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The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING JUNE 30, 1965

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1967

The Commonwealth of Massachusetts

DECEMBER 7, 1965

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, 1965.

Respectfully submitted,

Attorney General

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL

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[1] Resigned, July 17, 1964
[2] Appointed, November 30, 1964
[3] Resigned, December 1, 1964
[4] Resigned, December 12, 1964
[5] Resigned, January 19, 1965
[6] Appointed, January 20, 1965

STATEMENT OF APPROPRIATIONS AND EXPENDITURES

for the Period July 1, 1964–June 30, 1965

Appropriations

Attorney General's Salary	$ 20,000.00
Administration, Personal Services and Expenses	644,075.00
Veterans' Legal Assistance	18,600.00
Claims, Damages by State Owned Cars	100,000.00
Moral Claims	8,000.00
Capital Outlay Program, Equipment	5,790.81
	$796,465.81

Expenditures

Attorney General's Salary	$ 20,000.00
Administration, Personal Services and Expenses	633,411.26
Veterans' Legal Assistance	18,595.20
Claims, Damages by State Owned Cars	100,000.00
Moral Claims	8,000.00
Capital Outlay Program, Equipment	4,599.17
	$784,605.63

Financial statement verified (under requirements of C. 7, S 19 GL), April 18, 1966.

By JOSEPH T. O'SHEA,
For the Comptroller

Approved for publishing.

M. JOSEPH STACY,
Comptroller

The Commonwealth of Massachusetts

Department of the Attorney General
Boston, December 1, 1965

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, 1965, totaling 30,002, are tabulated as follows:

Extradition and interstate rendition	236
Land Court Petitions	133
Land Damage cases arising from the taking of land:	
Department of Public Works	1,952
Metropolitan District Commission	69
Civil Defense	1
Department of Natural Resources	29
Department of Public Safety	1
Department of Public Utilities	1
Government Center Commission	29
Lowell Technological Institute	1
Massachusetts Maritime Academy	1
Massachusetts Turnpike Authority	3
Salem Teachers College	1
Southeastern Massachusetts Technological Institute	7
State Reclamation Board	1
Town of Tewksbury Water Commissioners Board	1
County Commissioners, Worcester	1
University of Massachusetts	3
Miscellaneous cases, including suits for the collection of money due the Commonwealth	15,978
Estates involving application of funds given to public charities	2,182
Settlement cases for support of persons in State institutions	587
Small claims against the Commonwealth	402
Workmen's compensation cases, first reports	6,783
Cases in behalf of Employment Security	823
Cases in behalf of Veterans' Division	777

Introduction

My third Annual Report as Attorney General of the Commonwealth of Massachusetts, as required by G. L. c. 30, § 32, encompasses the fiscal year from July 1, 1964, through June 30, 1965.

During the period of this report, the twelve divisions of the Department of the Attorney General have handled an unprecedented work load with efficiency and imagination. Organizing this Department in such a way that staff members specialize in their own areas of interest has resulted in expert attention to each matter and has provided the very best legal services to the Commonwealth.

Since the date of my last report, the Great and General Court passed two more measures from my 1964 legislative program:

Chapter 730 of the Acts of 1964	An act extending the application of the provisions of law requiring open meetings of state boards and commissions so as to include all public authorities.
Chapter 718 of the Acts of 1964	An act regulating the solicitation of charitable contributions from the public.

This year, the Department proposed 33 new measures for consideration by the legislature. A list of these acts and resolves appears as Exhibit "A."

EXHIBIT "A"

1965 Legislation Proposed by the Department of The Attorney General

1. An act to increase the authority of the Attorney General to settle claims against state employees.
2. An act to further define the liability of the Commonwealth of Massachusetts for injuries sustained from defects in boulevards.
3. An act to further define the liability of the Commonwealth of Massachusetts for injuries sustained from defects in state highways.
4. An act to change the period of time within which petitions founded upon claims against the Commonwealth of Massachusetts may be brought.
5. An act relating to proceedings as to the appraisal required for the taking of real estate and interests therein by Eminent Domain.
6. An act relating to proceedings for the taking of real estate and interests therein by Eminent Domain.
7. An act to permit defendants to have a stenographer present at certain hearings.
8. An act providing that execution of sentence in criminal cases shall be stayed at the discretion of the court.
9. An act providing for the simplification of pleadings in criminal cases.
10. An act providing for the arrest of violators of certain gaming and gambling laws without a warrant.
11. An act relating to the regulation of retail installment sales.
12. An act requiring use of a stenographer at State Ballot Law Commission hearings and providing for orders relative to printing of the ballot when remand to the Commission is impracticable.
13. An act providing for the imposition of criminal penalties for the violation of zoning by-laws.
14. An act providing for a uniform method of review by the Superior Court of Decisions made by the Civil Service Commission under section forty-three of Chapter thirty-one of the General Laws.
15. An act providing for the admissibility as evidence (where competent) of stenographic transcripts of Administrative Proceedings.
16. An act relating to the classification of municipal employees for the purposes of preventing Conflicts of Interest.

17. An act relative to reimbursement under the Workmen's Compensation Law out of the special fund for veterans in the Department of the State Treasurer.
18. An act relative to the expense of defense against claims for reimbursement under the Workmen's Compensation Law out of the special fund in the Department of the State Treasurer.
19. An act relative to the expenses of prosecution of claims for deposit and defense against claims for reimbursement under the Workmen's Compensation Law out of the special fund for veterans in the Department of the State Treasurer.
20. A resolve providing for an investigation, study, and the drafting of appropriate legislation relative to the amendment or complete revision of the election laws and procedures of this Commonwealth.
21. A resolve providing for an investigation and study by a special commission relative to law enforcement information, investigation and research.
22. A resolve providing for a commission to investigate, study, and draft any needed legislation for the establishment of an administrative agency to review certain police practices.
23. An act authorizing appeals by the Commonwealth on questions of law under certain conditions in criminal prosecutions.
24. An act providing that the maximum penalty for violation of town by-laws be increased to one hundred dollars.
25. An act pertaining to filing of official reports of public authorities.
26. An act providing for the removal of public officials who refuse to testify concerning their official conduct on the grounds of self-incrimination.
27. An act to provide for the examination by experts of records subpoenaed by a Grand Jury.
28. An act to provide for the summonsing of witnesses on behalf of indigent defendants.
29. An act to authorize the Attorney General and the District Attorneys to subpoena certain corporate books and records.
30. An act extending the application of certain provisions pertaining to public contracts to public authorities.
31. An act invalidating certain so-called "tie-in" sale contracts.
32. An act to establish a policy of the Commonwealth that a release executed by a person under arrest is against public policy.
33. An act relative to the filing of schedules of minimum consumer prices.

Administrative Division

The Administrative Division's area of concern is extremely varied and far-ranging. The members of the Division answer requests for legal opinions from constitutional officers, state agencies and department heads; they represent the Commonwealth in civil court proceedings, advise the Governor upon the constitutionality of pending legislation, approve town by-laws, and seek to remedy injustices in the anti-trust field.

The stream of requests for opinions of the Attorney General has continued to increase substantially. And, as it has increased, the burden of the additional workload has fallen most heavily on the Administrative Division, the section of the office responsible for the drafting of ninety-five percent of the opinions issued by the Department and for the reviewing and editing of all opinions. A large portion of the time of the members of the Division is spent in the drafting, researching and preparing of opinions for the Attorney General.

The wide range of subjects covered by the requests which come into the office is evident from a brief summation of some of the most important opinions issued by the Department during the past fiscal year.

— The Secretary of State requested an opinion concerning a teen-ager's nomination papers for a seat in the State Legislature. The Secretary was advised that he cannot refuse to accept the nomination papers of a candidate because he is under 21 and not qualified to register as a voter because that fact is not evident on the face of the nomination papers and the Secretary does not have authority to ask for affidavits. This office did not rule, however, on the question of whether teen-agers could, in fact, run for or hold political office. This latter question became the core of a court case in which the Superior Court held that youths under 21 could not run for election to the State Legislature or hold seats in that body.

— In response to a question posed by the Commissioner of Public Safety relative to law enforcement problems that arose in connection with the New Hampshire sweepstakes, a ruling was issued that Massachusetts law was not violated by participation by Massachusetts residents in the New Hampshire sweepstakes. However, tickets cannot be sold or exchanged nor may sweepstakes agencies be established within the Commonwealth.

— The November election brought repeal by the voters of the Commonwealth of many of the statutory powers of the Governor's Council. The passage of the petition raised many questions about the remaining powers of the Council. The first inquiry was made in early December by the Lieutenant Governor who asked this office to define the remaining powers and duties of the Governor's Council. A lengthy and exhaustive opinion was issued in response to this request.

— General Laws c. 30, § 59, the so-called "Perry Law", has raised many complex and sensitive questions. The wording and meaning of the "Perry Law" has been carefully examined by the members of this Department in an effort to assure that our opinions regarding this law would be helpful in clarifying the true intent of the statute. As a result, this administration has issued several opinions in the past relative to the law and its ramifications. This year the Governor requested further clarification of the effect of the law. The Governor was advised that

temporary officers and employees appointed under the "Perry Law" do not serve at the pleasure of the Governor or other appointing authority, and they can be removed only "for cause."

— An important policy question arose in connection with a testimonial dinner sponsored by a city committee for the Commissioner of the Metropolitan District Commission. Interpreting the testimonial dinner law, c. 268, § 9, this Department ruled that such dinners may be held if no tickets are sold or offered for sale and contributions have not been accepted or solicited for that particular function.

— Indicative of the scope and variety of problems coming to the attention of the Division is a request by the State Boxing Commission as to whether closed circuit television performances of boxing matches are subject to taxation by the Commonwealth. In an opinion drafted by the Administrative Division, the Attorney General ruled that five percent and one percent of gross receipts may be collected only from live boxing matches and not from closed circuit television performances, according to the provisions of G. L. c. 147, §§ 40 and 40A.

— A final sample of the nature and function of written opinions is one issued near the close of this fiscal year in an attempt to solve a dispute between two state agencies. The Department of Public Safety and the Massachusetts Port Authority disagreed on a matter of police protection for authority properties, causing the Department of Public Safety to request a legal opinion from this office. The opinion issued stated that, because of an agreement entered into by the Department of Public Safety and the Port Authority, the former must furnish State Police assistance at the Logan Airport. In addition, the two agencies may agree to the furnishing of State Police assistance at any other Port Authority projects. The Authority, however, cannot require State Police at any place other than Logan Airport if the Department of Public Safety is not willing to supply the personnel.

The conflict of interest law (G.L. c. 268A), now in operation for two years, has been an invaluable boon to the effective administration of government. The continuous study and interpretation of this law by members of the Division has greatly aided the effectiveness of the Act. During the period covered by this report, ninety-one conflict of interest opinions have been issued to state employees regarding their status under the law. Moreover, we have continued our practice of rendering informal opinions to, and holding conferences with, members of state agencies, city solicitors, town counsels and municipal officials relative to the effect of this statute. We have continued to compile a statistical survey of the classification of municipal employees and the operation of the statute throughout the State from information about the operation of the statute received from every city and town in an attempt to provide data to guide the future drafting of amendments to this law. One extremely sensitive conflict opinion issued during this year was in response to a request by former Governor Peabody relative to any conflict of interest problems that might arise from legal services performed by the Governor after his term in office.

The Administrative Division handles all civil litigation that affects the constitutional officers or that is "extraordinary" in nature, and also handles much of the litigation in which state agencies and departments

find themselves involved. Among the matters handled in court by members of the Division were cases arising from the hearings of the Ballot Law Commission; a matter relating to the statutory powers of the Governor's Council, *Barnes* v. *Secretary of the Commonwealth;* further proceedings in the case against the book *Memoirs of a Woman of Pleasure;* a suit against the book *Naked Lunch;* and a case begun as a result of the Capitol Police ouster hearings. In addition, a decision was rendered in the legislative pay raise case, *Molesworth* v. *State Ballot Law Commission.*

The summer of 1964, preceding an election autumn, brought with it an unusual number of State Ballot Law Commission matters in the nature of protests filed by persons dissatisfied with the decision of the Commission for one reason or another. The Administrative Division was faced with an onslaught of some dozen matters that were contested, and members of the Division spent a good deal of time in Suffolk Superior Court arguing these cases in behalf of the State Ballot Law Commission. One of the more noteworthy cases which required court action was that involving a teen-ager who attempted to run for a seat in the State Legislature. This case is discussed above.

The election in the fall gave rise to another major case handled by this Division. Pursuant to Articles 48 and 74 of the amendments to the Constitution of the Commonwealth, initiative and referendum petitions must be approved by the Attorney General as to form before they may appear on the ballot. It is also the duty of this office to write brief summaries of the measures contained in such petitions for use on the ballot. A summary provided by this Department became the subject of the case, *Barnes* v. *Secretary of the Commonwealth.* By representing the Secretary, this office in effect took the position that the question was appropriate and the summary adequate. A writ of mandamus was sought by the petitioners in the Suffolk Superior Court to compel removal of the question pertaining to the Executive Council from the November Ballot. But the Superior Court rendered judgment for the respondents and the question remained on the ballot. An appeal was claimed to the Full Bench of the Supreme Judicial Court for the February sitting and the Full Bench affirmed the decision of the Superior Court, saying that the Attorney General had supplied a proper summary and that the attacks of the petitioners were without foundation. A companion case ruled upon by the Supreme Judicial Court at the same time was *Healey* v. *Treasurer and Receiver-General* in which the petitioners attacked both the summary and the constitutionality of the measure that had been enacted. The case had been reported by the Superior Court to be heard by the Full Bench together with the *Barnes* case.

The *in rem* suit, instituted at the request of the Obscene Literature Control Commission against John Cleland's *Memoirs of a Woman of Pleasure* (commonly known as *Fanny Hill)* in order to determine whether the book is obscene, is mentioned in the 1964 Annual Report. It has since been decided by the Superior Court which ruled that the book was obscene. This winter it was argued before the Supreme Judicial Court, Full Bench, which, in a four-to-three decision, upheld the ruling that the book is obscene. The publisher has since claimed an appeal to the United States Supreme Court and has filed a jurisdictional statement.

No decision has yet been made by the United States Supreme Court as to whether it will hear the appeal.

Another suit was instituted by this Department at the request of the Obscene Literature Control Commission. This case, *Attorney General* v. *A Book named "Naked Lunch,"* was heard by a trial judge of the Suffolk Superior Court in January, 1965. The judge declared the book obscene. The publishers appealed the ruling to the Full Bench of the Supreme Judicial Court and the case is on the October list for argument.

This Division represented the Commissioner of Administration in the appeal of a Superior Court decision in a suit brought against him by the Chief of the Capitol Police and two patrolmen to restrain the Commissioner from conducting further ouster proceedings. The Commissioner was represented by his own attorney in the Superior Court, which court enjoined the continuation of the proceedings. Briefs have been filed for both sides and the matter will be heard by the Supreme Judicial Court sometime in the fall.

The case of *Molesworth* v. *State Ballot Law Commission,* (described in detail in the 1964 Annual Report), which had been reported to the Supreme Judicial Court by the Superior Court, came to a conclusion when the Supreme Judicial Court reversed the State Ballot Law Commission and ruled that the question should properly appear on the November ballot.

These cases are examples of the extraordinary matters that require the attention of the members of the Division. Much of the routine work consists of advising and representing in court the numerous boards, commissions and agencies of the Commonwealth. Requiring an especially great amount of the time of the members of the Division have been the Department of Public Utilities, the Consumers' Council, State Racing Commission, Civil Service Commission, the Board of Real Estate Brokers and Salesmen and the Engineers', Architects' and Electricians' Boards.

In addition, we have represented the Consumers' Council in negotiations and court proceedings in the Superior Court and the Federal Court stemming from the inability of Nationwide Charters and Conventions, Inc., to repay approximately 1,500 customers. At our request, World Airlines, Inc., has agreed to provide well over $100,000 in addition to the customer deposits which it holds and in excess of more than $100,000 from insolvent Nationwide. Together, these sums should permit full repayment of all customers and repayment of commercial creditors at the rate of about twenty-five cents on the dollar. A formal plan under which World Airlines would receive well over $100,000 from the debtor, Nationwide, and would then repay all customers in full, was filed in the Federal Bankruptcy Court in a Chapter XI proceeding. A representative of this office attended the first meeting of creditors and the hearing on objections to the plan, on both occasions speaking strongly in support of it. Objections were filed on behalf of several Miami hotels. The referee in bankruptcy entered a decision approving the plan, however, and this office conferred and corresponded extensively with the objecting hotel owners and their counsel, asking them to reconsider their objections, and not to appeal. As a result, no appeals were filed. Extensive

efforts by this office, together with cooperation by the companies involved, resulted in a satisfactory settlement and protection of the consumer. The Attorney General's office was able to play a unique role here by watching matters on a day-to-day basis and keeping the situation from deteriorating.

Working in another area, members of this Division met several times and corresponded at great length with the Norwood School Committee and the Norwood Finance Committee over their school budget dispute. An amicable settlement was arrived at without court action.

Work has been continued by members of this Division in the areas of anti-trust and approval of town by-laws. The office also passes on the form and constitutionality of measures prior to signing by the Governor.

Finally, in connection with our effort to urge State boards to adopt the necessary regulations and to conform to the Administrative Procedure Act (G. L. c. 30A), members of this Division and other staff members have been working over a period of several months on a draft of a model set of rules to which all agencies may adhere. This set of rules will be published and distributed to the agencies within the next few months.

Of course, the members of the Division are constantly called upon to answer a myriad of legal questions which do not necessitate the drafting of formal opinions. And the discussion of legal problems both in person and through correspondence with state officials and private citizens further occupies the attention of this Division.

Civil Rights and Liberties Division

In keeping with the policies of this administration of assisting those responsible for administering state affairs justly and in a manner which recognizes inviolate the constitutional rights of the citizen, this Division has continued striving to be professionally competent, nonpartisan and fair. Such an attitude is especially important in dealing with the sensitive and difficult questions that confront the members of this Division.

The following is a summary of some of the most important matters relative to clashes between the individual citizen and his government that have required our attention during the past year.

This Division has appeared before the courts many times as counsel to the Massachusetts Commission Against Discrimination, the administrative agency empowered to enforce the laws against discrimination on account of race, color, creed, national origin, age or sex. Prior to the year 1964, only fourteen matters had been brought before the courts by this Commission during its entire existence. From July 1, 1964 through June 30, 1965, in comparison, this Division represented that agency in about fifteen court actions. Most of these actions seek to apply the Commission's power to enjoin the leasing, rental or sale of housing accommodations until the termination of Fair Housing proceedings under that Act. This injunctive power granted the Commission by amendment in 1961 has become the agency's most effective weapon — not only in guaranteeing equal opportunity in housing accommodations for minority groups but also in settling many of such cases at the conciliation stage

of the proceedings. The following is a partial list of such cases and the results:

Matthews v. *Spagnulo* — Injunction granted
Stark v. *Sachs* — Injunction granted
McCane v. *Worcester* — Injunction granted
Gentry v. *Baker* — Entered and settled prior to hearing
Holland v. *DeMello* — Injunction granted
Reid v. *Hoag and Biscaldi* — Injunction denied
Texeira v. *Stasinos* — Injunction granted
Witt v. *Davenport Realty Trust* — Stipulation not to rent entered
Ward v. *Barclay* — Entered and settled prior to hearing

The case of *Reid* v. *Garneau* was certified for public hearing before the Commission and heard on November 10, 1964 and a cease and desist order was entered. The case of *Boyd* v. *Burgess* was heard on November 6, 1964 and a cease and desist order was entered.

In addition, this Division has officiated at a number of public hearings before the Commission and drafted findings thereon.

In addition to the litigation, this Division has rendered several opinions to the Commission and the individual members thereof. These opinions involve questions raised by the Massachusetts Commission Against Discrimination:

(1) Whether licensing applications of state boards of registration may require information regarding national origin, age, derivation of citizenship.

(2) Whether G. L. c. 31, § 2A authorizes the Director of Civil Service to establish age requirements.

Despite the agreement (discussed in the 1963 and 1964 Annual Reports) between the Boston Housing Authority, CORE and the NAACP, relative to the segregation of Negro tenants in the Boston Public Housing, complaints against the Housing Authority have been lodged with the MCAD from time to time. Members of this Division have attended conferences with the investigating Commissioner and other officials in order to help clear up these problems.

As a research project during the fiscal year 1965, this Division undertook a study of Penal Reform. The study consisted of an evaluation of our penal laws and analyses of the disparity in sentencing procedures, rehabilitation methods, classification of prisoners and provisions in penal institutions, among other things. The findings of this study were forwarded to Governor Volpe.

During the legislative year 1965, members of this Division appeared at committee hearings on several bills filed by this Department.

A considerable amount of the time of personnel of this Division is also allotted to the complaints and inquiries of private citizens. This Division never misses an occasion to fully explain the duties and responsibilities of this office to state government and its citizens. We deem the time and effort spent in this kind of educational role, not only of value in clarifying the responsibilities of public officials to the citizen, but also in educating the citizen concerning the sanctity of his civil rights which he must protect through his own vigilance.

Contracts Division

The Contracts Division examines all state contracts and leases for correctness of legal form, and represents the Commonwealth in all civil actions brought by or against it as the result of such contracts and leases. In addition, the Division conducts conferences, engages in legal research, and prepares briefs, memoranda, and opinions in conjunction with contracts problems presented to the Division.

The influx of the Commonwealth's leases and contracts is voluminous. Each such instrument must be carefully, competently and expeditiously handled in order to permit the Commonwealth's business to proceed without interruption. During the fiscal year members of the Division reviewed and approved approximately 1,500 contracts for all state departments and agencies.

In order to forestall later litigation from developing as a result of the Commonwealth's contracts and leases, the Division has continuously given advice and guidance to various state officials in the preparation, drafting, and proper execution of contracts and leases affecting their departments. Moreover, the Division has investigated the background, researched the appropriate statutes, and subsequently advised approximately twenty concerned parties regarding competitive bidding procedures in which their departments or agencies were involved.

Members of the Division have been called upon from time to time to draft several opinions for the Attorney General in response to inquiries submitted to him. Some of the major topics covered in these opinions are listed below:

1. Problems relative to the use of foreign steel in the construction of the proposed Government Center;
2. Statutes applicable to bidding procedures of the Mystic River Flood Control Project;
3. Hearings and their scope under General Laws (Ter. Ed.) c. 16, § 5b in so far as the Department of Public Works is involved; and
4. Effect of semi-final and final estimates for contracts of the Bureau of Building Construction.

The Division also furnished a great deal of legal advice and technical assistance to state agencies on matters not requiring formal opinions. During the period of this report the Division has compiled over thirty-five lengthy memoranda at the request of state agencies. Following are some of the more significant topics upon which research was conducted and memoranda prepared or technical assistance rendered:

1. Revision of the Metropolitan Transportation Authority's Inter-Agency Indemnity Agreement as to qualification of contracting firms applying for state contracts;
2. Alleged price and bidding discrimination in washer-extractor bids for the Bureau of Building Construction;
3. Potential drug patent infringement situation involving the Purchasing Department of the Commonwealth;
4. Release of tax liens for the Metropolitan District Commission;
5. Proposal for the limitation of liability of landowners who permit the public to use their property for recreational purposes, submitted by the Division of Forestry and Parks;
6. Scope of autonomy of the Greater Boston Stadium Authority;

7. Contract breach by contractor working on project of the Waterways Division of the Department of Public Works;
8. Revision of the terms of the Purchasing Department's contractual agreements for uniformity; and
9. Applicability of Chapter 90B to a novel type of water ski equipment.

A complete revision of the Specifications Manual, on which all contracts of the Department of Public Works are based, was undertaken this year. Members of the staff prepared detailed analyses of critical portions of the specifications and attended an extensive series of conferences with officials of the Department of Public Works and the Federal Bureau of Public Roads. Participation of our staff was necessary to assure conformity with the statutes and latest decisions and interpretations by the courts to insure uniformity and simplicity and to protect the interests of the contractors as well as the interests of the Commonwealth.

The Contracts Division also determines whether state departments may make direct payments to subcontractors with claims against funds retained by the Commonwealth under General Laws (Ter. Ed.) c. 30, § 39F. The Division issues written authorizations or disapprovals in connection with such claims. During the year some 150 of these determinations were made.

The Division is also consulted for advice on and examination of state leases. Again this year a great deal of time was devoted to matters relating to the Board of Regional Community Colleges, including the lease for the proposed intown Boston campus of the University of Massachusetts: At issue here was the fact that the lease was originally drafted as an owner-type lease and contained several covenants inimical to the Commonwealth's welfare. The staff held several conferences with University officials and attorneys, and representatives of the Governor. After many weeks of concentrated work by this Division a revised lease was written, with covenants more consistent with the Commonwealth's interests. The Governor then reviewed the revised lease and presented a special bill to the Legislature in order to permit the state to enter into a lease of this nature.

More recently, the Division has been assigned the responsibility of reviewing the form of all documents prepared in connection with note issues and notice of sale of bonds under financial assistance housing programs for elderly persons and veterans of low income. Written approvals are issued if the review reveals that the form is in proper order. Files are maintained of the changes in membership of all of the local housing authorities. Advisory opinions have been prepared, informal conferences held, and forms developed to effect expeditious handling of the contracts stemming from the Commonwealth's housing program. The staff processes some forty note issues per quarter from individual housing authorities throughout the State.

As was the case last year this Division was faced with a heavy load of litigation. Three of the five attorneys in the Division devoted substantially all of their time to trial work. More than two hundred cases were handled by the Division during the year. Of these, five are at some stage of appeal in the Supreme Judicial Court. In two of the appealed cases, the Commonwealth is the appealing party; in the other three, the Commonwealth received favorable judgments in the lower courts, but the losing party filed an appeal.

Through the use of special pleadings, the Division has achieved favorable dismissal for the Commonwealth in more than one hundred cases. Ultimate success in these cases required conferences, drafting of pleadings, preparation of briefs in support of motions, and oral arguments by the trial attorneys.

The staff was also occupied with hearings and trials before auditors, masters and justices of the Superior Court. The length of these trials ranged from one or two days for relatively simple matters to six months for extremely complicated ones. At issue were varying fact situations including extra work, delays, bidding, and storm damage.

In one case in which the Metropolitan District Commission contracted with the petitioner for the construction of an eight-mile-long water distribution line through the cities of Medford and Malden, suit was brought against the Commonwealth for two and one-half million dollars for alleged delays and failure to perform. This trial lasted some six months or eighty-eight full trial days. In addition, the staff conducted more than three months of post-trial research to prepare law memoranda and suggested statements of fact for the auditor relative to eighty-five separate allegations about the simultaneous construction of five distinct parts of the pipe line. A preliminary decision has been reported by the Auditor in favor of the petitioner in the amount of $300,000 plus interest. The petitioner is in the process of deciding whether he will appeal on the basis of the inadequacy of the recovery.

This office also defended a three and one-half million dollar suit against the Commonwealth. This case demanded several months of preparation and seventy-six days of trial. Following the presentation of evidence, the auditor determined that none of the contractor's claims had merit and found for the Commonwealth. As a result of this successful conclusion, no funds had to be expended on this claim.

Thus, the Division has carried forward its litigation at a rapid pace, continuing the policy instituted by this Administration of not settling any disputed contract claims out of court. All disputed contract claims are tried on their merits. The staff has worked effectively in the non-trial areas of its concern as well, maintaining current status in all matters before it.

Criminal Division

In order to carry out his duties as the Chief Law Enforcement Officer of the Commonwealth, the Attorney General increased the personnel of the Criminal Division. More investigators, as well as attorneys, were assigned to continue the investigation and prosecution of crime and corruption in Massachusetts.

Trial of most of the cases resulting from the work of the Massachusetts Crime Commission has been delayed because of the vast number of special pleadings filed by defendants. In the so-called Small Loans Case alone, hundreds of motions have been filed. Many of these motions have been argued by an Assistant Attorney General who was successful in defeating almost all the attacks on the validity of the indictments. Only three indictments out of 134 have been quashed, and the defendants in these are the subject of other indictments.

A member of the Executive Council was tried with two co-defendants on conspiracy and bribery charges with guilty findings resulting. On ap-

peal these verdicts were reversed and a new trial was ordered by the Supreme Judicial Court. Another member of the Executive Council, who was tried on bribery and conspiracy charges, was found not guilty by a jury.

An official in the Department of Commerce was indicted for larceny and conspiracy to commit larceny from the Commonwealth and was found guilty. Two companion cases were placed on file by the Court.

A Commissioner of Public Safety, who was indicted for perjury before the Crime Commission, was found guilty. The trial judge reported the case to the Supreme Judicial Court on the question of the adequacy of the indictment.

The appeals of the convictions obtained in the two Boston Under-Common Garage Cases were decided by the Supreme Judicial Court. The convictions were upheld and the sentences executed.

The number of extraordinary writs (writs of error, writs of habeas corpus, writs of mandamus, declaratory judgments, etc.) continued to increase. The number actually increased so much it was necessary to assign two, and periodically more, Assistant Attorneys General to handle them. The Assistants assigned to the extraordinary writs have been remarkably successful in defending these actions. This was true in most instances because the Assistant Attorney General was able to demonstrate that the particular case was not controlled by any recent decision of the Supreme Court of the United States enumerating further constitutional rights of the accused.

The number of complaints received from the public at large also increased. Nearly 3,000 complaints were processed during this period. In many cases, the Division served as a clearing house, directing people to the appropriate agency concerned with the subject of their complaint. Others were forwarded to state and local Police Departments, with a number of them resulting in arrests and convictions for criminal offenses.

In an effort to aid law enforcement officials, the Criminal Division again prepared a list of recent changes in criminal statutes for distribution to police officers. A memorandum was sent to all police departments when any decision was handed down which seriously affected police work. This memorandum explained the meaning of the case and established certain guidelines to assist police officers in conforming with the holding of the case.

In addition, an assistant Attorney General has served on the staff of the State Police Academy. The Assistant lectures to each class on constitutional rights as set out in recent decisions of the Supreme Court of the United States and the Supreme Judicial Court of Massachusetts.

This Division has sought to cooperate with all local and state officials in combating crime and corruption. Information has been exchanged which enables all law enforcement officials to operate more effectively. The Division is striving to increase such cooperation and promote statutory revisions which will assist in the effort directed at stemming the rising tide of crime.

Eminent Domain Division

This Division's work involves the problems resulting from the taking of private land for a public purpose. If property is taken by the sovereign power of eminent domain, the owner must be compensated in a fair and reasonable manner. Current procedure is for the taking power and the former owner to attempt to reach agreement on the fair value of the property. When agreement is not reached the owner may petition the Superior Court to assess damages according to Chapter 79 of the General Laws. It is the Eminent Domain Division's responsibility to represent the Commonwealth in such litigation.

Members of the Division are constantly engaged in work to assure that all those from whom property has been taken are compensated promptly and equitably. The policy we have instituted—complete preparation for trial in every pending case at the earliest possible date—has been extremely successful. Every case is analyzed in detail, both in preparation for trial in order to assign outside settlement authority and trial counsel to each case. Attempts to settle each case are then pressed even more aggressively for it is such settlements that are the best solution for all concerned. They permit the speediest reimbursement to the former owner, substantially reduce the interest expenses of the state and eliminate a significant number of lawsuits. This reduction of litigation lowers the expenses of individual property owners and helps to clear some of the congestion on the docket of the Superior Courts.

When settlement is not possible, we have proceeded with trials as cases are routinely called on the regular lists. We have constantly endeavored to reduce the number of such Chapter 79 petitions pending in the Superior Court. Thus, we have completely eliminated what was at one time a major problem—the backlog of land damage claims. When this administration assumed office, approximately 1,800 such cases had accumulated. There is presently a total of only 690 cases awaiting trial. The pending cases have been reduced to one-third of what they were prior to our administration. The result is that, for the past year, the trial and settlement of land-taking cases has been on a current status. This accomplishment is considered by the public, and by the members of this office, to be one of the most gratifyng achievements of our term of office.

The cases currently pending are in the following Superior Courts:

Barnstable	15
Berkshire	26
Bristol	90
Essex	104
Franklin	60
Hampden	35
Hampshire	65
Middlesex	110
Norfolk	100
Plymouth	15
Suffolk	10
Worcester	60
Dukes and Nantucket	0

The Bristol County list does not reflect a Special Session extending into July. Authorization has been received from the Department of Public

Works with the approval of the U. S. Bureau of Public Roads to appoint an Assistant Attorney General for Case Analysis Control. We are currently interviewing for that position and when the position is filled, settlement negotiations can be more aggressively initiated by this Division.

We have attempted not only to catch up on the backlog of cases that has previously existed in this field, but we have also strived to eliminate the conditions that permitted the development of such a situation. To do so, this Division has formalized the best procedures in this field and prepared for publication booklets that will contain all these procedures in concise and clear form. One such publication will be the *Manual of Massachusetts Eminent Domain Appraisal Law* for use by Department of Public Works appraisers. This manual is currently in the final stages and its distribution to hundreds of state taking agencies is expected in the near future.

Another booklet, a manual of procedures within the Eminent Domain Division instituted by the administration of Edward W. Brooke, is being prepared at the request of the United States Bureau of Public Roads. This manual will consolidate what that Bureau considers to be major improvements and innovations in this area.

Members of this Division are involved in another updating and overhauling of Massachusetts law. There has been no major revision of our highway laws in fifty years and many of these old highway statutes are outdated, poorly drawn and obscure. They frequently impose penalties that do not fit the crime. To initiate action in this area, I met with highway experts, legislative leaders, and heads of state, county and municipal agencies to propose a Highways Laws Study Commission and outline legislation to revamp the highway laws. The ultimate goal of this top-level study commission is an all-inclusive highway code to be submitted to the Legislature next year. This comprehensive project and in-depth study involves all aspects of the Massachusetts highway system—state highways, parkways and roads, traffic, construction, motor vehicle laws, maintenance and repair financing and land acquisition. The proposed highway code would bring together voluminous legislation, now scattered throughout the General Laws.

The Codification Section of the Division spent two years in detailed examination and study of all special and general laws concerning highways and motor vehicles. The Section finally assembled over one thousand sections of applicable statutes. These sections, together with court decisons, are the foundation for the proposed legislation.

The Commission held its first meeting on June 4, 1965 with Assistant Attorney General John S. Bottomly as Chairman. It created eleven working committees, all of which are meeting frequently and regularly to analyze, organize and amend, as well as add to, existing law. The preliminary analysis and subsequent recommendations for changes are scheduled to be submitted to the Commission in the Fall of 1965. Some legislation is being drafted during the analysis period. However, most of the specific drafting will be done after the Commission has made decisions about the substance of the Code.

In the area of unusual litigation, special attention has been devoted to civil cases that involve disputes about overpayments for peat excavation. An Assistant Attorney General has been assigned to work on this matter on a daily basis. The various contractors have been offered an arbitration

procedure to avoid expensive litigation. Basically, this solution consists of having the contractors' experts confer with the Commonwealth's experts in an attempt to arrive at a mutually agreeable technical determination of the amount of overpayment. Some contractors have accepted a proposal for arbitration by mutually acceptable technicians, soon to be appointed by each party. The Commonwealth has been using a professor from a local university in this capacity. A useful program has been developed, although no specific proposals have been submitted by the arbiters to date.

This Division, through its expeditious and efficient handling of land damage cases, has performed an exceptionally valuable public service. Financially, the Commonwealth has benefited greatly. There have been both a saving of interest payments as a result of rapid disposition of cases and a return of more favorable verdicts due to more thorough preparation procedures.

Employment Security Division

The Division of Employment Security of the Department of the Attorney General works closely with the Massachusetts Division of Employment Security. Division members are primarily concerned with the prosecution of employers who are delinquent in making employment security tax payments and employees who file fraudulent compensation claims. Complaints brought against corporations and individuals in these areas have resulted in large financial recoveries for the Treasury of the Commonwealth.

On the other hand, this administration has been certain to insure that all individuals and corporations have not been unfairly or hastily prosecuted. Every opportunity is given to all parties to make proper restitution before litigation is begun. Criminal charges are brought only after the entire gamut of approved procedure has been attempted and after many opportunities have been given the individuals and the employers to discuss the problem and plan a solution outside of court.

When enforcement is attempted under the criminal procedures, payments are often made by employers who previously have ignored our attempts to secure collection. Furthermore, the prosecutions we have undertaken have encouraged other employers to take a more serious attitude toward payment of their taxes.

Extensive investigation and preparation procedures and intensive prosecution of delinquent employers have resulted in the following fiscal year statistics: in 115 employer cases $125,235.69 was collected; in addition, 793 criminal complaints were brought against eighty-four employers and there have been seventeen bills of complaint against employers.

The Division has also been conscientious in its efforts to prosecute those who illegally collect unemployment benefits. As a result, seventy cases were closed during the year covered by this report. In these cases $37,967.00 was collected in overpayment benefits owed the Commonwealth and 400 criminal complaints were issued against thirty-one employees.

This Division has also been active in the Supreme Judicial Court in cases appealed to that body. In the matter of *Gordon B. Wheeler* v. *Director of the Division of Employment Security and another,* the Supreme

Judicial Court upheld the decision of the district court which had affirmed the decision of the Board of Review. In addition, the General Electric Company appealed two cases to the state Supreme Court. One of the cases involved vacation allowances to General Electric employees. The Supreme Court finding upheld the Director's decision. The other G. E. case involved a labor dispute during a period in which the employees were out of work because of a strike. This case was remanded to the Board of Review for further action.

Finance Division

The Finance Division is active in assisting the following State Departments and Agencies with their legal problems and with litigation on the appellate levels: Department of Corporations and Taxation; Department of Insurance; Department of Banking, and the State Treasurer. A member of the Division sits on the Contributory Retirement Appeal Board, in accordance with the statute so providing, and also acts as counsel for the Board.

The Division is counsel to the Treasurer and Receiver-General of the Commonwealth and represents the State Retirement Board and the Teachers Retirement Board.

A more detailed analysis of the responsibilities of the members of this Division can be found in the 1964 Annual Report.

Cases of note argued in behalf of the above state agencies by this Division are outlined in the following paragraphs.

DeVincent vs. *Tax Commissioner*—involves determination as to the taxability of the proceeds of life insurance policies in the hands of trustees as being made "in contemplation of death." The case was argued at the March Sitting and the Court strongly suggested in its decision that if such proceeds are to be taxed it must be done by the Legislature and not by the Court. Representatives of this office talked with the Tax Commissioner and brought this suggestion to his attention. The Tax Commissioner advised that an attempt would be made to draft legislation which would make such proceeds taxable, as they are under the Internal Revenue Code. Proceeds of life insurance policies in the hands of trustees are not taxable.

Levin vs. *Tax Commissioner*—involves the applicability of the short Statute of Limitations to tax assessments made against the decedent. The Supreme Judicial Court held that even if the short statute of limitations were applicable, the Commonwealth may, under General Laws Chapter 60. Section 36, provide for the assessment and collection of taxes against the personal representatives of an estate.

John Hancock Life Insurance v. *Commissioner of Insurance*—involves the constitutionality of a moratorium on the payment of premiums during a strike. The petitioner alleged that the statute impairs the obligation of contracts, denies due process and equal protection of the Constitution, and interferes with interstate commerce. "Amici" briefs were filed by several life insurance companies and an Insurance Workers Union. The High Court held that G. L. c. 175, § 187F was invalid as applied to the petitioner.

Massachusetts Hospital Service, Inc. v. *Commissioner of Administration and Finance*—This is a petition for declaratory judgment filed by Massachusetts Hospital Service, Inc., (Blue Cross) seeking a determination as

to the validity of Agreement #HA-22-C between Blue Cross and the participating hospitals, which agreement was approved by Commissioner Waldron on December 31, 1964. An agreed statement of facts is presently being prepared and members of the Division are working on the case in preparation for a fall argument before the Full Bench.

Mary Ayres v. *Tax Commissioner*—involves the taxability under the inheritance tax laws of shares of stock received in exchange for old shares where there has been a reorganization and subsequent merger of two corporations. Despite attempts by members of this Department to reach a compromise between the taxpayers and the Tax Commission, the matter had to be taken to the High Court. No reasonable compromise was acceptable to both sides. As a result, the decision of the Supreme Judicial Court resulted in a completely favorable finding for the taxpayers and the Tax Commission was deprived of all revenue.

Tufts vs. *Commissioner of Banks*—involves a Petition for Writ of Mandamus challenging the ruling of an administrative board which permits savings bank corporations to make loans to one person of $1500 by its savings bank department and $1500 by its insurance department. The Petitioners allege that the General Laws allow the corporation to make only one loan of $1500 to a person. The Superior Court ordered that a writ of mandamus issue to the commissioner requiring him to enforce that provision of the law which states that savings banks may not make personal loans to one person in excess of $1500. It had been the practice of such banks to make a loan to one person of $3,000, with $1500 coming from the savings bank side and the other half coming from the life insurance side. Since the law is not very clear in this area and because of the long-standing custom of the banking department, this office is appealing the matter to the Supreme Judicial Court.

In regard to the Contributory Retirement Appeal Board, the backlog facing that Board at the start of this administration has been completely eliminated. Not so long ago an appellant often had to wait almost two years after the time of the filing of a report for a hearing. We are continuing to improve the time in which appeals to the Board are heard. And, when we have given each claimant on the active list an opportunity to be heard, it is our intention to have a show-cause hearing at which time the balance of the cases are either dismissed for lack of prosecution or set down for a day certain for hearing. The last meeting of the Contributory Retirement Appeal Board for this year was held on June 25, 1965, at which time disposition was made of all appeals both on the active list and on the continued list.

In addition to working on current retirement cases, this Division has sought to improve problems in the administration of the retirement laws. Presently there is a good deal of ambiguity in this area of the law. Under the present procedure, there is a possibility that both the "accumulated deductions" and "retirement benefits" may be paid to different persons as the result of certain designations made prior to the death of an employee. It is our hope that the proper case will soon come before us so that the Supreme Judicial Court may clarify certain sections of the retirement law. The Superior Court itself has referred to this Chapter as a "patchwork" statute, hoping that those responsible for the administration of the law will take upon themselves the task of trying to clarify it.

The preparation and writing of briefs and subsequent trial of cases such as those discussed above consumes much time of the members of the Division. In addition, the Division devotes a great deal of time to drafting opinions requested by the state agencies with which it is concerned. Finally, many hours are required to answer the correspondence received from the public relative to insurance, tax and retirement questions.

Health, Education and Welfare Division

The Health, Education and Welfare Division was created by Attorney General Brooke in 1963 to fill the pressing need for expertise in dealing with the varied legal problems in the fields of health, education and welfare. Prior to the creation of this Division, these problems were assigned to various sections within the office. No one division was primarily responsible for all questions in this area. The present national and statewide concern for improved health and educational facilities has generated a direct public interest in the work done by this Division. In the wake of this community emphasis, the responsibilities of the Division have multiplied and will continue to increase in the foreseeable future.

As the name implies, the Division is directly responsible for advising, with regard to legal matters, the Departments of Public Health, Mental Health, Education and Public Welfare. In addition, the Division handles legal problems for the Department of Commerce and Development, Alcoholic Beverages Control Commission, Board of Registration in Pharmacy, Board of Registration in Medicine, and the Rate Setting Board. The importance of these agencies cannot be overemphasized since their work directly affects every individual within the Commonwealth.

The legal problems referred to this Division are as varied and complex as the many statutes presently being administered by these agencies. The Department of Public Welfare itself has four well-known programs to aid the aged and the infirm. They are more familiarly known as "Aid to Families with Dependent Children," "Old Age Assistance," "Medical Assistance for the Aged," and "Disability Assistance." In the near future, the coverage and complexity of these welfare and other programs will be greatly increased by the institution of new federal programs.

The success of welfare as well as other programs depends to a great degree upon the availability of federal funds. For example, when a state educational institution applies for federal money, the authority to make such an application and the title to the land upon which the new facility is to be built, must be carefully checked and certified. During the past year, the Division has reviewed over 75 contracts and bond issues and has checked over 65 real property titles. In this manner, and in cooperation with the agency involved, the Division has strived to see that Massachusetts obtains its fair share of federal grants.

Not all federal grants are for the construction of new buildings or the institution of new welfare programs. Some grants are for planning projects which are an initial step prior to the expenditure of more federal money to implement a program outlined and conceived as a result of this preliminary step. These projects require persons skilled in the field under study as well as persons having legal training and, in this latter capacity, the Division has participated in a number of these projects.

Litigation plays a large role in the present operations of the Division. The Division carries an average of over 150 active cases. A number of

the cases involve judicial review pursuant to the Administrative Procedure Act.

The litigation falls into five general categories. The first of these involves rates established by various boards and agencies of the Commonwealth. The agencies involved are the Industrial Accident Board, the Rate Setting Board, the Commissioner of Administration and the Alcoholic Beverages Control Commission. These rate cases have a far-reaching effect because they include rates for almost all the hospitals, nursing and convalescent homes in the Commonwealth. In addition, the cases have a bearing on the present welfare programs and payments made under industrial accident policies.

In the second category are those cases on appeal from the Department of Public Welfare to the Superior Court pursuant to G. L. c. 30A. These cases involve the denial by the Department of claims made by welfare applicants. If partial or total eligibility for welfare is denied the applicant may file a petition for review in the Superior Court. This Division represents the Department in the review proceeding before the court.

The third category involves licenses. Institutional licensing is included in this category. The present concern for the proper care of the elderly and the sick has focused a great deal of attention on this area. The need for safe, sanitary and up-to-date hospitals, convalescent and nursing homes, was never greater. When the public health standards are not met, the Department has but one alternative: to protect the community by revoking or refusing to grant a license.

Other licensing litigation concerns individuals or groups within a given profession. For example, the Superior Court has overruled a demurrer and a plea in bar to a bill for declaratory relief brought by several opticians to review an opinion of the Attorney General that opticians are not permitted to fit contact lenses. The case is currently on appeal to the Supreme Judicial Court and we are representing the Board of Registration in Optometry.

In addition, the Division handles license cases from the Alcoholic Beverages Control Commission, Board of Registration in Medicine and Board of Registration in Pharmacy. The administrative proceedings are subject to judicial review; this Division represents the agency in the review proceeding.

The fourth category includes cases involving unsanitary conditions that may arise in the state. For instance, an open dump may be causing an unsightly and unsanitary condition in the community. If the local authority fails to eliminate the condition, the problem becomes the direct concern of the Department of Public Health. It is the responsibility of this Division to see that the Department's order eliminating the condition is enforced.

The remaining cases would fall into the fifth or miscellaneous category and it would be impossible to list them all. The following cases are cited only as examples. The Division is presently maintaining a suit for one of the state colleges to obtain a tax refund. In another suit which went to the highest court of the State, the Division obtained a decision with regard to the sale of artificial food substitutes. In still another case, the Division brought suit against an adjacent landowner to protect a state hospital against a possible trespass.

As a result of the volume of litigation handled by the Division, we are engaged in an active appellate practice. During this year the Division argued at least eight cases before the Supreme Judicial Court. Among these cases were the following: *Milligan* v. *Board of Registration in Pharmacy*, 348 Mass. 491; *Sullivan* v. *Fall River Housing Authority*, 348 Mass. 738; *Cohen* v. *Board of Registration in Pharmacy*, 347 Mass. 96; and *Moskow* v. *Boston Redevelopment Authority*, Adv. Sh. 1203.

Most litigation has only limited application. In order to effect permanent changes, legislation is necessary. During the past year the Division submitted legislation to the General Court. The Legislature passed H. 2147 which amended section 25C of chapter 138 of the General Laws. This remedial step brought about a needed change in the laws administered by the Alcoholic Beverages Control Commission.

In addition, the members of the Division participate in many special projects on behalf of the above agencies. For example, in conjunction with other public agencies and private institutions, we are exploring methods for actively dealing with mental retardation through the Massachusetts Mental Retardation Planning Project.

In cooperation with the Department of Public Health, the Division, for the Attorney General, is negotiating with towns bordering on the Merrimack River to reclaim that river as a natural resource of the Commonwealth. Presently the towns are using it as a sewer. It is hoped that these towns can be persuaded to construct sewerage treatment plants so that the Merrimack River can be safely used for the pleasure of the public.

Industrial Accidents Division

The Attorney General under the provisions of G. L. c. 152, § 69A is required to approve all compensation payments made under this Chapter by the Commonwealth to its state employees who sustain injuries arising out of and in the course of their employment with the Commonwealth, including all disbursements for related medical and hospital expenditures.

With the cooperation of the Chairman of the Industrial Accident Board and its Director of Public Employees Section, this Division made considerable progress during this fiscal year in a concerted effort to reduce the backlog of contested cases before the Industrial Accident Board. The Division handled 585 Board assignments which consisted mainly of pretrial conferences and hearings on claims, many of which arose prior to 1963.

During this fiscal period a total of 6783 accident reports were filed on state employees' injuries. Although most of this number were nondisability claims, nevertheless, they did require review by the Attorney General for approval of incurred medical expenditures. Of the disability claims received, the Attorney General approved 919 cases for voluntary payment of compensation benefits. These payments were in addition to any awards paid on litigated cases following decisions of the Industrial Accident Board.

Total payments made by the Commonwealth to injured state employees pursuant to General Laws c. 152, Section 69A, including all such disbursements through voluntary agreements, Board decisions and lump sum

settlements, for the period July 1, 1964 through June 30, 1965 were as follows:

Industrial Accident Board (General appropriation):	
Incapacity Compensation	$1,110,364.10
Hospital costs, drugs et al	211,748.26
Doctors', Nurses' costs	174,029.92
	$1,496,142.28
*Metropolitan District Commission**	
Incapacity compensation	$100,406.66
Hospital and medical costs	41,058.70
	$141,465.36
Total—*All Disbursements*	
Incapacity compensation	$1,210,770.76
Hospital and Medical costs	426,836.88
	$1,637,607.64

The above totals reflect an increase in the Commonwealth's expenditures on its Workmen's Compensation claims over the prior fiscal year in the amount of $157,286.13. This is attributable not only to the rising costs of hospital and medical care but also in great measure to the adjustment and settlement of backlog cases many of which involved heavy disability exposure.

In addition to its appearances before the Industrial Accident Board on state employees' matters, this Division is also assigned to the Board on petitions in "second injury" fund cases arising out of General Laws, c. 152, Sections 37 and 37A. It represents the Commonwealth in its capacity as custodian of these funds, which are established under the provisions of General Laws, c. 152, Sections 65 and 65N, and under which it must process all claims by the Commonwealth, as required, for payments by the insurers and self-insurers into the funds.

At the close of the fiscal year 1965 the General Accident Fund, established under §65 of c. 152, held an unencumbered balance of $54,199.97 while the unencumbered balance in the Veterans Industrial Accident Fund, established under §65N of c. 152, was $233,175.69. The special emergency legislation enacted in Chapter 554 of the Acts of 1963 (described in the Report of the Attorney General for the year ending June 30, 1964, page 37) expired on December 31, 1964.

Public Charities Division

The authority and duty of the Attorney General to represent the public interest in all donations of funds for charitable purposes is one of his most important and most interesting functions. This function of the office is becoming increasingly important because the provisions of Federal and State laws relative to the taxation of income, estates, legacies and gifts, exempting donations for charitable purposes from the taxes imposed, have greatly fostered charitable giving.

*These disbursements are from the Metropolitan District Commission appropriated funds for claims of Metropolitan District Commission employees.

The Attorney General must be named as a party in all court proceedings involving the construction of charitable instruments, approval by the courts of particular methods of administration of charities and changes in the administration of charities.

In the fiscal year 1964-1965, the Attorney General appeared in many court proceedings regarding charitable trust matters. The Attorney General was successful in every instance in having the courts decree that the funds involved be devoted to charitable purposes in accordance with the general charitable intentions of the donors.

Involved proceedings were had in the Supreme Judicial Court in reference to the *Hawes Fund*. That Fund is held by a corporation which was established for the purpose of carrying out the charitable provisions under the will of John Hawes who died in South Boston in the 1820's. His will provides that the income be used in part for religious purposes in connection with a congregational church with which he was associated called the Hawes Place Church, and in part for educational purposes in South Boston. The Hawes Place Church is no longer in existence. The last use of the income for educational purposes was for classes held in the Boys' Club in South Boston. That use was discontinued during World War II. No use had been made of the income of the Fund for many years. The Fund now amounts to about $500,000. The case was heard by a master appointed by the Supreme Judicial Court. His report was confirmed and a decree was entered under which one half of the income of the Fund is to be paid to the Phillips Congregational Church in South Boston and the other half is to be paid to the Boys' Club in South Boston.

In the estate of *Catherine Johnson* the testatrix left her home and a small amount of money for the purpose of establishing a home for aged women in North Andover. Miss Johnson died in 1918. The home property was not suitable for use as a home for the aged and the funds bequeathed were inadequate for the maintenance of the home. The home property was rented by the trustees and the funds were invested. The trustees filed a petition to have the court determine whether the property could be sold, and the funds and the accumulations left by the testatrix applied *cy pres*. The Attorney General on behalf of the public interest contended that the testatrix had a general charitable intent to aid elderly women. If it was not possible to carry out Miss Johnson's desire, her general intention should be carried out by applying the funds for some similar charitable purpose under an application of the *cy pres* doctrine. Judge Phelan in the Essex Probate Court entered a decree in accordance with the Attorney General's contentions. His decree was affirmed by the Supreme Judicial Court in the case of *Rogers* v. *Attorney General*, 347 Mass. 126. A decree after rescript was entered under which the proceeds of Miss Johnson's bequests were authorized to be paid to the Lawrence Home for Aged Women to be used partly for the cost of construction of an infirmary and partly for an endowment for the Lawrence Home. The decree contains a provision providing for a limited preference of applicants for admission to the Lawrence Home who are residents of North Andover.

In the estate of *Bartholomew J. Donnelly* two gifts of about $200,000 each were involved. One gift was to the Working Boys' Home. A decree was entered upholding that gift and providing for its payment to the Home. The other gift was to the "Catholic Institute for the Blind at Jersey City, New Jersey, conducted by the Little Sisters of the Poor." It

appeared that the Little Sisters of the Poor never operated an institute for the blind in Jersey City and that the only Catholic institute for the blind in Jersey City at the time of the execution of the will was the "Institute for the Blind, Sisters of St. Joseph of Peace." A decree was entered ordering the gift paid to the "Institute for the Blind, Sisters of St. Joseph of Peace," now merged with "St. Joseph Home for the Blind, Sisters of St. Joseph of Newark." We supported the claim of the Jersey City institution. One of the heirs has taken an appeal which has been entered in the Supreme Judicial Court.

In the *Dornoe Parker* estate the testator provided for the accumulation of the residue of his estate until such time as it amounted to $1,000,000. When that amount was reached, the trustees were to erect a hospital in Monson. Since the death of the testator, a modern hospital, the Wing Memorial Hospital, has been established in the adjoining town of Palmer. In view of the fact that only a very small and inefficient hospital could be erected for $1,000,000 and if erected would be in competition with the Wing Memorial Hospital, the trustees filed a petition suggesting that it would be impractical to erect the hospital in the manner suggested by the testator. The Attorney General took the position that the testator had a general charitable intention to benefit the people in the area by providing hospital facilities which, under the circumstances, could best be carried out by using the funds made available for the erection of an addition to the Wing Memorial Hospital. Judge Smith of the Hampden Probate Court found that it was impractical to use the funds as directed by the testator and that the testator's general charitable intention should be effected by using the funds for the construction of the addition to the Wing Memorial Hospital in Palmer.

We have many cases in which, because of changes over the years, charitable corporations are no longer able to carry out the purposes for which they were organized and can no longer raise the funds necessary to continue to operate. In such cases a dissolution of the corporation is sought with the court ordering that any remaining funds be used for similar charitable purposes. An example of such a case is the one involving the *National Sailors Home*. The home was established shortly after the Civil War for the purpose of caring for sailors and marines who had served in the War. Originally, the Home had been located in Quincy. Later it purchased a hotel building in Duxbury. When its funds became exhausted its property in Duxbury was transferred to another home, Sailors Snug Harbor. An arrangement was made to permit the National Sailors Home to send persons to Snug Harbor. At the time of the litigation, all but one of the trustees of the National Sailors Home had died. A petition was filed for the dissolution of the Home and the use of its remaining funds for similar charitable purposes. A receiver was appointed and a decree was entered by which the remaining real estate of the Home (a cemetery in Quincy) was transferred to the City of Quincy with a $10,000 fund to maintain the cemetery and with permission for the City to remove the bodies to a municipal cemetery if that should be deemed desirable. The remaining assets of the National Sailors Home were transferred to Sailors Snug Harbor.

In the estate of *Lillis R. Sawyer* the testatrix left a fund for the purpose of establishing a community house in Shelburne Falls. The fund was not large enough for the purpose at the time of the testatrix's death. Later,

the shortages and restrictions of the World War II and Post World War II periods prevented construction. A decree was entered by the Probate Court under the *cy pres* power authorizing the use of the funds made available for concerts, lectures and other community activities.

In the *Preston* case in Suffolk County, a gift in remainder to the Village Congregational Church of Dorchester was involved. Many years ago the Church had voted not to accept the gift, evidently because the testator, a grocer, had sold liquors. However, after the death of the life tenant, the Church, which was now in financial difficulties and did not have a minister, revoked its refusal of the fund. The trustee under the will of the testator brought a bill for instructions. The only heir of the testator was a very elderly woman in poor health and very moderate circumstances. We approved a compromise arranged by the Church under which the heir would be paid $20,000 and release all her rights.

Finally, two cases were argued at the April, 1965 sitting of the Full Bench. One, on appeal from the Probate Court, concerned the validity of a small trust (about $8,000) under the will of *Mary Brady* of Worcester for the education of one or more deserving needy children. The Court ruled that the trust was a valid charitable one, as we had contended. The other case, *Newhall* v. *Second Church and Society of Boston,* was on appeal from the Superior Court's decision that the Church had the right to sell five pieces of its church silver, which had been given to it in 1706 and 1711. The sale was for $50,000 to Henry F. Du Pont for the Winterthur Museum in Wilmington, Delaware. The decision of the Supreme Court accorded with the points made in our brief as to the title of the Church to three of the five silver vessels, and as to the other two the decision was in accord with the alternative point we had urged: that a sale of those two pieces could be approved by a Court of Equity when the vessels became of great historical and artistic value and thus particularly suitable for museum exhibition.

The Charities Division has also devoted a great deal of its time to the enforcement of Chapter 68, Sections 18-31, enacted in 1964. This legislation, prepared and sponsored by the Attorney General's Office, gives the Department of the Attorney General new powers to protect the public from fraudulent solicitations. As a result of the enactment of this statute, we have been involved in the preparation of forms for the registration of charities which solicit from the public and for the registration of professional fund raisers and solicitors. It is of interest to note in this connection that the U. S. Treasury Department has been urging other states in the union to follow the lead of Massachusetts in the area of enforcement of charitable solicitations.

In addition to acting as a watch-dog, the Division has taken a more active role in the charitable community by recognizing the need for a comprehensive directory of public charities operating within the Commonwealth. The Department took upon itself the task of compiling and publishing a now widely-acclaimed publication, the *Directory of Foundations in Massachusetts.* This Directory is a detailed description of more than 1100 charitable funds and foundations in the State (which are required by law to file annual financial reports with the Division of Public Charities). The Directory has proved to be useful to charitable agencies and individuals in search of money for scholarships, relief and various charitable projects.

Members of the Division have also engaged in various conferences and meetings. For example, a conference was held with the officers of the Central New England Sanatorium. This institution, originally for tuberculosis patients, later became a sort of half-way house for convalescents from the disease. More recently it operated as an institution for the care of disturbed children. The institution is now in financial difficulties and desires to transfer the assets to the Devereux Foundation, a large national organization that operates institutions for disturbed children. The Department of Mental Health, which sends about 100 children each year to institutions outside the State, including those operated by Devereux, is anxious to have the latter group operate an institution here. We are cooperating in having the question put before the Court for decision.

Of course, the Division members spend many hours answering the telephone and personal inquiries from the general public. This Division is one which handles matters of special concern to interested parties and therefore has made every attempt to deal with all inquiries in the most pleasant and expeditious manner possible.

Torts, Claims and Collections Division

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

General laws, chapter 12, section 3B provides that the Attorney General shall defend state employees who are involved in accidents while operating state-owned vehicles in the course of their employment. The Attorney General may settle claims against state 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.

During the fiscal year of this report the Division attorneys have settled 299 motor tort claims at an average of $330.21 per claim. The average motor tort settlement for the year has increased slightly from last year's figure of $312.09. This increase is due to the fact that in one instance it was necessary to settle (during trial) a single claim for $9,350.00. It became apparent during the trial that liability had been established and the evidence as to damages indicated that a verdict in excess of $10,000.00 (the limit under G. L. c. 12, § 3B) was probable. In the best interest of the Commonwealth and the employee involved, we decided to settle rather than risk a recovery far in excess of the statutory liability. Despite the slight rise in our average figure, the $330.21 amount is still a substantial reduction from the average settlement figure of $407.00 existing during the last administration.

One noteworthy claim in the tort field was that of *Burns* v. *Barry, et al.* that has been pending in this office since 1958. This was a suit for libel, slander and defamation of character arising from the action of the five members of the Board of Registration for Professional Engineers. In the Superior Court, motion for directed verdicts was allowed as to four members of the Board but denied as to the Chairman of the Board and one employee. Trial continued on the remaining counts and a verdict for the remaining defendants was rendered on all but one count against the Chairman. The verdict for this one count against the Chairman was in

the amount of $20,000 plus interest for some seven years. This verdict was taken under "leave reserved" by the Court. Motion for the defendant Chairman was immediately filed on his behalf by this office. As the result of hearing thereon, following intensive preparation of the law and successful argument by Assistant Attorney General Samuel W. Gaffer, the Court ordered a verdict for the defendant on the final count. The result of our success in this instance resulted in a substantial savings to the Commonwealth. Had the plaintiff held his verdict, the situation was such that the Legislature would have been called upon to indemnify this defendant for the amount of this verdict.

This Division also handles moral claims, defective highway cases and small claims. Moral claims (damages occurring in circumstances that impose a moral, though not legal, liability upon the Commonwealth) have accounted for twenty-seven cases which have been settled for an average amount of $552.56 per case. Twenty-three cases have arisen from defective state highways. Small claims have been settled for an average of $151.54 in the 104 cases considered.

All correspondence in this section is up-to-date, acknowledged and answered on a current basis.

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

The following collections have been made in 698 cases during the period covered by this report:

Department	*Amount Collected*	*No. of Cases*
Mental Health	$92,777.41	139
Public Health	220,886.11	251
Public Works	32,983.44	231
Metropolitan District Commission	6,783.08	25
Public Safety	1,032.08	2
Miscellaneous	686.60	6
Department of Correction	625.36	1
Department of Education	1,693.36	24
Department of Education— Division of the Blind	77.14	1
Public Utilities	161.50	1
Natural Resources	2,683.65	5
Youth Service	137.95	1
Soldiers' Home	175.00	0
Veterans' Services	2.00	0
University of Massachusetts	784.67	7
	$362,276.21	698

There has been a significant increase in the sums collected for the Commonwealth in this area ever since the start of this administration. Statistics for comparison with previous years can be found in the 1964 Annual Report.

During the year, 3016 claims for overdue payment have been referred to this office by the various state departments and agencies. All of these claims have been processed, a major task in itself. During the year 1664

claims were settled and disposed of. At the moment there are some 11,691 active claims in this Department. These staggering figures give some concept of the volume of work handled by this section of the office.

Finally, members of this Division represent the Attorney General on the Motor Vehicle Appeal Board, as required by the statutes of the Commonwealth.

Veterans Division

This Division advises Massachusetts veterans of their rights and duties under State and Federal law. The Division furnishes legal assistance to veterans and to members of their families. It helps to guide veterans in the securing of the many special services, local, state and federal, available to them. The Veterans Division is available at all times to help veterans resolve any problems that may arise in this regard.

Many inquiries have continued to be directed to the members of the Division from veterans and their dependents, especially concerning tax problems.

This Division is called upon to hold frequent conferences with other state agencies and with local tax officials. Once again, we are most pleased to note our gratitude for the excellent cooperation received from the Commissioner of Veterans' Services and from his entire staff.

Springfield and Worcester Offices

The responsibilities of the Department of the Attorney General extend through the Commonwealth. Many of the varied tasks of this Department can be handled efficiently and satisfactorily from the central Boston office, but maximum efficiency and accessibility for the citizens of the State is provided by having regional offices in Springfield and Worcester.

Staff attorneys operate out of both these cities to help residents in the specific areas with a variety of problems. In addition, the attorneys in these two offices have been primarily concerned with the handling of land damage, motor vehicle, tort and industrial accident cases. These are three areas of the law which concern many citizens. Special Assistant Attorneys General have been appointed from time to time to work in these offices to handle particular problems that have arisen, or to expedite exceptionally heavy workloads.

Conclusion

These reports give a basic recitation of the manifold tasks of the Department of the Attorney General. They provide a brief and general review of the work of the members of the staff during the past fiscal year.

The staff members of the Department of the Attorney General have worked unceasingly to provide the Commonwealth with the finest legal service possible. I am truly appreciative of the opportunity of serving the citizens of the Commonwealth with such a dedicated and efficient staff.

Respectfully submitted,

EDWARD W. BROOKE,

Attorney General

The trustees of the University of Massachusetts are authorized to make rules and regulations for the control, movement and parking of vehicles on the campus and other lands of the University and, while they may collect parking fees, any amount so collected must be paid into the treasury of the Commonwealth. Any procedure whereby the trustees utilize the university store as an agency to collect and expend trust fund receipts is not within the permissible use of such funds as outlined by the provisions of § 11, c. 75.

JULY 1 1964.

DR. JOHN W. LEDERLE, *President, University of Massachusetts.*

DEAR DR. LEDERLE: — You have requested an opinion as to whether the provisions of G. L. c. 75 authorize the University trustees to:

1. Make rules and regulations for the control, movement and parking of vehicles on the campus and other lands of the University;
2. Provide fees for the registration of vehicles of students, employees, faculty members and staff members of the University operated on said campus and other lands;
3. Provide for the conduct of registration services and collection of fees through the University Store and the application of said fees to purchase supplies and materials, including but not limited to registration decals, required for the administration of the traffic regulations and to defray other registration expenses as a part of the University Store receipts.

This request has been made because the Comptroller of the Commonwealth has stated that the retention of said vehicle registration fees is contrary to Art. XLIII, section 1 of the Constitution of the Commonwealth which provides as follows:

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

The Comptroller also stated that the decals used in the vehicle registration should have been ordered by the Printing Office of the State Purchasing Division. He referred to c. 29, § 18 which reads in part as follows:

"Except as otherwise provided, no money shall be paid by the commonwealth without a warrant from the governor drawn in accordance with an appropriation then in effect, and after the demand or account to be paid has been certified by the comptroller. . . ."

1. Section 32A, c. 75 of the Massachusetts General Laws explicitly provides that the trustees of the University of Massachusetts may make rules and regulations for the control, movement and parking of vehicles on the campus and other lands of the University. This section provides as follows:

"The trustees shall make rules and regulations for the control, movement and parking of vehicles on the campus of the university and on other land of the university, and may provide reasonable penalties for the violation of said rules and regulations. The trustees may appoint as

police officers persons in the employ of the university who in the enforcement of said rules and regulations and throughout university property shall have the powers of police officers, except as to service of civil process. Notwithstanding any other provisions of law, all fines and penalties recovered for violation of rules and regulations made under authority of this section shall be accounted for by the clerk of the court and forwarded to the trustees of the university to be deposited in the scholarship trust fund of the university for scholarship purposes."

As a consequence of this section a system employing decals to classify the various categories of vehicles subject to the traffic and parking regulations of the university is within the power granted to the trustees.

2 - 3. The trustees may not provide fees for the registration of vehicles of students, employees, faculty members and staff members of the University operated on said campus so as to defray the expenses of such registration. If parking fees are created by the trustees the proceeds must be paid into the Treasury of the Commonwealth to comply with Art. LXIII, section 1 of the Constitution of the Commonwealth.

General Laws c. 75, § 11, dealing with trust funds does empower the trustees to establish and manage such funds and expend the proceeds. However, a trust fund set up for the collection of vehicle registration fees and the purchase of the materials required to make the vehicle registration effective does not fall within the scope of the projects and activities for which a trust fund may be properly created by the trustees pursuant to the provisions of this section.

Section 11 explicitly mentions that trust funds may be created for "the operation of the boarding halls, student health service, research institutes and foundations, dormitories and student and faculty apartments." While this section makes it clear that trust funds can be established for purposes other than those enumerated, the nature and purposes of such special trusts must be viewed in comparison to the type of projects and activities for which trust funds are specifically allowed. It is clear that the statutory intent was to allow the University trustees to collect and expend trust income for projects and activities of broad operational importance that are expected to be self-supporting and not for the regulation of parking and traffic control. There is a manifest distinction between using trust funds for a dormitory building project and for the support of parking regulations.

Your letter also asked whether the collection and disbursement of registration fees by the University store would be permissible since § 11 explicitly allows the trustees to retain and expend income from this activity. The pertinent part of § 11 states:

". . . All receipts from students activities, including the operation of the university stores, student union, student operation of the home economics practice house, dramatics, debating, musical clubs, band, athletics and other like activities, shall be retained by the trustees in a trust fund or trust funds and shall be expended as the trustees shall direct in furthering the activities from which the receipts were derived."

Using the University store as the agency for the collection and disbursement of registration fees is also outside the scope of the trustees' power to use trust funds for two reasons:

a. Collection of registration fees is outside the normal and excepted activities of the University store. If the trustees are granted permission to use the University store as an agency to collect and disburse funds for this activity a precedent is established by which the University store may be used as an agency through which to channel income from any source into the student activity trust fund. This income could then be used for whatsoever activites and projects the trustees chose to designate, thus giving them control over funds not intended by the Legislature.

b. The second reason is that the above-quoted portion of § 11 is explicit in directing the trustees to expend the receipts derived from student activities in furthering the activities from which the receipts were derived. Funds disbursed for vehicle registration and regulation materials cannot be construed as furthering a student activity even when carried out under the aegis of the University store. These funds are expended to promote a regulatory system initiated by the trustees and do not further any student activity within the meaning of § 11.

Consequently, you are advised that the trustees may collect, retain and disburse receipts of the University store only when these receipts are obtained from the regular and normal activities of this store; and may not collect them when such collection and disbursement is additional and collateral to the normal functions of the store.

To summarize, you are advised that while you may collect parking fees, any amounts so collected must be paid into the Treasury of the Commonwealth. The procedure set-up by the trustees using the University store as an agency to collect and expend trust fund receipts is not within the permissible use of such funds as outlined by the provisions of § 11. The registration materials purchased should have been ordered by the Printing Office of the State Purchasing Division, in compliance with c. 29, § 18, which states:

> "Except as otherwise provided, no money shall be paid by the commonwealth without a warrant from the governor drawn in accordance with an appropriation then in effect, and after the demand or account to be paid has been certified by the comptroller . . . ."

Section 13 of c. 75 to which you referred in your letter is not applicable to the purchases made of the registration decals, as that section authorizes the trustees or officers to make

> ". . . any purchase or purchases in the amount of five hundred dollars or less, and to purchase without limitation of amount library books and periodicals, educational and scientific supplies and equipment, printing and binding, emergency repairs and replacement parts, and perishable items, without records to any other state board, bureau, department or commission. . . ."

This section is not applicable because, according to the Comptroller's letter of December 23, 1963, the decals completed cost in excess of five

hundred dollars. The clause "printing and binding" is not applicable to the manufacture of decals.

Section 13 does permit the trustees and officers to purchase other supplies and materials used in registration if such supplies cost under five hundred dollars, or if they consist of printed materials used in conjunction with registration.

Very truly yours,

EDWARD W. BROOKE

JULY 8, 1964.

St. 1964, C. 528, permitting the suspension of a person in the service of the Commonwealth who is under indictment for misconduct, is applicable to individuals who were indicted prior to the effective date of such Act for misconduct in an elective or appointive office which he previously held. Such retrospective application is entirely within the power of the General Court.

HONORABLE ENDICOTT PEABODY, *Governor.*

DEAR GOVERNOR PEABODY: — I have received your letter of June 25, 1964 relative to the effect of the recent amendment to G. L. c. 30, § 59, the so-called Perry Law. General Laws c. 30, § 59, which authorizes the suspension of appointd public officials who have been indicated for misconduct relating to their offices, originally applied only to indictments for misconduct in the particular office currently held by the ocffiial in question. Suspension was not authorized in cases of indictments for misconduct committed in prior offices.

By c. 528 of the Acts of 1964, the General Court expanded the effect of the law by deleting the first sentence and substituting the following:

"An officer or employee of the commonwealth, or of any department, board, commission or agency thereof, or of any authority created by the general court, may, *during any period such officer or employee is under indictment for misconduct in such office or employment or for misconduct in any elective or appointive public office, trust or employment at any time held by him,* if he was appointed by the governor, be suspended by the governor, whether or not such appointment was subject to the advice and consent of the council or, if he was appointed by some other appointing authority, be suspended by such authority, whether or not such appointment was subject to approval in any manner." (Emphasis supplied.) Accordingly, the Perry Law now applies to indictments for misconduct in any elective or appointive office, whether held currently or at a prior time.

In light of the extension of the application of G. L. c. 30, § 59, you have requested my opinion as to whether an officer or employee of the Commonwealth may be suspended for having been indicted for misconduct relating to a public office when such indictment was returned prior to the effective date of St. 1964, c. 528. In other words, you ask that an opinion be rendered as to whether the recent amendments to the law in question may validly be applied retroactively in cases of indictments for

offenses committed before the enactment of such amendments. Your request presents issues similiar to those treated in my opinion rendered to former Commissioner of Public Works Jack P. Ricciardi on June 26, 1963.

I will treat the problem of retroactive application of statutes below. Before considering the validity of such application, however, it should be pointed out that the question of retroactivity may well not arise at all. Indictment of an individual creates a continuing status, a status which exists from the time that the indictment is returned to the time that there is a verdict of guilty, a quashing of the indictment, or the entry of some other order conclusive of the case. The sentence inserted by c. 528 of the Acts of 1964 authorizes suspension *during any period* an officer or employee is *under indictment*. The language of the statute by itself indicates that it was the intention of the Legislature to make the amendments applicable to all indicted officials so long as the indictments were still in effect. Otherwise the General Court would not have referred to *any period* during which an official might be under indictment. An offense may have been committed prior to the effective date of the Act; but an official indicted for such offense remains indicted until the matter is tried or a determination is made not to pursue it further. An individual may well be under indictment now for an offense committed prior to 1964; and the amendments to G. L. c. 30, § 59 may properly be applied to him without raising the issue of retroactive effect at all.

Nevertheless, much has been said on the subject of retroactive legislation in general, and on the effect of St. 1964, c. 528 in particular, and I feel that some attention should be devoted to the matter. The said c. 528 does admittedly create disabilities which did not exist prior to its passage. Indictments for certain past offenses may now result in suspension, whereas formerly the offender was entitled to retain his position at least until conviction. However, there is nothing inherently wrong with retroactive application; it is only when some constitutional or statutory right is adversely affected that such application must be deemed to be invalid.

The General Court, having created certain offices and employments, has the right to abolish or otherwise take steps which affect such offices or employments. As they are created, so may they be abolished. Terms may be lengthened or shortened, or requirements for holding positions altered. No official has such a right to occupy a statutory office that he may object to an act of the Legislature which affects such office, or even which deprives him of it. The General Court clearly may prescribe causes for and method of removal from office.

Collins v. *Selectmen of Brookline.*

325 Mass. 562, 565

The Supreme Judicial Court has recently had occasion to consider this problem. In *Welch* v. *Mayor of Taunton,* 343 Mass. 485, the Court held that the General Court could lawfully empower the Mayor to remove members of a commission for a cause, specified in the statute, which occurred prior to its effective date. The Court pointed out that the statute was not criminal in its application, nor did it adversely affect substantive or vested rights of the officials indicted. The Court commented, at page 488:

"It is insignificant that § 56E increased the consequences of the plaintiff's prior wrongdoing. No punishment or penalty is imposed on the plaintiff in any constitutional sense by the operation of § 56E. An official has no right, vested or otherwise, to do wrong without an effect upon his term of office beyond that specified in the statutes when the wrong was done."

There is no substantive right to hold an office, and thus nothing of substance that can be affected by these amendments. The creation of a new way of shortening a term "deprives the office holder of nothing which he has a constitutional or statutory right to keep."

Welch v. *Mayor of Taunton, supra,* at p. 487

Statutes relating to remedies and not affecting substantive rights commonly are treated as operating retroactively.

Hanscom, Trustee v. *Malden & Melrose Gas Light Co., et al.,* 220 Mass. 1, 3

The spirit of G. L. c. 30, § 59 is such that I am compelled to conclude that the Legislature intended the law to have as wide an application as possible. It is essential to the preservation of confidence in government that public offices not be occupied by those who are under suspicion. The statute is designed so that whatever the office holder has lost by suspension will be returned in the event proceedings terminate without a verdict of guilty. Broad application is therefore possible without fear that substantive rights will be affected. Accordingly, it is my opinion that the Legislature intended that the amendments embodied in c. 528 of the Acts of 1964 be applicable to individuals who were indicted prior to the effective date of such amendments for misconduct in an elective or appointive office which he previously held, and that such retroactive application is entirely within the power of the General Court.

Very truly yours,

EDWARD W. BROOKE

It is beyond the authority of the Secretary of State to require information other than that specified by statute and he cannot require proof of age or eligibility to vote as a condition to acceptance of nomination papers.

JULY 8, 1964.

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

DEAR MR. WHITE: — I have received your letter of July 7, 1964 relative to your duties with respect to the proposed candidacies of individuals who have yet to reach the age of twenty-one years. You have informed me that one Leonard Edward Tagg of 203 Green Street, Weymouth, has filed nomination papers with your office as a candidate for election to the office of Representatives from the Fourth Norfolk District. Apparently, reliable reports indicate that Mr. Tagg is at present just sixteen years of age. Accordingly, you have requested my opinion upon the following questions:

"1. Is it within the purview of the administration rules and regulations for this office to require proof that a candidate on election

nomination papers is qualified as a voter prior to accepting the nomination papers?

"2. Is it within the administrative powers of this office to make inquiry from other sources such as city and town clerks as to the age of candidates?

"3. Having ascertained through official channels that the candidate is a minor, would this office be authorized, under the statutes, to refuse acceptance of his nomination papers?"

In essence, your questions are directed at determining whether you as Secretary of the Commonwealth may lawfully impose, as a condition to acceptance by your office of nomination papers, the requirement that the candidate submit proof that he has attained the age of twenty-one years or is qualified to register as a voter. The statute which governs the contents of nomination papers does not require that the age of the candidate be indicated, but rather provides in part as follows:

"All certificates of nomination and nomination papers shall, in addition to the names of candidates, specify as to each, (1) his residence, with street and number, if any, (2) the office for which he is nominated, and (3), except as otherwise provided in this section and in city charters, the party, if any, which he represents, expressed in not more than three words. . . ."

Mass. G. L. c. 53, § 8.

The requirements presently contained in c. 53, § 8, presumably represent the entire scope of the information regarding the candidate in question which the Legislature considered necessary for the candidate to submit. Had the General Court desired that the candidate's age appear on the papers it could easily have so provided. Absent such a provision, it must be assumed that the Legislature did not intend that the candidate be required to reveal his age at the time of the filing of nomination papers.

Were you, as Secretary of the Commonwealth, to enact an administrative rule governing the functioning of your department which required proof of age or eligibility to vote as a condition to acceptance of nomination papers, you would in effect have amended the provisions of c. 53, § 8, by imposing an additional requirement upon candidates. The statute does not at this time provide that a candidate's age be included upon his nomination papers, and it is not within your authority to add such a burden, albeit resort is had to the device of a departmental rule.

It cannot be said that the General Court was unaware of the possibility that proof of some kind might be required prior to acceptance of nomination papers. In § 48 of c. 53, which section provides for the filing of nomination papers for candidates in state primaries, there is to be found the requirement that a candidate submit a certificate from the registrars of voters of his city or town that he is enrolled as a member of the political party whose nomination he seeks. Such a requirement is of course essential, since there must be some assurance that a candidate belongs to the party whose primary he wishes to enter.

Having enacted such a provision relative to the filing of papers prior to state primaries, the Legislature could well have included a similar clause in c. 53, § 8. Failure to do so indicates that the Legislature did not intend that candidates filing under c. 53, § 8 be required to establish their eligibility to vote. Throughout the election laws, the General Court has treated the Secretary of the Commonwealth as an officer having ministerial duties only. When documents are submitted to his office for filing, the Secretary has no inherent authority to look beyond the surface of such documents. He may, for example, reject papers which obviously do not contain the appropriate number of signatures. But he is obliged to accept papers which on their face meet all lawful requirements; he cannot engage in an independent search for additional evidence, and — based upon such evidence — deny the candidate the right to file. Should an individual's candidacy be unlawful, provision has been made in sections 11 and 12 or c. 53 for the filing of objections with the State Ballot Law Commission. It is the Commission, and not the Secretary of the Commonwealth, which has the facilities to examine questionable candidacies, and which has been authorized to do so by the General Court.

The Legislature has not imposed upon the Secretary the burden of determining the validity of nomination papers where independent evidence is required. It would be beyond the authority of the Secretary to require information other than that specified by statute. Accordingly, I am answering each of your three questions in the negative.

There are, of course, other facets to the subject matter of your requests which may well be determinative of the problems raised. However, in my official capacity as Attorney General, I have addressed myself only to the questions you pose.

Very truly yours

EDWARD W. BROOKE

The Director of Civil Service is legally correct in his refusal to approve the appointment of a veteran where a disabled veteran, appearing higher on the list, was passed over on the sole basis of arrests and convictions for drunkenness which occurred more than ten years prior to the filing of his application.

JULY 8, 1964.

HON. W. HENRY FINNEGAN, *Director of Civil Service.*

DEAR MR. FINNEGAN: — You have asked my opinion, on the facts which you have submitted to me in your letter of May 14, 1964, whether the Director of Civil Service is legally correct in refusing to approve the appointment of a veteran where there is a disabled veteran appearing higher on the list who was passed over on the sole basis of arrests and convictions for drunkenness occurring more than ten years prior to the filing of his application.

The Legislature has seen fit to establish preference in the appointment of applicants to civil service positions. These preferences have been established on the basis of service in the armed forces of the United States, and on the basis of whether the applicant, as a result of that service, has suffered any physical disabilities.

This means that those disabled veterans who have received passing grades on the written examination and who meet the other requirements are placed at the top of the eligible list. The veterans, as a category, appear below the disabled veterans, and still further down on the list are the other applicants. Within any of these categories the applicants are listed in order on the basis of the numerical mark which they received. In accordance with this statutory system, a disabled veteran must be appointed and employed in preference to all other applicants.

G. L. c. 31, § 23.

"The names of persons who pass examinations for appointment to any position classified under the civil service shall be placed upon the eligible lists in the following order: —

. "(1) Disabled veterans as defined in section twenty-three A, in the order of their respective standing; (2) veterans in the order of their respective standing; (3) persons described in section twenty-three B in the order of their respective standing; (4) other applicants in the order of their respective standing. Upon receipt of a requisition not especially calling for women, names shall be certified from such lists according to the method of certification prescribed by the civil service rules applying to civilians. A disabled veteran shall be appointed and employed in preference to all other persons, including veterans."

In instances where the appointing authority does not appoint in the numerical order in which applicants appear on the list, the appointing authority is required to file under G. L. c. 31, § 15, a statement explaining the action which was taken. The statement in this case was to the effect that the disabled veteran had "a lengthy court record plus some convictions for drunkenness. "From your letter it appears that this matter was investigated and that the Director of Civil Service found as a matter of fact that the disabled veteran had a record of arrests and convictions for drunkenness, only, extending over a period from 1949 to 1950, and that this was the sole basis for his not being appointed.

Under G. L. c. 31, § 13, an applicant must include in his application information concerning "any arrest or conviction . . . (for) drunkenness . . . provided, that the date of arrest or conviction was ten years prior to the filing of said application." This section places the burden squarely upon the applicant to file a correct and honest application. Willful failure to do so would be grounds for disqualification.

G. L. c. 31, § 13.

" Every application shall state under penalties of perjury the full name, residence and post office address, citizenship, age, place of birth, health and physical capacity, right of preference as a veteran or a blind person, previous employment in the public service, occupation and residence for the previous five years, education of the applicant, and such other information as may be reasonably required relative to his fitness for the public service; but no question shall be asked in such application or in any examination requiring a statement as to any act of waywardness or delinquency or any offence committed before the applicant reached the age of seventeen. In filing such application, no applicant shall be required

to furnish any information of arrest or conviction of the following misdemeanors: — drunkenness, simple assault, speeding, minor traffic violations, affray or disturbance of the peace, provided, that the date of arrest or conviction was ten years prior to the filing of said application."

The purpose of this section is to establish a permanent record concerning an applicant's background, and as such it may be used by the appointing authority in selecting the person most qualified for a permanent appointment. (See Civil Service Rule 16.) The Legislature saw fit to exclude from this record any arrests or convictions for drunkenness occuring ten years before the applicant filed his application. In the light of this, it is not incumbent upon the appointing authority to now resurrect matters which the Legislature felt had no bearing upon his present appointment.

Should the appointing authority be in possession of evidence that past mistakes have been repeated in present conduct making the applicant unfit to be employed, this should be brought to the attention of the Director of Civil Service and made the basis for presently refusing to employ the applicant.

The appointing authority is not required to permanently appoint a person who is unqualified for the position for which he has applied. A candidate for appointment to the Civil Service must, in accordance with G. L. c. 31, § 20D, successfully serve a six months' probationary period. This provides the appointing authority with a first-hand opportunity to appraise his qualifications. If during this period the appointing authority discovers that the applicant is unfit, he may discharge him in accordance with the simple procedure found in that section.

In light of the action taken by the Legislature, it is my opinion that the Director of Civil Service is legally correct in refusing to approve the appointment of a veteran where there is a disabled veteran appearing higher on the list who was passed oven on the sole basis of arrests and convictions for drunkenness occurring more than ten years prior to the filing of his application.

Very truly yours,

EDWARD W. BROOKE

Where a municipality had obtained permission to pay a rate above the maximum under a previous Welfare Compensation Plan, it is not bound to pay an amount above the maximum rate under the present Welfare Compensation Plan.

JULY 9, 1964.

HON. W. HENRY FINNEGAN, *Director of Civil Service.*

DEAR MR. FINNEGAN: — You have asked my opinion concerning whether a town or city must pay an amount above the maximum rate under the present Welfare Compensation Plan (1963) where it had obtained permission to pay a rate above the maximum under the previous Welfare Compensation Plan (1961).

Certain local welfare employees were made subject to the Civil Service Law and Rules by virtue of G. L. c. 31, § 47C, St. 1941, c. 402, § 1, as

most recently amended by St. 1963, c. 432, § 1. As a result of this, all welfare employees coming within the purview of this section enjoy unlimited tenure and may be discharged only in accordance with the procedure outlined in G. L. c. 30, § 43. This is the case even though prior special statutes had been enacted excluding these employees from the operation of the Civil Service Law.

The wages paid to these employees are set by the Director of Civil Service and are incorporated into a compensation plan which must be approved by a special Welfare Compensation Board established under G. L. c. 31, § 47D. The Board is comprised of the Director of Civil Service, the Commissioner of Public Welfare, the Chairman of the Civil Service Commission and the Director of Accounts, who sit *ex officiis*. Neither the towns and cities nor the employees have direct representation on the Board.

A typical Welfare Compensation Plan lists the various welfare jobs by their position title. The towns and cities are not listed by name, but the various categories are established according to population. Both the maximum and minimum salary rates, as well as the annual step-rate increases, are established in line with these population categories.

In the administration of this plan the Director of Civil Service is empowered by statute to promulgate appropriate rules and regulations. These rules and regulations, as well as the Welfare Compensation Plan, may be changed from time to time with the approval of the Board. Any person employed by a local municipality who is aggrieved by any provision of a plan which affects his position may obtain a hearing before the Board.

G. L. c. 31, § 47D.

"The director shall establish, with the approval of a board consisting of the commissioner of public welfare, the chairman of the civil service commission and the director of accounts, *ex officiis,* a compensation plan for holders of positions referred to in section forty-seven C and made subject to this chapter by said section or otherwise. The director may, with like approval, make rules and regulations providing for the application and administration of said compensation plan. The director, with like approval, may from time to time modify or change said compensation plan or said rules and regulations. Any holder of such a position objecting to any provision of such plan, or any action taken in connection therewith, which affects his office or position, may appeal in writing to said board and shall be entitled to a hearing, after due notice, upon such appeal. The decision of said board shall be final."

Under G. L. c. 31, § 47E, as added by St. 1951, c. 537, local Welfare employees are entitled to annual step-rate increases up to the maximum salary as a part of the Compensation Plan. These increases, however, do not change the employees' job classification or increase their responsibilities. The step-rate increases for all practical purposes are automatic and are awarded on the basis of the number of years one has been employed. This section [G. L. c. 31, § 47E] dealing with step-rate increases as originally enacted St. 1951, c. 537, was optional with the towns and cities and became effective only after it had been accepted by the local

community. By St. 1961, c. 529 and St. 1962, c. 579, the payment of step-rate increases became mandatory.

Litigation arose over the proper interpretation of § 47E as it had been added by St. 1951, c. 537. In *Albernaz* v. *City of Fall River,* 1963 Adv. Sh. 963, 191 N. E. 2nd 771 (1963), local welfare employees of the City of Fall River contended that they were entitled under the new plan to any step-rate increases which they had obtained under prior plans. The Supreme Judicial Court held that under this section, as it then stood, the employees were not entitled to the new minimum plus any accrued step-rate increases.

Before the *Albernaz* case was finally decided the Legislature amended G. L. c. 31, § 47E by St. 1962, c. 579.

G. L. c. 31, § 47E.

"Persons holding positions referred to in section forty-seven C shall be paid the salaries set forth for such positions in the compensation plan and in accordance with the rules and regulations providing for the application and administration of said compensation plan established under section forty-seven D. such persons shall be given an anual step-rate increase, to be set forth in the compensation plan established under section forty-seven D, on the anniversary date of their appointment to the position which they hold or on such other date as the municipality uses for other employees, but such increase shall not entitled such persons to any change of rating or increased authority. Such increase shall be fixed by the board referred to in section forty-seven D and shall be paid annually until the maximum salary set forth in the compensation plan established under section forty-seven D for the positions so held has been reached.

"An amendment or change in such compensation plan shall become effective on the first day of July following the date on which such amendment or change is made for such position, and each person shall be paid the salary rate set forth in such compensation plan, as so amended or changed, which is equivalent in relative standing to the salary grade in effect prior to the amendment or change, as the case may be, commencing on such effective date.

"The superior court, upon suit by the attorney general or petition of one or more taxable inhabitants of a city or town in which it is alleged that the provisions of this section or sections forty-seven C and forty-seven D are not enforced may, in law or equity, enforce said sections." (As amended by St. 1962, c. 579.)

This statute where it states, "Each person shall be paid the salary rate set forth in such Compensation Plan, as so amended or changed which is equivalent in relative standing to the salary grade in effect prior to the amendment or change, as the case may be, commencing on such effective date . . .", has effectively dealt with the problem in the *Albernaz* case. The Court noted in this case that its decision would have been different if that case had been decided under c. 31, § 47E, as amended. Under § 47E, as it was amended by St. 1962, c. 579, a welfare employee is entitled to payment at the minimum rate under the new plan plus any step-rate increase which he had obtained under any prior plans.

Payment to welfare employees above the maximum established rate are not provided for in G. L. c. 31, §§ 47C through E. Provisions for such payments have been made in the rules and regulations providing for the application and administration of the Welfare Compensation Board. Under § 4 (a) of these rules and regulations, a municipality may make payments to its employees above the maximum rate by having the town or city placed in the next higher population category.

RULES AND REGULATIONS

"4 (a) upon presensation by the proper municipal authority of evidence of special reasons and exceptional circumstances in matters relating to the prevailing rates for comparable positions in other departments of the municipality, the proximity of the population of the municipality to the next higher population group and other relevant factors, the Director may authorize the establishment of a salary range for positions in the next higher population group."

Secondly, a municipality may apply under § 8 (a) of the rules and regulations to make salary payment in excess of the maximum rate.

RULES AND REGULATIONS

"8 (a) In any city or town wherein the Welfare Compensation Plan would involve practical difficulty or unnecessary hardship and wherein desirable relief may be granted without derogating from the intent and purpose of the Welfare Compensation Plan. The Director may, upon presentation of evidence satisfactory to him, permit reasonable differences in excess of the salary ranges established in the plan if, in his opinion, such differences are justified by local recruitment, employment or fiscal conditions."

Under both these sections the town or city must obtain the prior permission of the Director of Civil Service before making these payments. The basis upon which the Director's approval is given is that the present plan does not meet the needs of an individual community. Further, the municipality must establish that the new rates set by the Director and approved by the Board are not adapted to the local conditions. An evaluation such as this can only be made after the town or city has had an opportunity to study the new or amended plan in light of its own needs.

Where permission was given under a former plan to make salary payments in excess of the maximum rate, such permission was given on the basis of the plan and the needs of the community as they then existed. Where a new or amended plan is adopted, no such basis still exists. The welfare problems of a community are constantly changing. Whereas a former plan may have been deficient, the new plan may now provide full welfare services.

It is then incumbent upon the town and cities, after the promulgation of a new or amended Welfare Compensation Plan, to re-evaluate the welfare problems in their own community. If in the opinion of the town or city the plan presently adopted does not provide adequate welfare facilities, they may apply for permission under the new or amended plan

to pay wage rates in excess of the maximum. The result is that when a new or amended Welfare Compensation Plan is approved by the Board, the town or city must pay the new wage rate or apply for permission under the new or amended plan to pay a higher rate. Any other result would bind the towns and cities to a prior Welfare Compensation Plan found by the Board itself to be outmoded and not adapted to the welfare needs of the Commonwealth.

In the light of the action taken by the Leigslature and the discussion here of the problem involved, it is my opinion that a town or city does not have to pay an amount above the maximum rate under the present Welfare Compensation Plan (1963) where it had obtained permission to pay a rate above the maximum under the previous Welfare Compensation Plan (1961).

Very truly yours,

EDWARD W. BROOKE

The manifest purpose of St. 1964, C. 561, amending G. L. C. 75, by the insertion of § 55C, is to prescribe a safety requirement in classrooms where students and teachers engage in activities which could be injurious to the eyes, and requires some discretion on the part of school officials in determining when students and visitors are within a dangerous proximity to the activity and require the use of eye protective devices. The risk involved in particular classroom activities and not the general category of activity is the true criterion by which to determine when protective eyeglasses must be worn.

JULY 20, 1964.

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

DEAR DOCTOR KIERNAN: — You have requested answers to several questions which require an interpretation of c. 51 of the Acts of the General Court of 1964. This Act amends c. 71 of the General Laws by the insertion of § 55c. It reads as follows:

"The school committee of each city or town shall require each pupil and teacher in a public school to wear *industrial quality eye protective devices*, approved by the department of public safety, *while attending classes* in vocation or industrial art shops or laboratories in which *caustic or explosive chemicals, hot liquids or solids, hot molten metals, or explosives are used or in which welding of any type, repair or servicing of vehicles, heat treatment or tempering of metals, or the milling, sawing, stamping or cutting of solid materials,* or any similar dangerous process is taught, exposure to which might have a tendency to cause damage to the eyes. Visitors to such classrooms or laboratories shall also be required to wear such protective devices." (Emphasis supplied.)

The questions you have submitted are:

" (1) If only one student is performing an action covered by section 55C, do all students, teachers and visitors have to wear protective eye devices?

"(2) Does the act apply to cooking classes where water is boiled or soup is brought to the boiling point?

"(3) Can a Laboratory teacher, wearing glasses, conduct an experiment while all the students are watching without the students wearing glasses?

"(4) Can the laboratory teacher conduct an experiment wearing glasses behind a protective shield, while all the students are watching him, without the students wearing the glasses?

"(5) If a student saws a piece of wood with a hand saw, does he have to wear protective glasses?

"(6) Do students have to wear glasses while working on the repairing of an automobile regardless of the type of repair work that is being done?

"(7) What are the circumstances under which visitors to the classrooms or laboratories are required to wear protective eye devices?

"(8) Must the school committee purchase separate glasses for each student who is obliged to wear them, the student returning the glasses at the end of the course, or can it purchase a number of glasses from which each student can pick one upon entering a laboratory? This question is asked because of possible danger of transmitting skin and eye disease by indiscriminate use of glasses.

"(9) Can a school committee purchase glasses and sell them at cost to the student or require the student to buy approved glasses on his own? (The Ohio law allows a school committee to purchase protective eye glasses in large quantities and sell them at cost to pupils and teachers.) In Masaschusetts H-340, which subsequently became H-3021, contained such a provision. It was eliminated in the third reading in the House when the bill became H-3021.

"(10) Does the school committee have to purchase and loan the protective eye devices under Chapter 71, section 48?

"(11) Does the phrase 'or any similar dangerous process is taught, exposure to which might have a tendency to cause damage to the eye' mean that all the act previously described in section 55C are considered as 'dangerous processes' in and of themselves?"

The manifest purpose of this amendment is to prescribe a safety requirement in classrooms where students and teachers engage in activities that have a tendency to cause eye damage. That purpose is served by applying a proximity or exposure test rather than by requiring all persons entering a classroom, where any activity mentioned in § 55C is being carried on regardless of the unlikelihood of injury, to wear protective glasses. Consequently, it is my opinion that the Legislature intended that eye protective devices must be worn only when directly engaged in, or in close proximity to the activities mentioned in this section. This will require some discretion on the part of school officials in determining when students and visitors are within a dangerous proximity to the activity and require the use of eye protective devices. This determination will vary depending on the danger radius of various activities falling within the scope of § 55C.

With regard to your explicit questions concerning this section, it is my opinion and you are advised:

1. That if only one student is performing an action covered by § 55C, others in the classroom need not wear protective eye devices unless they are in such close proximity to the activity that their exposure would have a tendency to cause damage to the eyes.

2. The act does not apply to cooking classes where water is boiled or soup is brought to a boiling point. While water and soup are hot liquids they are not the type of chemicals which would likely cause eye damage after exposure, and should not be considered to be included within the scope of § 55C.

3. Whether a laboratory teacher, wearing glasses, can conduct an experiment while all the students are watching, without requiring the students to wear glasses, depends on two factors: the distance of the students from the teacher and the danger radius of the experiment. If the students are crowded around in close proximity to the teacher as he conducts the experiment, or if the experiment involves caustic or explosive chemicals likely to affect everyone in the classroom, then all students should wear the protective eye glasses.

4. Whether a laboratory teacher wearing an eye device can conduct an experiment behind a protective shield, while all the students watch him without wearing the glasses, depends on whether or not the protective shield provides the students with as good or better eye protection than would their glasses. If the shield does provide such protection, the students need not be required to wear their glasses during an experiment conducted by the teacher. However, they must wear them if the experiment exposes them to the danger of eye injury, despite the protective shield.

5. If a student saws a piece of wood with a hand saw, he must wear protective glasses. The section explicity mentions "sawing" but does not distinguish between hand and machine sawing. Consequently, we must infer that the Legislature intended the statute to apply to both, and requires the student to wear a protective eye device while engaged in any sawing activity.

6. A student must generally wear glasses while repairing or servicing a car. However, if the repair work is of a nature where the possibility of eye damage is virtually non-existent, it would not counter the purpose of the law to allow students to work without protective glasses at such times. The statute as it pertains to repairing an automobile should be interpreted as applying to those situations where the student is working with moving parts of machinery, using power tools, when there is a danger of flying objects striking him in the eye, and like situations where there is an exposure to eye injury.

7. Classrooms visitors are required to wear protective eye devices only when they are in proximate danger of receiving an eye injury. They need not wear these devices when they enter a classroom where an activity described in § 55C is taking place unless they are personally exposed to the possibility of eye injury.

8. This section does not contain guidance to determine whether a school committee must buy glasses for each student who is obliged to wear them, or buy a number of glasses for use by students upon entering the classroom and then depositing them at the termination of the class. It is apparent that the school committee has discretion on this matter.

9. A school committee should not purchase glasses and sell them to the student at cost nor should it require the student to buy approved glasses on his own. The fact that this provision was originally included in the House bill and subsequently dropped indicates that the Legislature did not approve either of these methods of procuring the protective eye devices required by the final version of the statute.

10. The answer to question #9 indicates the Legislature did intend that school committees purchase and loan the protective eye devices under c. 71, § 48. This section states:

"The committee shall, at the expense of the town, purchase textbooks and other school supplies, and, under such regulations as to their care and custody as it may prescribe, shall loan them to the pupils free of charge. If instruction is given in the manual and domestic arts, it may so purchase and loan the necessary tools, implements and materials. It shall also, at like expense, procure such apparatus, reference books and other means of illustration, as may be needed."

11. The phrase "or any similar dangerous process is taught, exposure to which might have a tendency to cause damage to the eye" should not be construed to mean that all the acts previously enumerated in § 55C are considered as "dangerous processes" in and of themselves. Any act which fits the described activities enumerated under this section must be evaluated according to whether or not it creates a danger of exposing a person or persons to eye injury. The activities described are those categories where the risk of eye injury is generally so great that only exceptional circumstances would remove a presumption of risk when protective eye devices are not used.

Consequently, the risk involved in particular classroom activities and not the general category of activity is the true criterion by which to determine when protective eyeglasses must be worn.

Very truly yours,

EDWARD W. BROOKE

The Commissioner of Agriculture and the Board of Agriculture are not equal in terms of the statutory allocation of powers and duties within the Department; the Commissioner's function is to administer and enforce, the Board's function is to supervise and control. Sites of Racing Meetings require approval by both the Board and the Commissioner. The Commissioner alone has the further duty of determining whether a fair is properly qualified. The broad discretion given in the granting of licenses must conform to general standards relating to the public interest.

JULY 20, 1964.

HON. VINCENT J. RILEY, *Chairman, Board of Agriculture.*

DEAR MR. RILEY: — You have asked my opinion on two questions:

1. A delineation of the statutory extent of the powers and duties of the Board of Agriculture and the Commissioner of Agriculture.

2. The powers and duties of the Commissioner and the Board under G. L. c. 128A, § 3, which states in part in subparagraph (4): "the location where such racing meeting is to be held is annually approved by him and by the board of agriculture. . . ."

These questions will be answered in the order in which they are numbered above.

1. Recognizing that certain activities are best administered by nonpartisan specialists, G. L. (Ter. Ed.) c. 20, § 1 provided that:

"There shall be a department of agriculture under the supervision and control of a commissioner, and an advisory board of six members the principal vocation of at least three of whom shall be agriculture."

This section was amended by c. 674 of the Acts of 1954. Section 1 of that chapter abolished the advisory board and provides that: "There shall be a department of agriculture under the supervision and control of a board of agriculture. . . ." Under this statute, the Board is to consist of seven members appointed by the Governor with the advice and consent of the Council, at least four of whom shall be "farmers whose principal vocation is the production of food or fibre." Each member must be from a different county.

This statute further provides that the Commissioner is to be appointed by the Governor with the advice and consent of the Council from a panel of not less than three names submitted by the Board.

Prior to 1954, control of the department was in the Commissioner; the function of the advisory board was limited, as shown by its title, to advisory powers. After the 1954 amendatory act, however, the statute now reads as follows:

"SECTION 1. . . . Said commissioner shall serve for a term of four years and shall have charge of the administration of the department. . . ."

". . .

"*Section 3.* The commissioner shall be the executive and administrative head of the department and shall have charge of the administration and enforcement of all laws which it is the duty of the department to administer and enforce, and shall direct all inspections and investigations."

Section 6 of that statute provides that the Commissioner is to organize the Department into divisions. The Commissioner's appointment and

removal powers over the division directors are subject to the approval of the Board, as is the Commissioner's appointment of "scientific experts." Again, note the change from the pre-1954 statute, wherein these powers resided solely in the Commissioner.

From the statute, then, it seems clear that while the function of the Commissioner is to administer and enforce, the function of the Board is to supervise and control. The Commissioner and the Board are not, therefore, equal in terms of the statutory allocation of powers and duties within the department. The Board is the organ with the dominant role in policy making.

2. In regard to your second inquiry, c. 805 of the Acts of 1963 has changed G. L. c. 128A, § 3 (as amended by § 2 of c. 295 of the Acts of 1959) by inserting certain additional requirements in the granting of a license for the holding or conducting of a horse or dog racing meeting in the Commonwealth in connection with a state or county fair. These provisions are that the license applicant show a certificate from the Commissioner of Agriculture that: "(1) such fair is a state or county fair as defined in section one [of c. 805], (2) such fair has been operating for each of the five consecutive years immediately preceding the date of filing such application and had received for each of said five consecutive years assistance from the agricultural purposes fund, (3) such fair is properly qualified as hereinafter in this paragraph provided, and (4) the location where such racing meeting is to be held is annually approved by him [the Commissioner of Agriculture] and by the board of agriculture. . . ." Thus, in addition to the required annual approval of the sites of the racing meeting, to be made by both the Commissioner and the Board, the Commissioner alone has a further duty under the statutes; namely, to determine whether a fair is properly qualified.

There is such judicial language as to the standards to which the State Racing Commission should conform in granting licenses. The Massachusetts Superior Court has held the controlling factor to be "public interest." As the Court pointed out in *Bay State Harness Horse Racing and Breeding Association, Inc.* v. *State Racing Commission,* 342 Mass. 694, at 699:

"We think that c. 128A contemplates that the commission, although given a broad discretion in granting licenses . . . shall conform to general standards related to the public interest. . . . From various provisions of the chapter may be implied a legislative requirement that licensees shall be financially responsible, be able to meet obligations to the Commonwealth, have suitable and safe facilities for the service of the patrons, and be persons likely to conduct racing in accordance with approved practices and in a manner consistent with the public safety, health, morals, and welfare. . . ."

Although that case involved the State Racing Commission, it would seem that, by analogy, similar standards would be implied by the Court in reviewing a decision by the Commissioner and Board of Agriculture as to the location of racing meetings.

Very truly yours,

EDWARD W. BROOKE

A license issued to an apprentice plumber shall be renewed on the next May First following the date it was issued.

July 20, 1964.

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

DEAR MRS. SULLIVAN: — In your letter of May 22, 1964, you have asked my opinion concerning the next date when apprentice plumbers are to renew their licenses.

The Board of State Examiners of Plumbers is established under G. L. c. 13, §36. It is the duty of this Board to administer the appropriate sections of G. L. c. 142 dealing with the "Supervision of Plumbing." Included within these duties is that of issuing licenses to those who meet the requisite standards.

Prior to the enactment of St. 1963, c. 431 there were two classifications of licensed plumbers; namely, journeymen and master plumbers. St. 1963, c. 431 amended c. 142 by including a new § 3A which provides for the licensing of apprentice plumbers.

G. L. c. 142, § 3A.

"Every apprentice shall before starting his apprenticeship file an application, accompanied by the appropriate fee, with the examiners, requesting that he be issued an apprentice license. Said application shall be made on a form to be furnished by the examiners, and shall require the applicant to state his age, the date on which he is to commence his apprenticeship, the name and address of his employer, and such other information as the examiners may require. Upon receipt thereof the examiners shall license said applicant as an apprentice and shall forthwith mail to him a certificate to that effect.

"A person may be employed as an apprentice by a master plumber only. An apprentice shall work under the direct supervision of a master plumber or a journeyman. A master plumber may employ one or more apprentices but not more than one apprentice may work under the direct supervision of a master plumber or a journeyman."

Under G. L. c. 142, § 1, an "apprentice is defined as "a person who is learning and working at the business of plumbing under the direct supervision of a master plumber or a journeyman." As a result of this legislation, all those coming within this definition must, after August 27, 1963, the effective date of St. 1963, c. 431, obtain a license as an apprentice plumber.

The licensing process is not without some necessary expenses. For this reason the Legislature saw fit to establish a fee of two dollars for the initial license as well as any subsequent renewal.

G. L. c. 142, § 3.

"The fee for the first license of a master plumber shall be fifteen dollars; for any renewal thereof eight dollars; and for an examination therefore, five dollars .The fee for the first license of a journeyman shall be five dollars; for any renewal thereof three dollars; and for an examination therefor, five dollars. . . ."

In establishing this fee schedule and also in the section setting up the category of apprentice plumber, the Legislature did not in that specific statute provide a date when the first license was to be renewed.

This problem is not without some answer in G. L. c. 142. The amendin sections should, in this context, be read in harmony with the chapter as a whole rather than as a series of unrelated sections. In G. L. c. 142, § 6 the Board of State Examiners of Plumbers is given the power to issue licenses for one year and for their renewal on or before May first of each year.

G. L. c. 142, § 6.

"Licenses and certificates issued by the examiners shall be valid throughout the commonwealth, but shall not be assignable or transferable. The examiners shall forward to the board of health of each town, or to the inspector of buildings having control of the enforcement of regulations relative to plumbing in such town, the names and addresses of all persons in such town to whom such licenses have been granted. Licenses shall be issued for one year and may be renewed annually on or before May first, or, in case of absence, sickness or other disability of the holder, on or before such later date as the examiners may permit, upon payment of the required fee . . . ."

There is no limitation upon the type of licenses to be issued under this section. It would apply with equal cogency to apprentice licenses as it would to journeyman or master licenses.

The establishing of May first of each year as the renewal date for all three categories of plumbing licenses has the attendant benefit of providing a uniform system. This benefit is shared by the agency's clerical force as well as by the licensee himself who will have only one renewal date to remember no matter what license he may hold at any given time.

Having set May first as the renewal date, the problem still remains of ascertaining whether the first license shall be effective for a period less than or in excess of one year. This problem arises because any initial license will be between sucessive May firsts.

The statute states the (G. L. c. 142, § 6) "licenses should be issued for one year." The issuance, in this instance, of a license which would be effective for less than one year would not be in derogation of this section since the power to issue a license for a greater period would include the power to issue the initial license for a shorter period. The converse would not be true since it would mean the exercise of a power greater than that delegated to the Board by the Legislature.

In light of the action which the Legislature has taken in the licensing of plumbers in the Commonwealth, it is my opinion:

1. That any first licenses isuued to apprentice plumbers from April 30, 1963 to August 27, 1963 (the effective date of St. 1963, c. 431), should have been renewed on or before May 1, 1964.

2. That any first licenses issued to apprentice plumber between successive May first shall be renewed on the next May first following the date that it was issued.

3. That the next renewal date for apprentice plumbers is May 1, 1965.

Very truly yours
EDWARD W. BROOKE

The duty of a contractor to pay withholding taxes is not a condition in a contract, but is required by statute, and failure to pay such taxes is not a violation of the contract.

JULY 21, 1964

Re: Malden Survey Company, Inc. and
Eastern Survey and Engineering
Company, Inc.

HON. JAMES D. FITZGERALD, *Commissioner of Public Works.*

DEAR COMMISSIONER: — On May 28, 1964, you requested an opinion from this office relative to proceedings brought by the Attorney General's Office against the above-named corporations.

It is true that the Attorney General's Office, Empolyment Security Division, has initiated criminal proceedings against the named companies for their alleged failure to pay withholding taxes. As a result of these proceedings, arrears are presently being paid to the Commonwealth at a satisfactory rate.

In answer to the remaining questions contained in your letter:

1. There is no provision in the copy of the contract attached to your letter which deals with the company's duty to pay withholding taxes. This duty is required by statute. Gen. Laws (Ter. Ed.) c. 62B. Therefore, the companies have not violated the contract concerned although they may be guilty of statutory violations.

2. The department concerned is of the opinion that these companies have no substantial assets other than contracts with the Commonwealth. They are also satisfied with the companies' arrearage payments. We will ask that your department be promptly advised if the arrearage payments are not satisfactorily maintained.

Thank you for your interest and concern.

Very truly yours,

EDWARD W. BROOKE

The Commonwealth and its departments are not allowed to purchase or contract for purchases except through competitive bidding procedures and under rules and regulations established by the Executive Office for Adminstration and Finance.

HON. JAMES D. FITZGERALD, *Commissioner of Public Works.*

DEAR COMMISSIONER: — You have requested an opinion as to the methods and procedures available to exercise an option to purchase the 1965 and 1966 Official Route Maps from the company originally awarded the contract for the 1964 Official Route Map of Massachusetts. As you have explained, the 1965 and 1966 maps will require revisions and this same company has offered to print the same at a certain price, provided that the Commonwealth exercises an option which has been offered by such company.

The Commonwealth and its departments are not allowed to purchase and contract for purchases except throught competitive bidding procedures and under rules and regulations established by the Executive Office for Administration and Finance. See Gen. Laws (Ter. Ed.) c. 7, § 22, and amendments thereto.

The Executive Office for Administration and Finance of the Commonwealth has duly promulgated rules and regulations regulating purchases. The "Rules and Regulations Governing Purchasing" state as follows:

"6. No supplies, material or other property shall be purchased or contracted for without competition, except it cases of emergency requiring immediate action. . . ."

Our courts have repeatedly held that competitive bidding procedures must be strictly complied with.

Poorvu Construction Co., Inc. v. *Nelson Electric Co., Inc.*
335 Mass. 545, 552
Pacella v. *Metropolitan District Commission*
339 Mass. 338, 342

The fact that a saving may inure to the taxpayers of the Commonwealth as a result of the exercises of this option is irrelevant.

East Side Construction Co. v *Town of Adams,*
329 Mass. 347
Gifford v. *Commissioner of Public Health*
328 Mass. 608

Irrespective of how slight the changes may be in the 1965 and 1966 maps, you would, nevertheless, be purchasing an entirely different product than originally bid for and would, therefore, come within the purview of requiring new bids for this item. Therefore, I have no alternative but to say that the competitive bid procedures must be complied with.

Very truly yours,

EDWARD W. BROOKE

An individual may apply for a position restricted to persons who are not over forty-five years of age until the day that he reaches his forty-sixth birthday.

JULY 29, 1964

HON. W. HENRY FINNEGAN, *Director of Civil Service*

DEAR SIR: — I have received your letter relative to age limitations to be imposed — pursuant to Civil Service Rule #6 — upon applicants for appointment as Supervisors of Attendance in the City of Boston. The Rules in question provides in part that individuals who are "over forty-five years of age" may not apply for service in such positions in the City of Boston. You have requested my opinion as to whether such an applicant remains eligible to apply for examination until his forty-sixth birthday.

The legal meaning of expressions such as "over forty-five years of age" has been a source of contention for a substantial period of time. Similar language is used in connection with the positions of patrolman, fire fighter, state police detective lieutenant inspector, fire inspector, and correction officer. The Supreme Judicial Court has yet to rule on the question, while courts of other jurisdictions have disagreed so completely that it cannot be said that a majority position exists. Likewise, opinions rendered by prior Attorneys General have failed to provide consistent guidelines.

This is a question which must eventually be determined by the Supreme Judicial Court, or settled by clarification of the language of the Rule involved. Lacking such guides, however, I must give to each word of the Rule its common, everyday meaning, and advise that an individual ordinarily is not considered over forty-five years until the day he celebrates his forty-sixth birthday. The words of a statute must be given their plain and ordinary meaning according to approved usage of language.

Johnson's Case, 318 Mass. 741, 747

Unless the contrary appears, statutory words are presumed to be used in their ordinary and natural meaning.

Massachusetts Protective Ass'n. v. *United States,*
114 F. 2d 304, 310-311

Technically speaking, an individual has lived more than forty-five years by the time he reaches his forty-fifth birthday. But in common parlance such a person generally is thought of as forty-five, not as being older. He is not—still referring to ordinary speech—considered to be older than forty-five until the day of his forty-sixth birthday. The public at large does not think of one who has yet to reach his forty-sixth birthday as being over the age of forty-five, and I have no reason to believe that the drafters of the Rule in question intended any other standard of construction be applied.

Such a construction based upon common and ordinary usage has been adopted by the courts of several other states. In *Wilson* v. *Mid-Continent Life Ins. Co. of Oklahoma City,* 159 Okla. 191, 14 P. 2nd 945, the Supreme Court of Oklahoma ruled that the phrase "over the age of sixty-five years", excluding from insurance coverage persons over sixty-five, was inapplicable to individuals who had yet to reach their sixty-sixth birthday, and commented that a fraction of a year should not be considered as relevant to the determination. Likewise, in *Allen* v *Baird,* 268 Ark. 975, 188 S.W.2nd 505, the court held that a person is not "over the age of forty-five years" until the day on which he reaches his forty-sixth birthday.

It must be assumed that the drafters of Civil Service Rule #6 were aware of the common usage of the language which they employed. Had they wished to eliminate applicants who were in their forty-sixth year, they could easily have provided that application be made prior to age forty-five, or have used some other expression which would have carried out their intention. In addition, I can find no compelling reason to

insist that the right to apply for the positions in question be cut off on the forty-fifth rather than the forty-sixth birthday. Such a restriction is recognized as arbitrary at best, and no policy exists which militates against the more liberal construction of the Rule.

Accordingly, it is my considered opinion that an individual may apply for positions restricted to persons who are not over forty-five years of age until the day that he reaches his forty-sixth birthday. In light of the undeniable ambiguity, however, I would strongly recommend revision of Civil Service Rule #6, as well as other rules containing similar provisions, so that there may be clarification of the information to be provided for prospective applicants.

Very truly yours,

EDWARD W. BROOKE

A kennel license is required of veterinary hospitals which only harbor dogs, already licensed, for injuries, illnesses or boarding, as well as those hospitals which breed, raise and board dogs.

JULY 30, 1964.

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

DEAR MRS. SULLIVAN: — You have asked my opinion on behalf of the Board of Registration in Veterinary Medicine whether veterinary hospitals must purchase a kennel license in the State of Massachusetts. You have broken down your inquiry according to the types of hospital involved as follows:

(1) hospitals which neither breed nor raise dogs for sale but only harbor dogs, already licensed by their owners, for injuries, illnesses or boarding;

(2) hospitals which do breed, raise, sell and board dogs.

My answer will similarly deal with each type of hospital separately. Before doing so, however, let me point out that as provided by G. L. c. 140, § 141A, my remarks will not apply to those institutions licensed under c. 49A; i.e., those empowered to use certain animals for purposes of scientific investigation, experiment or instruction.

1. As to those hospitals which merely harbor licensed dogs for injuries, illnesses or boarding, G. L. c. 140, § 136A defines a kennel as:

"one pack or collection of dogs on a single premises, *whether maintained for breeding, boarding, sale, training, hunting or other purposes* and including any shop where dogs are on sale, and also including every pack or collection of more than three dogs three months old or over owned or kept by a person on a single premises, *irrespective of the purpose for which they are maintained.*" (Emphasis supplied.)

Section 137A of that chapter provides in part:

"Every person maintaining a kennel shall have a kennel license. . . . Such license shall be in lieu of any other license for any dog while kept

at such kennel during any portion of the period for which such kennel license is issued."

It seems clear that a veterinary hospital would qualify under the statute as a kennel and must, therefore, purchase a kennel license. The language of the statute is sufficiently strong so as to admit of no exceptions. Even though such an interpretation would appear to require a double licensing for certain dogs, the statute seems to have anticipated this contingency in the above-quoted provision declaring the kennel license to be in lieu of other licenses for the relevant period. Further, the public policy or legislative purpose behind each license requirement —that of an owner for his dog and that of a "kennel" for its canine inhabitants—are sufficiently distinguishable to belie an argument that such dual licensing is illogical or repetitive. It is my opinion that the hospital must purchase a kennel license.

2. This argument is, therefore, even stronger in regard to those hospitals which breed, raise, sell and board dogs. As to this type of hospital, there is no question that a kennel license is required.

Very truly yours,

EDWARD W. BROOKE

While the power to employ apprentices is vested in a master plumber, he is limited in the number of apprentices he may hire by the total number (including himself) of master plumbers and journeymen in his employ.

JULY 31, 1964.

HON. HELEN C. SULLIVAN, *Director of Civil Service and Registration.*

DEAR MRS. SULLIVAN: — You have requested my opinion, on behalf of the Board of State Examiners of Plumbers, on the proper construction of § 3A, par. 2 of c. 431 of the Acts of 1963, which paragraph provides as follows:

"A person may be employed as an apprentice by a master plumber only. An apprentice shall work under the direct supervision of a master pulmber or a journeyman. A master plumber may employ one or more apprentices, but not more than one apprentice may work under the direct supervision of a master plumber or a journeyman."

More specifically, you have asked whether the latter half of the third sentence qualifies the former half so that the number of apprentices shall be limited to the total number of licensed journeymen and master plumbers.

The answer to your question turns on the statutory definitions of the three categories of plumbers involved: master plumbers, journeymen, and apprentices. A master plumber is a plumber "having a regular place of business and who, by himself or journeymen plumbers in his employ, performs plumbing work." (G. L. c. 142, § 1.) A journeyman is defined as "a person who himself does any work in plumbing subject to inspection under any law, ordinance, by-law, rule or regulation." (G. L. c. 142, § 1.) An apprentice is "a person who is learning and working at

the business of plumbing under the direct supervision of a master plumber or a journeyman." (G. L. c. 142, § 1, as amended by c. 431, § 1 of the Acts of 1963.)

From these definitions it is clear that while all master plumbers must be licensed journeymen, all journeymen are *not,* without more, considered master plumbers. There is another relevant distinction to be drawn between journeymen and master plumbers; only the latter may employ apprentices. Such apprentices may, however, work under the direct supervision of either a master plumber or a journeyman. Thus, while the power to employ an apprentice is vested in a master plumber, he is limited in the number of apprentices he may hire by the total number (including himself) of master plumbers and journeymen in his employ.

This interpretation is compelled not only by the wording of the statute but by the general policy behind c. 142. As the Court stated in *Barriere* v. *Depatie,* 219 Mass. 33, 36 (1914):

"Its primary object is the conservation of the public health from the deleterious effects which experience has shown arise from unsanitary and insufficient plumbing work due to the lack of technical knowledge and skill of those who perform it."

Very truly yours,

EDWARD W. BROOKE

The advertising of contraceptive devices or drugs meant for the prevention of pregnancy is clearly prohibited by G. L. c. 272, §§ 20 and 21. "Harmful" or so-called "Caution Drugs", as defined in G. L. c. 94, § 187A, may be prescribed only by physicians, dentists, or veterinarians.

AUGUST 3, 1964.

HON. LOUIS J. ROSSETTI, *Secretary, Board of Registration in Pharmacy.*

DEAR MR. ROSSETTI: — In your letter of May 19, 1964, you have asked my opinion concerning certain legal questions raised by the Board of Registration in Pharmacy. The text of these questions appears below, and they will be answered in the same order in which they were submitted to this office.

"(1) Can contraceptives be advertised? (circular enclosed).
"(2) Has a podiatrist the right to write prescriptions for Dangerous, Legent, or Caution drugs?"

1. The advertising of contraceptive devices or drugs meant for the prevention of pregnancy is clearly prohibited by Mass. G. L. c. 272, §§ 20 and 21.

The constitutionality of these sections has been tested. In *Commonwealth* v. *Allison,* 227 Mass. 57 (1917) the Court held that § 16 of c. 212, now G. L. c. 272, § 20, was a proper exercise of the police power of the state. The companion section, G. L. c. 272, § 21, was held to be constitu-

tionally valid in *Commonwealth* v. *Gardner*, 300 Mass. 372 (1938). The *Gardner* case went to the United States Supreme Court where it was dismissed by that court for want of a substantial Federal question. [See 305 U.S. 559 (1938).] The most recent Supreme Court case, *Poe* v. *Ullman*, 367 U.S. 497 (1961), indicates that the court has not modified its position on this subject.

2. "Harmful" or so-called "Caution Drugs" are defined by statute in G. L. c. 94, § 187A. This same section specifically limits those persons who may issue a prescription for these drugs to "physicians," "dentists," or "veterinarians." No other persons are authorized to write prescriptions for these drugs.

G. L. c. 94, § 187A.

"For the purposes of this section, the term 'harmful drug' shall mean and include any and all drugs upon which the manufacturer or distributor has, in compliance with federal law and regulations, placed the following: — 'Caution—Federal law prohibits dispensing without prescription.' The term 'harmful drug' shall in particular include any derivative, active principal, preparation, compound or mixture of barbituric acid, amphetamines, ergot or any hypnotic or somnifacient drug.

"No person shall sell or offer for sale at retail or dispense or give away any harmful drug to any person other than a physician, dentist or veterinarian, except upon oral or written prescription of a physician, dentist or veterinarian or his expressly authorized representative. No such oral or written prescription for a harmful drug shall be refilled unless the original prescription provides for such refilling or unless such refilling is authorized by the prescriber. Nothing in this paragraph shall be construed to be in conflict with the provisions of the sixth paragraph of this section.

"Whenever a physician, dentist or veterinarian prescribes a harmful drug by an oral prescription, the physician, dentist or veterinarian shall within a period of not more than seven days thereafter deliver a written prescription to the pharmacist to whom said oral prescription was transmitted. Any physician, dentist or veterinarian who violates this provision shall be punished by a fine of not more than twenty-five dollars for each violation.

. . .

"Except as otherwise provided herein, whoever violates any provision of this section or any rule or regulation authorized hereunder shall be punished by a fine of not more than one thousand dollars, or by imprisonment in jail or house of correction for not more than one year or both. . . ."

The term "physician" as used in this section is not without a legislative definition. In an analogous, though not controlling section of the "Narcotic Drugs Laws", G. L. c. 94, § 197, a physician is defined as: "A person authorized by law to practice medicine in the commonwealth." Further, those qualifications requisite to becoming a licensed physician are to be found in G. L. c. 112, § 2. "Chiropody" (podiatry) is defined in a separate section, G. L. c. 112, § 13 and the qualifications necessary to becoming a licensed chiropodist (podiatrist) are to be found in § 14 of

that chapter. The two definitions are not synonymous and a licensed chiropodist may not qualify to practice as a physician within the meaning of G. L. c. 112, § 2.

In the light of this, it is my opinion that a podiatrist is not included within that group of persons authorized by the Legislature to write prescriptions for "harmful drugs" as defined in G. L. c. 94, § 187A.

Very truly yours,

EDWARD W. BROOKE

The Commissioner of Insurance must establish classifications of risks, based on accident involvement, for the ensuing year, and the use of statistics involving only property damage would be discriminatory and therefore inconsistent with the requirements of G. L. c. 175, § 113B. He is not restricted to either a particular source or a particular time to secure the information necessary to carry out the

AUGUST 12, 1964.

HON. C. EUGENE FARNAM, *Commissioner of Insurance.*

DEAR COMMISSIONER FARNAM: — I am in receipt of your letter of July 22, 1964 relative to the effect of Chapter 391 Acts of 1964 amending G. L., c. 175, § 113B. You have requested my opinion on the following questions:

"1. Must the Commissioner of Insurance establish classifications of risks, 'including classifications of risks based on accident involvement' to be used for the year commencing January 1, 1965?

"2. Does the Commissioner of Insurance have the authority to exclude from his determinations 'classifications of risks based on accident involvement' for the year 1965, and thereby make the recent amendment applicable for any year subsequent to 1964 at the discretion of said Commissioner?

"3. Does the portion of the amendment referring to 'based on accident involvement' refer to accidents wherein only personal injuries were involved and for which the motor vehicle liability policies or bonds as defined in Section 34A of Chapter 90 are required to be issued, or does it refer to any accident involved including those which might have resulted only in property damage, and for which there is no requirement of insurance under said Section 34A?

"4. Whereas said amendment was approved on May 15, 1964, and becomes effective 90 days thereafter, August 13, 1964, and prior to the present time the Commissioner of Insurance in the determination of classifications of risks has given consideration to statistics gathered up to ten years prior thereto, and under the present amended section it is intended to create a classification for those who were not involved in any accident and who would pay a 'decreased premium,' may the Commissioner in establishing 'classifications of risks based on accident involvement' use statistics of accidents occurring prior to August 13, 1964, (at a time said Act was not in effect and the public had no notice thereof),

or must he give consideration only to accidents occurring after the effective date of said amendment?"

The pertinent part of G. L., c. 175, § 113B as amended reads:

"The Commissioner shall, annually on or before Sepetmber fifteenth, after due hearing and investigation, fix and establish fair and reasonable classification of risks, including classifications of risks based on accident involvement, and adequate, just reasonable, and non-discriminatory premium charges to be used and charged by companies in connection with the issue or execution of motor vehicle liability policies or bonds, both as defined in section thirty-four of chapter ninety, for the ensuing calendar year or any part thereof."

Chapter 391 Acts of 1964 was passed on May 15, 1964 and will go into effect on August 13, 1964. The Commissioner of Insurance is directed to establish a new classification based on accident involvement and, therefore, must initiate steps to carry out this directive. In the case of *Liberty Mutual Insurance Company* vs. *Acting Commissioner of Insurance,* 265 Mass. 23 (1928), the court stated that:

"It was the duty of the Commissioner each year, on or before September 1, to fix rates for the subsequent year. But it is not mandatory that this should be done within the time stated. . . . The time fixed for establishing rates was directory and not mandatory, otherwise it would be within the power of the Commissioner to defeat the operation of the statute."

The *Liberty Mutual Case,* however, is not controlling with regard to question number one. That case dealt only with the date upon which the rates for the subsequent year must be set—not whether or not a new classification would or would not go into effect in the subsequent year. The language in G. L., c. 175, § 113B, directing the Commissioner of Insurance to establish classifications, including classifications of risks based on accident involvement, is mandatory. If it were merely directory, then the Commissioner of Insurance would have the power to defeat the purpose of the statute. I do not believe that this was the intention of the Legislature. It is therefore, my opinion that you must establish classifications of risks, based on accident involvement, applicable to the calendar year 1965.

In view of the above, the answer to question number two is "no."

In answer to question number three, the Commissioner, in establishing risk classifications, should use only those accidents covered by liability insurance required by G. L., c. 175, § 34A. There is not sufficient correlation between accidents involving only property damage and the risks which individuals present to the compulsory insurance system. Hence, in my opinion, the use of statistics concerning accidents involving only property damage would be discriminatory and therefore not consistent with the requirements of G. L., c. 175, § 113B.

In answer to question number four, the powers and duties of the Commissioner of Insurance relating to the application and enforcement of G. L., c. 175, § 113B are stated in paragraph four of said section. It provides:

"The commissioner may make, and at any time alter or amend, reasonable rules and regulations to facilitate the operation of this section. . . . He may at any time require any company to file with him such data, statistics, schedules, or inforamtion as *he may deem proper or necessary* to enable him to fix and establish . . . fair and reasonable classifications of risks and adequate, just reasonable and non-discriminatory premium charges for such policies or bonds."

In my opinion, the Commissioner is not restricted to either a particular source or a particular time to secure the information necessary to carry out the operation of G. L., c. 175, § 113B. He must, however, establish classifications and rates which are fair, reasonable, and non-discriminatory. The final decision as to the use of statistical data occurring prior to August 13, 1964 lies within the discretion of the Commissioner of Insurance, guided by the principles hereinbefore discussed.

Very truly yours,

EDWARD W. BROOKE

The Board of Registration of Electrologists is empowered to require a physician's assistant, not himself a physician, to be a licensed electrologist in order to perform operations using the electrolysis method.

The Board is not authorized to inspect and regulate such physician's office if one employed therein is practicing electrolysis without a license. However, it is incumbent upon the Board to contact the legal official charged with prosecuting the violator. If such assistant is a licensed electrologist, the Board may regulate the establishment in so far as the work being done there involves the practice of electrolysis by a licensed electrologist.

AUGUST 13, 1964.

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

DEAR MRS. SULLIVAN: — I have your letter requesting, on behalf of the Board of Registration of Electrologists, my opinion on the following questions:

" If a physician employs an assistant, not a physican, who, under his supervision, assists with patients and the assistant is permitted, under his supervision, to remove hair from his patient, using the electrolysis method, can this Board require that such assistant be a licensed electrologist in order to perform this duty?

"2. Is this Board authorized to inspect and regulate the establishment where electrolysis is being practiced if the establishment is the office of a qualified physician registered under the laws of the Commonwealth?

"3. If the answer to question 2 is in the negative, may this Board inspect and regulate such establishment if the work is being performed by a licensed electrologist?

These will be answered in the order in which they have been numbered above.

(1) General Laws, c. 112, §87 provides:

"No person shall engage in the practice of electrolysis or hold himself out as a practitioner of, or being able to practice, electrolysis unless he is duly licensed by the board or is a qualified physician registered under the laws of this commonwealth. Whoever violates any provision of this section shall be punished by a fine of not more than one hundred dollars."

In answer to your first question, it is clear that since the statute provides for no exceptions, the Board may require the physician's assistant to be a licensed electrologist in order to perform this work. The relationship of supervisor and assistant is relevant only to the issue of liability should the patient be injured. Accordingly, I answer your first question in the affirmative.

(2) For the purposes of your second question, I shall assume, although the activity is being done in the office of a qualified and registered physician, the actual hair removal is not being performed by a physician, but by an electrologist who has neglected to procure the necessary certification from the Board of Registration of Electrologists.

General Laws c. 112, § 87EEE-87000 sets out the jurisdiction of the Board of Registration of Electrologists. Where relevant to your second question, this jurisdiction is limited by statute to the licensing, upon application, of a candidate as a qualified electrologist and to the regulation of the places in which such licensee practices electrolysis. Thus, since the Board has no jurisdiction over a person practicing electrolysis without a license, my answer to question number two must be in the negative.

As quoted above, the last sentence of §.§. 87FFF does provide a penalty for the practice of electrolysis without a license. Thus, upon discovery of any such violation, it would of course be incumbent upon the Board to contact the legal official charged with prosecuting the violator.

(3) In my opinion, however, if the work is being performed by a licensed electrologist, albeit in the office of a qualified and registered physician, the Board may regulate the establishment in so far as the work being done there involves the practice of electrolysis by a licensed electrologist. In other words, the Board's jurisdiction would not extend beyond this to the practice of medicine; it would, however, embrace electrolysis wherever such is done by a registered electrologist.

Very truly yours,

EDWARD W. BROOKE

Certificates issued or renewed by the Board of Registration of Electrologists between June 12, 1964, and September 12, 1964, as well as certificates issued or removed between January 1 and June 12 of the year 1964, will upon the effective date of St. 1964, C. 518, automatically receive the new expiration date of August 1, 1965, while licenses issued or renewed between January 1 and July 31, 1965, will be valid until the first day of August, 1967. The Board lacks the authority to charge fees other than those specified by statute.

August 18, 1964.

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

Dear Mrs. Sullivan: — I have received your letter of July 23, 1964 relative to interpretation of c. 518 of the Acts of 1964, which chapter regulates the issuance of certificates by the Board of Registration of Electrologists. You have requested my opinion upon the following five questions:

"1. Will licenses renewed between June 12, 1964 and September 12, 1964, the effective date of the amendment, be valid for a period of two years from date of issue as provided by the present law or on August 1 of the next odd year?

"2. What of licenses issued or renewed from January 1, 1964 to June 12, 1964?

"3. If your answer to question (1) and/or (2) is that these licenses are valid for a period of two years from date of issue, can this Board require the total fee for such licenses when renewed in 1966 although they would be valid only until August 1, 1967?

"4. Can this Board require the total fee for licenses required to be renewed between September 12, 1964 and December 31, 1964?

"5. Will licenses issued or renewed between January 1, 1965 and July 31, 1965 be valid until August 1, 1965 or August 1, 1967?"

Registration of practicing electrologists is currently controlled by G. L. c. 112, § 87GGG, as enacted by St. 1958, c. 625, § 2. The section provides for examination of applicants who meet certain requirements, and for the issuance of a certificate upon passage of such examination. "Such license shall be valid for a period of two years from its date of issue, and may be renewed for a like period upon application therefor on blank forms to be furnished by the board. The fee for each such renewal shall be thirty dollars." Accordingly, the present registration law provides for two-year certificates, which certificates expire automatically two years from the time of issue, irrespective of the particular date.

Chapter 518 of the Acts of 1964 deletes the present § 87GGG and substitutes a new section. Approved on June 12, 1964, the new law becomes effective on September 12, 1964. The new section provides in part as follows:

"Such license shall be valid until August first of the next odd year and may be renewed for a two year period upon application therefor on blank forms to be furnished by the board. The fee for each such

renewal shall be thirty dollars. Any person who has been licensed as a qualified electrologist . . . who fails to renew such license upon its expiry date, may renew the same upon application therefor and payment of the regular renewal fee at any time within two years after said expiry date. . . ."

Apparently one purpose of the new registration law is to establish August first of each odd year as the expiration date for all certificates, regardless of when such certificates may have been issued.

The new Act does not specify with any clarity what its effect is to be upon certicates that have already been issued, and which are scheduled to expire on dates other than the first of August. However, the new Act clearly supersedes the prior registration statute; since one object of the new law is the setting of a uniform expiration date, it is my opinion that the expiration dates determined pursuant to the earlier statutes are thereby nullified, and that all certificates presently outstanding, as well as all to be issued between now and the end of the current calendar year, must—by operation of St. 1964, c. 518—expire upon the first day of August, 1965. Consequently, the time during which outstanding certificates will remain effective will in some cases be shortened, in others lengthened; the General Court without doubt has the authority to affect outstanding licenses in either way.

In light of this construction of the statute in question, I will proceed to consideration of your specific inquiries. License renewals between June 12, 1964 and September 12, 1964, the effective date of the new Act. will admittedly be effected under the authority of the old § 87GGG, since the new section will not have become operative. Technically, therefore, such licenses will at the time they are issued be two-year licenses. But on Septmber 12, at which time the new statute will go into effect, all expiration dates set pursuant to prior legislation will be nullified, and August 1, 1965 will be established as the new expiration date. Likewise, certificates issued or renewed between January 1 and June 12 of this year will, upon the effective date of the new statute, automatically receive the new expiration date of August 1, 1965.

Your third and fourth questions relate to the amount of renewal fees to be imposed by the Board. Because of the change of expiration date, licenses issued or renewed at this time will be quite short in duration, remaining effective only until August 1, 1965. You have inquired whether the Board must demand the entire fee specified in the statute for certificates of such short standing.

The Act provides that each application for an original certificate shall be accompanied by a fee of twenty-five dollars, and that the fee for each renewal shall be thirty dollars. Presumably, the drafters of the Act were aware that the imposition of a new general expiration date would necessitate the issuance of certificates of different durations. Had the Legislature desired that fees be calculated pro rata according to the time during which the license would be effective, it could easily have indicated that such was to be the case. Absent such indication, however, the Board lacks the authority to charge fees other than those specified by statute. Should a licensee whose certificate expires in the summer or fall of 1964 object to the fact that payment of the full fee will secure him a certificate

of less than a year's duration, he may take advantage of the right to renew at any time within two years of expiration and delay renewal until January of 1965, at which time a certificate of substantially longer duration will be issued. The licensee, of course, may not lawfully practice during the interim period between expiration and renewal.

The statute provides that licenses "shall be valid until August first of the *next odd year*." (Emphasis supplied.) Use of the word *next* prevents the possibility of expiration of a certificate in the same calendar year in which it is issued. Certificates issued at any time during the calendar year 1965 will expire automatically on August 1, 1967. Accordingly, in response to your fifth question, licenses issued or renewed between January 1 and July 31, 1965 will be valid until the first day of August, 1967.

Very truly yours,

EDWARD W. BROOKE

Where money is expended for the administration of the Rehabilitation Commission as a functioning entity to provide vocational rehabilitation services, the primary responsibility rests with the Commissioner of Rehabilitation to see that the funds are correctly applied to this purpose. However, the Advisory Council is not relieved of its duty to explore possible methods by which these funds might be used more properly. The Commissioner may at times, rely wholly upon the wisdom and knowledge of the Council and at others, the exigency of the occasion may call for immediate action on the part of the Commissioner without being able to seek the prior advice of the Council.

AUGUST 18, 1964.

DR. AUGUSTUS THORNDIKE, *Chairman, Advisory Council, Massachusetts Rehabilitation Commission.*

DEAR DR. THORNDIKE: — You have asked my opinion concerning the statutory organization of the Massachusetts Rehabilitation Commission created by authority of St. 1956, c. 602. In this regard, you have posed several specific questions. These questions have been numbered and will be answered in the order in which they appear below.

1. "The Commission 'may expend such state, federal or other funds as are available for the vocational rehabilitation of handicapped persons'. Does this mean that I, as a member, have a direct responsibility in such expenditures, despite the fact that fiscal matters are handled by the commissioner, practically without my knowledge or understanding?

2. " 'The commissioner shall have sole charge with the advice of the advisory council of the supervision and administration of the commission, etc.' Does this mean that the commissioner must have the advice and/or the consent of the council on all important matters of supervision and administration, or only those upon which he seeks advice?

3. " 'The commissioner shall prescribe all rules and regulations relating to the vocational rehabilitation of handicapped persons, etc.'. Does

this overlap the mandate in Section 78 that 'The commission shall provide vocational rehabilitation services directly or through public or private rehabilitation facilities to any handicapped person, etc.'?

4. "Under Section 79 where some detailed powers and duties of the Commission are itemized—is the commissioner himself, with or without the advice and consent of the advisory council, empowered to carry out those powers and duties?

5. "In summary, is the commissioner the executive, agent, or administrator simply of the Commission as a whole or is he, in fact, the single head of the agency, obliged only when he feels the need, to seek the advice of council members. More important, if the latter have the larger responsibilities, may they delegate them to the commissioner under some sort of blanket vote and thus avoid them personally?"

1. The problems of the rehabilitation of the handicapped are not new to the Commonwealth. By St. 1950, c. 767 there was established in the Department of Industrial Accidents a State Rehabilitation Commission. The primary responsibility of that Commission was to study the problems of the handicapped industrial worker and to see that adequate rehabilitation facilities were provided.

Under St. 1952, c. 630, § 1 the provisions setting up the State Rehabilitation Commission were repealed. The functions, as well as the personnel of this Commission, were transferred to a subcommittee of the state board for vocational education which was designated to carry on the work of this Commission.

Shortly thereafter Congress passed an important amendment to the Vocational Rehabilitation Act (29 U.S.C. ch. 4) to provide, through the various state agencies, more extensive and improved vocational rehabilitation services. In response to this federal legislation, the Legislature again reorganized the vocational rehabilitation program. In accordance with St. 1956, c. 602 there was established a Massachusetts Rehabilitation Commission and an Industrial Rehabilitation Board. The scope of the Industrial Accident Rehabilitation Board is limited to the problems of vocational rehabilitation as they arise in the field of workmen's compensation; whereas, the Massachusetts Rehabilitation Commission is charged with the overall responsibility of providing comprehensive services to those in need of vocational rehabilitation.

The Commission is made up of a Commissioner and an Advisory Council. In carrying out its duties in regard to the vocational rehabilitation of the handicapped, it has been authorized by statute to "expend such state, federal or other funds as are available for the vocational rehabilitation of handicapped persons."

G. L. c. 6, § 74

"There shall be a commission on the vocational rehabilitation of handicapped persons to be known as the Massachusetts rehabilitation commission, in this section and in sections seventy-five to eighty-four, inclusive, called the commission, consisting of a commissioner of rehabilitation and an advisory council of eleven members as hereinafter described. The commission shall co-operate with the United States Department of Health,

Education, and Welfare or its successors in the administration of Public Law 565 (83rd Congress, 2nd Session 1954), and amendments thereto, relating to the vocational rehabilitation of handicapped persons, and may expend such state, federal or other funds as are available for the vocational rehabilitation of handicapped persons.

In the following section (G. L. c. 6, § 75) the Legislature has spelled out the dominant role of the Commissioner in the organization of the Commission. Section 75 specifically states that, "The Commissioner shall have sole charge with the advice of the advisory council of the supervision and administration of the commission and of the vocational rehabilitation of all handicapped persons, except the blind." It is clear from this section that where money is expended for the administration of the Commission as a functioning entity to provide vocational rehabilitation services for the handicapped, then the primary responsibility rests with the Commissioner to see that these funds are correctly applied to this purpose. This, however, does not relieve the advisory council of its duty to explore possible methods by which these funds might be used more profitably.

In this regard, a section of the Annual Report of the Commission [G. L. c. 6, § 79 (f)] should include a part edited by the advisory council outlining to the general court more appropriate means for expanding available funds.

2. The words "advice and consent" when used in a context such as this in the General Laws has a definite and precise meaning. This phrase is used quite extensively in connection with the Governor and the Executive Council, and as such has taken on a definite meaning. A case discussing the meaning and the effect of these words is *Murphy* v. *Casey,* 300 Mass. 232 (1938). Though the facts of that case are not similar to the present problem, the case is precedent for the proposition that where the necessary consent is withheld any proposed action is ineffective.

In G. L. c. 6, § 75 th Legislature did not see fit to make the Commissioner's actions subject to the "advice and consent" of the council. This section states that the Commissioner's shall act "with the advice of the advisory council." The council is described as serving in an advisory capacity not only in section 74 establishing the Massachusetts Rehabilitation Commission but in section 76 as well which provides for those persons who shall be members of the advisory council.

In the plain words of the statute the function of the council is to advise the Commissioner. The word "advice" here means that the advisory council is to aid the Commisisoner in devising the best possible vocational rehabilitation program for the handicapped. Sometimes the exigency of the occasion may call for immediate action on the part of the Commissioner without being able to seek the prior advice of the council. On other occasions the Commissioner may rely wholly upon the wisdom and knowledge of the council.

That the advisory council was not given an effective veto over the Commissioner's administration of the Commission does not mean that the council has any less responsibility to those handicapped persons in

need of vocational training. The problem is immense and needs the concerted effort of both the advisory council and the Commissioner.

3. One of the responsibilities which has been assigned to the Commissioner under G. L. c. 6, § 75 is that of promulgating rules and regulations. These rules and regulations must have the approval of the Governor and Council.

G. L. c. 6, § 75

"The Commissioner of rehabilitation shall be appointed by the governor with the advice and consent of the council for a term of six years and until his successor is duly appointed and qualified. He may be removed from office by the governor with the consent of the council. He shall receive such salary, not exceeding thirteen thousand dollars, as the governor and council may determine, and shall devote his full time during business hours to the duties of his office. The commissioner shall have sole charge with the advice of the advisory council of the supervision and administration of the commission and of the vocational rehabilitation of handicapped persons, except the blind. The commissioner shall, with the approval of the governor and council, prescribe all rules and regulations relating to the vocational rehabilitation of handicapped persons. He may establish such divisions and with the approval of the governor and council, may appoint such directors as he deems necessary, and such assistants and consultants as may from time to time be necessary to enable him to perform his duties."

In this section no mention was made of the specific areas to be regulated by the Commissioner. In G. L. c. 6, § 78 the Legislature noted with particular concern at least one area which might need immediate attention. This is in regard to providing an orderly method by which services shall be given to those in need of them.

Secondly, as to the overall duty of providing comprehensive services for the handicapped contained in these two sections, G. L. c. 6, §§ 75 and 78, there is no conflict. The Commission, as administered by the Commissioner of Rehabilitation, is to provide these services with the advice of the Advisory Council.

4. and 5. Your last two questions will be answered together. They raise the same problem concerning the powers of the Commissioner and his relationship to the advisory council.

The powers of the Commissioner are clearly set out in G. L. c. 6, § 75. In this section the Commissioner is given "sole charge . . . of the supervision and administration of the commission and of the vocational rehabilitation of all handicapped persons, except the blind." It is clear that the Commissioner enjoys broad powers of control over the work of the Commission. It is hard to conceive of giving the Commissioner much more extensive powers.

In the exercise of these powers the Commissioner is not without some supervision. His initial appointment must be by the Governor with the advice and consent of the Executive Council, and he may be removed by the same procedure. His regulatory and rule making powers are also subject to the approval of the Governor and Council. Furthermore,

an annual report of the activities of the Commission must be made to the General Court.

In G. L. c. 6, § 75 the Commissioner's powers are outlined as well as his relationship to the council. The role of the council is one of giving "advice" to the Commisisoner on the common problem of providing necessary rehabilitation services and facilities. This does not relegate the council to a subordinate role, but sets before it a challenging goal of devising better methods of improving the present system. It does mean, however, that the Commissioner is the chief administrator of the Massachusetts Rehabilitation Commission and as such must follow that policy which he thinks best for the Commission and the Commonwealth as a whole.

As to what work the Commission shall do and the powers which it possesses to accomplish this job, these are specified by statute. Section 79 of Chapter 6 provides a catalog of these powers and duties. This is not a comprehensive list, and other responsibilies of the Commission are to be found in other sections, especially §§ 77, 78, 80, 81, 83. In doing the work of the Commission as outlined by these sections, the power of the Commissioner does not change but is the same as that given to him by the Legislature in section 75. His relationship to the Council is also the same. The Council is to advise the Commissioner.

Very truly yours,

EDWARD W. BROOKE

Use of any representation of the arms or the great seal of the Commonwealth is prohibited only when employed for an advertising or commercial purpose, or where exposed to ridicule or exploited for private gain. In this regard, private companies may lawfully reproduce the registration application forms of the Registry of Motor Vehicles, and may freely imprint the reproduction of the seal of the Commonwealth thereon.

AUGUST 20, 1964.

HON. JAMES R. LAWTON, *Registrar of Motor Vehicles.*

DEAR REGISTRAR LAWTON: — In your letter of June 24, 1964, you requested my opinion on the subject of reproduction of registration applications bearing the seal of the Commonwealth. Apparently the Registry has always prepared registration application forms itself, which forms are distributed free of charge to individuals, insurance companies and others who desire them. These forms contain a reproduction of the seal of the Commonwealth imprinted upon them.

Certain insurance companies, brokers and agents have requested permission to prepare the forms themselves, at no cost to the Commonwealth. The form would be identical to those already produced by the Registry, including use of the seal of the Commonwealth, except that carbon paper would be interleaved between sheets. The printing to be done by the

Registry of Motor Vehicles would of course be substantially reduced, and the expenses of the Commonwealth consequently diminished. Accordingly, you have requested my opinion on the following question:

May we allow outside companies to reproduce the registration applications of this agency on which the seal of the Commonwealth is imprinted, these forms to be used as applications for the registration of motor vehicles?

The problem centers entirely upon the proposed use of the seal of the Commonwealth. Such use is governed by the provisions of G. L. c. 264, § 6, which reads in part as follows:

. . . whoever uses any representation of the arms or the great seal of the commonwealth for any advertising or commercial purpose, shall be punished by a fine of not less than ten nor more than one hundred dollars or by imprisonment for not more than one year, or both. . . .

It should be noted that the statute does not contain a blanket prohibition against reproduction of the seal; use of the seal is declared unlawful only where such use is made for an advertising or commercial purpose.

I have examined a copy of the proposed form, and in my opinion the representation of the seal of the Commonwealth reproduced thereon has not been placed there for an advertising or commercial purpose. Efforts have obviously been made to reproduce an exact likeness of the registration forms heretofore used by the Registry of Motor Vehicles. The reproduction of the seal appears next to the reference to the Registry at the side of the form, and slightly above the words "Passenger Registration Application." The seal in no way attracts attention to a particular part of the form, or to the form as a whole. It serves no other purpose than to identify the application form as an official document which will be acted upon by the Registry of Motor Vehicles.

The proposed reproduction upon the application form of the seal of the Commonwealth is necessary in order to duplicate the form currently used by the Registry. Use of the seal does not in the present situation serve to advertise the particular company or agency which prints the form, nor does it produce any other commercial advantage. The seal is not exposed to ridicule, nor is it exploited for private gain. An opinion of a former Attorney General, which considered an earlier version of G. L. c. 264, § 5, contains the following comment:

The purpose of this statute . . . is "to prohibit the misuse of the national and the state flags." It should be interpreted in the light of this purpose with a view to increase respect for our flags and, if possible, not in such a manner as to restrict the proper use of the flags or to reduce the statute to an absurdity. It apparently seeks to prohibit these things, namely, first, insults to the flags; second, their use as a part of any form of advertising, and third, the engraving or printing of a representation of the United States flag upon any article of merchandise or any wrapper or receptacle of articles. 4 *Op. Atty. Gen.*, 1915, p. 470, 471.

The current statute extends the above protection to the seal of the Commonwealth, and should be construed similarly relative thereto. It is not

the purpose of the statute unreasonably to prohibit reproduction of the seal. Where, as in the present instance, the seal is not used for an advertising or commercial purpose, and is not otherwise exploited or degraded, I find nothing to prevent its reproduction.

You refer in your letter to the definition of "application" contained in G. L. c. 90, § 1, which definition reads as follows:

"Application", an application by mail or otherwise to the registrar or any agent designated by him for the purpose, *upon a blank provided by the registrar,* and with which is deposited the fee provided in section thirty-three. . . . [Emphasis supplied]

I do not find that this section imposes any limitation upon the plans for private reproduction of registration application forms. The reference to a blank "provided by the registrar" does not in my opinion require that all application forms actually be supplied by the Registry of Motor Vehicles. The Registrar need only be responsible for assuming that appropriate forms are somehow made available; preparation and distribution by private companies and agencies, assuming that approval of the Registrar has been obtained, clearly complies with the statutory directive.

Accordingly, in light of the above analysis, it is my opinion that private companies may lawfully reproduce the registration application forms of the Registry of Motor Vehicles, and may freely imprint the reproduction of the seal of the Commonwealth thereon.

Very truly yours,

EDWARD W. BROOKE

A married woman dwelling or having her home separate and apart from her husband shall for the purpose of voting and registration therefor be deemed to reside at the place where she dwells or has her home, but her right to vote in her former name shall continue only until January First next following her marriage.

Wives of servicemen accompanying them on foreign station are included within the definition of "federal service personnel", but is required that such persons be qualified to register.

AUGUST 25, 1964.

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

DEAR MR. WHITE: — You have asked my opinion on the following two questions:

1. May a woman living in Hopedale, Massachusetts, at her parents' residence, at which address she was formerly a registered voter in her maiden name, married to a serviceman from New York who has since been sent overseas, vote on November 3, 1964? In other words, has she acquired New York as her domicile, or may she be retained on the voting list in Hopedale? If the latter contingency is correct, may she be registered in her married name?

2. May a woman who was a registered voter in Boston, who is married to a serviceman from Brookline, and who has gone overseas with him, intending to remain for the next two years, avail herself of G. L. c. 54, § 103B and be accorded the same absentee ballot privileges as a non-registered voter that are extended to the soldier himself?

These questions will be answered in the order in which they have been numbered above.

1. It is well settled that upon her marriage, a wife, by operation of law, acquires the domicile of her husband. *Greene* v. *Greene,* 28 Mass. (11 Pick.) 410 (1831); *Mason* v. *Homer,* 105 Mass. 116 (1870); *Rolfe* v. *Walsh,* 318 Mass. 733 (1945). G. L. c. 51, § 1, however, provides a statutory exception to that rule as follows:

A married woman dwelling or having her home separate and apart from her husband shall for the purpose of voting and registration therefor be deemed to reside at the place where she dwells or has her home.

Thus, it is my opinion, in answer to your first question, assuming that the woman in question in fact maintains a home separate from her husband, and assuming further that she has complied with the other requirements of c. 51, § 1, such as age and length of time of residence, may still be retained on the voting list in Hopedale.

It is also my opinion, that under c. 51, § 1, the legislative intent is clear that such a woman be registered in her married name. This opinion is, of course, subject to G. L. c. 51, § 2, which provides as follows:

If the name of a person who is duly registered as a voter is changed by decree of court, or, if a female, by marriage, his or her right to vote in his or her former name shall continue until January first next following. In the case of a person who has qualified for voting for electors of president and vice-president under section one A, his or her right to vote in his or her former name shall continue until the next following election at which such electors are to be chosen.

In other words, if the change of name has occurred within the time period set out in the statute, a person may vote under his former name, if the change of name has occurred beyond such period, the person must be registered under his new name.

2. In answer to your second question, under the aforementioned rule, the woman in question has acquired her husband's Brookline domicile. As you point out, assuming they did not reside in Brookline for six months, the issue now becomes whether G. L. c. 54, § 103B supersedes the six-month registration requirement. In my opinion, such is not possible. G. L. c. 54, §§ 103B-103Q does make provision for absent voting by federal service personnel, and wives of servicemen on foreign station are included within the definition of "federal service personnel" under § 103B. The paragraph in § 103B in which federal service personnel are defined, however, specifically includes the requirement that the persons in question be qualified to register. That paragraph provides as follows:

'Federal service personnel,' persons on active service in the armed forces or merchant marine of the United States . . . and spouses . . . of,

and accompanying or being with, such persons . . . *and having the qualifications entitling them to register in the same election district.* (Emphasis supplied.)

In addition, § 103C provides that only the following are entitled to absentee ballots:

Any legal resident of the commonwealth who is included in the definition of 'federal service personnel' *and whose name is included in the current annual register of voters of any city or town therein or who may be determined to be qualified for voting therein in accordance with § 103J.* (Emphasis supplied.)

Section 103J repeals the residence requirements of c. 51, § 1. Thus, it is my opinion, in answer to your second question, that unless the woman in question has qualified under c. 51, § 1, she may not avail herself of the provisions of c. 51, § 103B-103Q.

Very truly yours,

EDWARD W. BROOKE

The power to renegotiate a unit price of a contract or any part of a contract different from the bid originally submitted militates against the dictated purposes of the bid statute. The awarding authority must comply strictly with the competitive bid statutes.

AUGUST 25, 1964.

Re: Chelmsford—Contract No. 8079 I-495-6 (9)65

HON. JAMES D. FITZGERALD, *Commissioner of Public Works.*

DEAR COMMISSIONER: — By letter dated May 22, 1964, you requested an opinion concerning renegotiation under Article 22 of the *Standard Specifications for Highways and Bridges* of the above-designated contract. Your letter states that because of overruns of quantities, an increased allocation for traffic police, and an extra work order, the amount to be paid to the contractor under the terms of the contract increased from an estimated $1,579,551.00 to $2,027,889.90.

Article 22 of the *Standard Specifications* states in part:

. . . should *alterations* in the plans directly result in an increase or decrease of the quantity of the work to be performed of a value greater than twenty-five (25) per cent of the original value of the contract . . . then either party to the contract, upon demand shall be entitled to a revised contract consideration to be fixed and agreed upon in a written supplementary argument, covering the necessary changes, executed between the contracting parties. [Emphasis supplied]

Division I of the *Standard Specifications* defines an alteration as a "change in the form or character of any of the work done, or to be done." Overruns on quantities and increased allocations for traffic police do not constitute "alterations".

The only remaining item is a claim for extra work amounting to $163,041.34. Because the "alterations" made under this contract do not amount

to 25 per cent of the original value of the contract, there is no occasion to invoke Article 22 to revise or renegotiate any of the items under this contract.

As you have correctly pointed out in your request, the contractor has no claim for compensation other than that specified in the contract for items on which the actual quantities concerned differed from estimated quantities. The amounts provided in the published specifications, Invitation to Bid, and Bid Proposal "are made solely to furnish a basis for the comparison of bids" by the Commonwealth.

The Contractor must satisfy himself by his own investigation and research regarding all conditions affecting the work to be done and labor and material needed, and make his bid in sole reliance thereon.

Standard Specifications, Article 4

The courts have ruled that the contractor is bound by his submitted bid when the work in progress varies from the published specifications. *Benjamin Foster Co.* v. *Commonwealth,* 318 Mass. 190.

An extension of completion time does not entitle the contractor to additional compensation for labor and overhead costs. Article 5A (Bid Prices) states in part:

The price for any item, bid and/or contracted for, unless otherwise noted or specified shall include full compensation for all materials, equipment, tools, labor and incidental work, necessary to complete the item to the satisfaction of the Engineer.

Standard Specifications, Article 5A

The parties must have contemplated that there might be delay in the commencement of the work and they agreed that in that event the petitioner should be given additional time for completion as the engineer should determine was just, but it was specifically provided that the petitioner should have no claim for damages on account of such delay. Such a provision negatives any pecuniary compensation for delay.

Charles I. Hosmer, Inc. v. *Commonwealth,* 302 Mass. 495, 502

You further state that a doubt exists because of a letter to the former Commissioner of the Department of Public Works under date of August 23, 1961, from my predecessor, and a letter dated September 26, 1962, also from his office which touched upon this problem, namely, renegotiation of a bid contract. Having examined both letters, it is my opinion that the ruling given to your predecessor by letter of August 23, 1961, which discussed the question and law pertaining to renegotiation, at length is correct and is a ruling with which to concur.

The power to renegotiate a unit price of a contract or any part of a contract different from the bid originally submitted militates against the dictated purpose of the bid statute, G. L. (Ter. Ed.) c. 29, § 8A. The Supreme Judicial Court of Massachusetts has demonstrated that awarding authorities must comply strictly with the competitive bid statutes. *Poorvu Construction Co.* v. *Nelson Electric Co.,* 335 Mass. 545. That a benefit may accrue to the Commonwealth because of renegotiation is

not grounds for ignoring the bid statute. *Gifford* v. *Commissioner of Public Health,* 328 Mass. 608, 616-617.

Parties to a contract may not, by provisions of Article 22 avoid the consequences of statutory provisions designed to limit and control the authority of public officers to enlarge contracts without complying with statutory requirements. *Morse* v. *Boston,* 253 Mass. 247.

If said Article 22 is to be construed to stand for the principle that a contract may be renegotiated, and the language would indicate that this is so, then this is plainly wrong and steps should be taken to correct this connotation by eliminating Article 22 or revising it so that it may comply with the law.

I submit that this discussion should enable you to dispose of the claims of the contractor under this contract.

The following excerpt in the Opinion from Attorney General Dever to the State Racing Commission dated February 14, 1935, is most pertinent:

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

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

Very truly yours,

EDWARD W. BROOKE

The positions of senior supervision in education, supervisor in education, assistant supervisor in education, organizing extension instructor, university extension instructor and the like, in the Department of Education, are not subject to the civil service laws and rules.

AUGUST 26, 1964.

HON. W. HENRY FINNEGAN, *Director of Civil Service.*

DEAR MR. FINNEGAN: — In your letter of May 20, 1964, you asked my opinion whether certain positions such as senior supervisor in education, supervisor in education, assistant supervisor in education, organizing extension instructor, university extension instructor and the like, in the Department of Education are subject to the provisions of the civil service law and rules.

The Department of Education is organized pursuant to sections one through twenty-eight of Chapter fifteen of the General Laws. The depart-

ment is under the supervision and control of the board of education which is comprised of nine members chosen by the Governor with the advice and consent of the Executive Council. It is the duty of the board to appoint a commissioner of education who is the chief executive and administrator of the department. The commissioner serves in this capacity at the discretion of the board. Under the commissioner are various divisions which specialize in the many varied phases of modern education.

G. L. c. 15, § 4

"Under the direction of the board of education, the commissioner shall be the executive and administrative head of the department. He shall have charge of the administration and enforcement of all laws, rules and regulations which it is the duty of the department to administer and enforce. In the department there shall be a division of library extension, a division of immigration and Americanization, a division of the blind, a division of elementary and secondary education, a division of teachers colleges, a division of university extension, a division of research and statistics, a division of vocational education, a division of special education, a division of teacher certification and placement, and a division of civic education. Each division, except the division of immigration and Americanization, shall be in charge of a director, and each division shall be under the general supervision of the commissioner. Nothing in this chapter shall be construed as affecting the powers and duties of the trustees of the University of Massachusetts as set forth in chapter seventy-five or the powers of the trustees of the Lowell Technological Institute of Massachusetts as set forth in chapter seventy-five A."

The powers and responsibilities of the Department of Education are found in more detail in sections one through thirty-three of Chapter sixty-nine of the General Laws. In carrying out the functions of this department, the commissioner plays a dominant role. One of his most important duties, as well as that of the department as a whole, is seeing that better educational facilities are provided for the Commonwealth. More specifically, the commissioner is charged with the duty of seeing that state funds are properly used by the various state, city and town educational institutions. This duty includes the promulgation of information dealing with better teaching methods as well as information pertaining to the present school or college level.

In carrying out the various functions of his office, the commissioner has a direct responsibility for the success of the Commonwealth's educational progress. As a practical matter, however, the commissioner cannot do everything himself. For this reason, certain subordinate positions were created including those which you have referred to in your letter. This has in no way lessened the responsibility placed upon the commissioner. It means only that certain work must be delegated to individual members of the Department of Education. Ultimately, in doing this work, a member of the department must answer to the commissioner.

The organization of the Department of Education was created by the Legislature. In forming this important department, the Legislature could have made various positions within the department subject to the civil service law and rules. The Legislature made no such provision in Chapter fifteen or in Chapter sixty-nine of the General Laws.

It is interesting to note in this regard that Chapters sixty-nine through seventy-eight of the General Laws provide comprehensive educational facilities for the Commonwealth. The Legislature has in effect established an academic community which within its own tradition has developed high occupational requirements and exceptional standards of excellence.

Turning specifically to Chapter seventy-one of the General Laws, the legislature has provided here the administrative framework for our public schools. This Chapter spells out in detail, among other things, certain subjects which are to be taught in the schools, state subsidies for transportation of pupils, and provision is made as well for the length of the school year. Within this system the Legislature has provided public school teachers with a certain amount of job security independent of the civil service system. A public school teacher which has been summarily discharged has the right of judicial review found in G. L., c. 71, § 43A.

The work of the Department of Education is closely allied with the public schools of the Commonwealth. The Legislature has created a closely knit academic community which exercises for the most part supervision over its own affairs. If the Legislature had seen fit to modify or change this system by placing it within the classified civil service, they could have done so.

No basis for a different conclusion can be found in Chapter thirty-one of the General Laws. In section four of that Chapter there is enumerated a list of those positions which are to be included within the classified civil service. Though this list is not complete, it does shed some light upon the intent of the Legislature. Section four was amended in succession by St. 1958, c. 583, §§ 1, 2 and by St. 1959, c 320, §§ 1, 2. Under the 1959 amendment instructors in three state correctional institutions were placed within the classified civil service. If the Legislature had intended to effect a sweeping change in connection with other educational programs, this would have been an appropriate time to effectuate a change. This, however, was not done.

G. L. c. 31, § 4.

"The following, among others, shall be included within the classified civil service by rules of the commission: —

"Instructors in the Massachusetts Correctional Institution, Walpole, the Massachusetts Correctional Institution, Concord, and the Massachusetts Correctional Institution, Norfolk, and all other employees of said institutions having prisoners under their charge." (amended by St. 1959, c. 320, § 1).

This section also provides that the civil service commission shall exercise rule making power. Any rule made under G. L. c. 31, § 4, must, however, be in conformity with this section. The commission could not assume any power which is not specifically provided for by statute. Any rule which failed to have a statutory basis would be a nullity.

"But one of the exceptions to or qualifications of that doctrine is that the Legislature may delegate to a board or an individual officer the

working out of the details of a policy adopted by the Legislature. *Commonwealth* v. *Hudson,* 315 Mass. 335, 341-342, and cases cited. *Commonwealth* v. *Fox,* 218 Mass. 498, 500. "To deny this [power] would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power and, must, therefore, be a subject of inquiry and determination outside the halls of legislation." *Field* v. *Clark,* 143, U.S. 649, 694. It is on this principle that ordinances and by-laws of municipalities and the regulations of various boards have been upheld. *Brodbine* v. *Revere,* 182 Mass. 598, 600-602. Of course such ordinances or regulations, to be valid, must be within the ambit of the enabling statute." [*Commonwealth* v. *Dias,* 326 Mass. 525, 527 (1950).]

In light of the measures enacted by the legislature, it is my opinion that the positions in the Department of Education which you have described in your letter of May 20, 1964 are not subject to the civil service law and rules.

Very truly yours,

EDWARD W. BROOKE

A bowling alley shall be classified as a "place of assembly" rather than as a "public hall" in accordance with the provisions of G. L. c. 143.

SEPTEMBER 2, 1964.

HON. ROBERT W. MACDONALD, *Commissioner of Public Safety.*

DEAR COMMISSIONER MACDONALD: — You have asked whether, in my opinion, the definition of a "public hall" in G. L. c. 143, § 1 includes within its scope all places of assembly with a capacity of more than four hundred (400). You inquire specifically whether a bowling alley with a capacity of four hundred and fifty (450) is to be so included.

Pursuant to the regulation of safety facilities, the said c. 143 sets up a classification scheme for certain structures within the Commonwealth. The key factors in this scheme are usage and seating capacity. Thus, a "place of assembly" is defined as:

"any building designed, constructed, reconstructed, remodeled, altered, used, or intended to be used, for fifty or more persons to assemble therein for any of the following: — . . . *any room or space used for . . . billiard, pool, bowling and table tennis rooms. . . .*" (Emphasis supplied.)

A "public hall" is defined as:

"any building or part thereof, except theatres, churches and schools, containing an assembly hall with a seating capacity of more than four hundred and used for public gatherings and for such entertainments, not requiring the use of scenery and other stage appliances, as the licensing officer may approve."

In my opinion, a bowling alley should be classified as a "place of assembly," rather than as a "public hall." The statute is clear that the word "capacity" refers to seating capacity and not to capacity in terms

of net floor area. Accordingly, it is my opinion that the definition of "place of assembly," referring specifically as it does to bowling, is the controlling language.

Very truly yours,

EDWARD W. BROOKE

A licensed drug store may sublease an area within the establishment to a sublessee who would deal exclusively within the fountain area.

An alien applicant for registration as a Pharmacist must offer evidence of his actual and timely filing of a Declaration of Intention to become a citizen of the United States, otherwise, the Board of Registration would not have the right to grant a certificate.

SEPTEMBER 2, 1964.

HON. LOUIS J. ROSSETTI, *Secretary, Board of Registration in Pharmacy.*

DEAR MR. ROSSETTI: — You have asked my opinion on the following two questions:

"1. Can a Massachusetts licensed drug store sub-lease the fountain area?

"2. On June 22 and 23, 1964 an alien was examined for registration as a Pharmacist, and passed the examination. He did not file his Declaration of Intention to become a citizen of the United States with the Board until July 23, 1964. Does the Board have the right to grant him a Certificate of Registration?"

These questions will be answered in the order in which they have been numbered above.

Pursuant to your first inquiry, I shall assume that the sublessee in question does not have a license to operate as a drug store. General Laws c. 112, § 38 provides in part:

"No store shall be kept open for the transaction of the retail drug business, or be advertised or represented as transacting such business, by means of any sign or advertisement containing the words 'drug store,' 'pharmacy', 'apothecary', 'drug', 'drugs', 'medicine shop', or any combination of such words, or otherwise, unless it is registered with, and a permit therefor has been issued by, the board. . . ."

Section 39 of said c. 112 provides for the registration of such stores if the "management of the drug business in such store is in the hands of a registered pharmacist."

It seems clear that the intent of the Legislature in creating such a licensing requirement was to regulate the sale of medicines and other drugs. Assuming that the sublessee to whom you refer will be dealing exclusively within the fountain area, I see no objection to allowing a licensed drug store to sublease that area to an unlicensed lessee.

Turning to your second question, G. L. c. 112, § 24 provides in part:

"No certificate [of registration] shall be granted under this section unless the applicant shall have submitted evidence satisfactory to the board that he is a citizen of the United States; provided, however, that an alien may be examined by the board if he first offers evidence which is satisfactory to said board that he has filed his declaration of intention to become a citizen of the United States, and a certificate may be granted if he passes such examination. In case such applicant is subsequently registered, his certificate of registration shall be revoked and his registration cancelled, unless he shall present to the board, within five years following the issuance of said certificate, his naturalization papers showing that he is a citizen of the United States."

Given this language, it would seem clear that two courses of action are open to the Board. If the applicant in question had offered evidence "satisfactory" to the Board that he had seasonably filed his Declaration of Intention to become an American citizen with the proper authorities, the Board would then have the right to grant him a Certificate of Registration. Were the Board to do so, the last sentence of c. 112, § 24, as quoted above, would be operative. Assuming, however, that the applicant in question had not offered such evidence of his actual and timely filing of the Declaration of Intention, in my opinion, the Board would not have the right to grant the certificate.

Very truly yours,

EDWARD W. BROOKE

The Commonwealth cannot impose criminal penalties upon lottery activities conducted entirely within the State of New Hampshire. The so-called "acknowledgement of purchase" issued in connection with the New Hampshire Sweepstakes is not a lottery ticket as specified in G. L. c. 271, §§ 7 and 9, nor is it considered "apparatus or device" under § 17 of said chapter. Section 17 is not applicable to a casual arrangement whereby an individual may volunteer to purchase a chance on the Sweepstakes for a friend, but said section can be invoked against a professional gambler who sets up a place of business or has records and apparatus in his possession which enable him to deal in and profit by such transactions.

Money or other prizes won in lottery activities conducted entirely in New Hampshire do not fall within the purview of § 14 of c. 217 and are not subject to forfeiture.

SEPTEMBER 9, 1964.

HONORABLE ROBERT W. MACDONALD, *Commissioner of Public Safety.*

DEAR COMMISSIONER MACDONALD: — Your predecessor has requested my opinion relative to certain problems posed by the recently authorized New Hampshire Sweepstakes.

The New Hampshire Sweepstakes program became law in that state during the summer of 1963.

Since the laws of the Commonwealth of Massachusetts do not permit the functioning of a sweepstakes or any other lottery, the operation of a sweepstakes in a neighboring state like New Hampshire could cause reciprocal law enforcement problems of unusual complexity.

You have called to my attention the fact that participants in the New Hampshire Sweepstakes do not receive and keep in their possession a lottery ticket, as such. The purchaser receives only what is referred to as an "acknowledgment of purchase," a form of receipt which need not be presented in order to collect winnings. The lottery ticket, as such, which contains the name and address of the purchaser, remains in New Hampshire. This somewhat unorthodox practice presents subtle problems to law enforcement officials. Both statutory construction and a determination of legislative intent are involved.

To clarify the Massachusetts lottery laws and the legal impact of the New Hampshire Sweepstakes on Massachusetts, you have requested my opinion on five specific questions. I will answer your inquiries in the order presented.

Our Legislature has spelled out in great detail both its opposition to the operation of lotteries and other gambling devices in the Commonwealth and its opposition to the participation in such by Massachusetts citizens. (See Chapter 271 of the General Laws).

The New Hampshire Sweepstakes without question conforms to the definition of a lottery provided by our Supreme Judicial Court. "The essential elements of a lottery are the payment of a price and the possibility of winning a prize, depending upon hazard or chance."

Commonwealth v. *Rivers,* 323 Mass. 379, 381
Commonwealth v. *Lake,* 317 Mass. 264, 267

Yet, the Commonwealth cannot impose Massachusetts criminal law upon the State of New Hampshire. Consequently, it must be pointed out, at the outset, that whatever gambling activities take place entirely within New Hampshire are unaffected by the operation of Chapter 271 of the Massachusetts General Laws. It is equally clear, however, that gambling activities which occur within the Commonwealth of Massachusetts, albeit associated with a lottery legalized under the statutes of another state, are subject to the laws of this Commonwealth. In each instance certain determinations must be made: did the General Court desire to prohibit this particular activity; and, in addition, did such activity actually occur within the Commonwealth, and are Massachusetts laws applicable?

I set forth, below, your questions and my answers thereto:

Q. (1) "Under our existing statutes, is this so-called 'acknowledgment of purchase' a lottery ticket, a share of a ticket, or a writing, certificate, bill, token, or other device, or a share or right in such disposal or offer, as described in Chapter 271, Sections 7 and 9 of the General Laws?"

You have asked whether the so-called "acknowledgment of purchase" given as a form of receipt to participants in the New Hampshire Sweep-

stakes can be construed as being a lottery ticket, share of a ticket, writing, certificate, bill, token or other device as those terms are used in Sections 7 and 9 of Chapter 271 of the General Laws. Section 9 provides as follows:

"Whoever, for himself, or for another, sells or offers for sale or has in his possession with intent to sell or offer for sale, or to exchange or negotiate, or aids or assists in the selling, exchanging, negotiating or disposing of a ticket in such lottery, or a share of a ticket, or any such writing, certificate, bill, token or other device, or a share or right in such disposal or offer, as is mentioned in section 7, shall be punished by a fine of not more than two thousand dollars or by imprisonment for not more than one year."

The "disposal or offer" referred to in Section 7 is the transfer or offer of transfer of money or other property by means of a lottery or other game of chance. Section 9, makes the sale, exchange or other transfer within the Commonwealth of lottery tickets and similar items such as tokens, certificates, etc., a criminal offense. Accordingly, the statute proscribes all such transfers and negotiations and all offers of transfer; furthermore, possession of such items with intent to sell or otherwise transfer them is forbidden.

The statute in question is admittedly a broad one; but sensible law enforcement demands that such a section be construed intelligently. The regulations governing the operation of the New Hampshire Sweepstakes characterize the "acknowledgment of purchase" as entirely without value. The acknowledgment need not be presented in order to win. It need not be retained by the participant. Its transfer is an act of no consequence, since the transferee receives nothing but an acknowledgment that he has purchased a sweepstakes ticket. The ticket itself remains in New Hampshire.

The passing of a New Hampshire Sweepstakes "acknowledgment of purchase" from one person to another has no greater consequence than the passing of a blank piece of paper from one person to another. In enacting the provisions of G. L. c. 271, Sections 7 and 9, the General Court did not, in my opinion, intend to make such activities as the transfer of "an acknowledgment of purchase" a criminal offense.

Section 7 refers to the setting up or promotion of lotteries or other schemes for the distribution of money or property by chance. Section 9 speaks in terms of tickets, tokens, or other writings relating to "such disposal or offer, as is mentioned in section seven" and provides that the sale or other negotiation of such items shall be a criminal offense. The objective of the statute is to prevent traffic in lottery tckets or tokens that have some value, and which actually relate to the lottery in question, in the sense that their possession may be significant to the claim of winnings. The statute was clearly not designed to penalize an essentially meaningless transaction which takes place sometime after the actual entry of the participant into the lottery and which has no practical relationship to the operation of or to the participation in the Sweepstakes.

The delivery or other transfer of the "acknowledgment of purchase" within the Commonwealth cannot in and of itself be considered a crime.

The act of entry into the Sweepstakes took place in New Hampshire; it it legal there. The "acknowledgment of purchase" is delivered to the purchaser of a lottery ticket after the act of entry into the Sweepstakes has been completed. A subsequent transfer of the receipt does not affect the completed transaction. Accordingly, in response to your first inquiry, I advise you that the "acknowledgment of purchase" issued by the State of New Hampshire is not a lottery ticket or other item specified by sections 7 and 9 of Chapter 271.

Q. (2) "Under our existing statutes, would the so-called 'acknowledgment of purchase' be considered to be apparatus, books, or any device for registering bets, or the buying or selling of pools, upon the result of a trial or contest of skill, speed or endurance of man, beast, bird or machine, as described in Chapter 271, Section 17 of the General Laws?"

Turning to the possible inclusion of the so-called "acknowledgment of purchase" within the subject matter treated by Section 17 of Chapter 271, it is my opinion that the acknowledgment issued by New Hampshire is not the type of "apparatus or device" referred to in this paragraph. It is not reasonable to assume that the General Court intended the provisions of Section 17 to apply to what are essentially worthless slips of paper.

Section 17 imposes criminal penalties on those who keep, or who knowingly allow to be used on their premises "apparatus, books or any device, for registering bets, or buying and selling pools, upon the result of a trial or contest of skill, speed or endurance of man, beast, bird or machine, or upon the result of a game, competition, political nomination, appointment, or election." It was enacted in an attempt to cope effectively with the gambling operator or entrepreneur. It is not primarily aimed at the participant. The section authorizes the prosecution of those who actually set up and operate the games. It would be a distortion of the statute to hold that a receipt or a lottery ticket of any kind was the type of apparatus or device which the Legislature describes and proscribes in this Section.

Q. (3) "Would the mere possession of one so-called 'acknowledgment of purchase' be a crime in this Commonwealth, in violation of Chapter 271, Sections 7, 15 or 17 of the General Laws?"

Possession of the "acknowledgment of purchase," or, indeed of any type of ticket or receipt, is not considered a crime in the Commonwealth. Sections 7, 15 and 17, to which you refer in your request, do not relate to questions of possession. Section 7 deals only with the setting up, promoting and administration of lotteries. Section 15 refers to foreign lotteries and their promotion and management. Section 17, discussed above, concerns itself only with apparatus and other devices, and their use by gambling operators.

Possession of a lottery ticket is declared to be a common nuisance under G. L. c. 271, § 20.

"All lottery, policy or pool tickets, slips or checks, memoranda of any combination or other bet, manifold or other policy or pool books or sheets, are hereby declared a common nuisance and the possession there-

of unlawful; and the possession of any such article, or of any other implements, apparatus or materials of any other form of gaming, shall be prima facie evidence of their use, by the persons having them in possession, in the form of gaming in which like articles are commonly used. . . ."

However, in the light of my response to question #1, it is clear that possession of such an "acknowledgment of purchase" cannot be considered either a nuisance under section 20 or a crime under those sections specified in your letter.

Q. (4) "If a person purchases numerous tickets in the State of New Hampshire for others, in their names, and then brings the so-called 'acknowledgments of purchase' back to them in this Commonwealth, has he committed any violaton of Chapter 271, Sections 7, 9, 17 or 22 of the General Laws?"

In your fourth question you pose the problem of an individual who goes to New Hampshire and purchases Sweepstakes chances for others, returning to Massachusetts to distribute the acknowledgments to those individuals in whose names the purchase was made. You ask whether such activity violates the provisions of sections 7, 9, 17 or 22 of Chapter 271.

Sections 7 and 9 should be eliminated from consideration at the outset, for the reasons set forth in my answer to question #1. Since the acknowledgment of purchase" is not a lottery ticket or similar writing, the delivery of the acknowledgment to the individual in whose name a chance has been purchased is not a violation of either of these sections. Likewise, section 22, which prescribes penalties for those who deliver letters, packages or parcels to or from an individual who there is reasonable cause to believe is engaged in the promotion or management of a lottery, is directed at the messenger who services the professional operator, and not at the ordinary traveler who buys a chance or chances on the Sweepstakes.

I would point out, however, that section 17 of Chapter 271 may in certain instances be applicable to the activity discussed in your fourth question. Section 17 provides in part, as follows:

"Whoever keeps . . . apparatus, books or any device, for registering bets, or buying or selling pools, upon the result of a trial or contest of skill, speed or endurance of man, beast, bird or machine, or upon the result of a game, competition, political nomination, appointment or election . . . or . . . registers such bets, or buys or sells such pools . . . , or whoever becomes the custodian or depository for hire, reward, commission or compensation in any manner, of any pools, money, property or thing of value, in any manner staked or bet upon such result, shall be punished by a fine of not more than two thousand dollars or by imprisonment for not more than one year."

It follows that any individual who engages in the registering of bets in particular places upon such contests as are described in Section 17 is subject to the penalties contained in the above section. I, therefore, answer your fourth inquiry in the affirmative insofar as the violations relate to Section 17.

In this case, it is not the passage of the acknowledgment of purchase or other writing from one person to another which is at issue. Section 17 prohibits the actual making or registration of bets in places containing registering apparatus or books. The section is, of course, aimed primarily at the professional gambler or bookmaker whose business it is to place and to record such wagers. Consequently, the keeping of wagering apparatus or books and the holding of money or other property staked upon the result of the enumerated contests, as well as the actual placing or registering of the bets, are included among the prohibitions.

But the registering of wagers as such is not made a criminal offense by section 17. Its effect is to prohibit the keeping of a building or room, or the occupying of any place, with apparatus, books or other devices for the registering of bets, and the actual registering of bets by such keeper, occupant or person present in such a place.

Commonwealth v. *Chagnon,* 330 Mass. 278, 282

Therefore, section 17 does not apply to the casual arrangement by which an individual may volunteer to purchase a chance on the Sweepstakes for a friend. It can be invoked, however, against a professional gambler who sets up a place of business or has records and apparatus in his possession which enable him to deal in and profit by such transactions. Should the activity referred to in question #4 be carried on by persons with the type of apparatus, records and place of business specified in section 17, such activity will constitute a criminal offense under the statute.

Q. (5) "If a Massachusetts resident wins a prize in the New Hampshire Sweepstakes, would the prize money be subject to forfeiture under Chapter 271, Section 14 of the General Laws?"

As to your last inquiry, forfeiture of money or other prizes won in lotteries is provided for by G. L. Chapter 271, Section 14:

"Money or other thing of value drawn as a prize or share thereof in a lottery, and all property disposed of or offered to be disposed of by chance or device under the pretext mentioned in section 7, by an inhabitant of or a resident within the Commonwealth, and all money or other thing of value received by such person by reason of his being the owner or holder of a ticket in a lottery or pretended lottery, or of a share or right in any such scheme of chance or such device, *contrary to this chapter,* shall be forfeited, and may be recovered by an information filed or by an action for money had and received brought by the attorney general or a district attorney in the name and on behalf of the commonwealth." (Emphasis supplied)

The question, therefore, arises as to whether sums won by a Massachusetts resident in the New Hampshire Sweepstakes may be declared forfeit and recovered for the Commonwealth under the provisions of this section.

In order to answer this question, a distinction must be drawn between lottery activities which take place entirely in New Hampshire, and which are, therefore, permissible under the laws of that state, and activities which occur in Massachusetts and which are subject to regulation by

the Commonwealth. Section 14 applies *only to those which occur in Massachusetts.* The General Court specifically refers in the statute, to lotteries and other schemes "contrary to this chapter," thereby expressly excluding a lottery like the New Hampshire Sweepstakes. Money or prizes won pursuant to a violation of any of the sections of Chapter 271 may well be subject to forfeiture; but, it is my opinion that money won in New Hampshire *in a transaction taking place and completed entirely within that state,* does not fall within the purview of Section 14.

Accordingly, I answer your fifth question in the negative.

Very truly yours,

EDWARD W. BROOKE

Pursuant to G. L. c. 112, §§ 87OOO and 87PPP, employees of a manufacturer need not be licensed, excepting technicians authorized by the manufacturer to service equipment after it has left the manufacturer.

In accordance with the provisions of St. 1963, c. 604, § 87PPP, in order to qualify under the "grandfather clause" for a master "Technician License", the applicant must be twenty-one years of age.

SEPTEMBER 11, 1964.

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

DEAR MRS. SULLIVAN: — You have requested my opinion on behalf of the Board of Registration of Radio and Television Technicians on the following questions:

"1. Do the employees of a large manufacturing company have to be licensed if this is their full time position?

"2. Section 87PPP, of the Acts of 1963, Chapter 604, gives the definition of 'master technician' as a person being 21 years of age or over, having at least one year of experience. How does this relate to the 'grandfather clause'?"

These questions will be answered in the order in which they have been numbered above.

Before turning to your specific question, let me point out that the following remarks pertain only to radio and television technicians as defined in G. L. (Ter. Ed.) c. 112, § 87PPP; that is, one who "engages in the business of maintaining or repairing radio or television receivers," and not the persons licensed as electricians under G. L. (Ter. Ed.) c. 141, § 1.

General Laws (Ter. Ed.) c. 112, § 87RRR states that:

"Except as otherwise provided, no person shall engage in the business of or act as a radio and television technician directly or indirectly, unless he is licensed."

Thus, unless specifically exempted, any person who comes within the definition of a "radio and television technician" (G. L. (Ter. Ed.) c. 112, § 87PPP) must be licensed.

The exemption in point is found in G. L. (Ter. Ed.) c. 112, § 87QQQ, which exempts:

". . . any manufacturer of receiving equipment or the component parts thereof, when the service, testing or inspection thereof is performed as a necessary function of the manufacturer."

Obviously, a manufacturing entity does not personally accomplish these tasks. Its employees are the ones who perform the services, testing or inspection. Nor do the employees hold themselves out as radio and television technicians within the meaning of G. L. (Ter. Ed.) c. 112, § 87PPP. Further, the purpose of the statute was to provide protection to unwitting consumers against untrained or unscrupulous repairmen, not to compel employees in manufacturing concerns to purchase a license in order to retain their employment. Thus, I must conclude that employees of a manufacturer need not be licensed. However, I would not include technicians authorized by the manufacturer to service equipment after it has left the manufacturer within this definition.

Section 4 of c. 605 of the Acts of 1963 does not, in my opinion, allow an individual under the age of twenty-one to obtain a master technician license. That section provides for the payment of "the appropriate license fee." It is manifest that the Legislature did not intend to give everyone a master technician license. This section read in conjunction with the mandatory language of G. L. (Ter. Ed.) c. 112, § 87TTT that: "A master technician license shall not be issued to any person under twenty-one years of age," impels the conclusion that in order to qualify under the "grandfather clause" for a master technician license the applicant must be twenty-one years of age.

Very truly yours,

EDWARD W. BROOKE

To fulfill the requirement of a "substantially similar" license, the state in which the traveller is licensed must impose at least those requirements for a license to carry firearms which are imposed by the Commonwealth.

In determining what is an "organized group of firearms collectors", there are many factors to be considered, including, but not necessarily limited to, time of organization, standing in relation to national organizations, membership and attendance at meetings, meeting places and regularity of meetings, and requirements for membership.

SEPTEMBER 11, 1964.

HON. ROBERT W. MACDONALD, *Commissioner of Public Safety.*

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

"1) Under the provisions of this Chapter (447, Acts of 1964) which states in this United States issue a license that is 'substantially similar' to that issued in the commonwealth?

"2) What factors are required to be considered, 'any organized group of firearms collectors . . .'?"

I think the best way to answer your first question is to cite certain prominent examples of states which have substantially similar licensing requirements and set some guidelines to aid you in determining whether other states have "substantially similar" licensing provisions.

The purpose of the statute was to eliminate needless duplication of the licensing of out-of-state residents who come within or pass through the Commonwealth to attend a shooting match or a meeting of firearm collectors, while providing for at least the same standards of licensing as required by the Commonwealth. Thus, to fulfill the requirement of a substantially similar license, the state in which the traveler is licensed must impose at least those requirements for a license to carry firearms which are imposed by Massachusetts.

New York most certainly fulfills this requirement. Article 172, §§ 1896-1904 of the New York Law imposes more stringent standards for a license than does Massachusetts and, thus, any New York firearm licensee qualifies under c. 447 of the Acts of 1964.

Pennsylvania, which has adopted the Uniform Firearms Act, also qualifies. Title 18, § 4628 of the Pennsylvania statutes provides for substantially the same requirements for a firearm licensee as Massachusetts. Therefore, you may accept as substantially similar the license to carry firearms of any state which has adopted the Uniform Firearms Act or like statutes.

I cannot give you a definitive answer to your second question. There are many factors to be considered in determining what is an "organized group of firearms collectors" and do not want to unnecessarily limit your discretion. I might, however, suggest several factors which might influence your decision: how long the organization has been in existence; whether they meet regularly and attract a reputable membership; whether they have a regular meeting place open to the interested public; how they obtain new members; what requirements members need possess, etc. These are not, by any means, exclusive factors which should be considered, but I think they should give some indication of what to look for in order to determine what is a legitimate organization of firearms collectors.

Very truly yours,

EDWARD W. BROOKE

A question designed to allow voters to indicate approval or rejection of a proposed Massachusetts Sweepstakes is properly one of public policy and may lawfully appear on the ballot.

SEPTEMBER 15, 1964.

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

DEAR MR. WHITE: — I have received your letter of September 8, 1964 requesting my determination pursuant to section 19 of chapter 53 of the

General Laws whether a particular question filed with your office on September 4, 1964 may properly be considered a question of public policy. The said G. L. c. 53, § 19 provides in part as follows:

"On an application signed by twelve hundred voters in any senatorial district, or by two hundred voters in any representative district, asking for the submission to the voters of that senatorial or representative district of any question of instructions to the senator or representatives from that district, and stating the substance thereof, the attorney general shall upon request of the state secretary determine whether or not such question is one of public policy, and if such question is determined to be one of public policy, the state secretary and the attorney general shall draft it in such simple unequivocal and adequate form as shall be deemed best suited for presentation upon the ballot. . . ."

The appropriate number of qualified voters of the Commonwealth of Massachusetts have submitted a question of public policy to be voted upon in the First Essex Representative District at the State Election to be held on November 3, 1964. The question is designed to allow the voters to indicate their approval or rejection of a proposed Massachusetts Sweepstakes, "the exact nature of which shall be determined by the General Court and which shall in general provide that, after expenses, the remaining receipts shall be divided equally with approximately 50% of the remainder to be allotted for prize money and the remaining 50% to be distributed to the Cities and Towns of the Commonwealth for aid to Education and the relief of Real Estate Taxes."

I rule that such a question is properly one of public policy, and may lawfully appear on the ballot. In accordance with the provisions of G. L. c. 53, § 19, I am including the following statement of the measure for use upon the November ballot.

Statement

Shall the Representative from this District be instructed to vote to approve the passage of a measure providing for a Massachusetts Sweepstakes, its exact nature to be determined by the General Court, with half of the receipts after payment of expenses to be distributed as prize money, and half to be distributed to the Cities and Towns of the Commonwealth for aid to education and for reduction of real estate taxes?

I trust that the above will be sufficient. Should you have further questions with respect to the placing of this measure on the November ballot, please do not hesitate to contact this Department.

Very truly yours,

EDWARD W. BROOKE

Time which is to be counted in determining the end of a probationary period is the time the probationer has actually worked and payment of vacation time, during which duties were not actually performed, will not extend the employment beyond the date of its actual termination.

SEPTEMBER 22, 1964.

HON. JAMES R. LAWTON, *Registrar of Motor Vehicles.*

DEAR SIR: — You have requested my opinion as to:

"Whether payment of vacation time will extend the employment of a probationary employee beyond the date of termination of his services?"

It is my understanding that services of the employee in question were terminated three days before completion of his six month probationary period. General Laws (Ter. Ed.) Chapter 31, § 20D, added by chapter 703, § 2 of the Acts of 1945, requires that:

". . . no person . . . shall be regarded as holding office or employment therein until after he has *actually performed* the duties of the office or position for a probationary period of six months." (emphasis supplied)

Thus, unless expressly provided otherwise, the time which is counted in determining the end of the probationary period is the time the probationer has actually worked.

Inasmuch as the vacation period, for which the employee is entitled to receive compensation, does not represent time within which duties were "actually performed," it is my opinion that payment of such vacation time will not extend the employment of the subject beyond the date of his actual termination nor beyond the six months probationary period. I therefore answer your question in the negative.

Very truly yours,

EDWARD W. BROOKE

There is no constitutional objection to the Massachusetts Rehabilitation Commission's purchase of equipment to be used by a private non-profit organization whereby the welfare of the general public would be promoted, provided the equipment is kept under exclusive control of the public through such Commission.

SEPTEMBER 22, 1964.

HON. FRANCIS A. HARDING, *Commissioner of Rehabilitation, Massachusetts Rehabilitation Commission.*

DEAR COMMISSIONER HARDING: — I am in receipt of your letter of June 22, 1964 in which you request an opinion as to whether it is constitutional for the Massachusetts Rehabilitation Commission to purchase equipment to be used by the Berkshire Rehabilitation Center, a private non-profit organization.

The powers and duties of the Massachusetts Rehabilitation Commission are set forth in Chapter 602 of the Acts of 1956, Section 79.

"The Commission shall have the following powers and duties: (c) It may establish and operate rehabilitation facilities and workshops, may make grants to public and contracts with private, non-profit organizations."

From a reading of said Chapter 602 of the Acts of 1956, it is apparent that the powers of the Commission are broad, with few restrictions. Exclusive of the Constitution of Massachusetts, it would appear that Chapter 602 gives the Commission the power to purchase equipment to be used by a private, non-profit organization, according to a contract arrangement under Section 79 (c).

The only question then is whether Article 46 of the Amendments to the Constitution of Massachusetts prohibits the Massachusetts Rehabilitation Commission from executing a contract with a private, non-profit organization as above stated.

Article 46, Section 2 of the Amendments to the Massachusetts Constitution reads in part as follows:

". . . no grant, appropriation or use of public money or property or loan of public credit shall be made or authorized by the Commonwealth . . . for the purpose of founding, maintaining or aiding any school or institution of learning . . . or any college, infirmary, hospital, institution, or educational, charitable, or religious undertaking which is not publicly owned and under the exclusive order and superintendence of public officers or agents authorized by the Commonwealth or Federal authority. . . ."

The plain intent of this amendment is to require that the expenditure of public money for any educational, charitable or religious undertaking which possesses the requisite public character shall be under exclusive public control.

The Massachusetts Rehabilitation Commission was established and designed to advance the public welfare. In this respect it is a vital agency in the Commonwealth's public health program.

Equipment purchased by the Massachusetts Rehabilitation Commission to be used by a private, non-profit organization under contract would be a benefit to the people of the Commonwealth as distinguished from a benefit to the private, non-profit organization. Under such an agreement, the private, non-profit organization would not be receiving aid or support, inasmuch as the Commission would be directly promoting the general welfare by rehabilitating citizens of the Commonwealth through its own equipment. The crucial and vital point is that the Berkshire Rehabilitation Center would be a conduit in the treatment and care of the citizens of Massachusetts in an area where the Commission has not established nor founded its own facilities. To deny the Berkshire Rehabilitation Center the use of such equipment would be a deprivation to citizens of the Commonwealth needing such treatment and not the Center.

Provided the contract to be entered into between the Massachusetts Rehabilitation Commission and the Berkshire Rehabilitation Center is one which will keep the equipment under exclusive control of the public through its authorized agents on your commission, it must be concluded, and it is my considered opinion, that there is no constitutional objection to such an agreement.

Very truly yours,

EDWARD W. BROOKE

The Department of Public Works must submit profiles to the Board of Project Review and to the municipalities affected prior to the hearings conducted by said Board.

Public hearings are mandatory during the 90-day period, and notice to the chief executive officers of the affected municipalities would constitute proper notice.

The Board could approve a portion of a route and make recommendations consistent with State and Federal requirements, or it may register disapproval of the entire route and may make recommendations subject to such requirement.

The final approval or decision of the Board terminates any further changes in the project except that any approval could include provision for minor essential, unforeseen engineering changes.

SEPTEMBER 28, 1964.

HON. ALFRED R. VOKE, *Chairman, Board of Project Review.*

DEAR CHAIRMAN VOKE: — Receipt is acknowledged of your letter of August 24, 1964 requesting information about authority of the Board of Project Review and answers to the following specific questions:

"1. Does this Board (of Project Review) have the power to approve a portion of a route or recommend other changes?"

The Board may approve a portion of a route or recommend other changes pursuant to c. 822, § 9, Acts of 1963:

"The board of project review . . . shall *approve* or disapprove the project as orginally submitted; provided, however, that the board *may make* such *additional recommendations* consistent with state and federal requirements as it deems appropriate, which if approved by the department (of public works) and the municipalities whose approval is required, shall release funds for the project." (Emphasis added.)

That the power to approve the project includes authority to approve only a portion of the route (or that part lying within a particular city or town) is clear from the definition of "project' 'in said c. 822, § 9:

"For the purpose of this section 'project' shall mean only the route through the particular city or town. . . ."

Exercise of the authority of the Board to recommend changes in a portion of the route lying in a particular city or town must be consistent

with State and Federal requirements. Recommendations must be approved by the Department of Public Works and appropriate interested municipalities.

"2. Can this Board of (Project Review) disapprove the entire route with recommendations of changes?"

The Board has the power to disapprove a "project". It is my opinion that the Board could register disapproval and make recommendations to the Department of Public Works subject to the qualifications noted in the answer to question 1.

"3. Has the State D.P.W. the right to withdraw their proposed route from this Board before the 90-day period?"

Chapter 822, Acts of 1963 provides that the Board "shall approve or disapprove the project as *originally submitted* . . . ." (Emphasis supplied.) The statutory language clearly means that the Board must consider the original project of the Department of Public Works. The Board must approve or disapprove it subject only to the proviso which follows the quoted statutory language in the sixth paragraph of § 9, Chapter 822, Acts of 1963 concerning recommendations by the Board. That proviso is dealt with in the answers to questions 1 and 2. The Legislature intended by the language of the sixth paragraph of § 9, Chapter 822, Acts of 1963 to limit to the Board the initiative for recommending changes in ". . . the project as originally submitted . . ." subject to the limitations set forth in the answer to question 1.

"4. Are Public Hearings mandatory during this 90-day period, and if so, what notice is required?"

Chapter 822, Acts of 1963 provides: "The Board of project review shall hold a hearing in the city or town affeceted by the proposed project . . ." (paragraph 6 of § 9) and "If a project is referred to the board of project review, the board shall give the municipality in which the project is to be located ample opportunity to show why said project should not be approved." (paragraph 8 of § 9). The purposes of Chapter 822, Acts of 1963 are to establish an accelerated highway program and to resolve delaying conflicts arising from objections from certain municipalities. The language of the General Court is mandatory on the matter of hearings. The Board has no alternative. Such hearings would be of a public nature under the provisions of Chapter 274, Acts of 1960. Fulfillment of the provision of paragraph 8, § 9, Chapter 822, Acts of 1963 stating, ". . . the board shall give the municipality in which the project is to be located ample opportunity to show why said project should not be approved" requires giving as much advance notice as possible to a municipality. Notice to the chief executive officer or officers of the municipal government would constitute proper notice "to the municipality."

"5. If this Board approved the D.P.W. Project or route as presented could the D.P.W. move the alignment laterally as much as 400 feet after approval?"

Chapter 822, Acts of 1963 states in § 9 that the decision of the majority of the Board of Project Review ". . . shall be final and binding . ." No

language elsewhere in the statute relates to this question. The plain meaning of the statutory language on this point is that the final approval or decision of the Board terminates any further changes in the project except that any approval could include provision for minor essential, unforeseen engineering changes. However, a change as great as 400 feet could not be subsequently made unilaterally by the Department of Public Works.

"6. At the present time the D.P.W. submits to the cities and towns affected locations. Is it necessary that the D.P.W. also submit profiles at the same time?"

The Courts of the Commonwealth have interpreted the statutory duty of the Department of Public Works under c. 79, § 12 of the General Laws to include the making of profiles or cross-sections to aid in the consideration of land taking damages. The Legislative intent apparent in § 9 of Chapter 822, Acts of 1963 including the specific instruction that "the board shall allow other interested persons and municipalities an opportunity to be heard on the approval or disapproval of the project . . ." make it necessary that the Department of Public Works submit profiles to affected municipalities and to the Board of Project Review prior to the hearings of the Board.

Very truly yours,

EDWARD W. BROOKE

The Department of Public Works may make a land taking for highway maintenance purposes at the same time a taking is made for right-of-way purposes. If maintenance activities undertaken relate directly to the highway projects authorized by the statutes creating Bond Issue Funds, such funds may be used to pay for land taken for maintenance purposes.

SEPTEMBER 28, 1964.

Re: *Taking of Highway Maintenance Area.*

HON. JAMES D. FITZGERALD, *Commissioner of Public Works.*

DEAR SIR: — My opinion has been requested by you on the following questions:

(1) Does the Department of Public Works have the power to make a land taking for highway maintenance purposes at the same time a taking is made for right of way purposes?

(2) Can Bond Issue Funds be used to pay for land takings for highway purposes?

Section 13 of Chapter 81 of the General Laws requires the Department of Public Works to maintain state highways and keep them in good repair and condition.

The Bond Issue authorizations to which you refer provide among other things that the Department of Public Works be authorized and

directed to expend money ". . . for purposes or laying out, construction, re-construction, re-surfacing, relocation or improvement of highways, parkways, bridges, grade crossing eliminations and alteration of crossings at other than grade . . .". The same statutes provide that the cost of the work authorized ". . . shall include all project payments, property damage, expenses for contractors and engineering services including traffic studies, and for all legal and other technical expert services, and incidental expenses . . .". (Chapter 718, Acts of 1956; Chapter 32, Acts of 1958; Chapter 528, Acts of 1960; Chapter 490, Acts of 1961; Chapter 782, Acts of 1962; and Chapter 822, Acts of 1963.)

Chapter 354 of the Acts of 1962 established the Massachusetts Turnpike Authority. It was the subject of an Opinion of the Justices, 330 Mass. 713. In that Opinion the Court held, among other things, that land used for storage of road machinery, towing vehicles, snow plows, sanding equipment, and garages and buildings in connection therewith bear a relationship to the Turnpike similar to that which switch towers, water tanks, roundhouses, and stations bear to a railroad. 330 Mass. 713 at 722. Railroad charters, granting to private railroad corporations authority to take land by eminent domain for the laying out of tracks and establishment of those necessary auxiliary services, have come under examination of the Court in many cases. See citations 330 Mass. 713 at 718, 719. The language of the Supreme Judicial Court in consideration of the Turnpike Enabling Act could be applied as well to the activities of the Department of Public Works in connection with the accelerated highway program and particularly the interstate highway phases thereof. The projects connected therewith must be envisaged as a whole in their larger aspects.

It is my opinion that in addition to the worked portion of the roadway buildings and other structures to house equipment and services properly appurtenant to the construction and maintenance thereof and a reasonable amount of land on which to situate said structures are all needed for the actual construction of highways and must be considered integral parts of them. Land that is taken or acquired for such purposes will clearly be devoted to a public use. 330 Mass. 713 at 723.

The opinion of the Supreme Judicial Court as stated in 330 Mass. 713 indicates clearly that Article 39 of the Amendments to the Constitution of the Commonwealth does not restrict Article 10 of the Declaration of Rights of said Constitution in a manner which would reduce the power of the Legislature to authorize taking of land for the purposes described in the opinion letter. Land taken for such purposes would not be "more land and property than are needed for the actual construction" of the highway. The restrictions of Article 39 of the Amendments to the Constitution of the Commonwealth are inapplicable to the taking of property for activities as directly related to the construction and maintenance of the highway projects authorized in the many Bond Issue statutes. 330 Mass. 713 at 723

It is my opinion that the Department of Public Works may make a land taking for highway maintenance purposes at the same time a taking is made for right of way purposes.

It is my opinion that so-called Bond Issue Funds may be used to pay for land taken for maintenance purposes provided that the maintenance activities undertaken therefrom relate directly to the highway projects authorized by the statutes creating said Bond Issue Funds.

Very truly yours,

EDWARD W. BROOKE

A bachelor of science degree awarded by Boston Universtiy can be considered as a degree granted by a college or university authorized by the General Court to grant a degree of bachelor of science in engineering.

SEPTEMBER 29, 1964.

HON. CHARLES O. BAIRD, JR. *Chairman, Board of Registration of Professional Engineers and Land Surveyors.*

DEAR MR. BAIRD: — In your letter of June 24, 1964, you have asked my opinion whether a bachelor of science degree awarded by Boston University can be considered as a degree granted by a college or university authorized by the General Court to grant a degree of bachelor of science in engineering.

In answering this request reference must by necessity be made to the charter of Boston University. The original charter was granted by the Legislature in 1869. In this charter are contained the powers enjoyed by that corporate body. The specific power to grant degrees is clearly spelled out in that instrument, the pertinent section of which appears below:

St. 1869, c. 322.

"Section 2. The said corporation shall have full power and authority to determine at what times and places their meetings shall be held, and the manner of notifying the trustees to convene at such meeting; and also to establish *boards of instruction in all departments of science and the arts*, to elect a president of said university, and such professors, tutors, instructors and other university officers, as they shall judge for the interest thereof, and to determine the duties, salaries, emoluments, responsibilities and tenures of their respective offices. And the said corporation is further empowered to purchase or erect, and keep in repair, such houses and other buildings as they shall judge necessary for the said university; and also to make and ordain, as occasion may require, reasonable rules, orders and by-laws, not repugnant to the constitution and laws of this commonwealth, with reasonable penalties, for the good government of the said university, and for the regulation of their own body; *and also to determine and regulate the courses of instruction in said university, and to confer degrees; but no degree shall be conferred except upon the recommendation of the appropriate faculty.*" (Emphasis supplied.)

There is no indication that the word "science" appearing in the above section is used in a restricted sense. In this regard the case of *In Re*

Massachusetts General Hospital, 95 Fed. 973, 976 (1899) provides a helpful definition.

"As there is a distinction between philosophy and science, so there may be said to be a distinction between philosophical instruments and scientific instruments. Philosophy has reference 'to the fundamental part of any science', — to 'general principles connected with a science, but not forming part of it.' Science, on the other hand, signifies 'knowledge, coordinated, arranged, and systematized.' It is knowledge 'gained by systematic observation, experiment, and reasoning.' "

Further, the use of "all departments" in and conjunction with "science" indicates a clear intention that a broad interpretation was intended, a definition embracing every phase or field of exact learning and knowledge including engineering.

It is hard to conceive of any broader powers being given to a university. These powers would not in any instance be limited to those branches of science known and discovered at the time of incorporation, but must by necessity embrace an expanding concept — one geared to keep pace with the rapid growth of a modern society.

In light of the action taken by the Legislature, it is my opinion that a bachelor of science degree awarded by Boston University can be considered as a degree granted by a college or university authorized by the General Court to grant a degree of bachelor of science in engineering.

Very truly yours,

EDWARD W. BROOKE

A resident of Rhode Island who is an employee of a Massachusetts firm insured by a company doing workmen's compensation business in the Commonwealth is eligible for vocational rehabilitation services from an insurance company under the provisions of G. L. c. 152, and G. L. c. 6, § 78.

SEPTEMBER 29, 1964.

HON. FRANCIS A. HARDING, *Commissioner, Massachusetts Rehabilitation Commission.*

DEAR COMMISSIONER HARDING: — You have requested my opinion as to the eligibility of a resident of Rhode Island for vocational rehabilitation services from an insurance company under the provisions of G. L. c. 152, §§ 30A-30D. You specify that the individual in question is an employee of a Massachusetts firm insured by an insurance company doing workmen's compensation business in the Commonwealth; that he suffered an industrial accident for which he was compensated; that, upon application to the Rhode Island Division of Vocational Rehabilitation he was declared by them to be eligible for services; that he is no longer receiving compensation and is employed at his old job.

As you point out, under G. L. c. 6, § 78, the Commission is empowered to provide vocational rehabilitation services to a handicapped person:

"(2) who is eligible therefor under the terms of an agreement with any department, division, or sub-division of the commonwealth, with another state, or with the federal government. . . ."

Thus, the question becomes the eligibility in the Commonwealth of the employee in question for unpaid services under G. L. c. 152, § 30B. Paragraph 3 of that section provides in part:

"An insurer or self-insurer shall furnish rehabilitation services by a rehabilitation facility or a physician who, in the opinion of the board, is qualified to render rehabilitation services, and shall also furnish vocational rehabilitation services to any injured worker *eligible for or receiving compensation under the provisions of this chapter* who is determined to be fit and eligible for vocational rehabilitation by the Massachusetts rehabilitation commission. . . ." (Emphasis supplied.)

In my opinion, such an employee is eligible to receive compensation in Massachusetts under this section. The case law is clear that a nonresident, employed under a contract of employment made outside the Commonwealth and injured in the course of his employment while on temporary assignment in Massachusetts may recover under G. L. c. 152. *Bacnel* v. *Springfield Sand and Tile Co.,* 144 F.2nd 65 (1st Cir. 1944); *Lavoie's Case,* 334 Mass. 403 (1956). It is also settled that an employee working under a Massachusetts contract of hire may receive compensation in Massachusetts for an injury sustained while temporarily employed in another case. *Wright's Case,* 291 Mass. 334 (1935); *Bauer's Case,* 314 Mass. 4 (1943). As the Court in *Lavoie's Case* pointed out, the Supreme Court has upheld both of these propositions:

"A State may give compensation under its act both in cases where the contract of hire was made within the State and the injury occurred elsewhere, *Alaska Packers Association* v. *Industrial Accident Commission of California,* 294 U.S. 532, and in cases where the injury was sustained within the State, though the contract of hire was made elsewhere, *Pacific Employers Ins. Co.* v. *Industrial Accident Commission,* 306 U.S. 493. . . ."

This interpretation is strengthened by the provisions of G. L. c. 152. Section 26 of that chapter, dealing with the requirement of a waiver of common law rights of action as a prerequisite to recovery under the Workmen's Compensation Act, speaks of injuries "whether within or without the commonwealth." If compensation may be awarded to an employee injured out of state, it would seem that by analogy, a nonresident, working and injured within the Commonwealth is eligible for compensation under the Massachusetts statute. As pointed out in the cases cited above, the courts have upheld such eligibility. Similarly, in the definitions of c. 152, § 1, an employee is defined as "every person in the service of another under any contract of hire." The list of exceptions in § 1 makes no mention of nonresidents. Read in connection with the above-quoted provision of G. L. c. 6, § 72, it is my opinion that the employee in question is eligible for vocational rehabilitation services.

Very truly yours,

EDWARD W. BROOKE

Any person who advertises a rifle or shotgun for sale by use of "want-ads" is in violation of G. L., c. 140, § 128, if not licensed according to G. L., c. 140, § 122.

"Want-ads", a publication or advertising circular, which publishes such advertisements comes within the exemption provided by G. L. c. 266, § 91, and is not subject to criminal process.

September 29, 1964.

Hon. Robert W. MacDonald, *Commissioner of Public Safety.*

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

"1. Are each of the persons who advertise a rifle or shotgun for sale through this media (the Want-Ads) in violation of c. 140, § 128 of the General Laws if they are not licensed under the provisions of c. 140, § 122?

"2. In that persons reading the Want-Ads might be lead to believe that the persons they are doing business with are properly licensed, what is the responsibility of the Want-Ads under the provisions of c. 266, § 91 of the General Laws?"

General Laws (Ter. Ed.) c. 140, § 120 reads in part:

". . . *any person* who, without being licensed as hereinbefore provided, sells, rents or leases, or exposes for sale, rental or lease, or has in his possession with intent to sell, rent or lease, a firearm, rifle, shotgun or machine gun, . . . shall be punished by imprisonment for not less than six months nor more than two years. . . .' (Emphasis supplied.)

Under this section of the statute, no one may sell or have in his possession firearms for sale, rent or lease, or expose same for such purposes. Clearly, advertising firearms for sale falls within the provisions of this section and anyone who does so may be subject to criminal processes.

I do not believe that Want-Ads, a publication which publishes these advertisements, is liable under the provisions of G. L. (Ter. Ed.) c. 266, § 91. The statute specifically states:

". . . . that this section shall not apply to any owner, publisher, printer, agent or employee of a newspaper or other publication, periodical or circular, or to any agent of the advertiser who in good faith and without knowledge of the falsity or deceptive character thereof publishes, causes to be published, or participates in the publication of such advertisement."

It is my opinion that Want Ads, as an advertising circular, comes within the exemption provided by this section. The onus of the statute falls upon the person placing the advertisement.

Very truly yours,

Edward W. Brooke

A physician may treat a drug addict for his addiction with the use of narcotics whether or not he is afflicted with any other ailment or disease requiring drugs, provided the drugs are prescribed in "good faith" and in "legitimate practice".

September 29, 1964.

Hon. Alfred L. Frechette, M.D., *Commissioner of Public Health.*

Dear Sir: — You have requested my opinion as to whether a physician may treat a drug addict for his addiction with the use of narcotics whether or not he is afflicted with any other ailment or disease requiring drugs.

Since federal law has no influence on this question [*Lindex* v. *United States,* 268 U.S. 5; 45 S. Ct. 446; 69 L. Ed. 819 (1924)]; we need only look to Massachusetts law. The pertinent statute, G. L. (Ter. Ed.) c. 94, § 200, reads, in part:

"A physician or a dentist, in good faith and in the course of his professional practice only, for the alleviation of pain and suffering or for the treatment or alleviation of disease may prescribe, administer and dispense narcotic drugs, or he may cause the same to be administered by a nurse or interne under his direction and supervision."

The Supreme Judicial Court has held that:

"This section was intended merely to make it plain that physicians personally administering narcotics *in good faith and in legitimate practice* should be exempt from a series of penal provisions relative to the sale and distribution of narcotic drugs." (Emphasis supplied.)

King v. *Solomon,* 323 Mass. 329-330 (1948).

Thus, in order to be exempt from the penal provisions of the statute, the physician must prescribe the drugs "in good faith" and "in legitimate practice." Previously, the Legislature had provided specifically that a doctor might not prescribe narcotics to cure his patients' addiction. (St. 1917, c. 275, § 2.) However, by c. 660 of the Acts of 1957, the Legislature rewrote the statute, eliminating this provision, and substituting a provision which required a doctor or hospital treating a narcotics addict to report same within seventy-two hours of the first treatment. [G. L. (Ter. Ed.) c. 94, § 210A.] It would seem, therefore, in view of the legislative history of the statutes dealing with narcotics addiction, that the General Court intended to permit a physician, in good faith, to treat a drug addict with the use of narcotics in an attempt to cure him. The strong policy against permitting narcotics addiction, would, it seems to me, limit a physician's ability to prescribe narcotics only to those cases in which there is an active program to cure such addiction.

On the issue of a physician's good faith in treating a narcotics addict by himself, I feel I should point out that it has always been the policy to closely control the use of narcotics; that it is always open to the jury to decide whether the physician's action was, in fact, done in good faith [*Commonwealth* v. *Noble,* 230 Mass. 83 (1918)]; and that provision has been made by G. L. (Ter. Ed.) c. 123, §80 for the commitment of drug addicts to a hospital for treatment. Thus, although it is my opinion that a physician may legally attempt to cure an addict by prescribing narcotics

within the limitations set forth above, I would strongly urge that he exercise extreme care while his patient remains exposed to some of the factors which contributed to his addiction.

Very truly yours,

EDWARD W. BROOKE

The Act which established the Board of Regional Community Colleges cannot be construed as designed to affect rights secured by c. 30.

The provisions of G. L. c. 30, § 9B, are applicable to maintenance employees of the Board, and such employees are entitled to the safeguards of c. 31, §§ 43, 45, and 46A in the event of attempted removal or other action by the appointing authority affecting their position.

SEPTEMBER 29, 1964.

MRS. LAURETTA L. KELLAHER, *Acting Secretary, Civil Service Commission.*

DEAR MRS. KELLAHER: — I have received your letter dated August 27, 1964, relative to the application of §9B of c. 30 of the General Laws to maintenance employees of the Board of Regional Community Colleges. You have requested my opinion as to whether c. 605 of the Acts of 1958, wherein it is provided that the Massachusetts Board of Regional Community Colleges shall be within the Department of Education "but not subject to its control," has the effect of denying permanent maintenance employees of the Board the protections guaranteed by G. L. c. 30, § 9B. I understand that the question has arisen in connection with the pending appeal to the Civil Service Commission of Mr. Joseph B. Doherty, a fireman-janitor employed by the Board.

General Laws c. 30, § 9B extends certain provisions of the civil service law to particular permanent public employees not otherwise subject to civil service regulation and protection. Section 9B provides in relevant part as follows:

". . . no maintenance employee *permanently employed in any institution under the department of education,* shall, after having actually performed the duties of any office or position continuously for a period of six months in such an institution . . . , be discharged, removed, suspended, laid off, transferred from the latest permanent office or employment held by him without his consent, lowered in rank or compensation, nor shall his office or position be abolished, except for just cause and in the manner provided by sections forty-three and forty-five of chapter thirty-one. The provisions of section forty-six A of said chapter thirty-one shall apply to any person so employed." (Emphasis supplied.)

It is the apparent intent of the General Court that the employees referred to not be removed or otherwise have their positions affected except in accordance with the relevant provisions of the civil service law. The same protection is extended by § 9A of c. 30 to veterans in the unclassified service of the Commonwealth who have held their positions for not less than three years.

Chapter 605 of the Acts of 1958 established the Massachusetts Board of Regional Community Colleges and provided for the creation and operation of the colleges themselves. The said Board was made a part of the Department of Education, but provision was specifically made that it was not to be subject to Department control. A maintenance employee of the Board is—in a technical sense—an employee of an institution within the Department of Education rather than under the said Department.

I do not believe that an employee of the Commonwealth should be deprived of protection against arbitrary action by his appointing authority on the basis of such a distinction. The guarantees of the statute were intended to be broad.

"The protection to veterans under G. L. c. 30, § 9A, and to other public officers and employees under § 9B of that chapter indicates the declared policy of the Commonwealth toward its employees. Such statutes should be liberally construed to carry out the protective measures intended by such acts. . . ."

Op. Atty. Gen., Dec. 31, 1957, p. 39, 40.

The Act which established the Board of Regional Community Colleges cannot be construed as designed to affect rights secured by c. 30. The Act concerns itself almost exclusively with the creation and operation of the Board and of the schools under its jurisdiction. Non-professional employees are mentioned only in passing, and were obviously not an object of the General Court's consideration at that time.

The fact that the employees in question are appointees of the Board rather than of the Department of Education itself in no way affects the above analysis. General Laws c. 30, § 9B refers to employees of institutions under the Department, and it is not limited to employees of the Department as such. Had the Legislature wished to do away with the protections guaranteed by § 9B, it is safe to assume that it would have indicated clearly that such was the case. Absent a more substantial indication than the language contained in the first sentence of St. 1958, c. 605, it cannot be said that the General Court intended to deprive employees of the Board of Regional Community Colleges of protections granted employees of the Department of Education. Accordingly, it is my opinion that the provisions of G. L. c. 30, § 9B are applicable to maintenance employees of the Board, and that such employees are entitled to the safeguards of G. L. c. 31, §§ 43, 45 and 46A in the event of attempted removal or other action by the appointing authority affecting their positions.

Very truly yours,

EDWARD W. BROOKE

In spite of a technical invalidity of a certificate of enrollment, a nomination of a candidate at a primary election must stand since the protester did not avail himself of procedure pursuant to G. L. c. 53, § 11, and the electorate has expressed its will.

SEPTEMBER 30, 1964.

HON. ROBERT J. O'HAYRE, *Chairman, State Ballot Law Commission.*

DEAR MR. O'HAYRE: — I have your request of September 25, 1964, wherein you request my opinion of the validity of the nomination at the recent primary election of a candidate in the Twenty-second Middlesex District for the House of Representatives.

You recite, and the factual material you have submitted indicates, that the candidate was not an enrolled member of the party whose nomination he sought in the primary election for at least one year prior to the last day for filing nominations with the State Secretary as required by c. 53, § 48, as amended by c. 254 of the Acts of 1964.

The said § 48, as amended, in part provides:

"There shall not be printed on the ballot at a state primary the name of any person as a candidate for nomination for any office to be filled by all the voters of the commonwealth, . . . unless a certificate from the registrars of voters of the city or town wherein such person is a registered voter that he is enrolled as a member of the political party whose nomination he seeks is filed with the state secretary on or before the last day herein provided for filing nomination papers. Said registrars shall issue such a certificate forthwith upon request of any such candidate so enrolled or of his authorized representative.

"No such certificate shall be issued to any person who is a candidate for nomination for any such office, if such person has changed his party enrollment less than one year prior to the last day for filing nomination papers with the state secretary as provided by this section."

Inasmuch as your specific question relates to the 1964 amendment, I am constrained to say that your inquiry is one of first impression and with few guidelines set by our Court.

This matter differs in degree with the opinion of the Attorney General of August 19, 1954 in that in the instant case a certificate of party enrollment, on its face in proper form, has been duly filed with the Secretary of the Commonwealth. Accordingly, the placing of the candidate's name on the primary ballot, there being no protests to the nomination papers pursuant to c. 53, §§ 11 and 12, was a necessary and proper function of the Secretary of the Commonwealth.

Section 53A of c. 53 of the General Laws provides that written objections to a nomination at a state primary are subject to §12 of said chapter. It appears that the protest to the nomination of the candidate was timely filed and is properly before your Commission.

The question remains on the matter of law raised by your inquiry. Irrespective of the mandate of § 48 as amended and above quoted, it is clear that the candidate was chosen by the will of the people and to all

intents and purposes at the time of the primary election was properly on the ballot as a candidate for his party's nomination.

The case of *Attorney General* v. *Campbell,* 191 Mass. 497 is close on point and the Court stated at pages 501 and 502 in upholding an election where there had been statutory irregularities prior thereto:

"We are of opinion that, while the provisions as to holding caucuses for the nomination of candidates and as to the filing of nomination papers are binding upon the officers for whose guidance they are intended, they may be disregarded in determining the validity of a subsequent election, if it plainly appears that the will of the majority of the electors is fairly expressed by their ballots."

The certificate of enrollment, effective March 25, 1964, filed with the nomination papers could well have been protested procedurally before the Registrars of Voters of Melrose or before your Commission pursuant to § 11 of c. 53. Since the protester did not avail himself of these steps and the electorate has expressed its will, the nomination must stand in spite of the technical invalidity of the certificate of enrollment.

It is, therefore, my considered opinion that the name of the successful primary nominee may properly remain on the ballot for the coming State election.

Very truly yours,

EDWARD W. BROOKE

Referral selling schemes are illegal in Massachusetts in violation of its lottery laws, specifically, G. L. c. 271, § 6A.

SEPTEMBER 30, 1964.

HON. DERMOT P. SHEA, *Executive Secretary, Consumers' Council.*

DEAR MR. SHEA: — We are in receipt of your letter of August 19, 1964, requesting an opinion concerning the legality of referral selling schemes in Massachusetts.

Referral selling schemes are subject to c. 271, § 6A, entitled, "Endless Chain Transactions Subject to Laws Relative to Lotteries." It reads as follows:

"Whoever sets up or promotes a plan by which goods or anything of value is sold to a person for a consideration and upon the further consideration that the purchaser agrees to secure one or more persons to participate in the plan by respectively making a similar purchase or purchases and in turn agreeing to secure one or more persons likewise to join in the said plan, each purchaser being given the right to secure money, credits, goods or something of value, depending upon the number of persons joining in the plan, shall be held to have set up and promoted a lottery and shall be punished as provided in section seven. The supreme judicial court shall have jurisdiction in equity upon a petition filed by the attorney general to enjoin the further prosecution of any such plan and to appoint receivers to secure and distribute the assets received thereunder."

The language of § 6A indicates a clear intent of the Legislature to make referral selling a lottery and as such a crime against public policy.

The purpose of this statute, other than to avoid the corruption of public morals, is to prevent the citizens of the Commonwealth from being cheated and defrauded.

Recently, the Attorney General of Ohio rendered an opinion ruling that referral selling is a lottery. He stated as follows:

". . . it is my opinion . . . that a plan whereby a dealer agrees to pay a purchaser of an automobile $100.00 upon the purchase of an automobile under the same plan, by any individual whose name was first submitted by said original purchaser, and also to pay to said original purchaser $50.00 upon the purchase of an automobile, under the same plan, by a person whose name is first submitted by such individual referred to, is a lottery. . . ."

I am inclined towards the same view.

Statutes similar to the Massachusetts statute have been enacted in Missouri, Ohio, Arizona, Oklahoma and Indiana; and proposed in New York.

There is a concerted effort in all states to outlaw referral selling schemes.

Accordingly, it is my opinion that referral selling schemes are illegal in Massachusetts in violation of its lottery laws, specifically c. 271, § 6A.

Very truly yours,

EDWARD W. BROOKE

OCTOBER 1, 1964.

The owner of a servient estate retains the use of his lands for all purposes not inconsistent with effectuation of the stated purpose of the easement.

HON. JAMES D. FITZGERALD, *Commissioner of Public Works.*

Re: Opinion on Roughan's Point, Revere Easements.

DEAR COMMISSIONER FITZGERALD: — Reference is made to your request for my opinion concerning the right of the Department of Public Works to:

1. Order removal of the fences located on the black top areas of your 1936 and 1939 easements at Roughan's Point, Revere; and

2. Order removal of the fence built over the sea wall at Roughan's Point, Revere, pursuant to the aforesaid easements.

Your request states that the purposes of the easements were ". . . to construct, repair, inspect, renew, replace and hereafter maintain . . ." rip rap, a sea wall, a jetty and such black fill as was deemed necessary.

Whether or not the fences complained of do in fact interfere with the easements is a matter to be determined by you. The law in such a situation is well established and clear. The owner of a servient estate retains the use of his lands for all purposes except such as are inconsistent with the easement.

Ampagoomian v. *Atamian,* 323 Mass. 319.

Therefore it is my opinion that the owners of the servient estate are entitled to make such use of their land as is not in your determination inconsistent with the right and ability of the Commonwealth to effectuate the stated purposes of the easements.

Very truly yours,

EDWARD W. BROOKE

Acceptance of the nomination is required of a candidate whose name has not appeared upon the state primary ballot, but who has received sufficient write-ins and sticker votes to qualify for nomination. Acceptance filed with the clerk of a municipality is not an acceptance wtihin the meaning of G. L., c. 53, § 3.

"Ineligibility" of a candidate does not result from his failure to file a notice of acceptance after a primary victory.

The action of ward and town committee delegates to fill a vacancy caused by a nominee's failure to file such notice of acceptance is a nullity.

OCTOBER 1, 1964.

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

DEAR MR. WHITE: — I have received your letter of September 28, 1964, relative to the candidacy of one Vincent J. MacDonald for Representative in the General Court from the Eighth Essex District. You have informed me that Mr. MacDonald received a number of write-in and sticker votes in the primary election held on September 10 sufficient to nominate him as a candidate in the general election of November 3. Mr. MacDonald filed no notice of acceptance of the nomination with the Secretary of the Commonwealth, but did notify the City Clerk of Salem on September 10 that he was a sticker candidate for the office in question.

The candidate was apparently informed by your office that his failure to file a notice of acceptance would prevent the printing of his name upon the November ballot. Thereupon, a meeting of ward and town committee members from the district was held—purportedly pursuant to G. L. c. 53, § 14—and Mr. MacDonald was selected as a candidate to fill the vacancy that had been caused.

Accordingly, you have requested my opinion upon the following questions:

"1) Is the acceptance filed with the City Clerk of Salem to be honored as an acceptance of nomination within the meaning of G. L. c. 53, § 3? If not:

"2) Does a meeting of delegates of the ward and town committees in the district possess the right to fill a vacancy for nomination, on the grounds that Mr. McDonald is therefore 'ineligible' within the meaning of G. L. c. 53, § 14?"

Acceptance of nomination is required of candidates whose names have not appeared upon primary ballots, but who have received sufficient write-in and sticker votes to qualify for nomination. Such acceptances are governed by G. L. c. 53, § 3, which provides in part as follows:

"A person whose name is not printed on a state, city or town primary ballot as a candidate for an office, but who receives sufficient votes to nominate him therefor, shall file written acceptance of the nomination in the office of the state secretary within six days, or the city or town clerk within three days, as the case may be, succeeding five o'clock in the afternoon of the day of holding the primaries, otherwise his name shall not be printed on the ballot at the ensuing election. . . ."

Since it is possible that a write-in primary winner may choose not to accept a nomination which he may not have sought, it is essential that the Secretary of the Commonwealth be informed whether such an individual actually intends to run in the general election. A ballot must be printed and distributed, and accordingly the Secretary must know within a short time after the primary election exactly what names are to appear. Mr. MacDonald's letter to the City Clerk of Salem informing him of his sticker candidacy is not a notice of acceptance which meets the requirements of G. L. c. 53, § 3. A municipal clerk may be notified in the case of a city or town election; but a nominee of a state primary must notify the Secretary of the Commonwealth. Therefore, I answer your first question in the negative.

General Laws c. 53, § 14 provides in part:

"If a candidate nominated for a state, city or town office dies before the day of election, or withdraws his name from nomination, *or is found ineligible,* the vacancy, except for city offices where city charters provide otherwise, may be filled by the same political party or persons who made the original nomination, and in the same manner; or, if the time is insufficient therefor, the vacancy may be filled, if the nomination was made by a convention or caucus, in such manner as the convention or caucus may have prescribed, or, if no such provision has been made, by a regularly elected general or executive committee representing the political party or persons who held such convention or caucus. . . ." (Emphasis supplied.)

Delegates from ward and town committees in Mr. MacDonald's district have met—purportedly pursuant to the provision quoted above—to fill the vacancy created by the candidate's failure to file a notice of acceptance.

It cannot be said that Mr. MacDonald was an *ineligible* candidate within the meaning of G. L. c. 53, § 14. Ineligibility implies that an individual could not have held the office which he sought. It may result from failure to meet residence requirements, from lack of citizenship or from other factors. But it does not result from failure to file a notice of acceptance after a primary victory. Mr. MacDonald can lawfully hold

the office of Representative in the General Court. His failure to meet a preliminary requirement will prevent the printing of his name on the ballot, but does not render him ineligible to hold the office within the meaning of G. L. c. 53, § 14. In fact, Mr. MacDonald may still run a sticker and write-in campaign, and—should he win the general election —he will be eligible to hold the seat in question.

The requirement of notice of acceptance would mean little if candidates could ignore it and then be placed on the ballot by action of a committee. It is my opinion that Mr. MacDonald is not an incligible candidate, as that expression is used in the statute, and that the action of the delegates in filling the vacancy is a nullity. Accordingly, I answer your second inquiry in the negative.

Very truly yours,

EDWARD W. BROOKE

A contribution by a state, county or municipal employee to a political committee legally constituted in behalf of incumbent office holders does not violate the provisions of G. L. c. 55, § 13.

OCTOBER 27, 1964.

HON. ALFRED A. GARDNER, *Chairman, Massachusetts Crime Commission.*

DEAR MR. GARDNER: — I have received your letter of October 23, 1964, wherein you refer to the $100 contribution made by you to the current campaign of the incumbent Attorney General. You have requested an advisory opinion as to whether such a contribution violates the provisions of G. L. c. 55, § 13—a section of the so-called "Corrupt Practices Act." This law is an old one. Some of its provisions are ambiguous. Since its provisions affect an enormous number of state, county and municipal officials and employees, it is important that the statute's language, intent and history be carefully examined.

General Laws, Chapter 55, § 13, provides as follows:

"No officer, clerk, or other person in the service of the commonwealth or of any county, city or town *shall, directly or indirectly, give or deliver to an officer, clerk or person in said service,* or to any councillor, member of the general court, alderman, councilman or commissioner, any money or other valuable thing on account of, or to be applied to, the promotion of any political object whatever.

"Nothing in this section shall be construed to prevent any person holding elective public office from contributing to a candidate or to an elected or non-elected political committee.

"Violation of any provision of this section shall be punished by a fine of not less than one hundred nor more than one thousand dollars." (Emphasis supplied.)

The first paragraph of §13, therefore, prohibits the giving of political contributions to certain specified persons in the state, county or municipal service.

The second paragraph, added in 1954, limits the first by providing that any person holding elective public office may lawfully contribute to any candidate or to any elected or non-elected political committee. This is the only reference to a political committee in § 13.

The third paragraph provides a criminal penalty for violation of § 13.

The first paragraph of c. 55, § 13 became law for the first time in 1884, (c. 320, § 9) in substantially its present form.

Political committees, and contributions to such committees, are mentioned in our statutes for the first time some eight years later, in Chapter 416 of the Acts of 1892. That Chapter authorized contributions to political committees, and provided for the selection of a treasurer for every such committee. Accounts of receipts and expenditures were required to be kept and filed. The Legislature did not amend the aforementioned 1884 statute in 1892. It must therefore be assumed that the Legislature did not intend the 1892 law to expand the effect of the earlier statute in any way. Had the General Court intended to prohibit gifts to political committees by a large class of citizens it could have and undoubtedly would have expressly so provided in the 1892 Act, or, in the alternative, by amending the 1884 statute, the precursor of c. 55, § 13.

But, the first paragraph of c. 55, § 13 has now been the law in this Commonwealth for eighty years. At no time has it ever made reference to political committees.

Chapter 55, § 13, the section in question, is part of a more complete statutory framework providing for the regulation of contributions and other political activity. Accordingly, other sections of the Corrupt Practices Act (Chapter 55 of the General Laws) may well aid in the interpretation of § 13.

Section 6 of Chapter 55 regulates receipts and disbursements of political contributions, and provides in part:

". . . any individual may make campaign contributions to candidates or non-elected political committees: provided, that the aggregate of all such contributions for the benefit of any one candidate and the non-elected political committees organized on such candidate's behalf shall not exceed in any one calendar year the sum of three thousand dollars. . . ."

This section was reconsidered by the General Court and amended as recently as the year 1962. Had the Legislature desired to restrict the general authorization of gifts to political committees, such language could easily have been expressly included.

Chapter 55, § 11, which specifically mentions contributions for political purposes of any candidate or of any political committee, prohibits the solicitation or receipt of political contributions by persons in the public service, but exempts from these provisions all elected officers.

Chapter 55, § 14 provides: "No person in the public service shall, for that reason, be under obligation to contribute to any political fund, or to render any political service, and shall not be removed or otherwise prejudiced for refusing to do so." Violation is a criminal offense.

A similar provision protecting officers and employees from retaliation for failure to contribute is to be found in § 15.

The question that must be resolved is whether a state, county or political employee can lawfully make a political contribution to a legally constituted political committee.

In order to resolve this question, it is necessary to determine the legislative intent not only at the time Chapter 55, § 13 was first enacted in 1884, but also at the subsequent times at which this statute has been examined and amended by the General Court.

In my opinion the Legislature, in the sections mentioned above, clearly intended to protect, and did protect, state, county and municipal officers and employees from coercion in so far as the solicitation, contribution and receipt of political funds are concerned. There can be no question that § 13 of c. 55 was written into law to protect public employees from political exploitation including coercion, intimidation, political blackmail or "kickbacks".

The question may well be raised as to what protection the Legislature has provided in so far as possible coercion or intimidation by a public official of state, county or municipal officers or employees in order to compel political contributions to legally constituted political committees is concerned.

The Legislature has considered this problem, and has enacted §§ 14 and 15 of Chapter 55, which sections protect the officer or employee from retaliation for failure to make such political contributions.

It is significant that § 6 of Chapter 55 specifically provides that *any* individual may contribute to a non-elected political committee organized on behalf of a candidate. The language of this section is unqualified, clear and unambiguous.

There are some two hundred two thousand, three hundred (202,300) state, county and municipal employees in Massachusetts as of September, 1964, according to the Massachusetts Division of Employment Security.

If the Legislature had intended to make a special class of these employees—if the Legislature had intended to prohibit campaign contributions from them to legally constituted political committees—it would have written such a prohibition into our law with unmistakable clarity.

The Legislature has not done so. And in my opinion there is a serious question as to the constitutionality of any act which would deny such a right to citizens solely on the basis of employment in the public service.

The first paragraph of § 13 of Chapter 55 restricts gifts "to an officer, clerk or person in said service" only. The paragraph fails to include any reference to gifts to legally constituted political committees. The fact that the second paragraph mentions contributions to political committees demonstrates that the members of the General Court had such committees in mind when considering the statute in 1954, and could easily have included them within the prohibitions of the first paragraph. Failure to do so must be construed as a legislative determination that gifts to political committees were to be exempted from the provisions of

§ 13, Chapter 55.

One section of a law cannot be construed in such a way as to render other equally valid sections meaningless. As has been stated, §§ 14 and 15 of Chapter 55 were written into law with the clear purpose of protecting those in the public service from pressure for contributions by their employers or appointing authorities.

These provisions of law would be manifestly unnecessary were § 13 of Chapter 55 to be interpreted as a blanket prohibiiton against all political gifts by state, county and municipal employees. Rather, it appears that the Legislature intended that certain gifts, such as those to political committees, be permitted, and consequently enacted §§ 14 and 15 of Chapter 55 in order to shield employees from official retaliation for failure to contribute.

Section 13 of Chapter 55 does not prohibit gifts to political committees with the clarity required of a penal statute. I am well aware that the statute states that none of the specified persons shall give directly or indirectly to an officer, clerk or person in said service. The words "directly or indirectly" in my opinion are intended to refer to the mechanics of making the gift. The fact that the Legislature placed the words "directly or indirectly" immediately prior to the words "give or deliver" demonstrates that the former words apply to the act of giving alone. It prohibits state employees from contributing to a public office holder personally or to a public office holder through an intermediary. It is not intended to prohibit the receipt of gifts by political committees which are, by law, required to keep detailed records and to report their receipts and disbursements to the Secretary of the Commonwealth where they become a matter of public record.

Political contributions to political candidates and on behalf of political causes are important to our system of government, providing the opportunity by which the private citizen can exercise his right to work for good and responsible government. Persons in the public service are especially sensitive to the necessity of financial support of the political parties and candidates of their choice.

In my opinion the General Court never intended to enact a law which would make it a criminal offense to contribute to political committees legally constituted in behalf of incumbent office holders, while permitting contributions to all other candidates. It would be arbitrary to make a distinction between gifts made by persons in public service for the purpose of re-electing an incumbent public official, and gifts made by the same employees to the incumbent official's opponent. On the basis of the statutory language I do not find that the General Court has made such a distinction.

Section 13 of Chapter 55 of the General Laws is a penal statute which must be construed strictly. Its provisions cannot be extended by mere implication.

Commonwealth v. *Paccia,* 338 Mass. 4, 6.

Lustwerk v. *Lytrol, Inc.,* 344 Mass. 647, 653.

As our General Court has reviewed, re-studied and amended the Massachusetts Corrupt Practices Act, it has undoubtedly been mindful of the federal government's experience in this field. The so-called "Hatch Act" (U.S.C.A., Title 5, Sect. 118i, et seq.) which has been in effect since 1939 permits federal employees to make voluntary contributions to regularly constituted political organizations.

For the reasons I have set forth at some length I therefore advise you that it is my considered opinion that your contribution of $100 to the political campaign of the incumbent Attorney General is not a violation of Chapter 55, § 13 of the Massachusetts General Laws.

Very truly yours,

EDWARD W. BROOKE

The prior approval of the Governor and of the Department of Education is required where expenses are to be paid for the care of emotionally disturbed children at schools, or like institutions.

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

OCTOBER 29, 1964.

DEAR COMMISSIONER KIERNAN: — In your letter of July 17, 1964, you have asked for my opinion in determining whether, under the provisions of St. 1960, c. 750 (G. L. c. 71, §§ 46H and 46I), Dr. Jacques May is entitled to be reimbursed for expenses incurred in caring for his twin boys at the Parents' School for Atypical Children. The period of care extended from July 1, 1963 to June 30, 1964. In your supplementary letter of October 8, 1964 you state that the commitment of the May children to the school has not received the approval of the department or of the Governor.

Section 46I, Par. 1 of c. 71 of the General Laws reads as follows:

"The department may, upon the request of the parents or guardians and with the approval of the governor, 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."

As I interpret this statute, the *prior* approval of the Governor and of the department is required in any situation where expenses are to be paid for the care of emotionally disturbed children at schools, or like institutions. The statute seems to contemplate that the act of "sending" the child to the institution is to be the act of the department and not of the parents; the words "The department may . . . send" would be

nugatory if parents could be permitted to send children to schools and *then* request reimbursement.

This interpretation of § 461 is strongly reinforced by the second sentence of the first paragraph, which provides that the department may "continue" the education of a child after the expiration of the term for which he has been sent to a school. The use of the word "continue" in this context implies that the original decision to send the child to school was made and approved at an earlier time.

I note that under § 461 the Department of Education and Mental Health are authorized to prescribe regulations implementing the statute. If they have not already been adopted, it seems to me that the adoption of such regulations would be helpful to the parents of disturbed children and all other parties whom this statute affects. The procedure for adopting such regulations is indicated in G. L. c. 30A, §§ 3, 5 and 6.

With respect to Doctor May's request for reimbursement for expenses incurred in the 1963-64 period, I am of the opinion that the department may not approve the request at this time.

Very truly yours,

EDWARD W. BROOKE

The Director of Personnel and Standardization may require information relative to prior experience of proposed appointees under the provisions of G. L., c. 30, § 46(5A).

OCTOBER 29, 1964.

HON. HARRY C. SOLOMON, M.D., *Commissioner of Mental Health.*

DEAR DOCTOR SOLOMON: — In your letter to this office you have asked whether the Director of Personnel and Standardization is correct in requiring certain information pertaining to the recruitment of professional personnel under the provisions of § 46 (5A) of c. 30 of the General Laws. The requirement that this information be furnished was contained in a bulletin dated May 13, 1964 issued by the Bureau of Personnel and Standardization. The bulletin states that no request for a recruitment rate under G. L. c. 30, § 46 can be considered unless it is set forth in a letter to the Director of Personnel and Standardization. This letter is expected to contain the following information relative to the prior experience of the proposed appointee:

"(a) Title of position or positions
(b) Salaries received
(c) Summary of duties of such position or positions
(d) Dates employed in such position or positions
(e) Name and address of each employer".

By St. 1966, c. 729, § 9 the Legislature enacted the present provisions of G. L., c. 30, § 46 (5A). As evidenced by its title, the purpose of this statute as a whole is to ". . . correct existing inequities in the salary pay

plan of the Commonwealth and to systematically and economically reduce [the] time required to reach maximum rate in salary schedule." The text of the section relevant to this opinion appears below:

G. L. c. 30, § 46 (5) and (5A):

"(5) The said director may, with the approval of the commissioner of administration, permit the recruitment of employees at a rate above the minimum, but not exceeding the maximum, of the job group salary range for the class concerned; provided, however, that the said director shall have first determined, upon request of the appointing authority, that an emergency exists due to inability to fill positions. Any such permit shall remain in effect until rescinded by the said director, but shall not be in effect longer than one year unless renewed in like manner and with like approval. Whenever the said director shall permit such recruitment, all employees in the same class, being paid at a rate or rates below such rate of recruitment shall be advanced to the said recruitment rate."

"(5A) The said director shall permit the recruitment of professional personnel at a rate above the minimum and within the grade to which the requested position is allocated upon certification of the appointing authority 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 commonwetalth. For the purposes of this paragraph, professional personnel shall include, but shall not be limited to, registered nurses and persons employed in medical or technical positions in hospitals and clinics, including the administration thereof, persons employed for the instruction of students, and engineers and chemists. Nothing in this section shall be construed to limit the recruitment of personnel under the provisions of section thirteen of chapter seventy-five." (Added by St. 1956, c. 729, § 9.)

It is apparent that the Legislature, in addition to the general purpose discussed above, intended by means of these sections to enable state agencies to attract qualified individuals to fill responsible positions in government service. One criterion used by the Legislature to determine an applicant's experience and qualifications is that the applicant must have served in a position similar to the state job for a period equivalent to that required by the general salary schedule if the employment had been entirely for the Commonwealth.

It seems that, consistent with the purposes of this statute, the Director may require the information which he has requested. Without this information, his duties under G. L. c. 30, § 46 (5A) would be reduced to a purely "ministerial" status in carrying out the orders of a requesting agency. If he could not determine whether the previous experience of the proposed appointee justifies the request to permit the recruitment at a rate above the minimum, there would be little ? ?

(G. L. c. 30, § 46 (5A).

In this regard the bulletin of May 13, 1964 from the Bureau of Personnel and Standardization asks nothing more than that the appointing authority furnish a brief resumé of the facts constituting such a proper appointment under G. L. c. 30, § 46 (5A). Further, on the face of the

bulletin there is no evidence that any other purpose was intended nor does it appear that such a request would burden the orderly conduct of government which many times is seemingly hampered by unnecessary clerical and administrative matters. Such a request is proper.

In light of this, it is my opinion that your office should furnish to the Director of Personnel and Standardization the information which he has requested in the bulletin circulated by that office.

Very truly yours,

EDWARD W. BROOKE

In accordance with the provisions of St. 1957, c. 616, if a building is removed from the flood control area and relocated in a town other than that from which it was removed, there would be a resultant tax loss to the municipality wherein the building was previously situated.

OCTOBER 30, 1964.

HON. MALCOLM E. GRAF, *Director, Division of Water Resources.*

DEAR SIR: — I have received your letter of September 2, 1964, relative to the Thames River Valley Flood Control Commission and the computation of the tax loss with regard to buildings removed from land now owned by the United States. You have requested my opinion on the following questions:

"(1) If the owner retained title to a building which was later removed to a new location, should the building be considered a tax loss?

"(2) If the Government acquired title to land and buildings and later sold the buildings to others for removal to a new site, should the building be considered a tax loss?"

The governing statue, Acts of 1957, c. 616, incorporates in our laws the compact made between this Commonwealth and the State of Connecticut.

Article V of the compact provides that the State of Connecticut is "to reimburse the Commonwealth of Massachusetts forty per cent of the amount of taxes lost to its political subdivisions by reason of acquisition and ownership by the United States of lands, rights of other property therein for construction in the future of any flood control dam and reservoir . . . hereafter constructed by the United States in the Thames River Valley in Massachusetts."

This compact deals with contemplated and actual losses in tax revenues from "land or other property therein." The question arises as to whether there is a tax loss to one of Massachusetts' "political subdivisions" when buildings are removed and relocated elsewhere. Buildings assessed and taxed by the municipalities of the Commonwealth fall within the term "land or other property therein." Should a building be removed from the flood control area and relocated successfully and in substantially the same condition on another site within the same

town, then assuming no damage to the building because of the physical movement of it, it would continue on the rolls of the municipal assessor and be taxed at substantially the same rate. On the other hand, the situation may develop where a building is removed from the flood control area and relocated in a town other than that from which it was removed. Such a building would be removed from the tax rolls of the town where it was formerly located. In this instance there would be a tax loss to the municipality wherein the building was previously situated.

The terms of the Thames River Valley Flood Control Compact state that Connecticut will reimburse Massachusetts a percentage "of the amount of taxes lost" as a result of the project. The phrase "tax lost" is not elsewhere elaborated on or given a more limited meaning. Nowhere in the compact is a situation contemplated or provided for in which one town might lose a building which another town might gain. Therefore, it must be assumed that the intent of the compact in this regard was to compensate forty per cent of the taxable losses resulting to the municipalities with the flood control district.

The language of Article V, par. 1 can be read no other way. To do otherwise would be to legislate where in fact the compact is silent. In addition, the spirit of this compact which provides for a plan to take Massachusetts land for dams and reservoirs in order to control flood damage in Connecticut supports this view. The mutual protection from loss or damage is manifest in Article I:

"The principal purposes of this compact are: (a to promote interstate comity among and between the signatory states; b) to assure adequate storage capacity for impounding the waters of the Thames River and its tributaries for the protection of life and property from floods."

The reimbursement for actual tax loss to a Massachusetts town is, in my opinion, very much a part of the scheme as stated in Article I.

Very truly yours,

EDWARD W. BROOKE

NOVEMBER 5, 1964.

HON. AMOS E. WASGATT, JR., *Chairman, State Racing Commission.*

DEAR MR. WASGATT: — I have received your letter of October 29, 1964 relative to the granting of an additional racing date to the Taunton Greyhound Association, Inc., (hereinafter referred to as the Association). You have informed me of the following relevant facts. The State Racing Commission early in 1964 granted licenses to the Association for dog racing meetings to be held at its property in Dighton from August 28, 1964 to September 12, 1964 and from September 21, 1964 to October 31, 1964, a total of fifty racing days.

On Wednesday, October 28, 1964, a power failure in the City of Taunton left the race track without electricity, and forced cancellation of the evening program after the completion of the third race. The Association has now made application to the Commission for a license

authorizing the holding of an additional evening of racing on November 2, 1964 as a substitute for the evening lost during the previous week.

In light of the above facts, you have requested my opinion on the following four questions:

"1. Can the Commission accept the application of the Taunton Greyhound Association, Inc. for one day (November 2nd, 1964) to make up for that part of the program of Wednesday, October 28th, 1964 which was cancelled. The Taunton Greyhound Association, Inc. conducted three races on Wednesday, October 28th, 1964 before the electric power failed?

"2. If the answer to the above question is in the affirmative can the Commission grant the Taunton Greyhound Association, Inc. a license for a full racing program of eleven (11) races on Monday, November 2nd, 1964, if it so decides to issue a license.

"3. In view of the fact that time is of the essence in this case can the advertising of a public hearing to be published on Friday, October 30th, 1964 in the Taunton Daily Gazette and the holding of a public hearing on Saturday, October 31st, 1964 in the town of Dighton be considered as compliance with the provisions of Section 3, Chapter 128-A of the General Laws, as most recently amended by Chapter 803 of the Acts of 1963.

"4. If it is proper for the Commission to accept the application of Taunton Greyhound Association, Inc. for one day, November 2nd, 1964 and proceed to conduct a public hearing as outlined in (3) above—and after due consideration is it proper for the Commission to grant and issue a license to the Taunton Greyhound Association, Inc. for one day, November 2nd, 1964 regardless of the provisions of Section 3, paragraph (e)."

The issuance of licenses for horse and dog racing meetings within the Commonwealth is governed by sections 3 and 4 of c. 128A of the General Laws. Section 3 provides: "If any application for a license, filed as provided by section two, shall be in accordance with the provisions of this chapter, the commission, after reasonable notice and a public hearing in the city or town wherein the license is to be exercised, may issue a license to the applicant to conduct a racing meeting, in accordance with the provisions of this chapter, at the race track specified in such application. . . ." The section further states, in par. (e), that "dog racing meetings may be held only between the eighteenth day of April and the thirty-first day of October, both dates inclusive, in any year." The Commission may authorize in the aggregate no more than two hundred dog racing dates in any one year, not including dog racing meetings to be held at state and county fairs.

Section 4 of c. 128A provides in part as follows:

". . . The commission may, upon application of any such licenses, and upon the payment of the required license fees, grant an additional license for not more than the number of days on which it was impossible or impracticable to conduct racing, which days shall not be counted in the aggregate of racing days permitted by paragraphs (f), (g) and (j) of

section three. The decision of the commission as to such impossibility or impracticability shall be final."

Accordingly, discretion is vested in the State Racing Commission to grant substitute dates to licensees who have been deprived of regularly assigned dates by reason of circumstances beyond their control. The Commission may grant or withhold such additional licenses as it sees fit, and is to be the final judge of the question of the impossibility or impracticability of conducting racing.

Because of the provision contained in c. 128A, § 3 (e) to the effect that dog racing meetings shall not be held in the Commonwealth after the thirty-first day of October in any year, your fourth question becomes the crucial inquiry, and I am taking the liberty of treating its subject matter first.

It is obvious that § 3 (e) and § 4 of c. 128A potentially are in conflict. The Legislature has not indicated whether the right of the State Racing Commission to grant substitute dates may be exercised only during the period specified in § 3 (e), or whether such right is unlimited in so far as time is concerned. However, I do not believe that the General Court would have enacted the provisions of § 4 unless those provisions were intended to be used in appropriate situations. Section 4 contains no indication that the granting of substitute dates is to be restricted to the period from April 18 to October 31 in any year. Such a restriction would make § 4 meaningless to the licensee whose regularly assigned dates extend to October 31. Dates lost through no fault of such a licensee could never be replaced; such a result clearly discriminates against the licensee who happens to be assigned the latter part of the Massachusetts racing season.

The provision found in § 3 (e) was, in my opinion, intended to prohibit the granting of original licenses for the holding of racing meetings after October 31. It should be noted that the section restricting racing to the period April 18 to October 31 refers specifically to "dog racing meetings." Section 4, on the other hand, authorizes the granting of licenses for additional "days." Use of the word "meeting" would appear to be intentional, and is designed to indicate that the terminus date of October 31 is meant to apply only to the original granting of licenses for a series of dates. A date granted as a substitute for one that has been lost cannot be called a "meeting," and should not be considered to be subject to the restrictions embodied in § 3 (e).

The same conclusion to the question whether substitute dates may be granted beyond the limitations of § 3 (e) was rendered by former Attorney General Edward J. McCormack, Jr. in an opinion issued on October 17, 1960 to the State Racing Commission. Therefore, in response to your fourth inquiry, I advise you that it is within the discretion of the Commission to grant the Taunton Greyhound Association a substitute racing date on November 2, 1964. The decision as to whether such additional date should in fact be authorized must of course be made solely by the State Racing Commission itself.

In light of the affirmative response to your fourth inquiry, I will briefly treat with the first three questions. The filing of applications

for substitute racing dates is governed by c. 128A, § 2, which provides that "supplementary applications by a licensee for additional licenses under section four of this chapter may be filed with the commission at any time prior to the expiration of said year, and the commission shall grant or dismiss such applications within thirty days of the date of filing." As a result, applications submitted under the provisions of § 4 must be accepted by the Commission if filed before the end of the calendar year, and must be acted upon within thirty days of the date filed.

Should the Commission decide to act favorably upon the application, the Commission may in its discretion authorize the holding of a full eleven-race card, or may choose to allow a smaller number of races. I am aware of the fact that three races had been completed before the remainder of the card of October 28 had to be cancelled. But nothing appears in the statute which would force the Commission to deal in fractions of days. The Commission may properly decide that the evening of October 28 was—for all practical purposes—lost, and may authorize another full evening of racing as a substitute. The restriction that no more than two hundred dog racing dates (excepting those held at state and county fairs) shall be allowed does not limit the right of the Commission to grant substitute dates in any way (see c. 128A, § 4).

Section 3 of c. 128A requires the giving of reasonable notice and the holding of a public hearing.

"If any application for a license, filed as provided by section two, shall be in accordance with the provisions of this chapter, the commission, *after reasonable notice and a public hearing in the city or town wherein the license is to be exercised,* may issue a license to the applicant to conduct a racing meeting, in accordance with the provisions of this chapter, at the race track specified in such application. . . ." (Emphasis supplied.)

The statute does not specify what type of notice of the public hearing must be given. It requires only notice that is reasonable under the circumstances. Since applications for substitute dates under § 4 must frequently be acted upon quickly, extensive notice cannot always be given. Should newspaper advertising be impracticable for some reason, the posting of notices in public places will ordinarily be a permissible substitute. Since application has been made for a substitute racing date to be held on Monday, November 2, and time is of the essence, the Commission will, in my opinion, comply with statutory requirements by posting notices on Friday, October 30, and by holding a public hearing with regard to the application on Saturday, October 31.

Very truly yours,

EDWARD W. BROOKE

Towns may pass by-laws for preserving peace and good order within their limits.

There is no statutory imposition of duty on a fire chief and his department regarding civil disturbances, or general offense against society, but the police may request assistance in dispersing a riot from "all persons there present" and this would include firemen who were present at the scene.

November 9, 1964.

Hon. Robert W. MacDonald, *Commissioner of Public Safety.*

Dear Mr. MacDonald: — I have received your letter of September 24, 1964, formalizing the request of the Fire Chief's Club for an opinion as to whether or not the Fire Department has the obligation to send men or equipment in response to requests they may receive to assist in the supervision of civil disturbances.

A Fire Chief is the foremost administrator and director of an entire fire department. His powers and duties, as granted by statute, necessarily are broad enough to fulfill the direction of the department's activity as that activity is conceived of by the Legislature.

"He shall have and exercise all the powers and discharge all the duties conferred or imposed by statute. . . He shall have full and absolute authority in the administration of the department." (G. L. c. 48, § 42.) Such broad authority is granted to the Fire Chief so that he may discharge the duty imposed on him by statute, namely, G. L. c. 48, § 42, as follows:

"He shall have charge of extinguishing fires in the town and the protection of life and property in case of fire."

While there is no statutory imposition of duty on a fire chief and his department regarding civil disturbances, or general offenses against society, § 88 of c. 48 specifically indicates the General Court's intention that the activities of the Fire and Police Departments be separate and distinguishable in nature.

"No city or town . . . shall require a permanent member of its fire department to perform the duties of a police officer during his tour of duty." (G. L. c. 48, § 88.)

The duties of police officers as distinguished from firemen do relate to offenses against society. And since civil disorders, disobedience, and riot clearly offend society as a matter of reason and law, our General Court has devolved upon the police in the Commonwealth certain duties and concomitant powers, among which are those relative to suppressing and preventing disorders. In terms of the statute, "They [the police] shall suppress and prevent all disturbances and disorder." (c. 41, § 98.)

However, in carrying out their statutory duty under G. L. c. 41, § 98, the police may request assistance in dispersing a riot from "all persons there present," (G. L. c. 269, § 1) and this would include firemen who were present at the scene. In addition, the police may call for aid pursuant to the provisions of G. L. c. 269, § 3:

"If any persons who are so riotously or unlawfully assembled, *and who have been commanded to disperse*, as before provided, refuse or neglect to disperse without unnecessary delay, any two of the magistrates or officers before mentioned may *require* the aid of a sufficient number of persons, *in arms or otherwise as may be necessary*, and shall proceed, in such manner as they deem expedient, forthwith to disperse and suppress such assembly. . . ." (Emphasis supplied.)

Accordingly, once the police officers issue the command to disperse, they may not only request but also require the assistance of persons. This statute gives to the police officers who have commanded dispersement a certain discretion to call upon a number of persons generally whether they are "in arms or otherwise as may be necsesary." Presumably firemen would fit within the broad classification of "persons" as that word is used. Moreover, although fire hoses spraying a stream of high pressure water are not armaments and hence within the definition of "arms" as used in the statute, they are capable of inflicting great distress upon the human body. Consequently, even if not technically "arms," fire hoses could be summoned and be within the language "in arms or otherwise as may be necessary."

The specific question contained in your letter can be answered affirmatively when as noted certain conditions are met; namely, the police have commanded an unlawful assembly to disperse, and have required assistance. Any obligation the fire departments have under our General Laws derive from a request from the police department. But it may be possible that specific towns are able to and have passed by-laws more directly imposing an obligation on the fire department to maintain peace and order within the city or town.

The preservation of peace and order is of primary importance to the various cities and towns of this Commonwealth. In this connection a city's or town's power to preserve its own integrity as a government, not inconsistent with the laws of the state or the state or federal constitutions, is within the power to preserve public peace and order. Our General Laws have granted to cities and towns some authority to "make such orders and by-laws, not repugnant to law, as they may judge most conducive to their welfare. . . ." (G. L. c. 40, § 21.) Chapter 40, § 21 does not transfer to cities and towns the entire police power of the Commonwealth and does not sanction the establishment of local policy with regard to a matter of general concern. (*Commonwealth* v. *Kimball*, 299 Mass. 353.) But towns may pass by-laws for preserving peace and good order within their limits. (P. S. 1882, c. 27, § 15.) Whether or not various cities and towns throughout the Commonwealth have passed by-laws more directly imposing an obligation on fire departments to deal with rioting, would appear to be a matter of interest to the Fire Chief's Club of Massachusetts. With regard to this question and the variety of by-laws that undoubtedly exist, I would deem it helpful to the local Fire Chiefs to consult with their respective town counsels in this regard.

Very truly yours,

EDWARD W. BROOKE

Upon the effective date (December 4, 1964) of St. 1964, c. 740, the Governor, acting alone, may approve the taking or purchasing of land by the Department of Mental Health for the purposes set forth in G. L. c. 123, § 8.

NOVEMBER 13, 1964.

HON. HARRY C. SOLOMON, M.D., *Commissioner, Department of Mental Health.*

Re: Effect of voter limitation of powers of Executive Council on Chapter 123, Section 8 (G. L.)

DEAR COMMSSIONER: — By letter dated November 4, 1964, you have asked my opinion on the two questions set forth herein and in the third paragraph of your letter.

The first question propounded by you is:

1. Does the action of the voters in approving the law appearing on yesterday's ballot in Question #5 permit the Governor alone, without approval of the Council, to approve taking or purchasing land by this Department as provided in Section 8, of Chapter 123 of the General Laws.

Section 8 of Chapter 123 of the General Laws provides in part:

"The department, subject to the approval of the governor, and council, shall select the site of any new state hospital and any land to be taken or purchased by the Commonwealth for the purposes of any new or existing state hospital."

Question 5 of the referenda considered by the voters of the Commonwealth on November 3, 1964 dealt with *An Act Repealing Statutory Powers of the Governor's Council Which Interfere with the Efficient Operation of the Executive Department of the Commonwealth,* (hereafter referred to as "The Act").

Section 3 of Article 48 of the Constitution of the Commonwealth provides in part:

". . . if it [The Act] shall be approved by a majority of the qualified voters voting thereon, such law shall, subject to the provisions of the constitution, take effect in thirty days after such election, or at such time after such election as may be provided in such law. . ."

Section 4 of "The Act" provides:

"Subject to Section 2 of this Act and except as required by the Constitution of the Commonwealth, so much of each provision of the General Laws and of any special law as requires the advice and consent of the Council with respect to any action or omission to act by the governor or by any officer, agency, or instrumentality in the executive department, including without limitation, any deposit, borrowing, loan, investment, endorsement, validation, surety or bond, or any lease, license, purchase, acquisition, sale, conveyance, disposition or transfer, or any contract or other agreement, or any permit or license, or any rules or regulations, is hereby repealed."

"The Act" was approved by a majority of the qualified voters of the Commonwealth, voting thereon, on November 3, 1964 under the provisions of Section 3 of Article 48 of the Constitution of the Commonwealth.

The following language of Section 4 of "The Act" is applicable to Section 8 of 123:

". . . so much of each provision of the General Laws . . . as requires the advice and consent of the council with respect to any action . . . by any . . . agency or instrumentality in the Executive Department, including without limitation, any . . . purchase, acquisition, sale, conveyance . . . or transfer . . . is hereby repealed."

That language deletes from Section 8 of Chapter 123 (G. L.) the words: ". . . and Council . . ." so that on the effective date of "The Act" said Section 8 shall read as follows:

"The department, subject to the approval of the governor, shall select the site of any new state hospital and any land to be taken or purchased by the Commonwealth for the purposes of any new or existing state hospital."

It is my opinion that upon effective date of "The Act," the Governor, acting alone, may approve taking or purchasing of land by the Department of Mental Health for the purposes set forth in and under the provisions of Section 8 of Chapter 123 of the General Laws.

The second question propounded by you is:

2. If the answer to question #1 is in the affirmative what is the effective date of the approved statute repealing the statutory powers of the Governor's Council, and what is the earliest date His Excellency the Governor could act on a request made by this Department as provided by Section 8, Chapter 123, of the General Laws?

Nowhere in "The Act" is there a specific provision designating the effective date thereof. The absence of such language was provided for by that portion of Section 3 of Article 48 of the Constitution of the Commonwealth, quoted above.

Based upon the assumption that the unofficial results of the November 3rd election as they relate to "The Act" are in due course officially certified, it is my opinion that the provisions of *The Act Repealing Statutory Powers of the Governor's Council Which Interfere with the Efficient Operation of the Executive Department of the Commonwealth* shall become effective on 12:01 a.m., December 4, 1964.

Very truly yours,

EDWARD W. BROOKE

A contractor is not entitled to additional compensation for damages caused by a hurricane or other unusually severe storm prior to the completion and acceptance of the project. The contractor must rebuild, repair, restore and make good, at his own expense, any work performed which is damaged or destroyed in such manner.

November 20, 1964.

Hon. James D. Fitzgerald, *Commissioner of Public Works.*

Dear Commissioner: — You have requested an opinion as to whether, under Article 60 of the Massachusetts *Standard Specifications for Highways and Bridges,* a contractor must rebuild, repair, restore and make good, at his own expense, any work performed thereunder which is damaged or destroyed by a hurricane or other unusually severe weather.

Substantially the same question was asked by Commissioner Jack P. Ricciardi in July, 1963. On the basis of Articles 60 and 74D of the *Standard Specifications for Waterways* and the cases of *Boyle* v. *The Agawam Canal Co.,* 22 Pick. 381, and *Adams* v. *Nichols,* 36 Mass. 275, I replied on July 16, 1963 that a contractor is not entitled to additional compensation for damage caused by a hurricane. A copy of said opinion is herewith enclosed.

Articles 60 and 74P of the *Standard Specifications for Highways and Bridges* are identical to those referred to above. In addition to the portions quoted in the July 16, 1963 opinion, I should like to call to your attention the following language of Article 60:

"The Contractor shall rebuild, restore and make good, at his own expense, all injuries or damages to any portion of the work occasioned by any of the above causes before the completion of the work and the acceptance of the contract."

The case of *Boyle* v. *Agawam, supra,* answers the question set forth in your letter. The following case is also analogous particularly in view of the language used in Article 60 of the *Standard Specifications.* In *Rowe* v. *Peabody,* 207 Mass. 226, the plaintiff agreed to construct a tunnel thirty inches in diameter by the use of timber props. After work had begun, the plaintiff encountered such serious difficulties because of the nature of the soil that construction pursuant to the terms of the contract was almost impossible. The plaintiff thereupon abandoned its contract, whereupon the City of Peabody had the tunnel completed at a cost of $47,805.12 in excess of the contract price. In denying the plaintiff this sum in its action for breach of contract, and in allowing the city to recoup said sum, the Court stated at pages 233 and 234:

". . . 'where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burdensome or even impossible.' . . .

"But they chose to make their agreement an absolute one, and the court cannot relieve them from the bargain which they saw fit to make. . . .

"We are clearly of opinion that these contractors were not excused from the performance of their agreement by reason of its alleged impossibility, but that they were bound either to accomplish what they had promised to do or to respond in damages for their failure."

On the basis of the foregoing discussion I wish to reaffirm my position that under the facts as you have presented them a contractor is not entitled to any compensation for damage caused by a hurricane or other unusually severe storm, prior to the completion and acceptance of the project. I answer your question in the affirmative.

Very truly yours,

EDWARD W. BROOKE

In view of the qualifications required for a position and the duties thereof, the trustees of State Colleges may properly classify a Business Manager as a professional and thereby remove the position from the jurisdiction of the Division of Civil Service.

NOVEMBER 25, 1964.

HON. W. HENRY FINNEGAN, *Director of Civil Service.*

DEAR SIR: — I have received your letter of September 16, 1964 requesting an opinion about the ability of the Board of Trustees of State Colleges to classify a Business Manager as a professional and thereby remove the position from the jurisdiction of the Division of Civil Service. As you have written, the question arises since the Division of State Colleges has recently created the position of Business Manager. You have referred me to the relevant statutes.

If the position of Business Manager is within the jurisdiction of civil service, then it must be because that position is "non-professional."

"The non-professional personnel of the colleges shall continue as state employees under the provisions of chapter thirty. . . ." (G. L. c. 73, § 16.)

And if there is a newly created non-professional position within the Division of State Colleges, then, as you have indicated, the Director of Civil Service does have certain statutory duties.

"The director of personnel and standardization shall establish, administer and keep current and complete an office and position plan and a pay plan of the commonwealth.

"(1) In pursuance of such responsibilities as to the said classification plan, the said director shall classify all appointive offices and positions in the government of the commonwealth. . . ." (G. L. c. 30, § 45.)

On the other hand, the Trustees of the Board of State Colleges have been given some statutory discretion pursuant to G. L. c. 73, § 16 relative to appointment, promotion and reclassification of the professional staff.

"The trustees shall have complete authority with respect to the election or appointment of the professional staff including terms, conditions and

periods of employment . . . classification and reclassification. . . ." (G. L. c. 73, § 16.)

The General Court has clearly drawn the lines of authority. The Trustees of the Division of State Colleges are obliged to classify such persons in the employ of the division within their jurisdiction.

The question arises: is the determination of the Division of State Colleges correct that a Business Manager is a professional man and thereby removed from the provisions of G. L. c. 30? Mr. Francis X. Guindon's letter of July 17, 1963 to you indicates that the Division is seeking a man qualified at least in part by having earned a master's and a bachelor's degree. Such qualifications as well as the title Business Manager seem to indicate that the business manager will not function in a clerical capacity. The language of G. L. c. 73, § 16 clearly defines "professional staff" as being those employees who are involved in administrative work as distinguished from clerical or similar duties. "Professional staff" is defined as being composed of "all persons except those whose duties are clerical. . . ." (G. L. c. 73, § 16.)

In view of the qualifications required for the position and the duties thereof as outlined by the Trustees of the Division of State Colleges, it is my opinion that the position of Business Manager may properly be classified within the professional staff.

Very truly yours,

EDWARD W. BROOKE

It is within the discretion of the State Racing Commission to grant a substitute racing date to a licensee who has been deprived of regularly assigned dates by reason of circumstances beyond his control.

Where time is of the essence, the Commission will comply with statutory requirements regarding advertising by posting notices and by holding a public hearing prior to proposed date of substitute meeting.

Where a patient appeals his transfer by the Department of Mental Health from Boston State Hospital to Bridgewater State Hospital, under the provisions of c. 123, § 20, the request for hearing under that section should be made to a justice of the Superior Court, or a judge of probate for Suffolk County, or a justice of a district court in Suffolk County (other than the Municipal Court of the City of Boston), all of whom are given jurisdiction of original commitments under G. L. c. 123, § 50.

NOVEMBER 25, 1964.

HON. HARRY C. SOLOMON, M.D., *Commissioner of Mental Health.*

DEAR DOCTOR SOLOMON: — You have asked my opinion as to what court a patient may appeal his transfer by the Department of Mental Health from Boston State Hospital to Bridgewater State Hospital, under the provisions of G. L. c. 123, § 20.

You state that the patient in question was originally committed to Grafton State Hospital by the West Roxbury District Court under G. L.

c. 123, § 100 on July 15, 1963, and was transferred by the department to Boston State Hospital on September 10, 1963, under the same commitment.

On August 13, 1964, the department ordered the patient's transfer to the Bridgewater State Hospital under the provisions of § 20 of c. 123 of the General Laws.

He was notified of his right to appeal, and signified that he desired a court hearing upon the order. His request was transmitted to the Suffolk County Probate Court and then to the West Roxbury District Court. Each court, in turn, indicated that it did not consider that it had jurisdiction in the matter.

General Laws c. 123, § 20 deals generally with transfers of patients from one institution to another by the Department of Mental Health. Its final paragraph deals specifically with transfers to Bridgewater State Hospital. It reads as follows:

"On the request of a superintendent of any state hospital, the commissioner may transfer to the state hospital division at Bridgewater any male patient who has made two or more attempts to escape, or whose conduct has been such as to render him dangerous to other patients or the personnel of the hospital or school. In considering such application, the commissioner or an assistant commissioner shall personally visit and examine the patient. A transfer to Bridgewater state hospital shall not in any way interfere with the patient's rights for discharge under this chapter. Except in emergency cases, written notice must be given to the patient and to his nearest relative or guardian of the department's intention to transfer him to Bridgewater state hospital at least three days before such transfer. The notice shall contain a statement that the patient has a right to appeal this decision to the commissioner and a right to a hearing in a court in regard to such transfer. Such request for a hearing must be filed with a court having jurisdiction over original commitments under sections fifty and fifty-one. The court shall hear and determine whether or not the department is justified in making the transfer under this section. The procedure for such hearing shall be the same as in an original commitment hearing under said section fifty-one of this chapter. If the department determines that an emergency exists, it may make the transfer to Bridgewater forthwith, but shall give such notice as hereunder required within twenty-four hours of such transfer, and the patient's rights to a hearing shall be the same as above stated. If the court determines that the department is not justified in making the transfer it shall order the patient returned to the original state hospital or hospital school."

The clear intent of this paragraph is two-fold: to isolate dangerous patients, and to protect fully all rights of such patients by special provision for a court hearing on appeal. Such appeal is to be filed and heard in "a court having jurisdiction over original commitments under sections fifty and fifty-one."

This language is clear and unequivocal. It does not refer to *the* court having original jurisdiction of the particular commitment under which the patient is held, but to *a* court having jurisdiction of commitments under sections fifty and fifty-one.

Section 20 does not make any specific reference to patients committed under § 100. It refers to "any male patient." In my opinion this means what it says, and is not limited to commitments under § 51. To so limit the section would defeat one of the major purposes of the paragraph, which is to protect other patients by removing dangerous individuals from their midst.

It would further appear that the sole question to be determined by the court on such an appeal is whether "the department is justified in making the transfer under this section." (§ 20.)

The criteria for determining this are the same regardless of the circumstances under which the patient was committed, depending on his conduct in the institution.

For these reasons it is my opinion that G. L. c. 123, § 20 applies to the situation you have described and that the request for hearing under said § 20 should be made to a justice of the Superior Court, or a judge of probate for Suffolk County, or a justice of a district court in Suffolk County (other than the Municipal Court of the City of Boston), all of whom are given jurisdiction of original commitments under G. L. c. 123, § 50.

Very truly yours,

EDWARD W. BROOKE

The Metropolitan District Commission alone is authorized and directed to construct and maintain the bridge noted in St. 1964 c. 682 of the Acts of 1964.

The Commission may not lawfully enter into an inter-agency agreement whereby it redelegates the decision-making power or the actual responsibility for performance.

NOVEMBER 30, 1964.

HON. ROBERT F. MURPHY, *Commissioner, Metropolitan District Commission*

DEAR COMMISSIONER MURPHY: — I have received your letter of October 19, 1964, which relates to the proposed construction of a high level bridge from Leverett Circle in the City of Boston to the Mystic River Bridge in the City Square area of Boston's Charlestown District. The matter is governed by c. 682 of the Acts of 1964, which Act is entitled *An Act directing the metropolitan district commission to construct and maintain a high level bridge over the Charles river from Leverett circle to the vicinity of City Square in the city of Boston, and authorizing the Massachusetts Port Authority to construct certain connections thereto and to contribute to the cost thereof.*

You have informed me that at this time no money has been appropriated by the Legislature to defray the cost of construction. The Massachusetts Port Authority has proposed that the Metropolitan District Commission enter into an inter-agency agreement with the Authority to select and to hire a consulting engineer to design the bridge in question. The

engineer would be engaged with funds already available to the Authority, and would presumably be under the Authority's control and jurisdiction.

In light of the provisions of c. 682 of the Acts of 1964, you have requested my opinion as to the following:

"1. The legal right of the Commission to enter into this inter-agency agreement with the Authority in view of the language of Chapter 682 of the Acts of 1964, which places responsibility for the construction of the bridge in the hands of the Metropolitan District Commission, and

"2. Whether the entire project, including the hiring of a designer (consulting engineer), as well as the proposed bridge's construction, is vested solely in the hands of the Commission under the provisions of the Act."

St. 1964, c. 682 provides in part as follows:

". . . *the metropolitan district commission* . . . is hereby authorized and directed to construct and maintain a high level bridge over the Charles river from Leverett circle . . . to . . . the vicinity of City Square in the Charlestown district . . . together with the necessary approaches thereto. . . . The authority is hereby authorized to construct and maintain, as a southerly extension of the Mystic River bridge, such connections between the Mystic River bridge and said high level bridge and such other ways in the area in the vicinity of the present southerly end of said bridge, as may be necessary or desirable. . . ." (Emphasis supplied.)

The statute further provides that there shall be an agreement between the Metropolitan District Commission and the Massachusetts Port Authority that the Authority shall pay to the Commission half the cost of construction of the bridge, if the total cost does not exceed three million dollars. Should total construction costs exceed the figure of three million dollars, the Authority shall agree to reimburse the Commission for that part of the total construction cost which exceeds one and one-half million dollars.

The Metropolitan District Commission itself is authorized to spend such sums as may be appropriated for the project, such expenditure not to exceed one and one-half million dollars. The Commission may in addition expend whatever federal funds may be obtained for the purpose, as well as the sums contributed by the Massachusetts Port Authority under the provisions described above. The Commission may take by eminent domain or otherwise acquire whatever property may be necessary for completion of the project, and may apply for and use whatever federal assistance may be available.

Since the answer to your first inquiry depends upon the response to the second question, I am taking the liberty of treating the latter subject matter at the outset. St. 1964, c. 682 clearly distinguishes between the responsibilities of the Metropolitan District Commission and those of the Massachusetts Port Authority. The Commission is authorized and directed by § 1 of the chapter to construct and maintain the bridge in question. Construction and maintenance of necessary or desirable connections is left to the Massachusetts Port Authority. The statute does not indicate that the duties are to be shared in any way; authorization and responsi-

biliy are instead carefully determined and assigned. Even the title affixed to the chapter retains the distinction between the duties to be performed by the two agencies.

Provision is admittedly made for the Massachusetts Port Authority to share the construction cost of the bridge; in fact, under the statutory provisions the Authority could conceivably contribute more to the cost of the bridge than the Commission itself. An agreement binding the Authority to contribute its share must be signed before the Commission may lawfully expend funds for the project. But nothing in the law gives the Authority any control over the project, notwithstanding the large sum of money it may well pay before the bridge is completed. The Metropolitan District Commission alone is authorized and directed to maintain the bridge, and this responsibility is not—under the terms of St. 1964, c. 682—limited or shared.

Accordingly, in response to your second inquiry, it is my opinion that the General Court has vested control of that part of the project which involves the building of the high level bridge solely in the Metropolitan District Commission, and has left to the Massachusetts Port Authority control over construction of the so-called connections only. Hiring of a designer for the proposed bridge is an integral part of the task of construction, and therefore must—under the statute—be the responsibility of the Commission.

The question arises, therefore, whether—in view of the fact that responsibility for construction of the bridge is entirely in the hands of the Metropolitan District Commission—the Commission may lawfully enter into the inter-agency agreement described in your request. The effect of this agreement would be to allow the Port Authority to select and pay for a designer, and to exercise control and supervision over him.

An agency has only those powers actually conferred by its governing statute, or which are reasonably necessary to accomplish the purposes of the statute.

Scannell v. *State Ballot Law Commission,*
324 Mass. 494, 501

When the Legislature has itself delegated a particular function to an agency, that agency may properly exercise whatever powers may reasonably be necessary to perform such function. It may hire employees, and may assign them tasks of a ministerial, clerical or even investigative nature. But it cannot re-delegate the actual responsibility for performance.

Attorney General v. *Trustees of Boston Elevated Railway Co.,* 319 Mass. 642, 654-655

A re-delegation of the decision-making power is unlawful as an exercise of governmental power without legislative authority.

"I think there is no escape from the principle that public officers who have duties imposed upon them by law must perform those duties, and persons who do not have duties imposed upon them by law are not authorized to perform the duties imposed upon others."

5 *Op. Attorney General,* 1920, pp. 628, 629

Selection of a designer for the proposed bridge is in my opinion an important part of the construction project. It is not the kind of ministerial work which can lawfully be re-delegated. It becomes all the more apparent that abdication by the Metropolitan District Commission of its responsibility for such selection is unjustified, since it is proposed that the Port Authority is not only to supervise selection of the designer but is also to exercise control over his work.

The General Court has indicated that it expects the two agencies involved to enter into an agreement regulating contributions to the cost of construction. It has also provided in § 5 of the Act that the Commission may exercise its normal powers and may enter agreements as provided by chapters twenty-eight and ninety-two of the General Laws. None of these powers are applicable to the present matter. The statute is silent as to other agreements, and accordingly I find that other agreements are not authorized.

The fact that the Legislature has yet to appropriate funds for construction does not give the Commission authority to seek those funds elsewhere. Rather, failure to pass an appropriation would indicate that the General Court is not at present willing to have the project begin. Once an appropriation is made and the Commission commences operations, the Commission may of course consult with the Authority on any issue. Final decisions must however be made by the Commission alone, and may not be shared with any other person or agency. In view of the provisions of c. 682 of the Acts of 1964, and for the reasons given above, it is my opinion that the Metropolitan District Commission may not lawfully enter into the inter-agency agreement described in your request.

Very truly yours,

EDWARD W. BROOKE

The person occupying the position of Secretary to the Public Works Commission may be removed only by the specific procedure outlined in G. L. c. 30, § 9, by the Governor for cause.

DECEMBER 1, 1964.

HON. JAMES D. FITZGERALD, *Commissioner of Public Works.*

DEAR SIR: — In your letter of November 18, 1964, you have asked my opinion concerning the following questions pertaining to the position of Secretary to the Public Works Commission:

"1.) Is the removal procedure provided by General Laws, Chapter 30, Section 9 applicable to the position of Secretary to the Public Works Commission, created by Section 4 of Chapter 16 as it appears in Chapter 821 of the Acts of 1963.

"2.) Is the tenure of an incumbent of the position of Secretary to the Public Works Commission coterminous with the term of the Governor who appointed him or does the tenure of the Secretary continue thereafter with the benefits of General Laws, Chapter 30, Section 9."

The Department of Public Works was reorganized under the provisions of St. 1963, c. 821 by amending c. 16 of the General Laws. Under § 1 of that chapter, a public works commission was created comprised of five members appointed by the Governor with the advice and consent of the Council. One of the five is designated "the Commissioner of Public Works." Each commissioner serves a term of five years. Since each member is appointed by the Governor with the advice and consent of the Council, each member may be discharged during his term only in accordance with G. L. c. 30, § 9, by the Governor for cause with the advice and consent of the Council.

G. L. c. 16, §1

"There shall be a department of public works, in this chapter called the department, which shall be under the supervision and control of a public works commission, in this chapter called the commission. Said commission shall consist of five members, not more than three of whom shall be of the same political party, who shall be appointed by the governor, with the advice and consent of the council. Upon the expiration of the term of each member his successor shall be appointed, in like of five years. . . ."

The employees in the Department of Public Works are directly under the supervision of the commissioner and he may appoint or discharge any of these employees. This power is not unrestricted, however. It is subject to certain qualifications and exceptions. All employees who are members of the civil service may be appointed, promoted or removed only in accordance with c. 31. Similarly, where there are provisions of the General Laws other than the civil service sections which provide a specific appointment or removal procedure, the commissioner may not employ or discharge an employee contrary to such section.

G. L. c. 16, § 4

"The commissioner shall appoint and may remove all employees in the department under the public works commission. Unless otherwise provided by law, all such appointments and removals shall be done in accordance with chapter thirty-one. From time to time the commissioner may, subject to appropriation and regulation, employ such consultants as he may deem necessary."

Besides the qualifications described above, certain exceptions also exist. In § 4, itself, a maximum of twelve employees may be appointed and removed without regard to c. 31. In § 5 (b) the commissioner may appoint a hearing examiner with the approval of the Governor and he may be removed for cause in the same manner.

In the case of the Secretary to the Commission, the power of the commissioner is more than limited or restricted. The office itself is provided for not in § 4 but in § 5. The whole employment process is taken completely out of the hands of the commissioner. The Secretary is appointed by the Governor with the advice and consent of the Council. Being appointed in the same manner as the commissioners themselves, he may be removed only by the specific procedure outlined in G. L. c. 30, § 9—"by the Governor . . . for cause."

Unlike the commissioners, however, there is no provision in c. 16 as to the Secretary's term. There is no basis, then, on the face of this chapter which would support the contention that the Secretary's term is coterminous with the Governor. Such a provision making the term of the Commissioner of Administration and Finance coterminous with the Governor appears in G. L. c. 7, § 4. This section should be compared with § 5 of c. 16.

G. L. c. 7, § 4

"The governor shall appoint a commissioner of administration, who shall be a person of ability and experience. He shall serve at the pleasure of the governor, shall receive such salary not exceeding twenty thousand dollars per year as the governor may determine, and shall devote his full time during business hours to the duties of his office. . . ."

G. L. c. 16, § 5

"The commissioner shall have a secretary, appointed by the governor with the advice and consent of the council, who shall receive a salary of twelve thousand dollars. The secretary shall have the duty and responsibility of keeping the minutes of the commission, shall have custody of the official documents and papers of the commission and of the department, and of the official seal of the commission, of which judicial notice shall be taken."

Had the Legislature intended a different result, such as one similar to that applicable to the Commissioner of Administration, it would have done so by clearly stating its intention in this statute. No such intention appears. There being no provision reflecting such specific intention, reference must again be made to G. L. c. 30, § 9. Under that section the Secretary may be discharged and his term ended when it is established that there is sufficient cause for his removal.

Inasmuch as the Secretary to the Commission is appointed by the Governor with the advice and consent of the Council, a question arises about the effect of c. 740 of the Acts of 1964, the initiative petition to curb some of the statutory powers of the Council. When it has been officially determined that the said c. 740 has been approved in accord with Amend. Art. 48, Pt. 5, § 1 of our State Constitution, the Governor may then appoint and remove for cause in conformity with G. L. c. 30, § 9.

It is therefore my opinion that the Secretary to the Commission may be removed only by the Governor for cause following the effective date of c. 740 of the Acts of 1964. The Secretary's term is not coterminous with the Governor's but may be ended only where sufficient cause is established for his removal.

Very truly yours,

EDWARD W. BROOKE

The Deputy Registrar of Motor Vehicles is authorized to exercise all the powers and duties of the Registrar until a Registrar is duly qualified, and he may delegate to individuals who hold positions under G. L. c. 90, § 29, the performance of any duty imposed upon the Registrar by any provision of c. 90.

DECEMBER 4, 1964

MR. ROBERT C. CAPASSO, *Deputy Registrar of Motor Vehicles.*

DEAR MR. CAPASSO: — I have your request wherein you pose the following two questions:

"1. May the Deputy Registrar who is exercising the powers and duties of the Registrar under the provisions of General Laws, Chapter 16, Section 9, delegate to individuals who hold positions under Chapter 90, Section 29, the authority to certify records of the Registrar as provided under General Laws, Chapter 90, Section 30?

2. May the Deputy Registrar who is exercising the powers and duties of the Registrar under the provisions of General Laws, Chapter 16, Section 9, delegate to individuals who hold positions under General Laws, Chapter 90, Section 29, the performance of any duty imposed upon the Registrar by any provisions of this chapter (Chapter 90)?"

I will treat with your questions in the order presented.

Chapter 16, Section 9 of the General Laws in part provides:

"In the event of a vacancy in the office of registrar, his powers and duties shall be exercised and performed by the deputy registrar until a registrar is duly qualified."

Accordingly, when there is a vacancy in the office of Registrar, his powers and duties are exercised by the deputy. The Legislature did not see fit to include any restrictions on this delegation of authority and it is my opinion that the section clearly intends to bestow on the deputy all the powers and duties of the registrar, including those powers and duties vested in the Registrar under Sections 29 and 30 of the General Laws.

An examination of the records at the Secretary of State's office reveals that on June 12, 1963 former Registrar James R. Lawton appointed E. Theodore Gunaris as Deputy Registrar of Motor Vehicles.

It is therefore my opinion that Deputy Registrar Gunaris is authorized to exercise all the powers and duties of the Registrar until a registrar is duly qualified, thus answering your first question in the affirmative.

From the above discussion, it is clear that the answer to your second inquiry is in the affirmative.

Very truly yours,

EDWARD T. MARTIN

Deputy Attorney General

The term "office" as used in G. L. c. 51 §25, does not automatically include all positions filled by governmental personnel, and said section does not indiscriminately prohibit all governmental employees from serving as registrar of voters.

DECEMBER 8, 1964

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

DEAR MR. WHITE: — I have received your letter relative to the statutory prohibition against appointment of federal, state or municipal officers as registrars or assistant registrars of voters. This prohibition is contained in G. L. c. 51, § 25, which provides in part as follows:

"No person shall be appointed a registrar or assistant registrar who is not a voter of the city or town for which he is appointed, who holds an *office* in the city or town for which he is appointed either by election or by direct appointment of the mayor or of the selectmen or of a city manager or town manager, or who holds an office by election or appointment under the government of the United States or of the commonwealth, except as a justice of the peace, notary public, or officer of the state militia. The acceptance by a registrar or assistant registrar of any such *office* shall vacate his office as registrar or assistant registrar." (Emphasis supplied.)

You have informed me that a member of the Board of Registrars of a particular town is also a permanent employee of that community's Department of Public Works. The legality of such a situation has been questioned in light of the statute quoted above. Accordingly, you have requested my opinion on the following inquiries:

"1. Does the word 'office' as used in the cited section prohibit *any* employee of a town from serving as a member of the board of registrars?

"2. Is the word 'office', as used in the cited section, to be limited to *public* office in the town, whether elected or appointed, as distinguished from mere employment in the town such as civil service, clerk, or public service employee?"

The word "office" has traditionally been given a specialized meaning, and an "officer" of a municipality or other governmental unit has always been distinguished from an employee or an independent contractor. A governmental position which is designated as an "office" connotes a certain term or duration, a fixed salary and specified emoluments. Powers and duties of the office will generally be fixed by law; but the incumbent official ordinarily is vested with at least some discretion to determine how such powers shall be exercised and in what manner such duties shall be carried out.

"An office is a public station conferred by the appointment of government. The term embraces the idea of tenure, duration, emolument and duties fixed by law. Where an office is created, the law usually fixes its incidents, including its term, its duties and its compensation."

Metcalf v. *Mitchell,* 269 U. S. 514, 520

Creation of an office involves delegation by the Legislature of some of the sovereign powers and functions. There is an importance and dignity

to an office which does not attach to mere employment or to a simple contractual relationship.

"The holder of an office must have entrusted to him some portion of the sovereign authority of the State. His duties must not be merely clerical, or those only of an agent or servant, but must be performed in the execution or administration of the law, in the exercise of power and authority bestowed by the law."

Attorney General v. *Tillinghast,* 203, Mass. 539, 543

Employment by a governmental unit does not in and of itself make the employee an "officer." An employee who performs duties of a routine nature and who is supervised by a superior cannot ordinarily claim the status conferred upon those who are deemed governmental officials. Each position must of course be separately examined to determine whether it actually constitutes an office. But it is clear that the word "office," as it is used in G. L. c. 51, § 25, does not automatically include all positions filled by governmental empolyees, irrespective of the nature of such positions. Clerks, civil service personnel and independent contractors, as well as a large variety of other employees, have never been considered governmental officials as such, and were not meant to be subject to the provisions of G. L. c. 51, § 25.

The statute in question does not, in my opinion, use the word "office" in any manner inconsistent with its traditional meaning. I do not believe that the General Court intended to bar all governmental employees from service as registrars of voters. Had the Legislature desired to do so, it would presumably have referred to employees in the aggregate, and avoided reference solely to those holding "an office." But the Legislature did not choose to use broader language, and the scope of the statute should not be extended by interpretation.

Accordingly, it is my opinion that the word "office," as it is used in G. L. c. 51, § 25, must be given its usual restricted meaning, and that the statute does not indiscriminately prohibit all governmental employees from serving as registrars of voters.

Very truly yours,

EDWARD W. BROOKE

The trustees of Lowell Technological Institute are empowered to classify jobs and to change salaries and job descriptions, provided that salaries be within the general salary schedule and that notifications of personnel actions are filed.

DECEMBER 11, 1964

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

DEAR SIR: — I have received your letter of November 12, 1964 relative to the actions taken by the Committee on Personnel of the Lowell Technological Institute Board of Trustees on October 5, 1964. Specifically, the trustees have voted to expand the scope and function of the offices

of Assistant to the President, the Dean, and the Dean of Students. Your letter states that job descriptions corresponding to the new scope and duties of the above offices have been filed, and increases in salaries made. You have requested my opinion as to whether these actions taken by the trustees are within their powers under G. L. c. 75A, § 12, as amended by cc. 701, 801 of the Acts of 1963 and by c. 357 of the Acts of 1964.

The various state colleges and universities, among them the Lowell Technological Institute, have been given certain latitude and independence by the Legislature. Matters of policy which naturally affect the educational qualities of our state colleges are generally left to the boards of trustees; and the decisions made regarding personnel above a certain level clearly are matters of such policy. For this reason the General Court has made a distinction between professional and nonprofessional staffs and partially removed the former from the jurisdiction of Civil Service.

"In establishing the classification, title, and salary plan for the professional staff of the institute, 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." (c. 701 of the Acts of 1963.)

Thus, a broad directive is given to the trustees in respect to the classification and salary plan for the institute.

The power to classify jobs and to change salaries and job descriptions is specifically granted to the trustees with the provisions that salaries be within the "general salary schedule" and that notification of personnel actions shall be filed.

"The classification, title, salary range within the general salary schedule, and descriptive job specifications for each position shall be determined by the trustees for each member of the professional staff and copies thereof shall be placed on file with the governor, budget director, director of personnel and standardization, and the joint committee on ways and means." (c. 357 of the Acts of 1964.)

The positions with regard to which you have made the changes enumerated in your letter could properly be determined by the trustees to fall within the category of "professional staff." Also, your letter indicates that you have made the necessary filings of the changed job descriptions, duties and salaries.

Accordingly, I answer your first inquiry in the affirmative.

You further request an opinion as to whether or not the amounts that the Board of Trustees voted, on October 5, 1964, to be paid as salary increases to certain employees, could be effective beginning September 1, 1964.

The Legislature, in enacting cc. 701 and 801 of the Acts of 1963 and c. 357 of the Acts of 1964, has given the trustees the authority to determine salary schedules within the amounts set forth in § 46 of c. 30. It

is also within the power of the trustees to effect the new salary schedules as of September 1, 1964; consequently, I answer your second inquiry in the affirmative.

Very truly yours,

EDWARD W. BROOKE

Implemetation of the work provided for in St. 1963, c. 732, is "subject to appropriation" and the Department of Public Works is precluded from making any expenditure until the town of Winthrop has performed the acts prescribed. Department activity is limited to preparing estimates of construction costs.

DECEMBER 14, 1964

HON. FRANCIS W. SARGENT, *Associate Commissioner of Public Works.*

DEAR SIR: — I have received your letter regarding c. 732 of the Acts of 1963 providing for the dredging and filling of Winthrop harbor. Chapter 732 was passed subject to appropriation and, in addition, the act specifies:

"No expenditure shall be made under this act until said town (of Winthrop) has acquired title to such land, water rights, rights-of-way, or other easements as said department (of Public Works) deems necessary . . ., nor until said town assumes liability . . . for all damages to property suffered by any person by any taking of land, or of any right . . . ."

Thus, there are two contingencies upon which implementation of work under the act depend. One such contingency is the phrase "subject to appropriation" found in § 1; the other is the requirement that the town take title and assume liability for possible resulting damages.

You have requested my opinion as to both of these contingencies. Namely, your letter asks what effect the phrase "subject to appropriation" has; and a further opinion is requested as to whether your department is precluded from making any expenditures until the town of Winthrop has acquired the titles and assumed the liabilities described in § 1 of c. 732 of the Acts of 1963.

With regard to the contingency that the proposed project is "subject to appropriation," provisions for financing the reclamation project are made in § 4 of the Act which states:

"To meet the expenditure necessary to accomplish the work authorized in section one, the state treasurer shall upon request of the governor and council, issue . . . bonds of the commonwealth . . . ." (c. 732 of the Acts of 1963, § 4.)

The maximum limit on the bond issue is two and one-half million dollars.

The question arises: what expenditures, if any, the Department of Public Works may make pursuant to c. 732 before the Governor and Council request the State Treasurer to issue and sell bonds. Chapter 732

makes no provision for such expenditures by your department. The activity of the department relative to the reclamation project would be limited to the statutory obligations found in G. L. c. 29, §§ 4 and 5A, outlining the duty to prepare estimates of construction costs. Indeed, such estimates would be deemed most useful to the Governor and Council since they determine the amount of bond issue to be requested from the State Treasurer.

With regard to the contingency that the town of Winthrop must take title to land needed for the project, once again c. 732 § 4 provides for doing so:

"The town of Winthrop may take by eminent domain under chapter seventy-nine of the General Laws, or acquire by purchase, or otherwise, any lands, water rights, rights-of-way or other easements, public or private, required by said department to perform the work authorized under this act."

And, as noted above, in close connection with the requirement that the town take title, is the legislative directive that:

"*No expenditure* shall be made . . . until said town assumes liability . . . for all damages to property . . . suffered by any taking of land . . . ." (Emphasis supplied.) (c. 732 of the Acts of 1963, § 1.)

It clearly appears that the Legislature has imposed requirements that the town, rather than the Commonwealth, shall assume legal liability before any expenditures are made. Thus, the reclamation is "subject to appropriation" and the Department of Public Works is precluded from making any expenditures until the town of Winthrop has done the acts prescribed by c. 732 of the Acts of 1963.

Very truly yours,

EDWARD W. BROOKE

No person who has been retired for superannuation shall be paid for any service rendered to the Commonwealth except for emergency service and provided the certification required by c. 32 § 91, is first obtained.

DECEMBER 14, 1964

HON. JOHN D. COUGHLAN, *Director, Division of Youth Service.*

DEAR SIR: — I have received your request for an opinion regarding the employment by your division of a psychiatrist who has retired from service with the Commonwealth. Specifically, you have requested my opinion as to whether a psychiatrist who has been retired for superannuation at his own request from the position of Director of Clinical Psychiatry for the Division of Youth Service may be retained on a fee basis as a consultant for the division.

The Director of the Division of Youth Service has certain discretionary powers to hire employees in order to carry out his duties and obligations set forth in G. L. c. 120, §§ 1-4A. However, the General

Court has expressly limited the authority of a division head to employ retired persons. Such individuals may not be paid unless restored to active service on order by the appropriate retirement board except for services rendered under certain circumstances or in certain capacities. (G. L. c. 32, § 91.)

Under c. 32, § 91, the one circumstance that might possibly apply to the psychiatrist is the emergency situation. Chapter 32, § 91 states that:

"No person while receiving a pension or retirement allowance from the commonwealth . . . shall . . . be paid for any service rendered to the commonwealth . . . except . . . for emergency service for a period not to exceed one year in any position after certification that an emergency exists, that a vacancy exists, and that no person having the same or similar skill is available for such position, which certification shall, in each instance, be made by the appointing authority and, . . . by the director of personnel and standardization . . . ."

Within the prescribed limits for an emergency appointment as set forth in the above-quoted § 91, it is necessary for you to acquire the necessary certifications prior to retaining this employee.

Very truly yours,

EDWARD W. BROOKE

The Board of Elevator Regulations, upon a petition for variance from the application of any law, code or regulation relating to the installation or alteration of elevators, may grant a postponement of such application upon such conditions of time and use as it might prescribe.

DECEMBER 14, 1964.

HON. ROBERT W. MACDONALD, *Commissioner of Public Safety.*

DEAR SIR: — I have received your recent letter requesting an opinion regarding G. L. c. 143, § 70, as inserted by c. 439 of the Acts of 1959. More specifically, you have asked whether that statute "empowers the Board of Elevator Regulations upon a petition for a variance from the application of any law, code or regulation relating to the installation or alteration of elevators to grant a postponement of such application upon such conditions of time and use as it might prescribe."

A code of revised elevator regulations was promulgated by the Board of Elevator Regulations in 1956 pursuant to the statutory authority contained in G. L. c. 143, §§ 67, 68 and 69. The effective date of these regulations was delayed eight years, because, in many cases, large capital outlays would be needed to modify older elevators in compliance with the code. Without this delay the revised code could have created hardship.

General Laws c. 143, § 70 sets out the procedures to be followed by any party aggrieved by the application of regulations or codes, and the relief that the Board of Elevator Regulations or the Board of Elevator Appeals may grant. Once the regulations or codes become effective, absolute and immediate enforcement is not a foregone conclusion.

As to the procedures an aggrieved party may follow, they are complete and may be prolonged, thus further extending the time before the application of the codes or regulations becomes effective. A person is not compelled to comply until he has exhausted his administrative remedies and obtained judicial review. To this extent there is a type of postponement of the application of the law. More specifically, § 70 provides:

"Whoever is aggrieved by an interpretation, order, requirement or direction of an inspector . . . may within ten days after the service or notice thereof appeal from such interpretation, order, requirement or direction. . . ."
and,

"Whoever is or will be aggrieved by the application of any provision of law . . . may file a petition for a variance. . . ."

In the case the above appeal is made or petition filed, then there is a public hearing within thirty days thereof unless the appellant or petitioner agrees to an extension of the time, a postponement of the matter. Then, within thirty days after the hearing, the Board of Elevator Regulations issues a decision, unless once again the petitioner or appellant agrees to an extension of this time, in which case there is another postponement in the application of the law, the code, or the regulations. These postponements that I have referred to are products of the procedure established by § 70 and are available to an aggrieved party.

In addition, § 70 does speak of "postponing the application" of the law. This occurs as a mentioned possible type of decision the Board may make following the hearing on an appeal from an order or petition for a variance. The pertinent sentence reads:

"The board shall . . . issue an appropriate decision or order reversing, affirming or modifying in whole or in part said interpretation, order, requirement or direction or *postponing the application thereof* or granting or denying a variance." (Emphasis supplied.)

The plain meaning of this sentence appears to be that the Board of Elevator Regulations is directed to issue a decision reversing, affirming, modifying, or postponing the application of previously issued orders.

In the sense that a continuing use may be considered a postponement of the application of the law, § 70 provides for such as follows:

"In exercising its powers under this paragraph, the board of elevator regulations may impose limitations both of time and use, and a *continuation of the use* permitted may be conditioned. . . ." (Emphasis supplied.)

Under paragraphs (b) and (c) of § 70 there are more built-in procedural postponements. Appeals from the decisions of the Board of Elevator Regulations may be taken to the Board of Elevator Appeals. Such appeals must be heard within thirty days unless, once again, that time is extended by agreement with appellant. Then that Board must render a decision within sixty days of the hearing unless, by similar agreement, that is postponed. Further appeals may be taken to the Superior Court sitting in equity.

Because of the procedural and administrative delays provided for in § 70, and because of the statutory language indicating provision for postponements of the application of laws, regulations, or codes, it is my opinion that the answer to your question would be in the affirmative.

Very truly yours,

EDWARD W. BROOKE

A public officer, serving as a member of the Youth Service Board, whose tenure of office has terminated, may not receive vacation pay in lieu of vacation leave which he has not taken.

DECEMBER 14, 1964.

HON. JOHN D. COUGHLAN, *Director, Division of Youth Service.*

DEAR SIR: — I have received your recent letter requesting an opinion regarding the eligibility of a member of the Youth Service Board for a payment in lieu of a paid vacation. Specifically, the question you pose is that if Mr. Turley, a member of the Youth Service Board, has not been able to take a month's paid vacation for fiscal year 1965, now that his term of office has expired, may he receive a month's salary instead of the paid vacation leave he never took?

You recite that Mr. Turley's term has expired and that a successor has qualified as a member of the board. As your letter states, confirmation of the new appointment ends one term and begins another, pursuant to G. L. c. 30, § 8, entitled, *"Public Officers* appointed by governor." (Emphasis supplied.) A "public officer" is a person who serves the Commonwealth in a responsible capacity, a category into which a member of the Youth Service Board would fall as a consequence of the nature of his qualifications, duties and responsibilities. The distinction that our General Laws makes between a "public officer" and an "employee" seems clearly to be drawn on the basis of the nature of the position and all that it involves. See *Ops. Atty. Gen.* May 28, 1957, January 28, 1964.

Statutory provision has been made for compensating a person who has worked throughout the year and thus failed to benefit from paid vacations. The statute in question reads:

"(c) *Employees* who are eligible for vacation under the rules of said director (Director of Personnel and Standardization) . . . 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." (Emphasis supplied.) (G. L. c. 29, § 31A.)

The question arises whether c. 29, § 31A, referring to employees, governs the eligibility for payments for vacation benefits accruing to public officers.

The Director of Personnel and Standardization has, pursuant to authority granted him, promulgated

"rules which *shall regulate vacation leave,* sick leave and other leave with pay and overtime compensation, maintenance charges, or payments in lieu thereof . . . *for officers other than those exempted* by such rules." (Emphasis supplied.) (G. L. c. 7, § 28.)

It appears, therefore, that c. 29, § 31A, read in conjunction with G. L. c. 7, § 28, provides for the payment of money to some public officers to take the place of a paid vacation allowance. Some officers are exempted.

The Director of Personnel's rules which govern state employees and officials became effective July 1, 1956, and these rules apply to all persons in the executive branch of the state government with important exemptions; namely, *"officers of the commonwealth, as defined in rule G–6,. . . . Members of Boards,* Commissions or Committees *established* by statute or any other person whose expenses while performing their duties are expressly provided for by law in manner other than by rules and regulations of the Director of Personnel and Standardization." (Rule G–5.)

If a member of the Youth Service Board is within the purview of the rules and regulations, then in accord with rule LV–9 he will receive payment in lieu of accrued vacation time as follows:

"Persons who are eligible for vacation under these rules, whose services terminated other than as provided in Rules LV–7 and LV–8, shall be paid an amount equal to the vacation allowance earned in the vacation year prior to such termination which has not been granted; provided that no monetary or other allowance has already been made therefor." (Rule LV–9.)

If a member of the Youth Service Board is exempted from the rules and regulations and the vacation-payment benefit thereby conferred, the exemption may be for one of two reasons; namely, such a member may be an officer of the Commonwealth as defined by Rule G–6, or he may be a member of a board within the meaning of Rule G–5.

As to the first of the two possible reasons for exemption, as set forth in Rule G-6, an officer of the Commonwealth is a person who is, in fact, the head of a department, division, commission or committee established by statute. Furthermore, the expressed intention of Rule G-6 is "to exclude (only) heads of departments who are charged with the successful operation of a state unit." (Rule G-6.) There is no indication that Mr. Turley was, in fact, head of a department, division, or commission. Therefore, Rule G-6 would not exclude him from the coverage of the rules and its benefits. See also *Op. Atty. Gen.* January 28, 1964.

As to the second of the two possible reasons for exemption, the question arises as to a member of the Youth Service Board's exclusion from the rules and the vacation-payment benefit by virtue of being a member of a board or a person whose expenses are provided for by statute. Rule G-5 states that the rules do not apply to *"Members of Boards,* Commissions or Committees *established by statute* or any other person whose expenses while performing their duties are expressly provided for by law in manner other than by rules and regulations of the Director of Personnel and Standardization." (Emphasis supplied.)

The part of Rule G-5 beginning with the phrase "or any other person" and continuing to the end of the paragraph refers to persons whose expenses are provided for by legislation. Such "persons" are individuals other than those enumerated; i.e., members of boards and commissions.

Accordingly, this part of Rule G-5 cannot be considered adjectival and as such must be deemed to refer only to those particular board members whose expenses are expressly provided for by law and not by rules promulgated by the Director of Personnel.

However, even if the language were construed to mean that the only board or commission members excluded from the rules by Rule G-5 were those members whose expenses are provided for by statute, then a Youth Service Board member would still be within the exclusionary meaning of Rule G-5 and not entitled to the pay Mr. Turley seeks because of G. L. c. 6, § 66. That statute dealt explicitly with the matter of expenses of the members of the Youth Service Board and "expressly provided for (expenses) by law in a manner other than by (the) rules and regulations of the Director of Personnel and Standardization." (Rule G-5.)

"The chairman shall receive a salary of twelve thousand dollars, and each of the other members shall receive a salary of eleven thousand dollars, and each member shall also be reimbursed for his expenses actually and necessarily incurred by him in the performance of his official duties." (G. L. c. 6, § 66.)

The remainder of the exclusionary language found in Rule G-5 states clearly that the rules of the Director of Personnel do not apply to "Members of Boards . . . established by statute." The Youth Service Board was "established by statute"; namely, G. L. c. 6, § 65. Mr. Turley was appointed a member of that Board and has continued to serve as a "member." It is therefore my opinion that a member of the Youth Service Board whose tenure of office has terminated may not receive vacation pay in lieu of vacation leave which he has not taken.

Very truly yours,

EDWARD W. BROOKE

The widow of a judge who died prior to January 1, 1964, is not entitled to the benefits of St. 1964, c. 464.

DECEMBER 14, 1964.

HON. WILLIAM A. WALDRON, *Commissioner of Administration.*

DEAR COMMISSIONER WALDRON: — You have asked my opinion about the applicability of c. 464, Acts of 1964 to a widow of a judge who died on July 25, 1960. The act, approved on June 4, 1964 and effective on January 1, 1964, states as follows:

"In determining whether a judge has served in any such office or offices at least ten years continuously and would be, for the purposes of the second or third paragraphs of this section, entitled to a pension for life, under section sixty-five A, each three years spent by him in the serv-

ice of the commonwealth or of any county, city or town thereof shall count as one year of creditable service and each such year so credited, but in no event to exceed more than four years of such creditable service, shall be added to and deemed continuous with the period of his service in any such office or offices."

It would appear from the facts, as you have presented them, that the judge would not have been entitled to a pension when he died, since he had less than ten years' continuous service. His widow is similarly precluded unless she is entitled to the benefit of c. 464, Acts of 1964.

Ordinarily, a legislative act has only prospective application. However, in c. 464, the Legislature expressly stated that the act be retroactive to January 1, 1964. If the Legislature had intended the act to apply to widows of judges who died prior to January 1, 1964, it could have so provided with ease.

Chapter 464, Acts of 1964 is to be inserted in G. L. c. 32, § 65C, which section was approved by the Governor on October 27, 1960 and made retroactive to July 1, 1960. The Attorney General, in an opinion dated February 7, 1961 relating specifically to the question of veteran survivorship benefits under G. L. c. 32, § 58B, stated that the widow of a judge who died prior to July 1, 1960 was not entitled to receive a pension under G. L. c. 32, § 65C.

The question you have presented is essentially the same as that covered in the opinion of February 7, 1961. It is, therefore, my opinion that the widow of a judge who died prior to January 1, 1964 is not entitled to the benefits of c. 464, Acts of 1964.

Very truly yours,

EDWARD W. BROOKE

An initiative petition can affect only those powers conferred on the Governor's Council by statute and can not abolish any Constitutional provisions or amendments.

Any provision of the general or special law requiring any act or omission to act, appointment or removal by the executive department requiring the advice and consent of the Governor's Council has been repealed, excepting those powers and duties specifically exempted from the initiative act under § 2 of the Act.

The Governor's Council has the authority to approve the withdrawal of monies from the treasury of the Commonwealth by warrant including land damage and extra work payments under contract to which the Commonwealth is a party, except such funds as may be appropriated for the redemption of bills of credit or treasurer's notes or for the payment of interest thereon as set forth in Pt. 2, c. 2, § 1, Article II of the Massachusetts Constitution.

DECEMBER 15, 1964.

HON. FRANCIS X. BELLOTTI, *Lieutenant Governor of the Commonwealth.*

DEAR SIR: — In your letter of December 10, 1964, you have asked my opinion concerning a law proposed by initiative petition which appeared

as Question No. 5 on the Massachusetts ballot of November 3, 1964. The specific questions which you have posed in this regard are listed below and will be answered in the order in which they appear in your letter.

"1. Define the powers and duties of the Governor's Council as they presently exist.

"2. Does the Governor's Council have the authority to approve land damage payments?

"3. Does the Governor's Council have the authority to approve the extra work order payments under contracts in which the Commonwealth is a party?

"4. Does the Governor's Council have the authority to approve the Treasurer's warrants?"

From your letter it appears that the results of the election of November 3, 1964 have been certified by the Governor's Council and that the people have approved and adopted this initiative petition as a law of the Commonwealth.

The purpose of this law, as evidenced from the statute as a whole, is to repeal certain statutory powers of the Governor's Council. Section 1 defines the words "the council," "advice and consent of the council," and "executive department" as these terms are used in the context of this act. Section 2 exempts from the operation of this statute certain boards and commissions [1] established by § 65 of c. 6, § 15 of c. 23, § 2 of c. 25, § 4 of c. 27, and § 1 of c. 58A of the General Laws, but makes certain exceptions with regard to these sections where the Council refuses to act on an appointment or removal within a thirty-day period. Section 3 amends any provision of the General or special laws of this Commonwealth inconsistent with this act and repeals thereby any provisions of these laws which require the advice and consent [2] of the council "to any appointment (whether made by the Governor or other officer) in the executive department, or to the fixing of any salary, or other compensation for services rendered, in the executive department, or to the removal of any person holding office in the executive department. . . ." Section 4 repeals in the same manner as § 3 so much of any provision of the general or special laws which would require the advice and consent of the Council in regard "to any action or omission to act (relating to without limitation) any deposit, borrowing, loan, investment, endorsement, validation, surety, or bond, or any lease, license, purchase, acquisition, sale, conveyance, disposition or transfer, or any contract or other agreement, or any permit or license, or any rules or regulations. . . ." Section 5 permits the Governor at his discretion to seek the advice of the Council concerning any matter. Section 7 makes provision for severing any part of the act held to be unconstitutional and maintaining intact any provision not affected by such a decision.

From Article 48 of the Amendments to our Constitution, it is clear that an initiative petition could affect only those powers conferred on the Council by statute and could not abolish any constitutional provision or amendment. The act itself has effectively repealed all those statu-

tory powers of the Council relating to the executive branch of government [3] which heretobefore had required the advice and consent of the Council.

In light of this, in answer to question one, it is my opinion that any act or omission to act, appointment or removal by the executive department which had formerly required the advice and consent of the Governor's Council no longer needs such approval. Any provision of the general or special laws in which any such requirement appears is repealed. Those powers and duties of the Governor's Council not relating to the executive department as described above, those specifically exempted from the act under § 2 and those conferred on the Council by the Constitution remain unchanged.[4]

. 2. 3. 4. These three questions will be answered together since they concern related matters pertaining to the power of the Council to approve warrants submitted by the Treasurer.

A warrant is simply a document authorizing a specific act.[5] In this instance the act needing prior authorization is the withdrawal of funds from the Treasury of the Commonwealth. The Constitution requires in making such a withdrawal that:

Mass. Const. Pt. 2, c. 2, § 1, Art. 11.

"No moneys shall be issued out of the treasury of this commonwealth, and disposed of (except such sums as may be appropriated for the redemption of bills of credit or treasurer's notes, or for the payment of interest arising thereon) but by warrant under the hand of the governor for the time being, with the advice and consent of the council, for the necessary defence and support of the commonwealth; and for the protection and preservation of the inhabitants thereof, agreeably to the acts and resolves of the general court." [6]

The responsibility of authorizing a warrant initially stems from the Constitution. The duty under this section primarily rests with the Governor as the chief executive. *Opinion of the Justices,* 190 Mass. 617, 618, 619 (1906). The purpose of this section is to "insure that no payments (are made) from the public treasury except for public purposes and in accordance with the law. It is not the purpose to give the Governor and Council power to veto contracts or purchases lawfully made by authorized officers or to refuse to honor debts and obligations lawfully incurred." *Willar* v. *Commonwealth,* 297 Mass. 527, 529 (1937).[7] No inquiry may then be made concerning the wisdom of the policy behind the statute or decision. In approving such a warrant a reasonable delay would be justified only where "reasonable doubt on the part of the Governor and Council (arises) as to the existence or amount, according to law, of an obligation or liability. . . ." *Opinion of the Justices,* 309 Mass. 609, 630 (1941).

Certain funds are specifically exempted from the purview of this section. They are, as stated above, "sums . . . appropriated for the redemption of bills of credit or treasurer's notes, or for the payment of interest arising thereon. . . ." Land damage and extra work payments

are not within the exempted category. Such withdrawals must be made by warrant with the signature of the Governor and the approval of the Council.

In answer to questions 2, 3 and 4, it is my opinion that the Governor's Council has the authority to approve the withdrawal of monies from the Treasury of the Commonwealth by warrant including land damage and extra work payments under contract to which the Commonwealth is a party, except such sums as may be appropriated for the redemption of bills of credit or Treasurer's notes or for the payment of interest thereon as set forth in Pt. 2, c. 2, § 1, Art. 11 of the Massachusetts Constitution.

Very truly yours,

EDWARD W. BROOKE

1 These boards and commissions are the Youth Service Board, Industrial Accident Board, Commission of the Department of Public Utilities, Parole Board, and Appellate Tax Board.

2 As that term is defined in § 1 of the act.

3 Section 1 of the act expressly excludes from the definition of "executive department" the legislative, judicial departments and any instrumentality or agency of a city or town.

4 Including the following constitutional powers and duties of the Council: Mass. Const. Pt. 2, c. 1, § 1, Art. 4, Approval of Warrants; Pt. 2, c. 1, § 2, Art. 3, Examining Records and Issuing Summons to Persons Elected; Pt. 2, c. 2, § 1, Art. 4, Meeting with Governor concerning Affairs of the Commonwealth, Arts. 5 and 6, Certain Powers in Adjourning and Proroguing the General Court, Art. 8 Pardoning Offenses, Art. 9 Judicial Appointments, Art. 11 Approval of Warrants; Pt. 2, c. 2, § 3, Arts 1, 3, and 5, Establishing Council; Pt. 2, c. 2, § 4, Art. 2, Certain Records; Pt. 2, c. 3, Art. 1, Removal of Judicial Officers, Art. 2, Opinions of the Justices; Amendments Art. 4 Notaries Public, Art. 16 Election and Qualification of Councillors, Art. 17 Filling Certain Vacancies, Art. 37 Removal of Notaries and Justices of the Peace, Art. 85, Opinions of the Justices.

5 Webster, New International Dictionary (2 ed. 1948).

6 See also Mass. Const. Pt. 2, c. 1, § 1, Art. 4; Mass. G. L. c. 29, § 18, as amended by St. 1953, c. 203, § 2.

7 See also cases cited by court. *Opinion of the Justices,* 13 Allen 593; *Boston & Albany Railroad* v. *Commonwealth,* 296 Mass. 426; *Daley* v. *Mayor of Medford,* 241 Mass. 336, 339; *Godfrey Coal Co.* v. *Gray,* 296 Mass. 323, 325.

Where the Legislature has enacted a statute which contains broad or ambiguous language, the state agency charged with the administration of the statute in question is empowered to enact interpretative regulations, consistent with applicable statutes, in order to clarify parts of the law which require explanation.

DECEMBER 17, 1964.

HON. SALVATORE PETRONE, *Chairman, Board Regulating Installation of Gas Piping and Gas Appliances in Buildings.*

DEAR MR. PETRONE: — I have received the Massachusetts Gas Regulatory Board's request for an opinion on the subject of "gas fitting" as that term is used in c. 312 of the Acts of 1964. You have informed me that the Board is presently conducting a series of public hearings prior to the adoption of rules and regulations governing the installation, inspection and operation of liquefied petroleum containers and associated equipment.

The Board has investigated practices connected with the use of liquid petroleum for the heating of buildings. The equipment that is ordinarily installed for such heating consists of a cylinder, connecting hose or tube, and a heater (sometimes called a "salamander"). Such equipment is portable, and may easily be moved from one part of a building to another. Relocating these items necessitates lighting and turning off the flame, and removing and replacing a threaded fitting on a valve attached to the cylinder.

Chapter 312 of the Acts of 1964 provides in part as follows:

". . . As used in this section the words 'gas fitting' shall be construed to include the *installation, alteration and replacement* of a system beyond the gas meter outlet or regulator through which is conveyed or intended to be conveyed fuel gas of any kind for power, refrigeration, heating or illuminating purposes including the connection therewith and testing of gas fixtures, ranges, refrigerators, stoves, water heaters, house heating boilers, and any other gas using appliances and all attachments and appurtenances, and the maintenance in good and safe condition of said systems, and the making of necessary repairs and changes." (Emphasis supplied.)

Your Board now wishes to promulgate a regulation which would authorize the moving of the liquid petroleum heating equipment described above, as well as the accompanying replacement of the threaded fitting and re-lighting of the flame, by laborers who are not licensed gas fitters. Accordingly, you have requested a determination whether the type of tending, positioning, refueling and relocation of salamanders referred to in your letter should be considered "gas fitting" as defined by St. 1964, c. 312.

As indicated above, "gas fitting" shall — under the statute — be construed to include "installation, alteration and replacement" of certain systems. The words "installation, alteration and replacement" are not exact in their meaning, and are subject to varied interpretations. This language needs to be further defined so that decisions as to what operations are to be considered to be within the area of "gas fitting" may more easily be made. The General Court has not at the date of this writing provided such additional definition.

Further definition and refinement of this language can lawfully be provided by the state agency that has been charged with administration of the statute in question. It is an accepted principle of administrative law that a board or agency authorized by its governing statutes to promulgate rules and regulations may enact so-called "interpretative" regulations in order to clarify parts of the law which require explanation.

Cammarano v. *United States*, 358 U. S. 498, 508

The agency is thus in effect authorized to make the initial interpretations of its statute in light of its expertise in the subject matter to be regulated. Where the Legislature has enacted a statute which contains broad or ambiguous language, such interpretative regulation can be an important contribution by the agency.

The United States Supreme Court has recognized the implied authority vested in administrative agencies to embody statutory interpretation in regulations.

". . . The crucial words of the statute . . . are not so easy of application to varying facts that they leave no room for administrative interpretation or elucidation. . . . Interpretative regulations . . . are appropriate aids toward eliminating that confusion and uncertainty. . . ."

Magruder v. *Washington, Baltimore & Annapolis Realty Corp.,* 316 U. S. 69, 73-74.

Practical interpretation of an ambiguous or doubtful statute by administrators who are experts in the field regulated by such statute will not be disturbed except for reasons of great weight.

Brewster v. *Gage,* 280 U. S. 327, 336.

Such interpretative regulations must of course be consistent with applicable statutes; to the extent that these regulations conflict with such statutes the regulations would be unauthorized and invalid.

Trust of Bingham v. *Commissioner of Internal Revenue,* 325 U. S. 365, 377.

St. 1964, c. 312 does not indicate with any clarity whether the type of operation described in your letter should or should not be included within the concept of "gas fitting." A technical decision of this nature cannot properly be made by the Attorney General. Your Board, however, does have the experience and expertise necessary to make such a decision, and should provide the initial interpretation of the statute in question.

The words "installation, alteration and replacement" could have been intended to include the moving of salamanders and related equipment; but the term is equally susceptible to the opposite construction. This situation logically calls for the exercise of your Board's authority to enact interpretative regulations to clarify the ambiguity. In light of the professional knowledge of the members of the Board, and their understanding of the practical aspects of the subject matter being regulated, such a determination will be accorded great weight, and — unless determined to be clearly wrong by a court — will become the controlling interpretation of St. 1964, c. 312.

Very truly yours,

EDWARD W. BROOKE

The so called "grandfather clause" contained in St. 1963, c. 604, precludes the application of the age and experience limitations contained in §87PPP to individuals currently in the radio and television repairing field who seek to be licensed pursuant to St. 1963, c. 604, § 4. Applications under said "clause" may only be accepted prior to December 31, 1964, after which § 4 will no longer be in effect.

DECEMBER 17, 1964.

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

DEAR MRS. SULLIVAN: — I have received your letter of November 27, 1964, wherein you request reconsideration of an interpretation contained in an opinion of the Attorney General rendered to you on September 11, 1964, in response to two questions posed by the Board of Registration of Radio and Television Technicians. The second inquiry was worded as follows:

"2. Section 87PPP, of the Acts of 1963, Chapter 604, gives the definition of a 'master technician' as a person being 21 years of age or over, having at least one year of experience. How does this relate to the 'grandfather clause'?"

Section 2 of the said St. 1963, c. 604 amends c. 112 of the General Laws by inserting, under the caption REGISTRATION OF RADIO AND TELEVISION TECHNICIANS, §§ 87PPP to 87VVV, inclusive. Section 87PPP defines a master technician's license as a "license to any person at least twenty-one years of age who has had at least one year of experience in the repair and maintenance of radio and television receivers"; a technician's license is defined as a "license issued to any person at least eighteen years of age, who is employed by a service dealer or acts under the supervision of a licensed master technician in the repair and maintenance of radio and television receivers."

The "grandfather clause" to which you refer is to be found in § 4 of c. 604 of the Acts of 1963, and provides as follows:

"Notwithstanding the provisions of section eighty-seven PPP to eighty-seven VVV, inclusive, of chapter one hundred and twelve of the General Laws, inserted by section two of this act, any person who files an application for a license as a technician or a master technician with the board of registration of radio and television technicians at any time prior to December thirty-first, nineteen hundred and sixty-four, on a form furnished by said board, containing a written statement that he is engaged in the business of repairing and maintaining radio and television receivers in the commonwealth on the date of said application and furnishes evidence that he is and is found to be of good moral character, and pays the appropriate license fee as provided in section eighty-seven UUU, *shall, without examination or compliance with any other provision of sections eighty-seven PPP to eighty-seven VVV, inclusive,* be granted and issued such license by the board. Any such license shall expire one year from the date of issuance." (Emphasis supplied.)

St. 1963, c. 604, § 4, as amended by St. 1964, c. 110.

It is clear from the language of § 4 that the General Court intended by means of the so-called "grandfather clause" to protect all persons engaged in the business of repairing and maintaining radio and television receivers at the time of passage of the new registration law. The provisions of § 4 must be applied notwithstanding *any* requirements which appear in G. L. c. 112, §§ 87PPP-87VVV. Thus, the age and experience limitations imposed by the definitions contained in § 87PPP may not be applied to individuals currently in the radio and television repairing field who seek to be licensed pursuant to § 4 of St. 1963, c. 604.

Section 4 admittedly contains nothing which would prevent individuals of tender age and limited experience from becoming licensed technicians or even master technicians. But the General Court has specifically provided that applicants who file under § 4 need not comply with other sections of the registration statute, and it must therefore be assumed that the Legislature was aware of the possible result. Accordingly, such applicants are entitled to be licensed upon payment of the appropriate license fee and upon findings by the Board that they are engaged in the business of repairing and maintaining radio and television receivers in the Commonwealth and that they are of good moral character. Any language to the contrary appearing in the Attorney General's opinion of September 11, 1964 referred to above is hereby withdrawn. Applications under the "grandfather clause" may of course only be accepted prior to December 31, 1964; § 4 will no longer be in effect after that date, and applications must then be processed in accordance with the regular provisions of the regulation law.

Very truly yours,

EDWARD W. BROOKE

The holder of private tidal flats in Massachusetts is not entitled to damages when said flats are appropriated by the Commonwealth for public use to improve navigational facilities.

DECEMBER 21, 1964.

HON. JAMES D. FITZGERALD, *Commissioner of Public Works.*

Re: Chapter 543, Acts of 1964.

DEAR COMMISSIONER: — By letter of October 20, 1964, you have asked for my opinion on the following:

"(1) (Is) the holder of private tidal flats in Massachusetts . . . entitled to damages when said flats are appropriated by the Commonwealth for the public's use to improve navigational facilities?"

"(2) Who has the authority to make any taking for the Commonwealth within the limits of the Boston Harbor inasmuch as the Massachusetts Port Authority created by Chapter 465 of the Acts of 1946 has jurisdiction over Boston Harbor . . . ?"

The general rules of law evolved at common law and under the Colonial Ordinances of 1641-47 to govern property interests along the shores of the sea, bays, beaches and inlets have been considered repeatedly

by the Courts of the Commonwealth. *Commonwealth* v. *Charlestown,* 1 Pick. 179. *Commonwealth* v. *Alger,* 7 Cush. 53. *Commonwealth* v. *Roxbury,* 9 Grey. 451. *Home For Aged Women* v. *Commonwealth,* 202 Mass. 422. Early Colonial charters conferred all rights belonging to the English government on its representatives in this country. The title of the King of England to certain property, both *jus publicum* and *jus privatum,* with rights of regulation in Parliament in the interest of the people, came to the Colonies and passed to the several States and their legislatures.

The fee in the land under tidewaters has remained in the government as the representative of the people for the public use, subject to the Colonial Ordinance of 1647 and private grants. Before the adoption of that 1647 Ordinance private ownership of grants on navigable waters stopped at the highwater mark. The Ordinance of 1657 states: ". . . it is declared that in all creeks, coves and other places about and upon salt water, where the sea ebbs and flows, the proprietor, of the land adjoining shall have propriety to the low water mark, when the sea doth not ebb above a hundred rods and not more wheresoever it ebbs further: provided that such proprietor shall not by this liberty have power to stop or hinder the passage of boats or other vessels, in or through any sea, creeks or coves to another man's homes or lands" *Anc. Chart.* 148, 149. Title to low water mark or to the distance of one hundred rods is subject to the rights of navigation, fishing and fowling. *Butler* v. *Attorney General,* 195 Mass. 79. The government, representing the interests of all the people, reserved that control over the flats in private ownership necessary for the protection and promotion of navigation. All tideland rights granted to individuals by the General Laws are subject to that paramount right of the Legislature to do what it deems necessary for the promotion of Navigation.

Waters and the land under them beyond the line of private ownership are held by the Commonwealth both as it is owner of the fee and repository of sovereign power with a perfect right of control in the interest of the public. Acts of the Legislature on these matters have been treated as paramount to all private rights, subject only to the power of the Government of the United States to act in the interest of interstate or foreign commerce. *Home for Aged Women* v. *Commonwealth, supra.*

In *Sage* v. *Mayor of New York,* 154 N. Y. 61, cited in *Home for Aged Women* the Court said: "When any public authority conveys land bounded by tidewater, it is impliedly subject to these paramount uses to which the Government as trustee for the public may be called upon to apply the water front for the promotion of commerce and general welfare". Knowlton, J., citing this case, said: "The fundamental reason for the rule is the same as that in Massachusetts. Ultimately, the right depends upon the inherent and paramount power of the government as the representative of the whole public, which power has always been retained by the Legislature except when plainly limited by an express grant."

It has been established that even a title in flats by grant from the Colony or Commonwealth if they have not been built upon, is subject to the authority of the Legislature for the protection of harbors and

the public right of navigation. *Boston* v. *Richardson,* 105 Mass. 351-362. *Home for Aged Women* v. *Commonwealth, supra. Crocker* v. *Champlin,* 202 Mass. 441-442. *Michaelson* v. *Silver Beach Improvement Association, Inc.* 342. Mass. 251.

In the *Crocker* Case the Court, through Knowlton, J., asked: "Did the extension of the boundaries of private ownership under the Colonial Ordinance take away from the State the right to make such a change (in the depth of water over flats in that case) for the improvement of navigation without providing compensation to individual owners under the ordinance?" In answer the Court said: "We are of the opinion that it did not. This ordinance gave the owners only qualified rights. The rights of the public to have the benefit of waters for navigation were reserved." It must be noted with interest that there were no formal takings by eminent domain in the *Crocker* Case. See also *Butler* v. *Attorney General,* 195 Mass. 79 and 83.

The reserved public rights include a right to control the property as reasonably necessary in the interests of navigation. That is the substance of the decision in *Commonwealth* v. *Alger,* 7 Cash. 53, 89, 91 in which it was held that the Commonwealth might establish harbor lines over privately owned flats that had not been built upon and " . . . *exclude the owner from any use of them inconsistent with the most advantageous use that the public might make for purposes of navigation.*" (Emphasis supplied) That doctrine has been embodied in the legislation and judicial decisions of the Commonwealth. The statutes of the United States rest upon that principle.

In the case of *Michaelson* v. *Silver Beach Improvement Association, Inc., supra.* the Court said at page 256:

"An examination of our decisions shows that the only specific powers which have been expressly recognized as exercisable without compensation to private parties are those to regulate and improve navigation and the fisheries."

Under the authority of Chapter 543 of the Acts of 1964 the Department of Public Works was authorized to act as local agent for the Corps of Engineers on several projects. The specific project about which you wrote includes the proposed *Navigational Improvements* to Chelsea River in the Cities of Revere, Chelsea and Boston.

It is my opinion that the holder of private tidal flats in Massachusetts is not entitled to damages when said flats are appropriated by the Commonwealth for public use to improve navigational facilities.

The opinion expressed in the preceding paragraph makes it unnecessary to answer the second question propounded in your letter of October 20, 1964, because no formal taking of property by eminent domain need be made.

Very truly yours,

EDWARD W. BROOKE

Persons eligible under the so called "grandfather clause" in St. 1963, c. 604, need not comply with the requirements contained in §§87PPP to 87VVV of G. L. c. 112; age and experience limitations are not applicable.

A license cannot be issued under the provisions of the "grandfather clause" to any applicant who cannot establish that he was engaged in the radio and television repair business in the Commonwealth on the date of application.

DECEMBER 23, 1964.

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

DEAR MRS. SULLIVAN: — I have your letter of December 14, 1964, in which you pose the following two questions on behalf of the Board of Registration of Radio and Television Technicians:

"1. Can a person under eighteen years of age, obtain a Master or Technician License if he is actively engaged in the repair and maintenance of radio and television receivers at the time of filing the application under the 'grandfather clause'?

"2. Can a person under the 'grandfather clause' obtain a Master or Technician License if he was actively engaged in the repair and maintenance of radio and television receivers before he entered the military service?"

The "grandfather clause" to which you refer in your inquiries is found in § 4 of c. 604 of the Acts of 1963, and is designed to insure that persons engaged in the business of repairing and maintaining radio and television receivers at the time of passage of the regulatory statute would not be adversely affected by the new legislation.

"Notwithstanding the provisions of section eighty-seven PPP to eighty-seven VVV, inclusive, of chapter one hundred and twelve of the General Laws, inserted by section two of this act, any person who files an application for a license as a technician or a master technician with the board of registration of radio and television technicians at any time prior to December thirty-first, nineteen hundred and sixty-four, on a form furnished by said board, *containing a written statement that he is engaged in the business of repairing and maintaining radio and television receivers in the commonwealth on the date of said application and furnishes evidence that he is* and is found to be of good moral character, and pays the appropriate license fee as provided in section eighty-seven UUU, shall, without examination or compliance with any other provision of sections eighty-seven PPP to eighty-seven VVV, inclusive, be granted and issued such license by the board. Any such license shall expire one year from the date of issuance." (Emphasis supplied.)

St. 1963, c. 604, § 4, as amended by St. 1964, c. 110.

The subject matter of your first question has been fully treated in an opinion of the Attorney General rendered on December 17, 1964. It is clearly stated in § 4 of the new law that persons who are eligible to be licensed under the provisions of the "grandfather clause" need not comply with the requirements contained in §§ 87PPP to 87VVV of c.

112 of the General Laws. The age and experience limitations mentioned in the definitions which appear in § 87PPP thus are not applicable to individuals who seek to be licensed under § 4 of St. 1963, c. 604. An applicant, irrespective of his age, must be licensed if he meets the requirements of § 4, and I accordingly answer your fiirst question in the affirmative.

The "grandfather clause" does, however, require that an applicant furnish evidence that he is engaged in the business of repairing and maintaining radio and television receivers in the Commonwealth on the date on which his application for a license is filed. The statutory language is clear, and its interpretation cannot be varied. Should — for any reason — an applicant not be in business on the day on which he applies for a license, such license cannot be issued under the provisions of § 4 quoted above.

I am aware of the fact that individuals may be engaged in the radio and television repair business and may be forced to cease their operations because of military service. Such circumstances cannot be considered under the language of § 4. A person who makes application while in military service would, in virtually all instances, find it impossible to establish that he was engaged in the radio and television repair business in the Commonwealth on the date of application, and would not therefore be entitled to receive a license under the provisions of § 4 of St. 1963, c. 604.

Very truly yours,

EDWARD W. BROOKE

Application of G. L., c. 271, §6A-(referral selling) is made conditional upon the existence of an original sale to the person who is to undertake further solicitations and the chain aspect is an essential element amounting to a condition to prosecution.

DECEMBER 23, 1964

HON. DERMOT P. SHEA, *Executive Secretary, Consumers' Council.*

DEAR MR. SHEA: — On August 19, 1964, the Consumers' Council requested an opinion relative to the legality of the practice of "referral selling" in the Commonwealth of Massachusetts. An opinion of the Attorney General treating this subject matter was rendered on September 30, 1964. Since this opinion was issued, this Department has received a great variety of written and verbal communications seeking further clarification of the statute involved and of its application to specific selling practices. Because the treatment contained in the opinion of September 30, 1964 was intended as a general guide only, and was not addressed to problems of a specific nature, I feel that it is necessary to provide the following for application to such problems.

The statute which governs chain transactions within the Commonwealth of Massachusetts was enacted by St. 1938, c. 144, and inserted into the General Laws as § 6A of c. 271.

"Whoever sets up or promotes a plan by which goods or anything of value is sold to a person for a consideration and upon further consideration that the purchase agrees to secure one or more persons to participate in the plan by respectively making a similar purchase or purchases and in turn agreeing to secure one or more persons likewise to join in said plan, each purchaser being given the right to secure money, credits, goods or something of value, depending upon the number of persons joining in the plan, shall be held to have set up and promoted a lottery and shall be punished as provided in section seven. The supreme judicial court shall have jurisdiction in equity upon a petition filed by the attorney general to enjoin the further prosecution of any such plan and to appoint receivers to secure and distribute the assets received thereunder."

It is clear from even a single reading that this statute is extremely complicated and requires careful application. Criminal penalties can be imposed for violation of its provisions, and accordingly the said provisions must be strictly construed. The scope of this law must not be mere implication.

Commonwealth v. *Paccia*, 336 Mass. 4, 6

The statute describes several different aspects of selling plans; the existence of each must be proven before it may properly be established that a particular selling plan falls within the statutory prohibitions.

General laws c. 271, § 6A refers at the outset to the individual who "sets up or promotes a plan by which goods or anything of value is sold to a person for a consideration." Application of the statute is thus made conditional upon the existence of an original sale to the person who is to undertake further solicitation. The absence of such an original sale will in all cases protect whatever solicitation plan has been developed. The company which hires solictors who do not themselves purchase the item sold cannot be prosecuted under G. L. c. 271, § 6A, irrespective of the nature of the solicitation plan.

Assuming that a purchase has been made by the solicitor himself, there must under the statute be "the further consideration that the purchaser agrees to secure one or more persons to participate in the plan by respectively making a similar purchase or purchases and in turn agreeing to secure one or more persons likewise to join in the said plan, each purchaser being given the right to secure money, credits, goods or something of value, depending upon the number of persons joining in the plan. . . ." Therefore, it is far from automatic that selling plans under which purchasers agree to solicit other purchases will violate the provisions of the statute. The language quoted in this paragraph contains three distinct elements, each of which must be present before the selling plan may lawfully be prohibited.

1) The original purchaser must produce a new purchaser; i.e., one who will in fact buy the product in question. An actual purchase by the individual contacted by the solicitor is a requirement under the statute. Plans which require the securing of a potential customer or a "listener" only, (where the solicitor receives value or credit from the company merely for producing a prospect irrespective of whether the

negotiation culminates in an actual purchase), are not outlawed by the statute.

2) St. 1938 c. 144, which Act added § 6A to c. 271 of the General Laws, was entitled AN ACT MAKING CERTAIN ENDLESS CHAIN TRANSACTIONS SUBJECT TO THE LAWS RELATIVE TO LOTTERIES. Thus it would appear that the statute is directed entirely at selling plans with a particular type of chain aspect. The original purchaser must not only produce a second purchaser, but he must in addition secure an agreement from the said second purchaser that the latter will secure a third purchaser who will in turn submit to the same agreement. In other words, purchaser A must not only produce purchaser B, but must also induce purchaser B to agree to obtain similar agreements from purchaser C, who will in turn solicit purchaser D, etc. This chain aspect is an essential under the statute and is a condition to prosecution.

3) The plan must give *each purchaser* the right to secure money or other things of value, the amount to be determined by the number of persons participating in the said plan. The length of the chain would determine the amount of money or other premium, with each purchaster's reward increasing as new purchasers are attracted. Each purchaser in the chain must therefore be affected by each new purchase; plans which reward only the solicitor who actually produces the new purchaser are not prohibited by the statute.

The term "referral selling" as such is not used in G. L. c. 271, § 6A, and it is difficult to determine exactly what forms of such activity the members of the General Court had in mind when the statute was enacted. "Referral selling" is a label which covers a variety of plans and arrangements. The type of activity described in and declared unlawful by the statute in question certainly would be considered a form of referral selling. But the term may also justifiably be applied to plans which do not come within the provisions of G. L. c. 271, § 6A, and which are entirely legitimate. Any plan under which one customer suggests the names of other potential customers is in fact a form of referral selling.

A selling plan or arrangement may, consequently, be called "referral selling," but yet will not violate the provisions of G. L. c. 271, § 6A. The application of the label "referral selling" must not substitute for a careful analysis of what is involved in a particular selling plan. Such analysis must take place on a case-to-case basis. Plans which conform to the provisions contained in the statute as those provisions have been explained above must be considered unlawful and will be subject to prosecution. Plans which do not conform in every respect to the statutory description remain fully protected by law and their use must be permitted without interference.

Very truly yours,

EDWARD W. BROOKE

The Farmers' Agricultural Cooperative Trading Society is required to be bonded pursuant to G. L. c. 94, § 152A by way of § 152E.

DECEMBER 29, 1964.

HON. CHARLES H. MCNAMARA, *Commissioner of Agriculture.*

DEAR SIR: — I have received your letter relative to the Farmers Agricultural Cooperative Trading Society and your request for an opinion as to whether that organization (herein referred to as the Society) is required to be bonded pursuant to G. L. c. 94, §§ 152A to G.

The statute provides for the licensing of persons engaged in the business of buying and selling poultry. A specific type of business activity, namely, that of contracting with producers, falls within the broader perspective of business activity which must be licensed. Section 152E reads:

"Any person . . . who contracts with a producer . . . for the raising and delivery of poultry . . . shall be subject to the provisions of sections one hundred and fifty-two A and one hundred and fifty-two D . . . ." The provisions of the referred section 152A require persons involved in the business of buying and selling to be licensed and bonded. Section 152C imposes a criminal penalty for violations.

The Society is a Massachusetts corporation formed under G. L. c. 157, § 3. Among the purposes of the Society, as they are set out in its corporate charter, is the contracting with producers thereby requiring them to market any or all of their products through the Society which is authorized to acquire title to the products to remarket and distribute them.

The Society, pursuant to its charter and purposes, does contract with its producer membership. Under paragraph six of that contract, the grower-producer agrees "to sell and deliver all fowl" only to such firms, persons, or corporations as the Society designates "and only pursuant to an Approved Contract." The last sentence in paragraph six referring to the Approved Contract states: "Official notice of such approval shall be given to Member by Society by mail . . . ." Thus, it appears that the Society is acting pursuant to its purposes. It contracts with members and thereby exercises control over the products (to which it may take title); it then arranges for distribution and marketing. All of this is by contract as that word is used in § 152E; and in so conducting its business relative to these contracts the Society shall be deemed to be acting in its own name. (Society's Marketing Agreement clause 14.) Clearly then, the Society, in my opinion, falls within the category of "any person . . . who contracts with a producer . . . shall . . . be subject to the provisions of section 152A . . . ." (§ 152E.)

Section 152A states:

"No person shall engage regularly *in the business* of buying or selling poultry which is to sold or used for food unless he has a license from the commissioner of agriculture, the fee for which shall not exceed two dollars, and has filed a surety bond with said commissioner. . . ." (Emphasis supplied.)

Aside from the fact that the Society's contracting activities are within the purview of § 152E which in turn involves § 152A (and its bonding provision), the Society's charter sets out numerous activities it proposes to engage in, and does engage in; such activities when considered as a whole might be deemed as putting the Society "in the business" of buying and selling poultry. I refer to activities such as negotiations of sales, selling directly, acquiring title, and distributing. Thus, being so closely involved with the process of marketing poultry, the Society might be viewed as being "in the business" or being in the industry of buying and selling poultry as that phrase is used. However, since § 152D imposes criminal penalties for violations of § 152A, the statute must be construed strictly. It is, therefore, my opinion that the Society is covered by the bonding requirement of § 152A by way of § 152E.

Very truly yours,

EDWARD W. BROOKE

The trustees of the Southeastern Massachusetts Technological Institute have the discretion to apply for and use federal grants of the type available under the Higher Education Facilities Act of 1963 (Public Law 88.204), and have satisfied the requirements contained in § 170.14 of the Regulations promulgated pursuant to such Public Law.

DECEMBER 30, 1964.

HON. JOSEPH L. DRISCOLL, *President, Southeastern Massachusetts Technological Institute.*

DEAR DOCTOR DRISCOLL: — I have your request for an opinion relative to compliance by the Southeastern Massachusetts Technological Institute with certain regulations promulgated pursuant to Public Law 88-204, the so-called Higher Education Facilities Act of 1963. I understand that the Institute is about to file an application under the Act for a grant of federal funds for construction of educational facilities. Section 170.14 of the Regulations provides as follows:

"Before approving a Title I grant the Commissioner will require:

"(a) Satisfactory evidence that the applicant has or will have a fee simple or such other estate or interest in the facilities and site, including access thereto, sufficient in the opinion of the Commissioner to assure undisturbed use and possession for the purpose of the construction and operation of the facilities for not less than seventy-five years from the date of the application.

"(b) Satisfactory evidence that the applicant has the necessary legal authority to finance, construct, and maintain the proposed facilities, and to apply for and receive the proposed grant."

Accordingly, you have asked whether the Institute can comply with these two requirements imposed as conditions to receipt of the federal funds in question.

The campus properties in Dartmouth were taken by the trustees of the Southeastern Massachusetts Technological Institute pursuant to the eminent domain provisions contained in c. 543 of the Acts of 1960. The property taken exceeds 700 acres in extent, and the Institute will — as a result of the authorized taking — have clear and undisturbed use and possession of the same for at least 75 years from the date of application for the Federal grant. It is conceivable, of course, that the General Court could lawfully alter this situation in the future by providing for a different use of the land. But in light of the clear intent of the Legislature, as evidenced by St. 1960, c. 543, that this land was to be devoted to the purposes of the Institute, it is unlikely that the General Court would act to the contrary in any way.

The trustees of the Institute have been given broad powers of management by the General Court to the end that high educational standards may be maintained. The trustees are authorized, subject to appropriation and to G. L. c. 7, §§ 30A to 30J, to prepare plans and specifications and to award contracts "for the construction of necessary classrooms and library, laboratory, dormitory, administration and other buildings at the site of the campus." (St. 1960, c. 543, § 5.) In addition, c. 75B, § 8 provides in part:

". . . The trustees shall have the authority to assent to federal laws designed to benefit the institute and to enter into agreements or contracts with agencies of other governments, other colleges and universities, foundations, corporations, interstate compact agencies and individuals where such agreements or contracts, in the judgment of the trustees, will promote the objectives of the institute. . . ."

Clearly, discretion is vested in the trustees to apply for and to use federal grants of the type available under the Higher Education Facilities Act of 1963.

Consequently, in light of the above, it is my opinion that the requirements contained in § 170.14 of the Regulations have been satisfied.

Very truly yours,

EDWARD W. BROOKE

An application for voluntary retirement may, under the retirement law, be withdrawn by the employee prior to the effective date of retirement by means of oral communication, provided that adequate notice is conveyed in some way to the State Retirement Board that it is the employer's desire not to pursue his original intent to retire voluntarily.

JANUARY 4, 1965.

HON. ROBERT Q. CRANE, *Treasurer and Receiver General of the Commonwealth.*

DEAR MR. CRANE: — I have received your letter of December 30, 1964, wherein you request my opinion relative to the property of an oral withdrawal of a retirement application by one Rose L. Levine, an em-

ployee of the Department of Corporations and Taxation. You have informed me that earlier this year Miss Levine submitted an application for voluntary retirement to the State Retirement Board under the provisions of G. L. c. 32, § 5(1) (a), such retirement to become effective upon November 19, 1964. On November 16, 1964, having decided to return to work, Miss Levine orally notified the Commissioner of Corporations and Taxation, through one of the Commissioner's secretaries, that she wished to withdraw her retirement request. Consequently, the Commissioner apparently concluded that the matter was at an end, and did not submit the statistical information relative to Miss Levine which would ordinarily have been forwarded to the State Retirement Board.

The State Retirement Board was not actually advised in writing of Miss Levine's intent to withdraw her application until December 23, 1964, at which time the Board was so informed by the Commissioner. (The Commissioner's letter recited that the Board had been orally informed of the withdrawal at an earlier date.) Accordingly, you have asked whether an application for voluntary superannuation retirement may orally be withdrawn prior to the effective date of such retirement, and whether—on the above facts—there has been an effective withdrawal of the application filed by Miss Levine.

Applications for superannuation retirement are governed by G. L. c. 32, § 5 (1) (a), which provides in part:

"Any member in service or any member inactive on authorized leave of absence classified in either Group 1 or Group 2 who has attained age fifty-five, upon his written application on a prescribed form filed with the board or upon such an application by the head of his department after a hearing, if requested, as provided for in subdivision (1) of section sixteen and subject to the conditions set forth in said section and in this section, shall be retired for superannuation as of a date which shall be specified in such application and which shall be subsequent to but not more than four months after the filing of such application. . . ."
Nothing is contained in the sections governing applications for superannuation retirement which provides in any way for the withdrawal of such applications.

Considering the subject matter that is involved, I do not believe that the General Court's failure to treat the problem of withdrawal of applications should be considered an indication that such withdrawals were not to be permitted. Once an employee has decided to retire voluntarily, it is of course unlikely that he will subsequently choose to return to his former employment. But should he wish to do so, there certainly exists no overwhelming public policy consideration which would compel the employee's retirement notwithstanding his desire to continue working. Nothing in the retirement law prevents withdrawal of a voluntary retirement application prior to the date on which such retirement is scheduled to become effective; and nothing requires that notice of such withdrawal be written. Should the employee decide not to retire and should he give the State Retirement Board timely notice to this effect, the Board may—in my opinion—forego further processing of the application and the applicant may continue in the public employ as if no application had ever been filed.

The State Retirement Board must, however, determine in the first instance whether timely notice from the applicant has in fact been received. Although such notice need not necessarily be in writing, it must be of such a nature that the Retirement Board will actually be apprised of the employee's intention to withdraw his application. In the present case, Miss Levine notified only the Commissioner of Corporations and Taxation, her immediate employer. Prior to November 19, 1964, the scheduled effective date of Miss Levine's retirement, notice to the Board consisted only of the Commissioner's failure to submit the usual statistical information pertaining to the employee in question.

Since final processing of the application presumably required access to such documents, it would appear to be within the discretion of the State Retirement Board to determine that withholding of such information by the Commissioner constituted notice of withdrawal of the application. The Board itself must, however, judge whether timely notice of withdrawal has been received.

Accordingly, it is my opinion that an application for voluntary retirement may, under the retirement law, be withdrawn by the employee prior to the effective date of retirement by means of oral communication, assuming that adequate notice is conveyed in some way to the State Retirement Board that it is the employee's desire not to pursue his original intent to retire voluntarily.

Very truly yours,

EDWARD W. BROOKE

The Metropolitan Area Planning Council may enter into agreements with the Federal government to receive and expend Federal funds, but cannot lawfully bind itself by such agreements to take action inconsistent with or in excess of its controlling statute.

The Planning Council is authorized to cooperate and to work with departments, agencies, authorities and political subdivisions of the Commonwealth, but it cannot delegate the actual responsibility for performance of its particular functions to other agencies.

JANUARY 5, 1965.

HON. W. SEAVEY JOYCE, S.J., *President, Metropolitan Area Planning Council.*

DEAR FATHER JOYCE: — I have received your letter wherein you request my opinion upon the following questions relative to the functioning of the Metropolitan Area Planning Council:

"1. Is the Planning Council authorized to receive and expend Federal funds and to contract with the United States for the purpose of receiving and expending Federal funds in carrying out the metropolitan planning functions with which it is charged by the General Court?

"2. In carrying out these functions, may the Planning Council enter into working agreements with departments, agencies, authorities and political subdivisions of the Commonwealth?"

The Metropolitan Area Planning Council was established by c. 668 of the Acts of 1963, which chapter inserted §§ 109 to 114 into c. 6 of the General Laws. The Council consists of representatives of the cities and towns which comprise the Metropolitan Area Planning District, twenty-one gubernatorial appointees and eleven members *ex officiis*. The Council is charged with responsibility for research and study designed to improve the physical, social and economic conditions of the District, and for the development of comprehensve plans for the implementation of development and redevelopment programs. The Council shall maintain full cooperation with the cities and towns of the District, and shall render all possible assistance to them in their planning activities.

You have informed me that the Council is preparing an application to be submitted to the Urban Renewal Administration of the Housing and Home Finance Agency to obtain certain research and planning grants which are available under the so-called Urban Planning Assistance Program. Apparently the United States Government is prepared to contribute up to two-thirds of the cost of certain studies to be undertaken by the Metropolitan Area Planning Council.

The only reference to the United States Government to be found in St. 1963, c. 668 occurs in that part of § 2 of the act which inserts § 14 into c. 6 of the General Laws, and which reads in part as follows:

"The council may expend for services and other expenses such amounts as the general court may appropriate therefor. The total amount so appropriated, *less contributions from the federal government, if any,* shall be charged as assessments upon the various cities and towns comprising the district. . . ." (Emphasis supplied.)

The statute is silent otherwise on the subject of Federal grants. However, it is apparent that the General Court assumed that the Metropolitan Area Planning Council would take advantage of whatever Federal funds might become available; the language quoted above is a clear indication that the Legislature expected that contributions by the Federal government might be forthcoming. Projects such as those to be carried on by the Council frequently are financed in part by Federal funds and in fact may well be dependent upon such grants. The Council is, at least by implication, authorized to receive and to expend funds contributed by the United States Government. The Council may enter into agreements with the Federal government in order to secure such aid, but of course cannot lawfully bind itself by such agreements to take action inconsistent with or in excess of its controlling statute. Accordingly, I answer your first inquiry in the affirmative.

Section 112 of c. 6 provides in part as follows:

"There shall be a mutual exchange, between the council and all offices, boards, commissions, departments, divisions and agencies of the commonwealth, and all offices, boards, commissions and departments of each political subdivision of the commonwealth within the district, and all public authorities operating within the district, of data, records and information within their knowledge and control pertaining to the district, or to parts thereof, which may be required for the preparation of plans made pursuant to section one hundred and ten. . . ."

The General Court has thus provided that there shall be communication between the Metropolitan Area Planning Council and other departments, agencies and public authorities of the Commonwealth and of political subdivisions interested in the Council's projects, at least in so far as necessary records and information within the control of these bodies are concerned. It was clearly the Legislature's intent that the Council be authorized to work with other agencies and to take advantage of the knowledge and experience that other administrators might offer.

Section 112, however, does not authorize the Council to delegate responsibilities to other agencies. When the Legislature has assigned a particular function to an agency, that agency may properly exercise whatever powers may reasonably be necessary to perform such function. But it cannot re-delegate the actual responsibility for performance.

Attorney General v. *Trustees of Boston Elevated Railway Co.*, 319 Mass. 642, 654-655

With this single proviso, therefore, it is my opinion that the General Court has authorized, and in fact expects, the Metropolitan Area Planning Council to cooperate and to work with departments, agencies, authorities and political subdivisions of the Commonwealth, and I accordingly answer your second question in the affirmative.

Very truly yours,
EDWARD W. BROOKE

Municipal Light Boards are not subject to municipal ordinances and by-laws respecting employment, classifications, and salaries.

JANUARY 6, 1965.

HON. NORMAN MASON, *Chairman, Department of Public Utilities.*

DEAR SIR: — By letter of November 12, 1964, you have requested my opinion whether Municipal Light Boards are subject to municipal ordinances and by-laws respecting employment, classifications, and salaries.

Municipal Light Departments were originally established under authority of Chapter 370 of the Acts of 1891. Section 8 of that Act provided that the general management of the business was to be exercised by an officer with the title of manager and enumerated his duties, which included the hiring and discharging of employees, expressly providing that such duties were "subject to any ordinances established by the city council in a city, or the by-laws or regulations established in a town." The manager was to be appointed by the mayor in a city or by the selectmen in a town.

St. 1893, c. 454, § 10 changed this section to give the power of appointment of the manager to a Municipal Light Board if one were established, and incorporated this section in R.L. c. 34, § 20. A further revision (St. 1905, c. 410) substituted a new section 20 which struck out the reference to ordinances and by-laws completely and provided "the . . . Municipal Light Board . . . shall appoint a manager of municipal lighting who shall, under the direction and control of the . . . Municipal Light

Board, and subject to the provisions of this chapter, have full charge of the operation and management of the plant, the manufacture and distribution of gas and electricity, the purchase of supplies, the employment of agents and servants, the method, time, price, quantity and quality of the supplies, the collection of bills, and the keeping of accounts." It contained further detailed provisions relating to his duties which are substantially the same as contained in the present General Laws Chapter 164, Section 56.

In the case of *Municipal Light Commission* vs. *Taunton,* 323 Mass. 79, much of this legislative history is recapitulated. The question in that case was whether an ordinance of the city forbidding expenditures over $500 without sealed bids, and an ordinance setting salaries for custodians, janitors and matrons, applied to the Municipal Light Department.

The court stated that the statutes authorizing cities and towns to enter the electric light business make the members of the light board and the manager "public officers under legislative mandate, and not agents of the city," and vest "exclusive managerial powers in the commission subject to the supervision of other public officers and particularly the Department of Public Utilities of the Commonwealth as provided by G. L. c. 164".

It therefore held that these ordinances "have no application to the affairs of the commission, the management of which rest exclusively in the commission subject to the provisions of G. L. c. 164."

The principles enunciated in that case are decisive of the issues raised in your letter. The provisions of Chapter 41, Section 108A which provide for general employee classification and pay plans, were not intended to frustrate the legislative intent spelled out in Chapter 164 and are not applicable to municipal light departments.

This construction is strengthened by the decision in *Municipal Light Commission of Peabody* vs. *City of Peabody,* 1964 A.S. p. 1437 (December 11, 1964), holding that while in certain respects light departments are municipal departments, that generally speaking G. L. c. 44, dealing with municipal finance, does not apply to them because of the provisions of chapter 164. This reasoning would apply equally to section 108A of chapter 41.

You have asked three specific questions as follows:

1. May the manager, with the concurrence of the municipal light board, establish salary schedules applicable to employees of its department only, without the approval of a town meeting or of a board of selectmen (in the case of a town) or of the city council or board of aldermen (in the case of a city).

2. Where job classifications and salaries for municipal employees are established by ordinance or by-law, may the manager, with the concurrence of the municipal light board, establish job classifications or salary schedules incompatible with such ordinance or by-law.

3. Where an ordinance or by-law requires salary adjustments be approved by a municipal board other than a municipal light board, may

the manager, with the concurrence of the municipal light board, make salary adjustments without the approval of such other board.

I answer all three questions in the affirmative for the reasons stated above.

Very truly yours,
EDWARD W. BROOKE

The requirement of the Board of State Examiners of Plumbers, to the extent used in connection with its licensing activities, that applicants complete an application which elicits information regarding national origin, age and derivation of citizenship, is not a violation of G. L. c. 151B, §4(3).

JANUARY 6, 1965.

HON. WALTER H. NOLAN, *Executive Secretary, Massachusetts Commission Against Discrimination.*

DEAR SIR: — You have asked my opinion whether the requirement of the Board of State Examiners of Plumbers, that each applicant for a license to engage in the business of a master plumber or to work as a journeyman complete an application which elicits information regarding national origin, age and derivation of citizenship, is in violation of G. L. c. 151B, § 4 (3).

General Laws, c. 151B, § 4 (3) makes it unlawful for any employer or employment agency "to use any form of application for employment or to make any inquiry or record in connection with employment, which expresses, directly or indirectly, any limitation, specification or discrimination as to race, color, religious creed, national origin, age or ancestry or any intent to make any such limitation, specification or discrimination. . . ." For the purpose of this opinion, I assume that an application of the type described, if used by an employer or employment agency, would violate the quoted portion of § 4. The Board, however, clearly is not an employer. Therefore, unless the licensing activities of the Board make it an "employment agency" within the meaning of § 4 (3), it is not subject to that section.

General Laws, c. 151B, § 1 (2) provides as follows:

"The term 'employment agency' includes any person undertaking to procure employees or opportunities to work."

The reference sets forth the common understanding of the functions of an employment agency. The use of the word "includes" permits the development and expansion of the definition. It does not, however, evince a policy broad enough to cover activities wholly foreign to and different from those mentioned in the section. Were it otherwise, the definition would be spurious, and limited only by the uncontrolled discretion of the Commission. The licensing activities of the Board are so foreign. They are designed to determine only who is qualified by training and experience to compete for work as a master plumber or journeyman. No person may so compete unless the Board is convinced that he is so qualified. G. L. c. 142, §§ 3, 4. The application is a part of the procedure by which the Board's determination is made. The

"employment agency" is not entitled to participate in the Board's deliberative process and is bound by the decision of the Board, or of any reviewing agency. On the other hand, the Board must license any person so qualified, irrespective of the availability of jobs or job opportunities; and its licensing duties or functions cease upon the determination that the person is so qualified. Accordingly, although the activities of the Board complement those of the "employment agency," in that the latter's activities can be effective only when the work or job seeker has been qualified, they are designed to and do effectuate different purposes.

The New York Legislature, in its counterpart to our § 4 (3), has seen fit to subject licensing agencies to the same strictures which bind employers and employment agencies. New York Executive Law, Art. XV, § 296, 3-a (b). The General Court has not done so, and it alone is entitled to do so.

I express no opinion of whether the Board's application form is a proper exercise of power under G. L. c. 142, § 4, since the propriety of the exercise under that section is not before me. For the foregoing reasons, however, it is my considered judgment that the Board's requirement that each applicant for a license to engage in the business of a master plumber, or to work as a journeyman plumber, complete an application of the type described above, to the extent used in connection with its licensing activities, is not a violation of G. L. c. 151B, § 4 (3).

Very truly yours,
EDWARD W. BROOKE

A majority of the Commission of Labor and Industries, which does not include the Commissioner, may call a meeting of the Commission, provided proper notice of the meeting is given to the other members.

JANUARY 6, 1965.

HON. LOUIS W. MAPLES, *Associate Commissioner, Department of Labor and Industries.*

DEAR MR. MAPLES: — On January 6, 1965, you requested my opinion upon the following matter:

May a majority of the Commission of Labor and Industries, which does not include the Commissioner, call a meeting of the Commission?

General Laws, Chapter 23, Section 1 governs the composition of the Commission of Labor and Industries:

There shall be a department of labor and industries, under the supervision and control of a commissioner of labor and industries, in this chapter called the commissioner, an assistant commissioner, who shall be a woman, and three associate commissioners, one of whom shall be a representative of labor and one a representative of employers of labor. Thus it would appear that the General Court intended that supervision and control of the Department be vested in the five officers mentioned in this section, rather than that responsibility be assigned to the Commissioner alone. Certain duties, such as the appointment of experts and the employment of inspectors and investigators, are to be carried out by

the Commissioner. Appointment and removal of directors must clearly be acted upon by the commissioners sitting as a body (c. 23, § 4). Business which is not specifically assigned by the statute to the Commissioner himself, or to another party in particular, must—in light of the language of c. 23, § 1—be conducted by the several members of the Commission.

The statute is silent on the question of how meetings of the full Commission are to be called. Likewise, nothing appears in the General Laws which governs what shall constitute a quorum or what vote shall be necessary in order to take action. I am assuming that the Department has not promulgated regulations which would clarify these matters.

Absent statutory provisions to the contrary, an agency is entitled to act by vote of a majority of its members.

Plymouth Coal Co. v. *Pennsylvania*, 232 U.S. 531, 34 S. Ct. 359.

Such procedure is virtually compelled by practical considerations, since to require either unanimity or a very high vote as a condition to agency action would be, in many cases, to stifle the administrative process. The statute which governs the functioning of the Commissioners does not require a specific vote, and, accordingly, a majority vote is sufficient for lawful agency action.

Since a majority may carry on the business of the Commissioners, it is my opinion that a majority may also call meetings for the purpose of transacting such business. The General Court has not provided that the calling of meetings shall be the exclusive prerogative of the Commissioner. The statute assigns certain duties to the Commission as a whole, and the Commission must be able to meet to carry out such duties. The individuals who call the meeting will, of course, not be relieved of the obligation to give proper notice of the meeting to the other members. Assuming that all members are properly notified, however, a majority may lawfully call a meeting and may proceed to perform the business of the agency.

Very truly yours,
EDWARD W. BROOKE

Appointments of notaries public, justices of the peace, masters in chancery, and public administrators by the Governor require Executive Council advice and consent.

JANUARY 7, 1965.

HON. ENDICOTT PEABODY, *Governor of the Commonwealth.*

DEAR SIR: — I have received your letter of December 30, 1964, relative to the Executive Council's role with respect to the appointments of notaries public, justices of the peace, masters in chancery, and public administrators.

A law proposed and passed by initiative petition which appeared as Question No. 5 on the Massachusetts ballot of November 3, 1964, repealed any provision of the general or special laws in which appointments to offices in the Executive Department required the advice and consent

of the Executive Council. (See Op. Atty. Gen. December 15, 1964.) The constitutional requirements for advice and consent of the Executive Council remain. Therefore, any positions the appointments to which are made pursuant to the Constitution with advice and consent of the Council must still be made accordingly.

Appointments of notaries public are governed by the Constitution as follows:

"Notaries public shall be appointed by the governor in the same manner as judicial officers are appointed. . . ." Const., Article of Amendments, Art. 4.

"All judicial officers . . . shall be nominated and appointed by the governor, by and with the advice and consent of the council." Const. Pt. 2, c. 2, § 1, Art. 9.

The appointing of notaries public, therefore, still requires the advice and consent of the Executive Council since notaries public must be appointed in the same manner as are all judicial officers, namely, pursuant to the Commonwealth's Constitution Pt. 2, c. 2, § 1, art. 9, which prescribes Executive Council advice and consent. Justices of the peace are also judicial officers and therefore the above-quoted constitutional provision applies to their appointments.

The appointments of masters in chancery are governed by G. L. c. 221, § 53, which provides for the advice and consent of the Executive Council. Public administrators are appointed pursuant to G. L. c. 194, § 1, which likewise provides for the advice and consent of the Executive Council.

The law passed on November 3, 1964, as Question No. 5 on the ballot is limited to repealing provisions of the general and special laws requiring advice and consent of the Council "to any appointment in the executive department." (§ 3.) In § 1 of the law, "executive department" is defined as including

"all departments, divisions, boards, bureaus, commissions, institutions, . . . but expressly excluding therefrom the legislative and judicial departments. . . ." (§ 1.)

In so far as a master in chancery makes judicial findings of fact, he acts as an adjunct to members of the bench. A public administrator is charged with handling the affairs of a deceased and representing the estate of the deceased. The work of both a master in chancery and a public administrator is performed within the judicial department.

As noted above, the law passed on November 3, 1964, as Question No. 5 on the ballot does not repeal those sections of our general and special laws providing for appointments to the judicial department. General Laws c. 221, § 53 and G. L. c. 194, § 1, governing the appointments of masters in chancery and public administrators, have not been repealed. Therefore, these appointments still require Executive Council advice and consent.

Very truly yours,

EDWARD W. BROOKE

St. 1964, c. 610 does not apply to tenancies at will.

Pursuant to St. 1964, c. 610, where the property is in multiple ownership, each owner must sign and file jointly or separately a statement setting forth the information required by the statute.

Pursuant to St. 1964, c. 610, where property is held in trust or other fiduciary capacity, each trustee must file a signed statement disclosing all those persons having a direct or indirect beneficial interest in the property. A separate statement must be filed with each lease.

Phrase "(any stockholders of a corporation the stock of which is) listed for sale to the general public with the securities and exchange commission" defined. A business trust is not a corporation and the exception herein does not apply to such.

The statute does not invalidate and prevent the payment of rent under an agreement of sale or lease entered into prior to the effective date of the statute. However, a statement must be filed in any instance where a renewal, extension or modification of the existing lease would constitute a new agreement.

The commissioner must file an annual report with the Secretary of the Commonwealth of the statements received in his department pursuant to the statute.

January 7, 1965.

Hon. William A. Waldron, *Commissioner of Administration.*

Dear Commissioner Waldron: — In your letter of September 25, 1964, and in a subsequent memorandum from your department dated November 10, 1964, you have asked the advice of this office concerning certain problems of interpretation which may arise in the administration of G. L. c. 7, § 36, as added by St. 1964, c. 610. The specific questions which you have raised are answered below in the same order in which they were submitted.

G. L. c. 7, § 36

"No agreement to lease or to sell real property to the commonwealth or to any of its political subdivisions or to any authority created by the general court shall be valid and no payment shall be made to the lessor or seller of such property until a statement has been filed, under the penalties of perjury, with the commissioner of administration by the lessor or seller, and in the case of a corporation by a duly authorized officer thereof giving the true names and addresses of all persons who have a direct or indirect beneficial interest in said property. The provisions of this section shall not apply to any stockholder of a corporation the stock of which is listed for sale to the general public with the securities and exchange commission, if such stockholder holds less than ten per cent of the outstanding stock entitled to vote at the annual meeting of such corporation.

"The commissioner shall annually file with the secretary of the commonwealth a report of such statements."

"1. Does the statute apply to tenancies at will?"

Under G. L. c. 8, § 10A, as amended by St. 1962, c. 757, § 37, the Commonwealth may only enter into a lease "for a term not exceeding five years." An estate for years (a term) is defined as "an estate, the duration of which is fixed in units of a year or multiples or divisions thereof" [1] and a tenancy at will as "an estate which is terminable at the will of the transferor and also at the will of the transferee and which has no other designated period of duration." [2] A tenancy at will and a tenancy for a term are two separate and distinct estates. General Laws c. 8, § 10A authorizes the Commonwealth only to enter into a lease for a term. This section precludes the state from making a lease creating a tenancy at will. Fo rthis reason, St. 1964, c. 610 would not apply to a tenant at will.

"2. Where the property is in multiple ownership, is it sufficient if one of the owners executes the statement, or must all of the owners join in its execution?

"3. Where property is held in trust or other fiduciary capacity, is it sufficient for the holder of legal title to execute the statement, or must a beneficial owner or all the beneficial owners execute the statement? What if (the) beneficial owners are minors?"

The two questions will be answered together since they raise similar issues pertaining to multiple ownership.

The words "lessor" or "seller" as used in this section appear in the singular gender. It would be an unnecessary repetition for the General Court to include in every statute the plural gender each time the singular is used. Instead, the Legislature has enacted general "Rules of Construing Statutes" found in G. L. c. 4, § 6, as amended. In the fourth paragraph of that section, specific provision is made for extending the singular meaning to include the plural where it was intended not to restrict the meaning to the singular.

It is clear on the face of St. 1964, c. 610, that the Legislature did not intend this section to apply merely to property held by one person as lessor or seller. This statute clearly intends as broad and extensive disclosure as in practically possible. To insure accuracy in making such disclosure, each owner must file his statement under the penalties of perjury. Where the property is held by more than one person, each owner must sign and file jointly or separately a statement setting forth the information required by this statute.

In the case of a trust, the problem is not one merely of multiple ownership, but the more basic question of who is the owner or the lessor. When a trust is created, the legal title to the property vests in the trustee and the equitable title in the beneficiary.[3] Historically, at law viz. equity the trustee would be considered the owner or the lessor of the property. This would be the case also from a practical point of view, since under most

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1 Restatement, *Property*, § 19 (1936).
2 Restatement, *Property*, § 21 (1936).
3 Bogart, Trusts, §§ 1, 12 (1951).

trust agreements it would be the trustee who made repairs, collected the rents or initially received the sale price. Anyone coming in contact with the trust property would normally deal directly with the trustee.

The statute itself, where it states, "giving the true names and addresses of all persons who have a direct or indirect beneficial interest in said property," differentiates between the lessor or seller and those persons having a beneficial interest. This phrase, though appearing directly after the clause dealing with corporations, would not be limited to corporations. Any such construction would not be consonant with the purposes of the statute as a whole. In the case of a trust, the trustee or trustees, in every instance where there is more than one, must file a signed statement disclosing all those persons having a direct or indirect beneficial interest in the property.

No special problem would be created where the beneficiary is a minor since it is the trustee that is required to file the statement.

"4. What is meant by the phrase 'listed for sale to the general public with the securities and exchange commission'? Does this apply to business trusts with transferable shares as well as to corporations?"

The phrase, " (any stockholders of a corporation the stock of which is) listed for sale to the general public with the securities and exchange commission," refers to those securities of a corporation which are required to be registered with the Securities and Exchange Commission prior to their sale to the general public under the terms of the various Federal Securities Acts, more particularly the Federal Securities Act (1933) as amended.

In answer to the second part of your question and also with regard to question ten, it may well be that the Legislature excepted stockholders of corporations listed with the Securities and Exchange Commission because it felt that the federal listing requirement and the attendant public notice gives sufficient protection against an unheralded use of public funds. The General Court may also have been motivated by the fact that in most instances, the stock of a corporation listed with the S.E.C. is usually more widely distributed than closely held corporations and less susceptible to control by one stockholder. Or as it has been suggested, it may have been intended as a means of distinguishing between corporations with broad public ownership and those corporations that are privately owned.

These motives, discussed above, for establishing this exception might well apply with equal logic to both corporate and non-corporate business entities. It has been suggested further, in line with this, that there is a certain degree of similarity between a so-called Massachusetts business trust and a corporation. Any such discussion is now purely academic. The statute clearly states "a corporation." A business trust is not a corporation.[4] The exception applies only to corporations. The Legislature could in the future extend the exception to include other business associations. It has not yet done so.

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[4] Henn. *Corporations*, §§ 58-67 (1961).

"5. Does the new statute invalidate and prevent the payment of rent under leases entered into prior to September 24, 1964, in the absence of the required statement now being filed with the Commissioner of Administration?"

This statute would not invalidate and prevent the payment of rent under an agreement of sale or lease entered into prior to the effective date of this statute. It is a well-established canon of statutory construction that an act is to be construed as having a prospective application unless a contrary intent is clearly evidenced. No such intent appears in this statute.

It is also correctly pointed out that a retroactive interpretation might raise certain constitutional questions not dissimilar to the early case of *Dartmouth College* v. *Woodward*[5] where the State of New Hampshire attempted unsuccessfully to amend the prior charter agreement between the crown and the college. An application of this statute to contracts already in existence might well violate Article I, Section 10, Clause 1 of the United States Constitution. Such an interpretation would, however, be contrary to the intent of the statute and the rule of construction which requires a constitutional construction where two interpretations are possible.[6]

"6. Assuming that existing leases are not invalidated if no statement is filed, what is the effect of a future renewal, extension, or modification of an existing lease?"

Where a lease is entered into prior to the effective date of this statute, a statement must be filed in any instance where a renewal, extension or modification of the existing lease would constitute a new agreement. What constitutes a new agreement would have to be decided in light of the specific facts of each individual case.

"7. In the case of a lessor, the beneficial ownership of which is constantly subject to change, how often must the statement required by the statute be filed?"

The statute states in the second paragraph, "The Commissioner shall annually file with the secretary of the commonwealth a report of such statements." It is obvious that the Commissioner must file with the secretary a report of the statements received in his department pursuant to the statute. This would, of course, involve listing all new statements filed, inclusive of amendments and changes. The burden of filing the statement falls upon the lessor; the Commissioner merely files a report of what the statements indicate with the Secretary of the Commonwealth.

"8. Does a trust which has a statement on file, made in connection with one governmental tenant, have to file an additional statement when it enters into a new lease with another (or the same) governmental

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[5] *Trustees of Dartmouth College* v. *Woodward,* 17 U.S. (4 Wheat.) 518, 4 L.Ed. 629 (1819).

[6] *Thurman* v. *Chicago, Milwaukee & St. Paul Ry.,* 254 Mass. 509, 576 (1926). *Lewis* v. *White,* 56 F.2d 390 (1932).

tenant for additional space in the same (or a different) building owned by it?"

It is the individual lease which is rendered invalid by the failure to file under this section. In accordance with this requirement, a separate statement must be filed with each lease. Any proposed short cut would lessen the effectiveness of this legislation. It may be, however, that, in the discretion of the department, an orderly system of indexing will obviate difficulties under this provision.

"9. What would be the form and extent of the statement required to be filed?"

It may prove feasible for the Executive Office for Administration and Finance to print and promulgate a special form to be used for filing under this section. Should this course be adopted, this office would be happy to advise your department concerning that form. As to broad general guidelines, every statement should fully disclose all those persons, not specifically exempted, who have any interest in the property sold to or leased by the Commonwealth. In a case of a corporation or a business entity with transferable shares, this would naturally include a list of all the stockholders.

"10. Is the exemption from the filing requirement contained in the last sentence of the first paragraph of the new section available to a (business) trust?"

This problem has been previously discussed in answer to question four. The exception applies only to corporations.

As you have pointed out in your letter, this new statute presents some problem in interpretation and administration. It is hoped that the above discussion will help in this regard.

I suggest that if any future questions arise under this statute they may best be solved by having members of this office meet with those responsible for administering this statute.

Very truly yours,

EDWARD W. BROOKE

St. 1964, c. 582, confers upon the Trustees of the Southeastern Massachusetts Technological Institute at least as much authority as was conferred by the former G. L. c. 75.

JANUARY 11, 1965.

HON. JOSEPH L. DRISCOLL, *President, Southeastern Massachusetts Technological Institute.*

DEAR DOCTOR DRISCOLL: — In your letter of December 15, 1964, you ask the following question:

"Are all of the powers, rights, duties and responsibilities as set forth in Chapter 75B of the General Laws that were established by Chapter 543 of the Acts of 1960 inherent in Chapter 582 of the Acts of 1964?"

St. 1964, c. 582 inserted new §§ 1 to 17 in c. 75B of the General Laws, deleting the former §§ 1 to 20. The new § 1 in part provides:

"The Southeastern Massachusetts Technological Institute shall continue as a state institution of higher learning . . . . *In addition to the authority, responsibility, powers, and duties specifically conferred by this chapter, the board of trustees shall have all authority, responsibility,* rights, *privileges, powers and duties customarily and traditionally exercised by governing boards of institutions of higher learning.*" (Emphasis supplied.)

The underscored language clearly confers upon the Trustees at least as much authority as was conferred by the former G. L. c. 75, §§ 1-20. (See Attorney General's Report, 1948, p. 57.)

I conclude, therefore, that the amendments provided by St. 1964, c. 582 were for the purpose of expanding the powers of the Trustees in order to promote the administration and staff of Southeastern Massachusetts Technological Institute to that of other like institutes in the Commonwealth. (See *Doggett* v. *Hooper,* 306 Mass. 129, 132.)

Accordingly, I answer your question in the affirmative.

Very truly yours,

EDWARD W. BROOKE

A person who has been registered as a professional engineer under the so-called "grandfather clause" (§ 11) of St. 1958, C. 584, may also apply for a certificate as an engineer in training, under provisions of § 4 of said chapter, without requesting the cancellation of his existing registration as a professional engineer.

JANUARY 12, 1965.

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

DEAR MRS. SULLIVAN: — By letter dated November 19, 1964, on behalf of the Board of Registration of Professional Engineers and of Land Surveyors, you have asked my opinion whether a person who has been registered as a professional engineer under the so-called "grandfather" clause (section 11) of Chapter 584 of the Acts of 1958 may also apply for a certificate as an engineer-in-training, under the provisions of section 4 of the same chapter. You further ask whether, if he is allowed to apply for the certificate, he must as a prerequisite ask that his registration under section 11 be cancelled.

In order to answer your questions, it is necessary to look at the legislative history of St. 1958, Ch. 584.

Prior to the passage of the said Ch. 584, G. L., C. 112, §§ 81-D-81T provided for the registration of "Professional Engineers" after examination and/or proof of training and experience as set forth in the chapter. It did not forbid generally the practice of engineering by unregistered engineers, provided that such persons did not hold themselves out to be registered professional engineers.

Ch. 584 for the first time forbade the practice of engineering by unregistered engineers (section 10). To ease the effect on persons then currently practicing engineering, however, it provided in section 11 that such persons might be registered as professional engineers without examination, if they had been residents of the Commonwealth for a year, were of good character, and had done work satisfactory to the Board. All other applicants were required to take examinations and/or meet specific requirements of training and experience spelled out in section 4. Also, Ch. 584 inserted a new category, Engineer-in-Training, and provided that upon application and the meeting of educational and/or training qualifications and the passing of an examination, a certificate as Engineer-in-Training would be given by the Board.

The clear purpose of these changes is to improve the quality of engineering training and practice in the Commonwealth and to bring Massachusetts standards more in line with those of other states, while protecting the livelihood of existing practitioners.

The statute does not in express terms require an applicant to choose between categories. Its provisions for becoming professional engineers and engineers-in-training by meeting prescribed standards of education, training and/or experience are made part of G. L., C. 112, §§ 81D-81T. The grandfather clause (section 11) is not made a part of the General Laws, since its provisions must be taken advantage of within one year after June 1, 1958, and thereafter all applicants come under the continuing requirements of sections 81D-81T.

Faced with this statutory scheme, it is natural that an engineer who was eligible under the grandfather clause would seek to protect his livelihood by securing registration thereunder.

Having done that, he now seeks to advance himself, and possibly to secure employment open only to persons who have demonstrated the ability to pass the examination required of an engineer-in-training.

I see nothing in the language or intent of Ch. 584 that would prevent him from doing so, or authorize the Board to reject his application for a certificate if he meets the qualifications spelled out in section 4, now section 81J (2) of G. L., C. 112. The statute does not require an applicant to make a choice between categories. It simply states the requirements for obtaining:

1. Registration as a professional engineer.
2. Certification as an engineer-in-training.
3. Registration as a land surveyor.

It is true that, ordinarily, the greater includes the lesser, and one would not usually expect that a person who was already registered as a professional engineer would seek the title of engineer-in-training. But one's doing so, in the circumstances you have outlined in your letter, evinces a desire to prove oneself as an engineer, entirely in accord with the language and intent of the chapter. It is my opinion that registration under the grandfather clause was not intended to disqualify a person from earning the certificate.

I am aware of the possibility that an applicant might fail the examination, and thus create the embarrassing anomaly of a registered engineer who lacks the qualifications of an engineer-in-training. But this situation is implicit so long as there is registration under the grandfather clause.

In my opinion the applicant has a right to apply for and take the examination for a certificate as engineer-in-training, without requesting the cancellation of his existing registration as a professional engineer.

The fact, as stated by you, that this applicant is older than most applicants for this examination who are usually recent college graduates, and the likelihood that a precedent may be set for other registrants under the grandafther clause, does not appear to me grounds for denying the application under the law.

The use of the examinations to indicate proficiency in basic engineering information is a perfectly legitimate use by the applicant under C. 112 of the General Laws.

Very truly yours,
EDWARD W. BROOKE

After November 1, 1964, the right to damages arising from a taking by eminent domain vests in the persons entitled thereto upon the recording of the order of taking and interest is payable from the date of recording of the order to the date the agreement for settlement is approved by vote of the commissioner of the Department of Public Works.

For takings prior to November 1, 1964, the purpose of the taking must be considered when determining starting date of the period over which interest runs on the damages; final date of interest period is that on which the settlement agreement is approved by vote of the Commissioners.

General Laws, c. 79, § 37 does not permit by implication or otherwise, inclusion of interest in the amount assessed as damages to the landowner.

JANUARY 15, 1965.

HON. JAMES D. FITZGERALD, *Commissioner of Public Works.*

Re: G. L. Chapter 79 § 37 — Interest on Land Damage Settlements.

DEAR COMMISSIONER FITZGERALD: — By letter dated December 16, 1964, you have asked my opinion of the effect of Section 37 of Chapter 79 of the General Laws, as amended, on the payment of interest for negotiated settlements of land damage awards prior to and since January 2, 1962 and whether by implication or otherwise this section permits inclusion of interest in the assessment of an award of damages to the landowner.

Section 37 of Chapter 79 of General Laws states:

"Damages under this chapter shall bear interest at the rate of six per cent per annum from the date as of which they are assessed until paid, except that an award shall not bear interest after it is payable unless the

body politic or corporate liable therefor fails upon demand to pay the same to the person entitled thereto. Interest shall be added by the clerk of the court to the damages expressed in a verdict, finding, or order for judgment on an auditor's report. A judgment, whether against the commonwealth or any other body politic or corporate, shall bear interest at the rate of six per cent per annum from the date of the entry of such judgment to and including the last day of the month prior to the month in which satisfaction thereof is paid."

The phrase "damages under this chapter" refers to all types of damages included in G. L., Chapter 79. It includes the "damages" referred to in Section 39 of Chapter 79, G. L., authorizing certain settlement procedures by taking agencies.

The payment of interest on damage awards has been provided for by the Massachusetts General Laws since the passage of Chapter 257 of the Acts of 1918. Section 187 of that Act inserted a new chapter into the then Revised Laws of the Commonwealth, headed, "Eminent Domain, and the Assessment of Damages caused by acts done for public purposes." Section 37 of § 187 of said Chapter 257 of 1918 reads exactly the same as the current Section 37 of G. L. Chapter 79 on the obligation to pay interest on land damages except that the interest was then accrued at 4 per cent per annum rather than the current 6 per cent per annum. Section 39 of § 187 of said Chapter 257 of Acts of 1918 provided for settlement and tender and allowed "interest thereon as provided by law." The right to receive interest on damages has thus existed in the Commonwealth for 47 years.

Section 37 of Chapter 79 of the General Laws directs that interest shall accrue and be paid for the period from the date of assessment of damages to the date that damages are payable. It has long been the rule in Massachusetts that the title of a landowner in real property converts to a claim for damages at the time of the taking of said property by eminent domain. Damages are assessed as of the date of the taking. In *Imbescheid* v. *Old Colony Railroad Company*, 171 Mass. 209 (1898), the trial judge awarded the petitioner interest from the date of the taking. The Supreme Judicial Court ordered judgment on the verdict, including the interest, stating at page 210:

"The petitioner's loss of title occurred at the date of the taking. His compensation was then due, and his right to receive it with interest from that date is settled."

As of November 1, 1964, all takings on the part of the Commonwealth are accomplished by the recording of an order of taking in the appropriate registry of deeds. Chapter 579 § 1, Acts of 1964 amending G. L. Chapter 79 § 3. The right to damages arising from a taking by eminent domain now vests in the persons entitled thereto upon the recording of the order of taking. Interest is now payable from the date of recording of the taking.

Prior to November 1, 1964, the right to damages vested at different times for different types of takings. From takings for a highway or town way, ditches or drainage, the right to damages vested upon entry or taking of possession by the taking authority. From water right takings,

the right to damages accrued when the water was diverted. From all other takings, the right to damages vested when the order of taking was recorded. For takings occurring prior to November 1, 1964, the purpose of the taking must be considered when determining the period over which interest runs on the damages.

Section 37 of Chapter 79 G. L. provides that an award of damages shall not bear interest after the award is payable unless there is a failure, upon demand, to pay the award to the person entitled thereto. Damage awards determined by settlement under § 39 Chapter 79 G. L. are payable to the person entitled thereto when the Commissioners of the Department of Public Works approve the settlement agreement submitted for their consideration after having been executed by the former owner of the taken property. When voted by the Commissioners such approval creates a binding contract. Their vote constitutes the acceptance by the Commonwealth, of the offer, technically made by the former owner of the property by signing and delivering to the Department of Public Works the land damage agreement containing the proposed amount of the land damage award. Damages are then payable. Interest on negotiated land damage settlements must be computed up to the date of approval of the settlement agreement by vote of the Commissioners of the Department of Public Works.

The Department of Public Works has always paid interest on damages for land takings. Prior to the vote of January 2, 1962, it was departmental practice to total the damages and interest and describe the result as "damages." The word "damages" is used by some to describe the total amount paid to the former owner of the property including the damage award, interest thereon, taxes and costs. The concept of damages involves a right of recovery for the taking of property. Interest is the mathematical result of the multiplication of a land damage award by the rate of interest established by the Legislature. The separate references to "damages" and "interest" in Section 37 of Chapter 79, G. L. dictates the conclusion that an award of damages does not, by implication or otherwise, include interest.

It is my opinion that under the provisions of Section 37 Chapter 79 of the General Laws, after November 1, 1964, interest on negotiated settlements of damages resulting from all types of takings by eminent domain must be computed from the date of recording of the taking to the date the agreement for settlement is approved by vote of the Commissioners of the Department of Public Works.

If a taking by eminent domain were made prior to November 1, 1964, it is my opinion that interest must be computed on damage awards for takings for highway or drainage purposes from the date of entry to the date the settlement agreement is approved by vote of the Commissioners of the Department of Public Works, and on damage awards for takings of water rights from the date of diversion of the water to the date the settlement agreement is approved by the vote of the Commissioners of the Department of Public Works, and on damage awards for all other takings from the date of the recording of the order of taking to the date the settlement agreement is approved by vote of the Commissioners of the Department of Public Works.

It is my opinion that Section 37 of Chapter 79 of the General Laws does not permit, by implication or otherwise, inclusion of interest in the amount assessed as damages to the landowners. Said Section 37 provides, however, that such sum shall be the principal amount upon which shall be computed interest to be added thereto, along with the statutory adjustment of real estate taxes, to determine the total amount to be paid to the former property owner by the taking agency.

Very truly yours,

EDWARD W. BROOKE

Distances under c. 128A § 3 (p) must be measured from the outermost point of the property specified in the application and meant to be covered by the license, and must then proceed in a straight line to the nearest outside point on the nearest church, school or housing development building.

JANUARY 18, 1965.

HON. PAUL F. WALSH, *Chairman, State Racing Commission.*

DEAR MR. WALSH: — The State Racing Commission has requested my opinion on certain questions pertaining to an application for dog racing dates at a proposed site located on Middlesex Road in Tyngsborough. The dates requested are September 13, 1965 to October 30, 1965, inclusive, a total of 40 racing days. You have informed me that this is the first application to be filed by the applicant Tyngsborough Enterprises, Incorporated; no license has ever been granted for a racing meeting to be held by Tyngsborough Enterprises or for a racing meeting to be held at the proposed Middlesex Road Location.

In answer to a question in the application form calling for a statement of the distance between the proposed track and the nearest church, school or housing development, the applicant indicated that such distance was 2.04 miles. The applicant arrived at this figure by measuring along the roadway from the Winslow School to a point of intersection between Middlesex Road and a proposed but as yet not constructed access road, and then along the route of the proposed access road to the entrance to the proposed track. In light of these facts and of applicable laws set forth below, you have posed the following two questions:

"1. What method of measuring the distance between the proposed site as set forth in the application of Tyngsborough Enterprises, Incorporated and the Winslow School should be used? Should the measurement be taken over the road as claimed by the applicant — or should the distance be measured on a straight line commonly referred to 'as the crow flies.'

"2. In determining the distance by whatever method may be proper at what point in the applicant's premises should be used and at what point in the property of the Winslow School should be used."

The General Court has provided that racing meetings shall not be conducted within two miles of a church, school or housing development.

"No license shall be issued to permit a racing meeting to be held or conducted at any location within two miles of a church, school or housing development; provided, however, that this clause shall not apply to the issuance of a license to hold or conduct a racing meeting at any location at which a racing meeting had been held or conducted, pursuant to a license issued under the provisions of this chapter, prior to January first, nineteen hundred and sixty-one. . . ."

Mass. General Laws, Chapter 128A, section 3 (p), as added by St. 1961, c 1.

Since racing meetings have never been held at the location in question, the above-quoted clause is applicable, and Tyngsborough Enterprises, Inc. must establish that the nearest church, school or housing development — in this case, the Winslow School — is not within two miles of the area to be licensed.

Nothing in G. L. c. 128A, § 3 (p) indicates how the distance specified therein is to be measured. Comparison to another statute may, however, cast some light upon the intentions of the General Court. Similar considerations are necessitated by c. 138 of the General Laws, which chapter governs the manufacture and sale of alcoholic beverages. Section 16C of c. 138 is the counterpart of c. 128A, § 3 (p):

"Premises, except those of an inn-holder, located within five hundred feet; *measured along public ways,* of a church or school shall not be licensed for the sale of alcoholic beverages . . ." (Emphasis supplied.)

Mass. General Laws Chapter 138, section 16C, as added by St. 1954, c. 569, § 1.

The language of this section indicates clearly that the Legislature intended the required distance between premises licensed for the sale of alcoholic beverages and the nearest church or school to be measured along public ways rather than "as the crow flies." The phrase "measured along public ways" is itself ambiguous to a certain extent, and the Supreme Judicial Court has recommended the promulgation of interpretative regulations by the Alcoholic Beverages Control Commission.

Cleary v. *Cardullo's Inc.* 1964 Mass. Adv Sh 633, 638-639
But the General Court has at least established that measurement is to be made along normal routes of travel.

Section 3 (p) of c. 128A does not provide that the distance in question is to be measured along any particular route. This paragraph was added to the chapter governing horse and dog racing meetings in 1961. Section 16C of c. 138, the chapter relating to alcoholic beverages, contains the language "measured along public ways," and was inserted in 1954. Thus the General Court had a model provision which could easily have been duplicated had that body desired to impose similar conditions upon the measurement process. The fact that the provisions of the two statutes differ must be given some meaning. I can only conclude that omission of the language used in the earlier law was intentional, and that the Legislature meant that distances required under the racing statute were to be measured directly and not along roadways. Thus, no racing meetings may be licensed within a two-mile radius of a church, school

or housing development irrespective of what the distance may be along existing or proposed routes.

You have, in addition, requested a determination as to what point in a given piece of property should be used for measurement purposes. Apparently the applicant, Tyngsborough Enterprises, Inc., measured to the entrance to the proposed track facility itself, including in the measurement a portion of the applicant's property intended for parking for track patrons.

The statute itself is silent on this question. However, the license sought by the applicant would not be limited in its effect solely to that part of the applicant's property on which races are conducted. The authority granted by the license presumably extends to all of the property owned by the applicant at a particular location, including areas set aside for parking, ticket sales and the like. Distance under c. 128A, § 3 (p) must therefore be measured from the outermost point of the property specified in the application and meant to be covered by the license. Measurement must then proceed in a straight line to the nearest outside point on the nearest church, school or housing development building.

Consequently, the applicant should submit to your Commission further documents indicating the distances between the area to be covered by the license and the Winslow School, with such distance to be measured in accordance with the interpretations set forth above. Should such new measurement indicate that the proposed track lies within a two-mile radius of the Winslow School, the license applied for may not lawfully be issued.

Very truly yours,
EDWARD W. BROOKE

Pursuant to G. L. c. 127, § 129, as amended by St. 1963, c. 535, from its effective date forward, any prisoner who commits a crime and is convicted and sentenced therefor may have no deductions from the new sentence; deductions from his prior sentence are not affected.

JANUARY 19, 1965.

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

DEAR SIR: — You have asked my opinion as to the application of c. 127, § 129 of the General Laws, as amended by St. 1963, c. 535, to three specific fact situations outlined in your letter of October 5, 1964.

Prior to October 13, 1963, the effective date of c. 535 of the Acts of 1963, § 129 provided as follows:

"If during the term of imprisonment of a prisoner confined in a correctional institution of the commonwealth, such prisoner shall commit any offense of which he shall be convicted and sentenced, *all deductions hereunder from the former sentence of imprisonment of such prisoner shall be thereby forfeited.*" (Emphasis supplied.)

St. 1963, c. 535 amended this portion of § 129 to read as follows:

"If, during the term of imprisonment of a prisoner confined in a correctional institution of the commonwealth, such prisoner shall commit any

offense of which he shall be convicted and sentenced, *he shall not be entitled to any deductions hereunder from the new sentence or sentences of imprisonment.*" (Emphasis supplied.)

General Laws c. 4, § 6, cl. 2, provides:

"Second, The repeal of a statute shall not affect any punishment, penalty or forfeiture incurred before the repeal takes effect, or any suit, prosecution or proceeding pending at the time of the repeal for an offence committed, or for the recovery of a penalty or forfeiture incurred, under the statute repealed."

The Supreme Judicial Court has held that the rule set forth in § 6 above is applicable to amendments having the effect of a repeal in whole or in part. (*Commonwealth* v. *Nassar,* 341 Mass. 584, 589 [1961].)

I find no provision in the said c. 535 which would negate the application of this rule to the fact situations you have presented.

The specific question then is — whether the prisoners in the three instances you have set forth incurred any punishment penalty or forfeiture when they committed their escapes and while § 129 as it then provided was in effect?

In *Commonwealth* v. *Benoit* (1963 Adv. Sh. 917), there is a very full consideration of the meaning of "incur" in this connection. There the court held that incurrence resulted from the offender's wrongful act, and applied the law, as it then existed to his case relying upon G. L. c. 4, § 6. The court quoted the decision in the *Nassar* case (*supra*): "The general intention of c. 4, § 6, Second, is to preserve, even after legislative change of a statute, the liability of an offender to punishment for an earlier act or omission made criminal by the statute repealed in whole or in part. . . ."

It is a general rule of statutory construction that statutes operate prospectively. This is particularly true of criminal statutes, which would be unconstitutional if they imposed a substantially heavier penalty upon a prior act. (*Commonwealth* v. *Wyman,* 12 Cush. 237, 239 [1853].)

Here, one would have to know the record of the particular individual involved in each case, to be certain whether the elimination of "good time" from a prior sentence or from the new sentence would result in a substantially lighter or heavier penalty for him.

This is not "an act plainly mitigating the punishment of an offense" as in the *Wyman* case, in which the court held that a law reducing the penalty for arson from death to life imprisonment was an act of clemency, and should be applied to a person guilty of arson committed before the date of the repeal, but sentenced afterward.

Here the plain intent of the Legislature was to try a new approach to the problem which would clearly be more severe in some instances and conceivably less severe in others. I see no reason to take it out of the general rule that it should apply prospectively only.

From its effective date forward, any prisoner who commits a crime and is convicted and sentenced therefor may have no deductions from the new sentence. Deductions from his prior sentence are not affected.

Applying these principles to the fact situations, you have outlined:

"#1. On 7-25-63 prisoner escaped from M.C.I. Norfolk where he was serving a 2½-3 year sentence.

"He was returned from escape on 7-27-63.

"For the crime of escape from Norfolk, he was sentenced in the Norfolk Superior Court on 10-14-63 for a term of 6 months from and after (1 day after the effective date of Chap. 535 of the Acts of 1963).

"#2. On 8-23-63 prisoner attempted to escape from M.C.I. Concord while serving a sentence of 6-10 years and 3-5 years concurrent.

"He was indicted for attempt to escape and on 10-14-63 (1 day after the effective date of Chap. 535 of the Acts of 1963) in the Middlesex Superior Court received a sentence of 2½-3 years from and after for attempted escape.

"#3. On 7-25-63 prisoner escaped from M.C.I. Concord where he was serving a sentence of 5 years 1 day, 5 years concurrent.

"Returned from escape to Concord on 8-3-63. On 10-14-63 (1 day after the effective date of Chap. 535 of the Acts of 1963) in the Middlesex Superior Court was sentenced to 2½-4 years for the crime of escape to be served forthwith notwithstanding the sentence to Concord and was committed to M.C.I. Walpole."

In my opinion, the prisoner in fact situation #1 must lose deductions from his prior sentence, but will be entitled to deductions from the new sentence provided under § 129 prior to the adoption of c. 535 of the Acts of 1963.

The prisoner in situation #2 must lose any deductions accumulated under his prior sentences. He is entitled to any deductions from his new sentence that § 129 gave him as it stood prior to the adoption of c. 535.

Fact situation #3 is not entirely clear. You state elsewhere in your letter that the new sentence "wiped out" the former sentence. If, in fact, there is left no former sentence, I can only state that the same principles apply.

Very truly yours,
EDWARD W. BROOKE

The position of Education Information Officer in the Department of Education authorized in the appropriation bill for fiscal year 1965 is not subject to the Civil Service Law and Rules adopted in pursuance thereof.

JANUARY 21, 1965.

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

DEAR COMMISSIONER KIERNAN: — In your letter of December 16, 1964, you have asked my opinion as to whether the new position of Education Information Officer authorized in the appropriation bill for the fiscal year 1965 is subject to G. L. c. 31, the Civil Service Law and Rules adopted in pursuance thereof.

In my opinion of August 26, 1964, addressed to the Director of Civil Service, a copy of which is enclosed, the question of the application of the Civil Service Law to positions in the Department of Education was discussed at length.

The conclusion was reached that such positions as Senior Supervisor in Education, Organizing Extension Instructor, University Extension Instructor and the like, are not subject to Civil Service. In that opinion, I said: "One of (the Commissioners') most important duties . . . is seeing that better educational facilities are provided for the Commonwealth. . . . This duty includes the promulgation of information dealing with better teaching methods as well as information pertaining to the present school or college level."

This language clearly applies to the position and duties of Education Information Officer as outlined in your letter of December 16, 1964, and, in accordance with the reasoning of my letter of August 26 to the Director of Civil Service, it is my opinion that such position is not subject to the Civil Service Law and Rules.

Very truly yours,
EDWARD W. BROOKE

Any method or device intended to provide approval to the issuance of warrants for the payments of moneys from the treasury of the Commonwealth prior to a Council Meeting with a quorum present and voting is incompatible with the Constitutional responsibility of the Executive Council.

JANUARY 21, 1965.

HON. ELLIOT RICHARDSON, *Lieutenant Governor of the Commonwealth.*

DEAR LIEUTENANT GOVERNOR RICHARDSON: — You have requested my opinion on the question of the manner in which the Executive Council may give its advice and consent, in advance, to the issuance of warrants for the payment of moneys from the Treasury of the Commonwealth. More specifically, you have asked my opinion as to the effect of my statement in opinion dated December 15, 1964, to then Lieutenant Governor Bellotti that "such withdrawals must be made by warrant with the signature of the Governor and the approval of the Council," upon the Order of the Council, dated January 7, 1965, as follows:

"5. The Order re payment of Cash Discounts is adopted (see below). This Order facilitates the payment of bills of the Commonwealth in advance of a Council meeting in order to take advantage of cash discounts. It also provides for emergency payments. (The Council approves the warrants covering such discounts and emergency payments at the next meeting.)

ORDERED: That upon presentation of bills upon which a discount is to be allowed the Commonwealth for early payment, accompanied by a certificate duly signed by the Comptroller or Acting Comptroller showing amounts due to parties from the Commonwealth in accordance with an appropriation then in effect, including requests for travel on official

business, and for payments and reimbursements to departments, boards and institutions of the Commonwealth for payrolls and other purposes when it is for the public interest as determined by the Comptroller to make immediate payment; also, for the purpose of making emergency payments to individuals in an amount not to exceed $100.00 in any one instance, warrants for such purposes for the issuing of money out of the Treasury of the Commonwealth may be signed under the hand of the Governor or in his absence or disability under the hand of the Lieutenant Governor, the Secretary of the Commonwealth or whoever may be the Acting Governor for the time being — for the necessary defense and support of the Commonwealth and for the protection and preservation of the inhabitants thereof, agreeably to the Constitution and Acts and Resolves of the General Court. For such action the advice and consent of the Council is hereby given."

The responsibility of the Executive Council in the matter of approval of disbursement warrants is set out in the State Constitution as follows:

"No moneys shall be issued out of the treasury of this Commonwealth, and disposed of (except such sums as may be appropriated for the redemption of bills of credit or treasurer's notes, or for the payment of interest arising thereon) but by warrant under the hand of the governor for the time being, with the advice and consent of the council, for the necessary defense and support of the Commonwealth; and for the protection and preservation of the inhabitants thereof, agreeably to the acts and resolves of the general court."

Mass. Const. Pt. 2, c. 2, § 1, Art. XI.

The language of this constitutional provision is clear. Other than the specified exemptions provided for, the redemption of bills of credit or treasurer's notes or for the payment of interest on them, all moneys are to be issued from the Treasury *only* by warrant under the Governor's hand *with the advice and consent of the Council.* Where the Constitution has expressly provided that the issuance of moneys be accomplished with the advice and consent of the Council, that language must be given effect and cannot be dealt with as mere surplusage. There is therefore only one reasonable conclusion to be reached from a reading of this constitutional provision. That conclusion was expressed in my opinion of December 15, 1964, to the effect that "such withdrawals must be made . . . with . . . the approval of the council."

The question that you are now raising is directed to the determination of the lawful and proper means of the Council's expressing its approval in this context, to wit, whether approval of warrants in advance of a council meeting will satisfy the Constitution's requirement of approval.

The mandate of our constitution clearly requires a negative answer. The responsibility of the Executive Council in regard to its giving advice and consent to disbursement warrants arises from the Constitution of our Commonwealth. As such, the importance of that responsibility cannot be doubted; and, its purpose, "to insure that no payments (are made) . . . except for public purposes and in accordance with law" must be given fullest possible effect. *Willar* v. *Commonwealth,* 297 Mass. 527, 529 (1937). This purpose is not accomplished by the use of approval of warrants prior to Council meetings.

The gravity of the matters involved necessitates the careful and studied attention of the Executive Council in order to fulfill its constitutional responsibility. The approval of warrants for withdrawal of moneys necessitates that degree of judgment and discretion which can only be grounded in an informed, deliberate decision of the Council. Payment of the Commonwealth's funds prior to the positing of an informed opinion by the Executive Council as to the propriety of such disbursement is inconsistent with the Council's responsibility.

The grant of a general approval of warrants for emergency payment or discount benefits is not in keeping with the constitutional intent to insure responsible, lawful payments for public purposes. It is the responsibility of the Executive Council to act upon full information and after due and reasonable deliberation. A general approval, such as contained in the Order of January 7, 1965, is not the type of approval intended and therefore could constitute an unlawful abdication of constitutional responsibility.

Inasmuch as it is my opinion that approval of warrants in advance of Council meetings is incompatible with the constitutional responsibility of the Executive Council, any method adopted to implement utilization of advance approval would be unlawful as a means of discharging the burden of the Constitution. Accordingly it is not necessary for me to reply to your further questions.

The adoption of the Executive Council Order of January 7, 1965, will not satisfy the requirements of advice and consent found in the Constitution, nor would any other device intended to provide approval prior to a Council meeting with a quorum present and voting.

Very truly yours,
EDWARD W. BROOKE

G. L. c. 161A, § 18, as enacted by St. 1964, c. 653, exempts the Massachusetts Bay Transportation Authority from any tax, betterment or assessment, and waives payment by said Authority of its proportionate share of the expenses on self-insurers determined by the Department of Administration and Finance. However, the Authority is required under c. 152, § 25A (2) (a) to make the deposit of securities required of self-insurers; and these may be included in the total deposits under the statute.

JANUARY 28, 1965.

HON. JAMES J. GAFFNEY, JR., *Chairman, Division of Industrial Accidents.*

DEAR MR. GAFFNEY: — You have requested my opinion concerning the effect of § 18 of G. L. c. 161A, as enacted by c. 653 of the Acts of 1964, providing for an exemption of the Massachusetts Bay Transportation Authority from taxation, betterments and assessments, from the provisions of G. L. c. 152, § 25 (a) (4), requiring assessment of expenses on self-insurers. More specifically you have asked:

"1. Do the provisions of Section 18, Mass., G. L., c. 161A as enacted by Chapter 563 of the Acts of 1964 supersede or conflict with Section 25A,

par. 4, Mass., G. L., c. 152 and thereby waive the payment on the part of the Massachusetts Bay Transportation Authority of its proportionate share of expenses as shall be determined by the Department of Administration and Finance as necessary to carry out the provisions of Chapter 152 relating to Self-Insurance?"

It is my opinion that the provision in G. L. c. 152, § 25 (a) (4) that "such expenses as shall be determined by the Department of Administration and Finance as necessary to carry out the provisions of this chapter relating to self-insurance shall be assessed against all self-insurers . . ." has been superseded by G. L. c. 161A, § 18, enacted by c. 563, Acts of 1964. That enactment provides:

"The authority and all its real and personal property shall be exempt from taxation and from betterments and special assessments; and the authority shall not be required to pay *any* tax, excise or assessment to or for the commonwealth or any of its subdivisions; nor shall the authority be required to pay any fee or charge for any permit or license issued to it. . . ." (Emphasis supplied.)

The statutory language clearly and explicitly exempts the Massachusetts Bay Transportation Authority from *any* tax, betterment or assessment. Clearly, the purpose of the General Court in enacting this statute was to exempt the Massachusetts Bay Transportation Authority from any and all forms of taxation.

It is my opinion, therefore, that c. 161A, § 18 supersedes the provisions of c. 152, § 25 (a) (4) and waives payment by the Massachusetts Bay Transportation Authority of its proportionate share of the expenses on self-insurers determined by the Department of Administration and Finance.

You have also requested my opinion as to whether "the securities deposited by the Massachusetts Bay Transportation Authority may be included in the total deposits and bonds of all self-insurers for the purpose of determining the proportionate share of the expenses that the securities and deposits of each self-insurer bear to such total deposits?"

In light of my discussion above in answering your first question, your second question is answered in the affirmative. Although the Authority is exempt from the assessment set forth in G. L. c. 152, § 25 (a) (4), the Massachusetts Bay Transportation Authority would still be required under c. 152, § 25A (2) (a) to make the deposit of securities required of self-insurers. There is no provision to contravene this requirement and therefore no reason to conclude that such deposits be omitted from the total deposit. The mere fact of exempting the payment of an assessment computed proportionally on the basis that any given security deposit would bear to the total deposit, is not sufficient reason to obviate the deposit itself. Furthermore, including the Massachusetts Bay Transportation Authority securities in the total deposit would work no hardship on the other self-insurers.

It is my opinion, therefore, that despite the exemption of payment of any assessment based on the deposited securities, there is no reason why those securities should not be included in the total deposits.

Very truly yours,
EDWARD W. BROOKE

The qualification of a contractor to bid on work of the Department of Public Works are to be determined under the provisions of G. L. c. 29, § 8B.

The commissioners of the Department must decide whether acceptance of a bid from any company is in the public interest and whether the contractor could be the lowest responsible and eligible bidder possessing the integrity necessary for the faithful performance of the work.

FEBRUARY 1, 1965.

HON. JAMES D. FITZGERALD, *Commissioner of Public Works.*

Re: M. DeMatteo Construction Company — Employment As Contractor.

DEAR COMMISSIONER FITZGERALD: — Reference is made to your letter of January 13, 1965, on the above subject. With that letter you enclosed a copy of a letter dated January 12, 1965 from John A. Hanson, Division Engineer, U. S. Bureau of Public Roads to you advising that the M. DeMatteo Construction Company had been removed from suspension because investigation had not been completed by the Department of Justice. Division Engineer Hanson wrote in the same letter to you that the rescission of suspension is without prejudice to further administrative or legal action that may be taken by the U. S. Department of Justice or the U. S. Department of Commerce at some future date.

The second enclosure with your letter of January 13, 1965, is a copy of a letter to the DeMatteo Construction Company from Dowell H. Anders, General Counsel for the U. S. Bureau of Public Roads. Thereby Mr. Anders advises the DeMatteo Construction Company of the rescission of its suspension due to ". . . our inability to provide a hearing at this time. . . ." Mr. Anders also wrote, "It is our intention that following completion of the Department of Justice investigation and at such time as we can afford a hearing, we will reinstitute our proposed action." By that and other language in his letter of January 8, Mr. Anders emphasized that the action taken was solely for the reason that the U. S. Bureau of Public Roads was not in a position to grant immediately a hearing requested by the DeMatteo Construction Company.

In your letter of January 13, 1965, you wrote that the President of M. DeMatteo Construction Company has requested immediate consideration of that company for pre-qualification purposes prior to requesting plans and specifications for bidding purposes on several currently pending projects.

By your letter of January 13, 1965, you have requested my opinion on the following:

"1. Whether or not there is any impediment to permitting the DeMatteo Company bidding on work of this department.

"2. If there is such impediment, what it is.

"3. If there is such impediment, on what grounds and in what manner this department should proceed to exclude the DeMatteo Company from departmental work."

Your attention is respectfully invited to Section 8B of Chapter 29 of the General Laws of the Commonwealth. That section directs the Commissioner of Public Works to require that any person or company proposing to bid on any work (with a few exceptions not pertinent to this opinion) submit a statement under penalties of perjury setting forth his qualifications to perform such work. In some detail the statute indicates the information which must be included in the qualification statement and the procedures by which the Commissioner and the Pre-qualification Committee assisting him shall make a determination about the qualification of a prospective bidder to perform work. The statute directs the Commissioner not to consider any bid or to award any contract to any individual or company not qualified under the provisions of said Section 8B and appropriate administrative rules promulgated thereunder.

Your attention is invited to Paragraph 3C, Section II, Regulations Governing Classification and Rating of Prospective Bidders, R-110, Massachusetts Department of Public Works, promulgated March 29, 1963, providing:

"On federally-aided projects, if the prospective bidder has been established as being unacceptable for employment under administrative action taken in instances of irregularities as set forth in Federal Regulations, Chapter I, Part 2, Title 23, 'Statement of policy as to administrative action to be taken by the Federal Highway Administrator in instances of irregularities.' The time period during which a proposal form will not be issued in this instance shall be the period that the prospective bidder is considered unacceptable by the Federal Highway Administrator."

Your attention is invited to Section 39M, Chapter 30 of the General Laws of the Commonwealth providing for the manner of awarding contracts for construction and materials.

Paragraph (a) of said Section 39 states in part: "Every contract . . . shall be awarded to the lowest responsible and eligible bidder . . . ; provided, however, that such awarding authority may reject any and all bids, if it is in the public interest so to do."

Paragraph (c) of said Section 39M defines the term "lowest responsible and eligible bidder" to mean ". . . the bidder . . . possessing the skill, ability and integrity necessary for the faithful performance of the work."

In order to determine if there is any impediment to permitting the DeMatteo Construction Company of Quincy, Massachusetts, to bid on work of the Department of Public Works, it is necessary that you, as Commissioner of that Department, make a decision about the qualifications of that company under the provisions of Section 8B of Chapter 29 of the General Laws of the Commonwealth.

Regulation-110 of the Department of Public Works governing classification and rating of prospective bidders was promulgated to assist in the execution of said Section 8B of Chapter 29. In connection with the application of Paragraph 3C of said Department of Public Works Regulation-110 it must be noted that while the suspension of the DeMatteo Construction Company has been rescinded by the U. S. Bureau of Public Roads, notices of that rescission of suspension both to you and to the DeMatteo Company indicate that the U. S. Bureau of Public Roads con-

tinues to plan an administrative hearing on the qualifications of the DeMatteo Company.

In determining the qualifications of the DeMatteo Construction Company, it will be necessary for the Pre-qualification Committee and the Commissioner of the Department of Public Works to decide if the pendency of such an investigation and future hearing by the U. S. Bureau of Public Roads, has ". . . established (DeMatteo Construction Company) as being unacceptable for employment . . ." as provided in 3C, Section II, Department of Public Works R-110, promulgated by the Commissioners of the Department of Public Works on March 29, 1963.

Assuming that it is found by the Department of Public Works that the DeMatteo Construction Company is qualified under the provisions of Section 8B of Chapter 29 of the General Laws and the Departmental Regulations promulgated thereunder, consideration must then be given by the Commissioners of the Department of Public Works to the provisions of paragraphs (a) and (c) of Section 39M of Chapter 30 of the General Laws. On the basis of all the facts available to them concerning the M. DeMatteo Construction Company of Quincy and the significance to the "public interest" of Federal participation in the types of projects for which the DeMatteo Construction Company might bid, the Commissioners of the Department of Public Works must decide whether acceptance of a bid from that company is ". . . in the public interest . . ." and whether the M. DeMatteo Construction Company could be a "lowest responsible and eligible bidder" possessing the ". . . integrity necessary for the faithful performance of the work . . ." If the Commissioners should determine that awarding such contracts is not in the public interest, statutory authority for such a decision is provided by Paragraph (a), Section 39M of Chapter 30 of the General Laws. If the Commissioners should decide that the M. DeMatteo Construction Company of Quincy does not have the integrity necessary for the faithful performance of a contract, statutory authority for that decision is contained in Paragraph (c), Section 39M of Chapter 39 of the General Laws.

Very truly yours,
EDWARD W. BROOKE

Settlement procedures in cases arising from land takings made pursuant to St. 1952, C. 556, St. 1954, C. 403, and St. 1956, C. 718 are governed by the identical language contained in § 6 of those three statutes, and the limitations contained therein continue to control settlements of takings thereunder which exceed both twenty-five hundred dollars and the amount recommended by the Real Estate Review Board.

FEBRUARY 1, 1965.

HON. JAMES D. FITZGERALD, *Commissioner, Department of Public Works.*

Re: Property Takings — Settlements — Statutory Procedural Requirements Chapter 782 of the Acts of 1962; Chapter 822 of the Acts of 1963.

DEAR COMMISSIONER FITZGERALD: — As a result of certain language contained in Chapter 782 of the Acts of 1962 and Chapter 822 of the Acts of

1963 on January 4, 1965, you asked my opinion concerning appropriate procedures for settling claims for damages arising from land takings made pursuant to Chapter 556 of the Acts of 1952, Chapter 782 of the Acts of 1962 and Chapter 822 of the Acts of 1963.

(a) Chapter 782, Acts of 1962, Section 1, paragraph 2:

"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 718 of the Acts of 1956, Chapter 32 of the Acts of 1958, Chapter 528 of the Acts of 1960 and Chapter 590 of the Acts of 1961, as amended."

(b) Chapter 822, Acts of 1963, Section 1, paragraph 2:

"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 718 of the Acts of 1956, and shall be in addition to the amounts made available in Chapter 782 of the Acts of 1962 and to any other funds available for the purpose."

(c) Chapter 822, Acts of 1963, Section 3:

"No payment in excess of twenty thousand dollars by way of purchase of real estate or any interest therein shall be made, and no settlement in excess of twenty thousand 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 the real estate review board established by Section six of Chapter 718 of the Acts of 1956 by reason of a purchase or taking under this act or under Chapter 782 of the Acts of 1962. Each recommendation of such real estate review board shall be in writing and shall be accompanied by a written statement indicating the reasons for such recommendations.

"No settlement by reason of a taking under this act or under said Chapter 782, in excess of twenty thousand 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 settlement 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 the interest and costs.

"The department is hereby ordered and directed to file reports of all payments in excess of ten thousand dollars for damages resulting from a taking or for a purchase under this act or under said chapter seven hundred and eighty-two with the clerk of the house of representatives and with the clerk of the senate not later than ninety days after payment. Such reports shall contain the amount of the payment, an affidavit that the amount was not in excess of the amount recommended by the board if payment in excess of said amount is prohibited hereunder, by whom and in what manner settled, the name of the owner or owners of the land involved, and a description of said land sufficient to identify it."

Settlement procedures in cases arising from land takings made pursuant to Chapter 556 of the Acts of 1952, Chapter 403 of the Acts of 1954, and

Chapter 718 of the Acts of 1956 are governed by the following identical language in each Section 6 of those three statutes:

"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."

Chapter 822, Acts of 1963 does not amend the settlement procedures established by the earlier Acts. The amount of twenty thousand dollars is applicable only to cases arising out of takings under Chapter 782 of the Acts of 1962 and Chapter 822 of the Acts of 1963. When enacting Chapter 822, Acts of 1963 the Legislature clearly had previous similar statutes in mind. That is evident from reference to Chapter 718, Acts of 1956, specifically cited in Sections one and five of said Chapter 822. Said Chapter 822 also follows the previous statutes in general form. The omission, except for Chapter 782, Acts of 1962, of reference in Section 3 of said Chapter 822 to settlement limitations enacted by earlier, similar legislation must be construed as clear expression of the deliberate intention of the General Court not to amend those earlier limitations.

The limitations imposed by Section 6 of the Acts of 1952, 1954 and 1956 continue to control settlements of takings thereunder which exceed both twenty-five hundred dollars and the amount recommended by the Real Estate Review Board. Unless a settlement exceeds both of those limits, said Section 6 has no application. A settlement not in excess of either of those stated limits may be made by the Department of Public Works at any time before litigation is instituted (General Laws, Chapter 79, Section 39) and thereafter by the Attorney General. (6 Op. Attorney General 1921, p. 169; Opinion of the Attorney General, March 7, 1963.)

The limitations imposed by Section 3 of Chapter 822 of the Acts of 1963 operate in the same manner as those of the Sections 6 of the earlier Acts except that twenty thousand dollars has been substituted for twenty-five hundred dollars. Unless a settlement exceeds both limitations, Section 3 of said Chapter 822 has no application. A settlement not in excess of both defined limits may be made by the Department of Public Works at any time before suit is commenced. (General Laws, Chapter 79, Section 39) and by the Attorney General thereafter. (6 Op. Attorney General 1921, p. 169; Opinion of the Attorney General, March 7, 1963.)

Statutes concerned with remedies or procedure generally apply to pending cases. *Lindberg* v. *State Tax Commission,* 335 Mass. 41. Statutes relating to remedies and not affecting substantive rights commonly are treated as operating retroactively. *Hanscom* v. *Malden Light Company*, 220 Mass 1. The increase of the settlement limitation from $2,500 to $20,000 does not affect detrimentally the substantive rights of either the property owner or the Commonwealth. It provides a more practical and efficient system for the settling of land damage cases.

When considering the reference to Chapter 782, Acts of 1962 in Section 3. Chapter 822, Acts of 1963 it cannot be assumed that the Legislature intended to establish two different procedures for different takings under

authority conferred by the same enabling Acts (Chapter 782 of 1962 and Chapter 822 of 1963). The clear legislative language and the absence of adverse effect on any private rights permits the retroactive application of Section 3 of Chapter 822 of the Acts of 1963 to all takings thereunder and under Chapter 782 of the Acts of 1962.

Herewith are answers to the specific questions propounded by you in your letter of January 4, 1965:

1. Submission of appraisals for review by the Review Board or recommendation of the Review Board is not required before payment or settlement is made out of Court for a taking made pursuant to Chapter 822 of the Acts of 1963 in an amount not in excess of twenty thousand dollars.

2. A payment or a settlement for a taking made pursuant to Chapter 822 of the Acts of 1963 may be made out of Court in an amount not in excess of twenty thousand dollars if the Review Board has recommended an amount which is less than twenty thousand dollars.

3. Submission of appraisals for review by the Review Board or recommendation of the Review Board is not required before payment or settlement is made out of Court for a taking made pursuant to Chapter 782 of the Acts of 1962 in an amount not in excess of twenty thousand dollars.

4. A payment or settlement for a taking made pursuant to Chapter 782 of the Acts of 1962 may be made out of Court in an amount not in excess of twenty thousand dollars if the Review Board recommends an amount which is less than twenty thousand dollars.

5. The opinions expressed in answer to your third and fourth questions apply to all takings made pursuant to Chapter 782 of the Acts of 1962, whenever made.

6. It is my opinion that Chapter 822, Acts of 1963 did not amend the settlement procedures for cases arising from land takings pursuant to the Acts cited in your sixth question. Submission of appraisals for review by the Review Board or recommendation by the Review Board continues to be required before payment or settlement is made out of Court in an amount in excess of twenty-five hundred dollars for a taking made pursuant to Chapter 556 Acts of 1952, Chapter 403 Acts of 1954 and Chapter 718 Acts of 1956.

7. Payment or settlement of a taking made pursuant to Chapter 556 Acts of 1952, Chapter 403 Acts of 1954, and Chapter 718 Acts of 1956 may be made only when such settlement does not exceed twenty-five hundred dollars or does not exceed the recommendation by the Real Estate Review Board in an amount in excess of twenty-five hundred dollars.

This opinion is concerned with the operation of the statutory provisions specifically cited herein. It is not concerned with administrative procedures of the Department of Public Works for the prudent review of appraisals of damages arising from any property takings by that Department which may exist independent of and in addition to the statutory duties of the Real Estate Review Board.

Very truly yours,
EDWARD W. BROOKE

The Commissioner of the Department of Mental Health has the authority to apply in behalf of the Commonwealth to the Division of Surplus Property of the United States for the conveyance of land with buildings thereon and certain easements located in Greenfield.

The Commissioner of the Department of Mental Health has authority on behalf of the Commonwealth to accept the aforesaid property subject to the terms and conditions of the Federal Property and Administrative Services Act of 1949, as amended.

FEBRUARY 9, 1965

Re: Department of Mental Health — Receipt
of Property in Greenfield from U.S.A.

HON. HARRY C. SOLOMON, M.D., *Commissioner, Department of Mental Health.*

DEAR COMMISSIONER SOLOMON: — You have requested my opinion on the points raised by E. G. Bradley, Regional Representative, Division of Surplus Property, Department of Health, Education and Welfare" as set forth in his letter to the Commissioner, Department of Mental Health under date of December 7, 1964.

The December 7th letter of Mr. Bradley solicits my assurance that:

1. The Commissioner of the Department of Mental Health has the authority "under Chapter 414 of the Acts of 1964" to apply in behalf of the Commonwealth to the Division of Surplus Property of the United States for the conveyance of certain land with the buildings thereon and certain easements located in Greenfield, Massachusetts; and that

2. The Commissioner of the Department of Mental Health has authority on behalf of the Commonwealth to accept the aforesaid property subject to the terms and conditions, set forth in the draft of the deed without warranty transmitted by Mr. Bradley with his letter of December 7.

Section 1 of Chapter 414 of the Acts of 1964 states:

"The Department of Mental Health is hereby authorized to accept on behalf of the Commonwealth, a conveyance from the United States of America of all its right, title and interest in and to certain real estate together with the building thereon situated in the Town of Greenfield... said conveyance and the use of such real estate to be subject to the provisions and conditions of the Federal Property and Administrative Services Act of 1949 as amended".

Chapter 123, Section 1 of the General Laws provides that the Department of Mental Health shall act by the through the Commissioner of Mental Health.

The Federal Property and Administration Services Act of 1949 (63 Stat. 377) provides for the disposal of surplus property in part in Section 203:

"(a) Except as otherwise provided in this section, the administrator shall have supervision and direction over the disposition of surplus

property. Such property shall be disposed of to such extent at such times, in such areas, by such agencies, at such terms and conditions and in such manner as may be prescribed in or pursuant to this act.

"(b) . . . and the disposal of surplus property may be performed by the General Services Administrator, or where so determined by the Administrator, by the Executive Agency in possession thereof or by any other executive agency consenting thereto.

"(c) Any Executive Agency designated or authorized by the Administrator to dispose of surplus property may do so by the sale, exchange, lease, permit or transfer . . . with or without warranty upon such terms and conditions as the Administrator deems proper and it may execute such documents for the transfer of title or other interests in property . . . as it deems necessary and proper to dispose of such property under the provisions of this title . . ."

It is my opinion that under the provisions of Chapter 414 of the Acts of 1964 interpreted in conjunction with the appropriate Sections of Chapter 123 of the General Laws of the Commonwealth that:

1. The Commissioner of the Department of Mental Health does have the authority to apply in behalf of the Commonwealth to the Division of Surplus Property of the United States of America for the conveyance of all its right, title and interest in and to certain real estate together with the building thereon situated in the Town of Greenfield, Massachusetts and known and numbered as 20 Sanderson Street; and

2. The Commissioner of the Department of Mental Health has the authority on behalf of the Commonwealth to accept the conveyance of said real estate subject to the provisions and conditions of the Federal Property and Administrative Services Act of 1949, as amended, and as set forth in part in the deed without warranty proposed by E. G. Bradley, Regional Representative, Division of Surplus Property, U.S. Department of Health, Education and Welfare in his December 7, 1964 letter to the Commissioner of the Massachusetts Department of Mental Health. The provisions and conditions of that proposed deed are authorized completely by the Federal Property and Administrative Services Act of 1949, as amended.

Very truly yours,
EDWARD W. BROOKE

The position or rank of detective could be created under G. L. C. 31 only by including that position in the original classification plan or in a subsequent acceptance, which, in the normal course should be on file with the Department of Civil Service. If no such rank or position appears therein, it is within the discretion of the Chief of Police, under G. L. C. 41, § 97A, to assign the duties of conducting investigations to any officer or officers within the department.

FEBRUARY 11, 1965

HON. W. HENRY FINNEGAN, *Director of Civil Service.*

DEAR MR. FINNEGAN: — In your letter of November 23, 1964, you have asked my opinion concerning the following question: Whether a municipality has effectively established the position of detective in the local

police force, or whether the town may instead assign to individual patrolmen employed within the department the responsibility of doing investigative work which in some municipalities is performed by officers holding the rank of detective? From your letter it appears that the town police force has been classified under Civil Service since March 5, 1923, and that, in addition, you have reason to believe that the town has accepted § 97A of c. 41 of the General Laws.

Under that section the Board of Selectmen is responsible for establishing a local police force. Once established, the Selectmen have the further duty to appoint a Chief of Police, to appoint those officers who may be required, and to establish a workable pay scale within the department. These duties would include the continuing responsibility of appointing new personnel due to retirement, resignation, the creation of new positions or for other cause. The pay scale adopted must naturally not exceed the annual appropriation for that purpose.

The day-to-day supervision of the department is entrusted to the Chief of Police. Among those duties specifically enumerated by statute is the assumption of control of the town property used by the department, the supervision of those officers employed with the department, and the assignment of the various officers to particular duties. As an integral part of the administration of the department, the Chief of Police is required, from time to time, to draw up and promulgate regulations designed to promote the efficient running of the department, as a whole, including therein rules pertaining to the officers themselves. These regulations are subject to the prior approval of the Board of Selectmen. If the board, however, fails to act upon these regulations within a thirty-day period, the regulations become effective without the board's approval.

G. L. c. 41, § 97A.

"In any town which accepts this section there shall be a police department established by the selectmen, and such department shall be under the supervision of an officer to be known as the chief of police. The selectmen of any such town shall appoint a chief of police and such other officers as they deem necessary, and fix their compensation, not exceeding, in the aggregate, the annual appropriation therefor. In any such town in which such appointments are not subject to chapter thirty-one, they shall be made annually and the selectmen may remove such chief or other officers for cause at any time after a hearing. The chief of police in any such town shall from time to time make suitable regulations governing the police department, and the officers thereof, subject to the approval of the selectmen; provided, that such regulations shall become effective without such approval upon the failure of the selectmen to take action thereon within thirty days after they have been submitted to them by the chief of police. The chief of police in any such town shall be in immediate control of all town property used by the department, and of the police officers, whom he shall assign to their respective duties and who shall obey his orders. Section ninety-seven shall not apply in any town which accepts the provisions of this section. Acceptance of the provisions of this section shall be by a vote at an annual town meeting."

The powers of the Board of Selectmen and Chief of Police, as outlined above, are not contingent upon the town's establishment of a

Civil Service system for the employees involved. The town may, however, place the department within the classified Civil Service. To do this, certain formal procedures must be followed. These procedures are to be found in G. L. c. 31, §§ 47 through 50, entitled: "Application of Law to Commonwealth, Cities and Town:."

Under § 47, municipal employees in cities of over one hundred thousand inhabitants which would be classified in the category of the official or labor service are by the force of that section placed under c. 31. In the instance of a city with less than one hundred thousand inhabitants, those employees classified as the official service are subject to the provision of that chapter whether or not the city has accepted it. In respect to the labor service of such a city, not already a part of the system by a prior enactment, the city may choose to place these employees under Civil Service by vote of the City Council.

In the case of a town, as distinguished from a city, the provisions of this chapter become applicable only with respect to those employees who would be classified within the official or labor services by vote of the town itself at an annual election or a town meeting. The requisite machinery for placing this question before the town is outlined in §§ 47 and 49A.

Special provision is made in § 48 for members of municipal police and fire forces. In both cities and towns, without regard to size, the regular or permanent members of the police and fire forces can be classified within Civil Service only by the approval of the electorate. The procedure for doing this is contained within section 48 and with regard to the certification of names on petitions to place a department under Civil Service as well as the filing and hearing of objections to such a petition, under § 49A. The prior acceptance of § 48 with reference to certain officers or positions would not preclude a subsequent acceptance of that section where a new rank or position is created. Until such acceptance, no new position coming within this section would be subject to c. 31.

G. L. (Ter. Ed.) c. 31, § 48

"Regular or permanent members of police and fire forces of cities, and regular or permanent members of police and fire forces and call fire forces of such towns as, with reference to said forces, respectively, accept the provisions of this section as hereinafter provided or have accepted corresponding provisions of earlier laws, and chiefs of police or officers performing similar duties, however entitled, and chiefs of fire departments or officers performing similar duties, however entitled, of such cities or towns, as, with reference to such officers, respectively, accept the provisions of this section as hereinafter provided or have accepted corresponding provisions of earlier laws, shall be subject to the provisions of this chapter and the rules established thereunder; except that no rule regulating the height and weight of persons eligible to become members of the fire department shall be made or enforced except by the city council or selectmen; and except further that no rule shall prescribe a maximum age limit for applicants in police or fire departments lower than thirty-five years or a minimum age limit therefor higher than twenty-two years. In case an eligible list of at least two available persons

is not established from a competitive examination for fire fighter or police officer, the director may, upon request of the appointing authority of a fire force or police force made within six months after the results of the examination are determined, hold another competitive examination in which he may fix a maximum age limit of not more that forty years.

"In towns using official ballots at town elections, acceptance of the provisions of this section relative to any such officer or force shall be by vote in answer to a question placed on the official ballot at an annual town election as hereinafter provided, and in towns not using official ballots at town elections such acceptance shall be by vote at an annual town meeting. Upon the filing, with the clerk of any town using official ballots at town elections, of a petition signed either by not less than one thousand registered voters thereof or by not less than five per cent of the total number or registered voters thereof, requesting that the question of accepting the pertinent provisions of this chapter with reference to any such officer or force be placed upon the official ballot, the clerk shall, if such provisions are not already in force in such town, place such question on the official ballot for the next town election occurring more than thirty days after the filing of such petition. The provisions of section forty-nine A relative to the certification of names on petitions under said section and to the filing and hearing of objections to the validity or sufficiency of such petitions or of the signatures thereon shall apply in the case of petitions under this section.

"Acceptance of this section or corresponding provisions of earlier laws with reference to any of the aforesaid officers or forces shall not prevent subsequent acceptance of this section with reference to any or all of such officers or forces as to which there has been no acceptance of said section or provisions."

After the town has accepted c. 31, as in the present case, it is incumbent upon the Director of Civil Service, in accordance with § 2A. cl. (b) of that chapter, to establish a classification plan for the municipal department. Such plan should include a detailed classification of the various employees by their office or position within the department and contain as well a job description of each. Once the classification plan has been established, it is final as to those positions contained within the plan, and notice of the effective date thereof must be sent to the town. Within one year after receipt of such notice, the town must establish a compensation plan with maximum and minimum rates for the various positions.

G. L. (Ter. Ed.) c. 31, § 2A.

"In addition to other duties imposed upon him by this chapter and chapter thirteen the director shall —

"(b) Establish, with the approval of the commission, classification plans for positions in every city and town which are subject to any provision of this chapter. Upon the establishment of such classification plan the director shall forthwith make such plan effective, and after the establishment of such classification it shall be final. The city or town affected thereby shall, within one year after receiving notice from the director of the effective date of such classification plan, establish a compensation plan with a minimum and maximum salary, in accordance

with the class and grade, for each position, but no compensation plan established hereunder shall include positions subject to section forty-seven D. . . ."

The Commission, as distinct from the Director, is, under the section cited above, required to approve the classification plan. In addition, under § 3 (a), the Commission is empowered to promulgate rules pertaining to the "(e)stablishment of civil service classes and grades. . . ." By means of this rule-making power, the Commission could not unilaterally reorganize the present municipal department by creating a new position not already contained in the original organization plan or in a subsequent acceptance. A new rank or position could only be created by following the procedure discussed above. This requires individual as well as cooperative action on the part of the town and the Department of Civil Service. This is not a case falling within the general provisions of § 4, but comes under the specific provisions of §§ 47-50, more particulary, § 48.

The town is not to go without adequate protection where such a position has not been created. A modern police department must render diverse services to the community. Each member is called upon to maintain skills in both crime prevention and crime detection. It may well be that in this matter each member of the department must share the responsibility of crime investigation- Whether this assignment of duties or an alternative is adopted, would be within the discretion of the Chief of Police under G. L. c. 41, § 96A.

On the basis of the statutes cited and the principles discussed above, it is my opinion that the position or rank of detective could be created under c. 31 only by including that position in the original classification plan or in a subsequent acceptance which, in the normal course, should be on file with the Department of Civil Service. If no such rank or position appears therein, it would be within the discretion of the Chief of Police under G. L. c. 41, § 97A, to assign the duties of conducting investigations to any officer or officers within the department.

Very truly yours,
EDWARD W. BROOKE

The benefits available to an employee of the Commonwealth under G. L. C. 152 would not provide the necessary coverage for an individual engaged in employment under the provisions of the Defense Base Act, 42 U.S.C.A. 1651, as amended, and would not satisfy the provisions of a proposed contract between the United States Agency for International Development and the University of Massachusetts.

FEBRUARY 11, 1965

HON. JOHN W. LEDERLE, *President, University of Massachusetts.*

DEAR PRESIDENT LEDERLE: — In your letter of October 29, 1964, you have asked my opinion concerning certain problems arising under a contract entered into by the University of Massachusetts and the United States Agency for International Development which entails giving certain technical advice and assistance to the Government of Malawi.

The three questions which you have raised concerning this agreement appear in the text of this opinion. The third question will be answered first since this question largely determines the answers to the other two. That portion of the contract which you have included in your letter which has been designated provisions "G. 1." appears below:

"G. *Workmen's Compensation Insurance*

1. The Contractor shall provide and thereafter maintain workmen's compensation as required by United States Public Law 208, 77th Congress, as amended (42 U.S.C. 1 (6)51), with respect to and prior to the departure for overseas employment under this contract of all employees who are hired in the United States or who are American citizens or bona fide residents of the United States."

"3. If it is your opinion that any of the parts of question 1 should be answered 'yes', are the benefits available to such an individual under General Laws Chapter 152 sufficient to satisfy the above quoted requirements of the above contract?"

Under the contract clause appearing above, the University must provide and maintain workmen's compensation coverage as required by 42 U.S.C. § 1651, as amended. Section 1651 of c. 42 of the United States Code and the companion sections, 1652-4, are more commonly known as the "Defense Base Act." This statute was initially passed by Congress in 1941 as an adjunct to the destroyer-defense base agreement with Great Britain. The present provisions of § 1651 extend the benefits under the Longshoremen's and Harbor Workers' Compensation Act to include, among others, those employed ". . . under a contract entered into with the United States or . . . agency . . . where such contract is to be performed outside the continental United States." Such coverage is ". . . irrespective of the place where the injury or death occurs . . ." [1] and is not contingent on ". . . where the contract of hire . . . may have been made or entered into." [2] This coverage includes ". . . any injury or death occurring . . . during transportation to or from his place of employment, where the employer or the United States . . ." pays for or provides the transportation.[3]

In the normal course, an employee would be covered by § 1651 while in transit and during his employment in a foreign country. This Act has been interpreted, however, as not providing coverage to an employee injured or killed while performing work within the continental United States.[4]

Under the Longshoremen's and Harbor Workers' Act, itself, without reference to 42 U.S.C. § 1651, compensation is payable ". . . only . . . if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." This section has created a twilight zone in which an employee may, in certain cases, elect

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1 42 U.S.C.A. § 1651 (a).

2 42 U.S.C.A. § 1651 (c).

3 42 U.S.C.A. § 1651 (a).

4 *Alaska Airlines, Inc.* v. *O'Leary*, 216 F. Supp. 540, 545 (W. D. Wash. 1963).

either the state or federal remedy and, in the same manner, the section allows certain isolated instances in which state coverage might provide some protection to an individual employed under a contract circumscribed within this federal Act.

The Foreign Bases Act, as to workers specifically covered by that statute, has attempted to eliminate any possibility of such divided jurisdiction. The remedy under § 1651 is exclusive and can only be enforced through the federal administrative procedure and, if necessary, in the federal courts.[5] Similarly, the liability of the employer is exclusive ". . . and in place of all other liability . . . under the workmen's compensation law of any state, territory, or other jurisdiction." [6] No state compensation plan could provide any coverage under a statute such as this where the federal government has effectively preempted the field.

The Act, however, gives to the Secretary of Labor a certain amount of discretion. He may, in an appropriate situation, waive the application of § 1651.[7] In lieu of such a waiver, a contractor might act as a self-insurer or purchase a commercial workmen's compensation policy providing coverage under this statute.

In answer to question three, it is my opinion that the benefits available to an employee of the Commonwealth under G. L. c. 152 would not provide the necessary coverage for an individual engaged in employment under the provisions of the Defense Bases Act and would not satisfy provision "G. 1." of the contract.

"1. Is an individual employed by the University and assigned to service under the above contract entitled to benefits under General Laws Chapter 152 on account of injuries or death arising out of and in the course of his employment if such injuries are incurred while performing such service (a) within Massachusetts, (b) outside Massachusetts but within the United States of America, (c) outside the United States of America?"

Any discussion of this question is to a certain extent academic in light of the answer to question three. A discussion of this question may prove of some value, however, in future negotiations concerning this or subsequent contracts.

Under G. L. c. 152, § 69, as amended by St. 1959, c. 555, the Commonwealth is required to pay ". . . laborers, workmen and mechanics employed by it who receive injuries arising out of and in the course of their employment, or, in case of death resulting from such injury, to the persons entitled thereto, the compensation provided by this chapter." In the same section "laborers," "workmen" and "mechanics" are broadly defined to ". . . include other employees of the commonwealth . . . regardless of the nature of their work . . ." but to exclude members of the police or fire force.

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5 42 U.S.C.A. § 1653. See also *Royal Indemnity Co.* v. *Puerto Rico Cement Corporation*, 142 F. 2d 237, 239 (1st Cir. 1944). *Rogers Const.* v. *Alaska Industrial Board*, 116 F. Supp. 65 (D. Alaska 1953).

6 42 U.S.C.A. § 1651 (c).

7 42 U.S.C.A. § 1651 (e).

An individual employed by the University of Massachusetts is an employee of the Commonwealth as that term is used in c. 152.[8] As a Commonwealth employee, the individual would be covered by that chapter.

As long as the individual is a bona fide employee of the Commonwealth and has otherwise qualified for compensation benefits, the locality where the injury occurs would not usually, and for that reason alone, affect his coverage. It specifically states in G. L. c. 152, § 26 that an employee ". . . who . . . receives a personal injury arising out of and in the course of his employment . . . *whether within or without the commonwealth* [9] . . . shall be paid compensation."

The Defense Bases Act has somewhat modified this coverage. An employee injured outside the United States of America and thereby entitled to benefits under 42 U.S.C. § 1641, would not be covered by G. L. c. 152. A Commonwealth employee, however, injured in Massachusetts or outside of Massachusetts but within the United States would be entitled to benefits under G. L. c. 152 since, as presently interpreted,[10] the provisions of § 1651 would not apply to such an employee.

"2. Would your opinion as to any part of question 1 be different if the individual in question were a citizen and bona fide resident of the United States of America who (a) was specially employed by the University for the purpose of performing such service under the above contract and whose employment is conterminous with said contract, (b) was specially employed by the University for such purpose but whose employment is not conterminous with said contract, or (c) was employed by the University for other purposes and thereafter assigned to service under the above contract?"

The answer to question one contained in this opinion would not differ on the basis of the additional facts stated in this question. These additional facts do, however, aptly illustrate the existence of two contracts — the contract between the University and the individual as well as the contract between the University and the United States Agency for International Development. Under the first contract, the citizenship or residence of the individual would not, of itself, unless this fact in some way affected the employment relationship, deprive an individual of workmen's compensation benefits under G. L. c. 152. If, on the other hand, the individual is retained as an independent contractor,[11] he would receive no such benefits since he would not be "an employee of the commonwealth" within the meaning of G. L. c. 152, § 69.

What seems to complicate this matter is the presence of the second contract with the federal government which is superimposed upon the first. An employee derives specific benefits from the second contract while he

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8 G. L. c. 75, § 14.
* * *

"All officers and employees, professional and non-professional, of the university shall continue to be employees of the commonwealth irrespective of the source of funds from which their salaries or wages are paid. They shall have the same privileges and benefits of other employees of the commonwealth such as retirement benefits, group insurance, industrial accident coverage, and other coverage enjoyed by all employees of the commonwealth."

9 Emphasis supplied.

10 Note 4 Supra.

11 *Eckert's Case,* 233 Mass. 577 (1919). *Winslow's Case,* 232 Mass. 458 (1919).

is engaged in employment under that agreement.[12] He cannot at the same time be eligible under the state compensation plan. Complete coverage, not duplication, is intended.

Dealing directly with question two above, the individual described in subsection (a) would not be covered by G. L. c. 152 while he is employed outside the United States and his employment is conterminous with the second contract. In the case of the two individuals described in subsection (b) and (c) above, their eligibility for benefits under the state compensation plan would terminate while they were covered by the federal plan.

Very truly yours,
EDWARD W. BROOKE

G. L. C. 31, § 2A does not authorize the director of civil service to establish age requirements for applicants.

FEBRUARY 25, 1965.

HON. MALCOLM C. WEBBER, *Chairman, Massachusetts Commission Against Discrimination.*

DEAR SIR: — You have requested my opinion of whether that portion of G. L. c. 151B, § 4 (1), which makes it an unlawful employment practice for an employer to discriminate against an individual because of age, by implication, repealed or rendered void the following statutes: G. L. c. 31, §§ 2A, 13, 19A, 19B, 20, 20A, 20C, 22, 22A, 24; G. L. c. 74, § 24A.

When it inserted the prohibition against age discrimination into c. 151B, the General Court specifically provided that the prohibition should not be held to repeal "any other law of the Commonwealth relating to discrimination because of age." St. 1950, c. 697, § 9. At that time, the age provisions of c. 151B did not apply to the Commonwealth or its political subdivisions or agencies and so had no effect upon any of the quoted statutes. *Id.*, § 1. When this exemption was removed in 1962, 2t, 1962, c. 627, there was no indication of any purpose to alter the saving clause of § 9.

It might be argued, however, that the 1937 legislation which previously had made age discrimination in employment unlawful (St. 1937, c. 367, § 2, adding G. L. c. 149, §§ 24A-24J), had itself repealed all inconsistent statutes, such as those in question here. Assuming that each of the statutes to which your inquiry relates is so inconsistent, each such statute other than G. L. c. 31, § 22 and § 24 has been enacted or reenacted with its supposed inconsistency subsequent to the 1937 legislation.

General Laws	*Provision*	*Enactment or Reenactment*		*Statute*
C. 31	§ 2A	Stat. 1939	c. 238	§ 11
	13	1945	703	5
	19A	1941	38	
	19B	1949	288	
	20	1959	115	
	20A	1952	167	1
	20C	1952	167	2
	22A	1946	221	
C. 74	§ 24A	1958	154	

[12] This has in mind the territorial limitation previously discussed.

In addition, there is implicit in the amendments to G. L. c. 31, § 22 and § 24, which were enacted subsequent to 1937, a recognition that the balance of these sections, including the parts here in question, remains fully effective. (St. 1939, c. 238, §§ 29, 31; St. 1946, c. 345; St. 1949, c. 642, § 2; St. 1954, c. 627, § 4; St. 1956, c. 247.) Accordingly, it is my considered judgment that each statute to which your inquiry relates has not been repealed or rendered void either by the provisions of c. 151B, which relate to age, or by G. L. c. 149, §§ 24A-24J.

On the other hand, as has been pointed out above, since 1962, in the absence of a contrary legislative policy, the age provisions of c. 151B apply to government agencies, of which the civil service commission is one. General Laws, c. 31, § 2A does not, in my opinion, evince a contrary policy; and accordingly does not authorize the director of civil service to promulgate age qualifications which are discriminatory within the meaning of c. 151B. Similarly, the director cannot, except pursuant to G. L. c. 151B, § 24, determine what are bona fide occupational qualifications or otherwise promulgate rules or regulations concerning age which conflict with or derogate from the full exercise by the Massachusetts Commission Against Discrimination of its powers under c. 151B. Each of the other statutes in question enacts a policy or rule specifically dealing with age, which, as stated above, exists irrespective of any contrary policy in c. 151B. Section 2A, on the other hand, is a general authorization to the director to establish standards for the various civil service positions. Clearly the director cannot exercise this authority in a way inconsistent with the principles and policies of c. 31; and these principles and policies ought to be interpreted so as to harmonize with other provisions of the General Laws whenever it is reasonable to do so.

The Massachusetts Commission Against Discrimination is the agency entrusted with the responsibility of administering the Commonwealth's policy against age discrimination in employment generally. Many of the positions subject to § 2A are comparable to positions in private industry. It is desirable that not only the development and refinement of the meaning of the statute, such as the determination of bona fide occupational qualifications, but also the enforcement policies, be uniform. The Legislature has invested the director of civil service with the responsibility and power to oversee the imposition of age limitations in one narrowly defined area. G. L. c. 31, § 24. Were the director already possessed with general jurisdiction under § 2A to formulate age standards for jobs, the specific authority given him in § 24 to approve certain age limitations would be redundant and superfluous.

For the foregoing reasons, it is my considered opinion that § 2A of c. 31 does not authorize the director of civil service to establish age requirements for applicants.

Very truly yours,

EDWARD W. BROOKE

The Massachusetts Bay Transportation Authority, created by St. 1964, C. 653, succeeds to the right to request advances from the Treasury Department which was possessed by the Metropolitan Transit Authority under §§ 13 and 13A of its governing statute and the treasurer of the Commonwealth may properly advance amounts requested by the Authority's Board of Directors.

FEBRUARY 25, 1965.

HON. ROBERT Q. CRANE, *Treasurer and Receiver General of the Commonwealth.*

DEAR MR. CRANE: — I have received your letters of February 8 and 17, 1965, wherein you request my interpretation of a provision of c. 563 of the Acts of 1964, which chapter created the Massachusetts Bay Transportation Authority. You have informed me that the Board of Directors of the present Massachusetts Bay Transportation Authority has certified that the now abolished Metropolitan Transit Authority operated at a deficit for the calendar year of 1964 of $12,022,379.67; that no amount is available in the reserve fund to meet the said deficit, but that $11,000,000.00 has already been advanced to the earlier Transit Authority by the Treasury Department; and that accordingly a further advance of $1,022,379.67 is necessary. In light of the fact that legislation creating a new Authority has been enacted, you have asked my opinion whether the Treasury Department may lawfully advance the additional sum.

Chapter 544 of the Acts of 1947, which chapter created the Metropolitan Transit Authority, provided for such advances under § 13:

". . . If as of the last day of December in any year the amount remaining in the reserve fund shall be insufficient to meet the deficiency hereinbefore referred to, the trustees shall notify the state treasurer of the amount of such deficiency, less the amount, if any, in the reserve fund applicable thereto, and the commonwealth shall thereupon pay over to the authority the amount so ascertained. . . ."

Such amounts have been advanced directly from the State Treasury, when sufficient funds have been available; otherwise, the Treasurer has been authorized by § 13 to borrow whatever sums are necessary. Amounts paid over to the Authority under this section have then been assessed to the cities and towns which received service.

By c. 409 of the Acts of 1954, the General Court authorized the making of advance payments throughout the year. Thereafter, the Legislature provided that — when necessary to make such periodic payments — the Treasurer could lawfully borrow on the credit of the Commonwealth and issue interest-paying notes as security therefor. Thus, it is clear that the types of advances made to the Metropolitan Transit Authority, and the methods used to secure the money prior to assessment to the cities and towns, were authorized by the General Court under St. 1947, c. 544, and amendments thereto.

The Massachusetts Bay Transportation Authority is intended to be — among other things — a replacement for the Metropolitan Transit Authority. To this end, the Legislature has provided that all property

owned, controlled by, or in the custody of the old Authority be transferred to the ownership, control or custody of the new. Debts, liabilities and obligations are assumed, with adjustments made so that municipalities which have not formerly been serviced will not be unfairly assessed. (St. 1964, c. 563, § 20). Actions and proceedings remain unabated; orders, rules and regulations continue in full force and effect; all contracts and collective bargaining agreements are carried over and assumed by the new Authority. (St. 1964, c. 563, § 22.) Apparently, it was the intention of the General Court that public transportation and its administration be disrupted as little as possible by the abolition of the Metropolitan Transit Authority and the creation of the Massachusetts Bay Transportation Authority.

In accordance with this desire for a smooth transfer of control, it is clear that the General Court intended the new Authority to succeed to the right to request advances from the Treasury Department which was enjoyed by the Metropolitan Transit Authority under §§ 13 and 13A of its governing statute. This is specifically indicated in § 22 of St. 1964, c. 563:

". . . The rights of the Metropolitan Transit Authority to payments from the commonwealth or others on account of operations or debt service or other expenses under existing laws shall pass to the Massachusetts Bay Transportation Authority hereunder and, notwithstanding any other provision of this act, existing laws shall continue in effect with regard to assessment of the same and other applicable means of raising the same." Thus it would appear that the new Authority is entitled to advances from the Treasury Department to meet deficits incurred in operations. Without the right to secure such advances, transportation operations and administration could suffer; the language of § 22 makes it clear that such a result was not contemplated by the Legislature.

Accordingly, I advise you that you may properly advance to the Massachusetts Bay Transportation Authority the amount requested by the Authority's Board of Directors. This sum may be advanced directly from the State Treasury, or may — under present legislation — be obtained by borrowing if the necessary funds are not immediately available. The question whether a two-thirds vote of the General Court was necessary to carry over the authorization to raise funds by borrowing on the credit of the Commonwealth is presently before the Supreme Judicial Court and I have not addressed myself to it in this opinion.

Very truly yours,

EDWARD W. BROOKE

It is within the authority of the Commissioner of Mental Health to accept patients in residence at the North Reading facility for participation in programs of rehabilitation.

February 25, 1965.

Hon. Harry C. Solomon, M. D., *Commissioner of Mental Health.*

Dear Sir: — I have received your letter inquiring about the uses to which you may put the North Reading State Sanatorium, transferred to your department by c. 598 of the Acts of 1962.

In August of 1963, this office verbally informed you that your proposal to use the North Reading facility for a daytime rehabilitation center for mentally retarded patients was a proper use and within your authority. More recently, you have asked my opinion regarding your projected use of the North Reading facility to accept patients in residence as part of a program designed to rehabilitate the mentally retarded.

Chapter 598 of the Acts of 1962 authorized the Commissioner of Public Health to transfer the above-mentioned facility to the Commissioner of Mental Health. That transfer was accomplished shortly thereafter. You have determined the needs of the department, and you conclude that the best use of the facility is as a rehabilitation center.

The General Court has specifically contemplated and provided for the treatment of mentally retarded citizens. To this end, c. 123, § 12 states:

"The department may establish and maintain free clinics for the feeble minded. . . ."

and c. 123, § 10 provides:

"The department shall divide the commonwealth into districts, may change the districts from time to time, and shall designate the state hospitals to which mentally ill, epileptic and *feeble minded persons* . . . shall be committed." (Emphasis supplied.)

Chapter 123, § 13A provides:

"Such of the powers and duties conferred or imposed upon the department, relating to the cause and prevention of . . . feeblemindedness, as the commissioner may determine may be exercised and performed by the division of mental hygiene."

Thus, as seen, the Legislature has acted on the problem of the mentally retarded.

Furthermore, c. 123, § 12 authorizes the department to establish and maintain clinics for the feebleminded or mentally retarded. As outlined in your letter, you propose to carry out a program for the rehabilitation of the mentally retarded, and legislative sanction of this plan has been forthcoming in the form of an appropriation of money. It is, therefore, my opinion that it is within your authority to accept patients in residence for participation in programs of rehabilitation.

Very truly yours,

Edward W. Brooke

School committees are not limited to cash settlements of claims or judgments and may, if they desire, take out insurance to indemnify employees.

Where a judgment is recovered against a teacher in the employ of a community irrespective of whether or not the school committee has appropriated funds in anticipation of the judgment, the judgment may be filed with the board of selectmen and thereafter the assessors must see to the appropriation of funds to satisfy it.

An action by ten taxable inhabitants will lie under C. 71 § 34, requiring towns to provide annually a sufficient amount of money for the support of public schools, to compel the town to place the amount of the claim in the budget.

The act does not prohibit a school committee from putting funds in its budget to pay the legal costs of a libel suit which involves one of its teachers. A libel suit judgment could be paid out of funds appropriated by the school committees in pursuance of the indemnification of teachers provided by § 100C.

FEBRUARY 25, 1965.

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

DEAR COMMISSIONER KIERNAN: — You have recently asked my opinion upon several questions concerning the effect of c. 41, § 100C of the General Laws, as amended by c. 513 of the Acts of 1964.

Specifically, you have asked:

"Where the act provides for indemnification and does not specifically provide for the purchasing of insurance, can insurance be taken out by school committees for its employees or are they limited to a cash settlement of a claim or judgment?"

It is my opinion that school committees may, if they wish, take out insurance to indemnify their employees and are not limited to cash settlements of claims or judgments. Although § 100C of c. 41, as amended by c. 513 of the Acts of 1964, does not specifically mention the availability of insurance for the indemnification of cases falling within its purview, that section must be read in conjunction with § 100A. Section 100C supplements the provisions of § 100A, in view of the language of the first sentence that the indemnification is "In addition to the indemnification provided in sec. 100A. . . ." It is appropriate, therefore, to read § 100C in the light of § 100A.

Although § 100A also has no express provision for insurance, it does refer to insurance in its last sentence as follows:

"This section shall not apply in respect to so much of a claim against an officer or employee as is covered by a policy of insurance effected by the city or town under clause (1) of section five of chapter forty."

A reasonable interpretation of the above quotation is that it admits the possibility of insurance for such situations as are covered in § 100A. Derivatively then, § 100C being an addition to § 100A, insurance should be available for that section as well.

Furthermore, c. 40, § 5, providing for the appropriation of funds to pay for indemnity insurance, having been applied to §§ 100, 100A, 100B and 100D, even though those sections also do not expressly provide for insurance, may also be read as covering § 100C, there being no basis for

distinguishing that section from the other indemnification sections. A reasonable conclusion is that whereas c. 40 provides for indemnification insurance, failure to expressly provide for insurance in § 100C cannot be interpreted to preclude the availability of insurance for the situations covered in that section. It is, therefore, my opinion that in view of the authorization of indemnification insurance in c. 40 and the addition of §§ 100C to 100A, the availability of insurance for § 100A could be extended to include § 100C.

You have also asked my opinion as to what action can be taken against a school committee if, after finding that the act was committed while acting as a teacher and proper counsel was hired, the school committee fails to place the amount necessary to pay for the expenses or damages in its budget.

It is my opinion that if the given plaintiff were to recover a judgment against a teacher in the employ of the community, irrespective of whether or not the school committee has appropriated funds in anticipation of the judgment, the judgment, like any other judgment against a town, may be filed with the board of selectmen and thereafter the assessors must see to the appropriation of funds to satisfy it.

Your third question asks whether an action by ten taxable inhabitants will lie under c. 71, § 34, requiring towns to provide annually a sufficient amount of money for the support of public schools, to compel the town to place the amount of the claim in the budget.

Chapter 71, § 34 provides that:

"Every city and town shall annually provide an amount of money sufficient for the support of the public schools . . . upon petition to the Superior Court, sitting in equity, against a city or town, brought by ten or more taxable inhabitants thereof . . . alleging that the amount necessary in such city or town for the support of public schools . . . has not been included in the annual budget appropriations for said year, said Court may determine the amount of the deficiency, if any, and may order such city and all its officers whose action is necessary to carry out such order . . . to provide a sum of money equal to such deficiency. . . ."

Involved in your inquiry is the question of whether or not the indemnification of teachers under § 100C falls within the language of c. 71, § 34, providing for "the support of public schools." The Legislature appears to have provided for the inclusion of indemnification within the wording of c. 71, § 34. Section 100C provides that:

". . . a city, town or regional school district . . . shall, out of any funds appropriated for the purpose of this section which appropriation shall be made *in the same manner as appropriations for general school purposes,* indemnify a teacher. . . ." (Emphasis supplied.)

A reading of that language permits the conclusion that funds for indemnification are to be dealt with in the same manner as funds for general school purposes. Consequently, these funds may be included in the budget within the purview of c. 71, § 34. It is my opinion, therefore, that the provision of c. 71, § 34, allowing for the petition of ten texable inhabitants to provide for support of the public schools, may be applied to place the claim in the budget.

Your fourth question asks:

"Does this act prohibit a school committee from putting funds in its budget to pay the legal costs of a libel suit which involves one of its teachers?"

It is my opinion that the answer to your question is in the negative. The act provides:

". . . a city, town or regional school district . . . shall . . . indemnify a teacher . . . for expense or damages incurred by him by reason of an action or claim against him arising out of negligence of such teacher or other act of his resulting in accidental bodily injury to or death of any person or in accidental damage to or destruction of property. . . . For expenses or damages sustained by him by reason of an action or a claim against him arising out of any *other acts done* by him while acting as such teacher; provided in either case . . . it shall appear . . . that such teacher was . . . acting within the scope of his employment." (Emphasis supplied.)

The provision in the above section clearly denotes that a libel suit would fall within that category. Subject to the remaining provision that the act be accomplished in the scope of his employment, a libel suit judgment could be paid out of funds appropriated by the School Committee in pursuance of the indemnification of teachers provided by this section, 100C.

Very truly yours,

EDWARD W. BROOKE

Chapter 708, § 1, as amended by St. 1964, c. 580, applies to both temporary and permanent employees alike.

St. 1964, c. 580, deprives all persons, who voluntarily left their positions in the service of the Commonwealth or any of its subdivisions to serve in the military service prior to July 1, 1964, and who are discharged subsequent to that date, of any and all privileges or rights which St. 1941, c. 708 accorded them but which are not within the current (c. 580) definition.

A party discharged before July 1, 1964, who has served in excess of four years on a voluntary basis, would not come within the language of c. 708, as amended, and could not claim the benefits of the act.

A person who would not qualify for reinstatement after July 1, 1964, but has in fact, before that date, taken partial advantage of the available benefits is entitled to the benefits received. His failure to claim the remainder of them before July 1, 1964, will bar a subsequent claim.

FEBRUARY 26, 1965.

HON. W. HENRY FINNEGAN, *Director of Civil Service.*

DEAR SIR: — I have received your letter of September 1, 1964, relating to c. 580 of the Acts of 1964, which amended c. 708 of the Acts of 1941. You have requested my opinion on several questions, the first being whether or not c. 580 applies only to "permanent" (as contrasted with "temporary") employees who enter the military or naval service after July 1, 1964.

When World War II began, the General Court, wishing to protect the civil service status of government employees who had or would enter the military service, enacted c. 708 of the Acts of 1941, § 1 of which reads:

"*Any person* who after January first, nineteen hundred and forty, shall have tendered *his resignation from an office or position* in the service of the Commonwealth, or any political subdivision thereof, or otherwise terminated such service, for the purpose of serving in the military or naval forces . . . shall be deemed to be or to have been on leave of absence." (Emphasis supplied.)

The exact language of that statute designates that *any person* resigning from the service of the Commonwealth to serve in the military is within the purview of the act. No distinction between temporary and permanent employees was then made nor has the legislature seen fit to amend this provision since its enactment in 1941. Therefore, it is my opinion that the language of c. 708, § 1 applies to both temporary and permanent employees alike.

You further requested my opinion as to

". . . whether or not Chapter 580 is in any way retroactive so that persons now serving in the military or naval service in excess of four years on a voluntary basis and who left their positions prior to July 1, 1964 for military service and who are released from the military or naval service subsequent to July 1, 1964:

"(a) will be eligible for reinstatement to the permanent positions formerly held by them,

"(b) will be eligible for restoration to the eligible list,

"(c) will be eligible to take make-up competitive promotional examinations."

For the purpose of minimizing the inequities and uncertainties that arose from the previous definition of military service which allowed indeterminate prolongation of that service and continuing eligibility throughout its duration, however long, the legislature has seen fit to amend St. 1941, c. 708. The new provision, c. 580 of the Acts of 1964, redefines the definition of military service as follows:

"Service in the military or naval forces of the United States shall not be construed to include service for more than four years unless such further period of service in excess of four years was involuntary service required by the government of the United States."

When c. 580 of the Acts of 1964 became the law of this Commonwealth (July 1, 1964) the aforementioned redefinition of military service likewise became the law of Massachusetts. The purpose of the legislature is manifestly clear and must be given fullest possible effect. Consequently, all parties who entered military service after the effective date of c. 580, and all parties then in the service who would be discharged subsequent to that date are now to be governed by c. 708, *as amended.*

Therefore, in pursuance of the mandate of the legislature, it is my opinion that the effect of the current statute is to deprive persons who

were released from military service after the effective date of c. 580 from claiming the benefits of the statute, unless such claims are made either within two years after the date of discharge following four years of service or within two years after a discharge date following a period of additional involuntary military service beyond the four-year period.

Specifically, then, it is my opinion that c. 580 of the Acts of 1964 which went into effect on July 1, 1964, deprives all persons, who voluntarily left their positions in the service of the Commonwealth or any of its subdivisions to serve in the military service prior to July 1, 1964 and who are discharged subsequent to that date, of any and all privileges or rights which c. 708 of the Acts of 1941 accorded them but which are not within the current (c. 580) definition of military and naval service. The language of the General Court allows no other conclusion. Such persons do not meet the yardstick of eligibility which c. 580 creates and they are not entitled to avail themselves of the benefits provided in the various sections of c. 708.

You have also requested my opinion:

"As to whether any persons so serving prior to July 1, 1964 and were released from military or naval service *prior to July 1, 1964 but have not yet requested reinstatement, restoration to lists, et cetera,* but who still have time to make such requests will be entitled to the various actions referred to in Chapter 708 of the Acts of 1941, if it now appears that they have served in excess of four years on a voluntary basis."

The provisions of legislation such as c. 708, which confers job preservation, reinstatement, and eligibility benefits, do not create a contractual obligation which the Commonwealth is bound to honor unless a heretofore qualified person has actually entered into the scheme of conferred benefits prior to July 1, 1964 (the date the amendments of 1964 became effective). The General Court has always been free to amend or even to repeal c. 708 of the Acts of 1941. In view of the unsatisfactory situation of prolonging eligibility for benefits indefinitely, the legislature could and did amend c. 708 in 1964 and in doing so it may have denied potential but unexercised benefits to individuals who qualified for benefits under the broader provisions of c. 708. By virtue of the legislature's decision to amend, those individuals who did not claim the benefits of c. 708 before the enactment of c. 580 and its effective date, must be and are now governed by the provisions of the existing law. In terms of your question, a person falling within the purview of c. 708, who was discharged before the effective date of July 1, 1964 and within the time specified for making such requests, must qualify under the present law, which is c. 580 above quoted. Consequently, the effect of the amendment is that a party discharged before July 1, 1964, who has served in excess of four years on a voluntary basis, would not come within the language of c. 708, as amended, and could not claim the benefits of that act.

As a third question you have asked:

"As to whether permanent employees who remained in the military or naval service on a voluntary basis for a period in excess of four years and *were reinstated* prior to July 1, 1964 but have not yet asked for a veteran's promotional qualifying examination, restoration to lists, et

cetera, although under Chapter 708 of the Acts of 1941, before being amended by Chapter 580 of the Acts of 1964, would be still eligible to do so, may not be given such qualifying examination, et cetera."

In giving the new provisions their most reasonable construction, it is my opinion that the legislature has provided that no veteran who served in the military service in excess of four years on a voluntary basis may claim the benefits granted by c. 708 after July 1, 1964, unless he or she was qualified to do so within the terms of that act as amended. This would apply equally to a claim for partial benefits or for all available benefits. The fact that an individual has partially realized those benefits prior to July 1, 1964 is immaterial. Where there has been a total or partial acceptance of the benefits provided by c. 708 before amendment by c. 580, then to that extent c. 580 would not revoke such benefits. A complete failure to claim the benefits of c. 708 will preclude a later claim after the effective date of the amendment unless the claims within the limit of c. 708 as amended by c. 580 of the Acts of 1964. It follows, therefore, that a partial acceptance of benefits will not be revoked. However, any further claims other than under the terms of the statute as amended must be disallowed.

Specifically, then, in regard to your third question, it is my opinion that the statute provides that a person who would not qualify for reinstatement after July 1, 1964, but has in fact, before that date, taken partial advantage of the available benefits is entitled to the benefits received. His failure to claim the remainder of them before July 1, 1960 will bar a subsequent claim.

A petition or application for reinstatement submitted prior to the effective date of c. 580 of 1964, if made in accordance with the provisions of c. 708 would be valid. A petition or application for reinstatement received after July 1, 1964 must be acted on in accordance with c. 580 of 1964.

Very truly yours,

EDWARD W. BROOKE

The establishment of an effective date six days after enactment of the amended compensation plan is in complete accord with both the purpose and the language of c. 31, § 47E, as amended by St. 1964, c. 702.

FEBRUARY 25, 1965.

HON. W. HENRY FINNEGAN, *Director of Civil Service.*

DEAR SIR: — In your letter of November 24, 1964, you have requested my opinion as to the effect of c. 31, § 47E, as amended by c. 702 of the Acts of 1964, that:

"Any amendment or change in such compensation plan shall become effective within ninety days after the date on which such amendment or change is made. . . ."

Upon the determination of an effective date for an amended compensation plan authorized under c. 31, § 47E as follows:

"The director shall establish, with the approval of a board . . . a compensation plan for holders of positions referred to in section forty-seven C and made subject to this chapter by said section or otherwise. The director may, with like approval, make rules and regulations providing for the application and administration of said compensation plan. The director, with like approval, may from time to time modify or change said compensation plan or said rules and regulations."

You have presented this request for my opinion in terms of the following facts:

"On September 22, 1964, the Welfare Compensation Board approved the establishment of new salary ranges in the Welfare Compensation Plan to be effective on September 28, 1964 and on September 25, 1964 a letter and a copy of the new rates were sent to local mayors, boards of selectmen, city and town managers, chairmen and directors of boards of public welfare and chairmen of personnel boards informing them of the resulting action to be taken for the welfare department employees in their municipalities. (A copy of the September 25, 1964 letter and its attachment are enclosed.)

"I have now been informed by the City Solicitor of Springfield that Springfield will submit new appointments at the new rates, under protest, and an action will be filed in Court to test the legality of our interpretation of September 28, 1964 as the effective date rather than December 28, 1964 which is their interpretation of the effective date. (A copy of his letter is enclosed.) This means that the city will pay the new rates to new employees but that persons who were employed on September 28, 1964 in the Springfield Welfare Department will not be paid the new rates until the legality of our interpretation of the effective date is reviewed by the courts."

It is my opinion that in setting the effective date of September 28, 1964, some six days after the enactment of the new salary ranges in the Welfare Compensation Plan, you acted properly within the provision for establishing an effective date set out in c. 31, § 47E, as amended by c. 702 of the Acts of 1964.

The language of the statute itself is quite explicit in providing for the establishment of an effective date. The statute says that "such compensation plan shall be effective *within* ninety days after the date on which such amendment or change is made. . . ." Emphasis supplied.) The language of the statute providing for an effective date *within* ninety days is unequivocal and it is unreasonable to conclude that the word "within" can be taken to mean "after." There is, therefore, no requirement that the plan be effective only after the lapse of a ninety-day period. Such a plan may bcome effective anytime within the ninety days following its adoption.

In addition to the clarity of the statutory language itself, it is reasonable to conclude from a study of the purposes of the enactment of c. 702, Acts of 1964, that the setting of an effective date should not be delayed any longer than necessary, and in no event should be delayed beyond ninety days. In the event that the date chosen within the ninety-day period is not early enough, provision has been made to set an even earlier

date at the request of a city or town with approval of the Director. The intent of the Legislature to provide for the earliest possible effective date is made manifestly clear in the preamble to c. 31, § 47E, as amended by c. 702 of the Acts of 1964:

"Whereas, the deferred operation of this act would tend to defeat its purpose, which is to expedite any change in the compensation plan for certain municipal employees in order to prevent undue hardships and alleviate financial burdens, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience."

It would not be in keeping with the spirit of the amendment, as reflected in the language of the preamble, to conclude other than that a change of compensation plan could and should be made effective at any time *within* a ninety-day period following its enactment.

On the facts you have stated, the establishment of an effective date six days after enactment of the amended compensation plan would be in complete accord with both the purposes and the language of c. 31, § 47E, as amended by c. 702 of the Acts of 1964.

We have not yet received notice of the commencement of an action by the City of Springfield to challenge the legality of your established effective date. It would serve no useful purpose, in my opinion, to resort to the enforcement procedures suggested by you, namely, G. L. c. 31, § 47E, pending disposition of the suit which the City of Springfield has indicated its intention to institute.

Very truly yours,

EDWARD W. BROOKE

The Boston Architectural Center is a lawfully authorized institution of higher education.

FEBRUARY 26, 1965.

HON. VERNE C. EDMUNDS, *Executive Director, Higher Education Facilities Commission.*

DEAR MR. EDMUNDS: — You have requested my opinion as to whether the Boston Architectural Center is "legally authorized" in Massachusetts to provide a program of education beyond the high school.

I answer your question in the affirmative. Under G. L. c. 112, § 60C, authorizing the granting of architect registration to qualified parties, it is provided that:

"Every person applying to the board for registration shall submit with his application to the board evidence of graduation from a recognized high school or its equivalent. The applicant shall also submit satisfactory evidence of (a) graduation from an accredited architectural school and three years of practical training in offices of practicing registered architects; or (b) graduation from a non-accredited architectural school requiring not less than four years in a curriculum approved by the board and five years of practical training in offices of practicing registered archi-

tects; provided, however, that not more than one year of school and office training shall be concurrent; or (c) eight years of practical training in offices of registered architects and one additional such year in training for each year short of graduation from an architectural school approved by the board, but not more than five additional years. . . ."

I am informed by the Board of Registration of Architects that the Boston Architectural Center is recognized by them as adequately satisfying the provisions of § (b) of G. L. c. 112, § 60C. The Boston Architectural Center, although non-accredited, does furnish a satisfactory five year curriculum not only as to the "content of the examination but the technical subjects as well." The Board of Registration of Architects approves the education at the Boston Architectural Center as meeting the standards established by that Board for certification as a registered architect. Consequently, the education provided by the Boston Architectural Center coupled with five years practical experience entitles an individual with a certificate of registration from the Center to apply to the Board for examination preparatory to becoming a registered architect.

Since the education provided by the Boston Architectural Center meets the standards established by the Board of Registration of Architects and is approved by them as satisfying the minimal educational requirements for a registered architect, so as to allow an applicant to be considered eligible for examination for certification as a registered architect, it is my opinion that the Boston Architectural Center is a lawfully authorized institution of higher education.

Very truly yours,
EDWARD W. BROOKE

Temporary officers and employees appointed under the provisions of c. 30, § 9 do not serve at the pleasure of the governor or other appointing authority. Since no particular method of removal is specified in the Perry Law, removal can be effected only pursuant to c. 30, § 9, and must accordingly be "for cause".

MARCH 1, 1965.

THE HON. JOHN A. VOLPE, *Governor of the Commonwealth.*

DEAR GOVERNOR VOLPE: — I have received your letter of February 11, 1965, wherein you request interpretation of certain provisions of G. L. c. 30, § 59, the so-called Perry Law. That statute provides in relevant part as follows:

"An officer or employee of the commonwealth, or any department, board, commission or agency thereof, or of any authority created by the general court, may, during any period such officer or employee is under indictment for misconduct in such office or employment or for misconduct in any elected or appointive public office, trust or employment at any time held by him, if he was appointed by the governor, be suspended by the governor, whether or not such appointment was subject to the advice and consent of the council or, if he was appointed by some other appointing authority, be suspended by such authority,

whether or not such appointment was subject to approval in any manner. . . . *During the period of any such suspension, the appointing authority may fill the position of the suspended officer or employee on a temporary basis, and the temporary officer or employee shall have all the powers and duties of the officer or employee suspended.*" (Emphasis supplied.)

G. L. c. 30, § 59, as amended by c. 528 of the Acts of 1964.

Thus — subsequent to exercise of the suspension power authorized by this statute — the appointing authority may fill the position affected on a temporary basis.

You have asked my opinion upon the following question relative to the status of the temporary appointee:

"When an officer or employee of the Commonwealth has been suspended under the provisions of Chapter 30, Section 59, and the Governor or appointing authority has elected to fill the position of the suspended officer or employee on a temporary basis, does such temporary officer or employee serve at the pleasure of the Governor or appointing authority?"

The provisions of G. L. c. 30, § 59 relate primarily to the officer or employee who has been suspended. The statute sets forth who may be suspended, and how such person must be notified. It provides for reinstatement if criminal proceedings are terminated without finding or verdict of guilty on any of the charges. In addition, the Legislature has determined that the individual suspended shall receive no compensation during the suspension period, nor shall such period be included in calculating sick leave, vacation benefits or seniority rights. The suspended official or employee is entitled to no pension or retirement rights should he retire during the period of such suspension. However, should he be reinstated, the official or employee shall receive all compensation which would otherwise have accrued to him had he not been suspended. The time of suspension is counted in determining sick leave, vacation, seniority and other rights, and shall be considered creditable service for retirement purposes.

On the other hand, the statute is virtually silent relative to the tenure of temporary appointees, providing only that temporary appointments may be made, and that such temporary appointees shall have all the powers and duties formerly exercised by and assigned to the individual suspended. Since the suspended official or appointee is entitled to reinstatement should the criminal proceedings instituted against him terminate without a finding of guilty, it follows that any temporary appointment which has been made in the interim would expire upon such reinstatement. Otherwise, the status of temporary appointees is not defined by the statute.

The intention of the General Court relative to the status of such temporary appointees must therefore be determined by examination of the treatment by the Legislature of appointed officers and employees in general, and by analysis of the purposes of that part of the Perry Law which authorizes temporary appointments. The fact that an appoint-

ment is made by a given appointing authority does not in and of itself vest in the latter the right to remove the appointee. "Power to remove a public officer is not a necessary and inherent incident of the authority to appoint. Frequently they are disjoined."

Opinion of the Justices, 216 Mass. 605, 606
Adie v. *Mayor of Holyoke,* 303 Mass. 295, 301

Service at the pleasure of an appointing authority is for the most part not contemplated by the Massachusetts General Laws. Ordinarily, public officials are appointed for specific terms, and their removal is carefully regulated by law. The Legislature has provided that a public officer appointed for any term by the Governor, "shall hold his office during the term for which he is appointed and until his successor in office has qualified, *unless he is sooner removed in accordance with law.* (Emphasis supplied.)

Mass. G. L. c. 30, § 8

"Unless some other mode of removal is provided by law, a public officer, if appointed by the governor, may at any time be removed by him *for cause. . . .*" (Emphasis supplied.)

Mass. G. L. c. 30, § 9

Thus public officials may generally rely upon holding their offices for the given period of time designated by statute. Removal in most cases may be effected only for cause, thus necessitating the giving of timely notice to the official in question and the holding of a fair hearing on the charges brought against him.

Ham v. *Board of Police of the City of Boston,*
142 Mass. 90, 95
Murphy v. *Casey,* 300 Mass. 232, 234

This general treatment — i.e., that public officers are appointed for specific terms — is not altered by the occurrence of vacancies in offices. "Any vacancy in any office, the original appointment to which is required by law to be made by the governor . . ., and for which no other method of filling vacancies is expressly provided by law, shall be filled for the unexpired term in the manner provided for an original appointment. . . ."

Mass. G. L. c. 30, § 10

Thus even when an office unexpectedly becomes vacant, a successor is appointed for the unexpired term, and may be removed only in accordance with law. Persons appointed pursuant to G. L. c. 30, § 10 for the purpose of filling vacancies do not serve at the pleasure of the appointing authority.

Persons employed in the classified public service likewise do not serve at the pleasure of their appointing authorities. Civil service appointees are guaranteed unlimited tenure employment subject to the provisions of c. 31 of the General Laws. General Laws c. 31, § 43 provides that such appointees shall not be discharged or removed except for "just cause,"

and includes the requirement that such appointees be given notice and a hearing. Section 45 provides for judicial review of such removals.

Consequently, it is apparent that officers and employees of the Commonwealth are generally entitled to hold their positions for a given period of time specified in applicable statutes, unless removed for cause. They do not serve at the unrestricted will of the person who has appointed them.

In light of the General Court's provisions for tenure of officers and employees of the Commonwealth discussed above, a determinatoin must be made whether it would be reasonable to conclude, under the provisions of G. L. c. 30, § 59, that the Legislature intended a different conclusions.

The primary purpose of the Perry Law is to suspend from office persons in whom the public has lost confidence by reason of their having been indicted. Such a suspension undoubtedly can have a disruptive effect upon the functioning of the agency or department involved — especially where a department head is concerned. Provision for appointment of a temporary officer or employee to fill the vacant position and to have all the powers and duties formerly exercised by the permanent employee clearly was included in order to render the indictment and consequent suspension as harmless as possible to the continued efficient working of the governmental agency.

The purpose of providing for a temporary appointee under these circumstances is to continue the uninterrupted operation of the agency affected and to maintain the status quo to the extent possible. I do not believe that the General Court intended to enact a measure which is contrary to ordinary treatment of State officials and employees and which completely changes the nature of the specific office in question. The temporary appointee is assigned all the powers and duties of the officer or appointee who has been suspended. To exercise such powers and fulfill such duties, as well as to maintain the stability of his position or department, the temporary appointee should have the same confidence in his position and independence from the appointing authority which was enjoyed by the official or employee who has been replaced. Where an office or position which has a specified term and from which the incumbent may only be removed for cause is involved, it is not likely that the Legislature would change the nature of such office — even for a short period — simply because an incumbent has been indicted.

It should not be forgotten that application of the Perry Law is not restricted merely to State department heads. It extends to all appointed officials and employees, whether appointed under the provisions of c. 31 or otherwise. Temporary appontees may thus be installed at all levels of governmental service. The conclusion that such temporary appointees served at the pleasure of their respective appointing authorities could alter the nature and characteristics of a variety of State offices and positions. I do not believe that the Legislature intended to effect such changes by the few words relative to temporary appointments which appear in c. 30, § 59.

I am aware of the fact that certain "temporary" appointments are authorized for periods of six months by the statutes governing civil service. Such appointees may of course be removed without the necessity of "just cause" and without resort to the removal machinery of §§ 43 and 45 of c. 31. However, such temporary appointments are provided for and relate to the classified public service only. The word "temporary" can be used in a variety of ways; the fact that it is used in one specific manner in c. 31 cannot control its use in an entirely different context.

Were that part of the Perry Law which authorizes the making of temporary appointments intended to effect great changes in the positions involved, the General Court would presumably have so provided in specific and unmistakable terms. Absent such clear language, I cannot conclude that the Legislature actually intended to provide for arbitrary removal from positions to which tenure of a certain duration has formerly attached. Considering that the purpose of such temporary appointments is to permit offices and positions to function without disruption, it would not be likely that the Legislature would seriously alter the characteristics of such offices.

The temporary appointees in question are in my opinion assigned a fixed term of office. That term extends to the termination date of the term held by the official or employee who has been suspended, or to the date of conclusion of the litigation favorable to the individual involved which would entitle the former incumbent to reinstatement under the law.

In view of the above discussion, it is my opinion that temporary officers and employees appointed under the provisions of c. 30, § 59 do not serve at the pleasure of the Governor or other appointing authority. Since no particular method of removal is specified in the Perry Law, removal can be effected only pursuant to c. 30, § 9, and must accordingly be "for cause."

Very truly yours,
EDWARD W. BROOKE

The State Treasurer may lawfully proceed to transfer the specified portion of the revenue received under G. L. c. 64C, § 6, to the Massachusetts Bay Transportation Authority in accordance with the provisions of G. L. c. 64C, § 28(b) and c. 58, § 25B, to be used by the Authority to meet cost and contract assistance obligations of said Authority entered into under authority of G. L. c. 161.

MARCH 3, 1965.

HON. WILLIAM C. MAIERS, *Clerk of the House of Representatives.*

DEAR SIR: — I have received a copy of your order of February 3, 1965, wherein you request my opinion upon the following question:

"Notwithstanding the provisions of the first paragraph of Section 25B of Chapter 58 of the General Laws and of paragraph (b) of Section 28 of Chapter 64C of the General Laws, is it lawful for the state treasurer to transfer a portion of the revenue received under the provisions of

Section 6 of Chapter 64C of the General Laws to the Massachusetts Bay Transportation Authority to be used by said Authority to meet cost and contract assistance obligations of said Authority entered into under authority of Chapter 161 of the General Laws?"

Chapter 563 of the Acts of 1964 provides that a percentage of the excise taxes collected by the Commonwealth on cigarettes under the provisions of G. L. c. 64C, § 6 would be devoted to meet certain expenses incurred by the newly organized Massachusetts Bay Transportation Authority. Approximately one-fourth of the cigarette excise taxes collected, less an amount sufficient to reimburse the Commonwealth for expenses of administering the chapter, is earmarked to be used to meet the requirements of G. L. c. 58, § 25B [G. L. c. 64C, § 28 (b)]. The said requirements of G. L. c. 58, § 25B are as follows:

"The state tax commission shall, as hereinafter provided, certify to the state treasurer for payment, from that portion of the proceeds of the excise on cigarettes as authorized by paragraph (b) of section twenty-eight of chapter sixty-four C, the following: —

"(a) From time to time, when required, the contract assistance to the Massachusetts Bay Transportation Authority provided under section twenty-eight of chapter one hundred and sixty-one A; . . .

"(c) On or before April fifteenth of each year, the amount determined by the commission to be payable in accordance with this paragraph (c) to the Massachusetts Bay Transportation Authority, . . ."

It is apparent, therefore, that the Legislature has authorized use of a portion of the receipts from cigarette excise taxes for the purpose of meeting certain expenses incurred by the Massachusetts Bay Transportation Authority. Accordingly, the State Treasurer must make the revenue transfers specified, unless it be found for one reason or another that the provisions of the Act in question could not properly be enacted by the General Court.

Several questions relating to the constitutionality of c. 563 of the Acts of 1964 have just been resolved by the Supreme Judicial Court. In *Massachusetts Bay Transportation Authority* v. *Boston Safe Deposit and Trust Company,* [decided February 25, 1965 — citation not available], the Court addressed itself to the adequacy of standards regulating the operations of the Authority, especially those regulating disbursecredit of the Commonwealth to finance or to guarantee operations of the Authority; and to the validity of the apportionment of net transportation costs among the seventy-eight cities and towns which comprise the transportaton area. I am assuming from the citations included in the Order that your request relates solely to the propriety of use of cigarette excise taxes, and does not extend to funds which are to be borrowed. Therefore, I am addressing myself only to the question of the validity of the provisions authorizing use of such taxes.

It is clear from the opinion of the Supreme Judcial Court that the Legislature may constitutionally provide — as it has done — that a portion of the excise taxes in question are to be devoted to Transportation Authority purposes. A public interest is served by creation of an Author-

ity to develop and administer transportation programs. "Provisions empowering the Authority to cooperate with private enterprise to accomplish the public purpose are not made invalid by resulting incidental private advantage." (P. 4.) (Citations will be to the above-mentioned Supreme Judicial Court opinion.) Standards set up by the General Court to control the functioning of the Authority were – the Court ruled – adequate from a constitutional viewpoint. (Pages 5-15.)

The Court has left no doubt that the Authority has been properly constituted and that public money may lawfully be used to support its operations.

"We think that there is no reasonable likelihood that under c. 161A public funds will be paid to a private company whose particular operations do not greatly serve the public need, so that in the particular instance the private advantage would be principally served. If such a possibility exists, however, it does not establish that the statute is unconstitutional. The Legislature has decided that contracting with private companies is an appropriate means for meeting the public need for transportation. Such contracts are incidental to the general plan. They are means for public ends, just as are the contracts for constructing school buildings and the buildings themselves when built. . . ." (Page 13.)

In addition, the Court ruled that standards regulating action to be taken by the Executive Office for Administration and Finance provided reasonable statutory guidance for the making of the financial assistance contracts authorized by the Act. (Pages 15-19.)

The middle portion of the Court's opinion deals with the validity of the provisions of the Act which authorize borrowings on behalf of the Authority by the State Treasurer, and consequently does not relate to the question posed in your Order. The final section of the opinion is addressed to the method developed by the Legislature by which net transportation costs are to be apportioned among the various cities and towns. It was held that such method was a reasonable means of accomplishing the desired result.

"We discern nothing arbitrary in the assessment of the costs of local service. The basis of apportionment of losses to population and to routes is the general benefit to all inhabitants of an efficient public transportation system. The provision for a ten year period for gradual shift of loss computations for the fourteen cities and towns from the present method to the new method appears a suitable means of accomplishing a reasonable change. Apportionment of costs of debt service on a different basis for the fourteen cities and towns from that applicable to the sixty-four cities and towns is reasonable. It leaves the burden of preexisting debt where it was when originally incurred." (Page 32.)

Thus the Supreme Judcial Court has indicated that the Massachusetts Bay Transportation Authority has been lawfully created and its functioning properly regulated by the General Court: that public funds may be used to support the Authority's operations, despite the fact that a portion of such funds may eventually be received by private companies; and that the system of apportionment of costs among the seventy-eight

municipalities is a reasonable means of financing the Authority. In light of these rulings by the Supreme Judicial Court, it is my opinion that the State Treasurer may lawfully proceed to transfer the specified portion of the revenue received under G. L. c. 64C, § 6 to the Transportation Authority in accordance with the provisions of G. L. c. 64C, § 28 (b) and c. 58, § 25B.

Very truly yours,
EDWARD W. BROOKE

The Board of Agriculture is not prohibited by the provisions of G. L. c. 268A, § 8A, from submitting to the Governor, for his consideration for appointment as Commissioner of Agriculture, the name of one or more of the members of said Board as part of panel of three or more names from which the appointment is to be made under G. L. c. 20, § 1.

There is no specific prohibition in c. 268A which prevents a member of the Board from voting on his own name or upon other applicants for the same panel.

The Commissioner of Agriculture may submit to the Board of Agriculture the name of a member of the Board as Director of a Division, for their approval as required by G. L. c. 20, § 6.

MARCH 4, 1965.

HON. DONALD L. CROOKS, *Chairman, Board of Agriculture.*

DEAR MR. CROOKS: — You have requested my opinion as to whether the Board of Agriculture is barred by the provisions of c. 268A, § 8A of the General Laws from submitting to the Governor, for his consideration for appointment as Commissioner of Agriculture, the name of one or more of the members of said Board as part of the panel of three or more names from which the appointment is to be made under G. L. c. 20, § 1.

The ineligibility created in § 8A applies only to *appointment* or *election* by the members of such commission or board. (Emphasis supplied.)

Nomination to a panel from which the Governor appoints is not in itself an appointment or election to an office or position, but merely a first step in a process over which the board has no further control or power of final decision. It is therefore my opinion that the board is not barred by this section from submitting the names of one or more of its members as part of such panel for the consideration of the Governor, if in its opinion such persons are qualified therefor.

You ask further whether a member of the board may vote on the submission of his own name, or upon that of other applicants for submission.

Chapter 268A, dealing with the conduct of public officials and employees, is primarily directed toward the conduct of public officials and employees as affected by purely private financial interests. It is not

directed to the financial interest that an employee has in public employment as such. (Conflicts opinion No. 42, April 26, 1963.)

There is, in my opinion, no specific prohibition in c. 268A which prevents a member of the board from voting on his own name or upon other applicants for the same panel.

This is a matter for the member's own sense of propriety. He should, however, bear in mind the provisions of § 23 of c. 268A (Standards of Conduct) which oblige public officials and employees to avoid the appearance of seeking unwarranted privileges and conduct which gives basis for the impression that they are unduly influenced by the rank or position of any person, or raises public suspcion that they are acting in violation of their trust.

You ask, finally, whether the Commissioner of Agriculture may submit to the Board of Agriculture the name of a member of the Board as Director of a Division, for their approval, as required by G. L. c. 20, § 6.

The reasoning applied to your first question applies to this question also. Since the appointment of the Director is made by the Commissioner, the prohibition contained in § 8A does not apply, and mere recommendation for approval by the board is not forbidden.

Very truly yours,
EDWARD W. BROOKE

Reimbursement by the Commonwealth for reasonable travelling and other expenses is authorized to an individual who has been retired and is receiving a pension from the Commonwealth and is a member of a board whose members receive no additional compensation for services on said board and also to an individual who has been retired and is receiving a pension from the Commonwealth in the performance of duties requested by the head of a state department.

MARCH 4, 1965.

HON. JOSEPH ALECKS, *Comptroller, Commission on Administration and Finance.*

DEAR MR. ALECKS: — You have requested my opinion upon the question of the effect of G. L. c. 32, § 91 that:

"No person while receiving a pension or retirement allowance from the commonwealth or from any county, city, town or district, shall, after the date of his retirement be paid for *any service* rendered to the commonwealth or any county, city, town or district. . . ." (Emphasis supplied.)

Upon the provisions of G. L. c. 252, § 2 providing as follows:

"The board (State Reclamation Board) shall serve in the department of Agriculture, and the members thereof shall receive no additional compensation for service on said board, but shall be entitled to their reasonable travelling and other expenses incurred in the performance of their duties."

More specifically, you have asked:

"1. May an individual who has been retired, and is receiving a pension from the Commonwealth and is a member of a board, whose members thereof receive no additional compensation for services on said board, be reimbursed by the Commonwealth for his reasonable traveling and other expenses incurred in the performance of his duties?

"2. May an individual who has been retired and is receiving a pension from the Commonwealth be reimbursed for expenses incurred in the performance of duties requested by the head of a state department?"

It is my opinion that the answers to both questions are in the affirmative.

It is a general rule of statutory construction that the express mention of one matter excludes by implication other similar matters not mentioned. In the present case, the applicability of G. L. c. 232, § 91 is explicitly restricted by its terms to payments for any *service* rendered. The statute makes no mention of payment for *expenses* incurred in rendering any such service; there is therefore no reason to infer that a prohibition of any such payments was intended. Consequently, it is reasonable to conclude that the individual receiving a pension, who is a member of the State Reclamation Board, should be entitled to reimbursement of expenses in the performance of such duties, as specifically provided in c. 252, § 2.

In answer to your second question, the same principles would apply, the only difference being the absence of any express statutory provision for reimbursement of expenses. Nevertheless, assuming that the department head has such authority to agree to the reimbursement of expenses, such reimbursement would not be barred by c. 32, § 91, even though compensation for services would be prohibited unless the situation came within one of the statutory exceptions.

Very truly yours,
EDWARD W. BROOKE

In light of the recent Act affecting the statutory powers of the Executive Council (St. 1964, c. 740), henceforth, appointments, salary increases, and personnel upgradings within the Division of Construction of the Metropolitan District Commission no longer require approval by the Executive Council.

MARCH 4, 1965.

HON. HOWARD WHITMORE, JR., *Commissioner, Metropolitan District Commission.*

DEAR MR. WHITMORE: — I am in receipt of your letter of February 9, 1965, relative to executive approval of appointments, salary increases and personnel upgradings in the Division of Construction of the Metropolitan District Commission.

Pursuant to c. 375 of the Acts of 1962 and to certain regulations adopted by the Water Supply Commission, it has been required that all personnel

appointments, salary increases and upgradings over $3500 receive the approval of both the Governor and the Executive Council. Chapter 583 of the Acts of 1947 abolished the Water Supply Commission and transferred its functions to a Division of Construction established under the Metropolitan District Commission. In light of the recent Act affecting the statutory powers of the Executive Council (St. 1964, c. 740), you have requested my opinion as to whether the appointments, increases and upgradings in question must still receive Council approval.

Chapter 740 of the Acts of 1964 repeals certain statutory powers of the Executive Council which related to appointments and other activity within the executive branch of government. "Executive department" is defined in § 1 of the Act as including, among other things, "all departments, divisions, boards, bureaus, commissions, institutions, councils and offices of state government and of county government, and any instrumentality or agency within or under any of the foregoing," and expressly excludes the legislative and judicial departments.

There can be no doubt that both the Metropolitan District Commission and the Division of Construction established under it conform to the above definition and must be considered parts of the executive department, as that term is defined in the Act.

Section 3 of the Act provides in relevant part as follows:

"Subject to Section 2 of this Act and except as required by the Constitution of the Commonwealth, so much of each provision of the General Laws and of any special law as requires the advice and consent of the council *to any appointment in the executive department, or to the fixing of any salary, or other compensation for services rendered, in the executive department* — is hereby repealed." (Emphasis supplied.)

The requirement of Executive Council approval for personnel appointments and for salary increases in the Division of Construction originated in c. 375 of the Acts of 1926, a special law enacted by the General Court. The above-quoted language repeals those parts of the Act which required such Executive Council approval, and consequently removes from the Council jurisdiction to approve the appointments and salary increases in question.

"Personnel upgradings" as such are not specifically mentioned in St. 1964, c. 740. However, § 4 of the Act contains a general repealer of all provisions relating to Executive Council approval of actions within the executive department.

"Subject to Section 2 of this Act and except as required by the constitution of the Commonwealth, so much of each provision of the General Laws and of any special law as requires the advice and consent of the council *with respect to any action or omission to act by the governor or by any officer, agency or instrumentality in the executive department* . . . is hereby repealed." (Emphasis supplied.)

The Metropolitan District Commission is an agency within the executive department, and personnel upgradings are actions by that agency which heretofore required Executive Council approval under St. 1926, c. 375. The general repealer quoted above removes from the earlier Act all

references to Council approval of actions within the executive branch of government. Although personnel upgradings are never specifically referred to in the 1964 Act, they are included in the general provisions of § 4.

Accordingly, it is my opinion that henceforth, appointments, salary increases and personnel upgradings within the Division of Construction of the Metropolitan District Commission no longer require approval by the Executive Council.

Very truly yours,

EDWARD W. BROOKE

The requirement contained in C. 132A, § 3, as to approval by the Executive Council, has been repealed by the enactment of St. 1964, c. 740, § 4.

MARCH 5, 1965.

HON. CHARLES H. W. FOSTER, *Commissioner of Natural Resources.*

DEAR COMMISSIONER FOSTER: — You have requested my opinion as to whether approval of the Governor's Council is required for the purposes of the sale or exchange of land, the granting of easements, and the taking of land by eminent domain, as provided in c. 132A, § 3.

"The commissioner may, with the approval of the governor and council, sell or exchange any land acquired under this section which is his judgment can no longer be advantageously used for purposes of recreation or held for purposes of conservation. He may, with like approval, authorize the construction and maintenance, on any land under control of the department, of towers, poles, wires, pipes, and structures necessary for the purpose of transmitting electric power. . . ."

Section 4 of c. 740 of the Acts of 1964 specifically provides that:

"Subject to Section 2 of this Act and except as required by the Constitution of the Commonwealth, so much of each provision of the General Laws and of any special law as requires the advice and consent of the council with respect to any action or omission to act by the governor or by any officer, agency or instrumentality in the executive department, including without limitation, any deposit, borrowing, loan, investment, endorsement, validation, surety or bond, or any lease, license, purchase, acquisition, sale, conveyance, disposition or transfer, or any contract or other agreement, or any permit or license, or any rules or regulations, is hereby repealed."

The language of the above-quoted section is clear. In so far as c. 132A, § 3 requires approval of the Council, that requirement is repealed by the subsequent enactment of § 4, c. 740 of the Acts of 1964.

Very truly yours,

EDWARD W. BROOKE

Chapter 161A, § 18, exempts the Massachusetts Bay Transit Authority from compliance with the requirements of c. 152, § 25A(4). Since the Authority has complied with the other requirements of c. 152, § 25A, and since it has been exempted from requirements of § 25A(4), the Authority should therefore be granted a license for the privilege of being a self-insurer.

The assessment of c. 152, § 25A(4), as waived by c. 161A, § 18, is to be absorbed by the General Fund.

MARCH 5, 1965.

HON. JAMES J. GAFFNEY, JR., *Chairman, Division of Industrial Accidents.*

DEAR MR. GAFFNEY: — In light of my opinion of January 28, 1965, that c. 161A, § 18 supersedes c. 152, § 25A (4), you have requested a supplemental opinion on the following question:

"1. Does such a waiver of payment require the Division of Industrial Accidents to refuse the granting of a license to the Massachusetts Bay Transit Authority for the privilege of being a Self-Insurer under the provisions of Mass. G. L. c. 152, § 25 (a) (2) on the basis that it will be unable to meet the requirements set forth in § 25 (a) (4)?"

I answer your question in the negative. Although c. 152, § 25A (4) requires that

"Such expenses as shall be . . . necessary to carry out the provisions of this chapter relating to self-insurance shall be assessed against all self-insurers. . . ."

it is my opinion that c. 161A, § 18 exempts the Massachusetts Bay Transit Authority from compliance with that requirement. This does not mean, as you have stated, that "it will be unable to meet the requirements set forth in Section 25 (a) (4)," but rather that it is exempted from the necessity of having to meet that requirement. In that sense there is no inability to perform the requirement, since the statutory exemption amounts to a waiver of the given requirement for the Massachusetts Bay Transit Authority. Consequently, it is my opinion that, since the authority has complied with the other requirements of c. 152, § 25A, and since it has been exempted from the requirements of § 25A (4), it should therefore be granted a license for the privilege of being a self-insurer.

In your second question you have asked:

". . . may the assessment from which the Massachusetts Bay Transit Authority is exempted be considered as an uncollectible item and thus a part of the expenses as shall be determined by the Department of Administration and Finance as necessary to carrying out the provisions of this Chapter relating to Self-Insurers OR shall such a waiver of payment be absorbed by the General Fund?"

It is my opinion, in view of the exemption of c. 161A, § 18, that the assessment provided by c. 152, § 25A (4) should be absorbed by the general fund. Accordingly, I answer your second question in the affirmative.

The interest of the general public in public transportation necessitates that the operation of the Massachusetts Bay Transit Authority be allowed as much relief as possible from the expenses of management and administration. This was clearly the purpose of the Legislature in enacting c. 161A, § 18 and such a purpose must be retained to give full effect to that section.

I am therefore of the opinion that, to effectively pursue such a purpose and still allow the effective operation of the self-insurance program, the assessment of c. 152, § 25A(4), as waived by c. 161A, § 18, is to be absorbed by the general fund.

Very truly yours,
EDWARD W. BROOKE

In order to properly calculate an urban renewal assistance grant under G. L. c. 121, §§ 26DDD to 26FFF, the Division should deduct the portion of the cost of the Peabody School contributed by the State and should then divide this figure by two in order to arrive at the sum owing to the municipality.

MARCH 10, 1965.

HON. JOHN J. CARNEY, *Deputy Commissioner, Division of Urban Renewal.*

DEAR MR. CARNEY: — You have asked my opinion as to the proper method of calculating an urban renewal assistance grant under G. L. c. 121, §§ 26DDD to 26FFF.

Your letter states that the Riverview project in Cambridge "is shared two-thirds federal and one-third local," and that "ordinarily the state's share would be the maximum permitted by section 26FFF, subsection (b) or one-half of the local share." However, you go on to say that because "an examination of the accounts of this project disclosed that the federal authorities permitted a non-cash credit to the City of Cambridge for the construction of the Peabody School near the noted project site," you will deduct from the urban renewal assistance grant "that portion of the school credit which the City of Cambridge is receiving from the Commonwealth, namely 30 per cent of the school building construction cost through another state agency, the School Building Assistance Commission. . . ."

These facts raise the question whether the Division of Urban Renewal should or should not include as a basis for state reimbursement so much of the cost of a local facility as was subsidized by another agency of the Commonwealth, where such subsidized portion of the cost was credited as a local grant in aid by federal authorities.

It is my opinion that you should not include the state-subsidized portion of the cost of the local facility in computing the sum payable to the City of Cambridge.

Under federal law, every contract for federal capital grants requires what are termed "local grants in aid" equal at least to the total of one-third of the "aggregate net project costs" (in the case of two-thirds basis projects, 42 U.S.C. § 1454).

A "local grant in aid" for purposes of the federal law may include "assistance by a state, municipality, or other public body, or . . . any other entity" and may include the provision, at their costs of public buildings or other public facilities. (42 U.S.C. § 1460 (d).) (A subsidy contributed by another federal agency must, however, be excluded in determining the amount credited as a "local grant in aid." 42 U.S.C. § 1460 (d).)

Thus, for purposes of federal law, it is immaterial in determining if the cost of a facility qualifies as a local grant in aid, despite the fact that a portion of such cost came from the state rather than the city.

However, the Division of Urban Renewal must act in conformity with § 26FFF of G. L. c. 121. The federal law is material only in so far as it may be incorporated therein by reference.

Section 26FFF of G. L. c. 121 reads as follows:

"The total land assembly and redevelopment or urban renewal assistance grant for any approved federally-aided project as defined in clause (*a*) shall not exceed one half of the *local share* of the contribution required *from the municipality* under the federal capital grant contract or more than one sixth of the net project cost when the municipality pays for administrative planning and legal expenses as a part of the gross project cost." (Emphasis supplied.)

The City of Cambridge apparently argues that "one-half of the local share of the contribution required from the municipality under the federal capital grant contract" means "one-half of the local grant in aid under the federal capital grant contract." However, the use of the words "local share" and "from the municipality" strongly suggest that § 26FFF means the actual contribution of the city itself, and does not include portions of cost received from the Commonwealth.

As you point out, any other interpretation would result in a somewhat unusual windfall, and would seem to be contrary to the purpose of the statute, which is to reimburse localities for costs incurred by them.

Under the foregoing interpretation, your Division should deduct the portion of the cost of the Peabody School contributed by the state in order to compute "the local share of the contribution required from the municipality under the federal capital grant contract," and should then divide this figure by two in order to arrive at the sum owing to the City of Cambridge.

Your letter of December 8, 1964 suggests that you may plan to take one-half of the total federally-allowed local grant in aid, and then subtract from it the entire Peabody School state subsidy, in order to arrive at the sum due Cambridge. It is my opinion that the latter-described method would be incorrect under the statute.

Very truly yours,

EDWARD W. BROOKE

The several boards of trustees who serve in the Department of Mental Health are under the exclusive supervision and control of the Commissioner. However, the trustees retain the specific authority given them by c. 123, §§ 27, 28 and 29, and their independent judgment in these matters cannot be controlled, but they are not authorized to compel any action by the Commissioner, but only to suggest, to recommend, to report and to encourage.

MARCH 10, 1965.

HON. HARRY C. SOLOMON, M.D., *Commissioner of Mental Health.*

DEAR DOCTOR SOLOMON: — You have asked my opinion as to whether the members of, and the several boards of trustees who serve in the Department of Mental Health are under the jurisdiction and control of the Commissioner of Mental Health.

In order to answer your question, it is necessary to consider the language of several sections of cc. 19 and 123 of the General Laws.

Chapter 19 of the General Laws deals with the organization of the Department of Mental Health.

Section 1 states that:

". . . [the] commissioner of mental health . . . shall have the exclusive supervision and control of the department. All action of the department shall be taken by the commissioner or, under his direction, by such agents or subordinate officers as he may determine. . . ."

(As amended by St. 1938, c. 486, § 2.)

Section 4 states:

"The commissioner may organize in the department such divisions as he may determine. He shall appoint and may remove such agents and subordinate officers as he may deem necessary. . . ."

(As amended by St. 1959, c. 215, § 2.)

Section 5 states that:

"The boards of trustees of the following public institutions shall serve in the department: Belchertown state school, Massachusetts mental health center (Boston psycopathic hospital), Boston state hospital, Danvers state hospital, Foxborough state hospital, Gardner state hospital, Grafton state hospital, Walter E. Fernald state school, Medfield state hospital, Metropolitan state hospital, Monson state hospital, Norfolk state hospital, Northampton state hospital, Taunton state hospital, Westborough state hospital, Worcester state hospital, Cushing hospital, Paul A. Dever state school and Wrentham state school."

(As amended by St. 1959, c. 486, § 5.)

Chapter 123 deals with the commitment and care of the mentally ill, epileptic, other mental defectives, alcoholics and drug addicts.

Section 3 provides:

"The department shall have supervision and control of all public institutions for mentally ill, epileptic or mentally deficient persons and of all

persons, including alcoholics and drug addicts, received into any of said institutions. It shall have general supervision of all private institutions for mentally ill, epileptic or mentally deficient persons and of all persons, including alcoholics and drug addicts, received into said institutions. It shall supervise and control any institution placed under it by the governor with the advice and consent of the council, and when so directed by the governor it shall assume and exercise the powers of the trustees of any state hospital in any matter relative to the conduct or management thereof. . . ."

(As amended by St. 1956, c. 715, § 8.)

Section 4 provides:

"The commissioner shall administer the laws relative to persons in institutions under his general supervision."

(As amended by St. 1938, c. 715, § 8.)

Section 7 states:

"The department shall provide for the efficient, economical and humane management of the state hospitals. It shall establish by-laws and regulations, with suitable penalties, for the government of said state hospitals. . . ."

(As amended by St. 1954, c. 598, § 1.)

Section 9 provides:

"The department and the trustees of the state hospitals, or their representatives, shall meet semi-annually for consultation and to promote harmonious action."

(As amended by St. 1909, c. 50A, § 13.)

Section 25 lists the state institutions under the control of the department and includes therein by name all the institutions having boards of trustees.

Section 26, which formerly provided for supervision of state hospitals by the trustees, was repealed by St. 1938, c. 486, § 11.

Section 27 gives the trustees certain corporate powers to hold and manage trust funds for the benefit of the institution and inmates.

Section 28 provides that:

"When a vacancy in the position of superintendent of a state hospital occurs, the trustees shall appoint to such vacancy from a panel of not less than three names submitted by the commissioner, a physician. . . . [having certain prescribed qualifications.] If the trustees fail to make an appointment . . . within a period of sixty days . . ., the commissioner shall appoint a superintendent qualified as provided above. . . ."

It also provides that under certain conditions the trustees may remove a superintendent, with the approval of the department. (As amended by St. 1957, c. 482, § 4.)

Section 29 states:

"(a) The trustees of each state hospital shall visit and familiarize themselves with their respective state hospitals, and may from time to time make suggestions to the department as to improvements therein, especially such as will make the administration thereof more effective, economical and humane.

"(b) All trustees shall have free access to all books, records, and accounts pertaining to their respective state hospitals, and shall be admitted at all times to the buildings and premises thereof.

"(c) They shall keep a record of their doings and shall record their visits to the state hospitals in a book kept there for that purpose. They shall transmit promptly to the department a copy of the proceedings of each meeting.

"(d) They may personally hear and investigate the complaints and requests of any inmate, his attorney, guardian, conservator or next friend, or any officer or employee of the state hospital. If they deem any such matter of sufficient importance, after determining what, if anything, should be done relative thereto, they shall make written report of their determination to the department.

"(e) They may at any time cause the superintendent or any officer or employee of their respective state hospital to appear before them and answer any questions or produce any books or documents relative to the state hospital.

"(f) They may encourage the establishment of mental health centers or clinics in any community and inform the public of measures that may be taken to prevent mental disease and thus reduce mental hospital admissions."

(As amended by St. 1954, c. 598, § 5.)

It is a cardinal rule of statutory construction that statutes and their component parts are to be construed to give effect to each part, if possible, in conformity with the general intent of the legislation, as indicated first and foremost by the language of the statutes themselves.

"A law is the best expositor of itself and every part of an act is to be taken into view for the purpose of discovering the mind of the legislature."

Pennington v. *Coxe,* 2 Cranch 33, 52; 2 L. Ed. 199, 205.

United States v. *Freeman,* 44 U.S. 556, 565; 11 L. Ed. 724, 728.

Sections 1 and 5 of c. 19 quoted above make it clear that the boards of trustees serve in the department under the exclusive supervision and control of the commissioner.

This supervision and control is very complete and far-reaching so far as the administration of the department is generally concerned.

It is the commissioner who takes action personally through such subordinates as *he* may determine. (c. 19, § 1.) It is the commissioner, therefore, who has supervision and control of all the institutions in the depart-

ment. (c. 123, § 3.) It is the commissioner, in effect, who provides for the management of the state hospitals, and establishes by-laws and regulations. (c. 123, § 7.)

It is my opinion that the trustees are under the supervision and control of the commissioner, when they are involved in any of these functions. This conclusion is required by the clear letter of the law.

However, the principle that meaning should be given to every part of a statute, if possible, requires the qualification that the trustees retain the specific authority given them by c. 123, §§ 27, 28 and 29, and the conclusion that the supervision and control of the superintendent does not give him the power to control their independent judgment in these matters.

Chapter 123, § 28 spells out the respective powers and duties of the commissioner and the trustees in regard to the matters included, and the trustees are not under the control of the commissioner in respect to the limited power of appointment and removal therein given them.

The trustees also retain the powers and duties spelled out in c. 123, § 29. It is to be noted, however, that the trustees are not authorized by this section to compel any action by the commissioner, but only to suggest, to recommend, to report and encourage.

Very truly yours,

EDWARD W. BROOKE

Performance by administrative officers in the executive department of what may be referred to as functions of a "quasi-judicial" nature does not in and of itself transform the said officials into judicial officers, as that term is used in the Constitution of the Commonwealth, and Executive Council approval is no longer necessary for their appointments.

HON. ELLIOT L. RICHARDSON, *Lieutenant Governor of the Commonwealth.*

MARCH 12, 1965.

DEAR SIR: — On February 9, 1965, you requested my opinion upon two questions affecting the authority of the Executive Council:

"1. Does the requirement of advice and consent of the Council to the appointment of 'judicial officers' extend to the appointment of the members of quasi-judicial bodies?

"2. If so, what agencies and instrumentalities of the Commonwealth are to be deemed quasi-judicial bodies for purposes of the Council's power of confirmation?"

As set forth in my letter of February 11, 1965, a formal opinion of the Attorney General was not rendered in response to these questions, since similar questions raised in the case of *Thomas C. Healey, et al.* v. *Treasurer and Receiver General, et al.* had recently been argued before the Full Bench of the Supreme Judicial Court and a decision by that tribunal was expected shortly.

On March 5, 1965, the Supreme Judicial Court decided the *Healey* case together with the companion case of *Clarence A. Barnes, et al* v. *Secretary of the Commonwealth, et al.* In its opinion, the Court upheld the validity of St. 1964, c. 740, the act, passed by initiative petition, which reduced the statutory powers of the Executive Council. Addressing itself to the charges that the act in question contravened the Constitution of the Commonwealth, the Court commented:

"In so far as the contention is made that Chapter 740 improperly covers matters excluded by Article 48, Initiative, II, section 2, the substantive sections of Chapter 740 are sections 3 and 4, both of which contain a saving clause, 'Subject to section 2 of this act and except as required by the constitution of the Commonwealth.' Any other constitutional argument fails because the petitioners have no standing to raise such questions where no rights of theirs have been impaired."

Accordingly, the Court did not specifically treat the question of the necessity of Executive Council approval of appointments to "quasi-judicial" agencies; therefore, I consider it appropriate to deal with that subject matter at this time.

Part II, Chapter 2, section 1, Article IX of the Constitution of the Commonwealth provides that appointments of judicial officers shall receive the approval of the Executive Council.

"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."

(As amended by Arts. XVII and XIX of the Amendments.)

The term "quasi-judicial bodies" is normally used to refer to administrative agencies which have been authorized by the Legislature to conduct hearings and to render decisions which affect the rights of specific individuals – e.g., boards empowered to conduct adjudicatory proceedings by G. L. c. 30A, the State Administrative Procedure Act. The question to be determined, therefore, is whether the members of such agencies are to be considered "judicial officers" within the meaning of Part II, Chapter 2, section 1, Article IX of the Constitution of Massachusetts.

Judges are members of the judicial department of government and – in this Commonwealth – ordinarily hold their offices for life.

". . . All judicial officers, duly appointed, commissioned and sworn, shall hold their offices during good behavior, excepting such concerning whom there is different provision made in this constitution; provided nevertheless, the governor, with consent of the council, may remove them upon the address of both houses of the legislature. . . ."

(Constitution of the Commonwealth, Part II, Chapter 3, Article I.) Members of administrative agencies, on the other hand, are a part of the executive branch, and their right to hold office is treated far differently from that of judicial officers. Most administrative officers are appointed for a fixed term of years. Upon expiration of such term, the Governor may remove the officer by the simple expedient of appointing a successor. No recourse to the Legislature is necessary.

Administrative agencies are creatures of the General Court, and may be controlled by the General Court. The Legislature has complete authority to establish how the agency is to function, and what persons are to make up its membership. The Constitution of the Commonwealth does not affect or limit the power of the General Court to constitute administrative agencies.

Thus, the Legislature may establish fixed terms of office, or even provide that administrative officers may be removed at pleasure. It may require approval of the Executive Council relative to appointments, or it may dispense with such approval. Judicial officers obviously are treated in an entirely different manner.

". . . This grant of power to the General Court to erect and constitute courts, broad as it is, does not include the tenure of judges of such courts. That is fixed by the Constitution itself. . . . The tenure of office of judges as thus settled by the Constitution is imperative and final. It cannot be enlarged, limited, modifield, altered or in any way affected by the General Court."

Opinion of the Justices, 271 Mass. 575, 579-580

The fact that administrative officers in the executive department perform what may be referred to as functions of a "quasi-judicial" nature does not in and of itself transform the said officials into judicial officers. The General Court has vested executve department administrators with authority to make certain quasi-judicial determinations (subject to review by the judiciary) for the purposes of taking advantage of administrative expertise and of easing the burden on the Commonwealth's judicial system — not for the purpose of creatng a new body of Courts. Executive department administrators have a quasi-legislative function as well, since they frequently promulgate rules and regulations; but it can hardly be said that by so doing the administrators become members of the General Court or a part of the legislative branch of government. Likewise, executive department administrators do not become judges simply by conducting the type of adjudicatory proceeding authorized by certain of the Commonwealth's statutes.

I am aware of the fact that section 2 of Chapter 740 of the Acts of 1964 exempts from the provisions of the chapter five quasi-judicial bodies. There is nothing in the record to indicate why the drafters of the initiative petition which eventually resulted in the act in question felt that it was necessary or desirable to exempt only these agencies. Suffice it to say, it was not because the Constitution of the Commonwealth requires special treatment for such agencies.

Accordingly, in light of the above, it is my considered opinion that members of quasi-judicial bodies are not "judicial officers" as that term is used in the Constitution of the Commonwealth, and that approval of the Executive Council is no longer necessary for their appointments. Because of this conclusion, it is not necessary to address myself to your second question.

Very truly yours,

EDWARD W. BROOKE

The portion of a proposed statute which required public school children to recite each morning the pledge of allegiance to the flag, and which imposes criminal penalties for failure so to do, is beyond the power of the Legislature to enact. If enacted, such a statute would be unconstitutional and void.

MARCH 15, 1965.

HON. THOMAS A. CHADWICK, *Clerk of the Senate.*

DEAR SIR: — You have requested my opinion of the constitutionality of a proposed statute which reads as follows:

"ORDERED, That the opinion of the Attorney General be requested by the Senate on the following queston of law: Would current House document No. 481, a copy of which is hereto attached, and which is now pending before the Senate, be constitutional if enacted into law?"

It is my opinion that to the extent such a statute would require school children to recite the pledge, it would be unconstitutional and void. The question of the validity of such a law was adjudicated over twenty years ago in *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624 (1943). The holding of that case is clear:

"We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution (whose principles are made applicable to the state through the Fourteenth Amendment) to reserve from all official control." *Id.* at 642.

The factual distinction between the law involved in *Barnette* and the one to which your question relates are insignificant. The principles enunciated in *Barnette* apply equally to both. Nothing which has intervened since that decision has weakened or cast doubt upon the continuing vitality of these principles.

It is, accordingly, my considered judgment that the portion of the proposed statute set forth above which requires public school children to recite each morning the pledge of allegiance to the flag, and which imposes criminal penalties for failure so to do, is beyond the power of the Legislature to enact. If enacted, such a statute would be unconstitutional and void.

This is not to say that it is improper for schools to attempt to educate their pupils about the great heritage of the Nation, or to seek to instill into them patriotism and love of country. Quite the contrary is true. A significant part of this heritage, however, and one of which we are justly proud, is that the dissenter, whether in matters of ethics, religion or policy, however noxious his views may appear to the majority, cannot be and will not be punished merely because he holds such views.

The profession of a personal attitude is meaningful only if it is sincere. To coerce a child to make such a profession by repeating, by rote, a pledge of allegiance to the flag which may contradict the thoughts harbored within his heart can scarcely be expected to change the child's

attitude. "To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds." *Id.* at 641.

Very truly yours,

EDWARD W. BROOKE

The Armory Commission may lawfully hire a consultant to survey and appraise possible areas and facilities as replacements for the Irvington Street Armory, subject to the limitations on use of funds contained in St. 1962, c. 717.

MARCH 16, 1965.

MAJOR GENERAL JOSEPH M. AMBROSE, *The Adjutant General, Mass. ARNG.*

DEAR GENERAL AMBROSE: — You have requested my opinion upon the following question:

"May the Armory Commission expend money received from the Massachusetts Turnpike Authority as a partial payment for the taking of the Irvington Street Armory property for the purpose of employing a consultant to survey and appraise Army Reserve facilities as possible replacement facilities for said Irvington Street Armory, under Chapter 716 of the Acts of 1962?"

You have informed me that by virtue of the proposed merger of the Army Reserve into the Army National Guard there has arisen a need for immediate expansion of State military facilities. Plans for future armory construction must now be developed, and decisions made as to the advisability of use of present Army Reserve locations for future National Guard purposes. Since the Armory Commission has no regular engineering staff, the Commission wishes to hire a consultant for a temporary period to examine possible armory sites, the said consultant to be compensated from funds received by the Commonwealth as a result of the taking of the Irvington Street Armory.

By St. 1962, c. 717, the General Court provided for disposition of certain funds paid by the Massachusetts Turnpike Authority upon the taking by eminent domain of the Irvington Street Armory.

"Funds paid by the Massachusetts Turnpike Authority for the taking by eminent domain of the state armory, located at Irvington Street in the city of Boston, together with all land and appurtenances thereto, shall be paid into the state treasury *and may be expended by the armory commission for the acquisition of sites and the erection and equipping of armory facilities to replace said armory. . . .*" (Emphasis supplied.)

The Commission is also authorized by the act in question to expend whatever federal funds may be available for the purpose stated above, and to use the amount remaining from the appropriation for armory construction contained in Item 8262-01 of St. 1961, c. 544, § 2.

It is clear from the above language that the General Court intended the funds paid as damages for the taking of the Irvington Street Armory to be used for the purpose of construction of armory facilities to replace the facilities which had been lost. The Armory Commission is authorized to expend such funds to acquire sites and to erect and equip replacement facilities. Acquisition of sites necessarily involves selection of such sites. Intelligent selection of appropriate locations is a task which is best accomplished by individuals who are trained in such matters. The legislative directive to the effect that new sites are to be acquired by the Commission necessitates selection of areas and extends to the Commission the right to hire skilled persons to assist in such selection. Such authorization is consistent with the general provision of G. L. c. 33, § 126, that the Commission "shall designate the location of armories and air installations ... to be constructed."

Use of such personnel cannot, however, be unlimited under the provisions of St. 1962, c. 717. A portion of your letter reads as follows:

"It is essential, therefore, that the Armory Commission immediately survey and appraise the existing Army Reserve facilities in Massachusetts, as well as to survey sites for new armories, in order to develop a logical, efficient and economical facilities plan for the Commonwealth."

I gather, therefore, that the Armory Commission plans quite an extensive examination of potential military sites throughout the Commonwealth.

This type of general survey cannot, in my opinion, be conducted with the funds allocated by St. 1962, c. 717. That act specifically provides that the sums paid over by the Turnpike Authority may be used to replace the Irvington Street Armory. The General Court has not authorized use of these funds for the kind of broad investigation apparently contemplated in the sentence quoted above. Such a general survey is undoubtedly within the authority vested in the Commission by c. 33 of the General Laws; but the restrictive language of St. 1962, c. 717 does not permit use of the funds referred to therein for such purposes. Further resort to the Legislature may well be necessary to secure an appropriation for a full-scale study of potential military sites.

Accordingly, it is my opinion that the Armory Commission may lawfully hire a consultant to survey and appraise possible areas and facilities as replacements for the Irvington Street Armory, subject, however, to the limitations set forth above upon the functioning of such a consultant.

Very truly yours,

EDWARD W. BROOKE

The acquisition, by eminent domain, of property currently under the control of the Metropolitan District Commission by the Government Center Commission would not require payment of damages, although the Center Commission may, if it so desires, enter some arrangement to furnish valuable consideration.

MARCH 16, 1965.

HON. JEREMIAH SUNDELL, *Chairman, Government Center Commission.*

DEAR MR. SUNDELL: — You have requested my opinion on the question of whether or not the Government Center Commission is responsible for the payment of damages for the acquisition of property currently under the control of the Metropolitan District Commission, as provided for by c. 685, § 4 of the Acts of 1962, as follows:

"The Commission shall after consultation with the Boston Redevelopment Authority, take by eminent domain under the provisions of chapter 79 of the General Laws, or acquire by purchase or otherwise, all of the land in the City of Boston within the area bounded by Ashburton Place, Somerset Street, Cambridge Street and Bowdoin Street, for the purpose of clearing, developing and erecting thereon a State Office Building, *provided, that the Commission shall not be required to demolish the building occupied by the Metropolitan District Commission.*" (Emphasis supplied.)

More specifically, you have asked, "Is the Government Center Commission required to pay damages, at the fair market value or on any other basis, to the Metropolitan District Commission for the acquisition of the land and buildings located at 20 Somerset Street, Boston, Massachusetts, presently under the jurisdiction and control of the Metropolitan District Commission?"

Although c. 685, § 4 of the Acts of 1962 specifically provides that the acquisitions by eminent domain authorized by that section be accomplished under the provisions of c. 79, providing in part for the award of damages, this does not necessitate the award of damages in all cases. It is my opinion, in view of the recent holdings of the Supreme Judicial Court in the cases of *Worcester* v. *Commonwealth*, 345 Mass. 99 and *Mass. Turnpike Authority* v. *Commonwealth*, 1964 Adv. Sh. 849, that G. L. c. 79, § 6, allowing damages for an eminent domain taking, would not be applicable to the instant case.

It is a well-settled principle in this Commonwealth that land owned or used by a municipality or a public authority in its public capacity may be taken and transferred by the Legislature to another public agency without the payment of compensation. *Lowell* v. *Boston*, 322 Mass. 709, 731; *Opinion of the Justices*, 322 Mass. 745, 752. The implementation by the Government Center Commission of its authority under G. L. c. 685 would accomplish the transfer of the land of a public authority, the Metropolitan District Commission, to another public agency. Consequently, although G. L. c. 685 incorporates G. L. c. 79 by reference, the latter provision cannot be extended to include the facts of the instant case and, therefore, compensation would not be available.

In so far as G. L. c. 685 of the Acts of 1962 provides for the acquisition of said property by purchase, the option to use that method rests with the Commission. Absent a contrary provision, the term "purchase" must be interpreted in its normal manner. Black's Law Dictionary, Fourth edition, at page 1399, defines "purchase" as the "transmission of property . . . by voluntary act and agreement, *founded* on a valuable consideration." (Emphasis supplied.) It would therefore be incumbent upon the Commission to provide the valuable consideration necessary to acquire the property by purchase, if it should choose to act in that manner.

In conclusion, on the facts that you have stated, I am of the opinion that taking the said property by eminent domain would not require payment of damages, although the Commission may, if it so desires, enter some other arrangement to furnish a valuable consideration in exchange therefor.

Very truly yours,
EDWARD W. BROOKE

The Commissioner of Insurance must either reopen the hearing which was concluded on January 5, 1965, or give notice of a new hearing in order to consider any new filing resubmitted within a reasonable time after the original filing has been disapproved.

MARCH 16, 1965.

HON. C. EUGENE FARNAM, *Commissioner of Insurance.*

DEAR COMMISSIONER FARNAM: — You have asked my opinion as to whether under G. L. c. 176A, § 6 you can give further consideration to a rate filing, which is resubmitted within a reasonable time after the original filing has been disapproved, without reopening the public hearing that was originally held thereon. In submitting this request you assume that the resubmitted filing will be altered and amended in accordance with your opinion in connection with the original filing.

The opinion and decision which was promulgated by you and filed in your office on February 1, 1965 disapproved the proposed rate increases filed by the Massachusetts Hospital Service, Inc. In the decision you state that you would be prepared to accept for consideration a shorter projection as a basis for rates. You also mention that there was no evidence in the transcript to support the proposed 2% provision for contribution to statutory reserves and that the record disclosed no reason for the present method of distributing costs and of allocating expenses between Blue Cross and Blue Shield. In your conclusion, you find that the filing, as a whole, is specious and does not meet the statutory requirements necessary to justify the rate increases proposed.

General Laws c. 176A, § 6 states that:

"No such contracts or rates shall be approved until after a public hearing . . . held within thirty days of the date of the filing of a copy of the form of such contracts or rates with the commissioner. . . . No contracts shall be approved if the benefits provided therein are unreasonable in relation to the rate charged, nor if the rates are excessive, inadequate or unfairly discriminatory. . . . Any subscriber, non-profit hospital service

corporation or other person aggrieved by an action, order, finding or decision of the commissioner under this section may, within twenty days from the filing of such memorandum thereof in his office, file a petition in the supreme judicial court for the county of Suffolk for a review of such action, order, finding or decision. . . . The court shall have jurisdiction in equity to modify, amend, annul, reverse or affirm such action, order, finding or decision, and shall uphold the commissioner's action, order, finding or decision if supported by the weight of the evidence."

In the case of *Massachusetts Medical Service* v. *Commissioner of Insurance,* 344 Mass. 335, 339, the Supreme Judicial Court was concerned with a disapproval of rates under G. L. c. 176B. Under that statute a hearing is not required, but the court, nevertheless, stated that, "It is appropriate, if not necessary, that there be by the administration, rather than in court, the hearing in respect of rates which is necessary at some stage of the administrative-judicial process surely to meet constitutional requirements."

From the language contained in the *Massachusetts Medical Service* case, *supra,* it is apparent that a new hearing is required under the circumstances as you have presented them. There are questions which you have indicated in your opinion and decision of February 1, 1965 that need to be answered. Also, there may well be objections to any rate increases proposed by Blue Cross. It is only at a public hearing that these answers and objections can be recorded. Even though the new filing may be altered and amended to conform with your previous opinion, the public should be given an opportunity to examine the proposal and express its views, either favorably or unfavorably.

It is, therefore, my opinion that you must either reopen the hearing which was concluded on January 5, 1965, or give notice of a new hearing in order to consider any new filing resubmitted by the Massachusetts Hospital Service, Inc.

Very truly yours,

EDWARD W. BROOKE

The provisions of St. 1964, c. 727, § 32 supersede c. 337, § 20 of that Act and, therefore, the Massachusetts Board of Regional Community Colleges may transfer funds within and among subsiding accounts.

MARCH 23, 1965.

HON. KERMIT C. MORRISSEY, *Chairman, Massachusetts Board of Regional Community Colleges.*

DEAR MR. MORRISSEY: — You have requested my opinion regarding the fiscal autonomy bill for the Massachusetts Board of Regional Community Colleges, c. 727, § 32 of the Acts of 1964, as follows:

"Notwithstanding any other provision of law to the contrary, the general court shall annually appropriate such sums as it deems necessary for the maintenance, operation and support of each regional community college; and such appropriations shall be made available to each regional community college by the appropriate state officials for expenditure

through allotment, transfer within and among subsidiary accounts, advances from the state treasury in accordance with the provisions of sections twenty-four, twenty-five and twenty-six of chapter twenty-nine, or for disbursement on certification to the state comptroller in accordance with the provisions of section eighteen of said chapter twenty-nine as may from time to time be directed by the board or by a dean, or other officer of a regional community college designated by the board."

More specifically you have asked, "do the provisions of c. 737, § 32 of the Acts of 1964 supersede the provisions of c. 337, § 20 of the Acts of 1964?" Chapter 337, § 20 of the Acts of 1964 provides:

"The provisions of . . . section fifteen . . . of this act shall not apply to expenditures from appropriations made under this act for the University of Massachusetts, the division of state colleges of the board of trustees of state colleges, the New Bedford Institute of Technology, the Lowell Technological Institute of Massachusetts, and the Bradford Durfee College of Technology; nor shall the provisions of section nine B or section twenty-nine of chapter twenty-nine of the General Laws, or any provision of section six or section eight of this act apply to said expenditures which are inconsistent with any provision of the General Laws specifically regulating the expenditure of public funds at each of said institutions."

Section 15 of c. 337 of the Acts of 1964 referred to above provides:

"The budget director, notwithstanding the provisions of section twenty-nine of chapter twenty-nine of the General Laws, is hereby directed to limit the transfer of funds between subsidiary accounts, established as provided in section twenty-seven of said chapter twenty-nine, to those transfers required to meet unforeseen emergencies where funds otherwise are not available to protect the public interest. The budget director shall file forthwith, on the approval of any such transfer, a copy of the authorization with the house and senate committees on ways and means."

I answer your question in the affirmative.

Although the provisions of c. 37, § 20 of the Acts of 1964, approved April 30, 1964, do not include the Regional Community Colleges in the list of institutions to which § 15 of that act shall not apply, the subsequent enactment on July 9, 1964 of c. 737, § 32 indicates the Legislature's intent to also authorize fiscal autonomy for the Regional Community Colleges.

In this situation the chronology of the two acts is of the essence. Whereas the General Court in its wisdom has seen fit to pass a subsequent act specifically providing fiscal autonomy for the regional community colleges to transfer funds within and among subsidiary accounts, the Legislature must be deemed to have acted with knowledge of its earlier pronouncement of April 30, 1964. That the Legislature was aware of its prior pronouncement is confirmed by the express language of c. 737, § 32 that it be applicable "notwithstanding any other provision of law to the contrary." By that language the Legislature has manifested not only its awareness of the prior provision, but its willingness to expand the scope of c. 337 to include the regional community colleges in the grant of fiscal autonomy.

Consequently, in view of the enactment of c. 737, § 32 subsequent to c. 337, § 20, and the express language that c. 737 be applied notwithstanding any contrary provisions of law, it is my opinion that the provisions of c. 737, § 32 of the Acts of 1964 supersede c. 337, § 20 of those acts and, therefore, that the Massachusetts Board of Regional Community Colleges may transfer funds within and among subsidiary accounts.

Very truly yours,
EDWARD W. BROOKE

"Satisfaction" as appearing in G. L. c. 79, § 37, as most recently amended, means where the check of the Commonwealth is received by the person entitled thereto or his attorney or agent, and, absent any act by the condemnee which delays payment, additional interest must be awarded from the date of judgment to the last day of the month prior to the month in which satisfaction is paid, at the rate of six per cent per annum.

MARCH 24, 1965.

Re: Eminent Domain — Tax Apportionment as Damages — Interest Thereon — (General Land Corp., et al, [Suffolk 458625] A. G. 78184). HON. FRANCIS W. SARGENT, *Commissioner of Public Works.*

DEAR COMMISSIONER SARGENT: — This letter is in reply to your letter in part on the above subject, dated February 24, 1965, received by this Department March 3. On page four of that letter you requested my opinion on the following questions:

1. According to Section 37 of Chapter 79 of the General Laws, as most recently amended, it states that 'a judgment . . . shall bear interest at the rate of six per cent per annum from the date of the entry of such judgment to and including the last day of the month prior to the month in which satisfaction therefor is paid.' What is meant by 'satisfaction paid'? Is it the date the check issues from the Treasurer of the Commonwealth or the actual date of payment to the person entitled thereto?"

2. "In order to permit the Board of Commissioners to process the damages awarded under the above judgment (Francis J. Sawyer), should additional interest be computed on the judgment from the date computed by the Court to and including your definition of the date satisfaction is paid to the person entitled thereto?"

In answer to the first question it is my opinion that, for the purpose of computing interest pursuant to Section 37 of Chapter 79, satisfaction is paid when the check of the Commonwealth is received by the person entitled thereto or his attorney or agent. The case of *Vaughn* v. *Demoine*, 330 Mass. 83, states that interest is to be paid "to the date of payment." It is my opinion that payment requires receipt by the person entitled therto or by his duly authorized agent.

In answer to the second question it is my opinion that, absent any act by the condemnee which delays payment, additional interest must be awarded from the date of the judgment to the last day of the month prior to the month in which satisfaction is paid. Such interest payment

shall be computed at the rate of six per cent per annum on the total amount of the decree of judgment. That total amount of a judgment decree will be the sum of the land damage award and the tax adjustment and interest thereon and costs.

Implicit in your letter is concern over whether or not interest is payable upon the award for taxes assessed on the property taken. You have also expressed concern over confusion which has arisen regarding three "Opinions" of Attorneys General dealing with this question.

It is my opinion that interest is payable upon that portion of a damage award allocated to taxes.

Section 12 of Chapter 79 of the General Laws provides in part:

". . . the *damages* for the taking *shall include* an amount separately determined and stated which shall be estimated to be equal to that portion of the tax assessed upon the property in the year it is taken . . ." [emphasis supplied]

The Opinon of the Attorney General dated March 11, 1954 to which you referred states: "It was obviously the Legislature's intention to add a new element of damages to be taken into consideration in the disposition of land damage cases arising under this Chapter."

The Opinion of the Attorney General dated January 15, 1965 to which you refer states on page four: "the word 'damages' is used by some to describe the total amount paid to the former owner of the property, including the damage award, interest thereon, *taxes* and costs . . ." [emphasis supplied]

Therefore, as used in Section 12 of Chapter 79 of the General Laws, local real estate taxes on the taken property for the balance of the calendar year in which a taking is made shall be considered an element of damages.

Section 37 of Chapter 79 provides, "Damages under this chapter shall bear interest . . ." Since the balance of local real estate taxes is an element of damages, interest is payable on that portion of an award allocated to taxes.

The letter from this Department to the Comptroller of the Commonwealth dated February 1, 1965 to which you referred dealt with a particular fact situation in the unusual case captioned above. The title and other complications of that case were set forth in said February 1, 1965 letter to the Comptroller, the provisions of which are herewith ratified and confirmed except for the paragraph numbered 4 on page three thereof, which was in error and is inconsistent with the opinion expressed in the preceding paragraph of this letter.

Very truly yours,

EDWARD W. BROOKE

Pursuant to St. 1963, c. 660, the new valuation statute did not become effective until January 1, 1965, and the Department of Education's calculations concerning State aid grants for the payments which relate to the year 1964 must be made in accordance with the 1945 statute, and later payments made in accordance with the valuations prescribed by the 1963 statute.

MARCH 25, 1965.

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

DEAR SIR: — On March 12, 1965, you requested my opinion upon the following question:

"What valuation or valuations are to be employed for computing Chapter 70 Aid for the 1964-65 school year?"

Pursuant to § 18 of c. 58 of the General Laws, State Aid amounts are distributed to the various municipalities proportionally to the sum imposed upon such municipalities as taxes. Chapter 559 of the Acts of 1945 established a basis for apportionment of state and county taxes; by c. 660 of the Acts of 1963, the Legislature enacted a new apportionment statute, changing the valuations placed upon property in the cities and towns and thus altering the amounts of taxes to be paid.

In an opinion rendered to you on June 29, 1965, I indicated that the new valuation statute was not to take effect until January 1, 1965. At that time I advised you as follows:

"By c. 660 of the Acts of 1963, the General Court enacted a new apportionment of state and county taxes, thus superseding St. 1945, c. 559. The Legislature specifically indicated that the new apportionment would be applicable 'for the calendar year nineteen hundred and sixty-five, and until another is made and enacted by the general court.' (Section 1.) In addition, § 18 of c. 58 of the General Laws was amended by deleting the words 'amounts of the last preceding state tax imposed on them,' and inserting in place thereof the words 'valuations last established by the general court as a basis for the apportionment of state and county taxes.' (Section 7.) This change likewise becomes effective on January 1, 1965.

"The General Court has made it clear that the valuations specified in St. 1963, c. 660 are not to take effect prior to 1965. This is true for the purposes of determining State Aid amounts as well, since the change made in c. 58, § 18 has also been suspended until that year. The effective date of the new provisions is of course not altered by times of distribution or by the fact that significant changes in valuation may have been made. . . ."

This ruling is, in my opinion, dispositive of your present question. Since the new valuation statute did not become effective until January 1, 1965, it is clear that amounts to be paid over for periods of time prior to that date cannot be calculated on the basis of the new law. I realize that this may create certain difficulties for your Department, since State Aid grants are made on a schedule based upon the school year rather than upon the calendar year. But the statutory language does not permit

a different result. It is the apparent legislative intention that calculations be made on a pro rata basis, with payments which relate to the year 1964 made pursuant to the 1945 statute, and later payments made in accordance with the valuations established by St. 1963, c. 660.

Very truly yours,

EDWARD W. BROOKE

Persons operating scalp treatment establishments and specializing solely in scalp work on both male and female clientele are not "hairdressers" and are not subject to the provisions of G. L. 112, §§87T through 87KK.

MARCH 26, 1965.

HON. IRENE E. BODE, *Chairman, Board of Registration of Hairdressers.*

DEAR MADAM: — You have asked my opinion as to whether those operating scalp treatment establishments and specializing solely in scalp work on both male and female clientele are engaged in the business of "hairdressing" and are therefore subject to G. L. c. 112, §§ 87T through 87KK.

I assume that by "scalp treatment establishments" you mean establishments offering treatment to aid the growth of hair or to prevent the loss of it (commonly known as trichology) and by "scalp work" you mean work on the scalp for such purpose.

General Laws, c. 112, § 87T defines "hairdressing" as follows:

" 'Hairdressing', arranging, dressing, curling, waving, cleansing, cutting, singeing, bleaching, coloring, or similarly treating the hair of any female, or performing work as a cosmetologist as defined in section eighty-seven F, or any combination of any of the foregoing, but not including the removal of superfluous hair or skin blemishes by direct application of an electric current or any treatment of the bust."

"Cosmetologist" in turn is defined in § 87F of said c. 112 as follows:

" 'Cosmetologist', any person, who, with hands or mechanical or electrical apparatus or appliances, or by the use of cosmetic preparations, antiseptics, tonics, lotions, or creams, engages for compensation in any one or any combination of the following practices, to wit: — Massaging, cleansing, stimulating, manipulating, exercising, beautifying the scalp, face, neck, arms, bust or upper part of the body, manicuring the nails, or removing of superfluous hair, by the use of electricity or otherwise, about the body of any female, but not about the body of any male."

The Legislature has limited the Board of Registration of Hairdressers to registering and regulating the business of those persons engaged in the activities set forth in G. L. c. 112, § 87T, namely: "Demonstrators" of articles and equipment used in hairdressing; "hairdressers" (defined above); "instructors" in the teaching of hairdressing and manicuring; "operators" in hairdressing or any of its branches under supervision; "manicurists" in cutting, trimming, polishing, tinting, coloring or cleansing nails; "students" of hairdressing or manicuring. Furthermore, the

Legislature has limited the activities of those persons registered as to place, namely, beauty shops or schools for the teaching of hairdressing, and as to persons, upon females only. Also, throughout G. L. c. 112, the Legislature refers to the activities of those registered by the Board in such terms as "beautifying" and "beauty culture" and to the products used by them in such terms as "beauty preparations" and "cosmetic preparations."

Accordingly, it seems clear that the Legislature intended that the Board regulate the activities of only those engaged solely in practices designed for the beautification of females in beauty shops or beauty schools. It is equally clear that the functions of those engaged in the business of trichology, while employing some of the practices of hairdressing, such as scalp massage, are not primarily designed for beautification purposes nor for the female exclusively.

The services of these establishments, while available to and often used by females, are advertised primarily for the use of males and are not referred to as "beauty shops."

It is my opinion that those engaged in scalp work of the type you describe are not hairdressers and are not subject to the provisions of G. L. c. 112, §§ 87T through 87KK. This does not mean that such persons are not subject to other provisions of law respecting the practice of physical therapy and the practice of medicine, which questions are not here considered.

Very truly yours,
EDWARD W. BROOKE

The establishment of a uniform system of control and accounting, for equipment owned by the Commonwealth, would be a proper undertaking by the comptroller. However, such authority cannot be extended to include the delegation of powers which he does not himself possess.

MARCH 26, 1965.

HON. JOSEPH ALECKS, *Comptroller, Commission on Administration and Finance.*

DEAR MR. ALECKS: — I have received your letter of March 1, 1965, requesting my opinion on the legality of certain proposed procedures to be promulgated by your division in developing a uniform system of control and accounting for equipment owned by the Commonwealth.

In your letter you indicate that it is your intent, "in the case of equipment other than motor vehicles, to prescribe standard forms for reporting to the head of each state agency information pertaining to damage to such equipment or its loss, when it is missing or stolen. Also to provide that he will determine whether there is liability for such damage or loss, and, if so, determine the amount of damages and assess the individual or firm involved. If they do not pay or wish to compromise the matter, he is then to refer the case to your office."

The authority of the Comptroller in this context is set forth in G. L. c. 7, §§ 16 and 17.

General Laws c. 7, § 16 provides that:

"The comptroller shall design and install an accounting system for the commonwealth. . . . He may revise such . . . system from time to time."

General Laws c. 7, § 17 provides that:

"He shall have full authority to prescribe, regulate and make changes in the methods of keeping and rendering accounts. He shall establish in each such department, office, commission and institution a proper system of accounts, which shall be uniform so far as is practicable. . . . He shall provide such safeguards and systems of checking as will ensure, so far as possible, the proper collection of all revenue due the commonwealth. . . ."

In view of the language of these sections setting out the authority of the Comptroller, it is my opinion that the establishment of a uniform system of control and accounting for equipment owned by the Commonwealth would be proper. General Laws c. 7, § 6 authorizes the Comptroller to *design* and *install* an accounting system as well as to *make revisions* of any such system. In addition, G. L. c. 7, § 17 provides the Comptroller with authority to establish such an accounting system in a uniform manner. Clearly then, the proposed system would fall within the authority granted by these sections and would be a proper undertaking by the Comptroller.

As a second aspect of your proposed new system, you have suggested that the head of each State agency determine whether there is liability for damage or loss and, if so, to determine the amount of damage or loss and assess the individual or firm involved.

It is my opinion that such portion of the proposed new system would be beyond the purview of the authority of the Comptroller, as set forth in the statutes cited above. The determination of liability for damage is a legal determination to be made by the Court, should litigation ensue. There is no statutory or other basis for allowing such authority to be delegated to department heads or to the Comptroller himself. The responsibility in this area rests with the Court and is not an appropriate area for action by department heads.

Consequently, although the Comptroller is specifically authorized to develop uniform systems of accounting and control, that authority cannot be extended to include the delegation of powers which he does not himself possess. It is therefore my opinion that the second aspect of your proposed system would not be legal.

The answer to your first two questions renders unnecessary an answer to your third question.

Very truly yours,

Edward W. Brooke

If the Board of Regional Community Colleges chooses not to seek review by means of a petition for a writ of certiorari under G. L. c. 294, § 4, a decision of the Civil Service Commission relative to the reinstatement of an employee is final and binding.

April 8, 1965.

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

Dear Mr. Morrissey: — I have received your letter of February 24, 1964, which relates to the question of re-employment by your Board of one Joseph Doherty, a former fireman-janitor at the Massachusetts Bay Community College. You have informed me that on January 19, 1964, a full hearing was held by your Board on four charges which had been levied against the said Mr. Doherty — neglect of duty, insubordination, conduct unbecoming a public employee and chronic absenteeism. On the basis of the evidence submitted, it was voted unanimously to dismiss Mr. Doherty.

The employee thereupon requested review of the Board's decision by the Civil Service Commission pursuant to G. L. c. 31, § 43 (b). The matter was heard on October 27, 1964 by a hearing examiner appointed by the Commission. On January 13, 1965, the Commission voted to adopt the findings of the hearing examiner as the findings of the Commission, and found the employee guilty of all charges set forth by the appointing authority. The Commission, however, also voted to modify the penalty which had been imposed from discharge to suspension for three months without compensation, effective June 20, 1964. In light of these facts, you have requested my opinion whether the ruling of the Civil Service Commission is final in this matter and whether further legal redress of any kind is available to the Board of Regional Community Colleges.

In an opinion rendered on September 29, 1964 to Mrs. Lauretta L. Kellaher, Acting Secretary of the Civil Service Commission, I advised that the provisions of G. L. c. 30, § 9B are applicable to maintenance employees of your Board, and that such employees are entitled to the safeguards of G. L. c. 31, §§ 43, 45 and 46A in the event of attempted removal or other action by the appointing authority affecting their positions. Accordingly, Mr. Doherty was clearly entitled to have his discharge reviewed by the members of the Civil Service Commission. (See G. L. c. 31, § 43 (b).)

The Commission is authorized to affirm, reverse or otherwise modify the action of the appointing authority.

". . . The decision of the commission shall be in writing and notice thereof sent to all parties concerned within ten days after the filing of the report. If the commission finds that the action of the appointing authority was justified such action shall be affirmed; otherwise, it shall be reversed and the person concerned shall be returned to his office or position without loss of compensation. *The commission may also modify any penalty imposed by the appointing authority.*" (Emphasis supplied.)

G. L. c. 31, § 43 (b), as amended by St. 1962, c. 205.

Thus it was consistent with the authority vested in the Civil Service Commission to affirm the finding of the appointing authority that the employee in question was guilty as charged, but to modify the penalty imposed from discharge to suspension.

Absent further proceedings, the ruling of the Commission is binding upon the appointing authority. Your Board is not entitled to seek review in the district court under G. L. c. 31, § 45, since the provisions of that section are available to aggrieved employees only. The Board may, however, proceed pursuant to § 4 of c. 249 of the General Laws, which section provides that a "petition for a writ of certiorari to correct errors in proceedings which are not according to the course of the common law may be presented to a justice of the supreme judicial court, and he may, after notice, hear and determine the same." The petition must be filed within two years of the close of the proceedings to be reviewed. In such proceedings the Court ordinarily reviews questions of law only, and is not likely to substitute its judgment for decisions which are discretionary.

Mayor of Medford v. *Judge of First District Court of Eastern Middlesex*, 249 Mass. 465, 468.

Should your Board choose not to avail itself of this remedy, the ruling of the Civil Service Commission is final and determinative of Mr. Doherty's status. An employee who has been unlawfully removed may proceed to regain his position pursuant to the provisions of G. L. c. 31, § 46A.

"The supreme judicial court shall have jurisdiction of any petition for a writ of mandamus for the reinstatement of any person alleged to have been illegally discharged, removed, suspended, laid off, transferred, lowered in rank or compensation, or whose office or position is alleged to have been illegally abolished under this chapter; provided, that such petition shall be filed in said court within six months next following such allegedly illegal discharge, removal, suspension, laying off, transfer, lowering in rank or compensation, or abolition of his position, unless said court for cause shown extends the time. . . ."

The recent decision of the Supreme Judicial Court in *Commissioner of the Metropolitan District Commission* v. *Director of Civil Service*, 1964 Mass. Adv. Sh. 1345, in no way vests discretion in your Board to deny reinstatement to the employee in question. That decision affirmed the right of a given appointing authority to refuse to appoint a disabled veteran for the reason that the veteran's past conduct had been such as to render him unsuitable for the position. But the present matter involves an employee who has already received an appointment, and who is consequently entitled to hold his position unless removed in accordance with strict statutory provisions. The appointing authority is without discretion to vary such provisions in removal cases.

Accordingly, if your Board chooses not to seek review by means of a petition for a writ of certiorari under G. L. c. 249, § 4, the decision of the Civil Service Commission relative to the reinstatement of Mr. Joseph Doherty is final and binding.

Very truly yours,
EDWARD W. BROOKE

Pursuant to St. 1958, c. 647 and G. L. c. 79, the Department of Public Works has the authority and duty to pay the awards voted on September 7, 1960, for the takings voted July 11, 1960, and recorded in Barnstable County Registry of Deeds on July 19, 1960.

April 12, 1965.

Re: Taking by Eminent Domain — South Cape (Popponesset) Beach, Mashpee — *Ch. 647 of 1958 and Ch. 635 of 1962.*

Hon. Francis W. Sargent, *Commissioner of Public Works.*

Dear Commissioner: — By letter, dated March 24, 1965, you asked my opinion of whether the Department of Public Works has the authority to pay certain awards voted in 1960 as a result of land acquisition under Chapter 647 of the Acts of 1958 or whether that authority was withdrawn by Chapter 635 of the Acts of 1962.

Chapter 647 of Acts of 1958 authorized the Commissioner of Public Works on behalf of the Commonwealth to acquire by purchase or gift or to take by eminent domain under Chapter 79 of the General Laws . . . the whole or any portion of the properties comprising South Cape Beach also known as Popponesset Beach.

You advised that the Department of Public Works made such takings, recorded under date of July 11, 1960, of three parcels.

Section 1 of Chapter 635 of the Acts of 1962 provides in part:

"Upon the delivery to the commissioners of public works . . . by *all* the owners, except the town of Mashpee, . . . of releases of *all* claims . . . and of agreements for the dismissal of any . . . court proceedings [arising from the July 11, 1960 takings] . . . [the] commissioners . . . are hereby authorized and directed to reconvey to such owners . . .". (Emphasis supplied.)

You advise in your letter of March 3, 1965 that releases and dismissals set forth in Chapter 635 of the Acts of 1962 cannot be obtained from all of the former owners.

It is my opinion that in Section 1 of Chapter 635 of the Acts of 1962 the Legislature has clearly stated a condition precedent to any reconveyance to the former owners of the property taken July 11, 1960. That condition precedent is the delivery of the releases and agreements described above from *all* of the former owners except the Town of Mashpee.

The condition precedent has not been fulfilled. The sixth paragraph of your letter of March 3, 1965 indicates that it will not be fulfilled.

It is my opinion that under the provisions of Chapter 647 of Acts of 1958 and Chapter 79 of the General Laws, the Department of Public Works has the authority and duty to pay the awards voted on September 7, 1960 for the takings voted July 11, 1960 and recorded in Barnstable County Registry of Deeds on July 19, 1960.

Very truly yours,

Edward W. Brooke

Chapter 16, § 5(b) does not require that a contractor appeal the decision of the Department of Public Works to the Board of Contract Appeals as a prerequisite to instituting a suit, but it does, however, set out the procedure which is available to a contractor who desires to take advantage of the same.

HON. FRANCIS W. SARGENT, *Commissioner, Department of Public Works.*

APRIL 23, 1965.

DEAR COMMISSIONER: — I have your letter of February 19, 1965, in which you have requested my opinion as to whether or not the Department of Public Works may promulgate Rules and Regulations which would require a contractor, as a condition precedent to instituting a Chapter 258 petition for damages, to appeal all decisions of the Department based on claims to the Board of Contract Appeals, acting through its Hearing Examiner. You state that said proposed Rules and Regulations are intended to implement Gen. Laws c. 16, § 5, and are to be promulgated pursuant to c. 30A.

Chapter 16, § 5 defines the *powers and duties* of the Commission. Said section contains the following additional language:

"In addition to exercising the *powers* and performing the duties assigned to it by law, the commission shall have the following powers and duties. . . ." (Emphasis supplied.)

Pursuant to Chapter 16, § 5 (b), the Commission "shall act as a board of contract appeals, and shall approve or disapprove all claims made under contract with the department. To assist the commission in performing this function, the commissioner . . . shall appoint a . . . hearing examiner. . . .

"The hearing examiner shall hear all claims by contractors from determinations of the department, and shall, after hearing, render to the commission a report of the matter including a recommendation as to the disposition of the claim. Said examiner shall at the request of the contractor or of the department or on his own motion summon witnesses and require production of books and records and take testimony under oath. . . ."

It should be noted that nowhere in the above mentioned paragraphs is there an express statutory mandate that a contractor *must* appeal his claim to the Board of Contract Appeals and the hearing examiner, as a condition precedent to bringing suit against the Commonwealth under a Chapter 258 petition. The absence of such an express direction leads me to the conclusion that the Department cannot make such a procedure compulsory. As the Court itself has stated:

"It is not for us, however, judicially to impose rigid standards and requirements which the Legislature has not seen fit clearly to impose . . . and which the legislative history suggests may have been intentionally omitted." *Pacella* v. *Metropolitan District Commission,* 339 Mass. 338, 346.

It should be borne in mind that when the Legislature has intended that an individual appeal to a higher board prior to being able to institute a civil proceeding, it has explicitly so stated. Thus, in c. 31, § 43:

"Before any action affecting employment or compensation referred to in the preceding sentence is taken, the officer or employee shall be given . . . a full hearing before the appointing authority. . . .

"If within five days after receiving written notice of the decision of the appointing authority the person so discharged . . . shall so request in writing, he shall be given a hearing before a member of the commission. . . .

"[T]he facts as found by the commission, shall be subject to judicial review by the municipal court of the city of Boston. . . ."
Section 45 provides:

"Within thirty days after action by the commission on a hearing provided for in section forty-three, the person who was discharged . . . may, *if said action was affirmed by the commission,* bring a petition in the municipal court of the city of Boston. . . ." (Emphasis supplied.)

Clearly, under said section an individual who did not avail himself of the opportunity to obtain a hearing before the commission, would not be able to bring a petition in court. His failure to exhaust his administrative remedy would be fatal.

When the Legislature has required an exhaustion of administrative remedies, the court required that the same be followed.

Thus, in *Board of Selectmen of Truro* v. *Outdoor Advertising Board,* 346 Mass. 754, the plaintiff brought a bill for a declaratory judgment. Chapter 93, § 29A requires that:

"within thirty days after notification to the city or town, the board shall have received written objection to an application for a permit, such permit shall issue only after consideration by the board of such objection, and whenever, within thirty days after notification to the city or town, the board shall have received written notice of intention to appear in opposition to the application, the board shall issue such permit only after a public hearing on due notice to the applicant and the city or town. . . ."

The town neither filed written objections nor stated its intention to appear in opposition. The Court stated at 758:

"The selectmen have not pursued their administrative remedies before the board. . . ."
and dismissed the petition.

There are several additional factors which have led me to the above conclusion.

1. The history of the Rules adopted to implement c. 16, § 5 demonstrates the fact that said section is indeed ambiguous.

Chapter 16, § 5 was enacted and became effective on November 15, 1963. On March 25, 1964, following a public hearing as required by c. 30A, the Commission adopted a set of Rules which provided that:

"The determination of any officer or employee of the Department of Public Works (Department) of any controversy arising under any contract *may* be appealed by the contractor to the Public Works Commission (Commission) who shall act as a Board of Contract Appeals. . . ." Rule I. (Emphasis supplied.)

An examination of the records of the Department has revealed that, pursuant to said Rules, approximately 65 contractors have availed themselves of this procedure, whereas approximately 35 have not and have, instead, instituted suit directly pursuant to c. 258.

On December 30, 1964, the Commission, without a public hearing, voted to alter the Rules as follows:

"The determination of the Department *shall be final unless appealed* by the contractor to the Commission acting as a Board of Contract Appeals. . . ." (Paragraph II). (Emphasis supplied.)

It should thus be noted that the Rules adopted contemporaneously with the enactment of c. 16, § 5, which Rules were intended to implement said statute, gave a contractor the option of appealing to the Commission or instituting suit at once. According to the Rules which the Commission proposed on December 30, 1964, however, a contractor no longer will have such an option; the proposed Rules would require that he appeal to the Commission as a condition precedent to instituting suit. Since both sets of Rules are intended to implement the same statute, it is quite obvious that said statute cannot be interpreted both so as to give a contractor an option to appeal to the Commission or institute a suit and to require that he appeal to the Commission as a condition precedent to bringing such suit.

That two such diametrically opposed interpretations of the same statute have been arrived at indeed demonstrates that said statute is ambiguous. The Court has indicated the manner in which one may ascertain the meaning of an ambiguous statute:

"Significance in interpretation may be given to a consistent, long continued administrative application of an ambiguous statute . . . especially if the interpretation is contemporaneous with the enactment. . . . The best proof, of course, of a consistent administrative interpretation is the administrative body's regulations, or its published written decisions or interpretations. . . ." *Cleary v. Cardullo's Inc.*, 64 Adv. Sh. 633, 637-638.

2. The Legislature, in enacting § 5 (b), authorized the appointment of "a person of legal training and experience" as a hearing examiner to hear appeals. Had the Legislature intended that a hearing before an examiner was a condition precedent to the right to bring suit under c. 258, it surely would have provided for more than one hearing examiner. The number of claims presently made to the Department (approximately 100), including those submitted for hearing (approximately 65) and those commenced via a c. 258 petition (approximately 35) demonstrate the

physical impossibility of having one man hear all claims. It should be borne in mind that each claim by a contractor consisted of from 1–10 disputed items.

3. Section 5 (b) states that the

"board of contract appeals . . . shall *approve or disapprove* all claims made under any contract with the department. To assist the commission in performing this function . . . there shall be a hearing examiner who, after hearing, shall make a recommendation as to the disposition of the claim. . . ." (Emphasis supplied.)

The Legislature, in enacting § 5 (b) as it did, must have been aware of the fact that a department has no authority to settle claims, absent authorization by the Legislature.

"[I]f there is any power on the part of a State agency to settle claims against the Commonwealth by virtue of the statute permitting claims to be enforced by petition against the Commonwealth, under said c. 258 we think it is clear that that power can be exercised only after the petition is brought. . . ." *George A. Fuller Co.* v. *Commonwealth,* 303 Mass. 216, 221.

Once a petition is brought, the Attorney General is vested with the authority of representing the state departments, officers and commissions (c. 12, § 3), and only he may settle claims.

It should be noted that said section gives the Board of Contract Appeals, acting through its Hearing Examiner, a very limited power of review. All that it is authorized to do is to *approve or disapprove* the claims that have been appealed to it; it may not resolve or settle them.

One of the main purposes of statutes requiring administrative review of an agency decision prior to going to Court is to allow the reviewing body to resolve the controversy in such a manner so that resort to the Courts is unnecessary. This necessarily requires that said reviewing body have a more flexible and discretionary reviewing authority than merely to approve or disapprove all claims.

In contract actions brought against the Department, seldom does a Petitioner receive the exact amount of damages which he seeks. The final decision involves an adjustment of the claims and amounts involved. To require a hearing of all claims, which hearing must result in either a "Yes" or "No" answer to the claims, might seldom resolve the controversy. Resort to the Courts will, therfore, inevitably be necessary, thus defeating the purpose of having administrative review.

4. Section 5 (b), as originally worded, stated that:

"Such hearings shall be conducted as adjudicatory proceedings under chapter thirty A."

In July 1964, the Legislature amended said wording and exempted the hearings from the requirements of c. 30A. Said hearings were no longer to be conducted as adjudicatory hearings with their attendant formality.

It should also be noted that, according to § 5 (b):

"Said examiner *shall* at the request of the contractor or of the department or on his own motion summon witnesses and require the production of books and records and take testimony under oath. . . ." (Emphasis supplied.)

Neither the contractor, Department, nor Hearing Examiner is required by said statute to request the summoning of witnesses. If neither the contractor nor Department so requests, and the Examiner does not so move on his own, there may in fact be no hearing. Thus, to adopt an interpretation of a statute requiring a contractor to appeal to the Commission and have a hearing before the Hearing Examiner, as a condition precedent to instituting a suit, even though by the very same statute there would be no witnesses at said hearing unless one of the parties *voluntarily* so moved, might indeed render the hearing meaningless, except for complying with the requirements of the statute in having a hearing.

This legislative change indicates, I believe, the fact that the Legislature recognized that a hearing was not a condition precedent to instituting a suit.

It is, therefore, my opinion that c. 16, § 5 (b) does not require that one appeal the Department's decision to the Board of Appeals, as a prerequisite to instituting a suit. Said action does, however, set out the procedure which is available to a contractor who desires to take advantage of same.

Very truly yours,
EDWARD W. BROOKE

A so-called "pen gun" which fires tear gas capsules in the form of a bullet, is within the definition of a "firearm", G. L. c. 140, § 121, and therefore a license to carry as provided by G. L. c. 140, § 131, and a permit to purchase, as specified in § 131A of the same chapter, are necessary.

APRIL 26, 1965.

TO: THE COMMISSIONER OF PUBLIC SAFETY.
THE COMMISSIONER OF THE BOSTON POLICE DEPARTMENT.
THE CHIEFS OF POLICE OF ALL CITIES AND TOWNS IN THE COMMONWEALTH.

GENTLEMEN: — It has come to my attention that tear gas guns in the shape of fountain pens are being sold in the Commonwealth by different companies.

This so-called "pen gun" fires tear gas capsules in the form of a bullet. The gun itself has a firing pin and a chamber about three quarters of an inch in length. The capsule is placed in the chamber and fired by pulling back on the firing pin and releasing it so that it strikes the capsule in the same manner that any pistol, revolver, or other weapon does.

Several members of my staff have visited the ballistics lab at State Police Headquarters and witnessed a demonstration with the same type

of pen gun. A blank bullet was placed in the chamber instead of a tear gas capsule and was fired. The firing pin struck the detonating point of the blank and went all the way across the room, indicating that a real bullet could possibly be fired from such a "pen gun."

Further study of the so-called "pen gun" reveals that it is extremely dangerous when fired at very close range. When fired directly at the eyes it may cause injury to them. If fired at a distance of less than three feet, it can cause blindness temporarily and perhaps permanently.

General Laws, Chapter 140, Section 121 defines firearms as a pistol, revolver or other weapon of any description loaded or unloaded, from which a shot or bullet can be discharged and of which the length of barrel, not including any revolving, detachable or magazine breech, is less than eighteen inches.

It is my opinion that the above definition includes the so-called "pen gun," and therefore a license to carry as provided by Section 131 of Chapter 140 of the General Laws, and a permit to purchase, as provided in Section 131A of the same chapter, are necessary.

Very truly yours,
EDWARD W. BROOKE

One's right to apply under the so-called "grandfather clause" of St. 1963, c. 604, expired on December 31, 1964.

APRIL 27, 1965.

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

DEAR MRS. SULLIVAN: — On February 18, 1965, you requested my opinion on behalf of the Board of Registration of Radio and Television Technicians upon the following question:

"Can a person who has already received a Technician license under the so-called 'grandfather clause,' Chapter 604, Acts of 1963, and now realizes he must have a master technician license to operate on his own, acquire one by merely sending in an additional $5?"

In 1963, the General Court created a board of registration to govern the business of radio and television repairing, and provided that, with certain exceptions, "no person shall engage in the business of or act as a radio and television technician directly or indirectly, unless he is licensed." [G. L. c. 112, § 87RRR.] Because of the hardship which might potentially be caused persons already engaged in the business, the Legislature eased the effect of the licensing provisions by including a so-called "grandfather clause":

"Notwithstanding the provisions of section eighty-seven PPP to eighty-seven VVV, inclusive, of chapter one hundred and twelve of the General Laws, inserted by section two of this act, *any person who files an application for a license as a technician or a master technician with the board of registration of radio and television technicians at any time prior to December thirty-first, nineteen hundred and sixty-four,* on a form furnished by said board, containing a written statement that he is

engaged in the business of repairing and maintaining radio and television receivers in the commonwealth on the date of said application and furnishes evidence that he is and is found to be of good moral character, and pays the appropriate license fee as provided in section eighty-seven UUU, shall, without examination or compliance with any other provision of sections eighty-seven PPP to eighty-seven VVV, inclusive, be granted and issued such license by the board. Any such license shall expire one year from the date of issuance." (Emphasis supplied.)

St. 1963, c. 604, § 4, as amended by St. 1964, c. 110.

Thus, persons already engaged in the business of repair of radio and television receivers could, prior to the year 1965, receive either a technician or a master technician license, or both, simply by timely application and by meeting the more lenient requirements of the grandfather clause.

It is clear, however, that rights to apply under the above grandfather clause expired on December 31, 1964. The expiration date under the original act was June 30, 1964, which date was extended an additional six months by St. 1964, c. 110. Thus prospective applicants were given more than a year in which to file the necessary material.

The privilege of applying under the grandfather clause no longer exists. Henceforth, all applicants must comply with the provisions of the registration law and the rules and regulations of the Board. Possession of one license cannot in and of itself enable the licensee to secure a different license at his pleasure. The fact that certain licensees misconstrued the effect of the clause in question cannot extend a statutory provision beyond the date specified by the Legislature for its termination.

Accordingly, it my opinion that, as a result of the expiration of the grandfather clause, the answer to your question must be in the negative.

Very truly yours,
EDWARD W. BROOKE

The Department of Education may lawfully provide that a degree from an accredited college or university be a condition to appointment as a supervisor of attendance, but individual school committees are not authorized to establish educational requirements in the absence of action by said department.

APRIL 28, 1965.

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

DEAR DOCTOR KIERNAN: — In your letter of March 16, 1965, you have requested my opinion relative to the authority of the Department of Education and of local school committees to require a degree from an accredited college or university as a condition to appointment as a supervisor of attendance. You have asked the following three questions:

"1. Is the Massachusetts Department of Education authorized to make a degree from an accredited college or university a requirement for standards of qualifications for supervisors of attendance under Chapter 77, section 12?

"2. Does the mandatory appointing responsibility imposed on a School Committee by Chapter 77, section 12, grant it the authority to require a degree from an accredited college or university for appointment to the position of supervisor of attendance?

"3. Does Chapter 77, section 12, last amended 1948, supersede Chapter 31, section 6A, last amended 1935?"

Resolution of these problems requires consideration of the relationship between G. L. c. 31, § 6A and G. L. c. 77, § 12, and of the intent of the General Court in enacting such measures. Section 6A of c. 31 relates to the imposition of educational requirements for appointments to positions within the civil service, and provides as follows:

"No rule or regulation shall be made setting up educational requirements as a condition of taking a civil service examination *except in respect to professional and other positions for which such requirements are expressly imposed by statute* and to the extent of the requirements so imposed." (Emphasis supplied.)

Thus, despite the general rule that educational requirements may not be imposed as a condition to the taking of a civil service examination, the Legislature has provided for an exception for those cases in which the Legislature itself determines that educational requirements are desirable. Section 6A was added to c. 31 by St. 1935, c. 228, and has not been amended since that year.

In 1873, the General Court provided for the appointment of truant officers (now called supervisors of attendance) by the school committees of the several cities and towns. [St. 1873, c. 262, § 2.] As amended by § 1 of c. 184 of the Acts of 1928, this law (now G. L. c. 77, § 12) provided as follows:

"Every school committee shall appoint and fix the compensation of one or more supervisors of attendance, who may be either male or female, and shall make regulations for their government. Such supervisors shall not receive fees for their services. The committees of two or more towns may employ the same supervisors of attendance."

In 1948, this section was further amended:

"Every school committee shall appoint, make regulations governing and fix the compensation of one or more supervisors of attendance, who may be either male or female, *and who shall meet such standards of qualification for such work as shall be established by the department of education.* Such supervisors shall not receive fees for their services. The committees of two or more towns may employ the same supervisors of attendance."

Mass. G. L. c. 77, § 12, as amended by St. 1948, c. 573, § 5.

Accordingly, some thirteen years after the enactment of the statute generally restricting the imposition of educational requirements, the Legislature provided that — in the case of supervisors of attendance — "standards of qualification" might be established by the Department of Education.

When c. 31, § 6A and c. 77, § 12, as amended, are read together, the legislative intent becomes apparent. The latter is not intended to supersede the former, but to complement it. It is clear that the General Court intends to treat the position of supervisor of attendance as one for which educational requirements may be imposed, and thus as within the exemption contained in c. 31, § 6A. The desire of the Legislature to treat supervisors of attendance as professionals who must meet certain strict standards is by no means unreasonable.

". . . an attendance officer is an important adjunct to the public school system. . . . It seems apparent that the Legislature intended that a supervisor of attendance should be, to all intents and purposes, an officer connected with the public schools, charged with serious and important duties that have an intimate relation with that duty imposed upon the school committee by § 37 of said c. 71. . . ."

Ring v. *City of Woburn*, 311 Mass. 679, 692-693

That the amendment effected by St. 1948, c. 573, § 5 was meant to raise the standards applicable to supervisors of attendance becomes apparent by reference to the following section of the 1948 Act, which provides that "Nothing in section twelve of chapter seventy-seven of the General Laws shall affect the rights or status of any supervisor of attendance in office on the effective date of this act." Such protection of persons already holding the positions affected would clearly have been unnecessary had the requirements for qualification not been increased.

I am aware that the exception clause contained in c. 31, § 6A refers specifically to requirements which are "expressly imposed by statute." I do not believe, however, that this language necessitates that educational requirements actually be spelled out by the General Court in order to relieve a particular position from the limitations of § 6A. It is entirely consistent with sound administrative practice for the Legislature simply to provide that standards shall be established and then to delegate to the Department the working out of the specific requirements to be imposed.

General Laws c. 77, § 12, as amended, authorizes the Department of Education to establish standards of qualification. Admittedly, reference is not made specifically to educational standards. However, it is my opinion that it would be reasonable — in light of the nature of the position involved, and its close relationship to the public school system — for the Department to impose requirements which are educational in character. The requirement of a degree from an accredited college or university would certainly be within the discretion of the Department.

Section 12 of c. 77 does not, however, authorize the individual school committees to establish educational requirements in the absence of action by the Department of Education. Under this statute, a school committee is vested with authority to appoint attendance supervisors, to fix their compensation and to regulate the performance of their duties. The right to establish qualifications for the holding of such positions cannot be implied from such authorization. However, it is clear from the above that the Department of Education may lawfully provide that

an accredited college or university degree be a condition to appointment as a supervisor of attendance.

Very truly yours,

EDWARD W. BROOKE

Amounts of awards of damages need not be included in the Order of Taking required by G. L. c. 79, § 1, but these shall be included in the Notice of Taking required by G. L. c. 79, § 7C.

APRIL 28, 1965.

HON. HOWARD WHITMORE, JR., *Commissioner, Metropolitan District Commission.*

Re: Order of Taking by Eminent Domain — Inclusion of Award Therein.

DEAR COMMISSIONER WHITMORE: — Reference is made to your letter of April 23, 1965, requesting my opinion on whether the law requires the inclusion in a land taking order of the amounts of awards of damages which have been made by the Commission after appraisals in accordance with Chapter 79 of the General Laws as amended.

The contents of an order of taking are set forth in Section 1 of Chapter 79 of the General Laws. There is no language in that section of the statute which could be construed to require any agency exercising the power to take property by eminent domain to include in its order of taking the amounts of awards of damages which have been made by it after appraisals in accordance with the other provisions of said Chapter 79.

Your attention is respectfully invited to Section 7C of said Chapter 79 as inserted therein by Section 3 of Chapter 579 of the Acts of 1964. That section directs that a notice of taking shall be sent those whose property has been taken or who are otherwise entitled to damages. It further requires that such notice shall be in writing and *inter alia* shall state the amount of damages awarded for such taking.

It is my opinion that the amounts of awards of damages made by the Metropolitan District Commission after appraisals in accordance with the provisions of Chapter 79 of the General Laws, as amended, shall not be included in the order of taking required by Section 1 of said Chapter 79, but shall be included in the notice of taking required by Section 7C of said Chapter 79.

Very truly yours,

EDWARD W. BROOKE

The Treasurer of the Commonwealth is not authorized to distribute funds, pursuant to G. L. c. 70, § 3, unless and until the Commissioner of Education informs him, or a court of competent jurisdiction rules, that the reports required under c. 72 have been filed with the Commissioner's office in accordance with applicable provisions of the General Laws.

April 29, 1965.

Hon. Robert Q. Crane, *Treasurer and Receiver General of the Commonwealth.*

Dear Sir: — You have requested my opinion of whether the money which would otherwise be payable to the City of New Bedford under G. L. c. 70, § 3, may be withheld by you as a result of the certification by the Commissioner of Education that returns of that City have not been filed with his office in accordance with G. L. c. 72, § 6.

General Laws c. 72, § 6 provides as follows:

"A town whose report and returns do not reach the office of the commissioner on or before August fifteenth shall forfeit ten per cent of the sum to which it would otherwise be entitled under chapter seventy; if they do not reach said office before September first, the entire sum shall be retained by the state treasurer and added to the amount to be distributed under chapter seventy. For cause, the commissioner may grant an extension of time to any town."

According to the facts which you have given me, the Commissioner has certified to you that he has granted an extension of time to New Bedford to file reports in accordance with c. 72, but that such reports have not yet been filed. New Bedford has brought legal proceedings seeking a declaration that the information sought by the Commissioner was not authorized by c. 72, and that, accordingly, New Bedford's failure to provide the information was not prejudicial to it. The Commissioner's demurrer to the bill was sustained and New Bedford's appeal therefrom is now pending before the Supreme Judicial Court.

It is my opinion that you are not authorized to distribute funds, pursuant to G. L. c. 70, § 3, unless and until the Commissioner informs you or a court of competent jurisdiction rules that the reports required under c. 72 have been filed with the Commissioner's office in accordance with applicable provisions of the General Laws. To date, no such information has been given or ruling issued.

It will be of interest to you to note that in the aforementioned proceedings New Bedford petitioned the Superior Court to "enjoin and restrain the respondents [including the Commissioner] from taking any action, pending the outcome of the petitioner's appeal to the Supreme Judicial Court in this matter, which would deprive the City of New Bedford of any school aid to which it is entitled under chapter seventy." This Motion for Injunction was denied.

Very truly yours,

Edward W. Brooke

The practice of distributing free milk does not adhere to the minimum price requirements fixed by the Milk Control Commission, and is in violation of c. 94A, § 14(d). Consequently it is an appropriate subject for further action by said Commission.

April 30, 1965.

Hon. George W. Killion, *Secretary, Milk Control Commission.*

Dear Mr. Killon: — You have requested my opinion relative to the subject of free milk being distributed either upon presentation of a coupon and payment of the container deposit or with or without coupons by a milk dealer through his representative or the local "Welcome Wagon plan."

More specifically, you have asked "whether this offer and the giving of free milk is a violation of Section 14 (d) of Chapter 94A of the General Laws or any other section of said Chapter 94A and as such would constitute grounds for legal action."

That the production and distribution of milk are affected with a paramount public interest cannot be doubted; and, in view of the serious nature of that public interest, the regulation of milk has become a subject of special statutory concern.

Under the provisions of G. L. c. 94A, § 2 (2) the Milk Control Commission is authorized to both investigate and regulate, among other things, "all matters pertaining to . . . the production . . . storage . . . disposal, *distribution* and sale of milk within the commonwealth, and to the establishment and maintenance of reasonable trade practices relative to milk . . ." In the exercise of this responsibility, it is incumbent upon the Milk Control Commission to establish prices which will be most beneficial to the public interest and to prescribe the means of distribution that will best protect the milk industry.

Inasmuch as the Commission has the general authority to regulate the sale and distribution of milk under G. L. c. 94A, § 2 (2) and it is charged with protecting both the public and the industry in that context, it is reasonable that the distribution of free milk be a proper subject for their action. Consequently, in view of their authority and responsibility, it is reasonable that they could find the distribution of free milk as repugnant to trade practice and therefore act to halt its continuance.

In addition to the general regulatory powers of the Milk Control Commission, there are certain specific trade practices which have, by statute, been expressly prohibited. These are contained in c. 94A, § 14. Paragraph (d) of that section provides:

"No person shall sell within the commonwealth any milk, or render any service in connection with the sale or distribution of milk, at a price less than the cost of such milk or service, including, in the case of milk sold, the original purchase price thereof, and in every instance all regular direct or indirect elements of cost of service, physical handling and financial investment in the milk in question. No milk dealer shall use any method or device, whether by discount or rebate, free service,

advertising allowance, or by a combined price for such milk together with another commodity or service, as a result of which the total price for the milk and other commodity or service is less than the aggregate of the prices for the same when sold or offered for sale or performed separately, or otherwise. In the case of any person effecting sales of milk which has not been purchased, there shall be included as a part of the cost of such milk, in lieu of the original purchase price thereof, an amount equal to the purchase price which would have been payable under this chapter or under similar provisions of earlier law and the orders, rules and regulations of the commission made thereunder, if such person had purchased such milk within the commonwealth."

Consequently, even were it alleged that the Commission's general authority not be sufficient, the language of § 14 clearly precludes the distribution of milk on any basis wherein the price of the milk would be less than the cost of the milk, including the original purchase price and all regular direct or indirect elements of cost of service, physical handling and financial investment. It is impossible to imagine that the distribution of free milk could possibly satisfy these provisions. There is no price whatsoever and therefore no reflection on any basis of the cost of the milk.

In view of this failure of the practice of distributing free milk to to adhere to the minimum price requirements fixed by the Commission, it is my opinion that such practice violates c. 94A, § 14 (d) and would be an appropriate subject for further action by the Milk Control Commission.

Very truly yours,
EDWARD W. BROOKE

The Gas Regulartory Board's considerations and decisions cannot lawfully be reviewed or overruled by the Commission of the Department of Public Utilities.

The Public Utilities Commissioners do not have financial control over the Gas Regulatory Board.

The determination as to the independence of a given agency from the department in which it has been placed is made upon the basis of the character and functions of the agency in question, and upon consideration of practicality in administrative operations and relationships.

MAY 4, 1965.

HON. GEORGE J. COOGAN, *Chairman, Board Regulating Installation of Gas Piping and Gas Appliances in Buildings.*

DEAR MR. COOGAN: — I have received your letter of March 19, 1965, relative to the status of the Gas Regulatory Board created by c. 737 of the Acts of 1960. That chapter provided in part as follows:

"There shall be in the department [of Public Utilities] a board consisting of the chairman of the commission or a representative from his department designated by him, the commissioner of public safety or a

representative from his department designated by him and the commissioner of public health or a representative from his department designated by him. . . ."

The Board is authorized and directed to promulgate uniform rules and regulations to govern gas fitting in buildings in the Commonwealth, and provisions relating to the adoption of such rules and regulations are included. By c. 623 of the Acts of 1962, the General Court added further provisions relative to the issuance of gas fitters' licenses by the Board. In order to resolve the present dispute over the autonomy of the Gas Regulatory Board, you have requested my opinion whether considerations and decisions of the Board may lawfully be reviewed or overruled by the Commission of the Department of Public Utilities.

The chapter which created the Gas Regulatory Board (St. 1960, c. 737) was enacted as an emergency law, effective October 28, 1960. It is apparent that the General Court determined that the traditional method of regulation of gas fitting by the cities and towns individually was no longer adequate to ensure a sufficiently high level of safety throughout the Commonwealth. Accordingly, the Legislature provided in § 4 of the 1960 act that all by-laws and ordinances of cities and towns relating to gas fitting within buildings were thereby annulled. Henceforth, the rules and regulations promulgated by the Board would be applicable in all municipalities, and treatment of gas fitting would be uniform in all places in the Commonwealth. Shortly thereafter, the licensing requirements referred to above were added, and authority to examine applicants and to issue licenses was vested in the Gas Regulatory Board.

The Board was made a part of the administrative structure of the Commonwealth. Its rules and regulations must be adopted in accordance with the provisions of G. L. c. 30A, the State Administrative Procedure Act. The Board has been given the responsibility of hearing appeals from rulings interpreting its regulations, and decisions rendered by the Board on such matters are subject to review under c. 30A as adjudicatory proceedings. [G. L. c. 25, § 12H.]

In light of the purpose for which the Board was created, and the provisions enacted to govern its procedures, it is my opinion that the Legislature intended the Board to operate independently, and not to be subject to the supervision and control of the Commission of the Department of Public Utilities. The individuals who sit upon this Board become aware of practical problems and develop an expertise to an extent which would be impossible for Public Utilities Commissioners burdened with a wide variety of responsibilities. Persons who deal with the Board are protected by carefully developed statutory procedures contained in both c. 25 and c. 30A.

Were the Commission of the Department of Public Utilities to be empowered to overrule the Gas Regulatory Board on matters clearly placed by statute within the jurisdiction of the latter, there would be little point to the existence of such a Board. I do not believe that the General Court would have authorized the Board to issue licenses and to promulgate regulations if the Public Utilities Commissioners retained the right to revoke such licenses and to nullify such regulations.

It is my opinion that such administrative confusion was not contemplated, and that the responsibility of regulating gas-fitting operations within the Commonwealth is vested in the first instance in the Gas Regulatory Board. Such jurisdiction should, in my view, be exercised independently of the Commission of the Department of Public Utilities.

Likewise, it is my opinion that the Public Utilities Commissioners are not meant to have financial control over the Board. The General Court has consistently made separate appropriations for the use of the Board. The work assigned to the Board is of a nature that requires certain appropriations, and I find no legal or practical reasons for ruling that such funds should be channeled through the Department of Public Utilities. Financial control of the Board by the Department could conceivably enable the latter to influence decisions which are the responsibility of the Board.

I am aware that the Legislature has placed the Board within the Department of Public Utilities, and has not specifically indicated that it is not to be subject to Department control (G. L. c. 25, § 12H). The placing of the Board within a department in and of itself casts no light upon the status of the Board, since the governmental structure of the Commonwealth requires that all State bodies be assigned to one or another of the twenty departments of government. And the context is such that it was not necessary for the Legislature expressly to exempt the Board from Department supervision. Comparison should be made with G. L. c. 25, § 12F, which governs the Department's commercial motor vehicle division, and which states that the division shall be "under the general supervision and control of the commission." Such language does not appear in connection with the Gas Regulatory Board.

Employees of the Department are subject in all instances to supervision by the Commission:

"The commission may assign to all officers and employees appointed or employed under the four preceding sections such duties as it shall from time to time deem advisable, but all acts of such officers and employees shall be done under the supervision and control of, and subject to revision by, the commission."

G. L. c. 25, § 10.

This provision does not apply to the Gas Regulatory Board, the members of which are not employed under the section specified in the above quotation. In addition, the Board must hire an examiner under c. 25, § 12J, and such examiner is not subject to the above § 10.

It should be noted that in other instances the General Court has created independent agencies within departments which are not subject to control by such departments, and yet has not included language specifically exempting such agencies from outside control. See, for example, c. 22, §§ 11 and 12, which sections place the Board of Elevator Regulations and the State Boxing Commission within the Department of Public Safety. A determination as to the independence of a given agency from the department in which it has been placed cannot be made solely on the basis of the failure of the Legislature specifically to provide

that the agency shall be autonomous. It must be made upon the basis of the character and functions of the agency in question, and upon consideration of practicality in administrative operations and relationships.

The Gas Regulatory Board has been assigned specific functions which are of substantial importance to the safety and welfare of the general public. Provisions have been made to govern the carrying out of its responsibilities. I do not believe – and I find nothing to indicate – that the General Court intended the Board to function subject to the approval of the Commission of the Department of Public Utilities. Accordingly, it is my opinion that the Board was intended to act independently, and that its considerations and decisions may not lawfully be reviewed or overruled by the Commission.

Very truly yours,

EDWARD W. BROOKE

That portion of G. L. c. 123, § 101, which required advice and consent of the Executive Council for discharges effected pursuant to said section has been repealed by St. 1964, c. 740.

MAY 5, 1965.

HON. KEESLER H. MONTGOMERY, *Executive Secretary, Executive Council.*

DEAR MR. MONTGOMERY: — I am in receipt of your letter of April 1, 1965, which relates to petitions for releases from state hospitals pursuant to § 101 of c. 123 of the General Laws. You have requested my opinion as to whether the initiative petition approved by the electorate in the general election of November, 1964 [St. 1964, c. 740] removes from the Executive Council the responsibility of approval of such discharges.

Prior to the effective date of St. 1964, c. 740, G. L. c. 123, § 101 provided as follows:

"If a person indicted for murder or manslaughter is acquitted by the jury by reason of insanity, the court shall order him to be committed to a state hospital or to the Bridgewater state hospital during his natural life. *The governor, with the advice and consent of the council, may discharge such a person therefrom when he is satisfied after an investigation by the department* [*of mental health*] *that such discharge will not cause danger to others.*" (Emphasis supplied.)

Thus, discharge of a person committed under § 101 depended upon a determination by the Governor, with such determination subject to approval or disapproval by the Executive Council.

Chapter 740 of the Acts of 1964 repealed — with a few exceptions — all portions of the general and special laws which provided for Executive Council approval of actions and decisions taking place within the executive branch of government. Responsibility for certain executive actions which was formerly shared by the Governor and the Council is now vested in the Governor alone. Your present question is clearly decided by § 4 of the new Act:

"Subject to Section 2 of this Act and except as required by the Constitution of the Commonwealth, so much of each provision of the General Laws and of any special law as requires the advice and consent of the council with respect to any action or omission to act by the governor or by any officer, agency or instrumentality in the executive department . . . is hereby repealed."

Chapter 123 is not exempted by § 2 of St. 1964, c. 740, and approval by the Executive Council of discharges under § 101 is not required by the Massachusetts Constitution. Accordingly, it is my opinion that that portion of c. 123, § 101 which required the advice and consent of the Executive Council for discharges effected pursuant to its provisions must now be treated as repealed.

Very truly yours,
EDWARD W. BROOKE

A function tendered to a person "whose office or employment is in any law enforcement, regulatory or investigatory body or agency of the Commonwealth," for which invitations have been issued, but for which no tickets have been sold nor contributions solicited, is not, in and of itself, a violation of G. L. c. 268, § 9A. However, if amounts are to be, or have been, solicited especially for a gift, there would indeed be a failure to abide by the Testimonial Dinner Law.

MAY 8, 1965.

HON. HOWARD WHITMORE, JR., *Commissioner, Metropolitan District Commission.*

DEAR COMMISSIONER WHITMORE: — You have requested my opinion relative to the legality of a function to be held in your honor on Sunday, May 9, 1965. I understand that the gathering, to be sponsored by the Republican City Committee of Newton, is for the purpose of noting your long public service as Alderman and Mayor of Newton, member of the House of Representatives of the Commonwealth and Commissioner of the Metropolitan District Commission. Although invitations for the gathering have been issued, tickets as such have not been sold nor contributions solicited. However, you have informed me that it is planned to present you with a gift at some point during the evening. On the basis of these facts, you have asked whether the planned function is a violation of General Laws, chapter 268, section 9A, the so-called "Testimonial Dinner Law."

General Laws, chapter 268, section 9A provides as follows:

"No person shall sell, offer for sale, or accept payment for, tickets or admissions to, nor solicit or accept contributions for, a testimonial dinner or function, or any affair, by whatever name it may be called, having a purpose similar to that of a testimonial dinner or function, for any person, other than a person holding elective public office, whose office or employment is in any law enforcement, regulatory or investigatory body or agency of the commonwealth or any political subdivision thereof.

"Whoever violates any provision of this section shall be punished by a fine of not more than five hundred dollars."

Accordingly, it is apparent that the statute is directed primarily at the sale of tickets or other solicitation of contributions for such gatherings. It does not prohibit the actual holding of dinners or other functions as such. In addition, the fact that a criminal penalty may be imposed requires that the law be strictly construed.

There can be no doubt that in your present position you conform to the statutory reference to persons "whose office or employment is in any law enforcement, regulatory or investigatory body or agency of the commonwealth. . . ." The Metropolitan District Commission has been assigned its own police force, and consequently must clearly be considered a law enforcement agency. Likewise, there are regulatory aspects to the Commission's functionings, since the Commission is responsible for the supplying of water to a number of Eastern Massachusetts communities.

However, on the basis of the facts contained in the first paragraph of this opinion, it is my conclusion that the scheduled gathering is not, in and of itself, a violation of the Testimonial Dinner Law. Tickets have not been sold or offered for sale. Contributions have apparently not been accepted or solicited. The function that has been planned does not appear to have violated the provisions of General Laws, chapter 268, section 9A in any way.

I would, nevertheless, point out the following with regard to the gift to be presented. Payment of the cost of the gift from the treasury of the Newton Republican City Committee does not by itself violate the statute. But solicitation of contributions for the treasury for the purpose of purchasing the gift would be the equivalent of seeking and accepting contributions for the testimonial gathering as such, and therefore would be a circumvention of the Testimonial Dinner Law. Consequently, should the Committee vote to purchase a gift from funds already available in its treasury — funds not earmarked specifically for such a gift — there would be no violation. On the other hand, if amounts have been solicited especially for the gift, there would indeed be a failure to abide by the Testimonial Dinner Law.

Accordingly — with the sole proviso relative to the contemplated gift set forth above — it is my opinion that the planned function in your honor does not violate General Laws, chapter 268, section 9A.

Very truly yours,
EDWARD W. BROOKE

In accordance with St. 1960, c. 774, § 2, upon certification by the Commissioner of Administration that a project has actually been completed, the Comptroller must make the transfer of funds desired to Item 8261-20. "Substantially complete" does not mean "completed."

Transfer of funds from the contingency reserve (item 8260-68 of St. 1959, c. 604 § 2) of an amount sufficient to meet the cost of furnishings and equipment to be purchased (1958 Item 8259-45) is a practical and justified means of completing a project which has been authorized and may lawfully be effected.

MAY 19, 1965.

HON. HORACE M. CHASE, *Director of Building Construction.*

DEAR MR. CHASE: — I have your letters of March 3, 1965 wherein you request interpretation of portions of certain Special Capital Outlay statutes. Your first letter relates to a request made by you on January 27, 1965, with the approval of the Commissioner of Administration, that the Comptroller transfer the sum of $390,000.00 from item 8261-05 of section 2 of c. 774 of the Acts of 1960 to the contingency reserve account established by item 8261-20 of that section. Your second letter refers to a request of February 4, 1965, also approved by the Commissioner, that the sum of $277,894.00 be transferred from a contingency reserve created by item 8260-68 of c. 604 of the Acts of 1959 to item 8259-45, an account relating to the construction and equipping of the third section of a science center for the University of Massachusetts. You have asked whether the Comptroller may lawfully make the requested transfers. Since different questions are presented by the prospective transfers, I will treat with them separately.

1) Item 8261-20 of St. 1960, c. 774, § 2 established a contingency reserve account for the purpose of covering "unexpected contingencies in the cost of projects authorized by this act. . . ." The item further provides:

". . . that when a project authorized by this act has been determined to be completed by the commission on administration and finance [now the Commissioner of Administration], the comptroller, with the approval of said commission, may transfer the unencumbered balance to this item."

The Commissioner has certified that the project authorized by item 8261-05 of this section (construction and equipping of a natural resources laboratory and classroom building) is now "substantially completed." Certain change orders presently being considered may or may not eventually be approved; but funds are available to pay for whatever changes may be necessary. The sum of $390,000.00 remains as surplus over and above what may be required to meet possible obligations, and you have requested the Comptroller to transfer this amount to the contingency reserve referred to above.

It is clear that no transfer may lawfully be made under the authority of item 8261-20 on the basis of a certification that a project is "substantially complete." The item requires a determination by the Commissioner that a project has been "completed"; anything short of such a certification will not satisfy what is apparently a condition precedent

to the making of the requested transfer. The phrase "substantially completed" could be applied to projects which are in a variety of stages; transfers of funds made on the basis of "substantial completion" could conceivably deprive projects which are actually unfinished of sums necessary to finance their completion. The Comptroller is not only entitled to insist upon a certification of completion under item 8261-20, but actually lacks authority to transfer funds unless such certification is made.

However, upon certification by the Commissioner that a project has actually been completed, the Comptroller must – in my opinion – make the desired transfer of funds. Determinations as to completion are to be made by the Commissioner. The General Court has not indicated that such responsibility is to be shared or is to be subject to review in any way. I do not believe that the Legislature intended the Commissioner's decision to be checked, and perhaps reversed, by an official whose duties are virtually entirely ministerial.

It would be completely inconsistent with prior practice for the Legislature to vest in the Comptroller authority to make decisions of a substantive nature. Comptrollers – both in government and in private business – have traditionally been assigned duties of a ministerial nature exclusively. The Supreme Judicial Court has indicated that the Comptroller may operate in an advisory capacity in certain areas, but that generally he lacks decision-making authority.

Ward v. *Comptroller of the Commonwealth,* 345 Mass. 183, 185-186

O'Connor v. *Deputy Commissioner and Comptroller of the Commonwealth,* 1965 Mass. Adv. Sh. 329, 331

The Comptroller is without investigative and other facilities necessary to review a determination by the Commissioner relative to completion of a project. Considering the probable inability of the Division of the Comptroller to make a decision of this nature, and the traditional practice of assigning to the Division ministerial tasks of an accounting nature only, I am convinced that the General Court did not intend to vest in the Comptroller the right to overrule the Commissioner on the question of transfer of funds.

I am aware that item 8261-20 provides that the Comptroller *may* transfer the unencumbered balance, and that the word *may* is frequently used to indicate the existence of discretion. However, in certain instances, the word *may* will not be construed as permissive.

". . . The word 'may' ordinarily construed is permissive and not mandatory. In the construction of statutes when applied to a public officer in connection with a duty to be performed it is construed as 'must' or 'shall,' if such appears to have been the intention of the Legislature. . . ."

Attleboro Trust Company v. *Commissioner of Corporations and Taxation,* 257 Mass. 43, 51

No particular public interest appears which would be protected by establishing the Comptroller as a reviewing agent of the wisdom of transfer of funds. It is likely that the General Court used the word *may* to indicate that the transfers in question could lawfully be made despite

the general provisions relative to transfers of unexpended receipts contained in G. L. c. 29, § 56. The word has not, in my opinion, been used in order to vest in the Comptroller discretion to refuse to make a transfer after the Commissioner has properly certified that the project in question has been completed.

2) In 1956 the General Court authorized and appropriated funds for the preparation of plans for a science building for the University of Massachusetts [St. 1956, c. 711, § 2, item 8157-33]. In succeeding years, the Legislature appropriated amounts for the construction, furnishing and equipping of the various sections of the building. $2,734,000.00 was appropriated in 1957 for construction and for the purchase of furnishings and equipment. Use of federal funds was authorized, as well as use of any amounts remaining from the 1956 appropriation.

In 1958 and 1959, amounts were appropriated for construction and equipping of the third section of the building, and in 1960 an appropriation was made for the fourth section. [St. 1958, c. 650, § 2, item 8259-45; St. 1959, c. 604, § 2, item 8260-25; St. 1960, c. 774, § 2, item 8261-09.] Each item authorized use of federal funds and amounts remaining from previous appropriations for the building.

The project is now close to completion. However, furnishings and equipment must still be purchased for the fourth section. You have informed me that an additional $277,894.00 over and above the appropriation for the fourth section will be necessary. This amount is available in item 8260-68 of St. 1959, c. 604, § 2, a contingency reserve established to cover unexpected expenses encountered on projects authorized by special capital outlay acts passed between 1952 and 1958. You have requested transfer from this contingency reserve of an amount sufficient to meet the cost of the furnishings and equipment to be purchased, such amount to be placed in item 8259-45 of St. 1958, c. 650, § 2.

This actually is an indirect way of using funds which have been allocated as reserves for the third section of the building to meet expenses incurred in the furnishing and equipping of the fourth section. Thus limitations placed upon the contingency reserve in question will in one sense be exceeded, since the reserve was created to relate to acts passed between 1952 and 1958, and funds are now sought from it to defray expenses incurred under a 1960 statute.

However, I do not believe that such a transfer is improper, or inimical to the intentions of the General Court. The primary purpose to be achieved is the construction and equipping of a science building for the University of Massachusetts. As an alternative to appropriating a huge sum at one sitting for the project, the Legislature chose to appropriate amounts periodically as construction proceeded. The language contained in these various appropriation items to the effect that amounts appropriated by previous statutes are to be carried over to the extent that funds remained unexpended indicates that the Legislature intended to finance a complete project rather than a series of individual structures.

Funds are now available in the contingency reserve established by item 8260-68 of St. 1959, c. 604, § 2. This reserve was established to "cover unexpected contingencies in the cost of projects authorized by

this act and by [chapter] . . . six hundred and fifty of the acts of nineteen hundred and fifty-eight." Amounts may therefore lawfully be transferred from it to the 1958 item in question [item 8259-45], as you have requested. The transferred funds may then be used to meet any expenses which may be incurred under item 8259-45. The surplus which then remains may — by the terms of the items involved — be carried over to St. 1959, c. 604, § 2, item 8260-25 and from there to St. 1960, c. 774, § 2, item 8261-09, at which point it may be used to purchase furnishings and equipment for the fourth section of the science building.

Sums appropriated for one portion of the project in question remain unused while another portion cannot be completed because money is not available. Such a result could not have been intended by the General Court. Transfer of funds from a contingency reserve as set forth above is a practical and justified means of completing the project which has been authorized. Accordingly, it is my opinion that the transfer requested in your memorandum of February 4, 1965 may lawfully be effected.

Very truly yours,
EDWARD W. BROOKE

State and local police retain full jurisdiction regarding criminal offenses committed on land deeded to the United States of America and referred to as the new Cape Cod Federal Reservation, and have concurrent jurisdiction with the United States Rangers over the offense of Disorderly Conduct.

MAY 19, 1965.

HON. RICHARD R. CAPLES, *Commissioner of Public Safety.*

DEAR COMMISSIONER CAPLES: — I have received your letter of February 10, 1965, requesting my opinion on numerous questions involving the jurisdiction of federal, state and local police on the new Cape Cod federal reservation.

You state that on April 2, 1963, land was deeded to the United States of America to be used as a reservation; that it was provided in the deed that the interest of the United States was to be proprietary only and that the Commonwealth of Massachusetts shall continue to exercise all the jurisdiction, power and authority possessed by it over and within said land. In addition, you state that the jurisdiction of the reservation is under the Department of the Interior, supervision being by the U. S. Rangers who are allowed to make arrests on the reservation for disorderly conduct.

On these facts you ask:

"1. What is the jurisdictional position of the state and local police relative to criminal offenses committed on the reservation?"

In our General Laws there is only one section that specifically deals with the problem of jurisdiction over land acquired by the United States Government in this Commonwealth. Those provisions are set out in G. L. c. 1, § 7, as follows:

"The United States shall have jurisdiction over any tract of land within the commonwealth acquired by it in fee for the following purposes: for the use of the United States bureau of fisheries, or for the erection of a marine hospital, custom office, post office, life-saving station, lighthouse, beacon light, range light, light keeper's dwelling or signal for navigators; provided, that a suitable plan of such tract has been or shall be filed in the office of the state secretary within one year after such acquisition of title thereto. But the commonwealth shall retain concurrent jurisdiction with the United States in and over any such tract of land to the extent that all civil and criminal processes issuing under authority of the commonwealth may be executed thereon as if there had been no cession of the jurisdiction, and exclusive jurisdiction over any such tract shall revest in the commonwealth if such tract ceases to be used by the United States for such public purpose."

It is doubtful that the Cape Cod Reservation in question falls within the purposes specified in G. L. c. 1, § 7 for the use of such land and thereby does not fall within the operation of that statute. Nevertheless, it is my opinion that, although this statutory reservation of concurrent jurisdiction is not applicable, the reservation of jurisdiction in the grant itself would allow the same result.

On the basis of the express reservations in the deed, as you have stated them, it is my opinion that there is, in fact, jurisdiction retained in the Commonwealth of Massachusetts to act in all civil and criminal matters. Consequently, state and local police would retain full jurisdiction regarding criminal offenses committed on the reservation.

As a second question you have asked:

"2. May the state and local police arrest offenders on the reservation for the offence of Disorderly Conduct?"

My answer to your second question is in the affirmative. As I have indicated, the reservation in the Commonwealth of *all* jurisdiction, power and authority over and within said land clearly has no limitations either express or implied. The fact of having expressly granted to the U. S. Rangers the authority to arrest for disorderly conduct is not in any way in diminution of the state and local authority also so to act. Rather, it is the grant of a specific concurrent jurisdiction to the U. S. Rangers, in addition to the already extant authority in the state and local police.

It is therefore my opinion that the power, jurisdiction and authority of the state and local police has not been restricted and, in addition, the U. S. Rangers have been given limited authority to arrest for disorderly conduct. Concurrent jurisdiction exists for arresting offenders on the reservation for disorderly conduct.

As a third question you ask:

"3. If the United States Rangers first become aware of the commission of acts of Disorderly Conduct, may they bypass the requirements of federal law by utilizing the state and local police for the convenience of the United States Rangers?"

General Laws c. 147, § 1A provides that:

"Upon requisition of the commanding officer or other person in charge of a reservation of the United States of America, the commissioner, or the mayor or the selectmen of any city or town the territory of which adjoins or includes, in whole or in part, such reservation, *may provide* police officers, who shall perform such police duties within such reservation as such commanding officer or other person may assign to them, and who shall, while on such assignment, have the authority, immunities and privileges that they would have while acting as duly appointed and qualified police officers elsewhere within the commonwealth." (Emphasis supplied.)

It is my opinion that the answer to your third question is in the affirmative. The provisions of the above-quoted chapter, authorizing the head of the reservation to request police assistance from the Commissioner of Public Safety and adjoining cities and towns, would, in effect, allow the U. S. Rangers to bypass the requirements of Federal law by utilizing state and local police to act. However, it must be noted that although the making of the request is authorized, compliance with the request is not mandatory. The statute provides that the Commissioner or local officials "may provide police officers." There is no requirement that they must so provide. Consequently, the ability of the U. S. Rangers to "bypass" Federal regulations by utilizing state or local police is limited by the retention of discretion in the Commissioner and the local officials as to whether or not to provide police officers.

Accordingly, it is my opinion that there is no basis for either state or local police being utilized for the "convenience" of the U. S. Rangers. The necessity of both state and local police to assist in the prevention and punishment of acts of disorderly conduct in conjunction with the U. S. Rangers is one to be determined principally by their duty to act and the public interest involved.

As a fourth question you have asked:

"4. If the offence of Disorderly Conduct is committed in the presence of the United States Rangers and local and state police, which organization could legally make the arrest?"

I have stated in answer to your previous three questions that the jurisdiction to act in cases of disorderly conduct is concurrent among the state, local and federal enforcement agencies. Consequently, if the offense of disorderly conduct were to be committed in the presence of all three law enforcement groups, all three would be legally authorized to act.

As a fifth question you have asked:

"5. If the local or state police made the arrest in the above cited instance, would they be attempting to operate in a field from which they have been excluded by a paramount assertion of power by the Federal Government?"

I answer your fifth question in the negative. Since the deed, as you have reported it, expressly retains in the Commonwealth the unrestricted right to continue "to exercise all of the jurisdiction, power and authority

possessed by it over and within said land," it is my opinion that if the state or local police make the arrest hypothecized, they would not be operating in a field from which they have been excluded by a paramount assertion of federal power. This is true in view of the express reservation of authority to the state and the absence of any language restricting the exercise of that authority. There is no indication whatever from the language you have quoted in the deed that any such paramount assertion of power was desired or intended.

As a sixth question you ask:

"6. Has the field of regulation over the reservation on Cape Cod relative to the offence of Disorderly Conduct been occupied by the Federal Government?"

In view of the answers to your first five questions, it is clear the answer to this question is in the negative.

As a seventh question you ask:

"7. If a felony, e.g., murder, is committed on the reservation on Cape Cod, which authority would conduct the investigation, the federal authority or the local and state police?"

Your statement of facts does not indicate that the authority of the U. S. Rangers is any more extensive than that of concurrent jurisdiction with state and local officials for the offense of disorderly conduct. There is also no indication that the U. S. Rangers have any authority whatever to act in felony cases. Consequently, since the authority, power and jurisdiction is retained in the Commonwealth, this must be taken to include all civil and criminal jurisdiction on the reservation.

It is my opinion, therefore, that the local or state police would have the authority to conduct the investigation of any felony, subject to the possibility of federal action in appropriate circumstances.

Very truly yours,

EDWARD W. BROOKE

"Residence" pursuant to G. L. c. 6, § 78, connotes only bodily presence as an inhabitant of the Commonwealth and does not require the establishment of a residence with any intent to make it a fixed or permanent home.

MAY 20, 1965.

HON. FRANCIS A. HARDING, *Commissioner of Rehabilitation, Massachusetts Rehabilitation Commission.*

DEAR COMMISSIONER HARDING: — I am in receipt of your letter of March 31, 1965, requesting my opinion on the eligibility of two applicants for the services of your Commission relating to the residency requirement of G. L. c. 6, § 78.

General Laws c. 6, § 78 provides in part:

"The commission shall provide vocational rehabilitation services directly or through public or private rehabilitation facilities to any handicapped person (1) *who is a resident of the state at the time of filing his application therefor. . . .*" (Emphasis supplied.)

You have specifically asked my opinion as to the applicability of the above-quoted residence requirement to one party of Cambridge, Massachusetts, whom you have described as follows:

"Miss is a 27 year old single woman, who is a native of Formosa, and a graduate assistant and doctoral candidate at Massachusetts Institute of Technology in the department of Nutrition. She has an orthopedic condition involving some instability of her right knee which was operated on unsuccessfully in Iowa last summer, and which may need some physical therapy and possibly surgery, according to Massachusetts General Hospital orthopedic clinic. She receives $350 a month for her work as an assistant, but her Massachusetts Institute Technology Grant Insurance does not carry any pre-existing condition. We have checked with the International Institute who knows of no other resource for this kind of case. Miss is here on a student visa (F) and is apparently not committed to returning to Formosa. Her own plans for the future are not really decided."

and to Mrs. of Cambridge, Massachusetts, whom you also describe.

"Mrs. is a 24 year old married woman who is a citizen of Malaya and whose husband, also a citizen of that country, is a student at Harvard Graduate School of Education where he is studying on a Ford Foundation Scholarship of $450.00 per month which is to cover all their expenses.

"Mrs. was referred to Massachusetts Rehabilitation Commission by the Boston Guild for the Hard of Hearing for vocational counseling and possible help with a hearing aid since she has had a recent, gradual loss of hearing. She is a housewife at present and trained in Taiwan as a pharmacist but cannot practice in this country.

"Mr. and Mrs. are here on an exchange visa, DSP-66, Category J., which we understand is not the same as a student visa; it allows them to work in this country if necessary. However, the recipient of the Ford Foundation Scholarship is committed to returning to his homeland and practicing in his field for five years upon completion of training — in this case, June, 1967. His wife, of course will accompany him."

The language of G. L. c. 6, § 78, is clear as to the qualifications of applicants for rehabilitation. Among other things, it specifically provides that the applicant for the Commission's services must be a resident of the State at the time of filing his application. "The term 'residence' appearing in our statutes has been construed as one of flexible meaning, depending upon the phraseology of the particular statute, the relation of the term to the remaining words employed, and the aim and object intended to be accomplished by the legislature." *Cambridge* v. *West*

Springfield, 303 Mass. 63, 67 and cases cited therein. In so far as this statute requires "residence" in the Commonwealth, that word must be construed according to its normal meaning. The phraseology, context and purpose of the statute do not afford a basis for any other construction.

Residence as that term is defined by Black's Law Dictionary is "a factual place of abode. It requires only bodily presence as an inhabitant of a place." There is no requirement in establishing a residence that the party do so with any intent to make it a fixed or permanent home. *Jenkins* v. *North Shore Dye House, Inc.,* 277 Mass. 440, 444. In that sense, residence is not synonymous with domicile. An individual may have any number of residences; although he can have only one domicile.

In the cases of Miss and Mrs. , there is some doubt as to whether or not they will remain in this Commonwealth. However, although that fact might influence a determination of their domicile, it is not relevant to the determination of their residence. Both of them may, so long as they are physically present in Massachusetts, have residence here, even though they have no domicile and may not be able to establish the same.

Consequently, on the facts that you have given, since both Miss and Mrs. have been and are living here in the Commonwealth, it is my opinion that they are residents of this Commonwealth and do satisfy the requirements of G. L. c. 6, § 78.

Very truly yours,
EDWARD W. BROOKE

The Board of Registration in Medicine may legally license a physician to practice in Massachusetts provided that it determines that the standards prescribed by the state where such physician is licensed meet the requirements of this Commonwealth as administered by said Board.

MAY 20, 1965.

HON. DAVID W. WALLWORK, M.D., *Secretary, Board of Registration in Medicine.*

DEAR SIR: — You have requested my opinion as to whether the Board of Registration in Medicine may legally license a physician to practice medicine in Massachusetts, by endorsement of his existing license to practice in Pennsylvania.

Your precise question is:

". . . Did the Legislature intend that the Board register by endorsement an applicant who was registered in another state simply upon a written examination or upon a written examination by the Board of the State in which the original license was granted?"

You have pointed out that c. 365 of the Acts of 1946 provides in part as follows:

"The Board may, without examination, grant certificates of registration as qualified physicians to such persons as shall furnish with their

applications satisfactory proof that they have the qualifications required in the Commonwealth to entitle them to be examined and have been licensed or registered upon a written examination in another state *whose standards, in the opinion of the Board, are equivalent to those in the Commonwealth. . . .*" (Emphasis supplied.)

The said c. 365 does not specifically require that the written examination in another state be conducted by a state agency. It is therefore necessary for the Board to inquire into the standards of the Commonwealth of Pennsylvania in order to ascertain, in its opinion, whether such standards are equivalent to those in this Commonwealth. Such inquiry should disclose whether the physician licensed in Pennsylvania meets the requirements established by your Board. Under the statute, the opinion of the Board of Registration in Medicine is the controlling factor. Inasmuch as the emergency preamble of the said c. 365 recites that the purpose of the act is to provide for reciprocal registration of physicians, it is incumbent upon the Board of Registration in Medicine to ascertain that the standards for registration in Pennsylvania are equivalent to our own, and thereby to formulate its opinion as to the qualifications of the applicant for registration.

In view of the above discussion, it is my opinion that the Board may properly register the applicant provided that the Board, in its discretion, determines that the standards of Pennsylvania satisfactorily meet the requirements of this Commonwealth as administered by the Board of Registration in Medicine.

Very truly yours,
EDWARD W. BROOKE

House Bill No. 3578, an exercise of the police power which changes general provisions of law but which leaves specific contracts and duties unaltered is constitutional in its amended form.

MAY 21, 1965.

HON. JOHN A. VOLPE, *Governor of the Commonwealth.*

DEAR GOVERNOR VOLPE: — You have requested my consideration of House Bill No. 3578 entitled, "AN ACT TO PERMIT DOMESTIC INSURANCE COMPANIES TO WITHDRAW FROM THE BUSINESS OF INSURANCE AND CONTINUE AS BUSINESS CORPORATIONS." This measure was passed by the Senate and House of Representatives earlier this month, but was returned by you to the General Court because of certain constitutional questions which had been raised. The Act has now been amended, and has once again reached your desk for signature. In light of the history of this legislation, you have asked for my opinion relative to the constitutionality of the measure as amended.

House 3578 amends section 44 of Chapter 175 of the General Laws by adding three new paragraphs. The new paragraphs provide that any solvent domestic stock insurance company may — after reinsuring its outstanding risks and claims with another authorized insurance company — elect to continue as an ordinary business corporation by filing with the Secretary of the Commonwealth articles of amendment which

state the nature of the business to be transacted. If the Secretary finds that the changes conform to law, he shall endorse his approval upon the articles of amendment; thereafter, the corporation may carry on business under its amended powers. A company wishing to take advantage of the new provisions must give sixty days' notice of its intention to the Commissioner of Insurance, and must satisfy the Commissioner that all of its insurance contract obligations will be fully assumed by a solvent company approved by the Commissioner.

The Commissioner of Insurance may request any company which wishes to reinsure its obligations under this section to establish a contingency fund in trust in such amount as the Commissioner considers necessary to assure a full discharge of all such obligations. The amount of funds held in trust shall be increased or decreased as the Commissioner requires. If the corporation does not place the necessary funds in trust, the company which has assumed the obligations shall be responsible for transferring to the trust whatever amounts the Commissioner may require.

Prior to amendment, House 3578 provided that a corporation which reinsured pursuant to the new Act would continue to be liable only on those obligations which were not subject to reinsurance. This provision has now been changed so that the corporation remains liable on all of its outstanding obligations, irrespective of whether they have or have not been reinsured. The company retains the right to prosecute and defend suits, and to hold and dispose of property without being limited in any way by the provisions of this Act.

There can be no doubt that the measure prior to amendment impaired rights which had vested in individuals under lawful contracts, and thus violated provisions of both the Federal and the State Constitutions. The bill in its initial form permitted an insurance company to reinsure its obligations and transfer liability on an insurance contract from itself to another company. Although provision was made for the keeping of a trust fund to guarantee payment of obligations, the amount of the fund — and, in fact, the question whether the fund need be created at all — was left to the Commissioner of Insurance.

Thus, the Legislature enacted a measure which would, in effect, have abrogated a lawful contract and substituted a new and different contract in its place. As such, it would have been a clear violation of the "contract clause" of the Federal Constitution and the 'due process" clauses of the Federal and State Constitutions.

United States Constitution, Art. I, § 10; Amend. XIV
Massachusetts Declaration of Rights, Arts. 1, 10 and 12

The fact that policyholders may not be affected adversely by the contract change imposed upon them would not validate the Act in its original form. "The obligations of a contract are impaired by a law which renders them invalid, *or releases or extinguishes them. . . .*" (Emphasis supplied.)

Home Building & Loan Assoc. v. Blaisdell, 290 U. S. 398, 431

The measure has now been amended so that the corporation which reinsures pursuant to the Act is no longer relieved from liability on any

of its outstanding insurance contracts. Although an insurance company may — pursuant to the Act — elect to continue in an altogether different business capacity, it remains liable as before on all of the insurance contracts into which it has entered. Thus, a policyholder who contracted with the corporation while it was engaged in the business of insurance retains all rights to proceed against the corporation for the full amount of the policy — notwithstanding the fact that the business purposes of the corporation may have been altered. Although the Legislature may have authorized alteration of a company's business, it has in no way changed or otherwise interfered with the contract itself.

I am aware of the fact that the insurance business is subject to a high degree of regulation, and that the Act in question would permit insurance companies to enter fields which are not so strictly supervised. In one sense, therefore, the risk of a policyholder could possibly be increased, since the company to which he looks for payment is no longer so rigidly controlled. This, however, cannot be said to constitute an impairment of contractual rights. The Constitution prohibits the varying of the law which binds parties to perform a given agreement.

Blaisdell, supra, at p. 429

It does not prevent the Commonwealth from enacting a measure unrelated to the contract which might incidentally have the effect of decreasing the value of the contract to one of the parties.

No person has a vested right in any general rule of law or policy of legislation which would entitle him to insist that such law or policy remain unchanged.

Munn v. *State of Illinois,* 94 U. S. 113, 134

Chicago & Alton Railroad Company v. *Tranbarger,* 238 U. S. 67, 76

Accordingly, parties to contracts may not ordinarily rely upon immunity from change in general law.

Gross v. *United States Mortg. Co.,* 103 U. S. 477, 488

It is clear that no party can insist that the laws of Massachusetts relative to insurance companies remain the same. The Legislature can — within the limits of the police power — regulate the insurance business as it sees fit, and alter those regulations as it deems necessary.

The General Court considers the Act in question to be necessary and proper legislation. Contractual rights are not impaired by an exercise of the police power which changes general provisions of law but which leaves specific contracts and duties unaltered. Accordingly, in light of the above, it is my considered opinion that House Bill No. 3578, in its amended form, is constitutional.

Very truly yours,

EDWARD W. BROOKE

The commitment of a person to a penal institution is invalid where it appears that the treatment center is not actually established; the parole board does not have authority to continue supervision over the individual and cannot return him to a branch treatment center.

MAY 24, 1965.

HON. JOSEPH F. MCCORMACK, *Chairman, Parole Board.*

DEAR SIR: — Your predecessor in office has asked my opinion as to whether or not the Parole Board has the authority to continue under supervision the cases of the following men:

1. John Alexander — Committed on December 5, 1957, to the Branch Treatment Center at Walpole.

2. Edmund L. Croake — Committed on April 17, 1959, to the Branch Treatment Center at Walpole.

3. Donald S. Dupree — Committed on January 30, 1958, to the Branch Treament Center at Walpole.

4. Gerald D. Gendron — Committed on or about January 31, 1958, to the Branch Treatment Center at Concord.

5. Albert Lester — Committed on January 28, 1959, to the Branch Treatment Center at Concord.

6. Wisner Litchfield — Committed on February 7, 1958, to the Branch Treatment Center at Norfolk.

7. Chester F. Mancinelli — Committed on May 29, 1958, to the Branch Treatment Center at Walpole.

8. Raymond A. Merrill — Committed on January 16, 1958, to the Branch Treatment Center at Walpole.

9. Joseph E. Muse — Committed on November 27, 1957, to the Branch Treatment Center at Concord.

10. Henry W. McLaughlin — Committed on September 11, 1958, to the Branch Treatment Center at Walpole.

Your predecessor stated that all the above mentioned 10 individuals were committed to the various branch treatment centers as sexually dangerous persons. The request further stated that all these men have been granted parole permits on the term sentences from the branch treatment centers. It is to be noted that none of the branch treatment centers at which the above ten individuals were committed had actually been established at the time that the above individuals were committed there.

In a prior opinion of the Attorney General requested by Cornelius J. Twomey, Chairman of the Parole Board, involving one John W. Glynn, a similar set of facts and a similar request were presented to me. Pursuant to the then Chairman's request, I rendered my opinion that:

"In view of the decision of the Supreme Judicial Court in the case of *Commonwealth* v. *Page,* 339 Mass. 313, wherein it was held that the

commitment of a person to a penal institution was invalid where it appeared that the treatment center had not actually been established, it is my opinion that the original commitment of John W. Glynn is invalid under the reasoning of said decision and that the Parole Board does not have the authority to continue supervision over said John W. Glynn. It necessarily follows that the permit granted by your Board is invalid and, therefore, your Board is powerless to effect the same so as to return the person to a branch treatment center."

The status of the law has not been altered since my opinion relative to John W. Glynn. Therefore, the permits granted by your Board to the aforementioned ten men are invalid, and your Board is powerless to effect the same so as to return those persons to a branch treatment center.

Although it is my opinion that the original commitments of the above mentioned ten men were invalid under G. L. c. 123A, in view of the Opinion in the case of *Commonwealth* v. *Page,* 339 Mass., 313, I direct your attention, as did the Supreme Judicial Court in such case, to G. L. c. 123, §§ 1, 50, 51, which provide remedial and protective action for a person "in danger of causing physical harm to himself or to others . . . or . . . likely to conduct himself in a manner which clearly violates the established laws, ordinances, conventions or morals of the community."

Very truly yours,

EDWARD W. BROOKE

The head of a department, division or agency may determine the monetary amount of damage or loss to state equipment and thereafter request reimbursement and receive the same and execute proper receipt or releases on behalf of the Commonwealth. Heads of departments or agencies are empowered to so proceed against patients or inmates for loss, damage or injury to property, and employment of such authority is within their own discretion upon the facts presented to them.

MAY 25, 1965.

HON. JOSEPH ALECKS, *Comptroller.*

DEAR MR. ALECKS: — I have received your letter of March 31, 1965, requesting additional advice on questions arising out of my earlier opinion of March 26, 1965.

In your letter of March 1, 1965, you requested my opinion on two questions: First, the legality of a proposed uniform system of control and accounting and, second, the question of whether or not the head of a state agency may determine the existence of liability for damage or loss to state equipment, and, if so, determine the amount of damages and assess the individual or firm involved.

Your most recent letter relates to that portion of my prior opinion regarding the scope of the authority of an agency head. In summarizing my earlier opinion you say:

"Your opinion states that the head of a department, division or agency does not have the authority under the law to take action in the following instances:

"1. When property, which is under his control and jurisdiction, is damaged, lost or destroyed to determine the monetary value of such loss or damage.

"2. When it is known who caused the damage or loss, to send an invoice to the said individual to reimburse the Commonwealth for the amount of damage or loss."

This interpretation of my earlier opinion is not completely correct. You originally asked whether it was legal for the agency head to

"determine whether there is liability for such damage or loss, *and, if so*, determine the amount of damages and assess the individual or firm involved." (Emphasis supplied.)

I replied that "the determination of liability for damage is a legal determination to be made by the Court. . . ."

In view of the conjunctive nature of your request, there was no necessity of expressly dealing with the remaining two sections of the original question, since the system as therein described would have been improper once an initial determination of liability was made. However, that was not to say that the procedures of determining the monetary value of such loss or damage or of sending an invoice requesting reimbursement were not within the authority of an agency head, per se. Nor was it to say that in a proper system they might not be employed. Rather, it was my opinion that the use of those procedures in conjunction with the determination of liability, itself improper, would therefore also be improper.

There is nothing in our General Laws which would preclude an agency head from either determining the monetary value of the loss or billing the party who caused the damage or loss, when such party is known.

It is my opinion, therefore, that authority does exist for the head of a department, division or agency to determine the monetary amount of damage or loss and thereafter request reimbursement and receive the same and execute proper receipt or release on behalf of the Commonwealth. Consequently, it would be appropriate that this office be notified only when there is a dispute as to either the existence of liability, the amount of the claim and/or the refusal to pay, such as would require the services of this office or a determination by litigation.

In such a situation the office of the Attorney General should be requested by the head of the department, division or agency to take such action as may be necessary to protect the interest of the Commonwealth. All necessary information, facts and copies of reports concerning said matter should also be forwarded to the Attorney General.

As a second question you have asked:

"If a department head knows that the loss, damage or injury to the property was caused by an inmate or patient of the Commonwealth, is

there responsibility on the part of the department head to proceed against such patient or inmate?"

Before answering your question, it is important to delineate precisely what you mean by the word "proceed." As a result of discussions of this matter with a representative of your department, I am informed that you have used the word "proceed" in your question to mean simply the determination of the monetary amount of damage or loss and the issuance of an invoice for reimbursement — nothing more.

Keeping in mind such narrow interpretation of the word "proceed," it is essential to determine whether or not there exists any authority in the department or agency heads to "proceed" against patients or inmates for loss or damage to Commonwealth property.

A reading of our General Laws fails to disclose any prohibition against department heads proceeding against patients or inmates in the same manner as they would against other parties who lose or damage Commonwealth property. Consequently, it is my opinion that such authority must be implied as being one of those necessary and proper to the effective execution of the general duties of the given department or agency.

So far as the question of what precise responsibility rests with the given department or agency to exercise that authority is concerned, this cannot be determined by means of a sweeping generalization. Rather, it is my opinion that the decision to proceed against any given patient or inmate is an administrative decision that can best be made by the administrator charged with that responsibility. The exercise of such an authority, where it will depend extensively on the facts and circumstances of the particular situation, must be discretionary with those department or agency heads.

It is my opinion, therefore, that the department or agency heads do have the authority to "proceed" against patients or inmates for loss, damage or injury to property and that the employment of that authority is within their own discretion upon the facts presented to them.

Very truly yours,

EDWARD W. BROOKE

The five per cent and one per cent sums due to the Commonwealth under G. L. c. 147, §§ 40 and 40A may only be collected at the site of a "live" fight including those sums paid to the promoter for "television or broadcasting" rights with respect to this "live" fight.

MAY 25, 1965.

HON. HERMAN GREENBURG, *Chairman, Massachusetts State Boxing Commission.*

DEAR SIR: — I am writing in response to your letter of May 19, 1965, in which you state that a Boston promoter is presenting a boxing show in the Boston Garden on Tuesday, May 25, 1965, which will be beamed, via closed circuit television, into other places located in Massachusetts.

You request my opinion of whether the five percent and one percent sums due to the Commonwealth under G. L. c. 147, §§ 40 and 40A from the sale of tickets should be collected from the receiving locations.

The boxing show in question will feature two welterweight contenders and will be a so-called "under-card," with the main attraction to be a viewing, via closed circuit TV from Lewiston, Maine, of the Liston-Clay Heavyweight Title Fight. The "under-card" will take place "live" at the Boston Garden, to which the televised Liston-Clay match will be brought by television. In addition, under an agreement with the Boston Garden Arena Corporation, both the "under-card" and the Clay-Liston Fight in Lewiston will be shown via closed circuit TV at the Boston Arena.

It is my understanding that arrangements may be made to transmit the under-card to other locations in Massachusetts, to be shown prior to the Clay-Liston Fight.

It is my opinion that the five percent and one percent sums imposed by G. L. c. 147, §§ 40 and 40A cannot be collected on ticket sales and admissions at the locations where the under-card and Clay-Liston Fight are shown on closed circuit television. The sums should be collected, however, with respect to ticket sales and admissions at the Boston Garden.

These sums are imposed on "every licensee holding or conducting" a boxing match. The Clay-Liston Fight in Lewiston, Maine, is obviously not being held or conducted by a "licensee" within the meaning of the statute (viz: someone licensed to conduct matches *in Massachusetts* under G. L. c. 147, § 32). There is, in fact, no law in this state permitting the Commonwealth or the boxer's fund to share in the proceeds of out-of-state bouts which are shown here via closed circuit television.

The local "under-card" *is*, on the other hand, being conducted by a Massachusetts "licensee," who, therefore, is subject to payment of the sums imposed by G. L. c. 147, §§ 40 and 40A with respect to that bout. Under the statutory provisions, these excises are imposed upon the "total gross receipts from the sale of tickets or from admission fees" and also upon the "total amount paid or to be paid for television or broadcasting rights" (the latter quoted language is from G. L. c. 147, § 40, only. The one percent under G. L. c. 147, § 40A is of "the total gross receipts . . . from television or broadcasting.") The local promoter is thus liable for the Commonwealth's share of any sums paid for "television or broadcasting" rights with respect to his "under-card" (as well as for the Commonwealth's share of the gate). In my opinion the term "television" rights includes any sum or sums paid or to be paid for the privilege of receiving and showing the "under-card" event on closed circuit television. Section 40 was written before closed circuit television became a major financial factor in boxing and provides for payment of the state's share to the State Treasurer twenty-four hours *before* the fight. As most closed circuit arrangements call for the owner of the rights to share in the gate at the receiving location, such advance payment in full may be impossible. Nevertheless, the Commonwealth is entitled to its share of any amounts paid for these rights with respect to the "under-card" event, and its share should be collected as expeditiously as circumstances permit.

The requirement that a "licensee holding or conducting" any professional bout pay to the State Treasurer five percent of "total gross receipts from the sale of tickets or from admission fees" was first adopted by the Legislature in 1920 (St. 1920, c. 619, § 11). The language of the provision has remained unchanged since then insofar as the five percent on tickets and admissions is concerned; but in 1952 and 1956 the law was expanded to include television and broadcasting rights (1952, c. 203; St. 1956, c. 660).

While the statute does not specifically state that the tickets and admissions in question relate only to the live fight itself the Legislature could not have envisaged application of the statute to tickets or admissions to *televised* showings via closed circuit. The concepts and practices associated with closed circuit television are comparatively new, and the most recent amendment of G. L. c. 147, § 40 in 1956, preceded the widespread acceptance of this device. Closed circuit television combines the box office techniques of a live performance with the visual technique of television and motion pictures. It is neither fish nor fowl. To try to extend the provisions of Section 40 and 40A as now written to admissions to closed circuit showings would present a host of complex problems. For example, if a tax is imposed on the gate at a receiving location, is it appropriate also to tax the share of gate paid to the licensee and fighters for the "television rights?" Moreover, G. L. c. 147, §§ 40 and 40A as now written cannot be applied to out-of-state bouts, such as the Clay-Liston fight, which is the area of greatest importance. The widespread use of closed circuit television has so completely altered the economics of boxing that an immediate overhaul of our existing law is needed. To attempt to stretch our present statute in the case of this minor "under-card" event to cover a situation that it was never designed to cover will merely, in my opinion, cause confusion and, still worse, may postpone action with respect to needed statutory change.

I might add that under G. L. c. 147, §§ 40 and 40A, the Boxing Commission has power to alter the five percent and one percent sums in the case of a match which is an "incidental feature in an event or entertainment of a different character." In view of the entirely incidental character of the "under-card," if the Commonwealth were to attempt to share in the receipts at locations receiving the (non-taxable) Clay-Liston Fight on the basis of its control over the "under-card," there could be serious problems with respect to pro-rating the taxes were the Commission to attempt to do so. From a practical point of view, collection of the full taxes on the live box at the Boston Garden is likely to be as advantageous to the Commonwealth as collection of a heavily discounted tax there and at locations throughout the Commonwealth.

Accordingly, it is my considered opinion that the five percent and one percent sums payable under G. L. c. 147, §§ 40 and 40A may only be collected at the site of the "live" Boston Garden Fight including those sums paid to the promoter for "television or broadcasting" rights with respect to this "live" fight.

Very truly yours,

EDWARD W. BROOKE

"Milk dealer" referred to in subparagraph (b) of § 4, c. 94A, G. L., means a grocery store or market, and unless exempted from the license requirement of § 4(a), a "milk dealer" would be required to obtain a license and would be similarly subject to the provisions of §§ 5 and 9.

JUNE 7, 1965.

HON. GEORGE W. KILLION, *Secretary, Milk Control Commission.*

DEAR MR. KILLION: — I have received your letter of May 12, 1965 requesting my opinion on the following questions. You have asked:

1. Is a "store" as defined in Section 1 of the Milk Control Law, G. L. c. 94A, a "milk dealer", and, if so, subject to the provisions pertaining to licensing under Sections 4, 5 and 9 of said c. 94A?

2. Has the dictum in Cumberland Farms, Inc., vs. Milk Control Commission, 340 Mass. 672, any effect upon the statutory references above?

Treating your second question first, it is my opinion that the answer is in the negative. In its decision of the case of *Cumberland Farms* v. *Milk Control Commission,* 340 Mass. 672, the Supreme Judicial Court, after a consideration of §§ 10-12 of G. L. c. 94A, concluded that those sections were to be read together and that they comprised, as a unit, a price-fixing system. Accordingly, the Court, in its construction of the phrase "milk dealer," as it appears in § 11 of c. 94A, stated at page 680:

"We are of [the] opinion that the scope of the phrase *must be limited by resort to the overall legislative scheme of §§ 10 through 12.* . . . We conclude that the words 'milk dealers,' *in § 11,* mean wholesale dealers and not grocery stores, markets or the like. . . ." (Emphasis supplied.)

Nevertheless, despite the fact that the court concluded that "milk dealer," as used in §§ 10-12, meant wholesale dealers and not grocery stores or markets, the court also considered that the concept of a "milk dealer" could, in appropriate circumstances, include grocery stores and markets. In refusing to limit the scope of the phrase "milk dealer" to the confines of the case before it, the court in express language stated that:

"Standing alone, the phrase 'milk dealers' might very well include grocery stores, markets and the like."

The conclusion is inescapable therefore that the court did not fully construe the term "milk dealer" and that it would be open to future interpretation.

Accordingly, it is my opinion that the decision of that case did not decide the question that you have herein raised. The decision in that case upon the scope of the words "milk dealer" is restricted to the use of that phrase in the context of §§ 10-12. The Supreme Court, in unequivocal language, admitted the possibility of a broader construction of "milk dealer" and, accordingly, expressly limited their decision to a consideration of only §§ 10-12.

With regard to your first question, it is essential, in view of the approach taken by the Supreme Judicial Court in the *Cumberland Farms*

Case, supra, to confine the interpretation of any language in c. 94A to the specific sections wherein that language is employed. In the instant situation, you have asked that the phrase "milk dealer" again be construed, this time in terms of its usage in §§ 4, 5 and 9 of c. 94A, to determine whether or not that usage might include a "store" as defined in § 1 of c. 94A.

Section 1 of c. 94A defines "milk dealer" and "store" as follows:

" 'Milk dealer', any person, irrespective of whether such person is also a producer or an association of producers, who, on his own account or on behalf of producers, is engaged within the commonwealth in the business of receiving, purchasing, pasteurizing, bottling, processing, distributing or otherwise handling milk. No owner or operator of a hotel or restaurant who sells milk consumed on the premises where sold, and does not purchase or receive milk from producers, and no producer who delivers raw milk only to a milk dealer, shall be deemed a milk dealer for the purposes of this chapter."

" 'Store', includes a grocery store; dairy products store or any similar mercantile establishment at which milk is sold for consumption off the premises."

Although c. 94A defines the terms "milk dealer" and "store" separately, this does not compel the conclusion that they are mutually exclusive concepts. In fact, the use of two separate terms reflects the operational dichotomy of the industry and the necessity, in many instances, of distinguishing between wholesale milk dealers, retail milk dealers and other milk dealers who may be bottlers, distributors, purchasers, or retailers. As a result of this necessity for treating with these different groups of "milk dealers," it is not surprising that the Legislature set up a semantic distinction, between "milk dealers" and "stores." It is apparent that the operations of these two particular types of milk dealers are distinct and, accordingly, the regulation of both groups must be treated separately.

Unfortunately, the use of the term "milk dealer" applies to both groups; for, as the Supreme Judicial Court noted, a grocery store or market might well be a "milk dealer," in the appropriate circumstances. This has led to the type of problem found in the *Cumberland Farms Case;* the problem of determining to whom a particular regulation has reference.

Clearly, a grocery store or market at which milk is sold for consumption off the premises is run by a person who is engaged in the business of distributing, selling and handling milk. Thus, the definition of "milk dealer" may, without conflict, be applied to encompass a "store." The inclusion of two definitions in the statute illustrates the possibility of situations where these two types of dealers could not be dealt with identically nor be subject to the same form of regulation. Absent the insertion of two definitions, it might be concluded that the provisions of c. 94A applied to all milk dealers alike. This obviously cannot be possible.

Consequently, it is my opinion that the draftsmen of this statute, rather than establishing two mutually exclusive categories, intended to

demonstrate that for the purposes of certain portions of the statute, a delineation would be required between "stores" as "milk dealers" and other types of "milk dealers." Such a distinction was made in the *Cumberland Farms* case regarding the provisions of §§ 10-12 and it is my opinion that a similar distinction must be made regarding §§ 4, 5 and 9.

The context of §§ 4, 5 and 9 present another opportunity to re-examine the scope of the content of "milk dealers." The scope of the phrase must be determined according to its intended usage in regard to the purposes of the licensing power of the Commission set out in §§ 4, 5 and 9.

Section 4 of G. L. c. 94A provides in part:

"(*a*) No milk dealer, except as provided in subsection (*b*), shall within the commonwealth buy or receive milk from producers or others, or sell or distribute milk, or pasteurize, bottle, package or otherwise process milk for sale, unless he is duly licensed as provided in this chapter, and no milk dealer shall buy milk from or sell to another milk dealer who, being required to be licensed, is not so licensed, or in any way deal in or handle milk which he has reason to believe has previously been dealt in or handled in violatian of any provision of this chapter, or of any order, rule or regulation made thereunder.

"(*b*) The commission, provided it shall first determine that such action will not adversely affect market conditions relative to milk, may by its order exempt from the operation of all or any portion of this chapter any milk dealer who purchases milk only from a licensed milk dealer, and whose only sales of milk are at a store."

The above-quoted section sets out the requirement of a license for all "milk dealers." The only exception to that requirement is contained in sub-paragraph (b) of §4 providing for the exemption of certain qualified parties at the Commission's discretion. A party under sub-paragraph (b) who purchases only from a licensed dealer and whose only sales of milk are at a store is also a milk dealer according to the language of that section. Giving to that language its normal construction and at the same time keeping in mind the practical realities of the milk industry, it is reasonable to conclude that the "milk dealer" who may be exempted under § 4 (b) from the licensing of § 4 (a) is the retail store or market. Obviously, the only milk dealer whose only sales are at a store is a storekeeper.

Consequently, it is my opinion that the "milk dealer" referred to in sub-paragraph (b) of § 4 is the grocery store or market. Therefore, unless exempted from the license requirement of § 4 (a), a "milk dealer" would be required to obtain a license and would be similarly subject to the provisions of §§ 5 and 9.

Very truly yours,

EDWARD W. BROOKE

A land disposition agreement in the form of a "deed and indenture" proposed to be entered into between the Lowell Technological Institute and the Lowell Redevelopment Authority, the provisions of which purport to prevent the Commonwealth from exercising its sovereign powers would be invalid and not acceptable to the Commonwealth.

JUNE 7, 1965.

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

Re: Lowell Technological Institute –
Lowell Redevelopment Authority
Proposed Land Disposition Agreement.

DEAR SIR: – By letter dated May 25, 1965, you forwarded to me for review and approval a land disposition agreement in the form of a "deed and identure" proposed to be entered into between the Lowell Technological Institute of Massachusetts and the Lowell Redevelopment Authority.

In your letter of transmittal on behalf of the Trustees of Lowell Technological Institute you requested my opinion on the following questions:

"1. Should the trustees approve and sign the agreement submitted by the Lowell Redevelopment Authority and accept the conditions enumerated therein?

"2. If approved and signed by the trustees, would you find the conditions acceptable for the Commonwealth?"

By Item 8065-16, Chapter 640, Acts of 1964 the Legislature appropriated funds for the acquisition by Lowell Technological Institute of certain land from the Lowell Redevelopment Authority, a public body, corporate and politic, organized under Chapter 121A of the General Laws of the Commonwealth. The acquisition of said land without any conditions or restrictions and controls attached thereto would be within the authority of the Board of Trustees under the powers granted to it by Chapter 75A of the General Laws.

Chapter 75A of the General Laws provides in part in

Section 1:

"The institute . . . shall be governed solely by the Board of Trustees whose authority, responsibility, rights, privileges, powers and duties specifically conferred by this chapter shall be the same as those customarily and traditionally exercised by governing boards of institutions of higher learning. In exercising such authority, responsibility, rights, privileges, powers, and duties, said board shall not in the management of the affairs of the institute be subject to, or superseded in any such authority by any other state board, bureau, department or commission except as herein provided."

Section 1A:

"The Trustees may except as to the duties or powers granted under section one, two, three and six delegate their authority or any portion

thereof to the president or other officers of the institute whenever in their judgmnt such delegation may be necessary or desirable."

Section 8:

"The Trustees shall have authority to assent to federal laws designed to benefit the institute and to enter into agreements or contracts with the federal government or agencies thereof, as well as into agreements or contracts with agencies of other governments, other colleges and universities, foundations, corporations, interstate compact agencies and individuals where such agreements or contracts in the judgment of the trustees will promote the objectives of the institute."

Those Sections 1, 1A and 8 of said Chapter 75A (M.G.L.) confer broad discretionary powers on the Board of Trustees to enter into contracts and agreements. In exercising those powers the Board of Trustees must be guided by the law governing re-delegation of duties and responsibilities assigned to it by its enabling statute.

An agency to which a particular function has been delegated may not re-delegate the task of performing that function. An agency has only those powers conferred by the statute creating it or which may be reasonably necessary to accomplish the purposes of the statute. *Attorney General* v. *Trustees of Boston Elevated Ry. Co.*, 319 Mass. 642, 655 (1964). *Scannell* v. *State Ballot Law Commission,* 324 Mass. 494.

By implication, therefore, the agency may hire necessary employees to perform tasks of a ministerial, clerical or even investigative nature. *Fluet* v. *McCabe,* 299 Mass. 173, 180 (1938). *Ring* v. *City of Woburn,* 311 Mass. 679, 687 (1942).

Only acts of a ministerial nature may be re-delegated by the agency. Discretionary or quasi-judicial decisions must be made by the agency, itself. A re-delegation of the decision-making power is unlawful as an exercise of governmental power without legislative authority.

"I think there is no escape from the principle that public officers who have duties imposed upon them by law must perform those duties, and persons who do not have duties imposed upon them by the law are not authorized to perform the duties imposed upon others." 5. Opinion of the Attorney General, 1920, p. 628, 629.

Section 2 of the agreement under consideration provides *inter alia* that prior to the construction of any "Additional Improvements on the Property" site plans and working drawings therefor must be submitted to the Redevelopment Authority for its approval and to the City of Lowell Planning Department for it concurrence. The same Section 2 further states that its provisions shall be covenants running with the land. However urgent or desirable the Trustees might consider it, the provisions of said Section 2 would prohibit any construction without prior approval of the Lowell Redevelopment Authority.

The determination of the nature and extent of additional improvements of Lowell Technological Institute is an important responsibility of the Board of Trustees. It is not the type of duty that could be accurately described as ministerial and therefore lawfully be re-delegated.

Abdication by the Trustees of that responsibility by permitting the Lowel Redevelopment Authority to control its exercise would constitute an unlawful surrender of the sovereign powers of the Commonwealth. *Opinion of the Justices,* 341 Mass. 760, 784 (1960).

Section 6 (ii) of the agreement under consideration provides that the Trustees shall comply with such terms and conditions relating to the use and maintenance of such land and improvements as the Redevelopment Authority determines necessary to carry out the purposes and objectives of the Plan and of Chapter 121 of the General Laws. That provision attempts to delegate to the Lowell Redevelopment Authority discretion and responsibility vested in the Board of Trustees by the Legislature. Such a delegation of authority would be unlawful.

The Board of Trustees have plenary powers to enter into a contract for the purchase of the subject land on mutually acceptable conditions. However, the Board of Trustees cannot contract to re-delegate or transfer to another the powers, responsibilities or discretion vested in said Board by the General Court.

It is my opinion that the agreement proposed by the Lowell Redevelopment Authority would be invalid because its provisions would purport to prevent the Commonwealth from exercising its sovereign powers. *Boston Elevated Ry. Co.* v. *Commonwealth,* 310 Mass. 528, 552 (1942).

It is my opinion that the Trustees of Lowell Technological Institute should not approve or sign the agreement submitted by the Lowell Redevelopment Authority in the form submitted by your letter of May 25, 1965. If approved and signed by the Trustees certain conditions included in said proposed agreement in its present form would not be acceptable to the Commonwealth.

Very truly yours,

EDWARD W. BROOKE

The Department of Public Safety and the Massachusetts Port Authority may agree to the furnishing of State Police assistance at any of the Authority's projects or facilities, including Logan Airport, where the Authority can insist that police assistance be furnished pursuant to the agreement of June 1, 1959; additional personnel may be sent to the Airport pursuant to the Authority's enabling act or c. 22, § 9K, but the Authority cannot require that State Police personnel be made available under those statutes. If agreements are reached, the Authority retains the right to approval of all personnel assigned — and may refuse to compensate officers who have not been approved.

The Authority cannot require State Police to patrol the Mystic River Bridge or the Port properties if the Department is not willing to supply personnel.

JUNE 8, 1965.

HON. RICHARD R. CAPLES, *Commissioner of Public Safety.*

DEAR COMMISSIONER CAPLES: — I have received your letter of May 11, 1965, relative to certain legal relationships existing between the Depart-

ment of Public Safety and the Massachusetts Port Authority. You have requested my opinion on fourteen questions involving interpretation of the Port Authority's enabling statutes, §§ 9J and 9K of c. 22 of the General Laws, and a written agreement entered into by the Department and the Authority on June 1, 1959. The specific questions appear in the body of this opinion.

Before addressing myself to your fourteen questions, I believe that a brief examination of the present status of applicable laws and relevant agreements would be of assistance.

The Massachusetts Port Authority, created in 1956 by c. 465 of the Acts of that year, operates certain airport properties (Logan Airport and Hanscom Field), the Mystic Bridge and the port properties formerly controlled by the now dissolved Port of Boston Commission. Control of the Sumner Tunnel was originally vested in the Port Authority, but has since been transferred to the Massachusetts Turnpike Authority. [St. 1958, c. 598, § 10.]

The Legislature provided in the Port Authority's enabling statute that the Authority could request assistance from certain state and local departments and agencies with regard to the operation of the properties placed under its control.

". . . The Authority may call upon the department of public works, the metropolitan district commission, the department of commerce, the department of public safety, the planning board of the city, and such other state or city boards, commissions, divisions or agencies as may be deemed advisable for the purposes of assisting in making investigations, studies, surveys and estimates, *and in policing the projects,* and the Authority may arrange for payment for such services and expenses of said agencies in connection therewith. . . ." (Emphasis supplied.)

St. 1956, c. 465, § 23, as amended by St. 1958, c. 599, § 11

Thus, the Authority is authorized to request the aid of the State Police, among others, in policing all of its projects.

In 1959, the General Court made more specific provisions for the use of State Police officers by the Massachusetts Port Authority. By St. 1959, c. 274, the Legislature added §§ 9J and 9K to c. 22 of the General Laws. Section 9J governs the furnishing of State Police service at the Logan Airport, and provides in part as follows:

"The Commissioner [of public safety] is hereby *authorized and directed* to enter into an agreement with the Massachusetts Port Authority for police service to be furnished to the Authority by the department at the General Edward Lawrence Logan International Airport. Said agreement shall fix the legal responsibility pertaining to the operation and maintenance of such service. . . ." (Emphasis supplied.)

This section further requires that provision be made for such items as costs of retirement, compensation of injured officers, sick leave and other benefits, and that the agreement expressly state that expenses incurred by the Department in supplying police service thereunder are to be paid by the Authority.

Section 9K, on the other hand, is not limited in its effect simply to the Logan Airport.

"The commissioner may appoint and organize a state police force of such size as he and the Authority may agree upon, in addition to any other force authorized by law, to be assigned to the Massachusetts Port Authority to meet the requirements of section twenty-three of chapter four hundred and sixty-five of the acts of nineteen hundred and fifty-six, as amended by section eleven of chapter five hundred and ninety-nine of the acts of nineteen hundred and fifty-eight. The officers of the state police force, so appointed and so assigned, shall have the same powers and be subject to the same qualifications, orders or restrictions as officers appointed under the provisions of section nine A. During such assignment, such officers, in the performance of their duties, shall be subject to the control of the commissioner, but shall perform such police duties as may be requested by the Authority. . . . All assignments and reassignments to the Authority hereunder and under section nine A, *except as the commissioner shall determine that an emergency exists or is threatened*, shall be subject to the approval of the Authority." (Emphasis supplied.)

By providing that the police force referred to in § 9K would be used to meet the requirements of St. 1956, c. 465, § 23 and St. 1958, c. 599, § 11, which sections refer to all of the Authority's projects, the Legislature indicated that the police assistance furnished under § 9K could be assigned to any of the Authority's properties, and need not be limited — as is the case under § 9J — to the Logan Airport. In addition, the references to c. 22, § 9A (relating to additional appointments to the Division of State Police), and the provisions with regard to the interchangeability of officers appointed under §§ 9A and 9K, demonstrate that officers designated for duty under § 9K may be special appointees in the sense used in c. 22, § 9A, rather than regular State Police personnel. Such would not seem to be the case with § 9J, which section appears to contemplate the use of members of the regularly selected State Police force. Thus the title affixed to St. 1959, c. 274 is inaccurate, since properties other than Logan Airport may be affected.

On June 1, 1959, the Department of Public Safety and the Massachusetts Port Authority entered into an agreement relative to policing Logan Airport as called for by c. 22, § 9J. It was therein agreed that the Commissioner of Public Safety would assign to the Airport such officers of the State Police as might be requested by the Authority. The Authority agreed to be responsible for payment of the persons assigned, and retained the right to disapprove any police officer recommended for duty. It was also provided that "any time after one year from the date upon which the agreement takes effect, either party may cancel said agreement upon giving written notice ninety (90) days in advance of the date upon which said party desires to cancel the agreement."

Since the date of this agreement, the Department of Public Safety has supplied State Police officers to the Port Authority to perform duties not only at the Logan Airport, but at the port properties and the Mystic River Bridge as well. Disagreements between the Department and the Authority have arisen with respect to the continued use of State Police

officers at Authority projects. The Department apparently insists that it lacks legal authority to provide State Police officers for any Authority property other than the Logan Airport. In addition, I understand that you intend to cancel the above-described agreement relative to the Logan Airport at midnight on August 12, 1965, and have already given written notice to this effect. In light of the above, you have requested advice upon fourteen questions relating to the legal authority and responsibilities of your Department and the Port Authority, which questions I will treat with separately.

"1. Under General Laws, chapter 22, section 9J, the Commissioner of Public Safety is authorized and directed to enter into an agreement with the Massachusetts Port Authority. Does this section make it mandatory upon the part of the Massachusetts Port Authority to enter into an agreement with the Commissioner of Public Safety?"

Section 9J of c. 22 provides that the Commissioner is authorized and *directed* to enter into agreement with the Massachusetts Port Authority with regard to the furnishing of State Police service at the Logan Airport. In the light of related statutory provisions, I can only conclude that the General Court used the word "directed" advisedly, and intended that the reaching of such an agreement be mandatory on the part of both your Department and the Authority. At no other point has the Legislature used the word "directed" in connection with Department – Authority negotiations or arrangements, either in § 23 of the Authority's enabling statute or in c. 22, § 9K. It is clear that, by inserting the word in § 9J, the Legislature intended to remove from the parties involved all discretion as to whether to conclude the described agreement.

Should such a mandatory construction not be given to the section, this part of the statute becomes a virtual nullity. The Authority may request assistance from the Department pursuant to the terms of its enabling act, and further statutory provision of a permissive nature would add nothing. Rather, it appears that – in connection with the policing of the Logan Airport – the General Court has now required that the parties cooperate, and has withdrawn any authority formerly vested in them to refuse to do so. The fact that details of the agreement have been left to the parties represents simply a delegation of administrative duties, not a legislative determination that the parties are to be empowered to have no agreemnt at all.

"2. Under General Laws, chapter 22, section 9J, the Commissioner of Public Safety and the Massachusetts Port Authority did enter into an agreement for the policing of the Logan International Airport at East Boston, Massachusetts. A copy of that Agreement is attached hereto. Under this agreement, may the Massachusetts Port Authority request the State Police officers to police any facility or project of the Massachusetts Port Authority other than the said Logan International Airport at East Boston?"

The agreement referred to includes a preliminary clause which refers to the authority vested in the Commissioner by c. 274 of the Acts of 1959 "to enter into an agreement with the Authority for police services at the General Edward Lawrence Logan International Airport in East

Boston, Massachusetts." It is then specifically provided that the Commissioner "shall assign to police said Airport such number of troopers and superior officers of the Massachusetts State Police as may from time to time and upon reasonable notice be requested by the Authority." Other references to the Airport appear throughout.

By its very terms, the agreement is clearly limited to the Logan Airport, and was presumably entered into for the purpose of complying with the directive of c. 22, § 9J. I am aware that certain provisions of the agreement are suggestive of clauses appearing in § 9K, and may well have been drafted with such clauses in mind. But the effect of the agreement cannot be expanded beyond its clear terms. The agreement of June 1, 1959 relates solely to the Logan Airport, and does not authorize the Port Authority to request police assistance at other projects which it controls. It should be emphasized, however, that this limitation relates only to the specific agreement, and does not affect rights vested in the Authority by other statutory provisions.

"3. Is the force of State Police officers appointed and organized in accordance with the Agreement authorized by General Laws, chapter 22, section 9J or under section 9K?"

As discussed above, the agreement of June 1, 1959 relates solely to the Logan Airport, and accordingly was apparently entered into pursuant to c. 22, § 9J.

"4. Does General Laws, chapter 22, section 9K authorize the Massachusetts Port Authority to request that the State Police officers assigned under the agreement made under General Laws, Chapter 22, section 9J to perform police service at any other facility or project of the Massachusetts Port Authority than at Logan International Airport, East Boston, Massachusetts?"

The agreement relates solely to police service at the Logan Airport. However, it is clear that c. 22, § 9K authorizes the Authority to request police assistance for its other properties — as, in fact, does the Authority's enabling statute. Although § 9K would not permit the Authority to insist that officers assigned to Logan Airport pursuant to the agreement be available for other projects as well, nothing would prevent the Department from agreeing to use the same personnel at all places. Such personnel could — under the Authority's enabling statute — be regular State Police officers; or they could — under c. 22, § 9K — be especially appointed by the Commissioner for such duties. In either event, the providing of State Police assistance for Authority properties other than Logan Airport must be subject to agreement by both parties, and cannot be required by the Authority or imposed by the Department.

"5. If the Massachusetts Port Authority requests the State Police to do police service at the facilities or projects of the Massachusetts Port Authority, other than the Logan International Airport, is the Commissioner of Public Safety required to organize another State Police force under the authority of General Laws, chapter 22, section 9K?"

If the Department agrees to furnish police assistance to facilities other than the Logan Airport, two choices are available to the Commissioner.

He may act pursuant to St. 1956, c. 465, § 23, as amended, and provide regular State Police personnel, either in connection with the Logan Airport detail or independent therefrom. Or he may, pursuant to c. 22, § 9K, appoint a special force for such properties, subject to the approval of the Authority. Proceeding under the 1956 act, however, the Commissioner cannot impose personnel upon the Authority, since the latter can withdraw its request for assistance and refuse to compensate the persons assigned. The question whether a separate force assigned under c. 22, § 9K is desirable is a subject for consideration by and agreement between the parties.

"6. Absent a determination by the Commissioner that an emergency exists or is threatened, may the Commissioner lawfully assign any member of the State Police to duty with the Massachusetts Port Authority at Logan International Airport, without the prior approval of the Massachusetts Port Authority?"

The issue is resolved by par. 6 of the agreement, which paragraph provides in part that "[n]o trooper or officer shall be assigned to this detail without the approval of the Authority." The Commissioner also agreed to replace any person assigned upon written request by the Authority to do so. Clearly, prior approval of assignments of personnel by the Authority is required. Should the Commissioner resort to par. 4 and increase the Logan Airport detail on the basis that an emergency exists, the Commissioner's determination that an emergency exists, or is threatened must be reasonable under the circumstances and cannot be arbitrary.

"7. Absent a determination by the Commissioner that an emergency exists or is threatened, may the Commissioner lawfully assign any member of the State Police to duty at any of the facilities or projects of the Massachusetts Port Authority other than Logan International Airport, without the prior approval of the Massachusetts Port Authority?"

As indicated above in connection with questions 5 and 6, the Commissioner may not assign State Police officers to Authority projects without the approval of the Authority. Authority approval of assignments to Logan Airport under the agreement is required by par. 6 of that agreement. Assignments to projects pursuant to c. 22, § 9K require Authority approval under the terms of that section. Likewise, assignment of personnel pursuant to § 23 of the Authority's enabling act depends upon agreement by both of the parties involved. Once again, a determination by the Commissioner that an emergency exists or is threatened must be a reasonable determination.

"8. If the Commissioner, absent a determination by him that an emergency exists or is threatened, should assign a member of the State Police to duty with the Massachusetts Port Authority at Logan International Airport without the prior approval of the Massachusetts Port Authority, may the Massachusetts Port Authority lawfully refuse to pay the compensation of such member while so assigned?"

Since the agreement entered into pursuant to c. 22, § 9J requires Authority approval of assignments, the Authority may lawfully refuse to compensate persons assigned without such approval. Should the Com-

missioner choose to appoint personnel to the Logan Airport under § 9K, such appointments would likewise be subject to Authority approval under the terms of that section, and the Authority would not be liable for compensation absent the giving of such approval.

"9. If the Commissioner and the Massachusetts Port Authority be unable to agree upon the size of the State Police Force, may either the Commissioner or the Massachusetts Port Authority unilaterally determine the size of such police force to be so assigned, and the Massachusetts Port Authority lawfully be required to pay the entire compensation of each of the members of such force?"

The size of the force to be assigned at the Logan Airport pursuant to c. 22, § 9J (and the related agreement) may be determined unilaterally by the Authority, since par. 1 of the agreement provides that personnel shall be assigned in such number as the Authority shall request. However, personnel to be assigned under St. 1956, c. 465, § 23, as amended, or under c. 22, § 9K — be they assigned to Logan Airport or to other Authority properties — are subject to whatever other agreements the parties may reach, and can neither be required by the Authority nor imposd by the Department. Should the Department attempt to assign personnel arbitrarily under either of these statutes, such personnel need not be compensated by the Authority.

"10. Inasmuch as paragraph three of section 10 of the agreement purports to give either party the right to cancel that agreement, is that agreement valid in view of the first sentence of General Laws, chapter 22, section 9J?"

Since the agreement entered into pursuant to c. 22, § 9J is required by the General Court, it follows that the parties may not lawfully determine to have no agreement at all. Accordingly, the parties may not simply rescind the agreement. However, nothing prevents the parties from altering this agreement consistent with the statute, or even from entering into a new agreement. The provision in par. 10 of the agreement which allows either party to cancel upon ninety days' written notice is not — in and of itself — void, since the parties may lawfully arrange for such notification relative to alteration of the existing agreement. Should such notice be given, however, the parties must negotiate a new agreement in order to conform with the mandatory provisions of c. 22, § 9J. Absent a decision by the Department and the Authority to have a new agreement or to alter the existing one, the present agreement must remain in force and cannot be terminated by either party.

"11. Inasmuch as the Agreement does not set forth a police force of the size as the Commissioner and the Massachusetts Port Authority agreed upon, but rather left it to be determined unilaterally by the Massachusetts Port Authority, is the agreement valid and in compliance with the law?"

As suggested above in connection with question 1, the General Court has provided in c. 22, § 9J that there shall be an agreement between the Department and the Authority, and has left the working out of the details of that agreement to the parties involved. Included among such

details is the determination of size of the force. Such delegation is clearly consistent with sound administrative practice, and in no way renders the agreement or the statute authorizing it invalid. Likewise, the fact that the parties chose to vest the responsibility in the Port Authority alone in no way represents an abuse of discretion or a contradiction of legislative intent. Accordingly, it is clear that the agreement of June 1, 1959 between the Department of Public Safety and the Massachusetts Port Authority is wholly valid and in compliance with law.

"12. Absent a determination by the Commissioner that an emergency exists or is threatened, but a determination by the Commissioner that the number of State Police officers at the Logan International Airport, at the request of the Massachusetts Port Authority, is inadequate to perform the amount of police service required at the Logan International Airport, and as a result the citizens of the Commonwealth, the Airlines, and the users of Logan International Airport are being put in constant jeopardy and being deprived of normal public safety measures, may the Commissioner unilaterally increase the force and lawfully require the Massachusetts Port Authority to pay the entire compensation for each member?"

The agreement dated June 1, 1959 between the Department and the Authority, entered into pursuant to c. 22, § 9J sets forth that the Authority is to determine the number of officers to be assigned thereunder. Likewise, officers cannot be assigned under § 9K without Authority approval. Both the cited agreement and the applicable statutes provide that — in the absence of a reasonable determination by the Commissioner that an emergency has arisen — the responsibility of judging what is necessary for the efficient policing of the Logan Airport is to be vested solely in the Port Authority.

"13. Under paragraph 5 of the Agreement, the State Police officers assigned as set forth above shall be governed by the Rules and Regulations of the Uniformed Branch, Massachusetts State Police. Under Rule 5.19 of the Rules and Regulations, a 'Troop Commander' is a commissioned officer with the rank of Captain. Under Rule 14.1, commissioned officers will be assigned such troops or detachments as the commissioner may direct. If, under the agreement, the Massachusetts Port Authority requests the Commissioner to assign any given number of men to the Massachusetts Port Authority, may the Commissioner unilaterally determine the rank and grade of the State Police so assigned?"

The initial determination as to rank and grade of officers assigned to aid the Port Authority rests with the Commissioner. In so far as the Airport properties are concerned, clause #1 of the agreement of June 1, 1959 provides that you shall assign troopers and superior officers to the Airport as requested by the Authority. With respect to the remaining properties operated by and within the jurisdiction of the Authority, the appointment and assignment of State Police officers is subject to the agreement of the Authority and your Department, as more particularly set forth in my response to question #4 and my discussion relating to St. 1956, c. 465, § 23, as amended, set forth above.

"14. If the answer to the above is in the affirmative, may the Massachusetts Port Authority legally refuse to approve the assignment of the officer merely because the officer holds a higher rank in the Uniformed Branch, Massachusetts State Police, than they wish to pay compensation for?"

This inquiry is answered by my response to question 13.

The variety and complexity of the statutory provisions affecting these matters, as well as the effect of the agreement of June 1, 1959, can easily result in a substantial degree of confusion and a real threat to continued safety at Port Authority projects. It is certainly understandable that disagreements as to the interpretation of the applicable laws could arise. However, the above responses represent a construction of the statutes and agreements at issue, and hopefully may lead to a solution of present difficulties consistent with the intentions of the General Court.

In general terms, it would appear that the Department and the Authority may agree to the furnishing of State Police assistance at any of the Authority's projects, including the Logan Airport. If such agreements are reached, the Authority retains the right of approval of all personnel assigned — and may refuse to compensate officers who have not been approved. However, it is clear that the Authority cannot require State Police to patrol the Mystic River Bridge or the port properties if the Department is not willing to supply personnel.

The Authority may, on the other hand, insist that police assistance be furnished at Logan Airport pursuant to the agreement of June 1, 1959. Additional personnel may be sent to the Airport pursuant to the Authority's enabling act or c. 22, § 9K, but the Authority cannot require that State Police personnel be made available under those statutes. Despite the fact that there must be an agreement under c. 22, § 9J, the Authority retains the right — in accordance with the terms of the agreement — to approve all personnel assigned thereunder.

Very truly yours,

EDWARD W. BROOKE

Pursuant to G. L. c. 112, § 66, the fitting of contact lenses to the human eye constitutes the practice of optometry, and is therefore barred to opticians.

June 9, 1965.

HON. JOHN E. QUINN, M.D., *Secretary,*
Board of Registration in Optometry.

DEAR SIR: — I am in receipt of your request for my opinion on the following questions:

"1) Does the fitting of contact lenses to the human eye constitute the practice of optometry as defined by Chapter 112, Section 66, of the General Laws?

"2) May persons who are neither registered optometrists nor physicians or surgeons lawfully fit contact lenses to the human eye?"

In view of the lack of judicial interpretation in this Commonwealth of the questions presented, I am grateful for the thorough background material presented to me by your board, counsel for the Massachusetts Society of Optometrists and counsel for the Guild of Prescription Opticians of America, Inc.

I will answer your questions in the order presented.

Chapter 112, § 66 of the General Laws provides:

"The practice of optometry, as referred to in sections sixty-seven to seventy-three, inclusive, is hereby defined to be the employment of any method or means, other than the use of drugs, for the diagnosis of any optical defect, deficiency or deformity of the human eye, or visual or muscular anomaly of the visual system, or the adaptation or prescribing of lenses, prisms or ocular exercises for the correction, relief or aid of the visual functions."

Inasmuch as the fitting of contact lenses, by definition, involves "the adaptation . . . of lenses . . . for the correction, relief or aid of the visual functions," such fitting constitutes the practice of optometry under the statute. The definition of "adaptation" to include "fitting," in this context, is widely supported by the opinions of several courts. *Keating* v. *Sturges*, 372 S.W.2d (Mo.) 104, 113. *New Jersey State Board of Optometrists* v. *Reiss*, 198 A.2d (N. J. Super.) 816, 822. *State of Oregon ex rel. Reed* v. *Juzirian*, 228 Ore. 619. Accordingly, I answer your first question in the affirmative.

The second question involves a more complicated problem of statutory construction. Under G. L. c. 112, § 68, the practice of optometry is limited to qualified registered optometrists. However, G. L. c. 112, § 73 provides that "Sections sixty-six to seventy-two A, inclusive, shall not apply to physicians and surgeons . . . *or to persons who neither practice optometry nor profess to practice optometry but who sell spectacles, eyeglasses or lenses*, either on prescription . . . or as merchandise." (Emphasis supplied.) The right of physicians and surgeons to practice optometry under c. 112, § 73 is unconditional and absolute. On the other hand, the right as it extends to persons who sell spectacles, eyeglasses or lenses [opticians] appears to be conditioned on the proviso that they not practice optometry *generally*. (Unless the word "generally" is supplied, the statute would be self-contradictory for it would provide that sellers of eyeglasses and like merchandise may practice optometry as long as they belong to a class that does not practice it.) The real question, therefore, is whether the fitting of contact lenses is included in the practice of optometry generally or whether it falls within the exception in favor of persons "who sell spectacles, eyeglasses or lenses." I am of the opinion that the fitting of contact lenses involves the general practice of optometry and is, therefore, barred to opticians.

It is a settled rule of statutory construction that exceptions are to be strictly construed. *Opinion of the Justices*, 254 Mass. 617, 620-621. Endlich, INTERPRETATION OF STATUTES, 742.

I am mindful of the statement contained in your letter of March 19: "The proper fitting of contact lenses requires a thorough knowledge of ocular physiology and anatomy, because the lens must be fitted so as to least disturb the normal physiology of the eye. The use of diagnostic instruments and fluorescent liquid is helpful in this respect, but in addition, there is required the exercise of sound professional judgment based on appropriate training and experience." The fact that the qualifications for optometry, as established by statute, are considerably higher and more exacting than those set for opticians (see G. L. c. 112, § 68. Cf. c. 112, §§ 73C-73L.), supports the view that the Legislature did not intend opticians to fit contact lenses.

I call your attention to G. L. c. 112, § 73C, defining an optician as one "who prepares and dispenses lenses, spectacles, eyeglasses and appliances thereto to the intended wearer thereon on written prescriptions from a duly registered physician or optometrist, and, in accordance with such prescription, interjects, measures, adapts, fits, and adjusts such lenses, spectacles, eyeglasses or appliances thereto *to the human face* for the aid or correction of visual or ocular anomalies *of the human eye*." (Emphasis supplied.) This statute should be compared with G. L. c. 112, § 66, which contains the following definition of optometry: "The adaptation or prescribing of lenses, prisms, or ocular exercises for the correction, relief, or aid of visual functions." In § 73C, the phrase "to the human face" modifies and restricts the words "interprets, measures, adapts, fits, and adjusts," whereas in § 66 the word "adaptation" is not restricted by a similar phrase. The fitting of contact lenses involves fitting lenses directly to the "eye," rather than to the "face" as eyeglass frames are fitted.

It is my opinion, therefore, that while optometrists, physicians and surgeons may adapt lenses to the face (e.g., eyeglasses) or to the eye (contact lenses), opticians may adapt them only to the face.

Accordingly, I answer your second inquiry in the negative.

Very truly yours,

EDWARD W. BROOKE

The phrase, "the duties of which are described," as found in St. 1963; c. 775, refers to those duties which the Dictionary of Occuptional Titles sets out in its job descriptions.

"Title" as contained in the Act refers to a single title, and classifications are to be made with reference to a single title.

June 15, 1965.

REVEREND HUBERT C. CALLAGHAN, S. J., *Chairman, Personnel Appeals Board.*

DEAR FATHER CALLAGHAN: — I have received your letter of April 23, 1965, requesting an opinion regarding c. 775 of the Acts of 1963. Chapter 775 provides for a professional salary schedule for state employees. The pertinent portion of the chapter is quoted below:

"For the purposes of this section, the words 'professional position' shall mean any title in the office and position classification plan of the common-

wealth (1) the specifications for which require (*a*) a consistent exercise of discretion and judgment in a formal and well-organized field of knowledge, and (*b*) academic study, training, or experience of a scope and character commensurate with the duties of the office or position, and (2) the duties of which are described under a title classified as a professional occupation under code numbers 0-00 to and including 0-39.99 in the 'Dictionary of Occupational Titles', prepared by the Employment Service in the United States Department of Labor, a copy of which is on file in the bureau of personnel."

You have asked the following questions:

"1. Should the language, 'the duties of which are described . . .' be interpreted to mean the duties which are described in the official job description for the classification in question, or should it be interpreted to mean the duties of the position as they actually exist when there is some degree of variance between such duties in practice and the same duties as described in the official job description?

"2. Should the above mentioned language where the statute reads, '. . . under a title classified as a professional occupation . . .,' be interpreted to mean that if all or a major portion of the duties of the classification are not found to be described under a single title within the code numbers indicated in the statute, the classification in question may not be found to be professional under Chapter 775? Or should this language be interpreted in such a way that if all or a major portion of the duties of the position is not found to be described under a single title in the 'Dictionary of Occupational Titles,' yet is to be found under two or more titles of the Dictionary, such classification may be found to be professional under the provisions of Chapter 775 of the Acts of 1963?"

With regard to your first question, the phrase "the duties of which are described" refers to those duties which the Dictionary of Occupational Titles sets out in its job descriptions. These are duties "described . . . in the 'Dictionary of Occupational Titles' . . ." and, as such, are the duties recited in the above-quoted c. 775. That some variance exists between the official job description and "such duties in practice" clearly does not derogate from the plain meaning of the words in the legislative enactment. Therefore, it is my opinion that the phrase refers to the official job description for the classification in question.

With regard to your second question, the phrase ". . . under a title classified as a professional occupation . . ." employs singular, as opposed to plural, language throughout. In addition, should "a title" be read as "titles," the effect would be to broaden the concept of professional position beyond the descriptions of each of the individual listings of duties as set out in the Dictionary of Occupational Titles. Should this approach be taken, the result would go beyond the Legislature's contemplation much less its expressed intention. It is therefore my opinion that "a title" refers to a single title and that classifications are intended to be made with reference to a single title.

Very truly yours,
EDWARD W. BROOKE

If it appears that a trailer, located on realty taken by the exercise of eminent domain, has neither lost its identity by being placed on the land nor that its removal would cause material damage to the land or the trailer itself, such trailer is not part of the land taken by eminent domain and the Commonwealth may not pay an award of damages for or to said trailer because it did not acquire title thereto.

June 18, 1965.

HON. FRANCIS W. SARGENT, *Commissioner, Department of Public Works.*

Re: Anthony and Judy Torosian, Auburn, Worcester County, Layout 5437, Parcel 2-80.

DEAR COMMISSIONER SARGENT: — By letter of May 28, 1965, you have asked if the trailer on land involved in the above-captioned taking is subject to such a lien as would require the Department of Public Works to recognize the conditional vendor of said trailer as entitled to payment of part of the award of damages.

To reply to your question first requires consideration of the second paragraph of said May 28th letter which states:

"Parcel 2-80 was owned at the time of the taking by Anthony and Judy Torosian who were living in a trailer *permanently* affixed to the ground on a concrete block foundation and *permanently* connected to water and electrical service. [emphasis supplied]

This quotation contains the erroneous conclusion of law that the trailer is real property and subject to the exercise of the power of eminent domain.

"Where the chattel is so affixed to the realty that its identity is lost, or where it cannot be removed without material injury to the realty or to itself, the intent to make it a part of the realty may be established as a matter of law." *Bay State York Co.* v. *Marvix, Inc.*, 331 Mass. 409, 119 N.E. 2d 727. Also see *Stone* v. *Livingston*, 222 Mass. 192, 110 N.E. 297.

From the facts stated in your letter it does not appear that the trailer in question has either lost its identity by being placed on the land or that its removal would cause material damage to the land or the trailer itself. The exercise of due care in disconnecting utility services and lifting the trailer from the concrete blocks upon which it now rests would prevent damage of any property involved. It is also to be noted that the trailer has not been taxed as realty by the Town of Auburn in which it is located.

In the case of *Medford Trust Co.* v. *Priggen Steel Garage Co.*, 174 N.E. 126, steel garages were placed on the land. Two were placed atop concrete piers and one of these two was fastened to the piers with nuts and bolts and a concrete floor was poured. The only way to remove the latter garage was to remove the bolts and break the concrete floor. In that case the Supreme Judicial Court found that the garages remained personalty

because they were not so affixed to the realty that their identity was lost and because they could be removed without material injury to the real estate or themselves.

Whether an article is personalty or realty is a mixed question of fact and law and the intent of the parties is determined from their action. See *Ferdinand* v. *Earle*, 241 Mass. 92, 134 N.E. 603. The fact that property is bought on conditional sale, even if unknown to the mortgagee, has some tendency to show that the landowner did not intend it to remain permanently. *Medford Trust Co.* v. *Priggen Steel Garage Co.* supra. See also *Walker Dishwasher Corporation* v. *Medford Trust Co.*, 279 Mass. 33, 180 N.E. 517. The conditional sales agreement between Mr. and Mrs. Torosian and the General Electric Credit Corporation, described in your May 28th letter, is evidence of the intent of the parties to consider the trailer as personalty.

"Although it may have been within the contemplation of the parties that the chattel be attached to the realty, where articles are sold on the condition that the title shall not pass until they are paid for, or until some other condition is fulfilled, their annexation to the realty of the purchaser does not render them a part of the realty and irremovable, but an agreement preserving the character of the articles as personalty or reserving the right of removal is implied." 36A *Corpus Juris* 2nd pp. 620, 627.

It is my opinion that the General Electric Credit Corporation is not entitled to payment of part of the award of damages arising from the above-captioned taking because the trailer of which it was the conditional vendor or its assignee was not part of the real estate taken by eminent domain. It is my further opinion that the Commonwealth may not pay an award of damages for or to said trailer because it did not acquire title thereto by its order of taking parcel 2-80 of layout 5437 in Worcester County. Not being a part of the interest in the realty taken by the Commonwealth, the trailer should be removed from the real property within a reasonable time at the expense of its owner.

The above obviates the necessity of an answer to the question contained in your letter.

Very truly yours,
EDWARD W. BROOKE

The Board of Bank Incorporation has the authority to approve the petition of the Rockland Trust Company to move its present branch office from one location to another in the town of Cohasset.

JUNE 21, 1965.

HON. JOHN B. HYNES, *Chairman, Board of Bank Incorporation.*

DEAR COMMISSIONER HYNES: — I have your request of June 8, 1965, wherein you ask my opinion whether or not the Board of Bank Incorporation has the authority to approve the petition of the Rockland Trust Company, a Plymouth County Bank, to move its present branch

office from one location to another in the Norfolk County Town of Cohasset. Specifically, you have inquired whether the recent legislative enactments concerning branch banking across county lines in any way affects the special authorization granted to the Rockland Trust Company by c. 100, Acts of 1932, to maintain a branch office in the Town of Cohasset.

The legislative history concerning the establishment of branch offices by trust companies has moved from an early prohibition restricting branch offices to the city or town wherein its main office was located (c. 355, Acts of 1902) to the present limitations contained in G. L. c. 172, § 11, which states:

" (a) After such notice and hearing as the board may proscribe, a trust company may, with the approval of the board, establish and operate one or more branch offices in the city or town where its principal office is located, or in any other city or town in the same county having no commercial banking facilities or having banking facilities which, in the opinion of the board, are inadequate for the public convenience. . . .

" (b) With the approval of the board of bank incorporation, such corporation may change the location of its principal office or any branch office, when the public convenience so requires, to any place where a branch office may be established and operated by it, and, with like approval, the former principal office of the corporation may thereafter be operated as a branch office. . . ."

Chapter 100, Acts of 1932, authorized the Board of Bank Incorporation to permit the Rockland Trust Company to maintain a branch office in the Town of Cohasset. At the time this act was passed, trust companies were restricted to branch offices in the city or town wherein their main offices were located. In 1956 the Board of Bank Incorporation permitted the Rockland Trust Company to move its location from 48 South Main Street to a new location at 11 South Main Street in the Town of Cohasset. The General Laws had been amended at this time to restrict branch offices to locations in the county wherein the main office was located.

In the case of *Commonwealth* v. *Welosky*, 276 Mass. 398 (1931), the Supreme Judicial Court set forth a rule to be observed in statutory construction. The Court stated at page 401 that:

"Statutes are to be interpreted, not alone according to their simple, literal or strict verbal meaning, but in connection with their development, their progression through the legislative body, the history of the times, prior legislation, contemporary cutsoms and conditions and the system of positive law of which they are part. . . ."

It seems quite apparent that the grant of authority contained in c. 100, Acts of 1932 must be read in conjunction with the provisions of G. L. c. 172, § 11. The Legislature has never in its wisdom seen fit to expressly repeal the exception granted to the Rockland Trust Company to operate a branch office in Norfolk County. There is little doubt that the legislative intent was, and still is, to permit the Rockland Trust Company to maintain a branch office in the Town of Cohasset.

It is my opinion that the Board of Bank Incorporation does have the authority to approve a change of location of the branch office of the Rockland Trust Company in the Town of Cohasset. The final decision as to the actual location of any new branch office is, of course, within the discretion of the Board of Bank Incorporation, guided by the requirements of the public convenience.

Very truly yours,
EDWARD W. BROOKE

The Massachusetts Executive Committee for Educational Television does not have independent authority to determine the rate structure for member systems, an operating budget, and number, qualifications and reimbursement for employees.

The Committee's secretarial and clerical employees fall within Civil Service jurisdiction, and it is not free to pay personnel salaries without regard to the salary schedules in Chapter 30, §§ 46 and 46B of the General Laws.

The committee is not compelled to process its business transaction through "other divisions of the state government," but its expenditures, in so far as they are from funds appropriated to it by the General Court, are subject to the provisions of G. L. c. 29, § 18.

JUNE 23, 1965.

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

DEAR COMMISSIONER KIERNAN: — I have received your recent letter formalizing the request of the Massachusetts Executive Committee for Educational Television for my opinion regarding the following questions:

"1. Whether the Executive Committee, under Chapter 567, Acts of 1960, has the authority to determine, independent from any other state agency or department or division, the rate structure for member systems, an operating budget sufficient to permit effective operation, and the number, qualifications and reimbursement for employees of the Massachusetts Executive Committee for Educational Television?

"2. Whether secretarial or clerical employees of the Massachusetts Executive Committee for Educational Television must be members of the Civil Service?

"3. Whether business transactions authorized by the Massachusetts Executive Committee for Educational Television must be processed through other divisions of the state government; or whether, under those applicable laws governing any authority or state sub-division, it can carry on its own business transactions?

"4. Since the salary and expenses, etc. of the committee are paid out of a trust fund known as the Educational Television Program Fund and nothing has been paid by legislative appropriation, whether or not the Executive Committee is free to pay personnel what it feels they are en-

titled to without regard to the salary schedules contained in Chapter 30, sections 46 and 46B of the General Laws?"

Chapter 567 of the Acts of 1960 abolishes the Massachusetts Board of Educational Television and rewrites G. L. c. 71, §§ 13F through 13I, inclusive, by replacing the Board of Educational Television with the Executive Committee. In so doing, G. L. c. 71, §§ 13F through 13I, delineates the powers of the Executive Committee and determines the Committee's relationship to other state agencies.

The Legislature has charged the Committee with the duty of administering and coordinating broadcasts of educational programs to supplement the courses of study in elementary and high schools. (G. L. c. 71, § 13F.) In order to perform this function, the Legislature vested the Committee with certain necessarily concomitant powers among which is the authority to contract and make payments for the furnishing of the educational programs.

"In order to carry out its duties . . . [the committee] may—

" (*b*) Prepare programs, enter into agreements providing for the furnishing of programs. . . ."

G. L. c. 71, § 13I.

This authority to contract must be construed liberally in order to give effect to § 13I (*e*), which empowers the committee to:

"Do all acts and things necessary or convenient to carry out the purposes for which the committee is created."

Consequently, the Committee has authority to enter into agreement covering the costs of programing with city and town school committees which, according to the terms of § 13F, may contribute in an amount not to exceed one dollar per pupil. The Committee determines, as a preliminary matter, exactly what the contribution or "rate" will be. This decision is, however, subject to the approval of the Department of Education.

The legislative title of c. 567 of the Acts of 1960 places the Committee within the Department of Education. That title reads as follows:

"An act abolishing the Massachusetts Board of Educational Television and establishing *in the Department of Education* an Executive Committee for Educational Television." (Emphasis supplied.)

Accordingly, the text of the act provides for the Board of Education's approval of the Committee's determinations.

"*Subject to the approval of the board of education,* the executive committee for educational television shall act in matters pertaining to educational television. . . ." (Emphasis supplied.)

G. L. c. 71, § 13G.

"Matters pertaining to educational television" encompass the collecting of contributions or fixing of rates charged member systems, hence are

subject to review by the Board of Education and cannot be determined by the Committee acting independently of any other authority. The same must be said about all the other activities referred to in your first question. Because the singular purpose of the activities referred to in question number one is programing, it involves acts "pertaining to educational television"; thus, it is "subject to the approval of the Board of Education." Moreover, on the question of making personnel decisions, § 13G specifically provides:

". . . Said committee shall *recommend* to said board of education the appointment of such professional personnel as is necessary to carry on the work of the committee, and may *recommend* the appointment of such clerical, engineering, legal or other assistants as it deems necessary. . . ." (Emphasis supplied.)

It is, therefore, my opinion that the answer to your first question must be in the negative.

The Civil Service Commission's ability to classify certain positions, among them secretarial and clerical personnel, arises from G. L. c. 31, § 3, which provides:

"Subject to the approval of the governor and council, the commission from time to time shall make . . . rules which shall regulate the selection and employment of persons to fill positions in the official service of the commonwealth. . . ."

Since the General Court established the Executive Committee to provide educational programs for elementary and high schools, the employees of the Committee are in the service of the Commonwealth, hence subject to any rules that the Civil Service Commission promulgates pursuant to G. L. c. 31, § 3, unless specifically exempted.

That the Civil Service Rules do govern the status of clerks and secretaries is apparent since Rule 3 states:

"All persons . . . in any of the following offices and positions and classes of positions, . . . are subject to the Civil Service Law and Rules

. . . Class 3. Clerks, secretaries. . . ."

It is, therefore, my opinion that the Executive Committee's secretarial and clerical employees fall within Civil Service jurisdiction. Accordingly, I answer your second question in the affirmative.

This conclusion necessarily determines my opinion on the fourth question you have asked of me; for, the rates of compensation provided by G. L. c. 30, § 46 and 46B apply to personnel who are classified as being subject to Civil Service regulations. The fact that the actual payments made to employees are — at you indicate in posing the request — from the Program Fund does not alter the jurisdiction of the General Court to prescribe Civil Service salaries for those employees of the Committee that fall within Civil Service classifications. It is, therefore, my opinion that the Committee is not free to set the salary of any employee who is within Civil Service jurisdiction without reference to G. L. c. 30, §§ 46 and 46B.

To the extent that employees classified as being within the purview of Civil Service by Civil Service Rule 3 are involved in the first question of your request, there are further limitations on the Committee's independence to determine reimbursement for their employees.

The Committee may receive payments of money from school committees, organizations, or individuals which take advantage of the educational broadcasts. Section 13H specifically provides that these monies received shall be paid into a trust fund known as the Educational Television Program Fund. These receipts then are not paid into the general fund of the Commonwealth because the terms of G. L. c. 29, § 2 excepts from the general fund:

". . . revenue required by law to be paid into a fund other than the general fund and revenue for or on account of . . . trust funds. . . ."

G. L. c. 29, § 2.

Consequently, the Committee in expending the Fund need not comply with G. L. c. 29, § 18, which requires a warrant and certification by the Comptroller, nor the constitutional provision for an Executive Council vote on the warrant. To this extent, the Committee need not process its business transactions through "other divisions of the state government." However, in so far as the Committee's expenditures are from funds appropriated to it by the General Court, compliance with G. L. c. 29, § 18 would be a necessity.

Very truly yours,

EDWARD W. BROOKE

The solicitation of funds for the Blind is regulated in Massachusetts by G. L. c. 69, §§ 25A through 25E, and any organization, not specifically exempted by § 25E, is required to request and obtain a license as provided by § 25B.

JUNE 24, 1965.

HON. JOHN F. MUNGOVAN, *Director, Division of the Blind.*

DEAR DIRECTOR MUNGOVAN: — I have received your letter of March 24, 1965, requesting my opinion on the legality of a solicitation by the Donna Fund of the American Foundation for the Blind. You have stated the following as facts:

"The American Foundation for the Blind has recently conducted a direct mail solicitation of many residents of Massachusetts under the name of 'Donna Fund of American Foundation for the Blind, Inc.', State Street Bank and Trust Company, P. O. Box 20, Boston Massachusetts, 02101.

"The American Foundation for the Blind did not request or obtain a license for this fund raising appeal from the Division of the Blind."

The solicitation of funds for the Blind is regulated in Massachusetts by G. L. c. 69, §§ 25A through 25E. Section 25B of said chapter provides in part as follows:

"No person shall . . . solicit funds, for the benefit of any blind person or group of blind persons, without a license under section 25A."

The only exceptions to the licensing requirement of § 25B are contained in § 25E, which provides in part:

"Sections 25A to 25D inclusive, shall not apply to the Perkins institution and Massachusetts School for the Blind, to the Catholic Guild for the Blind, or to any organization incorporated under the laws of the Commonwealth prior to January first, nineteen hundred and thirty-eight."

On the facts as you have stated them, it is clear that the Donna Fund of the American Foundation of the Blind is not one of those organizations specifically exempted by § 25E from the coverage of the prior sections. Accordingly, despite the high value that must be placed on the furthering of such worthwhile efforts as are engaged in by the American Foundation for the Blind, they are nevertheless required to request and obtain a license as provided by § 25B.

Regarding the Donna Fund solicitation itself, it is my opinion that where no license was obtained, there was no compliance with our laws. Accordingly, the Donna Fund of the American Foundation for the Blind did violate the provisions of G. L. c. 69, §§ 25A through 25E.

Very truly yours,
EDWARD W. BROOKE

Chapter 581 of St. 1956 transferred the sidewalks which lie within the limits of Ocean Avenue, Revere, to the care and control by the Metropolitan District Commission.

JUNE 28, 1965.

HON. HOWARD WHITMORE, JR., *Commissioner, Metropolitan District Commission.*

DEAR COMMISSIONER WHITMORE: — I am in receipt of your letter of May 13, 1965, wherein you request my opinion on the inclusion of sidewalks in the transfer of Ocean Avenue, Revere to the Metropolitan District Commission.

Specifically, you have asked:

"Does Chapter 581 of the Acts of 1956, wherein Ocean Avenue, Revere was transferred to care and control by the M.D.C., include the sidewalks on said Ocean Avenue in addition to the highway of said Ocean Avenue, Revere?"

Chapter 581 of the Acts of 1956 provides in part:

"For the purpose of connecting certain boulevards and parkways presently under the care and control of the metropolitan district commission, and for the further purpose of providing continuous connections or

feeder roads to certain portions of the state highway system within the metropolitan area. . . .

"Said commission is . . . authorized and directed to take over the care, control and maintenance of Ocean Avenue in the city of Revere. . . ."

To reply to your question it is necessary that the intent of the Legislature in promulgating this transfer be deduced from the prior history of the roadway in question.

By c. 445, Acts of 1931, § 3, the Department of Public Works was directed to widen and reconstruct Ocean Avenue, Revere. That section provided:

"The department is hereby further directed to widen and reconstruct Ocean Avenue in the city of Revere. . . . When the work authorized by this section shall have been completed, said way shall become a city way and shall be kept in good condition and repair by said city of Revere. . . ."

Acting under the legislative authorization of the above-quoted section, the Department of Public Works did widen and reconstruct Ocean Avenue; in so doing, the department constructed new sidewalks. I have examined the layout plan of Ocean Avenue which you have provided ("Plan of Road in the City of Revere, Suffolk County, dated January 25, 1933.") It is clear from the plan that the sidewalks lie within the limits of the way. Widening the roadway necessitated, by implication, the reconstruction of the sidewalks. Having satisfied the mandate of c. 445 as to the improvements, said property, roadway and sidewalks were turned over to the City of Revere in conformance with the direction embodied in the last sentence of § 3, c. 445 of the Acts of 1931.

Ocean Avenue and its sidewalks remained under the control and care of the City of Revere until 1956, when, by c. 581 of the Acts of 1956, the Legislature directed that care, control and maintenance of Ocean Avenue be undertaken by the Metropolitan District Commission.

In the absence of any contrary legislative expression, the care and control of Ocean Avenue, Revere, included the sidewalks. This was true under c. 445 of the Acts of 1931 when the property was transferred to the Department of Public Works, and was also true by virtue of that same act when the property was transferred to the City of Revere. Consequently, in the absence of contrary language in c. 581, Acts of 1956, the care and control of the sidewalks which lie within the limits of Ocean Avenue is transferred to your Commission.

Accordingly, I answer your question in the affirmative.

Very truly yours,

EDWARD W. BROOKE

If a factual determination is made that an employee is one having police powers under c. 90, § 29, who suffered injury through no fault of his own in the actual performance of his duty, the Registrar is authorized to pay him, out of the Highway Fund, his reasonable hospital, medical and surgical expenses attributable to such injury.

JUNE 28, 1965.

HON. RICHARD E. MCLAUGHLIN, *Registrar of Motor Vehicles.*

DEAR REGISTRAR MCLAUGHLIN: — I have received your letter of May 17, 1965, requesting my opinion as to the applicability of c. 16, §§ 10 and 11, providing for the payment of hospital expenses to registry employees with police powers in the following circumstances.

You state that:

"We have had a Motor Vehicle Examiner sustain injuries while performing clerical work associated with his law enforcement activities and have been requested to pay him for the time which he has lost as well as for his doctor's and medical bills. However, the injury was not sustained while he was examining or investigating a motor vehicle violation or accident."

General Laws c. 16, § 10 provides as follows:

"The registrar of motor vehicles may authorize the payment, out of the Highway Fund, of the reasonable hospital, medical and surgical expenses of any employee in the registry of motor vehicles having police powers under section twenty-nine of chapter ninety who is temporarily or permanently disabled, either mentally or physically, by reason of injuries sustained through no fault of his own in the actual performance of his duty."

The language of the above-quoted provision, in setting out the requirements for its applicability, states that the employee be one "having police powers under section 29 of chapter 90." From the facts as you have stated them, I conclude that a Motor Vehicle Examiner is an employee having police powers under c. 90, § 29. Such Motor Vehicle Examiner would therefore be within the purview of the provisions of c. 16, § 10.

Chapter 16, § 10 requires that the injury to such employee be "sustained through no fault of his own in the actual performance of his duty." No distinctions between clerical, examining or investigative duties are drawn in the statute.

Accordingly, it is my opinion that if you make a factual determination that the employee in question is an employee, having police powers under c. 90, § 29, who suffered the injury through no fault of his own in the actual performance of his duty, you are authorized to pay him, out of the Highway Fund, his reasonable hospital, medical and surgical expenses attributable to such injury.

Very truly yours,

EDWARD W. BROOKE

Pursuant to c. 29, § 59, the Treasurer of the Commonwealth is to report lost or destroyed interest-bearing bonds to the Governor and Council.

The requirement of c. 29, § 42, providing for the annual examination of the value of notes and securities in charge of the State Treasurer by a committee of the Executive Council, has been repealed by the enactment of St. 1964, c. 740.

JUNE 28, 1965.

HON. ROBERT Q. CRANE, *Treasurer and Receiver General of the Commonwealth.*

DEAR SIR: — I have received your letter of May 12, 1965, requesting my opinion on the effect of c. 740 of the Acts of 1964, repealing the statutory powers of the Governor's Council, upon c. 29, § 42, providing for the annual examination of the value of notes and securities in charge of the State Treasurer by a committee of the Governor's Council.

Specifically, you have asked:

". . . will you kindly advise me whether a committee of the council shall continue to examine the securities within the State Treasurer's office and if they are to continue such examination, to whom should the committee report?"

Section 4 of c. 780 of the Acts of 1964 provides in part:
"Subject to section 2 of this act and except as required by the Constitution of the Commonwealth, so much of each provision of the General Laws and of any special law as requires the advice and consent of the council with respect to any action or omission to act by . . . any officer . . . in the executive department, including without limitation, any . . . investment . . . sale . . . disposition or transfer . . . is hereby repealed."

In defining "advice and consent," section one of c. 740 of the Acts of 1964 provides:

"As used in this Act, the phrase 'advice and consent of the council' shall include without limitation, approval, *advice,* consent, and advice and consent, *however phrased in the General Laws* and in any special law of the Commonwealth." (Emphasis supplied.)

Chapter 29, § 42, providing for the annual examination of notes and securities by a committee of the Governor's Council, states in part:

"The governor shall . . . appoint a committee of the council, which shall examine the value of the notes and securities . . . and report thereon to the governor and council, who may direct him to sell or collect notes or securities . . . and to reinvest the proceeds. . . ."

Although the phraseology of c. 29, § 42 does not expressly use the words "advice" or "advice and consent," it is my opinion that the language of section 42, that the committee of the executive council shall examine and report, is to the same effect. From a reading of the statute, it is apparent that the purpose of the committee's report is to inform the Governor and make recommendations with respect to the disposition

of the notes and securities. In that sense then, the report of the committee is advisory and therefore within the purview of § 1 of c. 740 of the Acts of 1964, defining "advice and consent," and consequently within the scope of § 4 of that Act, repealing the requirement of their advice.

It is my opinion that the advisory power of the committee of the council in this context falls within the purposes of the referendum. I, therefore, answer your question in the negative. The committee of the Council, heretofore prescribed by c. 29, § 42, shall not be required to examine the notes and securities nor to report, as a prerequisite to action by the Governor.

As a second question you have asked:

"Under said section 59 of Chapter 29, should this office continue to report lost or destroyed interest bearing bonds to the Governor and Council as stated therein?"

Section 59 of c. 29 provides:

"If it appears to the governor and council that any interest-bearing bond of the commonwealth identified by number and description has, without bad faith upon the part of the owner, been lost or destroyed, wholly or in part, they shall, under regulations and with restrictions as to time and retention for security or otherwise prescribed by them, order the state treasurer to issue a registered duplicate of such bond, payable at the same time, bearing the same rate of interest as the bond lost or destroyed, and so marked as to show the number and date of the original bond. If such bond was of a class or series which has been called in for redemption before the application for a reissue, it shall be paid, with such interest only as would have been paid if the bond had been presented in accordance with such call."

The provisions of the above-quoted statute granting authority to the Governor and Council to issue bond duplicates is not affected by the provisions of c. 740 of the Acts of 1964. There is no requirement, express or implied, in c. 29, § 59 that the "advice and consent" of the Governor's Council is a prerequisite to the ordering of the duplicate bonds. The function of the Council, therefore, in this situation is not one of those intended to be repealed by the referendum.

Moreover, the effect of c. 740 in repealing certain of the powers of the Governor's Council, was in no way intended to relieve the Treasurer's office of its responsibility in this context. Even assuming, for the purposes of argument, that the effect of c. 740 was to somehow bar the power of the Council relative to the issuance of duplicate bonds, this would not relieve your office of its responsibility to report to the Council and, in any event, to the Governor.

Consequently, I answer your second question in the affirmative. The Treasurer's office should continue to report lost or destroyed interest-bearing bonds to the Governor and Council as provided in c. 29, § 59.

Very truly yours,

EDWARD W. BROOKE