Public Document No. 12

The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING JUNE 30, 1967

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

1M-5-68-947301 Estimated Cost Per Copy: $3.975

The Commonwealth of Massachusetts

BOSTON, DECEMBER 6, 1967.

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, 1967.

Respectfully submitted,

ELLIOT L. RICHARDSON,
Attorney General.

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL

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HERBERT E. TUCKER, JR.
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Assistant Attorney General: Director, Division of Public Charities

JAMES J. KELLEHER

Assistant Attorneys General assigned to Department of Public Works

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JOSEPH S. AYOUB JAMES TWOHIG

Assistant Attorney General assigned to Veterans' Division

RICHARD E. MASTRANGELO

Chief Clerk

RUSSELL F. LANDRIGAN

Head Administrative Assistant

EDWARD J. WHITE

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[1]Appointed, February 6, 1967
[2]Resigned, February 28, 1967
[3]Resigned, March 3, 1967
[4]Appointed, March 6, 1967
[5]Appointed, April 17, 1967
[6]Appointed, May 1, 1967
[7]Resigned, May 2, 1967
[8]Appointed, May 3, 1967
[9]Appointed, May 15, 1967
[10]Resigned, May 31, 1967

STATEMENT OF APPROPRIATIONS AND EXPENDITURES

For the Period July 1, 1966 — June 30, 1967

Appropriations

Attorney General's Salary	$ 25,000.00
Administration, Personal Services and Expenses	971,395.00
Veterans' Legal Assistance	18,160.00
Claims, Damages by State Owned Cars	100,000.00
Moral Claims	8,000.00
Capital Outlay Program, Equipment	1,481.02
Total	$1,124,036.02

Expenditures

Attorney General's Salary	$ 24,905.29
Administration, Personal Services and Expenses	971,333.67
Veterans' Legal Assistance	18,142.58
Claims, Damages by State Owned Cars	100,000.00
Moral Claims	8,000.00
Capital Outlay Program, Equipment	664.30
Total	$1,123,045.84

Income

Fees — Filing Reports — Charitable Organizations	$ 13,692.00
Fees — Registration — Charitable Organizations	2,676.00
Fees — Professional Fund Raising Council or Solicitor	70.00
Miscellaneous	705.00
Total	$ 17,143.00

Financial statement verified (under requirements of C. 7, S. 19, G. L.), January 29, 1968.

By JOSEPH T. O'SHEA,
For the Comptroller

Approved for publishing.

M. JOSEPH STACEY,
Comptroller

The Commonwealth of Massachusetts

Department of the Attorney General
Boston, December 6, 1967

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, 1967, totaling 26,068, are tabulated as follows:

Extradition and interstate rendition	114
Land Court petitions	140
Land Damage cases arising from the taking of land:	
Department of Public Works	1,572
Metropolitan District Commission	90
Civil Defense	1
Department of Natural Resources	21
Department of Public Safety	2
Department of Public Utilities	1
Government Center Commission	6
Southeastern Massachusetts Technological Institute	8
Town of Tewksbury Water Commissioners Board	1
Town of Wilmington	1
University of Massachusetts	4
Miscellaneous cases, including suits for the collection of money due the Commonwealth	12,475
Estates involving application of funds given to public charities	2,471
Settlement cases for support of persons in State institutions	1,317
Small Claims against the Commonwealth	116
Workmen's compensation cases, first reports	6,316
Cases in behalf of Employment Security	623
Cases in behalf of Veterans' Division	789

Introduction

My first 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, 1966, through June 30, 1967. During the first half of this period the Department was under the direction of Attorney General Edward W. Brooke and Attorney General Edward T. Martin.

During my first six months as Attorney General I have devoted a great deal of time to a careful analysis of the Department, assessing its strengths and weaknesses. I have instituted changes where, in my judgment, change was necessary, and have endeavored to preserve the best of existing practice. My goal has been to provide to the Commonwealth and its citizens the highest quality of legal services in an efficient and capable manner.

In this task, I have been most fortunate in being able to build on the excellent work of my predecessor, Attorney General Brooke.

The primary responsibility of the Department of the Attorney General is to advise and represent the government of the Commonwealth. As new laws are passed, and as the government of the Commonwealth assumes new functions, lawyers in the Department must handle a work load which constantly grows in volume, and which presents novel questions requiring extensive research. In view of this fact I have given the highest priority to ensuring that the Department will have the services of the best legal talent available. Since January, over 200 interviews have been held, and the quality of prospective attorneys has been high. A number of excellent attorneys have joined the Department including — to mention only two — Assistant Attorney General Alan J. Dimond, a leading member of the Massachusetts bar, who is now serving as Chief of the Administrative Division, and Assistant Attorney General Charles H. Rogovin, former chief prosecutor in the Philadelphia District Attorney's office and the Assistant Director for organized crime of the President's Commission on Law Enforcement and Administration of Justice. Mr. Rogovin is directing our activities in the organized crime field. I am confident that through an active recruiting effort, operated on a strictly non-partisan basis, we will continue to obtain the highly qualified lawyers needed for the work of the Department, even though our salary levels fall far short of what I would like to see.

My task has been made easier by the fact that over 50% of the able staff assembled by Attorney General Brooke, including nine of its twelve Division Chiefs, have remained with the Department. During much of my first six months in office, I have had the valuable assistance of First Assistant Attorney General Edward T. Martin who served my predecessor in the same capacity. It is with deep regret that I accepted Mr. Martin's resignation in May, upon his leaving to serve as the Governor's executive secretary. His successor as First Assistant is Levin H. Campbell, an attorney who has served ably under both my predecessor and myself.

Since taking office I have substantially increased the Department's activities in the field of criminal law by creating an Organized Crime Section. If the Commonwealth is to mount a successful attack on the activities of organized crime there must be a centralized statewide effort, operating on a continuing basis. The Department of the Attorney General is the agency most capable of performing the task of coordinating such a statewide effort. We are thus in the process of assembling a small but highly skilled team of investigators and attorneys, and laying the groundwork for a concerted attack on organized crime. Massachusetts is the first state in the nation to form a unit of this nature. An organized crime unit in the Department of the Attorney General cannot, of course, do the job alone. It will not supersede other law enforcement agencies of the Commonwealth. Most of the investigative, police and prosecutorial work will continue to be done by these agencies, whose personnel far

outnumber the manpower that is now, or in the future can be, available to the Department of the Attorney General. But this Department can give essential leadership to an overall effort, replacing the fragmented approach which has proved unsuccessful in the past.

The Attorney General is not only the Commonwealth's lawyer and its chief law enforcement officer. He is also, in many respects, the people's lawyer, charged with protecting the public interest. As Attorney General I intend to emphasize this aspect of the office and to develop it more extensively. I have already established a Consumer Protection Division. This Division will assist the buying public by investigating complaints brought by individual citizens, and by developing protective legislation. It will continue to carry out the Attorney General's responsibility for bringing anti-trust actions on behalf of the Commonwealth and the cities and towns.

Plans are also underway for the creation of a Citizen's Aid Bureau within the Department. This Bureau will assist citizens who have complaints and questions about government. It will be in operation shortly, and is one more example of the way in which the Attorney General can function as Attorney for the people.

Because the Department of the Attorney General is in close touch with the operations of state government as well as with the administration of justice in the Commonwealth, this Department is in an excellent position to draft and sponsor legislation dealing with these vital matters. I intend to devote a substantial portion of my efforts to the constant review of our laws, and will recommend changes in existing statutes and the enactment of new ones whenever doing so will benefit the citizens of the Commonwealth. This year I proposed 33 new measures for consideration by the Legislature. A list of these proposed acts appears as Exhibit "A."

Administrative Division

The work of the Administrative Division covers a broad spectrum of state government, and its members frequently deal with matters of major public significance. Its primary areas of responsibility are constitutional law and administrative law. It answers requests for legal opinions from constitutional officers and from state departments, agencies and commissions. Attorneys from the Division appear in court for the Commonwealth in civil cases, advise the Governor as to the constitutionality of pending legislation, and review town by-laws.

An important part of the work of this Division is the drafting of the opinions of the Attorney General. The Attorney General issues formal opinions in response to written requests by state officials for legal advice on matters pending before them. During the past fiscal year, 123 such opinions were issued, and they are included in this report. In addition, attorneys in the Division responded informally to many other requests

for legal advice. Most of the questions dealt with in formal opinions are novel and difficult, and they are often important. In one opinion, the Department of Public Works was advised that an employee suspended under the "Perry Law" upon the employee's being indicted in connection with the duties of his office was entitled to immediate reinstatement to his office whenever the criminal charges terminate without a guilty verdict. In another opinion the Attorney General advised the Commissioner of Education as to the proper method of calculating the respective share of sales tax revenues for school aid due the cities and towns of the Commonwealth.

The Administrative Division is also responsible for drafting opinions interpreting the Conflict of Interest Law (G. L. c. 268A). The Division is engaged in continuous study and interpretation of that statute, and this work has unquestionably added to the effectiveness of this essential law. During the last fiscal year, 68 conflict of interest opinions were issued to state employees. The Division also continued its practice of informal consultation with state agencies, city solicitors, town counsels, and other local officials in connection with the Conflict of Interest Law.

The litigation handled by the Administrative Division includes some of the most complex and significant cases which come before the courts. The Division is responsible for all civil litigation affecting constitutional officers, and much litigation involving state agencies and departments.

During the period covered by this report the case of *School Committee of Boston* v. *Board of Education* was argued before the Supreme Judicial Court, and the Court handed down a decision favorable to the Commonwealth. The School Committee challenged the constitutionality of the Racial Imbalance Act (G. L. c. 76, § 12A) enacted in 1965. In view of my great interest in this legislation and the issues involved I argued the case personally. The decision upholding the statute has been appealed by the School Committee to the Supreme Court of the United States.

Another case of major significance was argued before the Supreme Judicial Court during the last fiscal year: *First Agricultural National Bank of Berkshire County* v. *State Tax Commission.* The Bank has sought a binding declaration that it is exempt from the Sales and Use Tax which the Commonwealth recently enacted. The matter was reserved and reported without opinion by a single justice, and the Court's decision can be expected in the near future. The case has important implications for the administration of the tax, and raises the question whether national banks should continue to be immune under *McCulloch* v. *Maryland* from non-discriminatory state taxation.

Other major cases which the Administrative Division has handled during the last fiscal year include the litigation involving the apportionment of the Massachusetts Congressional Delegation and that of the General Court (*Dinis* v. *Volpe*), and the litigation relative to the merger of the Pennsylvania and the New York Central Railroad (*B & O Railroad* v. *United States*).

These cases are examples of the extraordinary matters which come before the Administrative Division. The great bulk of its day-to-day work consists of advising and representing in court the numerous boards, commissions, and agencies of the Commonwealth. During the last fiscal year, proceedings before the Alcoholic Beverages Control Commission, the Civil Service Commission, and the Outdoor Advertising Board have required a great deal of attention.

Members of the Division have been called upon to perform numerous other tasks. For example, they represented the Commonwealth's interests in hearings before the Interstate Commerce Commission involving the New Haven Railroad, and they made frequent appearances before legislative committees in connection with the Attorney General's legislative program and other proposed legislation. In addition, attorneys from this Division were responsible for reviewing and preparing summaries of the four constitutional amendments submitted to the voters at the November election. After the passage of the so-called Home Rule Amendment, members of the Administrative Division have held numerous conferences with local officials to determine the impact of this important amendment.

Finally, it must be mentioned that the Administrative Division continues to receive a constant stream of inquiries and requests for advice both from officials and from the public at large.

Division of Civil Rights and Civil Liberties

This Division is responsible for ensuring that the constitutional and statutory provisions guaranteeing the civil rights and civil liberties of citizens are vigorously enforced and are respected by all. Thus, the members of the Division are frequently called on to deal with exceedingly difficult and sensitive matters. I consider this Division's work to be of the utmost importance. To advise and assist it I have reinstituted the Attorney General's Advisory Committee on Civil Rights and Civil Liberties. This Committee is composed of members of church, social and civic organizations, and lawyers and law teachers concerned with these problems.

The major portion of this Division's work consists of advising the Massachusetts Commission Against Discrimination (MCAD) and representing it in court. This Commission administers the laws relating to discrimination in housing, education, employment, union membership and places of public accommodations, when such discrimination is based on race, color, religion, national origin and national ancestry and, in the areas of employment and union membership, sex and age.

The work of the MCAD led to several important cases during the last fiscal year. *Local Finance Co. of Rockland* v. *MCAD* involves the question of whether a finance company is a place of public accommodation. The Commission's order was reported by the Superior Court without opinion to the Supreme Judicial Court. *LaPierre* v. *MCAD* involves a

Commission finding of discrimination in housing. The respondent appealed from the Commission to the Superior Court, which, after hearing, ordered the case dismissed for lack of substantial evidence. The Commission had found discrimination on account of national origin, but the Superior Court determined that there was no evidence that the complainant, a Puerto Rican, was born outside the U. S. The Commission, being of the opinion that the terms "national origin" and "national ancestry" are used interchangeably in the context of anti-discrimination statutes, has appealed to the Supreme Judicial Court. The case of *Strong* v. *MCAD,* involving alleged discrimination in employment on account of color, was dismissed by the Commission after public hearing. The order was affirmed both by the Superior Court and by the Supreme Judicial Court. *Chicopee School Committee* v. *MCAD,* an appeal now pending in the Supreme Judicial Court from a finding of the Superior Court upholding the Commission's order, is the first case dealing with discrimination based on age in employment. The case of *Katzman* v. *MCAD,* involving discrimination in rental housing, was remanded to the Commission by the Superior Court on the Commission's motion. While judicial review was pending, the attorneys for the parties were able to effect a settlement which was embodied in an agreement by the Commission, and the case was closed. Besides representing the MCAD in proceedings brought to review its orders, attorneys from this Division frequently appear in court to enjoin persons against whom a complaint alleging discrimination in housing is pending from disposing of the property before the complaint is decided.

In addition to working with the MCAD, the Division of Civil Rights and Civil Liberties directed a major overhaul of the Commission's publication "Compilation of Laws Against Discrimination," to include all of the recent changes and additions to the anti-discrimination laws. The Division also assisted the Commission in revising its Rules of Practice and Procedure, bringing them up to date with the "Uniform Rules for Adjudicatory Proceedings before Administrative Agencies," issued by the Department of the Attorney General.

After studying the serious problem of visitation rights for migrant workers living on the property of their employers, the Division recommended and subsequently drafted legislation to extend and safeguard those rights.

In addition, the Division is called upon to deal with numerous inquiries from the public at large. These sometimes involve complaints by citizens about activities by officials of local and state government. In all such cases the members of the Division conduct an investigation and endeavor to see that the citizen's rights are protected.

Consumer Protection Division

The Division of Consumer Protection was created on January 18, 1967. It will seek to eliminate consistently fraudulent practices through enforc-

ing legislation designed to aid the consumer (*e.g.* the Retail Installment Sales Act of 1966), recommending and drafting new legislation where necessary, and increasing the availability of educational material for the consumer. The Division is also involved in cooperating with the Better Business Bureaus, the Consumers' Council, the Retail Trade Board, Industry Associations, and legal aid societies for the benefit of the consumer.

Since its creation, this Division has handled approximately 450 written complaints and received approximately 4,500 complaints and inquiries by phone. Each complaint is processed, and in most cases a satisfactory solution is reached. Though some complaints are readily disposed of, others require extensive investigation, often leading to the uncovering of other defrauded consumers. Of the 35 investigations undertaken since January, the following were of particular significance: the fishing industry in Southeastern Massachusetts, to determine the possibility of price fixing among the wholesalers; the finance industry of Massachusetts, to determine the extent to which finance companies were using kickbacks to automobile dealers to gain business; the Diversified Products Company, to determine if they were defrauding their franchise dealers by failing to discharge all its obligations to them; several dairy companies, to determine if the pricing of their products constituted an unfair trade practice; and, the Juliet Gibson Career & Finishing School, to determine if they were defrauding the students by taking their tuition and failing to provide them with a sufficient number of teachers. In each of these cases satisfactory conclusions were obtained by the Division after prolonged discussions between the parties.

Two of the investigations resulted in injunctions. One Franklin Clifford was temporarily restrained from improperly using the name AFL-CIO and representing himself as having ties with the union for his own benefit. In the Crescent Pool Company case, the company was enjoined from engaging in "bait and switch" and other types of misleading advertising practices. After this case, I met with the Swimming Pool Association of New England and outlined to its members what we considered to be fair advertising guidelines for that industry.

An additional phase of consumer protection in which the Division is actively engaged is the prosecution of anti-trust violations. Two such cases are presently being prosecuted, and two are in the preparatory stage. In *Commonwealth* v. *Morton Rock Salt Company, et al.,* the Division has commenced discovery procedures and looks to substantial recovery when the litigation is concluded. Another investigation by this Division determined that certain publishing companies have been engaged in a price fixing conspiracy with regard to library editions of school books, and the Division plans to initiate suit in the near future.

The activities of the Division have included attending conferences and meeting with members of various agencies and departments of both the Commonwealth and the federal government to review areas of common interest and concern; filling numerous requests for copies of Massachusetts consumer protection laws from both private individuals and con-

sumer fraud agencies throughout the country; preparing for publication of a Consumers Handbook to provide the consumer with information and facts which will enable him to better protect himself from fraud and deception; and addressing groups such as the Associated Bedding Manufacturers of New England and the Massachusetts Weights and Measures Conference regarding the work of the Division.

The attendance at legislative hearings in support of new consumer legislation is an important aspect of this Division's work. In particular, the Division supported a bill to regulate credit life insurance and a bill enlarging the jurisdiction of the small claims court from $150 to $200. In addition, members of the Division have met with state representatives and senators and interested private parties in order to explain and to seek their counsel on pending legislation. The Division is also actively working against strong opposition to get the Deceptive Practices Act approved. This bill would generally outlaw all unfair deceptive trade practices in Massachusetts which are similar to those outlawed by the Federal Trade Commission Act. It would give the Attorney General certain subpoena powers in the deceptive practices area, allow speedy injunction against such acts without the necessity of showing "scienter," allow for assurances of discontinuance, and in certain situations provide for corporate dissolution. The Act would also give this Division the benefit of 50 years of FTC experience in the field and enable it to act swiftly and strongly in civil litigation against unfair trade practices.

The success of this Division's initial efforts, and the large volume of complaints it has received from the public are strong indications of the need for vigorous state action to protect the consumer. The work of this Division will make Massachusetts one of the leaders in this vital field.

Contracts Division

The activities of the Contracts Division include the trial of highway and building construction cases; appearances on motions incident to these cases; the arguing and briefing of appeals; the approval of public contracts, bonds, and leases; and conferences with officials from over 80 state agencies concerning their questions arising out of state contracts.

The general classes of litigation regularly handled by this Division are as follows: (1) Claims against the Commonwealth under G. L. c. 258, § 1. These claims are generally for "Alterations" or "Extra Work" under Articles 22 and 23 of the *Standard Specifications for Highways and Bridges*. (2) Cases brought by sub-contractors under G. L. c. 149, § 29, wherein the Commonwealth is improperly joined with the general contractor's surety. The procedure in this Division has been to file a demurrer to these petitions. This demurrer has been routinely sustained since the Petitioner (the sub-contractor) is entitled to relief only against the surety in a proceeding under G. L. c. 149, § 29. (3) Claims by subcontractors against the retainage held by the Commonwealth under the provisions of G. L. c. 30, § 39F. The Commonwealth answers to these

claims on the merits and defends them at trial. (4) Cases wherein the Commonwealth is the Petitioner. These are generally against bonding companies where the contractor has been defaulted on the job, or are instances where the contractor has otherwise breached a contract with the Commonwealth. (5) Cases wherein the Division appears on behalf of an awarding authority to oppose the issuance of an injunction that would prohibit the award of a contract, or restrain the prosecution of work under an awarded contract.

A total of 150 cases were disposed of during the last fiscal year.

One of the more significant cases was *Construction Service* v. *Commonwealth.* The contractor originally sought approximately two million dollars in damages. The case was tried before an Auditor who awarded approximately $550,000, including $355,048.67 for twenty-two so-called sewer claims. In the Superior Court, the contractor was awarded $222,-801.66, of which $97,046.10 was retainage, $20,000 was a return of liquidated damages, and $34,141.64 represented interest on certain amounts due prior to the commencement of the action. The balance of the judgment, about $70,000, was awarded for claims for damages. A settlement was finally effected whereby the contractor terminated his appeal upon receipt of $25,000 in addition to the Superior Court award.

Two cases were prepared and argued before the Supreme Judicial Court. In *Town of Falmouth* v. *Division of Fisheries and Game,* the Court dismissed a bill seeking to enjoin the Division from making use of land that it had acquired in Falmouth. In *Wes-Julian Construction Co.* v. *Commonwealth,* the Court sustained the Commonwealth's exceptions relating to delay and changes in the excavation requirements, totaling $102,915.35. The Court ruled that in view of the specific provisions in the contract relating to delay, the contractor was not entitled to damages for delay.

In addition to its involvement in litigation, the Division has been called upon to attend conferences with various department heads and officials, investigate factual background of contract disputes, research statute and case law, and prepare legal memoranda and opinions on matters pertaining to bidding, execution of contracts, defaulting contractors and the prosecution and defense of pending cases.

The Division continues its assignment of reviewing and approving the form of contracts, bonds and leases between various state agencies and contractors, suppliers and manufacturers. Approximately 75-100 such contracts are submitted to this Division each week. Also, the form of all documents prepared in connection with note issues and notice of sale of bonds under financial assistance housing programs for the elderly and veterans of low income is reviewed and approved by this Division.

Criminal Division

The Organized Crime Section mentioned in the Introduction has been created and is in the initial phases of operation. The first priority is to

assemble a staff and develop a comprehensive picture of the nature and scope of organized crime in Massachusetts. Much attention has been given to developing close cooperation with other law enforcement agencies.

The regular work of the Criminal Division has, of course, continued during the last fiscal year without let up. Most of this work can be divided into two major categories: the investigation and prosecution of offenses affecting the integrity of the state service, and representation of the Commonwealth in proceedings brought by prisoners and others held in state institutions.

In three cases falling into the first category, the Supreme Judicial Court affirmed convictions obtained in the Superior Court. In *Commonwealth* v. *Favulli and Sullivan* the Court upheld convictions of two members of the Executive Council for soliciting a bribe and for conspiracy to solicit a bribe. In *Commonwealth* v. *Leonard* a conviction for larceny from the Massachusetts Turnpike Authority was affirmed. And in *Commonwealth* v. *Abbott Engineering and Mogavero* convictions for larceny were upheld.

In three other cases in the same category, members of the Criminal Division obtained convictions in the Superior Court. The first Small Loans Case was finally brought to trial after a lengthy period of pre-trial maneuvering during which the defendants filed hundreds of special pleadings. The defendants were convicted and have appealed. Convictions were also obtained in the so-called "Turnpike" cases: *Commonwealth* v. *Kelly* and *Commonwealth* v. *Schnackenberg*. In both cases the defendants have appealed to the Supreme Judicial Court.

The second Small Loans Case is currently at the pre-trial stage. It promises to be even more lengthy and complex than the first Small Loans Case.

Another major case handled by the Criminal Division during the last fiscal year was *Commonwealth* v. *Spindel*. The defendant was convicted of violating the Eavesdropping Statute, G. L. c. 272, §§ 99-101. The case involved both the construction of the statute and its constitutionality. The Supreme Judicial Court affirmed the conviction.

In the second category, members of the Division have been called upon to handle a large volume of extraordinary writs, primarily writs of error and petitions for habeas corpus, in both the state and federal courts. The number of such writs brought on behalf of prisoners is increasing, and can be expected to increase further as the United States Supreme Court hands down more decisions extending the constitutional rights of criminal defendants. The Division also represents the Governor in matters involving the rendition and extradition of fugitives.

Members of the public and public officials frequently come to the Division with complaints and information about suspected criminal activity. Complaints are carefully processed, and many of them are forwarded to the district attorneys and to state and local police for appropriate action. Complaints about matters within the primary jurisdiction of this Depart-

ment, such as alleged misfeasance by state officials, are investigated by investigators assigned to the Department, and action is thereafter taken if warranted. We are in frequent touch with other law enforcement officials throughout the Commonwealth, with whom we endeavor at all times to cooperate.

Eminent Domain Division

The Eminent Domain Division is concerned with litigation and problems arising from the taking of private property by the Commonwealth for a public purpose. When the property owner is not satisfied with the price offered by the Commonwealth for his property, he petitions the Superior Court to assess damages under G. L. c. 79 and attorneys from this Division represent the Commonwealth in court.

Great effort has been directed by this Division toward assuring that all people whose property has been taken are fairly, justly and promptly compensated. Procedures have been established to assure that every pending case will be prepared and ready for trial at the earliest possible date. Indeed, in many instances the Commonwealth has moved for speedy trials. We recognize the unfairness and hardship that may result if cases are prolonged unduly. Summer court sessions, in cooperation with the Chief Justice of the Superior Court, have been held in those counties where the case load is particularly heavy. The savings in money to the Commonwealth and in irritation and aggravation to the individual property owner are substantial.

The fiscal year started with 711 pending court cases. An additional 318 cases were filed during the year. Three hundred ninety-three cases were disposed of, leaving 636 cases pending at the end of the fiscal year.

The work of this Division, though mainly consisting of settlement or defense of land damage cases, is quite varied. The Division assists all agencies with their general real estate problems, and represents the Commonwealth in all Land Court matters in which the Commonwealth has an interest. This general work involves over 300 cases a year. In addition, the Division reviews the accuracy and form of all title abstracts and related documents made by the various state agencies covering land acquisition.

Among the special problems handled by this Division were: a legislative request to aid the Massachusetts Port Authority in their search for lost acreage at Logan Airport belonging to the Commonwealth; legal problems relating to acquisition of the Governor's Mansion; acquisition and lease of the Shirley Eustis House on behalf of the Massachusetts Historical Society; and defending the Department of Public Works in equity proceedings for injunctions.

A major problem during the year concerning the so-called Southwest Transportation Corridor has been whether the Commonwealth can take lands of the bankrupt New Haven Railroad. It is contended that Federal

jurisdiction under the bankruptcy laws supersedes the powers of the Commonwealth to take property within its borders. A Petition for Declaratory Judgment has been argued in the Federal District Court. That Court found against the Commonwealth, and an appeal has been filed in the U. S. Circuit Court of Appeals and is awaiting argument. The result of this litigation may well affect the entire Southwest Corridor plans and the plans of the Massachusetts Bay Transportation Authority to expand its facilities to the South Shore over the median of the proposed roadway.

In representing the state Department of Public Works, whose major function over the past several years has been the implementation of the Interstate Highway System, the Division has worked closely with the Federal Bureau of Public Roads and has earned high praise for its cooperation and work from the office of the General Counsel of that Bureau. In addition, the Federal Bureau has recommended to other states the use of forms designed by this Division for the implementation of Federal rules and regulations.

This Division, as noted in the 1966 Annual Report, prepared a *Manual of Eminent Domain Appraisal Law.* During the current fiscal year the demand for this Manual by appraisers, lawyers, and state agencies has been so great that the original printing is almost exhausted.

Four years of continuous work by the Division culminated in a proposed new Highway Code which was submitted to the 1966 Legislature (S. 885). During the last two years the Division has cooperated closely with the Highway Laws Study Commission, and with the members of its eleven working committees.

The Division continues to participate in the drafting of formal opinions relating to land problems and handles numerous inquiries for informal opinions and legal advice from all state agencies.

Employment Security Division

The Employment Security Division works closely with the Massachusetts Division of Employment Security. It prosecutes employers who are delinquent in paying the employment security tax and employees who file fraudulent claims for unemployment benefits. Its work has resulted in the recovery of substantial sums of money.

During the fiscal year, 623 cases were handled by this Division. Of these, 371 cases were on hand at the outset of the year, and 252 new cases were thereafter received. Of the new cases, 147 were employer tax cases, 103 were fraudulent claims cases, and 2 were appeals to the Supreme Judicial Court.

Cases closed during the fiscal year totaled 146, of which 75 were employer tax cases, 68 were fraudulent claims cases, and 3 were Supreme Judicial Court cases, leaving a balance of 477 cases. $82,625.77 was collected from employers and $41,161.40 collected as the result of fraudulent claims cases, making a total recovery for the Commonwealth of $123,-

787.17. Steps were taken during the year to urge more prompt referral of cases to the Attorney General, so as to avoid expiration of the statute of limitations prior to the time that legal action can be commenced.

Of the three cases argued before the Supreme Judicial Court during the year, two were *James E. Brackbill, Jr.* v. *Director of the Division of Employment Security* and a companion case. In both cases the employing unit had only one employee. The petitioners contended that (1) The Employment Security Act "exceeds constitutional limitations"; (2) "The changes made in the act since its original enactment exceed constitutional limitations"; (3) "The terms of the act are so vague as to deny due process of the Law." The Court upheld the validity of the act and sustained the position of the Director of the Division of Employment Security. The third case, *Survey & Research Service, Inc.,* v. *Director of the Division of Employment Security,* was a petition for review of a decision of the Board of Review. The major issue presented was whether a notice complied with the provisions of G. L. c. 151A, § 42 as amended, after hearing. It was held that the deposit of a notice in the post office, within the time limited, was equally effectual with personal service thereof within the same time on the adverse party. The district court's order dismissing the petition was reversed.

During this fiscal year, many conferences were held with the Regional Counsel of the Internal Revenue Service as to the priorities of claims of the Commonwealth between the Division of Employment Security and Internal Revenue Service. In one particular case the Division was able to expedite the collection of claims in the amount of $20,000.

Finance Division

The Finance Division acts as counsel to the Commissioner of Banking, the Commissioner of Insurance, the Department of Corporations and Taxation, the Treasurer of the Commonwealth, the State Retirement Board, the Teachers' Retirement Board, and the Contributory Retirement Appeal Board.

During the last fiscal year members of the Division argued three cases of considerable importance before the Supreme Judicial Court. *Commissioner of Insurance* v. *First National Bank of Boston* involved the power of the Commissioner to compel the appearance of witnesses at a hearing to investigate the affairs of a company in receivership. The Commissioner had been appointed receiver of the Suffolk Insurance Company. He called a hearing and subpoenaed the Bank. The Bank at first complied, but then refused to appear on the ground that the Commissioner had no power to hold the hearing. The Commissioner filed an application before a single justice to compel the Bank to appear. The Justice reported the case without decision to the full Supreme Judicial Court, and the Court upheld the Commissioner. The Court held that he had the power to investigate companies in receivership as well as going companies, and that there was no conflict between his role as Commissioner and his role as receiver.

Massachusetts Port Authority v. *Treasurer and Receiver General* was a petition for declaratory judgment to determine the extent to which the Port Authority was responsible for the retirement allowances of certain of its former employees. The Superior Court reported the case without decision. The Supreme Judicial Court held that the Authority must reimburse the Commonwealth for amounts allowed to former employees of the Authority on account of superannuation, ordinary disability and failure of re-appointment in the proportion as contended by the Commonwealth, and that it must reimburse the full amount paid by the Commonwealth as the result of accidental disability. The Commonwealth was ordered to reimburse the Authority for amounts it had expended for retirement allowances for veterans in the proportion that the employee's service with the Commonwealth, exclusive of service with the Mystic River Bridge, bears to the total period of his service. This case resolves many of the long standing questions as to just what obligations the Port Authority assumed when it was created in 1959.

Harding v. *Commissioner of Insurance* involved a petition for writ of mandamus to compel the Commissioner to approve the calculation and amount of accidental death benefits awarded by the Worcester Retirement Board. The award had been made by the local board without a finding having been made that the death was the natural and proximate result of the injury for which the deceased had been retired. The petitioner argued that the Commissioner was limited to calculating the amount of the award. The Supreme Judicial Court held that this argument would place local retirement boards above the law, and affirmed the decision of the Superior Court dismissing the petition.

A member of this Division sits as Chairman on the Contributory Retirement Appeal Board and acts as counsel for the Board. During the fiscal year 150 appeals from decisions of local boards were heard, and 17 petitions for review of decisions of the Contributory Retirement Appeal Board were filed in the superior court. The Board continues to hear all appeals promptly, and each claimant's case is decided shortly after the filing of an appeal.

The Division's work with the Treasurer and Receiver General of the Commonwealth involves such matters as the approval of state and county bonds and the determination of claims for the proceeds of insurance which have escheated to the Commonwealth. Many people fail to collect the proceeds of insurance policies, through simple neglect, because the policy has been lost, or because the beneficiary does not know about the policy. When no claim is made to the insurance company within a reasonable period of time, the law requires it to turn the proceeds over to the office of the Treasurer. This Division advises the Treasurer whether he should make payment to the claimant and, if not, advises him as to the steps to be taken so that proper payment can be made. During the last fiscal year, approximately 75 such claims passed through this Division.

In addition, members of this Division are called upon by state officers and the public to give legal advice on questions pertaining to the sales tax,

real estate tax exemptions, income tax refunds, retirement, insurance and other related matters.

Division of Health, Education, and Welfare

Increased governmental involvement in the fields of health, education, and welfare, together with growing public interest, have been accompanied by increase in the activity of the Health, Education, and Welfare Division during the last fiscal year. The Medicaid program, for example, and such state legislation as the Clean Waters Act, have generated whole new fields of responsibility for the Division.

Moreover, besides furnishing a broad range of legal services to the departments of Public Health, Mental Health, Education, and Public Welfare, the Division began during the year to service the needs of several newly established agencies including the Medical Assistance Advisory Council, Board of Higher Education, Council of the Arts and Humanities, and Division of Water Pollution Control.

The work has been extremely varied. Litigation included such matters as enforcement of agency orders relative to licensing of nursing homes, abatement of contamination of a source of public water supply, defense of appeals from administrative decisions of the Department of Public Welfare relative to Welfare claims, and defense of petitions challenging rates established by the Commissioner of Administration for reimbursement to hospitals for care of welfare patients. Although the total number of cases pending in the Division exceeded 225 during the year, the Division was successful in reducing the number to 154 cases as of the close of the period.

An important part of the work of this Division consists of rendering assistance to state agencies which wish to participate in federally financed programs. The Division works closely with agencies in preparing federal grant applications, and prepares a letter verifying that the particular agency is authorized under state law to administer the federal program. Such an assurance is a prerequisite to obtaining federal funds.

Air and water pollution have recently become matters of primary concern not only to the citizens of the Commonwealth, but also to this Division. With the establishment this year of the Division of Water Pollution Control of the Department of Natural Resources, the Division of Health, Education, and Welfare has played an active role in preparing for that agency's vigorous enforcement program through advice on such matters as the procedures required for promulgating regulations and issuing Orders. Members of this Division also consulted with the Division of Air Pollution Control to the end that the most effective, practicable program possible will be generated to combat the increasingly serious menace of air pollution.

Another specialized endeavor of this Division involves G. L. c. 71, § 34, which authorizes the Attorney General, upon request by a school commit-

tee, to act to assure that each city and town budget is sufficient to support the public schools. This year, there were 6 requests from school committees for action by the Attorney General, each of which was resolved to the satisfaction of the school committees.

A proposed recodification of the laws governing commitment of mentally ill persons (S. 1129), a bill to reorganize the structure of welfare administration (S. 804), a proposal to establish a rate setting commission (H. 4431), and a bill to provide hearings to determine whether or not certain inmates and patients in state mental institutions are illegally detained (H. 4918), are among the most significant pieces of legislation prepared or reviewed by the Division, and supported by the Department, during the year.

Participation in the Mental Retardation Planning Project, commencement of a program to develop effective methods of instructing public school students on the harmful effects of drug abuse (in conjunction with the Department of Education), and publication of a manual entitled "Management of Administrative Records" (in conjunction with the Archivist and the Records Conservation Board), are other matters of particular interest to which the energies of the Division were devoted.

One of the endeavors in which the Division has taken most pride has been its special effort to encourage agencies to call upon it for legal advice in the earliest stages of potentially troublesome situations. The result has been to avoid unnecessary litigation and to encourage closer cooperation between the Division and the agencies it services.

Industrial Accidents Division

This Division handles Workmen's Compensation cases involving State employees. The Commonwealth is a self-insurer and under the provisions of G. L. c. 152, § 69A, the Attorney General must approve all payments of compensation benefits and disbursements for related medical and hospital expenses in compensable cases. Whenever the claim is contested, this Division represents the Commonwealth before the Industrial Accident Board and, if an appeal is taken, in the Superior Court and the Supreme Judicial Court.

During the last fiscal year the Supreme Judicial Court decided three cases argued by members of this Division: *Sherman's Case, Kilcoyne's Case,* and *Da Lomba's Case.* The last two cases presented questions of considerable interest and importance in the field of workmen's compensation. In *Kilcoyne's Case* an attendant nurse who lived on the grounds of a state school fell and suffered injuries while carrying groceries into his quarters on his day off. The Court held that the employee's occupancy of quarters at the school at a low rent of $1.54 a week had "elements of convenience and advantage on both sides," since the employer could call him to fill in for absent employees. Thus, the injury arose out of and in the course of his employment and an award of compensation was sus-

tained. In *Da Lomba's Case* the Supreme Judicial Court held that the Industrial Accident Board or any of its members must adhere to the Board's Rules in all proceedings. The Court reasoned that the Board might revoke or amend its Rules, but that it was not free to disregard them in particular cases.

During the year, a total of 6316 accident reports were filed on State employees' industrial injuries, a decrease of 139 over the prior year. Of the lost-time disability cases, the Division approved 1091 cases, an increase of 49 over the prior year.

The Division handled 467 assigned appearances at the Industrial Accident Board during this period, including hearings and pre-trial and other conferences. Not included in this total of Board assignments are an indeterminate number of informal conferences and sessions in which this Division participates at the Industrial Accident Board, especially those required in the weekly review of new claims pending evaluation and approval by the Attorney General.

Total payments made by the Commonwealth on State employees' claims under Chapter 152, including those on accepted cases, Board and court decisions and lump sum settlements, approved by the Industrial Accident Board, for the period July 1, 1966 through June 30, 1967 were as follows:

Industrial Accident Board (General Appropriation)*

Incapacity compensation	$1,237,716.42
Hospital costs, drugs, et al	215,008.20
Doctors, Nurses, et al	180,027.75
	$1,632,752.37

*Metropolitan District Commission***

Incapacity compensation	$ 141,096.24
Hospital and other Medical costs	44,763.45
	$ 185,859.69

Total — All Disbursements

Incapacity compensation	$1,378,812.66
Hospital and Medical costs	439,799.40
	$1,818,612.06

These totals represent an increase in compensation payments of $139,519.39 over the prior fiscal year. This increase is attributed to a number

*Appropriated to the Industrial Accident Board and administered through its Public Employees Section.

**These disbursements are from MDC appropriated funds for payment of claims involving MDC employees.

of factors, including a 10% statutory increase in the maximum weekly compensation payment to $58.00, effective November 15, 1965. The increased rate was in effect during the last fiscal year.

In addition to its responsibilities in matters concerning state employees, the Division represents the Commonwealth in its capacity as custodian of the second-injury funds, under §§ 65 and 65N of c. 152. Members of the Division appear before the Board when insurers and self-insurers file petitions under §§ 37 and 37A of c. 152. Payments of $500 are made by insurers and self-insurers into the General Industrial Accident Fund (§ 65) only in fatal industrial accident cases in which no dependents survive, while payments of $500 are made into the Veterans' Industrial Accident Fund (§ 65N) in all fatal cases without regard to dependency survivorship.

Because of the extremely limited funding process for the § 65 fund, special emergency legislation had to be enacted twice, in 1963 and 1965, in order to make it possible to make payments on proper claims against this Fund. Under this temporary legislation all payments were credited to a special fund under § 65. Thus all claims could be met.

At the close of the last fiscal year, the General Fund held an unencumbered balance of $139,479.33. Payments totalled $22,849.55 and receipts totalled $8,100. The amount of receipts should be contrasted with fiscal 1966 when a total of $114,400.00 was received into the special fund, substantially due to the temporary legislative act.

Receipts in the Veterans' Fund (§ 65N) during the fiscal year were $60,750 with payments of $38,937.28 during the same period. As of June 30, 1967 there remained an unencumbered balance of $244,680.06 in this fund.

Public Charities Division

The greatest volume of this Division's work relates to accounts of trustees, executors and other fiduciaries, petitions for probate of wills, appointment of executors and trustees, licenses to sell real estate, and annual financial reports of charitable organizations filed in compliance with the requirements of G. L. c. 12, § 8F. During the last fiscal year several thousand such matters were handled by the Division.

Attorneys for the Division handled a number of significant cases, including three before the Supreme Judicial Court. In *Old Colony Trust Company* v. *Silliman,* the Division supported the contention of the trustee that provisions in a will permitting the trustee to determine "whether accretions to the trust property shall be treated as principal or income" did not make the amount of principal passing to charity on the death of the life tenants "not presently ascertainable." The Internal Revenue Service had disallowed charitable deductions from the Federal Estate Tax on the ground that the value of the charitable remainder could not be ascertained.

The trustee and the executors petitioned for instructions. The Supreme Judicial Court accepted the position taken by the Division and the trustee. The Court held that the provision in the instrument did not substitute the discretion of the trustee for "the usual and understood rules applicable to fiduciaries." The Court said that the value of the remainder was, therefore, reasonably ascertainable. The case was returned to the Probate Court for instruction.

In *Sleeper, Executor* v. *Camp Menotomy, Inc.* the Division filed a brief in the Supreme Judicial Court in support of a decision by the Middlesex Probate Court that a $150,000 bequest to the Arlington Girl Scouts of Arlington, Massachusetts under the will of Edith M. Fox should go to the Mistick Side Girl Scout Council, Inc. rather than to Camp Menotomy, Inc. The latter was originally named Arlington Girl Scouts, Inc., but disassociated itself from the Girl Scouts of America, in protest against the parent group's policy of organizing by areas rather than by particular cities and towns. The Supreme Judicial Court sustained the Probate Court's decision.

The Division also appeared before the Supreme Judicial Court in the case of *Essex County Bank and Trust Company* v. *Attorney General,* involving the *Bartholomew Donnelly* estate. The Essex County Probate Court had rendered a decree in favor of a Catholic Home for the Blind in Jersey City, New Jersey. This decree was affirmed.

During the last fiscal year the Division handled a number of important *cy pres* matters, *i.e.* cases in which it is not possible to use charitable funds for the particular purpose which the person establishing the trust intended. In these cases the court assists the trustees in determining the charitable use which will most nearly satisfy the original intent. In the *Susanna K. Tobey* estate, funds which had reached a total of $1,500,000 had been left to establish a home for aged women in Wareham. The probate court entered a decree permitting the funds to be used to assist the Tobey Hospital in Wareham. In the *Ruth Holmes* estate, funds which reached a total of $280,000 had been left for the purpose of founding an orphanage. The court permitted the trustees to use $125,000 of the fund to erect a children's wing at St. Luke's Hospital in Middleboro. The income from the balance of the fund is to be used for scholarships for children from Carver, Middleboro and Lakeville. In the *George Phelan* estate, funds had been left to build a home for destitute children, or a hospital, in Cambridge. The fund had reached a total of $358,000, and the court permitted the trustees to use this money to construct and equip an out-patient clinic in a new building at the Cambridge City Hospital.

The Division participated in court proceedings relating to the disposition of the remainder of a trust under the will of *Robert C. Witten,* and cooperated with the trustees in the *John Brewster* and *Hannah Griffith Shaw* trusts to obtain decrees permitting deviations from provisions restricting investment. The decrees allowed the trustees to follow the "prudent man" rule.

In the *Catherine Connolly* estate, referred to in the 1966 Report, the Division brought proceedings to set aside a decree entered without any notice to the Attorney General but assented to by counsel for all the parties participating. The decree declared that the gift failed but that half the residue should be used for the purpose designated by the testatrix and the other half be distributed to her heirs. At the hearing of the Division's petition, it appeared that counsel opposing the gift would claim appeals from an adverse decision against them and would seek counsel fees in any event. A settlement was negotiated under which 22/32nds of the residue would go for the charity in Carraroe, Ireland, rather than the 50% (*i.e.* 16/32nds) provided for in the original decree, and counsel fees were charged only to the amounts going to the next of kin.

In addition, the Division participated in several court proceedings involving contests of wills containing provisions for the benefit of charities and approved several compromises of such contests.

Objections made by the Division to the proposed sale of the *George Robert White Fund* building on Washington Street in Boston, at the price of $265,000, led to a public auction at which a price of $335,000 was obtained resulting in an increased benefit to the charity of $70,000. In the *Hyde* estate, the Division assented to a petition for the sale of first mortgage bonds on the Hotel Touraine held by the trustees to the lessees for about $900,000. The buyers were not able to complete the necessary financing. The mortgage was later foreclosed and the hotel property was brought in by the trustees. The highest bid price was about $225,000. Subsequently, the trustees sold their shares to the Maurice Gordon interests for about $40,000, cash; a purchase money mortgage of $400,000, payable in three years; and a commitment to discharge, or settle, the current overdue taxes estimated at $280,000.

Proceedings of interest relating to the dissolution of charitable corporations included those concerning the *Horace Moses Foundation, Inc.* As a result of the Division's objections, and with the cooperation of the Attorney General of Ohio, a consent decree was entered under which about $4,000,000 of assets of the Foundation, which had been transferred to a National Bank in Ohio, as trustee under an inter-vivos trust for charitable purposes, were returned to the Foundation. The inter-vivos trust was terminated and the proceedings for the dissolution of the Foundation dismissed. Other dissolution proceedings related to the Boston Lakeshore Home, the Grove Hall Universalist Church, the Massachusetts Association of Universalist Women, the Parents Kindergarten, Inc., and the South End Diet Kitchen.

During the fiscal year, the Division handled a great many matters relating to estates administered by public administrators. A total of $117,395.50 was paid into the Treasury of the Commonwealth on account of property of such estates escheating to the Commonwealth because of a lack of known heirs of the descendants.

Torts, Claims and Collection Division

The Torts, Claims and Collection Division represents employees of the Commonwealth where claims are made against them for occurrences arising in the scope of their employment. After an investigation and a determination as to liability, the claim is settled, if warranted, upon a reasonable basis. If settlement is not warranted, this Division represents the employee in subsequent litigation.

Motor vehicle tort claims are paid from a fund established by the Legislature — pegged for the past several years at $100,000 annually. Notwithstanding the increase of indemnification for motor tort claims from $10,000 personal injury and $5,000 for property damage to $25,000 for personal injury and $10,000 for property damage claims, we have not yet had to seek a supplementary appropriation from the Legislature for payment of automobile claims. Indeed, the average motor vehicle tort settlement for this fiscal year, including verdicts and findings as the result of trial, was $333.12, which compares most favorably with that for the previous year of $372.33. In this day of spiraling claim costs, I take considerable pride in the excellent performance of the attorneys in this Division. Nonetheless, the time is fast approaching when even their efforts will not suffice to keep total recoveries within the $100,000 figure.

Under G. L. c. 12, § 3A, this Division is responsible for processing claims for damage occurring under circumstances which impose a moral but not a legal liability upon the Commonwealth. During the past year 146 such claims have been processed for payment at an average settlement of $53.21 per claim.

In addition, this Division represents the Department of Public Works and the Metropolitan District Commission upon claims for personal injury and property damage arising out of defects in state highways and MDC boulevards where statutory liability is imposed under G. L. c. 81, § 18 and chapter 92, § 36. Many claimants are unsuccessful because they fail to comply with statutory requirements for claims of this nature. During the past fiscal year, two claims for highway defects were settled in the amount of $93.45 and paid from the DPW appropriation, and six claims each were settled in the amount of $5,182.30 and paid from the MDC appropriation.

All claims for damage to state property, care of patients in state institutions, and for other obligations owed to various departments are referred to this Division for collection. The following is a summary of collections made by this Division on behalf of the Commonwealth during this fiscal year.

The following collections have been made in 564 cases during the period covered by this report:

Department	*Number of Cases*	*Amount Collected*
Mental Health	58	$132,006.00
Public Health	115	63,458.40
Public Works	278	39,230.43
Metropolitan District Commission	78	21,061.14
Corporations and Taxation	0	26,000.00
Education	10	1,757.01
Public Safety	10	2,065.78
Parole Board	1	95.00
Treasury	0	80.00
Youth Services	2	140.00
Division of Employment Security	1	75.00
Natural Resources	3	580.95
State Colleges	2	267.00
Correction	2	156.64
Public Utilities	2	496.40
Division of Waterways	1	1,376.50
Registry of Motor Vehicles	1	150.00
	564	$287,196.25

Finally, members of this Division represent the Attorney General on the Motor Vehicle Appeal Board.

Veterans' Division

During this fiscal year, the Veterans' Division has continued its policy of giving assistance to Massachusetts veterans and members of their families. The Division is available at all times to assist veterans in identifying and securing the many special services — local, state, and federal — available to them.

In fiscal 1967, there has been a sizeable increase in the number of inquiries, in large part due to federal and state laws granting increased benefits to Vietnam veterans.

The Division has participated in the drafting of a number of formal opinions of the Attorney General dealing with veterans' affairs. It has also held frequent conferences with federal and state agencies and with local tax authorities. The continued cooperation of these public agencies, especially the Commissioner of Veterans Service and his entire staff, is gratefully acknowledged.

Exhibit "A"

1967 Legislation Proposed by the Attorney General

1. An act to increase the jurisdictional amount of the Small Claims Court. (Chapter 21, Acts of 1967)

2. An act to increase the penalties for second offenders who violate the gambling laws. (Chapter 189, Acts of 1967)

3. An act to make assault and battery to collect a debt a separate crime with severe penalties. (Chapter 226, Acts of 1967)

4. An act to authorize arrest without a warrant of violators of certain gaming and gambling laws. (Chapter 372, Acts of 1967)

5. An act to permit police officers to seize liquor illegally possessed by minors. (Chapter 377, Acts of 1967)

6. An act allowing Massachusetts to join the New England State Police Compact. (Chapter 498, Acts of 1967)

7. An act relating to reporting procedures by taking authorities in eminent domain proceedings. (Chapter 526, Acts of 1967)

8. An act extending the application of certain provisions pertaining to public contracts to public authorities. (Chapter 535, Acts of 1967)

9. An act to extend to public authorities the Competitive Bidding Statutes. (S. 185)

10. An act requiring suspension of the license of any driver who, after arrest, refuses to submit to a breath test. (Chapter 773, Acts of 1967)

11. An act establishing the Governor's Committee on Law Enforcement and the Administration of Justice. (Chapter 798, Acts of 1967)

12. An act relating to the Eavesdropping Laws. (Chapter 102, Resolves of 1967)

13. An act clarifying the exemption of public utilities from the Eavesdropping Laws. (Chapter 102, Resolves of 1967)

14. An act further clarifying the Competitive Bidding Laws. (Chapter 535, Acts of 1967)

15. An act increasing the compensation for special grand juries. (S. 138)

16. An act exempting assistant attorneys general from the Conflict of Interest Law in certain cases. (S. 140)

17. An act regulating the transmission of racing information. (S. 151)

18. An act relating to the removal of public officials. (S. 170)

19. An act allowing the Attorney General to inspect income tax returns in certain criminal investigations. (S. 190)

20. An act establishing a special commission to study bail reform. (H. 1672)

21. An act clarifying the Conflict of Interest Law. (H. 2393)

22. An act relating to the prevention of "bait-advertising." (H. 2429)

23. An act making it unlawful to receive money derived from gambling profits. (S. 150)

24. An act requiring public authorities to maintain open records. (S. 182)

25. An act extending the law relating to public contracts to public authorities. (Chapter 102, Resolves of 1967)

26. An act to establish Juvenile Courts in Worcester and Springfield. (H. 1652)

27. An act extending the School Adjustment Counseling Program to secondary schools. (H. 510)

28. An act authorizing the Attorney General and District Attorneys to subpoena certain books and records. (S. 144)

29. An act extending the powers of the Massachusetts Defenders Committee. (H. 1673)

30. An act authorizing the granting of immunity to witnesses in certain cases. (S. 139)

31. An act authorizing appeals by the Commonwealth on questions of law under certain conditions in criminal prosecutions. (Chapter 898, Acts of 1967)

32. An act relating to the position of Chairman of the Massachusetts Commission Against Discrimination. (H. 2659)

33. An act further clarifying the Campaign Spending and Disclosure Law. (H. 1627)

Conclusion

The foregoing gives some indication of the tremendous scope, volume, and variety of our work. The members of the various Divisions handle literally thousands of cases, large and small, and a substantially greater number of requests for advice, questions, complaints, and inquiries of all types. I believe that all of these tasks are being performed exceptionally well by a capable and dedicated staff. I shall do all within my power to maintain and enhance this high level of performance. I view the Department of the Attorney General as a professional office — the state's law firm — which should provide the Commonwealth, its agencies, and employees, and the people generally, with the finest services possible.

Respectfully submitted,

Elliot L. Richardson,
Attorney General.

1. July 8, 1966.

Honorable James M. Shepard, *Director, Division of Fisheries and Game.*

Dear Mr. Shepard:—In a recent request for an opinion you ask whether students from states other than Massachusetts who attend school in this Commonwealth for nine or more months out of the year are entitled to resident licenses under G. L. c. 131, § 8, which I quote in part:

"Sporting, hunting, fishing and trapping licenses shall be issued to the following classes of persons upon payment of fees as hereinafter provided:—

"(1) A citizen of the United States, resident in this commonwealth for at least six consecutive months immediately prior to his application for such license, or a non-resident citizen coming within one of the two following classes:—

"*Class A.* Owner of real estate in the commonwealth assessed for taxation at not less than one thousand dollars, or person commissioned or enlisted in the military or naval service of the United States and stationed within the commonwealth.

"*Class B.* Member of any club or association incorporated for the purpose of hunting, fishing or trapping, or for any combination of such purposes; provided, that said corporation owns land in the commonwealth assessed for taxation in a total amount which is at least equal to one thousand dollars for each member, and that the membership list of the corporation shall be filed from time to time upon request, and at least annually, with the clerks of the several cities and towns within which such land, or any portion thereof, is located and with the director . . . "

Under other parts of this statute, license fees for non-residents are higher than they are for residents. For purposes of answering this question, I shall assume that the students about whom it is asked have attended school here for at least six consecutive months and that they have some regular living quarters here and do not commute to other states.

"In laws relating to taxation, voting and settlements the word 'residence,' in the absence of an expressed, contrary, legislative intent, has always been interpreted as equivalent to the word 'domicil.'" *Plymouth* v. *Kingston,* 289 Mass. 57, 60 and cases cited. However, the license fees established by G. L. c. 131, § 8 are clearly not taxes. *Commonwealth* v. *Boyd,* 188 Mass. 79, 80. And since domicil has been defined as "the place of one's actual residence with intention to remain permanently or for an indefinite time and without any certain purpose to return to a former place of abode" (*Tuello* v. *Flint,* 283 Mass. 106, 109; *Rummel* v. *Peters,* 314 Mass. 504, 512 and cases cited), it would be anomalous, if not inconsistent, to interpret G. L. c. 131, § 8 as requiring six months' domicil for issuance of licenses at the lower rate. Furthermore, while there is no doubt as to the right of a state to impose discriminatory restrictions upon the issuance of sporting licenses to non-residents (*Commonwealth* v. *Hilton,* 174 Mass. 29, 32; 61 A.L.R. 338), there is considerable doubt as to whether the equal protection clause of the Fourteenth Amendment to the United States Constitution permits a state to discriminate against a certain class of domiciliaries in the

issuance of such licenses. *Harper* v. *Galloway,* 58 Fla. 255, 263-265. *State* v. *Mallory,* 73 Ark. 236, 250. *Cf. State* v. *Kofines,* 33 R. I. 211, 240. But see also *Opinion to the Senate,* 87 R. I. 37, 39. It is a canon of statutory construction that where a statute is capable of several interpretations, an interpretation which would cast doubt on the constitutionality of the statute will, if possible, be discarded in favor of one whose constitutionality is unquestioned. *W. & J. Sloane* v. *Commonwealth,* 253 Mass. 529, 534 and cases cited. See *Ferguson* v. *Commissioner of Corporations & Taxation,* 316 Mass. 318, 323. I conclude that G. L. c. 131, § 8 does not require six months' domicil for issuance of a resident license.

It is thus immaterial that most students who come here from other states to attend school probably do not acquire domicil in Massachusetts. See *Opinion of the Justices,* 5 Met. 587, 589. The question is whether for purposes of G. L. c. 131, § 8, they acquire residence. "Residence is a term of flexible meaning." *Krakow* v. *Department of Public Welfare,* 326 Mass. 452, 454. See *Rummel* v. *Peters, supra,* 511. Perhaps because of this flexibility, courts have not been consistent in determining whether students were residents of the states in which they attend school. See *Putnam* v. *Johnson,* 10 Mass. 488, 500; *Pediqo* v. *Grimes,* 113 Ind. 148, 153; *Berry* v. *Wilcox,* 44 Neb. 82; *Hicks* v. *Skinner, 72* N. C. 15, 16-17, all holding that students were legal residents of the states in which they attended school. But *cf. Rummel* v. *Peters, supra,* 515-516; *Sanders* v. *Getchell, 76* Me. 158, 166; *Kelly* v. *Garrett,* 67 Ala. 304, 309; and cases cited in Beale, *A Treatise on the Conflict of Laws,* p. 176, fn. 1, holding that students were not residents of such states.

Obviously, therefore, the interpretation of the term "resident" which appears in c. 131, § 8 cannot be determined by resort to the ordinary authorities. In view of the conflicts and ambiguities in the cases, I am inclined to resolve the controversy by giving the statutory language the most straightforward reading which is possible. A "resident" of a particular state is a person who lives in that state. The term in ordinary usage does not necessarily imply an intent to remain indefinitely in a given location; nor would the purpose for which a person has taken up residence be relevant. (Compare the precise characteristics of "domicile," *Tuello* v. *Flint, supra.*)

The Legislature has referred to "residents," and has included an additional requirement that such residency be of at least six months' duration. I have indicated above that there is no basis for assuming that the General Court intended "residence" to be construed to mean "domicile." Likewise, there is no reason to believe that the Legislature wished students to be treated differently from non-students. Had such been its desire, provision could easily have been made by appropriate language.

Nothing in the statute indicates that students should be deprived of rights enjoyed by others who have been residents of the Commonwealth for a period of six months. Accordingly, it is my opinion that the question posed on the first page of this opinion should be answered in the affirmative.

Very truly yours,

Edward W. Brooke, *Attorney General.*

2. July 8, 1966.

Honorable William C. Maiers, *Clerk of the House of Representatives.*

Dear Sir:—You have recently transmitted to me the following Order adopted by the House of Representatives on June 20, 1966:

"That the Attorney General of the Commonwealth be forthwith requested by the House of Representatives to render an opinion to be delivered to the Speaker and the Clerk of the House of Representatives at the earliest possible date on the following questions:—

"1. Can the commissioner of corporations and taxation, acting under authority of chapter sixty-four G of the General Laws, require the payment of a room occupancy excise tax on consideration charged for personal occupancy of any room or building in a city or town, when such city or town does not require a license in accordance with sections six, twenty-three or thirty-two B of chapter one hundred and forty of the General Laws for the purpose of such use?

"2. Can said commissioner, acting under authority of said chapter sixty-four G, make a determination whether or not a city or town should require a license for such use as described in question 1?"

I consider the questions individually. I quote the relevant portions of St. 1966, c. 14, § 25, which inserts G. L. c. 64 G, § 1:

"When used in this chapter the following words shall, unless the context otherwise requires, have the following meaning:—

"(a) 'Hotel,' any building used for the feeding and lodging of guests which is conducted, controlled, managed or operated, directly or indirectly, pursuant to an inn-holder's license issued under the provisions of section six of chapter one hundred and forty.

"(b) 'Lodging House,' a house where lodgings are let to five or more persons not within the second degree of kindred to the person conducting it and which is licensed under section twenty-three of chapter one hundred and forty.

"(c) 'Motel,' any building or a portion of a building, other than a hotel or lodging house, in which persons are lodged for hire with or without meals and which is conducted, controlled, managed or operated, directly or indirectly, pursuant to a license issued under the provisions of section thirty-two B of chapter one hundred and forty."

Since the room occupancy excise imposed by G. L. c. 64 G, § 3 is "upon the transfer of occupancy of any room or rooms in a hotel, lodging house, or motel," the above-quoted definitions determine when the transfer of occupancy becomes subject to taxation. It is obvious from the plain language of these definitions that the "hotels," "lodging houses" and "motels" upon whose rooms the excise may be levied are those licensed under G. L. c. 140, §§ 6, 23 and 32B, respectively. An unlicensed hotel or motel cannot be said to be "operated, directly or indirectly, pursuant to a license." Nor can an unlicensed lodging house be regarded as one "which is licensed under section twenty-three of chapter one hundred and forty." Even if I were to assume that the Legislature did not intend to distinguish between li-

censed and unlicensed establishments in imposing the tax, I am bound by the rule that tax statutes must be strictly construed in favor of the taxpayer. *Osgood* v. *Tax Commissioner*, 235 Mass. 88, 90. "The right to tax must be found within the letter of the law and is not to be extended by implication." *State Tax Commission* v. *Gray*, 340 Mass. 535, 540.

In answer to the second question, I am of opinion that the Commissioner has no authority under G. L. c. 64G to determine whether a city or town should require a license for a hotel, lodging house or motel. The provisions of G. L. c. 140, §§ 6, 23 and 32B, empowering municipalities to license hotels, lodging houses and motels appear to be permissive rather than mandatory in nature. In any event, I find no provision in c. 64G that even remotely confers upon the Commissioner authority to determine whether cities and towns are performing their licensing duties under c. 140.

Accordingly, I answer each of your questions in the negative.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

3. JULY 8, 1966.

HONORABLE MICHAEL J. MCGONAGLE, *Secretary, Commissioners on Firemen's Relief.*

DEAR MR. MCGONAGLE:—You have requested my opinion as to whether the board known as the Commissioners on Firemen's Relief, established by G. L. c. 10, § 21, is governed by c. 30A of the General Laws, the so-called Administrative Procedure Act. Pursuant to c. 10, § 21, your board consists of the State Treasurer, ex officio, two members appointed by the Governor and two members appointed by the Massachusetts State Firemen's Association. The duties of the board are set forth in c. 48, § 81, which provides as follows:

"The sum of eighteen thousand dollars may be paid annually from the state treasury to furnish relief to firemen injured in the performance of their duty at a fire or in going thereto or returning therefrom, or while engaged in company drills, when such drills are ordered by the chief, acting chief or board of engineers of the fire department, or required by city ordinance or town by-law, and to widows and children of firemen killed in the performance of such duty. *Payments on account of said relief shall be determined in manner and amount, on properly approved vouchers, by the commissioners on firemen's relief, in the same manner as other claims against the commonwealth . . . .*" (Emphasis supplied.)

The State Administrative Procedure Act applies to "agencies" of the state government as that term is defined by the Act. General Laws c. 30A, § 1 (2) defines "Agency" as "Any department, board, commission, division or authority of the state government, or subdivision of any of the foregoing, or official of the state government, *authorized by law to make regulations or to conduct adjudicatory proceedings . . . .*" (Emphasis supplied.) Certain exemptions from the definition are not relevant. Accordingly, the answer to your question depends upon whether your board is authorized either to promulgate regulations or to conduct "adjudicatory proceedings" as that term is defined in c. 30A.

I find no statutory provisions which authorize the Commissioners on Firemen's Relief to promulgate regulations. Likewise, the actions taken by the Commissioners under c. 48, § 81 are not judicatory proceedings. "Adjudicatory proceeding" is defined as "A proceeding before an agency in which the legal rights, duties or privileges of specifically named persons are required by constitutional right or by any provision of the General Laws to be determined after opportunity for an agency hearing . . . ." [G. L. c. 30A, § 1(1).] No hearing is required by statute prior to the making of the Commissioners of a decision with respect to the granting of firemen's relief. Furthermore, the nature of such relief being what it is, and considering the fact that the General Court could lawfully withhold the granting of such relief altogether, it is clear that there would be no constitutional right to a hearing in connection with actions taken under c. 48, § 81. *Cf. Milligan* v. *Board of Registration in Pharmacy,* 1965 Mass. Adv. Sh. 237, 245.

It is therefore my opinion that the Commissioners on Firemen's Relief are not authorized by law to make regulations or to conduct adjudicatory proceedings, and accordingly such board is not an "agency" which is subject to the State Administrative Procedure Act.

Very truly yours,

Edward W. Brooke, *Attorney General.*

4. July 8, 1966.

Honorable Harry C. Solomon, M.D., *Commissioner of Mental Health.*

Dear Doctor Solomon:—You have requested an opinion with respect to the service of warrants for the arrest of patients in mental institutions who have been charged with criminal offenses. Specifically, you have asked the following five questions:

"1. Is a Superintendent of an institution for the mentally ill required to turn over to the State Police a patient for whose arrest they have a warrant, who has been committed under the provisions of Section 51, Chapter 123 of the General Laws, as amended?

"2. Is a Superintendent of an institution for the mentally ill required to turn over to the State Police a patient for whose arrest they have a warrant, who has been temporarily committed under the provisions of Section 77, Chapter 123 of the General Laws, as amended?

"3. Is a Superintendent of an institution for the mentally ill required to turn over to the State Police a patient for whose arrest they have a warrant, who has been received by the Superintendent for temporary care, under the provisions of Section 79, Chapter 123 of the General Laws, as amended?

"4. Is a Superintendent of an institution for the mentally ill required to turn over to the State Police a patient for whose arrest they have a warrant, who has been received as a voluntary patient under the provisions of Section 86, Chapter 123 of the General Laws, as amended?

"5. Is a Superintendent of an institution for the mentally ill required

to turn over to the State Police a patient for whose arrest they have a warrant, who has been admitted to the institution on a non-statutory status, that is, a patient who has submitted himself voluntarily for treatment without any written application therefor?"

In the absence of a constitutional or statutory provision to the contrary, every person, except a diplomatic representative of a foreign government (see *United States* v. *Kirby*, 7 Wall (U.S.) 482; *Williamson* v. *United States*, 207 U.S. 425), is subject to arrest on a criminal charge. See 5 Am. Jur. 2, "Arrest," § 95, p. 781. It is my opinion that it is immaterial that the warrant for arrest is for a patient in an institution for the mentally ill in view of the absence of any provisions exempting such persons from arrest.

Furthermore, the categorization of the admission procedure as voluntary or involuntary with regard to the institutionalized patient has no significance with respect to the service of arrest warrants. Institutionalized mentally ill persons are clearly subject to arrest although their competency may be such that they are not punishable for the charged offense. See G. L. c. 123, §§ 102-105; G. L. c. 278, § 13; G. L. c. 277, § 16. Therefore the Superintendent of an institution for the mentally ill is required to turn over to the State Police a patient for whose arrest a warrant has been issued.

However, this is not to say that the enforcement of the law should be either inflexible or insensitive to the particular patient. It may well be important to protect a given patient from possible harmful consequences brought about by arrest and confinement. In such case it would certainly be helpful to all parties involved if the Superintendent could inform the Court concerned of the patient's condition. This might be accomplished prior to the issuance of the warrant, if the opportunity exists, or after its issuance by the filing of an affidavit. If, in the opinion of the Superintendent, the gravity of the illness is such as to negate the advisability of arresting the patient, this should be reported to the Court. The Court — thus armed with relevant information with regard to the patient's condition — can then make the final decision upon issuance or enforcement of the warrant in question.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

5. JULY 11, 1966.

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

DEAR COMMISSIONER KIERNAN:—I quote a portion of your recent request for an opinion:—

"Just recently two more situations have arisen in connection with Public Law 89-10, which involve participation in programs by non-public school children and concerning which we would greatly appreciate your opinion. The following questions are in addition to those requested in our letter of July 29, 1965.

"(1) In one city the school committee proposed to conduct a summer school project financed by monies under Title I of Public Law 89-10. The

building and program will be under the control of the school committee and there will be no differentiation in enrollment between public and non-public school youngsters. The teachers will be hired by the school committee on the basis of a job notice describing the position. Amongst the applications already received are those of ten religious sisters.

(a) Under the law and Constitution of Massachusetts, can the Springfield School Committee engage and pay wages to religious sisters in a program conducted under the auspices of the school committee but wherein no religion will be taught?

(b) Would there be any difference in your answer if the sisters are to wear their regular religious garb during the classes?

"(2) In another city a school committee proposes to contract with five non-public schools, one of which is a sectarian school, one in which religious doctrine is taught. The purpose of the contract is to engage these schools to provide programs on their own premises for the educationally disadvantaged under Title I of Public Law 89-10 and the services to be paid from said title. No differentiation is made between public and non-public students as far as enrollment in the schools is concerned . . .

"May this school committee enter into a contract under our law and constitution with the non-public schools including a school conducted by a religious society? Of course, no religion is to be taught to this combination of public and non-public students."

The questions included in the above quotation refer entirely to actions of local school committees, to which this office does not give opinions directly or indirectly. However, because of the widespread interest in the subject matter of this request, I shall treat with these questions for the benefit of your Department.

I know of no provision in the Constitution that bars any person from public employment because of his religious affiliation or his membership in a religious order. (Indeed, it would be contrary to the laws of this Commonwealth to deny public employment as a teacher to any person solely because of his religion, his religious beliefs or his clerical status. See G. L. c. 151B, §§ 1 and 4.) It has also been held that there is no violation of the Federal Constitution when a teacher employed by a public school system appears regularly in habit or garb which generally identifies him (or her) as having a particular religious status. *Hysong* v. *Gallitzin Borough School Dist.*, 164 Pa. 629, 657-658. *Gerhardt* v. *Heid*, 66 N.D. 444, 459. *State ex rel. Johnson* v. *Boyd*, 217 Ind. 348, 370-371. *Rawlings* v. *Butler*, 290 S.W. 2d 801, 805-806 (Ky.). *Moore* v. *Board of Education of Southwest Local School Dist. No. 15588*, 212 N. E. 2d 833, 841 (Ohio CP). I agree with the holdings of these cases that specially garbed members of religious orders may be hired as teachers in public schools. However, pursuant to G. L. c. 71, § 38, a school committee need not hire specially garbed members of religious orders if it feels that "the effect of [their attire] worn . . . at all times in the presence of their pupils would be to inspire . . . sympathy for the religious denomination to which they . . . belong." *O'Connor* v. *Hendrick*, 184 N.Y. 421, 428. *Zellers* v. *Heff*, 55 N.M. 501, 525. See *Berghorn* v. *Reorganized School Dist. No. 8*, 364 Mo. 121; concurring opinion of Mr. Justice Brennan in *Schempp* v. *School Dist. of Abington Township, Pa.* 374 U.S. 203, 262, fn. 28.

Article 46 of the Articles of Amendment of the Constitution of Massachusetts prohibits the Commonwealth and its subdivisions from granting to non-public schools funds raised by taxation and has no applicability to grants of federal funds.

Subject to the above explanations and qualifications, my answer to question 1(a) is "Yes," and my answer to question 1(b) is "No."

Nothing in the General Laws specifically authorizes school committees to enter into the types of contracts with private institutions which are referred to in your second question. Such is the case even when the education of underprivileged children is at issue, and whether the private institutions in question are sectarian or non-sectarian. Ordinarily, a school committee may exercise only those powers which have been specifically granted by the General Court. *Brine* v. *Cambridge,* 265 Mass. 452, 454-456. *Wright & Ditson* v. *Boston,* 270 Mass. 338, 339. See also my recent opinion to you dated June 13, 1966.

Nevertheless, I do not believe that the lack of specific statutory authority need be conclusive in the present case. Your letter indicates that the "purpose of the contract is to engage these schools to provide programs on their own premises for the educationally disadvantaged under Title I of Public Law 89-10 and *the services to be paid from said title.*" (Emphasis supplied.) Consequently, it is apparent that the proposed programs are to be supported entirely by funds contributed by the federal government.

The Legislature has provided that certain municipal officers and departments shall have the authority to accept and to use certain forms of grants and other gifts. General Laws c. 71, § 37A applies specifically to school committees, but is limited to "grants or gifts for educational purposes from charitable foundations and private corporations . . . . " Thus, this particular status would not be applicable. However, it is my opinion that the proposed grant may be accepted and used pursuant to G. L. c. 44, § 53A, a portion of which I quote:

"An officer or department of any city or town, or of any fire, water, sewer, light, improvement, regional school or other district, may accept grants or gifts of funds from the federal government and from a charitable foundation, a private corporation, or an individual, *and in the case of any grant or gift given for educational purposes may expend said funds for the purposes of such grant or gift with the approval of the school committee* . . . . " (Emphasis supplied.)

I recognize that a strict reading of c. 44, § 53A might prohibit the acceptance of the grant in question by a school committee. Members of school committees are not considered officers of a given city or town. *Morse* v. *Ashley,* 193 Mass. 294, 296. Likewise, a school committee is generally not — in and of itself — considered a department of a municipality. Some municipalities do refer to their educational systems as "school departments," but there is some question whether such systems do have departmental status from a legal point of view. [But compare *Eastern Mass. St. Ry.* v. *Mayor of Fall River,* 308 Mass. 232, 233, in which there is some indication that a school committee may be considered a municipal "department."] In any event, it is my opinion that the Legislature did not intend the effect of this statute to be restricted. I believe that the General Court has sought — by a general provision — to authorize the acceptance

and use of federal funds whenever such funds are available. A restrictive interpretation of the language of c. 44, § 53A based upon a technical construction of the words "officer" and "department" would be a disservice to the apparent legislative intention. [It would also appear anomalous for the Legislature to grant to a school committee the power to approve such contracts if made by other municipal representatives and deny it the right to make such contracts on its own behalf.]

General Laws c. 44, § 53A provides specifically that funds received pursuant to its provisions may be expended "for the purposes of such grant or gift . . . ." It is my opinion that this language authorizes the municipal officers who receive a grant to take the action which is required as a condition to the grant's being awarded. In the present case, I gather that use of funds under the grant necessitates the type of contractual relationships described in your request. If such is the case, the statute authorizes such agreements. Since the proposed programs are authorized by federal statutes, and since they are to be supported wholly by federal funds, I do not consider it necessary or appropriate for me to explore the constitutionality of the enabling legislation.

Very truly yours,

Edward W. Brooke, *Attorney General.*

7. July 25, 1966.

Honorable Quintin J. Cristy, *Chairman, Alcoholic Beverages Control Commission.*

Dear Mr. Cristy:—You have requested my opinion with respect to the granting of a "package store license" under G. L. c. 138, § 15 to a married woman. You have posed your questions in the following context:

". . . [I]t would be important to have a ruling from your office as to whether or not the wife of a husband now holding his quota of licenses under the statute may, if she has filed a Married Woman's Certificate, hold an equal number of licenses under section 15, giving the husband and wife a collective total of six such licenses.

"We would also appreciate your advising whether or not the wife would be entitled to three such licenses regardless of whether or not she has filed a Married Woman's Certificate, if she does not hold any stock in the husband's corporation which possesses three licenses.

"If you rule that the wife would be entitled to the three licenses under the Married Woman's Agreement, what documents should the Commission require to have in hand to prove her status?"

The relevant portion of the so-called "Married Woman's Certificate" statute provides as follows:

"If a married woman does or proposes to do business on her separate account, she shall cause to be recorded in the clerk's office of the city or town where she does or proposes to do such business a certificate stating her name and that of her husband, the nature of the business and the place where it is or is proposed to be carried on, giving, if practicable, the street

and number, and the name, which shall not be her husband's, under which she proposes to carry on business, and pay to said clerk the fee provided by clause (46) of section thirty-four of chapter two hundred and sixty-two. If the nature of the business or the place where or the name under which it is carried on is changed, a new certificate shall be recorded accordingly. If she fails to cause such certificates to be recorded her husband may do so. If such certificates are not so recorded by either husband or wife, the personal property employed in such business shall be liable to be attached as the property of the husband and to be taken on execution against him, and the husband shall be liable upon all contracts lawfully made in the prosecution of such business in the same manner and to the same extent as if such contracts had been made by him."
Mass. G. L. c. 209, § 10

It was the purpose of this statute to allow a married woman to do business in her own name without the risk of having her property taken for her husband's debts, and without his being liable upon contracts made by her in the prosecution of her personal business. *O'Neil* v. *Wolfsohn,* 137 Mass. 134, 135. Often husband and wife appear to be in joint possession of a business and property. Thus, in addition to the foregoing purpose, the statute was intended to allow creditors to gain information as to title so that they could regulate their mercantile transactions accordingly. *Parsons* v. *Henry,* 197 Mass. 504, 509. With these two purposes in mind, it is clear that the statute was intended solely to regulate the affairs of a husband and wife with respect to their creditors.

The significant portion of G. L. c. 138, § 15 provides:

"No person, firm, corporation, association, or other combination of persons, directly or indirectly, or through any agent, employee, stockholder, officer or other person or any subsidiary whatsoever, shall be granted, in the aggregate, more than three such licenses in the commonwealth, or be granted more than one such license in a town or two in a city."

In making your inquiry under § 15 you must consider whether the wife is an agent[1] or otherwise controlled by her husband. *Cleary* v. *Cardullo's, Inc.,* 347 Mass. 337, 346-350. While the Supreme Judicial Court has recognized in other family situations the possibility of two members of a family being independent for the purpose of holding a liquor license, it has also indicated that such transactions should be carefully scrutinized to determine whether they may be a disguise for the purpose of avoiding the law. *Cleary* v. *Cardullo's, Inc. supra.* The filing by a married woman of a certificate under the provisions of c. 209, § 10 does not establish conclusively that her business affairs are not under control of her husband. As I have indicated above, c. 209, § 10 relates solely to the business affairs of a husband and wife with respect to their creditors. The significance of a statute should not be stretched beyond the original purpose for which it was intended. *Commonwealth* v. *Welosky,* 276 Mass. 398, 401-402.

I would suggest that the filing of a certificate is at most some evidence that a wife is in, or intends to carry on, a business separate and apart from her husband. It should not be given substantial weight because of the context in which it is filed. The filer need not make oath to the facts

[1] It is well settled that a husband or wife may be the agent for the other spouse. *Colbuzzi* v. *Parks,* 315 Mass. 199, 202. The existence of an agency between the husband and wife presents a question of fact and depends on the various circumstances. *Sztiamski* v. *Spinale,* 332 Mass. 500, 503.

therein nor is there any penalty for filing a false statement. There is no provision for any independent verification by any governmental authority that the wife is in reality doing business on her separate account. In fact, the contrary is true. The town clerk has no discretion to question the contents of the certificate, but is required to record the same upon receipt of the stated fee. G. L. c. 209, § 11.

I would further direct your attention to G. L. c. 138, § 23, which provides in part as follows:

"No license shall be issued, renewed or transferred under section . . . fifteen . . . unless there is filed with the application for such license a *sworn statement* by the applicant . . . giving the names and addresses of all persons who have a direct or indirect beneficial interest in said license . . . ." (Emphasis supplied.)

Implicit in your question is the assumption that the required sworn statements have been filed in connection with issuance and renewals of the licenses in question. It must therefore also be considered whether false statements have been filed by the applicants under said § 23. Resolution of such a question is a factual rather than a legal matter, to be determined by such inquiry and evaluation as the Commission shall consider warranted. As I have indicated above, the filing of a so-called "Married Woman's Certificate" is just one facet of the factual situation which determines whether there has been a violation of § 15.

Accordingly, therefore, in response to your first inquiry, it is clear that a wife *may* hold three licenses under § 15 despite the fact that an additional three licenses are held by her husband. Whether her ownership is or is not a veil for real ownership of all six establishments by her husband depends upon factual determinations which must be made by your Commission. The making of such determinations should not be greatly influenced by the filing of a Married Woman's Certificate. The answer to your second question is in the negative. The fact that a married woman does not hold any of the stock in the husband's corporation which possesses three licenses would not in and of itself *entitle* her to a license. Such a determination is much too narrow and would not satisfy the relevant portion of G. L. c. 138, § 15, which is set forth in this opinion. In view of my answers to your first two questions, there is no need for me to consider your third inquiry.

I have rendered my opinion on the assumption implicit in your request, *viz.*, that the wife has no interest in a liquor license issued under any other section of the liquor control act. However, I caution and remind you of the terms of G. L. c. 138, § 17 which provides in part:

"Unless expressly authorized by this chapter, local licensing authorities shall not grant licenses to any person, firm or corporation *under more than one section of this chapter.*" (Emphasis supplied.)

Your investigation, therefore, must, in addition, consider her interest and association with persons holding licenses under any other sections in order to insure that § 17 has not been violated. *Cleary* v. *Cardullo's Inc.*, 347 Mass. 337, 347.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

8. July 27, 1966.

Honorable John J. Droney, *District Attorney for Middlesex County.*

Dear Mr. Droney:—In a recent request for an opinion you state:

"An election inquest was held in the First District Court of Eastern Middlesex in January, 1966. The inquest was commenced by a petition and a complaint filed by your office. The petition alleged certain irregularities in the election in the City of Everett held on November 2, 1965.

"Witnesses were subpoenaed by the Commonwealth. The witnesses so subpoenaed testified under oath and their testimony was taken down and transcribed.

"Only one witness claimed the constitutional privilege against self incrimination. The district court judge thereupon granted immunity to that witness. . . .

"None of the witnesses except one asserted the privilege against self incrimination. The witnesses testified under oath that they had been subpoenaed. There is no evidence that they objected to being subpoenaed or to being called as witnesses. Witnesses answered every question asked them and did not refuse to answer any question."

In view of these facts you ask:

"Does the immunity provision of General Laws (Ter. Ed.) chapter 55, section 36 bar prosecution of the witnesses subpoenaed and called to testify by the Commonwealth?"

I quote G. L. c. 55, § 36:

"No person shall be excused from testifying or producing any papers in any inquest proceedings under sections thirty to thirty-five, inclusive, on the ground that his testimony may tend to criminate him or subject him to a penalty or forfeiture, but he shall not be prosecuted or be subjected to a penalty or forfeiture for or on account of any action, matter or thing concerning which he may be required so to testify, except for perjury committed in such testimony."

I assume, for purposes of this opinion, that the witnesses mentioned in your question face prosecution "for or on account of any action, matter or thing concerning which . . . [they were] required so to testify" at the inquest in the District Court.

There is considerable authority to the effect that where a statute by its own terms provides immunity to a person who is subpoenaed to testify at a hearing or investigation, a witness so testifying need neither claim his privilege against self-incrimination nor be granted immunity by an appropriate officer in order to receive the benefit of the statute. *United States* v. *Monia,* 317 U.S. 424, 430. *People* v. *Buslin,* 306 N.Y. 294, 297. *State* v. *Hennessey,* 195 Or. 355, 366. See collected cases at 145 A.L.R. 1417-1418. Although there does not appear to be any Massachusetts holding squarely in point, the Court in a dictum has said, "In the ordinary case, *where there is no reliance upon a statute granting immunity,* a claim of privilege is clearly essential." (Emphasis supplied). *Corcoran* v. *Commonwealth,* 335 Mass. 29, 37. *Cf. Ross* v. *Crane,* 291 Mass. 28, 33-34 (no

immunity where mayor testified voluntarily and failed to claim privilege; holding based partly on proposition that loss of eligibility to vote or hold office is neither penalty nor forfeiture). The Court went further in the *Crane* case, however, and stated that "the defendant does fall within the terms of paragraph (h) for the reason that he was not 'called to testify upon an election petition' "; this raises a strong implication that, on facts similar to those in the instant circumstances, where the witnesses were subpoenaed to testify, the Court would have reached a different conclusion.

In the recent case of *Commonwealth* v. *Benoit,* 347 Mass. 1, 5-6, the Supreme Judicial Court, while holding that the Massachusetts Crime Commission (see c. 146 of the Resolves of 1962) "is not a court," also implied that a witness who testified pursuant to G. L. c. 271, § 39 "before any court or in obedience to the subpoena of any court" automatically would enjoy the immunity from prosecution conferred by § 39.

Clearly, then, the Supreme Judicial Court has given every indication that it would follow *United States* v. *Monia,* supra, and other cases holding that one who testifies under subpoena pursuant to an immunity statute receives the statutory immunity, even though he does not specifically claim his privilege. Although other courts have reached a contrary conclusion (see, *e.g., State* v. *Davidson,* 242 Wis. 496; 145 A.L.R. 1419-1420), it would appear that the dicta contained in the *Ross, Corcoran* and *Benoit* cases indicate that the Supreme Judicial Court would not be guided by such a result. Accordingly, I answer your question in the affirmative.

Very truly yours,

Edward W. Brooke, *Attorney General.*

9. August 3, 1966.

Honorable Robert Q. Crane, *Treasurer and Receiver-General.*

Dear Treasurer Crane:—You have requested my opinion relative to the distribution of funds under section 30(3) of Chapter 14 of the Acts of 1966 (G. L. c. 58, § 18A(a)(3)). You have stated that the Local Aid Fund currently has a balance of $55,000,000 and have asked: 1) whether the State Treasurer can now make a distribution of funds to the cities and towns under the said Chapter 14, Section 30(3); 2) what proportion of the total balance may be distributed; and 3) at what time may such distribution be made. Certain facts which are essential to a complete analysis of these problems have been omitted from your request. However, I am able — upon the facts presented — to provide some guidelines with respect to the administration of this particular statute.

Paragraph 3 of Section 30, to which you have referred, is a part of subsection (a) of that section. Subsection (a) provides for the distribution of funds from the Local Aid Fund only to the extent of the amounts credited to the Fund under subsection (a) and (b) of St. 1966, c. 14, § 29 (G. L. c. 58, § 18), and twenty per cent (20%) of the amounts credited to the Fund under subsection (c) of the said section 29. The remaining eighty per cent (80%) of the amounts credited to the Local Aid Fund under subsection (c) above, and the amounts credited to the Fund under subsections (d) and (e) of Section 29 of Chapter 14 of the Acts

of 1966 are *not* available for distribution under subsection (a), and therefore cannot be distributed under the paragraph to which your questions relate (paragraph (3)). These latter amounts may be distributed only under subsections (b) and (c) of St. 1966, c. 14, § 30.

Therefore, the current balance of $55,000,000 in the Local Aid Fund must be divided in terms of its sources. Only that part of the balance which was credited to the Fund under subsections (a) and (b) of Section 29 of Chapter 14 of the Acts of 1966 and twenty per cent (20%) of the amount credited under subsection (c) of St. 1966, c. 14, § 29 are available for distribution under subsection (a) of section 30.

Further, before any distribution may be made under paragraph (3) of said subsection (a), the amounts specified in paragraphs (1) and (2) of said subsection (a) must be distributed or at least set aside. The amounts so specified in paragraphs (1) and (2) total $9,006,291.88. It is not clear from your request whether this amount has as yet been distributed or set aside within the Local Aid Fund.

Whatever remains from the amount available for distribution under subsection (a) after the amounts specified in paragraphs (1) and (2) have been set aside may be distributed under paragraph (3) of said subsection (a).

Paragraph (3) provides in part: "Fifty per cent of the appropriations made by the general court for these purposes shall be charged against the revenues of the Local Aid Fund enumerated in this subsection on July first and the remainder shall be so charged on January first . . . " Thus, on July first an amount equal to fifty per cent (50%) of the appropriations made by the general court for local reimbursement and assistance programs should be charged against the funds still available in the Local Aid Fund for distribution under subsection (a). If the funds available are insufficient to fill this quota of fifty per cent (50%), then only the amount available can be distributed and charged against the Fund.

The language which appears in paragraph (3) with respect to the charging of certain percentages against the revenues of the Local Aid Fund is admittedly ambiguous. However, I do not believe that this sentence was intended to prohibit distributions prior to the time at which the Local Aid Fund contains sums sufficient to meet all of the appropriations referred to in the paragraph. Such a construction totally ignores the statement which appears earlier in the section that amounts shall be distributed "to the extent that sufficient sums are available . . . " If a part of the funds necessary to meet the appropriations referred to in paragraph (3) is available, it is the clear intent of the section that such part be distributed. Money is of little use to the cities and towns if it simply resides in the State Treasury awaiting further growth of the Local Aid Fund. The final sentence of paragraph (3) represents only an instruction with respect to accounting, and does not in and of itself limit the right of the State Treasurer to make distributions at this time.

The amount thus set aside on July first for distribution under paragraph (3) can be distributed "(f)rom time to time during the year . . . " The statute does not specify the time when the actual distribution of funds under paragraph (3) is to be made. The times of distribution are therefore within the discretion of the State Treasurer.

On January first the remaining fifty per cent (50%) of the appropriations — or whatever smaller amount is available — should be charged against the funds then available for distribution under subsection (a). The amount so charged can then be distributed to the cities and towns "(f)rom time to time during the year . . ."

Accordingly, it is my opinion that — given sufficient funds derived from appropriate sources — a distribution may be made from the State Treasury at this time in accordance with the standards and guidelines set forth above.

Very truly yours,

Edward W. Brooke, *Attorney General.*

10. August 4, 1966.

Mr. Julian D. Steele, *Deputy Commissioner, Department of Commerce and Development.*

Dear Mr. Steele:—You have requested my opinion as to whether the provisions of c. 30A of the General Laws are applicable to the rules and regulations of the Bureau of Relocation.

G. L. c. 30A, § 1(2) provides the following definition of an agency for purposes of that chapter:

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

The Bureau of Relocation as defined by G. L. c. 79A, § 1 is a part of the Department of Commerce and Development. It is therefore a subdivision of a department of the state government as referred to in G. L. c. 30A, § 1(2). For apparent reasons, the Bureau does not fall within any of the enumerated exceptions to the definition of an agency.

Your question therefore depends upon a determination as to whether the Bureau is authorized by law to make regulations or to conduct adjudicatory proceedings. The term regulation is defined in c. 30A, § 1(5) as follows:

"'Regulation' includes the whole or any part of every rule, regulation, standard or other requirement of general application and future effect adopted by any agency to implement or interpret the law enforced or administered by it, but does not include (a) advisory rulings issued under section eight; or (b) regulations concerning only the internal management

or discipline of the adopting agency or any other agency, and not directly affecting the rights of or the procedures available to the public or that portion of the public affected by the agency's activities; or (c) regulations concerning the operation and management of state penal, correctional, welfare, educational, public health and mental health institutions and soldiers' homes, or the development and management of property of the commonwealth or of the agency; or (d) regulations relating to the use of public works, including streets and highways, when the substance of such regulations is indicated to the public by means of signs or signals; or (e) decisions issued in adjudicatory proceedings."

See *Allied Theatres of New England* v. *Commissioner of Labor and Industries,* 338 Mass. 609, 611; *Kneeland Liquor Inc.* v. *Alcoholic Beverages Control Commission,* 345 Mass. 228, 233.

G. L. c. 79A, § 12, provides that "the bureau [of Relocation] may promulgate regulations to carry out the purposes of this chapter. . . ."; and the Bureau's administrative rules and regulations state that:

"The Administrative Rules and Regulations of the Bureau of Relocation outline the policies and procedures to be followed in complying with the intent of the law."

The regulations of the Bureau are clearly designed to implement the law administered by it. In addition, it does not appear that any of the exceptions contained in c. 30A, § 1(5) apply to the regulations in question.

Accordingly, since the Bureau of Relocation is a subdivision of a state department authorized to make regulations as defined by G. L. c. 30A, § 1, and since no exemptions are applicable either to the Bureau or to its regulations, it is my opinion that the rules and regulations in question do fall within the scope of c. 30A of the General Laws, and that the provisions of that chapter are applicable to them.

Very truly yours,

Edward W. Brooke, *Attorney General.*

11. August 5, 1966.

Honorable Harry Solomon, *Commissioner, Department of Mental Health.*

Dear Commissioner Solomon:—In a letter dated April 29, 1966, you have requested my opinion regarding the effective date of the per diem rate to be charged elderly persons who are patients in Cushing Hospital, such rate having been established under Section 2 of Chapter 481 of the Acts of 1964.

Your letter indicates that, in accordance with Section 1 of said Chapter 481 of the Acts of 1964, the per diem cost of maintaining elderly persons as patients in Cushing Hospital was established and filed with the Secretary of the Commonwealth on March 12, 1966. Your letter further states that subsequently the Commissioner of the Department of Mental Health established May 1, 1966, as the effective date of the "new per diem rate." It is assumed for the purposes of this opinion that the words "new per

diem rate" in your letter refer to the per diem rate to be charged established under Section 2.

It is my opinion that the effective date of the per diem rate to be charged must be March 12, 1966.

Chapter 481 of the Acts of 1964 provides:

"SECTION 1. The director of hospital costs and finances shall examine the books and accounts of the Cushing hospital and, after a hearing, establish the per diem cost of maintaining elderly persons as patients in said hospital. The determination of the per diem cost shall be deemed a regulation as defined in paragraph (5) of section one of chapter thirty A of the General Laws.

"SECTION 2. The department of mental health is hereby authorized and directed to establish as the per diem rate to be charged to elderly persons as patients in said hospital the per diem cost established by said director as provided in section one."

Section 1 provides that the determination of the per diem cost shall be deemed a regulation as defined in G. L. c. 30A, § 1 (5). Therefore, the effective date of the per diem cost is determined by G. L. c. 30A, § 5, which provides in pertinent part:

"Regulations made in accordance with the provisions of this chapter shall be filed with the state secretary under the requirements of section thirty-seven of chapter thirty. Regulations shall become effective upon filing, unless a later date is required by any law or is specified by the agency in the regulation. (Emphasis supplied.)

There is no provision of law which prevents the per diem rate from taking effect on the date that it is filed. Nor was any later date specified by the Department in the regulation filed with the state secretary. The determination of the per diem cost, in my opinion, became effective, in accordance with the plain meaning of G. L. c. 30A, § 5, on March 12, 1966, the day it was filed with the Secretary of the Commonwealth.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

12. AUGUST 5, 1966.

HONORABLE HUGH MORTON, *Chairman, Civil Service Commission.*

DEAR MR. MORTON:—In a recent request for an opinion you state:

"The applicant for a civil service position took an examination on November 13, 1965, and after being notified of his mark on the Practical Questions seasonably filed a request with the Director of Civil Service for a review of his marks on certain questions. After review, the Director of Civil Service informed him that one question should be increased in the marking but that the other markings were free from error and that the applicant's protest concerning the marking of those answers was without merit. The applicant did not appeal from this decision of the Director of Civil Service to the Civil Service Commission within the statutory period.

"On June 3, 1966, the applicant requested the Director of Civil Service to re-examine the appeal which the applicant had filed with the Director, citing substantiation for his answers to the Questions (for) which (credit) had previously been denied. It also appears that credit had been given to other applicants who appealed to the Commission on answers to those questions substantially the same as those given by the applicant. The Director, on June 9, 1966, advised the applicant 'There is no provision in the statute to permit the Director to accept this request.' (This request being the appeal to the Director dated June 3, 1966.)"

In view of this information you ask, in essence, whether the Civil Service Commission may hear an appeal from the Director's decision of June 9, 1966.

I quote a relevant part of G. L. c. 31, § 12A:

"Not later than fourteen days after the giving of notice of the results of a written examination, an applicant may file with the director a request for a review of the markings in his examination, setting forth, in the form prescribed by the director, specifically in what particulars the markings of the examination are allegedly incorrect and the authority relied upon by the applicant to support his allegations.

"(W)ithin six weeks after acceptance of a request for a review of markings on any examination paper, the director shall cause such paper and the markings thereon to be reviewed, and shall transmit a copy of his decision to the applicant.

"Not later than fourteen days after receipt of notice of the decision of the director, the applicant may appeal to the commission by filing a petition in a form approved by it and containing a brief statement of the facts upon which such appeal is based.

The above language is clear. Pursuant thereto, a party who desires a review by the Director of the markings of his examination must seek such review within fourteen days after the results. And if he is dissatisfied with the Director's decision, within fourteen days thereof he must file his appeal to the Commission. If he does not appeal to the Commission within the time fixed by statute, the Commission does not have jurisdiction over the appeal. *Greeley* v. *Zoning Bd. of Appeals of Framingham,* 1966 Mass. Adv. Sh. 587, 589-590. See *Cheney* v. *Assessors of Dover,* 205 Mass. 501, 503; *Lincoln* v. *Board of Appeals of Framingham,* 346 Mass. 418, 420; *Brady* v. *Board of Appeals of Westport,* 348 Mass. 515, 520, each illustrating the principle that judicial, as well as administrative, reviews must be seasonably pursued, or else the reviewing tribunal loses jurisdiction of the matter.

In effect, the request filed on June 3, 1966, attempts to seek a redetermination of the Director's earlier decision. It is not necessary to consider upon the facts presented whether the Director may, in his discretion, ever grant such a redetermination after the time for filing an original request has gone by. The fact is that in this case he has refused to do so. I cannot say on the facts before me that this refusal constituted an error of law or abuse of discretion. See 2 Am. Jur. 2d 346, nn 9-11. *Cf. Atchison, Topeka and Santa Fe RR Co.* v. *United States,* 284 U. S. 248. The applicant now attempts to use his request for redetermination as a lever to obtain review of a decision which the Commission no longer has the auth-

ority to review. Jurisdictional requirements may not be so easily circumvented. *Pearce Hospital Foundation* v. *Illinois Pub. Aid Comm.,* 15 Ill. 2d 301, 307. *Hennessy* v. *Bischoff,* 240 S. W. 2d 71, 73 (Ky.). *Koehn* v. *State Bd. of Equalization,* 166 Cal. App. 2d 109, 113. I am of the opinion that the Commission lacks jurisdiction to hear the appeal from the Director's decision of June 9, 1966.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

13. AUGUST 8, 1966.

HONORABLE EDWARD J. RIBBS, *Commissioner, Department of Public Works.*

DEAR COMMISSIONER RIBBS:—In a recent request for an opinion, your predecessor in the office of Commissioner asked, in essence, whether the Department of Public Works is entitled to substantial reimbursement (not the legal witness fee under G. L. c. 262, § 29) from persons who summons employees of the Department to testify as expert witnesses in litigation to which neither the Commonwealth nor its agencies are parties. It is stated that in such litigation "Department personnel are frequently called upon to testify as experts rather than as ordinary witnesses because of their special skill and knowledge."

Whatever the rights of the Commonwealth or its agencies to reimbursement when their employees are summoned as expert witnesses in judicial proceedings may be, such rights derive from the rights of the employees themselves. See *Essex Trust Co.* v. *Wainwright,* 214 Mass. 507; *Gregory* v. *Milwaukee County,* 186 Wis. 235; *State* v. *Spencer,* 81 Fla. 211; *Solomons* v. *United States,* 137 U. S. 342, each illustrating the general principles of agency involved.

The rule in this Commonwealth appears to be that an expert witness is not entitled to compensation when testifying at a judicial proceeding pursuant to subpoena. This is the answer that was given after lengthy discussion of the question in VII *Op. Atty. Gen.* 326, 327-328. While the holdings of the Massachusetts cases cited in that opinion (*Barrus* v. *Phaneuf,* 166 Mass. 123, and *Stevens* v. *Worcester,* 196 Mass. 45) do not directly support the opinion referred to, there are strong dicta in these cases indicating that the conclusions are correct. Similar dictum was expressed in the recent case of *Ramacorti* v. *Boston Redevelopment Authority,* 341 Mass. 377, 379-380. Since a person employed by the Commonwealth and summoned into court by a private litigant may be required to testify as an expert without receiving compensation for his testimony, the Commonwealth itself is not entitled to compensation for the services of such a person.

I render this opinion subject to three qualifications: 1.) As already pointed out, the opinion applies only to substantial witness fees and not to the nominal fees which are provided for by G. L. c. 262, § 29. 2.) Nothing in this opinion should be read to require an unreimbursed witness summoned as an expert by a private litigant to acquaint himself with the facts relevant to a case or issue in order to give an opinion thereon. As

a matter of law, a person so summoned is under no such requirement. *Barrus* v. *Phaneuf, supra,* 124-125 and cases cited. VII *Op. Atty. Gen., supra,* 329-330. Such a witness is required only to express opinions that he already holds, not to form opinions for the sake of the summonsing party. *Stevens* v. *Worcester, supra,* 56. *United States* v. *284,392 Square Feet of Floor Space,* 203 F. Supp. 75, 77 and cases and authorities cited. 3.) This opinion has no application to circumstances in which an employee of the Commonwealth enters into an agreement, express or implied, to testify as an expert in return for compensation. See *Barrus* v. *Phaneuf, supra*; *Hartley* v. *Alabama National Bank,* 247 Ala. 651. Since specific facts are not before me, I do not consider the question whether, should an employee enter into such an agreement, the Commonwealth or its agencies would be entitled to the compensation agreed upon or to fair compensation for the witness' time and service.

Very truly yours,

Edward W. Brooke, *Attorney General.*

14. August 8, 1966.

Honorable Edward J. Ribbs, *Commissioner, Department of Public Works.*

Dear Sir:—Your predecessor in the office of Commissioner requested my opinion with respect to several questions regarding the proposed development by your Department and the Massachusetts Bay Transportation Authority of a joint transportation corridor along the Southwest Expressway.

The General Court has expressly granted to the Commonwealth authority to take railroad property by eminent domain.

The Commonwealth may, at any time after one year's written notice to a railroad corporation, take its railroad, franchise and other property by eminent domain under chapter seventy-nine. G. L. c. 160, § 7.

This statutory authority is consistent with the traditionally broad power of the Commonwealth relative to the operations of railroads. See *Palmer* v. *Massachusetts,* 308 U.S. 79. And the power of the Commonwealth to take property by eminent domain for public use is not only one of the most fundamental powers, but is also a basic attribute of sovereignty. *Kohl* v. *U.S.,* 91 U.S. 367; *U.S.* v. *Jones,* 109 U.S. 513; *Nichols, On Eminent Domain,* Vol. 1, § 1-14. This power is generally subject to certain restrictions which include statutory and constitutional safeguards. However, when a railroad has been under the jurisdiction of a federal bankruptcy court, there is conflicting authority on the effect such proceedings have on the power of eminent domain. The provision of the General Laws authorizing the taking of railroad property, namely G. L. c. 160, § 7, contains no restrictions as to what kinds of railroad property may be taken.

It is evident that the history of the property which is the subject of your request has been a long one resulting in various property interests such as ownership and leaseholds; and it is also apparent that distinctions have

been made between franchises, main line tracts other railroads' property, and operative and non-operative property. However, G. L. c. 160, § 7 makes no such distinctions and imposes only the restrictions of notice and other safeguards incorporated by reference to G. L. c. 79. Consequently, G. L. c. 160, § 7 is applicable to all railroad property. Therefore, it is my opinion that under normal circumstances the Department of Public Works may take by eminent domain all of the various property interests or portions thereof mentioned in your first three questions. [It could well be that the taking of certain property of an operating railroad might impose the type of burden upon interstate commerce which could be offensive to Section 8 of Article I of the Constitution of the United States, the so-called Commerce clause. However, I do not have before me the facts which would be necessary in order to make such a determination.]

The railroad companies which own or use the properties in question are being operated under and pursuant to the provisions of the Federal Bankruptcy Act (Title 11 of the U. S. Code). You have asked what the effect of this might be on the exercise by your Department of the power of eminent domain.

That the Commonwealth has extensive regulatory power over a railroad which is under the control of the federal bankruptcy courts has long been settled. *Palmer* v. *Massachusetts,* 308 U. S. 79 (1939). In the past, it has been my opinion that such power extends to the taking of railroad property by eminent domain for the purpose of constructing highways or other means of transportation. *Opinion of the Attorney General,* December 10, 1963. This remains my view of the applicable law. However, a careful review of past authority in the light of a case recently decided in the United States Court of Appeals for the First Circuit leads me to conclude that — under the circumstances — caution should be followed in exercising the right of eminent domain.

The Federal Bankruptcy Act contains many provisions for the protection of the debtor and his creditors in reorganization. Should such a debtor's property be taken by the exercise of eminent domain, sums of money would be substituted for that property. Such a substitution of money for property is attended by all of the procedural safeguards of General Laws, Chapter 79; and as I have said earlier, it is my opinion that there is thus no frustration of the purposes and safeguards of the Federal Bankruptcy Act.

Opinion of the Attorney General, December 10, 1963, p. 2.

Nevertheless, the bankruptcy court retains some degree of control by virtue of its power to pass upon the sufficiency of the damages awarded for such a taking. Title 11, U. S. Code, § 205 *et seq.* Furthermore, it has been held by some courts that the permission of the federal bankruptcy court is a prerequisite to the exercising of the power of eminent domain where the condemnee is a railroad undergoing reorganization in such court.

The case of *Chicago, Rock Island and Pacific Ry. Co.* v. *City of Owatonna,* 120 F. 2d 226 (8th Cir. 1941) concerned a taking of property by a municipality pursuant to its charter. The railroad which owned the property was at that time undergoing reorganization under the supervision of the federal bankruptcy court. It was held that where there is possession

of property in a court of bankruptcy, such court has exclusive control over the determination of all questions respecting title, possession and control of such property; therefore, the consent of the bankruptcy court was considered a jurisdictional prerequisite to the initiation and successful completion of the proceeding by the city to condemn the railroad property in question. The court enjoined the taking since the requisite consent had not been given.

This problem has not been presented to the United States Supreme Court for a ruling and the decision in the Eighth Circuit, although influential, would not bind our First Circuit Court of Appeals. In 1965, the United States Court of Appeals for the First Circuit held in *United States* v. *New York, New Haven and Hartford Ry. Co.,* 348 F. 2d 151 (1st Cir. 1965) that the United States could take property by eminent domain from a bankrupt railroad. Although the District Court denied the request of the federal government and relied upon the *Chicago, Rock Island* case, *supra,* the Court of Appeals, in reversing the lower court, stated that a bankruptcy court's control extends only to the purposes for which the proceeding was originally brought — i.e., protection of the debtor from harassment during reorganization and determination of the application of the debtor's assets. But the Court of Appeals did not mention the *Chicago, Rock Island* case. It treated the issue simply as one of reconciling two conflicting federal statutes: (1) 28 U.S.C. § 1403 (relating to judicial condemnation proceedings); and (2) Section 77 of the Bankruptcy Act, 11 U.S.C. § 205.

The court concluded that both statutes could be given effect and that the bankruptcy court "is limited to determining the application of the proceeds" and could not impede the exercise of the power of eminent domain or otherwise give the debtor or its creditors priority over the federal right.

Thus, there is an apparent conflict of authority among the federal courts. Although my basic opinion remains unchanged from that of December 10, 1963, it is my further opinion that one of two alternative actions might be followed by you:

1. Petition the United States District Court for the District of Massachusetts for a declaratory judgment as to your right to take by eminent domain; or

2. Request the permission of the bankruptcy court to take the property of the bankrupt railroad.

Should you proceed to take by eminent domain the properties to which you have referred, your Department is not required to depart from the ordinary statutory requirements and procedures so far as notice is concerned. It would, however, appear to be necessary to include the trustees in bankruptcy in that class of persons' to whom notice of the taking must be given.

In your letter you have further noted that the New York, New Haven and Hartford Railroad has petitioned the Interstate Commerce Commission for authority to discontinue passenger service over the line in question. At the time of your letter the petition was pending before the Interstate Commerce Commission, and you asked whether this situation affected your Department's power with regard to a taking by eminent domain. In

an opinion dated April 6, 1966, the Interstate Commerce Commission disposed of the petition in question. It is, therefore, no longer pending before the Commission and cannot be considered — in and of itself — as affecting your Department's eminent domain powers.

Very truly yours,

Edward W. Brooke, *Attorney General.*

15. August 8, 1966.

Honorable Harry C. Solomon, M.D., *Commissioner, Department of Mental Health.*

Dear Commissioner Solomon:—In a recent letter, you have requested my opinion as to whether the per diem rate to be charged to elderly persons as patients in Cushing Hospital under section 2 of Chapter 481 of the Acts of 1964 must be exactly the same as the per diem cost of maintaining said patients established under section 1 of that statute. Specifically, your letter states that, in accordance with section 1, the per diem cost of maintaining elderly persons as patients at Cushing Hospital was established at $14.76. Your letter further indicates that, in accordance with section two, "for administrative purposes" the per diem rate to be charged to elderly persons as patients in said hospital was established at $14.76.

It is my opinion that the per diem rate to be charged pursuant to section 2 must be identical to the per diem cost of maintenance established under section 1.

Section 2 provides, *inter alia*:

The department of mental health is hereby authorized and *directed* to establish as the per diem rate to be charged to elderly persons as patients in said hospital the per diem cost established by said director as provided in section one. (Emphasis supplied.)

The language of the statute is clear and free from doubt. The use of the word "directed" in the statute constitutes a positive command by the Legislature. Nothing in the statute reveals a legislative intent to permit any variance, however slight, from the per diem cost in establishing the per diem rate to be charged. Nor is any circumstance apparent which makes strict compliance with the plain meaning of the statute impossible.

The United States Supreme Court has construed the words "authorized and directed" as used in another statute similarly to the construction given those words herein. That statute, the Act of March 4, 1915 (38 Stat. 962, 981), provided:

"That the Secretary of the Treasury be, and he is hereby, authorized and directed to pay out of any money in the Treasury not otherwise appropriated . . . to Susan Sanders . . . $1200."

Regarding that statute, the Supreme Court stated:

"In the present case it is conceded, and properly conceded, that payment of the fund in question to . . . Sanders is a ministerial duty, the perfor-

mance of which could be compelled by mandamus." *Houston* v. *Ormes,* 252 U. S. 469 (1920).

Similarly, it is my opinion that section two of Chapter 481 of the Acts of 1964 imposes upon your Department a ministerial, nondiscretionary function. Therefore, in establishing the per diem rate to be charged, the Department has no discretion merely to approximate the per diem cost. Accordingly, the Department must establish $14.76 as the per diem rate to be charged.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

16. AUGUST 9, 1966.

HONORABLE ROBERT Q. CRANE, *Chairman, State Board of Retirement.*

DEAR MR. CRANE:—You have requested my opinion as to whether Frank S. Giles, former member of the General Court, and recently Commissioner of Public Safety, who "was suspended from his position as Commissioner of Public Safety on being indicted on charges" involving misconduct in his appointive public office is "entitled to receive a retirement allowance under the provisions of [G. L. c. 32, § 10]."

I call your attention to G. L. c. 30, § 59, of which I quote the relevant portion:

"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. . . .

"Any person so suspended shall not receive any compensation or salary during the period of such suspension, nor shall the period of his suspension be counted in computing his sick leave or vacation benefits or seniority rights, *nor shall any person who retires from service while under such suspension be entitled to any pension or retirement benefits, notwithstanding any contrary provisions of law, but all contributions paid by him into a retirement fund, if any, shall be returned to him.*" (Emphasis supplied.)

Records contained in the office of the Secretary of the Commonwealth indicate that Mr. Giles was suspended pursuant to G. L. c. 30, § 59. Mr. Giles has been tried upon one indictment and found guilty. See *Commonwealth* v. *Giles,* 1966 Mass. Adv. Sh. 61. He remains under indictment for several alleged offenses involving "misconduct in . . . office" within the purview of § 59. On September 27, 1965, while still under suspension, Mr. Giles submitted his resignation from the office of Commissioner of Public Safety. This resignation was accepted by the Governor of the Commonwealth on the following day.

Pursuant to the provisions of c. 32 of the General Laws, a period of retirement is deemed to commence upon the date upon which application for such retirement was filed. Since Mr. Giles was required — under the terms of the relevant retirement statutes — to file his retirement application prior to the effective date of his resignation, any approval of such application would relate back to the period of the applicant's suspension. Thus, Mr. Giles would have retired "while under . . . suspension" in the sense used in G. L. c. 30, § 59. Accordingly, it is clear that his retirement from service entitles him to the return of all of his contributions to the pension fund, but not to any other retirement benefits. See *Bessette* v. *The Commissioner of Public Works,* 348 Mass. 605, 610.

The answer given above applies both as to Mr. Giles' present rights under G. L. c. 32, § 10, pars. (1) and (2), and as to his future rights under par. (3). Under par. (3), the "retirement allowance of any member entitled thereto under the provisions" of pars. (1) or (2) may be deferred under certain circumstances. Since Mr. Giles is not entitled to benefits under pars. (1) or (2) because of his resignation while under suspension, he is not entitled to such benefits under par. (3).

Very truly yours,

Edward W. Brooke, *Attorney General.*

17. August 9, 1966.

Honorable John J. McCarthy, *Commissioner of Administration, Executive Office for Administration and Finance.*

Dear Commissioner McCarthy:—You have requested my opinion as to whether Mr. George A. Wells who is presently the Mayor of Worcester and on a leave of absence from a permanent position with the Department of Commerce and Development may be employed by the Commonwealth as an independent consultant under contract. I quote relevant portions of the contract:

"In consideration of the payments hereinafter to be made to George A. Wells, by the Commonwealth of Massachusetts by and through the Department of Commerce and Development, said George A. Wells agrees to work for and perform services as Special Consultant on Public Relations and Promotion. The said George A. Wells will have the responsibility of preparing and narrating such radio programs as the Department of Commerce may be involved with and, in addition, the said George A. Wells shall handle special projects for the Department of Commerce and Development in the field of promotion, shall research and prepare material for speeches for Department officials, shall assist in preparation of material for the Department publication, 'Commerce Digest,' and any other assignments that shall be given him by the Commissioner.

"For the above-mentioned services, said George A. Wells shall be compensated by the Commonwealth of Massachusetts with payments made on the monthly basis of statements rendered at the rate of eight (8) dollars per hour, not to exceed however six hundred and fifty (650) dollars in any month, plus necessary travel and expenses; said expenses shall be reimbursable to the amount permitted by the laws of the Commonwealth for

Civil Service employees. Expenses for out-of-state travel must receive prior approval of the Commissioner. The term of this agreement shall be for the period from March 15, 1966 through June 30, 1966."

General Laws c. 31, § 46E provides the following:

"Any person holding an elective state office, or the mayor of any city elected to said office by the people, who holds a permanent office or position in the classified civil service or the labor service or who is employed on a permanent basis by any public authority which is supported in whole or in part by public money shall, upon his written request made to the appointing authority, be granted a leave of absence without pay from such office, position or employment for all or such portion of the term for which he was elected as he may at any time, or from time to time, designate, and he shall not be suspended or discharged, and shall suffer no loss of civil service rights, as a result of such election." As amended St. 1965, c. 703, § 1.

Presumably, in accordance with the above provisions, Mr. Wells has taken a leave of absence without pay from his position with the Department of Commerce.

It is stated in G. L. c. 30, § 21:

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

Clearly, the terms of G. L. c. 30, § 21 have no application to the proposed contract with Mr. Wells, since (as I assume) he does not now receive any salary from the Commonwealth. Furthermore, I know of no other provision of law that could even remotely be said to bar the proposed contract between Mr. Wells and the Commonwealth while Mr. Wells is on leave of absence from his position with the Department of Commerce and drawing no salary therefrom. I am, therefore, of the opinion that the proposed contract is permissible.

Very truly yours,

Edward W. Brooke, *Attorney General.*

18. August 10, 1966.

Honorable Alfred L. Frechette, *Commissioner of Public Health.*

Dear Commissioner Frechette:—You have requested an opinion with respect to the assignment of a part of the grounds of the Medfield State Hospital as a site for the disposal of refuse from the operations of that hospital. You state that the Medfield State Hospital is under the jurisdiction of the Department of Mental Health and that the proposed site has been examined by the Department of Public Health. You have asked "whether this area must be . . . assigned as a dumping ground under the provisions of § 150A of Chapter 111 of the General Laws."

As I understand your question, you are concerned with whether the site may be assigned as a dumping ground by the Department of Mental Health and/or the Department of Public Health without permission from the local board of health, or whether the assignment must be made by the Medfield Board of Health under the provisions of § 150A of c. 111.

Section 150A of c. 111 provides that "no place in any city or town shall be established or maintained by *any person, including any political subdivision of the commonwealth,* as a dumping ground for garbage . . . unless such place has been assigned by the board of health of such city or town as a dumping ground. . . ." (Emphasis supplied.) The answer to your question, therefore, depends on whether a department of the Commonwealth is included within the phrase "any person, including any political subdivision of the commonwealth."

A department of the Commonwealth does not fall within the term "political subdivision of the commonwealth." This term refers to local units of government or to certain bodies, such as the Massachusetts Bay Transportation Authority, which by statute are designated as political subdivisions of the Commonwealth. The Commonwealth itself and departments of the Commonwealth are not included within the scope of the expression.

The remaining question, therefore, is whether a department of the Commonwealth is covered by the term "any person" in § 150A of c. 111.

Section 7 of c. 4 of the General Laws provides that " 'person' or 'whoever' shall include corporations, societies, associations and partnerships." Departments of the Commonwealth are not covered by this definition. In *Hansen* v. *Commonwealth,* 344 Mass. 214, 219, the Court said that " . . . it is a widely accepted rule of statutory construction that general words in a statute such as 'persons' will not ordinarily be construed to include the state or political subdivision thereof." It is therefore clear that "any person" in § 150A of c. 111 does not include a department of the Commonwealth.

The above interpretation of the language of § 150A of c. 111 outweighs any possible contrary conclusions which might be drawn from the statute's apparent purpose of placing the assignment of dumping grounds in the hands of the local boards of health. Section 2 of § 150A of c. 111 (St. 1955, c. 310, § 2) provided that *"Any place* in use as . . . a dumping ground for garbage . . . shall be deemed to have been assigned under section one hundred and fifty A. . . ." (Emphasis supplied.) This general language in § 2, however, cannot broaden the restrictive language used in § 1 of § 150A. The Legislature has clearly limited the application of § 150A of c. 111 so as to exclude refuse dumps established or maintained by departments of the Commonwealth.

This result is further supported by the general non-applicability of local ordinances and local control to activities of the Commonwealth or of agencies created by the Commonwealth. Cities and towns derive all of their powers from the general government and can exercise only such powers as are expressly or impliedly conferred upon them by the Legislature. In light of this fact, it would be unreasonable to place the activities of a department of the Commonwealth under the control of a local board of health in the absence of a very clear statutory mandate requiring such a result.

The Supreme Judicial Court has often held that municipalities can exercise no control over an officer whose duties have been defined by the Legislature. *Breault* v. *Town of Auburn,* 303 Mass. 424; *Reitano* v. *City of Haverhill,* 309 Mass. 118; *Municipal Light Commission of Taunton* v. *City of Taunton,* 323 Mass. 79. The Department of Public Utilities is

given authority under § 10 of c. 40A of the General Laws to grant exemptions from local zoning ordinances to public service corporations. And in *Village on the Hill, Inc.* v. *Massachusetts Turnpike Authority,* 348 Mass. 107, the Court held that "the Boston zoning statute . . . does not 'apply to buildings or land belonging to and occupied by the . . . commonwealth.' "

In conclusion, the Department of Mental Health and/or the Department of Public Health may establish a refuse disposal site on the grounds of the Medfield State Hospital without requesting permission from the Medfield Board of Health under § 150A of c. 111.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

19. AUGUST 10, 1966.

HONORABLE ROBERT Q. CRANE, *Treasurer and Receiver General, Chairman, State Board of Retirement.*

DEAR MR. CRANE:—You have requested my opinion with respect to an application for retirement filed on October 13, 1965, by former Commissioner of Administration Charles Gibbons. You have indicated that Mr. Gibbons, who has more recently served as Chairman of the Government Center Commission, filed the said application for reasons of superannuation under the provisions of G. L. c. 32, § 10. In his application, the following statement appears: "Failure of re-appointment because of suspension on July 1964 for reason of indictment."

In light of the above facts, you have posed the following questions:

"1. Must the Board comply with the request contained in the application filed and pay to the applicant a retirement allowance?

"2. May the Board make a finding to the effect that the applicant is not entitled to receive a retirement allowance and thereby refuses to pay any retirement allowance?

"3. If the applicant is not entitled to receive a retirement allowance, is he entitled to a return of his accumulated total deductions credited in his account?"

The questions which you have presented may be resolved by the provisions of § 59 of c. 30 of the General Laws, the so-called Perry Law. Records contained in the Department of the Secretary of the Commonwealth reveal that Mr. Gibbons was suspended from performing the duties of Chairman of the Government Center Commission pursuant to c. 30, § 59 on July 21, 1964.

The relevant portion of c. 30, § 59 provides as follows:

"Any person so suspended shall not receive any compensation or salary during the period of such suspension, nor shall the period of his suspension be counted in computing his sick leave or vacation benefits or seniority rights, *nor shall any person who retires from service while under such suspension be entitled to any pension or retirement benefits, notwithstand-*

ing any contrary provisions of law, but all contributions paid by him into a retirement fund, if any, shall be returned to him." (Emphasis supplied.)

The provisions of the retirement statutes required that Mr. Gibbons file his retirement application prior to the expiration of his term of office. Were such application to be approved, the approval would relate back to a date prior to the termination of Mr. Gibbons' employment by the Commonwealth. Since Mr. Gibbons' suspension remained in effect until the date of expiration of his term, it follows that his retirement would have occurred during the period of his suspension. See my opinion to you dated August 9, 1966 relative to the retirement application filed by Mr. Frank S. Giles.

Thus, Mr. Gibbons would not "be entitled to any pension or retirement benefits . . . , but all contributions paid by him into a retirement fund . . . shall be returned to him." Since the provisions of c. 30, § 59 are dispositive of this matter, it is not necessary to consider the effect of paragraphs (2)(a), (2)(b) and (2)(c) of § 10 of c. 32. Accordingly, I answer your first question in the negative and your second and third questions in the affirmative.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

20. AUGUST 11, 1966.

HONORABLE DONALD L. CROOKS, *Chairman, Board of Agriculture.*

DEAR MR. CROOKS:—You have requested my opinion upon the following question: "Can the Board of Agriculture assign the duties required of them in Chapter 128A, Section 3, to employees within the department?"

General Laws c. 128A, § 3 provides in part as follows:

"[O]n an application for a license to conduct a horse or dog racing meeting in connection with a state or county fair the applicant shall show a certificate from the commissioner of agriculture that (1) such fair is a state or county fair as defined in section one, (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 and by the board of agriculture."

Chapter 128A, § 3 thus requires that the proposed site of the racing meeting be approved by the Board of Agriculture. This is the Board's only "duty" under this statute. Whether this approval is discretionary or ministerial has not been decided by our courts.

It is my opinion that the approval of the Board required by c. 128A, § 3 is discretionary in nature. See *Springfield* v. *Commonwealth,* 1965 Mass. Adv. Sh. 857, 861-862. The statute requires approval by the Board of "the location where such racing meeting is to be held." If, for some reason, the members of the Board believe that a proposed site is not well

suited for a racing meeting, approval of that particular site may be withheld. It would be unreasonable to suppose that the statute requires the Board to go through the formalities of approval of the site selected by the applicant without exercising its independent judgment. In addition, when the Supreme Judicial Court has construed the word "approval" as it appears in other statutes relating to the granting of licenses, it has usually held that the "approval" required was discretionary in nature. *Leroy* v. *Worcester St. Ry. Co.,* 287 Mass. 1, 7; *Coyne* v. *Alcoholic Beverages Control Commission,* 312 Mass. 224, 228-229.

Since the approval required by c. 128A, § 3 calls for a discretionary act of the Board of Agriculture, it can be granted only as a result of a formal vote of the Board taken at a regular meeting. In *Moskow* v. *Boston Redevlopment Authority,* 1965 Mass. Adv. Sh. 1203, 1212, the Court said: "The members [of the Boston Redevelopment Authority] comprise a board of public officers, who must make official decisions . . . by at least a majority vote given at a duly constituted meeting of the board. They could not act separately or individually." See also *Alphen* v. *Shadman,* 330 Mass. 608, 609 (Boston Housing Authority); *Kenney* v. *McDonough,* 315 Mass. 689, 693-694 (city council). It is clear that your Board must approve or disapprove racing sites at a duly constituted meeting, and cannot lawfully delegate its power of approval.

It is a general rule of law that discretionary powers of administrative officials cannot be delegated to subordinates in the absence of clear statutory provisions allowing for such delegation.

"In the absence from the applicable . . . statutes of provisions relating to the power of boards or officials primarily charged with administering such statutes to delegate to others matters relating to [the administration of the statutes] . . . the existence of such authority is usually made to depend upon whether the particular act or duty sought to be delegated is . . . ministerial . . . or . . . discretionary . . . in nature. Where this distinction is observed, it is generally if not universally held that ministerial acts may be delegated. . . . If, however, the act sought to be delegated is discretionary . . . in nature, the . . . official has no authority to deputize it."

107 A.L.R. 1482, 1483.

The general rule that discretionary powers may not be delegated is observed in this Commonwealth. *Day* v. *Green,* 4 Cush. 433, 438. *Leroy* v. *Worcester St. Ry. Co., supra,* 7. There is no authority, either in c. 128A, § 3 or in c. 20, for the delegation by the Board of Agriculture of its power to approve racing sites. In the absence of statutory provisions authorizing the delegation of this power, and in view of my conclusion that the approval power is discretionary in nature, it is my opinion that the Board of Agriculture cannot assign to employees within the Department its approval powers under c. 128A, § 3.

Your letter states that the Board of Agriculture has found it advisable to make on-site inspections of proposed locations for racing meetings. Such subsidiary duties, preliminary to the formal decision to approve or disapprove the proposed site, may be delegated. Members of the Board need not personally conduct such an investigation. See *Malden* v. *Metropolitan Transit Authority,* 328 Mass. 491, 494-495; *Clooney* v. *Civil Service Commission,* 1965 Mass. Adv. Sh. 1243, 1244; 2 Am. Jur. 2d 54-55.

Accordingly, it is my opinion that the Board of Agriculture may not delegate its approval powers under c. 128A, § 3, but may lawfully provide that site inspections shall be conducted by Department employees.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

21. AUGUST 12, 1966.

HONORABLE GEORGE W. WATERS, *Chairman, Board of Standards.*

DEAR MR. WATERS:—You have asked for my opinion with regard to the question whether Section 106.1 of the Board of Standards Building Code, STD-10, conflicts with c. 691 of the Acts of 1963. Specifically, you have inquired whether the Board may, in light of c. 691, authorize the continued use, without change, of buildings or structures existing on January 13, 1966, provided such use is not detrimental to the general safety and welfare of the public, and provided the building is not enlarged and the exit facilities are adequate for a new building of the same use and occupancy load.

Chapter 691 of the Acts of 1963 amended § 3B of c. 143 of the Massachusetts General Laws. The purpose of this amendment, as evidenced by the title to the Act, is to "PROVIDE[E] THAT MATERIALS USED IN BUILDINGS REQUIRED TO HAVE PROPER EGRESSES AND OTHER MEANS OF ESCAPE FROM FIRE SHALL COMPLY WITH RULES AND REGULATIONS MADE BY THE BOARD OF STANDARDS." In determining whether § 106.1 of the Board of Standards Building Code is in conflict with St. 1963, c. 691, it is useful to consider both the language of § 106.1 of the Code and the pertinent provisions of § 3B of c. 143 of the General Laws, as amended by c. 691 of the Acts of 1963.

Section 106.1, Board of Standards Building Code, STD-10.

"Sec. 106.1 Existing Use Unchanged. The legal use and occupancy of any building or structure existing on January 13, 1966 or for which it had been heretofore approved may be continued without change when such use is not detrimental to the general safety and welfare of the public provided the building is not enlarged in height or area and the exit facilities are adequate for a new building of the same use and occupancy load."

G. L. c. 143, § 3B.

"The board of standards in the department shall make rules and regulations relating to the construction, reconstruction, alteration, repair, demolition, removal, use or occupancy, and to the standards of materials, *including materials used for finish and trim,* to be used in such construction, reconstruction, alteration, repair, demolition, removal, use or occupancy of any building, portion of a building or room which is a place of assembly *or which is required to be provided with proper egresses or other means of escape*; and such rules and regulations shall be in accordance with the generally accepted standards of engineering practice and not inconsistent with law. Such rules and regulations may provide that no permit for use

or occupancy of a place of assembly *or of any portion of a building in which said proper egresses or other means of escape from fire are so required* shall be granted unless there is presented with the application for such permit a certificate of the inspector to the effect that the building of which such place of assembly is a part *or that any portion of a building in which said proper egresses or other means of escape from fire are so required* complies with the pertinent provisions of this chapter. . . ." [Underlined portion was added by St. 1963, c. 691.]

The first sentence of G. L. c. 143, § 3B, as amended by c. 691 of the Acts of 1963, instructs the Board of Standards to make rules and regulations with regard to a building or room which is a place of assembly or which is required to be provided with proper egresses or other means of escape. It is clear that the General Court intended to require the promulgation of regulations relative to this subject matter ["The board of standards in the department *shall* make rules and regulations. . . ."]. Thus, if the Board should fail to promulgate rules and regulations with respect to the buildings or parts thereof referred to in c. 143, § 3B, as amended, the Board would violate the mandate of that statute.

However, the direction given the Board by G. L. c. 143, § 3B, as amended by c. 691 of the Acts of 1963, is a broad one. It does not specify with particularity what the rules and regulations promulgated by the Board are to be. Rather, it leaves to the expert judgment of the members of the Board the task of formulating rules and regulations so as to insure the public health and safety in so far as they are dependent upon the construction, and the materials used therein, of buildings subject to G. L. c. 143, § 3B.

Section 106.1 of the Board of Standards Building Code is a regulation applicable to the legal use and occupancy of a building or structure existing on January 13, 1966. This regulation allows continued use without change provided three conditions are met: (1) "such use is not detrimental to the general safety and welfare of the public"; (2) "the building is not enlarged in height or area"; and (3) "the exit facilities are adequate for a new building of the same use and occupany load." Thus, in order to have continued use without change — i.e., in order to have continued use without being required to meet the other provisions of the Code which, absent § 106.1, would be applicable — of a building or structure existing on January 13, 1966, such use must comply with the requirement (in effect a "regulation") that it not be detrimental to the general safety and welfare of the public. Further, any building or structure covered by § 106.1 must comply with the requirements (also "regulations") that there be no enlargement in height or area and that exit facilities are adequate for a new building of the same use and occupancy load. Consequently, it is clear that the Board has heeded the legislative direction to promulgate regulations with respect to buildings or parts of buildings in question.

By formulating § 106.1, the Board has attempted to alleviate what otherwise might be a heavy burden imposed upon the owners and users of buildings in existence at the time of the Code's enactment. As is evident from a perusal of its contents, the Code sets forth detailed requirements for buildings covered by it. If buildings in existence at the time of the Code's enactment were required to conform to the detailed provisions governing new buildings, owners of the older buildings most likely would

be compelled to engage in extensive and costly alterations. As a remedy, the Board has formulated § 106.1, a regulation which imposed requirements of general safety and welfare and adequate exit facilities, but which does not impose the detailed requirements of the remainder of the Code.

It is my conclusion that the Board has complied with its mandate to formulate rules relating to the buildings and structures dealt with in G. L. c. 143, § 3B, as amended. In accordance with the broad delegation of discretion contained in that statute, the Board has promulgated rules and regulations in the form of a building code. Section 106.1 of the Code imposes on buildings in existence at the time of the Code's enactment requirements in lieu of those set forth in other sections. As indicated above, there is a reasonable basis for regulating buildings constructed prior to the enactment of the Code in a manner somewhat different from other buildings. Accordingly, it is my opinion that § 106.1 of the Board of Standards Building Code does not conflict with G. L. c. 143, § 3B, as amended by c. 691 of the Acts of 1963.

Very truly yours,

Edward W. Brooke, *Attorney General.*

22. August 12, 1966.

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

Dear Commissioner Kiernan:—To your letter of July 26, 1966, you attach a "circular letter" dated June 29, 1966 and sent to state directors of vocational education by the United States Assistant Commissioner of Vocational and Technical Education. Calling my attention to Section II of the circular letter, you ask me to rule "at an early date" on whether the Constitution of the Commonwealth permits the donation of state funds or other state property to private institutions to achieve the purposes of the federal Manpower and Development Training Act of 1962. Under this Act, state funds or property so donated would be matched by donations of the Federal Government.

The relevant portion of the circular letter states:

"If any State has a constitutional provision that prohibits the expenditure of public funds for training in private schools, the Attorney General shall certify to the Commissioner of Education that the State cannot use public funds or in-kind contributions for such training."

The Constitution of the Commonwealth contains the type of provision prohibiting the expenditure of public funds for training in private schools to which the federal authorities have referred [See Article 46 of the Amendments to the Massachusetts Constitution, discussed more fully in my opinion to you of June 13, 1966]. For your convenience, I have prepared a letter to the United States Commissioner of Education certifying that such a provision exists and enclose that letter herein, together with a copy for your files.

Very truly yours,

Edward W. Brooke, *Attorney General.*

23. August 15, 1966.

Honorable J. Peter Griffin, *Director, Division of Dairying and Animal Husbandry.*

Dear Mr. Griffin:—You have requested my opinion with respect to the interpretation of the provisions of § 16F of c. 94 of the General Laws. Pursuant to that statute, all milk dealers within the Commonwealth are required — during the month of June — to register with your Division, and to supply certain information pertaining to their operations during the month of May. Chapter 94, § 16F further provides that the Director may require such dealers to submit similar information for any one calendar month. Accordingly, you have posed the following question:

"Does this last sentence restrict me so that I am only entitled to the information for two calendar months, specifically May and any other one of my choice, or does it mean that I am entitled to the information for the twelve calendar months?"

The relevant language of the statute provides as follows:

"Each person, not a producer of milk, whose principal business is the sale at wholesale or retail of milk, shall, before commencing to transact such business, register as a dealer with the director, and shall thereafter annually so register during the month of June, and upon every such registration shall state the address of each of his places of business, the names and addresses of producers, milk plants, receiving stations, or pasteurization plants supplying him the milk, with the number of quarts of milk supplied by each producer or from each such other source during the last calendar month preceding registration. . . . *The director may require . . . such person . . . to prepare and submit to him,* upon a form furnished by him therefor, *a further statement of similar information for any one calendar month. . . .*" (Emphasis supplied.)

The quoted language reveals a clear intent on the part of the General Court to restrict the amount of information which may be required by the Director. The Legislature has specifically referred to "a further statement of similar information for *any one* calendar month." (Emphasis supplied.) The conclusion is unavoidable that — by such language — the Legislature authorized the Director to require the submission of a statement for one calendar month only (other than the month of May.) This statutory provision does not support the contention that the Director may — at different times during the year — require information pertaining to various calendar months. Had such been the intention of the General Court, it presumably would not have included the type of restrictive language which now appears in c. 94, § 16F.

The section in question was most recently amended by c. 687 of the Acts of 1960. Prior to the effective date of that amendment, the section provided:

"The director may require each such person to prepare and submit to him, upon a form furnished by him therefor, *at such other times as he may require,* a further statement of similar information relating to any one calendar month." (Emphasis supplied.)

St. 1960, c. 687, deleted the words "at such other times as he may require."

It is not necessary to decide conclusively whether the provisions of c. 94, § 16F, as they existed prior to the 1960 amendment, authorized the Director to require the filing of statements for any or all calendar months. However, the removal of the words "at such other times as he may require" indicates even more strongly that the General Court intended to impose a limitation upon the number of times the Director could lawfully call for further information.

Accordingly, it is my opinion that the statute in question does not permit you to require the submission of information for all twelve calendar months; rather, it authorizes you to ask only for information pertaining to the month of May and to any other single calendar month of your choosing.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

24. AUGUST 18, 1966.

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

DEAR MADAM:—You have requested my opinion relative to the following questions:

"Under Section 21, of Chapter 142 of the General Laws, does the Board of State Examiners of Plumbers have the authority to inspect plumbing installations in buildings constructed under the authority of Chapter 563 of the Acts of 1964?

"If the answer to the above question is in the negative, then would the inspection of plumbing in these buildings fall under the jurisdiction of a local city or town in which the building is located?"

General Laws c. 142, § 21 provides as follows:

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

A reading of the plain and ambiguous language of the above-quoted section makes it clear that the authority of the Board of State Examiners of Plumbers under said section is limited to "buildings owned and used by the commonwealth." The answer to your first question, therefore, depends upon whether buildings constructed by the Massachusetts Bay Transportation Authority under the provisions of § 18 of c. 563 of the Acts of 1964 (G. L. c. 161A) are "owned and used by the commonwealth."

I am of the opinion that buildings constructed by the MBTA are owned by the MBTA and are not owned by the Commonwealth. Section 2 of c. 161A establishes the MBTA as a political subdivision of the Commonwealth. Among the powers granted to the Authority by said § 2 are the "power *to hold property,* to sue and be sued in law and equity and to

prosecute and defend all actions relating to *its property* and affairs." (Emphasis supplied.) The Authority is further given the power "[t]o take real property by eminent domain . . . ," (§ 3(o)), and "to buy, sell, lease, pledge and otherwise deal with real and personal property. . . ." (§ 3 (q)).

The above sections clearly provide that the MBTA has the power to hold property in its own name. Property so held is owned by the Authority and not by the Commonwealth. Therefore, buildings constructed by the MBTA are not owned by the Commonwealth and do not come within the scope of c. 142, § 21. The same conclusion was reached by a previous Attorney General in reference to the applicability of G. L. c. 142, § 21 to buildings constructed by the Massachusetts Turnpike Authority (*Attorney General's Report,* April 17, 1958, p. 61), and by the Massachusetts Port Authority (*Attorney General's Report,* January 8, 1959, p. 67).

You have also asked whether the inspection of plumbing in buildings constructed or owned by the MBTA would fall under the jurisdiction of the particular municipality in which the building is located. General Laws c. 142, § 11 provides in part that the inspectors of plumbing of each city and town "shall inspect all plumbing in process of construction, alteration or repair for which permits are granted within their respective cities and towns. . . ."

In my opinion, however, the local plumbing inspectors do not have jurisdiction over buildings owned by the MBTA. As a matter of general policy, local ordinances and local control are not applicable to activities of the Commonwealth or of agencies created by the Commonwealth. Cities and towns derive all of their powers from the general government and can exercise only such powers as are expressly or impliedly conferred upon them by the Legislature. In light of this fact, it would be unreasonable to place the activities of a body such as the MBTA under the control of local plumbing inspectors in the absence of a very clear statutory mandate requiring such a result. The Legislature has granted the Authority power to operate in a large number of cities and towns and to perform a very important public function. See, *Massachusetts Bay Transportation Authority* v. *Boston Safe Deposit and Trust Co.,* 348 Mass. 538. Control by each of the cities and towns over the facilities of the Authority located therein could disrupt the efficiency of this operation.

The Supreme Judicial Court has often supported this immunity of general governmental agencies from local control. It has held that municipalities can exercise no control over an officer whose duties have been defined by the Legislature. *Breault* v. *Town of Auburn,* 303 Mass. 424; *Reitano* v. *City of Haverhill,* 309 Mass. 118; *Municipal Light Commission of Taunton* v. *City of Taunton,* 323 Mass. 79. And in *Village on the Hill, Inc.* v. *Massachusetts Turnpike Authority,* 348 Mass. 107, 118, the Court held that "the Boston zoning statute . . . does not 'apply to buildings or land belonging to and occupied by the . . . commonwealth.' " While recognizing that property held by the Turnpike Authority was not owned by the Commonwealth, the Court went on to say that "the Legislature . . . made the authority sufficiently governmental in character so that the actual construction and operation of the turnpike . . . and action reasonably related to that function, should not be prevented by a zoning statute appli-

cable to one municipality or by a local zoning ordinance or by-law." The principle expressed in the above case applies with equal validity to the MBTA.

Statutory support for this conclusion is provided by c. 882 of the Acts of 1965 which amended § 3 of c. 161A of the General Laws. Paragraph (i) of said § 3 now provides in part as follows:

"[The Authority shall have the power] to provide mass transportation service . . . without being subject to the jurisdiction and control of the department of public utilities . . . *and, with respect only to operations of the authority with equipment owned and operated by the authority, without, except as otherwise provided in this chapter, being subject to the jurisdiction and control of any city or town or other licensing authority. . . .*" (Emphasis supplied.)

The italicized words quoted above were added by the 1965 amendment, which was entitled "An Act excluding operations of the Massachusetts Bay Transportation Authority with equipment owned and operated by said Authority from the jurisdiction and control of city, town and certain other licensing authorities." This amendment indicates a clear legislative intent to exclude the MBTA from local jurisdiction and control. The term "equipment" used in the amendment is defined broadly by § 1 of c. 161A to include "all rolling stock . . . vehicles, rails . . . station equipment . . . incidental apparatus and other tangible personal property, whether or not affixed to realty, required or convenient for the mass movement of persons." Plumbing installations in buildings owned by the MBTA come within the above definition. They are therefore excluded from local inspection and control.

Accordingly, it is my opinion that plumbing installations in buildings constructed by the MBTA are not under the jurisdiction of either the Board of State Examiners of Plumbers or individual municipal plumbing inspectors.

Very truly yours,

Edward W. Brooke, *Attorney General.*

25. August 29, 1966.

His Excellency John A. Volpe, *Governor of the Commonwealth.*

Dear Governor Volpe:—By letter dated August 17, 1966, you have requested my opinion with respect to the present status of Mr. Anthony N. DiNatale. You have indicated that on the seventh day of October, 1964, a Suffolk County Grand Jury returned four indictments (Suffolk Criminal Court Nos. 14835, 14836, 14837 and 14838 of 1964) against the said Mr. DiNatale. On October 14, 1964, Mr. DiNatale was suspended from performing his duties as a member of the Massachusetts Turnpike Authority by then Governor Endicott Peabody pursuant to the provisions of G. L. c. 30, § 59, the so-called Perry Law. The trial of two of the indictments, commencing in Suffolk Superior Court on May 23, 1966, resulted — on June 6, 1966 — in jury verdicts of not guilty on each indictment. On July 29, 1966, *nolle prosequi* statements were filed by the

Department of the Attorney General indicating that the two remaining indictments would not be prosecuted, since the evidence available with respect to trial of the charges contained therein was substantially the same as that introduced at the earlier trial.

In light of the above, you have posed the following questions:

"1. Have the criminal proceedings against Mr. DiNatale been sufficiently 'terminated without a finding or verdict of guilty on any of the charges on which he was indicted,' so as to require removal of his suspension under the provisions of Chapter 30, Section 59 of the General Laws?

"2. If the answer to the first question is in the affirmative, who is the appropriate person to remove the suspension, and what is the appropriate form and procedure to be followed in effecting such removal?"

The provisions of § 59 of c. 30 authorize the immediate suspension of any appointed officer or employee of the Commonwealth, or of any State department, board, commission or agency, or of any public authority, created by the General Court, should such officer or employee be indicted for misconduct in any public position at any time held by him. See *Bessette* v. *Commissioner of Public Works,* 348 Mass. 605, 608; *Reynolds* v. *Commissioner of Commerce and Development,* 1966 Mass. Adv. Sh. 167, 168. However, the statute carefully preserves the rights of the suspended officer or employee in the event he should ultimately be cleared of the charges lodged against him. Thus, should criminal proceedings conclude in favor of the suspended appointee, he is entitled to immediate restoration to his position, and to receipt of whatever compensation and benefits have been withheld.

"If the criminal proceedings against the person suspended *are terminated without a finding or verdict of guilty* on any of the charges on which he was indicted, his suspension shall be forthwith removed, and he shall receive all compensation or salary due him for the period of his suspension, and the time of his suspension shall count in determining sick leave, vacation, seniority and other rights, and shall be counted as creditable service for purposes of retirement." (Emphasis supplied.)

Mass. G. L. c. 30, § 59

There is no doubt that the criminal proceedings brought by the Commonwealth against Mr. DiNatale have terminated in his favor in the sense intended by the Perry Law. The statute does not require actual acquittal of all charges as a condition precedent to restoration of the appointee to his position. Rather, it provides that the person involved shall be entitled to restoration and to receipt of back salary and other benefits upon termination of the criminal proceedings "without a finding or verdict of guilty." In other words, termination of the criminal case in any way unfavorable to the Commonwealth satisfies the statutory condition and requires removal of the suspension.

Mr. DiNatale has been acquitted by a Suffolk County jury upon two of the four indictments returned against him. The Commonwealth has elected not to proceed with the prosecution of the remaining two indictments. Accordingly, the criminal proceedings against Mr. DiNatale have been "terminated without a finding or verdict of guilty on any of the

charges on which he was indicted," and I consequently answer your first inquiry in the affirmative.

Chapter 30, § 59 contains a specific notice provision.

"Notice of said suspension shall be given in writing and delivered in hand to said person or his attorney, or sent by registered mail to said person at his residence, his place of business, or the office or place of employment from which he is being suspended. Such notice so given and delivered or sent shall automatically suspend the authority of said person to perform the duties of his office or employment *until he is notified in like manner that his suspension is removed.* A copy of any such notice together with an affidavit of service shall be filed with the state secretary." (Emphasis supplied.)

It is my opinion that the statutory notice provision applies to the present case. The General Court has not made it absolutely clear whether formal notification of removal of suspension is necessary when such removal of suspension is required by law. Notice is of course necessary when a given appointing authority has decided — in his discretion — to terminate a suspension imposed at an earlier date. However, the desirability of informing both the individuals involved and the public as a whole of the exact status of a given appointee would seem to require application of the statute's notice provision under the present circumstances as well.

Consequently, it is my opinion that the Governor of the Commonwealth — as the appointing authority of members of the Massachusetts Turnpike Authority — must notify Mr. DiNatale forthwith that his suspension has been removed. Written notice signed by the Governor may be delivered in hand to Mr. DiNatale or to his attorney, or may be sent by registered mail to Mr. DiNatale at his residence or place of business. A copy of such notice together with an affidavit of service should be filed with the Secretary of the Commonwealth in accordance with the statutory requirement.

Very truly yours,

Edward W. Brooke, *Attorney General.*

26. August 30, 1966.

Honorable Elliot L. Richardson, *Lieutenant Governor of the Commonwealth.*

Dear Lieutenant Governor Richardson:—In a recent request for an opinion you state the following:

"On May 4, 1966, by Executive Order No. 50, Governor Volpe established the Vocational Rehabilitation Planning Commission (hereafter called the Commission).

"By this Executive Order the Governor also designated the Commission as the agency to carry out state-wide planning for services to the handicapped pursuant to a program established by 29 U.S.C. 34 (a) (2) B as amended by section 4 (a) (2) of the Vocational Rehabilitation Act Amendments of 1965 (Public Law 89-333). A maximum of $100,000 a year for up to two years is available from the federal government to carry out this planning with no state matching funds required."

In view of these facts you ask the following questions:

"1. Will the rules and regulations of the Civil Service Commission under Chapter 31 of the General Laws be inapplicable to the professional consultant whose services as Executive Director are contracted for by the Commission?

"2. Is there any state law which would limit the Commission's power to receive federal funds?

"3. Is there any state law which would limit the power of the Commission to contract for professional services to carry out the planning according to the charge in Executive Order No. 50?"

I shall consider each question separately but I shall not consider, in answering any of these questions, the general validity of Executive Order No. 50; I assume that consideration of so weighty an issue is not within the scope of the questions which you pose.

The term "consultant" generally suggests "a person who, *as a non-employee,* gives professional advice or service regarding matters in the field of his special knowledge or training." (Emphasis supplied.) G. L. c. 29, § 29A. See also G. L. c. 23A, § 9. I assume that any "consultant" hired by the Commission will be a "non-employee"; that is, he will render professional services to the Commission without immediate supervision by any officer or employee of the Commonwealth and, in brief, the Commission will be his client rather than his employer. Under G. L. c. 31, § 3, rules may be made to "regulate the selection and employment of persons to fill *positions* in the *official service* and *labor service* of the commonwealth." (Emphasis supplied.) Since a consultant to the Vocational Rehabilitation Planning Commission presumably does not hold a "position" with (see *Brown* v. *Luster,* 165 F. 2d 181, 185), and is in neither the "official service" (see *State* v. *Smith,* 19 Wash. 644) nor the "labor service" (see *Deveney's Case,* 223 Mass. 270, 271) of the Commonwealth, the rules issued by the Civil Service Commission under G. L. c. 31 would not apply to him. On the basis of my assumption regarding the status of the consultant as a "non-employee," I answer your first question in the affirmative.

Although the General Court has from time to time specifically conferred upon certain bodies the right to receive federal funds (see, *e.g.,* G. L. c. 44, § 53A), I know of no statute or constitutional provision that expressly or impliedly limits the rights of other official bodies to receive such funds. Accordingly, I answer your second question in the negative.

I assume that the funds to pay for any "professional services" for which the Commission may wish to contract will not come directly or indirectly from the treasuries of the Commonwealth or any of its subdivisions and that the Commission will not purport, in entering into any such contracts, to bind the Commonwealth to pay for such services. Based on this assumption, my opinion is that there is no law barring the Commission from entering into the contracts. Accordingly, I answer your third question in the negative.

Very truly yours,

Edward W. Brooke, *Attorney General.*

28. September 9, 1966.

Mr. Samuel M. Flaksman, *Executive Secretary.*

Dear Mr. Flaksman:—You have requested my opinion "as to whether or not Chapter 740 of the Acts of 1964 is applicable to Chapter 138, Section 24 of the General Laws concerning the approval of the Regulations of the Alcoholic Beverages Control Commission by the Council."

Chapter 740 of the Acts of 1964 is an Act — passed by initiative process — repealing certain statutory powers of the Governor's Council. Section 2 of said Act lists those provisions of the General Laws which are exempt from the Act's effects. General Laws c. 138, § 24 is not included in those exemptions.

General Laws c. 138, § 24 provides that "The commission shall, with the approval of the governor and council, make regulations. . . ." As used in c. 740 and defined in § 1 of said Act, the phrase "advice and consent of the council" includes "approval" by that body. "Approval" by the Executive Council is what is called for by c. 138, § 24.

Chapter 740, § 4 specifically repeals so much of each provision of the General Laws "as requires the advice and consent of the council with respect to any action or omission to act by the governor or by any . . . agency . . . in the executive department, including . . . any rules or regulations. . . ." Accordingly, it is my opinion that c. 740 of the Acts of 1964 is applicable to G. L. c. 138, § 24, and that rules and regulations of the Alcoholic Beverages Control Commission need no longer be submitted to the Executive Council for approval.

Very truly yours,

Edward W. Brooke, *Attorney General.*

29. September 13, 1966.

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

Dear Secretary White:—By letter dated August 31, 1966, you have inquired whether men in the academies of the three armed services of the United States can be considered members of the armed services (for purposes of administration of the state election laws).

General Laws c. 54, §§ 103B-103Q, make provision for special treatment under the election laws of those persons who are "federal service personnel." By § 103B, "federal service personnel" includes "persons on active service in the armed forces or merchant marine of the United States." The phrase "on active service in the armed forces . . . of the United States" is not further defined in the election laws.

Title 10 of the United States Code deals with the armed forces of the United States. Section 101(24) of Title 10 provides: "'Active service' means service on active duty." Section 3075(a) of Title 10 states, "The Regular Army is the component of the Army that consists of persons whose continuous service on active duty in both peace and war is contemplated by law. . . ." Section 3075(b) of Title 10 defines the Regular

Army as including " . . . the professors, registrar, and *cadets* of the United States Military Academy. . . . " (Emphasis supplied.)

Similarly explicit provisions of federal law establish that cadets at the United States Air Force Academy are on active service in the armed forces of the United States. See United States Code, Title 10, § 8075.

The status of midshipmen at the United States Naval Academy does not appear to be established by law with the precision used in the cases of cadets at the Military and Air Force Academies. Nevertheless, the provisions of Title 10 of the United States Code, taken in the aggregate, show that the status of midshipmen is that of men on active service in the armed forces of the United States. By § 5001 of Title 10, "member of the naval service" means a person "appointed or enlisted in . . . the Navy. . . . " Sections 6961(a), 6962(b) and 6963 of Title 10 establish that midshipmen are members of the naval service. By § 802 of Title 10, midshipmen are subject to the Uniform Code of Military Justice. The provisions of law relating to the Naval Academy are all to be found in Title 10 of the United States Code, which, as stated above, deals with the armed forces of the United States. Those provisions (§§ 6951-6974) are similar to the provisions relating to the United States Military Academy (§§ 4331-4355) and the Air Force Academy (§§ 9331-9355). Bearing in mind the provisions of the statutes dealing with absent voting by federal service personnel that "such provisions shall be construed liberally to effectuate their purposes" (G. L. c. 54, § 103Q), I conclude that the status of midshipmen is the same as that of cadets.

Consequently, it is my opinion that cadets at the United States Military Academy and the United States Air Force Academy and midshipmen at the United States Naval Academy are persons on active service in the armed services of the United States for the purpose of administration of the state election laws.

Very truly yours,

Edward W. Brooke, *Attorney General.*

30. September 15, 1966.

Honorable Samuel M. Flaksman, *Executive Secretary, Executive Council.*

Dear Mr. Flaksman:—At a recent meeting the Executive Council voted to request an opinion of the Attorney General as follows:

" . . . voted that an opinion of the Attorney General be requested as to whether, after a request for a respite by the Governor under Chapter 279, Section 49 of the General Laws, has received the consent of the Council, it is required that the Governor must therefore recommend a pardon for the 'convict', after the investigation and consideration of the facts; or can the Governor, after such investigation and consideration take no action towards a pardon."

Chapter 279, § 49 authorizes the granting of a respite of the execution of a sentence of death, and provides as follows:

"The governor, with the advice and consent of the council, may from time to time respite the execution of a sentence of death for stated periods so long as he may consider it necessary *to afford him,* with the advice and consent of the council, *an opportunity to pardon the convict and to investigate and consider the facts of the case for that purpose.*" (Emphasis supplied.)

I do not reach the question whether the Executive Council's statutory responsibility to advise with respect to such a respite has been repealed by the provisions of c. 740 of the Acts of 1964. See Constitution of the Commonwealth, Pt. 2, c. 2, § 1, Art. VIII; *Juggins* v. *Executive Council,* 257 Mass. 386, 388.

The clear purpose of c. 279, § 49 is to provide the Governor with the time that is necessary to make a careful and considered decision with respect to the granting of a pardon. The terms of the statute to the effect that execution of the sentence may be delayed for such period as is "necessary to afford him . . . an opportunity to pardon the convict and to investigate and consider the facts of the case" are susceptible to only one interpretation. The granting of such a respite in no way compels the Governor to take any action with respect to a pardon. The purpose of the respite is solely to provide the Chief Executive with time to investigate and to consider the question. Were the effect of the granting of a respite under the provisions of c. 279, § 49 to compel the recommendation of a pardon or any other action, the entire purpose of the statute would be negated.

Accordingly, the statute in no way operates to require the Governor to recommend a pardon. It is my opinion that — after the investigation and consideration which takes place during the period of the respite — the Governor retains complete discretion to recommend or not to recommend a pardon as he sees fit.

Very truly yours,

Edward W. Brooke, *Attorney General.*

31. September 19, 1966.

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

Dear Sir:—In your letter of August 16, 1966, you request my opinion with respect to one of the provisions of c. 236 of the Acts of 1966, which Act is entitled, "An Act Relative To Sessions For Registration Of Voters." You ask whether a Saturday registration session, which falls on the final day for registration under § 1 of St. 1966, c. 236, meets the Saturday session requirements imposed by §§ 2 and 3 of said Act.

Sections 2 and 3 of St. 1966, c. 236, provide in part that "they [the registrars] shall hold at least one session on a Saturday during the last two weeks prior to the close of registration." Section 1 of the Act requires that the final day for registration before the state primary and the state election shall be the thirty-first day preceding such primary or election. It is clear that such thirty-first day will always fall on a Saturday, since both the state primary and the state election are held upon Tuesdays. The question is, therefore, whether holding one Saturday registration on

the Saturday which falls on the thirty-first day preceding the state primary or state election satisfies the requirement of §§ 2 and 3 of St. 1966, c. 236, that "they shall hold at least one session on a Saturday during the last two weeks prior to the close of registration."

It should be noted that the language originally appearing in St. 1898, c. 548, § 37, was:

"They shall hold at least one session at some suitable and convenient place in every city or town on or before the Saturday last preceding the first caucus preceding the annual state election, to give an opportunity to qualified voters to register."

This language has undergone subsequent changes by amendments, but the use of the phrase "on or before" clearly indicated a legislative intention that a registration session on the Saturday last preceding the first caucus preceding the annual state election would satisfy this section.

The words "at least" are emphatic, and expressive of a minimum, to be equated with no less than one. *Lasro Corp.* v. *Kree Institute of Electrolysis,* 215 N.Y.S. 2d 125, 128; *In Re Gregg's Estate,* 213 Pa. 260; *Barron* v. *Green,* 13 N.J. Super. 483. The phrase "prior to," as used in St. 1966, c. 236, §§ 2 and 3, should be construed to mean a session "not later than" thirty-one days before the primary or election. *Berkow* v. *Hammer,* 189 Va. 489.

It will be noted further that a pertinent part of the language of § 1 of St. 1966, c. 236, is: ". . . there shall be no registration of voters between ten o'clock in the evening on the thirty-first day preceding and the day following, the biennial state primary. . . ." The statute sets a precise time for the close of registration on the last day. Any session before ten o'clock in the evening on the thirty-first day preceding the state primary or election is a session prior to the close of registration.

Accordingly, it is my opinion that the requirements of §§ 2 and 3 of St. 1966, c. 236 are satisfied if the various registrars hold Saturday sessions on the thirty-first day preceding the state primary or election.

Very truly yours,

Edward W. Brooke, *Attorney General.*

32. September 20, 1966.

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

Dear Mr. White:—You have requested my determination pursuant to § 19 of c. 53 of the General Laws whether a certain question filed with your office may properly be considered a question of public policy. General Laws 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. . . . "

A sufficient number of voters of the Seventeenth Hampden Representative District have filed an application with your office for submission of a question of public policy to the voters of the District at the State Election on November 8th. The question is designed to secure from the voters their approval or rejection of a continued increase in the rate of the property tax in order to meet the increased costs of government.

The words "public policy" as used in G. L. c. 53, § 19 should not be given a restrictive construction. See my other opinion issued today to your Department. See also 8 Op. Atty. Gen. 490, 493. "Public policy" in substance "may be said to be the community common sense and common conscience, extended and applied throughout the state to matters of public morals, public health, public safety, public welfare, and the like." *Pittsburgh, C., C. & St. L. Ry. Co.* v. *Kinney,* 95 Ohio St. 64; *Hammonds* v. *Aetna Casualty & Surety Co.,* 243 F. Supp. 793, 796-797.

The question submitted is clearly within the meaning of the term "public policy" as it is used in G. L. c. 53, § 19, and it 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 at the general election.

STATEMENT

Shall the Representative from this District be instructed to vote to approve the passage of a measure which would provide for a continued increase in the rate of property taxes in order to meet the increase in the cost of government?

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

33. SEPTEMBER 20, 1966.

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

DEAR MR. WHITE:—You have requested my determination in accordance with the provisions of § 19 of c. 53 of the General Laws whether a certain "Application for Submission to Voters of Questions of Public Policy," duly filed in your office, in fact presents that type of policy question which may properly be placed upon the ballot at the general election.

Since the term "public policy," as used in G. L. c. 53, § 19, is not limited or qualified in any way, it would appear that the Legislature intended that the term not be given a restricted meaning. See 8 Op. Atty. Gen. 490, 493. "Public policy" has been said to mean generally the community common sense and common conscience applied to matters of public morals, public health, public safety, public welfare, and the like. See *Pittsburgh, C., C. & St. L. Ry. Co.,* v. *Kinney,* 95 Ohio St. 64; *Hammonds* v. *Aetna Casualty & Surety Co.,* 243 F. Supp. 793, 796-797. It is my opinion that the question contained in the application, seeking the voters' ap-

proval or rejection of a measure designed to increase the rate of the state income tax as a means of assisting the cities and towns in obtaining sufficient revenue so that the property tax may be maintained at a constant rate, is properly one of public policy within the meaning of G. L. c. 53, § 19. An important question concerning the fiscal policies of the Commonwealth has been raised. The question may lawfully be submitted to the voters of the District at the State Election on November 8th.

In accordance with the provisions of G. L. c. 53, § 19, I am including the following statement of the measure for use at the general election.

STATEMENT

Shall the Representative from this District be instructed to vote to approve the passage of a measure providing for an increase in the rate of taxation on income as a means of assisting the cities and towns without unnecessarily increasing the present rate of property tax?

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

34. SEPTEMBER 27, 1966.

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

DEAR MR. WHITE:—By two letters dated September 1, 1966, and two letters dated September 9, 1966, you have indicated that there have been filed in your office four applications for submission to the voters of questions of public policy. Pursuant to the provisions of § 19 of c. 53 of the General Laws, you have requested my opinion whether the four questions are such that they qualify for inclusion upon the ballot at the general election as questions of "public policy."

The questions are as follows:

(1) 257 registered voters of the Seventeenth Worcester Representative District have asked for the opinion of the voters upon "a constitutional provision to reduce the size of the Legislature from 240 members to 160 members."

(2) 346 registered voters of the Twenty-first Worcester Representative District have submitted a similar question, worded upon their application as follows: "Do you favor reducing the members of the House of Representatives from 240 to 160?"

(3) 251 registered voters of the Seventeenth Suffolk Representative District submitted the following: "Do you prefer a limited three per cent sales tax rather than a graduated income tax as a means of raising additional state revenue needed to provide property tax relief for cities and towns?"

(4) 253 registered voters of the Seventeenth Suffolk Representative District proposed the following question for consideration at the general election: "Do you prefer a financial responsibility merit system of automobile insurance rather than the present compulsory system?"

General Laws c. 53, § 19 provides in part:

"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. . . ."

I do not believe that the General Court intended this section to be given a restrictive interpretation. See my two opinions to you, each dated September 20, 1966, wherein this subject matter is more fully explored.

I rule that each of the questions referred to above is properly one of public policy within the meaning of c. 53, § 19, and may lawfully appear on the ballot at the general election. In accordance with the provisions of that statute, I am including the following statements of the submitted measures for use upon the November ballot.

STATEMENTS

(1) Shall the Representative from this District be instructed to vote to approve the passage of a constitutional amendment reducing the size of the Massachusetts House of Representatives from 240 members to 160 members?

(2) Shall the Representative from this District be instructed to vote to approve the passage of a constitutional amendment reducing the size of the Massachusetts House of Representatives from 240 members to 160 members?

(3) Shall the Representative from this District be instructed to vote to approve the retention of a limited three per cent sales tax rather than the adoption of a graduated income tax as a means of raising additional revenue to provide property tax relief for cities and towns?

(4) Shall the Representative from this District be instructed to vote to approve the passage of a measure creating a financial responsibility merit system of automobile insurance as a substitute for the present compulsory automobile insurance system?

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

35. SEPTEMBER 27, 1966.

DR. DAVID W. WALLWORK, *Secretary, Board of Registration in Medicine.*

DEAR DOCTOR WALLWORK:—You have requested my opinion as to whether Executive Order No. 67, issued on February 21, 1944 by then Governor Leverett Saltonstall, still effectively modifies G. L. c. 112, § 9A,

For the purposes of this opinion, I assume that Executive Order No. 67 was valid when issued and did not involve an unconstitutional delegation of legislative power. Inasmuch as I am of the opinion that the Order in question is, in any event, not currently effective, I need not consider the possible constitutional questions.

Executive Order No. 67 was promulgated specifically to expedite the availability of qualified assistants in medicine for military service during World War II, by reducing the minimum age for registration from twenty-one years of age (as required by G. L. c. 112, § 9A) to twenty years of age. In relevant part that order provides as follows:

"NOW, THEREFORE, I, LEVERETT SALTONSTALL, Governor of the Commonwealth of Massachusetts, acting under the provisions of Acts of 1941, chapter 719, as amended by Acts of 1943, chapter 3, Acts of 1942, chapter 13, sections 2 and 3, and all other authority vested in me, do hereby issue this order as a measure necessary and expedient for meeting the supreme emergency of the existing state of war between the United States and certain foreign countries.

"The Board of Registration in Medicine is hereby authorized to register as an assistant in medicine an applicant for such registration who fulfills all the requirements of General Laws (Ter. Ed.) chapter 112, section 9A, other than the requirement as to age; but such applicant shall furnish the Board with satisfactory proof that he is twenty years of age or over. All provisions of law applicable to a person registered under General Laws (Ter. Ed.) chapter 112, section 9A, as an assistant in medicine shall be applicable to a person registered as such an assistant under the authority of this order.

"The provisions of General Laws (Ter. Ed.) chapter 112, section 9A, shall be inoperative *during the effective period of this order* only to the extent that such provisions are inconsistent with this order." (Emphasis supplied.)

The Governor's authority to issue Executive Order No. 67, which in effect amended a statute, was dependent on the legislative grant of powers contained in the statutes cited in the Order. I am of the opinion that the effective period of the Order was therefore coterminous with the effective period of the statutory authority upon which it was based. This conclusion is supported both in logic and in a number of reported cases.

The statutes were passed as emergency measures to meet the demands of the wartime situation, and Executive Order No. 67 was promulgated on the basis of these statutes and in furtherance of the statutory purpose. It is reasonable to conclude that with the end of the war the emergency statutes and the executive orders based thereon ceased to be operative. Justice Holmes, in *Chastleton Corp.* v. *Sinclair,* 264 U.S. 543, 547, said: "A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed."

Further, the Federal courts have uniformly held that suspension orders issued by the Office of Price Administration during World War II expire when the statutory authority to make such orders expires. *Bowles* v. *Loveman,* 147 F. 2d 654; *DiMelia* v. *Bowles,* 148 F. 2d 725; *Illario* v. *Bowles,* 57 F. Supp. 404.

The statutes upon which Executive Order No. 67 was based are clearly no longer effective. Chapter 719 of the Acts of 1941, as amended by c. 3 of the Acts of 1943, was to "be in effect during the continuance of the existing state of war between the United States and any foreign country. . . ." Chapter 13 of the Acts of 1942, in § 12 thereof, contains the identical language. Thus, while no termination date was or could have been specified in the statutes, the Legislature clearly expressed its intention that the end of World War II would signal the end of the effective period of the statutes. A similar intention was expressed by Governor Saltonstall in the last paragraph of Executive Order No. 67.

Accordingly, I answer your question in the negative.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

36. SEPTEMBER 29, 1966.

HONORABLE EDWARD J. RIBBS, *Commissioner of Public Works.*

DEAR COMMISSIONER RIBBS:—You have recently requested my opinion upon the following matter. You state that your Department took by eminent domain a parcel of land on March 13, 1956 and on November 9, 1956 took three additional parcels from the same landowner; that the owner refused to settle these cases for the offers made by the Department and that he did not file a petition for assessment of damages within the period allowed by law; that he is now attempting to have special legislation passed to permit him to file a petition for assessment of damages; that — pending the results of his efforts to obtain passage of a special bill — he has requested a pro tanto payment of damages and that he has refused to sign a final settlement agreement for a damage award concerning the four takings. You further state that the Commission is prepared to vote a payment of damages and such interest as might be due. Your questions, reworded for the purposes of this opinion, are as follows:

1. May the Board comply with the landowner's request for a pro tanto payment under § 8A of c. 79 of the General Laws?

2. Will the award be a final payment under the provisions of c. 79, § 41 of the General Laws although the owner does not sign the settlement agreement?

3. What is the period of time for which interest is payable on this award?

Section 8A of c. 79 of the General Laws which authorizes, and — in certain circumstances — commands, the taking authority to settle cases and make payments pro tanto was added to c. 79 by c. 626 of the Acts of 1959. Section 6 of that chapter states:

"This act shall apply only to orders of taking adopted *on and after* the effective date of this act." (Emphasis supplied.)

Since the taking of the land occurred in 1956, the Department has no power to make any payment pro tanto or enter any settlement agreement under c. 79, § 8A.

Before the addition of § 8A to c. 79 in 1959, however, taking authorities were empowered to make settlements and payments pro tanto by § 39 of c. 79 as amended by c. 242 of the Acts of 1955. *Willar* v. *Commonwealth,* 297 Mass. 527. This power was subsequently removed from § 39 by the 1959 amendments, but only for "orders of taking adopted on and after the effective date" of the act. St. 1959, c. 626, § 6. Section 39 was further amended in 1964 and 1965. These later amendments are also inapplicable to a 1956 order of taking. See St. 1964, c. 548, §§ 3 and 5; St. 1965, c. 653, § 2.

Thus the question whether a settlement or payment pro tanto should now be made for a 1956 taking must be decided in accordance with § 39 as it read before the amendments of 1959, 1964 and 1965.

". . . [the] body politic . . . may after the right to . . . damages has become vested offer in writing to pay to the person entitled to receive the same the amount which it is willing to pay in settlement thereof, with interest thereon, together with taxable costs if a petition for the assessment of damages is pending. If an award of damages has previously been made, the offer shall not be of a less amount than such award. Acceptance thereof may be either in full satisfaction of all damages so sustained, or as a payment pro tanto without prejudice to any right to have the remainder thereof assessed by the appropriate tribunal. After notice of such offer, made as aforesaid, or payment of the amount thereof, no interest shall be recovered, except upon such amount of damages as shall, upon final adjudication, be in excess of the amount of said offer. . . ."

Section 39 authorizes the Department to "offer in writing" an appropriate damage award. It is then the responsibility of the person entitled to damages to determine whether to accept the offer as full settlement or as a payment pro tanto. However, with respect to the payment of interest, the section states, ". . . after (written) notice of such offer . . . or payment . . . no interest shall be recovered, except upon such amount of damages as shall, upon final adjudication, be in excess of the amount of said offer. . . ."

The landowner has the right to accept the offer as a final settlement or as a payment pro tanto. Your Department must act in accordance with that decision.

Interest upon the award should be calculated in accordance with c. 79, § 37, as amended by c. 2 of the Acts of 1920. The later additions and amendments to this section are either irrelevant to the instant facts (see Acts of 1956, c. 641 and Acts of 1960, c. 298, § 1), or do not apply to a 1956 taking (see Acts of 1963, c. 793, §§ 1 and 3; Acts of 1964, c. 548, §§ 2 and 5). *Shelist* v. *Boston Redevelopment Authority,* 1966 Mass. Adv. Sh. 565. Thus, § 37, in relevant part, states:

"Damages under this chapter shall bear interest at the rate of four per cent per annum from the date as of which they are assessed until paid . . . but *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." (Emphasis supplied.)

It has long been the rule in Massachusetts that the title of a landowner converts to a claim for damages at the time of the taking of the property.

Since damages are to be assessed at the date of the taking, compensation is due at that date. Thus the interest should accumulate on the award from the taking date as well. *Imbeschied* v. *Old Colony Railroad Company,* 171 Mass. 209.

Section 37, which directs that an award shall not bear interest after it is payable unless there is a failure to pay on demand, should be read together with § 39 above which states that no interest shall be recovered after notice of an offer by the Department "except upon such amount of damages as shall, upon final adjudication, be in excess of the amount of said offer." Thus the award, in my opinion, would be payable upon receipt of notice of the offer of the Department. Interest should be calculated at the rate of 4% only for the period from the date of the taking to the date of payment or receipt of notice of the offer of the Department. If the Department has in the past made a written offer to this landowner, the amount proposed with interest to date of the offer should now be paid and no further action need be taken by the Department. If the Department has never made a written offer of a damage award, it would be proper and advisable to do so at this time in order to prevent a further accumulation of interest.

Section 41 of c. 79 states:

"If no petition under section fourteen is filed within the time limited, the award of damages shall be final and the amount thereof shall be paid upon demand, and if not so paid may be recovered in an action of contract."

Whether the landowner signs the agreement in full settlement or chooses to treat the offer as a payment pro tanto will make no difference as regards the liability of the Commonwealth for this taking. Since the landowner never filed a petition in court within the period allowed by § 16 of c. 79, he is now barred from doing so. *Herman* v. *New Bedford,* 250 Mass. 471. Thus there can be no "final adjudication" to determine an amount in excess of the offer by the Department. Either the amount proposed in any earlier written offer, or the amount now to be offered, plus interest in either case, would, in my opinion, be a final award under § 41 and the only relief to which the landowner is entitled. [Any special act extending the time of petitioning for assessment of damages in favor of this landowner would raise significant constitutional questions. See *Paddock* v. *Town of Brookline,* 347 Mass. 230.]

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

37. OCTOBER 3, 1966.

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

DEAR MRS. SULLIVAN:—On behalf of the Board of Registration of Barbers, you have requested my opinion with respect to the necessary prerequisites for registration as a barber. Specifically, you have asked:

"Does this Section (§ 87H of c. 112) include barbers from a foreign

country? In other words, does the word 'states' in this section cover those barbers from outside these United States?"

Section 87H of c. 112 provides in relevant part as follows:

"Any person desiring to obtain a certificate of registration shall make application . . . therefor . . . and . . . if he shows that he has . . . practiced such occupation for at least two years in this and/or other states . . . , the board shall issue to him a certificate of registration. . . ."

It is accepted practice in the interpretation of statutory language to give words their normal meaning whenever possible. Applying this to the instant situation, in the absence of circumstances indicating a contrary legislative intent, the word "states" must be construed according to its normal meaning and in the context of its usage in this sentence.

Examination of the phrase in question leads to only one conclusion. The sentence contains the phrase, "in this and/or other states." Although no noun immediately follows the adjective "this," it is obvious that such adjective refers to a state and means the Commonwealth of Massachusetts. It follows, therefore, that "other states" must be construed as referring to the same category of political subdivision as would logically apply to the Commonwealth of Massachusetts — *i.e.*, "states" with the United States.

Had the General Court intended to include practice in foreign countries within the prerequisites enumerated in § 87H, it presumably would have provided so specifically. Rather, it has used a word ("state") of more restricted connotation. It is my opinion, in view of the above, that the reference in § 87H of c. 112 to barbering experience acquired in "other states" does not include experience gained in foreign countries. Consequently, I answer your question in the negative.

Very truly yours,

Edward W. Brooke, *Attorney General.*

38. October 3, 1966.

Honorable Leo L. Laughlin, *Commissioner of Public Safety.*

Dear Commissioner Laughlin:—By letter dated September 19, 1966, you have requested my opinion with respect to the qualifications of agents employed by licensed private detectives. Specifically, you have asked:

". . . whether persons engaged as agents by Private Detectives, licensed under Chapter 147 of the General Laws, must have reached a certain age before they can be employed as such."

General Laws c. 147, §§ 22 to 30, as amended by St. 1960, c. 802, now provides — in § 28 — for the hiring of assistants by a licensed detective:

"A licensee may employ to assist him in his business as many persons as he may deem necessary but shall not knowingly employ in connection with his business in any capacity any person who has been convicted of a felony or any former licensee whose license has been revoked.

"No person shall be employed by any licensee until he shall have executed and furnished to such licensee a statement under oath setting forth his full name, date of birth and residence; his parents' names and places of birth; the business or occupation in which he has been engaged for the three years immediately preceding the date of filing his statement; and that he has not been convicted of a felony or of any offence involving moral turpitude. . . ."

Although § 24 of c. 147 requires, among other things, that an applicant for a private detective's license be at least twenty-five years of age, a similar requirement does not appear to be applicable to an assistant to a private detective. Admittedly, an assistant must — pursuant to § 28 — execute a statement which includes a reference to his date of birth. But I cannot by interpretation transform this directive into a minimum age requirement. Had the Legislature intended to impose an age restriction upon assistants, it presumably would have included some specific indication to that effect.

It is my opinion, therefore, that, while the nature of private detective work might warrant the use of mature individuals, the present statute sets no age requirement for an agent in such employment. The establishment of a minimum age requirement, if desirable, would require the passage of appropriate legislation.

Very truly yours,

Edward W. Brooke, *Attorney General.*

39. October 3, 1966.

Mrs. Helen C. Sullivan, *Director of Registration, Department of Civil Service and Registration.*

Dear Mrs. Sullivan:—On behalf of the Board of State Examiners of Plumbers you have requested my opinion upon the following question:

"Does Chapter 142, General Laws, allow a person who is licensed only as a Journeyman to engage in the business of plumbing by himself?"
Your letter indicates that the State Examiners are aware of the opinion issued by this Department on February 23, 1966 which advised that either a master or a journeyman plumber could lawfully obtain a permit to perform plumbing work.

The opinion of February 23, 1966 was addressed to the question whether it would be lawful for the State Examiners to adopt a regulation providing that permits to perform plumbing shall be issued to master plumbers only. It was then concluded:

"It is clear that the General Court contemplated the existence of two classes of plumbers — master plumbers and journeymen — and authorized the performing of plumbing operations by each. This legislative treatment cannot lawfully be altered by administrative action. Should the Board of State Examiners of Plumbers restrict the issuance of plumbing permits to master plumbers only, the Board would in effect be attempting to amend provisions of the statute which governs its operations. It is my

opinion that such a regulation would conflict with provisions of G. L. c. 142, and accordingly may not lawfully be promulgated by the agency."

Both the request submitted by the Board and the response of this Department were directed solely to the question whether plumbing permits could be issued to journeymen. The Board now seeks a determination whether —once having secured the permit — the journeyman may lawfully engage in the business of plumbing by himself rather than solely in the employ of a master.

An argument can be made that journeymen plumbers may lawfully perform plumbing work solely in the employ of a master plumber. Application for a master plumber's license requires the taking of a more difficult examination covering a wider variety of subjects. The master generally must encounter the expense of maintaining a place of business and of hiring employees. Yet, plumbing fees are regulated so that the master cannot demand a higher payment for any given project than can the journeyman plumber. Of course, the holding of a master's license may well attract business which is not available to a journeyman. In any event, it would appear — without deciding — that the Legislature could constitutionally provide that journeymen must work solely in the employ and under the direction of master plumbers.

It is my opinion that the General Court has not made such a choice. It is the right to work which is involved here. More specifically, it is the right to work for oneself without subjecting one's interests to the superior interests of an employer. If the Legislature seeks to limit or to eliminate this right, it must do so in clear and unmistakable terms. Limitations upon the right to work cannot be imposed by vague or by ill-considered statutory or administrative action. See *Milligan* v. *Board of Registration in Pharmacy,* 1965 Mass. Adv. Sh., page 237.

Nothing in c. 142 indicates that the General Court intended journeymen to work solely in the employ of master plumbers. If such is the intention of the Legislature, the statute must be clarified by amendment in such a way that the objective of restricting the right to work is not disguised. Accordingly, I answer your question in the affirmative.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

40. OCTOBER 4, 1966.

HONORABLE LEON STERNFELD, M.D., *Deputy Commissioner of Public Health.*

DEAR DOCTOR STERNFELD:—You have requested my opinion upon the following question:

"If a municipality, having joined (pursuant to procedures established by Section 142C, Chapter 111, General Laws) an air pollution control district formed pursuant to the said section, desires to withdraw therefrom, is additional special legislation necessary for its withdrawal?"

The Massachusetts Supreme Judicial Court in *Brucato* v. *Lawrence,* 338 Mass. 612, 615, held that:

"The Legislature may provide that a city or town, which once accepts a statute (enacted subject to local acceptance), shall have the power to revoke its acceptance. An intention that this power shall exist may be found in an express provision to that effect, as in the provision for absent voting in cities and towns, G. L. c. 54, § 103A (as amended through St. 1948, c. 477, § 2), or in the fact that an annual or periodic option is to be exercised locally as, for example, in the provisions with respect to liquor licenses, G. L. c. 138, §§ 11, 11A, as amended, or in the opportunity for changes in the form of city charters made possible under G. L. c. 43, §§ 1, 2, 7-13, 45-116, as amended. In the absence, however, of some indication in the language, the form, or the subject matter of a particular statute enacted subject to local acceptance, that an acceptance once given may be revoked, the effect of a valid acceptance by a city or town is to make the statute operative in that community until the statute is repealed or amended. Once the condition precedent stipulated by the Legislature to the taking effect of the statute in the community is satisfied, it becomes applicable statute law, subject to change, as in the case of other statutes, only by subsequent action of the Legislature. See *Northern Trust Co.* v. *Snyder,* 113 Wis. 516, 532-533; *Holt Lumber Co.* v. *Oconto,* 145 Wis. 500, 505-507; *McQuillin, Municipal Corporations,* (3d ed.) § 9.15."

Although the present matter does not involve technical "acceptance" of a statute, it does relate to discretionary municipal action which in effect constitutes an acceptance of statutory provisions which the city or town could have rejected.

The statute in question (G. L. c. 111, § 142C) provides for the formation of air pollution control districts and states that:

"Cities or towns wishing to form such a district shall make joint application to the department, requesting the department to approve such district and to effect the control of air pollution therein."

Such districts are also subject to the provisions of G. L. c. 111, § 142B. It appears, therefore, that municipalities have the option of joining air pollution control districts if they desire.

Neither § 142B nor § 142C of c. 111 provides any means by which a town may withdraw from a district once it has agreed to come under the provisions of the statute.

In the establishment of Regional Health Districts by two or more municipalities under G. L. c. 111, § 27B, there is a provision for withdrawal from said district.

"Any constituent municipality may, by vote passed prior to July first in any year, withdraw from the district, such withdrawal becoming effective January first following; provided, that the municipality shall have been a member of the district for at least five years."

Also, in the case of Regional School District Planning Committees and Boards there is a provision in G. L. c. 71, § 14B(f) for the member towns to determine a method by which they may withdraw from said district.

Section 142C of c. 111 provides that "air pollution control districts *similar to that established by section one hundred and forty-two B* may be formed upon approval of the department [of Public Health]. . . . The

powers, duties, and rights of the department in the exercise of air pollution control in such districts . . . shall be as provided in section one hundred and forty-two B." (Emphasis supplied.) Section 142B established a metropolitan air pollution control district to which a number of cities and towns were assigned by the Legislature. In addition, the Department of Public Health was authorized to admit other municipalities, provided the district would at all times be composed of contiguous territory. It is clear that a community which belonged to the district formed pursuant to c. 111, § 142B could not effectively withdraw therefrom without enabling legislation.

Section 142C provides for the creation of districts which are similar to that formed under § 142B. Absent specific language authorizing withdrawal by administrative action, it must be assumed that the same limitations upon withdrawal which apply to § 142B are also applicable to § 142C. Without such limitations, planning — financial and otherwise — could be made exceedingly difficult, even considering that the Department would have the power to reject withdrawal applications. Likewise, the statutory directive that districts shall be composed of contiguous territory could be defeated. I am aware that your Department was — to some extent — responsible for the insertion of § 142C, and that your Department had expected that the General Court would authorize withdrawal by administrative action. Nevertheless, these views cannot control interpretation of the Legislature's language.

In light of the fact that the Massachusetts Supreme Judicial Court has stated that a statute once accepted by a municipality may not subsequently be rejected by the town unless so provided in the statute itself, and since G. L. c. 111, § 142C makes no such provision, it is my opinion that once a municipality joins an air pollution control district, it may not withdraw without subsequent special legislation.

Very truly yours,

Edward W. Brooke, *Attorney General.*

41. October 7, 1966.

Honorable Joseph L. Driscoll, *President, Southeastern Massachusetts Technological Institute.*

Dear President Driscoll:—In your letter of August 26, 1966, you request my opinion on a question relating to the salary due to the President of Southeastern Massachusetts Technological Institute (SMTI) for the period from January 1, 1965 to July 1, 1966. To provide the background for your question, I will first set forth certain statutes of the Commonwealth and actions of the Board of Trustees of SMTI which are relevant to the problem.

Statutes 1963, c. 801, § 77 amended G. L. c. 75B, § 12 (as appearing in St. 1960, c. 543, § 3) by adding at the end of the section the following two sentences: "The president [of SMTI] shall receive a salary of not more than eighteen thousand dollars, the amount to be determined by the trustees. He shall devote his full time during business hours to the duties of his office." The Board of Trustees of SMTI, in accordance with this

provision, established the salary of the President at $18,000.00 by vote taken at a meeting of the Board on December 18, 1963 (the minutes of which you have provided with your request).

By St. 1964, c. 582, § 1, c. 75B of the General Laws was amended by striking out §§ 1-20, and inserting 17 new sections, effective (by St. 1964, c. 582, § 4) July 1, 1964. The authority to establish the salary of the President of SMTI after July 1, 1964 must be determined by reference to certain of the new sections of c. 75B, to which new sections I shall refer later. On July 1, 1964, however, and until action might be taken by the trustees under the new sections of c. 75B, the salary of the President continued at $18,000, since St. 1964, c. 582, § 2 provided: "The . . . salary of each member of the professional staff of . . . [SMTI] in existence on the day prior to the effective date of this act shall remain in effect until changed by the trustees as herein provided. . . ."

General Laws c. 75B, § 10 (as amended by St. 1964, c. 582, § 1) provides, in part: "The trustees shall elect the president and such other officers and members of the professional staff of the institution as they may determine necessary and shall fix their classification, title and salary within the general salary schedule and shall define their duties and tenure of office without limitation of any other provision of law." The words "general salary schedule" are defined elsewhere in § 10 as meaning "the pay plan of the commonwealth as contained in paragraph (1) of section forty-six of chapter thirty."

At a meeting of the Board of Trustees of SMTI on December 16, 1964, the trustees voted "that under the authority of Section 10 of Chapter 75B established by Chapter 582 of the Acts of 1964, the Board of Trustees of . . . [SMTI] hereby establishes the salary of the President of . . . [SMTI] at $21,372.00, effective January 1, 1965."

You state that "[F]rom January 1965 through June of 1966 the Comptroller's office refused to pay the President at a rate higher than $18,000 per year. The refusal was based on the fact that although the President's salary was not set by statute beyond June of 1964, nonetheless the position continued to be listed on the 'Schedule of Unclassified and Statutory Salaries' of the Joint Committee on Ways and Means until July 1, 1966. For that entire period SMTI has filed a protest with the Comptroller's office with each payroll submitted."

You have requested my opinion on the following question: "Should the President of Southeastern Massachusetts Technological Institute be compensated at the rate of $21,372.00 per year, effective January 1, 1965, in accordance with the Board of Trustees' action of December 16, 1964 . . . ?"

An answer to the question requires a consideration of the relevant statutes in somewhat greater detail than has been necessary to provide the background for the question.

General Laws c. 75B, § 10 (as amended by St. 1964, c. 582, § 1) reads, in relevant part, as follows:

"As used in this section the following words shall have the following meanings, unless the context otherwise requires:

'Professional staff', all officers of the university and all persons, except those whose duties are clerical, custodial, security, labor, maintenance and the like, employed for teaching, research, administration, extension, enforcement, control laws and regulatory services, technical and specialized academic support staff, and such related activities as shall be determined by the trustees of the institute.

'General salary schedule', the pay plan of the commonwealth as contained in paragraph (1) of section forty-six of chapter thirty.

The trustees shall elect the president and such other officers and members of the professional staff of the institute as they may determine necessary and shall fix their classification, title and salary within the general salary schedule and shall define their duties and tenure of office without limitation of any other provision of law. The trustees shall have complete authority with respect to the election or appointment of the professional staff including terms, conditions and periods of employment, compensation, promotion, classification and reclassification, transfer, demotion and dismissal within funds available by appropriation of the general court or from other sources. 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 commissioner, director of personnel and standardization, and the joint committee on ways and means. A notification of each personnel action taken shall be filed by the president or other officers of the institute designated by him with the director of personnel and standardization and with the comptroller. . . . Annually there shall be filed by the president or other officers of the institute designated by him, with the governor, budget commissioner and joint committee on ways and means, a listing of all positions at the institute, including the name of the incumbent, the classification and title, and rate of pay."

It is clear from the sweeping language of the statute that the powers of the trustees in this matter are very broad. This conclusion is reinforced by examination of § 6 of c. 75B:

"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 the institute; and such appropriation shall be made available 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 the 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 trustees or an officer of the institute designated by the trustees."

This section, together with § 10, was apparently intended to free SMTI from certain budgetary restrictions imposed on most departments and agencies. The language used appears to limit the applicability of G. L. c. 29, §§ 27 and 29. Section 27 provides:

"Notwithstanding any provision of general law, no department, office, commission and institution shall incur an expense, increase a salary, or

employ a new clerk, assistant or other subordinate, unless an appropriation by the general court and an allotment by the governor, sufficient to cover the expense thereof, shall have been made. Appropriations by the general court, and any allotments by the governor, shall be expended only in the amounts prescribed in the subsidiary accounts, if any, established for the several appropriation accounts in schedules established by, and on file with, the joint committee on ways and means. Said committee, as soon as may be after the general appropriation bill or any other appropriation bill has the force of law conformably to the constitution, shall file with the comptroller and with the budget director, a certified copy of the schedules aforesaid which relate thereto."

Section 29 reads, in part, as follows:

"Any subsidiary account set up as prescribed in the schedules referred to in section twenty-seven, on the books of any department, office, commission and institution, receiving an appropriation from the commonwealth, may be increased or decreased by interchange with any other such subsidiary account within the same appropriation account, if a request therefor from such department, office, commission or institution is approved in writing by the budget director and is filed with the comptroller by said director."

My conclusion that G. L. c. 75B, §§ 6 and 10 make G. L. c. 29, §§ 27 and 29 inapplicable to SMTI is based in part upon the legislative background of c. 75B. Statutes 1964, c. 582, amending c. 75B, had an uneventful passage through the General Court, and its legislative history reveals little. See 1964 Senate Bills Nos. 99 and 887. However, the provisions of St. 1964, c. 582, dealing with the budgetary powers of SMTI, are derived from an earlier statute, the legislative history of which is significant.

Statutes 1962, c. 648 amended G. L. c. 75 by inserting numerous wholly new sections in place of old ones. Chapter 75 deals with the University of Massachusetts, and St. 1962, c. 648 grows out of the work of the Special Commission on Budgetary Powers of the University of Massachusetts, created by Res. 1961, c. 92. The report of the commission, printed as 1962 House Doc. No. 3350, discusses at length the problems of control over fiscal matters and personnel. The legislation recommended by the commission, 1962 House Doc. No. 3350, App. A, contains provisions substantially identical with the present G. L. c. 75B, §§ 6 and 10. See proposed G. L. c. 75, §§ 8 and 14 in 1962 House Doc. No. 3350, App. A, § 1. (I note that proposed c. 75, § 14 contained specific limits on the minimum and maximum salary which the trustees might set for the president, limits *not* to be found in the present c. 75B, § 10.) The report of the commission makes clear that the legislation was intended to give the trustees of the University of Massachusetts power to set salaries within the general pay schedule and to transfer funds within any subsidiary accounts that might be established without the approval of any other body. See 1962 House Doc. No. 3350, pp. 20-23, 26-28, 34-37.

In matters now relevant, the powers of the Trustees of the University were not curtailed by amendment in the General Court of 1962 House Doc. No. 3350, App. A. In the Senate an amendment was offered to proposed G. L. c. 75, § 8, to require specifically the establishment of subsidiary accounts and to make G. L. c. 29, § 29 applicable to transfers

among subsidiary accounts. That amendment was decisively rejected. See 1962 Senate Journal, pp. 1346-1347.

Thus, I conclude that, in so far as the provisions of the General Laws are concerned, the power of the Trustees of SMTI to set the salary of the president is not restricted by G. L. c. 29, §§ 27 and 29 dealing with subsidiary accounts.

Two further problems remain. The general appropriation act for the fiscal year beginning July 1, 1964 is St. 1964, c. 337. Section 2 of that act appropriated funds for SMTI. Section 6 provided:

"Amounts included for permanent positions in sums appropriated in section two for personal services are based upon schedules of permanent positions and salary rates as approved by the joint committee on ways and means, and, except as otherwise shown by the files of said committee, a copy of which shall be deposited with the bureau of personnel, no part of sums so appropriated in section two shall be available for payment of salaries of any additional permanent position, or for payments on account of reallocations of permanent positions, or for payments on account of any change of salary range or compensation of any permanent position, notwithstanding any special or general act to the contrary. . . ."

An identical provision is part of the general appropriation bill for the fiscal year beginning July 1, 1965. See St. 1965, c. 824, § 6.

In so far as the action of the Comptroller in refusing to pay the President of SMTI a salary higher than that shown on schedules maintained by the Joint Committee on Ways and Means is based on § 6 of St. 1964, c. 337 and on St. 1965, c. 824, slightly different considerations apply to the period from January 1, 1965 to June 30, 1965 (covered by appropriations made in St. 1964, c. 337), than apply to the period from July 1, 1965 to June 30, 1966 (covered by appropriations made in St. 1965, c. 824).

For the latter period, St. 1965, c. 824, § 6 does not limit the power of the trustees to set the salary of the President of SMTI pursuant to G. L. c. 75B, § 10 (as amended by St. 1964, c. 582, § 1), because St. 1965, c. 824, § 20 provides:

"The provisions of section ten, section fifteen and section sixteen of this act shall not apply to expenditures from appropriations made under this act for the division of state colleges and institutions under the control of the board of trustees of state colleges, the Lowell Technological Institute of Massachusetts, *the Southeastern Massachusetts Technological Institute,* the University of Massachusetts and the regional community colleges under the control of the Massachusetts board of regional community colleges; *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.*" (Emphasis supplied.)

General Laws c. 75B, § 10 (as amended by St. 1964, c. 582, § 1) is a "provision of the General Laws specifically regulating the expenditure of public funds" at SMTI; and St. 1965, c. 824, § 6 does not limit any action

of the trustees validly taken pursuant to G. L. c. 75B, § 10 (as amended by St. 1964, c. 582, § 1).

For the period from January 1, 1965 to June 30, 1965, covered by appropriations made in St. 1964, c. 337, the problem is slightly more involved. St. 1964, c. 337, § 20 reads:

"The provisions of section ten, section fifteen, and section sixteen of this act shall not apply to expenditures from appropriations made under this act for the University of Massachusetts, the division of state colleges and institutions under the control 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."

You will note that St. 1964, c. 337, § 20, unlike St. 1965, c. 824, § 20, does not list SMTI among the institutions to which § 6 of the act does not apply if inconsistent with provisions of the General Laws specifically regulating the expenditure of public funds at that institution. However, New Bedford Institute of Technology and the Bradford Durfee College of Technology are so mentioned. By St. 1960, c. 543, § 9 (as amended by St. 1964, c. 495), it is provided:

"On and after July first, nineteen hundred and sixty-four, the phrases, 'New Bedford Textile Institute', 'New Bedford Institute of Textiles and Technology', 'New Bedford Institute of Technology', 'Bradford Durfee Institute of Technology of Fall River', 'Bradford Durfee College of Technology', or any words connoting the same, when used in any statute, ordinance, by-law, rule or regulation, shall mean the Southeastern Massachusetts Technological Institute."

Thus, the situation is the same for the fiscal year covered by St. 1964, c. 337, as it is for the fiscal year covered by St. 1965, c. 824; St. 1964, c. 337, § 6 does not limit any action of the trustees validly taken pursuant to G. L. c. 75B, § 10 (as amended by St. 1964, c. 582, § 1).

The final question to be considered is whether the action of the trustees at their meeting of December 16, 1964, setting the salary of the President at $21,372, was validly taken pursuant to G. L. c. 75B, § 10 (as amended by St. 1964, c. 582, § 1). Section 10 authorizes the trustees to fix the "classification, title and salary within the general salary schedule" of the President. The vote of the trustees, as recorded in the minutes you have provided, merely "establishes the salary of the President of . . . [SMTI] at $21,372.00, effective January 1, 1965," without making any reference to a classification within the general salary schedule contained in paragraph (1) of G. L. c. 30, § 46. However, $21,372 per year is equivalent, for a 52-week year, to $411 per week. Only one classification in the general salary schedule has a weekly pay rate of $411. Establishing the salary of the President at $21,372 must be considered also to be a classification of the President in step 7 of job group XXXIII of the general salary schedule.

Assuming that the various filings with, and notifications of, the Governor, Budget Commissioner, Director of Personnel and Standardization, Comptroller, and Joint Committee on Ways and Means required by G. L. c. 75B, § 10 (as amended by St. 1964, c. 582, § 1) have been made, I conclude that effective January 1, 1965 the President of the Southeastern Massachusetts Technological Institute should be compensated at the rate of $21,372 per year, in accordance with the vote of the Board of Trustees on December 16, 1964.

Very truly yours,

Edward W. Brooke, *Attorney General.*

42. October 7, 1966.

Honorable Robert Q. Crane, *Treasurer and Receiver General.*

Dear Mr. Crane:—In a recent request for an opinion you state:

"An employee of this office who is not serving as a confidential secretary as outlined in Section 7 of Chapter 30 being a veteran has completed three (3) continuous years of service in one (1) job title.

"A leave of absence from his position has been allowed by me in order that this employee in question may accept a promotion within this office to another position."

In view of these facts, you ask, in essence, whether, at the termination of his leave of absence, the employee will be entitled to hold the position which he has held for three years. I assume, for purposes of this opinion, that the employee holds a position "in the service of the commonwealth not classified" under G. L. c. 31, that he has not been legally removed from his position, that his position has not been abolished, and that he has not been separated therefrom because of "lack of work or money." I further assume that the leave of absence was lawfully allowed, is for an appropriate period and is regular in every respect.

Based on these assumptions, my answer to your question is in the affirmative.

I quote the appropriate language of G. L. c. 30, § 9A.

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

The above language conclusively establishes the rights of veterans to tenure in the positions covered thereunder; they can be removed only pursuant to the provisions of G. L. c. 31, §§ 43 and 45. Attorney General's Report (1954) pp. 61-62. And it is equally clear that a duly granted

leave of absence unless extended beyond the period allowed by law (see *Ferrante* v. *Higgiston,* 296 Mass. 208, 209) is not a separation from employment. *Ferrante* v. *Higgiston, supra. State ex rel. Cutright* v. *Akron Civil Service Comm.,* 95 O.A. 385, 389. See cases collected at 24A Words and Phrases 298-299. Whatever rights the employee in question had accrued prior to leave have not been forfeited. See *Thiebault* v. *New Bedford,* 342 Mass. 552, 557.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

48. OCTOBER 7, 1966.

HONORABLE EDWARD J. RIBBS, *Commissioner of Public Works.*

DEAR COMMISSIONER RIBBS:—In a recent request for an opinion you state the following:

"Former Associate Commissioner George C. Toumpouras of this Department was suspended from his position under Chapter 30, Section 59 of the General Laws by the then Governor in the P.M. of October 15, 1963 as a consequence of criminal proceedings instituted against him the day prior thereto. Said criminal proceedings were terminated without a finding of guilty.

"Mr. Toumpouras . . . has now requested payment of [his] salary from the date of his suspension until the date of the [qualification] of two Associate Commissioners under the provisions of Chapter 821 of the Acts of 1963."

You ask in essence whether Mr. Toumpouras is entitled to receive his salary from the date of his suspension to the date of qualification of the two Associate Commissioners. I quote part of the last paragraph of G. L. c. 30, § 59:

"If the criminal proceedings against the person suspended are terminated without a finding or verdict of guilty on any of the charges on which he was indicted, his suspension shall be forthwith removed, and he shall receive all compensation or salary due him for the period of his suspension. . . ."

I also quote St. 1963, c. 821, § 4 which provides that "[t]he tenure of the present associate commissioners [the office held by Mr. Toumpouras] shall cease upon the qualification of two associate commissioners appointed under the provisions of section one of this act."

Mr. Toumpouras' tenure as a state employee came to an end with the qualification of the two Associate Commissioners provided for in St. 1963, c. 821. It is my opinion that — pursuant to c. 30, § 59 — he is entitled to receipt of whatever salary would ordinarily have been paid him from the date of his suspension to the date of qualification of the two new Associate Commissioners.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

44. October 10, 1966.

Honorable John J. McCarthy, *Commissioner of Administration, Executive Office for Administration and Finance.*

Dear Commissioner McCarthy:—In a recent request for an opinion you state that the Department of Corporations and Taxation has adopted the following regulation interpreting the Sales Tax Act, St. 1966, c. 14:

"The sale, lease or rental of motor vehicles, tools, machinery and equipment to contractors for use in the construction, reconstruction, alteration, remodeling or repair of real property is subject to the sales and use tax. Such tangible property is not exempt under Subsection 6(f) of Section 1 or under Section 4 of Chapter 14 of the Acts of 1966 as building materials or supplies. The fact that such tangible property is used under a construction contract with an exempt governmental body or with any other exempt organization does not render its sale, lease or rental exempt from the sales or use tax."

You ask in essence whether the interpretation of c. 14 embodied in this regulation is legally tenable. I am of the opinion that it is.

I quote the relevant portions of c. 14, § 1, subsection 6(f) and § 43. Subsection 6(f) of § 1 exempts:

"Sales of building materials and supplies to be used in the construction, reconstruction, alteration, remodeling or repair of (1) any building or structure owned by or held in trust for the benefit of any governmental body or agency described in paragraph (d) of this subsection and used exclusively for public purposes and (2) any building or structure owned by or held in trust for the benefit of any corporation, foundation, organization or institution described in paragraph (e) of this subsection and used exclusively in the conduct of its religious, scientific, charitable or educational purposes."

Section 4 provides:

"Sales of building materials and supplies subject to the excise imposed by section one of this act and the storage, use or other consumption in this commonwealth of building materials and supplies subject to the excise imposed by section two of this act shall be exempt from the excises imposed by said sections to the extent that such building materials and supplies are to be used in construction, reconstruction, alteration, remodeling or repair of any building or structure pursuant to a contract entered into before the effective date of this section or entered into within sixty days after said effective date pursuant to a bid required to be submitted before said date."

In the case of *Grimes* v. *Keenan,* 88 N.H. 230, 232, the Court said that "materials and supplies" "in ordinary meaning, are used as part of, but not to facilitate construction and maintenance." To the same effect are *Peter's Garage, Inc.* v. *Burlington,* 121 N.J.L. 523, 526 and *Traylor Bros. Inc.* v. *Indianapolis Equipment Co., Inc.,* 336 S.W. 2d 590, 593 (Ky.). See also *Mutual Lumber Co.* v. *Sheppard,* 173 S.W. 2d 494, 498 (Tex. Cir. App.); *Troy Public Works Co.* v. *Yonkers,* 207 N.Y. 81, 84; *United States Fidelity & Guaranty Co.* v. *Stubbs,* 70 Ga. App. 284, 293. These

opinions support the proposition that the phrase "building materials and supplies" "in common and approved usage" (G. L. c. 4, § 6, Third) does not generally comprehend "motor vehicles, tools, machinery and equipment . . . for use in construction."

I advert briefly to two other considerations. First, it is well settled that the interpretation of a statute by an administrative body charged with its administration — in this case the Commissioner of Corporations and Taxation (see c. 14, § 1, subsection 31) — is entitled to considerable weight. *Tyler* v. *Treasurer and Receiver General,* 226 Mass. 306, 310. *Scott* v. *Commissioner of Civil Service,* 272 Mass. 237, 241. *Cardullo's Inc.* v. *Alcoholic Beverages Control Commission,* 347 Mass. 337, 343. Secondly, exemptions from the payment of a tax, such as those conferred by c. 14, § 1, subsection 6(f) and § 4, are to be construed strictly in favor of the taxing authority. *Commissioner of Corporations and Taxation* v. *Bristol County Kennel Club,* 301 Mass. 27, 29. These considerations, of course, do not require the conclusion that the regulation in question is valid; however, they do serve to re-enforce it.

It is entirely possible that the General Court intended the exemptions provided in the sections considered above to be construed broadly. If so, the legislative intention is far from clear. It is not the function of the Department of the Attorney General to provide by interpretation for legislative omissions except in the most obvious cases. The primary authority charged with interpretation of the provisions of St. 1966, c. 14 is the State Tax Commission. Given the lack of statutory clarity — even were there substantial disagreement as to the meaning of the words "materials or supplies" as used in the Act — I cannot say that the regulation promulgated by the Commission represents an arbitrary or unreasonable construction. Accordingly, it is my opinion that emergency regulation No. 7 promulgated by the State Tax Commission is a valid interpretation of the provisions of the Sales Tax Act.

Very truly yours,

Edward W. Brooke, *Attorney General.*

45. October 19, 1966.

His Excellency John A. Volpe, *Governor of the Commonwealth.*

Dear Governor Volpe:—By letter dated October 13, 1966, you have requested my opinion with respect to the current effect of c. 728 of the Acts of 1966. That Act, entitled "AN ACT ESTABLISHING A FLAT EXEMPTION OF A CERTAIN SUM OF MONEY DUE FOR TAXES BY CERTAIN ELDERLY PERSONS," amends G. L. c. 59, § 5, cl. 41, first enacted by St. 1963, c. 808, § 1 and then amended by St. 1964, c. 681, § 1.

Prior to this year's amendment, cl. 41 provided for an exemption from taxation for real property as follows:

". . . to the amount of four thousand dollars, of a person seventy years of age or over and occupied by him as his domicile, or of a person who owns the same jointly with his spouse, either of whom is seventy years

of age or over, and occupied by them as their domicile or of a person seventy years of age or over who owns the same jointly or as a tenant in common with a person not his spouse and occupied by him as his domicile. . . . "

The clause contains certain conditions which must be met prior to the valid awarding of the particular exemption. The person applying for the exemption must have been domiciled in the Commonwealth for the preceding ten years. He must have owned the real property which is the subject of the exemption for the preceding five years, or, "if such person has not so owned such real property for the preceding five years consecutively, has so owned and occupied as his domicile such real property and other real property in the same city or town for the preceding five years consecutively."

The statute further requires that the applicant have — in the preceding year — "a net income from all sources both taxable and non-taxable [not including social security payments] of less than four thousand dollars or, if married, a combined net income from all sources both taxable and non-taxable with his spouse of less than five thousand dollars." Eligibility for the exemption is further conditioned upon the requirement that the total assessed value of all real property owned by an applicant or by his spouse, or by them jointly, does not exceed the sum of $14,000.

Chapter 728 of the Acts of 1966 makes certain fundamental changes in the provisions of the clause in question. The amendment provides that a qualifying applicant shall be entitled either to the exemption to the amount of $4,000 previously available, or to the flat sum of $350 of taxes due, whichever figure is greater. In addition, the maximum assessed value of all real property which can be owned by an applicant or by his spouse, or by them jointly, has been increased from $14,000 to $20,000. Finally, the amendment makes a technical change in the residence requirement — i.e., an applicant may now qualify by owning and occupying as his domicile for the preceding five years the real property which is the subject of the exemption and other real property situated anywhere *within the Commonwealth,* rather than solely within the same city or town.

Chapter 728 was approved on September 12, 1966; accordingly, it becomes effective ninety days thereafter, on December 11, 1966. [See Const. of the Comm., Amends., Article 48, The Referendum, Pt. 1.] Under the provisions of G. L. c. 59, § 59, applications for the exemption granted by c. 59, § 5, cl. 41 must be filed on or before December 15, 1966. In light of the above, you request my opinion "as to whether or not Chapter 728 of the Acts of 1966 applies to taxes assessed for the year 1966."

I find nothing within the provisions of St. 1966, c. 728 which indicates that it was the intention of the General Court to suspend its effect until the taxable year 1967. The amendment was enacted in time for approval by the Governor on September 12, 1966. I cannot assume that the Legislature was unaware either that applications for the exemption were due to be filed by the fifteenth day of December, or that the Constitution of the Commonwealth provides that an Act of this nature shall take effect ninety days after approval. The result is that the provisions of c. 59, § 5, cl. 41 have been altered prior to the date upon which applications pursuant to such provisions must be filed. On December 11, 1966, the earlier provisions of the clause in question will no longer exist. I see no reason

for extending the effect of the prior provisions for a period which is longer than that imposed by the Massachusetts Constitution.

Had the General Court intended that the amendment not be effective until 1967, it could have provided so specifically. See, for example, St. 1964, c. 681, an earlier amendment to G. L. c. 59, § 5, cl. 41, which was approved July 31, 1964, and which specifically provided — in § 2 — that its provisions were to apply to taxes assessed for the year 1965 and for subsequent years. See also, St. 1964, c. 715 which amended G. L. c. 59, § 5, cl. 42, approved July 6, 1964 and — by § 2 — made applicable to the taxable year 1965 and thereafter. It cannot be assumed that such a provision was omitted from the amendment under discussion by inadvertence. It can only be concluded that the General Court intended c. 728 to take full effect no more than ninety days after its approval.

I am aware of the fact that property taxes are ordinarily assessed and are payable as of the first day of January of any year. Likewise, I know that tax calculations in the cities and towns have for the most part been completed, and that local assessors could not possibly have envisioned a change in the tax laws at this late date. But the Legislature must also have been aware of these factors. It is apparent that the General Court expected that the Act would apply to taxes assessed for the year 1966 notwithstanding some difficulties which might be caused certain municipalities.

The Constitution of this Commonwealth provides that a statute of this nature take effect ninety days after approval. This requirement would be a nullity were it to be held that although the statute was effective on December 11, 1966, applicants could not take advantage of its provisions until the following year. Nothing in the Act indicates that the Legislature intended to vary the date upon which c. 728 would ordinarily take effect. And the effective date cannot be varied merely by interpretation.

Accordingly, it is my opinion that c. 728 of the Acts of 1966 takes effect ninety days after its approval, and that the provisions of the Act are applicable to taxes assessed for the taxable year 1966. Since the amendment in its present form becomes effective only four days prior to the final date upon which applications for exemptions may be filed, it would appear that the affixing of an emergency preamble to make the Act effective immediately and give local assessors a longer period in which to accept applications would be highly desirable.

Very truly yours,

Edward W. Brooke, *Attorney General.*

46. October 24, 1966.

Honorable John L. Quigley, *Commandant, Soldiers' Home.*

Dear Mr. Quigley:—In a recent request for an opinion you state as follows:

"Section 1861(k) of Public Law 89-97 (Medicare) requires hospitals participating in Medicare programs to establish Utilization Review Committees.

"Serious question has arisen and been presented to the undersigned from doctors who will be charged with this responsibility at our hospital. Question arises on whether the doctors, who normally are consultants with us, will be covered or protected by the normal coverage and protection extended to state employees for decisions or deeds of the Utilization Review Committee of the Medical Staff. . . ."

In essence you ask whether the physicians serving on the Utilization Review Committee are entitled to the coverage and protection of G. L. c. 12, § 3D, which I quote:

"Upon the filing with the attorney general of a written request by any officer or employee of the department of mental health, public health or correction, of the Soldiers' Home in Massachusetts or the Soldiers' Home in Holyoke, that the attorney general defend him against an action for damages for bodily injuries or infections, physical or mental agony or pain, death of any person, or any damage to property of another on the hospital grounds, arising out of the operation of said department of mental health, public health or correction, or of the Soldiers' Home in Massachusetts or the Soldiers' Home in Holyoke, the attorney general shall, if after investigation it appears to him that such officer or employee was at the time the cause of action arose acting within the scope of his official duties or employment, take over the management and defence of such action. The attorney general may adjust or settle any such action at any time before, during or after trial, if he finds after investigation that the plaintiff is entitled to damages from such officer or employee, and in such case there shall be paid from the state treasury for settlement in full of such action from such appropriation as may be made by the general court for the purposes of this section such sum, not exceeding ten thousand dollars on account of injury to or death of one person and not exceeding five thousand dollars on account of damage to property, as the attorney general shall determine to be just and reasonable and as the governor and council shall approve. If an execution issued on a final judgment in such an action is presented to the state treasurer by an officer qualified to serve civil process and if there is also presented to or on file with said state treasurer a certificate of the attorney general certifying that said execution was issued on a judgment in an action in which he appeared for and defended the defendant in accordance with the provisions of this section, there shall be paid from the state treasury from the appropriation above referred to the amount of the execution, including costs and interest, up to but not in excess of the respective limits hereinabove set forth."

As you imply in your request, to participate in the federal Medicare program a hospital is required to have "in effect a hospital review plan." 42 U.S.C. § 1395x(e)(6). See 42 U.S.C. §§ 1395f(d), 1395x(a)(2), 1395x(e)(7), and 1395x(i) and (n). The provisions for a Utilization Review Committee are contained in 42 U.S.C. 1395x(k), which I also quote:

"A utilization review plan of a hospital or extended care facility shall be considered sufficient if it is applicable to services furnished by the institution to individuals entitled to insurance benefits under this subchapter and if it provides—

"(1) for the review, on a sample or other basis, of admissions to the institution, the duration of stays therein, and the professional services (including drugs and biologicals) furnished, (A) with respect to the medical necessity of the services, and (B) for the purpose of promoting the most efficient use of available health facilities and services;

"(2) for such review to be made by either (A) a staff committee of the institution composed of two or more physicians, with or without participation of other professional personnel, or (B) a group outside the institution which is similarly composed and (i) which is established by the local medical society and some or all of the hospitals and extended care facilities in the locality, or (ii) if (and for as long as) there has not been established such a group which serves such institution, which is established in such other manner as may be approved by the Secretary;

"(3) for such review, in each case of inpatient hospital services or extended care services furnished to such an individual during a continuous period of extended duration, as of such days of such period (which may differ for different classes of cases) as may be specified in regulations, with such review to be made as promptly as possible, after each day so specified, and in no event later than one week following such day. . . ."

I infer from your request that the Soldiers' Home is now participating in the Medicare program, that it is legally qualified to do so, and that it has obtained whatever approvals are necessary for such participation. I assume that the physicians in question are officers or employees of the Soldiers' Home while serving on the committee. Based on these inferences and assumptions, and upon the facts stated in your letter, it is my opinion that members of the Utilization Review Committee at the Soldiers' Home, when carrying out the Committee's functions, are acting within the scope of their official duties within the purview of G. L. c. 12, § 3D. They are, therefore, entitled to the protections conferred by that statute.

This opinion is consistent with several judicial decisions that state or local employees, carrying out federally-imposed duties in connection with undertakings involving federal-state cooperation, remain state or local employees for all usual purposes. See *Robertson* v. *Baldwin,* 165 U.S. 275, 280; *Dallemagne* v.*Moisan,* 197 U.S. 169, 174; *County of Hampden* v. *Morris,* 207 Mass. 167, 169; *Goulis* v. *Judge of Third Dist. Ct. of East. Middlesex,* 246 Mass. 1, 5; *United States ex rel, Indiana* v. *Killigrew,* 117 F. 2d 863, 867-868 (CCA 7); *Fries* v. *United States,* 76 F. Supp. 396, 398 (D. Ky.) affd. 170 F. 2d 726, 730 (CA 6); *Robin Construction Co.* v. *United States,* 345 F. 2d 610, 615-616 (CA 3); *Lenski* v. *O'Brien,* 207 Mo. App. 224, 229-230. A contrary rule might well make impossible or impracticable the numerous programs, especially in areas of social welfare, in which the states and the federal government now work together. See generally *Steward Machine Co.* v. *Davis,* 301 U.S. 548, 595-598 (Cardozo, J.); *Howes Bros. Co.* v. *Unemployment Compensation Comm.,* 296 Mass. 275, 294.

Although I answer your question, as I have restated it, in the affirmative, I feel that I should add one qualification to this answer. Section 3D of G. L. c. 12 requires the Attorney General to investigate every claim against a physician covered thereunder to determine whether "at the time the [claim] arose" the physician "was acting within the scope of his official

duties or employment." I construe this language to mean that, if there is any claim against a physician at the Soldiers' Home allegedly arising out of his duties as a member of the Utilization Review Committee, it will be the duty and prerogative of the Attorney General to determine for himself in each instance whether the claim did in fact arise out of such duties before undertaking defense or settlement. This opinion treats the subject matter of your request in general terms; it does not purport to indicate that the Attorney General will at any time be relieved of the necessity of making the threshold decision discussed above.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

47. OCTOBER 24, 1966.

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

DEAR MR. WHITE:—You have asked my opinion with respect to the meaning of a section of the Voting Rights Act of 1965, Public Law 89-110, 79 Stat. 437. Section 4(e)(2) of the Act, 42 U.S.C. § 1973(b)(e)(2) (1964 ed., Supp. I), provides:

"No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English."

You have asked:

"What constitutes an adequate 'demonstration' that the three basic ingredients apply to the prospective voter, namely that he was educated in a Puerto Rican school, that he successfully completed the sixth grade, and that English was not the primary classroom language?

"May such a registrant testify to these facts by an affidavit signed only by himself, or may he be given an oath that these facts apply to him? Or, is it permissible that he be required to supply boards of registrars with some type of quasi official document, such as a diploma, a letter from the school authorities, or a letter from the Government of Puerto Rico in order to be allowed to register without reading the Constitution in English?"

The term "demonstrate" is not defined in the Voting Rights Act of 1965. It is not a term of art which has acquired a special and peculiar legal significance. It is necessary then to consider the meaning of the word in ordinary usage.

Webster's Third New International Dictionary lists several meanings for the verb "demonstrate." The possibly relevant ones are:

"Indicate, point out.

"To manifest clearly, certainly, or unmistakably: show clearly the existence of.

"To make evident or reveal as true by reasoning processes, concrete facts and evidence, experimentation, operation, or repeated examples.

"To illustrate or explain in an orderly and detailed way, esp. with many examples, specimens, and particulars."

The first of these meanings is noted as obsolete, and may be eliminated from consideration. The other meanings of "demonstrate" all require something more than a bare assertion of the truth of that which is to be demonstrated. A registrant who merely asserted that he had successfully completed the sixth primary grade in a Puerto Rican school in which the principal language of instruction was other than English would not, in my opinion, have demonstrated those facts within the meaning of § 4(e)(2).

A statement under oath, however, is more than a mere assertion. It is a solemn avowal of the truth of the statements made. If made falsely, it may under certain circumstances constitute perjury and expose the maker to criminal prosecution. A statement under oath is accepted as evidence of the truth of the assertion in the statement in courts of law. Thus, a sworn statement is far more than a bare assertion and it may be considered a sufficiently clear manifestation of the truth of the statement to constitute a demonstration. I am of the opinion that for the purposes of § 4(e)(2) of the Voting Rights Act of 1965 a person "demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English" if he makes a sworn statement to that effect.

Since the question is not an entirely clear one, I set forth the reasons for my conclusion. First, the legislative history of § 4(e)(2) lends support to this interpretation, although that history is far from conclusive. Second, the interpretation I have adopted furthers the broad remedial purposes of the Voting Rights Act of 1965 and § 4(e)(2) thereof.

Section 4(e)(2) was not contained in the bill reported to the Senate by its Committee on the Judiciary. In the report accompanying the bill, Senator Javits of New York noted that he had offered as an amendment what eventually became § 4(e)(2), on behalf of himself and Senator Kennedy of New York, but "this amendment did not come to a vote because of the time limitation imposed upon the committee by the Senate referral. It will be offered on the floor by both Senators from New York when the measure is considered by the Senate." Senate Report No. 162, 89th Cong., 1st Sess. The amendment was introduced in the Senate by Senator Kennedy of New York for himself and for Senator Javits. III Cong. Rec. 11027 (May 19, 1965). The following day it was debated and adopted. The debate gives no indication of the meaning of "demonstrates." III Cong. Rec. 11060-11074 (May 20, 1965).

In the House of Representatives, § 4(e)(2) was introduced by Representative Ryan of New York as an amendment to the bill reported by the Committee on the Judiciary. III Cong. Rec. 15666 (July 6, 1965). The amendment was debated and accepted by the Committee of the Whole House on the State of the Union, but later the same day rejected by the House itself. At no point in the debate was any light shed on the question which concerns us. III Cong. Rec. 16234-16245, 16282-16283 (July 9, 1965). The conference committee convened by the two houses of Congress on the differing bills adopted by the Senate and the House of Representatives accepted § 4(e)(2) which had been adopted only in the Senate. The committee's report gives no indication of the meaning of "demonstrates." Conference Report No. 711, 89th Cong., 1st Sess. The bill reported by the conference committee was adopted by the House, but once again the debate is of no assistance. III Cong., Rec. 19193-19201 (August 3, 1965). At final adoption of the bill in the Senate, however, a pertinent exchange between Senator Kennedy of New York and Senator Hart of Michigan took place:

"Mr. KENNEDY of New York. I would like to ask the Senator a question concerning the meaning of the word 'demonstrates' in section 4(e) of the bill. The Senator from Michigan was one of the conferees, and would therefore be aware of the intent of the conference committee in agreeing to include section 4(e), which was not contained in the House version of the bill. Would it be correct to say that the demonstration which one must give of one's educational attainment in order to invoke the provisions of section 4(e) is not limited to production of a diploma or certificate, but can also be satisfied by an oath or affirmation of the requisite educational attainment, made at the time and place of registration?

"Mr. HART. The Senator is correct. Section 4(e) contemplates that a potential voter may demonstrate his educational attainment by oath or affirmation made when he comes to register."

III Cong. Rec. 19376 (August 4, 1965).

No other part of the Senate debate on final adoption of the bill is of any assistance. III Cong. Rec. 19374-19378 (August 4, 1965). The exchange between Senators Kennedy and Hart which I have quoted strongly suggests that my interpretation of § 4(e)(2) is the correct one, but I do not regard it as conclusive to that effect. The colloquy came at the last stage of Congressional consideration of the bill — after initial Senate adoption of § 4(e)(2), after adoption of the amendment by the Committee of the whole and rejection by the House itself, after the report of the conference committee, and after House acceptance of the conference bill. The colloquy cannot be regarded as conclusive evidence of what each house of Congress intended when it adopted § 4(e)(2), although it is certainly persuasive.

In a broader sense, however, the legislative history of § 4(e)(2) provides additional support for my view. It is clear that this is remedial legislation, designed to remove what Congress regarded as an unjustifiable clog on exercise of the franchise by citizens educated in Puerto Rico who, "because of our policy of cultural autonomy and self-determination . . . [have been educated under] the present system which allows instruction in the Spanish language." III Cong. Rec. 16238 (remarks of Repre-

sentative Scheuer of New York, July 9, 1965). See also the remarks of Representative O'Neill of Massachusetts. III Cong. Rec. 16241-16245 (July 9, 1965). To effectuate the purposes of § 4(e)(2), it is appropriate to adopt a liberal construction of its provisions, one which clears the path for those citizens of Massachusetts born and educated in Puerto Rico who now seek the right to vote. A construction of § 4(e)(2) which required these citizens to seek a certificate of their educational attainments from a faraway school, the past records of which might well be inaccessible, would in my opinion unduly and unnecessarily obstruct their exercise of the right to register and vote.

Accordingly, I advise you that any person who makes a sworn statement at the time of registration that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English may be allowed to register without being required to read the Constitution of the Commonwealth in the English language.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

48. OCTOBER 31, 1966.

HONORABLE QUINTIN J. CRISTY, *Chairman, Alcoholic Beverages Control Commission.*

DEAR MR. CRISTY:—On October 24, 1966, you requested my opinion with regard to interpretation of the provisions of c. 511 of the Acts of 1966. Chapter 511 amended § 11 of c. 138 of the General Laws (the Liquor Control Act) by striking out the former § 11, and inserting in place thereof a new section.

Section 11 provides for certain local options with respect to the sale — within a given municipality — of alcoholic beverages. Prior to this year's amendment, § 11 directed that the following three questions were to appear on the ballot at each biennial State election:

"A. Shall licenses be granted in this city (or town) for the sale therein of all alcoholic beverages (whisky, rum, gin, malt beverages, wines and all other alcoholic beverages)?

"B. Shall licenses be granted in this city (or town) for the sale therein of wines and malt beverages (wines and beer, ale and all other malt beverages)?

"C. Shall licenses be granted in this city (or town) for the sale therein of all alcoholic beverages in packages, so-called, not to be drunk on the premises?"

The section concluded with detailed instructions with respect to the legal result of affirmative and negative votes cast upon the various questions.

The amendment contained in St. 1966, c. 511 directs that a fourth question appear upon the ballot:

"D. Shall licenses be granted in this city (or town) for the sale of all alcoholic beverages by hotels having a dining room capacity of not less than ninety-nine persons and lodging capacity of not less than fifty rooms?"

The statutory instructions with respect to the result of certain affirmative and negative votes and combinations of votes are accordingly amended to include votes cast with respect to question D.

Your Commission is apparently concerned with the effect of affirmative votes upon question D, in light of the instructions included in the latter part of the new section. You state:

". . . if they (the registered voters) vote to renew their 'Package Goods' Store licenses (C.), and also try to take advantage of subdivided question D., the result would be that there would be no licenses. . . . It is very important that in a town . . . that has 'Package Goods' Store licenses and will probably vote to renew them, if they also vote favorably on question D., they lose everything?"

Your letter does not pose a specific legal question to be resolved. However, since time is short and since your Commission must be prepared to advise the municipalities with respect to the effect of different votes, I am providing the following general explanation.

It is my opinion that no substantial legal question is posed by the enactment of c. 511 of the Acts of 1966. The instructions contained in the latter part of c. 138, § 11 are not intended to cover every conceivable combination of votes. They are provided simply as guidelines. I am aware that a strict, legalistic construction of the statute might result in the cancellation of one vote by another. Such a result cannot be imputed to the Legislature, and an interpretation which enables such a result should be avoided.

The obvious intent of St. 1966, c. 511 is to provide an additional option for certain so-called "dry" communities. It is entirely possible that registered voters who have in the past rejected the option to authorize sales of alcoholic beverages to be drunk on or off the premises might nevertheless choose to authorize the sale of such beverages by hotels which meet the size requirements specified in the statute. The additional option was clearly not intended to have any negative effect upon those cities or towns which desire to grant some or all of the authorization contained in the first three questions. Had the General Court intended that responses to question D have the possible effect of cancelling one or more affirmative votes taken on earlier questions, it presumably would have provided so with far greater clarity.

An affirmative vote on question A makes question B unnecessary, since the general authorization for the sale of all alcoholic beverages to be drunk on the premises would automatically include the hotels specified in the latter query. In other words, an affirmative vote on question A would cancel a negative vote on question D. The result of any other combination of votes is obvious from the nature of the questions. A town could conceivably vote "yes" on questions B and D, thus authorizing only the sale of malt beverages in taverns and barrooms, but enabling the sale of all alcoholic beverages in the specified hotels. Nor would affirmative votes

on questions C and D have a cancelling effect, as your letter seems to suggest. Such a vote — assuming negative votes on questions A and B — would authorize the sale of all alcoholic beverages in package stores for consumption off of the premises, and also authorize the sale of all alcoholic beverages by certain hotels for consumption therein.

I am unable to identify any hidden meanings within this statute, the sole purpose of which is obviously simply to provide the municipalities with an additional option. It is my opinion that the only cancelling effect which can be derived from any combination of votes would be that which results from an affirmative vote cast upon question A, in which case negative votes cast upon questions B, C or D would be nullified.

Very truly yours,

Edward W. Brooke, *Attorney General.*

49. November 4, 1956.

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

Dear Commissioner Rizzotto:—You have requested an opinion regarding the authority of the Commissioner of Corporations and Taxation to designate certain banks doing business within the Commonwealth as his fiscal agents for the purpose of selling cigarette stamps and collecting revenues under c. 435 of the Acts of 1966.

You state that:

"Chapter 435 of the Acts of 1966 established a cigarette stamp law whereby payment of the cigarette excise, commencing January 1, 1967, shall be evidenced by the use of adhesive stamps or meter impressions affixed to the cigarette packages. The stamps are to be sold by the Commissioner of Corporations and Taxation, who will also set meters for those licensees using such system."

You further state:

"Section 30 of chapter 64C of the General Laws, as inserted by said Chapter 435, authorizes the Commissioner to make 'provisions for the sale of stamps and the setting of metering machines at such places and at such times as he may deem expedient.' It is his desire to designate a number of banks throughout the Commonwealth to sell cigarette stamps and set the metering machines without cost to the Commonwealth. They would remit the revenues collected on a monthly basis. This method of sale would, in his considered opinion, provide the maximum security for the sale of a highly negotiable item with no additional cost to the Commonwealth. It would, moreover, provide accessible locations throughout the State for cigarette licensees to purchase stamps or set meters. If the Commonwealth were to provide equivalent security and service, the additional cost would be considerable."

You then request my opinion upon the following questions:

"1. Is the Commissioner of Corporations and Taxation authorized to

designate banks doing business within the Commonwealth as his fiscal agents to sell cigarette stamps and set meters under Chapter 435 of the Acts of 1966 without cost to the Commonwealth?

"2. If he is so authorized, may he provide that said banks would remit to the Commissioner of Corporations and Taxation the cigarette revenues collected on a monthly basis?"

Section 29 of c. 64C of the General Laws, as inserted by St. 1966, c. 435, provides that the excise tax shall be paid " . . . to the commissioner by purchasing such stamps in accordance with such regulations as the commission may prescribe." Section 30 of said c. 64C, inserted by said c. 435, provides that "The Commissioner shall make provisions for the sale of such stamps and the setting of metering machines at such places and at such times as he may deem expedient."

It is my opinion that the broad powers for collection of this tax which have been conferred upon the Commissioner of Corporations and Taxation include by implication authority to designate banks doing business within the Commonwealth as fiscal agents to sell cigarette stamps. Likewise, I believe that the Commissioner may determine the manner in which the cigarette revenues should be remitted by the banks to the Commissioner of Corporations and Taxation. Had the Legislature intended a specific method for collection and payment of the tax, a provision to that effect would undoubtedly have been inserted in the statute. As was stated in the case of *Lynch* v. *Commissioner of Education,* 317 Mass. 73, at page 79:

"The authority to deal with the subject matter was left in the hands of those best qualified to do so by reason of intimate knowledge of the details of administration. . . . 'Statutes framed in general terms commonly look to the future and may include conditions as they arise from time to time not even known at the time of enactment, provided they are fairly within the sweep and the meaning of the words and fall within their obvious scope and purpose.' (Cases cited.) And it is well established that when a general power is given all authority necessarily incidental to carry out the power is given by implication."

The case of *Scannell* v. *State Ballot Law Commission,* 324 Mass. 494, states at page 501:

" . . . An express grant carries with it by implication all incidental authority required for the full and efficient exercise of the power conferred. The Legislature need not enumerate nor specify, definitely and precisely, each and every ancillary act that may be involved in the discharge of an official duty. It is enough for the Legislature to impose the duty to be performed within a prescribed field for a designated end, leaving to the board's discretion the selection of the appropriate methods and means and the other administrative details to be employed in accomplishing the statutory purpose."

Accordingly, for the reasons stated above, I answer each of your questions in the affirmative.

Very truly yours,

Edward W. Brooke, *Attorney General.*

50. November 7, 1966.

Honorable Edward J. Ribbs, *Commissioner of Public Works.*

Dear Commissioner Ribbs:—You have requested my opinion with respect to two questions involving interpretation of the provisions of c. 689 of the Acts of 1966.

Your first question states:

"Assuming the Department wishes to implement the Act as soon as possible, in the absence of funds specifically provided to do so, what action can the Department take?"

The Act is obviously permissive rather than mandatory legislation. However, assuming that you do wish to implement its provisions, you are authorized "to construct garage facilities in the City of Springfield for the Springfield Street Railway System in exchange for certain land and garage facilities of said company to be taken by eminent domain. . . ."

A taking by eminent domain entails an obligation to pay, and it is presumed that you have funds available under the Accelerated Highway Program with which to make such payment. Since this is an exchange specifically authorized by the Legislature, it appears that you are authorized to expend for garage facilities an amount equal to what you would otherwise be obliged to pay for the land to be taken.

It is my opinion, however, that this Act does not enable you to expend, for the specified purpose, a greater amount than you would be obligated to pay for the taking. If the statutory objective is to be carried out, the Springfield Street Railway Company should be required to release any claim for damages due from the taking in exchange for your agreement, under stipulated conditions, to construct or pay for the construction by them of facilities at a cost not to exceed fair compensation for the eminent domain taking.

Your second question states:

"Are the obligations of the Department under the Act too vague for implementation?"

Please note that there are no obligations of the Department under the Act, since it is a permissive or authorizing Act and does not, therefore, compel action by your Department. However, if you do elect to exercise the authority of the Act, the limitations upon that authority are as set forth in the answer to question one.

Very truly yours,

Edward W. Brooke, *Attorney General.*

51. December 20, 1966.

Honorable Harry C. Solomon, M.D., *Commissioner of Mental Health.*

Dear Commissioner Solomon:—You have requested my opinion regarding the authority of the Commissioner of Mental Health to accept a grant of real estate for a proposed Mental Health Center.

Specifically, you have asked:

". . . whether under the provisions of Section 6, Chapter 123 of the General Laws, the Commissioner of Mental Health, in the name of the Commonwealth, is authorized to accept a parcel of land from the Springfield Hospital for the purpose of constructing a Mental Health Center."

General Laws c. 123, § 6 provides as follows:

"The department [of Mental Health] shall be a corporation for the purpose of taking, holding and administering in trust for the commonwealth any grant, devise, gift or bequest made either to the commonwealth or to it, for the use of persons under its control in any state hospital. . . ."

Under the plain language of the above-quoted section, it is manifest that the Department of Mental Health is authorized to accept any grant made to it for the use of persons under its control in a state hospital. Accordingly, since a mental health center is a "state hospital" (See Attorney General's Report, March 1, 1966), the Department of Mental Health, acting by and through the Commissioner of Mental Health, may accept a grant of land for the use of the persons in such a center.

It is my opinion, therefore, that the Commissioner of Mental Health, in the name of the Commonwealth, is empowered by c. 123, § 6 to accept a grant of land from the Springfield Hospital, to be used for the Mental Health Center authorized by c. 626 of the Acts of 1963.

Very truly yours,

Edward W. Brooke, *Attorney General.*

52. December 20, 1966.

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

Dear Commissioner Kiernan:—In a recent request for an opinion, you ask (*inter alia*):

"Does the School Committee of Lincoln have the legal responsibility to educate the children who live on the federal base at the Hanscom Field and if so should the cost of this operation be included in the regular school budget?"

According to facts contained in your letter, the Town of Lincoln for the past several years has operated a school on a military reservation known as L. G. Hanscom Field. You state:

"Factually, the Real property upon which the Hanscom children reside and upon which the base school is located was ceded by the State to the Federal Government in 1958. The on-base school was constructed the following year entirely with Federal funds, and is attended only by children of military personnel residing on the installation. At the request of military authorities, the Town of Lincoln, with the sanction of a regular Town Meeting, agreed to operate the base school for military authorities on a year-to-year basis with all expenses to be borne by the Federal Government.

"The Town of Lincoln has operated the on-base school as a separate educational facility for the past several years maintaining separate books, accounting and property records which are regularly audited by Federal officials."

The Federal Government, on the basis of an opinion which I rendered to you on July 8, 1965, has suggested that the Town of Lincoln is under an obligation to provide educational facilities for the children who live at Hanscom. In my opinion to you of July 8, 1965, I ruled that the City of Chicopee was entitled to State reimbursement under G. L. c. 70, § 4 for minors who lived on Westover Air Force Base and for whose education the City was assuming responsibility. I did not rule that any municipality is obligated to provide educational facilities for children who reside on federal reservations. Nothing in our statutes supports such a proposition. See G. L. c. 71, §§ 1 and 68. And, indeed, the Supreme Judicial Court has taken the opposite view. *Opinion of the Justices,* 1 Met. 580, 583. *Newcomb* v. *Rockport,* 183 Mass. 74, 77-79. These opinions, until and unless overruled, remain the law of the Commonwealth.

I answer the first part of your question in the negative and, accordingly, do not answer the second part.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

53. DECEMBER 21, 1966.

HONORABLE JOHN L. QUIGLEY, *Commandant, Soldiers' Home.*

DEAR COMMANDANT QUIGLEY:—You have requested my opinion in regard to the eligibility of Vietnam veterans for admission to the Chelsea Soldiers' Home.

General Laws c. 4, § 7, cl. forty-third, as amended by St. 1965, c. 875, now includes Vietnam veterans within its scope:

" 'Wartime service' shall mean service performed by a 'Spanish War veteran', a 'World War I veteran', a 'World War II veteran', a 'Korean veteran', a 'Vietnam veteran', or a member of the 'WAAC', as defined in this clause during any of the periods of time described herein or for which such medals described below are awarded.

" *'Vietnam veteran' shall mean any veteran who has been awarded the armed forces expeditionary medal or the Vietnam service medal for military service performed in Vietnam between July first, nineteen hundred and fifty-eight and the termination of the Vietnam emergency as declared by proper federal authority."* (Emphasis supplied.)

A reading of the plain and unambiguous language of the above-quoted statutory provisions makes manifest the legislative intention in this context. Clearly, that intention was to broaden the scope of the term "veteran" as previously defined therein so as to include individuals rendering military service in the Vietnam conflict.

By virtue of the enactment of c. 875 of the Acts of 1965, those individuals who serve in the military in Vietnam and who fall within the scope

of the definition of "Vietnam veteran" in G. L. c. 4, § 7, cl. forty-third, as amended by St. 1965, c. 875, are now eligible for all the rights and privileges heretofore accorded to the veterans of other wars. Accordingly, since Vietnam veterans now clearly fall within the qualifying language of G. L. c. 115A, § 1(a), which sets out the prerequisites for admission to a soldiers' home, it is my opinion that Vietnam veterans are eligible to apply for admission to and treatment at the Soldiers' Home at Chelsea.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

54. DECEMBER 23, 1966.

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

DEAR MR. FINNEGAN:—In a recent request for an opinion, you state that on August 16, 1965 you wrote to the "public library in each city and in such towns which have accepted the pertinent provisions of the civil service law." In this letter, a copy of which is attached to your request, you informed each library:

"Section 47A of Chapter 31 of the General Laws sets forth the procedure where any office or position is placed within the classified civil service by the provisions of a statute. In order that the procedure outlined in the civil service law may be followed, I am sending to you herewith blank forms (Form 73) to be filled out IN DUPLICATE, signed by the appointing authority and listing the names of all persons, other than professional librarians, sub-professional librarians or pages, as described above, who were employed on August 15, 1965, the effective date of said Chapter 471. The name of any person who holds a certificate issued by the Board of Library Commissioners but who is performing duties, such as clerical duties, which are NOT those of a librarian or a sub-professional librarian must also be included on the list. If no such persons were employed on August 15, 1965, will you please so inform me in writing.

"I am also enclosing position-classification questionnaires (Form 59), two copies of which are to be filled out by each employee affected by said Chapter 471, signed by him, by his supervisor and by the appointing authority. The original copy should be returned by you to this office with the list of employees (Form 73). The carbon copy may be retained by the department head."

According to your letter, "certain library authorities either have not replied or replied in an unsatisfactory manner." Several others have replied through law firms. The libraries to which you refer are in Pittsfield, Westfield, Springfield and Northampton. In light of these developments, you ask:

"Question 1) In the case of those municipalities which have not filed a list of employees or have not sent me a satisfactory reply, what action may be taken by me to force compliance with the provisions of section 2 of Chapter 471 of the Acts of 1965 and section 47A of Chapter 31 of the General Laws?"

The answer to this question depends upon whether the libraries in Pittsfield, Westfield, Springfield and Northampton are agencies of these municipalities. None of them is. Each of the libraries is endowed and operated by a charitable trust or non-profit corporation. I am aware that each of them receives considerable financial aid from the municipality in which it is located. But these grants do not convert them into public agencies or departments. See *Opinion of the Justices,* 337 Mass. 800, 806-807. There is no provision in the laws of this Commonwealth that confers upon the Director of Civil Service any authority with respect to non-public employees. Absent a clear grant of such authority (which conceivably could raise grave constitutional issues), private libraries are not subject to civil service control, direction or classification. Thus, there is no basis upon which you may demand information from these libraries. *Cf. School Comm. of New Bedford* v. *Commissioner of Education,* 349 Mass. 410, 414-415.

The above answer makes it unnecessary to consider other questions presented in your letter.

Very truly yours,

Edward W. Brooke, *Attorney General.*

55. December 23, 1966.

Honorable Edward J. Ribbs, *Commissioner of Public Works.*

Dear Commissioner Ribbs:—You have requested my opinion on the following three questions:

1. Does the Department of Public Works, through the Division of Waterways, have jurisdiction over the transportation of rubbish and debris by barge to the outer harbor of Boston for burning and disposal?

2. If the Department has jurisdiction, may the Department formulate and implement rules and regulations governing such disposal operations?

3. What are the duties and obligations of the Department under §§ 10, 52, 53, 54 and 55 of Chapter 91 of the General Laws?

(1) Chapter 91, § 10 of the General Laws states in part:

"The department shall have general care and supervision of the harbors and tide waters within the commonwealth . . . in order to prevent and remove unauthorized encroachments and causes of every kind which may . . . interfere with the navigation of such harbors, injure their channels or cause a reduction of their tide waters. . . ."

Section 52 of that chapter states in part:

"The department shall supervise the transportation and dumping of . . . any . . . material which may be placed in scows or boats to be transported and dumped in tide water. . . ."

Chapter 91, § 3 considers separately certain powers of the Department in regard to Boston Harbor alone:

"The department shall have all the rights, powers and duties transferred to the directors of the port of Boston under section four of chapter seven hundred and forty-eight of the acts of nineteen hundred and eleven in respect to lands, rights in lands, flats, shores, waters and rights belonging to the commonwealth in tide waters and land under water in Boston harbor. . . . It may . . . excavate and dredge in Boston harbor wherever public convenience and necessity require. . . ."

The powers transferred from the Board of Harbor and Land Commissioners to the Directors of the Port of Boston by the 1911 provision are set out in c. 96, § 12 of the Revised Laws of 1902; that section was derived from c. 488 of the Acts of 1897. *Bent* v. *Emery,* 173 Mass. 495.

Revised Laws 1902, c. 96, § 12 authorized the Board to "make contracts for the filling, improvement and use of the lands and flats" and to "excavate and dredge" in Boston Harbor. In addition, the Board was to have "the management of all the wharves, docks and foreshore owned by the commonwealth in said harbor. . . ."

The present § 3 of c. 91 is then no more than a clarification and further spelling out of the powers and duties originally set forth in R. L. 1902, c. 96, § 12 in regard to excavation and dredging in the harbor and management of certain piers, public works, shores and waterfront properties.

Thus, although Boston Harbor is the subject of a separate and specific statutory enactment, § 3 of c. 91 should be restricted to its terms and no modification or restriction on the general power and authority granted to the Department in regard to harbors and tide water generally in § 10 should be implied.

Thus, in answer to your first question, the Department of Public Works through the Division of Waterways does have jurisdiction over the rubbish burning and disposal operations in Boston Harbor through its power to prevent any activity which violates the mandate of § 10 by interfering with navigation, injuring the channels or causing a reduction of tide water. The Department is further commanded by § 52 to supervise the transportation and dumping of any material in Boston Harbor. The jurisdiction of the Department is not exclusive however; rather, it is concurrent with the Massachusetts Department of Public Health. See G. L. c. 111, § 142B. See also, the Rules and Regulations of the Metropolitan Air Pollution Control District; the Massachusetts Department of Public Safety (c. 381, Acts of 1935); the Office of the State Fire Marshal (G. L. c. 148, §§ 3, 4); the Fire Department of the City of Boston (c. 355, Acts of 1943); and the Harbor Master of the City of Boston (c. 147, Acts of 1889, c. 234, Acts of 1947, c. 329, Acts of 1961).

(2) The Department has not expressly been granted general authority to formulate and implement rules and regulations governing the disposal operations. Section 10 of c. 91 which confers the general powers of care and supervision of the harbors and tide waters contains no express grant of authority to formulate regulations.

By expressly granting to the Department in § 7 the power to make rules and regulations governing the equipment of piers and other structures, the Legislature has indicated the power to make regulations shall be restricted solely to the specific subject matter of § 7 and that such power has not been impliedly granted in any other section of that chapter. *General Electric Company* v. *Commonwealth,* 329 Mass. 661.

This does not mean, however, that the Department is without authority to enforce the legislative purpose of c. 91. If the Department decides that the disposal and burning of waste materials interferes with the navigation of the harbor or injures the channels, it may seek to prevent such activity by way of § 57 which grants jurisdiction of violations of c. 91 to the Supreme Judicial Court.

The Department may also utilize the licensing power of c. 91 to carry out its duty of care and supervision of the harbors and tidewaters.

The power to license and issue permits has been expressly granted to the Department. Section 52, which commands the Department to supervise the transportation and dumping of "any material," states in part:

". . . The cost of such supervision and also of the *supervision under licenses and permits authorizing such transportation* or dumping . . . shall be repaid to the commonwealth monthly by the owners. . . ." (Emphasis supplied.)

Section 55 provides for penalties for violations of "any provision of the three preceding sections (referring to §§ 52, 53 and 54) or *of any license or permit* granted under said sections. . . ." (Emphasis supplied.)

Thus, in answer to your second question, it is clear that while the Department has no broad general authority to make rules and regulations governing the disposal and burning of waste materials in Boston Harbor, it does have the power to prevent violations of § 10 and it also has the power to control the transportation and dumping of the waste materials by the license power. It must be noted, however, that in the absence of specific statutory limitations, the terms of any license or permit issued by the Department must be reasonable. *Commissioner of Public Works* v. *Cities Service Oil Co.*, 308 Mass. 349.

(3) Your third question seeks a general explanation of the duties and obligations of the Department under certain sections of c. 91. It is traditional that opinions of the Attorney General are rendered solely upon factual situations which actually confront a given State department or agency, and not upon hypothetical questions or general requests for information. If your Department is faced with a specific problem involving the cited sections, I shall be happy to respond to a formal request containing the particular questions.

Very truly yours,

Edward W. Brooke, *Attorney General.*

56. December 29, 1966.

Mr. Daniel M. O'Sullivan, *Acting Director, Legislative Research Bureau.*

Dear Mr. O'Sullivan:—In a recent request for an opinion, you call my attention to the following 1966 Order of the House of Representatives:

"Ordered, That the legislative research council make a study and investigation relative to the feasibility of requiring the legislative research bu-

reau to: (1) analyze all pending legislation on House and Senate daily calendars which has reached the third reading stage with a view to preparing a brief summary thereof and (2) to compile a related summary of the acts and resolves passed by each session of the General Court, similar to such publications of other states; and that said council file its report hereunder with the clerk of the house of representatives not later than the third Wednesday of February in the year nineteen hundred and sixty-seven."

In view of this Order you ask two questions:

"(1) Would or could the daily summary of bills be construed as evidence of legislative intent, notwithstanding the summary's appearance in separate form apart from the journal or daily calendar?

"(2) Would a narrative summary explaining the principal points of each law enacted in the session be indicative of legislative intent?"

I shall consider these questions individually.

The "daily summary" to which you refer would presumably be an explanation from the Council, an official body of this Commonwealth, of all proposed legislation ready for its third reading. See Rule 30 of the Rules of the Senate; Rule 51 of the Rules of the House of Representatives. The summary, I assume, would be available to every representative in the General Court. As such, the Council's explanations may be evidence of the meaning of an ambiguous (see *Milton* v. *Metropolitan Dist. Comm.*, 342 Mass. 222, 223) statute. See *Plunkett* v. *Old Colony Trust Co.*, 233 Mass. 471, 474; *New Bedford* v. *New Bedford, Woods Hole, Martha's Vineyard & Nantucket S.S. Authy.*, 330 Mass. 422, 429; Horack, Sutherland, *Statutory Construction* (3rd ed.), §§ 5007, 5008, 5010. I, of course, cannot comment on how much probative value this evidence would have, since this would depend on the circumstances surrounding the need, if any, for extrinsic aid to interpretation. Nevertheless, I answer your first question in the affirmative.

However, the proposed "narrative summary" of legislation would not, in my opinion, be evidence of legislative intent, since it would be prepared and distributed subsequent to the enactment of the laws which it purported to explain. The rule is well settled that legislative statements of statutory purpose made after the enactment of the statute in question are inadmissible to show legislative intent. *State Wholesale Grocers* v. *Great Atlantic & Pacific Tea Co.*, 154 F. Supp. 471, 484-485 (N. D. Ill.). See Horack, Sutherland, *Statutory Construction* (3rd ed.), § 5013 and cases collected in n. 2. Applying the general purpose of that rule to the facts set forth in your second question, I answer that question in the negative.

Very truly yours,

Edward W. Brooke, *Attorney General.*

57. December 29, 1966.

The Honorable Owen B. Kiernan, *Commissioner of Education.*

Dear Commissioner Kiernan:—You have requested my opinion on the following question:

". . . whether in computing Chapter 70 Aid for distribution in 1967, the 'equalized valuation' for 1966 which will be submitted to the General Court on or before December 31, 1966 by the State Tax Commission (Chapter 58, Section 10C of the General Laws) or the 'equalized valuation' of 1965 contained in House No. 3998 should be used?"

By St. 1966, c. 14, § 40, the General Laws were amended by striking out Chapter 70 and inserting a new Chapter 70. All references to G. L. c. 70 herein will be to the chapter as so amended.

G. L. c. 70, § 4, provides, in part:

The school aid to be paid to each city and town in any calendar year shall be the amount obtained by multiplying its reimbursable expenditures for the last preceding fiscal year by its school aid percentage for the calendar year during which such fiscal year begins;

[subject to provisions not now relevant].

The school aid to be paid in 1967 to each city or town is thus to be determined by multiplying its reimbursable expenditures for the fiscal year July 1, 1965-June 30, 1966 (which is the last preceding fiscal year to 1967) by its school aid percentage for the calendar year 1965 (which is the calendar year during which the last preceding fiscal year to 1967 began).

School aid percentage is defined by G. L. c. 70, § 2(d), as follows:

"School aid percentage," for each city or town, the amount by which one hundred per cent exceeds the product, to the nearest tenth of one per cent, of sixty-five per cent times the valuation percentage;

Valuation percentage is defined by G. L. c. 70, § 2(f), as follows:

"Valuation percentage," the proportion, to the nearest tenth of one per cent, which the equalized valuation per school attending child of the city or town bears to the average equalized valuation per school attending child for the entire state.

Equalized valuation is defined by G. L. c. 70, § 2(a), as follows:

"Equalized valuation", the equalized valuation of the aggregate property in a city or town subject to local taxation, as most recently reported by the state tax commission to the general court under the provisions of section ten C of chapter fifty-eight.

The school aid percentage for the calendar year 1965 thus depends upon the valuation percentage for the calendar year 1965, which in turn depends upon the equalized valuation for the calendar year 1965. Difficulties arise, however, in determining the equalized valuation for the calendar year 1965. G. L. c. 70, § 2(a) refers to equalized valuation "as most recently reported by the state tax commission to the general court *under the provisions of section ten C of chapter fifty-eight.*" (Emphasis supplied.) In 1965, there was no G. L. c. 58, § 10C, that section having been inserted by St. 1966, c. 14, § 43 (effective as of January 1, 1966, by virtue of St. 1966, c. 14, § 79).

However, the definition of equalized valuation in G. L. c. 70, § 2(a) is subject to the phrase with which G. L. c. 70, § 2 begins:

"When used in this chapter the following words shall, *unless the context requires otherwise,* have the following meanings. . . ." (Emphasis supplied.) In this case I believe that the context requires that equalized valuation have a meaning other than that given in G. L. c. 70, § 2(a). Chapter 70 is quite clear in specifying that school aid for 1967 is to be calculated using reimbursable expenses for the fiscal year 1965-1966 and the school aid percentage for the calendar year 1965. I am unable to see how a school aid percentage can be said to be for the calendar year 1965 if one of the factors which determines the school aid percentage, equalized valuation, is determined as of a calendar year other than 1965. In the context, I take equalized valuation to be the equalized valuations prepared under G. L. c. 58, § 9, as amended through St. 1953, c. 654, § 7 (*before* amendment by St. 1966, c. 14, § 43). For the calendar year 1965, the equalized valuation "as most recently reported by the state tax commission to the general court" is that reported under G. L. c. 58, § 9, as amended through St. 1953, c. 654, § 7, and found in 1965 House Doc. No. 3998.

The construction I adopt avoids the anomaly of requiring you to certify to the Comptroller and the State Tax Commission school aid figures for 1967 based on equalized valuations as certified by the State Tax Commission to the General Court for 1966, when both you and the State Tax Commission are required to make your certification by the same date, December 31, 1966 (see G. L. c. 70, § 5 and G. L. c. 58, § 10C, as inserted by St. 1966, c. 14, § 43).

I note in passing that I have considered the effect of St. 1966, c. 14, § 73, and concluded that it is not relevant to the problem you present. Section 73 provides:

Notwithstanding the provisions of chapter seventy of the General Laws, as amended by section forty of this act, the equalized valuation to be used in determining school aid for the calendar year nineteen hundred and sixty-six shall be the equalized valuations as reported by the state tax commission to the general court under the provisions of section nine of chapter fifty-eight of the General Laws during the year nineteen hundred and sixty-five.

It has been argued that this section indicates a legislative intention that the equalized valuations reported in 1965 under G. L. c. 58, § 9 (as it stood before amendment by St. 1966, c. 14, § 43) were to be used only in computing school aid for 1966, and that equalized valuations for 1966 were to be used in computing school aid for 1967. As I interpret chapter 70, however, the equalized valuations to be used in computing 1966 aid, aside from St. 1966, c. 14, § 73, would have been the equalized valuations for 1964, the calendar year in which the last preceding fiscal year to 1966 began. St. 1966, c. 14, § 73 has the effect of requiring the use of 1965, rather than 1964, figures.

Very truly yours,

Edward W. Brooke, *Attorney General.*

58. December 29, 1966.

Honorable Richard E. McLaughlin, *Registrar of Motor Vehicles.*

Dear Sir:—In a request for an opinion, which you clarified by a subsequent letter, you ask, in essence, whether the Registrar may refuse to register a motor vehicle (see G. L. c. 90, §§ 1, *et seq.*), where the applicant's excise taxes (see G. L. c. 60A, §§ 1, *et seq.*), according to the sworn information provided in or with the application, have not been paid.

In your request you call my attention to G. L. c. 60A, § 2A, which I quote:

"If an excise assessed under this chapter remains unpaid for fourteen days after a demand therefor made not less than thirty days after such excise becomes due and payable, the local tax collector or the commissioner, as the case may be, may at any time and from time to time, in the calendar year to which such excise relates or in the next calendar year, transmit to the registrar of motor vehicles, hereinafter in this section called the registrar, upon a form approved by the state tax commission, a notice of such non-payment, specifying the name and address of the person to whom the excise is assessed, the amount of the excise due and such information as to the motor vehicle or trailer assessed as was transmitted by the registrar to the commissioner under section two; provided, however, that no notice shall be transmitted to the registrar under this section at a time when there is pending before the local board of assessors or the state tax commission, as the case may be, a duly filed application for the abatement of such excise in whole or in part nor within thirty days after action upon any such excise in whole or in part nor within thirty days after action upon any such application by the local board of assessors or the state tax commission, as the case may be. If at the time any such notice is received it appears from the records of the registrar that one or more motor vehicles or trailers are then registered in the name of the person to whom the excise is assessed, the registrar shall forthwith give him written notice by mail directed to his last known address that the certificates of registration of all such motor vehicles and trailers will be suspended at the expiration of thirty days from the date of mailing such notice unless within said thirty days there is filed with the registrar, together with a filing fee of one dollar, evidence satisfactory to him that the excise, and all interest thereon and costs relative thereto, have been paid or legally abated. Unless such evidence is so filed with the registrar, he shall forthwith suspend the certificates of registration of all such motor vehicles and trailers, and shall not terminate any such suspension nor renew nor issue any certificate of registration for the person to whom such excise is assessed until such evidence shall have been filed with him and such filing fee paid. The fact that a motor vehicle or trailer is being operated during any such suspension of its certificate of registration shall not be held to constitute such motor vehicle or trailer a trespasser upon the highways."

Nothing in this statute empowers the Registrar to refuse to issue or renew motor vehicle registration except as a condition subsequent to a suspension made under this section. To be valid, a suspension under § 2A requires (*inter alia*) notice to the Registrar from local tax assessors or from the State Tax Commission that a person's motor vehicle excise

has not been paid as well as thirty days' prior notice from the Registrar to the delinquent taxpayer.

"Requirements of notice . . . before an administrative board are to be strictly followed." *Co-Ray Realty Co., Inc.* v. *Board of Zoning Adjustment of Boston,* 328 Mass. 103, 107 and cases cited. *Landers* v. *Eastern Racing Assn.,* 327 Mass. 32, 41. *Chartrand* v. *Registrar of Motor Vehicles,* 347 Mass. 470, 472, 474-476. *Cf.* Powell, *Administrative Exercise of the Police Power,* 24 Harv. L. Rev. 333, 334-335.

I have no reason to doubt that the rule pertaining to notice stated in the *Co-Ray* case, *supra,* and the other cases that I have cited is applicable to disciplinary actions taken by the Registrar under G. L. c. 60A, § 2A. If the Registrar could refuse to issue or renew a registration merely upon receiving information from the applicant that his excise has not been paid, he could, in effect, vitiate not only the provision that such refusal follow a valid suspension but also, and far more important, the requirement that such suspension be made upon notice of thirty days. I know of no law other than G. L. c. 60A, § 2A that even conceivably confers upon the Registrar power to refuse registration for non-payment of the excise required by c. 60A, § 2. Since I am of opinion that the notice may not be dispensed with and that, therefore, the Registrar may not refuse to issue or renew a motor vehicle registration when an applicant indicates that his excise has not been paid, it is not necessary to consider whether the Registrar is empowered to demand information, in any form other than that specified in § 2A, concerning non-payment of the motor vehicle excise. See *School Comm. of New Bedford* v. *Commissioner of Education,* 1965 Mass. Adv. Sh. 1029, 1033.

Very truly yours,

Edward W. Brooke, *Attorney General.*

59. December 29, 1966.

Honorable Edward J. Ribbs, *Commissioner of Public Works.*

Dear Commissioner Ribbs:—You have asked my opinion on a question which has arisen in negotiations between the Department and the Massachusetts Bay Transportation Authority. You have stated:

"The Department and the Massachusetts Bay Transportation Authority intend that a portion of the land to be acquired by the Department in the cities of Boston and Somerville for construction of the so-called Inner Belt, shall be used by the Authority for the location of a rapid transit system within the Department's proposed highway layout for Interstate Route 695 (Inner Belt).

"Toward that end, the Department and the Authority are negotiating a contract to conserve public funds by coordinating their actions in acquiring interests in land in Boston and Somerville for their respective public purposes and to devote said land to its proposed highway layout for Interstate Route 695 (Inner Belt) and also to devote a portion of said land within said layout to the construction, maintenance and operation of a mass transit rail system.

"Negotiations have become stalemated concerning whether the Department must utilize the provisions of Chapter 16 of the General Laws, as amended by Section 5(b) of Chapter 821 of the Acts of 1963, which established the Board of Commissioners of the Department of Public Works as a Contract Appeal Board for disputes that may arise under the terms of a proposed contract, or, as declared by the Authority, utilize the provisions of Chapter 251 of the General Laws (Uniform Arbitration Act for Commercial Disputes)."

You have asked my opinion on the following question:

"In order to adjust disputes arising under a contract to which the Department of Public Works is a party, can the Department delegate arbitration of such disputes to a board of arbitrators under the provisions of Chapter 251 of the General Laws, or must the Department utilize the procedures established by Section 5(b) of Chapter 821 of the Acts of 1963?"

I take your reference to St. 1963, c. 821, § 5(b) as a reference to G. L. c. 16, § 5(b), as amended by St. 1963, c. 821, § 1. St. 1963, c. 821 does not contain a section denominated "5(b)." It is G. L. c. 16, § 5(b), as amended by St. 1963, c. 821, § 1, which established the Board of Commissioners as a Board of Contract Appeals. I note that G. L. c. 16, § 5(b) has been further amended by St. 1964, c. 645. Hereinafter, I will refer simply to G. L. c. 16, § 5(b), meaning thereby § 5(b) as amended through St. 1964, c. 645.

In my opinion, the Department may delegate to a board of arbitrators under the provisions of G. L. c. 251 the duty of arbitrating disputes which may arise under the proposed contract to which you refer. The provisions of G. L. c. 16, § 5(b) need not be utilized.

General Laws, c. 16, § 5(b) provides that the Board of Commissioners:

". . . shall act as a board of contract appeals, and shall approve or disapprove all claims made under any contract with the department. To assist the commission in performing this function, the commissioner with the approval of the governor shall appoint a person of legal training and experience, who shall be a member of the bar of the commonwealth, to the position of hearing examiner, and may remove him for cause in like manner. The hearing examiner shall receive a salary of fourteen thousand dollars and shall devote his entire time during business hours to the duties of his position.

"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 the production of books and records and take testimony under oath. Such reports shall be maintained as public records in a place and form fully accessible to the public. Any person aggrieved by a decision of the commission acting as a board of contract appeals may bring suit against the commonwealth for recovery of damages based on such claim under the provisions of chapter two hundred and fifty-eight."

It is apparent that this section does not provide a means for final resolution of disputes which may arise under contracts to which the Department is a party. Rather, it establishes a method by which the Department may determine what its own position is on the merits of a claim against it. The claimant, as the final sentence of the section shows, may seek relief in the courts if he is unwilling to accept the Department's determination. I note also that a claimant need not press his claim under the procedure of this section. His right of action is fully matured, and the statute of limitations begins to run against him, when the alleged breach of the Department's contract with him occurs. See *Campanella & Cardi Construction Company* v. *Commonwealth,* 1966 Mass. Adv. Sh. 1051.

Arbitration, in contrast to the procedure under G. L. c. 16, § 5(b), is a means of final settlement of disputes. See G. L. c. 251, as inserted by St. 1960, c. 374, § 1. I advise you that if the Department wishes to agree to arbitrate disputes which may arise between it and the Massachusetts Bay Transportation Authority, under the proposed contract to which you refer, the appropriate procedure is the one provided by G. L. c. 251, not that of G. L. c. 16, § 5(b).

Very truly yours,

Edward W. Brooke, *Attorney General.*

60. December 29, 1966.

Honorable Edward J. Ribbs, *Commissioner of Public Works.*

Dear Commissioner Ribbs:—This will acknowledge yours of October 20, 1966, requesting an opinion relative to the availability of funds for dredging and harbor improvements in the Town of Marshfield.

The question asked is whether the Department of Public Works may utilize funds provided under c. 711, § II, Item 8157-66 of the 1956 *Act to Provide for a Special Capital Outlay Program for the Commonwealth.* The Act in question authorizes expenditure by the Department of Public Works of money "for the improvement, development, maintenance and protection of rivers, harbors, tidewaters, and shores. . . ." The specific item number authorizing funds for this purpose has been carried forward by subsequent acts, the most recent being the Acts of 1966, c. 391, § 2A, which re-appropriated the Item number effective to June 30, 1967, so that the unused funds are still available to the Department of Public Works for those purposes outlined in the Act. An inquiry to the Comptroller has indicated that there is still $73,128.88 in unallocated funds and $53,016.15 in unencumbered funds giving a total of $126,145.03 still available to the Department of Public Works under the original Item number. There does not seem to be a question about this as the Department of Public Works has drawn on these funds as late as 1965.

The utilization of the funds for the specific purpose outlined is authorized in the Act and there seems to be no question that the State can use the money in conjunction with Federal or municipal funds, since such use is specifically authorized by the Act itself.

It is my opinion that under the condition stated in your letter, the Department of Public Works can draw on these funds because the Item number authorizing the funds has been continued until June 30, 1967.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

61. DECEMBER 29, 1966.

(See Opinion No. 57, *supra.* Due to a clerical error, copies of this opinion had been distributed under two different numbers, 57 and 61, before printing this report.)

62. DECEMBER 30, 1966.

HONORABLE ELLIOT L. RICHARDSON, *Lieutenant Governor of the Commonwealth.*

DEAR LIEUTENANT GOVERNOR RICHARDSON:—In a recent request for an opinion you state:

"Section 222 of the Social Security Act of the United States, as amended in 1965, provides for the payment from the Federal Disability Trust Fund and the Federal OASI Trust Fund for the authorized costs of vocational rehabilitation services provided to disabled worker beneficiaries entitled to benefits under Section 223 of the Act, and to disabled children entitled to benefits under Section 202(d) who are under a disability having attained age 18.

"These costs and the benefit payments themselves are totally chargeable to the federal trust funds. The amendment authorizes transfers of such sums as may be necessary up to a maximum of one per cent of the social security disability benefits certified for payment in the previous year for the purpose of paying for such services provided by agencies operating under a State plan pursuant to the Vocational Rehabilitation Act.

"Section 222(d) (2) (C) of the Social Security Act provides:

" ' . . . that such services will be furnished to any individual without regard to (i) his citizenship or place of residence, (ii) his need for financial assistance except as provided in regulations of the Secretary in the case of maintenance during rehabilitation, or (iii) any order of selection which would otherwise be followed under the State plan pursuant to section 5(a) (4) of the Vocational Rehabilitation Act.' "

You also call my attention to G. L. c. 6, § 78, which I quote:

"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 and whose vocational rehabilitation the commission, after full investigation, determines can be satisfactorily fulfilled, or (2) who is eligible therefor under the terms of an agreement with any department, division, or subdivision of the commonwealth, with another state, or with the federal government; provided, however, that those vocational rehabili-

tation services enumerated in items 2 to 8, inclusive, in section seventy-seven shall be provided at public cost only to those handicapped persons who are found by the commission to require financial assistance with respect thereto. If vocational rehabilitation services cannot be provided to all eligible handicapped persons who apply therefor, the commission shall provide by regulation the order to be followed in selecting those to whom such services will be provided."

In view of these facts and this statutory provision, you ask (*inter alia*):

"First, is the State plan an 'agreement . . . with the federal government' so that where the entire program conducted by the commission is under the state plan there would not be a requirement of residency pursuant to clause (2) of chapter 6, section 78.

"If the answer to that question is negative, can section 80, which appears to envision that the plan achieve the maximum financial benefit to the Commonwealth from funds provided under Federal laws, be construed either together or notwithstanding section 78 to permit a plan to be submitted under section 80 which would not require the imposition of a residence requirement with respect to individuals referred to in Section 222 of the Social Security Act inasmuch as a greater financial benefit can be said thereby to inure to the Commonwealth?"

I shall consider these questions in the order posed.

Answering your first question, I see nothing in G. L. c. 6, §§ 74 *et seq.*, which permits the vocational rehabilitation plan contemplated by this statute or by regulations adopted thereunder to be denominated an "agreement" between the Commonwealth and the federal government. Sections 78 and 80 (to which I shall refer in detail later) obviously contemplate the making of such agreements but are not themselves these agreements. *Cf. Springfield* v. *Commonwealth*, 349 Mass. 267, 268-270, interpreting G. L. c. 117, §§ 18-19 and c. 122, §§ 17, 19 (the latter now repealed). Accordingly, I answer your first question in the negative without considering whether, if the State plan were an agreement, the residence and financial requirements of § 78 would thereby be waived.

Answering your second question, I quote G. L. c. 6, § 80:

"In carrying out the provisions of sections seventy-four to eighty-four, inclusive, the commission shall co-operate with the Secretary of the Department of Health, Education and Welfare, and shall develop a state plan including such methods of administration as are found by the said Secretary and the Commission to be necessary for the proper and efficient operation of said sections, to assure that full financial benefits of all federal laws may be available to the commonwealth and the citizens thereof.

"The commission is authorized to enter into an agreement on behalf of the commonwealth with the Secretary of Health, Education and Welfare to carry out the provisions of the federal social security act relating to the making of determinations of disability under Title II of said act, and to appoint such agents or assistants as may be necessary to administer the provisions of such agreements."

Clearly, this section confers authority upon the Commission to enter into agreements with the federal Department of Health, Education and

Welfare to enable the Commonwealth to take full advantage of federal funds available for vocational rehabilitation purposes. And § 78, already quoted, just as clearly contemplates that, as a result of such agreements, the residence requirements of that section will be waived. Section 78 does not contemplate, even where there is an agreement with the federal government, that persons without financial need shall receive rehabilitation services at "public cost." But as I interpret these words, they do not apply to "costs" borne by the federal government; absent a most compelling reason, I would not impute to the General Court the intention of placing or attempting to place restrictions upon the expenditure of federal funds. See *Peter Kiewt Sons Co.* v. *State,* 116 N.W. 2d 619, 622 (N. D.).

Since under § 222 of the Social Security Act the full cost of the rehabilitation program under the type of agreement contemplated by your second question will be met with federal funds, the financial need provisions of G. L. c. 6, § 78 are inapplicable to this program. Accordingly, I answer your second question in the affirmative.

This answer obviates the need to consider other questions raised in your letter.

Very truly yours,

Edward W. Brooke, *Attorney General.*

63. December 30, 1966.

Honorable William M. Powers, *Chairman, Massachusetts Executive Committee for Educational Television.*

Dear Mr. Powers:—In a recent request for an opinion you ask the following questions:

"1. Whether, as trustees of a special Educational Television Program Fund within the state treasury, the Executive Committee for Educational Television is not the sole state agency which can determine the expenditure of the money within this Fund.

"2. Whether the Massachusetts Executive Committee for Educational Television may set the level of compensation of its professional employees, within the scope of and by reference to the pay scale of compensation established for professional employees of the Commonwealth, and may change that compensation, still subject to the above qualifications, without the requirement that such compensation, or its change, be approved by any part of the state government other than the Board of Education?

"3. Whether the Massachusetts Executive Committee for Educational Television may not directly purchase, insure and dispose of personal property without reference to other state agencies or the regulations established by them?

"4. Whether the Massachusetts Executive Committee for Educational Television may lease real property without being subject to authorization by any other state agency?

"5. Whether, in addition to its annual accounting, the Executive Com-

mittee must keep a set of standard state accounts and be audited by the state each year?"

In considering these questions, which I shall answer individually, I shall refer continually to my opinion of June 23, 1965 to the Commissioner of Education (hereinafter "the previous opinion") concerning certain problems that had arisen in the functioning of your Committee and to G. L. c. 71, §§ 13F-13I, which establishes the Committee and provides for its powers, duties and procedures. In referring to this statute I shall cite only the section numbers; reference to other chapters of the General Laws, where necessary, will include both chapter and section number.

Answering your first question, I call your attention to § 13H, which I quote:

"The committee may establish and manage under such regulations as it may from time to time prescribe, a trust fund to be known as the Educational Television Program Fund. All funds received from school committees, organizations, or individuals for the purposes of sections thirteen F to thirteen I, inclusive, shall be credited to said Fund and shall be deposited in the state treasury and may be expended by the committee for such purposes without appropriation; provided, that no obligation shall be incurred for any expenditure in excess of sums available therefor.

"The committee shall cause accurate accounts to be kept at all times of all receipts and expenditures of funds received by it, and shall make a report of the same annually in December to the board of education."
Although this statute does not expressly state that *only* the Committee may spend money in the Educational Television Program Fund, in the absence of a statute giving any other person or body power to make such expenditures, I conclude that this power is vested in the Committee and not in any other state agency. See *Attorney General* v. *Trustees of Boston Elevated Ry. Co.*, 319 Mass. 642, 654-655. I, of course, do not deem the General Court a "state agency" for purposes of this answer.

In the previous opinion I answered a question (number four) which raised the same issues as are raised by the second question in your present request, except that the answer in the previous opinion applied to clerical, rather than to professional, employees. I see no need to repeat what was said there. I quote Rule 3 of the Civil Service Rules (amended since the rendering of the previous opinion).

"All persons performing duties or rendering service in any of the offices and positions and classes of positions classified by statute, or in any of the offices and positions and classes of positions in the Commonwealth, cities and towns, unless otherwise exempted by statute, a list of which offices or positions and any amendments or additions thereto shall be on file in the office of the Division of Civil Service, which list shall be open to reasonable inspection by the public, and a copy filed with the Secretary of the Commonwealth, or performing duties or rendering services similar to that of any such offices or positions and classes of positions, under whatever designation, whether such service is permanent or temporary, and whether the same is paid by time for work done, by the piece, or in any other manner, are subject to the Civil Service Law and Rules."

Professional employees of the Committee are not "exempted by statute" from the operation and classifications of the civil service laws. Since G. L. c. 30, § 46 (c. 30, § 46B referred to in the previous opinion was repealed by St. 1966, c. 210, § 3) applies to all personnel classified under the civil service laws — see c. 30, § 45(1) — professional employees of the Committee are subject to the salary schedules of G. L. c. 30, § 46 and to classification by the director under c. 30, § 45. My answer to your second question is that the Committee lacks authority to set the level of compensation for its professional employees.

Answering your third question, I quote § 13I(a):

"In order to carry out its duties, said committee, from time to time and within the limits of appropriation therefor and of available trust funds, may —

"(*a*) Acquire, construct, hold, lease and dispose of real and personal property."

This language confers plenary power upon the Committee directly to purchase and dispose of personal property in carrying out its duties. But such property will be property of the Commonwealth and under G. L. c. 29, § 30 may not be insured by the Committee "without special authority of law." The Committee has no such special authority and, accordingly, may not insure its personal property. See Attorney General's Report (1961) p. 46.

The verb "lease," used transitively, may mean "let" or "hire." See Webster's Third New International Dictionary, Unabridged, p. 1286. I do not know in which sense you are using the word in your fourth question. However, if the Committee desires to lease property *to* other parties, it clearly may do so under the authority of § 13I(a).

Answering your fifth question, I quote the first sentence of G. L. c. 11, § 12:

"The department of the state auditor shall annually make a careful audit of the accounts of all departments, offices, commissions, institutions and activities of the commonwealth, including those of districts and of authorities created by the general court, and including those of the income tax division of the department of corporations and taxation, and for said purpose the authorized officers and employees of said department of the state auditor shall have access to such accounts at reasonable times and said department may require the production of books, documents and vouchers, except tax returns, relating to any matter within the scope of such audit."

I have no doubt that the accounts of the Committee are subject to audit under this section. See *Massachusetts Turnpike Authy.* v. *Commonwealth,* 347 Mass. 524, 528; *Opinion of the Justices,* 309 Mass. 571, 582; Attorney General's Report (1936) p. 107. Your reference to "a set of standard state accounts" is ambiguous; but if you are referring to accounts required to be kept by order of the Comptroller (see G. L. c. 7, §§ 16 *et seq.*), I am of the opinion that the Committee is required by law to keep the same.

Very truly yours,

Edward W. Brooke, *Attorney General.*

64. January 13, 1967.

Honorable John T. Driscoll, *Chairman, Massachusetts Turnpike Authority.*

Dear Mr. Driscoll:—You have requested my opinion as to whether you may run for public office. Specifically, you ask the three following questions:

"1. Whether I, as Chairman of the Massachusetts Turnpike Authority, may run for public office at the national, state, city or county level as a declared candidate without resigning my present post;

"2. Whether I might take or be granted a leave of absence while so running for public office; and

"3. Whether the Members of this Authority, the Governor of the Commonwealth, or any other person or persons are empowered to grant such a leave of absence for such purpose."

You have not presented any facts in your request. Nothing more appearing, I can find no statutory or other legal prohibitions which would require your resignation in order that you may actively seek election to public office. I, therefore, answer your first question in the affirmative. In reaching my conclusion I find no bar in the Acts of 1952, c. 354, § 1, as amended by the Acts of 1955, c. 47, as amended by the Acts of 1963, c. 801, § 84, which is the enabling legislation creating the Massachusetts Turnpike Authority and generally controlling its activities.

I shall consider your second and third inquiries together. A leave of absence is generally granted in the discretion of the appointing authority except as such discretion may be modified by a specific statute. (See, for example, G. L. c. 31, § 46E which applies to persons within the classified civil service.) The Acts of 1952, c. 354, § 1, as amended by the Acts of 1955, c. 47, as amended by the Acts of 1963, c. 801, § 84 provide that the Massachusetts Turnpike Authority shall consist of three members to be appointed by the Governor, by and with the advice and consent of the Council. The act does not specifically address itself to the question of leave of absence. However, since the Turnpike Authority is not generally subject to the supervision and regulation of any other department of the Commonwealth (*Ibid.*), it is clear that the Governor in his role as appointing authority would have the incidental power to grant a leave of absence.

Whether or not the Governor granted such a leave of absence would, of course, be within his sound discretion. I note that the enabling legislation provides, in part, that:

"Two members of the Authority shall constitute a quorum and the affirmative vote of two members shall be necessary for any action taken by the Authority. No vacancy in the membership of the Authority shall impair the right of a quorum to exercise all the rights and perform all the duties of the Authority." *Ibid.*

Therefore, inasmuch as the functioning of the Turnpike Authority would not be prohibited from acting in the absence of one of the three members of the Authority, there is no legal prohibition against granting a leave of

absence to such member. Therefore, in answer to your second and third inquiries, it is my opinion that a leave of absence may be granted while you are running for public office in the sound discretion of the Governor.

Very truly yours,

Edward T. Martin, *Attorney General.*

65. January 13, 1967.

Honorable John L. Quigley, *Commandant, Soldiers' Home.*

Dear Commandant Quigley:—You have requested my opinion regarding the application of c. 458 of the Acts of 1966 concerning deductions from the salaries of public employees for the purpose of meeting credit union obligations. Specifically, you have questioned "whether the credit union must be under the operation of state or municipal groups before deductions can be authorized for payment to the credit union."

There is no doubt that the answer to your inquiry is in the affirmative. The controlling statute (G. L. c. 149, § 178B, as amended by c. 458 of the Acts of 1966) is plain and unambiguous. That section provides in part as follows:

"The state treasurer, the treasurer of any county, the treasurer of any county or state department or institution, and the treasurer of any city or town having a by-law or ordinance so requiring shall, and unless contrary to a by-law or ordinance the treasurer of any other city or town or of any district may, deduct from the salary of any employee of the commonwealth or of any such county, city, town or district such amount or amounts as such employee in a written authorization to such treasurer may specify for purchasing shares of, or making deposits in, or repaying any loan from *any credit union operated by employees of the commonwealth or of any such county, city, town or district. . . .*" (Emphasis supplied.)

You have also directed my attention to G. L. c. 154, § 8 with the belief that it might have some applicability to the problem at hand. That section, in part, permits deductions from salaries for the purchasing of shares or for the repayment of loans to any credit union established in accordance with the laws of this Commonwealth.

The general language of a statute such as G. L. c. 154, § 8, would not, ordinarily, be deemed to be applicable to the Commonwealth. See 2 Op. Atty. Gen. 175.

The fact that when G. L. c. 154, § 8 was amended by St. 1955, c. 631, to permit deductions from employees' salaries for credit union purposes, the provisions of G. L. c. 149, § 178B were already in effect and were continued without change, confirms the view that the provisions of G. L. c. 154, § 8, as to deductions from employees' salaries for credit unions are not applicable to state employees.

Very truly yours,

Edward T. Martin, *Attorney General.*

66. JANUARY 13, 1967.

HONORABLE HUGH MORTON, *Chairman, Civil Service Commission.*

DEAR MR. MORTON:—You have requested my opinion relative to a Richard T. Rounds and James M. Murray. I repeat only the facts which were necessary to consider in reaching my decision.

Mr. Rounds and Mr. Murray held the respective positions of Commanding Officer and Chief Marine Engineer at the Massachusetts Maritime Academy. The duties of each position involve the teaching of cadets the many phases of operating ships in maritime trade. Both are veterans of the armed services within the meaning of G. L. c. 31, § 2 and G. L. c. 4, § 7, and have held their positions with the Massachusetts Maritime Academy for not less than three years. The Board of Trustees of Massachusetts State Colleges voted on May 3, 1966:

"to authorize the President of the Massachusetts Maritime Academy to abolish positions of a maritime nature at the Massachusetts Maritime Academy and to establish positions with academic titles and academic assignments for personnel affected. The President was also directed to establish necessary merchant marine positions and assignments aboard the training ship for each cruise."

On May 20, 1966, the President of the Massachusetts Maritime Academy abolished all positions of a maritime nature and reassigned personnel to academic positions with academic titles. The reassignment of personnel was accompanied by a salary increase. Among the titles abolished were Schoolship Commanding Officer and Chief Marine Engineer. Richard T. Rounds was reassigned from Schoolship Commanding Officer to Associate Professor; James M. Murray from Chief Marine Engineer to Assistant Professor. Each received a salary increase.

Mr. Rounds and Mr. Murray contend that they have been reduced in rank and transferred to duties of a lesser rank without their consent. They argue that as veterans they are entitled to the protection of the Veterans' Tenure Act (G. L. c. 30, § 9A), and therefore cannot be involuntarily separated from their positions, except in accordance with G. L. c. 31, § 43. As such, you have asked:

"Are Mr. Rounds and Mr. Murray entitled to a hearing before the Civil Service Commission under the provisions of G. L. c. 31, § 43(b)?"

I question whether Mr. Rounds or Mr. Murray have any serious grounds of contention. On the factual situation presented, it does not appear that Mr. Rounds and Mr. Murray have been "transferred" and/or "lowered in rank" and/or had their respective offices abolished within the meaning of G. L. c. 31, § 43. *Simonian* v. *The Boston Redevelopment Authority,* 342 Mass. 573, 584-585. However, since I answer your question in the negative, it is not necessary for me to consider these subsidiary problems which you also raised in your inquiry.

General Laws c. 30, § 9A provides in part:

"A veteran, as defined in section twenty-one of chapter thirty-one, who holds an office or position in the service of the commonwealth not classified under said chapter thirty-one, other than an elective office, an ap-

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

Mr. Rounds and Mr. Murray are veterans as defined in § 21 of c. 31 and § 7 of c. 4 who have held positions in the service of the Commonwealth for not less than three years. These positions are not classified under our Civil Service Laws. If Mr. Rounds and Mr. Murray had gained the protection of the Veterans' Tenure Act, they could not be involuntarily separated from their position, except in accordance with G. L. c. 31, § 43. Section 43 sets forth in great detail the procedures to be followed by an appointing authority wishing to affect an employee's position by discharge, removal, suspension, transfer, lowering in rank or compensation or abolition of position. The Veterans' Tenure Act had the salutory purpose of securing the notice and hearing provisions of § 43 to veterans who would not otherwise be entitled to its protection. Notwithstanding that salutory purpose, the protection of the act does not extend to every position which is not expressly excluded from its provisions. *Cieri* v. *Commissioner of Insurance,* 343 Mass. 181, 185; *Sullivan* v. *Committee on Rules of House of Representatives,* 331 Mass. 135, 137.

Where it is apparent the Legislature has not intended to extend the protection of this statute to certain positions, such legislative intent must be recognized. It is my opinion that such is the case as regards the positions of Mr. Rounds and Mr. Murray. In reaching my conclusion it was necessary to review several sections of c. 73. Section 1 of c. 73 grants the Board of Trustees of the State Colleges broad discretionary powers over the appointment and removal of instructors and other employees of the Massachusetts Maritime Academy. The relevant provision of § 1 provides that:

"The board of trustees of the state colleges shall provide and maintain the Massachusetts Maritime Academy as a nautical college for the instruction of students in the science and practice of navigation, seamanship and marine engineering, accommodations therefor on board a proper vessel at its present location and at such land facilities, including the present facilities, as the said trustees shall designate, books, stationery, apparatus and supplies needed in the work thereof, and *shall appoint and may remove necessary instructors and other employees, determine their compensation,* fix the terms upon which students shall be received and instructed therein and discharged therefrom, make all regulations necessary for its management and provide from time to time for cruises." (Emphasis supplied.)

This all-inclusive language is modified by § 16 of c. 73 which distinguishes between "professional staff" and "non-professional staff." The "non-professional staff," with some exceptions, are granted the protection and benefits of c. 31. However, as regards the "professional staff":

"The trustees shall have *complete authority* with respect to the election or appointment of the professional staff including terms, conditions and period of employment, compensation, promotion, classification and reclassi-

fication, transfer, demotion and dismissal within funds available by appropriation of the general court or from other sources." (Emphasis supplied.)

Mr. Rounds and Mr. Murray are members of the professional staff which includes:

"all officers of the division of state colleges, and all persons, except those whose duties are clerical, custodial, security, labor maintenance and the like, employed for teaching, research, administration, extension, enforcement, control laws and regulatory services, technical and specialized academic support staff, and such related activities as shall be determined by the trustees."

It is significant that § 4B provides its own machinery for preventing arbitrary removal of teachers who have served for three prior consecutive school years. That section provides that:

"The board of trustees, in electing a teacher in a state college, the Massachusetts college of art or the Massachusetts Maritime Academy who has served as such for the three previous consecutive school years, shall employ him to serve at its discretion, *and notwithstanding any contrary provision of general or special laws,* he shall not be dismissed from such employment except for just cause and for reasons specifically given him in writing by the said board. Before any such removal is effected, the said teacher, upon his request, shall be given a full hearing before said board, of which hearing he shall have at least thirty days written notice from said board, and he shall be allowed to answer charges preferred against him, either personally or by counsel. (Emphasis supplied.)

The broad discretionary powers of the Board of Trustees relating to all phases of employment, the specific protection of the "non-professional staff" as well as the independent machinery for removal of teachers who have served for three previous consecutive school years, indicate that c. 73 is designed to control the actions of the board relative to its employees without interference or restriction of any other law, except as specifically provided.

I, therefore, conclude that inasmuch as Mr. Rounds and Mr. Murray are part of the "professional staff" of the Massachusetts Maritime Academy they are not entitled to the notice and hearing provisions under G. L. c. 31, § 43.

Very truly yours,

Edward T. Martin, *Attorney General.*

67. January 16, 1967.

Honorable Robert Q. Crane, *Treasurer and Receiver General, Chairman, State Board of Retirement.*

Dear Mr. Crane:—You have requested my opinion relative to an application for reinstatement in the retirement system filed by Walter J. Trybulski, Commissioner of the Industrial Accident Board. Your inquiry indicates that the appointment of Mr. Trybulski became effective on Feb-

ruary 1, 1962. Previous to his appointment Mr. Trybulski had been retired by the Retirement Board in the City of Chicopee and on his appointment by the Governor to the Industrial Accident Board for a term of years waived his retirement allowance under the provisions of G. L. c. 32, § 91.

Specifically, you have asked:

". . . whether or not Mr. Trybulski is now eligible to become a member of the State Employees Retirement System under the provisions of . . . Chapter 256 of the Acts of 1966."

Chapter 256 of the Acts of 1966 expanded the class which might qualify for return to the retirement system under G. L. c. 32, § 5(1)(g) by adding, *inter alia*, those appointed to a position for a term of years by the Governor. The section, as amended, now provides as follows:

"Notwithstanding any provision of this chapter to the contrary, any member inactive of a retirement system who is elected to office by popular vote, or who is appointed to a position for a term of years by the governor, or who is appointed to any position by the mayor of a city or by a city council or by the selectmen of a town, may elect to become a member in service of the system pertaining to the position to which he is elected or appointed; provided, that any such member inactive who is receiving a retirement allowance shall repay into the system from which he is receiving such allowance the total amount of any such allowance received from the date of his retirement to the date of his again becoming a member in service."

The amendment was approved on May 9, 1966 and became effective as of January 1, 1966. (Acts of 1966, c. 256, § 2.) Since Mr. Trybulski was appointed on February 1, 1962, the question to be resolved is whether or not the amendment is applicable to persons who had been appointed prior to its effective date.

It is a general rule of statutory construction that a statute will be construed as having a prospective operation only, unless the statute plainly indicates an intent that it shall operate retroactively. While examination of the amendment in question does not plainly indicate an intention that the statute operate retroactively, neither does it plainly indicate an arbitrary cut-off date for the prospective beneficiaries of the legislation.

The words "who is appointed" could be construed as meaning either "who has been appointed and is now in service" or "who may be appointed in future" or "who have or may be appointed."

Absent a clear-cut indication of the legislative will, it would seem that the construction of the amendment to be adopted should be that construction which most clearly reflects the equitable treatment of all prospective or actual participants which is inherent in all retirement or pension systems; I deem that to be the construction which would include those "who have or may be appointed."

It should be clear that no reinstatements should be effected as of a date prior to the effective date of the amendment, namely, January 1, 1966. In other words, Mr. Trybulski could not be reinstated as of February 1, 1962, the date of his appointment.

It is therefore my considered opinion that, on the facts stated by you, Mr. Trybulski is eligible to become a member of the State Employees Retirement System pursuant to the provisions of c. 256 of the Acts of 1966.

Very truly yours,

EDWARD T. MARTIN, *Attorney General.*

68. JANUARY 17, 1967.

HONORABLE CHARLES H. MCNAMARA, *Commissioner of Agriculture.*

DEAR SIR:—I am in receipt of your request for my opinion whether a state-employed veterinarian who was injured by a cow in the course of his duties should be compensated under the "assault pay" provisions contained in Chapter 30, Section 58 of the General Laws.

The last paragraph of Section 58 reads as follows:

"Notwithstanding the provisions of this section, an employee who, while in the performance of duty, receives bodily injuries resulting from acts of violence of patients or prisoners in his custody, and who as a result of such injury would be entitled to benefits under said chapter one hundred and fifty-two, shall be paid the difference between the weekly cash benefits to which he would be entitled under said chapter one hundred and fifty-two and his regular salary, without such absence being charged against available sick leave credits, even if such absence may be for less than eight calendar days' duration."

The purpose of this provision is to extend benefits up to the amount of an injured state employee's full weekly wage when such employee is injured by the violence of a patient or prisoner in his custody. The requirement that the person committing the violent act must be in custody indicates that the General Court was mainly contemplating institutionalized mental patients or prisoners. The terminology of the paragraph as a whole shows that the violence must be committed by a person who is under some legal form of physical restraint. Since taking care of or maintaining custody of people of this sort is usually fraught with some hazard, the General Court intended to provide some added benefit to those employees who are victimized in some violent manner by their exposure to a greater than normal risk of violence.

Although a veterinarian is often exposed to injuries inflicted by animals he is treating, this danger is considered an ordinary hazard of the profession. It is not the type of hazard against which the General Court intended to protect such state employees. The statute speaks of "patients", by which term a human being is ordinarily indicated. A cow either under treatment or receiving an inoculation by a veterinarian is not a "patient". The General Court meant to include only injuries inflicted by the acts of violence of human beings while under the care or custody of those employees in a certain category.

For the reasons set forth above, a state-employed veterinarian who has been injured by an animal either while treating or administering an in-

jection to the same does not come within the purview of Section 58 of Chapter 30 of the General Laws.

Very truly yours,

Edward T. Martin, *Attorney General.*

69. January 17, 1967.

Honorable Harry C. Solomon, M.D., *Commissioner of Mental Health.*

Dear Sir:—I am in receipt of your request for my opinion whether an employee of the Department of Mental Health may receive disability benefits under c. 30, § 58 of the General Laws, as amended, and Rule LS-15, in addition to benefits for partial disability under c. 152, § 35.

The last paragraph of § 58 of c. 30 provides:

"Notwithstanding the provisions of this section, an employee who, while in the performance of duty, receives bodily injuries resulting from acts of violence of patients or prisoners in his custody, and who as a result of such injury would be entitled to benefits under said chapter one hundred and fifty-two, shall be paid the difference between the weekly cash benefits to which he would be entitled under said chapter one hundred and fifty-two and his regular salary, without such absence being charged against available sick leave credits, even if such absence may be for less than eight calendar days' duration."

The purpose of this statutory provision, sometimes referred to as the "assault pay" statute, is to extend benefits up to the amount of an employee's full weekly wage when that employee is injured by the violence of a patient or prisoner in his custody. By this means the General Court intended to compensate for the added hazards to which such employees of a correctional or mental institution are exposed when their duties entail the care or custody of mental patients or prisoners. Save for this provision, an employee in this category who is temporarily and totally disabled would receive only the benefits provided by § 34 of c. 152 which establishes a weekly compensation rate equal to only two-thirds of the employee's average weekly wage, as defined in § 1 of c. 152, at the time of injury, but, under a recent amendment, in no case more than fifty-eight dollars.

When an injured employee is determined to be only partially disabled, either by a direct order of the Industrial Accident Board or by the fact that he is gainfully employed but at a lower average weekly wage necessitated by his industrial injury, he may receive benefits under § 35 of c. 152. This section provides "a weekly compensation equal to the entire difference between [the employee's] average weekly wage before the injury and the average weekly wage he is able to earn thereafter, but not more than fifty-eight dollars per week."

As to your question No. 1 as to whether an employee who is receiving partial incapacity compensation based on an earning capacity established by order of the Industrial Accident Board is at the same time entitled to the benefits provided for in § 58 of c. 30, as amended and Rule Ls-15, the answer is in the negative.

To apply the "assault pay" provisions to partial incapacity cases would in effect be a reimbursement by your department of the employee's earning capacity. When the Industrial Accident Board determined that earning capacity it found such employee to be physically capable of an earning capacity at least in that amount, whether that employee in fact then engaged in some gainful employment to earn such amount or not.

To make the supplementary "assault" payment to the partially incapacitated employee would serve to discriminate against the totally incapacitated employee for whom the benefits under § 58, c. 30 were really intended and thus would be contrary to the original intent of the General Court. The statute did not envision the same full salary benefits for the partially incapacitated employee who is in effect deemed physically able to earn the differential amount by engaging in certain forms of gainful employment.

Chapter 152 is an equitable statute. The partial incapacity payments were part of the original enactment of this Act and this section has undergone several amendments through the years equated with the needs of injured employees. To render any other interpretation to the statutes in question would tend to defeat the equitable purpose of the pertinent provisions of c. 152 and might serve to deter a partially incapacitated employee from rehabilitating himself in achieving the earning capacity determined by the Industrial Accident Board.

Since the reply to question No. 1 is in the negative, it is not necessary to answer question No. 2.

Very truly yours,

Edward T. Martin, *Attorney General.*

70. January 26, 1967.

Honorable Edward J. Ribbs, *Commissioner, Department of Public Works.*

Dear Mr. Ribbs:—You have asked my opinion in regard to the possible issuance by your District Highway Engineers of permits approving traffic regulations and devices requested by cities and towns.

It is my understanding that these permits are now issued by the Commission charged with responsibility for your Department, but that diversification of this function might improve your service to the cities and towns.

Your letter states:

"The present procedural policy of the Department in granting approval and issuing Permits to the various cities and towns throughout the Commonwealth for the installation of Traffic Controls vests directly with the Commission of this Department as provided in Section 2 of Chapter 85 of the General Laws."

You ask if it will be legal if your District Highway Engineers issue these permits "in the name of the Commission and the Department."

My answer is in the affirmative.

Chapter 85, § 2 makes no mention of the "Commission", but does set forth the duties of "the department of public works" in regard to "written approval" required for certain traffic control devices.

The functions set forth in § 2 are to be performed by "the department", and need not be performed only by the Commissioner or the Commission.

Under G. L. c. 85, § 2, it is clear that "department" means "the department of public works." The same insistence upon the broad definition appears in Chapter 821, § 1, of the Acts of 1963 which created the five-man Commission to supervise and control the Department of Public Works. (Now G. L. c. 16, § 1.) All employees of the Department are available to the Commission to assist in carrying out the duties assigned to the Department.

In specific answer to your question, the 1963 statute gives your Commission power to revise your regulations and practices to more efficiently carry out the responsibilities assigned to your Department by the Legislature:

"It [the Commission] shall make, and from time to time revise, regulations for the conduct of the business of the department, and all regulations otherwise required by law."

Your inquiry is directed primarily at two sentences in G. L. c. 85, § 2, which reads as follows:

"No such signs, lights, signal systems, traffic devices, parking meters or markings shall be erected or maintained on any state highway by any authority other than the department except with its written approval as to location, shapes, size and color thereof, and except during such time as said approval is in effect. . . . No rule, regulation, order or ordinance or by-law of a city or town hereafter made or promulgated relative to (the items listed above) . . . shall take effect until approved in writing by the Department."

The Department can grant such approvals in writing in any reasonable manner so long as the decision is "under the supervision and control of a Public Works Commission." G. L. c. 16, § 1.

If the Commission chooses to delegate its approval function to the District Highway Engineers, under guidelines which would retain reasonable supervision and control in the Commission, there is nothing in our statutes to preclude this change.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General.*

71. JANUARY 27, 1967.

HONORABLE JOHN L. QUIGLEY, *Commandant, Soldiers' Home.*

DEAR SIR:—You have requested my opinion as to "the effect of Chapter 740 of the Acts of 1964 upon the operation and establishment of the Soldiers' Home as set forth in Chapter 452 of the Acts of 1931" and, specifically, in regard to "Section 2 of Chapter 452 wherein it says '. . .

Trustees of the Soldiers' Home . . . shall serve under the governor and council, and shall be subject to such supervision as the governor and council deem necessary or proper'."

Chapter 740 of the Acts of 1964 concerns the curtailment of certain powers of the Executive Council as regards appointments within the Executive Department, fiscal affairs and contracts. You question "whether Chapter 740 lessens in any way the charges set forth in Chapter 452 of 1931."

Section 2 of c. 452 of the Acts of 1931 became part of G. L. c. 6, § 17. Said chapter and section were amended by § 1 of c. 535 of the Acts of 1966 to read: ". . . the board of trustees of the Soldiers' Home in Massachusetts . . . shall serve under the governor, and shall be subject to such supervision as the governor deems necessary and proper."

Inasmuch as § 1 of c. 535 of the Acts of 1966, which provided that various officers serve under the "governor" rather than under the "governor and council," removed the word "council" from G. L. c. 6, § 17 (§ 2 of c. 452 of the Acts of 1931), it is my opinion that it is no longer necessary to question whether c. 740 of the Acts of 1964 has any effect upon § 2 of c. 452 of the Acts of 1931.

Very truly yours,

Elliot L. Richardson, *Attorney General.*

72. January 27, 1967.

Honorable Theodore W. Schulenberg, *Commissioner, Department of Commerce and Development.*

Dear Commissioner Schulenberg:—You have requested the opinion of the Attorney General regarding the authority of the Deputy Commissioner of Housing in your Department to hear and decide an appeal from an architect's determination of a dispute arising under a contract executed on November 20, 1960 between a local housing authority and a contractor for the construction of state-aided housing for the elderly. The contract, a copy of which has been furnished to me by the Chief Counsel of your Department, provided that such appeals should be heard by the Chairman or Director of the State Housing Board. In 1964, however, that agency was abolished and all its "powers and duties" were transferred to your Department. Acts of 1964, c. 636, inserting a new G. L. c. 23A, § 10.

The substantive matter in dispute involves the imposition of a "penalty" for late performance of the contract. We infer from your letter that this dispute has been submitted to the architect under the contract, that his decision was in favor of the housing authority, and that the contractor has appealed the decision to your Deputy Director of Housing. You also state that the housing authority has challenged your Deputy Director's jurisdiction to hear and decide the appeal.

The contract between the local housing authority and the contractor contained the following clause:

"DISPUTES"

"A. All disputes arising under this contract shall be decided by the Architect subject to the right of appeal to the Chairman or Director of the State Housing Board whose decision shall be final.

"B. The Chairman or Director may hear the appeal without regard to the particular officer to whom the appeal was directed except that decisions of the Director shall not be final without the written approval of the Chairman.

"C. If the architect fails to render a decision within thirty (30) days after receiving written notice of the claim either party may request a hearing before the Chairman or Director."

Section GC-1 of the "General Conditions" of the contract defined "board" and "State Housing Board" to mean the "chairman of the State Housing Board, an agency or instrumentality of the Commonwealth of Massachusetts created by chapter 260, Acts of 1948. . . ."

In 1960, when the contract was executed, the State Housing Board existed by authority of G. L. c. 6, § 64, inserted by c. 260 of the Acts of 1948. That statute specified that the powers and duties of the Board other than making reports "shall be exercised and performed by the chairman." See *Wellesley Housing Authority* v. *S. & A. Allen Construction Co.,* 340 Mass. 466, 468, footnote 1.

In 1964, c. 636 of the Acts of that year established the Department of Commerce and Development. Section 10 of the Act provided:

"The state housing board is hereby abolished. The powers and duties formerly exercised by said board are hereby transferred to the department of commerce and development. . . ."

General Laws c. 23A, § 3, as inserted by the same Act provides:

"There shall be in the department the following five divisions:—economic development, tourism, housing, urban renewal and planning. Each division shall be under the charge of a deputy commissioner of commerce and development, in this chapter called deputy commissioner, subject to the direction, control and supervision of the commissioner. Each deputy commissioner shall be a person of skill and experience in the field of his appointment and shall be appointed and may be removed by the commissioner, with the approval of the governor, and shall serve until so removed. The position of deputy commissioner shall not be subject to the provisions of chapter thirty-one or section nine A of chapter thirty. Each deputy commissioner shall devote his full time during business hours to the duties of his office. The commissioner may authorize any deputy commissioner to exercise in his name any power, or to discharge in his name any duty, assigned to him by law, and he may at any time revoke such authority."

In determining who, if anyone, is now authorized to hear and decide appeals from any architect's decision of a dispute between the local housing authority and the contractor, we begin with the settled rule of contract law that the authority of an arbitrator over a controversy must be derived solely from the agreement of submission itself, here the "Disputes" clause. *J. F. Fitzgerald Construction Co.* v. *Southbridge Water Supply Co.,* 304

Mass. 130, 134. Whatever doubts might have otherwise existed over whether the old State Housing Board had as one of its official duties the review of such decisions of an architect must be regarded as settled by *Wellesley Housing Authority* v. *S. & A. Allen Construction Co.,* 340 Mass. 466, where the Supreme Judicial Court assumed that the Board's exercise of the power of review involved the discharge of a public function.

Your question whether the old Board's power of review may be exercised by the Deputy Commissioner of Housing in your Department is not wholly free from doubt. Yet, on balance, I am of the opinion that § 10 of c. 636 of the Acts of 1964, quoted above, vested that jurisdiction in the Deputy Commissioner.

I am not unmindful of the proposition that "Arbitration implies the exercise of the judicial function." *Brocklehurst & Potter Co.* v. *Marsch,* 225 Mass. 3, 8. Thus the transferability of that function should not be lightly inferred. Yet, I am of the opinion that here the inference is sufficiently strong. I consider it significant that the "Disputes" clause identified the reviewing agent, not by name, but rather by designation of his office, that the contract was a construction contract requiring a number of months for its performance, and that it was reasonably possible that at some time before final settlement of the contract the old State Housing Board might be reorganized or abolished. The parties should be regarded as having contracted with this possibility in mind.

"Experimentation is frequent in the field of administration, and particular administrative agencies are sometimes abolished and new ones created embodying the fruits of the experiment, or old agencies are reorganized, or their functions transferred to other agencies. The powers of departments, boards, and administrative agencies are subject to expansion, contraction, or abolition at the will of the legislative and executive branches of the government. As there is no constitutional right to a particular form of remedy, there is no such right to the enforcement of a remedy by a particular agency. Thus a new agency may be created to centralize authority which had been scattered among several agencies, the powers of an independent commission may be placed in a division of another agency, or reorganization may create an independent agency in regard to previously subordinate functions."

1 Am. Jur. 2d Administrative Law, § 25.

The fact that the General Conditions of the contract defined the State Housing Board by specific reference to c. 260 of the Acts of 1948, without providing for a possible successor, does not require a different result. We are concerned here with a remedial rather than a substantive provision of a contract affecting a matter of public interest, and reasonable inferences may properly be drawn to promote the public purpose of vesting review of disputes in the agency charged with the supervision of the public program involved.

Nor does the fact that the Deputy Commissioner of Housing in your Department is, unlike the chairman of the old State Housing Board, not the chief official of his agency require a different result. The office of the Deputy Commissioner is specifically created by G. L. c. 23A, § 3 of c. 636 of the Acts of 1964, quoted above, and carries with it comparable responsibility in the area of its particular concern.

Support for this conclusion can be found in § 9 of c. 636 of the Acts of 1964, establishing your Department. By that section the Division of Housing in your Department was substituted for the State Housing Board in G. L. c. 121A (the statute providing for urban redevelopment corporations) and thereby became vested with all the responsibilities formerly held by the old Board in that field.

In summary, it is my opinion that the Deputy Commissioner of Housing in your Department has authority to hear and decide the appeal from the architect's decision in this matter.

Very truly yours,

Elliot L. Richardson, *Attorney General.*

73. February 1, 1967.

Honorable Leo L. Laughlin, *Commissioner of Public Safety.*

Dear Commissioner Laughlin:—You have requested an opinion of the Attorney General on the following two questions:

"Question 1. Does this steam boiler which generates more than nine horsepower come within the scope of c. 146, § 46?

"Question 2. Is it mandatory that duly licensed personnel be employed to supervise the operation of the steam boiler in accordance with the intent of c. 146, § 48, the source of heat being hot oil?"

The steam boiler in question is described as follows in your letter:

"Steam is generated in a boiler from the circulation of hot oil at a temperature from 350°F. to 500°F. Saturated steam is generated at a pressure of 150 PSI by the extraction of heat from the hot oil being circulated by pumping the oil through coils in the boiler. The output of steam may range from 250 to 20,000 lbs. per hour depending on the size of the unit."

General Laws c. 146, § 46 provides in part that:

"No person shall have charge of or operate a steam boiler or engine or its appurtenances, except boilers and engines upon locomotives, motor vehicles, boilers and engines in private residences, boilers in apartment houses of less than five apartments, boilers and engines under the jurisdiction of the United States, boilers and engines used for agricultural, horticultural and floricultural purposes exclusively, boilers and engines of less than nine horsepower, and boilers used for heating purposes exclusively which are provided with a device approved by the commissioner limiting the pressure carried to fifteen pounds to the square inch, unless he holds a license as hereinafter provided. . . ."

In my opinion, the factual determinations which you have incorporated in your two questions clearly establish the boiler in question as one which comes within the scope of §§ 46 and 48 and requires duly licensed personnel for its operation.

Very truly yours,

Elliot L. Richardson, *Attorney General.*

74. February 1, 1967.

Honorable John J. Carroll, M.D., *Superintendent, Massachusetts Hospital School.*

Dear Doctor Carroll:—At the direction of the Board of Trustees of the Massachusetts Hospital School, you have requested an opinion of this office on (1) whether the Trustees may admit commuting patients and (2) if so, what powers the Trustees have in setting the rates for them, especially for tuition only.

The School was established by c. 446 of the Acts of 1904, which, as since amended, is now G. L. c. 111, §§ 62I-62S. Section 62J provides that the School "shall be maintained for the education and care of crippled and deformed children of the commonwealth." Section 62J provides that the Trustees "shall have the same powers and shall be required to perform the same duties in the management and control of the school as are vested in and required of the various state hospitals under chapter one hundred and twenty-three, so far as applicable." Section 62M provides:

"The trustees may, upon application of any child entitled to receive the benefit of said school, or upon such application by a parent, guardian or person having the legal custody of the child, or by any state or municipal department, board or officer having such custody, admit such child to said school, subject to such rules and regulations as the trustees may prescribe, and the trustees may discharge such child from the school. The charges for the support of the children of the school who are of sufficient ability to pay for the same, or have persons or kindred bound by law to maintain them, shall be paid by such children, such persons or such kindred at a rate determined by the trustees. The board of such children as have a legal settlement in a town shall be paid by the town at a rate not exceeding seventeen dollars and fifty cents a week, notice of the reception of the children by the trustees being given by them to the board of public welfare of the town as soon as practicable; and the tuition and board of those having no such settlement shall be paid by the commonwealth. The trustees may receive other children having no means to pay for tuition and support, and the tuition and board of all such children shall be paid by the commonwealth. The attorney general and district attorneys shall upon request bring action to recover said charges in the name of the state treasurer. The admission of a child as aforesaid to the school shall be deemed a commitment of the child to the care and custody of the commonwealth, and the trustees, with the approval of the department, may detain the child at said school during its school age, or for such longer period during its minority as in the opinion of the trustees will tend to promote the education and welfare of the child."

It is my opinion that under the foregoing provisions the Trustees may admit commuting or "day" students, as well as boarding students. In view of the vital contribution that the Legislature plainly intended the School to make to the education of crippled and deformed children of the Commonwealth, the statute should not be interpreted in any narrow or restrictive sense.

The fact that § 62M declares that the "admission of a child . . . to the school shall be deemed a commitment of the child to the care and custody

of the commonwealth . . . " does not require a different result. In the sense in which "commitment" appears to be used in that section, it conveys the meaning only of an entrusting of general supervision rather than a delivery for continuous detention. The "commitment" is not to an institution but rather "to the care and custody of the commonwealth. . . ." In relation to children, "care and custody" ordinarily conveys the meaning of the right to control a child's upbringing and education. In the exercise of that right, the custodian may properly decide that the child does not have to remain at all times in the custodian's immediate presence.

That this meaning was the one intended by the Legislature in enacting § 62M seems clear from the language in that section saying that the trustees "*may* detain the child at said school during its school age. . . ." (Emphasis supplied.) If the provision relative to "commitment" was intended to convey a command for continuous detention, the provision giving a discretionary right to detain would have been superfluous. Its inclusion in the statute suggests that the Legislature may have thought that the "commitment" clause, standing alone, was not sufficient to permit physical detention.

The foregoing interpretation is consistent with the practice which I understand you follow with regard to boarding students. Supplemental information that you have given my office indicates that the Trustees have regularly allowed these students to go home every other weekend, at Thanksgiving, during Christmas and Easter vacations, and for six weeks during the summer.

As for your second question, namely, what powers the Trustees have in setting rates for commuting students, especially for tuition only, it is my opinion that the Trustees have the discretion to set a separate rate for such students. Section 62M provides in part that the "charges for the support of the children of the school who are of sufficient ability to pay for the same, or have persons or kindred bound by law to maintain them, shall be paid by such children, such persons or such kindred at a rate determined by the trustees." The statute then goes on to impose liability, for "board" only, on towns where a child has a settlement. Contrasting the extent of the liabilities for "support" and for "board" only, the Supreme Judicial Court, in construing the statute, has remarked, "The liability for the support of children is of much broader signification than is the mere liability for mere board." *Treasurer and Receiver General* v. *Bourne,* 275 Mass. 313, 315. It is my opinion that especially in relation to handicapped children, "support" is an appropriate term to cover both tuition and board.

This view seems to be the one adopted by the Legislature in passing the present statute. When it came to the point in the statute of specifying the particular components of the charges for attendance at the School in cases where a student has no settlement in a town, the Legislature provided in § 62M that "the tuition and board" of such children shall be paid by the Commonwealth. Where, on the other hand, the Legislature, by using the more general term "support" in the part of § 62M with which we are concerned, did not specify the particular elements of the charges, it may fairly be considered to have had in mind the specific elements of "tuition and board" that it enumerated later on in the same section. Hence, the provision in § 62M for "support" should be regarded

as including both of these items. Commuting students may, therefore, be charged separately for their tuition; and they may also be charged for any meals that they may from time to time have at the school.

In summary then, it is my opinion that the Trustees have the discretion to admit commuting students and to set separate rates for their tuition and other lawful charges.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General.*

75. FEBRUARY 1, 1967.

HONORABLE OWEN B. KIERNAN, *Commissioner, Department of Education.*

DEAR COMMISSIONER KIERNAN:—You have requested an opinion of the Attorney General as regards interpretation of St. 1966, c. 601, a statute which authorizes your Department to issue a certificate of exemption for tuition at any state institution of higher education within the Commonwealth,

"to any Vietnam veteran, as defined in section seven of chapter four of the General Laws, whose service in Vietnam was credited to the commonwealth . . . said department shall issue such certificate to any person who applies for such exemption, who satisfactorily establishes his status as a Vietnam veteran, and who is otherwise deemed qualified to attend such institution."

The difficulty of interpretation arises because of a recent change in the definition of the term "Vietnam veteran" in said G. L. c. 4, § 7. Prior to December 8, 1966, the term was defined in G. L. c. 4, § 7, to mean, "any veteran who has been awarded the Armed Services Expeditionary Medal or the Vietnam Service Medal for military service performed in Vietnam between July 1, 1958, and the termination of the Vietnam emergency as declared by proper federal authority." Thus on September 2, 1966, the effective date of Chapter 601, service performed in Vietnam was part of the definition of a "Vietnam veteran" and was plainly a qualifying requirement for certification under Chapter 601.

However, a week following the effective date of Chapter 601, on September 9, 1966, Chapter 716 of St. 1966 was approved and became effective 90 days thereafter, on December 9, 1966. Chapter 716 amended G. L. c. 4, § 7, so as to define a "Vietnam veteran" as " . . . any veteran who has served more than one hundred and eighty days on active duty in the armed forces of the United States between February first, nineteen hundred and fifty-five and the termination of the Vietnam campaign as declared by proper federal authority." Thus under the amended definition, service in Vietnam was no longer any part of the definition of a Vietnam veteran.

You state in your letter:

"The Department has interpreted this act to mean that the applicant must qualify as a Vietnam veteran under the first definition until Decem-

ber 8 and under the new definition on December 8, 1966, but in addition to this he must have had service in Vietnam which was credited to the Commonwealth."

Based on the specific language of Chapter 601, it is difficult to avoid the conclusion that your interpretation is correct.

If eligibility turned solely on being a "Vietnam veteran" under G. L. c. 4, § 7, it would be clear that St. 1966, c. 716, eliminated actual service in Vietnam as a prerequisite to certification. But Chapter 601 makes eligibility for tuition exemption dependent not only upon a veteran's being a "Vietnam veteran" within the meaning of G. L. c. 4, § 7, it further provides that such "Vietnam veteran" be one "whose service *in Vietnam* was credited to the commonwealth." (Emphasis supplied.)

"The statute must be construed as a whole, giving effect to all its provisions so far as possible. 'It is a familiar canon of statutory interpretation that every word of legislative enactment is to be given force and effect so far as reasonably practicable. No part is to be treated as immaterial or superfluous unless no other rational course is open.'" *Hinckley* v. *Retirement Board of Gloucester,* 316 Mass. 496, 500, and cases cited.

In *Boynton's Case,* 328 Mass. 145, at page 147, the Court said:

"To reach the contrary result, it is necessary to argue, as does the insurer, that the words 'in addition to all other sums' add nothing. But it is rationally possible to give these words force and effect, thence they can not be rejected as surplusage."

In Chapter 601, force and effect can rationally be given to the words "service in Vietnam." To do otherwise would be to ignore the foregoing rule of construction and, in effect, to rewrite the statute by disregarding part of its language. It may well be that because Vietnam veterans without service in Vietnam are entitled to federal benefits, including educational benefits, under P. L. 89-358 which was in force at the time the General Court enacted Chapter 601, and other state benefits, the Legislature intended Chapter 601 to confer this additional benefit only upon persons with actual service in the war theatre of Vietnam. Accordingly, I am of the opinion that "service in Vietnam" remains one of the requirements for tuition exemption under St. 1966, c. 601.

I am, of course, mindful of the fact that the Legislature is now in session, is considering further legislation in this area, and may, if it so chooses, take further action should such action be deemed advisable to remedy what may well have been a legislative oversight.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General.*

76. FEBRUARY 3, 1967.

HONORABLE JOHN R. WHEATLEY, *District Attorney for the Plymouth District.*

DEAR DISTRICT ATTORNEY WHEATLEY:—You have asked the Attorney General for an opinion as to your authority, with the approval of a Justice

of the Superior Court holding a criminal session in your district, but without an appropriation of funds by the Legislature, to hire a list clerk for the session at the expense of Plymouth County, no such clerk having been previously employed.

Although G. L. c. 12, § 22 authorizes you, with the approval of a Justice of the Superior Court, to employ persons for "clerical or stenographic work," and although this same section provides that "Their compensation shall be paid by the county . . . ," it is my opinion that the county cannot lawfully pay for their services unless the statutory provisions relative to payment of county bills are first satisfied. These sections, so far as now pertinent, are G. L. c. 35, §§ 29 and 32. Section 29 provides, in part:

"The expenditure of money by the several counties shall be in accordance with the appropriations of the general court, which shall specify as separate appropriations the several items of expenditure, as prescribed by the director of accounts. . . ."

Section 32 provides:

"No county expenditure shall be made or liability incurred, nor shall a bill be paid for any purpose, in excess of the appropriation therefor, except as provided in sections fourteen and thirty-four."*

It is, therefore, my opinion that without an appropriation by the Legislature, funds will not be available to pay for the services of your list clerk, essential as I recognize such services to be.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General.*

77. FEBRUARY 7, 1967.

HONORABLE HOWARD WHITMORE, JR., *Commissioner, Metropolitan District Commission.*

DEAR COMMISSIONER WHITMORE:—You have requested an opinion of the Attorney General on the following questions:

"1. Is the Metropolitan Police force a part of the Parks Division of this Commission?

"2. Under the provisions of Chapter 562 of the Acts of 1961, amending General Laws Chapter 28, Section 3, is the Commissioner authorized to establish divisions within the Metropolitan District Commission as well as subdivisions or sections thereof?"

Since the answer to your first question depends in part on the answer to your second, I shall deal with your questions in reverse order.

Until amended by c. 562 of the Acts of 1961, G. L. c. 28, § 3 expressly authorized the Commissioner of the Metropolitan District Commission to "organize it in such divisions as he may from time to time determine." Although this provision was stricken from § 3 by the 1961 amendment,

*Sections 14 and 34 relate to continuation of the past rate of expenditures until an appropriation for the current year has been voted. Section 34 provides, in part: "No new or unusual expense shall be incurred, or permanent contract made, or salary increased, until an appropriation therefor has been made by the general court. . . ."

it is my opinion that the Commissioner still has the same power to establish divisions.

The Metropolitan District Commission is one of twenty departments established in the executive branch of the state government. It has long been the custom to designate most of the agencies immediately subordinate to state departments as "divisions." A legislative intention to preserve this custom in the Metropolitan District Commission is manifested in G. L. c. 28, § 3, where the Commissioner is given the "direction, control and supervision" of "each *division* or section thereof." (Emphasis supplied.) The extremely diversified functions of the Metropolitan District Commission, including responsibility for parks, sewage disposal, water supply, highways and police (see G. L. c. 92), taking place in a variety of locations and requiring a variety of specific skills, plainly call for the establishment of different administrative units.

Yet, to the best of my knowledge, since the Commission's establishment in 1919, there has been only one occasion on which the Legislature has itself expressly created a "division" within the Commission: in c. 583 of the Acts of 1947, the Metropolitan District Water Supply Commission was abolished and its functions transferred "to a division of construction which the commissioner of the metropolitan district commission is hereby authorized and directed to establish." St. 1947, c. 583, § 2. While reference is made in G. L. c. 28, § 4A to a "sewerage division," the establishment of that division was evidently the result of administrative action by one of your predecessors. There are also occasional statutory references to "the police force of the commission" (see, for example, G. L. c. 92, §§ 62, 62A, 62B), but without any indication whether or not the police force is to have divisional status. The Legislature has left the establishment of appropriate divisions primarily to administrative action by the Commission; and, indeed, before 1961, it was expressly provided in G. L. c. 28, § 3, that the Commissioner should "organize it in such divisions as he may from time to time determine."

In 1961, the Legislature made major changes in the executive organization of the Metropolitan District Commission and, in so doing, eliminated the specific language authorizing establishment of divisions. The 1961 amendments to G. L. c. 28, however, greatly strengthened the office of Commissioner and eliminated the separation of responsibilities theretofore existing between the Commissioner and a board consisting of the Commissioner and four associate commissioners. The powers of the board of commissioners prior to 1961 had included the appointment of "a secretary, engineering chiefs, a purchasing agent, engineers, inspectors, officers and members of the police force, one or more women as special police officers, clerks and such other officers and employees as the work of the commission may require." G. L. c. 28, § 4 (as appearing in St. 1936, c. 244, § 2). The board also had authority to "assign them to divisions, transfer and remove them." *Ibid.* However, the Commissioner, not the board, had the power to organize the commission "in such divisions as he may from time to time determine" and to appoint directors of those divisions. G. L. c. 28, § 3 (as appearing in St. 1936, c. 244, § 1). The 1961 amendment rewrote both sections in such a way as to transfer virtually all of the enumerated powers of the board to the Commissioner. The new G. L. c. 28, § 3 provided: "The commissioner shall be the executive and administrative head of the commission and each division or section

thereof shall be under his direction, control and supervision." It further authorized the Commissioner to "appoint and remove, such officials and employees as the work of the commission may require, including officers and members of the police force, and one or more women as special police officers, and . . . from time to time assign to such officials and employees such duties as the work of the commission may require." General Laws c. 28, § 4 in its new form brought about a corresponding reduction in the powers of the board, providing only that "the commissioner with the approval of at least two associate commissioners may appoint a secretary."

The statutory changes made in 1961 do not suggest a desire by the Legislature to take away either from the Commission or the Commissioner the authority to organize the Commission into divisions. Rather, they suggest that the draftsmen of the revised G. L. c. 28 may have decided that specific language authorizing the Commissioner to establish divisions had become redundant, since there was no longer any question as to whether the power to do so was lodged in the Commissioner rather than the board. Certainly, the broad new powers conferred upon the Commissioner make it obvious that he, if anyone in the Commission, would have the power to establish divisions. Had the Legislature wished to provide in the future for legislative rather than administrative establishment of divisions, it would presumably have so indicated, either by specifying the particular divisions into which the Commission was henceforth to be divided, or in some other manner.

It is, therefore, my opinion that your second question is to be answered in the affirmative, both as respects establishment of divisions and subdivisions or sections thereof.

In answer to your first question, I am aware of no statute placing the Metropolitan Police Force in any particular division of the Metropolitan District Commission. The predecessor of the Metropolitan Police Force was the police force of the Metropolitan Parks Commission established by c. 407 of the Acts of 1893. The Metropolitan Parks Commission and its police force were abolished by § 123 of c. 350 of the Acts of 1919, and their functions transferred to the newly created Metropolitan District Commission. The "Parks Division" referred to in your letter is presumably the successor to the Metropolitan Parks Commission. However, the powers and duties of the Metropolitan Police Force now extend well beyond the boundaries of the Metropolitan Parks District. G. L. c. 92, § 61. The statutes pertaining to the Metropolitan Police Force, moreover, appear in a different portion of G. L. c. 92 (§§ 61-63B) than those dealing with the Metropolitan Parks District (§§ 33-59). These considerations lead me to the conclusion that the Legislature had no intention of assigning the Metropolitan Police Force to the Parks Division.

Since the statutes are silent on this organizational detail of the Metropolitan District Commission, the position of the Metropolitan Police Force in the departmental hierarchy — whether it be a part of one of the divisions or a division in its own right — can be determined only by your own examination of the records of the Commission, or by future administrative action on your part.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General.*

78. February 7, 1967.

Honorable John A. Gavin, *Commissioner of Correction.*

Dear Commissioner Gavin:—You have requested the opinion of the Attorney General relative to certain questions arising under G. L. c. 127, § 133, as rewritten by c. 764 of the Acts of 1965.* Said section provides in relevant part as follows:

"Parole permits may be granted by the parole board to prisoners subject to its jurisdiction at such time as the board in each case may determine; provided (*a*) that no prisoner, convicted for a violation of [various sections of G. L. cc. 165 and 172 pertaining to certain violent crimes], or for an attempt to commit any crime referred to in said sections, and held under a sentence containing a minimum sentence shall receive a parole permit until he shall have served two thirds of such minimum sentence, but in any event not less than two years or if he has two or more sentences to be served otherwise than concurrently, two thirds of the aggregate of the minimum terms of such several sentences, but in any event not less than two years for each such sentence; (*b*) that no other prisoner held under a sentence containing a minimum sentence shall receive a parole permit until he shall have served one third of such minimum sentence, but in any event not less than one year, or, if he has two or more sentences to be served otherwise than concurrently, one third of the aggregate of the minimum terms of such several sentences, but in any event not less than one year for each such sentence. . . ."

You ask, first, whether a prisoner serving two minimum sentences, one for a crime of violence specified in provision (*a*) of § 133 and one for a non-violent crime covered by provision (*b*) of said section, must serve at least two thirds of the aggregate minimum terms of *both* sentences before becoming eligible for parole, or whether such a prisoner need serve only two thirds of the minimum sentence for the crime of violence plus one third of the minimum sentence for the non-violent crime before becoming eligible for parole.

I am of the opinion that for such prisoner the requirements of provision (*a*) would apply only to the sentence for the crime of violence and the requirements of provision (*b*) would apply to the sentence for the non-violent crime. Section 133 distinguishes between specified crimes of violence and all other crimes. To the first class of crimes it applies harsher parole requirements than it does to the second class of crimes. In view of this clear distinction in the statute and the legislative intent expressed thereby, it would be unreasonable to apply the stricter requirements of provision (*a*) to a sentence for a non-violent crime simply because the prisoner is also serving a sentence for a crime of violence.

Had the Legislature intended that in the situation which you pose the harsher requirements of provision (*a*) should be applied to the sentence for the non-violent crime as well as to the sentence for the crime of violence, it would undoubtedly have made this intention explicit in the statute. No such intention appears explicitly in the statute; indeed the structure of the statute leads to the opposite conclusion.

*This opinion is based strictly on § 133 as appearing in St. 1965, c. 764, since it was that version of the statute as to which the opinion was requested. However, § 133 was significantly amended thereafter by St. 1966, c. 261, approved on May 10, 1966.

Accordingly, the requirements of provision (*a*) are applicable only to sentences for the crimes specified in said provision and the requirements of provision (*b*) are applicable to sentences for other crimes, even though one prisoner may be serving sentences for both types of crimes.

You ask, further, whether a prisoner serving two concurrent sentences, one for a crime of violence and one for a non-violent crime, must serve in any event not less than two years on each sentence before becoming eligible for parole. If the two sentences are concurrent, the minimum periods for each sentence are not aggregated. The prisoner would therefore have to serve the longest minimum parole eligibility period, that is, two years. If, however, the sentences do not run concurrently, the prisoner would have to serve not less than two years for each crime of violence plus one year for each non-violent crime.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General.*

79. FEBRUARY 8, 1967.

HONORABLE GEORGE W. WATERS, *Chairman, Board of Standards.*

DEAR SIR:—You have asked my opinion concerning the promulgation of regulations by your agency. You say that, "the Board has found in certain of its regulations . . . relating to electrical equipment and wiring . . . that there have been hardships and misinterpretations." In view of these circumstances, you ask if the Board can "amend or revise the regulations without holding a public hearing as specified in Chapter 143, Section 3B, or does Section 3, paragraph 3 of Chapter 30A [of the General Laws] give the Board the right to make amendments without a public hearing?"

The State Administrative Procedure Act (G. L. c. 30A) was enacted by c. 681 of the Acts of 1954 and has been in effect thereafter. Sections 2 and 3 of the Act set forth the procedural steps to be followed in promulgating administrative regulations.[1] [2] However, procedures established in § 2 are different from those in § 3, and regulations required to be issued under § 2 may not alternatively be issued under § 3.

The first part of § 2 defines the regulations which must be promulgated in accordance with procedures in that section. It states, "Prior to the adoption or amendment of *any regulation as to which a hearing is required by any law,* or any other regulation the violation of which is punishable by fine or imprisonment except a regulation of agency practice or procedure, an agency shall *give notice and hold a public hearing. . . .*" (Emphasis supplied.) Thus, where "a hearing is required by any law," the agency must follow § 2. To determine whether "a hearing is required by any law," it is necessary to examine the laws under which your Board operates.

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1 Not all the steps for promulgating effective regulations are set forth in these two sections. For instance, to be effective, all regulations must be filed with the Secretary of State pursuant to G. L. c. 30, § 37 and G. L. c. 30A, § 5.

2 All agencies subject to G. L. c. 30A must, before issuing regulations, adopt rules under § 9 setting forth the agency procedure, as distinguished from the statutory procedure, to be used in promulgating regulations (see "Uniform Rules for Adjudicatory Proceedings Before Administrative Agencies and For Adopting Regulations", Office of the Attorney General (March 1, 1966)).

The Board of Standards is organized pursuant to G. L. c. 22, § 13. Its responsibilities are enumerated in G. L. c. 143. Section 3B of that Chapter, dealing with the promulgation of regulations by the Board, reads in pertinent part as follows:

"The board shall hold public hearings annually, on the first Tuesday in May and October, and at such other times as it may determine, on petitions for changes in the rules and regulations formulated by it. If, after any such hearing, it shall deem it advisable to make changes in said rules and regulations, it shall appoint a day for a further hearing, and shall give notice thereof and of the changes proposed by advertising in at least one newspaper in each of the cities of Boston, Worcester, Springfield, Fall River, Lowell and Lynn, at least ten days before said hearing. If the board on its own initiative contemplates changes in said rules and regulations, like notice and a hearing shall be given and held before the adoption thereof."

Since under the above statute the Board is required to hold a public hearing before making changes in its regulations, the provisions of § 2 of c. 30A, rather than of § 3, are controlling. Accordingly, except in an emergency situation, the Board must hold a public hearing before promulgating regulations.

In an emergency, an abbreviated procedure is provided for in paragraph (3) of § 2. In such an instance, a public hearing need not be held. However, the emergency regulation remains in effect for three months only. In order to perpetuate the emergency regulation the agency must, during the three-month period, reissue the regulation in accordance with the procedural steps usually followed for promulgating a regulation. Paragraph (3) of § 2 may only be used where a genuine emergency exists and not as an administrative short cut.

In summary, it is my opinion that the Board of Standards cannot, except in an emergency, amend or revise its regulation without holding a public hearing in accordance with the procedures set forth at length in G. L. c. 30A, § 2.[3] The procedures of G. L. c. 30A, § 3 are not, in my opinion, applicable.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General.*

80. FEBRUARY 10, 1967.

HONORABLE ANTHONY P. DEFALCO, *Commissioner of Administration.*

HONORABLE GUY J. RIZZOTTO, *Commissioner of Corporations and Taxation.*

GENTLEMEN:—In a letter from the former Commissioner of Administration and the Commissioner of the Department of Corporations and Taxation, the opinion of the Attorney General has been requested on three

[3] An agency required to adopt and amend regulations under G. L. c. 30A, § 2 may repeal regulations under G. L. c. 30A, § 3. (Compare § 2: "Prior to the *adoption* or *amendment* of any regulation. . . ." with § 3: "Prior to the *adoption* or *amendment* of any regulation other than those subject to Section two or *the repeal of any regulation.* . . .") (Emphasis supplied.)

matters pertaining to the Greenfield-Montague Transportation Area. The letter sets forth the following facts:

"The Transportation Area contemplates the purchase of three buses, at a total estimated cost of $75,000, and the construction of a garage facility at an estimated cost of $90,000. The Town of Greenfield has approved an appropriation in the amount of $115,000 for the purpose of contributing towards this capital expenditure by the Area, and the Town of Montague has approved the appropriation of $51,150 for the same purpose. The Towns have jointly petitioned the Department of Public Utilities for approval, and a hearing has been scheduled by the Department of Public Utilities for December 8, 1966."

The questions as to which an opinion has been requested are as follows:

(1) Whether or not the Commonwealth, acting through the Executive Office for Administration and Finance, may enter into a contract as provided in G. L. c. 161, § 152A to reimburse the Towns of Greenfield and Montague, when it appears from the facts that the purpose of the appropriations is to give the Transportation Area Funds with which to make the initial purchase of the buses and garage facility rather than for the specific purposes set forth in G. L. c. 161, § 152.

(2) Whether or not the Department of Corporations and Taxation, acting through the Director of Accounts, may certify the issuance of notes by said towns under the provisions of G. L. c. 44, § 24, when G. L. c. 44, § 8(12) contains the same limiting purpose provisions as are contained in G. L. c. 161, § 152.

(3) Whether or not the Commonwealth, acting through the Executive Office for Administration and Finance, may enter into a contract to reimburse the Towns of Greenfield and Montague pursuant to the provisions of G. L. c. 161, § 152A if the appropriation by the said Towns is raised by the means of notes rather than by the means of bonds.

The first and third of the foregoing questions have been asked by the Commissioner of Administration, while the second has been asked by the Commissioner of the Department of Corporations and Taxation.

1.

General Laws c. 161, § 152A provides:

"The commonwealth, acting by and through the executive office for administration and finance, may enter into a contract or contracts with the trustees of a transportation area created under the provisions of sections one hundred and forty-three through one hundred and fifty-eight of this chapter whereby the commonwealth agrees to reimburse the cities and towns comprising the area for an amount equal to ninety per cent of the annual debt service on any bonds issued pursuant to section one hundred and fifty-two of this chapter in respect to any equipment or facility for mass transportation purposes acquired by the trustees after the effective date of this act, less the amount received by any such city or town from surplus as provided under section one hundred and fifty-one of this chapter in any year."

The Executive Office for Administration and Finance may, therefore, contract to reimburse a town if the town issues bonds pursuant to G. L.

c. 161, § 152 "in respect to any equipment or facility for mass transportation purposes acquired by the trustees of the transportation area."

General Laws c. 161, § 152 provides, in part:

"For the purpose of acquiring street railway property or other equipment or facility under sections one hundred and forty-three to one hundred and fifty-eight, inclusive, of operating the same, *or of contributing toward the sums expended by the transportation area for capital purposes,* cities and towns may, with the approval of the department, borrow money in excess of the statutory limit, but not exceeding the sum of two per cent of their respective assessed valuation. . . ." (Emphasis supplied.)

Thus, a town may borrow "for the purpose . . . of contributing toward the sums expended by the transportation area for capital purposes. . . ." Clearly, the purchase of buses, and the construction of a garage facility, are "capital purposes" within the meaning of § 152, and said buses and garage come within the terms "equipment or facility for mass transportation purposes" employed in § 152A. The first question asked seems to arise only from the fact that the Towns' borrowing will occur *before* any sums are *actually expended* by the Transportation Area.

I do not believe that § 152 limits a town's power to borrow to the situation where the transportation area has *already* made a capital expenditure. Standing alone, the words "sums expended" could admittedly be read narrowly to mean only "sums already expended." But these words can also be read to include "sums which are to be expended," and consideration of the language immediately surrounding them, and of the entire statute and its purposes, leads me to believe that the latter meaning was intended. "It is a general rule of statutory construction that all provisions must be so construed that they can operate harmoniously together." *McCue* v. *Director of Civil Service,* 325 Mass. 605, 611.

The words "contributing towards," which precede the words "sums expended," suggest an activity still in progress — the outlay of funds to meet *unsatisfied* liabilities. In G. L. c. 161, § 150, the word "contribute" is used in this sense. Under § 150, towns are required to *"contribute* to the discharge of . . . liabilities and obligations" of the transportation area in accordance with a specified formula. (Emphasis supplied.) If the Legislature had intended § 152 to apply only where funds have already been paid out by the Transportation Area, "reimburse" would be the appropriate word. General Laws c. 161, § 152A, where such was the legislative intention, provides: ". . . the commonwealth agrees to *reimburse* the cities and towns comprising the area for an amount equal to ninety per cent of the annual debt service on any bonds issued pursuant to section one hundred and fifty-two. . . ." (Emphasis supplied.)

This interpretation of the term "sums expended" is borne out by a consideration of the practical result of a contrary interpretation. If a transportation area were required to pay for all capital purchases and improvements before becoming eligible for a contribution under § 152, it might not be possible for an area ever to make any such purchases or improvements of significance. Indeed, the *only* statutory means specifically provided for acquiring funds for "capital purposes" is by contribution of cities and towns under the provision in question. A transportation area has no power to raise money by taxation. It may issue short-

term notes for the purpose of meeting "current expenses" only. G. L. c. 161, § 152. It is entitled to annual contributions from the constituent towns, but only to meet operating expenses. G. L. c. 161, §§ 150, 151. Its only other source of funds is the revenue from operating its transportation facilities. However, it is required by G. L. c. 161, § 151 to distribute eighty-five per cent of its annual net profits to the towns. Thus, in order to accumulate the necessary $165,000 for the expenditures involved in this case alone, the Transportation Area would have to realize total net profits of $1,100,000. As a practical matter, this would mean that such expenditures could probably never be made.

The fact that a restricted interpretation of the words sums expended "would thus tend to make the sections wholly ineffective is strong indication that this interpretation does not reflect the legislative intention." *O'Shea* v. *Holyoke,* 345 Mass. 175, 179. These sections were revised and expanded in 1964. At that time, the state aid provisions of § 152A were inserted, and the scope of § 152 broadened. These and other amendments to the General Laws were included in St. 1964, c. 563, entitled, "An Act Abolishing the Metropolitan Transit Authority, Establishing the Massachusetts Bay Transportation Authority, and Providing for the Acquisition and Maintenance of Mass Transportation Facilities and Services Which Shall Be Coordinated With Highway Systems and Urban Development Plans Throughout the Commonwealth." These amendments were enacted for the express purpose of promoting mass transportation in the Commonwealth. With respect to G. L. c. 161, §§ 152 and 152A, this purpose can be accomplished only if those sections are given an interpretation whereby a workable system of state and local aid can be devised.

It is, therefore, my opinion that a town may borrow funds under G. L. c. 161, § 152 for the purpose of contributing to the capital expenditures of a transportation area whether or not such capital expenditures have actually been made at the time of the borrowing. Accordingly (assuming compliance with other statutory requirements), I conclude that the Commonwealth, acting through the Executive Office for Administration and Finance, may enter into an appropriate contract under G. L. c. 161, § 152A with the Trustees of the Greenfield-Montague Transportation Area.

2.

The second of the questions presented involves an interpretation of G. L. c. 44, § 8, which provides in part as follows:

"Cities and towns may incur debt, outside the limit of indebtedness prescribed in section ten, for the following purposes and payable within the periods hereinafter specified.

* * * *

"(12) For acquiring street railway property under sections one hundred and forty-three to one hundred and fifty-eight, inclusive, of chapter one hundred and sixty-one, operating the same, or contributing toward the sums expended by a transportation area for capital purposes, ten years; but the indebtedness so incurred shall not exceed two per cent of the last preceding assessed valuation of the city or town."

The pertinent language of this statute is almost identical to that of G. L. c. 161, § 152 ("contributing toward the sums expended by a trans-

portation area for capital purposes") and reflects an identity of legislative purpose.

My answer to the second question is, therefore, governed by my answer to the first; and, under the facts presented, the Director of Accounts in the Department of Corporations and Taxation may, in my opinion, certify the issuance of the notes referred to under G. L. c. 44, § 24.

3.

The third question, like the first, must be answered in light of G. L. c. 161, § 152A, quoted above. The issue here is whether or not notes to be issued by the Towns are equivalent to "bonds issued pursuant to section one hundred and fifty-two" for purposes of § 152A.

While the terms "bonds" and "notes" have at times been used interchangeably, a contrary pattern has been consistently followed in the General Laws of Massachusetts. Throughout c. 44 of the General Laws, which governs the issuance of bonds and notes by municipalities, these words appear side by side as mutually exclusive terms. See, for example, G. L. c. 44, §§ 8A, 16, 16A, 16B, 16C, 17, 18, 19, 20 and 28. The importance of this distinction is manifest in G. L. c. 44, §§ 23-27, where numerous requirements are imposed upon the issuance of municipal notes but not upon the issuance of municipal bonds. Because of the intimate relationship between the municipal finance provisions of G. L. c. 161 and G. L. c. 44, I conclude that the powers of the Executive Office for Administration and Finance under G. L. c. 161, § 152A with respect to municipal "bonds" do not extend to municipal notes. It is, therefore, my opinion that the Commonwealth, acting through the Executive Office for Administration and Finance, may not enter into a contract to reimburse the Towns of Greenfield and Montague under G. L. c. 161, § 152A, if the appropriation by the Towns is raised by notes rather than bonds.

Very truly yours,

Elliot L. Richardson, *Attorney General.*

81. February 14, 1967.

Ruth Morey, *Chairman, Board of Schoolhouse Structural Standards.*

Dear Madam Chairman:—You have asked the Attorney General for an opinion as to the validity of actions taken by the Board of Schoolhouse Structural Standards following the exhaustion of the funds appropriated by the Legislature for the Board's operation.

The Board was established by c. 675 of the Acts of 1955, since amended by various Acts, including c. 361 of the Acts of 1958, c. 457 of the Acts of 1961, and c. 546 of the Acts of 1964. As now constituted, the Board consists of the Commissioner of Public Safety, the Chief of Inspections of the Department of Public Safety, the Administrator of the School Building Assistance Commission, and eight members appointed by the Governor.

Section 1 of c. 675 of the Acts of 1955, as now in force, provides in pertinent part:

"A majority of said board, constituted as above provided, may transact business but a lesser number may adjourn from time to time.

"Each appointive member of said board shall be paid twenty dollars for each day while in the actual performance of his duties as such, but not exceeding one thousand dollars in any fiscal year, and each member shall receive from the commonwealth all expenses necessarily incurred by him in connection with his official duties.

"Such clerical, technical and other assistance as may be required by the board shall be assigned to it by the commissioner."

General Laws c. 29, § 27 provides in pertinent part:

"Notwithstanding any provision of general law, no department, office, commission and institution shall incur an expense, increase a salary, or employ a new clerk, assistant or other subordinate, unless an appropriation by the general court and an allotment by the governor, sufficient to cover the expense thereof, shall have been made."

General Laws c. 29, § 26 provides:

"Expenses of offices and departments for compensation of officers, members and employees and for other purposes shall not exceed the appropriation made therefor by the general court or the allotments made therefor by the governor. No obligation incurred by any officer or servant of the commonwealth for any purpose in excess of the appropriation or allotment for such purpose for the office, department or institution which he represents, shall impose any liability upon the commonwealth."

Section 26 has been described as "designed to require an official or department to keep expenditures within the amount appropriated and to protect the public credit by preventing the incurring of any indebtedness against the Commonwealth for the payment of which no provision had been made by the Legislature." *Baker* v. *Commonwealth,* 312 Mass. 490, 493. See also *United States Trust Co.* v. *Commonwealth,* 348 Mass. 378, 380-381.

The application of § 26, in an earlier form, to a commission known as the Cattle Commissioners, for whom the Legislature had refused an appropriation, was the subject of an opinion of Attorney General Knowlton in 1898. 1 Op. Atty. Gen. 556. Attorney General Knowlton's opinion dealt with the question whether the Commission should, nevertheless, continue to perform its duties. So pertinent were the Attorney General's views to your inquiry, that I will set forth extracts from his opinion at some length.

First quoting Pub. Sts. c. 16, § 37 (the predecessor of the present G. L. c. 29, § 26), Attorney General Knowlton declared:

"By the positive provisions of the statute above quoted, you have no right to do any acts whatsoever which call for the expenditure of the money of the Commonwealth. The general statutes applicable to your commission imposing duties upon your Board are to be construed in connection with and are limited by the statute I have quoted. For example, it is made your duty to cause horses afflicted with glanders to be killed. In so far as this duty may require the expenditure of money, you have no right, in view of the action of the Legislature, to perform it; and the failure of the Legislature to furnish money for the purpose is to be re-

garded by you as abrogating any duty imposed upon you in that respect. Although by general laws you have been made the agents of the Commonwealth to do certain acts, your agency has been by implication revoked by the failure of the Legislature to furnish you with money for that purpose.

"The foregoing considerations apply to such portion of your duties as involve the expenditure of money. The failure, however, to make an appropriation does not repeal the law establishing your Board and its duties, except as hereinbefore stated, nor that which fixes your compensation. You are still sworn officers of the Commonwealth, duly constituted, charged with the performance without the expenditure of money or the incurring of liability on behalf of the Commonwealth, and entitled to the compensation fixed by law for your services. No appropriation having been made, you cannot at present receive your salary. . . .

"The failure of the Legislature to make appropriation for your work does not require you to abdicate your offices, nor to give up the performance of your duties, excepting in the cases where liability in behalf of the Commonwealth may be incurred. On the contrary, it is the duty of your commission to continue to hold their offices, and to perform the duties thereof, so far as may be, with the expectation that at some future time the Legislature will authorize payment therefor. If you are not willing to continue in office under these conditions, it is your duty to resign."

The foregoing opinion of Attorney General Knowlton should provide an adequate guide to your Board. Following his views, it is my opinion that to the extent that performance of your duties may not subject the Commonwealth to liability, your actions will be valid if otherwise performed in accordance with law; and that if the appointive members of the Board are willing to continue to serve despite the absence of funds to pay their compensation, they may continue to do so, and the actions of the Board, if otherwise in conformity with law, will be valid.

Very truly yours,

Elliot L. Richardson, *Attorney General.*

82. February 14, 1967.

Honorable Edward J. Ribbs, *Commissioner of Public Works.*

Dear Commissioner Ribbs:—In a recent request for an opinion you state the following:

"As a result of a hearing held by the Commissioner of Public Works against Rodolphe Bessette, Director of Waterways, he was ordered suspended by the Commissioner from August 10, 1961 to September 10, 1961 without pay, based upon the Department's own decision of having violated the Department rules.

"Mr. Bessette was also ordered suspended on June 28, 1963 as a direct result of an indictment pending against him in Court. Mr. Bessette was subsequently not found guilty of the charges alleged in said indictment."

In view of these facts you ask the following questions:

"1. Is Mr. Bessette entitled to receive the one month's salary withheld between August 10, 1961 to September 10, 1961?

"2. Is Mr. Bessetté entitled to receive his salary from June 28, 1963 to the date the position of Director of Waterways was abolished? If so on what date was said position abolished?

"3. Is Mr. Bessette entitled to receive interest in both the above cases, if so, at what rate and for what period of time?

"4. In addition to the salary question, during the period of suspension in 1963, Mr. Bessette paid the full premium for Blue Cross and Blue Shield, including the part of the premium which the State would have contributed if he were an employee. Is he entitled to a re-payment of what would have been the State's share of the premium? If so, is he entitled to interest on the same, and at what rate?"

It does not appear from the facts stated in your letter that Mr. Bessette's suspension in 1961 was related to the operation of G. L. c. 30, § 59 (which I shall discuss later), since that statute did not take effect until January 1, 1963. See St. 1962, c. 798, § 1. Beyond making this observation, I am unable to respond to your first question, because your request for opinion contains no facts upon which to base an answer.

With respect to your second question, I quote part of the last paragraph of G. L. c. 30, § 59:

"If the criminal proceedings against the person suspended are terminated without a finding or verdict of guilty on any of the charges on which he was indicted, his suspension shall be forthwith removed, and he shall receive all compensation or salary due him for the period of his suspension. . . ."

It therefore follows that Mr. Bessette was entitled to receive his salary from the date of his suspension, June 28, 1963, to the date on which his position as Director of Waterways was abolished by St. 1963, c. 821, § 2. Since the Governor affixed an emergency preamble to c. 821 (see *Molesworth* v. *Secretary of the Commonwealth*, 347 Mass. 47; *Prescott* v. *Secretary of the Commonwealth*, 299 Mass. 191), the act took effect on the date designated by the Governor, November 15, 1963, and on that date Mr. Bessette's position was abolished.

With respect to your third question, I do not know enough about the facts of Mr. Bessette's earlier suspension in August, 1961 to say whether he has any claim to be reimbursed for that period; thus, I cannot say whether such payment, if made, should bear interest. The payment contemplated by my answer to your second question should not bear interest, since G. L. c. 30, § 59 does not provide for any, either by its own terms or by reference to another statute. In general, there can be no interest paid on money owed by a state unless a statute provides for the payment of interest. *Salthouse* v. *Board of Commrs. of McPherson County*, 115 Kan. 668, 673. *Yancey* v. *North Carolina State Highway & Pub. Works Commn.*, 222 N. C. 106, 112. 49 Am. Jur. 286-287 and cases cited. *Cf.* G. L. c. 258, § 4A; *C. & R. Construction Co.* v. *Commonwealth*, 334 Mass. 232. I note in passing that in two recent cases in which the Supreme Judicial Court ordered "back pay" to be given to illegally discharged employees, the order did not provide for the payment of interest

to these employees. *Chartrand* v. *Registrar of Motor Vehicles,* 347 Mass. 470, 476-477. *McKenna* v. *Commissioner of Mental Health,* 347 Mass. 674, 675, 677.

With respect to your fourth question, I assume that Mr. Bessette, at the time of his second suspension, was an employee whose hospital insurance was paid partly by the Commonwealth pursuant to G. L. c. 32A, § 8(a), which I quote in part:

"With respect to any period of insurance authorized by this chapter which is in effect for an active or retired employee and dependent, there shall be withheld from each payment of salary, wages, pension or retirement allowance fifty per cent of the premium for such insurance, and the commonwealth shall contribute the remaining fifty per cent of said premium. . . ."

Payment of "fringe" benefits such as hospital or disability insurance premiums has been held to be a form of "compensation" to the person covered by the insurance. *Hobbs* v. *Lewis,* 159 F. Supp. 282, 286 (D.D.C.). In view of the purposes of G. L. c. 30, § 59, I am not inclined to give the word "compensation," as it is used therein, a restricted meaning. It is my opinion that the amounts which would have been paid by the Commonwealth for Mr. Bessette's hospital insurance between the date of his second suspension and the date on which his position was abolished should be returned to him. For the reasons indicated in my answer to the third question, the amounts so returned should not include interest.

Very truly yours,

Elliot L. Richardson, *Attorney General.*

83. February 16, 1967.

Honorable Howard Whitmore, Jr., *Commissioner, Metropolitan District Commission.*

Dear Commissioner Whitmore:—You have requested an opinion of the Attorney General on the effect of the creation of the Division of Water Pollution under c. 685 of the Acts of 1966 upon the construction of certain sewerage projects by the Metropolitan District Commission under c. 645 of the Acts of 1951. You have asked three questions regarding these statutes:

1. "Was the requirement of the 1951 law, . . . relative to approval of plans by the department of public health, so altered or changed by the 1966 law . . . that such approval by the department of public health is no longer required?

2. "If the answer to [Question 1] is 'Yes', is approval of such plans by the division of water pollution control now required?

3. "If the answer to [Question 1] is 'No', is approval of such plans by the division of water pollution control . . . now required in addition to department of public health approval?"

The first paragraph of St. 1951, c. 645, § 2, as amended by St. 1958, c. 649, § 1, St. 1963, c. 18, § 1 and St. 1965, c. 674, § 1, authorizes and directs the Metropolitan District Commission to undertake the following projects:

"Project A. The construction of a tunnel between Kosciuszko circle and Deer Island with necessary shafts and appurtenant works. Project B. The construction of a tunnel between Ward street pumping station and Kosciuszko circle with necessary shafts and appurtenant works. Project C. The enlargement of the previously authorized Deer Island Sewage treatment plant to care for the flow from Project A. Project D. The construction of a relief sewer between Boston University bridge and Ward street. Project E. The construction of a relief sewer for the west side and Stony Brook interceptors of the Boston main drainage district. Project F. The construction of a Marginal Conduit pumping station and appurtenant works. Project G. The rehabilitation of tide gates and pumping stations. In constructing said projects A, B, C, D, E and F the commission shall provide for the receipt by the south metropolitan sewerage system of the sewage of the main drainage system of the city of Boston at such place or places as the commission, after consultation with the commissioner of public works of said city, shall determine to be most practicable. The commission shall also make all connections, and construct intercepting sewers necessary to enable the city of Quincy to drain the territory in the Squantum section of said city now connected to the Boston main drainage system into the metropolitan sewerage system."

The requirement that plans for these projects be approved by the Department of Public Health, referred to in your first question, appears in the second paragraph of the same section:

"None of the projects authorized by this section shall be undertaken unless it is approved by the governor; nor shall any act be done under authority of this section, except the making of surveys, plans and borings and other preliminary investigations for submission to the governor for approval, *until the plans of the system of sewerage and sewage disposal herein authorized have been approved by the department of public health.* Upon application to said department for its approval of any sewage disposal works, it shall give a hearing after due notice to the public. At such hearing, plans showing in detail all the work to be done in constructing such sewage disposal works shall be submitted for approval by said department." (Emphasis supplied.)

The Division of Water Pollution Control is established as an agency within the Water Resources Commission, and its responsibilities are defined in G. L. c. 21, §§ 26-50. These sections were added to the General Laws by St. 1966, c. 685, § 1. As its name suggests, the Division is given the duty "to enhance the quality and value of water resources and to establish a program for the prevention, control, and abatement of water pollution." G. L. c. 21, § 27. In order to reconcile this and many other new provisions inserted in the General Laws by c. 685 of the Acts of 1966 with preexisting statutes, the Legislature goes on to provide that "wherever in any general or special law reference is made to the authority to administer water pollution abatement or control laws, such authority shall . . . be vested in the division of water pollution control. . . ." St. 1966, c. 685, § 3.

The answer to the first of your questions depends upon whether or not the above-quoted language of St. 1966, c. 685, § 3 has the effect of entirely substituting approval by the Division of Water Pollution for approval by the Department of Public Health under St. 1951, c. 645, § 2. In my opinion no such total substitution was intended by the Legislature.

Approval by the Department of Public Health has long been a routine requirement in enabling legislation for sewerage projects. During the same year in which the Metropolitan District Commission was authorized to undertake the projects at issue here, the Legislature created the Lanesborough Garden Circle Sewer District and imposed the condition that the plans for its sewerage system be "approved by the state department of public health. . . ." St. 1951, c. 133, § 14. The Legislature, again in the same year, authorized the Town of Clarksburg to construct a system of sewerage and sewage disposal, but again, not "until the plans for said system of sewerage and sewage disposal have been approved by the department of public health. . . ." St. 1951, c. 668, § 9. There have been many other special acts authorizing sewer districts and towns to construct works of this kind, enacted in some cases before the turn of the century (see, for example, St. 1887, c. 403), which include the same requirement of approval by the Department of Public Health and its predecessors. Many of them predate the present-day concern over water pollution, and many of them relate to projects whose geographical location is such that water pollution could scarcely have been a significant concern.

The jurisdiction and responsibilities of the Department of Public Health are, of course, exceedingly broad. Under G. L. c. 111, § 5, the Department is charged with the duty to "take cognizance of the interests, life, health, comfort and convenience among the citizens of the commonwealth," including the conduct of "sanitary investigations and investigations as to the causes of disease. . . ." The Department's functions extend far beyond the control of water pollution; and, important though this subject may be in the construction and operation of sewage disposal facilities, there are many other considerations relative to public health, sanitation and the prevention of contagious disease involved in designing an appropriate sewerage system. We may infer that the Legislature intended the Department to take all these considerations into account in reviewing the projects authorized by St. 1951, c. 645.

Accordingly, since the Legislature, in requiring approval by the Department of Public Health under the 1951 statute, must be assumed to have had in mind more than the Department's then responsibility for administering water pollution abatement or control laws, I am of the opinion that the 1966 law does not abrogate the need for such approval.

In view of my answer to your first question, no answer to your second question is required.

With respect to your third question, I am of the opinion that St. 1966, c. 685 does have the effect of requiring approval by the Division of Water Pollution Control of sewerage projects to be constructed under St. 1951, c. 645, as well as approval thereof by the Department of Public Health. While, as indicated above, the approval provision of St. 1951, c. 645, § 2 was intended to be more than an anti-pollution measure, the abatement and

control of water pollution was plainly within its intended scope. Prior to the 1966 amendments, one of the major functions of the Department of Public Health was to control the pollution or contamination of any or all of the lakes, ponds, streams, tidal waters and flats within the Commonwealth. . . ." G. L. c. 111, § 5. For this reason I think that St. 1951, c. 645, § 2 must be interpreted as containing an implicit "reference" to the authority of the Department of Public Health "to administer water pollution abatement or control laws" without respect to the particular sewerage projects therein authorized. St. 1966, c. 685, § 3. It follows that the approval powers vested by the 1951 act in the Department of Public Health have, in so far as they confer "authority to administer water pollution abatement or control laws" (but not otherwise), been transferred to the Division of Water Pollution Control.

Any other reading of St. 1951, c. 645 and St. 1966, c. 685, § 3 would eliminate an important safeguard provided by the approval requirement of the 1951 statute. St. 1966, c. 685 was enacted to strengthen and consolidate the Commonwealth's efforts in the field of water pollution control. This clear legislative purpose would be undermined if the 1966 statute were interpreted as making it unnecessary that the projects in question meet the standards of the agency primarily charged with water pollution control.

It is, therefore, my opinion that approval by the Division of Water Pollution Control is now required under St. 1951, c. 645, § 2, as well as approval by the Department of Public Health.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General.*

84. FEBRUARY 20, 1967.

HONORABLE HARRY C. SOLOMON, M.D., *Commissioner, Department of Mental Health.*

DEAR COMMISSIONER SOLOMON:—You have requested my opinion relative to the proposed acquisition of land by your department under item 8066-43 of St. 1965, c. 791, for purposes of a community habilitation and daytime treatment center. Item 8066-43 reads as follows:

"For the preparation of plans for a mental health treatment center, as authorized by chapter five hundred and seventy-one of the acts of nineteen hundred and sixty-four, *including the acquisition of certain land by purchase or by eminent domain* under chapter seventy-nine of the General Laws; *provided that no payment shall be made for the purchase of said property* until an independent appraisal of the value of the property has been made by a qualified, disinterested appraiser. $125,000." (Emphasis supplied.)

You state that the basis for said appropriation item was State Building Project Request, Form CO 1 (which I shall hereinafter call the "Request") submitted by you to the Commissioner of Administration on May 20, 1965. You have provided me with a copy of the Request. The property to be acquired, as referred to in the Request, is located on Crane Avenue, Pittsfield. You further state:

"We have recently been advised by the Berkshire Mental Health Association that the Crane Avenue site is no longer desirable and that a site near Onota Lake in Pittsfield should be acquired. This is some 2½ miles from the Crane Avenue site."

You ask whether the appropriation item in its present form would permit acquisition of any parcel of property other than that referred to in the original request form.

In my opinion, item 8066-43 of St. 1965, c. 791, does not authorize acquisition of property other than the Crane Avenue property.

St. 1965, c. 791 was approved by the Governor on December 9, 1965, and item 8066-43 thereof was, as you state, based on your Request previously submitted on May 20, 1965. In the Request, authority is requested solely for the acquisition of *"certain* land with buildings thereon"; and "the property to be acquired" is specifically described in explicit detail, said described property being that located on Crane Avenue only.

In preparing item 8066-43 for insertion in the budget, the Budget Commissioner would have had your Request before him; and, indeed, the references in item 8066-43 to "certain land" and "said property" follow identical language found in the Request where they referred to the Crane Avenue property. By carrying over the terms "certain land" and "said property" from the Request to the actual appropriation, the Legislature indicated that it was granting to your department only the authority sought in your Request — namely, an authority limited to acquisition of the Crane Avenue property.

I accordingly am obliged to conclude that item 8066-43, St. 1965, c. 791, does not authorize acquisition of the property near Onota Lake, or any land other than the Crane Avenue property contained in the Request upon which said item was based.

Very truly yours,

Elliot L. Richardson, *Attorney General.*

85. February 20, 1967.

Honorable John A. Gavin, *Commissioner of Correction.*

Dear Sir:—You have requested an opinion of the Attorney General relative to a George C. Toumpouras, who held the position of Correction Social Worker in the Department of Correction. You have attached to your request several letters, including a letter dated November 17, 1966, from an attorney representing Mr. Toumpouras. This letter is, in substance, a claim brought on behalf of Mr. Toumpouras for salary which he alleges is due him from your Department.

From these various documents, there appear the following facts: On September 15, 1957, Mr. Toumpouras was appointed by the then Governor of the Commonwealth to the position of Associate Commissioner of Public Works. Simultaneously, the then Commissioner of Correction granted him a leave of absence without pay from his position of Correction Social Worker with the Department of Correction. Further leaves of absence without pay were granted at six-month intervals, up to and including December 31, 1966. In all instances, Mr. Toumpouras requested the

leaves of absence. On October 15, 1963, Mr. Toumpouras was suspended from his position of Associate Commissioner of Public Works by the then Governor of the Commonwealth pursuant to G. L. c. 30, § 59 (the so-called Perry Law) as a consequence of pending criminal indictments against him based on alleged misconduct in his position as Associate Commissioner of Public Works. These indictments were nolle prossed on July 29, 1966.

St. 1963, c. 821, effected a reorganization of the Department of Public Works. Pursuant to § 4 thereof, the tenure of the then Associate Commissioners (the office held by Mr. Toumpouras) was to cease upon qualification of two Associate Commissioners appointed under the provisions of § 1. The two Associate Commissioners were appointed on December 30, 1963. As a result of a request from the Honorable Edward J. Ribbs, Commissioner of Public Works, it was my predecessor's opinion, with which I concur, that since the criminal proceedings terminated against Mr. Toumpouras without a finding or verdict of guilty on any of the charges on which he was indicted, Mr. Toumpouras was entitled to receive whatever salary would ordinarily have been paid him from the date of his suspension to the date of qualification of the two Associate Commissioners. Op. Atty. Gen. 66/67 No. 2 (interpreting G. L. c. 30, § 59). From the letter of the attorney for Mr. Toumpouras, it does appear that Mr. Toumpouras received from the Department of Public Works his salary from the date of suspension (October 15, 1963) to the date of the qualification (December 30, 1963) of the two Associate Commissioners.

He now alleges that he is entitled to receive his salary from the Department of Correction from December 31, 1963 to July 29, 1966 (the date the indictments were nolle prossed). He contends that it would have been contrary to both the meaning and intent of G. L. c. 30, § 59 for one department of the Commonwealth to take back an employee who was suspended from another department as a result of criminal indictments returned against him. He states that for this reason, and for reasons of "personal embarrassment," he never requested to be taken back by the Department of Correction. Thus, he submits that G. L. c. 30, § 59 necessitates the conclusion that he is now entitled to be fully compensated for the period from December 31, 1963 to July 29, 1966, since the criminal proceedings referred to were "terminated without a finding or verdict of guilty on any of the charges on which he was indicted."

On the foregoing facts, you have requested my opinion regarding his claim.

This claim must, in my opinion, be disallowed under the actual situation you present. General Laws c. 30, § 59 does not authorize reimbursement for back pay except for any period during which an employee was "suspended." Since Mr. Toumpouras was not under any form of suspension by your Department from December 31, 1963 to July 29, 1966, the "Perry Law" does not authorize reimbursement for that period. Mr. Toumpouras voluntarily sought and was granted a leave of absence without pay up to and including December 31, 1966. At six-month intervals during the entire period for which he now seeks compensation, he renewed his voluntary request for a leave of absence without pay. I know of no authority which would permit you to rely on anything but the outward manifestations of a person under such circumstances. *Cf., Greany* v. *McCormick,* 273 Mass.

250, 253 and cases cited. Mr. Toumpouras' personal and unexpressed reasons for seeking the leave of absence without pay are not relevant. *Ibid.* The fact is, he did so.

Furthermore, G. L. c. 30, §59 does not prevent a department of the Commonwealth from taking back an employee who was suspended from another department as the result of criminal indictments returned against him. Suspension of an employee is only permissive. The statute says "may . . . suspend." The use of the word "may" in a statute commonly imports discretion. *E.g., Dascalakis* v. *Commonwealth*, 244 Mass. 568, 569; *Irwin* v. *Municipal Court of the Brighton District*, 298 Mass. 158, 160; *Turnpike Amusement Park, Inc.* v. *Licensing Commission of Cambridge*, 343 Mass. 435, 437. I recognize that in most situations where an officer or employee of the Commonwealth is indicted for misconduct in connection with his office or employment an appointing authority will wish to avail itself of G. L. c. 30, § 59 and suspend the officer or employee. Nonetheless in exceptional circumstances an appointing authority may have sound reasons for continuing the employment of the indicted officer or employee. I find nothing in the statute that requires a different construction. See *Turnpike Amusement Park, Inc.* v. *Licensing Commission of Cambridge, supra* at 437-438.

Only the Department of Correction, as the appointing authority in question, had the power to decide whether or not to suspend Mr. Toumpouras from his position as Social Worker. However, your Department was never asked to reinstate Mr. Toumpouras and never had occasion to exercise this power. It is unnecessary, therefore, to speculate as to what you would have done had Mr. Toumpouras asked to return to active status. Suffice to say that at no time during the period in question was Mr. Toumpouras suspended by the Department of Correction. It is therefore my opinion that Mr. Toumpouras' claim for salary cannot be allowed.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General.*

86. FEBRUARY 21, 1967.

MR. MALCOLM E. GRAF, *Director and Chief Engineer, Water Resources Commission.*

DEAR MR. GRAF:—In your letter of December 14, 1966 you requested an opinion with reference to c. 581 of the Acts of 1966. You have asked the following questions:

1. "Where section 2 of said Act states '. . . directed to construct an 850 foot long dam . . . with a spillway at elevation 128 . . . immediately above the crossing of said river by Pond Street . . .' does this mean that we cannot make reasonable adjustment in location or elevation as may be determined by careful surveys and borings in the vicinity?*

*Section 2 reads as follows: "Said commission is hereby further authorized and directed to construct an eight hundred and fifty foot long low head earth dam with a spillway elevation of one hundred and twenty-eight in the town of Braintree on the Upper Blue Hill river immediately above the crossing of said river by Pond Street for the diversion of the flood runoff of said river, said dam raising the level of the water in the Blue Hill river to elevation one hundred and twenty-seven at which it will flow by gravity through a forty-two inch culvert into Great Pond."

2. "Must we keep the maximum level of the water in the reservoir at elevation 127?

3. "Could we, if it was found to be more feasible, excavate a pool to be pumped from in lieu of a dam?"

Before answering your questions, I observe that the feasibility report does not show a crossing of the Blue Hill River by Pond Street in Braintree. Since Pond Street in Randolph continues as West Street in Braintree, I think the Act is to be read to refer to a crossing by West Street. Apparently the feasibility study disclosed the possibility of building the proposed dam at a point a short distance above that crossing. Such a dam, however, would not be wholly "in the Town of Braintree," because at that point the Blue Hill River is the dividing line between the Town of Braintree and the City of Quincy. A dam across that stream at that location would be located in both municipalities.

Notwithstanding these inaccuracies, the dam's intended location seems sufficiently plain from the legislation.

In answer to Question 1, the statutory location and elevation requirements must, in my opinion, be substantially adhered to, although with reasonable tolerances. I would add that if you find that a dam of prescribed height may be constructed at the prescribed location, but of a slightly different length because of a difference in measurement between the uplands on each side to be connected by the dam, it is my opinion that you may construct such a dam even though the length measurement may vary slightly from that called for in the statute. The elevation of the spillway, however, would seem to be more critical, because of its possible effect on surrounding lands or purposes to be served. If it is possible to construct to the specified elevation without flooding either private property on the one hand or public facilities, such as Route 128, on the other hand, the specified elevation should be observed, always, of course, within reasonable tolerances. If it is not possible for the reasons above stated, or other reasons, to build to approximately the specified height, you should return to the Legislature for clarification or modification of its directive. Similarly, you should return to the Legislature if the dam cannot be constructed at a location reasonably within the language, "immediately above the crossing of said river by Pond [West] Street."

In answer to Question 2, the dam should be so constructed that the maximum level of water in the reservoir behind the dam would be elevation 127, under foreseeable conditions.

My answer to Question 3 is in the negative. Section 2 of St. 1966, c. 581, provides that the purpose of the dam is "for the diversion of the flood runoff of said river. . . ." The intent of this legislation is to provide a flood control reservoir with perhaps some incidental benefit to local water supply resources. The construction of the pool to which you have referred was not specifically authorized and would not accomplish what is at least the declared purpose of the legislation.

In view of the problems raised by your questions relative to this legislation, you may well determine that you should return to the Legislature for a somewhat broader or different authority before proceeding with the work. Certainly, if, as you suggest in your letter, you find that it is possi-

ble to "provide a better job at a lower cost" by departing from the requirements of St. 1966, c. 581, you will doubtless want to make your views known to the Legislature.

Very truly yours,

Elliot L. Richardson, *Attorney General.*

87. February 27, 1967.

Honorable Robert L. Yasi, *Commissioner of Natural Resources.*

Dear Commissioner Yasi:—Your predecessor in office has requested an opinion of the Attorney General as to whether or not G. L. c. 130, § 80 requires a certificate for

(1) "Sportsfishermen who sell their catches to persons who sell at wholesale or retail"; or

(2) "Fishing vessel catches which are sold to persons who resell at wholesale or retail."

The introductory paragraph of G. L. c. 130, § 80 provides (with exceptions not here relevant) that "no person shall engage in the commercial distribution of fish in this commonwealth as set forth herein unless he is the holder of a certificate hereinafter mentioned in full force and effect therefor. . . ." The next four paragraphs of § 80 deal with specific activities and the types of certificates required therefor. These requirements are as follows:

(1) A "bed certificate" for commercial use, digging or taking of *shellfish* other than scallops;

(2) A "dealer's shellfish certificate" for commercial distribution of *shellfish* or operation of a shucking plant;

(3) A "dealer's shellfish shipping certificate" for purchases of *shellfish* for shipment outside the Commonwealth, or for maintaining a packing plant for such shipment, and a "digger's shellfish shipping certificate" for digging or taking *shellfish* for such shipment or packing;

(4) A "wholesale fish dealer's certificate" for commercial distribution of fish *other than shellfish* by a wholesale dealer.

Thus, § 80 does not purport to require certificates for *all* persons who "engage in the commercial distribution of fish." Rather, its introductory paragraph refers only to "the commercial distribution of fish in this commonwealth *as set forth herein,*" and to "a certificate *hereinafter mentioned.*" (Emphasis supplied.) In this way the application of § 80 is confined to the four types of "commercial distribution of fish" enumerated above and to the particular types of certificates mentioned by the statute in reference thereto.

The first three of these four types of activities relate exclusively to shellfish. Assuming that neither of the questions presented was directed at such activities, I conclude that the only type of certificate (if any) required by a sportsfisherman or fishing vessel would be a "wholesale fish dealer's certificate."

The full text of the provision in § 80 requiring that type of certificate is as follows:

"No person, as a wholesale dealer, shall engage in the commercial distribution of fish other than shellfish within this commonwealth or ship the same outside the commonwealth without first obtaining a wholesale fish dealer's certificate."

The term "wholesale dealer," as used in the foregoing provision is defined in G. L. c. 130, § 1 as "any person who distributes fish commercially in bulk or for resale by a dealer, or who operates branch stores for the retail sale of fish."

A sportsfisherman who sells his catches is not normally one who "distributes fish commercially in bulk," and is plainly not a branch store operator. While he may under some circumstances be one who sells fish "for resale by a dealer," I do not think that the Legislature intended the term "wholesale dealer" to include a bona fide sportsfisherman who engages occasionally and spontaneously in isolated transactions involving the sale of small quantities of surplus fish. The definition of "wholesale dealer" in § 1 is restricted to a "person who distributes fish *commercially,*" and the certificate requirement in § 80 to "the *commercial* distribution of fish." (Emphasis supplied.) A sportsfisherman who on rare occasions sells a few fish that he cannot himself use would not seem to be engaging in a "commercial" activity, as that term is normally understood.

Still, I do not believe that all fishermen who claim to be fishing solely for recreation are exempt from the statutory requirement. If a fisherman makes a practice of selling his catches for resale by dealers, or if he sells a substantial number of fish for such resale, I think that the Department of Natural Resources would be justified in treating him as a "wholesale dealer" and requiring him to obtain a certificate.

There will inevitably be occasions when it will be difficult to draw the line between isolated non-commercial transactions and commercial activity. In dealing with such cases the Department may appropriately take into account that a certificate can be obtained for the relatively small fee of $20. G. L. c. 130, § 83. It is also significant that § 80 seeks to protect the public health* and the public's interest in natural resources. The determination in borderline cases, as to whether or not a certificate should be required is one which is most properly made by your Department, focusing its experience and expertise on the immediate factual situation.

The answer to part (2) of the question depends upon the type of "fishing vessel catches" referred to. If reference is to the catch of a fisherman who engages in fishing as a business or occupation, I am of the opinion that he is a "wholesale dealer" as that term is defined in G. L. c. 130, § 1, and must obtain the "wholesale fish dealer's certificate" required by G. L.

*The fact that G. L. c. 130, § 80 was intended in part as a public health measure is apparent from the following provision thereof:

". . . At the request of the commissioner of public health, or of his own motion, the director shall revoke and cancel and require the surrender of any certificate issued by him under this section if, in his opinion, after a hearing, after due notice, by him or some person designated by him, the holder thereof is guilty of violating any rule or regulation of the director or of the department of public health pertaining to fish or the sale thereof, or any provision of this section or section seventy-five, or upon a change in the facts and conditions set forth in such certificate. Pending the hearing the certificate shall be suspended. Whoever violates any provision of this section shall be punished by a fine of not less than ten nor more than fifty dollars or by imprisonment for thirty days, or both."

c. 130, § 80. There is no statutory exemption for commercial fishermen. Nor is there any parallel system of licensing or certification to suggest that they be treated otherwise than as wholesale dealers.

If, on the other hand, the question refers to the surplus catch of a charter-party fishing boat engaged by a group of sportsfishermen the criteria suggested above in connection with sportsfishermen would apply. In general, I am of the opinion that if a charter boat operator makes a practice of selling excess fish for resale, and such sales are not so infrequent and isolated as to fall short of being a "commercial" activity within the ordinary meaning of that term, he should be required to obtain a certificate under G. L. c. 130, § 80.

The factual determination as to whether or not your Department should insist upon the procurement of a certificate for the sale of fishing vessel catches in borderline situations, as indicated in my answer to part (1) of the question, is one which is most properly made by your Department.

Very truly yours,

Elliot L. Richardson, *Attorney General.*

88. February 27, 1967.

Honorable James T. Bleiler, *Chairman, Outdoor Advertising Board.*

Dear Mr. Bleiler:—By letter dated December 21, 1966, you have requested an opinion of the Attorney General on certain questions relating to the application of c. 93, §§ 29 and 29A, relevant portions of which are set forth in your letter.

Your first question is:

"Under each of the forms of local government in the Commonwealth, what officer or body of the local government may make objection to an application for a permit to maintain an advertising device in the city or town, and request a hearing on such application?"

Section 29A is applicable here. Its pertinent provisions are:

"Whenever, within thirty days after notification to the city or town, the board shall have received written objection to an application for 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."

This language contains no specific statement as to who in the city or town is entitled to file written objections. We must, therefore, consider the intent of the Legislature in providing that before granting a permit, consideration must be given by the Board to any written objection to an application received in thirty days after "notification to the city or town" and hold a public hearing if given "written notice of intention to appear in opposition."

The obvious intent, in my opinion, is to make certain that before a billboard is erected in a city or town, the local authorities may have an opportunity to call to the attention of the Board any relevant objections. These objections may be based on specific ordinances or by-laws, or they may rest on broad grounds of public policy. They may relate to safety factors, or be merely aesthetic. See *General Outdoor Advertising Co.* v. *Department of Public Works,* 289 Mass. 149, 159. The Board is not required to comply with them, but it is required to listen to them if they relate to "the proper control and restriction of billboards, signs and other advertising devices." (§ 29.)

If this is the intent of the statute, as I think it is, then it is not of major importance which officer or board (or agent of such officer or board) raises the objection. It is important only that the officer or board have a legal duty which is relevant to the question, and that the objection be heard and weighed. For example, if a building inspector, having a duty to enforce the building or zoning by-laws, considers the proposed structure a violation of such by-laws, he should be able to object and be heard on his objection.

If a policy-making board, such as a city council, the selectmen of a town, or a planning board wishes to raise an objection based on grounds of local public policy, it should be able to do so.

As long as the written objection required by § 29A comes from an official body or official of a city or town whose duties, policy making or otherwise, have relevance to the granting of the permit, I am of the opinion that it must be received and considered and a public hearing held, if requested, by the official body or official. Inasmuch as all written objections must be submitted so as to be received within thirty days after notification by your board, all objections from a particular municipality can be considered in a single hearing.

In this connection, the provision in § 5 of the Rules and Regulations of the Board providing for "the approval of the Mayor and Aldermen, if in a city, and the Board of Selectmen, if in a town," of temporary sign locations does not obviate the necessity for consideration of a written objection received from *another* official city or town body or officer, having duties in relation thereto, and a hearing, if requested. Your rules and regulations should be amended to make this clear.

For these reasons, my answer to your first question is that any officer or official body of a city or town, which or who has an official duty to the town, whether executive or policy making in nature, which the granting of a permit might in any way affect, is entitled to make an objection in writing to your board under the provisions of § 29A.

The statute requires that if a written objection is filed, it must be considered, and that if notice of intention to appear is filed, a hearing must be held. At the same hearing, it is within the discretion of your board to hear other municipal officials if your board sees fit to do so, and to attach such weight to the testimony and opinions adduced at that hearing as you think is justified.

Secondly, you ask:

"May a city or town delegate the authority to approve or disapprove an

application for a permit and to request a hearing to a subordinate official of the city or town?"

The statute, as pointed out above, does not give cities or towns authority to approve or disapprove applications. So far as your Board has done so by regulation, you may specify what official or board is to give the approval. However, as stated above, the Board must itself consider written objections and hold a hearing upon receipt of written notice of intention to appear in opposition from any municipal officer or board interested.

I see no reason why this authority may not be delegated by the officer or boards concerned.

Your third and final question is whether your Board should demand written proof of such delegation of authority before accepting action by a subordinate official as the action of a city or town.

If your Board, in its experience, finds that such a requirement is desirable, it cannot be said to be unreasonable. However, as stated in my answer to your first question, since in my opinion an objection can be lodged and a hearing insisted upon by any municipal officer or board having duties broadly relating to the subject matter, such delegation need only be shown to have come from such an officer or board.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General.*

89. MARCH 7, 1967.

SAMUEL M. FLAKSMAN, ESQUIRE, *Executive Secretary of the Executive Council.*

DEAR MR. FLAKSMAN:—You have asked, in behalf of the Executive Council, my opinion as to whether veterans' benefits under G. L. c. 115, as amended, may be paid to a veteran whose alleged need for such benefits arises from the fact that he is engaging in a strike against his employer as a result of a labor dispute.

You state that two previous attorneys general have rendered conflicting written opinions interpreting the applicable language in c. 115, and the Council wishes to resolve the matter at this time.

G. L. c. 115 § 5 in ¶2 states in part:

". . . [S]uch benefits shall not be paid to any person who is able to support himself. . . ."

and in ¶3:

". . . [U]nless the commissioner, at his discretion, shall otherwise determine, no veterans' benefits shall be paid . . . to or for any veteran or applicant if the necessity therefor is caused by his voluntary idleness. . . ."

On July 19, 1948, the Attorney General ruled that it was his opinion that:

". . . to strike and to remain on strike without seeking employment with a new employer is to engage in 'voluntary idleness,' as the quoted words

are used in said Chapter 115, and if the necessity for veterans' benefits is caused by such voluntary idleness, under the terms of the statute they may not be paid." *Report of the Attorney General for the Year Ending June 30, 1948* [*sic*], p. 75.

On October 8, 1949, his successor as Attorney General, in a more lengthy opinion, ruled to the contrary, stating in part,

"The particular language in [c. 115] . . . is to be read not only in conjunction with the entire context of the section from which the language . . . has been extracted but also in conjunction with the context of the entire chapter in so far as the chapter relates to veterans' benefits. All this is necessary in order to arrive at a fair, reasonable and rational conclusion in determining the legislative intention." *Report of the Attorney General for the Year Ending June 30, 1950,* p. 25.

In an opinion on another matter, the Attorney General on October 15, 1958, stated:

"As a general proposition, any veteran who is participating in a lawful strike is entitled to receive veterans' benefits provided he satisfies the requirements of the statute." *Report of the Attorney General for the Year Ending June 30, 1959,* p. 43.

Since 1949, the year in which an opinion was rendered that striking veterans could receive benefits, the General Court has amended § 5 no less than nine times, including a 1956 amendment which completely rewrote ¶3 — the paragraph which contains the language in question.

Prior to 1956 G. L. c. 115 § 5 provided:

"No veteran's benefits shall be paid to or for any applicant if the necessity therefor is caused by his voluntary idleness . . . unless the commissioner, after a hearing, shall otherwise determine. . . ."
In rewriting this paragraph, in 1956, the General Court struck the requirement of a hearing and granted to the Commissioner of Veterans' Services his present unconditional discretionary power to pay benefits even if the necessity therefor is caused by the voluntary idleness of the veteran.

The Commissioner of Veterans' Services is the agent charged with administration of G. L. c. 115. It was the Commissioner who sought and received the 1949 opinion. He has relied upon that opinion in exercising his statutory discretion and in determining the qualification of applicants for veterans' benefits under § 5 of c. 115 for nearly 18 years.

If the General Court had not been in accord with the administrative practice of paying veterans' benefits to veterans on strike, it could have added appropriate language to the statute at any time and would most certainly have done so in 1956 when ¶3 was totally rewritten. It is significant that the 1956 amendment actually strengthened the commissioner's discretionary power to confer benefits.

The Supreme Judicial Court in a 1964 decision stated:

"The duty of statutory interpretation is for the courts. Nevertheless, particularly under an ambiguous statute . . . the details of legislative policy, not spelt out in the statute, may appropriately be determined, at

least in the first instance, by an agency charged with administration of the statute." *Cleary* v. *Cardullo's Inc.*, 347 Mass. 337, 344.

I am accordingly not inclined at this time to issue an opinion which might have the effect of altering well-settled administrative policy which has been in existence with apparent legislative acquiescence, for nearly a generation.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General.*

90. MARCH 13, 1967.

HONORABLE EDWARD J. RIBBS, *Commissioner of Public Works.*

DEAR COMMISSIONER RIBBS:—Your predecessor has requested the opinion of the Attorney General upon the following questions:

"1. Where there is no written notice to the Department of a claim from the collector of taxes of the town in which such real estate is located under Section 44A of Chapter 79 when real estate is taken in whole or in part by the Department by eminent domain:

"a. Can the Department pay said town that portion of a damage award allocated to taxes; or

"b. Must the Department pay said portion of a damage award allocated to taxes to the person from whom the taking was made?

"2. In view of your opinion to me dated March 24, 1965, on page 2 thereof, in which you state, 'It is my opinion that interest is payable upon that portion of a damage award allocated to taxes,' and if the collector of taxes of the town in which said real estate is located, gives the Department written notice of a claim under Section 44A of Chapter 79, to whom shall the Department pay said interest allocated to taxes — to the collector of taxes of the town in which such real estate is located or to the person from whom the taking was made?

"3. If the collector of taxes of the town in which such real estate is located fails to give the written notice of claim provided in Section 44A of Chapter 79, to whom shall the interest allocated to taxes be paid?"

General Laws, c. 79, § 44A, to which reference is made in all of these questions, provides as follows:

"If real estate taken in whole or in part by eminent domain was at the time of said taking subject to any lien for taxes, assessments or other charges, which is extinguished by such taking, and if the collector of taxes of the town in which such real estate is located gives written notice of a claim of the amount covered by such lien to the body politic or corporate, on behalf of which such taking was made, prior to the payment of any award of damages for such taking or to the entry of judgment therefor, said collector shall be entitled to be paid such amount before any payment of damages for such taking is made to any other party; and any amount so payable on account of such taxes, assessments or other charges shall be deducted from the amount of such damages otherwise payable."

In answer to Question 1, I am of the opinion that if the Collector of Taxes fails to give written notice as provided in G. L. c. 79, § 44A, your Department may not pay any portion of the damages awarded for land taken to the municipality in which it is located, but must pay the entire amount of such damages to the person from whom the land is taken.

A taking of land by eminent domain extinguishes any tax lien upon such land. *Collector of Taxes* v. *Revere Building, Inc.*, 276 Mass. 576; *Richardson* v. *Boston,* 148 Mass. 508. The purpose of G. L. c. 79, § 44A is to establish a procedure whereby the Collector of Taxes may recover directly from the taking authority the amount secured by the lien prior to the destruction of that lien by the taking. General Laws c. 79, § 7F requires that the Collector of Taxes of a municipality be notified whenever land therein is taken. The initiative is then left with the Collector of Taxes. General Laws c. 79, § 44A provides in plain language that the municipality is "entitled" to be paid the amount secured by the lien "if" the Collector of Taxes "gives written notice" to the taking agency "prior to the payment of any award of damages for such taking or to the entry of judgment therefor. . . ."

The Collector of Taxes must therefore act within the statutory period, or forfeit the opportunity to avail himself of G. L. c. 79, § 44A. Apart from § 44A, your Department is given no authority to make direct payment to the Collector of Taxes of amounts owing on account of back taxes.

Your reference in Question 1 to "that portion of a damage award allocated to taxes" is evidently directed at the following provision of G. L. c. 79, § 12:

"Whenever the title or interest taken is such that the property will be exempt from taxation so long as it is held and used for the purposes for which it is taken, 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 which, if the tax were apportioned pro rata according to the number of days in such year, would be allocable to the days ensuing after the taking."

The purpose of this provision is to reimburse the owner of the land taken for a fair share of the taxes assessed upon his property "in the year it is taken". It appears in c. 79 as an element of damages payable to anyone from whom taxable land is taken, in the same sense that the value of the land taken is an element of such damages.

The purpose of G. L. c. 79, § 44A is entirely different. That section has no effect on the *amount* of damages payable, but only on their *apportionment*. Moreover, the amount allocable to the Collector of Taxes under § 44A bears no necessary relation to the amount payable under § 12; § 44A is broader in that it applies to all local taxes, rather than only those assessed during the year of the taking, and to "assessments and other charges" as well as taxes; § 12 is broader in that it applies to all tax liabilities during the year of the taking, rather than only those taxes which remain *unpaid*. Contrary to the implication of Question 1, the amount payable to the Collector of Taxes, upon his filing of notice under § 44A, is drawn from the total damages awarded, without regard to the amount of those damages (if any) arising from the tax apportionment provision of § 12. Since the latter type of damages is treated no differently than other types of land

damages, when the Collector files notice under § 44A, I see no reason for them to receive special treatment if the Collector fails to file such notice.

It is therefore my opinion that your Department has no authority to pay a municipality any sum on account of taxes owing on land taken unless the Collector of Taxes has fulfilled the condition of written notice in accordance with G. L. c. 79, § 44A. In the absence of such notice, the total award of damages, including that portion thereof attributable to local taxes, must be paid to the person from whom the land is taken.

Questions 2 and 3 arise from an Opinion of the Attorney General dated March 24, 1965, in which the then Attorney General stated that "interest is payable upon that portion of a damage award allocated to taxes." *Report of the Attorney General for the Year Ending June 30, 1965*, p. 250. Questions 2 and 3 can be resolved into the single question: to whom is such interest payable? I am of the opinion that it is payable to the person from whom the property is taken regardless of whether or not the Collector of Taxes has filed notice under G. L. c. 79, § 44A.

General Laws c. 79, § 37 provides that "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. . . ." General Laws c. 79, § 39 provides that when a land damage case is settled, "the amount of such settlement shall bear interest at the rate of six per cent per annum from the date of such settlement. . . ." Both sections speak in terms of interest payable on the damages as a whole, without distinguishing between the interest attributable to the value of the land taken and that attributable to the tax apportionment. There is nothing in these sections or in G. L. c. 79, § 44A to suggest that any portion of such interest is payable to the Collector of Taxes.

As indicated in my answer to Question 1, the Collector of Taxes who gives notice according to § 44A has a priority claim against taking agency for all amounts "payable on account of . . . taxes, assessments or other charges" upon the land taken. Such "other charges" include any interest owing to the municipality by reason of tax arrearages. Were the municipality also entitled to the interest payable on account of the tax reimbursement under G. L. c. 79, § 12, the municipality would be receiving a windfall. If the Legislature had intended such a peculiar result, I am convinced that it would have expressed this intention in clear language.

It is therefore my opinion that interest payable on account of damages to reimburse a landowner for local taxes, like interest on other elements of damage arising from the taking of land, is payable, in all instances, to the owner of the land.

Very truly yours,
ELLIOT L. RICHARDSON, *Attorney General.*

91. MARCH 16, 1967.

MR. WILLIAM G. DWYER, *President, Board of Regional Community Colleges.*

DEAR MR. DWYER:—You have asked my opinion on the application of c. 601 of the Acts of 1966 to those educational programs in the community colleges, operating under the Board of Regional Community Colleges,

which are offered in the evening and summer divisions, as authorized by G. L. c. 15, § 39, which provides:

"Each regional community college may conduct summer sessions, provided such sessions are operated at no expense to the commonwealth. Each regional community college may conduct evening classes, provided such classes are operated at no expense to the commonwealth."

You state in your letter to me that:

"The community colleges have been offering evening and summer courses. . . Faculty salaries, administration of the programs, and clerical support are paid for completely from student tuition and fees. For a program to be self-supporting, it is necessary to have an enrollment of 15 paying students in a given course. Without this number, the course cannot pay for itself and the college does not have access to other funds to make up the deficit."

Chapter 601 of the Acts of 1966 authorizes the Department of Education to issue a Certificate of Tuition Exemption to any state institution of higher education within the Commonwealth to any Vietnam veteran as defined in G. L. c. 4, § 7 whose service in Vietnam was credited to the Commonwealth.

You have asked my opinion whether:

"1. The Board may inform Vietnam veterans that Ch. 601 of the Acts of 1966 does not apply to those programs which are self-supporting and are, therefore, not financed out of state funds, or

"2. The Board should direct the separate colleges that there must be an enrollment of 15 paying students in addition to Vietnam veterans in each course offered in the evening and summer divisions, in order to make the offering of such courses possible."

I interpret your first alternative as, in effect, to deny any tuition exemption whatever to Vietnam veterans even where such exemption could be granted without expense to the Commonwealth. Your second alternative would recognize the exemption to the extent — but only to the extent — it could be granted without expense to the Commonwealth. I think that the second alternative is correct.

Under G. L. c. 15, § 39, summer sessions and evening courses must be self-supporting. Moreover, G. L. c. 29, §§ 26 and 27 provide that no department, office, commission or institution shall incur an expense unless an appropriation by the General Court and an allotment by the Governor, sufficient to cover such expense, shall have been made. Accordingly, it seems clear that a community college need not, and indeed may not, admit a Vietnam veteran on a tuition-free basis if to do so means to operate the summer session or evening classes so as to incur any expense to the Commonwealth.

If, however, a course has sufficient tuition-paying students to enable it to be given without expense to the Commonwealth, I am of the opinion that students eligible for tuition exemption under c. 601 could be enrolled in that course; and I think that to do so would be in keeping with the Legislature's intent in enacting c. 601.

As authority to issue the Certificate of Tuition Exemption under c. 601 is given to the Department of Education, I have discussed your request for this opinion with the Commissioner and am sending him a copy hereof.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General.*

92. MARCH 16, 1967.

HONORABLE THEODORE W. SCHULENBERG, *Commissioner of Commerce and Development.*

DEAR COMMISSIONER SCHULENBERG:—You have asked my opinion on several questions involving interpretation of G. L. c. 23A, which provides for the appointment by you, subject to the approval of the governor, of advisory committees to assist your department in the discharge of its duties.

Specifically, your questions are:

1. Are you limited to the specific advisory committees set forth in the second paragraph of § 6?

2. If you are not so limited, may you appoint additional advisory committees within divisions or bureaus of the department, all necessary in your opinion, to assist the department?

3. If you do make such appointments in addition to the specific committees named in paragraph 2 of § 6, may the members be reimbursed for expenses?

General Laws c. 23A, § 6 states in part:

"To assist the department in the discharge of its duties the commissioner shall appoint, without regard to chapter thirty-one but with the approval of the governor, advisory committees from among interested citizens of the commonwealth. There shall be advisory committees on: . . . ."

The statute in paragraph 2 then names eleven specific advisory committees which you are to appoint. Paragraph 3 states, in part:

"Members of such committees shall receive no compensation for their services, but may be reimbursed for their expenses. Such committees shall receive assistance from appropriate bureaus of the department as designated by the commissioner."

In answer to your first question, I do not think that G. L. c. 23A, § 6 provides authority for the appointment of advisory committees other than the ones listed by name therein. I reach this conclusion from a reading of the statute as a whole. The first sentence says that the commission "*shall* appoint" advisory committees to assist the department, and specifies that the commissioner shall act with the approval of the governor and "without regard to chapter thirty-one." The next sentence says "There shall be advisory committees on:" and there follows a detailed listing of

some eleven committees covering a wide variety of functions. The concluding paragraph of § 6 provides for reimbursement of committee members' expenses, assistance from appropriate bureaus within the department, and the issuance of annual reports by each committee on or before the first of November.

In my opinion, § 6 reflects a comprehensive legislative formulation establishing specific committees within your department. While the first sentence of § 6, taken alone, might be said to authorize the establishment of advisory committees generally, the use of the word "shall' in said sentence indicates that all the committees contemplated by § 6 have to be established — and from this I infer that only those specified come within the particular authorization of § 6. Consideration of the care with which the Legislature has listed the eleven committees that are to be established, its specification of applicable detail, together with failure to authorize "such other committees as he may deem appropriate" or some such apt language, strongly suggests that the Legislature did not envisage § 6 as conferring general authority to create advisory committees thereunder.

Thus, I do not think that you can establish additional advisory committees under authority of § 6. On the other hand, I know of nothing to prevent the head of a department, in the absence of statutory authority, from consulting with groups of interested citizens and from calling any such group an "advisory committee." Such an informal body would, of course, have no legal authority or status, and its members would not be entitled to reimbursement for expenses or otherwise. But, as I say, I know of nothing to prevent you from organizing such a purely voluntary group and calling it an advisory committee.

The foregoing answer to your first question should answer your second and third questions. Since the members of any informal advisory groups that you might choose to create, other than those specified in G. L. c. 23A, § 6, would not have any statutory right to reimbursement, I am of the opinion that you would not be legally empowered to provide for reimbursement of their expenses.

Very truly yours,

Elliot L. Richardson, *Attorney General.*

93. March 22, 1967.

Honorable Edward J. Ribbs, *Commissioner of Public Works.*

Dear Commissioner Ribbs:—Acting on your behalf, Associate Commissioner Robert S. Foster has requested my opinion on the following question:

"Can a traffic regulation prohibiting parking on a State Highway be enforced against violators in the absence of signs notifying the public of such prohibition?"

This question has apparently arisen from attempts to enforce Article II, Section 2 of your Department's Rules and Regulations for Driving on State Highways. Section 2 provides:

"Prohibiting Parking. — No person shall stop, stand or park a vehicle upon any State Highway except as otherwise provided in Section 3 of this Article."

Section 3, referred to in the proviso of Section 2, forbids parking on any such highway "for a time longer than that specified upon official signs erected within the area."

In an intra-departmental memorandum accompanying the request for my opinion, it is stated that the regulation appearing in Article II, Section 2, "is being questioned in one or two of the District Courts of the Commonwealth" on the ground that "enforcement of this regulation without official signs being posted would be improper." This memorandum continues as follows:

"Our regulation which has evolved to its present form stems from an assumption dating back almost forty years in our traffic engineering and regulatory experience and prior to that in the accepted policies of highway and traffic engineers nationally and internationally, that parking on a highway is not the right of any person, but rather a privilege granted by authorities where parking incidental to travel will not interfere with the travel rights of the public on the highway, or the rights of abutters along the highway. This policy was upheld and strengthened in a Supreme Court advisory opinion to the Mass. General Court in 1947. (297 Mass. 559).

"State highways have always been constructed primarily to provide facilities for travel between the many cities and towns of the Commonwealth by connecting them with a network of ways superior in quality and design than the connection of town ways could provide.

"State highways while they may in certain instances be constructed with side lanes for emergency stopping or safety rest areas are not constructed with specific provisions for parking lanes to provide convenient stopping or storage facilities for conducting business with highway abutters.

"As a matter of policy developed many years ago and expanded in the last ten years the Department has installed 'No Parking' signs at points along the State highway system where the abutting property development was such that it would induce the stopping of vehicles for the sole purpose of transacting business with abutting establishments. These 'No Parking' signs were installed to emphasize the general 'No Parking' restriction and to assist the police in enforcement of the parking prohibition.

"Where the stopping of vehicles at the side of a State highway would not interfere with the travel of the general public, and when local officials request them, signs allowing parking are installed.

"In areas where no signs are installed local officials are experiencing opposition to an enforcement program. This raises questions which we believe to be of sufficient importance to warrant reference to the Attorney General in order that we may be officially advised and may in turn advise local officials.

"Under the authority granted by Section 2 of Chapter 85 of the General Laws, this Department not only adopts regulations for traffic on

State highways but also sets standards for the use of traffic control signs, signals, pavement markings and other traffic control devices. Nothing in this law requires signs for enforcement of regulations. The only requirement for signs is found in our Standards, where it is stated that general rules of the road should be matters of common knowledge and therefore do not require signs.

"It is our contention that the general prohibition of parking on a State highway does not require signs for enforcement and that if anything additional is needed, it is only additional education of the public.

"The major question is whether or not we are correct in this contention."

With respect to violation of the general regulation quoted above (Article II, Section 2), I am of the opinion that signs would not be a necessary precondition to enforcement *provided* that the violation occurs on a way which is plainly identified as a state highway, and provided also that there are not misleading roadside conditions which would lead a reasonable person to believe that parking was allowed.

According to Amendment No. 7 to the Rules and Regulations for Driving on State Highways, Article II, Section 2 was adopted by the Commissioner of Public Works under G. L. c. 85, § 2. That statute authorizes your Department to "issue rules and regulations to direct, govern and restrict the movements of vehicles on all state highways. . . ." Section 2C of the same chapter makes it clear that this authorization includes the issuance of parking regulations, for it refers to "any rule or regulation adopted under section two which prohibits the parking or standing of all vehicles. . . ." There is no statutory requirement that your Department erect signs to notify the public of rules and regulations adopted pursuant to G. L. c. 85, § 2. On the contrary, § 2 provides that your Department shall erect only such signs "as it may deem necessary for promoting public safety and convenience. . . ."

Said Article II, Section 2 of your Rules and Regulations is worded so as to apply generally and uniformly to all state highways throughout the Commonwealth. Its text appears on page 185 of an official publication entitled *Legislation, Rules and Regulations Relating to Motor Vehicles (October, 1964),* available to the general public without charge. In my opinion, it is not unreasonable or contrary to standards of due process to charge the motorist with *knowledge* of this general regulation — any more than it is unreasonable to charge him with knowledge of the laws and other general regulations applicable to the operation of motor vehicles on public ways.

It does not follow, however, simply because the motorist may be presumed to know of this regulation, that he can always be expected to know that a given way is a state highway or that the regulation applies at a given location. On an unmarked highway, or under misleading roadside conditions, I think that it might well violate constitutional standards of due process to penalize a motorist in the absence of signs or other reasonable means of notification. The memorandum quoted above mentions several potentially confusing situations, such as the existence of roadside commercial establishments which seem to invite stopping. Even greater confusion may result from the fact that many — perhaps most — state

highways (unlike those of the multi-lane, limited-access type) are physically indistinguishable from town ways; unless such highways are conspicuously marked, the motorist cannot be expected to know that he is traveling on a state highway. In all these situations, I think that Article II, Section 2 would be unenforceable unless the motorist were put on notice, by signs or by other means, of the applicability of the no-parking regulation.

Up to this point I have dealt with the general parking regulation appearing in Article II, Section 2 of your Rules and Regulations for Driving on State Highways adopted pursuant to G. L. c. 85, § 2. Another provision of the General Laws, G. L. c. 90, § 18, covers promulgation of "*special* regulations as to the speed of motor vehicles and as to the use of such vehicles upon *particular* ways". (Emphasis supplied.) Unlike G. L. c. 85, § 2, G. L. c. 90, § 18 expressly provides that no regulation adopted thereunder "shall be effective until there shall have been erected, upon the ways affected thereby . . . , signs . . . setting forth the . . . restrictions established by the regulation. . . ."

Since G. L. c. 90, § 18 deals only with "special" regulations as to traffic on "particular" highways, its intended scope is obviously much narrower than that of G. L. c. 85, § 2. While the broad language of the latter statute could perhaps be read as granting authority to issue the very type of "special" regulation referred to in G. L. c. 90, § 18, the inconsistencies and confusion which would result from such an interpretation convince me that your Department's authority to adopt "special" regulations as to parking on "particular" state highways is governed exclusively by the narrower and stricter provisions of G. L. c. 90, § 18. Hence, with respect to any such special parking regulations that it may issue, your Department is required by statute to erect signs.

Indeed, this conclusion would seem to follow from the constitutional standards of due process to which I have previously referred. It would offend those standards to penalize an individual for violating a parking restriction of purely localized application unless the existence and terms of that restriction were made known to him. While a motorist can be expected to apprise himself of a regulation that applies generally and uniformly on all state highways throughout the Commonwealth, he can scarcely be expected to have knowledge of a special regulation that applies only on particular highways or sections thereof.

It is therefore my opinion that a traffic regulation prohibiting parking on state highways cannot be enforced against violators in the absence of signs in the following cases: (1) where the applicability of a general no-parking regulation is unclear due to misleading roadside conditions or due to the absence of any plain indication that the road in question is a state highway; or (2) where the parking restriction is a special regulation applicable only to particular ways or sections thereof. In these situations, appropriate signs *must* be erected as a precondition to enforcement of your Department's regulations.

I would emphasize, moreover, that your Department has discretionary authority to erect signs in all cases. Common sense should always play a controlling role in the determination of whether or not signs are necessary in any given instance. Considerations of fairness and safety, not to

mention ease of law enforcement, may well make it desirable for your Department to publicize all of its parking restrictions by the use of signs and other means.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General.*

94. MARCH 22, 1967.

HONORABLE ROY C. PAPALIA, *Chairman, Department of Public Utilities.*

DEAR MR. PAPALIA:—You have asked my opinion on whether the Department of Public Utilities (the Department) may, on behalf of the Commonwealth, enter into a certain cooperative agreement with the Interstate Commerce Commission (ICC) to enforce the economic and safety laws and regulations of the Commonwealth and the United States concerning highway transportation. The terms of the agreement are embodied in Section 117a.4 through Section 117a.7 of Title 49 of the Code of Federal Regulations. Upon consideration of the matter, I am of the opinion that specific authorization from the Legislature should be obtained before the Department enters into it.

The agreement is divided into four parts, two providing for reciprocal services to be rendered by the State and the Federal governments and two providing for joint action by the two governments. The reciprocal provisions relate to (1) exchanging information about violations of laws governing highway transportation and (2) obtaining evidence, "as time, personnel, and funds permit," for use in enforcement of such laws. The joint provisions relate to (1) "examinations, inspection, or investigation of the property, equipment, or records of motor carriers or others," for the enforcement of State and Federal laws concerning highway transportation and (2) conferences of staff members to exchange information and to facilitate the conduct of joint investigations and administrative action. The agreement also provides that either party may cancel it, in whole or in part, at any time.

The authority of the ICC to enter into the agreement is found in a 1965 amendment (Pub. L. 89-170) to the Interstate Commerce Act. Among other changes made by the amendment, section 205(f) of the Act, 49 U.S.C. § 305(f), was changed by the insertion of the following sentence:

". . . the Commission is authorized to make cooperative agreements with the various states to enforce the economic and safety laws and regulations of the various States and the United States concerning highway transportation."

Adoption of this amendment was based on a doubt whether existing legislation, 49 U.S.C. § 305, which authorized the ICC "to avail itself of the cooperation, services, records and facilities of . . . State authorities . . . ," was sufficient to empower the ICC to enter into a "cooperative agreement." Expression of this doubt is found in the report of the House Committee on Interstate and Foreign Commerce proposing the amendment. See House Report No. 253, 89th Cong. 1st Sess., U.S. Code Cong. and Adm.

News, 2923, 2927, where the Committee said that it was adding the new sentence to the section "so as to specifically authorize the Commission to reciprocate [for State cooperation] by entering into cooperative agreements with the States to enforce State and Federal economic safety laws and regulations concerning highway transportation."

I have set forth the Federal aspect of the cooperative agreement at some length so that the State aspect may be seen in the necessary context. From the Federal background we can also see that despite the language already existing in 49 U.S.C. § 305 relative to the ICC availing itself of the cooperation of State authorities, specific authorization to enter into "cooperative agreements" was still thought to be desirable.

Here in Massachusetts our statutes confer on your Department a "broad general power of regulation of carriers. . . ." *Newton* v. *Department of Public Utilities,* 339 Mass. 535, 541. Yet, I know of no statute that authorizes "cooperative agreements." Indeed, I know of no statute that even refers to "cooperation" by your Department with other agencies. Compare the statutes that authorize such cooperation by other departments. G. L. c. 21, § 1, relative to the Department of Natural Resources; G. L. c. 21, § 5, relative to the Division of Marine Fisheries; G. L. c. 21, § 9, relative to the Water Resources Commission; G. L. c. 62, § 58, relative to reciprocal inspection of State and Federal income tax returns; G. L. c. 90, § 40, relative to the Massachusetts Aeronautics Commission. And see generally G. L. c. 9, §§ 21-24, relative to the Commission on Interstate Cooperation.

I do not mean to imply that the absence, in the statutes governing your Department, of provisions for cooperation with other agencies means that you cannot engage in any cooperative activities at all. Such a narrow interpretation of your powers would be unwarranted. "The Legislature need not enumerate nor specify, definitely and precisely, each and every ancillary act that may be involved in the discharge of an official duty." *Scannell* v. *State Ballot Law Commission,* 324 Mass. 494, 501. Rather, my point is simply that in determining whether we can imply authority in your Department to enter into a cooperative agreement with the ICC, we do not even have, as a possible basis for such an implication, a statute that explicitly contemplates cooperative action with such an agency.

My principal reason, however, for concluding that we cannot infer that your Department may enter into the cooperative agreement with the ICC is that the agreement, by its very nature, goes beyond the informal assistance and arrangements that may occur in day-to-day administration of a department and establishes instead a formal and systematic Federal-State relationship. This should be preceded by legislative authorization. In addition, the cooperative agreement now being considered contemplates that the State will expend its own money and utilize state personnel, specifically in the obtaining of evidence, to carry out the responsibilities assumed by it to the Federal government under the agreement. Without an appropriation of funds by the Legislature, however, the incurring of expenditures would be illegal. G. L. c. 29, §§ 26 and 27.

The making of Federal-State cooperative agreements is an important new development in Federal-State relationships. At the Federal level, Congressional authorization appears to be sought for their execution. In

addition to the amendment to the Interstate Commerce Act, already noted, relative to the agreement on highway transportation, there is, to name a few other instances, specific Congressional authorization for cooperative agreements for disposition of surplus property (40 U.S.C. § 484(n), the improvement and management of public lands (40 U.S.C. § 1362), and preservation of historical data threatened by dams (16 U.S.C. § 469(b)). I am of the opinion that similar consent by the General Court should be obtained before a Massachusetts agency enters into a formal cooperative agreement such as that now under consideration by you.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General.*

95. MARCH 23, 1967.

HONORABLE LEO L. LAUGHLIN, *Commissioner of Public Safety.*

DEAR COMMISSIONER LAUGHLIN:—You have requested the opinion of the Attorney General on the question of whether a person under suspension from the Uniformed Branch of the Division of State Police is considered as being employed in law enforcement as defined in c. 268, § 9A, and, if so, whether the tendering of a testimonial dinner in his honor, as described by you, would be in direct violation of G. L. c. 268, § 9A.

You state that on October 24, 1966 a uniformed member of the Division of State Police was suspended in compliance with the Rules and Regulations for the government of the Massachusetts State Police (Uniformed Branch) for the period of one year. The suspension will terminate October 23, 1967.

You further state that it has come to your attention that arrangements are being made to hold a testimonial dinner in honor of the suspended member, said dinner being scheduled for Saturday, April 8, 1967. A donation of $5.00 per guest is being requested.

General Laws c. 268, § 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."

A primary purpose of this statute is to place persons in law enforcement and related fields above any suspicion that they may be improperly influenced in the performance of their duties. The member in question of the Uniformed Branch of the Division of State Police is under suspension only, and is to return to active duty on October 23, 1967. Thus, any receipt of contributions for, or sale of tickets to a testimonial dinner held for him, whether or not occurring during this period of temporary suspension, would be contrary to the foregoing purpose of the statute.

In an opinion of the Attorney General dated January 24, 1963, concerning testimonial dinners, it is stated:

"It is further my opinion that the new statute is applicable for the full period of the service of any person concerned and until the service is actually terminated, and the fact that the service is in prospect of termination by retirement or otherwise does not alter the situation." *Report of the Attorney General for the Year Ending June 30, 1963,* p. 110.

Thus, until the service is actually terminated, the statute is applicable. The suspended member has not resigned, and he has not been discharged. Therefore, his service as a member of the Uniformed Branch of the Division of State Police has not been terminated.

A suspension differs greatly from a dismissal or discharge. In *Mayor of Newton* v. *Civil Service Commission,* 333 Mass. 340, the Court said, at page 343-4:

"Suspension denotes a 'temporary withdrawal or cessation from public work as distinguished from permanent severance from the service accomplished by removal. . . .' 'The distinction between suspension and dismissal thus is one of substance and not of form. Suspension imports the possibility or likelihood of return to the work when the reason for the suspension ceases to be operative.' "

Thus it is clear that the suspended member remains subject to the provisions of G. L. c. 268, § 9A.

The statute relates to persons whose office or employment is in any law enforcement, regulatory or investigatory body or agency of the Commonwealth. A member of the Uniformed Branch of the Division of State Police is, of course, employed in a law enforcement agency of the Commonwealth. As a member of the State Police he is vested with all police power in the Commonwealth of Massachusetts.

For the above-stated reasons, it is my opinion that the sale of tickets to or accepting of contributions for the proposed testimonial dinner in honor of the suspended member would be in direct violation of the statute.

Very truly yours,

Edward T. Martin, *First Assistant Attorney General.*

96. March 30, 1967.

Honorable Harry C. Solomon, M.D., *Commissioner of Mental Health.*

Dear Doctor Solomon:—You have asked whether your Department may transmit certain information about patients to state and federal licensing agencies.

You say that under your Department's so-called Regulation No. 10, as currently in effect, each state or licensed private mental institution is required to report to the Department upon admission the name of any committed patient who is licensed as a physician, nurse, dentist, pharmacist, stationary engineer, railroad engineer, steam fireman, dynamiter, aircraft operator, or motor vehicle operator. Likewise, the admission of any

voluntary patient holding any of the foregoing licenses must be reported to the Department whenever the patient's mental condition is believed to be of such a degree as to interfere with his occupation, profession or the operation of a motor vehicle. Whenever a licensee's name is so reported, you say that it is the Department's practice to notify the appropriate state or federal licensing agency.

You say that the Department now contemplates revising Regulation No. 10 to permit a more individualized decision for each voluntary or committed patient. The amended regulation (which would include the same licenses, with the addition of "airplane . . . crew member") would require the physician responsible for examining or treating the patient to determine the patient's ability to exercise the rights and privileges of the license without endangering the public, and would report to the Department the names of only those licensees deemed incompetent because of medical considerations to exercise the rights and privileges of the license, or unwilling to comply with the physician's instructions that the licensee temporarily desist from exercising such rights and privileges. The term "medical considerations" is said by you to include, "for example, the presence of mental or physical illness or the effects of prescribed medication."

You say that the Registry of Motor Vehicles agrees on the substance of the proposed revision of Regulation No. 10.

You express doubt, however, whether the Department has the right to divulge the above information about a patient without his permission, especially when such action might cause him to lose a license. Under Regulation No. 10, you point out that the Department has been notifying licensing agencies, when licensees are admitted to one of its institutions, without the permission of the patient or guardian.

You state that another related question has been raised by the Registry of Motor Vehicles. The Registry has asked the Department to notify the Registry whenever any person who has been adjudged sexually dangerous under G. L. c. 123A is known to hold a driver's license. The Registry asks that this be done even when the patient's physician thinks that the patient has capacity to exercise reasonable and ordinary control over a motor vehicle, provided the physician believes the operation of a vehicle by the patient would contribute to the potential danger to the public represented by such person.

With respect to the above matters, you ask the following two questions:

"1. Does the Department of Mental Health have the authority to notify the various licensing agencies of the state and federal governments when any licensee is admitted to a state or licensed private hospital, whether by commitment or voluntary admission, and whenever such licensee is deemed by the Department to be either medically incompetent to exercise such rights and privileges of the license without endangering the public or unwilling to refrain temporarily from exercising such rights and privileges when so advised by his physician, even though the licensee or his guardian has not given his permission in writing for such information to be conveyed to the licensing agency?

"2. In the special case of persons who have been adjudged sexually dangerous under Chapter 123A of the General Laws, does the Depart-

ment have the right to inform the Registry of Motor Vehicles of such persons who have operator's licenses, and who are substantially capable of exercising reasonable and ordinary control over a motor vehicle, but whose operation of a motor vehicle might contribute to the potential danger to the public represented by such persons?"

In my opinion, the answer to your first question is in the affirmative.

While there is no statute authorizing the Department to furnish information of this nature to state or federal licensing agencies, neither is there any statute prohibiting it; and I believe that authority to do so may be inferred from the extensive powers given by the Legislature to the Department to care for, and to protect the public from, the mentally ill,* as well as from the duty imposed by the Legislature on the different state licensing agencies to see that unfit persons do not hold licenses.

A mentally-ill person is defined for purposes of involuntary commitment as one suffering from a disease or disorder "which renders him so deficient in judgment or emotional control that he is in danger of causing physical harm to himself or to others, or the wanton destruction of valuable property, or is likely to conduct himself in a manner which clearly violates the established laws, ordinances, conventions or morals of the community." G. L. c. 123, § 1. It would be unrealistic to assume that all mentally-ill persons will voluntarily desist from performing the services or acts for which they may be holding a license. With increasing outpatient treatment, and with use of modern drugs which may impair an individual's functioning, it may be essential, both for the patient's protection and that of the public, for information of a licensee's disabling mental or physical conditions to be relayed to the licensing agency.

All the licenses referred to both in current and proposed Regulation No. 10 regulate conduct which can be dangerous to the public or the licensee, or both, if incompetently or maliciously performed. The boards of registration in medicine, pharmacy and nursing, and the board of dental examiners, are expressly authorized to suspend, cancel or revoke licenses to practice those professions if the holder is "insane." G. L. c. 112, § 61. (In G. L. c. 123, § 1, the term "insane" is equated with the term "mentally ill.) The licenses of stationary engineers and steam firemen may be revoked for "incompetence." G. L. c. 146, § 67. The Registrar of Motor Vehicles may revoke a driver's license "after due hearing, for any cause he may deem sufficient." G. L. c. 90, § 22. Thus, if the Department is to exercise appropriate supervision and control of the activities of mentally-ill patients under its care, and if the licensing agencies are to discharge their public functions, a sharing of information of the type described in your first question would seem to be necessary.

The transmission of such relevant information to public agencies having a legitimate interest therein, although done without permission of the patient or his guardian, does not violate any provision of the state or fed-

*Under G. L. c. 123, the Department of Mental Health is given broad power to supervise and control all mentally ill, epileptic and mentally deficient persons in its institutions. § 3. It may "investigate the question of the mental illness" of any such persons. § 5. It "shall take cognizance of all matters affecting the mental health of the citizens of the commonwealth," and it "shall disseminate such information relating thereto as it considers proper for diffusion among the people, and shall define what physical ailments, habits and conditions surrounding employment are to be deemed dangerous to mental health." § 3A. In *Ex Parte Dubois*, 331 Mass. 575, 578-579, the term *parens patriae* is used in referring to the Commonwealth's powers with respect to incompetent persons.

eral constitution. Ordinarily, an individual's license may not be suspended without opportunity for a hearing before the licensing agency. At the hearing, the licensee would be entitled to seek to show that he was qualified to continue to exercise the privileges of the license. In this opinion, of course, I do not consider the adequacy or inadequacy of a particular agency's procedures with regard to the suspension or revocation of a license. Such procedures must be fair and must meet constitutional standards. The present opinion concerns only the Department's authority to advise a licensing agency of the patient's admission to one of its institutions in the instances set forth. No question of due process is, therefore, involved. In the recent case of *Moran* v. *Bench,* 353 F. 2d 193 (1st Cir. 1965), a Massachusetts resident unsuccessfully sued officials of the Registry of Motor Vehicles alleging a violation of 42 U.S.C. §§ 1983 and 1985, the so-called civil rights statute, by reason of the suspension of her driver's license upon a report from the Veteran's Administration of her commitment for treatment of mental illness. The court said, at page 194, "It does not appear that the defendants' acts were beyond their authority, or that their conduct was arbitrary or unreasonable. If they acted in good faith, treating the suspension as a matter of ordinary procedure, even if they might be thought to have been over-demanding, plaintiff has no federal claim."

In your request, you mention G. L. c. 111, § 70, the Opinion of the Attorney General to you dated May 4, 1964 (*Report of the Attorney General for the Year Ending June 30, 1964,* p. 231), and the case of *Bane* v. *Superintendent of Boston State Hospital,* 350 Mass. 637. That Opinion of the Attorney General dealt with the interpretation of G. L. c. 111, § 70, prior to its most recent amendment by St. 1964, c. 653, approved July 2, 1964. The Attorney General advised that G. L. c. 111, § 70 as then written did not apply to institutions controlled solely by the Department of Mental Health. That Opinion is, however, largely superseded, by the 1964 amendment to G. L. c. 111, § 70, which places all state-supported hospitals and like institutions within the coverage of the statute. It is, therefore, now clear that any such state-supported institutions under the Department's control are subject to G. L. c. 111, § 70.

The presently worded G. L. c. 111, § 70 provides that hospitals, dispensaries or clinics and sanatoria, supported in whole or in part by the Commonwealth, shall keep "records of the treatment of the cases under their care and the medical history of the same." The statute provides that such records are *not* public records within the meaning of G. L. c. 66. The statute also provides for inspection of the records by a patient or his attorney *except* in cases where the records are kept by a hospital or clinic under the control of the Department of Mental Health. In the *Bane* case, *supra,* the Supreme Judicial Court held that § 70 applied to Boston State Hospital, and, on the authority of the statute, denied a patient's request to see records of his "involuntary admission and detention" at Boston State Hospital. However, I do not interpret G. L. c. 111, § 70 or *Bane* as prohibiting the Department, when it thinks advisable and in the best interest of the patient and the public, from furnishing the information referred to in your first question to other public agencies in furtherance of its and their statutory duties.

The foregoing conclusion is consistent with practices authorized by G. L. c. 123, § 13, in the case of persons designated as "mental defectives."

Section 13 establishes "a registry of mental defectives," and provides that, ". . . the name of any person so registered shall not be made public *except, upon written request therefor, to public officials* or other persons having authority over the persons so registered. . . ." (Emphasis supplied.) The Legislature has thus recognized the interest of public officials, as distinguished from members of the public generally, in examining those otherwise confidential records.

I am, accordingly, of the opinion that it would be proper for the Department to furnish the information described in your first question to the licensing agencies.

With respect to your second question, I think that the answer is also in the affirmative, for many of the reasons already discussed. While medical and case records of persons found to be sexually dangerous would normally be subject to G. L. c. 111, § 70, and, hence, not public records, there is nothing in the statute providing for the adjudication of a person as sexually dangerous which requires the *fact* of such adjudication to be kept confidential. The furnishing to the Registry of the names of persons who have been adjudged sexually dangerous "whose operation of a motor vehicle might contribute to the potential danger to the public represented by such persons" would seem to be in reasonable accord with the legislative purpose behind G. L. c. 123A, which creates the classification of "sexually dangerous." The Legislature apparently assumed that some individuals would, predictably, continue to engage in certain dangerous conduct; and that such individuals need special restrictions to be placed upon them. The identifying to the Registry of such sexually dangerous persons, who have been adjudged such in court proceedings held pursuant to G. L. c. 123A, does not violate any statute and, indeed, would merely seem to provide information to which the public already has access.

Very truly yours,

Elliot L. Richardson, *Attorney General.*

97. April 6, 1967.

Richard M. Millard, *Chancellor, Board of Higher Education.*

Dear Doctor Millard:—On behalf of the Scholarship Committee of the Board of Higher Education, you have asked my opinion "as to whether the Board of Higher Education does or does not have the authority to [cause distribution of] the funds voted by the legislature in Chapter 709, Item 1320-09, Acts of 1966, for scholarships to the Boston Lyric Opera Company Workshop."

The Item in issue provides:

"For quarter, one half or full scholarships [for] worthy and qualified students, domiciled in the commonwealth, with previous musical training, in need of financial assistance to perfect such musical training at the Boston Lyric Opera Co., Inc. Workshop of the Boston Lyric Opera Co., Inc., forty-five Newbury Street, Boston, Massachusetts, and approved by the board of educational assistance . . . $35,000."

Boston Lyric Opera Co., Inc., to which the appropriation is apparently intended to refer, is a so-called charitable corporation formed under the provisions of Chapter 180 of the General Laws. According to its Articles of Organization, the corporation was formed for the following purposes:

"To advance, encourage, foster and promote the cause of opera, music, dramatics, musical art, theater art, art, or any combination thereof in all aspects by any proper means; to arrange, prepare, stage, produce, and sponsor performances and exhibitions of opera, music, dramatics, art, musical art, theatrical art or any combination thereof; to engage in research in the fields of opera, music, dramatics and any other similar or related fields and issue publications with respect to any findings made therein; to provide educational facilities to enable students to study the production of opera, music and dramatics by participation therein; to raise funds to provide financial assistance and scholarships for gifted and needy students; to give financial assistance to composers and dramatists and commission new works for public performance; to buy, sell, and lease real estate to carry out the purposes of the corporation; to raise and collect funds and accept any gifts and bequests necessary for carrying out any of its purposes by all lawful means; to do all other things necessary, desirable or useful in carrying out the above purposes."

It does not appear from the Articles of Organization or any other available information that any of the officers or directors is a public official or public agent.

It is my opinion that Item 1320-09 violates the provisions of Article Forty-Six of the Articles of Amendment of the Constitution of Massachusetts, commonly known as the "anti-aid" amendment. Accordingly, it would, in my opinion, be improper for the Board of Higher Education to approve the award of any scholarships under that appropriation.

Section 2 of the "anti-aid" amendment provides in pertinent part:

". . . no grant, appropriation or use of public money . . . 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 . . . institution, or educational, charitable or religious undertaking, which is not publicly owned and under the exclusive control, order and superintendence of public officers or public agents authorized by the commonwealth or federal authority, or both. . . ."

The corporation in question is clearly an "educational [and] charitable . . . undertaking", and is neither "publicly owned [nor] under the exclusive control, order [or] superintendence of public officers or . . . agents." Therefore, if the appropriation is "for the purpose of founding, maintaining or aiding" Boston Lyric Opera, Inc., it is unconstitutional. In my opinion, such is the case.

The "anti-aid" amendment would prohibit legislation designed to grant funds directly to Boston Lyric Opera, Inc. (or to any other non-publicly owned and controlled undertaking). This result cannot properly be achieved by the simple device of making students conduits for grants, if the eventual, exclusive recipient is required by the statute to be a single, named corporation. My opinion in this regard is supported by an opinion rendered by a previous Attorney General. In the course of a discussion

of whether a bill could, without infringing on the "anti-aid" amendment, provide for payment of scholarships to individuals to attend some approved institution, the following guiding principle was enunciated:

"[A]ny plan must be subjected to the test of substance rather than to a mere test of form. A payment of tuition, whether directly to the private institution (VI Op. Atty. Gen. 356) or to the scholar under such conditions that in effect it is a payment to the institution, if the effect of it is to aid the institution, would seem to achieve the forbidden result by indirection." VI Op. Atty. Gen. 648, 653 (1922).

In view of the above, I conclude that the Board of Higher Education lacks authority to approve scholarships, or cause distribution of any funds, under Item 1320-09.

To avoid misunderstanding, I emphasize that this question is intended to apply only to the specific appropriation in question, and that in reaching the above conclusions it has been unnecessary to consider the extent to which an appropriation may, without restricting the grants to students at a single, named institution, provide scholarships for musical training.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General.*

98. APRIL 6, 1967.

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

DEAR COMMISSIONER KIERNAN:—Your recent letter requesting an opinion of the Attorney General states that you would appreciate a clarification of an opinion of the Attorney General rendered on December 30, 1966 to the Chairman of the Executive Committee for Educational Television (Op. Atty. Gen. 66/67 No. 63). Your letter further states that that opinion "appears to be in conflict" with an opinion rendered by the Attorney General to you on June 23, 1965 (*Report of the Attorney General for the Year Ending June 30, 1965,* p. 315).

You now inquire, in essence, whether or not the Executive Committee for Educational Television may, without approval by the Board of Education:

(1) expend money in the Educational Television Program Fund, and

(2) purchase and dispose of personal property, and lease real property.

It is my opinion that the Executive Committee for Educational Television may not exercise any of the above powers without approval by the Board of Education.

With regard to expenditure of money in the Educational Television Program Fund, G. L. c. 71, § 13H provides:

"The [executive] committee may establish and manage . . . a trust fund to be known as the Educational Television Program Fund. All funds received from school committees, organizations, or individuals *for the purposes of sections thirteen F to thirteen I, inclusive,* shall be credited to

said Fund . . . and may be *expended by the committee for such purposes* without appropriation. . . ." (Emphasis supplied.)

The foregoing provision is supplemented and qualified by G. L. c. 71, § 13G, which provides:

"*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.)

In my opinion, expenditures from the Educational Television Program Fund constitute acts in "matters pertaining to educational television" within the meaning of said section 13G. Accordingly, they must be approved by the Board of Education. To interpret section 13G otherwise would be unduly restrictive. Any meaningful power of approval of the activities of the executive committee would have to include authority to review the expenditures thereof.

The conclusion that expenditures by the executive committee must be approved by the Board of Education is supported by the language of section 13H. In stating the purposes for which the Fund may be expended, that section refers explicitly to sections 13F to 13I, inclusive. Section 13G falls within sections 13F to 13I. Thus, from the fact that the section governing expenditures refers in this manner to the section requiring approval by the Board of Education, one may further infer that expenditures are subject to the approval of the Board.

To avoid misunderstanding, it should be made clear that even though the Executive Committee must obtain *approval* by the Board of Education of expenditures from the Educational Television Program Fund, the Board of Education may itself neither make nor compel any expenditures therefrom. Section 13H designates the Executive Committee as the trustee of the Fund, and authorizes only the committee to make expenditures therefrom.

With regard to purchasing and disposing of personal property, and leasing real property, G. L. c. 71, § 13I provides, in pertinent part:

"In order to carry out its duties, said committee, from time to time and within the limits of appropriation therefor and of available trust funds, may —

"(a) Acquire, construct, hold, lease and dispose of real and personal property. . . ."

Although sections 13I(a) and 13G do not directly refer to one another, it is my opinion that the exercise of the powers conferred upon the Executive Committee by section 13I(a) is also subject to the approval of the Board of Education. Sections 13F to 13I constitute a single, unified statutory scheme, and must be read together. Any purchase or disposition of personal property, or lease of real property, by the Executive Committee would be an "act in [a matter] pertaining to educational television," and would thus be "subject to the approval of the board of education," within the meaning of section 13G.

That the Legislature conceived of the Executive Committee as occupying such a position that its acts would be subject to approval of the Board

is further borne out by the provisions and wording of section 13F, which provides, *inter alia*:

"The *board of education,* with the advice of the commissioner, shall appoint a committee to *co-ordinate and administer* [educational] programs. Said committee shall be known as the executive committee for educational television. . . ." (Emphasis supplied.)

Accordingly, I conclude that the Executive Committee for Educational Television may not expend money in the Educational Television Program Fund, purchase or dispose of personal property, or lease real property, without approval of the Board of Education.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General.*

99. APRIL 7, 1967.

HONORABLE ROBERT Q. CRANE, *Treasurer and Receiver General.*

DEAR SIR:—You have asked my opinion as to whether individual scholarship payments under the Walter Parker Beckwith Scholarship Fund, the income of which is to be used for scholarships for students attending the State Teachers College at Salem, can be increased "due to the fact that the tuition at said college is $100.00 per semester." You also ask "whether or not such payments are limited to be paid annually."

The Fund to which you refer was established on February 13, 1957. At that time, the principal amount of $5,000, derived from the contributions of alumni of the State Teachers College at Salem who were graduates or students under the administration of Dr. Walter Parker Beckwith, was turned over to the President of that College accompanied by a letter specifying "the conditions upon which the trust fund is to operate." The letter provided that the fund was to be transferred to the State Treasurer to be held in trust on the terms contained in the letter. The terms material to your questions are that "The income only from the trust fund is to be used for scholarships to students attending the State Teachers College at Salem. . . . Scholarships of $50 are to be awarded to students whose rank and character justify such aid. . . . The fund should never be joined to any other fund and should always retain its original name. . . . Scholarships are to be awarded on the recommendations of the President of the College."

In view of the explicit requirement that "Scholarships of $50" are to be awarded, I am of the opinion that the State Treasurer, as trustee, may not authorize individual scholarships in any greater amount. Legislation seeking to authorize such deviation is not valid. *Franklin Foundation* v. *Attorney General,* 340 Mass. 197. The courts alone have power to permit a trustee to deviate from the terms of a trust, and then only in the event that the trustee can demonstrate that compliance is impossible or illegal or ". . . where owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust." SCOTT, TRUSTS, § 381, p. 2738. *Franklin Foundation* v. *Attorney General, supra.*

It would not appear to me that the continued payment of $50 scholarships would bring about such a defeat or impairment of the objectives of the trust as to justify your petitioning the court for permission to deviate from its terms. I would, however, be glad to receive any further information or thoughts on this matter that you or the Bursar at Salem State Teachers College would care to provide, should you disagree with this conclusion. In any event, it is clear that absent a decree of the court granting you the authority to deviate from the express terms of the trust, you may not pay out individual scholarships in excess of $50 each.

With regard to your second question, I am of the opinion that the scholarships are to be awarded annually, in the absence of any language indicating that the scholarships are to be awarded on a semester or some other basis.

Very truly yours,

Elliot L. Richardson, *Attorney General.*

100. April 7, 1967.

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

Dear Secretary White:—You have asked for an opinion whether the Massachusetts Historical Commission possesses "legal authority and responsibility to administer funds made available" by the Federal government for programs of historic preservation. The authority for the Federal grant is found in The Historic Preservation Act, P. L. 89-665, now 16 U.S.C. sections 470-470M, effective October 15, 1966. This statute vests in the Secretary of the Interior the authority for its general administration. The Secretary has, in turn, delegated his authority to the Director of the National Park Service within the Department of the Interior. Although I know of no regulations which have yet been issued under the statute, the Director has prepared a draft of a "Manual for the Implementation of (the act)." Chapter 3, Paragraph A of the Manual provides that an application by a State for funds must include a proposal for the conduct of a historic survey, preparation of a statewide preservation plan, and review of their professional content. Chapter 3, Paragraph B of the Manual provides:

"B. *Prerequisites.* The proposal must show how the State intends to meet these standards.

1. Accomplishment of survey and plan by or under the supervision of a State agency:

(b) Possessing legal authority and responsibility to *administer* funds made available under P. L. 89-665." (Emphasis supplied.)

The Massachusetts Historical Commission was established in the Department of the State Secretary by Chapter 697 of the Acts of 1963, adding sections 26 and 27 to Chapter 9 of the General Laws. Consisting of twelve members, the Commission is headed by the State Secretary, or an officer or employee from his department designated by him, who shall be the chairman, and includes the Commissioner of Natural Resources and the Commissioner of Commerce and Development.

Section 26 provides in part:

"The commission shall advise the state secretary on matters relating to the historic assets of the commonwealth and assist him in compiling and maintaining an inventory of such assets. The state secretary may on behalf of the commonwealth for the purposes of this section and section twenty-seven accept gifts of real and personal property including papers, documents and moneys, and he may provide technical and other assistance, and publish, furnish and disseminate information of an historic nature. All moneys received hereunder shall be transmitted forthwith to the state treasurer, who shall administer the same as a trust fund in the manner provided by section sixteen of chapter ten."

Section 27, as amended by Chapter 707 of the Acts of 1965, authorizes the Commissioner to certify sites and structures in the Commonwealth as historic landmarks, and to establish standards with respect thereto; and the State Secretary is to maintain and publish annually a list of such historic landmarks.

General Laws, chapter 10, section 16, which relates to the State Treasurer's management of gifts to the Commonwealth for certain public purposes, provides in part that the Treasurer shall:

"invest, reinvest and hold in the name of the commonwealth any money or securities, or the proceeds thereof, received from the department of education . . . the commissioner of natural resources . . . or from the trustees of the state library . . . and shall disburse the income or principal thereof on the order of the commissioner of the department having charge of the work in aid of which the gift . . . was made . . . ; provided, that no disposition of either income or principal shall be made which is inconsistent with the terms of the trust on which the property is held."

Also to be noted is the following provision in section 8 of Chapter 411 of the Acts of 1966 (the General Appropriation Act for that year): "All federal subventions and grants available to the commonwealth under any act of congress and not otherwise authorized to be received shall be paid into the treasury of the commonwealth."

We can turn now to the precise question that you have asked, namely, whether the Massachusetts Historical Commission is, within the meaning of the Draft Manual of the National Park Service, a State Agency possessing "legal authority and responsibility to administer funds made available" by the Federal act. In my opinion, it is such an agency.

"The word 'administer' is one susceptible of a very broad interpretation. In *Fluet* v. *McCabe,* 299 Mass. 173, at page 179, it was said that '(t)o manage' is to control and direct, to *administer,* to take charge of . . ." (emphasis supplied by the court in its quotation of the original text). *Costonis* v. *Medford Housing Authority,* 343 Mass. 108, 114.

The foregoing broad interpretation of "administer" appears to be appropriate in the present situation. Since the State Secretary, acting for the Commission of which he or his designee is chairman, is authorized by virtue of the provision incorporated by reference from G. L. c. 10, section 16, to direct the disbursement of the Federal grant, the Commission, may in my opinion, be regarded as possessing the requisite "authority and re-

sponsibility" specified in the Draft Manual. That the Commission or the State Secretary does not have the responsibility for the actual custody and investment of the Federal grant does not, in my opinion, prevent the Commission from being considered a qualified state agency to "administer" the funds.

I would suggest, however, that since the Manual states that it is "merely intended to be used as a basis for future discussions," you might, in the interest of eliminating all doubts, recommend to the Director of the National Park Service that the provision concerning the administration of the grant should be expanded to read as follows:

"B. *Prerequisites.* The proposal must show how the State intends to meet these standards.

1. Accomplishment of survey and plan by or under the supervision of a State agency:

(b) Possessing legal authority and responsibility to administer *or supervise the administration of* funds made available under P. L. 89-665."

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General.*

101. APRIL 7, 1967.

HONORABLE CLAYTON L. HAVEY, *Acting Commissioner of Public Safety.*

DEAR SIR:—You have requested my opinion as to whether the American District Telegraph Company, commonly known and hereinafter referred to as ADT, is subject to the licensing provision of G. L. c. 147, § 23 as a watch, guard or patrol agency.

General Laws, c. 147, § 23 provides in part that:

"No person shall engage in, advertise or hold himself out as being engaged in, nor solicit . . . the business of watch, guard or patrol agency, notwithstanding the name or title used in describing such business, unless licensed for such purposes as provided in section twenty-five."

The term watch, guard or patrol agency is defined in G. L. c. 147, § 22 as follows:

". . . the business of watch, guard or patrol agency, including the furnishing, for hire or reward, of watchmen, guards, private patrolmen or other persons to protect persons or property, to prevent the theft or the unlawful taking of goods, wares or merchandise, or the misappropriation or concealment thereof or of money, bonds, stocks, notes or other valuable documents, papers or articles of value, or to procure the return thereof, whether or not other functions or services are also performed for hire or reward, or other persons are employed to assist therein."

The services provided by ADT are outlined in a pamphlet it publishes and distributes entitled, "Protecting Life, Property and Profits". On page 5 of said pamphlet, the following protection services are enumerated:

"Burglar Alarm Service for Premises protection, including Invisible Ray and ultrasonic alarms.

"Burglar Alarm Service for safes and vaults.

"Holdup Alarm Service.

"Intrusion Detection and Alarm Service.

"Watchmen's Reporting Service."

The ensuing descriptions of these services reveal that alarm devices and other related equipment are installed on the clients' premises and connected with a central system in the ADT offices. ADT stresses the fact that it oversees, services and leases the equipment much as a telephone company does.

Concerning the ADT Central Station, the ADT pamphlet states on page 6:

"Upon operation of the system, or in case of trouble, distinctive signals are automatically received at the central station, which immediately initiates appropriate action. Fire or police headquarters are notified when necessary. Uniformed ADT guards stand ready to make investigations and to provide appropriate assistance if it is required."

On page 22, with regard to the Watchman's Reporting Service, it provides:

"ADT Watchman's Reporting Service checks your watchman's performance by requiring him to signal the ADT central station while on patrol. If the watchman fails to signal on schedule, ADT investigates. If he is ill, injured or otherwise disabled, ADT provides assistance."

The Burglar Alarm Service is described on page 25 as follows:

"Upon closing your premises, you apply the ADT protection merely by throwing a switch. Thereafter, any attempt to enter the building sounds an alarm at the central station — but not at the premises. Central station operators immediately take steps to have the premises surrounded and searched by ADT guards, the police, or both."

On page 29, the Telapproach System provides that:

"An alarm is automatically transmitted to the ADT central station, where operators go into action to initiate an investigation by ADT uniformed guards, the police, or both."

In each of the above-described functions, it furnishes "for hire . . . guards, private patrolmen or other persons" to protect its clients against theft. It provides uniformed guards, who conduct investigations, surround and search the premises, and assist injured watchmen. The fact that ADT also installs various fire protection devices does not place it without the scope of the definition in G. L. c. 147, § 22 which applies "whether or not other functions or services are also performed for hire. . . ."

In addition, the purpose clause in the ADT corporate charter on file with the Secretary of the Commonwealth states that said company is incorporated for "the transaction of a general messenger circular delivery,

offices, carriage supply, burglar alarm night watch and general service business." Also, on page 1093 of the 1967 edition of the New England "Yellow Pages" Telephone Directory, ADT is listed under the heading of "Watchmen's Clocks and Watchmen's Services."

Therefore, it is my opinion that the American District Telegraph Company does engage in, advertise and hold itself out as being engaged in the business of watch, guard or patrol agency as defined in the above-quoted G. L. c. 147, § 22, thereby requiring that it be licensed as such an agency as provided in Section 25 of that Chapter.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General.*

102. APRIL 13, 1967.

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

DEAR COMMISSIONER KIERNAN:—As the result of the recent decision of the Supreme Judicial Court of Massachusetts in *Pedlosky* v. *Massachusetts Institute of Technology,* Mass. Adv. Sh. (1967) p. 369, holding the "Teacher's Oath Law," G. L. c. 71, § 30A, to be invalid, you have asked for an opinion on two questions:

1. Should the Department of Education advise school committees that the oath [viz., the Teacher's Oath] should no longer be taken "even on a voluntary basis"?

2. Does the *Pedlosky* case have any effect on the oath required under G. L. c. 264, § 14 of public employees generally upon entering the employment of the Commonwealth or any political subdivision thereof?

As for your first question, it is my opinion that the answer is in the affirmative, and that school officials should take no action either to compel the taking of that oath or to receive the oath on a voluntary basis. The effect of the Court's decision in *Pedlosky* is to render the Teacher's Oath provision a nullity, lacking in official significance altogether.

As for your question about the Public Employee's Oath, the *Pedlosky* decision did not deal with the matter and did not invalidate or otherwise affect any of the requirements of G. L. c. 264, § 14 relative to that oath. These continue, therefore, to be applicable to all public employees, including teachers.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General.*

103. APRIL 18, 1967.

MR. CROCKER SNOW, *Director of Aeronautics, Massachusetts Aeronautics Commission.*

DEAR MR. SNOW:—By letter dated April 3, 1967, you have requested my opinion as to whether the zoning by-law of the town of Danvers may

be applied to bar the use of land in Danvers lawfully acquired by the Beverly Airport Commission for airport purposes for a hangar and ground school to be leased and operated by commercial tenants.

It is conceded that such use is within the terms of the statute under which the Beverly Airport Commission manages the property. (G. L. c. 90, §§ 51E-51N.)

The establishment of municipal airports is a public purpose. *Burnham* v. *Mayor and Aldermen of Beverly,* 309 Mass. 388, 391. The court in that case after exhaustive review held that provision for adequate means of transportation of the public at large by air was as much a public purpose as provision for other methods of travel which have been held to be public purposes and that legislation providing for taking land for airport purposes by eminent domain was proper.

Subsequent to that decision, G. L. c. 90, §§ 51E-51N were enacted (St. 1946, c. 613, § 1; St. 1947, c. 332; St. 1947, c. 501). Section 51G now specifically provides that land for airport purposes may be acquired or taken by eminent domain "both within *and without* its territorial limits" by a municipality. (Emphasis supplied.)

It is inherent in the nature of airports, at least in the present state of the art of aeronautics, that ample open space be provided for runways, approaches and other appurtenances. The authority granted to acquire land and, if necessary, make takings by eminent domain "both within and without its territorial limits" clearly recognizes this fact, and the likelihood that such space may not be available within a single community.

Whether it is desirable for the Legislature to go so far as to authorize one municipal subdivision of government to acquire or take land in the territory of another, and to use it in a manner contrary to local by-laws, is a question of legislative policy. If the Legislature decides that the public interest in transport by air is more important than the desire of the residents of a particular community to be left alone, it can grant such authorization. (Since November 8, 1966 this is subject to the provisions of Article 89 of Amendments to the Constitution.)

In the instance before me, it is not contended that the Legislature could not do this, but only that the Legislature has left the Airport Commission subject to the zoning by-law of its neighboring community.

In my opinion this is not so. It is well settled that local zoning by-laws do not apply to the Commonwealth, or instrumentalities of the Commonwealth, when acting in pursuance of a public function on land of the Commonwealth. *Teasdale* v. *Newell & Snowling Construction Co.,* 192 Mass. 440.

Medford v. *Marinucci Bros.,* 344 Mass. 50, the most recent case on this point, held that a highway contractor was not required to comply with local zoning by-laws in carrying out a construction contract for a state highway, even though his contract required him to comply with local by-laws. This principle is not confined to instances where the land is directly owned by the Commonwealth, but extends to instrumentalities of the state when engaged in their public function unless the Legislature has indicated a different intention.

In *Village on the Hill* v. *Massachusetts Turnpike Authority,* 348 Mass. 107, at page 118 the court stated that the Massachusetts Turnpike Authority is "sufficiently governmental in character so that the actual construction and operation of the Turnpike, its essential 'government function', and action reasonably related to that function, should not be prevented by a zoning statute applicable to one municipality or by a local zoning ordinance or by-law", although there was no specific exemption from local zoning by-laws as such in the act creating it (St. 1952, c. 354).

The court went on to hold that land not needed by the Turnpike Authority for turnpike purposes and sold by it as excess, *was* subject to the Boston zoning statute. These facts are inapplicable here.

It is to be noted that legislation setting up such subordinate public instrumentalities frequently contains language requiring compliance with local zoning regulations. For example, local housing authorities are made subject to local zoning regulations by the express language of G. L. c. 121, § 26S.

The omission of any such express provision from G. L. c. 90, here involved, is significant. Furthermore, there is an obvious difference in the two situations.

Since local housing authorities operate only in the towns in which they are established, the town which sets up a housing authority has full power to change its zoning by-laws, if necessary, and there is no hardship or hamstringing of the proper carrying out of a public function in requiring compliance therewith.

In the situation here presented, Beverly, which has the undoubted right to own and operate an airport, and is expressly authorized to take land "within and without its territorial limits" for the purpose, could be defeated in this object, conceivably even in the portion of the airport within Beverly because of inadequate space, if the town of Danvers could use its zoning powers to forbid such use.

It is therefore my opinion that the Beverly Airport Commission, acting within its authority under §§ 51E to 51N of G. L. c. 90, is not subject to the Danvers zoning by-laws to the extent that they prevent it from discharging its public functions.

Very truly yours,

Elliot L. Richardson, *Attorney General.*

104. April 18, 1967.

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

Dear Commissioner Kiernan:—You have requested an opinion of the Attorney General as to certain aspects of the legal obligation of cities and towns to furnish transportation to school children.

Your first two questions arise from a petition filed with the Department of Education under G. L. c. 71, § 68 by Mr. Joseph Wrona of Springfield, asking the Department to require the School Committee of that city to

transport his daughter to the public high school she attends there. Quoting from a letter written to you on behalf of the Springfield School Committee, you state the following facts:

"The Wrona home at 530 Berkshire Avenue is approximately 3.5 miles from the high school. The Springfield Street Railway bus that takes their daughter to school passes by their door. Although the Wrona home is in a two fare zone, it is only .4 of a mile from a one fare zone bus stop. If the Wrona girl boards the bus in front of her house she pays a double fare to and from school. This costs 60 cents per day for a total of $108 for the school year of 180 days. By walking .4 of a mile to the one fare zone bus stop she could cut the annual cost to $54, the same annual cost for all other students who pay for transportation to the high school."

The underlying policy of the Springfield School Committee is described in the same letter as follows:

"It is the general rule of the school committee to provide free transportation to the high schools only for those students who live more than two miles from school and more than one mile from a school bus stop."

On the basis of the foregoing, you have asked the following questions:

"(1) Has the Springfield School Committee declined to furnish transportation according to Section 68 of Chapter 71 of the General Laws?

"(2) If the answer is in the affirmative, and the Department determines Springfield should furnish transportation to the Wrona child, how does it proceed to compel Springfield to provide transportation to this child and others living more than two miles from the school?"

Your final question arises from the fact that "there are about ten communities in Massachusetts which do not provide school transportation." You ask:

"(3) If a school committee refuses to request money in its budget for transportation for youngsters who fall within the purview of Chapter 71, Section 68, or the town meeting or city council eliminates funds for school transportation, can the Department require the school committee to provide transportation and how will it accomplish this?"

I

The answer to your first question calls for an interpretation of G. L. c. 71, § 68, the relevant provision of which is as follows:

"If the distance between a child's residence and the school he is entitled to attend exceeds two miles and the nearest school bus stop is more than one mile from such residence and the school committee declines to furnish transportation, the department, upon appeal of the parent or guardian of the child, may require the town to furnish the same for a part or for all of the distance between such residence and the school."

Thus, in order for a child to qualify under this provision of § 68, she must meet two requirements: (1) the distance between her residence and the school she attends must exceed two miles, and (2) the distance between her residence and the nearest "school bus stop" must exceed one mile.

According to the facts stated in your letter, the Wrona child lives "approximately 3.5 miles from the high school." The first of these conditions is therefore met.

Whether or not the Wrona child also qualifies under the second of the above requirements depends upon the meaning of the phrase "school bus stop." I infer from the letter written on behalf of the Springfield School Committee that the Committee regards the Springfield Street Railway stop located .4 miles from the Wrona home as a "school bus stop" for purposes of G. L. c. 71, § 68. The Committee has evidently interpreted the phrase "school bus stop" to mean any bus stop at which a child can obtain transportation to school without paying more than a single fare.

I do not agree. There is nothing in § 68 which ties the phrase "school bus stop" to considerations of the fare zones which may be established by a local street railway company. The term "school bus" implies a vehicle by which transportation to a school is furnished at public expense. It certainly is not suggestive of public transportation for which the rider is charged a fare. It has long been the policy of this Commonwealth to furnish free education to all children of school age. Our system of public schools was established to implement this policy. The transportation provision of G. L. c. 71, § 68 is a part of the same statutory scheme. In my opinion, that provision is based on a legislative conclusion that the cost of transporting children who live more than two miles from their schools, like the cost of the schools themselves, may appropriately be borne by the general public.

This interpretation of the transportation provision is supported by the statutory context in which it appears. General Laws c. 71, § 68 begins with the following sentence:

"Every town shall provide and maintain a sufficient number of schoolhouses, properly furnished and conveniently situated for the accommodation of all children therein entitled to attend the public schools."

This is immediately followed by the transportation provision under consideration. The juxtaposition in a single section of these two seemingly diverse requirements — that of public schoolhouses and that of transportation to and from those schoolhouses — suggests a similarity of legislative approach toward the two: since the purpose of the first is to assure free education, one may infer that the purpose of the second is to assure free transportation.

Then, in the next sentence of § 68, the two topics are combined in a single provision:

"If said distance exceeds three miles, and the distance between the child's residence and a school in an adjoining town giving substantially equivalent instruction is less than three miles, and the school committee declines *to pay for tuition in such nearer school, and for transportation in case the distance thereto exceeds two miles,* the department, upon like appeal, may require the town of residence to pay for tuition in, and if necessary provide for transportation for a part or for the whole of said distance to, such nearer school." (Emphasis supplied.)

Thus, in the case of out-of-town schools, the Legislature has expressly authorized your Department to require the town of residence to pay not

only for tuition but for transportation as well. The Legislature would hardly have intended the town to defray the cost of transportation to schools outside its limits but not to its own schools.

I think, therefore, that just as G. L. c. 71, § 68 requires a community to provide tuition-free schools for its resident children, it also contemplates that your Department may require free transportation for any child living more than two miles from "the school he is entitled to attend."

Since the Wrona child lives more than two miles from her school and more than one mile from the nearest "school bus stop," and since the Springfield School Committee has thus far failed to furnish transportation for her (and, in the letter written on its behalf, has indicated that it has no intention of doing so in the future), it is my opinion that the Springfield School Committee has declined to furnish transportation within the meaning of G. L. c. 71, § 68.

II

Your second and third questions both involve the procedural issue of how a municipality can be required to furnish transportation under G. L. c. 71, § 68. I shall answer these questions together.

Your Department may require a city or town to provide transportation under G. L. c. 71, § 68 only "upon appeal of the parent or guardian" of a child qualifying under that section to whom transportation is refused. While this condition has been fulfilled in the Springfield case, it is not clear from your letter whether or not such appeals have been filed with respect to the other cities and towns referred to in your third question. Once such an appeal has been filed, and once your Department has determined that the municipality to which it relates should furnish transportation, I am of the opinion that the municipality can be compelled to do so.

Your Department should first issue a formal order pursuant to G. L. c. 71, § 68, whereby the city or town involved is directed to furnish transportation over such portion of the distance between the residence and school of the appellant's child as your Department may determine. This order should be directed to the city or town in its corporate capacity and delivered to the city or town clerk. It would also be appropriate to send copies of the order to the school committee and to the mayor or selectmen (who must initiate appropriations, if necessary), as well as the city council or board of aldermen of a city (which must appropriate the money).

A reasonable time should then be allowed for voluntary compliance. What constitutes a "reasonable time" will depend upon the particular circumstances. For example, our laws are such that a town requires much more time to appropriate funds than a city. The financial resources readily available to the municipality should also be considered, as well as the feasibility of its promptly obtaining adequate transportation facilities once the necessary funds have been raised. On the other hand, if it appears that the responsible municipal authorities are unwilling to take even the initial steps toward compliance with an order of your Department, I believe you would be justified at once in assuming noncompliance.

As soon as it becomes clear that a municipality will not voluntarily comply with your Department's order, the matter should be referred to

this Department for appropriate legal action. Ordinarily, I would not discuss the judicial remedies which are available, since the selection of these is a matter for this Department. But your letter suggests that some municipalities may contend that there is *no* judicial remedy for noncompliance with a transportation order of your Department. I do not agree with that contention.

In an opinion rendered to your Department on May 16, 1927, the then Attorney General stated that such a transportation order could be enforced under G. L. c. 71, § 34. 8 Op. Atty. Gen. 302. That section provides as follows:

"Every city and town shall annually provide an amount of money sufficient for the support of the public schools as required by this chapter. Upon petition to the superior court, sitting in equity, against a city or town, brought by ten or more taxable inhabitants thereof, or by the mayor of a city, or by the attorney general, alleging that the amount necessary in such city or town for the support of public schools as aforesaid 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, or such town and its treasurer, selectmen and assessors, to provide a sum of money equal to such deficiency, together with a sum equal to twenty-five per cent thereof. When such an order is made prior to the fixing of the annual tax rate the foregoing sums shall be required by such order to be provided by taxation in the manner set forth in section twenty-three of chapter fifty-nine; and when such an order is made after the annual tax rate has been fixed according to law such sums shall be required by such order to be provided by borrowing in the same manner and for the same period of time as is provided under clause (11) of section seven of chapter forty-four in the case of final judgments, subject to all other applicable provisions of chapter forty-four, except that, in the case of a town, such borrowing shall be made by the town treasurer, with the approval of a majority of the selectmen, and no vote of the town shall be required therefor. Said court may order that the sum equal to the deficiency be appropriated and added to the amounts previously appropriated for the school purposes of such city or town in the year in which such deficiency occurs and may order that the amount in excess of the deficiency be held by such city or town as a separate account, to be applied to meet the appropriation for school purposes in the following year."

Since the above-mentioned 1927 opinion of the Attorney General, the Supreme Judicial Court has held, in *Ring* v. *Woburn,* 311 Mass. 679, 688-689, that a municipality could not be required, in a proceeding brought by ten taxpayers under G. L. c. 71, § 34, to appropriate sums requested by its school committee for transportation of school children. The Court held that such transportation was not an item which fell into the category of being "necessary for the support of the public schools as required by this chapter [c. 71]." The Court noted that the primary authority for furnishing school transportation was conferred not by G. L. c. 71 but by G. L. c. 40, § 4, which provides that a municipality *may* furnish transportation to school children, and reiterated the earlier statement in *Eastern Massachusetts Street Ry.* v. *Mayor of Fall River,* 308 Mass. 232, 237, that "contracting for the furnishing of transportation of school children bears only a secondary relation to education."

On facts similar to those involved in *Ring,* the decision in that case must be taken to be the law. However, no order of your Department under G. L. c. 71, § 68 was involved in the *Ring* case.* There is a vast difference between the transportation which a municipality *may* furnish under G. L. c. 40, § 4 if it so desires, and the transportation which it *must* furnish under G. L. c. 71, § 68 upon the order of your Department. It is understandable that the Court in the *Ring* case did not find that the particular school transportation item there in question was "necessary" under the language of § 34. But where an order has been issued by your Department under G. L. c. 71, § 68, it is my opinion that the reasoning behind the *Ring* decision would no longer apply, and that the furnishing of school transportation pursuant to that order would be a "necessary" item for the "support of the public schools as required by" c. 71.

Even apart, however, from the statutory remedy provided by G. L. c. 71, § 34, I am of the opinion that the Superior Court, upon a petition in equity brought by the Commonwealth, would have the power to "require" the furnishing of transportation pursuant to the order of your Department issued under the authority of G. L. c. 71, § 68. The judicial power in suits brought by the Commonwealth against municipalities, to enforce the orders of state agencies, is virtually unlimited. The broad extent of this power is outlined in *Commonwealth* v. *Hudson,* 315 Mass. 335, 343-346.

It is, therefore, my opinion that the officers and inhabitants of a municipality can be judicially compelled to take the necessary steps for compliance with an appropriate order of your Department issued under G. L. c. 71, § 68, including the raising and appropriation of such funds as are needed.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General.*

105. APRIL 21, 1967.

MR. EVERETT V. OLSEN, *Assistant to the President, Lowell Technological Institute.*

DEAR MR. OLSEN:—I am writing in response to your inquiry of December 5, 1966, which was joined in by Commissioner of Education, Owen B. Kiernan, by letter to me dated March 30, 1967. You have asked for an opinion on whether your Board of Trustees must terminate the employment of a teacher at your Institute who, in signing the oath required of him as a public employee under G. L. c. 264, § 14, underlined the words *uphold and defend* in the clause "I will uphold and defend the Constitution of the United States of America and the Constitution of the Commonwealth of Massachusetts . . ." and wrote on the reverse side of the oath form *"uphold and defend* must be qualified by the fact that I am a conscientious objector."

*The *Ring* case involved numerous alleged violations of G. L. c. 71, § 34, as to most of which the Court granted relief. The item of school transportation was not even mentioned as such in the pleadings, being subsumed under general allegations as to reductions in the budget submitted by the School Committee. It received only the most cursory treatment in the testimony and briefs.

Your inquiry, which antedates the recent decision of the Supreme Judicial Court of Massachusetts in the case of *Pedlosky* v. *Massachusetts Institute of Technology,* Mass. Adv. Sh. (1967) p. 369, holding the teachers' oath under G. L. c. 71, § 30A (which oath differs from the public employees' oath under G. L. c. 264, § 14) to be invalid, has also asked whether the teacher must be dismissed because he had similarly underlined and annotated the word *support* in that portion of the teachers' oath requiring a teacher to swear that he "will support the Constitution of the United States and the Constitution of Massachusetts."

I will take up the teachers' oath first, since that can now be disposed of briefly and conclusively. The *Pedlosky* case held that because of the vagueness and the consequent judicial unenforceability of that portion of the oath requiring a teacher to declare that "I will faithfully discharge the duties of the position of . . . according to the best of my ability," the *entire* oath, being inseparable, was invalid. Hence, since it is now clear that a teacher may not be required to sign the teachers' oath in any form, we need not consider the significance of your teacher's annotation of it, and your Board of Trustees should not take any action based thereon.

The decision in the *Pedlosky* case having rested on the limited ground just stated, the Court did not reach the question of the constitutionality of that portion of the teachers' oath swearing support of the United States and Massachusetts Constitutions; nor did the *Pedlosky* case give particular consideration to the fact that the teacher was employed at a private institution, the Massachusetts Institute of Technology. Thus, the *Pedlosky* decision does not touch the questions presented by your inquiry about the annotation which your teacher, an employee at a state institution, attached to his public employee's oath required under G. L. c. 264, § 14. That statute, which was enacted by Chapter 619 of the Acts of 1949, provides:

"Every person entering the employ of the commonwealth or any political subdivision thereof, before entering upon the discharge of his duties, shall take and subscribe to, under the pains and penalty of perjury, the following oath or affirmation:—

" 'I do solemnly swear (or affirm) that I will *uphold and defend* the Constitution of the United States of America and the Constitution of the Commonwealth of Massachusetts and that I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence or by any illegal or unconstitutional method. [Emphasis as in the oath filed by your teacher.]

"Such oath or affirmation shall be filed by the subscriber, if he shall be employed by the state, with the secretary of the commonwealth, if an employee of a county, with the county commissioners, and if an employee of a city or town, with the city clerk or the town clerk, as the case may be."

General Laws c. 264, § 15, inserted by Chapter 619 of the Acts of 1949, as amended, provides:

"Violation of section fourteen shall be punished by a fine of not more than ten thousand dollars or by imprisonment for not more than one year, or both."

In the absence of any contrary indication by the Supreme Court of the United States or by the Massachusetts Supreme Judicial Court, I regard, as I must, the Legislature as authorized to require public employees to take an oath to uphold and defend both the Constitution of the United States and also our own Massachusetts Constitution. An oath to support the United States Constitution is required of all federal and state legislators and all federal and state executive and judicial officers by Article VI, Clause 3 of the United States Constitution as follows:

"The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this constitution; but no religious tests shall ever be required as a qualification to any office or public trust under the United States."

Similarly, Article VI of the Amendments to the Massachusetts Constitution requires an oath to support the Massachusetts Constitution of all persons "chosen or appointed or commissioned to any judicial, executive, civil, military, or other office under the government [of Massachusetts]." The oath prescribed by Article VI is as follows:

"I, A.B., do solemnly swear that I will bear true faith and allegiance to the Commonwealth of Massachusetts, and will support the constitution thereof. So help me GOD." [Quakers may substitute "affirm" for "swear" and substitute "This I do under the pains and penalties of perjury" for "So help me GOD."]

Article VII of the Amendments to the Massachusetts Constitution provides:

"No oath, declaration or subscription, excepting the oath prescribed in the preceding article [just quoted] and the oath of office, shall be required of the governor, lieutenant governor, councillors, senators or representatives, to qualify them to perform the duties of their respective offices."

We turn now to the annotation which the teacher at your Institute made to his oath as a public employee when he underlined the phrase "uphold and defend" and stated on the reverse side of the form, *"uphold and defend* must be qualified by the fact that I am a conscientious objector." If this annotation should be construed to add a condition or qualification not already impliedly permitted by law, then the oath has not been legally subscribed. If, on the other hand, the annotation only affirms a reservation impliedly accorded by law to a public employee, then it should be regarded as mere surplusage, not an added condition or a qualification.

Whether the annotation is an actual qualification or is mere surplusage depends on the meaning to be given to the statement, " . . . I am a conscientious objector." If this means that the teacher, because of *religious scruples,* is unwilling to participate in war, I am of the opinion that it is a reservation impliedly allowed by law and hence should not be regarded as an improper qualification.

It is my opinion that in passing the public employees' oath statute, the Legislature did not intend to impose more rigorous requirements on state employees than are required of state officials under both the United States

and Massachusetts Constitutions. That the oath required of state officials under Article VI, Clause 3 of the United States Constitution (quoted above on page 4 of this opinion) to "support this Constitution" should not be construed as requiring a willingness to bear arms contrary to one's religious scruples was impliedly determined in *Girouard* v. *United States,* 328 U.S. 61, decided by the United States Supreme Court in 1946. In that case an alien had answered "No (Non-combatant) Seventh Day Adventist" to a question in his citizenship application which asked, "If necessary, are you willing to take up arms in defense of this country?" When questioned by a naturalization examiner, he explained his answer by saying, "it is a purely religious matter with me, I have no political or personal reasons other than that."

In holding that the applicant was not thereby disqualified from being admitted to citizenship, the Supreme Court reasoned that a contrary result would have meant that Congress intended to set a stricter standard for aliens seeking citizenship than the United States Constitution requires of holders of the highest public offices under the United States. The provision in Article VI, Clause 3 of the United States Constitution (quoted above on page 4 of this opinion) that "no religious tests shall ever be required as a qualification to any office or public trust under the United States," the Court stated, safeguards the right of citizens who have the same religious scruples as the alien applicant to hold public office. Congress, it was said, could not have intended to deny the same right to aliens applying for citizenship.

By the same reasoning, I am of the opinion that the Massachusetts Legislature, in enacting the public employees' oath statute, did not intend to deny to public employees the right to assert their religious scruples against participating in war. When the statute requiring the oath was adopted in 1949, the *Girouard* case was three years old and it stood unimpaired. That the Massachusetts Legislature intended a result inconsistent with the principle underlying the *Girouard* case is most unlikely.

With regard to the portion of the oath in which the public employee swears to uphold and defend the Massachusetts Constitution, I hold a like opinion. Article II of our Declaration of Rights provides:

"It is the right as well as the duty of all men in society, publicly, and at stated seasons to worship the SUPREME BEING, the great Creator and Preserver of the universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping GOD in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship."

Further, § 1 of Article 46 of the Amendments provides:

"No law shall be passed prohibiting the free exercise of religion."

In the face of these constitutional guarantees, any requirement that a public employee, in taking his oath, must abandon his religious scruples, would raise serious constitutional questions. Statutes should, if reasonably possible, be construed so as to avoid reasonable constitutional doubts. *Sheridan* v. *Gardner,* 347 Mass. 8, 18.

For these reasons, then, I conclude that the teacher at your Institute may properly subscribe his public employee's oath by adding the stated

annotation, provided that his action is based on religious scruples against participating in war. The Institute, however, will have to conduct a further inquiry to determine if this is so. In making this determination, the Institute may appropriately use the definition of a "conscientious objector" contained in the Universal Military and Service Act, 50 U.S.C. App. § 456(j), where an exemption from combatant training and service in the armed forces is granted to a person, "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

I am transmitting this letter to you through Commissioner Kiernan pursuant to his request.

Very truly yours,

Elliot L. Richardson, *Attorney General.*

106. April 25, 1967.

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

Dear Commissioner Kiernan:—As you know, pending litigation has placed in issue an opinion of my predecessor to you, dated December 29, 1966, with regard to the basis for computing the school aid to be paid to each city and town of the Commonwealth during the year 1967 under G. L. c. 70, § 4 (Op. Atty. Gen. 66/67 No. 57). As a consequence of this litigation, I have had occasion to reconsider that opinion, and it is my belief that its conclusions should be modified.

The question you originally posed was ". . . whether in computing Chapter 70 Aid for distribution in 1967, the 'equalized valuation' for 1966 which . . . [was] submitted to the General Court on or before December 31, 1966 by the State Tax Commission (Chapter 58, Section 10C of the General Laws) or the 'equalized valuation' of 1965 contained in House [Document] No. 3998 should be used?"

The valuations contained in House Document No. 3998 are those figures submitted by the state tax commission under the provisions of G. L. c. 58, § 9, as amended through St. 1953, c. 654, § 7 (before amendment by St. 1966, c. 14, § 43). That section provided:

"In the year nineteen hundred and forty-three and in every second year thereafter, the commission shall, on or before April first, report to the general court an equalization and apportionment for the two succeeding years upon the several towns of the amount of property and the proportion of every one thousand dollars of state tax, and the proportion of county tax, which should be assessed upon each town."

The Acts of 1966, c. 14, § 40 amended the General Laws by striking out c. 70 and inserting a new c. 70. (Hereafter all references to c. 70 will be to this new chapter.)

General Laws, c. 70, § 4 provides in part as follows:

"The school aid to be paid to each city and town in any calendar year shall be the amount obtained by multiplying its reimbursable expenditures for the last preceding fiscal year by its school aid percentage for the calendar year during which such fiscal year begins. . . ."

The "financial year" of cities and towns of the Commonwealth, commonly referred to as their "fiscal year," is coterminous with their calendar year. G. L. c. 44, §§ 56 and 56A. Therefore, the term "fiscal year" as set forth in G. L. c. 70, § 4, apparently refers to the "fiscal year" of the Commonwealth (July 1 to June 30) as defined by G. L. c. 4, § 7. Thus, the school aid to be paid to each city and town in 1967 is determined by multiplying its reimbursable expenditures for the fiscal year July 1, 1965 to June 30, 1966 (the fiscal year last preceding 1967) by its school aid percentage for the calendar year 1965 (the calendar year during which the fiscal year began).

General Laws c. 70, § 2(d), (f) and (a) define the terms "School aid percentage," "Valuation percentage," and "Equalized valuation" as follows:

" 'School aid percentage', for each city or town, the amount by which one hundred per cent exceeds the product, to the nearest tenth of one per cent, of sixty-five per cent times the valuation percentage; (subject to a proviso not here relevant)."

" 'Valuation percentage', the proportion, to the nearest tenth of one per cent, which the equalized valuation per school attending child of the city or town bears to the average equalized valuation per school attending child for the entire state."

" 'Equalized valuation', the equalized valuation of the aggregate property in a city or town subject to local taxation, *as most recently reported by the state tax commission to the general court under the provisions of section ten C of chapter fifty-eight.*" (Emphasis supplied.)

Prior to 1966 there was no G. L. c. 58, § 10C, that section having been inserted by St. 1966, c. 14, § 43 (effective as of January 1, 1966 by virtue of St. 1966, c. 14, § 79). That section provides in relevant part as follows:

"On or before December thirty-first in each year in which an equalization is to be established, the commission shall, on the basis of the equalized valuations determined under sections nine and ten A, as modified by the appellate tax board under section ten B, establish a final equalization and apportionment upon the several cities and towns. . . The commission shall report its final equalization and apportionment to the general court, on or before December thirty-first, to assist it in determining the amount of any state tax or county tax to be imposed upon the several cities and towns."

Thus, the "equalized valuation" is an integral part of the formula for determining the "valuation percentage" for the calendar year 1965 which in turn is a part of the formula for determining the "school aid percentage" for the calendar year 1965, which in turn is a part of the formula for determining "school aid" for the year 1967. For 1967 the "equalized

valuations," as most recently reported by the state tax commission under G. L. c. 58, § 10C, are the 1966 equalized valuations reported on or before December 31, 1966. In essence, you express doubt as to whether the definition of "equalized valuation" specified in G. L. c. 70 should be given its plain and ordinary meaning. While perhaps arguments to the contrary can be made, I submit that this is the only reasonable alternative. As I shall explain, I do not think that use of the equalized valuation reported under G. L. c. 58, § 9 (prior to amendment by St. 1966, c. 14, § 43) and contained in House Document No. 3998 would be reasonable.

School aid for the year 1966 was payable quarterly, commencing not later than March 20 (G. L. c. 58, § 18A), at a time when there were no *equalized valuations as most recently reported under § 10C,* since under § 10C the state tax commission was not required to report the equalized valuations for the year 1966 until December 31, 1966, and prior to the year 1966 there was no section 10C. To correct this gap, it was necessary for the Legislature to make special provision for the year 1966. This they did by St. 1966, c. 14, § 73, which provides:

"Notwithstanding the provisions of chapter seventy of the General Laws, as amended by section forty of this act, the equalized valuation to be used in determining school aid for the calendar year nineteen hundred and sixty-six shall be the equalized valuations as reported by the state tax commission to the general court under the provisions of section nine of chapter fifty-eight of the General Laws during the year nineteen hundred and sixty-five."

Without this special provision for the year 1966, § 9 of G. L. c. 58 (as amended through St. 1953, c. 654, § 7 but prior to amendment by St. 1966, c. 14, § 43), has no relevance. That section simply required the filing of a report by the state tax commission to the General Court which did not have any official standing until acted upon and adopted by the Legislature. The last report submitted by the commission prior to 1965 was adopted by the General Court by St. 1963, c. 660. But the report in 1965 contained in House Document No. 3998 was never adopted by the General Court. Passage of St. 1966, c. 14, § 73 did give the report filed in 1965 legal significance, but by the express terms of that statute its use is limited to calculating school aid under G. L. c. 70 *for the year 1966 only.* The figures in the 1965 report have no legal status standing by themselves, and, without some express legislative direction, I can see no reasonable justification for using them in calculating state aid for the year 1967. This is especially so where it is entirely feasible to give literal effect to the definition of "equalized valuation" in G. L. c. 70.

In reaching this conclusion, I have considered the apparent anomaly of the requirement that you must make your certification for school aid figures based on equalized valuations to the Comptroller and the state tax commission not later than December 31, 1966, which is the last day the state tax commission must certify the equalized valuations to the General Court (G. L. c. 70, § 5 and G. L. c. 58, § 10C, as inserted by St. 1966, c. 14). However, as will appear, the equalized valuations are finally determined by December 2nd and thereafter are equally available both to you and to the state tax commission.

General Laws c. 58, § 9, as inserted by St. 1966, c. 14, § 43 (subse-

quent references to G. L. c. 58 will be to the statute as amended by St. 1966, c. 14, § 43) provides:

"In the year nineteen hundred and sixty-six and in every second year thereafter, the commission shall, on or before April first, determine and establish for each city and town a proposed equalized valuation. . . ."

Thereafter, on or before April 20th of each year in which an equalization is to be established, the commission is required to hold a public hearing on the proposed equalized valuations. G. L. c. 58, § 10A. On the basis of any new information received at the hearing or otherwise, the commission may change the proposed valuations, sending notice not later than one week after the close of the hearing to the assessors of the city or town concerned. *Ibid.* Any city or town aggrieved by the equalized valuation so established may appeal on or before June 1st to the Appellate Tax Board. G. L. c. 58, § 10B. The Appellate Tax Board must then decide any such appeal by December 1st, and failure of the Appellate Tax Board to act by that date is deemed to be a denial of the appeal. *Ibid.*

Thus, on December 2nd the equalized valuations are finally determined and are equally available to you and the state tax commission. Nothing in the statute prevents you from acting before the state tax commission has filed its report with the General Court. After December 1st the compilation of the figures is merely a ministerial function.

Thus, for years subsequent to 1966, it is my opinion that the plain and ordinary meaning of the statute should be given effect. Consistently with this opinion, in calculating state aid for 1967, you should use the "equalized valuations" for 1966 which were most recently reported by the state tax commission to the General Court on or before December 31, 1966 under the provisions of G. L. c. 58, § 10C.

Very truly yours,

Elliot L. Richardson, *Attorney General.*

107. May 1, 1967.

His Excellency John A. Volpe, *Governor of the Commonwealth.*

Dear Governor Volpe:—You have asked for my opinion as to:

1. Whether House Bill No. 4561, which is appended to your request, would, if enacted, be a law relating to the city of Boston within the meaning of Section 8 of Article LXXXIX of Amendment to the Constitution of the Commonwealth.

2. Whether Chapter 652 of the Acts of 1960 is a special law to which Section 9 of said Article is applicable.

3. Whether it is constitutionally competent, if the answer to Question 2 is in the affirmative, for the Legislature to amend said Chapter 652, except by a general law applying alike to all cities, or all cities and towns, or to a class of not fewer than two cities, no approval of such amendment having been given by the voters of Boston or by the Mayor and City Council of Boston.

Since it is brief, I set forth the entire text of House Bill No. 4561 here:

"AN ACT PROVIDING COMPENSATION FOR MEMBERS OF THE BOSTON REDEVELOPMENT AUTHORITY.

"Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

"SECTION 1. Chapter 652 of the Acts of 1960 is hereby amended by inserting after section 14 the following section:—

"Section 14A. Each member of the Boston Redevelopment Authority shall receive as compensation three thousand dollars a year for the performance of his duties. Such compensation shall be allocated by said Authority among its various projects in such manner and amounts as it deems proper.

"SECTION 2. This act shall take effect upon its acceptance by the city of Boston."

In my opinion, House Bill No. 4561, if enacted, would be a law "in relation to" the city of Boston within the meaning of Section 8 of Article LXXXIX, and therefore unconstitutional unless the provisions of Section 8 with respect to "special laws" have been complied with. This does not appear to be the case on the basis of the facts which you have stated.

Section 8 is quite clear in its terms, which I quote in full:

"The general court shall have the power to act in relation to cities and towns, but only by general laws which apply alike to all cities, or to all towns, or to all cities and towns, or to a class of not fewer than two, and by special laws enacted (1) on petition filed or approved by the voters of a city or town, or the mayor and city council, or other legislative body, of a city, or the town meeting of a town, with respect to a law relating to that city or town; (2) by a two-thirds vote of each branch of the general court following a recommendation by the governor; (3) to erect and constitute metropolitan or regional entities, embracing any two or more cities or towns or cities and towns, or established with other than existing city or town boundaries, for any general or special public purpose or purposes, and to grant to these entities such powers, privileges and immunities as the general court shall deem necessary or expedient for the regulation and government thereof; or (4) solely for the incorporation or dissolution of cities or towns as corporate entities, alteration of city or town boundaries, and merger or consolidation of cities and towns, or any of these matters."

The Boston Redevelopment Authority was established under the provisions of G. L. c. 121, § 26QQ. That statute is in terms a general law, originally including all cities and towns except Boston, and amended by c. 150 of the Acts of 1957 to include Boston. Chapter 121, as so amended, states:

"There is hereby created in each city and town in the commonwealth a public body politic and corporate to be known as the 'redevelopment authority' *of such city or town. . . .*" (Emphasis supplied.)

It provides further that no such redevelopment authority shall function until the local legislative body of the town or city (in a town, the town

meeting and in a city, the city council with the approval of the mayor) shall determine that there is a need for such an authority *"in such city or town"*. (Emphasis supplied.) In such case an authority shall be organized in the same manner as a housing authority. That is, four members are appointed by the mayor of the city involved and one by the state housing board. Further, the city or town is authorized to appropriate money for administrative expenses.

The Boston Redevelopment Authority was duly organized in pursuance of a vote of the Boston City Council passed August 19, 1957, and its members appointed and certificate thereof filed with the Secretary of the Commonwealth on October 4, 1957.

Chapter 652 of the Acts of 1960, "An Act concerning the development or redevelopment of blighted open areas, decadent areas and substandard areas by urban redevelopment corporations with special provisions for projects in the city of Boston," as its title indicates, is in some respects a general and in other respects a special law. Sections 1, 2, 5, 6, 7, 8, 9 and 10 make general amendments to G. L. c. 121A, dealing with urban renewal. Sections 3, 4, 11, 12, 13 and 14 all specifically mention the city of Boston or the Boston Redevelopment Authority or both, sometimes in connection with other cities or towns, and sometimes not. As stated by the Court in *Simonian* v. *B.R.A.*, 342 Mass. 573, 575-576, § 12 "gave substantial new powers and responsibilities to the Boston Redevelopment Authority" (p. 575), specifically including all the powers of the State Housing Board in respect to redevelopment projects "in the city of Boston", and establishing the Authority as the planning board of the city of Boston under G. L. c. 41, § 70.

We now come to House Bill No. 4561. It proposes to insert immediately after § 14 of St. 1960, c. 652 a new section, 14A, which does one thing and one thing only, namely, to give compensation of $3,000 each to members of the Boston Redevelopment Authority and to no others.

Section 8 of Article LXXXIX deals with the power of the General Court to act "in relation to cities and towns." It divides such legislation into general laws and special laws. General laws are stated to be "laws which apply alike to all cities, or to all towns, or to all cities and towns, or to a class of not fewer than two. . . . "

It is too clear for argument that House Bill No. 4561 is not a general law under any of these categories. It relates to one city, and only one, Boston. The Boston Redevelopment Authority is coterminous geographically with the city limits of Boston. It came into functioning being only by vote of the Mayor and Council of the City of Boston to meet a municipal need. It carries out projects for the benefit of the people of Boston. It is the Planning Board of the city of Boston. Four of its five members are appointed by the Mayor of Boston.

It is quite true that the state has an interest, and a large one, in the effective functioning of such authorities. But the General Court can protect that interest by general legislation at any time, such as the original legislation by which one member of each such authority is named by the state.

If House Bill No. 4561 is not general legislation under § 8, does it come

under any of the categories of special legislation permitted under that section?

I think not. It does not appear that it was introduced in pursuance of a petition filed or approved by the voters of the city of Boston or the Mayor and City Council of the City of Boston and, as I have stated, it clearly is "a law relating to that city or town," and, therefore, Cl. (1) is not satisfied. The provision in House Bill No. 4561 that it must be accepted by the City of Boston does not satisfy the constitutional requirement that it be initiated or approved by the voters or the Mayor and Council *before* the Legislature may act on it, not after. It was not adopted following a recommendation by the Governor under Cl. (2); it does not relate to a regional entity embracing two or more cities or towns or with other than existing city or town boundaries under Cl. (3), nor does it come under the matters enumerated by Cl. (4).

Since, in my opinion, House Bill No. 4561 is clearly a bill relating to the City of Boston which does not comply with the requirements set by Section 8 of Article LXXXIX, it is constitutionally incompetent for the Legislature to enact it into law. It, therefore, does not appear necessary to attempt to answer your second question and to sort out the parts of c. 652 of the Acts of 1960 that may constitutionally be amended in one way or another. Question 3 has been substantially answered in connection with Question 1.

Very truly yours,

Elliot L. Richardson, *Attorney General.*

108. May 4, 1967.

Honorable Cleo F. Jaillet, *Commissioner of Corporations and Taxation.*

Dear Commissioner Jaillet:—You have asked for an opinion on whether the persons in the classes enumerated below are entitled to personal income tax credits or refunds under G. L. c. 62, § 6B, inserted by c. 14 of the Acts of 1966 (the Sales Tax Act), as amended by c. 698, § 13 of the Acts of 1966.

Section 6B provides that if the total income of a "qualified taxpayer" and his spouse, if any, do not exceed $5,000 for the taxable year, the taxpayer, upon seasonable filing of a claim, shall be entitled to a credit (or a refund if the tax is less) of $4 for himself, a like sum for his wife, and $8 for each "qualified dependent." The section also provides that the credit or refund shall not be allowed to a married individual unless a joint return is filed. The same section defines a "qualified taxpayer" as:

". . . an individual who was an inhabitant of the commonwealth for not less than six months during the preceding calendar year, and who was not a person for whom another taxpayer was entitled to claim an exemption [under c. 62, § 5A]."

Finally, § 6B defines a "qualified dependent" as:

". . . an individual other than a spouse for whom a qualified taxpayer was entitled to claim an exemption [under c. 62, § 5A]."

Your inquiry to me asks whether, under the foregoing provisions, the following classes of persons, as described by you, are eligible for credits or refunds:

1. Inmates of correctional institutions, both federal and state.

2. Patients in mental institutions of all categories supported by private or public funds.

3. Persons on the welfare rolls of the Commonwealth in any form or on the rolls of any political subdivision thereof.

4. Members of the various religious communities, whether male or female.

5. Unwed mothers.

6. Any person receiving any aid in any form from any governmental unit or any political subdivision thereof.

7. Any married person estranged from his or her spouse who cannot meet the requirements of filing a joint return (because the spouse is of parts unknown).

8. Derelicts with no permanent place of residence anywhere and who can be classified as "drifters."

With respect to class number 7, you have also asked whether children of a union described in that class are "eligible to apply individually for and receive a refund?"

I construe your request for an opinion on all the foregoing matters as assuming that all the requirements for a credit or refund have been met unless by coming within one of your enumerated categories an individual is thereby rendered ineligible. Taking up your categories in the order of your presentation, my views on whether inclusion in any of them is by itself a disqualification are as follows:

(1) *Prison Inmates.*

Nothing in the statute disqualifies them as such. However, in order to be eligible as an "inhabitant," an individual must be "domiciled in the commonwealth." G. L. c. 62, § 61(c). This means that the taxpayer must have his home here. Obviously, this may occasionally present difficult factual questions in certain cases; but if an individual was domiciled in Massachusetts when imprisoned, the fact of imprisonment would not destroy the pre-existing domicile here.

(2) *Patients in mental institutions.*

Nothing in the statute disqualifies them, provided they are inhabitants of Massachusetts. Especially if the patient is committed by a court order, factual questions of domicile, as in the case of prison inmates, may occasionally arise where the patient was at some earlier time an inhabitant of another state. But if the patient was domiciled here when committed, the fact of commitment or mental incompetency would not destroy the pre-existing domicile.

(3-6) *Welfare recipients, members of religious communities, and unwed mothers.*

Nothing in the statute disqualifies any of the foregoing persons simply because they come within any of these categories.

(7) *Estranged married persons.*

Nothing in the statute excepts parties to broken marriages from the requirement that if a person is married, he and his spouse must file a joint return in order to qualify for the credit or refund. Nor does the statute disqualify a claimant simply because he is a child of a broken marriage.

(8) *"Drifters."*

Unless a person can qualify as an "inhabitant," as defined above in category 1, he is ineligible for a credit or refund.

The foregoing, I trust, answers your questions, so far as the facts presented allow.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General.*

109. MAY 16, 1967.

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

DEAR MRS. SULLIVAN:—On behalf of the Board of Registration of Radio and Television Technicians, you have requested my opinion on whether the Board may issue a master technician license to one Basil W. McFarland under the "grandfather clause" of the licensing statute.

The licensing of radio and television technicians by the Board is governed by St. 1963, c. 604, which became effective on November 3, 1963. Section 2 of the statute inserted §§ 87PPP-87VVV, the general licensing provisions, into G. L. c. 112. However, § 4, the "grandfather clause," as amended by St. 1964, c. 110, exempted persons already in the business of radio and television repair prior to December 31, 1964 from the examination and other requirements of §§ 87PPP-87VVV, by providing:

"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 [1] 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 [2] furnishes evidence that he is and is found to be of good moral character, and [3] 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."

You state that Mr. McFarland submitted an application for a master technician license, together with a check for the license fee, prior to December 31, 1964, but that his application and check were returned to him by the Board because the application form had not been properly completed, and were not resubmitted by him until January 4, 1965. (You do not indicate when you returned the original papers to him.) Mr. McFarland's error occurred in Item 18 of the Board's application form, which states:

"List the names and address of three (3) citizens, unrelated to you, who can vouch for your character, reputation, and technical competence in the repairing and maintenance of Radio and Television Receivers. *Do not give the members of this board.*" (Emphasis supplied.)

Spaces are provided on the form for three such references. One of the three references given by Mr. McFarland in his original application was a member of the Board, contrary to the prohibition in the foregoing instructions against using such a reference.

This raises a question whether Mr. McFarland qualified under the "grandfather clause" as a "person who files an application for a license . . . prior to December thirty-first, nineteen hundred and sixty-four. . . ." I am of the opinion that he did.

As indicated by the numbers [1], [2] and [3] that I have inserted in the "grandfather clause" quoted in the second paragraph of this opinion, a license must be granted to an applicant who meets the following three requirements:

[1] "files an application . . . at any time prior to December thirty-first, nineteen hundred and sixty-four on a form furnished by [the] board," containing a statement that he is engaged in the radio and television repair business on the date of the application and

[2] "furnishes evidence that he is and is found to be of good moral character," and

[3] "pays the appropriate license fee."

Item 18 of the application form is evidently addressed to the *second* of these requirements. Strictly read, however, the statute provides that only the *first* requirement need be fulfilled before December 31, 1964, and imposes no deadline for compliance with the second and third. Yet even if the statute did require the submission of evidence of good moral character before December 31, 1964, Mr. McFarland's error in completing the form cannot be regarded as so fundamental as to vitiate his application since the statute did not in terms require the submission of any particular kind of character evidence.

Further, viewing the application alone, as in the case of *Assessors of Brookline* v. *Prudential Insurance Co.*, 310 Mass. 300, 312 (holding that an application for abatement of a real estate tax on a form approved by the tax commissioner was not vitiated by the failure to answer certain questions on the form), I think that the application was only a notice by

which information was given to the Board with reference to the applicant's claim for an exemption. "An application, however, is not in its nature the presentation of evidence in support of such claim." *Assessors of Brookline* case, at p. 312. Without specifying in detail the kinds of errors and omissions that would be fatal to an application under the "grandfather clause," I am of the opinion that the application of Mr. McFarland was a sufficient compliance with the statute, and that, if he has otherwise satisfied the statutory requirements, he is entitled to be licensed thereunder.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General.*

110. MAY 16, 1967.

HONORABLE THEODORE W. SCHULENBERG, *Commissioner of Commerce and Development.*

DEAR COMMISSIONER SCHULENBERG:—You have requested my opinion on the following questions arising in connection with regional planning districts established under G. L. c. 40B:

"1. May a district refuse membership to an applicant municipality assuming the area requirement of section 3 of said chapter 40B is satisfied

(a) for any reason? and,

(b) on the ground that it has set its per capita limitation lower than set by the Commission?

"2. May a municipality lower its per capita limitation after joining and while a member, below the assessment set by the Commission for all member municipalities?

"3. If your answer is 'yes', must the commission lower the assessment for all the other member municipalities? Or, putting this question differently — does the lowest limitation set by one municipality in effect place a limit on the per capita assessment to be levied by the Commission on all member cities and towns?

"4. If your answer to question No. 2 is 'no', may the districts be advised that limitations as set by the municipalities at time of joining the District shall not be subsequently reduced?"

While it is not the practice of this Department to render formal opinions on matters of an essentially local character, an exception should be made here because of G. L. c. 40B, § 6, which provides:

"The several officers, boards, commissions, departments and divisions of the commonwealth and city and town officials may consult with any such district planning commission and shall furnish or make available to it on request all data and information within their knowledge and control pertaining to the area of jurisdiction of such commission."

I

Question 1 is apparently based on the assumption that a regional planning district established under G. L. c. 40B may be enlarged by the addition of other cities and towns which apply for membership. The only statute, however, which deals with membership in such a district is G. L. c. 40B, § 3, which provides:

"Any group of cities, towns, or cities and towns may, by vote of their respective city councils or town meetings, vote to become members of and thus to establish a planning district, which shall constitute a public body corporate, the area of jurisdiction of which shall be an area defined by the division of planning of the department of commerce and development as an effective planning region under clause (c) of section six of chapter twenty-three A."

Since § 3 makes no provision for enlargement of the membership of an existing district, an established district does not, as such, have power to accept an applicant municipality as an additional member. However, in conformity with § 3, the member municipalities of an existing district may at any time join with other municipalities to form what would, in essence, be a new, enlarged regional planning district which could then assume the functions of the old one. Should the formation of such a new, enlarged district be undertaken, any of the cities and towns belonging to an existing district could, of course, refuse to join the new one, and by so doing frustrate its formation. Thus, as a practical matter, an applicant municipality can be kept out of an expanded district by the refusal of any member of an existing district to join with it. The refusal of any such member need not be based on any particular ground.

II

Your remaining questions involve an interpretation of G. L. c. 40B, § 7, the relevant portions of which are as follows:

"Said commission shall, annually in the month of December, estimate the amount of money required to pay the costs and expenses of the district for the following year, shall fix and determine the proportion of such costs and expenses to be paid by the constituent cities and towns thereof during such year which, however, may not exceed any limit or maximum amount fixed by the city council of any city or town meeting of any town which votes to become a member of such planning district and shall certify the amount so determined for each city and town to the assessors thereof who shall include the sums in the tax levy of each year. Such apportioned cost shall be on a per capita basis in direct proportion to the population of the city or town and the planning district as they appear in the most recent national census, exclusive of the population in county, state or federal institutions. Upon order of the commission, the treasurer of each constituent municipality thereof shall, from time to time, subject to the provisions of section fifty-two of chapter forty-one of the General Laws, pay to the district treasurer sums not exceeding the amount certified by the commission as the municipality's share of the costs and expenses of the district."

Question 2 focuses on the "limit or maximum amount fixed by the city council of any city or town meeting of any town" upon the amount which

may be assessed by the regional planning commission, under the first sentence of § 7. The answer turns on whether or not such an assessment limit, once fixed by a member city or town at the time it votes to become a member of the district, may thereafter be reduced.*

I am of the opinion that no such reduction is permissible. Under G. L. c. 40B, § 3 (quoted in my answer to Question 1, above), a regional planning district is established by what amounts to a contract or compact among municipalities. The use of the language "which votes to become a member of such planning district," directly following the phrase "amount fixed by the city council of any city or town meeting of any town" in G. L. c. 40B, § 7, suggests that "the limit or maximum amount" fixed when the district was formed is not subject to later reduction and remains one of the obligations assumed by the member municipality.

The need for such a financial commitment on the part of the member municipalities is obvious. Without it, a single community could at any time sharply curtail the activities of the district by unilaterally reducing its sources of revenue. Indeed, there would be nothing to stop a recalcitrant municipality from cutting its assessment limit to an amount barely more than zero. Moreover, since § 7 requires that the portion of the costs assessed by the commission to any city or town "be on a per capita basis in direct proportion to the population of the city or town and the planning district," there would have to be a corresponding reduction in the amount assessed to all the other municipalities in the district. I find it hard to believe that the Legislature intended that the operations of a duly constituted regional planning district could be so readily frustrated.

The details of the fiscal procedure established by § 7 suggest the same result. That procedure consists of the following sequence of events:

(1) The district planning commission must "estimate the amount of money required to pay the costs and expenses of the district for the following year";

(2) The commission must "fix and determine the proportion of such costs and expenses to be paid by the constituent cities and towns thereof during such year";

(3) The commission must "certify the amount so determined for each city and town to the assessors thereof";

(4) The assessors must "include the sum in the tax levy for each year"; and

(5) The treasurer of each constituent municipality must from time to time pay to the district "sums not exceeding the amount certified by the commission."

The statute provides that the first three of these acts are to be performed by the commission "annually in the month of December." The plain implication is that step (4) is to be performed immediately thereafter, and the statute specifies that step (5) shall be completed "from

*There is now pending before the General Court a bill (Senate No. 516) which would insert in G. L. c. 40B, § 7, after the words "votes to become a member of such planning district" in the first sentence, the words: "provided that such per capita limit shall not be less than the per capita cost to the member municipalities at the time such city or town became a member. . . ." The filing of the bill does not, of course, mean that the amendment is needed.

time to time" during the ensuing year. Thus, each step in the above procedure is subject to a definite timetable. If the Legislature had intended the setting of the local assessment limits to be a recurring event, it seems to me that the statute would likewise have specified a time for this as well.

If, on the other hand, the absence of explicit reference to the time for municipal action under the assessment limit clause were interpreted as allowing such action at *any* time, the statute could become wholly unworkable. This clause appears in § 7 immediately after step (2) in the foregoing procedure, as a limitation on the amount which the commission is directed to "fix and determine" in December. The amount certified to the local assessors under step (3) is identical to the amount determined under step (2), and the duties of the assessors under step (4) and the local treasurer under step (5) are based on the amount so certified. Once this chain of events is set in motion, the statute makes no provision for redetermination or recertification by the commission, or for any exercise of discretion by the assessors or treasurer in the performance of their duties thereunder. Thus, any supervening change in the assessment limit of any municipality for the year in question would throw the entire procedure into chaos.

It is, therefore, my opinion that a municipality belonging to a regional planning district established under G. L. c. 40B may not reduce its existing assessment limit below the assessment lawfully set by the regional planning commission.

Since I have given a negative answer to Question 2, Question 3, by its terms, requires no answer. You will note, however, that I have already answered Question 3 in the course of my answer to Question 2.

In answer to Question 4, I see no objection to advising the regional planning districts established under G. L. c. 40B that the limits originally set by their member municipalities may not subsequently be reduced.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General.*

111. MAY 18, 1967.

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

DEAR MRS. SULLIVAN:—Acting on behalf of the Board of State Examiners of Electricians, you have requested my opinion on the following question:

"Under the provisions of G. L. c. 143, § 3L, does the Inspector of Wires in a city or town have to be given notice of work being done by a private contractor in or on property of the Commonwealth?"

Since you have not submitted specific facts with your question, I can answer it only in general terms.

The notice requirement referred to in your question appears in the last two paragraphs of G. L. c. 143, § 3L:

"No person shall install for hire any electrical wiring or fixtures subject to this section without first or within five days after commencing the work giving notice to the inspector of wires appointed pursuant to the provisions of section thirty-two of chapter one hundred and sixty-six. Any person failing to give such notice shall be punished by a fine not exceeding twenty dollars. This section shall be enforced by the inspector of wires within his jurisdiction and the state examiners of electricians.

"Any person installing for hire electrical wiring or fixtures subject to this section shall notify the inspector of wires in writing upon the completion of the work. The inspector of wires shall, within five days of such notification, give written notice of his approval or disapproval of said work. A notice of disapproval shall contain specifications of the part of the work disapproved, together with a reference to the rule or regulation of the board of fire prevention regulations which has been violated."

Thus, the notice requirement applies only to the installation for hire of "electrical wiring or fixtures subject to this section. . . ." The scope of "this section" (i.e., G. L. c. 143, § 3L) is defined in its first sentence as "electrical wiring and electrical fixtures used for light, heat and power purposes in buildings and structures subject to the provisions of sections three to sixty, inclusive."

While there are a great many types of "buildings and structures" which are "subject to the provisions of" G. L. c. 143, §§ 3-60, those sections contain no answer to the question of whether or not their scope extends to real estate of the Commonwealth. That question, I think, is answered by the first two sentences of G. L. c. 143, § 2A:

"The provisions of this chapter relative to the safety of persons in buildings shall apply to buildings and structures, other than the state house, owned, operated or controlled by the commonwealth, and to buildings and structures owned, operated or controlled by any department, board or commission of the commonwealth, or by any of its political subdivisions, in the same manner and to the same extent as such provisions apply to privately owned or controlled buildings occupied, used or maintained for similar purposes. The provisions of this chapter relative to the inspection of buildings privately owned shall apply in the same manner to the inspection of buildings subject to this section."

It is, therefore, my opinion that, generally speaking, a private contractor installing electrical wiring or fixtures used for light, heat or power purposes in any building or structure other than the State House, owned, operated or controlled by the Commonwealth is required to notify the municipal inspector of wires in accordance with § 3L thereof. In the absence of additional facts, I cannot answer your question more definitely.

Very truly yours,

Elliot L. Richardson, *Attorney General.*

112. May 25, 1967.

Honorable Howard Whitmore, Jr., *Commissioner, Metropolitan District Commission.*

Dear Commissioner Whitmore:—You have requested my opinion relative to a taking by the City of Boston of land owned by the Metropolitan District Commission (MDC) for the relocation and revision of the grade of the American Legion Highway in that city.

The documents you attached to your request reveal the following facts:

On December 6, 1962, the Public Improvement Commission (PIC) of the City of Boston filed in the Suffolk Registry of Deeds an order, approved by the PIC and the Mayor, for the relocation and revision of grade of American Legion Highway from Hyde Park Avenue, Hyde Park, to Canterbury Street, West Roxbury. Affected by this construction, and shown on plans dated November 5, 1962, attached to the order, is a parcel of land containing 55,265 square feet, owned in fee by the MDC and taken by a predecessor agency in October, 1899 in connection with the construction of Section 67, Stony Brook Siphon, High Level Sewer. The PIC order of December 6, 1962 purported to take 19,817 square feet of the MDC's parcel for a 90-foot highway location and 12,591 square feet for slope easements. The PIC construction will also require that one headhouse on the siphon be raised about 17 feet. The PIC order also purportedly took, in part, slope easements of the Metropolitan sewer easement from Station 0+70 to Station 11+47, Section 68, and slope easements and a highway location in the Metropolitan sewer and over the Metropolitan sewer from Station 11+47 to Station 17+30, Section 68.

The City of Boston cites as authority for this taking c. 393 of the Acts of 1906. That special act [as amended, including provisions for substitution of the PIC for the board of street commissioners] provides in part:

"Section 1. Every highway in the city of Boston shall be laid out, relocated, altered, widened, discontinued, constructed, or shall have specific repairs made thereon, only as provided in this act or as provided in some other special act for a highway named therein. . . .

"Section 2. Whenever said board of street commissioners shall be of opinion that in said city a public improvement should be made, consisting of laying out, relocating, altering, widening or discontinuing, with or without construction of sewer, or of changing the grade of, or constructing, with or without sewer, a highway or public alley, the board shall appoint a time for a public hearing. . . . After the hearing the board may pass an order for making any such improvement that in the opinion of the board is required by public convenience. . . . The board on the same day shall pass another order and therein shall determine and award the damages to be paid by the city to each person whose property is taken for the improvement. . . . Said orders shall . . . be approved in writing by the mayor. . . . After such approval by the mayor . . . the board shall cause to be recorded in the registry of deeds for the county of Suffolk the order for the improvement, . . . and such recording shall constitute the taking of land required for the improvement. . . ."

Specifically, you have asked ". . . whether or not this taking, made for the purpose for which it was taken by the city of Boston (PIC), was a

valid taking. . . . " You question whether the City of Boston has authority to take land held by the Commission in the absence of express legislation.

For reasons which I shall state below, I am unable to give you a conclusive answer to your question. I shall, however, set forth the relevant legal principles which may help you resolve the problems resulting from the purported taking.

As you correctly point out, there is no statute specifically authorizing Boston to take the land in question. Yet even absent specific authorization, land already in public use may be taken under a general power of eminent domain such as c. 393 of the Acts of 1906, for another public use provided the two uses are not inconsistent. See *Boston* v. *Brookline,* 156 Mass. 172, 175. *Commonwealth* v. *Massachusetts Turnpike Authority,* 346 Mass. 250, 254. Furthermore, uses are not necessarily inconsistent simply because the later taking may somewhat impair the original use. *East Hampton* v. *County Commissioners of Hampshire,* 154 Mass. 424. *Needham* v. *County Commissioners of Norfolk,* 324 Mass. 293, 296-297. Since the taking by the City of Boston is under the general authority of c. 393 of the Acts of 1906, the issue which must be resolved is whether the use of the City of Boston for the relocation and revision of the grade of the American Legion Highway is inconsistent with the MDC's sewer use.

This determination is essentially one of fact rather than law. *Boston* v. *Brookline, supra* at 176-177; *East Hampton* v. *County Commissioners of Hampshire, supra* at 425-426. No doubt an examination of the maps laying out each taking as well as an examination of the premises should be made. Consideration should also be given to the requirements of the City and the MDC and to possible engineering difficulties in adjusting them. These are some of the facts that should be resolved. With the aid of engineers, no doubt, other facts will also become relevant.

In your request you appear to assume that if the taking by the City of Boston was valid, the property would no longer be under the jurisdiction of the MDC. This result does not, however, follow from the given assumption. There being no statute specifically authorizing the City of Boston to take the land in question, the validity of any taking by the City under its general authority given by c. 393 of the Acts of 1906 must necessarily depend on the taking being so limited that the MDC's use of the land is not materially disturbed. *Newton* v. *Newton,* 188 Mass. 226, 228.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General.*

113. JUNE 5, 1967.

MR. ROBERT G. DAVIDSON, *Executive Director, Metropolitan Area Planning Council.*

DEAR MR. DAVIDSON:—You have requested my opinion as to the eligibility of the Metropolitan Area Planning Council (MAPC) to share in an appropriation made by Item 3015-05 of the Supplementary Budget for

the 1967 Fiscal Year (St. 1966, c. 709, § 2) to the Department of Commerce and Development from the Local Aid Fund. The appropriation is cast in the following terms:

"For the reimbursement, on a matching basis, of regional planning agencies for a program of planning studies . . . $30,000"

The eligibility of the MAPC to receive a distribution under this appropriation therefore apparently depends only on whether it is a "regional planning agenc[y]" within the meaning of the statutory language. On the face of it, this title certainly fits the MAPC, as described in G. L. c. 6, §§ 109-114. The MAPC is a *regional* agency, in that its activities are confined to a geographical district (the Metropolitan Area Planning District) consisting of a group of contiguous municipalities in the metropolitan Boston area. G. L. c. 6, § 111. That it is also a *planning* agency, is evident from the powers conferred upon it by G. L. c. 6, § 110. The very names "Metropolitan Area Planning Council" and "Metropolitan Area Planning District" are suggestive of its intended inclusion under the phrase "regional planning agencies."

According to your letter, however, it has been contended that the Legislature has, in effect, excluded the MAPC from the beneficiaries of this appropriation by making it payable from the Local Aid Fund. That Fund was established on the books of the Commonwealth by St. 1966, c. 14, § 28, inserting G. L. c. 29, § 2A, which provides that revenues credited thereto "shall be used solely for the state assistance of the cities and towns in accordance with the provisions of sections eighteen and eighteen A of chapter fifty-eight." General Laws c. 58, § 18A authorizes distributions from the Local Aid Fund "to the several cities and towns" for a variety of *local* purposes. The MAPC is a state agency, not a local one. G. L. c. 6, § 17. Its expenditures (with exceptions not here relevant) are limited to "such amounts as the general court may appropriate therefor." G. L. c. 6, § 114. For these reasons, it is argued, the allocation of sums from the Local Aid Fund to the MAPC would be inconsistent with the purposes for which that Fund was created and inconsistent with the word "reimbursement" in Item 3015-05.

I do not agree with this contention. That the MAPC is a state agency and that it receives a state appropriation are, in my opinion, insufficient reasons for ignoring the plain language of Item 3015-05. The particular issue to be decided here does not depend on the source, the General Fund, from which the MAPC may receive its other money. The issue is rather the uses which the Legislature authorized for Item 3015-05. It should be noted, moreover, that the MAPC differs from most state agencies in that the annual appropriations it receives from the General Fund are reimbursable from local sources. Under G. L. c. 6, § 114, "the amount appropriated by the general court [for the MAPC] shall be charged as assessments on the various cities and towns comprising the district; provided, however, that any such assessment on such city or town shall not exceed a sum equivalent to five cents per capita of the population of such city or town. . . ." Thus, the annual appropriations to the MAPC are in the nature of short-term charges against the member municipalities, rather than outright grants to the MAPC. A distribution of money from the Local Aid Fund to the MAPC under Item 3015-05 will thus have the effect of reducing the assessments upon these municipalities.

Actually, the reasons which have been advanced for excluding the MAPC from a share of these funds would apply to *all* "regional planning agencies." Typically, these agencies are the regional planning districts established by the voluntary action of cities and towns under G. L. c. 40B. While the c. 40B planning districts differ in a number of respects from the MAPC, these differences are only superficial. The two types of districts are almost indistinguishable in every important respect. For example:

(1) They are *regional* rather than *local,* both in purpose and in governmental status. (The MAPC, as previously indicated, is a state agency. G. L. c. 6, § 17. The c. 40B districts are political subdivisions of the Commonwealth. G. L. c. 40B, § 3.)

(2) They are governed by a body composed of *locally* appointed representatives of their member cities and towns. G. L. c. 6, § 109 (the "metropolitan area planning council").* G. L. c. 40B, § 4 (the "district planning commission").

(3) These bodies are charged with essentially the *same regional planning responsibilities,* their recommendations to their constituent municipalities being "advisory only." G. L. c. 6, § 110. G. L. c. 40B, § 5.

(4) They are financed principally by *assessments* upon the member cities and towns, made annually on a per capita basis. G. L. c. 6, § 114. G. L. c. 40B, § 7.

It seems to me, moreover, that exclusion of the MAPC from eligibility for distributions under Item 3015-05 would work a substantial injustice. Eighty-seven cities and towns are embraced in the Metropolitan Area Planning District, among them the City of Boston. It is by far the most populous of all the regional planning districts in the Commonwealth, and generates a large percentage of the income, meals and sales tax revenues from which the Local Aid Fund (in accordance with G. L. c. 58, § 18) is derived. If the Legislature had intended to omit such an important area from the benefits of this appropriation, I think it would have manifested this intention in plain language.

It is therefore my opinion that the MAPC is among the "regional planning agencies" referred to in Item 3015-05 of the Supplementary Budget for the 1967 Fiscal Year and hence is eligible to receive a portion of the funds appropriated thereunder. I would add, however, that the mere eligibility of the MAPC for such a distribution does not confer upon it any absolute right thereto, since, by the terms of Item 3015-05, the allocation of these funds among the "regional planning agencies" is left to the discretion of the Department of Commerce and Development.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General.*

*The MAPC also includes certain members appointed by the Governor and certain ex officio members, though the great majority of its members are the local representatives described above. There are also other details wherein the MAPC and the c. 40B planning districts differ.

114. June 6, 1967.

Honorable Edward J. Ribbs, *Commissioner of Public Works.*

Dear Commissioner Ribbs:—I have had under consideration a request by your predecessor to former Attorney General Edward W. Brooke for an opinion concerning land damage payments where the land is subject to a security interest. After careful consideration of the request, I have reluctantly come to the conclusion that the questions submitted are so general that it is inadvisable to attempt to deal with them without a specific factual foundation. In this connection I have in mind a statement by former Attorney General Paul A. Dever in 1935, appearing in the Report of the Attorney General for the year ending November 30, 1935, at page 31:

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

I have concluded, after very considerable thought and analysis, that the inquiries fall within the limitations just stated. I would apprehend that a necessarily discursive attempt to cover the field could cause more confusion than assistance. Please be assured, however, that upon submission to me of a particular set of facts involving the performance of some immediate duty, I will be pleased to render an opinion. In addition, the legal staff of the Eminent Domain Division is in a position to render informal legal advice to members of your Department on any aspects of the questions your predecessor has raised, as they may arise.

If this disposition presents any serious difficulties to you or to your staff, I should be glad to discuss the matter with you further.

Very truly yours,

Elliot L. Richardson, *Attorney General.*

115. June 6, 1967.

Honorable Quintin J. Cristy, *Chairman, Alcoholic Beverages Control Commission.*

Dear Mr. Cristy:—You have requested my opinion concerning two pending applications for transfers of alcoholic beverages licenses. One of these is an application to transfer to an individual a wine and malt "package goods" store license under G. L. c. 138, § 15; the other is an application to transfer to that individual's spouse a restaurant license under G. L. c. 138, § 12 for the sale of all kinds of alcoholic beverages.

In particular, you have asked the following questions:

"1. Whether or not the Commission may approve the transfers to the individuals, man and wife?

"2. Will the approval to the wife be predicated upon her having filed a Married Woman's Business Certificate?"

General Laws c. 138, § 12 states, in part:

"No person, firm, corporation, association or other combination of persons, directly or indirectly, or through any agent, employee, stockholder, officer or other person, or any subsidiary whatsoever, licensed under the provisions of section fifteen . . . shall be granted a license under this section."

General Laws c. 138, § 17 states, in part:

"Unless expressly authorized by this chapter, local licensing authorities shall not grant licenses to any person, firm or corporation under more than one section of this chapter."

Under these sections not more than one of the transfer applications may be approved if the transfers will result in one person directly or indirectly, in combination with or through any other person, holding both a package store license and a restaurant license. *Cleary* v. *Cardullo's Inc.*, 347 Mass. 337, 346-350.

Therefore, the Commission must determine whether any arrangement exists between the husband and wife which would amount to one of them being the agent or subsidiary of the other or the two of them being a "combination of persons" in the holding of the two licenses. If the Commission finds that there is no such arrangement or combination, it may approve the transfers.

As for your second question, you will recall that in an opinion to you on July 25, 1966 Attorney General Edward W. Brooke discussed in detail the significance of the filing of a Married Woman's Business Certificate. Op. Atty. Gen. 66/67 No. 7. That opinion pointed out that such a certificate is only one factor to be taken into consideration by the Commission in making its ultimate finding of fact.

Very truly yours,

Elliot L. Richardson, *Attorney General.*

116. June 7, 1967.

Honorable Anthony P. DeFalco, *Commissioner of Administration.*

Dear Commissioner DeFalco:—You have requested my opinion on the following questions:

"1. Does the Executive Office of Administration and Finance, acting through the Director of Program Planning and Research, have the authority, under the provisions of General Laws, Chapter 7, Sections 3 and 4, to do state level planning?

"2. Does the Executive Office of Administration and Finance have authority, under General Laws, Chapter 7, Sections 3 and 4, to receive federal funds for the above purpose of doing state level planning?"

You state in your letter that these questions arise because of an application made on behalf of the Executive Office for Administration and Finance to the United States Department of Housing and Urban Development for a $700,000 grant for "state-level planning." According to a memorandum furnished to me by your office, the term "state level planning" as used in your letter includes the following functions:

"1. Development and periodic revision of comprehensive state level, long-range plans for the Executive Department in Massachusetts [to provide answers to the following questions:]

a. What are the present responsibilities of the Executive Branch?

b. How are those responsibilities best delegated to the various state agencies to avoid (minimize) overlap or functional conflict?

c. What are the major long-range objectives of the Executive Department in Massachusetts?

d. What are the relative priorities among those objectives? . . . .

e. How can those objectives and priorities best be translated into an effective course of action?

f. What funds should be made available to which agencies over what period of time to accomplish the desired programs?

"2. Preparation of Executive Department reorganization plans as necessary to improve the implementation capabilities of the various departments and agencies of the Commonwealth.

"3. Cooperation with agencies of the federal government in the development, allocation, supervision and evaluation of specific federal grants for state level planning in Massachusetts."

Thus, the type of planning about which you inquire appears to be confined to organizational, fiscal, administrative and other *managerial* problems — as distinguished, for example, from the *physical, social* and *economic* planning committed to the Department of Commerce and Development under G. L. c. 23A, § 2(b).

As to Question 1, I think that the power of the Executive Office for Administration and Finance to conduct managerial planning projects is implicit in G. L. c. 7, § 3, which provides:

"The executive office for administration and finance shall serve as the principal agency of the executive department of the government of the commonwealth for the following purposes:

(1) Developing, co-ordinating, administering and controlling the financial policies and programs of the commonwealth;

(2) Supervising the organization and conduct of the business affairs of the departments, commissions, offices, boards, divisions, institutions and other agencies within the executive department of the government of the commonwealth;

(3) Developing new policies and programs which will improve the organization, structure, functions, economy, efficiency, procedures, services and administrative practices of all such departments, commissions, offices, boards, divisions, institutions and other agencies."

Under G. L. c. 7, § 4, moreover, the Commissioner of Administration, as head of the Executive Office for Administration and Finance, is expressly given powers which adequately encompass the functions listed in the above-quoted memorandum furnished to me by your Office:

"[The Commissioner of Administration] shall act as the executive officer of the governor in all matters pertaining to the financial, administrative, planning and policy co-ordinating functions and affairs of the departments, commissions, offices, boards, divisions, institutions and other agencies within the executive department of the government of the commonwealth. He shall inquire into the business affairs of the commonwealth and the laws governing them; shall supervise program planning and the co-ordination of the activities and programs of the commonwealth in its dealings with the federal government; shall review and report to the governor and the general court on all proposed legislation affecting the organization, structure, efficiency and administrative functions, services, procedures and practices of the departments, commissions, offices, boards, divisions, institutions and other agencies, or any of them, under the executive department of the government of the commonwealth; shall conduct studies of the operations of the said agencies with a view to effecting improvements in administrative organization, procedures, and practices and to promoting economy, efficiency, and avoiding of useless labor and expenses in the said agencies; shall from time to time recommend to the governor and the general court such changes as he shall deem desirable in the laws relating to the organization, structure, efficiency or administrative functions, services, procedures and practices of any such agency or agencies; and shall have such other powers and duties as shall be assigned to him by statute and may from time to time be assigned to him by the governor in accordance with law."

It is my understanding that the Director of Program Planning and Research, referred to in Question 1, is an official in the Executive Office for Administration and Finance whose office was created by you rather than by statute, to carry out the functions listed in the memorandum quoted in the second paragraph of this opinion. This delegation of authority is entirely proper. Under G. L. c. 7, § 4A, you, as Commissioner of Administration, "may from time to time establish within the executive office for administration and finance such bureaus, sections and other administrative units not otherwise established by law as may be necessary for the efficient, economical administration of the work of the executive office for administration and finance. . . ." Under G. L. c. 7, § 4D, you are authorized to "appoint such experts and other assistants in the said office as [you] shall deem necessary. . . ."

It is therefore my opinion that the Executive Office for Administration and Finance, acting through its Director of Program Planning and Research, has authority to conduct "state level planning" activities within the meaning of your letter.

I am also of the opinion that Question 2 must be answered in the affirmative. The authority of the Executive Office for Administration and

Finance to receive federal funds for "state level planning" purposes sufficiently appears in St. 1966, c. 411, § 8, which provides:

"Applications for all federal subventions and grants available to the commonwealth under any act of congress shall be subject to the approval of the commissioner of administration. Any transfer within such subventions or grants shall be subject to the approval of the commissioner of administration. All federal subventions and grants received by the commonwealth, or by a corporation or other organization established as an affiliate of any agency or institution operated by the commonwealth or by an individual employed by the commonwealth, authorized to expend such funds in conjunction with services rendered by the commonwealth, may be expended without specific appropriation under the terms and conditions provided in rules and regulations established by the commissioner of administration and if such expenditures are otherwise in accordance with law. All such federal subventions and grants shall be reported in full by the head of the agency directly rendering the services mentioned above to the budget director, to the comptroller and to the house and senate committees on ways and means. The report shall include such itemization as required in accordance with state and federal regulations. *All federal subventions and grants available to the commonwealth under any act of congress and not otherwise authorized to be received shall be paid into the treasury of the commonwealth.* All such expenditures of federal subventions and grants shall be subject to the audit of the state auditor." (Emphasis supplied.)

This provision (which was enacted as a part of the Budget for the 1967 Fiscal Year and which, in substantially identical form, has appeared in our budget statutes for many years) plainly contemplates the receipt by various state agencies, including the Executive Office for Administration and Finance, of federal funds "not otherwise authorized to be received." The only condition imposed upon the application to the federal government for such funds is that stated in the first sentence of the foregoing statute: your approval, as Commissioner of Administration. All funds thus received must, of course, as provided in the next to the last sentence of St. 1966, c. 411, § 8, quoted above, be "paid into the treasury of the commonwealth."

It is therefore my opinion that the Executive Office for Administration and Finance, subject to your approval, has authority to receive federal funds for the purpose of conducting state-level planning activities authorized by G. L. c. 7, §§ 3 and 4.

Very truly yours,

Elliot L. Richardson, *Attorney General.*

117. June 8, 1967.

Mr. William G. Saltonstall, *Chairman, Board of Education.*

Dear Mr. Saltonstall:—You have asked whether your membership on the State Board of Education, of which you are the chairman, precludes your teaching, with or without compensation, one of the seminars offered under the Harvard University Freshman Seminar Program. As

I understand it, such a teaching position would involve your formal appointment by the Harvard Corporation to the position of Visiting Lecturer in the Freshman Seminar Program; you would have charge of what to teach in your seminar; you would not grade the students, but would indicate at the conclusion whether or not their work was satisfactory; and satisfactory completion of your seminar would entitle the Harvard freshman taking it to receive credit towards his degree. It appears that these seminars were initiated in 1959 or 1960 on an experimental basis, and in 1963 they "became a regular part of the curriculum at Harvard and Radcliffe". Pamphlet entitled, *Harvard College-Radcliffe College, the Freshman Seminar Program 1966-1967,* p. 3. It is said in that pamphlet, "The Freshman Seminar Program offers opportunities for incoming students to work closely with members of the faculty on a variety of selected topics, in a variety of ways, each of which differs according to the predilections of the seminar leader and of the students he chooses to work with". At the end of the pamphlet is a brief description of each seminar with the name of the individual who will lead it. I understand that a stipend of $2000 would be offered to you for teaching a seminar, although, as indicated above, you might choose to waive it.

General Laws, c. 15, § 1E provides:

"No appointive member of said board shall be employed by or derive regular compensation from any educational institution, or school system, public or private, in the Commonwealth. . . ."

Should you decline to receive compensation for teaching the seminar, the question would remain whether, although not receiving compensation, regular or otherwise, you were nonetheless "employed by" an educational institution in the Commonwealth, within the meaning of the statute.

This is not an easy question to answer. The words "employ" and "employed" have been construed by courts in varying ways depending on their context. In the so-called Willis-Harrington report, which was the basis of the statute in question, the following rationale was given for excluding from the Board persons employed by or deriving regular compensation from educational institutions:

"[The Board of Education] . . . must at the very least exclude schoolmen, whose profession stands to gain most in power from expanding education. The best composition can consist basically of taxpayers who must find the money to finance expansion. Within that group, labor, management, industry, the private professions, finance, all stand at the frontiers of the Massachusetts economy. . . . Such statewide civilian leadership should be able to argue most persuasively and hardheadedly in support of the returns it sees in particular investments in education. . . ." *Report of the Special Commission to Investigate and Study Educational Facilities in the Commonwealth of Massachusetts,* 1965 House Doc. No. 4300, p. 190.

The above language suggests that the words "employed by" should not be limited to those faculty and staff members of an educational institution who actually receive pay (although, normally, of course, persons having an employment relationship would receive pay). The object of the legislation is apparently to exclude from Board membership all "schoolmen", a term which seems more descriptive of what the individual does than

whether or not he is compensated. Should you teach the seminar, you would receive a formal appointment to the Harvard Faculty; you would be entitled to compensation whether or not you actually accept it; you would be in charge of a course being given for credit to freshmen; and you would be regularly exercising over the period of at least one semester all the duties customarily exercised by a member of the faculty with respect to that seminar.

Under these circumstances, I am of the opinion that, regardless of whether or not you receive or waive compensation you would be in the employ of Harvard within the meaning of the statute. Hence, it is my opinion that you may not consistently with your present position as a member of the Board of Education, teach the described seminar.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General.*

118. JUNE 8, 1967.

HONORABLE EDWARD J. RIBBS, *Commissioner of Public Works.*

DEAR COMMISSIONER RIBBS:—You have requested my opinion as to the appropriate source of payment of the cost of a certain proceeding before the Real Estate Review Board of your Department.

The proceeding about which you inquire was the subject of the case of *Revere Housing Authority* v. *Commonwealth,* Mass. Adv. Sh. (1966) 1047. It arises from a taking of land by eminent domain from the Revere Housing Authority (RHA), made by the Metropolitan District Commission (MDC) for a parking area under authority of St. 1960 c. 515. For such a taking the Metropolitan District Commission is required by St. 1955 c. 693, § 1 to compensate the Revere Housing Authority in "an amount to be mutually agreed upon." Statute 1957, c. 657 amends this statute by adding the following provision:

"In the event that the parties concerned are unable to mutually agree upon the amounts to be paid as herein provided the matter shall be referred to the real estate review board created by section six of chapter four hundred and three of the acts of nineteen hundred and fifty-four which shall determine the amount to be paid, and said determination shall be final."

Since the MDC and RHA were "unable to mutually agree upon the amounts to be paid" for the land taken, a proceeding before the Review Board was instituted in accordance with the last-quoted provision.

We thus have two public agencies (the MDC and RHA) appearing as litigants before a third public agency (the Review Board), acting in a quasi-judicial capacity. Since the Review Board is within your Department, it is essential that you know from what source the expenses of this proceeding are to be paid. These expenses consist of salaries paid to the Review Board members and disbursements made by them. In the course of an opinion dated November 5, 1965 relative to the authority of the Review Board to determine the amount to be paid to the RHA for the taking, the then Attorney General declared:

"Compensation of the Real Estate Review Board shall be paid from the funds made available by the bond issue or other appropriation for the project from which the specific case or cases being considered by said Board arise." *Report of the Attorney General for the Year Ending June 30, 1966,* p. 164.

You now ask whether or not the foregoing statement "still stand[s]" and, if not, the source from which the expenses of this proceeding shall be paid.

I am of the opinion that the statement should be revised. The project in question was the construction and maintenance of a public parking area by the MDC and was authorized by St. 1960, c. 515, § 1, which provides in part as follows:

"The metropolitan district commission is hereby authorized and directed to take by eminent domain under the provisions of chapter seventy-nine of the General Laws, or to acquire by purchase or otherwise, a certain parcel of land located on Ocean avenue in the city of Revere, containing approximately fourteen acres of land, owned by the Revere Housing Authority and referred to as the Ocean Avenue Redevelopment Project, U R Mass. 1-1, for the purpose of constructing and thereafter maintaining and operating thereon a public parking area."

The only appropriation of funds for this project was made to the Metropolitan Parks Division of the MDC and appears in St. 1961, c. 517, § 2, Item 9027-01, ". . . for the construction, enlargement and improvement of parking facilities . . . including the project authorized by [St. 1960, c. 515] . . ."

As previously indicated, the Review Board is an agency of your Department. Thus, the use of funds available under the foregoing appropriation for the expenses of this proceeding would involve the transfer of those funds from the MDC to your Department. However, there is nothing in the enabling legislation or the appropriation (or in any other statute of which I am aware) which authorizes such a transfer. In the absence of statutory authorization, "one state department cannot transfer a part of the funds appropriated to it to another department." *Baker* v. *Commonwealth,* 312 Mass. 490, 493. *Attorney General* v. *Trustees of Boston Elevated Railway Co.,* 319 Mass. 642, 654-655. I therefore conclude that the expenses of this proceeding in your Department may not be paid from the funds appropriated for the MDC project from which the proceeding arises.

This being the case, there remains the question of the source from which these expenses shall be met. The Review Board was established "within the department of public works" by St. 1952, c. 556, § 6, and was given a continued existence by St. 1954, c. 403, § 6 and St. 1956, c. 718, § 6. Under these same statutes, the members of the Review Board are appointed by the Commissioner of Public Works, and your Department is empowered to "fix the compensation of the members. . . ." I infer from these provisions that the Legislature intended the salaries and disbursements of the Review Board to be paid from the funds of your Department.

This inference, in my opinion, is neither weakened nor counteracted by the fact that the proceeding involved here does not pertain to the func-

tions of the Review Board under the statutes referred to above. It is true that those statutes deal exclusively with the so-called accelerated highway program and the powers of the Review Board with respect thereto, while the project from which the present proceeding arises is not a part of that program and the Review Board's jurisdiction here was conferred by an unrelated statute (St. 1955, c. 693, § 1, as amended by St. 1957, c. 657, referred to in the second paragraph of this opinion). For this reason the Legislature might have chosen to relieve your Department of the financial responsibility for such a proceeding. However, it did not do so.

It is therefore my opinion that the expenses of the present proceeding must be paid from funds appropriated or otherwise available to your Department. Not having been supplied with more detailed information, I cannot specify the particular account to which these expenses should be charged, or, indeed, whether the necessary funds are even available. If no funds are presently available to your Department for this purpose, I can see no course open to you but to seek a special appropriation.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General.*

119. JUNE 13, 1967.

HONORABLE THEODORE W. SCHULENBERG, *Commissioner, Department of Commerce and Development.*

DEAR COMMISSIONER SCHULENBERG:—In a recent letter you have requested my opinion on whether proposed housing projects for elderly persons of low income under G. L. c. 121, § 26AA et seq. are limited to 100 dwelling units each and may be approved by your Department only after a public hearing, as in the case of housing projects for families of low income under G. L. c. 121, § 26AA(b). It is my opinion that these requirements apply alike to both kinds of projects.

General Laws c. 121, § 26TT (relative to housing for the elderly) provides:

"The housing authority of each city or town, organized under section twenty-six K, shall have power to provide housing for elderly persons of low income either in separate projects or as a definite portion of projects undertaken under Part III or Part V of this chapter, or in remodeled or reconstructed existing buildings, *and the provisions of Parts I, II, III and V of this chapter shall, so far as apt, be applicable to projects and parts of projects undertaken under this part,* except as otherwise provided in section twenty-six UU* or elsewhere in this chapter." (Emphasis supplied.)

General Laws c. 121, § 26AA (relative to housing for low-income families) found in Part III of chapter 121 provides in relevant part:

"Excepting projects as to which a contract between the federal government and a housing authority is in effect, and projects involving the recon-

*Section 26UU establishes certain special provisions for housing for the elderly, and will be discussed below.

struction, remodeling or repair of existing buildings, projects shall be approved by the board [the Department of Commerce and Development, see G. L. c. 121, § 26J] as follows:

"(b) Projects involving the construction of new buildings by a housing authority shall be approved by the board following due notice and a public hearing in the town or city involved held to consider testimony relating to the determinations required to be made. The board shall approve such a project only if it makes the following determinations: (i) the proposed project does not include in excess of one hundred dwelling units; . . . (iii) the design and layout of the proposed project is appropriate to the neighborhood in which it is to be located. . . ."

By use of the words "shall, so far as apt, be applicable" in section 26TT, the Legislature in my opinion, meant to incorporate by reference all the provisions of the other Parts (I, II, III and V) of c. 121, unless a plain conflict would thereby be created. No such conflict exists with regard to the requirement of a public hearing or the limitation of a project to 100 dwelling units. Indeed, I regard both these conditions for approval of a project for low-income families as plainly compatible with a project for housing for the elderly. Both types of projects have features which may be of local interest in the communities where they are to be established. Specifically, the determination required by G. L. c. 121, § 26AA (b)(iii) that "the design and layout of the proposed project is appropriate to the neighborhood in which it is to be located" is the kind of finding that is as applicable to one kind of project as the other. Since such a determination may be made only after a public hearing in the case of projects for low-income families, it should also, in the case of projects for the elderly, similarly be made only after a public hearing. Such a hearing would provide the kind of balanced consideration that a determination of that nature requires.

Similarly, the limitation on the size of a project is a feature that is as appropriate to apply to one type of project as to the other. A policy determination that projects in excess of 100 dwelling units create an undesirable environment would seem to have no less validity in the case of housing for elderly persons than in the case of housing for others.

It is significant that there is statutory sanction for establishing a project for housing for the elderly as a "definite portion" of a project for low-income families. G. L. c. 121, § 26TT. This provision implies recognition of the similarity in the general character of both types of housing.

Further, the provisions in G. L. c. 121, § 26UU that specifically relate to projects for the elderly, are not expressly or by implication incompatible with the public hearing requirement or the 100 dwelling unit limitation. These provisions simply establish standards peculiarly applicable to housing for the elderly. Thus section 26UU exempts occupants of housing projects for the elderly from any requirements that they constitute families; and it also provides that such projects shall when practicable be established near neighborhoods where elderly persons reside, shall be so designed "so as to alleviate the infirmities characteristic of the elderly," shall be assigned to applicants "without regard to their status as veterans," defines how rents shall be computed, and directs a housing board to establish rules and regulations for tenant selection. None of the foregoing

provisions of section 26UU are in conflict with the requirement of a public hearing or the 100 dwelling unit limitation.

I thus conclude that proposed housing projects for elderly persons involving the construction of new buildings by a housing authority may be approved only after a public hearing by your Department under G. L. c. 121, § 26AA and a determination that the proposed projects do not include in excess of one hundred dwelling units except, as stated in section 26AA, in the case of "projects as to which a contract between the federal government and a housing authority is in effect, and projects involving the reconstruction, remodeling or repair of existing buildings."

Very truly yours,

Elliot L. Richardson, *Attorney General.*

120. June 19, 1967.

Honorable Theodore W. Schulenberg, *Commissioner, Department of Commerce and Development.*

Dear Sir:—You have sent me, with your recent letter, a copy of a directive issued in March, 1967 from the Deputy Commissioner of the Division of Housing within the Department of Commerce and Development to each of the Housing Authorities in the Commonwealth, increasing architects' fees for housing projects effective March 1, 1967. The directive provides that all approved Architectural Contracts which have not resulted in executed Construction Contracts prior to March 1, 1967 will be adjusted to specified maximum all-inclusive fees and it orders all Authorities having executed Architectural Contracts affected by the directive to vote to adjust the contract accordingly. I understand that the effect of the directive would be to increase the former fees.

You then pose the following questions:

"1. Does the Deputy Commissioner of the Division of Housing have the power and authority to set architects' fees and promulgate directives and regulations concerning same?

"2. May the new increased fees be applicable retroactively to contracts which had provided for lesser fees between the local Housing Authority and the architect executed before the effective date of the directive but prior to the execution of the Construction Contract?"

In reference to question No. 1, G. L. c. 121, § 26U provides that the Division of Housing may from time to time make, amend and repeal rules and regulations prescribing standards and stating principles governing the planning, construction, maintenance and operation of projects by housing authorities. Although G. L. c. 121, § 26P authorizes housing authorities to enter into contracts relating to housing projects, approval of such contracts rests with the Division of Housing under § 26AA. Further, the Contract for Financial Assistance between the Commonwealth of Massachusetts and a local housing authority provides that all contracts are subject to the approval of the Division of Housing. In view of the foregoing, it is my opinion that the establishment and regulation

of architects' fees relative to contracts for housing projects is within the power and authority of the Division of Housing. Accordingly, I answer your first question in the affirmative.

Your second question relates to the retroactive effect of the March, 1967 directive providing for increased architects' fees on those Architects' Contracts executed prior to March 1, 1967. I assume that these contracts were previously approved by the Division of Housing, and are now valid and legally binding obligations of the parties thereto. If this is so, the Division, in my opinion, has no power to direct the local housing authority to undertake to amend, on terms less favorable to itself, the original contracts — contracts to which the Division was not and is not itself a party. No such power can be inferred from the Division's authority to withhold approval of *proposed* contracts. If amendment of an approved and existing contract could thus be forced, the local housing authority could be put in a position where it was committed against its will to a bargain which it no longer found acceptable or, indeed, could afford. A power of such magnitude cannot be inferred from any provision of G. L. c. 121. Accordingly, I must answer your second question in the negative.

With regard to your request for assistance in outlining steps to be taken "to remedy the situation" which might result from a negative answer to your second question, I think that this can best be handled by informal discussions between members of our respective staffs.

Very truly yours,

Elliot L. Richardson, *Attorney General.*

121. June 19, 1967.

The Board of Trustees, *Southeastern Massachusetts Technological Institute.*

Gentlemen:—You have requested my opinion on your authority to acquire by purchase or eminent domain certain oceanfront property for an oceanographic center which I understand is situated in the town of Westport, some distance away from the properties now held by your Institute. For the reasons which follow, I am of the opinion that you lack the authority to make the acquisition.

The Southeastern Massachusetts Technological Institute (SMTI) was created by § 3 of c. 543 of the Acts of 1960 (cited as c. 543), inserting G. L. c. 75B, "for the purpose of giving instruction in the theory and practical arts of engineering and science, the liberal arts, and other appropriate curricula. . . ." G. L. c. 75B, § 1.

Section 4 of c. 543 is the only authority for the acquisition by SMTI of real estate by purchase or eminent domain. It provided:

"The board of trustees for the Southeastern Massachusetts Technological Institute may acquire, in the name of the commonwealth, by gift, devise, purchase or the exercise of the right of eminent domain in accordance with the provisions of chapter seventy-nine of the General Laws, *a suitable site* subject to the approval of the governor and council *for the*

campus of the Southeastern Massachusetts Technological Institute in an area most accessible to the major population centers of the region." (Emphasis supplied.)

Section 5 of the same act declared:

"Said board of trustees shall have the power, subject to appropriation and the provisions of sections thirty A to thirty J of chapter seven of the General Laws [relative to public building construction] to prepare plans and specifications and to award contracts for the construction of necessary class rooms and library, laboratory, dormitory, administration and other buildings at *the site of the campus.*" (Emphasis supplied.)

Sections 6-10 of the act provided for the eventual consolidation and integration of Bradford Durfee College of Technology, in Fall River, and the New Bedford Institute of Technology, in New Bedford, into SMTI. By c. 495 of the Acts of 1964, the consolidation was made effective as of July 1 of that year.

I understand that by three takings made since 1960, the trustees, with the approval of the Governor and Council, have acquired contiguous parcels of land in North Dartmouth, which is now the center of SMTI. These acquisitions were financed by an appropriation made in Item 8261-03 of § 2 of c. 774 of the Acts of 1960 relative to "the acquisition of a site for the Southeastern Massachusetts Technological Institute, authorized by [c. 543]." Item 8064-21 of c. 648 of the Acts of 1963 allocated $6,000,000 "[f]or the construction of certain classroom and administrative facilities for the institute . . . in addition to the amount appropriated in item 8261-03 of [§ 2 of c. 774 of the Acts of 1960]."

The precise question raised by your inquiry is whether the proposed acquisition of the property in Westport, not being contiguous to the North Dartmouth campus and being some distance away in another community, is authorized by the provisions of § 4 of c. 543, whereby your board was empowered to "acquire . . . a suitable site . . . for the campus" of Southeastern Massachusetts Technological Institute. The answer to this question accordingly depends on whether, within the meaning of the statute, a "site . . . for the campus" can consist of noncontiguous sites in different localities.

The ordinary and natural meaning of the statutory language imports only one location. All references in the statute to the "campus" and to its "site" speak only in the singular, and the appropriation acts, cited above, relative to the acquisition of the "campus," also refer to it in the singular only. Like use of the singular is found in G. L. c. 75B, § 16, inserted by c. 543, whereby the trustees are authorized to "lease to any professor, instructor, teacher or employee of said institute, or to any society, association or fraternity established thereat, *land on the campus of the institute,* owned by the commonwealth, for the erection and maintenance of suitable dwellings thereon. . . ." (Emphasis supplied.)

I am not unmindful of the provision of G. L. c. 4, § 6, Fourth, that in construing statutes, "words importing the singular number may extend and be applied to several persons or things." Statutory construction may make such an extension or application only where the context of a statute fairly permits. Here, however, I find no valid basis for doing so. It has

been held that the "campus" of a university does not include noncontiguous lands. *Vanoli* v. *Munro,* (Cal.) 147 C.A. 2d 179, 304 P. 2d 722 (1956). Chapter 543, by its use of the words *"a* site," *"the* site," and *"the* campus" indicates that, in all likelihood, this was also the sense in which the Legislature used the word "campus." At the least, the Legislature, in my opinion, contemplated an integrated area made up of land confined to one local community.

Nothing in this opinion should, of course, be regarded as implying that I do not regard the proposed oceanographic center as a desirable addition to SMTI. On the information available to me, I indeed believe that it would be a valuable facility. But I am constrained to say that I cannot find any legal basis to permit the proposed acquisition.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General.*

122. JUNE 19, 1967.

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

DEAR MR. FINNEGAN:—You have requested my opinion as to the appointment of "confidential secretaries" in certain state agencies under G. L. c. 30, § 7, which provides:

"Each officer, board and commission having supervision and control of an executive or administrative department, including the commissioner of administration, the comptroller, the purchasing agent, the budget director, and the director of personnel and standardization, each commissioner of the department of banking and insurance, the state superintendent of buildings, the alcoholic beverages control commission and the state racing commission, but not including the several boards serving in the division of registration of the department of civil service and registration, may appoint and remove a person to serve as a confidential secretary. Such appointment shall be in accordance with the provisions of sections forty-five to fifty, inclusive, of this chapter and shall be exempt from the provisions of chapter thirty-one."

Your questions with reference to this statute are in substance as follows:

1. Does G. L. c. 30, § 7 authorize the appointment of a "confidential secretary" by the Board of Trustees of Lowell Technological Institute?

2. Does G. L. c. 30, § 7 authorize the appointment of more "confidential secretaries" in the Executive Office for Administration and Finance than one such secretary for each of the six officials within that Office who are named in the statute?

3. What is meant by the words "Each officer, board and commission having supervision and control of an executive or administrative department," in G. L. c. 30, § 7?

By way of background to Question 1, you state in your letter that you have received a requisition from Lowell Technological Institute for "one

permanent, full-time Confidential Secretary," and that you have withheld action on this requisition pending a determination of whether or not the Trustees are authorized by G. L. c. 30, § 7 to make such an appointment. As you point out in your letter, the existence of this authority depends on whether the Institute is "an executive or administrative department" within the meaning of § 7.

I am of the opinion that Lowell Technological Institute is not "an executive or administrative department" for purposes of G. L. c. 30, § 7. When used with reference to agencies of our state government, the word "department" ordinarily has a precise technical meaning. This is traceable to Article 66 of the Amendments to the Massachusetts Constitution, which provides:

"On or before January first, nineteen hundred twenty-one, the executive and administrative work of the commonwealth shall be organized in not more than twenty departments, in one of which every executive and administrative office, board and commission, except those officers serving directly under the governor or the council, shall be placed. Such departments shall be under such supervision and regulation as the general court may from time to time prescribe by law."

The 66th Amendment was adopted November 5, 1918. It continued in force until November 8, 1966, when it was repealed by the 87th Amendment. During the forty-eight-year life-span of the 66th Amendment, the word "department" had a constitutional significance which is of utmost importance to an understanding of many of our statutes,* including G. L. c. 30, § 7.

Soon after the adoption of the 66th Amendment and pursuant thereto, the Legislature enacted St. 1919, c. 350, entitled "An Act to Organize in Departments the Executive and Administrative Functions of the Commonwealth." Section 1 of this Act provided:

"The executive and administrative functions of the commonwealth, except such as pertain to the governor and council, and such as are exercised and performed by officers serving directly under the governor or the governor and council, shall hereafter be exercised and performed by the departments of the secretary of the commonwealth, the treasurer and receiver general, the auditor of the commonwealth and the attorney-general, and by the following new departments hereby established, namely:—

The department of agriculture.
The department of conservation.
The department of banking and insurance.
The department of corporations and taxation.
The department of education.
The department of civil service and registration.
The department of industrial accidents.
The department of labor and industries.
The department of mental diseases.
The department of correction.

*See *Commonwealth* v. *Toomey*, 350 Mass. 345, 348-350.

The department of public welfare.
The department of public health.
The department of public safety.
The department of public works.
The department of public utilities.

A metropolitan district commission is also hereby established as hereinafter provided and the provisions of Part I of this act shall apply to said commission.

"All executive and administrative offices, boards, commissions and other governmental organizations and agencies, except those now or by virtue of this act serving directly under the governor or the governor and council, are hereby placed in the said departments and said commission, as hereinafter provided. . . ."

Beginning with § 24 of the 1919 statute, the functions of each of these twenty departments were described in detail. These sections were preceded in the statute by the heading, "PART III. THE EXECUTIVE AND ADMINISTRATIVE DEPARTMENTS."

The same statute, being a comprehensive reorganization of the state government, also dealt with "those officers serving directly under the governor or the council," which were excepted from the twenty-department restriction by the 66th Amendment. "PART II" of St. 1919, c. 350, consisting of §§ 14-23, was entitled, "THE GOVERNOR AND COUNCIL." The boards and officers listed in this category were:

The Adjutant General (§ 14)
The Supervisor of Administration (§ 15)
The Armory Commissioners (§ 16)
The Art Commission (§ 16)
The State Ballot Law Commission (§ 16)
The Board of Appeals from Decisions of the Tax Commissioner (§ 16)
The Commissioners on Uniform State Laws (§ 16)
The Commissioner of State Aid and Pensions (§ 16)
The Trustees of the State Library (§ 16)
The Superintendent of Buildings (§ 17)

It was in the following year that the history of what is now G. L. c. 30, § 7 began, with the enactment of St. 1920, c. 205:

"Each officer, board and commission having supervision and control of a state department under the provisions of chapter three hundred and fifty of the General Acts of nineteen hundred and nineteen, including the adjutant general and the officers, boards and commissions mentioned in sections fifteen and sixteen of said chapter three hundred and fifty, may, subject to the provisions of chapter two hundred and twenty-eight of the General Acts of nineteen hundred and eighteen, as amended, and to the rules and regulations made thereunder, employ a person to serve under such officer, board or commission in a confidential capacity, and such employment shall be exempt from the civil service laws. Appointments and removals made under this act shall be subject to the approval of the governor and council."

This statute, like the 1919 reorganization statute, drew a clear distinction between "departments" and non-departmental agencies serving under the Governor or Council. In designating the persons authorized to appoint a "confidential" employee, c. 205 first referred to "each officer, board and commission having supervision and control of a state department under the provisions of" St. 1919, c. 350 — that is, the heads of the twenty departments established by St. 1919, c. 350, § 1, previously quoted. The statute went on to confer the same power upon "the adjutant general and the officers, boards and commissions mentioned in" St. 1919, c. 350, §§ 15 and 16 — that is, all the non-departmental officials listed in the preceding paragraph, with the exception of the Superintendent of Buildings. (The word "including," by which the latter phrase is introduced, should be taken to mean "as well as," since this group of officials derives its authority under c. 205 only because they are named therein and not because they are heads of "state departments" within the meaning of the statute.) Thus, under St. 1920, c. 205, the power to appoint a "confidential" employee was conferred upon virtually every board or officer having charge of an autonomous state agency in the Executive Branch, namely—

(1) All department heads.

(2) All heads of agencies serving under the Governor or Council (other than the Superintendent of Buildings).

Though this statute has undergone a series of amendments since its original enactment as St. 1920, c. 205, the distinction between departments and non-departmental agencies has always been preserved in its language. The reference to "departments" as such in the initial phrase of the 1920 statute has been amended only once. This occurred in 1921 when it was incorporated into the General Laws as G. L. c. 30, § 7. Since all the relevant provisions of St. 1919, c. 350 were also included in the General Laws at that time, the reference to the 1919 statute obviously had to be stricken. As a result, the opening phrase of the 1920 statute was replaced by the phrase with which G. L. c. 30, § 7 still begins: "Each officer, board and commission having supervision and control of an executive or administrative department. . . ." The insertion at that time of the words "executive or administrative" before the word "department" appears to be a deliberate allusion to language in the 1919 statute ("executive and administrative functions of the commonwealth" found in St. 1919, c. 350, § 1; and "THE EXECUTIVE AND ADMINISTRATIVE DEPARTMENTS" used as the title of "PART III" of the same statute). Simultaneously with the substitution of G. L. c. 30, § 7 for St. 1920, c. 205, the Legislature enacted G. L. c. 30, § 1, wherein the word "department" was and still is defined, with exceptions not here material, as "all the departments of the commonwealth. . . ." All of this suggests that the Legislature of 1921, like the Legislature of 1920, used the word "departments" in its constitutional sense.

The historical development of that portion of St. 1920, c. 205 dealing with the power of non-departmental agencies to appoint "confidential" employees is also significant. When the 1920 statute became G. L. c. 30, § 7 in 1921, the Legislature included within this grant of power "the adjutant general, the supervisor [of administration] and each officer, board and commission mentioned in section seventeen of chapter six. . . ." Here

again, there was no change in the substance of the law. However, numerous substantive changes have been made in this part of the statute since 1921. In 1923, as a result of the establishment of a Commission on Administration and Finance, and the creation of a Comptroller's Bureau, Budget Bureau, Purchasing Bureau and Division of Personnel and Standardization therein, § 7 was amended to authorize the heads of these agencies to appoint "confidential" employees. St. 1923, c. 362, § 38. In 1937 the Chairman of the Commission on Administration and Finance, the Alcoholic Beverages Control Commission and the State Racing Commission were added, and all reference to the Adjutant General and the numerous officers, boards and commissions listed in G. L. c. 6, § 17 was deleted. St. 1937, c. 414, § 1. In 1941 the power was extended to the State Superintendent of Buildings. St. 1941, c. 512. In 1947 the Commissioner of Banks, the Commissioner of Insurance and the Commissioner of Savings Bank Life Insurance were added. St. 1947, c. 376. In 1962, § 7 assumed its present form, with the substitution of certain officers in the newly created Executive Office for Administration and Finance for those in the then defunct Commission on Administration and Finance. Thus, although G. L. c. 30, § 7 began by conferring the power to appoint "confidential" employees in virtually every agency in the Executive Branch, the Legislature has since manifested an intention to grant this power selectively. This is particularly noticeable in the wholesale deletions of the 1937 amendment. It is also apparent from the fact that many new state agencies have been created in the past twenty years, of which but a few have been named in amendments to § 7.

On the basis of this history, I conclude that the powers conferred in G. L. c. 30, § 7 have at all times been exercisable only by the heads of the twenty state departments authorized by the 66th Amendment and by the other agency heads enumerated in § 7. While there have been various changes in the roster of state departments since the establishment of the original group of twenty by St. 1919, c. 350, Lowell Technological Institute has never been accorded departmental status. On the contrary, G. L. c. 75A, § 1 places the Institute "within the department of education . . . ," although exempting it from the "control" of the Department of Education, and conferring upon it a substantial degree of autonomy. There are, of course, a great many state agencies placed by statute "within" a given department "but not subject to its control," as well as many others, lacking departmental status, which serve directly under the Governor and Council. The Legislature has demonstrated its awareness of this by listing some of these agencies in G. L. c. 30, § 7, but, for whatever reason, has done so very selectively. Lowell Technological Institute is not among those listed.

It is, therefore, my opinion that the Trustees of Lowell Technological Institute are not authorized to appoint a "confidential secretary" under G. L. c. 30, § 7. In stating this conclusion I do not rule out the possibility that the Trustees may have such power under some other statute, although no such statute has been called to my attention. Nor do I express any opinion on the ruling of the Attorney General in 1949 that the Director of the Division of Employment Security was authorized to appoint a "confidential secretary" under G. L. c. 30, § 7. *Report of the Attorney General for the Year Ending June 30, 1949*, p. 75. The con-

clusion reached in that opinion was based on circumstances not present here.

As to Question 2, regarding the powers of the Executive Office for Administration and Finance under G. L. c. 30, § 7, your letter states:

"The section provides that '. . . the commissioner of administration, the comptroller, the purchasing agent, the budget director, and the director of personnel and standardization, . . . the state superintendent of buildings . . . may appoint and remove a person to serve as a confidential secretary.' The question has arisen from time to time as to whether there may be within the Executive Office for Administration and Finance more than the six confidential secretaries provided for in the above provisions, such as a confidential secretary for the First Deputy Commissioner of Administration or the Deputy Commissioner for Fiscal Affairs. Will you please inform me if the section restricts the appointment of a confidential secretary to these six officers or may additional appointments be made under the section within the Executive Office for Administration and Finance?"

For purposes of this question, the operative words of § 7 are "may appoint and remove *a person* to serve as *a confidential secretary.*" (Emphasis supplied.) The use of the singular ("a person" and "a confidential secretary") rather than the plural strongly suggests that each of the six named officers may appoint one "confidential secretary" for himself and no more.

This conclusion is borne out by the legislative history of G. L. c. 30, § 7. The Legislature enacted St. 1920, c. 205 (the predecessor of § 7, quoted earlier in this opinion) on the basis of a petition filed by the then Supervisor of Administration. That petition employed the term "a person" and was otherwise almost identical to the statute as enacted. 1920 House Doc. No. 42. The petition was accompanied by a report of the Supervisor of Administration (1920 House Doc. No. 41) stating that the purpose of his petition was to enable each agency head "to select *one person* as confidential secretary or clerk. . . ." (Emphasis supplied.)

It is, therefore, my opinion that G. L. c. 30, § 7 authorizes one and only one "confidential secretary" for each of the six officials in the Executive Office for Administration and Finance who are named in the statute. I would emphasize once again, however, that this conclusion is confined to appointments made under the statute referred to. It might well be that additional appointments of this type could be made by the Commissioner of Administration under G. L. c. 7, § 4D* or some other statute.

Question 3 is somewhat abstract. I believe, however, that it is substantially answered in my response to Questions 1 and 2. Any attempt on my part to answer more comprehensively might well be misleading when applied to a particular set of facts arising in the future.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General.*

*General Laws c. 7, § 4D provides that "the commissioner [of administration] may, without regard to chapter thirty-one but subject to the approval of the governor and council, appoint such experts and other assistants in the [executive] office [for administration and finance] as he shall deem necessary; provided, that the number of persons holding such appointments at any time shall not exceed nine. . . ."

123. June 20, 1967.

Honorable Leo L. Laughlin, *Commissioner of Public Safety.*

Dear Commissioner Laughlin:—You have requested an opinion of the Attorney General on the following question:

"Is a company incorporated for the purpose of providing protective services against burglary and fire by means of devices placed in a subscriber's place of business and which provides a signal activated by an unauthorized entry into protected premises or the occurrence of a fire on the protected premises over low tension wires from the subscriber's premises to the company's central station, the 'transmission of intelligence by electricity' so that such companies are exempt from the rules and regulations [of the Board of Fire Prevention Regulations] by section 7 of chapter 141 of the General Laws?"

Your question seems to assume that if the described company is incorporated for "the transmission of intelligence by electricity" it is exempt from the rules and regulations of the Board of Fire Prevention Regulations. I do not believe this to be the case.

The power of the Board, which is an agency of the Department of Public Safety, to make the rules and regulations in question is conferred by the first sentence of G. L. c. 143, § 3L, which provides:

"The board of fire prevention regulations shall make and promulgate, and from time to time may alter, amend and repeal, rules and regulations relative to the installation, repair and maintenance of electrical wiring and electrical fixtures used for light, heat and power purposes in buildings and structures subject to the provisions of sections three to sixty, inclusive."

It is to be emphasized that the foregoing statute appears in G. L. c. 143, which is essentially a public safety statute and deals mostly with the inspection and regulation of buildings.

General Laws c. 141, on the other hand, is a licensing statute and relates to the examination, certification and activities of professional electricians. It is administered not by the Board of Fire Prevention Regulations but by the State Board of Examiners of Electricians, an agency of the Department of Civil Service and Registration. An exemption from c. 141, for companies "incorporated for the transmission of intelligence by electricity," appears in § 7 of that chapter.

Because of the difference in scope and subject matter of G. L. c. 141 and G. L. c. 143, it cannot be inferred that an exemption under one of these chapters is applicable to the other without some expression of legislative intention to that effect. I find no such expression in either chapter. Indeed, G. L. c. 141, § 7, which creates the exemption referred to above, indicates a contrary intention. It provides:

"*This chapter* shall not apply . . . to the work of companies incorporated for the transmission of intelligence by electricity in installing, maintaining or repairing wires, apparatus, fixtures or other appliances used by such companies and necessary for or incident to their business. . . ." (Emphasis supplied.)

Thus, the very terms of the exemption confine its application to "this chapter" — that is, G. L. c. *141*.

It is therefore my opinion that a company of the type described in your letter, if otherwise subject to the regulatory powers of the Board of Fire Prevention Regulations, would not be exempted therefrom merely because of its exemption from the licensing requirements of G. L. c. 141. Accordingly, it seems unnecessary for me to express an opinion at this time as to whether or not such a company is "incorporated for the transmission of intelligence by electricity" within the meaning of G. L. c. 141, § 7. Further, since your inquiry was directed only to the extent of the c. 141 exemption, I express no opinion on whether or not the activities of the described company involve "the installation, repair and maintenance of electrical wiring and electrical fixtures used for light, heat or power" for purposes of G. L. c. 143, § 3L.

Very truly yours,

Elliot L. Richardson, *Attorney General.*

124. June 22, 1967.

Honorable Leo L. Laughlin, *Commissioner of Public Safety.*

Dear Commissioner Laughlin:—You have asked the following questions relative to certificates of inspection and insurance of steam boilers, air tanks, refrigerators and air condition systems. For my convenience in answering, I have rearranged the numbering of your four questions.

Question 1:

Certain fire insurance companies not authorized to insure steam boilers, air tanks and refrigeration and air conditioning systems which come within the scope of Chapter 146 are issuing a comprehensive insurance policy, or so-called package deal which includes the steam boiler, air tank and refrigeration and air conditioning system. The unauthorized insurance company in turn is entering into an agreement with an authorized insurance company [which] in turn [is] making the inspection and issuing a certificate of inspection in the name of the authorized company and signed by an inspector in [its] employment who holds a Certificate of Competency to Inspect Steam Boilers issued by the Department of Public Safety in compliance with Chapter 146, Section 60. The authorized insurance company does not issue a policy of insurance but does issue a statement whereby the authorized insurance company assumes full responsibility and control of the boiler machinery insurance provided in the policy of the unauthorized insurance company doing business in the Commonwealth of Massachusetts.

Does this procedure comply with the intent of Chapter 146, Mass. G. L. (Ter. Ed.), as amended?

Question 2:

There are in this Commonwealth insurance companies who are authorized to insure steam boilers that come within the scope of Chapter 146, but who do not have in their employ a resident authorized inspector, and

who issue a package policy and reinsure through an authorized insurance company.

Must the reinsurer's company issue a policy of insurance in the name of the reinsurer's insurance company and issue a certificate of inspection in the name of the reinsurer's company and the certificate of inspection signed by the reinsurer's company's inspector who holds a certificate of competency in the name of the reinsurer's company?

Question 3:

A group of independent authorized insurance companies combine for the purpose of dividing the risks involved and set up a central inspection agency whereby the inspectors of the central inspection agency have been authorized to inspect steam boilers, air tanks and refrigeration and air conditioning systems in the name of each independent authorized insurance company in the group.

Does such a procedure constitute a violation of the intent of Chapter 146, Mass. G. L. (Ter. Ed.), as amended?

Question 4:

The Department of Public Safety has taken the position that the Great and General Court of the Commonwealth created one inspection agency and placed that agency in the Division of Inspection of the Department of Public Safety, and that insurance companies are in the business of insurance and must comply with the specific sections governing authorized insurance companies doing business in the Commonwealth.

Is the Department of Public Safety's position correct?

With respect to Question 1, I am not clear if your reference to "unauthorized insurance companies" implies that these companies are writing insurance in actual violation of the insurance laws (as distinguished from the public safety laws) of Massachusetts. See G. L. c. 175, § 3 and *Stone* v. *Old Colony Street Railway*, 212 Mass. 459, 464. If such an implication was intended, I suggest that you bring evidence of any such insurance law violations to the attention of the Commissioner of Insurance.

The General Laws group refrigeration and air conditioning systems together and treat air tanks and steam boilers separately. With respect to air tanks, G. L. c. 146, § 34 reads in part as follows:

"No person shall install or use, or cause to be installed or used, any tank or other receptacle for the storing of compressed air at any pressure exceeding fifty pounds per square inch, except when attached to locomotives or street or railway cars or trackless trolley vehicles or their brakes or body lifting apparatus, unless the owner or user of such tank or other receptacle shall hold a certificate of inspection issued by the division, certifying that the said tank or other receptacle has duly been inspected within two years, or unless the owner or user shall hold a policy of insurance upon the said tank or other receptacle issued by an insurance company authorized to insure air tanks within the commonwealth, together with a certificate of inspection from an insurance inspector who holds a certificate of competency described in section sixty-two."

Under G. L. c. 146, § 34, quoted above, air tanks must either (1) be periodically inspected by the Division of Inspection of the Department of Public Safety or (2) be covered by insurance in authorized companies and inspected by insurance company inspectors holding certificates of competency. I infer from your statement of facts in Question 1 that the described arrangements do not include inspection by the Department of Public Safety. It, accordingly, seems clear that they do not comply with G. L. c. 146, § 34, since although inspection would apparently be provided by an authorized insurance company, the tanks would not also be insured by one. Thus, I am of the opinion that a person may not lawfully install or use an air tank in the situation described in Question 1.

With respect to refrigeration and air conditioning systems, G. L. c. 146, § 45A reads in part as follows:

"No person shall operate or cause to be operated a refrigeration or air conditioning system, or any appurtenances thereof, excepting refrigeration or air conditioning systems in railway trains, motor vehicles, private residences, apartment houses of less than five apartments, and refrigeration and air conditioning systems located on property under the jurisdiction of the United States government, refrigeration and air conditioning systems used exclusively for agricultural, horticultural and floricultural purposes, and refrigeration and air conditioning systems having less than five tons capacity, unless such system has been inspected by the division and a certificate of inspection issued therefor, or unless such system is insured by and subject to periodical inspection by a company authorized to insure pressure vessels in the commonwealth, and a certificate of inspection has been issued therefor."

My preceding discussion of air tanks would appear to be applicable, likewise, to refrigeration and air conditioning systems, and my conclusions are the same, namely, that persons may not, in the situation described in Question 1, lawfully install or use such systems.

Regarding steam boilers, a careful reading of the statute leads me to the conclusion that the Legislature did not intend to sanction an arrangement of the type described in your Question 1.

General Laws c. 146, § 6 requires all steam boilers, with specified exceptions, to be inspected annually. Section 13 provides that the inspection of boilers in the Commonwealth shall be made either by the Division of Inspection of the Department of Public Safety or "by inspectors of insurance companies authorized to insure steam boilers in the commonwealth." While nothing in G. L. c. 146 expressly provides that a boiler which is under the inspection of an authorized insurance company need also be *insured* by an authorized company, the relevant statutory provisions, taken as a whole, lead me to infer that the Legislature intended that to be the case. General Laws c. 146, § 10, for example, provides in part, "that the owner or user of an *insured boiler* shall report immediately in writing to the chief [of inspections of the Department of Public Safety] whenever *the* insurance company ceases for any cause to inspect the boiler." (Emphasis supplied.) General Laws c. 146, § 26 provides that if a previously uninspected boiler "is insured . . . the company so insuring shall forthwith notify the chief to that effect, and shall inspect such boiler . . . *after the insurance is effected.*" (Emphasis supplied.) General Laws c. 146, § 29 requires the owner or user of a boiler to "immediately notify

the division *or the insurance company, if the boiler is insured,* if a defect affecting the safety of a boiler is discovered." (Emphasis supplied.) General Laws c. 146, § 30 provides, "If the insurance on any boiler required by this chapter to be inspected *expires,* or is cancelled because the insurers deem it unsafe . . . the owner or user shall cease to operate it until it has been put in a safe condition, satisfactory to *the insurers,* or has been inspected by the division." (Emphasis supplied.)

General Laws c. 146, §§ 60 and 62 provide:

Section 60. Request of Insurer Accompanying Application; Fee.

"The application of a person desiring to act as inspector of boilers for an insurance company shall be accompanied by a written request of said company for an examination of such person, together with a fee of twenty dollars."

Section 62. Right to, and Term of, Certificate.

"If the applicant is found competent he shall receive a certificate of competency to inspect steam boilers *for the company which requested the examination.* The certificate shall remain in force during his employment by the company unless sooner revoked." (Emphasis supplied.)

Nothing in the above statute suggests that inspectors for one company are authorized to conduct inspections for another.

Accordingly, I am of the opinion that in the case of steam boilers, as in the other cases discussed above, the arrangement described in Question 1 would be unlawful. I might add that if by the term "unauthorized companies" you mean that the companies are writing policies which they are not entitled to write under the *insurance* laws, this would, of course, be a further and separate reason that the said arrangement would be unlawful.

Your question which I have numbered 2 describes an arrangement whereby an authorized company (a reinsured) does not have in its direct employ a resident authorized inspector. Your attention is directed to the following pertinent statute:

General Laws c. 146, § 8 provides:

"No person shall operate or cause to be operated any boiler required by this chapter, to be inspected until it has been inspected, and the certificate of inspection . . . has been issued."

General Laws c. 146, § 13 provides in part:

"The inspection of boilers and appurtenances shall be made by the division, under the supervision of the chief, or by inspectors of insurance companies authorized to insure steam boilers in the commonwealth."

General Laws c. 146, § 14 provides in part:

"Every insurance company authorized to insure steam boilers in the commonwealth, shall *have in its employ* at least one inspector who holds a certificate of competency under section sixty-two and resides in the commonwealth." (Emphasis supplied.)

The arrangement that you describe would clearly be in violation of the foregoing § 14 of c. 146, which specifically requires an authorized company to employ an inspector, unless the reinsurance and inspection ar-

rangement could be said to supply the necessary employment relationship between the reinsured company and the inspector. However, under the aforementioned sections 60 and 62 of G. L. c. 146 a qualified inspector receives "a certificate of competency to inspect steam boilers *for the company which requested the examination.*" (Emphasis supplied.) From the facts you state, it would appear that the inspector's certificate of competency would relate only to the company issuing the reinsurance. He would therefore not be authorized under § 62 to inspect steam boilers for the reinsured; and even under the most liberal statutory interpretation, I do not see how he can be said to be in the reinsured's "employ." The reinsured company would thus be in violation of § 14 under the arrangement described in question 2.

Further, it is my opinion that the reinsurer, by virtue of its reinsurance agreement alone (absent the issuance of an insurance policy in the insurer's name), does not become the insurer of the steam boilers in accordance with the intent of G. L. c. 146. In the case of *Friend Brothers, Inc.* v. *Seaboard Surety Co.,* 316 Mass. 639, 642, it was said:

"Reinsurance has been defined as 'an agreement to indemnify the assured, partially or altogether, against a risk assumed by . . . [it] in a policy issued to a third party.' *Royal Ins. Co.* v. *Vanderbilt Ins. Co.,* 102 Tenn. 264, 267."

Being only an indemnitor, the reinsurer cannot be said to provide the insurance. It is my opinion that only if the reinsurer issues an insurance policy and certificate of inspection in its own name, the certificate being signed by the reinsurer's authorized inspector, can it be said that the reinsurer provides the insurance and satisfies the employment requirements of G. L. c. 146, § 14.

Question 3, above, involves the interpretation of the word "employ" as used in said § 14. Specifically, are the inspectors in the employ of the independent authorized insurance company for whom they inspect the equipment? The primary object of c. 146 and sections thereunder dealing with the insurance and inspection of steam boilers would appear to be the taking of all necessary precautions for the safe operation and use of steam boilers. The statute should be interpreted with an awareness of this object. It has been stated:

"It is a principle of general scope that a statute must be interpreted according to the intent of the makers, to be ascertained from its several parts and all its words construed by the ordinary and approved usage of the language, unless they have acquired a peculiar meaning in the law, considered in connection with the cause of its enactment, the subject matter to which it applies, the pre-existing state of the common and statutory law, the mischief or imperfection to be remedied, and the main object to be accomplished, to the end that it be given an effect in harmony with common sense and sound reason." *Duggan* v. *Bay State Street Railway,* 230 Mass. 370, 374 and cases cited therein.

An employee may be a servant, agent or representative and the payment of compensation as such is not a necessary element of employment. *Commonwealth* v. *Riley,* 210 Mass. 387, 395-6. VIII Op. Atty. Gen. 191, 194-195 (1926). Factors such as direction and control by the independent authorized insurer as to the method and manner of the performance of the work to be done by the inspectors should be considered. Yet, whether

or not an employment relationship exists is a question of fact to be determined in each particular case. The statement of facts that you have furnished does not, I find, sufficiently describe the details of the structure and operation of the Central Inspection Agency and its relationship to the inspectors and independent authority companies so as to enable me to render an opinion on the legality of the arrangement under § 14 of c. 146, and it is not feasible to discuss various hypothetical possibilities. However, the authorities which I have previously referred to should furnish you with a basis for determining whether the necessary employment relationship in fact exists in the particular situation you have in mind. In general, if you find that the insurance company issuing the policy exercises sufficient authority and control over the inspector making a particular inspection so that he can be said to be in its employ, then the Central Inspection Agency arrangement would, in my opinion, be lawful. In addition, of course, the inspector must be authorized to inspect boilers for the company insuring the particular boiler as required under § 62.

With regard to air tanks, refrigeration and air condition, my opinion, in answering your third question, is in the affirmative.

With respect to the question which I have numbered 4, I trust that my opinion on your other questions are sufficient to indicate the inspection that may lawfully be performed by insurance companies and what their responsibilities are in connection therewith.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General.*

125. JUNE 30, 1967.

HONORABLE ROY C. PAPALIA, *Chairman, Department of Public Utilities.*

DEAR COMMISSIONER PAPALIA:—You have requested an opinion on the respective jurisdictions of the Department of Public Utilities (DPU) and the Massachusetts Bay Transportation Authority (MBTA) over the proposed discontinuance of certain commuter trains of the New York Central Railroad Company. Nine trains are involved, five running between Boston and Worcester (the Worcester trains) and four running between Boston and Framingham (the Framingham trains). All nine trains stop at intermediate points between Boston and Framingham. The jurisdictional questions presented by your request arise from the fact that the area constituting the MBTA includes Framingham but does not include Worcester. G. L. c. 161A, §§ 1 and 2. It is my understanding that none of the trains are operated under any contract between the railroad and the MBTA, and no application has been made by the railroad to the Interstate Commerce Commission for authority to discontinue any of the service involved.

The railroad has filed with both the DPU and the MBTA petitions, under G. L. c. 160, § 128A,* for discontinuance of the trains. The DPU

*"A railroad corporation which has scheduled and operated a passenger train on a regular schedule for twelve consecutive months or more, except for holidays or interruptions caused by storms or other causes beyond its control, shall not discontinue the operation of such train or cut out more than ten per cent of its station stops, except with the written approval of the department after public hearing, notice of which hearing and proposed discontinuance shall be posted by the corporation at the stations involved for a period of fifteen days immediately preceding said public hearing. The department shall render a decision on its findings within a period of sixty days after said public hearing."

petition seeks discontinuance of only the Framingham-Worcester portion of the five Worcester trains. The MBTA petition seeks discontinuance of the four Framingham trains and the Boston-Framingham portion of the five Worcester trains.

With your letter you have sent a copy of a vote of the DPU adopted on April 13, 1967 in DPU 15377-F, relative to all nine trains, reading as follows:

"VOTED: That pursuant to the provisions of Section 22 of Chapter 161A of the General Laws, the Department determines that with respect to the proposed discontinuance of New York Central Railroad Company passenger train service between Boston, Framingham and intermediate points, there exists a conflict between the regulatory powers and duties of the Department of Public Utilities and the Massachusetts Bay Transportation Authority, and the Department exercises its authority to resolve the conflict by ordering a public hearing, under the provisions of section 128A of Chapter 160 of the General Laws, concerning the discontinuance of said service in conjunction with the proposed discontinuance of passenger train service between Boston and Worcester. The public hearing will relate to the following trains Nos. 407, 409, 420, 431, 432, 442, 449, 451, 490."*

You have also sent with your request a copy of an Order of Notice in DPU 15474, setting forth the foregoing vote and announcing the holding of a public hearing by the DPU on the railroad's petition. This hearing has recently been held but no decision has yet been rendered.

The MBTA, on petition filed with it by the railroad, originally scheduled a hearing for April 25, 1967. However, this hearing was cancelled and a new hearing has since been scheduled for July 11, 1967.

Based on the foregoing facts, you have asked the following questions:

"(1) Has the Department acted within its statutory authority in adopting the Vote referred to above dated April 13, 1967, in DPU 15377-F?

"(2) In what way, if any, is the action of the MBTA in ordering its April 25, 1967 [now July 11, 1967] hearing affected by the Vote and Order of Notice issued by this Department, on April 13, 1967?

"(3) Under what circumstances may the Department properly decide that there exists a 'conflict' as referred to in § 22, c. 161A, and take action such as it took on April 13, 1967?

"(4) What discretion has the Department in exercising 'such powers as it deems required in the particular instance'?

"(5) What are the regulatory powers of both agencies over a carrier that operates both within and without the area of the MBTA i.e., railroads and bus operations that run from Boston to State lines, and beyond?

"(6) Is either or both actions of the MBTA and this Department legal in connection with the pending New York Central petitions?"

In answering your questions, I will consider first the Legislature's allo-

*Trains 407, 409, 420, 431 and 432 are the Worcester trains; trains 442, 449, 451 and 490 are the Framingham trains.

cation of jurisdiction between the DPU and the MBTA. The MBTA was created by § 2 of G. L. c. 161A, inserted by § 18 of St. 1964, c. 563. See *Massachusetts Bay Transportation Authority* v. *Boston Safe Deposit and Trust Company,* 348 Mass. 538. It is a "political subdivision of the Commonwealth" composed of a defined territory and the inhabitants thereof (G. L. c. 161A, § 2); it is managed (§ 6) by a board of five directors appointed by the Governor for five-year terms, subject to the approval of certain public officials; it has the power to make by-laws and rules and regulations (§ 3[e]); and to take real property by eminent domain (§ 3[o]). It reports annually (§ 5[h]) to the Governor, a public advisory board and the Legislature. The State Auditor is required to make an annual audit of its accounts (§ 17) and to report thereon to its directors, the Governor and the Legislature.

Section 5(a) imposes on the MBTA the "duty to develop, finance and operate the mass transportation facilities and equipment in the public interest . . . in order to promote the general economic and social well-being of the [MBTA] area and of the commonwealth." By § 5(k) it is given "regulatory power . . . over all private companies providing mass transportation in the area of the Authority." *Massachusetts Bay Transportation Authority* v. *Boston Safe Deposit & Trust Company,* 348 Mass. 538, 547-548. Section 5(k) reads:

"Any private company lawfully providing mass transportation service in the area constituting the authority [the MBTA] at the time the authority is established may continue so to operate the same route or routes and levels of service as theretofore, and may conduct such further operations as the authority may permit in the future with or without a contract; provided that the authority shall in all respects have the same powers and duties in respect to such private carriers as are provided by law for the department of public utilities except as to safety of equipment and operations, schedules and routes not being, however, considered safety of equipment and operations for the purposes of this paragraph; and provided, further, that whenever the authority desires to add new routes for service in any area, it shall give preference in the operation of such routes to the private carrier then serving such area unless the authority concludes that such carrier has not demonstrated an ability to render such service according to the standards of the authority, that such service can be operated directly by the authority at substantially lesser expense to the authority and the public than if operated by such private carrier, or that for substantial and compelling reasons in the public interest operation by such private carrier is not feasible."

The foregoing provision, as the statement of the Supreme Judicial Court, just quoted, makes clear, gives the MBTA jurisdiction over all mass transportation service in its area. In my opinion it is equally clear that this jurisdiction is exclusive. By providing in § 5(k) that the MBTA "shall in all respects have the same powers in respect to . . . private carriers as are provided by law for the department of public utilities . . . ," the Legislature vested in the MBTA the regulatory powers that had previously been held by the DPU in the area involved. To interpret the legislation as giving concurrent jurisdiction to both agencies would be inconsistent with the broad powers given by the Legislature to the MBTA to develop mass transportation facilities in its area. Moreover, such an un-

natural construction would invite confusion and the frustration of any workable program of mass transportation.

Only one exception to the MBTA's exclusive jurisdiction in its area was carved out by the Legislature — that is, matters of safety. These were to be retained by the DPU under the exception respecting "safety of equipment and operations, schedules and routes not being, however, considered safety of equipment and operations. . . ." (§ 3[i].) Any contention that "safety" does not apply to "operations" as well as to "equipment" would, in my opinion, be wholly unwarranted. If safety were intended to relate only to equipment, the associated clause that "schedules and routes [are not] considered safety of equipment and operations . . ." would be rendered self-contradictory and meaningless. Since schedules and routes are plainly a part of operations, a restriction of "safety" to "equipment" would cause the final clause to, in effect, read, "operations [are not] considered . . . operations."

Support for the conclusion that the MBTA has exclusive jurisdiction over operations in its area is found in G. L. c. 161A, § 3(i), which is correlative to § 5(k). Section 3(i) gives the MBTA power:

"To provide mass transportation service, whether directly, jointly or under contract, on an exclusive basis, except as provided in paragraph (k) of section five, in the area constituting the authority [the MBTA] and without being subject to the jurisdiction and control of the department of public utilities in any manner except as to safety of equipment and operations; provided that schedules and routes shall not be considered matters of safety subject to the jurisdiction and control of said department."

This section confirms the provisions of § 5(k) vesting in the MBTA exclusive jurisdiction "in the area constituting the authority."

That area is defined in § 2 as the "Fourteen cities and towns and the sixty-four cities and towns," all specifically named. G. L. c. 161A has no express provision, however, dealing with (1) service that originates within the MBTA zone and extends beyond it and (2) service that originates outside the MBTA zone and extends within it. Hence your inquiries.

After careful consideration of the statute, I have concluded that the MBTA has exclusive jurisdiction under § 5(k) over the four Framingham trains, since the cities and towns where they run are all in the area constituting the MBTA; the DPU has exclusive jurisdiction over the five Worcester trains, since the cities and towns where they run are not all within the MBTA area. I find in the statute a clear distinction between service "in the area constituting the authority" (§§ 3[i], 3[j], 3[k], 5[f], 5[g], 5[k]) and "areas outside the area constituting the authority" (§§ 3[j], 5[j]). Thus § 3(j) states that the MBTA may operate mass transportation facilities and equipment in such outside areas "only pursuant to (i) an agreement with or purchase of a private mass transportation company, part of whose operations were, at the time the authority was established, within the area constituting the authority or (ii) an agreement with a transportation area or a municipality for service between the area of the authority and that of such transportation area or municipality, where no private company is otherwise providing such service." See *Eastern Massachusetts Street Railway* v. *Massachusetts Bay Trans-*

portation Authority, 350 Mass. 340. And § 5(j) requires certain terms to be included in "[a]ny agreement entered into by the authority with a municipality outside of the area of the authority."

Thus nothing in the legislation, except § 3(j), gives the MBTA jurisdiction beyond its area. However, the fact that a carrier may have a separate route between a point outside of the MBTA area and a point therein or the fact that it may have a route wholly outside the area as well as a route wholly therein does not curtail the MBTA's jurisdiction within its area. Such a limitation of authority would find no warrant in the statute but, in my opinion, would be contrary to its underlying purpose to create the MBTA as an agency "to develop, finance and operate the mass transportation facilities and equipment in the public interest . . . , in order to promote the general economic and social well-being of the [MBTA] area of the commonwealth." (§ 5[a].) "The implicit mandate of the statute is to provide transportation when and where public necessity and convenience require it." *Massachusetts Bay Transportation Authority* v. *Boston Safe Deposit & Trust Company,* 348 Mass. 538, 548.

On the other hand, a commuter train running between Boston and Worcester is an indivisible unit and cannot, in my opinion, be realistically split, for regulatory purposes, into two segments — one within and one without the MBTA area. The interrelationship of all stops, in respect of revenues, service and personnel, leads me to the conclusion that a single agency must have been intended by the Legislature as the instrument of public regulation of such a train. As between the MBTA and the DPU, I consider the DPU as the instrument that the Legislature designated for this purpose. The MBTA's jurisdiction stops at its geographical perimeter, and no implication of additional jurisdiction can, in my opinion, be implied. On the other hand, the DPU had jurisdiction in the MBTA area before the creation of the MBTA; that jurisdiction must, in my opinion, be regarded as having continued unless curtailed by the MBTA statute. In the case of the five Worcester trains, I conclude that there was no such curtailment.

Further, it is my opinion that since the statute delimits the respective spheres of the MBTA and the DPU over the four Framingham trains with sufficient clarity, there is no room for the application of G. L. c. 161A, § 22, whereby "In the event of any conflict between the regulatory powers and duties of the [DPU] and the regulatory powers and duties of the [MBTA] within its area, the [DPU] shall resolve such dispute and exercise such powers as it deems required in the particular instance." In my opinion, this section does not refer to a disagreement such as that involved in the present matter. Where, as here, the statute is sufficiently clear and explicit to sustain the MBTA's exclusive jurisdiction over the four Boston-Framingham trains, § 22 has no application. There may be other situations in which it may properly apply, but preferring to deal with them as concrete cases when they actually arise, I believe it advisable to refrain from speculating about them as mere possibilities.

Relating this opinion to the questions asked in your letter of April 20, 1967, my views are, accordingly, as follows:

(1) The DPU acted beyond its statutory authority in adopting its vote dated April 13, 1967 in DPU 15377-F.

(2) The MBTA's jurisdiction in this matter was not affected by the foregoing vote or the DPU's Order of Notice dated April 13, 1967.

(3) Because the application of § 22 should be determined on a case-by-case consideration of particular facts, I believe it would be inadvisable to speculate on possible circumstances to which it might apply. Suffice it to say, it did not authorize the adoption of the vote dated April 13, 1967 in DPU 15377-F.

(4) Because of the generality of this question, I believe it inadvisable to attempt an answer. In the absence of specific facts, any answer would necessarily be inconclusive.

(5) Since the present matter does not involve any operations beyond state lines, I believe it inadvisable to deal with such a hypothetical situation. So far as this question deals with operations wholly within Massachusetts, I hope that this opinion will clarify the jurisdiction of each agency.

(6) I regard the hearings of each agency, in respect to the New York Central Railroad Company, as legal with the respective spheres of jurisdiction defined above in this opinion.

Very truly yours,

Elliot L. Richardson, *Attorney General.*

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