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The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

Year Ending June 30, 1970

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The Commonwealth of Massachusetts

Boston, December 2, 1970

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, 1970.

Respectfully submitted,

Robert H. Quinn
Attorney General

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL

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John F. Houton

Chief Clerk

Russell F. Landrigan

Assistant Chief Clerk

Edward J. White

1Appointed July, 1969
2Appointed August, 1969
3Appointed September, 1969
4Appointed October, 1969
5Appointed November, 1969
6Appointed December, 1969
7Appointed January, 1970
8Appointed February, 1970
9Appointed March, 1970
10Appointed April, 1970
11Appointed May, 1970
12Appointed June, 1970
13Terminated July, 1969
14Terminated August, 1969
15Terminated September, 1969
16Terminated October, 1969
17Terminated November, 1969
18Terminated December, 1969
19Terminated January, 1970
20Terminated February, 1970
21Terminated March, 1970
22Terminated April, 1970
23Terminated May, 1970
24Terminated June, 1970

STATEMENT OF APPROPRIATIONS AND EXPENDITURES

For The Period
July 1, 1969 — June 30, 1970

Appropriations

0810-0000	Administration	$2,037,660.
0811-0000	Certain Legal Services	10,500.
0821-0100	Settlement of Claims	108,000.
	Total	$2,156,160.

Expenditures

0810-0000	Administration	$1,873,301.
0811-0000	Certain Legal Services	3,222.
0821-0100	Settlement of Claims	96,916.
	Total	$1,973,439.

Income

0801-40-01-40	Fees—Filing Reports Charitable Organizations	$14,181.00
0801-40-02-40	Fees—Registration Charitable Organizations	3,620.00
0801-40-03-40	Fees—Professional Fund Raising Council or Solicitor	100.00
0801-69-99-40	Miscellaneous	338.64
	Total	$18,239.64

Financial Statement Verified (under requirements of C. 7, S 19 GL) April 28, 1971.

By Edward J. Baldwin
For the Comptroller

Approved for Publishing.

M. Joseph Stacey
Comptroller

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL

Boston, December 1, 1970

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 the department during the fiscal year ending June 30, 1970, totaling 23,933 are tabulated as follows:

Extradition and interstate rendition	128
Land Court Petitions	210
Land Damage cases arising from the taking of land	1,633
Miscellaneous cases, including suits for the collection of money due the Commonwealth	9,020
Estates involving application of funds given to public charities	4,154
Workmen's compensation cases, first reports	7,317
Cases in behalf of Employment Security	721
Cases in behalf of Veterans' Division	750

Introduction

My second Annual Report as Attorney General of the Commonwealth of Massachusetts, as required by G. L. c. 30, and 32, encompasses the fiscal year from July 1, 1969 to June 30, 1970.

Tradition and notoriety have accustomed us to view the Attorney General as a negative factor in governmental life. He accuses by indictment, prohibits by opinion, and prosecutes in trial. This is part of the job, but the perspective is not true for today. Through legislative mandate responding to social needs, the Massachusetts Attorney General is much more a positive force for improvement than a negative factor inhibiting action.

I have, over the past eighteen months, enjoyed the rare privilege of being able to implement through my present office programs restive to the people's needs, which I shared and shaped as a legislator. My office has also been active in proposing new programs for legislative enactment. In this regard, my staff is constantly engaged in researching and suggesting amendments or modifications of present laws, and in designing and drafting totally new laws where necessary. The 1970 Legislature enacted twenty-four bills proposed by this office, and these new laws have added to the growing list of legislative commands which help give my office its positive direction. (A list of these twenty-two acts and two resolves appears in the appendix.)

This positive direction has been most obvious and significant in consumer protection. In my term, this program has not been merely one of protection but of advancement of the buying citizen to the competitive level of his selling counterpart.

The positive aspect of our work is most humanely epitomized by our battle against drug abuse. The focus of new legislation in Massachusetts has been not so much upon the crime as upon the human beings involved and the human resources to be preserved. This progressive approach has also characterized the activities of our new Drug Abuse Section which we established in September, 1969. This section headed by Assistant Attorney General Robert Murray, has mounted a five-pronged attack against drug abuse emcompassing tough enforcement, positive education, realistic legislation, effective rehabilitation, and increased research. The diversity of our efforts underscores the complexity of the problems we face, but by working closely with doctors, educators, researchers, self-help leaders, and other experts and employees in the field of drug abuse prevention, we hope to reverse the rising tide of drug abuse in our communities.

This office has also naturally become the center of activity for government's response to our most recently acknowledged peril — that to man's environment. Balancing the economics to assure a life-supporting atmosphere is a particular challenge to the office of the lawyer for government and ultimately for the people. Legal doctrine developed in different eras, in response to different demands, all too frequently has not permitted creative legal redress of environmental injury. Our actions against polluters and our actions for clean air and pure water, have been direct and insistent, and this office is now gearing to intensify our efforts in this vital area of the environment.

All that makes up our environment, however, and all that makes up government, exists for creation's finest work, for man himself and man's happiness. He is the center of legislative command and legal implementation. This fact has remained uppermost in the minds of all of us in the Attorney General's office in the handling of our duties.

This concern for the citizen motivates us in our insistence that government employees exist to serve the people and that those who distort this principle must not be tolerated. This principle guides us in our effort to perfect the institutions that guard people's lives and property through our Committee on Law Enforcement. It also spurs the Attorney General to live in his every official act the theme of "Liberty and Justice for All."

Administration

The Administrative Division of this Department underwent considerable change during the year.

Due to attrition, the staff of the Division was severely reduced at the beginning of the fiscal year. Additions were made during the Summer and Fall of 1969, and by January 1, 1970 the Division was at full strength with a complement of twelve attorneys holding the rank of Assistant Attorney General or Deputy Assistant Attorney General and two attorneys holding the rank of Special Assistant Attorney General. In view of the workload during the past year, the number is less than we could profitably use, but despite reduced manpower the work of the Division has progressed satisfactorily for the most part.

During the administrations of prior Attorneys General, the principal function of the Administrative Division has been the preparation of the formal opinions of the Attorney General and the rendering of advisory services to constitutional officers and heads of state agencies on an informal basis. Litigation on the civil side of the Courts occupied a minor role. This balance has now shifted, not only because of a greater awareness of the rights of individuals vis-a-vis the state government and its agencies but also because of the work of various legal assistance projects and particularly the Massachusetts Law Reform Institute. During the past fiscal year, our work in the Federal courts tripled over the prior fiscal year. There was an increase in litigation in the state courts, but not nearly as significant as the increase at the Federal level.

As a result, advisory services took on a secondary role. This is unfortunate, but inasmuch as litigation involves deadlines which must be met, pleadings which must be filed, and cases which must be tried and argued, the litigation cannot wait. With a fixed staff, priorities were required to be reordered, and accordingly litigation became the first priority.

Two significant cases should be mentioned as demonstrative of the increasing litigation workload. In September and October of 1969, half of the attorneys of the Division were required to spend full time on research and preparation of the briefs in the case before the Supreme Judicial Court which challenged the Massachusetts inquest procedures. That case received world-wide attention, and was very ably argued by Assistant Attorney General Joseph J. Hurley, then the Chief of the Division. In April of 1970, the Division was required to defend the procedure for distributing the report and transcript of the inquest which was the subject of the case the preceding Fall. That suit, which was filed in the Federal Court, was also of great significance because it represented a potential conflict between the Federal and State court systems.

In addition, there have been numerous suits in the state courts challenging insurance statutes, orders of the Commissioner of Insurance, and orders of the Department of Public Utilities. Federal suits have been filed challenging portions of the state election laws.

The Massachusetts Reports are the best indication of the scope and complexity of the work of this Division. Additionally, I note that the staff of the Division prepared thirty-eight formal opinions of the Attorney General which are reprinted in this report.

Citizens' Aid Bureau

During the last twelve months the scope of the Citizens' Aid Bureau has increased considerably. One of the major innovations has been the addition of a Spanish-liaison officer who, although she handles all types of complaints amongst the Spanish-speaking community, functions out of the Citizens' Aid Bureau. In addition to servicing Spanish-speaking people who have problems with state government or consumer complaints, she has, on a regular basis, attended meetings in the Spanish community and visited the jails to insure that the Spanish-speaking inmates rights' are protected. A program has been instituted — which is in an embryonic

stage at present — with the various colleges throughout the Commonwealth to have Spanish-speaking students volunteer at correctional institutions to service individual needs under the direction and guidance of the Department of the Attorney General. Although the initial response to the services for Spanish people in the Attorney General's office was minimal, it is now a firmly established service in the community and used often by people throughout the state.

One of the more noticeable changes during the past year was the fact that the volume of complaints received by the Bureau remained constant at about an average of 60 per day. This is due in part to the increased visibility of the Bureau and the fact that more and more state agencies are referring people to us for assistance. The staff has generally consisted of nine people, four of whom have been interns — either on the summer program or the work study program from Harvard Divinity School. The frequent turnover of interns has proved beneficial — inasmuch as the students employed by the office have, without exception, a keen interest in helping people and learning the workings of state government. One of the last year's Harvard Divinity students has in fact remained on as a part-time member of the staff. In addition to dealing with the day-to-day problems, the interns have done research papers on matters of public concern — such as the new rent control legislation. This enables the office to have detailed information readily available.

One of the major stumbling blocks faced in helping people has been due to the cut-back of federal funds for legal assistance projects. In particular, legal services for indigent persons in Southeastern Massachusetts are now almost non-existent. The fact that some of the larger private firms are now taking indigent clients has helped somewhat but there is still a crying need for legal services to the poor.

Civil Rights and Liberties

The work of the Division includes acting as chief counsel to the Massachusetts Commission Against Discrimination, the state agency empowered to enforce those state laws prohibiting discrimination based on race, color, religion, sex, age, national origin or ancestry and past or present membership in the armed forces in the areas of employment, housing, education and public accommodations.

The case of *Massachusetts Commission Against Discrimination* v. *Franzaroli* was extremely significant for the Commission in that the Supreme Judicial Court held in its ruling that the Commission, where there is a basis for a finding that a complainant suffered frustration and humiliation as a result of a respondent's discrimination, may make an award of damages to the complainant to compensate him for the mental suffering so incurred. This ruling marked the first time in this Commonwealth that the Court had applied the principles of damage for mental suffering to a case of racial discrimination.

Attorneys in the Division also appear regularly in Superior Court proceedings to prevent discriminatory practices, primarily in the areas of housing and employment.

During the calendar year the Division has successful defended subpoenas issued by the Commission to both public and private bodies for the production of books and records deemed relevant to investigations being conducted by the Commission. Despite strong arguments by various respondents that the power of subpoenas accrues to the Commission only at the public hearing stage of its proceedings, the Courts have declined to accept that narrow interpretation of the law and instead have ruled that the Commission did have the power to subpoena books and records at the investigative stage of its proceedings.

In addition, members of the Division sit as counsel to the Commission at its weekly public hearings and advise the Commission on a daily basis as to problems that the Commission encounters in the administration of the antidiscrimination laws.

In addition to handling litigation on behalf of the Commission Against Discrimination, the Division processes many complaints and inquiries in its daily operation regarding the civil rights and liberties of the citizens of the Commonwealth.

Of particular importance to the Division are complaints made by citizens who allege police misconduct. Two of the most extensive efforts made by this Division in this connection involved the following incidents:

1) "Earth Day" Demonstration at Logan Airport, April 22, 1970. After a thorough investigation, the Division concluded that the police were "within bounds" in dispersing the demonstrators.

2) Hemenway Street Incident, May 10 and 11, 1970. The Division is conducting an exhaustive investigation of this confrontation in conjunction with the Internal Affairs Division of the Boston Police Department.

This Division acts as counsel to the Massachusetts Obscene Literature Control Commission and in addition, processes many inquiries and complaints from the general public regarding obscenity. Further, the members of the Division review allegedly obscene books submitted to them by local police departments and advise as to whether such materials should be prosecuted and by what means.

Of particular concern is the passage of legislation to insure greater protection from the civil rights and liberties of all citizens, and toward this end members of the Division testified at a number of legislative hearings. A bill (H. 2990), drafted through the joint efforts of staff attorneys of the Commission Against Discrimination and this Division, requiring the Commission to oversee State contracts in excess of $100,000, was filed and actively supported by the Division. The bill contemplated requiring prospective contractors to submit an affirmative action plan providing for equal employment opportunity to the Massachusetts Commission Against Discrimination in accordance with regulations and guidelines adopted by that Commission at a public hearing. Although this bill was not enacted into law during the 1970 legislative session it will be resubmitted in substantially the some form for consideration at the 1971 session of the General Court.

Public speaking engagements and the development of guidelines for police and district attorneys in the area of obscenity and human relations were among the many other efforts undertaken by the Division in 1969-1970.

Consumer Protection

During the year ending June 30, 1970, the Consumer Protection Division experienced a substantial growth. The number of consumer complaints was more than double that of the preceding year; staff correspondingly increased. Several hundred thousands of dollars were returned to consumers who had lost money or property because of the unfair or deceptive practices of certain sellers and lenders.

The wide scope of the Massachusetts Consumer Protection Act and the regulatory powers of the Attorney General under that law, as well as the enactment of new legislation outlawing other unfair or deceptive practices, have allowed the Division to investigate and enforce the law in a number of important areas.

The volume of consumer complaints and the addition of new consumer laws have created a need for educating the public about the provisions of these statutes. Consequently, a weekly "Consumer News" column is written and released to some two hundred daily and weekly newspapers throughout the Commonwealth. A set of six Consumer Information leaflets has been prepared illustrating several of the laws in cartoon form. 150,000 leaflets were distributed during 1970. Staff members of the Division appeared on television and were heard on the radio; others addressed various fraternal and service organizations, schools and other interested groups.

An average of two hundred complaints is investigated by the Division each week. In most cases the Division is able to arrange for a refund, a repair, or a replacement for a consumer who has filed a complaint with the Division. Last March when 350 Revere residents were facing an interest rate increase on their mortgages, the Division was able to save the homeowners $500,000 through an informal settlement with the bank.

In the area of litigation, many new suits were brought to stop unfair practices. In the automotive field, several injunctions were obtained against dealers who had turned back odometers in vehicles which they offered for sale. Some twenty-eight injunctions were obtained against used car dealers who were using misrepresentations in classified ads.

Over two hundred meetings were held with representatives of all types of business to discuss advertising and merchandising methods. Through these informal meetings, substantial modifications were made to assure consumers full and fair disclosure of the quality and adequacy of merchandise being offered for sale.

In 1970, thirteen new consumer laws were enacted to supplement the existing state consumer protection statutes, which are the most advanced and progressive in the country. The Consumer Protection Division is working to implement the consumer laws throughout the Commonwealth.

Contracts

The work of the Contracts Division is divided generally into three phases: serving in an advisory capacity to officials in the various departments and agencies, the approval of written agreements to which the Commonwealth is a party, and representing the Commonwealth in all litigation arising out of contractual matters.

All contracts, bonds and leases to which the Commonwealth is a party must be approved by this Division. Each instrument is reviewed in order to ascertain that all formal requirements of law have been met. Certain instruments must also be approved as to substance. The Division receives approximately one hundred contracts each week for approval. In addition, the form of all documents prepared in connection with note issues and notice of sale of bonds under financial assistance programs for the elderly and veterans of low income is reviewed and approved by the Division.

One of the most important services performed by this Division is the day-to-day advice and counsel given to officials from the various state departments and agencies. During the past year, this Division handled over two hundred such matters, involving contract formation, contract negotiation, pre-bidding matters, bidding disputes, performance of contracts, and alleged contract violations. These matters involve conferences, investigation, research and memoranda of law, informal opinions, and oral advice and counsel. The number of requests has increased markedly in recent months. As a result of our work in this area, we have recommended the adoption of certain new procedures and changes in the existing procedures. Our recommendations have been adopted by many agencies.

We welcome the opportunity to service the state agencies in this fashion because of the probability that early action can prevent litigation, often expensive and time-consuming.

The attorneys in the Contracts Division are constantly engaged in the various phases of litigation: pleadings, appearing at the Equity Motion Session arguing motions and demurrers; interviewing witnesses and examining documents; trying cases before Auditors, Masters and Judges; taking depositions of witnesses and parties; and handling the various stages of appeals including the writing of briefs and argument before the Supreme Judicial Court.

The bulk of our cases, and the most complex cases, are those arising out of building construction and the construction of public roads and other public works.

Future construction litigation will certainly be affected by two cases decided by the Supreme Judicial Court in 1970. The case of *Farina Brothers Co.* v. *Commonwealth,* 1970 A. S. 371 will serve as a guide in all future cases in which a contractor seeks to recover damages from the Commonwealth occasioned by delay beyond his control. In the *Farina* case, the contract provided that damages would not be awarded for such delay, but that an extension of time for completion would be granted. In the case of *Wes-Julian Construction Corp.* vs. *Commonwealth,* 351 Mass. 588, the Court had upheld such a contract provision

and denied damages to the contractor, but allowed an extension of time for completion of the work. In the *Farina* case, the Court said that the contractor was entitled to damages where the delay was caused by the unreasonable, arbitrary, and capricious conduct of the agents of the Commonwealth.

The case of *Earl Alpert, Trustee* vs. *Commonwealth,* 1970 A. S. 569 will also affect future contracts. Many of the holdings of the Court in this case are of first impression in this jurisdiction. For the first time in a suit against the Commonwealth, the Court held that where the Commonwealth furnishes plans and specifications for a contractor to follow in a construction job, the Commonwealth impliedly warrants their sufficiency for the purpose intended. In addition, the Court held that the Commonwealth, by positively representing the amount of unsuitable material to be encountered on a job site, impliedly warranted that it had made a full disclosure regarding soil borings it had taken. Also, that in positively asserting a specific quantity of unsuitable material to be encountered, the Commonwealth had made a representation upon which a bidder could rely without further investigation, irrespective of the language of several exculpatory clauses in the contract.

The Division is frequently involved in the trial of complex matters which do not involve construction contracts. For example, we successfully defended the members of the Group Insurance Commission in a suit which attacked their award of the group insurance contract for state employees. This case, *Amato* vs. *Group Insurance Commission,* was decided favorably to the Commission by a Justice of the Superior Court on December 29, 1970. No appeal was taken.

In another matter, the trustees of the Rockland Realty Trust were enjoined, after trial, from filling tide lands at the mouth of the Neponset River. This Division established that the trustees had violated the terms of a license issued by the Department of Public Works. The case is now on appeal to the Supreme Judicial Court.

Criminal

The Criminal Division is divided into three sections: Organized Crime, Appellate and Trial.

The Organized Crime Section of the Attorney General's Office has the dual purpose of collecting and disseminating intelligence information and the investigation and prosecution of criminal offenses committed by members of Organized Crime.

In the fiscal year, July 1, 1969 to June 30, 1970, this Section catalogued approximately fifteen hundred (1500) Intelligence Reports. These Intelligence Reports contain information on over eight hundred individuals.

During this same period, two hundred and fifty (250) items of valuable criminal data were disseminated to various federal, state and municipal agencies.

The Section provided assistance to over twenty states and fifteen agencies within these states, assisting in Massachusetts in criminal investigations conducted by these agencies and states.

The Organized Crime Section has been an active member of the Law Enforcement Intelligence Unit, an international association providing for the exchange of intelligence information, and is also presently closely cooperating with the Department of Justice Organized Crime Strike Force for New England, the Intelligence Units of the Massachusetts State Police, and other federal agencies having mutual interests.

During the fiscal year, as a result of information developed by the Organized Crime Section twelve (12) defendants were arrested in the Springfield area for violations of the State gaming laws. These arrests resulted in jail sentences ranging from sixteen (16) to eighteen (18) months and over ten thousand dollars ($10,000) in fines.

In the Worcester area, sixteen (16) bookmakers were arrested based on investigations, conducted by the Organized Crime Section. Thus far, four of these defendants have been convicted resulting in fines of eight thousand three hundred dollars ($8,300).

In August of 1969, investigators from the Organized Crime Section recovered four hundred, forty-two thousand dollars ($442,000) worth of stolen negotiable checks.

This Section has also provided investigators and criminal information, which has resulted in forty-eight (48) indictments in Plymouth County, as a part of an investigation into fraudulent automobile claims.

The Organized Crime Section has conducted investigations into bribery, extortion, fraud, gaming, homicide, loan sharking and narcotics. One investigation has resulted in the indictment of eight (8) defendants, three of whom are considered to be high-ranking members of Organized Crime.

In April of 1970, the Organized Crime Section began the first of five court authorized electronic surveillances. These electronic interceptions revealed a large multi-county gaming conspiracy.

The Trial Section of the Criminal Division is charged with the responsibility of reviewing the investigations and ultimately prosecuting criminal cases referred by the State Police assigned to the Division and other State agencies having investigatory powers.

One significant prosecution involved the last defendant of the so-called Under Common Garage Case. The defendant, George L. Brady, had been a fugitive from justice since October, 1963, and was arrested in New Jersey in November of 1969. After being returned to Massachusetts he was tried, convicted and sentenced. One facet of this case was reported to the Supreme Judicial Court and the Court sustained the Commonwealth's position.

This Section also successfully prosecuted cases arising from the infiltration of organized crime into a Lynn area bank resulting in the conviction of twelve (12) defendants.

A number of complaints and indictments involving various offenses, such as larceny, bribery of state officials, conflict of interest, pollution, illegal wire tapping, welfare fraud, sales tax violation, and contempt were also successfully prosecuted.

Grand jury investigations were also conducted and resulted in the return of indictments against individuals involved in the fraudulent auto-

mobile claim racket and indictments against employees of the Massachusetts Board of Registration of Real Estate Brokers and Salesmen.

The regular work of this Section has also increased due to the fact that in the past year it continued the policy of lending Assistant Attorneys General to the various district attorneys in order to assist them in reducing the overwhelming criminal case load in their counties.

In the Appellate Section of the Division, the number of extraordinary writs, petitions for habeas corpus, petitions for certiorari and other post conviction remedies filed has continued to increase. Also in the past year there were several petitions filed in the federal district court challenging the constitutionality of state criminal statutes.

In the case of *Karalexis* v. *Byrne,* this Section appealed an adverse ruling to the Supreme Court of the United States which took jurisdiction. Attorney General Robert H. Quinn twice argued the case which mainly involved the question of the proper roles of the state and federal courts. The case is presently pending before the Supreme Court.

In the cases of *Commonwealth* v. *Schnackerberg,* 1969 A. S. 847, *Commonwealth* v. *Baron,* 1969, A. S. 1233, and *Commonwealth* v. *Kelly,* 1970 A. S. 1145, this Section successfully prosecuted appeals to the Massachusetts Supreme Judicial Court.

This Section took an appeal to the Supreme Judicial Court from an adverse ruling in a state habeas corpus petition and was successful on appeal. *Frank E. Newton, Petitioner,* 1970 A. S. 609. It is the first reported case involving a government appeal from a state habeas corpus.

This Section also has assisted in training local and state police at the various municipal training schools conducted throughout the Commonwealth.

The Appellate Section was also responsible for drafting the comprehensive witness immunity bill which was enacted into law this year. This legislation marked the end of an eight-year battle by the District Attorneys and various Attorneys General to obtain witness immunity legislation.

This Section also assisted the rules committee of the district court in drafting two district court rules involving mental commitments in criminal cases.

Drug Abuse

In September, 1969, the Drug Abuse Section was established within the Department of the Attorney General. The purpose of the Drug Abuse Section is to cooperate on a statewide basis with all segments of our Massachusetts society in a united effort against the drug problem.

In November, 1969, the Attorney General appointed to his Advisory Committee on Drugs, experts in the field — professionals and laymen alike — to advise him regarding policy decisions.

One of the first tasks of the Drug Abuse Section was to assess the resources available within the Commonwealth for combating the problems of drug abuse. In this task the Section was aided by preliminary audits prepared by members of the Advisory Committee. This effort was

continued through Project Compilation which appealed to individuals, agencies, and organizations throughout the state to notify the Drug Abuse Section of their services and functions in the drug field. Follow-up meetings were conducted in several Mental Health regions to provide a forum for the exchange of ideas and to gather additional information.

Under the mandate of Chapter 889 of the Acts of 1969 (the Drug Rehabilitation Act) the Drug Abuse Section established its police training program in narcotics. The two-week courses, which are being held in every county of the state are designed to train law enforcement officials in all aspects of the drug problems, so that they will approach the drug problems intelligently and humanely. The courses instruct police officials concerning federal and state drug laws, detection methods and procedures, law enforcement techniques, the legal and practical ramifications of search and seizure, the physiological, psychological and sociological aspects of drug abuse, treatment and rehabilitation resources, and methods of promoting cooperation among agencies. Beginning in March, 1970, the Drug Abuse Section held 6 two-week Basic Courses with 210 law enforcement officials from 12 counties in Massachusetts graduating.

An outgrowth of the police training program has been a regionalization program whereby graduates of the course are setting up drug intelligence networks of county agencies that gather information about drugs, drug users, drug supplies and suppliers. Through this cooperative effort the data will be gathered and programmed into a computer so that it will be readily available to narcotics agents throughout the Commonwealth.

A major goal of the Drug Abuse Section has been to overcome the widespread misconceptions and ignorance, within which drug abuse flourishes. The staff has already made significant headway in disseminating information regarding the abuse of drugs and the sanctions provided by the law. They have spoken to parents, students, members of civic and professional groups, educators and legislators.

There has also been formed a Citizens' Corps Against Drug Abuse, including several prominent sports figures, to present young people with alternatives to the drug adventure.

As part of its drug education program, the Drug Abuse Section publishes TRACKS, a bi-monthly newsletter on drugs; and two pamphlets, MASSACHUSETTS DRUG LAWS and DRUG ABUSE REFERENCE CHART. These materials have been disseminated among educators, students, professionals and other citizens throughout the Commonwealth.

The Drug Abuse Section has availed itself of systematic research in the area of drug abuse. It has taken part in the activities of a technical scientific group which includes experts from the fields of medicine and psychiatry. This group continues to study and make recommendations regarding various complex aspects of the drug problems. The Attorney General, in his efforts to encourage meaningful research, has granted permission for several studies on marijuana to be conducted by qualified investigators.

The Drug Abuse Section has been called upon to explain and interpret the statutory provisions regarding drugs and drug abuse. It has formu-

lated appropriate revisions and proposals for new administrative rules and regulations or legislation.

Eminent Domain

The Eminent Domain Division is responsible for handling all litigation involving land to which the Commonwealth is a party. The Division acts as legal counsel to all agencies of the Commonwealth in: (1) the acquisition of land, whether the transfer is voluntary or involuntary, (2) the disposal of land by the Commonwealth, and (3) all matters before the Land Court to which the Commonwealth is a party. In addition, the Eminent Domain Division is responsible for the processing and disposing of all land damage actions filed against the Commonwealth under Chapter 79 of the General Laws. The division, also, has the responsibility of handling cases arising out of the application of Chapter 130 of the General Laws, and other statutes related to conservation and water pollution wherein the Commonwealth claims damages.

Under the above-mentioned chapters, the Division acts as attorney for state agencies, such as, the Department of Public Works, Metropolitan District Commission, The Board of Trustees of State Colleges, University of Massachusetts, Southeastern Massachusetts University, Department of Natural Resources, Water Resources Commission and Community Colleges in connection with matters relating to real estate.

The bulk of the Division's efforts are devoted to land damage actions resulting from the exercise of the Commonwealth's power of eminent domain. This power is initiated when it becomes necessary to take private property to complete a public purpose project. There are many phases to the proper exercise of this power, but the Eminent Domain Division becomes involved only when the former land owner in the proceeding is not satisfied with the offer made by the taking agency and files a petition in the appropriate Superior Court. At this point the Attorney General's Office takes full control and responsibility.

Under the present Attorney General, the governing directive is to achieve a just and reasonable solution to the dispute in the shortest period of time while, at the same time, making a conscious effort not to sacrifice competence for speed. The philosophy behind the approach is to avoid undue delay which leads to inconvenience, aggravation and hard feelings. To this end, procedures have been formulated within the Division to insure that all cases are thoroughly analyzed, prepared and ready for trial at the earliest possible moment.

The fiscal year 1970 began with *1337* cases pending. During the year, *349* new petitions were filed, which brought the total case load to *1686*. Of these *1686* cases, *382* have been disposed of by settlement or trial leaving *1304* cases pending.

At the present time, the Division is handling two cases of major importance. The first is *UNITED STATES VS. MAINE, ET AL.* No. 35 original. This case involves a joint claim by a number of the states of the eastern seacoast that, in fact, the seaward jurisdiction of a state extends beyond the three-mile limit and is determined by the termination of the continental shelf. It is being prosecuted jointly by the Attorneys General of Maine, New Hampshire, Massachusetts, Rhode Island, New York,

New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia and Florida. This case is of great concern to these various states in view of the reported quantities of natural resources contained within the Continental Shelf.

The second case of importance is *ELLIOT, ET AL VS. VOLPE, ET AL.* In this case, the petitioners are seeking injunctive relief, declaratory relief, and mandamus against various federal and state officials. In essence, the petitioners are attempting to halt construction of Highway I-93 through Somerville, claiming primarily that both the federal and state governments have violated the National Environmental Policy Act (42 U. S. C. Section 4321 et seq.) and numerous regulations of the Federal Government's Department of Transportation.

In addition to the tremendous case load handled by the Division, there is a deep concern with the drafting and passage of certain legislation. The Eminent Domain Division was instrumental in the drafting and passage of a bill which provides for the continuous cleaning and dredging of harbors to improve fishing and boating and establishes a harbor maintenance fund. Chapter 878 of the Acts of 1970. This legislation will, also, provide for the removal of the dangerous dilapidated piers and wharves that are so often a menace to navigation. Other bills to curb oil and water pollution problems were passed in the last legislative session. Chapter 827 of the Acts of 1970. As the dangers of water pollution to the health and welfare of all individuals become more evident, the Division will continue to participate in the drafting and filing of bills for our environmentol protection.

Employment Security

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, 721 cases were handled by this Division. Of these, 495 cases were on hand at the outset of the year, and 226 new cases were thereafter received. Of the new cases, 166 were employer tax cases, 55 were fraudulent claims cases, and 5 were appeals to the Supreme Judicial Court.

Cases closed during the fiscal year totaled 163, of which 107 were employer tax cases, 50 were fraudulent claims cases and 6 Supreme Judicial Court appeals, leaving a balance of 558 cases. $152,427.71 was collected from employers and $33,313.00 collected as the result of fraudulent claims cases, making a total recovery for the Commonwealth of $185,740.71. Additional steps were taken during the year to secure more prompt referral of cases to the Attorney General, so as to preclude the running of the statute of limitations.

In this fiscal year an interesting case was successfully argued at the December, 1969 sitting of the Supreme Judicial Court. The case involved an appeal by an employer from a decision of the Board of Review of the Division of Employment Security. An employee of 16

years was terminated due to a reduction in force. Subsequently, he received payment from his employer for a three-months' period. The question was whether or not the payment constituted a "severance payment" or a "payment in lieu of dismissal notice." If it were a payment in lieu of dismissal, it would come within the definition of remuneration in the Employment Security Law and, therefore, he would not be in total unemployment and not entitled to unemployment compensation. The Board of Review had found that the payment was a "severance payment", did not constitute "remuneration within the meaning of the law and that, therefore, the employee was unemployed and entitled to unemployment benefits." Our position supported the decision of the Board of Review, and we contended that the payment was a "severance" payment and that it did not disqualify the employee from receiving unemployment benefits. This, we argued, was so in spite of the fact that the employer's administrative procedures set forth in its Manual of procedure provided for "remuneration in lieu of notice."

The Supreme Judicial Court rendered its decision in the matter of the *Bolta Products Division, The General Tire and Rubber Co. v. The Director of the Division of Employment Security, et al.,* 1970 Ad. Sh. 139 supporting facts presented in our argument and affirming the decisions of the District Court and Board of Review.

The Employment Security Division has continued its practice of cooperating with the various departments of the Government of the Commonwealth. For example, information has been furnished on several occasions to the Department of Corporations and Taxation, which was obtained in investigations conducted by this Division.

Cases on hand July 1, 1969:		495	
Employer tax cases:	264		
Employee overpayment fraud cases:	230		
Supreme Judicial Court cases — (On appeal from Board/Review decision):	1		
Additional Referrals:		226	
Employer tax cases:	166		
Employee overpayment fraud cases:	55		
Supreme Judicial Court cases — (On appeal from Board/Review decision):	5		
Total Cases During Fiscal Year:			721
Cases Closed:		163	
Employer tax cases:			
1. Paid in full	77		
2. Uncollectible	13		
3. Partial Payment, Balance uncollectible	15		
4. Returned to DES Counsel	2		
	107		
Employee overpayment fraud cases:			
1. Paid in full	36		
2. Returned to Claims Investigation Department for further Administrative action	14		

	50	
Supreme Judicial Court Cases:		
(On appeal from Board/Review decision)		
1. Decision of Board upheld by the District Court was upheld by the Supreme Judicial Court	1	
2. Appeal Waived by Withdrawal	5	
	6	
Cases on hand June 30, 1970:		558
Employer tax cases:	320	
Employee overpayment fraud cases	238	
Supreme Judicial Court Cases — (On appeal from Board/Review decision):	0	
Total Monies collected on employer tax cases:		$152,427.71
Total Monies collected on employee overpayment fraud cases:		$ 33,313.00

Criminal Complaints: *38* Complaints, involving *549* counts of larceny were sought against *38* employees,

and

132 Complaints, involving *811* counts of tax evasions were sought against *101* employers.

Health, Education and Welfare

The Health, Education and Welfare Division provides legal counsel for a number of state agencies, principally the Departments of Public Welfare, Public Health, Natural Resources, Education and Mental Health and the Rate Setting Commission. The division's ten Assistant Attorneys General and two Special Assistant Attorneys General perform a wide variety of services, including representation in court proceedings, advice to agencies in the administration of the laws, research into legal-technological questions, as in the area of pollution abatement, and preparation of legislation.

Litigation in defense of the Department of Public Welfare and for enforcement of air and water pollution abatement orders of the Departments of Public Health and Natural Resources has markedly increased. Nowhere are the Division's disparate functions so apparent as in these two areas of representation.

Several cases which were commenced to protect the environment warrant mention.

The Attorney General on behalf of the Commonwealth joined with thirteen other states in a suit before the United States Supreme Court against four major automobile manufacturers for alleged conspiracy to violate the anti-trust laws. (State of Washington, et al. v. General Motors Corporation, et al., O. T. 1970, Original Action No. 45). It is claimed that the manufacturers delayed research and development toward abatement of automobile exhaust emissions.

For the first time a court order was obtained requiring a municipality to build a treatment plant for raw sewage being dumped into a river. Similarly, actions were successfully brought against fish processing plants in Gloucester for dumping raw fish waste products into the harbor. The

unregulated dumping of toxic waste materials, including mercury and beryllium, into the offshore waters of the Commonwealth was terminated as a result of negotiations initiated by the Attorney General.

In addition to the above cases, actions were brought against both private and municipal owners of dumps and incinerators which terminated in closings or repairs abating the pollution.

Because of the need for quasi-legal research into the technological aspects of environmental protection, a task force of summer legal interns was formed to research problems which included the protection of wetlands, the regulation of outdoor advertising, open burning on barges in Massachusetts waters, disposal of solid waste, the environmental impact of supersonic transportation, and the dangers of, and methods of abating, airport and city noise. The seriousness of the environmental crisis generated discussions of the advisability of the creation of a separate environmental division in the Attorney General's Office.

Suits against the Department of Public Welfare increased to such a point as to require the full-time services of two attorneys and the part-time services of three others, who represented the Department in both state and federal courts. The issues involved were too varied to note but of great import was a claim that striking employees of a major corporation were illegally receiving welfare assistance. It is expected that review order of the federal court favoring the employees and sustaining the Department's position will be sought on appeal to the United States Supreme Court.

Student unrest on college campuses led the Attorney General to twice meet with college administrators and state educational officials in order to lay down guidelines for the course of action to be taken in the event of student disruption. Education litigation included a federal court challenge to the procedures employed in altering the status of a student at a state college. The court's decision in that case, *Armsden* v. *Cataldo,* 315 F. Supp. 129, is most significant for its reaffirmance of the need for federal civil rights plaintiffs to exhaust available administrative remedies before seeking redress from a federal court.

Other activities of the Division, no less important or time-consuming, included representation of both the Departments of Public Health and Public Safety in litigation reviewing the revocation or non-renewal of nursing home licenses for failure to meet health and safety codes. Further, several cases brought against the Rate Setting Commission contested the per diem rates set for hospitals, nursing homes, rest homes and convalescent homes for care rendered to state-aided patients. Several such cases were appealed to the Supreme Judicial Court and presently await oral argument. The first to be heard will test the power of the Commission to audit the books and records of the business entities receiving such reimbursement from the Commonwealth.

Hearings for the determination of the legal status of patients confined at Bridgewater State Hospital are held before an Associate Justice of the Superior Court. The staff of the Division participates as counsel for the state officials concerned, since the hearings determine whether the patient requires the strict supervision of the institution at Bridgewater or if transfer to another state facility is warranted.

At the request of the Department of Public Health, an investigation was conducted into the embargoing of food by that Department's Food and Drug Division. A report was prepared detailing recommendations for procedures to be followed when goods are embargoed for the information and protection of the consumer.

In the late summer of 1969 the Legislature enacted the Comprehensive Drug Rehabilitation Act, Chapter 889, Acts and Resolves of 1969, providing Massachusetts with enlightened drug rehabilitation and drug law enforcement. The new legislation increases the duties and responsibilities of the Attorney General in the program to alleviate the drug-abuse crisis.

Industrial Accidents

The Industrial Accidents Division serves as legal counsel to the Commonwealth in all workmen's compensation cases involving state employees. Pursuant to G. L. c. 152, section 69A, the Attorney General must approve all payments of compensation benefits and disbursements for related medical and hospital expenses in compensable cases. In contested cases this Division represents the Commonwealth before the Industrial Accident Board and in appellate matters before the Superior Court and the Supreme Judicial Court.

During the 1968-1969 fiscal year the Supreme Judicial Court had decided *Klapacs's* case, 355 Mass. 46, which involved a claim against the Commonwealth under the Workmen's Compensation Act for nursing services furnished by the wife of a state employee. In its decision the Accident Board had allowed the claim against the Commonwealth in the amount of $46,500.00.

The Commonwealth certified this decision to the Superior Court and appealed from that court's decree to the Supreme Judicial Court. After argument, the Supreme Court remanded the case to the Accident Board for further evidence. On November 18 and 25, 1969 further testimony was taken and on February 18, 1970 final arguments were completed before the full board of the Industrial Accident Board.

Thereafter, the Board filed a new decision allowing the claim in the amount of $8,740.00 — an amount $37,760.00 less than the original award. Both the Commonwealth and the claimant have appealed this decision to the Superior Court where the matter awaits assignment.

During the past fiscal year a total of 7,317 accident reports were filed regarding state industrial accidents, an increase of 6% over the prior fiscal year and an increase of 11% over the 1967-1968 fiscal year. Of the lost time disability cases, this Division reviewed and approved 1,305 new claims for compensation, representing an increase of 88 over the previous fiscal year and an increase of 177 over the 1967-1968 period. The Division also reviewed and approved 71 claims for the resumption of compensation.

The Division appeared for the Commonwealth on 428 formal assignments at the Industrial Accident Board and in the courts on appellate procedures. Its staff members also participated in an indeterminate number of informal appearances at the Accident Board including those

required in the review of new claims for evaluation and approval by the Attorney General, and continuing review of accepted cases.

Total disbursements by the Commonwealth for state employees' industrial accidents claims, including accepted cases, board and court decisions and lump sum settlements, for the period July 1, 1969 to June 30, 1970, were as follows:

Industrial Accident Board (General Appropriation)*	
Incapacity compensation	$1,499,998.07
Hospital costs, drugs, et al.	234,865.17
Doctors, nurses, et al.	297,998.90
	$2,032,862.14
*Metropolitan District Commission***	
Incapacity compensation	$ 123,355.66
Medical and Hospital costs	35,417.78
	$ 158,773.44
Total Disbursements	
Incapacity compensation	$1,623,353.73
Medical and Hospital costs	568,281.85
	$2,191,635.58

*Appropriated to the Division of Industrial Accidents.

**From funds appropriated to the M.D.C. for payment of claims envolving M.D.C. employees.

In its capacity as custodian of the second injury funds under section 65 (General Fund) and section 65N (Veterans' Fund) of Chapter 152, the Division represents the Commonwealth before the Board in petitions filed by insurers and self-insurers for reimbursement out of these funds (commonly referred to as the *"second injury funds"*).

It is also necessary for staff members to meet with insurers' counsel to adjust, usually by negotiation, payments into the funds in those fatal industrial accident cases where the issue of liability has been in question or compromised.

At the close of this fiscal year the General Fund showed an unencumbered balance of $110,898.95 with payments totalling $12,009.46 and receipts of $6,200.00.

The Veterans' Fund showed receipts of $115,475.00 and payments of $106,046.13 reflects a total balance of $280,644.59 at the close of the fiscal period.

It is apparent both these funds are operating on a sound fiscal basis at no expense to the taxpayers.

Pursuant to section 11A (Acts of 1950, c. 639, as amended), the Chief of this Division represents the Attorney General as a sitting member of the Civil Defense Claims Board. During the fiscal year over 35 such claims were acted upon, awarding compensation to unpaid civil defense volunteers who were injured while in the course of their volunteer duties.

Public Charities

During the first quarter of the fiscal year, with the assistance of temporary summer employees, this Division completely reviewed its files of reports by public charities and eliminated all reports prior to 1965 and removed them to storage. At the same time information was collected for a new edition of the Directory of Foundations in Massachusetts which was published in 1965. The Committee of the Permanent Charity Fund decided it could not, as it had done for the earlier Directory, make a grant to publish the new edition. An appropriation was sought but none was made. The manuscript notes are being up-dated as new reports are filed so that if funds become available a new edition can be issued.

In the fall of 1969, at the invitation of the Supreme Judicial Court, an amicus curiae brief in the case of *Grover* v. *Christian Science Benevolent Association,* involving the question whether the Court should overrule its prior decisions as to the immunity of charitable organizations from tort liability, was prepared and filed for the Attorney General. Although the case in which the brief was filed was settled, the material was prepared in a form to be of assistance to the Court in considering other cases before it involving the same question. The brief was commended by several persons.

The appeal from the decree of the Norfolk County Probate Court in the case of *Trustees of Dartmouth College* v. *City of Quincy,* 1970 Ad. Sh. 809, as to the *Woodward Schools For Girls* was sustained by the Supreme Judicial Court, as was the appeal from the decree of the Suffolk County Probate Court in the *George Edmund Frost* estate. Under the decision in the latter case, about a quarter of a million dollars will be paid to six charitable organizations.

Among cy-pres proceedings was the merger of the *Brooks Hospital* with the Lahey Clinic. In separate proceedings a decree was entered that the income of the $1,250,000 fund left under the will of *Dr. Sias,* the founder of the Brooks Hospital, for the support of the research laboratories at the Hospital be used by the Lahey Clinic for research purposes. Changes in the *Ashton Fund* for wood for poor widows of Boston were approved in other proceedings. Other cy-press proceedings involved the *Byzantine Institute at Harvard* and the *Alpha Delta Phi Fraternity at Williams College.* Another such proceeding related to the *Herietta Wright Home in Northampton.*

Changes in administration of charities were effected in cases relating to *Stonehill College* and the *Dr. Nathan Sidel Fund* held by Beth Israel Hospital. A use of funds bequeathed by *Edith Fox* for girl scouting in Arlington for what is in effect a ground lease arrangement at Cedar Hill in Waltham was approved by the Middlesex Probate Court.

Proceedings involving sales of property of charities included land in Billerica devised to the Roman Catholic Archdiocese of Boston in the will of *Edward T. P. Graham* and sale of the stock of Old Mr. Boston Distillers owned by the *E. Sidney Berkowitz Foundation.* The land in Westwood left to Dedham for school aid by *Hannah Shuttleworth,* was by decree of the Norfolk Probate Court authorized to be sold to Westwood

to be used for school purposes. The proceeds of the sale will be used for school purposes in Dedham.

Will contests involving charities included that in the *Oetinger* Estate in Norfolk, decided in favor of the charities.

In the *Eleonora Sears* estate, a compromise agreement was assented to with regard to the charitable interests. Separately, another section of the Department worked out an adjustment with Florida, favorable to the Commonwealth, as to the tax aspects.

In the *Whitmore* estate in Suffolk, the Probate Court decreed that adopted children of a daughter of the testator who died without issue could not take under a provision of a 1901 will providing benefits for the issue of the testator's daughter and that if there were none the trust funds should be paid to charity. An appeal has been taken to the Supreme Judicial Court by the adopted children.

The Superior Court in the case of *Lucas* v. *Archdiocesan High Schools* dismissed proceedings brought by a parents group with regard to the closing of *St. Peter's High School* in Gloucester. The petitioners filed an appeal but later abandoned it.

An appeal was taken for the Attorney General from the decree of the Probate Court for the County of Franklin in the *George W. Davenport* estate, and on a petition to the Supreme Judicial Court, operation of the decree of the Probate Court was suspended pending the determination of the appeal.

An unusual case was a proceeding in the *Curran* estate under the new statute permitting the adoption of estate plans by guardians and conservators. The plan, which we approved, provided a large gift to charity.

A few cases handled, e.g. the *Wrye* estate in Norfolk, related to the manner in which funds for the poor administered by municipal welfare officials should be handled in view of the legislation transferring the welfare assistance program to the State. In the same connection a bill was prepared and filed with regard to the status of the Overseers of the Public Welfare in Boston as a separate corporation, under early statutes, for the purpose of administering the John Boylston and other funds bequeathed for aid to the poor of Boston. St. 1970, c. 368, changes the name of the corporation to the Trustees of Charitable Donations for Inhabitants of Boston and provides for the naming of members by the Mayor.

Cases involving interesting questions as to the laws applicable to wills in the period included that in the estate of *Joseph A. Stone* as to a claim by an omitted child under the statute.

Escheats totaled $146,356.05 in the period ($21,369.69 for the last quarter). In addition to the usual public administration cases, escheats also resulted from lapsed residuary gift of testators who left wills but no known next of kin.

Springfield Office

The Springfield office of the Attorney General handles matters for the Attorney General in the four western counties; Hampden, Hampshire, Berkshire and Franklin. The primary functions are basically three; Eminent

Domain, Consumer Protection and Criminal. With the exception of Consumer Protection matters, the Springfield office is not the office of origin; cases are referred to Springfield from the Boston office.

A member of the staff also sits on the Board of Insurance Cancellation which holds hearings once a month, averaging 40 appeals per sitting. The staff has represented Westfield State College at meetings involving student demands and is recently appearing for the College in the suit to enforce these demands. The University of Massachusetts and Holyoke Community College have asked at various times for assistance on internal problems. There are presently 55 land damage cases pending in Hampden County, 19 in Franklin County, 8 in Hampshire County and none in Berkshire County. Also awaiting trial are 15 tort cases, 4 contracts cases, 7 welfare cases, 2 public charity cases and 2 workmen's compensation cases.

In the field of Consumer Protection, since July 1, 1969 the Springfield office opened 354 complaints and closed 348. Consumer Protection service is available 24 hours a day seven days a week, and savings to the public to June 30, 1970 are computed to be $34,716.13.

Aside from these three main divisions, the office becomes involved in varied and divergent aspects of law. Town Counsels frequently call regarding zoning problems, liquor licensing and conflicts of interest. We have, and do, assist the Springfield office of the Department of Welfare. Members of the staff attend meetings of Town Selectmen when requested to do so in order to explain Public Health Laws, State Building Requirements, etc., and fulfill speaking engagements in cooperation with the Drug Abuse Education Program and in the area of Consumer Protection.

Torts, Claims and Collections

The Torts, Claims and Collections Division represents the Commonwealth, its officers, and employees in tort actions arising in the performance of their official duties.

The actions range from motor vehicle actions, malicious prosecution, arrest, false imprisonment, medical malpractice, assault and battery, libel and slander, road defects, deer damage claims, moral claims, to Civil Rights cases raising constitutional issues.

The Division also represents the Registrar of Motor Vehicles and the Motor Vehicle Appeal Board in matters of judicial review under the Administrative Procedure Act.

The bulk of the cases involved motor vehicle accidents. During the fiscal year 1970, 253 cases were tried or settled and $119,484.39 was paid to claimants as compared to 230 and 401 cases tried or settled, with $95,595.76 and $108,000.00 paid respectively, for the fiscal years 1968 and 1969.

Highway defect claims disposed of in the fiscal year were 6 compared to 14 in the previous year. In addition, 103 small claims were settled as "moral claims." The rise in the costs of automobile damage has made it increasingly difficult for the section to function within the $100,000.00 annual appropriation.

A uniform system of processing, investigating, preparing and evaluating claims has been created to enable the entire staff to function more effectively in the interests of the Commonwealth and its citizens.

While investigation, property damage surveys, thorough case preparation, negotiation and trial can hold the line, the primary responsibility rests with each department to reduce accidents by such steps as the proper maintenance of safety equipment, an on-going driver safety program and the transfer of personnel who are accident prone.

By virtue of chapter 258A, an act providing for the compensation of victims of violent crimes, which was enacted January 2, 1968, the Division has the responsibility of investigating and reporting to the courts on all claims of out-of-pocket loss for medical bills, loss of earnings or support, resulting from injuries received by victims of violent crimes. The unreimbursed loss must exceed one hundred and 00/100 dollars ($100.00) and the victim must have lost at least two continuous weeks of earnings. The number of claims filed in the fiscal year 1970 was 129 as compared to 55 for the fiscal year 1969.

A uniform system of reporting and court findings was established in conjunction with the office of the Chief Justice of the District Courts.

The Collections section of the Division recovered $265,525.21 for the Commonwealth during the fiscal year 1969, as compared to $569,300.09 and $326,989.37 in 1968 and 1969 respectively. (Decline due to some extraordinary litigation in 1968.) This section principally handles claims for the care and support of patients at state hospitals and for damage caused to state property. The following is a survey of cases involved in this phase of the Division's work:

Department Involved	*Amount Recovered*	*No. of Claims*
Mental Health	$156,132.77	80
Public Health	24,957.63	203
Public Works	24,986.42	227
MDC	22,327.41	89
Education	4,877.87	86
State Colleges	3,102.16	29
Public Safety	4,903.84	7
Corporations and Taxation	8,528.00	1
Adjutant General	537.93	2
Natural Resources	3,227.41	5
Commission of the Blind	66.45	6
Reg. of Motor Vehicles	519.85	3
Dept. of Correction	1,628.49	2
Public Welfare	2,505.00	2
Div. of Waterways	297.55	18
Industrial Accident Div.	892.14	4
Dept. of Labor and Industries	575.30	1
Div. of Employment Security	75.00	1
Soldiers Home (Holyoke)	2,000.00	1
Soldiers Home (Chelsea)	2,006.00	1
State Secretary	229.00	10

State Treasurer	25.00	1
Civil Defense Agency	364.51	1
Div. of Motor Boats	100.00	1
Div. of Fisheries and Games	659.48	1
Total	$265,525.21	782

There are several cases pending against organizations responsible for ecological damage caused by oil spills.

This year a uniform system of reporting and processing claims has been instituted should enable the section to be even more effective in recovering monies due the Commonwealth.

Veterans

The Veterans' Division has continued to assist the veterans of the Commonwealth to locate and secure the benefits available to them from the various local state and federal agencies involved in veteran services.

The Division advises all veterans and veteran groups of their legal rights and duties.

APPENDIX

Bills Proposed by Attorney General and Enacted by the 1970 Legislature

RESOLVES:

—Chapter 22. RESOLVE PROVIDING FOR AN INVESTIGATION BY THE JUDICIAL COUNCIL RELATIVE TO ESTABLISHING A CHILD ABUSE DIVISION WITHIN THE PROBATE COURTS.

—Chapter 49. RESOLVE PROVIDING FOR AN INVESTIGATION AND STUDY BY A SPECIAL COMMISSION RELATIVE TO THE MOTOR VEHICLE INDUSTRY.

ACTS:

—Chapter 163. AN ACT FURTHER PRESCRIBING THE FORM OF RETAIL INSTALLMENT SALE AGREEMENTS UNDER THE LAW RELATIVE TO RETAIL INSTALLMENT SALES AND SERVICES.

—Chapter 177. AN ACT RELATIVE TO PENALTIES FOR INTIMIDATION OF JURORS, WITNESSES AND OTHERS IN CONNECTION WITH CRIMINAL PROCEEDINGS.

—Chapter 272. AN ACT PROVIDING A RIGHT OF CANCELLATION FOR CERTAIN CONTRACTS CONSUMMATED AT A PLACE OTHER THAN THE SELLER'S PLACE OF BUSINESS.

—Chapter 408. AN ACT AUTHORIZING THE GRANTING OF IMMUNITY TO WITNESSES UNDER CERTAIN CONDITIONS.

—Chapter 457. AN ACT SUBJECTING CREDITORS IN CONSUMER TRANSACTIONS TO THE DEFENSES OF THE BORROWER.

—Chapter 499. AN ACT PROVIDING FOR RELEASE ON PERSONAL RECOGNIZANCE WITHOUT SURETY AND FOR A SPEEDY APPEAL FROM A REFUSAL TO ORDER SUCH RELEASE.

—Chapter 505. AN ACT INCREASING THE CREDIT FOR EACH DAY OF CONFINEMENT OF A PRISONER COMMITTED FOR FAILURE TO PAY A FINE.

—Chapter 635. AN ACT AUTHORIZING THE VOIDING OF CERTAIN MOTOR VEHICLE CONTRACTS OF SALE BY THE BUYER IF SAID MOTOR VEHICLE CANNOT PASS THE INSPECTION STICKER TEST.

—Chapter 665. AN ACT FURTHER LIMITING THE LIABILITY OF THE OWNER OF A CREDIT CARD OR OTHER LIKE CREDIT DEVICE.

—Chapter 666. AN ACT PROVIDING FOR THE PAYMENT OF INTEREST ON SECURITY DEPOSITS HELD BY LANDLORDS IN EXCESS OF ONE YEAR.

—Chapter 710. AN ACT AUTHORIZING THE ATTORNEY GENERAL OR HIS DESIGNERS TO ENTER THE PREMISES OF A PERSON LICENSED TO SELL SECOND HAND MOTOR VEHICLES TO EXAMINE SUCH VEHICLES AND RECORDS RELATING THERETO.

—Chapter 711. AN ACT AMENDING THE PROVISIONS RELATING TO JUDICIAL REVIEW OF CERTAIN DECISIONS OF THE CVIL SERVICE COMMISSION.

—Chapter 736. AN ACT MAKING CERTAIN CORRECTIVE CHANGES IN THE CONSUMER PROTECTION LAW.

—Chapter 795. AN ACT PROVIDING THAT CERTAIN DEPOSITS OF DAMAGE PAYMENTS IN CERTAIN EMINENT DOMAIN CASES BE PAID TO THE TREASURER OF THE BODY POLITIC OR CORPORATE ON BEHALF OF WHICH THE TAKING WAS MADE, AND DEPOSITED BY HIM FOR THE BENEFIT OF THE PERSONS ENTITLED THERETO.

—Chapter 811. AN ACT PROVIDING THAT CERTAIN TRAVELING EXPENSES AND MEMBERSHIP DUES OF DISTRICT ATTORNEYS BE PAID BY THE COMMONWEALTH.

—Chapter 822. AN ACT RELATING TO THE IMPOSITION OF FINANCE CHARGES IN CERTAIN REVOLVING CREDIT AGREEMENTS UNDER THE RETAIL INSTALLMENT SALES AND SERVICES LAW.

—Chapter 824. AN ACT REQUIRING CERTAIN DISCLOSURES IN CERTAIN RESIDENTIAL REAL ESTATE TRANSACTIONS.

—Chapter 827. AN ACT TO ABATE OIL POLLUTION IN THE WATERS OF THE COMMONWEALTH.

—Chapter 835. AN ACT ESTABLISHING A CAREER INCENTIVE PAY PROGRAM FOR REGULAR FULL-TIME POLICE OFFICERS AND PROVIDING FOR PARTIAL REIMBURSEMENTS BY THE COMMONWEALTH FOR CERTAIN CITIES AND TOWNS.

—Chapter 878. AN ACT PROVIDING FOR THE CONTINUOUS CLEANING AND DREDGING OF HARBORS AND INLAND WATERS TO IMPROVE FISHING AND BOATING AND ESTABLISHING THE HARBORS AND INLAND WATERS MAINTENANCE FUND.

—Chapter 880. AN ACT PROVIDING THAT ANY ATTEMPT TO EXCLUDE OR MODIFY THE WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE IN A SALE OF CONSUMER GOODS SHALL BE UNENFORCEABLE.

—Chapter 883. AN ACT PROHIBITING CERTAIN COLLECTION PRACTICES.

No. 1 July 10, 1969

HONORABLE ALFRED L. FRECHETTE, M.D.
Commissioner of Public Health

Dear Commissioner Frechette:

You have requested my opinion on a certain question relating to the circumstances under which the Department of Public Health may issue a license to an infirmary, a convalescent or nursing home or a rest home or charitable home for the aged, under G. L. c. 111, § 71.

Section 71 provides that your Department may not license such an institution unless and until the applicant submits "a certificate of inspection of the egresses, the means of preventing the spread of fire and apparatus for extinguishing fire, issued by an inspector of the division of inspection of the department of public safety . . . " Until 1967, § 71 went on to provide:

> "When such an inspector . . . issues to an applicant for a license to maintain a hospital, sanatorium, nursing or convalescent home, infirmary maintained in a town, rest home or charitable home for the aged, an acknowledgment of an application for such a certificate, it shall have the same effect as the certificate, and the department shall issue a provisional approval for temporary operation for a period of six months."

Thus, your Department could, in effect, issue a temporary license to an institution well before any certificate of inspection had been obtained. As I understand it, this procedure was designed to allow time for the Department of Public Safety to make the necessary inspection, and also to permit the prospective licensee to make such improvements as might be required to obtain the certificate without being prevented from commencing operations in the meantime.

The above-quoted provision, however, was stricken from § 71 by St. 1967, c. 891, § 9. In view of this deletion, you ask my opinion as to whether your Department may continue to honor an acknowledgment of an application for a certificate of inspection as a temporary substitute for the certificate itself, for purposes of licensing institutions under G. L. c. 111, § 71.

The answer to your question is by no means obvious. One complicating factor is a provision in G. L. c. 143, § 29, relating to the issuance of certificates of inspection by the Department of Public Safety for various types of buildings, whereby the inspector is required to issue an acknowledgment of any application for such a certificate, "which for ninety days, pending the granting or refusal of the certificate, *shall have the same effect as the certificate*. . . . (Emphasis supplied.) The same provision also authorizes the inspector to renew the acknowledgment for an additional period of up to ninety days "with the same effect." This provision was not amended by the 1967 statute referred to above, and continues in effect today. Thus, one might be led to believe that the acknowledgment provision was stricken from G. L. c. 111, § 71 merely because it was regarded as surplusage.

On balance, however, I am of the opinion that the Legislature did intend to change the substantive law when it deleted the provision in question, and that your Department may no longer license any institution under G. L. c. 111, § 71, provisionally or otherwise, until the actual certificate of inspection has been submitted. I base this conclusion on certain other changes which the Legislature made in § 71 by the enactment of St. 1967, c. 891, § 9 — which, I think, reflect a deliberate intention to prohibit issuance of licenses under § 71 before receipt of a certificate of inspection.

One such change appears in the fifth paragraph of the devised § 71:

> "Any applicant for an original or renewal license who is aggrieved, on the basis of a written disapproval of a certificate of inspection by the head of the local fire department or by the division of inspection of the department of public safety, may, within thirty days from such disapproval, appeal in writing to the department of public safety. *Failure to either approve or disapprove within thirty days, after a written request by an applicant, shall be deemed a disapproval.*" (Emphasis supplied.)

It is to be noted that under this procedure, failure by the Division of Inspection to act upon an application for a certificate of inspection for a period of *thirty* days is treated as a disapproval. Yet G. L. c. 143, § 29 still requires that Division to issue the usual acknowledgment upon receipt of the application, and, under the old version of G. L. c. 111, § 71, that acknowledgment would have served the purpose of a valid certificate of inspection for a period of *ninety* days. Thus, if the acknowledgment were still regarded as sufficient to authorize the issuance of a license under G. L. c. 111, § 71, failure of the Division of Inspection to act upon an application within thirty days would have no effect. This would be directly contrary to the provisions of the last sentence of the paragraph quoted just above.

The revised § 71, moreover, goes on to provide that the applicant may appeal a disapproval by the Department of Public Safety to the Superior Court, and that "[f]ailure of said department to either approve or disapprove the issuance of a certificate of inspection within thirty days after receipt of an appeal shall be deemed a disapproval." Here again, there is an essential inconsistency between the new appeal procedure and the notion that an acknowledgment will still suffice for purposes of § 71.

The sentence which immediately follows the foregoing provision in the new version of § 71 is, I think, decisive:

> "No original license shall be issued or no license shall be renewed by the department of public health until issuance of an approved certificate of inspection, as required in this section."

I regard this as a plain statement by the Legislature that an applicant must have a certificate of inspection before he may be granted a license under § 71 — that a mere acknowledgment of his application for such a certificate is no longer sufficient.

It is therefore my opinion that the 1967 amendment to G. L. c. 111, § 71 had the effect of carving out an exception to the acknowledgment

provisions of G. L. c. 143, § 29, and that your Department may no longer grant a license under § 71 until the applicant has been issued an actual certificate of inspection by the Department of Public Safety.

Very truly yours,
ROBERT H. QUINN
Attorney General

No. 2 July 28, 1969

HONORABLE GEORGE G. BURKE
District Attorney,
Norfolk District

Dear Sir:

You have requested my opinion as to whether you have authority pursuant to the General Laws, c. 12, § 20 (as amended by c. 145 of the Acts of 1969) to appoint additional legal assistants to your staff. Specifically, the appointments you contemplate making would be for a three-month period only and at a rate of compensation of two thousand dollars for that period. It is my opinion, for the reasons hereinafter stated, that you may make such appointments.

The General Court first authorized the appointment of legal assistants by a District Attorney in c. 460 of the Acts of 1906, which read in pertinent part:

> "Section 3. The district attorney for the Suffolk district may, if in his opinion the interests of the Commonwealth so require, employ additional legal assistants with the approval of the chief justice of the superior court . . . "

In the 1921 codification of the General Laws, the phrase "if in his opinion the interests of the Commonwealth so require" was inexplicably omitted, and that omission was continued in the Tercentenary Edition of the General Laws in 1932. In 1957, the section was amended by c. 694 of the Acts of 1957 to provide that the District Attorney of the Northern District might also employ additional legal assistants.

General Laws c. 12, § 20 was further broadened by c. 145 of the Acts of 1969, to which you refer, to provide that the District Attorney of the Norfolk District, which position you now hold, might employ additional legal assistants. As amended, the section now reads:

> "Section 20. The district attorney for the Suffolk district, the district attorney for the northern district and the district attorney for the Norfolk district may each employ additional legal assistants, with the approval of the chief justice of the superior court. The length of time of such employment, which shall in no instance exceed three months, and the amount of compensation, which shall in no instance exceed two thousand dollars, shall be determined by the district attorney, with the approval of said chief justice. Such compensation shall be paid by the treasurer of Suffolk county, Middlesex county or Norfolk county, as the case may be, upon presentation of bills approved

> by the district attorney, and by said chief justice and in Suffolk county by the auditor thereof. In matters connected with the work for which he is so employed, an attorney shall have all the powers and authority of an assistant district attorney."

I note that you intend to make the appointments for a period of three months and to pay each assistant so appointed a salary of two thousand dollars for that period. I assume that such appointments will be made with the approval of the Chief Justice of the Superior Court, not only as to the appointments themselves, but also as to the duration of the appointments and the compensation to be paid. It is for the Chief Justice of the Superior Court, of course, by virtue of the requirement that he approve the appointments and the duration and compensation thereof, finally to decide, by his approval, whether such legal assistants may be appointed, and if so, how many, and, within the statutory limits, for how long and at what compensation. I assume also that the necessary funds are legally available.

In conclusion, it is my opinion that you may appoint legal assistants to your staff subject to the terms and conditions set forth above.

Very truly yours,
ROBERT H. QUINN
Attorney General

No. 3 July 25, 1969

HIS EXCELLENCY FRANCIS W. SARGENT
Governor of the Commonwealth
Commonwealth of Massachusetts

Dear Governor Sargent:

You have asked my opinion as to the constitutionality of House No. 5333, entitled AN ACT PROHIBITING THE INCITING OF A RIOT, which has passed both branches of the General Court and which awaits your approval or disapproval. This bill would insert a new Section 1A in Chapter 269 of the General Laws which would read as follows:

> "Whoever urges ten or more persons to engage in tumultuous and violent conduct of a kind likely to create public alarm shall be guilty of inciting a riot and shall be punished by imprisonment in jail for six months or by a fine of five thousand dollars or both."

You state that a question has been raised concerning the constitutional validity of this proposed legislation which may through vagueness or otherwise invade the constitutionally protected area of freedom of speech.

While I recognize that House No. 5333, if enacted into law, would be construed by the Courts, so far as possible, in a manner which would avoid doubts as to its constitutionality (*Commonwealth* v. *Tirella,* Mass. Adv. Sh. (1969) 1075, 1076, decided June 25, 1969; *Opinion of the Justices,* 341 Mass. 760, 785), nonetheless, it is my opinion that

there is a serious doubt as to the constitutionality of this proposed legislation.

It is a general rule of statutory construction that a "statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connolly* v. *General Construction Co.,* 269 U. S. 385, 391. *Commonwealth* v. *Slome,* 321 Mass. 713, 715. *Commonwealth* v. *Carpenter,* 325 Mass. 519, 521. *Alegata* v. *Commonwealth,* 353 Mass. 287, 293.

"A statute creating a crime must be sufficiently definite in specifying the conduct that is commanded or inhibited so that a man of ordinary intelligence may be able to ascertain whether any act or omission of his, as the case may be, will come within the sweep of the statute." See *Commonwealth* v. *Slome,* 321 Mass. 713, 715; *Commonwealth* v. *Spindel,* 351 Mass. 673, 678.

Supreme Court decisions have " . . . fashioned the principle that the constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. As we said in *Noto* v. *United States,* 367 U. S. 290, 297-298 (1961), 'the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.' See also *Herndon* v. *Lowry,* 301 U. S. 242, 259-261 (1937); *Bond* v. *Floyd,* 385 U. S. 116, 134 (1966). A statute which fails to draw this distinction impermissably intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control. Cf. *Yates* v. *United States,* 354 U. S. 298 (1957); *De Jonge* v. *Oregon,* 299 U. S. 353 (1937); *Stromberg* v. *California* 283 U. S. 359 (1931). See also *United States* v. *Robel,* 389 U. S. 258 (1967); *Keyishian* v. *Board of Regents,* 385 U. S. 589 (1967); *Elfbrandt* v. *Russell,* 384 U. S. 11 (1966); *Aphtheker* v. *Secretary of State,* 378 U. S. 500 (1964); *Baggett* v. *Bullitt,* 377 U. S. 360 (1964)." *Brandenburg* v. *Ohio,* U. S. , 5 Cr. L. 3095, 3107-3108, 37 LW. 4525, 4525-4526 (June 9, 1969). The proposed legislation does not draw the distinction required by the opinions cited and, in my opinion, would require amendment making this distinction.

The bill under consideration, in my opinion, does not meet either state or federal standards for specificity. The bill under consideration does not use the word "imminent" or its equivalent. The word "urge" does not necessarily impart a sense of immediacy. The statute may therefore sweep " . . . within its condemnation speech which our Constitution has immunized from governmental control." See *Brandenberg* v. *Ohio,* U. S. 5 Cr. L. 3107, 3108, 37 L.W. 4525, 4526.

The Supreme Court of the United States has said, "Throughout our decisions there has recurred a distinction between the statement of an idea which may prompt its hearers to take unlawful action and advocacy that such action be taken." See Frankfurter, J. concurring in *Dennis*

v. *United States,* 341 U. S. 494, 545; quoted again in *Yates* v. *United States,* 354 U. S. 298, 322; *Noto* v. *United States,* 367 U. S. 290, 297. The bill under consideration fails to preserve this distinction. You may, in your judgment, wish to suggest an amendment in this respect.

This bill also offends, in my opinion, the constitutional principle that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *Zwickler* v. *Koota,* 389 U. S. 241, 249-250. An amendment in this area also would be needed.

In my opinion the bill is also too vague. "The requirements of clarity, definiteness and narrow scope are most strictly observed when a statute places a possible limitation upon First Amendment rights." See *Landry* v. *Daley,* 280 F. Supp. 938, 952, re-argument pending in Supreme Court on other issues. See 5 Cr. L. 4073. The terms "tumultuous and violent conduct" and "public alarm" are not defined nor are they limited by prior legal definitions to violations or threatened violations of the penal law.

In *Terminiello* v. *Chicago,* 1948, 337 U. S. 1, 5, the Supreme Court struck down an ordinance which "permitted conviction of petitioner if his speech stirred people to anger, invited public dispute or brought about a condition of unrest. A conviction resting on any of those grounds may not stand." Public alarm, if construed as "public anger or public unrest", is, therefore, not a constitutionally permissible standard. Appropriate amendments would also be required to overcome the objection of vagueness.

I recognize, of course, that it is a proper public purpose for the Legislature to prohibit the inciting of a riot, as the title and some of the language of this bill suggest was the legislative purpose. However, amendments in the areas specified would have to be proposed by you, in my opinion, to cure the constitutional defects in the present draft.

Respectfully,
ROBERT H. QUINN
Attorney General

No. 4 August 4, 1969

STATE RACING COMMISSION

Gentlemen:

I am answering your letter of July 9, 1969, in which you request my opinion on the matters set forth below, and in which letter you have stated the following facts:

Realty Equities Suffolk Downs, Inc. (Suffolk) has filed with the State Racing Commission (the Commission) as of July 8, 1969, two supplementary applications for licenses to hold or conduct running horse racing meetings at the Suffolk Downs race track located in Boston and Revere, in Suffolk County, for a total of twenty-four days in September and October, 1969. Suffolk previously had applied for a license to conduct a running horse racing meeting at the same Suffolk Downs

race track for a total of seventy-six days in April, May, June and July, 1969. This application was granted for a total of sixty-six days, the license applied for was issued and the sixty-six-day meeting was held.

On January 29, 1969, the Commission granted eight applications by Berkshire Downs, Inc. (Berkshire), for a total of twenty-four days of running horse racing to be held in July and August, 1969 at Berkshire Downs race track in Hancock, Berkshire County. I infer that up to June 12, 1969 no license had issued to Berkshire in connection with these applications. On June 12, 1969, the Commission voted to take no further action with respect to the issuance of licenses to Berkshire because of information the Commission had received as to a change in ownership of Berkshire and information that Berkshire intended not to hold the racing meetings applied for.

On July 2, 1969, Berkshire informed the Commission in writing that Berkshire "withdrew and cancelled" its applications for 1969, that Berkshire would not accept the grant of these applications and that the "licenses for such twenty-four (24) racing days for Berkshire Downs in 1969 have never been issued; and will not be requested or accepted by us." The stated reason was that Berkshire had suffered losses aggregating $253,709.69 since 1964, including a loss of $81,626.10 in 1968.

You have asked me, in substance, to advise (1) whether Suffolk's supplementary applications meet the requirements of G. L. c. 128A, § 2, so far as Suffolk's eligibility to file those applications is concerned; and (2) whether the Commission has the power to grant Suffolk's supplementary applications. I assume, for the purposes of this opinion, that the facts are as stated (see I Op. Atty. Gen. 273, 275, October 16, 1895).

(1) General Laws c. 128A, § 2 provides, in part, that " . . . a supplementary application by a licensee for a subsequent license in that calendar year *relating to* the same premises and the *original application*, . . . may be filed with the commission at any time prior to the expiration of said year . . . " (emphasis added). On the facts you have stated, Suffolk was a licensee for 1969; its supplementary applications relate to the same premises and are for the same calendar year. However, a supplementary application must additionally "relate to" the original application. Suffolk's original application was, as you have stated, for seventy-six days of racing between April 9, 1969 and July 5, 1969, or, alternatively, such number of racing days in the 1969 racing season commencing and ending on such dates permitted by law as the Commission might determine.

> "It is a well established principle of statutory interpretation that '[n]one of the words of a statute is to be regarded as superfluous, but each is to be given its ordinary meaning without overemphasizing its effect upon the other terms appearing in the statute, so that the enactment considered as a whole shall constitute a consistent and harmonious statutory provision capable of effectuating the presumed intention of the Legislature'." *Commonwealth* v. *Woods Hole, Martha's Vineyard and Nantucket S. S. Authy.,* 352 Mass. 617, 618.

In my view the proper interpretation of the words "relating to . . . the original application" is that an application for a subsequent license under G. L. c. 128A, § 2 is limited to any balance of the number of days originally applied for and is also limited to the date originally specified.

The alternative language in Suffolk's original application is surplusage. One of the statutory questions which must be answered (*Landers* v. *Eastern Racing Association,* 327 Mass. 32) requires that the applicant specify "the days on which it is intended to hold or conduct such meeting, which days shall be successive week days, Saturday and Monday being considered successive week days." General Laws c. 128A, § 2(4). Any language in the application in answer to this statutory question that purports to leave it to the Commission to determine for what dates the applicant is applying, in my opinion, is not properly part of the answer and may be disregarded. This does not mean, however, that the Commission is bound by dates specified in an original application, in approving or disapproving an original application. Although this question is not now before me, it is my view that the Commission on an original application is free to award to an applicant such number of days of racing (up to ninety) between April 1 and November 30 as the Commission's judgment indicates.

I must advise you, therefore, that on the facts you have stated, the Commission could approve Suffolk's supplementary applications for only a maximum of ten racing days and only for such ten days between April 9, 1969 and July 5, 1969. On the facts, therefore, the Commission is not authorized to approve Suffolk's supplementary applications since the period April 9, 1969 through July 5, 1969 has expired.

I am not unaware of the Commission's concern that maximum use be made of the racing days provided for by the statute. However, the Commission had originally granted to Suffolk sixty-six days and to Berkshire twenty-four days for a total of ninety racing dates. It is only as a result of Berkshire's surrender of their twenty-four days that all ninety days of racing will not be used this year. However, I can only interpret the statute as it is written and an appropriate amendment to so much of G. L. c. 128A, § 2 as relates to supplementary applications would be required for the Commission to act favorably upon Suffolk's applications.

In view of the answer I have given to the first question, it is unnecessary for me to answer your second question.

Respectfully,
ROBERT H. QUINN
Attorney General

No. 5

STATE RACING COMMISSION

Gentlemen:

By letter dated July 24, 1969, you have requested my opinion with respect to c. 546 of the Acts of 1969 as it amends G. L. c. 128A, §5. You have asked the following questions:

"1. What is the proper amount that should be withheld from the total amount wagered at running horse racing meetings held in connection with state or county fairs?
Should the amount be 17% as provided in the third paragraph of Section 5 of Chapter 128-A of the G. L. — plus 1% as provided in Section 27 of Chapter 546 of the Acts of 1969 — making a total of 18% — of which 7½% as provided by Section 5 of Chapter 128-A of the General Laws shall be paid to the Commission — plus 1% as provided in Section 27 of Chapter 546 of the Acts of 1969 — making a total of 8½% to the Commission — and the remainder or 9½% being retained by the licensee.

OR

"2. Should the amount be 15% as set forth in the fourth paragraph of Section 5 of Chapter 128-A of the G. L. — plus 1% as provided in Section 27 of Chapter 546 of the Acts of 1969 — making a total of 16% — of which 7½% as provided by Section 5 of Chapter 128-A of the General Laws shall be paid to the Commission — plus 1% as provided in Section 27 of Chapter 546 of the Acts of 1969 — making a total of 8½% to the Commission — and the remainder or 7½% being retained by the licensee."

The Commission is concerned only with these questions as they relate to running horse racing meetings in connection with state or county fairs and this opinion is so limited.

Chapter 546 of the Acts of 1969 is an act imposing certain taxes to provide needed revenue for the Commonwealth.

Section 27 of c. 546 provides as follows:

> "In addition to any amount required to be withheld under the provisions of section five of chapter one hundred and twenty-eight A of the General Laws, by a licensee conducting a horse or dog racing meeting, such licensee shall withhold an amount equal to one per cent of the total amount wagered on each day of such meeting and shall pay the same to the state racing commission on the day following."

Under the provisions of this section of the act, state or county fairs conducting running horse racing meetings must withhold an amount equal to one per cent of the total amount wagered over and above any amount which they are required to withhold in accordance with c. 128A, § 5. This additional one per cent withheld must be paid to the Commission on the day after it is withheld.

The relevant portions of c. 128A, § 5, as amended, now read as follows with the bracketed language having been deleted by §§ 30 and 31 of c. 546:

> " . . . Each licensee conducting a racing meeting shall become the custodian or depository for such sums as may be deposited with such licensee by patrons as wagers on the speed or ability of any one or more horses or dogs in a race or races

and such licensee shall be responsible for such sums so deposited and shall return to the winning patrons so wagering on the speed or ability of any one or more horses or dogs in a race or races all sums so deposited as an award or dividend, according to the acknowledged and recognized rules and method under which such pari-mutuel or certificate system has been operated, less the breaks, as defined in this section, and less an amount not to exceed fifteen per cent of the total amount so deposited by the patrons wagering on the speed or ability of running horses in a race or races not conducted in connection with a state or county fair, and seventeen per cent of the total amount so deposited by the patrons wagering on the speed or ability of running horses in a race or races conducted in connection with a state or county fair . . .

"Each person licensed to conduct a running horse racing meeting [other than a licensee holding a racing meeting in connection with a state or county fair,] shall pay to the commission on the day following each day of such horse racing meeting *a sum equal to seven and one half per cent of the total amount deposited on the preceding day* by the patrons so wagering at such meeting, *said percentage to be paid from the fifteen per cent withheld, as provided in this section, from the total amount wagered.*

"Each person licensed to conduct a dog racing meeting, [other than a licensee holding a racing meeting in connection with a state or county fair,] shall pay to the commission, on the day following each day of such dog racing meeting, a sum equal to five and one half per cent . . . "

"[Each person licensed to conduct a racing meeting in connection with a state or county fair shall pay to the commission on the day following each day of such meeting a sum equal to two per cent of so much of the total amount deposited on the preceding day by patrons so wagering at such meeting as does not exceed sixty-five thousand dollars, five and one half per cent as exceeds sixty-five thousand dollars, said percentages to be paid from the seventeen per cent withheld, as provided in this section, from the total amount wagered.]

"Each person licensed to conduct a harness horse racing meeting, [other than a licensee holding a racing meeting in connection with a state or county fair,] shall pay to the commission on the day following each day of such harness horse racing meeting a sum equal to five and one half per cent . . . "

Sections 27, 30 and 31 of c. 546 took effect upon the date of the passage of the Act, namely, July 18, 1969.

As a result of the amendment of c. 128A, § 5, the above questions arose because of an apparent conflict of the provisions within § 5. Paragraph 3 of that section provides that commercial tracks conducting running horse racing meetings are authorized to withhold fifteen per cent of the total amount wagered, whereas state or county fairs conducting the same type of racing are authorized to withhold seventeen per cent.

Paragraph 4 of the same section then provides that each person licensed to conduct running horse racing shall pay to the Commission seven and one-half per cent of the total amount wagered the preceding day, the seven and one-half per cent to be paid for the fifteen per cent withheld from the total amount wagered.

The basic rules of statutory construction require that the various provisions in a statute, if reasonably possible, be read together so as to make the statute a consistent and harmonious whole, giving effect to all the provisions thereof. *Real Properties Inc.* v. *Board of Appeal of Boston,* 311 Mass. 430; *Hinckley* v. *Retirement Bd. of Gloucester,* 316 Mass. 496. In addition, the intention of the Legislature is to be deduced from every material part of the statute and the interpretation to be placed upon it is to be determined from its apparent intent, as gathered from the context, as well as from the language of a particular provision. *Commonwealth* v. *Mekelburg,* 235 Mass. 383.

Applying these principles to the present language of § 5, it is apparent that the Legislature, as a result of this amendment, intended to increase the tax revenue coming to the Commonwealth by eliminating the favored tax treatment previously accorded to state or county fairs by now taxing them in the same manner as commercial tracks conducting the same type of racing. This purpose is clearly evident from a reading of § 5 as amended.

The obvious intent of the Legislature, then, in passing c. 546, was to provide additional tax revenue. However, there is no intent manifested by the Legislature to change or affect that part of § 5 which sets forth the amount to be withheld from the total amount wagered by commercial tracks as distinguished from state or county fairs. The Legislature did not see fit to eliminate the distinction between commercial tracks and state or county fairs in this regard although it could have done so very easily if this had been the intent of c. 546.

In my view, c. 546 did not affect the provisions of paragraph 3 of § 5, and I advise you that state or county fairs are authorized to withhold an amount up to seventeen per cent of the total amount wagered. The provisions of paragraph 4 of § 5, as amended, must be read together with the provisions of paragraph 3 so as to make the statute a consistent and harmonious whole. The state or county fairs are to pay the Commission seven and one-half per cent of the total amount wagered on the preceding day, plus the one per cent provided for in § 27 of c. 546 of 1969, and the eight and one-half per cent is to be paid from the amount withheld by the state or county fair.

Very truly yours,
ROBERT H. QUINN
Attorney General

No. 6 August 22, 1969

HONORABLE ROBERT Q. CRANE
Chairman, State Retirement Board

Dear Mr. Chairman:

By letter dated July 29, 1969, you set forth seven questions with respect to Public Law 90-486, enacted August 13, 1968, which classifies tech-

nicians employed by the Army and Air National Guards of the fifty states and Puerto Rico as federal employees. Briefly, you ask if, in view of the Public Law, technicians may elect to remain in the state retirement system, or may, under certain varying factual circumstances, retire under the state retirement system (or elect to defer their retirement), thereupon joining the federal civil service retirement system. You also ask if technicians may elect to remain in the state insurance program. Specifically, the questions you posed are:

"1. Since Public Law 90-486 classifies all technicians of the Army and Air National Guard as federal employees and since it also provides that those technicians who are members of a state retirement system on the effective date of the legislation may elect to remain in that state retirement system rather than accept membership in the federal civil service retirement system, will M. G. L. A., Chapter 32 permit continuous membership in the state retirement system so long as the technicians remain employed as technicians?

"2. Assuming that your answer to question number 1 is in the affirmative, may a technician, classified by Public Law 90-486 as a federal employee, who has attained the age of 45 years and who is eligible for retirement under the state retirement system, exercise the option provided so as to effect the deferment of his retirement under the state retirement system while concomittantly [sic] accepting a new, separate, and distinct membership with the federal civil service retirement system?

"3. Assuming that your answer to question number 1 is in the affermative, may a technician, classified by Public Law 90-486 as a federal employee, who has attained the age of 45 years and who is eligible for retirement under the state retirement system, exercise the option provided so as to effect his retirement under the state retirement system while concomittantly (sic) accepting a new, separate, and distinct membership with the federal civil service retirement system?

"4. Assuming that your answer to question number 1 is in the affirmative, may a technician, classified by Public Law 90-486 as a federal employee, who has not yet attained the age of 45 years but who is otherwise eligible for retirement from the state retirement system, exercise the option provided so as to effect the deferment of his retirement under the state retirement system, while concomittantly (sic) accepting a new, separate, and distinct membership with the federal civil service retirement system?

"5. Assuming that your answer to question number 1 is in the affirmative, may a technician classified by Public Law 90-486 as a federal employee, who has not yet attained the age of 45 years but who is otherwise eligible for retirement from the state retirement system, exercise the option provided so as to effect his retirement under the state retirement system while concomittantly (sic) accepting a new, separate, and distinct membership with the federal civil service retirement system?

"6. In as much (sic) as Public Law 90-486 classifies all technicians employed by the Army and Air National Guards of the 50 states and Puerto Rico as federal employees but does not provide that those technicians who are members of a state insurance plan on the effective date of the legislation may elect to remain in the state insurance plan rather than accept membership in the federal insurance plan, does Public Law 90-486 preclude membership in the state insurance program outlined by M.G.L.A., Chapter 32 A?

"7. Assuming that your answer to question number 6 is in the negative, does a technician, classified by Public Law 90-486 as a federal employee, satisfy the requirements of M.G.L.A., Chapter 32 A so as to render him eligible for membership in the state insurance program?"

In considering your questions, I have carefully reviewed the provisions of the National Guard Technicians Act of 1968 (Public Law 90-486) together with the Report of the Senate, No. 1446, 90th Congress, 2nd Session, dated July 22, 1968 and the Report of the House Armed Services Committee, No. 1823, July 31, 1968. In classifying technicians as federal employees, the House Committee stated that one of the purposes of the legislation was "(a) to provide a retirement and fringe benefit program which will be both uniform and adequate . . . " *U.S. Code Congressional and Administrative News,* 90th Congress, 2nd Session, p. 3883. Later in its Report, the House Committee stated:

> "As Federal employees the technicians would be covered under the laws providing for the various fringe benefits for Federal employees including group, health and life insurance, leave, Federal employees death and injury compensation, severance pay, tenure and status." *Id.* at 3888.

Although Public Law 90-486 provides a comprehensive Federal retirement and fringe benefit program for National Guard technicians, section 6(a) thereof specifically permits technicians who are members of state retirement systems to elect to remain in those systems:

> "Sec. 6. (a) Notwithstanding section 709(d) of title 32, United States Code, a person who, on the date of enactment of this Act, is employed under section 709 of title 32, United States Code, and is covered by an employee retirement system of, or plan sponsored by, a State or the Commonwealth of Puerto Rico, may elect, not later than the effective date of this Act, not to be covered by sub-chapter III of chapter 83 of title 5, United States Code, and with the consent of the State concerned or Commonwealth of Puerto Rico, to remain covered by the employee retirement system of, or plan sponsored by, that State or the Commonwealth of Puerto Rico."

That section was summarized by the House Committee as follows:

> "Section 6 (a) provides for an election between the date of the enactment of this legislation and its effective date (the first day of the first pay period that begins on or after January 1, 1969) by technicians who were covered by a State retirement

program as to whether they will remain under that program. The consent of the State would also be required if an affirmative election is made. This would protect the equity of technicians with long periods of covered State service." *Id.* at 3902-3903.

Section 6(c) of the Act provides for continued federal contributions to state retirement programs on behalf of those technicians who make the election allowed by section 6(a).

In view of the explicit authorization provided in Public Law 90-486, permitting technicians to remain as members of state retirement systems, there is nothing in Chapter 32 of the General Laws which would prohibit membership in the state retirement system. Section 3 of Chapter 32 provides that "any employee as defined in section one" is eligible for membership in the state retirement system. The definition of "employee" in section one includes "persons whose regular compensation is paid by the United States from funds allocated to the Massachusetts National Guard" provided such person "is regularly and permanently employed under the control of the military department of the Commonwealth and whose duties in such employment require substantially all normal working hours." If the technicians meet these latter qualifications, they would be eligible for membership in the state retirement system. I therefore answer your first question in the affirmative.

Your questions 2, 3, 4 and 5 present for consideration the question whether Massachusetts National Guard technicians who were eligible for either an immediate or a deferred annuity on December 31, 1968, under the State retirement system, lost that entitlement when they became covered by the Federal retirement system on January 1, 1969. The questions relate, then, only to those technicians who did not elect to remain covered by the State retirement system on and after January 1, 1969. It is my opinion that the technicians lost no rights in this respect. The Senate Report, No. 1446, is replete with references to the vested interests technicians had acquired in future annuities under the various State retirement systems. See Senate Report, pp. 4, 9, and 17. In contrast, there is nothing in the Act to prohibit a technician from effecting his retirement (or deferring such retirement) in the State retirement system on December 31, 1968, and, thereafter, joining the Federal retirement system on January 1, 1969 as a Federal employee. I likewise find nothing in G. L. c. 32 which would prohibit such a course of action.

As stated above, House Report No. 1823 indicates that Congress intended technicians to be subject to a uniform, Federal fringe benefit program. The question of insurance coverage for technicians, however, raises a unique problem. Conventional Federal employees may be entitled to post-retirement insurance coverage, if they have twelve years of Federal service. 5 U. S. C. § 8706. But, technicians who elected to remain in the State retirement system are not eligible for post-retirement insurance coverage, even though they must participate in the Federal fringe benefit program for the duration of their active service as technicians. This much is made clear by section 6(c) of the Public Law, which provides in pertinent part:

"A person who retires pursuant to his valid election shall not be eligible for any rights, benefits, or privileges to which

retired civilian employees of the United States may be entitled." *Id.* at 3539.

In enacting Public Law 90-486, Congress intended that technicians be subject to a uniform Federal retirement ond fringe benefit program. An exception was carved out to the effect that technicians might elect to remain covered by the State retirement system, but no such election was permitted with respect to the State fringe benefit program. It appears, then, that technicians who are currently covered by the Federal fringe benefit program may not, at the same time, participate in a similar State program. In my opinion such dual participation would run counter to the overall legislative intent that the fringe benefits available to technicians be uniform.

However, technicians who elected to remain covered by the State retirement system are not precluded by the provisions of Public Law 90-486 from obtaining post-retirement insurance coverage, once they have retired as technicians from the Federal service. The legislative history indicates that Congress envisioned post-retirement insurance coverage through State plans, where available. The Senate Report stated:

> "[T]echnicians who remain in a State system would not be covered after retirement for any of the fringe benefits such as health and life insurance which are available to persons retired under the Federal civil service system. Any benefits of this nature would depend on coverage under the State retirement system." S. Rep. No. 1446, p. 14.

I therefore conclude, in answer to your question 6, that technicians may not be covered under the State fringe benefit program for the duration of their service as technicians, although they may obtain State coverage once that service has been terminated, provided they made a valid election to be covered by the State retirement system.

Your question 7 asks if a technician satisfies the requirements of G. L. c. 32A, so as to render him eligible for membership in the state insurance program. In my opinion, a technician who has retired from Federal service and who elected to remain covered by the State retirement system would be eligible for membership in the State insurance plan, for substantially the same reasons as outlined in my answer to your first question. Both G. L. c. 32 and 32A provide that national guard technicians come within the definition of "employee" for the purposes of those chapters, and, subject to the restrictions expressed in the Federal Act, technicians are eligible for membership in the State insurance plan. The Federal restrictions, however, as noted in my answer to your question 6, confine such membership to the class of technicians who have retired from Federal service but who elected on or before December 31, 1968 to remain covered by the State retirement system.

Very truly yours,

ROBERT H. QUINN

Attorney General

No. 7 August 22, 1969

HIS EXCELLENCY FRANCIS W. SARGENT
Governor of the Commonwealth

Dear Sir:

You have requested my opinion as to whether the position of Commissioner of Youth Services, established by H. 5492, "AN ACT ESTABLISHING A DEPARTMENT OF YOUTH SERVICES," requires Executive Council approval pursuant to the provisions of Part 2, c. 2, § 1, art. 9 of the Constitution of the Commonwealth. Your letter states that the engrossed bill presently before you contains a provision in line 6 of Section 1 to the effect that the appointment of the Commissioner requires the advice and consent of the Executive Council.

House 5492 is described in your letter as follows:

> "The bill abolishes the Youth Services Board and the Division of Youth Services in the Department of Education, and reforms the Commonwealth's method of treating juvenile offenders. It creates a new department of the executive branch of government, the Department of Youth Services, under the supervision of a Commissioner of Youth Services. The Commissioner will serve for a term of years coterminus with that of the Governor. His department will consist of the following four bureaus, each headed by an Assistant Commissioner: (1) Clinical Services, (2) Aftercare, Delinquency Prevention, and Community Services, (3) Educational Services, and (4) Institutional Services.
>
> "The bureau of Clinical Services, headed by a psychiatrist, will have exclusive responsibility for diagnosing and prescribing care and treatment for those youths committed to the department by the courts under the provisions of an amended Chapter 119. In addition, the department will place new emphasis on identifying the underlying causes of delinquency and on community services for its prevention."

Part 2, c. 2, § 1, art. 9 of the Constitution of the Commonwealth provides:

> "IX. All judicial officers, the solicitor-general, [and] coroners, shall be nominated and appointed by the governor, by and with the advice and consent of the council; and every such nomination shall be made by the governor, and made at least seven days prior to such appointment."

If the appointment of the Commissioner of Youth Services requires "the advice and consent of the council," it is because that position is one of a judicial officer within the meaning of art. 9. It is my opinion that the Commissioner of Youth Services is not a judicial officer within the meaning of art. 9, and his appointment, therefore, does not require the advice and consent of the Executive Council.

The duties of the Commissioner include supervision of the four bureaus of the Department, among which is the Bureau of Clinical Services. That Bureau is responsible for the care and treatment of youths

"committed to the department by the courts . . . " The Commissioner's duties, therefore, cannot be said to be "judicial" in nature. In *Burnside* v. *Bristol County Board of Retirement,* 352 Mass. 481, the Supreme Judicial Court stated:

> "[T]here is a distinction between 'judicial officers whose sole function it is to determine rights and duties . . . [and] another class of officers to carry into effect the decisions and decrees made by the courts.' This latter class of officer is certainly not a 'judicial officer' within the meaning of Part 2, c. 2, § 1, art. 9, or Part 2, c. 3, art. 1 of the Massachusetts Constitution . . . " 352 Mass. at 482.

See, also, *Opinion of the Justices,* 353 Mass. 801, wherein the Justices determined that a sheriff was not a judicial officer within the meaning of Part 2, c. 2, § 1, art. 9, because a sheriff's "function is to carry into effect decisions, decrees and orders made by the courts." 353 Mass. at 803.

In my opinion, the Commissioner of Youth Services will have duties similar to the duties of a sheriff. His responsibilities will relate to the execution of decisions of the courts, following appropriate judicial proceedings. Although the Commissioner may have wide latitude and discretion as to the care and custody of youths committed to the Department, the exercise of such discretion would not, in my opinion, place the position of Commissioner within the category of "judicial officers." Sheriffs and wardens of prisons exercise similar discretion with respect to the custody of persons committed to their care.

In conclusion, then, it is my opinion that Part 2, c. 2, § 1, art. 9 of the Constitution of the Commonwealth does not require that the appointment of the Commissioner of Youth Services receive the advice and consent of the Executive Council.

Very truly yours,
ROBERT H. QUINN
Attorney General

No. 8 August 21, 1969

HONORABLE ARTHUR W. BROWNELL, *Chairman*
Water Resources Commission

Dear Sir:

In your recent letter you indicate that a question has arisen as to whether the rehabilitation of tide gates appurtenant to the Boston Main Drainage System[1] is the responsibility of the City of Boston, or whether it is the responsibility of the Metropolitan District Commission, and you

[1]The main drainage system of the City of Boston is a "combined" sewer system, meaning that it carries and disposes of both sanitary sewage and storm water which mingle in the same sewage conduits. Outlets (or storm flows) are provided at various places within the sewerage system, many of which empty into tidal waters, to relieve the system of surcharging during periods of heavy rainfall. The terminals of these outlets are generally lower than water level at high tide. Thus, self operating tide gates are provided within the overflows to prevent the intrusion of seawater into the system.

have therefore asked for my opinion as to whether the order of the Director of the Division of Water Pollution Control,[2] for the abatement of water pollution resulting from the defective nature of the aforesaid tide gates, should be directed to the City of Boston or to the Metropolitan District Commission.

I note at the outset that under G. L. c. 21, § 45 the Director of the Division of Water Pollution Control is without power to issue any order, directing the discontinuance of the discharge of sewage into the waters of the Commonwealth, unless a public hearing is first held. However, I assume that my opinion as to the responsibility for rehabilitation of the above tide gates will result in appropriate voluntary action by the responsible party, and obviate any necessity for a formal order.

After careful consideration, I am of the opinion that responsibility for the rehabilitation of the aforesaid tide gates rests with the Metropolitan District Commission.

Under St. 1945, c. 705, the Metropolitan District Water Supply Commission (established under St. 1926, c. 375) began the construction of a group of projects, including a sewage treatment plant at Nut Island in the City of Quincy and preliminary work for the construction of a sewage treatment plant at Deer Island, to be transferred to the Metropolitan District Commission upon completion (St. 1945, c. 705, § 2, last paragraph).

These projects, and other sewerage projects authorized and directed by this statute, were the first step in a program designed to abate pollution from sewage in Boston Harbor and its tributaries.

At this time, most of the sewage in the Boston Metropolitan area was being pumped untreated into Boston Harbor; at Nut Island from areas within the South Metropolitan Sewerage District, at Deer Island from areas within the North Metropolitan Sewerage District and at Moon Island from areas of the City of Boston (together with certain areas of the Town of Milton and the City of Quincy), not included within either the North or South Metropolitan Sewerage Districts, served by the Boston Main Drainage System.

By St. 1947, c. 583, the Metropolitan District Water Supply Commission was abolished, and its duties, functions and properties were transferred to the Metropolitan District Commission.

St. 1945, c. 705 has authorized, for the projects referred to therein, an expenditure of $15,000,000.

By St. 1949, c. 606, § 1, an additional $25,000,000 was authorized to be expended by the Metropolitan District Commission for carrying out the projects referred to in St. 1945, c. 705, and for construction of the Deer Island sewage treatment plant the preliminary work for which had been authorized under St. 1945, c. 705.

By St. 1949, c. 598, the City of Boston was authorized to construct, between April 1, 1950 and July 1, 1955, a sewage treatment plant at Calf Pasture Point in the Dorchester section of Boston, for the treat-

[2]Established by St. 1966, c. 685, § 1, G. L. c. 21, § 26, as a division of the Department of Natural Resources and subject to the control of the Water Resources Commission. G. L. c. 21, § 8.

ment and disposal of sewage from the Boston Main Drainage System.

This statute was repealed by section 9 of St. 1951, c. 645, which is entitled AN ACT MAKING THE BOSTON MAIN DRAINAGE SYSTEM A PART OF THE SOUTH METROPOLITAN SEWERAGE SYSTEM AND FURTHER PROVIDING FOR THE SEWAGE DISPOSAL NEEDS OF THE NORTH AND SOUTH METROPOLITAN SEWERAGE DISTRICTS AND COMMUNITIES WHICH HEREAFTER MAY BE INCLUDED IN SAID DISTRICTS.

By section 1 of this Act, the territory exclusively served by the main drainage system of the city of Boston[3] was added to and made a part of the South Metropolitan Sewerage District, as then defined in G. L. c. 92, § 1.[4]

Section 2 of this Act provides in pertinent part as follows:

> Section 2. Subject to the conditions hereinafter provided, the commission is hereby authorized and directed, on behalf of the Commonwealth, to carry out, in addition to the projects referred to in chapter seven hundred and five of the acts of nineteen hundred and forty-five, in chapter five hundred and eighty-three of the acts of nineteen hundred and forty-seven, and in chapter six hundred and six of the acts of nineteen hundred and forty-nine, and acts in addition thereto and in amendment thereof, prior to July first, nineteen hundred and fifty-eight,[5] the following projects: — Project A. The construction of a tunnel between Columbia Circle and Deer Island with necessary shafts and appurtenant works. Project B. The construction of a tunnel between Ward Street pumping station and Columbia 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

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3This area included Boston Proper, South Boston, and parts of Roxbury, West Roxbury and Dorchester, together with the Squantum section of the city of Quincy and a part of the Town of Milton. The remaining areas of Boston had already been being served by either the North or South Metropolitan Sewerage Districts.

4St. 1959, c. 612, § 2 inserted a new section 1 in G. L. c. 92, which combined the North and South Metropolitan Sewerage Districts into one Metropolitan Sewerage District.

5The time within which the above sewerage projects must be completed has from time to time been extended by the legislature, the presently effective deadline being July 1, 1971, as provided by St. 1968, c. 540, § 1.

> 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 (emphasis supplied).

For carrying out the projects referred to in section 2 and those enumerated in St. 1945, c. 705 and St. 1949, c. 606, section 6 of this act authorized an expenditure of $25,000,000 in addition to the uncommitted and unexpended balance of the previously authorized amounts.[6]

Project 5 of section 1 of St. 1945, c. 705 has yet to be completed, and projects F and G of section 2 of St. 1951, c. 645, and the work authorized by the last sentence of the aforequoted portion of that section, have yet to be commenced.

As of this date, all but $2,447,862.69 of the amounts authorized have been expended or encumbered, and it appears that, in addition to that amount, a further amount in excess of $3,000,000 will be needed for the completion of these projects, not considering the aforesaid project G.

The question here is whether the Legislature, by directing in section 2 of St. 1951, c. 645 that the Metropolitan District Commission carry out, as part of Project G there referred to, the rehabilitation of tide gates, intended the rehabilitation of only those tide gates appurtenant to main sewers constructed and maintained by the Commission under G. L. c. 92, § 1,[7] or whether the legislature also intended the rehabilitation of tide gates appurtenant to local sewers (including the Boston Main Drainage System) which are connected to main sewers of the Metropolitan District Commission under G. L. c. 92, § 2[8] and St. 1951, c. 645, § 2.

The legislative history of St. 1951, c. 645, shows that it was based on a recommendation of the Metropolitan District Commission (House Doc. No. 78 of 1951) which (page 2) refers to "Repair of tide gates", together with other projects which later appear in section 2 of St. 1951, c. 645, without specifying what tide gates were intended. The recommendation also states (page 1) that "the legislation herewith presented modifies existing legislation [St. 1949, c. 598, supra] in that it provides for the disposal of the sewage of the city of Boston now discharged into Boston Harbor at Moon Island, and will save a considerable sum of money to the city of Boston as it will not have to construct its own sewage disposal works or operate such works as originally contemplated." The proposed legislation submitted with this recommendation, House Doc. No. 75, of 1951, did not detail any particular projects. It

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6The legislature has subsequently authorized the expenditure of additional amounts for carrying out these projects; St. 1961, c. 515, § 1 ($25,000,000), St. 1962, c. 658, s. 1 ($5,000,000). St. 1962, c. 766, s. 1 ($10,000,000), St. 1966, c. 563, § 1 ($6,500,000) and St. 1967, c. 837, § 1 ($8,000,000).

7G. L. c. 92, § 1 provides, in pertinent part, that the Commission "shall construct, maintain and operate such main sewers and other works as shall be required for a system of sewage disposal for" the various municipalities within the metropolitan sewerage system. At the time of the passage of St. 1951, c. 645, there were (and still are) 16 tide gates, contained in 6 outlets, appurtenant to Metropolitan District Commission main sewers.

8G. L. c. 92, § 2 provides, in pertinent part, that "Any town, within the limits of which any main sewer under the control of the Commission is situated, shall connect its local sewers with such main sewers . . . subject to the direction, control and regulation of the Commission . . ."

merely authorized (section 2) agreements between the Metropolitan District Commission and the City of Boston "for the purpose of receiving and disposing of the sewage of said city not now received and disposed of through the North and South Metropolitan Sewerage Districts," and provided that (section 3), in accordance with any such agreement, the Commission "shall construct the necessary sewerage and sewage treatment works for the reception and disposal of the sewage from the said city . . . " The House Ways and Means Committee reported (House Doc. 2730 of 1951) that this bill ought to pass in the form of a new draft, the present St. 1951, c. 645.

What appears to have been the basis for St. 1951, c. 645, is a report made on February 9, 1951 by Charles A. Maguire and Associates, engineers, under a contract of July 19, 1950 with the Metropolitan District Commission. Basically, this report recommended the joint disposal of sewage from the Boston Main Drainage District with that of the Metropolitan Sewerage District, and suggested the location and design of construction projects, which ultimately appeared in St. 1951, c. 645, § 2, so as to most easily facilitate such joint disposal (characterized by the report as its "Joint Plan").

Table 18 of the report, which is a list of the contemplated projects together with their estimated initial costs, contains the item "Rehabilitation of tide gates and pumping stations." This item allocates a total of $800,000 for the rehabilitation of pumping stations, which are there identified as two stations maintained and operated by the Commission. The tide gates, for which an allocation of $200,000 is made, are not there identified.

However, on pages 37 and 38 of the report may be found a general discussion of "sewer overflows on the Boston Main Drainage System and the North and South Metropolitan Sewerage Systems" which goes on to state that "many of these overflows are such as will permit the entrance of tide water, and it is for this reason and for the reason that all unnecessary overflow of sewage should be prevented that we have included in our estimates of costs of work to be carried out under the Joint Plan, an item for the rehabilitation of gates and other works relating to the overflows." Further, at page 92 of this report, appears the assertion that under the proposed Joint Plan, "All existing storm overflows and tide gates in *the various systems* will be repaired in order to eliminate backflow from the harbor and its tributaries into the sewerage systems." (emphasis supplied).

As early as 1937, the problem of leakage of salt water into the Boston Main Drainage System through defective tide gates was brought to the attention of the legislature by House Doc. No. 1600 of that year (REPORT OF THE SPECIAL COMMISSION ON THE INVESTIGATION OF THE DISCHARGE OF SEWAGE INTO BOSTON HARBOR AND ITS TRIBUTARIES), filed pursuant to Chapter 42 of the Resolves of 1935 and Chapters 5 and 36 of the Resolves of 1936. Page 69 of that report, attributing salt water in the system to (defective) tide gates, pointed out that "it is important that this leakage be reduced to a minimum, as the presence of large amounts of salt water in the system

must reduce the capacity of the system for carrying sewage or storm water and increase the cost of operation because of increased pumpage."

As the Boston Main Drainage System is now connected to and a part of the Metropolitan Sewage District under St. 1951, c. 465, the above problems obviously result also in a decrease in capacity of main sewers of the Commission and an increase in the cost of their operation. Also, because the mingling of salt water with sewage impedes the proper operation of the Deer Island sewage treatment plant, substantial amounts of sewage from the Boston Main Drainage System are presently required, during periods of high tide, to be diverted from main sewers of the Commission and discharged untreated into Boston Harbor at Moon Island, contrary to the obvious purpose of St. 1951, c. 645 as evidenced by the recommendations contained in House Doc. 78 of 1951, supra.

It cannot be said that the legislature did not have such problems in mind when drafting St. 1951, c. 645. In providing for the construction of the Deer Island Plant, and for its enlargement to accommodate sewage received from the Boston Main Drainage System (Project C, of section 2 of St. 1951, c. 465), the Legislature cannot be presumed to have overlooked the problems with the operation of that plant which would result from salt water leakage into the Boston Main Drainage System. It "must be presumed to have been familiar with the situation." (See *Flanagan* v. *Lowell Housing Authority,* Mass. Adv. Sh. (1969) 787, 790) which would exist if such conditions were not corrected, and their correction could not have been accomplished merely by a rehabilitation of tides gates appurtenant to main sewers of the Commission.

I therefore conclude that Project G of section 2 of St. 1951, c. 645, was intended to include those tide gates appurtenant to the Boston Main Drainage System.

Very truly yours,
ROBERT H. QUINN
Attorney General

No. 9 September 12, 1969

MR. DERMOT P. SHEA, *Executive Secretary*
Consumers' Council

Dear Sir:

You have asked my opinion whether the recently enacted legislation regulating credit bureaus (St. 1969, c. 442) applies to the credit reporting activities of commercial banks. Specifically, you have asked whether such banks fall within the statutory term "credit bureau," defined as: "any person who engages in the business of making credit reports."

M. G. L. A. Chapter 4, Section 6, provides: "Words and phrases shall be construed according to the common and approved usage of the language . . . " This directive has been further clarified by standards of construction adopted by the Supreme Judicial Court. For example, where the meaning of a statute is plain, the Court will not go outside the words of the statute to examine legislative history or intent. *Allen* v.

Commissioner of Corporations and Taxation, 272 Mass. 502, 508 (1930); *Town of Milton* v. *Metropolitan District Commission,* 342 Mass. 222, 223 (1961). On the other hand, where statutory language is confusing or ambiguous, the Court will, if necessary, go beyond the statute itself to examine the circumstances surrounding its enactment, including its legislative history. *Commonwealth v. Welosky,* 276 Mass. 398, 401-402 (1931); *Tilton v. Haverhill,* 311 Mass. 572, 577 (1942); *Leonard v. School Committee of Attleboro,* 349 Mass. 704, 706 (1965).

It is not precisely clear from the language of G. L., c. 93, § 44, as inserted by St. 1969, c. 442, whether commercial banks were intended to be encompassed by the term "credit bureau." A "credit bureau" is "any person who engages in the business of making credit reports." But a "credit grantor," the next definition in the statute, is "any person engaged *in whole or in part* in the business of extending . . . credit . . . " (emphasis supplied). Applying the principles of construction that no words of a statute shall be rejected as surplusage, and that a statute should be construed as a whole so as to effect a consistent and uniform expression of the legislative intent (*Bolster v. Commissioner of Corporations and Taxation,* 319 Mass. 81, 84-85 (1946)), it appears that the definition of "credit grantor" was carefully drawn to include every person engaged *to any degree whatsoever* in the business of extending credit, and that the definition of "credit bureau," which omits such qualifying words, was *not* intended to encompass all persons engaged *to any degree whatsoever* in the business of making credit reports.

To determine the intended scope of the definition of "credit bureau," it is thus necessary to resort to circumstances surrounding the enactment of the statute, including its legislative history. Committee reports made on the proposed legislation before its enactment may be consulted to help resolve ambiguities. *Hood Rubber Co.* v. *Commissioner of Corporations and Taxation,* 268 Mass. 355, 358 (1929); *City of New Bedford, et al v. New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority,* 330 Mass. 422, 429-430 (1953).

The credit bureau legislation was based largely on a study and special report on local credit bureaus made by the Consumers' Council (House No. 2700), the study and report having been authorized by Chapter 26 of the Resolves of 1968. The final statute was in substantial part a verbatim enactment of a draft of legislation proposed in the Report. The definitions of "credit bureau" and "credit grantor" were identical. Nowhere in the Consumers' Council Report was any reference made to the credit reporting activities of commercial banks. In fact, pursuant to the authority for making this study (Resolves of 1968, Chapter 26) the Council was only "authorized and directed to make an investigation and study relative to the procedures used by local credit bureaus." And the Report itself states, at page 11: "For the purpose of this study the Council has concentrated on the most commonly used credit reporting agency, the local credit bureau, as it concerns and affects the overwhelming majority of the citizens of the Commonwealth." Examples are then given of bureaus such as the Credit Bureau of Greater Boston, Inc., the Credit Bureau of Greater Worcester, etc.

For the foregoing reasons I therefore conclude that Section 44 of Chapter 93 was not intended to apply to the credit reporting activities of commercial banks.

Very truly yours,
ROBERT H. QUINN
Attorney General

No. 10 September 23, 1969

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

Dear Commissioner:

You have requested my opinion as to the legality of using the following clause in the Department's Contract Special Provisions for future projects:

> "All structural steel, regardless of its source, will be fabricated in the United States."

In this regard G. L. c. 7, § 22, cl. 17 permits the Commissioner of Administration to adopt rules and regulations to establish

> "[a] preference in the purchase of supplies and materials, other considerations being equal, in favor, first, of supplies and materials manufactured and sold within the Commonwealth, with a proviso that the state purchasing agent may, where practicable, allow a further preference in favor of such supplies and materials manufactured and sold in those cities and towns within the Commonwealth in which the ratio of unemployment to the total labor force, as determined by the division of employment security, is in excess of five and nine tenths per cent, and second, of supplies and materials manufactured and sold elsewhere within the United States."

Pursuant to this section, the Executive Office for Administration and Finance has adopted Rule 16 which states:

> "The Purchasing Agent's Division shall give preference in the purchase of supplies and materials, other considerations being equal, in favor, first of supplies and materials manufactured and sold within the Commonwealth, and, second, of supplies and materials manufactured and sold elsewhere within the United States."

In this regard G. L. c. 7 § 23A provides in part as follows:

> "Applicability of approved rules, etc. Rules, regulations and orders adopted under clause (17) of section twenty-two shall, so far as may be approved by the governor and council, apply to the purchase by contractors of supplies and materials in the execution of any contract to which the Commonwealth is a party for the construction, reconstruction or repair of any public work; and there shall be inserted in any such contract a stipulation to such effect."

In accordance with this latter section, a provision has been inserted in the Standard Specifications for Highways, Bridges and Waterways referring to the statute and rule and stating that a preference in the purchase of supplies and materials, other considerations being equal, shall be given to supplies and materials manufactured and sold first within the Commonwealth and secondly within the United States.

The statute and rule clearly create a preference in favor of domestically-fabricated steel in the event that other considerations are equal but does not preclude the use of foreign-fabricated steel if permitting the use of such steel would be more beneficial to the Commonwealth.

The question of whether other considerations are equal, is a question of fact to be determined by the Commissioners on the basis of all the factors involved in performance of the contracts. Once it is determined that considerations are equal or favor the use of domestic products, the Department is required to give a preference to domestic products.

In your letter you have set forth some of the factors upon which you relied in arriving at your determination to use domestically-fabricated steel, such as, quality control and the cost and ease of inspection. You have also set forth an actual fact situation which, I assume, is typical of your experience in administering this statute.

The department has, in effect, made an administrative determination that other considerations are at least equal and that domestically-fabricated steel should be given a preference.

Since you have made an administrative determination that the use of domestically-fabricated steel would be more beneficial than the use of foreign-fabricated steel, and since this determination is based upon relevant criteria as well as the Department's knowledge and experience in administering the contracts with the Commonwealth, I am of the opinion that the use of the aforesaid provision in the Contract Special Provision is a permissible form of granting a preference under G. L. c. 7, § 22, cl. 17.

Very truly yours,
ROBERT H. QUINN
Attorney General

No. 11 October 8, 1969

HONORABLE SAMUEL M. FLAKSMAN
Executive Secretary
Executive Council

Dear Sir:

By a letter dated October 2, 1969, you transmitted a copy of a vote of the Executive Council, taken October 1, 1969, which requests my opinion whether Michael E. Haynes, a member of the 1969-1970 Legislature, can be appointed by the Governor of the Commonwealth to the office of "Member of the Parole Board of Massachusetts" pursuant to G. L. c. 27, § 4. The question has been raised because of the enactment of c. 766, Acts of 1969.

As you have correctly indicated in your letter, the answer to your question is governed by two statutory provisions and Article 65 of the Articles of Amendment to the Constitution of the Commonwealth. Article 65, in pertinent part, provides that "[n]o person elected to the general court shall during the term for which he was elected be appointed to any office . . . the emoluments whereof are increased during such term . . . " Section 42 of c. 766 of the Acts of 1969 amends G. L. c. 27, § 4, so as to increase the salary of "Members of the Parole Board of Massachusetts," and § 47a of that chapter provides that anyone appointed as a "Member of the Parole Board" between the effective date of c. 766 and January 6, 1971, shall receive the salary payable under G. L. c. 27, § 4 prior to the enactment of c. 766.

Article 65 of the Articles of Amendment to the Constitution prohibits the appointment of any member of the Legislature to an office the salary of which has been increased during the member's term of office. Chapter 766 of the Acts of 1969 was enacted during Mr. Haynes' term as a member of the House of Representatives, and it increased the salaries of members of the Parole Board. However, a reading of § 47a of c. 766 evidences a clearly expressed legislative intent that the increase in salary apply only to members of the Parole Board serving or appointed prior to the effective date of the chapter. The salary for any member appointed after that date, but prior to January 6, 1971, remains at the salary prescribed by G. L. c. 27, § 4, as it formerly read.

Should Representative Haynes be appointed by the Governor as a member of the Parole Board, and such appointment is made prior to January 6, 1971, Mr. Haynes would receive as salary that prescribed by the former version of G. L. c. 27, § 4. The appointment would not, therefore, be to an office "the emoluments whereof [were] . . . increased" during Mr. Haynes' term as a legislator. The appointment, if it is made, would not be prohibited by the provisions of Article 65 of the Articles of Amendment to the Constitution.

The appointment considered by the Justices in *Opinion of the Justices,* 348 Mass. 803, is distinguishable on the facts. There the Justices were asked for an advisory opinion with respect to an appointment of John J. McGlynn to the office of Registrar of Motor Vehicles, the salary for which position had been increased during the term for which Mr. McGlynn had been elected to the Legislature. Following Mr. McGlynn's appointment, the Governor and Council reduced the salary to the level obtained prior to the increase. The Justice stated that "[t]he fact that the Governor and Council one week later . . . sought to reduce the salary . . . is without significance." *Id.,* at 805. In the instant case, the salary for the position to which Mr. Haynes may be appointed has never been increased.

In conclusion, then, it is my opinion that the appointment of Representative Michael Haynes to the office of member of the Parole Board is not prohibited by Article 65 of the Articles of Amendment to the Constitution.

Very truly yours,
ROBERT H. QUINN
Attorney General

No. 12 October 21, 1969

HONORABLE NEIL V. SULLIVAN
Commissioner of Education
Department of Education

Dear Commissioner Sullivan:

You have requested my opinion as to the constitutionality of a practice involving Bible reading and prayer conducted in an elementary school in the Town of Leyden pursuant to a motion voted by members of the Leyden School Committee. For reasons that will appear evident, it is my opinion that such a practice is unconstitutional under the First Amendment of the United States Constitution.

In your letter you refer to a motion passed by members of the Leyden School Committee on August 21, 1969, which states:

> "On each school day, before class instruction begins, a period of not more than five minutes shall be available to those teachers and students who may wish to participate voluntarily in the free exercise of religion as guaranteed by our United States Constitution.
>
> "This freedom of religion shall not be expressed in any way that will interfere with another's rights.
>
> "Participation may be total or partial, regular or occasional, or not at all.
>
> "Nonparticipation shall not be considered evidence of non-religion nor shall participation be considered evidence of recognizing an establishment of religion.
>
> "The purpose of this motion is not to favor one religion over another nor to favor religion over non-religion, but rather to promote love of neighbor, brotherhood, respect for the dignity of the individual, moral consciousness and civic responsibility; to contribute to the general welfare of the community and to preserve the values that constitute our American heritage."

According to the information you provide, this motion is implemented at the Leyden Elementary School in the following manner. At 8:35 a.m., a school bell rings to indicate that it is time for the pupils to gather for prayer. At 8:40 a.m., another bell rings signaling the commencement of the exercise. At this time different practices occur in grades one through six. Either the Bible is read by the teacher or by a volunteer chosen by the teacher, or else the Lord's Prayer is recited under the teacher's supervision. Students have been advised that they may participate or not in these exercises. Immediately following this five-minute period, another school bell rings at 8:45 a.m. and the "regular" school day begins with a flag salute, a patriotic song, and silent meditation.

You have asked whether this practice is constitutional. Although one of my predecessors has ruled unconstitutional a program factually indistinguishable from the Leyden practice (see *Op. Atty. Gen.,* August 30,

1963, 88-89), your question merits an independent evaluation because the prior opinion I have referred to was based on a hypothetical question.

The First Amendment of the United States Constitution declares that "Congress shall make no law respecting an establishment of religion . . . " The Supreme Court has held that this principle is a "fundamental concept of liberty" which also binds the States through the Fourteenth Amendment, *Cantwell* v. *Connecticut,* 310 U. S. 206, 303, and thus has applied the Establishment Clause in several cases concerning state public school systems.

Of particular relevance are the companion cases of *Abington School District* v. *Schempp* and *Murray* v. *Curlett,* 374 U. S. 203, which pertained to prayer and Bible reading. In *Schempp,* a state statute required the reading of at least ten verses from the Bible, without comment, at the opening of each school day and provided that any child could be excused from attendance or participation upon the written request of parent or guardian. In *Murray,* a rule of the local board of school commissioners pursuant to state statute required the reading, without comment, of a chapter from the Bible and/or the recitation of the Lord's prayer. In this case children were also excused upon the written request of parent or guardian. In both cases, it was clear to the Court that the programs were religious exercises required by the states in violation of the command of the First Amendment that government maintain strict neutrality, neither aiding nor opposing religion. The conclusion reached in this case has since been confirmed by the Supreme Judicial Court of Massachusetts. *Attorney General* v. *School Committee of North Brookfield,* 347 Mass. 775; *Waite* v. *School Committee of Newton,* 348 Mass. 767.

The singular importance of *Schempp* and *Murray* derives from a rule formulated by the Court to distinguish between forbidden involvements of the state with religion and those contacts permitted by the Establishment Clause.

> "The test may be stated as follows; what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the structures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Id.,* at 222.

Based on prior decisions, this guiding rule has been reaffirmed in more recent cases. *Board of Education* v. *Allen,* 392 U. S. 236, 243; *Epperson* v. *Arkansas,* 393 U. S. 97, 106-107. Accordingly, it is my duty to advise you in the light of the *Schempp* rule, irrespective of my own views and predelictions.

The school committee's motion must have a secular purpose *and* a primary effect that neither advances nor inhibits religion in order to withstand the Establishment Clause under the *Schempp* rule.

The motion authorizes and establishes a period for "the free exercise of religion." Since it clearly contemplates that religious exercises will in

fact take place, it is impossible to avoid the conclusion that its purpose is "the advancement . . . of religion." Nor does the motion's later recitation of a number of concededly beneficial secular purposes affect this conclusion. In *Chamberlin* v. *Dade County Board of Public Instruction,* 160 So. 2d 97 (Fla. 1964), the state court upheld a statute requiring daily reading, without comment, from the Bible in the presence of pupils because its preamble indicated that it was in the interest of good moral training and of a life of honorable thought and good citizenship that public school children have lessons of morality brought to their attention. The Supreme Court summarily reversed, merely citing *Schempp. Chamberlin* v. *Dade County Board of Public Instruction,* 377 U. S. 402. In the *Murray* case, the state contended that the purposes of a similar statute were the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature. In rejecting this argument, the Court noted that the Bible had been used neither as an instrument for nonreligious moral inspiration nor as a reference for the teaching of secular subjects. *Abington School District* v. *Schempp, supra* at 224.

There can also be no doubt that the practices in Leyden are primarily religious in nature and advance religion. In *Engel,* the non-denominational Regents' prayer was held to be "a religious activity . . . a solem avowal of divine faith and supplication for the blessings of the Almighty," *Engel* v. *Vitale, supra* at 425, "whose nature and meaning were quite clearly religious . . . " *Abington School District* v. *Schempp, supra* at 264 (concurring opinion). The same must be said for the Lord's Prayer. In *Schempp,* Bible reading was seen to be "a religious ceremony," and it was noted that "the place of the Bible as an instrument of religion cannot be gainsaid . . . " *Id.* at 223, 224. In one respect, at least, the Leyden program goes beyond *Engel* and *Schempp,* for in those cases the teachers were confined to written text and were not permitted by statute or rule to give any answers, comments, explanations or interpretations. The school committee's motion contains no such restriction.

While superficially dissimilar, the Leyden practices bear a strong resemblance to *McCollum* v. *Board of Education,* 333 U.S. 203, which held unconstitutional a "released time" program in which pupils whose parents consented were released temporarily from their regular school classes to attend classes of religious instruction conducted on school premises by religious instructors who were employed at no expense to the state. The Court found beyond all question that there was a utilization of the tax-established and tax-supported school system to aid religious groups in spreading their faith. School buildings were used for the dissemination of religious doctrines and the state's compulsory public school machinery helped to provide pupils for religious classes. Their decision, the Court noted in a later case, resulted from the fact that the program "would involve the State in using tax-supported property for religious purposes . . . " *Epperson* v. *Arkansas, supra* at 106. This same objection clearly applies to the Leyden program.

In reaching the conclusion that the purpose and primary effect of the school committee's motion is the advancement of religion, I am required

under criteria established by the Supreme Court to say that the following considerations legally cannot be controlling. The fact that the program may be nondenominational and voluntary in nature does not free it from the limitations of the Establishment Clause. *Abington School District* v. *Schempp, supra* at 224-225; *Engel* v. *Vitale,* 370 U.S. 421, 430. That the program takes place "before class instruction begins" is also of no weight, since the practices held invalid in both *Engel* and *Schempp* were also conducted before regular classes began. Nor can it be argued that the prohibitation of such a practice would collide with the majority's right to the free exercise of religion, for this right has never meant that a majority could use the machinery of the state to practice its beliefs. *Abington School District* v. *Schempp, supra,* at 225-226. Moreover, it would be no defense to urge that the practice may be a relatively minor encroachment on the First Amendment, if in fact an encroachment does take place. *Id.* at 225.

This opinion, however, and the decisions that I have referred to in no way affect the observance of a period of silent meditation as conducted in Leyden and in other schools throughout the Commonwealth pursuant to G. L. c. 71, § 1A. This practice appears to satisfy fully the Constitution's mandate of neutrality. *Abington School District* v. *Schempp, supra* at 281 (concurring opinion). *Op. Atty. Gen.,* April 4, 1966, at 299-303. Nor is the use of the Bible or other religious tracts completely forbidden in public schools by the Establishment Clause. It is the religious exercise, not the religious text, that is prohibited. The Bible, of course, has great literary and historical value in addition to its religious significance. The Supreme Court has noted:

> " . . . it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment." *Abington School District* v. *Schempp, supra* at 225.

Either of these practices, however, is a far cry from authorizing by official act publicly paid teachers to hold or assist in holding religious exercises in a public school. As our late President John F. Kennedy stated:

> " . . . The Supreme Court has made its judgment and a good many people obviously will disagree with it. Others will agree with it. But I think that it is important for us if we are going to maintain our constitutional principle that we support the Supreme Court decisions even when we may not agree with them.
>
> "In addition, we have in this case a very easy remedy and that is to pray ourselves. And I would think that it would be a welcome reminder to every American family that we can pray a good deal more at home, we can attend our churches with a good deal more fidelity, and we can make the true meaning of

prayer much more important in the lives of all of our children. That power is very much open to us. And I would hope that as a result of this decision that all American parents will intensify their efforts at home, and the rest of us will support the Constitution and the responsibility of the Supreme Court in interpreting it, which is theirs, and given to them by the Constitution."

Public Papers of the Presidents, John F. Kennedy, 1962, pp. 510-511.

Very truly yours,
ROBERT H. QUINN
Attorney General

No. 13 October 27, 1969

HONORABLE ROBERT Q. CRANE
Chairman, State Board of Retirement

Dear Mr. Chairman:

You have requested my opinion whether c. 601 of the Acts of 1968 imposes any obligation on cities and towns which have not accepted the provisions of G. L. c. 32, §§ 56 to 59, the so-called "Veterans' Retirement Act." Those sections establish special retirement provisions for veterans, separate and distinct from the provisions applicable to members of the State Employees' Retirement System. For example, G. L. c. 32, § 58 provides in pertinent part:

> "A veteran who has been in the service of the commonwealth, or of any county, city, town or district or any housing authority, for a total period of thirty years in the aggregate, shall, at his own request, with the approval of the retiring authority, be retired from active service at seventy-two percent of the highest annual compensation . . . "

General Laws c. 32, § 60 provides that sections 56 to 59 shall only "be in effect in any county, city, town or district which accepted them or accepted corresponding provisions of law . . . "

Chapter 601 of the Acts of 1968, now found in G. L. c. 32, § 59A, provides as follows:

> "If a retired veteran or the widow of a veteran receives a pension from the commonwealth or from a political subdivision thereof under the provisions of section fifty-six, fifty-seven, fifty-eight or fifty-eight B, and if a portion of such pension or widow's allowance is based on the creditable service of such veteran in a governmental unit other than the unit which pays such pension or allowance, the governmental unit making such payment shall be reimbursed in full by such other governmental unit for such portion of the pension or allowance as shall be computed by the actuary in the division of insurance. The treasurer of the governmental unit paying such pension or allowance shall annually, on or before January fifteenth, upon certification of the retiring authority of such governmental unit,

notify the treasurer of such other governmental unit of the amount of reimbursement due therefrom for the previous calendar year, and the treasurer of such governmental unit shall forthwith take such steps as may be necessary to insure prompt payment of such amount. All such payments from the other governmental unit shall be charged to such funds as shall be appropriated for payment of pensions and allowances under section fifty-six, fifty-seven, fifty-eight or fifty-eight B, and when received they shall be credited to and added without further appropriation to such similar appropriation as shall have been made for the payment of similar pensions and allowances in the paying governmental unit. In default of any such payment, the paying governmental unit may maintain an action of contract to recover the same."

You state in your letter that:

"1). The treasurers of some cities and towns question the obligations of their political subdivisions to pay their share of the pension or allowance as they claim their cities and towns have never accepted the so-called Veterans Law, (Sec. 56-60 of Chapter 32) and hence have never made appropriations for such purpose.

"2). The city and town treasurers question their obligation to pay a share of the pension or allowance in cases where the retiree was a teacher and part of his service took place while a member of the Teachers' Retirement System, and during that time his retirement deductions were deposited in the Teachers' Retirement System and were not at the disposal of the local political subdivision."

It is clear from a reading of G. L. c. 32, § 60 that cities and towns which have not accepted the provisions of G. L. c. 32, §§ 56-59 have no obligation to pay pensions pursuant to those sections to veterans who retire as employees of those cities and towns. Chapter 601 of the Acts of 1968 (G. L. c. 32, § 59A), however, imposes an obligation on the Commonwealth and all political subdivisions thereof which is not conditioned upon an acceptance of G. L. c. 32, §§ 56-59. The Act provides that if a portion of the pension "is based on the creditable service of such veteran in a governmental unit other than the unit which pays such pension" then the "unit making such payment *shall* be reimbursed in full by such other governmental unit for such portion . . . " (Emphasis supplied.) The Legislature did not provide that reimbursement would occur only if the other governmental unit had accepted the provisions of G. L. c. 32, §§ 56-59. In addition, I note that G. L. c. 32, §60, by its terms, applies only to G. L. c. 32, §§ 56-59, and not to § 59A. Thus any argument that § 60 restricts the imposition of any obligation only to those cities and towns which have accepted §§ 56-59 appears to be without merit.

It is clear that the Legislature can impose new obligations on cities, towns and other political subdivisions without their consent and without reimbursement. It is well settled that a city or town of the Commonwealth

> "is simply a political subdivision of the state, and exists by virtue of the exercise of the power of the state through its legislative department." *City of Worcester* v. *Worcester Consolidated Street Railway Company,* 196 U.S. 539, at 548 (1905).

See, also, *Horrigan* v. *Mayor of Pittsfield,* 298 Mass. 492, at 499. Given this relationship between the Commonwealth and its political subdivisions, it is certainly within the power of the Legislature to require reimbursement from all of the Commonwealth's political subdivisions and not just those which have accepted the provisions of G. L. c. 32, §§ 56-59.

There appears to be no reason why the same reasoning does not obtain with respect to instances where retirees were teachers and their retirement deductions were deposited in the Teachers' Retirement System. Whether or not the deductions were "at the disposal of the local retirement system" is, in my opinion, irrelevant to the central question whether the Legislature has imposed an obligation of reimbursement in such cases. It is my view that such an obligation has been imposed even though deductions were not at the disposal of the political subdivision involved.

In considering your questions, I have not overlooked that provision in c. 601 which states that "[a]ll such payments from the other governmental unit shall be charged to such funds as shall be appropriated for payment of pensions and allowances under section fifty-six, fifty-seven, fifty-eight or fifty-eight B . . . " This provision would require any political subdivision which had not accepted the provisions of §§ 56-59 to make an annual appropriation to satisfy any obligation imposed by c. 601.

Very truly yours,
ROBERT H. QUINN
Attorney General

No. 14 October 31, 1969

HONORABLE HOWARD M. MILLER, *Chairman*
Alcoholic Beverages Control Commission

Dear Sir:

You have requested an opinion as to the applicability of an opinion rendered by the Attorney General to the Alcoholic Beverages Control Commission (the Commission) on December 4, 1959, to an application now pending before the Commission for the transfer of a tavern license to premises which were licensed as an all-alcoholic beverage package store for the year 1967, although there is no license in effect on said premises at this time. The premises in question are located within a 500-foot radius of a school. General Laws c. 138, § 16C provides:

> "Premises, except those of an inn-holder and except such parts of buildings as are located ten or more floors above street level, located within a radius of five hundred feet of a church or school shall not be licensed for the sale of alcoholic beverages; but this provision shall not apply to the transfer of a license from premises located within the said distance to other

premises located therein, if it is transferred to a location not less remote from the nearest church or school than its former location, nor shall it apply to the licensing of premises located within a radius of five hundred feet of a church if the governing body of such church assents in writing to such licensing.

"In this section a church shall mean a church or synagogue building dedicated to divine worship and in regular use for that purpose, but not a chapel occupying a minor portion of a building primarily devoted to other uses, and a school shall mean an elementary or secondary school, public or private, giving not less than the minimum instruction and training required by chapter seventy-one to children of compulsory school age."

Your letter asks whether the application before the Commission may be excepted from G. L. c. 138, § 16C by § 2 of c. 569 of the Acts of 1954 (effective January 1, 1956), which provides as follows:

"The provisions of section sixteen C of chapter one hundred and thirty-eight of the General Laws, inserted by section one of this act, shall not apply to premises which, prior to the effective date of this Act, or prior to the establishment of a church or school within five hundred feet thereof, were licensed for the sale of alcoholic beverages."

You have orally informed me that the premises in question were licensed prior to January 1, 1956, the effective date of St. 1954, c. 569.

The cited 1959 opinion of the Attorney General was that an exception was available under St. 1954, c. 569, § 2, where the premises had previously been licensed as a "package goods" store for the sale of malt beverages during the year 1935. However, subsequent to the time the 1959 opinion was rendered, it was argued in *Vaughan* v. *Max's Market, Inc.,* 343 Mass. 394, at 396-397, that St. 1954, c. 569, § 2 is intended only to shield from the operation of G. L. c. 138, § 16C the renewal of *existing* licenses of premises located within 500 feet of a church or school, and that it is inapplicable to earlier *expired* licenses. While the Court did not decide that issue because of the absence of a necessary party, there was dictum that a narrower interpretation of § 2 of c. 569 of the Acts of 1954 than was expressed in the 1959 opinion of the Attorney General would be correct or even necessary on constitutional grounds of equal protection. The Court also noted that the omission to include § 2 of c. 569 of the Acts of 1954 in § 16C, as inserted in G. L. c. 138, suggests an intention that § 2 have a limited application.

It is my opinion that the dictum in *Vaughan* should be followed in applying St. 1954, c. 569, § 2, and that said § 2 was intended as a "grandfather clause" to exempt premises with licenses in effect at the time of the effective date of St. 1954, c. 569, or licenses in effect at the time of the establishment of the school or church in question. *Jaspar* v. *Dolan,* Mass. Adv. Sh. (1968) 1293, decided on December 4, 1968, held only that where there was an existing license on the premises at the time of application for a different type of license for the same premises, St. 1954, c. 569, § 2 was applicable. That decision has no application to the facts of the present situation.

For the reason stated, I conclude that § 2 of c. 569 of the Acts of 1954 does not apply to the transfer in question.

Very truly yours,
ROBERT H. QUINN
Attorney General

No. 15 November 18, 1969

HONORABLE MILTON GREENBLATT, M.D.
Commissioner of Mental Health

Dear Doctor Greenblatt:

You have requested my opinion with respect to the effective date of certain provisions of c. 889 of the Acts of 1969, "An Act Establishing a Comprehensive Drug Rehabilitation Program and Establishing Within the Department of the Attorney General a Narcotic and Harmful Drug Training Program for State and Local Police Officers." By its terms, the Act amends or repeals portions of G. L. c. 111A and c. 123, which govern the commitment of drug addicts, and provides new procedures for commitment and treatment of addicts and drug dependent persons. While the new procedures are to take effect on January 1, 1971, it appears from a reading of c. 889 that certain of the amendments and repeals may take effect on November 27, 1969. Section 25 of c. 889 provides:

> "This act shall take effect conformably to law except that sections one hundred and thirty-two to one hundred and thirty-seven, inclusive, and section one hundred and thirty-nine, and the second, fourth and fifth paragraphs of section one hundred and thirty-one of chapter one hundred and twenty-three of the General Laws, inserted by section one of this Act, shall take effect on January first, nineteen hundred and seventy-one."

You state in your letter that an interpretation that the new commitment procedures are to become effective on January 1, 1971 and that the other repealing and amendatory provisions are to become effective on November 27, 1969 would result in "turmoil and confusion" in the commitment and treatment of drug dependent persons. Such an intent, with its resulting consequences, cannot in my opinion be attributed to the Legislature.

It is clear that the new commitment and treatment provisions provided by c. 889 of the Acts of 1969 become effective on January 1, 1971, by the express terms of section 25 of the Act. The precise issue for resolution, then, is on what date the amending and repealing provisions of c. 889, not specifically covered by the January 1, 1971 reference, are to become effective. It is my opinion that the provisions of c. 889 which repeal or significantly amend existing provisions for drug rehabilitation were intended to be included among those provisions the effectiveness of which is postponed until January 1, 1971. The contrary and, in my opinion, untenable interpretation would result in eliminating, on November 27, 1969, existing provisions for drug rehabilitation, long before those provisions would be replaced by new procedures.

In *Spaulding* v. *The Inhabitants of Alford,* 1 Pick. 33, the Supreme Judicial Court determined that there was "nothing inconsistent or contradictory in allowing" the provisions of a repealed Act to continue until the effective date of a new Act, where both Acts regulated the practice of medicine and the Legislature obviously intended that the old provisions continue until the new provisions became effective. In *State* v. *Kennerly,* 104 A.2d 632 (1954), the Court of Appeals of Maryland cited the *Spaulding* case with approval and determined that the provisions of a repealed statute remained in effect until re-enacted provisions could become effective. The Court stated:

> "If the change in the instant case is to be applied prospectively, it should not be construed as a repeal of the previous requirements, for this would create a hiatus and break the continuity of the license system and the long range conservation plan. *We think the clear intention, drawn from the intrinsic evidence of the statute itself, is that the old requirements should remain until the new ones come into operation."* 104 A.2d at 635. (Emphasis supplied.)

In the instant situation, as in the Maryland case, the "clear intention" is that the old commitment and treatment provisions should remain in effect until the new provisions become effective.

In conclusion, then, it is my opinion that those portions of G. L. c. 111A and c. 123, governing the commitment and treatment of addicts and drug dependent persons, which were amended or repealed by c. 889 of the Acts of 1969 and which provide the present statutory authority for commitment and treatment remain in effect until January 1, 1971.

Very truly yours,
ROBERT H. QUINN
Attorney General

No. 16 November 21, 1969

HIS EXCELLENCY FRANCIS W. SARGENT
Governor of the Commonwealth of Massachusetts

Dear Governor Sargent:

You have requested my opinion whether a member of the General Court may be reappointed by you as a member of the Public Health Council established under G. L. c. 17, § 3. You have indicated that the legislator in question was not a member of the General Court when he was originally appointed to the Public Health Council.

A review of the constitutional and statutory provisions applicable to the facts presented by your request reveals no impediment to such an appointment. Article 65 of the Articles of Amendment to the Constitution of the Commonwealth is not applicable, since the position to which the legislator is to be reappointed was not created, nor were the emoluments thereof increased, during his present term in the General Court.

Part 2, Chapter 6, Article 2 of the Constitution and Article 8 of the Amendments to the Constitution make a number of offices expressly in-

compatible. However, neither of these constitutional provisions prohibits a member of the General Court from serving as a member of the Public Health Council.

Nor does G. L. c. 30, § 21, which forbids a person from receiving more than one salary from the Treasury of the Commonwealth, prevent the appointment. Although the legislator receives a salary from the Treasurer as a member of the General Court, the payment of $25 per day while in conference as a member of the Public Health Council consists of wages or compensation rather than salary. In this connection the factual situation here is similar to that presented in 1920 *Op. Atty. Gen.* 699. There a person had been appointed a member of the Advisory Board of the Department of Agriculture and received $10 per day, while in conference, plus travel expenses. The same person was also appointed Director of the Division of Reclamation, Soil Survey and Fairs in the Department of Agriculture at a salary of $4,000 per year. The opinion of the Attorney General stated that "[salary] is limited to compensation established on an annual or periodical basis and paid usually in installments, at stated intervals, upon the stipulated per annum compensation. It differs from the payment of a wage in that in the usual case wages are established upon the basis of employment for a shorter term, usually by the day or week, or on the so-called 'piece work' basis and are more frequently subject to deductions for loss of time." 1920 *Op. Atty. Gen.* 699, 700. It was concluded that the compensation received on a per diem basis as a member of the advisory board was a wage paid him for the limited time in which he was engaged on this special work. Cf. 1956 *Op. Atty. Gen.* 42.

I assume, for the purposes of this opinion, that the legislator's service on the Public Health Council will not be such as to interfere with his duties as a member of the General Court or be performed at the same time that he is required to attend to his duties as a legislator. 1920 *Op. Atty. Gen.* 699, 701.

Although offices are not made expressly incompatible by any constitutional or statutory provision, they "may be incompatible at common law because the nature of their duties is such as to render improper the holding of both offices by one person. Where the holder of one office is the superior of the holder of the other office, or has discretionary power to review the action of the other, the offices are incompatible." *Russell* v. *County of Worcester,* 323 Mass. 717, 719.

In the *Russell* case, it was held that the office of county commissioner and the office of clerk of the First District Court of Southern Worcester were incompatible, and that when the clerk was elected and duly qualified as a county commisioner, the office of clerk became vacant. The decision was based on the points of contact between the two offices, including the fact that the county commissioners controlled the expenses of the clerk and determined the town in which his office was to be located.

The legislator in this instance will be one of six appointed members on the Public Health Council which, together with the Commissioner of Public Health, comprises the Department of Public Health. The duties of the Public Health Council are set forth in G. L. c. 111, § 3 and include the making of rules and regulations, taking evidence on appeals, holding

hearings and considering plans and appointments required by law. However, the Council has no administrative or executive functions, G. L. c. 111, § 3. In addition, the Commissioner must submit annually to the Council recommendations regarding health legislation, G. L. c. 111, § 2. As a member of the General Court, the legislator has no supervisory power relative to the duties which he performs as a member of the Public Health Council and exercises no discretionary power to review the actions of the same. Therefore, these positions are not incompatible at common law.

Article 30 of the Declaration of Rights of the Commonwealth, which provides in part that "the legislative department shall never exercise the executive and judicial powers or either of them" does not preclude the appointment of the legislator to the Public Health Council. This provision is intended to prohibit the legislature as a body from exercising executive or judicial duties and has no application to the members of the General Court, 1895 *Op. Atty. Gen.* 233. Thus, the legislator as an individual member of the General Court is not prevented by Article 30 from being appointed a member of the Public Health Council.

In conclusion, it is my opinion that the reappointment of the legislator as a member of the Public Health Council is not prohibited by any provision of the Constitution or statutes of the Commonwealth.

Very truly yours,
ROBERT H. QUINN
Attorney General

No. 17 November 21, 1969

HONORABLE CLEO F. JAILLET
Commissioner of Corporations and Taxation

Dear Commissioner Jaillet:

On behalf of the Director of Accounts of the Department of Corporations and Taxation, you have requested my opinion with respect to several questions arising from the enactment of Chapter 849 of the Acts of 1969, "An Act to Improve the Collection of Property Taxes Through Changes in the Fiscal Cycles of Counties, Cities, Towns and Certain Districts." The Act is a lengthy and complex piece of legislation, consisting of seventy-nine sections, but for the purposes of this opinion it is sufficient to note that its principal purpose is to change the fiscal year of counties, cities, towns and districts from a calendar year basis to a July 1 — June 30 basis.

In providing for the change in the fiscal years of counties, cities, towns and districts, the Legislature of necessity had to provide for a transition period of either six months or eighteen months, as you note in your letter. The Legislature chose the eighteen-month period, and in the first drafts of the Acts that period was to run from January 1, 1970 through June 30, 1971. However, you inform me that it was determined, prior to final enactment, that the eighteen-month period should be delayed by one year. Thus, the eighteen-month period would not run from January 1, 1970 but from January 1, 1971. That change was made in sections

77 and 78 of the Act, but the reference to the eighteen-month period in section 76 of the Act did not change.

The Act, as passed by the House and Senate and signed by the Governor, therefore contains incompatible sections. Section 76 refers to a transitional period of eighteen months beginning January 1, 1970 and ending June 30, 1971, whereas sections 77 and 78 refer to a transitional period of eighteen months beginning January 1, 1971 and ending June 30, 1972. On the basis of that incompatibility, you have posed the following problems for resolution:

> "1. Because of the conflict between the provisions of Sections 76 and 77, the Director is uncertain as to whether he should prescribe and furnish blank forms to the county commissioner of the several counties, excluding Suffolk and Nantucket, for the preparation during the current year budget estimates, as required by Sections 28 and 28A of Chapter 35, Section 30 of Chapter 36, Section 28 of Chapter 74, and Section 44 of Chapter 128, for a twelve month period beginning January 1, 1970 or for an eighteen month period beginning on that date.
>
> "2. Because of the conflict between the provisions of Section 76 and Section 77, the Director is uncertain as to whether the forms to be used in the preparation of budget estimates by officers of our cities, other than Boston, which forms he is required to approve, shall be set up for a twelve month period beginning January 1, 1970 or for an eighteen month period beginning on that date.
>
> "3. If your opinion in answer to Question No. 2 is that the forms should be prepared for a twelve month period, thereby providing for budget estimates for twelve months rather than eighteen months, should budget estimates prepared by town officers, under the provisions of the aforementioned Section 59 of Chapter 41, be prepared for a twelve month period beginning on January 1, 1970.
>
> "4. If your opinion in answer to Question No. 2 is that the forms should be prepared for a twelve month period, thereby providing for budget estimates for twelve months rather than eighteen months, should the appropriations provided under Section 12B of Chapter 40 for beach districts be for a twelve month period beginning on January 1, 1970
>
> "5. If your opinion in answer to Question No. 2 is that the forms should be prepared for a twelve month period, thereby providing for budget estimates for twelve months rather than eighteen months, shall the budget estimates and the assessments made against member towns under the provisions of Section 7 and 18 of Chapter 40B; Section 16B of Chapter 71; Section 27 of Chapter 111; and Section 11 of Chapter 115 be for a twelve month period beginning on January 1, 1970."

In my opinion, the answers to your questions turn primarily on an interpretation of section 76 of the Act, and that provision should be considered first. It is my opinion that section 76 was *intended* to read that "the fiscal year of every county, city, town and district which begins

on January first, *nineteen hundred and seventy-one,* shall consist of an eighteen-month period and shall not end with the following December thirty-first but with June thirtieth, *nineteen hundred and seventy-two.* (Emphasis supplied.) The failure of the Legislature to change the draft of the Act or conform to the language quoted above, when it in fact had changed other comparable provisions so to read, is a legislative mistake which is subject to a corrective interpretation. *Blanchard* v. *Sprague* 3 F.Cas. 645 (No. 1517) (C.C.D. Mass. 1838). In *Blanchard,* Mr. Justice Story, sitting as a Circuit Justice, stated:

> "Now, I agree, that, in construing an act of Congress, if there be a plain mistake apparent upon the face of the act, which may be corrected by other language in the act itself, the mistake is not fatal." 1F Cas. at 646.

"Other" language found in Chapter 849 of the Acts of 1969 indicates without exception, that the eighteen-month transitional period is to commence on January 1, 1971. Section 79, by its express terms, provides that sections 1 through 75 of the Act "shall take effect on July first, nineteen hundred and seventy-one." Section 77, by its express terms, provides that estimates shall be for an "eighteen month period beginning with January first, nineteen hundred and seventy-one . . . " and section 78 provides that two bills shall be rendered for real estate and personal property taxes "assessed as of January first, nineteen hundred and seventy-one . . . "

In the face of these latter provisions, to interpret section 76 literally, as taking effect on January 1, 1970, would be to presume that the Legislature intentionally wrote conflicting provisions into the Act, or that the Legislature intentionally provided for classifications and distinctions which have no rational basis. I decline to make such a presumption, especially where the result, as here, would be considerable disruption and confusion in the administration of the fiscal affairs of counties, cities, towns and districts.

Having determined, therefore, that section 76 should be read as providing for an eighteen-month transitional period commencing January 1, 1971, it is my opinion, in response to your first question that the Director of Accounts should furnish blank forms to the county commissioners of the several counties, excluding Suffolk and Nantucket, as required by G. L. c. 35, §§ 28 and 28A, c. 36, § 30, c. 74, § 28, and c. 128, § 44, for a twelve-month period beginning January 1, 1970.

In response to your second question, it is my opinion that the forms to be used in the preparation of budget estimates by officers of cities of the Commonwealth, other than the City of Boston, should be set up for a twelve-month period beginning on January 1, 1970.

In response to your questions three, four and five, I answer each in the affirmative.

Very truly yours,

ROBERT H. QUINN
Attorney General

No. 18 December 2, 1969

HONORABLE WILLIAM POWERS
Commissioner of Public Safety

Dear Sir:

By a letter dated September 12, 1969, the then Acting Commissioner of Public Safety, Walter P. Parker, requested my opinion with respect to the provisions of § 7A of c. 271 of the General Laws, inserted by c. 810 of the Acts of 1969, entitled "An Act Authorizing Certain Organizations to Conduct Raffles and Bazaars." Specifically, the following questions have been posed:

"Question 1. The said Section 7A contains the following definition: 'Raffle,' an arrangement for raising money by the sale of tickets, certain among which, as determined by chance after the sale, entitle the holders to prizes.

A. DOES THE ABOVE DEFINITION PERMIT THE SALE OR POSSESSION OF SO-CALLED 'U. S. TREASURY BALANCE TICKETS' BY QUALIFIED MEMBERS OF SPONSORING ORGANIZATIONS HAVING A PERMIT ISSUED UNDER THE PROVISIONS OF THE SAID SECTION 7A, INASMUCH AS WINNING TICKETS ARE NOT DRAWN, BUT ARE DETERMINED BY CERTAIN DIGITS OF THE U. S. TREASURY BALANCE WHICH IS PUBLISHED IN DAILY NEWSPAPERS?

B. DOES THE ABOVE DEFINITION PERMIT THE SALE OR POSSESSION OF LOTTERY TICKETS CALLED 'LUCKY-SEVEN,' 'CLUB VEGAS,' 'PLAY POKER,' OR SIMILAR TICKETS BY QUALIFIED MEMBERS OF SPONSORING ORGANIZATIONS HAVING A PERMIT ISSUED UNDER THE PROVISIONS OF THE SAID SECTION 7A, SUCH SALE OR POSSESSION BEING *ON THE PREMISES* OF SUCH SPONSORING ORGANIZATIONS?

C. DOES THE ABOVE DEFINITION PERMIT THE SALE OR POSSESSION OF LOTTERY TICKETS CALLED 'LUCKY-SEVEN,' 'CLUB VEGAS,' 'PLAY POKER,' OR SIMILAR TICKETS BY QUALIFIED MEMBERS OF SPONSORING ORGANIZATIONS HAVING A PERMIT ISSUED UNDER THE PROVISIONS OF THE SAID SECTION 7A, SUCH SALE OR POSSESSION BEING *OUTSIDE THE PREMISES* OF SUCH SPONSORING ORGANIZATIONS?

"Question 2. The said Section 7A contains the following definition: 'Bazaar,' a place maintained by the sponsoring organization for disposal of merchandise awards by means of chance.

A. DOES THE ABOVE DEFINITION PROHIBIT THE DISPOSAL OF CASH AWARDS BY MEANS OF CHANCE?

"Question 3. The last paragraph appearing in the said Section 7A provides as follows:— No person who prints or produces tickets, cards or any similar article used in the conduct of a bazaar or raffle pursuant to a permit issued under the provisions

of this section shall be subject to any penalty therefor, provided that a certified copy of such permit was presented to him prior to his undertaking to print or produce such tickets or cards.

A. DOES THIS PROVISION EXEMPT SUCH A PERSON FROM BEING SUBJECT TO ANY PENALTY FOR PRINTING OR PRODUCING ANY OF THE TICKETS, CARDS OR SIMILAR ARTICLES OF THE TYPE ENUMERATED IN QUESTIONS 1-A, 1-B and 1-C?"

These questions will be answered *seriatim.* For the reasons hereinafter stated, I answer questions 1(A), (B) and (C) in the negative, question 2(A) in the affirmative, and question 3(A) in the negative.

Question 1(A) asks whether the absence of a drawing of winning tickets in the so-called "Treasury Balance" game, prevents it from qualifying as a raffle as that term is defined in G. L. c. 271, § 7A. As you note in your question, the statutory definition of raffle is "an arrangement for raising money by the sale of tickets, certain among which, as determined by chance after the sale, entitle the holder to prizes."

In defining "raffle," G. L. c. 271, § 7A makes no mention of the necessity for a drawing but states only that winning tickets must be "determined by chance, after the sale" of the tickets. However, § 7A further provides that any organization wishing to conduct a raffle must first apply for a permit from the clerk of the city or town in which the raffle will be "drawn." In my opinion, this provision of § 7A evidences a clear legislative intent that the determination by chance to be made after the sale of the tickets must be made by a drawing of the winning ticket(s).

It is a fundamental principle of statutory construction that every part of a legislative enactment will be given force and effect and no part treated as immaterial or superfluous. *Bolster* v. *Commissioner of Corporations and Taxation,* 319 Mass. 81. It is a further principle that the several sections of a statute must be read together so as to make the statute a consistent and harmonious whole. *Real Properties, Inc.* v. *Board of Appeal of Boston,* 311 Mass. 430.

With these principles in mind, it is my opinion that G. L. c. 271, § 7A requires, as an element of the definition of "raffle," the "drawing" of the winning tickets. To interpret the statute in the opposite fashion would be to allow, as "raffles," certain games which because of the absence of a drawing would have no locus in which to be licensed. In my view, the Legislature intended no such result in enacting c. 810 of the Acts of 1969.

It is my understanding of the Treasury Balance game that winning tickets are selected by matching numbers on the tickets with certain numbers of the United States Treasury balance as it is published, Monday through Friday, in daily newspapers. At no time is a drawing involved. As such, the game does not comply with the requirements of a raffle as set forth in c. 271, § 7A and, therefore, in response to question 1(A), it is my opinion that the game is not permitted by the statute.

Question 1(B) appears to ask two questions, the first of which is whether the definition of "raffle" in G. L. c. 271, § 7A permits the sale or possession of the lottery tickets called "Lucky-Seven," "Club Vegas,"

"Play Poker," or similar tickets. It is my understanding that in each of these games winning tickets are selected at the time the game cards are printed and prior to the sale of any of said cards.

A person purchasing one of these tickets, by comparing the slips contained in the back of his game card with the front of the same card, can determine whether he has won or lost. Here again, at no time during the proceeding does a drawing occur. Therefore, it is my opinion that the aforementioned games do not qualify as raffles pursuant to G. L. c. 271, § 7A, and that § 7A does not permit the sale or possession of the lottery tickets called "Lucky-Seven," "Club Vegas," "Play Poker," or similar tickets.

The second half of Question 1(B) inquires if the definition of "raffle" in G. L. c. 271, § 7A permits the sale or possession of any of the aforementioned or similar lottery tickets on the premises of the sponsoring organization. It is my opinion that my response to the first half of Question 1(B) is dispositive of this question, and that such sale or possession would not be permitted.

Question 1(C) inquires if the definition of "raffle" in G. L. c. 271, § 7A permits the sale or possession of the aforementioned or similar lottery tickets *off the premises* of the qualified sponsoring organization. It is my opinion that my response to the first half of Question 1(B) is also dispositive of this question, and that such sales or possession would not be permitted.

Question 2(A) inquires if the definition of "Bazaar" in G. L. c. 271, § 7A permits the disposal of cash awards by means of chance. It is a fundamental principle of statutory construction that the words of a statute are to be construed according to their natural import and approved usage. *Johnson* v. *District Attorney for the Northern Dist.,* 342 Mass. 212. Another such principle is that when a statute is clear and unambiguous on its face, the express mention of a matter in that statute excludes by implication all other similar matters not mentioned. *Op. Atty. Gen.,* Apr. 18, 1961, p. 119; *Spence, Bryson, Inc.* v. *The China Products Company,* 308 Mass. 81, 88; *Boston and Albany Railroad Company & another* v. *Commonwealth,* 296 Mass. 426, 434.

The natural import of the express reference to "merchandise awards" in G. L. c. 271, § 7A is that the statute intends that only merchandise awards may be disposed of at a Bazaar. The omission of any reference to other types of awards evidences a clear legislative intent to prohibit all other forms of awards.

Therefore, in response to question 2(A), it is my opinion that G. L. c. 271, § 7A does not permit the disposal of cash awards by means of chance at a Bazaar. In answering your question, I intimate no opinion on the question whether G. L. c. 271, § 7A permits the disposal of cash awards at a raffle.

Question 3(A) inquires if the final paragraph of G. L. c. 271, § 7A, exempting printers of tickets used in the conduct of a raffle or a Bazaar from prosecution when the raffle or bazaar is permitted, exempts printers of "Treasury Balance Tickets" and/or the lottery tickets called "Lucky-Seven," " Club Vegas," "Play Poker," or similar tickets. In view of my

determination, *supra,* that under no circumstances does the sale of any of the aforementioned lottery tickets qualify as a raffle under G. L. c. 271, § 7A, it is my opinion that a person printing such tickets is not exempt from the penalty provided for such printing.

Very truly yours,
ROBERT H. QUINN
Attorney General

No. 19 December 5, 1969

HONORABLE ARTHUR W. BROWNELL
Commissioner of Natural Resources

Dear Commissioner Brownell:

You have requested my opinion with respect to several questions arising from the enactment of c. 715 of the Acts of 1962, entitled "An Act Relative to the Promotion and Development of Marine Fisheries of the Commonwealth." The Act, as you note, made significant changes in the administration and financing of marine fisheries activities and research in the Commonwealth. The Act established a Marine Fisheries Advisory Commission, consisting of nine members, to be appointed by the Governor, and section 8 of the Act delegated extensive rule making powers to the Director of Marine Fisheries to enable him to act upon proposals of the Commission. That section, which is now found in G. L. c. 130, § 17A, provides:

> "Upon petition signed by any interested party or upon his own motion, the director shall submit to the marine fisheries advisory commission proposals relating to the management of the marine fisheries. After public hearing, notice of which shall be published in a newspaper of general distribution in the areas affected, the commission shall in writing approve or disapprove such proposals. If any proposal is so approved, the director shall in accordance with such approval adopt, amend or repeal rules and regulations, subject to the approval of the commissioner, which shall govern the following activities only:
>
> (1) The manner of taking fish;
>
> (2) The legal size limits of fish to be taken;
>
> (3) The seasons and hours during which fish may be taken;
>
> (4) The numbers or quantities of fish which may be taken;
>
> (5) The opening and closing of areas within the coastal waters to the taking of any and all types of fish; provided that no area shall be so opened or closed without the consent of the selectmen of the town or the mayor and council of the city affected thereby. Upon the request of the commission, the selectmen or mayor and council shall hold a public hearing upon the question and shall thereafter notify the commission in writing within forty-five days after such request has been received or consent will be deemed to have been granted.

"No such rule or regulation shall require a license for the taking of finned fish from the coastal waters for non-commercial purposes."

Section 9 of the Act amended G. L. c. 130 by inserting a new section 104, as follows:

"This chapter shall not be deemed to affect any privileges granted in any special statute relating to fisheries in any particular place, except such provisions thereof as relate to shellfish and shellfisheries, to alewife fisheries, and to those activities which are the subject of rules and regulations under section seventeen A."

With these statutory sections in mind, you have posed the following questions for resolution:

"1) Does the rule-making power delegated to the director of marine fisheries by G. L. c. 130, sec. 17A, construed in the light of G. L. c. 130, sec. 104, authorize the director to adopt and enforce regulations which conflict with and thereby supercede previously existing special acts of the legislature?

"2) Does the requirement in G. L. c. 130, Sec. 17A for local consent apply to subsection (5), or does it also apply to subsection (1) through (4) as well?

"3) Does a rule or regulation which permits, in a defined area, a particular manner of fishing (such as dragging) when formerly that manner of fishing was prohibited in that area (though fish could be taken by any other method) constitute a regulation of 'the manner of taking fish,' or a regulation 'opening . . . areas within the coastal waters to the taking of any and all types of fish . . . , ' within the meaning of G. L. c. 130, sec. 17A?"

I will consider your questions *seriatim.*

In considering your first question, it is necessary, first of all, to consider a problem raised by any legislation relating to marine fisheries. Historically, this industry has been the subject of many special Acts of the Legislature, some of which, as you state, are two hundred years old. Often, many of these Acts are not found in the General Laws and are only uncovered by a search of the Acts of each session of the Legislature. In many instances, the original provisions has lapsed.

With these considerations in view, the Governor's message to the Legislature in 1962 proposed a legislative program (a portion of which is embodied in c. 715 of the Acts of 1962) which would include, *inter alia,* "First, a creation of a permanent Marine Fisheries Advisory Commission in the Department of Natural Resources" and "Second, the granting of *administrative control* to that agency over the coastal fisheries of the Commonwealth." Governor's Address to the Legislature, Sec. 1 of 1962, p. 12. (Emphasis supplied.)

The Governor's message was premised, in part, on a report issued by the Massachusetts Marine Fisheries Advisory Commission on December 1, 1960. In setting forth the problems which confronted the marine fisheries industry, the Commission stated:

> "Many of the existing fishing laws are outdated, needlessly complicated, and in many cases impractical. In some instances the laws are either difficult to enforce, or the violators cannot readily be prosecuted. Lack of flexibility in the administrative powers of the Department of Natural Resources serves to magnify this problem, *in that regulations can be altered only by legislative action.*" Final Report on the Studies of Massachusetts Marine Fisheries Problems by the Marine Fisheries Advisory Commission, Department of Natural Resources, December 1, 1960, p. 16. (Emphasis supplied.)

The report went on to detail the Commission's recommendations with respect to administrative control of marine fisheries:

> "Under present procedures, virtually any changes in policies or programs affecting the marine fisheries must be accompanied by individual legislative petition, with a consequent tendency to accomplish revision by competition of special interests rather than scientific and technological need.
>
> . . . . .
>
> "It is therefore a strong recommendation of the Commission that the Director of Marine Fisheries, subject to the approval of the Advisory Commission, the Commissioner of Natural Resources, and the Board of Natural Resources, be empowered to have full administrative control of the marine fisheries over which the Commonwealth now has jurisdiction, and that these powers extend to include, where necessary, the opening or closing of areas to fishing, the licensing of all parties concerned with the marine fisheries, the adoption of mesh regulations or size limits, and the revision of any existing fees now administered by the Director." *Id.* at pp. 19-20.

It is apparent that the Legislature, in enacting c. 715 of the Acts of 1962, followed the recommendations of the Governor and the Advisory Commission and enacted them without significant change. The intent of the Legislature, in my opinion, was that there be, as you state in your letter, "a fresh start at marine fisheries management" and not "that the rule-making power should be circumscribed by the many special acts" passed over the last two centuries. It is my opinion, therefore, that the very broad rule-making power delegated to the director by the terms of G. L. c. 130, § 17A, construed in the light of G. L. c. 130, § 104, does indeed authorize the Director of Marine Fisheries to adopt and enforce regulations with respect to those subjects specifically enumerated in the former section which conflict with and thereby supersede previously existing special acts.

With respect to your second question, it is my opinion that the requirement for local consent applies only to subsection (5) of G. L. c. 130, § 17A, and not to subsections (1) through (4). The requirement is included in a proviso which refers to the specific question of opening or closing areas within the coastal waters, and it bears no relation to the other four subsections.

With respect to your third question, it is my opinion that a regulation which permits, within a defined area, a particular manner of fishing is a regulation pertaining to "the manner of taking fish" and not to "the opening or closing of areas within the coastal waters to the taking of any and all types of fish." A regulation pertaining to the latter category would not involve a particular manner of fishing; rather, it would either open or close an area to all types of fishing. However, I note that it might be possible to effect an opening or closing of areas within the coastal waters to the taking of any and all types of fish through the promulgation of a series of individual regulations governing the manner of taking fish. The Director could not, in my opinion, circumvent the requirement of local consent by such an exercise of his rule-making authority. Your letter does not indicate that any such course is contemplated, and I assume that it is not.

Very truly yours,
ROBERT H. QUINN
Attorney General

No. 20 December 11, 1969

HONORABLE ROBERT F. OTT
Commissioner of Public Welfare

Dear Commissioner Ott:

You have requested my opinion with respect to certain questions arising from the enactment of c. 885 of the Acts of 1969, which became effective November 28, 1969. You state in your letter that a "study and review of [the Act's] . . . provisions leave a large gray area of doubt and inconsistencies as to its meaning in some cases and consequently its method of implementation." For these reasons, apparently, you desire my opinion on several matters, and for convenience, I will consider your questions *seriatim*.

1. Your first question asks whether a provider of assistance or the Department of Public Welfare is responsible for sending a copy of a bill to the recipient of assistance, as required by G. L. c. 18, § 5C (as amended by § 6 of c. 885), for services rendered to a welfare recipient under any assistance program of the Department of Public Welfare.

General Laws, c. 18, § 5C provides in pertinent part:

> "Any vendor under any assistance program administered by the department shall submit to the department within ninety days a bill for services rendered, a copy of which shall be sent to the recipient . . . "

It is my opinion that the provider of assistance (i.e. the vendor) is the party responsible for sending a copy of the bill to the welfare recipient. Section 5C sets forth the procedure that must be followed before a vendor is eligible to receive payment for services he has rendered under any assistance program administered by the Department. The requirements for eligibility to receive payment must be fulfilled by the party seeking to qualify. This section requires the vendor to provide the recipient of

his services with a copy of his bill before the vendor may receive payment from the Department for those same services.

2. Your second question asks whether the Commissioner is required to take action with respect to persons or institutions which knowingly make a false representation to the Department in violation of G. L. c. 18, § 5B (as amended by § 6 of c. 885), and, further, at what time the Commissioner may receive a "submission of proof" that a clerical or administrative error led to the proscribed false representation. General Laws, c. 18, § 5B provides:

> "Any person or institution which knowingly makes a false representation to the department of public welfare or its agents, for the purpose of causing any persons, including the person making such representations, to be supported in whole or in part by the commonwealth, or for the purpose of procuring a payment under any assistance program administered by the department, or by fradulent means obtains any such payment, shall be punished by a fine of not less than two hundred nor more than five hundred dollars or by imprisonment for not more than one year."

In my opinion, the Commissioner may not treat the provisions of this section as optional at least in so far as reference of any violation which comes to his attention is concerned. The statute provides that violators "shall be punished" for a violation of the section, and if the Commissioner has evidence of such violation, he has a duty, as the chief administrator of the Department of Public Welfare, to make that evidence known to the Attorney General or the appropriate District Attorney, as the case may be, or seek a complaint from a district court.

General Laws, c. 18, § 5D provides:

> "Any vendor procuring a payment under any assistance program administered by the department who violates any of the provisions of section five B shall be ineligible to participate further in the program for a period of three years next subsequent to the date of said violation. However, a vendor shall not be considered in violation of section five B upon submission of proof, to the satisfaction of the commissioner, that such violation was due solely to clerical or administrative error."

Again, the Commissioner may not treat the provisions of this section as optional. A person who violates G. L. c. 18, § 5B is clearly made ineligible to receive payments form the department under that program for a period of three years. The statute states that a violator "shall be ineligible to participate further in the program," and, in my opinion, the Commissioner has no choice but to exclude the violator from participation.

With respect to the appropriate time for the submission of the proof referred to in G. L. c. 18, § 5D, it is my further opinion that the Commissioner is obligated to accept evidence that a violation was due solely to a clerical or administrative error whenever such evidence becomes available. The proof may be submitted at any time before or during criminal proceedings, and, if the Commissioner is satisfied as to the proof, he is relieved of his duty to take action with respect to a person or insti-

tution for an apparent violation of section 5B. If criminal proceedings have been begun, the Commissioner does have an obligation to bring any determination which he may make pursuant to section 5D to the attention of the Court.

3. Your third question involves the problem of under what circumstances the department may recover payment made for assistance granted under the Public Welfare programs to persons not entitled to receive payment. In this connection, G. L. c. 18, § 5E provides:

> "Any recipient or vendor who receives payment under any assistance program administered by the department, to which he is not entitled, shall return such payment to the commonwealth by paying the same to the state treasurer as soon as demand is made upon him."

The above-quoted section gives the Commonwealth the right to be reimbursed from the recipient or vendor in cases where payment has been made and subsequent disclosures show that the recipient or vendor was ineligible at the time of payment to receive it. I decline, however, to delineate the factual circumstances under which the Commonwealth may exercise this right to repayment. At this point in time, the problem is purely anticipatory, and, absent more definite facts, an opinion is not possible. The problem does not appear to be susceptible of resolution by the adoption of general guidelines or standards.

4. Your fourth question asks what effect the last sentence of G. L. c. 18, § 7 (as amended by § 8 of c. 885) has on the next to the last sentence of that section. The two sentences in question read:

> "The members of the community service boards shall receive no compensation for their services but shall be reimbursed for expenses necessarily incurred in rendering such services.
>
> "The members of the community service boards shall receive no compensation for their services but shall be reimbursed for travel expenses necessarily incurred in rendering such services within the local service areas."

The two sentences quoted above appear to be somewhat duplicative and confusing. The first provides that "expenses" shall be reimbursed, while the second provides that "travel expenses" incurred for rendering services "within the local service areas" shall be reimbursed. It is clear that the section allows reimbursement, at the very least, of travel expenses. I am inclined to the view that the Legislature intended only travel expenses to be reimbursed, despite the inclusion of the first sentence quoted above. It is a general rule of statutory construction that "particular words and phrases will limit and define general words and phrases which are to be found within the confines of the same statute and which might embrace related acts or conduct. *Koller* v. *Duggan,* 346 Mass. 270, at 273. It is therefore my opinion that only travel expenses are reimbursable.

5. Your fifth question asks to what extent, if any, the amendment to G. L. c. 18, § 10 limits the power and duty of the Commissioner to make and revise rules and regulations, as defined in G. L. c. 30A, prior to review by the "Commissioner of Administration and Finance."

Section 9 amends G. L. c. 18, § 10 by adding two sentences at the end of the section so that the section now reads:

> " . . . The Commissioner shall make and from time to time revise and publish such rules and regulations for the conduct of the business of the department and the execution of the programs administered by the department as may be necessary or appropriate. Such rules and regulations shall be submitted to the commissioner of administration and finance for review prior to publication. The extent of such review shall be no greater than that allowed by the federal Social Security Act."

This section does not provide any limitation on the present power and duty of the Commissioner to make and revise rules and regulations, as defined in G. L. c. 30A, prior to review by the Commissioner of Administration and Finance. The Federal Social Security Act includes a section, 42 U.S.C. § 1316(a)(1), entitled "Administrative and judicial review of Public Assistance Determinations." The administrative review provided for in that section is that the Secretary of Health, Education and Welfare shall determine whether the plan submitted to him "conforms to the requirements for approval" as set forth in the sub-chapter of Title 42, U.S.C. pursuant to which the plan is submitted.

The Commissioner of Administration must approve the rules and regulations submitted by the Commissioner of Public Welfare if the rules and regulations conform to the requirements for approval found in the chapter of the General Laws which authorizes the rules and regulations. Such a requirement does not constitute a limitation on the power and duty of the Commisioner of Public Welfare under G. L. c. 30A, for it does not permit the Commissioner of Administration and Finance to review discretionary or policy matters embodied in the rules. He may only disapprove the rules if they are found not to be authorized by statute.

6. Your sixth question asks whether the Department can by rule place a limit of sixty days within which an appeal must be brought before the Commissioner because of the failure of the Department to respond to the needs of an applicant for assistance. In this respect, G. L. c. 18, § 16 (as amended by § 11 of c. 885), provides:

> "Any person aggrieved by the failure of the department to render adequate aid or assistance under any program of aid or assistance administered by the department, or to approve or reject an application for aid or assistance thereunder within thirty days after receiving such application, or aggrieved by the withdrawal of such aid or assistance, or by coercive or otherwise improper conduct on the part of his social worker, shall have a right to a hearing, after due notice, upon appeal to the commissioner of public welfare. Such hearing shall be conducted by a referee designated by the commissioner at a location convenient to the person appealing and shall be conducted as an adjudicatory proceeding under chapter thirty A. Any referee so designated is hereby empowered to subpoena witnesses, administer oaths, take testimony and secure the production of such books, papers, records and documents as

may be relevant to such hearing. The decision of the referee, when approved by the commissioner, shall be the decision of the department and shall be subject to review in accordance with the provisions of said chapter thirty A.

"When a hearing is requested because of termination or reduction of assistance, involving an issue of fact, or of judgment relating to the individual case, between the agency and the appellant, assistance will be continued during the period of the appeal and through the end of the month in which the final decision of the hearing is reached. If assistance has been terminated prior to timely request for fair hearing, assistance will be reinstated."

The only reference to a jurisdictional requirement in section 16 is found in the second paragraph where the Legislature used the word "timely" in reference to a request for a hearing on reduction or termination of assistance. In the absence of any time limitation for filing a request for a hearing, it is my opinion that the matter can be dealt with pursuant to the Commissioner's rule-making powers found in G. L. c. 18, § 10. In this respect, I note that G. L. c. 118E, § 22 as inserted by § 1 of c. 800 of the Acts of 1969, provides for a sixty-day period within which to file a request for a hearing with respect to medical assistance claims, and such a period might also be used in any rule which the Commissioner may issue pursuant to G. L. c. 18, § 10 in order to implement the provisions of § 16 of the same chapter.

7. Your seventh question asks my opinion as to how and by whom "an emergency" may be defined and determined to exist under G. L. c. 18, § 19, as added by section 12 of Chapter 885. Section 19 reads in part:

"In the case of an emergency or where a recipient is evicted from a furnished or partially furnished apartment and does not have sufficient basic furniture to set up housekeeping, such furniture may be authorized by the department after investigation by the social worker and determination by the district supervisor that a need exists . . . "

It is my opinion that the Commissioner of Public Welfare has the power to define and determine when "an emergency" within the meaning of G. L. c. 18, § 19, exists, and that the problem can best be met through the exercise of the Commissioner's rule-making powers found in G. L. c. 18, § 10. The Legislature has refrained from including a detailed definition of the word "emergency", and in the absence of any such express definition, the Commissioner must rely on the expertise which he and his staff have with respect to welfare problems generally to define the term further.

I note that the statute, particularly G. L. c. 18, § 2(A)(1) sets forth in broad and general terms what the duties and obligations of the department are:

"The department shall provide and administer throughout the commonwealth a comprehensive public welfare program, including the following services: . . . the provision of financial assistance to those in economic need . . . ; comprehensive family

and child welfare services; . . . and other forms of social welfare service to families and individauls as needed."

It would appear that any rules and regulations designed to implement G. L. c. 18, § 19 should reflect, in so far as it is possible, the broad mandate which the Legislature has given the Department.

8. Your eighth question asks my opinion "as to the proper method of implementing a hearing for appeal by a recipient against his Social Worker as provided in . . . [G. L. c. 18, § 22] and section 11 in a manner consistent with the rights of an employee in accordance with the provisions of Chapter 31."

The last paragraph of G. L. c. 18, § 22 provides:

> "Failure on the part of any social worker to make such visits as provided herein may be the basis for an appeal by the recipient as set forth in section sixteen. Such failure shall also be grounds for disciplinary action against the social worker in accordance with provisions set forth in chapter thirty-one."

In my opinion, a hearing for appeal should be held under this section in the same manner as for all appeals brought under G. L. c. 18, § 16. However, the last paragraph of section 22 provides for two separate and distinct proceedings. The first proceeding is the granting of a hearing to a recipient aggrieved by the failure of his Social Worker to make visits as provided for in the section. The second proceeding is the determination of whether disciplinary action should be taken by the Department against the Social Worker for his failure to make such visits.

Any disciplinary proceeding against a social worker must be conducted pursuant to the provisions of G. L. c. 31, separate from the hearing on an appeal brought by a recipient of assistance. The recipient has a right under G. L. c. 18, § 16 to a hearing before a referee appointed by the Commissioner. If it is determined that a social worker has failed to make visits as required by G. L. c. 18, § 22, such failure constitutes grounds for the institution of disciplinary proceedings brought under the provisions of G. L. c. 31, and any changes preferred in such a proceeding would have to be proved independently.

9. Your last question asks whether G. L. c. 18, § 23, as added by section 12 of Chapter 885, makes mandatory the performance of all functions listed in that section by a social worker or whether these functions may be performed by someone other than a social worker.

General Laws, c. 18, § 23 provides:

> "The duties of the social worker shall include but not be limited to the following:
>
> "1. Investigating the eligibility and extent of the applicant's need and developing a plan of social assistance in accordance with section two.
>
> "2. Where necessary, obtaining documentary evidence pertaining to eligibility and resources of applicant, such as records of birth, marriage, property and monetary resources.
>
> "3. Assisting applicants and recipients in utilizing financial, health and social service rehabilitation within the family.

"4. Visiting foster homes to interview both the foster parents and the foster children to determine the development and adjustment of the foster children. Periodic visits shall also be made to the schools that the foster children may be attending."

It is my opinion that the duties enumerated in section 23 must be carried out by a social worker. Each duty requires some expertise in the field, and the Legislature has set forth the duties as "the duties of the social worker . . . " Under those circumstances, they may not be performed by any other person.

Very truly yours,
ROBERT H. QUINN
Attorney General

No. 21 December 12, 1969

HONORABLE ARTHUR W. BROWNELL
Commissioner of Natural Resources

Dear Commissioner Brownell:

You have requested my opinion on a question arising from the administration, by your Department, of the so-called "Self-Help Program" which provides for reimbursement to cities and towns of up to fifty percent of the cost of acquisition of land to be held for conservation purposes.

Specifically, you ask:

"[I]s it necessary for a town to vote to *authorize* a duly established conservation commission to acquire land under either G. L. c. 40, § 8C or G. L. c. 132A, § 11, and, if so, is a two-thirds vote required . . . ?"

In considering your question, it is necessary, at the outset, to review briefly the pertinent statutory provisions. I note that G. L. c. 40, § 8C permits a town, which accepts the provisions thereof, to establish a conservation commission. That section provides, in pertinent part, as follows:

"Said commission may receive gifts of property, both real and personal, in the name of the city or town, subject to the approval of the city council in a city or the selectmen in a town, such gifts to be managed and controlled by the commission for the purposes of this section. Said commission may acquire by gift, purchase, grant, bequest, devise, lease or otherwise the fee in such land or water rights, or any lesser interest, development right, easement, covenant, or other contractual right including conveyances on conditions or with limitations or reversions, as may be necessary to acquire, maintain, improve, protect, limit the future of or otherwise conserve and properly utilize open spaces and other land and water areas within their city or town, and shall manage and control the same. For the purposes of this section a city or town may, upon the written request of the commission, take by eminent domain under chapter seventy-nine, the fee or any lesser interest in any land or waters located in such city or town, provided such taking has first been ap-

> proved by a two-thirds vote of the city council or a two-thirds vote of an annual or special town meeting, which land and waters thereupon be under the jurisdiction and control of the commission. Upon a like vote, a city or town may expend monies in the fund, if any, established under the provisions of clause (51) of section five for the purpose of paying, in whole or in part, any damages for which such city or town may be liable by reason of any such taking."

The section provides that a town conservation commission may *receive* gifts of real or personal property, subject to the approval of the selectmen, to be held and managed by the commission for the purposes of the section. In addition, a conservation commission may *acquire* by gift, purchase, bequest, devise or lease such property as the commission may deem necessary to carry out the purposes of the section. There is no requirement, in these latter instances, that the acquisition be approved by the selectmen or any other governmental body or agency. However, prior to an eminent domain taking authorized by § 8C, a two-thirds vote of an annual or special town meeting is required, and a similar two-thirds vote is required prior to the expenditure of monies from a conservation fund for such a taking.

General Laws, c. 40, § 5, cl. (51), authorizes a city or town to appropriate money to a "conservation fund." The monies so appropriated to such a fund may be expended by a commission established pursuant to G. L. c. 40, § 8C "for any purpose, other than a taking by eminent domain, authorized by section eight C." Once the monies have been appropriated by the town, there is no further requirement for a vote of a town meeting prior to an expenditure by the conservation commission, except, of course, in the case of an eminent domain taking. It is my opinion, therefore, that it is *not* necessary that a town vote to authorize a duly established conservation commission to acquire land under G. L. c. 40, § 8C, unless the acquisition is to be by eminent domain.

In answering your question, I have considered the provisions of G. L. c. 40, § 14 and have determined that they are not applicable. That section requires a vote of a town to take or purchase land and a two-thirds vote for an appropriation of money therefor, when land is sought "for any municipal purpose for which the purchase or taking of land, easement or right therein is not otherwise authorized or directed by statute." Clearly, G. L. c. 40, § 8C "otherwise" authorizes the purchase or taking of land for conservation purposes, and G. L. c. 40, § 14 is not applicable here. See *Shea* v. *Inspector of Buildings of Quincy,* 323 Mass. 552, 557.

Having determined that a vote of a town is not a condition precedent to the acquisition of land by a conservation commision, except in cases involving eminent domain takings, and that G. L. c. 40, § 14 does not apply to acquisitions of land by such commissions, a further question arises from the application of the provisions of G. L. c. 132A, § 11. That section, in pertinent part, is as follows:

> "The commissioner shall establish a program to assist the cities and towns, which have established conservation commissions under section eight C of chapter forty, in acquiring

> lands and in planning or designing suitable public outdoor facilities as described in sections two B and two D. He may . . . reimburse any such city or town for any money expended by it in establishing an approved project under said program in such amount as he shall determine to be equitable in consideration of anticipated benefits from such project, but in no event shall the amount of such reimbursement exceed fifty per cent of the cost of such project. No reimbursement shall be made hereunder to a city or town unless a project application is filed by such city or town with the commissioner setting forth such plans and information as the commissioner may require and approved by him, nor until such city or town shall have appropriated, transferred from available funds or have voted to expend from its conservation fund, under clause fifty-one of section five of chapter forty, an amount equal to the total cost of the project, nor until the project has been completed, to the satisfaction of the commissioner in accordance with said approved plans . . . "

The provisions of the section authorize reimbursement, up to fifty percent, to cities and towns for the cost of acquiring land to be held for conservation purposes, although the section does not itself provide the statutory authorization for the land acquisition. That authorization, as I have stated, *supra,* is found in G. L. c. 40, § 8C. If a city or town does not seek reimbursement for a portion of the land acquisition cost, the provisions of the section do not come into play. However, if reimbursement is sought from the Commonwealth, the section sets forth certain conditions which must be met.

Those conditions are (1) that a project application be filed with the commissioner in conformity with the requirement of section 11; (2) that the city or town "shall have appropriated, transferred from available funds or have voted to expend from its conservation fund, under clause fifty-one of section five of chapter forty, an amount equal to the total cost of the project"; and (3) that the project be completed.

General Laws c. 132A, § 11, does not, then, require that a town vote to authorize a conservation commission to acquire land to be held for conservation purposes. At some point in time, however, it is necessary that a town "have appropriated, transferred from available funds or have voted to expend from its conservation fund" an amount which will completely cover the cost of a project, if the town wishes to be reimbursed from the Commonwealth for a portion of the land acquisition cost. The appropriation, transfer or vote to expend, as the case may be, may be accomplished by majority vote of an annual or special town meeting, unless the project requires a taking by eminent domain.

In conclusion, then, it is my opinion that a conservation commission may acquire land, as authorized by G. L. c. 40, § 8C, without the vote of a town meeting and that a commission may expend monies from a conservation fund for such purposes, with the exception that if land is to be taken by eminent domain, a two-thirds vote of a town meeting is required in both instances. It is my further opinion that G. L. c. 40, § 14 is not applicable in such circumstances, and, finally, that G. L.

c. 132A, § 11 requires, prior to reimbursement from the Commonwealth to a town, that the town have appropriated, transferred or voted to expend the amount required by section 11, and that such action be by majority vote.

Very truly yours,
ROBERT H. QUINN
Attorney General

No. 22 December 17, 1969

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

Dear Doctor Lederle:

By letter transmitted by the Chancellor of the Board of Higher Education, you have requested my opinion with respect to whether the University of Massachusetts at Amherst has "the authority to bargain collectively on matters relating to non-professional employees, such as wages, vacation, holiday, sick leave, etc., or whether such employees come under the laws, rules and regulations of the Commonwealth." For the reasons hereinafter stated, I find that the University has the authority to bargain collectively with non-professional employees, but I decline to delineate the scope of that bargaining.

The question you raise concerns the power of the Trustees of the University to engage in collective bargaining with its non-professional employees. A reply to this issue requires an examination of the provisions of G. L. c. 75 relating to the University of Massachusetts and those of G. L. c. 149, § 178F concerning collective bargaining by state employees.

Chapter 648 of the Acts of 1962 significantly amended G. L. c. 75 and expanded the authority of the Board of Trustees of the University of Massachusetts. As amended, G. L. c. 75, § 1 provides that the University shall continue as a state institution within the department of education "but not under its control and shall be governed solely by the board of trustees . . . " It further specifies that in exercising its authority, responsibility, powers and duties,

> " . . . said board shall not in the management of the affairs of the university be subject to, or superseded in any such authority by, any other state board, bureau, department or commission, except as herein provided."

General Laws, c. 75, § 3 states:

> "Notwithstanding any other provision of law to the contrary, except as herein provided, the trustees may adopt, amend or repeal such rules and regulations . . . for its . . . employees . . . as they may deem necessary . . . "

In G. L. c. 75, § 14, the subject of non-professional personnel is defined:

> " 'Non-professional staff', all employees who are not classified as professional personnel, such as clerical, custodial, security, labor, maintenance and the like.

"The non-professional personnel of the university shall continue as state employees under the provisions of chapter thirty and except as otherwise provided in this paragraph, shall be employed in authorized permanent positions in accordance with the provisions of section forty-five of said chapter; provided, however, that the university shall have the authority without prior approval and within the limits of appropriations to establish and fill temporary, part-time and seasonal positions within existing titles and rates within available appropriations for the fiscal year . . .

"All officers and employees, professional and non-professional, shall continue to be employees of the commonwealth irrespective of the source of funds from which their salaries or wages are paid. They shall have the same privileges and benefits of other employees of the commonwealth such as retirement benefits, group insurance, industrial accident coverage, and other coverage enjoyed by all employees of the commonwealth."

The legislative intent in passing these and related measures is to be ascertained from the language used, the evil to be remedied, and the object to be accomplished by the enactment. *New York Central Railroad* v. *New England Merchants National Bank,* 344 Mass. 709, 713.

The legislative history of c. 648 of the Acts of 1962 reveals that the purpose of the Act was to resolve the conflict between state central control agencies and their need for information on the one hand, and the University's claim for greater freedom of operation on the other. House Document No. 3350 of 1962, *Report of the Special Commission on Budgetary Powers of the University of Massachusetts and Related Matters,* at p. 9. More specifically, the task before the Legislature was to decide which among the existing administrative controls needed to be changed or eliminated at state-supported institutions of higher learning in order to promote the purpose and objectives of public higher education. *Id.* at p. 13. Fiscal management and policy, together with recruitment and tenure of professional personnel, were of primary concern, while the subject of non-professional personnel received only passing attention. *Id.* at pp. 17-30, 34-37. Only the procedures for filling non-professional temporary and part-time positions were recommended for change; the status of such personnel as state employees was continued. *Id.* at p. 37. It is clear that the substantive rights of non-professional employees as state employees remained unaltered by the Act.

General Laws, c. 149, § 178F, as amended by c. 774 of the Acts of 1967, concerns collective bargaining by state employees. Under subsection one the following definitions appear:

" 'Employee', any employee of the commonwealth assigned to work in any department . . . thereof . . .

" 'Employer', the commonwealth, acting through a department or agency head as agent, or any person so designated by such department or agency head.

> " 'Employee organization', any lawful association, organization, federation, council or labor union, the membership of which includes employees of the commonwealth, and having as a primary purpose the improvement of working conditions for employees of the commonwealth."

Subsection two provides that employees "shall have . . . the right . . . to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining . . . ." Procedures for establishing the appropriate collective bargaining unit, conducting collective bargaining, and executing a written agreement are provided, while powers incidental thereto are granted to the Director of Personnel and Standardization and the Labor Relations Commission. G. L. c. 149, § 178F (2)-(11).

The answer to your question depends upon the extent, if any, that G. L. c. 75 is affected by G. L. c. 149, § 178F. This involves the interpretation of the latter statute with the objective of ascertaining the true intent of the Legislature from the words used. *Lehan* v. *North Main Street Garage, Inc.,* 312 Mass. 547, 550. Such words are the main source for the ascertainment of legislative purpose and should be construed according to their natural import in common and approved usage. *Tilton* v. *Haverhill,* 311 Mass. 572, 577.

The language of the statute makes it clear that the Legislature's overriding purpose was to provide all state employees falling within the definition of subsection one with a comprehensive right to bargain collectively. As a General Law, the statute should be construed so as to effectuate its salutary and important purpose. *Foley* v. *Lawrence,* 336 Mass. 60, 65. To interpret the statute as excluding significant numbers of state employees would completely frustrate the legislative intent and such a construction should be avoided. *Board of Assessors of Newton* v. *Pickwick Ltd., Inc.,* 351 Mass. 621, 625.

To the extent that any of the provisions of G. L. c. 75, cited above, might, in their application, be repugnant to and inconsistent with the provisions of G. L. c. 149, § 178F, the former, earlier enactment must give way in order that the latter statute may not be rendered useless. *Doherty* v. *Commissioner of Administration,* 349 Mass. 687, 690. This result is consistent with legislative intent, since the Legislature is presumed to understand and intend all consequences of its own measures, *Spaulding* v. *McConnell,* 307 Mass. 144, 149, and to have known the existing statute law at the time its measures were enacted. *Mathewson* v. *Contributory Retirement Appeal Board,* 335 Mass. 610, 614.

I therefore answer your question in part by stating that the University does have the authority to enter into collective bargaining with an appropriate bargaining unit representing non-professional employees in accordance with G. L. c. 149, § 178F.

However, I understand your letter as raising the further question whether the Trustees of the University have the authority to bargain collectively on *any* and presumably *all* matters respecting non-professional employees, such as wages, vacation, holidays, sick leave, etc., although such matters may presently be the subject of laws, rules and regulations

of the Commonwealth. In effect, you are requesting an opinion relative to any matter which may arise in the course of future collective bargaining.

A response to this part of your question would require an examination of all statutes and acts, as well as all rules and regulations thereunder, having any possible bearing on G. L. c. 149, § 178F, with the object of determining their combined effect in an infinite range of merely hypothetical situations. This I decline to do. As I stated in my opinion of June 4, 1969, to Commissioner Howard Whitmore, Jr. of the Metropolitan District Commission, I am inclined to the view that the legal questions which arise in collective bargaining negotiations are often so tentative and anticipatory that they are not appropriate for formal legal opinions by the Attorney General. Since this part of your question is of such a nature, it appears inappropriate for me to express an opinion thereon. Members of my staff will, of course, be available to provide legal advice and guidance relative to questions that arise during actual collective bargaining negotiations.

Very truly yours,
ROBERT H. QUINN
Attorney General

No. 23 December 19, 1969

MRS. MABEL A. CAMPBELL
Director of Civil Service

Dear Mrs. Campbell:

You have requested my opinion whether, in view of the provisions of § 2 of c. 811 of the Acts of 1969, provisional appointments to the positions of case aide and social service technician may be made prior to the establishment of an eligible list for appointment to those positions. For the reasons hereinafter stated, I answer your question in the affirmative.

Section 2 of c. 811 of the Acts of 1969 included an item, No. 1900-1000, wherein a supplemental appropriation was provided for the office of the Commissioner of the Department of Public Welfare. The item included a proviso with respect to appointments to the position of case aide which stated:

> "[P]rovided, that persons employed in the position of case aide shall not be subject to chapter thirty-one of the General Laws; and provided, further, that any provisional or temporary employee shall be appointed from a civil service list . . . "

I note that § 12 of c. 885 of the Acts of 1969 also included a provision with respect to the appointment and employment of case aides. That section inserted a new section 25 in c. 18 of the General Laws which provides, in pertinent part:

> "The department shall provide case aides whose employment shall not be subject to chapter thirty-one, . . . provided, how-

> ever, that wherever, as a condition of receiving federal grants for programs and activities to which the federal standards for a merit system of personnel administration relate, federal requirements make necessary the application of the civil service laws and rules to any such position, said position shall be subject to chapter thirty-one."

In view of the fact that you have advised me that federal requirements make mandatory the application of the civil service law and rules to the position of case aide, it is my opinion that appointments to that category must be made in compliance with the provisions of G. L. c. 31 and the rules promulgated thereunder. It is a general principle that "[t]he earlier statute has no higher standing than the later and may be superseded thereby wholly or in part when such is the clear legislative intention." *Boston Elevated Railway* v. *Commonwealth,* 310 Mass. 528, 551. Op. Atty. Gen., May 3, 1966, p. 328. With respect to the applicability of the civil service law to the position of case aide, it is clear that the General Court intended that the provisions of the later act supersede those of the earlier act. The later act, c. 885 of the Acts of 1969, constitutes legislative recognition of the existence of possible federal requirements in the area.

Having determined, therefore, that appointments to the position of case aide must be made in compliance with the civil service law and rules, the question for resolution is whether those appointments may be made on a provisional basis absent a civil service eligible list. General Laws, c. 31, § 1 defines "provisional appointment" as "an appointment authorized on a requisition *when there is no suitable eligible list."* (Emphasis supplied.) Thus, an inconsistency is at once apparent. The governing statute defines a provisional appointment as one made when there is no eligible list; § 2 of c. 811 of the Acts of 1969 includes a provision which states that provisional and temporary appointments *shall* be made from an eligible list. With respect to *temporary* appointments, of course, no problem arises. However, in my opinion the general definition of "provisional appointment" must control. In view of the general definition and the well-established practice of making provisional appointments when there is no eligible list, the general definition must prevail over the later proviso. To follow any other course would render an important portion of the civil service law meaningless.

It is clear that the object of c. 811 was, in part, to provide for appointments to the positions of case aide and social service technician. It is well settled that "[t]he object of all statutory construction is to ascertain the true intent of the Legislature from the words used. If a liberal, even if not literally exact, interpretation of certain words is necessary to accomplish the purpose indicated by the words as a whole, such interpretation is to be adopted rather than one which will defeat that purpose." *Lehan* v. *North Main Street Garage, Inc.,* 312 Mass. 547, 550, and cases cited.

The language of the statute makes it clear that the Legislature's overriding purpose was to provide for appointments to the positions of case aide and social service technician. Once an eligible list is established, provisional appointments are unnecessary for permanent appointments

can then be made. The Legislature cannot have intended that implementation of the programs which would be carried out by case aides and social service technicians must await the application, examination and appointment procedures which of necessity precede permanent appointments. The statute should be construed so as to effectuate its salutary and important purpose. *Foley* v. *Lawrence,* 336 Mass. 60, 65. While I recognize that normally none of the words of a statute are to be regarded as superfluous (*Commonwealth* v. *Woods Hole, Martha's Vineyard & Nantucket S. S. Authy.,* 352 Mass. 617, 618), it is fundamental that the intention of the Legislature must prevail, any rule of construction to the contrary notwithstanding. See *United States* v. *Freeman,* 3 How. 556, 565; *Board of Assessors of Newton v. Pickwick Ltd., Inc.,* 351 Mass. 621, 625.

In conclusion, then, it is my opinion that provisional appointments to the positions of case aide and social service technician may be made absent the existence of a civil service eligible list.

Very truly yours,
ROBERT H. QUINN
Attorney General

No. 24 January 12, 1970

HONORABLE NEIL V. SULLIVAN
Commissioner of Education

Dear Commissioner Sullivan:

You have requested an opinion concerning the authority of a local educational agency to undertake construction with state and/or local funds on federal property or on federal property leased on a long-term basis to said agency by the federal government. According to the information provided, you specifically ask whether funds of the Town of Ayer may be used for the construction of an addition to an elementary school building located on the Fort Devens Military Reservation. Whether the construction funds would be town funds exclusively or would include state contributions under, for example, G. L. c. 70, § 1-9, is irrelevant to the issue you raise. I answer your question in the negative for the reasons hereinafter stated.

The Fort Devens Military Reservation was acquired by the United States with the Commonwealth's consent granted pursuant to legislation enacted in 1921, 1933 and 1950. In St. 1921, c. 456, § 1, the Commonwealth consented to the acquisition by the United States of the tract of land then known as Camp Devens and situated in the Towns of Ayer and Shirley in Middlesex County and the Towns of Harvard and Lancaster in Worcester County. By § 2, the Commonwealth ceded jurisdiction over said tract to the United States, retaining concurrent jurisdiction only to the extent that civil and criminal process of the Commonwealth might be executed on the land in the same manner as though its consent and cession had not been granted. By St. 1933, c. 290, the Commonwealth granted the same consent and cession with respect to the great ponds situated within the reservation, then known as Fort Devens Military

Reservation, and in St. 1950, c. 778 similar action was taken with respect to forty-three acres of land in the Town of Ayer. In 1966, by St. 1966, c. 482, the Commonwealth accepted retrocession by the United States of concurrent jurisdiction of 3.6 acres in the Town of Ayer located in the vicinity of the Fort Devens Military Reservation.

As a result of these acts, the land involved ceased to be part of the Commonwealth and also ceased to be part of the towns in which said land was formerly located. In a case involving a similar consent and cession of land by the Commonwealth to the United States for use as a veterans' hospital, it was stated that "for the purposes of this case, the land on which the Veterans' Hospital was located was not a part of this Commonwealth, and neither our administrative officers and boards nor our courts had any jurisdiction over it." *Employers' Liability Assurance Corp. Ltd.* v. *DiLeo,* 298 Mass. 401, 404. That holding is directly applicable to the instant case.

Accordingly, the issue presented is whether the Town of Ayer can expend any funds to construct an addition to a school building located on land *outside* the town.

It is an "elementary principle that a town is merely a subordinate agency of State government created for convenient administration and has only those powers which are expressly conferred by statute or necessarily implied from those expressly conferred or from undoubted municipal rights or privilieges." *Atherton* v. *Selectmen of Bourne,* 337 Mass. 250, 255-256, and cases cited. "In the expenditure of funds raised by taxation this principle applies with special force, and in making such expenditures municipalities have always been rigidly restricted to the bounds imposed by law." *Berube* v. *Selectmen of Edgartown,* 331 Mass. 72, 74, and cases cited. Moreover, it should be kept in mind that "[i]n this Commonwealth statutes as to powers conferred upon . . . towns have always been given a strict construction." *MacCrae* v. *Selectmen of Concord,* 296 Mass. 394, 397; *Adie* v. *Mayor of Holyoke,* 303 Mass. 295, 299.

An examination of those statutes relating to the corporate powers of towns leads me to the conclusion that the Town of Ayer is not authorized to effect the proposed construction. For the purpose of this opinion, a detailed recitation of said statutes would be neither necessary nor helpful, but it is worthy of note that the Legislature has in special cases specifically authorized expenditures for construction outside towns. See, for example, G. L. c. 40, § 5(35) (for establishment, maintenance and operation of public airports), and G. L. c. 71, §§ 14-16I (for regional school districts).

Moreover, if the town were to use its funds for the construction in question, it would in effect be making a gift to the United States, for a building once affixed to real estate becomes part of the realty, unless prior to construction there is a written or oral agreement with the owner of the land that the building shall remain personal property. *Barnes* v. *Hosmer,* 196 Mass. 323, 324, and cases cited. I also find nothing in the statutes which would authorize such an agreement.

Accordingly, my opinion is that without specific legislative authorization the Town of Ayer may not expend its funds for the construction of

an addition to a federally-owned school building located on the Fort Devens Military Reservation.

I am also of the opinion that the town may not pay for such construction on land leased for a long term by the United States to the town without specific statutory authorization. In my opinion, the Town of Ayer has no authority to enter into such a lease for the reasons I have set forth above.

Very truly yours,
ROBERT H. QUINN
Attorney General

No. 25 January 12, 1970

DR. JEROME MILLER, *Commissioner*
Department of Youth Services

Dear Doctor Miller:

Your predecessor, Mr. Frank Maloney, requested my opinion as to what action should be taken with respect to a claim made (pursuant to the provisions of G. L. c. 31, § 43 (h)) by Pasquale Prencipe, Assistant Superintendent of the Institute for Juvenile Guidance at Bridgewater. The claim is in the amount of eight hundred dollars for reimbursement of attorneys' fees and costs incurred in proceedings before the Director of Youth Services and the Civil Service Commission relating to disciplinary action taken by the Director against Mr. Prencipe. It is my opinion, for the reasons hereinafter stated, that the claim must be denied.

Mr. Prencipe was discharged from his position as Assistant Superintendent by the Director of Youth Services after a hearing, and he thereafter sought a hearing *de novo* before the Civil Service Commission, pursuant to the provisions of G. L. c. 31, § 43. Following that second hearing, the hearing officer made findings and conclusions, and the Commission took action thereon. Sixteen charges were originally preferred. Prior to the consideration of the case by the Commission, nine of the charges were withdrawn. Of the remaining seven charges, the Commission found that six were not sustained and the action of the Director was not justified. As to the last charge, the Commission sustained the Director. However, pursuant to the discretionary power conferred on the Commission in the last sentence of G. L. c. 31, § 43(b), the Commission modified the penalty imposed on Mr. Prencipe from a discharge to a suspension of one month. The pertinent portion of G. L. c. 31, § 43(b) is as follows:

> " . . . If the commission find that the action of the appointing authority was justified, such action shall be affirmed; otherwise, it shall be reversed and the person concerned shall be returned to his office or position without loss of compensation. *The commission may also modify any penalty imposed by the appointing authority.*" (Emphasis supplied.)

The instant claim was made pursuant to G. L. c. 31, § 43(h) which provides, in pertinent part:

> "Any person holding office or employment under permanent appointment in the official or labor service of the commonwealth . . . *who has incurred expense in defending himself against an unwarranted discharge, removal, suspension,* laying off, lowering in rank or compensation, or abolition of his position, shall, if he engages an attorney for such defense, be reimbursed for such expense; provided, however, that the amount of such reimbursement shall in no event exceed an aggregate sum of nine hundred dollars . . . " (Emphasis supplied.)

It is clear from the record before me that the Civil Service Commission found some disciplinary action against Mr. Prencipe to be warranted, although it disagreed with the Director of Youth Services as to the form that action should take. The Director discharged Mr. Prencipe, but the Commission modified that action to a one month suspension. While Mr. Prencipe was successful in over-turning the decision of the Director with respect to six of the charges against him, he did not prevail with respect to the seventh charge. That fact is crucial to a determination of the question you raise.

In my opinion, the provisions of G. L. c. 31, § 43(h) apply only in cases where the decision of an appointing authority is reversed in its entirety and an employee is "returned to his office or position without loss of compensation." Such was not the case here. Since the Commission found a suspension to be warranted, the reimbursement permitted by G. L. c. 31, § 43(h) cannot occur. In my view, the Legislature intended that the reimbursement provided for in G. L. c. 31, § 43(h) occur only in those cases where an employee emerged either from the proceeding before the Commission or a review proceeding in the District Court acquitted of all charges against him.

In conclusion, then, it is my opinion that the Department of Youth Services may not reimburse Pasquale Prencipe for attorneys' fees and costs incurred by him in proceedings before the Director of Youth Services and the Civil Service Commission.

Very truly yours,
ROBERT H. QUINN
Attorney General

No. 26 February 10, 1970

HONORABLE FREYDA P. KOPLOW
Commissioner of Banks

Dear Commissioner Koplow:

You have requested my opinion concerning assessments for investigations of licensed insurance premium finance agencies under G. L. c. 255C, § 6, as amended by § 3 of the Acts of 1969, which provides in pertinent part:

> "The commissioner shall assess the licensee forty dollars per day for each man participating in any such investigation or twenty dollars per one thousand accounts or fraction thereof written by said agency, whichever is less."

Specifically, you ask the following questions:

"1) Does the sentence mean that I assess twenty dollars per one thousand accounts or fraction thereof per day per man or does it mean that such charge should be for the total investigation irrespective of the number of days consumed and the number of men employed?

"2) Does the phrase 'written by said agency' mean written during a calendar year, since the date of the previous investigation, or some other period of time?

"3) Inasmuch as many insurance premium finance agencies are not licensed insurance agents or brokers but acquire contracts by virtue of an assignment from an agent or broker, can the phrase 'written by said agency' be used as a basis for determination of the investigation charge?"

Since the statute must be construed as it is written, (*Harry Alan Gregg, Jr. Family Found'n Inc.* v. *Com'r of Corp'ns & Tax'n,* 330 Mass. 538, 544), I conclude with regard to Question No. 1 that the assessment of twenty dollars per one thousand accounts or fraction thereof refers to the total investigation irrespective of the number of days consumed and the number of men employed. No other conclusion is possible if the words of the statute are construed, as they must be, according to their natural import and approved usage (*Johnson* v. *District Attorney for the Northern District,* 342 Mass. 212, 215), and the statute is not extended by construction or enlargement beyond its fair import. *Mitchell* v. *Mitchell,* 312 Mass. 154, 161. Accordingly, if there is an omission in the statute which is intentional, a substitution cannot be effected; if there is an omission due to inadvertance, an attempt to supply it would be tantamount to adding to the statute a meaning not intended by the Legislature. *Boylston Water District* v. *Tahanto Regional School District,* 353 Mass. 81, 84. Although this interpretation may result in assessments which are completely disproportionate to the time expended in investigation and which compare unfavorably to examination bank charges assessed under G. L. c. 167, § 2, the statute is clear and relief therefrom can be afforded only by the Legislature.

In order to answer Question No. 2, it is necessary for me to refer to the remaining part of the amended statute, since all provisions of the statute must be so construed that they can operate harmoniously together. *McCue* v. *Director of Civil Service,* 325 Mass. 605, 611. General Laws c. 255C, § 6 states in pertinent part:

> "The commissioner may make such investigations as he deems necessary to determine whether any licensee or any other person has violated any of the provisions of this chapter, or whether any licensee has so conducted himself as to justify the revocation of his license . . . "

Under the express terms of § 6, therefore, investigations are not limited to a calendar year or to any other period of time. Moreover, since the statute should be construed in accordance with sound judgment and common sense, so as to make it an effective piece of legislation (*Sun Oil Co.* v. *Director of the Division of the Necessaries of Life,* 340 Mass.

235, 238), an interpretation which would result in an assessment for only part of the period of time under investigation and which would impose an unequal burden on finance agencies should be avoided. An intention to accomplish such a result should not be attributed to the Legislature. *Johnson* v. *Commissioner of Public Safety,* Mass. Adv. Sh. (1968) 1381, 1385. In answering to Question No. 2, therefore, I am of the opinion that the phrase "written by said agency" refers to that period of time for which the Commissioner "deems [it] necessary" to conduct an investigation. Although ordinarily the investigation period will extend back to the time the last investigation was completed, the Commissioner may "deem [it] necessary" to conduct a new investigation which would include a period of time involved in a prior investigation. Individual complaints concerning a particular company, for example, might prompt such a decision.

I understand you to ask in Question No. 3 whether the phrase "written by said agency" refers only to those premium finance agreements written by said agency. The statute states that part of the assessment computation shall be based on the number of "*accounts* . . . written by said agency . . . " (emphasis supplied), and not the number of premium finance agreements written by an agency. Although no definition of the word "accounts" is provided by the statute, the word must be presumed to have its ordinary meaning. *Davey Bros., Inc.* v. *Stop & Shop, Inc.,* 351 Mass. 59, 63. Accordingly, in answer to Question No. 3, I conclude that the phrase "written by said agency" refers to those records kept by the agency to record the financial transactions of those insureds who have entered into premium finance agreements, whether or not said agreements were written by the agency.

Very truly yours,
ROBERT H. QUINN
Attorney General

No. 27 March 2, 1970

State Racing Commission

Gentlemen:

You have requested my opinion as to whether you may approve a refund of the license fee paid and return the bond filed by Berkshire Downs, Inc. (Berkshire) in connection with its application for 1969 racing dates. You state the following facts:

On January 3, 1969, Berkshire filed with the State Racing Commission (Commission) applications for licenses to conduct a total of twenty-four (24) days of running horse racing during 1969. These applications were accompanied by a check for $14,400 for the license fee, which check was deposited with the State Treasurer on January 13, 1969. After a public hearing the Commission voted on January 29, 1969, to grant to Berkshire five (5) licenses for a total of twenty-four (24) racing days to commence July 9, 1969.

On June 5, 1969, the president of Realty Equity Suffolk Downs, Inc. (Suffolk) advised the Commission that he had just signed an agreement

to purchase 100% of Berkshire's outstanding stock, and requested a conference with the Commission. Berkshire filed a bond on June 9, 1969, but in view of the fact that the Commission had been informed of the sale of Berkshire's stock to Suffolk, the bond was not approved by the Commission, and the license certificates were not issued. The requested conference between Suffolk and the Commission was held on June 12, 1969, at which time Suffolk advised the Commission that Suffolk wanted to run the twenty-four (24) days originally allotted to Berkshire.

The Commission received from Berkshire's president on July 2, 1969, a letter stating Berkshire would not hold any racing meeting in 1969 due to losses it had sustained in recent years. The letter further stated that Berkshire was thereby withdrawing and cancelling its racing applications for 1969, that Berkshire would not accept the grant or award of its applications, that no licenses had issued to Berkshire, and that Berkshire would not request nor accept any such licenses.

On November 14, 1969, the Commission received a letter from Berkshire's counsel requesting a refund of the license fee and return of the bond.

You have asked whether the Commission legally may approve Berkshire's request for a refund of the $14,400 paid by it at the time it filed its applications for twenty-four (24) days of running horse racing in 1969.

Section 4 of c. 128A of the General Laws, to which you refer authorizes the Commission in certain prescribed circumstances to approve the refund of a license fee if " it should become impossible or impracticable to conduct racing upon any day or *successive days specified in a license issued by the commission* . . . " (Emphasis supplied.) G. L. c. 128A, § 3, para. 2(3). As indicated by the italicized words, this section applies only where a license has been issued. None having been issued here, section 4 does not apply.

The license fee paid by Berkshire was in the nature of an excise exacted for the privilege of conducting a twenty-four (24) day running horse racing meeting. *Boston* v. *Schaffer,* 9 Pick. 415, 419. Once the Commission has *effectively* conferred upon an applicant the privilege of conducting a racing meeting, it cannot refund the fee paid for that privilege, even if not exercised, except in the limited circumstances set forth in G. L. c. 128A, § 4, which, as shown above, is inapplicable here. *Cook* v. *Boston,* 9 Allen 393, 394. 6 Op. Atty. Gen. 111 (1921). Although technically a racing license is "granted" when the Commission acts favorably upon an application after a public hearing (*Berkshire Downs, Inc.* v. *State Racing Commn.,* 350 Mass. 695, 699), the license is not then effective. It cannot be exercised until the Commission actually issues the license by delivering to the applicant the certificate of license. *Commonwealth* v. *Welch,* 144 Mass. 356, 357; *Commonwealth* v. *Cauley,* 150 Mass. 272, 275. Op. Atty. Gen. 29, 30-32 (1939). Here, then, as in the case of liquor licenses, the issuance of which is governed by a similar statutory procedure, the licensee is not barred from obtaining a refund unless the Commission has formally issued a license to it. See *Emery* v. *Lowell,* 127 Mass. 138, 141. *McGinnis* v. *Medway,* 176 Mass. 67, 71. *Taber* v. *New Bedford,* 177 Mass. 197, 198-199. *Brown* v. *Nahant,* 213 Mass. 271, 276. No license having been issued to Berkshire, it never

had the privilege of conducting a running horse racing meeting in 1969. Accordingly, it is my opinion that the fee paid for that privilege may properly be refunded.

You have also asked whether Berkshire's bond filed in connection with its 1969 racing license applications may properly be returned. A bond is necessary only if a license is being issued. G. L. c. 128A, § 3. No license having been issued to Berkshire, it is my further opinion that it is proper to return the bond.

Very truly yours,
ROBERT H. QUINN
Attorney General

No. 28 April 24, 1970

HONORABLE PHILIP A. QUINN
Senator, Worcester and Hampden District

Dear Senator Quinn:

You have requested my opinion concerning a reorganization in the Department of Public Health. Specifically, you have asked whether the Commissioner of Public Health is legally empowered to combine the Food and Drugs Division into the structure of the Division of Environmental Health and to appoint a divisional director to serve under him and over the director of the Division of Food and Drugs. Subject to the limitations that will hereinafter appear, it is my opinion that the Commissioner is authorized to effect such a reorganization.

Pursuant to G. L. c. 17, § 1, the Department consists "of a commissioner of public health and a public health council." The Legislature has determined that the Public Health Council "shall have no administrative or executive functions." G. L. c. 111, § 3. Instead, these powers have been entrusted to the Commissioner under G. L. c. 17, § 2, which provides that he "shall be the executive and administrative head of the department." Moreover, G. L. c. 111, § 2 provides that the Commissioner "shall administer the laws relative to health and sanitation and the regulations of the department . . . "

It is well established that where a grant of power is expressly conferred by statute upon an administrative officer or where a specific duty is imposed upon him, the officer, in the absence of some statutory limitation, has the authority to employ all ordinary means reasonably necessary for the full exercise of the power conferred and for the faithful performance of the duty imposed. *Bureau of Old Age Assitance of Natick* v. *Commissioner of Public Welfare,* 326 Mass. 121, 124, and cases cited. Part of the express power granted the Commissioner is the exclusive power to administer the Department. "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). *Costonis* v. *Medford Housing Authority,* 343 Mass. 108, 114.

The executive and administrative power of the Commissioner, however, is limited by G. L. c. 17, § 4, which provides:

> "There shall be in the department a division of food and drugs, and such other divisions as the commissioner, with the approval of the public health council, may from time to time determine. The commissioner shall, subject to the approval of the public health council, appoint a director, who shall take charge of each division. Every such director shall be subject to chapter thirty-one . . .
>
> "There shall be within the division of food and drugs a furniture and bedding inspection section, a drugs control section, a poultry inspection section, a fish inspection section and such other sections as the director, with the approval of the department, may from time to time determine."

Implicit in this section is recognition by the Legislature that minimal protection of the public welfare required the establishment of a food and drugs division, including therein certain inspection sections, whose existence was to be independent of the Commissioner's administrative discretion. "The word 'shall' in a statute is commonly a word of imperative obligation and is inconsistent with the idea of discretion." *Johnson* v. *District Attorney for the Northern District,* 342 Mass. 212, 215. A reorganization could not, therefore, eliminate the existence of the Division of Food and Drugs.

However, since you have stated that "the Food and Drug[s] Division will retain its [sic] identity," and will apparently continue to function as a separate division, the legislative mandate will be satisfied. Moreover, the appointment of another divisional director as an apparent administrative conduit between the Commissioner and the director of the Division of Food and Drugs appears to lie well within the administrative power of the Commissioner, provided, of course, that the former director does not interfere with the latter director's authority and duty to "take charge" of his division under G. L. c. 17, § 4. Certainly nothing in the statutory scheme grants the director of the Division of Food and Drugs an express or implied right to be a direct subordinate of the Commissioner.

I therefore conclude that G. L. c. 17, § 2 and G. L. c. 111, § 2 are sufficiently comprehensive to indicate a legislative intent to confer upon the Commissioner authority to institute the reorganization to which you have referred. Inasmuch as the reorganization does not appear to involve the establishment of a new division or the appointment of a new director of a division, the approval of the public health council would not be required. See G. L. c. 17, § 4. Nor is the implied authority conferred by the Legislature an unconstitutional delegation of power. That the Legislature cannot under our Constitution delegate its general power to make laws is so well settled that a citation of authorities is unnecessary. "But one of the exceptions to or qualifications of that doctrine is that the Legislature may delegate to . . . an individual officer the working out of the details of a policy adopted by the Legislature." *Commonwealth* v. *Diaz,* 326 Mass. 525, 527, and cases cited. Accordingly, "[t]he 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 . . . [officer's] discretion the selection of the appropriate methods and means and the other administrative details to be employed in accomplishing the statutory purpose." *Scannell* v. *State Ballot Law Commission,* 324 Mass. 494, 501, and cases cited. The "policy adopted by the Legislature" and the "prescribed field" limiting the Commissioner's duties clearly appear in G. L. c. 111, §5, which defines in broad terms the powers and duties of the Department. The reorganization, the object of which is the more effective administration of the Department of Public Health, is clearly permissible as an aid in fulfilling the statutory duties of the Department.

Very truly yours,
ROBERT H. QUINN
Attorney General

No. 29 May 11, 1970

MR. GEORGE J. COOGAN
Chairman, Gas Regulatory Board
Department of Public Utiilties

Dear Mr. Coogan:

You have requested my opinion whether a city or town may promulgate rules and regulations pertaining to gas fitting or installation, which rules and regulations provide that gas installations may be approved or inspected by persons other than a duly appointed gas inspector who is appointed pursuant to G. L. c. 143, § 30. You state that the City of Lynn has adopted as part of its building code the following provision which has been applied to gas fitting:

> "A boiler furnace or heating appliance shall not be located or installed in any part of a building other than a basement boiler room, without first being approved by the inspector of buildings." Section 220 (2-C), *Building Code of the City of Lynn,* adopted Sept. 15, 1964.

It is my opinion, for the reasons hereinafter stated, that the above-quoted provision of the Lynn Building Code, insofar as it pertains to gas appliances, is invalid and beyond the power of the City to adopt.

In 1959, the General Court authorized the Department of Public Utilities to make an investigation and study "relative to the establishment of a state-wide safety code covering the installation of gas facilities within buildings . . . " Resolves of 1959, c. 39. Pursuant to the directions of the resolve, the Department completed a study and drafted a detailed safety code which was submitted in due course to the General Court. The Department's report accompanying the code stated:

> "[T]he dire need for state-wide adoption of the technical application of this code as outlined in Parts 2-7 inclusive, transcends the jurisdictional conflicts between the various interested organizations, and it should be adopted as submitted." *Special Report of the Department of Public Utilities Under C. 39, Resolves of 1959,* Senate #490 of 1960, p. 7.

The General Court's response to the report of the Department took the form of the enactment of St. 1960, c. 737. That Act established a Gas Regulatory Board in the Department of Public Utilities, which board was empowered to make

> "rules and regulations relative to gas fitting in buildings throughout the commonwealth, which rules and reguations shall be reasonable, uniform, based on generally accepted standards of engineering practice, and designed to prevent fire, explosion, injury and death . . . " G. L. c. 25, § 12H, as inserted by St. 1960, c. 737, §1.

The Act further provided for the appointment of a local gas inspector in each town and city whose duty "shall be the enforcement of the rules and regulations adopted by the board . . . " G. L. c. 143, § 30, as inserted by St. 1960, c. 737, § 2. Finally, the Act provided:

> "All by-laws and ordinances of cities and towns relating to gas fitting within buildings are hereby annulled." St. 1960, c. 737, § 4.

In approving St. 1960, c. 737, the Governor attached an emergency preamble, declaring the act to be an emergency law:

> "Postponement of the operation of this act for ninety days would defeat its purpose which is to establish forthwith uniform rules and regulations to govern gas fitting in buildings throughout the commonwealth."

In my opinion, the legislative history of St. 1960, c. 737 indicates a clear intent on the part of the General Court that there be uniform rules and regulations with respect to gas fitting. In approving the act and declaring it to be an emergency law, the Governor stressed the need for uniformity. The provision in the act annulling by-laws and ordinances of cities and towns was designed to carry out the intent of the General Court in this regard.

The Gas Regulatory Board has now carried out its statutory mandate to adopt rules and regulations and has promulgated the "Massachusetts Code for Installation of Gas Appliances and Gas Piping." Sections 4.8.1 and 4.8.2 of that Code permit the installation of recessed gas heating appliances in the first floor or above in compliance with the manufacturer's instructions and those provisions of the code. The provision of the Lynn Building Code to which you refer places a further restriction on the placement of such appliances and makes placement subject to the approval of the inspector of buildings of the City of Lynn if the appliance is placed anywhere other than "a basement boiler room."

The City's requirement clearly invades an area reserved by the General Court to the Gas Regulatory Board, and the City's requirement must therefore fall. Such a provision markedly detracts from the mandate of the General Court that rules and regulations in the area of gas fitting be uniform, and, in view of the pre-emption of the field by the Legislature and the grant of jurisdiction to the Gas Regulatory Board, the City's requirement is invalid and unenforceable insofar as it applies to gas appliances.

In conclusion, then, it is my opinion that a city or town may not adopt as a part of its building code or otherwise rules or regulations which pertain to gas fitting or installation and provide for inspection of gas installations by persons other than a duly appointed gas inspector.

Very truly yours,
ROBERT H. QUINN
Attorney General

No. 30 May 26, 1970

MR. EDMUND H. STONE
Executive Secretary
Rate Setting Commission
Boston, Massachusetts 02116

Dear Mr. Stone:

Your Commission has requested my opinion with respect to the "rate freeze" provisions of St. 1969, c. 800. That Act, entitled "An Act to Establish A Program of Medical Care and Assistance For Certain Residents of the Commonwealth" inserted a new chapter 118E in the General Laws, and provides for a comprehensive program of medical assistance for eligible persons "whose income and resources are insufficient to meet the costs of necessary medical services." G. L. c. 118E, § 5. The program is to be administered in conformity with Title XIX of the Federal Social Security Act which provides for grants-in-aid to the Commonwealth to carry out the purposes of the program.

Grants from the Federal government to assist the Commonwealth in providing for medical assitance are not new, however. As you point out in your letter, a state plan for medical assistance has functioned in this Commonwealth since 1966, and legislation enacted in 1965 authorized the Commissioners of Public Welfare and Public Health to expend funds received from the Federal government pursuant to Title XIX without appropriation. St. 1965, c. 874.

Your questions concern section 6 of the Act, which provides:

> "Notwithstanding the provisions of any general or special law to the contrary, the fee schedules in effect on January 1, 1969 for medical care and assistance provided under the state plan, adopted in accordance with the provisions of Executive Order 49, dated January 21, 1966, and pursuant to and in conformity with the provisions of Title XIX of the Social Security Act (P.L. 89-97), shall continue in effect until June 30, 1970, insofar as such action does not violate federal law."

Specifically, you ask:

1. "Does St. 1969, c. 800, s. 6 require that the fee schedules applicable to intermediate care facilities and rest homes effective January 1, 1969, be continued in effect through June 30, 1970?
2. "Does St. 1969, c. 800, s. 6 require that the American Druggist Blue Book published in March, 1968, form the basis of payment to pharmacists through June 30, 1970?

3. "Which of the following does St. 1969, c. 800, s. 6 require to continue in effect through June 30, 1970 [for out-patient hospital care rates]:
   (a) the percentage of billed charges as appearing in Fee Schedule II and as applied to current charges; or
   (b) the percentage of billed charges as appearing in Fee Schedule II and as applied to charges for services as they would have been billed on January 1, 1969?"

I will consider your questions *seriatim.*

I. Your first question concerns that portion of G. L. c. 118E, § 6 which provides that "[t]he department [of public welfare] shall provide financial assistance for . . . skilled nursing home services for individuals twenty-one years of age or over . . . " The Commonwealth receives funds from the Federal government under Title XIX to enable it to provide assistance for such services. Title XIX (P.L. 89-97), § 1905(a)(4). You state that the Department of Public Health sets standards for nursing home care and that the Department currently confers on certain nursing homes the designation "skilled home" on the basis of standards set forth in Federal and state regulations. You further inform me that as of November 1, 1969, less than half the nursing homes in the Commonwealth have been so classified. There are, therefore, many persons receiving assistance who are patients in facilities designated "intermediate care facilities" and "rest homes". Payments to these latter facilities are made not pursuant to G. L. c. 118E, the medical assistance program but pursuant to the statutes pertaining to old age assistance (G. L. c. 118), disability assitance (G. L. c. 118D), and aid to the blind (G. L. c. 6, §§ 129-150). The Federal government's participation is authorized by Title XI of the Social Security Act.

Your question thus reduces itself to whether the Rate Setting Commission may set rates for "intermediate care facilities" and "rest homes" pursuant to the statutory grant of authority found in G. L. c. 7, § 30L, or whether, in the light of St. 1969, c. 800, § 6, the Commission is prohibited from setting rates for such facilities until June 30, 1970. It is my opinion that the provisions of St. 1969, c. 800, § 6 do not apply to the setting of rates for "intermediate care facilities" and "rest homes," and that the Commission is now free to set rates for such facilities.

St. 1969, c. 800, § 6, by its terms, applies only to fee schedules "for medical care and assistance provided under the state plan, adopted in accordance with the provisions of Executive Order 49, dated January 21, 1966, and pursuant to and in conformity with the provisions of Title XIX of the Social Security Act . . . " Fee schedules for "intermediate care facilities" and "rest homes" are not set pursuant to the "state plan"* referred in St. 1969, c. 800, § 6 but pursuant to the Commission's authority found in G. L. c. 7, § 30L. The setting of rates for such facilities is designed to implement the provisions of G. L. c. 118, 118D, and c. 6, as identified *supra.* Federal participation, as I have noted, occurs not as

*The "state plan", more properly known as the state plan for medical assistance, has been in existence since 1966 as required by Title XIX of the Federal Social Security Act, as I have noted *supra,* and its provisions were continued by St. 1969, c. 800, § 8, in so far as they were consistent with Title XIX.

a result of the provisions of Title XIX but rather from the provisions of Title XI.

II. Your second question requires a determination of the proper fee schedule applicable to the purchase of drugs for public assistance recipients. The fee schedule in effect on January 1, 1969 provided only that "[t]he American Druggist Blue Book, hereinafter referred to as the Blue Book, shall be the official reference book for pricing . . . " Fee Schedule XIV, *Massachusetts Public Assistance Policy Manual*, Chapter VII. You inform me that the Blue Book is published each March, so that the Blue Book in use on January 1, 1969 was published in March, 1968. Your question is, then, whether the March, 1968 Blue Book prices are to be continued until June 30, 1970, or whether the prices in the March, 1969 Blue Book control after the latter's publication.

It is my opinion that the prices found in the March, 1968 Blue Book continue in effect until June 30, 1970, nothwithstanding the fact that a new Blue Book was published in March, 1969. St. 1969, c. 800 § 6 states that "the fee schedules *in effect* on January 1, 1969" shall remain in effect until June 30, 1970. There is no question but that the prices found in the March, 1968 Blue Book were in effect on January 1, 1969. The intent of the Legislature, in my opinion, was to continue the March, 1968 prices in effect and not to permit the substitution of other prices as a result of a new edition of the Blue Book subsequent to the enactment of the statute.

It is well settled that statutes are to be accorded their full meaning, and no words are to be regarded as surplusage. *Commonwealth* v. *Woods Hole, Martha's Vineyard & Nantucket S.S. Authy.*, 352 Mass. 617, 618. Since St. 1969, c. 800, § 6 states that "the fee schedules *in effect* on January 1, 1969 . . . " shall remain in effect until June 30, 1970, the Legislature must have meant that the prices being charged on January 1, 1969 would continue in effect until June 30, 1970 without change. Even if St. 1969, c. 800, § 6 was susceptible of the interpretation that prices for drugs might change as a result of a new edition of the Blue Book, that interpretation must be avoided because it would defeat the legislative purpose of freezing rates and charges as they existed on January 1, 1969. See *Lehan* v. *North Main Street Garage, Inc.*, 312 Mass. 547, 550.

III. Your third question requires a determination of the rates for out-patient hospital care to be continued in effect until June 30, 1970. You state that the fee schedule for out-patient hospital care appears in the *Massachusetts Public Assistance Policy Manual* as Fee Schedule II, "Hospitalization". That schedule shows the rates for out-patient hospital care as a percentage of billed charges for each hospital included in the schedule. You further advise me that the schedule was established pursuant to paragraph 12 of the Commission's rules and regulations with respect to determination of rates of payment to hospitals adopted under the authority of G. L. c. 7, § 30L. Since the schedule in effect on January 1, 1969 showed the rate to be charged for out-patient hospital care in each hospital as a percentage of billed charges, your question is whether the rates to be continued are based (1) on current billed charges or (2) billed charges as those charges would have been billed on January 1, 1969.

It is my opinion that the rates to be continued in effect until June 30, 1970 are rates based on billed charges as those charges would have been billed on January 1, 1969. The reasoning underlying my answer to this question is similar to that underlying my answer to your second question, and, briefly stated, it is that the Legislature intended to freeze rates as they stood on January 1, 1969. If the Legislature had intended to permit rates to change as a result of increasing charges for out-patient hospital care, it is my opinion that the statute would have been drafted differently to reflect that intent.

Very truly yours,
ROBERT H. QUINN
Attorney General

No. 31 May 27, 1970

HIS EXCELLENCY FRANCIS W. SARGENT
Governor of the Commonwealth

Dear Governor Sargent:

You have requested my opinion as to the constitutionality of a proposed statute which would require the compulsory recital of either the "Pledge of Allegiance to the Flag," together with a salute to the flag, or a designated portion of the Declaration of Independence in the public schools of the Commonwealth. The bill passed by the General Court is H. 5385 and would amend General Laws, chapter 71, section 69 by striking out the fourth, fifth and sixth sentences thereof and inserting the following language:

> "Each teacher shall cause the pupils under his charge to recite each day at said opening exercise, in unison with him, either the 'Pledge of Allegiance to the Flag', while saluting the flag, or the following portions of the Declaration of Independance, to wit: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. And for the support of this Declaration, with a firm reilance on the Protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor'. Failure for a period of five consecutive days by the principal or teacher in charge of a school, equipped as aforesaid to display the flag as above required or to salute the flag and recite said pledge or said portions of the Declaration of Independence, or to cause the pupils under his charge to do so, shall be punished for every such day by a fine of not more than five dollars."

First, I note that the language of H. 5385 is similar in all respects, except for the addition of the provision pertaining to the Declaration of Independence, to the language of H. 481 of 1965. In response to a request for an opinion from the Senate with respect to the constitutionality of H. 481, the then Attorney General, Edward W. Brooke, concluded:

"It is my opinion that to the extent such a statute would require school children to recite the pledge, it would be unconstitutional and void. The question of the validity of such a law was adjudicated over twenty years ago in *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624 (1943). The holding of that case is clear:

'We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution (whose principles are made applicable to the state through the Fourteenth Amendment) to reserve from all official control.' *Id.* at 642.

"The factual distinction between the law involved in *Barnette* and the one to which your question relates are insignificant. The principles enunciated in *Barnette* apply equally to both. Nothing which has intervened since that decision has weakened or cast doubt upon the continuing vitality of these principles.

"It is, accordingly, my considered judgment that the portion of the proposed statute set forth above which requires public school children to recite each morning the pledge of allegiance to the flag, and which imposes criminal penalties for failure so to do, is beyond the power of the Legislature to enact. If enacted, such a statute would be unconstitutional and void."

Attorney General Brooke's opinion was rendered in 1965. Since that date there have been no intervening decisions or constitutional amendments which would allow a change in the result. I therefore conclude that H. 5385 would, if enacted, be unconstitutional. The fact that the bill permits an option of reciting the pledge or a portion of the Declaration of Independence does not alter this conclusion. It is the compulsory recitation requirement which renders the bill unconstitutional. *West Virginia State Board of Education* v. *Barnette,* 319 U.S. at 633.

You have asked the further question whether H. 5385 "remove[s] from Massachusetts law the requirement that each classroom display the American Flag?" St. 1969, c. 77 amended G. L. c. 71, § 69 by inserting therein a sentence, which became the fifth sentence of the section, as follows: "A flag shall be displayed in each classroom in each such schoolhouse." H. 5385 would amend the section by striking out that sentence, as well as the sentences immediately preceding and following it, and no comparable provision is inserted in lieu thereof. I therefore conclude that the requirement that a flag be displayed in each classroom would be repealed by H. 5385.

Very truly yours,
ROBERT H. QUINN
Attorney General

No. 32 June 1, 1970

DR. RICHARD M. MILLARD, *Chancellor*
Board of Higher Education

Dear Doctor Millard:

You have requested, on behalf of the Commonwealth's Division of State Colleges, an opinion with respect to educational leaves for non-teaching professional staff members of state colleges. You have informed me that one Robert H. Marsh, a professional non-teaching member of the staff of the Framingham State College applied to the Director of Personnel and Standardization for an educational leave under the terms of the Director's Policy No. 131-68. In response, the Director determined that an educational leave under that policy was not possible for a professional person serving under a governing board of a state institution of higher learning.

Under the circumstances, you have posed the following questions for resolution:

> "1. Is the application of Policy No. 131-68 by the Director of Personnel and Standardization to Mr. Marsh's case correct in the light of the fact that Mr. Marsh is a state employee and is therefore entitled to such benefits as are accrued to all other state employees?
>
> "2. Can the Board of Trustees of State Colleges under the powers granted to them under Section 1 of G. L. Chapter 73 and under Section 16 of the same chapter adopt a policy which would permit the granting to a non-teaching professional staff member of the Division of State Colleges or of one of the colleges . . . an educational leave of absence with pay under much the same terms and conditions (but not exceeding them) as is provided under Policy No. 131-68, cited above?"

In considering the questions presented, it is necessary at the outset to review briefly the pertinent statutory provisions.

General Laws, c. 73, § 1 provides in part as follows:

> "Notwithstanding any other provision of law to the contrary, except as herein provided, the trustees may adopt, amend or repeal such rules and regulations for the government of any such college, for the *management*, control and administration of its affairs, for its faculty, students and employees, . . . as they may deem necessary . . . "

This provision of the General Laws clearly conveys a legislative intent to confer upon the Board of Trustees authority to deal with the conduct of the colleges under their control in all of the details of their operation and administration.

General Laws c. 73, § 16 further provides:

> "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, reclassification, transfer, demotion and dismissal . . . "

Thus, the Board of Trustees is given complete authority over the professional staff of the colleges under their control and the Board has authority to promulgate all rules and regulations necessary for the management and control of their affairs. The broad discretionary powers of the Board of Trustees relating to all phases of employment indicate that G. L. 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. Consequently, it is clear that there can be no concurrent or supervening authority vested in another agency.

In light of these provisions, it is evident that the Legislature has already drawn the lines of authority. Mr. Marsh, as a member of the professional staff of a state college, is subject to the authority of the Board of Trustees and the terms of his employment are subject to the rules and regulations of the Board unless otherwise specifically provided by law.

Accordingly, in response to question one, it is my opinion that the educational leave policy was applied correctly in the case of Mr. Marsh. The Director of Personnel and Standardization cannot make rules and regulations which are applicable to members of the professional staff of a state college. This authority is vested solely in the Board of Trustees.

Your second question is also answered in the affirmative, since the Board of Trustees is given the authority to promulgate rules for the management and control of state colleges including the employees thereof, and the Board may establish rules governing educational leave for professional non-teaching staff members. In this regard, the Board is not limited to the terms and conditions set out in Policy No. 131-68 of the Director of Personnel, although it is, of course, free to follow them.

Very truly yours,
ROBERT H. QUINN
Attorney General

No. 33 June 23, 1970

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

Dear Mr. Waters:

You have requested my opinion whether the Board of Standards is authorized under G. L. c. 143, § 3B, as amended, to make rules and regulations relating to the standards of materials, including electrical wiring, to be employed in public garages and parking structures. For the reasons hereinafter stated, I find that the Board has the authority to enact such rules aand regulations, but not with respect to electrical wiring and electrical fixtures.

General Laws c. 143, § 3B provides:

" . . . [T]he 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 . . .* " (Emphasis supplied.)

A public garage or parking structure is not a "place of assembly" as defined by G. L. c. 143, § 1. Accordingly, regulation of such structures by the Board would be authorized only if they are "required to be provided with proper egresses or other means of escape . . . " The provisions of G. L. c. 143, § 21, which delineate the buildings to which this requirement applies, state in pertinent part:

> "The owner, lessee or mortgagee in possession of any building, in whole or in part, used . . . as a factory, workshop, mercantile or other *establishment, and which has accommodations for ten or more employees* . . . shall provide such building with proper egresses or other means of escape from fire sufficient for the use of all persons employed, lodged or resident therein; provided, that . . . such egresses or means of escape from fire . . . in such mercantile establishments, hotels and buildings used solely for office purposes, shall be sufficient, to the greatest extent compatible, in the opinion of the inspector, with the reasonable use thereof, for the use of all persons accommodated or assembled therein . . . " (Emphasis supplied.)

This statute was designed for the protection of human life against fire and is to be broadly construed so as to achieve this important purpose. *Repucci* v. *Exchange Realty Co.,* 321 Mass. 571, 575. The term "establishment," as normally used in business, means a distinct physical place of business and, in the context of G. L. c. 151A, § 25, has been interpreted to denote premises, not precisely described as a factory, where labor is performed, such as garages and repair shops. *Ford Motor Co.* v. *Director of the Division of Employment Security,* 326 Mass. 757, 762. I therefore conclude that the term "establishment," as used in G. L. c. 143, § 21, refers to a distinct physical place of business where labor is performed, other than a factory, workshop or mercantile establishment. In my opinion, a public garage and a parking structure both fall within that definition.

However, either type of building is required to be provided with proper egresses or other means of escape under § 21 only if it is an "establishment and . . . has accommodations for ten or more employees . . . " (Emphasis supplied.) In other contexts, the term "accommodations" has been employed with differing shades of meaning. See, e.g., G. L. c. 126, § 8; c. 147, §19; c. 161, §§ 104 and 105 and c. 272, § 98A. With respect to § 21, "[t]he Legislature in using a term capable of varying shades of meaning must be understood to have adopted the particular meaning that best served its purpose and aim in enacting the statute." *St. George's Church* v. *Primitive Methodist Ch.,* 315 Mass. 202, 205. In view of the purpose to be served by the statute, the Legislature must have imputed a basic and simple meaning to the term "establishment," intending the

statute to apply wherever ten or more persons were provided with sufficient facilities for employment in such an "establishment".

I therefore conclude that the Board of Standards is authorized to make rules and regulations relating to the standards of materials to be employed in public garages and parking structures whenever such buildings are required to be provided with proper egresses or other means of escape under the provisions of G. L. c. 143, § 21.

This authority of the Board, however, does not extend to the power to make rules and regulations relating to electrical wiring and electrical fixtures, for G. L. c. 143, § 3L states:

> "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 section three to sixty, inclusive."

Regulatory authority in this area, therefore, is expressly conferred upon the Board of Fire Prevention Regulations, and not upon the Board of Standards under G. L. c. 143, § 3B.

You also raised the general question whether the Board may make rules and regulations on subjects covered by other boards and inquire as to the type of buildings and occupancy within the Board's jurisdiction. A response to this question would require an examination of all statutes and acts, as well as all rules and regulations thereunder, with respect to an infinite range of merely hypothetical situations. This I decline to do. I am willing in the future, however, to respond to any question involving a definite factual controversy. See 1935 Op. Atty. Gen'l, p. 31.

Very truly yours,
ROBERT H. QUINN
Attorney General

No. 34 June 24, 1970

HIS EXCELLENCY FRANCIS W. SARGENT
Governor of the Commonwealth

Dear Governor Sargent:

You have requested my opinion whether, in the light of G. L. c. 33, § 23(a)(1), as inserted by St. 1954, c. 590, § 1, you may fill the vacancy recently caused by the retirement of the major general commanding the 26th Infantry Division of the Massachusetts Army National Guard by appointing to that position the major general who now commands the Headquarters Augmentation Unit of the Army National Guard.

General Laws c. 33, § 23(a)(1) provides:

> "A major general of the line, commanding a division, shall be appointed by the commander-in-chief from the brigadier generals of the line who have served in such offices for a period of at least two years."

Your question arises due to a change in December of 1967 of the table of organization of the senior line officers of the Army National Guard in the Commonwealth. Prior to that time, the table provided for *one* major general, the commanding general of the 26th Infantry Division. When the table of organization was revised by the National Guard Bureau of the Department of Defense, an additional major general was authorized, to command the newly formed Headquarters Augmentation Unit. In 1968, one of the then brigadier generals was duly promoted to the rank of major general and assigned to that post, which he still holds.

It appears that same directive which revised the table of organization created an additional position of brigadier general, bringing the number of brigadier generals back to two. Thus, the incumbent brigadier generals were both appointed in 1968, one as a result of the promotion to the newly created position of major general and the other as a result of the creation of the new position of brigadier general.

As a result of the 1967 revision of the table of organization of the senior line officers of the Army National Guard of the Commonwealth and the 1968 promotions which occurred subsequent to that revision, the senior line officers of the Army National Guard are no longer confined to the rank of brigadier general. Rather, the senior line officers consist of one major general and two brigadier generals. In view of the statutory language quoted above, you state that you are uncertain whether you may appoint or transfer the major general commanding the Headquarters Augmentation Unit to the command of the 26th Infantry Division with the same rank.

It is my opinion that you may make the contemplated appointment. When the General Court enacted St. 1954, c. 590, there was only one major general, i.e. the commanding officer of the 26th Division. When the incumbent of that position retired or resigned, it was necessary to make a promotion from among the senior line officers in the next highest rank, i.e. brigadier general, and the General Court added the proviso that the officer appointed must have served as a brigadier general for a period of at least two years. I observe that St. 1954, c. 590 was enacted long before the revision of the table of organization of senior line officers, a revision over which the General Court had no control.

In my view, the General Court intended only that a senior line officer appointed to the command of the 26th Division have the minimum qualifications of two years in the office of brigadier general. An interpretation of the statute to the effect that additional qualifications, such as those possessed by the officer now commanding the Headquarters Augmentation Unit, disqualifies an officer for appointment to the position of commander of the 26th Division, is clearly not warranted. The General Court could not have foreseen the revision of the table of organization when it enacted St. 1954, c. 590. In connection therewith, it must be noted that "statutes do not govern situations not within the reason of their enactment and giving rise to radically diverse circumstances presumably not within the dominating purpose of . . . [their framers]." *Edgar H. Wood Associates, Inc.* v. *Skene,* 347 Mass. 351, 362, quoting *Commonwealth* v. *Welosky,* 276 Mass. 398, 403, *cert. den.* 284 U.S. 684. Also, "[e]very statute, if possible, is to be construed in accordance

with sound judgment and common sense, so as to make it an effectual piece of legislation." *Commonwealth* v. *Slome,* 321 Mass. 713, 716. See, also, *Sun Oil Co.* v. *Director of the Division of the Necessaries of Life,* 340 Mass. 235, 238.

In conclusion, then, it is my opinion that you may appoint the major general commanding the Headquarters Augmentation Unit of the Massachusetts Army National Guard to the position of commander of the 26th Division of the Guard. In view of my conclusion, it is unnecessary to discuss the question whether the major general commanding the Headquarters Aumentation Unit could be transferred to the position of commander of the 26th Division.

Very truly yours,
ROBERT H. QUINN
Attorney General

No. 35 June 25, 1970

HONORABLE JOHN F. X. DAVOREN
Secretary of the Commonwealth

Dear Mr. Secretary:

You have requested my opinion with regard to reporting and recording births and amending birth records where there is a question of legitimacy of the child. You present three casses. I have set forth below with respect to each case the facts, your question, and my opinion and answer.

1. A child was born on November 8, 1969. On November 11, 1969, the mother and her husband signed an affidavit admitting that the child was not that of the husband. The hospital sent the record of birth and the affidavit to the clerk of the municipality involved.

Must the clerk accept and record the birth as illegitimate?

The clerk has the statutory duty of receiving or obtaining and recording in the birth record of a legitimate child the name of, and certain other facts relating to, the father. Such information, however, must not be recorded in the birth record of an illegitimate child. G. L. c. 46, § 1. It follows that the clerk must determine whether the child is legitimate. If the child was conceived or born in wedlock, he is presumed to be legitimate. *Commonwealth* v. *Leary,* 345 Mass. 59, 60. *Wechsler* v. *Mroczkowski,* 351 Mich. 483. Op. Att'y Gen. 207, 208 (1921). The clerk, in such a case, must record the child as legitimate. If, after such recording, the clerk receives an affidavit of the mother and the man who was her husband at the time of conception or birth admitting that the child is illegitimate, the clerk must then correct the birth record to reflect this fact. G. L. c. 46, § 13, para. 3.

It is true that there is no statutory provision for the filing of such an affidavit with the clerk *prior* to his recording the birth. By necessary implication, however, if such an affidavit is filed prior to the recording of the birth, the birth must be recorded as illegitimate, for the affidavit is evidence of the facts at the time of the birth. See Op. Att'y Gen. 619, 621 (1922). Since it is acceptable to correct a record to reflect the true

facts as of the time of birth, it cannot reasonably be said to be unacceptable as a basis for recording the true facts in the first instance. This construction of the statute, which I recognize governs very strictly the reporting and the recording of births, is consistent with the obvious legislative intent to provide and maintain accurate and reliable birth records. See G. L. c. 46, § 19.

My answer to your first question is "Yes".

2. A child was born on June 26, 1969. The mother was then divorced, the decree having become absolute on March 15, 1969.

Should this child be reported as legitimate?

The presumption of legitimacy when a child is born in wedlock can be overcome only by the facts which prove beyond all reasonable doubt that the husband could not have been the father. *Sayles* v. *Sayles,* 323 Mass. 66, 69. *Commonwealth* v. *Stappen,* 336 Mass. 174, 177. *Commonwealth* v. *Leary,* 345 Mass. 59, 60. The same strong presumption exists when a child is conceived in wedlock although born after a divorce decree has become absolute. *Drennan* v. *Douglas,* 102 Ill. 341. *Wechsler* v. *Mroczkowski,* 351 Mich. 483. *Haugen* v. *Swanson,* 219 Minn. 123. *Wilson* v. *Wilson,* 8 Ohio App. 258.

Therefore, where it appears that the mother was married at the time of conception but was divorced at the time of birth, the birth must be reported and recorded as legitimate in the absence of an appropriate affidavit as prescribed by statute, or evidence that the child has been legally determined to be illegitimate. G. L. c. 46, § 13, para. 3. Op. Att'y Gen. 207, 208 (1921).

My answer to your second question is "Yes".

3. A child was born on July 3, 1969. The mother was divorced at the time of birth, the decree having become absolute on March 24, 1969. On July 24, 1969, she signed an affidavit before the clerk having custody of the birth record stating that her former husband was not the father.

Is such an affidavit signed by the mother alone sufficient to allow the clerk to amend the birth record by removing the name of the former husband as the father?

As I stated in answer to your second question, a child conceived in wedlock must be reported and recorded as legitimate in the absence of evidence of a legal determination of illegitimacy or an appropriate affidavit. G. L. c. 46, § 13, para. 3. The affidavit must be signed by *both* the mother and the husband. However, if the clerk is satisfied that either the mother or the husband cannot be located, then he may accept an affidavit from the available party. He cannot, solely on the basis of such an affidavit, remove the name of the husband as the father. Before making such a change in the record, the clerk must also have received "evidence substantiating the statements in such affidavit beyond all reasonable doubt, which affidavit and evidence shall have been submitted by the town clerk to a judge of probate or to a justice of a district court and shall have been approved by such judge or justice." G. L. c. 46,

§ 13, para. 3. Your facts do not reveal that these additional statutory requirements have been met.

The answer to your third question is "No".

Very truly yours,
ROBERT H. QUINN
Attorney General

No. 36

June 25, 1970

HONORABLE JOHN J. FITZPATRICK
Commissioner of Correction

Dear Commissioner Fitzpatrick:

You have requested my opinion as to which records and files of the Department of Correction may be opened to staff members of the Harvard Prison Legal Assistance Project for inspection. It appears that the staff of the Project wish to examine commitment books and "a number of files" to aid in the preparation of an inmate's appeal to the Appellate Division of the Superior Court for a reduction of sentence.

You inform me that much of the information in the files of the Department is gathered through G. L. c. 276, § 100. That section, as most recently amended by St. 1969, c. 838, § 63, provides:

> "Every probation officer, or the chief or senior probation officer of a court having more than one probation officer, shall transmit to the commissioner of probation, in such form and at such times as he shall require, detailed reports regarding the work of probation in the court, and the commissioner of correction, the penal institutions commissioner of Boston and the county commissioners of counties other than Suffolk shall transmit to the commissioner, as aforesaid, detailed and complete records relative to all paroles and permits to be at liberty granted or issued by them, respectively, to the revoking of the same and to the length of time served on each sentence to imprisonment by each prisoner so released specifying the insituation where each such sentence was served; and under the direction of the commissioner a record shall be kept of all such cases as the commissioner may require for the information of the justices and probation officers. Police officials shall cooperate with the commissioner and the probation officers in obtaining and reporting information concerning persons on probation. The information so obtained and recorded shall not be regarded as public records and shall not be open for public inspection but shall be accessible to the justices and probation officers of the courts, to the police commissioner for the city of Boston, to all chiefs of police and city marshals, and to such departments of the state and local governments as the commissioner may determine. Upon payment of a fee of one dollar for each search such records shall be accessible to such

departments of the federal government and to such educational and charitable corporations and institutions as the commissioner may determine. The commissioner of correction and the department of youth services shall at all times give to the commissioner and the probation officers such information as may be obtained from the records concerning prisoners under sentence or who have been released."

At the outset, I am uncertain whether you are referring to the information submitted by you to the Commissioner of Probation or information received by you as a result of an examination of the reports submitted to the Commissioner. However, both alternatives have been taken into consideration in the preparation of this opinion.

The definition of "public records" in this Commonwealth is quite broad. General Laws, c. 4, § 7, as amended by St. 1969, c. 831 § 2, provides, in pertinent part:

"Twenty-sixth, 'Public records' shall mean any written or printed book or paper, any map or plant [sic] of the commonwealth, or of any county, district, city, town or authority established by the general court to serve a public purpose, which is the property thereof, and in or on which any entry has been made or is required to be made by law, or which any officer or employee of the commonwealth or of a county, district, city, town or such authority has received or is required to receive for filing, any official correspondence or of a county, district, city, town or such authority, and any book, paper, record or copy mentioned in section eleven A of chapter thirty A, where applicable, section nine F of chapter thirty-four, section twenty-three A of chapter thirty-nine, or sections five to eight, inclusive, and sixteen of chapter sixty-six, including public records made by photographic process as provided in section three of said chapter."

Records falling within the above-quoted definition are open to inspection and examination. In that respect, G. L. c. 66, § 10 provides in pertinent part:

"Every person having custody of any public records shall, at reasonable times, permit them to be inspected and examined by any person, under his supervision, and shall furnish copies thereof on payment of a reasonable fee . . . "

The Legislature, however, has seen fit to remove certain records from the general rule that books or papers received for filing or which are required to be received for filing are public records. Thus, G. L. c. 276, § 100, to which you refer, states that reports submitted to the Commissioner of Probation pursuant to that section are not "public records" and thus are not open to public inspection and examination, with certain exceptions noted in the statute. However, an examination of the statutes relating to the Department of Correction, and more particularly the statutes with respect to the filing and receipt of certain reports (see, e.g., G. L. c. 124, §§ 5, 6, 8, and 9), indicates that the Legislature has not exempted the records of the Department of Correction, if they otherwise

come within the definition of "public records," from the provisions of G. L. c. 66, § 10.

It is my opinion, therefore, that the commitment books maintained by the Department are open to public inspection and examination. In so far as "the number of files" mentioned in your letter are concerned, I am unable to answer that portion of your inquiry with certainty. However, the contents of those files, with the exception noted below, are open to inspection and examination if they are "public records" falling within the definition set out in G. L. c. 4, § 7. The exception includes any information received as a result of an inspection or examination of the records of the Commissioner of Probation referred to in G. L. c. 276, § 100 and reports submitted by you to the Commissioner of Probation pursuant to the same section. In the event that a request is made to examine such information, it would be necessary to obtain the consent of the Commissioner of Probation pursuant to the terms of section 100. I would suggest that any information received from the Commissioner be segregated from other records and reports in so far as the same is practicable.

In the event that particular requests to examine and inspect records raise further questions, you are free to call upon us for assistance whenever it is required.

Very truly yours,
ROBERT H. QUINN
Attorney General

No. 37 June 30, 1970

MRS. MABEL A. CAMPBELL
Director of Civil Service

Dear Mrs. Campbell:

You have requested an opinion concerning the Model Cities Program established pursuant to 42 U. S. C. § 3303 and the exemption, if any, of the offices and positions thereunder from civil service law. More specifically, you state:

> "I have been requested to ask your opinion as to the applicability of the Civil Service Law to the offices and positions within the said program and particularly whether the Federal statute and the contracts executed by municipalities thereunder modify in any way the application of the Massachusetts Civil Service requirements. Would you please inform me, therefore, if in your opinion there is any exemption for these offices and positions?"

You have also requested an opinion concerning several bills, particularly House No. 5600 of 1969. State officers are entitled to the opinion of the Attorney General only upon questions necessary or incidental to the discharge of the duties of their office. I am unable to see how pending legislation in any way concerns the actual performance of your duties and must, therefore, ask to be excused from answering any

questions relative thereto. 2 *Op. Atty. Gen.* 100, November 15, 1899.

With respect to your first question, you state that you have made a determination that an exemption exists for a total number of officers and employees not exceeding thirty to be employed in a model cities program in any one city. St. 1968, c. 603. You have further determined that no other exemption exists under the applicable statutes. In your request, you suggest no doubts concerning your conclusions in relation to the performance of your duties, and, accordingly, it does not appear that you are presented with a factual situation or controversy in which you are required to act and which warrants the assistance of this Department. See *Op. Atty. Gen.,* February 14, 1935, at 31. On the contrary, it appears that you "have been requested to ask . . . [my] opinion" at the instance of a municipal official, and that your request has been forwarded to this Department merely as an act of accommodation in his behalf. This Department has no authority whatever to render opinions to such officials, and it has been the long-established policy of this Department not to offer such assistance. *Op. Atty. Gen.,* January 29, 1935, at 30. Consequently, I must decline to comply with your request.

I am willing in the future, of course, to respond to any question involving a factual controversy involving the discharge of your official duties.

Very truly yours,
ROBERT H. QUINN
Attorney General

No. 38 June 30, 1970

MR. I. ALBERT MATKOV
State Librarian

Dear Mr. Matkov:

You have requested my opinion whether positions in the State Library are subject to the Civil Service Law and Rules. You inform me that prior to the enactment of St. 1967, c. 780 (as most recently amended by St. 1970, c. 165), all appointments to positions in the State Library, except employees holding clerk typists' positions, were approved by the Division of Civil Service as "not being subject to the rules and regulations of Civil Service."

A resolution of your question requires a brief review of the pertinent statutory and regulatory provisions. The authority of the Civil Service Commission to promulgate rules concerning the classifications of positions in the official service and labor service of the Commonwealth is derived from G. L. c. 31, § 3, which provides in pertinent part:

> "Subject to the approval of the governor, the commission from time to time shall make and may amend rules which shall regulate the selection and employment of persons to fill positions in the official service and labor service of the commonwealth . . . "

In turn, the Commission's rules have the force of law (*Lynes* v. *Board of Selectmen of Milton,* 346 Mass. 59, 61). Rule 3(1) (b) of those rules delimits the Classified Official Service:

> "The offices and positions and the persons performing duties or rendering service in any office and position and classes of positions in the Commonwealth, the Massachusetts Bay Transportation Authority Police Department, and cities, unless otherwise exempted by statute."

Rule 1 of the Civil Service Rules states:

> "2. Persons paid by the Commonwealth or any city, whether carried on the regular pay roll, or special pay roll or by presenting a bill personally or by some other person, company or corporation, shall be deemed to be in the service of the Commonwealth or the city within the meaning of these rules unless specially exempt by statute."

Expenditures for the State Library are authorized by G. L. c. 6, § 36, which provides in part:

> "The trustees of the state library may expend such sums annually as the general court may appropriate for permanent assistants and clerks, for books, maps, papers, periodicals, and other material for the library . . . "

Finally, the function of the State Library is controlled by G. L. c. 6, § 38, which provides:

> "The state library shall be in the state house, and shall be kept open every day except Sundays and legal holidays for use of the governor, lieutenant governor, council, general court and such officers of the government and other persons as may be permitted to use it."

It is thus clear that persons holding positions in the State Library are in the service of the Commonwealth and are, by virtue of the application of Rule 3 of the Civil Service Commission subject to the provisions of the Civil Service Law, unless otherwise exempted by statute. The operational effect of Rule 3 which subjects all public service positions to the Civil Service Law and Rules, unless otherwise exempted by statute, was succinctly summarized by the then Attorney General, Clarence A. Barnes, in an opinion rendered in 1945 to the then Director of Civil Service:

> "Unless a place in the public service has been specifically or impliedly excluded by the Legislature from the control of the Civil Service Law and Rules, or is within some group of places which has been so specifically or impliedly excluded, it is within the sweep of these measures and is governed by them when . . . it falls within a classification established by the Civil Service Commission."

The statutory provisions which apply to the State Library, G. L. c. 6, §§ 33-39A, contain no specific exemption from the Civil Service Law and Rules. For examples of specific exemptions, see G. L. c. 15, § 35; c. 75, § 24; c. 75B, § 12. General Laws, c. 6, § 34, which provides that the Trustees of the State Library shall have management and control of the State Library, certainly contains no implied exemption.

The only exemption is found in G. L. c. 31 § 5, as amended by St. 1967, c. 780, and St. 1970, c. 165, to which you refer. That section

provides that "[P]rofessional librarians and subprofessional librarians whose duties require that they have certificates issued by the board of library commissioners and pages who are employed in libraries on a part-time or intermittent basis" are exempt from the Civil Service Law and Rules. If any persons holding positions in the State Library fall within the latter categories, they are exempt from the Civil Service Law and Rules. All other positions in the State Library are subject to the Civil Service Law and Rules, and appointments to those positions should be made accordingly.

Very truly yours,
ROBERT H. QUINN
Attorney General

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