The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

Year Ending June 30, 1971

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The Commonwealth of Massachusetts

Boston, December 1, 1971

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, 1971.

Respectfully submitted,

Robert H. Quinn
Attorney General

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL

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Donald J. Wood[10]
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James J. Kelleher

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Thomas J. Crowley
John P. Davey[4]
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Stephen A. Ferguson[2]
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Richard W. Hynes
David A. Leone
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John H. O'Neil
Paul E. Ryan
Herbert L. Schultz
Richard L. Seegel
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George Jacobs
James P. McAllister
Frederick J. Sheehan

Assistant Attorneys General Assigned to the Division of Employment Security

Joseph S. Ayoub
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Assistant Attorney General Assigned to the Veterans' Division

John F. Houton[3]

Chief Clerk

Russell F. Landrigan

Assistant Chief Clerk

Edward J. White

[1]Appointed June 1970
[2]Appointed July 1970
[3]Appointed August 1970
[4]Appointed October 1970
[5]Appointed January 1971
[6]Appointed April 1971
[7]Appointed May 1971
[8]Appointed June 1971
[9]Terminated September 1970
[10]Terminated December 1970
[11]Terminated January 1971
[12]Terminated February 1971

STATEMENT OF APPROPRIATIONS AND EXPENDITURES
For The Period
July 1, 1970 — June 30, 1971

Appropriations

0810-0000	Administration	$2,397,489.11
0810-6613	Consumer Protection Research and Pilot Program	117,500.00
0810-6614	Organized Crime Investigation Training and Preliminary Design of Technical Assistance Center...	14,850.00
0821-0100	Settlement of Claims	158,000.00
	Total	$2,687,839.11

Expenditures

0810-0000	Administration	$2,145,710.81
0810-6613	Consumer Protection Research and Pilot Program	80,739.68
0810-6614	Organized Crime Investigation Training and Preliminary Design of Technical Assistance Center...	12,000.00
0821-0100	Settlement of Claims	158,000.00
	Total	$2,396,450.49

Income

0801-40-01-40	Fees — Filing Reports Charitable Organizations	$17,090.00
0801-40-02-40	Fees — Registration Charitable Organizations	4,350.00
0801-40-03-40	Fees — Professional Fund Raising Council or Solicitor	70.00
0801-69-99-40	Miscellaneous	740.93
	Total	$22,250.93

Financial Statement Verified (under requirements of C. 7, S 19 GL)
November 10, 1971

By Joseph T. O'Shea
For the Comptroller

Approved for Publishing

M. Joseph Stacey
Comptroller

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL

Boston, December 1, 1971

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 for the fiscal year ending June 30, 1971.

Introduction

My third Annual Report as Attorney General of the Commonwealth of Massachusetts encompasses the fiscal year from July 1, 1970 to June 30, 1971.

In a year characterized by increasing workloads for each one of the Office's divisions, notable accomplishments sometimes tend to obscure the vital, day-to-day effort made in innumerable areas on behalf of the citizens of the Commonwealth. Nevertheless, without detracting from the importance of the individual reports included herein, I would like to draw attention to the establishment of a new Division of Environmental Protection within the Office of the Attorney General. As I mentioned in my Annual Report of last year, there was at that time a growing recognition that state and local governments must begin to respond to the then recently-acknowledged peril of pollution and its multifaceted threat to our environment. The ancient common law framework for attacking pollution and polluters needed "shoring up" and revitalization. In addition, specialization was called for in light of the rapidly increasing caseload and the diversity of disciplines involved in dealing with environmental problems. I believe that the establishment of this new Division, with several Assistant Attorneys General devoting full time to environmental matters, is now and will prove to be a timely and justified response to a worsening situation.

The Office has also continued to be active in implementing the passage of legislation designed to protect the Commonwealth's consumers, and, in another area of vital importance, to place further controls on drugs and other dangerous substances. (A list of fourteen acts and resolves proposed and enacted by the 1971 legislature are included in the Appendix to this report.)

Administrative

The Administrative Division was engaged continuously throughout the fiscal year rendering advisory legal services to various state agencies and boards of professional registration and licensure. Fifty-two formal opinions of the Attorney General were prepared by the Division during the year, and, in addition, one hundred and one informal opinions were

issued over the signatures of assistant attorneys general. Twenty-nine formal opinions were prepared with respect to the provisions of the conflict of interest law, chapter 268A of the General Laws.

The practice of assigning members of the Division to act as liaison with the state agencies and boards of registration has worked well. The number of requests for formal opinions of the Attorney General has been reduced as a result of instituting this system, although the number of opinions issued increased over fiscal year 1970. This increase is attributable to questions which arose as a result of the 1970 state elections and a concerted effort to reduce the backlog of requests for formal opinions. The Division has intensified its efforts to encourage agencies and state officials to resolve legal questions short of requests for formal opinions, and considerable headway was made in that direction during the year.

As was noted in the annual report for fiscal year 1970, litigation in the federal and state courts occupies the greater part of the time of the Division. Approximately one hundred and seventy-five cases were opened during the fiscal year, none of which can be called routine. Many of them involved constitutional issues of great significance. As in past years, litigation in the federal courts increased quantitatively and in variety of issues. The decisions of the Supreme Court of the United States in *Younger* v. *Harris*, 401 U.S. 37, and companion cases, may have a braking effect on the quantitative escalation of such cases, but there remain areas of litigation in the federal system which are unaffected by the *Younger* decision. The increase in the number of federal suits in the area of welfare rights is due, in large part, to the feeling on the part of prospective plaintiffs that the federal courts provide a more sympathetic forum than the state courts.

The Division participated in several cases heard by three-judge courts dealing with challenges to various provisions of the state election laws during the fiscal year. Those cases challenged the requirement for signing nomination papers, the number of signatures needed, and the requirement that not more than one third of the signatures come from any one county. Because state elections were held in November, several additional cases were commenced in the state courts on questions relating to election procedures.

The Division prepared and filed two appeals with the Supreme Court of the United States during the fiscal year. The first sought review of a decision of the United States District Court invalidating the state loyalty oath, and, in June, the Supreme Court noted probable jurisdiction in that case. The second sought review of a decision of the same district court invalidating the one-year residency requirement for voting in the Commonwealth. Although the one-year requirement was deleted by the voters at the November election, effective in 1971, there remained a number of impounded ballots which had been cast by persons who did not meet the one-year requirement when they voted in 1970. Resolution

of that issue will depend upon the Supreme Court's decision in a case involving a similar requirement in Tennessee.

In the state courts, the Division participated in a score of cases involving challenges to provisions of the state insurance statutes and rate orders issued by the Commissioner of Insurance. The Supreme Judicial Court struck down one provision of the no-fault automobile insurance statute passed in 1970 which mandated across-the-board decreases in premium rates for all automobile insurance coverages, but the court did uphold the law as constitutional in all other respects. Suits against the Commissioner of Public Welfare required the attention of two Assistant Attorneys General on a full-time basis. The number of petitions for judicial review of decisions of the Civil Service Commission remained fairly constant, and the Division was instrumental in effecting substantial revisions in the statute governing review of such decisions.

Finally, members of the Division briefed and argued four appeals involving major decisions of the Department of Public Utilities with respect to gas rates in Boston and in certain north-shore communities. The records in those four cases were substantial, and the briefs and oral arguments were a credit to the Department. The cases represented the first challenges to D.P.U. rate orders in many years and will have important precedential effects.

Citizens' Aid Bureau

The character of the work of the Citizens' Aid Bureau has not changed considerably during the last year. However, several innovations are worthy of mention.

The Bureau has been developing an intern program with high school students, specifically through the Copley Square High School in Boston, whereby the students work several hours per week in the Bureau as part of their social studies course. The students have also been placed in several other divisions of the Attorney General's office. It is hoped that this program will be expanded during the current year. In addition, we are in the process of establishing a program with colleges and universities whereby students majoring in social work may be given course credits for doing their practicum in the Citizens' Aid Bureau. This was done on an experimental basis with a student from Penn State during the past summer and was highly successful inasmuch as the work of the Bureau is a good training ground for social workers.

In conjunction with their work at the Citizens' Aid Bureau, students from the Harvard Divinity School have undertaken a program of travelling to major cities in the Commonwealth and informing ecumenical and private groups of the services available through the Citizens' Aid Bureau.

The workload of the Bureau, including Spanish speaking complaints, has remained constant at about 60 inquiries and complaints per day.

Civil Rights and Liberties

A good portion of the work and effort of the Division during the past year has centered upon the problem of police-community relations. Throughout the nation the relationship of law enforcement agencies to various segments of society such as the Black, the Spanish-speaking and the young has become an increasingly sensitive area. This has been true here in the Commonwealth, as is evidenced by a series of clashes between the police and various groups. It is gratifying to note that the relationship between the Office of the Attorney General, local law enforcement authorities, and community groups has improved in recent months. Much of the success which has been achieved must be attributed in some measure to the "Uniform Procedure Recommended For The Investigation and Disposition of Citizens' Complaints Concerning Police Officers in the Commonwealth of Massachusetts." This procedure drafted by the Division and promulgated by the Attorney General has received wider acceptance from local police departments than was originally anticipated. Significant improvement has been noted in the quality of the response from this Division to requests for investigations into allegations of police misconduct. Principal among those departments taking swift and affirmative action was the Boston Police Department Officers. In virtually every instance, investigations were initiated by that Department and action was taken when necessary.

Another positive step taken in the area of police-community relations was the commencement of a training program for both policemen and community members initiated in New Bedford, a city which experienced a good deal of disruption during the summer of 1970. This program, conducted by the American Institutes for Research, Washington, D.C., is being tested in New Bedford under the general guidance of this Division, and should it prove successful, steps will be taken to implement the program throughout the Commonwealth. Initial funding for the program was obtained from the Committee on Law Enforcement and the Administration of Criminal Justice, chaired by the Attorney General.

Further, this Division has taken responsibility for the revision of the popular pamphlet "If You Are Arrested." This pamphlet will soon be distributed to various civic and social action organizations as well as schools and churches throughout the Commonwealth, in order better to inform citizens of their rights under the Constitutions of the United States and the Commonwealth of Massachusetts.

Another major responsibility of this Division is representing the Massachusetts Commission Against Discrimination MCAD. The Division appears in court to seek enforcement of the various powers and decrees of that Commission in matters concerning discrimination in housing, employment, education and public accommodations. This past year found attorneys of the Division making several appearances in court to establish the right of the MCAD to subpoena witnesses and information to assist in its deliberations on complaints involving discrimination.

A very important function of the Division is investigating complaints of deprivation of first amendment rights, especially the rights of freedom of speech and of the press. To that end the Division consults with local and regional law enforcement authorities and advises them whether certain materials alleged to be obscene are constitutionally protected. While formerly the work of the Division had been confined to books, today movies, magazines, and other materials alleged to be obscene are reviewed by the Division in an effort to determine their constitutionality and legality. In addition, attorneys from the Division act as counsel to the Massachusetts Obscene Literature Control Commission and process complaints and inquiries from the general public regarding obscene materials.

Another major responsibility of the Division deals with drafting and lobbying for legislation which would broaden the civil rights and liberties of all citizens of the Commonwealth. While there has been some success in this regard in the past session of the General Court, there remains much to do in the future regarding legislation of this nature.

In addition to the foregoing, this Division handles many general complaints and inquiries in respect to civil rights and liberties, not the least of which concern problems which have arisen as a result of the passage of the Twenty-Sixth (26th) Amendment to the United States Constitution, namely, the right of eighteen year old citizens to vote. Following a recent opinion of the Attorney General which liberally interpreted this Amendment, much time has been spent with local election officials considering the legal implications of the Amendment and the Attorney General's opinion.

In line with the foregoing responsibilities, on many occasions during the past year, attorneys assigned to this Division addressed businesses, civic groups, community organizations and various other parties interested in the field of civil rights and civil liberties.

Consumer Protection

Between July 1, 1970 and June 30, 1971, the Division continued to experience the substantial growth in workload that characterized it in the past two years. The average number of consumer complaints reported per week reached 250, 150% over that of the preceding year. In excess of seven hundred thousand dollars was returned to consumers who had lost money or property because of unfair or deceptive sales or lending practices. In addition, work valued at several hundred thousand dollars was furnished to consumers as a result of action taken by the Division.

An average of three hundred inquiries and complaints are investigated by the division each week. In most cases, the division is able to arrange for a refund, a repair, or a replacement product or service for every consumer who files a complaint.

In 1971, several new consumer bills were filed and enacted to supplement the existing state consumer protection statutes, which are among

the most progressive in the country. Regulations under the Consumer Protection Act were promulgated late in June 1971, spelling out specific prohibitions under that law.

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 additional unfair or deceptive practices, have allowed the division to investigate and enforce the law in a number of important areas.

In the area of litigation, many new suits were brought to stop unfair practices. Several injunctions were obtained against automobile dealers who had turned back odometer readings in vehicles offered for sale. Additional actions were brought against computer dating firms, gasoline stations, and pyramid sales organizations for deceptive sales practices.

Over the year some two hundred meetings were held with representatives of all types of businesses 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.

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 eight Consumer Information Leaflets has been prepared illustrating several of the laws in cartoon form. Over 1 million of these leaflets were distributed during 1971. Staff members of the division appeared on television and were heard on radio; others addressed various fraternal and service organizations, schools, and other interested groups.

Contracts

The Contracts Division represents the Commonwealth and its departments and agencies in litigation involving contractual matters. A major portion of this litigation — and certainly the most time-consuming and complex — deals with highway and building construction cases before auditors and justices of the Superior and Supreme Judicial Courts.

Further, the Division represents state agencies in court actions to enforce their contracts and leases and represents awarding authorities in actions opposing the issuance of injunctions which would prohibit the award of contracts. In addition to its litigation role, the Division advises some eighty state agencies as to the form and scope of their contracts and leases, and renders advice to such agencies with respect to competitive bidding practices and procedures.

The Division reviews in excess of 3,000 contracts per year as to legal form, and generally has more than 100 cases pending at any given time. Most of these cases, which are tried in the courts on a regular basis, involve claims by general contractors for extra work for the completion

of contracts, alterations to contracts, and disputes over amounts owed to either the Commonwealth or its contractors for work performed.

Additionally, the Division conducts investigations throughout the Commonwealth involving alleged irregularities in public bidding or construction matters. The Division is also seriously involved in the drafting of remedial legislation concerning public construction and competitive bidding.

Criminal

The Criminal Division is divided into three departments: Investigations and Trials, Appeals and Writs, and Organized Crime.

The Investigations and Trials Section has the power to initiate inquiries into any criminal activities in which there is reason to believe a violation of law exists. Frequently, investigative leads are developed by other state agencies and subsequently referred to this section for further investigation and eventual prosecution.

Some of the more intensive investigations undertaken during this year involved: (1) a major probe into alleged irregularities by the City of Somerville in no-bid contracts; (2) an exhaustive inquiry into allegations concerning a lack of security precautions in the printing of the Massachusetts Bar Examination; and (3) an investigation into Welfare frauds perpetrated by Department of Public Welfare workers and recipients.

As a result of the investigation into irregularities in welfare disbursements, indictments have been returned against some departmental personnel and complaints made against a score of recipients and independent contractors for submitting false vouchers. In many of these cases, fines and restitution have resulted.

The Division had noteworthy success in the prosecution of cases involving environmental pollution. For the first time in the history of the Commonwealth, indictments were returned for violations of the Massachusetts pollution laws. As a result of one indictment, a heavy fine was levied against a Waltham trucking firm for polluting the Charles River with poisonous chemicals. In another action, a New Bedford man was sentenced to prison when he was found guilty of criminal negligence for permitting 170,000 gallons of oil to escape into Falmouth Harbor.

Two members of the State Board of Registration of Real Estate Brokers and Salesmen, along with an independent broker, were found guilty of accepting and soliciting bribes for real estate licenses. The investigation that led to the indictment of the three revealed the selling of broker's and salesmen's licenses to persons who did not take examinations or who had criminal records.

In other prosecutions conducted by the Division, a fraudulent scheme involving down payments on homes to be constructed resulted in the conviction of a Hanover builder and his business partner on charges of grand larceny. A Boston surgeon was fined and received a suspended sentence for his participation in a statewide fraudulent insurance claims ring.

As part of a continuing plan of assistance to the state's District Attorneys, experienced prosecutors from the Division were sent into the counties to aid in the fight against crime at the local level. This effort resulted in several convictions on narcotics charges and crimes associated with attempts by addicts to procure the money necessary to support their habit.

The operations of the Division took on international aspects when two members of the staff travelled to Israel in order to extradite a North Attleboro man who allegedly had stolen $160,000 from a Bristol County finance company. With the cooperation of the United States Department of State and the Israeli Ministry of Justice, the accused was returned to the Commonwealth to face criminal charges. While extradition is by definition a demand upon another jurisdiction for the return of a fugitive who has fled the Commonwealth, rendition requests arrive from other states asking the arrest of an accused who has taken shelter in Massachusetts. Division personnel examine the rendition documents, hold a hearing, and advise the Governor on these matters. Recently, a rendition request was honored by sending Joe "Barboza" Baron to California to stand trial for murder.

The Division also performs educational and public relations functions. Legal memoranda drafted by the staff are distributed to other law enforcement agencies to explain the impact of recent court decisions upon police procedure. A summary of the year's legislation which affects criminal law is prepared and sent to every police department in the state. Staff attorneys frequently speak before and assist public service groups, police organizations, and local police departments. In addition, hundreds of inquiries by concerned citizens are telephonically processed throughout the year.

Recent United States Supreme Court decisions that have recognized the expanding concept of prisoners' rights, and new interpretations of the constitutional rights accorded defendants in criminal trials, have resulted in an enormous increase in the number of extraordinary writs sought in both state and federal courts. While the majority of the petitions brought by those accused of a crime and those convicted of crimes have little merit, some involve complex constitutional questions.

A case having national implications, *Karalexis* v. *Byrne*, was successfully argued in the United States Supreme Court by Attorney General Quinn. The Court decided that federal courts must abstain from interfering with state criminal cases unless there is evidence of both bad faith in the prosecution of and irreparable injury to a defendant.

Other important appeals brought by the Division before the Supreme Court related to issues involving *trial de novo*, sentencing procedures, and the imposition of the death penalty.

The Organized Crime Section of the Division had a very busy year. As a result of court-authorized electronic surveillance, the largest coordinated attack on organized gambling installations in Massachusetts history was carried out on September 24, 1970. Simultaneous raids by more

than 100 State Police Officers in Barnstable, Essex, Middlesex and Suffolk Counties resulted in the arrest of 56 persons on gaming charges. In Worcester and Hampden County, 25 bookmakers were arrested based on investigations conducted by the Organized Crime Section.

In May, 1971, four men were indicted by the Middlesex Grand Jury on a charge of conspiracy to commit arson in connection with a fire which destroyed the contents of a Woburn furniture store. The evidence presented to the grand jury stemmed from an investigation by the Organized Crime Section, the Woburn Police Department, and the State Fire Marshall's Office.

Investigators from the Organized Crime Section recovered stolen securities valued at over $80,000 and presented evidence to a Suffolk County Grand Jury in connection therewith resulting in indictments against two individuals on charges of receiving stolen goods.

Based on evidence developed by the Organized Crime Section, four individuals were indicated in Suffolk County on charges of larceny, forgery, and uttering. The evidence presented to the grand jury showed a fraudulent scheme through which a Massachusetts bank suffered a loss of $27,000.

As a result of an investigation by the Organized Crime Section, evidence was presented to a Suffolk County Grand Jury resulting in the indictment of an organized crime figure for failure to file Massachusetts Income Taxes for the years 1964 to 1969 inclusive. This was the first indictment for income tax violation ever obtained in the Commonwealth.

During the course of the fiscal year, the Organized Crime Section received two federal grants from the Federal Law Enforcement Assistance Administration. One grant provided for the creation of a Technical Assistance Center which would serve as a central repository for highly sophisticated equipment to be used in combating organized crime. This equipment will be made available to all the police departments and all the district attorneys in the Commonwealth. A further grant was received from the same source to conduct an Organized Crime Training School for local police. Both of these programs are in the process of implementation.

This section continues to cooperate closely with other state and federal agencies and during the past year conducted 61 investigations for 16 other states. Evidence of an interstate narcotics ring was furnished to the Federal Bureau of Narcotics and Dangerous Drugs resulting in the arrest and conviction of 26 individuals.

FISCAL PERIOD JULY 1, 1970 THROUGH JUNE 30, 1971

Period	Received	Approved	Rejected
July 1, 1970-July 31, 1970	295	289	6
August 1, 1970-August 31, 1970	452	433	19
September 1, 1970-Sept. 31, 1970	270	266	4
October 1, 1970-October 31, 1970	271	268	3
November 1, 1970-Nov. 30, 1970	130	128	2
December 1, 1970-Dec. 31, 1970	305	301	4
January 1, 1971-Jan. 31, 1971	170	170	—
February 1, 1971-Feb. 28, 1971	215	211	4
March 1, 1971-Mar. 30, 1971	170	169	1
April 1, 1971-Apr. 30, 1971	270	264	6
May 1, 1971-May 31, 1971	240	225	15
June 1, 1971-June 30, 1971	301	286	15
TOTALS:	3089	3010	79

Drug Abuse

Since its inception in September 1969, the Drug Abuse Section has continued to cooperate on a statewide basis in the battle against drug abuse in Massachusetts. At the present time the Drug Abuse Section is working on two fronts: educational and legislative.

In the realm of education, the Section conducts a two-week Drug Abuse Education School which deals with all aspects of the drug problem. Originally designed for the training of law enforcement officials, the course has been expanded to include probation officers, nurses, school administrators, and members of related disciplines. The course has been offered at colleges and universities for college credit. An Advanced School is available for police officials for training in informant development and advanced search and seizure techniques. The Basic School includes lectures and discussions on the psychological, pharmacological, and sociological aspects of drug abuse; federal and state laws and current legislation; organized crime involvement; and treatment and rehabilitation procedures.

An outgrowth of the police training has been a regionalization program whereby graduates of the Drug Education School set up county agencies of drug intelligence networks for gathering information about drugs, drug users, and drug suppliers. A study is in process to examine the merits of a computerized system through which intelligence data will be programmed and made readily available to narcotics agents throughout the Commonwealth.

The Drug Abuse Section is vitally involved in formulating school policy statements concerning drug abuse. Working closely with the Massa-

chusetts Department of Education and the Massachusetts College of Pharmacy, the Section is preparing a model drug policy for schools throughout the Commonwealth.

The staff of the Drug Abuse Section and a Speakers Bureau of qualified persons in the field are assisting in the campaign to overcome the widespread misconceptions and ignorance within which drug abuse flourishes. They conduct panel discussions and lectures for parents, students, civic and professional groups, educators and legislators.

A Citizens Corps Against Drug Abuse, including several prominent sports figures, is also instrumental in the dissemination of drug information. In programs designed specifically for young people, these celebrities try to present to students an alternative to drug use.

As part of its education program, the Section publishes TRACKS, a bi-monthly newsletter on drugs, and two pamphlets, MASSACHUSETTS DRUG LAWS and DRUG ABUSE REFERENCE CHART. These materials are available upon request to educators, students, professionals, and citizens who wish to inform themselves about the drug problem.

The 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 who make recommendations regarding various complex aspects of the drug problem. The Attorney General, in his efforts to encourage meaningful research, has granted permission for several studies on marijuana to be conducted by qualified investigators.

In the realm of legislation, the Section has been called upon to explain and interpret statutory provisions regarding drugs. During the 1971 legislative session the Attorney General has been actively involved in drafting a recodification of the Commonwealth's drug laws prepared in cooperation with the Special Legislative Commission investigating drug abuse. The Section has undertaken a project to analyze the drug laws and legislation of other states in order to prepare proposals for amending present laws.

The Section has recently received a $50,000 grant from the Committee on Law Enforcement Administration of Criminal Justice. The grant was awarded for the purpose of publishing a drug training manual and providing technical assistance for law enforcement officers.

Eminent Domain

The Division is responsible for all actions involving the acquisition and disposal of land by the Commonwealth. This responsibility encompasses all matters to which the Commonwealth is a party in the Land Court. In addition to representing Massachusetts in land damage actions brought under Chapter 79 of the General Laws, the Division has the responsibility of handling cases arising out of the application of Chapter 130, relating 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.

The Division's attorneys are called upon daily to render informal opinions to various state agencies authorized by law to exercise the power of eminent domain. This process insures that all land takings by state agencies will be in conformity with the laws of Massachusetts and the Constitution of the United States.

As a condition precedent to the exercise of eminent domain, the taking agency must order an appraisal of the property to be taken, and vote an award of damages based on at least one appraisal. On the trial level the Division becomes actively involved only after the land takings are complete and the landowner, dissatisfied with the award made by the taking agency, has petitioned the Court for additional compensation. At this point the office of the Attorney General assumes full control and responsibility.

At the beginning of fiscal 1971 the Division had 1,217 cases pending in the Superior Court, and 95 cases pending in the Land Court. During the year, 236 cases were added in the Superior Court and 310 closed, leaving a total of 1,143 cases pending. In the Land Court, 55 cases were added and 57 closed, leaving a total of 93 cases pending at the end of the fiscal year.

Under the Attorney General's direction, the Division seeks to achieve a just and reasonable solution to each dispute as efficiently as possible, 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 may lead to increased and unnecessary expense to the Commonwealth, as well as inconvenience and hardship for the petitioner. 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.

Although the interest of the Division is necessarily focused to a large extent on matters relating to real property, it is by no means restricted to the acquisition and distribution of land alone. In addition to drafting and filing legislation dealing with the problem of pollution of tidal and tideland waters, the Division is currently engaged in the preparation of arguments to be brought before the Supreme Court of the United States. The case, *United States v. Maine, et. al.*, involves the claim of Massachusetts and other states along the Eastern Seaboard that the seaward jurisdiction of a sovereign state extends beyond the three mile limit. In conjunction with this, the Division organized the Atlantic Seabord Conference of Attorneys General, which Attorney General Quinn now chairs. The case is of great significance not only because it is brought within the original jurisdiction of the Supreme Court (in the history of

the United States there have been but thirty-five instances of such jurisdiction), but also because of the potential benefit to the involved states which would be derived from the reported quantity of natural resources located within the Continental Shelf.

With respect to its role as counsel for the various state agencies, the Division provides the Real Estate Review Board with a legal advisor who aids the Board in takings of government-owned land for highway purposes. In such cases Division attorneys are called upon to testify before the executive council before land damage payments are approved. Also, a member of the staff serves as the Attorney General's representative to the Commission on Eminent Domain which reviews proposed legislation in this field.

Employment Security

The Division works closely with the Massachusetts Division of Employment Security. It prosecutes employers who are delinquent in paying employment security taxes and employees who file and collect on fraudulent claims for unemployment benefits. The vigorous prosecutions made by this Division have resulted in the recovery of substantial sums of money for the Commonwealth.

During the fiscal year, *813* cases were handled by this Division. 558 cases were on hand at the start of the year and *255* new cases were received during the year, of which *191* were employer tax cases and *64* were fraudulent claims cases.

280 cases were closed during the fiscal year, of which *225* were employer tax cases and *55* were fraudulent claims cases, leaving a balance of *533* cases on hand at the end of the fiscal year. Monies collected totaled *$170,793.78* from employer tax cases and *$35,275.50* from fraudulent claims cases, making a total recovery of *$206,069.28*. At the beginning of the fiscal year there were no cases pending in the Supreme Judicial Court; none were added during the year.

The Division is charged with the duty of pursuing those individuals found to be in violation of the Employment Security Law. During this fiscal year the Division waged an energetic and forceful program in handling all cases referred to it for criminal prosecution. At the same time the Division has maintained the policy of giving an erring individual, corporation or business entity every opportunity to make a settlement out of court. Concentrated office conferences are conducted with the principals involved to determine whether or not criminal proceedings should be initiated. Criminal prosecutions are brought against those failing to cooperate with the terms of agreement made by this office, but only after they have had an opportunity to discuss the matter thoroughly. During this fiscal year, *120* complaints involving *784* counts of tax evasion, totaling *$211,959.82* in monies due the Commonwealth, were brought against *96* employers. Complaints involving *575* counts of larceny were brought against *36* individuals found collecting unem-

ployment benefits under fraudulent claims totaling *$32,130.00* in monies taken from the Commonwealth.

In addition, 13 investigations were made into the whereabouts of defendants who had defaulted appearance in outstanding court actions brought by the Division. Eighty percent of the investigations resulted in success, and warrants were served upon the defendants. Of particular note was an investigation involving the Columbia Car Corporation. The Human Rights Division of the Boston Mayor's Office, representing a group of Spanish speaking workers employed by the corporation, contended that the firm was engaged in unlawful employment practices. Investigatory hearings resulted in the matter being referred to the Department of Labor and Industries to enforce the fair labor practice laws.

Because of increased prosecutions resulting in more convictions, substantial sums of money were collected in fiscal 1971. Employers and employees were made aware of the penalties and restrictions imposed by the courts, and a marked decrease in the number of overall violations was a direct result. Employers realized that state taxes must be paid; claimants have voluntarily returned money owed to the Commonwealth.

Environmental Protection

On January 20, 1971, Attorney General Quinn created the Division of Environmental Protection by administrative order. It is hoped that the General Court will act favorably on legislation filed in this session formally to create the division.

English anti-pollution statutes date back to at least the thirteenth century. The development of a substantive body of law, however, did not follow. Although Massachusetts' pollution statutes often serve as models for other states, today we are sometimes left with legal doctrines developed in past eras, in response to markedly different demands, which frustrate creative redress of environmental injury. The Attorney General has limited statutory and traditional common law authority to prevent or remedy public nuisances, but modern technology and the seriousness of modern environmental crises far outstrip the usefulness of this legal tool. The present state regulatory structure which is called upon to react to society's new environmental awareness is spread among several state agencies. The authority of the Attorney General to prosecute violations of the regulations of these agencies on his own initiative is not clear. The bill which would formally create the Division of Environmental Protection would clarify this authority. At the same time it would not jeopardize the present close working relationship between the Division and those state agencies which the Division represents.

Just prior to the creation of the Division the caseload was approximately sixty, then handled by the Division of Health, Education and Welfare. It was this sizeable and demanding caseload, a massive increase over the six cases pending when Attorney General Quinn assumed office in January 1969, which led the Attorney General to dis-

solve the Division of Health, Education and Welfare, transfer all non-pollution functions to the Administrative Division, and delegate responsibility for all environmental matters to a Division devoted exclusively to representation of the Commonwealth's environmental needs. No court decisions adverse to the Commonwealth have been encountered. Since its creation the Division has successfully closed twenty-two cases, thirteen dealing with air pollution, eight with water pollution, and one with wetlands protection.

In the past five months the Division has grown to six assistant attorneys general responsible for a caseload of almost eighty pending or prospective court cases. The Division serves as in-court legal counsel for several state agencies charged with abating pollution, including the Bureaus of Air Use Management, Community Sanitation, and Water Supply and Water Quality in the Department of Public Health, and Divisions of Water Pollution Control, Fish and Game, Marine Fisheries and Conservation Services in the Department of Natural Resources. On behalf of these environmental agencies, the Division regularly seeks injunctions from the Superior Court against municipalities and companies which have violated state laws or regulations designed to protect the environment.

In these cases the most difficult task for the Division is to accommodate the goal of preserving and developing the Commonwealth's vast industrial capacity with the goal of making certain that pollution is not an inheritance of the next generation. Another troublesome element is posed by the common financial plight of our cities and towns. Absent an awareness of what the law requires and where financial assistance can be found, protecting the environment can cause a city or town a massive financial burden.

Where the law is clear and where the law is violated, however, court action is required. In the majority of enforcement cases handled by the Division, the order involved (for example, requiring construction of a sewage treatment facility or abatement of unnecessary smoke pollution) is not challenged. Not only is judicial review of the agency order rarely sought under the Administrative Procedure Act, Mass. G. L. c. 30A, but in many cases, especially regarding water pollution, the order is one agreed to by the offending municipality or company. As a result, the Commonwealth's burden in enforcement proceedings is considerably eased.

The active caseload of the Division presents an array of environmental problems which demand skill in criminal and civil law enforcement, federal and state law, municipal and corporate finance and many scientific disciplines. Air pollution and water pollution demand the largest portion of the Division's attention. Presently there are thirty active air pollution cases (eighteen against industry, twelve against municipalities) and twenty-six water pollution cases (ten against industry, sixteen against municipalities). Court actions necessary to protect Massachusetts wetlands number fifteen, all against individuals or companies. As well, the Division is responsible for eight additional court or administra-

tive matters involving atomic energy licensing proceedings, conspiracy by automobile manufacturers against development of anti-pollution measures, regional solid waste disposal crises, and chlorination.

Other recent Division actions include:

— advising the Supreme Judicial Court on the constitutionality of state legislation banning SSTs from Massachusetts airports.

— commencing a statewide study of the crisis in municipal financing of air and water pollution treatment measures.

— intervening on behalf of the Commonwealth in Atomic Energy Commission proceedings on applications by Vermont Yankee Nuclear Power Corporation and Boston Edison Company, respectively, to operate nuclear power stations at Vernon, Vermont (on the Connecticut River) and Plymouth, Massachusetts.

— enlisting the support of the New England Attorneys General and petitioning the Federal Trade Commission regarding proposed trade regulations on labeling of the phosphate content of detergents.

— securing from Suffolk Superior Court contempt citations against two municipalities, Grafton and Blackstone, which had violated court decrees ordering construction of pollution treatment plants.

— conducting a residential survey of the physical and mental effects of exposure to airplane noise on persons living in twelve communities near Logan International Airport.

Industrial Accidents

The Industrial Accidents Division serves as legal counsel to all the departments of 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 fiscal year 8,509 accident reports were filed regarding state employees, an increase of 1,192 reports, or approximately 16% over fiscal 1970. This increase represents a continuing trend that is reflected by an overall 35% increase in accident reports since fiscal 1967. The Division reviewed and approved 1,144 new claims for compensation in lost-time disability cases, and 72 claims for the resumption of compensation.

The Division appeared for the Commonwealth on 586 formal assignments at Industrial Accident Board hearings and in the courts, repre-

senting an increase of 158 appearances or approximately 37% over the prior fiscal year. The Division's 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 for the continuing review of accepted cases.

Disbursements by the Commonwealth for state employees' industrial accident claims, including accepted cases, board and court decisions and lump sum settlements, for the period July 1, 1970 through June 30, 1971, were as follows:

Incapacity compensation (including awards for disfigurement and loss of bodily function)	$1,920,154.25
Medical Expenses	713,690.11
Total of all disbursements	$2,633,844.36

In its capacity as custodian of the "second injury fund" under Sections 65 (General Fund) and 65N (Veterans' Fund) of chapter 152, the Division represents the Commonwealth before the Industrial Accident Board regarding petitions filed by insurers and self-insurers for reimbursement out of this fund. Also, in connection with this fund the Division has responsibility for enforcing the obligation of insurers and self-insurers to pay into the fund in fatal industrial accident cases where the issue of liability is disputed. Special emphasis was placed upon this role during the fiscal year. The fund closed with an unencumbered balance of $573,744.13, a net increase of $162,200.59 over the previous fiscal year which insures that the fund will continue to function at no expense to the taxpayers.

Pursuant to section 11A, (Acts of 1950, c. 639, as amended) the Division represents the Attorney General as a sitting member on the Civil Defense Claims Board. During the fiscal year over 25 claims were acted upon awarding compensation to unpaid civil defense volunteers who were injured while in the line of their volunteer training and duties.

Public Charities

During the fiscal year, the Division reviewed 2,286 probate accounts of trustees, 702 petitions for probate of wills, 491 accounts of executors, administrators w.w.a., etc., and 296 miscellaneous probate matters such as petitions to sell real estate and appoint trustees. In addition, 205 new petitions for public administration were dealt with and 235 pending public administration cases were closed. A total of $178,209.45 was paid into the State Treasury as escheats from public administration and other estates.

Annual financial reports and accounts filed under M. G. L., c. 12, § 8F totalled more than 5,132. The processing of 405 applications for Cer-

tificates to Solicit Contributions from the Public for Charitable Purposes resulted in the issuance of such Certificates.

Because of the amendment to M. G. L., c. 59, § 5, Third (b) effected by St. 1970, c. 219, § 1 providing that exemption of charitable organizations from local real estate taxes shall be available only if the organization has filed annual financial reports with the Division as required by M. G. L., c. 12, § 8F, many organizations which had not been filing with the Division have started to do so.

The provision of the 1969 Federal Tax Reform Act which requires "private foundations" to file copies of their federal returns with the Division has also increased the number of organizations filing. This increase has overburdened the Division's staff and has required that the staff be increased and more space and facilities be furnished.

Many court cases resulted from the provisions of the 1969 Federal Tax Reform Act which imposed income taxes on "private foundations."

Several court cases during the fiscal year reflected the adverse effects on charitable institutions of great increases in the cost of operation resulting from inflationary economic conditions and changes in social conditions.

We assented to a decree for the dissolution of the *St. Francis Xavier High School in Concord* and the transfer of property to the Boston Archdiocese. *Assumption Preparatory School in Worcester*, another victim of the high cost of operation of secondary parochial schools, was authorized to transfer its property.

In connection with the secularization of Merrimac College, assent was given to transfer the title to the Chapel and other buildings to the Augustinian Brothers.

Petitions to effect changes in order to minimize taxes under the Tax Reform Act include, among others, those brought by the trustees under the will of *Lotta Crabtree*. Other similar matters related to the *Dana Foundation*, the *Oaks Foundation*, the *James W. Sherman Trust u/d.*, and the *George Sherman Trust u/w*. Amendments to the *Attleboro Trust*, community trust, to meet the requirements of the Tax Reform Act were approved.

To avoid taxes and various reporting requirements, petitions were brought for the approval of transfers of trust funds to operating charities. The funds of the *Trustees of the Consumptives Home in Boston* were transferred to the Deaconess Hospital; those of the *Waltham Training School for Nurses* to the Waltham Hospital; and those of the *Huntington Institute for Orphan Children, Inc.* to the *Boston Children's Services Association.*

In proceedings relating to the over $1,000,000 *Dorothy Melcher Sneath Foundation* for scholarships in private secondary schools, a decree was entered relieving the trustees from a provision for the accumulation of one-half the income annually. Under the decree the possibility of higher taxes under the Tax Reform Act was avoided and larger sums were made available for scholarships.

The Division co-operated with a bar group in drafting a bill to enable "private foundations" to meet the requirements imposed by the Tax Reform Act, as a condition to lower rates of taxation on income. The Attorney General was a co-petitioner on the bill. The measure was enacted by Chapter 367 of the Acts of 1971, and the provisions are now Chapter 68A of the General Laws, entitled "Limitations Upon The Conduct of Certain Trusts and Corporations Having Charitable Interests."

Extensive work was done to collect material for a revised edition of the 1965 Directory of Foundations. However, it was not possible to obtain financial support for a new edition from foundation sources nor an appropriation from the Legislature to defray the costs of editing and publishing a new and revised printed edition of the Directory. It is planned, therefore, to use the material as effectively as possible by preparing and issuing a supplement to the Directory listing the larger "broad purpose" foundations established since 1965, and also listing the larger trusts, such as those providing funds for scholarships.

SPRINGFIELD OFFICE

The Springfield Staff consists of three Assistant Attorneys General, one Deputy Assistant Attorney General, three Special Assistant Attorneys General, one Special Assistant Attorney in Consumer Protection who also works with the Massachusetts Commission Against Discrimination, an Investigator in Consumer Protection, one Trooper in Criminal Division and two administrative personnel. The office handles matters of concern to the Attorney General in the Commonwealth's four Western Counties: Hampden, Hampshire, Berkshire and Franklin. The Office's primary concerns are eminent domain, consumer protection and criminal matters. With the exception of consumer protection matters, the origin of the Office's workload is the Attorney General's Boston office.

The following land damage cases were returned to Boston as completed by settlement or trial.

HAMPSHIRE	1
BERKSHIRE	3
FRANKLIN	9
HAMPDEN	19

Fifteen more cases were settled in Hampden County which only need to have settlement papers typed and filed in Court before they can be returned to Boston.

Listed below are other cases which have been worked on in the Springfield office.

Industrial Accident Cases
9 cases returned as completed
2 cases pending

Collection Cases
2 cases returned as completed

Tort Cases
7 cases returned as completed

Contract Cases
2 cases returned as completed

Victim of Violent Crime Cases
3 cases pending

Pollution Cases
1 case pending

H.E.W. Cases
One returned to Boston as completed.

Seven rendition hearings have been handled by the Office. The Trooper in the Criminal Division is constantly investigating criminal offenses and cooperates with all law enforcement agencies in the area.

In the field of consumer protection, the following cases were dealt with by the Office since the first of the year:

OPENED
876 cases

CLOSED
825 cases

PENDING
205 cases

SAVINGS
$113,955.52

(The closed and pending figures include cases that were carried over from the previous year.)

Consumer protection is available 24 hours a day, seven days a week. The office has averaged 30 telephone calls per day.

Aside from the Office's three main concerns, the Office becomes involved in varied and divergent aspects of the law. Town Councils fre-

quently call regarding zoning problems, liquor licensing, and conflicts of interest. The Office assists the Department of Welfare upon request. The Office staff attends night meetings of Town Selectmen when requested to do so in order to explain Public Health Laws, State Building Requirements, and other legal matters. The staff fulfills speaking engagements in cooperation with the Drug Abuse Education Program and in the area of consumer protection.

Our total correspondence, outside of consumer complaints, averages 90 contacts per month, and ranges from explaining uniforms support, school prayers, pornography, and the Vietnam War, to birth control, abortion, civil liberties, and rights of privacy. The Better Business Bureau of Springfield has and continues to engage in the practice of telling all of their complainants to call our office. On some days this practice results in many calls not within our jurisdiction. It has been our practice, however to reply and answer all calls within 24 hours whenever possible.

Torts, Claims, and Collections

The Division represents the Commonwealth, its officers and employees in tort actions arising from the performance of their official duties. The actions range from motor vehicle actions, malicious prosecution and arrest, false imprisonment, medical malpractice, assault and battery, libel and slander, road defects, deer damage claims and 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 involve motor vehicle accidents. During the fiscal year 243 cases were tried or settled and $147,569.81 was paid to claimants as compared to 262 and 272 cases tried or settled, with $111,481.51 and $129,437.80 paid respectively for the years 1969 and 1970. Also, 17 highway defect claims and 91 moral claims were disposed of at a cost of $3,536.24 and $7,839.47 respectively.

Under Chapter 258A, an act to provide for the compensation of Victims of Violent Crimes, the Division has the responsibility for investigating and reporting to the courts on all claims for out-of-pocket loss for medical bills, loss of earnings or support resulting from injuries received by victims of violent crimes. One hundred and twenty-five claims were filed in 1971 as compared to 105 and 195 for the fiscal years 1969 and 1970 respectively.

The Collections Section of the Division recovered $476,607.73 on behalf of the Commonwealth for the fiscal year as compared to $326,989.37 and $265,525.21 for the fiscal years 1969 and 1970. Principally, the Section handles claims for the care and support of patients at state hospitals and for damage caused to state property.

The following is a table of cases reflecting the Division's work:

Departments	*Recovered*	*Cases*
Dept. of Mental Health	$144,520.55	62
Dept. of Public Health	40,125.49	196
Dept. of Public Works	44,516.91	336
Metropolitan District Commission	18,705.64	88
Dept. of Natural Resources	200,000.00*	1
All other State Departments	28,739.14	171
TOTAL	$476,607.73	854

NOTE: 421 — number of completed claims (paid in full).

NOTE: 1,155 — number of claims referred to Collections Section by various departments of the Commonwealth.

NOTE: 757 — number of claims disposed of as being uncollectable.

Veterans

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

The Division advises all veterans and veterans' groups of their legal rights and obligations.

* The Division recovered $200,000.00 in damages for the Commonwealth for injury to the seafile of Buzzard's Bay resulting from an oil spill which occurred in September of 1969.

In the same case, the division assisted the Town of Falmouth in obtaining a settlement of $100,000.00 for damage to its shellfish.

APPENDIX

Bills Proposed by Attorney General and Enacted by the 1971 Legislature.

RESOLVES:

—Chapter 23. RESOLVE PROVIDING FOR AN INVESTIGATION AND STUDY BY A SPECIAL COMMISSION RELATIVE TO THE LABOR LAWS OF THE COMMONWEALTH.

ACTS:

—Chapter 37. AN ACT REQUIRING THE SUBMISSION OF CERTAIN INFORMATION RELATING TO HOME RULE CHARTERS WITH THE ATTORNEY GENERAL.

—Chapter 130. AN ACT DECREASING THE TIME WITHIN WHICH THE ATTORNEY GENERAL SHALL NOTIFY CERTAIN PERSONS OF INTENDED ACTION UNDER THE LAW REGULATING BUSINESS PRACTICES FOR CONSUMERS PROTECTION.

—Chapter 254. AN ACT ELIMINATING THE REQUIREMENT THAT CITY AND TOWN CLERKS RECORD IN THE RECORD OF MARRIAGES THE COLOR OF ALL PARTIES MARRIED IN THEIR CITIES AND TOWNS.

—Chapter 325. AN ACT REQUIRING LICENSED WAREHOUSEMEN TO NOTIFY DEPOSITORS OF FAMILY, PERSONAL OR HOUSEHOLD GOODS THAT SUCH GOODS ARE NOT COVERED BY INSURANCE AGAINST FIRE OR THEFT.

—Chapter 426. AN ACT PROVIDING FOR LIFE IMPRISONMENT OF A PERSON GUILTY OF ANY BOMBING OFFENSE WHICH RESULTS IN THE DEATH OF A PERSON.

—Chapter 655. AN ACT DEFINING THE TERM "FLAG OF THE UNITED STATES" IN THE LAW RELATIVE TO THE MISUSE OF SAID FLAG.

—Chapter 805. AN ACT REGULATING THE LAW RELATIVE TO CONSUMER CREDIT REPORTING.

—Chapter 818. AN ACT PROVIDING FOR TAKING AUTHORITIES TO PAY SUMS LESS THAN FIVE HUNDRED DOLLARS TO ANY PERSON IN WHOM THE RIGHT TO DAMAGES FOR LAND TAKING HAS VESTED IN ORDER THEREBY TO PREVENT A HARDSHIP ON SAID PERSON.

—Chapter 996. AN ACT REQUIRING CERTAIN AMUSEMENT LICENSEES TO PROVIDE BY INSURANCE FOR THE PAYMENT OF WORKMEN'S COMPENSATION AS A PREREQUISITE TO LICENSING.

—Chapter 1025. AN ACT REGULATING MULTI-LEVEL DISTRIBUTION COMPANIES.

—Chapter 1071. AN ACT PROVIDING FOR THE REGULATION OF DRUGS AND CONTROLLED SUBSTANCES.

—Chapter 1076. AN ACT ESTABLISHING A COMPREHENSIVE PROGRAM FOR THE TREATMENT AND REHABILITATION OF INTOXICATED PERSONS AND ALCOHOLICS AND ABOLISHING THE CRIME OF PUBLIC INTOXICATION.

—Chapter 1096. AN ACT REQUIRING PRIVATE BUSINESS SCHOOLS TO BE LICENSED BY THE DEPARTMENT OF EDUCATION.

Number 1 July 9, 1970

Honorable Leon Charkoudian
Commissioner of Community Affairs
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

Dear Commissioner Charkoudian:

You have requested my opinion with respect to certain questions arising from the enactment of G. L. c. 40B, §§ 20-23, as inserted by St. 1969, c. 774. You inform me that the "Housing Appeals Committee," established within the Department of Community Affairs by G. L. c. 23B, § 5A, has several appeals now pending, the decisions in which turn on the definition of "limited dividend organization" as that term is used in G. L. c. 40B, § 21. You have, therefore, asked the following questions:

> "1. Has the Commissioner of Community Affairs or the Housing Appeals Committee the authority to define or interpret any of the terms or language contained in Chapter 774 of the Acts of 1969?
>
> "2. If neither the Department nor the Committee has such authority, would the following definition of 'limited dividend organization' be consistent with the laws and requirements that govern eligibility of applicants under Chapter 774 of the Acts of 1969, and with current practice in the field of subsidized housing programs?
>
> " 'Limited Dividend Organization' means any applicant which (a) proposes to sponsor housing under Chapter 40B, and (b) is not a public agency, and (c) is eligible to receive a subsidy from a State or Federal agency after a comprehensive permit has been issued."
>
> "3. If the preceding definition is not consistent with the laws and requirements that govern eligibility of applicants under Chapter 774 of the Acts of 1969, and with current practice in the field of subsidized housing programs, then what is a limited dividend organization?"

For the reasons hereinafter stated, it is my opinion that the Commissioner may, by regulation, interpret statutory language which is or may be the basis of appeals before the "Housing Appeals Committee," but the "Housing Appeals Committee" may make no such interpretations.

It is settled in this Commonwealth that a Commissioner of an administrative agency who is charged with the administration of a statute may, in the absence of judicial determination, interpret the provisions of that statute. The Supreme Judicial Court in *Cleary* v. *Cardullo's Inc.*, 347 Mass. 337, 344 (1964) stated:

> "The duty of statutory interpretation is for the courts. Nevertheless, particularly under an ambiguous statute . . .,

> the details of legislative policy, not spelled out in the statute, may appropriately be determined, at least in the first instance, by an agency charged with administration of that statute."

See, also, *Op. Atty. Gen.*, Dec. 17, 1964, at 153.

> An administrative agency may interpret statutes in accordance with G. L. c. 30A, through its published written decisions or interpretations. The appropriate manner to interpret ambiguous language is by regulation rather than less formal means. *Cleary* v. *Cardullo's Inc., supra.* In this regard, I note that the rule-making powers conferred on the Commissioner of Community Affairs are quite broad. In that respect, G. L. c. 23B, § 6 provides, in pertinent part:
>
> "The commissioner shall make, and from time to time revise, regulations for the conduct of the business of the department, and such other regulations as may be required by law."

In turn, G. L. c. 23B, § 5A establishes the "Housing Appeals Committee" to hear all petitions for review filed under G. L. c. 40B, § 22 in accordance with rules and regulations established by the Commissioner.

Clearly, the Department of Community Affairs, acting through its Commissioner, is under a statutory obligation to promulgate rules and regulations relative to all proceedings before the "Housing Appeals Committee." It is my opinion, therefore, that the Commissioner may promulgate regulations interpreting any terms or language which properly come before the "Housing Appeals Committee," when an interpretation would facilitate and aid the discharge of the Committee's statutory functions. An interpretation of the phrase, "limited dividend organization" appears to fall within this category.

Your first question, in addition to asking whether the Commissioner may define or interpret terms contained in c. 40B, §§ 20-23, asks whether the "Housing Appeals Committee" has the same power. In my opinion the answer to that portion of your question must be in the negative. General Laws c. 23B, § 1 provides that:

> "The commissioner may authorize any *officer* of the department to exercise in his name any power, or to discharge in his name any duty, assigned to him by law, and he may at any time revoke such authority." (Emphasis supplied.)

General Laws c. 23B, § 5A, concerning membership of the "Housing Appeals Committee," provides in part:

> "There shall be within the department a housing appeals committee, consisting of three members to be appointed by the commissioner, of whom one shall be an *officer or employee* of the department, and two members to be appointed by the Governor . . . " (Emphasis supplied.)

In construing G. L. c. 23B, §§ 1 and 5 A together, it is my opinion that the "Housing Appeals Committee" cannot exercise the Commissioner's power to interpret statutory language. Pursuant to G. L. c. 23B, § 1, the Commissioner may only delegate his powers to one who is an officer of the department. Although an "officer" may be a Committee member, the "Housing Appeals Committee" cannot be regarded as an "officer" of the Department of Community Affairs, as that term is used in G. L. c. 23B, § 1.

In conclusion, then, it is my opinion that the Commissioner may, by means of an appropriate regulation, interpret ambiguous language contained in G. L. c. 40B, §§ 20-23, when such an interpretation is necessary to facilitate the consideration of appeals before the "Housing Appeals Committee" of the Department of Community Affairs. In view of my answer to your first question, no answer is required to your questions 2 and 3.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 2 July 20, 1970

Mr. John P. Harrington, *Superintendent*
Soldiers' Home in Holyoke
Holyoke, Massachusetts 01040

Dear Mr. Harrington:

You have requested my opinion with respect to five questions relating to the Soldiers' Home in Holyoke which have arisen as a result of the amendment of G. L. c. 6, § 71 by c. 470 of the Acts of 1969.

General Laws c. 6, § 71, as amended, provides in pertinent part:

> "Said board of trustees [of the Soldiers' Home] shall have the management and control of said home . . . In the management and control of said home as aforesaid, said board of trustees shall (1) adopt, issue and promulgate reasonable rules and regulations governing outpatient treatment at, admission to, and hospitalization in, said home, and (2) appoint a superintendent and a medical director. The superintendent shall be the administrative head of the home and in charge of the domiciliary facilities but shall not have any control or supervision of the hospital, medical, surgical and outpatient facilities therein. He shall, subject to the approval of the board of trustees, appoint and may remove a treasurer and assistant treasurer, each of whom shall give bond for the faithful performance of his duties . . . The medical director shall be the head of the hospital and in charge of the medical, surgical and outpatient facilities. He shall appoint and may remove such physicians, nurses and other medical staff as he

> deems necessary for the proper and efficient operation of the facilities of the home under his charge and supervision . . ."

For convenience, I will consider your questions as they appear in your request.

1. Your first question relates to that part of § 71 which states that "The superintendent shall be the administrative head of the home . . ." You ask whether the word "home" as used in this context connotes the Soldiers' Home in Holyoke "as the complete and entire state agency." I am of the opinion that the question requires no extended discussion, and I answer this question in the affirmative.

2. Your second question relates to that part of § 71 which provides as follows:

> ". . . The medical director shall be the head of the hospital and in charge of the medical, surgical and outpatient facilities. He shall appoint and may remove such physicians, nurses and other medical staff as he deems necessary for the proper and efficient operation of the facilities of the home under his charge and supervision . . ."

You ask whether the word "home" as used in this context refers only to the hospital section within the entire state agency, viz., the Soldiers' Home in Holyoke. The word "home" here means the entire state agency but in this context it is limited by the words "operation of the facilities . . . under his charge and supervision." Accordingly, the medical director is the head of the hospital and in charge of the medical, surgical and outpatient facilities within the "home."

Since questions one and two are answered in the affirmative, you ask in an unnumbered question whether the personnel who are in the hospital, including the medical director, are subject to the administrative direction of the superintendent when said direction is not related to the professional care of patients.

It is clear from a reading of § 71, as amended, that the superintendent is the administrative head of the Soldiers' Home in Holyoke. Thus, he is responsible for the management and operation of the entire home on an administrative level. However, the same section expressly provides that he shall not have control or supervision of the hospital, medical, surgical and outpatient facilities. Supervision of the hospital and other medical facilities is delegated to the medical director. Accordingly, in answer to your unnumbered question, it is my opinion that while the superintendent is responsible for the administration of the home, he cannot, in the performance of his duties, interfere in the control and supervision of the hospital or other medical facilities. I am unable, absent more facts, to give a more definite answer to your question, and it would appear that disputes as to control or supervision of personnel who are in the hospital relating to matters other than the professional care of patients would have to be resolved on a case by case basis, bearing in mind the division of powers and duties between the superintendent and medical director as set forth in G. L. c. 6, § 71.

3. As the basis of your third question, you state that presently the superintendent certifies under the penalties of perjury that all vouchers processed for payment and charged against appropriations are true and correct and that there has been compliance with all laws of the Commonwealth governing the disbursement of public funds. Since the superintendent, under the provisions of § 71, as amended, now has no control over the hospital and medical facilities, you ask whether the said superintendent will be held accountable and responsible and must certify under the penalties of perjury with respect to expenditures of state funds for the operation of a facility over which he has no control or supervision or whether two separate appropriations are necessary.

As the administrative head of the entire home with the power to appoint and remove a treasurer and an assistant treasurer, the superintendent has the ultimate responsibility for the fiscal operation and management of the entire home, including the medical facilities. It is my opinion that the superintendent can determine whether expenditures made for the benefit of the medical facilities are true and correct without interfering with the medical director's supervision of the hospital and other medical facilities. Accordingly, the superintendent must certify as to all expenditures and there is no need for two separate appropriations.

4. In your fourth question you state that in 1952 a determination was made that the nursing home and dormitory sections of the Soldiers' Home comprised the domiciliary unit of the home and the acute medical and surgical wards comprised the hospital unit. This determination was apparently made by the board of trustees in order to qualify for Federal aid to state homes, and you now ask whether the nursing home section still remains a part of the domiciliary unit.

Since the board of trustees have the management and control of the home and are responsible for adopting rules governing out-patient treatment at, admission to, and hospitalization in, said home, it is my opinion that this is a question which must properly be determined by the board pursuant to its powers of managerial oversight found in G. L. c. 6, § 71.

5. In your fifth question you ask whether as administrative head of the home and the person in charge of the domiciliary facility of the home, you can direct or authorize the transfer of a member from the domiciliary unit to the hospital unit when, in your opinion, such a transfer is in the member's best interest.

In my opinion, the answer to your fifth question is "no." Such a determination clearly involves a medical decision, and in this respect I note that the medical director has charge and control of the hospital unit. It is my further opinion that although the superintendent cannot direct or authorize the transfer of a member from the domiciliary unit to the hospital unit, he may certainly call a situation where such a transfer might be appropriate to the attention of the medical director and request him to make the determination. Finally, I note that the problems incident to

such a transfer could be dealt with by the promulgation of rules by the board of trustees pursuant to their rule-making powers referred to *supra*.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 3 July 30, 1970

Honorable William F. Powers
Commissioner of Public Safety
1010 Commonwealth Avenue
Boston, Massachusetts 02215

Dear Commissioner Powers:

Your predecessor requested my opinion whether qualified applicants for the position of State Police Detective Lieutenant Inspector, upon appointment to that position, could receive credit for prior service in police departments of cities and towns of the Commonwealth, so that such applicants might be placed in a step in grade above that of the minimum in the grade to which they are appointed.

General Laws c. 30, § 45 provides, in pertinent part:

> "The director of personnel and standardization shall establish, administer and keep current and complete an office and position classification plan and a pay plan of the commonwealth.
>
> . . .
>
> "(6) Subject to the approval of the commissioner of administration, the Director of Personnel and Standardization shall make, and from time to time may amend, rules governing the establishment and administration of the said classification and pay plans, and credits due officers or employees, subject to this section, for previous services. Such rules, and amendments thereto, shall be open to public inspection in the files of the bureau of personnel and standardization and copies thereof shall be made available to officers and employees of the commonwealth upon request."

Pursuant to the statutory mandate of G. L. c. 30, § 45, the Director of Personnel and Standardization has established an office and position classification plan and a pay plan of the Commonwealth and has promulgated rules referred to in G. L. c. 30, § 45(6). Rule 9b of the director's rules provides:

> "When an employee is entering the service of the Commonwealth for the first time or is re-employed, after continuous separation of three years or more from the service of the Commonwealth, which Director of the Bureau of Personnel and Standardization finds was caused by reasons other than those listed in Rule 9C IV, he shall receive the minimum Sal-

ary Rate in the Grade to which he is allocated in the General Salary Schedule in force at time of employment or re-employment. The above provision shall apply on all Emergency employment whether original entry or otherwise."

The question for resolution is thus whether a person appointed to the position of State Police Detective Lieutenant Inspector who has previously served in a police department of a city or town of the Commonwealth "is entering the service of the Commonwealth for the first time" and must, therefore, receive the minimum salary rate in the grade to which he is allocated. It is my opinion, for the reasons hereinafter stated, that service in a police department of a city or town of the Commonwealth is not service of the Commonwealth, and, accordingly, a person appointed to the position of State Police Detective Lieutenant Inspector may not receive credit for such prior service. Rule 9b therefore applies, and a person so appointed must be placed in the minimum salary step of the grade to which he is appointed.

I think it clear that persons appointed as police officers of the cities and towns of the Commonwealth are employees of the respective cities and towns and not of the Commonwealth, they are appointed and employed by the local municipalities involved. Thus, the terms and conditions of employment as a police officer may be set by each appointing authority. *McAuliffe* v. *New Bedford,* 155 Mass. 216, 220. In my view, the identity of the appointing authority is controlling. *Phillips* v. *Boston,* 150 Mass. 491, 494.

In considering the question presented, I have examined G. L. c. 30, § 46, paragraph 5 and 5A and find that they are inapplicable. Paragraph 5 pertains to emergency recruitment, which is not the situation you present, and paragraph 5A permits recruitment of professional personnel, primarily in medical and technical positions. While the position of State Police Detective Lieutenant Inspector involves the performance of professional duties, it does not appear to fall within the category of "professional personnel" as that term is used in paragraph 5A.

In conclusion, then, it is my opinion that applicants for the position of State Police Detective Lieutenant Inspector may not receive credit for prior service in police departments of cities and towns of the Commonwealth.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 4 July 30, 1970

Mrs. Mabel A. Campbell
Director of Civil Service
State House
Boston, Massachusetts 02133

Dear Mrs. Campbell:

You have requested my opinion whether the positions of Administrator of Field Operations of Authority Audits and the Administrator of

Field Operations of State Audits in the office of the State Auditor are subject to the provisions of General Laws, Chapter 31, the Civil Service Law.

In my opinion, the above-entitled positions are subject to the Civil Service Law and Rules. These positions were created by G. L. c. 11, § 5, which states:

> "He [the Auditor of the Commonwealth] may, subject to confirmation by the governor, appoint . . . a second, third and fourth deputy auditor . . . The auditor may employ an administrator of field operations of state audits and an administrator of field operations of authority audits to assist him in the performance of his duties."

General Laws c. 31 confers on the Civil Service Commission jurisdiction to make rules to:

> "regulate the selection and employment of persons . . . in the official service . . . of the commonwealth . . ." G. L. c. 31, § 3(l).

It is evident that persons filling the positions referred to in G. L. c. 11, § 5 are in the official service of the Commonwealth. They are thus subject to the Civil Service Law and Rules unless otherwise exempted. General Laws c. 31, § 5 does exempt certain positions. That section provides, in pertinent part:

> "No rule made by the commission shall apply to the selection or appointment of any of the following:
>
> . . .
>
> " . . . officers appointed by the governor, or whose appointment is subject to approval by the governor . . .
>
> . . .
>
> "Such others as are by law exempt from the operation of this chapter."

Even assuming, *arguendo*, that the persons appointed to the position of administrator of field operations of authority audits and the position of administrator of field operations of state audits are considered officers of the Commonwealth, it is, nevertheless, apparent from a reading of G. L. c. 11, § 5 that their appointment is not subject to approval by the Governor. Nor does that section exempt the positions from the operation of the Civil Service Law and Rules. I, therefore, conclude that the positions to which you refer must be filled in accordance with the Civil Service Law and Rules.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 5 August 4, 1970

The Honorable John F. X. Davoren
Secretary of the Commonwealth
State House
Boston, Massachusetts

Dear Mr. Secretary:

You have requested my opinion whether The Federal Voting Rights Act (Public Law 91-285, approved June 22, 1970) has nullified the provision found both in the Constitution of the Commonwealth and the General Laws (see Article XX of the Articles of Amendment to the Constitution and G. L. c. 51, §§ 1, 44) that a citizen must be able to read the Constitution of the Commonwealth in the English language prior to being registered to vote. It is my opinion for the reasons hereinafter stated that the requirement has been nullified by the Federal Act.

Section 201 of P. L. 91-285 provides:

> "(a) Prior to August 6, 1975, no citizen shall be denied, because of his failure to comply with any test or device, the right to vote in any Federal, State, or local election conducted in any State or political subdivision of a State as to which the provisions of section 4(a) of this Act are not in effect by reason of determinations made under section 4(b) of this Act.
>
> "(b) As used in this section, the term 'test or device' means any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class."

Article VI of the Constitution of the United States provides in pertinent part:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding."

First, I note that the provision of section 4(a) of the 1965 Voting Rights Act (79 Stat. 438; 42 U.S.C. § 1973b) were not in effect within this Commonwealth prior to the enactment of the 1970 Act, nor were they made effective as a result of the 1970 amendment to section 4(b) of the Act. Secondly, I note that the provisions of section 201 of the 1970 Act (quoted *supra*) were effective upon approval, i.e., June 22, 1970.

That being the case, the provisions of section 201 of the 1970 Act were immediately applicable to Massachusetts by reason of the supremacy clause of Article VI of the Constitution of the United States if the Massachusetts Constitutional and statutory requirement that a citizen be able to read the Constitution of the Commonwealth in the English language is a test or device within the meaning of section 201(b) of the 1970 Act.

In my opinion, it is clear that the Massachusetts Constitutional and statutory requirement is a test or device prohibited by section 201 of the Federal Act. The test is therefore in conflict with an Act of Congress and cannot stand. *Gibbons* v. *Ogden*, 9 Wheat 1, 210-211. Accordingly, by virtue of the provisions of the Federal Act, use of the test prescribed by the Massachusetts Constitution and statutes has been suspended until August 6, 1975.

Yours very truly,
ROBERT H. QUINN
Attorney General

Number 6 August 5, 1970

Honorable Nathan Chandler
Commissioner of Agriculture
State Office Building
100 Cambridge Street
Boston, Massachusetts 02202

Dear Commissioner Chandler:

You have requested my opinion with respect to certain questions arising from the enactment of St. 1969, c. 807 which inserted a new paragraph (g) in G. L. c. 128, § 2. The statute is intended to promote the breeding of thoroughbred horses within the Commonwealth by authorizing the Department of Agriculture to award cash prizes to breeders of qualifying Massachusetts bred thoroughbred horses who win first, second, or third prize in horse races conducted within the Commonwealth. In your letter you state that certain portions of G. L. c. 128, § 2(g) are "not clear and there is a difference of opinion as to the intent of the law." You have therefore posed the following questions for resolution:

"(1) Does the five per cent prize mentioned in G. L. c. 128, § 2(g) refer to the prize offered by the track or the prize which the breeder of the horse receives from the Department of Agriculture?

"(2) Is the five per cent prize awarded to the owner of the stallion who sired the winning horse to be given to the owner at the time of the winning of a race or to the owner at the time of conception?

"(3) Is a foal that is dropped in the Commonwealth, but not conceived in the Commonwealth, considered to be a Massachusetts bred horse and eligible for a prize?"

Your first and second questions require an interpretation of G. L. c. 128, § 2 which provides, in pertinent part:

> "The department [of agriculture] . . . shall have power —
>
> * * * * *
>
> "(g) To aid in the promotion, development and encouragement of the breeding of thoroughbred horses, by offering as a prize to the breeder of a Massachusetts bred thoroughbred horse, a cash prize equal to twenty per cent of the first, second, or third prize according to the position in which said horse officially finished in a horse race conducted in the commonwealth, *and a further prize of five per cent of the prize awarded said horse to the owner of the stallion which sired said horse, provided said stallion stands in the commonwealth.*" (Emphasis supplied.)

The answer to your first question turns on the meaning of the word "prize" as that word is used in G. L. c. 128, § 2(g). It is a familiar canon of statutory construction that where a word occurs twice or more in the same statute its meaning and scope remain unchanged. *Booma* v. *Bigelow-Sanford Carpet Co.*, 330 Mass. 79, 82; *Marcus* v. *Street Commissioners of Boston*, 252 Mass. 331, 334-335. The word "prize" is first used in G. L. c. 128, § 2(g) in reference to the award made to the breeder of a winning Massachusetts bred thoroughbred horse by the Department of Agriculture. It is my opinion that the five per cent prize in question is a "further prize" and refers to the prize awarded by the Department of Agriculture to the breeder of a Massachusetts thoroughbred horse.

Your second question requires a determination of who is an "owner" and thereby entitled to the five per cent prize referred to *supra*. The Supreme Judicial Court, in discussing the word "owner," has stated:

> "The word is one of flexible meaning depending upon other language of the particular statute in which it is employed and the purpose and aim of the statute. It varies from an absolute proprietary interest to a mere possessory right." *Animal Rescue League* v. *Bourne's Assessors*, 310 Mass. 330, 333.

When an owner sells a stallion which has sired a Massachusetts bred thoroughbred horse, he no longer has a proprietary interest or a possessory right in that stallion. The new owner acquires all incidents of ownership, including, in my opinion, the right to the five per cent prize referred to in G. L. c. 128, § 2(g).

Finally, you ask whether a horse which is not conceived within the Commonwealth is eligible for the prize referred to in G. L. c. 128, § 2(g) as a "Massachusetts bred thoroughbred horse." In this connection, I note that the statute makes reference to the place of conception of a qualifying horse as follows:

> "The stallion shall have been based in the commonwealth at the time of the conception of said foal to the aforementioned mare." G. L. c. 128, § 2(g) (3).

There is no language in the statute that can be construed as requiring that conception take place in the Commonwealth. The effect of requiring that conception occur within the Commonwealth would be to supply an additional qualification which the Legislature failed to provide either intentionally or unintentionally. In that regard it is a well-established rule of statutory construction that "if the omission was intentional, no court can supply it. If the omission was due to inadvertence, an attempt to supply it . . . would be tantamount to adding to a statute a meaning not intended by the legislature." *Boylston Water Dist.* v. *Tahanto Regional Sch. Dist.*, 353 Mass. 81.

It is therefore my opinion that the statute cannot be construed to require that a horse be conceived in this Commonwealth in order to qualify for a prize. Thus, a foal that is dropped in the Commonwealth but not conceived in the Commonwealth, may be considered a Massachusetts bred horse and eligible for a prize under G. L. c. 128, § 2(g).

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 7 August 28, 1970

Honorable Richard E. McLaughlin
Registrar of Motor Vehicles
100 Nashua Street
Boston, Massachusetts 02114

Dear Sir:

You have requested my opinion as to your authority to permit personnel of various insurance companies to obtain:

> (1) Records in computer processable form of all suspensions and/or revocations of operator licenses or vehicle registrations.
>
> (2) Use of a computer terminal so that such information may be gathered by direct inquiry into the Registry's computer.

The threshold issue is, of course, whether the Registry records of suspensions and/or revocations of licenses or registrations are public records.

Public records are defined in G. L. c. 4, § 7, twenty-sixth as:

> " . . . any written or printed book or paper . . . of the commonwealth . . . 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 . . . has received or is required to receive for filing . . ."

General Laws c. 90, §§ 2 and 30 require that records of registrations and licenses be maintained by the Registrar. General Laws c. 90, § 34I

requires that the Registrar maintain "such records and books and publish and distribute such forms and information as will facilitate the operation of the provisions of the eight preceding sections . . ." In turn, the eight preceding sections to which reference is made in section 341 pertain to compulsory motor vehicle liability insurance. In *Canney* v. *Carrier*, 333 Mass. 382, 383, the Supreme Judicial Court stated that the records which the Registrar is required by statute to keep are those enumerated in G. L. c. 90, §§ 2, 30, and 341. See, also, *Lord* v. *Registrar of Motor Vehicles*, 347 Mass. 608, 611 (reports filed under G. L. c. 90, § 26 determined to be "public records"). Therefore, any statutory direction to keep records of suspensions and revocations must be found within the above sections.

There is within G. L. c. 90, §§ 2, 26, 30 and 341 no direct and explicit requirement that the Registrar keep records of suspensions and revocations. However, it is my opinion that such a requirement is necessarily implied and must have been intended by the Legislature.

General Laws c. 90, § 30 provides, in pertinent part:

> "A proper record of all applications and of all certificates and licenses issued shall be kept by the registrar at his main office, and such records shall be open to the inspection of any person during reasonable business hours . . ."

A statute is to be construed, whenever possible so "as to make it an effectual piece of legislation in harmony with common sense and sound reason." *Atlast Distributing Co.* v. *Alcoholic Beverages Control Commission*, 354 Mass. 408, 414. In order that G. L. c. 90 as a whole be considered to be an effectual piece of legislation, it is necessary that a "proper record of all . . . certificates and licenses issued" must include records of suspensions and revocations. This is so because other sections of Chapter 90 give specific directions to the Registrar in circumstances under which an individual's license or registration has been suspended or revoked and the Registrar must be aware of suspensions and revocations in order to comply with the directions of such sections.

In this regard, G. L. c. 90, § 8 provides in pertinent part:

> "Application for a license to operate motor vehicles may be made by any person except a person who has been licensed and whose license is not in force because of revocation or suspension or whose right to operate is suspended by the registrar . . ."

And, according to G. L. c. 90, § 10:

> " . . . [N]o person shall operate on the ways of the commonwealth any motor vehicle . . . if the registrar shall have suspended or revoked any license to operate motor vehicles issued to him under this chapter, or shall have suspended his right to operate such vehicles, and such license or right has not been restored or a new license to operate motor vehicles has not been issued to him . . ."

Finally, G. L. c. 90, § 22 provides in part:

> "The registrar may suspend or revoke any certificate of registration or any license issued under this chapter, after due hearing, for any cause which he may deem sufficient, . . . and neither the certificate of registration nor the license shall be reissued unless . . . the registrar determines that the operator should again be permitted to operate . . ."

I note that other sections of c. 90 which require knowledge by the Registrar that a license or registration has been suspended or revoked are §§ 22A, 22B, 23, 24 and 24B.

In light of the foregoing, I conclude that the provision of G. L. c. 90, § 30 stating that a "proper record of all . . . certificates and licenses issued shall be kept by the registrar" requires such "proper record" to include record of suspensions and revocations. "Common sense and sound reason" demand this. Consequently, a Registry record of a suspension or revocation is a "written or printed book or paper . . . in or on which any entry . . . is required to be made by law, or which any officer or employee of the commonwealth . . . is required to receive for filing," and is therefore a public record under G. L. c. 4, § 7, twenty-sixth.

In reaching my decision, I have considered the case of *Finnegan* v. *Checker Taxi Co.*, 300 Mass. 62, and find it inapposite. There, the plaintiff offered as part of his case Registry "papers containing the operating record" of the defendant's operator. The papers indicated that the operator's license had been suspended and reissued several times in the previous two years. The Court held that the papers in issue were not required to be kept under G. L. c. 90, §§ 2, 30 or 341, and, therefore, were not admissible in evidence as public records. 300 Mass. 62, 70, citing *Commonwealth* v. *Slavski*, 245 Mass. 405, 417. However, the *Slavski* decision makes clear that the Court was concerned with evidentiary matters, specifically the public records exception to the hearsay rule and the best-evidence rule. See, also, *Canney* v. *Carrier*, *supra*, at 383-84. Standards are different from determining what are "public records" under the rules of evidence. See *Amory* v. *Commonwealth*, 321 Mass. 240, 252. Hence, it is consistent with *Finnegan* v. *Checker Taxi Co.*, *supra*, to determine that the records of suspensions and revocations are required to be kept under G. L. c. 90, § 30, and therefore are public records under G. L. c. 4, § 7, twenty-sixth.

In *Lord* v. *Registrar of Motor Vehicles*, *supra*, at 612, the Court offered as an indicium in determining whether certain records are public, whether they could conceivably have usefulness to the general public. In my opinion, information whether a license or registration has been suspended or revoked can have such usefulness. For example, an employer may wish to determine whether the employee's license is presently valid before allowing him the use of a company vehicle; or, an individual may wish to verify the validity of an automobile registration before driving it.

For the above reasons, I have decided that Registry records on suspensions and revocations are public records.

In addition to the requirement of G. L. c. 90, § 30 that Registry "records shall be open to the inspection of any person during reasonable business hours," G. L. c. 66, § 10 provides in 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 latter statute has been interpreted as allowing any person the right to inspect and copy public records, with no limitation on the use to be made of such copies. The applicant need only refrain from interfering unduly with the work of the office and must submit to such reasonable supervision as will guard the safety of the records and assure equal opportunity for all. *Direct Mail Service* v. *Registrar of Motor Vehicles*, 296 Mass. 353, 355-57.

There is nothing in *Direct-Mail Service* v. *Registrar of Motor Vehicles, supra*, to indicate that copies of public records in computer processable form cannot be provided to interested applicants as long as there is no undue interference and a reasonable fee is paid. It is therefore my opinion that the Registrar may provide, in computer processable form, records of suspensions and revocations.

Finally, there appears to be no difference between providing suspension/revocation information through the lease of a terminal in the Registry's computer and providing it through more conventional methods. I have been informed that computer technology is such that data provided through a computer terminal can be strictly limited to certain information. In the instant situation, it should be made certain that only such information as comes within the definition of "public records" is disseminated. Also, the insurance industry may not so use the terminal as to interfere with use of the computer by the Commonwealth or to endanger the records stored within the computer. However, here again I am assured that safeguards are easily implemented, and additionally, a reasonable fee can be determined reflecting the value of the use of such a terminal.

In conclusion, then, it is my opinion that:

(1) The Registrar may make available the records of all suspensions and revocations in computer processable form to members of the insurance industry; and

(2) The Registrar may allow members of the insurance industry to use a computer terminal by which they can inquire directly into the Registry's computer.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 8 September 11, 1970

Honorable John F. X. Davoren
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Secretary Davoren:

By a letter dated August 1, 1970, you have asked me whether the following question is one of public policy in accordance with section 19 of Chapter 53 of the Massachusetts General Laws:

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

It is my opinion that the question presented is an "important public question" in which "every citizen of the Commonwealth has an interest" and is therefore a question of "public policy" within the meaning of G.L. c. 53, § 19. See 1939 Opinions of the Attorney General, pp. 99-100; 1955 Opinions of the Attorney General, pp. 51-52. See also 8 Opinions of the Attorney General, 1928, 490, 491-94; 1965 Opinions of the Attorney General, pp. 92-93.

You have requested further that if I determine the question submitted to be one of "public policy" and therefore properly included on the election ballot in the 7th Essex Representative District, that I supply your office with a suitable statement of the question for presentation upon the ballot. It is my opinion that the question, as presently stated, is in proper form and may be printed on the ballot as such. See 1965 Opinions of the Attorney General, p. 93.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 9 September 29, 1970

Honorable John F. X. Davoren
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Secretary Davoren:

By letters dated September 1, 3 and 4, 1970, you have asked me whether the following question (or questions identical in all material aspects) is one of public policy in accordance with section 19 of Chapter 53 of the Massachusetts General Laws:

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

It is my opinion that the question presented is an "important public question" in which "every citizen of the Commonwealth has an interest" and is therefore a question of "public policy" within the meaning of G. L. c. 43, § 19. See 1939 Opinions of the Attorney General, pp. 99-100; 1955 Opinions of the Attorney General, pp. 51-52. See, also, 8 Opinions of the Attorney General 1928, pp. 490, 491-92; 1965 Opinions of the Attorney General, pp. 92-93. Consequently, the question may properly be included on the election ballot in the Representative Districts which you have mentioned, namely: 1st, 2nd, 5th, 8th, 9th, 10th and 13th Essex; 14th Hampden; 10th, 23rd, 28th and 34th Middlesex; 8th, 12th and 13th Norfolk; 17th Suffolk; 16th and 22nd Worcester.

You have requested further that I supply your office with a suitable statement of the question for presentation upon the ballot. It is my opinion that the question should be printed on the ballot in the form in which it appears in this letter.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 10 September 29, 1970

Honorable John F. X. Davoren
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Secretary Davoren:

By letter dated September 1, 1970, you have asked me whether the following question is one of public policy in accordance with section 19 of Chapter 53 of the Massachusetts General Laws:

> "Shall the Representative from this District be instructed to vote to approve the passage of a constitutional amendment to abolish the Executive Council?"

It is my opinion that the question presented is an "important public question" in which "every citizen of the Commonwealth has an interest" and therefore is a question of "public policy" within the meaning of G. L. c. 53, § 19. See 1939 Opinions of the Attorney General, pp. 99-100; 1955 Opinions of the Attorney General, pp. 51-52. See, also, 8 Opinions of the Attorney General 1928, pp. 490, 491-492; 1965 Opinions of the Attorney General, pp. 92-93. Consequently, the question may properly be included on the election ballot in the Representative District which you have mentioned, namely: 15th Suffolk.

You have requested further that I supply your office with a suitable statement of the question for presentation upon the ballot. It is my opinion that the question should be printed on the ballot in the form in which it appears in this letter.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 11 September 29, 1970

Honorable John F. X. Davoren
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Secretary Davoren:

By letters dated September 1, 1970 you have asked me whether the following question is one of public policy in accordance with section 19 of Chapter 53 of the Massachusetts General Laws:

> "Shall the Senator from this district be instructed to vote to approve a resolution directed to the President and the Congress of the United States stating that it is the sense of the Senate of the Commonwealth of Massachusetts that there be an immediate cease fire and that all the Armed Forces of the United States be immediately withdrawn from Vietnam, and further, that the resulting savings be appropriated by the Congress of the United States to help the Commonwealth of Massachusetts carry out domestic programs to improve the educational, medical, and environmental facilities for the people of the Commonwealth?"

It is my opinion that the question presented is an "important public question" in which "every citizen of the Commonwealth has an interest" and therefore is a question of "public policy" within the meaning of G. L. c. 53, § 19. See 1939 Opinions of the Attorney General, pp. 99-100; 1955 Opinions of the Attorney General, pp. 51-52. See, also, 8 Opinions of the Attorney General 1928, pp. 490, 491-492; 1965 Opinions of the Attorney General, pp. 92-93. Consequently, the question may properly be included on the election ballot in the Senatorial Districts which you have mentioned, namely: 1st Essex and 2nd Middlesex.

You have requested further that I supply your office with a suitable statement of the question for presentation upon the ballot. It is my opinion that the question should be printed on the ballot in the form in which it appears in this letter.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 12 September 29, 1970

Honorable John F. X. Davoren
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Secretary Davoren:

By letter dated September 1, 1970, you have asked me whether the following question is one of public policy in accordance with section 19

of Chapter 53 of the Massachusetts General Laws:

> "Shall the Representative from this District be instructed to vote to approve the passage of a bill requiring all members of the State Senate and House of Representatives to file with the Secretary of State a report of all of their financial assets and sources of income?"

It is my opinion that the question presented is an "important public question" in which "every citizen of the Commonwealth has an interest" and therefore is a question of "public policy" within the meaning of G. L. c. 53, § 19. See 1939 Opinions of the Attorney General, pp. 99-100; 1955 Opinions of the Attorney General, pp. 51-52. See, also, 8 Opinions of the Attorney General 1928, pp. 490, 491-492; 1965 Opinions of the Attorney General, pp. 92-93. Consequently, the question may properly be included on the election ballot in the Representative District which you have mentioned, namely: 15th Suffolk.

You have requested further that I supply your office with a suitable statement of the question for presentation upon the ballot. It is my opinion that the question should be printed on the ballot in the form in which it appears in this letter.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 13 September 30, 1970

Mrs. Glendora M. Putnam, *Chairman*
Massachusetts Commission Against Discrimination
120 Tremont Street
Boston, Massachusetts 02108

Dear Mrs. Putnam:

You have requested my opinion regarding the continuing validity of Massachusetts laws regulating the employment of women in light of Title VII of the Civil Rights Act of 1964. You refer particularly to G. L. c. 149, §§ 53-59 and 99-103 and generally to "all other sections which have the effect and regulate the employment of women."

Massachusetts has statutes prohibiting women from lifting or carrying objects in excess of forty pounds, G. L. c. 149, § 53A; restricting working hours for women in various types of employment to nine hours daily and forty-eight hours weekly (with certain enumerated exceptions and permissible waivers by the Commissioner of Labor and Industries), G. L. c. 149, § 56-58; and prohibiting, under various conditions, the employment of women at certain hours of the night, G. L. c. 149, § 59. Other provisions particularly referred to in your letter are G. L. c. 149, § 53 (pulleys or casters required for receptacles moved by women); § 54 (core rooms where women are employed); § 55 (employment of women

before or after childbirth); § 99 (mealtimes); § 100 (hours of work without interval for meal); § 101 (nonapplicability of statutes relating to mealtimes and intervals for meals); § 102 (labor during mealtime without knowledge of employer); and, § 103 (seats for employees). That these laws were enacted for the purpose of protecting the health of women does not appear to be in dispute. See, e.g., *Broussard* v. *Melong*, 322 Mass. 560, 562.

Section 703(a) of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-2a) provides:

> "(a) It shall be an unlawful employment practice for an employer[1] —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.
>
> (2) to limit, segregate or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

Massachusetts law also prohibits discrimination in employment by reason of sex, G. L. c. 151B § 4(1), but specifically excepts the provisions in Chapter 149 applicable to women. G. L. c. 151B, § 9.

The only statutory exception to section 703(a) of Title VII occurs "where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of [the] particular business or enterprise." 42 U.S.C. § 2000e-2e (1964). The Equal Employment Opportunity Commission, which administers the provisions of the Civil Rights Act of 1964, has set forth the following guideline relating to sex as a bona fide occupational qualification:

> "(1) Many States have enacted laws or promulgated administrative regulations with respect to the employment of females. Among these laws are those which prohibit or limit the employment of females, e.g., the employment of females in certain occupations, in jobs requiring the lifting or carrying of weights exceeding certain prescribed limits, during certain hours of the night, or for more than a specified number of hours per day or per week.
>
> "(2) The Commission believes that such State laws and regulations, although originally promulgated for the purpose of protecting females, have ceased to be relevant to our technology or to the expanding role of the female worker in our economy. The Commission has found that such laws and regulations do not take into account the capacities, prefer-

[1] 42 U.S.C. § 2000e(b) defines an employer as a person engaged in interstate commerce with twenty-five or more employees for each working day in each of twenty or more calendar weeks of the year.

ences, and abilities of individual females and tend to discriminate rather than protect. Accordingly, the Commission has concluded that such laws and regulations conflict with Title VII of the Civil Rights Act of 1964 and will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception." 34 F.R. 13367, § 1604.1(b) (August 19, 1969).

Your request for clarification as to the continuing validity of the cited provisions of c. 149 of the General Laws derives urgency from the fact that many employers, beset with the claims of qualified women employees for equal access to job classifications and overtime hours that are blocked by the operation of certain of those provisions, are caught between the state and Federal laws and stand to violate one by compliance with the other.

Individual instances of direct conflict between state laws of this kind and the Civil Rights Act of 1964 have been adjudicated in favor of the Federal act. *Rosenfeld* v. *Southern Pacific Co.*, 293 F. Supp. 1219 (C.D. Cal. 1968); *Caterpillar Tractor Co.* v. *Grabiec*, 39 U.S.L.W. 2152-53 (S.D. Ill. 1970) (state statutes limiting hours and weight-lifting for women); *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969) (state statute limiting weight lifting); *Richards* v. *Griffith Rubber Mills*, 300 F. Supp. 338 (D.C. Ore. 1969) (state regulation limiting weight lifting.[2] The decisions have centered on the operation of the Supremacy Clause (Art VI, § 2) of the Constitution of the United States whereby the state law must yield when its application deprives a citizen of a right to which he is entitled under a law enacted pursuant to the Federal Constitution. *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat. 1, 210 (1824)). In these instances, the right denied has been access to a job, job classification or other employment privilege protected by the Civil Rights Act of 1964.

The finding of such a conflict has necessarily implied a finding that the relevant employment circumstances would not justify application of the bona fide occupational qualification exception. Such a finding has been made by the courts regarding a 35-pound weight lifting limitation (*Bowe* v. *Colgate-Palmolive Co.*, *supra*, at 715); a job as press operator, occasionally requiring lifting as much as 60 pounds (*Richards* v. *Griffith Rubber Mills*, *supra*, n. 3); and, a job as switchman "subject to call out 24 hours a day . . . and sometimes required to work alone during late night hours, including the period from midnight to 6 a.m." (*Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 234 (5th Cir. 1969)). The court in *Weeks* held a broad construction of the bona fide occupational qualification to be inconsistent with the purposes of the Federal act, and placed upon the employer the burden of showing that he had reasonable cause to believe that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved. 408 F.2d at 235.

[2] For a comprehensive listing of judicial and quasi-judicial treatment of state protective legislation to date, see Pressman, *Revolution in Women's Employment Rights*, 44 Florida Bar Journal, No. 6, p. 29.

Your inquiry requires me to determine whether there is such a prima facie conflict apparent with regard to the provisions of chapter 149.

The authorities on conflicts between state and Federal laws define two conditions upon which the state law must yield: (1) if the latter stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress (*Hines* v. *Davidowitz*, 312 U.S. 52, 67) or (2) if it is manifestly evident that Congress intended to preempt the field and bar any state law or regulation of the kind in question (*Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230). Because the courts have strictly construed the latter condition, and because the language of the Federal act suggests directly otherwise,[3] I find no Congressional intention to bar the states from legislating to protect the health of female employees.

However, applying the other standard, it is my opinion that the flat, inflexible restrictions of the Massachusetts statutes upon weight lifting, working hours and night duty for women, without regard to their individual wishes or abilities,[4] stands as a serious obstacle to the accomplishment of the full purposes of Title VII. Such restrictions, while designed to protect women from exploitation in strenuous or heavy industry, have the effect of denying women access to certain jobs, classifications and overtime privileges to which they are entitled under the Federal act.[5] Hence no operation or application whatsoever of G. L. c. 149, § 53A or §§ 56-59 could withstand a challenge based upon that act.

The Massachusetts Legislature, in initially providing these restrictions, assumed, and I think rightfully, that certain women in certain industries required and desired such protection. However, with the passage of the Civil Rights Act of 1964, it is now undeniably clear that such protection cannot be forced upon women who do not require it. Seen from this perspective, the inflexible restrictions of the Massachusetts statutes go beyond their protective purpose and, although unintentionally and inconsistently with their original purpose, run afoul of Title VII of the 1964 Civil Rights Act. This does not mean that the Commonwealth can no longer legislate in the fashion now in question. However, if it chooses so to legislate, it can do so only to the extent of making the protection of hours, weight, etc. statutes voluntarily available to individual employees, to invoke or not as the employees see fit. The statutes, in other words, must be tailored to the individual, allowing those who wish to work (assuming they are otherwise qualified), and those who wish not to work to be protected in this refusal.

[3] 42 U.S.C. 2000e-7 (1964) states: "Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title." See, also 42 U.S.C. 2000h-4 (1964).

[4] It might be observed that in this regard the statute goes beyond its protective purpose, which could presumably be achieved by making the protection which the legislature has seen fit to provide voluntarily available to individual employees and barring only compulsion to work under the prescribed conditions.

[5] The enumeration of certain exceptions in § 56 and conditions in § 59 does not remedy this defect, as women are still excluded from other employment opportunities not falling under the bona fide occupational qualification exception. Cf. *Rosenfeld* v. *So. Pac. Co.*, *supra*, 293 F. Supp. at 1224.

I hasten to add that this result is not true for employers not covered under the Civil Rights Act of 1964[6] and, hence, outside Federal jurisdiction. These employers are obliged to conform with all of the provisions of chapter 149.

A different conclusion regarding conflict with Federal law is required concerning the other statutes to which you specifically refer, G. L. c. 149, §§ 53, 54, 55 and 99-103. These provisions decree particular steps to be taken with regard to women employees which do not of themselves deny Federally protected rights. Section 53, for example, requires casters to be provided on receptacles weighing (with contents) over 75 pounds, that are to be moved by women. I can see in § 53 no inherent obstacle to the accomplishment of the purposes of the Federal act. See *Hines* v. *Davidowitz, supra*, at 67. There is no necessity that employers violate the latter by complying with the former; the required installation of casters need not deny women access to employment rights, privileges or opportunities open to males. Indeed, deferring as I must to the legislative determination of a need for such a protective measure, this provision insures such access. In the same manner I find no conflict necessary between Federal law and the statutes relating to core rooms (§ 54),[7] childbirth (§ 55), mealtimes (§§ 99-102) and seats (§ 103).

While I do not find these latter provisions void on their face, this is not to suggest that a denial of rights clearly protected under the Civil Rights Act could be excused by reason of their affirmative requirements. An employer could not, for example, refuse to hire women for a job requiring the use of receptacles because state law requires the installation of casters.[8]

Your letter also inquires about the validity of other Massachusetts statutes which regulate the employment of women. If you wish to particularize with respect to any other such statutes not dealt with in this opinion, I will be happy to advise you further.

Very truly yours,
ROBERT H. QUINN
Attorney General

[6] See note 1, *supra*.

[7] Under § 54 the Department of Labor and Industries is authorized to issue rules regulating the employment of women in foundry core rooms. Such rules as have been adopted (*Mass. Board of Labor and Industries, Bill*, No. 10 (Feb. 7, 1917)) do not necessitate a denial of employment rights or opportunities, with one exception. The rule prohibiting lifting cores above a specified size and weight (1 cubic foot or 25 pounds) without an assisting mechanical appliance (*Id.*, § 30, para. 1) is an affirmative requirement and therefore does not collide with Federal law, but the rule immediately following (§ 30, para. 2) prohibits any female, regardless of desire or ability, from working on any core exceeding 2 cubic feet or 60 pounds and hence conflicts with the Federal act.

[8] The same theory would apply to a claim that provisions such as sections 53, 54, 55, and 99-103 constitute a denial of Federally protected rights of *male* employees by treating women preferentially. On their face alone there is no necessity that compliance with them need deny any such rights as an employer is not required to take the prescribed protective measures only for female employees. This is not to suggest that a male employee would be barred from suing under the Civil Rights Act for equivalent terms and conditions of employment. I intimate no opinion as to whether a Federal court would deem the measures required under such provisions to constitute rights or privileges covered under the Federal act, or as to the effect of the language of 42 U.S.C. § 2000e-7 (see note 2 *supra*) on such a question.

Number 14 September 30, 1970

Honorable John F. X. Davoren
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Secretary Davoren:

By a letter dated September 4, 1970, you have asked me whether the following question is one of public policy in accordance with section 19 of Chapter 53 of the Massachusetts General Laws:

> "Shall the Representative from this District be instructed to vote to approve the passage of such measures, including constitutional amendments, as may be necessary to effect the substitution of regionally based service districts for county governments?"

It is my opinion that the question presented is an "important public question" in which "every citizen of the Commonwealth has an interest" and is therefore a question of "public policy" within the meaning of G. L. c. 53, § 19. See 1939 Opinions of the Attorney General, pp. 99-100; 1955 Opinions of the Attorney General, pp. 51-52. See also 8 Opinions of the Attorney General, 1928, 490, 491-92; 1965 Opinions of the Attorney General, pp. 92-93.

You have requested further that if I determine the question submitted to be one of "public policy" and therefore properly included on the election ballot in the 7th Essex Representative District, that I supply your office with a suitable statement of the question for presentation upon the ballot. It is my opinion that the question, as presently stated, is in proper form and may be printed on the ballot as such. See 1965 Opinions of the Attorney General, p. 93.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 15 October 5, 1970

Honorable John F. X. Davoren
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Sir:

You have asked my opinion whether the following categories of persons have the right to register to vote in Massachusetts:

> 1. members of military forces stationed at and permanently residing on military bases in the Commonwealth;
>
> 2. employees of military or other federally owned hospitals located in the Commonwealth and

3. patients in federal institutions within the Commonwealth.

I treat these questions together since they all deal with the question of the voting rights of persons living on federal reservations. Most of my opinion, therefore, applies with equal force to each category.

All Massachusetts inhabitants are guaranteed the right to vote: "All elections ought to be free; and all the inhabitants of the commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers . . ." Mass. Const., Pt. 1, Art. IX. Qualifications which must be met to entitle a Massachusetts inhabitant to register and to vote are set forth in the Massachusetts Constitution (Arts. 3, 20, 28, 30, and 45 of the Articles of Amendment) and in the General Laws (c. 51, particularly §§ 1 through 4). There is no Constitutional or statutory provision that would disqualify a patient, member of the military forces, or employee of a military or other federally owned hospital, permanently residing on a federal reservation in the Commonwealth, from registering to vote in Massachusetts because of his status or because of his residence on a federal reservation.

In *Opinion of the Justices*, 42 Mass. 580, 583-584, the Court advised the House of Representatives that persons residing on lands purchased by or ceded to the United States for navy yards, forts, and arsenals, where no reservation of jurisdiction is made by the Commonwealth except concurrent jurisdiction to make service of process on such lands, do not acquire any elective franchise as inhabitants of towns where such lands are located. Noting that Congress had exclusive jurisdiction over such lands (U.S. Const., Art. 1, § 8), the Court declared that state law did not operate therein. *Opinion of the Justices, supra,* at 582.

This opinion, you point out, "has always been cited as a reason why persons who lived within the boundaries of federal forts or enclaves such as in the town of Bedford, Weymouth, Athol, and the city of Chicopee, should not be allowed to register." However, since 1841, when that opinion was rendered, the relationship between federal reservations and the states where they are located has changed considerably. Pursuant to Acts of Congress, many state laws have been made applicable to persons living on federal reservations, e.g. state laws governing unemployment and workmen's compensation, criminal acts not punishable under federal law, and income, gasoline and sales and use taxes. It was this change of relationship that recently led the Supreme Court of the United States to conclude that certain persons living on a federal reservation in Maryland (National Institutes of Health), although exempt from local property taxes, did not have such a "degree of disinterest in electoral decisions that might justify a total exclusion from the franchise." *Evans* v. *Cornman*, 398 U.S. 419, 425-426. The Court affirmed the decision of the United States District Court which held that to deny such persons the right to vote was to deny them equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States.

It follows from the *Cornman* case that patients in federal institutions in Massachusetts, employees of military or other federally owned hospi-

tals in Massachusetts, and members of the military forces stationed at military bases in Massachusetts cannot be denied registration on the ground that they reside on a federal reservation or in a federal enclave.

The circumstances that the person seeking registration is a member of the military forces is not, of itself, any reason for denying registration. This is so even though such person may be residing on a military base. *Arapojolu* v. *McMenamin*, 113 Cal. App. 2d 824. It is true that concentrated balloting of military personnel on a base in a small town could sway an election in such a town. It is also true that, in general, a serviceman has no choice of duty station and is subject to reassignment. But these arguments have recently been considered and rejected by the Supreme Court of the United States as bases for excluding members of the armed forces from voting in the states where their bases were located. In *Carrington* v. *Rash*, 380 U.S. 89, the Court held invalid a provision in the Texas Constitution prohibiting any member of the Armed Forces who moved his home to Texas while in the military service from voting in Texas while in the Armed Forces. That provision, the Court declared, imposed "an invidious discrimination in violation of the Fourteenth Amendment." *Carrington* v. *Rash*, *supra*, at 96.

On the basis of the *Carrington* case, then, the fact that an applicant for registration is in the military service stationed in Massachusetts, standing alone, cannot be a basis for denying registration.

That a person happens to be a patient in a federal institution in Massachusetts, an employee of a military or other federally owned hospital in Massachusetts, or a member of the military forces stationed at a military base in Massachusetts does not prevent him from acquiring a new domicile here. If such a person can show he has acquired a new domicile in Massachusetts, through evidence of his intention to make the Commonwealth his home indefinitely, and if he meets the voting qualifications of Massachusetts inhabitants, he must be allowed to register to vote. *Carrington* v. *Rash*, supra, at 93-94.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 16 October 6, 1970

The Honorable Francis W. Sargent
Governor of the Commonwealth of Massachusetts
State House
Boston, Massachusetts 02133

Dear Governor Sargent:

You have requested my opinion on several questions relating to the pension to be paid to the widow of the late Leo P. Doherty, who from March 20, 1935 until his death on September 18, 1964 was a Special Justice of the Municipal Court of the City of Boston. Your questions arise because of the enactment of St. 1969, c. 552 which conferred pension rights on the widows of certain special justices.

Prior to considering your questions, a brief review of the pertinent statutory provisions relating to the instant case is in order. General Laws c. 32, § 65C, which governs pensions for, *inter alia*, special justices and their widows, provides in pertinent part:

> "A chief justice, justice, associate justice, judge, associate judge or special justice, hereinafter in this section called judge, who is retired or who resigns and who is entitled to a pension for life under the provisions of section sixty-five A or sixty-five B, may elect to receive, in lieu thereof, a pension for life at a lesser annual rate with the provision that upon his death, leaving as a survivor a widow who was his spouse at the time of his retirement or resignation, two thirds of such pension for life at a lesser annual rate shall be paid to such widow. Such lesser annual rate shall be determined so that the value, on the date of such retirement or resignation, of the prospective payments to such judge and to such widow shall be the actuarial equivalent of the value of the pension for life to which such judge is entitled under the provisions of section sixty-five A or sixty-five B. Such election shall be in writing on a prescribed form and filed with the appropriate retiring authority at the time of retirement or resignation or within thirty days thereafter. The computation of said actuarial equivalent shall be subject to supervision and verification in accordance with the provisions of section twenty-one by the actuary appointed by the commissioner of insurance.
>
> "If a judge, who would be entitled, upon resigning, to a pension for life under section sixty-five A or sixty-five B, dies before resigning, his widow shall receive a pension for life of two thirds of such pension for life at a lesser annual rate to which such judge would have been entitled had he, as of the date of death, resigned and had such pension for life at a lesser annual rate been computed under the first paragraph."

The above-quoted version of G. L. c. 32, § 65C was inserted by St. 1968, c. 699 to broaden the class of widows covered by the section to include widows of special justices. Because the amendment was of prospective application only, the General Court later enacted St. 1969, c. 552 which provides, in pertinent part:

> "If a special justice who would be entitled upon resigning to a pension for life under section sixty-five B of chapter thirty-two of the general laws dies before resigning and before the effective date of section sixty-five C of said chapter thirty-two, added by chapter six hundred and ninety-nine of the acts of nineteen hundred and sixty-eight, his widow shall receive a pension for life of two thirds of such pension for life at a lesser annual rate to which such special justice would have been entitled had he resigned on the effective date of said section sixty-five C of said chapter thirty-two, and had

such pension for life at a lesser annual rate been computed under the first paragraph of said section sixty-five C."

Thus it appears that until the enactment of St. 1968, c. 699, a special justice who retired could *not* elect to receive a pension at a lesser annual rate with the provision that his widow would receive at his death a pension of two-thirds of such lesser annual rate. After the effective date of St. 1968, c. 699, special justices were entitled to make such an election, and, by virtue of the enactment of St. 1969, c. 552, provision was made for widows of certain special justices who had died before resigning and before the effective date of St. 1968, c. 699. Inasmuch as the Honorable Leo P. Doherty died on September 18, 1964 and had not resigned as of the date of his death, his widow has been accorded pension rights by St. 1969, c. 552.

Accordingly, you request my opinion on the following questions:

"1. Does the annual pension to which Mrs. Doherty is entitled under St. 1969, c. 552, commence on or immediately after the date of Judge Doherty's death, or on or immediately after the effective date of St. 1968, c. 699, or on the effective date of St. 1969, c. 552?

"2. If your answer to Question 1 is that Mrs. Doherty is entitled to a pension commencing on the effective date of either of the statutes referred to therein, what is the effective date of that statute?

"3. Is the annual pension to which Mrs. Doherty is entitled under St. 1969, c. 552, to be computed on the basis of the full annual pension which would have been payable to Judge Doherty had he resigned on the date of his death, or on the basis of the full annual pension which would have been payable to him had he resigned on the effective date of St. 1968, c. 699?"

I will consider your questions *seriatim*.

1. It is my opinion that the annual pension to which Mrs. Doherty is entitled under St. 1969, c. 552, commences on the effective date of St. 1968, c. 699. While Mrs. Doherty's right to receive a pension came about by virtue of the enactment of St. 1969, c. 552, the latter statute provided that she became entitled to a pension "of two-thirds of such pension for life at a lesser annual rate to which such special justice would have been entitled had he resigned on the effective date of said section sixty-five C of said chapter thirty-two . . ."

I am not unmindful of the general rule that a statute is to be construed as having a prospective operation only, unless an intent that it operate retroactively is clearly indicated. See, e.g., *Martin L. Hall Co.* v. *Commonwealth*, 215 Mass. 326 and *Wynn* v. *Board of Assessors of Boston*, 281 Mass. 245. However, the insertion of the provision in St. 1969, c. 552 that the pension to the widow is computed as if the special justice had resigned on the effective date of St. 1968, c. 699 evidences a legislative intent, in my opinion, that the pension be paid as of the effective date of St. 1968, c. 699.

II. With respect to your second question, it is my opinion that the effective date of St. 1968, c. 699 was October 17, 1968, ninety days following approval of the Act. Acts of the Legislature ordinarily take effect ninety days following approval by the Governor, unless they are laws which may not be the subject of a referendum petition. Article 48 of the Articles of Amendment to the Constitution, The Referendum, Pt. I. Among those laws which may not be made the subject of a referendum petition are laws relating to the "compensation of judges." St. 1968, c. 699 is not such a law. Without deciding whether a law relating to the pensions of judges is a law relating to the "compensation of judges," it is sufficient to note that St. 1968, c. 699 relates not to the pensions of judges but to the pensions of widows of special justices.

III. With respect to your third question, it is my opinion that the annual pension to which Mrs. Doherty is entitled under St. 1969, c. 552 is to be computed on the basis of the full annual pension which would have been payable to Judge Doherty had he resigned on the effective date of St. 1968, c. 699. Your question arises because St. 1967, c. 888 altered the method of computation of pensions for special justices. However, St. 1969, c. 552 makes no reference to the date of death in computing the pension; the Act expressly refers to a pension computed on the basis of a pension "at a lesser annual rate to which such special justice would have been entitled had he resigned on the effective date of [St. 1968, c. 699]." If Judge Doherty had resigned as of the effective date of St. 1968, c. 699, his pension would have been computed on the basis of G. L. c. 32, § 65B (as amended by St. 1967, c. 888) and § 65C. In enacting St. 1969, c. 552, the General Court indulged in the fiction of disregarding the date of death of the special justice involved and treating each situation as a resignation as of the effective date of St. 1968, c. 699. Thus, Mrs. Doherty's pension is to be computed on the basis of two-thirds of the lesser annual rate to which Judge Doherty would have been entitled had he resigned on the effective date of St. 1968, c. 699. In turn, the lesser annual rate is to be determined by computing the full annual pension which would have been payable to the Judge had he resigned on said effective date. To employ the fiction of a later death for one purpose and not for the other would be inconsistent, and such an intent on the part of the General Court is not to be presumed.

In conclusion, then, it is my opinion that Mrs. Doherty's pension rights commenced on the effective date of St. 1968, c. 699, which was ninety days following approval of that Act, and that her annual pension is to be computed on the basis of the full annual pension which would have been payable to Judge Doherty had he resigned on the effective date of St. 1968, c. 699.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 17 October 7, 1970

Honorable William F. Powers
Commissioner of Public Safety
1010 Commonwealth Avenue
Boston, Massachusetts 02215

Dear Commissioner Powers:

In connection with the authority conferred on you by G. L. c. 147, § 10G, to appoint employees of educational institutions as special police officers, you have requested my opinion whether the Children's Hospital Medical Center qualifies as an "educational institution" under the statute. Attached to your request is a letter from the Chief of the Medical Center Police of the Children's Hospital Medical Center which states that the center and its sister hospitals "have teaching or training programs, operate educational medical research programs or provide some form of fellowship or grant in aid assistance to their staff physicians, interns, nurses or employees."

General Laws c. 147, § 10G provides, in pertinent part:

> "The commissioner may at the request of an officer of a college, university or other educational institution appoint employees of such college, university, or other institution as special police officers."

In order for the Children's Hospital Medical Center to qualify under the statute, it must be an "educational institution." In that regard, I note the Supreme Judicial Court has categorized institutions as "educational" where the stated purposes of the institution is "clearly educational" and work actually conducted by the institution is "dominantly educational," *Assessors of Boston* v. *Garland School*, 296 Mass. 378, 387. See, also, *South Lancaster Academy* v. *Lancaster*, 242 Mass. 553, 558. The Court has further stated that an educational institution's activities must be primarily educational and not merely incidental to some other dominant purpose. *Assessors of Boston* v. *Garland School*, *supra*, at 387.

In my opinion, a hospital whose primary purpose is to heal the sick or research new cures for illness is not an "educational institution," whose dominant purpose must be education. Accordingly, resolution of the question you have posed depends on a determination whether the Children's Hospital Medical Center and its sister hospitals primarily carry on work of an educational nature. Such a determination is a factual one and must be made by you as the Commissioner of Public Safety. See 1965-1966 Op. Atty. Gen. 242, 243. In the absence of sufficient facts upon which to make the determination, I am only able to advise you that the Children's Hospital Medical Center and allied hospitals may only qualify as educational institutions under G. L. c. 147, § 10G, if their stated and actual dominant purposes are educational.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 18 October 8, 1970

Honorable John J. Droney
District Attorney for Middlesex County
Court House
Cambridge, Massachusetts

Dear Mr. District Attorney:

You have requested my opinion whether, in the light of the provisions of General Laws, Chapter 12, section 20, the amount of compensation which is to be paid to legal assistants appointed or to be appointed by you is restricted in amount when the compensation is to be paid through a Federal grant. More specifically, you inform me that enactment of the Federal Omnibus Crime Control and Safe Streets Act of 1968 (P.L. 90-351, 82 Stat. 197) has resulted in the availability of Federal funds to implement a District Court Prosecutor's Program, administered by the Governor's Committee on Law Enforcement and Administration of Criminal Justice. This program will evaluate the utility of an alternative to police prosecution in the district courts. You further inform me that you have hired a legal assistant to operate the demonstration project and that assistants hired with Federal funds will have all the powers and duties of an assistant district attorney.

It is my opinion that the provisions of G. L. c. 12, § 20 do not limit the compensation to be paid legal assistants connected with the District Court Prosecutor's Program, when their compensation is paid through a Federal grant. General Laws c. 12, § 20 provides:

> "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."

On July 28, 1969, in opinion to the District Attorney of the Norfolk District, I reviewed the history of G. L. c. 12, § 20, which originated as St. 1906, c. 460 (1969-1970 Op. Atty. Gen., No. 2). With respect to the question you pose, I think it clear that the restriction on compensation found in that section applies only when the compensation is to be paid with county funds. The maximum of two thousand dollars is designed to

protect the county treasury, and the need for that protection vanishes when Federal funds are involved. In the latter instance, if the Federal government deems fiscal controls necessary, it is free to enact them. *Cf.* 1946-1947 Op. Atty. Gen. 66-67.

In conclusion, then, it is my opinion that G. L. c. 12, § 20 does not restrict the compensation to be paid legal assistants when the compensation is to be paid with Federal funds.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 19 October 26, 1970

Honorable John F. X. Davoren
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Mr. Secretary:

You have requested my opinion on two questions relating to the so-called "public policy questions" which are submitted to the voters at biennial state elections. Before proceeding to a discussion of your questions, it is helpful to quote the pertinent statutes, which are G. L. c. 53, §§ 19 and 21:

Section 19 provides:

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

Section 21 provides:

> "Applications shall be filed with the state secretary not later than the sixtieth day before the election at which the questions are to be submitted. Not more than two questions under section nineteen shall be placed upon the ballot at one election, and they shall be submitted in the order in which the

applications are filed. No question negatived and no question substantially the same shall be submitted again in less than three years."

You have informed me that on August 28, 1970 there was filed with your office an application for a question on the election ballot in the 2nd Middlesex Senatorial District. The application which contained 2,562 signatures concerned a resolution on withdrawal of United States armed forces from Vietnam. You have also informed me that on September 1, 1970 at 1:08 P.M. your office received two additional applications for questions on the election ballot in the 15th Suffolk Representative District. The applications, containing 255 and 257 signatures respectively, concerned the filing of reports of financial assets by state legislators and a proposal to abolish the executive council. I note that I have previously determined that all three questions are questions of public policy. See *Op. Atty. Gen.*, September 29, 1970 (70/71-10); September 29, 1970 (70/71-11); September 29, 1970 (70/71-12).

It appears that the 15th Suffolk Representative District is composed of Wards 21 and 22 in the City of Boston. Ward 22 is also a part of the 2nd Middlesex Senatorial District. Under the circumstances, you have asked whether:

1. All three questions may be printed on the ballot in Ward 22 of Boston, and

2. The two questions contained in the applications in the 15th Suffolk Representative District can both appear upon the ballot in Ward 21 of Boston inasmuch as Ward 21 is only one half of the 15th Suffolk Representative District.

My answers to both your questions are in the negative.

General Laws, c. 53, § 19 is clear and unequivocal in stating that "not more than two questions . . . shall be placed on the ballot . . ." See *Op. Atty. Gen.*, August 16, 1939, at 100. Since the application for the question on the ballot of the 2nd Middlesex Senatorial District was filed first, that application takes precedence. The question concerning withdrawal of United States armed forces from Vietnam must, therefore, be placed on the ballot for the 2nd Middlesex Senatorial District, which means, of course, that the question will also be on the ballot for Ward 22 of Boston, a part of the 15th Suffolk Representative District. Under the provisions of section 21, one additional question on the ballot for the 15th Suffolk Representative District is permitted. If the persons who filed the two applications on September 1, 1970 cannot agree as to which question should be placed on the ballot, the choice should be made by lot. Both questions cannot be placed on the ballot for Ward 21 in view of the language in G. L. c. 53, § 19, which provides that the questions shall be submitted "to the voters of that senatorial or representative district . . ." I conclude that the statute does not permit the submission of a question to the voters of one half of a representative district.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 20 November 2, 1970

Honorable John F. X. Davoren
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Mr. Secretary:

You have requested my opinion on two questions arising from the rights and duties of voting challengers at polling places at the biennial state election on Tuesday, November 3, 1970. Specifically, you ask whether legally appointed voting challengers may keep personal notes which would include the marking of voting lists during voting hours, and whether said challengers may retain control of their notes and lists when they enter and leave polling places during voting hours.

The subject of voting challengers is covered by G. L. c. 54, § 85A, which provides:

> "The state committee of a policital party may appoint a person to act as a challenger of voters at any polling place in the commonwealth at a state election, and a city or town committee of such a party, in a city or town in which municipal officers are nominated by primaries or by caucuses of political parties, may appoint a person to act as such challenger at any polling place in such city or town at a municipal election. Such challenger may challenge any voter during the hours that said polling place is open for the purpose of voting; and a statement signed by the chairman of the committee appointing him shall be sufficient evidence of his right so to act. He may be compensated for his services by the political party whose committee appointed him. He shall be assigned by the election officer presiding at the polling place to such position within the polling place as will enable him to see and hear each voter as he offers to vote. Nothing herein contained shall deprive any other person of the right to challenge a voter as provided by law."

I construe your first question to inquire whether legally appointed voting challengers may keep personal notes which would include their own copies of voting lists, and whether they may mark said lists while they are in their respective polling places. I find nothing in section 85A to prohibit such a practice, and it is my opinion that the right to keep personal notes which would include personal copies of voting lists can fairly be inferred from the statutory language. The statute provides that a challenger "may challenge any voter during the hours that said polling place is open for the purpose of voting: . . . " In order that that right be exercised, a challenger must have access to a voting list, and I see no reason why he should not be permitted to use his own list in order to determine whether a prospective voter is entitled to vote.

With respect to your second question, it is my opinion that a legally appointed voting challenger may retain control of his notes and lists

when he enters and leaves the respective polling place during election day. Such control would appear to be essential in order that the challenger's notes and lists not be altered or lost. Again, I find nothing in the section to prohibit such control, and a challenger's control of his own notes and lists when he enters and leaves the polling place can fairly be derived from his primary duty and/or right to challenge a prospective voter.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 21 November 10, 1970

Honorable William F. Powers
Commissioner of Public Safety
1010 Commonwealth Avenue
Boston, Massachusetts 02215

Dear Commissioner Powers:

Your predecessor requested my opinion with respect to several questions arising from the relationship of the Uniformed Branch of the Massachusetts State Police and the Detective Bureau of the State Police, both of which are within the Department of Public Safety. St. 1965, c. 785 first provided for a system of promotional examinations in the Uniformed Branch of the State Police. You have informed me that it is the policy of the Department to give leaves of absence to members of the Uniformed Branch in order that those persons may accept provisional appointments as State Police Detective Lieutenant Inspectors in the Detective Bureau. Such provisional appointments are of indefinite length and are abolished upon the establishment of a civil service list, since the positions are subject to the Civil Service Law and Rules.

It appears that a member of the Uniformed Branch was given a leave of absence from that Branch and accepted a provisional appointment as a State Police Detective Lieutenant Inspector. The Detective Lieutenant Inspector has now requested that he be permitted to take an examination for promotion to the rank of corporal in the Uniformed Branch, despite the fact that he has not returned to that Branch and retains his provisional appointment in the Detective Bureau. I have been informed that a similar situation exists with respect to a Detective Lieutenant who has been permitted to take the staff sergeant's examination in the Uniformed Branch, although he, too, has retained his provisional appointment in the Detective Bureau.

Under the circumstances, you have asked the following four questions:

> "1. If a member of the Uniformed Branch is granted a leave of absence to accept a provisional appointment as a

State Police Detective Lieutenant Inspector, within the Division of State Police, does the period of time that he is on a leave of absence from the Uniformed Branch count with respect to pension rights in accordance with Chapter 32, section 26, paragraph 3, which states 'any member in service classified in Group 3 who is an officer appointed under section 9A of Chapter 22, and who has performed service in the Division of State Police in the Department of Public Safety for not less than twenty years shall be retired by the state board of retirement upon his attaining age fifty or whichever occurs last.'

"2. Does a member of the Uniformed Branch who is on a leave of absence to accept a provisional appointment as a State Police Detective Lieutenant Inspector maintain his seniority rights with respect to Chapter 22, section 9-0?

"3. Does a member of the Uniformed Branch on leave of absence to accept an appointment as a provisional State Police Detective Lieutenant Inspector maintain his eligibility rights to file for promotional examination to the next higher grade when said promotional orders are posted, even though he is on a leave of absence during the entire thirty days specified for filing?

"4. If a member of the Uniformed Branch who is on a leave of absence to accept a provisional appointment as a State Police Detective Lieutenant Inspector is considered a member of the Uniformed Branch during this period of absence, how should he be evaluated in accordance with the provisions of Chapter 22, section 9-0, wherein he is not under the supervision of a first line supervisor or troop commander during the period of his leave of absence."

For the reasons hereinafter stated, I ask to be excused from answering your first question. I answer your second question in the negative and your third question in the affirmative. In answer to your fourth question, I have set out the procedure to be followed.

1. Your first question relates to the retirement and pension rights of members of the Uniformed Branch. It does not appear that a member of the Uniformed Branch who has been granted a leave of absence to accept a provisional appointment as a State Police Detective Lieutenant Inspector now seeks to retire pursuant to the provisions of G. L. c. 32, § 26(3). It has been the long settled custom and practice of this Department that the Attorney General advises constitutional officers and heads of state agencies only with respect to questions arising in the performance of their official duties. 2 *Op. Atty. Gen.* 100, November 15, 1899. Since it does not appear that an opinion is required in order to aid you in the discharge of your duties, it would be inappropriate for me to answer your first question at this time. See *Op. Atty. Gen.*, Feb. 14, 1935, at 31. Further, since G. L. c. 32, § 26(3) refers to the State Board of Retirement as the state agency charged with retiring persons subject to that

section, the Chairman of that Board should request such an opinion, if the occasion arises.

II. Your second question asks whether a member of the Uniformed Branch who is on a leave of absence and who has accepted a provisional appointment as a State Police Detective Lieutenant Inspector accrues seniority as a member of the Uniformed Branch during his leave of absence. In this regard, G. L. c. 22, § 9-0 provides that promotions shall be based, *inter alia*, on "(4) . . . a determination of longevity based upon the granting of five per cent per each year, or major part thereof up to twenty years of service."

I construe the statute as referring to "service" in the Uniformed Branch of the Division of State Police. Section 9-0 refers to promotions to positions in the Uniformed Branch, and the standards for promotion relate solely and exclusively to that Branch. I can perceive no intent on the part of the Legislature to broaden the term "service" to include service outside of the Uniformed Branch. In my view, if such is to be accomplished it must be by way of an amendment to the statute.

III. Your third question asks if a member of the Uniformed Branch on a leave of absence as a Detective Lieutenant Inspector may file for a promotional examination to the next higher grade in the Uniformed Branch even though he is on a leave of absence during the entire filing period. First, I note that a leave of absence does not constitute a separation from service, unless the leave is unauthorized or exceeds the period permitted by law. I find nothing in the statutory provisions relating to appointment of members of the Uniformed Branch which limits a leave of absence from that Branch. Compare G. L. c. 31, § 46E (leaves of absence for persons subject to the Civil Service Law and Rules). See, also, *Ferrante* v. *Higgiston*, 296 Mass. 208, 209.

Secondly, while the Commissioner of Public Safety has adequate statutory authority to promulgate rules and regulations on this subject (G. L. c. 22, § 9A), I find nothing in the Rules and Regulations relating to the government and discipline of the Uniformed Branch which pertains to eligibility for filing for promotional examinations while on a leave of absence. I therefore conclude that a member of the Uniformed Branch of the Division of State Police on a leave of absence as a provisional Detective Lieutenant Inspector may file to take a promotional examination in the Uniformed Branch.

IV. Your fourth question asks how a member of the Uniformed Branch should be evaluated in accordance with the provisions of G. L. c. 22, § 9-0 if he is on a leave of absence as a provisional Detective Lieutenant Inspector and is not under the supervision of a first line supervisor or troop commander during the period of his leave of absence. In this regard, G. L. c. 22, § 9-0(2) provides that one of the criteria for promotion shall be:

> "performance evaluation reports which shall be submitted annually to the commissioner by each troop commanding officer or bureau head and first line supervisor, under whom

> each candidate has served, and the average percentage of all such annual reports in the then current grade of such candidate shall be the performance evaluation mark . . ."

I think it clear that the statute refers to performance evaluation reports submitted by personnel in the Uniformed Branch, and thus the words "bureau head" cannot be construed as including the head of the Detective Bureau. Accordingly, in taking a leave of absence from the Uniformed Branch, a member of that Branch takes the risk that his performance evaluation mark will be based on a period of time which includes his leave of absence. If the candidate's file includes any evaluation reports for his then current grade, the average of those reports will be the performance evaluation mark. If there are no reports, then the performance evaluation mark must be zero.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 22 November 16, 1970

Mr. Edward T. Sullivan, *Chairman*
Division of Employment Security
Board of Review
Charles F. Hurley Employment
Security Building
Government Center
Boston, Massachusetts 02114

Dear Chairman Sullivan:

You have requested my opinion whether the Board of Review of the Division of Employment Security has the discretion to waive the ten-day period within which appeals from decisions determining the validity of claims for unemployment benefits must be filed with the Board. Specifically, you refer to situations where it appears that the claimant had good cause for filing late because of illness during the prescribed filing period.

The filing period is prescribed by General Laws, c. 151A, § 40, which now provides:[1]

> "A claimant or interested party may, within ten days after mailing to him of notice of the decision, file an application for a review of such decision by the board of review."

It is my opinion that the Board of Review does not have the discretion to waive the provisions of G. L. c. 151A, § 40. In my view, the language of the statute is clear and prescribes a jurisdictional requirement for review.

[1] The section was recently amended by St. 1970, c. 421, approved on June 10, 1970, effective on September 8, 1970. Prior to amendment, an application for review was required to be filed "five days after receipt, but in no case more than seven days after mailing" of the notice of the decision.

In *Kravitz* v. *Director of the Division of Employment Security*, 326 Mass. 419, the Supreme Judicial Court affirmed the dismissal of an appeal from a decision of the Board of Review because of noncompliance with certain provisions of G. L. c. 151A, § 42. That section provides that the claimant shall deliver "to the director as many copies of the notice and petition as there are parties respondent." Although there were two respondents, the claimant delivered only one copy of the notice and petition to the director. In affirming the District Court, the Court stated:

> "Apart from this statute there is no right to such a review. Touching the matter here involved the statute is free from ambiguity. Compliance with its terms was a condition precedent to the right of review. The requirement [of the statute] . . . is not a provision that can be treated as merely directory. *The language of the statute is mandatory and admits of no exceptions. It is an essential part of the statutory scheme* . . ." 326 Mass. at 421-422. (Emphasis supplied.)

The portion of the *Kravitz* opinion quoted above is applicable as well to the provisions of G. L. c. 151A, § 40. The clause, "within ten days" must be construed according to its natural and ordinary meaning. *Johnson* v. *District Attorney for the Northern District*, 342 Mass. 212, 215. So construed, the clause evidences a clear legislative intent that the appeal period provided by the statute is to be applied, without exception, to all cases arising under it.

I realize that construing the statute in this manner will undoubtedly cause a hardship for those individuals who are unable for one reason or another to file a timely application for review. However, this consideration is not entitled to weight where, as here, the words of the statute are clear and unambiguous and cannot be disregarded. *Boston Five Cents Savings Bank* v. *Assessors of Boston*, 317 Mass. 694, 702-703. Such considerations are more properly addressed to the General Court.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 23 December 2, 1970

Honorable John F. X. Davoren
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Sir:

You have requested by interpretation of two provisions of the Voting Rights Act Amendments of 1970 (the Act) to assist you in preparing effective instructions for distribution to election officials of the Commonwealth of Massachusetts. The Act, approved June 22, 1970, significantly

amends the Voting Rights Act of 1965. 42 U.S.C. §§ 1973-1973p. The first provision as to which you pose a question is Section 201 of the Act which suspends, until August 6, 1975, any requirement that a citizen comply with a "test or device," such as the ability to read and write, to qualify to vote in any election. The section provides as follows:

> "(a) *Prior to August 6, 1975, no citizen shall be denied, because of his failure to comply with any test or device, the right to vote* in any Federal, State, or local election conducted in any State or political subdivision of a State as to which the provisions of section 4(a) of this Act are not in effect by reason of determinations made under section 4(b) of this Act.
>
> "(b) As used in this section, *the term 'test or device' means any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter,* (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class."

I have underlined the portions of Section 201 which are relevant to your first question, which is as follows:

> "Since the ability to write any matter is forbidden as a part of a registration test, is the requirement contained in Article 20 of the Amendments to the State Constitution that any voter be able to sign his name now made ineffective?"

Article 20 of the Articles of Amendment to the Massachusetts Constitution provides as follows:

> "*No person shall have the right to vote, or be eligible to office under the constitution of this commonwealth, who shall not be able to read the constitution in the English language, and write his name:* — provided, however, that the provisions of this amendment shall not apply to any person prevented by a physical disability from complying with its requisitions, nor to any person who now has the right to vote, nor to any persons who shall be sixty years of age or upwards at the time this amendment shall take effect." (Emphasis supplied.)

Under the Supremacy Clause of the Federal Constitution the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U. S. Const., Art. 6, cl. 2. To the extent Article 20 conflicts with Section 201 of the Act, then, Article 20 must give way.

Article 20 requires a citizen to be able to "write his name" in order to have the right to vote unless physically disabled from so doing. Section 201 forbids the employment, as a precondition to registering or voting, of a test to demonstrate the ability of the citizen to write "any matter." This broad language brings within the sweep of the prohibition the requirement that a citizen be able to write his name. Consequently, this requirement is suspended under the Act until August 6, 1975.

The answer to your first question, therefore, is affirmative subject to the time limitation imposed by the Act.

The other provision of the Act as to which you seek my opinion is Section 302 extending the franchise to citizens between the ages of 18 and 21; it provides as follows:

> "Except as required by the Constitution, no citizen of the United States who is otherwise qualified to vote in any State or political subdivision in any primary or in any election shall be denied the right to vote in any such primary or election on account of age if such citizen is eighteen years of age or older."

Under Section 305 of the Act, this provision is applicable to all primaries and elections held on or after January 1, 1971.

The question you ask with respect to Section 302 is as follows:

> "Article 9 of the Bill of Rights of the State Constitution, together with the state election law and city charters, provides that the various office holders must be chosen from among qualified voters. Is this to be interpreted that once registered to vote, a person of the age of 18 years is qualified to be elected to all offices on all ballots in the Commonwealth, with the exception of Congress, and U. S. Senator?"

"The right to hold office," the Supreme Judicial Court has advised, "is not necessarily co-extensive with the right to vote." *Opinion of the Justices*, 240 Mass. 601, 606. The question whether a citizen of the Commonwealth has the right to hold office is different from the question whether he has the right to vote. Thus, holders of public offices created by the Massachusetts Constitution must meet residency requirements different from those of voters. Mass. Const., Pt. 2, c. 2, § 1, Art. 2; § 2, Art. 1 (seven years for governor and lieutenant governor); Arts. 16, 17, and 22 of the Arts, of Amend. of the Mass. Const. (five years for councillor, secretary, treasurer, auditor, attorney general, and senator); and Art. 21 of the Arts. of Amend. of the Mass. Const. (one year in district for representative). Similarly, holders of public offices created by the Federal Constitution must also meet certain qualifications not required of voters. U. S. Const., Art. I, § 2 (Representative must be United States citizen for seven years, at least 25 years of age, and an inhabitant of state in which chosen); Art. I, § 3 (Senator must be United States citizen for nine years, at least 30 years of age, and an inhabitant of state for which chosen); and Art. II, § 1 (President must be United States citizen, at least 35 years of age, and a resident of the United States for fourteen years). *Opinion of the Justices, supra*, at 604-607.

Section 302 of the Act contains no provision with respect to the right to hold office. It is limited to the right to vote. Its effect, then, is restricted to modifying the Massachusetts Constitution and laws by substituting the age 18 wherever the age 21 appears as a qualification for the right to vote. Art. 3 of the Arts. of Amend. of the Mass. Const. G. L. c. 51, § 1. See U. S. Const., Art. 6, Cl. 2.

Although the Commonwealth, by taking appropriate action, has the power to set age qualifications for holders of public office different from the age qualification of voters, it has not done so. The implication has persisted through the years that in the absence of a provision for a specific qualification for public office, the qualification to be eligible to vote applies. This implication has arisen from usage and from interpretation of the Massachusetts Constitution, particularly Article 9 of the Declaration of Rights, to which you refer, which provides that "the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments." *Opinion of the Justices, supra*, at 608.

Since voter qualifications must govern in the absence of specific provision for different qualifications, the change in age requirement for voters from 21 to 18 causes the same change in the age requirements of holders of public office. *Opinion of the Justices, supra* at pp. 608-610.

I answer your second question affirmatively subject to the addition to the exceptions you list of the office of President since he must be at least 35 years of age.

Your third question, like your first, relates to Section 201 of the Act and is as follows:

> "There appears a dual requirement in Article 20 of the Amendments of the Constitution that: 'No person shall have the right to vote, *or be eligible to office* under the constitution of this commonwealth, who shall not be able to read the constitution in the English language, and write his name,' . . . Does this mean that if a person cannot read or write he cannot hold office?"

What I have said in response to your second question applies equally here. In view of the fact that the Commonwealth has made specific provision in the Constitution that one must be able "to read the Constitution in the English language, and write his name" to be eligible to hold office, this requirement is not affected by Section 201 relating only to voter eligibility.

I, therefore, answer your third question affirmatively.

I caution you that, although both sections about which you have inquired have withstood constitutional challenge in the United States District Court for the District of Columbia (*Christopher* v. *Mitchell*, 39 U. S. Law Week 2196), the Supreme Court of the United States recently has taken under advisement four original suits in which the states of Oregon, Texas, Arizona and Idaho attack the constitutionality of the

same sections. See 39 U.S. Law Week 3173. I had hoped these cases would have been decided before this opinion was given. Unfortunately, they have not. I, therefore, suggest that, pending the outcome of those cases, your instructions to election officials provide some means of identifying those voters who would not qualify but for Section 201 of the Act and those candidates for office who would not qualify but for Section 302 of the Act.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 24 December 10, 1970

Honorable John F. X. Davoren
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Mr. Secretary:

You have requested an opinion whether you may authorize the use of a representation or replica of the Great Seal of the Commonwealth as a "backdrop" for portions of television news programs which pertain to "state house news." You inform me that application has been made to you for such permission, in view of the fact that you have custody of the Great Seal. It is my opinion, for the reasons hereinafter stated, that you may not grant such permission because the use to which you refer would constitute an advertising and/or commercial use of the Great Seal which is prohibited.

While custody of the Great Seal of the Commonwealth is committed to you by statute, General Laws, c. 9, § 11, the use of a reproduction or replica of the Seal is also strictly regulated by statute and is not a matter of administrative discretion. General Laws, c. 264, § 5 prohibits the use of "any representation of the arms or great seal of the commonwealth for any advertising or commercial purpose . . ." and provides a penalty of a fine of not less than ten nor more than one hundred dollars or imprisonment for not more than one year, or both, for commission of that offense. Although the prohibition has been construed by prior Attorneys General as not applying to advertising by the Port of Boston Authority (Op. Atty. Gen., April 16, 1974, p. 92) or by the Division of Savings Bank Life Insurance (Op. Atty. Gen., November 2, 1925), the distinction in those cases was that the advertising was for a governmental purpose and by a governmental unit. In the case you present, it is my opinion that the use would be for an advertising or commercial purpose which is prohibited by the statute. See *Commonwealth* v. *R. I. Sherman Manuf. Co.*, 189 Mass. 76, 79.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 25 December 16, 1970

David M. Wallwork, M.D.
Secretary, Board of Registration in Medicine
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

Dear Doctor Wallwork:

You have requested my opinion with respect to the legality of a decision of the Board of Registration in Medicine denying an application for further limited registration submitted by a physician who is not registered to practice medicine within the Commonwealth. The physician involved, who is a graduate of a Canadian medical school, has already been granted five years of limited registration by the Board, and he desires further limited registration so that he may accept and perform the duties of Director of Evaluative Studies (Director of Clinical Psychiatry) at the Boston University — Department of Mental Health Community Mental Health Center.

In support of his application for limited registration, the physician argues that the provisions of St. 1968, c. 234, as amended by St. 1969, c. 179, require that the Board grant the application inasmuch as he is a graduate of a foreign medical school. You have advised in your letter that the Board's denial (which has not been made final) is based on the Board's opinion that graduates of Canadian medical schools are *not* graduates of foreign medical schools. In this respect, you inform me that it has been the practice of the Board to register graduates of Canadian medical schools on the same basis as graduates of United States medical schools.

In considering your request, I have confined myself solely to the question whether a graduate of a Canadian medical school is a graduate of a foreign medical school within the meaning of St. 1968, c. 234, as amended by St. 1969, c. 179. For the reasons hereinafter stated, I answer that question in the affirmative. On the assumption that the Board's denial of the application for limited registration is based solely on a contrary and erroneous construction of the statute, it is my opinion that the application must be granted.

Limited registration is governed by G. L. c. 112, § 9 which provides:

> "An applicant for limited registration under this section who shall furnish the board with satisfactory proof that he is twenty-one or over and of good moral character, that he has creditably completed two years of a premedical course of study in a college or university and not less than three and one half years of study in a legally chartered medical school having the power to grant degrees in medicine, and that he has been appointed an interne, fellow or medical officer in a hospital or other institution of the commonwealth, or of a

> county or municipality thereof, or in a hospital or clinic which is incorporated under the laws of the commonwealth or in a clinic which is affiliated with a hospital licensed by the department of public health under authority of section seventy-one of chapter one hundred and eleven, or in an out-patient clinic operated by the department of mental health, or in the department of public health for duty in clinics or in programs operated or approved by the department of public health, or in programs approved by the board of registration in medicine in the commonwealth and leading toward certification by specialty boards recognized by the American Medical Association, may upon payment of five dollars, be registered by the board as an interne, fellow or medical officer for such time as it may subscribe; but such limited registration shall entitle the said applicant to practice medicine only in the hospital, institution, clinic or program designated on his certificate of limited registration, or outside such hospital, institution, clinic or program for the treatment, under supervision of one of its medical officers who is a duly registered physician, of persons accepted by it as patients, or in any hospital, institution, clinic or program affiliated for training purposes with the hospital, institution, clinic or program designated on such certificate, which affiliation is approved by the board and in any case under regulations established by such hospital, institution, clinic or program. The name of any hospital, institution, clinic or program so affiliated and so approved shall also be indicated on such certificate. Limited registration under this section may be revoked at any time by the board."

Pursuant to the above-quoted section, registration shall be only "for such time as it [the board] may prescribe" and "may be revoked at any time by the board." The Board, then, has broad discretion with respect to issuing limited registrations. In the absence of a showing that the Board has acted arbitrarily, capriciously or discriminatorily, its action was proper unless the provisions of St. 1968, c. 234, as amended by St. 1969, c. 179, required it to extend the applicant's limited registration. That special act provided:

> "Notwithstanding the provisions of any other law or regulation, the limited registration for the practice of medicine issued to a physician who is a graduate of a foreign medical school shall be extended so long as such physician is an employee of the commonwealth and works in a state hospital, state school or other mental health or retardation facility, or is a municipal employee working in a municipal hospital, and otherwise complies with the requirements for limited registration." St. 1968, c. 234, as amended by St. 1969, c. 179.

The design and effect of the special act, as applied here, is to *require* the Board to extend limited registration issued to the physician involved

if he (1) graduated from a "foreign" medical school, (2) is employed by the Commonwealth in a mental health facility, and (3) otherwise complies with the requirements for limited registration. As to (2), no question is raised. I assume that the applicant has "otherwise" met the requirements for limited registration and, thus, the only remaining question is whether he is a graduate of a "foreign" medical school.

The word "foreign" in the statute must be construed, according to its common usage (G. L. c. 4, § 6). So construed, the words "foreign medical school" mean a medical school not located in the United States. Where the Legislature has wished to classify graduates of Canadian medical schools with graduates of medical schools in the United States, it has done so in express terms. See, e.g., G. L. c. 112, § 2. Furthermore, when G. L. c. 112, § 2 was first amended to provide an additional pre-examination requirement of graduates of "medical schools legally chartered in a sovereign state other than the United States or Canada," the Legislature stated that the purpose of the amendment was to provide "for the screening of graduates of *certain* foreign medical schools for the purpose of determining their qualifications for admitting them to examination for licenses to practice in the commonwealth . . ." (Emphasis supplied.) St. 1955, c. 622. The apparent intent of the Legislature in using the word "certain" was to exclude Canadian schools from the category of "foreign medical schools." Here the Legislature has employed no such word to modify "foreign medical school." I therefore conclude that the Legislature intended the special act to apply to graduates of *all* foreign medical schools, including those in Canada.

I appreciate the fact that the Board has always registered graduates of Canadian medical schools on the same basis as graduates of medical schools in the United States. Nevertheless, the meaning of the special act is plain. Any modification of the act must come from the Legislature. *Commonwealth* v. *Antonio*, 333 Mass. 175, 178.

Since the special act applies in this case, the Board cannot deny the applicant further limited registration so long as he has met the requirements for limited registration and is employed by the Commonwealth of Massachusetts in a mental health facility.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 26 December 22, 1970

Honorable Alfred L. Frechette, M.D.
Commissioner of Public Health
600 Washington Street
Boston, Massachusetts 02111

Dear Commissioner Frechette:

You have requested my opinion on a question relating to approval by your Department of a proposed sewerage system which would serve 35

single family dwellings in a real estate subdivision in West Barnstable. If approved, the system would be installed by the developer and administered after sale of the homes by an association of the lot owners. You have informed me that it is the Department's policy in such situations to disapprove a sewerage system if there is no guarantee of collection of funds to ensure operation, maintenance, and periodic rehabilitation. Such disapproval protects the public health by preventing the installation of a system where the local municipality has not agreed to assume ownership of the sewerage system to ensure such operation, maintenance and rehabilitation. As you note, if a sewerage system is not maintained properly, the public health can be endangered.

Specifically, you ask:

"Is the Department of Public Health's policy and decision (refusal because of the lack of guarantee of funds for long term continuous maintenance and periodic rehabilitation of the works) a proper interpretation of Sections 6 and 7 of Chapter 83, or other laws pertaining to maintenance or prevention of nuisance or conditions which are likely to create objectionable results in its neighborhood from sewage works?"

For the reasons hereinafter stated, I answer your question in the affirmative.

In considering your question, it is necessary to review the relevant statutory provisions. General Laws, c. 83, § 6 provides:

> "A town, with the approval of the department of public health, after a public hearing by said department of all parties interested, of which notice shall be given by publication in one or more newspapers, may purchase land within its limits, or take the same by eminent domain under chapter seventy-nine, for the treatment, purification and disposal of sewage. Towns or persons owning or operating filter beds or other works for the treatment, purification and disposal of sewage shall provide and maintain works adequate for the treatment of the sewage at all times, and shall operate such works in such manner as will prevent a nuisance therefrom or the discharge or escape of unpurified or imperfectly purified sewage or effluent into any stream, pond or other water, or other objectionable result."

General Laws, c .83, § 7 provides:

> "If the department of public health determines upon examination that a filter bed or other works for the treatment, purification and disposal of sewage causes the pollution of a stream, pond, or other water, or is likely to become a source of nuisance or create objectionable results in its neighborhood by reason of defective construction, inadequate capacity or negligence or inefficiency in maintenance or operation or from other cause, it may issue notice in writing to the town or person owning or operating such works requiring such enlargement or improvement in the works or change in the

method of operation thereof as may be necessary for the proper maintenance and operation of the works and the efficient purification and disposal of the sewage. If said department determines after investigation that the unsatisfactory operation of a sewage disposal system is due wholly or partly to the discharge into the system of manufacturing waste or other substance of such character as to interfere with the efficient operation of said works, it may if necessary prohibit the entrance of such waste or other material, or may regulate the entrance thereof into the system, or may require the treatment of such waste or other material in such manner as may be necessary to prevent its interference with the operation of the works."

General Laws, c. 111, § 5 provides, in pertinent part:

"The department shall take cognizance of the interests of life, health, comfort and convenience among the citizens of the commonwealth; . . . It shall have oversight of inland waters, including surface and subsurface waters and sources of water supply, and shall control the pollution or contamination of any or all of the lakes, ponds, streams, tidal waters and flats within the commonwealth and of tributaries of such tidal waters and flats. . . ."

General Laws, c. 111, § 17 provides, in pertinent part:

"The department shall consult with and advise . . . persons having or about to have systems of water supply, drainage or sewerage as to the most appropriate source of water supply and the best method of assuring its purity, or as to the best method of disposing of their drainage or sewage with reference to the existing and future needs of other towns or persons which may be affected thereby . . . Towns and persons shall submit to said department for its advice and approval their proposed system of water supply or of the disposal of drainage or sewage, and *no such system shall be established without such approval* . . ." (Emphasis supplied.)

The statutory scheme of regulation of water and sewerage systems evinces a clear legislative intent, in my opinion, that the Department of Public Health have plenary control over such systems, not only as to their initial approval but also as to their continued operation. See II *Op. Atty. Gen.*, p. 46 (1899). In view of the statutory command found in G. L. c. 83, § 6 that persons operating and owning sewerage treatment facilities "provide and maintain works adequate for the treatment of the sewage at all times" and the Department's extensive powers found in G. L. c. 83, § 7 to order corrective action once pollution is detected or a nuisance becomes apparent, I think it clear that the Department may inquire into the subject whether funds to operate, maintain and rehabilitate a proposed sewerage system will be guaranteed once the system becomes operative. If it appears that funding is speculative, depends upon

voluntary concerted action by lot owners in a subdivision, or is difficult to enforce, then the Department may properly withhold its approval of a proposed system. Inasmuch as the Town of Barnstable has no municipal sewerage system in the area of the proposed subdivision and the Town has not agreed to assume ownership once the system becomes operative, it is my opinion that the Department's decision to disapprove the system is not violative of the applicable statutes.

In reaching my conclusion, I have considered the provisions of G. L. c. 183A, the so-called "condominium law," and find them inapplicable. In particular, G. L. c. 183A, § 11(a) requires that the by-laws of a condominium organization include "[t]he method of providing for the necessary work of maintenance, repair and replacement of the common areas and facilities and payments therefor, including the method of approving payment vouchers." That section is not applicable here because the proposed subdivision is not a condominium. However, even in situations involving condominiums, the Department is not ousted of its power to approve or disapprove a proposed sewerage system by the provisions of the section.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 27 December 23, 1970

Honorable John W. Sears, *Commissioner*
Metropolitan District Commission
20 Somerset Street
Boston, Massachusetts 02108

Dear Mr. Sears:

Acting Commissioner Max Rosenblatt requested my opinion on several questions so that your Commission can proceed effectively in dealing with an order of the Water Resources Commission that the Metropolitan District Commission chlorinate the effluent at the Clinton Sewage Treatment Plant.

Specifically, the questions posed are the following:

1. "Does Chapter 462, Acts of 1954, negate previous statutes relating to transfer of the Clinton Sewage Treatment Plant facilities to the Town of Clinton?
2. "Is the Commission or is the Town of Clinton responsible for the additional construction, maintenance and operational costs which will be involved in the chlorination of the effluent of the Clinton Sewage Treatment Plant?
3. "Can the Metropolitan District Commission construct capital supplementary improvements at the Clinton Sewage Treatment Plant without authorization in the form of special legislation?

4. "Is the Metropolitan District Commission authorized to construct supplementary facilities without compensation from the Town of Clinton?"

Chapter 557 of the Acts of 1898 authorized the then Metropolitan Water Board to take lands in the towns of Clinton and Lancaster and to erect and maintain thereon a plant for the disposal of sewage of the town of Clinton.

Section 3 of the Act provided:

> "The metropolitan water board shall maintain and operate the works constructed by it, unless otherwise agreed by said board and the Town of Clinton, until the sewage of said town shall have outgrown the normal capacity of the south branch of the Nashua river to properly dispose thereof; and then said board shall transfer to said town all the works, lands, water rights, rights of way, easements and other property, constructed and acquired under the provisions hereof, upon such terms as may be agreed upon by said board and said town, and thereafter said works, lands, water rights, rights of way, easements and other property shall be owned, maintained and operated by the Town of Clinton under the supervision and control of the state board of health, and said town shall pay to the Commonwealth for the property so transferred such sum or sums, if any, as may be agreed by said town and said board to be just and proper . . ."

Section 4 of the Act further provided that if the Metropolitan Water Board and the Town of Clinton were unable to agree upon the proper time or the terms under which the transfer of the Sewage Treatment Plant should be made, either party could apply to the Supreme Judicial Court for a determination of any matter in controversy.

Several attempts made over the years by the Metropolitan Water Board to have the Sewage Treatment Plant taken over by the Town of Clinton were ineffective, so that in 1954 the Plant was still in the control of the successor Metropolitan District Commission. That year, by c. 462 of the Acts of 1954, the Legislature provided for the reconstruction of the Clinton Sewage Disposal Works.

Section 1 of this Act specified in relevant part:

> "The metropolitan district commission shall . . . begin the construction of a modern plant to replace the existing works now serving the town of Clinton . . . *Said metropolitan district commission shall continue to maintain said sewage disposal works upon their completion . . .*" (Emphasis supplied.)

The question for resolution, then, is whether the above provision of St. 1954, c. 462 impliedly repealed that part of St. 1898, c. 557, § 3 allowing for the turning over of the Sewage Treatment Plant upon the agreement of the Town of Clinton and further mandating such turnover upon outgrowth of the normal disposal capacity of the south branch of the Nashua River. It is my opinion that it did.

The repeal of statutes by implication is not a principle favored by the courts. *Homer* v. *Fall River*, 326 Mass. 673. However, it does have its proper place in judicial construction, deriving "from the basic concept that it is the duty of the court to ascertain the legislative intent and to effectuate it." *Doherty* v. *Commissioner of Administration*, 349 Mass. 687, 690. The legislative intent to repeal or supersede the prior provision must plainly and clearly appear. *Dudley* v. *City of Cambridge*, 347 Mass. 543. "The test of the applicability of the principle of implied repeal is whether the prior statute is so repugnant to and inconsistent with the later enactment covering the subject matter that both cannot stand.*** Repugnancy and inconsistency may exist when the Legislature enacts a law covering a particular field but leaves conflicting prior prescriptions unrepealed.*** Where such a conflict does appear it is the court's duty to give effect to the Legislature's intention in such a way that the later legislative action may not be futile. The earlier enactment must give way . . ." *Doherty* v. *Commissioner of Administration, supra*, at 690, and cases cited. The earlier statute is impliedly repealed only to the extent of the inconsistency. *Nassar* v. *Commonwealth*, 341 Mass. 584, 589.

In my view it is impossible to avoid the plain and clear intent expressed in the provision: "Said metropolitan district commission shall continue to maintain said sewage disposal works upon their completion." St. 1954, c. 462, § 1. In addition to this, Section 3 of the Act directed that "all costs of future maintenance" of the new plant should be borne by the Metropolitan Water District, a division of the Metropolitan District Commission under G. L. c. 92.

These pronouncements are repugnant to and inconsistent with the earlier Act's allowance for Commission divestiture of the works. Therefore, it is my opinion that under the test of *Doherty* v. *Commissioner of Administration, supra*, the Legislature's intention was to supersede the prior provision, and the earlier enactment must give way to the extent of the inconsistency.

Buttressing this conclusion is the fact that the 1954 Act called for the Commission "to replace" the then existing works. It is therefore reasonable and apparent that the directive that the Commission continue to maintain the Treatment Plant was meant "to replace" the earlier legislative provision for divestiture of control.

In accordance with the above, it is my opinion that:

(1) St. 1954, c. 462 superseded St. 1898, c. 557 relating to transfer of the Clinton Sewage Treatment Plant facilities to the town of Clinton.

(2) Consequently, the Metropolitan District Commission, and not the Town of Clinton, is responsible for the additional construction, maintenance and operational costs which will be involved in the chlorination of the Clinton Treatment Plant effluent.

The next question for consideration is whether the Commission can construct capital supplementary improvements at the Clinton Plant without special legislative authorization.

The Town of Clinton is not included in the Metropolitan District under G. L. c. 92, nor is there mention therein of the Clinton Sewage Treatment Plant. The Treatment Plant is *sui generis* under St. 1954, c. 462, and such provisions of St. 1898, c. 557 as remain consistent, and such sums as are authorized for construction of the plant are controlled by the 1954 Act. The Act provides in Section 1: "For the purpose of constructing said plant [the Commission] may expend such sums as may be necessary but not exceeding the amount authorized to be borrowed under section three of this act." Section 3 specifies: "To meet the expenditures necessary in carrying out the provisions of this act, the state treasurer shall . . . issue and sell . . . bonds of the commonwealth . . . not exceeding in the aggregate the sum of six hundred and fifty thousand dollars."

The Treasurer and Receiver General has informed me by letter dated December 21, 1970 that the full allowance of $650,000 has been issued and sold. As a result, there being no present authorization for funds with which to undertake additional construction at the Clinton Plant, it is my further opinion that:

(3) The Metropolitan District Commission cannot construct supplementary improvements at the Clinton Sewage Treatment Plant without authorization in the form of special legislation.

(4) Since the Metropolitan District Commission is not authorized to construct supplementary facilities without special legislation, I find it unnecessary to answer question (4). The Legislature will presumably decide upon cost allocation should it decide to authorize additional construction.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 28 December 23, 1970

Honorable Joseph L. Grace
Mayor of the City of Gloucester
City Hall
Gloucester, Massachusetts

Dear Mayor Grace:

You have referred a communication to me which was received by the Gloucester City Council from the Gloucester Community Pier Association, Inc. (the Association) with a request that I render an opinion on the same. I have been furnished with a copy of a letter from the Associ-

ation, addressed to the City Clerk, which states that it is "subject only to the supervision of the office of the Attorney General . . ." On that basis, the Association has refused to comply with a request by the City that leases of the Gloucester State Fish Pier facilities (the Pier) be made available to the Gloucester Urban Renewal Authority.

As you know, the Attorney General does not ordinarily render opinions to municipal officials. However, in the light of the circumstances of the particular situation presented, I deem it appropriate for me to express an opinion on this matter.

In essence, you ask if the Association is, as it says, subject only to the supervision of this Department. For the reasons hereinafter stated, I answer your question in the negative.

I find from a review of records of this Department that the Association has periodically filed annual financial reports as a "public charity" with the Division of Public Charities in this Department. However, although reports are required to be filed annually and the necessary forms are mailed to each reporting organization every year, the Association has not filed any report since that filed for the calendar year 1966. I am enclosing a copy of the report filed for that year.

Although the Association, as stated in its letter, has been referred to as a corporate entity, separate from the City, it was pointed out by the Supreme Judicial Court in *Gloucester Ice & Cold Storage Co.* v. *Assessors of Gloucester*, 337 Mass. 23, 26, footnote 6, that the Association has "some of the aspects of a special municipal 'authority' in view of the essentially public functions which it was designed to serve."

It is also to be noted that the statutes applicable to the construction of the Pier in Gloucester provided that the City of Gloucester itself was to be the preferred lessee of the Pier, and if the City became such, the Pier and buildings were to be administered by the City Council or by a commission appointed by it.

In my view it is clear that if, as the statutes contemplate, the Pier is leased to a charitable corporation, that corporation is to administer the Pier for the benefit of the City and its inhabitants and in lieu of operation of the Pier by the City itself. In this regard, I observe that St. 1931, c. 311, § 1 originally authorized the construction of the Pier "[f]or the purpose of improving and developing Gloucester harbor for the promotion of the fish industry and commercial facilities of . . . Gloucester."

The Association, as a charitable organization and lessee of the Pier is, in effect, administering a public charitable trust for the benefit of the City of Gloucester and its inhabitants. See *American Institute of Architects* v. *Attorney General*, 332 Mass. 619.

In the circumstances, the Association, like any other trustee of property administered for the benefit of a municipality or its inhabitants, is subject to the provisions of G. L. c. 41, § 53, which provides that municipal auditors shall at least once in every year audit the accounts of the charity and report thereon. To that extent at least, it is not true that the Association is subject only to the supervision of the office of the Attorney General.

In enacting G. L. c. 41, § 53, the Legislature has, in my opinion, provided a method for making available to the City of Gloucester the facts as to the operation of the Pier, which facts are clearly of interest to the officers and inhabitants of the City. Compare *Mahoney* v. *Natick*, 346 Mass. 709. Inspection of the leases to which you refer must be considered to be an integral part of the audit contemplated by the statute.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 29 January 15, 1971

Honorable John W. Sears, *Commissioner*
Metropolitan District Commission
20 Somerset Street
Boston, Massachusetts 02108

Dear Commissioner Sears:

You have requested my opinion whether the provisions of G. L. c. 92, § 62B, which provide for overtime compensation for members of the Metropolitan District Police, apply to Captains of that police force who perform duty beyond their regular hours of service. It appears from your request that at certain times members of the Metropolitan District Police force have performed overtime service, and that at such times the M.D.C. police forces have been under the direction of a District Captain and a Headquarters Captain. You have advised me that the Captains' request for overtime compensation was denied because a captain "is a public officer and not an employee." You have further advised that an appeal under the police grievance procedure is now pending before you.

General Laws, c. 92, § 62B provides:

> "Notwithstanding any other provision of law, members of the police force of the commission who perform service beyond their regular hours of service shall be compensated therefor as overtime service, at an hourly rate equal to one and one half times the hourly rate of their regular compensation for their average weekly hours of regular duty."

In my opinion, the question you pose does not depend upon whether a Captain of the Metropolitan District Police is an "officer" of the Commonwealth or an "employee". That distinction appears to have been the basis of an opinion rendered in 1952 by an Assistant Attorney General to the then Commissioner of Administration that Captains of the Metropolitan District Police were not entitled to overtime compensation, and, accordingly, the rules of the Director of Personnel and Standardization have employed that distinction in denying overtime compensation to Captains.

As I view the question, the only matter for resolution is whether Captains are members of the Metropolitan District Police force. Since I conclude that they are, it follows that the overtime provisions of G. L. c. 92, § 62B should apply to them, any rule of the Director of Personnel and Standardization notwithstanding. Concededly, G. L. c. 7, § 28 confers upon the Director the authority to make rules and regulations with respect to overtime compensation "for permanent and temporary employees, and for officers other than those exempted by such rules . . .," but the Director may not, of course, adopt rules which contravene clear statutory provisions. I can discern no intent on the part of the Legislature to affect or supersede the provisions of section 62B when it enacted St. 1954, c. 680, § 2 (G. L. c. 7, § 28, in substantially its present form). Compare *Boston Elevated Railway* v. *Commonwealth*, 310 Mass. 528, 551. That being the case, the more specific statutory language found in section 62B controls over the general rulemaking powers conferred on the Director by G. L. c. 7, § 28.

In conclusion, then, it is my opinion that Captains of the Metropolitan District Police are entitled to overtime compensation pursuant to G. L. c. 92, § 62B.

Yours very truly,
ROBERT H. QUINN
Attorney General

Number 30 January 25, 1971

Honorable Arthur W. Brownell
Commissioner of Natural Resources
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

Dear Commissioner Brownell:

You have requested my opinion whether G. L. c. 44, § 7(3) permits the Town of Canton to borrow funds for the acquisition of certain real estate. You indicate that the property in question — 33.8 acres of land, which includes two estate-type dwellings and accessory buildings — is to be acquired for conservation and recreation purposes within the intent of G. L. c. 40, § 8C. Specifically, you have asked whether G. L. c. 44, § 7(3),[1] under which a city or town may incur debt for the purpose of "acquiring land for any purpose for which a city or town is or may hereafter be authorized to acquire land . . .," is to be construed as authorizing a debt financed acquisition only of "land" in the narrow sense, that is, exclusive of buildings standing thereon. It is my opinion, for the reasons hereinafter stated, that the word "land" as contained in clause (3) of c. 44, § 7, cannot be so narrowly construed.

[1] In pertinent part, G. L. c. 44, § 7 provides: "Cities and towns may incur debt, within the limit of indebtedness prescribed in section ten, . . . (3) For acquiring land for any purpose for which a city or town is or may hereafter be authorized to acquire land, not otherwise specifically provided for; for the construction of buildings which cities or towns are or may hereafter be authorized to construct, or for additions to such buildings where such additions increase the floor space of said building, including the cost of original equipment and furnishings of said buildings or additions . . ."

It has long been an elementary principle that "[t]he term 'land' legally includes all houses and buildings standing thereon." *First Parish in Sudbury* v. *Jones*, 8 Cush. 184, 189. Indeed, in a conveyance of a specified parcel of land "with all the buildings thereon," the quoted words are mere surplusage and have no legal effect (*Crosby* v. *Parker*, 4 Mass. 110, 114), because, generally speaking, a building affixed to the soil is part of the realty.

The Supreme Judicial Court recently pointed out that a reading of the word "land" as meaning only "land" in its original state, that is, exclusive of buildings and other improvements, would be to give that term an interpretation which varies from the meaning usually accorded it in the general laws. *Board of Assessors of Amherst* v. *State Tax Commissioners*, Mass. Adv. Sh. (1970) 781, 782. General Laws, c. 4, § 7, provides that "In construing statutes the following words shall have the meanings herein given, unless a contrary intention clearly appears . . . Seventeenth, 'land', 'lands' and 'real estate' shall include lands, tenements and hereditaments, and all rights thereto and interest therein." These words are of comprehensive import (see *Moulton* v. *Commissioner of Corps. Tax'n.*, 243 Mass. 129, 132), and obviously include land which has been improved by the presence of buildings. 3 *Op. Atty. Gen.* 34. Similar language is contained in the statute of frauds, G. L. c. 259, § 1, Fourth. Compare *Hook Brown Co.* v. *Farnsworth Press, Inc.*, 348 Mass. 306, 310. In the statutes relating to eminent domain takings (see, e.g., G. L. c. 79, §§ 1, 2 and 4) the word "land" obviously is intended to include land which has been improved by the addition of buildings.

In short, as stated by the Supreme Court of New Jersey in *Bruro* v. *Long Beach*, 21 N.J. 68, 72, the term "land" is, in the law, a word of art; it " 'is a *nomen generalissimum* and includes not only the soil, but everything attached to it, whether attached by the course of nature, as trees, herbage, and water, or by the hand of man, as buildings, fixtures and fences.' . . ." In the *Bruro* case the Court held that, no contrary intent appearing, a statute permitting a municipality to exchange "lands" owned by it for other "lands" desired for public use authorized an exchange of lands which had been improved with buildings.

As I have previously noted, "unless a contrary intention clearly appears," the Legislature must be deemed to have employed the term "land" in its usual comprehensive meaning. G. L. c. 4, § 7, Seventeenth. See, also, G. L. c. 4, § 6, Third, providing that a statutory word or phrase is to be construed according to "Common and approved usage" unless "inconsistent with the manifest intent of the law-making body." *Board of Assessors of Amherst* v. *State Tax Commission*, *supra*, at 782.

I discern nothing in G. L. c. 44, § 7(3), or in its legislative history, which indicates that the Legislature intended the word "land" to have other than its "common and approved" meaning. Compare *Board of Assessors of Amherst* v. *State Tax Commission*, *supra*, at 785-786.

Clause (3) of G. L. c. 44, § 7 does not deal with the power of a municipality to acquire or to appropriate funds for the acquisition of real estate. Rather, that clause, along with each of the other clauses in § 7, merely sets forth the terms under which debt may be incurred in the exercise of powers which are to be found elsewhere. See, e.g., G. L. c. 45, § 3, providing for the taking or purchase of "land" for public parks. The fact that land has been improved by the presence of buildings apparently will not bar a town from taking or purchasing it for park purposes (*Iris* v. *Hingham*, 303 Mass. 401, 402-403), and there is no reason why such an acquisition would not qualify for debt financing under G. L. c. 44, § 7(2) ("For acquiring land for public parks . . ."). The power to incur debt in the financing of such an acquisition is no less extensive in its subject matter (viz., "land") than is the power to make the acquisition. All borrowings authorized by G. L. c. 44, § 7 are subject to the strict fiscal controls set forth therein and to the limit of indebtedness prescribed in G. L. c. 44, § 10. Nothing in these provisions discloses any legislative fiscal policy which would only permit a debt-financed acquisition of land so long as that land has not been improved by the presence of buildings.

Therefore, it is my opinion that the authority of a town to incur debt under G. L. c. 44, § 7(3) for the acquisition of land which it is otherwise authorized to acquire is not affected by the fact that the land has been improved by the presence of buildings.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 31 February 10, 1971

Honorable Neil V. Sullivan
Commissioner of Education
182 Tremont Street
Boston, Massachusetts 02111

Dear Commissioner Sullivan:

You have requested my opinion whether public schools are authorized to maintain sessions on the third Monday in February and the third Monday in April. According to the information you have provided, several communities did not hold sessions on days when bomb threats were received and have asked whether they may hold sessions on said days in order to maintain the minimum 180-day school year as mandated by the Board of Education. For the reasons hereinafter stated, I answer your question in the negative.

The third Monday in February (Washington's Birthday) and the third Monday in April (Patriots' Day) are legal holidays. Mass. G. L. c. 4, § 7, cl. 18. It is required that "public offices shall be closed on all legal holidays . . ." Mass. G. L. c. 136, § 12. Whatever the definition of "public offices" in other contexts, I am of the opinion that the Legislature intended that public schools, with their necessary staffs and

facilities, be included within the term in construing section 12. The holding of public school sessions certainly does not appear within the list of activities permitted on legal holidays under Mass. G. L. c. 136, § 14.

Finally, whatever doubt may exist whether public schools are "public offices," it is clear that certain areas of public schools (e.g., principal's and superintendent's offices) are most certainly "public offices," the closing of which on these holidays would in any event have the effect of preventing public school operations. Accordingly, while I sympathize with the desire of several communities to compensate for lost school days, such cannot be done by the expedient they propose.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 32 February 24, 1971

Dr. Edward C. Moore, *Chancellor*
Board of Higher Education
182 Tremont Street
Boston, Massachusetts 02111

Dear Doctor Moore:

You have requested my opinion whether business corporations, which are incorporrated or propose to incorporate for profit-making purposes under the provisions of General Laws, Chapter 156B, may provide either in their articles of organization or articles of amendment a provision that they may grant academic degrees. As you note in your letter, the Board of Higher Education has the responsibility, upon reference from the Secretary of the Commonwealth, to investigate and make a determination concerning the incorporation of any college or educational institution seeking the power to grant degrees. You have advised me that until recently the Board has received applications only from non-profit corporations organized under the provisions of General Laws, Chapter 180, but that a request is now pending from a Chapter 156B corporation which seeks approval of articles of amendment to its articles of organization. For the reasons hereinafter stated, I answer your question in the affirmative.

General Laws, c. 69, § 30 provides in part as follows:

> "The state secretary, before approving a certificate of organization in connection with the *proposed incorporation* of a college, junior college, university or other *educational institution with power to grant degrees, or articles of amendment to the charter of an existing educational institution which will give it such power*, or changing its name to a name which will include the term 'college', 'junior college' or 'university', shall refer such certificate or articles to the board of higher education. Said board shall immediately make an investiga-

> tion . . . and subject to the provisions of section 31, shall make a determination . . ., and shall forthwith report its findings to the state secretary . . . If it appears . . . that said board does not approve of such certificate or articles, he shall refuse to endorse his approval thereon, otherwise he shall endorse his approval thereon unless he finds that the provisions of law relative to the organization of the corporation or the amendment to its charter have not been complied with . . ." (Emphasis supplied.)

Section 31 of Chapter 69 refers to junior colleges and provides in part that the Board of Higher Education shall not approve a certificate of incorporation or articles of amendment in connection with the proposed incorporation of a junior college with power to grant degrees or an amendment of the charter of any such existing educational institution which will give it the power to grant junior college degrees, etc., unless

> "Second, the institution is organized under the laws of the commonwealth as a non-profit educational institution, and shall have operated as such an institution for . . . not less than one year immediately prior to the filing of the petition for such privilege . . ."

The specific requirement in G. L. c. 69, § 31 Second that a junior college be organized "as a non-profit educational institution" and the absence of any such express requirement in § 30 for a college, university or other educational institution lead to the conclusion that the latter types of institutions need not be non-profit organizations. Accordingly, a corporation whose articles of organization provide upon incorporation that its purposes include that of operating an educational institution with power to grant degrees comes within § 30 and the articles may be approved. I find nothing in G. L. c. 156B, §§ 9 or 12 which indicates that a contrary result is required.

In the instant case, a subsidiary question is raised by the fact that the c. 156B corporation was not originally organized for educational purposes and now seeks to amend its articles of organization to give it the power to grant degrees. While this question relates to the responsibilities of the Secretary of the Commonwealth, I am taking the liberty of answering it at this time and am also furnishing the Secretary with a copy of this opinion. The question arises because the articles of amendment would not constitute the "articles of amendment to the charter of an *existing educational institution*" and therefore at first blush such articles of amendment would appear not subject to approval by the Board under G. L. c. 69, § 30. However, there would seem to be no objection to filing articles of amendment with the Secretary which add to the corporate purposes operation for specified educational purposes and then further amending the articles of organization to provide degree granting power. Furthermore, it is my opinion that what can be done by two separate amendments can obviously be done in one instrument provided that the

amendment incorporating educational purposes is adopted first in time.

Accordingly, I conclude that a Chapter 156B corporation is eligible for degree granting authority.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 33 March 1, 1971

The Honorable Steven A. Minter
Commissioner
Department of Public Welfare
600 Washington Street
Boston, Massachusetts 02111

Dear Commissioner:

You have requested my opinion on three questions relating to the following facts which are in part stated in your letter of February 26, 1971, requesting my opinion and which in other part appear from certain documents you have appended to your letter.

On February 22, 1971, a Probate Court of this Commonwealth entered an order granting to the Department of Public Welfare (the Department) temporary custody of a certain minor female (hereinafter referred to as "the girl"). This order also gave to the Department "express power to give or withhold consent to an abortion for (the girl) depending on its judgment and discretion as to whether or not such abortion is lawful and therapeutic."

The girl's mother is deceased, and, her father, as appears from the statement of a physician on the staff of the hospital where the father is a patient, is *non compos mentis* as the result of injuries sustained in an automobile accident. Efforts by your Department to secure legal guardianship for the girl from among other living relatives were unsuccessful.

On January 16, 1971, a consultant physician, after examining the girl, reported to the Superintendent of the State Hospital where she was a patient (the State Hospital) that the girl was thought to be with child, and that, because of a history of severe recurrent bronchial asthma since birth, on account of which the girl "has been maintained almost constantly on adrenal steroid therapy, bronchodi lators and intermittent positive pressure breathing", pregnancy "would present increased risks of medical and respiratory complications". The physician recommended that the girl be "advised of the circumstances that indicate interruption of pregnancy for medical and genetic factors" and that her acceptance and the approval of her nearest relative should be obtained.

On January 23, 1971, the suspected pregnancy was confirmed by laboratory tests. Subsequently, another consultant physician to the State Hospital, in an undated memorandum which you have identified as being of February 1, 1971, reported as follows with respect to the girl.

"Since very early in her life she has required numerous admissions to the Children's Hospital and elsewhere because of severe attacks of bronchial asthma. In spite of routine treatment including hyposensitization, her asthma has been intractable and has necessitated the use of high, cortico steroid therapy intermittently from 1957 and continuously since 1960. Because of the severity of her asthma she has spent most of her life in Foster Homes or in Hospitals, including a stay at the Children's Asthma Research Institute and Hospital in Denver from October 1, 1964 until February of 1967. She was discharged from this latter institution on 15 mg. of Prednisone each day, and all attempts to reduce this dosage were followed by severe asthma attacks.

"After a stay of several months at the Children's Hospital she was transferred on 8-31-67 to the Residential Asthma Rehabilitation Unit of the (State) Hospital for care. Her primary findings on examination were her stunting, hyper-inflation of her lungs and generalized fairly constant wheezing. During her stay at the (State) Hospital it has been necessary to keep her on high doses of Prednisone and at times it amounts to 60 mg. of Prednisone per day. Despite high Prednisone dosages wheezing is not completely controlled and episodes of acute status Asthma has required intravenous therapy and even transfer to Children's Medical Center on three of four occasions during this time.

"As in most cases of intractable bronchial asthma there is a strong emotional overlay which will provoke acute asthma. Psychiatric therapy has been spotty, largely because there is no psychiatric help available in this institution. Her current medication consists of Tedral tablets three times per day and Tedral S.A. at bed time. Her Prednisone doses has varied from 20 to 40 mg. daily during the month of January. She requires IPPB with Isoproterenol morning and night and during acute periods much more. She is also on daily SSKI."

After noting that the pregnancy test was positive, the same physician stated: "The Medical Staff of this hospital, including myself, feel very strongly that a pregnancy would add a severe stress to this girl's rather precarious state of health in that she is neither emotionally or physically capable of carrying the pregnancy to term without considerable risk. The danger of a deformed baby would also be enhanced because of her high dose steroid dependency." (Sic)

The same physician recommended the girl's transfer to a private, general hospital "for medical gynecologic, and psychiatric evaluation for question of a therapeutic abortion."

The girl was admitted to the private hospital, as recommended by the last-mentioned physician, on February 5, 1971. After examination, on February 12, 1971, the Obstetrician-Gynecologist-in-Chief of the private hospital reported to the Department in part that:

> "We find that she has severe bronchial asthma with chronic pulmonary insufficiency, aggrevated (sic) significantly by the pregnancy. Although compensated at this time and in no immediate danger we anticipate that the progression of the

pregnancy, if allowed to continue, will cause severe respiratory embarrassment and lead to potential critical decompensation. In other words, we expect the pregnancy to endanger her life at some time in the near future."

On February 25, 1971, a further report was made as requested by you which stated in part:

"1. abortion is a feasible procedure and in our honest belief is a medical necessity,
2. this opinion corresponds with the general opinion of the average member of the practicing medical profession, and
3. we collectively corroborate these statements."

This report was signed by the physician designated to perform the abortion, a member of the private hospital's "Therapeutic Abortion Committee", the Obstetrician-Gynecologist-in-Chief who signed the report of February 12, 1971 and the hospital's Director.

You state that the girl signed a permission for therapeutic abortion on February 4, 1971 and has remained constant since in her desire to have the abortion. You have informed me that her wishes "will at all times be important in any action I may take".

You have asked me the following questions:

"1. Under the foregoing facts and circumstances, would an abortion performed on (the girl) be lawful?
2. Does the Department have the authority to consent to an abortion for (the girl)?
3. Does the Department have the authority to pay for an abortion for (the girl) under the provisions of Chapter 119 of Section 1, Section 6, and Section 15 of Chapter 118E or of any other provision of law?"

1. With respect to your first question, G. L. c. 272, § 19 provides:

Whoever, with intent to procure the miscarriage of a woman, unlawfully administers to her, or advises or prescribes for her, or causes any poison, drug, medicine or other noxious thing to be taken by her or with the like intent, unlawfully uses any instrument or other means whatever, or, with like intent, aids or assists therein, shall, if she dies in consequence thereof, be punished by imprisonment in the state prison for not less than five nor more than twenty years; and, if she does not die in consequence thereof, by imprisonment in the state prison for not more than seven years and by a fine of not more than two thousand dollars.

As early as 1876, our Supreme Judicial Court held that the Judge presiding at a trial upon an indictment charging the defendant with lawfully procuring the miscarriage of a pregnant woman, had correctly instructed the jury in part as follows:

> " . . . (A) physician may lawfully procure the miscarriage of a woman pregnant with child, by any means appropriate and reasonable for that purpose, directly or indirectly applied, if in so doing he acts in good faith for the preservation of the life or health of such pregnant woman. The justification of a physician thus acting must depend upon his exercising his best skill and judgment, and in the honest belief that his acts directly applied to produce a miscarriage, or applied to the treatment of a disease so as to involve a miscarriage, as a not unusual incident of such treatment, are necessary to save such pregnant woman from great peril to her life or health." *Commonwealth* v. *Brown*, 121 Mass. 69, 76-77, 82.

In the years since 1876, the Supreme Judicial Court has reiterated the rule of *Commonwealth* v. *Brown* in *Commonwealth* v. *Nason*, 252 Mass. 545 (1925); *Commonwealth* v. *Wheeler*, 315 Mass. 394 (1944); and *Commonwealth* v. *Brunelle*, 341 Mass. 675 (1961).

The most recent case involving the question of a violation of G. L. c. 272, § 19 is *Kudish* v. *Board of Registration in Medicine*, 356 Mass. 98, Mass. Adv. Sh. 1969, 883 (June 2, 1969). The Court there held that "a physician may lawfully perform an abortion if he acts in good faith and in an honest belief that it is necessary for the preservation of the life or health of the woman" provided, of course, that the doctor's judgment corresponds "with the average judgment of the doctors' in the community in which he practices". Mass. Adv. Sh. 1969, 883, 884-885.

It must be apparent to you from the foregoing excerpts from the decisions of the Supreme Judicial Court that no one except the jury (or a judge sitting in a court room where a trial by jury has been waived) hearing an indictment for violation of G. L. c. 272, § 19 can decide whether or not a particular abortion is lawful, after hearing the evidence and applying the relevant law to the facts found. The question whether a given abortion is or is not lawful is a mixed question of law and fact that can only be decided by the judicial trier of fact. It has early and often been stated by Attorneys General of this Commonwealth that the Attorney General does not decide questions of fact in rendering opinions. "His [the Attorney General's] business is to deal with questions of law only." 1. Op. Atty. Gen. 462, June 3, 1897. I must decline, therefore, to answer your first question.

2. With respect to your question whether the Department has authority to consent to an abortion for the girl, I can only answer that a Probate Court of this Commonwealth has entered an order granting legal custody of the girl to your Department "with express power to give or withhold consent to an abortion [for the girl] *depending on its judgment and discretion* as to whether or not such abortion is lawful and therapeutic" (emphasis added). In my opinion you, as Commissioner, are authorized to act for the Department in this matter, or to designate one or more of your subordinates so to act. G. L. c. 18, § 3 as inserted by St. 1967, c. 658, § 1, effective July 1, 1968 (and as later amended in irrelevant respects).

"The department (of public welfare) shall be under the *direction, supervision and control* of a commissioner of public welfare" (emphasis added). Compare, G. L. c. 19, § 1, where it is spelled out that "supervision and control" of the Department of Mental Health means that "(a)ll action of the department shall be taken by the commissioner, or under this direction, by such agents or subordinate officers as he shall determine." The order of the Probate Court requires the Department to exercise "judgment and discretion". Discretion, in circumstances such as this, means "freedom to act according to honest judgment," *Paquette* v. *Fall River*, 278 Mass. 172, 174. *Corrigan* v. *School Committee of New Bedford*, 250 Mass. 334, 339.

" 'The term discretion implies the absence of a hard-and-fast rule. The establishment of a clearly defined rule of action would be the end of *discretion*, and yet discretion should not be a word for arbitrary will or inconsiderate action. 'Discretion means a decision of what is just and proper in the circumstances.' " *Paquette* v. *Fall River*, 278 Mass. 172, 174.

1, therefore, advise you that if you honestly determine, on the basis of the evidence you have, that the proposed abortion appears to you to be lawful and therapeutic, you may give your assent to the abortion as authorized by the decree of the Probate Court.

Whether you should or not make that determination is, in part at least, a question of fact which is confided to your judgment and which is not a question for the Attorney General to answer.

3. Finally, you have asked whether the Department has authority to pay for this abortion if performed. My answer is, that if the abortion is a lawful abortion, the Department may pay for it as medical assistance under G. L. c. 118E, § 15, and if it is not a lawful abortion the Department may not. Translating this answer into the practical realities of the situation, I advise you that if you make the honest judgment that an abortion would be lawful and, acting on that judgment, you give the Department's consent to that abortion, as authorized by the decree of the Probate Court, you may approve vouchers for the payment of the hospital and medical services involved.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 34 March 5, 1971

Mrs. Glendora M. Putnam, *Chairman*
Massachusetts Commission Against Discrimination
120 Tremont Street
Boston, Massachusetts

Dear Mrs. Putnam:

On September 10, 1970, I rendered an opinion to you regarding the continuing validity of certain specified Massachusetts laws regulating

the employment of women. My opinion stated that sections 53A, 56, 58 and 59 of Chapter 149 of the Massachusetts General Laws were in conflict with Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e) and, as such, had been preempted and were null and void. I also stated that sections 53, 54, 55, 99 and 100-103 of Chapter 149 did not frustrate the purpose of Title VII and, as such, were not preempted by the Federal act. Subsequent to the issuance of the September 30th opinion, I have had cause to modify my decision with respect to most of the statutes previously listed as not preempted.

I am now of the opinion that the existence of a half-hour meal period for women mandated by G. L. c. 149, § 100 (as opposed to a required fifteen minute period for men) denies to women, in some instances, an extra fifteen minutes of compensated employment during the course of the working day. More importantly, however, the half-hour meal requirement extends a woman's working shift fifteen minutes beyond that of her male co-workers and, in so doing, prevents her from being available to compete for overtime work commencing at the end of the male work shift. Consequently, both the direct and indirect effect of the half-hour mealtime provision is to deny to women an employment opportunity for which they are otherwise qualified. Such a denial constitutes discrimination in employment opportunity based upon sex and is in violation of Title VII. Accordingly, in so far as sections 100, 101, and 102 of Chapter 149 require that women take one-half hour for any meal, those sections are preempted and are null and void.

Likewise, it is my opinion that section 55 of Chapter 149 (which prohibits all females, regardless of medical condition, from working during the four weeks preceding and the four weeks subsequent to childbirth) is that type of inflexible class regulation which is not tailored to the physiological characteristics of individual workers and, as such, is preempted by Title VII. See, for a statement of the aforementioned standard against which state "protective" laws must be judged, *Bowe* v. *Colgate-Palmolive Company*, 416 F. 2d 711, 717-18 (7th Cir. 1969); *Weeks* v. *Southern Bell Telephone & Telegraph Company*, 408 F.2d 228, 235-36 (5th Cir. 1969); *Cheatwood* v. *Southern Bell Telephone & Telegraph Company*, 303 F. Supp. 754, 759-60 (M.D. Alabama 1969); *Richards* v. *Griffith Rubber Mills*, 300 F. Supp. 338, 340 (D. Oregon 1969); *Jones Metal Products Co.* v. *Walker*, 2 FEP Cases 1113 (D. Ohio 1970); *Local 246 Utility Workers* v. *Edison Co.*, 3 FEP Cases 21 (N.D. Calif. 1970). Accordingly, section 55 of Chapter 149 is null and void.

And, finally, it is my opinion that Title VII also preempts the following portions of Chapter 149: section 53 (requiring pulleys or casters on receptacles weighing more than seventy-five pounds which are moved by women), section 54 (requiring the investigation and regulation of core rooms where women are employed) and section 103 (requiring that employers provide seats for women both at and away from their area of work).

Evaluation of these latter sections is made more difficult by the fact that they benefit rather than discriminate against women. However,

Title VII was passed, not to aid women workers, but to outlaw employment discrimination based upon sex. As one Court has stated: "it seems unlikely that Congress would enact a statute banning discrimination based on sex and in doing so mean to grant special privileges to one sex at the expense of another." *Rosen* v. *Public Service Electric Co.*, 2 FEP Cases 1090, (D.N.J. 1970). Because sections 53, 54 and 103 contain classifications based exclusively upon sex, and because those classifications have the effect of discriminating against male workers, it is my opinion that those sections are in violation of Title VII and as such are null and void.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 35 March 9, 1971

Mrs. Helen C. Sullivan
Director of Registration
Department of Civil Service
and Registration
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

Dear Mrs. Sullivan:

You have requested an opinion, on behalf of the Board of Registration of Professional Engineers and of Land Surveyors, whether cities and towns have the power to hire unregistered persons as city engineers and town engineers. For the reason hereinafter stated, I answer your question "No."

General Laws, c. 112, § 81D, which defines the term "practice of engineering," provides that:

> "A person shall be construed to practice or to offer to practice engineering who practices any branch of the profession of engineering . . . or who holds himself out as able to perform, or who does perform any engineering service or work or any other professional service or work designated by the practitioner or recognized by educational authorities as engineering . . ."

General Laws, c. 112, § 81T makes it a crime to practice or offer to practice engineering without being registered. I find nothing in the General Laws which exempts city or town engineers from the requirements of registration or the penalties provided by section 81T.

Accordingly, if the person employed by a municipality as an engineer is unregistered, he cannot act as an engineer. Moreover, even if he does not in fact act as an engineer, he cannot assume the title "Town Engineer" of "City Engineer" because this would constitute an "offer to

practice engineering." I conclude therefore that cities and towns cannot hire unregistered persons as city engineers or town engineers.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 36 March 9, 1971

Honorable Edward J. Ribbs
Commissioner of Public Works
100 Nashua Street
Boston, Massachusetts 02114

Dear Commissioner Ribbs:

You have requested my opinion as to whether the Department of Public Works (DPW) may assess the Massachusetts Port Authority (MPA) for tidewater displacement. The DPW, you state, has issued to the MPA licenses numbered 5758 and 5759 to fill tide water. I understand that the filling is to be done in the vicinity of General Edward Lawrence Logan Airport and is not to be done in the "port of Boston" as defined in the act creating the MPA (the Act). St. 1956, c. 465, § 1. I assume that the filling is to be done as part of an MPA project undertaken in accordance with the provisions of the Act or amendments thereto.

The specific question you pose is "whether the Port Authority is liable for an assessment for tide water displacement under the provisions of Section 21 of Chapter 91 . . ." I answer your question in the negative.

General Laws, c. 91 § 21 provides:

> "*The amount of tidewater displaced by* any structure below high water mark, or *any filling of flats, shall be ascertained by the department, which shall require the persons who cause such displacement to make compensation therefor* by excavating, under its direction, between high and low water mark in some part of the same harbor a basin for a quantity of water equal to that displaced; or *by paying to the commonwealth,* in lieu of such excavation, *an amount essessed by the department,* not exceeding thirty-seven and one half cents per cubic yard of water displaced; or by improving the harbor in any other manner satisfactory to the department. An assessment for tide water which has been displaced; may be recovered in contract in the name of the state treasurer." (Emphasis supplied.)

The DPW has broad statutory authority over the licensing of persons to fill tidal flats. G. L. c. 91, § 14. This authority was narrowed somewhat by the Act, which exempted the MPA from the requirement of obtaining from the DPW a license to fill tidal flats in the "port of Boston, as defined in section one . . ." St. 1956, c. 465, § 6. It is true that here licenses are required since, as I understand, the filling is to be done out-

side the limits of the "port of Boston," as defined in the Act. Op. Atty. Gen. (1960) p. 39. However, it does not follow from the fact that the MPA must be licensed to fill tidal flats that it is subject to the assessment for tide water displacement in view of the following provision in the Act:

> "The exercise of the powers granted by this act will be in all respects for the benefit of the people of the commonwealth, for the increase of their commerce and prosperity, and for the improvement of their health and living conditions, and as the operation and maintenance of the projects by the Authority will constitute the performance of essential governmental functions, *the Authority shall not be required to pay any taxes or assessments upon any project or any property acquired or used by the Authority under the provisions of this act or upon the income therefrom,* and the bonds issued under the provisions of this act, their transfer and the income therefrom (including any profit made on the sale thereof) shall at all times be free from taxation within the commonwealth, and no property of the Authority shall be taxed to a lessee thereof under section three A of chapter fifty-nine of the General Laws . . ." (Emphasis supplied.) St. 1956, c. 465, § 17.

Under this provision the MPA, which I have assumed is doing the filling as part of a project under the provisions of the Act, is not required to pay the assessment whether or not it is required to have a license. General Laws, c. 91, § 21, upon the basis of which the assessment was made, is plainly inconsistent with this provision. The resolution of the conflict is in the Act itself which, passed long after G. L. c. 91, § 21 was enacted, provides that "[a]ll other general or special laws, or parts thereof, inconsistent herewith are hereby declared to be inapplicable to the provisions of this act . . ." St. 1956, c. 465, § 29. General Laws, c. 91, § 21 is thereby rendered "inapplicable" in the present circumstances, and the exempting provision in the Act governs.

The answer to your question, therefore, is: "No."

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 37 March 9, 1971

Mr. Thomas J. Legere, *Director*
Division of Motorboats
100 Nashua Street
Boston, Massachusetts 02114

Dear Mr. Legere:

You have requested my opinion on a question relating to the arrest powers of enforcement personnel of your Division under St. 1970, c.

589. Specifically, you ask whether the enforcement personnel of the Division of Motorboats have the authority of arrest under the recently enacted Snowmobile and All Terrain Vehicle Law. For the reasons hereinafter stated, I answer your question in the affirmative.

In considering your question it is necessary to review certain pertinent statutory provisions. General Laws c. 90B, § 13 provides:

> "All officers empowered to enforce this chapter may arrest without a warrant any person found violating any provision of this chapter or of any rule or regulation made under authority hereof. Such officers may in the performance of their duties enter upon and pass through or over private lands and property whether or not covered by water."

Chapter 589 of the Acts of 1970, known as the "Snowmobile Act," amended c. 90B by adding sixteen sections, §§ 20-35, to said chapter. Section 32 provides:

> "The provisions of section twenty-one to thirty-four, inclusive, and of all rules and regulations made under authority hereof shall be enforced by the director or his duly appointed agents, by police officers, by fish and game wardens, by members of the state police, by enforcement officers of the department of natural resources and by city, town and metropolitan district commission police officers. Whoever while operating or in charge of any snow vehicle or recreation vehicle, other than on property owned by him, refuses to stop such snow vehicle after having been requested or signalled to do so by any such officer, or whoever refuses to give his true and correct name and address or refuses to display the certificate of number of such vehicle and surrender to such officer for examination shall be punished by a fine of not more than fifty dollars. Such officers may, in the performance of their duty, enter upon and pass through or over private lands or property.
>
> "Every officer authorized to enforce the provisions of this chapter, or any rule, regulation, ordinance or by-law made under authority hereof, shall report to the director, on forms provided by him and in such manner as he may prescribe, every violation of such chapter, rule, regulation, ordinance or by-law."

At no point does St. 1970, c. 589 refer to the authority to arrest. However, a close reading of the new provisions of c. 90B makes it clear that the Legislature intended to create similar areas of authority for the enforcement personnel of the "Snowmobile Act" as presently exist for the enforcement personnel of the Division of Motorboats. Compare G. L. c. 90B, §§ 12 and 14 with St. 1970, c. 589, §§ 32 and 34.

In my opinion, it would have been superfluous for the Legislature to make further provisions for the authority to arrest for violations of c. 589 in view of G. L. c. 90B, § 13, which provides that "*all* officers empow-

ered to enforce *this chapter* may arrest without a warrant any person found violating *any provision of this chapter* or of any rule or regulation made under authority hereof." (Emphasis supplied.) If the Legislature had intended to limit the applicability of Section 13 to violations of the motorboat law, it should have done so expressly.

Finally, I note that general principles of statutory construction require that so far as possible a statute is to be construed in conjunction with other statutes enacted at different times to the end that there may be a harmonious and consistent body of law. *Morse* v. *Boston*, 253 Mass. 247, 252.

In the present instance, to ignore the words in Section 13, i.e., "All officers empowered to enforce this chapter," would circumvent the expressed legislative intent and would render the plain statutory words meaningless. I therefore conclude that the enforcement personnel of your Division have the authority to arrest persons for violations of the provisions of G. L. c. 90B, §§ 20-35.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 38 March 16, 1971

Honorable Edward J. Ribbs
Commissioner of Public Works
100 Nashua Street
Boston, Massachusetts 02114

Dear Commissioner Ribbs:

You have requested an opinion as to the effect of the Presidential proclamation suspending the Davis-Bacon Act on the provisions of G. L. c. 149, §§ 26, 27. More specifically, your inquiry is whether the provisions of Mass. G. L. c. 149, §§ 26, 27 have also been suspended by the Presidential proclamation.

For the reasons hereinafter stated, I must answer your question "no."

In this regard, G. L. c. 149, § 26 provides that the rate of wages paid to mechanics, apprentices, teamsters, chauffeurs and laborers employed in the construction of public works by the Commonwealth shall not be less than the rate of wages to be determined by the Commissioner of Labor and Industries. Under section 27 of said chapter, the said Commissioner is required to prepare a schedule of wages for such employees and this schedule must be made a part of any call for bids or contract entered into for the construction of public works. There is no provision in either of these sections which provides for their suspension. Accordingly, any contract entered into by the Commonwealth for the construction of public works must be in compliance with these sections.

In my opinion, the Presidential proclamation does not affect or suspend the applicability of these sections. The Presidential action was

taken pursuant to 40 U.S.C. § 276a-5 which expressly provides that in the event of a national emergency the President may suspend the provisions of the Davis-Bacon Act. Under the provisions of the Davis-Bacon Act any contract in excess of $2,000 to which the United States is a party must contain a schedule of minimum wages as determined by the Secretary of Labor. The Davis-Bacon Act provisions have also been incorporated in other acts which provide for federal assistance to the states. However, the state statute applies solely to contracts to which the Commonwealth is a party and takes no cognizance of federal administrative action. The federal government is not a party to contracts to which the state law in question applies although in many instances federal assistance is requested by the Commonwealth after it has received bids for a particular construction project. Therefore, under §§ 26 and 27 you are required to include a schedule of wages in a contract for the construction of public works, notwithstanding any national executive proclamation.

I wish to call your attention, however, to the intended consequence of such action with respect to federally-aided projects. The Bureau of Public Roads of the U. S. Department of Transportation has issued a directive that proposals for federal-aid projects on which bids are opened after March 5, 1971, must contain no wage determinations made under the provisions of state statutes or other wage determination processes. In order to be eligible for federal funds, then, the states must comply with the Presidential proclamation.

I see no other way of avoiding the consequence that federal-aid funds will be denied the Commonwealth on such state projects unless the President rescinds or amends his proclamation as it applies to federally-aided state projects, or the provisions of G. L. c. 149, §§ 26 and 27 are repealed or amended to permit compliance with the requirements for federal assistance in construction projects. The Commonwealth is free to accept or reject federal aid and this is a policy decision which must be determined by the Governor and the Legislature.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 39 April 2, 1971

Honorable Robert Q. Crane
Treasurer and Receiver General
State House
Boston, Massachusetts 02133

Dear Mr. Crane:

You have requested my opinion on several questions relating to your office as Treasurer and Receiver General of the Commonwealth. Specifically, you ask whether acceptance of the chairmanship of a state politi-

cal committee (see G. L. c. 52, § 1) would in any way cause you to vacate the office of Treasurer and Receiver General to which you have been elected. Further, you ask whether any conflict of interest arises from the holding of both positions, if you waive compensation or remuneration for the position of chairman. Finally, you ask if there are any statutes which would prohibit you from accepting the position of chairman while serving as Treasurer and Receiver General. For the reasons hereinafter stated, I answer all three questions in the negative.

Your first question is answered by reference to the provision in the Constitution of the Commonwealth concerning plurality and incompatibility of offices, Pt. 2, c. 6, Art. II. That provision provides, in part, as follows:

> "No person holding the office of . . . treasurer or receiver-general . . . shall at the same time have a seat in the senate or house of representatives; but [his] being chosen or appointed to, and accepting the same, shall operate as a resignation of [his] seat in the senate or house of representatives; and the place so vacated shall be filled up."

It is clear that the above-quoted provision is not applicable in your case. Accordingly, it is my opinion that your acceptance of the position of chairman of a state political committee would not cause you to vacate the office of Treasurer and Receiver General.

Your second question asks whether any conflict of interest results from the holding of the offices of Treasurer and Receiver General and chairman of a state political committee if you waive compensation or remuneration for the latter. The provisions of the conflict of interest law, General Laws, chapter 268A, prohibit the receipt of or request for compensation "from anyone other than the commonwealth or a state agency, in relation to any particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest." G. L. c. 268A, § 4(a). The statute also prohibits a state employee from acting "as agent or attorney for anyone other than the commonwealth or a state agency for prosecuting any claim against the commonwealth or a state agency, or as agent or attorney for anyone in connection with any particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest." G. L. c. 268A, § 4(c).

Since you have advised me that you intend to waive compensation if you accept the chairmanship of a state political committee, it is clear that no violation of G. L. c. 268A, § 4(a) will occur. With respect to the provisions of G. L. c. 268A, § 4(c), it is my further opinion that the holding of the office of chairman of a state political committee would not, *per se*, constitute a violation of the section, and I can perceive no set of facts where the prohibitions of the section would come into play.

With respect to your final question, I am unable to find any statute or constitutional provision which would prohibit you from accepting the

chairmanship of a state political committee while serving as Treasurer and Receiver General.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 40 April 7, 1971

Honorable John J. Fitzpatrick
Commissioner of Correction
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

Dear Commissioner Fitzpatrick:

You have requested an opinion whether females awaiting trial may be placed in the Massachusetts Correctional Institution, Framingham, if they are kept separate and apart from other convicted and sentenced females.

The "Massachusetts Correctional Institution, Framingham" is the reformatory for women and is one of the correctional institutions of the Commonwealth. General Laws, Chapter 125, § 1. Chapter 125, § 16 provides that this institution shall be the institution of the Commonwealth where all females who have been convicted and sentenced or removed thereto shall be imprisoned and detained.

A prisoner awaiting trial must be committed to *jail*. The relevant statutes are G. L. c. 276, § 42, which provides for admission of a prisoner to bail or, if not bailed, for commitment to "jail for trial," and c. 126, § 4 which provides that "[j]ails shall be used for the detention of persons charged with crime and committed for trial . . ."

There are statues which permit transfers and removals of prisoners, but they do not permit an unsentenced prisoner to be transferred from a jail to a correctional institution. Thus, c. 276, § 52 permits persons held in "jail" to be removed to a "jail" in another county and c. 126, § 5 permits the sheriff to cause a prisoner to be confined in any "jail" in a county if there is more than one "jail." Chapter 127, § 97 permits transfer of prisoners from any jail to any correctional institution but *only* if they have been sentenced.

Accordingly, it is my opinion that in no event can a female awaiting trial be placed in the Massachusetts Correctional Institution, Framingham.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 41 April 30, 1971

Honorable Neil V. Sullivan
Commissioner of Education
182 Tremont Street
Boston, Massachusetts 02111

Dear Commissioner Sullivan:

You have requested an opinion whether the provisions of General Laws, Chapter 70 are in conflict with the requirements of section 5 of Title III, section 305, subsections (a) and (b) of Public Law 90-576, which is codified as 20 U.S.C. § 240, and, if there is a conflict, whether you may by regulation obviate that conflict under your power to adopt regulations which is found in G. L. c. 70, § 2(c). It is my opinion that there is no conflict between the State and Federal statutes, and thus it is unnecessary to answer your second question.

Briefly, G. L. c. 70, § 2(c) provides a definition for "reimbursable expenditures" which are to be computed for purposes of state educational aid to cities and towns. That section provides, in essence, that monies expended from local tax revenues are to be reimbursed, subject, of course, to the limitations and percentages found in various other sections of Chapter 70. In arriving at the computation of "reimbursable expenditures", all "receipts from the federal government" are deleted or deducted.

Clearly, there is no conflict with 20 U.S.C. § 240. That section only provides that a State may not take "into consideration" any payments under the Federal Act in computing State aid to cities and towns within that State. Massachusetts does not take such payments into consideration; in fact, they are expressly excluded from consideration. Taking two hypothetical cities, one receiving Federal funds under Title 20 and one not receiving such funds, and both having identical "reimbursable expenditures", the aid which Massachusetts grants under Chapter 70 would, in both instances, be the same. As I understand the City of Chicopee's position, it is that the state must give, as aid, funds to match the Federal payments. In my view, that is not the intent of the Federal Act.

In summary, I find no conflict between the Federal and State acts referred to. Your second question does not, therefore, require an answer.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 42 May 7, 1971

John J. Quigley, *Commandant*
Soldiers' Home
Chelsea, Massachusetts 02150

Dear Sir:

You have requested my opinion whether a male registered nurse — formerly a full-time employee of the Chelsea Soldiers' Home but now

employed full-time by the Walter E. Fernald State School — may be hired by the Chelsea Soldiers' Home for part-time evening and week-end work while he maintains his position with the Fernald School. For reasons set forth below, my answer is in the affirmative.

The only statute restricting dual employment of an individual by the Commonwealth is G. L. c. 30, § 21, which provides that: "A person shall not at the same time receive more than one salary from the treasury of the commonwealth." Thus, assuming that the individual in question is presently receiving a "salary" for his employment at the Fernald School, what must be determined is whether he would, under your proposal, be also receiving a "salary" for his work at the Soldiers' Home.

The Supreme Judicial Court, in another context, has pointed out that the word "salary" is "more frequently applied to annual employment than to any other, and its use may import a factor of permanency." *Maynard* v. *Royal Worcester Corset Co.*, 200 Mass. 1, 4. And, in construing G. L. c. 30, § 21, opinions by prior Attorneys General have given that term the same meaning:

> "[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." 5 Op. Atty. Gen. 699, 700 (1920).

See, also, Op. Atty. Gen., Sept. 21, 1955, p. 42. Op. Atty. Gen., July 6, 1967, pp. 33, 34.

The purpose of the statute is to prevent a person from being employed in two positions *at the same time,* receiving salary from each. But it does not prevent payment of compensation for additional services not rendered during the usual hours of employment of the position for which the person is primarily employed. 2 Op. Atty. Gen. 309, 309-310.

There is nothing in your request which indicates that your proposal to utilize the person in question on a part-time basis during evenings and week ends would in any way conflict with his usual hours of duty at the Fernald School. I am informed, also, that he will be compensated only for services actually performed at the Soldiers' Home or for actual time in attendance there; in other words, that his compensation will not be in the nature of a "salary" as defined above.

Therefore, I am of the opinion that there is no bar to his employment under G.L. c. 30, § 21.

A further question has arisen as to whether hours of employment of the person in question at the Fernald School must be combined with his hours at the Soldiers' Home so as to require, at times, overtime compensation under G. L. c. 149, § 30B. My answer is in the negative. That

statute speaks in terms of "service in excess of eight hours in any one tour of duty or forty hours in any one work week rendered by an employee of the commonwealth at the request of an officer of the commonwealth or other person whose duty it is to employ, direct or control such employee . . ." The intent of this provision is to provide overtime compensation for an employee who has performed, at the request of his superior, service in excess of those regular hours of duty which he is or may be required in his position to perform under G. L. c. 149, § 30A. We are here dealing with two separate and unrelated employments, under the independent direction and control of two separate agencies of the Commonwealth. In my opinion, they must be dealt with separately in applying the provisions of c. 149, § 30B.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 43 May 26, 1971

Mr. Henry H. Shultz
Executive Secretary
Council Chamber
State House
Boston, Massachusetts 02133

Dear Mr. Shultz:

By vote taken on May 12, 1971, the Executive Council requested my opinion on a question arising from the following circumstances. On April 29, 1971, Justice John V. Spalding of the Supreme Judicial Court submitted his resignation as an Associate Justice of that Court to the Governor, which resignation was to become effective on July 1, 1971. The Justice's resignation was accepted by the Governor and Council on April 30, 1971 and May 5, 1971, respectively. On May 12, 1971, the Governor submitted the nomination of Justice Edward F. Hennessey of the Superior Court to fill the vacancy which will be created by Justice Spalding's retirement on July 1, 1971.

The question for resolution, then, is whether the Governor can now nominate, and the Council can now confirm, Justice Hennessey as an Associate Justice of the Supreme Judicial Court, in view of the fact that Justice Spalding is currently sitting on the Supreme Judicial Court and will not retire until July 1, 1971. For the reasons hereinafter stated, I answer the question in the affirmative.

It is clear that Justice Spalding's resignation has been accepted by the appointing authority, i.e., the Governor and Council. It is well settled that upon the valid acceptance of a resignation, the rights of the parties are fixed, although the date when the resignation is to become effective is a later date. *Warner* v. *Selectmen of Amherst*, 326 Mass. 435, 438; 1969 Op. Atty. Gen. 97, at 98.

I can find no constitutional or statutory impediment to the nomination and confirmation of Justice Hennessey as an Associate Justice of the Supreme Judicial Court at this time. In my opinion, the Governor and Council must be deemed to possess the power to fill judicial vacancies at such time in advance as is necessary to assure an orderly selection procedure and efficient administration of the courts. Two of my predecessors have reached the same conclusion with respect to filling anticipated vacancies or making reappointments to public offices. See 1960 Op. Atty. Gen. 84, 85; V Op. Atty. Gen. (1917) 116. Since I conclude that the Governor and Council, as presently constituted, would be empowered to make and confirm the appointment on July 1, 1971, and since the period of time from date of appointment (May 12, 1971) to the date of Justice Spalding's retirement (July 1, 1971) is not excessive in terms of ensuring an orderly transition, I see no reason why the appointment may not be made and confirmed now.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 44 May 28, 1971

Mr. George A. Luciano
State Superintendent of Buildings
State House
Boston, Massachusetts 02133

Dear Mr. Luciano:

You have requested my opinion on several questions arising as a result of the construction of the Charles F. Hurley Employment Security Building which has been occupied by the Commonwealth's Division of Employment Security. Because of conflicting interpretations of the statutes pertaining to the construction, operation and maintenance of said building, you have asked that I clarify the extent of your jurisdiction over the building and the type and terms of the lease which you are to negotiate with the Director of the Division of Employment Security.

It will be helpful to first of all review the applicable statutory provisions. The matter of construction of an employment security building came before the Legislature in 1960, and in that year the Legislature enacted St. 1960, c. 635, entitled "An Act Establishing The Government Center Commission To Construct A State Office Building And A Health, Welfare, And Education Service Center." Section 6 of the Act authorized the Government Center Commission to take land, by eminent domain, for, *inter alia*, "an employment security building." The section also authorized construction of the building and the negotiation of a lease "for the use of the employment security building." The rental specified was to be

> "at a price in which due consideration is given to the interest charges as they would accrue on account of monies borrowed

by the commonwealth for use in the construction of such building and for the acquisition of property in connection therewith and to the repayment of principal amounts of the monies so borrowed and to the payment of such other expenses as may be properly allocable to the cost of construction of the building for the use of the division of employment security and the acquisition of property in connection therewith." St. 1960, c. 635, § 6.

St. 1962, c. 685 amended St. 1960, c. 635 by inserting therein a new section 6. Paragraph 3 of the new section provided in relevant part:

"The [government center] commission, after consultation with the division of employment security, shall cause site and building plans and specifications to be prepared for an office building for use of the said division. The commission may cause to be installed in said building such elevators, moving stairways, escalators, plumbing, heating, air conditioning, electrical fixtures, partitions, machinery and equipment, after consultation with the division of employment security, as in their judgment may be required, but shall not be required to furnish or install any furniture or furnishings. Before approval by the commission of final plans and specifications of said building, the commission shall notify in writing the state superintendent of buildings and the director of the division of employment security of the estimated costs. In determining the total estimated costs of construction, the commission shall consider the cost of construction of the building and the proportion of the cost, allocable to the employment security building and the land appurtenant thereto, of (1) the site thereof, (2) the preliminary costs including surveys and site development, (3) the payment to the city of Boston in lieu of taxes, (4) landscaping and tunnels, and (5) the finance charges including interest and amortization of the cost incident to the issuance of the bonds under section seven. After such consideration and upon approval of final plans and specifications, the commission shall enter into contracts for the construction of a division of employment security building for the use of the division of employment security. At least six months prior to the estimated date of completion of construction, the commission shall notify the director of the division of employment security and the state superintendent of buildings of the estimated date for the completion of said building. The director of the division of employment security is hereby authorized and directed following such notification to negotiate and enter into a lease for the use of said building by the division of employment security with the state superintendent of buildings which shall, upon the recommendation of the commission on administration and finance, be submitted to the governor and council for approval. The lease shall be for a

> term of not more than twenty years and shall provide for a square foot rental based upon, but not limited to the factors outlined in this paragraph. Said lease shall provide also that the division of employment security shall assume full responsibility for the costs of operation, as well as maintenance and repair of said building including land appurtenant thereto during the term of the lease."

The 1962 Act also amended St. 1960, c. 635 by inserting therein a new section 12, which provided, in relevant part:

> "Upon acceptance as completed of any building provided for by this act, the commission shall deliver to the state division of building construction all plans, specifications, surveys and papers relating to site acquisition, engineering, planning and construction of such building and the state superintendent of buildings shall assume full responsibility for the operation and maintenance of the property, subject to appropriation, except the building provided for in the third paragraph of section six."

Accordingly, you ask (1) whether the care, operation and maintenance of the Charles F. Hurley Employment Security Building is vested in you, as Superintendent of State Buildings; (2) whether you are authorized and/or required to enter into a "rental-purchase" type of lease with the Director of the Division of Employment Security; and (3) whether the rent for the building is to be assessed on a prescribed formula with the ultimate determination to be made by you. For the reasons hereinafter stated, I answer your first and second questions in the negative and your third question in the affirmative.

Your first question depends upon the construction to be accorded the statutory language, found in St. 1962, c. 685, § 2 which amended St. 1960, c. 635, § 6 and which reads "the division of employment security shall assume full responsibility for the costs of operation, as well as maintenance and repair of said building" and the further language, found in St. 1962, c. 685, § 4 which amended St. 1960, c. 635, § 12 and which reads "the state superintendent of buildings shall assume full responsibility for the operation and maintenance of the property, subject to appropriation, except the building provided for in the third paragraph of section six."

The statutory language either means that the Division of Employment Security is responsible only for the costs of operation, maintenance and repair, leaving to the Superintendent of Buildings the actual operation, maintenance and repair, or it means that the Division is responsible for the total operation, costs as well as actual maintenance and repair, leaving to the Superintendent of Buildings the responsibility for negotiating the lease. I have examined the legislative history of St. 1962, c. 685, and I am compelled to adopt the latter interpretation.

It is fundamental that the intention of the Legislature must prevail, any rule of construction to the contrary notwithstanding. *Board of As-*

sessors of Newton v. *Pickwick, Ltd., Inc.*, 351 Mass. 621, 625. With respect to ambiguous statutes, resort to legislative history is permissible. *Hood Rubber Co.* v. *Commissioner of Corporations & Taxation*, 268 Mass. 355, 358.

The message of His Excellency, the Governor which accompanied the 1962 legislation stated:

> "We have been in continuous communication with federal representatives and have their assurance that our plans are satisfactory to qualify for reimbursement, including a provision with an amendment of section 12, *requiring the Division of Employment Security, instead of the State Superintendent of Buildings, to maintain and operate the building.*" House No. 3832 of 1962, p. 3. (Emphasis supplied.)

In my opinion, St. 1962, c. 685 created an exception to the general responsibility and duty of the State Superintendent of Buildings to care for and operate the State House and other public buildings "owned by or leased to the Commonwealth for the use of public officers . . ." G. L. c. 8, § 9. Any ambiguity in the legislation is resolved by the gubernatorial message which accompanied the 1962 legislation.

With respect to your second question, the language of St. 1960, c. 635, § 6, prior to the 1962 amendment, which I have set out *supra* indicates that the Legislature intended the lease to be negotiated to be of the "rental-purchase" type. It appears that the amendment made in 1962 altered that intention, and I find no warrant for an interpretation that the lease now to be negotiated is to be of the "rental-purchase" type.

Your second question is, of course, intimately involved with the third question which is whether the rent for the building is to be assessed on a prescribed formula, with the ultimate determination to be made by you. I answer your question with a qualified "Yes." The 1962 amendment enumerates the factors which the Government Center Commission was to take into consideration in estimating the costs of construction of the building. The 1962 amendment further provided that "[t]he lease shall be for a term of not more than twenty years and shall provide for a square foot rental *based upon, but not limited to the factors outlined in this paragraph.*" (Emphasis supplied.) In my opinion, the Legislature has, to a point, prescribed the formula which you are to use in determining the rental. However, other factors may be taken into consideration, and with respect to those the amount of the rental is of course negotiable. I therefore conclude that you may, as a preliminary matter, utilize the prescribed factors in determining the rental to be set, leaving to negotiation and agreement the use of any other factors which you see fit to use.

It may be that the actual negotiation of the terms of the lease and the amount of the rental may require additional assistance from this Department. My staff stands ready to assist you on such matters.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 45 June 2, 1971

Honorable Freyda P. Koplow
Commissioner of Banks
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

Dear Commissioner Koplow:

You have requested my opinion with respect to the accessibility of the public to certain stockholder lists and verifying documents which are compiled by the Board of Bank Incorporation pursuant to G. L. c. 172, § 10, as amended by St. 1961, c. 493, § 1. The statute provides in relevant part:

> "When all the capital stock [of a trust company] has been issued, a list of the stockholders, with the name, residence and post office address of each, and the number of shares in each class held by each stockholder, shall be filed with the board of bank incorporation, which list shall be verified by the clerk of the corporation . . ."

You have informed me that after the list of stockholders has been filed, the clerk of the Board of Bank Incorporation writes to each of the individuals whose names appear on the list and requests that they individually verify their ownership of stock in the new trust company. After the verification procedure is completed, the individual responses are filed with the papers relative to the new trust company.

With respect to the above procedure, your first inquiry is:

> "Must the stockholder lists submitted under G. L. c. 172, § 10 be made available for public inspection?"

It is my opinion that these lists are "public records" and are available for public inspection.

General Laws, c. 4, § 7(26), as amended by St. 1969, c. 831, § 2, defines public records in part as "any written or printed book or paper . . . of the commonwealth . . . 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 . . . has received or is required to receive for filing . . .*" (Emphasis supplied.) Records falling within the above-quoted definition are open to inspection and examination. In that respect, G. L. c. 66, § 10 provides, in relevant 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."

In *Op. Atty. Gen.*, Dec. 31, 1957, p. 41, the then Attorney General was of the opinion that applications to the Board of Registration of Professional Engineers and Land Surveyors were public records and open for inspection. He stated that:

> "The information and records which constitute 'public records' and which must be open to public inspection, relate only to books or papers or entries which are 'required to be made by law,' or papers which a public body 'is required to receive for filing.' "

Therefore, absent a specific statutory exception, all papers, lists and records required to be filed with any officer or employee of the Commonwealth are "public records" and open to public inspection. The Supreme Judicial Court of the Commonwealth has so construed G. L. c. 4, § 7. In *Lord* v. *Registrar of Motor Vehicles*, 347 Mass. 608, the Court held that accident reports which were required to be filed with the Registrar under G. L. c. 90, § 26 were "public records" and open for inspection. See also, *Direct-Mail Serv., Inc.* v. *Registrar of Motor Vehicles*, 296 Mass. 353, 355-357.

Under the provisions of G. L. c. 172, § 10, the list of stockholders is clearly "required to be received for filing." Since I can find no exception in the statutes relating to the Board of Bank Incorporation, and you point to none, I conclude that the stockholder lists are "public records" and are available for public inspection.

Your second inquiry concerns the responses received from the individual stockholders in which they verify their ownership of the trust company stock. Specifically, your inquiry is:

> "Must the responses of stockholders to the inquiries of the Clerk of the Board of Bank Incorporation regarding stock ownership be made available for public inspection?"

It is my opinion that this inquiry must also be answered in the affirmative.

The definition of "public records" in G. L. c. 4, § 7(26) includes "any official correspondence of any officer or employee of the commonwealth . . ." In addition, it includes any papers or books which an officer or employee of the Commonwealth "has received . . . for filing." Since these responses are the "official correspondence" of the clerk of the Board of Bank Incorporation and are received by him for filing with the papers relative to the new trust company, they come directly within the statutory definition of "public records" and are open for public inspection.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 46 June 8, 1971

Honorable Milton Greenblatt, M.D.
Commissioner of Mental Health
190 Portland Street
Boston, Massachusetts 02114

Dear Commissioner Greenblatt:

You have requested my opinion on the following two questions relating to the commitment and treatment of persons determined to be dependent upon the use of drugs.

"1. May a person committed to the Division of Drug Rehabilitation pursuant to Sections 134 and 136 of Chapter 123 of the General Laws be sent by the Division to Bridgewater for treatment.

"2. May persons be sent to Bridgewater for treatment without a conviction for any crime, or may this be done only pursuant to Section 135 of Chapter 889 which requires conviction and further order of the court."

For the reasons hereinafter stated, it is my opinion that persons committed to the Division of Drug Rehabilitation pursuant to G. L. c. 123, § 134 or 136 may not be sent to Bridgewater for treatment and that a person who has not been convicted of any crime may not be sent to Bridgewater for treatment. It is my further opinion that a person may be committed pursuant to G. L. c. 123, § 135 to Bridgewater for treatment after July 1, 1971, but that until that date treatment at Bridgewater may only be afforded persons who have been committed to another penal institution.

Prior to explaining my answers to your questions, a review of the statutory scheme for commitment and treatment of drug dependent persons is in order. St. 1969, c. 889 established a "comprehensive drug rehabilitation program" within the Commonwealth for the treatment of drug dependent persons. General Laws, c. 123, § 125 (inserted by St. 1969, c. 889, § 1) defines "drug dependent person" as "a person who is unable to function effectively and whose inability to do so causes or results from the use of a dependency related drug." By virtue of the provisions of G. L. c. 123, § 134 (also inserted by St. 1969, c. 889, § 1), persons charged with drug offenses who are found to be drug dependent persons "who would benefit by treatment" may request commitment to the Division of Drug Rehabilitation in the Department of Mental Health. The section provides for a stay of criminal proceedings during the period of a request for an examination is under consideration and for such additional period, if the request is granted, required for the examination and report of the psychiatrist or physician. After the report is submitted, the section provides:

> "If the defendant is also charged with a violation of any law other than a drug offense, the stay of the criminal proceedings shall be vacated upon the report of the psychiatrist or physician, the report shall be considered upon disposition of the charge in accordance with sections one hundred and thirty-five and one hundred and thirty-six, and the remaining provisions of this section shall not apply.
>
> "If the defendant is not also charged with a violation of any law other than a drug offense, and if the psychiatrist or physician reports that the defendant is a drug dependent person who is a drug addict who would benefit by treatment or a drug dependent person who is not a drug addict but who would benefit by treatment, the court shall inform the defen-

dant that he may request commitment to the division, and advise him of the consequences of the commitment and that if he is so committed the criminal proceedings will be stayed for the term of such commitment.

"If the defendant requests commitment and if the court determines that he is a drug dependent person who is a drug addict who would benefit by treatment, the court may stay the criminal proceeding and commit him to the division as an inpatient. An order committing a person who is determined to be drug dependent person who is a drug addict under this section shall specify the period of commitment, which shall not exceed two years.

"If the defendant requests commitment and if the court determines that he is a drug dependent person who is not a drug addict but who would benefit by treatment, the court may stay the criminal proceeding and commit him to the division as an outpatient; provided, however, that the commitment may be as an inpatient if the court determines that the defendant is a proper subject for an inpatient program. An order committing a person who is determined to be a drug dependent person who is not a drug addict under this section shall specify the period of commitment, which shall not exceed one year."

After detailing the factors to be considered by the Court "[i]n determining whether or not to grant a request for commitment," the section further provides:

"In the event that the defendant requests commitment, and if the court determines that the defendant is a drug dependent person who is a drug addict who would benefit by treatment or a drug dependent person who is not a drug addict but who would benefit by treatment, and the defendant is charged with a first drug offense not involving the sale or manufacture of narcotic or harmful drugs, and there are no continuances outstanding with respect to the defendant pursuant to this section, the court shall order that the defendant be committed to the division without consideration of any other factors.

"If the defendant requests commitment, and if the court determines that the defendant is a drug dependent person who is a drug addict who would benefit by treatment, or a drug dependent person who is not a drug addict but who would benefit by treatment, and the defendant is charged with a first drug offense not involving the sale or manufacture of narcotic or harmful drugs, and there are no continuances outstanding with respect to the defendant pursuant to this section, and adequate and appropriate treatment *at a facility* is not available, the stay of criminal proceedings shall remain in effect until such time as adequate and appropriate treatment *at a facility* is available.

"In all other cases, a commitment order shall not be made unless adequate and appropriate treatment is available *at a facility;* provided, however, that the court may in its discretion order that the stay of criminal proceedings remain outstanding until such time as adequate and appropriate treatment is available.

"In the event that the stay of the criminal proceedings remains in effect for the reason that adequate and appropriate treatment *at a facility* is not available, the issue of the availability of adequate and appropriate treatment at a facility may be reopened at any time by way of motion by the court, the prosecutor, or the attorney for the defendant." (Emphasis supplied.)

If after trial, a court determines that a person who is convicted of an offense other than a drug offense should be imprisoned, G. L. c. 123, § 135 applies in certain situations. That section provides, in pertinent part:

"Any person found guilty of a violation of any law other than a drug offense, who, prior to disposition of the charge, states that he is a drug dependent person, and requests an examination shall be examined by a psychiatrist or, if, in the discretion of the court, it is impracticable to do so, by a physician, to determine whether or not he is a drug dependent person who is a drug addict but who would benefit by treatment or a drug dependent person who is not a drug addict but who would benefit by treatment.

* * * * *

"If the report states that the defendant is a drug dependent person who is a drug addict who would benefit by treatment or a drug dependent person who is not a drug addict but who would benefit by treatment, *and if the court orders that the defendant be confined to a jail, house of correction, prison, or other correctional institution,* the court may further order that the defendant be afforded treatment *at a penal facility* for the whole or any part of the term of imprisonment; provided, however, that the court shall determine the term of treatment to be afforded with the advice of the administrator of *the penal facility;* and provided, further, that the court shall not order that the defendant be afforded treatment *at a penal facility* unless the defendant consents to the order in writing. The administrator may terminate treatment of the defendant at such time as he determines the defendant will no longer benefit by treatment . . ." (Emphasis supplied.)

General Laws, c. 123, § 136 applies in situations where the court imposes probation rather than imprisonment. Section 136 provides:

"Any court may, in placing on probation a defendant who is a drug dependent person who is a drug addict who would benefit by treatment or a drug dependent person who is not a

> drug addict but who would benefit by treatment, impose as a condition of probation that the defendant receive treatment *in a facility as an inpatient or outpatient;* provided, however, that the court shall not impose such a condition of probation unless, after consulting with the division, it determines that adequate treatment *at an appropriate facility* is available. The defendant shall receive treatment *at the facility* for so long as the administrator of the facility deems that the defendant will benefit by treatment, but in no event shall he receive treatment *at the facility* for a period longer than the period of probation ordered by the court. If at any time during the period of treatment the defendant does not cooperate with the administrator or the probation officer, or does not conduct himself in accordance with the order or conditions of his probation; the administrator or the probation officer may make a report thereon to the court which placed him on probation, which may consider such conduct as a breach of probation." (Emphasis supplied.)

General Laws, c. 123, § 125, the "definitions" section of the Act, defines "facility" (the term used in both sections 134 and 136) as "any public or private place, or portion thereof, which is not part of or located at a penal institution and which is not operated by the federal government, providing services especially designed for the treatment of drug dependent persons or persons in need of immediate assistance due to the use of a dependency related drug." The same section defines "penal facility" (the term used in section 135) as "an institution, or any part thereof, other than an institution, or any part thereof, operated by the federal government, for the detention and confinement of persons accused or convicted of crime, including, but not limited to, jails, prisons, houses of correction and correctional institutions, providing services especially designed for the treatment of drug dependent persons."

Since your questions relate to "Bridgewater" (by which, I assume you refer to the Massachusetts Correctional Institution, Bridgewater), a brief review of several statutory provisions relating to that institution is necessary. General Laws, c. 125, § 1 provides that the "Massachusetts Correctional Institution, Bridgewater" shall mean "the state farm." The section further provides that the state farm and the other institutions enumerated in the section "shall constitute the correctional institutions of the commonwealth."

General Laws, c. 125, § 19 provides, in pertinent part:

> "The Massachusetts Correctional Institution, Bridgewater, shall be the institution of the commonwealth where all males convicted of drunkenness shall be committed and detained. . . ."

The section further provides, until July 1, 1971, that "[e]xcept for alcoholics committed . . . defective delinquents committed . . . or insane persons committed . . . or mentally ill persons committed . . . no person

shall be committed to the Massachusetts Correctional Institution, Bridgewater, except for the crime of drunkenness." After July 1, 1971, the statutory language will provide (by virtue of an amendment made by St. 1970, c. 888, § 6) that "[n]o other person [referring to "males convicted of drunkenness"] shall be committed thereto except those committed pursuant to the provisions of chapter one hundred and twenty-three."

The statutory provisions referred to *supra* are clear and unambiguous and provide the answers to your questions. General Laws, c. 123, §§ 134 and 136 refer to commitment and treatment "at a facility." Since Bridgewater is a correctional institution of the Commonwealth and thus "a penal institution," it is not a "facility" within the meaning of G. L. c. 123, § 125. It is my opinion, therefore, that a person committed to the Division of Drug Rehabilitation pursuant to G. L. c. 123, §§ 134 or 136 may *not* be sent by the Division to Bridgewater for treatment. It follows, of course, that if the Division has sent persons to Bridgewater who were committed to the Division under either section 134 or section 136, such persons may not continue to be detained there.

In answer to your second question, it is clear that a person who has not been convicted of a crime may not be sent to or treated at Bridgewater. In such instances, treatment is governed by section 134, and that section requires treatment "at a facility." As I have noted, Bridgewater does not qualify as "a facility" within the meaning of the statute.

The only remaining inquiry is whether persons may be "sent to Bridgewater for treatment" under the provisions of G. L. c. 123, § 135. Bridgewater qualifies as a "penal facility" as that term is defined in G. L. c. 123, § 125. Clearly, it is "an institution . . . for the detention and confinement of persons . . . convicted of crime, . . ." I am reliably informed that it provides "services especially designed for the treatment of drug dependent persons," so that it qualifies under the latter part of the statutory definition. Thus, persons may be sent to and treated at Bridgewater, unless the provisions of G. L. c. 125, § 19 require otherwise. The amendment to section 19 made by St. 1970, c. 888, § 6 will remove any impediment to such commitment and treatment as of July 1, 1971. Prior to July 1, 1971, however, it is my opinion that persons may not be committed to Bridgewater under the provisions of G. L. c. 123, § 135. However, the language of section 135 would permit commitment to an institution other than Bridgewater with treatment occurring at Bridgewater:

> "[A]nd if the court orders that the defendant be confined to a jail, house of correction, prison, or other correctional institution, the court may further order that the defendant be afforded treatment at a penal facility for the whole or any part of the term of imprisonment. . . ."

Since Bridgewater qualifies as a "penal facility" within the meaning of the statute, treatment may take place there so long as the commitment is to another institution. The prohibition of G. L. c. 125, § 19 (applicable

only to July 1, 1971) acts only to bar "commitments" to Bridgewater and not treatment at that institution.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 47 June 17, 1971

Dr. Edward C. Moore, *Chancellor*
Board of Higher Education
182 Tremont Street
Boston, Massachusetts 02111

Honorable Charles E. Shepard
Commissioner of Administration
State House
Boston, Massachusetts 02133

Gentlemen:

You have requested my opinion as to proper interpretation of G. L. c. 41, § 108L, inserted by St. 1970, c. 835, entitled "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."

The program established by section 108L is one providing "base salary increases to regular full-time members of the various city and town police departments, the division of state police in the department of public safety, the capitol police and the metropolitan district commission police, as a reward for furthering their education in the field of police work." The salary increases are determined by a system whereby an officer fulfilling various educational requirements is awarded a specified number of points, and, as certain point levels are reached, he is given percentage increases in his salary in accordance with a statutory schedule. The eligibility of municipal police officers to participate in the program is contingent upon acceptance of the statute by the municipalities in which they are respectively employed. Any municipality which does so is reimbursed by the Commonwealth for one half the cost of the salary increases granted pursuant to section 108L. The Board of Higher Education is given the responsibility of receiving information as to points earned by members of the participating police forces, of determining their eligibility and the amount of any salary increases to which the statute entitles them, of certifying the amounts of the Commonwealth reimbursements to be made to the participating municipalities, and of certifying the amounts of the salary increases payable to police officers in the three state agencies named in the statute.

Specifically, you have asked the following questions:

"1. Does the term 'education in the field of police work,' as used in G. L. c. 41, § 108L, include —

(a) Only those courses of study which have a direct and immediate relation to police work and which are designed to educate an officer occupationally rather than generally — such as police science, law and law enforcement, and criminal justice?

(b) Courses of study in sociology, psychology, English, mathematics, chemistry and other subjects commonly offered in liberal arts institutions?

(c) Courses of study in business administration?

"2. Does G. L. c. 41, § 108L allow points for —

(a) Courses taken or degrees earned by a regular full-time member of any of the police forces enumerated therein *before* becoming such a member and *before* the effective date of St. 1970, c. 835?

(b) Courses taken or degrees earned by a regular full-time member of any such police force after becoming such a member but *before* the effective date of St. 1970, c. 835?

(c) Courses taken or degrees earned by a regular full-time member of any such police force before becoming such a member but *after* the effective date of St. 1970, c. 835?

(d) Courses taken or degrees earned by a regular full-time member of the police department of a municipality which accepts § 108L *after* becoming such a member and *after* the effective date of St. 1970, c. 835, but *before* the effective date of such acceptance by the municipality?

"3. In the case of an officer in the Division of State Police, the Capitol Police or the Metropolitan District Commission Police as to whom a salary increase has been certified by the Board of Higher Education pursuant to G. L. c. 41, § 108L, is such an increase payable to him —

(a) Before the effective date of an appropriation made for the purpose of, and sufficient to cover, the cost of such increase?

(b) Before the action by the Joint Committee on Ways and Means in accordance with St. 1970, c. 480, § 6, or corresponding provisions of subsequent appropriation acts?

"4. In the case of an officer in the Division of State Police, the Capitol Police or the Metropolitan District Commission Police to whom a salary increase is payable in accordance with your answer to Question 3, is such increase payable only prospectively or is it payable retroactively, and, if payable retroactively, is it so payable —

(a) To the date on which he was certified as entitled thereto by the Board of Higher Education?

(b) To the date on which he earned the points necessary to entitle himself to such increase?

(c) To such date, if any, as may be specified by the Joint Committee on Ways and Means in accordance with St. 1970, c. 480, § 6, or corresponding provisions of subsequent appropriation acts?

(d) To some other date and, if so, what?

"5. If an officer receives a salary increase pursuant to G. L. c. 41, § 108L, is the amount of such increase treated as a part of his salary for purposes of determining the amounts of the following —

(a) The amount of his pension upon retirement?

(b) The amount of group insurance coverage to which he is entitled?

(c) The rate of his overtime pay?

(d) In the case of an officer subject to St. 1969, c. 547, § 2A, the amount of any cost-of-living salary increase payable to him thereunder?

"6. If your answer to parts (a), (b) and (c) of Question 5 or any such part, is affirmative, and a municipality incurs costs by reason thereof, do the reimbursements payable by the Commonwealth to the municipality under G. L. c. 41, § 108L include one half of any or all of the costs so incurred?"

Question One

Your first question is a broad, general one. Subject to the following observations, I conclude that the question should either be treated on an *ad hoc* basis for each case which arises or through the promulgation of general rules and guidelines by the Board of Higher Education. With this in mind, it is my opinion that the General Court intended some flexibility in determining what constitutes "education in the field of police work." In this regard, I note that the Advisory Committee on Police Education of the Board of Higher Education takes the position that higher education *per se* is of primary importance in improving law enforcement and that specific courses or programs are of secondary importance. And, while the Advisory Committee and the Board have developed law enforcement and criminal justice programs, the programs have included general education courses such as English, Psychology, Sociology, Mathematics, Science, Government and other courses. I am also advised that the Committee has endorsed education in the social sciences, business administration and public administration as being of value to law enforcement.

I am of the opinion that the Committee's position is well taken, and I would not restrict the phrase "education in the field of police work"

solely to degree programs in criminal justice and law enforcement. Subject of course, to a detailed examination of each case and/or the promulgation of the general guidelines to which I have referred, I answer your first question by saying, first, that the term "education in the field of police work" cannot be limited solely to courses in police science, law and law enforcement and criminal justice. It is my further opinion that courses of study in sociology, psychology, English, mathematics, chemistry, other liberal arts subjects, and business administration contribute to the improvement of police efforts and the effectiveness of police departments and thus cannot be said as a matter of law in construing Chapter 835 to be outside the field of police works.

Question Two

For the reasons stated hereinafter, I answer all parts of question two in the affirmative. Any other result would pose severe administrative problems and create gross inequities depending upon individual situations. It is clear that the purpose of the statute is to upgrade police forces and personnel. Under the terms of the statute, education is envisioned as a primary means of such upgrading, and I can perceive no reason why the chronology under which courses were undertaken should be a critical and deciding factor regarding eligibility.

While I am cognizant of the general principle that legislation has no retroactive effect unless required by the terms of the statute (see, e.g., *Martin L. Hall Co.* v. *Commonwealth*, 215 Mass. 326 and *Wynn* v. *Board of Assessors of Boston*, 281 Mass. 245), I cannot at the same time attribute to the General Court an intent to discriminate among members of police forces on the basis of when the educational credits were earned. Because of the substantial equal protection problems which would be raised by negative answers to the question, I am of the opinion that the statute must be construed as allowing points for courses taken (which are approved in the manner discussed in answer to your first question) or degrees earned by a regular, full-time member of any of the police forces enumerated in the statute in all of the instances referred to in your second question.

Question Three

It is my opinion that the answer to both parts of this question must be "No."

As to Part (a), this result would appear to be dictated by G. L. c. 29, §§ 26 and 27, and by G. L. c. 30, § 46(9). General Laws, c. 29, § 26 provides:

> "Expenses of offices and departments for compensation of officers, members and employees and for other purposes shall not exceed the appropriations made therefor by the general court or the allotments made therefor by the governor. No obligation incurred by any officer or servant of the commonwealth for any purpose in excess of the appropriation or allotment for such purpose for the office, department or institution which he represents, shall impose any liability upon the commonwealth."

General Laws, c. 29, § 27 further provides, in relevant part:

> "Notwithstanding any provision of general law, no department, office, commission and institution shall incur an expense, [or] increase a salary . . . unless an appropriation by the general court and an allotment by the governor, sufficient to cover the expense thereof, shall have been made . . ."

According to G. L. c. 30, § 46(9):

> "No increase in salary shall be effective for any position before the effective date of the appropriation act which includes an appropriation made for the purpose of, and sufficient to cover, the cost of such increase."

The meaning of G. L. c. 29, §§ 26 and 27, has been dealt with by a series of interpretations of prior Attorneys General and the Justices of the Supreme Judicial Court. The opinions were as follows:

(1) In 1937, the then Attorney General ruled that under G. L. c. 29, §§ 26 and 27, the Trustees of the State Library and the Governor and Council could not exercise their power (pursuant to G. L. c. 6, § 35) to grant a salary increase to the State Librarian until an appropriation sufficient for the purpose had been made. *Op. Atty. Gen.*, Dec. 7, 1937, p. 17.

(2) In 1947, the then Attorney General ruled that a salary increase voted to the Commissioner of Probation by the Board of Probation and approved by the Governor and Council (pursuant to G. L. c. 276, § 98) could not be paid to him before a sufficient appropriation had been made — apparently because of G. L. c. 29, §§ 26 and 27. *Op. Atty. Gen.*, Dec. 29, 1947, p. 42.

(3) In 1948, the Justices of the Supreme Judicial Court rendered an advisory opinion to the House of Representatives to the effect that a bill pending before that body which would give state employees a 20% salary increase without providing sufficient funds to pay for it would *not* be unconstitutional. *Opinion of the Justices*, 323 Mass. 764.

(4) In 1959, the then Attorney General, relying on the 1948 Opinion of the Justices, ruled that salary increases in excess of appropriations which had been voted by the Senate Committee on Rules to certain Senate employees (pursuant to G. L. c. 3, §§ 12 and 13) could be immediately paid, that G. L. c. 29, §§ 26 and 27 did not prevent a state officer from exercising his statutory authority to increase a salary, and that the 1937 opinion (and, it would seem, the 1947 opinion) were wrong. *Op. Atty. Gen.*, Nov. 25, 1959, p. 63.

I believe that the last-mentioned opinion, though perhaps correct in its conclusion, was incorrect in its reasoning. The *Opinion of the Justices* relied upon had nothing to do with the meaning of G. L. c. 29, §§ 26 and 27, but was directed at the constitutionality of a bill (1948 House Doc. No. 1881) which would have expressly overridden the restrictions of G. L. c. 29 by a special act. Except where those restrictions are thus vitiated by special legislation, the prior interpretations of their meaning in

the context of administratively-granted salary increases remain, in my opinion, completely valid. It may be, however, that G. L. c. 29, §§ 26 and 27 are inapplicable to employees of the Legislative Branch — in which case the 1959 opinion reached the right result, but for the wrong reason.

The 1948 *Opinion of the Justices* does not, in any event, have any bearing on G. L. c. 41, § 108L. That opinion dealt with a special act in express derogation of G. L. c. 29; section 108L is a part of the General Laws (and, hence, subject to the "notwithstanding" clause in G. L. c. 29, § 27), and contains no provision which is even inconsistent with G. L. c. 29. Besides, the facts of the Opinion differ significantly from the subject matter of the 1959 Attorney General's opinion, in that its application is confined to members of the Executive Branch. Moreover, G. L. c. 30, § 46(9), which, as noted in the 1959 opinion, is inapplicable to legislative employees, does apply to members of the Detective Branch of the State Police, the Capitol Police and the Metropolitan District Commission Police, and therefore appears to prohibit their receiving a salary increase under § 108L "before the effective date of the appropriation which includes an appropriation made for the purpose of, and sufficient to cover, the cost of such increase." While members of the Uniformed Branch of the State Police are not subject to G. L. c. 30, § 49(9) (being exempted therefrom by G. L. c. 22, § 9A), it would seem appropriate that they be accorded the same treatment under § 108L — since § 108L is completely silent on when the increases are to be paid.

Turning to Part (b) of Question 3, it is my opinion that the increases awarded under § 108L fall squarely within the terms of St. 1970, c. 480, § 6, and hence that, so long as such terms or corresponding provisions of subsequent appropriations acts remain in effect, the payment of any such increases before Ways and Means Committee action thereunder would be in plain violation thereof. St. 1970, c. 480, § 6 provides in relevant part:

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

Question Four

It is my opinion that the extent, if any, to which any pay increase under G. L. c. 41, § 108L is retroactive is entirely dependent upon the terms of the appropriation covering the amount of the increase. No such appropriation has as yet been made. If, as you presume in your letter,

St. 1970, c. 480, § 6 will continue to be included in all future appropriation acts, as has been the case for many years, it is my opinion that alternative (c) would be the appropriate response to this question. In such case, the salary increase would be payable from the date, if any, specified by the Joint Committee on Ways and Means unless the General Court provides otherwise in a subsequent appropriations act.

If no date were specified, or if St. 1970, c. 480, § 6 or corresponding provisions were not included in the appropriations act, it would be my opinion that, absent contrary language in the act, the effective date of such appropriation act would have to be regarded as the effective date of any increases in salary.

Question Five

All the police officers who are entitled to incentive pay increases under G. L. c. 41, § 108L will, upon retirement, receive their pensions under G. L. c. 32, the "Contributory Retirement System for Public Employees." Section 5(2) of G. L. c. 32 provides a formula by which a public employee's pension is determined on the basis of his "regular compensation."

According to G. L. c. 32, § 1 (in relevant part):

> " 'Regular compensation', during any period subsequent to December thirty-first, nineteen hundred and forty-five, shall mean the salary, wages or other compensation in whatever form, lawfully determined for the individual service of the employee by the employing authority, not including bonus or overtime . . ."

It is clear then that the salary increase provided by G. L. c. 41, § 108L must be lawfully determined for each police officer by each employing authority for it to be considered "regular compensation" for pension purposes. Otherwise, it would be in the nature of a bonus, and therefore excluded from consideration in pension determination.

As to the city and town police officers, this question would be resolved upon a decision by the various city and town employing authorities whether to adopt the career incentive pay program. If they adopt the program, the employing authorities would necessarily follow their lawfully mandated procedures to provide for the additional compensation, fifty percent of which would be reimbursed by the Commonwealth. This could conceivably require amendments to any existing ordinances and by-laws defining the present scope of compensation. In any event, the following of those procedures would, in my opinion, be sufficient to qualify the incentive pay increase as "salary, wages or compensation in whatever form, lawfully determined . . . by the employing authority," and thus as "regular compensation."

As for the State, MDC and Capitol Police, it is my opinion that by St. 1970, c. 835 the General Court intended the career incentive pay increases to be additional "regular compensation." It seems unlikely that the General Court contemplated that the pay increases should be con-

sidered in any other way. The Act clearly states that the program offers increases in "base salary", that phrase being used three times. In paragraph four, it is stated the Act provides "career incentive *salary* increases." (Emphasis supplied.) The increment is not an amount in addition to base salary, but an increase in base salary itself. It is by no means temporary; it is to continue as a permanent addition to salary as long as the officer shall serve. The new, increased compensation for police officers will continue to meet the common and approved usage of the word salary, "fixed compensation paid regularly" (*Webster's Third New International Dictionary*, 1964). "Words found in a statute are to be given their ordinary lexical meaning unless there be a clear indication to the contrary." *Randall's Case*, 331 Mass. 383, 385. There is no clear indication that the new compensation was intended other than to fit what is designated as salary in the definition of "regular compensation," G. L. c. 32, § 1. However, there is sufficient affirmative indication that such is what was intended by the General Court for me to so hold as my opinion.

The question remains, in reference to G. L. c. 32, § 1, whether the salary increase is "lawfully determined for the individual service of the employee by the employing authority." My opinion is that it is.

In each case the employing authorities of the State, MDC and Capitol Police must implement the career incentive pay program. They were given no discretion by the General Court, as was given to the cities and towns, to refuse to accept it. Certainly there can be no contention that the Legislature did not have the lawful capacity to prescribe the program for each authority. The legislative intent, indicated by the language of the Act that the increments in pay should be increases in base "salary", must be carried out. Consequently, the only action to be taken by these employing authorities is to compute the statutorily mandated increases which come under "salary, wages or other compensation"; and, therefore, the increments in base salary should be considered "regular compensation" under G. L. c. 32, § 1.

As of this time, the salary schedule for the pay plan of the Commonwealth, as set forth under G. L. c. 30, § 46, has not been revised to accommodate for the percentage increases in base salary under the career incentive pay program. Notwithstanding that fact, it is my opinion that the new salaries have been lawfully determined so as to be regular compensation. The Legislature apparently believed that the computation instructions for new salaries set forth in St. 1970, c. 835 were sufficiently clear so that the new salaries can be determined by reference to the general salary schedule. I see no substantial significance in a failure to modify the schedule itself.

In accordance with the above, my answer to Part (a) of Question 5 is "Yes."

Group insurance is controlled by G. L. c. 32A for employees of the Commonwealth and by G. L. c. 32B for employees of the counties, cities and towns. The only section in each chapter affected by the career

incentive pay program is that permitting additional insurance over the minimum amounts provided for all public employees. General Laws, c. 32A, § 10A and G. L. c. 32B, § 10B both provide for additional group insurance based on the employee's "gross annual salary, wages or compensation" (not including overtime) in accordance with a set schedule. Since it is my opinion that the career incentive pay increases represent additional salary, I believe that clearly the police officers who receive such increases will be entitled to the additional group insurance allowed in consideration of their new salary figures. Therefore, my answer to Part (b) of Question 5 is "Yes."

State Police detectives and Capitol Police officers are not entitled to overtime pay, so your Question 5(c) applies to overtime pay for Uniformed Branch State Police officers, MDC officers and local police officers.

Under G. L. c. 22, § 9D, all members of the Uniformed Branch State Police shall be granted compensation "for each additional duty hour beyond the normal work day or compensatory time off shall be granted as soon thereafter as is practicable." Since undoubtedly additional duty hours are to be compensated at the same rate which applies to regular hours, it is clear to me that the salary increase from the career incentive pay program should be reflected in such overtime compensation.

As for the MDC Police, G. L. c. 92, § 62B provides:

> "Notwithstanding any other provision of law, members of the police force of the commission who perform service beyond their regular hours of service shall be compensated therefor as overtime service, at an hourly rate equal to one and one half times the hourly rate of their regular compensation for their average weekly hours of regular duty."

This compensation for overtime service being based on the hourly rate of "regular compensation," in accordance with my answer to Part (a) of Question 5, I believe that MDC Police overtime pay should also reflect any career incentive program augmented salary.

The statutory provisions with respect to overtime compensation of local police are found in G. L. c. 41, § 111H, and G. L. c. 147, §§ 17A *et seq.*

General Laws, c. 41, § 111H provides that:

> " . . . [A]ny police officer of a city or town who is required to perform any service beyond his regular established hours of service on primary day, on election day, on the thirty-first day of October or at any parade or race or at any public celebration or while police listing, shall be compensated for such additional hours of service at the rate per hour of his regular compensation . . ."
>
> General Laws, c. 147, § 17A provides that for working on specified holidays any additional payment in lieu of a compensatory day off shall be based on "regular compensation

. . . or such higher rate as may be determined by the person or persons authorized to establish pay scales in the respective police departments."

General Laws, c. 147, § 17B (optional for cities and towns), except for lack of a provision for compensatory time off, requires payment in the same manner as provided in section 17A for service beyond five days and forty hours in one week.

General Laws, c. 147, § 17C, applying to cities and towns which have not accepted section 17B, provides that an officer working overtime:

" . . . may be given time off equal to such period of overtime duty or . . . he may be paid for such period of overtime duty at such an hourly rate as may be determined by the authority in charge of the police department, which rate shall in no event be less than one and one half times the hourly rate of his regular compensation for his average weekly hours of regular duty."

General Laws, c. 147, § 17F provides an additional day's pay, presumably based on regular compensation, for police chiefs who work on specified holidays. Added to section 17F by St. 1969, c. 872, § 1, is a provision (optional for cities and towns) requiring that service in excess of forty hours in five days:

"be compensated at an hourly rate equal to one and one half times the hourly rate of his regular compensation for his average weekly hours of regular duty or such higher rate as may be determined by the person or persons authorized to establish pay scales in the respective police departments . . ."

It is my opinion that in all the above sections applying to local police, providing overtime either equal to or at a multiple of "regular compensation" requires that overtime pay be based upon salary as may be augmented by the career incentive pay program.

In accordance with the above, my answer to Part (c) of Question 5 is "Yes."

St. 1969, c. 547, § 2A provides a cost-of-living adjustment to every "salary" payable under sections forty-five to fifty, inclusive, of G. L. c. 30. Since it is my opinion that the Legislature intended the career incentive pay increases to be an increase in "salary", it is also my opinion that such adjustments should be based upon any such increased salary. My answer to Part (d) of Question 5 is, therefore, "Yes."

Question Six

The statute in question, G. L. c. 41, § 108L, states in paragraph four, sentence one:

"Any city or town which accepts the provisions of this section and provides career incentive salary increases for police

> officers shall be reimbursed by the commonwealth for one half the cost of such payments upon certification by the board of higher education . . ."

If I may take out of order the parts of this question as they correspond to the parts of Question 5, I should like to dispose first of (b), group insurance. Under G. L. c. 32B, § 11A, the premium for additional group insurance is withheld from each payment of salary or wages of the employee, and the governmental unit makes no contribution to said premium. So there is no cost incurred by the city or towns as a result of the salary increases, other than the minimal administrative cost of paper work in adjusting the premium amount withheld. It is my opinion that any such cost in relation to group insurance is of such a *de minimis* nature that it was not intended by the Legislature to be reimbursed. The cost of ascertainment would be greater than the cost incurred. "The intention to accomplish an absurd result, unless clearly required by language of the statute, is not to be attributed to the Legislature." *Johnson* v. *Commissioner of Public Safety*, 355 Mass. 94. Therefore, my answer to Part (b) is that there will be no reimbursable costs in relation to group insurance as a result of the career incentive pay program.

The first sentence of paragraph four of G. L. c. 41, § 108L provides that reimbursement is to be measured by one half "the cost of such payments"; but one cannot be sure what is the proper antecedent to the word "such". However, it appears by reference to the complete sentence that the only payments intended to be included are those made in the form of the "career incentive salary increases" themselves. This is the most logical interpretation of the language of the sentence; and a statute must be construed "in accordance with the intention of the Legislature as expressed in the language used." *Solomon* v. *Nessen*, 263 Mass. 371, 377. Therefore, it is my opinion that the Legislature intended reimbursement to the cities and towns of fifty percent of the cost of the *salary* increases alone. This interpretation excludes payment as to the municipal costs of increased overtime and pensions. Overtime and pensions, from the discussion above, quite clearly are not salary; rather they are based upon salary. If the statute had provided that the Commonwealth would reimburse for one half the "costs incurred as a result of such payments", then a different interpretation would follow.

Consequently, it is my opinion that cities and towns may not be reimbursed for costs incurred, as a result of the career incentive pay program, in increased payments on (a) pensions, and (c) overtime pay.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 48 June 16, 1971

Honorable Milton Greenblatt, M.D.
Commissioner of Mental Health
190 Portland Street
Boston, Massachusetts 02114

Dear Commissioner Greenblatt:

You have requested my opinion relative to the powers and duties of persons holding the position of assistant superintendent in various institutions under the jurisdiction of the Department of Mental Health.

Specifically, you inquire as follows:

> "1. In the absence, incapacity or disability of a Superintendent, does the Assistant Superintendent have the authority to preside over a disciplinary hearing at the institution relating to the employee of the institution resulting in his discharge?
>
> 2. Do the words, 'appointing authority' contained in General Laws, Chapter 31, Section 43 (a) include Assistant Superintendents for the purpose of permitting the Assistant Superintendent to hold discharge proceedings in the absence or incapacity of the Superintendent?
>
> 3. May the Commissioner of Mental Health make a formal designation under Chapter 19, Section 1, to allow the Assistant Superintendent to act as appointing authority in case of absence, incapacity or disability of the Superintendent?"

For the reasons hereinafter stated, I answer your first two questions in the affirmative and your third question in the negative.

Although G. L. c. 123, § 28 provides that the superintendent of a state hospital or a state school is the appointing authority for employees at those institutions and the statutes relating to institutions within the Department of Mental Health make no provision for the assumption of the powers and duties of the superintendent by the assistant superintendent in the absence, incapacitation or disability of the former, an assistant superintendent may, under certain circumstances, exercise the powers and duties of the superintendent.

In this regard, St. 1950, c. 639, § 20A (as inserted by St. 1962, c. 767) provides:

> "The commissioner or head of each executive or administrative department of the commonwealth, including the state secretary, the attorney general, the treasurer and receiver-general, and the auditor, and the director or head of each division in each such department, shall designate, by name or position, five persons in his respective department or division who shall exercise, successively, his duties in the event of his absence or disability. Each such designation shall be subject to approval by the governor and council and shall be in effect

> until revoked by the officer who made such designation. Persons designated under this section to perform the duties of a department or division head in his absence or disability shall perform such duties only in succession to persons so authorized under any other provision of general or special law."

Since I conclude that the superintendent of a state hospital or a state school is "the director or head of [a] . . . division in" the Department of Mental Health, it follows that the superintendent may submit the designation referred to in section 20A. Accordingly, if an assistant superintendent is designated to act in the absence of the superintendent and if the designation is approved by the Governor,[1] an assistant superintendent would be permitted to preside at a disciplinary hearing and would qualify as the appointing authority within the meaning of G. L. c. 31, § 43(a).

With respect to your third question, the provisions of section 20A do not appear to permit the designation by the Commissioner of an assistant superintendent to act in the superintendent's absence, incapacity or disability. I find nothing in G. L. c. 19, § 1 which would authorize such a designation, and, accordingly, it is my opinion that the Commissioner may not designate an assistant superintendent to act as the appointing authority at a state hospital or a state school.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 49 June 16, 1971

Honorable Leon Charkoudian
Commissioner of Community Affairs
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

Dear Commissioner Charkoudian:

You have requested my opinion on the following question:

> "If a housing authority determines the compensation of its executive director in accordance with section 7 of Chapter 121B of the General Laws, can the Department of Community Affairs, in reviewing the proposed operating budget of the Authority, require the Authority to change said compensation to an amount that meets the approval of said Department?"

For the reasons stated hereinafter, I answer your question in the affirmative.

You state that it has the practice of the Department of Community Affairs (the Department) to set uniform standards regarding the salaries of executive directors, and that it has been the practice of housing au-

[1] The requirement of approval by the Council was repealed by St. 1964, c. 740 (G. L. c. 6 App.)

thorities to submit all financial items to the Department for approval before including them in the budget. Evidently, it was also the practice of the State Housing Board, and later the Department of Commerce and Development, which were formerly charged under G. L. c. 121 with the duties now assigned to your Department, to exercise general supervision and control over the financial affairs of local housing authorities, including the compensation of executive directors. See *Jackson* v. *Chelsea Housing Authority*, 327 Mass. 423, 425; *Flanagan* v. *Lowell Housing Authority*, 356 Mass. 18, 21 (Mass. Adv. Sh. (1969) 787). The Supreme Judicial Court has only recently declined an opportunity to decide whether former G. L. c. 121, §§ 261 *et seq.* (now contained in G. L. c. 121B, inserted by St. 1969, c. 751, § 1) authorized such control by the Department. *Flanagan* v. *Lowell Housing Authority*, *supra*. The answer to your question, therefore, requires an examination of the statutory provisions governing the relationship between the Department and a local housing authority.

General Laws, c. 121B, § 7, provides that a housing authority "may employ counsel, *an executive director who shall be ex officio secretary of the authority*, a treasurer who may be a member of the authority and such other officers, agents and employees as it deems necessary or proper, and shall determine their qualifications, duties and compensation . . ." (Emphasis supplied.) Section 11 (*l*) authorizes a housing authority to "enter into, execute and carry out contracts . . ."

Chapter 121B, § 29, requires a housing authority to report annually to the Department in a form to be prescribed by the Department, "an accurate account of all its activities and all its receipts and expenditures . . ." Section 29 provides further that the Department "may investigate the budgets, finances and other affairs of housing authorities and their dealings, transactions and relationships."[1] The Department has the power to examine the records of housing authorities, "and to prescribe methods of accounting and the rendering of periodical reports in relation to . . . housing projects." In addition, the Department has the power to promulgate "rules and regulations, prescribing standards and setting principles governing the planning, construction, maintenance and operation of . . . housing projects by housing authorities," which rules and regulations may be enforced in a proceeding in equity.

Section 31 of c. 121B requires a housing authority to submit to the Department for its approval the plans for a proposed low-rent housing project, including the estimated cost, proposed method of financing and a detailed estimate of the expenses and revenues of the project.

Section 34 of c. 121B authorizes the Department, in behalf of the Commonwealth, to enter contracts with housing authorities for the purpose of granting state financial assistance for a project. "Each such contract shall contain such limitations as to the cost of the project *and administrative and maintenance costs, and such other provisions, as the department may require*." (Emphasis supplied.) The standard Contract

[1] G. L. c. 121B, § 29, as amended by St. 1970, c. 851, § 2. As originally enacted by St. 1969, c. 751, § 1, this section provided, as did former c. 121, § 26U, that the Department (or its predecessor) "may investigate the affairs of housing authorities and their dealings, transactions and relationships."

for Financial Assistance, drafted by the Department pursuant to section 34, contains in cl. 5(c) an agreement by the housing authority to submit to the Commissioner for his approval its proposed operating budget for the next fiscal year, and a further agreement that the housing authority "will operate the Project during such fiscal year within the total amount and in accordance with the details of the budget *as approved by the Commissioner.*" (Emphasis supplied.)

It is clear that a housing authority in the first instance has the power to employ an executive director and to set his salary. In my opinion, however, the exercise of that power is subject to review and possible disapproval by the Department. In requiring housing authorities to submit accounts of their activities, receipts and expenditures, and in granting the Department the power to "investigate the budgets, finances and other affairs" of the housing authorities, to examine their records, to approve plans for the construction and financing of housing projects, and to promulgate rules and regulations governing the construction and operation of housing projects, the Legislature has provided the Department with broad supervisory powers and duties. Included among these powers and duties is the authority to promulgate rules and regulations regarding expenditures and compensation for employees. See 1967 Op. Atty. Gen., p. 237.

While it does not appear from your letter that the Department has promulgated any rules or regulations regarding compensation of executive directors, a similar result has been accomplished with regard to housing authorities which have executed the standard contract for state financial assistance, drafted by the Department pursuant to G. L. c. 121B, § 34. The right reserved in cl. 5(c) of the contract necessarily implies the right of the Commissioner to disapprove a budget which includes compensation for an executive director which the Commissioner finds does not meet the uniform standards established by the Department. See Op. Atty. Gen., *supra.*

Note should be taken, however, of the decision in *Chessman* v. *Somerville Housing Authority*, 332 Mass. 92. That decision does not indicate a lack of authority on the part of the Department to require housing authorities to adhere to Department standards in the compensation of executive directors. However, the Court did hold in that case that a housing authority which had executed a contract of employment with its executive director was liable on the contract even though the housing authority had previously agreed with the State Housing Board (the predecessor of your Department) not to enter into any contracts without the Board's approval. The fact that the executive director, when he entered into the contract of employment, had no knowledge of the prior contract between the housing authority and the Board, appears to have dictated the result in *Chessman.* In my opinion the result of that case would have been different had the Department adopted and promulgated its standards for compensation as administrative regulations under G. L.

c. 121B, § 29. Such regulations adopted in conformity with G. L. c. 30A would have the force of law. *DaLomba's case*, 352 Mass. 598, 603.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 50

June 18, 1971

Honorable William F. Powers
Commissioner of Public Safety
1010 Commonwealth Avenue
Boston, Massachusetts 02215

Dear Commissioner Powers:

At a meeting of the Joint Steering Committee of the New England Organized Crime Intelligence System (NEOCIS), you requested my opinion with respect to certain provisions of the New England State Police Compact (Mass. G. L. c. 147 App.). Specifically, you raise the following two questions:

> "1. May NEOCIS be legally designated as the official intelligence bureau of the New England State Police Administrator's Conference (NESPAC)?
>
> "2. In such event, would state police forces of any party state assigned to NEOCIS possess the same powers, duties, rights, privileges and immunities as members of the Massachusetts State Police enjoy, whenever the former are engaged in the performance of their duty?"

I answer both questions in the affirmative. With respect to your first question, Mass. G. L. c. 147 App., § 1-1, Article IV provides in pertinent part:

> "The Conference shall have power to:
>
> "(a) Establish and operate a New England Criminal Intelligence Bureau . . . in which shall be received, assembled and kept case histories, records, data, personal dossiers and other information concerning persons engaged or otherwise associated with organized crime."

I assume that the other member states of the New England State Police Compact have comparable statutory provisions, and you have not advised me to the contrary. Accordingly, I am of the opinion that NESPAC can legally designate NEOCIS as its official intelligence bureau by, for example, a properly recorded vote of its Executive Board.[1]

In such event, I am of the further opinion that state police forces of any party state assigned to NEOCIS would possess the same powers, duties, rights, privileges and immunities as members of the Massachusetts State Police enjoy, whenever the former are engaged in the per-

[1] I assume for the purposes of this opinion, that NEOCIS is properly qualified to perform the functions of the Bureau referred to in Article IV.

formance of their duty. As Mass. G. L. c. 147 App., § 1-1, Article VII(d) specifically provides:

> "Whenever any of the state police forces of any party state are engaged outside their own state in carrying out the purposes of this compact, the individual members so engaged shall have the same powers, duties, rights, privileges and immunities as members of the state police department of the state in which they are engaged, but, in any event, a requesting state shall save harmless any member of a responding state police department serving within its borders for any act or acts done by him in the performance of his duty while engaged in carrying out the purposes of this compact."

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 51 June 25, 1971

Honorable Edward J. Ribbs
Commissioner of Public Works
100 Nashua Street
Boston, Massachusetts 02114

Dear Commissioner Ribbs:

You have requested my opinion relative to the authority and obligations of the Department of Public Works (the Department) regarding the payment of moving and relocation expense payments to certain individuals and businesses who have been displaced as a result of eminent domain takings by the Department. You state that these individuals and businesses are tenants of property acquired by the Department under the accelerated highway program and in turn leased by the Department under St. 1966, c. 427; that they have failed to pay all or part of the rents due the Department; and that they are entitled to moving and relocation expense payments under G. L. c. 81, § 7J.

You state further that before approval by the United States Secretary of Transportation of any Federal-aid highway project which will displace any person, business or farm operation, the Department is required by the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, § 210, Pub. L. 91-646 (superseding 23 U.S.C. § 502), to give satisfactory assurances to the Secretary that fair and reasonable relocation payments will be made to displaced occupants.

Your questions are:

> "1. May the Department pay full moving expense and relocation payments to a displaced occupant if such displaced occupant owes rent to the Department for the premises from which displacement is made?
>
> "2. (a) May all or any part of any moving expense and relocation payment due a displaced occupant be withheld

if such displaced occupant be withheld if such displaced occupant owes rent to the Department for the premises from which displacement is made?

(b) If the answer to 2(a) is in the affirmative, may the amount owed the Department for rent be deducted from such payments?

"3. (a) Is the Department required to withhold all or any part of any moving expense and relocation payment due a displaced occupant if such displaced occupant owes rent to the Department for the premises from which displacement is made?

(b) Is the Department required to deduct the rent owed the Department from such payments?

"4. If the occupants are displaced under a Federal-aid highway project, do the assurances required to be given and which have been given by the Department in accordance with Section 502 of Title 23 of the United States Code and Section 210 of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, prohibit the Department from withholding moving expense and relocation payments or from deducting the rents due from such payments?"

For the reasons hereinafter stated, I answer question 1 in the affirmative and question 2(a) and (b) in the negative. Answers to questions 3 and 4 are not required.

The Department is required under G. L. c. 81, § 7J[1] to pay reasonable and necessary moving or relocation expenses to persons who are displaced by the action of the Department in taking property for highway purposes. Such payments "shall not be subject to attachment by trustee process or otherwise, nor shall they be subject to be taken on execution or other process." *Ibid.* as amended by St. 1967, c. 162, § 2.

Under G. L. c. 29, § 17, the Governor may instruct the Treasurer and Receiver General to withhold all payments to any person who is illegally withholding money from the Commonwealth. This procedure is not strictly an "attachment", "execution", or "other process", it is more in the nature of the exercise of a right of setoff. Nevertheless, in construing statutes which, like G. L. c. 81, § 7J, exempt certain funds or payments from attachment or execution, the courts have generally held that such statutes operate to exempt the funds from a right of setoff. See, *e.g.*, *Financial Acceptance Co.* v. *Breaux*, 160 Colo. 510, 419 P.2d 955 (1966); 20 Am. Jur. 2d, *Counterclaim, Recoupment and Setoff*, § 33.

The various jurisdictions are divided, however, as to whether exemption provisions like that in G. L. c. 81, § 7J, operate to bar claims by the state. See, generally, 31 Am. Jur. 2d, *Exemptions*, §§ 130-132, 134, 135. There is no express mention of the Commonwealth in G. L. c. 81, § 7J;

[1] See also G. L. c. 79, § 6A, and c. 79A, § 7.

and it is a general rule of statutory construction that a statute will not bind the Commonwealth unless the statute expressly so provides. See *Hansen* v. *Commonwealth*, 344 Mass. 214, 219, and cases cited. However, those cases which have held that exemption provisions do not bind the state have placed great weight on the nature of the state's claim. In the ordinary case the claim will be for unpaid taxes or for fines or penalties, which are unlike usual contractual debts or unpaid judgment in that there is a strong public policy in enforcing payment. See cases collected in 31 Am. Jur. 2d, *Exemptions*, §§ 131, 132. The claim of the Commonwealth in the present situation is merely that of a lessor for rent, and thus lacks the especially compelling public interest in its enforcement that has influenced some courts to except claims for taxes or fines from exemption provisions. Moreover, the greater weight of authority seems to hold that to allow claims by the state to be enforced against otherwise exempt funds would be to frustrate the policy of the exemption law. See 31 Am. Jur. 2d, *Exemptions*, § 130.

It is my opinion that the exemption provision in G. L. c. 81, § 7J, prohibits the withholding of moving and relocation expense payments on account of rent owed to the Commonwealth. Moving and relocation expense payments are provided for in three separate sections of the General Laws, c. 79, § 6A; c. 79A, § 7; c. 81, § 7J. They are intended "to provide forthwith for the relocation of persons dispossessed by the taking of real property . . ." St. 1963, c. 594, emergency preamble. One purpose of such payments is the reduction of the intensity of the financial impact of a forced relocation. See Note, *The Interest in Rootedness: Family Relocation and an Approach to Full Indemnity*, 21 Stanford L. Rev. 801, 807-818 (1969). Another apparent purpose of such payments is to facilitate the implementation of the highway program. See id., 804 at fn. 20. The exemption provision of G. L. c. 81, § 7J which was added on the recommendation of the Department (H. Doc. 113 of 1967, § 11), furthers the statutory purpose by assuring that the payments will be used for relocation, and not tied up by attachment. This provision, which appears to be unique among relocation assistance statutes, is especially important where the displaced occupants have low income levels, see Note, *supra*, 21 Stanford L. Rev. at 824, where the financial impact on the displaced occupant is highest and the possibility of delay in the implementation of the highway program is most likely. Certainly the Commonwealth has an interest, as evidenced in G. L. c. 29, § 17, in adjusting its accounts with persons illegally withholding money. In my opinion, however, that interest is not so compelling as to warrant the frustration of the purposes of the statutes granting moving and relocation expense payments and exempting them from attachment and execution.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 52 June 30, 1971

Honorable Edward J. Ribbs
Commissioner of Public Works
100 Nashua Street
Boston, Massachusetts 02114

Dear Commissioner Ribbs:

You have requested my opinion whether the Department of Public Works (the Department) is authorized under St. 1969, c. 768 to expend a certain sum from funds appropriated for the accelerated highway program in order to provide one half of the cost of the construction of a ferry to be used by the Woods Hole, Martha's Vineyard and Nantucket Steamship Authority (the Authority). The other half of the construction cost would be supplied by the Authority. The sum expended by the Department from funds appropriated for the accelerated highway program would then be reimbursed by the Federal government under Section 139 of the Federal-Aid Highway Act of 1970 (Pub. L. 91-605, 84 Stat. 1713). You ask further whether, assuming such expenditure to be authorized, the sum reimbursed by the Federal government may be credited to accelerated highway program funds rather than to the "Commonwealth's general fund."

I answer your first question in the affirmative. Section 6 of St. 1969, c. 768, entitled "An Act Relative to the Accelerated Highway Program," (the Act) directs the Department to "accept any federal funds available *for projects authorized in section one of this act . . .*" (Emphasis supplied.) In § 1 of the Act the Department is authorized to expend funds "for projects for the laying out, construction, reconstruction, resurfacing, relocation or improvement of highways, bridges, grade crossing eliminations and alternation of crossings at other than grade, *and for construction of needed improvements on other routes not designated as state highways and without acceptance by the commonwealth of responsibility for maintenance . . .*" (Emphasis supplied.)

It is evident that the Act does not authorize the Department to expend funds for the purpose of constructing ferries unless the phrase, "other routes not designated as state highways," is construed to include ferry lines. As a general proposition, ferries have been regarded as substitutes for bridges and as integral parts of highway systems. See, *e.g.*, *Savage Truck Line* v. *Commonwealth*, 193 Va. 237, 242-243, 68 S.E.2d 510, 513-514; *State ex rel. King County* v. *Murrow*, 199 Wash. 685, 691, 93 P.2d 304, 307; *Puget Sound Nav. Co.* v. *United States*, 107 F.2d 73, 74-75 (9th Cir.), *cert. den.* 309 U.S. 668; *United States* v. *Washington Toll Bridge Authority*, 190 F. Supp. 95, 97-98 (W.D. Wash.). In this Commonwealth, however, the Legislature has not seen fit to integrate the operation of ferries generally with the highway system. Nothing in G. L. c. 81, relative to the Department's authority over the highway system, or in G. L. c. 91, relative to the Department's authority with regard to waterways, contains any reference to ferries. Legislative enactments concerning ferries have treated them separately from the highway system. See G. L. c. 88, §§ 1-8. See also St. 1960, c. 701 (creating the Authority).

As noted above, however, the Department is directed in § 6 of the Act to "accept any federal funds available for projects authorized in section one of this act . . ." In addition, G. L. c. 81, § 30 authorizes the Department to

> "make all contracts and agreements and do all other things necessary to co-operate with the United States in the construction and maintenance of highways, under an act of Congress approved on July eleventh, nineteen hundred and sixteen, entitled 'An Act to provide that the United States shall aid the states in the construction of rural post roads and for other purposes,' as amended and supplemented, . . . [and to] make any agreements or contracts that may be required to secure federal aid in the construction of highways under the provisions of the act of Congress aforesaid . . ."

The Federal statute referred to in G. L. c. 81, § 30 now appears as amended in 28 U.S.C. §§ 101 *et seq.* One of the amendments to that statute was contained in § 139 of the Federal-Aid Highway Act of 1970 (Pub. L. 91-605, 84 Stat. 1713) which added to 23 U.S.C. § 129 the following:

> (f) Notwithstanding section 301 of the title, the Secretary [of transportation] may permit Federal participation under this title in the construction of ferry boats, whether toll or free, subject to the following conditions:
>
> "(1) It is not feasible to build a bridge, tunnel, combination thereof, or other normal highway structure in lieu of such ferry.
>
> "(2) The operation of the ferry shall be on a route which has been approved under section 103(b) or (c) of this title as a part of one of the Federal-aid systems within the State and has not been designated as a route on the Interstate system . . ."

The phrase "other routes not designated as state highways" in § 1 of the Act, refers in part to the federal Interstate Highway System. See 1966 Op. Atty. Gen., p. 274. It also refers to Federal-aid primary and secondary systems described in 23 U.S.C. § 103(b), (c.) Since passage of § 139 of the Federal-Aid Highway Act of 1970, quoted above, primary and secondary road systems may, with the approval of the Secretary of Commerce, include the operation of ferries on their "routes."

It is my opinion that the provision in St. 1969, c. 768, § 6, that the Department shall accept any federal funds available for projects authorized in § 1, when read with the authority of the Department in G. L. c. 81, § 30, to contract with the federal government in order to secure federal aid under 23 U.S.C. §§ 101 *et seq.*, justifies the conclusion that the phrase in St. 1969, c. 768, § 1, "other routes not designated state highways," can be construed to refer to any "route" which may be included in Federal-aid highway sytems, including primary and secondary systems. Since a primary or secondary route now may include a ferry

line, the Department is authorized to expend funds to aid in the construction of a ferry for that line. *Cf. Lawrence Housing Authy.* v. *Commissioner of Labor and Indus.*, Mass. Adv. Sh. (1970) 1323, 1328-1330.

I see no constitutional barrier to such an expenditure. The initial appropriation for the accelerated highway program was from the Highway Fund, which consists for the most part of revenue from gasoline taxes under G. L. c. 64A, § 13, and registration fees, etc., under G. L. c. 90, § 34. The funds for the program must therefore be expended in accordance with Art. 78 of the Articles of Amendment to the Constitution of the Commonwealth. [1] Consequently, the operation of the ferry to be built must be an aid to the motoring public. See *Opinion of the Justices*, 324 Mass. 746. Since ferries are generally regarded as substitutes for bridges and as integral parts of a highway system (see cases cited *supra*), the expenditure of funds appropriated from the Highway Fund for the construction of a ferry would not contravene Art. 78 so long as the ferry will ultimately be used to transport motor vehicles.

Your second question relates to the disposition of Federal funds received in reimbursement for the cost of constructing the ferry. You state that ordinarily Federal reimbursements for highway construction are returned to the Highway Fund rather than to accelerated highway program funds. [2]

You wish to know whether in this instance the Federal funds may be credited instead to the funds for the accelerated highway program.

In my opinion the answer is in the negative. As noted above, the expenditure for this project of funds appropriated for the accelerated highway program is authorized by St. 1969, c. 768, § 1. Section 6 of that Act clearly mandates the disposition of Federal funds granted in reimbursement of such expenditures: "The department shall accept any federal funds available for projects authorized in section one of this act *and such federal funds when received shall be credited to the Highway Fund* . . ." (Emphasis supplied.) There is no provision for crediting such funds directly back to the funds appropriated to the Department for the accelerated highway program. Nor is there any similarity to the situation described in the opinion in 1955 Op. Atty. Gen., pp. 108, 109-110. I know of no other authorization for crediting Federal funds directly to accelerated highway program funds.

Very truly yours,
ROBERT H. QUINN
Attorney General

[1] Article 78 requires that revenue exacted from owners of motor vehicles through license fees and fuel taxes, etc. be used solely for highways and bridges intended for motor vehicles.

[2] Your letter states that the federal funds received "go into the Commonwealth's general fund rather than into the accelerated highway fund." Since St. 1969, c. 768, § 6 requires that such funds when received be credited to the Highway Fund (see also G. L. c. 10, § 8), I interpret your use of the term "Commonwealth's general fund" to refer to not the General Fund itself (G. L. c. 29, § 2) but to all sums, including the Highway Fund, which are held by the Treasurer and are subject to appropriation before expenditure.

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