The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

Year Ending June 30, 1979

Ref
MR
340M3
R467
1979
c.1

PUBLICATION OF THIS DOCUMENT APPROVED BY JOHN MANTON, ACTING STATE PURCHASING AGENT.
500-8-80-156726 Estimated Cost Per Copy $2.70

Ref
MR
340 M3
A 467
1978
c. 1

The Commonwealth of Massachusetts

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, 1978.

Respectfully submitted,
FRANCIS X. BELLOTTI
Attorney General

DEPARTMENT OF THE ATTORNEY GENERAL

Attorney General
FRANCIS X. BELLOTTI

First Assistant Attorney General
Thomas R. Kiley

Assistant Attorneys General

Jose R. Allen
Nicholas P. Arenella
Charles Barry
Michael J. Barry
W. Channing Beucler
Robert Bohn
Margot Botsford
John E. Bowman[4]
Jonathan Brant
Laurie Burt
James Caruso[26]
Robert D. Cohan
Garrick F. Cole
John P. Corbett[21]
Charles C. Corkin II
James J. Cotter[23]
Leah Crothers[6]
Kathleen R. Dacey[16]
Stephen R. Delinsky
Ernest DeSimone
Maureen Dewan
Paul Donaher
Michael C. Donahue
Eleanor A. Dwyer[20]
Irene Emerson
Joan Entmacher[2]
Michael Farrington[5]
Charles James Barry
James A. Fox[27]
Susan Frey[15]
Gloria A. Fry
Carol Fubini
Charles P. Gamer
Frank A. Gaynor
Brian F. Gilligan
Dwight Golann[5]
Paula Gold
Paul Good
Joseph P. Gordon
Alexander Gray, Jr.[9]
Robert V. Greco
William F. Green[30]
Steven Greenfogel
Richard Gross
Catherine Hantzis
L. Scott Harshbarger[29]
Paul D. Hodge[22]
William E. Howell
Edward Hughes[7]
John F. Hurley
Daniel P. Jaffe
Ellen L. Janos[9]
Paul Johnson
Carolyn A. Kelliher
Sally Kelly
Kevin Kirrane
Alan Kovacs[12]
Kenneth Lenze[15]
Steven M. Leonard
William F. Linnehan
Bernard Manning
Michael McCormack
Andrew McElaney
Denzil McKenzie
Leo McNamara
William McVey[9]
James Meehan[10]
Barton J. Menitove[17]
Michael Meyer
Thomas H. Miller
William Mitchell
Anton T. Moehrke
John T. Montgomery
Paul J. Muello
Henry O'Connell, Jr.
Terence O'Malley
Kathleen Parker
Steven Platten
Alan Posner
Robert S. Potters[11]
Richard Rafferty
Mary J. Reedy
Louis Rizoli
Robert Rodophele
Barry Rosen[9]
S. Stephen Rosenfeld
James. F. Ross
Barbara J. Rouse
Steven Rusconi
Anthony P. Sager
Stephen Schultz
Marc S. Seigle[28]
Terry Seligman
Paul W. Shaw
David M. Siegal
Mitchell Sikora

Susan K. Sloane
E. Michael Sloman[3]
Barbara A. Smith
Pirska Soos
Donna Sorgi[9]
Jonathan Souweine[24]
Timothy Spillane[25]
Donald Stern[19]
Helen Stewart[14]
Kevin Suffern
Gail Sullivan[9]
John Toomey[1]
Terence M. Troyer
Carl Valvo[9]
Edward Vena[9]
John J. Ward
Betty Waxman
Ellen R. Weiss[18]
Catherine A. White
Estelle Wing
Timothy J.W. Wise
Christopher Worthington[13]
Francis Wright[8]
Donald P. Zerendow
Stephen Zeidman

Assistant Attorney General; Director, Division of Public Charities

Susan Sloan

Assistant Attorneys General Assigned to Department of Public Works

Elizabeth A. Bowen
Edward J. Clancy, Jr.
Allan Gottlieb
James J. Haroulos
Leslie Hedgebeth
F. Timothy Hegarty, Jr.
Michael Marks
Robert Mulligan
Dean Nicastro[31]
Howard Palmer
Joseph A. Pelligrino
T. David Raftery
John W. Spencer

Assistant Attorneys General Assigned to the Division of Employment Security

Joseph S. Ayoub
George J. Mahanna
Frank J. Scharaffa

Chief Clerk

Edward J. White

Assistant Chief Clerk

Leo J. Cushing[32]

[1] Appointed June 27, 1977
[2] Appointed July 11, 1977
[3] Appointed August 1, 1977
[4] Appointed August 15, 1977
[5] Appointed September 19, 1977
[6] Appointed September 26, 1977
[7] Appointed October 17, 1977
[8] Appointed October 24, 1977
[9] Appointed January 1, 1978
[10] Appointed January 17, 1978
[11] Appointed February 6, 1978
[12] Appointed March 6, 1978
[13] Appointed April 3, 1978
[14] Appointed May 4, 1978
[15] Appointed May 8, 1978
[16] Terminated July 29, 1977
[17] Terminated August 11, 1977
[18] Terminated September 9, 1977
[19] Terminated September 13, 1977
[20] Terminated October 14, 1977
[21] Terminated November 1, 1977
[22] Terminated February 8, 1978
[23] Terminated March 24, 1978
[24] Terminated March 28, 1978
[25] Terminated March 31, 1978
[26] Terminated April 28, 1978
[27] Terminated June 21, 1978
[28] Terminated August 31, 1977
[29] Terminated March 10, 1978
[30] Terminated May 24, 1978
[31] Appointed April 18, 1978
[32] Terminated December 5, 1978

Schedule 1

DEPARTMENT OF THE ATTORNEY GENERAL
STATEMENT OF FINANCIAL POSITION
FOR FISCAL YEAR ENDED
JUNE 30, 1978

Account Number	*Account Name*	*Appropriation*	*Expenditures*	*Advances*	*Encumbrances*	*Balance*
0810-0001	Administration	$4,857,122.75	$4,649,416.87	$3,813.74	$121,907.87	$ 81,984.27
0810-0014	Public Utilities Auth. by Ch. 1224, 1973	250,000.00	206,570.48		16,225.67	27,203.85
0810-0021	Medicaid Fraud Control Unit	1,469,351.00				1,469,351.00
0810-0031	Local Consumer Aid Fund	200,000.00	199,999.76			.24
0810-0100	LEAA Hard Cash Matching Funds	30,000.00	21,632.54		8,187.54	179.92
0810-0201	Insurance; Auth. by Ch. 266, 1976	200,000.00	151,047.50		30,428.06	18,524.44
0810-8871	Capital Outlay Furnishings and Equipment-Law Library	165,939.83	53,577.59		2,000.00	110,362.24
0821-0100	Settlement of Claims	250,000.00	249,886.27		113.73	—
	Totals	7,422,413.58	5,532,131.01	3,813.74	178,862.87	1,707,605.96
	Federal Funds from Schedule 2	528,419.92	446,843.50			81,576.42
	GRAND TOTAL	$7,950,833.50	$5,978,974.51	$3,813.74	$178,862.87	$1,789,182.38

Schedule 2

FEDERAL GRANTS
Receipts and Disbursements
July 1, 1977 to June 30, 1978

Account Number	Account Name	Balance July 1, 1979	Receipts	Disbursements	Balance June 30, 1978
0810-6613	From the Office of Economic Opportunity:				
	Consumer Protection, Research, and Pilot Program	$ 7.78	—	$ 7.78	—
0810-6619	From the Committee on Criminal Justice:				
0810-6624	Organized Crime Unit	536.50	$ (536.50)	—	—
0810-6626	Organized Crime Unit	932.27	—	932.27	—
0810-6627	Appellate Legal Services	2,027.23	(2,027.23)	—	—
0810-6632	Organized Crime Unit	1,246.68	(1,246.68)	—	—
0810-6634	Law Library	19.05	(19.05)	—	—
0810-6635	State Organized Crime Unit	125,734.03	141,200.00	254,398.54	$12,535.49
0810-6636	Violent Crime Unit	11,949.00	26,000.00	37,949.00	—
0810-6640	Criminal Appellate Service	4,924.84	10,500.00	15,424.84	—
	Violent Crime Unit	—	52,454.00	33,830.25	18,623.75
0810-6637	From the Department of Justice:				
	Anti Trust Enforcement Unit	—	80,000.00	58,529.20	21,470.80
0810-6638	From the Federal Energy Administration:				
	Office of Consumer Services	—	60,000.00	44,997.57	15,002.43
0810-6639	From the Department of Health, Education, and Welfare:				
	Consumer Education Information System	—	4,718.00	—	4,718.00
0810-6661	From the Executive Office of Environmental Affairs:				
	Coastal Zone Management Program Implementation	—	10,000.00	774.05	9,225.95
		$147,377.38	$381,042.54	$446,843.50	$81,576.42*

* In Custody of State Treasurer

Schedule 3

SUSPENSE FUNDS
Receipts and Disbursements
July 1, 1977 to June 30, 1978

Account Number	Account name	Balance July 1, 1977	Receipts	Disbursements	Balance June 30, 1978
0810-6701	Dexter Nursing Home Case	$ 344.95	—	—	$ 344.95
0810-6703	Miami Vacations, Inc. d/b/a Resort Hotel Association Trust Account	869.05	—	—	869.05
0810-6704	Framingham Civil Service School, Inc. Trustee Account	16.18	—	—	16.18
0810-6705	Dante Gregorie d/b/a United Auto Buyers Trust Account	4,000.00	—	$ 2,900.00	1,100.00
0810-6708	Massachusetts Rentals, Inc. d/b/a City Wide Rentals Trust Account	380.00	—	—	380.00
0810-6710	E. + S. Enterprises, Inc. d/b/a Beltone Hearing Aid Service	35.00	—	—	35.00
0810-6712	C. Murphy, W. Hartwick, Bird, Inc. Univ. Bank and Trust Company Trust Account	162.49	—	—	162.49
0810-6715	Julius Wilensky d/b/a Orleans Coal and Oil Company	—	$ 750.00	750.00	—
0810-6716	Compact Auto, Inc.	550.00	550.00	—	1,100.00
0810-6719	Paul J. Woods Co., Consent Judgement	3,500.00	2,273.98	5,773.98	—
0810-6720	Paul Sheridan d/b/a Sherry Decorators, Consent Judgement	75.00	125.00	200.00	—
0810-6721	Wish Realty Associates, Inc. Judgement on Petition for Contempt	1,000.00	—	—	1,000.00
0810-6724	Bluebird Realty Trust, Consent Judgement	6,772.00	135.00	5,031.50	1,875.50
0810-6725	Philip G. Gallagher, M.D., Assurance of Discontinuance	1,956.75	—	1,956.75	—
0810-6726	Kenneth T. and Michael Wasil — Agreement for Judgement	—	6,318.05	—	6,318.05
0810-6727	David Eck d/b/a Eck's Auto Sales, Consent Judgement	—	2,400.00	—	2,400.00
0810-6728	Apartment Showcase Inc., Consent Judgement	—	400.00	—	400.00
0810-6730	Protection of Witnesses — Personal Services	—	91,000.00	77,171.73	13,828.27
0810-6731	Emmanuel Mediros d/b/a T.V. and Radio Center, Assurance of Discontinuance	—	178.72	178.72	—
0810-6732	Thomas C. McMahon vs. Nyanza Inc., Escrow Account	—	50,000.00	15,620.02	34,379.98
0810-6733	G.C. Services Co. Agreement	—	500.00	—	500.00
0810-6734	James Gesner, Individual and Pres. Gesner Construction Co.	—	4,214.00	4,214.00	—
0810-6735	Lee Savings Bank vs Philip Feltman, et al.	—	4,480.71	4,480.71	—
0810-6736	Taunton Sales Inc., Consent Judgement	—	1,468.00	1,468.00	—
0810-6737	Alan G. Edwards, M.D., Assurance of Discontinuance	—	687.85	687.75	.10
0810-6738	General Motors Corp. — Agreement	—	10,000.00	7,634.12	2,365.38

0810-6739	Wallace Civic Center — McDonald Productions — Roberta Flack Concert	—	1,184.90	—	1,184.90
0810-6740	Chala Foods, Inc. et al stipulation	—	56.00	56.00	—
0810-6741	Lawrence A. Robichaud d/b/a Robichaud Auto Sales and Services	—	275.00	275.00	—
0810-6742	Ford Motor Credit Corp., Consent Judgement	—	1,500.00	1,500.00	—
0810-6743	Alan Zuker d/b/a Alan Realty	—	900.00	—	900.00
0810-6744	Frank G. Rafferty — Final Judgement	—	257.45	257.45	—
0810-6746	Ventura S. Correia — Assurance of Discontinuance	—	450.00	450.00	—
0810-6747	Brookfield Insurance Agency Inc., et al	—	8,662.50	—	8,662.50
0810-6748	M.A.R. Auto Wholesalers — Consent Judgement	—	1,200.00	—	1,200.00
		$19,661.42	$189,967.16	$130,605.73	$79,022.85 *

* In Custody of State Treasurer

Schedule 4

DEPARTMENT OF THE ATTORNEY GENERAL STATEMENT OF INCOME FOR FISCAL YEAR ENDED JUNE 30, 1978

Account Number		
0801-40-01-40	Fees, Filing Reports, Charitable Organizations	$ 83,998.36
0801-40-02-40	Fees, Registration, Charitable Organizations	13,157.02
0801-40-03-40	Fees, Professional Fund Raising Council	80.00
0801-41-01-40	Fines and Penalties - Miscellaneous	6,000.00
0801-41-02-40	Fines and Penalties, Civil Actions	13,681.65
0801-62-01-40	Reimbursement for Services, Cost of Civil Actions	4,409.35
0801-62-02-40	Reimbursement for Services, Cost of Investigations	6,968.46
0801-67-67-40	Reimbursement, Indirect Cost Allowances	3,292.96
0801-69-99-40	Miscellaneous	2,028.06
	TOTAL INCOME	$133,615.86

The Commonwealth of Massachusetts

In accordance with the provisions of section 11 of chapter 12 and of section 32 of chapter 30 of the General Laws, I hereby submit the Annual Report of the Department of the Attorney General. This Annual Report is my fourth filed as Attorney General of the Commonwealth and covers the fiscal year from July 1, 1977 to June 30, 1978. It therefore covers the last full fiscal year of the term for which I was elected in November of 1974.

As one might expect, the Department functioned at peak efficiency during the final full year of my term. During the earlier years of this administration we implemented a number of administrative changes designed to make this Department the best possible public law office. Last year those administrative changes were fully in effect and the programmatic efforts of the staff reflect the success of our earlier administrative innovations.

Perhaps the best example of this process is in the work of the Criminal Bureau. Two years ago this Department, in cooperation with his Excellency, the Governor of the Commonwealth, worked to create an internal corruption investigative unit. In the period covered by this report, and as a result of investigative work by that unit, this Department obtained more than 100 indictments against fourteen individuals and five corporations in connection with a major scandal involving the administration of federal vocational education funds.

As noted in the Annual Report for the last fiscal year this Department also entered into institutional relationships with the Department of Corporations and Taxation in the area of tax enforcement and with state and insurance industry officials involved in the area of arson detection and prosecution. Those administrative actions bore fruit this past fiscal year. This Department obtained more than one hundred and ten indictments against individuals for alleged failure to file tax returns in what was characterized as the first systematic effort to prosecute state tax delinquents in the history of the Commonwealth. Our efforts in the area of prosecuting those engaged in arson for profit were even more successful; in Suffolk County alone we obtained indictments against thirty-three individuals allegedly involved in a major arson for profit ring. Those indicted included building owners, lawyers, insurance adjusters, law enforcement officials and the actual arsonists. By the close of the fiscal year we had successfully disposed of more than half of those indictments by obtaining convictions or guilty pleas.

Our administrative innovations were productive in other areas of the office as well. In previous reports I have noted the creation of affirmative litigation components throughout the Department. The most graphic illustration of the value of these units occurred this past year in the

Government Bureau. We established an Affirmative Litigation Division in the Bureau in April of 1975, and its single most significant accomplishment transpired this past year when it challenged a determination by the United States Department of Health, Education and Welfare not to reimburse the Commonwealth for expenditures associated with various social services programs. The Affirmative Litigation Division, acting cooperatively with the affected agencies and the Governor and Lieutenant Governor, litigated the validity of the HEW determination and ultimately settled the claim for $74,701,181.00. It bespeaks the obvious but is worth noting that the monies recovered in this single action exceed the total operating budget of this Department throughout my term as Attorney General.

Other highlights within the Government Bureau also resulted in significant savings for the Commonwealth and its citizens. We prevented the elimination of the Federal Emergency Energy Assistance Program which provides financial assistance to the needy who are faced with fuel emergencies and we obtained an injunction preventing HEW from eliminating $20 million in Medicaid reimbursements. Both of these matters were handled by the Affirmative Litigation Division. Another case with enormous financial ramifications was the successful defense of an emergency state statute requiring auto insurance companies to return $55 million to its policyholders in the form of rebates.

Some of our successes were equally significant but involved less dramatic amounts of money. As noted in the Annual Report, we created an Antitrust Division within the Public Protection Bureau at the end of the last fiscal year. In its first full year of operation that Division recovered nearly a million dollars for the Commonwealth, its cities and towns. The Environmental Protection Division, also within the Public Protection Bureau, obtained the first civil penalties ever assessed under the Massachusetts Clean Waters Act and under the state air pollution statute. These developments augur well for future environmental enforcement efforts, especially when considered in conjunction with our successful defense of the State's Coastal Zone Management Plan and our equally successful suit to enjoin the Secretary of the Interior from proceeding with oil and gas leases in the fertile George's Bank area off the Massachusetts coast.

The authority of this office to bring the kind of litigation highlighted in the preceding paragraphs was also strengthened during the last fiscal year. In our defense of the so-called "Veterans Preference" statute we faced a challenge on the issue of whether the Attorney General had the authority to appeal a case to the Supreme Court of the United States over the expressed objections of the Governor and the nominal defendants in a particular case. The Supreme Judicial Court of the Commonwealth, acting on a question certified to it by the highest court of the land, answered that question in the affirmative in September of this past year, thus confirming the Attorney General's control of the course of federal litigation and underscoring the independence of the Department.

As the above highlights demonstrate, this Department was extremely aggressive during the past year in its representation of the Commonwealth and its citizens. It is my belief that our successes are due in part to the

innovative administrative programs we have implemented and that they should therefore continue through my second term. Obviously I could not reduce the accomplishments of the past year to the foregoing paragraphs. The extent of our efforts and accomplishments are really set forth instead in the pages which follow.

MONEY RECOVERED AND SAVED
FOR THE COMMONWEALTH AND HER CITIZENS

I. *MONEY RECOVERED FOR THE COMMONWEALTH TREASURY*

Item	Amount
1. Rent Collected	$ 134,554
2. Collections	$ 629,546
3. Medicaid Fraud Restitution	$ 130,000
4. Medicaid Fraud Costs & Fines	$ 35,000
5. Social Security Reimbursement	$74,500,000
6. Civil Penalties in Environmental Protection Cases	$ 72,000
7. Public Charities:	
(1) Charity Filing Fees	$ 85,410
(2) Solicitation Filing Fees	$ 10,598
(3) Escheats	$ 269,093
8. Employment Security:	
(1) Overdue taxes collected	$ 1,426,507
(2) Fraudulent claims recovered	$ 238,772
TOTAL	$77,531,480

II. *MONEY RECOVERED AND SAVED FOR THE COMMONWEALTH'S CITIZENS*

Item	Amount
1. Eminent Domain (Difference between the plaintiff's appraisal of the land and the Court award)	$ 5,000,000
2. Electricity Stealing Restitution	$ 250,000
3. Consumer Complaint Recoveries	$ 530,751
4. Savings in Rate Cases	$68,000,000
5. Antitrust Recoveries	$ 913,000
TOTAL	$74,693,751

I. CIVIL BUREAU

CONTRACTS DIVISION

The work of the Contracts Division is generally divided into three Areas: (A) Litigation, (B) Advice and counsel to state agencies, and (C) Contract review.

A. *LITIGATION*

The Division represents state officers and agencies at all stages of litigation involving contracts.

Chapter 258 of the General Laws is, for the most part, the controlling

statute. Essentially, it is mandatory that all actions against the Commonwealth be brought in Suffolk County, if the amount claimed exceeds $2,000.00. The cases are tried without a jury and, almost universally, are referred to a Master for hearing.

At the end of the fiscal year, there are 355 active cases in the Division. These cases involve state highway, building or public work construction claims. Most of these cases involve contract or specification interpretation and entail extensive preparation and investigation. Discovery, principally depositions and interrogatories, are mandated in all cases. Consultation with engineers and architects is routine in every instance. The work of the Division in the preparation and trial of contract matters continues to be greatly facilitated by the recent augmentation of the staff with the services of a professional engineer. His assistance in investigation, practical advice and expertise has been invaluable to the attorneys.

Trials are prolonged, not solely because of the complexity of issues, but also because of the fact that most cases involve at least three or four parties. Increasingly, the trend has been toward claims alleging deficiencies in plans and specifications necessitating separate or third party actions involving consultant engineers.

The general economic picture has generated litigation in contesting the award of contracts, resulting in many more allegations of failure to meet public bidding requirements. There has been an increase in suits in which preliminary injunctive relief is sought.

The Contracts Division has intensified its opposition to the issuance of preliminary, or temporary, injunctive relief against the Commonwealth, its agencies and officers. The allowance of such relief would delay normal contract procedure and would result in increased costs. To date, we have succeeded in defeating all attempts at securing injunctive relief.

During the last half of the fiscal year, the judicial drive to clear the backlog in the Superior Court has resulted in increased trial activity, both in the Jury Waived Sessions and in hearings before Masters.

B. *ADVICE AND COUNSEL TO STATE AGENCIES*

Every day, the Division receives requests for assistance from state agencies and officials. Their problems involve formation of contracts, performance of contracts, bidding procedures, bid protests, contract interpretation, and a myriad of other matters. Many of these agencies have no counsel or are subdivisions of the Executive Office of Administration & Finance.

The Division has done a considerable amount of work for the State Purchasing Agent's Office, the Department of Public Works, Metropolitan District Commission, Bureau of Building Construction, Group Insurance Commission, Secretary of Transportation, Regional Community Colleges, Data Processing Bureau, Mental Health, Youth Services, and Water Resources.

C. *CONTRACT REVIEW*

We review all state contracts, leases and bonds submitted to us by state agencies. During the fiscal year, we approved as to form a total of 2,453

such contracts. In many cases, 285 to be exact, we rejected the documents and approved them when the deficiencies were eliminated.

All contracts are logged in and out and a detailed record is kept. The monthly count for the fiscal year was:

Month	Count
July, 1977	233
August	280
September	254
October	193
November	147
December	215
January, 1978	157
February	189
March	206
April	173
May	236
June	170
	2,453

Contracts are assigned to the attorneys in rotation. The average contract is approved within forty-eight hours of its arrival in the Division.

EMINENT DOMAIN DIVISION

The major function of the Eminent Domain Division is the representation of the Commonwealth in the defense of petitions for the assessment of damages resulting from land takings by eminent domain. The Commonwealth acquires land for a variety of purposes, including rights of way for roads, land for State Colleges, land for recreation and park purposes, land for flood control and land for easements. The division deals primarily with the Department of Public Works, Metropolitan District Commission, Department of Environmental Affairs, State Colleges and University of Massachusetts.

We also provide a legal advisor to the Real Estate Review Board to assist in settling damage claims on takings of government-owned land for highway purposes, and in some instances, we are called upon to testify before the Executive Council before they will approve land damage payments.

Advisory services, both written and oral, are rendered to practically every state agency in existence, whether it be Executive or Legislative in nature. Every agency which has an eminent domain or real estate question or problem either writes or calls this division for advice, help or opinion.

Chapter 79 of the General Laws prescribes the procedure in eminent domain proceedings. Under Chapter 79, when property is taken, the taking agency makes an offer of settlement known as a Pro Tanto, which makes available to the owners an amount the taking agency feels is fair and reasonable, but reserves to the prior owners the right to proceed through the courts to recover more money. In the event of a finding by the court or jury, the *pro tanto* payment is subtracted from the verdict and the taking agency pays the balance, with interest, running at the rate of 6% from the date of

the taking to the date of the judgment. In years past, during the road building boom of the sixties, land damage matters caused congestion in the civil sessions of the Superior Court. Special land damage sessions including summer sessions were set up to accommodate the trial of these cases and it was the practice to refer cases to auditors for their findings. The auditor system was not entirely satisfactory because too many cases previously tried to auditors were retried to juries. In 1973, the Legislature passed Section 22 of Chapter 79 which provides for the trial of land damage matters to a judge in the Superior Court jury waived in the first instance; a trial by jury may be had first only if both parties file waivers, in writing, waiving their right to a jury waived trial. The statute also requires the court make subsidiary findings of fact when the case is heard. If either party is aggrieved by the finding, they may reserve their right to jury trial by so filing within ten days of the finding.

It has been the practice of our division to try all our matters in accord with Section 22 before a Justice in a jury waived session. We have found, in many instances, it is not necessary to retry the case because the findings usually contain a clear statement of the subsidiary facts to support the decision for the finding. Section 22 appears to be a vast improvement over the auditor system and a means of reducing the number of land damage cases requiring a jury trial for solution.

If occupied buildings are situated on parcels taken by eminent domain, the occupants become tenants of the Commonwealth and the question of rent is handled by the division, with the assistance of a Special Assistant Attorney General plus a Rent Administrator both of whom are on loan from the Department of Public Works temporarily assigned to the Eminent Domain Division. It is the function of the Rent Collection staff to work closely with the trial attorneys of this division to see to it that a proper accounting for all rent due the Commonwealth is made at the time of the land damage trial concerning the parcels in question. If there is no land damage matter pending, then it is the duty of this section to collect monies due on rent by negotiation or litigation.

Shortly, this section will be reassigned to work at and under the primary direction of the Department of Public Works at 100 Nashua Street, Boston, Massachusetts.

The division consists of a Chief, ten trial attorneys, six secretaries, three investigators, one legal engineer, one rent administrator and one administrative clerk. In addition to the trial of land damage matters, the division has the responsibility of reviewing petitions to register land filed in the Land Court to determine whether the Commonwealth or any of its agencies or departments has, or may have, an interest which may be affected by the petition. This responsibility requires the close examination of the petitions and plans filed in connection therewith. If the Commonwealth's interest is involved, the division insures that its interest is fully protected and no decree issues from the Land Court without the withdrawal of the appearance of the Attorney General.

Rental agreements, contracts, deeds and documents relating to land under the control of any of the state's departments or agencies find their way to the Eminent Domain Division to be approved as to form. It is also

the function of the division to make itself available for consultation and the rendering of advice in connection with the Commonwealth's problems relating to land.

During the fiscal year July 1, 1977 through June 30, 1978, the following information figures are indicative of this extremely busy division:

New Land Court Cases	132
Land Court Cases Closed	164
New Land Damage Complaints Received	106
Land Damage Cases Disposed of by Superior Court	173
Total Land Damage Cases Closed	217
Rent Owed to Commonwealth Collected	$134,554.50
Money Saved the Commonwealth During this Period as Indicated by the Difference Between Plaintiffs Appraisal and Court Award	$5 million+

Pending Cases Eminent Domain Division as of June 30,1978

Eminent Domain Cases	665
Land Court Cases	251
Rent Cases	627
Total	1,543

Breakdown of Pending Superior Court Eminent Domain Cases by County as of June 30, 1978

Barnstable	20
Berkshire	3
Bristol	29
Essex	122
Franklin	4
Hampden	29
Hampshire	16
Middlesex	135
Norfolk	42
Plymouth	27
Suffolk	121
Worcester	117

During the administration of Attorney General Francis X. Bellotti, great strides have been taken to make the Eminent Domain Division the most effective it has been probably in the long history of the Attorney General's Office. The outstanding caliber of its trial lawyers and staff has resulted in the closing out of approximately 600 cases, the great majority by Superior Court trial and the balance by strictly approved negotiated settlements. Approximately $600,000 has been collected in delinquent rents owed to the

Commonwealth. For the 1977 - 1978 fiscal period alone, the division's activities resulted in a savings for the Commonwealth in excess of 5 million dollars.*

INDUSTRIAL ACCIDENTS DIVISION

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

There were 11,742 First Reports of Injury for state employees filed during the last fiscal year with the Division of Industrial Accidents, an increase of 1,032 over the previous fiscal year. Of the lost time disability cases, this Division reviewed and approved 1,777 new claims for compensation, and 127 claims for resumption of compensation. In addition to the foregoing, the Division worked on and disposed of 171 claims by lump sum agreements and 31 by payments without prejudice.

This Division appeared for the Commonwealth on 666 formal assignments before the Industrial Accident Board and before the Courts on appellate matters. In addition to evaluating new cases, this Division continually reviews the accepted cases; that is, those cases which require weekly payments of compensation, to bring them up to date medically and to determine present eligibility for compensation.

Total 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, 1977 to June 30, 1978, were as follows:

General Appropriation (Appropriated to the Division of Industrial Accidents)	
Incapacity Compensation	$4,762,415.46
Medical Payments	1,889,994.51
TOTAL DISBURSEMENTS	$6,652,409.97

Metropolitan District Commission (Appropriated to M.D.C.)	
Incapacity Compensation	$ 438,680.30
Medical Payments	114,143.85
TOTAL DISBURSEMENTS	$ 552,824.15

This Division also has the responsibility of collecting payments due the "Second Injury Fund" set up by Chapter 152, section 65, and defending the fund against claims for reimbursement made under Chapter 152, section 37 and 37A. During the past fiscal year this Division appeared on 67 occasions

*This figure being the difference between plaintiffs appraised value and final award.

to defend this fund against claims for reimbursement by private insurers. As of June 30, 1978, the financial status of this fund was:

Unencumbered Balance	$ 70,836.01
Invested in Securities	825,000.00
TOTAL	$ 895,836.01
Payments made to fund	$ 186,703.93
Payments made out of fund	289,251.47

Pursuant to Section 11A (Acts of 1950, C. 639, as amended), the Chief of this Division represents the Attorney General as a sitting member on the Civil Defense Claims Board. This involved reviewing and acting upon claims for compensation to unpaid civil defense volunteers who were injured while in the course of their volunteer duties. During the past fiscal year the Chief of this Division appeared at both sittings of this Board and acted on 31 claims.

This Division also represents the Industrial Accident Rehabilitation Board. When an insurer refuses to pay for rehabilitative training for an injured employee, this Division presents the case to the Industrial Accident Board on behalf of the Industrial Accident Rehabilitation Board.

During the past fiscal year the attorneys of this Divison were called upon numerous times to assist workers in private industry who contacted this Division regarding problems they were having with their compensation claims against private industry and their insurers. Every effort was made to assist these employees in resolving their difficulties or in referring them to persons or agencies wherein the solution to their particular problems lay.

TORTS DIVISION

The Torts Division is composed of three sections: Torts, Collections, and Petitions for Compensation for Victims of Violent Crimes.

We presently have five lawyers in addition to the Chief. There are four investigators assigned to this division. We have a total of seven secretaries and clerk typists. One legal assistant is presently on leave.

The procedural operation of the division continues to work efficiently and all matters are handled on an up-to-date and current basis.

We have had favorable results for the most part in our defense and handling of our many Tort cases. We opened 328 Tort cases in this fiscal year. Law suits brought against the Commonwealth and its employees totaled 173. Releases and executions received were in the sum of $292,186.41.

There were 353 Violent Crime cases opened during the period. We have been successful in all cases heard before the Appellate Division of the District Courts. We desire that victims be compensated in accordance with the provisions of the law, but we resist and defend against those we consider to be unfounded and unwarranted.

After working with the Administrative Office of the District Courts for almost two years, the new procedural rules that we proposed were finally

promulgated on May 8, 1978. The necessity of court appearance on uncontested cases is now eliminated.

The total collections received during this fiscal period amounted to $629,546.38. A complete report of collections follows.

Departments	Amount Collected	No. of Claims Processed
Mental Health	$160,700.15	37
Public Health	86,232.62	227
D.P.W.	69,597.60	306
M.D.C.	8,157.68	10
Education	18,523.21	282
State Colleges	19,020.10	360
Administration & Finance	3,245.23	6
Commission for the Blind	61.80	1
Corporation & Taxation	18,769.41	1
Corrections	1,705.05	12
Environmental Management	10,100.00	2
Industrial Accidents	1,240.36	2
Labor & Industries	125.00	4
Military Division	320.00	5
Milk Control Commission	400.00	1
Public Safety	6,561.85	16
Retirement Board	150.00	5
Secretary of State	394.72	7
Soldiers' Home	4,974.32	1
Treasury	79,896.44	8
Treasury (Probate Collection)	139,370.83	—
TOTAL	$629,546.38	1,293

NOTE:
929 No. of claims being paid on account
364 No. of completed claims (paid & closed)
553 No. of claims opened
1,597 No. of claims referred
2,319 No. of claims disposed of as being uncollectible

II. CRIMINAL BUREAU

In fiscal 1977-1978, the Criminal Bureau was comprised of the following components: Trial Section, Appellate Section, Nursing Home Task Force, Organized Crime Unit, Violent Crime Unit, Drug Abuse Division and Division of Employment Security. The traditional responsibilities continued, but with greatly expanded efforts in the prosecution of arson, public corruption, tax violation and nursing home fraud.

Trial Section: In addition to prosecuting economic crime cases ranging from welfare provider fraud, insurance fraud, banking law violations, conflict of interest violations, larceny and small loans violations, the Trial Section launched a massive attack on the problem of arson, particularly in Suffolk County. In the Fall of 1977, this investigation culminated in the return of 121 indictments against 33 individuals. Among the crimes charged were arson, burning to defraud and murder, and among the defendants were attorneys, real estate investors and public officials. There have already been several convictions after trial, and several more pleas of guilty, with sentences being meted out of up to 18 to 20 years.

In the preceding fiscal year, a major investigation into the abuses of the Commonwealth's state tax system had been undertaken. That investigation has now seen greater activity in the prosecution of tax violations than had ever occurred in the history of the Department. In a twelve month period,

113 indictments were returned containing 1,230 counts against 56 individuals and corporations, involving over $900,000.

New ground was also broken in the prevention of "electricity stealing." During the fiscal year, 57 indictments were returned related to the tampering with electric meters in order to defraud the electric company. A conservative estimate would indicate that over a quarter of a million dollars has been recovered by way of restitution and fines. Also of note is the exhaustive investigation into corruption within the Commonwealth's Vocational Education program. Over 100 indictments were returned against 14 individuals and 5 corporations. As to those defendants already convicted, dispositions have involved incarceration, restitution and fines.

Organized Crime Unit: In addition to its participation in the arson investigation and prosecutions, the Organized Crime Unit continued to be involved in such diverse areas as gaming, bribery, cigarette smuggling and theft from state agencies. This Unit also cooperates with other agencies in combating the activities of criminal organizations and provides technical assistance to law enforcement officers and district attorneys. Included in the technical assistance supplied are photographic aid and advice and expert testimony in such novel areas as voice print identification.

Nursing Home Task Force: The Attorney General's Nursing Home Task Force represents an effort to establish a comprehensive approach to attacking what national statistics have shown to be the lucrative crime of medicaid fraud. With the passage of a package of federal legislation known as the Medicare-Medicaid Anti-Fraud and Abuse Amendment, federal funding is now available to states which establish Medicaid fraud programs. Pursuant to this legislation, the Attorney General's Office has sought approval of a plan for a Massachusetts Medicaid Fraud Control Unit which would qualify for federal funding. At present, the Nursing Home Task Force employs four Assistant Attorneys General, one auditor and two secretaries. With the proposed federal funding, this staff will be greatly expanded to include at least 13 attorneys, 19 auditors and 19 investigators with appropriate support staff.

Over the last year, as presently constituted with its limited staff, the Nursing Home Task Force has successfully prosecuted several nursing homes in cases that netted over $130,000 in restitution and over $35,000 in costs and fines.

Appellate Section: The Appellate Section continues to maintain a substantial caseload both in the state and federal courts. The bulk of these cases consists of post-conviction claims of persons convicted of criminal activity. In fiscal 1977-1978, 41 new suits were filed in the Federal District Court; 30 challenged the constitutionality of custody, 11 were civil rights suits brought by inmates of correctional institutions. Forty-nine suits, including 38 habeas corpus petitions, were filed in the Superior Court.

On the appellate side, 10 new cases were filed in the Court of Appeals for the First Circuit; 4 cases in the Supreme Judicial Court (Full Bench) and one in the Appeals Court; 25 cases were filed in the Single Justice Session.

Attorneys for the section successfully opposed 10 petitions for writs of certiorari filed in the Supreme Court of the United States. Of four petitions for certiorari filed by the section, one was granted and will be argued in the

Fall. The case involves the use of statements obtained in violation of *Miranda* v. *Arizona,* for the purpose of securing a search warrant.

Substantial resources of the section continue to be devoted to class action suits brought by prisoners in the various institutions, for example, the Bridgewater Treatment Center and the "protective custody" cases.

The Appellate Section also processes demands for the rendition of fugitives from justice. The section examines demands from both law enforcement officials of the Commonwealth and from governors of other states and renders an opinion as to the legal adequacy of each demand. Approximately 166 rendition demands were processed during fiscal 1977-1978. In addition, an attorney must appear in court whenever a rendition warrant is challenged.

The Appellate Section also administers the Commonwealth's criminal usury laws.

Violent Crime Unit: This Unit was active in two separate areas in 1977-1978. In Suffolk County, the Unit concentrated on assisting the Boston Police Department in evaluating cases of racial violence. In connection with these investigations, the Unit coordinated police activities with the efforts of the district attorney in Dorchester, West Roxbury and South Boston. The Unit recommended the direct indictment of several individuals involved in an assault on school children visiting the Bunker Hill Monument in Charlestown. The Unit participated with and assisted in the formation of the Boston Police Department's Community Disorder Unit. Staff attorneys from the Attorney General's Office presented a prosecution perspective in a series of lectures to members of the tactical patrol force at the Boston Police Academy. The Unit assisted the Metropolitan District Commission police in the incidents at Carson Beach in August, 1977, and monitored the prosecution of the more than fifty people arrested as a result of these incidents.

In April of 1978, the Unit terminated the Attorney General's involvement with the screening unit in Norfolk County as District Attorney Delahunt assumed full management responsibility. During fifteen months of operation, intake screening procedures were established in all the district courts of Norfolk County and twelve separate categories of felony cases were designated for priority handling throughout the county. During the period in which Unit attorneys were assigned to the district attorney's office, the average time from arrest to disposition was reduced to less than ninety days in Superior Court. Initial statistics for the district court program indicated that many cases were handled from arrest to disposition in less than thirty days.

Drug Abuse Division: During the past year, the Drug Abuse Division continued to engage in its two primary activities; the Drug Education Seminar, and the Speakers Program.

The Drug Education Seminar is a two-week program which addresses the problem of drug abuse through the means of education. Although geared primarily for those in law enforcement related positions, it also serves other professionals working in drug-related fields. The program is designed to educate those involved in dealing directly with drug-related

matters and on a broader plane to train these professionals who in turn can educate others in their respective fields.

In conjunction with state and community colleges, 12 such seminars were held throughout the Commonwealth during the year for which academic credits were awarded.

We have engaged the services of experts in the various related fields to implement this course. These individuals donate their time on a regular basis and represent a wide range of agencies and institutions including the Massachusetts State Police, Federal Drug Enforcement Administration, the United States Treasury Department, United States Customs Bureau, Massachusetts Department of Public Health, as well as, various drug and alcohol rehabilitation programs.

Over the past year, representatives of the Drug Abuse Division addressed over fifty civic, professional, social and educational organizations on various aspects of drug abuse. The majority of these requests were carried out during the evening hours. It has been our experience that many groups will request speakers on a semi-annual or annual basis. From the requests and attendance at these various functions, it is evident there is a great deal of interest by the general public in the drug abuse problem.

Employment Security Division: The purpose and intent of the Attorney General's office in the Employment Security Division is to provide its Director with whatever legal assistance and representation is necessary to enforce the Employment Security Law, otherwise known as Chapter 151A of the General Laws, and designated in Section 42A of the Law.

The Employment Security Law is highly complex. Under the Law, employers with one or more employees become subject to it and are expected to comply with its provisions. The efficient and economical administration of the employment security program in Massachusetts depends in large measure on the cooperation and compliance of well-informed employers throughout the Commonwealth, for it is they who pay the entire cost of its operation. The employment security program also insures individuals who become unemployed through no fault of their own a weekly benefit check paid on a claim filed with the Division of Employment Security.

Whenever an employer fails to comply with the Employment Security Law and does not file the necessary reports or pay the taxes due on his account with this Division, the matter is referred to the Attorney General for criminal prosecution under the provisions set forth by the Law. The Assistant Attorneys General make every effort to fully inform the employers of their rights and obligations under the Law. As a result, a certain percentage of the tax matters are settled immediately thereby avoiding the expense of prosecuting the offender and collecting the taxes owed through court action, representing a savings to the Commonwealth and its taxpayers.

During the fiscal year ending June 30, 1978, 961 employer tax cases were handled by this Division. 596 cases were on hand July 1, 1977. 365 additional cases were received during the fiscal year, and 134 cases were closed leaving the balance of 827 employer tax cases on June 30, 1978.

$1,426,507.16 in overdue taxes was collected during fiscal year ending June 30, 1978. Monies collected were deposited to the Unemployment Compensation Fund.

Criminal complaints were brought in the Boston Municipal Court, charging 374 individuals with non-payment of taxes totaling $2,052,893.61, owed on 261 delinquent tax accounts. 30 criminal indictments were brought in the Suffolk Superior Court charging 15 nursing homes owners with failure to pay taxes due the Division of Employment Security.

Whenever individuals are found to be collecting unemployment benefits fraudulently on claims they filed while gainfully employed and earning wages, the fraudulent matters are referred to the Attorney General's office for prosecution of the criminal offense. Criminal complaints are brought only when the facts surrounding the offense have been investigated and reviewed with the individual involved and criminal intent is found. Action is brought in the court holding jurisdiction over the offense, under G.L. c. 266, s. 30 or G.L. c. 151A, s. 47, to reclaim monies stolen from the Division of Employment Security.

During the fiscal year ending June 30, 1978, 1061 fraudulent claims matters were handled by this Division. 898 cases were on hand July 1, 1977. 163 additional cases were received during the fiscal year, and 131 cases were closed leaving a balance of 930 cases on hand June 30, 1978. Criminal complaints were brought in the courts holding jurisdiction over the offenses, charging 137 individuals with larceny of $218,415.00 in unemployment benefits fraudulently collected from the Division of Employment Security. The amount of $238,772.54 was collected during the fiscal year ending June 30, 1978, and returned to the Division of Employment Security for deposit to the Unemployment Compensation Fund.

In addition, the Division investigated and prosecuted cases involving internal fraud and CETA fraud, appeared in actions brought by or against the Director of the Division of Employment Security challenging various provisions of G.L. c. 151A, and handled appellate matters in the Supreme Judicial Court.

III. GOVERNMENT BUREAU

The Government Bureau has four main responsibilities:

(1) defense of state officials and state agencies, principally in state and federal lawsuits raising issues of administrative law, constitutional law, and statutory interpretation;
(2) initiation of affirmative litigation on behalf of state agencies covering a broad span of public issues, but focusing primarily on the conduct of the federal government;
(3) preparation of Opinions of the Attorney General; and
(4) legal review of all newly enacted municipal by-laws pursuant to G.L. c. 40, § 32.

A report on these functions as well as several additional responsibilities follows.

DEFENSE OF STATE AGENCIES

The Government Bureau represents the Commonwealth and its officials

and agencies in defensive litigation in state and federal courts, and, in exceptional cases, before certain state and federal administrative agencies. These proceedings typically involve administrative law and constitutional issues in diverse areas of public law. In the 1977-1978 fiscal year (FY 1978) Government Bureau attorneys maintained an average caseload of 50 to 90 defensive lawsuits.

During FY 1978, the Division received 522 new cases. By quarters, the breakdown was the following:

(1) July - September, 1977	139
(2) October - December, 1977	103
(3) January - March, 1978	121
(4) April - June, 1978	159
	522

By subject matter and client, these new cases fell into the following categories (with miscellaneous and non-current cases omitted):

Class of Law Suit	*Number*
Civil Service Appeals	79
Alcoholic Beverages Control Commission Appeals	42
Registry of Motor Vehicles	37
Department of Public Utilities	31
Education	28
Auto Surcharge Appeals	28
Rate Setting Commission	27
Taxation	21
Insurance	21
Personnel Administration (non-civil service)	19
Defense of Cases Brought Against Judges	20
Defense of Boards of Professional Registration	19
Welfare	18
Civil Rights (42 U.S.C. § 1983)	16
Public Health	10
Housing (chiefly Department of Community Affairs)	7
Mental Health	6

The relative time spent representing particular agencies cannot be measured accurately by the number of cases. The representation of certain agencies involves a substantial commitment to individual pieces of complex, major litigation, although the total number of lawsuits involving those agencies may be quite small. For example, as in fiscal year 1976-1977, substantial Bureau resources in FY 1978 were devoted to negotiating and overseeing implementation of consent decrees in five cases seeking improvement in the conditions and treatment in state institutions for the mentally retarded. Four Bureau lawyers had responsibility for these cases. During FY 1978, a final personnel decree was reached which provides for a substantial increase in personnel providing direct care to residents at these

institutions. Moreover, Bureau lawyers carried on lengthy negotiations to determine the extent of capital improvements to buildings at three of the five institutions.

During FY 1978, lawyers from the Government Bureau argued a number of cases before the United States Supreme Court. These included a case in which the Bureau successfully defended the constitutionality of a state statute which taxes federal savings and loan institutions located in Massachusetts. It also included an unsuccessful attempt to prevent the federal government from imposing a tax on an essential state function—the operation of the state police helicopter and airplanes — on the grounds that the tax violated the doctrine of intergovernmental tax immunity.

Government Bureau lawyers also argued a substantial number of cases before the Massachusetts Supreme Judicial Court. One of the most significant was the so-called "auto insurance rebate" case, *American Manufacturers Mutual Ins. Co.* v. *Commissioner of Ins.*, Mass. Adv. Sh. (1978) 58. In that case, Bureau lawyers successfully defended an emergency state statute which required auto insurance companies to return to policyholders fifty-five million dollars collected in premiums for 1977. Insurance companies leveled many arguments against the law, with primary weight on the claim that it unconstitutionally impaired the companies' existing contracts with Massachusetts drivers. The SJC accepted the arguments presented on behalf of the statute and upheld it.

In another important case, *Lahey Clinic Foundation, Inc.* v. *Health Facilities Appeals Board*, Mass. Adv. Sh. (1978) 2523, the Lahey Clinic sought to enjoin the Government Bureau's client, the Health Facilities Appeals Board, from considering whether Lahey's planned construction of a major new facility in Burlington, Massachusetts, was in keeping with the certificate of need—a form of prior permission health care providers must obtain prior to making large capital expenditures—which Lahey received in 1972. The trial court found the HFAB to be without jurisdiction, a determination which the Government Bureau appealed to the Supreme Judicial Court. The Supreme Judicial Court affirmed the judgment below in a decision which considered a number of important administrative law and health care cost issues.

A third significant Supreme Judicial Court case which the Bureau argued concerned the nature and scope of special education services to be provided to a child with special educational needs. The Bureau defended two policies of the Department of Education concerning the placement of a child with special needs in a private school program when the school committee fails to develop an adequate educational program for the child. A town challenged those policies and the court ultimately upheld the Department of Education in a decision which has had a direct effect on many similar cases now pending in state courts. *Amherst-Pelham Reg'l Sch. Comm.* v. *Department of Educ.*, Mass. Adv. Sh. (1978) 2673.

Finally, Bureau lawyers argued a number of significant cases in the Supreme Judicial Court on behalf of the Alcoholic Beverages Control Commission. For example, in *Board of Selectmen of Barnstable* v. *A.B.C.C.*, the court reiterated that the Commission has broad powers to control alcoholic beverages and determined that they could overrule a local

licensing board's grant of licenses because of procedural irregularities which occurred before the local board. Moreover, in *Aristocratic Restaurant of Massachusetts, Inc.* v. *A.B.C.C. (No. 1)*, Mass. Adv. Sh. (1978) 558, the court upheld the Commission's authority to construe local licensing board regulations prior to their having been construed by the local board. The Court also upheld the A.B.C.C.'s defense of the Boston Licensing Board's anti-mingling regulations against vagueness, overbreadth, free speech, and free association attacks under the Massachusetts and United States Constitutions.

An important case argued by Bureau attorneys in the United States Court of Appeals for the First Circuit was *Arthurs* v. *Stern*, 560 F. 2d 477 (1977). This case was an appeal from a judgment of the District Court declaring G.L. c. 112, § 63 unconstitutional. Section 63 provides that the pendency of criminal proceedings against a person registered to practice one of the professions licensed under c. 112 is not a basis for postponing the conduct of disciplinary proceedings. The District Court held the statute unconstitutional as violative of the right against self-incrimination. The court of Appeals reversed and declared the statute constitutional.

Another important federal case was *Massachusetts General Hospital* v. *Weiner*, 569 F. 2d 1156 (1st Cir. 1978). There, the hospital brought suit in the District Court for injunctive and declaratory relief challenging on statutory and constitutional grounds Medicaid rate regulations promulgated by the Rate Setting Commission and approved by the United States Department of Health, Education and Welfare. The regulations established a plan of prospective reimbursement for hospital charges. The District Court granted summary judgment for defendants and the First Circuit affirmed.

In addition to the cases mentioned, the Bureau also committed significant amounts of time to a number of other civil actions: first, settlement of a federal court class action discrimination suit which alleged that the state civil service system discriminated in all its phases against racial minority applicants. The final settlement of this case committed the Commonwealth to continue many of the affirmative action reforms it had begun or planned to initiate, set deadlines for such reforms and tied the program to specific hiring goals and timetables; second, successful defense in the Supreme Judicial Court of the Department of Public Utilities' discretion in a number of rate regulation matters; third, successful defense of the Personnel Administration's newly adopted examination practice of rounding-off exam scores to the nearest whole number, thus permitting appointing authorities wider latitude in hiring.

The primary administrative development of the year was the implementation of a computer-assisted case management system. All Bureau cases and opinions are now indexed in the Department of the Attorney General's computer data base. Thereafter significant actions, pleadings, and hearings are added to the computer record. The computer system provides a quick, uniform, up-to-date record of the Bureau's case load in a manner previously unavailable.

AFFIRMATIVE LITIGATION

The Attorney General established the Affirmative Litigation Division within the Government Bureau in April, 1975. The Division's purpose is to provide agencies of the Commonwealth with litigation services when performance of their statutory functions requires resort to the state and federal courts. During its third full year of existence, the Affirmative Litigation Division increased its activity, commenced a number of major actions, and brought to conclusion significant litigation begun in prior years.

Cases which the Affirmative Litigation Division brings may be divided into three broad, and often overlapping, categories: (1) advocacy litigation; (2) grant-in-aid related litigation; and (3) enforcement litigation. The first category subsumes cases which the Attorney General commences either on behalf of a state agency with an advocacy responsibility or in furtherance of his own obligation to advance the public interest. In prior years, suits related to the imposition of taxes by the state and federal governments and increases in postal rates have comprised a large portion of this category of litigation, and similar matters were the subject of litigation during FY 1978. Litigation related to grant-in-aid programs, most significantly the various public assistance programs operated by the Department of Public Welfare, accounted for a substantial portion of the Affirmative Litigation Division's efforts. These cases also tend to be the Division's most significant ones when financial value is the dominant consideration. Finally, the Division continued to perform the Attorney General's traditional enforcement function by commencing suit on behalf of state regulatory and licensing agencies. The following paragraphs contain brief descriptions of representative cases drawn from each of these broad categories.

Advocacy Litigation

The Attorney General continued to litigate several substantial advocacy matters begun in prior years during the reporting year. *Brouillette* v. *New Hampshire*, an action which the Attorney General commenced against the State of New Hampshire to recover tax payments made by Massachusetts residents pursuant to an unconstitutional commuter tax, progressed with the addition of the Commonwealth as a party plaintiff and the preparation of the case for decision in the New Hampshire Superior Court on the defendant's motion to dismiss. This case involves a dispute with the State of New Hampshire which the Attorney General values at several million dollars.

Commonwealth v. *U.S. Postal Service*, a proceeding which the Attorney General commenced in the United States Court of Appeals for the First Circuit and which was subsequently transferred to the District of Columbia Circuit late in the reporting year, seeks judicial review of the Postal Service's decision to increase first class mail rates from thirteen to fifteen cents. In commencing this litigation, the Attorney General sought to protect both the interests of the Commonwealth and of its citizens from unfair allocations of the costs of postal service to the users of first class mail.

Finally, a significant controversy arose during the reporting year between the United States Internal Revenue Service and the Com-

monwealth's hundred-odd retirement systems over the reporting requirements imposed by the Employees' Retirement Income Security Act of 1974 (ERISA). The Affirmative Litigation Division undertook representation of the Retirement Law Commission and assisted the agency in making its position known to the Service. As a result of a series of meetings, the Service altered its reporting requirements by deleting several of the requests for information which the Commission believed would impose significant burdens upon it and the individual retirement boards of the Commonwealth's counties, cities, and towns.

Grant-in-Aid Litigation

The Affirmative Litigation Division's most significant grant-in-aid litigation, *In re Masssachusetts Social Security Services Claims,* an administrative proceeding before the United States Department of Health, Education, and Welfare, was settled during the fall of the reporting year. This case, involving a dispute with the United States over its obligation to reimburse the Commonwealth for expenditures incurred to provide social services to eligible recipients under the Social Security Act, included claims totaling one hundred forty-five million dollars. HEW had refused to make any payments to the Commonwealth since 1974, and some of the debt was derived from services rendered as early as 1971-72. The national nature of this controversy (virtually all of the fifty states had similar claims against HEW) and the enormous sums involved (HEW's total liability exceeded one billon dollars) made this litigation one of principal concern to the Carter Administration. Ultimately, the Attorney General, after consulting with the Governor, agreed to settle the Commonwealth's claim for seventy-four and a half million dollars. Receipt of these funds was expected soon after the commencement of the 1979 federal fiscal year.

Another significant case was brought against another federal agency, this time the Community Services Administration, to protect the right of Massachusetts citizens entitled to assistance under the federal Emergency Energy Assistance Program (EEAP). This program provides financial help to poor and near-poor families who encounter fuel emergencies such as utility cutoffs during the coldest months. CSA had determined to end operation of the program on May 1, 1978, despite the availability of appropriated funds and a clear need for the funds to help families hard hit by the 1978 winter season. The Government Bureau filed suit in the United States District Court for the District of Columbia and, before a hearing could be scheduled, CSA agreed to extend the program.

A third substantial grant-in-aid controversy involved the Commonwealth's administration of its medical assistance program for the poor (Medicaid) and the United States Department of Health, Education, and Welfare's interpretation of certain utilization review requirements applicable to nursing homes and other facilities participating in the Medicaid program. This controversy arose during the prior reporting year and resulted in the Commonwealth's filing two federal lawsuits, one in Boston and one, in conjunction with four other states, in the District of Columbia. During the reporting year, this litigation concluded when the Congress amended Title XIX of the Social Security Act to preclude HEW

from imposing penalties upon the states. The Commonwealth was able to avoid the loss of twenty million dollars in federal Medicaid reimbursement funds by the Attorney General's obtaining a preliminary injunction against HEW from the United States District Court for the District of Columbia pending Congressional action.

A dispute with the United States Department of Agriculture prompted the Department of Public Welfare to seek the Affirmative Litigation Division's assistance during the winter of the reporting year. As a result of a decision in *Aiken* v. *Obledo*, 442 F. Supp. 628 (E.D. Cal. 1977), USDA directed the Commissioner of Public Welfare to adopt procedures for making retroactive benefits payments to certain food stamp recipients. The Commissioner determined that compliance with USDA's directives would be expensive and burdensome and sought the Attorney General's assistance in preventing USDA from requiring compliance with them. In response to the Commissioner's request, the Attorney General sought to intervene as a defendant in *Aiken* v. *Obledo*, then still pending in the Eastern District of California, and to assert cross-claims against USDA. At the close of the reporting year, it appeared likely that USDA would modify its instruction to states to avoid imposing the burdens which the Commonwealth found objectionable and that the litigation would be settled.

A final grant-in-aid dispute in which the Attorney General became involved concerned the effort of the Department of Public Works to maintain the Commonwealth's eligibility for federal highway assistance funds. In this case, the Federal Highway Administration threatened to terminate highway assistance because the Commonwealth had allegedly failed to perform adequate truck weighing inspections. However, after an administrative hearing, the Federal Highway Administrator was convinced that the Massachusetts truck weighing program satisfied federal standards.

Regulatory Enforcement

The Affirmative Litigation Division commenced a number of significant regulatory enforcement actions during the reporting year. These cases sought judicial enforcement of state agency determinations or compliance with statutory requirements by private entities and units of local government.

In *Commonwealth* v. *Town of Andover*, the Affirmative Litigation Division commenced an action to require an initial group of twenty-three cities and towns in the Commonwealth to appropriate funds required by their boards of assessors to perform revaluation of real property as directed by the Commissioner of Corporations and Taxation (now the Commissioner of Revenue). Through this litigation, the Attorney General has sought a declaration that the Commissioner may contract with independent appraisal firms to perform revaluations in cities and towns which refuse to appropriate funds and deduct the costs of these contracts from local aid distributions. At the close of the reporting year, it appeared that several municipalities would voluntarily comply with the Commissioner's directive but that the litigation would continue as to a number of other defendants.
would continue as to a number of other defendants.

The Affirmative Litigation Division also: (1) commenced suit against the Mayor of the City of Boston on the Attorney General's behalf in order to

compel the Mayor to appoint members of the Boston Redevelopment Authority to their statutory five year terms; (2) commenced suit in the name of the Commonwealth against the Norwood Housing Authority in order to require members of the Authority and its staff to make restitution to the Commonwealth of Authority funds which they improperly spent for personal purposes; and (3) commenced a series of actions on behalf of the Department of Public Health to enforce the state's Determination of Need law. Suits for violating the statute were filed against the Newton-Wellesley Hospital, the Waltham Hospital, and Wing Memorial Hospital.

OPINIONS

The Attorney General's responsibility for rendering legal opinions is defined by G.L. c. 12, §§ 3, 6 and 9, and, until November 1, 1978, by G.L. c. 268A, § 10. Pursuant to c. 12, §§ 3 and 9, he renders written legal opinions to state agencies and administrative officials, the Governor, either branch of the General Court, and to legislative committees with respect to pending legislation. Under c. 12, § 6, the Attorney General provides legal opinions and advice to District Attorneys; these opinions, however, are most often furnished on an informal basis. Finally, G.L. c. 268A, § 10 directed the Attorney General to give conflict of interest opinions to state employees.

Formal Opinions

(1) *General comments:*

During the 1978 fiscal year, the Attorney General sought to reaffirm and clarify the standards that the Department uses to determine which opinion requests are appropriate for answering with formal opinions and which are not. The most important standards governing formal opinions are that (1) the Attorney General will render legal opinions solely to state officers and agencies—he does not have the responsibility or authority to give opinions to municipal or county officials, or to private citizens; and (2) opinion requests received from state officers or agencies themselves will not be answered by an opinion of the Attorney General if they raise hypothetical or abstract questions, or relate to pending litigation.

Applying these standards, the Attorney General issued 31 formal opinions during FY 1978. Two of these were in fact declinations, but they were rendered in opinion form so that state officials would have explicit statements as to why the Attorney General sometimes cannot answer questions posed. In one case the reason was that the questions related to litigation pending in various federal courts; in the other, the questions were too general and abstract for a proper response. During FY 1978, the Attorney General additionally declined to issue opinions in response to over 100 opinion requests submitted by private citizens and municipal and county officials.

The Attorney General continued to publish during FY 1978 the Opinion Digest, a summary of all formal opinions issued. (The Opinion Digest was first published in FY 1977.) The Digest is prepared every four months, and is distributed to state agencies and officers, county libraries, and other interested individuals and organizations.

(2) *Summary description of opinions rendered:*

Turning to the formal opinions themselves, three of the 31 issued during FY 1978 were addressed to the legislative branch. The first of these concerned the constitutionality of a proposed statute giving immunity from civil and criminal liability to the members of the Board of Registration and Discipline in Medicine; the other two opinions, issued in response to requests by the House of Representatives, involved: (1) the authority of executive officials to spend certain appropriated funds on particular types of advertising for the Commonwealth; and (2) the power of the State Fire Marshall under designated fire prevention regulations to approve a specific type of heating apparatus.

By far the largest majority of opinions issued in FY 1978, 27 out of the 31, were rendered to the heads of state agencies. These covered a broad range of subject matters and legal issues. Among the areas most touched upon was education, the subject of four different opinions. In the first of these, at the request of the Commissioner of Education, the Attorney General rendered an opinion construing the term "teacher" in G.L. c. 71, § 38, a statute which requires that every school committee limit its appointment and promotion of teachers to those recommended by the superintendent. The Attorney General interpreted the word "teacher" in a broad fashion to cover a variety of professional positions in addition to the traditional classroom teacher. In another education opinion, the Attorney General returned to the subject of the "grandfather clauses" in St. 1972, c. 766, concluding that the Governor can designate which agency shall bear the responsibility for satisfying the Commonwealth's financial obligations for "grandfathered" special education students.

Issues concerning environmental protection were the subject of three opinions during FY 1978. In one, the Attorney General considered whether Article 97 of the Amendments to the Massachusetts Constitution, guaranteeing certain rights to environmental protection, would preclude without additional legislation the transfer of land owned by the Department of Environmental Management to the Southeastern Massachusetts University. The Attorney General concluded that Article 97 did not require further legislative action to authorize this transfer. Another environmental opinion ruled that the Department of Fisheries, Wildlife and Recreational Vehicles had the requisite authority to issue fee regulations that would govern designated public access sites and facilities owned by municipalities.

Several areas which were the subject of significant opinions in the previous fiscal year were again important during FY 1978. In the field of public records, the Attorney General issued an opinion which sought to clarify what information held by the Division of Industrial Accidents qualified as "public records," subject to public inspection, and what type of information was deemed exempt from disclosure, primarily for reasons of privacy. Another opinion concerned the power of the Supervisor of Public Records to adopt regulations establishing fee schedules for custodians of public records; the Attorney General determined that the Supervisor possessed the necessary rule-making power.

In the area of campaign and political finance, the Attorney General issued an opinion defining the responsibility of candidates and political committees to keep records of contributors. Another opinion related to the duty of the Director of Campaign and Political Finance to respond to inquiries concerning the validity of reports filed by candidates and political committees. On the latter issue, the Attorney General determined that the Director was responsible for answering general questions about the campaign finance law, G.L. c. 55. However, he could not substitute his judgment as to the accuracy or completeness of filed reports for that of the appropriate prosecuting officers.

Certain opinions deserve mention because of their individual significance. One concerned the interpretation of the word "compensation" in the retirement law applicable to municipal teachers. The question was whether severance payments made to teachers for unused sick leave pursuant to collective bargaining agreements should be considered as "compensation" for purposes of computing the teachers' retirement allowances. The Attorney General answered that "compensation" did include such bargained-for severance payments. A lawsuit is pending which challenges this construction of the statutory phrase.

A second significant opinion dealt with the relation between the Division of Hearing Officers (DHO) and the Rate Setting Commission (RSC). The statute defining that relation, G.L. c. 6A, § 36, is highly ambiguous and the power of the DHO to order that the RSC adopt DHO rate decisions in administrative appeals brought by health care providers was contested. The Attorney General interpreted the statute to mean that the DHO had no such expansive authority. Rather, its hearing officers could recommend rate decisions to the RSC, but the Commission in turn was empowered to reject them. This opinion is the subject of an appeal now pending before the Supreme Judicial Court.

Other opinions rendered by the Attorney General in FY 1978 concerned: the authority of the Department of Public Health to apply the state's Determination of Need law to a specific hospital; the power of the Commissioner of Mental Health to designate mental health area directors as "superintendents" of units in state hospitals, with the resulting authority to hire and fire staff working in those units; the jurisdiction of the Civil Service Commission to hear appeals that now fall within the scope of the state employees' collective bargaining agreements; the power of the Alcoholic Beverages Control Commission to regulate sales of liquor on military bases; and the application of the prison "furlough" statute to those convicted of violating the mandatory gun law.

Conflict of Interest Opinions

FY 1978 was the last full year in which the Attorney General was responsible for rendering conflict of interest opinions to state employees. By St. 1978, c. 210, effective November 1, 1978, the Legislature vested sole authority to issue such conflict opinions in the new State Ethics Commission. During FY 1978, the Attorney General issued 50 conflict opinions to state employees and declined over 50 improper requests received from individuals who were not state employees.

Each conflict of interest opinion necessarily turns on the individual facts and circumstances presented by the requesting state employee. However, during FY 1978, the Attorney General attempted to develop a greater depth and consistency of response in his conflict of interest opinions so that, despite their individual orientation, the opinions could serve as prospective guides to the conduct of all state employees.

BY-LAWS

The By-Laws Division is responsible for reviewing all newly enacted town by-laws to determine whether they conform to statutory and constitutional requirements. During FY 1978, 710 general by-law and 933 zoning by-law submittals were reviewed. In addition, 9 home rule charter actions from cities and towns were examined.

The high increase of zoning by-laws was caused by the new Zoning Act which required that all local zoning by-laws be brought into conformity with the Act's provisions by June 30, 1978. Many of the zoning by-laws were complete revisions of the municipality's existing zoning by-law.

Town Meeting procedures and local administrative organization along with public drinking were the dominant themes in the general by-law area.

COUNSELING TO STATE AGENCIES

In addition to the major responsibilities described above, the Government Bureau also counsels 30 boards of professional registration in the performance of statutory duties to license, regulate and discipline the members of the professions. Each Government Bureau attorney on the average advises two boards concerning the boards' administrative rulemaking and adjudicatory proceedings, and represents them in all court proceedings as well.

This counseling function extends to all state clients needing guidance on questions likely to generate litigation. The Bureau is especially available to agencies lacking their own counsel, and will assist others on serious matters when they have exhausted the resources of their own attorneys. The objective is to obviate litigation wherever possible and to prevent administrative error. In particular, a number of boards of registration have adopted the Rules of Adjudicative Procedure drafted by the Government Bureau in an effort to improve the hearings process and make adjudicative rules uniform from board to board.

THE CLINICAL PROGRAM

The Bureau continued its successful clinical program with law students from Boston College Law School. Fifteen third-year students participated in the Government Bureau's clinical program. The students assisted in all phases of litigation and generated a substantial work product, including a number of excellent — and winning — briefs. Bureau attorneys served as instructors in the daily handling of particular cases and in formal seminar sessions which taught pleading, discovery practice, motion practice, appellate argument, trial preparation, negotiation, as well as substantive issues of special importance.

IV. PUBLIC PROTECTION BUREAU

ANTITRUST DIVISION

I. *Introduction*

The Antitrust Division of the Department of the Attorney General was formed in March, 1977 with the hiring of one full-time attorney to handle the ever-increasing level of antitrust work coming into the Department of the Attorney General.

The division is responsible for representing the Commonwealth, both in its proprietary capacity and as parens patriae on behalf of the citizens of the Commonwealth, in Federal Court for violations of the antitrust laws of the United States (15 U.S.C. §l, et seq).

Prior to the establishment of this division, all antitrust cases brought by the Commonwealth were handled by special assistant attorneys general who had expertise in such matters. The increasing level of antitrust activity, however, clearly indicated the need for in-house capability to deal with the pressing economic issues raised by the violation of the Federal Antitrust Laws.

In addition to the Federal Antitrust Laws, the Attorney General is charged pursuant to c.12, §10 with protecting the citizens of the Commonwealth from unfair trade practices engaged in within the Commonwealth. Under c.93 of the General Laws, the Attorney General has broad criminal responsibility to prosecute for monopolization, tie-ins, price fixing of necessaries and bid rigging. The Attorney General also has authority under c.93A of the General Laws to bring actions for unfair methods of competition affecting the citizens of the Commonwealth. Unfair methods of competition include the traditional antitrust violation.

In addition to bringing affirmative litigation on behalf of the Commonwealth and its citizens, the Antitrust Division is also actively involved with counselling business and state agencies insofar as the antitrust laws are concerned. The purpose of this counselling is to try to achieve the maximum amount of competition compatible with the free economic system of the Commonwealth.

To help states achieve a higher level of effectiveness in their antitrust enforcement, the United States Congress enacted section 116 of the Crime Control Act of 1976, which provided for 30 million dollars antitrust seed money to be given to states to increase their capabilities in combatting antitrust violations on a state and local level. Ultimately, Congress appropriated 21 million of the authorized 30 million dollars. In September of 1977, the Attorney General received a grant for $320,681 from the Department of Justice Antitrust Division to fully develop the enforcement capabilities within the Division. The funds have been earmarked for hiring staff, purchase of equipment, litigation expenses and general expenses associated with day to day operations of a law office. The grant is for a period of 18 months commencing September 1, 1977 and terminating April 1, 1979. It is anticipated that an additional grant for approximately the same amount of money will be issued as of April 1, 1979 and which should extend into 1981.

At the close of the fiscal year, the Division which started with one attorney was staffed by a chief, three assistant attorneys general, an administrative assistant, an economic consultant on a retainer basis and one legal secretary.

II. *Litigation*

Commonwealth v. *NBMA, et al.* (NDGA) — During the course of the year this litigation was basically concluded by the reaching of settlement agreements among all plaintiffs' counsel and 36 of the 38 defendants. The final settlement amounts were in excess of 31 million dollars and with interest at time of distribution, it is expected that the settlement fund will exceed 38 million dollars. The governmental share of the settlement will be either 9.4% or 15% depending upon the Congressional resolution of Illinois Brick. In either event, the Commonwealth of Massachusetts will receive 2.8% of the allocation to governmental entities. In addition, we can anticipate a recovery of our costs in this action as well as a fairly substantial amount for attorneys fees.

Commonwealth v. *Amstar Corporation, et al.* (EDPA) — We are representing the Commonwealth, the City of Boston and the City of Cambridge for proprietary purchases of sugar during the period 1970 through 1975. Through June of 1978, there were 3 million dollars in settlements in the overall litigation. The case is in a discovery phase and trial is anticipated in the fall of 1979.

Commonwealth v. *Brinks, Inc., et al.* (NDGA) — This suit involving armored car services has been settled on a global basis for 11.8 million dollars. Because of the vast size of the claiming universe, the claim of the governmental entities in the Commonwealth will be extremely small. Nevertheless, it is anticipated that the Commonwealth will recover more than 40 to 50 thousand dollars in this litigation. It is also anticipated that the Commonwealth will receive attorneys fees and costs in this matter.

Commonwealth v. *Medical Oxygen Service, Inc. et al.* (D. Mass.) — The Commonwealth brought suit on its own behalf and as parens patriae on behalf of all users of medical oxygen equipment against four companies dispensing specialized medical oxygen apparatus. The charge was price fixing and territorial allocation among the competitors. The case is presently in the discovery phase.

Commonwealth v. *Ahern Corporation, et al.* (D. Mass.) The Commonwealth brought suit on behalf of its public agencies and political subdivisions alleging that seven suppliers of liquid asphalt in the Commonwealth had conspired since at least as early as 1960 to fix prices and rig bids to the Commonwealth and its public agencies and political subdivisions. The case is in class action discovery phases and is presently awaiting a number of rulings which, when made, will allow the case to proceed.

Commonwealth v. *Leviton Corp., et al.* (EDNY) — The Commonwealth brought suit against a number of wiring device manufacturers alleging that they had conspired to fix prices on wiring devices throughout the United States and the Commonwealth of Massachusetts. This case was recently transferred by the Judicial Panel for Multidistrict Litigation from the District of Massachusetts to the Eastern District of New York.

III. *Other Activities*

1. Trade Association Survey — During the fiscal year, the Antitrust Division commenced a survey of all trade associations within the Commonwealth to determine whether or not certain of their by-laws violate the federal and/or state antitrust laws. This is part of an on-going program which is being done in conjunction with an analysis of all state regulatory bodies to determine whether certain of their by-laws may violate antitrust standards as used by the Department of Justice.

2. New England Bid Monitoring Project — As part of the Federal Antitrust Seed Money, the Commonwealth has undertaken a project to collect and analyze bid materials submitted to the various municipalities of the Commonwealth, as well as the Commonwealth itself. The project anticipates collecting data on over 150 products from more than 100 collection stations throughout the Commonwealth. This data will then be computerized and an economist will devise programs to test the data for indications of collusive bid activities. While this program is still at an early stage of development, it is anticipated that it will become a regional project for all of New England with data being collected from over 300 collection stations in the six state region. This is the most ambitious computer bid detection program of its type. The Department of Justice and the L.E.A.A. have expressed great interest in the future development of this program.

CIVIL RIGHTS AND LIBERTIES DIVISION

I. *Introduction*

The Civil Rights and Liberties Division, established by G.L. c.12, § llA, is one of the five Divisions within the Public Protection Bureau of the Department of the Attorney General. The Division operates to protect the civil rights and civil liberties of citizens in the Commonwealth. Specifically, the Division initiates affirmative litigation on behalf of citizens, citizen groups, agencies and departments of the Commonwealth in matters involving constitutional protections, and defends government agencies in cases which raise constitutional issues. In addition, staff of the Division advise the Attorney General of developments and issues in the area of civil rights, draft legislation, comment on agency regulation and investigate complaints of violations of civil rights brought to the attention of the Division by citizens of the Commonwealth. Finally, the Division is given the authority pursuant to the provisions of G.L. c.151B, §5 to initiate complaints before the Massachusetts Commission Against Discrimination (MCAD) and to represent that agency before trial and appellate courts when judicial review of MCAD decisions is sought.

The Division is presently staffed by a Chief, five Assistant Attorneys General, one of whom directs the Women's Rights Unit and another of whom heads a Privacy and Public Records Section, and appropriate support personnel including three paralegals who staff a citizen complaint unit. In addition, the general counsel to the Security and Privacy Council is located physically within the Division and is available for specific case assignments in areas consistent with her expertise.

II. *Description of Activities*

Through Fiscal Year 1978, the activities of the Division were catalogued according to the nature of the Division's involvement in any one of several areas involving the protection of civil rights and civil liberties.

Activity on the part of Division attorneys generally took the form of litigation, non-litigation activity, or affirmative action. Cases in litigation were those cases in which a Division attorney represented a plaintiff or a defendant in a legal cause of action before a court or an administrative agency. Non-litigation activities included cases disposed of through preliminary negotiations, or activities not of a litigation nature, such as the drafting of legislation or position papers. Affirmative actions generally involved lawsuits or administrative matters initiated by the Division in response to perceived patterns and practices of discrimination. Such patterns were generally found to exist following self-initiated investigations or were brought to the Division's attention through citizens' complaints.

Matters in which staff of the Division were involved, whether through litigation or non-litigation, occurred in the following areas:

Equal Educational Opportunities
Correctional/Youth Services
Employment Discrimination
Privacy Matters
Matters Involving Public Records
Health Matters
Discrimination Against Physically Handicapped
Age Discrimination
Problems Involving Migrant Laborers
Developmentally Disabled
Women's Rights
Housing

A representative description of cases in each of the several areas of involvement follows.

1. EDUCATION

Department of Education v. *New Bedford School Committee.*

On behalf of the Commissioner of the Department of Education, we brought an administrative action against the New Bedford School Committee for failure to implement M.G.L. c.71A, the Transitional Bilingual Education Act. The suit's objective was to ensure that every student within the New Bedford School system had access to education in his or her primary language, as required by law. After extensive negotiations, the School Committee agreed to implement the statute.

Morgan v. *Kerrigan.*

The Division continues to represent the State Board of Education in the implementation of Phase II and Phase IIB of the United States District Court's decision and order requiring the establishment of a unified school system in the City of Boston.

Katz v. *Garrity.*

Dismissal of Collateral Attack on *Morgan* Order

2. CORRECTION/YOUTH SERVICES

Inmates of the John Connally Detention Center v. *Dukakis.*

Youths incarcerated at the Department of Youth Services Detention Center in Roslindale brought a class action suit against the Department of Youth Services alleging that unconstitutional conditions existed at the Detention Center. After numerous hearings, at which we represented the state defendants, the parties were able to negotiate a consent decree which remedied the alleged abuses and which also provided the Commonwealth with the flexibility necessary to administer the detention center. Ongoing monitoring continues.

3. EMPLOYMENT

Bellotti v. *Allyn and Bacon, Addison-Wesley and Houghton Mifflin.*

These are three employment cases alleging that publishing companies discriminate in their employment practices on the basis of sex and race. After receiving right to sue letters from the Equal Employment Opportunity Commission, the cases were filed in the United States District Court. Extensive discovery continues.

Garden, et al. v. *Houghton Mifflin.*

We intervened in this case alleging sex-based employment discrimination in the publishing industry. After extensive negotiations, a settlement was reached providing for implementation of an affirmative action plan and payments to members of the class. The total award in the case is for $880,000 back pay plus $65,000 in attorneys fees.

Nardini v. *Daka*

Complaint filed in MCAD on behalf of person alleging dismissal on account of race.

a. WOMEN'S RIGHTS/EMPLOYMENT

Grass Instruments v. *MCAD*

Settlement of appeal from MCAD finding for woman dismissed from her job. She received cash payment because of the past discrimination.

Attorney General v. *Youth Enrichment Commission*

Complaint filed in MCAD alleging sexual harassment of women employees.

Smith College v. *Massachusetts Commission Against Discrimination*

Our appeal of an adverse Superior Court decision was argued before the Supreme Judicial Court in this case involving whether a decision not to grant tenure was discriminatory against women. The Supreme Judicial Court reversed and remanded the case to the Commission, setting a difficult standard for future determinations of discrimination.

4. PRIVACY

Police Commissioner of Boston v. *Municipal Court of the Dorchester District*

The Supreme Judicial Court issued a comprehensive opinion upholding the power of a juvenile court judge in appropriate circumstances to expunge the court records of juveniles found not delinquent after a hearing.

New Bedford Standard Times v. *Clerk of the Third District Court of Bristol*

The newspaper brought suit alleging that it was improperly denied access to the alphabetical index of criminal offenders. We represented the judge in

the action and defended the lawsuit on the grounds that the information sought was Criminal Offender Record Information. The Superior Court held that part of the Criminal Offender Record Information Act was unconstitutional as a violation of the doctrine of separation of powers and ordered access for the plaintiff. Our appeal to the Supreme Judicial Court is pending.

Swartz v. *Department of Banking and Insurance*

Plaintiff alleged a violation of the Fair Information Practices Act on the grounds that records pertaining to his insurance agency were improperly disseminated. Our motion to dismiss was granted on the grounds that plaintiff could not sue under FIPA. Plaintiff's appeal is pending.

Commonwealth v. *Doe*

The Third District court of Bristol granted a motion to expunge the record of a state trooper who was convicted of an offense while undercover.

5. PUBLIC RECORDS

Attorney General v. *Assessors of Woburn*

We brought suit in the Superior Court seeking an order that field assessment cards were public records. The Superior Court found in our favor and the Supreme Judicial Court affirmed overturning a 1972 decision on the same subject.

Attorney General v. *Collector of Lynn*

We brought suit in the Superior Court seeking an Order that lists of delinquent tax records are public. Worcester, Clinton, and Adams intervened. The Superior Court held the records not to be public. Our appeal to the Supreme Judicial Court is pending.

Hatch v. *Commissioner of Revenue*

We unsuccessfully defended a public records case seeking lists of delinquent state taxpayers. No appeal was taken.

Boston Globe v. *Commissioner of Education*, and *Olympus Research Corp.* v. *Attorney General*

Defense of public records actions relating to vocational education records.

Supervisor of Public Records v. *City Clerk of Revere*

In this action, the Superior Court upheld a regulation of the Supervisor setting forth the maximum fee which custodians of public records can charge for providing copies.

Attorney General v. *School Committee of Northampton.*

This action was commenced in the Superior Court of Hampshire County. The local newspaper had sought the names and addresses of all applicants for the position of Superintendent of Schools in Northampton. The School Committee refused to make such list available and also refused to print the names of 16 semi-final candidates and the minutes of a subcommittee meeting. The newspaper appealed to the Supervisor of Public Records. The Supervisor declared the list to be a public list and ordered its release. When the School Committee refused, the Supervisor asked the Attorney General to initiate this action pursuant to the amended G.L. c. 66,§10(b) and the Open Meeting Law. After argument, the Supreme Judicial Court found a violation of the Open Meeting Law and held that the privacy exemption

might protect the records of the non-semi-finalists. The Supreme Judicial Court affirmed.

Hastings Sons Publishing Company v. *City Treasurer of Lynn.*

The Supreme Judicial Court affirmed a Superior Court decision that salaries paid to police employees are public.

D'Attillo v. *President and Fellows of Harvard College.*

In this case we represented the Supervisor of Public Records relative to whether the records of the Governor's Special Commission considering the Sacco and Vanzetti pardon (the Lowell Commission) are public records. The records are presently housed in the Harvard Archives under a promise that they not be made public until December 9, 1977. We moved to dismiss the complaint on the grounds that the Supervisor of Public Records is not a proper party. The Supervisor was dismissed as a party and the records were made public on December 9, 1977.

Cunningham v. *Health Officer of Chelsea.*

We filed an amicus curiae brief in the Appeals Court urging reversal of a Superior Court determination that housing inspection reports are not public records. We argued that specific statutory provisions made the records public and, even in their absence, no exemption to the public records law would exempt housing inspection reports from public disclosure. The case awaits argument.

6. HEALTH

Department of Public Health v. *Sheriff of Plymouth County.*

In FY 1978, we negotiated a settlement with the Sheriff of Plymouth County who promised to provide complete physical examinations to inmates committed for more than 30 days and to keep complete medical records as required by statute. The County Commissioners agreed to provide the necessary funds.

In re. Ora G.

After a hearing, the Probate Court authorized use of an investigatory drug to treat an incompetent patient from a state hospital suffering from advanced cancer.

Green v. *Superior Court,* and *Custody of a Minor*

Involvement in first appeal of the Chad Green matter arguing that parents have no right to withhold necessary chemotherapy for acute lymphocytic Leukemia where chemotherapy has strong likelihood of saving child's life and no alternative therapy is offered. The Supreme Judicial Court agreed, holding that where parents seek to withhold necessary life-saving medical treatment from a child, the state, acting through the care and protection process, should intervene to protect the child. Parents cannot assert privacy interests on behalf of their children where to do so will lead to the death of the child.

7. PHYSICALLY HANDICAPPED

Architectural Barriers Board v. *Selectmen of Burlington.*

At the request of the Architectural Barriers Board, we filed suit against the Town of Burlington to enforce state laws prohibiting towns from building sidewalks and curbs without "curb cuts" to make them accessible

to the physically handicapped. The Superior Court granted most of th
relief sought. We negotiated settlement of the rest of the issues.

Architectural Barriers Board v. *Maxwell Silverman's Toolhouse*

Suit against restaurant alleging inaccessibility to handicapped. Su
settled when restaurant agreed to make necessary changes.

8. AGE

Lewis v. *Massachusetts General Hospital.*

Complaint filed in MCAD alleging dismissal because of age.

9. MIGRANT LABOR

Commonwealth v. *Cumberland Farms.*

Unsuccessful lawsuit seeking determination that single-family housin
provided to farm workers was migrant labor camp subject to Department c
Public Health regulation.

10. DEVELOPMENTALLY DISABLED.

Superintendent of Belchertown State School v. *Saikewicz.*

Defendant in this case was a 67 year-old retarded resident of a stat
school for the mentally retarded. He was found to have acute termina
leukemia and was given only months to live. Following the recommenda
tion of a guardian *ad litem* appointed by the Probate Court, a probate judg
ordered that chemotherapy treatment not be administered because the toxi
side effects of the disease would outweigh any benefits. The judg
concluded that such treatment would have serious debilitating conse
quences for the patient, might prolong his life for a short time but woul
not cure him of the disease, and would cause severe pain and suffering fc
the patient. Further, the patient would not comprehend what wa
happening to him nor would he be able to cooperate with the treatmen
The Probate Court Judge reported the case to the Supreme Judicial Cou
and his Order was upheld in a case in which the Division filed an amicu
brief supporting the guardian *ad litem*. Another bureau of the Departmer
represented the petitioning superintendent and argued in favor c
administering the chemotherapy. After nearly one and one-half years c
consideration, the Supreme Judicial Court issued a comprehensive decisio
describing the rights of competent persons to decline life-prolongin
medical treatment and of incompetent persons not to have intrusiv
medical treatment imposed upon their limited purposes.

In re. Bassett.

A brief was filed in Appeals Court upholding the authority of a Probat
Judge to grant guardianship for persons requiring guardian for som
purposes but not for all.

Ricci v. *Greenblatt*

With attorneys from the Government Bureau, we continue to represen
the Department of Mental Health, and other state Defendants, in this sui
challenging the conditions of the facility and the nature of care provided t
mentally retarded residents at the Belchertown State School as well as a
four other state institutions for the mentally retarded. Efforts for the pas
six months have concentrated on the implementation of the Consent Decre

entered into in November, 1973, and on the continuation of the transition from an institution-based to a community-based delivery system.

11. WOMEN'S RIGHTS/OTHER

Secretary of State v. *City Clerk of Lowell*

The Supreme Judicial Court upheld our position that persons may choose the name by which they are generally known and that traditions concerning choice of names for women or children are not legally required.

Opinion of the Justices Concerning H.1726.

Comment to the Supreme Judicial Court that Bill authorizing a drill team at a high school to be only for girls would violate State Equal Rights Amendment. The Supreme Judicial Court agreed.

Opinion of the Justices concerning H.872.

Comment to the Supreme Judicial Court that Bill to forbid girls from playing on football or wrestling teams would violate State Equal Rights Amendment. The Supreme Judicial Court agreed.

12. Housing

Department of Community Affairs v. *Massachusetts State College Building Authority*

Complaint filed in Supreme Judicial Court for Suffolk County alleging that the Authority should be subject to relocation assistance Act requiring payments to persons displaced by State College construction.

Attorney General v. *Orantes.*

Suit filed in Superior Court alleging defendant refused to sell apartment house to interracial couple. A preliminary injunction was issued and discovery is in process.

Building Inspector of Boston v. *Coolidge.*

Representation of Commissioner of Youth Services as intervenor in action by City to close half-way house for delinquent youths. Court refused action pending decision by Board of Appeal. That decision is under advisement after a hearing.

13. MISCELLANEOUS

Carr v. *Civil Service.*

Representation of Superintendent of Belchertown State School in civil service appeal by dismissed employee. Case is awaiting decision in Superior Court.

Representative Non-Litigation Activity

1. Beginning in late July, 1977, and continuing through the first several weeks of August, 1977, considerable effort on the part of all personnel in the Civil Rights Division was devoted to activities connected to demonstrations at Carson Beach. Among other things, members of the staff monitored the activities of various groups at Carson Beach, monitored prosecutions in the South Boston District Court, and served to coordinate efforts of the various law enforcement agencies involved, including the MDC Police, the Boston Police, the FBI, and the United States Department of Justice.

2. In September, 1977, we concluded an investigation of allegations of

mistreatment of prisoners by staff and administrative officials at the Suffolk County House of Correction on Deer Island. On September 9, 1977, a report of our findings and recommendations was presented to Boston City Officials with a request that the officials continue the investigation of Deer Island and take whatever action they felt appropriate at the conclusion of their investigation.

Since the filing of our report with the Boston City Officials and the conclusion of the Boston City investigation, the Master of Deer Island House of Correction and four correctional officers have resigned. In addition, the Penal Commissioner has refused to renew the contracts of three provisional correction officers.

3. In October, 1977, we were asked by the Governor to investigate allegations of physical abuse and related matters at MCI Walpole. We concluded our investigation in April, 1978.

4. In February, 1978, attorneys of the Civil Rights Division investigated the use of security cells or "Blue Rooms" at MCI-Walpole, including a review of standards applicable to such cells, inquiries of correctional administrators in other states and the Federal Bureau of Prisons with respect to their use of such rooms, interviews with correctional department personnel and social service professionals familiar with the conditions at Walpole and on-sight visits. Information developed in our investigation was presented in a series of meetings with members of the Governor's staff, the Commissioner of Corrections, the Secretary of Human Services, and the Chairman of the Governor's Advisory Committee on Corrections.

Following these meetings, the Commissioner of Corrections agreed to amend a bulletin issued by him on January 26, 1978, restricting the use of security cells and agreed to install basic furnishings and equipment in all such cells in Blocks 9 and 10 at Walpole as well as at MCI-Concord.

5. In February, 1978, we learned that certain fuel companies were refusing to make deliveries in the Roxbury section of Boston following the murder of a fuel oil company truck driver. It was our belief that fuel oil companies could not refuse service to any one section of the city strictly on geographical lines. We were sympathetic, however, with the problem of the fuel oil companies and offered to assist them. Fuel oil companies who were reluctant to send their drivers to portions of Roxbury were asked to contact our office. In turn, we contacted the Boston Police Department and arranged for a sector car to escort delivery trucks into areas of Roxbury until streets in those areas became more passable through removal of snow.

6. In March, 1978, staff of the division assisted in the organization and delivery of a conference held for representatives of law enforcement agencies on the topic of battered women.

7. Other Non-Litigation Activity included:

a. The completion of an agreement with R.L. Polk that door-to-door takers of a private city directory will clearly identify that they work for a private concern and not for a municipality.

b. The drafting of Amendments to the Criminal Offender Record Information Act, the Fair Information Practices Act, and the Public Records Law.

c. The completion of an agreement with Lechmere Sales Corporation concerning illegal use of lie detectors.

d. Notifying high school principals concerning requirements for notification of parents and students under Chapter 622 providing opportunity for girls in interscholastic sports.

e. Settlement with various hospitals concerning practice of not fulfilling responsibilities of providing free care under Hill-Burton program.

f. Investigation into red-lining practices of banks and credit grantors.

g. Comments to MCAD on proposed rules of procedure.

h. Meeting with federal officers concerning the formula for the program of supplemental food for Women, Infants, and Children.

i. Assistance to persons not properly compensated for work missed as a result of the blizzard of February,1978.

j. Agreement with Jordan Marsh, Co. regarding making new main store available for the handicapped.

k. Comments to Department of Correction on proposed regulations for standards for county houses of correction.

l. Comments to Department of Correction concerning proposed prison facility expansion.

m. Comments to legislators concerning proposed amendments to state school breakfast law which would have made school breakfast programs optional.

n. Comments to the State Parole Board concerning the Board's proposed guidelines for release decision-making.

o. An opinion from the Attorney General to the Commissioner of the Department of Correction concerning inconsistencies between the mandatory one year sentence gun law and furloughs.

p. Work with the Committee on Criminal Justice concerning affirmative action requirements of contract agencies.

q. Service on a special DMH task force proposing regulations for the use of psychotropic drugs in schools for the mentally retarded.

CONSUMER PROTECTION DIVISION

I. *LITIGATION*

In 1977-1978 we continued strong action in all areas which have become a hallmark of this Division: litigation; representation of consumers before the Departments of Public Utilities and Insurance; complaint mediation; and continued work on the promulgation of new regulations further defining consumer's rights.

We filed 157 new cases, and 261 were pending from last year. Specifically we entered into 49 Assurances of Discontinuance, and 34 Consent Judgments.

II. *COMPLAINT SECTION*

During this period the Complaint Section logged in 12,616 complaints and closed out 9,584. We recovered $530,751.79 for consumers in refunds, savings and goods or services. We accomplished this through the employment of over three hundred (300) volunteer complaint mediators.

The computerization of complaints began on July 1, 1977. A microfiche reader has been put in the Complaint Section so that the computerized information can be easily obtainable.

A 100-page training manual was written and is distributed as the new volunteers arrive.

A total of 5,168 consumer complaints were referred to other state agencies, local consumer groups and other state attorneys general.

III. *INVESTIGATIONS*

Investigations have been conducted in the areas of real estate developments, billing practices, unit pricing, home improvement, swimming pools, textiles and advertising.

Our major investigation this year, however, has centered upon compliance with the recently promulgated Motor Vehicle Regulations. Most automobile dealers in the Commonwealth have been visited once, and some twice thus far. Investigators fill out compliance check lists pertaining to the various requirements set forth in the regulations. When violations are found, letters are forwarded to the dealers advising them of our findings. If after receipt of the second warning letter the dealer fails to correct the violations, legal proceedings are initiated.

As well as participating in the routine investigations, investigators continue to work on a day-to-day basis with attorneys obtaining information, supplying affidavits, and assisting with field work on past, present and future legal proceedings.

IV. *LOCAL CONSUMER GROUPS*

We have encouraged the formation of local consumer groups. In 1977-1978 there were thirty (30) local consumer groups in operation throughout the state.

Each month meetings were held to allow all the groups to discuss current consumer issues, train newcomers to the program and exchange ideas.

A Local Consumer Aid Fund in the amount of $250,000 was established by the Massachusetts Legislature in the Department of the Attorney General for the purpose of assisting regional consumer groups throughout the entire Commonwealth. These funds are to supplement local funding and volunteer efforts. Some of the major benefits this fund will provide are the computerization of consumer complaints and financial assistance for supplies and personnel.

Attorney General Bellotti named a seven (7) member advisory committee to draft guidelines for the disbursement of these funds. The closing date for applications was December 19,1977.

V. *REGULATIONS*

Retail Advertising — The Retail Advertising Regulations promulgated by the Consumer Protection Division became effective on October 17,1977. These regulations attempt to insure truth-in-advertising. They closely outline the procedures to be followed by businesses in their advertising, dealing with pricing, introductory offers and other commonly deceptive advertising practices. We are in the process of monitoring these regulations for compliance.

Motor Vehicle — All sections of the Motor Vehicle Regulations became effective on June 1, 1977 and are being closely monitored for compliance by our office. These regulations address themselves to all aspects of the sale, service and repair of automobiles.

Debt Collection — These regulations are currently in the drafting stage. We anticipate holding public hearings in the Spring of 1979.

Nursing Home — The Consumer Protection Division is investigating nursing homes in the Commonwealth for possible violations of state and federal laws prohibiting discrimination against Medicaid recipients, and the Attorney General's Nursing Home Regulations. Complaints have been received alleging discrimination against medicaid recipients in regard to transfer policies.

All regulations are drafted pursuant to G.L. c. 93A with the assistance of advisory committees whose members are appointed by the Attorney General. These members are chosen on the basis of the individual's knowledge in the subject area being addressed. Public hearings are held in Boston and Springfield prior to the final version affording all concerned citizens and businesses alike to express their opinions and offer suggestions on the regulations being proposed.

VI. *INSURANCE SECTION*

During 1977-1978 the Insurance Section participated in every major ratemaking and regulatory proceeding before the Division of Insurance. In addition, a number of major 93A cases were filed against automobile insurance agents engaging in unfair and deceptive practices.

In the area of automobile rates, the Section played a prominent role as an intervenor in hearings to fix and establish 1978 rates. The hearings consumed 24 days, and resulted in a radical new rates design which eliminates age, sex, and marital status as classification variables. The battle over competition continued into 1978, with the Commissioner deciding, consistent with the recommendations of the Insurance Section, to fix and establish rates for 1979.

The Insurance Section intervened also in hearings considering a license application by an open panel Health Maintenance Organization. We were instrumental in changes in the license application which should insure solvency of the operation.

The Insurance Section has been investigating insurance agencies within the Commonwealth for overcharging consumers. Suit has been filed against several of these agencies and there is presently an ongoing investigation involving other agents.

VII. *UTILITIES DIVISION*

A. *Personnel and General*

During the past year, the Utilities Division employed six lawyers, one accountant, two economist/financial analysts, one group coordinator/administrator and three secretaries.

The Division represented the public and participated in the hearing of every general electric and gas rate case before the Department of Public Utilities during this period and every monthly electric fuel clause case. In

addition, the Division participated in the investigation into generic rate decision for electric rates before the Department, and also in the investigation into the propriety of Boston Edison Company's construction program (Pilgrim II). The Division also participated in the hearings before the Energy Facilities Siting Council on the long-range demand and energy forecast of each electric utility in Massachusetts. (In general, the Attorney General's Utilities Division continued as the most active and most professional consumer representative in all matters relating to utility rates and regulations in Massachusetts.)

B. *Specific Cases*

1. *Boston Edison Company* - Rate Case - D.P.U. 19300 - decided February 28, 1978; company requested approximately $70 million and received approximately $23 million.

2. *Boston Edison Company* - investigation into the propriety of its construction program and capacity needs - Phase I (future energy and demand requirements) completed and briefed; Phase II underway.

3. *Massachusetts Electric Company* - D.P.U. 19376 - company requested $18 million and received $2 million.

4. *Brockton Edison Company* - company requested approximately $4 million and received approximately $1 million.

5. *New England Power Company* - three successive wholesale rate cases before the Federal Energy Regulatory Commission in various stages of discovery, trial and briefing.

6. *Fitchburg Gas and Electric Light Company* - company requested approximately $6 million and received approximately $4 million.

7. *Cape Cod Gas Company and Lowell Gas Company* - prosecution of two 93A cases for alleged improper overcharges continued; two appeals from last pair of rate cases continued; preparation for pending pair of rate cases begun.

8. Miscellaneous fuel charge cases.

9. Seven long-range demand and energy forecast cases.

VIII. *SPECIFIC CONSUMER PROTECTION LEGAL ACTIONS*

A. *ADVERTISING*

Defendant	*Status/Disposition*	*County/Court*
Lloyd O. Appleton & Kingsmount	Assurance of Discontinuance	Suffolk
Robert P. Auer, d/b/a Bob Auer & Sons Enterprise	Assurance of Discontinuance	Suffolk
Bob Auer & Sons Enterprise	Consent Judgment	Middlesex
B&G Industries, Inc.	In Litigation	Norfolk
Richard Boisvert	In Litigation	Hampden
Brigham-Gill Pontiac AMC	Assurance of Discontinuance	Suffolk
Chala Foods, Inc., Lawrence Drake, Ind. and as he is President and Treasurer of Chala Foods, Inc., Charles Waystack	In Litigation	Middlesex
Columbia Research Corp.	In Litigation	Suffolk
Commonwealth Builder's Supply, Inc.	Assurance of Discontinuance	Suffolk

Diversified Products Corp. d/b/a National Marketing Corp.	In Litigation	Middlesex
Eardrum of New England, Inc., d/b/a Eardrum	Assurance of Discontinuance	Suffolk
Edwards Wayside Furniture, Inc.	In Litigation	Hampden
Norman Gear, Individually and as Trustee of 56 & 60 Commonwealth Associates Trust & Gerald Bern	Consent Judgment	Suffolk
Golub Furniture, Inc.	Assurance of Discontinuance	Suffolk
The B.F. Goodrich Company	Assurance of Discontinuance	Suffolk
Kaplan's Furniture Co., Inc.	Assurance of Discontinuance	Suffolk
William Kavanagh Furniture Company	Assurance of Discontinuance	Suffolk
Lafayette Radio Electronics Corp.	Assurance of Discontinuance	Suffolk
Lane's Furniture Co., Inc. (Brockton)	In Litigation	S.J.C.
Leisure Distributors, Inc., d/b/a Hi-Fi Buys	Consent Judgment	Hampden
Pieraway Electric Co.	Consent Judgment	Hampden
Emmanuel Medeiros, d/b/a TV and Radio Center	Assurance of Discontinuance	Suffolk
Ephram Miller, d/b/a Miller's Furniture Co.	Assurance of Discontinuance	Suffolk
National Business Association Directory	In Litigation	Middlesex
New England Audio, Inc., d/b/a Tweeter, Etc.	Assurance of Discontinuance	Suffolk
New England Furniture Corp.	Assurance of Discontinuance	Suffolk
Northeastern Powerguard Corp., Powerguard Eastern Corp., Inc. and R.A. Wilson Contractors, Inc.	Consent Judgment	Suffolk
Max Okun Furniture Co., Inc.	In Litigation	Hampden
George O'Neil, d/b/a Ace Motors	In Litigation	Middlesex
Seiden Sound, Inc.	Assurance of Discontinuance	Suffolk
Seiden Sound, Inc.	Consent Judgment	Hampden
Leonard B. Paul, d/b/a Town & Country Products	Consent Judgment	Hampden/ Housing
Paul E. Petit, d/b/a TV and Radio Center	Dismissed	Bristol
Wholesale Furniture and Carpet Warehouse and Wholesale Furniture Co., Inc.	Assurance of Discontinuance	Suffolk
Peoples Furniture Co., Of Everett	In Litigation	Middlesex
Stanley Shuman, d/b/a Excellent Car Company	Consent Judgment	Suffolk
Stanley Labovitz Assignee for Benefit for Andrews Furniture Creditors	Assurance of Discontinuance	Suffolk
Sunup, Inc.	Assurance of Discontinuance	Suffolk
Videsign, Inc. d/b/a Amherst Audio	Assurance of Discontinuance	Suffolk

B. *ANTI-TRUST*

Defendant	*Status/Disposition*	*County/Court*
Yankee Milk	Decision	S.J.C.

C. *AUTOMOBILES*

Defendant	*Status/Disposition*	*County/Court*
Back Bay Motors, Inc.	In Litigation	Suffolk
Victor Belotti, Inc.	Assurance of Discontinuance	Suffolk
Bonded Motors of Stoughton, d/b/a Bonded Dodge	In Litigation	Norfolk
Edward J. Borlen d/b/a City Auto Sales	In Litigation	Hampshire
Shirley Bragel d/b/a Avenue Auto Wholesalers	Assurance of Discontinuance	Suffolk
Bob Brest Buick, Inc.	Consent Judgment	Suffolk
Brockton Dodge, Inc.	Assurance of Discontinuance	Suffolk
Carol Cars, Inc.	In Litigation	Hampden
Colonial Motor Sales, Inc. and Bruce Milton	In Litigation	Hampden
William Desautels	In Litigation	Bristol
David Eck, d/b/a Eck's Auto Sales	In Litigation	Norfolk
Elro Enterprises, Inc. d/b/a Brockton Auto Wholesalers and Ronald Barreira	In Litigation	Plymouth
Falmouth Datsun	Assurance of Discontinuance	Suffolk
Falmouth Dodge, Inc.	Assurance of Discontinuance	Suffolk
Walter A. Fife and Barbara A. Fife	In Litigation	Middlesex
Fitchburg Ford Fiat	Assurance of Discontinuance	Suffolk
Foreign Auto Import, Inc.	In Litigation	Middlesex
Freedom Motors, Inc.	Consent Judgment	Hampden
In re: Dante E. Gregorie, Bankrupt	In Litigation	U.S.D.C.
Jay L. Horowitz and Maria Nunes d/b/a Gentlemen's Wear House	Assurance of Discontinuance	Suffolk
Don Lamolino and Michael B. Iscaldi d/b/a Don's Getty Service Station	In Litigation	Hampden
Thomas L. McManus and 128 Sales, Inc.	In Litigation	Middlesex
Main St. Auto Sales and Service	Assurance of Discontinuance	Suffolk
M.A.R. Auto Wholesalers	Consent Judgment	Berkshire
Morris Motors, Inc.	Assurance of Discontinuance	Suffolk
Francis A. O'Connor d/b/a Car Finders	In Litigation	Hampden
Thomas O'Connor d/b/a O'Connor Bros.	In Litigation	Middlesex
Perry Pontiac, Inc.	Assurance of Discontinuance	Suffolk
Jim Pierce Ford World	Assurance of Discontinuance	Suffolk
Plaza Oldsmobile	Assurance of Discontinuance	Suffolk
Lawrence A. Robichaud, d/b/a Robichaud Auto Sales and Service	Consent Judgment	Worcester
Schaffer Motor Car Co., Inc.	In Litigation	Norfolk
Muzi Motors, Inc.	In Litigation	Norfolk

Defendant	Status/Disposition	County/Court
Seacrest Cadillac/Pontiac, Inc.	Assurance of Discontinuance	Essex
Smyly Buick, Inc.	Assurance of Discontinuance	Suffolk
Stop & Go Transmissions of Lawrence, Inc.	Stipulation & Order	Essex
Taunton Sales, Inc.	Consent Judgment	Bristol
Topor Motor Sales	In Litigation	Hampden
Two Guys Antique Parts Co. Chicopee Antique Auto Supply, Frank H. Parks	Final Judgment	Hampden
Toyota of Falmouth	Assurance of Discontinuance	Suffolk
Kenneth T. Wasil, Michael Wasil	In Litigation	Suffolk
West Springfield Chrysler-Plymouth et al	In Litigation	Hampden

D. *BANKING & CREDIT*

Defendant	*Status/Disposition*	*County/Court*
Allied Bond & Collection Agency	In Litigation	U.S.D.C.
Rene Beaulieu, Individually and as President of Enterprise Cooperative Bank	Consent Judgment	Suffolk
The Codman Company	Consent Judgment	Suffolk
First National Bank of New Bedford	Assurance of Discontinuance	Suffolk
Ford Motor Credit Co.	Consent Judgment	Suffolk
In the Matter of General Motors Acceptance Corporation	Assurance of Discontinuance	Suffolk
In re: Vincent Hale	In Litigation	U.S.D.C.
Margy E. Katzeff, Business Achievement Corp., and Julian H. Katzeff, Ind. and as Trustee	In Litigation	Middlesex
Allen C. Keene (Int'l. Health Spa)	In Litigation	Suffolk
New England Merchants Bank	Consent Judgment	Suffolk
Northampton National Bank	In Litigation	Hampshire
Frank Ramos	In Litigation	Bristol
World of Homes, Inc.	Assurance of Discontinuance	Essex
Van Ru Credit Corp.	In Litigation	Suffolk

E. *CONTRACTS*

Defendant	*Status/Disposition*	*County/Court*
Welton Cuffee	In Litigation	Hampden
Edward Gray, d/b/a Picture Your World	In Litigation	Essex
International Magazine Service of Boston, Inc.	Assurance of Discontinuance	Suffolk
Kiddy Photographers, Inc.	Assurance of Discontinuance	Suffolk
Suburban Lawn Services	Assurance of Discontinuance	Suffolk

F. *BILLING PRACTICES/HEALTH*

Defendant	*Status/Disposition*	*County/Court*
Alan G. Edwards, Jr., M.D.	Assurance of Discontinuance	Suffolk
Interchurch Team Ministries, Inc. et al	In Litigation	Plymouth

G. *HEARING AIDS*

Defendants	*Status/Disposition*	*County/Court*
Dee & Mahoney Inc., d/b/a Beltone Hearing Aid Service	Final Judgment	Hampden
E & S Enterprises d/b/a Beltone Hearing Aid Service	In Litigation	Hampden

H. *HOME IMPROVEMENTS/APPLIANCE REPAIRS*

Defendants	*Status/Disposition*	*County/Court*
Ralph Anderson and Anderson Construction Co.	Consent Judgment	Suffolk
Frederick G. Andrews and Andrews Painting Co., Inc.	In Litigation	Norfolk
John W. Jones, Jerry M. Jones and Battle Green Construction	In Litigation	Middlesex
Paul Johnson d/b/a Factory Heating Service	Partial Judgment	Middlesex
Kingsley Bristol d/b/a King Appliance Service	In Litigation	Suffolk
William Siano, Jr.	In Litigation	Hampden
William Sutter d/b/a Sutter's Home Improvements	In Litigation	Hampden
Supreme Remodeling, Inc.	In Litigation	Norfolk

I. *INSURANCE*

Defendant	*Status/Disposition*	*County/Court*
Aetna Casualty and Surety Co.	In Litigation	Suffolk
Brookfield Insurance Agency Inc., et al	Consent Judgment	Norfolk
E.J. Bruce Ins. Agency, Inc. and Elmer J. Bruce, Jr. Individually and as President of E.J. Bruce Insurance Agency Inc. and Commercial Union Insurance Co., Trustee	In Litigation	Suffolk
Sula Dodd, et al v. Commercial Union Ins. Co.	Decision	S.J.C.
Motor Club of America	In Litigation	Worcester
John C. Roche	In Litigation	Suffolk
TKO Insurance Agency of Holyoke, Inc., et al	In Litigation	Hampden

J. *LICENSING*

Defendant	*Status/Disposition*	*County/Court*
Eastern Atlantic Tractor-Trailer Training School	In Litigation	Hampden
Colonial Travel Service Counselors, Inc., Pedro P. Patino, President and Ingar C. Patino, Treasurer	In Litigation	Middlesex
New England Tractor Trailer Training of Connecticut, Inc.	In Litigation	Hampden
South Eastern Academy, Inc. d/b/a New England Academy, Paul J. Rich	In Litigation	Plymouth

K. *MOBILE HOMES*

Defendant	*Status/Disposition*	*County/Court*
Daniel Vassett, et al (Suburban Mobile Home Park)	In Litigation	Bristol

L. *PRICING/FOOD*

Defendant	*Status/Disposition*	*County/Court*
Bi-Lo Food Warehouse, Inc.	In Litigation	Hampden
Brands Mart, Inc.	Assurance of Discontinuance	Suffolk
Purity Supreme, Inc.	In Litigation	Suffolk
Raymond Cournoyer d/b/a Ray's IGA Store & Walter P. O'Malley	Consent Judgment	Suffolk
Waltham Camera, Inc. a/k/a Waltham Camera and Stereo	Assurance of Discontinuance	Suffolk
Waldbaum Inc., d/b/a Food Marts	Consent Judgment	Hampden

M. *REAL ESTATE/HOUSING*

Defendant	*Status/Disposition*	*County/Court*
Acres & Acres	In Litigation	Essex
William E. Aubin, William E. Aubin, Inc. and Northeast Land Limited Partnership	In Litigation	Hampshire
Alfred L. Gladstone, Individually and as Trustee of Ridgewood Realty Trust and Michael F. Iodice, Sr.	In Litigation	Middlesex
Robert J. Gregory d/b/a Hub Realty	Consent Judgment	Suffolk
William Hartwick, Individually and as he is partner in Homes by Design	Judgment	Suffolk
Stephen Sesser, d/b/a Wonder Construction Co.	Consent Judgment	Suffolk
Southbrook Real Estate Sales, Inc.	Consent Judgment	Plymouth
Louraine E. Souther and Furmer H. Souther, d/b/a Brookside Acres Dev. Co. and Crest Realty	In Litigation	Norfolk
William Walo and Richard Levine, d/b/a Homes by Design	In Litigation	Middlesex
Alan Zuker, d/b/a Alan Realty	Consent Judgment	Norfolk

N. *SALES PRACTICES*

Defendant	*Status/Disposition*	*County/Court*
Lloyd Carr & Co.	In Litigation	Suffolk
Timothy J. Rich et al	Partial Judgment	Middlesex
Bonny Rigg Camping Club	Assurance of Discontinuance	Suffolk
Julius Wilensky d/b/a Orleans Coal & Oil Co.	In Litigation	Middlesex
Allied Construction Training Corporation	Assurance of Discontinuance	Suffolk
Apartment Showcase	Consent Judgment	Middlesex
Atlantic Richfield Co.	In Litigation	Suffolk

Bulk Meat Co., d/b/a Holyoke Packing Co., Inc. et al	In Litigation	Hampden
Robert E. Chalue	In Litigation	Hampden
Marquise China Company and Marquise Acceptance, Inc.	Order	Hampden
Fafco Division V.S.I., Inc. a/k/a Valve Service International, Inc.	Consent Judgment	Middlesex
Aaron Glickman, Individually and as d/b/a Aaron's Advertising Agency and A.C. Titus and Co., Inc. d/b/a Titus of Salem	In Litigation	Suffolk
Ranaan Katz, Individually and as Trustee of Victory Realty Trust	In Litigation	Suffolk
John W. Kilgo Associates, Inc. d/b/a Evelyn Wood Reading Dynamics Institute	Assurance of Discontinuance	Suffolk
Michael J. Konior d/b/a Executive Dating Systems	Judgment	Suffolk
Frank G. Rafferty	Consent Judgment	Norfolk
Alan Rich	In Litigation	Hampden
Richard Ryll, Individually and as Manager of Automotive Products Company, Inc. and Automotive Products Co., Inc.	In Litigation	Berkshire
In the matter of Selective Singles	In Litigation	Norfolk
Shaker Workshops	Assurance of Discontinuance	Suffolk
Charles R. Stott, a/k/a George R. Scott; and George Michael Ward, d/b/a Town & Country Roofing, Waltham Roofing Service, Beacon Hill Roofing & Skylight Service	In Litigation	Middlesex
Supreme Furniture Co., Inc. d/b/a Summerfield's	Consent Judgment	Suffolk
Universal Marketing Corp.	In Litigation	Norfolk
Medeiros Williams Chevrolet, Inc.	Assurance of Discontinuance	Suffolk
Young Enterprises, Inc.	In Litigation	Suffolk
Alex Zellin, d/b/a A-Z Appliance Co.	Assurance of Discontinuance	Suffolk

O. *SWIMMING POOLS*

Defendant	*Status/Disposition*	*County/Court*
Pioneer Pools of Boston Inc.	In Litigation	Norfolk

P. *NURSING HOMES*

Defendant	*Status/Disposition*	*County/Court*
Louis Almeida, Individually and as Trustee of Forest Manor Nursing Home Trust, Highland Nursing Home Trust and as he is owner of Middlesex Manor Nursing Home and Green Pastures Nursing Home	Consent Judgment	Bristol

Berkshire Nursing Home, Inc.	Consent Judgment	Suffolk
Kimwell Nursing Home	Consent Judgment	Norfolk
QT Services, d/b/a Harvard Manor Nursing Home	In Litigation	Suffolk
Twin Pines Corp. d/b/a Western Manor Nursing and Retirement Home	Consent Judgment	Middlesex

Q. *WARRANTIES*

Defendants	*Status/Disposition*	*County/Court*
Associated Pool Distributors, Inc.	In Litigation	Norfolk

IX. *SPECIFIC INSURANCE ACTIVITIES*

1. 1978 auto insurance case tried and briefed; a 24-day hearing involving radical and new rate design and rate level techniques applied to auto insurance rates.
2. Blue Cross/Blue Shield 1977 Medex rate case, tried, briefed and won.
3. Blue Cross/Blue Shield non-group coverage rate case, 1977, tried, briefed and won.
4. Blue Cross/Blue Shied physician fee profile increase withdrawn.
5. Fair Plan homeowner's insurance case, tried, briefed and won.
6. Hearings under c.175E, §5 to determine whether competition was working in the 1977 auto insurance market, tried, briefed and won. Hearings under c.175E, §5 to determine whether competition could operate effectively in the auto insurance market in 1979; tried, briefed and won.
7. Hearings on plan of operation and rules of operation of the Massachusetts Motor Vehicle Reinsurance Facility for last portion of 1977; separate hearings on 1978 plan of operation and rules of operation.
8. Brookfield Insurance Agency: 93A action commenced for violation of Attorney General Regulation on sale and financing of automobile insurance policies. Settled by consent judgment which provides for restitution to consumers.
9. Mainstreet Insurance Agency: 93A action commenced for violation of Attorney General Regulation on sale and financing of automobile insurance policies.
10. E.J. Bruce Insurance Agency: 93A action commenced for violation of Attorney General Regulation on sale and financing of automobile insurance policies.

ENVIRONMENTAL PROTECTION DIVISION

I. *INTRODUCTION*

The Environmental Protection Division is established by statute, G.L. c. 12, §11D, which also authorizes the Attorney General to take all necessary affirmative action to prevent or remedy damage to the environment.

At the close of the fiscal year the Division was staffed by a Chief, seven Assistant Attorneys General, six secretaries and a Wetlands Scientist. The Secretary of Environmental Affairs and the Departments within his jurisdiction generate the bulk of the enforcement cases and defenses handled by the Division. In addition, following the mandate of G.L. c. 12, §11D, the Division initiates cases on behalf of the Attorney General in many areas of environmental concern.

Massachusetts has a relatively long-standing and well-established structure of environmental legislation covering, *inter alia,* air and water pollution, coastal and inland wetlands protection, solid waste disposal regulation and outdoor advertising control. The Division is also the legal representative of the Energy Facilities Siting Council, which regulates the siting and construction of electrical generating facilities, oil pipelines and facilities associated with oil refining and production, and the Coastal Zone Management Office of the Executive Office of Environmental Affairs.

During the past year, the Division was the recipient of federal grant funds. In recognition of the central role performed in Massachusetts by the Attorney General in the enforcement of federal and state and water pollution standards, the U.S. Environmental Protection Agency granted the Division $175,000 in FY'78. These monies have been used primarily for additional staffing.

In addition to conventional legal responsibilities, attorneys for this Division sit as hearing officers in adjudicatory hearings held pursuant to the procedures of the Department of Environmental Quality Engineering.

II. *DESCRIPTION OF CATEGORIES*

A. AIR

Air pollution cases are usually referred from the Department of Environmental Quality Engineering, Division of Air and Hazardous Materials, for violations of the state Air Pollution Regulations. The most frequent violations of these Regulations at the present time seem to be municipal incinerators. The statutory authority is M.G.L. c.111, §42.

B. WATER

Water pollution cases are referred from a Division of Water Pollution Control. These cases generally involve a violation of discharge permits issued jointly by the Commonwealth's Division of Water Pollution Control and the United States Environmental Protection Division. Other water pollution cases involve seeking the recovery of costs expended in order to clean up oil spills. The statutory authority is M.G.L. c.21, §§26-53.

C. WETLANDS

Wetlands cases are generally referred from the Department of Environmental Quality Management, Wetlands Section; the Department of Environmental Quality Engineering, Wetlands Division, or by citizen complaints. These cases fall into two categories: (1) cases involving the permit program for altering of wetlands under M.G.L. c.131, §40 and (2) cases challenging the development restrictions which the state is authorized to impose on inland and coastal wetlands pursuant to M.G.L. c.130, §105, and M.G.L. c.131, §40A.

D. SOLID WASTE

Solid waste cases originate from the Department of Environmental Quality Engineering, Division of General Environmental Control. These cases involve the manner in which refuse is disposed and the enforcement of the state's sanitary landfill regulations. The statutory authority is M.G.L. c.111, §150A.

E. BILLBOARD

Billboard cases are referred from the Outdoor Advertising Board. These cases are governed by M.G.L. c.93, §§29-33, which regulate and restrict outdoor advertising and authorize a permit program. A

majority are defenses to petitions for judicial review from decisions of the Outdoor Advertising Board.

F. NON-CATEGORICAL

A number of matters are handled by this Division each year which do not fall into the categories above. These are often those matters initiated or pursued by the Attorney General in areas of broad environmental policy, including, for example, nuclear power plant siting and construction, *amicus curiae* briefs to the Massachusetts Supreme Judicial Court and the United States Supreme Court, National Environmental Policy Act and Massachusetts Environmental Policy Act cases, administrative interventions and energy policy.

III. *DISPOSITION OF CASES*

A. During FY'78, this Division opened the following numbers of cases in each of the listed categories:

AIR	18
WATER	73
WETLANDS	38
SOLID WASTE	35
BILLBOARDS	31
NON-CATEGORICAL	10
Total number of cases opened during FY'78:	205

B. During FY'78, this Division closed the following number of cases in each of the listed categories:

AIR	18
WATER	5
WETLANDS	16
SOLID WASTE	5
BILLBOARDS	39
NON-CATEGORICAL	3
Total number of cases closed during FY'78:	86

IV. *NOTEWORTHY CASES*

This section includes a description of some cases of special significance to the Commonwealth either because they were the first of a particular type, because they had important precedential value or because they made a distinct contribution to the environment.

DEPARTMENT OF ENVIRONMENTAL QUALITY ENGINEERING v. UNION PETROLEUM CORPORATION (1977)

The Division filed a complaint based on the defendant's violation of the state air pollution statute and regulations. After negotiations, an Agreement for Judgment was executed that provided for the payment of a $12,000 civil penalty. This was the first such penalty collected for air pollution.

DEPARTMENT OF ENVIRONMENTAL QUALITY ENGINEERING v. HOLLISTON SAND AND GRAVEL (1977)

The Division sought the closure of the defendant's operations on the grounds that, in addition to violating the air pollution regulations, they constituted a public nuisance. Just before hearing on the Division's motion for preliminary injunction, the defendant agreed to install the necessary pollution abatement equipment and pay a penalty of $15,000 for the creation of a public nuisance. This was the first Massachusetts case in which a public nuisance theory was pleaded for the purpose of receiving civil damages.

DIVISION OF WATER POLLUTION CONTROL v. TOWN OF DIGHTON (1977)

This was the first case in which a Court assessed a civil penalty ($35,000) against a municipality under the Massachusetts Clean Waters Act.

UNITED STATES OF AMERICA v. CITY OF LYNN AND COMMONWEALTH OF MASSACHUSETTS (1977)

The Environmental Protection Agency brought an action against the City of Lynn for failure to comply with the Federal Water Pollution Control Act, 42 U.S.C. §§1251 *et seq.* The Commonwealth of Massachusetts was joined as a necessary party under the federal statute. Rather than defend the city, which had violated a state-federal water discharge permit, the Commonwealth brought a cross-claim against it under the Massachusetts Clean Waters Act. The Commonwealth prevailed on its motion for a partial summary judgment and the city agreed to a judgment which provided a schedule for the completion of construction of its wastewater treatment facility and payment of a $10,000 civil penalty for its past violations of the Massachusetts Clean Waters Act and its discharge permit. The federal government's claim is still pending.

CONNECTICUT RIVER FISHWAYS CASE (1977)

This Division represented the fishery agencies of all the states in the Connecticut River Basin (Massachusetts, Connecticut, New Hampshire and Vermont) in hearings before the Federal Power Commission seeking to require the Western Massachusetts Electric Company to install fish passage facilities at its dam at Turners Falls, Massachusetts. After evidence was presented, an agreement was reached which will require the company to complete two sets of facilities by 1980.

Thereafter, the Division, on behalf of the same four states, entered into negotiations with New England Power Company, the licensee of the next three dams on the Connecticut (all of them on the New Hampshire-Vermont border). An agreement was reached establishing a schedule for the construction of fishways.

These two agreements will allow Atlantic salmon and American shad to reach their historic spawning grounds on the Connecticut and its tributaries.

MASSACHUSETTS v. ANDRUS, et al. (1978)

This action was brought in Federal District Court to enjoin the Secretary of Interior from leasing oil and gas development rights in the Georges Bank area off the Massachusetts coast. The complaint alleged that the defendant was violating the Outer Continental Shelf Lands Act and the National Environmental Policy Act.

On January 28, 1978, the court issued a preliminary injunction blocking the opening of bids for the leases scheduled to take place on February 1. On January 30 the First Circuit refused to stay the order pending its appeal. On March 7 the appeal was argued to the First Circuit and is awaiting decision.

AMERICAN PETROLEUM INSTITUTE, et al. v. KNECHT, et al. (1978)

This suit, brought by an oil industry association in Federal District Court for the District of Columbia, sought to enjoin the Coastal Zone Management Program. The Plaintiffs moved for a preliminary injunction on April 28, 1978. At the same time we intervened on behalf of the Commonwealth. The injunction was denied. The matter was heard on cross motions for summary judgment and the court entered judgment for the Commonwealth on September 6, 1978.

PUBLIC CHARITIES DIVISION

I. *REGISTRATION AND MONITORING OF CHARITABLE ORGANIZATIONS.*

A. *Annual Reports.* The Division currently has registered with it 11,941 charitable organizations, each of which is required to file annually with the Division either a Form PC or a copy of its annual probate account and to pay a filing fee of $15.00. For the fiscal year ending on June 30,1978, the Division had collected $85,410 in filing fees.

B. *Annual Report Form.* On May 15, 1978, the Division held a public hearing with regard to the Form PC. The Division intends to make some changes in the Form PC based upon some of these recommendations.

The Division has also been working with other states and with the Internal Revenue Service in an attempt to develop a national uniform reporting form for charitable organizations. This would enable charitable organizations to complete a single form which could be filed with every state, and perhaps with the IRS, instead of having to complete a myriad of different forms at great administrative cost to the charities.

C. *Advisory Committee on Public Charities.* During fiscal year 1978, the Attorney General appointed an Advisory Committee on Public Charities. This Committee has been an excellent resource for the Division and has helped to draft both new legislation in the charities area and a new report form. The Committee members have also acted as liaisons with the charitable and professional fund-raising community and have helped generate widespread acceptance of the new report form and the proposed statutory changes.

D. *New Filing System.* The Division adopted a new numerical system of open-shelved, color-coded files which has been approved and will be installed this Fall. Because the system is housed on open shelves, retrieval and re-shelving of files should be much easier and faster.

E. *Computerization.* We have entered into a computer the names and account numbers of all registered charities so that we will have available a computer listing which will be up-dated regularly. The computer list will be on microfiche and we have obtained three microfiche readers. This will enable us to answer inquiries from citizens and to locate charity files more quickly than before.

We have also prepared computer information sheets containing important biographical data from the charity files for each registered charity.

F. *Dissolution of Delinquent and Defunct Charities.* Under G.L. c.180, §11B, the Attorney General has the authority to dissolve charitable corporations if they have failed to file their annual reports for two successive years or if they have become inactive. In fiscal year 1978, the Division filed the first of a series of dissolution petitions in the Massachusetts Supreme Judicial Court to dissolve some thirty-two delinquent and defunct charities. *Bellotti* v. *Allston-Brighton Citizens Council, Inc.*

G. *Suits to Enforce Charities Laws.* In fiscal year 1978, the Division also filed a number of suits to enforce various provisions of the law of charities. Some of these suits are:

Bellotti v. *Byrd,* Suffolk Probate Court. A suit to remove Richard E. Byrd, Jr. as trustee of the Admiral Richard E. Byrd Foundation, a charitable foundation created by Mr. Byrd's mother in memory of his father, Admiral Richard E. Byrd. The suit alleges that Byrd, Jr. has allowed the assets of the foundation to deteriorate and has not conducted any charitable activities with the Foundation's assets. After two days of trial, this case was settled by an agreement between the parties to remove the other trustee, to allow Richard to remain as a trustee, and to appoint three "neutral" trustees to run the Foundation.

Perkins v. *Rich,* Plymouth Superior Court. This suit was brought by the members of a Unitarian Church in East Bridgewater to determine what had happened to the Church assets since 1962 when Paul John Rich, III had become the minister of the Church. The Attorney General was named as a defendant because a substantial amount of charitable trust assets (approximately $250,000) were unaccounted for. The Division participated in a lengthy Master's hearing on this matter. In addition, the Division has filed a counterclaim against an intervening bank which has a mortgage on the Church property claiming that the Bank accepted restricted trust funds as collateral for a general loan to the Church when it knew or should have known that the funds could not be used for that purpose. We are seeking to force the bank to return the money to the Church on the ground that it is a constructive trustee of the funds.

Bellotti v. *Star Island Corporation* and *Bellotti* v. *Christian Broadcasting Network,* Suffolk Superior Court. These two companion cases were brought to determine whether the defendants, both of which claim to be

incorporated and operated for "religious purposes", are exempt from the registration requirements of G.L. c.12, §8F. Both suits involve serious First Amendment issues.

Bellotti v. *Cuervels,* Suffolk Superior Court. This case is still in the discovery stage. It is a suit brought against the former officers and directors of the Boston Council of Girl Scouts attempting to hold them personally liable for the deterioration of the council's assets, dissipation of the council's general funds which should have been used for Girl Scout activities and misuse of restricted trust funds.

Bellotti v. *Sylvester,* Suffolk Superior Court. This action was brought to remove and surcharge the trustee of a charitable trust for taking excessive fees and for imprudent investment of trust funds. A preliminary injunction was obtained removing the trustee and appointing a temporary trustee. The case is now in discovery.

Bellotti v. *Swedish Mission Fund,* Suffolk Probate Court. The Division filed an application to investigate this organization which was allowed by the probate court.

II. *MONITORING CHARITABLE SOLICITATIONS.*

A. *Solicitation Certificates.* The number of solicitation certificates issued by the Division jumped from 601 in fiscal year 1977 to 1,089 in fiscal year 1978. Total filing fees increased from $5,750.00 to $10,598.40. The reason for the increase is that our new Form PC combines the annual report form with the application for a solicitation certificate. Thus many charities became aware for the first time that they were required to obtain such a certificate.

B. *Registration of Professional Fund-Raisers.* There are currently 51 professional fund-raisers and solicitors registered with the Division. Each charity is required to list on its annual report the name of its professional fund-raiser. We have instituted a procedure for cross-checking the Forms PC with the registrations of professional fund-raisers to ensure that all fund-raisers are registered.

C. *Suits to Enforce Solicitation Laws.* In fiscal year 1978 the Division filed a number of suits to enforce the solicitation laws. Examples are:

Bellotti v. *Congress of Racial Equality.* Suffolk Superior Court. This case ended in a consent judgment in which C.O.R.E. agreed to be permanently enjoined from using harassing solicitation techniques in Massachusetts.

Bellotti v. *Salvation Rehabilitation Center,* Suffolk Superior Court. A preliminary injunction was obtained in this case against an organization which claimed it was soliciting funds to hold a Christmas party for needy children. In fact, no such party was ever held and the organization appears never to have conducted any charitable activities.

Bellotti v. *World Changers,* Suffolk Superior Court. A preliminary injunction was also obtained in this case enjoining defendant from conducting any charitable solicitations in Massachusetts. The organization's solicitation materials are misleading in that they state that all funds collected will be used for needy children when, in fact, a large percentage of the funds are used for other pruposes.

Bellotti v. *Leavitt,* Suffolk Superior Court. This action resulted in an

injunction against Mr. Leavitt soliciting in Massachusetts. Leavitt claimed he was soliciting on behalf of a charitable organization, Italian American War Veterans, but the charity claimed it had not received any of the proceeds from his solicitations.

III. *PROBATE MATTERS.*

A. *Wills Reviewed.* In fiscal year 1978 the Division reviewed and set up files on 1,039 new wills in estates which either created charitable interests or in which there were no heirs. A para-legal has been able to review the wills satisfactorily thus relieving the attorneys of that burden.

B. *Accounts Reviewed.* The Division received for review in fiscal year 1978 2,391 trustee accounts, 65 accounts of administrators, 48 conservator's accounts and 580 executor's accounts.

C. *Litigation Matters.* The Division was involved in 235 litigation matters which included petitions for cy pres, petitions for instructions, will contests, etc. Examples of some of those matters are:

Chase, Trustee v. *Pevear,* Essex Probate Court. This case was commenced some time ago and involves various claims by the life beneficiaries and the Attorney General against the trustee of a trust fund with charitable remainder interests. We are seeking to remove and surcharge the trustee for self-dealing, imprudent investments, failure to pay taxes on time, etc. The case was tried before a Master who found in favor of the trustee. The Probate Court, however, has since found in favor of the income beneficiaries and the Attorney General.

Samuels v. *Attorney General,* Supreme Judicial Court. This matter was decided in the Division's favor in January, 1978. The question was whether funds of the Massachusetts Pythian Relief Fund could properly be used for the purchase of land and construction of a regional hall for the use of the Grand Lodge, Knights of Pythias. The Attorney General argued and the court found that the Relief Fund was a restricted fund which must be used for aid to needy members of the Lodge and could not be used for the general purposes of the Lodge.

Congregational Church of Chicopee Falls v. *Attorney General,* Supreme Judicial Court. This case has been briefed and is waiting to be argued. The Court has been asked to decide whether the Superior Court has jurisdiction to dissolve a Church corporation or whether the Supreme Judicial Court has exclusive jurisdiction in such matters. The case also presents the question of the scope of the court's discretion in determining how the assets of a dissolving charitable corporation are to be distributed.

D. *Common Trust Fund Accounts.* The Division has begun to monitor the accounts of the large common trust funds which must file with us annually. In a number of instances we have filed appearances and objected to the allowance of the accounts because they were not a fair presentation of the fund's actual financial position as of the date of the account. The Division recently met with representatives of some of the banks and Judge Mary Fitzpatrick and agreed to a new format for presentation of these accounts.

IV. *PUBLIC ADMINISTRATION ESTATES AND ESTATES WITH NO HEIRS*

In fiscal year 1978, the Division opened files on 154 new public administration estates. Total escheats from public administration estates and no heirs estates were $269,093.66 from 94 estates.

V. SPRINGFIELD OFFICE

The Springfield office the Department of the Attorney General continues to be responsible for matters of concern to the Attorney General in the four Western Counties: Hampden, Hampshire, Franklin and Berkshire. The primary function of the office has been to handle all division references and requests for assistance pertaining to Eminent Domain, Criminal, Torts, Contracts, Administrative, Employment Security Division, Collections, Public Charities, Victim of Violent Crime cases and election law violations. Only Consumer Protection matters originate in the Springfield office.

The office also supplies personnel to the Board of Appeal on Motor Vehicles Liability Policies and Bonds for monthly sittings which consider approximately 20 cases per sitting.

It is difficult to determine with accuracy the number of matters handled for the Administrative Division because many of the actions taken by this office on these cases involve the filing of a particular pleading, hearing on motions and the gathering of information without actually handling the entire case. The same is true of Eminent Domain and contract cases. During 1977-78 a total of 28 new cases were received in their entirety from the above mentioned divisions.

The Consumer Protection section of the Springfield office was again quite active. In 1977-78 some 64 investigations were conducted resulting in 10 Assurances of Discontinuance, 9 Consent Judgments, 6 Preliminary Injunctions and 1 contempt action. The above actions covered a wide range of industries including automobiles, photography, door-to-door sales, mail order solicitations, and advertising.

The section in conjunction with the Massachusetts Public Interest Research Groups and the Consumer Action Center of Springfield conducted an indepth survey of unit pricing in the Western Massachusetts area. The action resulted in several complaints being filed and consent judgments being obtained.

A systematic monitoring system for consent judgments, advertising and motor vehicle regulations was established.

In addition to the formal investigations, some 161 individual complaints were received from areas not represented by a local consumer center. Of these complaints 138 were resolved.

The Springfield office in 1977-78 conducted public hearings on the proposed retail advertising regulations, fulfilled speaking engagements for numerous groups, and helped to establish a new Consumer Center at Holyoke Community College.

The staff consists of one Administrative Assistant, two Assistant Attorneys General, two investigators, and two secretaries.

Number 1 July 18, 1977

Jonathan E. Fielding, M.D.
Commissioner
Department of Public Health
600 Washington Street
Boston, MA 02111

Dear Commissioner Fielding:

You have requested my opinion on the responsibility of the Department of Public Health (D.P.H.) concerning the proposal of the City of Lawrence to convert the Bessie M. Burke Memorial Hospital (the Burke Hospital) into a long-term care nursing home facility for the elderly. Your question is whether St. 1973, c. 923 (c.923) and St. 1971, c. 596 (c.596) relieve the city from the obligation to comply with the statutory determination of need process set forth in G.L. c. 111, §§25B-25G.

In my judgment neither c. 923 nor c. 596 exempts the Burke Hospital's conversion from the procedures established by G.L. c. 111, §§25B-25G. The city and D.P.H. therefore are required to follow the provisions of §§25C and 25D with respect to a determination of need by D.P.H. for a nursing home on the site of the Burke Hospital before the city proceeds to convert the hospital into that type of long-term facility.

The relationship of c. 923[1] and c. 596[2]—both special laws relating specifically and directly to the Burke Hospital—to G.L. c. 111, §§25B-25G, is not entirely a new question. In *Commissioner of Public Health* v. *The Bessie M. Burke Memorial Hospital,* 366 Mass. 734 (1975), (cited hereafter as *Commissioner* v. *Burke Hospital*) the Supreme Judicial Court considered and upheld the constitutionality of the two special laws in light of the generally applicable determination of need procedure set forth in G.L. c. 111, §§25B-25G, and its predecessor statute. The court's opinion describes in detail the factual circumstances of the special laws' enactments. *Id.* at 735-38. It is helpful to summarize these facts in order to provide background to your present opinion request.

In 1971, the Legislature passed St. 1971, c. 1080, entitled "An Act to prevent unnecessary expansion of health care facilities during the period ending [May 31, 1972]." The Act required, as a condition of commencing construction of a new health care facility or renovating an existing facility, where an expenditure of $100,000 or more was involved, that D.P.H. make a "determination" that a "need" existed for the new or renovated facility.

---

[1]Chapter 923 provides in pertinent part:
Notwithstanding the provisions of chapter seven hundred and seventy-six of the acts of nineteen hundred and seventy-two [enacting G.L. c. 111, §§25B-25G], or any other contrary provision of law, the commissioner of public health is hereby authorized and directed to issue a certificate of need and a temporary hospital license to the city of Lawrence for the continued operation of the Bessie M. Burke Memorial Hospital. This certificate of need shall not be withheld pending the issuance of a certificate of safety nor shall a certificate of safety be withheld because a certificate of need has not been issued. Said city of Lawrence is hereby authorized and directed to expend such sums of money as were authorized by chapter five hundred and ninety-six of the acts of nineteen hundred and seventy-one to remodel, reconstruct, enlarge, make extraordinary repairs to, re-equip and refurnish said Bessie M. Burke Memorial Hospital.

[2]Chapter 596 provides in pertinent part:
SECTION 1. For the purpose of remodeling, reconstructing, enlarging, making extraordinary repairs to, re-equipping and refurnishing the Bessie M. Burke Memorial Hospital, the city of Lawrence may borrow, within a period of two years from the passage of this act, such sums as may be necessary, not exceeding, in the aggregate, one and one half million dollars, and may issue bonds or notes therefor, which shall bear on their face the words, Lawrence Hospital Remodeling Loan, Act of 1971. . .

The statute also required that a determination of need be made before a facility could substantially change the services it offered.[3] In 1972, the Legislature enacted G.L. c. 111, §§25B-25G, which made the determination of need process of c. 1080 a permanent statutory requirement for construction, alteration and changes in services of health care facilities. St. 1972, c. 776, §3. *See Commissioner* v. *Burke Hospital, supra* at 736-37, 738-39.

On August 5, 1971, the Legislature passed c. 596, authorizing the city of Lawrence to borrow up to $1,500,000 to finance improvements in the Bessie Burke Hospital *(See* n. 2 *supra).* Although the city subsequently approved the funding and contracted to have the hospital renovations in question performed, city officials suspended work under the construction contract when they learned that the alterations were subject to the then-new determination of need statute, St. 1971, c. 1080. *Commissioner* v. *Burke Hospital, supra* at 736. Thereafter, on December 29, 1971, the Burke Hospital applied for a determination of need in accordance with c. 1080. The Public Health Council denied the application on April 11, 1972. *Id.*

The Burke Hospital did not seek judicial review of this denial. It turned instead to the Legislature, which on October 17, 1973, enacted c. 923 as an emergency law *(See* n. 1 *supra). Commissioner* v. *Burke Hospital, supra* at 737.[4] On June 25, 1975, the Commissioner and the Public Health Council, pursuant to the judgment entered in that case, issued a "certificate of need"[5] and a "hospital license"[6] to the Burke Hospital.

Moving in time beyond the previous litigation, you have informed me that in 1976—for reasons unrelated to the earlier case and not relevant to this opinion—the Burke Hospital was decertified from continued participation in the federal Medicare program[7] as well as the state-administered Medicaid program.[8] As a result, in September, 1976, the hospital was closed, following the dismissal of an action in federal court to enjoin the closing.[9] You have further explained that on January 18, 1977, the voters of Lawrence "passed a binding initiative referendum mandating that the Lawrence City Council expend the money provided by Chapter 596 of the Acts of 1971 to remodel and repair the institution so that it could be

[3]"Health care facility" was defined in c. 1080 to include both hospitals and nursing homes supported in whole or in part by public funds. A "determination of need" has been defined by D.P.H. as "the formal decision of the Department . . . relative to the need of the project proposed in an application", Massachusetts Determination of Need Regulations (DON Regs.), Part 5 (12), appearing in Mass. Reg. Special Issue No. 32 at 20 (1976); the "Department" is defined as the Commissioner of Public Health and the Public Health Council. *Id.* Part 5(10).

[4]It was to challenge c.923 *(inter alia)* under arts. 10 and 30 of the Declaration of Rights of the Massachusetts Constitution and the Fourteenth Amendment to the United States Constitution that your predecessor commenced the action at issue in the cited opinion. As mentioned, the court upheld the statute's constitutionality. *Commissioner* v. *Burke Hospital, supra* at 744, 750.

[5] This certificate, mentioned in c. 923, appears to signify the written "determination of need" issued by D.P.H. in response to an application. *See* DON Regs. Part 54.8, appearing in Mass. Reg. Special Issue No. 32 at 60-61 (1976).

[6] *See* G.L. c. 111, §51.

[7]*See* 42 U.S.C. §1395 *et seq.*

[8]*See* 42 U.S.C. §1396 *et seq.;* G.L. c. 118E.

[9]*The Friends of the Bessie M. Burke Memorial Hospital* v. *The Trustees of the Bessie M. Burke Memorial Hospital,* C.A. 76-1452-S (D. Mass. June 21, 1976), aff'd, No. 76-1316 (1st. Cir. Oct. 8,1976).

used as a Long-term Nursing Care Facility."[10] It is in light of the January 18, 1977, vote and of inquiries from both officials and citizens of Lawrence that you ask whether c. 923 and c. 596 exempt the establishment of a long-term nursing care facility on the site of the Burke Hospital from the determination of need process set forth in G.L. c. 111, §25C.

The court's decision in *Commissioner* v. *Burke Hospital, supra* has laid to rest any argument that the Legislature is without constitutional authority to enact special legislation exempting a hospital or presumably a nursing home from complying with the determination of need process.[11] The sole issue raised by your request is whether c. 923 and c. 596[12] themselves show a legislative intent to exempt the Burke Hospital in 1977 from the determination of need process otherwise applicable to its conversion to a long-term nursing care facility and thus require you to issue both a certificate or determination of need and a nursing home license to the hospital. Chapter 923 is a special act, a type of law defined as:

> Legislation addressed to a particular situation, that does not establish a rule of future conduct with any substantial degree of generality, and may provide *ad hoc* benefits of some kind for an individual or a number of them. *Commissioner* v. *Burke Hospital, supra,* 366 Mass. at 740.

There have been many Massachusetts cases which address the constitutionality of particular special acts. *Compare, e.g., Gray* v. *Salem,* 271 Mass. 495 (1930) (legislative granting of a pension to particular employee held constitutional) *with Holden* v. *Paddock,* 347 Mass. 230 (1964) (legislative extension of statute of limitations in particular case held unconstitutional). There appear to be no Massachusetts decisions or relevant cases elsewhere, however, which establish general principles for construing the scope of special legislation. Nevertheless, the case law governing the construction of statutes which confer privileges or franchises on particular individuals or entities is instructive. *See, e.g., Prudential Ins. Co. of America* v. *Boston,* Mass. Adv. Sh. (1976) 182, 189; *Tilton* v. *Haverhill,* 311 Mass. 572, 579 (1942); *Boston Elev. Ry. Co.* v. *Commonwealth,* 310 Mass. 528, 565 (1942).

These cases all establish that a grant of a privilege by public authority to a private individual is to be strictly construed against the grantee and in

---

[10]The January 18, 1977, vote was an "Inititative" under Section 64 of the Lawrence City Charter enacted by Mass. St. 1911, c. 621 rather than a referendum. The January 18, 1977, ballot contained two questions: (1) "Shall the measure adopting an order calling for bids, awarding contracts, and taking such further action as is necessary for the expenditure of monies already borrowed for remodeling. . . the Bessie M. Burke . . . be passed"; (2) "Shall the measure adopting an order determining it shall be the policy of the City Council to continue the operation of Bessie M. Burke Hospital for long term care of the citizens of Lawrence, and directing the Trustees . . . to reopen said hospital forthwith for said purpose and take such other action as shall be necessary for licensing with State Authorities for said purpose . . . [be passed]."

[11]The court emphasized that in the case before it there was no allegation of specific injury to another individual or entity or a competitor hospital arising out of the legislatively-mandated determination of need for the Burke Hospital. 366 Mass. at 744-45. The court did not indicate the extent to which such facts might, if proved, render c. 923 constitutionally invalid. However, you have not mentioned any specific injury that might arise from the Burke Hospital's conversion to a nursing home facility. I assume, for purposes of this opinion, that a legislative directive as to the conversion would be constitutional.

[12]Although your opinion request cites both c. 923 and c. 596, c. 923 is the real statute at issue. Only c. 923 gives life to the borrowing authority in c. 596 beyond the original two-year limitation. Moreoever, it is c. 923 which, if applicable here, contains the specific direction to you with respect to the Burke Hospital's conversion. Accordingly, the following discussion will concern only c. 923.

favor of the public.[13] In substance, c. 923 confers a special grant on the Burke Hospital by exempting it from the general regulatory scheme applicable to all other hospitals. Accordingly, in my opinion c. 923 should similarly be construed in strict terms, and should not be read to extend benefits in excess of those expressly provided.

Chapter 923 specifically "authorized and directed" the Commissioner of Public Health "to issue a certificate of need and a temporary hospital license to the city of Lawrence for the continued operation of the Bessie M. Burke Memorial Hospital" (see n. 1,*supra)*. The statute makes no mention of a determination of need for a long-term care nursing home facility nor does it mention a nursing home license.[14] Conversely, the general statutes, G.L. c. 111, §25B-25G, mandate a determination of need as a prerequisite to substantial renovations or construction of *all* health care facilities, including both hospitals and nursing homes. Further, the statutory determination of need procedure was enacted as an emergency law for the express legislative purpose of "providing forthwith for the appropriate allocation of certain resources for provision of health care services in the Commonwealth." St. 1972, c. 776, emergency preamble; *see* G.L. c. 111, §25C, second paragraph.

There is unquestionably a significant difference between the need for additional hospital beds in a particular area and the need for additional nursing home facilities. The Legislature presumably made a judgment in 1973 as to the appropriateness of exempting the proposed 1973 renovations at the Burke Hospital from the determination of need process, but since that time the hospital has closed for wholly independent reasons. Its possible reopening as a nursing home facility is a contingency which I do not assume the Legislature contemplated when enacting c. 923 four years earlier.

In light of the significant changes in circumstances which have occurred subsequent to the enactment of c. 923, as well as the existence of separate statutory licensure provisions for hospitals and nursing homes, I conclude that c. 923 does not exempt the conversion of the Burke Hospital from the determinationn of need process prescribed by G.L. c. 111, §§25B-25G. Accordingly, it is my opinion that, absent further legislation, D.P.H. must first make a determination that the need exists for a nursing home facility on the site of the Burke Hospital prior to the issuance of an affirmative determination of need under G.L. c. 111, §25C.[15]

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

---

[13]In the *Prudential* case, for example, the plaintiff insurance company undertook a redevelopment project pursuant to a statute which entitled the company to a six percent return on its investment on the project as well as other advantages. *See* G.L. c. 121A, §1 *et seq.; Prudential, supra,* Mass. Adv. Sh. (1976) at 183-184. Boston later adopted a rent control statute and applied its provisions to all rental units including those in the Prudential Center complex. The company claimed that G.L. c. 121A insulated it from operation of the rent control act, but the court held the rent control statute applied. *Id.* at 193. In so holding, the court stated that it was "dealing with a public grant, which is to be 'construed strictly against the grantee. Nothing will be included in the grant except what is granted expressly or by clear implication.' " *Id.* at 189 quoting from *Attorney General* v. *Jamaica Pond Aqueduct Corp.*, 133 Mass. 361, 365-366 (1822). *See Tilton* v. *Haverhill, supra*, 311 Mass. at 574, 579; *Boston Elev. Ry. Co.* v. *Commonwealth, supra;* G.L. 564-565.

[14]Nursing homes and hospitals are licensed under entirely different statutes. *Compare* G.L. c. 111, §71 (nursing and convalescent homes, town infirmaries, rest and charitable homes for the aged) with c. 111, §51 (hospitals, institutions for unwed mothers, clinics). Moreover, under a 1973 amendment to G.L. c. 111, §25C—St. 1973, c. 1168, §§20, 21—applications for determination of need with respect to long-term care facilities licensed under c. 111, §71, must be provided the Department of Elder Affairs for review and comment.

[15]It also follows that D.P.H. must consider and follow the procedures set forth in G.L. c. 111, §71, with respect to the possible issuance of a nursing home license for the Burke Hospital.

Number 2 July 26, 1977

Gregory R. Anrig
Commissioner
Department of Education
182 Tremont Street
Boston, Massachusetts

Dear Commissioner Anrig:

You have requested my opinion regarding the definition of the word "teacher" in G.L. c. 71, §38. Section 38 provides in pertinent part:

> It [the school committee] shall elect and contract with the teachers of the public schools . . . .
>
> . . . No election, contract or promotion of a teacher shall be made by a school committee unless such person shall have been nominated for such election, contract or promotion by the superintendent of schools.[1]

You ask whether the term "teacher" is to be interpreted narrowly to include only persons occupying classroom teaching positions, or broadly, to include "all professional personnel employed by a school committee such as principals, assistant principals, supervisors and directors of curriculum, coordinators, department heads, guidance counselors, school psychologists, school librarians, media specialists and others who serve in a professional capacity." You state that the Department of Education has adopted the broad interpretation. It appears, however, that certain school committees have refused to accept this construction, contending that "teacher" means only those performing a traditional classroom teaching function. (*See* n. 1 *supra*).

For the reasons discussed below, I conclude that "teacher" in §38 should be interpreted to mean professional personnel employed by school committees, including those employees whose positions are part of, or closely related to, traditional classroom teaching functions. However, I believe that the term should not be read to include certain other professional employees[2] whose responsibilities are less akin to those of the classroom teacher, and whose hiring is specifically governed by other statutes.

The word "teacher" is not defined in G.L. c. 71, §38, nor has it received a judicial construction to date. The task of defining the term is made more difficult than in many cases because in various sections of c. 71 "teacher" has been given different meanings.[3] Ordinarily a word used in different

---

[1]The superintendent's responsibility over nomination of "teachers" is the result of a 1974 amendment to St. 1974, c. 342, §38. You have informed me that a number of disputes between school committees and their superintendents have developed over the specific positions which are subject to the nomination power of the superintendents under the amended §38. For example, in one town, a school committee appointed two teachers and a guidance counselor without the superintendent's nomination and over his objection. Your office has been called upon to issue opinions to school systems on the requirements of the statute. You have requested this opinion in order to clarify the statute's meaning so that you may properly advise school committees on their responsibilities under §38, and obtain compliance from them with the statute's provisions.

[2]I would include in this category school superintendents, attendance supervisors, school physicians and nurses, athletic directors, coaches, and school adjustment counselors.

[3]Some sections, such as §38G, use the term "teacher" in the specific sense of regular classroom instructors. *See also* §41A. In other sections, the word "teacher" has a broader meaning. Thus, in construing §42, governing dismissals of teachers and superintendents, the Supreme Judicial Court has read the word "teacher" to include "principal". *McCartin* v. *School Committee of Lowell*, 322 Mass. 624, 628 (1948). *See also Kaplan* v. *School Committee of Melrose*, 363 Mass. 332, 336-338 (1973) (director of elementary art is "teacher" for purposes of §43, governing salary reductions of teachers and superintendents).

parts of a statutory scheme is given the same meaning throughout. *E.g., Arnold* v. *Commissioner of Corporations & Taxation,* 327 Mass. 694, 700 (1951); *cf. Commonwealth* v. *Baker,* Mass. Adv. Sh. (1975) 1875, 1889. Obviously the rule is inapplicable here, and I have been forced to utilize other tools of statutory construction in order to answer your question.

In considering the meaning of "teacher" in c. 71, §38, I follow the general rule that a statute is to be interpreted to effectuate the legislative purpose it embodies; and that where a number of statutes relate to the same subject matter, they should be construed together, in order to form a "harmonious whole, consistent with the legislative purpose." *Board of Education* v. *Assessor of Worcester,* Mass. Adv. Sh. (1975) 2626, 2629-2630, and cases cited.

The question you have posed concerns fundamentally the allocation of authority between school committees and superintendents. General Laws, c. 71, §37, invests the school committee with "general charge of all the public schools." Included among the committee's duties is the power set forth in §38, to "elect and contract with teachers of the public schools." Section 59 of G.L. c. 71 provides that the superintendent shall be:

> the executive officer of the [school] committee, and under its general direction, shall have the care and supervision of the public schools . . . and shall recommend to the committee, teachers, textbooks and courses of study.

The purpose of §59 was to insure that the school committee, which "cannot . . . know much about the qualifications of teachers . . . or the supervision of instruction", obtained the "expert knowledge" of the superintendent, who "should know more than any of the school committee regarding educational practice." 1910-1911 Annual Report of the Board of Education at 270-271.[4] *See Crudden* v. *Superintendent of Schools of Boston,* 319 Mass. 686, 688 (1946).

A broad definition of "teacher" in §38 is consistent with the advisory mandate given the superintendent in §59. It also advances the section's purpose of separating the functions of school committees and superintendents according to their respective areas of compentence or expertise. *See* 1910-1911 Annual Report, *supra* at 270; Mass.H.R. 164 at pp. 25-26 (1911). A superintendent's expertise with respect to personnel who provide instruction is not naturally limited to judgments about classroom teachers; it is reasonable to assume that the superintendent would also be better informed than the school committee about the qualifications of principals, guidance counselors, and many other professional staff within the schools. Requiring the superintendent's recommendation for a broad class of professional school personnel under §38 leaves intact the school committee's ultimate control over contracts with all school department employees, but makes maximum use of the educational training and background of the superintendent in the hiring process. *See Crudden* v. *Superintendent of Schools of Boston, supra* at 688.

Furthermore, a broad construction of "teacher" in §38 is required in order to read that section in harmony with G.L. c. 71, §38G, the related

[4]The present version of §59 was enacted in 1911, St. 1911, c. 444, at the recommendation of the Department of Education, *see* Mass.H.R. 164 and 1760 (1911); the Department's quoted annual report explained the purpose of the statute.

statute governing certification of most public school professional staff. *See Board of Education* v. *Assessor of Worcester, supra* at 2629. Section 38G expressly contemplates that school committees will employ the types of professional staff whose certification it prescribes, for the statute provides in part that:

> No person shall be eligible for employment by the school committee as a teacher, principal, supervisor, director, guidance counselor and director, school psychologist, school librarian, audio-visual media specialist, unified media specialist, school business administrator, superintendent of schools or assistant superintendent of schools unless he has been granted by the board a certificate with respect to the type of position for which he seeks employment . . . .

With respect to many of the professionals listed, however, no statutory provision specifically authorizes a school committee to hire them.[5] If "teacher" in §38 were interpreted to mean only a person performing traditional classroom teaching duties, a school committee would be without power to contract with the other types of staff whose employment is not only intended, but indeed necessary if the committee is to meet its educational responsibilities under G.L. c. 71, as well as c. 71A (bilingual education) and c. 71B (special education).

Finally, a broad interpretation of the term "teacher" in §38 is consistent with the cases construing other sections of c. 71. As mentioned, the Supreme Judicial Court has interpreted the term "teacher" in the dismissal statute, G.L. c. 71, §§42 and 43 to include principals and certain other positions.[6] If "teacher" includes a principal within its definitional scope when it appears in those sections, it is only reasonable to assume that the term is also broad enough to cover other types of professional personnel who are likely to be performing more direct teaching functions than the principal himself, such as media specialists, librarians, guidance counselors, etc.

I now turn to the question, raised indirectly by your letter, whether *all* professional staff with which a school committee contracts are included in the term "teacher" as used in G.L. c. 71, §38, so as to require nomination by the superintendent before the committee may hire them. *Cf. Bonar* v. *Boston,* Mass. Adv. Sh. (1976) 240, 245 (special statute applicable to Boston provides no "person" shall be elected or appointed by school committee unless nominated by superintendent). It is my opinion that they are not all included.

Examination of G.L. c. 71 and related statutes shows that the Legislature has enacted a number of provisions expressly authorizing school committees to employ or appoint specific categories of professional school personnel. The categories of personnel whose hiring or appointment is covered by specific statutes include the following: school superintendents

[5] For example, supervisor, director, guidance counselor and director, school psychologist, audio-visual media specialist, unified media specialist, school business administrator, assistant superintendent.

[6] *See McCartin* v. *School Committee of Lowell, supra* at 628; *Boody* v. *School Committee of Barnstable,* 276 Mass. 134, 138 (1931), both construing §42. As to §43, *see Downey* v. *School Committee of Lowell,* 305 Mass. 329, 321 (1940); *Kaplan* v. *School Committee of Melrose, supra* at 336-338, (director of elementary art).

(G.L. c.71, §59); school physicians and nurses (c. 71, §53); athletic directors (c. 71, §47); coaches (c. 71, §47A); school adjustment counselors (c. 71, §46G); and school attendance supervisors (G.L. c. 76, §19).[7] It is a general rule of statutory interpretation that a specific statute on a particular subject takes precedence over a subsequently enacted and more general provisions. *E.g., Boston Teachers Union, Local 66, Amer. Federation of Teachers (AFL-CIO)* v. *School Committee of Boston,* Mass. Adv. Sh. (1976) 1515, 1542-1543; *cf. also Pereira* v. *New England LNG, Inc.,* 364 Mass. 109, 118-119 (1973). Moreover, as a practical matter, these members of a school's professional staff do not appear to perform functions that are very closely related to traditional classroom teaching. (Note, for example, that none of the listed staff positions are included in the class of professionals who must be certified under G.L. c. 71, §38G.) Accordingly, it is my opinion that these categories of professional personnel should not be included within the term "teacher" as it appears in G.L. c. 71, §38.

There remain two classes of professional employees who are not so easily categorized—school principals and school librarians. Both are required to obtain certification under G.L. c.71, §38G. In addition, however, the hiring or appointment of both principals and librarians is specifically treated in sections of c. 71 apart from §38. *See* G.L. c. 71, §59B (principals);[8] and §38H (librarians).[9] Despite the separate treatment accorded these positions in c. 71, I nevertheless conclude that each of them falls within the term "teacher" for purposes of §38.[10]

Turning first to the position of principal, the case law cited above demonstrates that principals have traditionally been considered as superior teachers, and not a separate class of professionals with substantively different duties. *Boody* v. *School Committee of Barnstable, supra* at 138.In amending G.L. c. 71, §38 in 1974 to give the superintendent authority to nominate "teachers" for election, contract, or promotion, it is assumed that the Legislature was aware of these prior decisions. *See, e.g., Board of Assessors of Melrose* v. *Driscoll,* Mass. Adv. Sh. (1976) 1497, 1503, and cases cited. In view of this background, I interpret the new G.L. c. 71, §59B, as a directive that there be a specified number of principals, rather than a

---

[7]Chapter 71 also contains separate provisions which pertain to the hiring of school principals, librarians, and directors of occupational guidance. For reasons discussed below, I consider the relationship between these statutes and c. 71, §38, to be different than the statutes listed immediately above in the text.

[8]Section 59B provides in pertinent part:
"The school committee of a city or town and the school committee of a regional school district shall employ a principal for each public school and fix his compensation. A principal employed under this section shall be the administrator of said school subject to the supervision and direction of the superintendent and subject to the regulations and policies of the school committee, and shall be assigned such duties as are determined by the superintendent of schools . . . . He may recommend to the superintendent or his designee appointments, assignments, promotions and dismissals of professional personnel within his school. The provisions of this section shall not prevent one person from serving as the principal of two or more elementary schools or the use of a teaching principal in such schools."

[9]Section 38 provides:
"Every school librarian and school library supervisor or coordinator appointed by the school committee shall acquire tenure in the school system of the city or town in which he is employed subject to the provisions of section forty-one, relating to tenure for teachers, and of sections forty-two and forty-three A, relating to dismissal, suspension and discharge and of appeals therefrom."

[10]Another position which bears some similarity in treatment to those of principal and librarian is the director of occupational guidance. General Laws, c. 71, §38A, specifically provides for the appointment of directors of occupational guidance. However, under c. 71, §38C, every such director is "deemed to be a regularly appointed teacher . . . and shall be subject to the provisions of this chapter relating to teachers." Therefore, c. 71, §38, applies to directors of occupational guidance and their appointment is subject to the nominating powers of the school superintendent.

mandate that the school committee alone— without nomination by the superintendent—hire or appoint every principal within the system.[11]

With respect to the position of school librarian, the section concerning librarians, G.L. c. 71, §38H, is in reality a tenure statute. It does nothing more than expressly provide for the application of tenure rights defined in G.L. c. 71, §§41, 42, 43A, to school librarians. Although §38H does speak of "every school librarian . . . appointed by the school committee . . . ." I do not consider that language to preclude a construction of "teacher" in §38 to include school librarians and library supervisors or coordinators.[12] Therefore, as with principals, I am of the opinion that a school committee may appoint or hire a school librarian only from among the nominations of its superintendent.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 3 July 28, 1977

Jerald L. Stevens
Secretary
Executive Office of
Human Services
State House
Boston, Massachusetts 02133

Dear Secretary Stevens:

On May 24, 1976, I issued an opinion to Gregory R. Anrig, Commissioner of Education, in response to two questions he raised concerning the "grandfather clauses" of Chapter 766 of the Acts of 1972.[1] 1975/76 Op. Atty. Gen. No. 71 (hereafter "1976 Opinion").[2] You now seek

[11]If "teacher" in §38 is read to exclude a principal, then the superintendent would be in the position of having power to nominate "teachers" within the school system for *promotion* to the position of principal, but no power to nominate in the first instance individuals from outside that system. Such an anomalous result is to be avoided, if possible, in interpreting this statute. *See, e.g., McCarthy* v. *Woburn Housing Authority*, 341 Mass. 539, 542 (1960).

[12]I am guided in my conclusion by the close functional relationship between librarian and traditional classroom teachers, which is spelled out in the materials you sent me to accompany your opinion request. *See also, e.g., LaMarch* v. *School Committee of Chicopee*, 272 Mass. 15 (1930) (adopting functional analysis to determine whether an individual was in fact a "teacher" for purposes of G.L. c. 71, §42).

[1]The "grandfather clauses" appear as §§16-18 of Chapter 766. They provide as follows:

"SECTION 16. A child who is in a special education program as of the effective date of this act shall be presumed to be appropriately assigned to said program until an evaluation pursuant to the provisions of section three of chapter seventy-one B of the General Laws, inserted by section eleven of this act, indicates that another program would benefit said child more.

SECTION 17. No child with special needs in a special education program on the effective date of this act shall be removed from said program he is in without the written consent of the parents, guardians, or persons with custody of said child.

SECTION 18. A school committee shall not be responsible for more than the average per pupil cost for pupils of comparable age within the respective city, town or school district as its share of the cost of continuing placement for those children with special needs enrolled in an institution with his [sic] tuition paid by the commonwealth as of the effective date of this act."

[2]The specific questions raised by Commissioner Anrig were the following:

1. Does the phrase "with his tuition paid by the commonwealth" in St. 1972, c. 766, §18, make this grandfather clause applicable to children placed in special education programs as of September 1, 1974 by *ony* agency of the commonwealth?
2. Does St. 1972, c. 766, §18 impose responsibility on a state agency for a child's continuing special education placement as long as the child was a client of the agency, and had his special education program approved by that agency prior to September 1, 1974, even if the special education program which the agency contracted to pay did not actually begin until September 3, 1974?

I answered both questions in the affirmative.

a clarification of the statement in that opinion that "§18 of Chapter 766 imposes responsibility on a state agency for a child's continuing special education placement in an institution" if the agency was financially responsible for that child's program on the effective date of the Act (September 1, 1974).

You inform me that this statement has caused confusion among state agencies because (1) in some cases it is not clear which state agency had responsibility for a particular child on September 1, 1974; and (2) the agencies within the Executive Office of Human Services[3] have not been appropriated any funds to pay these types of special education costs. To clarify the situation, you have asked me to answer the following two questions:

1. Does c. 766 require that the state agency which was paying the tuition of a child with special needs enrolled in an institution on September 1, 1974 (the effective date of the Act) be the agency of the Commonwealth which must be responsible on behalf of the Commonwealth, for that share of the child's subsequent special education expenses exceeding the local school committee's average per pupil expenditure for regular education?

and, if the answer to this question is "no,"

2. Does c. 766 permit the executive branch, acting ultimately through the Governor, to use its own discretion in deciding which state agency or agencies shall bear the liability for paying the Commonwealth's share of special education costs, so long as that liability is borne by some state agency?

In response to your first question, I conclude that Chapter 766 does not require that the agency which was responsible for a "grandfathered" student's special education program as of September 1, 1974, continue to pay the Commonwealth's share of that program after that date, so long as some agency of the Commonwealth makes the necessary payments in a timely manner. With respect to the second question, it is my opinion that Chapter 766 permits the executive branch to designate a particular agency (or agencies) to be responsible for paying the Commonwealth's share of the grandfathered students' special education costs. That designation, however, must be made in conjunction with the budget process. I set forth my reasons below.

By its express terms, §18 of Chapter 766 speaks only to the financial responsibility of local school committees and *the Commonwealth* for grandfathered students; references to particular agencies of the Commonwealth are omitted. The section on its face, therefore, leaves open for further executive or administrative definition the specific method by which the Commonwealth is to pay its share of those students' educational costs. A reading of §18 in the context of Chapter 766 as a whole and its accompanying regulations supports this facial interpretation.

[3]Those agencies include: the Office for Children, Departments of Public Health and Mental Health, Division of Youth Services and Massachusetts Rehabilitation Commission. I assume that these are the agencies within your office that may be responsible for "grandfathered" students.

Chapter 766 establishes a comprehensive special education scheme which in programmatic terms specifically draws in and depends on local school committees, the Department of Education, and the Departments of Mental Health, Public Health, Youth Services and Public Welfare. *See, e.g.*, G.L. c. 71B, §§2, 3, 4, 6, 7, 9, 10, 11, 12. In its financial aspects, however, the statute primarily refers to local school committees on the one hand and the Commonwealth on the other. *See* G.L. c. 71B, §§5, 10, 12, 13; *cf.* c. 71B, §11 (Department of Education to reimburse cities and towns for certain recreation and transporation expenses).

As I noted in my previous opinion on the grandfather clauses, general rules of statutory construction direct that insofar as possible, a word or term used in several different provisions or sections of a statute be given a consistent meaning throughout; and further, each word be assigned its ordinary meaning and proper effect. *See* 1976 Opinion at 4-5, and cases cited. When §18 is considered in light of the more programmatic sections cited above, in which explicit reference is made to particular state agencies, it is plain that the term "commonwealth" has not been used interchangeably with a particular agency or agencies. Rather the term refers to the Commonwealth acting through *any* of its officers or agencies. *See* 1976 Opinion at 5.

I conclude, therefore, that the state agency responsible for the tuition of a grandfathered student on the effective date of Chapter 766 is not required to continue to pay the Commonwealth's ongoing share of the students' education expense, as long as another agency assumes the financial burden.[4]

Your second question concerns the power of the executive branch, acting ultimately through the Governor, to make a particular state agency responsible for paying the Commonwealth's share of "grandfathered" students' special education expenses under Chapter 766, §18.

As I concluded above, in using the term "commonwealth" in §18, the Legislature left open the method by which the Commonwealth should meet its financial responsibility for grandfathered students. In the absence of definition it is my opinion that the Governor has the discretionary authority to decide which agency shall make the required payments. He must, however, exercise this discretion in accordance with the Commonwealth's budget process.

The Governor as the "supreme executive magistrate of the Commonwealth", Massachusetts Constitution, Part 2, c. 2, §1, has broad

---

[4]Two points should be noted regarding this conclusion. First the Department of Education has suggested that the grandfather clauses of Chapter 766 were intended to preserve the status quo for grandfathered students; and that a reading of §18 to permit a shift in financial responsibility from one state agency to another would violate the intent. A review of the legislative history of Chapter 766, however, did not reveal any indication of the purpose of the grandfather clauses. As a matter of common sense, one may surmise that they were intended to prevent immediate disruption in the grandfathered students' education programs which might have occurred had all Commonwealth financial responsibility automatically terminated on the effective date of Chapter 766. But a common sense judgment, without more, does not justify the conclusion that the Legislature also (1) considered similar hardship and disruption would occur if the Commonwealth's share of financial responsibility shifted from one state agency's budget to another's; and (2) intended the grandfather clauses to prevent such a result. Accordingly, I cannot adopt Department of Education's suggested reading of the statute.

Second, I note that under G.L. c. 15, §1M (inserted in the General Laws by Chapter 766, §2), the Division of Special Education within the Department of Education is given broad authority

> (2) to regulate all aspects of, and assist with the development of all special education programs supported in whole or in part by the commonwealth . . .

Without attempting to define the parameters of this provision, I conclude that it is not directed toward the allocation of financial responsibility among state agencies over which neither the Division of Special Education nor the Department of Education has any control.

supervisory power over the executive branch. His authority is emphasized by the statutory organization of the executive branch (including state departments and agencies) into eight executive offices: each office is headed by an executive secretary whom the Governor appoints to serve at his pleasure; and each secretary functions directly as the Governor's "executive officer" in supervising the agencies included within the particular executive office. G.L. c. 6A, §§2-4. In sum, both constitutional and statutory provisions expressly place the Governor at the head of the executive branch. From this position, he clearly is the appropriate official to designate the manner in which the Commonwealth's share of special education expenses for grandfathered students should be paid.[5]

Nevertheless, the Governor must use this discretionary authority in conjunction with the budgetary process, and particularly with the Legislature. The Legislature has the sole power of appropriation, which it exercises by designating specific sums of money for particular departments and agencies and, in its discretion, particular activities. *See, e.g., Opinion of the Justices,* 302 Mass. 605 (1939); *see also* G.L. c. 29, §§12, 19. The Governor may recommend to the Legislature that a particular agency should be responsible for paying the Commonwealth's share of all grandfathered students' special education costs although the students may actually be served by state agencies other than the one designated. He may also request an appropriation for that agency to meet the expense. *See, e.g.,* G.L. c. 29, §§6, 6A. Absent such an appropriation, the Governor is without power unilaterally to require that one agency assume the special education expenses of other departments or agencies.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 4 August 1, 1977

Mr. Samuel A. Vitali
Executive Secretary
Executive Council
State House
Boston, Massachusetts 02133

Dear Mr. Vitali:

You have requested my opinion on a series of questions dealing with the power of the Governor and Council to consider appeals from the decisions of the Commissioner of Veterans Services.[1] That authority is conferred by G.L. c.115, §2, which provides in pertinent part:

---

[5]The constitutional and statutory provisions governing the Commonwealth's budget process are consistent with this conclusion. No money is paid by the Commonwealth except by the Governor's warrant. Massachusetts Constitution, Part 2, c. 2, §1, art. 11; G.L. c. 29, §18. Moreover, the Governor is ultimately responsible for preparation of a budget and its presentation to the Legislature. Massachusetts Constitution, Amendments, art. 63, §2; G.L. c. 29, §6. The responsibility includes discretionary power to make recommendations about expenditures that are independent of and different from those of the agency and department heads. G.L. c. 29, §6.

[1]You have asked these questions in the context of the following facts. A veteran in Northampton applied for veterans' benefits from the local agent pursuant to G.L. c. 115, §4. The veteran was denied benefits and pursuant to G.L. c. 115, §2, the veteran appealed to the Commissioner who sustained the decision of the local veterans' agent. The veteran further appealed to the Governor's Council which voted to sustain the appeal. The local agent refused to comply with the decision of the Council.

> . . . A final appeal from such decisions or determination may be taken by such claimant, veterans' agent or resident, within ten days after his receipt of notice of the same, to the governor and council . . . .

Specifically, you have asked:

1. In light of St. 1964, c.740, §§4, 5, what is the effect of a decision by the Governor and Council to sustain such an appeal?
2. Do the Governor and Council act as one unified body or must both the Governor and the majority of the Council each concur on a decision concerning a veteran's appeal?
3. Can a majority of the Council alone order the local veterans' agent to comply with the Council's decision and to pay the outstanding bills?
4. Where the Governor disagrees with the Council on their decision to sustain a veterans' appeal, can the Council alone, upon a majority vote, order the Commissioner of Veterans' Services to request the Treasurer of the Commonwealth to pay the bills? Can the Council compel compliance with such an order?
5. Does the Council's power to punish for contempt or disrespect (Mass. Const. Pt. 2, C.1, Sec. 3, Art. 10, 11) help in the solution of these enforcement problems, or is it merely for punishment of contempt which disrupts their proceedings, i.e., contempt in their presence?

In answer to your first question, St. 1964, c.740, §§4 and 5 do not alter the authority of the Governor and Council to consider appeals from decisions of the Commissioner of Veterans' Services. Chapter 740 was designed solely to repeal Executive Council powers as to matters requiring advice and consent of the Council. Section 4 of c.740 provides in part:

> . . . so much of each provision of the general laws and of any special law as requires the *advice* and *consent* of the council with respect to any action or omission to act by the governor or by any officer . . . in the executive department . . . is hereby repealed. (emphasis supplied)

As was stated in 1965/66 Op. Atty. Gen. at 192, considering the same question, the power of the Governor and Council to hear appeals from the decision of the Commissioner of Veterans' Services is a quasi-judicial power and does not involve advice and consent of the Council.[2] Section 5 of St. 1964, c.740[3] simply has no bearing on the power of the Council to hear such appeals.

In answer to your second and third questions, it is my opinion that the

---

[2] *See also, Selectmen of Sterling v.Governor*, Mass. App. Ct. Adv. Sh. (1974) 937, 940, *aff'd*, Mass. Adv. Sh. (1975) 2707, noting without deciding, the question whether St. 1964, c. 740 terminated the Council's role in granting veterans' benefits.

[3] Section 5 provides:

> Notwithstanding anything contained in this act to the contrary, the governor shall at all times, in his sole discretion, be free to seek the advice and consent of the council upon any matter.

Governor and Council act together as one body with respect to veterans' benefits appeals under G.L. c. 115. §2, and a majority of that board decides whether to sustain or overturn a decision of the Commissioner of Veterans' Services. In *Opinion of the Justices,* 190 Mass. 616, 618 (1906), the court stated:

> The Constitution recognizes two kinds of executive business which may come before the council: one, that which is to be done by the Governor and Council acting together as an executive board, and the other, business to be done by the Governor, acting under the responsibility of his office as supreme executive magistrate, by and with the advice and consent of the Council. . . .

It is clear that the role of the Governor and Council with respect to veterans' benefits falls within the first category of "executive business" described in that case. Accordingly, both act together as a single "executive board", and the Governor, as a member of that board, may cast one vote. *See Sparhawk* v. *Sparhawk,* 116 Mass. 315, 317, (1874).[4] *See also, Opinion of the Justices,* 211 Mass. 632, 635 (1912) (construction of phrase "Governor and Council" in *Sparhawk, supra,* noted with approval, but not followed in special situation presented).

Turning to your fourth question, a majority of this "executive board", with the Governor as a member, may order the local veterans' agent to comply with its decision to pay the outstanding bills. If a party is aggrieved thereby, he may petition for a writ of certiorari to review the decision.[5] However, the executive board may not order the Commissioner of Veterans' Services to request the Treasurer of the Commonwealth to pay the bills. The method of paying veterans' benefits is for the city or town to pay the veteran the amount due to him: the state then reimburses that particular city or town for fity percent of the benefit. G.L. c.115, §5. While the last paragraph of G.L. c.115, §2[6] allows the Commissioner in his discretion to authorize the Treasurer to pay directly veterans' benefits in certain instances, this authority is not also vested in the Governor and Council.

In answer to your fifth question, it is my opinion that the Council may not exercise its authority to punish for contempt those persons who do not comply with its decision regarding the payment of veterans' benefits. The constitutional provisions vesting power in the Governor and Council to punish for contempt, Massachusetts Constitution, Part 2, c.1, §3 arts. 10 and

---

[4]There, in considering an act in the Massachusetts Province Charter which provided for all matters of marriage and divorce to be "heard and determined by the Governor and Council", the court stated:

> The Governor and Council having been thus constituted a Supreme Court of Probate, and a court for the decision of cases of marriage and divorce, their proceedings as such, though not according to the course of common law, were judicial, *and were determined by a vote of a majority of those present, even if the Governor was in the minority.* (emphasis supplied)

[5]*See Selectmen of Sterling* v. *Governor, supra.*

[6]The last paragraph reads:

> [The Commissioner of Veterans' Services] may, by written notice, order a city or town to pay veterans' benefits to an applicant on an application approved by the commissioner. If a city or town refuses or does not make such payment within fourteen days from receipt of such notice he shall notify the state treasurer of such refusal or failure and thereafter such benefits shall be paid to the applicant by the commonwealth. If the commonwealth shall be called upon to pay any such benefits on behalf of any such city or town, the total of any such benefits paid in any such calendar year shall be assessed upon such city or town, or deducted from funds that may be due such city or town from the commonwealth.

11, relate only to contemptuous or disrespectful behavior in their presence. *See Opinion of the Justices,* 331 Mass. 764, 767 (1954). The power may not be expanded to reach acts of noncompliance occurring outside of formal Council meetings or deliberations.

Very truly yours,
Francis X. Bellotti
Attorney General

Number 5 September 27, 1977

Hon. James A. Kelly, Jr.
Chairman
Senate Committee on Ways and Means
Boston, Massachusetts 02133

Dear Senator Kelly:

On behalf of the Senate Committee on Ways and Means you have requested my opinion as to the constitutionality of Senate Bill No. 388 (1977) (S. 388),[1] regarding the operations of the Board of Registration and Discipline in Medicine (the Board). Specifically, you have asked:

1) Does legislation, such as Senate No. 388, Section 5A, granting board members immunity from civil or criminal liability for actions or non-actions performed in the course of their duties, and making absolutely privileged all communications or statements of said board members made in the course of said duties, fall within constitutional limits?

2) Does legislation, such as Senate No. 388, Section 5B, authorizing a board to grant immunity from civil or criminal liability to persons, professional societies, or other entities assisting said board in performing its duties, fall within constitutional limits?

For the reasons set forth below, it is my opinion that each of the referenced sections is within constitutional limits as rationally designed to further the permissible governmental purpose of protecting the public

[1]Senate Bill No. 388 reads as follows:
"*Be it enacted by the Senate and House of Representatives in General Court assembled and by the authority of the same, as follows:*
Chapter 112 of the General Laws is bereby amended by adding after Section 5 thereof the following sections:—
Section 5A. Board members shall be absolutely immune from civil or criminal liability with respect to any action or non-action in the ordinary course of their duties, and all communications or statements by board members made in the ordinary course of said duties shall be absolutely privileged.
Section 5B. The board, upon majority vote of its members, may grant absolute immunity from civil or criminal liability to any person(s), professional society, or any other entity, who or which, at board request, assists the board in discharging its duties and functions. Pursuant to its general rulemaking powers under section five of this chapter, the board shall promulgate regulations defining the circumstances and conditions under which absolute immunity shall be granted by the board under this section.
Section 5C. All complaints or other writings filed with the board, and all testimony given before the board with respect to any charge of misconduct by a registrant shall be conditionally privileged, and any person or entity making said filings or giving such testimony shall, with respect thereto, be immune from civil or criminal liability, provided said person or entity acts without malice and on the basis of a reasonable belief in the truth of the matters contained in the complaint or any other writings filed, or in the testimony given."

health. I will treat your questions separately and in the order you have presented them.

1. Evaluation of the constitutionality of a statutory extension of immunity and privilege to the members of the Board requires an examination of the common law. In my view, §5A effectively grants immunity from civil liability alone,[2] and I consider first common law civil immunity in relation to the Board's adjudicative function of disciplining physicians. In performing this duty the Board operates in a quasi-judicial capacity. As such, it would probably be entitled to absolute immunity from civil liability which the common law accords members of the judiciary.[3] *See Jaffarian* v. *Murphy,* 280 Mass. 402, 405-402 (1932) (Mayor's performance of licensing duties within limits of statutory jurisdiction is a quasi-judicial function accorded absolute immunity). *Cf. Gildea* v. *Ellershaw,* 363 Mass. 800, 820, 823 (1973) (disclaiming judicial/non-judicial distinction in allowing qualified immunity for all public oficers). In effect, therefore, the statute may simply operate to codify the protection from civil liability that would exist under the common law for Board members when performing their quasi-judicial disciplinary duties.

In carrying out the non-judicial functions of investigation and rule-making, however, the members of the Board enjoy at common law only a qualified civil immunity for acts and decisions within the scope of their duties, *see Gildea* v. *Ellershaw, supra,* as well as a conditional privilege from liability for defamatory statements made in the performance of those duties, see *Vigoda* v. *Barton,* 348 Mass. 478 (1965).[4] The conditional or qualified nature of the common law immunity and privilege means that it may be lost by a showing of bad faith, malice or corruption. The granting of absolute immunity and an absolute privilege in §5A thus extends beyond that granted by the common law.

The constitutionality of this extension, and indeed of the civil immunity provisions in §5A taken as a whole, is a function of whether the legislation bears a reasonable relation to a permissible governmental objective. *Pinnick* v. *Cleary,* 360 Mass. 1, 14, (1971) (constitutionality of no-fault automobile insurance statute); *Howes Bros. Co.* v. *Unemployment Compensation Commission,* 296 Mass. 275, 284 (1936) (constitutionality of unemployment compensation law). Regulation of the practice of medicine is a valid exercise of the Commonwealth's police power designed to protect the public health. *Lawrence* v. *Board of Registration of Medicine,* 239 Mass. 424 (1921). Presumably §5A is intended to shield the Board members from potential liability for their actions and statements in order to encourage the aggressive enforcement of the laws governing the practice of medicine. G.L. c. 112, §§2-12. The public interest in ensuring and improving the quality of

[2]Section 5A also purports to afford Board members absolute immunity from criminal liability for actions or non-action within the ordinary course of their duties. However, when a Board member performs a criminal act, he is acting in excess of his authority and not within the ordinary course of his Board duties. Accordingly, he would not be immune from criminal liability under §5A. *Cf. Ex Parte Young,* 209 U.S. 123, 159-160 (1908) (state officer enforcing unconstitutional statute is stripped of official character and personally subject to suit). In sum, the criminal immunity provision of §5A does not change the current law in any manner, and is not further discussed in this opinion.

[3]On the privilege of absolute immunity from civil liability afforded judges, *see Allard* v. *Estes,* 292 Mass. 187 (1935).

[4]To date, the Court has found it unnecessary to extend to public officers other than judges an absolute immunity, *see Gildea, supra* at 820-821, or an absolute privilege, *see Vigoda, supra* at 484, suggesting a deference to legislative initiative in this complex area. *Cf. Whitney* v. *City of Worcester,* Mass. Adv. Sh. (1977) 1713, 1715 (comprehensive legislative action preferable to judicial abrogation of governmental tort immunity); *Morash & Sons, Inc.* v. *Commonwealth,* 363 Mass. 612, 623 (1973).

health care and the competence of medical practitioners is a permissible legislative objective, *see Lawrence, supra,* which might rationally be advanced by allowing the Board to act without fear of personal consequences.

There are, however, countervailing interests affected by the extension of absolute immunity and privilege to Board members. Such an extension obviously eliminates the right or interest of persons who may be adversely affected by the negligent, bad faith or malicious performance of Board functions to obtain redress under the civil law.[5] However, it is clear that the Legislature has authority, in the pursuit of a permissible objective, to cause "the modification, abolition and creation of causes of action so long as fundamental rights are not thereby affected." *Opinion of the Justices,* 309 Mass. 571, 599 (1941) (compulsory workmen's compensation law sustained as constitutional). Since "no person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit," *New York Central R.R.* v. *White,* 243 U.S. 188, 198 (1917), a common law cause of action which has not accrued is not such a fundamental right. *See Pinnick* v. *Cleary, supra,* at 10-12, 15;[6] *Silver* v. *Silver,* 280 U.S. 117, 122 (1922) ("guest statute" depriving gratuitous passenger in an automobile of the right to sue for mere negligence is constitutional).

As indicated in *Lawrence* v. *Board of Registration, supra,* at 428, the right of a physician to engage in the practice of medicine "must yield to the paramount right of the government to protect the public health by *any rational means*" (emphasis supplied). The interests of a registrant aggrieved by the proposed statute are, in my judgment, outweighed by the public interest in ensuring the highest character and quality in the medical profession. With respect to other citizens who may be adversely affected by the abolition of civil remedies,[7] the extension of absolute immunity for the purpose of protecting the quality of health for the benefit of the general public cannot be characterized as irrational. *See Ascherman* v. *San Francisco Medical Society,* 39 Cal. App. 3rd 623, 663 (1974) (statutory qualified immunity for physician peer review committee). The statute reflects a legislative policy judgment that the operations of the Board in all its various capacities are of such significance to the public welfare that its members, like judges, should be unimpeded and "not influenced by apprehension of personal consequences." *Allard* v. *Estes, supra* at 190.[8]

2. The analysis of the constitutionality of proposed G.L. c. 112, §5B follows the same path as the preceding discussion. Legislative recognition that the Board should operate freely and with broad authority would also justify extending absolute immunity from civil liability to those persons and

[5]As I have indicated, the allowance of immunity from criminal liability recorded by §5A is merely a reaffirmation of the fact that the duties of the Board are not criminal in nature. In the performance of these duties, the members do not impinge upon societal interests, but rather significantly advance them.

[6]The *Pinnick* case also disposes of any argument that §5A's grant of absolute immunity violates art. 11 of the Massachusetts Declaration of Rights. 360 Mass. at 11-12, 31.

[7]An individual defamed by a member of the Board or simply dissatisfied with a particular Board act or omission is an example.

[8]Although the absolute immunity will preclude tort liability, an individual adversely affected by the actions of the Board in an adjudicatory discipline proceeding is nonetheless entitled to judicial review of the Board's decision, G.L. c. 30A, §14,and, of course, can complain of abusive treatment to appropriate state officials. The proposed legislation thus does not eliminate entirely existing remedies to redress misfeasance or, more simply, bad decisions. *See Pinnick* v. *Cleary, supra* at 15.

entities assisting the Board in the performance of its statutory mandate. Such immunity from liability presumably would serve to encourage participation by private parties in the various licensing and disciplinary processes which ensure the continued competence of the medical professions. If the public interest in maintaining high quality health care is furthered by the Board's aggressive pursuit of its statutory duties, absolute immunity for those who assist the Board in achieving that objective cannot be deemed irrational or arbitrary. *Cf. Mezullo* v. *Maletz,* 331 Mass. 283 (1954) (examining physician in mental commitment case entitled to absolute privilege, given judge's need for assistance of medical experts).

The constitutionality of authorizing the Board to grant immunity from criminal liability to those who provide assistance is somewhat more troubling. While presumably intended to encourage voluntary participation, such authority might well enable the Board to compel testimony from an individual who seeks to invoke the protection of the privilege against self-incrimination.[9] Although the Legislature has delegated the power to grant criminal immunity to various administrative agencies,[10] the authorizing statutes generally contain terms defining explicitly the scope of the immunity extended.[11] In order for a grant of immunity to be sufficient to compel testimony, it must be co-extensive with the scope of the privilege conferred by the Fifth Amendment. *See Kastigar* v. *United States,* 406 U.S. 441 (1972). Section 5B is inexplicit on the scope of immunity intended. For this delegation of authority to be within constitutional limits, it must be presumed that the statute contemplates prohibition of the use and derivative use of testimony compelled and that regulations promulgated by the Board will so provide. *See Baird* v. *Bellotti,* Mass. Adv. Sh. (1977) 96, 100, 122, 123 (statute should be construed, if fairly possible, in a manner which avoids constitutional problems).

Assuming that the statute will contain the proper scope of immunity, there remains the general question of delegating legislative power. It is well established that the Legislature may constitutionally delegate to a board authority to grant immunity to those who render assistance, provided that standards to govern exercise of that authority are supplied. The standards may be supplied by regulations, since the Legislature may lawfully "delegate to a board or an individual officer the working out of the details of a policy adopted by the legislature." *Commonwealth* v. *Racine,* Mass. Adv. Sh. (1977) 1101, 1106. *Accord, Commonwealth* v. *Diaz,* 326 Mass. 525, 527 (1950); *see also Burnham* v. *Board of Appeals of Gloucester,* 333 Mass. 114, 118 (1955). Although the proposed statute does not prescribe explicit standards for the extension or denial of immunity, the legislative scheme of

[9] At present, G.L. c. 112, §62 establishes the power of the Board to conduct hearings to the same extent as that conferred upon city councils by G.L. c. 233, §§8-10, statutes which require application to the Superior Court in order to compel testimony.

[10] *See, e.g.,* G.L. c. 94A, §18(c) (Milk Control Commission); c. 150D, §7(3) (Labor Relations Commission); c. 151B, §3(7) (Massachusetts Commission Against Discrimination).

[11] *See, e.g.,* G.L. c. 151B, §3(7), which provides that:

> No person shall be excused from attending and testifying or from producing books, records, correspondence, documents or other evidence in obedience to the subpoena of the commission, on the ground that the testimony or evidence required by him may tend to incriminate him or subject him to penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

promoting quality health care embodied in G.L. c. 112, §§2-12, and the implied policy of encouraging participation of private parties in that process, would seem to provide sufficient guidance for the formulation of appropriate standards and safeguards in the administration of the delegated power. *See MacGibbon* v. *Board of Appeals of Duxbury*, 356 Mass. 635, 638 (1970) (Zoning Enabling Act and town by-law together provide adequate standards for decision of Board of Appeals on application for special permits). Moreover, §5B expressly provides that the Board is to promulgate regulations setting forth the rules which will govern its grants of immunity. These regulations will be subject to judicial review. G.L. c. 30A, §7. They represent a legitimate vehicle for articulating the necessary standards to guide the Board's exercise of delegated authority. *See generally* Davis, Administrative Law of the Seventies, §§2.00, 2.00-6 (1976).

In accordance with the provisions of G.L. c. 12, §9, I, therefore, answer both your questions in the affirmative and advise you that in my opinion the proposed sections are both constitutional.

Very truly yours
FRANCIS X. BELLOTTI
Attorney General

Number 6 October 3, 1977

John R. Buckley
Secretary
Office of Administration and Finance
State House
Boston, Massachusetts

Amelia Miclette
Chairperson
Civil Service Commission
One Ashburton Place
Boston, Massachusetts

Dear Secretary Buckley and Chairperson Miclette:

For the past several months, my staff and I have been considering your request for an opinion on the validity of a proposed rule which we have characterized as the "3 plus 3" rule. Specifically, you asked me (1) whether the Civil Service Commission possesses the authority under G.L. c.31, §3 to promulgate the proposed rule, and (2) whether the proposed rule would withstand a legal challenge by individuals who are adversely affected by the operation of the rule. Intensive research and drafting have been done on both issues. Nonetheless, I have come to the conclusion that for the reasons set forth below, I must respectfully decline to answer each of the two questions you have propounded.

Under G.L. c.31, §3,the Civil Service Commision may only promulgate rules which are "consistent with [other provisions of] law." A question has arisen as to the consistency of the proposal with the preference afforded veterans by G.L. c.31, §23. As you know, the United States District Court decision invalidating the "old" version of G.L. c. 31, §23 is currently on appeal to the Supreme Court of the United States. *Commonwealth* v.

Feeney, (U.S. No. 76-265). The recent decision of the Supreme Judicial Court, *Feeney* v. *Commonwealth,* Mass. Adv. Sh. (1977) 1959, has upheld the propriety of this appeal and thus Supreme Court action on the case can be reasonably expected within a short time. Furthermore, the "new" version of G.L. c.31, §23, which was inserted by St. 1976, c.200, is expressly conditioned on the outcome of this appeal. Both the effect of the proposed rule and its validity may well depend on the anticipated Supreme Court decision and the particular veterans' preference provision which survives it. Thus, any advice which I might give would be tentative at best and dependent on factors over which I have little or no control. Like the Supreme Judicial Court, I must decline to render an opinion under such circumstances. *See, Answer of the Justices to the House of Representatives,* Mass. Adv. Sh. (1977) 1845, 1849.

Similar reasoning compels me to defer answering your second question. That question essentially asks whether the rule constitutes an impermissible instance of "reverse discrimination", and it cannot be answered without speculating on the outcome of *Regents, University of California* v. *Bakke,* (U.S., No. 76-811), scheduled for oral argument in October.

I recognize, of course, that during the pendency of this opinion request the Commission has deferred promulgating the proposed affirmative action rule. I regret any delay that may have occurred. At the same time, I note that my opinion is not a condition precedent to the promulgation of a valid rule. Thus, even though I must now decline to answer the questions you have posed, the Civil Service Commission is still free to issue the rule as it chooses.

This declination should not be interpreted in any way as a tacit conclusion that the proposed rule is or is not valid. To the contrary, I wish to assure you that, if the proposed rule is promulgated and it is challenged in court by those adversely affected, I will provide representation for those named as defendants.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 7 October 11, 1977

John P. Larkin
Executive Secretary
Alcoholic Beverages Control Commission
100 Cambridge Street
Boston, Massachusetts 02202

Dear Mr. Larkin:

You have requested my opinion as to the authority of the Alcoholic Beverages Control Commission (Commission) to regulate liquor traffic on state military reservations and federal military reservations over which the federal government has exclusive jurisdiction.[1] Your question arises in

[1]It is unnecessary for this opinion to treat the question of state regulation of the sale of liquor into joint facilities because you have specifically withdrawn your request as to that issue and thus, the references in this opinion to federal military facilities include only those facilities over which the United States has exclusive jurisdiction.

relation to complaints received from Massachusetts liquor wholesalers alleging that out-of-state liquor exporters and sellers holding Certificates of Compliance under G.L. c.138, §18B, are making direct sales of alcoholic beverages into federal military reservations within the Commonwealth. For the reasons discussed below, it is my opinion that the Commission may regulate the sale of alcoholic beverages into state, but not federal, military reservations.

I believe the power of the Commonwealth, and hence the Commission,[2] to regulate liquor traffic on state military facilities is clear. The Commonwealth may regulate that traffic either under its general police power to promulgate all manner of reasonable laws to promote the health and welfare of its citizens, or under its more specific power to regulate the sale of intoxicating liquor which is confirmed by the Twenty-First Amendment. These powers are unaffected by the fact that the sale of alcoholic beverages will occur on state military facilities, since the militia is itself an agency of the state government. G.L. c.33, §4.

Where, however, the United States Government assumes jurisdiction over territory in Massachusetts for military purposes, the Commission has no regulatory authority over that territory. Exclusive jurisdiction over such federal military facilities is vested by the Constitution in Congress, U.S. Const., Art.I, §8, cl.17,[3] and the Supreme Court has consistently held that in the absence of specific Congressional authorization, no form of state regulation applies on such federally controlled territory. *See, e.g., Pacific Coast Dairy, Inc. v. Dept. of Agriculture*, 318 U.S. 285 (1943).

While the Twenty-First Amendment confers and confirms the broad authority of the states to regulate the sale of intoxicating liquor within their respective jurisdictions, it has no impact on sales beyond their territorial reach. *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1963); *Collins v. Yosemite Park and Curry Co.*, 304 U.S. 518 (1938). Federal military enclaves within a state's borders are not regulatory territory over which the state exercises sovereign power. *United States v. State Tax Commission of Mississippi*, 412 U.S. 369 (1973),[4] and the states have no authority to regulate the sale of intoxicating liquor on or to such military bases.

Thus, I conclude that the Commission may regulate the flow of alcoholic beverages to state military reservations, but is without authority to regulate the flow of alcoholic beverages to military reservations where the United States exercises exclusive jurisdiction.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

---

[2] The Commission was created in [illegible], after ratification of the Twenty-First Amendment to the United States Constitution and has extremely broad regulatory powers. St. [illegible] et seq.

[3] Article I, §8, cl. 17 provides that Congress shall "... exercise exclusive Legislation ... over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings."

[4] In that case, the United States challenged a regulation of the Mississippi Tax Commission requiring out-of-state liquor distillers and suppliers to collect and remit to the Commission a wholesale mark-up on liquor sold to military officers' clubs on federal bases within Mississippi. The United States operated four military bases in Mississippi, exercising exclusive jurisdiction over two of the bases and concurrent jurisdiction over the remaining two. The Supreme Court struck down the regulation, holding that the bases were not the territory of Mississippi. 412 U.S. at 374.

Number 8 October 11, 1977

Robert L. Okin, M.D.
Commissioner of Mental Health
190 Portland Street
Boston, Massachusetts 02114

Dear Dr. Okin:

You have asked my opinion on the following question:

> Upon designation of the Plymouth Unit of the Taunton State Hospital as a "facility" of the Department of Mental Health, will the Plymouth Area Director become the appointing authority for subordinate personnel of the unit?

In my view your question poses three separate inquiries which must be answered:

1. May the Commissioner of Mental Health (the Commissioner) designate an area unit[1] located within a state hospital as a "facility" of the Department of Mental Health pursuant to G.L. c. 19, §14A?
2. If he may, upon designation of an area unit as a facility, is the area director the head of that unit?
3. If the area director becomes the head of the designated facility, is he the appointing authority for the unit's subordinate personnel?

For the reasons discussed below, I conclude that (1) the Commissioner may designate a state hospital unit a "facility" under G.L. c.19, §14A; (2) the area director does not become head of the facility by operation of law, but may be appointed to that position by the Commissioner acting pursuant to the requirements of G.L. c.19, §§14C, 18 and 23(c); and (3) if the area director is so appointed, he becomes the "appointing authority" for subordinate personnel in the unit, as that term is defined by G.L. c.31, §1.

The system for the delivery of mental health services in the Commonwealth is governed by G.L. c.19, covering the structure, powers and responsibilities of the Department of Mental Health (the Department) and G.L. c.123, relating to the treatment and commitment of mentally ill and mentally retarded persons. In 1966, the Legislature repealed the former G.L. c.19 and replaced it with a statutory scheme which decentralized the organization and delivery of services previously concentrated in state hospitals and state schools, and provided for comprehensive, community-based facilities to supply care and treatment. St. 1966, c.735. In 1970, the Legislature enacted further legislation, St. 1970, c.888, which reorganized G.L. c.123 and granted additional specific powers to the Commissioner.[2]

As presently constituted, the Commonwealth's mental health services system divides the state into regions which are themselves subdivided into areas, *see* G.L. c.19, §17, each served by a citizen area board, *see* G.L. c.19,

[1] The materials you have sent me indicate that an "area unit" is a discrete section or unit within a state hospital which the Department has established to serve as an in-patient facility for one of the 4[illegible] mental health "areas" into which the Department has divided the Commonwealth. G.L. c.19, §17. The Plymouth Unit of the Taunton State Hospital is the area unit designed to serve the Department's Plymouth "area."

[2] *See*. G.L. c.19, §§14A, 14B, 14C, 14D, 14E, added by St. 1970, c.888, §2.

§21, and an area director, *see* G.L. c.19, §18. The area director works with the area board and is responsible for the planning and delivery of mental health and mental retardation services within his area. G.L. c.19, §18. Additionally, when the Commissioner has designated a "comprehensive center" within the area, he may appoint the area director to head the center. G.L. c.19, §§18 and 23(c).

Although not defined in G.L. c.19 or the Department's implementing regulations, it is my understanding that a "comprehensive center" is a community health center which offers a full range of mental health services, including in-patient services, to the citizens of a particular area. A shortage of resources has made it impossible to establish comprehensive centers in many of the Department's area. The Department has created the area units in the state hospitals to provide necessary in-patient services for areas that have no comprehensive centers. *See* 11 C.M.R. Part 8 at 160-161, §10.2 (1974).

1. The Commissioner's authority to designate state "facilities" is found in G.L. c.19, §14A, which provides in pertinent part:

> The state facilities under the control of the department shall be Worcester state hospital . . . [and other named state hospitals and state schools] and such other mental health or retardation facilities as the commissioner from time to time shall designate in the regulations of the department, including any facilities or portions thereof, which the department may, subject to appropriation, construct or develop for use as homes or facilities for aging persons who are not mentally ill.

"Facility" is not defined in §14A, nor anywhere in G.L. c.19. However, the Department's regulations implementing the quoted "designation" provision of §14A define the term as follows:

> [A]hospital, state school, clinic, ward, comprehensive center, or any other public or private entity which provides in-patient or out-patient services, emergency services or partial hospitalization services for day care and night care relating to the observations, diagnosis or care and treatment of mentally ill or mentally retarded persons, and which may consist of an aggregation of coordinated programs and services geographically dispersed. 11 C.M.R. Part 8 at 138 (1974).

The broad scope of this definition clearly includes within it a unit of a state hospital, and permits designation of an area unit as a facility.

Other sections of the Department's regulations which follow the quoted definition govern the actual designation of facilities. These sections demonstrate that the Department has often treated a unit of a state hospital as a "facility" within the meaning of G.L. c.19, §14A. *See* 11 C.M.R. Part 8 at 160-161, §10.2 (1974).

As a general rule of statutory construction, the views of the agency charged with administering a statute are entitled to weight.[3] This is particularly true where the Legislature has granted broad power to the

[3]*See, e.g., Consolidated Cigar Corp.* v. *Department of Public Health,* Mass. Adv. Sh. (1977) 1419, 1427; *Board of Education* v. *Assessors of Worcester,* Mass. Adv. Sh. (1975) 2626, 2632-2633; *Cleary* v. *Cardullo's Inc.* 347 Mass. 337, 343-344 (1964).

agency to work out the details of a statute.[4] In this regard, the Department's powers under G.L. c.19 are sweeping, *see* c.19, §1, and it has been granted broad rulemaking powers to implement those responsibilities. G.L. c.19, §26. Similarly, the Commissioner has been given wide authority to supervise and control the Department and act on its behalf. G.L. c.19, §1. In light of these extensive powers, the Department's definition of facility should be give deference.

The Department's view that an area unit may be designated a facility also finds support in other provisions of G.L. c.19. As mentioned above, §14A specifically allows the designation of a portion of an existing facility as a "state facility under the control of the Department." Further, §§18 and 23 implicitly acknowledge the propriety of such a designation.[5]

I therefore conclude that the Commissioner does have authority to designate a unit in a state hospital as a "facility".

2. Upon the designation of an area unit in a state hospital as a state facility, the area director would not become head of the facility by operation of law. I find nothing in G.L. c.19, §18, governing the powers and duties of the area director, to support an automatic designation. Nor is such a result prescribed by or suggested in the Department's regulations.

When an area unit is so designated, I conclude that the Commissioner has the authority under G.L. c.19, §14C[6] to appoint a head of such facility and may appoint the area director to that position, provided that the appointment is in compliance with the requirements of G.L. c.19, §§14C, 18 and 23(c).

3. The final question to be answered is the one you have asked directly: whether an area director appointed as head of an area unit in a state hospital is the appointing authority for the unit's subordinate personnel. Based on my reading of G.L. c.19 in the context of G.L. c.123 and the Department's regulations I conclude that the area director would become the appointing authority.

After providing for the appointment of superintendents, directors and heads of state hospitals and other facilities of the Department, G.L. c.19, §14C, states that "[t]he superintendent with the approval of the commissioner shall appoint and may remove assistant physicians and necessary officers and other persons . . . ." As with the term "facility", the word "superintendent" is not defined in §14C or anywhere in G.L. c.19. It is necessary, therefore, to look to other sources for a definition of the term.

The Department's regulations implementing G.L. c.19 define the term "superintendent" as the head or "appointee" of a state facility under the control of the Department which has been designated pursuant to G.L. c.19, §14A. 11 C.M.R. Part 8 at 161, §10.3 (1974). General Laws c.123, §1,

---

[4] *Cf., e.g., Commonwealth* v. *Racine*, Mass. Adv. Sh. (1977) 1101, 1106-1107.

[5] Section 23(c), addressed to the duties of area boards in choosing an area director, defines the Board's responsibilities when the area director will also head a facility which is "*integrated* with a university medical center or medical school or with a hospital . . ." (emphasis supplied). Again, the designation of a "facility" already contained within a larger medical complex is recognized. Section 18 contains a similar acknowledgment. It enumerates the professional qualifications required of an area director serving as ". . . executive head of a facility as provided for in paragraph (c) of section 23 . . . if such center or facility is equivalent to a state institution included within section 14A . . . ."

[6] *See also* G.L. c.19, §18, ¶¶3, 4; §23(c), which recognize that an area director may be appointed superintendent or head of a state institution or portion of a state institution.

defines superintendent to mean "the superintendent or other head of a public or private facility."

The Department's definition of "superintendent", representing the interpretation of the statute by the agency charged with its operation, is entitled to weight.[7] In addition, as a general rule of statutory construction, words used in several statutes concerning the same subject are presumed to have the same meaning. *E.g., Insurance Rating Board* v. *Commissioner of Insurance*, 356 Mass. 184, 188-189 (1970); *see Commonwealth* v. *Baker*, Mass. Adv. Sh. (1975) 1875, 1889; *Davis* v. *School Committee of Somerville*, 307 Mass. 354, 361 (1940). The rule seems particularly applicable where, as here, the definition of "superintendent" in G.L. c.123 and G.L. c.19, §14C, were added to the General Laws by the same act. *See Devlin* v. *Commissioner of Correction*, 364 Mass. 435, 440, n.6 (1973). Following this principle, I interpret "superintendent" in the appointing authority provision of G.L. c.19, §14C, quoted above to encompass both the superintendents of state hospitals and the heads of other residential facilities within the control of the Department. Thus, it includes the head of a designated area unit within a state hospital.[8]

Accordingly, pursuant to that provision of §14C, an area director who is appointed a "superintendent" of a designated area unit within a state hospital, would have authority to appoint and remove assistant physicians and other necessary subordinate personnel.

Very truly yours
FRANCIS X. BELLOTTI
Attorney General

Number 9 October 14, 1977

John G. Martin
Chairman
Division of Industrial Accidents
100 Cambridge Street
Boston, Massachusetts 02202

Dear Mr. Martin:

You have asked whether the Division of Industrial Accidents[1] ("Division") must give access to persons other than an injured employee to information in the files compiled or maintained by the Division concerning injured employees. Your specifc questions may be summarized as follows:

---

[7] *See* cases cited in notes 3 and 4, *supra*.

[8] Moreover, the goal in construing the statute is to reach an interpretation which accords with the legislative intent, " 'considered in connection with the course of [the statute's] enactment, the mischief to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated.' " *Board of Education* v. *Assessor of Worcester*, Mass. Adv. Sh. (1975) 2626, 2629, quoting *Industrial Fin Corp.* v. *State Tax Commission*, Mass. Adv. Sh. (1975) 967, 972-973. As discussed above, a major aim of the mental health services system established by G.L. c.19 is to provide decentralized, comprehensive and community-based mental health services on both an outpatient and in-patient basis. The creation of comprehensive centers, *see* G.L. c.19, §18, was intended to meet this goal. General Laws c.19, §18, expressly provides that an area director may be appointed head of a comprehensive center and shall, "subject to departmental regulations, supervise all employees within such center." It seems in keeping with the legislative purpose of G.L. c.19 that when an area director is appointed head of an area unit in a state hospital, a unit created because of a lack of funding has prevented establishment of comprehensive centers, he should also be responsible for the unit's personnel. The construction of "superintendent" which I have adopted advances this purpose

[1] G.L. c. 23, §§14 *et seq.*

(1) Are the Division's files concerning individual, injured employees "public records" within the meaning of G.L. c. 4, §7, cl. 26?
(2) If so, is the employee's entire file, including medical reports, available without restriction to anyone requesting access under G.L. c. 66, §10?
(3) If there are restrictions on public access to these files, what is the nature of these restrictions. both as to the files' contents and as to categories of persons seeking access?
(4) If the files are not public records, are there any circumstances under which access to an individual employee's file must be granted pursuant to G.L. c. 66A, §2 (c)?

For the reasons discussed below, I conclude that (1) some of the contents of the Division's individual employee files are matters of public record; (2) certain portions of those files are exempt from the disclosure provisions of G.L. c. 66, §10 (a); (3) the exempted portions of the files include hospital and medical records and information as to which a legitimate privacy interest exists; and (4) some access to the exempted portion of the files is authorized by G.L. c. 152, §20, G.L. c. 23, §16, and G.L. c. 66A, §2 (i).

You have informed me that the information in the Division's files on individual injured employees comes from several different sources. Under G.L. c. 152, §19, every employer subject to the workmen's compensation law, G.L. c. 152, must file a written report with the Division concerning all injuries sustained by his employees in the course of their employment. Section 19 further requires that the report contain (a) the name, nature and situation (location) of the employer's business, (b) the name, age, sex, and occupation of the employee, (c) the date and hour of the accident, (d) the nature and cause of the injury, and (e) any other information required by the Division.

If an employee becomes eligible for compensation, additional information must be submitted and placed in his file, including (a) the employee's name and address, (b) spouse's name and address, (c) place and date of marriage, (d) place and date of birth of children, and (e) amount of weekly compensation being received. In nearly all of these cases, medical reports of attending and examining physicians, (including in some cases psychiatric reports), and copies of hospital records are also added to the file. *See* G.L. c. 152, §20. In addition, the file may contain transcripts of any testimony by doctors in depositions or hearings before the Industrial Accident Board. *See* G.L. c. 152, §8. Finally, under G.L. c. 152, §30D, every insurer or self-insurer paying workmen's compensation to an injured employee for six months or more is to file the employee's name and address with the Industrial Accident Rehabilitation Board.

The answers to your questions require the reconciliation of several statutes relating to information kept by government agencies: (1) the Public Records Law (PRL), G.L. c. 66, §10, and its definitional counterpart, G.L. c. 4, §7, cl. 26, which together mandate access to most government records; (2) the Fair Information Practices Act (FIPA), G.L. c. 66A, which safeguards the confidentiality of government-held information concerning

particular individuals; and (3) the specific statutes dealing with access to information held by the Division or the Industrial Accident Rehabilitation Board. *See* G.L. c. 152, §§19, 20, 30D, and G.L. c. 16, §23. Given their close relation, I will discuss the four questions you have posed together.

The definition of public records contained in G.L. c. 4, §7, cl. 26, includes all "documentary materials or data . . . made or received by any officer or employee of any agency, executive office, department board or commission . . ." unless such data falls within one of nine exemptions set forth in the statute. Thus, unless one of these exemptions applies, all documents in the employee files held by the Division are public records and open to any member of the public requesting access under G.L. c. 66, §10.

Two of the public record exemptions in G.L. c. 4, §7, cl. 26 may apply to parts of the Division's files: §7, cl. 26(a) and (c). Exemption (a) excludes from the definition of "public record" documents "specifically or by necessary implication exempted from disclosure by statute." Within the workmen's compensation law, there exists such an exemption. General Laws, c. 152, §30D explicitly prohibits the public disclosure of the names and addresses of persons receiving compensation for six months. Thus, this information, insofar as it is contained in Division files, cannot be disclosed to the public under the PRL. There appear to be no other statutory provisions which contain a similarly "specific" exemption.

The question whether any statute "by necessary implication" protects information in the Division's employee files from disclosure requires examination of FIPA and its relation to the PRL. The information contained in the employee files is clearly "personal data" within the meaning of FIPA, *see* G.L. c. 66A, §1 (definition of "personal data"), and the files themselves constitute a "personal data system" under the statute. *See id.* (definition of "personal data system"). FIPA directs that an agency which maintains a personal data system shall,

> not allow any other agency or individual not employed by the holding agency to have access to personal data *unless such access is authorized by statute* or regulation, or is approved by the holding agency and by the data subject whose personal data is sought . . . . G.L. c. 66A, §2(c) (emphasis supplied).

In a prior opinion, I ruled that this section of FIPA does not operate to exempt "by necessary implication" all personal data from disclosure as a public record. 1976/77 Op. Atty. Gen. No. 32 at 8, n. 5. I adhere to this reading of the statutes, and refer you to that opinion. Accordingly, I conclude that with the exception of information furnished the Industrial Accident Rehabilitation Board pursuant to G.L. c. 152, §30D, exemption (a) does not exempt any information contained in the Division's employee files from disclosure as a public record.

The broader exemption which relates to the Division's files is G.L. c. 4, §7, cl. 26 (c), which exempts,

> personnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute an invasion of personal privacy.

Under this exemption, all the medical reports and hospital records kept in Division employee files are clearly protected from disclosure.[2] Transcripts of doctors' testimony would also be protected. However, application of the exemption to other information in the files requires a balancing of the employee's privacy interest in non-disclosure against the public's interest in being informed in light of the particular circumstances at hand. In the prior opinion cited above, 1976/77 Op. Atty. Gen. No. 32 at 9-11, I discussed the legal principles relevant to this determination, and I again refer you to that opinion for guidance. *See also* 1976/77 Op. Atty. Gen. No. 33 at 4-5.

Given the need to weigh the competing interests of individual privacy and public information in the context of a particular case, I am unable to make an abstract determination whether certain items of information contained in an individual employee's file are exempt from disclosure or not. *Cf.* 1976/77 Op. Atty. Gen. No. 32 at 15. The Division itself must evaluate the information contained in specific files or records in accordance with the legal principles treated in the earlier opinion to determine whether and to what extent exemption (c) applies. Any decision by the Division denying access to such records is subject to review by the Supervisor of Public Records and the courts. G.L. c. 66, §10 (b).

To assist your deliberations I offer the following general guidelines. First, it is my opinion that disclosure of personal information concerning an employee's name and home address and his family situation is information in which the employee has a legitimate privacy interest. *See Rural Housing Alliance, Inc.* v. *United States Department of Agriculture*, 498 F.2d 173 (D.C. Cir. 1974); *see also* 1976/77 Op. Atty. Gen. No. 32 at 11, and cases cited. Second, information concerning an employer's business name, location and the type of business conducted does not appear to pose any danger of invasion of privacy to the employee or the employer. Third, whenever possible, personal identifying information contained in a file should be deleted so that the privacy of a particular individual will not be invaded through disclosure of the document. *See Department of the Air Force* v. *Rose*, 325 U.S. 352 (1976).

You have also asked who may obtain access to the information in Division files. All public record information, as defined above, must be made available under G.L. c. 66, §10(a), to any person who requests it. Where personal data is not a public record, FIPA controls and no access may be granted without the individual's and the Division's consent, unless authorized by statute or regulation. G.L. c. 66A, §2(c).[3]

In summary, much of the information in the Division's files on injured employees, including medical and hospital reports and family data is not subject to disclosure as public record information because it is expressly held on a confidential basis, G.L. c. 152, §30D, or because it is exempt under the privacy exemption of the PRL, G.L. c. 4, §7, cl. 26(c). Those

[2] Limited access to this information by parties to Board proceedings before the Industrial Accident Board is authorized by G.L. c. 152, §20.

[3] Parties to Division proceedings are specifically granted access to employee medical and hospital reports under G.L. c. 152, §20. This section takes precedence over FIPA. *See* G.L. c. 66A, §2(c). Similarly, G.L. c. 23, §1e directs the Chairman of the Industrial Accident Board to prepare and make available to public inspection a monthly list of claims heard or conferred upon by each Board member. To the extent that information on this list is also contained in employee files, c. 23, §1e also authorizes public access to the information within the meaning of G.L. c. 66A, §2(c). Finally, G.L. c. 66A, §2(i) grants the employee full access to information in the Division's file relating to that employee.

portions of the file not so exempt should be made available to the public as long as this can be done without also disclosing the protected information.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 10 October 20, 1977

John J. McGlynn
Supervisor of Public Records
McCormack State Office Building
One Ashburton Place, Room 1709
Boston, Massachusetts 02108

Dear Mr. McGlynn:

You have asked for an opinion concerning the validity of a regulation you have issued limiting the fees which custodians of public records may charge for furnishing copies of such records to the public.[1] Specifically, you wish to know whether (1) you have the authority to establish a general fee schedule and (2) whether the fee schedule set forth in your promulgated regulation is reasonable.[2]

I find that you do have the authority to set limits on the fees which custodians of public records charge for furnishing copies to members of the public. With regard to your second question, however, I must decline to state whether or not the specific fee schedule you have established is reasonable. At the same time I note that there is a strong presumption of reasonableness which attaches to duly promulgated regulations. My reasons for these responses are set forth below.

1. The definition of a "public record" in the General Laws is very broad. G.L. c. 4, §7 cl. 26. The definition clearly applies to records kept by cities and towns and other political subdivisions of the Commonwealth, as well as the records of agencies and other entities of state government. [3] *Bougas* v. *Chief of Police of Lexington*, Mass. Adv. Sh. (1976) 2236.

Prior to 1973, the public records law provided that inspection and furnishing of copies of town public records could be regulated by ordinance or by-law, and the fees for furnishing such copies were specifically prescribed by statute. G.L. c. 66, §10 (as amended by St. 1948, c. 550, §5); G.L. c. 262, § 34 (65) (as amended by St. 1948, c. 550, §1). Chapter 1050 of

[1]The regulation reads as follows:
"Except where fees for copies of public records are prescribed by law, and except as may be provided in any schedule of fees from time to time approved by the Supervisor, a governmental agency shall charge no more than ten cents per page for copies of public records which may be located and copied by standard office procedures except that where the actual cost for reproduction is greater than ten cents per page, the agency shall charge no more than twenty cents per page for said copies. Where a request requires services to be performed in addition to standard office procedures, an additional fee may be charged that reasonably reflects the costs of the additional services. For purposes of this section, the reproduction of records not susceptible to photocopying (e.g oversize documents, punch cards, magnetic tapes) and services performed by an employee upon a request to furnish access or produce copies where the employee expends more than twenty minutes to fulfill the request shall not be included in "Standard Office Procedures".' Secretary of the Commonwealth, Division of Public Records, *Freedom of Information Regulations*, Reg. 2.5, reprinted in 40 Mass. Reg. at 61 (Jan. 20, 1977)."

[2]Your letter indicates that your particular concern is with your power to regulate fees charged by clerks of the various cities and towns. I have focused my opinion to address this concern. *See Secretary of the Commonwealth* v. *City Clerk of Lowell*, Mass. Adv. Sh. (1977) 1674, 1679.

[3]The only type of governmental agency which may be exempt from coverage by the public records law is one created by a statute which allows the agency to exempt itself from coverage. *See* 1976/77 Op. Atty. Gen. No. 12 (University of Massachusetts enabling statute allows Trustees to exempt themselves from coverage of Open Meeting Law).

the Acts of 1973 changed the statutory scheme. It repealed the statutory fee schedule for copies of town and city public records appearing in G.L. c. 262, §34 (65). and amended G.L. c. 66, §10, to provide that every custodian of public records was to furnish requested copies "on payment of a reasonable fee", and, if required, on payment of "the actual expense" of any necessary search for a particular document. G.L. c. 66, §10(a) (as amended by St. 1973, c. 1050, §3).

In 1976, the public records law was again amended. St. 1976, c. 438, §§1, 2. A sentence was added to G.L. c. 66, §1, directing the Supervisor of Public Records[4] to adopt regulations under G.L. c. 30A "to implement the provisions of [c. 66]."[5] The freedom of information regulations, including the fee schedule at issue, were promulgated pursuant to this statutory grant of authority. See n. 1. *supra.* The fee schedule is intended specifically to implement the "reasonable fee" provision in G.L. c. 66, §10 (a).

Although nothing in c. 66 explicitly provides that the Supervisor of Public Records shall determine reasonable fee levels for public record copies, the statutory background outlined above plainly embraces fee schedules as within the scope of your authority. As Supervisor you have broad authority to effectuate the purposes of c. 66, and the setting of a fee schedule is "reasonably related to the purposes of the enabling legislation." *Thorpe* v. *Housing Authority of Durham,* 393 U.S. 268, 280-281 (1969). The Supreme Judicial Court recently upheld similar regulations of the Department of Public Health which elaborated upon the meaning of the word "reasonable" in a statute. *Consolidated Cigar Corp.* v. *Department of Public Health,* Mass. Adv. Sh. (1977) 1419, 1433. *See Colella* v. *State Racing Comm'n,* 362 Mass. 152, 155 (1971); *see also Commonwealth* v. *Racine,* Mass. Adv. Sh. (1977) 1101, 1106-1107; *Cleary* v. *Cardullo's Inc.,* 347 Mass. 337, 344 (1964).

2. You have asked whether the specific fee schedule prescribed in Reg. 2.5[6] is reasonable. The question of reasonableness is matter of judgment which lies within your administrative discretion in the first instance. *Cf. Lybarger* v. *Cardwell,* ___ F. Supp. ___ (D. Mass. 1977) 5 M.L.W. 778. Without further information concerning the actual costs of reproducing documents, I cannot determine whether or not your judgment was correct.[7]

Nevertheless, the fee schedule. as a duly enacted regulation, is presumed to be valid. *Consolidated Cigar Corp.* v. *Department of Public Health, supra* at 1433; *Druzik* v. *Board of Health of Haverhill,* 324 Mass. 129. 138-139 (1949). All custodians of public records should therefore comply with the schedule in its current form.

Very truly yours.
FRANCIS X. BELLOTTI
Attorney General

[4]The Supervisor's position and duties are defined by G.L. c. 9, §4.

[5]Section 10(b) was further amended to create an administrative appeal for a person seeking public records in addition to the existing judicial remedy; the section now authorizes the bringing of an appeal to the Supervisor of Public Records when a custodian refuses to furnish a copy of a particular record, and grants the Supervisor the power to request that the Attorney General or appropriate district attorney enforce compliance with the Supervisor's orders.

[6]See n. 1, *supra.*

[7]I note that the distinction drawn in the regulation between the copying fee itself and a fee for additional services is also reflected in the governing statute, G.L. c. 66, §10 (a).

Number 11 November 14, 1977

Paul J. Moriarty
State Building Code Commission
John W. McCormack State Office Building
One Ashburton Place
Boston, MA 02108

Dear Mr. Moriarty:

You have asked my opinion on behalf of the State Building Code Commission (Commission) concerning the following questions:

1) Do the provisions of G.L. c. 143, §3R,[1] apply to buildings and structures erected prior to the effective date of that law?
2) May the Commission clarify by regulation, in terms consistent with the answer given to the first question, whether or not G.L. c. 143, §3R, applies to buildings erected prior to the effective date of the legislation?[2]

For the reasons set forth below, it is my opinion that G.L. c. 143, §3R, (the "Lock Law") applies to all buildings erected before and existing at the time the statute or any amendments to it went into effect,[3] as well as to buildings constructed thereafter. In response to your second question, the Commission is authorized, pursuant to its general rulemaking powers contained in G.L. c. 23B, §17, to issue rules and regulations which incorporate and explain the provisions of G.L. c. 143, §3R, provided such rules and regulations are consistent with the language of the statute.

By its terms, G.L. c. 143, §3R, applies to "every apartment house having more than three apartments. . . ." The articulated limitations on the law's coverage relate solely to the type of building and the number of apartments within a building; there is no reference to any limitation based on the date of construction.

The Supreme Judicial Court has interpreted similar statutes and ordinances according to their plain meaning, and has declined to read in an exclusion for existing buildings where the statute or ordinance did not

[1]General Laws c. 143, §3R, provides:

"At least one of the doors of the main common entryway into every apartment house having more than three apartments shall be so designed or equipped as to close and lock automatically with a lock, including a lock with an electrically operated striker mechanism, a self-closing door and associated equipment, and such lock, door or equipment shall be of a type approved by the state building code commission. Every door of the main common entryway and every exterior door into every such apartment house, other than the door of such main common entryway which is equipped as provided in the preceding sentence, shall be equipped with a lock of a type approved by said state building code commission; provided, however, that the said commission may, in writing, waive any of the requirements of this section in appropriate cases in which, in its opinion, other security measures are in force which adequately protect the residents of such apartment house. Whoever, being in control of such premises, willfully and knowingly violates the provisions of this section shall be punished by a find of not more than five hundred dollars.

This section shall not apply to lodging houses, as defined in section twenty-two of chapter one hundred and forty, dormitories of charitable, educational or philanthropic institutions or projects of housing authorities, as defined in chapter one hundred and twenty-one."

[2]You have informed me that many existing apartment houses having more than three apartments currently do not satisfy the requirements of G.L. c. 143, §3R. The questions you have asked me arise because the State Building Code Appeals Board, established pursuant to G.L. c. 23B, §23, has recently heard several appeals requesting waivers from the provisions of G.L. c. 143, §3R, under the proviso concerning waivers which appears in the first paragraph of the section.

[3]As originally enacted, §3R required only that "one of the doors of the main common entryway into every apartment house having more than three apartments" be designed to close and lock automatically. St. 1965, c.464, §1. In 1967 the section was amended to include the current second sentence of the section's first paragraph, requiring that every door of the main common entryway and exterior door of included apartment houses be equipped with a lock St. 1967, c. 735, §1. In 1969, §3R was again amended to add the requirements concerning locks with electrically operated striker mechanisms, self-closing doors, and associated equipment which are now set forth in the first sentence of the first paragraph. St. 1969, c. 303, §1.

expressly contain one. *See Paquette* v. *Fall River,* 338 Mass. 368, 375 (1959); *Commonwealth* v. *Roberts,* 155 Mass. 281, 282-283 (1892); *Cf. Commonwealth* v. *Racine,* Mass. Adv. Sh. (1977) 1101, 1102-1103 (lead paint). If the Legislature, in enacting G.L. c. 143, §3R, had intended to restrict its applicability to buildings constructed after the effective date of the statute, it clearly could have included language to accomplish that result. *See, e.g.* St. 1973, c. 395, enacting G.L. c. 148, §26A; St. 1974 c. 214, enacting G.L. c. 148, §26B; St. 1975, c.676, amending G.L. c. 148, §§26A and 26B; *see also* St. 1974, c. 528.[4] In the absence of an explicit limitation, the requirements of G.L. c. 149, §3R, must be read to apply to buildings erected prior to the effective date of the statute or its amendments, as well as to the buildings erected thereafter.[5]

Your second question asks whether you may set forth the conclusion on the law's coverage, stated above, in the form of a regulation. General Laws, c. 23B, §17(a), establishes the Commission's general authority to make rules and regulations relating, *inter alia,* to building construction, alteration and repair requirements. The Commission may use this rulemaking authority to promulgate regulations which incorporate and explain the specific statutory requirements set forth in G.L. c. 143, §3R. Any such regulation, however, must be consistent with the statute's terms in order to be valid. *See, e.g., Bureau of Old Age Assistance* v. *Commissioner of Public Welfare,* 326 Mass. 121, 124 (1950). They may not, for example, attempt to limit the application of §3R to buildings erected after the date of the statute.[6]

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

[4]These statutes expressly provided that the structural requirements which they prescribed were to apply to buildings begun or substantially altered after a certain date. *See* St. 1973, c. 395, §3; St. 1974, c. 214, §2; St. 1975, c. 676, §3; St. 1974, c. 528, §3. By contrast, the legislative history of G.L. c. 143, §3R, reveals that neither the 1965 statute originally enacting the section nor the 1967 and 1969 amendments (see n.3, *supra*) contained any provision that limited the section's requirements to buildings erected or altered after a particular date.

[5]Statutes such as §3R which require alterations to existing structures in order to comply with later-enacted safety measures have been held to be prospective in operation, in the sense that they apply to "violations which continue after [the statute's] passage or which then come into existence." *Commonwealth* v. *Roberts, supra* at 283. *Cf. Hoffman* v. *Howmedica,* Mass. Adv. Sh. (1977) 1488, 1492. Such statutes have been consistently upheld as constitutional exercises of the police power. *See, e.g., Queenside Hill Realty Co., Inc.* v. *Saxl,* 328 U.S. 80, 83 (1946); *Pacquette* v. *Fall River, supra* at 375-376.
The Commission, in accordance with the waiver provision of §3R, may waive any of the section's requirements for a building governed by the statute, if it determines that other security measures adequately protect the building's residents.

[6]You have expressed a concern that if the Commission adopts regulations as part of the State Building Code pursuant to G.L. c. 23B, §17(a), stating that G.L. c. 143, §3R, applies to existing buildings, those regulations would contravene the provisions of G.L. c. 143, §92. That section provides that new provisions of the Building Code or other regulations shall not affect building permits lawfully issued before the effective date of any such provisions, or buildings lawfully begun before that date. There is no inconsistency between G.L. c. 143, §3R, and c. 143, §92. The requirements of §3R are statutory; they do not exist as separate Code requirements. The limitations imposed by §92 apply only to Code provisions which have no express statutory basis.

Number 12 November 28, 1977

Carol S. Greenwald
Commissioner of Banks
Office of the Commissioner of Banks
100 Cambridge Street
Boston, Massachusetts 02202

Dear Commissioner Greenwald:

You have requested my opinion on the interpretation of the licensing provisions of G.L. c. 93, §24. In particular, you ask whether a Pennsylvania corporation seeking to conduct the business of a collection agency in the Commonwealth is required to obtain a license from you pursuant to §24. On the basis of the facts recited in your request, it is my opinion that the licensing requirement in §24 does not apply to the corporation in question.[1]

You state that the Pennsylvania corporation operates in the ordinary course of business as a collection agency for public utility corporations in Pennsylvania, and that it currently seeks to do the same kind of collection business for utility companies serving Massachusetts residents. The corporation would have no contact with Massachusetts debtors except through letters sent from outside the Commonwealth. The letters would encourage debtors to make payments directly to the utility company and the corporation would itself transmit to its clients all payments it happened to receive.

The need for the corporation to obtain a collection agency license in these circumstances requires a two step analysis of G.L. c. 93, §24. The first question is whether the corporation comes within the scope of the section's general licensing requirement. If so, it is necessary to determine whether the corporation falls among the exceptions specified in the statute.

The licensing requirement of §24 is broad in scope. Its plain intent is to reach virtually every type of collection activity unless that activity is performed by a person or business made specifically exempt. Thus, the Pennsylvania corporation must be deemed to fall within the general bounds of §24. It remains to determine whether the corporation qualifies for a §24 exception.

One exception set forth in §24 is for

> an agent or independent contractor employed for the purpose of collecting charges or bills owed by a . . . customer to a corporation subject to the supervision of the department of public utilities . . . in so far as said person collects charges or bills only for such supervised corporations . . . .

[1] Section 24 provides:

"No person not being an attorney at law authorized to practice in the commonwealth, a bank as defined in chapter one hundred and sixty-seven, a national banking association having its main office in the commonwealth, or a person whose usual business is not that of a collection agency, who acts as agent for such bank or national banking association for the purpose of collecting any accounts, bills or other indebtedness which arise from such *person's usual business, or an agent or independent contractor employed for the purpose of collecting charges or bills* owed by a tenant to a landlord or *owed by a customer to a corporation subject to the supervision of the department of public utilities* or the division of insurance *in so far as said person collects charges or bills only for such landlord or supervised corporations*, shall directly or indirectly conduct a collection agency, or engage in the commonwealth in the business of collecting or receiving payment for others of any account, bill or other indebtedness, or engage in the commonwealth in soliciting the right to collect or receive payment for another of any account, bill or other indebtedness, or advertise for or solicit in print the right to collect or receive payment for another of any account, bill or other indebtedness, without first obtaining from the commissioner of banks a license to carry on said business, nor unless such person or the person for whom he or it may be acting as agent has on file with the state treasurer a good and sufficient bond. The commissioner may from time to time establish such regulations pertaining to the conduct of the business as he may deem necessary."
[Emphasis supplied.]

The apparent premise for this exception is that the Department of Public Utilities possesses sufficient authority to supervise and regulate utility bill collections in the public interest. *Cf. Cambridge Electric Light Co.* v. *Department of Public Utilities,* 363 Mass. 474 (1973). On the basis of the facts given me, I have assumed that the Pennsylvania corporation in question would operate in Massachusetts as an "agent" collecting only for "corporation[s] subject to the supervision of the Department of Public Utilities."[2] Therefore, it need not be licensed by the Commissioner of Banks in order to conduct its collection business in Massachusetts.[3]

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 13 November 29, 1977

John R. Buckley, *Secretary*
Executive Office of Administration and Finance
State House
Boston, Massachusetts 02133

Dear Secretary Buckley:

You have asked on behalf of the Teachers' Retirement Board[1] how certain severance payments made to retiring teachers should be treated in calculating those teachers' retirement allowances. Specifically, you state that several school committees provide severance payments for unused sick leave to retiring teachers pursuant to contractural agreements.[2] You ask whether these payments constitute "regular compensation" under G.L. c. 32, §1, for purposes of computing the retired teachers' retirement allowances. I conclude that the severance payments qualify as "regular compensation" as defined by G.L. c. 32, §1,[3] and must be included in the retirement allowance computation. My reasons are discussed below.

Under G.L. c. 32, §5(2), the retirement allowance for any retirement system member classified in Groups 1, 2 or 4[4] is

[2]If the corporation intends to collect bills from Massachusetts residents on behalf of utilities that are not regulated by the Department of Public Utilities or on behalf of other entities, it would no longer come within the scope of the quoted §24 exception, and a collection agency license would be necessary.

[3]This opinion, as is true of G.L. c. 93, §24, considers only the activities of the Pennsylvania corporation conducted in the Commonwealth. Massachusetts has no jurisdiction to regulate the corporation's activities outside of this state.

[1]General Laws c. 7, §4G, places the Board within the Executive Office of Administration and Finance.

[2]As an example of such a contractual agreement you cite a collective bargaining agreement between the Lee School Committee and Lee public school teachers which provides:

> A severance pay for cumulative sick leave will be paid to a teacher or his estate, who has served twelve (12) years in the Lee School System, upon retirement or termination. Formal notice of retirement or termination shall be given at least thirty (30) days prior to the start or closing of the school year. The severance pay will be paid in the last two (2) paychecks; the rate will be determined by the number of accumulative sick leave days, up to a maximum of 16 days x 1/180 of that teacher's annual salary.

[3]General Laws, c. 32 §1, defines regular compensation during any period after December 31, 1945, to mean:

> [T]he 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 . . .
>
> . . . .
>
> In the case of a teacher employed in a public day school who is a member of the teachers' retirement system, salary payable under the terms of an annual contract for addditional services in such a school and also compensation for services rendered by said teacher in connection with a school lunch program or for services in connection with a school lunch program or for services in connection with a program of instruction of physical education and athletic contests as authorized by section forty-seven of chapter seventy-one shall be regarded as regular compensation rather than as bonus or overtime and shall be included in the salary on which deductions are to be paid to the annuity savings fund of the teachers' retirement system.

[4]Teachers are classified in Group 1 for the purpose of computing the amount of their retirement allowance. *See* G.L. c. 32, §2(g).

> . . . based on the annual rate of *regular compensation* received by such member during any period of three consecutive years of creditable service for which such rate of compensation was the highest, or on the average annual rate of *regular compensation* received by such member during the period or periods, whether consecutive or not, constituting his last three years of creditable service preceding retirement . . . (emphasis supplied).

Thus, the greater the amount of regular compensation which a member earns during his final three years of creditable service, the greater will be his retirement allowance.

The Supreme Judicial Court has upheld the validity of a collective bargaining agreement provision which grants a retiring teacher a salary increase in the final year of service to reflect unused sick or personal leave. *Fitchburg Teachers Association* v. *School Committee of Fitchburg*, 360 Mass. 105, 106-107 (1971). The court characterized such a provision as

> . . . part of the over-all package of service and benefits worked out by the parties pursuant to collective bargaining and embodied in the contract . . . [and] a valid exercise by the [school] committee of its power to set wages. 360 Mass. at 107.

See also Averell v. *Newburyport*, 241 Mass. 333, 335 (1922); *cf. Quinlan* v. *Cambridge*, 320 Mass. 124, 128 (1946). The severance payments considered here are identical in substance to the "salary adjustment" in the *Fitchburg Teachers Association* case. Accordingly, under the reasoning of that case it is clear that the payments represent valid compensation or salary arrangements agreed to by and binding on the affected school committees and teachers.

The question that remains is whether the severance payments, although constituting compensation, nevertheless fall outside the definition of "regular compensation" because they are "bonuses" as that term is used in G.L. c. 32, §1.[5] In *Attorney General* v. *Woburn*, 317 Mass. 465 (1945), the court considered the legality of a lump sum "bonus" granted by a school committee to its teachers during a single year. The court held that the payment was a valid and binding contractual obligation providing compensation for services rendered. In *Fitchburg Teachers Association, supra*, the Court referred to the *Woburn* case, stating that the retiring Fitchburg teachers' salary adjustment resembled the "bonus" provision sustained in *Woburn*. *Fitchburg Teachers Association, supra*, 360 Mass. at 107. In both these cases, however, the question before the court was whether the payments at issue represented gratuities or gifts from the respective school committees rather than compensation for services actually performed. The court did not consider the distinction between the terms "bonus" and "salary" or "compensation" as they appear in G.L. c. 32, §1. Given the different concerns at issue, I do not believe that the court's

[5] I do not consider whether the severance payments might be classified as "overtime" as that word appears in G.L. c. 32, §1. Overtime is generally defined as payment for work which is not customary or normal. *See Smith* v. *Lowell*, 334 Mass. 516, 519 (1956); *see also* Prosecutors, *Detectives and Investigators Assn.* v. *Hudson County Board of Chosen Freeholders*, 130 N.J. Super. 30, 324 A.2d 897, 902 (1974). There is no indication that the work done by the teachers entitling them to the severance payments was not normal or customary, or that the work was done outside of normal and customary working hours.

discussion of the word "bonus" in these two cases answers the question you have asked.

Turning to general principles of statutory construction, it is axiomatic that a statute should be interpreted in accordance with the legislative intent "ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied, and the main object to be accomplished . . . ." *Massachusetts Commission Against Discrimination* v. *Liberty Mutual Ins. Co.* Mass. Adv. Sh. (1976) 2403, 2407. The general purposes of the retirement statutes are "beneficent", *Selectmen of Brookline* v. *Allen,* 325 Mass. 482, 486 (1950), and as the court indicated in that case, the compensation provisions of such statutes should be broadly construed. The provision for severance payments at issue here represents an integral term of a comprehensive collective bargaining package governing teachers' salaries. Given the contractual nature of these payments, I conclude that for purposes of G.L. c. 32, §1, the payments must be deemed part of the retiring teachers' "salary, wages or other compensation in whatever form", and not a "bonus."[6]

This reading of the statute is strengthened by reference to the provision of G.L. c. 32, §1, which states that, for a public school teacher, "salary payable under the terms of an annual contract for additional services in such a school . . . shall be regarded as regular compensation rather than as bonus or overtime. . . ." A teacher who receives a severance payment as a result of not taking all the sick days available in a sense has given additional service to the school system. Since the payments are provided for "under the terms of an annual contract" they seem to fall within the scope of the quoted statutory language and should be treated as "regular compensation" for purposes of calculating the teacher's retirement allowance.[7]

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Attorney General v. *Woburn, supra,* and *Selectmen of Brookline* v. *Allen, supra.* provide implicit support for this conclusion. Both cases suggest that an important element of a "bonus" is its temporary or non-continuing character *See Woburn,* 317 Mass. at 468; *Allen,* 325 Mass. at 485-486. There is no suggestion in the materials you sent me that provisions for severance payments in certain collective bargaining agreements are likely to be limited to a single year's agreement Rather it seems more reasonable to assume that future agreements will contain similar provisions.

I should emphasize that my conclusion regarding the treatment of severance payments for purposes of computing a teacher's retirement allowance is limited to those payments arising under the terms of a collective bargaining contract. I do not reach the question of whether severance payments made to retiring teachers under a different or less formal arrangement would also qualify as "regular compensation" as the term is used in G.L. c. 32, §1.

Number 14. December 12, 1977

Amelia Miclette
Chairperson
Civil Service Commission
One Ashburton Place
Boston, Massachusetts 02108

Dear Ms. Miclette:

You have asked whether execution of the collective bargaining agreement (Agreement) between the Commonwealth and state employees[1] on November 23, 1976,[2] has nullified the responsibility of the Civil Service Commission (Commission) to decide employee class reallocation appeals[3] pending before it on the date the Agreement was signed.

Before the effective date of the Agreement, employee requests for class reallocations were handled by the Division of Personnel Administration and the Commission under G.L. c. 30, §§45 and 49. You have informed me that thirteen class reallocation appeals were still pending before the Commission on the date the Agreement was executed. Some of these appeals had been acknowledged but not yet scheduled for hearing; others had been heard and were awaiting decision by the Commission. Sometime after November 23, 1976, three of these appeals were voluntarily withdrawn, but the remaining ten are being pressed.

The question that arises is whether the Commission continues to have authority to decide these ten pending appeals in view of the terms of Article 17A of the Agreement. Article 17A provides in §1 that all requests for class reallocations are to be governed by the Agreement's grievance procedure, culminating, if necessary, in arbitration. Section 2 of Article 17A goes on to state:

> The Employer and the Union agree that the procedure provided in Section 1 shall be the sole procedure for class reallocations for all classes covered by this Agreement, and no other class reallocations shall be granted during the term of this Agreement.

For the reasons set forth below, I advise you that in my opinion Article

[1]The state employees' collective bargaining representative (the "Union") is composed of an alliance of the American Federation of State, County and Municipal Employees Union (AFSCME), AFL-CIO, and its affiliate councils, and the Services Employees International Union (SEIU), and its affiliate locals.

[2]The Agreement in its original form was in effect from November 23, 1976, through June 30, 1977. Since that time the Commonwealth and various groups of its employees have entered into new collective bargaining contracts, all of which contain the same relevant provisions as the Agreement. For the sake of convenience I therefore refer throughout this opinion to the original Agreement.

[3]Class reallocations are predicated upon the classification system and the pay plan governing most state employees and outlined in G.L. c. 30, §§45-50. Under the system, positions with similar duties and responsibilities are grouped into "classes". G.L. c. 30, §45 (1) (b). Offices and positions in the same class are allocated to the same job group; placement in job groups determines salary in accordance with the salary schedule set forth in G.L. c. 30, §46. G.L. c. 30, §45(3). Pursuant to G.L. c. 30, §45, the Personnel Administrator is responsible for classifying positions and allocating and reallocating classes to the appropriate job groups in the salary schedule.

As in effect on November 23, 1976, G.L. c. 30, §45, also permitted employees of the Commonwealth to object to any provision of the classification scheme affecting their positions by appeal to the Personnel Administrator. If the Personnel Administrator sustained an appeal, he was required to report his recommendation to the budget director and the House and Senate Committees on Ways and Means in accordance with G.L. c. 30, §45(4). If the Personnel Administrator denied the appeal, a further appeal was allowed to the Civil Service Commission pursuant to G.L. c. 30, §49. A decision by the Commission favorable to the employee required the Commission to report its recommendation to the budget director and the House and Senate Committees on Ways and Means. G.L. c. 30, §49.

17A appears to supersede the Commission's jurisdiction and authority over all class reallocation appeals, and precludes the Commission from deciding those appeals pending before it on November 23, 1976.[4]

The statute governing collective bargaining by state employees, G.L. c. 150E, provides that in the case of a conflict between the terms of a collective bargaining agreement and the specific statutory provisions of G.L. c. 30 relating to class reallocation appeals, the term of the agreement shall prevail. G.L. c. 150E, §7.[5] Such a conflict seems to exist between the provisions of G.L. c. 30, §§45 and 49, and Article 17A of the Agreement: Article 17A provides that the Agreement's grievance procedure (set forth in Article 23a) represents the only procedure for resolving class reallocation questions during the term of the Agreement; G.L. c. 30, §§45 and 49, establish a separate and different administrative channel through which reallocation appeals may be brought. Thus pursuant to G.L. c. 150E, §7, the statutory appeal process clearly appears to be superseded by Article 17A. *See also* St. 1977, c. 628, amending G.L. c.30, §49.[6]

Turning to the ten class reallocation appeals pending before the Commission, the terms of the statutory appeal process, when read together with Article 17A, §2 of the Agreement, indicate that the Commission should not decide these appeals. Under G.L. c. 30, §§45(4) and 49, the Commission's ultimate ability to grant relief to appealing employees is limited to making recommendations for future action on class reallocations by the budget director and the House and Senate Committees on Ways and Means. However, any such recommendations in the pending cases would be futile because under the express terms of Article 17A, §2, no class reallocations other than those granted through the Agreement's grievance procedure can be granted during the term of the Agreement.

Moreover, the shift from the statutory appeal process of G.L. c. 30, §§45 and 49, to the Agreement's grievance procedure is a procedural rather than a substantive change. The basic standard governing class reallocations remains the same: similar or comparable positions are still to be located within the same salary range. *Compare* G.L. c. 30, §45 (1) (b) and (3), *with*

---

[4]I note at the outset a caveat to my opinion. Under G.L. c. 150E, §8, a public employee collective bargaining agreement may contain "a grievance procedure culminating in final and binding arbitration to be invoked in the event of any dispute concerning the interpretation or application of such written agreement." The Agreement at issue here contains such a grievance procedure. *See* Article 23a, §§1 *et seq.* Therefore, interpretation of its provisions is ordinarily reserved to an arbitrator, and the Attorney General would not render an opinion on the meaning of the Agreement's terms. *Cf.* 1968/69 Op. Atty. Gen. No. 30, *reprinted in* P.D. No. 12 at 100, 102 (1969). However, under the express terms of the Agreement, only an employee or the Union may initiate the grievance procedure. *See* Article 23a. As mentioned above, the Union has not invoked the grievance procedure with respect to the pending class reallocation appeals, but has instead asked you to decide those appeals. It thus appears that an arbitrator cannot resolve the interpretive questions necessarily raised by your opinion request. While I cannot perform an arbitrator's function and authoritatively construe the Agreement, as your lawyer I am responsible for advising you on questions relating to your official duties. To that end I give here my opinion on the appropriate manner of handling the class reallocation appeals pending before the Commission.

[5]Section 7 reads in pertinent part:

> If a collective bargaining agreement reached by the employer and the exclusive representative contains a conflict between matters which are within the scope of negotiations pursuant to section six of this chapter and . . . .
> (c) section 24A, *paragraphs (4) and (5) of section forty-five,* paragraphs (1) (4) and (10) of section forty-six, *section forty-nine, as it applies to allocation appeals,* and section fifty-three of chapter thirty . . . .
> the terms of the collective bargaining agreement shall prevail. [Emphasis supplied.]

The subject matter of Article 17A, class realloation appeals, is a matter "within the scope of negotiations" under G.L. c. 150E, §6. Section 6 permits negotiation "with respect to wages, hours, standards of productivity and performance, and any other terms and conditions of employment. . . ." As explained above, the classification of an employee's position determines his salary or wage level.

[6]Chapter 628, enacted as an emergency law on October 21, 1977, made the legislative mandate in G.L. c. 150E, §7, even more explicit. It added a paragraph to G.L. c. 30, §49, which provides specifically that the section shall not apply to class reallocation appeals of employees who are part of a public employee collective bargaining unit.

Article 17A. §1 (b).[7] Implementation of Article 17A only alters the manner in which reallocation appeals are decided and thus affects remedies rather than substantive rights.

It is a general rule of statutory construction that statutes affecting remedies are commonly treated as operating retroactively, and construed to apply to pending actions or causes of action. *See, e.g., Palmer* v. *Selectmen of Marblehead*, Mass. Adv. Sh. (1975) 2837, 2841-2842; *Hein-Werner Corp.* v. *Jackson Industries, Inc.*, 364 Mass. 523, 525 (1974); *Smith* v. *Freedman*, 268 Mass. 38, 40 (1929); *E.B. Horn Co.* v. *Assessors of Boston*, 321 Mass. 579, 584 (1947). Under the principles set forth in these cases, I conclude that Article 17A should be retroactively applied[8] to cases pending at the time the Agreement was executed.[9] Thus, in my opinion the Commission has no jurisdiction to decide class reallocation appeals pending before it on November 23, 1976.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 15 December 12, 1977

Frank A. Hall, *Commissioner*
Department of Correction
100 Cambridge Street
Boston, Massachusetts 02202

Dear Commissioner Hall:

You have requested an opinion about the relationship between G.L. c. 269, §10 (a)[1] ("gun control law"), and G.L. c. 127, §90A,[2] ("§90A") the

[7] Article 17A, §1 (b) of the Agreement provides that Union requests for class reallocation may be submitted as a grievance at Step 4 of the Agreement's grievance procedure. It goes on to state:

> Should any requests for reallocations be submitted to arbitration the question before the arbitrator shall be whether or not the requested reallocation is justified by the existence of an inequitable relationship between the positions covered by the reallocation and other positions covered by this Agreement when compared with comparable jurisdictions and other relevant evidence.

[8] While I apply Article 17A retroactively, I note that Article 17A itself is relevant only insofar as G.L. c. 150E, §7, and c. 30, §49 (as most recently amended) mandate that the terms of a public employee collective bargaining agreement shall govern over conflicting provisions in G.L. c. 30, §§45 and 49. In effect, therefore, my conclusion gives retroactive effect to c. 150E, §7, and c. 30, §49, themselves.

[9] I reach this result in view of the fact that neither G.L. c. 150E, §7, nor c. 30, §49, as recently amended treats the question of pending appeals. *Compare* St. 1974, c. 806, the statute which created the Executive Office of Environmental Affairs and reorganized existing agencies concerned with environmental matters. One section of the statute specifically provided for the continuation of all petitions and hearings pending before certain agencies on the statute's effective date. St. 1974, c. 806, §32.

[1] General Laws, c. 269, §10 (a), reads in pertinent part:

> Whoever, except as provided by law, carries on his person, or carries on his person or under his control in a vehicle, a firearm, loaded or unloaded, as defined in section one hundred and twenty-one of chapter one hundred and forty without . . . [having complied with certain statutory licensing requirements] shall be punished by imprisonment in the state prison for not less than two and one-half nor more than five years, or for not less than one year nor more than two and one-half years in a jail or house of correction. The sentence imposed upon such person shall not be reduced to less than one year, nor suspended, *nor shall any person convicted under this subsection (a) be eligible for* probation, parole, or *furlough* or receive any deduction from his sentence for good conduct *until he shall have served one year of such sentence.* (Emphasis supplied.)

[2] General Laws, c. 127, §90A provides in pertinent part:

> The commissioner may extend the limits of the place of confinement of a committed offender at any state correctional facility by authorizing such committed offender under prescribed conditions to be away from such correctional facility but within the commonwealth for a specified period of time, not to exceed fourteen days during any twelve month period nor more than seven days at any one time . . . Such authorization may be granted for any of the following purposes: (a) to attend the funeral of a relative, (b) to visit a critically ill relative; (c) to obtain medical, psychiatric, psychological or other social services when adequate services are not available at the facility and cannot be obtained by temporary placement in a hospital under . . . [G.L. c. 127, §§117, 117A, and 118]; (d) to contact prospective employers; (e) to secure a suitable residence for use upon release on parole or discharge; (f) for any other reason consistent with the reintegration of a committed offender into the community.
>
> A person away from a correctional facility pursuant to this section may be accompanied by an employee of the department, in the discretion of the commissioner, or an officer of a county correctional facility, in the discretion of the administrator.

statute authorizing certain temporary prison releases for incarcerated prisoners. Specifically, you ask:

1. Does the term "furlough" as used in G.L. c. 269, §10 (a) include all temporary releases under G.L. c. 127, §90A?
2. If the answer to Question 1 is negative, what furloughs does Section 10 (a) contemplate and what furloughs can this department authorize without violating the provisions of G.L. c. 269, §10 (a)?

The practical object of these questions is to determine if, and when, temporary prison releases authorized under §90A may be provided to persons convicted of a gun control offense, in light of the language in the gun control law rendering them ineligible for furloughs. For the reasons discussed below, I answer your questions as follows: (1) The term "furlough" as used in the gun control law does not preclude all temporary releases under §90A. (2) Temporary releases under escort to attend a relative's funeral (§90A(a)), visit a critically ill relative (§90A(b)), or obtain otherwise unavailable medical or related services (§90A(c)), are not precluded by the gun control law; however, temporary unescorted releases and releases to contact prospective employers (§90A(d)), or secure living arrangements upon release (§90A(e)), are precluded. I cannot give an opinion on the more abstract section authorizing temporary release "for any other reason consistent with the reintegration of a committed offender into the community" (§90A(f)).

The term "furlough" is not defined in the gun control law, and its meaning in that statute has not been judicially construed.[3]

You state that the Department of Correction has in the past interpreted the furlough prohibition of that statute restrictively to mean that a person convicted under the gun control law cannot obtain a release of any kind under §90A until he has served at least one year of the sentence. Your past interpretation rests on the grounds that (1) the Department regulations in effect at the time that the gun control law was amended in 1974 specifically defined "furlough" to include all temporary releases listed in §90A, including emergency releases under escort; and (2) the Legislature is presumed to be aware of pertinent regulations, and, therefore, to have categorically prohibited temporary releases for gun control offenders. You state that the harsh results of such a strict reading are out of step with modern criminal justice theory and practice; you have requested this opinion to determine whether your interpretation, with its harsh results, is mandated by the law.

Upon analysis, I conclude that the Department's construction of the word "furlough" in the gun control law is not compelled. The Legislature's 1974 amendment to that law offers inadequate reason for requiring the

[3]It does not appear that any cases have yet construed "furlough" in the corrections or prison context. *Cf. Devlin v. Commissioner of Correction*, 364 Mass. 435, 438-443 (1973) (temporary releases in §90A and §90A(f) in particular described as "furloughs" but term never defined). The word "furlough" has traditionally been considered a military term and has been interpreted in the military context to mean a leave of absence from military duty. *See, e.g., Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 287 (1946); *Brown v. United States*, 99 F. Supp. 685, 687 (D.W. Va. 1951). "Furlough" has also been used and interpreted in the context of employment as a leave of absence or a lay-off. *See, e.g., Jones v. Metropolitan Life Ins. Co.*, 156 Pa. Super., 39 A. 2d 721, 725-726 (1944). These definitions of the term, however, do not appear relevant to the determination of how "furlough" should be defined in a criminal statute. On the contrary, I consider "furlough" to be a term of art the meaning of which is a function of the particular context in which it is used. I must construe it accordingly. *See* G.L. c. 4, §6.

Department's interpretation. While there is a presumption of legislative awareness of administrative regulations, *see, e.g., Commonwealth* v. *Racine,* Mass. Adv. Sh. (1977) 1101, 1106-1107, the presumption is a limited one, which, like any tool of statutory construction, operates only as a guide in interpreting an ambiguous statute. It does not mandate a construction of a statute identical to regulations in every instance. There must be a proximate relationship between the regulation and the subsequent legislative action. In this case, the Department's furlough regulations were adopted to implement a statue, §90A, which uses different language than the gun control law[4] and has a different purpose. The value of the regulations as a guide to legislative intent is therefore weakened.[5] *See* C.P. Sands, *Sutherland Statutory Construction,* §51.01 (4th Ed. 1972). Moreover, the legislative histories of the two statutes in issue suggest that, in enacting the gun control law, the Legislature did not intend categorically to sweep aside all temporary releases authorized by §90A.

The six categories of temporary release authorized by §90A were approved in 1972. St. 1972, c. 777. However, earlier versions of §90A show that releases for some of these purposes have a long and uninterrupted history under Massachusetts law. As first enacted in 1923 (*see* St. 1923, c. 52), G.L. c. 127, §90A allowed inmates in the custody of correctional officers to attend the funerals of their spouses and of any next of kin. Chapter 394 of the Acts of 1951 permitted an inmate, again in the custody of a correctional officer, to visit certain sick relatives whose deaths were expected to be imminent. In addition, while not originally mentioned in §90A, the escorted release of an inmate to obtain necessary medical or related care has traditionally been permitted. *See* G.L. c. 127, §§117-118. The major changes wrought in 1972 were the authorization of unescorted releases, and the creation of new release categories relating directly to the prisoner's reintegration into the community. *See* §90A (d) - (f). For the first time as well, releases were permitted for up to 14 days per year and 7 days at any one time. As explained below, I believe that the word "furlough" applies only to the types of releases first established by the 1972 legislation.

The prohibition against furlough eligibility was added to the gun control law by a 1974 amendment. St. 1974, c. 649. The context of this amendment's passage suggests the source of the Legislature's concern. At about the same time c. 649 was enacted, the Legislature passed a resolve creating a special commission, composed primarily of senators and representatives, to study the effects of the "prisoner furlough program" on the citizens of the Commonwealth. 1974 Mass. Resolves, c. 52.

On October 29, 1975 the special commission submitted its interim report. The majority described the furlough program as one of several established by the 1972 amending legislation (St. 1972, c. 777) which was intended to reduce criminal recidivism by working towards the reintegration of the criminal into the community. Mass. S. Doc. No. 2131 at 8 (1975). The

[4]General Laws, c. 127, §90A, does not mention the term "furlough"; it speaks only of a "temporary release."

[5]*Compare Commonwealth* v. *Racine, supra* at 1107. That case involved the interpretation of a statute, G.L. c. 111, §198, which made specific reference to an existing body of administrative regulations. Similarly, in *Board of Assessors of Melrose* v. *Driscoll,* Mass. Adv. Sh. (1976) 1497, 1503, the Legislature was presumed to be aware of "the regulations of *the agency to which it referred*" (emphasis added) when the statute in question explicitly adopted the definition used by a designated agency.

majority also characterized the furlough program as one which permitted prisoners "to walk the streets, devoid of restraints." *Id.*[6]

The commission also expressed awareness, however, that before the furlough program began, prisoners had been permitted to leave the prisons in certain circumstances. The commission's majority stated, "[p]rior to the establishment of the furlough program, inmates were allowed to attend the funeral of a relative or to visit a critically ill relative." *Id.* at 33. Furthermore, the amendments to §90A proposed by the majority, designed to limit the availability of furloughs, retained a provision that would have allowed any offender to apply immediately for an escorted, emergency furlough for one of the reasons set forth in §90A (a), (b) and (c). *Id.* at 33, 54.[7]

The special commission's report presents the only clear record of the legislative perception of the furlough program,[8] and it suggests that the Legislature intended the term "furlough" in the gun control law to refer to unescorted, rehabilitative releases, and not releases under escort for the emergency purposes set forth in §90A (a) through (c).[9]

Finally, it should be noted that an interpretation of the term "furlough" which continues to permit emergency, escorted releases for the purposes set forth in G.L. c. 127, §90A(a), (b) and (c), is compatible with the legislative purpose of the gun control law. The aim of that statute is "to deter through a nondiscretionary penalty" by removing "many of the opportunities for the exercise of discretion and leniency." *Commonwealth* v. *Jackson*, Mass. Adv. Sh. (1976) 735, 744, 745; *see Commonwealth* v. *Hayes*, Mass. Adv. Sh. (1977) 928, 934. Given this purpose, it seems clear that the furlough prohibition was enacted to preclude unescorted releases of persons convicted under the gun control law for non-emergency reasons.

However, a temporary release in the custody of a correctional officer under the exigent circumstances listed in G.L. c. 127, §90A (a) through (c), presents a dramatically different situation. The events which would make a prisoner eligible for any of these releases are beyond his control; such a

[6]While disagreeing with the majority's proposals to restrict the furlough program, the minority of the commission shared the majority's view of the program's origins and salient features. *See* Mass. S. Doc. No. 2131, *supra* at 43-44, 46.

[7]*See also* Mass. H. Doc. No. 1696 (1975), entitled, "An Act Eliminating the Prison Furlough Program." This bill proposed to amend §90A by eliminating authorization for all the listed categories of temporary release except emergency releases, under escort, to attend a relative's funeral or to visit a critically ill relative.

[8]Although the special commission's report, written after the approval of St. 1974, c. 649, is not part of the "history" of that statute, it is "entitled to some consideration as a secondarily authoritative expression of expert opinion", C.D. Sands, *Sutherland Statutory Construction, supra* at §48.06. This is particularly true since it represents an interpretation of the word "furlough" made by a group of legislators under the explicit statutory mandate of the same Legislature which approved St. 1974, c. 649. *See Devlin* v. *Commissioner of Correction, supra* at 440, n. 7.

[9]The conclusion gains support from a look at other jurisdictions' definitions of the term "furlough" in the prison or corrections context. In 1965, Congress enacted legislation to authorize furlough and work release programs for federal prisoners, 18 U.S.C. §4082(c) (1) and (2). Pub. L. 89-176, 79 Stat. 674, *amending* 18 U.S.C. §4082(c) (1). In 1973, §4082(c) (1) was further amended to expand the types of furloughs that could be authorized. *See* Pub. L. 93-209, 87 Stat. 907. The legislative history of these acts clearly shows that Congress understood the term "furlough" to indicate a temporary, *unescorted* leave of absence from a prison, the purpose of which was to encourage rehabilitation by permitting the prisoner new freedoms and responsibilities. *See* S. Rep. No. 613, 89th Cong., 1st Sess. (1965), *reprinted in* [1965] U.S. Code Cong. & Ad. News 3076, 3079; S. Rep. No. 93-418, 93rd Cong., 1st Sess. (1973), *reprinted in [1973] U.S. Code Cong. & Ad. News 3018, 3018-3022.* Indeed, in regulations implementing 18 U.S.C. §4082(c) (1), the Federal Bureau of Prisons has specifically defined "furlough" to mean any authorized absence from a prison except under escort. *See* Federal Prison System, Policy Statement No. 7300.12D, §46.

Furlough programs established by other states have also used the term to mean temporary releases (a) without an escort and (b) for rehabilitative purposes such as contacting employers and family visiting. *See, e.g.,* New York Correction Law, §§851.4, 853 (McKinney Supp. 1976). New York has a statutory "leave of absence" program, separate from its furlough program, to accomodate prisoners who need emergency medical treatment or to visit dying relatives. *Id.* §§851.6, 853.3. *See generally* Project: Temporary Release in New York Correctional Facilities, 38 Alb. L. Rev. 691, 702, 712-713 (1974). *See also* Pa. Stat. Ann. tit. 61, §1051 *et seq.* (West Supp. 1977); Comment: An Evaluation of the Home Furlough Program in Pennsylvania Correctional Institutions, 47 Temp. L. Q. 288 (1974).

release, therefore, cannot realistically be viewed as providing an opportunity for the exercise of "discretion and leniency" in violation of the gun control law's mandate. *Cf. Commonwealth* v. *Hayes, supra,* Mass. Adv. Sh. (1977) at 933-934. There the court held that a construction of the gun control law permitting offenders to be sentenced to M.C.I. Concord, rather than solely to M.C.I. Walpole, did not contravene the law's purpose to prohibit leniency and discretionary punishment, although offenders at Concord would be eligible for parole earlier than those at Walpole. If the Legislature had intended to prevent gun control law offenders from being eligible for each of the temporary releases listed in §90A, it could have said so. *See Commonwealth* v. *Hayes, supra* at 933.[10]

In summary, I conclude that the word "furlough" as used in the gun control law may fairly be read to proscribe all unescorted temporary releases of prisoners as well as releases granted for the purposes set forth in §90A (d) and (e). However, a prisoner's escorted, temporary release to (a) attend a funeral, (b) visit a dying relative, or (c) obtain medical care, as respectively described in G.L. c. 127, §90 (a) through (c), is not a "furlough" prohibited by G.L. c. 269, §10 (a), and you may exercise the discretion conferred on you by §90A to permit escorted temporary releases for such purposes.

I decline to answer whether all escorted releases under §90A (f) must be prohibited under the gun control law. The wording of clause (f) is very broad. It is not beyond possibility that it might include within its scope an emergency situation in which an escorted release would not constitute a "furlough" under the principles set forth above. Without specific facts, however, I am not in a position to render an opinion on the question.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 16 December 22, 1977

Wallace C. Mills, *Clerk*
House of Representatives
State House
Boston, Massachusetts 02133

Dear Mr. Mills:

You have transmitted an order of the House of Representatives, designated as House No. 6790, which asks my opinion on the following question:

> Is the expenditure of large sums of money by the Secretary of Manpower Affairs for radio and newspaper ads promoting expansion of industry within the Commonwealth in contraven-

[10] Also relevant here is the general rule that penal statutes are to be strictly construed. *Commonwealth* v. *Devlin,* 366 Mass. 132, 137-138 (1974). This principle has been applied not only to that portion of a criminal statute defining the crime, but also to the portion prescribing the penalty. *See Wood* v. *Commissioner of Correction,* 363 Mass. 79 (1973). In that case the court declined to construe broadly a statute providing for the loss of good time deductions from sentences by prisoners found guilty of escape or attempted escape. The court stated: "Since we have an ambiguous penal statute to interpret . . . we must construe it strictly . . . to prevent its extension by implication unless the Legislature made this intent manifest (citations omitted)." 363 Mass. at 8[illegible].

> tion to the statutory language of item 9091-0400 [.] Chapter 363A of the Acts of 1977?[1]

Pursuant to the responsibilities conferred by G.L. c. 12, §9. I respectfully submit the following opinion.

House No. 6790 is phrased in broad and general terms. I have been informed, however, that it is intended specifically to address language in the current item 9091-0400 which differs from that used in item 9091-0400 as it appeared in St. 1976, c. 283, the fiscal year 1977 appropriation act. In c. 283, 9091-0400 appropriated $750,000 to the Division of Economic Development "[f]or the promotion of industry *within* the commonwealth . . .": St. 1977, c. 363A, item 9091-0400 appropriates the same amount to the same agency, but "[f]or the promotion of industry *into* the commonwealth . . ." (*See* n. 1 *supra*). The question posed is whether, in light of the change from "within" to "into", the use of FY 1978 funds for advertisements placed in Massachusetts newspapers and radio stations, as opposed to their out-of-state counterparts, contravenes the language of c. 363A.[2] For the reasons discussed below, I conclude that such expenditures are not prohibited by or inconsistent with that law.

The underlying principles governing the expenditure of funds by government are familiar and simply stated. Under the Massachusetts Constitution, the power of appropriation is lodged exclusively in the Legislature; the Legislature may, by exercising this power, delimit the types of expenditures which agencies in the executive branch of government may make. *See* Massachusetts Constitution, Amendments, art. 63, §3, and Part 2, c. 1, §3, art. 7. The power of appropriation may not, however, intrude upon the power of expenditure which the Constitution vests in the Governor and through him, in executive and administrative agencies. Massachusetts Constitution, Part 2, c. 2, §1, art. 11. As the Supreme Judicial Court has noted, " . . . however minutely appropriations are itemized, some scope is left for the exercise of judgment and discretion by executive or administrative officers or boards in the expenditure of money . . . ." *Opinion of the Justices,* 302 Mass. 605, 615 (1939). *See also Opinion of the Justices,* Mass. Adv. Sh. (1976) 220, 224-225; *Opinion of the Justices,* Mass. Adv. Sh. (1975) 2745, 2755.

In applying these basic principles to the present context, the pertinent statutes to consider are those relating to the Department of Commerce and Development (Department) and, in particular, the Division of Economic Development (Division). The Division is by statute one of four divisions within the Department. G.L. c. 23A, §§3, 4. The Legislature has vested broad authority and responsibility in the Department for purposes of

[1]Chapter 363A of the Acts of 1977 is the appropriation act for fiscal year 1978. Item 9091-0400 appropriates $750,000 to the Division of Economic Development for

> . . . the promotion of industry *into* the Commonwealth, provided, that no salaries or expenses of employees shall be chargeable to this item . . . (emphasis supplied)

[2]House No. 6790 refers to the expenditure of funds by the Secretary of Manpower Affairs. I note, however, that the Division of Economic Development, the agency to which item 9091-0400 specifically appropriates the funds in question, is within the Department of Commerce and Development which in turn is within the Executive Office of Communities and Development. G.L. c. 23A, §§3, 4; c. 6A, §8; *see also* c. 6A, §17. It is thus clear that the Secretary of Manpower Affairs has no statutory authority to spend the monies appropriated by item 9091-0400 of St. 1977, c. 363A, and I have not received any information to suggest that he has done so.

I understand the House of Representatives' question to focus on the purposes for which the item 9091-0400 monies are spent, rather than on the particular state official authorized to make the expenditures. Accordingly, in this opinion I consider solely the question whether the Division of Economic Development may properly spend the monies appropriated in item 9091-0400 "for radio and newspaper ads promoting the expansion of industry within the Commonwealth."

"[p]romoting, developing and expanding the economy, the commerce, the industry . . . of the commonwealth . . ." and of "[p]reparing and perfecting functional plans for the economic development of the commonwealth . . . ." G.L. c. 23A, §§2(a), 2(b).[3]

These statutes evince a legislative intent to improve the economy of the Commonwealth by expanding and attracting business and industry and creating employment for its citizens. More important, the statutes also show that the Legislature has chosen to delegate the implementation of this goal to agencies within the executive branch, as is its prerogative. *See Opinion of the Justices,* Mass. Adv. Sh. (1975) 2521, 2530-31 (1975); *see also Commonwealth* v. *Racine,* Mass. Adv. Sh. (1977) 1101, 1106-1107.

It is my understanding that the Department and other agencies within the executive branch have formulated a comprehensive economic development plan for Massachusetts which has two major facets: (1) the attraction of new business or industry to the state, and (2) the retention and expansion of existing business and industry. The judgment has been made that, in both categories, a critical early step in the successful implementation of the plan is to enlist Massachusetts businessmen in the Commonwealth's efforts to promote Massachusetts in other states and countries. *See* G.L. c. 23A, §2(b). The Division has allocated a portion of the funds appropriated in item 9091-0400 to advertising within Massachusetts to accomplish this first priority. I have been informed that at the same time funds in item 9091-0400 are also being spent for out-of-state advertising as well as for other purposes.

Against this constitutional and statutory framework and on the basis of the information supplied me, I cannot find any violation of the FY 1978 appropriation act. It appears that the expenditures of item 9091-0400 monies currently being made reasonably advance the promotion of industry into the Commonwealth. The Department and the Division are vested by their enabling statute with wide authority to oversee the area of state economic development and planning. *see, e.g.,* G.L. c. 23A, §2. In these circumstances, I will not strictly construe item 9091-0400 in St. 1977, c. 363A—or the introduction of the word "into"—as a limit on the otherwise broad discretionary powers of those agencies, absent a far more explicit indication of legislative purpose. If the General Court had intended to prohibit the Division or the Department from spending any of the funds appropriated under item 9091-0400 on advertisements within the Commonwealth, it could have expressly so stated. *See Commonwealth* v. *Hayes,* Mass. Adv. Sh. (1977) 928, 933.[4]

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

[3]*See also* G.L. c. 6A, §17A, which establishes a technical assistance strike force in the executive office of manpower affairs to offer advice and assistance to businesses within the Commonwealth.

[4]House No. 6790 asks whether the expenditure of "large" sums of money for the advertisements at issue contravenes the language of item 9091-0400. The House order does not further specify the amounts it considers to be "large". It is theoretically possible that the expenditure of item 9091-0400 funds on Massachusetts newspaper and radio advertisements could represent such a great percentage of the total amount appropriated as to constitute arbitrary and unreasonable action or an abuse of discretion on the part of the Division, such expenditures would be subject to legal challenge. *See, e.g., West Broadway Task Force, Inc.* v. *Commsssioner of the Department of Community Affairs,* 363 Mass. 745, 750-751 (1973). However, none of the information supplied to me suggests that the Division has in fact acted unreasonably in its spending of item 9091-0400 funds.

Number 17 January 12, 1978

Jerald Stevens
Secretary of Human Services
Executive Office of Human Services
State House
Boston, MA 02108

Dear Secretary Stevens:

You have requested my response to two questions concerning the relationship between the Rate Setting Commission (Commission) and the Division of Hearings Officers (DHO). Both questions are rooted in G.L. c. 6A, §36 (hereafter §36), the statute governing the DHO's administrative review of rates set by the Commission to pay or reimburse certain providers of health care. Your letter of request described at length the problems arising from ambiguities in §36.[1] The two questions which you seek to have answered are as follows:

1. May the DHO entertain or rule on any constitutional questions?
2. Is the DHO's standard of review confined to an examination of whether the Commission misapplied its regulations or whether the Commission misinterpreted its regulations where two or more interpretations are possible?

I shall first summarize my response to these questions. Section 36 allocates to the DHO the responsibility for holding hearings to review rates set for a provider by the Commission; the DHO must determine whether the rates are "adequate, fair and reaonable for such provider, based among other things, on the costs of such provider." §36, ¶ 1. In answer to your first question, it is my judgment that this review includes authority to consider a claim that the rate set by the Commission is unconstitutional as applied to the provider in question. However, the DHO's resolution of such a claim is not binding on the Commission. Nor does the DHO have authority to consider a claim that either the regulations of the Commission or any Act of the Legislature are unconstitutional on their face.

In answer to your second question, I conclude that the DHO may determine, in reviewing a particular provider's rate, whether the Commission correctly applied the Commission's own regulations; it may offer what it views as the proper reading of an ambiguous regulation; and it may consider whether the Commission's regulations, as properly applied to the particular provider, fail to provide an "adequate, fair and reasonable" rate. Section 36 does not empower the DHO, however, to reverse the Commission's interpretation of its own regulations when that interpretation is clearly established. Accordingly, the Commission would be entitled under §36 to reject and remand a rate recommendation of the DHO, if the recommended rate were premised on a reading of the regulations in conflict with the Commission's interpretation. My analysis follows.

I begin with a brief description of the pertinent functions of the Commission and the DHO, to place your two questions in proper context.

[1] In addition the Commission and the DHO, both of which play a prominent role in rate review, have submitted memoranda on the subject.

The Commission operates pursuant to G.L. c. 6A, §§32 *et seq.*[2] It has "sole responsibility for establishing fair, reasonable and adequate rates to be paid providers of health care services by governmental units . . ."[3] The setting of rates occurs in two phases. In the first, the Commission determines the standards applicable to broad classes of health care providers. This step is legislative in substance and entails essentially the creation of general ratesetting formulas for a number of provider classifications.[4] In the second phase, the general formula is applied to the operating costs and related information of a provider in order to determine the provider's individual rate. This rate is usually expressed as a per diem amount, to be paid for each day the provider gives medical care to an eligible recipient.

The Commission promulgates the ratesetting formulas comprising the first phase as general regulations under G.L. c. 30A, §2. Since the Legislature has explicitly authorized their promulgation, *see* G.L. c. 6A, §32, these regulations carry the force of statute, so long as they are consistent with the substantive standards set forth in §32. *See Palm Manor Nursing Home, Inc.* v. *Rate Setting Commission*, 359 Mass. 652, 655-656 (1971). Furthermore, it has been established that a provider or other party affected by the regulations and seeking to challenge their facial validity should do so through an action for declaratory relief brought in state court, pursuant to G.L. c. 30A, §7 and c. 231A, §§1 *et seq.*[5] or, in certain circumstances, through a federal action.[6]

The specific application of the general regulatory formulas to individual providers, the second ratesetting phase, is far more mechanical in nature. *See, e.g., Palm Manor Nursing Home, Inc.* v. *Rate Setting Commission, supra,* 359 Mass. at 656-657. Whereas the three members of the Commission of necessity play a personal role in developing a regulatory formula, I understand that the initial calculation of each provider's per diem rate is done almost entirely by Commission staff. *See* G.L. c. 6A, §33.

The Commission's history shows that health care providers dissatisfied with their reimbursement rates usually focus their challenges on the calculation of the individual rates rather than on the validity of the overall regulations or statute. While less global in scope, these challenges may nonetheless raise complex questions requiring extensive consideration. Moreover, the providers covered by the regulations—principally nursing homes and hospitals—number in the hundreds. The resources necessary to review individual rate challenges are therefore substantial.

Prior to the enactment of St. 1973, c. 1229, effective July 1, 1974, the

[2]The Commission was originally established by St. 1968, c. 492, §3, codified as G.L. c. 7, §§30K-30P. *See Cabot Nursing Home Inc.* v. *Rate Setting Commission*, 359 Mass. 686, 687 (1971). Subsequent recodification and reorganization have changed its structure somewhat but its essential functions have remained intact. *See* St. 1973, c. 1229, §2.

[3]The Commission's other responsibilities include establishing rates to be charged by state institutions for general health care, social, rehabilitative and educational services, and rates to be paid for similar services provided under G.L. c. 152, the workers' compensation act. G.L. c. 6A, §32. It is also responsible for approving hospital service corporation contracts pursuant to G.L. c. 176A, §5. Further, the Commission must now review and approve hospital charges applicable to the general public. G.L. c. 6A, §§37 - 46, added by St. 1976, c. 409, §4

[4]A classic example of such a formula is found in the Commission's regulation designated as 114.1 CMR 3.00 prescribing methods for reimbursing hospitals which participate in the federal-state Medicaid program, 42 U.S.C. §§1396 *et seq.* *See Massachusetts General Hospital* v. *Rate Setting Commission*, Mass. Adv. Sh. (1977) 50.

[5]*See, e.g., Murphy Nursing Home, Inc.* v. *Rate Setting Commission*, 364 Mass. 453, 456, 457 (1973); *Massachusetts General Hospital* v. *Rate Setting Commission*, 359 Mass. 157, 164-165, 166 (1971).

[6]*See, e.g., Massachusetts General Hospital* v. *Weiner*, No. 75-2651-G (D. Mass. February 10, 1977), *appeal pending*, No. 77-1191 (1st Cir. 1977).

Commission and its own hearing officers conducted all administrative reviews of individual provider rates under G.L. c. 7, §300. *See, e.g., Massachusetts General Hospital* v. *Rate setting Commission, supra,* 359 Mass. at 166, n.5. Chapter 1229 revamped the statutory framework under which the Commission had operated. Among other steps, it reorganized the Commission to provide for three full-time commissioners rather than a larger part-time agency, and created the DHO, specifically assigning to it responsibility for hearing Commission rate appeals.[7] Indeed, the legislative history of c. 1229 shows that the DHO was established in large part to assist the Commission in reviewing the substantial flow of individual rate challenges which are brought each year.[8]

The relation between the Commission and the DHO is wholly prescribed and governed by §36.[9] Unfortunately, however, §36 leaves in doubt the specific details of that relation. The section was amended substantially during its legislative passage, and legislative history does not furnish guidance as to its meaning. In certain parts §36 refers to the Commission as the administrative body with final authority over rates, to which DHO decisions must come for final adoption, and against which court challenges, under G.L. c. 30A, §14, would be brought, as is the case with any similar agency empowered to make individual adjudicative determinations.[10] Other passages, however, suggest that the DHO, not the commission, possesses final authority in the rate review process, with power to compel the Commission to adopt a particular rate, and therefore presumably to act as the agency defendant in a suit brought by a provider challenging that rate.[11] If this latter reading were adopted, the DHO would be operating as an administrative appellate tribunal, a status with a partial parallel in other areas.[12]

[7] The DHO's enabling statute is G.L. c. 7, §4H, enacted by St. 1973, c. 1229, §3. Chapter 1229, §2 enacted G.L. c. 6A, §§31-36, which actually reorganized the Commission and, in §36, established the DHO's reviewing functions at issue here. As discussed below, under G.L. c. 7, §4H, the DHO possesses more generalized authority to hear administrative appeals of other agencies. *See* p. 10, n.14 *infra.*

[8] Mass. H. R. 7250 (1973) which resulted in St. 1973, c. 1229, stated in its preamble that reorganization of the Commission (and the consequent assignment of rate hearings to the DHO) was necessary "in order to reduce the annual backlog of rates and appeals . . . ."

Since the DHO's creation in 1974, at least 2994 individual appeals from the Commission's rates have been filed or refiled with the agency. Currently, approximately 1500 such appeals are pending before the DHO.

[9] Section 36 provides in summary as follows: (1) the DHO (in practice, a hearings officer of the DHO) is to hold an adjudicative hearing on an aggrieved person's appeal from a Commission rate determination; (2) on appeal, the rate determined is to be "adequate, fair and reasonable for [the] provider, based, among other things, on the costs of such provider"; (3) the hearings officer is to render a decision containing a rate recommendation as well as a statement of reasons on all factual and legal issues raised and forward that decision to the Commission; (4) if the hearings officer has recommended a different rate than the one originally set, the Commission is either to establish a new rate or, if it finds the officer's statement of reasons inadequate, to remand the appeal to the DHO; (5) a provider may appeal from the Commission's final rate determination, or the DHO's decision, to the Superior Court.

[10] For example, §36, ¶3 states that if the decision of the DHO results in a *recommendation* for a rate different from that certified, the Commission shall *based upon statement of reasons* establish a new rate, but if the Commission determines that the statement of reasons is inadequate to determine a fair, reasonable and adequate rate, it may remand the appeal to the hearing officer for "further investigation." The statute here thus speaks in terms which place the Commission in a controlling posture, giving it a right to reject the hearings officer's recommendation. Moreover, §36, ¶3 also refers to "any part aggrieved by a decision of the *Commission*" as having a right to file a petition for review in Superior Court (emphasis added), buttressing the view that the Commission, not the DHO, makes the final decision in the administrative process.

[11] The language favoring a heightened role for the DHO is found exclusively in the penultimate paragraph of §36. It states that the petition to the Superior Court shall set forth the grounds upon which the "decision of the *division* should be set aside" (emphasis added). It then states that the Court may "affirm, modify or set aside the decision of the *division* in whole or in part, remand the decision to the *division* for further proceedings, or enter such other order as justice may require" (emphasis added).

[12] For example, under G.L. c. 111, §§25B-25G, the determination of need law, the Department of Public Health and Public Health Council are responsible for determining whether health care facilities should receive authorization to make substantial capital expenditures for facility construction or alteration, but the Health Facilities Appeals Board, created by G.L. c. 6, §166, possesses the power under §25E to reverse the Council's determination and remand the matter for reconsideration. Under G.L. c. 90, §28, the Board of Appeal on Motor Vehicle Liability Policies and Bonds, created by G.L. c. 26, §8A, is given authority to affirm, modify, or annul rulings or decisions of the Registrar of Motor Vehicles. However, both G.L. c. 111, §25E and c. 90, §28 are far more explicit in their grant of appellate reviewing powers to the two boards in question than §36 is with respect to the DHO.

Two overriding factors compel me to reject the latter interpretation of §36. First, placing the DHO in an appeallate posture, with the Commission playing a subordinate rather than a controlling role, would work a unique and unprecedented reversal in the parts normally played by hearing officers and agencies.[13] Hearings officers generally, and the DHO itself in all its other activities,[14] act as an adjudicative surrogate for the substantive agency. By holding hearings, developing a record, and preparing a recommended decision with tentative findings of fact and rulings of law, hearings officers lift a heavy burden from agencies which are ill-equipped to hold trials. I cannot conclude that the Legislature intended so radical a modification of this role without an explicit statement of intent or a less ambiguous statutory framework than §36 provides. *Compare* G.L. c. 90, §28; c. 111, §25E. *See Boston & Albany Railroad* v. *Boston,* 275 Mass. 133, 138 (1931); *cf. Massachusetts Commission Against Discrimination* v. *Liberty Mutual Ins. Co.,* Mass. Adv. Sh. (1976) 2403, 2407-2408.

The second factor compelling rejection arises out of the disparity in functions and statutory qualifications of the Commission and DHO. The Commission is charged with performing a highly technical task, and in recognition of this, the Legislature carefully specified the requisite qualifications for its three commissioners: the Chairman must have administrative experience and an advanced degree in business administration, public administration or law; one Commission member is to be a certified public accountant; the other must be experienced in medical economics. G.L. c. 6A, §32.

In contrast, the qualifications of DHO hearings officers are far more general in character, reflecting the fact that their primary function lies in administering hearings for many different agencies. They must be members of the bar of the Commonwealth and have trial experience, but they need not possess any specialized knowledge in rate making. *See* G.L. c. 7, §4H. Given the difference in qualification, I find it unlikely that the Legislature intended to give a hearings officer the final word in the ratesetting process.[15]

In summary, viewing §36 in light of the Commission's and the DHO's respective enabling statutes taken as a whole, I find that the relationship between the Commission and the DHO, although described in unique terms procedurally in §36, must be deemed to conform to the general pattern governing hearings officers and agencies. *See Boston* v.

[13] *See, e.g,* K. Davis, Administrative Law Treatise, §10.06, at 34 (1958 Ed.), which states:

> The status of the examiner [hearing officer] should and does depend upon his functions. His two main functions are to preside and to prepare the intermediate (initial or recommended) decision. Both functions are definitely subordinate. . . . The examiner's role as a deciding officer is overshadowed by the power of the agency.

See also id. §10.03, at 17-18 ("[i]n nearly all states the judge-made law is in accord with the provision of the federal APA that the agency has 'all the powers which it would have in making the initial decision' "); *Ramspeck* v. *Federal Trial Examiners Conference,* 345 U.S. 128, 130-131 (1953).

For Massachusetts illustrations of the traditional agency-hearing officer relationship, *see, e.g.,* G.L. c. 7, §30 O (as in effect prior to July 1, 1974) (Commission to designate hearing officer or one of its members to hear a provider's appeal and recommend a decision); G.L. c. 31, §43(b) (Civil Service Commission to designate disinterested persons to conduct hearings and report findings for Commission to act upon). G.L. c. 111, §25E (Health Facilities Appeals Board may designate hearing officer to hear appeals from Public Health Council determinations and submit a recommended decision).

[14] Under its enabling statute, G.L. c. 7, §4H, the DHO is responsible for conducting hearings on appeals to the Civil Service Commission and is authorized to conduct such additional adjudicative hearings or appeals as other agencies may request.

[15] A final difficulty in perceiving the DHO as an appellate tribunal inheres in the notion of giving a single hearings officer, as distinguished from a multi-member tribunal, the authority to reverse the determination of a substantive agency. By contrast, both the Health Facilities Appeals Board and the Board of Motor Vehicle Appeals are multi-member bodies, far more analogous to an appellate court than is a single hearings officer. *See* p.9, n.12, *supra.*

Massachusetts Bay Transportation Authority, Mass. Adv. Sh. (1977) 2588, 2593. Accordingly, the DHO hearings officers are responsible for conducting adjudicatory hearings and submitting a recommended rate determination to the Commission. However, the Commission is not *required* to adopt that recommendation. It may in its discretion exercise its powers under §36 to remand an appeal "for further investigation" if it determines the hearings officer's decision to be an "inadequate" basis on which to set a new rate. With this conclusion in place I now address your two specific questions.

1. *Authority to entertain or rule on constitutional questions.*

Administrative agencies generally do not possess authority to decide constitutional challenges to statutes or regulations governing their operations. *See, e.g., School Committee of Springfield* v. *Board of Education,* 362 Mass. 417, 431 (1972) ("[i]t is fundamental to our system of government that courts and not administrative agencies must resolve conflict between statutes and constitutional provisions").[16] However, it is also a principle that an agency may, in the course of its statutory responsibilities, exercise judgment in individual situations influenced by its determination of constitutional requirements, particularly when the constitutional issue raised depends on the specific fact. *See, e.g., Board of Education* v. *School Committee of Springfield,* Mass. Adv. Sh. (1976) 861, 898-899; *Board of Selectmen of Framingham* v. *Civil Service Commission,* 366 Mass. 547, 554-555 (1974). *See also Davis, supra,* §20.04 at 74.

The principal constitutional challenge a provider might properly raise in the context of an individual rate appeal to the DHO would center on confiscation, i.e. a claim that a particular rate was so low as to take or confiscate the provider's property in violation of constitutional due process guarantees. *Cf., e.g., Wannacomet Water Co.* v. *Department of Public Utilities,* 346 Mass. 453, 457, 471 (1963); *New England Tel. & Tel. Co.* v. *Department of Public Utilities,* 327 Mass. 81, 86 (1951); *cf. also Murphy Nursing Home Inc.* v. *Rate Setting Commission, supra,* at 461-462 (attack on general ratesetting regulation on confiscation grounds).[17] A provider carries a heavy burden in proving confiscation, *cf., e.g., Fitchburg Gas and Electric Light Co.* v. *Department of Public Utilities,* Mass. Adv. Sh. (1977) 273, 277-278; *New England Tel. & Tel. Co.* v. *Department of Public Utilities,* 331 Mass. 604, 617 (1954), but since a showing of confiscation, if made, would obviously bear on the standard of "adequate, fair and reasonable" rates mandated by §36, I find that this issue lies within the DHO's authorized zone of inquiry.[18]

---

[16] The winds of change, however, are being felt in this area. *See Southern Pacific Transporation Co.* v. *Public Utilities Commission,* 18 Cal. 3d 308, 556 P. 2d 289 (1976); *see generally,* Note, The Authority of Administrative Agencies to Consider the Constitutionality of Statutes, 90 Harv. L. Rev. 1682 (1977).

[17] A provider might perhaps claim that a rate was so arbitrary and irrational as to reach unconstitutional dimensions, again in violation of the provider's right to substantive due process, although such an attack would seem more likely to arise in the context of a challenge to a general ratesetting formula. *See, e.g., Murphy Nursing Home* v. *Rate Setting Commission, supra,* 364 Mass. at 460-461. Similarly, it seems probable that a provider would raise an equal protection claim as part of a challenge to a general regulation governing an entire provider class rather than in an individual rate appeal. *See, e.g., Davis* v. *Weiner,* No. 15324 (Suffolk Superior Court, October 28, 1976).

[18] As in *Board of Selectmen of Framingham* v. *Civil Service Commission, supra,* 364 Mass. at 554, a provider's assertion of unconstitutional confiscation is necessarily "rooted in facts . . . ." The DHO's function in conducting §36 adjudicative hearings is to find the facts in each case from the evidence presented It is therefore appropriate for the DHO hearings officers to consider confiscation questions raised in the course of such hearings.

It bears repeating, however, that the judgment of a DHO hearings officer on any constitutional issues raised in a rate appeal is not binding on the Commission. While the Commission could adopt a recommended rate determination based on a hearings officer's finding of confiscation,[19] it is not required to do so. *See* pp. 12-13 *supra.*[20]

2. *Standard of DHO review*

Your second question asks if the DHO must confine its scope of inquiry in a rate appeal to the questions whether the Commission (1) misapplied its regulations or (2) misinterpreted an ambiguous regulation in a particular case. My answer follows a course similar to the discussion of the first question. Just as the DHO lacks authority to overturn the statute under which it operates as inconsistent with the superior demands of state or federal constitutional provisions, it may not overturn the Commission's general ratesetting regulations as violative of either the statute or the Constitution; the regulations stand on the same footing as a statute. *See Palm Manor Nursing Home, Inc.* v. *Rate Setting Commission, supra,* 359 Mass. at 655-656. As mentioned, challenges to the facial validity of regulations are allocated as an initial matter to the judiciary. Until the Legislature indicates plainly a desire to permit the DHO to question the ratesetting framework, its role must be limited to issues relating exclusively to the adequacy of the individual rate under review.

There are three areas of inquiry open to the DHO in its role as a reviewing body of individual rates.[21] First, a DHO hearings officer may inquire in every case whether the Commission, through its staff, has properly applied the general rate formula to the particular facts at hand, for the Commission may not contradict its own regulations. Once given the force of law, they find the regulating agency as well as providers. *See DaLomba's Case,* 352 Mass. 598, 603-604 (1968); *see also Finklestein* v. *Board of Registration in Optometry,* Mass. Adv. Sh. (1976) 1548, 1551; *cf. Service* v. *Dulles,* 354 U.S. 363, 372-373, 383 (1957); *Nader* v. *Bork,* 363 F. Supp. 104, 108 (D.D.C. 1973).

Second, the hearings officer may determine whether the Commission through its staff has correctly interpreted and applied an ambiguous regulation not previously construed by the Commission. However, if the Commission's interpretation is authoritatively established on the record, he does not possess authority to contradict that reading unless it is plainly wrong. Courts have uniformly held that an agency's interpretation of its own regulations is controlling unless it is clearly erroneous or unreasonable. *See, e.g., Udall* v. *Tallman,* 380 U.S. 1, 16-17 (1965); *Bowles* v. *Seminole Rock & Sand Co.,* 325 U.S. 410, 413-414 (1945); *see generally Consolidated Cigar Corp.* v. *Department of Public Health,* Mass. Adv. Sh. (1977) 1419,

[19]This would be true even where the Commission's original rate was properly calculated in accordance with the applicable ratesetting regulation. The Commission is bound to follow its own regulations, but it may provide by regulation for administrative adjustment of individual rates in particular circumstances. At least for hospitals, the Commission has adopted such an adjustment provision. *See, e.g.,* 114.1 CMR 3.00, §3.15, *reprinted in* Mass. Register Issue No. 89 (1978).

[20]In addition, if all the calculations leading to the rate were mandated by Commission regulations, with no room for adjustment, the confiscation claim would then perforce constitute an attack on the regulations themselves and be cognizable only in a judicial sitting. *See Murphy Nursing Home, Inc.* v. *Rate Setting Commission, supra,* 364 Mass. at 461-462; *Massachusetts General Hospital* v. *Rate Setting Commission, supra,* 359 Mass. at 163-166 and n.5. *See* p. 5 and nn. 5, 6 *supra.*

[21]Once again, I note that the DHO hearings officer's authority on review is ultimately subordinate to the Commission; the judgments he makes on the issues open to his consideration are subject to rejection by the Commission.

1432-1437. What these cases deem a fitting self-restraint for courts with strong powers of review over such legal questions, can be no less appropriate for the DHO, which plays a subordinate role in the process of rate adjudication. *See Consolidated Cigar Corp.* v. *Department of Public Health, supra* at 1432, 1437.

Finally, as with constitutional questions, the hearings officer may also consider whether on the facts of a particular case, a rate is so low as to violate the "adequate, fair and reasonable" standard of §36, even though the rate has been calculated properly under the governing rate formula. The purpose of such an inquiry would not be to render a legal judgement on the facial validity of the general regulation but to determine if its application to a particular provider resulted in a rate which failed, in the opinion of the hearings officer, to satisfy the statutory standard. Like the constitutional question of confiscation, this statutory issue is one "rooted in facts", and should be treated accordingly. *See Board of Selectmen of Framingham* v. *Civil Service Commission, supra,* 364 Mass. at 554.

Very truly yours
FRANCIS X. BELLOTTI
Attorney General

Number 18 January 20, 1978

Evelyn F. Murphy
Secretary
Executive Office of Environmental Affairs
100 Cambridge Street
Boston, Massachusetts 02202

Dear Secretary Murphy:

On November 21, 1977, you forwarded to me 16 questions concerning the Massachusetts Coastal Zone Management (CZM) program. You posed four of these questions on you own behalf as Secretary of Environmental Affairs.[1] You transmitted an additional 12 questions on behalf of the Joint Committee on Natural Resources of the Legislature.[2]

As background for your request you stated the following. In 1972 Congress passed the Coastal Zone Management Act of 1972, Pub. L. 92-583, 86 Stat. 1280, 16 U.S.C. §§1451-1464. The Act authorized federal funding to states which were developing plans for the coordinated management of coastal areas. The Executive Office of Environmental Affairs (EOEA), pursuant to the Governor's designation, has received federal and matching state funds for the past three years to develop a CZM

[1]Your questions may be paraphrased as follows: (1) does the statutory authority of EOEA, including its constituent agencies, empower appropriate EOEA agencies to implement a CZM plan for the Commonwealth, which includes such policies as those 27 set forth in the (draft) Massachusetts CZM Plan? (2) Do the Secretary's statutory responsibilities under G.L. c. 21A, §§3 and 4 authorize the Office of the Secretary to develop and implement a CZM program jointly with EOEA agencies, when requested in a memorandum of understanding? (3) Is it within the authority of the Energy Facilities Siting Council to agree to recognize and to act consistently with EOEA regulations concerning CZM policies? (4) Does G.L. c. 21A, §2 (7) or any other provision of law authorize the Secretary to designate areas of critical environmental concern within the coastal zone as provided in the CZM plan?

[2]As Secretary, you are entitled to obtain legal advice from the Attorney General on questions relating to your immediate official duties. G.L. c. 12, §3. That section does not apply to the Joint Committee, whose legal relationship with the Attorney General is defined by G.L. c. 12, §9. Under the terms of §9, the Joint Committee would not be entitled to an opinion on the questions it has raised because none of the questions concerns legislation pending before it. I understand that you transmitted the Joint Committee's 12 questions along with your own as a matter of courtesy.

plan for Massachusetts. The plan has now been drafted, and you have submitted it to the United States Department of Commerce for approval; that approval is a prerequisite of the plan's implementation. However, several questions have recently been raised concerning the legal authority of EOEA to carry out the provisions of the CZM plan without additional enabling legislation. Your opinion request seeks an answer to those questions, for final federal approval of the plan will not be forthcoming until the issues of state statutory authority are resolved. *See* 16 U.S.C. §1455.

For the reasons discussed below, I must respectfully decline to answer the questions you have asked in the context of a formal opinion: the abstract, hypothetical and general nature of the questions prevents my doing so. Nevertheless, I recognize your special need to resolve the issues of legal authority you have raised, since final review of the CZM plan by federal authorities cannot be completed without such a resolution. Accordingly, pursuant to my responsibilities under G.L. c. 12, §3, I have undertaken to answer your questions in a separate memorandum accompanying this opinion.

It has been the long established policy of the Attorney General to refuse to give opinions on hypothetical questions or those calling for a general, abstract interpretation of statutory provisions. *See, e.g.*, 1966/67 Op. Atty. Gen. at 112, 114; 1934/35 Op. Atty. Gen. at 31; 3 Op. Atty. Gen. at 425, 428-429 (1911); 1 Op. Atty. Gen. at 273-275 (1895); *cf.* 1946/47 Op. Atty. Gen. at 23. The reasons for this practice are not hard to discern.

Every opinion of the Attorney General is advisory in a sense, and is to some extent a general pronouncement or prediction about the law. *Cf. Opinion of the Justices*, 365 Mass. 665, 679 (1974); *Opinion of the Justices*, 341 Mass. 738, 748 (1960). Nevertheless, when legal questions are presented which are divorced from a concrete factual context or application, the Attorney General's ability to properly advise the requesting state official on their answers is extremely limited. Obviously the answers may change depending on the particular circumstances in which the questions arise. *Cf. Ierardi, Petitioner*, 366 Mass. 640, 649 (1975); *Commonwealth v. Welosky*, 276 Mass. 398, 400 (1931). Rather than hazard a factually unfounded guess as to the correct legal determination in such situations, the Attorney General has traditionally declined to rule on the questions presented. The policy finds analogous support in the advisory opinions of the Supreme Judicial Court. *See, e.g., Opinion of the Justices*, Mass. Adv. Sh. (1977) 1814, 1818; *cf. Opinion of the Justices*, 347 Mass. 797, 798 (1964).

These principles govern the present opinion request. The draft CZM plan[2] represents a proposed course of governmental action to be put into effect in the future. Your questions ask whether a variety of statutory provisions, some identified in the questions and others only generally referred to, authorize you, the Office of the Secretary, and the agencies, departments, commissions and boards under the jurisdiction of EOEA, to implement that plan. By their terms, the inquiries are extremely broad and

---

[2] The draft CZM plan is presented in a two-volume document of commentary, analysis, maps and other information, totaling 900 pages. It appears that the draft is still undergoing a process of amendment and revision; your staff has recently forwarded new material reflecting changes in the wording and number of CZM policies and in the accompanying commentary. The fluid nature of the actual CZM plan underscores the inappropriateness of my rendering a formal opinion in this instance.

their answers call for a general examination of legislation removed from a sufficiently developed factual framework. In these circumstances I find I must abstain from considering the questions within this opinion.

At the same time, I wish to emphasize that my inability to render a formal opinion should not be construed as a conclusion that the appropriate EOEA agencies and officers presently lack the statutory authority to implement the policy objectives presented in the draft CZM plan. My memorandum on these issues makes plain that this is not the case. What is more, I want to assure you that if EOEA proceeds to implement the plan and its legal authority to do so is challenged in court, I will provide representation for those state officials and agencies named as defendants. *See* 1977/78 Op. Atty. Gen. No. 6.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 19 February 28, 1978

Major General Vahan Vartanian
The Adjutant General's Office
905 Commonwealth Avenue
Boston, Massachusetts 02215

Dear General Vartanian:

You have requested my opinion on eight questions concerning officers of the Massachusetts National Guard (the Guard) ordered to active duty pursuant to G.L. c. 33, §18.[1] The questions relate to the officers' entitlement to state or federal pay, or both, during absences from their state duties for vacation, sick leave, or participation in mandatory training programs. Because of the number of the questions I shall answer them separately in the order proposed.

> 1. Does G.L. c. 33, §18 intend that those officers ordered to state active duty will perform those duties assigned by the commanding officer of the Division in a state military status or a civilian employee status?

Under the terms of G.L. c. 33, §18 ("§18"), the officers appointed are ordered to "active duty", which I understand to mean full-time duty in military service. *See* 32 U.S.C. §101(12) (1970) (federal definition of "active duty"). In addition, the §18 officers' compensation is determined by reference to the pay which comparable officers in federal military service receive, and their duties are assigned by a commanding military officer. Moreover, in order to qualify for appointment under §18, the officers must obtain "federal recognition" from the federal National Guard Bureau Chief, under regulations prescribed by the Secretary of the Army.[2]

[1] General Laws, c. 33, §18, provides as follows:

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

[2] *See* 32 U.S.C. §307 (1970); 32 C.F.R. §564.3 (1977).

The prerequisites and terms pertaining to the officers' appointments under §18 are thus entirely military in character. Jobs held by civilian employees of the Commonwealth are not subject to any such conditions. In my judgment, §18 clearly contemplates that the officers appointed under its terms will perfom the duties assigned to them in a state military status.

2. Is an officer ordered to state active duty under §18 entitled to vacation and sick leave time without forfeiture of his state pay for the periods of such absences, and if so, what is the amount of leave time to which he is entitled?

Neither §18 nor any other provision of G.L. c. 33, the statute governing the Commonwealth's military forces, provides for vacation and sick leave benefits for the officers ordered to duty under §18.[3] *Cf.* G.L. c. 33, §88 (disability compensation). Nevertheless, under the Massachusetts Constitution, the Governor as Commander-in-Chief of the Commonwealth's armed forces may "make regulations for their government" to the extent authorized by the Legislature. Massachusetts Constitution, Part 2, c. 2, §1, art.7.[4] The Legislature has authorized the Governor to "make and publish regulations for the government of the organized militia in accordance with law." G.L. c. 33, §5. I construe these constitutional and statutory rulemaking provisions as including the authority to regulate vacation and sick leave for officers appointed under §18.[5] Therefore, my answer to the first part of Question 2 is that an officer ordered to duty under §18 is entitled to vacation and sick leave with pay to the extent that regulations duly adopted or ratified by the Governor may permit.

In view of this conclusion, I cannot now answer the second part of Question 2, *viz.*, "the amount of leave time to which" an officer appointed under §18 is entitled. The amount of time is a matter properly left to the discretion of the Governor and those who are in charge of the Guard under the Governor's direction. Although it does not appear that the Governor has yet adopted regulations on vacation and leave time for §18 officers,[6] I

[3]The term "pay" in §18 does not itself appear to incorporate these types of benefits. Section 18 defines the officers' "state pay" in terms of the "pay [of] an officer of the regular service of corresponding grades. . ." The federal statutes governing compensation for officers in the uniformed services of the United States provide for monthly "basic pay," *see* 37 U.S.C. §§201, 203-205 (1970 and Supp. V), §1009 (as amended by Pub.L. 94-361); a subsistence allowance, *see* 37 U.S.C. §402 (Supp.V); and an allowance for quarters, *see* 37 U.S.C. §403 (Supp.V). *See also* 37 U.S.C.§101 (25) (Supp. V) (definition of "regular compensation"). I note, however, that officers in the United States Army do receive both leave or vacation time with active duty pay under separate statutory provisions. *See* 10 U.S.C. §§701, 704 (1970 and Supp. V). They also receive sick time with pay. *See* 37 U.S.C. §502 (1970).

[4]Article 7 of Part 2, chapter 2, section 1 of the Massachusetts Constitution provides:

> The general court shall provide by law for the recruitment, equipment, organization, training and discipline of the military and naval forces. The governor shall be the commander-in-chief thereof, and shall have power to assemble the whole or any part of them for training, instruction or parade, and to employ them for the suppression of rebellion, the repelling of invasion, and the enforcement of the laws. He may, as authorized by the general court, prescribe from time to time the organization of the military and naval forces and make regulations for their government.

[5]In other contexts, the power to promulgate regulations governing vacation and sick leave has been expressly granted. *See, e.g.*, G.L. c. 7, §28 (personnel administrator to make rules for regulating "vacation leave, sick leave and other leave with pay. . . ") The Governor's powers as Commander-in-Chief, however, are necessarily broad in scope, and the Legislature has chosen to define his rulemaking authority over the militia in very general terms. In these circumstances, it would be inappropriate to view the scope of that authority in such a way as to preclude his making rules for vacation and sick leave for officers serving full-time under §18. *Cf. Cambridge Electric Light Co.* v. *Department of Public Utilities*, 363 Mass. 474, 494 (1973). Furthermore, other full-time employees of the Commonwealth are entitled to both vacation and sick leave with pay, *see* G.L. c. 7, §28; *see also* c. 149, §52A, as are federal military officers situated similarly to the §18 officers. Considerations of common sense and of equity strongly suggest that the statutes pertinent to the §18 officers be interpreted to permit vacation and sick leave time with pay if authorized by the Governor.

[6]You have furnished me with a copy of Military Division Regulation No. 600-4, which concerns vacation and sick leave for §18 officers, among others. The regulation is issued under your name, and does not indicate that it was approved by the Governor. I treat the Adjutant General's independent authority to issue regulations in response to your third question. *See* pp. 6-7 *infra*.

do not believe it appropriate for the Attorney General to give an opinion on such policy issues, *See, e.g.,* 1977/78 Op. Atty. Gen. No. 10; 1976/77 Op. Atty. Gen. No. 25; 1961/62 Op. Atty. Gen. at 199.

3. In the event an officer appointed under §18 is not entitled to vacation and sick leave time, does the Adjutant General, as the operational and administrative head of the Military Division, Executive Branch, have the inherent administrative authority at his discretion to authorize such leave without loss of state pay?

The Adjutant General is the chief-of-staff to the Governor as Commander-in-Chief, and is also chief of the state military staff. The Adjutant General possesses broad supervisory and managerial authority as the "executive and administrative head of the military division of the executive branch of the government of the commonwealth." G.L. c. 33, §15(b). His powers, however, have specified limits. General Laws, c. 33, §15(b) also provides:

> Except in those cases where by law or regulation specific powers are conferred on the adjutant general as such, he shall have no authority independently of the commander-in-chief, from whom his orders shall be considered as emanating, and the acts of the adjutant general shall be regarded as in execution of commander-in-chief.

This language indicates that the Adjutant General does not have inherent administrative authority, independent of the Governor, to authorize vacation or sick leave without loss of pay for §18 officers.[7]. The question remaining is whether the Governor may delegate his rulemaking powers to the Adjutant General, thereby enabling him to adopt regulations which provide for authorized vacation and sick leave. The answer is not free from doubt. The Supreme Judicial Court long ago held that "'[o]fficial duties involving the exercise of discretion and judgment for the public weal cannot be delegated [to a subordinate officer].'" *Sodekson* v. *Lynch,* 298 Mass. 72, 74 (1939), quoting from *Commonwealth* v. *Badger,* 243 Mass. 137, 142 (1922). This restrictive view of administrative authority, once shared by many courts, has been subject to much criticism, and has been considerably relaxed in other jurisdictions during the intervening years. *See, e.g., Fleming* v. *Mohawk Wrecking & Lumber Co.,* 331 U.S. 111, 121-123 (1947); *E.E.O.C.* v. *Raymond Metal Products Co.* 530 F.2d 590, 594 (4th Cir. 1976); *Warren* v. *Marion County,* 222 Or. 307, 353 P.2d 257, 263-264 (1960); *see generally* K. Davis, Administrative Law Treatise, §9.06 (1958 and 1970 Supp.) The more flexible attitude, however, has not been extended to approve the subdelegation of substantive rulemaking powers absent an express legislative mandate. *See, e.g., Relco, Inc.* v. *Consumer Products Safety Comm'n,* 391F. Supp. 841, 845-846 (S.D. Tex. 1975); *cf. Fleming* v. *Mohawk Wrecking & Lumber Co., supra,* 331 U.S. at 121. *But see Gaston* v. *United States,* 34 A.2d 353 (Mun. Ct. App. D.C. 1943), *aff'd* 143 F.2d 10, *cert. denied* 322 U.S. 764 (1944) (National Guard uniform regulations).

[7]The conclusion is supported by the fact that in certain instances, not pertinent to the question of pay, the Legislature has specifically granted rulemaking authority to the Adjutant General. *See, e.g.,* G.L. c. 33, §84 (travel expense regulations).

In view of (1) the Massachusetts courts' failure to overrule their prior subdelegation decisions and (2) the general and continuing reluctance to find statutory authority for implied subdelegations of rulemaking powers, I conclude that the Governor may not vest you with independent authority to promulgate vacation and sick leave regulations for the §18 officers. Any regulations on the subject must come from the Governor himself as Commander-in-Chief acting pursuant to G.L. c. 33, §5.[8]

4. May an officer ordered to state active duty under §18 receive both his state pay and federal military pay during his service with the active national guard on training under G.L. c. 33, §60?

Under G.L. c. 33, §60, all members of the active Guard must annually perform at least 15 days' training under service conditions. State pay is provided for this annual training. G.L. c. 33, §83(a)[9]. However, the state pay must be reduced by any federal pay received for military service performed during the same period of annual training. G.L. c. 33, §83(d).[10]. Therefore the officers serving under §18 may not receive both state and federal pay for annual training, but may receive from the Commonwealth only the excess, if any, of state pay over federal pay for the training period.[11]

5. May an officer ordered to state active duty under §18 receive both his state pay and federal military pay during his service with the active national guard on so-called inactive duty training under G.L. c. 33, §61 (which is usually conducted on weekends or evenings but may be performed at times during weekdays)?

General Laws, c. 33, §61 requires every unit of the Guard to assemble for training at least 48 times each year. See 32 U.S.C. §502(a)(1) (Supp. V). There is state pay for performing this training duty, G.L. c. 33, §83(a),[12] and federal pay is also provided. 37 U.S.C. §204(a)(2). However, no statute prohibits Guard members, including the officers appointed under §18, from receiving both state and federal pay for duty required by §61. General Laws, c. 33, §83(d), which requires that state pay for duty performed under §§38, 40, 41, 42 and 60 of that chapter shall be reduced by any federal pay received for the same period,[13] does not refer to state pay received for training duty under §61. "It is a familiar principle of statutory interpretation that the express mention of one matter excludes by

[8]You may, of course, advise the Governor on the proper content of such regulations. *See* G.L. c. 33, §15(b).

[9]General Laws, c. 33, §83(a), provides:

> For duty performed under the provisions of sections thirty-eight, sixty and sixty-one, there shall be allowed and paid from funds appropriated therefor to members of the armed forces of the commonwealth the same rate of pay of like grade as would be received by them if they were on an active duty status in the armed forces of the United States with less than two years' service, and such subsistence, travel or other allowance as the adjutant general may authorize

[10]Section 83(d) reads:

> For duty performed under the provisions of sections thirty-eight, forty, forty-one, forty-two and sixty, the pay and allowances authorized by this section shall be reduced by any amounts received from the United States government as pay or allowances for military service performed during the same pay period.

Federal pay is available for annual training periods. *See* 37 U.S.C. §204(a)(2) (1970).

[11]I recognize that practical problems may arise in trying to administer the state and federal pay provisions. I do not address these problems in this opinion, but leave their resolution to the discretion of the appropriate military and executive officials.

[12]*See* footnote 3, *supra*.

[13]*See* footnote 10, *supra*.

implication all other similar matters not mentioned." *County of Bristol* v. *Secretary of the Commonwealth,* 324 Mass. 403, 406, 407 (1949). The Legislature, in enacting §83 (d), was presumably aware of existing federal laws providing pay for training assembly duty. *Board of Assessors of Melrose* v. *Driscoll,* Mass. Adv. Sh. (1976) 1497, 1503. Therefore, the officers serving under §18 are entitled to receive both state and federal pay for §61 training assembly duty.

6. May an officer ordered to state active duty under §18 receive both his state pay and his federal military pay during his service with the active national guard on full-time training duty (FTTD) under G.L. c. 33, §38?

The three officers serving under §18 may not receive both state and federal military pay for full-time training duty (FTTD), for the reasons stated in the opinion on this issue which I rendered to the Governor, dated February 1, 1977. 1976/77 Op. Atty. Gen. No. 19.

7. In the event your answer to questions [2] and/or [3] are in the affirmative and your answer to question [6] is in the negative, may an officer order to state active duty under §18 charge his FTTD training days under G.L. c. 33, §38 against entitled or authorized vacation or sick leave time and receive both state pay and federal military pay?

My answers to your second and third questions indicate that the existence and amount of vacation and sick time available to the officers appointed under §18 are matters left to the Governor. Since the Governor has not yet promulgated regulations on vacation and sick leave, your seventh question is hypothetical and I cannot presently answer it. *See* 1964/65 Op. Atty. Gen. at 112. I note, however, that sick leave with pay is available only in the event of an employee's actual illness, injury, or incapacity. *See Quinlan* v. *Cambridge,* 320 Mass. 124 (1946).

8. Does the state active duty ordered under §18 contemplate a seven (7) day, twenty-four (24) hour per day availability to the Military Division of the Executive Branch, and if not, what period of time does it contemplate?

"State active duty" is not defined in §18. As indicated above, I understand the term to mean full-time military duty, but "full-time" itself has not been defined. The materials which the three officers currently appointed under §18 have submitted to me state that they ordinarily work regular hours, but are available for emergency duties on an 24-hour day, 7-day week basis, if their commanding officer should so order. I do not consider whether such a working schedule is appropriate or required. In my view, the determination of appropriate hours of duty for the §18 officers is a matter properly left to the officials who supervise the officers' functions, including the Governor as Commander-in-Chief, the Adjutant General and the officers' commanding officer.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 20 March 8, 1978

Paul E. Hall
Acting Regional Director
Federal Disaster Assistance
Administration, Region I
150 Causeway Street, Room 710
Boston, Massachusetts 02114

Re: Presidentially Declared "Major Disaster"
FDAA-546-DR-Massachusetts;
Damage to Water Pollution Control Facility,
Hull, Massachusetts

Dear Mr. Hall:

On behalf of the Federal Disaster Assistance Administration, you have requested a state legal determination on two questions relating to the water pollution control facility located in the Town of Hull, Massachusetts (hereafter "facility").These questions arise because of the significant damage sustained by the facility during the February snowstorm and flooding which brought about the above-referenced "major disaster." The two questions are the following:

1. Who owned the water pollution control facility when damaged by this major disaster?
2. Who bears legal responsibility and liability for the damage incurred?

The facility is being constructed pursuant to a general contract between the Town of Hull and Vappi & Co., Inc., executed on February 17, 1976 (hereafter "Contract"). Based on an examination of the Contract and for the reasons summarized below, it is my opinion that (1) the Town of Hull owned the facility at all relevant times; and (2) the general contractor, Vappi & Co., Inc., bears legal responsibility and liability for the damage incurred to the facility during the major disaster.

1. *Ownership:* The Contract defines the Town of Hull throughout as the "Owner" of the Project. *See, e.g.*, pp. A-3, E-1, 1-1, E-2 (signature page). While Hull has not finally accepted the facility, the contract treats acceptance of the work performed independent of any consideration of ownership, *see, e.g.*, §§10(f), 5(c); it does not condition ownership on final acceptance of the work. Moreover, information provided by Hull indicates that approximately 95 percent of the work had been completed and paid for at the time the major disaster occurred. These circumstances together indicate that ownership of the facility resided in the Town of Hull at that time.

2. *Risk of Loss:* The Contract expressly provides in §8(e) that:

> The Contractor shall take all responsibility for the work . . . shall bear all losses resulting to him on account of the amount or character of the work, or . . . on account of the weather, elements or other cause.

See also §8(m) ("The work shall be entirely at the Contractor's risk until the

same is fully completed and accepted and he will be held liable to the amount of the Owner's interest in the same as shown by payments on account . . . ."); §10(a) (rights and duties of payment).

These provisions clearly indicate that until the facility is completed and accepted by the Town of Hull, Vappi & Co., Inc. bears the risk of loss and responsibility for the damages incurred by the facility.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 21 March 10, 1978

Gregory R. Anrig
Commissioner of Education
31 St. James Avenue
Boston, MA 02116

Dear Commissioner Anrig:

You have requested my opinion about the application of statutory restrictions on employment and receipt of compensation to certain activities of Board of Education members. Specifically, you have asked whether an appointive Board member is prohibited from accepting a fellowship at the Institute of Politics, John Fitzgerald Kennedy School of Government, Harvard University, by G.L. c. 15, §1E, which states in relevant part that:

> No appointive member of said board shall be employed by or derive regular compensation from any educational institution, or school system, public or private, in the commonwealth, be employed by or derive regular compensation from the commonwealth, or serve as a member of a governing board of any public institution for higher education in the commonwealth or as a member of any school committee. . . .

For the reasons which follow, I conclude that the quoted provisions of G.L. c. 15, §1E preclude acceptance of the fellowship in question.

You have provided me with a description of the program for fellows at the Institute of Politics. Under this program, individual fellows typically receive a four-month appointment at the Institute. They receive a monthly stipend of $1,500, of which $300 is tax exempt under federal and Massachusetts law.[1] Fellows are entitled to Harvard University library and athletic privileges, membership in the Harvard Faculty Club, eligibility for health insurance, use of an office at the Institute, and secretarial assistance.

The program for fellows is individually tailored, but all fellows are involved in three areas of activity: (1) supervision of a non-credit study group of undergraduate students on a general topic, such as political campaign management or congressional reform; (2) completion of a project, usually written, related to the political process; and (3) interaction

[1]Section 117 of the Internal Revenue Code excludes scholarship and fellowship grants from the definition of gross income. Section 117(b) (2) (B) of the Code limits this exclusion in the case of non-degree candidates to a maximum of $300 per month up to 36 months. The Massachusetts income tax law adopts the federal definition of gross income in this respect. G.L. c. 62, §2(a).

with faculty and staff on social occasions, as well as occasional assistance in teaching, research or case development at the Kennedy School.

The task at hand is to determine whether a fellow's relationship with Harvard University is such as to characterize him as being "employed by or deriv[ing] regular compensation from" the University. These terms are not defined in G.L. c. 15, §1E, but guidance concerning their scope may be obtained from the history and purpose of the statute. *See, e.g., First Data Corp.* v. *State Tax Comm'n,* Mass. Adv. Sh. (1976) 2731, 2735; *Leonard* v. *School Committee of Attleborough,* 349 Mass. 704, 406 (1965); *see also Gallo* v. *Division of Water Pollution Control,* Mass. Adv. Sh. (1978) 195, 201; *Board of Education* v. *Assessor of Worcester,* Mass. Adv. Sh. (1975) 2626, 2629.

General Laws, c. 15, §1E, establishing the Board of Education, was enacted by St. 1965, c. 572. The relevant provisions defining qualifications for appointive Board members were part of §1E from the beginning.[2] The provisions were based on the recommendations set forth in the *Report of the Special Commission to Investigate and Study Educational Facilities in the Commonwealth of Massachusetts,* Mass. H. Doc. No. 4300 (1965), known as the Willis-Harrington Report (hereafter "Report"). The Report recommended a major overhaul of the Commonwealth's public educational system, including the creation of a strong board of public school education to oversee the Department of Education and the provision of public education at the elementary and secondary school levels. *Id.* at 189-191. The Report clearly voiced its concern that the proposed board be an impartial body, composed of persons with no professional or formal connections to education:

> [T]he Board of Public School Education faces in two directions. Looking one way, it confronts the General Court and Governor, the ultimate authority for commiting the police power of the state to compulsory attendance and the taxing power of the state to school support. Looking the other way, it must represent all of the people. In this regard, it is especially important that the political aspect of the Board of Public School Education be impeccable. Its campaigns cannot afford to be in the least compromised by the slightest hint of bias, or partiality. It must represent the public interest of the whole Commonwealth and speak for all citizens together. If it is to be able to do so, its membership must at the very least exclude schoolmen, whose profession stands to gain most in power from expanding education. The best composition can consist basically of the taxpayers who must find the money to finance expansion. Within that group, labor, management, industry, the private professions, finance, all stand at the frontiers of the Massachusetts economy and can argue most persuasively for its educational demands. Such statewide civilian leadership should be able to argue most persuasively and hardheadedly in support

[2] *See also* G.L. c. 15, §§1A (Board of Higher Education), 1H (Advisory Council on Education), 20A (Board of Trustees of State Colleges). By virture of St. 1965, c. 572, these statutes similarly prohibit appointive members of the boards and the council established thereunder from being employed by or receiving regular compensation from public or private educational institutions.

of the returns it sees in particular investments in education. This is one of its primary missions. *Id.* at 190.[3]

The legislative history of G.L. c. 15, §1E, thus suggests that a broad reading of the statute's restrictions on outside educational activities of Board members is appropriate.[4] Two previous opinions of the Attorney General interpreting these statutory provisions support this conclusion.

The first opinion, 1965/66 Op. Atty. Gen. at 320, considered the relevant language in G.L. c. 15, §1E and the corollary provisions in G.L. c. 15, §1A, the statute establishing the Board of Higher Education. The opinion stressed the "broad terms" chosen by the Legislature "to express the prohibition against service on certain boards by persons connected with education in various ways." *Id.* at 321. It then advised the Commissioner of Education that, while giving an occasional lecture or seminar for a school or other educational institution would not render a person an employee, more regular remunerative work for an institution would be considered employment for purposes of the statute; this would be true regardless of whether the work was full- or part-time or for all or part of the academic year.

The second opinion, 1966-67 Op. Atty. Gen. at 231, followed suit. It examined the legislative history of G.L. c. 15, §1E and the applicable portions of the Report in particular. It concluded that the language of §1E at issue here would prohibit a Board member from teaching an undergraduate seminar at Harvard with or without compensation since he would be considered to be "employed by" the institution.

The employment status of a fellow in the Institute of Politics' program presents a more difficult question than that addressed in the 1966/67 opinion of the Attorney General just described. Some of the terms of the program distinguish fellowship status from that of a typical employee. On the other hand, the perquisites of faculty membership offered fellows and the teaching duties required of them suggest an employment relation between the fellow and the University. In view of the terms of your question, however, it is unnecessary to finally resolve whether a fellow is or is not "employed" by Harvard; if a fellow derives "regular compensation" from the University, his membership on the Board would thereby be prohibited by G.L. c. 15, §1E.

In my view, a fellow does receive "regular compensation" as a participant in the Institute of Politics' program. Compensation is generally defined to mean payment conferred for services rendered or to be rendered. *See, e.g.*, G.L. c. 268A, §1(a) (defining "compensation" under the Commonwealth's conflict of interest statute). The stipend received by the fellow is "regular" since it is received on a monthly basis co-extensive with the duration of the fellowship program. It is also substantial, totalling $6,000 for the four-month fellowship period. Finally, the terms of the

[3]The need for an impartial, lay citizen-controlled citizen board whose members have no professional ties to educational institutions is echoed in the Report's recommendations for the Board of Higher Education. *See* Report at 171.

[4]It should be noted that the language of §1E relating to employment and compensation by educational institutions, quoted at p. 1 *supra*, is actually broader than that recommended by the Special Commission. Draft legislation appended to the Report suggested the following provision: "No member of [the Board of Public School Education] shall be employed by or derive regular compensation from any public or private school system, institution or agency in Massachusetts. . . ." This language indicates that the only restriction deemed necessary related to elementary or secondary schools, and not to colleges or universities. As enacted, G.L. c. 15, §1E proscribed ties to educational institutions at *all* levels.

fellowship program indicate that the stipend constitutes, at least in part, compensation for the services rendered to the Institute or Harvard University by the fellow.[5]

I recognize that the primary statutory responsibility of the Board of Education is in the area of public elementary and secondary education. G.L. c. 15, §1G. Since Harvard University, the source of the compensation here, is a private institution of higher education, receipt of a fellowship by a Board member may not pose the type of conflict with Board membership suggested by the original proponents of §1E. See p. 4 and nn. 3 and 4 *supra.* Nevertheless, the language of §1E prohibits in unambiguous terms compensation from *any* educational institution in the Commonwealth. I am not free to disregard the clear terms of the statute to rationalize a particular result. *Desmarais* v. *Standard Accident Ins. Co.,* 331 Mass. 199, 202 (1954), and cases cited. Any relief from the statute's prohibitions must come from the legislature. *First Data Corp.* v. *State Tax Commission, supra,* at 2736.

In summary, given the plain language of §1E and the partially compensatory character of the stipend offered by the Institute of Politics, it is my opinion that the provisions of G.L. c. 15, §1E prohibit a fellow of the Institute from serving as an appointive member of the Board of Education.

Very truly yours
FRANCIS X. BELLOTTI
Attorney General

Number 22 April 3, 1978

John F. Kehoe, Jr.
Commissioner of Public Safety
1010 Commonwealth Avenue
Boston, Massachusetts 02215

Dear Commissioner Kehoe:

You have asked two questions relating to your duties under G.L. c. 136, §4(1),[1] a statute which gives the Commissioner of Public Safety authority to approve or disapprove certain types of entertainment held on Sunday. Both your questions concern flea markets:

1. May you approve as "public diversion[s]" applications for the Sunday operation or conduct of flea markets at which a general admission charge is made to the public?

[5] The fellowship stipend apparently is not considered as compensation for "employment services" for federal income tax purposes. Otherwise, no tax exemption would be available. *See* I.R.C. Reg. §1.117-4(c) (1977), which provides that payments for such services do not qualify as a fellowship grant under I.R.C. §117. Nevertheless, the Internal Revenue Code only exempts $300 per month of a fellowship grant in a non-degree program. I.R.C. §117(b) (2) (B). This limitation suggests a Congressional judgment that payments exceeding the $300 maximum are sufficiently akin to compensation to be taxable. Moreover, the provisions of G.L. c. 15, §1E do not permit the drawing of lines similar to those in I.R.C. §117(b) (2) (B). I must instead determine whether a Board member's acceptance of the fellowship and of its accompanying stipend taken as a whole is precluded by §1E.

[1] That section reads in pertinent part:

> The mayor of a city or the selectmen of a town, upon written application describing the proposed dancing, or game, sport, fair, exposition, play, entertainment or public diversion, except as provided in section one hundred and five of chapter one hundred and forty-nine, may grant, upon such reasonable terms and conditions as they may prescribe, a license to hold on Sunday dancing, or any . . . [of the other activities listed above] *for which a charge in the form of payment or collection of money or other valuable consideration is made for the privilege of being present thereat or engaging therein* . . . provided . . . that such application to conduct an athletic game or sport, shall be approved by the commissioner of public safety . . . . (Emphasis supplied.)

2. Is it necessary for a person to obtain both a local license and your approval for the operation of a flea market on Sunday, if the general public is not required to pay admission, but the vendors at the flea market are charged a rental charge for the privilege of setting up booths and stands?

For the reasons discussed below, I conclude that you may approve as a "public diversion" an application for a Sunday flea market at which a general admission charge is made to the public. Neither a license nor your approval is required, however, if there is no admission charge to the general public.

You have informed me that for the last five years, various cities and towns have submitted applications for licenses to conduct flea markets on Sunday to the Department of Public Safety for approval. The Department has always considered flea markets to come within the category of "public diversion" within the meaning of G.L. c. 136, §4(1), and therefore subject to the Department's jurisdiction under that statute. However, the Department has taken the position that only those flea markets which impose a general admission charge on the attending public are subject to the license requirements of G.L. c. 136, §4(1).[2]

The term "public diversion" is not defined in G.L. c. 136, §4(1), and has not been judicially construed by Massachusetts courts. *Cf., State* v. *Ryan,* 80 Conn. 582, 69 A. 536, 537 (1908) (interpreting "public diversion" in similar Connecticut statute). In these circumstances the consistent reading given the term by your Department, the agency charged with administering the statute, is entitled to weight. *See, e.g., Ace Heating Service, Inc.* v. *State Tax Comm'n,* Mass. Adv. Sh. (1976) 2490, 2492; *see also First Federal Savings & Loan Ass'n* v. *State Tax Comm'n,* Mass. Adv. Sh. (1977) 895, 902-903; *cf. Opinion of the Justices,* Mass. Adv. Sh. (1978) 347, 352-353.

The contours of the phase "public diversion" in G.L. c. 136, §4(1) can be ascertained from the words which precede it in the statute, namely, "dancing or any other game, sport, fair, exposition, plan, [and] entertainment . . . ." I have been informed by the official in your Department directly involved in reviewing flea market license applications that the flea markets at issue can generally be characterized as similar to a fair or exposition or a combination of the two. Given this description and the Department's consistent treatment of flea market license applications, the classification of a flea market as a "public diversion" represents a reasonable and valid construction of the statutory phrase. *Cf. Consolidated Cigar Corp.* v. *Department of Public Health,* Mass. Adv. Sh. (1977) 1419, 1427, 1433; *cf. also Foxborough* v. *Bay State Harness Horse Racing and Breeding Ass'n. Inc.,* Mass. App. Ct. Adv. Sh. (1977) 1031, 1039.

Your second question is whether G.L. c. 136, §4(1) applies to Sunday flea markets where the public is granted free admission, but individual vendors or exhibitors are charged a fee as a condition of participation. The recent case of *Foxborough* v. *Bay State Harness Horse Racing and Breeding*

---

[2] I understand from your letter that the Department does not consider its approval to be necessary for flea markets (1) where neither a public admission charge nor vendor fee is imposed, or (2) where a general admission charge is not imposed but a vendor fee is. Flea markets falling in the first category are clearly not covered by G.L. c. 136, §4(1). See the underlined portions of §4(1) quoted in n. 1 above. Flea markets in the second category are the subject of your second question; I address that question in the text below.

Association, Inc., supra, is dispositive of this issue. In that case the Appeals Court held that the fee paid for the use of a booth at a flea market is not a charge made to those engaging in an activity listed in G.L. c. 136, §4(1). Mass. App. Ct. Adv. Sh. (1977) at 1038-1039. Thus, the provisions of the statute have no application to the flea markets you describe. Accordingly, neither a license nor your approval is required in such instances.

Very truly yours
FRANCIS X. BELLOTTI
Attorney General

Number 23 April 26, 1978

Leroy Keith
Chancellor
Board of Higher Education
31 St. James Avenue
Boston, Massachusetts 02116

Dear Chancellor Keith:

On behalf of the Board of Higher Education, you have requested my opinion on the following question:

> Does the 97th Article of Amendments to the Massachusetts Constitution, enacted on November 7, 1972, preclude the transfer to Southeastern Massachusetts University by the Department of Natural Resources of a certain tract of land, as directed by Chapter 648 of the Acts of 1969?

The statute referred to in your request, St. 1969, c. 648, directed the Department of Natural Resources (now known as the Department of Environmental Management [DEM][1]

> . . . to transfer to the Southeastern Massachusetts Technological Institute[2] a certain tract of land not exceeding twenty acres in the town of Westport located in the area known as Gooseberry Neck, which tract shall be selected and designated by said . . . Institute and the department of natural resources, and which shall be used for the construction thereon of an oceanographic experimental station for scientific study and research. C. 648, §1.

Your question arises because DEM has refused to transfer any land in Gooseberry Neck to the University. DEM takes the position[3] that since the transfer did not occur before 1972,[4] when art. 97 of the Amendments to the

[1] *See* St. 1974, c. 806, §8.

[2] The Institute's name was changed to Southeastern Massachusetts University in 1969. St. 1969, c. 391, §1, and c. 684, §1.

[3] DEM, through its general counsel, has submitted a memorandum to me explaining its position regarding the transfer.

[4] The reason for the delay has not been provided to me.

Massachusetts Constitution [5] was passed, art. 97 now operates to prohibit that transfer; art. 97 requires a two-thirds vote of each branch of the Legislature for the taking of certain kinds of land. The agency also argues that the description in St. 1969, c. 648, of the land to be transferred is not sufficiently precise to satisfy the standards laid down by the Supreme Judicial Court under the doctrine of "prior public use" to govern shifts in uses of public lands.

For the reasons discussed below, I conclude that (1) art. 97 of the Amendments does not bar the transfer of land authorized by St. 1969, c. 648, and (2) c. 648 satisfies the requirements of the prior public use doctrine. Accordingly, in my opinion, the transfer which the statute contemplates may validly take place and should be made forthwith to carry out the provisions of c. 648.

Gooseberry Neck is a spit of land of approximately 75 acres extending into Buzzards Bay in Westport, Massachusetts. It is part of Horseneck Beach Reservation, a public park under the jurisdiction of DEM. From 1957 to 1968, Gooseberry Neck (and all of Horseneck Beach) were owned and maintained by the Department of Public Works for public recreational purposes. In 1968, DEM acquired Horseneck Beach, including Gooseberry Neck, pursuant to St. 1968, c. 501, which transferred all beaches under the supervision of the Department of Waterways in the Department of Public Works to the Division of Forests and Parks in the Department of Natural Resources. Since 1968, Gooseberry Neck has been used for public recreation, such as fishing and bird watching, and for conservation purposes.

Article 97 of the Amendments to the Constitution was the subject of a lengthy and well reasoned opinion of my predecessor which answered several questions raised by the House of Representatives concerning the proper interpretation of the amendment. 1972/73 Op. Atty. Gen. at 139. That opinion concluded that art. 97 applies, *inter alia,* to public lands acquired for park and recreational purposes, *id.* at 143; to such public lands acquired prior to the amendment's effective date, *id.* at 140; and "to transfers of legal or physical control between agencies of government, between political subdivisions, and between levels of government, or land, easements and interests therein originally taken or acquired for the purposes stated in Article 97." *Id.* at 144.

Application of these conclusions to the present situation establishes that Gooseberry Neck is used for purposes within the scope of art. 97, and that the transfer directed by St. 1969, c. 648, is of the kind covered by that article. What remains to determine is whether the amendment's requirement of a two-thirds vote of the Legislature for disposition of public lands applies to a transfer which was authorized but not completed before the article's enactment.

[5] Article 97 provides in pertinent part as follows:

> . . . The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.
>
> . . . .
>
> Lands and easements taken or acquired for such purposes shall not be used for other purposes or otherwise disposed of except by laws enacted by a two thirds vote, taken by yeas and nays, of each branch of the general court.

138, § 23 does not authorize the pledge of a liquor license to secure the payment of taxes owed to the Commonwealth by the licensee. It is thus unnecessary to consider whether independent considerations, such as a lack of authority of the Department of Revenue to hold a liquor license, would otherwise preclude such a pledge.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 21 November 24, 1978

Frank T. Keefe
Director of State Planning
One Ashburton Place
Boston, Massachusetts 02180

Dear Mr. Keefe:

You have requested my opinion as to whether a city or town may remove itself form a regional planning district established pursuant to G.L. c. 40B, § 3, without specific authorization for the Legislature. As your letter indicates, this question was the subject of a previous opinion of the Attorney General, Rep. A.G., Pub. Doc. No. 12, at 305 (1966), and was answered in the negative. You ask whether the Home Rule Amendment, [1] with its broad delegation of power to municipalities, now requires that the question be answered differently.[2]

For the reasons outlined below, I follow and adopt the opinion of my predecessor as continuing to reflect the correct reading of the relevant statutes. In my view, a municipality which has joined a regional planning district pursuant to G.L. c. 40B, § 3, may not remove itself from the district at will and in the absence of legislative permission.

It is useful to begin by considering the function and duties of regional planning districts and the relationship of your office to them. Regional planning districts are primarily established pursuant to G.L. c. 40B § 3[3] or special act of the Legislature. They are composed of groups of citites and towns which vote to form a planning district, G.L. c. 40B, §3. Each is governed by a regional planning commission consisting of one member of the planning board of each city and town in the district, *id.*, §4. The responsibilities of these districts and commissions include: (1) to study and develop "a comprehensive plan of development" for the district; *id.*, § 5; and (2) to review all proposals for federal grants pertaining to the district and all federal environmental impact statements for projects within it. *See* e.g., *id.*, § 4A.[4]. These functions are, you state, vital to the continuation of

[1] The Home Rule Amendment was adopted in 1966 as art. 89 of the Amendments to the Massachusetts Constitution, amending art. 2 of the Amendments.

[2] The factural background of your question relates to a dispute between the Town of Granville and th Lower Pioneer Valley Regional Planning District. This district was formed under G.L. c. 40B, §3. In March of 1970, Granville voted to become a member; on June 6, 1977 the town voted to withdraw its membership. At issue is whether Granville had the power to withdraw from the district on its own motion.

[3] General Laws, c. 40B, §§ 9 and 10 provide for the formation of the Southeastern Regional Planning and Economic Development District. As discussed below, the Southeastern Planning District is distinct in several respects from the regional planning districts established under c. 40B, § 3. The description of planning districts in the text refers to the section 3 districts.

[4] The districts perform many of these federal review functions as federally designated regional review clearinghouses.

certain federal aid to the Commonwealth. The Office of State Planning serves as the Commonwealth's liaison with all regional planning agencies established under G.L. c. 40B. You have thus requested this opinion in your capacity as director of the supervisory state agency for the regional planning districts.

General Laws, c. 40B, § 3 provides:

> Any group of cities, towns, or citites and towns may, by vote of their respective city councils or town meetings, vote to become members of and thus establish a planning district, which shall constitute a public body corporate. After a planning district has been thus established, any other city or town within the district area as hereinafter defined may by vote of its city council or town meeting apply for admission. Upon the affirmative vote of two thirds of the representatives of the cities and towns comprising the district, said city or town shall became a member thereof. The area of jurisdiction of said district shall be an area defined or redefined as an effective regional planning region by the division of planning of the department of commerce and development. All rights, privileges and obligations applicable to the original members of the district shall be applicable to the new members.

The statute thus speaks in detail about the ability of a city or town to join a regional planning district and the process it is to follow in joining, but does not address the issue of removal from a district.

As indicated above, in 1966 the Attorney General issued an opinion concluding that in the absence of any provision in G.L. c. 40B, § 3 (or any other statute) for the withdrawal from or dissolution of a regional planning district, a city or town could only remove itself through legislative action. Rep. A.G., Pub. Doc. No. 12, at 305, 306 (1966). As a general matter, I adhere to my previously stated view that it is inappropriate to reconsider and reverse a prior opinion of the Attorney General unless there are compelling reasons for doing so. *See* 1975/76 Op. Atty. Gen. No. 77, Rep. A.G., Pub. Doc. No. 12, at 198, 199 (1976). I can find no compelling reason to conclude that the subsequently enacted Home Rule Amendment requires modification of the prior opinion issued on the question you have raised.

The grant of independent powers to municiplites in the Home Rule Amendment, though large, is not unrestricted. *See Arlington* v. *Board of Conciliation and Arbitration,* Mass. Adv. Sh. (1976) 2035, 2039-2040. The municipal authority conferred by § 6 of the Amendment has been given firm boundaries by the Supreme Judicial Court. On several occasions the court has determined that the prime limit on the power of municipalities under § 6 "is that it not be exercised in a manner which frustrates the General Law of the Legislature." *Collura* v. *Arlington,* 367 Mass. 881, 885, n. 3 (1975). *See Board of Appeals of Hanover* v. *Housing Appeals Committee in the Dept. of Comm. Affairs,* 363 Mass. 339, 360 (1973).

It is apparent that the legislative intent underlying c. 40B could be frustrated if the Home Rule Amendment were construed to allow municipalities the right to withdraw from regional districts at will. The

"shall be used for the construction thereon of an oceanographic experimental station for scientific study and research."

The third requirement is that there appear in the statute a statement "showing in some way legislative awareness of the existing public use."[8] As noted above, Gooseberry Neck is used for public recreation and conservation. Given the limited uses for which DEM could own or hold land at the time c. 648 was enacted, *see, e.g.*, G.L. c. 21, §1; 1965/66 Op. Atty. Gen. at 335, 336, the Legislature's awareness that the land was owned by DEM implies a general knowledge that the land was used for recreation and conservation purposes at that time.[9] In addition, c. 648, §§2 and 3, furnish specific evidence of legislative awareness of the existing recreational use.[10] I conclude therefore that c. 648 indicates sufficient "legislative awareness" of the existing uses to satisfy the prior public use doctrine. *Cf. Boston* v. *Massachusetts Port Authy.*, 356 Mass. 741, 742 (1970).

Since the three requirements of the prior public use doctrine set forth in *Robbins* are met by c. 648, the propsed transfer is not proscribed by that doctrine. In order to effectuate the intent of the statute, the transfer should take place expeditiously.

Very truly yours
FRANCIS X. BELLOTTI
Attorney General

Number 24 May 2, 1978

Charles J. Doherty, *Director*
Office of Campaign and
Political Finance
8 Beacon Street
Boston, Massachusetts 01108

Dear Mr.Doherty:

You have requested an opinion concerning the recordkeeping responsibilities of candidates and treasurers of political committees under the provisions of G.L. c. 55, the statute regulating political campaign expenditures and contributions. Specifically, you ask whether candidates and treasurers of political committees are required to keep records of the name, address, date and amount of each person who makes a political

---

[8]It should be noted that this requirement appeared for the first time in *Robbins* v. *Department of Public Works*, *supra* at 331, and seems contrary to statements in earlier cases. *See Boston* v. *Albany R. Co.* v. *City Council of Cambridge*, 166 Mass. 224 (1896). The court in *Robbins* did not indicate any intent to overrule or otherwise alter the holdings and conclusions stated in previous "prior public use" decisions. In light of this fact, I believe that the third *Robbins* standard may fairly be read with a degree of flexibility, as demanding only some evidence in the statute that the Legislature had a general awareness of the existing public use.

[9]Moreover, only a year before c. 648 was enacted, the Legislature had transferred the ownership of various beaches to DEM, including Horseneck Beach and Gooseberry Neck. St. 1968, c. 501.

[10]Section 2 allows the public to take fin fish from the water surrounding the tract. Section 3 directs the Department to make a study of the advisability and cost of constructing a protected harbor on Gooseberry Neck "by connecting the various ponds thereon, more especially in connection with the needs of sport fishermen in the area . . ."

contribution under $15, or $25 in the case of a "depository candidate."[1] For the reasons discussed below, it is my opinion that candidates and treasurers of political committees need keep records of the amount and date of each contribution under $15, but not the name and address of each such contributor.

The recordkeeeping responsibilities of political treasurers are set forth in G.L. c. 55, §§2 and 5.[2] Section 2 provides in pertinent part:

> Every candidate shall keep detailed accounts of all contributions received by him or by a person acting on his behalf, and of all expenditures made by him, or by a person acting on his behalf. . . . Such accounts shall include:
>
> (1) the full name and residential address of each person who has made a contribution, in an amount or value of fifteen dollars or more, or twenty-five dollars or more, if the candidate is required to designate a depository in accordance with the provisions of section nineteen, in a reporting period, and such information for each contribution of less than the sum of fifteen dollars, or twenty-five dollars, if the aggregate of all contributions are received from such contributor within said reporting period is the sum of fifteen dollars or more, or twenty-five dollars or more, as the case may be, and the amount or value and date of the contribution. . . .
>
> . . . .
>
> (3) the amount or value and date of each contribution made, in a reporting period . . . which is not otherwise included under clause (1). . . .

These provisions should be read in relation to each other and to G.L. c. 55 taken as a whole, in order to give a coherent and harmonious effect to the entire legislative scheme. *See, e.g., Boston* v. *Massachusetts Bay Trans. Authy.*, Mass. Adv. Sh. (1977) 2588, 2593.

When §2 (1) and (3) are read together, they plainly require a candidate or treasurer to keep a record of the amount and date of every contribution made, but not of every contributor. As to the contributors, a candidate must record their names and addresses only when they give either (a) an individual contribution of $15 or more in a reporting period,[3] or (b) more than one smaller contribution in a reporting period which in the aggregate equal or exced the $15 minimum figure.[4]

General Laws, c. 55, §10, is not inconsistent with this reading of the

[1] "Depository candidates" are candidates for the political offices specified in G.L. c. 55, §19, who are required by that section to designate a national bank or trust company in Massachusetts as a depository for campaign funds.

In all the sections of G.L. c. 55 which pertain to your question, the relevant dollar amounts of contributions specified are $15 for non-depository candiates and $25 for depository candidates. For purposes of brevity, my discussion of these sections in this opinion will refer only to the provisions relating to non-depository candidates. Such references should be understood, however, to apply as well to the statutory provisions governing depository candidates.

[2] Section 2 specifically concerns political candidates. The provisions of §2 are made applicable to treasurers of political committees under G.L. C. 55, §5.

[3] Reporting periods are defined in G.L. c. 55, §18.

[4] The pertinent reporting requirements set forth in c. 55, §18 directly track the recordkeeping provisions of G.L. c. 55, §2. Section 18 (2) provides that candidates and political committees must file reports disclosing the name and residential address of each person who has made a contribution of $15 or more, or smaller contributions which together total $15 or more. Reports of the names and addresses of smaller contributions are not required.

respective accounting and reporting requirements of c. 55, §§2 and 18. Section 10 reads in relevant part:

> No person shall. . . make a campaign contribution in any name except his own . . . nor unless he makes his name and residential address known to the person receiving such contribution is made . . . . No candidate or political committee or person acting under its authority or in its behalf shall knowingly receive a campaign contribution, or knowingly enter or cause the same to be entered in the accounts or records of such candidate or committee, unless the provisions of this section have been complied with.

The import of this section, when read in conjunction with G.L. c. 55, §§2 and 18, is solely that the contributor must give his name and residential address to the candidate or committee receiving his contribution. Section 10 does not address the issue of what the candidate or committee is to do with these items of information; it is necessary to look at §§2 and 18 for an answer to that question.

In sum, the language of G.L. c. 55, §2, considered alone and in relation to the statutory scheme of which it is a part, is clear and unambiguous. It requires political candidates and political committee treasurers to record the names and addresses only of individuals who give an aggregate of $15 or more in a reporting period. This plain expression of legislative purpose must be given effect. *Cf. Hoffman* v. *Howmedica, Inc.,* Mass. Adv. Sh. (1977) 1488, 1493; *Chouinard, petitioner,* 358 Mass. 780, 782 (1971).

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 25 May 3, 1978

Robert Q. Crane
Treasurer and Receiver General
State House, Room 227
Boston, Massachusetts 02133

Dear Mr. Crane:

You have requested my opinion whether the state board of retirement, of which you are the chairman, should set off any federal disability compensation against the accidental disability retirement allowance to which a member of the Massachusetts National Guard is otherwise entitled pursuant to G.L. c. 32, §7. Specifically, you have asked the following question:

> [W]hether a member of the Massachusetts National Guard, who is to be retired by the State Board of Retirement for reasons of Accidental Disability under Section 7 of Chapter 32, is entitled to receive the 72%, plus the annuity, plus an allowance for minor children if any, as well as a compensation payment

from the Federal Government of approximately 75% for the same disability, without [the board] being permitted to offset.

For the reasons stated below, I conclude that the board should not set off any such federal compensation against the state disability retirement allowance.

A full-time member of the Massachusetts National Guard whose salary is paid from United States funds allocated to the Massachusetts Guard, is eligible to be a member of the state employees' retirement system. G.L. c. 32, §§1 (definition of "employee") and 3 (2) (a) (i).[1] A full-time Guardsman may also qualify for an accidental disability retirement allowance under the state system. *See* G.L. c. 32, §§3 (2) and 7 (1).

General Laws, c. 32 §7 (b) (2) defines the annual amount of the accidental disability retirement allowance as the sum of the following yearly amounts: (1) the annuity specified in G.L. c. 32, §12 (2) (a) (i); (2) a pension equal to 72 percent of the employee's annual rate of "regular compensation"[2] on the date of the disabling incident; and (3) any additional pension for dependents. Your question asks how the disability retirement allowance provisions of §7 should be interpreted in the case of an eligible National Guardsman who also receives disability retirement benefits from the federal government on account of the same illness or injury.[3]

No section of G.L. c. 32 directly addresses this issue. Nevertheless, several provisions of the retirement statute, G.L. c. 32, as well as the statute governing the Massachusetts National Guard, G.L. c. 33, demonstrate a clear legislative awareness of the a fact of double compensation. The treatment of double compensation in these provisions provides the key to resolving your question.

Thus, G.L. c. 32, §14 (2) (a) requires any disability benefits available to a disabled retiree under the workers' compensation law, G.L. c. 152, to be offset against disability pension otherwise payable to the individual pursuant to G.L. c. 32, §7; the disabled retiree may receive from the state system only the amount, if any, by which his retirement pension exceeds the workers' compensation benefits. Similarly, G.L. c. 32, §91A in pertinent part directs each person receiving a disability retirement allowance to (1) file annually a sworn statement of his employment earnings and (2) refund any amounts by which his independent earnings and retirement benefits together in the past year exceeded the amount he would have earned if still a state employee, plus $1,000. In both of these instances, the principle of set off is operating.

Turning to the National Guard statute, several sections specifically require set offs of federal compensation against compensation or allowances received by Guardsmen from the Commonwealth. General

[1]These two sections respectively establish (1) that a full-time National Guardsman is an "employee" within the meaning of the retirement statute, and (2) that as an employee, a Guardsman may become a member of the state retirement system so long as he is not at the same time a member of the federal civil service retirement system.

[2]"Regular Compensation" is defined in G.L. c. 32, §1 as the salary or wages determined by the employee's employing authority, and specifically as including salary or wages paid from federal grants.

[3]National Guardsmen are eligible for the same hospital benefits, pensions and other compensation as members of the United States Regular Army if they are disabled while performing or participating in federal National Guard training duty, exercises or school programs. *See* 32 U.S.C. §318 (1970); 10 U.S.C. §§1201-1205 (1970). A member of the Guard may also be entitled to veteran's disability compensation under 38 U.S.C. §§331-336 (1970).

Laws, c. 33, §88 provides for disability compensation to be paid a National Guardsman who suffers an injury in the line of duty which incapacitates him from pursuing his usual occupation.[4] A board within the Commonwealth's military division reviews an injured Guardsman's claim and determines the appropriate amount of compensation to be given. In performing these functions,

> [t]he board in consideration of the claim shall (1) except as otherwise provided in section eighty-eight [as to the death of a National Guardsman], take into account any compensation received by the claimant or his dependents from the United States. G.L. c. 33, §90.

In G.L. c. 33, §90, then, the Legislature has clearly expressed its decision to set off any federal disability compensation against whatever disability compensation the Commonwealth would otherwise provide under G.L. c. 33.[5] Similarly, in G.L. c. 33, §83 (d), the Legislature has required that state compensation to National Guardsmen for the period of their annual training must be reduced by any federal pay which they receive for the same military training service.

The provisions of G.L. c. 32 and c. 33 described above show not only a plain legislative recognition of the issue of double compensation in the area of disability retirement allowances; they also demonstrate that when the Legislature has chosen to preclude a public employee from receiving such double benefits, it has taken the necessary steps to do so. In these circumstances, I believe that had the Legislature intended the state retirement board to set off any federal disability benefits which a member of the National Guard receives against his state disability retirement allowance, it would have expressly so provided.[6] *See Negron* v. *Gordon,* Mass. Adv. Sh. (1977) 1701, 1706; *Commonwealth* v. *Hayes,* Mass. Adv. Sh. (1977) 928, 933; *see also County of Bristol* v. *Secretary of the Commonwealth,* 324 Mass. 403, 406-407 (1949); 1977/78 Op. Atty. Gen. No. 19 at 9.[7]

In sum, the provisions of G.L. c. 32 §7 in my view are clear. They do not require or permit the state Board of Retirement to set off any federal disability benefits which a Guardsman receives against the accidental

---

[4]Section 88 also provides for payment of compensation to the dependents of a National Guardsman who dies in the line of duty.

[5]Disability claims approved by the board under G.L. c. 33, §90, are deemed ". . . a charge against the commonwealth [to be] paid in the same manner as other military accounts." *Id.*

The compensation provisions of G.L. c. 32, §7, and G.L. c. 33, §88, overlap, for both provide disability benefits to National Guardsmen. The two sections differ, however, in that c. 32, §7 applies in the case of any retirement, whether temporary or permanent, while disability compensation under c. 33, §88, except in the case of death, is available only during the period in which the individual is prevented by the injury from pursuing his usual occupation.

[6]Moreover, my reading of the statutes at issue here is bolstered by the fact that when the Legislature amended G.L. c. 32 to include full-time National Guardsmen within the state retirement system by St. 1950, c. 600, the Congress had recently enacted the provisions entitling National Guard members to federal disability retirement benefits: the substance of what is now 32 U.S.C. §31 was first enacted as the Act of June 20, 1049, c. 225, §3, 63 Stat. 201; the substance of what is now 10 U.S.C. §§1201-1205 was first enacted as the Act of October 12, 1949, c. 681, §402, 63 Stat. 802. The Legislature is presumed to have been aware of existing state as well as federal statutes when it enacted St 1950, c. 600. *See, e.g., Board of Assessors of Melrose* v. *Driscoll,* Mass. Adv. Sh. (1976) 1497, 1503; *see also Velasco* v. *Minter,* 352 F. Supp. 1109, 1116 (D. Mass., *aff'd* 481 F. 2d 573 (1st Cir. 1973); C.D. Sands, *Sutherland Statutory Construction,* §51.06 (4th Ed. 1974).

[7]The provisions of G.L. c. 32, §7 (2) are not inconsistent with this conclusion. That section provides that an individual cannot receive an annual retirement *allowance* under §7 greater than the annual rate of his regular compensation at the time he was injured. "Allowance" is specifically defined in G.L. c. 32, §1; it does not include federal retirement benefits. Thus a Guardsman's receipt of federal payments does not affect the level of the disability "allowance" he receives from the Commonwealth.

disability retirement allowance provided for in §7, so long as the Guardsman is not a member of the federal civil service system. Arguments about the wisdom of this scheme as a matter of social policy cannot justify a different reading. *See Druker* v. *State Tax Comm'n,* Mass. Adv. Sh. (1978) 80, 82-83. The Legislature is the appropriate forum to resolve such social policy issues. *See Negron* v. *Gordon, supra,* Mass. Adv. Sh. (1977) at 1711-1712.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 26 May 16, 1978

Wallace C. Mills
Clerk
House of Representatives
State House
Boston, MA 02133

Dear Mr. Mills:

You have forwarded to me a copy of House Document 4635 (1978), which sets forth an order of the House of Representatives requesting my opinion on the following question:

> Does the State Fire Marshal have the authority pursuant to the Department of Public Safety, Board of Fire Prevention Regulations, FPR-3, Oil Burning Equipment-Fuel Oil and Other Inflammable Liquid Products (filed June 30, 1976 and published July 8, 1976), to approve multi-fuel boilers that are fired by wood and/or oil, where the fuel oil burner component of said boilers have already received such approval?

Having reviewed the cited regulations, I answer the question in the affirmative: the state fire marshal is empowered to review and approve multi-fuel boilers in situations where the oil burner component is already approved.[1]

The Board's current regulations governing oil burning equipment, designated as FPR-3,[2] provide that "[a]ll fuel oil burners[3] and all equipment in connection therewith shall be installed and maintained in accordance with these rules and regulations." FPR-3, Rule 2. They go on to require that the state fire marshal approve every fuel oil burner before it is installed, maintained or used in any structure (Rule 4), and further, that

---

[1] I note at the outset that the Representatives' question may soon be moot. On December 14, 1977, the Board of Fire Prevention Regulations adopted emergency regulations amending FRR-3 specifically to require the state fire marshal's approval of all multi-fuel boilers installed and used in Massachusetts. *See* 87 Mass. Reg. 71, 73 (1977). The Board held a public hearing on these new regulations on February 23, 1978. Upon the Board's compliance with the filing requirements of G.L. c. 30A, §§2 and 6, the new regulations will be in full force and effect.

[2] These regulations are published in 12 Mass. Reg. 81 (1976).

[3] "Fuel oil burner" is defined in FPR-3, Rule 1(f) as

> any device designed and constructed for the purpose of burning oil for heating or cooking in any range, stove, boiler, furnace or other heater.

applications for such approval be accompanied by "complete assembly drawings and specifications . . . ." *Id.*, Rule 5. The provision of direct relevance to the question here posed is Rule 6, which reads:

> A device or equipment not described in the original application for approval shall not be installed nor connected to any oil burner until approval has been obtained from the marshal.

In my view, Rule 6 authorizes the state fire marshal to approve multi-fuel boilers where the fuel oil burner component has previously been approved. The information I have been furnished by the fire marshal's office concerning multi-fuel boilers indicates that they are single heating units with separate oil-burning and coal- or wood-burning compartments. Thus, a previously-approved oil burner can only become part of a multi-fuel boiler by connecting the burner to the boiler equipment. Rule 6 directly speaks to the issue of connecting "device[s]" or "equipment" to oil burners, and specifically requires the marshal's approval for the same. Thus, by its terms, the language of the regulation applies to the multi-fuel boilers described in the Representatives' question; that clear language must be given effect. *Cf. Hoffman* v. *Howmedica, Inc.,* Mass. Adv. Sh. (1977) 1488, 1493; *Commonwealth* v. *Gove,* 366 Mass. 351, 354 (1974).

That the Board of Fire Prevention Regulations has taken steps (*see* n. 1 *supra*) to amend its oil burner regulations in order to regulate multi-fuel boilers specifically does not in itself show the current regulations cannot be applied to such heating equipment. The Board legitimately could seek to clarify its existing regulations without being forced to adopt the position that absent clarification, the regulations fail to reach the multi-fuel boilers at issue here. *Cf. Massachusetts Comm'n Against Discrimination* v. *Liberty Mut. Ins. Co.* Mass. Adv. Sh. (1976) 2403, 2412 (agency seeking clarifying legislation).

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 27 May 18, 1978

Charles J. Doherty, *Director*
Office of Campaign and
Political Finance
8 Beacon Street
Boston, MA 02108

Dear Mr. Doherty:

As Director of the Office of Campaign and Political Finance, you have requested my opinion regarding the extent of your obligation to respond to requests for legal interpretations under G.L. c. 55, the statute governing disclosure and regulation of campaign expenditures and contributions. Specifically, you ask whether you are required to give an answer to a candidate, political committee or member of the public on a general question such as the following:

> Are the reports filed with your office by the XYZ Committee or by X Candidate in full compliance with the requirements of the law based upon the information presently in your possession?

For the reasons set forth below, it is my opinion that you are not required to answer a question propounded in this form.

The duties of the Director of Campaign and Political Finance, as they relate to the question you present, are contained in G.L. c. 55, §3. Pursuant to that section, the Director "[is] . . . free to advise and consult with . . . persons affected by the laws under [his] jurisdiction . . ."(¶4), and ". . . shall also . . . respond with reasonable promptness to requests for information, interpretations and advice presented by candidates, state committees, political committees, and members of the public." (¶6)

Treating the cited provisions separately, I conclude that those in §3, ¶4, impose no obligation on you to answer an inquiry whether reports filed with your office are in full compliance with the law. This portion of the statute serves to authorize your rendering advice to individuals affected by G.L. c. 55; it cannot reasonably be interpreted as requiring your response on the validity of financial disclosure reports in your possession.[1]

I am also of the opinion that the portions of G.L. c. 55, §3, ¶6, quoted above, do not envision your responding to the type of question you describe. The provisions of G.L. c. 55, §3 must be construed in light of the entire statutory scheme set forth in c. 55, so as to constitute a harmonious whole consistent with the legislative purpose. *See, e.g., Boston* v. *Massachusetts Bay Transp. Authy.,* Mass. Adv. Sh. (1977) 2588, 2593; *Massachusetts Comm'n Against Discrimination* v. *Liberty Mut. Ins. Co.,* Mass. Adv. Sh. (1976) 2403, 2407. The conclusory type of question you cite could only be answered by determining the ultimate legality of financial disclosure reports filed with your office. Although c. 55 grants the Director "the power and authority to investigate the legality, validity, completeness and accuracy" of reports, G.L. c. 55, §3; §§28-29, it specifically delegates to the Attorney General and the District Attorneys the duty to make final legal determinations on these questions. G.L. c. 55, §§3 and 29.[2] An answer to the broad question whether reports are "in full compliance with the law" could interfere not only with the responsibilities of these officials, but also with your own investigative duties and powers described in §§3 and 29.[3]

In sum, in order to preserve the discrete functions and responsibilities of the officials responsible for enforcing G.L. c. 55, and to give full meaning to the statute as a whole, I conclude that the Director's duty to respond to questions pursuant to c. 55, §3, must be read in a limited way. The Director is responsible for answering factual and general questions about the campaign finance laws of the Commonwealth. However, the legal

---

[1]It is a well-established principle of statutory construction that where the words of a statute are unambiguous, the language is to be given its plain and ordinary meaning. *See, e.g., Hoffman* v. *Howmedica, Inc.,* Mass. Adv. Sh. (1977) 1488, 1493.

[2]It is worth noting that G.L. c. 55 does not require the Director of the Office of Campaign and Political Finance to be a lawyer, although you yourself are a member of the Massachusetts Bar.

[3]In a recent opinion, I concluded that the Director's primary function under G.L. c. 55 is to serve as a record keeper; his investigatory functions are limited. 1976/77 Op Atty. Gen. No. 38. There may be violations of c. 55 or of other statutes that would or could not be uncovered in the Director's examination of filed reports. I hesitate to adopt a construction of c. 55 calling upon the Director to rule on issues that he may be without power to investigate fully.

determination whether reports on file are in "full compliance with the law" is entrusted to the Attorney General and the appropriate District Attorney. A contrary interpretation would impair the ability of these law enforcement officers adequately to investigate and enforce violations of c. 55, and thereby interfere with the effective working of the statutory scheme. Such an interpretation should be avoided. *See, e.g., School Comm. of Springfield* v. *Board of Educ.,* 362 Mass. 417, 438 (1972); *Atlas Distrib. Co.* v. *Alcoholic Bev. Control Comm'n,* 354 Mass. 408, 414, 415 (1968); *Gosselin* v. *Gosselin,* 1 Mass. App. 146, 148 (1973).

In reaching this conclusion, I do not intend to unduly restrict you in your advisory functions. You are, of course, free to advise those candidates who ask general questions like that contained in your request as to the existence or nonexistence of violations which appear on the face of their reports or as to the timeliness or their reports. You may not, however, substitute your judgment for that of the appropriate prosecuting or judicial officers by declaring a candidate's filing to be in conformity with the law.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 28 June 2, 1978

John R. Buckley, *Secretary*
Executive Office for Administration and Finance
State House
Boston, Massachusetts 02133

Dear Secretary Buckley:

In a letter dated March 21, 1977, I addressed certain questions you raised relating to the interpretation of St. 1976, c. 434 (c. 434). 1976/77 Op. Atty. Gen. No. 25 (1976 Opinion). Chapter 434 charges you with establishing a "small business purchasing program" which will ensure that at least five percent of all goods and services purchased by the Commonwealth are purchased from "small businesses."[1] You now ask two additional questions which I summarize as follows:

1) Does the program apply to purchases made by the legislative and judicial departments?
2) May agency purchases of less than five hundred dollars be included in computing the aggregate of agency purchases included in the program to arrive at the minimum five percent figure required by c. 434?

For the reasons which follow, I conclude that (1) the program does not apply to the legislative and judicial departments; and (2) agency purchases of less than $500 may be included in computing the five percent of all

[1] A "small business" is defined in c. 434, §2(6) as "a business which is independently owned and operated, has its principal place of business within the commonwealth, which is not dominant in its field of operation, and is not a corporation which is a member of an affiliated group . . . ."

purchases which are to be included in the program, provided, however, that such purchases are made through competitive bidding.

With regard to your first question, c. 434, §3, provides that the small business purchasing program "shall apply to all purchasing agencies." Section 2(4) of c. 434 in turn defines a "purchasing agency" as "any agency, department, board, commission, office, or authority of the commonwealth empowered by law to purchase goods or services." Clearly the legislature and judiciary do not come within the terms "agency," "board," "commission," "office," or "authority." Thus, the question you pose is whether they should each be considered a "department" for purposes of the definition of "purchasing agency." In my judgment they should not.

A number of decisions of the Supreme Judicial Court have considered the meaning of the word "department" as it appears in statutory or consitutional provisions listing several types of governmental entities (e.g., "board," "commission," "office," "authority"), in a manner and order very similar to c. 434, §2(4). *See, e.g., Westinghouse Broadcasting Co., Inc.* v. *Sergeant-at-Arms of the General Court,* Mass. Adv. Sh. (1978) 1213, 1219 (construing "department" in G.L. c. 4, §7, cl. 26, the definition of "public records"); *Massachusetts Probation Ass'n* v. *Commissioner of Administration,* Mass. Adv. Sh. (1976) 1814, 1829-1830 (construing "department" in G.L. c. 149, §78F, prior state employee collective bargaining statute); *Yont* v. *Secretary of the Commonwealth,* 275 Mass. 365, 367-368 (1931) (construing "department" in art. 48 of the Amendments to the Constitution, The Referendum, III, §2, definition of "excluded matters" from referendum petitions). *See also* art. 66 of the Amendments to the Constitution (dividing executive and administrative work of Commonwealth into 20 "departments"). In each case the court concluded that "department" referred only to departments within the executive branch of government. and did not include either the legislative or judicial branches.[2]

Given the similarity between the language in c. 434, §2(4) and the statutes under review in the cited cases, I follow the court's decisions and conclude that "department" in c. 434, §2(4) does not encompass the legislative or judicial branch.[3] Accordingly, it is my view that both branches fall outside the definition of "purchasing agency" as used in c. 434, and are therefore not subject to the small business purchasing program.

My conclusion finds support in the structure of the small business purchasing program itself, when considered in light of the methods by which legislative and judicial expenditures are made. As the Secretary of Administration and Finance you are responsible, together with the Commissioner of Commerce and Development, for the establishment and administration of the program created by c. 434. *See* c. 434, §§3-7. Both you

---

[2]In each case the court noted that the legislature and judiciary were referred to in the Constitution as two of the three "departments" of government, *see* art. 30 of the Declaration of Rights, but expressly concluded that the term "department" had been used in a far more restrictive way in the statutory and constitutional provisions under review in the case before it than was true of art. 30. *Westinghouse Broadcasting Co., Inc., supra* Mass. Adv. Sh. (1978) at 1219; *Massachusetts Probation Ass'n, supra* at 1830; *Yont, supra,* 275 Mass. at 368.

[3]Moreover, when the legislature has intended to include the legislative and judicial branches within the word "department" it has stated so specifically. *See* G.L. c. 268A, §1(p) ("department" of state government includes legislative and judicial branches for purposes of conflict of interest statute). The legislature presumably would have made the same express designation in c. 434 if it intended to include those two branches within the definition of "purchasing agency." *Cf. Commonwealth* v. *Hayes,* Mass. Adv. Sh. (1977) 928, 933.

and the Commissioner are officers within the executive branch of the government, and your statutory duties extend only to agencies, departments, and other entities within the executive branch. See G.L. c. 7, §§4, 4A, 4B, 4C, 4G (setting forth powers and duties of the Secretary, and the divisions and agencies within the Executive Office of Administration and Finance); G.L. c. 23A, §§1, 3, 4, 5 (describing powers and duties of the Commissioner and the divisions and bureaus under his supervision). Nothing in the statutes generally governing the functions of your and the Commissioner's offices authorizes either of you to supervise, regulate or review expenditures of the legislature or the courts.

On the contrary, legislative expenditures are governed and approved exclusively by the legislature and its own officers. *See* G.L. c. 3, §§30-38.[4] With respect to the judiciary, the great majority of court expenditures are currently paid by the counties (or cities) rather than the state.[5] To interpret the definition of "purchasing agency" in c. 434, §2(4) as including the legislative and judicial branches would bring certain purchases of these branches under the supervision of the Secretary and Commissioner even though neither officer has any authority over their purchases or expenditures generally. The legislature could not have intended such an anomalous result. *Cf. Massachusetts Probation Ass'n* v. *Commissioner of Administration, supra,* Mass. Adv. Sh. at 1827.

Your second question asks if a purchasing agency's purchases of less than $500 may be included in determining whether the aggregate amount of purchases in the program amounts to five percent of all purchases of the Commonwealth.[6] The question appears to arise because state agencies are not required to use competitive bidding procedures for purchases under $500, *see* G.L. c. 7, §22(2). At the same time c. 434 applies only to purchases for which bids are received. *See* c. 434, §§4, 5, 7.

Chapter 434, §3, ¶1 states that the provisions of c. 434 are to,

> apply to all small business purchases which the Secretary institutes pursuant to this program, notwithstanding the provisions of [G.L. c. 7, §§22-23A, G.L. c. 39, §29A], or any other law or regulation concerning the authority and the procedure for purchasing by the commonwealth. (Emphasis supplied.)

General Laws, c. 7, §22[7] directs the Secretary of Administration and Finance to make rules governing "the manner and method of" purchasing

[4]The comptroller of the Commonwealth authorizes payment of bills for expenditures incurred by the legislature, *see* G.L. c. 7, §13; *Westinghouse Broadcasting Co., Inc.* v. *Sergeant-at-Arms of the General Court*, Mass. Adv. Sh. (1978) 1213, 1215, n. 2, and the Comptroller's Division is within the Executive Office of Administration and Finance. G.L. c. 7, §4A. Nevertheless, the Secretary does not supervise the Comptroller's functions. *See* G.L. c. 7, §4.

[5]*See, e.g.*, G.L. c. 213, §8 and c. 35, §12 (Supreme Judicial Court and Superior Court); c. 185A, §19 (Boston Housing Court); c. 185B, §19 (Hampden County Housing Court); c. 218, §39 (books and supplies for District Courts).

[6]Under c. 434, §3, "the aggregate amount of the purchases included in [the small business purchasing program] shall equal or exceed five percent of the aggregate amount of all purchases made by the commonwealth . . . ." The Act defines "purchases" as "contracts by which a purchasing agency agrees to buy goods or services from a specified vendor at a specific price and according to specified conditions." Chapter 434, §2(3). The regulations you have promulgated to implement c. 434 track these statutory provisions. "Rules and Regulations for the Massachusetts Small Business Purchasing Program" §§22(b), 3(c), 57 Mass. Reg. 1, 3, 4 (1977).

[7]The other statutory provisions listed in c. 434, §3, quoted above, are not relevant to your question.

and contracting for supplies, equipment, etc. "for the various state departments, offices and commissions . . . ." Pursuant to G.L. c. 7, §22(2), these rules are to provide, *inter alia,* for the purchase by agencies of supplies without advertisement or public bids, "where the amount involved will not exceed five hundred dollars . . . ." As the portion of c. 434, §3, ¶1 quoted above indicates, however, the small business purchasing program is to take precedence over G.L. c. 7, §22 and regulations promulgated under it. In light of this statutory mandate, it is clear that as Secretary you may exercise the broad powers vested in you by c. 434 over the purchases to be included in the program by designating goods or supplies costing less than $500 for inclusion.[8] However, any such purchases that are so designated must then be made through the competitive bidding procedures referred to in c. 434, §§4, 5 and 7; under the plain terms of the statute, these bidding procedures are not discretionary and may not be waived by the Secretary.[9]

The construction I adopt of c. 434 will best advance the clear legislative intent underlying c. 434. *See Board of Education* v. *Assessor of Worcester,* Mass. Adv. Sh. (1975) 2626, 2629. That purpose or intent, as set forth in c. 434, §1, was to,

> aid, counsel, assist, and protect, insofar as possible, the interests of small business concerns in order to preserve free competitive enterprise and to ensure that a fair proportion of the total purchases for the Commonwealth be placed with small business enterprises.

If the statute is construed to exclude purchases of $500 or less from the program, significant portions of an agency's total purchases may not be covered, since, as you indicate in your letter, many agencies probably spend a large percentage of their annual budget on individual purchases of under $500. On the other hand, a reading of c. 434 as permitting purchases of this amount to be included in the program without competitive bidding would contravene the clear language of c. 434, §§4, 5 and 7, and therefore should not be adopted. *Cf. Hoffman* v. *Howmedica, Inc.*, Mass. Adv. Sh. (1977) 1488, 1493.

In concluding that purchases of $500 or less may be included in the small business purchasing program, I do not intend to suggest that they *must* be. As the 1976 Opinion and the discussion above make clear, as Secretary you possess a great deal of discretion in determining which purchases are to be included in the program.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

[8]Your authority to determine the purchases that will be subject to the program is described in G.L. c. 434, §3, ¶2: ". . . [t]he Secretary . . . shall promulgate rules and regulations establishing guidelines for determining which purchases by such agencies shall be eligible for the program . . . ." Further, c. 434, §3, ¶4 vests additional authority in the Secretary ". . . to include specific purchases in the program . . . if such action is necessary in the Secretary's judgment to ensure that the five percent minimum is met or exceeded." Your letter requesting this opinion implies that unless at least some $500 or smaller purchases are included in the program, it may be difficult to meet the five percent figure.

[9]In effect, therefore, the rules or regulations promulgated under G.L. c. 7, §22 would not apply to purchases of $500 or less which are included in the small business purchasing program, insofar as the §22 rules authorized an agency's direct purchase from a vendor without competitive bidding. In contrast to the bidding requirements set forth in c. 434, §4, the provisions of c. 434, §3 appear specifically to contemplate the waiving of rules and regulations promulgated under G.L. c. 7, §22

Number 29 June 9, 1978

Bruce S. Gullion
Commissioner
Department of Fisheries, Wildlife and Recreational Vehicles
100 Cambridge Street
Boston, MA 02202

Dear Commissioner Gullion:

You have requested my opinion concerning the rulemaking authority of the Department of Fisheries, Wildlife, and Recreational Vehicles (Department) under G.L. c. 21, §17A.[1] Specifically you ask whether G.L. c. 21, §17A, grants to the Department[2] the authority to create, by regulation, uniform fee schedules for public use of any "designated", municipally-owned, public access sites and facilities and related parking facilities, even in the absence of a formal land management agreement between the municipality and the Department.

Your request arises in the context of the following facts. Over the years, a number of municipalities have agreed with the Department to allow the use of town land designated for public access or for construction of public access facilities. In such instances arising since 1973, the Department has entered into formal land management agreements with the municipal owners of the designated sites or facilities. The agreements provide that all users of the facilities or sites—residents of the municipality in question as well as non-residents—are to be treated equally, and that no fees are to be imposed on users without the Department's consent. For sites or facilities designated and constructed before 1973, however, no such formal agreements exist. Some of these municipal owners have imposed fee schedules discriminating in favor of residents or imposing fees on non-residents only. The Department's contemplated rulemaking would simply extend the requirement of equal treatment for all users to the pre-1973 sites and facilities which are not governed by formal agreements.

It is my opinion that the Department may govern the use of designated sites by exercising its rulemaking authority under G.L. c. 21, §17A, and it may, pursuant to that authority, create uniform fee schedules without regard to the existence of any land management agreements. I further conclude, however, that the Department's rulemaking authority does not extend to sites which have not been designated by the Board. Hence uniform fee schedules may not be set for non-designated, but related parking areas.

---

[1]General Laws, c. 21, §17A, creates within the Department a Public Access Board (Board) whose function is to designate various locations of public access to inland and coastal waters within the Commonwealth, and locations of trails and paths for recreational uses. After designation by the Board, the Department is to acquire the designated land or water areas by purchase, gift, lease, or, with the Governor's consent, by eminent domain. The Department may also use public lands without formal acquisition if it has the consent of the governmental agency in charge. After acquiring the land or the consent to use the land, the Department may construct such public facilities, including parking areas and boat ramps, as the Board may designate. The Department is required as well to maintain, operate and improve the facilities and associated land and water areas unless other public agencies agree to assume those responsibilities.

Section 17A expressly authorizes the Department to adopt regulations governing the use of land and water areas designated under the section.

[2]Your request asks if the Commissioner may adopt the regulations. Inasmuch as the statute actually authorizes the Department to adopt regulations, I will consider the reference to be to the Department.

In G.L. c. 21, §17A, the Legislature has delegated to the Department power to "adopt . . . regulations governing the use of land and water areas under this section." Given this clear grant of rulemaking authority, the principal questions presented by your request are (1) whether a regulation requiring uniform fee schedules for use of designated public access sites is within the scope of the Department's rulemaking power, and if so, (2) whether it is constitutional. *See Colella* v. *State Racing Commission,* 360 Mass. 152, 155 (1971).

The general rule in Massachusetts is that in carrying out statutory duties expressly conferred, an agency has implicit power to use all ordinary means for the full performance of those duties. *See Attorney General* v. *Trustees of Boston Elevated Ry. Co.,* 319 Mass. 642, 655, 656 (1946); *see also Massachusetts Comm'n Against Discrimination* v. *Liberty Mutual Insurance Co.,* Mass. Adv. Sh. (1976) 2403, 2405; *Bureau of Old Age Assistance of Natick* v. *Commissioner of Public Welfare,* 326 Mass. 121, 124 (1950); *cf.* 1975/76 Op. Atty. Gen. No. 63.

Section 17A imposes specific duties upon the Department and the Board to designate, acquire and improve public access and recreational sites for public use, and grants the power to govern the use of such sites by regulation. The Supreme Judicial Court has held that similar obligations and grants of power entitle agencies to exercise broad discretion in enacting rules and regulations in the pursuit of their statutory duties. *E.g., Colella* v. *State Racing Commission, supra* at 155;[3] *cf.* 1977/78 Op. Atty. Gen. No. 10 (Supervisor of Public Records may adopt fee schedule under general rulemaking authority); *Supervisor of Public Records* v. *City Clerk of Revere,* C.A. No. 25839 (Suffolk Superior Court, May 10, 1978) (upholding fee schedule).

The purpose of §17A is to make access sites more available to the public. The section sets forth the procedures for designating, acquiring, improving and maintaining public access sites and vests in the Department authority to regulate their use. Since differences in user fees, based on place of residence, can tend to limit or restrict use of the facilities, fee schedules are a fit subject of regulation under §17A, and are "reasonably related to the purposes of the enabling legislation." *Thorpe* v. *Housing Authority of Durham,* 393 U.S. 268, 280-281 (1969).

Moreover, such fee regulations, under examination by a court, would be entitled to "all rational presumptions in favor of [their] validity" and must be sustained "unless [their] provisions cannot by any reasonable construction be interpreted in harmony with the legislative mandate." *Consolidated Cigar Co.* v. *Department of Public Health,* Mass. Adv. Sh. (1977) 1419, 1433. In my opinion, regulations governing fee schedules are related to the use of designated public access sites, are consistent with the legislative mandate, and thus are within the scope of the Department's rulemaking power.

[3]In *Colella,* the plaintiff attacked a regulation of the State Racing Commission which sets fees paid to jockeys in the absence of independent agreements. The court ruled that the fee regulations were authorized by the legislative delegation of "full power to prescribe rules, regulations, and conditions under which all horse or dog races at horse or dog racing meetings shall be conducted in the Commonwealth." The court noted that the Legislature had established the overall plan by which the conduct of racing meetings would be governed, but left to the commission the authority to regulate the details of racing operations. *Id.* at 115.

In assessing the constitutionality of the contemplated regulation, I apply the same standard as in evaluating the constitutionality of a statute: would the regulation, if enacted as a statute, constitute a valid exercise of the legislative police powers? In considering this question, all rational presumptions are to be made in the regulation's favor. *See Consolidated Cigar Co.* v. *Department of Public Health, supra* at 1428, 1433; *Palm Manor Nursing Home* v. *Rate Setting Commission,* 359 Mass. 651, 655-656 (1971); *Colella* v. *State Racing Commission, supra* at 155-156. While it is obviously not possible to pass on the constitutional validity of currently unwritten regulations, it can be fairly stated that a regulation simply requiring uniform fee schedules for the use of public access sites without regard for place of residence would not offend the Constitution. The regulation would be constitutionally vulnerable only if no rational basis in fact can reasonably be conceived to sustain it. *Colella* v. *State Racing Commission, supra* at 156; *see also Coffee-Rich, Inc.* v. *Commissioner of Public Health,* 348 Mass. 414, 422 (1965); *Druzik* v. *Board of Health of Haverhill,* 324 Mass. 129, 139 (1949). The Department may find that fee differentials imposed by municipalities in favor of their own residents restrict or impede the use of public access sites in a way not in the best interests of the citizens of the Commonwealth. Such a finding, if not manifestly unreasonable, would be sufficient to sustain the constitutional validity of the regulation.[4]

One additional issue is raised by your opinion request. You have stated that at least one town charges no fee for the use of the designated public access site, but charges a non-resident fee for the use of a non-designated but related parking area. As noted above, §17A confers rulemaking authority on the Department to regulate "the use of land and water areas *under this section* . . ." (emphasis added). Inasmuch as the only references to land and water areas in the section are to sites which are designated by the Board, regulations promulgated pursuant to §17A must be limited to the control of these sites. Thus in the situation you have described, the Department may not regulate the use of the town's non-designated parking area.

It is open to the Department to designate the parking area and enter into a management agreement with the town's consent, G.L. c. 21, §17A. Absent consent, if the property is held solely for a public use, it may be taken by the Department without compensation. *Cambridge* v. *Commissioner of Public Welfare,* 357 Mass. 183, 186 (1970). If the municipality holds the property in a proprietary capacity, the property may be taken by eminent domain. G.L. c. 21, §17A; *Cambridge* v. *Commissioner of Public Welfare, supra* at 186-187. If any of these procedures is followed, the parking lot would be land used under §17A, and would therefore be subject to the Department's rulemaking authority.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

---

[4]Of course, such regulations would be subject to the rulemaking requirements of the Administrative Procedure Act G.L. c. 30A, §§2 and 3. Moreover, I do not express an opinion on any particular regulations the Department may wish to promulgate, for " . . . it is not the function of this office to draft and pass upon regulations . . . in advance of actual rights involved thereunder " 1961/62 Op. Atty. Gen. at 115, 116. *See also* 1977/78 Op. Atty. Gen. No. 10.

Number 30 June 16, 1978

Gary F. Egan
Executive Director
Massachusetts Criminal Justice Training Council
One Ashburton Place
Boston, MA 02108

Dear Mr. Egan:

The Secretary of Public Safety has forwarded to me your request for my opinion on a number of issues regarding the interpretation and application of recent statutory amendments affecting the duties and authority of the Massachusetts Criminal Justice Training Council (Council). The statute in question, G.L. c. 41, §96B (§96B), was amended by St. 1977, c. 932.[1] Section 96B, in conjunction G.L. c. 6, §118,[2] delineates the duties of the Council with respect to the approval of police training schools and the designation of courses of study for law enforcement officers. Given the length and number of your question, I have set forth the substance of each question separately below, and have answered them in the order presented.

> 1. (a) May the Council reasonably assume that a police officer is not to be considered a "permanent" employee before completing the training requirements prescribed by §96B and G.L. c. 6, §118, since under §96B, ¶5, the officer is to be removed from his position if these training requirements are not met? (b) In addition, may the Council reasonably use the definition of an officer "appointed to a position on a permanent full-time basis" that has been established by the Division of Personnel Administration?

The first part of your question refers to the language in §96B, ¶1, defining the persons subject to its terms: "[e]very person who receives an appointment to a position on a *permanent* full-time basis in which he will

[1]The paragraphs of amended §96B may be summarized as follows:

Paragraph 1: Every person appointed on a "permanent full-time basis" to a position in which he will exercise "police powers" in a municipal police department, the M.D.C. police, M.B.T.A. police, Capitol police, division of law enforcement within the Executive Office of Environmental Affairs, and Registry of Motor Vehicles, shall, prior to exercising such police powers, complete courses prescribed by the council; while attending those courses, he shall be paid wages and reasonable expenses.

Paragraph 2: Every regular police officer in the police departments listed above (with the exception of the Capitol police department), shall participate in such in-service training programs as the Council may approve and determine. Participants shall be paid wages and expenses.

Paragraph 3: Every person "appointed as a reserve, or intermittent police officer" in a city or town shall complete courses prescribed by the Council before exercising any police powers.

Paragraph 4: Every appointing authority shall submit to the Council the name and date of appointment of any person who will exercise police powers within one month of appointment. The Council may exempt a person from the provisions of §96B prior to his exercising police powers, upon petition of an appointing authority.

Paragraph 5: An appointed police officer's failure to comply with §96B prior to his exercise of police powers, or to satisfactorily complete the prescribed course of study, shall result in his removal by the appointing authority (absent an exemption under Paragraph 4).

Paragraph 6: Every employee of the Department of Correction, Division of Youth Services, Parole Board or county correctional institution, whose duties require contact with inmates of institutions or parolees, is to complete a course of study prescribed by the Council. The Council may exempt individuals enrolled in specific training programs from the requirement that training be completed prior to exercising any police powers.

[2]General Laws, c. 6, §118 provides that the Council:

> . . . shall approve or disapprove municipal police training schools and shall make rules and regulations subject to the approval of the governor and council, for such schools, relating to courses of study, attendance requirements, equipment and facilities and qualifications of instructors. No municipal police training school shall be approved unless it provides for training members of the rape prevention and prosecution unit established by section ninety-seven B. of chapter forty-one.

exercise police powers . . . " (emphasis supplied). It is my view that the Council would be unwarranted in assuming that a police officer is not a "permanent" employee until the officer completes the Council's training requirements.

A governing principle of statutory construction provides that:

> A statute is to be interpreted with reference to the pre-existing law. If reasonably practicable, it is to be explained in conjunction with other statutes to the end that there may be a harmonious and consistent body of law. *Everett* v. *Revere,* 334 Mass. 585, 589 (1962).

Accord, Walsh v. *Commissioners of Civil Service,* 300 Mass. 244, 246 (1938). The word "permanent," as used in connection with "full-time" in §96B, refers to the character of a position of public employment. In my judgment, the term must be construed to comport with the explicit and well-established meaning under the existing civil service law, G.L. c. 31, §§1, 15.[3] When this is done, it is clear that an officer's status as a "permanent" employee has no direct connection to the power of the appointing authority to remove an officer for failure to complete the Council's training requirements, as suggested by your question.

My response to the first part of your question in effect answers the second part. I believe that the Council should utilize the Personnel Administrator's definition of "permanent employee" in administering the statutory training programs under its charge.

> 2. Did the Legislature intend that the terms "reserve" and "intermittent", as used in §96B, ¶3, be applied generically, thereby including under this provision all persons regardless of specific title who work with or without compensation, who work regularly or irregularly as required, but less than a schedule consistent with full-time employment for the appointing agency?

It is my opinion that the terms "reserve" and "intermittent" were not intended to be applied generically. Section 96B, ¶3 is plain in its application only to the reserve and intermittent police officers of cities and towns; it does not extend to the officers of other agencies who work less than full-time.[4] Further, while words of a statute must be construed according to the common and approved usage of the language, technical words that may have acquired a peculiar and appropriate meaning in law must be construed according to such meaning. G.L. c. 4, §6, cl. 3. *See Corcoran* v. *S.S. Kresge Co.,* 313 Mass. 299, 303 (1943). The words "reserve" and "intermittent" have clear statutory definitions and meanings in the civil

[3]The word "permanent" relates to the budgetary status of particular positions which are to be contrasted with "temporary" positions; the word further denotes the type of appointment made, distinguishing between permanent and "provisional" appointments. The qualifying phrase "full-time" distinguishes the affected appointments from intermittent positions, which do not ensure regular employment, but would be subject to the requirements of the civil service system. *See generally Sullivan* v. *Commissioner of Labor and Industries,* 351 Mass. 462, 464 (1966).

[4]Section 96B, ¶3 reads in pertinent part: "Each person appointed as a *reserve,* or *intermittent* police officer, *in a city or town,* shall . . . satisfactorily complete a course of study . . ." (emphasis supplied).

service system. Thus, the position of "reserve" police officer is authorized by G.L. c. 147, §§11-13C. As specified in G.L. c. 147, §13, a reserve officer is assigned to duty "whenever and for such length of time as [the] mayor, chief of police or marshall may deem necessary," and has all the powers and duties of members of the regular force when on duty. The intermittent position is defined in the civil service statute, G.L. c. 31, §1, as "an appointment from an eligible list to recurrent employment which may be regular or irregular as the needs of the service require." *See also* 1941 Op. Atty. Gen. at 90. As discussed in the answer to your first question, governing rules of construction mandate that these particular statutory definitions of "reserve" and "intermittent" be applied in the discharge of the Council's responsibilities under §96B, ¶3.

3. What is a substantive definition of "police powers" as specified in §96B, ¶¶1 and 3?

Your third question requests a substantive definition of the term "police powers," presumably to determine the class of individuals subject to the Council's training requirements. However, it would be inappropriate for me to supply a general definition of the term since the powers and duties of the various police officers specified in §96B are established by the common law and by the respective statutes under which they operate. *See, e.g.*, G.L. c. 41, §98 (municipal police); c. 92, §61 (Metropolitan District Commission police); c. 8, §12 (Capitol police); c. 21, §6B (division of law enforcement in the Office of Environmental Affairs); c. 90, §29 (Registry police). *See also* *Caswell* v. *Somerville Retirement System*, 306 Mass. 373, 376 (1940) (duties of municipal police); *Hartley* v. *Granville*, 216 Mass. 38, 39-49 (1913) (duties of constable); *Buttrick* v. *Lowell*, 1 Allen 172, 173-174 (1861). In these circumstances, I believe a single, generalized definition of "police powers" is not called for because it would not aid the Council in implementing §96B.

4. If the Council can reasonably determine that an appointing authority is in violation of the provisions of §96B, ¶4, can the Council take any action beyond informing that specific appointing authority that it is in violation of the statute?

Section 96B, ¶4 requires each appointing authority to submit, within one month of appointment, the name and date of appointment of any person who will exercise police powers. You now ask whether the Council can take any action against an appointing authority which fails to comply with this provision. Although the language of the reporting requirement is mandatory, there are no sanctions for noncompliance specified in §96B. Nor does the statute expressly or impliedly indicate that the Council has the power to impose a penalty in the event of a failure or refusal to comply. *Compare* *Commonwealth* v. *Racine*, Mass. Adv. Sh. (1977) 1101, 1105-1108. Therefore, the Council's response to the failure to submit the names of appointments is limited to the notification of noncompliance.

5. (a) Does the reporting requirement specified in §96B, ¶4 apply to the agencies designated in ¶6 of the same section; and (b) can the Council require said information on all persons employed on the effective date of the legislation?

(a) The statutory requirement, set forth in §96B, ¶4, that the appointing authorities submit the names of appointments to the Council, seems to apply only to individuals subject to the terms of §96B, ¶¶1-3. *See* n.1 *supra*. However, it is apparent that the Council must be informed of the persons covered by §96B, ¶6, in order to effectuate the purposes of the statute by providing the training which ¶6 calls for.

As a general rule, where a specific duty is imposed upon an administrative agency or board, it has authority to employ all ordinary means reasonably necessary for the full exercise of the power. *See, e.g., Bureau of Old Age Assistance of Natick* v. *Commissioner of Public Welfare*, 326 Mass. 121, 125 (1950). *Cf. Commonwealth* v. *Cerveny*, Mass. Adv. Sh. (1977) 1943, 1952. I do not read the absence of a specific reporting requirement applicable to employees within ¶6 as an intentional effort to restrict the Council's general rulemaking powers. A regulation requiring reports about the appointment of officers to the positions described in ¶6 would appear to be necessary and reasonably related to the purposes of §96B generally and to ¶6 of §96B in particular. It therefore would be within the Council's power to adopt such a regulation pursuant to its rulemaking authority "relating to *courses of study, attendance requirements*, equipment and facilities and qualifications of instructors" conferred by G.L. c. 6, §118 (emphasis supplied). *See Consolidated Cigar Co.* v. *Department of Public Health*, Mass. Adv. Sh. (1977) 1419, 1433; *Cambridge Elec. Light Co.* v. *Department of Pub. Utils.*, 363 Mass. 474, 494 (1973).[5]

(b) The related question is whether the Council may require appointing authorities to report the names of persons who exercise police powers and are so employed on the effective date of the amendments to §96B. I believe this issue can similarly be resolved by regulation, even though §96B does not in terms specify that appointing authorities must supply the Council with a list of such persons. The scope and effectiveness of the in-service training authorized by §96B, ¶2 obviously requires a current list of individuals for whom that training is deemed appropriate. A regulation requiring the submission of the names of employees subject to the requirements of §96B would appear to be rationally related to the performance of the Council's duty to provide in-service training.

6. Do the compensation requirements specified in §96B, ¶¶1 and 2 apply to the employees of those agencies designated in §96B, ¶6?

Although §96B, ¶¶1 and 2 both require the payment of regular wages and expenses to officers engaged in the Council's training programs, a similar provision does not appear in §96B, ¶6, which requires the training of employees in contact with institutionalized or paroled individuals. In these circumstances, the statute cannot be interpreted as providing for the payment of compensation to the ¶6 employees. It is an established rule that statutory omissions cannot be supplied by the courts or those charged with administering the law. *Thatcher* v. *Secretary of the Commonwealth*, 250

Mass. 188, 190 (1924); *see Boylston Water Dist.* v. *Tahanto Reg'l School Dist.*, 353 Mass. 81, 84 (1967). Despite its potential adverse impact on the Council's ability to perform the training duties described in §96B, ¶6, the omission cannot be corrected by the Council's rulemaking authority. The continued payment of wages and expenses to the employees mentioned in ¶6 is a matter relating to the internal operations of the employees' several appointing authorities, and is beyond the scope of the Council's responsibilities. There is nothing in the statute which suggests that the Council can dictate the employment practices of the agencies to such an extent.

7. Since the agencies specified in §96B, ¶1 as being subject to the statute's training requirements are identically specified in paragraph 2, except that the Capitol Police were omitted, may the Council assume that this omission was inadvertent or a clerical error, particularly since the Capitol Police were included in both paragraphs 1 and 2 of G.L. c. 41, §96B prior to the amendments made by St. 1977, c. 932?

This question in effect asks whether the omission of the Capitol Police from the statutory provision dealing with in-service training, §96B, ¶2, can be treated as a curable error. My answer to the previous question applies here. Again, the accepted rule is that courts or agencies cannot supply statutory omissions. *Thatcher* v. *Secretary of the Commonwealth, supra,* 250 Mass. at 190. As stated in *Cole* v. *Brookline Housing Authority,* Mass. App. Ct. Adv. Sh. (1976) 1238:

> [I]f the omission was intentional, no court can supply it. If the omission was due to inadvertance, an attempt to supply it . . . would be tantamount to adding a meaning not intended by the Legislature. *Id.* at 1241.

Therefore, regardless of the cause of the omission of the Capitol Police from §96B, ¶2, officers in that police force are not subject to the Council's in-service training program.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 31 June 23, 1978

Leroy Keith, *Chancellor*
Board of Higher Education
Park Square Building
31 St. James Avenue, 6th Floor
Boston, Massachusetts 02116

Dear Chancellor Keith:

The Board of Trustees of Southeastern Massachusetts University (S.M.U.) has requested, through the Board of High Education, my opinion about the use of certain university property by an organization not formally

connected with S.M.U. The specific question raised is whether the Trustees may legally authorize a rental arrangement between the S.M.U. student newspaper and For The People, a private, non-profit organization, for use of the student newspaper's office space, printing equipment and facilities.

On the basis of the information which I have been furnished, I conclude that the Board of Trustees has authority to permit the private organization in question to use the S.M.U. newspaper facilities and space, provided, however, that the fee paid under the rental arrangement covers the cost of making the facility available to For The People.

The factual background to the Trustees' request is this. The student newspaper, entitled "The Torch", has certain printing equipment which was purchased with funds allocated from mandatory student fees. The Torch also uses office space in a building on the S.M.U. campus which is owned by the Commonwealth. For The People publishes a community-oriented newspaper which is also called "For The People," and which apparently seeks to cover issues of interest and concern to low-income residents and members of the New Bedford/Fall River community. For The People publishes its newspaper approximately once every six weeks, and uses some of The Torch's office space and printing equipment to put the newspaper together. It pays The Torch a rental fee of $80 for each issue; these rental payments are in turn used in connection with publishing "The Torch" itself. It appears that For The People has been using "The Torch's" facilities since 1971, although the financial arrangements related to that use were somewhat different in the past. Finally, there is general agreement that other organizations not formally connected with S.M.U. have traditionally been allowed to use university property for their own programs and activities.[1]

The facts just stated appear in your letter requesting this opinion and in a memorandum submitted on behalf of For The People. In considering For The People's use of S.M.U.'s space and newspaper facilities, I begin by examining the character of the university and the general scope of the Board of Trustees' powers in light of these facts. S.M.U. is a "state institution of higher learning" directed by the Legislature to "provide educational programs, research, extension and continuing education services in the technological and engineering and physical science fields through the master's degree level, with general education subjects as may be appropriate to such programs." G.L. c. 75B, §1. S.M.U. is governed by a Board of Trustees established under G.L. c. 15, §21A. The powers of the Board of Trustees are those conferred by the enabling act. *See Attorney General* v. *Trustees of Boston Elevated Ry. Co.*, 319 Mass. 642, 655 (1946); *cf. Commonwealth* v. *Cervey*, Mass. Adv. Sh. (1977) 1943, 1952.

General Laws, c. 75B, §§1-7, confer on the Board of Trustees an extensive degree of control over the university.[2] However, none of the

[1]A memorandum submitted on behalf of For The People lists a number of such groups. Counsel for the university has acknowledged that several different organizations use S.M.U. property, while reserving his right to question specific details on the submitted list. I find no need to address such details in the context of this opinion.

[2]The Trustees select and determine the conditions of employment for the president and professional staff of the university, §10. They establish qualifications and standards for admission, promotion and graduation, §1. They also have a variety of other specifically defined powers such as those relating to the maintenance of an accounting system, §7, the administration of special trusts, §8, the purchase of supplies and equipment, §9, and the issuance of annual and special reports, §11.

specific provisions in G.L. c. 75B directly governs the situation presented in your request.[3] Reference must therefore be made to the general grant of authority contained in that chapter. In this regard, G.L. c. 75B, §1, provides in pertinent part:

> In addition to the authority, responsibility, powers and duties specifically conferred by this chapter, the board of trustees shall, subject only to such general authority in the board of higher education, have all authority, responsibility, rights, privileges, powers and duties customarily and traditionally exercised by governing boards of institutions of higher learning.

The construction of this language governs whether approval of the rental arrangement with For The People is within the scope of the Trustees' authority.

The language of §1 places reliance upon notions of custom and tradition. As stated above, there is general agreement that organizations not formally connected with the university traditionally have been allowed to use university property for different types of functions and purposes.[4] The question, then, is not whether private organizations may as a general matter use the school's property, but whether For The People's particular use of S.M.U. property is permissible.

The pertinent issue was set forth in an opinion of the Attorney General which approved the use of the recreational facilities of Lowell Textile Institute, a state educational institution, by private groups. The trustees of the institution were said to "have the authority, in the exercise of their sound discretion and judgment . . . to permit . . . [such] use . . . provided that such use is so limited and regulated by them as not to interfere with its employment for the school's purposes and for the needs of the pupils of said institution." 1940 Op. Atty. Gen. at 74, 75.

The present opinion request does not indicate that For The People has interfered with the use of S.M.U. property by its students or is likely to do so in the future.[5] The question of interference, however, has more than a physical dimension. In any case where a private group uses facilities belonging to a public university, it is also necessary to determine whether the nature of the activitiy is such as to clash with the school's educational purposes. Thus, the nature of the activity may be so unrelated to the educational purpose that it constitutes an impermissible use even in the absence of actual physical interference.

Compare G.L. c. 75B, §13, which specifically authorizes the Trustees to lease dwellings on the S.M.U. campus to former teachers or employees of the university for successive one-year terms, provided a reasonable rent is paid. A year's lease of a home is clearly of a very different character than intermittent and short-term use of printing equipment. That the dwelling lease should be dealt with specifically by statute arrangement involving university property requires express statutory permission. *Cf. Securities & Exchange Comm'n* v. *C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350-351 (1943); *City of New York* v. *Davis*, 7 F. 2d 566, 575 (2d Cir. 1925).

It should be noted at the outset that I find no constitutional or statutory prohibition generally against any use of the university's property by private interests. In particular, it is clear that the Anti-Aid Amendment, art. 18 of the Amendments to the Massachusetts Constitution, does not prohibit every such use, *cf.* 1975/76 Op. Atty. Gen. No. 72 at 183; 1974/75 Op. Atty. Gen. No. 65 at 153; 7 Op. Atty. Gen. at 616 (1925). With respect to statutory provisions, the recently enacted G.L. c. 7, §3B, furnishes implicit authorization for use of property in circumstances like those at issue here. This statute is discussed below. See p. 7 *infra*.

Indeed, the fact that the student newspaper has voluntarily entered into the arrangement with For The People supports a contrary conclusion. Moreover, For The People's memorandum specifically states that it uses The Torch's equipment on weekends and other times when S.M.U. students are not themselves using it.

The term educational purpose is broad indeed, transcending the granting of academic degrees. *See Harbor Schools, Inc.* v. *Board of Appeals of Haverhill,* Mass. App. Ct. Adv. Sh. (1977) 1012, 1018, and cases cited: *cf. Cummington School for the Arts, Inc.* v. *Board of Assessors of Cummington,* Mass. Adv. Sh. (1977) 2283, 2289-2290. As the existence of The Torch demonstrates, the preparation and distribution of a newspaper is certainly within the ambit of educational activities pursued at S.M.U. Moreover, it appears that the educational purposes of S.M.U. are linked directly with the area in which it is located. Thus, the Trustees must reside in specified cities, towns or communities surrounding S.M.U. in order to qualify for appointment. G.L. c. 15, §21A. In addition, a recent report prepared by representatives of the various university "constituencies" (students, faculty, administrators and Trustees) on future goals for S.M.U. stresses the university's role as an educational resource for the Southeastern Massachusetts region.[6] As explained above, the newspaper published by For The People focuses on issues of interest and concern to the communities around S.M.U. Permitting For The People to rent space and printing equipment may be viewed as one means by which S.M.U. can serve those communities.[7]

In sum, it is my judgment that authorization for the use of the S.M.U. newspaper facilities by For The People does not contravene the educational purposes of the university. Accordingly, the Trustees may exercise their discretion to permit such a use.

Two additional considerations deserve note in connection with For The People's use of university property. First, G.L. c. 7, §3B, provides in relevant part that:

> No. . . building, facility or equipment owned by the commonwealth [shall] be used by any person for private purposes or gain unless the commonwealth receives at least the cost of providing such building, facility or equipment. . .
>
> The secretary of administration shall . . . from time to time . . . determine the cost hereinbefore mentioned and shall inform each . . . institution of the commonwealth . . . having control of such property or equipment of the cost so determined.

In order to lease The Torch's office space and newspaper printing equipment to For The People, it appears that the Trustees of S.M.U. will need to ensure compliance with the pertinent cost regulations promulgated by the Secretary of Administration and Finance. *See* 106 Mass. Reg. 1, 10 (1978) (rental charges for space used in state buildings).

[6]The report is entitled "A Report to the President and the University Community," and is authored by the Mission of S.M.U. Committee. It has been furnished to me by the university's counsel.

[7]It deserves mention, however, that such permission need not be considered an endorsement of the contents of For The People's publication. Allowing the use of university space and equipment is only to be viewed as a mechanism for enabling a local group to express its own views. *Cf. Bazaar* v. *Fortune*, 476 F. 2d 570 (5th Cir.), *modified on rehearing, en banc*, 489 F. 2d 225 (5th Cir. 1973), *cert. denied*, 416 U.S. 985 (1974).

Finally, a question arises in allocating the university's space or facilities between permissible but competing uses. I have been informed that the issue of proper allocation standards is presently under consideration by the Board of Trustees of S.M.U. A fair, impartial policy requires that no individual or group be discriminated against in claim for use of university space or equipment because of the content of its message. *Cf. Police Dept. of Chicago* v. *Mosely, 408 U.S. 92, 95 (1972); cf. also Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 546, 555 (1975); *Stacy* v. *Williams,* 306 F. Supp. 963 (N.D. Miss. 1969) (three-judge court); *compare Advocates for the Arts, Inc.* v. *Thomson,* 532 F. 2d 792, 795-797 (1st Cir. 1976). So long as a private use of university property neither interferes physically with the students' use nor contravenes the educational purposes of the school, neutrality should provide the key to the allocation process.

Very truly yours,
FRANCIES X. BELLOTTI
Attorney General

INDEX OF OPINIONS

TOPIC	OPINION	PAGE
Advertising		
Expenditure of funds for advertising promoting expansion of industry in Commonwealth	16	106
Affirmative Action		
Declines reply on validity of proposed rule	6	82
Alcoholic Beverages		
Regulation of liquor traffic on state and federal military reservations	7	83
Appealability of Decision		
Powers of Governor and Executive Council in appeals from decisions on veterans' benefits	4	75
Appointments		
Designation of state hospital area unit as "facility"; powers and duties of area director	8	85
Armed Forces		
1) Regulation of liquor traffic on state and federal military reservations	7	83
2) Entitlement of National Guard officers to state and/or federal pay in certain situations	19	117
Banks and Banking		
Collection agency license for Pennsylvania corporation	12	96
Boards and Commissions		
1) Constitutionality of bill granting immunity and privilege to members of Board of Registration and Discipline in Medicine	5	78
2) Statutory restrictions on outside educational activities of Board of Education members	21	123
3) Authority of State Fire Marshal to review and approve multi-fuel boilers where oil burner component is already approved	26	137
4) Relationship between Rate Setting Commission and Division of Hearing Officers	17	109
Building Code		
Application of G.L. c. 143, § 3R ("lock law") to buildings erected prior to effective date	11	94
Chapter 766		
Financial responsibility for special education of "grand-fathered" children	3	72
Civil Service		
1) Declines reply on validity of proposed affirmative action rule		
2) Employee class reallocation appeals	14	100
3) Authority of Massachusetts Criminal Justice Training Council with respect to police training programs	30	147
Coastal Zone		
Declines reply concerning Coastal Zone Management program	18	115

TOPIC	OPINION	PAGE
Constitutionality		
1) bill granting immunity and privilege to members of Board of Registration and Discipline in Medicine	5	78
2) Relationship between Rate Setting Commission and Division of Hearing Officers	17	109
3) Transfer of land to Southeastern Massachusetts University	23	128
Contracts		
Ownership of water pollution control facility and responsibility for damage in major disaster	20	122
Disasters		
Ownership of water pollution control facility and responsibility for damage in major disaster	20	122
Discrimination		
Declines reply on validity of proposed rule	6	82
Educational Institutions		
Use of university property by outside organization	31	151
Elections		
1) Recordkeeping requirements for small campaign contributions	24	132
2) Obligations of Office of Campaign and Political Finance to respond to inquiry on validity of financial disclosure reports	27	138
Employees, Public		
1) Declines reply on validity of proposed affirmative action rule	6	82
2) Employee class reallocation appeals	14	100
3) Authority of Massachusetts Criminal Justice Training Council with respect to police training programs	30	147
Fees		
1) Fee limits for copying public records	10	92
2) Sunday licenses for flea markets	22	126
3) Uniform fee schedules for municipal public access facilities	29	144
Fire Prevention, Board of		
Authority of State Fire Marshal to review and approve multi-fuel boilers where oil burner component is already approved	26	137
First Amendment		
Use of university property by outside organization	31	151
Flea Markets		
Sunday licenses	22	126
Freedom of Information		
Public access to files on injured employee	9	88
Gun Control: see Weapons		
Hospitals		
Compliance with determination of need process	1	64
Land Use		
Transfer of land to Southeastern Massachusetts University	23	128

TOPIC	OPINION	PAGE
Leaves of Absence		
Treatment of unused sick leave payments in computing teachers' retirement allowances	13	97
Liability		
Ownership of water pollution control facility and responsibility for damage in major disaster	20	122
Licenses		
1) Collection agency license for Pennsylvania corporation	12	96
2) Sunday licenses for flea markets	22	126
"Lock Law"		
Application of G.L. c. 143, § 3R to buildings erected prior to effective date	11	94
Medicine, Board of Registration and Discipline in		
Constitutionality of bill granting immunity and privilege to members	5	78
Mental Health		
Designation of state hospital area unit as "facility"; powers and duties of area director	8	85
National Guard		
1) Entitlement of officers to state and/or federal pay in certain situations	19	117
2) Set off of federal disability compensation against state disability retirement allowance	25	134
Nursing and Convalescent Homes		
Compliance with determination of need process	1	64
Open Records: see also Public Records		
Public access to files on injured employee	9	88
Physically Handicapped		
Set off of federal disability compensation against state disability retirement allowance	25	134
Police		
Authority of Massachusetts Criminal Justice Training Council with respect to police training programs	30	147
Political Contributions		
Recordkeeping requirements for small campaign contributions	24	132
Preemption		
Regulation of liquor traffic on state and federal military reservations	7	83
Prisoners		
Interpretation of term "furlough" in gun control law	15	102
Public Buildings		
Use of university property by outside organization	31	151
Public Hearings		
Relationship between Rate Setting Commission and Division of Hearing Officers	17	109
Public Lands		
1) Transfer of land to Southeastern Massachusetts University	23	128

TOPIC	OPINION	PAGE
2) Uniform fee schedules for municipal public access facilities	29	144
Public Records: see also Open Records		
1) Public access to files on injured employee	9	88
2) Fee limits for copying public records	10	92
Purchasing		
Application of small business purchasing program	28	140
Rate Setting		
Relationship between Rate Setting Commission and Division of Hearing Officers	17	109
Retirement		
1) Treatment of unused sick leave payments in computing teachers' retirement allowances	13	97
2) Set off of federal disability compensation against state disability retirement allowance	25	134
Rulemaking Power		
1) Application of G.L. c. 143, § 3R ("lock law") to buildings erected prior to effective date	11	94
2) Uniform fee schedules for municipal public access facilities	29	144
Rules and Regulations		
1) Declines reply on validity of proposed affirmative action rule	6	82
2) Application of G.L. c. 143, § 3R ("lock law") to buildings erected prior to effective date	11	94
3) Interpretation of term "furlough" in gun control law	15	102
4) Relationship between Rate Setting Commission and Division of Hearing Officers	17	109
5) Authority of State Fire Marshal to review and approve multi-fuel boilers where oil burner component is already approved	26	137
6) Uniform fee schedules for municipal public access facilities	29	144
Safety Equipment		
Authority of State Fire Marshal to review and approve multi-fuel boilers where oil burner component is already approved	26	137
Salaries		
1) Treatment of unused sick leave payments in computing teachers' retirement allowances	13	97
2) Entitlement of National Guard officers to state and/or federal pay in certain situations	19	117
3) Statutory restrictions on outside educational activities of Board of Education members	21	123
Sick Leave		
Treatment of unused sick leave payments in computing teachers' retirement allowances	13	97
Small Business		
Application of small business purchasing program	28	140

TOPIC	OPINION	PAGE
Southeastern Massachusetts University		
1) Transfer of land	23	128
2) Use of university property by outside organization	31	151
Statutory Construction		
1) Definition of word "teacher" in G.L. c. 71, § 38	2	68
2) Treatment of unused sick leave payments in computing teachers' retirement allowances	13	97
3) Interpretation of term "furlough" in gun control law	15	102
4) Expenditure of funds for advertising promoting expansion of industry in Commonwealth	16	106
5) Relationship between Rate Setting Commission and Division of Hearing Officers	17	109
6) Declines reply concerning Coastal Zone Management program	18	115
7) Statutory restrictions on outside educational activities of Board of Education members	21	123
8) Transfer of land to Southeastern Massachusetts University	23	128
9) Obligation of Office of Campaign and Political Finance to respond to inquiry on validity of financial disclosure reports	27	138
10) Application of small business purchasing program	28	140
11) Authority of Massachusetts Criminal Justice Training Council with respect to police training programs	30	147
Teachers		
1) Definition of word "teacher" in G.L. c. 71, § 38	2	68
2) Treatment of unused sick leave payments in computing teachers' retirement allowances	13	97
"3 + 3" Rule		
Declines reply on validity of proposed affirmative action rule	6	82
Transfer of Land		
Transfer of land to Southeastern Massachusetts University	23	128
Veterans		
1) Powers of Governor and Executive Council in appeals from decisions on veterans' benefits	4	75
2) Declines reply on validity of proposed affirmative action rule	6	82
Weapons		
Interpretation of term "furlough" in gun control law	15	102
Workmen's Compensation		
Set off of federal disability compensation against state disability retirement allowance	25	134

INDEX OF REQUESTING AGENCIES

AGENCY	OPINION	PAGE
Adjutant General	19	117
Administration and Finance, Executive Office of	6, 13, 28	82, 97, 140
Alcoholic Beverages Control Commission	7	83
Banks, Commissioner of	12	96
Building Code Commission: see State Building Code Commission		
Campaign and Political Finance, Office of	24, 27	132, 138
Civil Service Commission	6, 14	82, 100
Correction, Department of	15	102
Criminal Justice Training Council: see Massachusetts Criminal Justice Training Council		
Education, Department of	2, 21	68, 123
Environmental Affairs, Executive Office of	18	115
Executive Council	4	75
Federal Disaster Assistance Administration, Region I	20	122
Fisheries, Wildlife and Recreational Vehicles, Department of	29	144
Higher Education, Board of	23, 31	128, 151
House of Representatives	16, 26	106, 137
Human Services, Executive Office of	3, 17	72, 109
Industrial Accidents, Division of	9	88
Massachusetts Criminal Justice Training Council	30	147
Mental Health, Commissioner of	8	85
Public Health, Department of	1	64
Public Records, Supervisor of	10	92
Public Safety, Commissioner of	22	126
Retirement, State Board of: see Treasurer and Receiver General		
Senate Committee on Ways and Means	5	78
State Building Code Commission	11	94
Treasurer and Receiver General	25	134