The Commonwealth of Massachusetts

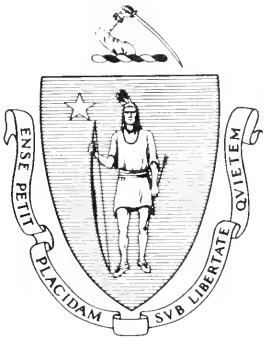
REPORT

OF THE

ATTORNEY GENERAL

FOR THE

Year Ending June 30, 1982



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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, 1982.

Respectfully submitted,

FRANCIS X. BELLOTTI

Attorney General

DEPARTMENT OF THE ATTORNEY GENERAL

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FRANCIS X. BELLOTTI

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Stephen Ziedman

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Robert Lombard
Paul Molloy
George J. Mahanna

Chief Clerk
Edward J. White

Assistant Chief Clerk
Marie Grassia

APPOINTMENT DATE	*TERMINATION DATE*
1. 2/16/82	30. 4/30/82
2. 6/14/82	31. 10/16/81
3. 11/30/81	32. 9/30/81
4. 9/8/81	33. 2/27/81
5. 12/28/81	34. 9/9/81
6. 10/28/81	35. 9/11/81
7. 12/1/81	36. 9/30/81
8. 2/8/82	37. 5/11/81
9. 4/5/82	38. 5/28/82
10. 2/8/82	39. 6/4/82
11. 3/1/82	40. 2/5/82
12. 5/17/82	41. 9/18/81
13. 3/16/82	42. 3/23/82
14. 11/25/81	43. 1/8/82
15. 6/7/82	44. 5/12/82
16. 6/1/82	45. 10/14/81
17. 4/1/82	46. 6/25/82
	47. 8/28/81
	48. 1/29/82
	49. 11/27/81
	50. 11/13/81
	51. 1/29/82
	52. 2/17/81
	53. 1/8/82
	54. 2/26/82
	55. 6/30/82
	56. 6/2/82
	57. 7/9/82

DEPARTMENT OF THE ATTORNEY GENERAL
STATEMENT OF FINANCIAL POSITION
FOR FISCAL YEAR ENDED
JUNE 30, 1982

Account Number	*Account Name*	*Appropriation*	*Expenditures*	*Advances*	*Encumbrances*	*Balance*
0810-0001	Administration	$ 6,962,931.86	$6,229,052.05	$ 827.43	$ 79,041.63	$ 654,010.75
0810-0014	Public Utilities Auth. by Ch. 1224 1973	250,000.00	232,538.58	.00	17,383.52	77.90
0810-0017	Judicial Proceedings Relevant to Fuel Charge	67,725.25	45,447.79	.00	22,277.46	.00
0810-0021	Medicaid Fraud Control Unit	1,006,390.00	927,553.29	.00	63,725.74	15,110.97
0810-0031	Local Consumer Aid Fund	250,700.00	247,790.25	.00	2,908.45	1.30
0810-0032	Local Consumer Aid Fund Deposit	45,595.38	.00	.00	.00	45,595.38
0810-0035	Antitrust Div. Adm.	252,040.00	242,104.70	183.21	4,722.23	5,029.86
0810-0201	Insurance: Auth. by Ch. 266, 1976	200,000.00	180,318.23	.00	17,181.12	2,500.65
0810-0410	Forfeited Funds	8,500.00	2,417.00	.00	.00	6,083.00
0810-8771	Capital Outlay Furnishings & Equipment - Law Library	5,325.04	2,268.74	.00	3,056.30	.00
	TOTALS	$ 9,049,207.53	8,109,490.63	1,010.64	210,296.45	728,409.81
Schedule 2	TOTALS	$ 1,225,079.82	470,038.77	.00	.00	755,041.05
	GRAND TOTALS	$10,274,287.35	$8,579,529.40	$1,010.64	$210,296.45	$1,483,450.86

FEDERAL GRANTS

Receipts and Disbursements
July 1, 1981 and June 30, 1982

Account Number	*Account Name*	*Balance July 1, 1981*	*Receipts*	*Disbursements*	*Balance 6/30/82*
0810-6610	Attorney General Trust Fund	$121,208.61	$472,566.04	$ .00	$593,774.65
0810-6630	Water Pollution Control Program	77,588.75	100,000.00	92,848.02	84,740.73
0810-6631	Air Pollution Control Program	11,031.80	35,000.00	38,987.03	7,044.77
0810-6637	Department of Justice Anti-Trust Enforcement Unit	63,428.44	.00	37,282.10	26,146.34
0810-6640	Violent Crime Unit	154.58	.00	154.58	.00
0810-6643	Anti-Trust Enforcement Program N. England Bid Monitoring Project	152.17	.00	.00	152.17
0810-6644	C.A.P.E.S.	114,656.43	173,915.85	263,520.51	25,051.77
0810-6645	Tax & Insurance Prosecution Division	257.72	.00	257.72	.00
0810-6661	Coastal Zone Management Program Implementation	8,730.79	31,841.64	36,988.81	3,583.62
0810-6662	Pesticide Regulation Program Enforcement Activities		14,547.00		14,547.00
TOTALS		$397,209.29	$827,870.53	$470,038.77	$755,041.05

SUSPENSE FUNDS
Receipts and Disbursements — July 1, 1981 to June 30, 1982

Account Number	*Account Name*	*Balance July 1, 1981*	*Receipts*	*Disbursements*	*Balance 6/30/82*
0810-6701	Dexter Nursing Home Case	$ 344.95	$ .00	$ 344.95	$ .00
0810-6703	Miami Vacations, Inc. d/b/a Resort Hotel	869.05	.00	.00	869.05
0810-6704	Framingham Civil Service School	16.18	.00	16.18	.00
0810-6705	Dante Gregorie d/b/a United Auto Buyers Trust Account	1,100.00	.00	.00	1,100.00
0810-6708	Mass. Rentals, Inc. d/b/a City Wide Rentals	380.00	.00	.00	380.00
0810-6712	C. Murphy, W. Hartwick, Bird, Inc. Univ.	162.49	.00	.00	162.49
0810-6716	Compact Auto, Inc.	1,500.00	.00	.00	1,500.00
0810-6732	Thomas C. McMahon v. Nyanza	22,379.98	.00	.00	22,379.98
0810-6733	G.C. Services	500.00	.00	.00	500.00
0810-6737	Allan C. Edward M.D.	.10	.00	.10	.00
0810-6738	General Motors Corp.	20.21	.00	20.21	.00
0810-6747	Brookfield Insurance Agency	290.63	.00	.00	290.63
0810-6748	M.A.R. Auto Wholesalers	6.00	.00	6.00	.00
0810-6751	Joseph D. Shuman d/b/a/ Roch Insurance Agency	872.05	.00	.00	872.05
0810-6754	TKO Insurance	26,526.30	25,000.00	51,526.30	.00
0810-6756	Diamedic Weight Control Ctr. Inc.	5,000.00	.00	.00	5,000.00
0810-6760	Frank H. Parks	1,335.00	10.00	.00	1,345.00
0810-6762	Alfred Zimei d/b/a/ Dinner Tours Assurance	50.00	.00	.00	50.00
0810-6773	Owens Motors	5,062.50	1,687.50	.00	6,750.00
0810-6774	King B's Auto Mart	12,000.00	.00	.00	12,000.00
0810-6775	John Roche, et al	3,484.84	.00	.00	3,484.84
0810-6776	Leonard Corporale	.20	.00	.20	.00
0810-6777	Middlesex Vacuum Cleaners	378.55	.00	.00	378.55
0810-6778	General Mass. Markt.	305.00	.00	.00	305.00
0810-6781	William Hartwick, et al		6,000.00	3,500.00	2,500.00
0810-6782	Personnel Data Systems	10,000.00	.00	.00	10,000.00
0810-6783	Brighton Ins. Agency	2,000.00	1,042.63	2,787.35	255.28

0810-6784	Chrysler Corp.	10,000.00	.00	.00	10,000.00
0810-6785	Independence Ins. Agency	3,773.90	.00	.00	3,773.90
0810-6786	United Resources, Inc.	1,155.10	.00	.00	1,155.10
0810-6788	David Rogers, et al	.15	.00	.15	.00
0810-6792	Belmont Auto Sales	5,055.00	500.00	3,480.00	2,075.00
0810-6793	Patrick Ciampo & Howard Johnson a/k/a Edward Miller	400.00	1,350.00	.00	1,750.00
0810-6794	McCoy Auto Sales	.07	.00	.07	.00
0810-6795	Peterson Ford Inc.	801.49	.00	.00	801.49
0810-6796	Daniel Vassett, et al	4,500.00	4,500.00	9,000.00	.00
0810-6798	Charles Kasparian AOK Prod.	11,513.37	.00	520.00	10,993.37
0810-6799	Eliot R. Schneider d/b/a The Garage	4,000.00	10,000.00	14,000.00	.00
0810-6801	Leander Vlahakis d/b/a Watertown Roofing	1,300.00	.00	1,298.00	2.00
0810-6802	Myles Chrysler Plymouth, Inc.	10,000.00	.00	10,000.00	.00
0810-6803	Chet Locke Auto Sales & Serv.		500.00	.00	500.00
0810-6804	Frank Lussier d/b/a Wakefield Motors		15,000.00	12,675.00	2,325.00
0810-6805	Robert Wilcox d/b/a Robert's Auto Sales		2,000.00	.00	2,000.00
0810-6806	Highway Leasing Co., Inc.		5,000.00	5,000.00	.00
0810-6807	Peter F. Scribner d/b/a Peter F. Scribner Agency		5,064.42	2,363.90	2,700.52
0810-6808	William H. Johnson III and J&G Auto Salvage		4,849.50	1,308.10	3,541.40
0810-6809	Lehigh Corp. & National Travel, Inc.		301.50	301.50	.00
0810-6810	Gordon Kalil, Will D. Lagrange, and Will. O'Brien		25,000.00	.00	25,000.00
0810-6811	Steven Sesser Const. Co. Wonder Const. Co.		3,000.00	3,000.00	.00
0810-6812	Edward J. Borlem		800.00	.00	800.00
0810-6813	Paul Solas, T. William Solas, d/b/a Center Reh.		1,817.71	.00	1,817.71
0810-6814	John Lavalee d/b/a N.E. Auto		1,500.00	.00	1,500.00
0810-6815	John R. Osland d/b/a Money Search		255.44	255.44	.00
0810-6816	Peter Skaltsis		150.00	.00	150.00
0810-6817	William R. Clark d/b/a Educator		200.00	200.00	.00
0810-6818	Century of Lawrence		5,000.00	.00	5,000.00
0810-6819	Allen C. Keene, et al		2,842.63	.00	2,842.63
0810-6820	N.J. MacDonald & Son Ed MacDonald		400.00	.00	400.00
0810-6821	Gould Auto Sales		750.00	.00	750.00
TOTALS		$147,083.11	$124,521.33	$121,603.45	$150,000.99

DEPARTMENT OF THE ATTORNEY GENERAL
STATEMENT OF INCOME
For Fiscal Year Ended
June 30, 1982

Account Number		
0801-40-01-40	Fees, Filing Reports, Charitable Organizations	$ 223,606.00
0801-40-02-40	Fees, Registrations, Charitable Organizations	18,513.00
0801-40-03-40	Fees, Professional Fund Raising Council	400.00
0801-41-02-40	Fines & Penalties, Civil Actions	46,234.00
0801-62-01-40	Reimbursement for Services, Cost of Civil Actions	9,103.71
0801-62-02-40	Reimbursements for Services, Cost of Investigations	18,548.12
0801-62-03-36	Local Consumer Aid Fund-Reimbursement For Service	45,576.30
0801-67-67-40	Reimbursement, Indirect Cost Allowances	81,612.71
0801-67-01-40	Reimbursements, For Service	1,060,117.38
0801-68-04-36	Forfeitures	8,500.00
0801-69-99-40	Miscellaneous	14,002.76
	TOTAL INCOME	$1,526,213.98

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 for the Department of the Attorney General. This annual report covers the period from July 1, 1981 to June 30, 1982 and is the eighth report I have filed as the Attorney General of the Commonwealth of Massachusetts. Its submission also marks the near conclusion of my second full term in this office. As in the past, the achievements of this office during this past fiscal year continue to reflect my commitment to making the public interest paramount in both our defensive and affirmative efforts.

In this annual report, I would like to take the opportunity to highlight that commitment by detailing the positive impact this office can have on the economic lives of the citizens of the Commonwealth. Through the efforts of a fine staff of lawyers and support personnel, this Department annually saves and recovers many millions of dollars for the Commonwealth and its citizenry. At the same time, the Department successfully defends hundreds of civil cases each year in which the potential drain on the General Fund is immeasurable. These cases are anything but glamorous and subsequently are not among the cases which typically appear in the news media and thus do not come to the attention of the public and their elected representatives. Thus a report such as this focusing on the financial impact of our cases may be of material assistance to the General Court in its deliberative functions.

A financial focus is particularly appropriate for this report because this past fiscal year has been marked by continuing inflation and a depressed national economy. The Commonwealth did not escape the consequences of these national trends and our citizens are no strangers to the rapidly escalating costs of living. This Department has therefore expended a great effort towards lessening the dramatic effect the skyrocketing costs of fuel, utilities, insurance, and other basic necessities can have on the cost of living.

The highlights of the accomplishments of the Public Protection Bureau perhaps best mirror our efforts in this regard. This past fiscal year our Utilities and Insurance Divisions continued to represent the interest of consumers in rate cases. Supported by an accounting section in the Public Protection Bureau, these two Divisions alone saved Massachusetts citizens over three hundred million dollars in cases where substantial increases were sought in utility and insurance rates.

The role of these two Divisions has become central to efforts to keep the rates charged by utility companies and automobile and health insurance providers at affordable levels for citizens of the Commonwealth. Although the funding for these two divisions has remained the same as in previous years, the positive results they have obtained from state rate-making bodies reflects not only their hard work but also a commitment to the interests of Massachusetts ratepayers. Their efforts, however, are not confined to state rate making procedures. The Utilities Division this past fiscal year participated in a United States Supreme Court challenge to a Louisiana tax on natural gas, resulting in more than fourteen million dollars in rebates to Massachusetts gas users, while the Insurance Division undertook a review of the way deferred compensation systems are

operated. Their analysis promises to yield significant benefits in the next fiscal year.

The Utilities and Insurance Divisions are not the only components of the office effectively combatting escalating utility rates. Last year, an extremely important accomplishment of the Public Protection Bureau in the utilities area was the settlement of a consumer protection action against the Lowell and Cape Cod Gas Companies. Our complaint alleged, and the Superior Court found, that the companies committed unfair and deceptive trade practices and common law fraud in their accounting and billing procedures. In the largest cash settlement ever obtained in an action alleging unfair and deceptive trade practices, these related utility companies agreed to return over one million dollars to ratepayers.

Another financial highlight was the action of the Consumer Protection Division in successfully preventing the default of millions of dollars in home mortgages. In a time of extremely high interest rates, certain banks in the Commonwealth attempted to seize an opportunity to generate greater profits by calling in mortgages with low interest rates and then attempting to refinance them at market rates. At the time, those market rates were seventeen and eighteen percent, and in some cases represented over ten percent of the original mortgage note. Investigation by the Consumer Protection Division indicated that in most cases, homeowners were unaware of provisions in their mortgages that would have allowed this result. In a series of timely actions, we contended that this situation was caused by incomplete or misleading information from lending institutions. Our intervention in these matters resulted in settlements which clearly favored the homeowners who were not forced to pay these extremely high rates and were saved from possible future foreclosures. Had the rates been increased to the full amount authorized by the arguably deceptive mortgage documents, the cost to homeowners would have exceeded twelve million dollars. These utility and mortgage cases serve to illustrate how important an active Consumer Protection Division can be to our citizenry, but it is important to remember that they are only illustrations. During the period covered by this report the Division obtained an additional $12,486,343 in settlements or judgments, almost all of which was returned directly to injured consumers.

As one would expect, the Antitrust Division was also active last year. This Division handles cases which I believe are the logical extension of our consumer efforts, and the attorneys assigned to it obtained almost a half a million dollars for the Commonwealth and its political subdivisions in fiscal 1982. Together these two divisions not only served to protect the public from unlawful business practices, but also enhanced the business climate by working with the vast majority of Massachusetts businessmen who legitimately seek to resolve their own problems with the consumers they serve.

It would probably surprise most people to know how much of a financial impact the remaining divisions of the Public Protection Bureau have on their lives. One would not ordinarily think of the Civil Rights, Public Charities, and Environmental Protection Divisions as places within this Department which generate financial benefits for the Commonwealth, as their primary function is not the recovery of funds. Just last year, however, the Civil Rights Division collected almost two million dollars of free or reduced health care at hospitals in

the Commonwealth pursuant to the Federal Hill Burton requirements. Investigations indicated that although these hospitals were required to provide levels of free health care under the federal law, they were not fulfilling these obligations. Our efforts were singularly responsible for the hospitals agreements to provide those services mandated by their receipt of Federal funding for construction of their facilities. The Public Charities Division, is primarily responsible for protecting the public from the misapplication of charitable funds and participating in probating estates and trusts which have charitable remainders. The activities of attorneys in this Division have protected over three hundred thousand dollars, earmarked for charitable purposes, from those who sought to use those funds for individual and private use. The successful efforts of the Environmental Protection Division in keeping our environment clean has resulted in fines and penalties of almost two hundred thousand dollars to be used in various clean up efforts.

One also may not typically think of criminal prosecution as an area which yields favorable financial results for the public. However, the efforts of our Criminal Bureau successfully prosecuting those individuals who violate our criminal laws have had a decidedly favorable fiscal impact on the Commonwealth and its citizens. This impact is best exemplified by our prosecution of those individuals who seek to enrich themselves by unlawful schemes in the delivery of governmental benefits. Both the public generally, and those persons who are the proper recipients of various governmental benefits lose when those funds are misdirected to those that neither qualify nor deserve them. Many of our criminal prosecutorial efforts therefore are directed toward these illegal schemes. A case during the reporting period which received significant media attention and illustrates the point involved a college professor sentenced to Walpole for masterminding a welfare larceny scheme which netted more than half a million dollars. It was but one of scores of welfare fraud cases we brought last year, many of which were against state employees. Virtually all of these prosecutions resulted in convictions and frequently in fines and restitution of funds that were stolen.

These benefits cases are similar in many ways to our tax fraud cases; those who defraud the system cause us all to pay more than our own fair share to support the system. Last year we collected more than half a million dollars in fines and court ordered payments in such tax fraud cases and collected nearly two million dollars in back taxes in the process. The true measure of success for our tax prosecution, however, is not how much we recover but how well those efforts encourage voluntary compliance with our laws. Our experience has shown that vigorous prosecution operates to deter those who will not voluntarily comply.

The Criminal Bureau also saves the Commonwealth hundreds of thousands of dollars through successful prosecution of public employees who use their positions to convert public resources to their own personal benefit. This theft of state property by public employees impacts on all of us because it is the public that ultimately pays. Protecting the public fisc from those who are in a position to raid it has long been one of the most successful targets for prosecution in the Criminal Bureau. Last year our Government Integrity Unit convicted more than a dozen state employees for larcenous schemes against the Commonwealth or its

citizens. Among those convicted were a cabinet secretary and the director of a major division in the Department of Public Health. Again, these schemes diverted more than a quarter of a million dollars from the Treasury, much of which was recovered.

The Medicaid Fraud Control Unit also brought a series of provider fraud cases which had a direct impact on the public treasury. The Medicaid program is a cooperative federal-state program which finances health care delivery systems. During the reporting period we secured forty-seven convictions involving corporations and individuals from throughout the system, collected more than a quarter of a million dollars in fines and restitution and identified nearly five times that amount for civil recovery. The United States Congress rated the unit one of the top two in the country, and federal estimates suggest that for every dollar we collect or identify for recovery, the deterrent effect of our efforts saves ten.

Sometimes our prosecutorial efforts have a less direct impact on the state treasury, but have a significant impact on the financial well-being of our business community. For instance, we worked cooperatively with major corporations in a series of cases involving on-going white collar crime conspiracies. We successfully prosecuted a night-club owner who stole more than a hundred thousand dollars worth of electricity, store owners who had taken approximately seven million dollars in computer software, and half a dozen individuals using counterfeit credit cards and charging hundreds of thousands of dollars worth of goods and services to non-existent accounts.

In our traditional role of defending the Commonwealth, its agencies and officers, it is also possible to have a positive impact on the financial lives of our citizens. Whether it be through successfully defending complaints seeking money damages, or those which would result in increased expenditures, the Civil and Government Bureaus of this office have continued to significantly impact on the finances of the Commonwealth this fiscal year.

We may not have had a case as large as the seventy-four million dollars we recovered from the federal government two years ago, but our impact was significant, nevertheless. The savings achieved by the successful defense of civil cases is impossible to measure simply because of the large volume of cases that are disposed of in any given year. Even the most conservative estimates, however, would be in the tens of millions of dollars each year. In the Eminent Domain Division of the Civil Bureau, for instance, our involvement in land damage cases resulted in savings to the Commonwealth of approximately four million dollars. One can similarly ascribe substantial savings to the Contracts, Torts and Industrial Accident Divisions of that Bureau.

It is possible, however, to measure the financial impact of affirmative recoveries, where as a result of our efforts, monies flow back to the general treasury of the Commonwealth. In the Torts, Claims and Collections Division of the Civil Bureau, for instance, almost six hundred thousand dollars was recovered for the state this past fiscal year. Similarly, the Contracts Division recovered almost two hundred thousand dollars in two suits where we alleged that contractors either breached their contracts with the Commonwealth or were negligent in construction of public buildings. The Eminent Domain Division obtained more

than two hundred thousand dollars in rents, and the Industrial Accident Division recouped a like amount for the Second Injury Fund.

In our Government Bureau, attorneys were successful before the United States Supreme Court in their challenge to a decision of the New Hampshire Public Utilities Commission which would have prohibited the exportation of hydro-electric power by the New England Power Company. The Supreme Court reversed the New Hampshire Supreme Court's affirmance of that order and thereby saved Massachusetts electric consumers in excess of one million dollars annually for the indefinite future. In another case with significant financial impact, Bureau attorneys commenced action with nine other states against the Secretary of Education seeking to require him to use 1980 and not 1970 census data as the basis for allocating federal education funds to states and local school districts. Use of the 1970 census would have resulted in a loss of over nine million dollars of federal aid to the Commonwealth. Our litigation resulted in the enactment of remedial legislation by Congress, which restored the level of funding to that the Commonwealth would have received under the 1980 census.

Many would think that our single most significant contribution to the taxpayers of the Commonwealth during the reporting period was our successful defense of "Proposition 2½", the law enacted by the people via initiative petition which limits the levels of municipal property and excise taxes. Regardless of one's views of the merits of Proposition 2½ and hence of the lawsuit, it is an apt case with which to close this introduction, because it demonstrates perhaps better than any other single case how the work of this office can have a dramatic impact on the financial condition of the Commonwealth and its citizens for had we lost the case, the economy of the state would be different from current conditions.

The recovery of monies on behalf of the Commonwealth and financial savings we achieve is by no means the only measure of how well we serve the public interest. I have only highlighted the financial consequences of our activities this year because this past fiscal year has been a particularly difficult economic period for the nation and the state. Anything that this office can do to make the adverse financial condition of the economy less felt by Massachusetts citizens, is a goal worth pursuing. I believe the foregoing pages should demonstrate that in pursuing that goal we have achieved a more than respectable level of success in serving the public interest. Those particularly interested in our financial successes should pay particular attention to the charts which follow this introduction and summarize the monetary effect of our cases.

There were many more accomplishments during the past fiscal year than I could possibly hope to set forth in these few paragraphs. I offer the foregoing highlights to demonstrate that, as in years past, I am committed to the principle that this Department is and should be committed to serving the interests of the public. A fuller exposition of the activities of this Department is set forth in the pages that follow.

MONEY RECOVERED AND SAVED FOR THE COMMONWEALTH AND ITS CITIZENS

I. MONEY RECOVERED FOR THE COMMONWEALTH TREASURY

A.	Charitable Registrations & Certificate Fees	$ 242,765
B.	Charitable Recoveries & Savings	245,000
C.	Escheats	505,597
D.	Collections, Rent	221,533
E.	Collections, General	557,687
F.	Delinquent Unemployment Compensation Claims	1,346,699
G.	Fraudulent Unemployment Compensation Recovered	67,291
H.	Civil Penalties in Environmental Protection Cases	190,000
I.	Restitution and Fines in Tax Fraud Cases	311,500
J.	Restitution and Fines in Criminal Cases	56,000
K.	Restitution in 93A Insurance Cases	290,000
	TOTAL	$ 4,034,072

II. MONEY RECOVERED & SAVED FOR COMMONWEALTH'S CITIZENS

A.	Hill-Burton Recoveries	$ 1,785,000
B.	Antitrust Recoveries	431,186
C.	Deposits to Antitrust Enforcement Fund	115,625
D.	Judgments, Settlements and Restitution In Consumer Protection Division Court Cases	12,486,323
E.	Consumer Recoveries — Non-Court Cases	292,003
F.	Consumer Savings, Restitution Settlements & Judgments — Springfield Office	39,863
G.	Savings Auto Insurance	100,000,000
H.	Savings Utility Rate Hearings	149,000,000
I.	Savings Blue Cross/Blue Shield (Medex)	131,000,000
J.	Savings Electric Fuel Clause Intervention	5,400,000
K.	Savings Return of First Use Tax Payments	14,500,000
L.	Eminent Domain Land Takings Savings	3,365,008
	TOTAL	$418,415,008

TOTAL OF TABLES I & II..... $422,449,080

I. CIVIL BUREAU

CONTRACTS DIVISION

The responsibility of the Contracts Division generally involves three areas:

A. Litigation involving matters in a contractual setting;

B. Advice and counsel to state agencies concerning contractual matters; and

C. Contract review.

A. *LITIGATION*

The Contracts Division represents the Commonwealth, its officers, and agencies, as both party plaintiff and defendant in all civil actions involving contract and contract related disputes.

A majority of the cases handled by the Division concern public building, state highway, and public work construction disputes. Other typical cases in the Division involve claims arising from the interpretation of leases, employment contracts, statutes, rules, regulations, and surety bonds.

In contract actions against the Commonwealth, G.L., c. 258, §12, is, for the most part, the controlling statute. At the commencement of actions, litigants routinely seek temporary restraining orders and preliminary injunctions. The grant of such relief would delay the execution of contracts, increase contract costs, and result in additional claims for damages. During the fiscal year, Division attorneys successfully resisted all such attempts for injunctive relief.

With increasing frequency, government contract disputes have become more complicated, since there has been a tendency for consultants, engineers, architects, and subcontractors to be joined as parties. Discovery in contract cases is prolonged partly due to the volume of documentation and the complexity of the issues, especially in the building construction area.

On July 1, 1981 the beginning of the fiscal year, the one hundred, nineteen page Omnibus Bill "To Improve The System Of Public Construction In The Commonwealth" (c. 579, Acts of 1980), sponsored by the Special Commission Concerning State and County Buildings went into effect. The implementation of this Bill has further complicated contract disputes. The impact of the new legislation became increasingly evident near the end of the fiscal year when a number of actions, principally relating to the validity of the "set aside" provisions for minority and women-owned business enterprises, were initiated.

Trials of contract cases often involve long hearings before court appointed masters. During the fiscal year, opposing counsel have successfully resisted references to masters, resulting in an increase of trials before the court.

Eighty-nine (89) new actions were commenced during the fiscal year. Forty-one (41) cases were closed. As of June 30, 1982, there were three hundred thirty-three (333) pending cases in the Division.

B. *ADVICE AND COUNSEL TO STATE AGENCIES*

On a daily basis, the Division receives requests for legal assistance from state agencies and officials. Problems involve formation of contracts, performance of contracts, bidding procedures, bid protests, contract interpretation, and numerous other miscellaneous matters. The most frequent requests received during the fiscal year were related to the interpretation of the language of the new Public Construction Legislation (c. 579 of the Acts of 1980).

On a weekly basis, the Contracts Division also receives requests for assistance in purchasing matters. Economic conditions have heightened competition, and bid awards are often bitterly contested. Members of the Division counsel the Purchasing Agent and his staff, interpret regulations, and attend informal protest hearings.

Board of Regents of Higher Education, Data Processing Bureau, Mental Health, Youth Services, Water Resources, State Lottery Commission, Public Welfare, Division of Capital Planning and Operations, etc.

C. *CONTRACT REVIEW*

The Division reviews all state contracts, leases, and bonds submitted by state agencies. All contracts are logged in and out, and a detailed status record is maintained. Contracts are assigned to the attorneys on a rotating basis; and the average contract is approved within forty-eight hours of its submission to the Division.

During the fiscal year, the Division approved as to form a total of 1,952 contracts. Two hundred fifty-eight (258) contracts were rejected and later approved after the deficiencies were corrected. The monthly count for the fiscal year is as follows:

Month	*Number Received*	*Number Approved*	*Number Rejected*
1981			
July	269	206	63
August	217	178	39
September	250	227	23
October	198	182	16
November	141	123	18
December	149	135	14
1982			
January	123	103	20
February	108	97	11
March	109	92	12
April	110	100	10
May	164	159	5
June	114	87	27
TOTAL	1,952	1,689	258

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 acquisition 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, the University of Massachusetts, Armory Commission and the Department of Food and Agriculture.

The Division also provides legal advice 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.

highway purposes, and in some instances, we are called upon to testify before the Executive Council before they will approve land damage payments.

Informal advisory services, both written and oral are rendered to practically every state agency in existence, whether it be Executive or Legislative. Every agency which has an eminent domain or real estate question or problem either writes or calls this division for consultation and advice. This division also appears before Legislative Committees to give advice on legislation of importance to this office as well as other state agencies.

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 from the date of the taking to the date of judgment. In years past, during the road building boom of the sixties and seventies 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 satisfactory because too many cases previously tried to auditors were retried to juries. In 1973, the Legislature passed Section 22 of Chapter 79 which provided for the trial of land damage matters to a judge in the Superior Court, jury-waived in the first instance; and a trial by jury could be had first only if both parties filed written waivers of their right to a jury-waived trial. The statue also required the court to make subsidiary findings of fact when the case was heard. If either party was aggrieved by the finding, he would reserve his right to a jury by so filing, within ten days of the finding.

It had been the practice of our division to try the great majority of our cases in accord with Section 22 before a justice in a jury-waived session. We found, in many instances, it was not necessary to retry the case because the findings usually contained a clear statement of the subsidiary facts to support the decision of the single justice. In many cases this resulted in a final disposition of the matter. Still the backlog continued as did our efforts to make Chapter 79 more expeditious.

During 1981, we filed and supported legislation providing for one trial before a jury unless both parties agreed to a waiver. The potential of a two trial system, either via the earlier Master's Hearing or the jury-waived trial, was a luxury courts could no longer afford. With full and complete discovery of the expert witnesses, both parties would be prepared to try the merits of the case *one time,* thereby eliminating the time consuming and expensive fishing expeditions and the so-called "trial by ambush". In addition, we felt that the passage of this bill would result in more effective trial discovery resulting in a greater number of cases being settled without the necessity of trial. Such a result would be beneficial to the trial bar as well as to the Commonwealth and its citizens. We are pleased to report that Chapter 476 of the Acts of 1981 was signed into law on October 26, 1981, abolishing the two trial system once and for all. Each case

now would be tried one time before a jury, unless both parties agreed to waive their right to trial by a jury and try the case before a judge.

If occupied buildings are situated on parcels acquired by eminent domain, the occupants remaining become tenants of the Commonwealth and are obligated to pay rent under a lease agreement or for use and occupancy. The problem of rent collection is handled by a Special Assistant Attorney General who is assigned to the Department of Public Works at 100 Nashua Street, Boston, on a full-time basis. He is under the direct supervision of the Right of Way Division with review supervision from the Eminent Domain Division. His primary function is to represent the Department of Public Works in all matters related to state owned property being leased or rented to the general public. This includes negotiating settlements, closing out uncollectables, suits to enforce the payment of rent, as well as eviction matters. In those cases where rent is owed to the Commonwealth and there is a land damage case pending, the Eminent Domain Division trial attorney assigned handles both matters at the time of trial. During the past fiscal year over 100 rent cases were closed out and $221,533 was collected and turned over to the State Treasurer.

In addition, the Eminent Domain Division has the responsibility of protecting the Commonwealth's interests in all petitions for registration of land filed in the Land Court. In each case, a determination must be made as to whether or not the Commonwealth, or any of its agencies or departments, has an interest which may be affected by the petition. If such a determination is made, no decree issues without our office being given a full and complete opportunity to be heard.

Some of these issues are tried out to a judicial conclusion while others are amicably agreed upon and the rights of the Commonwealth are protected by stipulation.

Obviously, the Land Court involves the full-time activities of an Assistant Attorney General on a daily basis. Its jurisdiction covers every type of land transaction from foreclosure, tax takings, to determination of title absolute and all the equity rights arising therefrom.

More and more, the equitable power of the Courts is being used along with the temporary restraining order and injunction process. Zoning cases are now being sent to the Land Court from the Superior Court and also being commenced at the first impression in the Land Court. The Attorney General is involved in all these cases because declaratory relief is usually sought and constitutional issues are typically involved.

The Attorney General's Office is involved in almost every petition to confirm or register title. The involvement requires the determination of all interests in state highways, the preservation of the taking lines, the determination of drainage and other easements and the assurance that the decree is entered subject to all of the above.

In addition, the Land Court determines so-called "water rights". As indicated in the report of past years, this is becoming a new problem area in that many rivers and streams have been cleaned and improved as a result of federally funded projects, bringing into question the Commonwealth's rights and responsibilities. Also, the tidal areas of the Commonwealth are creating additional litigation, particularly where the Colonial Ordinances are concerned. Litigation

is developing whereby the public is asserting adverse possession and prescriptive rights in the flats of the tidelands and access to beaches.

In addition, more claims are being made against the Insurance Fund and local probate court decisions are having an effect upon the land registration system. Considering current trends and statistics for the year, we can expect to be even busier in fiscal 1983 in discharging our Land Court responsibilities while protecting the rights of the citizens of the Commonwealth.

Further, all rental agreements, *pro tanto* releases, general releases, deeds of grants and conveyance, 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 reviewed and approved as to form.

As reported in last year's report, this Division is actively assisting the Department of Food and Agriculture to expedite and carry out the mandates of Chapter 780 of the Acts of 1977, known as The Agricultural Preservation Restriction Act.

It is important to understand that since 1949, farming acreage in the Commonwealth had declined from approximately 2 million acres to about 600,000 acres in the year 1975. This loss has necessitated Massachusetts to import some 85% of her food supply from other states as distant as Florida and California. Considering the increase in costs of transportation and fuel in the last five years, the reasons for the alarming increase that our citizens must now pay for their food becomes obvious. This high cost of energy trend is expected to continue, making it incumbent for the Commonwealth to preserve and increase the amount of productive farmland. The Massachusetts Legislature made this possible by enacting The Agricultural Preservation Restriction Act and by their approval of a 5 million dollar bond issue to initiate the program. This Act offered the only real hope for preserving our remaining agricultural land, by providing for the public purchase of agricultural preservation restrictions, commonly referred to as "Developmental Rights". This program is completely voluntary. It allows the farmer to obtain the developmental value of his land without destroying its productive capacity as farmland. The statute provides that the Commonwealth will pay the farmer the difference between the agricultural value of the land and its appraised market value. Stated simply, the farmer keeps his farmland but sells his developmental rights. A deed is then filed in the appropriate registry wherein it is agreed that the land be restricted in perpetuity to farming purposes.

Since the inception of this program in 1977 more than 5,605 acres of farmland have been permanently protected in the Commonwealth. Presently there are more than an additional 4,700 acres under consideration. During the last four years the Legislature has appropriated a total of 20 million dollars to fund this program, which is by far the most ambitious of any in the United States, and is being used as a "model program" by many other states considering ways to protect their diminishing farmland.

The Attorney General's Office considers this program to be essential to the protection and revitalization of the farming industry in Massachusetts. Hopefully it will lessen our dependency on farm produce from distant parts of the United States and lower food costs to the citizens of Massachusetts.

The Eminent Domain Division consists of a chief, six full-time attorneys, three special assistant attorneys general, one investigator, one administrative assistant, one administrative trial clerk and three legal secretaries. We also enjoy the services of a full time Assistant Attorney General stationed in Springfield.

During the fiscal year July 1, 1981 through June 30, 1982, the following statistics are indicative of the activity of this extremely busy division:

New Land Court Cases	241
Land Court Cases Closed	209
Land Court Cases Pending	358
New Land Damage Complaints Received	126
Land Damage Cases Disposed of in Superior Court	38
Land Damage Cases Disposed of by Settlement	43
Land Damage Cases Pending	632
Total Cases Pending	990
Rent Cases Closed by Special Assistant Attorney General	175
Rent Owed to the Commonwealth - (Collected by Special Assistant Attorney General)	$221,533

Fiscal 1983 promises another busy year for the Eminent Domain Division. The Massachusetts Department of Public Works, as well as the Metropolitan District Commission predict a heavy workload for Fiscal Year 1983. The Department of Environmental Management is still deeply committed to and involved in the Heritage State Park Projects in Lowell, Lynn, Holyoke, North Andover and Lawrence. These ambitious undertakings are expected to cost in the vicinity of 100 million dollars and can be expected to result in extensive litigation for this Division.

This Division once again looks forward to accepting any and all challenges presented during the coming year.

INDUSTRIAL ACCIDENT DIVISION

The Industrial Accident Division serves as legal counsel to the Commonwealth in all Workmen's Compensation cases involving state employees. Pursuant to G.L. c. 152, §69A, the Attorney General must approve all payments of compensation benefits and disbursements for related medical and hospital expenses in compensable cases. 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 12,969 First Reports of Injury filled during the last fiscal year for state employees with the Division of Industrial Accidents, an increase of 1305 over the previous fiscal year. Of the lost time disability cases, this Division reviewed and approved 2,080 new claims for compensation and 144 claims for resumption of compensation. In addition to the foregoing, the Division worked on and disposed of 182 claims by lump sum agreements and 25 by payments without prejudice.

This Division appeared for the Commonwealth on 1,289 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 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, 1981 to June 30, 1982 were as follows:

General Appropriation
(Appropriated to the Division of Industrial Accidents)

Incapacity Compensation	$7,120,721.54
Medical Payments	1,555,355.19
TOTAL DISBURSEMENTS	$8,676,076.73

Metropolitan District Commission
(Appropriated to M.D.C.)

Incapacity Compensation	$ 681,053.29
Medical Payments	104,761.18
TOTAL DISBURSEMENTS	$ 785,814.47

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 165 occasions to defend this fund against claims for reimbursement by private insurers. As of June 30, 1982, the financial status of this fund was:

Unencumbered Balance	$ 11,233.73
Invested in Securities	247,000.00
TOTAL	258,233.73

Payments Made to Fund	$ 765,871.65
Payments Made Out of Fund	959,122.86

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 involves reviewing and action on 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 the sitting of this Board and acted on 12 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 Division 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 for solution of their particular problems.

TORTS DIVISION

The staff of the Torts Division as of the end of Fiscal Year 1982 consisted of a division chief, seven attorneys, one investigator and four clerical personnel.

The main activities of the division remained unchanged, with highest priority being given to the handling of tort and civil rights actions against the Commonwealth and its officers. Petitions for Compensation to Victims of Violent Crime absorbed a lesser although still significant amount of staff time, and attorneys continued to handle some collections work. The Violent Crime Petitions were assigned throughout the year to all of the attorneys in the Civil Bureau; a large number of tort cases were also assigned to attorneys outside the torts division.

During the fiscal period, 286 new tort cases were opened, while 74 were closed, resulting in a large overall increase in pending tort matters. This increase was due primarily to three factors: (1) a growing utilization on the part of the plaintiffs' attorneys of opportunities for suing the Commonwealth under the 1978 Tort Claims Act; (2) the necessity of trying many more tort actions because of the lack of appropriation of money for settlements; and (3) the absorption by the Torts Division of a significant number of serious and complex civil rights cases, many of which would formerly have been handled by other divisions of the office.

The increase in tort cases against the Commonwealth included a large number of new cases involving employees of the Department of Mental Health and the Department of Social Services. For example, the division was engaged in defending seven serious cases involving deaths of patients at state mental hospitals. These included four suicide cases, one alleging negligence of Westborough State Hospital employees involved with the care of a young patient who committed suicide by drowning himself in the bathtub, another involving a patient who hung himself at the Solomon Mental Health Center, an action arising out of the death of a 22-year old man who placed a bag over his head at Taunton State Hospital, and the fourth involving a patient at Metropolitan State Hospital who hung himself in the shower. The other Mental Health death actions involved a patient at Danvers State Hospital who drowned while on an outing, and two patients who died while in restraints, one at Taunton State Hospital and one at the Solomon Mental Health Center.

Other serious cases involving Mental Health employees being defended by this division were the *Zeleznik* case, where 9 year old Arnold Zeleznik was murdered in Florida by a patient released by the Northampton State Hospital, a civil rights and malpractice case involving a young woman patient at Boston State Hospital who blinded herself while in seclusion, a suit brought by a woman who lost several toes due to frostbite while she was lost on the grounds at Medfield State Hospital, actions involving permanent injuries to a patient who jumped out of a third-story window at Worcester State Hospital, a civil rights and malpractice suit against officials of the Wrentham State School for failure to properly treat a young patient committed there, and a negligence

action arising out of injuries inflicted on a 13-year old retarded child by another child at a community residence.

The division was also engaged in handling an increasing load of cases questioning conduct of social workers and their supervisors in the Department of Social Services. These included a number of death cases: a 16-year old girl under supervision of the department who was shot by her boyfriend, a 4-year old child purportedly abused by his foster parents, a 3-year old child who was allegedly denied adequate medical care by his foster parents, and a 6-year old child allegedly abused by his foster parents. Another serious case alleges that the department's negligent conduct was the cause of a foster child's rape of a 4-year old girl in the home where he was placed, while social workers were under attack in a different kind of suit for allegedly removing a child from her natural parents without making a sufficient investigation of whether the child was being abused.

The Torts Division absorbed a large number of new suits against employees of the Department of Correction, almost all federal civil rights cases claiming personal injury to inmates. Several complicated death cases in this category were being litigated by torts attorneys during the past year. Among those suits are a suit by the family of a Walpole inmate killed by another inmate who had a prior history of mental illness and homicidal behavior (*Salmon* v. *Hall, et al.*), a negligence suit involving an inmate who escaped from MCI-Framingham and then killed one person and seriously injured two others, (*Valentine* v. *Commonwealth*), and a federal civil rights and tort action brought against doctors and the Superintendent at Bridgewater State Hospital by the estate of Patricia Gilmore, a woman who was stabbed to death by her former boyfriend Bradford Prendergast after being released from Bridgewater State Hospital and later the Billerica House of Correction (*Gilmore* v. *Buckley, et al.*). The Department of Youth Services was also being defended in several major cases, a civil rights suit alleging failure to provide adequate medical care to a 15-year old girl in DYS custody, resulting in a complete hysterectomy (*Irwin* v. *Calhoun*), and two civil rights suits for failure to provide adequate rehabilitation, treatment and educational opportunities to juveniles in custody.

The cases just described have typically involved extensive discovery, the need to arrange for expensive evaluation and testimony by medical and psychiatric experts, the necessity to locate, interview and prepare for trial many witnesses, and difficult legal issues such as the propriety of the use of restraints, seclusion and psychotropic drugs in state hospitals, the predictability of dangerousness, the limits of the state's duty to protect individual citizens from persons who are or have been in state care, and the application of common law immunity principles to supervisory and professional employees in various situations. In many of these cases the Attorney General is representing several state employees whose personal liability is potentially unlimited, as well as appearing for the Commonwealth.

Other types of cases being defended included hundreds of motor vehicle accident suits, many involving deaths and serious injuries, actions claiming damage to property from flooding and improper salt storage, various suits against court personnel, district attorneys, and state and MDC police on causes

of action arising out of criminal prosecutions, and personal injury claims arising out of falls on state-controlled property.

Lack of availability of appropriated funds for the settlement of claims was reflected in a decrease in the number of tort cases being closed. Cases which would otherwise have been settled thus joined the large number of cases which await trial. At the present time, many of the judgments which were obtained by plaintiffs after trial or settlement over the last year have not been paid, again due to lack of funds. The total number of tort cases tried was eleven.

Approximately 490 new Violent Crime Petitions were received by the division, an increase of about 14% over last year. The Treasurer's Office paid out roughly $905,269.87 on completed claims, and there were no significant delays in payment. Processing and investigation of the VC's continued to be handled smoothly by the clerical and investigative staff, with minimal attorney input prior to preparation of a final recommendation to the court. Court hearings on reports did require significant attorney time, especially due to the necessity to make appearances in the district courts in distant regions of the Commonwealth.

Collections for Fiscal Year 1982 totalled $557,687.30 on 285 claims, the bulk of that amount being from Revenue and Probate accounts. By the end of the period 2,041 claims have been closed as uncollectible.

II. CRIMINAL BUREAU

The Criminal Bureau, consisting of Trial, Organized Crime and Appellate Sections, Arson Enforcement, Tax and Insurance Prosecution and Government Integrity Units, and the Employment Security Division continued to accelerate the number and increase the range of investigations and prosecutions of illegal activity occurring throughout Massachusetts during fiscal 1981-1982. The following report has been designed to reflect a representative sampling of cases the Bureau has generated in its efforts to enforce the laws of the Commonwealth, promote public safety and secure justice for all citizens.

Trial Section: Following the institution of a series of investigations designed to detect corruption in state government, there resulted the successful prosecution of a large number of appointed officials charged with breaching their public trust.

As a direct consequence of numerous presentments to a Suffolk County Grand Jury, sixty-four indictments were returned against seventeen individuals and a corporation implicated in bribery and larceny schemes involving the Massachusetts Bay Transportation Authority. After a lengthy trial, the Secretary of Transportation and Chairman of the Board of the MBTA was convicted of conspiracy to steal and receive bribes. He was sentenced to serve seven to ten years in Walpole State Prison and ordered to pay a $5,000.00 fine. Others who were ultimately convicted and sentenced on criminal charges arising out of this complicated criminal fraud scheme included MBTA managerial personnel, project directors and department heads as well as an attorney, construction contractors, rental agents, a druggist, parking lot concessionaires and the editor of a nationally recognized travel journal. The resulting scandal encouraged a reorganization of the authority's structures and public functions in an effort to restore integrity and efficiency to a system long burdened by institutionalized

patronage, notorious featherbedding and encumbered by an antiquated physical plant and ancient equipment.

The Director of the Division of Food and Drugs of the Massachusetts Department of Public Health who had occupied that position for more than twenty years was convicted of accepting bribes and sentenced for receiving tens of thousands of dollars in free food, meats and liquor from a supermarket chain subject to inspection by the division for sanitary code violations. He was also fined court costs for making false statements to the State Ethics Commission concerning his financial interersts.

A member of the Massachusetts Board of Registration of hairdressers, and a clerk employed by the Board of Registration for Plumbers and a Medford barber were indicted for conspiracy to steal and receive professional and trade license certificates from various State Boards of Registration. The three individuals sold the license certificates to unqualified persons who would then be able to fraudulently represent to the public that they were qualified to perform in that particular trade or profession and bill the unsuspecting customer accordingly.

Two program coordinators employed by the Massachusetts Department of Youth Services have been convicted and sentenced for stealing money from juveniles enrolled in a restitution program funded by the Massachusetts Department of Manpower Development. The restitution program had been instituted as a form of alternative sentencing for juvenile offenders. Rather than face incarceration, qualifying youth are admitted to the program and provided a job to supply a source of income in order to make restitution to the victims of crime.

While one official from the Massachusetts Department of Revenue employed as a tax examiner has been arrested on charges that he attempted to solicit a bribe, another state revenue agent in an entirely separate case was approached by three Middlesex County men and offered a substantial amount of money if he would reduce a meals tax assessment. The agent promtly reported the matter, and an undercover investigation was conducted by the Bureau which culminated in the indictment of two Framingham men and the owner of a Marlborough bakery on substantive charges of bribery and conspiracy to bribe the state revenue agent.

An inspector for the Massachusetts Department of Communities and Development was convicted and sentenced after being charged with soliciting a bribe of $800.00 and stealing money from a Revere corporation while engaged in the performance of his official duties. A State Treasury employee was found quilty of larceny of state funds and ordered to make full restitution of $36,000.00.

As part of the Bureau's continuing program designed to detect cases where government employees illegally collect welfare payments while remaining on the public payroll, six individuals employed by government agencies: the Suffolk County Sheriff's Department; the Massachusetts Group Insurance Commission; the Department of Education; the Roxbury District Court; the Boston Public Schools, and the Massachusetts Department of Public Welfare as well as high salaried employees of Bethlehem Steel Corporation and Polaroid, Inc. have been charged by multiple indictments with stealing state money and making false statements to obtain welfare payments fraudulently. Through the use of

computer assisted investigative techniques and information supplied by individuals who report the names and circumstances of illegal welfare benefit recipients, thousands of larceny cases have been developed by the Bureau of Special Investigations over the past year which have been reviewed by this office for prosecution. One such case involved a Northeastern University professor who unlawfully induced his students and some of his acquaintances to wrongfully apply for welfare benefits. He was convicted and ordered to serve a long state prison sentence for his part in the scheme that generated more than half a million dollars in illegal welfare payments. Four of the participants were also imprisoned. In another case, five illegal aliens from the Dominican Republic were indicted and received prison sentences for unlawfully collecting more than $400,000 in welfare payments when they used forged Puerto Rican birth certificates to verify the presence of non-existent children.

Three western Massachusetts residents have been convicted of larceny and making false statements to obtain welfare payments. The three unlawfully obtained aid, food stamps and medical assistance while employed or enrolled in a fellowship program at the University of Massachusetts at Amherst. One of the three was also indicted for fraudulently receiving payments from a state administered Vietnamese refugee aid program. A social worker assigned to the Roxbury Crossing Intake Unit of the Welfare Department was convicted and sentenced to serve a year in jail. Over a six month period, the defendant, using his official position, fraudulently issued approximately $21,000 worth of food stamps.

The Director of Facilities of the Massachusetts College of Art pled guilty to larceny charges predicated upon the theft of paint and supplies from the college and using credit cards issued to the school for personal purposes.

A husband and wife have been arrested and charged in multiple indictments, with defrauding the Division of Employment Security of more than $100,000. They accomplished the larceny of state funds by using more than twenty different aliases and furnishing false identification when submitting applications for unemployment compensation at departmental offices throughout the Greater Boston area.

The activities of law enforcement officers have also come under the scrutiny of the Bureau. Five Department of Correction Officers have been charged with assault and battery and violating the civil rights of a patient who had been committed to the Bridgewater State Hospital for evaluation. The new Civil Rights Statute, enacted in 1979, makes it a crime to use force or threat of force to injure, intimidate or interfere with a person's exercise of his rights under federal or Massachusetts Constitutions or laws. A Captain of the Amesbury Police Department has been arraigned on an Essex County indictment alleging that he forged the signature of the clerk of the Amesbury District Court to a search warrant and then executed the warrant at a private residence in that town. Three Ayer police officers have been dismissed as the result of an investigation conducted by the Bureau. Allegations had been made that members of the Ayer Police Department had been engaged in extortionate activities and had maliciously destroyed valuable construction equipment in an effort to pursue their illegal design.

The Department of Revenue referred a number of tax cases to the Tax Insurance Fraud Unit for criminal prosecution. Of those investigations, eleven individuals and one corporation have been indicted and arraigned on 359 counts representing almost $250,000 in unpaid taxes. Nine cases have been concluded this year resulting in fines and restitution in excess of $311,500 recovered by the Commonwealth.

The Bureau has developed a number of important cases involving what has been classified as white collar crime. Three individuals and a corporation have been arraigned and charged with conspiracy, larceny, and receiving stolen goods. The participants, with inside help and through the use of false shipping documents, were able to steal computer systems and equipment with a value that could reach $7,000,000 from a Waltham based computer manufacturer and resell the stolen items through a Peabody retail electronics company. In another case, a coordinator in field engineering for a Burlington computer firm has been indicted and charged with larceny after he sold hundreds of thousands of dollars worth of computer equipment to an undercover state police officer assigned to the Bureau. A Middlesex businessman has been convicted of larceny and sentenced to serve a term of probation providing that he make restitution in the amount of $15,000 to customers he defrauded while operating a storm window installation franchise. An executive of a corporation under contract with the state for cleaning services has been convicted and ordered to make restitution for funds that he stole engaged as an independent contractor. A Revere nightclub has been indicted on larceny charges based upon the finding that more than $100,000 worth of electricity was used by the corporation without charge through the use of an illegal device that bypassed the meter and nullified the utilities billing mechanisms.

Nine individuals have been indicted in a major credit card fraud scheme has resulted in the loss of hundreds of thousands of dollars in money and goods to merchants and banks in Eastern Massachusetts. The group has been implicated in a conspiracy to manufacture counterfeit Visa and Mastercard credit cards and to use them to obtain money and merchandise. The perpetrators selected valid credit card numbers from carbon copies of a legitimate sale or purchase by credit card. The valid number would then be printed on a counterfeit credit card along with a fictitious name and identification. Numbers stolen from cards of several prominent people were used in the scheme. Since the population is tending to rely upon the credit card as a currency replacement in transacting business in ever increasing numbers, the Bureau is exercising greater vigilance to guard against this proliferating fraud.

The Comprehensive Arson Prevention and Enforcement System (CAPES) Program, a federally funded arson unit with civil and criminal law enforcement responsibilities throughout the Commonwealth, continued to investigate and successfully prosecute cases of suspected and proven fire setting. One individual was convicted of burning the same building on two different nights and conspiring to burn insured property. At the time of the incendiary activity the Roxbury apartment housed thirty tenants. In another case, an owner of extensive real estate holdings was convicted and sentenced to prison after being charged he burned for profit a multi-family dwelling in Jamaica Plain. The owner of a restaurant and discotheque in Quincy is awaiting trial based upon charges he

uncapped a gas pipe in the basement and placed lighted candles close at hand. The premises were occupied at the time, and had the expected explosion occurred, hundreds of casualties most probably would have been a consequence.

Four individuals and a New Jersey Corporation have been convicted and sentenced on charges that they illegally disposed of huge quantities of dangersous and hazardous waste materials in several Plymouth County towns. Investigations into illegal dumping of toxic and explosive materials throughout the Commonwealth are continuing at an increased rate. The alert has been caused by recent site discoveries by law enforcement officers and environmentalists in a number of urban, suburban and rural locations.

The practice of assisting the district attorneys with Bureau personnel when requested by the county prosecutors has continued this fiscal year. This intervention has led to convictions in cases involving; homicide, where a second life sentence was imposed upon the convicted killer and conspiracy to murder, where two Marlborough men received long prison sentences for their unsuccessful attempt to kill a Framingham attorney. Other crimes of a more diverse nature including the sale of cocaine, assault with a dangerous weapon, contributing to the delinquency of a minor and similar offenses directed against both person and property have been successfully concluded by the Bureau.

Organized Crime Section: The Organized Crime Section disseminates criminal intelligence information on a strict need-to-know basis and provides other support services to law enforcement agencies investigating political corruption, organized, and white collar crime activities. It supplies photographic and technical expertise to other prosecutorial units and maintains systems for the collection and distribution of computerized information designed to enhance the ability of the police to understand and protect against the ever increasing sophistication of criminal schemes and complex unlawful commercial enterprises. The section continues to be involved in an investigative capacity in a number of diverse areas of concentration such as; gaming, bribery, narcotics, arson, hazardous waste, larceny and receiving stolen goods.

This year witnessed a proliferation of criminal activity in the computer and software field. A number of Greater Boston companies designing and manufacturing electronic equipment sought the assistance of the section in an effort to end the theft of these expensive products. Undercover operations were conceived and implemented with the consequence that both individuals and corporations engaged in the sale of stolen data processing devices have been charged for their participation in the larcenous plans.

With the aid of statutorily authorized clandestine auditory and visual surveillances, the section has been able to amass sufficient evidence to indict numerous state and local officials on charges that they sought, solicited and accepted bribes from corporations and individuals over which they maintained, under color of law, a supervisory capacity. In addition to the effect upon the wrongdoer, such enforcement methods serve to discourage others who entertain thoughts of easy riches and deter further incursions by those who have already embarked upon a career in crime.

Considerable investigative effort has been expended by the section in policing the police. When the constabulary cannot be trusted the criminal justice system

will no longer function. In closely scrutinizing complaints involving such corrupt practices, the section has unearthed a number of cases where peace officers have betrayed their oath and engaged in extortionate activity, solicited and accepted bribes and had become involved in outright larcenies. Charges have been preferred against the malefactors and dismissal from the force has been ordered pending judicial disposition of the cases. With a record 72 arrests made in 43 cases, the achievements of this investigative backbone of the Bureau, have been many. The Section's operational mandate has been predicated upon the lesson that the war against crime is not won through isolated victories remote from the center of battle. The Section demonstrates unequivocally that only centralized authority is capable of maintaining the coordinated effort needed to avoid costly duplications and unnecessary waste. The advantages of a unified command reflect the development of effective strategy and exemplify the evaluation of appropriate tactics to assure the success of its mission.

Appellate Section: The caseload of the Appellate Division increased by 30 cases over the previous fiscal year. Two hundred and seventy-four new cases were opened. Approximately 254 cases are presently active. The vast majority of the cases involve civil litigation arising from underlying criminal convictions. Of the 183 cases filed in the various state courts, 111 constituted inmate suits challenging some aspect of sentences or prison conditions or treatment. This number does not reflect the number of inmate suits referred to attorneys within the Department of Correction.

Fifty (50) petitions for review of SDP status pursuant to G.L. c. 123A, §9 were filed. Working in conjunction with the Office of the Chief Justice of the Superior Court, evidentiary hearings are now held in one unified session in a single convenient location before a specially assigned judge every three months. For example, in November, 15 cases were on the list, five full hearings were held, four petitions were withdrawn and one petition dismissed. In the March session of 22 cases, 12 full hearings were held and three petitions withdrawn.

This new procedure has greatly reduced costs of transportation of inmates, attorneys and doctors, reduced the amount of payment to the doctors by assuring that the case will go forward on a specifically assigned date and has streamlined the judicial administration of these matters.

Seventy-three (73) cases were filed in the federal district court, 47 petitions for writs of habeas corpus (for the first time in approximately ten years the number of habeas petitions have decreased), and 26 civil rights actions or requests for declaratory and injunctive relief were filed.

Fifteen (15) cases were argued in the Court of Appeals for the First Circuit. Seven petitions for writ of certiorari were successfully opposed in the Supreme Court of the United States. The one petition filed, challenging the First Circuit's grant of a writ of habeas corpus (*Meachum* v. *Longval*), was granted and the decision of the First Circuit vacated and the case remanded for reconsideration.

In an unusual case, the Attorney General intervened, in the Supreme Judicial Court, on behalf of the Justices of the Superior Court to argue, successfully, that the court had the power, without violating the constitutional prohibition against double jeopardy, to increase as well as decrease, under the constraints of Rule 29 of the Massachusetts Rules of Criminal Procedure, a previously imposed sentence.

The Appellate Division also processes the rendition of fugitives from justice. Demands from both law enforcement officials of the Commonwealth and governors of other states are examined and an opinion rendered as to the legality of each demand. The number of rendition demands increased dramatically during fiscal 1981-1982: from 85 the previous year to 199, 125 foreign requests and 74 requests by Massachusetts authorities. In addition, an attorney must appear in court whenever a rendition warrant is challenged.

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 and its language is technical as well as legal. Under the law, employers with one or more employees become subject to its provisions and are expected to comply. The efficient and economical administration of the employment security program in Massachusetts depends in large measure on the co-operation and compliance of well-informed employers throughout the Commonwealth, for it is they who pay the entire costs of its operation. The employment security program also insures that individuals who become unemployed through no fault of their own will receive 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 the Division of Employment Security, the matter is referred to the Attorney General for criminal prosecution under the provisions set forth by the statute.

The Assistant Attorneys General in the Division make every effort to fully inform employers of their rights and obligations under the Law. As a result, a certain percentage of the matters are settled immediately, 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, 1982, 1,472 employer tax cases were handled by this Division. One thousand one hundred and twenty-five cases were on hand July 1, 1981. Three hundred and forty-seven additional cases were received during the fiscal year, and 182 cases were closed leaving a balance of 1,290 employer tax cases on hand June 30, 1982.

Criminal complaints were brought in the Boston Municipal Court, charging 115 individuals with 1,301 counts of tax delinquencies, totalling $1,346,699.53 in monies owed the Commonwealth's agency by the 87 employer tax accounts.

$1,182,039.13 in overdue taxes was collected during the fiscal year ending June 30, 1982. Monies collected were deposited to the Massachusetts Unemployment Compensation Fund.

Whenever individuals are found to be collecting unemployment benefits fraudulently on claims they have filed while gainfully employed and earning wages, the matters are referred to the Attorney General's Division for prosecution of the criminal offenses. Criminal complaints are brought only when the facts surrounding the offense have been investigated, reviewed with the individual involved and criminal intent has been found. The criminal action is brought

in the court with jurisdiction over the offense for larceny under G.L. c. 266, §30 or under G.L. c. 115A, §47, in order that monies stolen from the Massachusetts Division of Employment Security may be reclaimed and the criminal punished.

During the fiscal year ending June 30, 1982, 972 fraudulent claims of unemployment benefits were handled by this Division. Seven hundred and ninety cases were on hand July 1, 1981. One hundred and eighty-two additional cases were received during the fiscal year, and 158 cases were closed leaving a balance of 814 fraudulent cases on hand June 30, 1982.

Criminal complaints were brought in various courts charging 32 individuals with larceny of $67,291 in unemployment benefits fraudulently collected from the Commonwealth's agency.

The amount of $162,519.07 was collected from the fraudulent claimants during the fiscal year ending June 30, 1982, and has been restored to the Unemployment Compensation Fund of the Massachusetts Division of Employment Security.

Furthermore, after intensive investigations were conducted by the Massachusetts Division of Employment Security and the Attorney General's Division, on November 17, 1981, the Grand Jury of Suffolk County returned five (5) larceny indictments against two individuals, totaling $24,399 from the Massachusetts Division of Employment Security. On April 1, 1982, the Grand Jury of Middlesex County returned five (5) larceny indictments against another individual totaling $14,270 from the Massachusetts Division of Employment Security. This case has been continued to September 14, 1982 for trial.

Subsequent to the indictments being returned, four additional fraudulent claims were discovered in Suffolk County, totaling $23,109 and seven fraudulent claims were discovered in Middlesex County, totaling $35,398, as well as two additional fraudulent claims discovered in Norfolk County, totaling $12,555. Investigations are presently in progress and when completed, criminal action will be brought, after reviewing the sentences imposed by the Superior Court on September 14, 1982 in the original five (5) indictments.

Five of the criminal actions brought in years past remain outstanding pending court disposition. Default warrants have issued and are outstanding at this time after exhaustive searches have been made to locate the defendants. As a result of our earlier prosecutions made on the CETA claims, the case-load during the fiscal year ending June 30, 1982 continues to be the five cases presently awaiting court disposition.

During the Fiscal year ending June 30, 1982, actions brought against or by the Director of the Massachusetts Division of Employment Security numbered 21. Twenty cases were on hand July 1, 1981. Two additional cases were received during the course of the fiscal year, and two cases were disposed of and closed, leaving 19 cases remaining on hand as of June 30, 1982. The two cases closed involved a case that was dismissed by the United States Court of Appeals and another case dismissed by the United States District Court.

It should also be noted that during the past fiscal year this division has been involved in rendering both formal and informal opinions on various aspects of Chapter 151A and related laws. With regard to G.L. c. 151A, Section 46, we were involved with rendering an opinion concerning the confidentiality of information secured by the Massachusetts Division of Employment Security pursuant

to this Chapter. In every instance where these positions were challenged in court the Director's position was upheld due to the representations and recommendations of the Attorney General's Division.

Twenty-three cases brought in the Supreme Judicial Court of the Commonwealth were handled by the Attorney General's Employment Security Division during the fiscal year ending June 30, 1982. Thirteen of the cases were argued and closed leaving the balance of cases on hand at ten. Of the thirteen cases argued, the court upheld the position of the director in three cases and denied benefits; reversed the position of the Director in four cases and allowed benefits; remanded three cases to the state agency for further administrative review which resulted in a denial of benefits; and, dismissed three cases by agreement of the parties.

During the fiscal year ending June 30, 1982, the direction of the Employment Security Division in the Department of the Attorney General has continued to operate in accord with the philosophy of the Department to continue to use the resources of this Division to its maximum potential for a statewide impact in providing an effective remedy by enforcing the laws of a social program designed to serve the people of the Commonwealth.

The Employment Security Division's Annual Report is submitted in two parts, and attached hereto is the statistical report providing a breakdown of the case handling for the fiscal year ending June 30, 1982.

EMPLOYMENT SECURITY DIVISION
Statistical Report

FISCAL YEAR ENDING JUNE 30, 1982

Cases on Hand July 1, 1982		1945
Employer tax cases	1125	
Employee fraudulent claims cases	790	
Supreme Judicial Court cases, (On appeal from Board/Review Decision)	10	
D.E.S. Director Actions, (Brought against or by the Director)	20	
Additional Case Referrals:		543
Employer tax cases	347	
Employee fraudulent claims cases	182	
Supreme Judicial Court cases, (On appeal from Board/Review Decision)	13	
D.E.S. Director Actions, (Brought against or by the Director)	1	
Total Cases on Hand During Fiscal Year:		2488
Cases Closed:		355
Employer tax cases	182	
Employee fraudulent claims cases	158	
Supreme Judicial Court cases, (On appeal from Board/Review Decision)	13	
D.E.S. Director Actions, (Brought against or by the Director)	2	
Cases Remaining on Hand June 30, 1982:		2133
Employer tax cases	1290	
Employee fraudulent claims cases	814	
Supreme Judicial Court cases, (On appeal from Board/Review Decision)	10	
D.E.S. Director Actions, (Brought against or by the Director)	19	

Total Monies Collected: $1,344,558.20

From Employers:	$1,182,039.13
From Employees:	162,519.07

Criminal Complaints Brought:

Tax Cases: 115 Complaints, involving *1301* Counts brought against *87* employer accounts for delinquent taxes totaling *$1,346,699.53*.

Larceny Cases: 32 Complaints involving *671* counts brought against *32* individuals for collecting benefits fraudulently in the amount of *$67,291.00*.

III. MEDICAID FRAUD CONTROL UNIT

The Massachusetts Medicaid Fraud Control Unit during its fourth certification period continued to operate from its central offices at 18 Oliver Street, Boston, Massachusetts. The Unit has continued its efforts toward meeting all of its responsibilities under Public Law 95-142. Again, the Unit has addressed itself toward successfully responding to the four priorities stated in the Unit's first Annual Report:

1. Investigating and prosecuting provider Medicaid fraud and the physical abuse of patients;
2. Providing the Commonwealth of Massachusetts with an effective and visible deterrent force;
3. Drafting and proposing both legislation and regulations to ensure deterrence to future provider fraud and to create a more efficient and equitable Medicaid system;
4. Identifying for recovery and return to the taxpayers overpayments made to providers.

This year MFCU opened 180 new cases and closed 165. The Unit carried over 198 cases from the previous year therefore leaving the Unit with 213 cases which are presently pending.

The Unit's prosecutorial efforts resulted in a return of 132 indictments against a wide range of Medicaid providers. Of those cases which reached disposition during the year the Unit had 47 convictions.

The Unit is continuing its effort to maintain a comprehensive training program for its staff as well as employees of other state agencies. This year the National Association of Medicaid Fraud Control Units held its third annual training conference in Boston, December 7-11, 1981, hosted by the Attorney General's Massachusetts Medicaid Fraud Control Unit. A total of 228 participants attended, including representatives from 27 of the 29 state Medicaid Fraud Units. Many staff members served as lecturers, workshop moderators and/or facilitators.

IV. EXECUTIVE BUREAU

ELECTIONS DIVISION

A. *CAMPAIGN AND POLITICAL FINANCE*

One of the primary functions of the Elections Division is to enforce compliance with the state's campaign finance law by candidates and political committees. (G.L. c. 55). The Division is also responsible for advising the Office of Campaign and Political Finance on questions of law. In fiscal 1982, the Office of Campaign and Political Finance reported 86 individual candidates or treasurers who had failed to file the required financial disclosure reports. Through administrative action taken by the Division, compliance was obtained in 52 instances. The division brought civil suit against 34 individuals; 23 of whom have since complied with the disclosure statute. In addition, city and town clerks throughout the Commonwealth reported 160 local candidates or political

committee treasurers who had not complied with the filing requirements. The Division has obtained compliance with the law in all but 14 instances; 120 by administrative action, and 26 through litigation.

B. *LOBBYISTS*

The Elections Division also enforces the state statute that requires legislative agents and their employees to file financial disclosure statements with the Office of the Secretary of the Commonwealth. (G.L. c. 3 §§43, 44, 47). In fiscal year 1982, 77 violations of these sections were reported by the Secretary. As a result of administrative action taken by this Division, the required statements were filed by all reported violators.

C. *LITIGATION*

During fiscal 1982, the Elections Division was engaged in numerous civil suits brought by candidates and voters concerning the composition of the 1982 primary election ballots. These cases were often challenges to decisions rendered by the State Ballot Law Commission; none of the challenges were successful. The Elections Division participated in the case of *Langone* v. *Connolly* before the Supreme Judicial Court, arguing, on behalf of the Attorney General that the rule of the Democratic Party requiring candidates to obtain the votes of at least 15% of the Party's Convention to qualify for a place on the state primary ballot would not supercede or abrogate state statutes. The Division also filed amicus briefs with the Supreme Judicial Court on requests for advisory opinions on the Democratic Party's 15% rule and concerning the procedures the Constitutional Convention must follow in considering a pending constitutional amendment introduced by an initiative petition.

The Division also sought and obtained preclearance from the United States Department of Justice for the changes in the state election laws enacted during the prior year, including the congressional redistricting legislation.

D. *INITIATIVE AND REFERENDUM*

In August of 1981 the Elections Division reviewed thirteen separate initiative petitions calling for the adoption of laws and five petitions for constitutional amendments. The petitions concerned a wide variety of subjects including abolition of county government; construction of new nuclear power plants, reformation of the way the state legislature conducts its business and reformation of the state budgetary process. The Division also reviewed a referendum petition calling for the repeal of the so-called "Bottle Bill."

The Division handled several cases in the Supreme Judicial Court regarding the initiative process. The case of *Slama* v. *Connolly* challenged the Attorney General's determination that an initiative petition that made a specific appropriation was not proper for submission to the people. The State Ballot Law Commission's decision that the "Bottle Bill" referendum was properly filed was upheld in *Gibbons* v. *Tisdale*. The power of the Governor to reassemble a constitutional convention following the prorogation of the General Court was confirmed by the Supreme Judicial Court in *Backman* v. *Connolly*.

VETERANS DIVISION

The Veteran's Division serves primarily as an informational agency referring private citizens to appropriate Federal and State offices for assistance in veterans matters. The Division serves as counsel to the Commissioner of Veterans Services and the Veterans Affairs Division of the Department of the Treasury. The Division handles civil litigation concerning appeals of agency decisions granting or terminating veterans benefits. During fiscal 1982 the Division brought affirmative litigation to require a town to employ a full time veterans agent in compliance with St. 1972, c. 471.

V. PUBLIC PROTECTION BUREAU

The Public Protection Bureau is the largest of the Bureaus in the Attorney General's Office. Its work is carried out by seven Divisions: Antitrust, Civil Rights, Consumer, Environmental Protection, Insurance, Utilities and Public Charities, as well as a Complaint and an Investigative Section. The Bureau carries on affirmative litigation on behalf of the public, and represents the public in insurance and utility rate hearings.

The primary work of Bureau attorneys is to aid the Divisions within the Bureau in carrying out their work. In addition to the cases brought by individual Divisions, and described later in this report, a number of matters were handled on a Bureau level in FY-1982. These cases involved serious public issues, and represented millions of dollars in costs to the Commonwealth's citizens. The cases often required in-depth study and extensive effort from a number of attorneys in the Bureau and support personnel. Among these cases were:

Boston Edison "Pilgrim II" Case

In October, 1981, Boston Edison Company filed its request with the Department of Public Utilities to recover from ratepayers approximately $291 million in costs incurred in planning and constructing the Pilgrim II nuclear power plant. The plant was cancelled in September, 1981 and never provided any services to customers. In the administrative hearings on the cost recovery request, attorneys from the Utilities, Consumer Protection and Insurance Divisions represented consumers in opposing recovery. We spent substantial time and effort presenting evidence and argument that Boston Edison was not financially capable of completing Pilgrim II, and thus the investment in the project was "imprudent" and costs should not be borne by ratepayers. The Department of Public Utilities ruled partially in our favor in April, 1982, allowing Boston Edison to collect approximately half of what it requested. The Attorney General is appealing the D.P.U. decision to the Supreme Judicial Court, contending that no costs of Pilgrim II should be passed through to consumers.

Attorney General v. Lowell and Cape Cod Gas Companies

In 1982, Bureau attorneys completed landmark litigation brought in 1977 against two utilities, Lowell Gas and Cape Cod Gas, for fraud and deception on their customers. In 1981, we had secured a Superior Court ruling that both companies had acted fraudulently and deceptively toward their consumers. In 1982, after further briefs and hearings and shortly before a trial on damages, the companies agreed to settle the case by paying one million dollars in cash to

current ratepayers and agreeing to other conditions. This is the first known case in the nation in which a consumer protection act has been successfully used against a utility. It is also the largest cash recovery ever obtained under G.L. c. 93A.

Local Division 589 v. Commonwealth and MBTA

Bureau lawyers successfully defended the constitutionality of two Massachusetts laws which make important reforms in labor practices at the Massachusetts Bay Transportation Authority. One statute changes labor arbitration standards; the other, enacted during the MBTA shutdown in late 1980, expands the power of the MBTA's management to run the system efficiently. Both laws were challenged by labor unions. During Fiscal Year '82 the United States Court of Appeals upheld the constitutionality of both laws in all respects on our appeal from the lower federal district court decision which struck down the statutes in part. Later, the U.S. Supreme Court refused to hear any further appeals. The laws have now been put into effect, allowing the MBTA to save larger amounts of money and improve service to customers.

In addition to the above cases handled on a Bureau level, Bureau attorneys assisted in many cases brought by individual Divisions. Among the most significant cases, described in greater detail in the sections on the appropriate Division, were:

Attorney General v. MBTA

This suit challenged the failure of the MBTA Board of Directors to comply with the Open Meeting Law (See Civil Rights Division).

Commonwealth v. Hayes, FDA Commissioner

This suit, which challenges the U.S. Food and Drug Administration's failure to exempt Massachusetts hearing aid regulations from federal preemption, continued. (See Consumer Protection Division).

Commonwealth, Secretary of Environmental Affairs, and Attorney General v. Massachusetts Port Authority (Bird Island Flats Case)

A significant amount of time was spent negotiating a settlement which resolved environmental disputes so that a development at the Bird Island Flats portion of Logan Airport could go forward. (See Environmental Division).

Special Prosecutor Program

During FY-1982, Bureau attorneys acted as special prosecutors in the offices of the District Attorneys in Essex and Plymouth Counties. This program provided assistance to overburdened district attorneys' offices, and resulted in Bureau attorneys gaining trial and courtroom experience.

REPORTS OF DIVISIONS AND SECTIONS

During FY-1982, in addition to the joint efforts described above, the Bureau's specialized divisions and sections carried on and expanded litigation in their subject areas. Reports of each section and division appear below.

ACCOUNTING SECTION

The Bureau's Accounting Section made further progress during the year in a project in association with the Civil Rights Division to evaluate the level of

compliance by hospitals in the Commonwealth with regulations under the Hill Burton Act, a federal law requiring granted facilities to provide a level of free or reduced-cost services to persons unable to afford hospital care. Teams of accountants, investigators and student interns completed field visits at 43 facilities during the year, bringing our overall total to 79 field visits. At this time last year, a final settlement had been reached with one hospital and two administrative complaints were filed with the U.S. Department of Health and Human Services (HHS). To date, fifteen hospitals (including the two facilities previously named in the administrative complaints) have entered into settlements and agreed to provide millions of dollars in uncompensated services to eligible persons in future years. One administrative complaint was also filed with HHS during the year. Forty-two of the facilities visited were found to be in substantial compliance and negotiations are continuing with the remaining 21 facilities found not be in compliance.

In FY-1982, the Accounting Section also gave extensive assistance to the Bureau attorneys in calculating the damages and interests in the Lowell Gas litigation. Our personnel analyzed all rate cases and price adjustment clause filings by the two defendant utilities over a ten-year period, in order to trace the impact of their fraudulent accounting practices on the rates charged to consumers. To accomplish this, it was necessary to develop and apply complex assumptions and analytic techniques which had not previously been used in consumer or utility cases. Our work culminated in a one million dollar cash recovery for consumers.

COMPLAINT SECTION

During FY-1982, the Public Protection Bureau Complaint Section processed 7,955 cases. We closed 4,129 cases. The section recovered for consumers $292,003 in refunds, savings and the value of goods or services they would not have received but for our intervention. In addition, we referred 5,158 written complaints to out of state agencies, other state or federal agencies or local consumer groups.

The staff who answer the "8400" public telephone lines received a total of 120,793 calls during the past year. Of these calls 17,828 citizens were sent Complaint Inquiry Forms, 15,125 citizens were given information and 90,216 calls were referred to local consumer groups or other state or federal agencies. The staff also received 625 civil rights calls. Of these calls, 190 citizens were sent Complaint Inquiry Forms and 116 citizens were given information relating to civil rights inquiries.

Special projects were conducted by the Complaint Section staff in addition to our normal investigative and litigation support functions. Local consumer groups in both Taunton and Worcester closed this year and we were obliged to take physical possession of, process and mediate hundreds of their complaints. Several of the Complaint Section staff participated in an auditing project for the civil rights division this spring. The project lasted for six weeks to determine whether discrimination was being practiced.

The Section also began an investigation into the sale of cars which are rebuilt "insurance wrecks" without disclosure of same. It now appears that it may be the largest investigation we have ever worked on, involving thousands of cars

and a multitude of dealers. We are working with the investigative section and an Assistant Attorney General in the Consumer Protection Division.

As always, individual members of the staff (both permanent and volunteer) worked on a wide array of projects for specific attorneys. As part of a reorganization effort to update our closed files system, we prepared for archiving, all of our 1975, 1976 and 1977 closed complaints. In addition to this, we included those closed files from the defunct Taunton and Worcester groups as well.

INVESTIGATIVE SECTION

In F-Y 1982, the Investigative Section diversified its activities through involvement in a number of areas in which its assistance was sought. These areas reflect the broadened use of investigators in many facets of the Bureau's activities. Some examples of major tasks undertaken are described below.

Investigators in the auto unit obtained information that "junked" cars were being deceptively returned to the market for sale to consumers. The percentage of such cars on the auto market was previously unknown, but continue to be uncovered through the unit's efforts. The odometer spinning investigations that have been conducted in the past now overlap this new concern and provide the firm basis for discovery of both "junked" cars and "spun" cars.

In another area, close interaction with the community though the anti-arson and housing investigators has provided increased visibility for the Department and a growing respect for the Department's impact. Road construction bid-rigging was uncovered and successfully brought to the attention of the Federal Court through the efforts of the investigators working with the Antitrust Division. Antitrust has historically been an area which did not generate quick results but the joint work of the investigators and attorneys using innovative prosecution methods produced results here.

The financial investigative capacities of the section have expanded. Cases referred to us by the Executive Office of Human Services and the State Auditor involving providers to the Executive Office of Human Services and the State Auditor involving providers to the Department of Mental Health resulted in civil actions against six providers. Additional cases are being pursued, and some have resulted in voluntary repayment of overcharges to the Commonwealth. The on-going review of hospitals to determine compliance with the Hill-Burton Act is another example of our expanded financial investigations.

Investigators worked with the Civil Rights Division in two important cases. One investigation led to the first prosecution under the state civil rights law for the violation of a black family's civil rights involving an attack upon their home. The other instance involved the investigation of a police brutality charge which led to the temporary suspension of the officer involved.

In FY-1982, the Section also investigated charges against MDC and State Police in which the charges were shown to be without merit. These were matters referred from the Government Bureau. This Bureau also acted as a conduit for requests for investigations by Boards of Registration including cases involving an attorney, a certified public accountant, doctors, nurses, and allegations of real estate fraud. All matters referred to the Section in this manner have been resolved successfully.

In FY-1982, investigators were involved in undercover assignments which produced first hand testimony to aid in the prosecution of illegal practices at a clinic. Investigators have also worked closely with FBI personnel in matters involving fraudulent sale of government leases for oil land.

The investigators have been available for use by other Bureaus in the Department, when needed. For example, two investigators were temporarily assigned to the Criminal Bureau in FY-1982. In sum, the Investigative Section has expanded its activities significantly to assist in a variety of cases brought by the Bureau and the Department.

LOCAL CONSUMER AID FUND

For FY-1982, the Massachusetts Legislature appropriated $250,700 to provide regional consumer groups throughout the Commonwealth with supplemental funding for consumer complaint mediation. This funding is distributed through the Local Consumer Aid Fund and is administered by the Department of the Attorney General.

Through this program 14,000 consumer complaints, representing complaints from 85% of the cities and towns in the Commonwealth, are mediated at the local level. The handling of complaints at the local level has proven beneficial to both consumers and businesses, in that complaints are handled more quickly and a more workable rapport has developed between the merchants and the community. The familiarity with local merchants enables groups to recognize the patterns of unfair and deceptive practices at an early stage and had proven to be an asset to the Bureau in curbing these practices.

In 1982 appropriation was distributed among twenty-five agencies in the following manner:

Grant Recipient	*Amount Awarded*
Agawam Consumer Advisory Committee	$ 3,000
Arlington Office of Consumer Affairs	$ 6,000
Berkshire County Consumer Advocates, Inc.	$13,500
Mayor's Office of Consumer Affairs and Licensing-Boston	$17,000
Brockton Consumer Advisory Commission	$ 8,000
Cambridge Consumer Council	$ 8,000
Cape Cod Consumer's Assistance Council, Inc.	$ 6,500
Duxbury Consumer Advisors	$ 300
Fall River Consumer Service Office	$10,000
Greater Lawrence Community Action, Inc.	$ 8,000
Hampshire-Franklin Consumer Protection Agency	$ 8,000
Haverhill Community Action Commission	$10,000
Lowell Community Teamwork, Inc.	$ 8,000
Lynn Economic Opportunity	$10,000
Medford Consumer's Council	$ 9,000
Newton Department of Human Services	$ 8,000
North Shore Community Action Program, Inc.	$ 8,000
Quincy Consumers' Council	$ 6,000
Revere Consumer Affairs Office	$10,000

Somerville Multi-Service Center	$ 2,000
South Middlesex Consumer Protection Office	$13,500
Southeastern Massachusetts Consumer Action Center	$ 8,000
Southeastern Massachusetts Legal Assistance Corporation	$13,000
Springfield Consumer Action Center	$13,500
Worcester Consumer Protection Coalition, Inc.	$18,500

ANTITRUST DIVISION

A. *INTRODUCTION*

During FY-1982, the Antitrust Division of the Department of the Attorney General continued its vigorous enforcement of state and federal antitrust laws. Massachusetts is now clearly recognized as one of the most active states involved in state antitrust enforcement. In selecting those violations to be pursued, the Antitrust Division has continued to give highest priority to bid-rigging and nationwide price-fixing activities to obtain the greatest possible damage recoveries for the Commonwealth and its political subdivisions. Additionally, the Division has stressed prosecution of resale price maintenance activities, which directly affect consumers by stabilizing retail prices at artificially high levels.

B. *FEDERAL FUNDING*

During FY-1982, the Antitrust Division continued to have available limited federal funding. As of October 1, 1980, Attorney General Bellotti was able to obtain an additional $99,000 to be used for further development of an effective antitrust enforcement program. During FY-1982, the final $65,000 of the grant was used for operating expenses. The additional operating expenses of the Antitrust Division for FY-1982 were funded through the Antitrust Revolving Fund created by Chapter 459 of the Acts of 1978.

C. *STAFF*

During FY-1982, the Antitrust Division consisted of four (4) attorneys and approximately ten (10) support personnel.

D. *LITIGATION*

During FY-1982, the Antitrust Division had cases which were in various stages of litigation in both federal and state court systems.

1. *Commonwealth of Massachusetts* v.*N.B.M.A., et al. Chicken Antitrust Litigation (Northern District of Georgia)*

This is a suit against 37 major producers of chicken in the United States charging them with conspiring to raise the price of chicken throughout the United States. The suit was brought on behalf of the Commonwealth and its political subdivisions in their proprietary capacities. A settlement, in excess of $40 million, has been approved by the court in this global class action and the Commonwealth is presently awaiting a final determination of the potential recoveries available to the Commonwealth. The Department of the Attorney

General serves on the Settlement Administration Committee as representative of all states participating in this litigation.

2. *Commonwealth of Massachusetts* v. *Amstar Corp., et al.*
Eastern Sugar Antitrust Litigation (Eastern District of Pennsylvania)

This is a suit against seven refiners of sugar alleging that they conspired to fix prices of sugar in violation of the Federal Antitrust laws. The Department is representing the Commonwealth in its proprietary capacity and the cities of Boston and Cambridge. During FY-1982, each plaintiff received 80% of its proportionate share of the settlement; the Commonwealth received a distribution of $4,755.27; Boston received $470.56. Final distribution will be made in FY-1983. Additionally, the Department received an award of $30,926.45 in fees and expenses.

3. *Commonwealth of Massachusetts* v. *Brinks, Inc., et al.*
Armored Car Antitrust Litigation (Northern District of Georgia)

This is a suit against three major armored car carriers alleging that they conspired to fix the price of armored car services throughout the United States. A global settlement of $11.8 million has been approved. In FY-1982, the Commonwealth received its proportionate share of the settlement, a total of $51,042.39. Cities and towns in the Commonwealth also received a distribution. Additionally, the Commonwealth received $12,961.94 for attorneys fees and expenses.

4. *Commonwealth of Massachusetts* v. *Boise Cascade, Inc., et al.*
Fine Paper Antitrust Litigation (Eastern District of Pennsylvania)

This is a suit by the Commonwealth, on behalf of itself and its political subdivisions, against 15 major paper manufacturers charging them with conspiring to fix the prices of fine paper products throughout the United States. The Commonwealth was certified as a class representative of its political subdivisions in this action. As of September 15, 1980, settlement had been reached with all defendants and the total settlement of approximately $62,000,000 has been approved by the Court. The Commonwealth is awaiting award of its share of the total settlement fund (to be based on claims submitted) and attorneys fees requested in the amount of $35,000. The Division was actively involved in processing the claims of the Commonwealth and its cities and towns.

5. *Commonwealth of Massachusetts* v. *Rockwell Corp., et al.*
(Eastern District of Pennsylvania)

The Commonwealth brought suit in FY-1980 on behalf of four municipally owned gas works against three major manufacturers of gas meters in the United States, alleging that they have conspired to fix prices and rig bids on gas meters. This case has been settled for in excess of $15 million and the Commonwealth is presently awaiting a final resolution of the method by which the settlement monies will be distributed in order to determine how much will be recovered by four municipally owned gas works.

6. *Commonwealth of Massachusetts* v.*Harborside Liquor, Inc., et al. (Dukes County Superior Court; District Court of Massachusetts)*

The Commonwealth brought two antitrust actions in FY-1980, one in state court and one in federal court, charging seven liquor stores on Martha's Vineyard with price-fixing for at least the last fifteen years. The state action sought injunctive relief and a civil penalty, while the federal *parens patriae* action, sought injunctive relief and damages for consumers injured by the unlawful conspiracy. The case was settled with all defendants in FY-1981, during pretrial discovery. The total settlement amounted to approximately $80,000, and provided for the entry of a consent decree in federal court. In FY-1982, the Court ordered that the entire settlement amount be deposited in the Antitrust Enforcement Fund.

7. *Commonwealth of Massachusetts* v.*Milton Bradley Co., Art Materials Antitrust Litigation et al. (District of Massachusetts)*

The Commonwealth filed suit in FY-1980 against the four major manufacturers of art supplies in the United States, charging them with a nationwide conspiracy to raise the prices of art supplies and bid rigging. The suit was brought on behalf of the Commonwealth and its political subdivisions in their proprietary capacities. During FY-1981, the Commonwealth's case was consolidated with other civil antitrust actions brought against the same defendants and transferred to the Federal District Court in Cleveland, Ohio for coordinated pretrial proceedings. Class action discovery was then ordered to proceed. During FY-1982, discovery proceeded, the Commonwealth being responsible for all discovery in connection with Milton Bradley Co. The Commonwealth serves on the Plaintiff's Executive Committee, responsible for overall management of the litigation.

8. *Commonwealth of Massachusetts* v.*Cuisinarts, Inc., et al. (District of Connecticut)*

The Commonwealth filed this case in FY-1981 against Cuisinarts, Inc., claiming that it had unlawfully engaged in a vertical price fixing agreement. Federated Department Stores was named as a party defendant several months after the filing of the complaint. This is a *parens patriae* action filed by the Department on behalf of Massachusetts residents and seeks treble damages. During FY-1982, defendants' motions to dismiss were denied and the parties proceeded with class action discovery. In a related action, the Second Circuit Court of Appeals affirmed the District Court's refusal to release to the Commonwealth materials and testimony presented before a Federal Grand Jury which returned an indictment against Cuisinarts, Inc. The Commonwealth has filed a petition in the U.S. Supreme Court for a writ of certiorari on behalf of itself and twelve additional states.

9. *Commonwealth of Massachusetts* v. *Richard Zimmerman et al. (District of Massachusetts)*

This suit, filed in FY-1981 against two individuals and two corporations, alleges that the defendants engaged in bid-rigging with respect to busing contracts entered into by the Department of Education, Division of Special Needs.

The suit seeks injunctive relief and damages for the Commonwealth. Defendants motions to dismiss were denied in FY-1982 and discovery has proceeded.

10. *Commonwealth of Massachusetts* v. *Russell Stover Candies, Inc. (District of Massachusetts)*

In December, 1981, the Department filed this case against Russell Stover Candies, Inc., claiming that company had unlawfully engaged in resale price maintenance. This *parens patriae* action was brought on behalf of Massachusetts residents and sought treble damages. The complaint charged the defendant with unlawfully setting the retail price of its candy and thereby artificially raising the price paid by Massachusetts residents. After decision by the Court on preliminary motions, a settlement was reached. Pursuant to the settlement, Russell Stover agreed to payment of $140,000 and entry of a Consent Decree prohibiting it from engaging in resale price maintenance in the future. $35,625.30 is to be deposited in the Antitrust Enforcement Fund with the remainder to be distributed to municipalities in the Commonwealth on a pro-rata basis.

11. *Commonwealth of Massachusetts* v. *Bristol Myers, et al. Ampicillin Antitrust Litigation (District of Columbia)*

The Commonwealth and a number of other states during the 1970's, filed this complex antitrust litigation claiming that the major manufacturers of ampicillin had entered into various unlawful agreements restricting the sales and distribution of this important drug. In this action seeking damages, the Commonwealth has represented itself and all other states which did not file their own individual actions (the "Residual CCS Class"). After years of expensive and time-consuming discovery and motions, the case was settled with defendants for a total of $6,800,000. During FY-1982, the Commonwealth filed and administered plans of distribution for itself and the Residual CCS Class. Massachusetts received $32,600.45 and its municipalities received $87,961.67. Additionally, as representative of the Residual CCS Class, the Department received $49,791.85 in attorneys fees and expenses.

12. *Commonwealth of Massachusetts* v. *Ashland Warren, Inc., Erg Investments, Inc., et al. (District of Massachusettts)*

In February, 1982, the Antitrust Division filed this case alleging that nine companies had engaged in bid-rigging and price-fixing in Massachusetts in connection with the sale of bituminous concrete and the paving of roads in and around DPW Districts 5 and 8 (i.e. Boston and its northern environs). The suit was brought on behalf of the state and municipalities injured by the alleged conspiracy and seeks recovery of treble damages. The Court has denied defendants' motions to dismiss on statute of limitations grounds, has taken under advisement defendants' motions to dismiss attacking the right of the Commonwealth to represent political subdivisions without bringing a class action, and has directed that discovery should proceed.

13. *Commonwealth of Massachusetts* v. *Ashland Warren, Inc., Old Colony Crushed Stone Corp., et al. (District of Massachusetts)*

In February, 1982, the Antitrust Division filed this case alleging that four companies had engaged in bid-rigging and price-fixing in Massachusetts in connection with the sale of bituminous concrete and paving of roads in and around DPW Districts 6, 7 and 8 (Boston and its southern environs). The suit was brought on behalf of the state and municipalities injured by the alleged conspiracy and seeks recovery of treble damages. The Court has taken under advisement various motions to dismiss filed by defendants, which attack the action on statute of limitation grounds, and challenge the right of the Commonwealth to represent political subdivisions without alleging a class action.

E. *ADDITIONAL PROCEEDINGS AND ACTIVITIES*

In addition to the above cases, the Antitrust Division was, during FY-1982, involved in the following proceedings and activities:

1. *Commonwealth* v. *Don Law, Inc.*

The Division accepted and filed in Superior Court a Consent Decree which prohibited Don Law, Inc., and related companies from engaging in certain anticompetitive behavior which restricted competition in the promotion of popular music concerts in and around Boston. Additionally, the company paid the Commonwealth $20,000 as reimbursement of costs and expenses incurred in the investigation.

2. *Commonwealth* v. *Ralph Iaccarino & Sons Lumber Co., Inc.*

In this action, related to an investigation referred to the office by the Special Commission, the Commonwealth moved for an order compelling the defendant to respond to a civil investigative demand. The Superior Court refused to issue the order and the Division appealed to the Appeals Court. A single justice of the Appeals Court reversed the decision of the lower court and ordered production of the documents in question forthwith. The Division then proceeded to review approximately 460,000 documents produced.

3. *Architectural Hardware/Building Specialties, Inc.* v. *Nucor Corp., et al.*

The Antitrust Division submitted an amicus brief in Federal District Court in opposition to defendant's motion to dismiss. The issue involved relates to the meaning of the interstate commerce exemption in G.L. c. 93A. A decision is pending.

4. *In The Matter of Shawsheen Valley Transit Authority*

Consent Decrees were accepted from four competing bus companies who had submitted a joint bid to the Shawsheen Valley Transit Authority with respect to the busing of school children. The Decrees prohibited companies from engaging in joint bidding practices in the future. The Commonwealth was also paid $1,500 as reimbursement for the costs of investigation.

5. *New England Bid Monitoring Project*

In the summer of 1978, the Commonwealth began a pilot program to determine the feasibility of collecting and analyzing masses of bid data from municipalities in order to determine whether antitrust violations were occurring in the sale of certain specified products. As part of the project, the Antitrust Division collected bid data from over 100 towns and cities in Massachusetts and commenced development of computer programs for analysis of data.

During FY-1982, data collection continued to ensure that the project remained current. Additionally, software was improved to permit more effective management of data collected and analysis of project bids in addition to product bids.

Most importantly, computer analysis generated by the project played a significant part in the investigation leading to the filing of the two road paving cases.

CIVIL RIGHTS AND LIBERTIES DIVISION

The Civil Rights and Liberties Division is established by G.L. c. 12, §11A. It initiates judicial and administrative proceedings in the name of the Attorney General to protect civil rights in a wide variety of substantive areas in cases affecting the public interest; on behalf of agencies and departments of the Commonwealth, to enforce statutes and regulations guaranteeing individual rights; and to enforce the provisions of the Massachusetts Civil Rights Act.

In addition to litigation, staff of the Division investigate alleged violations of civil rights, many of which are brought to the attention of the Division by citizens of the Commonwealth; comment on proposed legislation and administrative regulations, both state and federal; provide advice to state agencies on civil rights matters, and inform members of the public of developments and issues of civil rights and constitutional protections.

In FY-1982, the Division was staffed by a Chief, four assistant attorneys general, and appropriate support personnel. A description by category of some of the more significant activities of the Division in FY-1982 follows.

A. *ENFORCEMENT OF THE MASSACHUSETTS CIVIL RIGHTS ACT*

The Division brought several successful criminal prosecutions under the Massachusetts Civil Rights Act, St. 1979 c. 801. Three defendants were prosecuted by a Division attorney for interfering with the civil rights of a black family living in a Weymouth housing project by throwing rocks at their windows and shouting racial epithets and threats. Each of the three defendants was sentenced to the House of Correction (in two cases, a portion of the sentence was suspended) for the one-year maximum authorized under the Civil Rights Act for forcible interferences with civil rights which do not result in bodily harm. The sentences were the stiffest imposed under the recently enacted Civil Rights Act, and indicated the seriousness with which such violations will be viewed by the Courts.

Division staff also worked with local police and Assistant District Attorneys to investigate and prosecute alleged civil rights violations in several communities, including Boston, Cambridge, Chelsea, Hull, Milton, Needham, Somerville, Wayland and Westwood.

To inform members of the public and the law enforcement community about their rights under the Massachusetts Civil Rights Act, a pamphlet was prepared in English and Spanish, and distributed to civil rights groups, district court clerks, local police, and other interested individuals. Division staff also spoke about the provisions of the law at several police training seminars.

B. *HEALTH*

Throughout FY-1982, lawyers from the Division, working with staff from the Accounting Department and the Investigative Unit, continued their enforcement of the Hill-Burton Act. The Hill-Burton Act requires hospitals which received federal funds to provide a reasonable volume of free or reduced cost care to persons unable to pay. Approximately 110 Massachusetts health care facilities were subject to this "free care" obligation in 1982, and were required to provide approximately $85,000 worth of free or reduced cost care to low income consumers.

In FY-1982, we audited an additional 43 hospitals, bringing the total number of audits in FY-1981 and FY-1982 to 79. Agreements were signed with ten hospitals, pursuant to which the hospitals have agreed to provide approximately $1,700,000 in free or reduced cost care. Approximately $2 million in additional free or reduced cost care has been recovered during the 2 year period of the investigation. Negotiations with other facilities are continuing. Also in the Hill-Burton area, we drafted testimony which the Attorney General submitted to the U.S. House Subcommittee considering repeal of the Hill-Burton Act urging that the Act be retained. As of June 30, 1982, moves to repeal had not succeeded.

In addition to the "free care" obligation, hospitals which received Hill-Burton funds have an obligation to serve the needs of the community in which they are located. The withdrawal from the Medicaid program of many Cape Cod doctors specializing in obstetrics and gynecology threatened to make those services unavailable to indigent women on the Cape. Following our negotiations with the Cape Cod Hospital, the Hospital reached an agreement with the physicians establishing a rotational referral system to provide OB-GYN services to Medicaid-eligible women free of charge.

A decision was rendered in *Frechette* v. *Block,* a suit we filed in FY-1980 against the U.S. Secretary of Agriculture challenging the formula used in FY-1979 for allocating funds among the states for the federal supplemental food program for women, infants, and children (WIC). The U.S. District Court for the District of Columbia ruled that the Secretary of Agriculture had violated provisions of the federal Administrative Procedure Act, but denied relief because the Commonwealth had not used all of the funds for FY-1979 that it had received.

In accordance with the holding of *In Re Saikewicz,* we petitioned for the appointment of guardians for several mentally ill or retarded persons in need of medical treatment, so that the question of whether consent to the treatment should be given could be resolved by the Probate Court.

C. *EDUCATION*

The Supreme Judicial Court rendered its decision in *Board of Education* v. *City of Boston,* a suit which we had filed in FY-1981 to enjoin the closing of the

Boston Public Schools before the end of the state-mandated 180-day school year. The Court affirmed the Superior Court injunction which had required Boston to keep its schools open for 180 days, even though the School Committee had exhausted its appropriation. In addition, the Supreme Judicial Court dismissed a claim of the City of Boston against the Commonwealth for reimbursement of the additional $30 million required to keep the schools open.

The Supreme Judicial Court also ruled in our favor in *Attorney General, et al.* v. *Bailey, et al.*, holding that supervisors of private religious schools must comply with the school attendance reporting provisions of G.L. c. 72, §2, and that those provisions do not violate defendants' constitutional rights. Several similar cases are pending. In *Attorney General, et al.* v. *Grace Bible Church Christian School, et al.*, we filed a civil suit against the operators of an unapproved school and the parents of children attending the school to enforce compliance with the compulsory school attendance laws.

The obligation of public vocational schools to provide physical education to their students under G.L. c. 71, §3 was established by the decision of the Appeals Court in the case of *Worcester Vocational Teachers Association* v. *City of Worcester*, a case in which we intervened on behalf of the Attorney General and Board of Education.

Following a joint effort by the Division and the Department of Education, the Worcester vocational schools adopted a plan to change their recruiting and admissions policies, to improve the representation of women and racial and linguistic minority students in the vocational schools. We also worked with the Department of Education to investigate the Lawrence public schools' compliance with the state's bilingual education laws and regulations, and began negotiations with Lawrence on how the program could be brought into compliance.

The Division represented the Department of Education in several special education cases in state and federal court. The Department's orders for special education programs have, for the most part, been upheld.

D. *HOUSING*

Lawyers from the Division, working with Bureau investigators, began an investigation of racial discrimination by apartment rental agencies in Greater Boston. As of the end of FY-1982, the investigation was continuing.

A consent judgment was entered in *Attorney General* v.*Chart Realty*. The defendant, a Brockton real estate office, is enjoined from discriminating against families with children or against recipients of public assistance, and is required to publish corrective advertising. This was one of a series of cases brought following an investigation of discrimination against families with children.

In *Commonwealth* v. *Gulliver*, the Superior Court enjoined the operator of a migrant labor camp from housing workers without a Department of Public Health certificate of occupancy.

Accessibility of apartments to the handicapped was the subject of *Architectural Barriers Board* v. *Stasino's*. We filed suit to enforce an order of the Architectural Barriers Board which required apartment buildings owned by the defendant to be made accessible. This case is pending.

E. *EMPLOYMENT*

In accordance with consent decrees entered in prior years in three class-action discrimination cases, we monitored compliance of three Boston publishing companies with affirmative action requirements. We also reviewed the compliance of construction contractors working on the large Copley Place development project with affirmative action requirements. No litigation was required.

We filed comments on two sets of proposed regulations by the Office of Federal Contract Compliance Programs which would have virtually destroyed the long standing federal affirmative action program. The proposed rules to which we objected would have exempted 75% of all presently covered federal contractors from the affirmative action requirements, substantially loosened the substantive standards applicable to the remaining 25%, and limited the enforcement tools available. As of the end of FY-1982, the OFCCP had not issued final regulations.

We filed an administrative appeal with the OFCCP of their denial of our Freedom of Information request seeking the results of its compliance review of the John Hancock Mutual Life Insurance Company with affirmative action requirements. The appeal was still pending at the end of FY-1982.

In *Holden* v. *Massachusetts Commission Against Discrimination,* we are defending the M.C.A.D. against charges of discriminatory and wrongful discharge. This year, the First Circuit Court of Appeals affirmed the District Court's dismissal of plaintiff's case. A petition for *certiorari* was filed with the U.S. Supreme Court at the end of FY-1982.

We investigated a number of employment discrimination complaints, which resulted in referrals or informal resolutions. Division attorneys also participated as speakers at a number of conferences concerning employment-related issues.

F. *TRANSPORTATION*

We obtained injunctions in several cases initiated in FY-1981 and 1982 to enforce the right of mentally retarded adults under G.L. c. 19, §28 to transportation to their day programs. A partial summary judgment issued by a single Justice of the Supreme Judicial Court in *Attorney General* v. *Middleboro and Greenfield School Committees* declared that under G.L. c. 19, §28, a mentally retarded person who lives in a community residence funded by the Department of Mental Health must be considered a resident of the community in which he or she physically lives; that the statute applies to privately, as well as publicly operated programs; and that the failure of the Commonwealth to fully reimburse cities and towns for these expenditures did not relieve them of that obligation.

We argued before the Supreme Judicial Court, the case of *Attorney General* v. *School Committee of the Town of Essex*. This was an action to enforce the provisions of G.L. c. 76, §1, which requires school committees to provide students attending private schools the same transportation benefits afforded to public school students.

G. *PUBLIC ACCOMMODATIONS AND RELATED MATTERS*

We brought a contempt action against the owner-developer of Shawmut Plaza, a Bellingham shopping center, for violating a consent judgment in *Architectural Barriers Board* v. *Clark* which had ordered him to comply with the

Board's order to make the plaza accessible to handicapped people. The plaza is now in compliance.

Two formerly all male activities are now available to women. Following negotiations with the Division, Winchester Youth Baseball agreed to open its teams to females, and the Chatham Band, which had been receiving town funds despite its "males only" by-law, changed the by-law so that female musicians may participate.

H. *PRISON AND JAIL CONDITIONS*

We continued our efforts to ensure compliance with the order we obtained in FY-1981 that the Penal Commissioner improve conditions at the Deer Island House of Correction, and continued to monitor the situation at the John Connolly Detention Center in Roslindale, a Department of Youth Services facility, which had been the subject of a lawsuit against the Commonwealth.

I. *ELECTION AND VOTING RIGHTS*

In *Batchelder* v. *Allied Stores International, Inc.*, we filed an amicus brief in the Supreme Judicial Court in support of a candidate who was denied access to the common areas of a shopping center to speak, distribute literature, and solicit signatures for his nomination papers. We argued that these rights are protected by Article 16 of the Constitution of the Commonwealth, and the state Civil Rights Act, G.L. c. 12, §11I. The case was still pending at the close of FY-1982.

The City of Boston modified its formerly all "at-large" method of electing its City Councillors and School Committee members. We reviewed the district lines that were drawn to insure compliance with the Constitution and Voting Rights Act. No further action was required.

In cooperation with the Secretary of State's Office, we conducted a survey of all town clerks to determine the accessibility of polling places to handicapped voters. We are in the process of following up on the findings.

We also spoke at conferences sponsored by Hispanic groups on the subject of voter registration, election day rights, and remedies.

J. *PUBLIC RECORDS*

We intervened in the case of *Boston Globe* v. *Boston Retirement Board*, arguing that there must be a balance between the privacy interests of individuals and the public's right to know. We supported the decision of the Supervisor of Public Records that the Retirement Board should disclose cursory statements of the reasons for disability awards. The Supreme Judicial Court allowed the Globe's application for direct appellate review, and the case was pending at the end of the fiscal year.

In *Bellotti* v. *Milton Board of Appeals*, the Superior Court ordered the Board to turn over a letter it received from town counsel to the Supervisor of Public Records for an *in camera* inspection, upholding the Supervisor's regulations on *in camera* inspections against their first challenge. The court rejected Milton's claim that the attorney-client privilege created a common law exception to the public records law.

At the request of the Supervisor of Public Records, we sought compliance with the Freedom of Information regulations by over 300 local police departments that had been charging excessive fees for copies of accident reports and other public records, or refusing to furnish copies by mail. The majority agreed to comply. We are continuing to seek compliance by the others.

K. *OPEN MEETING LAW*

We filed suit in *Attorney General* v. *M.B.T.A., et al.*, to enjoin the M.B.T.A. Board of Directors from future violations of the Open Meeting Law. The Complaint alleges that in illegally convened executive sessions, the M.B.T.A. has discussed issues of great public interest, including major service cutbacks and the issuance of bonds. The case is pending.

We also prepared and distributed information on the Open Meeting Law, and, without litigation, resolved a number of complaints against local officials who were not complying with the law.

L. *OTHER MATTERS*

We filed an *amicus* brief in the U.S. Supreme Court on behalf of the Commonwealth in *Alfred Snapp and Sons, Inc.* v. *Commonwealth of Puerto Rico*, arguing that Puerto Rico has standing as *parens patriae* to file suit under federal labor laws when the economic well-being of its labor force would be affected. The Court upheld our position, and adopted our argument that there should be less strict requirements for state standing in cases initiated in federal District Court, rather than the U.S. Supreme Court. The expansion of *parens patriae* standing may enable the Commonwealth to sue to enforce other federal statutes, including federal antidiscrimination laws, on behalf of its citizens.

The Division participates in the Greater Boston Civil Rights Coalition, and this year helped develop programs on crime control, victim-witness support programs and reform of the criminal justice system; and a major conference on housing, employment and education.

CONSUMER PROTECTION DIVISION

A. *INTRODUCTION*

The priorities and accomplishments of the Consumer Protection Division this year reflect the economic pressure which the recession has placed on consumers and business people. Creative use of the Consumer Protection Statute, G.L. c. 93A, to resolve banking problems for hundreds of mortgage holders stands as the landmark accomplishment of the Division this year. In addition, the Division continued to target such traditional areas as odometer spinning, home improvement scams, patient abuse and mistreatment in nursing homes and hospitals, travel frauds and investment schemes for investigation and litigation.

Two of the Division's major efforts highlighted the national import of our state's consumer protection effort. First, the Division initiated the development of the Northeast Regional Consumer Protection Committee. The purpose of this committee, composed of the New England states as well as New York, New Jersey, and Pennsylvania, is to centralize and share information and litigation efforts. Our litigation involving Subaru of America, one of the first to be brought as a result of the Committee's action, is discussed in the automobile

section below. Second, the Division, representing the National Association of Attorneys General, authored and presented testimony in the United States Congress in opposition to efforts to restrict §5 (a) of the Federal Trade Commission Act.

B. *STATISTICS*

During fiscal year 1981-1982, the Consumer Protection Division maintained an active litigation caseload of 140 lawsuits; the Division obtained 28 preliminary injunctions, 24 judgments, 24 Assurances of Discontinuance, and initiated 11 contempt of court proceedings. In addition, the Division obtained approximately $12,486,323, in judgments, settlements and restitution for Massachusetts consumers.

C. *MAJOR CASE AREAS*

1. *Automobiles:*

Odometer tampering, hidden and undisclosed defects, and deceptive advertising constitute the central area of automobile-related litigation.

Judgments against auto dealers permanently enjoining the practice of odometer spinning have been entered or sought in at least 10 cases filed during 1981-1982. In five of these cases, tentative settlements have been reached requiring dealers to pay more than fifty thousand dollars in restitution to consumers.

The Division has continued to pursue cases against automobile manufacturers for their failure or refusal to notify consumers about defects in certain vehicles. These lawsuits, based on the manufacturers breach of implied and express warranties, continue to be the most sophisticated litigation in the auto area. For example, on December 17, the Division filed a complaint against Subaru of America for an alleged defect in the protective axle boots of certain two and four wheel drive vehicles manufactured in 1980 and 1981. Substantial and expensive repairs to the vehicles are often required when the defective boots break and crack under normal conditions and use. The complaint is part of a coordinated effort by the Northeast Regional Consumer Protection Committee.

In addition, the Division initiated a major drive to enforce the Attorney General's automobile invoice pricing regulation. Because manufacturers often pay dealers "holdbacks" of promotional fees upon the sale of a vehicle, the concept of "invoice price" is often misconstrued by dealers and misunderstood by consumers. The Attorney General's invoice price regulation provides a standard definition of "invoice price" and requires that advertisements in this area contain specific cost disclosures. Over seventeen Assurances of Discontinuance and six Judgments requiring dealers to comply with the invoice pricing regulation have been obtained in the past year.

2. *Banking and Credit:*

In 1981-1982 the major banking effort by the Consumer Protection Division involved settlements of mortgage disputes with Massachusetts banks, including the Bay State Savings Bank in Worcester, and the Bass River Savings Bank in Yarmouth. These cases involve short-term demand notes written on long-term amortization schedules, coupled with statements made by mortgage officers,

correspondence by the banks and technically imperfect truth-in-lending disclosures, each of which indicated different mortgage terms.

In the Bay State Savings Bank case, many homeowners were deceptively led to believe that they had entered into a 25 year mortgage, the rate of which might increase by ½ of 1% every 5 years. When the first of these mortgages became due in July, 1981, the bank began demanding repayment of the full outstanding balance of the loans. Homeowners would have had to borrow money from other banks at the current 17%-18% rates to meet this demand, thus suddenly doubling their mortgage costs. After extensive negotiations with the bank, we reached a settlement agreement which represents a savings of approximately two million dollars to the Bay State Savings Bank consumers.

In the Bass River case, approximately 1,400 homes and fifty million dollars in mortgages were involved. The settlement resulted in a savings to consumers of at least ten million dollars over the next twenty years. These cases illustrate the scope of the protection that the Consumer Protection Statute provides to consumers in their relations with the business world.

The Division also continued to enforce truth-in-lending regulations in the context of bank advertising and loan applications.

3. *Contempt:*

Contempt actions continued to be used to enforce judgments and injunctions. In one ongoing action, the Division is seeking civil penalties against Nadine Gan d/b/a Cooperative Investment Club. The penalties are for violations of an injunction enjoining her from advertising investment contracts without registering with the Securities Division, from concealing records relating to her investment programs, and from transferring or disposing of assets of her investment program.

In *Commonwealth* v. *Sarah Cutler (I)*, the defendant was found in contempt of court for failing to make repairs on residential real estate required by the court pursuant to a preliminary injunction. A fine of $1,000 and a continuing fine of $50 a day was imposed by the court until necessary repairs were completed.

4. *Health Care:*

Patient abuse in nursing homes and hospitals, deception in the unlicensed practice of medicine, and incompetent medical laboratories continue to be targets of the Division's litigation efforts. At least seven cases seeking injunctive relief against nursing homes for abuse, mistreatment and neglect were filed this year. Five health care facilities are in state court receivership at the request of Division attorneys because of abuse or neglect of patients and or mismanagement of the facilities. Much of the Division's health litigation has centered around the developments in these complex receivership cases. In three of the receivership cases, after a great deal of work by the Division, the facilities, two hospitals and one nursing home were sold with court permission to new owners who meet state standards that are designed to ensure that owners are capable of adequately caring for patients. These sales were critical to the patients' well-being and, in two instances, a goal of our litigation. The transfer to new owners allowed the patients to avoid the trauma and medical risks associated with the

precipitous transfer of elderly and infirm patients from one institution to another.

In addition, in *Commonwealth* v. *Middlesex Fells Nursing Home, Inc.*, the Division obtained a Final Judgment barring the home from discriminatory actions against medicaid recipients and requiring the home to notify residents of their right to apply for and receive medicaid.

Cooperative effort with the Department of Public Health to enforce the new patient abuse statute, G.L. c. 111, §72K, resulted in several lawsuits against rest home and nursing home owners. For example, in the first Massachusetts case where civil penalties for neglect were obtained pursuant to G.L. c. 111, *Commonwealth* v. *Wellpine Rest Home, Inc., et al.*, the Division also obtained an injunction barring the defendants from operating a rest home or nursing home for ten years.

In two cases, *Commonwealth* v. *Hippocrates Health Institute* and *Commonwealth* v. *Green Pasture, Inn*, the Division obtained injunctions barring individuals from practicing medicine without a license, and from misleading the public about the validity of certain tests and food products administered by the groups. In *Hippocrates*, the defendants were ordered to discontinue its practice of telling the public that their founder, Ann Wigmore, was a Nobel Prize winner. In addition, the defendants were ordered to discontinue claims that adherence to their program could result in the cure of cancer and diabetes. In the *Green Pastures* case, the defendant was ordered to discontinue making similar statements to the public.

Massachusetts hearing aid statutes provide consumers with greater protection than the Food and Drug Administration regulations promulgated by the FDA. The Attorney General, therefore, applied to the Food and Drug Administration for an exemption from federal preemption for the Massachusetts statute. The Food and Drug Administration refused to give Massachusetts the exemption requested. We responded by challenging the federal preemption in FY-1981. Because we were unsuccessful in the U.S. District Court, we entered an appeal to the U.S. Court of Appeals for the First Circuit in March. Argument is scheduled for September.

In the insurance area, Travelers and Metropolitan Insurance Companies have appealed to the United States Supreme Court the Supreme Judicial Court's decision that both companies must provide mandatory psychiatric and psychological benefits to Massachusetts consumers, as required by G.L. c. 176.

5. *Real Estate and Landlord-Tenant:*

In another major area of activity, the Division has brought lawsuits against companies which purport to locate apartments for consumers in exchange for a fee paid in advance of any services rendered. We have sued three companies for falsely advertising the nature of their services and for providing listings to consumers for apartments that are already rented or otherwise inappropriate for their needs.

In the *Ralston & Chilton Realty* case, the Divsion entered a new field, tax abatements, and effected the return to consumers of tax abatements received by landlords who had previously passed that tax burden on to their tenants. We

successfully sued and forced landlords to distribute over $5,500 in tax abatements for fiscal year 1978-1979 to approximately 100 tenants in Revere.

In the home construction area, the Division continued to pursue its case against two builders, Starr and Kaplan, for questionable construction of new homes.

6. *Comprehensive Arson Prevention and Enforcement System:*

Since its merger into the Consumer Protection Division in June of 1981, the C.A.P.E.S. Unit (Comprehensive Arson Prevention and Enforcement System) has continued its arson prevention efforts in the City of Boston as mandated by its federal grant. During the past year, the C.A.P.E.S. Unit focused its efforts on three primary strategies to prevent fires in Boston. First, the unit continued to work with communities in specifically targeted neighborhoods located in Dorchester, Roxbury, and the South End to assist community groups, city agencies and the fire department in identifying and addressing arson problems. During this period, the Unit also had significant success in two particular Boston neighborhoods, Highland Park and the West End. The Highland Park neighborhood had suffered from a series of fires, many in vacant buildings, during 1981. In August of 1981 the C.A.P.E.S. Unit began working in the neighborhood and assisted the residents in communicating with police and other appropriate city agencies involved in investigating the causes of the fires and making vacant buildings secure. Within a short time after the Unit began working in this neighborhood, the incidence of fires was drastically reduced. In the West End, the Unit became involved at the time the City of Boston was beginning to notify owners of its plans to obtain title, through eminent domain, to numerous properties as part of a large redevelopment program in the area. By working with insurance companies, residents and city agencies, the Unit helped to limit the occurrence of fires in this area during a period of transition.

A second area of activity by the C.A.P.E.S. Unit involved civil litigation against landlords who failed to pay property taxes and correct violations of state sanitary code in residential rental units. In *Commonwealth of Massachusetts* v. *Second Realty Corp., et al.*, the Unit continued its suit seeking to hold certain individuals responsible for thousands of dollars of property taxes and to correct code violations in property owned by a corporation controlled by these individuals. In *Commonwealth of Massachusetts* v. *Sarah Cutler (II)*, an injunction was obtained requiring the landlord to correct numerous state sanitary code violations existing in her properties, apply all rents to repairs, and prohibiting transfer or acquisition of any properties until all repairs were made.

In another important area, the Unit continued its ongoing cooperative efforts with numerous city and state government agencies to develop programs and strategies addressing the arson problem in Boston. As part of these efforts, the Unit has made numerous suggestions to these agencies concerning steps they could implement to prevent arson more effectively in the city.

7. *Miscellaneous:*

The Division continued to litigate in many traditional areas of consumer protection. In the debt-collection area, the Division successfully obtained an Assurance of Discontinuance, pursuant to §5 of c. 93A, against a lawyer in

which the attorney agreed to stop using "forum abuse" in filing cases against consumers. The practice of forum abuse, in this case, involved the lawyer's instigation of legal actions against debtors in geographical locations far away from their homes. This case is particularly important because it stands as a recognition for the first time that the Consumer Protection Statute, G.L. c. 93A, applies to attorneys in the practice of their trade.

In *Burnham* v. *Mark IV Homes,* the Attorney General filed an amicus brief in the Supreme Judicial Court. In this case, the SJC may issue the first reported decision on the meaning of the exemption language in §3 (1) (b) of c. 93A.

In *Commonwealth* v. *Fred Locke Stereo,* the Division worked cooperatively with the Attorneys General of Connecticut and New York in the Bankruptcy Court of the U.S. District Court for the District of Connecticut and obtained the return of over $15,000 worth of consumer items from the bankruptcy trustee.

Money brokers, that is, people who represent that they can locate loans for a fee, continue to be a source of litigation for the Division. In the *Ferulo/Letson* case, the Division obtained injunctive relief against a money broker who falsely claimed she could find loans for consumers by using her extensive computer data bank as a resource.

The Division continues to work closely with the Division of Standards. We successfully sought a preliminary injunction against three Anchor Gas stations who were selling incorrectly labeled types of gasoline. In addition, we continued to obtain injunctions against food sellers who short-weighted their products and wood sellers who short-measured the "cords" of wood delivered to their customers. Oil dealers who short-measure their home heating oil customers continue to face litigation. In the *Paligno Oil* case, restitution of $19,000 was distributed to consumers as a result of our lawsuit.

D. *CONCLUSION*

In FY-1982, the Division continued its commitment to protect Massachusetts consumers in all areas of the marketplace through litigation based on the state Consumer Protection Act. In addition, our Division served as a strong national force in successfully preventing Congress from limiting the Federal Trade Commission Act, an act whose precedents and interpretations often stand as the basis for litigation in Massachusetts.

CONSUMER PROTECTION CASE LIST

ADVERTISING

Defendant	*Status/Disposition*
AAA Rental TV Repair/RMB Sales	Consent Judgment
Aarons Advert. Agency/Aaron Glickman	Consent Judgment
Amherst Radio-Electronics/Vidsign	Assurance of Discontinuance
Anderson's Furniture	Consent Judgment
Aqua-King Pool Co.	Consent Judgment
Arkey Radio/Electronics	Assurance of Discontinuance
Atlantis Sound, Inc.	Assurance of Discontinuance
Audiosonics, Inc.	Assurance of Discontinuance
Bob Auer d/b/a/ Bob Auer & Sons	Consent Judgment
B & G Industries, Inc.	Assurance of Discontinuance
Booth Communications/Steve Stavis	Final Judgment
Boston Organ and Piano	Assurance of Discontinuance
Botolph Assoc., Inc.	Assurance of Discontinuance
Brands Mart, Inc.	Assurance of Discontinuance
Bromfield Camera	Assurance of Discontinuance
Building 19	Assurance of Discontinuance
Castro Convertibles/Rinman, Inc.	Assurance of Discontinuance
Columbia Research	Consent Judgment
Comm. Builders Supply	Assurance of Discontinuance
Consumer Audionics	Assurance of Discontinuance
Crown Convertibles/Johema	Assurance of Discontinuance
Cuomo's Audio	Assurance of Discontinuance
Discount Records	Consent Judgment
Eardrum of New England	Assurance of Discontinuance
Eclipse Sleep Products of New England	Assurance of Discontinuance
Ed's Radio	Assurance of Discontinuance
Edward's Wayside Furniture	Consent Judgment
Emerson Rugs	Assurance of Discontinuance
Figures & Fitness	Assurance of Discontinuance
Furniture Gallery	Assurance of Discontinuance
Gentlemen Warehouse Factory Outlet	Assurance of Discontinuance
Goldstein's Hardware	Assurance of Discontinuance
Golub Furniture	Assurance of Discontinuance
B.F. Goodrich	Assurance of Discontinuance
Graham Radio	Assurance of Discontinuance
H.M. Fisk	Judgment
Hercules Trouser/Lesnaw Manufacturing	Assurance of Discontinuance
Hi-Fi Buys/Leisure Distributors	Assurance of Discontinuance
Indiana Merchandising Corp./Nassi Assoc.	Assurance of Discontinuance
Jordan Marsh	Assurance of Discontinuance
Kaplan's Furniture Co.	Assurance of Discontinuance
Kavanaugh Furniture	Assurance of Discontinuance
Labovitz, Stanley/Andrew Furniture	Assurance of Discontinuance
Lafayette Radio	Assurance of Discontinuance
Lane Pools	Assurance of Discontinuance
Macy's Liquors	Final Judgment
Mass. Camera Centers	Assurance of Discontinuance
Miller's Furniture	Assurance of Discontinuance

Minute Man Radio Co.	Assurance of Discontinuance
Nantucket Sound/Hyannis Hi-Fi	Consent Judgment
National Business Directory	Assurance of Discontinuance Final Judgment
New England Audio/Tweeter	Consent Judgment
New England Group	Assurance of Discontinuance
New England Photo	Assurance of Discontinuance
Max Okun Furniture Co.	Consent Judgment
Olde Colony Stereo	Assurance of Discontinuance
Overseas Employment Research Bureau	Assurance of Discontinuance
Paul's Furniture/Paul Doucette	Assurance of Discontinuance
Precision Motor Rebuilders	Consent Judgment
Professional Guild of America	Assurance of Discontinuance
Puppy Center	Consent Judgment
Railroad Salvage of Conn.	Assurance of Discontinuance
James Rautio d/b/a/ Treas. Chest	Assurance of Discontinuance
S & L Sales Corp./K & L Sound	Assurance of Discontinuance
Seiden Sound	Consent Judgment
Shaker's Workshops	Assurance of Discontinuance
Sherman's	Assurance of Discontinuance
Stanley Shuman	Consent Judgment
Siesta Sleep Shop	Assurance of Discontinuance
A. Smith/Wolfe & Sons	Assurance of Discontinuance
Sound II	Assurance of Discontinuance
Sound Co.	Assurance of Discontinuance
Spartan Paint & Supply	Assurance of Discontinuance
Starlander Beck	Assurance of Discontinuance
Stereo Component Systems, Inc.	Assurance of Discontinuance
Strawberries, Inc.	Consent Judgment
Summerfield's	Consent Judgment
Tech Hi-Fi/New England Sound Svc.	Assurance of Discontinuance
Todd's World of Furniture	Assurance of Discontinuance
Waltham Camera & Stereo	Assurance of Discontinuance
Wholesale Furniture & Carpet	Assurance of Discontinuance
Wholesale Marketing/Joanne Scheff	Consent Judgment
Wilmington Ford	Consent Judgment
Y.D.I. Corp. (You-Do-It Electronics)	Assurance of Discontinuance

AUTOMOBILE

Defendant	*Status/Disposition*
Abe Kalil & Sons	Judgment
Abel Ford	Consent Judgment
Allen Buick	Consent Judgment
Allen Chevrolet	Assurance of Discontinuance
Arthur E. Center, Inc.	Assurance of Discontinuance
Atlantic Chrysler-Plymouth-Toyota	Assurance of Discontinuance
Atlantic Savings Bank	Final Judgment
Auto Brokers, Inc./Jospeh Zagarella	Assurance of Discontinuance
Auto Supermart	Final Judgment
Autobarn/Desgroseilliers	Order
Automotive Products	Default Judgment

Avenue Auto Wholesalers/Brazel	Assurance of Discontinuance
Baggatta Volkswagen	Assurance of Discontinuance
Bart Auto Center/Rev-Ben Enterprises	Consent Judgment
Beacon Auto Sales	Assurance of Discontinuance
Beaulieu Chevrolet	Assurance of Discontinuance
Belmont Auto Sales	Consent Judgment
Victor Belotti, Inc.	Assurance of Discontinuance
Big Beacon Chevrolet	Assurance of Discontinuance
Boch Oldsmobile/Toyota	Assurance of Discontinuance
Bonded Dodge	Final Judgment
Edward J. Borlen d/b/a City Auto	Assurance of Discontinuance
Boston Imported Cars/Lotus/Wasil	Consent Judgment
Bob Brest Buick	Consent Judgment
Brigham-Gill Pontiac/AMC	Assurance of Discontinuance
Brockton Auto Wholesalers/Elro Enterprise	Final Judgment
Brockton Dodge	Assurance of Discontinuance
Budget Auto Sales	Assurance of Discontinuance
Bug Hospital	Assurance of Discontinuance
Cape Motors	Assurance of Discontinuance
Car Finders	Consent Judgment
Carl Chevrolet	Assurance of Discontinuance
Central Berkshire Auto Dealers	Assurance of Discontinuance
Central Chevrolet	Assurance of Discontinuance
Century of Lawrence	Judgment
Chalet Motor Sales	Assurance of Discontinuance
Charles Chevrolet	Assurance of Discontinuance
Chestnut Hill Motors	Assurance of Discontinuance
Chicopee Antique Auto Supply	Final Judgment
Clay Chevrolet	Assurance of Discontinuance
Colonial Motor Sales/Bruce Milton	Litigation
Tom Connelly Pontiac	Consent Judgment
	Assurance of Discontinuance
Brian Connolly	Assurance of Discontinuance
Cook Motor Sales, Inc.	Assurance of Discontinuance
Joe Cullunan Ford, Inc.	Consent Judgment
Dazell Volvo	Assurance of Discontinuance
DeSautels, Wm.	Contempt
Kevin Delaney	Assurance of Discontinuance
Deluxe Reconditioning/Wm. Hardy	Assurance of Discontinuance
Dino Buick	Assurance of Discontinuance
Don's Getty Service Station	Consent Judgment
Duddy Ford	Final Judgment
Eastfield Auto Sales	Consent Judgment
Easthampton Motor Sales, Inc.	Assurance of Discontinuance
Eck's Auto Sales	Consent Judgment
English Chevrolet, Inc.	Contempt Judgment
Excellent Car Co.	Assurance of Discontinuance
Falmouth Datsun	Assurance of Discontinuance
Falmouth Dodge	Assurance of Discontinuance
Fathers and Sons	Assurance of Discontinuance
Walter Fife	Judgment
Fitchburg Ford/Fiat	Assurance of Discontinuance
Fobert Fleischer/Bob's Auto Sales	Consent Judgment

Foreign Auto Imports	Consent Judgment
Freedom Motors	Final Judgment
The Garage/Eliot Schneider	Final Judgment
Gould Auto Sales	Judgment
H.E. Wood and Sons	Assurance of Discontinuance
Haddon Lincoln-Mercury	Final Judgment
Hallissy Toyota	Consent Judgment
Hallman Chevrolet	Assurance of Discontinuance
Hellawell Cadillac & Olds, Inc.	Assurance of Discontinuance
Holyoke Auto/Toyota of Holyoke	Consent Judgment
Howard Chevrolet	Assurance of Discontinuance
Imported Cars of Cape Cod	Assurance of Discontinuance
Owen Infiorati, Inc.	Consent Judgment
George Kalil	Judgment
Harold Kent Ford	Consent Judgment
King B's Automart/Granese	Judgment
Lakeside Auto Sales	Litigation
Locke's (Chet) Auto Sales	Judgment
Lord Toyota	Consent Judgment Assurance of Discontinuance
Frank Lussier/Wakefield Motors	Judgment
Main Street Auto Sales & Services	Assurance of Discontinuance
McCoy Auto Sales	Final Judgment
Medieros-Williams Chevrolet Co., Inc.	Assurance of Discontinuance
Middleboro Auto Sales	Assurance of Discontinuance
Middlesex Subaru, Inc.	Preliminary Injunction
Morris Motors Inc.	Assurance of Discontinuance
Motor Mart of Malden	Assurance of Discontinuance
Mutual Ford	Assurance of Discontinuance
Natick Auto Sales	Assurance of Discontinuance
New England Auto Sales	Consent Judgment
New England Toyota Dealers Advertising Assoc.	Consent Judgment
Northshore Toyota	Consent Judgment
Tom O'Brien Pontiac/Datsun	Consent Judgment
O'Hara (Geo.) Chevrolet/Cadillac	Assurance of Discontinuance
128 Imports	Assurance of Discontinuance
128 Sales	Assurance of Discontinuance Consent Judgment
Perry Pontiac	Assurance of Discontinuance
Pete's Chrysler Plymouth	Assurance of Discontinuance
Peter's Auto Sales	Litigation
Peterson Ford	Assurance of Discontinuance
Pierce Ford World	Assurance of Discontinuance
Pioneer Toyota-Chrysler-Plymouth	Assurance of Discontinuance
Regan and Stapleton	Consent Judgment
Robert's Auto Sales	Consent Judgment
Robichaud Auto Sales and Service	Consent Judgment
Jerry Rome Chevrolet, Inc.	Assurance of Discontinuance
Ryll Automotive Products	Consent Judgment
Saab-Scania of America	Consent Judgment
Scher Datsun/Bernard Sher	Litigation
Skaltisis, Peter/LaTulippo	Assurance of Discontinuance
Smyly Buick	Assurance of Discontinuance

Smyly Dodge	Consent Judgment
Springfield Lincoln-Mercury	Assurance of Discontinuance
Stop & Co. Transmissions of Lawrence	Order
Subaru	Litigation
Sun Motor Sales	Litigation
Taunton Sales, Inc.	Consent Judgment
Tober Foreign Motors, Inc./Ives Toyota	Assurance of Discontinuance
Topor Motor Sales	Consent Judgment
Toyota of Falmouth	Assurance of Discontinuance
V.W. of America	Litigation
Woburn Foreign Motors	Final Judgment - Contempt
United Auto Buyers/Dante Gregorie	Consent Judgment
Valley Chevrolet	Assurance of Discontinuance
Village Chevrolet	Assurance of Discontinuance
West Country Motors	Final Judgment
West Springfield Chev./Plymouth	Consent Judgment
Westport Autorama	Consent Judgment
Yenom Auto Sales	Litigation

BANKING AND CREDIT

Defendant	*Status/Disposition*
Aetna/St. Annes Credit Union	Final Judgment
Allied Bond & Collection	Litigation
Arlington Trust Co.	Litigation
Arthur Ind./1st Safety National Bank	Litigation
Bass River Savings Bank	Agreement
Bay State Savings Bank	Agreement
Central Secret Service Bureau	Consent Judgment
Chrysler Credit Corp.	Consent Judgment
Enterprise Cooperative Bank	Consent Judgment
Financial Ent. Corp./Statewide Credit	Litigation
First National Bank of New England	Assurance of Discontinuance
Ford Motor Credit Corp.	Assurance of Discontinuance
General Motors Acceptance Corp.	Assurance of Discontinuance
Hancock Bank & Trust	Final Judgment
Hull Cooperative	Final Judgment
Industrial National Bank of RI	Consent Judgment
Legal Credit Counselors	Litigation
Leominster Savings Bank	Consent Judgment
Merrimac Savings Bank	Final Judgment
New England Merchants Bank	Consent Judgment
Security National Bank	Litigation
Stanton, Frank	Assurance of Discontinuance
Tuck & Pozzi	Consent Judgment
Van Ru Credit Corp.	Consent Judgment

CONTRACTS

Defendant	*Status/Disposition*
American International Holidays	Assurance of Discontinuance
American International Leisure/Gene Paglia	Assurance of Discontinuance

Diamedic	Consent Judgment
International Magazine Services	Assurance of Discontinuance
Kiddy Photographers	Assurance of Discontinuance
Northeast Marketing	Litigation
Selective Singles	Litigation
Slimtique	Litigation
United Marketing Corp.	Litigation
WAAF/A-OK Productions	Final Judgment
Walo & Levine	Consent Judgment

EDUCATION

Defendant	*Status/Disposition*
Allied Construction Training Corp.	Assurance of Discontinuance
Colonial Travel School	Final Judgment
Eastern Atlantic Tractor Trailor Training School	Judgment
Framingham Civil Service School	Consent Judgment
Graham Junior College	Consent Judgment
LaSalle Extension Univ.	Consent Judgment
New England Academy	Preliminary Injunction
New England Appliance School/Solari	Consent Judgment
New England School of Culinary Arts	Consent Judgment
New England Tractor Trailer Training School	Consent Judgment
Solari Schools/Tech Age	Preliminary Injunction
Evelyn Wood Reading Dynamics/Kilgo	Assurance of Discontinuance

ENERGY

Defendant	*Status/Disposition*
All Star Fuel Co./Norman Marshall	Final Judgment
Atlantic Farm, Inc.	Assurance of Discontinuance
J.T. Birch	Assurance of Discontinuance
Rene (Frank) Brodeur	Preliminary Injunction
C & C Oil Co./Issac Cohen	Consent Judgment
Leonard Caporale	Consent Judgment
Aenzo Cardelli	Consent Judgment
Patrick Caswell/Pat's Fireplace	Assurance of Discontinuance
Clene Heat/R.J. Holding Gas & Oil	Consent Judgment
Barry Daigle	Assurance of Discontinuance
Anthony DePalma/Hilltop Oil	Consent Judgment
Jack DePalma/D. Oil Co.	Final Judgment
John DePalma	Consent Judgment
Festino Fuel, Inc.	Temporary Restraining Order Preliminary Injunction
Richard Forbes/Dick's Landscaping	Assurance of Discontinuance
Global Oil	Litigation
Kero-Sun, Inc.	Partial Final Judgment
King's Row Fireplace Shop	Assurance of Discontinuance
Edward Levesque	Consent Judgment
Ron Marchetta/Timberline Tree	Final Judgment
Robert Millian/Newton St. Gulf	Consent Judgment
Orleans Coal & Oil Co.	Consent Judgment Contempt

Palingo Oil Co.	Final Judgment
William Perry	Assurance of Discontinuance
Joseph Pigeon	Final Judgment
Seth Potter	Assurance of Discontinuance
Russo Oil Co.	Consent Judgment
Santucci (Paul D.) & Co.	Assurance of Discontinuance
Simonelli Oil Co.	Consent Judgment
Smith Farms/G.R. Smith	Assurance of Discontinuance
Mark Smith/G & M Wood	Assurance of Discontinuance
Tropicana Oil/Leonides Benzan	Temporary Restraining Order Preliminary Injunction
Steve Wheeler/Saddleback Farms	Consent Judgment
Julius Wilkensky	Consent Judgment Contempt
Ronald Zion	Consent Judgment

HOME IMPROVEMENT

Defendant	*Status/Disposition*
Air Temp Engineering, Inc.	Judgment
Alco Alum. Pool & Siding	Consent Judgment
Aluminumville/Leonard Gerber	Litigation
Anderson (Ralph) Construction	Contempt
Associated Pool Distributors	Consent Judgment
Batmasian, James	Litigaton
Beacon Hill Roofing	Litigation
Bianco Construction Co./Leonard Bianco	Final Judgment
Bird, Inc./Chris Murphy	Consent Judgment
Boston Chimney & Roofing/Hosea	Preliminary Injunction
Builders Industries, Inc	Litigation
D.C. Heath	Assurance of Discontinuance
Factory Heating/Paul Johnson	Default Judgment
Hale/United Vinyl	Consent Judgment
Home Insulating of New England	Litigation
Al Libman	Litigation
Paul Luisi, et al	Judgment
McCarthy Construction	Consent Judgment
O'Connor Brothers	Final Judgment
Quincy Chimney and Roofing/Hosea	Preliminary Injunction
Sentury Paving King of Hot Top/Stanley	Preliminary Injunction
Chalres Stott/Waltham Roofing/Geo. Ward	Litigation
Suburban Lawn Services	Assurance of Discontinuance
Supreme Remodeling/Al Libman	Judgment
Daniel Vassett	Judgment
Watertown Roofing/Leander Vlahakis	Consent Judgment
Window Systems	Assurance of Discontinuance

APPLIANCE REPAIR

Defendant	*Statute/Disposition*
A-Z Appliance Co./Zellin	Assurance of Discontinuance
Acme Power Vac/Ralph Rigione	Consent Judgment

Jack's Radio & TV John Debie	Consent Judgment
King Appliance Service	Consent Judgment
Manny's TV & Appliance	Assurance of Discontinuance

HEALTH

Defendant	*Status Disposition*
Lyoyd O. Appelton King's Mount	Assurance of Discontinuance
Belton Hearing Aid Service	
E & S Enterprise	Consent Judgment
Belton George Lucas	Consent Judgment
Dimock Community Health Center	Receivership
ELM Medical Laboratory Baez-Giangreco	Litigation
Genesis Laboratory	Litigation
Green Pastures Inn	Preliminary Injunction
Hippocrates Health Inst.	Consent Judgment
Inter-Church Team Ministries	Litigation
Medical Home Care Services	Consent Judgment

INSURANCE

Defendant	*Status Disposition*
Balfour Federal Credit Union	Litigation
CUNA Mutual Insurance Society #1	Litigation
CUNA Mutual Insurance Society #2	Litigation
Edwards, Allan G., Jr.	Assurance of Discontinuance
Gallagher, Philip G.	Assurance of Discontinuance
Hartford Ins. Co.	Litigation
Metropolitan Life Insurance	Litigation
Dan Potter Insurance	Consent Judgment
Traveler's Insurance Co.	Litigation
Union Fidelity Ins. Co.	Litigation

MOBILE HOMES

Defendant	*Status Disposition*
Bluebird Acres Mobile Home Park Richard Grochmal	Consent Judgment
Cranberry Village	Assurance of Discontinuance
Cranbury Village	Litigation
Mogan's Mobile Home Park	Consent Judgment
Suburban Estates Mobile Homes	Final Judgment

NURSING HOMES REST HOMES

Defendant	*Status Disposition*
Adams Nursing Home Alessandroni	Partial Judgment
Algonquin Rest Home Hazel & Irving Witlow	Litigation
Almeida Lewis	Judgment
Ashmere Manor Nursing Home	Litigation
Berkshire Hills Nursing Home	Consent Judgment
Big G Rest Home Gladys Oja	Preliminary Injunction
Aldophus & Toni Bullock	Litigation

Harry Daley/Marshall Dranetz	Litigation
Fleetwood Nursing Home	Litigation
Hancock House of Beverly	Litigation
Harvard Manor Nursing Home QT Services	Judgment
Havolyn Management/Ray Monahan	Contempt
Hellenic Nursing Home	Litigation
Heritage Hill Nursing Home	Litigation
Hodgdon Rest Home	Litigation
Jewish Nurs. Home of West. Mass.	Litigation
Kimwell Nursing Home	Judgment
Lewis Bay Convalescent Home	Litigation
Middlesex Manor Nursing Home	Judgment
New England Nursing Hm. Development Corporation/Cape Ann	Judgment
Newburyport Manor Chronic Hospital	Litigation
Newburyport Manor NH/Stephen S., Inc. Stephen Shirair	Litigation
Gladys Oja/Big G Rest Home	Preliminary Injunction
Pentucket Manor Chronic Hospital	Receiver
People's Church Nursing Home Kenneth Long	Judgment
Resthaven Nursing Home	Receivership
Six State Management/Park Hill Manor	Stipulation & Order
Twin Pine Corp./Weston Manor NH	Judgment
Twomey Rest Home/Wellpine Rest Home	Final Judgment

REAL ESTATE/HOUSING

Defendant	*Status Disposition*
Alan Realty/Alan Zuker	Consent Judgment
Allen Realty	Consent Judgment
Apex Apartment Rentals	Consent Judgment
William Baker	Litigation
Battlegreen Construction	Litigation
Bluebird Realty Trust	Consent Judgment
Harold Brown/Hamilton Realty	Consent Judgment
Cape Real Estate	Consent Judgment
Albert Carista	Final Judgment
John and Carol Carroll	Preliminary Injunction
City Real Estate	Consent Judgment
Citywide Rentals	Consent Judgment
Clarke-Jacob Realty Trust	Assurance of Discontinuance
Co-Ree Real Estate	Consent Judgment
Terry Cohen d.b/a Bulfinch Realty	Consent Judgment
Colonial Realty	Litigation
Commonwealth Condo Trust	Consent Judgment
Countryside Realty	Consent Judgment
Cutler, Sarah	Contempt-Prel. Injunction
Delta Realty	Consent Judgment
DiBiase Realty Corp./Ugo & Elio DiBiase	Consent Judgment
Stephen DiSarro Summit Development	Final Judgment
E-Z Rentals	Consent Judgment
Elmwood Park Realty Trust/Stivalette	Assurance of Discontinuance
R.J. Ferioli, Inc.	Consent Judgment

Gei-Ger Real Estate	Consent Judgment
Gesner Construction Co.	Consent Judgment
Gladstone Realty Trust	Litigation
Golden Eagle Apartments	Assurance of Discontinuance
Gray Rental Properties	Assurance of Discontinuance
H & F Realty	Consent Judgment
Hamilton Realty	Judgment
John Harkey Realtor	Consent Judgment
Hartwick Construction	Litigation
Fran. Holt Christine Anne Rlty	Consent Judgment
Homes by Design	Consent Judgment
Hub Realty	Consent Judgment
Irwin Kantor	Judgment
Kaufman & Broad	Litigation
Keith (John W.) Builders	Consent Judgment
Land & Leisure	Judgment
Land Auction Bureau	Litigation
Ledgemere Farms Davis Farm Road	Judgment
Liberty Hill Management Corp.	Consent Judgment
MacDonald Real Estate	Consent Judgment
Marshfield Real Estate	Consent Judgment
Randolph Messineo Randy's Realty	Litigation
Murphy & Murphy Drive-In Real Estate	Consent Judgment
Park Avenue Realty Trust	Consent Judgment
Parkwood Estates Realty	Consent Judgment
Michael Perry 1st Bellvista	Assurance of Discontinuance
Poulos Construction Poulos Family Trust	Preliminary Injunction
Pyramid Construction	Assurance of Discontinuance Consent Judgment
Realty Sales Co.	Consent Judgment
Rentell	Preliminary Injunction
Second Realty	Summary Judgment
Sergi Enterprises	Consent Judgment
Bernard Shadrawy	Dismissal Without Prejudice
Sharonshire Starr & Kaplan L.J.J., Inc	Preliminary Injunction
Edward Shibley, St.	Consent Judgment
Simeone, Inc., Realtors	Consent Judgment
Southbrook Real Estate	Consent Judgment
Town & Country Real Estate	Consent Judgment
United Resources	Final Judgment
Valley Publications Select-A-Home D. Dubosar	Preliminary Injunction
Weight Loss Medical Center	Consent Judgment
Sheila Weiss	Assurance of Discontinuance
Wish Realty Assoc., Inc.	Consent Judgment
Wood Real Estate	Consent Judgment

SALES PRACTICES

Defendant	*Status Disposition*
AAA Paving LeGrant Stanely	Litigation
Apartment Showcase	Judgment
Wm. E. Aubin N.E. Land Realty	Consent Judgment
Automotive Equipment Webb	Final Judgment

BIC's	Consent Judgment
Bi-Lo Food Warehouse	Assurance of Discontinuance
Bonney Rigg Camping Club	Assurance of Discontinuance
Broadway Discount Furnitures	Final Judgment
Butcher's Pride	Assurance of Discontinuance
Delta Electronics	Final Judgment
Dinner Tours/Alfred Zimei	Litigation
Diversified Health Industries/Roman Health Spa	Litigation
Edwin R. Sage Co.	Consent Judgment
Farm Stand of Peabody	Consent Judgment
Feelin' Great, Inc./Glen Turner	Litigation
Food Marts	Consent Judgment
Foodmaster Supermarkets, Inc.	Consent Judgment
General Investment & Development Co.	Assurance of Discontinuance
Gloucester Dispatch, Inc.	Consent Judgment
Stephen Guarino/Kitchen Delight	Consent Judgment
Hearing Dynamics of New England	Consent Judgment
Homelike Apartments	Assurance of Discontinuance
Hub Ticket Agency Seven's Inc.	Consent Judgment
J & T Auto Repair	Assurance of Discontinuance
Jewell Companies, Inc.	Consent Judgment
Michael Konior Executive Dating	Consent Judgment
Lamour, Inc.	Assurance of Discontinuance
Lane's Furniture	On Appeal
Liberty Park Equipment & Sales Grochmal	Consent Judgment
Mansfield Mattress Corp.	Assurance of Discontinuance
Mass. Business & Professional Directory	Consent Judgment
Mass. Distributors/Cushing	Assurance of Discontinuance
Maynard Market	Consent Judgment
Middlesex Vacuum	Preliminary Injunction
Mold Specialists/Vincent Hale	Consent Judgment
Wayne Murphy	Consent Judgment
New England Furniture Corp.	Assurance of Discontinuance
Our House Furniture	Bankruptcy
Out-Of-Town Ticket Agency	Consent Judgment
Pat's Ticket Agency	Final Judgment
People's Furniture	Consent Judgment
Pieroway Electric Co.	Assurance of Discontinuance
Pioneer Pools	Final Judgment
Plymouth County Memorial Park	Preliminary Injunction
Promotional Sales Consultants	Assurance of Discontinuance
Puritan Barbos	Litigation
Ray's IGA Store	Consent Judgment
Rich of Falmouth Furniture/Timothy Dowling	Preliminary Injunction
Rocola Manufacturing Co.	Consent Judgment
Schultz Lubricants, Inc.	Assurance of Discontinuance
Service Merchandise	Assurance of Discontinuance
Oren Showman	Assurance of Discontinuance
Skyline Manor/Dion Baker	Consent Judgment
Supreme Furniture Co.	Consent Judgment
Swim-Rite Pools, Walpole	Final Judgment
Town and Country Pools Leonard Paul	Consent Judgment Supp. J.
Two Guys Antique & Auto Parts	Final Judgment

Tyson Ticket Agency	Consent Judgment
Uniserv Int'l. Corporation	Litigation
Valenti Ticket Agency	Consent Judgment
Variety International Publications	Partial Judgment
Wheelers Enterprise (clothing)	Assurance of Discontinuance
Paul Woods (swimming pools)	Consent Judgment
World of Homes	Assurance of Discontinuance
Young Enterprises/Neighborhood Reader Service	Stipulation

TRAVEL

Defendant	*Status/Disposition*
Associated Travel Service of Newton	Assurance of Discontinuance
Carnival Cruise Lines	Litigation
Great American Travel/Southwind	Consent Judgment
International Leisure Service/Berman	Final Judgment
Las Vega Executives	Final Judgment
Paragaon Travel Agency, Inc.	Assurance of Discontinuance
Quality Tours/Gloria Patt	Final Judgment
Supersonic Tours	Assurance of Discontinuance

WEIGHTS AND MEASURES

Defendant	*Status/Disposition*
ACOMI Corp./Anchor Gasoline Co.	Preliminary Injunction
Aceite Tropical Oil Co./Benzan	Temporary Restraining Order Preliminary Injunction
B & T Wood Products/Tarentino	Final Judgment
Blue Ribbon Dairy	Final Judgment
Peter Camarra/Dennis DeAngelis	Final Judgment
James and Michael Corrigan	Assurance of Discontinuance
Family (Foods Market) Association	Consent Judgment
J & J Market	Assurance of Discontinuance
Lamusta's Auto Service	Consent Judgment
Mr. Meat of Mattapoisett	Final Judgment
Louis Ricci (Wood Seller)	Temporary Restraining Order
Sage's Market	Final Judgment
Village Store	Final Judgment

MISCELLANEOUS

Defendant	*Status/Disposition*
A & P/Great Atlantic & Pacific	Consent Judgment
A & W Electronics	Assurance of Discontinuance
A-D Financial Service/Doris Ferullo (Letson)	Preliminary Injunction
Abel Rug Cleaners, Inc.	Assurance of Discontinuance
Aqua Corporation	Litigation
Donald E. Anchutz	Assurance of Discontinuance
Andrews Paint	Consent Judgment
Artistic Typing Headquarters	Assurance of Discontinuance
Henry Barry	Consent Judgment
Big-Y-Foods, Inc.	Consent Judgment

Blackstone Trading Co./Wm. Armstrong	Final Judgment
Richard Boisvert	Final Judgment
Boston Gold & Silver Exchange/Cercone	Litigation
Shirley Bragel	Assurance of Discontinuance
Hy Brettman	Consent Judgment
Brighams Ice Cream	Consent Judgment
Brown & Finnegan, Inc.	Preliminary Injunction
Chala Foods/Lawrence Drake	Consent Judgment
Chalue	Default Judgment
Chatham Development Co.	Consent Judgment
Wm. R. Clark/Educator's Emp Conslt	Assurance of Discontinuance
Codman Company	Consent Judgment
Ralph Coffman	Assurance of Discontinuance
Comfort Corner	Assurance of Discontinuance
Commercial Tow & Repair	Litigation
Louis Consigli	Consent Judgment
Continental Cablevision of New Hampshire	Final Judgment
Continental Employment Agency	Assurance of Discontinuance
Coordinators, Inc.	Consent Judgment
Jeff Cushing/Mass. Distributors	Assurance of Discontinuance
Datamarine International	Consent Judgment
Dawn Figure Salon	Litigation
Daylight Dairy Products	Consent Judgment
DeliSchoss	Consent Judgment
Deltex	Bankruptcy
Doggari	Assurance of Discontinuance
Dorchester Wayport Trust	Assurance of Discontinuance
Eck's Trucking/David Eck	Preliminary Injunction
Fafco Division, VSI	Consent Judgment
Anthony Famalette	Consent Judgment
Feodoroff Agency	Consent Judgment
First National Stores	Assurance of Discontinuance
Fitness Plus	Litigation
Forbes Enterprises	Bankruptcy
Framingham Housing Authority	Consent Judgment
Daniel Gaeta	Consent Judgment
Goldstein & Gurwite Auctioneers	Consent Judgment
Gramatan Home Investor's Group	Assurance of Discontinuance
Nadine Gan/Cooperative Investment Club/ New Horizon Club	Contempt
Harvest Ltd.	Final Judgment
Hearing Aids Petition/FDA	On Appeal
Hewitt Assoc., Inc.	Assurance of Discontinuance
Dominic Iaciafano/American Fold & Silver	Litigation
Joy Health Spa of Canton	Litigation
Juno, Inc.	Assurance of Discontinuance
Raanan Katz/Victory Realty	Judgment
Arthur LaFranchise	Consent Judgment
Robert Larkin	Litigation
Little & Company	Consent Judgment
Fred Locke Stereo	Litigation
Loring Hills Assoc.	Consent Judgment

Marquis Acceptance/Marquis China/ Harold Simons	Order
Mass. Rentals	Consent Judgment
Ephram Miller	Assurance of Discontinuance
Millis Commodity Ltd.	Litigation
Millis Trading System	Litigation
Moccasin Craft	Final Judgment
Money Search International	Consent Judgment
N.I. Associates	Assurance of Discontinuance
National Marketing Consultants	Litigation
New England Assoc. Ind. Home Dairy Distributors	Assurance of Discontinuance
New England Studio Co.	Consent Judgment
Northeastern Powerguard	Consent Judgment
Norwell Trade Winds, Ltd.	Litigation
Frank H. Parks	Consent Judgment
Pickwick International Corp.	Consent Judgment
Publication Services, Inc.	Consent Judgment
Purity Supreme	Final Judgment
Charles Quigley	Consent Judgment
Frank Rafferty	Consent Judgment
Roger Rao, Inc.	Assurance of Discontinuance
Rollins Protective Services	Litigation
Rollins v. Bellotti	Litigation
Kenneth Ryan	Consent Judgment
San-Mac Industries	Consent Judgment
Scholbro Foods d/b/a Evergood Market	Final Judgment
William Siano, Jr.	Assurance of Discontinuance
Silverman (Harry), Inc.	Assurance of Discontinuance
Spray A Way/Map-O-Matic	Order
Stamps Information Associates	Consent Judgment
Sunup	Assurance of Discontinuance
Chawa Tash	Assurance of Discontinuance
Valve Service International	Consent Judgment
Vazza Properties	Dismissal
Max Wasserman	Consent Judgment
Charles Waystack, Jr.	Consent Judgment
Windsor Meadows	Assurance of Discontinuance
W.E. Withow Moving & Storage	Final Judgment
Women's World of Health Spa	Litigation

ENVIRONMENTAL PROTECTION DIVISION

General Laws c. 12, §11D establishes the Environmental Protection Division. The Division's responsibilities lie in two main areas. It is litigation counsel to all the agencies of the Commonwealth, principally those within the Executive Office of Environmental Affairs, that are charged with protecting the environment. In this role the Division appears in court on matters such as air and water pollution, hazardous and solid waste control, wetlands protection and billboard control. In addition, and pursuant to its mandate under G.L. c. 12, §11D, the

Division initiates and intervenes in judicial and administrative actions for the purpose of protecting the environment of the Commonwealth. These cases include hearings before federal agencies on the siting of energy generating facilities and participation in state and federal appellate courts on issues of significance to the environment.

During the year, the Division continued its involvement with four issues of great significance to Massachusetts: hazardous waste disposal, the environmental effects of offshore drilling, the rights of states to be involved in decisions regarding nuclear power, and acid rain/interstate transport of air pollutants. The hazardous waste enforcement efforts described in previous annual reports and involving interstate cooperation and interdepartmental coordination within Massachusetts continued and resulted in several cases described below. In addition, the Division undertook the first defense of the Massachusetts Hazardous Waste Facility Siting Act in cases that are also described below. Upholding of the siting process is essential to the Commonwealth's ability to deal successfully with the hazardous waste problem over the long term.

The Division has for some years been involved in efforts to mitigate the environmental effects of offshore oil drilling. Although this involvement arose out of a concern for the Georges Bank fishery offshore Massachusetts, it has led to our participation in litigation, some of which is described below, in several forums where issues concerning the rights of states to participate in offshore decision making and the proper structure of the nationwide drilling program were in issue.

The Division continued its active involvement in cases concerning nuclear power. In both site-specific and generic proceedings, described below, we focused on the need to assure safe operation of nuclear facilities at all stages of their operation.

With respect to the interstate transport of air pollutants and the problem of acid rain, the Division remained active. Several cases that were briefed and argued before this year are still pending. It became increasingly clear during the year, however, that the significant arena for this problem is legislative, not judicial, and the Division therefore has participated in a group of state officials from the Northeast that has worked toward having Congress adopt legislation to deal with the problem.

As a result of its role in environmental enforcement the Division is the recipient of substantial grant money from the United States Environmental Protection Agency. In fiscal year 1982, the Division received one hundred and eighty-seven thousand dollars ($187,000) of such funds.

The Division's enforcement policy includes seeking monetary penalties in appropriate cases. During the year such penalties accounted for approximately one hundred ninety thousand dollars ($190,000) in income to the General Fund.

CATEGORIES

AIR

Air pollution cases are referred from the Department of Environmental Quality Engineering, Division of Air Quality, and involve violations of the state Air Pollution Regulations. The statutory authority is G.L. c. 111, §42.

WATER

Water pollution cases are referred from the Department of Environmental Quality Engineering, Division of Water Pollution Control. Most of these cases involve violations of discharge permits issued jointly by the Division of Water Pollution Control and the United States Environmental Protection Agency. Others seek to recover costs expended in cleaning up oil spills. The statutory authority is G.L. c. 21, §§26-52.

WETLANDS

Wetlands cases are generally referred from the Department of Environmental Management, Wetlands Section, or Department of Environmental Quality Engineering, Wetlands Division. The cases fall into two categories: those involving the permit program for altering of wetlands under G.L. c. 131, §40 and those challenging the development restrictions the state imposes on inland and coastal wetlands pursuant to G.L. c. 130, §105 and G.L. c. 131, §40A.

SOLID WASTE

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

HAZARDOUS WASTE

Hazardous waste cases are referred by the Department of Environmental Quality Engineering, Division of Hazardous Waste. They involve the transport and disposal of hazardous substances in violation of state regulations. The statutory authority is G.L. c. 21C.

PESTICIDES

Pesticide cases are referred by the Pesticide Board of the Department of Food and Agriculture. They involve the improper application of pesticides in such a way as to pose a threat to human health. The statutory authority is G.L. c. 94B.

BILLBOARD

Billboard cases are referred by the Outdoor Advertising Board. A majority are defenses to petitions for judicial review of decision of the Outdoor Advertising Board. The statutory authority is G.L. c. 93, §§29-33.

OTHERS

A number of the cases handled by the Division do not fall into any of the above categories. Some of them involve representation of state agencies, for example, the defenses, in federal court, of the Massachusetts Executive Office of Environmental Affairs and Executive Office of Transportation and Construction. Others are brought pursuant to the Attorney General's statutory authority to prevent environmental damage. These are frequently in areas of broad concern, such as energy policy, the siting of nuclear facilities and the interpretation of state and federal environmental statutes. They involve the initiation of or intervention in proceedings in a variety of state and federal, judicial and administrative, forums.

SIGNIFICANT CASES

The following are significant cases in which the Division was involved during the year.

DEQE and the Attorney General v. William H.H. Johnson III and J&G Auto Salvage, Inc.

This is a hazardous waste action brought to compel the defendants to clean up approximately 300 barrels of hazardous waste illegally buried on their property. They agreed in a consent judgment to perform the cleanup but failed to do so. The Division then brought a petition for contempt, and the court held both the defendants in civil contempt for violation of the cleanup schedule in the consent judgment. The contempt order set a new schedule requiring the defendants to liquidate their assets in order to raise money for the cleanup and then to perform the cleanup. When the defendants again failed to comply with the contempt order for cleanup, the Division moved for the forced sale of their assets to raise money for the cleanup. In a precedent-setting decision, the court ordered the defendants' property (four pieces of real estate) transferred to a nominee of the Attorney General, to have it sold at public auction, and to have the proceeds used by the state to conduct the cleanup.

McMahon v. Amoco, et al.

This case seeks the recovery of substantial costs incurred in remedying pollution of the water supply in Provincetown. One defendant moved to dismiss, arguing, *inter alia*, that the Attorney General had no authority to maintain a common law public nuisance action in an area covered by statute and that "waters of the commonwealth" as used in the statute does not include groundwater. The motion was denied in all respects. The case is awaiting trial.

Department of Food and Agriculture v. Gulf + Western Corp.

This case involved the aerial application of pesticides to tobacco fields where people were working. It was settled by a consent judgment providing specific guidelines for future spraying activity and for the payment of the maximum civil penalty available under the statute.

City of Haverhill, et al. v. The Hazardous Waste Facility Site Safety Council

The Division defended two state agencies, the Hazardous Waste Facility Site Safety Council and the Department of Environmental Management, in a suit brought by the City of Haverhill challenging certain actions taken and decisions made pursuant to the state's new siting law, G.L. c. 21D. The suit was dismissed by the Superior Court and the City has appealed. The Division also represents these agencies in a similar suit filed by the Town of Warren.

Commonwealth of Massachusetts v. Charles George Land Reclamation Trust

The Charles George Land Reclamation Trust operates a landfill in Tyngsboro. The landfill has been a source of many complaints about windblown litter and muddy road conditions. Recently, leachate from the landfill has become the chief suspect as the cause of contamination of a nearby water supply. In August of 1981, the Division filed a Petition for Contempt against the landfill for its

violation of a previous consent judgment. Negotiations led to a new consent judgment, entered in December, which requires the cover of inactive areas of the landfill, the installation and operation of a leachate collection and recirculation system and continued compliance with all applicable statutes and regulations. In May, 1982 the landfill sued Tyngsboro and DEQE over the town's suspension of the landfill's site assignment. DEQE and the Attorney General are monitoring the landfill's compliance with the December consent judgment.

DEQE and the Attorney General v. *Caporale*

This is a wetlands case in which a private developer was engaged in extensive dredging and filling in Billerica and Wilmington on a 130-acre tract in the watershed of the Ipswich River. The developer had not filed Notices of Intent for the work. The Division obtained a preliminary injunction halting the dredging and filling pending a hearing on the merits. The developer has now agreed to submit notices of Intent with plans so that Orders of Condition may issue.

Moskow v. *Kendall*

This is the first case involving the Inland Wetlands Restriction Act decided by the Supreme Judicial Court. It reverses a trial court holding that a wetland restriction on a parcel in Newton constituted an unconstitutional taking. The court reviewed the important functions of wetlands — flood prevention, pollution attenuation, habitat protection — and upheld the power of the Commonwealth to restrict their use. It then looked at the particular restriction at issue. Ruling that the owner's entire parcel, and not just the restricted area must be considered in a taking analysis, the court held that, because there was land outside the restricted area on which the owner could build a house (he had proposed to build eight), there was no taking.

Callahan v. *Outdoor Advertising Board*

This was the first Massachusetts appellate case decided after the Supreme Court decision in *Metromedia* v. *City of San Diego,* which cast serious doubt on the ability of municipalities to prohibit billboards. In defense of the Town of Lenox's ban we argued that a commercial advertiser could not raise the issues of non-commercial speech that had so troubled the Court in *Metromedia.* The Appeals Court sustained our position, and the Lenox by-law stands.

Pennsylvania v. *EPA, and Sierra Club and Natural Resource Defense Council* v. *EPA*

These consolidated cases challenge the "stack height regulations" promulgated by EPA in February, 1982. These regulations will allow large sources of air pollution to build taller smoke stacks to disperse pollutants over a wider area rather than taking further steps to control pollutants. The Division has intervened in the cases on the side of petitioners on the grounds that the new regulations will increase the interstate transport of air pollutants from the midwest to the Northeast and exacerbate the already serious acid precipitation problem, in violation of the Clean Air Act. We will be joining other affected states in filing a brief opposing the regulations.

Offshore Oil Development

The most significant and controversial issue between the federal government and the coastal states regarding offshore oil drilling is whether the federal government (Department of the Interior) must ensure that its offshore lease sales are consistent with the affected states' coastal zone management plans. Because of the vulnerability of Massachusetts coastal resources, particularly the Georges Bank fishery, Massachusetts has a large stake in this dispute. During the past year, we participated in two lawsuits where this issue was addressed.

California v. *Watt*

In this case, the State of California successfully sued to enjoin the Interior Department from proceeding with an offshore lease sale to the extent that some of the tracts to be offered were inconsistent, in California's view, with the California Coastal Zone Management Program. We filed *amicus* briefs in support of California's motions for a preliminary injunction and for summary judgment. The District Court entered judgment in favor of California on the coastal zone issue, and we filed an *amicus* brief in the Ninth Circuit on behalf of seven coastal states in support of the District Court's decision.

California v. *Baldridge*

The Commonwealth intervened as plaintiff, joining the states of California and Alaska, in this action to challenge federal regulations regarding the applicability of the "consistency requirements" of the Coastal Zone Management Act to offshore lease sales. In a reversal of its previous position, the Department of Commerce, which is responsible for administering the CZMA, promulgated regulations adopting the Interior Department's view that offshore oil and gas lease sales are not subject to the consistency requirements of the CZMA. Following the filing of this suit, and the introduction in Congress of resolutions disapproving the regulations, the Commerce Department withdrew the regulations. The states then agreed to dismiss the case without prejudice.

California v. *Watt*

The Division, as *amicus curiae,* joined with the states of Alaska and California in seeking a remand of the Five Year Offshore Leasing Program prepared by the Secretary of the Interior. The program, we argued, did not adequately protect such sensitive areas as the North Atlantic's Georges Bank. The Court of Appeals for the District of Columbia Circuit agreed with the challenge and returned the program to the Secretary for revision.

Pacific Legal Foundation v. *State Energy Commission*

The Division participated as *amicus curiae* on behalf of the State of California in this appeal from two federal court decisions invalidating the state's nuclear plant siting statute. The Ninth Circuit reversed the Decision, holding that a state may validly regulate the siting of nuclear power plants in furtherance of such traditional state interests as control of utility rates and assurance of adequate supply of energy.

Seabrook Operating License Proceeding

The Divison has petitioned to intervene in the NRC's operating license proceeding for the Seabrook Nuclear Power Station in Seabrook, New Hampshire, on the issue of emergency planning. We have submitted initial contentions challenging the sufficiency of current evidence as to the feasibility of evacuating or sheltering the persons at risk in the event of a severe accident, the adequacy of the applicants' emergency plans, and the size of the area within which emergency plans are being developed for local communities.

Pilgrim I

In January, 1982, the Nuclear Regulatory Commission fined Boston Edison Company $550,000 for breakdowns in its management of the Pilgrim I Nuclear Power Station that have led to unsafe conditions at the plant. At the same time, the NRC modified Boston Edison's operating license to require an independent assessment of management capabilities and the submission of a plan to improve management of the facility. The Division filed a Petition to intervene in the NRC's proceeding in February in order to protect the Commonwealth's interest in the safe operation of the plant. The NRC has yet to rule on our Petition.

Pilgrim II Construction Permit Proceeding

Prior to the cancellation of Boston Edison's plans to construct a second nuclear power station on the Pilgrim site in Plymouth, the Division was preparing for a hearing before the Nuclear Regulatory Commission on the feasibility of evacuation or other emergency action in the event of a severe accident at the planned facility and the adequacy of existing plans for responding to such an accident. The Division was also asking the NRC to examine various aspects of the design of the facility for compliance with certain requirements imposed by the Commission on all licensees as a result of the accident at the Three Mile Island nuclear reactor. Discovery had been completed and preparation for the actual hearing had begun when Boston Edison announced that it was abandoning the Pilgrim II project.

Commonwealth of Massachusetts, Secretary of Environmental Affairs, and Attorney General v. Massachusetts Port Authority

This case involved the proposal of the Massachusetts Port Authority ("Massport") to undertake an airport and commercial development project at the Bird Island Flats portion of Logan Airport. Massport was required, prior to undertaking the project, to submit an environmental impact report to the Secretary of Environmental Affairs regarding the anticipated impacts of the proposed project. The Secretary determined that the final report was not adequate and did not comply with MEPA. The Secretary requested the Attorney General to file suit to seek to prevent the project from moving forward until Massport fully complied with its obligation under MEPA. Intensive negotiations took place among the Secretary of Environmental Affairs, the Secretary of Transportation and Construction, who had independent objections to the project and had filed a separate lawsuit, and Massport. A settlement was reached and the project, with modifications alleviating the Secretary's environmental and transportation concerns, went forward.

INSURANCE DIVISION

The Insurance Division of the Public Protection Bureau represents the interests of Massachusetts citizens who purchase insurance. Funding for the Division's activities is provided by G.L. c. 26, §8F. The Division has two areas of activity: Division attorneys intervene in administrative hearings held to consider insurance companies' requests for rate increases, and also brings affirmative litigation on behalf of victims of deceptive sales practices, fraud, and other illegal insurance activities.

A. *ADMINISTRATIVE*

1. *Automobile Insurance 1982 Rate Hearing*

The Insurance Division intervened this past year in a major case involving industry requests to increase automobile insurance rates by 24%. Extensive commitments of personnel and financial resources by the Division resulted in the introduction of significant evidence which helped reduce the amount allowed by over one hundred million dollars.

2. *Blue Cross Blue Shield (Non-Group)*

The Division intervened in a hearing which reviewed the request of Blue Cross Blue Shield to increase non-group health and accident insurance rates by 24.2% and 14.4% respectively. Despite opposition from many sources, the rates were approved as filed.

3. *Blue Cross Blue Shield (Medex)*

Senior citizens use Medex insurance to supplement other Medicare coverages. As a result of a requested 36.9% increase in premium levels, the Division and representatives of the Public Charities Division intervened. After an extensive hearing process the petitioners agreed to re-file their rate request. It was accepted and which resulted in a savings to consumers of thirteen million dollars.

4. *Workers Compensation*

The Division has intervened in a major rate hearing resulting from insurers' request for an increase in Worker Compensation insurance premiums of ninety seven million dollars. The Division has urged that over seventy million dollars be slashed from this request. The Hearing officer's decision is pending.

5. *Automobile Insurance Competition*

Insurers providing automobile insurance again sought approval of the use of competitively set rates for 1983. The Division appeared and presented expert testimony at that hearing urging that safeguards against excesses of insurers were as yet lacking. A decision against the insurers resulted.

6. *Massachusetts Reinsurance Facility*

The field of automobile insurance and reinsurance is in flux and the Division participated in a number of formal and informal hearings relating to operational matters of concern to insureds, agents and insurers within the Commonwealth. These included hearings before the Insurance Commissioners, the various boards of the Massachusetts Reinsurance Facility and the Merit Rating Board.

7. *Speakers Bureau For Elderly Issues*

The Division initiated a schedule of speaking engagements. Speakers from the Division presented information on topics of importance to citizens involving medicare, medicare supplements, life insurance, and dreaded disease insurance.

8. *Municipal Deferred Compensation*

The Division is continuing its examination of deferred compensation plans offered by insurance companies to many employees of state, city and municipal governments. A seminar including representatives of ten such plans was conducted by the Division to review appropriate duties of public employers' insurers and plan administrators with particular regard to prudent and prompt investment of funds.

B. *LITIGATION*

1. *Tax-Deferred Annuities*

The Division has developed several significant cases against major life insurance companies involved in the sale of so-called "tax deferred" annuities. The cases are the first of their kind brought in the country by public law enforcement offices. Restitution and damages resulting from the erroneous representations concerning the tax consequences of these purchases is sought on behalf of thousands of Massachusetts citizens. These cases are pending.

2. *Insurance 93A Cases*

Case Name	*Restitution*
1. *Commonwealth* v. *Marquis et al.*	$285,000
2. *Commonwealth* v. *Scribner*	$5,000

C. *LEGISLATION*

1. *Group Health Insurance*

The Division authored several measures designed to provide greater protection for employees insured through group health plans and so-called "self-insured" plans.

2. *Licensing of Insurance Agents*

Insurance agents were urged by the Division to file remedial legislation designed to resolve legal questions relating to licensing. A bill has been filed and actively supported.

3. *Auto Insurance*

In an effort to reduce automobile insurance rates, the Division proposed legislation designed to require use of a realistic tax rate in the insurance rate setting process to prevent companies from significantly over-estimating their tax burden.

DIVISION OF PUBLIC CHARITIES

The Division of Public Charities is one of seven divisions in the Public Protection Bureau. It is established by the Attorney General pursuant to G.L. c. 12, §8B. Its activities fall into three main areas: 1) affirmative litigation aimed at protecting the public generally from misapplications of charitable funds and

from fraudulent or deceptive solicitation; 2) participation in estates and trusts in which there is a charitable interest; and 3) various administrative functions mandated by G.L. c. 12, §8F and G.L. c. 68, §§19, 21 and 23.

A. *AFFIRMATIVE ENFORCEMENT ACTIVITIES*

1. *Registration and Audit Enforcement*

The Division continues to actively enforce the registration requirements of G.L. c. 12, §8F and G.L. c. 68, §19. In addition, it has expanded its audit enforcement program so that currently every report received by the Division is examined to see whether an audit is included if required. The registration and audit requirements are key elements of the Divisions's efforts to insure accountability for charitable funds. In connection with these efforts the following lawsuits were filed:

Failure To Register

Defendant

1. Communications Theatre Group
2. Cadmus School et al.
3. Children in Crisis, Inc.
4. Technology in Medicine
5. Williams et al.

Failure To Provide Audit

Defendant

1. Mass. Jaycees Charitable Trust
2. Transporting the Handicapped Elderly in Mass., Inc.
3. Victory House
4. Memorial Square Citizens Council
5. Friends of Laughing Brook
6. South Area Jewish Community Center
7. Jewish Community Center of Greater Boston
8. Young Men's Hebrew Association
9. Jewish Community Center of Brookline, Brighton & Newton
10. Community Teamwork, Inc.
11. Northeast Appropriate Technology, Inc.
12. End Stage Renal Disease, Network #28, Inc.
13. Greenfield Area Animal Shelter
14. Mashpee Wampanoag Indian Tribal Council, Inc.
15. Rockwood Day Care Center, Inc.
16. Theatre at The Square, Inc.
17. The Stephen Caldwell Memorial Convalescent Home
18. Delta Projects, Inc.
19. Chelsea Jewish Nursing Home

In addition, the Division obtained audits from over 500 organizations which initially failed to provide them without the need to resort to litigation.

Ad Books

In the last year the Division has received increasing numbers of complaints from the public concerning telephone solicitations. Typically these complaints involve for-profit businesses which solicit small businessmen to purchase advertising in an organization's year book. Violations include failure to register and post bond as required by G.L. c. 68, excessive compensation usually in the

range of 65-85%, and deceptive sales presentations. Certain of these solicitations were made on behalf of police groups with solicitors suggesting that donations would result in favored treatment from police on parking and traffic violations. Suits were filed against the following defendants:

Defendant	*Status*
O.S.C. Corporation *et al.*	Open
G.M.C. Corporation *et al.*	Open
WRG Enterprises	Open
George Leavitt *et al.*	Open
John Hanafin	Open

In addition, the Division criminally prosecuted one ad book scheme in District Court.

2. *Charitable Gambling*

During the past fiscal year, more and more charitable organizations resorted to raffles and bazaars (authorized by G.L. c. 271, §7A) as a fund-raising device.

The Division continued its efforts to enforce the provision of G.L. c. 271, §7A, which permits only members to promote or operate the events, against suppliers of casino equipment providing paid dealers. In this connection cases were filed against the following suppliers of casino equipment:

Defendant	*Status/Disposition*
Frank Fitzgerald and Clayton Ritchie d/b/a Monte Carlo Associates	Consent Judgment
Joseph D/Amico d/b/a Casino Royal	Consent Judgment
Ravera Games, Inc.	Consent Judgment
James DiPaoli d/b/a Happy Knights Precise Las Vegas Equipment	Consent Judgment

In addition the Division has an active program of monitoring these judgments and those entered in prior years for compliance.

The Division also focused its efforts on the phenomenon of house raffles. Its main concerns were whether ticket purchasers were given fair disclosure of the terms of the raffle and that third parties — builders and realtors — were not the real beneficiaries of the privilege extended to charitable organizations to sponsor gambling events. In this connection over 45 investigations were opened and two lawsuits were filed:

Defendant	*Status*
Milford Whitinsville Regional Hospital	Closed
Hudson Boys Club	Closed

In addition, the following three suits were filed in the area of charitable gambling:

Bellotti v. *Easton Lions Club and Easton Jaycees*

This was a suit filed to enjoin a "poker championship" which violated the $25 cash prize limit in G.L. c. 271, §7A. In *Bellotti* v. *Solas, et al.*, and *Bellotti* v. *Christodlous* we filed suits to enjoin unlicensed raffles. Both were settled by consent judgments requiring repayment of over $5,000 in raffle proceeds.

Information received as a result of investigation and litigation with suppliers coupled with numerous complaints from organizations and individuals concerning Las Vegas Nights and house raffles suggested the need for a more comprehensive enforcement approach to charitable gambling. In January, 1982 the Attorney General held public hearings on the subject of charitable gambling. In addition, the Division conducted a five month study of organizations conducting Las Vegas events. The Division also surveyed twenty-five organizations which held Las Vegas Nights by personally interviewing the member in charge of the event. In May, 1982 the Division submitted a Report of Charitable Gambling which presented the first broad-based and reliable information concerning Las Vegas-type gambling and house raffles. Transmitted with the Report were regulations the Division had drafted in response to the findings of the Report. The Regulations governing raffles, 940 CMR 12.00, and the Regulations governing bazaars, 940 CMR 13.00 were promulgated by the Attorney General on May 6, 1982.

3. *Dissolutions*

The Division continues its efforts to dissolve inactive charitable organizations. This involves an investigation to discover any corporate assets as well as legal proceedings. In 1982 involuntary dissolution petitions were filed against the following organizations:

Defendant	*Status*
Air-O-Limited	Open
Amherst Youth Center, Inc.	Open
Atlantic Wind Ensemble, Inc.	Closed
Bruce J. Anderson Foundation, Inc.	Open
Area Cooperative Team, Inc.	Open
Arlington Women's Center, Inc.	Closed
Berkshire County Chapter, National Society for Autistic Children, Inc.	Closed
Bicentennial at the Junction, Inc.	Open
Books for People, Inc.	Open
Boston Area Self Education Committee	Open
Boston Committee to Save Ethiopian Jews	Open
Bradston Client Counsel, Inc.	Closed
Canalside Community Association, Inc.	Open
Cape Cod Horticulture Study Group, Inc.	Open
Cape Community Exchange, Inc.	Closed
Captain S. Wood Company of Minuteman Inc.	Open
C.H.U.M.'s, Inc.	Closed
Citizens Alert for All Retarded Persons in Mass.	Open
N.J. Cole Memorial Fund for Children with Specific Needs	Open
Community Counsel of Marion, Inc.	Open
Community Research Center	Open
Credit Bureau of Fall River	Open
Crusaders of Beverly Drum & Bugle Corp.	Open
Eckankar Commonwealth Satsang Society	Open
Energies Alternative Group	Open
Essex Photographic Workshop, Inc.	Open
Experimental Aircraft Association, Inc.	Open
Extended Hand, Inc.	Open

Family Center for the Handicapped	Open
Fisherman Foundation, Inc.	Open
4-Cs in the Berkshires, Inc.	Open
Friends of Ashodt Yaacov Hakibbutz Hameuchad	Open
Friends of Odwin School	Open
Friends of the Seekonk Bicentennial	Open
Friends of the Society for Medicine & Law in Israel	Open
Friends of Wakefield Senior Citizens	Open
Dr. C. Benjamin Fuller Home and Infirmary	Open
Full Gospel Fellowship Interdenominational	Closed
Harvard Elm Project, Inc.	Open
Holyoke Family Service Society	Open
Ices Users Group	Open
I.L. Charitable Foundation, Inc.	Closed
International Marine Archivers, Inc.	Open
Intertown Meals on Wheels, Inc.	Open
Job Placement Project, Inc.	Open
Henry P. Kendall Foundation, Inc.	Closed
Latvian Song Festival	Open
Lexington Child Care Cooperative, Inc.	Closed
Littleton Nature Daycamp, Inc.	Open
Living & Learning Institute for Teachers of Young Children	Open
Marblehead Dance Workshop	Open
Mass. Association of Service Station Dealers	Open
Methuen Playhouse, Inc.	Closed
Millerville Firefighters Benevolent Assoc., Inc	Open
Mission Guild of Our Lady of Perpetual Help	Open
Mountain Laurel, Inc.	Open
Music Ministries	Open
New England Artisan's Guild	Open
Newton Interfaith Life Care Center	Closed
Newton Youth Foundation	Open
Nikki Hu Dancers, Inc.	Closed
Nutrition and Heath Systems, Inc.	Closed
100-Aker-Wood, Inc.	Open
Peabody Terrace Nursery School	Open
Pierce School Extended Day Kindergarten Program	Open
Roxbury-Dorchester Community Beautification Program, Inc.	Closed
Rutland Committee on Drug Abuse, Inc.	Open
St. Michael's School Association of North Hampton	Open
Saval Foundation, Inc.	Open
Secondary School Research Program	Open
Serono Research Foundation U.S.A., Inc.	Open
Sheriffs Commission of Concerned Citizens of Berkshire County	Open
Silver Lancers Junior Drum & Bugle Corps	Open
Somerville Community Day Care	Open
Sound Side Counseling Center	Open
Suffolk County Community Fair, Inc.	Closed
Edward Hood Taplin Institute, Inc.	Open
TNT Workshops	Open
20th Century Association	Open
United American Arab Appeal, Inc.	Open
United Cerebral Palsy Association of Worcester, Inc.	Open

Valley Adult Counseling Services	Open
Vineyard Land Use	Open
Walden III, Inc.	Open
Westhampton Fine Arts Guild, Inc.	Closed
West Newton Garden Club, Inc.	Closed
West Roxbury Catholic Women's Club	Open
West Side Workshop, Inc.	Open
Worcester Open Door, Inc.	Open
Wrentham Cultural Exchange, Inc.	Open

In addition, organizations may dissolve voluntarily by filing an action against the Atttorney General. While the division assents to most dissolutions, it is necessary in each case to be sure that there has been a proper disposition of assets. During the past year the division has been involved in the following dissolutions:

Defendant	*Status*
Arrowhead Sportsmen's Club, Inc.	Open
Braintree Y.M.C.A.	Closed
Cambridge-Somerville Community Residences, Inc.	Closed
Camping Associates of Roslindale & Milton, Inc.	Open
C.A.R.P.	Closed
Charlestown Community Center, Inc.	Open
Chelmsford Scout House, Inc.	Closed
Drug Abuse Foundation of Pioneer Valley, Inc.	Closed
Eastern Middlesex Opportunities Council, Inc.	Open
Family and Personal Counseling of Brockton, Inc.	Closed
First Church of Christ Science, Inc.	Closed
French American Club, Inc.	Closed
Gamma Eta Alumni, Inc.	Open
Governor's Management Task Force, Inc.	Closed
Haskell Home Corporation	Closed
Haverhill Union Mission, Inc.	Closed
Institute for Continued Education and Child Psychiatry, Inc.	Closed
Ipswich Hospital, Inc.	Open
Join Our Band, Inc.	Closed
Keniticompany, Inc.	Closed
Living Folks Records & Concerts, Inc.	Closed
LNS Associates	Closed
Mass. Bay Federation Council	Open
Massachusetts Chapter of the National Commission for Prevention of Child Abuse	Open
Mill Arts, Inc.	Open
Project Independence, Inc.	Open
Project Independence Residential Homes, Inc.	Open
Project Local, Inc.	Closed
Salem Young Women's Association	Closed
South Shore Mental Health Association	Closed
Town of Townsend Police Ambulance Association, Inc.	Open
Unis Outdoor Education Program, Inc.	Open
Visiting Nurse Association of Dover & Medfield	Closed
Wahcanoh Music Association, Inc.	Closed

4. *Miscellaneous*

Bellotti v. *Callahan et al.*

Suit filed against the sole officer and director of a charitable organization alleging waste, mismanagement and related party transactions.

Bellotti v. *Tri-City Council, 823, United Commercial Travelers of America*

Complaint and consent judgment filed enjoining defendant from failing to make a timely application for real estate tax abatements.

Bellotti v. *People Against Cancer*

Complaint and consent judgment filed against a for-profit business requiring that all its literature disclose its for-profit non-charitable status.

Bellotti v. *Salvation Rehabilitation Center, Inc.*

Default judgment entered in case regarding deceptive solicitations.

Bellotti v. *Brockton Agricultural Society*

Case is currently on appeal from the Superior Court's denial of a motion to intervene brought on behalf of the corporation's shareholders.

Bellotti v. *The New Assembly of Saint Cecilia*

Suit filed to obtain an accounting and restitution from defendant charitable organization and its Board of Directors of $154,000 of charitable assets expended for non-charitable purposes.

Bellotti v. *B.A. Langan d/b/a Ron Ton Productions*

Suit filed to compel defendant to comply with registration requirement for professional solicitors and to enjoin the use of paid telephone solicitors.

Bellotti v. *Mattson et al*

Suit filed to compel defendants to comply with registration requirements of G.L. c. 12, §8F and with the requirements of G.L. c. 271, §7A governing charitable raffles.

In re: Dimock Community Health Center

Receivership continues of this financially troubled health center. This case is being jointly handled with attorneys from the Consumer Protection Division.

Commonwealth v. *Columbo et al*

Suit was filed to enjoin defendants from failing to disclose that the use of a tax avoidance scheme which they sell for $3,900 subjects purchasers to substantial risks of criminal and civil prosecution by the Internal Revenue Service.

In Re: Medex Rate Hearing

The Division, together with the Division of Insurance, intervened in hearings before the Commissioner of Insurance concerning Blue Cross' and Blue Shield's request for a 36% increase in Medex premiums The Commissioner denied the companies' request and instead ordered a 21% increase.

Bellotti v. *Downey Side, Inc.*

Complaint and consent judgment filed enjoining the defendant from failing to make timely application for real estate tax abatement.

Bellotti v. *Williams et al*

Suit filed to enforce a request for documents pursuant to G.L. c. 12, §8L.

B. *PARTICIPATION IN ESTATES AND TRUSTS WITH CHARITABLE INTERESTS*

The Attorney General is an interested party in the probate of an estate in which there is a charitable interest. This fiscal year, 2,536 new wills were received. Each of these wills was reviewed and it was determined that the Attorney General had an interest in 1,425 of these estates.

Probate accounts were reviewed and approved as follows:

Executor Accounts	1488
Trustee Accounts	2294
Total	3782

In addition the division approved 133 petitions for the sale of real estate and 34 petitions for appointment of trustees, and was involved in 110 miscellaneous probate legal actions.

The Division has continued its efforts to review old probate matters in order to close files where no further action is required and to investigate estates and trusts where additional accountings are required but have not been received by the division. In FY-1982, 603 estates had been reviewed and closed. At the completion of this effort only active cases will remain in the files and as a result the monitoring of such cases by the Division will be more effective.

In addition to these routine matters, the Division handled 193 actions on cases in litigation. The most significant cases in this area are as follows.

First National Bank of Malden v. *John Martin et al*

The Division's participation in this action regarding the interpretation of a will saved a $140,000 charitable remainder interest.

Admiral Byrd Foundation

The Division of Public Charities in an action in Probate Court in 1979 effected the appointment of five individual trustees in the Foundation, three of whom were independent and were able to control the Foundation. The original trust agreement establishing the Foundation provided for three trustees, one of whom was Commander Byrd, Admiral Byrd's son. Commander Byrd controlled the trust. He was also living in the trust's main asset — the Byrd family house on Brimmer Street, Beacon Hill. During 1982, the independent trustees prevailed in an eviction proceeding against the Commander. Those assets of the trust will now be used for the purposes delineated in the original trust agreement.

Estate of George Cowen

Action was brought to compel trustees under the will of George Cowen to proceed with the construction of a $1.5 million home for the aged in Rochester, Mass.

Cole v. *Bellotti*

Through the Division's efforts, the probate court after trial, ordered a plan for administration of a long dormant charitable trust. It is estimated that under this plan the trust will yield $100,000 per year for educational purposes in Barnstable and Hyannis.

Society for the Preservation of New England Antiquities (SPNEA) v. *Bellotti*

Suit was filed by SPNEA to obtain authorization to sell the oldest brick house in America located in Medford to private parties with preservation restrictions. The Division was instrumental in a settlement which allowed the house to be sold to the Medford Historical Society.

Chase v. *Pevear*

This case was remanded to the Probate Court by the Supreme Judicial Court for a determination of the amounts of attorneys fees to be awarded. Time charges by all counsel in the case were $675,000. After twenty five days of trial the Attorney General recommended that the aggregate fee award be limited to $132,000, the amount in controversy.

C. *ADMINISTRATIVE FUNCTIONS*

The Division has numerous administrative and routine responsibilities including:

1. Receiving annual financial statements from nearly 12,000 charities operating in Massachusetts and maintaining these as public records;
2. Administering the state's charitable solicitation act (G.L. c. 68, §§18-33);
3. Registering and regulating professional solicitors and professional fundraising counsel;
4. Representing the State Treasurer in the public administration of estates escheating to the Commonwealth.

Annual Registrations Under G.L. c. 12, §8F

The Division has completed the process of computerizing registration information. Together with an increased level of enforcement, this has resulted in a dramatic (48%) increase in registrations over FY-1981.

	1981	1982	1982 Fees
Form PC - $25.00 fee	6028	8925	$223,125
Form PC - $15.00 fee	325	152	2,280
Total Amount			$225,405

After many years of effort, the states' plan to achieve uniform reporting for charitable organizations has become a reality. All states will now accept the revised Internal Revenue Service form 990 together with certain supplementary schedules. It is hoped that this development will substantially ease the burden on charitable organizations imposed by state reporting requirements.

Under G.L. c. 68, §19, every charitable organization soliciting funds from the public must apply to the Division for a Certificate of Registration. Each such application must be reviewed for compliance with the statutory requirements.

For the period from July 1, 1981 to June 30, 1982, some 1,692 applications were received. Certificate fees received were $16,920.

Under G.L. c. 68, §§21 and 23 all persons acting as solicitors or fund-raising counsel for soliciting organizations must register with the Division and file a bond. Each registration and each professional solicitation contract must be approved by the Director if it meets statutory requirements. During the fiscal year ending June 30, 1982, 44 registrations were received and approved and total fees collected were $440.

The Division represents the State Treasurer in the public administration of intestate estates where the decedent has no heirs. Such estates escheat to the Commonwealth. The following table represents activity in this area.

New Estates	142
Estates Closed	184
With Escheat	85
Without Escheat	99
Total Amount of Escheats Received	$505,597.32

UTILITIES DIVISION

The Attorney General has been involved in utility matters since 1973 by virtue of G.L. c. 12, §11E. The Division continues to operate as the major, and in most instances the only representative of consumer interests in gas, electric and telephone rate setting and related matters affecting Massachusetts residents. These matters are heard and decided by the Department of Public Utilities (D.P.U.). The budget allocated to the Utilities Division pursuant to G.L. c. 6A, §9A has remained at $250,000 since 1973. Seventy-five thousand dollars in additional funding was authorized solely for greatly expanded responsibility under St. 1981, c. 375, the new state fuel adjustment statute, and is not available for use in any other proceedings. The effects of inflation upon the original assessment and the growing complexity and number of rate cases have created major resource problems for the Division. Lawyers have been working concurrently on two major rate cases on a consistent basis. Notwithstanding these severe constraints, the staff of seven attorneys, two utility rate analysts, two secretaries, and an administrator, have strived to effectively represent residential customer interests in utility rate cases.

A. *RATE CASES*

During the fiscal year, the Utilities Division intervened in each of the 22 gas, electric or telephone rate matters before the Department of Pulbic Utilities. A total of approximately 411 million dollars in rate increases were requested by companies. Of those 15 cases decided at this writing, 108 million has been granted out of 257 million requested.

The following chart shows the rate cases which were filed, heard and/or decided this past fiscal year. It should be noted while reviewing this chart, that the Department of the Attorney General has no control over the schedule of rate cases. Companies may file for a rate increase annually and many do so. The D.P. U. sets the schedule based on the timing of these filings. There is a six-month statutory time limit in which each rate case must be heard and judged.

The Utilities Division staff reviews requested increases critically. It examines profit margins, operation and maintenance expenses, property taxes, depreciation, and utility plant in service. Through this exhaustive review and questioning of company witnesses the Attorney General challenges questionable numbers and recommends what he believes are just and reasonable rates. The D.P.U. often asks few, if any questions of the utilities and rarely asks for any information other than what a company has filed. The factual basis for allowing rates less than those requested by a utility is developed almost entirely by the Attorney General's Utilities Division.

An example of effective rate case work was the Boston Edison rate case, [D.P.U. 906]. The Company asked for $98.3 million, half of which related to Pilgrim II's cancellation. The Company received about $25 million for Pilgrim II (each year for 13 years) and about $6.5 million out of $49 million on non-Pilgrim II issues.

B. *ELECTRIC FUEL CLAUSE INTERVENTION*

In August 1981, a new law went into effect regarding the right of electric utilities to collect from ratepayers the cost of fuel and purchase power (Chapter 375, Acts of 1981, amending G.L. c. 164, §94G). The new law eliminated the virtually automatic pass-through of fuel costs to consumers through the fuel clause and required that the utility bear the burden of proving the reasonableness of all such expenses. The statute further required that the Department of Public Utilities establish performance standards for each electric utility against which the utility's actual generating efficiency in performance would be measured. Now, failure to operate in conformity with performance standards could result in the denial of the utility's right to recover fuel and purchased power expenses from ratepayers.

The new fuel clause statute was developed by a task force comprised of consumer representatives, the utility companies, and the Department of the Attorney General. The new law provided seventy-five thousand dollars ($75,000) in funding for intervention by the Attorney General on behalf of consumers in fuel clause and performance standard proceedings. This funding was initially opposed by the utilities but was subsequently included in the amended legislation.

Since passage of this legislation the Attorney General has intervened in two major fuel clause proceedings where the prudence of costs resulting from the outage of Pilgrim Unit I was considered. The Attorney General has also intervened in the performance standard case of Boston Edison Company. The Attorney General, through the newly-available funding, has not only participated in these hearings but has sponsored the expert testimony of four witnesses in the presentation of a direct case on behalf of consumers.

The Attorney General's intervention in fuel clause proceedings has already produced substantial benefits for ratepayers. In the fuel clause hearings regarding Boston Edison's right to collect replacement power costs from consumers as a result of the outage of Pilgrim Unit I [D.P.U. 1009-F], the Attorney General argued that the Company should be required to refund certain imprudently incurred costs to its ratepayers associated with that outage. The D.P.U. subsequently ordered a refund of over five million dollars ($5,400,000) which has

been passed through to consumers by a reduction in the fuel adjustment factor which constitutes a major portion of consumers' electric bills.

The Division was also involved in fuel adjustment hearings regarding Boston Edison's right to collect over a two-year period, $53 million in deferred fuel costs. A group of industrial intervenors sponsored a witness and argued against such collection. The Attorney General supported the position of the industrial intervenors. The collection of the $53 million will be completed during the 1983 fiscal year and to date no decision has been rendered by the DPU.

C. *GAS SHORTAGE INVESTIGATION — D.P.U. 555*

In January 1981, the Attorney General intervened in what became a very lengthy and detailed investigation into the reasons and causes for the shortage of natural gas experienced by certain gas companies during the Winter of 1980-81. Hearings were convened by the Department of Public Utilities and, despite the Attorney General's urging that the hearings be treated as adjudication, the D.P.U. determined that all hearings would be in the nature of an investigation. Hearings in this matter involving all gas companies continued until November 12, 1981, totalling 56 days of hearings. The Attorney General cross-examined witnesses from the pipeline supply companies, the major LNG supplier for companies in the Commonwealth and gas company official representing all of the gas utilities of the Commonwealth. Additionally, at the request of the Attorney General, the President of the parent company of Boston Gas, Eastern Gas & Fuel Associates, appeared and was cross-examined. On December 16, 1981 the Attorney General filed his initial brief and advocated that the D.P.U. deny the right of Boston Gas Company to collect approximately 46 million dollars in emergency gas supply expenses from ratepayers. The Attorney General argued that these expenses were incurred because of imprudent and unreasonable conduct on the part of Boston Gas Company, in pursuit of extraordinary profits which were available to the Company from the sale of gas to interruptible customers. The Attorney General also advocated that the Department deny the right of Lowell Gas Company to collect 2.7 million dollars from its ratepayers, arguing that those costs have been incurred through unreasonable actions on the part of that Company.

In the early stages of this proceeding the Attorney General made a motion that the D.P.U. deny Boston Gas Company the right to collect from its consumers, subject to refund, expenses which were being contested in the ongoing investigation. The Department denied the Attorney General's motion and ruled that Boston Gas could, in fact, begin collecting through its cost of gas adjustment clause costs associated with emergency gas purchases. The Legislature, however, subsequently passed a law prohibiting the Company to collect any of the contested expenses from its ratepayers pending the outcome of the Department's investigation into the gas crisis. The Department has not yet issued its findings in this proceeding.

D. *MISCELLANEOUS*

During the fiscal year the Utilities Division intervened in several other significant proceedings. First, in D.P.U. 662, Boston Gas sought to begin collecting unrecovered gas costs from the 1980-1981 winter in April, 1981. In August of

1981, the D.P.U. barred the pass through based upon the Division's argument that good cause had not been shown to permit an accelerated pass through. Those same gas costs were later allowed to pass through by the D.P.U. over protest by the Utilities Division and then blocked by legislative action pending the outcome of the D.P.U. 555 investigation.

The Attorney General has also commissioned and received an analysis of the fuel factors of the major electric companies along with a handbook providing suggested methods of analysis and strategies which may be employed for effective intervention in future fuel clause proceedings. The Attorney General plans to continue to be actively involved representing consumers before the Department of Public Utilities in these proceedings.

The Division intervened in two corporate reorganization proceedings, D.P.U. 515 (Colonial Gas Company) and D.P.U. 850 (Boston Edison). In July, 1981, Colonial Gas Company greatly simplified itself by eliminating its holding company structure and dissolving a number of non-utility affiliates. Boston Edison has sought to form a holding company structure with the electric company wholly-owned by a parent known as Boston Industries. The Division has opposed this reorganization, as did the City of Boston. The hearings in this case were concluded nearly a year ago and no decision has been rendered by the D.P.U. to date.

At the beginning of this fiscal year, the U.S. Supreme Court ordered the State of Louisiana to refund all First Use Tax payments which it had collected. Massachusetts and seven other states led the challenge to the constitutionality of the tax and as a result, $14.5 million in refunds are being returned to Massachusetts gas companies. The bulk of these refunds will flow back to consumers. In August 1981, the Utilities Division petitioned the D.P.U. to require that all First Use Tax refunds flow back to consumers. Hearings were held during the fall of 1981, but the D.P.U. has not issued any decision to date.

The Utilities Division was also an active participant in rulemaking proceedings involving telephone company billing and termination regulations, amendments to the D.P.U. Annual Return, standard rate case filing format, amendment to the Uniform System of Accounts for Electric Companies and accounting for advertising expenses of utilities. It also intervened in several matters where utilities sought D.P.U. approval to issue new securities.

Wholesale rate case activity at the FERC in Washington was limited to two electric rate cases, New England Power Company and Montaup Electric Company. As a result of a settlement reached in the former case, consumers were saved millions. Due to the failure of the Legislature to authorize additional funding, wholesale rate case intervention by this office will be eliminated entirely. Expert witnesses are necessary to litigate FERC cases and funds do not exist to expand the number of staff witnesses or hire outside consultants. By contrast, Rhode Island has authorized a special fund for wholesale rate case intervention by its Attorney General.

While the Utilities Division is not established to handle individual consumer complaints, a large number of complaints have been received and efforts are made to deal with them. In some cases, the consumer has already tried to resolve their problems with the D.P.U. A measure of success has been achieved in resolving such complaints, and in some instances customers whose utilities

have been shut off have had service restored, potential shutoffs were averted and billing adjustments were made.

E. *CONCLUSION*

While the Utilities Division has been making an extensive effort to protect strongly consumer interests in reasonable utility rates, it has a critical need for additional resources for expert staff witnesses, computer capability and attorney staffing of rate proceedings.

RATE CASES FILED, HEARD AND/OR DECIDED DURING FISCAL YEAR 1982 BEFORE THE MASSACHUSETTS DEPARTMENT OF PUBLIC UTILITIES

DPU Docket	*Company*	*Date Filed*	*Rate Increase Requested*	*Atty. General Recommendation (in $ and % of Company Request)*	*Decision Date*	*DPU Allowed Increase*	*% of Request*	*Comments*
558	Western Massachusetts Elect Co. [WMECo] Electric Co. [WMECo]	1/81	$42,168,000 41%	$17,355,000 41%	7/81	$25,504,000	60%	
614	North Attleboro Gas Company	2/81	197,354	148,840 75%	9/81	173,387	88%	
635	Lowell Gas Company (Interim Case)	3/81	1,024,826	0	8/81	0	0%	
636	Cape Cod Gas Company (Interim Case)	3/81	680,887	0	8/81	9,708	1%	
637	Lowell Gas Company	3/81	4,447,873	867,529 20%	9/81	1,223,232	28%	Company requested & rec'd recalculation to correct mathematical error
637A						1,611,718	36%	
638	Cape Cod Gas Company	3/81	3,783,361	1,363,275 36%	9/81	1,876,448	50%	Company requested & rec'd recalculation due to mathematical error
638A						2,020,142	53%	
701	Nantucket Electric Co. (Interim Case)	5/81	$260,627	effective dismissal	11/81			
702	Nantucket Electric Co.	5/81	389,196	315,439 81%	11/81	372,597	96%	Interim & final order combined
750	Fall River Gas Company	6/81	3,050,000	1,593,461 52%	12/81	1,352,754	44%	
777	Bay State Gas Company	7/81	15,391,628	295,968 2%	1/82	4,307,002	28%	Company requested several reconsiderations

	A								
	B								
	C					5/82	6,959,692	45%	Reconsideration & recalculation filed by Company & Atty. Gener.
	D					5/82	7,051,900 (final total)	46%	Reconsideration requested by Company
800		Massachusetts Electric Company [MECo]	7/81	28,527,000	11,785,000 41%	1/82	8,879,000	31%	Company requested & recalculation & reconsideration
	A					5/82	3,674,000 (additional)		
	B					6/82	42,000 (additional) [TOTAL = $12,595]	FINAL 44%	
837		Eastern Edison Company	8/81	$10,064,677	$860,190 9%	2/82	$3,404,378	34%	
859		New England Telephone [NETT]	8/81	59,775,000		3/82	19,131,000	32%	Reconsideration requested by Company resulted in no change
905		Berkshire Gas	10/81	1,974,946	(241,280)	4/82	102,168	5%	
	A					6/82	171,398	9%	Recalculation due to error
	B								Reconsideration Filed
906		Boston Edison Company [BECo]	10/81	98,300,000	1,928,000 2% (based on a 0% Pilgrim II recovery)	4/82	26,374,000	27%	Company filed a Motion for & rec'd a Recalculation
	A					5/82	(32,153,000 of which $24m. for Pilgrim II)	33%	due to miscalculation
	B					7/82	31,277,000	32%	BECo filed Motion for Reconsideration in another issue issue resulting in a small downward adjustment
956		Commonwealth Electric Co.	11/81	26,996,000	9,539,000 35%	5/82	18,267,000	68%	Recalculation by Dept. resulted in
	A								
	B								
957		WMECo	11/81	19,966,000	3,393,000 17%	5/82	4,324,000	22%	

DPU Docket	*Company*	*Date Filed*	*Rate Increase Requested*	*Atty. General Recommendation (in $ and % of Company Request)*	*Decision Date*	*DPU Allowed Increase*	*% of Request*	*Comments*
1015	Cambridge Electric Co. [CELCo]	1/82	6,234,000	382,975 6%	due 7/82	2,500,000	40%	
1100	Boston Gas Company*	3/82	67,886,000		due			Atty. General Initial Brief filed 7/21/82
1115	Haverhill Gas Company	5/82	2,882,000		due 10/82			Atty. General Initial Brief filed 8/2/82 Reply due 8/23/82
1120	Commonwealth Gas Company	5/82	40,644,000		due 11/82			In hearing stage
1122	Bay State Gas Company	5/82	22,948,200		due 12/82			In hearing stage
	*See DPU 555 in text-Gas Investigation							
1125	Colonial* Gas Company**	5/82	Cape 4,661,812 Lowell 9,590,938		due 12/1			In hearing stage
1130	Eastern Edison Co.	6/82	11,000,000		due 11/82			In hearing stage
1133	Massachusetts Electric Company	6/82	20,830,000 modified to 17,057,000		due 12/82			Company modified original request downward as a result of decision in DPU 800B
1135	Blackstone Gas Co.	5/82	78,735		due 11/82			Atty. General's Brief filed 7-30-82

*See DPU 555
Gas Investigation
**Cape Cod Gas and Lowell Gas Companies were Re-organized as Colonial Gas

VI. SPRINGFIELD OFFICE

The Springfield Office of the Department of the Attorney General continues to be responsible for matters of concern to the Attorney General in the four western counties of the Commonwealth: Hampden, Hampshire, Franklin and Berkshire. As in the past, the primary function of the office has been to handle division referrals and requests for assistance. Only consumer protection matters originate in the Springfield Office.

In addition to the usual types of cases referred by the various divisions during the fiscal year, the Springfield Division also handles Department of Employment Security and Department of Public Welfare criminal prosecutions relating to recipient fraud, Chapter 123A section 9 hearings and the Industrial Accident Board claims hearings in the four western counties.

The following represents, by bureau and division, the cases assigned to the Springfield Office:

CIVIL BUREAU	*Assigned*	*Closed*	*Pending*
Collection	12	0	12
Contracts	6	1	5
Eminent Domain	23	3	20
Victim of Violent Crimes	52	10	42
Torts	41	18	23
Industrial Accidents	03	02	01
CRIMINAL BUREAU			
Chapter 123A Section 9 hearings	07	07	00
Employment Security	11	09	02
Welfare Fraud Investigation	03	00	03
GOVERNMENT BUREAU			
Defense of State Agencies	47	10	37
PUBLIC PROTECTION BUREAU			
Consumer Protection	18	06	12
Assurance of Discontinuance		20	
Restitution, Penalties, Recoveries			$39,863.44

In addition to the above cases, attorneys in the Springfield Office responded to 58 requests to make court appearances on behalf of the various divisions in Boston. These court appearances ranged from answering calls of the trial list to filing various pleadings and/or arguing various motions before the court.

At times such as the above, attorneys from the Springfield Office will appear in court on that particular assignment but not handle the entire case. During the course of the year over 100 man-hours were spent in court on such matters. The ability of the Springfield Office to respond to these requests on short notice contributes to the efficiency of the Department as a whole because of the savings that result from not having to send an attorney from the Boston Office.

The Springfield Office also supplies personnel to the Board of Appeal on Motor Vehicle Liability Policies and Bonds which meets monthly.

The Consumer Protection section of the Springfield Office continues to actively pursue enforcement of consumer protection statutes and regulations. Additionally, the office provided assistance and information to the local consumer groups in the four western counties and aided individual consumers where no local consumer group exists.

Investigators assigned to the consumer protection section conducted numerous investigations of firms or individuals suspected of unfair and deceptive practices. The investigations covered a wide range of businesses including but not limited to automobile sales and service, career schools, employment services, consumer savings booklets, business franchise sales, rental listing firms advertising practices, an investment scheme and firewood sales.

One of the major areas of concern for the Springfield Office in the consumer protection area was that of odometer turnbacks. The office conducted reviews of the records of new and used car dealerships throughout the four western counties. The investigations entailed a review of dealer record books, odometer statements, warranties and follow-up with the consumer who purchased the automobile. Currently, the results of the investigation are being analyzed and a determination is being made of the type of action to be taken against the dealerships found in violation of the law. It is expected that both civil and criminal action will be taken.

During a review of advertisements in local newspapers it was noted that there were widespread violations of the advertising regulations dealing with the use of the term "Below Dealer Cost" or "Below Invoice Price". This led to 16 automobile dealers entering into Assurances of Discontinuance and paying $100.00 each in investigative costs.

The consumer protection section also took action against an individual who was operating two investment programs known as the Cooperative Investment Club and New Horizon Club. This office commenced its suit on July 17, 1981, at which time a Temporary Restraining Order was obtained prohibiting the individual from continuing to operate her investment scheme in violation of the Consumer Protection Act, c. 93A and the Uniform Securities Act, c. 271, §6A. The defendant's numerous misrepresentations, including statements that each consumer's investment was guaranteed and would earn between 50% and 80% over a thirty or forty-five day period, induced consumers to pay the defendants amounts which ranged from $300.00 to $62,100.00. The program was operated without having ever registered either the securities or the defendants with the Securities and Exchange Division of the Secretary of State as required by the Uniform Securities Act. Further, the defendant offered a bonus of 10% to consumers who solicited new customers to invest with her. At the height of activity from the Winter of 1978 through the Spring of 1981, records obtained from Western Massachusetts banks documented that approximately two million dollars had been deposited and withdrawn from these accounts by the defendant. Currently this office is proceeding with a petition for Contempt filed against the defendant for continuing the operation of the defendants club and for failing to make disclosures required by the Court in its Order for Accounting.

In November of 1981 the Consumer Protection section filed a Complaint against Valley Publications, Inc. d/b/a Select-A-Home, an apartment rental

isting service; alleging violations of the Consumer Protection Act, c. 93A and c. 271, §45 which regulates the operation of such listing services.

The defendants placed newspaper advertisements representing that consumers could rent the advertised apartments by calling the defendants' telephone number. When consumers called the defendants, they were told they could obtain the information necessary to identify the advertised apartment and numerous other apartments which met their needs only by paying the defendants a fee of $60.00. After payment of such fee, consumers were provided with listings which did not meet the requirements they disclosed to the defendants. Numerous listings contained incorrect telephone numbers or were for apartments which had been previously rented. Consumers also were often unable to locate the advertised apartment through the defendants' service. A Preliminary Injunction was obtained prohibiting the defendants from continuing to misrepresent services provided and to comply with the requirements of c. 271, §45.

Additionally, personnnel from the consumer protection section gave testimony on behalf of the Attorney General at three hearings held by the Department of Public Utilities in Western Massachusetts and fulfilled speaking engagements for numerous groups.

The Medicaid Fraud Investigators assigned to the Springfield Office conducted several investigations. One of these investigations culminated in the indictment of two individuals in the largest case of Medicaid fraud by single provider in Massachusetts. Indictments were returned against a psychologist and his interpreter alleging that they falsely billed the Department of Public Welfare for services supposedly administered to patients. These services were not in fact rendered. In one month alone the psychologist billed and was paid $131,944. In a civil suit filed in conjunction with the criminal matter it is alleged that the psychologist illegally received $510,883 during a thirteen month period. This matter is still pending before the Court.

CONCLUSION

During the fiscal year, the Springfield Office continued to provide a high level of service to the various divisions of the Department of the Attorney General and the citizens of Western Massachusetts.

VII. GOVERNMENT BUREAU

The Government Bureau has four functions:

(1) Defense of state officials and state agencies; principally in lawsuits raising issues of administrative and constitutional law and statutory interpretation;
(2) Initiation of affirmative litigation on behalf of state agencies and the Commonwealth;
(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 of each of those functions 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 certain cases, before federal administrative agencies. These proceedings typically involve issues of administrative and constitutional law in diverse subject-matter areas.

During fiscal year 1982, the Bureau opened 486 new cases and concluded a total of 248 previously active cases. By subject matter or client, the new cases fell into the following general categories:

Type of Case/Client	*Number*
Automobile Insurance Surcharge	52
Department of Public Welfare	41
Civil Service Commission	40
Judges and Court Personnel (excluding Chief Administrative Justice of the Trial Court)	39
Alcoholic Beverages Control Commission	25
Special Education	24
Department of Social Services	23
Department of Revenue	22
Motor Vehicle (excluding automobile insurance surcharge appeals)	22
Boards of Registration	20
Division of Personnel Administration	20
Department of Public Utilities	16
Department of Public Safety	13
Education (excluding special education)	10
Department of Mental Health	10
Rate Setting Commission	10
Communities and Development	10
Secretary of the Commonwealth	8
Department of Public Health	7
Division of Insurance	7
Treasurer & Receiver General	7
Attorney General	6
Retirement Board	6
Racing Commission	5
Governor	5
Administration & Finance	4
Division of Employment Security	4
Trial Court Administration	4
Rehabilitation Commission	2
Commerce	2
Labor & Industries	2
MDC	2
Board of Conciliation & Arbitration	2
Transportation	1
National Guard	1
Corrections	1
Energy Resources	1
Manpower Affairs	1

Department of Banking	1
Division of Youth Services	1
Others	9
TOTAL	486

The relative time spent representing specific agencies cannot be measured simply by the number of cases. The representation of certain agencies involved a significant commitment to complex litigation, although the total number of such lawsuits brought against agencies was relatively small. For example, as in the previous five years, substantial Government Bureau resources were devoted to six cases in which consent decrees had previously entered seeking improvement in the conditions and treatment of residents at state institutions for the retarded and mentally ill. A substantial amount of time, not fully reflected in the above statistics, was also spent advising the various boards of registration in administrative proceedings which did not always result in litigation. Also, a rapidly growing portion of Government Bureau time is spent in connection with claims for attorneys' fees under 42 U.S.C. §1988. These claims arise in both state and federal court and often involve substantial amounts of state money (e.g., as of the beginning of FY 1982, plaintiffs' attorneys in *Rogers* v. *Okin* claimed over $1.5 million in fees; in *Brewster* v. *Dukakis,* the claim exceeded $1.2 million).

This was an unusually active year for the Government Bureau in the United States Supreme Court. In addition to *Commonwealth* v. *New Hampshire,* (see, Affirmative Litigation, below), the Government Bureau was before the Supreme Court in three cases which were decided during FY 1982. In *Globe Newspaper Co.* v. *Superior Court for the County of Norfolk,* the Court struck down a Massachusetts statute which required the exclusion of the public from trials for certain sex offenses involving victims under the age of eighteen. The statute was held to violate the First Amendment right of access to criminal trials. In *Rendell-Baker* v. *Kohn,* the Court agreed with the Commonwealth's position that the firing of a teacher by a private, "special needs" school was not "state action" for purposes of the Fourteenth Amendment despite the substantial state funding and regulation of the school. Finally, in a unanimous decision, in *Schweiker* v. *Hogan*, the Supreme Court reversed a judgment of the federal district court which had invalidated a Medicaid statute and regulation.

Government Bureau lawyers argued ten cases before the United States Court of Appeals for the First Circuit which resulted in reported decisions this year.[1] The Legislature's delay in enacting a budget at the outset of fiscal year 1982 resulted in an action brought by welfare recipients seeking to require the Commonwealth to issue their checks for the month of July despite the absence of an appropriation. In that case, *Coalition for Basic Human Needs* v. *King*, the First Circuit ordered the Commonwealth to take all steps necessary to ensure that the checks issue promptly; however, the Legislature enacted an interim budget covering those checks before the court's order took effect. *Brewster* v. *Dukakis*, another of the First Circuit cases decided this year also arose from an absence of

[1] As in the Supreme Judicial Court and the Massachusetts Appeals Court, the Government Bureau briefs and argues many more appeals than result in reported decisions. Although briefing and argument of these cases requires the same professional effort as any others, the issues presented in such cases are relatively insignificant or are already settled and, consequently, are disposed of in unreported summary decisions or by rescript opinion. Such cases are not included in the Government Bureau's roster of appellate decisions this fiscal year.

legislative appropriations for funds required to implement a consent decree previously entered into by state mental health officials. In that case, the First Circuit vacated or modified certain district court orders requiring that the consent decree programs required be fully funded. In the *Brewster* decision, which has important ramifications for other consent decree cases, the First Circuit held that the district court could not require the defendants to go beyond what their good faith professional best efforts could reasonably be expected to achieve. In *Massachusetts Association For Retarded Children* v. *King*, the First Circuit dissolved a district court order which had enjoined the defendants from implementing a state statute requiring residents of the state schools for the mentally retarded who are financially ineligible for Medicaid to pay for their own care. That decision enabled the Commonwealth to increase its federal Medicaid revenues by substantial amounts for fiscal years 1981 and 1982.

Other significant Government Bureau cases decided by the First Circuit this year include the following: *Town of Burlington* v. *Department of Education*, the first case under the Education for All Handicapped Children Act to be decided by the First Circuit, in which the Court held that the standard of judicial review contained in the federal Education for All Handicapped Children Act preempts the state-law standard; and *Costa* v. *Markey*, in which height requirements for female police officers were upheld against a claim of sex discrimination under Title VII. The First Circuit rendered two decisions in FY 1982 in which Government Bureau attorneys have obtained further review in the United States Supreme Court. In *Grendel's Den, Inc.* v. *Larkin*, the First Circuit held that a state statute, G.L. c. 138, §16C, providing that premises may not be licensed to sell alcoholic beverages if a nearby church or school objects, violates the Establishment Clause of the First Amendment. In *Boston Chapter, NAACP* v. *Beecher*, the court held that prior orders to remedy discrimination in hiring may be modified to require a layoff procedure which maintains certain percentages of minorities in the Boston police and fire departments despite a valid state statute prescribing layoffs by seniority. Both *Grendel's Den* and *Boston Chapter* will be argued before and decided by the Supreme Court during FY 1983.

A substantial portion of the Government Bureau's resources in fiscal 1982 were devoted to the litigation of numerous cases in the United States District Court for the District of Massachusetts. In addition to the consent decree issues discussed above, many of these cases involved special education (e.g., *Town of Burlington* v. *Department of Education*); the rights of institutionalized elderly, retarded, and, mentally ill persons to treatment in the least restrictive environment (e.g., *Linden* v. *King*; *Gustafson* v. *Mahoney*); the rights of emotionally disturbed juveniles to community-based residential placements (e.g., *Jose T.* v. *Okin*); the standards governing the award of attorney's fees to prevailing parties under the Civil Rights Attorney's Fees Act (e.g., *Ingerson* v. *Hogan*; *Wescott* v. *Secretary of Health and Human Services*; *Coalition for Basic Human Needs* v. *King*); the amount of reimbursement to be paid to providers of Medicaid services by the Commonwealth (e.g., *Massachusetts Hospital Association* v. *Secretary of Health and Human Services*); and questions relating to compliance with various consent decrees entered into by state defendants during the 1970's (e.g., *Brewster* v. *Dukakis*, *Ricci* v. *Okin* and four consolidated cases, and *Fortin* v. *Spirito*). In addition, the Government Bureau was actively involved in

a number of proceedings before the United States Bankruptcy Court, in which Medicaid providers filed for bankruptcy. The Bureau's participation in these cases sought to ensure that state and federal Medicaid regulations were enforced, that the claims of the Commonwealth as a creditor were protected, and that challenges to the authority of state agencies to enforce their regulations against the debtors were defended.

During this fiscal year, Government Bureau lawyers were involved in 28 cases decided by the Supreme Judicial Court. Several of these cases involved the timely issues of property taxation and financial aid to cities and towns. In *Massachusetts Teachers Association* v. *Secretary of the Commonwealth*, Bureau attorneys successfully defended the constitutionality of "Proposition 2½," an initiative petition limiting the levels of municipal property and excise taxes. In another property tax case, *City of Newton* v. *Commissioner of Revenue*, the court upheld guidelines issued by the Commissioner of Revenue for determining the limitation of Newton's property tax levy for fiscal year 1982. In *Mayor of Boston* v. *Treasurer and Receiver General*, a legislative proviso restricting Boston's use of state aid was held to violate the Home Rule Amendment of the Massachusetts Constitution.

Two important insurance cases were handled by Bureau attorneys before the Supreme Judicial Court this year. In *Massachusetts Auto Rating and Accident Prevention Bureau* v. *Commissioner of Insurance*, a team of Bureau attorneys successfully defended the 1981 auto insurance rates established by the Commissioner of Insurance. In *Kartell* v. *Blue Shield of Massachusetts, Inc.*, in which a Bureau attorney represented the Commissioner of Insurance, the court responded to questions of law certified to it by the United States District Court concerning the rights and duties of Blue Cross and Blue Shield under state law.

In several cases, Bureau attorneys were called upon to defend the validity of state statutes and regulations. Those cases included: *Massachusetts Council of Construction Employers, Inc.* v. *Mayor of Boston*, in which the court held that G.L. c. 149, §26, giving employment preference to Massachusetts residents for positions in state-funded construction projects, is unconstitutional (the City has appealed to the Supreme Court the portion of that decision affecting a mayoral executive order); *Guaranty Mortgage Corporation* v. *Town of Burlington*, in which a Bureau attorney successfully defended a procedural due process challenge to the constitutionality of G.L. c. 60, §79, governing the sale of low-value and for non-payment of taxes; and *Zoning Board of Appeals of Wellesley* v. *Housing Appeals Committee*, in which the court upheld the validity of a state regulation defining low or moderate income housing.

Several of the cases handled by the government Bureau before the Supreme Judicial Court this year concerned the administrative powers of judges. In *Attorney General* v. *Administrative Justice of the Boston Municipal Court*, the court ruled that, due to the effective Governor's veto of certain line items in the 1982 budget, the Administrative Justice of the Boston Municipal Court does not also hold the position of Administrative Justice of the Housing Court. In *Brach* v. *Chief Justice of the District Court Department*, the court struck down a regulation promulgated by the defendant requiring persons convicted of certain motor vehicle offenses to surrender their drivers' licenses to the court. In *Clerk of the Superior Court for the County of Middlesex* v. *Treasurer and Receiver*

General, the court upheld the validity of a centralized bank account system adopted by the Chief Administrative Justice of the Trial Court.

During fiscal year 1982, Government Bureau attorneys represented the Commissioner of Revenue in six appeals to the Supreme Judicial Court from decisions of the Appellate Tax Board. In *Commisssioner of Revenue* v. *Massachusetts Mutual Life Insurance Co.*, the court upheld the constitutionality of G.L. c. 63A, §22A, which governs the assessment of excise taxes to be paid by domestic insurance companies. In *Seiler Corp.* v. *Commissioner of Revenue*, the court upheld the Commissioner's imposition of a meals tax on certain items sold through vending machines. In *Southeastern Sand & Gravel, Inc.* v. *Commissioner of Revenue*, the count held that a corporation engaged in quarrying and crushing stone is not a "manufacturing" corporation entitled to a tax exemption.

Two other significant Government Bureau cases decided by the Supreme Judicial Court this year are *Draper* v. *Town Clerk of Greenfield*, the first attorneys fees case decided by the Supreme Judicial Court under 42 U.S.C. §1988, and *Bradley* v. *Commissioner of Mental Health*, in which the court held that the trial court's order requiring the defendant to provide a less secure mental health facility for the plaintiff exceeded the court's authority and amounted to a usurpation of executive and legislative functions.

Bureau lawyers also participated in eighteen cases decided by the state Appeals Court this year. Among the most significant of those cases was *Robinson* v. *Secretary of Administration and Finance*, in which the Appeals Court vacated a preliminary injunction entered by the Superior Court, thereby enabling the Secretary to implement a $4 semi-annual fee for the inspection of motor vehicles. Other Government Bureau cases decided by the Appeals Court this year involved issues of termination of parental rights (e.g., *Custody of a Minor (No.2)*; *Petition of the Department of Public Welfare to Dispense with Consent to Adoption)*; personnel and civil service matters (e.g., *Commissioner of the MDC* v. *Civil Service Commission*; *Young* v.*Commissioner of Public Safety*); taxation (e.g., *Board of Assessors of Provincetown* v. *Commissioner of Revenue*); and suspension of licenses (*Rao* v. *Board of Registration of Real Estate Brokers*; *Griffin's Brant Rock Packaging Store Inc.* v. *ABCC*).

AFFIRMATIVE LITIGATION DIVISION

The Attorney General has established the Affirmative Litigation Division in the Government Bureau in order to represent the Commonwealth and its officers and agencies when performance of their official duties or protection of their interests require resort to the state or federal courts.

The affirmative litigation cases which the Government Bureau brings may be divided into three broad, and sometimes over-lapping, categories: (1) advocacy litigation; (2) federal program litigation; and (3) enforcement litigation. The first category includes cases which the Attorney General commences on behalf of a state agency with an advocacy responsibility or in the furtherance of his own obligation to advance the public interest or to protect the interest of the Commonwealth as a sovereign. The second category, litigation related to federal

programs continues to account for a substantial portion of the Bureau's affirmative litigation efforts. These cases also tend to be the most significant ones in terms of financial value since federal government programs involve hundreds of millions of dollars due to the Commonwealth and its citizens. Finally, in cases of the third category, the Bureau performs the traditional enforcement function of the Attorney General by commencing suit on behalf of state regulatory and licensing agencies. The following paragraphs contain brief descriptions of significant or representative cases litigated during the reporting year.

In *Commonwealth* v. *New Hampshire*, the Bureau intervened, on behalf of the Commonwealth and its residents, in a challenge to a decision of the New Hampshire Public Utilities Commission prohibiting the exportation of hydroelectric power by the New England Power Company. The cost of that decision to Massachusetts consumers was estimated to be in excess of one hundred million dollars annually. Following the New Hampshire Supreme Court's affirmance of the PUC order, the Government Bureau sought further review in the United States Supreme Court. After granting review, the Supreme Court reversed the New Hampshire decision, agreeing with the Attorney General's argument that the decision amounted to unconstitutional interference with interstate commerce and discrimination against the Commonwealth and its citizens. The ultimate result of this action is to prevent a significant rise in electric rates across the entire Commonwealth.

In another example of advocacy litigation, the Attorney General directed the Government Bureau, together with the Consumer Protection Division, to commence actions against nursing homes and other health care institutions to obtain appointment of receivers to take over their operation. In *Commonwealth* v. *Newburyport Manor Chronic Hospital, Inc., et al.*, the Department proceeded under G.L. c. 111, §56, and obtained the appointment of a receiver to manage two chronic care facilities with over 200 patients when the owners and mortgagees refused to continue their operation. Both facilities were subsequently sold to a third party. In *Bellotti* v. *Steven S., Inc. d/b/a Newburyport Manor Nursing Home*, Government Bureau attorneys sought and obtained the appointment of the first receiver pursuant to the newly enacted G.L. c. 111, §§72M, when the failure of the owner to provide essential services had created an emergency in the facility potentially threatening the health and safety of the patients.

Occasionally, the Government Bureau is called upon to litigate against political subdivisions of the Commonwealth to vindicate the Commonwealth's and the public's interest. For example, in *Commonwealth* v. *County of Suffolk*, the Government Bureau, on behalf of the Trial Court of the Commonwealth, sued Suffolk County, the Mayor of Boston, and others, to stop an effort to terminate or reduce the level of services provided at the Suffolk County Courthouse. The defendants' actions created a significant threat to the Trial Court's ability to continue the effective administration of justice in Suffolk County and the Supreme Judicial Court entered an injunction requiring the defendants to continue to provide necessary services and facilities at the courthouse.

An example of federal program litigation is *Ambach, et al.* v. *Bell*, an action commenced by Government Bureau attorneys in concert with nine other states against the Secretary of Education seeking to require him to use 1980 census data as the basis for allocating Title I/Chapter I funds to the states and local

school districts. The Secretary insisted on attempting to allocate the funds on the basis of 1970 census data. The use of 1970 census data would have resulted in the loss of over $9 million in federal Title I aid to the Commonwealth. Late in FY 1982 the district court entered a preliminary injunction which prohibited the Secretary from distributing Title I funds on the basis of 1970 census data. Although the Court of Appeals vacated that injunction, the Congress has since enacted legislation which restores the funds which Massachusetts would receive under the 1980 census data.

In another example of federal program litigation, the Government Bureau initiated litigation on behalf of the Department of Public Welfare against the Federal Department of Health and Human Services, seeking to compel that agency to contribute its share of financial participation for the cost of Medicaid abortions paid for by Massachusetts in compliance with orders of the Court of Appeals for the First Circuit in *Preterm, Inc.* v. *Dukakis*. The disallowance covers the period August, 1978, through June, 1980, and will amount to over $700,000 in federal funds. The Bureau argues that the Commonwealth is entitled to receive federal reimbursement for the payment of Medicaid abortions for which it was ordered to pay solely because of its participation in the federal Medicaid program, the restrictions of the so-called Hyde Amendment notwithstanding. The case is in the initial stages of litigation before the United States District Court.

The Government Bureau also filed two separate actions on behalf of the Department of Public Welfare in the United States District Court against the Secretary of Health and Human Services relating to an ongoing dispute over payment of federal reimbursement to the Commonwealth under the Medicaid program when long-term care facilities which received Medicaid payments from the state are later adjudicated bankrupt or cease business. These cases have been argued and are pending decision in the First Circuit.

As in past years, the Government Bureau commenced many lawsuits to enforce the licensure requirements, regulations, and orders of state agencies. For example, in *Commonwealth* v. *Yamilkowski*, the Bureau obtained a preliminary injunction against an individual who was installing formaldehyde insulation, a substance banned by the Commissioner of Public Health as creating a health hazard. This case represents one of the many situations in which the Bureau must bring suit to enforce decisions and orders issued by state agencies which, without aggressive enforcement, would fail to achieve their intended effect.

OPINIONS AND BY-LAW DIVISION

General Laws Chapter 12, section 3, authorizes the Attorney General to render legal advice and opinions to state officers, agencies and departments on matters relating to their official duties.

(1) *Standards for Issuing Opinions*

Following in large part the established practice of previous Attorneys General, the Attorney General gives opinions only to state agencies, departments and the officials who head those entities. The Attorney General does not render opinions to individual employees of a state agency. He does not answer legal

questions posed by county or municipal officials or by private persons or organizations.

The questions which the Attorney General considers in legal opinions must have an immediate, concrete relation to the official duties of the state agency or officers requesting the opinion. In other words, hypothetical or abstract questions or questions which ask generally about the meaning of a particular statute, lacking a factual underpinning, will not be answered.

The Attorney General does not render opinions on questions raising legal issues which are or soon will be the subject of litigation or that will concern collective bargaining. He also refrains from making findings of fact, as well as answering questions relating to the wisdom of legislation or administrative or executive policies. Finally, he does not generally undertake the task of construing federal statutes or the constitutionality of proposed state or federal legislation.

(2) *Procedures for Requesting an Opinion*

In an effort to make the Attorney General's opinion rendering function as effective, helpful and efficient as possible, the Opinions Division has established a number of procedural guidelines to govern opinion requests.

Opinion requests from state agencies (or heads of state agencies) which come under the jurisdiction of a cabinet or executive office must be first sent to the appropriate executive secretary for his or her consideration. If the secretary believes the question raised by a request is one which requires resolution by the Attorney General, the secretary should then request the opinion on behalf of the agency or send the agency's request with the secretary's approval noted.

There are two reasons for this rule. The first concerns efficiency. Opinions of the Attorney General, because of their precedential effect, are thoroughly researched and prepared. If a question can be satisfactorily resolved more quickly within the agency or executive office — by agency legal counsel or otherwise — everyone is better served. The second reason relates to the internal workings of the requesting agency and its executive office. It would be inappropriate for the Attorney General to place himself in the midst of an administrative or even legal dispute between these two entities. The rule, therefore, helps to ensure that the agency and its executive office speak with one voice insofar as opinions of the Attorney General are concerned.

If the agency or executive office requesting an opinion has a legal counsel, counsel should prepare a written memorandum explaining the agency's position on the legal question presented and the basis for it. The memorandum should accompany the request.

When an agency request raises questions of direct concern to other agencies, governmental entities, or private individuals or organizations in addition to the requestor, the Opinions Division will solicit the views of such interested parties before rendering an opinion. In this way, the Attorney General seeks to make sure that he does not overlook significant and relevant considerations.

The Attorney General strongly discourages the issuance of informal opinions. Informal opinions are often relied upon as though they are formal opinions of the Attorney General. In a number of instances, this reliance has been seriously

misplaced. As a result, the Attorney General is intent upon limiting the issuance of informal opinions to situations of absolute necessity.

(3) *Synopses of Opinion Requests*

Approximately 130 requests for an opinion of the Attorney General were received during FY 1982. Seventeen formal opinions of the Attorney General were rendered, some of which are summarized below.

Most of these opinions concerned questions of statutory construction necessary to the daily functioning of various state agencies. One such opinion request came from the Secretary of Administration and Finance who asked whether the Chairman of the State Ballot Law Commission, a retired judge receiving a pension, might receive additional compensation for his services as chairman without waiving his pension benefits. The Attorney General determined that the Chairman might receive both compensation and a pension as long as he did not serve as Chairman for more than 90 days and the total amount of both were not more than the amount of his salary before retirement.

The Commissioner of Public Safety asked whether the Chief of Inspections within his Department has police powers such that the Commissioner would be required to report him to the Board of Retirement along with other employees possessing police powers. The Attorney General concluded that, unlike the police powers specifically given to other inspectors, the conferring of police powers upon the Chief of Inspectors is within the discretion of the Commissioner; until such power is given, the Chief does not come under the statutory requirement that he be reported by the Commissioner to the Retirement Board.

The Chief Administrative Justice of the Trial Court asked whether the Clerk of Court might receive compensation for duties performed as a part-time court librarian outside his normal working hours. The Attorney General concluded that although a state employee may not receive more than one annual salary from the Commonwealth, this does not preclude his receiving additional "compensation" for special services performed outside the ususal working hours of his position.

The District Attorney for Berkshire County asked whether he was authorized to defend the county sheriff in a civil action under the federal civil rights act, 42 U.S.C. §1983 (1976). The Attorney General concluded that notwithstanding a provision in G.L. c. 258, §9, which authorizes public employers to indemnify public employees for violations of the federal civil rights laws, the District Attorney in his capacity as "public attorney" is only empowered to defend civil actions brought against the county pursuant to G.L. c. 258, §2, and not those actions brought against its officers or employees.

The District Attorney for Middlesex County asked whether the use of recording equipment by the City of Cambridge on its emergency, business, and internal phone lines constitutes an "interception" as proscribed by the eavesdropping statute, G.L. c. 272, §99 (B) (4), and whether the "beep" on the line is sufficient to signal to the calling party that the conversation is being recorded, thereby removing the practice from the statutory prohibition. The Attorney General concluded that the "beep" does not give the caller the requisite "actual knowledge" of the recording and, therefore, use of business or emergency lines with or without the "beep" is statutorily impermissible.

The Director of Employment Security asked whether a decision remanded to the Director by the Board of Review for the purpose of taking additional evidence requires the Director to issue a new decision and if not, whether the Director is required to make new findings of fact regarding the remanded case. The Attorney General concluded that the Director was not authorized to issue a new decision, but was required to make new findings of fact when the evidence at the remand hearing differs in any way from that at the original hearing.

Four other opinion requests focused upon the financial administration of the Commonwealth. The Commissioner of Education asked whether under the School Building Assistance Act, st. 1948,. c. 645, the Department of Education is required to continue to make reimbursement payments to cities and towns for buildings which are no longer used for school purposes. The Attorney General concluded that the statute had to be read strictly; since it did not contain an express provision for discontinuance of reimbursment payment, the discontinuance is unauthorized.

The Treasurer and Receiver General inquired regarding the amount of pension to be paid to the widow of a firefighter or police or corrections officer killed in the performance of his duties. The Attorney General concluded that the amount of pension should be the amount of the officer's salary at the time of his death, plus whatever salary increments he would have received thereafter.

The Chairman of the Arts Lottery Council asked whether the deduction from the Arts Lottery Fund for arts lottery expenses for fiscal year 1981 is limited to 15% of the total arts lottery revenues for that year. The Attorney General concluded that the Arts Lottery Fund is comprised of revenues from lottery tickets, minus prizes and the expenses of the State Lottery Commission in administering the arts lottery. Since such expenses are not limited by statute, all related expenses of the Commission may be deducted.

The State Librarian inquired whether it is within the powers of the Board of Trustees of the State Library to dispose of books unsuitable for state library purposes and whether the proceeds from their sale might be placed in trust to be used for the needs of the library. Although the Attorney General opined that disposal of the books is within the discretion of the Library Board of Trustees, he concluded that the proceeds must be deposited in the state treasury.

Other requests centered around the question of whether certain individuals meet the statutory qualifications for appointment to the positions they seek. In response to the Inspector General's question whether, pursuant to chapter 388 of the Acts of 1981, he might hire individuals who were temporarily assigned from other state agencies to the Special Commission Concerning State and County Buildings, the Attorney General concluded that such appointment was precluded by the broad statutory prohibitions against appointment within the Inspector General's Office of any person, paid or volunteer, who served with the Special Commission.

In his capacity as Chairman of the Commission organized under G.L. c. 55, §3, for the purpose of selecting the director of campaigns and political finance, the Secretary of State asked whether he might appoint a current member of the General Court to the Office of Director of Campaign and Political Finance. The question required the application of Article 65 of the Amendments to the

Massachusetts Constitution which provides that "no person elected to the general court shall during the term for which he was elected be appointed to any office created or the emoluments whereof are increased during such term." The Attorney General concluded that Article 65 would not prohibit such an appointment.

The District Attorney of Middlesex County asked whether he might criminally prosecute individuals who make false police reports as a common law crime since there is no specific statutory prohibition. The Attorney General concluded that although there is no specific criminal liability for false reports to police offficers, they may still be liable for the common law offense of obstruction of justice.

The Commissioner of Education asked which veterans employed by the Department are included within the Veteran's Tenure Act so as to require a hearing before being laid off due to lack of funds. The Attorney General determined that as long as a veteran has served three consecutive years in the same position, he or she is covered by the Act regardless whether he or she is on a part-time payroll.

The Director of the Division of Standards asked whether G.L. c. 94, §303F, prohibits oil dealers from selling home heating oil by the gallon on a temperature-compensated basis. The Attorney General concluded that although a standard temperature for a gallon of oil at the time of delivery might be a better approach for retail oil sales, the statute requires that the statement of quantity of retail oil be expressed in gallons at ambient temperatures.

The Commissioner of Public Health asked two questions concerning his responsibilities to license certain health care facilities. The first concerned whether a building constructed as a motel might be renovated, remodeled, and licensed as a hospital under G.L. c. 111. The Attorney General concluded that licensure under G.L. c. 111 would require that the building have been originally constructed as a hospital, even when a conversion would enable the building to meet construction standards. The Commissioner also asked whether a professional corporation which does not use the term "clinic," "dispensary," or "institute" in its name and which submits documents showing one physician as its sole shareholder, director, and officer, is exempt from the "clinic" licensure requirements of G.L. c. 111, §51, because of the "solo or group practice" exception to those requirements. The Attorney General concluded that such a determination is within the purview of the Department itself, may require a factual evaluation, and offered guidelines for the Department in making these determinations.

(4) *By-Laws*

Town by-laws, home rule charters, and amendments thereto are reviewed and must receive approval of the Attorney General prior to becoming effective. The review function is performed by attorneys in the Government Bureau. During the fiscal year ending June 30, 1982, the Bureau reviewed over 1500 by-laws and a half dozen home rule charter actions.

The regulation of pesticides, hazardous and radioactive waste, and the discharge of firearms were frequent subjects of by-laws reviewed during the past year. Also, the Attorney General considered and disapproved several by-laws

which sought to regulate condominium conversions without proper enabling legislation.

Many towns have increased their fees in response to a legislative change allowing them to do so. Some by-laws increasing fees were disapproved on the grounds that the charge exceeded the cost of the service to be rendered.

August 4, 1981

Number 1.

Gregory R. Anrig, *Commissioner*
Department of Education
31 St. James Avenue
Boston, Massachusetts 02116

Dear Commissioner Anrig:

You have requested my opinion whether the Board of Education must continue to make reimbursement payments to cities and towns pursuant to the School Building Assistance Act, Chapter 645 of the Acts of 1948, as amended (hereafter, "Chapter 645"), if the building for which the payments were authorized is no longer used for school purposes. Your request derives from your responsibilities to the Board of Education concerning its legal duties and to ensure that the laws pertaining to education are enforced.

For the reasons set forth below, I am of the opinion that Chapter 645 requires the Board of Education to continue to make payments to cities and towns even if the building for which the payments were authorized is no longer used for school purposes.

The School Building Assistance Act created a program of finite duration whereby state financial assistance was extended to political subdivisions involved in eligible school building projects. Originally scheduled to expire at the conclusion of fiscal year 1951, it has been extended by a series of legislative enactments through the end of the fiscal year just passed. By the express terms of the statute, however, the payments provided by section nine are to be continued thereafter by the state Treasurer, subject to appropriation, in accordance with the provisions of said section, on certification by the Commissioner of Education. St. 1948, c. 645, §10, as amended by St. 1976, c. 302, §7.

Chapter 645 is a mechanism for providing financial assistance to cities and towns for the construction of school buildings. With amendments over the years since its initial passage, Chapter 645 remains the primary statute for this purpose. Each school building project undergoes a chronology of development and financing. After a need for the project is established and plans developed, the Board of Education approves the project. The locality issues bonds or notes, usually of 20-year duration, builds the project, with payment to contractors for work accomplished, and accepts the completed project. The Board of Education then approves its final cost. The locality repays the bonds or notes, and the Commonwealth, by the Board of Education, reimburses a percentage of the cost. (St. 1948, c. 645, §§6, 7, 8, 8A, 9, as amended.)

Upon an earlier request from you, I had an opportunity to opine on this statute. 1974/75 Op. Atty. Gen. No. 60, Rep. A.G., Pub. Doc. No. 12 at 141

(1975). At that time you requested an opinion whether the Board of Education could elect to make bond or note reimbursement payments to local authorities according to alternative payment schedules. I concluded that the Board could not. At that time I noted the language of Chapter 645 to be plain and unambiguous and that any alternatives to the mandatory language of the statute must come through legislative change.

My predecessor has also advised you regarding Chapter 645 and has concluded that because the statute does not expressly so provide, the board may not rescind its approval of a proposed project. 1974/75 Op. Atty. Gen. No. 30, Rep. A.G., Pub. Doc. No. 12 at 74 (1974). In so concluding, then Attorney General Quinn opined:

> A Board refusal to honor a request for funds for an *approved* project would so contradict the express direction of the Legislature . . . that it would be unlawful. Furthermore, approval by the Board is a significant event; when a locality receives notice of approval, substantial legal consequences immediately ensue: the city then possesses the authority to borrow an amount equal to the estimated grant. *See* St. 1948, c. 645, as amended, §8 (fourth paragraph).[1]

A review of Chapter 645, as amended, similarly reveals no express provision for the discontinuance of reimbursement payments even if the building for which the payments were authorized is no longer used for school purposes.[2] Based upon the prior opinions of the Attorney General and the governing rules of statutory construction, I must conclude that the Board has no authority to discontinue payments. While I am mindful of the practical implications of this conclusion, including the apparent contravention of the program's purpose[3] , the scope of the operation of the statute cannot be extended by any construction beyond its apparent limits. *Worcester* v. *Quinn*, 304 Mass. 276, 280 (1939). The unambiguous language of a statute is not susceptible to a construction to avoid hardship. *Rosenbloom* v. *Kokofsky*, 373 Mass. 778, 781 (1977); *Milton* v. *Metropolitan District Commission*, 342 Mass. 222, 227 (1961). Moreover, despite administrative temptation, a statute must be interpreted "without enlargement or restriction and without regard to one's own ideas of expediency". *See* v. *Building Com'r of Springfield*, 246 Mass. 340, 343 (1923). Statutes are to be construed as written, and contingencies for which no provisions are made do not justify judicial legislation. *Prudential Ins. Co. of America* v. *City of Boston*, 369 Mass. 542, 547 (1976).

As my predecessor has noted, "[T]he Legislature has not been unwilling to modify Chapter 645 of the Acts of 1948 where the same was required."

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[1] The legal consequences referred to by my predecessor are not insignificant. The statute requires bonds or notes issued by the municipality to "bear on their face the words, (name of city or town) School Project Loan, Act of 1948". St. 1948, c. 645, §8. Where the approval of a project allows a municipality to borrow in excess of its statutory limit, the purchasers of the notes and bonds are unquestionably acting in reliance upon the Commonwealth's commitment to the reimburse the municipality according to the schedule of payments set forth in section 9(d) of Chapter 645. Should reimbursement be discontinued, the detrimental reliance of both the municipality and the bondholder may well allow recovery against the Commonwealth. *See generally Loranger Const. Corp.* v. *E.F. Hanserman Co.*, 6 Mass. App. Ct. 152, 154-57 (1978), aff'd 376 Mass. 757 (1978).

[2] As you correctly note, Massachusetts law assigns to the municipality, rather than to the school committee, the responsibility for providing school buildings and the right to control those buildings if the municipality chooses to exercise that control or if the buildings are not needed by the school committee. G.L. c. 71, §68; G.L. c. 40, §15A. Control of school buildings includes the power to sell or lease the premises. G.L. c. 40, §3.

[3] That express purpose is "[t]o promote the planning and construction of school buildings an the establishment of consolidated and regional schools, in order to insure safe and adequate plant facilities for the public schools, and to assist towns in meeting the costs thereof . . . ." St. 1948, c. 645, §1.

1972/73 Op. Atty. Gen. No. 15, Rep. A.G., Pub. Doc. No. 12 at 67, 69 (1973). Each amendment has given the Legislature ample opportunity to address previous oversights in the Act. I do not express my view as to the value or wisdom of pursuing a legislative amendment which would permit withholding reimbursements from cities and towns if the building for which the payments were authorized is no longer used for school purposes. I simply conclude that the controlling law presently does not permit such a withholding.

For the foregoing reasons, I answer your question in the negative.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

October 9, 1981

Number 2.

Robert Q. Crane
Treasurer and Receiver General
State House
Room 227
Boston, Massachusetts 02133

Dear Mr. Crane:

You have requested my opinion as to the amount of pension under G.L. c. 32, §100, to be paid to the widow of a firefighter, police officer or correction officer who is killed in the performance of his duties. More specifically, you ask whether the amount of the widow's pension may increase periodically or whether it remains fixed at the maximum salary set for the officer's position at the time of his death.

For the reasons set forth below, I am of the opinion that the amount of pension immediately payable shall be the maximum salary set for the deceased officer's position at the time of death and that thereafter the widow is entitled to whatever increases in salary the officer would have received had he remained in that position.

The receipt of pensions by widows of firefighters, police officers or corrections officers who are killed in the performance of their duties is governed by G.L. c. 32, §100, as amended,[1] which provides, in pertinent part:

> [T]here shall be paid to the widow of such firefighter, police officer or corrections officer an annual amount of pension which shall be equal to the amount of salary *which would have been paid* to such firefighter, police officer or corrections officer *had he continued in service in the position held by him* at the time of his death; provided, however, that the amount of pension *immediately* payable shall be equal to the maximum salary set for the position whether or

[1] General Laws chapter 32, section 100, has been subject to numerous amendments in recent years. For example, in 1970, the Legislature amended the first sentence thereof by adding the present words which establish the amount of the widow's benefits. St. 1970, c. 318. In 1971, the Legislature amended the statute to provide benefits for the widows of police officers of the Massachusetts Bay Transportation Authority, St. 1971, c. 1012, and in 1973, for widows of corrections officers, St. 1973, c. 685.

not such firefighter, police officer or corrections officer had reached the maximum at the time of his death. (Emphasis supplied).

Where, as here, the language of a statute is plain, it must be interpreted in accordance with the usual and natural meaning of the words, *Gurley* v. *Commonwealth*, 363 Mass. 595, 598 (1973); *Burke* v. *Chief of Police of Newton*, 374 Mass. 450, 452 (1978), and so as to fulfill the legislative intent, *Industrial Finance Corporation* v. *State Tax Commission*, 367 Mass. 360, 364 (1975). While legislative intent must be ascertained by an examination of the language used, in connection with its legislative history and the system of law of which it is a part, *Commonwealth* v. *Welosky*, 276 Mass. 398, 401 (1931), the first tool of statutory construction is a literal reading of the words which comprise the subject statute.

By the very terms of section 100, the widow shall be paid what the officer "would have been paid . . . had he continued in service in the position held by him at the time of his death." Accordingly, if the officer in the continuation of his service was to receive periodic pay increases, a literal application of the statutory terms requires that those increases be reflected in the widow's pension. The statute provides that the amount "immediately" payable shall be the maximum salary set for the position of the deceased. The use of this terminology also indicates that the amounts of benefits payable under the statute may vary over time.

This construction also fulfills its legislative intent, as reflected in the legislative history of this provision. Prior to 1970, General Laws chapter 32, section 100, had provided that on the date the deceased firefighter or police officer would have reached the maximum retirement age, the widow's pension was "reduced to an amount equal to the amount such firefighter or police officer would have received had he lived and been retired at his maximum retirement age." The 1970 amendment struck entirely the language which attempted to permanently fix the amount of the widow's pension. See St. 1970, c. 318. This amendment evidences the legislative aim to provide full pension benefits to these widows. See St. 1970, c. 318.

An examination of the overall pension law of the Commonwealth, of which this provision is a part, further supports my conclusion. Various amendments to chapter 32 "evidence an increasing recognition of the obligation of the public toward those who enter its service in occupations involving risk of injury and death." *Acford* v. *Auditor of Cambridge*, 300 Mass. 391, 393-94 (1938). I must presume, for example, that the Legislature was aware at the time of the 1970 amendment of the specific provisions regarding retirement and pension benefits for widows and dependents contained in G.L. c. 32.[2] *Condon* v. *Haitsma*, 325 Mass. 371, 373 (1950). Because of this presumption and because these provisions are part of an overall statutory scheme, see *Registrar of Motor Vehicles* v. *Board of Appeal on Motor Vehicle Liability Policies and Bonds*, Mass. Adv.

[2] General Laws chapter 32, section 9, for example, governing accidental death benefits for the dependent of the deceased beneficiary, fixes the yearly amount of pension at 72% of the deceased's annual rate of compensation on the date such injury was sustained or at 72% of the average rate of compensation for the prior twelve month period. Similiarly, under G.L. c. 32, §89B, widows of police officers or firefighters may receive "an accidental death benefit allowance to consist of a yearly amount of annuity equal to two thirds of the annual rate of regular compensation of such police officer or firefighter on the date such injury was sustained or such hazard was undergone . . . " On the other hand, General Laws chapter 32, section 100, reflects a legislative determination that widows of employees of fire and police departments and corrections agencies who are killed while undergoing the risks inherent in their positions are to receive greater benefits.

Sh. (1981) 415, 420, I must conclude that these distinctions are intentional. Thus, if the Legislature has intended to fix the widow's pension at the maximum salary of the officer at the time of his death, it would have so specified.

I note that my conclusion is consistent with my construction of this statute in a previous opinion which I have rendered to you. See 1975/76 Op. Att. Gen. No. 7, Rep. A.G., Pub. Doc. No. 12 at 76 (1975). In that opinion I had occasion to comment upon the purpose of section 100, as follows:

> An analysis of the language and history of §100 indicates that its purpose is to give a full pension to widows of those employees of the fire department, police department, and corrections agencies who, as a result of their duties, are exposed to the risk of danger on a day-to-day basis. In this regard, it is important to note that the amending legislation to G.L. c. 32, §100 has been expansive in nature. *Id.*

For the foregoing reasons, it is therefore my opinion that the amount of benefits payable to widows under G.L. c. 32, §100, is not fixed at the maximum salary for the respective position at the time her spouse is killed in the performance of his duties, but, rather, must increase each year as if the deceased firefighter, police officer or corrections officer remained in that position.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

October 13, 1981

Number 3.

Edward T. Hanley, *Secretary*
Executive Office for Administration and Finance
State House
Boston, Massachusetts 02133

Dear Secretary Hanley:

You have requested my opinion whether the chairman of the State Ballot Law Commission, a retired judge receiving a judicial pension, may receive additional compensation for his service as chairman. You have requested this opinion because the present chairman has asked you whether he may receive compensation at the rate set by the Governor[1] without waiving his pension benefits.

For the reasons discussed below, it is my opinion that the chairman may receive both his judicial pension and also his compensation as chairman, but only (1) if his services actually rendered as chairman do not exceed ninety days or seven hundred and twenty hours (720) in the aggregate in any calendar year and (2) his earnings as chairman, when added to his pension, do not exceed the salary which is being paid for the position from which he was retired. If these

[1] By letter of March 19, 1980, you informed the present chairman that the Governor has determined the rate of compensation for members of the State Ballot Law Commission to be $150.00 per day per member, not to exceed $2500., plus reimbursement for expenses. Prior to that time, however, you had already informed the chairman that he may not accept compensation for his services without waiving pension benefits.

two conditions are not met, he may not receive compensation without waiving his pension benefits. He can, at any rate, be reimbursed for his expenses incurred in rendering such services.

The chairman's claim to entitlement to compensation arises under General Laws chapter fifty-five B, sections one and three. That former section provides in pertinent part as follows:

> There shall be a state ballot law commission consisting of five persons to be appointed by the governor, one of whom shall be a retired justice of the supreme judicial court, appeals court, superior court or district courts of the commonwealth who shall be chairman.

Section three sets forth, *inter alia*, the compensation to be paid members of the commission and provides that:

> The members . . . shall each be paid such compensation for their services not exceeding twenty-five hundred dollars annually, as the governor may determine, and shall be reimbursed for expenses necessarily incurred in the performance of their duties . . .

Because the chairman is to be a "retired justice," these statutory provisions must be read in conjunction with General Laws chapter 32, section 91, which sets forth the circumstances under which a retired government employee may receive both pension benefits and compensation for government service during the period of retirement. See 1978/79 Op. Atty. Gen. No. 27, Rep. A.G., Pub. Doc. No. 12 at 152, 154 (1979). General Laws chapter 32, section 91(a) begins with the general prohibition that:

> [n]o person while receiving a pension or retirement allowance from the commonwealth . . . shall, after the date of his retirement be paid for any service rendered to the commonwealth . . .

This provision goes on to enumerate fifteen (15) specific exceptions to the general "no compensation" rule, none of which are relevant to the instant situation.[2] Each of these exceptions is both severely delimited and attaches only to a specific situation. No specific exception comprehends the service of a retired justice who serves as the chairman of the State Ballot Law Commission. The fact, however, that there are fifteen exceptions to the general rule, four of which may apply to retired justices, indicates a legislative intent to carefully proscribe the general prohibition of the statute. *Cf. Brady* v. *Brady*, Mass. Adv. Sh. (1980) 1053, 1056; *Harborview Residents Comm., Inc.* v. *Quincy Housing Authority*, 368 Mass. 425, 432 (1975) (express mention of one matter in a statute indicates legislative intent to exclude by implication other similar matters not mentioned).

General Laws chapter 32, section 91(a), goes on to provide a waiver procedure whereby an "apointed official" shall receive compensation if he waives

[2] Of these fifteen exceptions, four (4) apply directly to different forms of services which may be rendered by retired justices, that is, services under the provisions of section twenty-four of chapter two hundred and eleven, section sixteen of chapter two hundred and eleven A, and section fourteen of chapter two hundred and eleven B, and for services rendered as an auditor or master by appointment of the probate court, the superior court or the supreme judicial court. *See* St. 1978, c. 478, §15.

his retirement rights during the same period.[3] As an official appointed by the Governor for a term of years,[4] the retired justice who serves as chairman of the State Ballot Law Commission falls directly within this waiver section. Therefore, of course, the retired justice may receive compensation as chairman of the State Ballot Law Commission if he files the proper waiver documentation with the treasurer of the Commonwealth and thereby waives his pension rights[5] during his statutory term.

In addition, General Laws chapter 32, section 91(b), sets forth the conditions by which compensation may be paid to retirees for limited government service.[6] That subsection provides in pertinent part:

> *In addition to and notwithstanding the foregoing provisions of this section* or similar provisions of any special law, any person who has been retired and who is receiving a pension or retirement allowance, under the provisions of this chapter or any other general or special law, from the commonwealth . . . may, subject to all laws, rules and regulations, governing the employment of persons in the commonwealth . . . be employed in the service of the commonwealth . . . *for not more than ninety days, or seven hundred and twenty hours in the aggregate, in any calendar year*; provided that the earnings therefrom when added to any pension or retirement allowance he is receiving do not exceed the salary that is being paid for the position from which he was retired . . . (Emphasis added).

Thus, by a specific and narrow exception to the broad prohibition of section 91 (a), the Legislature has clearly provided a means whereby the chairman, even though appointed by the Governor for a term of years, may be compensated for temporarily providing his services.[7] See 1978/79 Op. Atty. Gen. No. 27, Rep. A.G., Pub. Doc. No. 12 at 152, 154 (1979).

Finally, I conclude that the chairman may be reimbursed for his necessary expenses incurred in serving in that capacity. This is so because the general prohibition contained in G.L. c. 32, 91(a), is directed to payment "for any services rendered" and does not proscribe reimbursement for expenses incurred in rendering such services. 1964/65 Op. Atty. Gen., Rep. A.G., Pub. Doc. No. 12 at 230 (1965).

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[3] The relevant language is as follows.
Notwithstanding the foregoing provisions of this section or similar provisions of any special law, a person who, while receiving such a pension or retirement allowance, is appointed for a term of years to a position by the governor shall be paid the compensation attached to such position; provided, that he files with the treasurer of the governmental unit paying such pension or allowance, a written statement wherein he waives and renounces his right to receive the same for the period during which such compensation is payable.

[4] General Laws chapter 55B, section 1, provides in part that:
The chairman shall serve for a term of one year from February first of the year in which he was appointed and may be reappointed for further terms. The other members of said commission shall serve for terms of two years from February first of the year in which they were appointed and may be reappointed for further terms.

[5] The pension benefits for retired justices of the Trial Court of the Commonwealth who have been appointed prior to January 2, 1975, are set forth in G.L. c. 32, §65A. Pension benefits for those appointed on or after that date are set forth in G.L. c. 32, §65D.

[6] G.L. c. 32, §91(b) was inserted by St. 1968, c. 676, "An Act Permitting Persons Retired From Public Service To Be Employed Therein For Not More Than Ninety Days In The Aggregate In Any Calendar Year." The manifest intent of this subsection is to permit retirees to return to service on a limited, part-time basis without waiving pension benefits. It applies, regardless of the duration of a particular appointment, whenever the retiree's service is actually limited to ninety days or seven hundred and twenty hours in the aggregate, in any calendar year. Compare, G.L. c.268A, §4 (service "on not more than sixty days")

[7] I note that at the current rate of compensation for members of the Commission, as established by the Governor, the chairman, in any event, will be compensated for only 16 2/3 days' service, and in an amount not to exceed $2500.

It is my opinion, therefore, that the chairman of the State Ballot Law Commission may receive his judicial pension during the tenure of his paid appointment as chairman, but only in the manner provided by G.L. c. 32, §91(b).

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

November 10, 1981

Number 4.

John J. Droney, *District Attorney*
Middlesex County
Superior Courthouse
East Cambridge, Massachusetts 02141

Dear Mr. Droney:

You have requested my opinion, pursuant to G.L. c. 12, §6, whether you may prosecute an individual for voluntarily making false reports to police officers, thereby compelling them to expend important amounts of time, resources and energy in futile efforts at verification. Specifically, in the absence of a statute explicitly making such conduct punishable as a crime,[1] you ask whether the making of false reports may be prosecuted in Massachusetts as a common law crime. For the reasons set forth below and although the question is ultimately one for the courts of the Commonwealth, I conclude that an individual who voluntarily makes reports to the police which he knows to be false may be prosecuted in Massachusetts for the common law offense of obstruction of justice.

As an initial matter, I note that there is no statute in the Commonwealth which makes conduct of this sort punishable as a crime.[2] The absence of any reference to such a crime in the General Laws[3] focuses our inquiry upon whether the conduct is punishable at common law in Massachusetts. *See Commonwealth* v. *Jarrett*, 359 Mass. 491, 494-95 (1971), and cases cited; *Commonwealth* v. *Lopes*, 318 Mass. 453, 457 (1945). See also G.L. c. 279, §5. Such an inquiry necessarily requires a review of early Massachusetts cases and the rich heritage

[1] A review of the general laws reveals several statutes which establish criminal liability for specific instance of false reporting . *See* G.L. c. 268, §§6 and 6A (false reports by and to certain state agencies); G.L. c. 268, §32 (false alarms); G.L. c. 269, §13 and §14 (false reports of fires and locations of explosives). These statutes, while indicative of a general legislative aversion to false reporting in specific egregious circumstances, do not have a direct bearing on the specific question you have asked. The absence of an explicit reference in this statutory scheme to the particular conduct about which you inquire does not, however, indicate a legislative intent to insulate false reporting from criminal prosecution. Rather, in the absence of such a reference, the proper mode of analysis is to turn to the common law. *Commonwealth* v. *Jarrett*, 359 Mass. 491,495 (1971).

[2] The crime of making false reports to law enforcement officials was included in the 1972 proposed Massachusetts criminal code *see* Proposed Criminal Code of Massachusetts, c. 268, §4 (1972)], but the Legislature has not yet seen fit to implement needed reforms in the many criminal statutes which may be found scattered throughout the General Laws. A federal statute, 18 U.S.C. §1001, has been construed to permit such conduct to be prosecuted as a federal crime. *See, e.g., United States* v. *Massey*, 550 F.2d 300, 305 (5th Cir. 1977) (federal statute is intended "to cover situations in which a person voluntarily seeks out a government agency with a statement which he knows to be false and which he has every reason to expect the agency to pursue"). Neither of these provisions, however, enables a district attorney to prosecute an individual for making false reports to police officers.

[3] *But see* G.L. c. 274, §4, setting forth the penalties for being an accessory after the fact of the commission of a felony. This section may provide for prosecution in certain circumstances of those who provide false information "with intent that [the principal felon] shall avoid or escape detention, arrest, trial or punishment . . . "

of our jurisprudential forefathers in England. Chief Justice Shaw explained the process succinctly in *Commonwealth* v. *Webster*, 5 Cush. 295, 303-04 (1850):

> [W]e resort to that great repository of rules, principles, and forms, the common law. This we commonly designate as the common law of England; but it might now be properly called the common law of Massachusetts. It was adopted when our ancestors first settled here, by general consent. It was adopted and confirmed by an early act of the provincial government, and was formally confirmed by the provision of the constitution (ch. 6, art. 6,) declaring that all laws which had theretofore been adopted, used, approved, in the province or state of Massachusetts bay, and usually practised on in the courts of law, should still remain and be in full force until altered or repealed by the legislature. So far, therefore, as the rules and principles of the common law are applicable to the administration of criminal law, and have not been altered and modified by acts of the colonial or provincial government or by the state legislature, they have the same force and effect as laws formally enacted.

See also *Cassidy* v. *Truscott*, 287 Mass. 515, 519 (1934) (the "Puritan colonists . . . claimed the common law as their birthright, and brought it with them, except such parts as were judged inapplicable to their new state and condition").

In England, an individual who voluntarily makes a report which he knows to be false to the police is susceptible to prosecution for the common law misdemeanor of "committing an act tending to the public mischief." *King* v. *Manley*, 1 K.B. 529, 534 (1932). In *Manley*, a woman was successfully prosecuted on a charge of having effected a public mischief on the basis that she made false reports to the local police, requiring them "to devote their time and services to the investigation of false allegations, thereby temporarily depriving the public of the services of these public officers . . . " *Id.* at 529. This conduct was deemed actionable because at common law, "[a]ll offences of a public nature, that is, all such acts or attempts as tend to the prejudice of the community, are indictable." *ID.* at 534, *quoting King* v. *Higgins*, 2 East. 5, 21, (Laurence, J.). *See also King* v. *Porter*, 1 K.B. 369, 372 (1910) (recognizing the crime of public mischief).

In America, the notion of public mischief is linked to the crime of obstruction of justice. *See* R. Perkins, Criminal Law (2nd Ed. 1969) at 494-498. Obstruction of justice is a generic term for a category of offenses against the state. *See, e.g., Commonwealth* v. *Russo*, 177 Pa. Super. 470, 111 A. 2d 359, 366 (1955) (obstruction of justice "is a common law offense which may take a variety of forms"); 4 Wharton's Criminal Law, §592 (14th Ed.) 1981. *See also Commonwealth* v.*McKarski*, 208 Pa. Super. 376, 222 A. 2d 411, 414 (1966) (linking obstruction of justice with the common law notion that an individual may be prosecuted for an offense "against the public police or economy"). In this respect, courts have determined that "[t]he common law is sufficiently broad to punish as a misdemeanor . . . any act which directly injures or tends to injure the public . . . . " *Commonwealth* v. *Mochan*, 177 Pa. Super. 454, 110 A. 2d 788, 790 (1955).

Massachusetts appears to recognize the common law offense of obstruction of justice, *see Commonwealth* v. *Reynolds*, 14 Gray 87, 91 (1859), but the range of indictable offenses under that rubric is unclear. *See*, *e.g.*, *Commonwealth* v. *Devlin*, 366 Mass. 132, 138 (1974), where the court refused to consider whether an individual charged with removing fingerprints from a knife could be prosecuted at common law for obstruction of justice. In *Commonwealth* v. *Reynolds, supra*, the Court, while finding that a person may be prosecuted for attempting to deter a witness from testifying in court, noted the broad parameters of the crime of obstruction of justice. The Court stated that "obstruction of the due course of justice . . . means the due course of proceedings in the administration of justice. By obstructing those proceedings, public justice is obstructed." *Id.* at 91.

An individual who makes what he knows to be false reports to law enforcement officials, and whose conduct consequently requires those officials to expend valuable amounts of time and resources in a futile effort to verify those reports, is obstructing the due course of justice. Such conduct cannot be considered as a mere prank or harmless gesture. Rather, making false reports causes direct injury to the general public by causing law enforcement officials to squander public resources which ought to be devoted to genuine public needs. Diverting such resources from legitimate areas of criminal investigation directly impedes the orderly administration of justice. In the two specific instances to which you refer in your opinion request, it is evident that false reporting has had a seriously harmful effect upon the administration of justice in Middlesex County.[4] Such disruptions should not go unchecked.

In short, it appears that, as District Attorney for Middlesex County, you have the authority to prosecute for the common law crime of obstruction of justice[5] those individuals who knowingly make false reports to law enforcement officials. While this specific issue has never, to my knowledge, been tested in a Massachusetts court,[6] "[t]he test is not whether precedents can be found . . . but whether the alleged crimes could have been prosecuted and the offenders punished under the common law." *Commonwealth* v. *Mochan, supra* at 790. I believe an indictment on a charge of obstruction of justice will lie, and that prosecution on this basis would be based on colorable legal grounds. Ultimately, of course, this issue is one which must be resolved by the courts of this Commonwealth.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

[4] In one case, the false report led police astray in their investigation of a homicide. In another instance, witnesses apparently made false reports to an Assistant District Attorney and later recanted their testimony during preparation for trial. These instances graphically illustrate the serious ramifications of false reporting for the business of law enforcement in the Commonwealth.

[5] An issue which may arise in the context of a common law prosecution for false reporting is the degree to which such a prosecution, without prior notice, infringes on a defendant's right to due process. While this is essentially an open question which must ultimately be resolved by the court, it would appear that colorable arguments could be fashioned to resist such a constitutional challenge. *See*, *e.g.*, *Commonwealth* v. *Gallo*, 275 Mass. 320, 333-334 (1931) (changed conditions "require that the common law within the limits of the Constitution shall adapt its principles to meet present needs"). *Cf. Shoppers' World, Inc.* v. *Board of Assessors of Framingham*, 348 Mass. 366, 376 n.9 (1965) (re-examination of the scope of remedies is not unusual, and may be essential, to meet evolving constitutional interpretations).

[6] *But see Commonwealth* v. *Lopes*, 318 Mass. 453 (1945). There the Court found that the conviction of the defendants upon a count of conspiracy "to make false statements to the law enforcement officers, to the interference and obstruction of the due course of justice" was not warranted because of the lack of evidence of any conspiracy. *Id.* at 455.

November 12, 1981

Number 5.

Michael J. Daly
Acting Commissioner
Department of Education
31 St. James Avenue
Boston, Massachusetts 02116

Dear Mr. Daly:

You have requested my opinion concerning the applicability of the Veterans' Tenure Act, G.L. c. 30, §9A, to various employees within the Department of Education (the Department). You have requested this opinion at this time since the Department is being required to lay off employees due to federal and state funding cuts.[1] First, you have asked whether the Department has the "power" to decide that a particular position is not covered by G.L. c. 30, §9A, based upon the appointment and removal statutes governing that position and the degree of discretion exercised by one in that position. Second, you have asked whether, in computing the length of service of a person whose position is otherwise covered by the Veterans' Tenure Act, time served in a temporary ("02") position[2] should be included.

For the reasons discussed below, it is my opinion that the Department, acting through its Board of Education (hereafter, "the Board") and pursuant to its authority to appoint and remove employees, has the authority and responsibility to determine in the first instance whether such employees are covered by G.L. c. 30A, §9A. In response to your second question, it is my opinion that in computing the length of service for purposes of the Veterans' Tenure Act, it is irrelevant whether for all or a portion of that service, the position has been funded under the "01" or "02" subsidiary accounts.

My conclusion that the Board has the authority to determine whether particular positions are covered by G.L. c. 30, §9A, is based upon the Board's statutory authority to appoint and remove employees. *See, e.g.*, G.L. c. 15, §§1F, 1N, 10, 4A, 6B.[3] In exercising that authority, the Board must comply with other general statutes limiting the power to remove state employees, including G.L. c. 30, §9A, which provides, in part, as follows:

> A veteran . . . who holds an office or position in the service of the commonwealth not classified under . . . chapter thirty-one . . . and

[1] General Laws chapter 30, section 9A, provides that a veteran who has held for three years a position not governed by the civil service laws may not be involuntarily separated without a hearing before the appointing authority, pursuant to G.L. c. 31, §§41-43. Furthermore, if a tenured veteran is laid off for lack of funds, such lay offs must be made in reverse order of seniority, pursuant to G.L. c. 31, §39.

[2] "02" refers to the subsidiary account in the Department's budget covering compensation to those in positions characterized by the General Court as temporary. It should be noted that while the *positions* covered by "02" accounts are temporary, the individuals holding such positions may be permanent, provisional, or temporary employees as those terms are used in civil service law. G.L. c. 31, §§7, 8, 12, 13, 14, 15. Similarly, the "01" subsidiary account covers compensation to those in permanent approved *positions*, whether the incumbent of such a position is on a permanent, provisional, or temporary appointment. *See* Subsidiary Accounts and Expenditure Code Numbers for Budgetary Control at 3. In some agencies there is a direct correlation between the number of permanent positions authorized by the general appropriation act and the number of authorized, permanent civil service positions. However, since there is not necessarily a direct correlation, I attempt to refrain from using civil service terms.

[3] Although some of these statutes expressly refer only to appointment and not removal, it is well-settled that the power to remove can be inferred from the power to appoint. *Furlong* v. *Ayers*, 305 Mass. 455, 456-57 (1940); *Adie* v. *Mayor of Holyoke*, 303 Mass. 295, 300 (1939); *Barkin* v. *Milk Control Commission* Mass. App. Ct. Adv. Sh. (1979) 2069, 2075.

> has held such office or position for not less than three years, shall not be involuntarily separated from such office or position except subject to and in acccordance with the provisions of sections forty-one to forty-five, inclusive, of said chapter thirty-one . . .

In order to comply with this provision, it is necessary for the Board to determine whether a position from which an employee is about to be separated is covered by the Veterans' Tenure Act. The Board's power to make such a determination, while not expressly granted by statute, may therefore by inferred as "reasonably necessary for the full exercise of [its] power and for the faithful performance of [its] duty."[4] *Town Taxi, Inc.* v. *Police Commissioner of Boston*, 377 Mass. 576, 586 (1979), *quoting from Bureau of Old Age Assistance* v. *Commissioner of Public Welfare*, 326 Mass. 121, 124 (1950).

In exercising its authority to determine whether a particular position is covered by G.L. c. 30, §9A, the Board should follow the guidelines established by the courts and by my predecessors in construing this statute. It has long been established that the protection of the Veterans' Tenure Act "does not necessarily extend to every position which is not excluded from its provisions." *Cieri* v. *Commissioner of Insurance*, 343 Mass. 181, 185 (1961). *See also Hanley* v. *Commissioner of Insurance*, 355 Mass. 784 (1969); *Barkin* v. *Milk Control Commission*, Mass. App. Ct. Adv. Sh. (1979) 2069, 2072-73; 1975/76 Op. Atty. Gen. No. 28, Rep. A.G., Pub. Doc. No. 12 at 104, 105; 1966/67 Op. Atty. Gen. No. 66, Rep. A.G., Pub. Doc. No. 12 at 129, 130. Therefore, assuming that a position does not fall within the express exemptions contained in G.L. c. 30, §9A,[5] an exemption may still be inferred "[w]here it is apparent the Legislature has not intended to extend the protection of this statute to certain positions . . . "1966/67 Op. Atty. Gen. No. 66, at 130. *See also Barkin* v. *Milk Control Commission*, Mass. App. Ct. Adv. Sh. (1979) at 2074.

A legislative intent to exclude certain positions may be inferred from the language of the statutes concerning appointment to and removal from the position in question. *See, e.g., Dwyer* v. *Commissioner of Insurance*, 375 Mass. 227, 232 (1978); *Hanley* v. *Commissioner of Insurance*, 355 Mass. at 784; *Cieri* v. *Commissioner of Insurance*, 343 Mass. at 185; 1966/67 Op. Atty. Gen. No. 66 at 130. Where such statutes give an employing agency "free administrative discretion" with respect to removal of employees in a particular position, that position is not covered by the Veterans' Tenure Act. *Dwyer* v. *Commissioner of Insurance*, 375 Mass. at 231 n.8. Furthermore, even if the statute in question is silent with respect to removal, a legislative intent to afford "free administrative discretion" can be inferred from the nature of the position itself. For example, where the position is a high-level one in which the incumbent must work closely with the top administrators of the agency in carrying out agency policies, it is

[4] The board's determination that a particular position is not covered by G.L. c. 30, §9A, is not unreviewable. Rather, an employee (not holding a civil service position) who is separated without the procedural protections provided by G.L. c. 30, §9A, and who claims a right to tenure under that provision could seek a determination by the Civil Service Commission (the Commission) as to whether his removal was proper. In determining its jurisdiction to grant such review, the Commission would have to decide whether the position involved was covered by G.L. c. 30, §9A. *See, e.g., Chairman of the State Housing Board* v. *Civil Service Commission*, 332 Mass. 241, 242 (1955). The Commission's decision would then be subject to judicial review. *See id. See also Dwyer* v. *Commissioner of Insurance*, 375 Mass. 227, 228 (1978) (judicial review of applicability of G.L. c. 30, §9A, by a civil action in the nature of mandamus).

[5] The exemptions expressly listed in G.L. c. 30, §9A, are: "an elective office, an appointive office for a fixed term or an office or position under section seven of this chapter [confidential secretary] . . ."

improbable that the legislature intended such position to be tenured. *See, e.g., Barkin* v. *Milk Control Commission*, Mass. App. Ct. Adv. Sh. (1979) at 2074; *Cieri* v. *Commissioner of Insurance*, 343 Mass. at 186; 1975/76 Op. Atty. Gen. No. 28 at 105.

Since you have not specified which positions within the Department may be affected by lay offs due to funding cuts, I will not attempt to apply these guidelines to specific positions within your Department.[6] Furthermore, even where I have attempted to determine whether a particular position is covered by G.L. c. 30, §9A, I have advised the agency, in a close case, to follow the conservative course of granting a hearing of the type referred to in G.L. c. 31, §43, even though it may not be legally required. *See* 1975/76 Op. Atty. Gen. No. 28 at 105. *See also Chairman of the State Housing Board* v. *Civil Service Commission*, 332 Mass. 241, 245 (1955).

With respect to your inquiry whether time served in an "02" or temporarily authorized position should be included in computing an employee's length of service for purposes of the Veterans' Tenure Act, I refer you to an earlier opinion of mine, in which I stated as follows:

> [W]here a veteran has served for three years or more in the same position, and where the position in which he or she serves is, at the end of three years, classified as a permanent position, it is my opinion that the veteran qualifies under G.L. c. 30, §9A . . .

1975/76 Op. Atty. Gen. No. 50, Rep. A.G., Pub. Doc. No. 12 at 141, 142.

Because the facts underlying that opinion request did not require it, I did not express an opinion at that time whether a veteran would qualify under c. 30, §9A, if, after three years' service, the veteran occupied a position which was temporarily authorized. *Id.* at 142. The same reasoning and authority which supported my earlier opinion, however, also supports my present opinion that as long as a veteran serves for three consecutive years[7] in the same position, he or she is covered by the Veterans' Tenure Act, regardless whether the compensation for part or all of that time was paid from "02" funds:

> The language of §9A makes no distinction between temporary and permanent positions, only requiring three years of service in an office or position . . .
>
> There is no court opinion which distinguishes between temporary and permanent positions, except to the extent that service in such positions will not be tacked on for tenure purposes if the temporary and permanent positions are not the same.

1975/76 Op. Atty. Gen. No. 50 at 141-42. *See Chairman of the State Housing Board* v. *Civil Service Commission*, 332 Mass. at 245; 1960/61 Op. Atty. Gen., Rep. A.G., Pub. Doc. No. 12, at 96, 97.

Factors relevant to a determination whether the positions in question are the same or different include the names of the positions, the payroll codes, the

[6] The application of the guidelines will necessarily involve factual determinations which are more appropriately made by the Board. *Cf.* 1979/80 Op. Atty. Gen. No. 10, Rep. A.G., Pub. Doc. No. 12 at 116, 118 (1980) (noting limitations upon the Attorney General's authority to render opinions).

[7] *Cf.* 1965/66 Op. Atty. Gen., Rep. A.G., Pub. Doc. No. 12 at 216, 217 (tenure not acquired by veteran whose service in a particular position was temporarily interrupted by service in another, different position).

relative status of the positions in the agency structure, and the duties performed.[8] *See Commissioner of Administration* v. *Kelley*, 351 Mass. 686, 691 (1967); *Chairman of the State Housing Board* v. *Civil Service Commission*, 332 Mass. at 245; 1975/76 Op. Atty. Gen. No. 50 at 141.

In sum, it is my opinion that the Board of Education has the authority to determine, in the first instance, whether a particular position is covered by G.L. c. 30, §9A. If such a position is covered, and a veteran has served in that same position for three consecutive years, it is immaterial whether all or part of that time was served in a permanent (''01'') or temporary (''02'') position.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

November 13, 1981

Number 6.

Frank J. Trabucco, *Commissioner*
Department of Public Safety
1010 Commonwealth Avenue
Boston, Massachusetts 02215

Dear Commissioner Trabucco:

You have asked my opinion whether the chief of inspections within the Department of Public Safety (hereafter, ''the Department'') has police powers. Your question results from your duty as Commissioner to appoint the chief of inspections, G.L. c. 22, §4A, and your general administrative duties over the Department, G.L. c. 22, §3. One of these duties pertains to state retirement laws. General Laws chapter 32, section 3 (g), provides in pertinent part:

> Department heads shall furnish to the [State Board of Retirement] within thirty days after the receipt of a written request therefor, a statement giving the name, title, rate of regular compensation, duties, date of birth and length and class of service of each employee in his department and thereupon the board shall classify each member in one of the following groups:
>
> Group 1: Officials and general employees including clerical, administrative and technical workers, laborers, mechanics and all others not otherwise classified.
>
> Group 2: [O]fficials and employees of the department of public safety *having police powers* . . . (Emphasis supplied).

A reading of this statute indicates that whether the chief of inspections has police powers will determine his classification in group one or two. This in turn determines events such as retirement age. G.L. c. 32, §1 (maximum age

[8] It should be noted, however, that a person who merely performs the duties of a particular position without being permanently *appointed* to that position does not thereby accrue tenure in that position. *See, e.g., O'Dell* v. *Commissioner of Banks*, 3 Mass. App. Ct. 709 (1975) (acting director did not acquire tenure as permanent director); 1957/58 Op. Atty. Gen., Rep. A.G., Pub. Doc. 12 at 39,40 (acting Assistant Superintendent of state hospital did not acquire tenure as Assistant Superintendent). The distinction in such cases is between permanent and temporary *appointments* rather than, as here, between permanent and temporary *positions*. See note 2, *supra*.

defined). See also G.L. c. 32, §5.[1] Although department heads provide information upon which the State Board of Retirement bases its classification, it is the Board itself which classifies the member. *Maddocks* v. *Contributory Retirement Appeals Board*, 369 Mass. 488 (1976). Thus I answer the question which you pose in order to assist you in providing information to the Board. To the extent that your request pertains to the specific classification of the chief of inspections, I must, of course, respectfully decline to make a determination which has been conferred by statute upon the Board. *Cf.* 1961/62 Op. Atty. Gen., Rep. A.G., Pub. Doc. No. 12 at 199 (it is not the function of the Attorney General to pass upon questions of fact, policy or discretion).

After a review of the relevant statutes, it is my conclusion that the chief of inspections does not have police powers unless they are specifically conferred by the commissioner.[2]

Certain personnel within the department have police powers expressly conferred by statute. General Laws chapter 147, section 2, provides:

> *All officers and inspectors of the department* shall have and exercise throughout the commonwealth the powers of constables, police officers and watchmen, except as to service of civil process. The governor may command their services in suppressing riots and in preserving the peace. The commissioner may detail any officer or inspector in the division of inspection or in the division of fire prevention for temporary service in the division of state police. He may from time to time appoint *employees of the department* to serve at his pleasure as special state police officers and may invest them with such of the powers of state police as he may deem advisable. . . . (Emphasis supplied).

See also G.L. c. 22, §9A (additional officers appointed to the division of state police pursuant to that section are granted same powers).

The answer to your question depends in part upon whether the position of chief of inspections comes within the phrase in G.L. c. 147, §2: "all officers and inspectors of the department." If so, the holder of the position may have police powers. For the reasons set forth below, I conclude that the position does not come within that phrase.

The chief of inspections is appointed pursuant to G.L. c. 22, §4A. Because he directs the Division of Inspection within the Department, see G.L. c. 22, §3, the chief of inspections is an "officer" in the sense that the term means "public officer." *See Sherman* v. *Town of Swansea*, 261 Mass. 407, 409 (1927) (highway surveyors are public officers whose powers and duties are defined by statute); *Attorney General* v. *Tillinghast*, 203 Mass. 539, 543-544 (1909) (public officer is one whose duties are public in their nature and involve the exercise of some portion of the sovereign power). I conclude, however, that the terminology "all officers and inspectors of the department," as used in G.L. c. 147,

[1] While General Laws chapter 32, section 5, requires that members of group 2 retire at age sixty-five, chapter 46 of the Acts of 1980 provides an exception for district engineering inspectors, state building inspectors and state elevator inspectors. Because I conclude that the chief of inspections is not an "inspector" within the Division of Inspection and because this statute omits from its terms the chief of inspections, *cf. General Electric Co.* v. *Commonwealth*, 329 Mass. 661, 664 (1953) (express mention of one matter in a statute excludes by implication other similar matters not mentioned), this statutory exemption does not apply to this position.

[2] I am informed by the State Board of Retirement that the current and most recent holders of the position of chief of inspections have received written grants of police powers from the commissioner.

§2, includes the word "officers" in a narrower sense, i.e., to designate those persons appointed to the Department pursuant to G.L. c. 22, §6.[3]

I so conclude, first, because application of the rules of statutory construction requires that words and phrases which "have acquired a peculiar and appropriate meaning in law" are to be "construed and understood according to such meaning." G.L. c. 4, §6. Second, General Laws chapter 147, which defines in part the duties of the Department, cannot be read in isolation, but must be read in conjunction with General Laws chapter 22, which establishes the Department. *See Registrar of Motor Vehicles* v. *Board of Appeal*, Mass. Adv. Sh. (1981) 415, 421; *Board of Education* v. *Assessors of Worcester*, 368 Mass. 511, 513-514 (1975); *Pereira* v. *New England LNG Co., Inc.*, 364 Mass. 109, 115 (1973) (where two or more statutes relate to the same subject matter, they should be construed together so as to constitute a harmonious whole consistent with the legislative purpose).

The term "officers and inspectors" occurs frequently in General Laws chapter 22, and in each occurrence it is clearly related to officers and inspectors who have been appointed pursuant to G.L. c. 22, §6.[4] Additionally, General Laws chapter 22, section 6, provides that the number of "officers and inspectors" appointed pursuant to that section may be increased only with the approval of the Governor and Council, except as provided in G.L. c. 22, §§9 and 9A (Governor alone may authorize commissioner to make additional appointments to state police) and G.L. c. 147, §2 (the commissioner may detail officers or inspectors from division of inspections and fire prevention for temporary service in division of state police, and may appoint department employees as special state police officers). Thus the word "officers" in G.L. c. 22, §§6, 9, and 9A, refers to state police officers. I must conclude, also, that the word "officers" in G.L. c. 147, §2, is being used in the narrower sense referred to above. Because the chief of inspections is clearly not an officer appointed pursuant to G.L. c. 22, §6, but an administrator appointed pursuant to G.L. c. 22, §4A, that position is not intended to be included in the term "officers" in "all officers and inspectors" in G.L. c. 147, §2.

For similar reasons, I conclude that the term "inspectors" as used in G.L. c. 147, §2, does not include the chief of inspections, but refers only to "inspectors" appointed pursuant to G.L. c. 22, §6. The Legislature has dealt with the appointment of the chief of inspections separate from the appointment of other inspectors. *See* G.L. c. 22, §§4A, 6. Indeed, throughout the public safety statutes, the position of chief of inspections is treated as a wholly separate position from that of inspector. *See, e.g.*, G.L. c. 143, §§1, 50; G.L. c. 146, §§1, 10, 13, 17, 45A, 50A, 62, 67, 67A, 70, 77; G.L. c. 148, §1. I have not found a single instance where the term "inspector" is used in a way that even arguably is meant to include the chief of inspections. I conclude, therefore, that as used in G.L. c. 147, §2, "inspectors" does not include the chief of inspections.

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[3] General Laws chapter 22, section 6, provides, "The commissioner may appoint, transfer and remove *officers, inspectors*, experts, clerks and other assistants . . . ." (Emphasis supplied).

[4] *See, e.g.*, G.L. c. 22, §6A (no person who has been convicted of a felony shall be appointed as an officer or inspector); §7 (each officer and inspector receives traveling and necessary expenses when on duty); §7A (injuries in line of duty); §7B (injuries or death in line of duty); §8 (officers and inspectors must take oath of office within ten days after date of appointment).

The chief of inspections, for the reasons given above, is not one of the officers or inspectors of the department upon whom police powers are expressly conferred by G.L. c. 147, §2. For the purposes of that provision, however, the chief of inspections is an "employee of the department"[5] who may be invested with police powers at the discretion of the commissioner. G.L. c. 147, §2. This conclusion is consistent with the broad discretion granted to the commissioner by G.L. c. 147, §1.[6] *See also* G.L. c. 22, §3.

In summary, it is my opinion that the chief of inspections is not expressly granted police powers by statute. If necessary to insure the public safety, however, the commissioner may appoint any employee of the department as a special state police officer and invest that employee with such police powers "as he may deem advisable." G.L. c. 147, §2. This includes the chief of inspections.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

January 26, 1982

Number 7.

Honorable Arthur M. Mason
Chief Administrative Justice
The Trial Court
Commonwealth of Massachusetts
317 New Court House
Boston, Massachusetts 02108

Dear Judge Mason:

You have requested my opinion whether a Clerk of Court may receive compensation, in addition to his usual salary, from the treasury of the Commonwealth for duties performed outside of normal working hours as a part-time librarian for the court library. For the reasons set forth below, and on the basis of the facts which you have presented, I believe you could correctly conclude[1] that a Clerk may receive compensation in addition to his usual salary for his part-time work as a law librarian.

The starting point for analysis is G.L. c. 30, §21, which provides that:

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

[5] For other purposes he might not be so classified. *See, e.g., Attorney General* v. *Tillinghast*, 203 Mass. 539, 543 (1909) (where a public officer is distinguished from a "mere employee," whose duties are merely clerical, or an agent or servant) *See also McGrath* v. *Mass. Port Authority*, 350 Mass. 762 (1966).

[6] General Laws chapter 147, section 1, provides.
The commissioner of public safety . . . shall have charge of the administration and enforcement of all laws, rules and regulations which it is the duty of the department . . . to administer and enforce, and shall, except as is otherwise provided, direct all inspections and investigations. He shall, subject to the approval of the governor, make all necessary rules for the government of his department, for reports to be made by officers under him and for the performance of their duties . . .

[1] Although your request concerned a particular court clerk, I must respectfully decline to make an individual determination based upon a specific case, since such a venture necessarily involves a determination of facts, which the Attorney General has traditionally refrained from making *See* 1961 62 Op. Atty Gen., Rep A.G., Pub. Doc. No 12 at 199

That general proscription has been the subject of much review over the years and has been interpreted by the courts and my predecessors in a manner which produces logical and practical results. *E.g., County Commissioners of Bristol* v. *Conservation Commission of Dartmouth*, Mass. Adv. Sh. (1980) 1289, 1295 n.6; *Massachusetts Mutual Life Insurance Company* v. *Commissioner of Corporations and Taxation*, 363 Mass. 685, 691 (1973) and cases cited. *See generally* 1980/1981 Op. Atty. Gen. No. 3, Rep. A.G., Pub. Doc. No. 12 (1980).

The determination of a statutory violation depends upon whether the compensation being paid is a "salary" or a "wage". 1980/81 Op. Atty. Gen. No. 3, Rep. A.G., Pub. Doc. No. 12 at 100. As a general matter, a salary "shall mean annual salary." G.L. c. 4, §7, Twenty-seventh. *See also Maynard* v. *Royal Worcester Corset Co.*, 200 Mass. 1, 4 (1908) [salary] is perhaps more frequently applied to annual employment than to any other, and its use may import a factor of permanency). In making this determination, a great deal rests on the nature of the services for which compensation is sought. If the services are special services performed from time to time, or services performed outside the usual duties of an individual, compensation is generally looked upon as a "wage" and not a salary. 1980/81 Op. Atty. Gen. No. 3, Rep. A.G., Pub. Doc. No. 12 at 101. Thus a predecessor of mine noted, in a frequently cited passage, that

> [salary] is limited to compensation established on an annual or periodical basis and paid usually in installments, at stated intervals, upon the stipulated per annum compensation. It differs from the payment of a wage in that in the usual case wages are established upon the basis of employment for a shorter term, usually by the day or week, or on the so-called "piece work" basis, and are more frequently subject to deductions for loss of time.
> 5 Op. Atty. Gen. at 700 (1920).

While an individual "may not accept another salaried position from the Commonwealth, even though the work of the second office might be done outside of the usual hours of employment of the first office," 7 Op. Atty. Gen. at 330 (1924), he may nonetheless "receive from the Commonwealth additional compensation for special services performed outside of the usual working hours of his position and not required in the performance of the duties of his position." *Id. See also* 2 Op. Atty. Gen. at 310 (1902) (statutory predecessor to G.L. c. 30, §21, "does not prevent the payment of compensation for extra services not rendered during the usual hours of employment in the position for which the person is employed").[2]

Here, a Clerk of Court, duly elected to his office and performing the usual duties of that office, is also performing the duties of librarian for the court library. The Clerk is paid for these additional services what appears to be a fixed sum on an annual basis. While the manner of payment on its face suggests that the payment is in the nature of a salary, *see* 5 Op. Atty. Gen. at 700 (1920),

[2] A related statute, G.L. c. 29, §31, provides in relevant part that "[s]alaries payable by the commonwealth . . . shall be in full for all services rendered to the commonwealth by the persons to whom they are paid." Although you have not put the question directly to me, for the reasons outlined above I am of the opinion that compensation to the Clerk for his part-time duties as law librarian does not violate G.L. c. 29, §31. See 5 Op. Atty. Gen. at 698 (1920) (provision in statutory predecessor to G.L. c. 29, §31 "by immemorial custom does not forbid extra compensation for overtime service").

other factors argue in favor of a different conclusion. The Clerk's duties, as you have described them, are performed on a part-time basis and on the Clerk's personal time, usually before or after normal working hours. There duties are therefore special duties, not a traditional or usual part of the Clerk's role. They are performed by him from time to time on his own personal time and, as you have described them, do not appear to interfere with his usual duties as Clerk in any way. These factors suggest that the payments made for these additional services are in the nature of wages and do not constitute a second "salary" for purposes of G.L. c. 30, §21. *See* 1980/81 Op. Atty. Gen. No. 3, Rep. A.G., Pub. Doc. No. 12 at 102.

On the basis of these facts and the previously cited authority, you may properly conclude that the Clerk may receive compensation for the work he performs as a part-time law librarian and that such compensation does not violate G.L. c. 30, §21.[3]

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

February 3, 1982

Number 8.

Joseph R. Barresi
Inspector General
One Ashburton Place
Boston, Massachusetts 02108

Dear Mr. Barresi:

You have requested my opinion whether Chapter 388 of the Acts of 1980 prohibits the Office of the Inspector General from hiring two individuals who were temporarily assigned from other state agencies to the Special Commission Concerning State and County Buildings (hereafter, "the Special Commission").[1] You inform me that while on loan to the Special Commission, each of these individuals filled out weekly time sheets to, drew their salaries from, and, in one situation, attended a job-related training program at the expense of, the state agency from which each was assigned. You further inform me that while these individuals worked under the direction of the Special Commission, they had no responsibilities for formulating or drafting legislation establishing the Office of the Inspector General. Consequently, you ask whether these individuals "served in the employ of" the Special Commission for purposes of the statutory prohibition set forth in St. 1980, c. 388, §3.

[3] I express no opinion with respect to whether certain provisions of G.L. c. 268A apply to the facts you have presented to me, nor do I possess the authority to do so. The clerk, however, may wish to request the opinion of the State Ethics Commission, pursuant to G.L. c. 268A, §10, whether his receipt of compensation for the work he performs as a part-time law librarian for the court violates any provision of that chapter.

[1] The Special Commission was created by Chapter 5 of the Resolves of 1978 to investigate and study, as a basis for legislative action, the existence and extent of Corrupt practices and maladministration concerning contracts awarded for the construction of state and county buildings.

For the reasons set forth below, I conclude that it is a violation of St. 1980, c. 388, §3, for the Office of the Inspector General to employ any person who worked under the control and supervision of the Special Commission, even if that person drew his salary from another state agency.[2]

The answer to your question requires a close analysis of the hiring prohibition imposed upon the Office of the Inspector General by Chapter 388 of the Acts of 1980. Section 3 of that act provides:

> [N]o person who has served as a member of the special commission concerning state and county buildings, established by chapter five of the resolves of nineteen hundred and seventy-eight, with the exception of the attorney general, or any person who has served in the employ of said commission, on either a paid or volunteer basis, shall be eligible for appointment to any positions created as a result of the establishment of the office of inspector general.

Where, as here, the language of a statute is plain, it must be interpreted in accordance with the usual and natural meaning of the words, *Gurley* v. *Commonwealth*, 363 Mass. 595, 598 (1973); *Burke* v. *Chief of Police of Newton*, 374 Mass. 450, 452 (1978), and so as to fulfill the legislative intent, *Industrial Finance Corporation* v. *State Tax Commission*, 367 Mass. 360, 364 (1975). While legislative intent must be ascertained by an examination of the language used, in connection with its legislative history and the system of law of which it is a part, *Commonwealth* v. *Welosky*, 276 Mass. 398, 401 (1931), the first tool of statutory construction is a literal reading of the words which comprise the subject statute.

The plain words of this statute are clear and unambiguous. By the very terms of section 3, appointment of "any person who has served in the employ of said commission, on either a paid or volunteer basis" to any position in your office is prohibited. The use of the terminology "paid or volunteer basis" suggests that the Legislature intended that the word "employ" be construed in its broadest sense. Accordingly, whether a person was on the payroll of the Special Commission is clearly not decisive. It is my opinion that this language indicates a legislative objective to prohibit the appointment of any person who performed services under the control and supervision of the Special Commission, regardless of the capacity in which he was associated, probably to ensure that the office of the Inspector General not be perceived as an attempt to perpetuate the Special Commission.[3]

My literal reading of the statute is supported by the principle that statutes are to be construed in the light of pre-existing common law. See *Ferullo's Case*, 331 Mass. 635, 637 (1954). It has long been settled at common law that one who is a general employee of another may be loaned to or hired by a third person for some special service and may, as to that special service, become the

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[2] Although your request included the names of two persons whose services were loaned to the Special Commission, I must respectfully decline to make individual determinations based upon specific cases, since this necessarily involves determination of facts, which my predecessors and I have traditionally refrained from making in the opinion-writing process. See 1961/62 Op. Atty. Gen., Rep. A G., Pub. Doc. No. 12 at 199.

[3] This interpretation of the word "employ" is consistent with the definition of employment found in other provisions of the General Laws. For example, G.L. c. 151A, §2, which governs the area of employment security, defines employment as follows:

> [S]ervice performed by an individual . . . shall be deemed to be employment . . . unless . . . such individual has been and will continue to be free from *control and direction* in connection with the performance of such services . . . (emphasis supplied).

employee of the third party. *Galloway's Case*, 354 Mass. 427, 430 (1968). The fact that the employee is paid by his general employer and not by the person for whom the services are performed is not decisive. *See Chisholm's Case*, 238 Mass. 412, 419 (1921). The essential test is whether the person is under the control and supervision of the latter and is bound to obey his instructions, not only as to the result to be accomplished, but also as to the means and methods which are to be utilized in the performance of the work. *Griswold* v. *Director, Division of Employment Security*, 315 Mass. 371 (1944). These considerations require the conclusion that the word "employ," as it appears in section 3, would include persons on loan from other agencies to the Special Commission, regardless from whom they drew their salary, provided that they were under the control and supervision of the Commission.

That this interpretation of section 3 is consistent with the legislative purpose may also be ascertained by analysis of the history of the statute. As originally introduced, the bill seeking to establish the office of Inspector General contained no prohibition against the appointment of persons associated with the Special Commission: Mass. H. Doc. No. 5619 (1980). The bill was later amended to include the prohibition presently contained in section 3. Mass. H. Doc. No. 6557 (1980). Subsequently, the bill was once again amended, but the Legislature retained the prohibition as it presently appears. Mass. H. Doc. No. 6755 (1980). There were repeated attempts to alter that prohibition in both the House and Senate, all of which were ultimately rejected. In the House a proposed amendment to strike out section 3 and insert in its place a new section 3, which would have prohibited appointment of Special Commission personnel only until 1985, was overwhelmingly rejected on a roll call vote. House Journal 1296-1297 (1980). Section 3 was successfully amended in the Senate by striking the words "on either a paid or volunteer basis" and replacing them with "as Chief Counsel or Executive Director." Senate Journal 1019-1020 (1980). The House of Representatives rejected this amendment, insisting upon the original wording of section 3. House Journal 1441 (1980). After a Committee of Conference was apppointed by both branches, the Senate receded from the amendment and adopted the bill with section 3 in its present form. St. 1980, c. 388, §3.

Based on the plain language of the statute, the common law of employment and the legislative history of Chapter 388, it is therefore my opinion that the Office of the Inspector General is prohibited from hiring persons who were temporarily loaned to the Special Commission from other state agencies, provided that the services they performed were under the control and supervision of the Special Commission.[1]

While I am mindful that this conclusion may appear to constitute a hardship as to the particular persons whom you mention, the words of a statute are not to be stretched beyond their fair meaning in order to avoid hardship. *Rosenbloom*

[1] This intent to exclude all persons who worked under the Special Commission, regardless of the capacity in which they served, is further evidenced by the fact that the Legislature provided a specific exemption from the prohibition. The statute provides that the prohibition applies to all members of the Commission "with the exception of the Attorney General." Here the legislature has provided a specific exemption to the general prohibition, although concededly the exception specifically applies to the phrase dealing with members of the Commission rather than its employees. Nevertheless, where the legislature has provided an express exemption from an overall exclusion, it must be construed to be the only exemption that the legislature meant to apply to the rule. *See McArthur Brothers Co.* v. *Commonwealth*, 197 Mass. 137, 139 (1908). *Cf. Brady* v. *Brady*, Mass. Adv. Sh. (1980) 1053, 1056; *Harborview Residents Committee, Inc.* v. *Quincy Housing Authority*, 368 Mass. 425, 432 (1975) (statutory expression of one thing is an implied exclusion of other things omitted from the statute).

v. *Kokofsky*, 373 Mass. 778, 781 (1977); *Milton* v. *Metropolitan District Commission*, 342 Mass. 222, 227 (1961); *Boston Five Cents Savings Bank* v. *Assessors of Boston*, 317 Mass. 694, 703 (1945).

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

February 11, 1982

Number 9.

Donald B. Falvey, *Director*
Division of Standards
One Ashburton Place
Boston, Massachusetts 02108

Dear Mr. Falvey:

You have asked my opinion whether General Laws chapter 94, section 303F, prohibits retail oil dealers from selling or delivering home heating oil by the gallon on a temperature-compensated basis.[1] It is my opinion that retail oil dealers may not adopt this practice in the sale or delivery of oil for heating or cooking purposes, nor do you have the authority to require such dealers to use temperature compensation devices.

You have informed me that, generally speaking, retail dealers in home heating oil sell or deliver oil at an ambient temperature below that at which they receive delivery. This is so because dealers usually purchase their supplies during the warm months and sell them during the cold months.[2] Because oil occupies less volume at lower temperatures, a gallon of oil delivered during the heating season will contain more oil (by weight) than a gallon delivered during the warm season. Although the difference is small,[3] it is significant for wholesalers, who deal in large volumes, and it has become significant at the retail level because of the rise in oil prices over the past four years. It can be expected that retailers may no longer absorb the cost of this difference, as they have previously done.

One method of compensating for expansion or contraction of volume is to adjust the actual volume of oil to the volume it would occupy at a temperature constant. That is, instead of expressing volume in terms of the actual volume at the ambient temperature, volume could be expressed in terms of the volume which the oil would occupy at sixty degrees Farenheit. Transactions in certain types of fuels, such as bunker oil and liquefied petroleum gas, are now expressed in terms of volume at a standard temperature. So, too, wholesale

[1] Temperature compensation in this context refers to an adjustment by which volume is expressed in terms of gallons at a standard temperature — here, sixty degrees — rather than gallons at the actual (ambient) temperature of the oil.

[2] In some cases, the retailer purchases his supplies by the gallon compensated to sixty degrees. Even so, because the oil will be delivered to the consumer during the heating season, the temperature at which it is delivered will usually be lower.

[3] I am informed that the coefficient of expansion for home heating oil is .00045. A thousand gallons of oil at 60 degrees Farenheit will occupy 987.5 gallons at 30 degrees. According to your studies, the total gallons of home heating oil delivered during 1978 would have been 16,122 higher if it had been compensated to 60 degrees instead of being sold by the gallon at the ambient temperature.

transactions in home heating oil are often expressed in terms of gallons at sixty degrees.[4] Your question, then, is whether sales at retail may be expressed in the same terms.

The answer to this question requires an analysis of G.L. c. 94, §303F, which governs the delivery and retail sale of fuel oil. "[A] statute must be interpreted according to the intent of the Legislature 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, to the end that the purpose of its framers may be effectuated." *Registrar of Motor Vehicles* v. *Board of Appeal on Motor Vehicle Liability Policies & Bonds*, Mass. Adv. Sh. (1981) 415, 420, *quoting Board of Education* v. *Assessor of Worcester*, 368 Mass. 511, 513 (1975). Guided by this principle, analysis of the statute yields a straightforward answer to your question.

I begin with the language of the statute. General Laws chapter 94, section 303F, provides in part as follows:

> [W]hoever sells or delivers fuel oil in quantities of twenty gallons or over for heating or cooking purposes shall cause a delivery ticket, which shall consist of an original and at least one carbon copy thereof, to be issued. Said ticket shall be serially numbered for the purpose of identification and shall have the date of delivery as well as the names and addresses of the seller and of the purchaser legibly recorded on the ticket prior to delivery of the fuel oil. *A statement of quantity of oil delivered, in terms of gallons and fractions thereof, if any*, the price per gallon, the grade of fuel, and the identity of the person making such delivery, *shall also appear on the ticket* . . . The director or inspector of standards . . . shall, at the time of delivery of fuel oil, be authorized to enter and go into or upon, without warrant, any such vehicle to inspect or examine the metering system, vehicle tank compartments and delivery tickets then in the actual possession or under the control of the person making the delivery and may seize, without warrant, any such delivery tickets suspected of constituting a deceptive or fraudulent practice . . . .
>
> Who ever violates any provision of this section shall be punished for the first offense by a fine of fifty dollars, for the second offense by a fine of two hundred dollars and for each subsequent offense by a fine of five hundred dollars. Whoever alters or substitutes a delivery ticket for fraudulent or deceptive purposes shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year or both (emphasis supplied).

Thus, the statute requires, on pain of a fine or imprisonment, that dealers in fuel oil for heating or cooking purposes must issue a delivery ticket stating, among other things, the "quantity of oil delivered, in terms of gallons and fractions thereof." This provision has appeared in this section since it was first enacted in 1935. *See* St. 1935, c. 95; St. 1952, c. 107; St. 1967, c. 92; St.

[4] You have established standards governing the devices which make these adjustments. 202 C.M.R. 4.00.

1972, c. 597; St. 1978, c. 444. It is one of many provisions in chapter 94 designed to protect the consumer from fraudulent or misleading practices, and honest dealers from unfair competition, by regulating the measure by which a product may be sold. *See, e.g.*, G.L. c. 94, §7 (bread), §77F (fish), §84 (fish by the quintal), §90B (eggs), §92B (meats, poultry, fish), §96 (fruits, vegetables, nuts), §115 (cranberry barrels and crates), §174A (flour, meal, grits), §§240-42 (coal), §298 (cordwood, firewood, and kindling). *See generally, Burns Baking Co.* v. *Bryan*, 264 U.S. 504, 517 (1924) (Brandeis & Holmes, JJ., dissenting) (discussing regulation requiring sales of bread by standard weights). The heart of all such provisions is the establishment of a standard measure to govern transactions in a product or commodity.[5]

The Legislature has provided that home heating oil is to be sold by the gallon. In my opinion, there is no ambiguity in this provision, and no leeway to impose additional requirements, such as the requirement that the actual volume is to be compensated to sixty degrees. Under our laws, a gallon is a measure of volume equal to a standard established and maintained by the national government. *See* G.L. c. 98, §3. It does not vary with the ambient temperature; it is 231 cubic inches, whether at thirty degrees or at eighty degrees. *See Nichols* v. *Beard*, 15, F. 435, 436-37 (C.C. Mass. 1883) (gallon of commerce in United States is wine gallon, i.e., gallon of 231 cubic inches); *State* v. *Standard Oil Co. of Louisiana*, 188 La. 978, 178 So. 601 (1937). Because the words of a statute are to be given their usual and ordinary meaning, *Nantucket Conservation Foundation, Inc.* v. *Russell Management, Inc.*, Mass. Adv. Sh. (1980) 781, 783, and because the same word used in different sections of a statute relating to the same subject matter is ordinarily to be given a uniform meaning, *Insurance Rating Board* v. *Commissioner of Insurance*, 356 Mass. 184, 188-89 (1969), General Laws chapter 94, section 303F, must be understood in this sense.

You have stated your agreement with this interpretation of the statute, but you ask whether you may, consistently with this view, require retail dealers to use temperature compensation devices, pursuant to your authority under G.L. c. 98, §29.[6] The merit of the suggestion is that the dealer who chooses to adjust his prices to compensate for contraction would not need to estimate the size of the adjustment or to vary his price according to the ambient temperature.[7] Thus, greater certainty might be promoted in such transactions. Nevertheless, I conclude that you are not authorized to make this innovation.

The Division of Standards is not an agency having a broad charter to implement a program of reform or social welfare.[8] The Director's principal functions

[5] The recent change relating to the measurement of cordwood and firewood illustrates this point. General Laws chapter 94, section 298, formerly provided that the standard unit of measure for cordwood and firewood was the cord, i.e., 128 cubic feet of wood, closely stacked. The general failure of vendors to adhere to this definition caused much confusion and even deception of consumers, as is well known. To remedy this situation, the Legislature banned the use of the terms "cord", "face cord", "pile", "truckload", and similar words. Cordwood and firewood must now be sold by the cubic foot or meter of closely stacked wood. St. 1979, c.253, *amending* G.L. c. 94 §298.

[6] It is clear that dealers may not, consistently with the legislative purpose, choose for themselves whether or not to employ temperature compensation devices at the retail level. That course would effectively establish two standard measures where the Legislature has prescribed only one and would, arguably, constitute a deceptive practice under G.L. c 93A

[7] At the present, the price of home heating oil does not appear to be the subject of regulation, either at the federal or at the state level. Thus, oil dealers might elect to adjust their prices according to the ambient temperature, whether or not the use of temperature compensating devices was permitted. If prices were tied to the ambient temperature by some other means, I assume that the device employed would be subject to your regulation

[8] Compare G.L. c. 98, §29, with G.L. c. 13, §9 and G.L. c. 112, §5. *See Levy* v. *Board of Registration and Discipline in Medicine*, 378 Mass. 519, 524-25 (1979) (in keeping with its broad role, Board may establish grounds for discipline not specifically provided by statute).

are to establish standards of accuracy and reliability in weighing and measuring devices, and to "enforce the laws relating to the use of weighing and measuring devices and the giving of false or insufficient weight or measure . . ." G.L. c. 98, §29. He has custody of the state standards, and in relation thereto, his duty is to ensure that they agree with the standards maintained by the United States government and to supply accurate sets of standards to the cities and towns. G.L. c. 98, §§3, 5. I find nothing in these provisions to authorize the Director to vary the legislatively prescribed measure by which goods and commodities are sold. Nor does General Laws chapter 94, section 303F, contain a grant of discretionary authority to the Director. Especially because the section imposes a criminal penalty, it should be construed to avoid not create ambiquity. *See Director of the Division of Milk Control* v. *Haseotes*, 351 Mass. 372, 373-74 (1966).

For the foregoing reasons, I conclude that General Laws chapter 94, section 303F, requires that the statement of quantity on the retail delivery ticket for fuel oil must be expressed in gallons at the ambient temperature, thus reflecting the actual volume of oil delivered rather than the hypothetical volume at a standard temperature.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

March 11, 1982

Number 10

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

Dear Commissioner Frechette:

You have asked my opinion on two questions relating to the licensure of clinics by the Department of Public Health pursuant to G.L. c. 111, §§51-56. First, you raise a question regarding the construction of the phrase "solo or group practice" as used in the definition of "clinic" in G.L. c. 111, §52, §3, as amended by St. 1979, c. 674, §1. Specifically, you ask whether a professional corporation which does not use the terms "clinic," "dispensary," or "institute" in its name and which has submitted documents showing that one physician is its sole shareholder, director and officer, is exempted from the clinic licensure requirement of G.L. c. 111, §51, by the "solo or group practice" proviso contained in the statutory definition of a clinic. Second, you ask whether the Department may use any standards to construe the phrase "solo or group practice" other than the statutory language, the legislative history, the

Department's interpretation of the statute, and its understanding of other applicable principles of law, all of which you state constitute the standards currently being used by the Department.

Your questions arise out of the legislative scheme for the regulation and licensure of medical facilities which provide care outside of the hospital setting. *See* G.L. c. 111, §§51-56. Since 1918, the Legislature has provided for the Department of Public Health to inspect and license "dispensaries" and "clinics" and has made operation of such facilities without a license illegal. *See* St. 1918, c. 131, §§2 and 3. Key to that system is the definition of "clinic" now contained in G.L. c. 111, §52, §3. Prior to 1979 the term "clinic" was defined to include:

> any institution or place, however named, conducted for charity or profit, which is advertised, announced, established or maintained under the name of a clinic for the purpose of providing medical, surgical, dental, restorative or mental hygiene services to persons not residing therein. Clinic shall include such places as "medical associates", "dispensary", "medical center", "medical institute", "rehabilitation center", "rehabilitation institute", "memorial", "association", or such other designation of like import but not necessarily limited to the above mentioned. It shall not include a clinic conducted by a hospital licensed under section fifty-one, or a clinic conducted under the authority of the United States government, or under the authority of the commonwealth or a local health department. Clinics shall not provide overnight care.

However, as noted above, that definition was amended by Chapter 674 of the Acts of 1979 which changed the definition of "clinic" to include:

> any entity, however organized, whether conducted for profit or not for profit, which is advertised, announced, established, or maintained for the purpose of providing ambulatory medical, surgical, dental, physical rehabilitation, or mental health services. In addition, "clinic" shall include any entity, however organized, whether conducted for profit or not for profit, which is advertised, announced, established, or maintained under a name which includes the word "clinic," "dispensary," or "institute," and which suggests that ambulatory medical, surgical, dental, physical rehabilitation, or mental health services are rendered therein. With respect to any entity which is not advertised, announced, established, or maintained under one of the names in the preceding sentence, "clinic" shall not include a medical office building, or one or more practitioners engaged in a solo or group practice, whether conducted for profit or not for profit, and however organized, so long as such practice is wholly owned and controlled by one or more of the practitioners so associated, or, in the case of a not for profit organization, its only members are one or more of the practitioners so associated or a clinic established solely to provide service to employees or students of such corporation or institution. No matter

> how the clinic is named, "clinic" shall not include a clinic conducted by a hospital licensed under section fifty-one or by the federal government, the commonwealth, or a local health department. St. 1979, c. 674, §1.

That Act also added for the first time a definition of the term "practitioner" as follows:

> any individual who may diagnose and treat medical, surgical, dental, physical rehabilitation, or mental health problems without limitation within the confines of his profession.
> St. 1979, c. 674, §2.

In your letter you informed me that H. 6077, which was the bill which ultimately became chapter 674 (and which replaced the previously filed S. 466 and H. 2754), was filed at the request of the Department of Public Health, the Massachusetts Medical Society, and the Board of Registration in Medicine. You further inform me that your Department has consistently interpreted the language in the manner indicated in your request for my opinion. Under such circumstances your interpretation of the meaning of the statutory language must be given considerable deference. *Cf. Metropolitan Property & Liability Ins. Co.* v. *Commissioner of Insurance*, Mass. Adv. Sh. (1981) 347, 356-57; *Xtra, Inc.* v. *Commissioner of Revenue*, Mass. Adv. Sh. (1980) 849, 853-55.

In order to answer the questions which you have posed, I must first analyze the statutory language in question. In this case the relevant language of G.L. c. 111, §52, is contained in the third sentence of the definition of "clinic." There, the Legislature narrowed the scope of that definition from "one or more practitioners engaged in a solo or group practice" to exclude any entity which did not use the words "clinic," "dispensary," or "institute" in its name and which "is wholly owned and controlled by one or more of the practitioners so associated."

To respond to your first question, I believe your construction of the phrase "solo or group practice" is based upon appropriate criteria and reaches a result which does not appear to be inconsistent with the statutory language and intent. I believe, however, that in deciding whether any particular medical practice is or is not exempt from licensure, the general principles you listed in your letter may be supplemented by a factual investigation aimed at determining whether, in fact, that particular practice meets the statutory test for exemption. While this aspect of the licensure decision thus depends upon the particulars of each case and so cannot be resolved in the abstract, I list below several factors which you could consider in connection with that factual investigation. With these qualifications I can state that the interpretation you have adopted is based upon sound principles of statutory construction and is well within your authority. In the terms of your request, therefore, it is a legally "correct standard for the Department to use."

The principal basis for my opinion is the specific statutory language. Where, as here, the language of a statute is not technical or complex, it must be interpreted in accordance with the usual and natural meaning of the words actually used by the legislature, *Registrar* v. *Board of Appeal on Motor Veh. Liability Policies & Bonds*, Mass. Adv. Sh. (1981) 415; *Burke* v. *Chief of Police of Newton*, 374 Mass. 450, 452 (1978), and so as to fulfill the legislative

intent, *Industrial Finance Corp.* v. *State Tax Commission*, 367 Mass. 360, 364 (1975). While legislative intent must normally be ascertained by an examination of the language used, in the context of its legislative history and the system of law of which it is a part, *Commonwealth* v. *Welosky*, 276 Mass. 398, 401 (1931), the first tool of statutory construction is a literal reading of the words which comprise the subject statute. From such a literal reading it appears that in this case the legislature intended the focus of investigation to be on the actual facts of ownership and control.

This result is consistent with application and construction of those terms in other statutory contexts. Unless there is strong legislative history to the contrary, similar language in other statutory schemes is normally given such an interpretation. *See, e.g., Northgate Construction Co., Inc.* v. *State Tax Commission*, 377 Mass. 205, 208 (1979); 15 U.S.C. §77b (11) (''controlling or controlled by'' in federal Securities Act); *United States* v. *Corr*, 543 F. 2d 1042, 1050 (2nd Cir. 1976) (''control'' . . . ''is a question of fact which depends upon the totality of the circumstances''); *Gilbertville Trucking Co.* v. *U.S.*, 371 U.S. 115, 125 (1962) (''control'' is to be defined in light of the ''actualities and current practices of the industry involved''), *aff'g in part*, 196 F. Supp. 351 (D. Mass. 1961) (ICC case); *cf. Commonwealth* v. *One 1978 Ford Van*, Mass. App. Ct. Adv. Sh. (1981) 880,882-84 (analysis of explicit legislative history of statutory reference to ''ownership''). The legislative history of H. 6077 does not show that this provision as enacted was modified or amended in the legislative process. Since there is nothing in the legislative history of chapter 674 to indicate that the legislature wished the Department to do otherwise, I conclude that in applying ''ownership'' and ''control'' to specific cases, the Department should focus on the individual facts of the case at hand.

It is also necessary to consider how the statutory language in question applies to a medical practice by a professional corporation incorporated under G.L. c. 156A. Under normal principles of corporate law, the ''owners'' of a corporation are its shareholders. 13A Massachusetts Practice, C.A. Peairs Business Corporations, §443 at 155 (1971). The ''controllers'' or managers of the corporation are its directors and officers. *Id.*, §461 at 193 and §441 at 148. *See also* Henn, Law of Corporations (2nd ed. 1970). These general principles are embodied in the Massachusetts Business Corporation Law codified at G.L. c. 156B. Pursuant to G.L. c. 156A, §3, the provisions of that chapter apply to professional corporations organized under G.L. c. 156A. The sole owner, director, and officer of a professional corporation does ''own and control'' that corporation.

Against this background, I conclude that in applying the standards of G.L. c. 111, §52, to a medical practice carried on by such a corporation, there should be a strong presumption that a professional corporation whose sole officer, director, and shareholder is a licensed physician who actually practices at the facility in quesiton is a ''solo or group practice . . . wholly owned and controlled by one or more of the practitioners so associated.'' Thus, assuming none of the names enumerated in section 52 is used, the practice would be presumed to be exempt from clinic licensure. In view of the essentially factual nature of the ultimate inquiry, however, that presumption could be rebutted upon a sufficient factual showing.

The statute refers to ownership and control of the "practice" and a medical practice may be viewed as an entity distinct from the professional corporation that carries it out. A medical practice is normally understood to be more than an ordinary business. A medical practice carried out by a professional corporation is not, therefore, the exact analog of an ordinary commercial business conducted by a business corporation. Although for most purposes a commercial business and a business corporation are considered interchangeable or even identical, that does not mean that for purposes of clinic licensure the Legislature intended the Department to assume a similar interchangeablility between a medical practice and a professional corporation under which it operates. Many, if not most, medical practices have no corporate organization connected to them in any fashion and, of course, medical practices, both solo and joint, existed for centuries before the adoption of the Professional Corporations Act. It seems clear that that Act was designed for limited purposes and it was not intended to "alter any law applicable to the relationship between a person rendering professional services and a person receiving such services." G.L. c. 156A, §10. Therefore, analysis of the ownership and control of the corporation cannot necessarily resolve the question of the ownership and control of the medical practice. To make a rigid rule that the corporation is the practice for all purposes would not be consistent with the common understanding of a "medical practice" and might lead to an undesirable limitation of liability and responsibility on the parts of the professionals or other individuals who are the real persons who constitute both the practice and the corporation. *See* G.L. c. 156A, §10.

The factual investigation necessary to determine whether a practice carried out by a wholly owned professional corporation is exempt from licensure could only be performed by your Department and is beyond the scope of the Attorney General's opinion rendering function. *See* 1961/62 Op. Atty. Gen., Rep. A.G., Pub. Doc. No. 12 at 199. In conducting such a factual inquiry you might look to such factors as the history of the medical practice in question, the terms by which any property is owned or leased by the practice or the corporation and from whom, the terms of any management or service contracts entered into by the corporation on behalf of the practice, the professional background of corporation's owners and officers, particularly in light of the nature of the type of medical services the practice furnishes, the person or persons who actually make treatment decisions for the practice, and the relative amount of the actual work of the practice performed by the corporation's owners and officers. These factors are not intended to be inclusive and should be supplemented by any additional inquiries which you believe would aid you in determining whether the corporation, or its owners and officers, actually "own and control" the practice. It is the answer to that latter question which is decisive in determining the availability of exemption from clinic licensure.

Thus in some future case you might, for example, conclude that the purpose underlying the "ownership and control" requirement in section 52 requires the Department's consideration to go beyond the formal indicia of ownership and control of the corporate entity which operates a medical practice in order to explore the substance of the relationship among an entity, the practitioners associated with it, and third persons. Such an investigation would be in some ways akin to "piercing the corporate veil" in ordinary corporate law. *See My*

Bread Baking Co. v. *Cumberland Farms Inc.*, 353 Mass. 614 (1968); C.A. Peairs, *supra*, §§646 at 565, *et seg.* While that type of investigation might be reserved for rare and unusual cases, it might be a potentially valuable tool for an administrator charged with assuring the integrity of a licensure system and so should not be foresworn unnecessarily in view of the enforcement and administration responsibilities in the clinic licensure statute which are confided to the Department of Public Health. *See, e.g.*, G.L. c. 111, §§53, 56.

You have also asked what standards the Department could use in construing the statutory phrase "solo or group practice" in other contexts. In particular, you asked whether it is "beyond the authority of the Department" to use any standard of construction other than the language of section 52, its legislative history, the Department's implementation of that section and the corporation statutes and corporate law generally. I believe you have correctly identified the tools available to assist your factual inquiry and that the discussion above makes it unnecessary to provide a separate additional answer for this question.

In summary, it is my opinion that in determining whether a professional corporation without a clinic name is a solo practice of medicine, the Department must consider the language of G.L. c. 111, §52, its legislative history and the Department's interpretation of the statute. While the documents of incorporation may demonstrate that one physician is the sole shareholder, director and officer, the Department may in its discretion consider all the relevant facts to ascertain whether the medical practice is "wholly owned and controlled by that physician."

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

March 11, 1982

Number 11.

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

Dear Commissioner Frechette:

You have requested my opinion whether a building erected and formerly used as a motel may be licensed by the Department of Public Health as a hospital pursuant to G.L. c. 111, §51. Specifically you ask whether General Laws chapter 111, section 51, can be interpreted to include conversion, renovation and reconstruction of a building to meet the construction standards specified in the statute or whether the building in question must have been originally constructed as a hospital.

For the reasons set forth below, I am of the opinion that General Laws chapter 111, section 51, requires that a hospital license may be issued only for a building which was originally constructed as a hospital.

The answer to your question requires an analysis of the third paragraph of G.L. c. 111, §51, which provides that:

> [N]o original license shall be issued to establish a hospital, except a college and school infirmary, unless it complies with the construction standards of the state building code, is of at least type 1-B fireproof construction, and shall have been constructed for the purpose.

This language was placed in G.L. c. 111, §51, by St. 1977, c. 868, §1. Under the prior enactment, St. 1967, c. 891, §1, this paragraph provided as follows:

> [N]o original license shall be issued to establish a hospital, except a college and school infirmary, unless it is of at least Class 2 construction and shall have been constructed for the purpose. Class 2 construction shall be no less than the standards set forth in rules and regulations of the department of public safety applicable to buildings.

In answering your question, I am guided by the principle that the meaning of a statute must be determined first by examining its plain language, *Burke* v. *Chief of Police of Newton*, 374 Mass. 450, 452 (1978); *Boston* v. *Massachusetts Port Authority*, 364 Mass. 639, 657 (1974), construed so as to fulfill the legislative intent, *Industrial Finance Corp.* v. *State Tax Commission*, 367 Mass. 360 (1975). Moreover, the words and phrases contained in a statute are to be given their ordinary meaning and to be construed according to their natural import and approved usage. *Burke* v. *Chief of Police of Newton*, 374 Mass. 450, 452 (1978).

Applying these principles here, it is plain that the phrase "constructed for the purpose" in G.L. c. 111, §51, cannot be interpreted to include the conversion, renovation, or reconstruction of a building for the purpose of meeting the construction standards specified in that section. The Supreme Judicial Court has had occasion to define "construction", finding it to be the "erection of a new building or addition to an old building." *Commonwealth* v. *Hayden*, 211 Mass. 296, 297 (1912). *Accord, D'Ambra* v. *Zoning Board of Appeal of Attleborough*, 324 Mass. 61, 62 (1949). The Court has also distinguished "alteration" from "construction" and has defined alteration as "a change or substitution made in a particular part of a structure of such a substantial nature as to make the structure itself or an important part thereof materially different from what it formerly was." *Boston & Albany R.R* v. *Dept. of Pub. Utilities*, 314 Mass. 634, 637 (1943). *Accord, Commonwealth* v. *Hayden, supra.* Thus, as these cases indicate, the procedure involved in renovating or reconstructing a building in order to meet the construction standards specified in section 51 is more properly characterized as "alteration" as opposed to construction.[1] I must presume that in enacting St. 1977, c. 868, the Legislature was aware of pre-existing law and the decisions of the Supreme Judicial Court. *Selectment of*

[1] My conclusion is not changed by the phrase "new construction" which appears in the fourth paragraph of §51. It might be argued that the specific reference to "new construction" in paragraph four demonstrates that the legislature intended the more general term "constructed" in paragraph three to have a broader meaning than that described above including renovation or reconstruction. It is my opinion however, that this was not the case. An examination of paragraph four indicates, instead, that the legislature intended to distinguish between the construction of a new hospital and alterations to an existing hospital, rather than between construction of a new hospital and renovation or reconstruction of a building, originally constructed for another purpose, so as to convert it into a hospital.

Topsfield v. *State Racing Commission*, 324 Mass. 309, (1949). I conclude therefore that the Legislature intended the phrase "shall have been constructed for the purpose" to serve as a requirement that only buildings originally constructed as hospitals may be licensed under section 51.

This conclusion is supported by a comparison of the provision at issue with the corresponding provision regarding the licensure of convalescent and nursing homes contained in the fifteenth paragraph of G.L. c. 111, §71. This latter provision was also amended by the Legislature by the same enactment which amended section 51 to provide in pertinent part:

> no original license for the establishment or maintenance of a convalescent or nursing home shall be issued by the department unless the applicant for such license submits to the department a certificate of an inspector of the division of inspection of the department of public safety that each building to be occupied by patients of such convalescent or nursing home . . . meets the construction standards of the State building code, and is of at least type 1-B fireproof construction.

St. 1977, c. 868, §2 (G.L. c. 111, §71). I must conclude that this differing statutory treatment of related subjects in the same legislative enactment was intentional. *Cf. School Committee of Springfield* v. *Board of Education*, 362 Mass. 417, 433 (1972) (statutes enacted as part of same bill must be construed together); 1980/81 Op. Atty. Gen. No. 17, Rep. A.G. Pub. Doc. No. 12 at 147 (1981) (differing treatment by Legislature of two subjects within one statutory scheme is intentional). Thus, the Legislature, while not desiring to impose a corresponding requirement on convalescent and nursing homes, plainly intended to require that only buildings originally constructed as hospitals were eligible for licensure under section 51.[2]

Any other interpretation would render the phrase "constructed for the purpose" superfluous in contradiction to the basic principle of statutory interpretation that "[n]one of the words of a statute is to be regarded as superfluous, but each is to be given its ordinary meaning without overemphasing its effect upon the other terms appearing in the statute, so that the enactment considered as a whole shall constitute a consistent and harmonious statutory provision capable of effectuating the presumed intention of the Legislature." *Milton* v. *Metropolitan District Commission*, 342 Mass. 222, 225 (1961) *quoting Bolster* v. *Commissioner of Corporations and Taxation,* 319 Mass. 81, 84-85 (1946). Thus, if the Legislature intended only to require hospitals to meet the construction standards of the state building code and to be of type 1-B fireproof construction, it could have simply said so, and the phrase in section 51 "shall have been constructed for the purpose" would have been unnecessary. Since the Legislature chose to include the phrase in question when dealing with hospitals in St. 1977, c. 868, §2, yet omitted it when dealing with convalescent or nursing homes in section 2 of the bill, it must be presumed that the Legislature intended

[2] This construction also fulfills the legislative intent to ensure that the needs of the public in general, and hospital patients in particular are protected, not only with regard to safety of construction, but also with regard to architectural and design considerations that may be uniquely applicable to hospitals. This intent is further demonstrated by the provisions of paragraph four of section 51, which require that both the preliminary and final architectural plans for the new construction of a hospital and the alteration or addition to an existing hospital be submitted to the Department for approval.

for the phrase to have purpose and meaning. *Insurance Rating Board* v. *Commissioner of Insurance*, 356 Mass. 184, 189 (1969); *Selectmen of Topsfield* v. *State Racing Commission*, 324 Mass. 309, 314 (1949).

Finally, it is my understanding that the Department has interpreted the provision in question in the manner discussed above. It is my further understanding that this interpretation has been consistently applied since the time of the provision's enactment, and that the Department in fact participated in the drafting of this legislation. In light of these considerations, the interpretation of the Department, the agency charged with the administration and enforcement of the statute, is entitled to some weight in resolving any possible ambiguity in the provision. *Devlin* v. *Commissioner of Correction*, 364 Mass. 435, 438-39 (1973). See also 1981/82 Op. Atty. Gen. No. 10, Rep. A.G., Pub. Doc. No. 12 at (1982).

For the foregoing reasons, it is therefore my opinion that General Laws chapter 111, section 51, permits the issuance of licenses only for those buildings which were originally constructed as hospitals and prohibits the conversion, renovation or reconstruction of a building which was constructed for some other purpose even if such conversion, renovation or reconstruction enables it to meet the specified construction standards.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

March 15, 1982

Number 12.

Jacqueline D. O'Reilly, *Chairman*
Massachusetts Arts Lottery Council
State House, Room 212M
Boston, Massachusetts 02133

Dear Ms. O'Reilly:

In your capacity as Chairman of the Arts Lottery Council you have requested my opinion concerning the determination of the amount of arts lottery funds available for distribution to local and regional arts councils from the operation of the Arts Lottery for fiscal year 1981.

Specifically, you ask whether the deduction from the Arts Lottery Fund for the fiscal year 1981 of arts lottery expenses of the Lottery Commission is limited to 15% of total arts lottery revenues for that year. You have also asked me questions regarding the form of certification of these expenses and the necessity of further action by the Council, e.g., promulgation of a "supplemental regulation," issuance of a "formal interpretative ruling" or "some other action" to "resolve any uncertainty" surrounding the issues you have raised.

For the reasons set forth below, I am of the opinion that the deduction from the Arts Lottery Fund for the expenses incurred by the Lottery Commission in

operating the arts lottery in fiscal year 1981 is not limited to fifteen percent of the fiscal year 1981 arts lottery revenues. Since I reach this conclusion, I need not answer the remaining two questions you have posed.

The answer to your first question requires an interpretation of the statutory scheme which governs operation of the state lottery and the state arts lottery, as well as an analysis of a previous opinion rendered by me regarding the two lotteries.[1]

I note at the outset that the amount of monies to be distributed to the local and regional arts councils is that contained in the State Arts Lottery Fund less the Arts Lottery Council's administrative expenses, which are limited to 3% of the State Arts Lottery Fund. G.L. c. 10, §35A. See 1980-81 Op. Atty. Gen. No. 17, Rep. A.G. Pub. Doc. No. 12 at 102 (1981). The Arts Lottery Fund is defined by St. 1979, c. 790, §2, which inserted G.L. c. 10, §35A, and established:

> a separate fund to be known as the State Arts Lottery Fund. Said fund shall consist of all revenues received from the sale of arts lottery tickets *less* prizes and expenses and all other monies credited or transferred thereto from any other fund or source pursuant to law (emphasis added).

In construing the word "expenses" in this statute I must be guided by its plain meaning. *Burke* v. *Chief of Police of Newton*, 374 Mass. 450, 452 (1978); *Boston* v. *Massachusetts Port Authority*, 364 Mass. 639, 657 (1974). By the terms of section 35A, prizes and "expenses" must be deducted from gross revenues to ascertain the balance in the "State Arts Lottery Fund" and thus the amount distributable to local and regional arts councils. Section 35A, by its terms, imposes no limit on the deduction which must be made for "expenses" for fiscal year 1980-1981. Certainly the Legislature could have inserted such a limit in the statute. I must presume, in the absence of such language, that no limit is intended. *Cf. Prudential Insurance Co. of America* v. *Boston*, 369 Mass. 542, 546-47 (1976) (statute must be construed as written, and an event or contingency for which no provision is made does not justify judicial legislation).

Accordingly, I conclude that the deduction mandated by section 35A for "expenses" encompasses *all* expenses of the Lottery Commission incurred in the operation and administration of the state arts lottery. My conclusion is supported by my previous comparison of G.L. c. 10, §35, and G.L. c. 10, §35A. See 1980/81 Op. Atty. Gen. No. 17, Rep. A.G., Pub. Doc. No. 12 at 102 (1981). As I noted in that opinion to the Treasurer and Receiver General, the language in section 35A is distinguishable from that of G.L. c. 10, §35, establishing the general State Lottery Fund.[2] Because these two provisions are

[1] In my opinion, your question is properly answered without reference to St. 1981, c. 351, §294, which deleted G.L. c. 10, §35A, and inserted in its place three new sections: §§35A, 35B and 35C. These amendments took effect on July 1, 1981, the first day of fiscal year 1982. St. 1981, c. 351, §299. Your questions relate to the previous fiscal year, and no provision mandating retroactive application of these amendments to G.L. c. 10 is apparent on the face of St. 1981, c. 351. In the absence of such language, I rely on the presumption that statutes are prospective in their operation "unless an intention that they shall be retrospective appears by necessary implication from their words, context or objects when considered in the light of the subject matter, the pre-existing state of the law and the effect upon existent rights, remedies and obligations." *Hanscom* v. *Malden and Melrose Gas Light Co.*, 220 Mass. 1, 3 (1914). *Accord, Welch* v. *Mayor of Taunton*, 343 Mass. 485, 487 (1962); *Goes* v. *Feldman*, Mass. App. Ct. Adv. Sh. (1979) 1456, 1460.

[2] General Laws chapter 10, section 35, provides in pertinent part

> [S]aid fund shall consist of all revenues received from the sale of lottery tickets or shares, and all other monies credited or transferred thereto from any other fund or source pursuant to law.

contained within the overall state lottery statute, *see Registrar of Motor Vehicles* v. *Board of Appeal on Motor Vehicle Liability Policies and Bonds*, Mass. Adv. Sh. (1981) 415, 420, and because the Legislature must be presumed to have been aware of existing statutes when enacting St. 1979, c. 790, *see id.* at 424, I then concluded that this distinction is intentional. Thus, if the Legislature had intended to limit the amount of expenses deductible from the Arts Lottery Fund, it would have so specified by an explicit provision so limiting deductions, or by a reference to the fifteen percent limitation contained in G.L. c. 10, §25.

Further, while the arts lottery is to be conducted and the revenues therefrom distributed in accordance with the general provisions of the state lottery law,[3] this provision is expressly made "[s]ubject to the provisions of section 35A." G.L. c. 10, §24. Upon review of §35A, I conclude that the fifteen percent limitation upon the expenses of the State Lottery Commission imposed by G.L. c. 10, §25, has no application to the distribution of fiscal 1981 arts lottery funds.[4]

Because I find the language in G.L. c. 10, §35A, clear and unambiguous, and distinguishable by its terms from G.L. c. 10, §35, I must decline your invitation to draw inferences from language contained in G.L. c. 10, §25, or in the acts of 1980 which appropriated monies for the operation and administration of the state lottery (St. 1980, c. 329, §2, item 0640-0000). *See Department of Community Affairs* v. *Massachusetts State College Building Authority*, 378 Mass. 418, 427 (1979) (a court cannot resort to extrinsic sources to vary the plain meaning of an unambiguous statute). The plain language of G.L. c. 10, §35A, reveals, in my opinion, a legislative intent that the arts lottery, like the state lottery, be self-supporting. The differences in budgetary language do not compel a different conclusion.

For the foregoing reasons, I answer your first question in the negative and respectfully decline to answer the remaining questions which you pose.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

[3] As I have previously opined, the State Lottery Commission is to conduct the arts lottery and must do so in accordance with the state lottery law. 1980/81 Op. Atty. Gen. No. 4, Rep. A.G., Pub. Doc. No. 12 at 102 (1981).

[4] G.L. c. 10, §25, states:

> The apportionment of the total revenues accruing from the sale of lottery tickets or shares and from all other sources shall be as follows. — (a) the payment of prizes to the holders of winning tickets or shares which in any case shall be no less than forty-five per cent of the total revenues accruing from the sale of lottery tickets; (b) the payment of costs incurred in the operation and administration of the lottery, including the expenses of the commission and the costs resulting from any contract or contracts entered into for promotional, advertising or operational services or for the purchase or lease of lottery equipment and materials which in no case shall exceed fifteen per cent of the total revenues accruing from the sale of lottery tickets, subject to appropriation, and (c) the balance to be used for the purposes set forth in clause (c) of section thirty-five.

Thus the State Lottery Commission may not incur expenses of operation and administration in excess of fifteen per cent of total revenues from the sale of lottery tickets.

March 16, 1982

Number 13.

Anthony J. Ruberto, Jr.
Berkeshire District Attorney
Bank Row
Pittsfield, Massachusetts 01201

Dear District Attorney Ruberto:

You have requested my opinion pursuant to G.L. c. 12, §6, whether you, as District Attorney, have the authority to represent the Sheriff of Berkshire County in a civil action under the federal civil rights act codified at 42 U.S.C. §1983 (1976). The facts, as you have informed me, are the following: The Sheriff of Berkshire County has recently been named a defendant in an action filed in the United States District Court in Springfield, Massachusetts. The plaintiff in this litigation is a former employee at the Berkshire County House of Correction and is alleging that he was wrongfully discharged from his employment on account of race. A cause of action is alleged to arise under the federal civil rights act. The Berkshire County Commissioners have requested that you represent the Sheriff in this suit.

For the reasons discussed below, it is my opinion that the district attorney, as the "public attorney", as that term is defined by G.L. c. 258, §1, may only defend actions brought against the "public employer" pursuant to G.L. c. 258. Thus, the district attorney is to represent the county when it is sued pursuant to G.L. c. 258. G.L. c. 258, §§1, 6. He is not authorized by that chapter[1] to represent the sheriff as a county officer in the defense of a federal civil rights action.

Your request involves the construction of G.L. c. 258, §9, as added by St. 1978, c. 512, §15,[2] and specifically, requires a determination whether the indemnification of public employees provided by that section vests the district attorney with the authority to defend an action not arising under that chapter.

The authority of the district attorney in this area is explicit. G.L. c. 258, §1, §3 establishes the position of "public attorney." He is

> the attorney who shall defend all civil actions brought against a public employer *pursuant to this chapter*. In the case of the commonwealth he shall be the attorney general; in the case of any county he shall be the district attorney as designated in sections twelve and thirteen of chapter twelve (emphasis supplied).

Each district attorney is the "public attorney" in his respective district. General Laws chapter 258, section 6, reiterates this duty:

[1] I have treated your question as one arising under G.L. c. 258. By so doing, I express no opinion as to whether you, as a district attorney, pursuant to G.L. c. 12, §27, or otherwise, possess the inherent authority to represent the Sheriff in such an action.

[2] Chapter 512 of the Acts of 1978 abrogated the doctrine of sovereign immunity by adding to the general laws "An Act Establishing A Claims and Indemnity Procedure for the Commonwealth, its Municipalities, Counties and Districts and the Officers and Employees Thereof." This act has come to be known as the "Massachusetts Tort Claims Act." *See generally*, Glannon, Joseph, W., "Governmental Tort Liability under the Massachusetts Tort Claims Act of 1978" 66 Mass. Law Review 1 at 7-22 (Winter, 1981). By St. 1978, c. 512, §15, that act struck out the old G.L. c. 258 and inserted in place the present General Laws chapter 258, sections 1-13.

> [t]he public attorney shall defend all civil actions brought against a public employer *pursuant to this chapter* (emphasis supplied).

In short, the express provisions of G.L. c. 258, §§1 and 6, limit the role of the "public attorney" to the defense of actions brought pursuant to the provisions of that same chapter. An express and unambiguous statement by the legislature concerning the scope of a statute is ordinarily regarded as conclusive. *See United States* v. *Turkette*, U.S. , 101 S. Ct. 2524, 2527 (1981).

In addition, the authority of the district attorney as set out in G.L. c. 12, §§12 and 13, was expanded by chapter 512 of the Acts of 1978[3] to include defense of actions brought pursuant to the provisions of G.L. c. 258. These amendments to the district attorney's authority dovetail precisely with that of the "public attorney" as set forth in G.L. c. 258, §§1 and 6. These two statutes should be construed together so as to constitute a harmonious whole consistent with the legislative purpose. *See Registrar of Motor Vehicles* v. *Board of Appeal on Motor Vehicle Liability Policies and Bonds*, Mass. Adv. Sh. (1981) 415, 420. A district attorney, when acting as the "public attorney" as defined in G.L. c. 258, §1, may only defend civil actions brought pursuant to G.L. c. 258.

In your request you suggested that General Laws chapter 258, section 9, which provides, *inter alia*, for indemnification of public employees for violations of the federal civil rights law, may also afford protection of public employers as to claims not brought under G.L. c. 258. If this were true, then the "public attorney" would defend such claims. General Laws chapter 258, section 9, does not, however, establish any basis for bringing a federal civil rights claim pursuant to that chapter. This section merely provides that:

> [P]ublic employers may indemnify public employees from personal financial loss and expenses, including legal fees and costs, if any, in an amount not to exceed one million dollars arising out of any claim, action, award, compromise, settlement or judgment by reason of an intentional tort, or by reason of any act or omission which constitutes a violation of the civil rights of any person under any federal or state law.

This section permits indemnification of a public employee if he is sued directly in circumstances where the public employer cannot be sued pursuant to G.L. c. 258, that is, for an intentional tort[4] or for a federal or state civil rights violation.[5]

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[3] Sections 3 and 4 of chapter 12 of the Acts of 1978 amended and expanded the jurisdiction of the district attorney by adding the following two paragraphs to G.L. c. 12. "The district attorney shall appear for a county constituting such district in all civil actions in which such county is a party under the provisions of chapter two hundred and fifty-eight." G.L. c. 12, §12 (as amended by St. 1978, c. 512, §3). And further, "[F]or the administration of the criminal law, or for the defense of civil actions brought pursuant to chapter two hundred fifty-eight, Suffolk County shall constitute the Suffolk District." G.L. c. 12, §13 (amended by St. 1978, c. 512, §4).

[4] General Laws chapter 258 generally abrogated the doctrine of sovereign immunity. However, G.L. c. 258, §10, provides that "sections one to eight, inclusive, shall not apply to . . . (c) any claim arising out of an intentional tort." Even so, G.L. c. 258, §9, allows for indemnification in any "claim, action, award, compromise, settlement or judgement by reason of an intentional tort."

The statute clearly distinguishes between the provision of an exclusive remedy for tortious conduct by governmental employees, G.L. c. 258, §2,[6] and the possible indemnification of governmental employees in certain circumstances, G.L. c. 258, §9. The inclusion of a clause allowing possible indemnification of a public employee for a federal civil rights violation does not convert that into a G.L. c. 258 action to ultimately be defended by the public attorney.[7]

Therefore, it is my opinion that the district attorney, acting in the capacity of public attorney pursuant to G.L. c. 258, §§1 and 6, may defend only civil actions brought pursuant to G.L. c. 258, §2. An action brought under 42 U.S.C. §1983 for race discrimination is not an action encompassed in G.L. c. 258, §2. Further, the fact that General Laws chapter 258, section 9, allows indemnification by a public employer of certain federal civil rights violations does not bring this cause of action within G.L. c. 258. Thus, the district attorney may not rely upon G.L. c. 258 as authority to defend the Sheriff in the action filed under the federal civil rights act codified at 42 U.S.C. §1983 (1976) in the United States District Court.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

April 8, 1982

Number 14.

John J. Droney, *District Attorney*
Middlesex County
Superior Courthouse
East Cambridge, Massachusetts 02141

Dear District Attorney Droney:

Acting pursuant to G.L. c. 12, §6, you have asked my opinion whether the use of recording equipment by the police department of the City of Cambridge on its emergency, business and "internal" telephone lines constitutes an "interception" as that term is defined in G.L. c. 272, §99 B 4. You further ask whether an electronic "beep" on the line at the commencement of a telephone conversation is sufficient to give the caller knowledge that the communication is being recorded so that a prohibited "interception" does not occur. I conclude

[5] A claim brought under 42 U.S.C. §1983 is not a claim within the ambit of G.L. c. 258, although General Laws chapter 258, section 9, allows indemnification of a public employee for a federal civil rights violation. As one commentator has recently pointed out, "[A]lthough they are not expressly excepted from the scope of the Massachusetts Tort Claims Act, it is clear as a matter of constitutional law that civil rights actions arising under federal law are not affected by the statute. Public employers are authorized, however, under G.L. c. 258, §9, to indemnify employees for losses resulting from such actions in some circumstances." Glannon, Joseph W., "Governmental Tort Liability under the Massachusetts Tort Claims Act of 1978," *supra*, at 11.

[6] General Laws chapter 258, section 2, provides, *inter alia*, that "[t]he remedies provided by this chapter shall be exclusive of any other civil action or proceeding by reason of the same subject matter against the public employer or, the public employee." *See Perkins School for the Blind* v. *Rate Setting Commission*, Mass. Adv. Sh. (1981) 1510, 1515-1516, n. 4 (G.L. c. 258, §1, is procedural in purpose and is not in itself the source of any new rights against the Commonwealth," *quoting Smith* v. *Commonwealth*, 347 Mass. 453, 456 (1964)).

[7] This conclusion is supported by the fact that the Legislature in 1979 added a new section 3E to G.L. c. 12 providing for representation by the Attorney General of certain state officers and employees in civil rights actions. St. 1979, c. 806, §2. This statute would have been unnecessary if General Laws chapter 258 already provided for representation in such actions by the public attorney.

that such use on emergency or business lines, with or without an accompanying electronic "beep," constitutes an "interception" under the statute.[1] The use of recording devices on "internal" lines may constitute an "interception," depending upon the specific use. I therefore reserve opinion on the portion of your question related to internal use in the absence of a detailed description of such use.

The answer to your first question follows inexorably from the literal words of the statute. General Laws chapter 272, section 99 B 4, which is but one part of the Commonwealth's comprehensive eavesdropping statute, defines an "interception" as follows:

> [T]he term "interception" means to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication; provided that it shall not constitute an interception for an investigative or law enforcement officer, as defined in this section, to record or transmit a wire or oral communication if the officer is a party to such communication or has been given prior authorization to record or transmit the communication by such a party and if recorded or transmitted in the course of an investigation of a designated offense as defined herein.

The Massachusetts statute thus imposes the requirement of two-party consent not found in the federal wiretap statute, 18 U.S.C. §§2510, *et seq.*, or the majority of the statutes of other states. *Compare* N.Y. Penal Law §250.00 (McKinney, 1967). The Supreme Judicial Court in *Commonwealth* v. *Jackson*, 370 Mass. 502, 506 n. 6 (1976) has remarked in this regard:

> we note that the [Special Commission on Electronic Eavesdropping]. . . . rejected the prevalent approach of permitting wiretapping and eavesdropping in cases of one-party consent . . . . One-party consent had been the operative standard in this Commonwealth prior to the 1968 amendment of G.L. c. 272, §99. [Citations omitted.]

See also *District Attorney for the Plymouth District* v. *New England Telephone & Telegraph Company*, Mass. Adv. Sh. (1980) 197, 203-04 n. 6 ("in certain respects our statute imposes more stringent restrictions on the use of electronic surveillance devices than exist in certain other jurisdictions").

Indeed, two-party consent represents but one demanding provision in an exceedingly stringent statute. The restrictive nature of G.L. c. 272, §99, was recently noted by the Supreme Judicial Court in *Commonwealth* v. *Thorpe*, Mass. Adv. Sh. (1981) 1827. In *Thorpe*, the Court examined the "organized crime" exception contained in section 99 B 4. (See also G.L. c. 272, §99 B 7.)

[1] Your request states that the "logger-recorder" in question falls within the definition of an "intercepting device" under G.L. c. 272, §99 B 3, and is not furnished to the police department by the New England Telephone and Telegraph Company under its tariff. Therefore, for purposes of this opinion, I assume that the common carrier equipment exemption contained in G.L. c. 272, §99 B 12, is inapplicable to these facts.

It described the statute as "framed largely in negative terms: clandestine overhearing or recording of communications is prohibited except as otherwise specifically provided." *Id.* at 1831. The Court noted the legislative preamble to the eavesdropping statute, G.L. c. 272, §99A, which states:

> [T]he general court further finds that the uncontrolled development and unrestricted use of modern electronic surveillance devices pose grave dangers to the privacy of all citizens of the commonwealth. Therefore, the secret use of such devices by private individuals must be prohibited. The use of such devices by law enforcement officials must be conducted under strict judicial supervison and should be limited to the investigation of organized crime.

Id. at 1833, n. 5. The Court stated further: "As evidenced by the statutory preamble and the legislative history, the Legislature proceeded on the premise that electronic surveillance is anathema except within certain narrowly prescribed boundaries." *Id.* at 1835.

This restrictive interpretation of section 99 comports with the well-settled principle of statutory construction that where the legislature has provided express exemptions to a general rule, these exemptions must be construed to be the only exemptions that the legislature intended to create. See *McArthur Brothers Co.* v. *Commonwealth*, 197 Mass. 137, 139 (1980). See also *Harborview Residents' Committee, Inc.* v. *Quincy Housing Authority,* 368 Mass. 425, 432 (1975) (statutory expression of one thing represents implied exclusion of others omitted from the statute). The only express exemption for the use of an "intercepting device," see G.L. c. 272, §99 B 3, without a warrant[2] by state and local investigative or law enforcement officers who are parties to a communication is when the communication is "recorded or transmitted in the course of an investigation of a designated offense as defined herein." G.L. c. 272, §99 B 4. The statute defines a "designated offense" to include a wide variety of crimes "in connection with organized crime as defined in the preamble." G.L. c. 272, §99 B 7. There is no express exemption contained in the statute for the routine use of "logger recorders" by the police on emergency and business lines, except insofar as such recordings come under the "designated offense" exemption.[3]

Moreover, as the court in *Thorpe* has made clear, there is no implicit exemption for the use of an intercepting device without a warrant by law enforcement officers. *See Commonwealth* v. *Thorpe, supra*, at 1835.

You have also asked me whether the use of an electronic "beep" by the police recorders is sufficient to remove the surveillance from the purview of the statute. As the Supreme Judicial Court has held, if the caller has "actual knowledge" that the recording is taking place, then the recording is not being made "secretly" and does not, therefore, constitute an "interception" as defined by G.L. c. 272, §99 B 4. *See Commonwealth* v. *Jackson*, 370 Mass. 502, 505 (1976).

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[2] The statute specifically exempts from its term surveillance by "any person duly authorized to make specified interception by a warrant issued pursuant to this section." G.L. c. 272, §99 D 1 d. See G.L. c. 272, §99 E.

[3] As the Court in *Thorpe* noted, however, "the Commonwealth may not rely on evidence of organized criminal activity gathered from the warrantless surveillance itself. There must be some showing of an organized crime connection *before* the surveillance, not afterward." *Commonwealth* v. *Thorpe*, Mass. Adv. Sh. (1981) at 1834-35.

In *Jackson*, the Court expressly rejected a subjective "state of mind" test for actual knowledge. *Id.* at 507. It also rejected the notion that the statute requires that the caller be informed that the conversation is being recorded. *Id.* Instead, it held that the caller needs to have "actual knowledge of the recording, but . . . that actual knowledge is proved where there are *clear and unequivocal* objective manifestations of knowledge, for such indicia are sufficiently probative of a person's state of mind as to allow an inference of knowledge." (Emphasis added). *Id.*

I must conclude that an electronic "beep" at the commencement of the conversation is not a sufficient basis in and of itself to draw an inference of actual knowledge.[4] To conclude otherwise would be inconsistent with the Court's direction that one must "look to the caller's words and conduct to determine if a conversation is being intercepted unbeknown to him." *Id.* at 507. Thus, I conclude that use of the "logger-recorder" with an electronic "beep" may well constitute an "interception" under G.L. c. 272, §99 B 4.

To the extent that your request requires a factual determination whether the public in general is actually aware of the import of such a "beep," I am, of course, unable to make such a determination. *Cf.* 1961/62 Op. Atty. Gen., Rep. A.G., Pub. Doc. No. 12 at 199, 200 (1962) (Attorney General traditionally refrains from making factual determinations in the course of rendering an opinion). In some instances, a beep may sufficiently give the caller "actual knowledge" that the conversation is being recorded. Given the broad prohibitions against warrantless surveillance contained in the statute and the strong legislative policy of protecting the privacy of the citizens of Massachusetts, however, I must conclude that one cannot presume on a routine basis that the electronic beep conveys such knowledge. *See Campiti* v. *Walonis*, 611 F. 2d 387, 396 (1st Cir. 1979), *affirming* 453 F. Supp. 819 (1978) (Massachusetts eavesdropping statute contains no implied knowledge exemption).

Based on the language of the statute and the cited authorities I conclude, therefore, that there exists no explicit or implicit exemption for the use of recording equipment by police on their emergency or business lines. Nor may the police rely upon the presence of an electronic beep on the line to convey to each caller an actual awareness that his conversation is being recorded. The lack of a specific exemption, the restrictive language of the statute, the broad prohibition against unexempted police interceptions expressed in the legislative preamble and finally the case law all independently compel this conclusion.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

[4] In my view, the *dictum* in *Commonwealth* v. *Douglas*, 354 Mass. 212 (1968), published prior to the extensive rewriting of c. 272, §99, later that year, see St. 1968, c. 738, and before *Jackson*, represents a weak reed for support of the proposition that the "beep" satisfies *Jackson's* actual knowledge requirement.

April 21, 1982

Number 15.

James H. Fish, *State Librarian*
George Fingold State Library
State House
Boston, Massachusetts 02133

Dear Mr. Fish:

You have requested my opinion, on behalf of the Board of Trustees of the State Library (the Trustees), concerning the scope of the Trustees' power, pursuant to G.L. c. 6, §34, to "sell or otherwise dispose of such books belonging to the [state] library as they consider unsuitable for its purposes." Specifically, you have asked (1) what procedures the Trustees must follow in selling or otherwise disposing of such books and (2) whether the proceeds of the sale of such books may be placed in a trust fund to be established and used by the Trustees for the purposes of the State Library.

For the reasons set forth below, it is my opinion that the precise manner of selling or otherwise disposing of books which the Trusteees consider unsuitable for the purposes of the State Library is largely within the discretion of the Trustees, within the general parameters established by certain statutes and regulations referred to below. With respect to your second question, it is my opinion that the Trustees may not place the proceeds of such sales in a trust fund to be used for the purposes of the State Library. Instead, the Trustees must turn over such proceeds to the state treasurer to be paid into the treasury in compliance with Article 63 of the Amendments to the Massachusetts Constitution.

General Laws c. 6, §34, authorizes the Trustees to "sell or otherwise dispose of such books belonging to the Library as they consider unsuitable for its purposes." Although that statute does not expressly authorize the Trustees to establish procedures for selling or otherwise disposing of such books,[1] such authority can be inferred from the general authorization to sell or dispose of books. *See, e.g., Town Taxi, Inc.* v. *Police Commissioner of Boston*, 377 Mass. 576, 586 (1979), *quoting from Bureau of Old Age Assistance of Natick* v. *Commissioner of Pub. Welfare*, 326 Mass. 121, 124 (1950) ("[w]here a grant of power is expressly conferred by statute upon an administrative officer or board . . . they in the absence of some statutory limitation have authority to employ all ordinary means reasonably necessary for the full exercise of the power"). In exercising their authority to sell or otherwise dispose of books, however, the Trustees must act in accordance with the rules and regulations established by the Commissioner of Administration, pursuant to G.L. c. 7, §22 (12), concerning the [d]isposal of obsolete, excess and unsuitable supplies . . . and other property" which requires that such property be sold or otherwise disposed of "to the best interests of the State." 802 C.M.R. 2.00 (12). *See* 1961/62 Op. Atty. Gen., Rep. A.G., Pub. Doc. No. 12 at 168 (1962); 7 Op. Atty. Gen. at 129, 131 (1923).

[1] Procedures for the sale or disposal of books and other records kept in the state archives are set forth at G.L. c. 30, §42. I am assuming for the purpose of this opinion that you are not referring to such books.

My opinion that the proceeds of such sales must be paid into the treasury rather than placed in a trust fund established by the Trustees for the purposes of the State Library is based on Article 63, §1, of the Amendments to the Massachusetts Constitution. It provides: "[A]ll money received on account of the commonwealth from any source whatsoever shall be paid into the treasury thereof."

The underlying purpose of Article 63, as often stated by the Supreme Judicial Court, is "to centralize, and improve control of, the Commonwealth's funds and to insure careful consideration of their expenditure." *Opinion of the Justices*, 349 Mass. 804, 807 (9165). *See also Town of Manchester* v. *Department of Environmental Quality Engineering*, Mass. Adv. Sh. (1980) 1753, 1761; *Opinion of the Justices*, 334 Mass. 716, 718 (1956); *Baker* v. *Commonwealth*, 312 Mass. 490, 493 (1942); *Opinion of the Justices*, 297 Mass. 577, 580 (1937). In accordance with its purpose and its literal language, this amendment has been broadly construed to cover not only tax revenues, *see, e.g., Oakley Country Club* v. *Long*, 325 Mass. 109, 111 (1949), but money received from "any source whatsoever," including court fines,[2] fees,[3] rental income,[4] parking fines,[5] profits,[6] and payments of penalty bonds.[7] Of particular relevance to the Trustees' proposed sale of books, my predecessors and I have repeatedly rendered opinions that money received from the sale of government property is "money received on account of the commonwealth" within the meaning of Article 63. 1979/80 Op. Atty. Gen. No. 13, Rep. A.G., Pub. Doc. No. 12 (1980); 1961/62 Op. Atty. Gen., Rep. A.G., Pub. Doc. No. 12 at 168 (1962); 7 Op. Atty. Gen. at 129 (1923); 6 Op. Atty. Gen. at 320-21 (1921).

The facts of the present situation do not fall within the limited circumstances in which courts and prior attorneys general have ruled that certain funds fall outside the ambit of Article 63 because they are not received on account of the Commonwealth. Such holdings have been limited to situations where the funds are received by a private or quasi-private entity rather than by a state agency, *see, e.g., Opinion of the Justices,* 309 Mass. 609, 622-23 (1941) (money received by company in private ownership, although managed by public officers, not subject to Article 63); *Opinion of the Justices*, 334 Mass. 721, 734 (1956) (funds received by Massachusetts Port Authority, an entity in itself, distinct from the Commonwealth, not subject to Article 63); or where the funds are impressed with a trust by the legislature, *see, e.g., Howes Bros. Co.* v. *Unemployment Comp. Com.*, 296 Mass. 275, 289 (1936) (Unemployment Compensation Fund); 1979/80 Op. Atty. Gen. No. 13, Rep. A.G., Pub. Doc. No. 12 at 124 (1980), (Inland Fisheries and Game Fund); 1972/73 Op. Atty. Gen. No. 34, Rep. A.G., Pub. Doc. No. 12 at 114, 117-18 (1973) (Lottery Commission Fund). *Cf. Town of Manchester* v. *Department of Environmental Quality*

[2] Town of Manchester v. *Department of Environmental Quality Engineering, supra,* at 1761.

[3] Robinson v. *Secretary of Administration*, Mass. App. Ct. Adv. Sh. (1981) 1634, 1642.

[4] 1961/62 Op. Atty. Gen., Rep. A.G., Pub. Doc. No. 12 at 154, 157 (1962).

[5] 1961/62 Op. Atty. Gen., Rep. A.G. Pub. Doc. No. 12 at 143, 145 (1962).

[6] 1958/59 Op. Atty. Gen., Rep. A.G., Pub. Doc. No. 12 at 48 (1959).

[7] 5 Op. Atty. Gen at 524 (1920).

Engineering, supra, at 1763-64, or by the donor.[8] *See, e.g., Opinion of the Justices,* 375 Mass. 851, 854 (1978) (federal funds received by state agencies on express condition that such funds be spent for a particular purpose, not subject to Article 63).

For the Trustees themselves to impose such a trust upon money received from the sale of state property and to thereafter expend the funds in such a trust without appropriation by the legislature would defeat the purpose of Article 63. *See Opinion of the Justices, supra*, 334 Mass. at 718. Furthermore, any inference that the Trustees are empowered to spend money without appropriation is precluded by the express language of the Trustees' enabling statutes, which authorize the Trustees to manage and control the state library and "the moneys appropriated therefore," G.L. c. 6, §34, and to "expend such sums annually as the general court may appropriate." G.L. c. 6, §36. The exercise of such power would violate Article 30 of the Declaration of Rights, relating to separation of powers, since it would constitute appropriation by the executive, rather than the legislative, branch. *See Opinion of the Justices, supra,* 334 Mass. at 720; *Opinion of the Justices, supra,* 375 Mass. at 853; *Opinion of the Justices*, 302 Mass. 605, 612, 614 (1939); *Robinson* v. *Secretary of Administration, supra*, at 1642.

In sum, for the reasons discussed above, it is my opinion that the Trustees may employ any reasonable procedures to sell or dispose of books they consider unsuitable for the purposes of the State Library, consistent with the rules established by the Secretary of Administration pursuant to G.L. c. 7, §22. However, the proceeds of such sales must be turned over to the state treasurer for payment into the treasury and cannot be expended by the Trustees without appropriation by the General Court.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

April 29, 1982

Number 16.

Honorable Michael Joseph Connolly
Secretary of State
Room 340
State House
Boston, Massachusetts 02133

Dear Secretary Connolly:

Acting in your capacity as chairman of the commission established by G.L. c. 55, §3, as most recently amended by St. 1981, c. 699, §79, you have asked me

[8] The Trustees do have the statutory authority to receive *gifts* and *bequests* in trust for any purpose incident to the uses of the state library. G.L. c. 6, §37A. *Cf.* 6 Op. Atty. Gen at 636, 638 (1922) (Division of Fisheries and Game not so authorized). It is my opinion that this provision cannot be construed to authorize the Trustees themselves to impose a trust on money received from a sale of state property. *See* 6 Op. Atty. Gen at 320, 321 (1921). Furthermore, even money received in trust by gift or bequest must be transferred to the state treasurer and cannot be disbursed without the prior approval of the house and senate committees on ways and means. G.L. c. 6, §37A; G.L. c. 10, §16.

to opine as to the legality of the appointment of a current member of the General Court to the Office of Director of Campaign and Political Finance. Assuming that such an appointment is made and is valid, you also inquire when the commission may properly increase the salary of the director.

Your questions arise under Article 65 of the Amendments to the Massachusetts Constitution, which provides in part "[n]o person elected to the general court shall during the term for which he was elected be appointed to any office created or the emoluments whereof are increased during such term." The Office of Director of Campaign and Political Finance was created by St. 1973, c. 1173, §1, which took effect on January 1, 1974. St. 1973, c. 1173, §17. The current term of members of the general court commenced in January, 1981 and will expire in January, 1983. There is, therefore, no argument that the Office of Director was created during the term being served by current legislators.

This past year the Legislature acted concerning the salary of the director, deleting that portion of G.L. c. 55, §3, which had previously set his salary and providing instead for the director's salary to be fixed by the commission[1] which you chair. St. 1981, c. 699, §79. You inform me that the commission has not yet increased that salary, but that you contemplate doing so in the future. Thus, the focus of your inquiry is on the meaning of that portion of Article 65 which provides that a legislator shall not be appointed to an office "the emoluments whereof are increased during [his] term." The twin concerns raised by this phrase are whether the change worked by St. 1981, c. 699, §79, is itself an increase in emoluments and whether an increase in salary after the appointment is duly made would violate Article 65. With the qualifications expressed below, I answer each of the questions in the negative.

In construing this phrase, I am guided by the maxim that the words of an Amendment to the Constitution "should be interpreted in the sense most obvious to the common intelligence, because a matter proposed for public adoption must be understood by all entitled to vote." *Lincoln* v. *Secretary of the Commonwealth*, 326 Mass. 313, 317 (1950). *See also Opinion of the Justices,* Mass. Adv. Sh. (1981) 2071, 2074-5; *Opinion of the Justices*, 365 Mass. 655, 657 (1974). Similarly, I must read the amendment so as to achieve a reasonable result in light of its dominating purpose. In seeking to ascertain the dominating purpose the framers of Article 65 were seeking to serve, I have been guided primarily by the Debates of the Constitutional Convention of 1917, which reveal that Article 65 was modeled upon Article I, Section 6, of the United States Constitution and, like the federal provision, "was generated out of a fear that corruption would result if the legislature multiplied the number or increased the salaries of public offices for the benefit of its own members." *Atkins* v. *United States*, 556 F. 2d 1028, 1070 (Ct. Cl. 1977). *See generally* 3 Debates in the Massachusetts Constitutional Convention 1917-1918 (1920).

In 1976, the Supreme Court of Alaska considered a similar constitutional provision of that state which was also modeled upon the federal provision contained in Article I, Section 6. The court examined similar provisions of

[1] This commission is comprised of the chairman of the two leading political parties, the State Secretary and a dean of a law school located in the Commonwealth. The function of the commission is to appoint the Director of the Office of Campaign and Political Finance. G.L. c. 55, §3.

numerous other states, including Massachusetts, and articulated their purpose as follows:

> [T]here is little disagreement as to the purpose of the type of constitutional provision under consideration here. Although the exact language varies from state to state, all such provisions are aimed at a common goal: to remove improper motives from considerations of legislators in voting for increased salaries or the creation of new offices (footnotes ommitted).
> *Warwick* v. *Chance,* Alaska , 548 P. 2d. 284, 288 (1976).

Turning to the first question presented by your request, I begin with a literal reading of Article 65 construing its words in their ordinary sense. The word "emolument" is defined in Black's Law Dictionary as the "profit arising from office or employment . . . any perquisite, advantage, profit or gain arising from the possession of an office." In construing constitutional provisions like Article 65, the courts have consistently ascribed this ordinary meaning to the term and have accordingly held that the word implies an "actual pecuniary gain, rather than some imponderable and contingent benefit," *State* v. *Reeves,* Wash. , 82 P. 2d 173, 175 (1938). Thus, a change in the manner of payment has been held not to be an increase in emoluments, even though it rendered payment more secure. *State* v. *Nye*, 148 Wis. 659, 135 N.W. 126 (1912). Similarly the highest court of Maryland has ruled that a statute authorizing a board to establish the salary for a position is not the equivalent of an increase in emoluments, even where the authority is exercised and an increase granted. *Mayor and Commissioners of Westernport* v. *Green*, 144 Md. 85, 124A. 403 (1923).

Utilizing the approach of these cases, I conclude that the change worked by St. 1981, c. 699, §79, was not in itself an increase in the emoluments of the office of director. It altered the mechanism for establishing the director's salary, but that is precisely the type of "imponderable and contingent benefit" the courts have declined to identify as "emoluments." *See State* v. *Reeves,* Wash. at , 82 P. 2d at 175.

Recalling the purpose of Article 65, it is clear that the recent amendment to G.L. c. 55, §3, was not the type of legislation contemplated by the framers. That recent amendment merely divests the Legislature of the ability to set the salary of the director and confers that power, instead, upon an independent commission. Your commission is able to reduce or increase the director's salary. Therefore, it cannot be said that in enacting St. 1981, c. 699, §79, the Legislature has acted to increase the emoluments of the office or could have been influenced by such a consideration. I conclude that this legislative action does not increase the emoluments of the office of director.

The second question which you pose asks, in effect, whether, if your commission does increase the director's salary, the appointment of a legislator elected for the current term is invalidated by the provisions of Article 65. To be answered, this question necessarily requires a determination when the disqualifying event under Article 65 — here, an increase in salary — must occur in order for the legislator to be rendered ineligible for office. For the following reasons, I conclude that the increase in salary must have taken place prior to the

appointment of the legislator in order to bring the case within the prohibition of Article 65.

My conclusion derives in part from the fact that while Article 65 is an "ineligibility" clause, the Massachusetts Constitution, like the federal Constitution, contains a separate provision governing incompatibility of offices.[2] An ineligibility clause focuses on one's qualifications for office at the time of appointment, *i.e.*, whether an individual "shall . . . be appointed." An incompatibility provision, on the other hand, speaks to one's ongoing authority to hold a particular office. The authorities construing ineligibility clauses uniformly conclude that events which occur after appointment do not vitiate an originally valid selection.

Thus, the Supreme Judicial Court offered an opinion to the Governor and Council in 1964 concerning the operation of Article 65. *Opinion of the Justices*, 348 Mass. 803 (1964). It was the opinion of the Justices that an increase in the salary of an office during the term of a member of the General Court, and prior to the appointment of that member to the office, invalidated the legislator's appointment. The fact that the salary was reduced subsequent to the appointment was without significance. *Id.* at 805. Courts of other jurisdictions have also looked to the time of the questioned appointment to determine whether the emoluments of the office had been increased so as to make a member of the state's legislature ineligible for appointment. See *Student Public Int. Research Group* v. *Byrne*, 86 N.J. 592, 432 A. 2d 507 (1981) (appointment of member of general assembly to position emoluments of which were increased by law passed on the day of her appointment, but effective one week later, does not violate state constitutional "ineligibility clause"); *Ryan* v. *Boyd*, 21 Wis. 208 (1866) (election of state legislator to judicial office not violative of state constitution even though salary increase voted by state legislature after the election but during legislator's elective term). See also 42 *Op. U.S. Atty. Gen.* 381 (1969) (appointment of Congressman to position of Secretary of Defense does not offend federal constitution's ineligibility clause when at the time of appointment salary increase had not yet received final approval).

Based upon a literal reading of Article 65, I too conclude that if an appointment of a legislator is valid when made, subsequent events will not in themselves render it unlawful for the legislator to continue to hold appointive office. That is not to say, however, that subsequent events are irrelevant in determining whether Article 65 has been violated. Any device to circumvent Article 65 could not be upheld. *See, e.g., Opinion of the Justices*, 348 Mass. 803 (1964) (fact that salary for position raised during legislator's term was reduced following legislator's appointment to position is of no constitutional significance); *Hawthorne* v. *Wiseheart*, 158 Fla. 267, 28 So. 2d 589 (1946) (resignation from

[2] The "incompatibility" provision is contained in the Massachusetts Constitution, Pt. 2, C. 6, Art. 2, which provides that individuals holding certain ennumerated public offices may not hold certain other public offices at the same time. This prohibition specifically provides that

> [N]o person holding the office of judge of the supreme judicial court — secretary — attorney-general — solicitor-general — treasurer or receiver-general — judge of probate — sheriff — clerk of the house of representatives — register of probate — register of deeds — clerk of the supreme judicial court — clerk of the inferior court of common pleas — or officer of the customs, including in this description naval officers — shall at the same time have a seat in the senate or house of representatives; but their being chosen or appointed to, and accepting the same, shall operate as a resignation of their seat in the senate or house of representatives; and the place so vacated shall be filled up.

The United States Constitution, Art. I, sec. 6, provides the following "incompatibility" provision:

> no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

legislative branch prior to appointment insufficient to insulate such appointment from scrutiny). If an increase in salary had in fact been granted prior to appointment, but deferred until after the legislator had assumed office as an attempt to avoid the strictures of Article 65, such subterfuge would be set aside and the appointment would be invalid.

It is apparent that there is, therefore, no specific date after which you may grant a salary increase to a former legislator serving as Director of the Office of Campaign and Political Finance. It it clear, however, that no increase may be made prior to the appointment.

For the foregoing reasons and based upon the facts you have provided me, I conclude that Article 65 does not prohibit the appointment of a legislator to the Office of Director of Campaign and Political Finance and that once such an appointment has been duly made, Article 65 does not preclude the commission you chair from increasing the salary of the position.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

June 2, 1982

Number 17.

Eugene J. Doody, *Director*
Division of Employment Security
Charles F. Hurley Employment
Security Building
Government Center
Boston, Massachusetts 02114

Dear Mr. Doody:

You have requested my opinion on a question relating to that portion of G.L. c. 151A, §41 (b), which permits the Board of Review[1] (hereafter, "the Board") "[b]efore rendering its decision . . . [to] remand [a] case to the director for taking such additional evidence as the board deems necessary or [to] itself take evidence at a hearing." You ask whether this provision authorizes the Director of the Division of Employment Security (hereafter, the "Division"), after taking additional evidence when a case is remanded by the Board, to issue a new decision with new appellate rights for the aggrieved party. If the Director is not authorized by G.L. c. 151A, §41 (b), to issue a new decision, you wish to know whether the Director is required to make new findings of fact after taking additional evidence when a case has been remanded to him by the Board. For the reasons stated below, it is my opinion that General Laws chapter 151A, section 41 (b), does not authorize the Director to issue a new decision when a case is remanded by the Board for the purpose of taking additional evidence. The Director, however, is required to make new subsidiary findings of fact

[1] The Board of Review in the Division of Employment Security is established by G.L. c. 23, §9N (b), as added by St. 1981, c. 699, §44; its duties are set forth in G.L. c. 151A, §41.

when the evidence taken at the remand hearing is different in any significant respect from the evidence taken at the original hearing.

Section 41 of Chapter 151A of the General Laws was completely revised by the General Court through its enactment of St. 1976, c. 473, §14.[2] This provision creates an administrative procedure for determining the merits of an application for review filed by a party aggrieved by the Director's determination under G.L. c. 151A, §39, of a claimant's eligibility for unemployment compensation.[3] The Board must first conduct a preliminary examination of the record of the hearing held by the Director or his designee along with the Director's findings of fact and decision. Based upon this evaluation, the Board must either grant or deny the application for review within twenty-one days from the date the application is filed.[4] If the Board determines that review of the Director's decision is warranted, the Board is directed to determine "whether the director's decision was founded on the evidence in the record and was free from any error of law affecting substantial rights." G.L. c. 151A, §41 (b). If in the process of ascertaining whether the Director's decision satisfies this standard, the Board determines that it requires additional evidence, the Board "may remand the case to the director for taking of such additional evidence as the board deems necessary or may itself take evidence at a hearing."[5]

Answers to your questions require careful interpretation of section 41 (b). The Massachusetts rule of statutory interpretation has been concisely stated by Chief Justice Rugg in *Hanlon* v. *Rollins*, 286 Mass. 444 (1934):

> [T]he general and familiar rule is that a statute must be interpreted according to the intent of the Legislature 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, to the end that the purpose of its framers may be effectuated.
>
> *Id.* at 447.

The language of the statute itself must be the starting point for determining its meaning, as well as the principal source of insight into the legislative purpose

[2] On April 1, 1976, the Governor sent a message to the Legislature which set forth a series of recommendations for major changes in the Massachusetts employment security system. Along with his message to the Legislature, the Governor submitted a legislative package designed to reform various provisions of chapter 151A. Several of these suggested revisions in the employment security law encompassed changes in the administrative appeals procedure of the Division of Employment Security, including a provision authorizing the Board, prior to issuing its final decision, to remand a case to the Director "for the taking of such additional evidence as the board deems necessary." The legislative package submitted by the Governor became House Bill No. 4624.

This measure, along with several other House and Senate petitions to revise various sections of chapter 151A, was referred to the House Committee on Commerce and Labor. Based upon its review and consideration of the serious problems affecting the employment security system and the various proposals for comprehensive restructuring of the program, the Committee reported out House Bill No. 5413, which adopted much of the Governor's original proposal as a framework for the new legislation. House No. 5413, however, did not rely exclusively upon the Governor's proposal; it also contained language which originated in the Committee or was adopted from other legislative petitions and the recommendations of the Division and other interested parties. After an emergency preamble was attached to the measure, House Bill No. 5413 was enacted by the Legislature without significant revision and signed by the Governor.

[3] General Laws chapter 151A, section 39 (b), permits the Director to designate a hearing examiner to conduct a fair hearing in a case where a claimant's eligibility for unemployment compensation is disputed. The Director's determination of eligibility for unemployment compensation must be based solely upon evidence introduced at the fair hearing.

[4] The Board may appoint an examiner in accordance with G.L. c. 23, §9K, to conduct the preliminary examination and recommend an appropriate disposition of the application for review.

[5] Whether the case is remanded to the Director for a supplementary evidentiary hearing or such a hearing is conducted by the Board, the procedures used during the hearing must conform with the provisions of G.L. c. 151A, §39 (b), which sets the procedural format for all hearings conducted by the Director or his designee. See *Walker* v. *Director of the Division of Employment Security*, Mass. Adv. Sh. (1981) 190, 192-93, for a general description of the remand procedure.

for its enactment. *Globe Newspaper Co.* v. *Superior Court,* Mass. Adv. Sh. (1980) 485, 489; *Hoffman* v. *Howmedica, Inc.,* 373 Mass. 32, 37 (1977).

The language of section 41 (b) is unambiguous. It provides a limited right of remand that arises only when the Board determines that it is necessary to take additional evidence before it can decide all the issues raised by a claim for unemployment compensation. The provision goes on to give the Board two alternatives for obtaining the supplementary evidence. The Board may choose to take the evidence itself at a hearing or it may remand the case to the Director with instructions to take certain additional evidence. Nevertheless, the authority to decide the merits of an application for review rests exclusively with the Board. There is nothing in the language of the statute nor in its legislative history to indicate that the Legislature intended to authorize the Director to issue a new decision after taking additional evidence when a case is remanded to the Director by the Board.[6]

Both the statute and the history of its development reflect the legislative purpose for revising section 41. The framers of the 1976 amendment focused their attention on designing a procedure that would expedite the Division's adjudicatory process, as well as protect and enhance its fundamental fairness.[7] Message of the Governor submitted with Mass. H. 4624 (1976) at 2. *Cf. DaLomba* v. *Director of Division of Employment Security,* 369 Mass. 92, 96 (1975) (proceedings for determinations regarding unemployment compensation benefits must be simple and prompt). The Director's issuance of a new decision in a case remanded by the Board would advance neither of the Legislature's primary objectives for amending section 41 (b). Rather, it would serve merely to delay final action on an unemployment compensation claim by introducing another level of administrative decision-making. Similarly, such added step in the adjudicatory process is unnecessary to enhance the fairness of that process.

Finally, had the Legislature considered such a procedure advisable to guarantee procedural fairness, it could have easily made the option available.[8] In the State Administrative Procedure Act, for example, the Legislature provided such an option to administrative agencies which are directed by the Superior Court to take additional evidence relating to specific issues raised in an action for judicial review of an agency decision. After conducting an evidentiary hearing on remand, the agency is authorized to modify its final decision on the basis of the

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[6] The final language of the second sentence of section 41 (b) differs from the language used in the Governor's initial proposal in one important respect. The House Committee on Commerce and Labor added the concluding phrase to that sentence which authorizes the Board to take additional evidence if necessary as an alternative to remanding the case to the Director for the purpose of taking such evidence. Mass. H. 4624 (1976); Mass. H. 5413 (1976).

In addition to providing a measure of flexibility to the Division's adjudicatory process, this addition evinces the Legislature's intention to give the Board all the tools it would require to fulfill its duty to decide applications for review.

[7] To accomplish the objective of insuring prompt action on all unemployment compensation claims, the Legislature established a series of time limitations which govern the processing of such claims. G.L. c. 151A, §§39-42. For example, the Board is instructed by section 41 (b) to "make every reasonable effort to issue a decision within forty-five days after granting an application for review." This forty-five day period applies whether or not the case is remanded to the Director for the taking of additional evidence.

[8] In slightly different circumstances, the Legislature has authorized the Board through section 41 (d) to modify the findings of fact and determinations made by the Director pursuant to section 39 (d). This is a clear indication that when the Legislature intends to authorize an administrative body to modify its adjudicatory decisions or those of its agency subordinates, the Legislature will do so explicitly.

evidence received at the hearing. G.L. 30A, §41(6).[9] The absence of such a procedure in section 41 (b) is a firm acknowledgement of the Legislature's intention to limit the scope of the Director's authority when a case is remanded by the Board.[10]

For these reasons, I conclude that the Director is not authorized by section 41 (b) to issue a new decision when a case is remanded to the Director by the Board for the purpose of taking additional evidence.

Your second question addresses a related but different issue: whether, on remand, the Director is required to make new findings of fact after conducting an evidentiary hearing. The answer to this question cannot be stated in absolute terms because the need to make new subsidiary findings will depend upon the circumstances of each case. If the additional evidence taken at the remand hearing differs in any significant respect from the original evidence upon which the Director's initial decision was based, new subsidiary findings should be made by the Director and reported to the Board.

New subsidiary findings may become necessary for several reasons. First, General Laws chapter 151A, section 39 (b), which governs the conduct of evidentiary hearings on remand to the Director, see G.L. c. 151A, §41 (b), requires that such hearings "shall be in accordance with chapter 30A." General Laws chapter 30A, section 11(8), directs that every agency decision "shall be accompanied by a statement of reasons for the decision, including determination of each issue of fact or law necessary to the decision." Massachusetts courts have consistently enforced this requirement. The Supreme Judicial Court has often "stressed the importance of specific, clear, and complete subsidiary findings of fact." *Smith* v. *Director of the Division of Employment Security,* 376 Mass. 563, 566 (1978), and cases cited. The Court routinely has refused to exercise its appellate function in the absence of specific findings on all material issues raised by a claim for unemployment compensation. *Graves* v. *Director of the Division of Employment Security,* Mass. Adv. Sh. (1981) 2405, 2408; *Walker* v. *Director of the Division of Employment Security,* Mass. Adv. Sh. (1981) 190, 193-194; *Smith* v. *Director of the Division of Employment Security, supra* at 566.

Although most agencies experience no procedural impediments to fulfilling this obligation, the adjudicatory process created by section 41 (b) does not always permit the Board to follow a direct path in its effort to satisfy the requirement that a full statement of reasons accompany its final decision. The difficulty arises when the Board remands a case to the Director to conduct a

[9] G.L. 30A, §14(6) provides:

> If application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material to the issues in the case, and that there was good reason for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon such conditions as the court deems proper. The agency may modify its findings and decision by reason of such additional evidence and shall file with the reviewing court, to become part of the record, the additional evidence, together with any modified or new findings or decision.

[10] Section 42 (b), by referencing section 39 (b), directs that evidentiary hearings on remand and before the Board must be conducted in accordance with G.L. c. 30A. This reference to the Administrative Procedure Act is specifically limited to the procedural format for conducting adjudicatory hearings. In light of this explicit limitation, the reference in section 39 (b) to chapter 30A cannot be interpreted broadly to include authority for the Director to modify his decision after a hearing on remand, as may be done by an agency under G.L. c. 30A, §14 when a case is remanded in accordance with that provision. The highly specific reference to the Administrative Procedure Act in section 39 (b) restricts application of the provisions of chapter 30A in the context of those unemployment compensation matters to the manner in which adjudicatory hearings are conducted. It provides no basis for concluding that the Legislature intended to authorize the Director to issue a new decision after taking additional evidence in a case remanded by the Board.

supplementary hearing and does not itself take the additional evidence it considers necessary to decide the merits of an application for review. In these circumstances, when the Board does not conduct the evidentiary hearing, it may not make independent findings of fact. *Boston Mutual Life Insurance Company* v. *Director of the Division of Employment Security*, Mass. Adv. Sh. (1981) 2131; *Director of the Division of Employment Security* v. *Fingerman*, 378 Mass. 461, 463 (1979). The Board, therefore, must rely upon the subsidiary findings made by the Director following a remand hearing as the basis for its final decision and accompanying statement of reasons. Because the Board is powerless to make independent findings of fact in a case that it has remanded to the Director, if section 41 (b) were interpreted to preclude the Director from making new subsidiary findings, the remand procedure would serve no useful function.

"An intention to enact a barren and ineffective provision is not lightly to be imputed to the Legislature." *Insurance Rating Board* v. *Commissioner of Insurance*, 356 Mass. 184, 189 (1969) quoted in *Baystate Medical Center* v. *Blue Cross of Massachusetts, Inc.*, Mass. Adv. Sh. (1981) 317, 323. A statutory construction will not be adopted "when that construction would be inconsistent with other material provisions of the statute and would defeat the aim and object of the legislation." *Town of Lexington* v. *Town of Bedford*, 378 Mass. 562, 570 (1979). Rather, when the draftmanship of a statute lacks precision, it must be given a reasonable construction which will effectuate the legislative purpose for its enactment. *School Committee of Greenfield* v. *Greenfield Education Association*, 385 Mass. 70, 80 (1982); *Massachusetts Commission Against Discrimination* v. *Liberty Mutual Insurance Co.*, 371 Mass. 186, 190 (1976).

Reasonable construction of section 41 (b) must preserve the flexibility the Legislature intended to accord the Board when it determines that additional evidence is required before it can issue a final decision on an application for review. Therefore, when the Board remands a case to the Director for the purpose of taking additional evidence and the Director determines that the evidence taken on remand will necessitate new subsidiary findings of fact, the Director should make appropriate findings and report to the Board these findings along with the additional evidence taken at the hearing.[11] Although the Director is not empowered to revise his original decision based upon the new subsidiary findings, these findings form an essential basis for the Board's final decision on the merits of a disputed claim for unemployment compensation.

The legislative objective of expediting the Division's adjudicatory process and ensuring its procedural fairness will best be effectuated through consistent application of this procedure when the Board decides to remand a case to the Director for the purpose of taking additional evidence. Use of the remand procedure in this manner will afford all parties a fair and prompt resolution of unemployment compensation claims.

[11] The Supreme Judicial Court appears to approve this procedure in *Groves* v. *Director of the Division of Employment Security*, Mass. Adv. Sh. (1981) 2405. There the hearing examiner failed to make subsidiary findings on a central issue in the case. The Court observed that the Board could employ the remand procedure to send the case back to the hearing examiner for a determination of the undecided issue on the evidence in the record or for an evidentiary hearing at which the issue could be addressed. *Id.* at 2408.

For the foregoing reasons, I answer your first question in the negative, but your second question in the affirmative.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

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