The Commonwealth of Massachusetts

Report

of the

Attorney General

For the

Year ending June 30, 1961
The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING JUNE 30, 1961

Publication of this Document Approved by Alfred C. Holland, State Purchasing Agent.
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, 1961.

Respectfully submitted,

EDWARD J. McCORMACK, JR.,
Attorney General.
The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL

Attorney General
EDWARD J. MCCORMACK, Jr.

First Assistant Attorney General
FRED WINSLOW FISHER

Assistant Attorneys General

GEORGE W. ARVANITIS
JAMES W. BAILEY
GERALD A. BERLIN
PHILIP W. BOUCHARD 10, 17
LUCY BRODERICK BRADY
GERALD CABITT 16, 21
JOHN J. COFFEY 15
SAMUEL R. DESIMONE 13
FRANCIS R. DOBROWSKI
RICHARD T. DI-LANX 20
JOSEPH T. DOYLE
SAUL GURVITZ 4

JOHN M. HART 12
DAVID S. HOAR
BERNARD I. KAPLAN 3
JAMES J. KELLEHER
WILLIAM F. LONG, JR.
CHARLES H. MCCUE 19
NATHAN S. PAVEN 2
ROBERT M. READY 2
JOHN E. RYAN 11, 17
THEODORE R. STANLEY 10
WILLIAM H. SULLIVAN 8
ROBERT H. TEBIN

HERBERT E. TUCKER, JR.

Assistant Attorneys General; Director, Division of Public Charities
RICHARD H. GENS 14

Assistant Attorneys General assigned to Department of Public Works
DOMENICO J. ALFANO
GEORGE BREGIANES
DONALD J. CLANCY 10, 11
CHARLES E. FRAZIER 16
RALPH GORDON 15

JOSEPH P. ZAJAC 17

Assistant Attorneys General assigned to Metropolitan District Commission
DANIEL W. CARNEY
JOSEPH H. ELCOCK, JR. 6

Assistant Attorneys General assigned to Division of Employment Security
JOSEPH S. AYOUB

Assistant Attorney General assigned to Veterans Division
LEO SONTAG

Chief Clerk
RUSSELL F. LANDRIGAN

Head Administrative Assistant
EDWARD J. WHITE

2 Terminated, Nov. 11, 1960.
4 Terminated, Dec. 21, 1960.
10 Appointed, April 1, 1961.
16 Terminated, June 1, 1961.
17 Appointed, June 12, 1961.
STATEMENT OF APPROPRIATIONS AND EXPENDITURES

For the Period from July 1, 1960 to June 30, 1961

Appropriations.

Attorney General's Salary ........................................ $15,000 00
Administration, Personal Services and Expenses ................ 377,647 00
Veterans' Legal Assistance ....................................... 19,100 00
Investigation and Study of Public Charities ..................... 10,000 00
Claims, Damages by State Owned Cars ............................. 95,000 00
Small Claims ................................................................ 10,000 00

Total ......................................................................... $526,747 00

Expenditures.

Attorney General's Salary ........................................ $15,000 00
Administration, Personal Services and Expenses ................ 377,575 29
Veterans' Legal Assistance ....................................... 18,996 68
Investigation and Study of Public Charities ..................... 10,000 00
Claims, Damages by State Owned Cars ............................. 94,999 84
Small Claims ................................................................ 10,000 00

Total ......................................................................... $526,571 81


By JOSEPH T. O'SHEA,  
For the Comptroller.

Approved for publishing.

JOSEPH ALECKS,  
Comptroller.
To the Honorable Senate and House of Representatives:

Pursuant to the provisions of section 11 of chapter 12 of the General Laws, as amended, I herewith submit my report.

The cases requiring the attention of this department during the fiscal year ending June 30, 1961, totaling 21,306, are tabulated as follows:

- Extradition and interstate rendition: 112
- Land Court petitions: 138
- Land damage cases arising from the taking of land:
  - Department of Public Works: 1,585
  - Metropolitan District Commission: 190
  - Civil Defense: 1
  - Department of Mental Health: 1
  - Department of Natural Resources: 19
  - Department of Public Safety: 1
  - Lowell Technological Institute: 2
  - Massachusetts Maritime Academy: 4
  - Massachusetts Turnpike Authority: 2
  - State Reclamation Board: 2
- Miscellaneous cases, including suits for the collection of money due the Commonwealth: 8,948
- Estates involving application of funds given to public charities: 1,644
- Settlement cases for support of persons in State institutions: 23
- Pardons:
  - Investigations and recommendations in accordance with G. L. c. 127, § 152, as amended: 52
  - Small claims against the Commonwealth: 280
  - Workmen's compensation cases, first reports: 6,124
  - Cases in behalf of Division of Employment Security: 538
  - Cases in behalf of Veterans' Division: 1,640

Introduction.

The fiscal year covered by this report was one of the most active in the history of the office of Attorney General. In addition to the heavy burden of the ordinary legal matters and litigation handled by the office which continued at a large and increasing volume, very important and difficult situations of extraordinary occurrence arose and required the attention of the Criminal Division of the office. The Division of Civil Rights and Liberties continued its activities for the protection of the rights of all citizens and the Division of Consumer Counsel was active in many important matters. Detailed reports of the activities of the three divisions named and of the other units and branches of the office are set out below.
CONSUMER COUNCIL AND DIVISION OF CONSUMER COUNSEL.

I again recommended the passage of legislation creating the Consumer's Council as a statutory body to be located in, but not subject to the control of, the Attorney General's office, with the Attorney General to supply legal and clerical assistance. It has become increasingly apparent to me that there is need for such representation before the administrative agencies and before the courts.

In rate cases, affecting public utilities, insurance, small loans and the like, there is virtually no representation of the users before the administrative agencies. When one examines the record of the evidence submitted to the several agencies in support of, or in connection with these hearings, one is struck by the almost total lack of any statement of opposition. The interested parties are quite often the utilities or the insurance companies or the lending agencies, as the case may be. For this reason, I recommended that the legislation creating the Consumer's Council give the Council standing in court as a "party in interest" with the right to challenge any ruling by an administrative agency. Under existing legislation, the only parties having such standing are usually the parties who have themselves appealed for the increase in rates and the user has been ruled not to be a "party in interest."

During the year, the Consumer's Council has been concerned with prosecution of certain cases involving fraudulent and misleading advertising and has instituted suits to enjoin such activity. In one instance, after suit was entered by me, a stipulation was filed, whereby the offending party agreed to cease the misleading advertising and salesmanship, in which it had been engaged.

On October 6, 1960, in co-operation with the Bar Association of the city of Boston and the Massachusetts Bar Association, I sponsored a seminar on antitrust matters. This seminar was attended by lawyers from all over the Commonwealth and supplied them with information concerning the latest rulings and changes in the laws relating to antitrust. This seminar followed my filing of suits to seek recovery in treble damages in the asphalt cases.

In connection with my investigation of the Metropolitan District Commission, it came to my attention that several utility companies had been charging the Metropolitan District Commission for the use of electricity for street lighting in a manner which was not consistent with the rate schedules as filed by those utilities with the Department of Public Utilities. I, therefore, with the co-operation of the Metropolitan District Commission, began an investigation into these rates to determine whether or not the Commonwealth was being overcharged and what, if any, remedies there were available to us. In connection with this investigation, I also started an investigation of all electric rate charges to which the Commonwealth was subject to determine whether or not the treatment accorded the Commonwealth was similar in all instances. This investigation is still going on.
Mass Transportation.

The field of mass transportation again continued to occupy a good deal of the time and attention of this office, during this period.

Old Colony.

On July 18, 1960, Judge Anderson in the United States District Court in Connecticut, entered a decision on the Commonwealth’s rights to the option after lengthy litigation. The court set a deadline by which time the Commonwealth was to enact legislation to complete the exercise of the option. This deadline was extended several times at the request of the Governor and the General Court, until May 10, 1961, when legislation creating the South Shore Transportation District was enacted.

Boston & Maine Railroad.

On October 4, 1960, the Boston & Maine Railroad proposed to cut certain commuter service in Massachusetts. In accordance with the agreement which the Boston & Maine Railroad entered into with the Commonwealth, for the refunding of certain of its bonds, I immediately objected both to the Boston & Maine Railroad and to the Department of Public Utilities claiming that the discontinuance application was a breach of faith. On November 13, 1960, I appeared before the Department of Public Utilities in opposition to this discontinuance application. Largely as a result of my actions, on February 16, 1961, the Boston & Maine Railroad withdrew its application for discontinuance.

In line with the problems which I discussed concerning the position of the Attorney General, in opposition to certain actions of the Public Utilities Commission, among others, I had appeared before the Department of Public Utilities in opposition to the proposed sale of South Station which had been filed by the South Station Terminal. The Department of Public Utilities had approved this application and I, therefore, appealed the decision to the Supreme Judicial Court. I appointed the counsel for the Department of Public Utilities as a Special Assistant Attorney General to represent the department, while another Assistant Attorney General appeared in my behalf in opposition to the decision. The court, while ruling in favor of the department, said “we recognize that troublesome questions may arise where the Attorney General is representing both a department or commission whose decision is called in question, and the public or some portion of it. . . . But since the Attorney General has certain common law responsibilities with respect to the enforcement of public rights . . . as well as the statutory duty to appear for State departments (G. L. c. 12, § 3), we are not to be understood as holding that he can never represent more than one interest.” Attorney General v. Department of Public Utilities, 342 Mass. 662, 665, 666.

This case is a continuing demonstration of the obligation and duty of the Attorney General to enforce the public right even though he may have to do so against a governmental agency for which he has the responsibility to appear in court.
Antitrust.

Antitrust activity increased greatly in this period. This was due in large measure to what is now known as the "Asphalt Clause." In my report for the year ending June 30, 1960, I stated that I opposed the acceptance by the Antitrust Division of "nolo contendre" pleas and consent decrees in the criminal and civil road material cases brought by the Federal Government in the United States District Court in Boston. Since the Commonwealth of Massachusetts and its cities and towns were the victims of the price-fixing and bid-rigging conspiracies, I felt that they should have the advantages of prima facie cases when suing for triple damages.

On October 13, 1960, I was informed that a consent decree containing the prima facie provision which is now known as the "Asphalt Clause," would be presented and probably accepted on the following Monday, October 17. The prima facie benefit of this decree only extended to those governmental units which had cases pending prior to its acceptance by the court. Since I had already filed suit on behalf of the State, it would have the advantage of the decree. However, I knew that the major portion of the damages sustained as a result of these conspiracies was sustained by the cities and towns of the Commonwealth. Massachusetts has 351 cities and towns. It was not certain whether or not I, as Attorney General, could bring suit in my name on behalf of the cities and towns either by way of direct representation or a class suit. It was also obvious that to help the cities and towns, something had to be done promptly. Therefore, sent a letter on October 13 to all 351 cities and towns informing them of the anticipated decree and advising them that if they wished to proceed on this matter they file their own complaint on the following Monday morning or forward me proper written authorization to file one on their behalf. Eventually, approximately 70 suits were filed by or in behalf of cities and towns.

The multiplicity of parties and of actions raised many difficult practical problems in the mere handling of the paper work. I called a meeting of all the cities and towns which had suits pending at which a procedure was evolved for handling of the discovery through one Assistant Attorney General, with the co-operation of all other counsel. Millions of dollars of purchases were involved in the State and cities and towns cases. Pre-trial discovery and analysis proceeded throughout the year.

Being aware that similar triple damage actions arising out of the Federal Government "electrical" cases in Philadelphia were on the horizon, I requested, and there was enacted, special legislation as an amendment to Section 10 of Chapter 12 of the General Laws. This gave the Attorney General direct authority to bring antitrust damage suits in behalf of the political subdivisions of the Commonwealth. When the cases were decided in Philadelphia, I sent a questionnaire to all of the more than 370 such subdivisions to determine what triple damage suits should be commenced. The answers revealed many millions of dollars of purchases on the basis of which suits for triple damages were subsequently entered.
Railroad Passenger Service Cases.

In instances where the Attorney General, as the representative of all the people, differs, or is asked to differ, on grounds of public policy, with the decision of a particular board or commission, the Attorney General, since he also has the duty of defending the decisions of State departments, boards and commissions, is put in a difficult position.

As stated, such situations frequently arise with reference to decisions of the Public Utilities Commission. During the year two other cases arose which illustrate the two sides of the problem. In one case the Public Utilities Commission rendered a decision approving the plan of a railroad to rearrange passenger service on certain lines in such a way as not to greatly reduce the service in the area or inconvenience the public to any great extent while relieving the railroad from a large loss in passenger operations. An appeal was taken by the communities involved. The Attorney General felt that the appeal was ill-advised, that the objections to the commission's order approving the service rearrangement were unjustified and he took that position before the Supreme Judicial Court of the Commonwealth which sustained the commission's order in every respect. *Town of Wilmington v. Department of Public Utilities*, 341 Mass. 599.

In another case, however, the commission approved the discontinuance by a railroad of all passenger service on a certain line, some of the trains on which operated at a profit and on which a curtailed service could continue to operate profitably, or at a small expense. The Attorney General disagreed with the commission's decision. To resolve the difficulty one Assistant Attorney General was assigned to represent the commission and argue the case in support of its order, and another Assistant Attorney General, the Director of the Division of Consumer Counsel, was assigned to work with the municipalities which had appealed the commission's order. The Attorney General and the Assistant in charge of the Division of Consumer Counsel were successful in working out a program of continuing on a reduced schedule, rather than discontinuing all passenger service, which program was agreed to by the railroad and the communities involved and approved by the commission, and the appeals were withdrawn.

Division of Civil Rights.

The third edition of the "If You Are Arrested" pamphlet was printed and distributed to a waiting list of over 200,000 people, including the senior classes of all the public and private schools in the Commonwealth. During the year six other states adopted the Massachusetts pamphlet for their own jurisdictions, and the American Bar Association designated a committee to prepare a pamphlet for national distribution dealing with the Federal criminal laws.

The division, as part of its duties as counsel for the Massachusetts Commission Against Discrimination, was active in helping to draft and secure legislation to extend and tighten the enforcement of the Massachusetts Fair Housing Practices law. During the year in question, it
represented the commission in the prosecution of the Colangelo case, now headed for the first high court test in the nation of this type of regulatory statute.

Towards the end of the year the United States Supreme Court in Mapp v. Ohio, 367 U.S. 643 (1961), 81 S. Ct. 111, ruled that illegally obtained evidence is inadmissible in State prosecutions. The office subsequently received numerous requests from law enforcement officials for an explanation of this decision which overturned nearly 125 years of Massachusetts law, and asked for a clarification as to its effect on them in the performance of their duties. The division assisted in the preparation of a memorandum summarizing the history of this area of the law, the reasoning of the court, and some suggestions as to how to employ the division in future law enforcement activities. The memorandum was widely distributed among the judiciary and the law enforcement officials in the Commonwealth.

It will be recalled that during the previous year the Attorney General had intervened when Massachusetts enforcement officials had on a number of occasions sought to interfere with the rights of persons engaged in peaceful picketing to demonstrate sympathy with the lunch counter sit-ins in the South. At that time the Attorney General had ruled that peaceful, noncoercive picketing is a protected expression of opinion under the First Amendment. Subsequently, attempts were made to suppress, first, the activities of George Lincoln Rockwell, the self-styled Fuehrer of the American Nazi Party, and then an extended series of organized peaceful demonstrations by pacifists and other groups protesting the bomb shelter program, the resumption of nuclear testing and related matters. The teaching of the previous year appears to have been effective and in due course all of the demonstrations were allowed to proceed as an exercise of the right of free speech.

Legislation to establish a State agency to provide counsel for indigent defendants in certain criminal matters having been prepared during the preceding year, the division has since been working constantly to insure its effectiveness and to co-ordinate the work of as many private and public agencies throughout the Commonwealth as possible to this end. A series of conferences with judges, probation officers, criminal lawyers and private agencies were conducted and arrangements effected whereby the Lawyers' Reference Service of the Boston Bar Association, working with the courts, would supplement the necessarily limited jurisdiction of the State defendant's agency.

The division played an unusual role in a Southern school desegregation case. A three-judge Federal court considering the constitutionality of a Louisiana statute enabling the parishes (counties) in that State to close its schools rather than desegregate invited the Attorneys General of 50 States to file briefs on this question:

"Are our States required by the fourteenth amendment to the United States Constitution to provide public school education?"

So far as is known, this is the first time that a Federal court has asked the participation of all the States in a case. At the request of the Department
of Justice, the division prepared for Massachusetts a brief which asserted that "under no conceivable circumstances should Louisiana or any other State withdraw from the business of public education . . . without offering a valid reason and valid substitute, nor under circumstances which are bound to result in a perpetuation of power by a limited group." Joining in the Massachusetts brief were New York, Pennsylvania, Rhode Island, Connecticut, Maine, Michigan, Ohio, Illinois, Minnesota, Wisconsin, Nevada, California, Alaska, Oregon and (in part) Kentucky.

Criminal Division.

During the past year the Criminal Division has been engaged most actively in a series of extraordinary investigations and prosecutions. In addition, the work of investigating complaints, and complying with requests for assistance from local enforcement officers and law enforcement officers of the Federal Government and other States continued to require the time, attention, thought and action of those assigned to the Division.

Many criminal proceedings were prosecuted directly by the Assistants in charge of the Divisions of Consumer Counsel and Charities, and the Assistants handling the legal work of the Division of Employment Security, and other legal work, and are discussed in connection with the other work of the said Divisions and such other legal work.

The attorneys of the Criminal Division under my supervision have been engaged in representing the Commonwealth's interests in many and varied criminal cases.

In prosecuting and investigating all matters, it has been my policy to effectively prosecute the guilty while zealously guarding the constitutionally guaranteed rights of the accused.

There has been much justified criticism of prosecution tactics of State and Federal prosecuting officers which fell short of the fair procedure required for the protection of the rights of all citizens who may be accused of crime. It is no answer to say that most of those whose rights were violated were guilty anyway and that less than strict compliance with their constitutional rights made conviction easier.

Competent, painstaking and persistent efforts by the police in investigation, and by prosecution officers on complaints, in grand jury proceedings and trials, will assure that no really guilty person who should be convicted escapes. The alternative of looking the other way at violations of the constitutional rights of persons accused of crime and evasions by law enforcement officials of obligations to follow procedures written into our basic charters for the protection of anyone who may ever be unjustly charged with crime is not to be tolerated.

No responsible law enforcement officer would ever deliberately sacrifice the constitutional rights of one accused of crime in order to obtain a conviction for any reason. They are too fully cognizant of the injury to the prospects and future of a person convicted of a crime to ever deliberately seek a conviction by evading the constitutional rights of an accused.

The danger is the tendency, since most persons whom the ordinary law
enforcement officer deals with are actual transgressors, to relax the strict observance of the constitutional requirements. That, however, is the very thing which may lead to a conviction of an innocent person.

The very gravely harmful consequences of a conviction to one unjustly accused, require, for the protection of every citizen, that the constitutional rights of every person accused of crime be fully protected.

As stated, that has been the principle and policy I have adhered to in the handling of all criminal matters coming before me and which I have enjoined on the law enforcement officers of the Commonwealth. I am sure that the citizens of the Commonwealth endorse and support that policy.

With the co-operation of the State and local police, State tax authorities, and the Federal Bureau of Investigation, many investigations and prosecutions were conducted. Some investigations had interstate ramifications. The more important cases handled by my office are discussed hereinafter.

**Metropolitan District Commission Cases.** As a result of disclosures in a report of the State Auditor in July, 1960, and Senate committee hearings in August of 1960 on the affairs of the Metropolitan District Commission, members of my staff conducted an investigation into the Commission's operations and business dealings. In November of 1960, I presented evidence resulting from the investigation to the Grand Jury of Suffolk County. As a result of this presentation indictments were returned against the Chairman of the Metropolitan District Commission and an Associate Commissioner as well as several contractors and others, for larceny, conspiracy, conflict of interest and perjury. The charges were of three kinds. First: Those concerned with conflicts of interest in the sale of highway guard rails to the Commonwealth by a supplier in which an Associate Commissioner had a personal financial interest and the sale of performance bonds by the Chairman to persons doing business with the Commonwealth. Second: Those concerned with graft in the dismantling of the tent over the Metropolitan Art Theater on Soldiers Field Road in Boston, which was under the jurisdiction of the Metropolitan District Commission. Third: Those concerned with the failure to perform certain sidewalk contracts between the B & M Construction, Del-Mar Construction Co. and the Metropolitan District Commission. These cases were prosecuted by Assistant Attorney General Joseph T. Doyle and findings of guilty were entered in each case, appeals being taken in some of the cases.

**Taunton Municipal Light Case.** During the fiscal year, indictments were returned by the Bristol County grand jury upon a presentation by the Criminal Division of this office with respect to four officials of the Taunton Municipal Light Co., charging them with larceny and taking of presents. During the current fiscal year many preliminary matters in the nature of motions to quash were taken by the defendants and arguments were heard before the Supreme Judicial Court. The validity of the indictments was upheld by the court and the cases will be assigned for trial.

**Brink's Case Aftermath.** Upon the request of the Governor of Pennsylvania, a hearing was held at this office with respect to the rendition to that
State of Joseph "Specks" O'Keefe. Mr. O'Keefe was a key figure in the prosecution of the notorious Brink's case. The facts elicited at the hearing and other pertinent information were reported to the Governor in due course.

**Polaroid Case.** Officials from the Polaroid Corp. sought the assistance of my office as a result of excessive losses in merchandise at their Needham plant amounting to approximately a quarter of a million dollars. For six months prior to contacting my office, the Polaroid Corp. had engaged private investigators relative to these losses without success. I immediately assigned members of my staff to investigate the matter. The investigation uncovered a ring of thieves and "fences." Within ten days of my first meeting with the Polaroid officials, fifteen men were arrested and indicted for larceny and receiving stolen goods. The results of the investigation were turned over to the District Attorney for Norfolk County and convictions were obtained by him. Some of the defendants have also been indicted by the Federal grand jury on the basis of information turned over to the United States Postal authorities by my office.

**Tax Indictments.** As a result of shortages discovered in an audit of the books of the Alcoholic Beverages Excise Division of the Department of Corporations and Taxation, my office investigated the books and records of that division. After a thorough investigation by my staff and presentation of the case to the grand jury, indictments were returned against two individuals, including a State employee, for conspiracy and filing of fraudulent tax returns. This case marked the first time in this Commonwealth that persons were indicted under the tax laws and subsequently convicted. Full restitution of taxes due in an amount in excess of one thousand dollars was made to the Commonwealth and fines totalling five thousand dollars were imposed. The case was important from the standpoint of maintaining the integrity of the tax system.

**State Racing Commission.** During the course of this year representation of the State Racing Commission was assigned to the Criminal Division. In *Hancock Raceway, Incorporated v. State Racing Commission*, the division defended the commission which had denied a license to the petitioner to conduct a horse race meeting at Hancock in Berkshire County. Another case involving the commission was *Bay State Harness Horse Racing and Breeding Association v. State Racing Commission*, 342 Mass. 694, involving the decision of the commission to award licenses for pari-mutuel harness racing of 33 days to Suffolk Downs and 57 days to the Foxboro Race Track.

Some of the more interesting cases argued by my staff before the Supreme Judicial Court were:


Golden upon being acquitted of murder by reason of insanity was confined to the Worcester State Hospital for life. The court held that he was not a "person adjudicated by . . . a court to be a mentally ill person" within § 94A as appearing in St. 1959, c. 293, and, therefore, the procedure provided in § 94A was not the correct procedure to effect his discharge from the hospital, even if he had recovered his sanity.

This was a writ of error wherein the petitioner sought to set aside his conviction alleging that he had been improperly convicted of the crime of manslaughter for telling his wife to shoot herself and handing her the gun with which she did so. The petitioner argued that his wife had committed suicide and since self-murder is not a crime, he could not be charged with the crime of murder or any degree thereof. The court upheld the validity of his conviction upon the theory that his actions constituted a wanton disregard of human life and the defendant had been properly convicted of manslaughter.


The petitioner brought a petition for a writ of habeas corpus seeking to have credited against his sentence the time he spent in confinement as an insane person. He had been committed as insane at the time of his arraignment on a charge of assault with intent to murder and assault with a dangerous weapon. He contended that he was entitled to credit for the four years spent in the mental hospital under the provision of a 1960 statute granting credit for time spent in confinement "while awaiting trial." The Supreme Judicial Court decided that the petitioner was entitled to be credited with such time and further ruled that a writ of habeas corpus might be issued despite the provision of G. L. c. 248, § 1, that persons in execution of legal process shall not be entitled to this remedy.

The cases of District Attorney for the Northern District v. Superior Court, 1961 Adv. Sh. 303, presented by a Special Assistant Attorney General, Goldman v. Commonwealth, 342 Mass. 779, and Nassar v. Commonwealth, 341 Mass. 584, were also argued before the Supreme Judicial Court.

Another investigation initiated during the year concerned alleged shake-downs by employees of the Department of Public Utilities.

Report of the Criminal Laws Passed During the Legislative Session. In accordance with G. L. c. 12, § 6A, a digest of all new laws was prepared, printed and distributed to sheriffs and local law enforcement officials.

The division also complied with many requests for legal opinions from State agencies involved in law enforcement activities. Requests were received from the Department of Correction, the Department of Public Safety and other related law enforcement activities too numerous to mention. The opinions were prepared by staff members assigned to the Criminal Division after extensive legal research.

Law of Arrest for Police Officers. The Criminal Division was also assigned the task of preparing a handbook on the Law of Arrest for Law Enforcement Officers. There is a great need for such a handbook for the guidance of police officers and for the protection of the rights of accused persons.

Extraordinary Writs and Similar Matters; Renditions; Pardon Recommendations. The great bulk of the duties of the Criminal Division is taken up with representing the Commonwealth in various proceedings in the courts as well as investigating and prosecuting work. A brief statistical table of its activities in such matters is as follows:
P.D. 12. 17

Petitions to be Adjudged Sane ........................................ 7
Writs of Error ............................................................... 28
Writs of Mandamus (Tax and Ballot Commissions) ...................... 16
Writs of Mandamus .......................................................... 5
Writs of Habeas Corpus ...................................................... 19
Petitions for Discharge (Supreme Court, Probate Courts) .......... 6
Writs of Certiorari ............................................................ 2
Bills for Declaratory Judgment ............................................ 3
Petitions for Review (Ballot Law Commission, Racing Commission) . 4
Bills in Equity (Re: Telephone discontinuance because of gaming) . 6
Complaints against Registry of Motor Vehicles ....................... 3
State Board of Conciliation (U. S. District Court) .................... 1
Pardon Petitions Recommended upon .................................... 52
Rendition Cases:
(This figure includes requests from other States and requests by us to other States) ........................................... 111

Division of Public Charities.

Massachusetts General Laws, c. 12, § 8, directs the Attorney General of the Commonwealth of Massachusetts to "enforce the due application of funds given or appropriated to public charities within the commonwealth, and prevent breaches of trust in the administration thereof." In 1954, the statute was amended by the addition of five sections designed to aid the Attorney General in carrying out this common law power. A Division of Public Charities was established in the office of the Attorney General, with which all public charities were required to file annual financial reports. The director of the division was given broad power to conduct hearings and investigations, subpoena witnesses, and promulgate regulations.

It should be noted that the term "public charity," as it appears in the General Laws and has been used by the courts of the Commonwealth, has a broad meaning. It includes all trusts, corporations and voluntary associations, established for judicially recognized charitable purposes, to aid an indefinite number of individuals.

In the fall of 1960, Attorney General McCormack requested two members of the staff of Brandeis University to conduct a survey of the activities of his Division of Public Charities with an eye toward assessing and improving the operation of the division. Their report contained four major recommendations:

"First: a detailed inventory of all funds currently reporting to the division to gather further information on the method of creation, administration and purpose of these funds; and a compilation of this information in a Master File.

"Second: a revision of the form currently used for annual reports, to give more detailed information about financial activities and the means by which the charitable purposes are being implemented."
"Third: preparation and distribution of a booklet containing information on all charities currently reporting to the division.

"Fourth: expansion of current efforts to discover funds which were not reporting; exploration of the feasibility of amending the existing law to extend the authority of the Attorney General over certain funds not currently included under Chapter 12."

A supplementary appropriation was obtained from the General Court and these recommendations are now being carried out by an expanded staff in the Division of Public Charities.

**Attorney General's Advisory Committee on Public Charities.** The first major step in this new program was the appointment by the Attorney General of an Advisory Committee on Public Charities, composed of thirty leaders from the fields of philanthropy, law, accounting and social work, including representatives from the law schools in the area. This group, working with the staff of the division, primarily through small committees, has given advice and recommendations on such phases of activity as the revision of forms, legislative changes, problems arising from solicitation by charitable organizations and the drafting of rules and regulations for the division. They have also been consulted on certain policy matters in which the Attorney General is interested. For example, they recently proposed recommendations concerning a bill in equity filed by the trustees of a loan fund set up under the will of Benjamin Franklin asking permission of the Supreme Judicial Court to apply the funds by pres for loans to medical students and residents.

**Directory of Public Charities in Massachusetts.** The Division, in June 1961, published a *Directory of Public Charities in Massachusetts* which contains an alphabetical listing of all charities filing reports with the Division, and a breakdown of these charities by purpose. A grant for this project was donated by the Permanent Charity Fund of Boston. The Directory has been distributed to all public libraries in the State, city and town clerks, and the probate courts, and is available to individuals on request.

Prior to publication, a complete analysis of all charities reporting to the Division was necessary. A new office file was compiled listing the charities by purpose and containing names, addresses, principal directors, assets and charitable donations. It is used by large numbers of individuals each month who are seeking sources of donations or potential beneficiaries, as well as by members of other State departments.

For the first time, computations were made of the assets of charitable funds, including total figures and a breakdown of these totals according to charitable purpose.

Office procedures were also revised. Addressograph plates have been made for all funds, so that blank forms can be automatically mailed out each year. The staff has investigated the use of automatic processing data to handle the financial reports, but feels that such a step is not necessary at present. If the number of charitable funds reporting to the Attorney General should increase appreciably in the future, however, the use of I. B. M. cards will again be explored.
Search for Non-Reporting Funds. Once the master list was compiled for the Directory, a second phase of the work was commenced: the comparison of this list with that of the exempt organization file of the local Bureau of Internal Revenue. Over 1,000 additional charitable funds were located in this way and are now being requested to report.

A measure of the success of this search for new charitable funds can be seen in the figures supplied by the State Auditor on the collection of the three dollar fee which must accompany each financial report. For the period January 28, 1960, to November 18, 1960, $6,279 was collected, while for the period from November 18, 1960, to November 8, 1961, during which this intensive search was started, the figure rose to $11,448. The division staff still feels there are more funds, particularly inter-vivos trusts, to be located and this phase of activity will be a continuous one.

Investigations of Public Charities. Collection of financial reports from charitable organizations is fully effective only if continuous scrutiny is maintained and irregularities are corrected. Under the new system, each report is checked by one individual who writes for additional information where necessary. Some 200 such letters were sent during this period. Questionable reports are referred to a legal member of the staff for investigation. This individual has the co-operation of State and Federal tax officials, and, with the powers given in General Laws, c. 12, § 8H, can conduct a thorough investigation. To date, thirty funds have been marked for investigation for such irregularities as unwarranted accumulation of income, unauthorized loans and self-dealing by trustees. Some of these will come to court action, although the division members have been able to correct a large number without the need for such a final resort.

Revision of the form used by the public charities for filing financial reports was a major task of the staff and a sub-committee of the Advisory Committee. The new form is an adaptation of form 990A used by the Bureau of Internal Revenue, it has been well received by the charities since it simplifies bookkeeping and management of records. The need for uniform accounting procedures is well recognized in the field of public charities, particularly the health and welfare agencies. It is hoped that, at least in Massachusetts, the new reporting procedure will have a beneficial effect on this problem. While the Massachusetts statute does permit substitution of a printed financial report, if such is published, in cases where these printed reports contain inadequate information, the charity is requested to supply additional data.

Regulations. In the course of this work it became evident that regulations were necessary to clarify certain portions of c. 12, § 8. These regulations have been drafted by the division with the co-operation of a sub-committee of the advisory group and the advice of Professors Austin Scott and Albert Sachs of Harvard Law School and Professor William Curren of the Law-Medicine Institute of Boston University. The chief problems which they are designed to meet are those of definition; the range of public charities which fall within the coverage of the statute; and the funds for religious purposes which are exempt.

Guide for Trustees and Directors. The division is now planning publica-
tion of a guide for trustees and directors. It is felt that many individuals are ignorant of the law of charities or even of the sources of information available on the subject. The guide will contain a simplified statement of the statutes and common law relating to charitable activities and a bibliography of the leading cases and treatises. It is not intended to serve as an all-inclusive statement of the law, but merely as a starting point for individuals who may be new to their duties as heads of charitable funds.

Cemeteries. Non-profit cemeteries are not by law considered public charities in Massachusetts. However, unsegregated perpetual care funds established by cemeteries, which are engaged in the sale of cemetery lots with perpetual care have been ruled by the Attorney General to be trust funds for a public purpose. Trustees of these funds must accordingly file annual financial reports with the division. Notice of this ruling was sent to every cemetery in the Commonwealth in January of 1961. Since funds for religious purposes are exempt from the filing provisions, as well as funds maintained by municipalities, it has been necessary to rule on these exemptions and process the reports which are filed. To date, such reports are processed separately from other charitable funds, due to their specific nature, but the procedures which have been established are similar to those described above.

Probate Matters — Cy Pres. Processing annual reports by charitable funds is only one phase of the activities of the Division of Public Charities, albeit a large one. Two other areas are of considerable importance: probate matters, and supervision of solicitation by charities.

By statute, the Attorney General is made a party to all legal proceedings where a charitable interest is involved. During the course of a year the legal staff of the division examined and ruled on approximately 1,500 matters pending in the probate courts of the Commonwealth, involving allowance of wills, petitions for instructions, petitions for licenses to sell, allowance of executor's and trustees's accounts, petitions for appointment of trustees and petitions for the application of the cy pres doctrine.

The reactivation of dormant trust funds has long been considered an important phase of the division's work. Search for these funds and preparation of petitions for appointment of new trustees or application of the cy pres doctrine has continued. For example, the division recently sponsored legal action which resulted in the creation of an $800,000 trust fund, the income from which will be used to aid and assist aged men and women through programs of research and recreational programs.

The Attorney General participated in litigation which led to an interpretation of the $4,000,000 trust established by the will of Marion Potter so that the trustees may make grants to charitable organizations within the Commonwealth and in those States granting the same tax privileges to charitable institutions as are given in Massachusetts.

The Attorney General at the request of the Supreme Judicial Court prepared a memorandum on appointment of trustees of charitable trusts in response to questions raised by the action of a probate judge appointing his son as trustee of the Lotta Crabtree estate. The son resigned two weeks later.
Regulation of Solicitation. Regulations concerning the solicitation of funds for charitable purposes are contained in various sections of the General Laws. Chapter 68, § 17, provides for the filing of reports on these activities with the office of the Attorney General in cases where solicitation involving $1,000 or more is being carried on in more than one city or town in the State. Complaints of improper solicitation practices are handled jointly by the Division of Public Charities and the Criminal Division of the Attorney General’s Department in co-operation with local police officials. The forms which must be filed by organizations coming within the provisions of the statute have recently been revised. A subcommittee of the Attorney General’s Advisory Committee has made a survey of similar legislation in other States and is currently preparing a report of its findings along with recommendations for changes in existing legislation.

Summary. In summary, the activities of the Division of Public Charities for the last year have been directed to three major goals: service to beneficiaries, trustees, and directors; increasing public confidence in charitable activity; and the promotion of beneficial regulations.

The specific components of this program have been the establishment of the Attorney General’s Advisory Committee, publication of the Directory of Public Charities in Massachusetts, the extensive search for non-reporting funds, revised office procedure for audit and investigation of charities, preparation of a guide for trustees and directors, promulgation of regulations, supervision of the solicitation of charitable funds and the reactivation of dormant trust funds.

This work has been carried on by a staff composed of a Director who is an Assistant Attorney General, a legal assistant, an administrative assistant and two secretaries, under the supervision of the Attorney General.

By-Laws.

Over one thousand by-laws were submitted to this office by various towns and acted upon in the past year. Once again it is interesting to note that zoning amendments were predominant. Less than thirty of these by-laws were disapproved by the Attorney General. The provisions of G. L. c. 40A, § 6, should be carefully complied with by towns in order that all proper procedural steps be taken in the adoption or amendment of by-laws. It was failure to do so that caused the relatively few disapprovals noted above. According to the provisions of § 6, when the planning board hearing is held within twenty days of the town meeting it is essential that the final report with recommendations of the planning board be submitted to the town meeting. We have taken the position that in that instance, the report, as submitted, should be in writing and read to the town meeting in order to satisfy this statutory directive.

By-laws were speedily acted upon by this office, and returned to the town clerk’s office, as has been our custom in the past.
DIVISION OF EMPLOYMENT SECURITY.

During the fiscal year there were in the division a total of 537 cases requiring the attention of the Assistant Attorneys General assigned to the division. Employers who failed to pay their employment security taxes accounted for 445 of these cases. There were 90 cases involving fraud on the part of claimants who collected unemployment benefits illegally; and two cases were entered in the Supreme Judicial Court on appeal from decisions rendered by the Board of Review in the agency.

With respect to employers who were delinquent in making payment of taxes, before proceeding with criminal action, numerous letters were sent and repeated warnings given. After all methods had been exhausted and every opportunity given, and the employers still neglected to make payment, it then became necessary to enforce payment through an active program conducted under the provisions of G. L. c. 151A, § 47. This involved the issuance of 241 criminal complaints against 23 employers. Findings of guilty were entered against the employers; and the court imposed jail sentences or ordered the defendants to make full payment of the taxes owed. This program resulted in substantial sums of money being obtained for the Commonwealth which could not otherwise have been recovered.

A complete study has been undertaken covering a wide scope in the field of fraud and abuses in the collection of unemployment compensation benefits. Conferences have been held with the investigatory staff of the division and much time has been devoted to preparation of preliminary data and reports. It is expected that this study will soon be completed so that we may proceed to bring to trial those persons who are responsible for the fraudulent practices.

In the Superior Court in Equity, twenty bills of complaint were brought in receivership proceedings against delinquent employers.

Of the two cases in the Supreme Judicial Court, one has been decided in favor of the Commonwealth; namely, Bogdanowicz v. Director of Division of Employment Security, 341 Mass. 331. Still pending on the court docket is the case of Raytheon Co. v. Director of Division of Employment Security, which will be argued at the Fall 1961 sitting of the Supreme Court.

A total of 91 cases of all types were disposed of during the year, and as of June 30, 1961, the inventory of cases numbered 446. The sum of $76,838.72 was collected during the year; of this amount, $69,276.21 was paid by delinquent employers, and $7,562.51 was recovered on unemployment benefits collected fraudulently.

CONTRIBUTORY RETIREMENT APPEAL BOARD.

The Contributory Retirement Appeal Board provided for by G. L. c. 32, § 16, is composed of three members: an Assistant Attorney General designated by the Attorney General, the Director of the Division of Accounts or an assistant designated by him, and the Commissioner of Insurance or his designee. The board meets weekly on Friday (holidays and the summer period excluded), at which times a minimum of four cases
are assigned for hearing. While most of the cases considered involve disability and other retirements under that chapter, all other matters relating to retirement benefits, such as creditable service, classification and amounts of benefits, are determined.

The board's decision is binding upon the local board and all other parties in interest. Any decision rendered may be appealed by way of a petition for review to the court having jurisdiction in accordance with the Administrative Procedure Act.

During the current period the Contributory Retirement Appeal Board heard, and rendered decisions on, approximately thirty cases. Before a decision is reached, in almost every instance, because of the lack of sufficient precedent, a considerable amount of research is necessary, followed by discussion of both the law and the facts. All of this, naturally, consumes a great deal of time and effort. Because of the advances in medical science and the resultant longer life of potential claimants, the case load of the Contributory Retirement Appeal Board has become increasingly heavy. For these reasons it is necessary that many claimants wait a longer period than they should to have their claims adjudicated. This is an inequitable situation which can be corrected by legislation providing better operative conditions for the board.

The board, having no appropriation of its own for clerical services, has to depend entirely upon the voluntary services of employees of other offices for the preparation of records for the courts. This alone unduly delays hearings. The board does not have the services of an investigator. In many instances such services could be of great help in obtaining information and facts when it is indicated they are needed. From week to week hearings are held in different sections of the State House, which is a very unsatisfactory arrangement. Quarters for the board's own use should be furnished. Sufficient funds should be provided to meet its costs of administration and operation. Too often the Assistant Attorney General who sits as a member of the board finds himself in the courts arguing a case on which he sat as a member. This is an awkward situation which should be corrected by substituting some other official for an Assistant Attorney General as a member of the Contributory Retirement Appeal Board. The Attorney General's office should, as is done with every other administrative board, act only as counsel to the board.

Among the more important decisions of the Supreme Judicial Court reviewing decisions of the board during this period were the following cases:


In each of those cases the Supreme Court sustained the decision of the board.

The Cataldo case decided that the burden of proof in accidental death claims must be sustained by the claimant. The Kelley case decided that the statement of the medical panel in accidental disability cases must contain a statement of possible causal connection to the claimant's employ-
ment. The *McCarthy* case decided that the Superior Court is not warranted on review of a decision of the board as to accidental death claims to make independent findings of fact.

The fact that in every case which was appealed to the Supreme Judicial Court during this period the court agreed in substance with the decision of the Contributory Retirement Appeal Board is a tribute to the fair and objective attitude of the members in considering cases. The board could be far more effective if favorable action is taken with reference to the observations set forth above.

**LAND TITLE CASES.**

The Attorney General's office is charged with the duty of protecting the rights of the Commonwealth in the lands owned by the Commonwealth and in lands owned by private individuals where public rights are concerned.

This includes the protection of public rights in the great ponds and in the tidewaters of the Commonwealth. An Assistant Attorney General hears all petitions pertaining to the establishment of access to great ponds.

During the year, 136 Land Court cases were processed.

In all cases where land has been taken in eminent domain proceedings and a settlement is made to the owner of the land because of such taking, the title abstract is reviewed to make certain that the individual who receives the payment is the rightful owner, that he is entitled to the damages awarded, and that all outstanding encumbrances, municipal liens and inheritance taxes have been paid.

During the year, approximately 1,000 abstracts, etc., were processed.

In addition to the above, all deeds conveying title to land owned by the Commonwealth and all deeds, leases and easements conveying property and property rights to the Commonwealth are checked as to form and title.

**TORT CASES.**

By virtue of the provisions of G. L. c. 12, §§ 3B and 3C, the Attorney General has the responsibility of adjusting or engaging in trial in the defense of suits against officers or employees of the Commonwealth for property damage or personal injuries, including death, resulting from the operation of State-owned motor vehicles.

During the current fiscal year, 442 cases have been disposed of either by settlement or trial by the Tort Division of the Attorney General's office. This figure represents claims for defects in State highways, together with moral claims (c. 12, § 3A).

**WORKMEN'S COMPENSATION DIVISION.**

During the year the Workmen's Compensation Division received 5,628 first reports of injury. This resulted in 721 agreements for compensation being submitted for approval. Six hundred and ninety-five agreements were approved for payment and 26 have not been approved, but are being held for further investigation, further medical reports, etc.
Payments made by the Commonwealth to injured employees totaled as follows:

<table>
<thead>
<tr>
<th>For Compensation</th>
<th>$902,538.22</th>
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</thead>
<tbody>
<tr>
<td>Medical Payments to Doctors</td>
<td>130,878.49</td>
</tr>
<tr>
<td>Hospital Payments</td>
<td>145,838.10</td>
</tr>
</tbody>
</table>

$1,179,254.81

Under G. L. c. 152, § 65, this office collected $9,650. The balance on hand at the beginning of the fiscal year in this fund was $20,869.40, making the total amount of funds available $30,519.40. Payments out of this fund on insurer’s petitions brought under G. L. c. 152, § 37, totaled $20,227.88, leaving a balance on hand at the end of the fiscal year of $10,291.52.

Under G. L. c. 152, § 65N, this office collected $103,875 during the year. The balance on hand at the beginning of the fiscal year was $373,584, making the total amount of funds available $477,459. Payments out of this fund on insurer’s petitions brought under G. L. c. 152, § 37A, totaled $86,351.84, leaving a balance on hand at the end of fiscal 1961 of $391,107.16.

It should be noted that the income received under § 65 is continuously less than the expenditures under this same section, whereas the income received under § 65N is greater than the expenditures under the § 65N fund. The reason for this is that the insurers are compelled to pay into the § 65 fund, also known as the “second injury fund,” only when an employee dies and leaves no dependents. This situation of course does not arise as frequently as the situation under which the insurer must pay into the § 65N fund, which is also known as the “veteran’s fund.” Legislation has been filed to correct this problem and to build up the § 65 fund.

The Workmen’s Compensation Division of the Attorney General’s office represented the Commonwealth on 212 different matters before the Industrial Accident Board at hearings and conferences held in Boston, Fitchburg, Foxborough, Taunton, Plymouth, Brockton, Springfield, Worcester, Salem, Lynn, Lowell, Lawrence and Northampton.

Veterans.

As in the past, legal advice was furnished to veterans, their dependents and others who are concerned with veterans and their problems and matters that affect them. Many veterans and their dependents come to the division for help on their own initiative. Others are referred by service organizations and agencies and departments of government at its various levels. Numerous written inquiries are received regarding veterans’ problems, particularly from disabled or hospitalized veterans and from service-men on active duty in the armed forces of the United States.

Although personal interviews are always preferable, for the reason that our division staff is able to obtain all the vital facts, inquiries by letter are answered as expeditiously as possible, although in many cases, further
correspondence is necessary to obtain needed information. In addition, many telephone calls are received each day from veterans requiring on-the-spot legal advice.

The problems which most often concern veterans and their dependents involve questions of veterans' benefits, real estate, taxation, domestic relations, civil service and retirement, education, employment and many others too numerous to mention.

Collections.

Collections for the year totaled $127,776.41. Listed below is a breakdown for each department:

<table>
<thead>
<tr>
<th>Department</th>
<th>Number</th>
<th>Collections</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mental Health</td>
<td>64</td>
<td>$93,801.62</td>
</tr>
<tr>
<td>Public Works</td>
<td>112</td>
<td>13,890.62</td>
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<tr>
<td>Metropolitan District Commission</td>
<td>11</td>
<td>3,399.70</td>
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<tr>
<td>Public Health</td>
<td>32</td>
<td>11,730.60</td>
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<tr>
<td>Natural Resources</td>
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<td>33.00</td>
</tr>
<tr>
<td>Agriculture</td>
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<td>335.00</td>
</tr>
<tr>
<td>Education</td>
<td>17</td>
<td>1,662.42</td>
</tr>
<tr>
<td>Labor and Industry</td>
<td>1</td>
<td>125.00</td>
</tr>
<tr>
<td>Public Safety</td>
<td>2</td>
<td>227.79</td>
</tr>
<tr>
<td>Public Welfare</td>
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<td>79.19</td>
</tr>
<tr>
<td>Treasury Department</td>
<td>2</td>
<td>2,176.78</td>
</tr>
<tr>
<td>Civil Defense</td>
<td>1</td>
<td>90.50</td>
</tr>
<tr>
<td>Commerce</td>
<td>2</td>
<td>4.19</td>
</tr>
<tr>
<td>Parole Board</td>
<td>1</td>
<td>220.00</td>
</tr>
<tr>
<td></td>
<td>248</td>
<td>$127,776.41</td>
</tr>
</tbody>
</table>

Springfield Office.

The Springfield office of the Department of Attorney General, presently located at the new State Building in Springfield, Massachusetts, is staffed by a secretary, two assistants, one legal assistant who handles legal research and preparation of pleadings, and one State police officer.

A member of the Springfield staff covered all hearings conducted in Springfield by the Department of Banking and Insurance, Division of Insurance. The Springfield hearings cover all appeals in the four western counties.

The Springfield staff handled, either by trial or settlement, all eminent domain cases arising in the four western counties.

Hearings before the Workmen's Compensation Board were covered by a member of the Springfield staff, as they were assigned to it by the Boston office.

Contract actions or suits in equity brought against the Commonwealth or its various agencies in the western counties were defended by a member of the Springfield staff, and in a number of cases, actions were brought in
behalf of the Commonwealth by a member of the Springfield staff, including actions to recover funds for the Department of Mental Health, the Department of Agriculture, and other agencies requesting this service.

The Springfield office worked in conjunction with the district attorneys in the four western counties on various criminal matters, and also rendered service to various city solicitors and town counsels, with respect to legal rulings requested by said persons. All criminal investigations arising in the four western counties were handled by the State police officer assigned to the Springfield staff.

Citizens requesting various services were interviewed at this office frequently, and if matters could not be completely terminated by the Attorney General's staff, they were channeled to other agencies of the Commonwealth.

**Conclusion.**

The high degree of accomplishment of my administration of the office of the Attorney General during the period of this report could not have been attained without the full co-operation of Governors Furcolo and Volpe, the presiding officers and members of the Legislature, other State officers, and the careful and conscientious performance of their duties by the Assistant Attorneys General and the other members of the staff, for all of which I am most grateful.

Respectfully submitted,

EDWARD J. MCCORMACK, JR.,
Attorney General.
OPINIONS.

An extra work order for work necessary to the completion of a project and incidental and subsidiary to the work called for in the contract was valid without bidding under G. L. c. 29, § 8A.


Mr. Frederick J. Sheehan, State Comptroller.

Dear Sir: — Under date of July 11, 1960, you requested an opinion on certain questions relating to an extra work order as to which the Metropolitan District Commission had filed with you the notice of intention required by G. L. c. 29, § 20A. On July 12, 1960, we informed you that the facts submitted with your inquiry were not sufficient to enable us to determine your questions as to the validity of the order. Under date of July 15, 1960, you wrote us enclosing a letter to you from the commission stating in some detail the background of the situation calling for the doing of the additional work covered by the extra work order.

It appears from the last-mentioned letter to you that reports of engineering consultants for the development of Breakheart Reservation as a recreational area had been made with plans and cost estimates for buildings and other work included therein. The proposed development looked to the construction of new, and the widening of old, roads, the laying of water pipe through wooded areas and the erection of various structures. A necessary preliminary to the construction work was the clearing and grubbing of the areas for the new roads, and for the widening of the old roads, and the areas through which the pipe line was to run and where the buildings were to be erected. In the original proposals of the engineers, which were not adopted because the total cost exceeded the amount available, clearing and grubbing of 50 acres at an estimated cost of $20,000 and selective clearing at an estimated cost of $10,000, were suggested. Revised proposals were prepared and finally adopted in which clearing and grubbing was reduced to 29 acres, the selective clearing remaining the same.

Prior to advertising invitations for proposals for the work, the commission was offered the use of prison help by the Department of Correction and accepted the offer. With the intention of having such help do the clearing and grubbing, a provision was inserted in the advertised invitation and in the contract that "Clearing and Grubbing and Selective Clearing will be performed by prison labor help under the supervision of the Department of Correction."

The contract as so advertised was awarded to the lowest bidder, the Charles Contracting Company, in the amount of $260,903.25.

Due to a reduction in the quota of prisoners assigned to the work and the adverse weather conditions, the prison help cleared and grubbed only 6.4 acres of land and did none of the selective clearing.

It is clear from the foregoing narration that the work covered by the extra work order, which it is estimated will cost $20,725, not only is a part of the complete project but, though minor in comparison to the total cost, is an essential part of the project and is a necessary preliminary to the doing of the more costly work.
The fact that the work covered by the extra work order in question was excluded from the contract as advertised is not, and particularly so in view of the demonstrated reason therefor, of significance in the determination of the validity of the order. As was stated in the formal opinion to the Commissioner of Administration of August 12, 1955 (Attorney General's Report, 1956, p. 27), with regard to an extra work order covering the change in design at the end, and the extension beyond the original terminal point, of the Boston expressway, if the work to be done under an extra work order "amounts to something which the contractor could not have been required to do under the terms of the contract as originally written, but was necessary to the satisfactory completion of the project, then it is 'extra work.'"

The inclusion in construction contracts which are required by statute to be advertised for competitive bidding of provisions that the contractor can be required to perform additional work not within the plans and specifications which is necessary for the completion of the project, on terms provided for in the contract, has been held to be valid. Morse v. Boston, 253 Mass. 247.

It has been frequently stated in opinions of this office relating to questions as to validity of extra work orders that the question of whether such an order should be issued in a particular instance is largely a question of fact for the determination of the officers charged with the duty and responsibility of supervising the doing of the work.

The situation with regard to the extra work order for clearing and grubbing in connection with the contract for construction at the Breakheart Reservation is like that referred to in the opinion of the Attorney General to you of August 8, 1957 (Attorney General's Report, 1958, p. 14), in that on all the facts it would appear that the commission was justified in reaching a decision that the extra work covered by the order was necessary to the completion of the project and was incidental to, and subsidiary to, the work called for in the contract as awarded and, therefore, the commission acted properly in ordering the contractor to do the work as extra work under the contract.

Very truly yours,

Edward J. McCormack, Jr., Attorney General,

By James J. Kelleher,
Assistant Attorney General.

The University of Massachusetts Building Association legislation was not necessarily voided by the decision in Ayer v. Commissioner of Administration; if extending and ratifying legislation is enacted by two-thirds roll call vote, any doubts will be resolved.

July 22, 1960.

His Excellency Foster Furcolo, Governor of the Commonwealth.

Sir: — You have called attention to House 2592 of 1960 passed by a majority vote of both branches of the General Court. The bill would increase the amount of real and personal property which may be held by the University of Massachusetts Building Association and would have the indirect effect of allowing that organization to issue an additional amount of bonds.
You point out that the association, established under the provisions of St. 1939, c. 388, as amended from time to time, has erected dormitories and other buildings on the campus of the University of Massachusetts, and that the Commonwealth, through the University, has rented these buildings from the association. The Commonwealth pays rental to the association and in turn receives revenues from University students who use and occupy the premises.

In view of the decision of the Massachusetts Supreme Judicial Court in the case of Ayer v. Commissioner of Administration, 340 Mass. 586, decided in March of the current year, a question has arisen concerning the propriety of your approval of current House 2592. The Ayer case related to the construction of a State office building by an association to which the Commonwealth would pay rent. The factual situation in the Ayer case was somewhat similar to the factual situation under which the University of Massachusetts Building Association has erected the buildings described above.

In the Ayer case, the court held that the contemplated lease-purchase arrangement for erecting a proposed State office building actually contemplated borrowing funds by the Commonwealth and thus required a two-thirds vote of each branch of the General Court. That vote being taken by the yeas and nays. The statute was declared to be void on its face because it lacked such a two-thirds vote. The decision in the Ayer case does not necessarily lead to the conclusion that the various statutes relating to the University of Massachusetts Building Association are also void. There are many differences in detail between the association set up to erect dormitories and the proposed association to erect the State office building. At least one of these differences was noted by the court at page 461 of the Ayer decision where it pointed out that students' fees were a source of income in the University Building Association situation, whereas no outside revenues were contemplated under the State office building legislation.

You have asked advice as to whether or not, based on the foregoing facts, there is any obstacle to you as Governor in approving House 2592.

You have also asked whether there is any obstacle to the payment of rent to the association as such rent payments fall due.

As stated above, the Ayer case did not specifically determine that the University Building Association statute was invalid. Although all of the questions which were before the court in the State office building case were not actually decided by the court, the precise difficulty relied upon by the court in that case can be avoided in connection with House 2592 if that bill is passed by a two-thirds vote of the yeas and nays in each branch of the Legislature.

In answer to your first question then, it is recommended that such two-thirds vote be obtained before you sign the bill in your capacity as Governor.

In respect to your second question, relating to the rental payments due from the Commonwealth to the association under current existing leases, it is suggested that any possible cloud on the right of the Commonwealth to pay such rent could be removed by adding an additional section to House 2592 confirming the prior legislation relating to Massachusetts University Building Association and ratifying the acts performed under such prior legislation in executing the leases in question.

House 2592, with this additional section and being passed by two-thirds
majority, should meet the objections relied upon by the court in the Ayer case. There are, of course, many other methods which you might elect to follow in order to resolve any doubts created by the Ayer case. The foregoing suggestions are made on the assumption that you desire to employ House 2592 as a means of accomplishing this end.

Very truly yours,

Edward J. McCormack, Jr., Attorney General,
By Joseph H. Elcock, Jr., Assistant Attorney General.

Apportionment of costs of Metropolitan Sewer System among cities and towns under G. L. c. 92, § 5A, cannot be changed for five years; effect of reductions in capacity of its connections made by a member town.

JULY 25, 1960.

Hon. John E. Maloney, Commissioner, Metropolitan District Commission.

Dear Sir: — You have called attention to the provisions of St. 1959, c. 612, which amends G. L. c. 92, relating to the basis for the apportionment of the cost of construction and payment of the debt of the Metropolitan Sewer System among the various cities and towns served by such system.

You have asked the following questions:

Question 1: Does the Metropolitan District Commission have the authority or duty to establish in 1960, prior to September 1, 1960, the proportion in which the cities and towns in the Metropolitan Sewer District shall contribute to the capital charges for the system for each of the five years beginning January 1, 1961?

If the answer is in the affirmative, shall the proportion so established take into consideration any reduction in the capacity of sewer connections of the town of Milton with the Metropolitan Sewer System which may be effected before September 1, 1960?

In answer to question 1, your attention is called to §§ 3 and 5 of the aforesaid c. 612. By § 3 of c. 612, which adds a new § 5A to c. 92, the commission is required to establish the said proportions not later than September 1 in the year 1960. It likewise must establish the proportions in each fifth year thereafter. In establishing the proportion for the year 1966, however, § 5 of c. 612 requires that the commission shall adopt an apportionment specifically set out in § 5 which provides that Milton shall pay 4.74 per cent of the charges. The commission, therefore, cannot take into consideration any reduction in the capacity of the sewer connections of the town of Milton effective prior to September 1, 1960. The statute establishes a mandatory proportion for such year.

Question 2: Does G. L. c. 92, § 5A, as enacted by St. 1959, c. 612 require that a request of the town of Milton for an adjustment of the apportionment assessed upon said town be made before September 1, 1960?

If so, when must the town make such request and when may it submit
evidence of reduction in the capacity of the connections of the town of Milton sewers connected with the Metropolitan District Sewer System?

In view of our answer to question 1, where it appears that an adjustment of the proportion cannot be made by the commission in 1960, your second question does not require an answer.

Question 3: An expert study by consulting engineers retained by the town of Milton has already been completed, which if carried out, could substantially reduce the capacity of the town of Milton sewer connections with the Metropolitan District Sewer System. If this study is approved, would the Metropolitan District Commission take into account the reduction in the capacity of the town of Milton sewer connections effected by the carrying out of such study in establishing the proportions of assessments for the five years beginning January 1, 1961?

This question similarly is predicated upon the assumption that the Metropolitan District Commission may make changes in the apportionment for the five-year period commencing on September 1, 1960. Since it is our opinion that the Legislature has by law established the proportion for this five-year period, the Metropolitan District Commission cannot take into account the reduction in the capacity in the town of Milton sewer connections during that period.

The language of § 3 of St. 1959, c. 612, provides for an apportionment to be made by the commission once every five years after establishing the apportionment in 1960 as described above. Any such changes in the apportionment may be made only if occasioned by construction or changes in connections as may be authorized. The statute does not contemplate changes in the apportionment during the five-year period. If a town desires to make such changes, it is believed that they could be accomplished only after authorization of the General Court.

Very truly yours,

EDWARD J. McCORMACK, JR., Attorney General,

By JOSEPH H. ELCOCK, JR., Assistant Attorney General.

Discussion of a proposed bill (H. 2960 of 1960, enacted as G. L. c. 40, § 4C — St. 1960, c. 561) authorizing a city or town to engage in collective bargaining with labor organizations representing its employees.


His Excellency Foster Furcolo, Governor of the Commonwealth.

Sir: — You have submitted to me for examination and report enacted bill numbered House 2960, entitled "An Act allowing Cities and Towns to enter into Collective Bargaining Agreements."

House 2960, as indicated by the title, authorizes those municipalities which accept its terms to enter into collective bargaining agreements with labor organizations representing its employees, except police officers. This bill takes effect when accepted in a city having a Plan D or Plan E charter by the affirmative vote of a majority of all the members of the city council;
in a city not having such a charter by vote of the city council, subject to the provisions of the charter of such city; and in a town by a majority vote at an annual town meeting.

While there exists much legislation relative to labor relations between employees and private employers, legislation in this State dealing with the subject matter referred to in this bill is comparatively recent. By the provisions of c. 294 of the Acts of 1955 municipalities were authorized, by city ordinances and town by-laws, to establish a personnel relations review board and empower such board to adjust the grievances of all the employees of such city or town other than those appointed by the school committee, with some limitations and restrictions. In 1958 the General Court enacted c. 460, inserting a new § 178D in c. 149 of the General Laws, entitled "An Act protecting the right of Public Employees to join Vocational or Labor Organizations," in which it is provided that employees of the Commonwealth or any political subdivision shall have the right to form and join vocational or labor organizations and to present proposals relative to salaries and other conditions of employment through representatives of their own choosing, and protecting the employees from discharge or discrimination because of their exercise of such right. The new § 178D exempts police officers from its operation. House 2960 follows in the wake of the legislation above referred to.

At the outset it should be borne in mind that the cities and towns of the Commonwealth are divisions of government established in the public interest. The Legislature is supreme in the control of these governmental instrumentalities, subject to the provisions of the Constitution. This legislative power of control embraces regulation by law of employment in the service of cities, towns and other divisions of the Commonwealth. Moreover, such regulation need not be the same in all the cities and towns and other divisions of the Commonwealth, and the General Court has the right to make local laws to meet the peculiar exigencies of any part of the community. In addition, where matters are of local concern, it may be provided that statutes dealing therewith shall become effective in any particular city or town when accepted by such city or town. In its representative capacity within appropriate functions of legislation, the General Court stands in the position of employer. It may establish general rules for the employment of labor. Undoubtedly, the General Court under the Constitution has broader power to deal as employer with employees than to regulate the conduct of the general public. It should further be borne in mind that there is a serious difference between the relations of the government and its political subdivisions and their employees, and employees in private industry. Most, if not all, public employees are appointed or employed by public officials whose tenure and responsibilities are fixed by statutes, local legislation and rules and regulations. Many or most public officials are sworn to uphold the laws of the Commonwealth and the Constitution. How far they may abdicate their public statutory duties may be a serious question. To do so might, of course, lead to a government by men in place of a government by laws. Moreover, many of the subjects of collective bargaining in private industry and business are covered, so far as public employees are concerned, by statutes, local legislation and State and local rules and regulations. The civil service law, found in G. L. c. 31, deals in detail with the appointment, promotion, transfer and discharge of public employees. Innumerable statutes, city ordinances, town
by-laws and State and local rules and regulations exist dealing in great detail with the subjects of vacations, sick leave, holidays and overtime. General Laws c. 32 covers a wide field of retirement and retirement benefits, both for superannuation, ordinary disability and accidental disability, and accidental death benefits. Moreover, c. 32 contains special protection against discharge of public employees belonging to the public retirement systems (see § 16). However, the General Court, in the exercise of its wisdom, has found that a need may exist in some instances in specific cities or towns for the protection of the public employees of that city or town.

Accordingly, I have no doubt the subject matter of this bill was given careful thought and study by the General Court. The facts to which I have alluded, I assume, were in the minds of the members when the bill was under consideration. The Legislature could have found that working conditions of municipal employees in some instances were unfair, unjust and out of step with the times; that any improvement is at present difficult, if not impossible, to obtain without an agreement, and that an opportunity should be provided any city or town which felt that justice and fair play required a collective bargaining agreement to execute one if it chose to do so. In view of the foregoing, it is my opinion that the General Court acted within its jurisdiction in passing House 2960. This bill, if it becomes law, must be fitted into the legal framework of the Commonwealth and construed with all other applicable measures so as to form a harmonious whole. I can envision some problems which may arise which will require careful thought and consideration on the part of all concerned. It is not, I believe, at this time necessary to deal with a hypothetical situation which may or may not come to pass, namely, the possibility of a strike. That subject may be better dealt with if, as and when it occurs. However, it may not be amiss to state here that I find nothing in this bill dealing with that subject. City of Manchester v. Manchester Teachers Guild, 100 N. H. 507, 511 (1957).

This bill appears to be in proper form and would, in my opinion, be constitutional, if enacted.

Very truly yours,

Edward J. McCormack, Jr., Attorney General,

By Fred W. Fisher,
Assistant Attorney General.
The provision of St. 1959, c. 620, § 2, prohibiting reallocations of positions in State institutions of higher education in classes the duties of which as indicated in the specifications are administrative is not applicable to positions in classes with academic duties although the incumbents are performing administrative functions.

AUG. 1, 1960.

Hon. Frank L. Boyden, Chairman, Board of Trustees, University of Massachusetts.

Dear Sir: — This letter is in reply to that of the secretary of the Board of Trustees in which he stated that the board had voted to request the opinion of the Attorney General on the interpretation of St. 1959, c. 620, with particular reference to the salaries the board set for certain individuals who were considered by the board to be holding administrative positions. The secretary stated that the personnel action referred to “took effect February 28, 1960,” but did not state when the vote was taken.

Chapter 620 of the Acts of 1959 contains five sections.

Section 1 revised the general salary schedule by inserting a new salary schedule with higher rates for the then existing job groups in G. L. c. 30, § 46.

Section 2 of the chapter reads as follows:

“The rate of compensation for each position in a public institution of higher education operated by the commonwealth is hereby increased according to a schedule filed in accordance with the provisions of paragraph (5) of section forty-five of chapter thirty of the General Laws; provided, that no change in the job group allocation shall be authorized for a position in a class the duties of which, as indicated by the descriptive specifications on file with the division of personnel and standardization, are clearly administrative; and, provided further, that the amount of the increase in compensation authorized for any position upgraded under the provisions of this section shall, on the effective date of this act, be limited to an amount which is the difference, as shown in the general salary schedule in section forty-six of chapter thirty of the General Laws as appearing in chapter seven hundred and twenty-nine of the acts of nineteen hundred and fifty-six, between the rate in the job group from which the position was assigned and the corresponding rate in said salary schedule for the job group to which the position is assigned as authorized by this section, notwithstanding the provisions of section one of this act or any other provision of law to the contrary; and, provided further, that the minimum increase authorized by this section shall be the increase authorized by section one of this act.”

Section 3 contains an appropriation for meeting the cost of the salary adjustments authorized by the act, § 4 increases the compensation of blind workers, and § 5 provides that the act shall take effect on February 28, 1960. The act was approved on September 17, 1959.

It is to be noted that under the provisions of § 2, quoted above, only positions “in a class the duties of which, as indicated by the descriptive specifications on file with the division of personnel and standardization, are clearly administrative . . .” were excluded from the upgrading by way
of changes in job group allocations provided in the schedules referred to in the section.

The secretary stated in his letter that —

"Under St. 1959, c. 620, the Joint Committee on Ways and Means designated what they considered to be teaching positions under § 2 of the act. They excluded positions with obviously administrative titles and duties. In order to comply with the intention of the committee, the Board of Trustees, acting under the provisions of G. L. c. 75, § 13, limited increases to the minimum authorized under § 1 of the act where in its opinion the duties were strictly administrative although the title was that of a teaching position. Historically, a number of positions with administrative duties have been classified in titles that are normally used for teaching faculty."

The secretary goes on to give two examples. The first concerned a person holding a position classified as "Head Department A," which title was allocated to a higher job group under c. 620. It is stated that the actual duties of the person referred to are different from those of other positions with the same title, that the trustees considered the duties to be clearly administrative, and voted to deny the incumbent the change in job group allocation provided by c. 620. The second concerned a person holding a position classified as "Professor 'A'," which title was allocated to a higher job group under c. 620. Said c. 620 also allocated the position of Dean of Men, University of Massachusetts, the duties of which were being performed by the person classified as "Professor 'A'," to a job group lower than that to which the title of "Professor 'A'" was allocated by c. 620, but higher than that to which the position of "Professor 'A'" had been allocated prior to the enactment of said c. 620. The secretary stated that the trustees "promoted" the person referred to from "Professor 'A'" to the position of Dean of Men at the salary for the job group to which the latter position was allocated by c. 620, which, as stated, was lower than the job group to which the title of "Professor 'A'" was allocated by c. 620.

The secretary then asked for opinions as to whether the trustees had made the proper salary determination for the person referred to in the first example and, if not, what salary increase he is entitled to; and whether the trustees acted within their power in "promoting" the person referred to in the second example and, if not, what salary increase the incumbent is entitled to.

Upon receipt of the letter referred to, we wrote the secretary asking for the descriptive specifications for each class, the positions in which were held by the trustees to be affected by the provisions of § 2 of c. 620, quoted above, and the titles of the positions held to be excluded. At the same time we also requested the Director of Personnel and Standardization to supply us with similar information.

We also requested the secretary, and the director, to inform us what, if any, the seniority or tenure rights of incumbents of the positions involved might be in respect to discharge, denial or promotion or demotion.

The director wrote us stating that in the course of a study of positions at the University, which he made at the request of the House and Senate Ways and Means Committees, he specifically stated to the University authorities that if changes from improper academic titles to proper titles were not initiated by the University prior to February 28, 1960, the ef-
ective date of c. 620, all employees holding academic titles on that day would, under the law, become entitled to the upgradings designated by c. 620. The director further stated:

"It was recently brought to my attention that the University of Massachusetts had decided to pay employees with academic titles who were admittedly not performing the duties thereof the same rate of pay they were receiving as of February 27, 1960 plus $6.75 per week, the increase which was given to all other State employees that were not covered under § 2 of c. 620. On receipt of this information, I made these facts known to the Budget Commissioner and the Comptroller for their consideration and any action deemed necessary.

"It should be noted that exclusionary positions were determined by the Legislature. Inasmuch as the University officials have failed to accede to our suggestions for correcting improper titles prior to February 28, 1960, all employees filling academic and professional positions are entitled to the upgradings designated by the Legislature. This is in spite of the fact that some are performing administrative and other non-teaching duties at titles improperly assigned because of poor administrative personnel practices by the University. As a result, the intent of the Legislature is not being carried out."

The director also stated that he had considered only the classification problems and was not concerned with the effect, if any, seniority and tenure rights would have as to the way in which any required changes were to be put into effect.

About the time we received the director's letter, a copy of which was sent to you, the treasurer of the University and the secretary of the Board of Trustees visited this office to discuss the request. They had not then seen the copy of the director's letter sent to you. At the discussion referred to, it appeared that the trustees had considered that seniority or tenure rights did not affect the personnel action taken by the trustees.

The provisions of St. 1959, c. 620, § 2, excluding positions "in a class the duties of which, as indicated by the descriptive specifications on file with the division of personnel and standardization, are clearly administrative . . ." from the changes in job group allocation authorized in the schedules referred to in the section, would not exclude a position which was in a class of duties of which, as shown by the descriptive specifications referred to, were not clearly administrative, even though the actual duties being performed by the incumbent were claimed to be clearly administrative. It would appear that there is no question but that the duties of the positions referred to in the examples stated by the secretary, as shown by the specifications designated, are not clearly administrative. It would follow, therefore, that, as stated by the Director of Personnel and Standardization, persons holding the positions referred to on February 28, 1960, would be entitled to the upgradings authorized by the Legislature.

In answer to the specific questions asked by the secretary, I inform you that in my opinion the trustees could not deny the persons referred to in the examples given by the secretary the salaries for the job groups authorized by c. 620 for the positions held by them on February 28, 1960.

It should be understood that the conclusion stated is not to be considered as in any way expressing a limitation on the authority the trustees have to change the assignments or titles of persons subject to their juris-
diction. However, if such action involves what is in effect a demotion or discharge, specific action directed to those ends should be taken and the procedure followed should comply with any statutory provisions regulating the demotion or discharge of the particular employees involved.

Very truly yours,

EDWARD J. MCCORMACK, JR., ATTORNEY GENERAL,

BY JAMES J. KELLEHER,
ASSISTANT ATTORNEY GENERAL.

Land for a student center and chapel at the University of Massachusetts could not be conveyed to the Roman Catholic Bishop of Springfield, a corporation sole, under a statute authorizing the trustees to convey land to societies, etc., "established thereat."

AUG. 1, 1960.

Mr. John Gillespie, Secretary, Board of Trustees, University of Massachusetts.

Dear Sir: — In a letter which you state was written at the request of the Buildings and Grounds Committee of the Board of Trustees, you ask if the trustees have authority under G. L. c. 75, §§ 25 and 27, to sell a small parcel of land which is part of the university campus to the Roman Catholic Bishop of Springfield, a corporation sole. The parcel in question would be used with land already owned by the Bishop on which a student center and chapel for Catholic students is to be constructed, and is desired so that the project will have adequate space.

General Laws c. 75, § 25, provides, in part, that the trustees of the university may sell and convey, to any "society, association or fraternity established thereat, land owned by the commonwealth in Amherst or Hadley. Not more than one acre shall be so sold and conveyed to any one such person or organization. Such conveyances shall contain necessary restrictions and conditions."

By § 27 of the chapter conveyances under § 25 must be approved by the Governor and Council.

Section 2 of c. 368 of the Acts of 1898 (see also St. 1950, c. 197, § 5), incorporating the Roman Catholic Bishop of Springfield, a corporation sole, provides that said corporation may take and hold real and personal estate "for the religious and charitable purposes of the Roman Catholic church . . ."

As noted, G. L. c. 75, § 25, authorizes a conveyance of land by the trustees of the university "to any society, association or fraternity established thereat . . ." The words "society, association or fraternity," used in § 25, do not aptly describe a corporation sole such as the Roman Catholic Bishop of Springfield, and further, the words "established thereat," as used in the section, would appear to have been intended to restrict the field of eligible grantees to societies or associations formed for purposes directly related to student and other activities of the university. Although, it is true, as you state, that the land in question would be devoted for a religious use connected with activities at the university, the proposed grantee corporation
could not reasonably be said to be "established" at the university. It is	heralded, established for the Springfield diocese of the Roman Catholic
curch.

The authority of the trustees to make the proposed conveyance is de-
ependent entirely upon the provisions of G. L. c. 75, § 25. As has been sug-
gested, there is a serious question whether a conveyance to the proposed
grantee is authorized by that section. Under the circumstances it is re-
commended, if the trustees approve the requested conveyance, that legis-
lation be sought either by way of specific authorization for the conveyance
of the particular parcel referred to, or by a general amendment to G. L.
c. 75, relating to conveyances for the construction of buildings for religious
purposes. Cf. G. L. c. 123, § 6A, as to leases of land for chapels at State
hospitals.

In the legislative sessions of 1954, 1955 and 1956, bills were submitted
which if enacted would have given the trustees of the university authority
to sell and convey land for the erection of chapels for the use of students
at the university. The bills referred to were not enacted, evidently be-
cause of the provision contained in each of them that such sales and con-
veyances could be made for a nominal consideration.

Very truly yours,

Edward J. McCormack, Jr., Attorney General,

By Lucy Broderick Brady,
Assistant Attorney General.

Bid proposal differing from invitation may, depending on applicable statute,
be void or defect may be waived, but if invitation states that defective bids
shall be invalid, such bids must be rejected.


Hon. Charles F. Mahoney, Commissioner of Administration.

Dear Sir: — You have called my attention to two bids which have
been submitted for the furnishing of files and equipment for the storage
of archives in the new facility recently constructed in the State House.
You list various discrepancies in the bids and you inquire, "Whether or
not either or both of the bid proposals represents a bona fide valid accept-
able proposal based upon the contract documents and plans and specifica-
tions for which proposals were invited . . . ." The discrepancies consist
of certain additional material added to the proposal by each of the bids;
to the fact that one of the bids listed sub-bids whereas sub-bids were specif-
ically excluded by the investigation; and to the fact that the other bid
contained an alternate proposal whereas no alternate was asked for in the
invitation for bids.

An answer to your question depends, to some extent, on the particular
bidding statute which would be applicable to the proposed contract. If
the proposed contract requires that the equipment in question be affixed
to the building, thus becoming a part of it, then the provisions of G. L.
c. 149, § 44A, et seq., would be applicable. Under such circumstances the
various discrepancies described by you would cause both bids to be defective and they should be rejected.

If the proposed contract is merely for the purchase of equipment and does not require that such equipment be affixed to the building, then the Commission on Administration and Finance is empowered by G. L. c. 7, § 30D, to procure such equipment under the provisions of G. L. c. 7, §§ 22 to 26. Said §§ 22 to 26 give the commission broad power to establish rules, regulations and orders governing such purchase and governing the advertisement and the receipt of bids for such equipment. The commission, under some circumstances, would have limited authority to waive informalities on bids to be awarded under this latter chapter.

In the present case, however, the invitation for bids states expressly at page 13 that bids “... on a form not completely filled in, or which is incomplete, conditional or obscure, or which contains any addition not called for, shall be invalid; and the awarding authority shall reject every such general bid.” In view of this language, it is our opinion that both bids are invalid and should be rejected.

It is noted also that the awarding authority has the right to reject all bids, irrespective of any discrepancies by virtue of item 2-10.5 in the specifications at pages 2-9.

Very truly yours,

Edward J. McCormack, Jr., Attorney General,

By Joseph H. Elcock, Jr., Assistant Attorney General.

An increase in the estimated quantity of work under an item in a unit-price contract is to be compensated for at the unit price.


Mr. Rodolphe G. Bessette, Director, Division of Waterways.

Dear Sir: — You state that a contract was issued by the Department of Public Works calling for stream improvements in the Ten Mile River in the city of Attleboro. A question has arisen as to whether the contractor is entitled to be paid for the removal of 176 trees where the contractor’s proposal was based on an estimate that only 41 trees were to be removed.

Reference to the contract discloses that under item 3 of the proposal, the contractor bid the unit price of thirty-five dollars a tree for the removal of 41 trees as specified in the invitation for bids. The special provisions of the contract, at pages 5 and 6, required the contractor to remove all trees over nine inches in diameter from a specified area for which payment was to be made under item 3.

At page 2 of the special provisions the following language appears:

“... It is estimated that the quantity of materials mentioned in the proposal will be required, but this amount shall not control the performance of this contract, and the Contractor shall be bound hereunder whether or not such estimate is even approximately correct.”
It is also noted that the special provision at page 1 states that the work is to be performed in accordance with the special provisions and the Standard Specifications for Waterways Work. Article 3 of these specifications provides in part as follows:

“All bids will be compared on the estimate of quantities of work to be done, as shown in the Proposal. These quantities are approximate only, being given as a basis for the comparison of bids, and the Party of the First Part does not expressly or by implication agree that the actual amount of work will correspond therewith, but reserves the right to increase or decrease the amount of any class or portion of the work, as may be deemed necessary or expedient by the Party of the First Part.

“Bidders are required to submit their estimate upon the following express conditions, which shall apply to and become part of every bid received, viz.:

“An increase or decrease in the quantity for any item shall not be regarded as cause for an increase or decrease in the prices, nor in the time allowed for the completion of the work, except as provided in the contract.”

From the foregoing it appears that the contract did not call for the removal of only 41 trees but called for the removal of all trees of a particular size from a particular area. The proposal figure of 41 trees was used as a means of comparing bids and was specifically stated to be only an estimate which might increase or decrease.

Under the circumstances of the present case it appears that there were actually 176 trees in the specified area which the contractor was obliged to remove from the area in question under the terms of the contract.

For this work he is entitled to be compensated at the unit price of thirty-five dollars per tree under item 3.

A matter involving a similar situation was the subject of an opinion of the then Attorney General to the State Comptroller, dated August 8, 1957, a copy of which opinion was referred to by you and annexed to your request. The principles therein set forth govern the present question.

The foregoing principle could, of course, be made inapplicable if the facts of a particular case showed that a contract was based on mutual mistakes as to material facts or showed that bidders had been misled by an intentional misrepresentation of the quantities involved. Such factors do not appear to exist in the present situation.

Very truly yours,

Edward J. McCormack, Jr., Attorney General,

By Joseph H. Elcock, Jr.,
Assistant Attorney General.
The charges for the support of a person committed for mental treatment to a State hospital, except the Bridgewater State Hospital, after arrest on a criminal charge, like such charges for the support of a person so committed without having been arrested or charged, are recoverable from the persons liable therefor, in view of the amendment to G. L. c. 123, § 96, by St. 1954, c. 598. There is no liability on other public agencies for the care and support of persons so committed after being accused or convicted of crime.

Aug. 9, 1960.

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

Dear Sir: — You have requested an opinion as to the liability for the support of a patient at a State hospital, committed under circumstances stated by you.

You state that the patient in question, while under arrest for armed robbery, was committed on July 9, 1956, in accordance with G. L. c. 123, § 100, for observation, and on September 7, 1956, was regularly committed under the same section.

The first paragraph of G. L. c. 123, § 96, as now in effect, reads as follows:

"The price for the support of inmates of state hospitals, except for insane inmates of the Bridgewater state hospital shall be determined for each person by the department on the basis of the actual weekly cost of care as determined by the commission on administration and finance annually on or before October first in each year for each person, and may be recovered of such persons or of the husband, wife, father, mother or child, if of sufficient ability. A married woman shall be subject to the said liability as though sole. Such action shall be brought by the attorney general in the name of the state treasurer."

Under the provisions just quoted the only exception to liability for support is for insane inmates of the Bridgewater State Hospital.

Prior to 1954, the first paragraph of G. L. c. 123, § 96, provided that the price for the support of "inmates of state hospitals . . . and of insane inmates . . . of the Bridgewater state hospital, not under orders of a court . . ." (emphasis supplied) should be fixed and could be recovered as provided. In the case of Acting Commissioner of Mental Health v. Williamson, 330 Mass. 52, the court held that the words "not under orders of a court . . ." formerly contained in the first paragraph of G. L. c. 123, § 96, referred to all the institutions mentioned in the paragraph, and the court construed them as meaning under court orders similar to those issued under G. L. c. 277, § 16, and c. 278, § 13, for the commitment of persons charged with felony and not indicted, or acquitted, by reason of insanity, which sections provide that the expense of the support of persons so committed shall be paid by the Commonwealth. The court also stated that it might well be that the policy expressed in G. L. c. 277, § 16, and c. 278, § 13, applies also to insane persons committed by orders under G. L. c. 123, §§ 100, 101 and 103.

However, the words "not under order of a court" were stricken from the first paragraph of G. L. c. 123, § 96, by St. 1954, c. 598, § 4, so that there is now no limitation on the liability imposed by that section except, as stated, that relating to insane inmates of the Bridgewater State Hospital.
The provision contained in G. L. c. 277, § 16, and c. 278, § 13, that the expense of the support of persons committed under those sections shall be paid by the Commonwealth was originally enacted by St. 1883, c. 148, §§ 1 and 2. At that time the city or town of settlement was liable for the support of inmates of a State hospital, and could recover the amount paid from the patient or his kindred liable for his support. See Public Statutes (1882), c. 87, §§ 31 to 34, inclusive. In view of the latter fact, it would seem that the purpose of the provision referred to was merely to make it clear that the city or town of settlement should not be liable, and that the provision was not intended to mean that the patient himself, or his kindred liable for his support, should not be liable.

In Bradford v. Cambridge, 195 Mass. 42, in permitting recovery by the Commonwealth against the city of settlement for the support of prisoners who during their terms of criminal commitments had been adjudged insane and removed to mental institutions, the court says, at page 41,

"It is plain, therefore, we think, that the asylum at Bridgewater is to be regarded as a part of the system adopted by the Commonwealth for taking care of its insane rather than as a part of the system adopted by it for the purpose of taking care of its criminals. It is true that in certain cases the time of confinement in the asylum is to be computed as a part of the term of imprisonment, but that does not alter the fact that those committed to the asylum are there for treatment as insane persons and not for confinement as criminals; and it follows that the general provision in regard to the payment of the charges for the support of insane persons having known settlements in this Commonwealth applies to those supported in the asylum for insane criminals at Bridgewater. R. L. c. 87, § 79. See Shrewsbury v. Worcester, 180 Mass. 38."

In the same case the court held that even under a provision that the expense of supporting a State prison convict who is committed to a State insane hospital should be paid by the Commonwealth, the provision manifestly referred only to support during the term of his sentence and did not prevent recovery from the city of settlement for support furnished after the expiration of the sentence.

Inasmuch as the patient you refer to was not committed under either G. L. c. 277, § 16, or c. 278, § 13, it is not necessary to consider the effect, if any, of the provisions of those sections on the liability under G. L. c. 123, § 96, as now worded.

In view of the fact that the words "under orders of a court," construed in the case of Acting Commissioner of Mental Health v. Williamson, 330 Mass. 52, were stricken from the first paragraph of G. L. c. 123, § 96, by St. 1954, c. 598, § 4, I advise you in answer to your first question that the charges for the support of insane persons committed under G. L. c. 123, § 100, or §§ 101 to 105, inclusive, for such periods as they are inmates of any State hospital, except the Bridgewater State Hospital, are recoverable under G. L. c. 123, § 96, as presently in effect.

It is the evident intention of the Legislature that, with the exception of those mentally ill persons whose condition require their confinement in the Bridgewater State Hospital (that hospital is a part of the Massachusetts Correctional Institution, Bridgewater, and is under the jurisdiction of the Department of Correction, G. L. c. 125, § 18, G. L. c. 123, § 22A), persons whose commitments for custodial care and treatment to other
State hospitals follow upon conduct made the basis of criminal proceedings are not for that reason to be treated differently as regards the liability for the cost of their support and care than mentally ill persons who are committed without having engaged in conduct which resulted in criminal proceedings, or after having committed acts which might have resulted in such proceedings if their mental illness had not been obvious to those charged with the enforcement of the criminal laws.

In answer to your second question, I advise you that there are no statutory provisions making a court, county, the Department of Correction or any other agency, in whose charge or custody a person is before being sent to a State hospital, or to the Bridgewater State Hospital, under the sections referred to above, liable for the cost of support of the prisoner while he is in the hospital. The provisions of G. L. c. 127, § 126, as appearing in St. 1955, c. 770, § 64, must, in view of the provisions of G. L. c. 125, § 1, as appearing in § 11 of said St. 1955, c. 770, be construed as being applicable only to transfers under G. L. c. 127, § 125, and not to transfers under G. L. c. 123, § 104. Cf. Bradford v. Cambridge, 195 Mass. 42.

Very truly yours,

EDWARD J. MCCORMACK, JR., ATTORNEY GENERAL,

BY James J. Kelleher,
Assistant Attorney General.

In the absence of an express statute, the State Department of Public Works has no authority to rent its helicopter for private use.


Dear Sir: — You have asked whether your department has authority to rent its helicopters for private use.

Your question is answered in the negative. An examination of the various enactments of the General Court fails to disclose any statute relating to such rental power. In the absence of an express statute, your department would not have power to lease its helicopters as suggested.

Very truly yours,

EDWARD J. MCCORMACK, JR., ATTORNEY GENERAL,

BY JOSEPH H. ELCOCK, JR.,
Assistant Attorney General.
Special legislation would be necessary to authorize the State Department of Public Works to insure a helicopter being purchased by it.

Aug. 18, 1960.


Dear Sir: — Your predecessor in office has asked whether the Department of Public Works may insure the helicopter it is in the process of purchasing, in order to protect the substantial investment of the Commonwealth.

Your question is answered in the negative. This conclusion is dictated by G. L. c. 29, § 30, which provides that: —

“No officer or board shall insure any property of the commonwealth without special authority of law.”

If your department feels that the interests of the Commonwealth should be protected by having an insurance policy written to cover the helicopter, it is suggested that you seek legislation to accomplish this purpose.

Very truly yours,

Edward J. McCormack, Jr., Attorney General,

By Joseph H. Elcock, Jr.,
Assistant Attorney General.

The psychiatric examination required by G. L. c. 123, § 100 (the "Briggs Law"), is not required to be made by two qualified physicians.


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

Dear Sir: — You have requested an opinion as to whether the examination required under G. L. c. 123, § 100A (the Briggs Law), of persons under indictment for a capital offense, and of certain other persons under indictment or bound over for trial in the Superior Court, can be conducted by only one physician.

You state that it has been the policy of the department to designate two qualified physicians to make the examination, but that you are having difficulty in obtaining qualified psychiatrists to make such examinations because the fees authorized are not adequate.

General Laws, c. 123, § 100A, states only that the department “shall cause such person to be examined with a view to determine his mental condition and the existence of any mental disease or defect which would affect his criminal responsibility.”

The provision quoted leaves the manner of conducting the examination, including the number of physicians by which it shall be made, to the determination of the department. The department might well determine that in some cases, for example, cases other than capital cases, or cases of marked recidivism, the examination could be properly conducted by a single qualified physician.
Although examination and certification by two qualified physicians is required for the commitment of a person to an institution for the mentally ill (G. L. c. 123, § 51), and additional medical testimony may be required (G. L. c. 123, § 52), the examination provided for in G. L. c. 123, § 100A, is not one for the purpose of commitment. The examination provided for in the section cited is comparable to that provided for in G. L. c. 123, § 100, where specific provision is made that the court may “employ one or more experts in mental disease” to conduct the examination.

I advise you that in my opinion G. L. c. 123, § 100A, does not require that the department cause an examination required thereunder to be by more than one qualified physician, and that it is for the department to determine whether the examination in a particular case shall be made by one or more qualified physicians.

Very truly yours,

Edward J. McCormack, Jr., Attorney General,

By James J. Kelleher,
Assistant Attorney General.

The use of an armory for a wedding reception may not be permitted.


Col. Ralph T. Noonan, QMC, Mass. ARNG, State Quartermaster.

Dear Sir: — You have requested an opinion as to whether armories may be used for wedding receptions.

General Laws, c. 33, § 122, contains the only provisions authorizing the use of armories and air installations for non-military uses.

Paragraph (a) of said § 122, authorizes certain such uses by the military units stationed in the armory or installation; paragraph (c) certain temporary uses for “public purposes”; paragraph (e) (1) for “athletic contests and social or civic activities conducted by responsible organizations or associations,” and (2) for certain exhibitions.

The “public purposes” specified in paragraph (c) are either governmental, political, or sponsored by community groups. Although paragraph (e) (1) does refer to “social” activities, it includes only such as are conducted by “responsible organizations or associations.”

A wedding reception could not reasonably be said to be a social activity conducted by an “organization” or by an “association,” within the meaning of those words as used in the section.

I advise you, therefore, that in my opinion the use of an armory or air installation for a wedding reception cannot be permitted under G. L. c. 33, § 122.

Very truly yours,

Edward J. McCormack, Jr., Attorney General,

By James J. Kelleher,
Assistant Attorney General.
Changes in the Government Center Bill were not necessary to accomplish certain objectives suggested by the Director of Employment Security as to the building to be built and leased to his division.


Hon. William D. Fleming, Chairman, Senate Committee on Ways and Means.

Dear Sir: — You have called to my attention the provisions of House Bill 3255 which is currently pending before your committee. The bill provides for the establishment of a State Government Center Commission and, among its other provisions, authorizes the construction of a building to be leased to the Division of Employment Security.

The Director of the Division of Employment Security, in a letter to the Commission on Administration and Finance, dated August 15, 1960, has made suggestions for amendments to the bill. Four of the suggestions made by the director relate to provisions in the proposed lease and you ask whether it is possible to incorporate these suggestions into provisions in the lease without the necessity of amending the existing language of House Bill 3255.

The director suggests first that the bill provide for a lease having a term of twenty years. The bill in its present form has language in § 6, lines 43 and 44, providing that the lease "... shall be for a term of not more than twenty years..." This language already in the bill would authorize the execution of a lease for a period of twenty years. No amendment is required for this purpose.

The director next calls attention to those provisions of § 6 relating to the amount of rental to be charged. The section provides the rental shall be "... at a price in which due consideration is given to..." interest charges, principal charges and expenses allocable to the cost of construction. The director suggests that language be added to the act allowing consideration to be given also to other costs including maintenance and operation charges. The language in the present bill does not preclude consideration of these additional factors in arriving at an agreed rental price. As long as due consideration is given to the interest and principal payments on monies borrowed by the Commonwealth and to the cost of construction of the building, consideration may also be given to such other ordinary factors as would enter into the determination of a rental figure. The bill need not be amended to accomplish this result.

Thirdly, the director calls attention to lines 66 through 68 of § 6 whereby the commission is not required "... to furnish or install any furniture, furnishings or partitions..." The director desires that the words "furnishings" or "partitions" be stricken in order to require that these items actually be furnished by the commission. The bill in its present form imposes no obligation on the commission to install furnishings or partitions but it does not preclude the installation of such items. If it desires, the commission can undertake to install furnishings or partitions by inserting a clause to this effect in the lease. The bill need not be amended to accomplish this purpose.

Lastly, the director suggests that § 8 be amended by adding a new provision to the effect that payments made by the Commonwealth in lieu of taxes to the city of Boston shall be allocated in part to the Federal Govern-
ment. One of the elements to be used in determining the amount of rental to be paid should be this cost to the Commonwealth of making a payment to the city in lieu of taxes. To the extent that the Federal Government reimburses the Commonwealth for rentals paid by the Division of Employment Security, the Federal Government will thus indirectly reimburse the Commonwealth for this payment in lieu of taxes. An express provision in the bill is, therefore, not necessary to accomplish this result.

Very truly yours,

EDWARD J. MCCORMACK, JR., ATTORNEY GENERAL.

The Board of Regional Community Colleges has no authority to adopt a rule that a lesser number of members than a majority shall constitute a quorum.


MRS. GWENDOLYN C. WOODS, SECRETARY, MASSACHUSETTS BOARD OF REGIONAL COMMUNITY COLLEGES.

DEAR MADAM: — In your recent letter you pose the following question:

"As to the propriety and legality of the following by-law adopted by the Board at its regular meeting of May 13, 1959:

RULES AND REGULATIONS.

Article 1.

Section 4.

Six members of the Board or the authorized representatives of the ex officio members shall constitute a quorum. A lesser number shall adjourn the meeting to a definite date."

The board, as you know, was created by the provisions of St. 1958, c. 605. By its provisions it should consist of fifteen members. I am unaware of any provision authorizing the board to enact by-laws or rules or regulations in general, more particularly relating to quorums.

While it has been stated by the Supreme Court that in the absence of statutory restriction the general rule is that a majority of a council or board is a quorum and a majority of the quorum can act (Clark v. City Council of Waltham, 328 Mass. 40, 41), it is specifically provided in G. L. c. 4, § 6 (fifth), that "words purporting to give a joint authority to, or to direct any act by, three or more public officers or other persons shall be construed as giving such authority to, or directing such act by, a majority of such officers or persons."

In the light of the foregoing, it is my opinion that your question must be answered in the negative. Attorney General’s Report, 1946, p. 13.

Very truly yours,

EDWARD J. MCCORMACK, JR., ATTORNEY GENERAL,

BY FRED W. FISHER,

ASSISTANT ATTORNEY GENERAL.
The buildings in which prisoners are housed at the Massachusetts Correctional Institutions are not subject to the provisions of G. L. c. 143, § 2A, to the extent that the Department of Correction to comply therewith would be unable to comply with G. L. c. 125, § 11, as to the maintaining of the security and confinement of prisoners.

Sept. 12, 1960.

Hon. George F. McGrath, Commissioner, Department of Correction.

Dear Sir: — You have asked whether or not the buildings wherein prisoners are housed in the Massachusetts Correctional Institutions are subject to the provisions of G. L. c. 143, § 2A. The answer is in the negative if it interferes with the Department of Correction maintaining the security and confinement of prisoners.

Historically, the control of the prisons has always been the responsibility of the prison officials in charge of the prison. As early as 1811 in c. 32, § 3, it was stated that the warden of said prison "shall have the care, custody, rule and charge of the same, and of all persons confined therein, and of all lands, buildings, machines, . . . ." Chapter 125, § 14, of our present General Laws practically uses the same words when it states that the superintendent, subject to rules and regulations established by the commissioner, "shall also have the charge and custody of the institution and of the land, buildings, furniture, . . . ."

It would appear that if the Department of Correction had to comply with the requirements of G. L. c. 143, § 2A, they would be unable to comply with c. 125, § 11, which clearly states that the Department of Correction shall maintain the correctional institutions of the Commonwealth for the security and confinement of prisoners of the Commonwealth. I do not find any legislative intent in passing c. 143, § 2A, of taking this responsibility and duty away from the Department of Correction.

This opinion should not be interpreted to mean that the Department of Correction is free to ignore c. 143, § 2A, but that they should make every effort to comply with it so long as compliance with it would not interfere with their maintaining the security and confinement of prisoners.

Very truly yours,

Edward J. McCormack, Jr., Attorney General,

By Joseph T. Doyle, Assistant Attorney General.
Fines imposed for violations of the Motor Boat Law are to be disposed of as provided in G. L. c. 280, § 2.  

SEPT. 13, 1960.

Mr. Herman B. Dine, Director of Accounts, Department of Corporations and Taxation.

Dear Sir: — You have asked my opinion concerning what disposition is to be made of fines received for violations of the provisions of St. 1960, c. 275, which is an act regulating the use of motor boats and requiring the registration thereof on certain waterways of the Commonwealth.  

Section 2 of said c. 275 inserted a new chapter 90B in the General Laws. Section 16 of chapter 90B provides:

"Moneys received by the commonwealth from fees and other sources pertaining to the administration of this chapter shall be credited on the books of the commonwealth to a fund to be known as the Recreational Boating Fund. Said Recreational Boating Fund, subject to appropriation, shall be used as follows:

"(1) For the payment of the administration and enforcement expenses of the division.

"(2) For conducting programs of boating safety education.

"(3) For the construction of access to water areas, including land, parking areas, roads, launching ramps and docks.

"(4) For the reimbursement to cities and towns, so far as possible, for such projects as are indicated in (2) and (3) above, provided, the plans for such construction or programs have been approved in advance by the director."

Upon examination of c. 90B, I find that § 3 thereof sets forth the fee to be charged for the original certificate number and the subsequent fees for the years thereafter for renewals. Section 4 also provides in case a certificate is lost, destroyed or mutilated, that upon payment of a fee the certificate will be replaced. You will note that under these sections the amount for the payment of the fees is to be forwarded to the director but there is no reference under this section, or in any part of the act, as to where fines received from violations of the provisions of this act shall be paid.

I also note from examination of the chapter that § 15(b) allows cities and towns to make regulations, by ordinance or by-law, not contrary to the provisions of this chapter. It further provides that cities and towns may, by joint action, provide for regulations for waters lying in two or more cities or towns. It is to be noted that the only requirement for the above is that it be approved by the director. It is conceivable that a fine could be imposed for the violation of these regulations promulgated by cities and towns and it would not be necessary in all instances that moneys received from such fines would go to the Commonwealth.

It is also important to note the disposition of fines and penalties paid for violating the rules and regulations of other agencies of the Commonwealth. Section 3 of c. 131 reads as follows: "All fines, penalties and forfeitures recovered in prosecutions under the laws relative to birds and mammals, and relative to fish, all as defined in section one, shall be equally divided between the county where such prosecution is made and the city
or town where the offence is committed; provided, that if the prosecuting
officer is a conservation officer or member of the state police receiving compen-
sation from the commonwealth, such fines, penalties and forfeitures
shall be paid to the commonwealth."

General Laws, c. 101, § 14, provides that fines from violations of the
hawkers and peddlers' law shall be equally divided between the Common-
wealth and the town in which the offence was committed.

General Laws, c. 14!, § 10, states that "fees and fines collected under
this chapter shall be paid to the commonwealth."

From the above, it is clear that the Legislature indicated its intent where
it specifically stated how fines were to be disposed.

There being no reference in this chapter as to the disposition of the fines
received from violations of the provisions of the Motor Boat Act, it is my
opinion, where no specific mention is made as to how the fines shall be dis-
posed of, that the fines received from the violations of this chapter shall be
disposed of as provided in G. L. c. 280, § 2, with which, I am sure, you
are familiar.

Very truly yours,

EDWARD J. MCCORMACK, JR., ATTORNEY GENERAL,

BY JOHN J. GRIGALUS,
ASSISTANT ATTORNEY GENERAL.

A provision limiting the number of members of a board who may belong to
the same political party does not prohibit the appointment of a person
who is not a member of a political party.

SEPT. 19, 1960.

His Excellency Foster Furcolo, Governor of the Commonwealth.

Sir: — In your letter of recent date you state that St. 1960, c. 635, § 1,
established a Government Center Commission "consisting of three persons
to be appointed by the governor, not more than two of whom shall be mem-
ers of the same political party, to serve for terms of five years each."

After calling my attention to St. 1960, c. 295, you request my opinion
"as to whether or not under the wording of these statutes the Governor
may appoint as a member of this commission a person who has not been
registered as either a Democrat or Republican for a period of two years."

The provision you refer to is not a new one in this Commonwealth. Other
commissions have been created by the General Court by substan-
tially similar language. The Alcoholic Beverages Control Commission
(G. L. c. 6, § 43), the State Racing Commission (G. L. c. 6, § 48) and the
Massachusetts Aeronautics Commission (G. L. c. 6, § 57), are illustrations.

The purpose of a provision such as you refer to, is not, in my opinion, to
serve as a barrier to prevent thoughtful and upright citizens from holding
public office because for one reason or another they are not aligned with
either of the two major political parties in the Commonwealth. Rather,
it is more to encourage independence of thought and action in the public
interest and perhaps minimize political considerations in the handling of
the public business.
The language found in § 1 of c. 635 and in §§ 43, 48 and 57 of c. 6 before referred to, is quite different from the language found in St. 1885, c. 323, in which the Governor was authorized to appoint "from the two principal parties three citizens . . . " It is quite similar to that found in the New York case of Rogers v. Buffalo, 123 N. Y. 173, where the statute in question authorized the Governor to appoint a Civil Service Commission consisting of three persons "not more than two of whom shall be adherents of the same party." Referring to that provision the court said:

"It must be remembered that there is nothing in this statute which compels the appointment of even one member of any political party. It simply prevents the appointment of more than two from such party . . . In such case it cannot be truly said that eligibility to hold office depends upon party affiliation."

My answer to your question is in the affirmative. I find nothing in St. 1960, c. 295, requiring a different conclusion from that which I have already stated.

Very truly yours,


When a State police officer is to be considered as "on duty at night," within provisions of G. L. c. 262, § 53B, as to payment of witness fees for court attendance.


Hon. J. Henry Goguen, Commissioner of Public Safety.

Dear Sir: — You have requested an opinion on the following four questions relative to G. L. c. 262, § 53B:

"1. An officer returning from time off, due back at his station at 8 A.M., is scheduled for an eight hour tour of duty commencing at 6 P.M. the same day. If he makes an appearance in court before his tour of duty, is he considered 'on duty at night' within the meaning of this chapter and section?

"2. An officer completes his tour of duty at 2 A.M. and makes an appearance in court at 9 A.M. on the same day. Is he considered 'on duty at night' within the meaning of this chapter and section?

"3. An officer completes his tour of duty at 10 P.M. and is required to remain in the station on call until his next scheduled tour of duty on the following day. Is he considered 'on duty at night' within the meaning of this chapter and section?

"4. Except on his scheduled time off, an officer is required to remain in the barracks at night, on call, between his regular assigned tours of duty. Does such time that he is required to remain in the barracks constitute 'on duty at night' within the meaning of this chapter and section?"

The applicable statutes are as follows:

General Laws, c. 262, § 50:

"No officer in attendance on any court, sheriff, deputy sheriff, jailer, constable, city marshal or other police officer who receives a salary or an
allowance by the day or hour from the commonwealth or from a county, city or town shall, except as otherwise hereinafter provided, be paid any fee or extra compensation for official services performed by him in any criminal case; or for aid rendered to another officer; or for testifying as a witness in a criminal case during the time for which he receives such salary or allowance; or for services or as a witness at an autopsy or inquest; or in proceedings for commitment of insane persons, but his expenses, necessarily and actually incurred, and actually disbursed by him in a criminal case tried in the superior court, shall, except as provided in section fifty-two, be paid by the county where the trial is held, or in a criminal case tried in a district court by the town where the crime was committed. Whoever receives extra compensation or a witness fee in violation of this section shall be punished by a fine of not more than one hundred dollars.” (Emphasis added.)

General Laws, c. 262, § 53B:

“Any officer of the division of state police in the department of public safety, appointed under section six or nine A of chapter twenty-two, on duty at night, or on vacation or furlough, or on a day off, who attends as a witness in a civil or criminal case pending in a district court or in the superior court shall be allowed a witness fee in the amount of three dollars for each day’s attendance, including his first day’s attendance as arresting officer. Any such officer who attends court held at a place other than his residence or regularly assigned station or office in a criminal case pending in any court of the commonwealth shall be paid at the rate of five cents a mile for travel out and home for each day’s attendance, except that travel allowance shall not be allowed when such travel is made in state-owned vehicles. Each officer shall certify in writing under the penalties of perjury the amount of his travel and attendance. Such payments shall be in addition to his other expenses necessarily and actually incurred as provided for in section fifty and shall be paid in the same manner.” (Emphasis added.)

In the event of a conflict of the above-cited statutes, G. L. c. 262, § 53B, is to govern because it was enacted after said § 50 as an exception. Acts of 1952, c. 235. Indeed, prior to 1952 there was no provision for witness fees being paid to State Police.


It appears necessary to define “on duty at night” as used in § 53B before the questions presented can be answered.

Since there are no Massachusetts decisions on the point, the Federal cases may be of value. “On duty” was defined in United States v. Denver & R. G. R. Co., 197 F. 629, 631, as “to be actually engaged in work or to be charged with present responsibility for such should the occasion for it arise.” Thus, where a trooper is not engaged in work nor presently responsible for an assignment, he is not on duty.
It is clear that the Legislature was aware of the military nature of State Police service and that the uniformed police must, with certain exceptions, live in barracks and get off but one day in four. See G. L. c. 22, § 9D. Thus the phrase "on duty at night" must be interpreted in the light of military customs, regulations and usages existing in the State Police service at the time of the enactment of said § 53B. Specifically, § 53B was intended to avoid imposing a hardship in attendance at court by State Police officers "on duty at night, or on vacation or furlough, or on a day off" because of the long hours of "on duty." Being aware of State Police practices, if the Legislature had intended to include troopers "on call," it would have added that phrase or similar clarifying phrase.

In view of the above, the answers to your questions are as follows:

1. No, because said officer was not "on duty" the previous night and it would impose no hardship because said officer would lose no sleep because of duty when he attends court.
2. Yes, because "on duty at night" would include being on duty a part of the night.
3. Yes, because the officer is on duty at night from sunset to 10:00 p.m., which is part of the night.
4. No, with the qualification that if the officer is actually roused from bed and assigned to duty he would be entitled to a fee.

Very truly yours,

Edward J. McCormack, Jr., Attorney General,

By Joseph T. Doyle,
Assistant Attorney General.

Advances by the State Treasurer to State officers, including the deposits of such advances, are subject to the rules of the State Comptroller, and the provisions of G. L. c. 29, § 34, are not applicable to deposits of such advances by the Department of Public Works.


Hon. Maurice A. Donahue, Chairman, Special Committee for Investigating the Highway Division of the Department of Public Works.

Dear Sir: — In your letter of recent date, setting forth certain facts relative to deposits of funds of the Department of Public Works in a Boston bank allegedly exceeding forty per cent of the combined capital and surplus of said bank, you pose the following question:

"Does G. L. c. 172, § 31, permit deposits in excess of 40% of the combined capital and surplus of the depository as imposed by G. L. c. 29, § 34, provided that such excess is secured by United States securities in the amount of the excess?"

In view of the nature of your inquiry, I construe this question to be limited to the matter of deposits made by the Department of Public Works and my answer is so limited.

After a review of the applicable statutory provisions, it appears that § 34 of c. 29 applies to the State Treasurer and to deposits made in the name
of the Commonwealth. It is clear that the Treasurer may advance monies from deposits under his control to officers of the Commonwealth by virtue of and subject to the provisions of G. L. c. 29, §§ 23, 24 and 25. When such State officers deposit the money so advanced the deposit is not subject to G. L. c. 29, § 34, but is instead subject to §§ 23, 24 and 25. Section 23 provides specifically that monies advanced shall be subject to such rules and regulations as the Comptroller may determine. The Comptroller has issued an Accounting Manual under the provisions of G. L. c. 7, § 16, dealing with advances and other features of State finances. I believe the foregoing answers your question.

In conclusion, I recommend that serious consideration be given to the subject of advances by the State Treasurer of the funds of the Commonwealth. Rules and regulations promulgated by the Comptroller under § 23 can profitably be employed in the public interest to control them, if that seems desirable to the General Court.

Very truly yours,


Only the records relative to land takings by the State Department of Public Works which are required to be made by law, are “public records”; materials collected by the department with regard to pending claims for damages for land taken are not open to public inspection; when a right of inspection exists it must be exercised reasonably.

SEPT. 22, 1960.


Dear Sir: — In your recent letter you state that you have been asked by representatives of a Boston newspaper to “throw open the files of the Department of Public Works on matters dealing with land takings . . .” and refer to a letter, a copy of which you enclosed, sent to you by the managing editor of the newspaper.

You state that the letter you enclosed makes certain statements regarding “public records” and refers to them as “records of the data of land taken by the Commonwealth of Massachusetts through the Department of Public Works in the exercise of the right of eminent domain.” You then further state as follows:

“In view of the fact that many of these records pertain to matters presently in litigation or negotiation or matters which are likely to result in litigation, it appears to be in the best interest of the Commonwealth to withhold from public inspection such data. Allowing public inspection of matters of this nature would, it seems to me, be prejudicial to both the Commonwealth and the private parties involved in negotiation or litigation.”

A reading of the letter you refer to discloses that after stating that the department is required by law to maintain certain public records among which are “records of the data of land taken by the Commonwealth of Massachusetts through the Department of Public Works in the exercise of the right of eminent domain” (emphasis added), it is stated that rep-
resentatives of the newspaper have been trying to see "certain public records" and have been denied access to them, and a demand is made that the bearer of the letter be given access to the public records requested.

Evidently you have considered that by the use of the words "data of land taken," which are of very broad import, a demand was being made of the right to inspect the "files" of the department with regard to such takings. It would appear to me, however, that your correspondent's demand was merely that access to such of your records relating to land takings as are public records is desired.

As stated in an opinion of this office dated December 31, 1957, to the Chairman of the Board of Registration of Professional Engineers (see Attorney General's Report, 1958, page 41):

"The information and records which constitute 'public records,' and which must be open to public inspection, relate only to books or papers or entries which are 'required to be made by law,' or papers which a public body 'is required to receive for filing.' G. L. c. 4, § 7, cl. 26. Persons having custody of such 'public records' shall permit them to be inspected and examined by members of the public. G. L. c. 66, § 10."

As was further stated in the opinion referred to:

"In the absence of positive declarations of statutes, information obtained by you merely to aid you in the administration of your duties, which information is not required to be filed with you by statute, is not 'public records' and is not open to public inspection. Gerry v. Worcester Consolidated Street Railway, 248 Mass. 559, 567. III Op. Atty. Gen. 136; id., 351."

In the case of Hardman v. Collector of Taxes of North Adams, 317 Mass. 430, in which the petitioner made a written request to inspect and examine the commitment sheets or tax ledgers, and the daily cash book, of the respondent, it was held that the documents referred to were not public records and were not open to public inspection.

A formal vote of the Department of Public Works is required to effectuate all land takings and the records of such votes are public records and are open to public inspection. Of course, the actual instruments of taking recorded in the registries of deeds are also public records. Similarly, votes of the department approving the payment of claims for damages and fixing the amounts to be paid would be public records.

However, the materials collected by the department to aid in the administration of its duties and which are not specifically required by statute to be filed, are not public records, and are not open to public inspection.

As you point out in your letter, to allow public inspection of all material in your files with regard to claims in litigation or in the process of negotiation could greatly prejudice the Commonwealth in arriving at reasonable settlements of land damage claims.

In answer to your specific inquiry —

"It is not proper for me to require a request for specific data rather than accede to a general request to open the files which inevitably would include data properly withheld?" —

I advise you that, as stated above, you are not required to open the files of the department with relation to land damage cases and you are only required to allow the inspection of such records of the department with
regard to land damage takings as are public records. Since, as has been indicated, there are various public records of the department with relation to land damage takings, a request to you for permission to examine the public records of the department with relation to such matters should reasonably specify the particular public records inspection of which is desired.

In answer to your other specific inquiry —

"In addition would it not be in the best interests of the Commonwealth not to accede to a general request of this nature which would interfere seriously with the orderly conduct of the business of the department" — I advise you that the right of inspection of public records must be exercised reasonably. As was stated in the case of Direct-Mail Service v. Registrar of Motor Vehicles, 296 Mass. 353, at page 357:

"No one person can take possession of the registry or monopolize the record books so as to interfere unduly with the work of the office or with the exercise of equal rights by others, and the applicant must submit to such reasonable supervision on the part of the custodian as will guard the safety of the records and secure equal opportunity for all."

As stated above, it may be that because of the use of the words "records of the data of land taken by the Commonwealth," you have misapprehended just what records of the department are sought to be inspected. Although there is a basis for the broad construction you have placed on the wording of the request, I would feel that there is no desire on the part of the newspaper to require disclosure of the information in your files which would prejudice the settlement of pending land damage claims and that all that is desired is an opportunity to examine the records of the votes of the department authorizing the taking of land and of such votes as may have been taken relating to the payment of claims for land damages. I would suggest that the matter be discussed further with your correspondent and that it be ascertained just what public records of the department are desired for inspection.

Very truly yours,

Edward J. McCormack, Jr., Attorney General,

By James J. Kelleher, Assistant Attorney General.

The owner of a motor vehicle is not entitled to a rebate of registration fee after suspension or revocation of registration.


Mr. Clement A. Riley, Registrar of Motor Vehicles.

Dear Sir: — You have requested an opinion on the following question:

"When the registration of a motor vehicle or trailer has been suspended or revoked, and thereafter the owner, prior to August 1, transfers such vehicle and applies, on or before September 1, for a rebate, is the registry justified in paying such a rebate?"
As to whether a rebate is due in the question presented depends upon the intention of the Legislature. The Legislature has not provided for a rebate in the event of a suspension or revocation of a registration. See G. L. c. 90, § 2. However, the said § 2 provides for rebates in certain cases of transfer of owner or other loss of possession of a motor vehicle. If the Legislature intended to grant rebates in cases of motor vehicle registration suspension or revocation, it would have so provided in the statute. There is no such provision.

It is clear that registration fees are not in the nature of a revenue act or annual tax but are actually collected as filing fees for a service rendered each year. This is so because the statute also imposes a registration fee on political subdivisions of the Commonwealth which are ordinarily exempt from taxes. G. L. c. 90, § 33. Furthermore, rebates are paid out of the fees received and not out of the Treasury of the Commonwealth as tax refunds are. See G. L. c. 90, § 2.

Again, said § 33 also imposes a substitution fee of one dollar and fifty cents for transfer of a registration number from one vehicle to another instead of the six-dollar fee for a new registration. Apparently, the intent of the Legislature is not to charge the six-dollar fee because new metal registration plates need not be manufactured. Thus, the fee bears a relationship to the cost of services rendered at the initial registration.

As to commercial vehicles and trailers, the fees vary under said § 33 and in many cases may exceed the cost of the services rendered. However, it should be borne in mind that said commercial vehicles, trailers and taxicabs are subject to extensive regulation by departments of the Commonwealth other than the Registry of Motor Vehicles. For example, the Department of Public Utilities extensively regulates rates charged by commercial carriers. The cost of regulating these vehicles is greatly in excess of that of regulating pleasure motor vehicles.

A further distinction is that the statute used the word “rebate” and not “abatement” when referring to refunds. G. L. c. 90, § 2. The word “abatement” is generally used to refer to tax refunds. G. L. c. 59, §§ 59–74. The word “rebate” as commonly understood is an allowance by way of discount or drawback, a deduction from a gross amount, as, for example, a rebate of freight charges or interest on premium. State v. Laucks, 32 Wyo. 26, 228 P. 632, 634. There is no reported case in Massachusetts or elsewhere wherein the word “rebate” is used to mean a refund of a tax. There is no reported case on rebates of filing fees other than under statutory authorization.

There are no constitutional issues because, as pointed out above, the fee is not a revenue producing tax; rather it is, if anything, a regulatory tax or fee for services rendered.

In view of the above, and that there is no statutory authorization for such rebates, the question presented must be answered in the negative.

Very truly yours,

Edward J. McCormack, Jr., Attorney General,

By Joseph T. Doyle,
Assistant Attorney General.
The Commissioner of Administration may not, under G. L. c. 176A, § 5, approve rates for charges at State mental institutions for Blue Cross subscribers which are in excess of the charges to the general public.


Hon. Charles F. Mahoney, Commissioner of Administration.

Dear Sir: — You have requested an opinion as to the application of G. L. c. 176A, § 5, to the prices determined for the support of patients in institutions under the control of the Department of Mental Health, under the provisions of G. L. c. 123, § 96.

Your letter states that the Commission on Administration and Finance, in accordance with the provisions of c. 123, § 96, has made a determination that an additional charge be made by the Department of Mental Health for the care and support of patients who are Blue Cross subscribers, in excess of the amount charged to patients who do not enjoy Blue Cross coverage, or to persons listed in said § 96 as responsible for the cost and support of patients. The basis for such additional charge is that the billing of charges for Blue Cross subscribers requires special handling and additional services, with resultant increases in the work load of the department's medical, administrative and clerical personnel.

You ask whether or not an opinion of this office to the then Commissioner of Administration, dated April 6, 1955 (unpublished), which decided that the Commission on Administration and Finance could properly establish and charge the Veterans Administration higher rates for the support of veterans than those charged the general public, because of additional services required to be furnished in veterans' cases, is applicable to the extra charge being made to patients who have Blue Cross coverage.

General Laws, c. 123, § 96, as most recently amended by St. 1958, c. 613, § 8A, provides as follows:

"The price for the support of inmates of state hospitals, except for insane inmates of the Bridgewater state hospital shall be determined for each person by the department on the basis of the actual weekly cost of care as determined by the commission on administration and finance annually on or before October first in each year for each person, and may be recovered of such persons or of the husband, wife, father, mother or child, if of sufficient ability. . . ."

The Commission on Administration and Finance has determined under said § 96, that the "actual weekly cost of care" in the case of Blue Cross patients is higher than that charged patients or persons liable for the support of patients under the section.

General Laws, c. 176A, § 5, as most recently amended by St. 1956, c. 466, permits non-profit hospital service corporations (Blue Cross) to enter into contracts with hospitals, including agencies of the Commonwealth, for the rendering of hospital services to subscribers of Blue Cross, and provides that. "All rates of payments to hospitals made by such corporations, under such contracts, shall be approved in advance by the commissioner of administration, in this section called the commissioner. Any such approval may be withdrawn by the commissioner at any time. No rates of payment shall be approved, or their continuance be permitted,
by the commissioner unless such rates reflect reasonable hospital costs or are based on charges made to the general public, whichever is lower.”

The provision quoted clearly limits the authority of the Commissioner of Administration to the approval or continuance of rates of payments to hospitals by Blue Cross which are the lower of rates reflecting reasonable hospital costs or those based on the charges made to the general public. In view of this express statutory provision, the Commissioner cannot approve rates of payment for hospital charges made to patients who are Blue Cross subscribers, even if they reflect reasonable hospital costs, where the charges made to the general public are lower.

Accordingly, I advise you that the opinion of this office dated April 6, 1955, referred to above, is not applicable to permit a higher charge to patients of State mental hospitals who are Blue Cross subscribers than the charges made to the general public.

Very truly yours,

Edward J. McCormack, Jr., Attorney General,
By Leo Sontag, Assistant Attorney General.

Where contract items for “clearing and grubbing” and “removal of trees,” did not cover trees just nine inches in diameter, the contractor was properly paid for such trees at unit price for tree removal where payment clause refers to Standard Specifications, which provided that unit price for tree removal should be payable for trees “at least nine inches in diameter.” General Laws, c. 29, § 20.A, provides that the notice requirements thereof are not applicable to changes in quantities of items in unit price contracts.

Oct. 6, 1960.

Mr. Frederick J. Sheehan, State Comptroller.

Dear Sir: — In your recent letter you requested that you be advised as to certain alterations made by the Department of Public Works in a contract for stream clearance.

Your first question is whether the department was correct in scheduling payment to the contractor for forty-one trees included in one of the alterations at the unit price for removal of trees rather than at the unit price for clearing and grubbing.

It appears that the trees in question are nine inches in diameter. The contract item as to removal of trees refers to trees “over” nine inches in diameter, while the item for clearing and grubbing refers to trees of “less” than nine inches in diameter.

It is pointed out in a letter to the Comptroller’s Bureau from the Division of Waterways, which you enclosed with your request, that there is a reference in the contract, under the heading of “Measurement and Basis for Payment,” to a section of the department’s “Standard Specifications” which, in referring to measurements with respect to compensation for removal of trees, fixes “at least nine inches” as the diameter standard, and the letter further states that it has been the practice of the department for many years to pay for the removal of trees having a diameter of nine inches or more.
Neither of the provisions of the contract as to clearing and grubbing, and as to tree removal, specifically covers trees which are just nine inches in diameter. It is clear that it was intended that such trees should be removed as well as those of smaller and larger diameter, and the fact that the provision incorporated by reference for the method of measurement as a basis of payment sets the standard for the application of the unit item for tree removal at a diameter of "at least nine inches" shows clearly, in my opinion, that under the contract, trees of nine inches in diameter are to be compensated for at the unit price for tree removal rather than that for clearing and grubbing, and I advise you, therefore, that the department was correct in so scheduling payments to the contractor.

You also point out that the Department of Public Works has submitted three alterations to the contract in question for a total of $8,725, while the total bid of the contractor at unit prices was $9,210, and you ask that you be advised whether the Department of Public Works can issue alterations which increase the original bid price without complying with the provisions of G. L. c. 29, § 20A, and if not, and that section is not complied with, whether the department can subsequently honor a claim for payment for extra work.

It is specifically provided in G. L. c. 29, § 20A, that the requirements of the section as to the filing of notices of intention to approve orders, or claims, for extra work under construction contracts of the Commonwealth shall not apply to "... change in quantities of work or materials covered at unit prices by an item or items in any such original contract, nor to work, other than extra work, for which payment is specifically provided in the contract or specifications."

As was pointed out in an opinion to one of your predecessors under date of August 8, 1957 (Attorney General's Report, 1958, p. 14), where the actual quantities of unit price items within the area covered by the contract exceed the estimated quantities, there is no change in the original contract and the contractor is entitled to be paid at the unit prices set forth in the contract. The contractor bids on the estimated quantities on the express understanding that the actual quantities may be more or less than the estimates and that if less he is to be paid only for the actual quantity at the unit price, and if more he must perform all the work required and is to be paid therefor only at the unit price bid.

As further stated in the opinion cited, only additional work which the contractor could not be required to perform at the unit prices under the terms of the original contract is "extra work" within the meaning of G. L. c. 29, § 20A, requiring a notice of intent to be filed thereunder. See also the opinion of the Attorney General to the Commissioner of Administration, dated August 12, 1955; Attorney General's Report, 1956, p. 27, at p. 30.

As stated in the opinion last referred to, a notice of intention under G. L. c. 29, § 20A, is not required when a change is merely an "alteration" because the work involved is in some form or another within the original contract provisions and such a notice is required only where the change involves the doing of "extra work," that is, work which is incidental to the work under the original contract and necessary for the satisfactory completion of the project, and though not originally called for, can, under the contract, be required to be performed by the contractor on the terms of the contract as to compensation for "extra work."

In view of the answer, just stated, to the first part of the question here
under discussion, it is not necessary to answer the second part thereof. However, it is to be noted that in the case of *M. DeMatteo Construction Co. v. Commonwealth*, 338 Mass. 568, our Supreme Judicial Court, in an opinion written by the Chief Justice, after saying that they could not reconcile a request for a ruling granted by the trial judge in the case, to which ruling no exception had been taken, that an order for extra work was required to be given before the work begins, with the finding made by the trial judge for the petitioner for the amount of the extra work order in question in the case, which order had been issued by the Department of Public Works after the extra work involved had been completed, stated, at page 582, "We accept his [the trial judge's] general conclusion and disregard the inconsistent ruling on the request, as we are of opinion that there is nothing in article 23 [of the Standard Specifications for highway contracts] which requires that an order in writing should precede the commencement of extra work." (Emphasis added.) Subsequently, on the same page of the opinion cited, the court says, "The real purpose of article 23 was to prevent work which is part of the contract being compensated for as an extra." On page 583 of the opinion the court cites G. L. c. 29, § 20A, and stated with further reference to the issuance of extra work orders after the doing of the work involved, "If the Commonwealth wishes to impose a forfeiture upon contractors for work performed in the circumstances of this case, more precise language should be used. There is nothing requiring a different result in G. L. c. 29, § 20A." (Emphasis added.)

Very truly yours,

Edward J. McCormack, Jr., Attorney General,

By James J. Kelleher,
Assistant Attorney General.

A wagering pool on the outcome of three or more races, without the use of automatic betting machines, would not be valid under the provisions of G. L. c. 123A, permitting the pari-mutuel system of wagering.


Hon. Morris H. Leff, Chairman, State Racing Commission.

Dear Sir: — You have requested an opinion as to whether the conduct of a wagering pool on the outcome of three or more races under the circumstances herein set forth would be lawful by virtue of the provisions of G. L. c. 128A. It appears from the enclosure in your letter that the conduct of the wagering pool on the outcome of three or more races would be held under the following conditions:

"Special certificates are to be made available to patrons of the Association. Each certificate will bear a number of columns of boxes, the number of columns to be equal to the number of races on the outcomes of which the winning wagerer or wagerers are to be chosen. The number of boxes in each column is to correspond to the number of horses entered in that particular race. An alternate column of boxes is to be provided for each race so as to permit a patron to select an alternate choice in case his first choice should
be scratched from the race after he has made his selection. The certificate also provides a space in which the amount wagered by the individual patron is to be stated.

"Patrons desiring to participate in this wagering pool are to fill out certificates by marking a box in each column corresponding to the number of the horse in the particular race which the patron selects as the winning horse and by stating the amount which the patron proposes to wager.

"Prior to the start of the first of the designated races, patrons participating in the pool are to deposit the certificates bearing their selections and stating the amounts wagered by them, together with the amounts of their wagers, with designated clerks. The certificates are made up in duplicate, and a clerk, upon receipt of a certificate and the amount wagered, is to remove the original copy, insert it in a time clock so that it receives a time stamp, and return the carbon copy to the patron. As the races are run, which have been designated as governing the determination of the winners of the pool, the certificates deposited by patrons of the pool are to be automatically sorted by a sorting machine which, upon completion of the last of the designated races, will automatically produce the certificates on which the largest number of winners has been selected. The total pool, minus the deductions authorized by law, is then to be divided equally among the holders of the winning certificates."

Section 1 of G. L. c. 137 gives to a person who has lost money or goods by playing at cards, dice or other game a right to recover such money or the value of such goods in an action of contract. If the loser does not within three months after such loss prosecute such action with effect, any other person may sue for and recover in tort treble the value thereof.

Section 2 provides a similar penalty against the owner, tenant or occupant of a house or building where money or goods are lost in any form of gaming referred to in the preceding section, with the knowledge or consent of said owner, occupant or tenant. The action given to a third person after three months is penal. It must be commenced within one year. The statute can be traced far back in our provincial history. A bet on a foot race between men or on the physical ability of animals is gaming within the statute. Betting on a horse race was held within the statute in Kemp v. Hammond Hotels, 226 Mass. 409, 414.

By St. 1934, c. 374, which by § 3 inserted in our statutes what is now known as G. L. c. 128A, a great change was made in the public policy of the Commonwealth with respect to gaming on horse and dog racing. The State Racing Commission was created, and empowered to license horse and dog racing. By virtue of the provisions of c. 128A, particularly the provisions of § 5, the pari-mutuel or certificate system of wagering

"on the speed or ability of horses or dogs performing in the races held or conducted by such licensee at such meeting, and such pari-mutuel or certificate method of wagering upon such races so conducted shall not under any circumstances be held or construed to be unlawful, other statutes of the commonwealth to the contrary notwithstanding."

Section 5 further provides that the place of wagering

"shall be equipped with automatic betting machines capable of accurate and speedy determination of award or dividend to winning patrons, and all such awards or dividends shall be calculated by a totalisator machine or like machine . . ."
Section 5 also provides for
"wagers on the speed or ability of any one or more horses or dogs in a race or races . . . ."

The case of Donovan v. Eastern Racing Assoc., 324 Mass. 393 at page 397, referring to the above phrase, states,

"By these words we think it was intended to permit the daily double as a part of the pari-mutuel system of betting."

I know of no opinion extending the variations of pari-mutuel wagering beyond the limits of the Donovan case. The Legislature has not extended them. Our Supreme Court has not by its decision extended them.

That being so, in view of the fact that c. 128A made a great change in the public policy of this Commonwealth and with respect to gaming on horse and dog racing, I feel constrained to rule that the system which has been outlined to me would not be valid under the provisions of G. L. c. 128A as presently written. I find nothing in the statute envisioning a setup such as you inquire about. I seriously doubt if a proposition such as this one was envisioned by the General Court at the time that legislation was enacted.

Very truly yours,


"Twin Double" system of wagering with the use of automatic betting machines is valid under the provisions of G. L. c. 123A, permitting pari-mutuel betting.


Hon. Morris H. Leff, Chairman, State Racing Commission.

Dear Sir: — You have requested my opinion as to the legality of the Twin Double system of wagering.

While I am not acquainted with all the details, mechanical and otherwise, involved in this system, I am advised that the participants in it are to select winning horses in four races. Prior to the running of the first of these races participants are to deposit their wagers and name their selections for the first two of the four races, receiving tickets issued by a daily double machine, which tickets are to evidence the amount wagered and the selections made. Between the second and third races, participants whose selections in the first two races win these races are to exchange their tickets for tickets, also issued by a daily double machine, designating their selections for the second two of the four races. At the end of the fourth race the total amount wagered less the deductions permitted by law is to be distributed among these persons who have selected the winners of the four races. Provision is to be made for distributions at the end of the third, second or first race if no participant has selected the winner of the fourth, third or second race and for distribution in the event other contingencies occur.

From the foregoing it appears that the Twin Double system is a system which involves the outcome of four races, conducted in two parts of
two consecutive races each, as the determinant of the winning participants. The entire amount to be divided as winnings can be determined prior to the commencement of the first race. While the number of possible winners cannot be determined until after the continuing participants make their second selections, which is not to take place until after the second of the four races (barring a contingency requiring distribution of the pool on the basis of the first or second race), and therefore the amount each possible winner might receive cannot be computed until after the second of the four races, the amount each winner will receive remains the total amount wagered, less lawful deductions, divided by the number of winning participants. The fact that the selection of winning events is made in two stages does not appear to have legal significance in determining whether the proposed Twin Double system is a part of the pari-mutuel system, inasmuch as each participant is to deposit his wager on the agreement that the winners are to be determined on the basis of the outcome of the four races designated for the purpose. The mechanics of selection in two stages does permit the employment of existing daily double machines in the operation of the proposed Twin Double system.

Recently I rendered an opinion to the State Racing Commission relative to the validity under G. L. c. 128A of a proposed system of pari-mutuel wagering involving three or more races and special computation methods. It was my opinion that the requirement of special computation methods compelled the conclusion that one of the long recognized and understood systems in pari-mutuel betting would not be employed. It became my duty, as I saw it, to declare it to be invalid. It was my judgment that the General Court did not, in passing this legislation, envisage a system and did not intend to authorize its operation.

I am now requested to render my opinion as to whether the Twin Double system is a pari-mutuel or certificate method of wagering so as to come within the purview of G. L. c. 128A. Section 5 of c. 128A describes the funds deposited with the licensee by its patrons as “. . . wagers on the speed or ability of any one or more horses or dogs in a race or races . . . .”

The Supreme Court in the case of Donovan v. Eastern Racing Association, 324 Mass. 393, at page 397, in holding the daily double system, so called, to be valid, used the following language, referring to the above provision,

“. . . we think it was intended to permit the daily double as a part of the pari-mutuel system of betting.”

As I understand the situation, the mechanics of selection in two stages does permit the employment of existing daily double machines in the operation of the proposed Twin Double system. The problem which presented itself in the proposed system of pari-mutuel wagering involving three or more races and special computation methods and popularly known as the “Pick Six” system does not, therefore, present itself here.

In the light of the foregoing, it is my opinion that the Twin Double system, before referred to, would be within the pari-mutuel or certificate system of wagering made lawful by G. L. c. 128A. Your commission will, of course, see that reasonable rules and regulations are enacted in this matter to protect the interests of the public.

Very truly yours,

The Director of Building Construction is not required to withhold acceptance of a project despite the objections of an operating agency when after such objections adjustments satisfactory to the Director have been made.


Mr. HALL NICHOLS, Director of Building Construction.

DEAR SIR: — You have requested an opinion as to the following provision of G. L. c. 7, § 30G, cl. 2:

"He [the director of building construction] shall be responsible for accepting or rejecting each project upon its completion and for directing final payment for work done thereon: provided, however, that if upon inspection of any project for acceptance he shall find that the plans, specifications, contracts or change-orders for the project shall not have been fully complied with or that the operating agency shall for any reason object to his acceptance of the project, he shall, until such compliance has been effected, such objection has been removed or adjustments satisfactory to him have been made, refuse to accept the project and to direct such payment."

Your question reads as follows:

"In the event that an operating agency objects to the director's acceptance of a project after the director has caused the contractor to remedy to the satisfaction of the director the features objected to by the operating agency, may the director accept the project and direct final payment for work done thereon, although the objection of the operating agency has not been removed?"

Clause 2 of G. L. c. 7, § 30G, quoted above, first places the responsibility for acceptance of, and direction of final payment for work done on, a project in the director. There then follows a proviso which requires that the director shall refuse acceptance and payment in two instances until certain stated conditions are met. The first instance is not applicable here. The second, to which your question relates, requires that if "the operating agency shall for any reason object to his [the director's] acceptance of the project, he shall, until . . . such objection has been removed or adjustments satisfactory to him have been made, refuse to accept the project and to direct payment." (Emphasis added.)

The provision quoted definitely prohibits your acceptance of a project or direction of final payment for the work done, if objections are made by the operating agency concerned, until either of the following stated alternatives are satisfied: (1) the objection has been removed, or (2) adjustments satisfactory to you have been made.

The situation you refer to in your letter is, in effect, that the operating agency objected to your acceptance of a project, that adjustments satisfactory to you have been made by the contractor, but that despite the making of the adjustments, the operating agency still objects to your acceptance of the project.

Although you should give careful consideration to the reasons for the continued objection of the operating agency and should not accept the project, or direct final payment for the work done, until you are satisfied that every reasonable ground for continued objection has been removed, it is clear that in the portion of G. L. c. 7, § 30G, cl. 2, which reads "or
adjustments satisfactory to him have been made” the pronoun “him” refers to the Director of Building Construction. I, therefore, advise you that if, after objection has been made by an operating agency, adjustments are made by a contractor which you determine after giving careful consideration to the continued objection of the operating agency are satisfactory to you, as director, to complete the performance of the contract and remedy any defects made the subject of such objection by the operating agency, you are no longer required to refuse to accept the project, or refuse to direct final payment for the work done.

Very truly yours,

Edward J. McCormack, Jr., Attorney General,

By James J. Kelleher,
Assistant Attorney General.

Under the amendment to G. L. c. 30, § 9B, by St. 1960, c. 611, employees in certain institutions of the Commonwealth promoted to permanent positions within the section, from such positions in which they have tenure rights, have such rights in the positions to, but not in those from, which they were promoted.


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

Dear Sir: — You have requested an opinion on two questions relating to the effect of the amendments made by St. 1960, c. 611, to G. L. c. 30, § 9B.

Acts of 1960, c. 611, amending G. L. c. 30, § 9B, makes the following changes in the first sentence of the section: the former wording “duties of the office or position” is changed to “duties of any office or position,” and the former wording “from the latest office or employment held by him” is changed to “from the latest permanent office or employment held by him.”

As so amended, G. L. c. 30, § 9B, reads as follows:

“No person permanently employed in any institution under the department of mental health, public health, public welfare or correction, or in the soldiers’ homes in Massachusetts, or in institutions under the jurisdiction of the division of youth service, except an employee, other than a nurse, rendering professional service, who is not classified under chapter thirty-one, and no maintenance employee permanently employed in any institution under the department of education, shall, after having actually performed the duties of any office or position continuously for a period of six months in such an institution or department, be discharged, removed, suspended, laid off, transferred from the latest permanent office or employment held by him without his consent, lowered in rank or compensation, nor shall his office or position be abolished, except for just cause and in the manner provided by sections forty-three and forty-five of chapter thirty-one. The provisions of section forty-six A of said chapter thirty-one shall apply to any person so employed.”

Your first question is:

“1. (a) If an employee not classified under c. 31 in an institution under this department, who has actually performed the duties of a permanent
position continuously for a period of six months or more, is, with his consent, appointed, promoted, or transferred to another permanent position not classified under c. 31, must he serve another period actually performing the duties of the position to which he is appointed, promoted or transferred, continuously for an additional six months, in order to gain tenure in this position.

(b) or does the fact that he served a six-month period in the position which he vacated to accept the appointment, promotion, or transfer, preclude the necessity of serving such an additional period?"

In considering your first question I assume, since there is no indication to the contrary in your request, that your question refers to the situation in which the two permanent positions referred to are not only not in the classified civil service but neither is within the exception relating to positions requiring the rendering of professional service.

In answer to your first question, so construed, I advise you that a person permanently employed in a permanent position in an institution of the Department of Mental Health which is not classified under civil service and is not a position, other than a nursing position, requiring the rendering of professional service, after having actually performed the duties of the position continuously for a period of six months, who accepts a permanent appointment, promotion or transfer to another permanent position in such an institution, not so classified and not within the exception as to positions requiring the rendering of professional service, is not required to serve for a six-month period in the second position in order to make the provisions of G. L. c. 30, § 9B, applicable to prevent his discharge from that position, or to prevent other action as referred to in the section being taken against him with reference to that position, except in compliance with the requirements of said § 9B. Such an employee, is entitled to the benefit of the provisions of G. L. c. 30, § 9B, as regards the permanent position, subject to the section, to which he has been appointed, promoted or transferred, on the basis of his previous six months' service in the permanent position, so subject, which he held prior to such appointment, promotion or transfer.

Your second question is:

"2. If the answer to question 1(a) is in the affirmative, may I have your opinion on the following?

Does such an employee referred to relinquish all his rights of tenure in the position which he vacated, by accepting appointment, promotion or transfer to the second position?"

General Laws, c. 30, § 9B, specifically extends the protection provided therein for persons permanently employed in institutions under the Department of Mental Health to the "latest permanent office or employment held . . ." It necessarily follows, therefore, and I so advise you in answer to your second question, that a person who voluntarily gives up one permanent position to accept another permanent position is no longer entitled to the protection afforded by G. L. c. 30, § 9B, for the position he has voluntarily vacated.

Very truly yours,

Edward J. McCormack, Jr., Attorney General,

By James J. Kelleher,
Assistant Attorney General.
Statutes as to payment, and reimbursement by Commonwealth, of tuition of residents admitted to vocational schools of other towns, by towns not maintaining such schools, are applicable to high school graduates.


Hon. Owen B. Kiernan, Commissioner of Education.

Dear Sir: — This acknowledges your letter of recent date setting forth certain facts and posing the following question:

"Is a town where a person resides, who is admitted to a Vocational School in another town, under the provisions of G. L. c. 74, § 7, liable for the payment of a tuition fee even though the person in question is a graduate of a regular high school?"

Relative to your question, former Attorney General Paul A. Dever, in an opinion found in Attorney General's Report, 1935, p. 31, states:

"The long-continued practice of this department and the precedents set by my predecessors in office indicate, what is undoubtedly the correct rule of law, that it is not within the province of the Attorney General to determine hypothetical questions which may arise, as distinguished from questions relative to actual states of fact set before the Attorney General, upon which states of fact public officials are presently required to act; nor is it the duty of the Attorney General to attempt to make general interpretations of statutes or of the duties of officials thereunder, except as such interpretations may be necessary to guide them in the performance of some immediate duty."

In view of the foregoing and the fact that you have already made an affirmative determination under G. L. c. 74, § 7, the problem is now primarily between the two towns involved under G. L. c. 74, § 8.

However, in view of your interest in this question, I shall review it briefly and informally. As you have stated, by virtue of the provisions of G. L. c. 74, § 7, residents of towns in the Commonwealth not maintaining approved vocational schools may, upon approval of the Commissioner of Education under the direction of the State Board for Vocational Education, be admitted to a school in another town.

Section 8 of that chapter provides that the town where a person resides who is admitted to a school of another town under § 7 shall pay a tuition fee to be fixed by the commissioner under the direction of the State Board for Vocational Education and in default of payment shall be liable therefor to such other town.

Section 8A provides that a town where a person resides who is admitted to a day school in another town under § 7 shall through its school committee, when necessary, provide for the transportation of such person and shall, subject to appropriation, be entitled to State reimbursement to the extent of fifty per cent of the amount so expended. Section 10 provides that the Commonwealth shall reimburse towns paying fees under § 8 for tuition in vocational schools one-half the amount so expended.
I assume that the situation you refer to is the one referred to in §§ 7, 8, 8A and 10. If I am correct in this assumption, it is my opinion that the answer to your question is in the affirmative.

Very truly yours,

Edward J. McCormack, Jr., Attorney General,

By Fred W. Fisher,
Assistant Attorney General.

A claim by the contractor for payment for the extra work under a State highway construction contract referred to in the opinion of May 18, 1960, to the Department of Public Works, may be approved if the department can make the determinations specified in that opinion.

Nov. 18, 1960.

Mr. Frederick J. Sheehan, State Comptroller.

Dear Sir: — You have written this office concerning a claim for payment, approved by the Department of Public Works, in connection with a contract awarded to Peter Salvucci, Inc., being numbered 7734. You ask the following question:

"As the original contract was in the amount of $688,029.50, may the Department of Public Works now approve a claim for payment of extra work under G. L. c. 29, § 20A, in the amount of $65,841.95 without complying with the provisions of G. L. c. 29, § 8A?"

It is noted that the Department of Public Works previously issued an "alteration" for the work involved which was held up by the State Controller. The question was eventually referred to the Attorney General and an opinion dated May 18, 1960, was forwarded to the Department of Public Works to the effect that the work involved would constitute "extra work" rather than an "alteration" and that such extra work order could be issued by the department; provided, it complied with the various tests as set forth in that opinion.

For some reason which is not clear to this office, apparently the extra work order was not processed, but in lieu thereof a claim for extra work was filed on July 25, 1960, and was approved by the Department of Public Works on August 2, 1960. From the information currently available, it appears that the work which was the basis of the opinion of the Attorney General dated May 18, 1960, is the same work which is also the basis of the claim for payment for extra work.

Your question, in effect, asks whether the claim for payment may be approved without compliance with the bid statute as embodied in G. L. c. 29, § 8A. Our opinion of May 18 was to the effect that an extra work order could be issued without the necessity of rebidding the contract under c. 29, § 8A; provided, the department was able to make the various factual determinations listed in said opinion. Similarly, a claim for extra work may be approved by the department without the necessity for rebidding the contract if the department is able to make the same determinations that they would have made in connection with an extra work order.
Article 23 of the Standard Specifications for Highways and Bridges of the Department of Public Works relates to both extra work ordered in writing and to claims for extra work not previously ordered in writing. Since a claim for extra work is here involved, rather than extra work ordered in writing, the department should, of course, determine that the provisions of Article 23 relating to claims have been satisfied or have been waived. In this connection, I refer you to the formal opinion of former Attorney General Fingold to the Department of Education dated July 28, 1954 (unpublished), which confirmed an earlier informal opinion signed by former Assistant Attorney General John V. Phelan, to the effect that G. L. c. 29, § 20A, did not preclude processing a "claim for payment for extra work" as to which a proper notice of intention under that section had been filed, and as to which any applicable contract provisions relative to the time and manner of submission of such claims had been waived. Copies of these two opinions are attached.

For your possible information in relation to extra work orders, your attention is called to the case of M. DeMatteo Construction Co. v. Commonwealth, 338 Mass. 568 (1950), where an extra work order was issued after the work had been commenced. The Supreme Court stated that Article 23 of Standard Specifications did not require that the order in writing should precede the commencement of the work.

Very truly yours,

Edward J. McCormack, Jr., Attorney General,

By Joseph H. Elcock, Jr.,
Assistant Attorney General.

"Higher education" as used in the statute providing scholarship aid for children of certain deceased members of the armed forces may, subject to the determination of the Commissioner of Education, include advance courses not in the ordinary high school curriculum and not requiring graduation from high school.

Nov. 21, 1960.

Hon. Owen B. Kiernan, Commissioner of Education.

Dear Sir: — This will acknowledge your letter of recent date enclosing correspondence and other material relative to Clyde Dav's Wood, in which you request my "advice" as to the eligibility of this young man for the award of the so-called War Orphans Scholarship.

Apparently, from the information you have supplied, Mr. Wood is about seventeen years old, having completed one year in high school, withdrawing in June, 1960, and has been accepted as a special student in the Swain School of Design. It further appears that he is enrolled in the Commercial Art program and will generally take most of the freshman subjects. As a general rule this school considers, first, students who have completed high school education. However, if it feels that there is a possibility that it may be of assistance in preparing a student for a useful career, it does make an exception. Every student is on trial for the first year and it is during that time that the school works with the student closely and sur-
veys his chances regarding potential in the commercial field. The students are ordinarily with the school for four years. The courses cover various aspects of art, drawing, painting and other kindred subjects. I understand that the problem before you is one of reimbursement under the provisions of G. L. c. 69, § 7B.

Except for the enclosures setting forth in some detail the facts relating to the matter you refer to, your inquiry is not far different from the questions propounded to Attorney General Bushnell by your predecessor, Commissioner Walter F. Downey, in answer to which Attorney General Bushnell, under date of February 19, 1941, rendered his opinion. The questions propounded by Commissioner Downey, which referred to St. 1930, c. 263, as amended, entitled "An Act providing higher educational opportunities for the children of Massachusetts men who died in the military or naval service of the United States during the World War, or as a result of such service," were as follows:

"1. Does the term 'higher education' as used in section 1 signify an education higher than that normally provided, from public monies, to all children who are residents of Massachusetts, namely, a four-year high school education?

"2. If the answer to the above is in the affirmative, would the Commissioner be acting in accordance with the statute in approving only those educational institutions whose requirements for admission include graduation from a four-year high school course or its equivalent?"

The Attorney General answered the first question in the affirmative and the second in the negative, using the following language:

"It is plain that by the phrase 'the higher education of any child . . . not under sixteen years and not over twenty-two years of age' the Legislature intended to indicate a course or courses of study of a more advanced or more highly specialized character than those offered by the ordinary high school curriculum. The statute is not one which should be construed narrowly and it cannot well be said that only courses given in educational institutions which require graduation from a high school or its equivalent, as a prerequisite to admission, are within the meaning of the enactment. Some courses of study may be more advanced or more highly specialized than those of the high school and yet may be pursued with profit to the pupil even without the particular preliminary training afforded by a high school."

Section 7B has for its object a very humanitarian purpose, namely, public aid for the higher education of the children of deceased war veterans. This purpose should not be frustrated by a narrow construction of the provisions of § 7B. The phrase "higher education", as it is used in § 7B, is intended to indicate a course or courses of study of a more advanced or more highly specialized character than those offered by the ordinary high school curriculum. Furthermore, it cannot well be said that only courses given in educational institutions which require graduation from high school or its equivalent as a prerequisite to admission, are within the meaning of the enactment. Some courses of study may be more advanced or more highly specialized than those of the high school and yet may be pursued with profit to the pupil even without the particular preliminary training afforded by a high school."
In connection with matters such as you refer to, the last paragraph of § 7B is peculiarly significant. I have no doubt that the General Court envisioned situations such as is now before you when this legislation was originally enacted. It is my conviction that the General Court did not intend to deprive children of deceased veterans of special training to develop talents not ordinarily covered in the public schools solely because of the fact they had not graduated from high school after taking the general courses of study offered in the public schools. Such a position, it seems to me, would be inconsistent with the benign purposes of this legislation.

However, as stated in the last paragraph of § 7B,

"The said commissioner shall determine the eligibility of children for the benefits provided for in this section."

I am not permitted to determine the eligibility of the young man you refer to. That responsibility is yours. In my opinion the Legislature, by the insertion of this paragraph, intended to provide you with a reasonable discretion in determining the eligibility of children for the benefits provided by § 7B, taking into consideration all of the circumstances.

Very truly yours,

EDWARD J. MCCORMACK, JR., ATTORNEY GENERAL.

Discussion of authority of Massachusetts Aeronautics Commission to swear witnesses.

Nov. 21, 1960.

HON. EDWARD J. LYNCH, CHAIRMAN, MASSACHUSETTS AERONAUTICS COMMISSION.

DEAR SIR: — In your recent letter you request an opinion as to whether or not your commission has authority under the law to swear in witnesses at hearings.

I beg to advise you that by the provisions of G. L. c. 90, § 42, it is provided that the Superior Court may compel the attendance of, and the giving of testimony by, witnesses before your commission or any member thereof in the same manner and to the same extent as before said court, insofar as said testimony relates to the matters referred to in that section which reads as follows:

"The superior court shall have jurisdiction in equity to enforce any lawful rule, regulation or order made by the commission or any of its members or by a city or town under any provision of sections thirty-five to fifty-two, inclusive, and may compel the attendance of and the giving of testimony by witnesses before the commission or any member thereof, in the same manner and to the same extent as before said court."

Insofar as your question relates to the summoning and swearing of witnesses in adjudicatory proceedings as defined by G. L. c. 30A, § 1 (1), your commission has the power to subpoena witnesses by reason of, and in accordance with, the provisions of § 12 of that chapter. "Adjudicatory proceedings" are defined as follows:
"'Adjudicatory proceeding' means a proceeding before an agency in which the legal rights, duties or privileges of specifically named persons are required by constitutional right or by any provision of the General Laws to be determined after opportunity for an agency hearing. Without enlarging the scope of this definition, adjudicatory proceeding does not include (a) proceedings solely to determine whether the agency shall institute or recommend institution of proceedings in a court; or (b) proceedings for the arbitration of labor disputes voluntarily submitted by the parties to such disputes; or (c) proceedings for the disposition of grievances of employees of the commonwealth; or (d) proceedings to classify or reclassify, or to allocate or reallocate, appointive offices and positions in the government of the commonwealth."

Very truly yours,

Edward J. McCormack, Jr., Attorney General,

By Fred W. Fisher,
Assistant Attorney General.

Provision that Massachusetts Aeronautics Commission shall approve engineering contracts of local bodies does not give it the right to preselect engineers.

Nov. 21, 1960.

Hon. Edward J. Lynch, Chairman, Massachusetts Aeronautics Commission.

Dear Sir: — In your letter of recent date you pose the following question:

"We would like to know if under the law the commission has the right to preselect and recommend engineers prior to the submission of an engineering contract for approval by the commission."

General Laws, c. 90, § 51K, requires the "approval" by your commission of the contracts therein referred to.

In the case of Rooney, Petitioner, 298 Mass. 430, 433, the court, in construing the word "approval," used the following language:

"The word 'approval' when it appears in our statutes generally means an affirmative sanction by one person or by a body of persons of precedent acts of another person or body of persons."

While mutual collaboration in the interest of the public is always to be desired, it is my judgment that your commission should not, in any way, endeavor to coerce or force your judgment upon the local body in control.

Very truly yours,

Edward J. McCormack, Jr., Attorney General,

By Fred W. Fisher,
Assistant Attorney General.
Funds made available for the assistance of the Governor-elect may be expended prior to certification of results of election if no recount petition is filed, and after certification expenses incurred at any time after election may be approved.

Nov. 23, 1960.

Hon. Charles Francis Mahoney, Commissioner of Administration.

Dear Sir:—You have called attention to c. 754 of Acts of 1960 authorizing the Commission on Administration and Finance to expend an amount up to $25,000 immediately after the biennial State election in the current year for furnishing such assistance as the governor-elect may request in writing. You ask whether such sums may be expended by the commission before the election of the new governor is certified by the outgoing governor, as required by G. L. c. 54, § 116.

In the event such sums may not be expended prior to certification, you ask whether the commission may, after certification, approve retroactively those expenses incurred by the governor-elect after the election but before such certification.

Article XIV of Amendments to the Massachusetts Constitution provides:

"In all elections of civil officers by the people of this commonwealth, whose election is provided for by the constitution, the person having the highest number of votes shall be deemed and declared to be elected."

Article XV of the Amendments provides:

"The meeting for the choice of governor, lieutenant-governor, senators, and representatives, shall be held on the Tuesday next after the first Monday in November, biennially: but in case of a failure to elect representatives on that day, a second meeting shall be holden, for that purpose, on the fourth Monday of the same month of November."

From these two provisions it would appear that the governor is "elected" on election day by then receiving the highest number of votes and would be the governor-elect as of that time. To determine just what candidate has the highest number of votes requires, of course, the official count and tabulation of such votes. It would appear that the votes may be actually ascertained when the election officials have canvassed and counted the votes as required by G. L. c. 54, § 105, and when the aldermen and city clerk and the selectmen and town clerk of the respective cities and towns have examined the copies of the records of such election officials as required by G. L. c. 54, § 111. This result could be changed if a recount were sought within fifteen days after the election as provided by G. L. c. 54, § 135.

In the event that you receive satisfactory evidence concerning the actual tabulation of the votes as indicated above and if the time for recount has elapsed, then it is my opinion that you may expend funds for the governor-elect in accordance with c. 754 of the Acts of 1960, even though the results of the election have not actually been certified under § 116 of c. 54.

As a practical matter, it may be difficult to ascertain the actual result of the elections until these results are certified by the governor and made available in the office of the secretary of state. Even in this event, your commission would have authority to approve retroactively, those expenses of the governor-elect which were made after the election but before the
actual certification of the governor, since the certification merely states what votes were actually cast on the prior election day and the governor would have been elected as of that earlier date.

Very truly yours,


The provision of G. L. c. 32, § 94 (the "Heart Law"), including State police thereunder did not extend the law to inspectors of the Division of Inspections of the Department of Public Safety.

Nov. 29, 1960.

Hon. J. Henry Goguen, Commissioner of Public Safety.

Dear Sir: — In your recent letter, relative to the application of the so-called "Heart Law" (G. L. c. 32, § 94), you pose the following question:

"Do the Inspectors of the Division of Inspections of the Department of Public Safety, appointed under G. L. c. 22, § 6, who have the same police powers under G. L. c. 147, § 2, as members of the State Police of the Department of Public Safety, come within the provisions of G. L. c. 32, § 94"?

You state that the inspectors of the Division of Inspections of the Department of Public Safety are appointed under the authority of G. L. c. 22, § 6, and are "designated as Building Inspectors or District Engineering Inspectors according as their duties relate to buildings or engineering."

You further state that G. L. c. 147, § 2, provides that these inspectors "shall have and exercise throughout the commonwealth the powers of constables, police officers and watchmen, except as to service of civil process," and that they may be detailed for temporary service in the Division of State Police.

General Laws c. 32, § 94, provides in general that despite the provisions of any other law to the contrary affecting the non-contributory or contributory system, any condition of impairment of health caused by hypertension or heart disease resulting in total or partial disability or death to members of various employee groups in the Commonwealth, shall, if they successfully passed a physical examination on entry into such service, which examination failed to reveal any evidence of such condition, be presumed to have been suffered in line of duty, unless the contrary be shown by competent evidence.

Section 94 was originally limited to a very few groups of public employees. Numerous amendments since the original enactment have been passed extending the presumption afforded by § 94 to different groups of public employees. For example, c. 511 of the Acts of 1956 included any employee of the Registry of Motor Vehicles in the Department of Public Works who entered the service of the Registry as an investigator or an examiner and performed police duty. Chapter 594 of the Acts of 1951 added several new groups including "the state police in the department of public safety." I am not aware of any other groups of employees in the Department of Public Safety having been added to those included in § 94.
other than, as stated above, members of the State Police. I am, therefore, constrained to advise you that in my opinion, the answer to your question is in the negative.

To remove any doubt about the matter, I recommend a legislative amendment definitely and clearly bringing the group you refer to within the purview of § 94.

Very truly yours,

Edward J. McCormack, Jr., Attorney General,

By Fred W. Fisher,
Assistant Attorney General.

The fee for an original license as a real estate broker or salesman extending for more than one year is the annual rate for such a license, plus one-twelfth thereof for each month, or part thereof, in excess of one year.

Dec. 6, 1960.

Mr. Joseph J. Mulhern, Chairman, Board of Registration of Real Estate Brokers and Salesmen.

Dear Sir: — You have requested an opinion on a question relative to the license fees of your board. I believe the opinion which was rendered by this office in November of last year and addressed to Mrs. Helen C. Sullivan supplies the answer to your question. However, in order to remove any possible doubt about the matter, I will reply.

Mrs. Sullivan’s communication, as you state, posed the following question:

"Assume, for example, that a broker’s birth date is April 28. The original license to be issued to that individual will bear an effective date as of January 1, 1960, and an expiration date of April 28, 1961. The Board of Registration of Real Estate Brokers and Salesmen requests your opinion on the following question:

In this case, does the original fee of $15 cover the entire period from January 1, 1960, to April 28, 1961, or should there be added to the $15 a proportional fee to cover the four months of 1961?"

The question you pose is as follows:

"In the previously mentioned case, does the original fee of $15 cover the entire period from January 1, 1960, to April 28, 1961, or should there be added to the $15 a proportional fee to cover the four months of 1961? And, furthermore, should this proportional fee for the period from January 1, 1961, to April 28, 1961, covering a period of approximately four months, be calculated on the original fee basis of $15 for 12 months or on the renewal fee basis of $10 for 12 months?"

You will note that in G. L. c. 112, § 87XX, in dealing with the subject of licenses, the General Court has provided as follows:

"... Except as otherwise provided in section eighty-seven UU in the case of a license issued to a corporation, society, association or partnership,
a license shall be valid for a period of one year from the date of issue unless sooner suspended or revoked and shall be renewed by the board annually thereafter, . . .”

It is later provided in § 87XX that:

“. . . Notwithstanding the foregoing, the license originally issued to an individual shall be valid until the anniversary of the licensee’s date of birth next occurring more than twelve months after the date of issuance . . . .”

(Emphasis added.)

Turning its attention to the amounts of the license fees, the General Court in § 87ZZ provides that the following fees shall be paid by individuals in advance to the board: —

(b) For issuance of a broker’s license, original, at the rate of fifteen dollars for twelve months; renewal, ten dollars.

(c) For issuance of a salesman’s license, original, at the rate of ten dollars for twelve months; renewal, five dollars.

(d) As amended by chapter 455 of the Acts of 1959, it is provided that the applicable fee for the issuance of a license shall be adjusted by the board on the basis of each month during which the license originally issued would be valid unless revoked or suspended and, for this purpose, any part of a month shall be considered as a full month.

Turning to your question, in the first instance, as stated in § 87XX, the license originally issued shall be valid until the anniversary of the licensee’s date of birth next occurring more than twelve months after the date of issuance. Accordingly then, the express provision of § 87XX is that the license originally issued runs for one year and until the anniversary of the licensee’s date of birth next occurring more than twelve months after the date of issuance. The renewal licenses run for one year as stated in § 87XX.

Section 87ZZ expressly provides that license fees are payable “in advance.” The original fee for a broker’s license is, as stated in § 87ZZ, at the rate of fifteen dollars for twelve months; the duration of the original license to be figured at $1.25 per month. As stated in § 87ZZ, in computing the applicable fee for the issuance of the original license, it shall be adjusted by the board on the basis of each month during which it would be valid and for this purpose, any part of a month shall be considered as a full month.

To state the matter again, the fee for an original broker’s license is fifteen dollars for twelve months plus $1.25 a month for the number of months or fractional part of a month covered by the license beyond the year.

Very truly yours,

Edward J. McCormack, Jr., Attorney General,

By Fred W. Fisher,
Assistant Attorney General.
In the absence of a statute authorizing training physicians in State hospitals under Federal grants as psychiatrists, a physician receiving such training and paid from a Federal grant is not an employee of the Commonwealth eligible for group insurance coverage.

Dec. 6, 1960.

HARRY C. SOLOMON, M.D., Commissioner of Mental Health.

Dear Sir: — You have requested an opinion as to whether or not certain physicians paid from a Federal grant for training as psychiatrists at a State mental hospital may be considered employees of the Commonwealth for the purpose of being eligible for group insurance under G. L. c. 32A.

You indicate in your letter that the necessary funds to pay these physicians is forwarded by the National Institute of Mental Health, United States Public Health Service, a Federal agency within the Department of Health, Education and Welfare of the United States, and is deposited with the State Treasurer and Receiver General, and earmarked by him to pay the physicians participating in the training program. The trainees are paid by standard invoice form CB-12, and processed through the Comptroller's Bureau. The Treasurer issues a check in the full amount of the standard invoice; no deductions (for Federal or State taxes, retirement, etc.) of any kind are made.

General Laws c. 32A (as inserted by St. 1955, c. 628) § 2(b), defines "employee" in part as follows:

"... any person in the service of the commonwealth, whether such person be employed, appointed or elected by popular vote; provided, the duties of such person require that his time be devoted to the service of the commonwealth during the regular work week of permanent employees, ... but shall in no event be construed to include ... seasonal employees or emergency employees. . . ."

Your letter has not directed my attention to any statute of the Commonwealth which authorizes the Commissioner of Mental Health to enter into an agreement or contract with the above referred to Federal agency, relative to instituting a training program as set forth in your letter in such a way as to constitute a physician benefiting under the program an employee of the Commonwealth.

The above quoted statute defines employee as "... any person in the service of the commonwealth, whether such person be employed, appointed or elected. . . ." No person can become an employee of the Commonwealth or be appointed as such without the authorization or consent of the Commonwealth. Such authorization or consent must necessarily manifest itself in appropriate legislation. An employer-employee relationship, wherein the Commonwealth is the employer, cannot be created by the head of a department in the absence of a statute authorizing or permitting such action.

Accordingly, I must answer your question in the negative.

Very truly yours,

Edward J. McCormack, Jr., Attorney General,

By Leo Sontag, Assistant Attorney General.
An appointee to the Board of Registration in Medicine who has been a registered physician less than ten years does not meet the requirements of G. L. c. 13, § 10, that appointees to the Board "shall have been for ten years actively engaged in the practice of their profession."


DAVID W. WALLWORK, M.D., Secretary, Board of Registration in Medicine.

Dear Sir: — You have requested an opinion in behalf of the Board of Registration in Medicine relative to the status of a person registered by the board as a physician.

Chapter 188 of the Acts of 1960 provides that:

"There shall be a board of registration in medicine, in the two following sections called the board, consisting of seven persons, residents of the Commonwealth, registered as qualified physicians under section two of chapter one hundred and twelve, or corresponding provisions of earlier laws, who shall have been for ten years actively engaged in the practice of their profession. . . ." (Emphasis added.)

You advise me that the person referred to was registered by the board as a qualified physician on October 23, 1951, after his thirteenth examination. Further, that he was appointed as a member of the Board of Registration in Medicine on November 3, 1960, and was confirmed and was given the oath of office on November 10, 1960.

If the facts are as you have stated them, and I have no reason to doubt but that they are, that the person you refer to at the time he was appointed, qualified and confirmed, had been practicing medicine in the Commonwealth only nine years, then, of course, he does not meet the requirements laid down in the statute.

Very truly yours,

EDWARD J. MCCORMACK, JR., Attorney General,

By Fred W. Fisher,
Assistant Attorney General.

G. L. c. 40, § 41B, added in 1958, providing that the water supply in certain municipalities not be fluoridated unless a favorable vote is taken at the "next . . . [municipal] . . . election," contemplates votes in years other than 1959.

Jan. 6, 1961.

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

Dear Sir: — In your recent letter you inquire as to the insertion on the ballot of the question of fluoridation.

Chapter 254 of the Acts of 1958, provides as follows:

"An Act requiring that the will of the voters be ascertained before any public water supply system is fluoridated.

"Chapter 49 of the General Laws is hereby amended by inserting after section 41A, inserted by chapter 793 of the acts of 1949, the following section: —
Section 41B. No public water supply for domestic use in any city, town or district supplying such water which is not being fluoridated prior to September first, nineteen hundred and fifty-eight shall thereafter be fluoridated by any such city, town or district or combination of two or more towns supplying such water jointly unless the will of the voters of such city, town or district, or of the towns being supplied such water by such combination of towns is first ascertained as herein provided. The board of water commissioners or other officers performing like duties may require that the following question be placed upon the official ballot to be used at the next regular municipal election or for the election of town officers at the next annual town meeting or meetings: — 'Shall the public water supply for domestic use in (this city) (this town) (the towns of and ) be fluoridated?', or in such district may require that the following question be placed before the next annual meeting of the inhabitants of the district: — 'Shall the public water supply for domestic use in this district be fluoridated?'

"If a majority of the votes in answer to said question is in the affirmative, it shall be deemed and taken to be the will of the voters of the said city, town or towns, or district that the public water supply for domestic use shall be fluoridated, and if a majority of said votes is in the negative, it shall be deemed and taken to be the will of said voters that such supply shall not be fluoridated. Approved April 11, 1958."

It is argued that this legislation does not authorize the question above referred to being placed upon the official ballot at the annual election in any municipality at any time other than the annual town meeting for the election of officers in the year 1959. It is further argued that by the use of the words "at the next regular municipal election or for the election of town officers at the next annual town meeting" only the annual town meeting succeeding the enactment of this legislation is meant, which would of necessity be the annual town meeting for the year 1959. I cannot agree with that conclusion.

It is a matter of general knowledge that the subject of fluoridation has been discussed at length in many places for some time. The discussions and arguments have found learned and upright people on both sides of the question. The General Court undoubtedly had this in mind when c. 254 was enacted. It seems evident to me that the General Court by the enactment of c. 254 intended to give the various cities and towns in the Commonwealth the right to vote on the subject of fluoridation. To say that only those municipalities which acted at the annual town meeting in 1959 should have the right to pass on this subject would seem to frustrate the obvious intent of this legislation.

It is entirely conceivable that many communities where the subject was still under discussion were unaware of the existence of the statute in time to put it on the ballot at the annual election in 1959. If they were aware of the existence of c. 254, it is quite conceivable that for one reason or another they did not progress through the discussion stage of this subject in time to take advantage of the act.

In my opinion, the words "next regular municipal election or . . . election of town officers at the next annual town meeting or meetings . . ." mean the next election following the determination by the board of water commissioners that the question be placed on the ballot.
The General Court is quite familiar with the method of limiting the acceptance of statutes to a short period of time if it chose. Chapter 56 of the Acts of 1959 is an illustration of what I refer to. Chapter 56 reads as follows:

"An Act providing that the voters of the town of Wilmington shall determine whether or not the water supply of said town shall continue to be fluoridated.

"The following question shall be placed upon the official ballot to be used for the election of officers at the annual town meeting in the current year in the town of Wilmington: — 'Shall the fluoridation of the water supply of the town of Wilmington be continued?' If a majority of the votes in answer to said question is in the affirmative, the fluoridation of the water supply of said town shall be continued, otherwise it shall be discontinued. Approved February 20, 1959.'"

Moreover, it should be borne in mind that St. 1958, c. 254, is not an isolated statute, by any means. It merely inserts a new § 41B in G. L. c. 40, thereby making it a part of the permanent General Laws of the Commonwealth. In other words, it is my opinion that this amendment to the General Laws of the Commonwealth, constituting a permanent part of our statutory system, was not intended to be an impermanent statute which became ineffective the year following its enactment. Sense-of-the-meeting votes taken prior to the enactment of St. 1958, c. 254, do not, in my opinion, limit the right of the municipalities to take a formal vote under the statute since its enactment.

Naturally, you will understand that it is not the function of this office to pass upon the merits or demerits of fluoridation or legislation relative to it. This opinion simply relates to the right to have the question referred to placed upon the ballot for the voters to determine whether or not they want fluoridation.

Very truly yours,


The Department of Public Works is to be presumed to have acted properly in determining the lowest eligible bidder on a State highway construction contract; and in the absence of fraud, a comment by the State Auditor that abnormally low unit prices were bid on items, estimated quantities of which were too low, does not require that the Comptroller hold up payments on the contract.


Hon. Joseph Alecks, State Comptroller.

Dear Sir: — Your predecessor in office requested an opinion on two questions concerning a voucher calling for payment to M. DeMatteo Construction Co., Inc. in the amount of $118,964.45 for highway bridge work done under Contract No. 8025. Payment of the voucher is being withheld in view of certain comments relating to the contract contained in the current auditor's report. The auditor has picked out certain items of work for which unit prices were bid, and has stated that such unit prices are abnormally high, resulting in an "unbalanced bid."
The following two questions were asked:

"1. Where the Department of Public Works, under the facts as above indicated, has awarded a contract which in the opinion of the department is to the lowest, responsible eligible bidder, is there any legal requirement that this office question the determination of facts as made by the Department of Public Works?

"2. Where a contractor has bid on a unit price contract a high price for a lump sum item, and low individual unit prices for estimated quantities which vary greatly from the department's estimates and abnormally low as compared with the unit prices bid by other contractors as stated in the State Auditor's Report and it subsequently turns out that the quantities estimated are low to finish the job, is there any legal requirement placed on this office before said additional quantities are certified for payment?"

In answer to the first question, it would appear that under the provisions of G. L. c. 16, § 4, the Department of Public Works, acting through the Commissioner and Associate Commissioners, had the responsibility of awarding the contract in question. In making such award, the department must, of course, act in the best interests of the Commonwealth and must comply with the provisions of G. L. c. 29, § 8A, governing the bid procedure relating to such contracts. The letter requesting the opinion does not indicate noncompliance with the formal technicalities of c. 29, § 8A, nor does it call attention to any facts indicative of fraud, bad faith, discrimination or the like, which might taint the contract in question. In the absence of any such facts, it should be presumed that the public officials in question have acted properly.

In these circumstances, it is assumed that the contract in question was awarded for the best interests of the Commonwealth. On the facts presented to this office, it does not appear that the Comptroller should refuse payment of the voucher in question.

What we have said concerning the first question would seem likewise to answer the second question.

Very truly yours,

Edward J. McCormack, Jr., Attorney General,

By Eugene G. Panarese,
Assistant Attorney General.

A veteran granted public relief is not, in the absence of the notice by the town granting relief to the town of his settlement required by G. L. c. 116, § 2, prevented from gaining a settlement in the former town.


Mr. Charles N. Collatfs, Commissioner of Veterans' Services.

Dear Sir: — You have asked for an interpretation on certain facts of G. L. c. 116, § 2, stated with reference to a veteran applicant for aid, as amended by St. 1955, c. 740, § 3, in connection with the above case and for the approval by the Attorney General of your decision.
You have enclosed copies of correspondence which indicate that the veteran had a settlement in Boston and moved to Quincy February 16, 1955, and, within five years of said date, that is, during 1959, received public welfare from the city of Quincy.

General Laws, c. 116, § 2, as amended by St. 1955, c. 740, § 3, provides:

"No person shall acquire a settlement, or be in the process of acquiring a settlement, while receiving public relief, unless within two years after receiving such relief, he tenders reimbursement of the cost thereof to the commonwealth or to the town furnishing it . . ."

Said section 2 further provides that:

". . . receipt of public relief by a veteran . . . shall not prevent such veteran . . . from acquiring, or being in the process of acquiring, a settlement, unless the veterans' agent of the town of settlement . . . of such veteran . . . shall notify, in writing, the public welfare authorities of the town furnishing such public relief that such veteran or dependent is not eligible for benefits under said chapter one hundred and fifteen, in answer to a notice, which . . . shall . . . be given forthwith to the veterans' agent of the town of settlement . . . by the town granting such public relief."

The latter proviso means that, notwithstanding the general provisions contained in § 2, a veteran shall acquire, or be in the process of acquiring, a settlement even while receiving public relief unless, using the names of the cities involved in the present case, Quincy, upon granting public relief to the veteran, forthwith gives a notice in writing to the Commissioner of Veterans' Services of the city of Boston, and the latter notifies, in writing, the public welfare authorities of Quincy that such veteran is not eligible for veterans' benefits.

The provisions as to notices in writing are mandatory, and if either the town granting public relief or the town of settlement fails to give such notice as is required of it, it must suffer the consequences of its neglect.

In this case, Quincy should have given a notice in writing, and having failed to so do, the veteran acquired a settlement in Quincy on February 16, 1960.

The fact that the Veterans' Agent of the city of Boston had, at a time prior to the receipt by the veteran of public welfare aid from the city of Quincy, notified the veteran in writing that he was not eligible for aid from the Agent's department, would not relieve the officials of the city of Quincy from the obligation to notify the Veterans' Agent of Boston of the granting of such assistance to the veteran.

Accordingly, under the provisions of G. L. c. 115, § 2, this office must disapprove your decision that the veteran was prevented from acquiring a Quincy settlement on February 16, 1960, and rule that he did acquire a settlement in Quincy on such date.

Very truly yours,

Edward J. McCormack, Jr., Attorney General,

By Leo Sontag, Assistant Attorney General.

Dear Sir: — You have requested an opinion concerning the construction of St. 1958, c. 639, relative to the covered bridge on Groton Street in the town of Pepperell.

The provisions of c. 639 authorize and direct your department "to reconstruct the covered bridge on Groton Street in the town of Pepperell." I understand that the replacement of the present bridge in a new location, as stated in your letter, will require alterations to a high tension transmission line of the Wachusett Electric Light Company and to certain facilities of the New England Telephone and Telegraph Company, both of these being on their own right-of-ways.

I also understand that a taking or takings of land with resulting damages may be required in order to accomplish what your department is planning. You ask, "... whether or not this department can spend funds allocated to this project under the above-mentioned act for either land damages or utility changes." Authority to exercise the power of eminent domain must be express or by necessary implication. Jenks v. Taunton, 227 Mass. 293, 296. Comiskey v. Lynn, 226 Mass. 210, 213. I find nothing in the provisions of c. 639 conferring authority to exercise the power of eminent domain either expressly or by necessary implication.

Moreover, I am not satisfied that the expense of the alteration of the facilities of the utility companies you refer to on their own right-of-ways, may be paid by your department. Such an expenditure would not, in my opinion, be "to reconstruct the covered bridge on Groton Street . . ." In the light of the foregoing, I am constrained to advise you that, in my opinion, your department is not authorized to expend funds allocated for the purposes of c. 639 for either land damages resulting from takings or such utility changes.

Very truly yours,

Edward J. McCormack, Jr., Attorney General,

By Fred W. Fisher,
Assistant Attorney General.

A person designated as the personal representative of the Insurance Commissioner on the Board of Appeal on Motor Vehicle Liability Policies and Bonds does not acquire tenure rights under G. L. c. 30, § 9A.


Hon. Otis M. Whitney, Commissioner of Insurance.

Dear Sir: — In your recent letter you request an opinion as to whether or not your action in terminating the designation of the member of the Board of Appeal on Motor Vehicle Liability Policies and Bonds represent-
ing the Commissioner of Insurance and your designation of another person as your representative was in accordance with law.

You state that on May 8, 1957, the then Commissioner of Insurance, Joseph A. Humphreys, designated Joseph A. Cieri as his representative to act in his place as a member of the board, under the provisions of G. L. c. 26, § 8A. I assume that such designation was made by a writing as required by said section. You state that Mr. Humphreys' term as Commissioner of Insurance expired on April 21, 1959. You further state that you never designated Mr. Cieri to act as your representative on the board, although he continued to act in such capacity until January 25, 1961.

It appears from the correspondence attached to your letter that on January 11, 1961, pursuant to the provisions of G. L. c. 26, § 8A, you designated one Thomas F. Donohue as your representative on the Board of Appeal, such designation to remain in effect until revoked. Said designation became effective January 26, 1961. It also appears from the correspondence that by letter of January 11, 1961, you notified Joseph Cieri of your designation of Thomas F. Donohue on said date.

You specifically request my opinion as to whether or not you had the right, against Mr. Cieri's wishes, to terminate his services as representative of the Commissioner of Insurance on the board in view of the provisions of G. L. c. 30, § 9A. You state that Mr. Cieri is a veteran. General Laws, c. 30, § 9A, reads as follows:

"A veteran, as defined in section twenty-one of chapter thirty-one, who holds an office or position in the service of the commonwealth not classified under said chapter thirty-one, other than an elective office, an appointive office for a fixed term or an office or position under section seven of this chapter, and has held such office or position for not less than three years, shall not be involuntarily separated from such office or position except subject to and in accordance with the provisions of sections forty-three and forty-five of said chapter thirty-one to the same extent as if said office or position were classified under said chapter. If the separation in the case of such unclassified offices or positions results from lack of work or lack of money, such a veteran shall not be separated from his office or position while similar offices or positions in the same group or grade, as defined in section forty-five of this chapter, exists unless all such offices or positions are held by such veterans, in which case such separation shall occur in the inverse order of their respective original appointments."

General Laws, c. 26, § 8A, reads in part as follows:

"There shall be a board of appeal on motor vehicle liability policies and bonds serving in the division of insurance and consisting of the commissioner of insurance or his representative, the registrar of motor vehicles or a representative, and an assistant attorney general to be designated from time to time by the attorney general. The commissioner of insurance may by a writing in such form as he may prescribe, filed in his office, designate from time to time a representative to act in his place and the registrar of motor vehicles may in like manner designate from time to time a representative to act in his place. Any such designation may be revoked at any time and may run for such period as the designating officer may prescribe. . . ."

It is the general rule of the common law apart from statute that a public officer can not give an appointee a tenure of office beyond his own. Commonwealth v. Higgins, 4 Gray, 34-35. Opinion of the Justices, 239 Mass. 603, 605; Opinion of the Justices, 275 Mass. 575, 579; Howard v. State
Board of Retirement, 325 Mass. 211, 213. The designation of Mr. Cieri, made by Commissioner Humphreys on May 8, 1957, as a member of the board representing the Commissioner of Insurance, terminated on April 21, 1959, the date on which the term of office of Mr. Humphreys as Commissioner of Insurance expired.

Mr. Cieri was not designated on or subsequent to April 21, 1959, in writing, as required by c. 26, § 8A, to be your representative on the board, although he continued to act as such representative beyond that date. Assuming but without deciding that Mr. Cieri possessed some status, it was revoked on January 11, 1961 (to become effective January 26, 1961), when you designated Thomas F. Donohue to be your representative on the board. It appears from the correspondence that the designation of Mr. Donohue was made in writing and complied with the provisions of c. 26, § 8A. A designation made under § 8A may, by the express language of that section, be revoked at any time.

Chapter 30, § 9A, provides in part that a veteran who holds an office or position in the service of the Commonwealth not classified under the civil service statute (c. 31) and who has held such office or position for not less than three years, shall not be involuntarily separated from such office or position except in accordance with provisions of sections relating to classified offices and positions (c. 31, §§ 43 and 45). Appointive offices for a fixed term are exempted from the provisions of § 9A. A designation made under c. 26, § 8A, expires upon the death or the cessation of tenure of the public officer who made such designation and is an appointive position for a fixed term excluded from the provisions of c. 30, § 9A.

In substance, you ask whether c. 30, § 9A, is applicable to the type of position about which you make inquiry. My answer is that the type of position referred to comes within the express exemption referred to above.

Very truly yours,

Edward J. McCormack, Jr., Attorney General,
By Leo Sontag, Assistant Attorney General.

A person who held a civil service rating referred to in St. 1958, c. 584, § 11, on or before December 31, 1958, is entitled to registration as a professional engineer without examination, even if he was not practicing engineering on June 1, 1958.


Mrs. Helen C. Sullivan, Director of Registration.

Dear Madam: — In your recent letter you state that the Board of Registration of Professional Engineers and Land Surveyors has received applications for registration as a professional engineer and as a land surveyor from Richard D. Carney. You state that the applications were filed May 27, 1959, under St. 1958, c. 584, § 11.

You further state that in the affidavit for qualification under § 11, Mr. Carney answered “No” to both of the following questions:

"Were you practicing land surveying on June 1, 1958?" and "Were you practicing engineering on June 1, 1958?"
Moreover, it appears from your letter that Mr. Carney has been employed as Town Manager of Shrewsbury since August 6, 1957, and that he last worked as a Grade III Jr. Civil Engineer in July, 1954. In the light of the foregoing, you pose the following question:

"Is this applicant to be considered eligible for registration under St. 1958, c. 584, § 11?"

In my opinion he is.

Chapter 584 strikes out various sections of the General Laws and inserts several new sections dealing with the Board of Registration of Professional Engineers and Land Surveyors and their activities. The new sections 81D, 81E, 81J, 81K, 81L, 81M, 81P, 81R, and 81T, of c. 112 of the General Laws indicate a clear intent on the part of the General Court to require the registration under the conditions therein stated of both land surveyors and professional engineers.

Section 11 of c. 584 is a so-called grandfather section providing the conditions under which certain applicants may receive a certificate of registration from the board without oral or written examination.

The first paragraph of § 11 authorizes the issuance of a certificate of registration to a person with the qualifications therein referred to who was practicing engineering or land surveying on June 1, 1958. The second and third paragraphs deal with a different class of persons, namely, persons who had already achieved a civil service status as a permanent "junior civil engineer" or higher grade as defined in Class 27 of the civil service rules. As to such a person who is employed on or before December 31, 1958, under such civil service status, the board shall issue a certificate of registration without oral or written examination.

It is to be noted that there is a significant change of phraseology from the first paragraph to the second and third paragraphs, in that the first paragraph requires the applicant to be practicing engineering or land surveying "on June 1, 1958," while the second and third paragraphs require that persons with the civil service status therein referred to must be employed "on or before December 31, 1958." Mr. Carney apparently was not employed "on June 1, 1958," as he stated. However, he was employed, as I understand it, under such civil service status "before December 31, 1958."

There is a significant change in the language of this legislation between that applicable to general practicing engineers and surveyors and those with the foregoing civil service status. As to such, the General Court may well have assumed that engineers with said civil service status, having already been examined and qualified under the laws of the Commonwealth relating to civil service examinations, were competent and qualified without the necessity of an examination and despite the fact that they were not actively practicing under our statutes on December 31, 1958, or June 1, 1958, or either of such dates.

As before stated, my answer to your question under the circumstances is in the affirmative.

Very truly yours,

Edward J. McCormack, Jr., Attorney General,

By Fred W. Fisher, Assistant Attorney General.
The temporary emergency re-employment of a person retired from the public service is permitted under St. 1950, c. 639, § 9, but he can be paid only the difference between his retirement allowance or pension and the compensation for his services.


Dear Sir: — You state that the secretary to your department reached the mandatory retirement age in the spring of 1960 and was retired. Thereafter, the commissioners voted to retain her services on a contract basis. The Director of Personnel and Standardization has declined to approve a rate of compensation for these services until it is determined whether the retired individual is entitled to any additional monies from the Commonwealth in view of the limitations of G. L. c. 32, § 91.

As a general proposition, the foregoing statute prohibits persons receiving a pension or retirement allowance from the Commonwealth from being paid for any service thereafter rendered to the Commonwealth. There are certain exceptions listed in the statute which do not here appear to be applicable.

In some limited situations involving an emergency, the provisions of § 9 (b) of c. 639 of Acts of 1950, as amended from time to time, allow the temporary re-employment of retired or pensioned employees, provided, among other things, that the compensation for services rendered by such persons shall be reduced by any retirement allowance or pension received by such persons. (See opinion to Commissioner of Education, Attorney General’s Report, 1954, p. 44.)

The terms of the contract in question state that the employment is made under authority of c. 639. The compensation for services rendered may be paid; provided, that such compensation is reduced by the amount of retirement allowance or pension which would otherwise be due.

Very truly yours,

Edward J. McCormack, Jr., Attorney General,

By John J. Grigalus,
Assistant Attorney General.

General Laws, c. 160, § 134A, as to the height of a bridge over tracks in a railroad yard, would not apply to a bridge partly in Rhode Island and only over tracks in a yard there.


Dear Sir: — You have requested an opinion as to whether the provisions of G. L. c. 160, § 134A, regulating the clearance above the rails of a bridge crossing tracks in a railroad yard, are applicable to a bridge located partly in Massachusetts and partly in Rhode Island, only the portion of which located in Rhode Island is actually above tracks in a railroad yard.

As was said in Sandberg v. McDonald, 248 U. S. 185, 195,
"Legislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction."

I advise you, therefore, that in the circumstances you describe, the Massachusetts statute referred to is not applicable.

However, your department and the Rhode Island officials concerned should, in determining the height at which the new bridge will cross the railroads tracks, take into account, with the other applicable considerations, the purposes for which the minimum height fixed in G. L. c. 160, § 134A, was adopted.

Very truly yours,

Edward J. McCormack, Jr., Attorney General,

By James J. Kelleher,
Assistant Attorney General.

A decision by the Director of Building Construction as to the acceptability of materials under a contract for the construction of a State building, supersedes any decision of the architect and is not subject to review on appeal by the Commission on Administration and Finance. Patented articles may be called for in the specifications for contracts for the construction of State buildings.


Hon. Charles Gibbons, Commissioner of Administration.

Dear Sir: — In a letter of your predecessor, and from other information furnished to us through the Commission by the Division of Building Construction, it appears that pursuant to G. L. c. 29, § 8A, and subject to G. L. c. 149, §§ 44A–44L, a contract for Mass. State Project U 58–4 was awarded to Daniel O'Connell's Sons, Inc., hereinafter referred to as O'Connell, in which Fred C. McLean Heating Supplies, Inc., was the selected subcontractor (G. L. c. 149, § 44C) for Heating and Ventilating (Contract Specifications § 24), and Acoustical Materials Corporation was named by McLean (G. L. c. 149, § 44G [E]) to provide labor and materials for a radiant acoustical ceiling as described in Contract Specifications § 24-23.

A protest was registered against McLean on the ground that Acoustical Materials Corporation's proposed ceiling materials did not meet the specifications. The materials to be used were accordingly submitted on behalf of O'Connell to the architect for a determination as to their compliance with the specifications. On June 30, 1960, the architect notified O'Connell that the materials submitted were not approved. The latter appealed this determination to the Director of Building Construction. On August 4, 1960, the architect, by letter to the director, expressed his "opinion" that the materials submitted met the specifications under the "or equal" clause of the Contract Specifications (Section 1-08.2). On October 15, 1960, the director notified O'Connell that its appeal was "denied" and that its use of the proposed materials was "disapproved." O'Connell took an appeal to the Commission on Administration and Finance from the adverse decision of the director.

Our opinion is asked on three questions relating to the appeal:
“(1) Does the Commission on Administration and Finance have jurisdiction to review the decisions of the Director of Building Construction and is this jurisdiction limited by statute?

(2) Does the contract in question give the architect the right to finally determine what is acceptable under the ‘or equal’ clause of the contract, subject to no further determination?

(3) Are the specifications proprietary? (Specifications referred to being Section 24–23.)”

With reference to the first question, G. L. c. 7, § 30A, provides in part: —

“Except as otherwise provided in this section or by any appropriation act of the general court, the director of building construction shall, in the manner and to the extent provided by this chapter, have control and supervision of all building construction projects, as hereinafter defined, which may be undertaken by the commonwealth. . . .”

Initially, then, the director is given broad power of control and supervision except as the Legislature may specifically provide otherwise.

Specific powers and duties of the director are found in §§ 30A to 30J, inclusive, of said c. 7. Only two situations can be found where the director’s “control and supervision of all building construction projects” are subject to appeal to the commission:

1. Appeals by the requesting party or operating agency from disapproval of requested changes in plans, specifications, or contracts (§ 30E); and

2. Appeals by the designer or operating agency from disapproval of plans, specifications, contracts, appointment of clerk-of-the-works, or payment for any project (§ 30F).

In the instant case, the commission is asked to entertain an appeal by the general contractor from the director’s determination that the materials proposed to be submitted by the subcontractor do not comply with the plans and specifications. This situation is not embraced by either § 30E or § 30F. The Commission on Administration and Finance has jurisdiction to review the decisions of the Director of Building Construction only where expressly authorized by statute. See Alonzo B. See v. Bldg. Com'r of Springfield, 246 Mass. 346, 343; Cosmopolitan Trust Co. v. S. L. Agos Tanning Co., 245 Mass. 69, 74.

Accordingly, the answer to the first question is that in the particular situation presented there is no jurisdiction for an appeal by the general contractor to the Commission on Administration and Finance from the decision of the Director of Building Construction.

With reference to the second question, the statutory powers and duties of the architect are found in G. L. c. 7, § 30C, where he is referred to as the designer. It is there stated that the director shall make a contract with the designer, which contract shall include among other terms that the designer “. . . (3) shall be charged with general supervision of construction of the project; . . .” Since § 30C refers to the contract terms between the director and the designer, it cannot be assumed that the Legislature, after granting the director overall power of control and supervision under § 30A, intended to compel him to relinquish this power to the designer by contract provision under § 30C, and no such conclusion is required by the provision of the standard contract documents and specifications which, pursuant to § 30C, the designer “. . . (2) shall, so far as feasible, use . . .
[and] which said director shall have prepared and made available in the division of building construction . . . "

Although certain powers of the architect are found, for example, in Art. I (f), (g), of the standard contract, and sections 1–08.2 and 24–08.2 of the Specifications, only Articles III and IV of the standard contract contain any provision that decisions and determinations of the architect are final and in each, this finality of power is subject to the express proviso, "... except as may be otherwise determined by the Division." Since the plans and specifications are expressly made a part of the standard contract, their provisions must be construed together with the standard contract which makes the final determination the responsibility of the director.

Under the contract the contracting parties must look to the architect for certain preliminary determinations. However, as between the architect and the director, finality of decision rests with the latter. Accordingly, the answer to the second question is that the contract does not give the architect the right finally to determine what is acceptable under the "or equal" clause of the contract.

The third question involves section 24–23 of the Specifications: Ceiling Type Radiant Heat. The specifications call for a certain type radiant heated ceiling or its equal (section 24–01.2 (a) (1), (2)). The question is presented whether these specifications are proprietary. It is assumed that by this question your inquiry is whether these specifications, insofar as they may call for the prime contractor to supply a patented article, thereby prohibit free, open and competitive bidding. The specifications in question cannot be said to be proprietary in the sense stated, for by the inclusion of the words "or equal," provision is made for substituting materials which are "... equal in quality, durability, appearance, strength, and design of the material or article named or described and will perform adequately the functions imposed by the general design." In other words, a bidder can satisfy the requirements of the specifications by supplying materials which are the equal of those specified. In the case of Pacella v. Metropolitan District Commission, 330 Mass. 338, 341–347, the court ruled in a situation where the specifications called for a specified patented article and contained no provision for an article that would be functionally equivalent, that there was no violation of law in the absence of fraud or favoritism or the like.

The court in the Pacella case, at page 344, adopted the view that as long as "specifications do not appear to preclude competition among bidders for the prime contract," and as long as "any person who wishes to do so can purchase [the materials] . . ." from the supplier of the patented product, the rule of free, open and competitive bidding applicable to prime contractors is not extended to suppliers of component materials or equipment.

The information supplied us contains no indication that fraud or favoritism or the like was practiced in drawing the specifications or that competition among the bidders for the prime contract was precluded, or that the specified materials cannot be purchased by anyone who wishes to do so.

I advise you, therefore, in answer to the third question that the specifications are not open to the objection referred to.

Very truly yours,

EDWARD J. McCORMACK, JR., Attorney General,

BY EUGENE G. PANARESE,

Assistant Attorney General.
The widow of a judge who was a veteran, and who died before the enactment of G. L. c. 32, § 65C, making retirement benefits available to a judge's widow, could claim the benefits under G. L. c. 32, § 58B, for widows of veterans.

FEB. 7, 1961.

Mr. Joseph Alecks, State Comptroller.

Dear Sir: — In your recent letter you inquire relative to the entitlement of the widow of Justice Francis J. Good to the benefits of G. L. c. 32, § 58B.

I understand from your letter that Justice Good, when he died, was a veteran with thirty years' service for the Commonwealth and that he died on November 25, 1958; that his widow has submitted an application dated December 7, 1960, for the benefits provided by G. L. c. 32, § 58B, and that this application has been approved by the retiring authority under the provisions of G. L. c. 32, §§ 58 and 59.

General Laws, c. 32, § 58, provides in substance that a veteran who has been in the service of the Commonwealth for a total period of thirty years in the aggregate shall, at his request, with the approval of the retiring authority, be retired from active service at sixty-five per cent of the highest annual rate of compensation.

Section 58B provides that a veteran entitled to be retired under § 58, may, on or before the date of written application for retirement, elect to receive a lesser yearly pension during his lifetime, with the provision that upon his death, the spouse at the time of his retirement shall be entitled during her lifetime to an annual pension equal to two-thirds of the yearly amount of such lesser pension.

The first paragraph of § 58B provides that the election of this option shall be filed in proper form on or before the date of the written application for retirement.

The third paragraph of § 58B provides in substance that if a veteran entitled to be retired under the provisions of § 58 dies before making written application for such retirement, his widow shall receive an annual allowance consisting of two-thirds of the actuarial equivalent to which the veteran would have been entitled had his retirement allowance been computed under the provisions of § 58B as of the date of the death of the veteran.

The fourth paragraph of § 58B provides that any allowance provided for under that section shall be in the alternative to any allowance provided for under § 12 of c. 32, and contains a further provision that if the deceased veteran was a member of a system established under §§ 1 to 28, inclusive (which is not here the case), the provisions of paragraph (c) of subdivision (2) of § 11 and Option (d) of subdivision (2) of § 12 shall apply unless the appropriate retiring authority, as defined in § 59, is notified in writing of the election of the pension under this section within ninety days of the date of death of the veteran. There are further provisos not now important. Such, then, is the statutory framework controlling veterans' pension benefits under the provisions of G. L. c. 32, §§ 58 and 58B.

By virtue of the provisions of G. L. c. 32, § 65A, the chief justice or any associate justice of the Superior Court under circumstances therein set
forth shall be entitled to receive a pension for life at an annual rate equal
to three-quarters of the annual amount of his salary. General Laws, c. 32
was amended by St. 1960, c. 724, effective as therein stated in § 2, as of
July 1, 1960, by the addition of a new § 65C. The new § 65C provides,
among other things, that a judge entitled to a pension for life under the
provisions of § 65A, may, in lieu thereof, elect to receive a pension for life
at a lesser annual rate with the provision that upon his death leaving a
surviving widow as described therein, she shall be paid a pension in an
amount equal to two-thirds of such lesser annual pension for life. Detailed
provisions are contained for the election and the computation of the
pensions.

The second paragraph of § 65C, inserted by c. 724, reads as follows:

“If a judge who would be entitled, upon resigning, to a pension for life
under section sixty-five A, dies before resigning, his widow shall receive a
pension for life of two thirds of such pension for life at a lesser annual rate
to which such judge would have been entitled had he, as of the date of
death, resigned and had such pension for life at a lesser annual rate been
computed under the first paragraph.”

Chapter 724 was approved by His Excellency the Governor on October 27,
1960, and was to take effect, as stated by § 2 of c. 724, on July 1, 1960,
with an emergency declaration by the Governor.

As you are doubtless aware “members of the judiciary” are expressly
excluded from participating in the benefits of the contributory retirement
systems under the provisions of § 1 of c. 32.

Whether the General Court intended, in setting up the system of pensions
for members of the judiciary referred to in §§ 65A, 65B and 65C of c. 32,
to make special provisions exclusively for that group is not wholly clear.
It is clear, however, that the benefits are substantially larger than those
accorded to veterans under § 58. I am not aware that members of the
judiciary entitled to pensions under §§ 65A, 65B and 65C, have been re-
tired as veterans under § 58. It seems that the General Court did not
intend a veteran to have two pensions or retirement allowances for the
same services rendered. Section 3 (7) (g) makes that clear. It reads:

“All person retired under the provisions of this chapter, or under corre-
sponding provisions of earlier laws or of any other general or special law,
shall receive only such benefits as are allowed or granted by the particular
provisions of the law under which he is retired.”

I find no provision of law authorizing a member of the judiciary who is
entitled to pension benefits under §§ 65A, 65B and 65C, to elect to receive
a veteran’s pension under § 58.

However, it appears that Justice Good passed away over a year and a
half before c. 724 was passed extending the benefits of the judiciary pens-
sions to widows of deceased justices. Moreover, while there are clear and
explicit provisions bestowing upon public employees, who are also veterans,
an election to receive their retirement benefits under the provisions of
§§ 1 to 28, inclusive, of c. 32, known as the Contributory Retirement
System, or take their veteran benefits under § 58 (see G. L. c. 32 § 25),
there is a conspicuous and significant absence of any such provision rel-
ating to non-contributory pensions of members of the judiciary.

While the question may not be free from doubt, since the General Court
has now made it clear beyond peradventure that members of the judiciary entitled to pensions may elect to receive survivorship pensions, it is my opinion that a veteran’s rights do not vanish upon his appointment to the judiciary.

Under all the circumstances, I am of the opinion that the widow in the case you refer to may claim and receive survivorship benefits under the veterans’ pension laws (G. L. c. 32, §§ 58 and 58B).

Very truly yours,

EDWARD J. MCCORMACK, JR., ATTORNEY GENERAL,

BY FRED W. FISHER,
Assistant Attorney General.

Prior service in a State position which had been voluntarily given up cannot, upon re-employment in the same position, be counted towards the three years’ service required to attain tenure rights under G. L. c. 30, § 9A.

FEB. 8, 1961.

HON. KEVIN H. WHITE, SECRETARY OF THE COMMONWEALTH.

DEAR SIR: — In your recent letter you inquire relative to the status under G. L. c. 30 § 9A, of a veteran in the position of chief of the Archives Division in the Department of the State Secretary.

In your letter you state that a veteran employee in the Department of the State Secretary was appointed chief of the Archives Division and served as such from 1950 to 1956, inclusive; that from 1956 to April 1, 1959, this employee served as confidential secretary in the department; that from April 1, 1959 to the present, the veteran was again employed as chief of the Archives Division. In the light of these facts, you inquire as to the rights of the veteran under § 9A to the position of chief of the Archives Division.

At the outset I have to assume that the position of confidential secretary in your department and the position of chief of the Archives Division are different in fact as well as in name.

General Laws, c. 9, § 2, authorizes the State Secretary to appoint, among other officers, "... a chief of the archives division ..." and he is further authorized to appoint clerks, messengers and other assistants necessary for the prompt dispatch of public business. This section further provides that the position of chief of the Archives Division shall not be subject to c. 31. At the outset, G. L. c. 30, § 9A, provides that a veteran who holds a position in the service of the Commonwealth but not classified under c. 31, with certain exceptions not now important, "... and has held such office or position for not less than three years, shall not be involuntarily separated from such office or position ...", except in accordance with the provisions of §§ 43 and 45 of c. 31 to the same extent as if said office or position were classified under said chapter. Other provisions are contained in § 9A not applicable to the situation you refer to.

Section 9A has been construed to require three immediate consecutive years’ service in the position claimed in order to provide the veteran in the position with protection against dismissal.
Chairman of the State Housing Board v. Civil Service Commission, 332 Mass. 241, 244, 245.

In the foregoing case the Supreme Court, in declining to extend the protection of § 9A to the veteran who claimed the position of executive secretary to the State Housing Board although depending upon his three years' service period as "expediter," said:

"The two positions were recognized in the records of the division under different code numbers. We are of opinion that in fact as well as in name they were different positions. The position of executive secretary was not 'such . . . position' as that which he occupied as expediter."

For a case where "tacking" was barred in circumstances not entirely, dissimilar to those in this case see Kelley v. School Committee of Watertown, 330 Mass. 150, 152-153. That three consecutive years' service in the position claimed is mandatory, see also Attorney General's Report, 1955, pages 61, 62 and 63, where, in discussing a situation similar to the present one, it was stated:

"Such protection to veterans who have been continuously employed in the same position for more than three years is not unreasonable"

and again,

"It is a very different thing to discharge an employee who is a veteran and who has been serving your Agency continuously for three years or more."

Reasons are readily observed why three current consecutive years are required to effectuate the purpose of the statute. To hold that a total of three years' service may consist of several short periods of employment in different positions might well frustrate the purpose of the General Court in requiring a steadiness of occupation in the veteran. For a further statement of the reasons for the construction of the statute as I have construed it, see Kelley v. School Committee of Watertown, 330 Mass. 150, 152-153. Whether, in any event, an appointee of the Secretary of State has tenure beyond that of his superior may seriously be doubted. Howard v. State Board of Retirement, 325 Mass. 211.

In view of the foregoing, it is my opinion that the veteran you refer to is not entitled to the benefits of § 9A as they relate to the position of chief of the Archives Division.

Very truly yours,

Edward J. McCormack, Jr., Attorney General,

By Fred W. Fisher,
Assistant Attorney General.
A person becomes another year of age on the first moment of the day before his birthday.


MR. JOHN F. WOSTREL, Senior Supervisor, Licensed Schools, Department of Education.

DEAR SIR: — In your letter of recent date relative to G. L. c. 74, § 24A, you refer to the following provision:

"Any person who is not over fifty years of age and is otherwise qualified shall be eligible for an appointment as a teacher in state aided approved vocational schools."

You state that on August 12, 1959, an oral opinion was given by this office as follows:

"A person is 50 years of age on the first moment of the day before the 50th birthday,"

and you pose the following question:

"Is this a valid definition legally?"

In my opinion it is. Very truly yours,

EDWARD J. MCCORMACK, Jr., Attorney General,

By Fred W. Fisher,
Assistant Attorney General.

The authority of the Government Center Commission under St. 1960, c. 635, § 3, to fix the salary of its Secretary excludes any authority of the Director of Personnel and Standardization as to such salary under G. L. c. 30, §§ 45 to 50, inclusive.


Hon. Charles Gibbons, Commissioner of Administration.

DEAR SIR: — You have requested an opinion on the question, among others, as to whether the Director of Personnel and Standardization has the duty, in view of the provisions of G. L. c. 30, §§ 45 and 46, to set the salary for the position of executive secretary of the Government Center Commission.

Section 3 of St. 1960, c. 635, provides, in part, that the Government Center Commission, established by the act, "shall appoint an executive secretary who shall receive an annual salary of not less than twelve thousand five hundred dollars nor more than fourteen thousand five hundred dollars as the commission may determine."

It is provided in paragraph (4) of G. L. c. 30, § 45, which section directs that the Director of Personnel and Standardization shall establish and
administer an office and position classification plan and a pay plan for the Commonwealth, that:

“(4) In pursuance of his said responsibilities as to the said pay plan, the director of personnel and standardization shall allocate, as provided in paragraph five of this section, each such officer or position to the appropriate job group in the salary schedule set forth in section forty-six, excepting such offices and positions the pay for which is or shall be otherwise fixed by law and those the pay for which is required by law to be fixed subject to the approval of the governor and council, and he may from time to time, in like manner, reallocate any such office or position. In so allocating or reallocating any such office or position, the said director shall use standard, objective methods and procedures for evaluating the same so that the principle of fair and equal pay for similar work shall be followed; and all offices and positions in the same class shall be allocated to the same job group.” (Emphasis added.)

As is indicated in the paragraph quoted, G. L. c. 30, § 46, contains a salary schedule for the pay plan for the Commonwealth. The schedule referred to lists thirty-three job groups, each having a minimum and maximum weekly salary, changes from the minimum to the maximum, except as otherwise provided, being by annual increases to progressively higher weekly steps-in-range, the increments between each step in a particular range being equal, and the maximum being attained after seven years’ service. The section also contains detailed provisions prescribing the application of the salary schedule in certain circumstances, e.g. service to be credited upon reinstatement, promotion, etc.

The provision of St. 1960, c. 635, § 3, that the executive secretary of the Government Center Commission shall receive an annual salary of not less than $12,500 nor more than $14,500, as the commission may determine, is a method of determining the compensation to which the incumbent of the position should be entitled which is at wide variance from the method of fixing salaries provided in G. L. c. 30, §§ 45 and 46. Under said c. 635, an annual salary, without reference to any weekly basis, is provided for, within the limits stated, and, as you point out, the limits referred to do not fit any one of the salary ranges for the thirty-three job groups listed in the salary schedule set out in G. L. c. 30, § 46.

Your request refers to concern expressed by the Division of Personnel and Standardization which implies that previous to this there have been no instances of a specific statutory provision for the determination of the salary of a particular position similar to the provision contained in St. 1960, c. 635, § 3, having operation over the general provisions of G. L. c. 30, §§ 45 and 46. In fact, however, there have been such instances. Thus in 1953, by St. 1953, c. 631, the act reorganizing the Department of Natural Resources, it was provided that the Commissioner of Natural Resources be appointed by the Board of Natural Resources and that the commissioner “shall receive such salary, not exceeding ten thousand dollars, as the board of natural resources may determine.” (G. L. c. 21, §§ 3, 3A.) Since the enactment of those provisions the salary of the Commissioner of Natural Resources has been determined by the board, and not in accordance with G. L. c. 30, §§ 45 and 46. Similarly in 1947, provision was made in c. 652 of the acts of that year, for a Board of Education and it was provided that the board should appoint a Commissioner of Education who should receive “such salary not exceeding eleven thousand
dollars as the board may determine.” (G. L. c. 15, § 1B.) By subsequent amendment the eleven thousand dollar limit was raised to fourteen thousand dollars (St. 1955, c. 730), and last year it was provided by St. 1960, c. 585, that the Commissioner of Education should receive “a salary of not less than twenty thousand nor more than twenty-five thousand dollars, the amount to be determined by the board.” Since 1947, the salary of the Commissioner of Education has been determined by the Board of Education under the provisions referred to, and not in accordance with the provisions of G. L. c. 30, §§ 45 and 46. There are other similar instances, but the practice as to the commissionerships referred to is sufficient to demonstrate that provisions similar to that contained in St. 1960, c. 635, § 3, have been deemed to operate as exceptions to G. L. c. 30, §§ 45 and 46.

As was pointed out in the case of *Boston Elevated Railway vs. Commonwealth*, 310 Mass. 528, 551, an earlier general statute is not binding on subsequent legislatures so as to restrict their power to enact statutes inconsistent therewith, and “The earlier statute has no higher standing than the later and may be superseded thereby wholly or in part when such is the clear legislative intention.”

Which of the two statutory provisions here in question is to prevail is not to be determined solely by the language of the earlier as to what should be exceptions to it, but is rather to be determined by an examination of both statutes, and if the provisions of the later are inconsistent with the operation of the earlier, the provisions of the later statute must prevail. This is particularly true where, as in this case, the earlier provisions are of general application and the later is of specific application. *Posadas v. National City Bank*, 296 U. S. 497.

Applying the rules stated, it is clear that the specific provisions of St. 1960, c. 635, § 3, are so inconsistent with the general provisions of G. L. c. 30, §§ 45 and 46, as to manifest a plain legislative intention that the sections cited should have no application to the fixing of the salary of the executive secretary of the Government Center Commission.

Your request recites four specific questions:

1. “Does the Director of Personnel and Standardization in view of G. L. c. 30, §§ 45 and 46, have the duty to set the salary of the position of executive secretary, Government Center Commission created by St. 1960, c. 635?"

2. “Is the Director of Personnel and Standardization limited to the salaries set out in G. L. c. 30, § 46 (1), when exercising his powers under G. L. c. 30, § 45 (4)?"

3. “Do the opinions dated September 12, 1922, and October 24, 1927, still apply in determining whether a certain salary is ‘fixed’ in a statute?"

4. “Do the Government Center Commission and the Division of Personnel and Standardization have to agree before a salary can be set in the case of the executive secretary, Government Center Commission established under powers of St. 1960, c. 635?"

In accordance with the foregoing review of the applicable legal consideration I answer your first and fourth questions in the negative.

The answers to your first and fourth questions make it unnecessary for an expression of opinion as to your second and third questions so far as the position of executive secretary of the Government Center Commission is concerned, and since that is the only position referred to in your request
those questions are not now properly before us. It has been the fixed rule of this office for many years to render opinions only on questions relating to matters coming before the requesting official or a subordinate for decision, and then only upon a full statement of the surrounding facts and circumstances.

However, with reference to your third question and the implication referred to above that the exception in G. L. c. 30, § 45, as to positions the pay for which is otherwise fixed by law has had a narrow interpretation, it should be pointed out that the Division of Personnel and Standardization has evidently overlooked the operation, until 1953, of the former provisions of G. L. c. 75, § 13. As pointed out in an opinion of my predecessor published in Attorney General's Report, 1958, p. 49, until 1953 the Trustees of the University of Massachusetts had broad authority in fixing the salaries of the teaching staff under G. L. c. 75, § 13, which then read as follows:

"The trustees shall elect the president, necessary professors, tutors, instructors and other officers of the college and fix their salaries and define the duties and tenure of office." (Emphasis added.)

Very truly yours,


A contractor for public repair work, removing public property in the course of his work, is under a duty to use reasonable care to protect the property from theft.


Hon. Robert F. Murphy, Commissioner, Metropolitan District Commission.

Dear Sir: — In a letter of your predecessor in office he stated that the Commission has a contract with Salah & Pecece Construction Co., Inc. (Contract No. 1171) for "Storm Damage Repairs to Dam and Causeway at Pleasure Bay, William J. Day Boulevard, South Boston," that during the course of the work the contractor removed some rods from the sluice gates in order to perform work on the contract and that subsequent to their removal the rods were stolen. You have requested an opinion as to whether the commission or the contractor is responsible for the replacement of these rods.

It is to be noted that there is no provision in the contract specifically providing for theft of materials, nor is there any provision in the contract specifically requiring the contractor to take out any theft insurance.

However, in view of the fact that the contractor removed these rods in the course of the work, it would appear that the contractor had custody of them and, therefore, it was incumbent upon him to use care in preventing any injury to this property, and if he omitted to take proper care he is liable for the ensuing loss.

Under the circumstances outlined in your letter, the removal of these rods was for the mutual benefit of the contractor and the commission.
Accordingly, the contractor was a bailee for hire. Morse v. Homer's, Inc., 295 Mass. 606. As such, the contractor (bailee for hire) is liable for any damage to the bailed property resulting from a failure to exercise that degree of care which would reasonably be expected from an ordinarily prudent man in similar circumstances. Butter v. Bowdoin Square Garage, Inc., 329 Mass. 28.

It, therefore, becomes a question of fact whether the loss of these rods was due to the contractor's negligence. See Soutier v. Kaplow, 330 Mass. 448. What precautions the contractor made to safeguard the property so that he might return it to the bailor in as good condition as when received — what circumstances surrounded the disappearance of the rods — these are all matters to be given consideration by your commission in determining whether the contractor used reasonable care.

Very truly yours,

Edward J. McCormack, Jr., Attorney General,

By Eugene G. Panarese,
Assistant Attorney General.

A vote of the Metropolitan District Commission approving a request of an abutter for purchase of an easement for a driveway at a location to be fixed did not create a contract binding on the commission requiring the execution of the necessary instruments.


Hon. Robert F. Murphy, Commissioner, Metropolitan District Commission.

Dear Sir: — You have requested an opinion on the following question:

"Is the vote taken on July 20, 1960, binding on this commission so as to require the execution of such instrument or instruments as may be necessary to comply?"

The vote referred to approved a request for the purchase of an easement by the Chestnut Hill Towers, Inc., for a driveway entrance off Hammond Pond Parkway at a location to be fixed, subject to conditions to be prescribed, and subject to certain other approvals.

You refer in your letter to an ambiguity in the records of the meeting which, in view of the conclusion hereinafter stated, I find it unnecessary to consider as having a possible invalidating effect on the vote.

In the case of Edge Moor Bridge Works v. County of Bristol, 170 Mass. 528, 532, in referring to a claim of a contract supposed to have been effected by a favorable vote of the county commissioners, the court said,

"... where the supposed contract is found only in a vote passed by a board of public officers, which looks to the preparation and execution of a formal contract in the future, care must be taken not to hold that to be a contract which was intended only to signify an intention to enter into a contract."
In the case of *Al's Lunch, Inc. v. Revere*, 324 Mass. 472, a vote taken on December 30, 1947, by the City Council of Revere, approved by the mayor, authorized the city solicitor to sell certain land owned by the city to the plaintiff for a price which had been offered to the mayor. The plaintiff's president called on the city solicitor to pay the price and receive a deed but the city solicitor told him he doubted that, as city solicitor, he could convey a good title to the land. On March 1, 1948, a new mayor and city council having taken office on January 5, 1948, the city council voted to rescind their vote of December 30, 1947, and that action was approved by the mayor. A bill by the plaintiff for specific performance of an alleged contract for the sale of the land was dismissed.

At page 475, after quoting the above language from the *Edge Moor Bridge* case, the court said:

"... the vote of the council on December 30, 1947, did not in itself constitute an acceptance of the plaintiff's offer... it was intended merely as authority to the city solicitor to execute a deed, and it contemplated the deed as the only contract which the defendant was to execute with the plaintiff."

The vote of the commission of July 20, 1960, was merely a preliminary step in the negotiations and did not itself constitute the acceptance of an offer. It merely expressed a willingness on the part of the commission to proceed further to effect an ultimate conveyance of an easement, with many details referred to only generally in the vote to be the matter of subsequent negotiation.

Under G. L. c. 92, § 85, the concurrence of the local park commissioners must be obtained, a deed executed and deposited, with a certificate of the terms of the sale, with the State Treasurer, and the deed is to be delivered to the purchaser only upon payment of the purchase price.

The conveyance itself was the only contract contemplated in the vote and only an actual delivery of the deed would vest an interest in the land in the prospective grantee. Until such time as a deed is executed and delivered, the corporation referred to has no enforceable statutory, contractual or property rights for an easement for a driveway entrance off the parkway in question.

I advise you, therefore, in answer to your specific question that the vote of July 20, 1960, is not binding on the commission so as to require the execution of such instruments as may be necessary to comply. Whether the negotiations which have been initiated should be carried to the conclusion contemplated in the vote or should be ended is a matter for the members to decide in the exercise of their own judgment. In the event that they deem it advisable to terminate the negotiations, it would be well for the commission to rescind the vote of July 20, 1960.

Very truly yours,

Discussion of various questions as to the administration of the plan for State
aid to free public libraries under the 1960 legislation.


Hon. Owen B. Kiernan, Commissioner of Education.

Dear Sir: — In your recent letter you pose several questions relative to
the administration of the program of State aid for free public libraries.

As you are, of course, well aware, the current legislation surrounding
this subject matter has been supplemented by St. 1960, cc. 429 and 760.

After references to the new §§ 19, 19A and 19C of G. L. c. 78, you pose
several questions, the first of which reads as follows:

"1. For purposes of certifying public libraries for a State grant in
fiscal 1961, is it permissible to apply 1960 U. S. Census figures to 1960
calendar year appropriations for public library services despite the fact
that the 1960 U. S. Census figures were not official until December of that
year?"

In my opinion it will be proper to use the United States Census figures
if, in your opinion, they more accurately reflect the true situation.

After a paragraph relating to the new § 19C inserted by St. 1960, c. 760,
you pose the following question:

"1. Is it permissible under St. 1960, cc. 429 and 760, for the Board of
Library Commissioners to contract directly through Boards of Library
Trustees with public libraries which are city or town public service de-
partments as well as with public libraries which are associations or cor-
porate bodies?"

In connection with the matters you refer to, the new § 19 inserted by
c. 429 provides that:

"... The board may contract with any other state agency, city or town,
public or private library to provide improved library services in an area,
or to secure such library services as may be agreed upon ..." (Emphasis
added.)

I notice that the statutory authority refers to "... city or town, pub-
lic or private library ..." I therefore answer your question in the
affirmative.

You then pose another question reading as follows:

"2. Does this legislation permit the board to contract with local library
boards of municipalities for public library services planned for and to be
offered in a regional area with payment made in advance and in anticipa-
tion of the rendering of the regional services; or does the language of the
law permit payments under 19C to be made only on a reimbursement
basis?"

I concede that the over-all language of the new § 19C might reflect a
policy of anticipatory payments. I am, however, compelled to agree with
what you state is the present interpretation of the Comptroller's office that
so far as possible it is desirable that payments by the Commonwealth so
far as can reasonably be arranged should be made on the basis of results
accomplished rather than unrealized ambitions.
You then propound the following question:

"3. (a) May the board in one area provide both regional services under 19C (1) and reference and research service under 19C (2) by contract with one or more libraries; while in another area, where such an arrangement were not practicable, may the board contract with one or more libraries for reference and research service and provide other regional services in the same area under 19C (1) through a regional center administered and operated by the Division of Library Extension?"

Section 19C (1) and (2) provide that:

"(1) In so far as practicable the board shall enter into an arrangement or arrangements with such public library or libraries in each regional area as it may determine under the terms of which such library or libraries shall supply services or space, equipment, personnel, ... the cost of which shall not exceed an amount equal to fifty cents per annum for each resident in such regional community having less than twenty-five thousand inhabitants ..." (Emphasis added.)

"(2) Said board shall also designate such public library or libraries in each area or an additional such public library or libraries in the area to serve as a regional reference and research center or centers to meet the reference and research library needs of the residents of all the cities and towns in the area; ..."

The answer to question 3(a) is, in my opinion, in the affirmative.

Your question 3(b) reads as follows:

"May the board under this legislation contract with one public library, namely Boston, for the provision of reference and research service to all the communities in the Commonwealth?"

A reading of paragraph (2) of § 19C compels me to answer this question in the negative.

Your question 3(c) (1) (2) reads as follows:

"If an operational plan for regional library service in one area approved by the board provided for contracting with more than one public library in the area to provide the services rendered, could the board choose one of these two alternatives:

(1) to make a contractual relationship with only one library as regional coordinator, and have that one library initiate sub-contracts with the other library or libraries concerned?

(2) to enter into a contractual relationship with each library designated to provide a specific regional service or services?"

Section 19C, as presently written, in my opinion, contemplates arrangements between the Board of Library Commissioners and the libraries themselves. I find nothing in the legislation indicating an intent on the part of the General Court to avoid its statutory responsibility by authorizing its contractors to assign or sublet their responsibilities to other libraries.

Very truly yours,

EDWARD J. McCORMACK, JR., Attorney General,

By Fred W. Fisher,

Assistant Attorney General.
The New Bedford Institute of Technology is authorized to grant "Associate Degrees."


Dr. John E. Foster, President, New Bedford Institute of Technology.

Dear Sir: — In your recent letter relative to the granting of an "Associate Degree" you state that your Institute now grants the Bachelor of Science Degree and the Master of Science Degree in many fields and say that in view of the modern educational trend, there is a considerable demand for the so-called "Associate Degree," and you pose the following question:

"However, we would like to know if new legislation would have to be filed for the sole purpose of granting the 'associate degree.'"

In the case of Commonwealth v. N. E. College of Chiropractic, 221 Mass. 190, at pages 192 and 193, the Supreme Court discussed at some length the subject of degrees. That case involved a complaint charging the defendant, a corporation called the New England College of Chiropractic, with granting a degree as a Doctor of Chiropractic without the authority of a special act of the General Court granting the power to give degrees in violation of R. L. c. 208, § 75. In discussing the subject of degrees, the court said the obvious purpose of the statute was,

"... to suppress the kind of deceit which arises from the pretence of power to grant academic degrees, and to protect the public from the evils likely to flow from that variety of misrepresentation and imposition... The section as a whole is an effort to punish the issuing and holding of sham degrees from colleges and other educational institutions. It aims to ensure to the people of the Commonwealth freedom from deception, when dealing with those who put forward professions of educational achievement such as ordinarily is accompanied by a collegiate degree from an institution authorized to grant it... Considered historically and according to present practice, there are three general grades of such degrees, namely, — Bachelor, Master and Doctor; although by some institutions intermediate distinctions are granted. ... It is not to be assumed that the statute was intended to relate only to such degrees as were in use at the time it was enacted. It is comprehensive in its terms and includes whatever properly may be described as a degree at any time. It is possible that institutions authorized to grant degrees may establish and grant the degree here in question..."

The power in your Institute to grant degrees appears in G. L. c. 74, § 42, which says in part:

"... The board of trustees of said... institute may grant the degree of bachelor of science or other appropriate degrees to any person, either male or female, satisfactorily completing the prescribed courses of instruction, if and so long as the faculty, equipment and courses of instruction... at said institute meet with the approval of the board of collegiate authority."

I notice that by the provisions of St. 1953, c. 523, as amended by St. 1957, c. 347, § 2, your board of trustees was authorized to grant the hon-
ory degree of Master of Science, and by the provisions of G. L. c. 74, § 42B, your board of trustees, with the approval of the Board of Collegiate Authority, was authorized to grant such honorary doctorates as they may determine.

I am not aware of any legislative or judicial definition of the term “Associate Degrees.” It is clear, however, that the phrase “Associate Degrees” is definitely tied up with the provisions of § 42 which limit the phrase “other appropriate degrees” to persons “satisfactorily completing the prescribed courses of instruction, if and so long as the faculty, equipment and courses of instruction . . . at said institute meet with the approval of the board of collegiate authority.”

If the degree you refer to meets the above requirements, in my opinion, such degree may be granted; otherwise, not. Undoubtedly the approval of the Board of Collegiate Authority was inserted by the General Court as a safeguard against the creation and issuance of degrees promiscuously, independently perhaps, on occasion, for other than scholastic achievements in the field referred to.

Very truly yours,

Edward J. McCormack, Jr., Attorney General,

By Fred W. Fisher,
Assistant Attorney General.

A State employee on a terminable leave of absence for employment in war industry who while on such leave entered the armed forces is entitled to have his period of military service credited towards his retirement.


Hon. John T. Driscoll, Chairman, State Board of Retirement.

Dear Sir: — In your letter of recent date relative to the status of Mr. Redford M. Rand you state that in 1942, certain employees of the Department of Public Works were granted a leave of absence by the department at the request of the Federal War Manpower Commission for the purpose of performing necessary engineering work in the war effort and that such leaves were granted on the condition that the employees would be available for return to the department if it was desired; that one such employee, Redford M. Rand, who was granted a leave of absence and was still on leave from the Department of Public Works although engaged in private employment under the conditions stated above, entered the armed forces within two months after the leave of absence was granted and remained in the armed forces until November, 1945; that Mr. Rand has applied to have his military time from August, 1942 to November, 1945, credited to him in computing the years of service for retirement.

In view of the foregoing, you pose the following question:

“Did Mr. Rand leave the service of the Commonwealth for the purpose of entering the armed forces and can the military time be credited towards retirement?”
I am informed that your question arises in connection with the Contributory Retirement law.

General Laws c. 32, § 4(1) (h), as lately amended by St. 1960, c. 619, contains the following provisions:

"The period or periods during which any member who is a veteran as defined in section one was on leave of absence from the governmental unit to which the system of which he is a member pertains, for the purpose of serving in such campaign and until he was discharged or released from such service in the armed forces, shall be allowed as creditable service.

"Any such period of leave of absence which is subsequent to his becoming a member of such system shall be counted as membership service, and any such period prior thereto shall be counted as prior service; provided, that he would have been entitled to such credit in the event he had continued in the active service of such governmental unit during the period of time covered by such leave of absence.

"Any member who served in the armed forces between January first, nineteen hundred and forty and July first, nineteen hundred and sixty-two, shall have such actual service credited to him as creditable service when reinstated or re-employed in his former position or in a similar position within two years of his discharge or release for such service. The provisions of sections nine and nine A of chapter seven hundred and eight of the acts of nineteen hundred and forty-one, as amended, and as may be further amended, shall be applicable to any such veteran referred to therein."

Chapter 708 of the Acts of 1941, to which you refer, contains provisions for the protection of the retirement allowance and pension rights of certain persons who, while employed in the public service, tendered their resignation for the purpose of serving in the military or naval forces of the United States. However, through the years as a result of many different amendments, the right to war service credits has been broadened to include many other members of the various retirement systems operating under the provisions of G. L. c. 32 §§ 1–28, inclusive.

The first paragraph of subdivision (h) above referred to, provides specifically that:

"The period or periods during which any member who is a veteran as defined in section one was on leave of absence from the governmental unit to which the system of which he is a member pertains . . . shall be allowed as creditable service."

And further in the third paragraph of subdivision (h),

"Any member who served in the armed forces between January first, nineteen hundred and forty and July first, nineteen hundred and sixty-two, shall have such actual service credited to him as creditable service when reinstated or re-employed in his former position or in a similar position within two years of his discharge or release from such service."

If, as I understand it, this person is admittedly a veteran and put in the time required in the armed forces and was re-employed in his former position within two years of his discharge, it would appear that he comes within the purview of subdivision (h).

However, your specific question of whether Mr. Rand took his leave of
absence for the purpose of entering the armed forces is a question of fact to be determined by the board. The fact that he engaged in engineering work in the war effort may be taken into consideration. So, also, the fact that he ultimately became a part of the armed forces within two months after receiving his leave of absence is significant.

In my opinion, your board would be well within its rights in finding, if it becomes material, that this man did, in fact, take his leave of absence for the purpose of entering the armed forces. In my opinion, the right to war time creditable service of members of the contributory retirement systems is presently to be adjudicated under the provisions of subdivision (h) as before stated.

Very truly yours,

Edward J. McCormack, Jr., Attorney General,

By Fred W. Fisher,
Assistant Attorney General.

The Director of the Division of Motorboats, as the executive and administrative head of the division, has the responsibility of operating it, though it is placed within the Registry of Motor Vehicles and his appointments are subject to the approval of the Registrar.


Hon. William D. Fleming, Senate Committee on Ways and Means.

Dear Sir: — You have requested an opinion as to whether the Registrar of Motor Vehicles is charged with the responsibility of operating the entire Division of Motorboats established within the Registry of Motor Vehicles by St. 1960, c. 275, § 1.

Section 1 of St. 1960, c. 275, inserts a new section 12 in G. L. c. 16, under the heading “Division of Motorboats.”

Section 2 of said c. 275 inserts a new c. 90B, entitled “Motorboats and Other Vessels,” in the General Laws.

Section 12 of G. L. c. 16, as inserted by c. 275, § 1, reads as follows:

“There shall be within the registry of motor vehicles a division of motorboats. With the approval of the council the governor shall appoint for a term of seven years, and may remove for cause with like approval, an officer to be known as the director of the division of motorboats who shall be the executive and administrative head of the division. The director shall receive such salary not exceeding ten thousand two hundred dollars, as the governor and council may determine, which shall be paid out of the recreational boating fund.

“The director may, with the approval of the registrar of motor vehicles, employ such hearing officers, inspectors and such administrative, technical, clerical and other employees as in his opinion the duties of the division may require, and may expend for such purpose and other necessary expenses such amounts as may be appropriated therefor out of the recreational boating fund. Such employees shall not be subject to chapter thirty-one, but the qualifications for the positions shall be established by
the civil service commission, and the positions and compensation of such employees shall be classified in accordance with sections forty-five to fifty, inclusive, of chapter thirty.

“A certificate of award of number issued by the director of the division of motorboats shall become valid on the effective date thereof notwithstanding the fact that the director who issued the same ceased to hold said office prior to said effective date.”

It is to be noted that it is provided in the second sentence of the first paragraph that the Director of the Division of Motorboats, “shall be the executive and administrative head of the division.”

The new G. L. c. 90B, in § 1, defines “director” as the Director of the Division of Motorboats, and in § 11 it is provided that the director shall administer and enforce the provisions of the chapter, and in § 12 that the provisions of the chapter and all rules and regulations made thereunder shall be enforced by the director, etc.

The first sentence of the second paragraph of the new § 12 of G. L. c. 16, quoted above, provides that the director of the Division of Motorboats in employing hearing officers, etc., shall have his appointments approved by the Registrar of Motor Vehicles, but goes on to provide that the director may expend for such purposes and other necessary expenses such amounts as may be appropriated therefor out of the Recreational Boating Fund.

It is well established in Massachusetts that under statutes providing for the “approval” of the action of one official by another, the approving official acts only after precedent action has been taken by the other official. Rooney, Petitioner, 298 Mass. 430, 433, 434 and cases cited.

Upon a consideration of the provisions of G. L. cc. 16 and 90B, referred to, while the provision that the director of the Division of Motorboats shall be the executive and administrative head of the division is necessarily narrowed somewhat by the provision requiring that the director submit his appointments to the registrar for his approval, the director is, nevertheless, by express provision, the executive and administrative head of the division. As such head the responsibility for operating the division would be in the director and not in the registrar. The provisions of G. L. c. 90B, referred to, placing the responsibility for the administration and enforcement of the chapter (the administration and enforcement of which comprises the entire jurisdiction of the division) in the director, are confirmatory of the conclusion stated.

Very truly yours,

Edward J. McCormack, Jr., Attorney General,

By James J. Kelleher,
Assistant Attorney General.
The certificate of coverage under the Compulsory Motor Vehicle Liability Insurance Law required as a condition of registration can appear on the face of the application for registration.

MARCH 14, 1961.

HOR. CLEMENT A. RILEY, Registrar of Motor Vehicles.

Dear Sir: — You have requested an opinion on the following question:—

"May the insurance certificate be made part of the motor vehicle registration application instead of being an individual stub attached to the application?"

In a letter accompanying your request, you state: —

“Our Legal Section advises that there is no legal bar to having the insurance certificate on the face side of the application for registration. All that are required to constitute the certificate are the wording of the certificate under which would appear the rubber stamped name of the company and the authorized signature of the person in behalf of the company.”

You further state: —

“We plan to have the registration application signed by the registrant, then followed by this certification:

"‘The Company Signatory hereto hereby certifies that it has issued to the motor vehicle registrant, hereinbefore indicated, a Policy, Bond or Binder covering such motor vehicle hereinbefore described in conformity with the provisions of General Laws, c. 90, s. 1A; c. 175, s. 113A or c. 40, s. 4, and that the premium charge thereon is at the rate fixed and established by the Commissioner of Insurance.’"

General Laws, c. 90, § 1A, provides in part that no motor vehicle shall be registered unless the application therefor is accompanied by a certificate as defined in § 34A.

General Laws, c. 90, § 34A, defines "certificate" as follows:

"‘Certificate’, the certificate of an insurance company authorized to issue in the commonwealth a motor vehicle liability policy, stating that it has issued to the applicant for registration of a motor vehicle such a policy which covers such motor vehicle, conforms to the provisions of section one hundred and thirteen A of chapter one hundred and seventy-five and runs for a period at least coterminous with that of such registration or that it has executed a binder, as defined in said section one hundred and thirteen A, under and in conformity with said section covering such motor vehicle pending the issue of a motor vehicle liability policy; or the certificate of a surety company authorized to transact business in the commonwealth under section one hundred and five of said chapter one hundred and seventy-five as surety, stating that a motor vehicle liability bond, payable to the commonwealth, which covers such motor vehicle, conforms to the provisions of said section one hundred and thirteen A, and runs for a period at least coterminous with such registration, has been executed by such applicant as principal and by such surety company as surety; or the cer-
tificate of the state treasurer stating that cash or securities have been de-
posited with said treasurer as provided in section thirty-four D."

General Laws, c. 90, § 34B, provides in part as follows:

"The registrar shall accept a certificate as defined in section thirty-four A
from any person applying for registration of a motor vehicle.

"Such certificate of an insurance or surety company shall, except as
hereinafter provided, be in a form prescribed by the commissioner of in-
surance, shall contain the recitals required by said section thirty-four A
and, if at the time of the execution thereof the schedule of premium charges
and classifications of risks for the year for which registration is sought
have been fixed and established under section one hundred and thirteen B
of chapter one hundred and seventy-five shall state the rate at which and
the classification under which the motor vehicle liability policy or bond
referred to therein was issued or executed and the amount of the premium
thereon and whether or not said premium is at the rate fixed and estab-
lished as aforesaid, and each such certificate shall contain such other in-
formation as said commissioner may require. . . ."

The certificate required by G. L. c. 90, § 1A, is presently printed on the
back of the application for registration. The form of certificate used,
which I assume has been approved by the Commissioner of Insurance both
as to its contents and location on the form, specifically describes the ve-
hicle and specifically states the rate, premium and other information re-
ferred to in G. L. c. 90, §§ 34A and 34B. I see no reason why, if the Com-
missoner of Insurance approves and the form of certificate submitted by
you is changed in the manner hereafter referred to, the certificate could
not appear on the face of the application.

In order to comply with the provisions of G. L. c. 90 § 34B, the form of
certificate you propose should have the following added at the end thereof:
"and the classification and amount of premium are as hereinabove stated."

Very truly yours,

EDWARD J. MCCORMACK, JR., ATTORNEY GENERAL,

BY JAMES J. KELLEHER,
ASSISTANT ATTORNEY GENERAL.

A group life, etc., contract entered into by the State Employees Group Insur-
ance Commission after competitive bidding, with the same insurer which
had been awarded the previous contract, was not a renewal of that con-
tract, and unused reserves under the first contract must be paid to the Com-
monwealth and cannot be retained and credited by the insurer to
reserves under the later contract.

March 16, 1961.

State Employees' Group Insurance Commission, State House.

Gentlemen: — You have requested an opinion as to certain issues which
have arisen under contracts of insurance entered into under the provisions
of G. L. c. 32A between the Group Insurance Commission and the Boston
Mutual Life Insurance Company. You stated that these issues are
raised under section X(n) of the contract dated December 30, 1955, ef-
effective for a three-year term commencing January 1, 1956, and under section X(o) of the contract dated October 20, 1958, effective for a three-year term commencing January 1, 1959. Both sections X(n) and X(o) deal with divisible surplus under the heading of "Dividends."

You have forwarded with your request the above contracts and correspondence between the Group Insurance Commission and the Boston Mutual Life Insurance Company relative to the issues hereinbefore referred to.

You asked the following questions:

1. Can the commission require the Boston Mutual Life Insurance Company to return the 1958 Unused Reserve to the Commonwealth in the form of a check (cash)?

2. Is the contract (Policy G-100 and the proposal) signed October 20, 1958, and effective for a three-year period commencing January 1, 1959, a new contract, or, an extension (renewal) of the initial contract which became effective January 1, 1956?

3. Can the commission require the Boston Mutual Life Insurance Company to return future unused or unallocated reserves set up from premiums paid to Boston Mutual by the commission in the form of cash rather than in the form of a credit?

4. If it is determined that the contract effective January 1, 1959, is an entirely new contract and not a renewal, would not this fact point up all the more the requirement for the Boston Mutual to return the 1958 unused reserve to the Commonwealth in the form of cash as would of necessity be the case if the Boston Mutual had not been successful and another insurance company had been awarded the new contract January 1, 1959?

Under the provisions of G. L. c. 32A, § 4, inserted by St. 1955, c. 628, § 1, the Group Insurance Commission entered into a contract of insurance on December 30, 1955, with the Boston Mutual Life Insurance Company for group term life insurance and accidental death and dismemberment insurance for certain employees of the Commonwealth for a three-year period commencing January 1, 1956. Section 4 authorized the Commission to "negotiate a contract for such term not exceeding three years as it may, in its discretion, deem to be the most advantageous to the commonwealth . . . ." (Now extended by St. 1960, c. 389, § 1).

A contract of insurance, entered into under the provisions of c. 32A, § 4, is limited by the above provision of the statute. The contract executed on December 30, 1955, and effective on January 1, 1956, expired on December 31, 1958, in accordance with the terms of the policy and the statutory limitation of a "term not exceeding three years." In accordance with the statute, the Group Insurance Commission was empowered to enter into a new contract of insurance, effective January 1, 1959, for a term not exceeding three years.

Section X(m) of the policy dated December 30, 1955, reads as follows:

"(m) Renewal Privilege. At the end of the initial term and of each subsequent term, this policy may be renewed by the Policyholder upon such terms as the Policyholder and the Company may then agree."

Even though Section X(m) is entitled "Renewal Privilege," neither party is obligated to renew nor has the privilege of renewal without the concurrence of the other. A subsequent concurrence of the will of both parties involving an agreement as to terms, payment of a new considera-
tion by one party and a new promise by the other is required. Such a concurrence is in essence a new and original contract. Epstein v. Northwestern National Insurance Company, 267 Mass. at 571; Gardella v. Greenburg, 242 Mass. 405, 407.

Accordingly, for the reasons given, I must rule in answer to your second question that the contract of insurance executed October 20, 1958, for a three-year term commencing January 1, 1959, was a new contract and not an extension of the original policy.

It appears from the attached correspondence that certain reserves were set up by Boston Mutual for the calendar years 1956 through 1958. The reserve for 1956 was determined to be too high, was subsequently reduced by agreement of the parties and the excess in the amount of $39,753.17 was returned to the commission by check of Boston Mutual. Although termed "the necessary adjustment in the dividend" in the Boston Mutual letter of transmittal dated October 4, 1957, the amount returned was a return of the unused and unallocated reserves. The letters of Boston Mutual of January 27, 1958, and February 5, 1958, addressed to the commission indicate that the sums of $19,502.11 representing 1956 unused reserve and $159,144.89 representing 1957 dividends were returned to the commission by checks of Boston Mutual. Letters of Boston Mutual to the commission dated January 26, 1959, and February 20, 1959, indicate that the amount of $10,586.85 representing 1957 unused reserve and an additional sum representing 1958 dividend were paid to the commission by checks.

By letter of January 20, 1960, Boston Mutual informed the commission that there would be no dividend for the calendar year 1959. Boston Mutual has retained the sum of $3,013.66 representing 1958 unused reserve. This amount of $3,013.66 was determined in 1960 upon further review of the 1958 policy year and was applied by Boston Mutual to 1959 policy reserves. The enclosed statement of the Executive Secretary of the commission states that if Boston Mutual is allowed to so apply the 1958 unused reserve, rather than to return it in the form of a check to the commission, it will be lost to the Commonwealth.

The statement of the Executive secretary of the commission states that the policy with Boston Mutual dated December 30, 1955, resulted from a proposal submitted by Boston Mutual when the contract was put out on bid by the commission. The Boston Mutual proposal of December, 1955, contained the special questions submitted by the commission and the answers thereto. Page five of Boston Mutual's proposal contained the following question and answer:

"If the coverage is cancelled on an anniversary date, will your company return to the commonwealth all unused and unallocated Life, Accidental Death and Dismemberment reserves set up under the policy?"

"Yes."

In view of the above question and the affirmative answer thereto, it is evident that the agreement and understanding of the parties was that the total annual premium was to be reduced by the amount of unused and unallocated reserves set up for each year under the policy. As stated above, such was the actual practice for the years 1956 and 1957 under the policy.

The State Employees' Group Insurance program was authorized by the provision of G. L. c. 32A, inserted in the General Laws by St. 1953, c. 628. Chapter 32A, § 9, as amended by St. 1958, c. 424, § 1 reads as follows:
“Any dividend or other refunds or rate credits shall inure to the benefit of the commonwealth, except as herein provided, and shall be deposited by the commission with the treasurer and receiver-general of the commonwealth, and shall be applied to the over-all cost of such insurance to the commonwealth . . .”

General Laws, c. 175, § 140, requires every domestic life company to provide in every policy of life or endowment insurance that the proportion of the divisible surplus of the company contributed by said policy shall be ascertained and distributed annually. The letters of Boston Mutual to the commission dated January 27, 1958, January 26, 1959, and January 20, 1960, indicate that the policy was placed in a separate classification and the dividend formula determined on the basis of experience under the policy. This is in consonance with the requirements and provisions of c. 175, § 140. Further, the provisions of c. 175, § 120, which deal with distinctions and discriminations “in favor of individuals between insurants of the same class and equal expectation of life . . .” do not prohibit the establishment of the policy in such classification by itself. The policy, which was entered into by the commission under the specific provisions of c. 32A, authorizing the commission to negotiate and purchase policies, would control in the event of any conflict with the general provisions of the insurance law contained in c. 175.

The Commissioner of Insurance, in his letter of March 22, 1960, to the Executive Secretary of the commission, was of the view that the procedure of the Boston Mutual was in conformity with the requirements of §§ 140 and 120.

In view of what appears to have been the general agreement of the parties with respect to the return of the unused and unallocated reserves and the actual practice under the policy of returning the reserves for 1956 and 1957 to the commission in cash, I must rule in answer to your first question that the commission can require the Boston Mutual Life Insurance Company to return the 1958 unused reserve to the commission in the form of a check (cash).

It is apparent that if the insurance policy had been negotiated with a company other than Boston Mutual for the period commencing January 1, 1959, or if the risk had not been insured commencing in 1959, the 1958 unused reserve would have been payable to the commission in cash. I trust that this sufficiently answers your fourth question.

In your third question you ask whether or not the commission can require Boston Mutual to return future unused or unallocated reserves (set up from premiums) in cash rather than in the form of a credit. I must assume that you refer to the reserves set up and to be set up under the policy dated October 20, 1958, effective for a three-year term commencing January 1, 1959. From the information submitted, this appears to be the only policy presently in force between the commission and Boston Mutual.

Although the present policy constitutes a new contract and not an extension of the original policy, its terms and provisions are to a large extent identical to the terms and provisions of the original policy. Since the agreement and understanding of the parties under the original policy was that the amount of unused and unallocated reserves set up for each policy year was to be returned in cash to the commission, and where the parties actually carried out such practice for the years 1956 and 1957, the same agreement applies to the policy presently in force between the parties,
especially where the present policy contains no express provision negating or modifying such agreement or practice. Accordingly, I must rule in answer to your fourth question that the commission can require Boston Mutual to return the unused and unallocated reserves set up from premiums under the present policy in cash to the commission.

Very truly yours,

EDWARD J. McCORMACK, JR., Attorney General,

By LEO SONTAG, Assistant Attorney General.

Effect of provisions of Motor Vehicle Fuel Sales Law, as to posting prices, etc., and as to giving of trading stamps, under the decisions in the cases of Sperry & Hutchinson Co. v. Director, Division on the Necessaries of Life, 307 Mass. 408, and Sun Oil Co. v. Director, Division on the Necessaries of Life, 340 Mass. 235.


Mr. DONALD B. FALVEY, Director, Division on the Necessaries of Life, Department of Labor and Industries.

DEAR SIR: — In your recent letter you raise certain questions as to the effect of the decision in the case of Sperry & Hutchinson Company v. Director, Division on the Necessaries of Life, 307 Mass. 408.


In the decision our Supreme Judicial Court held that the provisions of G. L. c. 94, § 295E, could not constitutionally be applied to prohibit the giving of trading stamps in connection with sales of motor vehicle fuels or to prevent the changing of price signs for twenty-four hour periods.

You refer to the fact that the final decree after rescript entered in the Sperry & Hutchinson Case restrains and enjoins you, as the Director of the Division on the Necessaries of Life, from interfering with the posting of signs similar to those attached to the bill of complaint in the case, advertising the issuance of trading stamps.

You then state:

"This verdict practically nullified § 295E of the Acts of 1939.

This division would like to know what parts, if any, of this section can be enforced or should this entire section be repealed by the Legislature.

The Division also wishes to know if signs stating the giving of premiums or discounts would be held to be within the meaning of § 295C's second paragraph; that is, signs 'relating to the price of motor fuel' or 'designed or calculated to cause the public to believe' that they relate to it. 321 Mass. 713."

General Laws c. 94, § 295E, as amended, reads as follows:

"The price posted on any pump or other dispensing device from which motor fuel is sold, as required by section two hundred and ninety-five C, shall remain posted thereon and continue in effect thereat for a period of not less than twenty-four consecutive hours. No retail dealers shall sell
motor fuel at any price other than the price so posted at the time of the sale. No premiums, rebates, allowances, concessions, prizes or other benefits shall be given directly or indirectly by any retail dealer so as to permit any purchaser to obtain motor fuel from such retail dealer at a net price lower than the posted price applicable at the time of the sale. In no transaction in which a retail dealer may fix or set a single price or charge for the sale of a quantity of motor fuel, together with some other commodity or service, shall such single price or charge be less than the aggregate of the charge, in accordance with the posted price, for the motor fuel involved in the transaction, plus the charge for such other commodity or service when the same is sold or rendered separately, rather than in combination with the sale of motor fuel.”

In the Sperry & Hutchinson case the court pointed out that § 295E, in the form in which it had been considered in the case of Slome v. Chief of Police of Fitchburg, 304 Mass. 187, 191, had been held to have been intended to prevent the use of misleading signs, and stated that they assumed, without deciding, that the language of § 295E, as amended, was comprehensive enough to prohibit the giving of trading stamps with the retail sale of motor fuel and said that in order to invalidate the prohibition they had to be satisfied that the means adopted would not accomplish the aim intended of protecting the public against fraud, or that the prohibition was unreasonable and arbitrary.

At page 421, the court said:

“Trading stamps have been in use long enough so that any purchaser of merchandise who is interested in acquiring and converting them to his advantage, cannot be said to be likely to be deceived as to their value. As appears from the agreed facts, these stamps represent certain well defined and easily understood rights that the recipient acquires, and there is no reasonable cause to believe that the dealer who offers them in consideration of any or approved credit sales will resort to fraudulent practices. The price fixed by Ouellette for the sale of his gasoline, if paid for in cash or if sold upon credit, entitled the purchaser to trading stamps. Such a transaction, so clearly free from illegality, has no reasonable connection with any possible fraud in the sale of motor fuel. On the contrary, under the guise of protecting the public from fraud, the enforcement of the statute would result in an arbitrary interference with business and an irrational and unnecessary restriction.”

At pages 423 and 425, in analyzing the effect of the provision prohibiting changing a posted price for any twenty-four hour period, the court demonstrates that the provision was more likely to encourage, rather than discourage, practices injurious to the public referred to as justifying the provision, and points out that the time period requirement made did not afford any protection to the buyer and penalized the seller, inasmuch as the fact of importance to the buyer is the posted price not when it was posted. At pages 424 and 425, the court stated:

“The fact that all prices must be posted does not relieve the purchaser, if he has any real interest in the subject matter, from the exercise of some degree of vigilance in order to determine what price he is to pay for the particular brand of gasoline that he is buying. Upon his approach to a
filling station he has no means of knowing from appearances when the price was posted. The twenty-four hour period may have just begun or be just ending. The law gives him no greater security than he had before. After all, he does not have to purchase at any station unless he wishes, and whether the price is posted at six o'clock in the morning or at noon, it is that price which the purchaser must consult, if he cares to, in order to determine whether he is willing to pay it."

You enclosed with your letter a memorandum dated July 11, 1941, which was sent to the then incumbent of the office you hold by the then Assistant Attorney General Jacob Lewiton as a tentative guide for your predecessor in the performance of his duties.

The memorandum referred to considers the effect of the decision in the Sperry & Hutchinson case in certain circumstances.

The memorandum includes the following: —

"Of course, the giving of premiums bears no stigma of fraud and cannot be forbidden for the purpose of avoiding fraud. The court so held in the McBride [i.e. Sperry and Hutchinson] case, and it said, at page 421:

"'The price fixed by Ouelette for the sale of his gasoline, if paid for in cash or if sold upon credit, entitled the purchaser to trading stamps. Such a transaction, so clearly free from illegality, has no reasonable connection with any possible fraud in the sale of motor fuel.'

"Incidentally, this would seem to indicate that the price is understood by the court to be a matter independent of future premiums. This view is strengthened by a consideration of the ordinary use of the words. In common parlance the price of an article is the amount asked by the person offering it for sale.


"Discounts and premiums, like free service and rest rooms, are essentially inducements to buy rather than ingredients of the price asked."

The statement made that the language of the court would seem to indicate that "the price is understood by the court to be a matter independent of future premiums," is an entirely reasonable construction of the decision, and is consistent with the ruling of our Supreme Judicial Court in the most recent case considering the provisions of the Motor Vehicle Fuel Sales Act, Sun Oil Company v. Director, Division on the Necessaries of Life, 340 Mass. 235, at page 237, that, "The price of motor fuel is the number of currency units for which a unit of fuel is sold." On that construction the provisions of G. L. c. 94, § 295E, are operative at least to prevent a dealer charging a price higher than the posted price (See Merit Oil Co. v. Director, Necessaries of Life, 319 Mass. 301, 306) even if the provisions of the section cannot constitutionally be applied to prevent the giving of trading stamps, and the section can be enforced to that extent. Whether, as you also inquire, the section should be repealed, is a question for the Legislature and is not one for this office.

You ask also whether signs stating the giving of premiums or discounts would be held to be within the provisions of G. L. c. 94, § 295C.

The answer to that inquiry would depend upon a consideration of all the facts and circumstances applicable to any particular situation in which the question arose and no opinion could be expressed without a statement of such facts and circumstances. (Cf. Commonwealth v. S lone, 321 Mass. 713,
717.) Inasmuch, however, as your letter refers specifically to the Sperry & Hutchinson case, it should be pointed out that, as has been noted above, the final decree after rescript entered in that case restrains you from interfering with the posting of signs of the type referred to in the final decree after rescript advertising the giving of trading stamps in connection with a sale of motor vehicle fuel.

Very truly yours,

Edward J. McCormack, Jr., Attorney General,

By James J. Kelleher,
Assistant Attorney General.

A retired public employee forbidden by G. L. c. 32, § 91, to be paid for services rendered to certain governmental entities is not deprived of his retirement allowance, and, therefore, the State Comptroller has no duties with reference to a retired State employee employed by the Metropolitan Transit Authority. Reference is made to the fact that the Transit Authority is not specifically mentioned in § 91.

April 18, 1961.

Mr. Joseph Alecks, State Comptroller.

Dear Sir: — You have requested an opinion relative to the legality, in view of the provisions of G. L. c. 32, § 91, of the employment by the Metropolitan Transit Authority of a former employee of the Commonwealth who is in receipt of a pension from the Commonwealth.

General Laws c. 32, § 91, provides that "No person while receiving a pension or retirement allowance from the commonwealth or from any county, city or town, shall, after the date of his retirement be paid for any service rendered to the commonwealth or any county, city, town or district . . ." with certain exceptions.

Except in one instance (and that is not the applicable situation here), the provisions of G. L. c. 32, § 91, do not operate to suspend the payment of the pension of a retired person who holds either permitted or non-permitted re-employment. The retired person continues in receipt of his pension, only the compensation for his other employment being affected.

Under the provisions of the Civil Defense Act, permitting the re-employment in the public service of retired public employees, and providing for the deduction of the amount of the retirement allowance or pension from the compensation for the services rendered in the re-employment (St. 1950, c. 639, § 9[b]), the retired person also continues in receipt of his pension, only the compensation for his other services being affected.

Since, therefore, the person you refer to is entitled to the payment of his retirement allowance, in any event, and it is only the payment of the retirement allowance that comes before you in your official capacity, in accordace with the long-established policy of this office to render opinions only on those aspects of any matters presented for opinions which concern the legal duties of the requesting official, I advise you that, as stated, there
can be no legal objection to the payment of the retirement allowance of the person referred to in your request.

The question of the extent of the authority, under the provisions of the Civil Defense Act referred to or of G. L. c. 32, § 91, of the Metropolitan Transit Authority to pay for services rendered by a retired State employee, is one which cannot come before you in the performance of your official duties.

It is to be noted, however, that the general prohibition contained in G. L. c. 32, § 91, against re-employment of retired persons, even without the exceptions stated therein, is not a broad prohibition against the payment of a retired person for services rendered in any public employment. The Legislature in the prohibition referred to explicitly enumerates with some care the governmental entities which may not pay for the services of former public servants receiving pensions from the Commonwealth, and specifically enumerates, only "the commonwealth, or any county, city, town or district . . ." Public authorities such as the Metropolitan Transit Authority, which was created by the provisions of c. 544 of the Acts of 1947, with officers, agents, employees and a treasury of its own, are not specifically included, and it is a general rule of statutory construction that expressio unius est exclusio alterius. That is to say, the express mention of one matter in a statute excludes by implication other similar matters not mentioned. It is well established by the decisions of our Supreme Judicial Court that, as was said in the decision in Morss v. Boston, 253 Mass. 247, 252, "Statutes must be interpreted as enacted. Omissions cannot be supplied . . ." The expediency of the enactment of the statutory provisions referred to, and the wisdom of the provisions, was for the Legislature. See Howes Brothers Company v. Unemployment Compensation Commission, 296 Mass. 275, 283.

Very truly yours,


Upon the discharge of trustees in proceedings for a corporate reorganization under the Bankruptcy Act and transfer of the property held by the trustees to the corporation, motor vehicles so transferred must be re-registered.

April 20, 1961.

Mr. Clement A. Riley, Registrar of Motor Vehicles.

Dear Sir:—You have requested an opinion as to whether the registration of vehicles registered in the names of the trustees of a corporation involved in reorganization proceedings in the Bankruptcy Court, in the name of the corporation, is required under G. L. c. 90, § 2, upon the discharge of the trustees and the transfer of the property held by the trustees to the corporation. Trustees appointed in proceedings for corporate reorganization under c. 10 of the Bankruptcy Act (U. S. C. Tit. 11, §§ 501, et seq.), like trustees appointed in regular bankruptcy proceedings, acquire the title of the corporation to property owned by it. (U. S. C. Tit. 11, §§ 572, 110.) The title to the motor vehicles of the corporation you refer to having
been in the trustees at the beginning of the 1961 registration period, the
said motor vehicles were properly registered, as you state, in the names of
the trustees as owners.

The discharge of the trustees in the corporate reorganization proceedings
affects the transfer of the title to the motor vehicle registered in the name of
the trustees to the corporation and, therefore, under G. L. c. 90, § 2, new applications for registration are required to be filed and new registra-
tions issued for each of the motor vehicles involved.

The conclusion stated is supported by the opinion of June 1, 1943 (At-
torney General's Report, 1943-1944, p. 55), holding that motor vehicles of
one corporation merged with another corporation must be re-registered,
that a motor vehicle purchased by the surviving member of a partnership
dissolved by the death of one of the partners must be re-registered in the
name of the purchaser.

Very truly yours,

Edward J. McCormack, Jr., Attorney General,

By James J. Kelleher,
Assistant Attorney General.

A communication signed by the Commissioner of Agriculture, referred to in
the opinion, did not constitute the certificate of approval, etc., by the Com-
missioner of the Nantucket Agricultural Society required by G. L. c. 128A,
§ 3, in connection with an application by the Society for the issuance of
a license for a harness race meeting at the Bay State Raceway, Fox-
borough.

April 20, 1961.

Hon. Leo J. Madden, Chairman, Thomas J. Fleming and Morris H.
Leff, as they constitute The State Racing Commission.

Gentlemen: — You have requested my opinion upon the following facts
and questions:

On Friday, March 31, 1961, an application for a license to conduct a
racing meeting at the reduced license fee provided for in G. L. c. 128A,
§ 4, was filed by the Nantucket Agricultural Society, Inc.

This is the initial application from this applicant.

The application requests permission to conduct a harness horse racing
meeting between the hours of 8:00 p.m. and 12:00 Midnight at the property
of the Bay State Harness Horse Racing and Breeding Association, Inc.,
Bay State Raceway, Foxborough, Norfolk County.

The application is accompanied by a lease on the property of the Bay
State Harness Horse Racing and Breeding Association, Inc., signed by
two officers of said Association and also signed by one officer of the Nan-
tucket Agricultural Society, Inc.

The application indicates that this Society was incorporated by the Gen-
eral Court under the provisions of St. 1856, c. 25, entitled, "An Act to
incorporate the Nantucket Agricultural Society."
The Nantucket Agricultural Society, Inc., did not operate a horse or dog racing meeting under the provisions of G. L. c. 128A, prior to July 1, 1958, nor at any subsequent time.

On Monday, April 3, 1961, a communication was filed with the commission by the Nantucket Agricultural Society, Inc. which reads as follows:

COMMONWEALTH OF MASSACHUSETTS,
DEPARTMENT OF AGRICULTURE,
41 TREMONT STREET, BOSTON 8, APRIL 3, 1961.

To Whom It May Concern:

The records in the Department of Agriculture, Division of Plant Pest Control and Fairs, show that the Nantucket Agricultural Society operated an agricultural fair for a number of years. For the consecutive years from 1928 through 1934 it was a properly qualified agricultural fair and approved by this Department.

For the past twenty years we have no knowledge of the operation of this fair; nor have we allotted any money from the Agricultural Purpose Fund to this fair.

CHARLES H. McNAMARA
/s/
CHARLES H. McNAMARA,
Commissioner of Agriculture.

The Agricultural Purpose Fund as referred to in G. L. c. 128A, § 3, as amended, and also in the communication dated April 3, 1961, from Charles H. McNamara, Commissioner of Agriculture, was created by St. 1948, c. 319.

Previous to the enactment of St. 1948, c. 319, creating the Agricultural Purpose Fund, all monies paid for prizes, etc., at the various State and county fairs throughout the Commonwealth were paid by the Department of Agriculture through an appropriation from the General Fund.

The questions propounded by you are as follows:

1. Does the conduct of this fair in the years 1928 to 1934 meet the requirements of G. L. c. 128A, § 3, as most recently amended by St. 1959, c. 295, § 2, insofar as condition (1) is concerned?

2. Does the fact that this fair in the years 1928 to 1934 may have received financial assistance from the Department of Agriculture in an appropriation from the General Fund meet the requirements of G. L. c. 128A, § 3, as most recently amended by St. 1959, c. 295, § 2, insofar as condition (2) is concerned?

3. Does the communication from Charles H. McNamara, Commissioner of Agriculture, dated April 3, 1961, as set forth above meet the requirements of G. L. c. 128A, § 3, as most recently amended by St. 1959, c. 295, § 2, insofar as condition (3) is concerned?

4. Based on the facts as set forth above, does the application of Nantucket Agricultural Society, Inc., appear to be in proper legal form on which the commission may proceed with a public hearing, as required by G. L. c. 128A, § 3, and consideration of the merits of the application?

The applicable statute is as follows:
G. L. c. 128A, § 3:
"... and provided, further, that on an application for a license to conduct a horse or dog racing meeting in connection with a state or county fair by an applicant which has not operated a horse or dog racing meeting under the provisions of this chapter prior to July first, nineteen hundred and fifty-eight, the applicant shall show (1) that the state or county fair at which such racing meeting is to be held has operated for a period of at least five consecutive years; (2) that said fair has received financial assistance from the agricultural purpose fund for the same period of time, and (3) a certificate from the commissioner of agriculture that said fair is properly qualified and approved by him; ... In determining whether a fair is properly qualified under this paragraph, the commissioner of agriculture shall consider the number of days such fair has operated each previous year, the area of land used for fair purposes, the number of entries in agricultural show events in previous years, the number and value of prizes offered in such events and whether or not the granting of a racing license would tend to promote the agricultural purposes of the fair."

Your third question relates to the certification and approval by the Commissioner of Agriculture.

The requirements of G. L. c. 128A, § 3, set forth above include a provision that the Commissioner of Agriculture certify that the fair in question, "... is properly qualified and approved by him ..." Assuming that the letter addressed "to whom it may concern" is sufficient to meet the requirements of certification contemplated by the Legislature, it is apparent that said letter on its face does not comply with the said section of G. L. c. 128A. At the best, the commissioner states, with respect to the Nantucket Agricultural Society, "... For the consecutive years from 1928 through 1934 it was a properly qualified agricultural fair and approved by this department." No statement is made that the said fair is now properly qualified and approved by him. Certainly, the letter of the commissioner is in vague and indefinite terms and could not be construed to be the approval required by the Legislature in paragraph (3) of § 3 of c. 128A. Selectmen of Topsfield v. State Racing Commission, 324 Mass. 300. The reply, therefore, to the third question is in the negative.

Failure of the proponent of the license to provide as a condition precedent the proper certification compels a negative reply to question 4 as pronounced to this office by your commission. See, e.g. Mass. G. L. c. 233, § 76 (official documents as evidence in courts); Cincinnati, N. O. & T. P. Ry. Co. v. Fidelity & Deposit Co. of Md., 296 F. 298, 300, 301 (certification discussed).

My reply to questions 3 and 4 makes it unnecessary to answer your first two questions.

Very truly yours,

Edward J. McCormack, Jr., Attorney General,

By Joseph T. Doyle,
Assistant Attorney General.
State highway construction contracts — date of beginning of period of limitations on claims under; interest on disputed claims, and application of new interest statute to claim which originated prior to its effective date; issuance of extra work orders after completion of extra work covered.

April 20, 1961.

Mr. Joseph Alecks, State Comptroller.

Dear Sir: — Your predecessor in office has requested an opinion concerning the final payment on Contract No. 5650 between the Department of Public Works and Marinucci Bros., Inc. You have asked the following questions:

(1) "Is it proper for the Commonwealth to make payment on the above claims without complying with the provisions of G. L. c. 260, § 3A?"

(2) "Is it proper for the Commonwealth to pay interest on items identified as Claim # 1 and Claim # 2 in accordance with the provisions of G. L. c. 30, § 39G?"

(3) "Would the provisions of G. L. c. 30, § 39G, which took effect October 20, 1955, apply to claims for work which originated prior to that date?"

(4) "Where a contractor has not complied with the provisions of Article 23 of the Standard Specifications for Highways and Bridges relative to claim for compensation for extra work not ordered, can the department subsequently waive such provisions and approve payment to said contractor?"

In reference to question No. 1, you state that the contract was awarded on the 2nd day of March, 1954, and that the work was completed on March 8, 1955. You state that on August 15, 1960, you were informed that the Department of Public Works had approved two claims of the contractor, the first relating to foundation work and the second relating to pumping during construction. The provisions of G. L. c. 260, § 3A, to which you make reference are as follows:

"Petitions founded upon claims against the commonwealth prosecuted under chapter two hundred and fifty-eight shall be brought only within three years next after the cause of action accrues."

If the statute of limitations of three years has expired, then, of course, the claim for extra work should not be authorized. In the present case, an examination of the records indicates that the semifinal estimate was not prepared until 1958 and the final estimate, apparently, was not approved until 1960. Under these circumstances, the contractor may well be able to argue that his cause of action had not accrued until 1958 or perhaps 1960. In either event, the statute of limitations would not bar the approval of the claims in the present case.

Your second question relates to the payment of interest on the two claims as provided by c. 30, § 39G. Under the statute in question, interest would be paid on the undisputed amounts due which should have appeared in the semifinal estimate which, in turn, should have been prepared within sixty-five days of completion of the contract. Your letter apparently does not raise any question on the payment of interest on such undisputed items.
Section 39G provides specifically for a semifinal estimate in the event that items may be in dispute between the Commonwealth and the contractor. As to the disputed items which may be excluded from such semifinal estimate, the statute does not require the payment of interest. Your second question is answered in the negative.

Your attention is called to the fact that we are not determining whether the Commonwealth could be required to pay interest as a result of a legal proceeding brought by the contractor to recover monies he claims due. The third question relates to the applicability of c. 30, § 39G, to contracts awarded prior to the effective date of that statute. If the time for preparing a semifinal estimate or a final estimate had not been reached at the time said statute became effective, then the department in question should follow the statute and prepare the estimates as required thereby, even though the contract was awarded prior to its effective date. Only in this way can the general intent of the statute be carried out. The contract itself is not affected by the provisions of the statute but the contractor should be given the benefit of an obligation imposed upon State officials to expeditiously prepare estimates. The answer to question three, therefore, is in the affirmative.

Your fourth question relates to the right of the Commonwealth to approve a claim where the contractor may not have complied with the technical provisions of the Standard Specifications concerning the filing of a claim.

Your attention is called to the recent case of *M. DeMatteo Construction Co. v. Commonwealth*, 338 Mass. 568, in which the court points out that the department may issue an extra work order after the work is all performed. Under such circumstances, compliance with the "claim" provisions would not be required. Your fourth question is, therefore, answered in the affirmative.

In the future, your department must, of course, comply with the provisions of c. 771 of the Acts of 1960 relating to contract changes. This statute, however, is not applicable to the present matter.

Very truly yours,

EDWARD J. McCORMACK, Jr., Attorney General.

By JOHN J. GRIGALUS,
Assistant Attorney General.

The provision of G. L. c. 41, § 96A, that no person convicted of a felony shall be appointed a police officer, is not applicable to a person who has received a full pardon.

MAY 4, 1961.

MISS ROSE ABRAMS, Secretary, Civil Service Commission.

DEAR MADAM: — Your letter of recent date to the Attorney General relative to a person who took the examination for the police service of Milton, has been handed to me for consideration. In it you state that the person's application was cancelled by the director because of a court record, and he has appealed to your commission. One of the items on the court record you state is a felony, namely, breaking and entering in the
nighttime and larceny, of which he was found guilty on April 25, 1952, in Suffolk Superior Court. You further state that at the hearing before your commission the person referred to presented a pardon which was issued by Governor Volpe with the advice and consent of the Executive Council.

You call our attention to the provisions of G. L. c. 41, § 96A, which reads as follows:

"No person who has been convicted of any felony shall be appointed as a police officer of a city, town or district."

In the light of the above circumstances you request the advice of this office "as to whether the issuance of a pardon by the Governor and Council would make said applicant eligible for appointment to the police service of Milton in view of the exact verbiage of the chapter and section of the above-named law."

The Constitution of Massachusetts, pt. 2d, c. II, § I, art. VIII, provides as follows:

"The power of pardoning offences, except such as persons may be convicted of before the senate by an impeachment of the house, shall be in the governor, by and with the advice of council, provided, that if the offence is a felony the general court shall have power to prescribe the terms and conditions upon which a pardon may be granted; but no charter of pardon, granted by the governor, with advice of the council before conviction, shall avail the party pleading the same, notwithstanding any general or particular expressions contained therein, descriptive of the offence or offences intended to be pardoned."

The answer to your question depends upon the nature of the pardon. As the Supreme Court of this Commonwealth said in the case of Perkins v. Stevens, 24 Pick. 277 at page 280:

"We think the view taken by a former distinguished law officer of this Commonwealth, whose long experience in the administration of criminal law gave to his opinions the weight of authorities, are correct and sound. He says, 'there is but one mode now in use, of restoring the competency of a witness, and that is by pardon under the great seal of the State:' 'which, when fully exercised, is an effectual mode of restoring the competency of a witness. It must be fully exercised to produce this effect; for if the punishment only be pardoned or remitted, it will not restore the competency, and does not remove the blemish of character. There must be a full and free pardon of the offence, before these can be restored and removed.'"

You do not provide me with a copy of the pardon in this matter. Accordingly, I say that if the pardon is a full, absolute, unrestricted and unconditional one, the answer to your question is the applicant is entitled to have his application considered.

I am aware that one of my predecessors in an opinion found in Attorney General's Report, 1942, p. 60, in answer to a request by the Commissioner of Probation as to his duty to expunge from his records a record of conviction of a person subsequently pardoned for the offence for which he was convicted, ruled that the record should not be expunged inasmuch as under the law it was the commissioner's duty to keep records. The Attorney General further ruled that it was the duty of the commission to note the
fact of the pardon on the record in his files relating to the recipient. That opinion was not inconsistent with the conclusion to which I have come. The pardon in my opinion extinguishes the conviction. It may well not alter the commissioner’s duty to preserve the record of it.

This office assumes, of course, that your letter has given us all the facts germane to the subject matter you refer to.

Very truly yours,

Edward J. McCormack, Jr., Attorney General,

By Fred W. Fisher,
Assistant Attorney General.

A town whose high school pupils are transported to a regional district high school in another town, by it or the district, must provide similar transportation to pupils attending private high schools outside the town.


Hon. Owen B. Kiernan, Commissioner of Education.

Dear Sir: — In your letter of recent date, relative to the responsibility of the town of Raynham to provide transportation to high school students in view of the opening of the new Bridgewater-Raynham Regional High School in Bridgewater, you pose the following questions:—

“Is Raynham compelled to provide continued transportation to the high school students who attend private schools outside its town commencing September 1, 1961, when Raynham becomes a part of the regional school district? Would there be any difference in your opinion if the regional school district, under G. L. c. 71, § 16C, provides the transportation for the public school students as distinct from each town providing transportation to the Regional School?”

You state that your department has an interest in this matter because if transportation is mandatory, your department makes reimbursement under G. L. c. 71, § 7A.

As you are doubtless aware, G. L. c. 71, particularly § 68, contains numerous requirements for schoolhouses and the education of children in the public schools of the Commonwealth. Section 68 also contains provisions, under stated conditions, for the transportation of the pupils to and from school.

General Laws, c. 76, including particularly § 1, embraces many provisions for school attendance by the children including a paragraph devoted to the subject of transportation to private schools reading as follows:

“Pupils who, in the fulfillment of the compulsory attendance requirements of this section, attend private schools of elementary and high school grades so approved shall be entitled to the same rights and privileges as to transportation to and from school as are provided by law for pupils of public schools and shall not be denied such transportation because their attendance is in a school which is conducted under religious auspices or includes religious instruction in its curriculum.”
The Supreme Court of Massachusetts in the case of Quinn v. School Committee of Plymouth, 332 Mass. 410 at 412, in discussing the above paragraph, used the following language:

"... We think that by its enactment the Legislature intended to make available to children in private schools transportation to the same extent as a school committee within its statutory powers should make transportation available to children in public schools ... The question is not what the committee can be made to do. The requirement imposed is that there be no discrimination against private school children in what the committee in its discretion decides to do."

General Laws, c. 71, § 7A, provides for reimbursement by the terms and conditions therein stated by the Commonwealth to the several towns for costs of transportation for school children.

General Laws, c. 71, §§ 14 to 16I, inclusive, relate to the forming and operation of regional school districts. In referring to the formation of a district, § 14B provides that the regional district planning board may recommend a proposed agreement made between the municipalities interested in forming the district, which agreement may include:

"(e) The method by which school transportation shall be provided, and if such transportation is to be furnished by the district, the manner in which the expenses shall be borne by the several towns."

It further appears from § 16 that:

"A regional school district established under the provisions of the preceding section shall be a body politic and corporate with all the powers and duties conferred by law upon school committees, and with the following additional powers and duties: ..." (Emphasis added.)

Moreover, § 16C of c. 71 provides as follows:

"The regional school district shall be subject to all laws pertaining to school transportation; and when the agreement provides for the furnishing of transportation by the regional school district, the commonwealth shall reimburse such district to the full extent of the amounts expended for such transportation, except that no such reimbursement shall be made for transportation of any pupil who resides less than one and one half miles, measured by a commonly traveled route, from the district school which he attends. The state treasurer shall annually ... pay to the regional school districts ... subject to appropriation, the sums required for such reimbursement and approved by the commissioner of education. ..." (Emphasis added.)

I am not aware that the provisions to which I have referred have been repealed. Rather, the statutory provisions for the organization and operation of regional school districts, to some of which I have adverted, seem to envision their continuance in full force and vigor except as modified by the provisions of law relating to regional school districts. As stated in § 16, the regional school districts have all the powers of, and are subject to the duties conferred by law upon, school committees.

Furthermore, the member towns of the district have the power by agreement to adopt the method of school transportation of the pupils and if the transportation is to be furnished by the district, the manner in which the expenses shall be borne by them. Further, the regional school districts
are subject to all laws pertaining to school transportation; and when the agreement provides for the furnishing of transportation by the regional school district, the commonwealth shall reimburse such district to the full extent of the amounts expended for such transportation, with the exceptions therein stated.

Section 16C provides that the State Treasurer shall annually pay to the regional school districts the sums required for reimbursement of transportation which have been approved by the Commissioner of Education. It is a well-settled rule of statutory construction that statutes are to be so construed as to form an harmonious whole. The general provisions relative to municipal responsibilities for the education and transportation of school children, to which I have referred, must be construed harmoniously with the regional school district’s statutes and will stand, except as modified, if at all, by them.

With this statutory pattern surrounding the subject matter about which you write and subject to the foregoing, I answer your first question in the affirmative. Your second question I answer in the negative subject to transportation problems covered by G. L. c. 71, §§ 14B (e) and 16C.

Very truly yours,

EDWARD J. MCCORMACK, JR., ATTORNEY GENERAL,

BY FRED W. FISHER,
ASSISTANT ATTORNEY GENERAL.

The Trustees of a Soldiers’ Home would not have authority under G. L. c. 123, § 6A, to lease land at the Home for a chapel.

MAY 4, 1961.

JOHN L. QUIGLEY, COMMANDANT, SOLDIERS’ HOME.

DEAR SIR: — In your letter of recent date, relative to the powers of the Board of Trustees of the Soldiers’ Home in Massachusetts, you pose the following question:

“The undersigned would like to specifically ask whether the Board of Trustees of the Soldiers’ Home in Massachusetts would be ‘covered’ by G. L. c. 123, § 6A, inasmuch as under c. 6, § 41, our Board of Trustees has the same powers and duties as are given the Trustees in State hospitals under chapter 123.’”

As you have observed, G. L. c. 6, § 41, provides that the Board of Trustees of the Soldiers’ Home

“... shall have the management and control of said home and all property, real and personal, belonging to the commonwealth and occupied or used by said home ... In the management and control of said home as aforesaid, said board of trustees shall have the same powers and perform the same duties as are vested and imposed in the trustees of state hospitals under the provisions of chapter one hundred and twenty-three, so far as applicable.”
General Laws c. 123, § 27, provides that the trustees of each State hospital shall be a corporation for the purpose of taking and holding, by them and their successors, in trust for the Commonwealth, any grant or devise of land, and any gift or bequest of money or other personal property, made for the use of the State hospital of which they are trustees. They may expend any unrestricted gift or bequest, or part thereof, in the erection or alteration of buildings on land belonging to State hospitals, subject to the approval of the department, but all such buildings shall belong to the State hospital and be managed as a part thereof.

Section 29 of c. 123 further defines the powers of the trustees of a State hospital in ways not here important.

Section 6A of c. 123 provides:

"The department, after a determination by the commissioner, subject to the approval of the trustees of the respective institutions, that it is in the best interests of the patients, may lease, upon such terms and conditions as may be stipulated by the commissioner, sufficient land belonging to State institutions described in section twenty-five for the purpose of constructing thereon chapels for the use of the patients of said institutions. . . ."

The lease shall remain in effect so long as the chapel for the patients is maintained thereon and so long as it shall be maintained in conditions satisfactory to the superintendent and the Commissioner of Mental Health. The commissioner shall select the lessees, and the design and location of the chapel shall be subject to his approval.

From the express language of § 6A, it is quite clear that the trustees of the State institutions, so far at least as the leasing of State property for a religious chapel is concerned, have only a minor control of the lease. The section authorizes the department, after a determination by the commissioner, but with the approval of the trustees, to lease upon terms stipulated by the commissioner, sufficient land belonging to State institutions for construction of chapels for the use of the patients of said institutions. The commissioner is the controlling party in matters of the kind referred to in § 6A, not the trustees. The trustees' power is limited to the approval or disapproval of the action of the department after a determination by the commissioner.

It should also be borne in mind that the Board of Trustees of the Soldiers' Home in Massachusetts serves under the Governor and Council and is subject to such supervision as the Governor and Council deem necessary and proper. G. L. c. 6, § 17.

In view of the very limited jurisdiction of the board of trustees of State institutions to lease State property for religious chapels as set forth in § 6A of c. 123, a proper construction of § 41 of c. 6, giving as it does to your Board of Trustees, the same powers and duties as are given the trustees of the State hospitals, would seem to make it clear that your trustees, so far at least as the subject matter you write about is concerned, have only a very limited control over the situation.

Very truly yours,

Edward J. McCormack, Jr., Attorney General,

By Fred W. Fisher,
Assistant Attorney General.
The Division of Employment Security could not consider a revised bid submitted by a bidder on a proposal to lease space, after the time for opening bids had passed; but could call for new bids.


Dear Sir: — You have requested an opinion as to a problem which has arisen in connection with the application of c. 620 of the Acts of 1960.

Said c. 620 requires, in part, that prior to the execution of a lease of premises for the use of a State department, a notice inviting proposals, stating the area to be leased, the term and other requirements of the proposed lease, be posted conspicuously in the office of the State Superintendent of Buildings for at least thirty days prior to the execution of the lease.

In your request you stated that a notice was posted as required inviting proposals for office space for a local office of the division under a three-year lease. It was further stated that two proposals were submitted and the division, after surveying the property to which the lower bid related, accepted that bid, subject to Federal and State approval. The invitation for proposals had asked for alternate figures, with and without air conditioning, and you inform us that since the Federal officials, while approving the division’s request for the leasing of the premises to which the lower bid related, suggested that consideration be given to the inclusion of air conditioning, the division made an amended request with the inclusion, and the request is still pending.

Your request also stated that about three weeks after the initial approval was received from the Federal authorities, the higher bidder sent a letter to the State Superintendent of Buildings cutting its bid by $0.35 per square foot, and further qualifying it by offering the premises (which are now, and have for many years been, occupied by the division) in their present condition without regard to the specifications originally set forth. It was further stated that, although the higher bidder contended in its letter to the State Superintendent of Buildings that the proposal of the lower bidder was not in accord with the specifications, in fact, the proposals received were in accord with the specifications.

After the receipt of your request for an opinion, protests were made to us on behalf of the higher bidder against your statement that the low bid was in accordance with the specifications, and we wrote you asking you to supply us with complete information as to the invitations and bids, which information you furnished to us.

It appears from the material furnished us that proposals were invited for the leasing of 3700 to 4700 square feet of space for the division.

The higher bidder filed three proposals. One for 3700 to 4700 square feet at $1.55 per square foot, the second for 3700 to 4700 square feet at $1.69 per square foot, and the third for 3700 to 4700 square feet at $1.89 a square foot with air conditioning.

The lower bidder also filed three proposals, one for 4675 square feet at $1.41 per square foot, the second for 4675 square feet with air conditioning at $1.74 per square foot, and the third for 4,675 square feet at $1.90 per square foot with air conditioning and elevator service.

The higher bidder claims that the notice to bidders, properly construed, required bidders to offer the entire range of minimum to maximum space
requirements set forth, and, therefore, that the bid of the lower bidder for a specific area of space within the range was not a compliance with the invitation for proposals.

The division's acceptance of the bid of the lower bidder, the statement in the request for an opinion that the proposals received were in line with the specifications, and the statement in the form attached to the division's original letter to the Federal authorities that it had considered a bid of the higher bidder for 4700 square feet of space, make it apparent that the division considered that under the invitation for proposals a bidder could restrict its offer to a specific area or areas within the range, or could offer to lease to the division any area within the range which the division should see fit to decide to lease. It is also apparent from the method of bidding adopted by the low bidder that it construed the notice inviting proposals in the same way the division did. It is not apparent from the bid of the higher bidder, by itself, how it construed the notice.

It cannot be said that the construction of the notice by the division and the low bidder was not a reasonable construction of the invitations for proposals, and, therefore, it cannot be ruled that the bids of both the high and low bidders were not in accordance therewith.

Your specific question is:

"In your opinion are we complying with the provisions of c. 620 of the Acts of 1960 and all other pertinent statutes if we either accept or reject this latest proposal received from the . . ." original higher bidder?

In view of the purpose of such statutes as G. L. c. 8, § 10A, as stated in Morse v. Boston, 253 Mass. 247, 252,

"to establish genuine and open competition after due public advertisement in the letting of contracts . . . to prevent favoritism in awarding such contracts and to secure honest methods of letting contracts in the public interests."

it is my opinion that an awarding authority could not decide to accept the offer of a higher bidder to change his bid after the time for submission and opening of bids had been passed. I advise you, therefore, that in my opinion only those bids filed in response to the notice inviting bids under the statute can be considered by the awarding authority.

However, it is to be noted that under G. L. c. 8, § 10A, a lease by the division must be approved by the State Superintendent of Buildings, the Governor and Council, and the Commission on Administration and Finance.

The mere indication of approval of the proposal of the lowest bidder for the lease advertised for the division, manifested by the division's acceptance of the bid and initiation of proceedings looking to the execution and final approval of the formal lease do not effect a contract. See Edge Moor Bridge Works v. County of Bristol, 170 Mass. 528, 532. Al's Lunch, Inc. v. Revere, 324 Mass. 472.

In the situation you describe, it is my opinion, therefore, that no lease binding on the division comes into existence until a formal lease executed by the division and the lessor has been approved in the manner required by the statutes, and that the division can prior to such execution and approval determine not to proceed further with its action looking to the final approval and execution of a lease, and to readvertise for proposals for a lease of premises for the purpose desired.
It is for the division, and not for this office, to determine whether in view of all the circumstances the proceedings initiated looking to the final execution and approval of a lease based on what, as stated above, was the valid low bid, should be discontinued and a new invitation for proposals for a lease be posted, or the proceedings should be continued with a view to the final execution and approval of a lease based on the original low bid.

Very truly yours,

Edward J. McCormack, Jr., Attorney General,

By James J. Kelleher.
Assistant Attorney General.

A military substitute who entered the armed services in 1942 but on discharge was not re-employed by the Commonwealth because the permanent incumbent of the position had returned to it, subsequently becoming employed by the Commonwealth, is not entitled to have the period of his military service credited toward his retirement.


Hon. John T. Driscoll, Chairman, State Board of Retirement.

Dear Sir: — In your recent letter relative to Kenneth Rhodes, you state that he was employed as a farmhand at the Belchertown State School from May 10, 1937, to March 1, 1942. He was then employed as a farmer on a military substitute basis on April 1, 1942, and continued in this employment until he entered the armed forces on September 26, 1942. He was separated from the armed forces on February 1, 1946. A few days prior to January 17, 1948, which was within the two-year period established in the law for returning to State service, Mr. Rhodes contacted the school requesting reinstatement. He was advised that the position of farmer in which he had been a military substitute had been filled by the return from military service of the original holder of the position and the school ruled that it had no obligation to reinstate a military substitute. You further state that a previous decision of this office makes it mandatory that a military substitute be reinstated for at least one day, which was not done in this case.

Under the above circumstances, you ask our opinion on the following question:

"Is Kenneth Rhodes entitled to be credited with the time spent in the armed forces as creditable time towards retirement?"

Chapter 708 of the Acts of 1941 is entitled

"An Act to meet certain contingencies arising in connection with the service of public officers and employees and certain other persons in the military or naval forces of the United States during the present national emergency."

This act concerns itself with the status of public employees who left their public employment for the purpose of serving in the military or naval
forces of the United States. Section 6 of c. 708 provides that any person referred to in § 1 who was or shall be separated from the service of the Commonwealth while holding an office or position not subject to G. L. c. 31 shall, if he so requests in writing to the appointing authority within one year after the termination of his military or naval service, be reinstated or re-employed in said office or position. I understand that Mr. Rhodes was not under civil service.

Section 1 of c. 708 provides that under the circumstances therein stated, persons who have left their position in the service of the Commonwealth for the purpose of serving in the military or naval forces of the United States shall be deemed to be on leave of absence until the expiration of one year from the termination of said military or naval service.

Section 2 provides, among other things, that certain persons so entering the armed forces from the service of the Commonwealth shall upon request be reinstated. It also provides for the filling temporarily of the positions vacated by reason of such entry into the armed forces. Section 2 goes on to say that:

"All appointments, transfers and promotions made on account of such leaves of absence shall be temporary only and the person so appointed, transferred or promoted shall be known as a military substitute; . . ."

A reading of §§ 1, 2 and 6, leads me to the conclusion that the tenure of a non-civil service military substitute terminated upon the return to his position of the permanent employee, and the Belchertown State School was under no obligation to reinstate Mr. Rhodes since the position he sought had already been filled by the return of the permanent occupant of the same position from the armed forces.

The legislation above referred to has been covered in various statutes subsequently enacted. General Laws, c. 32, § 4 (1) (h), in the third sub-paragraph, inserted by St. 1960, c. 619, reads as follows:

"Any member who served in the armed forces between January first, nineteen hundred and forty and July first, nineteen hundred and sixty-two, shall have such actual service credited to him as creditable service when reinstated or re-employed in his former position or in a similar position within two years of his discharge or release from such service. The provisions of sections nine and nine A of chapter seven hundred and eight of the acts of nineteen hundred and forty-one, as amended, and as may be further amended, shall be applicable to any such veteran referred to therein."

The General Court apparently exercised much care in an endeavor to protect the rights of public employees for service in the Armed Forces. It seems clear, however, from a reading of the subparagraph, that credit for actual service could be had only when the member was reinstated or re-employed in his former position or in a similar position within two years of his discharge or release from such service. I am advised that Mr. Rhodes was not reinstated or re-employed in his former position or in a similar position within that period but went into private employment and subsequently returned to employment in the Commonwealth. If there is any difference between the provisions of St. 1941, c. 708, and the above subparagraph, it is my opinion that the latter, being the last word on the subject, will control.
As the court said in the case of *McDonald v. Superior Court*, 299 Mass. 321 at page 324:

"That problem was State-wide. There was importance in uniformity in the law to govern the administration of the subject. A statute of that nature displays on its face an intent to supersede local and special laws and to repeal inconsistent special statutes."

Section 3 of St. 1960, c. 619, also covers the subject of credit for wartime service as applied to veteran retirements by inserting a new § 58A into G. L. c. 32.

In the light of the foregoing, I am constrained to answer your question in the negative.

Very truly yours,

**Edward J. McCormack, Jr., Attorney General.**

*By Fred W. Fisher,*

**Assistant Attorney General.**

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**The State Department of Public Works may participate in, and contribute to, the cost of a study of highway needs although a private agency is also participating.**

**MAY 24, 1961.**

**Mr. George C. Toumpouras, Associate Commissioner of Public Works.**

**Dear Sir:** In your letter of recent date you have requested an opinion in regard to the participation of the Department of Public Works in the cost of a study called the North Terminal Study.

Under G. L. c. 81, § 1, which describes the general duties of the Department of Public Works, the department may participate in that part of the survey which pertains to highways. Section 1 of said c. 81 states in part:

"The department of public works . . . shall compile statistics relative to the public ways of counties, cities and towns, and make such investigations relative thereto as it considers expedient. . . ."

In the opinion of this office, the fact that although a private agency is involved and benefits from the study, such benefit is merely incidental to the main purpose of the study, which is to benefit the general public.

Very truly yours,

**Edward J. McCormack, Jr., Attorney General,**

*By William D. Quigley,*

**Assistant Attorney General.**
The rules and regulations authorized by G. L. c. 25, § 12H, as to gas fittings, in view of G. L. c. 143, § 2A, apply to State-owned buildings other than the State House.

MAY 24, 1961.

Mr. Stanley W. Ellis, Chairman, Board Administering Gas Code.

DEAR SIR: — In your recent letter you request an opinion relative to the scope of the various sections of St. 1960, c. 737 concerning the rules and regulations therein referred to covering gas fittings in the Commonwealth. I assume that you have been designated by the chairman of your commission as the representative from your department on the board referred to in G. L. c. 25, § 12H. You inquire whether the provisions of law referred to in c. 737 apply to State-owned buildings.

Section 1 of C 737 amends G. L. c. 25, relating to the Department of Public Utilities, by adding after § 12G thereof, a § 12H which creates in the Department of Public Utilities a board consisting of the chairman of the commission, the Commissioner of Public Safety and Commissioner of Public Health or representatives of their departments designated by them, which shall make, and may alter, amend and repeal rules and regulations relative to gas fittings in buildings throughout the Commonwealth, which rules and regulations . . . are designed to prevent fire, explosion, injury and death. Section 12H also provides any person aggrieved by a ruling interpreting the rules and regulations made under the provisions of § 12H with a right of appeal to your board subject to the provisions of G. L. c. 30A.

Section 2 of c. 737 amends G. L. c. 143 concerning the inspection and regulation of buildings, by inserting after § 3L a § 3N (prohibiting persons engaging in gas fitting except under stated conditions, and providing a penalty for violation of any rule or regulation issued under § 12H of c. 25), and a § 3O requiring each city and town to provide for the appointment of an inspector of gas piping and gas appliances whose duties shall be the enforcement of the rules and regulations adopted by the board under § 12H.

Section 3 provides that the existing local officials in charge of inspecting gas appliances and piping shall continue and be designated as inspectors as provided in § 3O.

Section 4 provides that all by-laws and ordinances of cities and towns relating to gas fittings within buildings are hereby annulled.

"There is a well-settled presumption of law that such an exercise of the police power by the Legislature does not apply to property of the Commonwealth, unless the Legislature has clearly manifested an intent that it should do so."

Attorney General's Report, 1941, p. 118 (hot water tank requirements). "It is a general principle of law that statutes are not to be interpreted as imposing burdens on the sovereign, the Commonwealth, unless a clear legislative intent that they should do so is apparent," ibid. 1942, p. 88 (land takings by county commissioners). See also I Op. Atty. Gen. 290, 297 (local board of health cannot regulate plumbing and drainage facilities within State Reformatory); II ibid. 56 (Metropolitan Park Commission need not obtain local building permit); II ibid. 300 (Boston building commissioner has no jurisdiction over State House elevators); IV ibid. 537 (no local amusement license necessary for entertainment in armory); Attorney General's Report, 1932, p. 86 (no local plumbing and wiring licenses required for State-owned buildings); ibid. 1933, p. 38 (no license required for inmate of State prison colony assigned to operation of steam..."
shovel); *ibid.* 1933, p. 47 (no local amusement license necessary for entertainment in armory); *ibid.* 1933, p. 65 (no approval by county commissioners required for construction of a dam in a State forest); *ibid.* 1934, p. 75 (plumbing at Reformatory for Women not subject to local inspection); *ibid.* 1935, p. 38 (State-owned buildings not subject to general laws relating to the licensing of plumbers); *ibid.* 1939, p. 42 (national guard need not obtain local permit to maintain fires on State land used for military purposes).

Despite, however, the foregoing, it is my opinion that the legislation you have referred to, subject to its express provisions, applies to State-owned as well as municipal buildings. The fact that the General Court has expressly provided in § 12H of c. 25, as inserted by St. 1960, c. 737, § 1, that the rules and regulations referred to therein are designed for the purpose of preventing "... fire, explosion, injury and death ...", is an indication of such an intent. Obviously protection of the public from injury and death would seem to be equally important in public as well as private buildings.

Moreover, G. L. c. 143, relating to the inspection and regulation of buildings, is inextricably intertwined with the objects sought to be attained by c. 737. Indeed, § 2A of c. 143 specifically provides, in so many words, that the provisions of c. 143, which naturally includes the new §§ N and O, inserted by c. 737, shall apply to buildings and structures other than the State House owned or controlled by the Commonwealth or department, board or commission thereof, or by any of its political subdivisions, in the same manner and to the same extent as such provisions apply to privately owned or controlled buildings used or maintained for similar purposes.

Very truly yours,

Edward J. McCormack, Jr., Attorney General,

By Fred W. Fisher,

Assistant Attorney General.

The conduct of certain entertainments, on holidays on which the Sunday laws apply, requires the approval of the Commissioner of Public Safety as well as that of the local authorities.


Hon. J. Henry Goguen, Commissioner of Public Safety.

Dear Sir: — Your recent letter relates to the provisions of G. L. c. 136, § 37. In it you refer to the provisions of the third paragraph of § 37, which was inserted by St. 1960, c. 812, and pose the following question:

"Do the provisions of the third paragraph of c. 136, § 37, inserted by St. 1960, c. 812, require the approval of the Commissioner of Public Safety, of licenses granted by local licensing authorities, in accordance with §§ 4 and 4A of G. L. c. 136, for the three legal holidays named: May thirtieth, November eleventh and Christmas Day?"

Sections 4 and 4A of G. L. c. 136 provide, as you are aware, for the issuance of licenses for public entertainments on the Lord's day and the maintenance and operation of enterprises at amusement parks, beaches or resorts on the Lord's day. Without setting forth §§ 4 and 4A in full, they
provide for the issuances of licenses for entertainments and certain enterprises at amusement parks, beaches or resorts on the Lord’s day and, in addition, provide that such licenses shall not have effect until the proposed entertainments and enterprises shall have been approved in writing by the Commissioner of Public Safety.

The third paragraph of § 37 inserted by St. 1960, c. 812, § 3, to which you refer, reads as follows:

“Any entertainment, amusement or enterprise mentioned in sections four, four A and four B may be conducted or operated on any such legal holiday, provided, however, that the provisions for licensing and the hours of operation as contained in said sections shall apply on May thirtieth, November eleventh and Christmas Day.”

You will note from a reading of this paragraph that the entertainments, amusements or enterprises mentioned in §§ 4, 4A and 4B, may be conducted or operated on any legal holiday provided, however, that the provisions for licensing and the hours of operation as contained in said sections shall apply on May 30th, November 11th and Christmas Day.

Inasmuch as one of the important provisions for licenses requires the approval of the proposed entertainment or enterprise by the Commissioner of Public Safety, I answer your question in the affirmative.

You are doubtless familiar with the opinions of the Attorney General, one dated August 22, 1955, found in Attorney General’s Report, 1956, p. 32, and the second dated June 27, 1956. *ibid.* p. 94.


Very truly yours,

EDWARD J. MCCORMACK, JR., Attorney General,

By Fred W. Fisher,
Assistant Attorney General.

A contract of the Metropolitan District Commission for the construction of a public work is not terminated by the contractor’s acceptance of the final estimate; termination would occur only upon acceptance of the final payment.

JUNE 8, 1961.

Hon. Robert F. Murphy, Commissioner, Metropolitan District Commission.

Dear Sir: — You have requested advice as to whether the acceptance of the final estimate by a contractor who refuses to accept the reserve because a claim for further payment under the contract is pending terminates the contract under Article 26 of the contract.

From an examination of the question and Article 26 of the contract, we feel that the contract has not been terminated by the contractor’s acceptance of the final estimate. Under said Article 26, acceptance of final payment by the contractor would terminate the contract and extinguish any rights the contractor may have under said contract. According to the
facts supplied us, the contractor has accepted the final estimate but not the last payment. If acceptance of the final estimate terminated the contract, the contractor would have to reserve his rights in some way against the Commonwealth.

Basing our opinion on the foregoing, we feel that the contract would not be terminated by the contractor’s acceptance of the final estimate.

Very truly yours,

Edward J. McCormack, Jr., Attorney General,

By William D. Quigley,
Assistant Attorney General.

Military service during “grandfather” period for registration as professional engineer without examination does not extend the closing date for application.

June 8, 1961.

Mrs. Helen C. Sullivan, Director of Registration.

Dear Madam: — In a recent letter you state that on November 15, 1960, the Board of Registration received an application for registration as a professional engineer under St. 1958, c. 584, § 11, of a person who was on active duty with the United States Army on January 1, 1959, when § 11 expired, and the applicant was unaware of the enactment of the mandatory registration law.

You then pose the following question:

“Can the Board consider this application under St. 1958, c. 584, § 11?”

Section 11 of c. 584 of the Acts of 1958 affects G. L. c. 112, § 81, and provides in the first paragraph:

“At any time within one year after June first, nineteen hundred and fifty-eight, upon due application therefor and the payment of the registration fee . . . the board of registration of professional engineers and of land surveyors shall issue a certificate of registration, without oral or written examination, to any professional engineer . . . who shall submit evidence under oath satisfactory to said board that he is of good character, has been a resident of the commonwealth for at least one year immediately preceding the date of his application, and was practicing engineering . . . on June first, nineteen hundred and fifty-eight, and in the case of a professional engineer, has performed work of a character satisfactory to the board.”

This is recent legislation. The deadline is clear and unambiguous — “one year after June first, nineteen hundred and fifty-eight.”

Accordingly, it is my opinion that this application cannot properly be granted.

Very truly yours,

Edward J. McCormack, Jr., Attorney General,

By Fred W. Fisher,
Assistant Attorney General.
A change order within the scope of a contract for the construction of a State building may be approved by the Director of Building Construction under G. L. c. 7, § 30E.

June 8, 1961.

Mt. Hall Nichols, Director of Building Construction.

Dear Sir: — By your letter of May 19, 1961, you have requested an opinion as to whether a change order described in your letter of May 3, 1961, to a general contractor is in violation of any statute.

It has been contended that the decision in the case of Grande & Son, Inc. v. School Housing Committee of North Reading, 334 Mass. 252, is authority for the proposition that the proposed change order would violate G. L. c. 149, § 44A. The Grande case stands for the proposition that the awarding authority was required to reject a general bid which included a subcontractor’s bid for the application of acoustical tile in a manner contrary to the mode of application prescribed by the specifications because the general contractor’s bid was not for the complete work as specified. The Grande case is to be distinguished from the problem before us as it does not deal in any way with the validity of a change order subsequent to the valid award of the general contract.

On the facts indicated in your letter, the contract was validly awarded to the general contractor on February 26, 1960. The power to approve a change order at this time is found in G. L. c. 7, § 30E. It provides:

“A request for any change in the plans, specifications or contracts for any project may be initiated by . . . any contractor or subcontractor working on the project . . . .”

The statute then prescribes the procedure for submitting requests for change orders and provides for approval or disapproval by the Director of the Division of Building Construction.

In addition to the statutory power of the Director of Building Construction to approve such change orders, Article 16 of the contract reserves the right in the Director of Building Construction to make or approve changes in the plans, specifications and the contract at any time before, during or after the commencement of the project work.

If you find as a fact that the work called for by the change order is within the scope of the contract and necessary to properly complete the contract, then, in my opinion, you may accept and approve a change order.

Very truly yours,


By John J. Grigalus,
Assistant Attorney General.
The State Board for Vocational Education has authority to administer Federal grants for vocational training to relieve unemployment.

June 8, 1961.

Hon. Owen B. Kiernan, Commissioner of Education.

Dear Sir: — Your letter of recent date relates to Public Law 87–27, establishing a program to alleviate the conditions of substantial and persistent unemployment and underemployment in certain economically distressed areas.

In it you pose the following question:

"Does the State Board for Vocational Education have the authority, under State law, to administer funds to be made available under section 16 of Public Law 87–27, effective May 1, 1961?"

In your letter you state that § 16 of this act places the responsibility for providing training under this section with the State and local vocational agencies. It also provides that the United States Secretary of Health, Education and Welfare shall provide assistance, including financial assistance when necessary, to the appropriate State vocational agency (in Massachusetts, the State Board for Vocational Education).

You further state that it is expected that the operation of receiving these funds will be much the same as under the Smith-Hughes and George-Barden Acts, except that funds will be certified to States on the basis of projects submitted.

Supplementing your letter, we have received a letter from the Director of the Division of Vocational Education in your department, relative to this subject matter, in which he states as follows:

"Mr. Ward Beard, Assistant Commissioner of Vocational Education in the U. S. Office of Health, Education and Welfare, who is in charge of all the financial aspects of federal money for Vocational Education, informed me that the money which will come into the states under the provision of P. L. 87–27 will be considered to be in the same category as are all federal monies which now come into the states under the provisions of the Smith-Hughes and George-Barden Acts, except that no matching funds of state and local money will be required in order to expend this 87–27 money.

Since 1917, Massachusetts has been receiving federal funds for Vocational Education. These funds, once they have come into the State Treasury, have been expended by the State Board for Vocational Education as provided in the law. Through the years, we, in Vocational Education, have believed that Massachusetts legislation, as expressed in c. 15, § 6A, has allowed Massachusetts to participate in all Vocational Education programs for which federal money has been appropriated. We believe, and so does the Federal Office of Vocational Education, that this section wherein it is stated ‘acts in amendment thereof and in addition thereto’ relating to Vocational Education has been broad enough to allow Massachusetts to accept federal monies. Public Law 87–27, Section 16, has been declared by the Federal Office as being ‘in addition to’ the original federal law for Vocational Education. The money under this law will come into the state to be used for training
and re-training workers in the fields of agricultural and trade and industrial education."

General Laws, c. 15, § 6A, provides for the organization of the State Board for Vocational Education. Among other things, it provides that the board shall co-operate with the office of education, Federal Security Agency, or its successors,

"... in the administration of the act of congress approved February twenty-third, nineteen hundred and seventeen, and any acts in amendment thereof and in addition thereto, relating to vocational education in agriculture, distributive occupations, household arts and trades and industries, and secure for the commonwealth the benefits thereof and shall perform such other duties as may be imposed upon it by law. ..." (Emphasis added.)

The functions of the Federal Security Agency have been transferred to the Department of Health, Education and Welfare.

General Laws, c. 74, § 20, provides as follows:

"The state treasurer shall be custodian of funds allotted to the commonwealth from appropriations made under the acts of congress mentioned in section six A of chapter fifteen. The funds so allotted from appropriations under the act of congress mentioned in said section six A shall be expended, without specific appropriation, under the order or the approval of the state board for vocational education." (Emphasis added.)

Sections 21 and 22 of c. 74, provide for the use by the State Board for Vocational Education of the funds received under the said acts of Congress mentioned in § 6A of c. 15.

Reading the provisions of the sections I have referred to together, in the light of the uniform established practice over a long period of years of the Federal authorities in control of the expenditure of funds for the purposes referred to, I answer your question in the affirmative.

It is a well-established principle of statutory construction in this Commonwealth that established uniform departmental practices of public officials are persuasive and sometimes compelling reasons controlling statutory enactments. General Laws, c. 15, § 6A, dealing with the powers of the State Board for Vocational Education, contains the statement that it "shall co-operate ... in the administration of the act of congress approved February twenty-third, nineteen hundred and seventeen, and any acts in amendment thereof and in addition thereto, relating to vocational education in agriculture ... and secure for the commonwealth the benefits thereof and shall perform such other duties as may be imposed upon it by law." (Emphasis added.)

General Laws, c. 74, § 20, provides that the State Treasurer shall be the custodian of funds allotted to the Commonwealth from appropriations made under the acts of congress mentioned in section six A of chapter fifteen. The funds so allotted from appropriations under the act of congress mentioned in said section six A shall be expended, without specific appropriation, under the order or the approval of the state board for vocational education."
Sections 21 and 22 authorize the State Board for Vocational Education to use the funds received "under said acts of congress mentioned in section six A of chapter fifteen."

I construe the language of § 6A, in the light of the Federal practice you have referred to, as justifying, if indeed not compelling, the answer which I have already given you.

Very truly yours,

Edward J. McCormack, Jr., Attorney General,

By Fred W. Fisher,
Assistant Attorney General.

The State Treasurer must borrow the funds for the purchase of tax title notes under St. 1933, c. 49, as amended, and may borrow on notes, and purchase notes, payable within the maturities fixed in the 1957 amendment, which was carried by the two-thirds vote required in Article LXII of the Amendments to the Constitution; but may not borrow on, or purchase notes, maturing thereafter, since the later amendments, fixing later dates, were not enacted by the required vote.


Hon. John T. Driscoll, Treasurer and Receiver General.

Dear Sir: — You have requested an opinion as to your authority, under the provisions of St. 1933, c. 49, as amended by St. 1957, c. 209, and St. 1959, c. 387, to purchase a $300,000 tax title note of the city of Somerville, approved by the Emergency Finance Board under the act cited.

Section 2 of said St. 1933, c. 49, as amended, with the dates hereinafter referred to deleted, reads in part as follows:

"The treasurer of any city or town, if authorized by a two-thirds vote, as defined by section one of chapter forty-four of the General Laws, and with the approval of the mayor or the selectmen, may, on behalf of such city or town, petition the board to approve of its borrowing money from the commonwealth for ordinary maintenance expenses and revenue loans, and the board may, if in its judgment the financial affairs of such city or town warrant, grant its approval to the borrowing as aforesaid of specified sums not at any time exceeding, in the aggregate, the total amount represented by tax titles taken or purchased by such city or town and held by it; provided, that such borrowing is made at any time or times prior to . . . In case of such approval, the treasurer of such city or town shall, without further vote, issue notes, with interest at such rate as may be fixed by the treasurer with the approval of the board, in the amount approved by the board, for purposes of sale to the commonwealth only, and said notes, upon their tender to the state treasurer, shall forthwith be purchased by the commonwealth at the face value thereof. Such notes shall be payable in not more than one year, and may be renewed from time to time, if authorized by the board, but no renewal note shall be for a period of more than one year, and the maturity of any loan or renewal shall not be later than . . .
Such notes shall be general obligations of the city or town issuing the same, notwithstanding the foregoing provisions. Indebtedness incurred by a city or town under authority of this act shall be outside its limit of indebtedness as fixed by chapter forty-four of the General Laws. The excess, if any, of the amount of interest payments received by the commonwealth on account of notes issued by cities and towns hereunder over the cost to the commonwealth for interest on money borrowed under section five, expenses of the board, including compensation paid to its appointive members, and expenses of administration of the funds provided by sections three and five shall be distributed to such cities and towns . . . .” (Emphasis added.)

Section 3 of said c. 49, contains the following provisions:

"Until payment to the commonwealth of all principal and interest on account of any notes issued by a city or town hereunder and held by the commonwealth, all amounts received during any month by such city or town from the redemption or sale of land purchased or taken by it for non-payment of taxes, or from the assignment of any tax title held by it, shall, at the end of such month, be paid over to the state treasurer who shall receive and forthwith apply the same toward the payment of any note or notes issued hereunder by such city or town and then held by the commonwealth, and thereafter interest shall be payable only on the balance of such note or notes remaining unpaid.”

Section 4 of the chapter makes provision for assessments on the city or town in the event that it fails to make any payment of principal and interest when due.

Section 5 of said St. 1933, c. 49, with the date hereinafter referred to deleted, reads as follows:

"The state treasurer, with the approval of the governor and council, may borrow from time to time, on the credit of the commonwealth, such sums as may be necessary to provide funds for loans to municipalities as aforesaid, and may issue and renew notes of the commonwealth therefor, bearing interest payable at such times and at such rate as shall be fixed by the state treasurer, with the approval of the governor and council; provided, that the total indebtedness of the commonwealth under this section, outstanding at any one time, shall not exceed ten million dollars. Such notes shall be issued for such maximum term of years as the governor may recommend to the general court in accordance with section 3 of Article LXII of the Amendments to the Constitution of the Common-wealth, but such notes, whether original or renewal, shall be payable not later than . . . All notes issued under this section shall be signed by the state treasurer, approved by the governor and countersigned by the comptroller.” (Emphasis added.)

The powers of cities and towns to borrow from the Commonwealth on notes approved by the Emergency Finance Board under St. 1933, c. 49, § 2, were extended by St. 1959, c. 387, until July 1, 1961, the notes which are to be issued being required to be payable in not less than one year, and to mature not later than July 1, 1962.

Acts of 1933, c. 49, § 5, authorizing the State Treasurer to borrow on the credit of the Commonwealth such sums as may be necessary to provide funds for loans to municipalities under the act, and to issue notes therefor for such terms of years as the Governor may recommend to the General
Court, was amended by St. 1959, c. 387, to provide that notes should be payable not later than June 30, 1962. As most recently amended prior to the enactment of said c. 387, said St. 1933, c. 49, § 5, had been amended by St. 1957, c. 209, to provide that the notes or renewals thereof, issued by the State Treasurer, under the section, should mature not later than June 30, 1962.

You state that the 1957 amendment to St. 1933, c. 49, § 5, was enacted by a vote taken by the yeas and nays of two-thirds of each house of the General Court as required by Article LXII of the Amendments to the Constitution of the Commonwealth, but that the amendment to said St. 1933, c. 49, § 5, by St. 1959, c. 387, was not enacted by such a vote. Inasmuch as the provisions of said § 5 contemplate that the notes to be issued thereunder may be issued for terms of more than one year, the provision of § 2 of Article LXII of the Amendments to the Constitution permitting borrowings without a two-thirds vote taken by the yeas and nays, in anticipation of receipts from taxes or other sources, “such loan to be repaid out of the revenue in which it is created,” would not be applicable to such notes.

It also appears that St. 1957, c. 770, provided that the notes issued by the State Treasurer under St. 1933, c. 49, § 5, as amended by St. 1957, c. 209, could be issued, and renewed one or more times, for terms not exceeding one year, the final maturities to be not later than June 30, 1962, but that no act was passed in 1959, as to the terms of the notes authorized to be issued by the State Treasurer by St. 1933, c. 49, § 5, as amended by St. 1959, c. 387.

Section 1 of St. 1957, c. 770, reads as follows:

“Notwithstanding any provision of law to the contrary, the notes which the state treasurer is authorized to issue under section five of chapter forty-nine of the acts of nineteen hundred and thirty-three, as most recently amended by section two of chapter two hundred and nine of the acts of the current year, further extending the opportunity to cities and towns to borrow under the act creating the emergency finance board, shall be issued and may be renewed one or more times for terms not exceeding one year, and the final maturities of such notes, whether original or renewal, shall be not later than June thirtieth, nineteen hundred and sixty-two, as recommended by the governor in a message to the general court, dated September twenty-first, nineteen hundred and fifty-seven, in pursuance of section 3 of Article LXII of the amendments to the constitution of the commonwealth.”

You inform me that no notes issued under St. 1933, c. 49, § 5, as amended, are presently outstanding.

You have asked the following questions:

“1. From the above facts, can I as Treasurer purchase the tax title note of the City of Somerville for $300,000 and advance the city said sum from the Treasury of the Commonwealth?

2. Is it necessary for me as Treasurer to follow c. 387, § 2, as amended, to borrow on notes of the Commonwealth from purchasers of our notes, such as banks or other such purchasers?”

I advise you in answer to your questions that the provisions of St. 1933, c. 49, must be read as a whole, and so read, it is my opinion that you are
restricted under the act in purchasing city and town notes to the use of funds which you have in turn borrowed on the credit of the Commonwealth.

It is also my opinion that the provisions of St. 1959, c. 387, are divisible and that the amendment to St. 1933, c. 49, § 2, enacted by § 1 of the 1959 act, which amendment did not require a two-thirds vote by the yeas and nays, is effective even though the amendment to St. 1933, c. 49, § 5, enacted by § 2 of the 1959 act required a two-thirds vote by the yeas and nays. Consequently, as amended by the 1959 act, St. 1949, c. 33, § 2, authorizes cities and towns to borrow at any time prior to July 1, 1961, and to issue notes therefor maturing not later than July 1, 1962.

Under St. 1933, c. 49, § 5, as amended by St. 1957, c. 209, § 2, and the provisions of St. 1957, c. 770, § 1, the State Treasurer is authorized to issue notes under said St. 1933, c. 49, § 5, for terms not exceeding one year, the final maturities to be not later than June 30, 1962.

It is my opinion, therefore, although the question is a difficult one and there are strong reasons for a contrary conclusion, that despite the failure of the Legislature to enact the 1959 amendment to St. 1933, c. 49, § 5, by a two-thirds vote by the yeas and nays, and the failure to provide for legislation in that year fixing the terms of the notes authorized, a city or town has the authority, at any time prior to July 1, 1961, to obtain the approval of the Emergency Finance Board to its borrowing, and to borrow, from the Commonwealth, on notes payable in not more than one year and finally maturing not later than June 30, 1962, and that the State Treasurer to obtain funds to make the loan to the city or town may issue notes under St. 1957, c. 770, § 1, for terms not exceeding one year, the final maturities to be not later than June 30, 1962.

Very truly yours,

Edward J. McCormack, Jr., Attorney General,

By James J. Kelleher,
Assistant Attorney General.

The manufacture, etc., of a food product made to resemble, and to be marketed as a substitute for, a food for which a standard has been established by law, is prohibited by G. L. c. 94, § 187.

June 27, 1961.

Alfred L. Frechette, M.D., Commissioner of Public Health.

Dear Sir: — You have requested my opinion as to whether a food product made to resemble, and to be marketed as a substitute for, cream, which product does not satisfy the requirements set forth in G. L. c. 94, § 12, for cream, may be manufactured and/or sold in Massachusetts.

General Laws, c. 94, § 187, states one of the circumstances in which food shall be deemed to be misbranded, as follows:

"First, if it is in imitation or semblance of any other food; provided, that this paragraph shall not apply to an imitation of a food for which a standard of quality or identity has been adopted under the provisions of section one hundred and ninety-two, nor to an imitation of any other food for which no standard has been established by law or regulation, if its label bears in type of uniform size and prominence, the word 'imitation',
and, immediately thereafter the name of the food imitated; and, provided further, that this paragraph shall not be construed to permit the imitation of any food for which a standard has been established by law, other than as specifically provided herein.” (Emphasis added.)

General Laws, c. 94, § 192, referred to in the portion of § 187, quoted above, provides, in part, as follows:

“The department of public health . . . except as to standards fixed by law, may adopt standards, tolerances and definitions of purity or quality or identity. Such standards, tolerances and definitions shall conform to the standards, tolerances and definitions, if any, of purity or quality or identity adopted or that may hereafter be adopted for the enforcement of the Federal Food, Drug and Cosmetic Act, approved June twenty-fifth, nineteen hundred and thirty-eight (Title 21, USC 301 et seq., 52 Stat. 1040 et seq.), or now or hereafter adopted for the enforcement of federal law.” (Emphasis added.)

General Laws, c. 94, § 190, penalizes one who manufactures an article of food which is misbranded within the meaning of § 187; and § 191 penalizes one who delivers or offers to deliver a misbranded article of food.

The closing words of the paragraph of c. 94, § 187, quoted above, specifically provide that it shall not be construed to permit the imitation of any food for which a standard has been fixed by law, other than as provided therein. The other provisions of the paragraph refer only to the conditions under which imitations of foods for which standards have been set under G. L. c. 94, § 192, or for which no standard has been established by law or regulation, may be marketed. As stated above, the standard for cream was established by statute, G. L. c. 94, § 12, and not by the Department of Public Health acting under the provisions of G. L. c. 94, § 192.

In the case of 62 Cases of Jam v. United States, 340 U. S. 593, Justice Frankfurter speaking for the court, stated, at page 601:

“If Congress wishes to say that nothing shall be marketed in likeness to a food as defined by the Administrator, though it is accurately labeled, entirely wholesome, and perhaps more within the reach of the meager purse, our decisions indicate that Congress may well do so.” (Emphasis added.)

Upon a consideration of the various statutory provisions above referred to, it is my opinion that our statutes prohibit the manufacture and marketing of a food product in the semblance or likeness of, and intended as a substitute for, a food, such as cream, for which a standard has been established by statute, and that such a prohibition is, as stated by Judge Frankfurter, a valid exercise of legislative power.

Very truly yours,

Edward J. McCormack, Jr., Attorney General,

By James J. Kelleher,

Assistant Attorney General.
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