



The Commonwealth of Massachusetts

REPORT

OF THE

Mass ATTORNEY GENERAL *in office*

FOR THE

Year Ending June 30, 1969



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The Commonwealth of Massachusetts

Boston, December 3, 1969

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, 1969.

Respectfully submitted,
Robert H. Quinn
Attorney General

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL

Attorney General
ELLIOT L. RICHARDSON
(resigned January 23, 1969)

Robert H. Quinn
(elected by Legislature January 23, 1969)

First Assistant Attorney General
James J. Kelleher⁹
Wilmot R. Hastings²⁻¹³

Assistant Attorneys General

Ruth I. Abrams⁶
Christopher J. Armstrong¹²
Roger L. Aube⁴
Richard E. Bachman
Louis S. Barr³⁻¹⁶
Shirley D. Bayle¹³
Aileen H. Belford
Daniel T. Brosnahan⁸
George D. Brown¹²
Oscar S. Burrows
Eugene R. Capuano
Mark L. Cohen
Donald L. Conn¹²
Russell M. Coombs¹³
Barry F. Corn
Thomas J. Crowley⁵
Albert F. Cullen Jr.⁷
John W. Delaney³⁻¹²
Alan J. Dimond¹⁷
Carmen L. Durso
John M. Finn³⁻¹⁶
Samuel W. Gaffer
David B. Gittelsohn⁷
Howard W. Glaser¹²
Paul M. Gollub¹⁰
Frederic E. Greenman¹³
Edward W. Hanley III³
David C. Hawkins¹³
Henry S. Healy¹³
Robert L. Hermann

George V. Higgins³
Harold J. Keohane⁶
James P. Kiernan⁸
Donald Koleman
James B. Krasnoo¹¹
Carter Lee
Richard L. Levine³⁻¹⁵
Bernard Manning³
Walter H. Mayo III
Bruce G. McNeill³
Robert L. Meade¹⁶
Howard M. Miller¹⁷
David G. Nagle Jr.⁷
Lawrence H. Norris⁸
H. Peter Norstrand¹³
Henry F. O'Connell Jr.⁸
James J. O'Leary³⁻¹²
Paul F.X. Powers
Glendora M. Putnam
Theodore Regnante Sr.
Allan G. Rodgers³⁻¹³
Charles H. Rogovin¹⁴
Thomas A. Sheehan⁷
George W. Spartichino⁷
George R. Sprague¹³
George A. Stella³
Herbert F. Travers Jr.¹⁶
Elizabeth G. Verville
Henry G. Weaver Jr.¹²

Assistant Attorney General; Director, Division of Public Charities

James J. Kelleher

Assistant Attorneys General Assigned to Department of Public Works

Burton Berg
Robert W. Coughlin⁷
Coleman G. Coyne
Willie J. Davis
Richard T. Dolan⁷
Robert H. Gordon
Edward D. Hicks
Daniel J. Leonard
Charles W. Patterson

Alfred R. Podolski
Harold Putnam
Rudolph A. Sacco¹⁶
Edwin M. Satter¹⁶
Richard L. Seegel
John E. Sheehy
F. Dale Vincent Jr.
John W. Wright

Assistant Attorneys General Assigned to Metropolitan District Commission

Robert C. Gerrard¹⁻¹¹
Peter R. Leone¹¹

John M. Rose
Richard A. Savrann

*Assistant Attorneys General Assigned to the
Division of Employment Security*

Joseph S. Ayoub

Hartley C. Cutter

Assistant Attorneys General Assigned to Veterans' Division

John F. Houton⁴

Richard E. Mastrangelo¹⁷

Chief Clerk

Russell F. Landrigan

Assistant Chief Clerk

Edward J. White

¹Appointed July, 1968

²Appointed August, 1968

³Appointed September, 1968

⁴Appointed February, 1969

⁵Appointed March, 1969

⁶Appointed April, 1969

⁷Appointed May, 1969

⁸Appointed June, 1969

⁹Terminated July, 1968

¹⁰Terminated August, 1968

¹¹Terminated December, 1968

¹²Terminated January, 1969

¹³Terminated March, 1969

¹⁴Terminated March, 1969

¹⁵Terminated April, 1969

¹⁶Terminated May, 1969

¹⁷Terminated June, 1969

STATEMENT OF APPROPRIATIONS AND EXPENDITURES

For The Period
July 1, 1968 – June 30, 1969

Appropriations

0801-02	Administration	\$1,487,033.00
0801-05	Recovery of Certain Unclaimed Court Deposits	24,082.19
0801-10	Certain Legal Services	21,472.00
0802-02	Settlement of Claims	<u>108,000.00</u>
Total		\$1,640,587.19

Expenditures

0801-02	Administration	\$1,311,106.48
0801-05	Recovery of Certain Unclaimed Court Deposits	3,368.81
0801-10	Certain Legal Services	20,448.00
0802-02	Settlement of Claims	<u>108,000.00</u>
Total		\$1,442,923.29

Income

0801-40-01-40	Fees – Filing Reports – Charitable Organizations	\$14,058.00
0801-40-02-40	Fees – Registration – Charitable Organizations . .	2,696.00
0801-40-03-40	Fees – Professional Fund Raising Council or Solicitor	90.00
0801-69-99-40	Miscellaneous	<u>74.52</u>
Total		\$16,918.52

Financial Statement Verified (under requirements of C. 7, S 19 G.L.) May 21, 1970.

By Joseph T. O'Shea
For the Comptroller

Approved for publishing.

M. Joseph Stacey,
Comptroller

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL
Boston, December 1, 1969

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, 1969, totaling 20,063 are tabulated as follows:

Extradition and interstate rendition	.114
Land Court Petitions	.169
Land Damage cases arising from the taking of land:	
Department of Public Works	.1,481
Metropolitan District Commission	.101
Civil Defense	.2
Department of Mental Health	.20
Department of Natural Resources	.16
Department of Public Safety	.11
Department of Public Utilities	.14
Government Center Commission	.2
Massachusetts Maritime Academy	.1
Salem Teachers College	.10
Southeastern Massachusetts Technological Institute	.3
State Colleges	.1
University of Massachusetts	.13
Miscellaneous cases, including suits for the collection of money due the Commonwealth	.6,139
Estates involving application of funds given to public charities	.2,953
Settlement cases for support of persons in State institutions	.598
Small claims against the Commonwealth	.186
Workmen's compensation cases, first reports	.7,347
Cases in behalf of Employment Security	.689
Cases in behalf of Veterans' Division	.760

Administrative Division

The staff of the Administrative Division participated fully in the research and drafting of all legal opinions which numbered thirty-two for the fiscal year. In addition, seventeen formal conflict of interest opinions were issued. Among the formal opinions of more than routine interest were those on the validity of a question on the placement registration form of the Department of Education inquiring about membership in the Communist party and other organizations; the responsibilities of the Alcoholic Beverage Control Commission in approving minimum prices when the agency lacked adequate staff to perform that function; the ABC's authority to defer full implementation of the new credit

law; the ABC's authority to set maximum prices; the effect of the resignation of the Director of the Division of Youth Services; the scope of the collective bargaining statute as it applies to the Metropolitan District Commission; and the applicability of the civil service law to certain positions in the Department of Community Affairs.

In addition to the formal opinions rendered, the Division was engaged throughout the year in rendering informal legal opinions, both written and oral, to all of the agencies of the Commonwealth and to various officers thereof. These informal opinions number in the hundreds and constitute a very important part of the work of this Division. Often it is possible to avert problems of substantial magnitude by means of advance legal advice. Members of the Administrative Division are encouraged to counsel freely with the various agencies of the Commonwealth to which they are assigned.

With respect to the procedure adopted for issuing formal opinions, I wish to advise that once an opinion request is assigned to an Assistant Attorney General, that assistant is responsible for developing a complete set of facts on which to base the opinion. I decline, as a matter of policy, to honor requests unless they are accompanied by sufficient facts.

The other major area of work for the staff of the Division involves the prosecution and defense of a broad range of civil actions in which the Commonwealth or an officer or agency thereof is a party. The Division represents all of the Boards of Registration, the Civil Service Commission, the Director of the Division of Civil Service, and all other agencies of the Executive Department of the Commonwealth with the exception of Commission Against Discrimination, the Division of Employment Security, the Industrial Accidents Division, the Labor Relations Commission, and the Department of Public Welfare. Many problems relating to the Departments of Mental Health and Public Health are handled by the Division of Health, Education and Welfare, but opinion requests from those Departments come directly to this Division. All of the exceptions noted above are represented by other Divisions within the Department of the Attorney General with the exception of the Labor Relations Commission. That Commission is permitted by statute to appear in the Courts through its own counsel.

The litigation in which the Division is involved is principally in the state courts, with a large number of cases argued before the Full Bench of the Supreme Judicial Court. Important cases argued and decided during the year were the cases involving a DPU order exempting Boston Edison Co. from zoning requirements as to overhead transmission lines (order of DPU affirmed); the right of a woman in the uniformed branch of the Massachusetts State Police to be promoted (decided adversely to the Commissioner of Public Safety); several civil service cases, involving matters before both the Commission and the Director; the revocation of a doctor's registration because he performed an illegal abortion; the effect of the insurance "rate freeze" provisions of Chapter 643 of the Acts of 1968; and the entitlement of a former employee of the Lowell Housing Authority to a pension based on his total annual salary, a portion of which was derived from Federal funds (decided adversely to the Commissioner of Community Affairs).

Members of the Division appeared on many occasions in the Single Justice Sitting of the Supreme Judicial Court on interlocutory matters and on equity suits brought directly in that Court. The Single Justice has jurisdiction over appeals from orders of the Department of Public Utilities, and such cases are usually reserved and reported by the Single Justice to the Full Bench.

The Division's activities in the Superior Court involved all aspects of equity jurisdiction, petitions for writs of mandamus certiorari, petitions to review administrative agency orders, and bills for declaratory and injunctive relief. Hardly a day passed when one or more of the staff of the Division was not in the Equity Motion Session of that Court.

Litigation in the District Courts was confined to petitions to review decisions of the Civil Service Commission. Those cases are quite routine, inasmuch as they involve only a review of the certified record from the Civil Service Commission, a brief oral argument, and the submission of memoranda of law. During the fiscal year, not one case from the Commission heard in the District Courts was lost.

In the Federal Courts, the Division actively participated in the reorganization proceedings of the New Haven Railroad. That litigation was before both the United States District Courts for the District of Connecticut and the Southern District of New York. On December 31, 1968, the inclusion of the New Haven Railroad in the merged Pennsylvania-New York Central system was completed, after an injunction sought in the New York court was denied. The litigation still continues over the question of the price to be paid for the assets of the New Haven.

In the case of *Lyons v. Davoren*, we prevailed in both the District Court and the Court of Appeals, and the Supreme Court of the United States denied certiorari. That case involved the constitutionality of the Massachusetts statute governing signature requirements for independent candidates for Congress. In *Zuber v. Allen*, a case involving the validity of the Secretary of Agriculture's milk marketing order for the Massachusetts-Rhode Island area, we filed a brief amicus curiae in support of petitions for writs of certiorari, and certiorari was granted.

Members of the Division serve in positions other than as legal advisers to state agencies. They are represented on the Tri-State Transportation Committee (Massachusetts, Connecticut and Rhode Island), the Northeastern Regional Transportation Committee, the Attorney General's legislative committee, and the Commission to Investigate the Medical Examiners' System. In addition, it is to be noted that the Division is constantly engaged in counselling various municipal officials on a wide variety of problems, incident to the Attorney General's responsibility with respect to town by-laws.

During this transitional year, the members of the Division performed their work expeditiously and in a highly professional manner. The transition in staff was handled smoothly, and very few problems, other than a temporary backlog of opinion requests, were encountered.

Citizen's Aid Bureau

The Citizen's Aid Bureau functions as an information center for people across the Commonwealth, dealing with individual problems in an effort to solve them directly or to direct them to the proper agency. These complaints or requests range from people having problems with their landlords to asking for food baskets at Christmas. In addition, many people are under the misapprehension that the Attorney General or one of his assistants should serve as their private attorney. The Bureau explains to them that the Attorney General is prohibited from representing private individuals and refers them to their own attorney, the referral service of the Bar Association or to their local legal aid society. Frequently, people request official opinions from the Attorney General, which he is allowed to give only to state agencies. Whenever possible, they are furnished with copies of the law or sent copies of opinions already rendered on the subject matter involved.

The Citizens' Aid Bureau is not a referral agency by any means — all too often people are shuffled through the red tape of state government and encounter great confusion in finding a solution to their problems. All legitimate requests are treated individually with every attempt made to assist the person and also to make him familiar with his rights. Many times an individual's problem will require weeks and even months of work before it is resolved. In some remote cases, it may even require remedial legislation.

Since the inception of the Citizens' Aid Bureau in 1967, the Bureau has developed an excellent working rapport with almost all agencies in state government. This has enabled it to handle many of the inquiries and requests in the most expeditious manner possible. The Bureau has been in contact with local and state agencies only when they have failed to provide public services required by law or when a possible change in procedure appears necessary.

One of the most useful services of the Citizens' Aid Bureau is a complete listing of all legal and social services available to the citizens of the Commonwealth. I have endeavored to work closely with these agencies in the hope that through mutual cooperation we will be better equipped to serve the needs of the people.

Requests for information on Massachusetts government, the General Laws, businesses operating in the Commonwealth, and out-of-state firms, are also handled by this Bureau. Students, in particular, find this service most useful.

A branch office of the Citizens' Aid Bureau has been established in Springfield with the hopes that other branch offices can also be opened in various parts of the Commonwealth. The branch office answers all questions immediately whenever possible. If research is necessary, the problem is forwarded to the main office for action.

In addition, a 24 hour message center has been installed enabling citizens to call in for help at anytime. Calls are returned as soon as possible.

Civil Rights

The Division of Civil Rights and Liberties ensures that state officials, as they administer laws of the Commonwealth, do so in such a manner as will not interfere with the civil rights and civil liberties of the citizen. To this end the Division has worked with many departments, boards and commissions upon complaints of citizens who felt their civil rights or civil liberties to have been violated.

One's major responsibility of the Division is to provide legal services for the Massachusetts Commission Against Discrimination. It provides legal advice and counsel and handles all litigation for that Commission. During the past fiscal year, members of this Division made 162 appearances in the Courts of the Commonwealth on behalf of that agency. Also, it provided counsel for the Commissioners at 32 hearings.

One of the most important cases before the Courts was the *Local Finance Co. of Rockland v. Massachusetts Commission Against Discrimination* which went to the Supreme Judicial Court. This was a case on complaint brought by the Massachusetts Commission Against Discrimination against the company alleging violation of the public accommodations statute on account of using a color coding system. The issues before the Supreme Judicial were 1) whether a finance company was a place of public accommodation and 2) whether the use of a coding system which designated the race or color of an applicant was discriminatory. The respondent appealed to the Superior Court which reported the case to the Supreme Judicial Court. It was a case of first impression. The Supreme Judicial Court found that a finance company was a place of public accommodation within the meaning of the public accommodations statute and that the color coding system was discriminatory.

Another case currently on appeal by the Massachusetts Commission Against Discrimination to the Supreme Judicial Court is *Massachusetts Commission Against Discrimination v. Franzaroli*. This case is one in which the Superior Court on a petition for enforcement of an order by the Massachusetts Commission Against Discrimination in a housing case after public hearing, deleted the paragraphs of the order relating to damages. The Massachusetts Commission Against Discrimination will contend that because the statute contains a review proceeding for damages in the district court, the Superior Court is precluded from deleting such order after the statute of limitations for appeal has run. A 1966 amendment to the statute provided for damages in housing cases and proceedings for review. The case of *Vitti v. Massachusetts Commission Against Discrimination* in the Newton District Court was the first case involving review of an award of damages in a housing case. Although the Court altered the award, it sustained the Commission's right to award damages for mental suffering as well as actual damages.

The case of *Massachusetts Commission Against Discrimination v. Keating and Brady* involved a reopened hearing on a housing complaint at which the respondent real estate broker and respondent contractor under subpoena refused to testify upon interrogation by the Commission. The respondents invoked the constitutional provision against incrimination, contended that the Commission had no authority to reopen the hearing and asserted that their testimony might

subject them to a penalty or forfeiture in violation of the Constitution. The Massachusetts Commission Against Discrimination filed a petition to compel testimony and contended that because c. 151B contained a witness immunity statute, there was no privilege against self-incrimination and that a cease and desist order was not a penalty of forfeiture within the meaning of the statute. The Court ordered respondents to appear before the Commission and to testify, sustaining the Commission's view.

This Division has argued and has pending several other cases involving enforcement of subpoenae and review of orders of discrimination in housing and employment. One of the pending employment cases is a review of an order against the Department of Mental Health. This is the first case in which an order of a department of the Commonwealth has come under review.

This Division assisted the Attorney General in developing a policy to assist law enforcement officials in enforcing our obscenity laws in compliance with U.S. Supreme Court decisions. Because of the high regard for the principles of the First Amendment to the U.S. Constitution, the Department has set forth a uniform policy throughout the state which is designed to protect the citizen from obscene material while at the same time supporting the free exchange of ideas.

During the past year, the Division drafted legislation to make unlawful racial restrictive covenants in real estate transactions. Such legislation was necessary because although *Shelley v. Kraemer* in 1946 ruled such covenants unenforceable, it did not rule them unlawful. Many citizens of the Commonwealth had raised objections to the Massachusetts Commission Against Discrimination which had no jurisdiction in this area because such covenants were being conveyed in current deeds. Legislation to this effect was enacted and signed into law. In addition the Division drafted and supported several bills designed to increase the powers of the Massachusetts Commission Against Discrimination and to improve the administration of that agency.

This Division is called upon to deal with numerous inquiries and complaints from the citizens at large. Much of the time and resources of this Division is given over to investigation and resolution of these matters. They often involve complaints concerning activities by officials of local as well as state government. In all cases, the members of the Division try to eliminate the grievances of these citizens and, also, to interpret to them their roles in being vigilant and alert to those practices which interfere with their rights and privileges.

Consumer Protection

The rapid growth of this division, noted in prior reports, continued apace as the public became increasingly aware of the prevalence of consumer fraud and the redress available to them. At the same time the business community came to the realization that their interests were best served by cooperation with the division and, as a result, voluntary solutions to consumer problems were much more common than court cases.

Antitrust litigation continued to play a prominent role in the work of the division with the settlement of a case against several library book publishers for

\$200,000 as the highpoint.

In the antibiotic drug case the defendants set up a \$100 million national settlement fund. At this time, it would appear that Massachusetts' share should exceed \$1 million. In addition, this office represents Massachusetts consumers as a class in the same action. To notify people of their right to file claims in the latter, newspaper advertisements, press releases, television interviews and radio tapes were utilized which told the consumer how to proceed. At one point telephone inquiries became so frequent that it was necessary to assign additional personnel to answer them.

During the same period, tentative agreements were reached in the milk and copper piping antitrust cases, with final settlement likely in the near future.

A number of criminal cases were successfully prosecuted by the division for violations of credit laws and, in the home improvement field, larceny by false pretense. In one case, a swimming pool company used contracts which violated the Retail Installment Sales Act in several respects, notably in the failure to disclose the percentage rate of interest and requiring the payment of \$60 more in interest than the amount allowed by statute. The Worcester District Court assessed a \$6,000 fine against the company for these activities.

Curtis Publishing Company, which published the Saturday Evening Post, discontinued publication of the magazine and told subscribers only that they could receive another magazine. When the Federal Trade Commission declined to act, suit was brought by the division under Chapter 93A to require Curtis to disclose to their 62,000 Massachusetts subscribers that they had the right to a refund. This suit, the first in the nation, was followed by other states taking similar action. Subsequently, the Federal Trade Commission reversed itself and has now issued a complaint against Curtis. Both matters are still pending.

An intensive investigation of a number of automobile dealers throughout the state revealed that some were engaging in such deceptive practices as turning back odometers, and selling rental vehicles without notifying the consumer. These practices were terminated by obtaining voluntary Assurances of Discontinuance. The same procedure was used to stop bait and switch advertising and model home schemes in the home improvement industry.

A most important part of the work of this division is its handling of consumer complaints. During the fiscal year 2,473 written complaints were received in addition to an incalculable number of telephone inquiries. As a result of division action, over \$205,000 was saved for consumers. This amount represents deposits returned and contracts canceled. It does not include the value of obtaining repairs, warranty service or contract fulfillment which the consumer had not been able to obtain prior to our intervention.

Because we believe that the great majority of businessmen are honest and want to comply with the law, a special effort has been made in those areas where complaints are numerous to educate the entire industry. Accordingly meetings were set up with the automobile transmission repair industry, the General Home Improvement Contractors Association of Massachusetts, the Swimming Pool Association of New England, and the Retail Grocers Association, among others,

for the purpose of seeking their cooperation in curbing consumer frauds and to notify them what our response would be to unchecked deceptive practices. At the same time, advertising guidelines for the automobile industry were prepared and distributed.

Some significant legislation was proposed and supported during this period. A bill to allow credit counseling by non-profit charitable corporations was passed. Two important amendments to Chapter 93A are pending and favorable action is anticipated. One would allow the Attorney General to obtain redress for individual consumers, while the other provides the consumer with a private remedy, including a minimum recovery of \$25.00, attorney's fees, a class action provision, and, in certain cases, treble damages. Measures which would declare unordered merchandise gifts, and provide a minimum of nine days in which a revolving credit account could be paid without the imposition of finance charges also are pending.

Consumer education continued as a major preoccupation. A series of three seminars was presented to community workers at the Roxbury Multi-Service Center to provide them with knowledge of consumer problems, frauds and the relevant laws so that they might better serve their community. Staff members spoke to Lions Clubs, Rotary, Kiwanis, Retail Trade Boards, Chambers of Commerce, Jaycees, Area Planning Councils, Community Action Programs, Church groups, High Schools, Granges, Women's Clubs, newspaper editors, and appeared on radio and television talk shows in order to more fully inform the public about the redress available to them when they have been subjected to consumer frauds.

Contract Division

The work of the Contract Division includes the preparation and trial of highway and building construction cases before auditors, Justices of the Superior Court, and the Supreme Judicial Court. Members of the Division appear on motions and depositions incident to these cases, in addition to prosecuting appeals in public contract matters. All public contracts, bonds and leases are reviewed by the Division for correctness of legal form. Conferences with officials from more than 80 state agencies are frequently scheduled to deal with questions relative to state contracts. The Division is frequently called upon for legal advice by the various Departments of the Commonwealth regarding public contracts, bonds and leases.

One of the most significant decisions resulting from work of the Division during the year was that in *State Line Contractors, Inc. vs. Commonwealth of Massachusetts*, wherein the Supreme Judicial Court reduced a Superior Court award in favor of a highway contractor by \$175,166.09 upon appeal by the Attorney General. The case arose out of a 1962 Department of Public Works Contract for the construction of a section of Interstate Route 495 including two bridges, one over Newton Road and another over Amesbury Road in the City of Haverhill. The Contractor was State Line Construction Inc., which recovered \$225,974.45 in Superior Court.

In its opinion the Supreme Judicial Court ruled that there were errors of law in all but two claims amounting to \$30,278 in the Superior Court award. An additional amount of \$20,030.36 had been tendered by the Commonwealth in Court on three other claims in the form of an "offer of judgment" and was not challenged by the Commonwealth.

The Supreme Judicial Court also ruled that interest should have been computed from January 21, 1966, the date when the petition was filed and not an earlier date, in view of the provisions of the General Laws dealing with interest on state contracts.

The Supreme Judicial Court also returned a favorable decision in the case of *Marinucci Bros. & Co., Inc. v. Commonwealth*, 354 Mass. 141, wherein Marinucci Bros. & Co. sought to recover what they said was a \$19,298.30 overpayment in restitution that it made in a case wherein it was charged with larceny from the Commonwealth's D.P.W.

The Division represented the Metropolitan District Commission in the complex litigation involving the construction of the M.D.C. Deer Island Sewerage Plant. The matter was finally resolved on August 9, 1968 by a "Final Decree" entered by Linscott, J. of the Superior Court, terminating two and one half months of trial.

In addition to its involvement in litigation, the Division has attended conferences with various department heads and officials, investigated factual backgrounds in contract disputes, and researched statute and case law, and proposed statutory changes.

The Division was also responsible for the review and approval of the forms of all documents prepared in connection with note issues and notices of sale of bonds under financial assistance housing programs for the elderly and veterans of low income.

Criminal Division

The regular work of the Criminal Division continued during the last fiscal year without let up. Most of this work can be divided into two major categories: the investigation and prosecution of offenses affecting the integrity of the state service, and representation of the Commonwealth in proceedings brought by prisoners and others held in state institutions.

The Supreme Judicial Court this year affirmed the convictions obtained in the case of *Commonwealth v. Schnackenberg*. In *Commonwealth v. Ryan et al* convictions for receiving stolen goods, to wit, data processing cards from the Division of Employment Security, were upheld.

In other cases members of the Criminal Division obtained convictions in the Superior Court. A cigarette tax fraud case was successfully prosecuted against two individuals and is being appealed. Convictions were obtained in two counties for gaming violations. In one county, a conviction for perjury was obtained and is being appealed.

The second so-called Small Loans Case was successfully concluded in June, 1968, and is being appealed.

In the second category, members of the Division have been called upon to handle a large volume of extraordinary writs, primarily writs of error and petitions for habeas corpus, in both the state and federal courts. The number of such writs brought on behalf of prisoners is increasing, and can be expected to increase further as the United State Supreme Court hands down more decisions extending the constitutional rights of criminal defendants. The Division also represents the Governor in matters involving the rendition and extradition of fugitives.

Members of the public and public officials frequently come to the Division with complaints and information about suspected criminal activity. Complaints are carefully processed, and many of them are forwarded to the district attorneys and to state and local police for appropriate action. Complaints about matters within the primary jurisdiction of this Department, such as alleged misfeasance by state officials, are investigated by investigators assigned to the Department, and action is thereafter taken if warranted. The Division is in frequent touch with other law enforcement officials throughout the Commonwealth, with whom it endeavors at all times to cooperate.

During this administration, the Criminal Division has started prosecuting environmental pollution cases for the Department of Natural Resources and the Division of Water Pollution Control. To date, twenty-four complaints have been brought, with eight convictions and twelve cases awaiting trial. This area of prosecution will continue to grow in the future.

Within the Criminal Division is the Organized Crime Section, a specialized unit involved in the collection of Organized Crime intelligence information, the investigation of criminal offenses committed by members of the organized crime family, and the prosecution of those cases. During the past year, the section, which maintains its own files, catalogued approximately 1000 intelligence reports and disseminated organized crime information to approximately 42 separate federal, state and local agencies. The section has returned indictments or complaints against 66 persons and one corporation and thus far has obtained 42 convictions, with 21 cases still pending. In one noteworthy case, *Commonwealth v. Penachio et al*, investigators from the Organized Crime Section coordinated the investigation of \$175,000 in negotiable bearer bonds from a Boston stockbroker with law enforcement agencies in Canada and New York. This investigation resulted in the recovery of \$130,000 of the stolen bonds and the arrest of four persons in Canada and the United States. One conviction has been obtained and the remaining three persons are awaiting trial. The Organized Crime Section has been an active member of the Law Enforcement Intelligence Unit, an international association providing for the exchange of intelligence information, and is presently working in cooperation with the Department of Justice, Organized Crime Strike Force for New England. Throughout the past year, the Organized Crime Section continually attempted to cooperate with all law enforcement agencies and to offer guidance and the facilities to those agencies desiring such assistance. Furthermore, Section personnel have been made available on request to civic organizations and other groups for public

speaking engagements as part of the Department's continuing public education program.

Eminent Domain Division

The Eminent Domain Division is concerned with litigation and problems arising from the taking of private property by the Commonwealth for public purposes as well as general real estate matters that affect the interests of the Commonwealth. When a property owner is not satisfied with the price offered by the Commonwealth, he petitions the Superior Court to assess damages under G.L. c. 79. In these cases, attorneys from the Division represent the Commonwealth in court.

In order to assure a property owner that he will be fairly, justly and promptly compensated, the Division has established procedures to facilitate early trials, in many instances, the Commonwealth has moved for speedy trials. The savings in money to the citizens of the Commonwealth and the reduction in irritation and aggravation to the property owner is substantial.

The following tables dramatically illustrate the case load handled and savings affected by this Division during the past fiscal year.

Cases Pending July 1, 1968	New Cases	Cases Closed	Cases Pending June 30, 1969
758	351	258	851
Amount of Damages Sought by Petitioners July 1, 1968 — June 30, 1969	Amount of Awards by Decision or Settle- ment, July 1, 1968 — June 30, 1969	Savings to Commonwealth	
\$7,990,149.00	\$5,346,230.40*	\$2,643,918.60	

*Does not include \$410,816.77 paid for interest, property tax adjustments and court costs.

Although 90% of the Division's work is related to G.L. c. 79 land damage cases, the remaining work of the Division is quite varied. In addition to G.L. c. 130 wetlands cases, equity matters and miscellaneous litigation concerned with real property matters, the Division renders advice to and assists all agencies with real estate problems and represents the Commonwealth in all Land Court cases in which the Commonwealth has an interest. The Division reviews the accuracy and form of all title abstracts and related documents drafted by various state agencies covering land acquisition.

Almost every week, special problems arise that require solution by the Division. Among the matters dealt with during this fiscal year were: control of oil spillage in Boston Harbor; control of water and air pollution; dilapidated piers and wrecks in Boston Harbor and the resolution of problems among the Department of Public Works, the Boston and Maine Railroad and the M.B.T.A.

over rights to land needed for the completion of the M.B.T.A. tunnel to Charlestown. In almost all instances, members of the Division's staff investigate the problem, call conferences of interested parties, and where necessary propose remedial legislation.

A member of the staff serves as the Attorney General's representative on the Commission on Eminent Domain which reviews proposed legislation in the field of eminent domain (much of which legislation is drafted by the Division as a part of the Attorney General's legislative program) and proposed changes in the law.

Significant developments have occurred in the area of defining the seaward boundary of the Commonwealth of Massachusetts. Under the leadership of this Division, a conference of the Attorneys General of seaboard states was convened to discuss mutual problems regarding state jurisdiction over sea boundaries. As a result, legislation has been introduced in the Congress of the United States to give states such as Massachusetts jurisdiction over the ocean beyond the 3 mile limit to a 12 mile limit and then right to share in revenues derived from the continental shelf. In connection with this, the Commonwealth has been made a party in the case of *United States v. Maine* in which the federal government seeks to determine whether or not under the Federal Submerged Lands Act of 1953 the Commonwealth can assert jurisdiction to the 3 mile limit or to a greater distance. This Division is participating in the briefs and arguments before the United States Supreme Court.

Not only has the Division cooperated with other states as noted above, but there has been continued cooperation with the United States Bureau of Public Roads in the implementation of the Interstate Highway System and has earned high praise from that Bureau.

This Division, as noted in the annual report of 1966, prepared a *Manual of Eminent Domain Appraisal Law*. Because the demand for this *Manual* by lawyers, appraisers and state agencies has been so great, the supply is now exhausted. In contemplation of a re-issuance of a revised *Manual*, staff members are now bringing the material in that volume up to date.

As in the past, the Eminent Domain Division has participated in the drafting of formal opinions relating to land problems and has handled numerous requests for informal opinions and legal advice from all state agencies, some local agencies and the individual citizens.

Employment Security Division

The Employment Security Division works closely with the Massachusetts Division of Employment Security and makes every effort to seek enforcement of the Employment Security Law. In the event that there has been non-compliance of the Law, wherein employers become delinquent in paying the employment security taxes and employees file fraudulent claims to receive unemployment benefits, criminal prosecution is then undertaken. As a result of concentrated efforts approximately \$158,000 has been recovered. This is in addition to the many cases handled by the Division as well as others handled independently in

the departments of the Massachusetts Division of Employment Security.

During the fiscal year, 689 cases were handled by this Division. Of these, 502 cases were on hand at the outset of the year, and 187 new cases were thereafter received. Of the new cases, 132 were employer tax cases, 54 were fraudulent claims cases, and 1 appeal to the Supreme Judicial Court.

Cases closed during the fiscal year totaled 187, of which 107 were employer tax cases and 80 were fraudulent claims cases, leaving a balance of 502 cases. \$109,903.18 was collected from employers and \$47,343.30 collected as the result of fraudulent claims cases, making a total recovery for the Commonwealth of \$157,246.48. Additional steps were taken during the year to urge more prompt referral of cases to the Attorney General, so as to avoid expiration of the statute of limitations prior to the time that legal action can be commenced.

We have prepared a case for presentation and argument in the Massachusetts Supreme Judicial Court in its Fall sitting. Briefly, the case involves an appeal by an employer from a decision of the Board of Review of the Division of Employment Security. An employee of 16 years was terminated due to a reduction in force. Subsequently, he received payment from his employer for a three months' period. The question was whether or not the payment constituted a "severance payment" or a "payment in lieu of dismissal notice." If it were a payment in lieu of dismissal, it would come within the definition of remuneration in the Employment Security Law and, therefore, he would not be in total unemployment and not entitled to unemployment compensation. The Board of Review found that the payment was a "severance payment", and did not constitute "remuneration" within the meaning of the Law and that, therefore, the employee was unemployed and entitled to unemployment benefits. Our position supports the decision of the Board of Review, and we will contend that the payment was a "severance payment" and did not disqualify the employee from receiving unemployment benefits. This, we will argue, is so in spite of the fact that the employer's administrative procedure set forth in its manual of procedure provides for "remuneration in lieu of notice."

As a result of the numerous prosecutions made by this office over the course of years, defendants have defaulted court appearances resulting in warrants issuing. There are presently 109 warrants in existence on cases still open in Court, and 29 warrants outstanding on cases presently in the hands of the Probation Department, together totaling \$134,252.14 in monies owed this Division on outstanding warrants. We are seeking closer cooperation with the State and Local Police for service on the outstanding warrants presently in existence.

The Employment Security Division has continued its practice of communicating with the various departments of the Government, and has had numerous contacts with the Massachusetts Income Tax Department since it has been our experience to find that the same individuals found delinquent in paying the State Withholding Taxes have also been delinquent in non-payment of Employment Security Taxes. Several communications have been made this fiscal year with the Department of Corporations and Taxation, resulting from information obtained in inquiries received, or investigations conducted by our Division.

Division of Health, Education and Welfare

The responsibilities of the Health, Education and Welfare Division have multiplied and become more complex in the past year.

In the course of the year the Division performed its function of advising, with regard to legal matters, the Department of Health, Education, Welfare, Natural Resources and the Rate Setting Board. The problems referred to this Division are both varied and, in many instances, complicated.

The Division Attorneys represent the various departments in litigation ranging from appearances before an administrative board up to and including arguments before the Supreme Judicial Court and the Supreme Court of the United States.

The litigation falls into several categories. The first category is the determination of the legal status of patients confined at Bridgewater State Hospital. Hearings were held before an Associate Justice of the Superior Court. The hearings determine whether or not the patient required the strict supervision of Bridgewater State Hospital or if the circumstances warranted a transfer to some other state mental institution. Since June of 1967, when the hearings initially began, the number of inmates have been reduced from over 600 to 210; 60 of which are observation patients. The hearings terminated in June of 1969. The Division has been called upon since then to handle individual cases.

The second category is conducting administrative hearings before the Rate Setting Board hearing officer and overseeing Judicial Review when necessary.

Air and water pollution is one of the major problems confronting the state, and as a result litigation is on the increase. More significant than litigation are my legislative efforts towards abating the cause of pollution. An advisory committee, consisting of people knowledgeable in this area, has been created to advise this Division and implement methods to solve the paramount problems that exist in restoring an ecological balance.

The remainder of litigation is extensive and concerned with the rules, regulations and statutes governing the departments serviced by this division. Numerous cases are pending before the state and federal courts at the trial and appellate level.

On May 16, a six level attack on drug abuse in the Commonwealth was initiated. The full weight of the Division of Health, Education and Welfare was placed behind new efforts in law enforcement coordination, specialized police training, education for the young, parental orientation, community involvement, and comprehensive treatment and rehabilitation.

A product of these efforts, legislation now pending before the General Court, the Comprehensive Drug Rehabilitation Act (H. 5629), passage of which seems assured, will provide Massachusetts with a modern, innovative approach to drug rehabilitation and drug law enforcement. In particular, the Attorney General will conduct a law enforcement training program, instructing municipal, metropolitan and state police officials in practice and procedures relating to the Commonwealth's narcotic and harmful drug laws. Training will center upon the relevant criminal laws, methods of drug detection and identification, law

enforcement techniques, the physiological and sociological causes and effects of drug abuse, opportunities for treatment and rehabilitation, and available educational programs. The Attorney General may call upon the Commissioner of Public Safety to assign to him up to six uniformed state police for assistance in carrying out this law enforcement training program.

Industrial Accidents Division

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

During this fiscal year the Supreme Judicial Court rendered a decision in *Klapacs' Case* which involved a claim against the Commonwealth under the Workmen's Compensation Act for nursing services furnished by the wife of an injured employee.

During the past fiscal year a total of 6916 accident reports were filed on state employees industrial accidents, an increase of 320 over the prior fiscal year. Of the lost-time disability cases, this division approved 1217 new claims, an increase of 89 over the prior period. It also approved 75 resumption of compensation agreements.

The Division appeared for the Commonwealth on 463 assignments at the Industrial Accident Board and in the courts on appellate procedures. Its staff members also participated in an indeterminate number of informal appearances at the Board including those required in the regular review of new claims for evaluation and approval by the Attorney General.

Total disbursements by the Commonwealth on state employees' industrial accident claims, including accepted cases, Board and court decisions and lump sum settlements, for the period July 1, 1968 to June 30, 1969 were as follows:

*Industrial Accident Board (General Appropriation)**

Incapacity compensation	\$1,354,995.53
Hospital costs, drugs et al	254,993.11
Doctors, nurses et al	209,981.58
	\$1,819,970.22

*Metropolitan District Commission***

Incapacity compensation	\$109,912.99
Medical and Hospital costs	52,241.45
	\$162,154.44

Total Disbursements

Incapacity compensation	\$1,464,908.52
Medical and Hospital costs	517,216.45
	\$1,982,124.97

* Appropriated to the Division of Industrial Accidents

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

Although there was an increase of 89 approvals of new agreements over the prior fiscal period, the cost to the Commonwealth for incapacity compensation was \$28,912.19 less in the last fiscal year than fiscal year 1968. The hospital and medical costs did show an increase of \$34,378.76 over the 1968 fiscal year, due largely to the sharp increase in hospital per diem rates.

In its capacity as custodian of the second-injury funds under §65 (General Fund) and §65N (Veterans Fund) of Chapter 152, the division represents the Commonwealth before the Board in petitions filed by insurers and self-insurers for reimbursements out of these funds. It is also necessary for staff members to confer with insurers' representatives to negotiate payments into the funds in those fatal industrial accident cases where the issue of liability has been in question or compromised.

At the close of the fiscal year the General Fund (§65) showed an unencumbered balance of \$116,708.41 with payments totalling \$25,938.84 and receipts of \$7,450.00.

The Veterans Fund (§65N) with receipts of \$87,372.00 and payments of \$85,774.96 held a total balance of \$271,215.72 at the close of the fiscal period.

Public Charities Division

This Division protects the public interest where charities are involved in accounts of trustees, executors and other fiduciaries, petitions for probate of wills, appointment of executors and trustees, licenses to sell real estate, and receives and files the annual financial reports required by General Laws, chapter 12, §8F, from public charities.

The number of cases involving court proceedings, other than such formal proceedings as the allowance of accounts, etc., totalled 213 for the year. Although the largest number of these cases required only the preparation and filing of appropriate responsive pleadings, and the review and approval of the decrees to be entered, many also required actual court appearances, including oral argument and printed briefs in cases before the Supreme Judicial Court.

The following is a listing of the various matters involving formal action after review:

<i>Quarter</i>	<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>	<i>Total for yr.</i>	<i>Total prev. yr.</i>
Trustees accounts	603	567	503	598	2271	2382
Wills	182	171	234	197	784	693
Executors accts.	93	119	122	110	444	577
Misc. Pet. for Lic. to sell, etc.	22	96	59	80	257	202
P.A. matters	109	59	139	78	385	709*
Annual Fin. Reports u/G.L., ch. 12, s.8F	1152	676	604	2552	4984	3883
Certif. of Registration u/G.L., ch.68, s.20	23	56	183	51	313	272

* In the previous period a program of reviewing and closing out all old public administration cases had been conducted.

The total amount collected in the year as escheats in estates in which the deceased left no known heirs was \$160,901.21. The total for the previous year was \$260,180.77.

As in previous years amounts were paid into the State Treasury from estates where although the deceased left a will, the will did not dispose of all the estate and there were no known heirs.

In the cases of *Stackpole v. Brewster Free Academy*, 1969 Adv. Sheets 757, and *Old Colony Trust Co., v. Board of Governors of the Belleville General Hospital*, 1969 Adv. Sheets 761, printed briefs were filed with, and argued before, the Supreme Judicial Court. The decisions of the Court in the cases favored the positions taken in the briefs.

In the \$3,500,000 estate of *Joseph Furst*, appeals were taken from decrees as to counsel and trustees' fees. Later, compromises were effected under which the counsel fees were cut by about one-third and the trustees' fees by about one-sixth.

Several matters involved cy-pres applications of funds for religious purposes, as follows: — changes in the use of funds held for the *Crane Theological School* at Tufts University because of the discontinuance of that School; approval of change in the payment of income of a trust under the will of *John Weaver*, (Hampden Co.) for *Bexley Hall* at Kenyon College, in Ohio, the Hall being transferred to Rochester, New York; approval of the use in other ways of funds held by the *Unitarian-Universalists* and the United Church Board for charitable work in what is now Red China.

A number of cases involved changes in the method of administration of trusts of real estate. Two involved museum studios of the eminent sculptors Daniel Chester French and Gaston La Chaise. Others, the approval of the transfer of the historic Frary-Barnard House, in Deerfield to the Heritage Foundation; the transfer to the Captain Robert Bennett Forbes House, Inc., of the Lincoln Cabin in Milton, (devised by Mary Bowditch Forbes) and the transfer of land on Clark's Island in Plymouth Harbor devised by Sarah W. Taylor to the Pilgrim Foundation to the Duxbury Rural and Historical Society.

The sale for \$1,000,000 at public auction, of the building owned by the George Robert White Fund at 478-488 Boylston Street, Boston was approved. Also the sale of the Crabtree Building on Washington Street by the Lotta Crabtree Trustees, after newspaper solicitation of offers, for \$500,000 to the highest bidder. The sale for \$475,000 of a large parcel of land in Falmouth to the Woods Hole Oceanographic Institute owned by the Edward Nicholl Fenno estate was also approved.

Appearances were filed in two administration cases in which it was questioned whether the deceased had left any next of kin and whether the person claiming to be heirs were such.

In the Agnes Hawkins estate, proceedings to probate an office copy of a lost executed will benefitting charities were supported.

In the George W. Davenport estate in Greenfield, extended hearings were held and a brief was submitted and argued. The case involves an attack by the residuary legatees of the testator on a trust under the will for a Home for the Aged.

In the Meriva L. Capen estate, a \$270,000 fund held by the Pioneer Valley Baptist Association for an old folks home was transferred to the New England Deaconess Association, which is to build a home in Northampton.

A petition for the sale of Morville House operated by the Episcopal City Mission and, the use of the proceeds for erecting housing for the elderly on land off Massachusetts Avenue to be allotted to the Mission by the Boston Redevelopment Authority, was approved.

The use of \$600,000 of the \$2,000,000 principal of the William Lowell Putnam Prize Fund, to support a mathematics competition at Harvard to endow a professorship of Mathematics there, was approved. The Fund set up in 1937, by Elizabeth Lowell Putnam, as a memorial to her husband in the original amount of \$75,000 has increased to the amount above stated.

Among the compromises of will contests approved was that in the estate of Henry Penn ("Penn the Florist") who left most of his estate to charity.

At various times in the year discussions were had to induce the trustees under the will of Lotta Crabtree to use the income of the Agricultural Fund, as prior trustees had, for scholarships at the University of Massachusetts.

An appeal was taken from the decree of the Norfolk Probate Court holding that the Board of Managers of the Woodward School for Girls in Quincy could not admit girls who had not been born in Quincy to the School. The largest part of the funds to maintain the School are supplied by the City. The Woodward Funds pay only a part of the cost of the Quincy born girls attending the School. Under those circumstances it would seem that there could be no objection to admitting girls not born in Quincy, who are to pay tuition. Dartmouth College which has a contingent interest takes a contrary position.

Several cases in the period involved interesting questions as to law applicable to wills. The application of rules as to the ademption of bequests was involved in one case. In another, the implication of a provision for cross-remainders between

life income beneficiaries of a trust was involved. In a third, the will made a relative the principal beneficiary in the event she survived the testatrix and provided that in the event of the simultaneous deaths of the testators and the principal beneficiary the estate should go to charity. The principal beneficiary predeceased the testatrix. It was held that the gift to charity took effect.

The Eleonora Sears estate involved questions as to the domicile of the deceased and as to whether undue influence was exercised by the principal beneficiary under a later will. Earlier wills largely benefitted Massachusetts hospitals, later provisions eliminated those benefits.

We cooperated with the Governor's office in drafting legislation to return the Endicott House to the town of Dedham.

A large number of Public Administration matters were dealt with. As has been the trend in previous years, rather large amounts were escheated. The decedents, under present economic conditions, very often leave rather estates.

In the Blackett case a petition to revoke a decree ordering distribution to a large number of cousins was allowed, there being grounds for the belief that the deceased was survived by his father and the claimants not being able to prove that the father is dead.

The Torts, Claims, and Collections Division

The Torts, Claims, and Collections Division represents the Commonwealth, its officers and employees, in tort actions arising in the performance of their official duties. It also represents the Commonwealth and the Metropolitan District Commission in claims brought for injury and damage resulting from defects in state highways and MDC roads.

There are an increasing number of actions brought in the Federal Court under U.C.A. Title 42 §1983. These cases, which are commonly referred to as Civil Rights cases, are usually brought against state officials who act in judicial and law enforcement capacities, though any state official can be sued under this statute. They have been defended by the Division.

The Attorney General is represented on the Motor Vehicle Appeal Board by the attorneys of the Torts, Claims, and Collections Division.

After investigating all cases, the Division decides whether the claimant should be compensated. Where it is found that compensation should be made, payment is authorized either in settlement of a claim, or in satisfaction of judgments, from a fund of \$108,000, appropriated by the General Court. Chapter 12 now provides for maximum payments of \$25,000 per person for personal injury and \$5,000 for property damage. The same annual appropriation has been made and no supplemental appropriation have been sought since these increases in liability limits have gone into effect. During the past year there were 401 motor tort claims processed by the Division for amounts totaling \$108,000.

Fourteen road defect cases were disposed of in the past year with an average cost of \$95.00 per claim.

Damages occurring in circumstances which impose a moral, though not a legal, responsibility upon the Commonwealth are also dealt with by the Torts, Claims, and Collections Division. There have been several special statutes requiring compensation to be paid for damage from sewerage, or water pipe breaks under Metropolitan District Commission jurisdiction which have been made subject to approval by the Attorney General. This responsibility has been assigned from time to time to the Division.

The Collections Section of the Division represents the Commonwealth in claims for damage to state property and for recovery of monies due on account of care of patients in state institutions, as well as amounts owing to various other state agencies. The following is a summary of cases involved in this phase of the Division's work:

<i>Departments</i>	<i>Amt. Collected</i>	<i>#of Claims Processed</i>
Mental Health	\$112,353.49	79
Public Health	95,833.16	396
Public Health (Tort)	1.00	1
Mental Health (Tort)	300.32	3
Public Works	42,664.48	332
MDC	17,425.86	80
P.H. Div. of Administration	2.00	1
Education	3,275.80	62
State Colleges	6,363.41	94
Public Safety	4,332.52	9
Corporations & Taxations	20,107.65	21
Commission of the Blind	5.50	1
Treasury	329.61	5
Adjutant General	192.16	2
Civil Defense Agency	167.48	2
Natural Resources	347.07	2
Office of the Secretary	281.00	9
Div. of Waterways	20,500.00	1
Milk Control Commission	678.75	2
Board of Retirement	10.00	1
Soldiers Homes	45.00	4
Agriculture	177.75	4
Aeronautics Commission	61.50	1
Registry of Motor Vehicles	1,318.61	1
Fisheries & Games	215.25	1
	<u>\$326,989.37</u>	<u>1,114</u>

Veteran's Division

The Veteran's Division is available at all times to assist veterans and their families in identifying and securing the many special services — local, state and federal — available to them.

The Division has continued to receive, in this regard, the cooperation of all public agencies which are involved in Veteran's affairs.

Number 1.

July 22, 1968

HONORABLE EDWARD J. RIBBS

Commissioner of Public Works

100 Nashua Street

Boston, Massachusetts 02114

Dear Commissioner Ribbs:

You have requested my opinion on the proper interpretation of the second paragraph of G.L. c. 79, §3, which provides:

"If the person in possession of property which has been taken in fee, or in which an easement has been taken, by eminent domain under this chapter refuses to permit the body politic or corporate by which the taking was made to enter thereon and take possession thereof or to exercise its rights under the taking after thirty days' notice in writing sent to him by registered mail or posted upon the property so taken or in which an easement has been so taken, *the board of officers having the direction and control of the public improvement in connection with which the taking was made* may issue its warrant to the sheriff of the county in which the property is situated or to his deputy directing him to make entry on the property so taken and to take possession thereof or of the easement therein which has been taken, on behalf of said body politic or corporate, and such sheriff or his deputy shall forthwith execute said warrant using such force as he may deem necessary for the purpose." (Emphasis supplied.)

Your letter states:

"There is presently under construction in the City of Gardner, work on a section of Route 68, a Federal Aid Secondary Highway pursuant to a layout and decree of the County Commissioners of the County of Worcester and under General Laws, Chapter 82, Sections 1-16 and the Federal Aid Highway Act of 1956.

"The work was ordered upon petition of the Mayor of Gardner and others which was filed with the Board of County Commissioners on February 3, 1967. Part of the decree by the Worcester County Commissioners laying out *Route 68 Relocation* provided that the City of Gardner pay certain awards made for takings and provided as follows:

'And the City of Gardner is hereby ordered to build and make specific repairs to said highway in accordance with the standard specifications of the Massachusetts Department of Public Works, and under the direction of the Engineer [sic] of said Department.'

"The contract, awarded by the County to McDonald and Donovan, Inc., was executed by the State Department of Public Works on March 15, 1968. This contract, in standard form, provided that the work was to be done in accordance with certain specifications adopted and on file with the Department and consideration for the work to be paid by the Commonwealth as set out in an accompanying proposal.

"The work has been delayed by the refusal of an occupant to vacate a two-story wooden structure located on land within the layout and taken in connection therewith."

It is my understanding that the portion of Route 68 involved is a county highway, rather than a state highway or town way, that title to the highway easements taken by the decree of the County Commissioners still lies in the County of Worcester, and that neither the Commonwealth nor the City of Gardner ever acquired any proprietary interest therein.

The documents accompanying your letter indicate that the construction contract was awarded by your Department (and not by the County Commissioners, as stated in your letter), and that neither the County nor the City is a party thereto. I have been advised by members of your staff that your Department undertook this project pursuant to St. 1965, c. 679, §1, and St. 1967, c. 616, §1, authorizing it to expend funds "for projects for the laying out, construction, reconstruction, resurfacing, relocation or improvement of highways . . . and for construction of needed improvements on other through routes not designated as state highways and without acceptance by the commonwealth of responsibility for maintenance . . ." The background materials furnished by you suggest that your Department did so in order to facilitate federal reimbursement for a share of the construction costs.

Your letter continues:

"Counsel for the Worcester County Commissioners has stated that the remedy in this situation is for the City of Gardner to send or post notice and if, at the end of thirty days, the building is not vacated, to issue its warrant to the sheriff directing him to take the property in the name of the County.

"The City Solicitor for the City of Gardner, however, disagrees and avers that the said City has no authority to issue the necessary warrant. He recommends that the Department of Public Works for the Commonwealth be looked upon to issue the warrant as being the Board of Officers having 'direction and control of the public improvement' here involved.

"Interpretation of the words 'board of officers having the direction and control of the public improvement in connection with which the taking was made' would appear to be at issue. Although the contract for work was executed by the Department, the layout was made by the County Commissioners with technical assistance by State Engineers upon the petition of the City of Gardner. It appears that the taking authority in this case is the County of Worcester although the City is required to pay the land damage costs for the right of way.

"In view of the differences in opinion as to which agency, political subdivision or Board is authorized to issue its warrant to the sheriff for eviction, the following questions are respectfully submitted:

"(1) Under the provisions of General Laws, Chapter 79, Section 3, is the City of Gardner, the Board of Commissioners for the County of Worcester, or the State Department of Public Works the proper authority to issue a warrant to the sheriff to proceed with eviction in this case?

“(2) Does the written notice of taking have to be sent or posted by the same authority that issues the warrant to the sheriff to make entry and take possession?”

“(3) Under General Laws, Chapter 79, Section 3, which authority in this case should send or post the required written notice?”

“(4) Can possession be taken under said statute by the sheriff in behalf of a county on a warrant issued by the Department?”

It should be noted at the outset that there is a fundamental distinction between a “body politic or corporate” and a “board of officers,” as those terms are used in G.L. c. 79, §3. The former term refers to the legal entity on behalf of which land is taken or other official acts performed, such as the Commonwealth, its political subdivisions and certain private corporations. In the present context three “bodies politic or corporate” are involved: the Commonwealth, the County of Worcester and the City of Gardner.

A “board of officers,” on the other hand, is a group of individuals — such as your Public Works Commission and the Worcester County Commissioners — employed by a “body politic or corporate” to act on its behalf. The first paragraph of G.L. c. 79, §3 imposes certain duties on “the board of officers by whom an order of taking has been adopted” while the second paragraph (quoted above) deals with the responsibilities of “the board of officers having the direction and control of the public improvement in connection with which the taking was made . . .” In many instances the same “board of officers” falls into both categories, as where your Department takes land on behalf of the Commonwealth for a state highway and supervises all aspects of the layout, engineering and construction thereof. In other cases two different “boards of officers” may be involved, as where the Commonwealth acts through its Department of Mental Health in acquiring land for a state hospital and through its Bureau of Building Construction in erecting the buildings thereon. The possibility of a single project involving “boards of officers” of two *different* “bodies politic or corporate” for purposes of G.L. c. 79, §3, is, of course, implicit in your questions.

It is clear that the phrase “the body politic or corporate by which the taking was made” in the above-quoted paragraph of G.L. c. 79, §3 refers in this instance to the County of Worcester. It is equally clear that whoever has the duty under that section to notify the former owner and issue a warrant to the sheriff, that warrant must direct the sheriff or his deputy to take possession of the subject land “on behalf of” the County of Worcester. The answers to your questions, however, also depend on the identity of “the board of officers having the direction and control of the public improvement in connection with which the taking was made” — which is far less clear.

The latter issue is raised squarely by Question (1) in your letter. In answer to that Question, I am of the opinion that the “board of officers” having such “direction and control” is the Worcester County Commissioners, and hence, that they are the proper authority to issue the necessary warrant.

As you point out in your letter, this project was undertaken pursuant to G.L. c. 82, §§1-16. Section 1 confers jurisdiction upon county commissioners to “lay out, alter, relocate and discontinue highways and order specific repairs thereon . . .” Under §8, the commissioners are required to “determine and specify the manner in which a new highway shall be laid out or an existing one altered, relocated or specifically repaired, and [to] specify in sufficient detail

the work required so that the same may be completed in accordance with the commissioners' directions, and the time within which it shall be completed, and each town shall perform the work so required within its limits unless other provision is made." The same section provides that "the commissioners or their agents shall examine the work as often as may be necessary during its progress to ascertain that it is well done according to the direction of the commissioners, and, in case the town does not perform the work to the acceptance of said commissioners, the provisions of sections fourteen and fifteen [authorizing the commissioners to impose certain sanctions against delinquent towns] shall apply." Section 8 also authorizes the commissioners to "apportion the expense thereof upon the county and towns, respectively, or [to] agree with the towns in which the highway is located or with the department of public works, or both, as to the apportionment of such expense to be paid by the towns, county or state, respectively."

Under these procedures, which the record indicates were followed in the instant case, I think there is little doubt that the Worcester County Commissioners are "the board of officers having the direction and control of the public improvement . . ." The Mayor of Gardner, in petitioning the County Commissioners for the project, was nothing more than an applicant; under G.L. c. 82, §§ 2 and 11, a group of private citizens could have played the same role. The fact that the City was ordered by the County Commissioners to pay the land damages arising from the takings and "to build and make specific repairs to said highway" still leaves the City in a subordinate position. While your Department has been intimately involved in the preparation and execution of the project, I think it has participated essentially in the capacity of advisor to and contracting agency for the County Commissioners. The assumption by your Department of immediate responsibility for the details of construction does not alter the fact that the County Commissioners have exercised ultimate "direction and control" over the project as a whole: its nature and location, and indeed, its very existence. It is by virtue of the Commissioners' decree, rather than any unilateral action of your Department, that the highway was ordered to be constructed "in accordance with the standard specifications of the Massachusetts Department of Public Works, and under the direction of the Engineer of said Department." Whether or not your Department *could* lawfully have undertaken the project without the approval of the County Commissioners, the fact remains that it did not follow this course.

It is therefore my opinion, on the basis of the facts before me in this case, that the Worcester County Commissioners are the proper authority to issue a warrant to the sheriff under G.L. c. 79, § 3.

Turning to Question (2), I am of the opinion that the notice required by G.L. c. 79, § 3 must be sent or posted by the same agency that issues the warrant thereunder. This, I believe, is the clear implication of the statutory language imposing the notice requirement.

On the basis of my answer to Question (2), I answer Question (3) by advising you that the required notice under G.L. c. 79, § 3 should be sent or posted by the Worcester County Commissioners.

As to Question (4), I do not think that G.L. c. 79, § 3, standing alone, would permit the sheriff to take possession of this property on the basis of a warrant issued by your Department. This conclusion is, I believe, dictated by my answer to Question (1).

I do not, however, intend to foreclose the possibility of your Department's taking independent action at some future time pursuant to G.L. c. 81, §30, authorizing it to "make all contracts and agreements *and do all other things* necessary to co-operate with the United States in the construction and maintenance of [federally-aided] highways . . ." (Emphasis supplied.) Assuming without deciding that §30 is broad enough to authorize your Department to issue a warrant on behalf of the County Commissioners, it could do so only if this were "necessary to co-operate with the United States . . ." In the absence of factual details showing that such action *by your Department* (rather than by the County Commissioners) is "necessary," G.L. c. 81, §30 has no application. See *Boston, Worcester & N.Y. Street Ry. v. Commonwealth*, 301 Mass. 283, 288.

Very truly yours,
ELLIOT L. RICHARDSON
Attorney General

Number 2.

August 1, 1968

HONORABLE OWEN J. KIERNAN
Commissioner of Education
182 Tremont Street
Boston, Massachusetts 02111

Dear Dr. Kiernan:

Acting in your behalf, Deputy Commissioner Thomas J. Curtin has asked for my opinion concerning the "constitutionality" of Question No. 3 in the Placement Registration Form of your Department's Bureau of Teacher Certification and Placement ("the Bureau"), reading as follows:

"Are you now or have you ever been a member of the Communist Party or any other organization, the purpose of which is or was the over throw [sic] of the government of the United States by force[?]"

I understand that the placement services of your Department are distinct from its certification functions. The latter are undertaken pursuant to G.L. c. 71, §38G, which conditions the appointment of a teacher in a public school on the issuance of a certificate of qualification by the Board of Education. Placement services, on the other hand, are provided for under G.L. c. 69, §6, which reads as follows:

"The department shall receive applications for the position of teacher from graduates of good moral character of any high school or teachers college in this commonwealth, or of any other school deemed by the department to be of equal grade, or of any reputable college. Such an application shall contain the applicant's name and address, and, briefly, his experience and qualifications. The department, without charge, shall communicate with the various school committees and with the applicants themselves with a view to securing such positions."

I understand that when a superintendent of schools requests the Board to furnish him with the names of teachers for possible employment, the Bureau customarily gives the superintendent copies of the Placement Forms of the teachers who are referred. The teachers and the superintendent then deal

directly with each other. There is no requirement, however, that the Bureau's placement service must be used either by a superintendent or by a teacher who desires employment in a public school. Thus, the employment of a teacher does not necessarily depend on his completion of the Placement Form. Yet if the teacher seeks to avail himself of the placement services of the Bureau, the Form must be filled out.

Nothing in G.L. c. 69, §6, which confines the application to the "applicant's name and address, and, briefly, his experience and qualifications," authorizes an inquiry into a teacher's political opinions or affiliations. This restriction could itself render Question No. 3 invalid as an impermissibly broad inquiry into a teacher's qualifications. (See the cases cited below.)

Invalidity could also result from the operation of G.L. c. 71, § 39, which reads as follows:

"No public school committee or official shall inquire concerning, or require or solicit from an applicant for a position in the public schools any information as to, his religious belief, creed or practice, or his political opinions or affiliations; and no appointment to such a position shall be in any manner affected thereby. Violation of this section shall be punished by a fine of not more than fifty dollars."

Since the foregoing section would prohibit a public school official from inquiring into the political opinions or affiliations of an applicant, the official should not be allowed by means of the Placement Form to obtain indirectly from your Bureau the kind of information that he could not obtain directly. Any other conclusion would raise serious doubts as to the constitutionality of Question No. 3. See *Keyishian v. Board of Regents of University of State of N.Y.*, 385 U.S. 589; *United States v. Robel*, 389 U.S. 258; *Schneider v. Smith*, 390 U.S. 17. And it is fundamental that statutes should be construed to avoid constitutional doubts. *Opinion of the Justices*, 341 Mass. 760, 785; *Rohrer, petitioner*, Mass. Adv. Sh. (1967) 1445, 1448.

In short, then, without reaching questions of constitutionality, I conclude that Question No. 3 is invalid under the Massachusetts statutes set forth above.

Very truly yours,
ELLIOT L. RICHARDSON
Attorney General

Number 3.

August 1, 1968

HONORABLE HOWARD WHITMORE, Jr., *COMMISSIONER*
Metropolitan District Commission
20 Somerset Street
Boston, Massachusetts 02108

Dear Commissioner Whitmore:

You have requested my opinion on the effect of St. 1966, c. 685, §3, on certain powers of the Metropolitan District Commission. The 1966 Act inserted §§ 26-50 (referred to in § 50 as the Massachusetts Clean Waters Act) in c. 21 of the General Laws, whereby a program of water pollution control for the Commonwealth was established, and the Division of Water Pollution Control created to administer this program. Section 3 of the 1966 Act provides:

"Wherever in any general or special law reference is made to the authority to administer water pollution abatement or control laws, such authority shall . . . be vested in the division of water pollution control"

The specific questions as to which you have requested my opinion are as follows:

- "1. Are the rules and regulations for the government and use of the waters of the Charles River Basin, particularly Rule 9, adopted in 1935, which reads as follows – 'No person shall throw or dump any papers, garbage or other refuse into the waters of the Basin nor allow any form of pollution to empty or drain into said waters,' still valid and in full force and effect?
- "2. Does the Metropolitan District Commission have the authority and power to enforce and prosecute violations of water pollution [laws relating to] the Charles River and other rivers within its jurisdiction and control?
- "3. Does the Metropolitan District Commission have the authority and power to enforce rules and laws pertaining to the prohibition of disposing of garbage, refuse, bottles, cans or rubbish in coastal or inland waters within the care and control of the Commission?
- "4. Have Sections 39 and 76 of Chapter 92 of the General Laws been repealed by the passage of Massachusetts Clean Waters Act of 1966?"

For convenience I begin with Question 4. General Laws c. 92, §§ 39 and 76, referred to in Question 4, provide:

"§ 39. The [metropolitan district] commission may make rules and regulations prohibiting the pollution of the Charles River within the metropolitan parks district. Any person violating any rule or regulation made hereunder shall be punished by fine not exceeding one thousand dollars."

"§ 76. The [metropolitan district] commission may order the removal of all sewage and other polluting matter or factory waste as a common nuisance from the Charles River and its tributaries below Waltham and from the Charles River basin; and no sewer, drain or overflow or other outlet for factory or house drainage or for any other drainage shall hereafter be connected with said basin or the river below Waltham without the approval of the commission."

To the extent that the foregoing statutes confer powers on the Metropolitan District Commission ("MDC"), I regard them as relating to its "authority to administer water pollution abatement or control laws" within the meaning of St. 1966, c. 685, § 3, quoted at the end of the first paragraph of this opinion. To *administer* is "to direct or superintend the execution, use or conduct of" *Webster's Third New International Dictionary* (1964), p. 27. It is a word "susceptible of a very broad interpretation" (*Costonis v. Medford Housing Authority*, 343 Mass. 108, 114) – broad enough, in my opinion, to cover the sort of rule-making, removal and approval powers conferred by G.L. c. 92, §§ 39 and 76.

It is clear, I think, that G.L. c. 92, § 39 is, in its entirety, a statute relating to "water pollution abatement or control" as that term is used in St. 1966, c. 685, § 3, since the whole purpose of the rules and regulations authorized thereunder is that of "prohibiting the pollution of the Charles River . . ." I am likewise of the opinion that § 76 is aimed exclusively at the pollution problem. The removal of "sewage and other polluting matter or factory waste" contemplated by the first clause of § 76 seems on its face to have been intended as a "water pollution abatement or control" measure. Read in the context of the first clause, the approval requirement in the second clause of § 76 appears to be designed to protect the Charles River against the introduction of pollutants. It differs from the requirement that the MDC obtain approval from the Department of Public Health under St. 1951, c. 645, § 2, and similar statutes, in that the latter type of approval necessarily involves broad considerations of public health which go beyond the control of water pollution. See Op. Atty. Gen. No. 66-67/83. Under the Massachusetts Clean Waters Act, moreover, an approval power comparable in scope to the one in G.L. c. 92, § 76 has been expressly conferred upon the Division of Water Pollution Control with respect to *all* waters of the Commonwealth by G.L. c. 21, § 43:

"No person shall make or permit a new outlet for the discharge of sewage or industrial waste or wastes, or the effluent therefrom, into any of the waters of the commonwealth nor shall he construct or operate a new disposal system for the discharge of sewage or industrial or other wastes or the effluent therefrom into the waters of the commonwealth without first obtaining a permit, which the director is hereby authorized to issue subject to such conditions as he may deem necessary to insure compliance with the standards established for the waters affected."

The inclusion of the foregoing provision in St. 1966, c. 685 lends further support to the conclusion that the Legislature intended by § 3 thereof to divest other agencies, such as the MDC, of like approval powers.

It is therefore my opinion that the enactment of St. 1966, c. 685, § 3 has relieved the MDC of all powers exercisable under G.L. c. 92, §§ 39 and 76. It would be inaccurate, however, to say that §§ 39 and 76 have thereby been "repealed." Rather, the effect of the 1966 Act was to *transfer* the MDC's powers thereunder to the Division of Water Pollution Control.

Turning to Question 1, I note from a subsequent letter sent by you to the Chief of our Administrative Division that the rules and regulations to which you refer were adopted not under § 39 of G.L. c. 92, but under § 38 thereof. The latter section authorizes the MDC to "make reasonable rules and regulations, not impairing freight traffic, for the care, maintenance, protection and policing of the Charles River basin" and imposes "a fine not exceeding fifty dollars" for each violation of such rules and regulations. Thus, the statute under which the MDC acted contains no express reference "to the authority to administer water pollution abatement or control laws" within the meaning of St. 1966, c. 685, § 3.

I am of the opinion, however, that any rule or regulation adopted under G.L. c. 92, § 38 has been nullified by St. 1966, c. 685, § 3, if and to the extent that such rule or regulation is directed at "water pollution abatement or control . . ." The anti-pollution program envisioned in the 1966 statute is a comprehensive one. Under § 1 thereof, provisions were inserted in G.L. c. 21 delegating broad supervisory and regulatory powers to the Division of Water

Pollution Control (§§ 27, 34, 43, 46, 49) and treating the MDC in certain respects simply as a "water pollution abatement district" for purposes of this program (§ 30A). General Laws c. 21, § 42, also inserted by St. 1966, c. 685, § 1, covers much of the ground formerly left to administrative regulation by such agencies as the MDC:

"Whoever directly or indirectly throws, drains, runs or discharges or permits the discharge into the waters of the commonwealth organic or inorganic matter which shall cause, or contribute to, a condition in contravention of the standards adopted by the division shall be punished by a fine of one hundred dollars. Each day such violation continues shall be a separate offense, punishable by a like fine. For the purposes of this section and sections forty-three to forty-six, inclusive, the words 'whoever' and 'person' shall include political subdivisions of the commonwealth and public corporations."

I am informed by the Division of Water Pollution Control that "standards" have been adopted for purposes of the foregoing statute with respect to the Charles River. If pre-existing regulations of the MDC on pollution of the Charles River remained in force – differing in their terms from the above-quoted statute and from regulations promulgated by the Division of Water Pollution Control, with violators subject to the fifty-dollar fine imposed by G.L. c. 92, § 38 rather than the hundred-dollar fine prescribed in G.L. c. 21, § 42 – the Division of Water Pollution Control could not function effectively and the legislative scheme embodied in the Massachusetts Clean Waters Act would be seriously impaired. I am therefore persuaded that the elimination of the MDC's "authority to administer water pollution abatement or control laws" by St. 1966, c. 685, § 3 was intended not only to divest the MDC of its authority to adopt certain types of regulations, but to rescind existing regulations made in the exercise of that authority.

Rule 9, quoted by you in Question 1, is, at least to some extent, a regulation of this type. Its first clause, which forbids any person to "throw or dump any papers, garbage or other refuse into the waters of the [Charles River] Basin," appears to be directed primarily against littering rather than pollution, since not everything falling into the category of "papers, garbage or other refuse" would actually *pollute* the River as that term is ordinarily understood. However, Rule 9 goes on to provide that no person shall "allow any form of *pollution* to empty or drain into said waters" (emphasis supplied), and even its first clause is in some degree an anti-pollution measure. Furthermore, the Rule as a whole overlaps with G.L. c. 21, § 42, quoted above. It is therefore my opinion that Rule 9 is no longer enforceable. This is not to say that a regulation confined to *littering*, as distinguished from *pollution*, could not hereafter be adopted by the MDC.

The only other regulation among those you have furnished us which appears to touch on the problem of pollution is Rule 7, which provides:

"No person shall have or ride or drive a horse or motor or other vehicle upon the ice, or cut holes in or deface *or defile* the ice in said Basin." (Emphasis supplied.)

Since "defile" is a synonym for "pollute" (*Webster's Third New International Dictionary* (1964), p. 1756), and since pollution of the ice on the Charles is equivalent to pollution of its water, I am of the opinion that the words "or defile" have been effectively stricken from Rule 7 by operation of St. 1966, c. 685, § 3.

Since Questions 2 and 3 both deal with the MDC's law-enforcement powers, I answer them together. In doing so I assume that your questions refer to criminal enforcement by the MDC police force and not to civil enforcement through the institution of bills in equity for injunctions and the like. The latter type of enforcement, of course, remains within the exclusive province of the Department of the Attorney General. See: G.L. c. 12, § 3; G.L. c. 21, § 44.

Except to the extent that a particular statute or regulation may have been vitiated by St. 1966, c. 685 (such Rule 9, discussed above), I am of the opinion that the law-enforcement powers of the MDC police were in no way impaired or reduced by the 1966 legislation. These powers are conferred by G.L. c. 92, § 61, which provides (with exceptions not here material) that the MDC police "shall have within the metropolitan parks district, and within the towns outside said district wherein any of the property of the metropolitan water and sewerage districts* is situated, all the powers of police officers and constables of towns of this commonwealth" Their powers, like those of local police officers, are of a general character, extending to the *enforcement* of laws *administered* by a variety of state agencies, such as the Registry of Motor Vehicles. In short, I regard the *administration* of the laws referred to in St. 1966, c. 685, § 3 and the *criminal enforcement* of those laws as two completely separate functions. It follows that the power of the MDC police to enforce anti-pollution laws is not a part of the MDC's "authority to administer water pollution abatement or control laws" which was transferred to the Division of Water Pollution Control.

In arriving at this conclusion I am not unmindful of G.L. c. 21, § 50, inserted by St. 1966, c. 685, § 1, which provides that "the officers of the division of law enforcement [of the Department of Natural Resources] shall, upon request of the water resources commission, investigate and prosecute violations of law, orders or rules and regulations relating to [the Massachusetts Clean Waters Act]." The statutory authority of officers in the Division of Law Enforcement of the Department of Natural Resources, unlike that of the MDC police, is confined to the enforcement of "penal laws which it is the duty of the department to enforce" G.L. c. 21, § 6A. The Division of Water Pollution Control is under the control of the Water Resources Commission (G.L. c. 21, § 26), which is nominally within the Department of Natural Resources "but not under the supervision and control thereof." G.L. c. 21, §§ 1, 8. Thus, it may well have been necessary to enact separate legislation in order to give the Division of Law Enforcement jurisdiction over pollution-law violations, and it was certainly necessary to do so in order to put the personnel of that Division at the disposal of the Water Resources Commission. That, I believe, was the purpose of the quoted provision of G.L. c. 21, § 50. I do not believe that § 50 can be legitimately read as conferring *exclusive* law-enforcement power upon the Division of Law Enforcement.

In any event the administrative authority over pollution matters removed from the MDC and other agencies by St. 1966, c. 685, § 3 transferred that authority to the Division of Water Pollution Control – not to the Division of Law Enforcement. The Division of Water Pollution Control has no police of its own, and, as indicated in G.L. c. 21, § 50, must therefore rely upon the police

*It is obvious that the phrase "the property of the metropolitan water and sewerage districts" in § 61 refers to the property of the *Commonwealth* which is *under the control* of those districts, since the districts themselves hold title to no property but are merely charged with the control of certain property owned by the Commonwealth.

of a different agency — the Division of Law Enforcement. Thus, if § 3 of the 1966 legislation were construed as transferring the anti-pollution enforcement powers of the MDC to the Division of Water Pollution Control, those powers would be reposed in an agency which, in itself, could not exercise them.

It is therefore my opinion that St. 1966, c. 685 does not affect the power of the MDC, through its police force, to enforce criminally all valid statutes and regulations of the types described in Questions 2 and 3, and to prosecute violators thereof.

Very truly yours,
ELLIOT L. RICHARDSON
Attorney General

Number 4.

August 2, 1968

MRS. HELEN C. SULLIVAN
Director of Registration
Department of Civil Service and Registration
State Office Building, Government Center
100 Cambridge Street
Boston, Massachusetts 02202

Dear Mrs. Sullivan:

You have requested my opinion as to the legal effect, if any, of a certain memorandum of understanding upon Rule 49, Item 22, of the Rules and Regulations of the Board of Registration in Pharmacy.*

The following facts are set forth in your letter:

“The Board as authorized by S. 42A of C 112 of the General Laws as amended by C 634 of the Acts of 1960 adopted Rules and Regulations of Professional Conduct on September 29, 1961 and filed with the Secretary of State on the same day. The thirty Rules under the Code of Professional Conduct for Pharmacy were designated as Rule 49 effective July 12, 1966, and filed with the Secretary of State on that date.

“Item #22 of Rule 49 reads as follows: ‘A Registered Pharmacist connected with and employed by a hospital or clinic shall only dispense medicines or drugs to in-patients, and to out-patients who are under the immediate treatment of the hospital or clinic.’

“On February 20, 1962 a memorandum of understanding between the Department of Public Health and the Board of Registration in Pharmacy was executed. A copy of a signed agreement (the agreement) by the Secretary of the Board Mr. Anthony P. Giuggio and Dr. A. Daniel Rubenstein of the Department of Public Health relative to this memorandum is enclosed for your perusal. In this agreement comment on Item #22 of Rule 49 (Code of Professional Conduct) reads as follows:

“ ‘Under this Rule the hospital pharmacist may dispense to any

*Initially you also requested my opinion about the legal effect of Item 22 itself. It is my understanding, however, based on a recent letter received from you by the Chief of our Administrative Division, that you no longer seek my opinion on this question.

employee for his own use and for the use of his spouse and children living in the same household with him medicines and drugs as part of his employment agreement and to a student medicines and drugs as part of the student agreement. Prescriptions must be written by a Staff Physician in the hospital.'

"The Agreement was not adopted by the Board as a regulation or filed with the Secretary of State. Item #22 of Rule 49 has never been amended."

It is clear from the facts disclosed in your letter that the memorandum of understanding had no effect on the terms of Item 22 of Rule 49. Any amendment of Item 22 would require action by the Board of Registration in Pharmacy in accordance with the rule-making provisions of G.L. c. 30A, including the filing of the amendment with the State Secretary as provided in G.L. c. 30A, § 5, and G.L. c. 30, § 37. Your letter indicates that there has been no compliance with these statutory requirements.

I do not mean to imply, however, that Item 22 in its unamended form is necessarily valid. Before any attempt is made to enforce Item 22, the Board should be prepared to establish factually that it meets the test of validity enunciated by the Supreme Judicial Court in *Milligan v. Board of Registration in Pharmacy*, 348 Mass. 491, 498: namely, that it "has a rational tendency to promote the safety health, morals and general welfare of the public." In the absence of further information I am, of course, unable to express any opinion at this time on whether Item 22 of Rule 49 meets this test.

Very truly yours,
ELLIOT L. RICHARDSON
Attorney General

Number 5.

August 30, 1968

HONORABLE JOHN F.X. DAVOREN
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Mr. Secretary:

Pursuant to G.L. c. 53, § 19,* you have asked me to determine whether the following question contained in a petition filed with your office by certain voters of the Fifteenth Suffolk Representative District is "one of public policy" within the meaning of the foregoing statute. You also ask, if my determination is in the affirmative, to supply you, under the same statute, with a form of question "suited for presentation upon the ballot" in that district. The question contained in the petition reads as follows:;

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

"Shall the Representative from this district be instructed to vote to approve the passage of a bill permitting the construction of a track arena on the Metropolitan District Commission Reservation bordering the Charles River and Soldiers Field Road in Brighton?"

You have advised me that the petition contains 500 certified signatures of voters and was seasonably filed with your office on August 23, 1968.

Nothing in the petition, beyond the statement of the question itself, indicates the nature of the problem to which the question is directed. However, the statute contains no requirement that the petition include an explanation or exposition of the problem. It would accordingly appear that the determination of whether or not the question is "one of public policy" must be gathered from the form of the statement of the question in the petition, drawing such inferences therefrom and relying on such facts of common knowledge, actual or presumed, in the voting district concerned as may be reasonable. That this is the proper method of evaluating a question presented for submission under G.L. c. 53, § 19, finds support in opinions of former Attorneys General holding that since the phrase "public policy" in the statute is not limited or qualified in any way, it is to be construed broadly. 8 Op. Atty. Gen. 490, 493; Report of the Attorney General for the Year Ending November 30, 1939, pp. 99-100; Report of the Attorney General for the Year Ending June 30, 1955, pp. 51-52.

Having thus considered the petition, I hereby determine that the question contained therein is "one of public policy" within the meaning of G.L. c. 53, § 19. In accordance with the provisions thereof and with your request, I submit the following statement of the question for presentation upon the ballot:

"Shall the Representative from this district be instructed to vote to approve the passage of a bill permitting the construction of a track arena on the Metropolitan District Commission Reservation bordering the Charles River and Soldiers Field Road in the Brighton district of Boston, Massachusetts?"

Very truly yours,
ELLIOT L. RICHARDSON
Attorney General

Number 6.

September 12, 1968

HONORABLE CHARLES H. McNAMARA
Commissioner of Agriculture
State Office Building
100 Cambridge Street
Boston, Massachusetts 02202

Dear Sir:

You have requested my opinion as to whether a certain milk cooperative marketing corporation (the "Association") which operates a milk processing plant in the Fall River area is required to comply with the provisions of G.L. c. 94 §§ 42A-42K relative to the licensing and bonding of operators of milk plants. The Association enters into a "Producer Membership and Marketing Contract" with its producer members by which a member agrees to sell to the Association and the Association agrees to buy all the member's milk and dairy products. Paragraph 5 of the contract provides:

“Producer Member agrees that title to the milk or dairy products sold by the Producer Member to the Association shall pass to the Association in the case of bulk farm cooled milk when the milk is pumped into the tank truck designated by the Association, without right or rejection thereafter. Producer Member further agrees that in the case of milk cooled in cans, title to the said milk shall pass to the Association upon the loading of the cans of milk into a truck designated by the Association, except that the Association shall have the right to reject and send back to the Producer Member any can cooled milk which, upon arrival at the truck destination, does not meet the quality requirements as provided in Paragraph 4 of this agreement.”

Paragraph 6 of the contract provides that “subject to adjustments for differentials . . . , it [the Association] will pay the Producer Member the price received for . . . milk and dairy products, less costs of handling, operation, supervision [and certain other costs].”

You ask:

“Does the . . . Association, acting as a marketing cooperative for Massachusetts Producers, need [to] be licensed and bonded under the provisions of General Laws, Chapter 94, Sections 42A through K?”

General Laws c. 94, § 42A provides, in pertinent part:

“No person buying milk or cream from Massachusetts producers, in this section and in sections forty-two B to forty-two K, inclusive, called producers, shall operate any milk plant or manufactory unless licensed to operate such plants and manufactories by the commissioner of agriculture . . . Such application shall be made upon a form prescribed by the commissioner, and shall contain a statement of such information as he may require to aid him in fixing the amount of bond hereinafter required. Such statement shall be made under penalties of perjury by the applicant, if an individual, and, if the applicant is a corporation, by its president and treasurer. A license shall not be issued unless the applicant shall execute and file at the time of filing the application . . . a bond or other security satisfactory to the commissioner or shall be relieved therefrom as provided in section forty-two E.”*

General Laws c. 94, § 42B provides that the bond shall be a surety company bond and that its penal sum “shall be substantially equivalent to the total purchase price, as determined by the commissioner [of agriculture], of milk and cream purchased by the applicant from Massachusetts producers in the average period between payments by him to producers during the three months immediately preceding the date of application for a license, plus ten per cent of such total purchase price”

*Certain producers of small quantities of milk and cream are exempted by G. L. c. 94, § 42E from the requirement of filing a bond. We assume that the Association does not come within this exemption.

I find no provision in the statute that exempts cooperative marketing corporations from being licensed and bonded. The fact that the Association in the present situation buys its milk from its own producer members does not put it in a position different from that of other buyers of milk who operate milk plants. Nor may a different position be implied. The Association is a separate legal entity, distinct from its members and cannot be regarded as identical with them. See *Galdi v. Caribbean Sugar Co.*, 327 Mass. 402, 407-408; *My Bread Baking Co. v. Cumberland Farms, Inc.*, 1968 Mass. Adv. Sh. 217, 220-222. I therefore conclude that even though the Association buys its milk from its own producer members, it must be licensed and bonded under G.L. c. 94, § 42A.

You have also asked:

“If [a] bond is required, would there be a change of opinion if the title of the milk did not pass to the Cooperative?”

This question assumes a hypothetical set of facts and is not susceptible of an answer in its present form. Although the passage of title is a distinctive characteristic of a sale (G.L. c. 106, 2-106(1)), the mere passage of title may not necessarily be determinative of the application of G.L. c. 94, § 42A. Lacking a full statement of a given set of circumstances where title might not pass, I do not express — nor do I intimate — any opinion on your second question.

Very truly yours,

ELLIOT L. RICHARDSON
Attorney General

Number 7.

September 20, 1968

HONORABLE ALFRED L. FRECHETTE, M.D.

Commissioner of Public Health

State House

Boston, Massachusetts 02133

Dear Doctor Frechette:

You have requested my opinion as to the validity of action by the Department of Public Health in eliminating nursing notes from a regulation which defines the data required to be included in the medical records that hospitals must keep pursuant to G.L. c. 111, § 70.

The required content of hospital medical records is defined in the “Licensure Rules and Regulations for Hospitals and Sanatoria in Massachusetts” (1950), which are applicable to all hospitals licensed by the Department of Public Health. Prior to this elimination of nursing notes from the required records, Chapter Two (II) (C) (1) of these rules provided:

“The medical record shall include date of admission; identification data; chief complaint; history of present illness; past history; family history; physical examination; provisional diagnosis; reports of special examinations or procedures, including consultation; clinical, laboratory and X-ray reports; complete surgical and dental record; medical, surgical and dental treatment; progress *and nursing* notes; graphic bedside charts; final diagnosis; condition on discharge; date of discharge; autopsy report, if any.” (Emphasis supplied.)

After a public hearing under G.L. c. 30A, the Department on December 12, 1967, approved the deletion of the words “and nursing” from this regulation.

1. *Scope of Review.* I regard my role in passing on the validity of the deletion of "nursing notes" from the regulation defining the content of required medical records, as confined to a determination of whether the Department's action was unlawful on its face, being demonstrably beyond its authority. This is to say, the issue as it stands before me is limited to whether, wholly apart from factual matters which might be developed in an adversary proceeding, the action was clearly in conflict with the applicable statutes or demonstrably exceeded the Department's authority. Cf. *Board of Old Age Assistance of Natick v. Commissioner of Public Welfare*, 326 Mass. 121, 124. The wisdom, as distinguished from the legality, of the Department's action, is beyond my province. Cf. *Silverman v. Board of Registration in Optometry*, 344 Mass. 129, 135. Indeed, because my review of a questioned regulation occurs without the benefits of an adversary proceeding, my scope of review is, as a practical matter, even more narrowly circumscribed than that of a reviewing court.

2. *Nature of Nursing Notes.* You state that nursing notes are "made up largely of observations of the nursing personnel and these observations are recorded by the nurse." You also state that "it is the job of the attending physician to determine the significance of the notes and all details of importance should then be recorded in the progress notes, which are his responsibility."

You have furnished me with certain extracts from nursing literature. One extract states that "the nurse's notes must be an accurate and purely factual report of her observations of the patient and the care he has received."¹ Another extract reads in pertinent part:

"It is the nurses' responsibility to maintain concise, orderly, and up-to-date records on each patient. In hospital practice, this is simplified by the use of standardized record forms for the various types of information. The record will include the charting of temperature, pulse and respiration, bowel movements, urinary outputs, listing of medications used and treatments administered, the result of examinations, and observations by the nurse and all other pertinent information. Recording must be entered immediately, for it is very unwise to rely too greatly on memory. The physician frequently refers to the record and therefore it is essential that it be properly kept to avoid confusion and to enable him to obtain information with a minimum of time and trouble."²

You have also called to my attention the fact that the Joint Commission on the Accreditation of Hospitals, a national hospital accreditation agency, "has no requirements concerning nurses notes. It is the responsibility of the hospital's medical and nursing staffs to develop policy concerning the type and extent of nurses notes to be kept."³

3. *The Department's Rule-Making Authority.* The Commissioner of Public Health together with the Public Health Council (of which the Commissioner is an *ex officio* member, G.L. c. 17, § 3), comprise the Department of Public

¹Hayt, et al., "The Law of the Hospital and Nurse" (Hospital Textbook Company, 1958) page 316.

²Petry, "The Encyclopedia of Nursing," (W. B. Saunders, 1952).

³As quoted from Hayt, et al., "The Law of Hospital and Nurse," *supra*, page 318. The Joint Commission is sponsored by the American Medical Association, the Canadian Medical Association, the American College of Physicians and the American Hospital Association.

Health. G.L. c. 17, § 1. Within the Department, the Public Health Council is the general rule-making body. General Laws c. 111, § 3 provides in pertinent part:

“The council shall make and promulgate rules and regulations, take evidence in appeals, consider plans and appointments required by law, hold hearings, and discharge other duties required by law; but it shall have no administrative or executive functions.”

General Laws c. 111, § 53, as most recently amended by St. 1967, c. 891, § 3, provides in pertinent part:

“The department [of public health] shall, after a public hearing, promulgate rules and regulations for the conduct of hospitals and clinics. Such rules and regulations shall include requirements for diagnostic and therapeutic facilities for the study, diagnosis, treatment and care of patients, and the keeping of proper medical records.”

Thus, these statutes confer on the Department's Public Health Council not only a general rule-making authority, but also a specific authority to regulate “requirements for . . . the keeping of proper medical records.”

In view of these provisions of law and the material reviewed above as to the general nature of nursing notes, I cannot rule that the elimination of nursing notes as part of the requirements for medical records is demonstrably beyond the Department's authority and thus invalid. Nor can I hold that G.L. c. 111, § 70, which requires licensed hospitals to “keep records of the treatment of the cases under their care and the medical history of the same,” mandates otherwise. This provision does not purport to define the specific content of the records required to be kept.

This conclusion finds support in the doctrine that an administrative agency may exercise its rule-making powers to define statutory terms that have been left undefined by the legislature. See *Pacific Coast European Conference v. Federal Maritime Commission*, 376 F.2d 785 (D.C. Cir. 1967).

Your request for my opinion, I note, goes beyond the mere deletion of nursing notes from the regulation. It also asks in general terms whether the Department is precluded from “regulating what the content of the medical record shall contain.” I am not inclined to express an opinion on this broad question, since without a specification of particular items, I am not in a position to make an adequate determination. Conceivably, certain kinds of records may be required by law and may not be subject to administrative variation.

Very truly yours,
ELLIOT L. RICHARDSON
Attorney General

Number 8.

September 23, 1968

MR. SAMUEL M. FLAKSMAN
Executive Secretary
Council Chamber
State House
Boston, Massachusetts 02133

Dear Mr. Flaksman:

Acting on behalf of the Executive Council, you have requested my opinion as

to the legality of authorizing payments upon a certain warrant now pending before the Council for approval.

The payments in question are for services rendered by two individuals as executive director and consultant, respectively, of a special commission created by Res. 1965, c. 80. According to your letter, the commission filed its final report on June 15, 1967, and went out of existence on that date. The invoices appended to your letter indicate that the services for which payment is sought were for the most part rendered thereafter.

It is my understanding that at some time prior to July 19 of this year, the same invoices were submitted but payment was never made, presumably because substantially all the services were rendered after June 15, 1967. A new warrant has since been prepared and was submitted to the Council on July 31.

Between the initial submission and resubmission of this matter to the Council, the General Court enacted Res. 1968, c. 126, approved by the Governor on July 19, which provides:

“RESOLVED, That the special commission, established by chapter eighty of the acts of nineteen hundred and sixty-five, and most recently revived and continued by chapter one hundred and twelve of the resolves of nineteen hundred and sixty-six, is hereby revived for the sole purpose of paying certain bills contracted by it for services and supplies, *notwithstanding the fact that said commission had filed its final report.* Said commission may expend for such purposes from the balance available in item 0267-07 of section two of chapter one hundred and thirty-two of the acts of nineteen hundred and sixty-eight.” (Emphasis supplied.)

In my opinion the payments in question are authorized by the foregoing Resolve. By its very terms, the Resolve appears to be directed specifically at the problem of paying bills incurred after the commission has filed its final report. Moreover, we have been advised by the Comptroller's Division that, to the best of its knowledge, these are the only unpaid bills to which the Resolve could possibly refer. Thus, if it did not authorize this payment, the Resolve would be a nullity. Indeed, all the circumstances tend to indicate that it was these particular unpaid bills that occasioned enactment of Res. 126.

Very truly yours,
ELLIOT L. RICHARDSON
Attorney General

Number 9.

September 27, 1968

HONORABLE ROBERT Q. CRANE
Treasurer and Receiver General
State House
Boston, Massachusetts 02133

Dear Mr. Treasurer:

You have requested my opinion as to whether the voluntary retirement from state service of the “second member” of the State Board of Retirement forecloses him from serving out the balance of his three-year term on the Board, to which he had been elected as of February 16, 1968. I conclude that he may serve out his three-year term.

It is provided by G.L. c. 10, § 18 that the second member of the State Board of Retirement:

“... shall be elected by the members in service of such system from among their number in such manner and for such term, not exceeding three years, as the commissioner of insurance shall determine. . . .”

Section 18 further provides:

“Each member of such retirement board shall continue to hold office until the expiration of his term and until the qualification of his successor. Upon the expiration of the term of office of any elected, chosen or appointed member or in case of a vacancy in either of said offices, his successor shall be elected, chosen or appointed as aforesaid for a three-year term or for the unexpired portion thereof. . . .”

Identical language is found in statutes relating to the Teachers' Retirement Board (G.L. c. 15, § 16) and the retirement boards established for counties, cities and towns (G.L. c. 32, § 20(4)). I have found no cases, opinions of an Attorney General or legislative history which clearly establishes whether the retirement from service of the second member of a Board disqualifies him from continuing on the Board. Neither has the insurance commissioner formulated any written guidelines, pursuant to G.L. c. 10, § 18, which would assist in the determination of the question you have posed. I must therefore rely upon the language of § 18 and the general policy of the Massachusetts retirement laws.

In requiring that the second member of the Board be elected “by the members in service of such system from among their number,” § 18 does not specifically command that such member continue to be a “member in service” throughout his term. That the General Court knew how to express a requirement that the second member be a member in service during his entire term is illustrated by a predecessor of § 18, which declared that: “the second member shall be a member of the association elected by the latter.” (St. 1911, c. 532, § 4, cl. (1)). It is significant that the language employed in the 1911 statute was changed to language substantially similar to that in § 18 by St. 1927, c. 325. Moreover, the provision in § 18 that each member of the Board shall continue in office until the expiration of his term further emphasizes the legislative intention to permit a retired Board member to serve out his elected term.

The continuance in an elected office by a member of the state retirement system who has retired from his state position is consistent with other provisions of the state retirement law. For example, § 5(d) of G.L. c. 32 states that a member of the state retirement system “holding office by popular election” at the time of reaching maximum age shall continue to hold his elected office. Although I cannot conclude that the second member of the Board is in office by virtue of a “popular election,” § 5(d) illustrates a policy of the General Court to permit elected officials to continue in office despite their retirement from state service.

There is nothing in the information furnished us to suggest that any “member in service” point of view might be lost by the retirement of the “second member” from state service. Nor do I discern in the pertinent statutes any indication of any legislative purpose which would be frustrated by such retirement.

I therefore conclude that the current "second member" of the Board of Retirement may serve out his three-year term despite his retirement from state service.

Very truly yours,
ELLIOT L. RICHARDSON
Attorney General

Number 10.

October 8, 1968

ALCOHOLIC BEVERAGES CONTROL COMMISSION

State Office Building
100 Cambridge Street
Boston, Massachusetts 02202

Gentlemen:

You have requested my opinion relative to the interpretation of G.L. c. 138, § 25C(a). That subsection provides that:

"No brand of alcoholic beverages shall be sold within the commonwealth to a wholesaler or retailer, and no manufacturer or wholesaler shall sell, offer for sale, solicit any order for, or advertise, any alcoholic beverages, the container of which bears a label stating the brand or the name of the owner or producer, unless a schedule of minimum consumer prices for each such brand of alcoholic beverages shall first have been filed with the commission and is then in effect."

This provision is part of a regulatory scheme which includes § 25C(d). The latter section provides that the prices filed with the Commission shall not go into effect unless approved by it "as not being excessive, inadequate, or unfairly discriminatory." It is the administration of this § 25C(d) which was the subject of our recent special report to the Commission.

In your letter request of October 7, you state that "[d]ue to a lack of administrative personnel and resources, the Commission is unable to properly approve prices" under § 25C(d), for the forthcoming November-December price period. Therefore, you have expressed your concern that no minimum consumer prices may be "in effect" for purposes of § 25C(a) for this period. You have asked for our opinion as to whether, in these circumstances, the fact that no minimum consumer prices will be "in effect" would prohibit the sale of alcoholic beverages by wholesalers to retailers.

On the basis of the facts as stated in your letter, including your factual conclusion that the failure to approve prices is "[d]ue to a lack of administrative personnel and resources," I conclude that in the present extraordinary circumstances, § 25C(a) would not prohibit such sales. Plainly that statute necessarily presupposes that the Commission will have the resources to have processed the price schedules filed with it so as to enable it, in accordance with § 25C(d), to approve the prices "as not being excessive, inadequate, or unfairly discriminatory." Where the Commission has not simply withheld its approval because of the failure of particular prices in a schedule to meet the required statutory standard, but has conceded that it is impossible for it to determine such compliance for any prices, then in my opinion the Legislature did not intend § 25C(a) to prohibit all sales from wholesalers to retailers. Otherwise the entire distribution of alcoholic beverages in the Commonwealth would be

paralyzed, a result which would be directly contrary to the stated purpose of the Legislature "to meet the reasonable demand of the public for pure alcoholic beverages." G.L. c. 138, § 23.

Very truly yours,
ELLIOT L. RICHARDSON
Attorney General

Number 11.

October 8, 1968

ALCOHOLIC BEVERAGES CONTROL COMMISSION

State Office Building
100 Cambridge Street
Boston, Massachusetts 02202

Gentlemen:

You have requested my opinion as to whether you may, under the circumstances described in your letter of October 7, defer implementing the new sixty-day credit law applicable to sales of alcoholic beverages (St. 1968, c. 574) until such time as the Legislature appropriates to your Commission the funds you deem necessary for this purpose. In general, this law provides for a maximum lawful period of sixty days for credit extended to a retailer by a wholesaler for prohibiting *any* credit to a retailer who is delinquent in his payments beyond sixty days and for criminal penalties for violations of these rules.

You have previously been advised by my office as to certain of your duties under this credit law, in connection with a proposal by which you may avail yourselves of the output of a private service bureau which will employ a computer to process the necessary initial paper work. You have been advised that prior to your certification of the correctness of a daily list of delinquent retailers, you must be independently satisfied that it accurately represents the underlying delinquency notices. You have also been advised that you should provide procedures which would permit retailers an opportunity to contest the factual allegations made by wholesalers in the underlying delinquency notices.

You state that the Legislature has appropriated no funds whatever for your administration of this new law and that without additional funds any attempt to process the several thousand daily delinquency notices, to hear protests, determine violations and otherwise administer the new law will be "absolutely impossible". You further state that in your opinion, such an attempt to implement the law in a partial, incomplete or inadequate manner would "cause serious hardship and injustices to innocent licensees." In support of this statement, you cite the possibility of unjustified economic and criminal penalties which might be suffered by these licensees.

It is of course beyond my province to make a judgement as to your internal financial or personnel needs. These are administrative and executive matters, involving factual determinations and judgments which are beyond the realm of my office. My legal opinion, based on the facts as stated by you, is as follows.

I find little legal precedent to guide you in the difficult situation in which you find yourselves. You are faced with the responsibility of administering a law, yet, on the facts stated, you are denied the tools necessary to perform your task. Plainly you cannot formally suspend the operation of the law, that being a function reserved by Article 20 of the Massachusetts Declaration of Rights to

the Legislature itself. But this obvious proposition is not fully responsive to the issue presented.

In the first place, you do not seek to effect such a suspension, since portions of the act, such as the establishment of sixty days as the maximum lawful term of credit, do not need any administrative action to become effective.

Secondly, there are numerous examples of state and federal laws which require some form of administrative action in order to become fully effective. While such action should, of course, in the usual case be taken as soon as practicable, seldom is this action completed by a law's effective date. Delays of this nature are generally accepted as inherent in any complicated regulatory structure.

Thirdly, and most important, the present situation is one in which incomplete or inadequate administrative action (which would be caused in this instances by a lack of appropriated funds) would result in the risk of serious injustices to various persons subject to your jurisdiction. For example, unless you were to establish adequate procedures (which obviously would involve considerable staff and Commission time and effort) to permit retailers to contest the accuracy of delinquency notices, retailers could be posted as delinquent solely on the basis of allegations of any wholesaler. But there obviously will be cases of *bona fide* disputes as to the delivery of goods, as to their quality or quantity and as to payments claimed to have been made or not made on their account. If retailers were posted as delinquent without a chance to dispute wholesalers' claims, their credit could be cut off (and criminal penalties threatened) even though not in fact delinquent. Thus adequate administrative staff work under this law would seem essential to its fair application. As public officials you are charged with the duty of executing your duties in a fair and impartial manner. It is inconceivable that the Legislature intended you to administer the new statute in any other manner.

If the unfair consequences of implementation described above are, in your judgment, reasonably certain to occur at this time in light of your present administrative capacity, then I would advise you that sound public policy dictates that you should defer implementation until such time as they may be avoided. If in your view this situation cannot be remedied until you receive additional funds (a conclusion on which, as stated earlier, I pass no judgment), you should await the appropriation of such funds. Cf. 1 Op. A.G. 556 (1898).

In the meantime, of course, you should be taking all necessary steps to adopt the procedures and regulations that will eventually govern the administration of the law. My office will, of course, be available to render you all necessary legal assistance in this regard.

Sincerely,
ELLIOT L. RICHARDSON
Attorney General

Number 12.

October 14, 1968

HONORABLE MARTIN J. LYDON, PRESIDENT
Lowell Technological Institute
Lowell, Massachusetts 01854

Dear Doctor Lydon:

You have requested my opinion on the power of the Board of Trustees of

Lowell Technological Institute to forgive tuition to certain classes of students at the Institute. Your questions are as follows:

- “1. May the Trustees, by appropriate action of the body, make provision for the employment of graduate students at stipulated rates of compensation and under stipulated working conditions and as part thereof, provide for forgiveness of tuition for these graduate students so employed?
- “2. May the Trustees, by appropriate action of the body, provide for the forgiveness of tuition for sons and daughters of employees of the Institute?”

Question 1

With reference to Question 1, your letter states:

“The Board of Trustees engages the services of certain graduate students for teaching undergraduate sections of various subjects. These graduate student teachers are employed in the 01 Permanent Salaries account, the 02 Temporary Services account and some are employed from the 03 Services, Non-Employees account. Compensation for the graduate student selected for this teaching service is generally at the rate of one-half the Instructor's level of salary and this amount is paid to those employed throughout the school year, provided that service is rendered as agreed.

“A Faculty Committee has presented a recommendation to the Board of Trustees which is supported by surveys conducted by the Faculty Committee. The results of the surveys indicate that graduate school teachers at many other colleges receive a stipend and free tuition. Those employed at this institute receive a salary as stated above but they are required to pay tuition.

“In a previous opinion from the Department of the Attorney General it was suggested that forgiveness of tuition for a graduate student amounted to a fringe benefit for an employee, and it was recommended that approval of the Commissioner of Administration be sought on the granting of such a benefit to graduate students. Since that time this Institute's Charter has been changed and the Board of Trustees has been granted broad new powers and responsibilities under the so-called ‘Fiscal Autonomy’ law, a section of which permits the Trustees to establish salary rates for ‘professors, tutors, instructors, teachers and other officers and assistants of the Institute.’ ”

The previous opinion of this Department to which you refer is, I assume, the one issued on January 18, 1957 by a member of the staff of the then Attorney General, and does not, of course, constitute a formal opinion of the Attorney General. Whether or not the law in effect at that time is accurately stated in the 1957 opinion, you correctly point out that the pertinent laws have materially changed since then. Under the laws now in effect, I think that Question 1 must be answered in the affirmative.

The boards of trustees of the various state colleges and universities, among them the Lowell Technological Institute, have recently been granted broad discretionary powers over the operation of their institutions. *Report of the Attorney General for the Year Ending June 30, 1965*, p. 140. These powers were

originally granted to the boards of trustees of the Institute by St. 1963, c. 701, amending G.L. c. 75A. The new powers cover a wide spectrum. Thus, G.L. c. 75A, § 1 provides that the Institute "shall be governed solely by the board of trustees whose authority, responsibility, rights, privileges, powers and duties . . . shall be the same as those customarily and traditionally exercised by governing boards of institutions of higher learning."* Section 7 empowers them to adopt "such rules and regulations for the government of the institute, for the management, control and administration of its affairs, for its faculty, students and employees, and for the regulation of their own body, as they deem necessary"

General Laws c. 75A, § 12 specifically deals with the staff of the Institute. It grants the trustees power to "elect the president, the necessary professors, tutors, instructors, teachers and other officers and assistants of the institute" The same section authorizes the trustees to determine "[t]he classification, title, salary range within the general salary schedule, and descriptive job specifications for each position . . . for each member of the professional staff" Graduate students employed as teachers are clearly members of the Institute's "professional staff" as that term is defined in § 12:

"[A]ll officers of the institute and all persons, except those whose duties are clerical, custodial, security, labor, maintenance and the like, employed for teaching, research, administration, extension, enforcement, control laws and regulatory services, technical and specialized academic support staff, and such related activities as shall be determined by the trustees of the institute."

The comprehensive nature of the foregoing powers and the terms in which they are conferred convince me that the Legislature intended to leave the administration of the Institute largely in the hands of the trustees. This conclusion finds support in the legislative history of the pertinent statutes. General Laws c. 75A, §§ 1, 3B, 7 and 12, whereby most of these powers are conferred, were obviously derived from G.L. c. 75, §§ 1, 3, 8 and 14, whereby comparable powers are granted to the trustees of the University of Massachusetts in almost identical terms. As previously indicated, the statutory provisions relating to the Institute were inserted in the General Laws by St. 1963, c. 701; those relating to the University of Massachusetts were inserted a year earlier by St. 1962, c. 648. The 1962 statute was based on a bill submitted with the *Report of the Special Commission on Budgetary Powers of the University of Massachusetts and Certain Related Matters* (1962 House Doc. No. 3350). While the Report was directed primarily at the University of Massachusetts, its conclusions are stated in terms equally applicable to the Institute:

"After considerable study this Commission arrived at the conclusion that the University and Lowell Technological Institute should operate under four essential controls. Beyond these reasonable limits, further restrictions on the authority of the trustees can lead to impairment of their ability to manage the institution as the public requires. These reasonable limitations upon the trustees are the following:

"1. The General Court has the ultimate authority to determine

*I assume that the proposed actions of the Trustees do not conflict with any of the determinations of the Board of Higher Education. See G.L. c. 15, § 1D and G.L. c. 75A, § 1.

general public policy for the University and implement that policy through legislation and appropriation.

"II. Budget requests should be submitted in any prescribed form which the Governor and the Legislature believe will aid them in making wise decisions on the allocation of public funds.

"III. Complete management and financial reporting is essential to the control agencies so that there may be adequate knowledge concerning state operations and to promote public understanding engendered when people know that their tax dollars are being spent to secure the maximum educational benefits.

"IV. A post-audit of all accounts, either by the state auditor or by certified public accountants, is both necessary and desirable in accounting for public funds."

Thus, it was the intention of the Legislature to give the trustees complete discretion in the administration of the Institute, subject only to such specific limitations as are set forth in the statutes. Since I have discovered nothing in the statutes to prevent the trustees from granting to its student teachers such fringe benefits as forgiveness of tuition, I conclude that it is within the trustees' discretion to do so.

This is particularly true where the practice which the trustees propose to follow is widespread among institutions of higher learning throughout the country. Your letter indicates that forgiveness of tuition for student teachers is such a practice. Your Provost has advised us that according to a report filed on November 1, 1967, eight out of ten New England institutions offering graduate courses which were surveyed remit tuition to graduate teaching assistants — the remaining two consisting of a university which employs no graduate teaching assistants, and Lowell Technological Institute. He quotes the Dean of your Graduate School as saying that he knows of no college in the country that employs graduate teaching assistants without remitting tuition. Thus, the power to waive tuition for student teachers may well be among the powers "customarily and traditionally exercised by governing boards of institutions of higher learning," conferred upon the trustees of the Institute by G.L. c. 75A, § 1.

In answer to Question 1, therefore, it is my opinion that the trustees of the Institute do have the power to forgive the tuition of graduate students employed by the Institute in a teaching capacity.

Question 2

Insofar as Question 2 relates to forgiveness of tuition for sons and daughters of members of the Institute's *professional staff*, I answer it in the affirmative. This answer is, I believe, required by most of the same reasons that led to my affirmative answer to Question 1.

There does, however, appear to be one distinguishing factor between the two questions: your Provost has indicated that the practice of forgiving tuition for children of employees, while common among institutions of higher learning, is by no means universal. Thus, the power to forgive tuition for this class of students may not be among "those customarily and traditionally exercised by governing boards of institutions of higher learning" within the meaning of G.L. c. 75A, § 1. This, of course, does not in itself present any obstacle to the trustees adopting the practice. Indeed, the mere fact that the practice is a

common one argues for the trustees' authority to adopt it. The Commission Report previously referred to stressed the need for improving the competitive position of Massachusetts institutions of higher learning in regard to obtaining and retaining the services of eminent scientists and scholars. 1962 House Doc. No. 3350, pp. 24, 36. The same objective is reflected in G.L. c. 75A, § 12, whereby the trustees, in establishing the classification, title and salary plan for the professional staff, are directed to "give recognition to the need to establish and maintain appropriate academic ranks and titles as may be appropriate for higher education in order to provide for outstanding scholars, scientists and teachers." If the trustees believe that forgiveness of tuition for the sons and daughters of the professional staff is an effective means of competing for their services, I am of the opinion that the trustees have the statutory power to adopt such a practice.

In arriving at this conclusion, I am aware of a 1959 opinion of Assistant Attorney General Fred W. Fisher to the opposite effect. *Report of the Attorney General for the Year Ending June 30, 1960*, p. 52. That opinion, like the one alluded to in my answer to Question 1, was rendered before the trustees had been given the broad powers conferred by G.L. c. 75A, as amended by St. 1963, c. 701. The question raised in the 1959 opinion was whether G.L. c. 75A, § 14, which authorizes the trustees to "fix the rates of tuition" at the Institute, permitted forgiveness of tuition to children of its employees. I agree that it did not. For the reasons already stated, however, I believe that other and more recently enacted provisions of G.L. c. 75A do authorize forgiveness of tuition for children of the professional staff.

The foregoing comments, of course, apply only to members of the professional staff. To the extent that Question 2 relates to children of members of the *non-professional staff*, I feel constrained to answer it in the negative.

Although the trustees now have broad powers regarding the recruitment and remuneration of professional personnel, the 1963 amendment to G.L. c. 75A, § 12 did little more than perpetuate the pre-existing law with respect to non-professional employees. Thus, it provides that they "shall continue as state employees under the provisions of chapter thirty and except as otherwise provided in this paragraph, shall be employed in authorized permanent positions in accordance with the provisions of section forty-five of said chapter. . . ." General Laws c. 30, § 45 requires the Director of Personnel and Standardization to "classify all appointive offices and positions in the government of the commonwealth" with exceptions not here material, and to "allocate . . . each such office or position to the appropriate job group in the salary schedule set forth in section forty-six . . ." In this way most of the powers which § 12 confers upon the trustees with respect to professional personnel ("the classification, title, salary range . . .") are vested in the Director of Personnel and Standardization where non-professional personnel are involved. The only exception appears in a provision of § 12 authorizing the trustees "without prior approval and within the limits of appropriations to establish and fill temporary, part time and seasonal positions within existing titles and rates within available appropriations for the fiscal year." This is clearly insufficient to permit the trustees to offer the sort of fringe benefits to non-professional employees that the statute allows with respect to the professional staff.

The sharp distinction in treatment of professional and non-professional employees under G.L. c. 75A, § 12 evidently resulted from a legislative determination that employees in the latter category should not be treated differently from employees of other state agencies. See *Report of the Special*

Commission on Budgetary Powers of the University of Massachusetts and Certain Related Matters, 1962 House Doc. No. 3350, p. 37. The same policy is reflected in G.L. c. 30, § 45 (which is incorporated by reference in G.L. c. 75A, § 12): "In so allocating or reallocating any such office or position, the said director [of personnel and standardization] 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 supplied.) This statutory declaration of equal treatment of state employees who perform similar work leads me to the conclusion that the trustees have no more power to grant forgiveness of tuition to sons and daughters of the Institute's non-professional employees than to those of any other state employees.

In summary, then, in answer to your second question, I am of the opinion that the trustees of the Institute may forgive tuition for sons and daughters of its *professional staff*, but not for sons and daughters of its *non-professional staff*. Reluctant as I am to reach this conclusion, the governing statutes leave me no alternative. Any change in the law governing the trustees' powers over non-professional employees must come from the Legislature. Of course, any decision by the trustees to avail themselves of this limited power in favor of professional employees is one left entirely to the discretion of the trustees.

Very truly yours,
ELLIOT L. RICHARDSON
Attorney General

Number 13.

October 18, 1968

HONORABLE ROBERT Q. CRANE
Treasurer and Receiver General
Chairman, State Board of Retirement
State House
Boston, Massachusetts 02133

Dear Mr. Crane:

As Chairman of the Board of Retirement, you have requested my opinion as to the effect of St. 1968, c. 700 on the amount of the pensions payable to widows of certain classes of veterans who were employed in public service during their lifetimes.

Section 1 of the 1968 statute amended G.L. c. 32, § 58 to read as follows:

"A veteran who has been in the service of the commonwealth, or of any county, city, town or district or any housing authority, for a total period of thirty years in the aggregate, shall, at his own request, with the approval of the retiring authority, be retired from active service at *seventy-two* percent of the highest annual rate of compensation, including any bonuses paid in lieu of additional salary or as a temporary wage increase in addition to his regular compensation and including any maintenance allowance, payable to him while he was holding the grade held by him at his retirement, and payable from the same source." (Emphasis supplied.)

The effect of the amendment was to increase the percentage of annual compensation used in computing the retirement allowance from 65% to 72%. Section 2 of St. 1968, c. 700 provides that "any veteran who, prior to the

effective date of this act, was retired under [G.L. c. 32, § 58] *shall have his annual pension adjusted*, so as to comply with the provisions of said [§ 58], as amended by section one of this act." (Emphasis supplied.) The 1968 statute was approved July 19 and its effective date is October 17, 1968.

The problem arises under G.L. c. 32, § 58B, which was not amended by St. 1968, c. 700. Section 58B allows a veteran qualifying for a pension under § 58 to accept a lesser sum in order that an allowance may be payable to his widow after death. You are concerned about the effect of the 1968 amendment to § 58 upon the rights of widows of veterans who have died prior to October 17, 1968, the effective date of the amendment. You ask specifically about the rights of a widow in the following situations:

1. Where the veteran had elected to accept the option under § 58B and had retired before his death.

2. Where the veteran was entitled to retire but died before applying for retirement and before accepting the option under § 58B.

I am of the opinion that the widows of both classes of veterans are entitled to an adjustment in the allowances payable to them under G.L. c. 32, § 58B. This conclusion is based on the inter-relationship which appears to have been intended between §§ 58 and 58B, and the effect on that interrelationship of St. 1968, c. 700, § 2.

The first paragraph of G.L. c. 32, § 58B provides:

"A veteran who is entitled to be retired under the provisions of section fifty-eight may, on or before the date of his written application for retirement, elect to receive a lesser yearly amount of pension payable to such veteran during his lifetime, with the provision that upon his death leaving as a survivor his spouse at the time of his retirement two thirds of the yearly amount of such lesser pension shall be continued during the lifetime of and paid to such spouse; provided, however, that the surviving spouse shall receive not less than one half of the pension such employee is receiving at the time of his death . . ." The yearly amount of such lesser pension shall be determined so that the value, on the date of retirement, of the prospective payments to such veteran and to such spouse shall be the actuarial equivalent of the value on such date of the full pension that such veteran would be entitled to under the provisions of said section fifty-eight."

It is clear that any veteran who retired under G.L. c. 32, § 58 before October 17, 1968, *if still living on that date*, would be entitled to the benefits of the 1968 amendment whether or not he had elected to accept the lesser sum under § 58B. The source of the right to retire and to receive a pension lies exclusively in § 58 itself. Section 58B does not affect the existence of those rights, but deals only with the manner in which the pension is to be paid. The "lesser pension" payable to a veteran who has accepted the § 58B option is determined by a formula which is applied to "the full pension that such veteran would be entitled to under the provisions of [§ 58]." Since the amount of the "full pension" payable to a living veteran must be recomputed at the 72% rate because of the 1968 amendment to § 58, the same adjustment must be made in the "lesser pension" payable to a living veteran who made the election under § 58B.

Upon the death of a veteran who has accepted the "lesser pension" under § 58B, his widow receives an allowance equal to "two thirds of the yearly amount of such lesser pension . . ." If he should be entitled to an adjustment under St. 1968, c. 700, § 2 in that "lesser pension" before his death, it follows that his widow's allowance payable thereafter would also have to be adjusted to conform to the increased pension rate. In this way the increase in the pension rate brought about by the 1968 amendment would ultimately inure to the benefit of the widow of a previously retired veteran who happens to be alive on the effective date of October 17, 1968.

The foregoing case differs from the one described in part 1 of your question only in that the veteran in the latter case has died prior to October 17. But once it is conceded (as I believe it must be) that the widow of the previously retired veteran who died *after* October 17 will benefit from the increased pension rate, I can see no basis for supposing that the Legislature intended to deny similar benefits to widows of veterans who died before that date. The Supreme Judicial Court, in upholding the application of another statute increasing pensions payable to a broad class of veterans, stated that "[t]he benefits thereby afforded should not be denied to the plaintiff . . . unless there exists a substantial reason to believe he was not intended to be among those retired veterans receiving the increase." *Johnson v. Milton*, 349 Mass. 736, 740. I think that the same reasoning is applicable to the pension rights of retired veterans' widows in the present case.

In my opinion the widow under § 58B must be treated as standing in the place of her deceased husband regardless of whether his death preceded or followed the effective date of the 1968 amendment. Under § 58B the lives of *two* persons — the veteran and his widow — are substituted for the life of the veteran alone in determining the period of the retirement benefits conferred by § 58. For purposes of § 58B, therefore, I think that the reference to "veteran" in the retroactive adjustment clause of the 1968 statute should be construed as including the veteran's widow. Her rights are derivative and her survival to the effective date of October 17, 1968 was, in my opinion, intended to satisfy the statutory prerequisites for the increased pension rate to the same extent that her husband's survival to that date would have done so.

Putting it a different way, I think that § 58B should be read as, in effect, including within the scope of the word "veteran" the widow in whose favor he has made the election provided in that section. Mathematically, this was certainly the intention of the Legislature, since § 58B provides that "[t]he yearly amount of such lesser pension shall be determined so that the value, on the date of retirement, of the prospective payments to such veteran and to such spouse *shall be the actuarial equivalent of the value on such date of the full pension that such veteran would be entitled to under the provisions of [§ 58].*" (Emphasis supplied.) I am persuaded that a similar legislative purpose governs in determining the effect of the 1968 amendment to § 58.

To be sure, a literal reading of some of the language of § 58B — such as the proviso that the widow receive "not less than one half of the pension such employee is receiving *at the time of his death*" (emphasis supplied) — might argue for a narrower interpretation. But the terms of an isolated provision must be subordinated to the overriding legislative intent. In any event I do not think that this is sufficient evidence to establish the proposition that the Legislature intended to discriminate between veterans' widows in otherwise identical circumstances merely on the basis of the date of their husbands' deaths.

To summarize, I am of the opinion that the widow's allowance depends on the amount which *would have been payable* to her husband on the date of his retirement if he had lived to October 17, 1968. Under St. 1968, c. 700, § 2, the amount which would have been so payable must be adjusted to comply with the newly established pension rate of 72%. Accordingly, an adjustment must be made in the amount payable to the widow.

The class of cases described in part 2 of your question involves additional complications. Here the veteran, though entitled to retire, died before actually doing so and before electing to provide an allowance for his widow under G.L. c. 32, § 58B. The third paragraph of that section is relevant to cases of this kind:

"If a veteran entitled to be retired under the provisions of section fifty-eight dies before making written application for such retirement, or, having exercised the option provided by this section, dies before the effective date of his retirement, his widow shall receive an annual allowance consisting of two thirds of the actuarial equivalent to which said veteran would have been entitled had his retirement allowance been computed under the provisions of this section as of the date of death of said veteran, and payable from the same source; provided that said widow and the deceased veteran were living together at the time of his death, or that the retiring authority finds that they had been living apart from justifiable cause other than desertion or moral turpitude on the part of the widow."
(Emphasis supplied.)

For purposes of your question, I read the foregoing provision as saying, in effect, that the widow of a veteran eligible for retirement who dies before applying therefor and before exercising the option under § 58B *shall be treated as if her husband had lived long enough to exercise the option and to retire*. As previously indicated, the widow would be entitled to an adjustment in her allowance, pursuant to St. 1968, c. 700, § 2, if her husband's retirement and his exercise of the option had preceded his death — even if she was widowed before the effective date of the 1968 statute. Thus, the widow described in part 2 of your question, like the widow described in part 1, is entitled to the adjustment.

Very truly yours,
ELLIOT L. RICHARDSON
Attorney General

Number 14.

October 21, 1968

DR. FRANCIS X. GUINDON, Director
Division of State Colleges
50 Franklin Street
Boston, Massachusetts 02110

Dear Doctor Guindon:

You have requested my opinion on whether the Board of Trustees of State Colleges (the "Trustees") may authorize the expenditure of \$10,000 for a program of educational stipends for a group of students at Boston State College from certain funds appropriated to the Trustees.

Your letter indicates that the proposed expenditure "arises from the need to provide additional subsidy to some ten to fifteen disadvantaged students who on the basis of a ten-week workshop held this summer had been admitted as

full-time regular students to Boston State College." As I understand it, this program is an experiment designed to assist students who, because of the extreme cultural and economic handicaps of the urban ghetto environment in which they have been living, would not otherwise have any opportunity for a college education.

The program as a whole involves forty-seven such students who were selected from a larger group by a faculty team from Boston State College on the basis of college potential. The summer workshop referred to was the first stage of this program, and was financed by a self-replenishing fund available for the purpose. See St. 1968, c. 380, § 2, Item 7107-0001. Since this phase of the program was conducted on a part-time basis, the participating students were able to continue working at their jobs and thereby support themselves without interfering with their studies.

This is no longer the case. Having become full-time freshmen at Boston State College, these students must now devote much more time to their studies and cannot hold full-time outside jobs without defeating the purpose of the program. You report that through scholarships and existing student-aid programs, most of these students can afford to continue at the College. You state, however, that the remaining ten or fifteen of them, some of whom have dependents, cannot do so without an additional subsidy to defray living expenses.

Accordingly, the Trustees have voted to authorize a \$10,000 stipend to assist the latter group of students with their living expenses for the fall semester, with the expectation of authorizing a similar expenditure for the spring semester. These funds would be disbursed to the students by the President of Boston State College in varying amounts on the basis of individual need, using much the same criteria as those prescribed by certain educational aid programs sponsored by the Federal Government. You indicate that the Trustees adopted this course of action only after exploring all other possible solutions to the problem and satisfying themselves that there was no presently available alternative.

In submitting their request for this expenditure to the Comptroller, the Trustees directed that it be charged against the general operations account of Boston State College, to which over four million dollars had been appropriated in the Budget for the 1969 Fiscal Year (St. 1968, c. 380, § 2, Item 7108-0000). The Comptroller, however, has refused to certify the expenditure, stating that it is not a proper charge against this account. You have asked me to determine the correctness of the Comptroller's ruling.

I regret to advise you that in my opinion the Legislature did not intend that this account be charged for the proposed expenditure. In so advising you I do not deprecate in any way the social desirability of the proposed stipends. Rather, I have assumed, for purposes of this opinion, that the Trustees are correct in treating this expenditure as necessary to meet a social and educational need of the highest priority. Nor do I believe there is any constitutional obstacle to the use of public funds for this purpose.

This opinion is therefore addressed exclusively to the narrow question of whether the Legislature has in fact authorized the Trustees to use funds from the particular appropriation in question (Item 7108-0000 of the 1969 Budget) for the proposed program of educational stipends.

It is fundamental that the Trustees may exercise only such powers as the Legislature has conferred upon them. It is equally fundamental that the exercise of any power involving the expenditure of funds from the State Treasury is

conditional upon the existence of an appropriation for that purpose at the time the expenditure is to be made. See G.L. c. 29, §§ 26, 27. These two basic propositions supply the framework for my answer to the question at hand.

1. AUTHORITY TO GRANT STIPENDS APART FROM *THE BUDGET FOR THE CURRENT FISCAL YEAR*

The Board of Trustees of State Colleges is established as an agency within the Department of Education by G.L. c. 15, § 20A, and is given broad powers over the state colleges by G.L. c. 73. There clearly is no provision in c. 73 or elsewhere in the General Laws, however, whereby the Trustees are given express authority to grant the proposed stipends.

In my opinion, it is equally evident that there are no general statutory provisions from which such authority may justifiably be inferred.

You point out in your letter that "the granting of such stipends is a customary prerogative of boards of trustees of institutions of higher education." The state colleges (including Boston State College) are, of course, institutions of higher education which "provide a major emphasis on the preparation of teachers and other professional educational personnel." G.L. c. 73, § 1. But, while G.L. c. 73, § 1, prior to 1965, gave the Trustees "all the authority, responsibility, rights, privileges, powers and duties customarily and traditionally exercised by governing boards of institutions of higher learning," this provision was stricken from § 1 by St. 1965, c. 572, § 18.

The 1965 statute also created the Board of Higher Education and gave it ultimate control over certain areas of educational policy. Thus, under G.L. c. 15, § 1D, inserted by St. 1965, c. 572, § 2, the stated purpose of the Board of Higher Education is "to support, facilitate, and delineate functions and programs for public institutions or of higher education in the commonwealth segments of such institutions, to allocate to them the responsibility and autonomy to discharge such functions and programs, and to plan and develop efficient and effective coordination among them . . ." There follows in the same statute a long list of powers conferred upon the Board of Higher Education, the first of which is to "promote the best interests of all public higher education throughout the commonwealth." In this manner, the Trustees, though continuing to perform a vital function in the structure of Massachusetts higher education, have in some respects been subordinated to the Board of Higher Education, thereby somewhat narrowing the scope of the independent powers of the Trustees which might otherwise be inferable from the broad language of G.L. c. 73.

Evidence of such a legislative intent to restrict the scope of the Trustees' implied powers in the area of student aid programs lies in the fact that the Board of Higher Education, not the Trustees, has been specifically charged with the administration of many programs for providing financial aid to needy students. Under G.L. c. 15, § 1D, the Board administers three different scholarship programs: one for students "enrolled in and pursuing a program of higher education," another for those pursuing "a course of study in medicine, dentistry or nursing" and still another for awarding a limited number of "merit scholarships." In addition, the Board of Higher Education is authorized by G.L. c. 69, § 7D to award "special education scholarships . . . to graduates of high schools within the commonwealth who qualify for entrance to a public or private college or university in courses in the field of education . . ." The latter

provision is particularly significant in that it extends the authority of the Board of Higher Education even to scholarships for students in the state colleges.¹

Thus, although the Trustees are largely autonomous in their administration of the state colleges, the Legislature has seen fit to vest most of the authority over scholarships in the Board of Higher Education and to assign the Trustees a relatively minor role in this particular area. The specificity of these grants of power, moreover, discloses a legislative pattern of providing for student-aid programs only by express statutory enactment.²

Therefore, apart from the 1969 Budget, I find no express or implied power in the Trustees to authorize the expenditure of \$10,000 for the program of educational stipends here in question.

2. AVAILABILITY OF FUNDS FOR STIPENDS *FROM ITEM 7108-0000*

Turning, then, to the 1969 Budget, by which the Legislature could, if it so wished, have authorized as well as funded the proposed student stipend program, I find no indication that it intended to do either.

The appropriation in question is Item 7108-0000 of the Budget for the 1969 Fiscal Year (St. 1968, c. 380), one of many appropriations made to the Trustees "[f]or the administration, maintenance of and for certain improvements at state colleges and the boarding halls attached thereto . . . with the approval of the board of trustees." Subject to these limitations, Item 7108-0000 appropriates \$4,323,680 for "State College at Boston, including not more than three hundred and seventy-nine permanent positions."

This appropriation, like any appropriation, is a legislative enactment entitled to statutory force and effect, and the funds therein may be used only for purposes falling within the scope of the appropriation. The precise question, then, is whether the "administration" and "maintenance" of Boston State College include the granting of stipends to its students.

It has already been noted that so far as the General Laws are concerned, the Legislature has followed a practice of establishing programs for student aid by express statutory language. The same is true of appropriations to educational agencies. For example, the Legislature, under Item 7108-9704 of the 1969 Budget, appropriated \$75,000 for use by the Trustees at Boston State College "[f]or the commonwealth's contribution toward the national defense education act loan program and the office of economic opportunity student work program." A similar appropriation relative to these federally-sponsored student-aid programs was made for each of the other state colleges (see St. 1968, c. 380, § 2, Items, 7109-9704, 7110-9704, 7111-9704, 7112-9704, 7113-9704,

¹There is an exception under G.L. c. 69, § 7D for scholarships to Fitchburg State College. Scholarships to that College are specially covered by G.L. c. 69, § 7C, which provides that they shall be recommended by its president and approved by the Board of Education (as distinguished from the Board of Higher Education). Yet § 7C makes no reference to the Trustees of State Colleges, whose sole responsibility in this regard appears to be to act as a conduit of funds appropriated for such scholarships. See St. 1968, c. 380, § 2, Item 7110-9704.

²While I have found no express provision in the General Laws which authorizes a program of educational stipends in the \$10,000 amount proposed, G.L. c. 73, § 5 appears to authorize (subject to appropriation) such a program in a lesser amount:

"The trustees may annually expend, in semiannual payments, *not more than four thousand dollars* in aiding students in state colleges." (Emphasis supplied.)

7114-9704, 7115-9704, 7116-9704, 7117-9704) — despite the fact that a general operations appropriation was made for each state college in terms similar to Item 7108-0000 (see St. 1968, c. 380, § 2, Items 7109-0000, 7110-0000, 7111-0000, 7112-0000, 7113-0000, 7114-0000, 7115-0000, 7116-0000, 7117-0000). In the case of Fitchburg State College, which is authorized to award “special education scholarships” by G.L. c. 69, § 7C, a specific appropriation is made to the Trustees “for not more than one hundred scholarships, as authorized by [G.L. c. 69, § 7C].” St. 1968, c. 380, § 2, Item 7110-9407.

Until 1967, moreover, the Legislature had made a practice of including in its annual budgets specific appropriations of \$4,000 to the Trustees “[f]or aid to certain pupils in state colleges, under the direction of the board of trustees.” See, for example, St. 1966, c. 411, § 2, Item 1329-03.³ Yet this appropriation (which is conspicuous by its absence from the 1968 and 1969 Budgets) customarily appeared side by side with a general operations appropriation for each of the state colleges identical in all material respects to Item 7108-0000 of the 1969 Budget. See, for example, St. 1966, c. 411, § 2, Items 1330-01, 1331-01, 1332-01, 1333-01, 1334-01, 1335-01, 1336-01, 1337-01, 1338-01.

The same degree of particularity is demonstrated in the appropriations made to the Board of Higher Education under St. 1968, c. 380 for the scholarship programs administered by that agency. Here the Legislature has not only specified that the appropriated funds are to be used for such scholarships, but has made separate appropriations for each individual scholarship program. Thus, \$250,000 has been appropriated to the Board “[f]or medical, dental and nursing scholarships, as authorized by [G.L. c. 15, § 1D]” (Item 7070-0005); \$2,000,000 has been appropriated “[f]or general scholarships, as authorized by [G.L. c. 15, § 1D]” (Item 7070-0006); \$15,000 has been appropriated “[f]or special educational scholarships, authorized by [G.L. c. 69, § 7D]” (Item 7070-0007) and \$32,000 has been appropriated “[f]or merit scholarships, as authorized by [G.L. c. 15, § 1D]” (Item 7070-0014).

It is even more significant, in my opinion, that the Trustees of the University of Massachusetts received an appropriation in the 1969 Supplementary Budget of \$150,000 “[f]or a program of assistance for students from various racial backgrounds in disadvantaged environments, including but not limited to negro students; provided, that expenditures may be made for, but not limited to, scholarships, loans, matching federal and private grants, tutorial assistance and programs of cultural enrichment.” St. 1968, c. 771, Item 7411-2000. The powers of the Trustees of the University of Massachusetts, under G.L. c. 75, are at least as broad as (if indeed, not broader than) those of the Trustees of State Colleges, many of them being conferred by identical statutory language. And the University received a general maintenance appropriation similar to those received by the state colleges. St. 1968, c. 380, § 2, Item 7410-0000. Yet the Legislature made a specific appropriation to the University for what appears to be a program closely similar to the one contemplated by the Board of Trustees of State Colleges.

³These appropriations had been made in order to provide funds for implementing G.L. c. 73, § 5, whereby the Trustees are authorized, subject to appropriation, to spend up to \$4,000 annually “in aiding students in state colleges.” The omission of any comparable appropriation in the current Budget suggests that the Legislature did not intend to make funds available to the Trustees for student aid under G.L. c. 73, § 5. Furthermore, even if the Legislature had intended to incorporate an appropriation for use under G.L. c. 73, § 5 within some larger account, it seems unlikely that it would have selected for this purpose an account (such as Item 7108-0000) whereby funds are appropriated for use at a single state college rather than the state colleges generally.

We discern here a clear and consistent pattern whereby the Legislature has provided funds for each student-aid program on an individual basis, in some instances prescribing the uses of those funds in considerable detail. In doing so, the Legislature has, I think, manifested an intention to reserve to itself all major decisions on the nature and extent of scholarship and other student-aid programs. It has, in effect, carved out an exception to the largely autonomous status which it has conferred upon bodies like the Trustees of State Colleges.

In the light of this legislative pattern, my conclusion that Item 7108-0000 was not intended to include funds for the proposed stipend program is strengthened by the fact (reported by you and by the Fiscal Affairs Division) that the Trustees did not request funds for this or any similar program in the budgetary estimates they submitted for the current Fiscal Year. The Legislature therefore had no proposal for such a program before it when it included Item 7108-0000 in the 1969 Budget. This being the case, it is highly unlikely, in the light of the legislative pattern heretofore described, that the Legislature intended to appropriate funds from this account for this purpose.

In summary, then, all the available evidence, considered together, points to the conclusion that the Legislature did not intend Item 7108-0000 to include expenditures for a student stipend program of this nature.

3. THE EFFECT OF THE EXPENDITURE CODE MANUAL AND OF FISCAL AUTONOMY

The foregoing conclusion is not altered by the two further factors relied upon in your letter as possible sources of the Trustees' authority to expend funds from Item 7108-0000 for educational stipends. The first of these is the fact that such stipends are recognized as possible objects of expenditure in the Expenditure Code Manual published at the direction of the Joint Committee on Ways and Means in accordance with G.L. c. 29, § 27. The second is the considerable measure of fiscal autonomy enjoyed by the Trustees under G.L. c. 73, § 12.

As to the first of these, you have called my attention to the schedule of "subsidiary accounts" relating to appropriation Item 7108-0000 which is on file with the Joint Committee on Ways and Means pursuant to G.L. c. 29, § 27, and to the allocation therein of \$150,000 to Subsidiary Account 13. Subsidiary Account 13 is captioned on page 10 of the Expenditure Code Manual as "Special Supplies and Expenses." There follows a long and varied list of *object codes* — i.e., possible purposes for which funds in this account may be spent, if otherwise authorized, with a code number identifying each. Object Code 655, appearing on page 11 of the Manual, provides:

"Tuition, *Educational Stipend* and Supplies:

"Includes expenditures for tuition, *educational stipend* and supplies, textbooks and periodicals for teachers *and pupils* and all supplies for educational purposes." (Emphasis supplied.)

But this does not mean that all appropriated funds allocated to Subsidiary Account 13 are available for the purposes described in Object Code 655, or that funds allocated to Object Code 655 can necessarily be expended for all the purposes set forth therein. On the contrary, these educationally oriented types of expenditures are grouped under Object Code 655, and Object Code 655 is included under Subsidiary Account 13, merely for administrative convenience in the classification and control of expenditures. That is, if and when authorized by

the Legislature, expenditures for educational stipends would be assigned to Subsidiary Account 13 and Object Code 655 for accounting purposes.⁴

Whether a given object code is pertinent to a particular appropriation always depends in the final analysis on the scope of the appropriation itself. For the reasons already stated, I do not think that the Legislature intended the funds in Item 7108-0000 to be available for the payment of the educational stipends here in question.

For similar reasons, I do not believe that the degree of fiscal autonomy which the Legislature has conferred upon the Trustees can be successfully relied upon here. General Laws c. 73, § 12 authorizes the Trustees, among other things, to transfer appropriated funds "within and among subsidiary accounts" without obtaining the approval of the Budget Director which G.L. c. 29, § 29 requires of most state agencies.⁵ But funds so transferred may still be used only for purposes falling within the scope of the general appropriation within which the transfer is made — in this case, Item 7108-0000. As previously indicated, the payment of the proposed educational stipends is not among the purposes for which funds from Item 7108-0000 may be spent.

It should be noted in this connection that the Trustees of the University of Massachusetts are also granted fiscal autonomy by a statute almost identical to G.L. c. 73, § 12.⁶ Yet the Legislature apparently deemed it necessary to give the University the specific appropriation previously referred to "[f]or a program of assistance for students . . . in disadvantaged circumstances . . ." St. 1968, c. 771, Item 7411-2000.

In short, neither the terms of Object Code 655 in the Expenditure Code Manual nor the degree of fiscal autonomy given by G.L. c. 73, § 12 can alter the fact that the proposed expenditure of \$10,000 for this program of educational stipends is outside the intended scope of Item 7108-0000 of the 1969 Budget. It is therefore my opinion that the Trustees may not authorize the proposed payment of such stipends to students at Boston State College from this account.

Very truly yours,
ELLIOT L. RICHARDSON
Attorney General

⁴Subsidiary Account 13 also embraces such expenditures as those "for all fish and game propagation supplies for stocking streams and forests" (Object Code 636, at page 11 of the Manual), and "for military and police supplies such as revolvers, holsters, rifles, ammunition, gas, bombs, cartridges, handcuffs, etc." (Object Code 637, at page 11 of the Manual). It could hardly be contended that the Trustees may apply funds appropriated under Item 7108-000 to these purposes.

⁵The full text of G.L. c. 73, § 12 is as follows:

"Notwithstanding any other provision of law to the contrary, the general court shall annually appropriate such sums as it deems necessary for the maintenance, operation and support of each state college; and such appropriations shall be made available to each state college by the appropriate state officials for expenditure through allotment, transfer within and among subsidiary accounts, advances from the state treasury in accordance with the provisions of sections twenty-four, twenty-five and twenty-six of chapter twenty-nine, or for disbursement on certification to the state comptroller in accordance with the provisions of section eighteen of said chapter twenty-nine as may from time to time be directed by the trustees or an officer of the division designated by the trustees."

⁶General Laws c. 75, § 8 provides:

"Notwithstanding any other provision of law to the contrary, the general court shall annually appropriate such sums as it deems necessary for the maintenance, operation and support of the university; and such appropriations shall be made available by the appropriate state officials for expenditure through allotment, transfer within and among subsidiary accounts, advances from the state treasury in accordance with the provisions of sections twenty-four, twenty-five and twenty-six of chapter twenty-nine, or for disbursement on certification to the state comptroller in accordance with the provisions of section eighteen of said chapter twenty-nine, as may from time to time be directed by

Number 15.

October 30, 1968

HON. CHARLES H. McNAMARA
Commissioner of Agriculture
State Office Building
100 Cambridge Street
Boston, Massachusetts 02202

Dear Commissioner McNamara:

You have asked my opinion as to whether, upon a request by a certain greyhound association (the "Association"), you must notify it of applications to you for the certificate of approval (a "Certificate") under G.L. c. 128A, § 3, which an applicant for a racing license at a state and/or county fair must submit to the State Racing Commission. You also ask whether you must comply with a request of the Association that you hold an adjudicatory proceeding under the Administrative Procedure Act (G.L. c. 30A) upon each application for a Certificate and that you allow the Association to appear, participate and be heard.

For purposes of this opinion, I will assume, without deciding, that the application for a Certificate under G.L. c. 128A, § 3 must be determined in an adjudicatory proceeding under G.L. c. 30A, § 1(1), since I am of the opinion that even in that event the Association has no right to notice or to appear, participate or be heard.¹

Under G.L. c. 128A, § 3, as amended through St. 1967, c. 14, an applicant for a license to conduct a horse or dog racing meeting in connection with a state or county fair must present to the State Racing Commission a certificate from the Commissioner of Agriculture that

"(1) such fair is a state or county fair as defined in section one, (2) such fair has been operating for each of the five consecutive years immediately preceding the date of filing such application and had received for each of said five consecutive years assistance from the agricultural purposes fund, (3) such fair is properly qualified [in certain specified respects], and (4) the location where such racing meeting is to be held is annually approved by him and by the board of agriculture.... 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 the 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."

Assuming, then, for the purposes of this opinion only, that a Certificate may be issued only after an adjudicatory hearing under G.L. c. 30A (a question, as noted earlier, that I do not now decide), the question of whether the Association has a right to notice, appearance and participation in such a hearing depends on whether the Association is to be regarded as a "party" to the proceeding, within the meaning of G.L. c. 30A, § 1(3), which defines a "party to an adjudicatory proceeding" as:

¹It is equally clear that if G.L. c. 30A were not applicable, no other provision of law would grant to the Association the right to notice, appearance, participation or hearing.

“(a) the specifically named persons whose legal rights, duties or privileges are being determined in the proceeding; and (b) any other person who as a matter of constitutional right or by any provisions of the General Laws is entitled to participate fully in the proceeding, and who upon notice as required in paragraph (1) of section eleven makes an appearance, and (c) any other person allowed by the agency to intervene.”

Under G.L. c. 30A, § 11(1), only a “party” is entitled to notice of the hearing; under G.L. c. 30A, § 10, only a “party” is entitled to “an opportunity for full and fair hearing;” and under G.L. c. 30A, § 11(3), only a “party” has a “right to call and examine witnesses, to introduce exhibits, to cross-examine witnesses who testify, and to submit rebuttal evidence.”

Although the exact nature and function of the Association does not appear in the information that you have furnished to me, I assume that it is a potential competitor of one or more potential applicants for Certificates. Yet even on this assumption it does not come within the definition of a “party” in § 1(3) of the Administrative Procedure Act quoted above. First, “the specifically named” person whose legal rights, duties or privileges are being determined in the proceeding to obtain a Certificate is the applicant only. Second, no provision is made in the pertinent statute, G.L. c. 128A, § 3, for participation by any person other than the applicant. And finally, I am of the opinion that a potential competitor of the applicant has no “constitutional right . . . to participate . . . in the proceeding.”² An application to you for a Certificate is only the first step in a longer process that may culminate in the issuance of a license by the State Racing Commission. You merely make certain preliminary determinations under G.L. c. 128A, § 3, which are related to the agricultural aspects of the proposed fair. If your determinations are favorable, they merely enable the applicant to take the next step of seeking a license from the State Racing Commission. They do not confer any operating right on the applicant nor do they deny or abridge rights of any other person. The possibility that the granting of a license to the applicant by the State Racing Commission may create possible competition with other racing activities is not one of the matters that have been committed to you for consideration. Questions as to such competition fall instead within the jurisdiction of the State Racing Commissioners who upon an application for a racing license must conduct an adjudicatory proceeding. See *Bay State Harness Horse Racing & Breeding Assn. Inc. v. State Racing Commn.*, 342 Mass. 694, 701. The Commissioners may of course allow other persons to intervene in the proceeding before them.

I regard as inapplicable in the present situation such cases as *South Shore National Bank v. Board of Bank Incorporation*, 351 Mass. 363, 367-368, and *Westland Housing Corp. v. Commissioners of Insurance*, 352 Mass. 374, 383-384. Each of these cases presented the issue whether the plaintiff had a sufficiently direct interest to have standing to seek judicial review of administrative action. None of them involved the question of whether the plaintiff was as a matter of constitutional right entitled to participate in the hearings of the administrative agency. In any event, I regard as more applicable certain cases which have denied standing to certain persons who have sought judicial review of administrative

²The situation where a person has in fact been permitted to intervene as a party is not presented by your request. See G.L. c. 30A, § 10; *Wilmington v. Department of Public Utilities*, 340 Mass. 432, 437.

action. See *Circle Lounge & Grill, Inc. v. Board of Appeal of Boston*, 324 Mass. 427, 429-430; *Springfield Hotel Assn. Inc. v. Alcoholic Beverages Control Commission*, 388 Mass. 699, 701; *Shaker Community, Inc. v. State Racing Commn.*, 346 Mass. 213, 215-216.

In summary then, I conclude that the Association has no right to notice of, or to appear or participate in, hearings upon applications by other persons for Certificates.

Very truly yours,
ELLIOT L. RICHARDSON
Attorney General

Number 16.

November 1, 1968

HONORABLE RICHARD E. McLAUGHLIN
Registrar of Motor Vehicles
100 Nashua Street
Boston, Massachusetts 02114

Dear General McLaughlin:

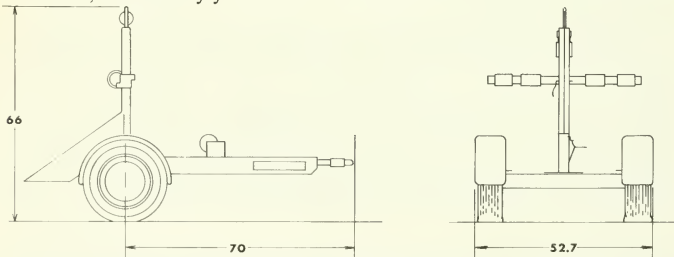
You have requested my opinion on a certain question arising under the following provision of G.L. c. 90, § 19:

“No motor vehicle shall be operated on any way to draw more than one trailer or other vehicle without a permit so to operate from the department of public works.”

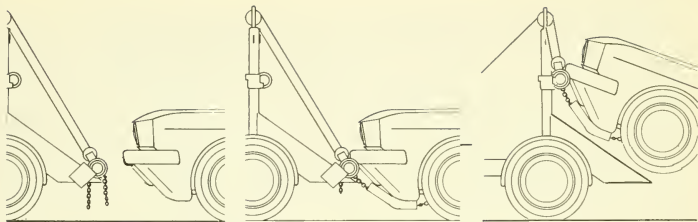
Your question is whether a certain towing device is a “trailer or other vehicle” for purposes of the foregoing provision, and hence, whether the use of a motor vehicle to tow another vehicle by means of this device would fall within the statutory prohibition.

This device is described in your letter as “T-shaped, and similar in appearance to a small boat trailer, although of heavier construction.” According to your letter, it “permits the towing of another motor vehicle by fitting its two wheels under the front or rear wheels of the towed vehicle, leaving the vehicle’s other two wheels in contact with the ground.”

The general design of this device is best explained by the following illustrations, furnished by your staff:



The shaft at the front of the device is attached to the rear of the towing vehicle, while a hoist at the rear of the device is attached to the towed vehicle in the following manner:



I am of the opinion that the device in question is a "trailer" for purposes of the above-quoted statutory provision. The word "trailer" is defined in G.L. c. 90, § 1 to include (with exceptions not here material) "any vehicle or object on wheels and having no motive power of its own, but which is drawn by or used in combination with, a motor vehicle." This towing device is plainly a "vehicle or object on wheels" and otherwise meets all the requirements of the foregoing definition.

Under the terms of G.L. c. 90, § 1, this definition is controlling "unless a different meaning is clearly apparent from the language or context, or unless such construction is inconsistent with the manifest intention of the legislature" I can find nothing in the "language or context" of the statutory provision under consideration from which it is "clearly apparent" that the word "trailer" is used therein with "a different meaning." Nor, in my view, can this construction of the statutory provision be regarded as "inconsistent with the manifest intention of the legislature."

As to the latter point, it has been suggested that this device is nothing more than a type of towing hitch, and that the Legislature could never have intended to subject it to the severe restrictions applicable to trailers merely because it is equipped with two wheels. This argument, of course, rests on the assumption that the Legislature could not reasonably have regarded the purpose of these restrictions as being served by applying them to a device of this kind. I do not think that any such assumption is warranted.

The statutory provision relative to towing more than a single vehicle was inserted in G.L. c. 90, § 19 by St. 1930, c. 297, on the basis of a bill submitted by the Department of Public Works (1930 House Doc. No. 59), as a part of that Department's annual report to the General Court. The descriptive portion of this report (1930 House Doc. No. 56) explained the purposes of the accompanying bill as follows:

"One of the most hazardous features of the operation of motor vehicles, with trailers, on the highways, is the use of more than one such trailer. Such combinations of vehicles create another element of uncertainty in the overtaking and passing by other vehicles, and furthermore, it is not believed that the highways should become roadways for trains of such vehicles. It is therefore recommended that section 19 of chapter 90 of the General Laws, be amended to prohibit such operation.

Since the 1930 statute is identical to the bill submitted by the Department of Public Works, the stated purpose of the Department in filing the bill must be ascribed to the Legislature in enacting it. Thus, this legislation was partly aimed at eliminating a potential "element of uncertainty in the overtaking and passing

by other vehicles.”

Whether the use of this device in a towing operation would in fact “create another element of uncertainty in the overtaking and passing by other vehicles” is a matter of engineering judgment on which I do not feel qualified to express opinion. But that is not the issue in any event. The real issue is whether the Legislature *could reasonably have believed* that the use of such a device might have this effect. The answer lies in the fact that several experts at the Registry of Motor Vehicles and Department of Public Works contacted by my staff think that it would.* The very existence of such expert opinion tends to undermine any contention that the Legislature could not reasonably have intended to classify this towing device as a “trailer” for purposes of G.L. c. 90, § 19. This being the case, there is no basis for inferring that the application to § 19 of the definition of “trailer” in § 1 would be “inconsistent with the manifest intention of the legislature.” The definition in § 1 must therefore control.

Accordingly, it is my opinion that in the absence of a permit from the Department of Public Works, G.L. c. 90, § 19 prohibits the use of this device, in combination with a motor vehicle, to tow another vehicle on any way of the Commonwealth.

Very truly yours,
ELLIOT L. RICHARDSON
Attorney General

Number 17.

November 1, 1968

HONORABLE ROBERT F. OTT
Commissioner of Public Welfare
600 Washington Street
Boston, Massachusetts 02111

Dear Commissioner Ott:

You have requested my opinion as to whether liens previously imposed under G.L. c. 118A, § 4 by cities and towns on real estate of welfare recipients have survived the Welfare Reorganization Act of 1967, St. 1967, c. 658, which became effective on July 1, 1968. Specifically, you ask:

- “1. Are those liens recorded in accordance with the provisions of General Laws Chapter 118A section 4 as inserted by Chapter 801 of the Acts of 1951 and from time to time amended, now enforceable?
2. If the answer to question number 1 is in the affirmative, under what provision of law and by what procedure?
3. If the answer to question number 1 is in the negative, how may such liens be released in order to clear the title?

*These experts believe that the use of such a towing device might well present special problems of braking and handling, would tend to increase the circumference of the path taken by the towing combination on curves, and would increase the danger of one of the vehicles breaking away from the towing combination. Any one of these factors would obviously “create another element of uncertainty in the overtaking and passing by other vehicles.”

4. Prior to July 1, 1968, under appropriate conditions, such liens were released by an instrument signed by the local board of public welfare or a person designated by such board and recorded in the proper registry.

Section 79 of the before referred to Chapter 658 contains the provision:

'All powers and duties exercised by such boards and offices are hereby transferred to the state department of public welfare'

Would the signing of such a release or discharge be considered such a power or duty and may such a function be performed by a person or persons designated by the Commissioner?

5. If the answer to number 4 is in the negative, by whom should such a release be signed?"

Prior to its amendment in 1967, G.L. c. 118A, § 4 directed a municipality to take a lien on certain real estate of recipients of old age assistance as a condition of granting such assistance to them. Section 4 also provided that the lien was to be recorded in the appropriate registry of deeds and was to be enforceable by a bill in equity with the consent of the Department of Public Welfare, "upon the death of the recipient [unless his wife continued to reside on the property] or his otherwise ceasing to receive old age assistance from it." The lien was not enforceable however when the combined value of the recipient's real estate at the time of his death, together with the cash surrender value of certain life insurance, did not exceed \$1500. Proceeds above an exempt portion realized from the enforcement of a lien were to be apportioned among the Federal government, the Commonwealth and the city or town furnishing the old age assistance in proportion to their respective contributions up to the amount contributed. Upon a voluntary sale of the real estate by a welfare recipient, the proceeds above a certain exempt amount were also applied in satisfaction of the lien.

The Welfare Reorganization Act of 1967 made a comprehensive revision of the Commonwealth's public welfare structure.¹ Although its essential feature was the transfer to the Commonwealth of the public welfare functions previously assigned to the cities and towns, many other changes in the welfare statutes were also made. Among them was the following:

"Section 39. Said chapter 118A is hereby further amended by striking out section 4 and inserting in place thereof the following section:

"Section 4

The ownership in vacant land from which no income is derived, or the ownership of an interest in real estate by an applicant who resides thereon or who, in the opinion of the department, is residing elsewhere than on such real estate because of physical or mental incapacity, shall not disqualify him from receiving assistance under this chapter."

¹On the background of the Act, see "Meeting the Problems of People in Massachusetts," National Study Service (1966).

None of the provisions in old § 4 relative to liens were retained.

The elimination of the provisions for old age assistance liens by the drastically revised provisions of the new § 4 manifests a strong legislative policy against the retention of such liens. Standing by itself in the light of this background, the new § 4 would accordingly have the effect of abolishing all liens, whatever the state of their enforcement might be on July 1, 1968. *Wilson v. Head*, 184 Mass. 515; *Pittsley v. David*, 298 Mass. 552. To be distinguished are cases where an old law is regarded as remaining in force as to pre-existing rights when a repealing act substantially retains the former provisions. *United Hebrew Benevolent Association v. Benshimol*, 130 Mass. 325, 327; *McAdam v. Federal Mutual Liability Insurance Co.*, 288 Mass. 537, 541. The present situation also differs from cases such as *Manchester v. Popkin*, 237 Mass. 434, and *Frank Kumin Co. Inc. v. Marean*, 283 Mass. 332, 335, where a construction which would treat outstanding rights under an earlier statute as eliminated by a later statute would raise serious constitutional questions. However, where no vested rights are involved – and, as indicated below, I believe that none are involved here – such an obstacle to a total replacement of the earlier version is not present.

It is clear that the Legislature was not required to preserve existing old-age assistance liens. Since the Legislature originally created them for the benefit of cities and towns in their public as distinct from their private capacity, the liens remained subject to legislative control and were subject to transfer by the Legislature to some other agency of government charged with the same duties or they could have been devoted to other public purposes without the payment of compensation. *Higginson v. Treasurer etc. of Boston*, 212 Mass. 583, 585; *Worcester v. Commonwealth*, 345 Mass. 99, 100. I believe that it is equally true that if the Legislature considers it in the public interest to abolish by a statute of general application a certain class of municipal property rights created by statute and held in a public capacity, such as the right involved here, it may lawfully do so. See *Opinion of the Justices*, 1968 Mass. Adv. Sh. 1099. Cases which have held that the rights of *private parties* to existing liens under contracts may not be disturbed by subsequent legislation must be sharply distinguished. See *Manchester v. Popkin*, 237 Mass. 434, 436-437.

In summary, then, if § 4 of the new Act stood alone, all existing old-age assistance liens whether or not in the process of enforcement would have been abolished on July 1, 1968. However, § 4 was not enacted in isolation. Section 80 of the new Act provided:

“All petitions, applications, hearings and other proceedings duly pending before, and all prosecutions and legal and other proceedings duly begun by, any city or town board or office abolished by this act or before or by any member, officer or employee thereof, shall continue unabated and remain in full force and effect notwithstanding passage of this act, and may be completed before or by the department of public welfare.”

It is my opinion that the foregoing section has kept in force all judicial proceedings begun before July 1, 1968 to enforce liens previously taken by cities and towns under former § 4 of G.L. c. 118. These proceedings may, in my judgment, still be maintained according to the procedure set forth in former § 4 but the Department of Public Welfare should by motion in each case be substituted as the plaintiff. Distribution of any proceeds realized in such proceedings should be made in the manner and proportions provided in the former section.

Although § 80 of the new Act thus preserves those liens which were in the process of judicial enforcement on July 1, 1968, it is not, however, broad enough to preserve liens which were not on that date the subject of a petition or bill in equity already filed in the Superior Court or in an appropriate Probate Court. Liens with respect to which no petition or bill had been filed were, as already stated, abolished by force of the new § 4 of G.L. c. 118A.

I find nothing in the new § 4A of G.L. c. 118A which alters the foregoing conclusions. Section 4A in both its old and new versions imposes a personal unsecured obligation, with certain limitations, on each old-age welfare recipient for old age assistance payments made to him under G.L. c. 118A. Section 4A has always been separate from § 4. *City of Medford v. Quinn*, 352 Mass. 42, 44-45; *City of New Bedford v. Bender*, 345 Mass. 544. *Haverhill v. Porter*, 333 Mass. 594, 598. Each section has a different statutory background, § 4 dating back to St. 1951, c. 801 (amending St. 1936, c. 436, § 1) while § 4A goes back to St. 1941, c. 729, § 5. See *City of Worcester v. Quinn*, 304 Mass. 276, decided in 1939, and holding that § 4 created no personal liability on the part of a recipient of old age assistance payments to reimburse a municipality therefor. It is likely that § 4A was inserted in 1941 to impose such liability. Further, there is nothing to indicate that a lien taken under § 4 stood as security for the statutory cause of action created by § 4A.

I have not overlooked the sentence in the new § 4A which provides: "The commonwealth shall succeed to and shall have all rights of enforcement of any causes of action which shall have accrued to any city or town for or on account of any payments made by a city or town under this chapter." Since this sentence is embodied in § 4A (which, as already stated, created a distinct statutory cause of action different from the statutory lien taken under old § 4), it is in my judgment applicable only to rights of enforcement of causes of action which have accrued under § 4A, not to rights of enforcement of liens that may have been taken under § 4. The reference to "this chapter" modifies only "payments made by a city or town," and does not modify "causes of action." The latter term thus cannot be regarded as including causes of action under the lien provisions of old § 4.

To summarize then, my conclusions to this point, I answer your first question by stating that the liens are still enforceable only if a petition or bill in equity for enforcement had been filed in court before July 1, 1968. I answer your second question by stating that the procedure for enforcement is governed by G.L. c. 118A, § 4 as it stood just prior to St. 1967, c. 658. The Commonwealth should by motion, however, be substituted as the plaintiff in each case.

I now turn to your third question in which you ask: "If the answer to question number 1 is in the negative, how may such liens be released in order to clear the title?" In view of my answer to question 1, I will construe your third question as concerned only with those liens as to which no judicial proceedings for enforcement had been begun prior to July 1, 1968.

Under G.L. c. 118A, § 4 as it stood prior to July 1, 1968, the only provision for release of liens was that "Upon reimbursement for the amount due under the terms of [the] lien, the town through its appropriate official shall execute and deliver a satisfaction thereof, and upon it being filed, the lien shall be dissolved as of the date of such filing." Although not expressly stated, it would also appear that a town official could release a lien upon the existence of circumstances, described in old § 4, such as when a deceased welfare recipient's interest in real estate together with the cash surrender value of certain insurance

policies did not exceed \$1500. Determination of the identity of the "appropriate official" of a municipality to release a lien under old § 4 would depend on an examination of the internal structure of particular cities and towns. You state, however, that the releases were signed by "the local board of public welfare or a person designated by such board." Authority to sign such releases was, in my judgment, transferred to the Department of Public Welfare, to be exercised by an appropriate official thereof, by virtue of St. 1967, c. 685, § 79, which provides in pertinent part: "All powers and duties exercised by [municipal] boards and offices [of public welfare] are hereby transferred to the state department of public welfare." Determination of the state official or employee who may now sign such a release is a matter within the authority of the Commissioner of Public Welfare. G.L. c. 18, § 3.

I trust that the foregoing answers your questions 3 and 4. In the light of my answer to question 4, question 5 does not require an answer.

Very truly yours,
ELLIOT L. RICHARDSON
Attorney General

Number 18.

November 15, 1968

HONORABLE GEORGE A. LUCIANO
State Superintendent of Buildings
State Office Building
100 Cambridge Street
Boston, Massachusetts 02202

Dear Mr. Luciano:

You have asked for my opinion on the authority of municipal police officers to maintain order and enforce the criminal law on state property, upon request of an appropriate state official. Your letter states:

"The General Laws impose the responsibility upon me of protecting certain properties which are under the control of the Commonwealth. In addition to buildings owned by the Commonwealth, these properties include, without limitation, any municipally owned or privately owned building which is leased in its entirety to the Commonwealth for public offices, as well as any part of a municipally or privately owned building which is leased to the Commonwealth for public offices.

"In the past I have called upon municipal police departments for assistance in providing the ordinary policing necessary to protect adequately these properties under the control of the Commonwealth. Our cities and towns are to be commended for their cooperation in this regard.

"In order that this high degree of cooperation may be maintained, it is necessary that the following question be resolved:

'Does the power and authority of a municipal police officer extend to the maintenance of order and enforcement of the criminal law of the Commonwealth while on property controlled by the Commonwealth within the geographical limits of his employing municipality, when he is on such property pursuant to assignment by his local police department in

response to a request by me or by the official having charge of such property?"

"By way of illustration, municipal police authorities from time to time might be asked to provide officers on detail for assistance in safeguarding persons and property in the State Office Building at Springfield, and various local offices operated by the Department of Public Welfare, and for assistance in protecting visiting dignitaries at the State House in Boston.

"In responding to the above question, it would be of great value if you specifically treated the effect, if any, of G.L. c. 8, § 12, upon your opinion."

Your question is posed in general terms. While it may be appropriate in most cases to decline to answer questions so framed, we deem this occasion an appropriate exception to that rule. The matter directly involves your present statutory duties and is susceptible of a reasonably specific answer.

The subject matter of your request has not, it seems, been treated in any opinion of the Supreme Judicial Court. It has however been considered in prior opinions of Attorneys General which will be referred to below in this opinion.

It may be useful at this point to restate certain general principles of law. Ordinarily, the authority of local police to protect life and property and maintain the peace extends to all property located within the municipality of the officer's appointment. *Joyce v. Parkhurst*, 150 Mass. 243, 246. As recently stated in *Thurlow v. Crossman*, 336 Mass. 248, 250,

"Lawful entry [by police officers] may be made 'to save goods which are in jeopardy of being lost or destroyed by water, fire or any like danger' [citation], to prevent the spread of fire [citation], and to make arrests [citation]. A police officer who enters upon private premises in good faith in the performance of his official duty to protect life and property and to preserve the peace is not a trespasser."

See also *Commonwealth v. Murphy*, 1968 Mass. Adv. Sh. 1, 5. And while, apart from "fresh pursuit" (see G.L. c. 41, § 98A, as amended through St. 1967, c. 263), the power of a municipal police officer to make an arrest without a warrant is limited at common law to the territory of his own municipality, his power to execute a warrant of arrest or commitment is statewide. *Commonwealth v. Martin*, 98 Mass. 4; G.L. c. 279, § 38; c. 41, §§ 95 and 98. Certain broad territorial powers are also conferred on municipal police officers by c. 41, § 99 and by the Civil Defense Act. St. 1950, c. 639, § 11, as amended.

The foregoing examples are only some of the instances of the exercise by local police of concurrent jurisdiction with other police forces. The statutes relating to the State Police furnish another example of the exercise of such jurisdiction. By St. 1921, c. 461, now appearing as amended in G.L. c. 22, § 9A, the State Police were given concurrent jurisdiction with local police over all offenses. This grant was based on legislative reports which found that such jurisdiction, rather than being detrimental, would in fact contribute to the public safety. *Report of the Adjutant General and the Commissioner of Public Safety on the Establishment of a State Police Force*, 1921 House Doc. No. 280; *Report of the Special Commission on Constabulary and State Police*, 1917 House Doc. No. 539.

I consider that the above materials both establish the general principle of a broad grant of police power within the geographic limits of a municipality and eliminate any conceptual barriers to overlapping police jurisdiction based on abstract notions of state "sovereignty." They do not support any proposition that under either the common law or statutes municipal control of premises within a municipality is necessary for the exercise of local police jurisdiction thereon. Nothing in the above materials carves out any exception for state property as an exempt enclave. Further, the activities of local police considered here do not involve any conflict between state and municipal authorities. Activities of local police in preserving the public peace on Commonwealth property do not in any way involve the imposition of local law upon the supreme sovereign. On the contrary, they are simply a means whereby the law of the supreme sovereign can be enforced on its own premises. Thus, far from impeding the operations of the Commonwealth, such action by local police should plainly facilitate them. See *Commonwealth v. Biddiscombe*, 347 Mass. 427; *Op. Atty. Gen.* No. 68/69-3. Thus, I see no reason to conclude that, as a general proposition, the leasing or purchase of a building by the Commonwealth removes that building from the area in which local police may exercise their police powers to keep the peace and enforce the criminal laws of the Commonwealth.

I now turn specifically to G.L. c. 8, § 12, to which you have referred in your request. This statute provides:

"The [state] superintendent [of buildings] shall take proper care to prevent any trespass on, or injury to, the state house or its appurtenances, or any other building or part thereof owned by or leased to the commonwealth for public offices; and, if any such trespass or injury is committed, he shall cause the offender to be prosecuted therefor. For any criminal offence committed in any part of the state house or the grounds appurtenant thereto, or in any other building owned by or leased to the commonwealth, the superintendent and his capitol police shall have the same power to make arrests as the state police officers. A capitol police officer may, upon view of any misdemeanor committed in his presence, while on duty, arrest the person committing such misdemeanor, and shall have all the powers of police officers in the enforcement of traffic rules, regulations and ordinances on streets adjacent to any building owned, or occupied wholly or in part, by the commonwealth; and a capitol police officer shall have all the powers of state police officers while going to or from any such building on any assigned duty. The superintendent may arm his capitol police and, in case of an emergency, may arm and detail as capitol police for extra duty such employees in his department as, in his judgment, the emergency requires for the proper protection of state property under his jurisdiction. The capitol police shall have such additional duties as may be from time to time assigned by the commissioner of administration, and shall have, when so assigned, all the powers of state police officers."

The Capitol Police, through whom you exercise your authority to maintain order on the premises under your jurisdiction, are created by G.L. c. 8, § 4. They are the successors to the "watchmen" who until 1938 (St. 1938, c. 249) had the duty of guarding the State House and other buildings in Boston owned or controlled by the Commonwealth. G.L. (Ter. Ed.) c. 8, § 12. The watchmen had the "same power to make arrests as the police officers of the City of

Boston." St. 1895, c. 284, § 4. It was, I assume, inconceivable both in 1895, when the power of arrest was first given to the "watchmen," and in 1938, when the watchmen were designated as Capitol Police, that the Legislature could have ever intended that this historic public building should be deprived of protection by police officers of the City of Boston.

As for other premises of the Commonwealth under your jurisdiction, there may conceivably be cases where the Legislature intended to deny local police any jurisdiction over them. However, I would suppose that there are few such cases. Unquestionably, the Legislature could, by appropriate enactment, deprive local police of any police authority when on state property within their municipality. But I find no such general legislation in effect, and I know of no other authority requiring such a result. In particular, I know of no common law rule or statutory provision which would exempt from local police jurisdiction the particular state properties described in your request for my opinion.

I do not consider applicable certain cases which have held that municipal ordinances may not be applied to state property so as to frustrate state policy or interfere with state activities. See *Teasdale v. Newell & Snowling Constr. Co.*, 192 Mass. 440 and *Medford v. Marinucci Bros. & Co.*, 344 Mass. 50, 54-57. We are here not concerned with the frustration of or interference with state policy or activities but rather with the implementation thereof, pursuant to state permission. Compare *Commonwealth v. Biddiscombe*, 347 Mass. 427, 429; *Commonwealth v. Bragg*, 328 Mass. 327, 330-331. And it is my judgment that there are no abstract principles of state sovereignty which would strip municipal police of their powers to keep the peace and enforce state criminal law when on state property at state request.

There have been several opinions of Attorneys General dealing with the general subject matter of municipal police jurisdiction. See *Report of the Attorney General for the Year Ending June 30, 1947*, p. 91; *Report of the Attorney General for the Year Ending June 30, 1949*, p. 45; *Op. Atty. Gen. No. 67/68-50*. The first of these opinions dealt with the jurisdiction of the Boston Police over the Logan International Airport (prior to its inclusion in the Boston Port Authority). In it, Attorney General Clarence A. Barnes stated:

"Land acquired by the Commonwealth is not generally subject to control by municipal police departments. When such control is deemed desirable, specific legislative authority to exercise it is granted by the General Court (see G.L. (Ter. Ed.) c. 81, §§ 11, 19). Lands such as reservations, parks and boulevards of the Commonwealth placed by the Legislature under the control of a State agency or authority are not subject to entry or control by municipal police except for such purposes as may have been specifically granted to such police by statutory provisions.

"The police of the city of Boston are confined in their authority as regards the said airport to the pursuit and apprehension of persons who have committed a breach of any statute, ordinance or regulation within the city of Boston outside the airport and have taken refuge in the said airport, and they have no authority to enter said airport for the purpose of maintaining peace and order therein except at the request of said bureau established for the maintenance and operation of the airport as aforesaid."

As authority for the foregoing statement, Attorney General Barnes cited an opinion by Attorney General Herbert Parker in 1902 (2 *Op. Atty. Gen.* 454)

which, together with an earlier opinion (2 *Op. Atty. Gen.* 363), held that municipal police officers, except when in fresh pursuit of a fugitive, had no jurisdiction to enforce the public peace on the roadways, parkways and boulevards of the Metropolitan Park Commission. In reaching this conclusion Attorney General Parker relied on the fact that the statute which created the Commission not only vested in it complete and exclusive control of its property but also created a special police force to enable the Commission to preserve good order thereon. Although the statute was silent on whether this force was to have exclusive jurisdiction, the Attorney General inferred this to be the intention of the Legislature, and he so held. It is plain, however, that he proceeded on the assumption that but for the statute local police would have had jurisdiction over the Commission's property.

Whatever the circumstances in 1902 when Attorney General Parker considered this question in respect to the statutes creating the Metropolitan Park Commission, I ascertain no such legislative intention generally applicable now to all state property. Also, Attorney General Barnes' opinion clearly dealt with an asserted *conflict* in jurisdiction over Logan International Airport. It is, on the particular facts there presented, not inconsistent with my opinion herein. Indeed, Attorney General Barnes specifically noted an exception for the authority of Boston police "to enter said airport for the purpose of maintaining peace and order therein . . . at the request of . . . [the state body established to operate the airport]."

Finally, in an opinion dated November 14, 1967 (*Op. Atty. Gen.* No. 67/68-50), I stated my view that G.L. c. 41, § 98, which authorizes local police to "enter any building to suppress a riot or breach of peace therein" and to make arrests in connection therewith, authorized entry for such purposes in buildings controlled by the Commonwealth. For the reasons indicated above, however, I do not regard § 98 as limiting the authority of local police to enter state property.

Moreover, the present opinion does not in any way diminish the control of the Commonwealth or its officials over property owned or leased by the Commonwealth. Further, nothing in this opinion should be regarded as holding that local police officials are empowered to enforce on state property municipal ordinances or by-laws or certain special statutes of only local application.

In summary then, it is my opinion that, except in particular cases where there is a clear legislative expression to the contrary — and there is no such contrary expression in relation to the illustrations given in your request for my opinion, namely, the State House in Boston, the State Office Building at Springfield and various local offices of the Department of Public Welfare — the answer to your question is YES.

Yours very truly,
ELLIOT L. RICHARDSON
Attorney General

Number 19.

December 2, 1968

HONORABLE ROBERT Q. CRANE

*Treasurer and Receiver General**Chairman, State Board of Retirement*

State House

Boston, Massachusetts 02133

Dear Mr. Crane:

You have requested my opinion on a problem resulting from the amendment of G.L. c. 32, § 58, by St. 1968, c. 700, entitled "An Act increasing [by seven percent] the pension allowance of certain veterans." Specifically, you ask whether certain prior increases in the pensions of veterans who have already retired from public service have, in effect, been replaced by and consolidated into the new 7% increase, so that this latter increase represents the only addition that can now be made in veterans' basic pension amounts. My answer is in the negative. That is to say, both the 7% increase as well as the prior increases (subject to a \$6,000 limitation, beginning in 1970, referred to below) should now be paid.

Section 1 of c. 700 increased the pensions of certain veterans from 65% to 72% of the "highest annual rate of compensation." Section 2 of the Act made the increase applicable to veterans who had already retired, as follows:

"Notwithstanding any provision of law to the contrary, any veteran who, prior to the effective date of this act, was retired under the provision of section fifty-eight of chapter thirty-two of the General Laws shall have his annual pension adjusted, so as to comply with the provision of said section fifty-eight, as amended by section one of this act."

The background of the 1968 legislation discloses that in addition to receiving amounts calculated under G.L. c. 32, § 58, veterans have from time to time received certain increments in their pensions as the result of two classes of enactments applicable to both veterans and non-veterans. The first class has consisted of flat dollar increases. See St. 1962, c. 646; St. 1963, c. 478; St. 1964, c. 486. The second class has consisted of percentage increases dominated as "cost-of-living increases." The latter class is represented by St. 1966, c. 661, as amended by St. 1967, c. 408, which in effect replaced flat dollar increases by an annual system of percentage adjustments based on increases in the United States Consumer Price Index (the "index"). The initial adjustment made by the cost-of-living statute was based upon the difference between the average index for the year in which a pensioner retired to the average index for the year 1965. One-third of such adjustment was to be paid in 1967, two-thirds in 1968, and the total sum in 1969. However, in order to prevent the new system of computation from reducing a pension below the amount that a pensioner was already receiving as the result of flat dollar increases, the 1967 amendment also provided:

"No adjustment under this section shall be made in any case where the pension . . . is greater than the sum of the original amount of said pension, . . . plus the amount derived by the application of the percentum used to determine any adjustment provided for in this section." St. 1967, c. 408, § 1.

The 1967 legislation also made provision for further cost-of-living adjustments in 1970 and annually thereafter. St. 1967, c. 408, § 1 amending St. 1966,

c. 661, § 2; and § 2, amending G.L. c. 32, § 102. And for 1970 and these later years, a pension *payable as of December 31, 1969* was fixed as the base pension to which cost-of-living adjustments shall thereafter be added, subject to a limitation of \$6,000 on the amount to which a cost-of-living adjustment may then increase a pension.

I find nothing in the 1968 amendment of G.L. c. 32, § 58 which indicates any legislative intention to deny a veteran the benefit of prior increases in his pension. The 1968 amendment was not a broad statutory revision, which might otherwise perhaps indicate an intention to establish an entirely new system of calculating veterans' pensions. It was rather merely an amendment of one term within a larger framework of pensions and pension increases that was kept intact.

It has been suggested that, on the authority of *Mathewson v. Contributory Retirement Appeal Board*, 335 Mass. 610, 614, the words "[n]otwithstanding any provision of law to the contrary" in § 2 of c. 700 evidence an intent of the General Court to adjust each affected veteran's pension of 72% of his highest annual rate of compensation, and to deny any effect to flat dollar or cost-of-living increases to which such veteran may have been entitled prior to the effective date of c. 700. It is my opinion that the quoted words are designed to override any statutory provision that conceivably might prevent a previously retired veteran under G.L. c. 32, § 58 from getting the 7% increase, not to replace statutory provisions that might enable a veteran to receive other benefits as well. As the court emphasized in the *Mathewson* case, the quoted language should be interpreted to repeal only *inconsistent* laws, and every effort should be made to harmonize the statutes involved. See also *Morra v. City Clerk of New Bedford*, 340 Mass. 240, 242-243. I believe that the prior flat-dollar and cost-of-living increase laws are not the kinds of inconsistent laws which are repealed by c. 700 as regards veterans retired under c. 32, § 58.

Finally, except for the \$6,000 aggregate amount of a pension for years beginning after December 31, 1969, I find nothing in St. 1967, c. 408 which limits the full effect of the seven percent increase granted by St. 1968, c. 700.

Very truly yours,
ELLIOT L. RICHARDSON
Attorney General

Number 20

December 5, 1968

HONORABLE LEO L. LAUGHLIN
Commissioner of Public Safety
1010 Commonwealth Avenue
Boston, Massachusetts 02215

Dear Commissioner Laughlin:

You have requested my opinion as to whether members of the Massachusetts State Police, particularly the Uniformed Branch, are permitted to engage in collective bargaining with your Department pursuant to G.L. c. 149, § 178F. Specifically, you have asked:

"1. Are members of the Massachusetts State Police, and particularly the Uniformed Branch, 'Public Officers' of the Commonwealth?

"2. Are members of the Massachusetts State Police, and particularly

the Uniformed Branch, 'employees' as defined by General Laws, Chapter 149, section 178F as amended?

"3. If the answer to question number 2 is in the affirmative, are members of the Massachusetts State Police, and particularly the Uniformed Branch, such persons whose participation or activity in the management of employee organizations [would] be incompatible with law or with their official duties as employees?

"4. If the answer to question number 3 is in the affirmative, may members of the Massachusetts State Police, and particularly the Uniformed Branch, be members of an employee organization if they do not participate or have activity in the management of such employee organization?"

The applicable statute is G.L. c. 149, § 178F, inserted by St. 1964, c. 673, as amended by St. 1967, c. 774. It provides (subsec. 3) that "Employees of the Commonwealth shall have and be protected in the exercise of the right of self-organization, the right to form join or assist any employee organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining and other mutual aid or protection, free from interference, restraint or coercion; . . ." The statute deals comprehensively with many aspects of employer-employee relations, covering such matters as the establishment of bargaining units, conduct of elections, procedures for fact finding, prohibition of unfair labor practices, and investigation of complaints that such practices have been committed. Strikes are prohibited. Since the statute applies only to "employees" of the Commonwealth, the statutory definition of an employee is critical. An employee is defined (subsec. 1) as:

"[A]ny employee of the commonwealth assigned to work in any department, board, commission or other agency thereof except the head of any department, board, commission or other agency who is appointed by the governor and members of any board, commission or other agency who are so appointed, and any other person whose participation or activity in the management of employee organizations would be incompatible with law or with his official duty as employee."

I turn now to your specific questions:

Question One

The term "employee" in the foregoing definition is used in a broad and comprehensive sense, indicating a legislative intention to include within its scope all employees of the Commonwealth except those specifically excluded. Because of the breadth of the definition and the nature of its exclusions, it is clear that the term "employee" is not used in the narrow limited sense of a mere employee as distinguished from a "public officer." Compare *Commonwealth v. Tsaffaras*, 250 Mass. 445, 447-448; *Attorney General v. Tillinghast*, 203 Mass. 539, 543-544; *Brown v. Russell*, 166 Mass. 14, 25-26. The statutory definition of "employee" does not provide a general exclusion for "public officers" as a class. Since, therefore, nothing in your inquiry as to the collective bargaining rights of members of the State Police turns on whether they are "public officers," I find it unnecessary to answer your first question, and I must ask to be excused from making a reply.

Question Two

As I have already stated above in relation to your first question, the word "employee" in G.L. c. 149, § 178F is used broadly and comprehensively. Any exclusion must be derived from its specific exceptions. Such an exclusion, in the case of members of the State Police, would require a determination that they are (1) "members of [a] board, commission or other agency who are . . . appointed" by the Governor or (2) persons "whose participation or activity in the management of employee organizations would be incompatible with law or with [their] official duty as employee[s]." It is clear that they do not come within the first of the foregoing categories since they are not *members* of a "board, commission, or agency" and, further, they are not appointed by the Governor. Rather, they are *employed* by a "department" (the Department of Public Safety), a unit which is carefully distinguished in G.L. c. 149, § 178F from a "board, agency or commission," and they are appointed by the Commissioner of Public Safety. G.L. c. 22, § 9 and 9A.

As for the second of the exceptions, namely, "any other person whose participation or activity in the management of employee organizations would be incompatible with law or with his official duty as [an] employee," I observe initially that the exclusion is phrased not in terms of the employee's actual role in an employee organization but rather in terms of his possible role if he should become engaged in its management. That is to say, the test is phrased in terms of whether his position as a public employee would be incompatible with a management role in the employee organization, not in terms of whether he actually participates in the management of the employee organization.* Your request for my opinion, however, relates only to the State Police and its Uniformed Branch as *general classes*, and refers only to their general powers and duties as police officers. My opinion must therefore be framed in similarly general terms, and not with reference to any more particular position or responsibilities.

It is my judgment that the Legislature has made a determination that, as a general proposition, members of the State Police and its Uniformed Branch come within the definition of "employees" in § 148F and that their official duties as police officers are not, as such, incompatible with their participation in the management of an employee organization. In reaching this conclusion, I find it significant that although prior legislation, referred to below in this opinion, had expressly excluded police officers from the class of public employees entitled to join labor organizations, St. 1967, c. 774, which supplied the present definition of "employee" in G.L. c. 149, § 178F, made no explicit reference to police officers. Moreover, in determining the intention of the Legislature in connection with state employees, it is, I believe, relevant to observe that police officers are included in the municipal collective bargaining statute. G.L. c. 149, §§ 178G-178N. When this statute was first enacted by St. 1965, c. 763, § 2,

*Compare the original definition of "employee" in G.L. c. 149, § 178F, as contained in St. 1964, c. 637. Although employees with "incompatible" positions were not prohibited from membership in employee organizations, they were not allowed "to participate in the management of [an] employee organization or act as its representative." The Director of Personnel and Standardization was designated to determine when such incompatibility existed in particular cases. The 1967 amendment, St. 1967, c. 774, changed the definition of an "employee" to the present form so as to exclude holders of "incompatible" positions not merely from management roles in employee organizations but from the coverage of § 178F as well.

police officers were excluded from the definition of "employee". (§ 178G). However, by St. 1966, c. 156, the General Court deleted the police exception from the definition. Thus, it is clear that municipal police officers may now engage in collective bargaining. It is reasonable to assume that the General Court, in amending § 178F in 1967, had this history in mind and would have specifically excluded police from the operation of § 178F, if it had intended to deny collective bargaining to State Police.

In concluding that members of the State Police and its Uniformed Branch are generally to be regarded as "employees" within the meaning of G.L. c. 149, § 178F(1), I have carefully considered G.L. c. 149, § 178D. Inserted in the General Laws by St. 1958, c. 460, as amended by St. 1962, c. 504, this statute authorized public employees at both the state and local levels "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." Excluded from its provisions were "police officers in the employ of the commonwealth or any political subdivision thereof." Since this statute was only a precursor of the independent and more comprehensive provisions of G.L. c. 149, § 178F, I find no basis for reading a police officer exclusion into the latter enactment. In fact, as I have already stated, I regard the absence of an explicit reference to police officers in the latter statute as indicative of a legislative intent that, as a general proposition, they should be regarded as "employees."

I have also considered St. 1950, c. 120 (not inserted in the General Laws), which authorized the "uniformed members of the division of state police . . . to organize or incorporate under the provisions of the General Laws for the purpose of bettering their working conditions . . ." This statute expresses a positive legislative attitude toward an employee organization of members of the Uniformed Branch but it does not, in my judgment, fix the outer limits of such an organization. To the extent that G.L. c. 149, § 178F provides broader rights, I regard the latter statute to be applicable.

Question Three

I believe that your third question has already been answered in my answer to your second question. In the context of the phrasing of your third question, my conclusion is that the Legislature has determined that members of the State Police and its Uniformed Branch cannot be said to be persons who are generally regarded as persons whose participation or activity in the management of employee organizations would be incompatible with law or with their official duties as employees. Conceivably holders of certain senior ranks in the State Police might be so regarded. Any such determination, however, would involve a careful consideration of all relevant facts relating to the duties of the holders of such ranks. I call your attention to the provisions of G.L. c. 149, § 178(11) which authorizes the Director of Personnel and Standardization to adopt rules "to carry out the provisions of [§ 178F]." If questions should arise with regard to possible incompatibility, I suggest that you consult the Director.

Question Four

Your fourth question seems to assume that the answer to your third question must be unqualifiedly in either the affirmative or the negative. For the reasons that I have indicated above, however, in relation to your third question, it is clear that a categorical response cannot be given. As I have indicated, generally speaking, the answer to the third question is in the negative. That is to say, it cannot be said that members of the State Police and its Uniformed Branch are persons who are generally regarded as employees whose participation or activity

in the management of employee organizations would be incompatible with law or with their official duties. However, depending on the functions of particular individuals, presumably holders of senior ranks – and I have not been furnished with any set of facts which would enable me to make a determination in this respect – one might conceivably conclude that there would be such incompatibility in specific cases.

With reference to that part of your fourth question which asks whether the existence of incompatibility would automatically exclude a member of the State Police from the coverage of G.L. c. 149, § 178F, even though he does not participate in the management of the employee organization, I refer you to my answer to your second question. There I stated that in my judgment the correct legal test depends on whether a public employee's position in the public service *would* conflict with a management role in an employee organization, assuming he held such a role, not on whether he actually participates in its management. There being no particular facts before me, however, with reference to your fourth question, I must refrain from attempting to answer it further.

Very truly yours,
ELLIOT L. RICHARDSON
Attorney General

Number 21.

December 9, 1968

ALCOHOLIC BEVERAGES CONTROL COMMISSION

State Office Building
100 Cambridge Street
Boston, Massachusetts 02202

Gentlemen:

You have requested my opinion on certain questions relating to the establishment of maximum prices for the retail sale of alcoholic beverages. Your question, in substance, are as follows:

1. Does the Alcoholic Beverages Control Commission have authority to establish maximum prices chargeable by licensees under G.L. c. 138, § 12?
2. Does the Commission have authority to establish maximum prices chargeable by licensees under G.L. c. 138, § 15?
3. If the answer to either of the foregoing questions is affirmative, "what standards or guide-lines . . . should [the Commission] follow in establishing said maximum prices[?]"

The licensees at which your questions are directed are the two largest classes of liquor retailers in Massachusetts. General Laws c. 138, § 12, referred to in Question 1, is the statute under which restaurants, hotels, taverns and clubs may be licensed to sell alcoholic beverages for consumption on the licensed premises. General Laws c. 138, § 15, referred to in Question 2, authorizes the licensing of package stores. Together, these two groups of licensees represent the overwhelming majority of those engaged in the retail liquor industry in this Commonwealth.¹

¹The only other types of licenses for the retail sale of alcoholic beverages which may be issued under G.L. c. 138 are for railroad trains and ships (§ 13), for certain special activities and enterprises (§ 14) and for druggists (§ 30A). It is my understanding that these classes of licensees have at all times represented only a small fraction of the licensed liquor retailers in Massachusetts.

As you indicate in your letter, the answers to your questions depend on the effect of G.L. c. 138, § 24, the first sentence of which reads as follows:

“The [alcoholic beverages control] commission shall, with the approval of the governor and council, make regulations not inconsistent with the provisions of this chapter for clarifying, carrying out, enforcing and preventing violation of, all and any of its provisions, for inspection of the premises and method of carrying on the business of any licensee, for insuring the purity, and penalizing the adulteration, or in any way changing the quality or content, of any alcoholic beverage, for the proper and orderly conduct of the licensed business, *for establishing maximum prices chargeable by licensees under this chapter*, and regulating all advertising of alcoholic beverages, except such advertising as appears in publications which are circulated to the liquor trade and not to the general public, and shall, with like approval, make regulations governing the labelling of packages of alcoholic beverages as to their ingredients and the respective quantities thereof.” (Emphasis supplied.)

On the face of it, then, § 24 clearly authorizes the Commission to “make regulations . . . for establishing maximum prices chargeable by licensees under this chapter” It is equally clear that those licensed under G.L. c. 138, § 12, to sell alcoholic beverages for on-premis consumption, referred to in Question 1, are “licensees under this chapter.” Thus, the plain language of the statute would seem to require an affirmative answer to Question 1.

I can find nothing in the legislative history of the maximum price clause of § 24 to suggest that any different meaning was intended. On the contrary, there is some indication that when this clause was inserted in the General Laws by St. 1933, Extra Session, c. 376, § 2, licensees under § 12 were among those at which it was principally aimed. In the first place, the Legislature had before it a special report of the Alcoholic Beverages Control Commission, filed at the direction of the Senate shortly before the passage of c. 376, indicating that well over half of all the licenses theretofore issued during the brief period of the Commission’s existence had been to establishments serving drinks for on-premises consumption. 1933 Senate Doc. No. 497 (Extra Session).² Thus, it must have been obvious to the Legislature at the time that any unqualified reference to “licensees under this chapter” would necessarily include this class of licensees under this chapter” would necessarily include this class of licensee. Moreover, this general reference did not appear in the bill originally submitted to the Legislature, but resulted from an amendment proposed by its Committee on Legal Affairs. 1933 House Doc. No. 1610 (Extra Session). The original version of § 24 would have confined such regulations to “prices chargeable by

²The Commission had been established by St. 1933, c. 120, which authorized the issuance of licenses to manufacturers, wholesalers, transporters and retailers of certain wines and malt beverages. The Commission’s report disclosed that licenses had been issued in the following numbers:

Licenses issued to on-premises drinking establishments	3346
Licenses issued to package stores	1724
Licenses issued to all other retailers and to all manufacturers, wholesalers and transporters	741

manufacturers of alcoholic beverages and holders of wholesalers' and importers' licenses." (Emphasis supplied.) 1933 Senate Doc. No. 494 (Extra Session). The only "licenses under this chapter" which the Legislature could possibly have intended to include by the adoption of this amendment were *retailers*.³ And, since the Legislature had every reason to assume that most of the "licensees under this chapter" would be on-premises drinking establishments licensed under G.L. c. 138, § 12, I think that this history indicates a deliberate effort on the part of the Legislature to bring those licensees within the scope of the maximum price clause of § 24.

In answer to Question 1, therefore, I am of the opinion that G.L. c. 138, § 24 authorizes the Commission, subject to the approval of the Governor,⁴ to establish maximum prices chargeable for alcoholic beverages by licensees under G.L. c. 138, § 12.

Question 2 is addressed to the other major class of liquor retailers: the package stores licensed under G.L. c. 138, § 15. For much the same reasons given in my answer to Question 1, it is clear, I think, that the Legislature, when it enacted G.L. c. 138, § 24 in 1933, intended that its maximum price clause apply to sales by licensees under § 15 as well as those by licensees under § 12. While it was to be expected at the time that there would be fewer package-store licenses than on-premises licenses, the large number of package-store licenses predictable from evidence then before the Legislature was such that it could hardly have failed to consider them as "licensees under this chapter" when adopting the revised version of G.L. c. 138, § 24.⁵

It has been suggested, however, that so much of § 24 as would authorize the establishment of maximum prices for sales by licensees under § 15 was impliedly repealed by the enactment of St. 1952, c. 385, inserting G.L. c. 138, § 25C in the General Laws. Section 25C imposes a system of minimum consumer prices for sales by package stores of alcoholic beverages other than malt beverages. Subsection (d) of § 25C divides each calendar year into six price periods of two months' duration. Subsections (b) and (c) require certain wholesalers, importers and manufacturers to file minimum consumer prices for each brand of alcoholic beverage marketed in Massachusetts prior to each of these price periods. The prices thereby filed go into effect only after they have been approved by the Commission under § 25C(d) "as not being excessive, inadequate or unfairly discriminatory." The final paragraph of § 25C authorizes the Commission to suspend the license of a package store which sells below any of the applicable minimum consumer prices then in effect.

Prior to the enactment of § 25C, the Legislature had attempted to regulate minimum prices of alcoholic beverages sold at package stores by making the so-called "Fair Trade Law" (G.L. c. 93, §§ 14A-14D) and "Unfair Sales Act" (G.L. c. 93, §§ 14E-14K) applicable thereto. This was the purpose of G.L. c. 138, § 23A, inserted by St. 1945, c. 215. In 1957, however, the Supreme Judicial Court held that § 23A had been impliedly repealed by the enactment of

³The only non-retail alcoholic beverage licenses authorized by G.L. c. 138 at the time were for manufacturers, wholesalers and importers. See G.L. c. 138, §§ 18, 19, as appearing in St. 1933, Extra Session, c. 376, § 2. The 1933 version of G.L. c. 138 also provided for the issuance of licenses to package stores (§ 15) and to the relatively minor groups of retailers listed in Note 1, *supra*.

⁴The words "and council" were stricken from the approval requirement of G.L. c. 138, § 24 by St. 1964, c. 740, § 4. See Op. Atty. Gen. No. 66/67-28.

⁵See Note 2, *supra*.

§ 25C. *Bond Liquor Store, Inc. v. A.B.C.C.*, 336 Mass. 70, 74. The Court gave two reasons for its holding: (1) that “the application of § 23A to sales to which § 25C also in terms applies would be so arbitrary and unreasonable . . . as to show inconsistency and repugnance in their respective provisions” (p. 74), and (2) that “the intention to occupy the entire field of price control in the liquor industry is reasonably manifested by § 25C” (p. 77).

I am of the opinion that neither of the reasons relied upon in the *Bond* case for the implied repeal of G.L. c. 138, § 23A is applicable to the provision of G.L. c. 138, § 24 involved here. As to the first of these reasons, the Court in the *Bond* case emphasized that the continued application of §§ 23A and 25C to the same sales would subject those sales to two sets of minimum prices and would subject violators of those prices to two sets of penalties. 336 Mass. at 74-77. The Court found this to be “arbitrary and unreasonable” because both § 23A and § 25C are *minimum* price statutes. The regulatory power sought to be asserted under § 24, however, is restricted to *maximum* prices.⁶ The imposition of both a minimum and a maximum price upon sales of the same beverage – even where they are established by different procedures and their violators are subject to different penalties – cannot properly be regarded as “so arbitrary and unreasonable . . . as to show inconsistency and repugnance in their respective provisions.”

The second of the reasons given by the Court in the *Bond* case for the implied repeal of § 23A – that “the intention to occupy the entire field of price control in the liquor industry is reasonably manifested by § 25C” (336 Mass. at 77) – seems on its face to apply equally to the price clauses of § 24. Read in the context of the opinion as a whole, however, I think this statement must be taken as referring only to the field of *minimum* price control. The fact that Commission approval of proposed minimum consumer prices under § 25C is conditioned upon their not being “excessive” does not alter this conclusion, since a given price might well be “excessive” as a *minimum* without being “excessive” as a *maximum*. In any event, the Supreme Judicial Court seems to have so interpreted the *Bond* case in *T.J. Hartnett Beverage Co., Inc. v. A.B.C.C.*, 350 Mass. 619, 621:

“The reasoning in the *Bond* case was that both statutes were designed to eliminate price cutting and ‘loss-leader selling,’ and that if both statutes were operative there would be inconsistencies which would have unreasonable and capricious consequences. Thus it was held that § 25C, which was enacted after § 23A, was intended to cover the whole subject of price *cutting* and repealed § 23A by necessary implication.” (Emphasis supplied.)

As the Court said in *Hartnett*, § 25C does not undertake “to forbid sales in excess of the established minimum prices.” 350 Mass. at 622. Thus, the entire area of operation of the maximum price clause of § 24 remains outside the field pre-empted by § 25C.

Since neither of the grounds cited in the *Bond* case for the implied repeal of § 23A apply to the maximum price clause of § 24, that case cannot be relied upon as authority for implied repeal of the latter provision. And, since these

⁶Actually, one of the alternatives to § 25C which the Legislature considered at the time of its enactment was a proposal whereby G.L. c. 138, § 24 would be amended to authorize the Commission to establish “maximum *or* minimum prices chargeable by licensees under this chapter . . .” (Emphasis supplied.) See 1952 House Doc. No. 952.

two grounds — inconsistency and pre-emption — are, to the best of my knowledge, the only ones which have ever been recognized in Massachusetts as a basis for implied repeal of a statute. I do not think that such implied repeal can be established here on any other theory. The Court has often stated that repeals by implication are not favored, and that “[u]nless the prior statute is so repugnant to and inconsistent with the latter enactment that both cannot stand, then the former is not deemed to have been repealed.” *Commonwealth v. Bloomberg*, 302 Mass. 349, 352. *Haffner v. Director of Public Safety of Lawrence*, 329 Mass. 709, 713-714. *T.J. Hartnett Beverage Co., Inc. v. A.B.C.C.*, 350 Mass. 619, 622.⁷ There is no such repugnance and inconsistency between § 24 and § 25C.

It is therefore my opinion that G.L. c. 138, § 24, as applied to licensees under G.L. c. 138, § 15, was not affected by the enactment of G.L. c. 138, § 25C, and that the Commission, with the approval of the Governor, may still adopt regulations establishing maximum prices thereunder for sales of alcoholic beverages by such licensees.

Question 3, relating to the “standards or guide-lines” the Commission should follow in setting maximum prices under G.L. c. 138, § 24, is, of course, quite abstract. And the difficulties inherent in attempting to answer abstract legal questions are compounded here by the total absence of any express substantive standards in § 24,⁸ and by the fact that the Commission, so far as I am aware, has never promulgated any maximum price regulations during the entire twenty-five years that § 24 has been in effect.

I can only advise you that the Legislature has conferred extremely broad discretion upon the Commission in the establishment of maximum liquor prices. The standards for determining the levels of these prices, the scope and the degree of generality or specificity of the regulations establishing them and the procedures for adopting those regulations have all been left largely to the discretion of the Commission. So long as the prices it adopts meet constitutional tests of fairness and common sense tests of reasonableness — and so long as they are adopted in accordance with the Massachusetts Administrative Procedure Act, G.L. c. 30A (see *Kneeland Liquor, Inc. v. A.B.C.C.*, 345 Mass. 228), and through the exercise of independent judgment based on “some form of substantial information or evidence” as to their compliance with the standards established by the Commission (see *Pioneer Liquor Mart, Inc. v. A.B.C.C.*, 350 Mass. 1, 8) — I believe that the Commission will be acting within its authority.

⁷The *Hartnett* case held that a provision of G.L. c. 138, § 15 requiring package stores to post their prices and to sell only at the posted prices was not impliedly repealed by the subsequent enactment of § 25C. Since the § 15 posting requirement has a maximum (as well as minimum) price aspect, the *Hartnett* case lends further support to the proposition that the maximum price clause of § 24 remains intact.

⁸I have considered the possibility of a constitutional objection to § 24’s price-setting clause based on a claim of an over-broad delegation of legislative power to the Commission. But without facts tending to show that sufficiently precise standards may not be supplied by implication, I am not prepared to rule that the maximum price clause of § 24 is unconstitutional on its face. More explicit statutory standards — both substantive and procedural — would, of course, be desirable. See *Supreme Matt Products Co., Inc. v. A.B.C.C.*, 334 Mass. 59, 63.

In short, the Legislature has relied upon the expertise of your agency in this area for the development of appropriate standards and guidelines within the broad limitations described above. The discretion thus delegated to you is even broader than that conferred by G.L. c. 138, § 25C, and the standards and guidelines are, at least at this preliminary state, primarily the subject of administrative, not legal, judgment.

Very truly yours,
ELLIOT L. RICHARDSON
Attorney General

Number 22.

January 2, 1969

HONORABLE RICHARD E. McLAUGHLIN
Registrar of Motor Vehicles
100 Nashua Street
Boston, Massachusetts 02114

Dear General McLaughlin:

You have requested my opinion as to whether a certain claim in the amount of \$645 submitted by John M. O'Donnell, an investigator at the Registry of Motor Vehicles, may be paid under G.L. c. 16, § 11.

Your letter states:

"The claim arises out of damage sustained by Mr. O'Donnell to radio equipment installed by him at his own expense in his car for the purpose of better enabling him to carry out his duties of investigating fatal accidents.

"On Thursday, October 14, 1967, Mr. O'Donnell had responded to a call from the Metropolitan District Commission, and was returning to his home in Milton when his car was in collision with another vehicle, which reportedly had crossed the center line.

"... We are advised that the insurance carried by Mr. O'Donnell did not cover the radio equipment, and that he has not been compensated by any other source for the loss, nor is there any reasonable expectation that he will be compensated unless paid by this agency. If it is relevant, Mr. O'Donnell had the approval of the Registry for the use of this equipment in the performance of his duties."

Appended to your letter is a report of the accident prepared by Mr. O'Donnell, indicating that it resulted in the total destruction of his car and radio equipment. It appears from other materials furnished to us that this has been confirmed by an independent investigation by the Registry. Also attached to your letter is a copy of a receipt issued to Mr. O'Donnell in the amount of \$645, as payment in full for the labor and materials involved in replacing the radio equipment.

Your letter further states that you have submitted a voucher to the Comptroller for payment to Mr. O'Donnell in the above amount pursuant to G.L. c. 16, § 11, but that the Comptroller has declined to certify your voucher for payment and has returned it with the recommendation that it be presented to the Legislature. You now seek my opinion as to whether this is a proper expenditure under the statute relied upon.

General Laws c. 16, § 11, so far as material, provides:

“The registrar of motor vehicles shall, subject to appropriation, indemnify an employee in the registry of motor vehicles having police powers under section twenty-nine of chapter ninety to an amount not more than the amount recommended by said registrar, for expenses or damages sustained by him while performing his duties under said section twenty-nine”*

According to your letter and previous correspondence with this Department, you have determined that Mr. O'Donnell is “an employee in the registry of motor vehicles having police powers under [G.L. c. 90, § 29],” that his radio equipment was destroyed “while performing his duties under said [§ 29]” and that the replacement cost of the equipment was \$645. On the basis of these factual determinations, I believe this to be precisely the sort of claim at which the quoted provision of G.L. c. 16, § 11 is directed.

We need not inquire whether Mr. O'Donnell was actually *using* the equipment in the performance of his duties under G.L. c. 90, § 29 (though I infer from your letter that he probably was). Indemnification under G.L. c. 16, § 11 extends to *all* personal property of an employee described therein which happens to be damaged or destroyed *while* he is performing such duties. Thus, you would be empowered, although not required, under § 11 to indemnify him for the loss of any item he was carrying in his automobile at the time, without regard to the character or use of the item. It is immaterial that the particular article involved was equipment which might well have been furnished by the Registry at Commonwealth expense in the first instance.

On the basis of the facts submitted by you and assuming the availability of funds appropriated for this purpose, I am therefore of the opinion that you may in your discretion indemnify Mr. O'Donnell under G.L. c. 16, § 11 in the amount claimed, and, if the voucher presented by reason thereof is otherwise in order, that the Comptroller has a duty to certify the same for payment.

Very truly yours,
ELLIOT L. RICHARDSON
Attorney General

Number 23.

January 3, 1969

MRS. MABEL A. CAMPBELL, DIRECTOR
Division of Civil Service
State House
Boston, Massachusetts 02133

Dear Mrs. Campbell:

You have requested my opinion as to whether the parking meter supervisors

* Section 11 also provides indemnity for such an employee for expenses and damages incurred by him in the defense or settlement of certain claims brought against him, “provided, that the defense or settlement of such claim shall have been made by the attorney general” The same section requires that amounts paid on account of damages for personal injuries “shall have been approved by the attorney general.” However, no such approval or other action by this Department is required for the payment of claims described in that portion of § 11 quoted in the text and relied upon by Mr. O'Donnell.

(commonly known as “meter maids”) of the City of Boston are subject to civil service.

The position of parking meter supervisor was created by St. 1965, c. 365, § 1, in the form of an amendment to St. 1898, c. 282, § 3, relating to the appointment of special police officers in the City of Boston. The 1965 amendment inserted the following sentence in the earlier statute:

“Every special police officer appointed under the provisions of this act upon the written application of the commissioner of traffic and parking of said city shall have all the powers and duties of a police officer, including those conferred or imposed by section twenty C of chapter ninety of the General Laws, to enforce all laws, rules and regulations regulating, directing, controlling or restricting the stopping or standing of vehicles *at meters* in public ways and in off-street parking areas and facilities deemed to be ways under the control of the city.” (Emphasis supplied.)

The 1965 statute, in § 2, also amended G.L. c. 31, § 5, by which the selection and appointment of persons to fill various positions are specifically exempted from rules of the Civil Service Commission, by adding “parking meter supervisors” to the list of positions so exempted. The obvious purpose of the latter amendment was to place the special police officers described in the sentence quoted above outside the civil service system.

It is now suggested, however, that this result has been changed by the enactment of St. 1968, c. 308, which struck the words “at meters” from the above-quoted provision of the 1965 statute. The effect of the 1968 amendment, of course, was to extend the authority of these special police officers to vehicles stopping, standing or parking at places other than meters. Accordingly, the contention is made that these officers no longer qualify as “parking meter supervisors,” and hence are no longer exempt from civil service under G.L. c. 31, § 5.

I am not persuaded by this contention. The legislative purpose of the 1968 statute, as set forth in its title, was to authorize “parking meter supervisors to enforce all laws relative to parking in the City of Boston.” I find nothing in the language or history of this statute to suggest that it was intended to do more than increase the powers of these officers. The fact that the Legislature created a specific exemption from civil service for these officers at the time it authorized their appointment leads me to believe that the Legislature would have been equally specific if it had intended to limit or eliminate that exemption three years later. Indeed, it may well be that the exemption in G.L. c. 31, § 5 for “parking meter supervisors” would cease to have any application whatever if these officers were now regarded as outside its scope. And it is of some significance that the officers whose powers were extended by the 1968 statute to non-meter parking violations were nonetheless referred to in the title to that statute as “parking meter supervisors.”

Moreover, the civil-service status of parking meter supervisors was the specific subject of other 1968 legislation, enacted subsequently to the 1968 statute discussed above. In St. 1968, c. 461, § 2, the Legislature inserted § 48B in c. 31 of the General Laws, whereby “[a] city, by vote of its city council, and a town, by vote of its town meeting, may place the position of parking meter supervisor under the provisions of this chapter [i.e., under civil service].” Section 1 of the same statute inserted language after the words “parking meter supervisors” in the list of positions exempted from civil service by G.L. c. 31, § 5 to allow for

the exercise of this local option. The plain implication of c. 461 is that the Legislature intended to subject these officers to civil service *only* where the employing municipality elected to do so. It is my understanding that the City of Boston has not so elected.

I am therefore of the opinion that St. 1968, c. 308 in no way affected the civil-service status of the special police officers referred to therein. Accordingly, in the absence of local action pursuant to G.L. c. 31, § 48B, these officers remain within the exemption conferred by G.L. c. 31, § 5.

Very truly yours,
ELLIOT L. RICHARDSON
Attorney General

Number 24.

January 10, 1969

HONORABLE OWEN B. KIERNAN
Commissioner of Education
180 Tremont Street
Boston, Massachusetts 02111

Dear Commissioner Kiernan:

You have requested my opinion as to certain powers and duties of school committees as a result of the amendment of § 178I of the municipal collective bargaining law (G.L. c. 149, §§ 178G-N) by c. 633 of St. 1968. Prior to the 1968 amendment the first paragraph of § 178I read as follows:

"The municipal employer and the employee organization recognized or designated as exclusive representative of employees in an appropriate unit shall have the duty to bargain collectively. In such bargaining other than with an employee organization for school employees, the municipal employer shall be represented by the chief executive officer, whether elected or appointed, or his designated representative or representatives. In such bargaining with an employee organization for school employees, the municipal employer shall be represented by the school committee or its designated representative or representatives. In such bargaining in a superintendency union formed in accordance with general or special law, the school committees may be represented by a common representative or representatives designated by them and the employee organizations may be represented by a common representative or representatives designated by them."

The 1968 amendment added a proviso to the third sentence of the foregoing paragraph so that the third sentence now reads as follows:

"In such bargaining with an employee organization for school employees, the municipal employer shall be represented by the school committee or its designated representative or representatives; provided, however, that the school committee shall not designate an attorney as its representative unless it is so authorized by vote of the city council, in the case of a city, or of the town meeting, in the case of a town. Such attorney shall not be subject to the provisions of section nine A of chapter thirty¹ or the provisions of chapter thirty-one."²

¹ Veteran's tenure

² Civil Service

You have asked me the following eight questions:

"1. Is Chapter 633 of the Acts of 1968 a valid discrimination against a class of persons?

"2. Under said Chapter 633 may a school committee represent itself in bargaining with an employee organization if (a) one, (b) more than one but fewer than a majority, (c) a majority of its members are attorneys?

"3. Under said Chapter 633 may a school committee designate an attorney who is a member of the school committee as (a) its representative or (b) one of its representatives, in each case without compensation, in bargaining with an employee organization?

"4. If it is your opinion that any part of question 1 or question 2 should be answered 'no', is said Chapter 633 an invalid discrimination against a class of persons?

"5. If it is your opinion that said Chapter 633 is valid, does the act prohibit a school committee from contracting with, employing or retaining a consultant, who is an attorney, to advise and assist its designated representative or representatives in bargaining with an employee organization unless such contract, employment or retainer has been authorized as provided in the act?

"6. If it is your opinion that question 5 should be answered 'no', is the compensation to be paid to such consultant an expenditure for the support of the public schools to which General Laws Chapter 71, Section 34 applies?

"7. Must the authorization specified by said Chapter 633 be authorization limited to the designation of a particular attorney or to the designation of an attorney as the representative of the school committee for particular bargaining matters or for a particular period of time or may such authorization be an authorization to continue in effect as to all designations thereafter made until further action of the authorizing body?

"8. If a school committee designates an attorney pursuant to valid authorization may such attorney be compensated and, if he may be compensated, is such compensation an expenditure for the support of the public schools to which General Laws Chapter 71, Section 34 applies?"

The legislative history of c. 633 shows that the measure as enacted differed considerably from the bills from which it was derived. The original bills authorized a school committee to employ legal counsel for general purposes. 1968 House Doc. Nos. 236, 666; 1968 Senate Doc. No. 244. The House substituted for these bills a measure authorizing school committees to hire an attorney to represent them in *collective bargaining*. 1968 House Doc. No. 4433. This bill passed both the Senate and the House but the Governor returned it with a recommendation that a school committee could designate an attorney as its collective bargaining representative only upon approval by the city council or town meeting. The Governor stated:

"While I can see that there may be some need for some school committees to hire someone skilled in collective bargaining, I feel that a decision as to whether any particular city or town should permit a person other than the appointed town counsel to represent

the school committee should be left to the governing body of that particular municipality.” 1968 House Doc. No. 4670.

The Legislature accepted the Governor’s recommendation with minor amendments. It also changed the title of the bill from “An Act Providing for Hiring of Counsel by School Committees as Collective Bargaining Representatives” to “An Act Providing that School Committees Shall Not Designate Attorneys as Collective Bargaining Representatives unless so Authorized by the City Council or the Town Meeting.”

Turning now to your questions, I answer them as follows:

Question 1

Your first question asks whether c. 633 is a “valid discrimination” against attorneys. I assume that you are referring to the fact that although authorization by a city council or town meeting is required for a school committee’s designation of an attorney as its representative in collective bargaining negotiations, no such authorization is required for the designation of someone who is not an attorney. I find no invalidity in the foregoing provision. The statute does not exclude attorneys from serving as collective bargaining representatives but merely conditions their designation as such on a vote of a city council or town meeting. That the designation of a non-lawyer is not subject to the same condition does not present any substantial issue of “discrimination” in any constitutional sense. The presumed statutory purpose – that of centralizing municipal approval for all municipal legal services – does not appear to be improper. See *Opinion of the Justices*, 303 Mass. 631, 641; *Mayor of Somerville v. District Court of Somerville*, 317 Mass. 106.

Question 2

Your second question asks whether “under” c. 633 a school committee may “represent itself” in collective bargaining negotiations if one or more of its members are attorneys. My answer is in the affirmative. Chapter 633 specifically retained the provisions of § 178I which state that “the municipal employer shall be represented by the school committee or its designated representative or representatives.” The only change effected by c. 633 was to require approval by a city council or town meeting if a school committee should “designate” an attorney as its representative. When serving as a member of a school committee which acts as its own representative in collective bargaining negotiations, however, an attorney is not acting under a “designation” but rather as part of the committee and thus under the statutory powers conferred on him by virtue of his office.

Question 3

Your third question asks, in effect, whether under c. 633, a school committee may, without local legislative authorization, “designate” one of its own members, who is also an attorney, as an unpaid representative to conduct collective bargaining negotiations. No specific facts have been supplied to indicate the terms or scope of the “designation” as “representative.” In particular, there is nothing to indicate that the member-attorney would be acting in any capacity other than as a member of the school committee. But even without such additional facts, I find nothing in c. 633 which would in general prevent a school committee from detailing one of its members, who happens to be an attorney, to serve without compensation as the committee’s collective bargaining “representative.” Chapter 633 is, in my judgment, directed rather at

services that are not regarded as incident, whether inherent or by appointment, to membership on the committee. Uncompensated services of a member in conducting collective bargaining negotiations, for example, may be regarded as such an incident of membership. Without more particular facts as to what duties such a member might be delegated, however, I cannot offer a more specific answer.

Question 4

Your fourth question, which is predicated on a negative answer to question 1 or 2, does not, in view of my answers to those questions, require a reply.

Question 5

Your fifth question asks whether, absent local legislative approval, c. 633 prohibits a school committee from retaining "a consultant, who is an attorney, to advise and assist its designated representative" in collective bargaining negotiations. No particular facts have been furnished which would indicate the context in which the proposed consultant services would be rendered. As a general proposition, however, I do not regard such services as coming within the scope of c. 633. Yet if in a given situation, the attorney-consultant were in fact "assisting" the designated representative in such a manner as to be actually a responsible sub-representative or co-representative, then his employment could be subject to the statute. Each case would be governed by its own particular facts.

Question 6

Your sixth question asks whether (if c. 633 does not prohibit the employment of an attorney-consultant) the compensation to be paid to him is "an expenditure for the support of the public schools to which General Laws Chapter 71, Section 34 applies?"¹ Expenditures which come within § 34 are those which are "necessary for the support of public schools." *Ring v. Woburn*, 311 Mass. 679, 695; *Day v. Newton*, 342 Mass. 568, 569-570. "Within a wide limit 'necessary' means reasonably deemed by the [school] committee to bear a relation to its statutory mandate." *Day v. Newton*, at p. 570. Such a determination is essentially a question of fact which may vary from case to case. So far as it is appropriate for me to express a general view, I am of the opinion that a school committee might reasonably conclude that a particular consultant's services are necessary to enable it to carry out its collective bargaining responsibilities. See *William W. Drummey, Inc. v. City of Cambridge*, 282 Mass. 170, involving, under other statutory provisions, the appointment of a paid consultant to advise a school committee on repairs to school buildings to comply with local safety regulations.

Question 7

Your seventh question asks in effect whether local legislative authorization of the designation of an attorney under c. 633 must specify a particular attorney, the period of his employment and the scope of his duties. Without a given vote before me, I can again answer only in general terms. The statute does not make particular reference to the aspects to which you refer. I accordingly conclude

¹General Laws c. 71, § 34 provides in pertinent part: "Every city and town shall annually provide an amount of money sufficient for the support of the public schools . . ."

that the matter lies within the discretion of the city council or town meeting, each of which may in authorizing a school committee to designate an attorney, impose such limitations as it considers appropriate.

Question 8

Your eighth question asks whether a school committee's designation of an attorney under c. 633 is "an expenditure for the support of the public schools to which General Laws Chapter 71, Section 34 applies?" As in my answer to your sixth question, I am of the opinion that, depending on particular circumstances such an expenditure could reasonably be determined by a school committee to be "necessary under section 34. I would suppose, moreover, that since a town meeting or city council would, under c. 633, have already approved the committee's designation of the attorney, there would be adequate support for the committee's determination.

Very truly yours,
ELLIOT L. RICHARDSON
Attorney General

Number 25.

January 10, 1969

EXECUTIVE OFFICE FOR ADMINISTRATION AND FINANCE

State House
Boston, Massachusetts 02133

Gentlemen:

The former Commissioner of Administration has requested my opinion as to the method to be used in computing the compensation to be paid to former state employees who while receiving a pension have returned to active state service. The question arises as a result of St. 1968, c. 676, amending G.L. c. 32, § 91. Subsection (b) of § 91 as thus amended is a general provision authorizing reemployment of former public employees, both state and local. Any such employee may be reemployed in public service "for not more than ninety days, in the aggregate, in any calendar year; provided that the earnings therefrom when added to any pension or retirement allowance he is receiving do not exceed the salary that is being paid for the position from which he was retired or in which his employment was terminated."

The former Commissioner asked whether under the foregoing provisions a reemployed employee is entitled to —

(1) Only that portion of the full weekly (or other pay period) salary of the position in which he is reemployed which when added to his pension, calculated in a like basis, will equal the salary, similarly calculated, currently being paid for his former position, or —

(2) The full weekly (or other pay period) salary of the position in which he is reemployed, until he has received an amount which when added to his annual pension will equal the annual salary currently being paid for his former position.

By way of illustration of the problem, the former Commissioner has given the case of a former employee of the Commonwealth who retired as a Principal

Clerk and is receiving a pension of \$60 a week, or \$3,120 a year. He has been reemployed as a Junior Clerk and Stenographer, a position for which the regular salary is \$96.80 a week. The present salary of his former position is \$127.50, or \$6,630 a year.

Under the first of the two interpretations set forth above, the employee's weekly compensation for the 90 days of his reemployment would be \$67.50 computed as follows:

	1) Present weekly salary of former position	\$127.50
Less	2) Weekly pension	60.00
	3) Maximum allowable weekly compensation payable to former employee in new position	\$ 67.50

Under the second of the interpretations the employee's weekly compensation would be \$96.80, rather than \$67.50, for the full 90 days of his reemployment, for a total of \$1,742.40, a sum which when added to his annual pension of \$3,120 would still be less than \$6,630, the present annual salary of his former position.

Although support can be found in the statute for each of the suggested interpretations, I am of the view that the first interpretation, namely, that which requires proration, is the correct one. The "salary that is being paid for the position from which he [the employee] was retired" is ordinarily fixed on a weekly (or in a few cases a monthly) basis. See G.L. c. 30, § 46 (the General Salary Schedule). Pensions are payable on a monthly basis and cease with the last full monthly payment due prior to a retired employee's death, with a pro rata additional payment allowable for any period of less than a full month. G.L. c. 32, § 13(b). Furthermore, since there is an absolute 90-day working limit, it seems unlikely that the Legislature intended that the earnings limit be based on a full annual period. I am therefore disposed to conclude that in enacting the 1968 amendment to G.L. c. 32, § 91, the Legislature contemplated that all calculations should be made on the same base as pensions and salaries.

In reaching this conclusion, I have not overlooked subsection (c) of § 91, as inserted by the 1968 amendment. Subsection (c) provides that each reemployed person shall "certify . . . the number of days which he has been employed in any . . . calendar year and the amount of earnings therefrom, and if the number of days exceed ninety in the aggregate, he shall not be employed, or if the earnings therefrom exceed the amount allowable . . . , he shall return . . . all such earnings as are in excess of [the] allowable amount." The foregoing provision may be regarded simply as a safeguard against possible overpayments and does not, in my judgment, have any controlling effect on the interpretation to be given to subsection (b).

The former Commissioner has submitted for my consideration a proposed guideline to implement a prorated method of calculation. Since this is a matter that can be handled best on a counselling basis rather than by a formal opinion, I am referring it to my staff with instructions to assist in the formulation of the guideline in the light of the principle of proration set forth above.

Very truly yours,
ELLIOT L. RICHARDSON
Attorney General

Number 26.

January 17, 1969

MRS. HELEN C. SULLIVAN

Director of Registration

Department of Civil Service

and Registration

State Office Building

100 Cambridge Street

Boston, Massachusetts 02202

Dear Mrs. Sullivan:

You have requested my opinion on the following questions:

- (1) "Under Section 21 of Chapter 142 of the General Laws, does the Board of State Examiners of Plumbers have the authority to inspect plumbing installations in buildings constructed under the authority of Chapter 773 of the Acts of 1960?
- (2) "If the answer to the above question is in the negative, then would the inspection of plumbing in these buildings fall under the jurisdiction of a local city or town in which the building is located?"

The buildings referred to are those constructed by the University of Massachusetts Building Authority, "a body politic and corporate" established by St. 1960, c. 773, § 2, "which shall not be subject to the supervision or regulation . . . of any department, commission, board, bureau or agency of the Commonwealth except to the extent and in the manner provided in [c. 773]."

General Laws c. 142, § 21 provides:

"The [board of state] examiners [of plumbers] shall formulate rules relative to the construction alteration, repair and inspection of all plumbing work *in buildings owned and used by the Commonwealth*, subject to the approval of the department of public health, and all plans for plumbing in such buildings shall be subject to the approval of the examiners." (Emphasis supplied.)

Question 1, then, asks in substance whether the buildings of the University of Massachusetts Building Authority are "buildings owned and used by the commonwealth" for the purposes of the foregoing statute.

In the past this Department has consistently ruled that buildings owned by public authorities are not "buildings owned and used by the Commonwealth" within the meaning of G.L. c. 142, § 21. *Report of the Attorney General for the Year Ending June 30, 1958*, p. 61 (Massachusetts Turnpike Authority). *Report of the Attorney General for the Year Ending June 30, 1959*, p. 67 (Massachusetts Port Authority). Op. Atty. Gen. No. 66/67-24 (Massachusetts Port Authority). Op. Atty. Gen. No. 66/67-24 (Massachusetts Bay Transportation Authority). While I have some doubts about these rulings, I believe it inappropriate at this time to overturn precedents which have presumably been relied upon by state and local officials, as well as plumbing contractors, for the past ten years. See Op. Atty. Gen. No. 66/67-89. Hence, I answer Question 1 in the negative.

Turning to Question 2, I am of the opinion that plumbing in buildings of the University of Massachusetts Building Authority does not fall within the jurisdiction of the local authorities. It has long been established that local jurisdiction does not extend to plumbing in buildings of the Commonwealth. 1 Op. Atty. Gen., p. 290. *Report of the Attorney General for the Year Ending*

November 30, 1932, p. 86. *Report of the Attorney General for the Year Ending November 30, 1934*, p. 75. *Report of the Attorney General for the Year Ending November 30, 1935*, p. 38. These rulings were based on the broader proposition that "the general law made for the regulation of citizens must be held subordinate to [a] special statute regulating the use of the property of the State unless there is express provision to the contrary." *Teasdale v. Newell & Snowling Construction Co.*, 192 Mass. 440, 443. *Medford v. Marinucci Bros. & Co.*, 344 Mass. 50, 55. In my opinion, the same reasoning applies to the property of the University of Massachusetts Building Authority, the powers of which are declared by St. 1960, c. 773, § 2 "to be the performance of an essential governmental function," and which is otherwise treated in the enabling legislation as comparable in importance to an agency of the State government.

Moreover, Attorney General Brooke ruled in 1966 that plumbing in buildings of the Massachusetts Bay Transportation Authority was not subject to local jurisdiction. Op. Atty. Gen. No. 66/67-24. I concur in this conclusion and regard it as controlling here.

It is therefore my opinion that plumbing in buildings of the University of Massachusetts Building Authority is subject neither to rules of the State Board of Examiners of Plumbers under G.L. c. 142, § 21, nor to local jurisdiction.

Very truly yours,
ELLIOT L. RICHARDSON
Attorney General

Number 27.

January 17, 1969

HONORABLE ERNA BALLANTINE, *Chairman*
Massachusetts Commission Against
Discrimination
41 Tremont Street
Boston, Massachusetts 02108

Dear Madam Chairman:

You have requested my opinion on the following two questions concerning the investigatory powers of the Massachusetts Commission Against Discrimination (MCAD) under the Fair Employment Practices Act, G.L. c. 151B, §§ 1-10.

1. May the MCAD investigate an employer for engaging in unlawful practices regarding the hiring of members of minority groups when the complaint upon which the investigation is based does not name any particular individual as a person affected by such practices?

2. Does the MCAD have the power to subpoena documents when investigating complaints of unlawful practices?

From information that you have furnished to me, including information given at a meeting on December 19, 1968 at which you, your staff and members of my staff were present, it appears that your questions arise from the MCAD's participation in programs of the Equal Employment Opportunity Commission (EEOC) in aid of state agencies. The EEOC, which was established by Title VII of the Civil Rights Act of 1964 (78 Stat. 241; 42 U.S.C. 2000a), has furnished you with certain data indicating the numbers and percentages of black persons and persons with Spanish surnames employed by particular employers. In at least one case the data indicates that an employer has taken no "affirmative

action” to seek out employees from the black and Spanish-speaking communities and has not submitted a job order to a city-wide anti-poverty program or a neighborhood employment office.

General Laws c. 151B, § 4 provides:

“It shall be an unlawful practice:

1. For an employer, by himself or his agent, because of the race, color, religious creed, national origin, sex, age or ancestry of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification.”

....

It has been suggested that the reference in the foregoing provision to an “individual” limits the MCAD’s power of investigation to situations where a specifically named person is said to be the object of the unlawful practice. I do not concur in this interpretation. The statute is drawn in broad terms and expressly states in section 9 that it “shall be construed liberally for the accomplishment of the purposes thereof.”¹ These include the prohibition, as set forth above, of discrimination based on characteristics common to broad classes of persons — “race, color, religious creed, national origin, sex, age or ancestry.” Other prohibitions of G.L. c. 151B, § 4 against unlawful practices are framed in similarly broad terms. I regard the comprehensive nature of all these provisions, in the light of the statutory mandate that the act shall be liberally construed, as affording an adequate basis for initiating an investigation even though the complaint upon which the investigation is founded does not name a particular person as the object of an unlawful practice. Such an investigation is, moreover, not prohibited by the last paragraph of G.L. c. 151B, § 8.² An investigation is an important step in a longer process that may eventually lead to a formal hearing followed by findings and an order. G.L. c. 151B, § 5. Without adequate investigation this process would be seriously hampered and the realization of the statute’s broad and humane purposes would be materially impaired.

In short, then, I answer your first question in the affirmative.

As for your second question, namely, the power of the MCAD to subpoena documents in connection with an investigation, I call your attention to section 3

¹See also *Local Finance Co. of Rockland v. Massachusetts Commission Against Discrimination*, 1968 Mass. Adv. Sh. 1287.

²“Nothing contained in this chapter or in any rule or regulation issued by the commission shall be interpreted as requiring any employer, employment agency or labor organization to grant preferential treatment to any individual or to any group because of the race, color, religious creed, national origin, sex, age or ancestry of such individual or group because of imbalance which may exist between the total number of percentage of persons employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization or admitted to or employed in, any apprenticeship or other training program, and the total number or percentage of persons of such race, color, religious creed, national origin, sex, age or ancestry in the commonwealth or in any community, section or other area therein, or in the available work force in the commonwealth or in any of its political subdivisions.” Added by St. 1966, c. 361.

of the Act which provides:

"The commission shall have the following functions, powers and duties:

....

"6. To receive, investigate and pass upon complaints of unlawful practices, as hereinafter defined, alleging discrimination because of race, color, religious creed, national origin, sex, age, or ancestry.

"7. To hold hearings, subpoena witnesses, compel their attendance, administer oaths, take the testimony of any person under oath, and in connection therewith, to require the production for examination of any books or papers relating to any matter under investigation or in question before the commission. The commission may make rules as to the issuance of subpoenas by individual commissioners."

I regard the foregoing provisions as providing ample authority for the issuance of subpoenas in connection with an investigation. Subsection 6 plainly authorizes the MCAD to "receive, investigate or pass upon complaints." Subsection 7 implements subsection 6 by authorizing the subpoena of witnesses and the "production for examination of any books or papers relating to any matter under investigation."

Very truly yours,
ELLIOT L. RICHARDSON
Attorney General

Number 28.

May 13, 1969

HONORABLE SAMUEL M. FLAKSMAN

*Executive Secretary of the
Executive Council*

State House

Boston, Massachusetts 02133

Dear Mr. Flaksman:

On behalf of the Executive Council you have requested my opinion as to whether Dr. John D. Coughlan continues to hold the positions of chairman and member of the Youth Service Board established by G.L. c. 6, § 65 and director of the Division of Youth Service established by G.L. c. 120, § 4A. With your request you have submitted copies of the following documents:

- (1) A letter from Dr. Coughlan to Governor Francis W. Sargent dated March 10, 1969 in which Dr. Coughlan stated,

"I hereby submit my resignation from the positions of Chairman and Member of the Youth Service Board and Director of the Division of Youth Service, to take effect May 10, 1969."

- (2) A letter from Governor Sargent to Dr. Coughlan dated March 10, 1969 in which Governor Sargent stated,

"I hereby accept your resignation tendered today from the positions of Chairman and Member of the Youth Service Board and Director of the Division of Youth Service, to take effect

May 10, 1969.”

- (3) A letter from Dr. Coughlan to Governor Sargent dated May 9, 1969 (bearing a receipt stamp of the same date) in which Dr. Coughlan stated:

“I hereby withdraw my resignation, which was to be effective on May 10th, as a member and Chairman of the Youth Service Board and Director of the Division of Youth Service. Since no successor has been appointed to take my place, the Division and the Board might be seriously impaired in emergency situations that might adversely affect the welfare of children.

“In the absence of a legally appointed replacement, chaos could result, and I consider it my duty to withdraw my resignation and remain at my post.”

- (4) A letter from Governor Sargent to Dr. Coughlan dated May 9, 1969 in which the Governor stated:

“I am in receipt of your letter dated May 9, 1969, in which you purport to withdraw your resignation, previously accepted, as a member and Chairman of the Youth Service Board and Director of the Division of Youth Service.

“I appreciate your concern that a successor be appointed, and am pleased to be able to tell you that a successor has been named by me and his name will be placed before the Executive Council on Monday morning, May 12, 1969, for approval.

“I decline to accept your attempted rescission of your resignation.”

Based on the foregoing facts, the Council’s specific questions are as follows:

- “1. Whether the resignation of John D. Coughlan as Chairman and Member of the Youth Service Board and Director of the Division of Youth Service and the acceptance of said resignation are valid and of legal effect?
- “2. Whether there now exists a vacancy in the membership of the Youth Service Board?”

I answer both the Council’s questions in the affirmative. The law of Massachusetts clearly establishes that upon the Governor’s acceptance of Dr. Coughlan’s resignation “the rights of the parties were determined, although the date when it [the resignation] was intended to become effective was [a future date].” *Warner v. Selectmen of Amherst*, 326 Mass. 435, 438. See also *Martin v. City Manager of Worcester*, 349 Mass. 760, 761. That the Governor was authorized to accept the resignation is clear. 3 *Op. Atty. Gen.* 1.

The underlying considerations of public policy have been stated in *State v. Grace*, 113 Tenn. 9, 16-17, quoted with approval in *Warner v. Selectmen of Amherst*, *supra*, at page 439, and again in *Campbell v. Boston*, 337 Mass. 676, 678:

“Official robes cannot be put off and assumed at the pleasure of individuals or officers. Public interest requires that all possible certainty exist in the election of officers and the beginning and expiration of their terms, by law or resignation, and forbids that

either should be left to the discretion or vacillation of the person holding the office or the officer or body having the appointing power.”

It follows that Dr. Coughlan's purported withdrawal of his resignation was of no legal effect, *Warner v. Selectmen of Amherst, supra*, at page 439, especially in view of Governor Sargent's refusal to accept the withdrawal, and that, no successor to Dr. Coughlan having been appointed, a vacancy now exists, and has existed since May 10, 1969, in each of the positions involved.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 29.

May 14, 1969

HONORABLE EDWARD J. RIBBS
Commissioner of Public Works
100 Nashua Street
Boston, Massachusetts 02144

Dear Commissioner Ribbs:

You have requested my opinion as to the validity of your establishment of the following “line of authority” over the Public Works Building Police:

Commissioner
Associate Commissioner, Administrative Services
Director, Division of Administrative Services
Assistant Director, Division of Administrative Services
Supervisor of Building Operations Motor Pool
Section
Building Superintendent
Building Police Captain
Building Police Officer

In a departmental memorandum dated January 31, 1969, you declared that the foregoing “line relationships . . . have been in effect for a considerable period of time,” although your department's Standard Operating Procedure (S.O.P.) which had been issued in 1967 and was not altered until the issuance of your memorandum of January 31, 1969 set forth a different order. Your memorandum also stated:

“The Building Superintendent will continue to have full supervisory authority and responsibility over the Building Police Captains, the Building Police Officers and all security matters pertaining to the Public Works Building. Police Captains are to report directly to the Building Superintendent and are not to by-pass the Building Superintendent except in emergency situations when the Superintendent is not immediately available.

“Building Police Officers are to report directly to their shift Captain and are not to by-pass the Captain except in emergency situations when the Captain is not immediately available.”

It is not necessary to review in this opinion the organization chart of your department as set forth in your S.O.P. Nor is it necessary to review in this opinion the various job specifications of the personnel whom you have placed in

the line of authority over the Building Police. It is sufficient to note that under G.L.c. 16, § 1, "The commissioner shall be the executive and administrative head of the department and shall be responsible for administering and enforcing the provisions of [G.L. c. 16] relative to the department and to each division thereof under his control and supervision"; that under c. 16, § 2, "The commissioner shall assign to all officials, agents and employees of the department their respective duties . . . He may also authorize the associate commissioners or any of them to exercise in his name any power, or to perform in his name any duty, assigned to him by law . . ."; and that under G.L. c. 16, § 3, "The commissioner shall from time to time establish such bureaus, sections, and districts and other offices as shall be necessary for efficient and economical administration of the department, and, if necessary for such purpose may from time to time consolidate or abolish the same."

It is plain from the foregoing provisions that the Commissioner, as the executive and administrative head of the department, "is given broad authority with respect to the appointment of employees the assignment of their duties, and their removal." *Report of the Attorney General for the Year Ending November 30, 1942*, pages 105, 106. See also *Report of the Attorney General for the Year Ending June 30, 1946*, page 69.

I regard the establishment of a line of authority over the Public Works Building Police as a matter which falls within the Commissioner's broad administrative and executive powers, and I find no provision of law which diminishes these powers in the present case. General Laws c. 16, § 6, which provides that "For any criminal offense committed in any part of [the] public works building or the grounds appurtenant thereto the commissioner and his public works building police shall have the same power to make arrests as the state police officers" is entirely consistent with the authority of the Commissioner to establish a line of authority over the Public Works Building Police. Likewise consistent is the provision in G.L. c. 16, § 6, which declares that "the commissioner shall be responsible for the fitness and good conduct of all such police officers."

In short then, your establishment of the indicated line of authority over the Public Works Building Police presents no genuine legal question but is simply a matter which falls within your executive and administrative responsibilities.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 30.

June 4, 1969

HONORABLE HOWARD WHITMORE, JR., *Commissioner*
Metropolitan District Commission
20 Somerset Street
Boston, Massachusetts 02108

Dear Commissioner Whitmore:

You have requested my opinion as to the correct method — straight time or time-and-one-half — of computing the payment to be made to those members of the police force of the Metropolitan District Commission who are to receive "additional pay" in lieu of compensatory time off under G.L. c. 262, § 53C, as

most recently amended by St. 1967, c. 286,¹ for so-called "court-time," that is for time spent in court as witnesses for the Commonwealth. It appears that your request arises out of certain collective bargaining negotiations that are now taking place between the MDC and its police. You state that "A great many witness fees to which members of our Police Force would otherwise be entitled have been waived by them pursuant to this statute. The total number of hours of compensatory time off for which they have thereby become eligible is such that I do not believe it could be granted without causing a serious personnel shortage. We have therefore determined, subject to the necessary appropriation, to give them 'additional pay' in accordance with the final portion of s. 53C."

You then ask:

"Must the additional compensation payable to police officers of the Metropolitan District Commission for time spent in attendance in court in lieu of witness fees therefor, pursuant to G.L. c. 262, s. 53C, be computed at a rate no greater than their regular rate of pay?"

In your request you have referred to certain statutes that deal with the payment of overtime, namely, G.L. c. 149, § 30B (providing for overtime pay at a time-and-one-half rate for certain employees other than members of your police force) and G.L. c. 92, § 62B (providing that members of the MDC police force "who perform service beyond their regular hours of service shall be compensated therefor as overtime service.") Reference might also be made to a provision that annually appears in the General Appropriation Act, stating that "no part of sums appropriated in [the Act] shall be available for the payment of overtime service to any employee of the commonwealth without prior written approval of such overtime by the commissioner of administration upon recommendation of the director of personnel and standardization, except where such overtime service is essential to replace the service of an employee necessary for the care of patients or inmates in institutions operated by the commonwealth." St. 1967, c. 414, § 6; St. 1968, c. 380, § 6.

Your request for an opinion calls attention to G.L. c. 7, § 28 which authorizes the Director of Personnel and Standardization, subject to the approval of the Commissioner of Administration and the Governor, to make rules "which shall regulate . . . overtime compensation" for state employees. You state, however, that the Director has informed you that "there is nothing in the rules . . . to authorize payment at [the time-and-one-half] rate" for members of the MDC police force for court-time under G.L. c. 262, § 53C.

Your essential question, quoted above, therefore appears to be whether the MDC may give its police "additional pay" under G.L. c. 262, § 53C at the

¹Any police officer, on duty at night or on vacation, furlough or on a day off, who attends as a witness for the commonwealth in a criminal case pending in a district court including the municipal court of the city of Boston, or any juvenile court, or the superior court, may, in lieu of the witness fee to which he would otherwise be entitled under section fifty-three, be granted such compensatory time off as shall be equal to the time during which he was in attendance at such court, but in no event shall less than three hours compensatory time off be granted him or, if such additional time off cannot be given because of personnel shortage or other cause, he shall, in lieu of said witness fee, be entitled to additional pay for the time during which he was in attendance at such court, but in no event shall he receive less than three hours additional pay." For a discussion of certain aspects of this statute, see Op. Atty. Gen., 1967-68, No. 46.

time-and-one-half rate notwithstanding the absence of an enabling rule under G.L. c. 7, § 28. Although your question concededly raises a valid legal issue, it appears inappropriate for me to express an opinion until there is a fuller exploration by the MDC through the Director of Personnel and Standardization of the possibility of securing the adoption of an appropriate rule. Only then will it be clear whether or not the question lends itself to an administrative resolution or necessarily presents a legal issue.

The interrelationship of legal and administrative questions in this situation is, I am inclined to believe, typical of many of the questions that arise in collective bargaining matters. Further, it is certainly not the intention of the state employees collective bargaining statute that the Attorney General should act as a board of arbitration even before the parties have set their positions. There is, indeed, a real risk that this result might follow if he adopted a practice of issuing formal opinions in such cases. For that reason I intend to follow the general policy of not issuing formal opinions on questions that may arise in the course of collective bargaining negotiations. Although members of my staff will be available to give legal advice to state officials, I am inclined to the view that the legal questions which arise in collective bargaining negotiations are often so tentative and anticipatory, or so closely connected with essentially administrative procedures, that they are not appropriate for formal legal opinions by the Attorney General. I also believe that it is undesirable to hold up collective bargaining negotiations until a formal opinion of the Attorney General can be issued. Speed may often be of the essence; yet the questions may require considerable research by my staff and careful review and deliberation by me before an authoritative response can be given. I believe that these conflicting considerations can ordinarily best be resolved by assigning collective bargaining questions to members of my staff who will be available to provide legal advice and guidance in a manner that I am confident will be efficient and effective. This, at least for the present, will be my policy in such cases.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 31.

June 9, 1969

HONORABLE JOSEPH F. McCORMACK

Chairman, Parole Board

Leverett Saltonstall Building

100 Cambridge Street

Boston, Massachusetts 02202

Dear Chairman McCormack:

You have requested my opinion as to whether a parole officer of your Board may look to the Commonwealth for payment of any damages to person or property that the officer may cause as a result of the officer's operation of his own car in the course of his official duties.

A reply to your request requires an examination of several statutes. I refer first to G.L. c. 12, § 3B, which authorizes payment by the Commonwealth, upon approval of the Attorney General, of tort claims against employees of the Commonwealth in legal proceedings "arising out of the operation of a motor or other vehicle *owned by the commonwealth*." (Emphasis supplied.) I refer also to G.L. c. 12, § 3C, which authorizes the payment of like types of motor tort

claims which have not yet become the subject of legal proceedings.

Payments of claims under §§ 3B and 3C are made out of specific annual appropriations by the Legislature. See, for example, St. 1966, c. 411, Item 0802-01; St. 1967, c. 414, Item 0802-01; St. 1968, c. 0821-0100. In each appropriation the particular item was described as follows:

“For the settlement of certain claims, as provided by law, on account of damages by cars *owned by the commonwealth* [emphasis supplied] and operated by state employees; provided, that the comptroller shall transfer to the General Fund from the appropriate funds sums equal to the payments made under this item for claims against agencies whose appropriations are derived from other funds.”

It is clear that a state employee who is driving his *own* car is not entitled to the protection of G.L. c. 12, §§ 3B and 3C and may not look to the annual appropriation item, cited above, for any reimbursement. General Laws c. 12, § 3D may, however, afford some protection. Section 3D provides that the Attorney General may defend officers and employees of certain state agencies including the Departments of Mental Health, Public Health or Correction in lawsuits for “damages for bodily injuries or infections, physical or mental agony or pain, death of any person, or any damage to property of another on . . . hospital grounds, arising out of the operation of said departments . . . if [the] officer or employee was at the time the cause of action arose acting within the scope of his official duties or employment” Subject to certain limitations, payments on any such settlement or on a judgment in the action may be made upon approval or certification of the Attorney General and the approval of the Governor. However, any such payment depends on “such appropriation as may be made by the general court for the purposes of [section 3D].”

Section 3D appears to be broad enough to include actions for bodily injury or death caused by the operation by state employees, of the specified agencies, including the Department of Correction, of the privately owned vehicles of such employees in the course of their employment. (Actions for property damage appear to be limited to cases arising on “hospital grounds.”) However, I am not aware of any general appropriation by the Legislature, as in the case of §§ 3B and 3C, to pay judgments under § 3D. And I am not aware of any special appropriation therefor. Hence, any benefits under § 3D, at least at the present time, would have to await an appropriation.

No other statute appears to be pertinent to the case of parole officers. Compare G.L. c. 8, § 4B, relative to indemnification of Capitol Police Officers, and G.L. c. 16, § 8, relative to indemnification of Public Works Building Officers.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 32.

June 24, 1969

MRS. MABEL A. CAMPBELL

Director of Civil Service

State House

Boston, Massachusetts 02133

Dear Mrs. Campbell:

You have asked my opinion as to whether certain positions in the Department of Community Affairs are exempt from the Civil Service Law and Rules. The specific positions are described in your letter as follows:

"99840 – Administrative Officer, Commonwealth Service Corps
Duties – Performs various administrative services including personnel budget fiscal and office supply and supervises specialized areas, such as the federal contributions and performs other related work as required.

"A96865 – Senior Bookkeeper
Duties – shall be supervised by the Associate Director for Administration and be responsible for all bookkeeping and accounting for the Department of Community Affairs.

"99841 – Senior Bookkeeper
Duties – Shall be supervised by the Associate Director for Administration and be responsible for all bookkeeping and accounting for the Community Affairs Department.

"A96871 – Senior Clerk and Stenographer
Takes dictation in shorthand, transcribes and performs according to standard procedures of moderately complex clerical duties requiring a moderate degree of decision and a general knowledge of the functions of the programs."

It is my opinion that the positions described are not exempt.

Your question arises out of the manner in which the Commonwealth Service Corps was abolished by c. 761 of the Acts of 1968, and the powers, duties and employees of the Corps were transferred to the Department of Community Affairs. That abolition and transfer were accomplished by §§ 12, 13 and 14 of c. 761, which sections read as follows:

"Section 12. All powers and duties, as existing immediately prior to the effective date of this act, of the division of housing, the division of urban renewal, the bureau of relocation, and the bureau of planning assistance within the department of commerce and development, and of any administrative unit within said divisions and bureaus, the commonwealth service corps, and the commission on aging are hereby transferred to, and shall be exercised and performed by, the department of community affairs established by section one of chapter twenty-three B of the General Laws.

"Section 13. The division of housing, the division of urban renewal, the bureau of relocation, the bureau of planning assistance, and any administrative unit within such divisions and bureaus, as existing in the department of commerce and development immediately prior to the effective date of this act, the service corps commission, the commonwealth service corps, the service corps advisory council and the commission on aging, and any administrative units existing within said commissions, boards or corps immediately prior to the effective date of this act, are hereby

abolished.

"Section 14. All officers and employees of any division, bureau, commission, corps, council, or any other administrative unit abolished by section thirteen of this act who immediately prior to the effective date of this act hold permanent appointment in positions classified under chapter thirty-one of the General Laws, or have tenure in their positions by reason of section nine A of chapter thirty of the General Laws, are hereby transferred to the department of community affairs established by section one of chapter twenty-three B of the General Laws, every such transfer to be without impairment of civil service status, seniority, retirement and other rights of the employee, without interruption of service within the meaning of said chapter thirty-one or section nine A of chapter thirty, and without reduction in his compensation and salary grade, notwithstanding any change in his title or duties made as a result of such transfer, subject, however, to the provisions of said chapter thirty-one and the rules and regulations established thereunder. All officers and employees of any such abolished division, bureau, corps, commission, council or other administrative unit who immediately prior to said effective date do not hold permanent appointment in such positions, or do not hold such tenure, are hereby transferred to said department of community affairs without impairment of seniority, retirement, and other rights, without interruption of service within the meaning of the said section nine A of chapter thirty, and without reduction in compensation and salary grade. Nothing in this section shall be construed to confer upon any officer or employee any rights not held prior to such transfer or to prohibit any subsequent reduction in compensation or salary grade not prohibited prior to such transfer. All questions regarding the identification of those persons who are officers or employees of any division, bureau or other administrative unit within the department of commerce and development, of the commonwealth service corps or of the commission on aging abolished by section thirteen of this act shall be determined by the director of personnel and standardization, with the approval of the commissioner of administration; provided that notwithstanding any other provisions of this act, the deputy commissioner of commerce and development in charge of the division of housing, transferred by this act, shall be directly responsible to the governor."

Prior to the enactment of c. 761 of the Acts of 1968, appointment and removal of employees of the Commonwealth Service Corps was governed by G.L. c. 6, § 121. The second paragraph of that section provided that the Service Corps Commission should appoint a director, and not more than seven associate directors, and the director, in turn, with the approval of the commission, might appoint "such other employees, including experts and consultants, as he deems necessary to carry out the provisions of section one hundred and twenty-one" None of the above were subject to the Civil Service Law and Rules.*

* In addition, § 121 provided that the Corps should consist of corpsmen, of various categories, none of whom were subject to the Civil Service Law and Rules.

In enacting c. 761 of the Acts of 1968, the General Court placed the appointment and removal power of employees in the Department of Community Affairs in the hands of the Commissioner, with the proviso that appointments and removals were to be made, with an exception, to be discussed *infra*, in accordance with the Civil Service Law. That provision of c. 761 appears in the General Laws as § 8 of c. 23B, as follows:

"The commissioner shall appoint and may remove all employees in the department. Unless otherwise provided by law, all such appointments and removals shall be made in accordance with chapter thirty-one. From time to time the commissioner may, subject to appropriation and the laws and regulations pertaining to the employment of consultants, employ such consultants as he may deem necessary.

"In addition to deputy commissioners and directors of bureaus, the commissioner may appoint, with the approval of the governor, and may remove, an executive assistant, a chief counsel, and experts on urban affairs, public information, and intergovernmental relations, to serve in the office of the commissioner, and such other officers, experts and assistants as he may deem necessary to carry out the work of the department; provided, however, that the total number of appointments to be made by the commissioner under this paragraph shall not exceed two. Any person holding appointment under this paragraph shall not be subject to the provisions of chapter thirty-one or section nine A of chapter thirty.

"The commissioner may appoint and may remove persons to serve in positions the *primary responsibility of which is the discharge of powers and duties vested in the commonwealth service corps*, and such appointments and removals, notwithstanding the foregoing provisions of this section, shall be made as stated in section one hundred and twenty-one of chapter six." (Emphasis supplied.)

The precise question presented for resolution, then, is whether persons who would fill the positions described in your letter would serve in positions "the primary responsibility of which is the discharge of powers and duties vested in the commonwealth service corps . . ." In my opinion, they would not. The positions which you describe involve administrative, accounting or clerical duties. As such, they are concerned with routine, day-to-day administrative functions of the Department of Community Affairs and not the execution of policy or the supervision of projects which relate directly to the powers and duties of the Commonwealth Service Corps. Those powers and duties are set forth in G.L. c. 6, § 121, and it is unnecessary to quote them here. It is sufficient to note, however, that the powers and duties enumerated relate to the substantive functions of the Corps. Although administrative, clerical and bookkeeping positions are necessary to the proper functioning of any agency of government, such positions cannot, in my opinion, be categorized as "positions the primary responsibility of which is the discharge of the powers and duties vested in" the agency.

My interpretation of G.L. c. 23B, § 8, as applied to the positions which you describe, is reinforced by an examination of the scope of the exemption from the Civil Service Law and Rules which obtained prior to the enactment of c. 761 of the Acts of 1968. That exemption included the director, associate directors, and "such other employees, *including experts and consultants . . .*" as were

necessary to carry out the duties of the Corps. (Emphasis supplied.) That statutory language conveys a sufficiently clear legislative intent, in my opinion, that only those positions most closely associated with the execution of policy were to be exempted. The wording of G.L. c. 23B, § 8 has continued and clarified this legislative restriction.

In conclusion, then, it is my opinion that the positions in the Department of Community Affairs which you describe in your letter are not exempt from the Civil Service Law and Rules.

Very truly yours,
ROBERT H. QUINN
Attorney General

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JUN 1974

GENERAL

