FORMAL OPINIONS

OF THE

ATTORNEY GENERAL

OF

NEW JERSEY

1974-1977

WILLIAM F. HYLAND
Attorney General

Opinions Committee
ROBERT J. DEL TUFO
First Assistant Attorney General
STEPHEN SKILLMAN
Assistant Attorney General
Director, Division of Law
THEODORE A. WINARD
Assistant Attorney General
In Charge
Administrative Agency Advice

ATTORNEYS-GENERAL

1704, Alexander Griffith; 1714, Thomas Gordon; 1719, Jeremiah Basse; 1723, James Alexander; 1728, Lawrence Smith; 1733, Joseph Warrel; 1754, Cortlandt Skinner; 1776, William Paterson; 1783, Joseph Bloomfield; 1792, Aaron D. Woodruff; 1811, Andrew S. Hunter; 1817, Theodore Frelinghuysen; 1829, Samuel L. Southard; 1833, John Moore White; 1838, Richard S. Field; 1841, George P. Mollesson; 1844, Richard P. Thompson; 1845, Abraham Browning; 1850, Lucius Q.C. Elmer; 1852, Richard P. Thompson; 1857, William L. Dayton; 1861, F.T. Frelinghuysen; 1867, George M. Robeson; 1870, Robert Gilchrist; 1875, Joel Parker; 1875, Jacob Vanatta; 1877, John P. Stockton; 1897, Samuel H. Grey; 1902, Thomas N. McCarter; 1903, Robert H. McCarter; 1908, Edmund Wilson; 1914, John W. Wescott; 1919, Thomas F. McCran; 1924, Edward L. Katzenbach; 1929, William A. Stevens; 1934, David T. Wilentz; 1944, Walter D. Van Riper; 1949, Theodore D. Parsons; 1954, Grover C. Richman, Jr., 1958, David D. Furman; 1962, Arthur J. Sills; 1970, George F. Kugler, Jr.; 1974, William F. Hyland.

February 13, 1974

HONORABLE BRENDAN T. BYRNE
Governor of New Jersey
State House
Trenton, New Jersey 08625

FORMAL OPINION NO. 1–1974

Dear Governor Byrne:

Chapter 357 of the Laws of 1973, approved December 28, 1973, established the Governor's salary at $65,000, whereas Chapter 194 of the Laws of 1969 had established the salary at $50,000. You have asked us to consider the legal propriety of your proposal to take the $15,000 salary increase in increments of $5,000 over a period of three years rather than to take the entire increase immediately as provided by the statute. We have concluded based upon our review of State law and precedents and the ruling of the Federal Cost of Living Council attached hereto that it would be proper for you to take the $15,000 salary increase provided by Chapter 357 of the Laws of 1973 in increments of $5,000.

An analysis of your proposal must begin with a consideration of the New Jersey Constitution which provides that:

> "The Governor shall receive for his services a salary, which shall be neither increased nor diminished during the period for which he shall have been elected." Art. V, § 1, par. 10.

There does not appear to be any discussion of this provision in any proceedings of constitutional conventions. The provision appeared first in the 1844 Constitition, and there are no New Jersey cases construing it. Nonetheless, the same type of provision appears in the United State Constitution and in many other state constitutions regarding chief executive officers, legislators and judges.

The leading case construing such constitutional language is *O'Donoghue v. United States*, 289 U.S. 516, 53 S. Ct. 740, 77 L. Ed. 1356 (1932), which involved the provisions of Article 3, Section 1 of the United States Constitution. The Court in *O'Donoghue* stated that "the great underlying purpose which the framers of the Constitution had in mind" when they adopted this provision of the federal constitution was to prevent the commingling in the same hands of the essentially different powers belonging to distinct and separate branches of government. 289 U.S. at 529-530. The Court said:

> "[E]ach department should be kept completely independent of the others— . . .in the sense that the acts of each shall never be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments." 289 U.S. at 530.

The Court added that the provision denying the power to diminish the compensation of federal judges was made explicit:

> "[I]n order, *inter alia*, that their judgment or action might never be swayed

in the slightest degree by the temptation to cultivate the favor or avoid the displeasure of that department which, as master of the purse, would otherwise hold the power to reduce their means of support." 289 U.S. at 531.

The principle underlying Article V, Section 1, Paragraph 10 of the New Jersey Constitution is essentially the same as that discussed by the Supreme Court of the United States in *O'Donoghue*. The delegates to the 1844 Constitutional Convention no doubt concluded that if the Legislature could enact legislation during the term of a Governor which affected his salary, it could use this power to control or influence the Governor's actions as head of the executive branch of government. The constitutional prohibition against increasing or decreasing the salary of the Governor was therefore added to insulate him from such pressure.

In this instance, since the Legislature has fixed the salary of the Governor and could not itself either reduce or increase the stated amount, it would not undermine the independence of the office of the Governor if you were unilaterally to accept a lesser salary. Therefore, it is our opinion that you would not be acting in contravention of Article V, Section 1, Paragraph 10 by agreeing to take less than the $65,000 salary established for your office.

There are also statutory provisions regarding the Governor's salary which must be considered before an answer to your inquiry can be given. N.J.S.A. 52:15-1 provides that, "The Governor shall receive such salary as shall be provided by law." Chapter 357 of the Laws of 1973 (N.J.S.A. 52:14-15. 104) provides that ". . .the annual salary of the Governor shall be fixed and established at $65,000.00." And, with respect to the obligation of the State Treasurer to pay salaries, N.J.S.A: 52: 14-15 provides that ". . .all officers and employees paid by the State shall be paid their salaries or compensation bi-weekly in a bi-weekly amount." Although there is authority for the proposition that a governmental official may not agree to accept less than the salary established by law for his office, (see, *e.g.*, "Public Officers and Employees," 63 Am. Jur. 2d (1972), §§ 392-98; Annotation, *Validity and effect of agreement by public officer or employee to accept less than compensation or fees fixed by law, or of acceptance of reduced amount*, 160 A.L.R. 490 (1946)), it is our opinion that this principle, as articulated by the courts of this state, does not prohibit the implementation of your plan to voluntarily accept less than the full statutory salary of the office of Governor.

In *Vander Burgh v. County of Bergen*, 120 N.J.L. 444 (E. & A. 1938), a judge of an inferior court entered into a written agreement with Bergen County to accept a graduated deduction from his salary as set by statute, when, during the Depression, a state enabling statute made such agreements lawful. The judge later sued the County for the difference between what he had been paid and his statutory salary. The Court of Errors and Appeals held that the judge was estopped from claiming that his agreement to accept a reduced salary was unlawful as a violation of public policy. The court said:

> "What is public policy as between a public officer and . . . an agency of government in normal times, does not as of course control the question of the salary or wage of a person in the public employ, payable from public funds, in a time of grave financial peril when the whole economic structure is trembling. Far from being against public policy, we think that, the constitution and the statutes permitting, the participation of those on the public

> payroll in the reductions submitted to by employees generally was an eminently patriotic, fitting and serviceable act." 120 N.J.L. at 451-52.

In a later case, the Supreme Court of New Jersey held that emergency conditions, such as the Depression, were not a prerequisite to the relinquishment of the full amount of a statutory salary. *Long v. Board of Chosen Freeholders of the County of Hudson*, 10 N.J. 380 (1952). However, the court in *Long* noted that a type of unfavorable economic condition existed even in that case, since the period of the claim for partially unpaid salaries was during the Second World War, and the court asked, rhetorically:

> "Was it not for the common good for these jail guards, who accepted salary without complaint, to relinquish their claims to additional salary in order to ease the heavy burdens of the taxpayers in those emergent years?" 10 N.J. at 388.

It is of course apparent that in taking less than the full $65,000 in 1974, you would be responding to the well-known economic ills affecting New Jersey at the present time. You have made it clear that you believe the entire $15,000 salary increase is unjustified because it constitutes, in inflationary times, a 30% raise over the $50,000 salary of your predecessor, and you have publicly questioned the impact such a raise would have on the demands of other public employees and on the overburdened taxpayers. It is beyond question that the reasons you have presented for accepting less than your full salary are similar to those discussed in the *Vander Burgh* and *Long* cases and that your decision therefore may be viewed, in the language of the court in *Long*, as "for the common good."

This conclusion draws additional support from the fact that the payment of the full salary provided by Chapter 357 of the Laws of 1973 might conflict with the Economic Stabilization Regulations adopted by the Federal Cost of Living Council. Since these regulations generally limit wage increases to 5.5%, the Cost of Living Council was asked to review the provisions of Chapter 357 increasing the salary of the Governor. In response to this inquiry, the Council replied:

> "Upon consideration of the facts concerning this matter, including the fact that the salary of this position has not been increased since 1969, it is found that pursuant to Section 201.30 of the Economic Stabilization Regulations an exception to the general wage and salary standard is warranted sufficient to permit payment of the following increases: $5,000 per year for the calendar year commencing January 1, 1974; $5,000 per year for the calendar year commencing January 1, 1975; and $5,000 per year for the calendar year commencing January 1, 1976."

It is of course well established that under the Supremacy Clause of the United States Constitution such provisions in a federal statute or regulation take precedence over conflicting provisions of state law. *Carleson v. Remillard*, 406 U.S. 598, 92 S. Ct. 1932, 32 L. Ed. 2d 352 (1972); *Swift & Co. v. Wickham*, 382 U.S. 111, 86 S. Ct. 258, 15 L. Ed. 2d 194 (1965). It also is well established that state law ordinarily should be interpreted so as to avoid any possible federal constitutional question.

State v. Profaci, 56 N.J. 346 (1970); *Ahto v. Weaver*, 39 N.J. 418 (1963). However, since we have concluded that the action you propose is not inconsistent with state law in any event, it is unnecessary to explore further the impact of the Economic Stabilization Regulations.

Accordingly, it is our opinion that you may legally agree to accept less than the Governor's $65,000 statutory salary. The appropriate action for you to take to effectuate a temporary reduction in the Governor's salary would be to execute a written instrument similar to that involved in *Long v. Board of Chosen Freeholders of the County of Hudson, supra*, indicating that you intend to temporarily waive a portion of the statutory salary in recognition of the prevailing adverse economic conditions and pursuant to the ruling of the Federal Cost of Living Council. The instrument should then be served upon the State Treasurer and a certified copy should be served upon the Director of the Division of Budget and Accounting. By acting in this manner, you would not be changing the statutory terms of the Governor's salary. Therefore, when the temporary reduction established by your unilateral waiver expires, you would be able to take the full Governor's salary of $65,000 without violating the provisions of Article V, Section 1, Paragraph 10 of the State Constitution, which prevents the Governor's salary from being increased during his term of office.

Respectfully,
WILLIAM F. HYLAND
Attorney General

July 31, 1974

JOANNE E. FINLEY, M.D., *Commissioner*
New Jersey State Department of Health
Health and Agriculture Building
Trenton, New Jersey 08625

FORMAL OPINION NO. 2–1974

Dear Dr. Finley:

The Department of Health has asked for advice as to the extent to which health care facilities owned and operated by recognized religious organizations are exempted from the certificate of need requirements of N.J.S.A. 26:2H-1, *et seq.*, the "Health Care Facilities Planning Act."

The Legislature has conferred on the State Department of Health "the central, comprehensive responsibility for the development and administration of the State's policy with respect to . . . hospital and related health care services . . ." N.J.S.A. 26:2H-1. Almost every conceivable type of health care facility has been included by the Legislature within the Department's jurisdiction. The only kinds of facilities specifically excluded from the statute are those "institutions that provide healing

solely by prayer." N.J.S.A. 26:2H-2(a). Ostensibly, the Legislature intended to encompass all health care facilities "whether public or private" within the scope of this statute. Thus, the certificate of need requirement found in N.J.S.A. 26:2H-7 applies to all types of health care facilities (with the one exception noted above) regardless of by whom and for whom they are operated and maintained.

Some of these facilities, of course, are owned and operated by recognized religious bodies or denominations. Nevertheless, these facilities, unless they provide healing solely by prayer, are subject to the same requirements under N.J.S.A. 26:2H-1, *et seq.*, as are those facilities operated and maintained by private, non-sectarian, public or governmental agencies.* The applications for certificates of need submitted by these facilities under N.J.S.A. 26:2H-7 must be reviewed under the criteria found in N.J.S.A. 26:2H-8, which are:

(a) the availability of facilities or services which may serve as alternatives or substitutes,
(b) the need for special equipment and services in the area,
(c) the possible economies and improvement in services to be anticipated from the operation of joint central services,
(d) the adequacy of financial resources and sources of present and future revenues,
(e) the availability of sufficient manpower in the several professional disciplines, and
(f) such other factors as may be established by regulation.

The statute expressly states that the above criteria "shall be taken into consideration" when processing certificate of need applications. The criteria are mandatory and each application must undergo scrutiny with reference to each criterion, whether statutorily or administratively created. The criteria deal with various aspects of both the subject matter presented by an applicant and the financial and practical abilities of the applicant itself. The critical issues to be determined are "the need for health care facilities" in the applicant's particular geographical and service area and the impact of the proposed project on "the orderly development of adequate and effective health care services." N.J.S.A. 26:2H-8.

The request for advice is primarily concerned with the effect of the final sentence of N.J.S.A. 26:2H-8, which provides:

> "In the case of an application by a health care facility established or operated by any recognized religious body or denomination, the needs of the members of such religious body or denomination for care and treatment in accordance with their religious or ethical convictions may be considered to be public need."

This language was originally found in a bill passed by the Legislature and vetoed by the Governor in March 1971. The phrase was deleted in the bill's final passage (L. 1971, c. 136) and was then adopted as it now appears (L. 1971, c. 138). The issues raised herein concern the effect and degree of an exemption on the issuance of certificates of need by reason of this language on the overall administration of a certificate of need program by the Department of Health under N.J.S.A. 26:2H-7. Furthermore, assuming *arguendo* that there is an exemption, is the exemption affected by the Department's moratorium on skilled and intermediate care beds?

It is clear that this sentence in N.J.S.A. 26:2H-8 cannot be read as the grant by the Legislature of a blanket exemption from the Statute's certificate of need requirements. Such an interpretation would be repugnant to the broad definition of a "health care facility" as set forth in N.J.S.A. 26:2H-2 and the specific, narrow exclusions found therein. *Roman v. Sharper*, 53 N.J. 338, 341 (1969). Such an interpretation would also undercut the declared purpose for which the statute was enacted, since the loss of control over the sizable segment of the health care industry operated by and for religious groups would render impotent attempts at health planning and control of rates. *Cf. Asbury Park Press v. City of Asbury Park*, 19 N.J. 183, 196 (1955); *Evans v. Ross*, 57 N.J. Super. 223, 229 (App. Div. 1959).

In effect, the last sentence of N.J.S.A. 26:2H-8 merely gives to the Department the discretion to consider, when processing an application of a recognized religious body or denomination, the issue of the needs of the members of that particular religious body or denomination, rather than the needs of the general populace in the facility's geographic or service area. Since the needs of a particular religious sect may be so specialized or localized, the Department is not bound to review an application from such sect under the broad "need" criterion found in the sentence preceding it.

On October 4, 1973, the Commissioner of Health, with the approval of the Health Care Administration Board, adopted pursuant to N.J.S.A. 26:2H-8(f) a general moratorium on the approval of certificates of need for both skilled nursing and intermediate care beds. The regulation was adopted as follows:

> "Effective immediately and until March 31, 1974, certificates of need shall not be issued to health care facilities requesting additional skilled nursing or intermediate care beds, or proposing to construct new facilities to accommodate skilled nursing or intermediate care beds." N.J.A.C. 8:33-1.11.

Thereafter, on February 7, 1974, the Commissioner of Health again with the Board's approval, amended the above language and substituted "September 30, 1974" for "March 31, 1974." See 5 N.J.R. 408(c) and 6 N.J.R. 63(b). The effect of this regulation was and is to proscribe the erection of any new skilled nursing or intermediate care beds until October 1, 1974. The regulation does not on its face draw any distinction among the various types of skilled nursing or intermediate care homes, whether religious or otherwise, being operated in New Jersey.

We have been advised that the policy considerations underlying this regulation had their origins in 1971. At that time, the 1971 State Plan for the Construction and Modernization of Hospitals and Related Medical Facilities indicated a statewide surplus of 4,300 long term care beds, and no differentiation at all was drawn therein between skilled nursing beds and intermediate care beds. By the middle of 1972, federal and state officials estimated that as many as 40% of the patients occupying nursing home beds could be cared for in a less intensive, or intermediate, care facility. However, since there was no federal or state program of standards and reimbursement fully developed for intermediate care nursing services, the need for such beds could not be accurately calculated. Therefore, the Commissioner and the Health Care Administration Board (hereinafter "HCAB") on July 25, 1972, decided to maintain the one classification of "long term care beds" for an indefinite period.

When the 1973 State Plan was approved by the HCAB, long term care beds

were broken down into skilled nursing beds and intermediate care beds. It was decided, however, that because the new State Plan showed a large surplus of skilled nursing beds and a great need for intermediate care beds, a number of nursing homes might wish to change the classification of their existing long term care beds (which were skilled nursing beds under the 1973 State Plan) to intermediate care beds. Thus, the HCAB approved the initial general moratorium on the erection of any skilled or intermediate beds to enable reclassification of existing beds. Once the general moratorium has ended on October 1, 1974, N.J.A.C. 8:33-1.11, the Department will be able to determine more accurately the need for both new skilled and new intermediate care beds. It is therefore clear from both the face of the regulation itself and the reasons behind its adoption, that the general moratorium is equally applicable to religious as well as to non-religious nursing homes.

Thus, the terms of the above regulation effectively preclude the processing of certificate of need applications under *any* of the criteria found in N.J.S.A. 26:2H-8. All applications for the types of beds encompassed by the regulation must be treated equally by the Department. See, *e.g.*, *Hercules Powder Co. v. State Bd. of Equalization*, 66 Wyo. 268, 208 P. 2d 1096, 1112 (Sup. Ct. 1949); *New York Telephone Co. v. United States*, 56 F. Supp. 932, 938 (D.C.N.Y. 1944), rev'd on other grounds 326 U.S. 638, 66 S. Ct. 393, 90 L. Ed. 371 (1946). See also Cooper, 1 State Administrative Law §4(E). Therefore, no applications for certificates of need for either skilled nursing beds or intermediate beds should be granted until the regulation expires, regardless of by whom or for whom they are submitted.

For these reasons, you are accordingly advised that the provisions of N.J.S.A. 26:2H-8 do not provide a blanket exemption for religiously sponsored nursing homes from the certificate of need requirements imposed by law, but that the criteria of "religious need" shall be evaluated as a factor along with other pertinent factors in the exercise of administrative discretion. You are also advised that the general moratorium imposed by the Department on the issuance of certificates of need for either skilled nursing beds or intermediate care beds until October 1, 1974, is applicable to both religious and non-religious nursing homes.

Very truly yours,
WILLIAM F. HYLAND
Attorney General

BY: JONATHAN WEINER
Deputy Attorney General

* Although not an issue raised in the Administrative Agency Advice Request, the appropriateness of State regulation of health care facilities owned and operated by religious bodies or denominations is not open to question. "[I]t is axiomatic that, while the right of religious belief is absolute, the exercise of practices corollary to that belief may be subjected to reasonable regulation by the police power and must be considered in light of the general public welfare." *State v. Congdon*, 76 N.J. Super. 493, 509 (App. Div. 1962). The public welfare has been balanced and has prevailed against the religious needs or tenets of a particular church or group in many areas. For example, in *Allendale Congregation of Jehovah's Witnesses v. Grosman*, 30 N.J. 273 (1959), the church's proposed meeting hall violated a municipal zoning ordinance. The church claimed that compliance with the ordinance would not allow it to utilize its property in the manner it desired and hence such an ordinance abridged the church's right to "freedom of assembly." The court, in rejecting this argument, held that the ordinance was necessary to promote the public safety and general welfare. Thus, the property, despite its use for religious purposes, was subject to the ordinance. See also, *Sexton v. Bates*, 17 N.J. Super. 246 (Law Div. 1951), *aff'd* 21 N.J. Super. 329 (App. Div. 1952).

August 7, 1974

HONORABLE J. EDWARD CRABIEL
Secretary of State
State House
Trenton, New Jersey 08625

FORMAL OPINION NO. 3—1974

Dear Secretary Crabiel:

You have asked for an opinion as to whether the 30 day voter durational residency requirement set forth in Laws of 1974, c. 30, §6, is violative of Art. 2, para. 3(a) of the 1947 New Jersey Constitution which provides that an individual must be a resident of the county where he intends to vote for 40 days preceding an election.*

A review of a number of authoritative decisions of the Supreme Court of the United States suggests that substantial doubt has now been cast on the constitutionality of the 40 day voter durational residency requirement of our State Constitution. A serious question has now arisen under the Equal Protection Clause of the United States Constitution as a result of the newly enacted 29 day period for registration preceding an election. In *Dunn v. Blumstein,* 405 U.S. 330, 31 L. Ed. 2d 274, 92 S. Ct. 995 (1972), the Supreme Court of the United States struck down the durational residency requirement of the State of Tennessee, which required the voter to be a resident of the state for one year and of the county for 3 months. Significantly, Tennessee permitted registration up to 30 days before an election. In declaring the Tennessee durational residency requirements to be unconstitutional, the Court did not fix a specific residency period but left some discretion to the states to fix the period within reasonable limits. The Court said:

> "Fixing the constitutionally acceptable period is surely a matter of degree. It is sufficient to note here that 30 days appears to be an ample period of time for the State to complete whatever administrative tasks are necessary to prevent fraud—and a year, or three months too much."
>
> * * *
>
> "As the court below concluded, the cut-off point for registration 30 days before an election 'reflects the judgment of the Tennessee legislature that 30 days is an adequate period in which Tennessee's election officials can effect whatever measures may be necessary, in each particular case confronting them, to insure purity of the ballot and prevent dual registration and dual voting' . . . ."

The Supreme Court has more recently upheld a statutory closing of voter registration 50 days before election, *Burns v. Fortson,* 410 U.S. 686, 93 S.Ct. 1209, 35 L.Ed. 2d 633 (1973), and a 50 day durational residency requirement which was tied to a closing of registration 50 days before election. *Marston v. Lewis,* 410 U.S. 679, 93 S.Ct. 1211, 35 L.Ed. 2d 627 (1973).

The essential rationale of the Supreme Court's opinions in *Dunn* and *Marston* is that a residency requirement of 40 or 50 days may be sustained if the Legislature determines such a period of time to be necessary for the preparation of adequate voter lists. Enactment of a law establishing a shorter period for the preparation of

voter lists, such as the 29 day period provided by this law, constitutes a legislative judgment that the longer period is not necessary for that purpose. Although the Supreme Court of the United States has not held that a state's durational residency requirement must be identical with the period between the close of registration and election day, the Court in *Dunn* and *Marston* emphasized that a legislative act prescribing a specific period of time to be necessary to achieve the State's legitimate goal of preparing adequate voter lists would also probably tend to indicate that no longer period of time would be necessary as a durational residency requirement. Therefore, the enactment of a 29 day period for registration preceding an election substantially undermines the constitutional basis presently sustaining a longer 40 day residency period.

For these reasons, it is our opinion that the establishment of a 29 day period by the Legislature for the preparation of adequate voter lists has created a substantial likelihood that the 40 day durational residency provision of the State Constitution may be violative of the Equal Protection Clause of the United States Constitution. You are therefore advised that in accordance with Laws of 1974, c. 30, §6, N.J.S.A. 19:31-5, all county boards of election may be informed that a registrant shall be entitled to vote at any election held subsequent to such registration if he or she is a resident of the State and county for at least 30 days at the time of the holding of such election.

Sincerely yours,
WILLIAM F. HYLAND
Attorney General
By: THEORDORE A. WINARD
Assistant Attorney General

* Art. 2, para. 3(a)

> "Every citizen of the United States, of the age of 21 years, who shall have been a resident of this State 6 months and of the county in which he claims his vote 40 days, next before the election, shall be entitled to vote for all officers that now are or hereafter may be elective by the people, and upon all questions which may be submitted to a vote of the people;"

A concurrent resolution was introduced in the General Assembly proposing to amend Art. 2, para. 3 of the Constitution of New Jersey, to provide for a durational residency requirement of only 30 days. This resolution passed in the General Assembly on April 30, 1973 and in the Senate on November 29, 1973. The proposed amendment to the State Constitution will appear as a referendum on the ballot in the November 1974 general election.

August 30, 1974

MR. JOHN F. LAEZZA, *Director*
Division of Local Government Services
Department of Community Affairs
363 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 4—1974

Dear Mr. Laezza:

You have requested an opinion regarding the extent to which the Emergency Petroleum Allocation Act of 1973, P. L. 93-159 (hereafter EPAA), excuses municipalities and counties from their obligation under State law to advertise for bids for gasoline supply contracts. The answer to your inquiry requires a discussion of the applicable State and Federal regulatory schemes.

INTRODUCTION

Competitive bidding is designed to secure honest competition and protect taxpayers from unjust and extortionate contracts. *Hillside Twp. v. Sternin*, 25 N.J. 317, 322 (1957). Toward this end, the Local Public Contracts Law imposes certain obligations upon governmental units selecting gasoline suppliers. The statute requires that "[e]very contract [with certain exceptions not herein relevant] . . . for the . . . furnishing . . . of any materials or supplies, the cost . . . whereof is to be paid with or out of public funds, shall be made or awarded only after public advertising for bids . . . ." N.J.S.A. 40A:11-4.* The contract must then be awarded to the lowest responsible bidder. N.J.S.A. 40A:11-16. To receive the contract, of course, the lowest responsible bidder must offer a bid capable of satisfying the specifications for the work contemplated. *Hillside Twp. v. Sternin, supra.* A contract awarded in violation of these standards is invalid and may be set aside. *E.g., Hillside Twp. v. Sternin, supra.*

The EPAA requires the President to allocate scarce petroleum products and establishes broad goals to be achieved by this program. Such goals include the preservation of an "economically sound and competitive petroleum industry," and an equitable distribution of . . . refined petroleum products at equitable prices among all regions and areas of the United States." P.L. 93-159 §4(b) (1). See also Federal Energy Administration Act of 1974, P.L. 93-275, §5(b).

A comprehensive regulatory scheme was promulgated to implement these goals. These regulations distinguish between an "end user" and a "wholesale purchaser-consumer" of an allocated product. An "end user" is defined as an ultimate consumer" of an allocated product. An "end user" is defined as an ultimate consumer who purchased less than 84,000 gallons of product. 10 C.F.R. 211.51. A wholesale purchaser-consumer, on the other hand, is defined as a firm which in any year since 1971 received 84,000 gallons of an allocated product "into a storage tank . . . at a fixed location." 10 C.F.R. 211.51.

Under the program, a gasoline supplier must provide gasoline to any end users which it supplied as of January 15, 1974 (10 C.F.R. 211.9(b)), as well as such new end users as it would supply under "normal business practices". 10 C.F.R. 211.12(f) (1). With regard to a wholesale purchaser-consumer, "[e]ach supplier of [motor gasoline] *shall* supply all . . . wholesale purchaser-consumers which purchased . . . [such gasoline] from that supplier during [the corresponding month of 1972]." 10 C.F.R. 211.9

(a) (1) (emphasis supplied); 10 C.F.R. 211.102. This relationship may be terminated only by mutual agreement or order of the FEA. 10 C.F.R. 211.9(a) (2) (n). It follows as a general rule that a wholesale purchaser must obtain its required gasoline from its 1972 supplier. *Cf.* 10 C.F.R. 211.12(b) (2). Suppliers must make their gasoline available to both "end users" and "wholesale purchaser-consumers" at the base price, *i.e.*, the "weighted average price" at which the gasoline was priced on May 15, 1973 in transactions with the same class of purchasers, plus any increased product costs incurred by the refiner. 10 C.F.R. 212.82(f); 10 C.F.R. 212.83(b); FEA Ruling 1974-1.

END USERS

In order to determine whether the Federal allocation program excuses a municipality from the bidding requirements of the Local Public Contracts Law, attention should be directed to the circumstances under which gasoline contracts will be consummated. The first such circumstance concerns a municipality which is an end user of gasoline. As noted earlier, the supplier must accept such new end users as it would supply under "normal business practices". 10 C.F.R. 211.12(f) (1). In the context of government contracts, such normal business practices include the selection of a supplier through competitive bidding. Thus, a governmental end user is free to apply to a non "base period" supplier as a new end user and to do so by competitive bidding, without interfering with the allocation program. FEA Ruling 1974-19. Therefore, the competitive bidding requirements of the Local Public Contracts Law remain in full force with respect to municipalities and counties which are classified as "end users" by the FEA.

WHOLESALE PURCHASER-CONSUMERS

As applied to wholesale purchaser-consumers, state bidding statutes are "superseded to the extent they are inconsistent with the allocation regulations." FEA Ruling 1974-19. The petroleum allocation program, as noted earlier, requires a supplier to furnish gasoline to its base period wholesale purchaser-consumers. 10 C.F.R. 211.9(a). On the other hand, the Local Public Contracts Law requires that a municipal wholesale purchaser-consumer award such contracts to the lowest responsible bidder. N.J.S.A. 40A:11-1 *et seq.* Since a municipal wholesale purchaser-consumer may receive a low bid from a non base period supplier, these provisions appear to be incompatible.

Under the allocation program, a wholesale purchaser-consumer may be relieved of its obligation to obtain allocated petroleum products from a base period supplier by means of an exception from the coverage of the program on the ground of serious hardship or gross inequity. 10 C.F.R. 205.41. Such exceptions, however, appear to be granted sparingly. The FEA has declared that the allocation regulations are "intended to be applied equitably such that the burden of fuel shortages will be borne without regard to whether a governmental agency or a private citizen is involved." FEA Ruling 1974-19. Moreover, in a parallel area involving an assignment to a new supplier when a base period supplier is unable to provide product, "[t]he fact that a wholesale purchaser-consumer is a governmental entity required by State . . . law to procure supplies at the lowest price will not be a controlling factor . . . ." FEA Ruling 1974-19. In applying for an exception, a municipality must demonstrate that "the nature of the resulting burden on the [applicant] is not significantly different from the nature of the burden shared by other such governmental units throughout the country." *Board of Education, City of New York, CCH Federal Energy Guidelines*, par. 20, 616. The magnitude of the burden of proof resting upon a

municipality is revealed in *Department of Purchase, City of New York, CCH Federal Energy Guidelines*, par. 20618, in which the FEA noted that:

> "[a]lthough the scope of the disruptions which New York City is experiencing is greater simply because of its population size than the problems experienced by other communities, the nature of the burden which the City faces is no different from the nature of the burden shared by other communities throughout the country."

At the present time, therefore, it is clear that the Federal allocation program is so stringently administered as to render it virtually impossible for a municipal wholesale purchaser-consumer to obtain an exception even when public bidding has produced a low priced supplier. In such an environment, to require a governmental wholesale purchaser-consumer to solicit bids for its petroleum contracts and exhaust its adminstrative remedies before the FEA would unnecessarily engender confusion among suppliers concerning the volume of their supply obligations and the identity of their purchasers while an application for an exception is being processed. Such uncertainty on a statewide scale could disrupt the flow of petroleum products envisioned by the allocation program. Moreover, the State's interests in avoiding extortionate contracts and collusive purchasing seem protected by the price formulae built into the allocation program and the fact that a base period supplier relationship was initially established by public bidding. Thus, the State law requirement that a contract be awarded to a low bidder directly conflicts with the allocation program, and thus the competitive bidding requirements of the Local Public Contracts Law are at the present time superseded by the regulatory provisions of the FEA.** It should be noted, however, that this conclusion may be altered if future developments reveal that an exception on the grounds of price differential may be regularly available to political subdivisions.

ASSIGNMENT TO A NEW SUPPLIER

Such a conflict does not occur when a supplier cannot fulfill a contract with a base period wholesale purchaser-consumer. In that situation, the allocation program permits a municipality to apply to the FEA for an assignment to a new supplier. 10 C.F.R. 211.12(e) (3). The regulations provide, however, that "[t]o the extent practicable, the FEA shall continue any existing supplier/purchaser relationships in making such assignments." 10 C.F.R. 211.12 (e) (3) (i). Additional factors include

> "the supplier's allocation fraction, the allocation fraction of other suppliers which could supply the wholesale purchaser-consumer, and whether an assignment will effect the competitive position of any independent marketer, or small or independent refiner or would be otherwise inconsistent with the objectives of the Emergency Petroleum Allocation Act of 1973." FEA Ruling 1974-19.

Bearing these criteria in mind, a municipality faced with such prospects should first attempt on its own to locate a supplier. The selection is obviously not limited to a base period supplier. Accordingly, a municipality may advertise for bids under the Local Public Contracts Law and obtain a non base period supplier without necessarily interfering with the allocation program; therefore, the competitive bidding requirements of the Local Public Contracts Law remain in full effect in such circumstances.***

CONSTRUCTION PROJECTS

Finally, under the allocation program, a municipality soliciting bids for a new construction project and desiring to assure prospective bidders that gasoline is available to complete the project "may apply to a supplier as a new end user." The volume of fuel needed to complete the job may be estimated, and upon award of the contract, transferred to the successful bidder, if that bidder does not already have a sufficient base period volume. No requirement is imposed that a supplier selected must be a "base period" supplier. Thus, when a governmental unit "applies to a supplier as a new end user" it is clear that such application may be made in compliance with this State's bidding requirements without interfering with the Federal program.

CONCLUSION

You are therefore, advised that an end user (a purchaser of less than 84,000 gallons of an allocated product) in obtaining its petroleum resources must continue to comply with the Local Public Contracts Law. However, with regard to a governmental wholesale purchaser-consumer of an allocated product (a firm which in any year since 1971 received at least 84,000 gallons of an allocated product "into a storage tank . . . at a fixed location". 10 C.F.R. 211.51), the provisions of the Local Public Contracts Law appear to conflict with the Federal petroleum allocation program. Therefore, to the extent that an exception on the ground of price differential is unavailable to a municipality, the bidding requirements of the Local Public Contracts Law are superseded.

Very truly yours,
WILLIAM F. HYLAND
Attorney General
By: DOUGLASS L. DERRY
Deputy Attorney General

* Parallel provisions relating to board of education contracts may be found in N.J.S.A. 18A: 18-1 *et seq.*; N.J.S.A. 18A:18-5; N.J.S.A. 18A:18-6; N.J.S.A. 18A:18-19; N.J.S.A. 18A:18-20; N.J.S.A. 18A:18-21; and N.J.S.A. 18A:54-30.

** Of course, a municipality remains free in its own discretion to let a contract for gasoline by competitive bidding if it concludes that the appropriate hardship waivers can be secured from the FEA or, in the alternative, that it can terminate its relationship with its base period supplier by mutual consent, 10 C.F.R. 211.9(a) (2) (ii), and then find a new supplier through the competitive bidding process.

*** It should be noted, however, that the assignment of a new supplier continues for the duration of the allocation program or "until otherwise ordered by the FEA." 10 C.F.R. 212.12 (e) (5). Thus, if a municipality does not want to be committed to an arrangement which by its length might violate State law (see *e.g.*, N.J.S.A. 40A:11-15(1) (a)), it must anticipate repeating this procedure upon the expiration of the period for which it can legitimately enter into contracts.

September 5, 1974

ALAN SAGNER, *Commissioner*
Department of Transportation
1035 Parkway Avenue
Trenton, New Jersey

FORMAL OPINION NO. 5—1974

Dear Commissioner Sagner:

You have requested an opinion as to whether an audit report prepared by the staff of the Department of Transportation, which contains financial data pertaining to the operations of the Transport of New Jersey, may be withheld from public disclosure.

You have advised that an audit report was prepared by the staff of the Department of Transportation as a means to determine whether the financial position of the Transport of New Jersey warranted a $2,000,000 subsidy of the motor bus carrier by the Commuter Operating Agency (COA). You have further indicated that the subsidy granted to TNJ was in fact based in whole on the financial data and analysis of the audit of operations of the TNJ.

On February 13, 1974 a contract was executed between TNJ and COA which indicated that TNJ was "in imminent danger of terminating bus operations" and that the continuation of its commuter and transit operations "are essential to the health, safety and welfare of the citizens of New Jersey." The contract thereupon provided a subsidy by COA of the continued operations of TNJ on the basis that "all payments are subject to audit and the availability of funds" and that COA shall have the right to inspect "all the books, records and accounts . . . which relate to contracted service accounts, revenues and costs . . . ." It is, therefore, clear from the terms of the arrangement with the TNJ that the COA, as a condition to subsidizing the bus operations of the motor carrier, would exercise a right to audit and make a financial examination of the records and costs of the TNJ.

The essential issue posed is whether such an "audit report" may be withheld from public disclosure or from disclosure to a motor bus carrier, Hudson Transit Lines, Inc., in competition with TNJ for subsidies from the COA. You have advised that the Hudson Transit Lines, Inc. has made a specific request upon you for disclosure of the audit report prepared as a condition to the award of a subsidy to TNJ.

The analysis of the right of the public to inspect such an "audit report" must consider the so-called "common law right" as well as the right to public disclsosure arising under the recently enacted Right to Know law. N.J.S.A. 47:1A-1 *et seq.* Recent judicial interpretation in both of these areas in *Irval Realty, Inc. v. Board of Public Utilities*, 61 N.J. 366 (1972), provides substantial guidance to resolving the present inquiry. In *Irval*, two plaintiffs were suing for property damage and personal injury as a result of a gas explosion on their property. Both plaintiffs brought a proceeding to compel the disclosure of a report prepared by the gas company itself and submitted to the Board of Public Utility commissioners containing significant information relating to the gas explosion, and a report customarily prepared by a staff member of the Board of Public Utilities including the same kind of data listed in the gas company report. The court held that a person seeking access to public records may assert a common law right as a citizen to inspection of such records, subject to

the proviso that he "be able to show an interest in the subject matter of the material he sought to scrutinize. Such interest need not have been purely personal. As one citizen or taxpayer out of many, concerned with a public problem or issue, he might demand and be accorded access to public records bearing upon the problem even though his individual interest may have been slight . . . ." *Irval Realty, Inc. v. Board of Public Utilities, supra,* at 372.

The Supreme Court cited with approval the case of *Josefowicz v. Porter,* 32 N.J. Super. 585 (App. Div. 1954), wherein a public record was defined for purposes of the common law as:

> ". . . one required by law to be kept, or necessary to be kept, in the discharge of a duty imposed by law or directed by law, to serve as a memorial and evidence of something written, said or done, or a written memorial made by a public officer authorized to perform that function, . . ."

Thus, it is fair to assume that an audit report prepared and maintained by the Department of Transportation as a prerequisite to a subsidy grant to a motor bus carrier is a public record necessary to be kept by the agency in the discharge of its responsibilities. It is also apparent that the Hudson Transit Lines, Inc. would have a particular interest in examining the audit report to discern the financial criteria upon which a substantial subsidy was granted to TNJ by the COA and as an aid to enable it to compete for similar subsidies or assistance from the COA.

In *Irval,* the Supreme Court concluded that the Right to Know Law, N.J.S.A. 47:1A-1 *et seq.*, did not require the demonstration of any showing of interest in the material sought for public disclosure. The public record sought to be inspected merely had to be "required by law to be made, maintained or kept on file by any department . . . of the State." N.J.S.A. 47:1A-2. In the present situation, the preparation of an audit report by the staff of the Department of Transportation is a necessary incident to the exercise of the COA's statutory power to grant a subsidy. For example, the COA may enter into contracts with a motor bus carrier to operate passenger service and to make payments based on the actual cost of such service to the motor bus carrier plus a 6% return on the investment. N.J.S.A. 27:1A-19. In order to carry out this responsibility, the agency has been empowered to investigate any matters concerning any carrier under contract to the COA and shall have access to, and a motor bus carrier shall make available, its property, books, records or documents. N.J.S.A. 27:1A-25 (b). Thus, the preparation, examination and maintenance of an audit report as a precondition to a subsidy from the COA may conceivably be construed to be a public record "required by law" within the Right to Know law and thereby properly in the public domain. Whether the audit report prepared by members of the staff of the DOT squarely meets this definition is less than clear, but need not be decided here, since it certainly qualifies as a public record within the scope of the common law rule.

There, furthermore, does not appear to be any bona fide consideration of confidentiality in furtherance of the public interest expressed in either the statuory exclusions to the Right to Know Law, Executive Order No. 9 (1963),* or in the confidentiality regulations of the Department of Transportation promulgated pursuant thereto, N.J.A.C. 16:1-2.1. In fact, we are advised that the same or comparable financial data is filed annually by the TNJ with the Board of Public Utilities

for other purposes. There is, consequently, no clearly defined public interest in maintaining the confidentiality of these audit reports.

For these reasons, you are advised that an audit report prepared by the DOT of the financial status of the TNJ as a prerequisite to the grant of substantial bus subsidies to the TNJ to minimize certain operating deficits is a public record within the "common law" rule. It is, therefore, subject to inspection by a person with a well defined interest in the subject matter of bus subsidies in this State. You are also advised that there is serious concern that such audit report is subject to public disclosure under the provisions of the Right to Know law, as well, especially since there is no precise consideration of confidentiality which would outweigh the public's right to be familiar with the disbursement of public funds through bus subsidies to motor bus carriers.

Sincerely yours,
WILLIAM F. HYLAND
Attorney General

By THEODORE A. WINARD
Assistant Attorney General

* In accordance with the provision of the Right to Know law, Govenor Hughes issued Executive Order No. 9 which established the various records which were not to be deemed public records under the Right to Know Law. In addition, Executive Order No. 9 empowered the head or principal executive of each department of State government to adopt and promulgate regulations setting forth which records under his jurisdiction shall not be deemed public records.

September 5, 1974

WILLIAM M. LANNING, *Chief Counsel*
Legislative Services Agency
State House
Trenton, New Jersey 08625

FORMAL OPINION NO. 6 - 1974

Dear Mr. Lanning:

You have inquired whether the State Constitution allows an appropriation to provide legislators with office space in their home districts. It is concluded on the basis of constitutional and judicial precedent that such an appropriation would be valid. It would be important, however, for any such program to be coordinated with the State Treasurer because of his specific responsibilities in the area of space procurement and allocation and for the additional purpose of formulating appropriate controls over procedures.

The provision of the 1947 New Jersey Constitution directly applicable is Art. IV, § IV, par. 7, which provides in pertinent part:

> "Members of the Senate and General Assembly shall receive annually, during the term for which they shall have been elected and while they shall hold their office, such compensation as shall, from time to time, be fixed by law and no other allowance or emolument, directly or indirectly, for any purpose whatever . . . ."

In drafting this provision. the framers of the 1947 Constitution effected a change from fixed legislative compensation as prescribed in the 1844 Constitution to a flexible mode of compensation.* In other respects they left the 1844 provision unchanged. The proceedings of the 1947 Convention reveal, in this connection, an almost exclusive concern with the question of fixed versus flexible salaries. The only reference to the prohibition of allowances discovered is the remark, in committee, that "members of a legislative council could not be paid for what might amount to considerable extra work." III *Proceedings of the Constitutional Convention of 1947*, p. 689.

Examination of the previous constitutional history of the prohibition provides no substantial guidance in answering the present inquiry. It first appeared as part of the 1875 amendments to the 1844 Constitution, and substituted the fixed compensation specified for per diem and mileage payments.** Proclamation of Sept. 28, 1975, L. 1876, p. 433.

As part of the former Constitution, the paragraph received its only judicial interpretation in *Wilentz ex rel Golat v. Stanger*, 129 N.J.L. 606 (E. & A. 1943), where the court found the clause violated by payment of salary to an incumbent legislator for services as counsel to the Milk Control Board. The court stated:

> "The compensation of $500 fixed for members of the legislature is the *maximum compensation*, according to our understanding, permitted to be paid *from the state treasury for any and all services* by such members to or on behalf of the state, and the words 'no other allowance or emolument, directly or indirectly, for any purpose whatever' are inclusive of the compensation nominated by the director to be paid to Mr. Stanger for his services as counsel." (Emphasis added.) 129 N.J.L. at 609.

The court's comment suggests that the evil to be avoided is pecuniary gain to the legislators over and above their stated compensation and not the provision of ancillary services or facilities, in aid of the strictly legislative function.

The courts of sister states have so interpreted constitutional provisions kindred to N.J. Const. Art. IV, § IV, para. 7. They have distinguished between payments of personal expenses and those of a distinctly legislative character. Where the proposed allowance is not related to a legitimate legislative expense, it is prohibited; where such a relation is shown, it is allowed. *State ex rel Griffith v. Turner*, 117 Kan. 755, 233 P. 510 (1925) (invalidating an unrestricted per diem allowance as not necessary to enable the legislature to perform its functions); *Peay v. Nolan*, 157 Tenn. 222, 7 S.W. 2d 815 (1928) (appropriation for postage, stenographic hire and other necessary expenses, unrelated to actual expenses, invalid as not directed to expenses arising from the performance of official duties); *Manning v. Sims*, 308 Ky. 587, 213 S.W. 2d 577 (1948) (allowing the judiciary a monthly sum, determined to be a reasonable minimum estimate, for postage, telephone, supplies, stenographic and law clerk hire, books and periodicals). The Kentucky court stated:

"Unless the contrary is clearly expressed, it is consistently held that the allowance of reasonable expenses incurred in the discharge of the official duties is neither salary, compensation, nor an emolument of the office." 213 S.W. 2d at 580.

Squarely on point with regard to the present inquiry is the more recent *Spearman v. Williams*, 415 P. 2d 597 (Okla. 1966), distinguishing disallowable personal expenses from proper legislative outlays, among which were found to be a monthly allowance in lieu of actual expenses for the maintenance of mandatory legislative district offices. The court reasoned:

"The functions of government have grown and expanded greatly since statehood, many new boards, commissions and agencies having been created to carry out the ever increasing necessities, welfare and desires of our people. Many members of the Legislature, past and present, have not maintained offices within which to transact legislative business in their districts. The Legislature has now, due to the present press of legislative business, deemed it advisable for each member thereof to maintain an office in their respective districts so they can be more available and accessible to advise and consult with their constituents, which the legislative body evidently thought would inure to the benefit of the whole state.

"It is our conclusion that such office and traveling expenses incurred by members of the Legislative Council are expenses of the performance of official duties and are not compensation, salary or emoluments . . . ." 415 P. 2d at 602.

It is therefore sound to distinguish for purposes of Art. IV, § IV, para. 7, between payments constituting pecuniary gain and those which directly facilitate the conduct of legislative business, although they may incidently reduce expenses otherwise borne by particular legislators. See *Manning v. Sims, supra.* Among the latter are the existing appropriations for legislative aids, for postage and telephone, and the proposed appropriation for legislative district offices.

What has been said also disposes of any constitutional difficulties on the score of Art. IV, § IV, para. 8, providing:

"The compensation of members of the Senate and General Assembly shall be fixed at the first session of the Legislature held after this Constitution takes effect, and may be increased or decreased by law from time to time thereafter, but no increase or decrease shall be effective until the legislative year following the next general election for members of the General Assembly."

This paragraph is new in the 1947 Constitution, for the obvious reason that compensation was previously fixed by organic law rather than by statute. Since the proposed appropriation is not compensation for purposes of paragraph 7, the succeeding paragraph, *a fortiori*, is no impediment.

For the reasons above stated, you are advised that an appropriation to provide

legislative district offices would be valid under Art. IV, § IV, para. 7 of the 1947 New Jersey Constitution. Your attention is again directed, however, to the importance of coordination of such a program with the State Treasurer.

Very truly yours,
WILLIAM F. HYLAND
Attorney General

By: PETER D. PIZZUTO
Deputy Attorney General

* Art. IV, §IV, para. 7 of the 1844 document, as amended, directed:

"Members of the senate and general assembly shall receive annually the sum of five hundred dollars during the time for which they shall have been elected, and while they shall hold their office, and no other allowance or emolument, directly or indirectly, for any purpose whatever."

** The original language of 1844 specified:

"Members of the senate and general assembly shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the State; which compensation shall not exceed the sum of three dollars per day for the period of forty days from the commencement of the session, and shall not exceed the sum of one dollar and fifty cents per day for the remainder of the session. When convened in extra session by the Governor they shall receive such sum as shall be fixed for the first forty days of the ordinary session. They shall also receive the sum of one dollar for every ten miles they shall travel in going to and returning from their place of meeting, on the most usual route."

September 9, 1974

THE HONORABLE ANN KLEIN
Commissioner
Department of Institutions
and Agencies
135 West Hanover Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 7 – 1974

Dear Commissioner Klein:

You have asked for an opinion as to whether the county government or the state government is responsible for establishing shelter care facilities for juveniles in need of supervision pursuant to N.J.S.A. 2A:4-42 *et seq.* Initially, it should be noted that N.J.S.A. 2A:4-42 does not require that any new accommodations for juveniles be built or otherwise established. Since the Legislature enacted this code only a few months in advance of its effective date, it did not contemplate the need to establish additional residential facilities. If, however, existing residential arrangements do

prove inadequate, then, you are hereby advised that the county governing body may establish such new facilities or adapt existing facilities so as to provide for the shelter care of juveniles within its jurisdiction. The Division of Youth and Family Services may establish such shelters for children who are in its care, custody or guardianship programs. The State, however, has no obligation to establish and maintain facilities for the shelter care of every juvenile determined to be in need of supervision.

Under the new juvenile act, which became effective March 1, 1974, "shelter care" is defined as "the temporary care of juveniles in facilities without physical restriction pending court disposition" (N.J.S.A. 2A:4-43d) and "detention" means "the temporary care of juveniles in physically restricting facilities pending court disposition." N.J.S.A. 2A:4-43c. Furthermore, the act distinguishes between those juveniles charged with an act of delinquency (N.J.S.A. 2A:4-44) and those juveniles in need of supervision (N.J.S.A. 2A:4-45) and clearly establishes different criteria for placing a juvenile in a detention facility or in a shelter facility pending court disposition. N.J.S.A. 2A:4-56. It is thus immediately apparent that the law no longer permits a youth house facility to be used indiscriminately as a place of detention for alleged delinquents and as a place of residence for those juveniles who may be abandoned or neglected or who may be charged with some juvenile offense such as truancy, incorrigibility, etc. The act, while authorizing use of separate facilities, does not provide for the establishment of any new facilities nor does the act repeal any sections of the existing law providing for the establishment of shelter care facilities. Therefore, in order to fix the responsibility for establishment and maintenance of shelter care facilities, it is necessary to examine existing law.

Under N.J.S.A. 9:12A-1, the county board of chosen freeholders may establish and maintain shelters for the temporary residence of juveniles. N.J.S.A. 9:12A-1 provides in pertinent part:

> "The board of chosen freeholders of any court may establish, equip and maintain a home for the temporary detention of children, separated entirely from any place of confinement of adults, to be known as "The Children's Shelter of ..... County," which shall be conducted as an agency for the purpose of caring for the children of the county whose cases are pending before the juvenile and domestic relations court of the county or who are homeless or abandoned, abused, neglected or cruelly treated, or who, being under 16 years of age, are witnesses before such court or some other court." N.J.S.A. 9:12A-1.

Similarly, the county is authorized to appropriate funds for the maintenance of County Youth Houses (N.J.S.A. 9:11-8), County Detention Schools (N.J.S.A. 9:10-3), and County Homes for Children. N.J.S.A. 9:12-1.

In the event the county fails to establish a residential facility, county funds must be used to maintain the juvenile in an appropriate place in a neighboring county, at a state facility or in a foster home. Under N.J.S.A. 44:4-24, the county welfare board has charge of the supervision of the relief and settlement of the poor in its jurisdiction. "Settlement of a person" means his right under the provisions of Chapter 4 of Title 44 to relief, maintenance or support in any county or counties. N.J.S.A. 44:4-1. Specifically, if a county maintains a Youth House for the detention of juveniles, the court has the power to order financially able parents to pay the county for the maintenance and clothing of the detainee. N.J.S.A. 9:11-6. Even when a youngster is adjudged delinquent and committed to a state institution, the expenses of the committment and board are to be paid by financially able parents to the county treasurer. N.J.S.A. 30:4-157.4.

The Legislature, on the other hand, has placed no statutory burden on the State to maintain facilities for shelter care of all juveniles. Only juveniles enrolled in Division of Youth and Family Services programs are statutorily eligible for maintenance by the State. N.J.S.A. 30:4C-27 provides in pertinent part:

> "Pursuant to the providing of care, custody or guardianship for any child, in accordance with the provisions of this act[1], the Bureau of Children's Services may expend sums as may be necessary for the reasonable and proper cost of maintenance, including board, lodging, clothing, medical, dental, and hospital care, or any other similar or specialized commodity or service as the needs of any such child may require ...." N.J.S.A. 30:4C-27.

Since this provision is permissive rather than mandatory, the obligation to provide maintenance for even Division of Youth and Family Services children can be considered discretionary with the agency. In any event, the Division of Youth and Family Services has the statutory power to assess a certain portion of any maintenance costs it expends for children in the State to the home counties of the children involved. N.J.S.A. 30:4C-30 provides that maintenance costs for each child in the care, custody or guardianship of the Division are to be shared 75% by the State and 25% by the county.

Moreover, the State is authorized to establish child care shelters pursuant to N.J.S.A. 40:4C-26.2, but they are restricted in their use by N.J.S.A. 30:4C-26.3 which provides *inter alia* that "such shelters shall be equipped and used for the temporary care and supervision of children who are placed in the care, custody or guardianship of the State Division of Youth and Family Services". Thus, maintenance payments by the State are reserved for those youngsters accepted by the Division of Youth and Family Services for placement. To be eligible for placement in a Division of Youth and Family Services program, the youngster must be of such circumstances as to qualify for these services under N.J.S.A. 30:4C-11. If the child meets the standards set forth in N.J.S.A. 30:4C-11, "then the Bureau of Children's Services *may* accept and provide such care or custody as the circumstances of such child may require". N.J.S.A. 30:4C-11 (emphasis added). For purposes of temporary shelter care pending a hearing, the Division of Youth and Family Services has no statutory obligation to maintain youngsters who are not in its programs.

Therefore, the county governing bodies may establish shelter care facilities if they deem it necessary or they must expend the sums necessary for maintaining county juveniles in other appropriate facilities.

Very truly yours,
WILLIAM F. HYLAND
Attorney General

By: JOSEPH T. MALONEY
Deputy Attorney General

1. Sections 30:4C-1 to 30:4C-40

September 12, 1974

JOANNE E. FINLEY, M.D., *Commissioner*
New Jersey State Department of Health
Health & Agriculture Building
John Fitch Plaza
Trenton, New Jersey 08625

FORMAL OPINION NO. 8—1974

Dear Dr. Finley:

The Executive Director of the New Jersey Health Care Facilities Financing Authority has asked for an opinion on the constitutionality of a proposed amendment to the Health Care Facilities Financing Law, N.J.S.A. 26:2I-1 *et seq.*, which would empower the Authority to finance or refinance through the public sale of bonds construction projects undertaken by proprietary health care facilities. The present statute empowers the Authority to finance or refinance public and private non-profit health care facility construction projects. The Authority has requested advice as to whether an amendment to include proprietary health care facilities within the purview of the act would be violative of Article VIII, §II, par. 1 and Article VIII, § III, par. 3 of the 1947 New Jersey Constitution.

In 1972 the Legislature declared "that a serious public emergency exists affecting the health, safety and welfare of the people of the State" because of the obsolescence and inadequacy of the State's hospital and other health care facilities. N.J.S.A. 26:2I-1. In order "to encourage the timely construction and modernization, including equipment, of hospital and other health care facilities," N.J.S.A. 26:2I-1, the Legislature created the Authority in the State Department of Health and declared it to be "a public body corporate and politic, with corporate succession" and "an instrumentality exercising public and essential governmental functions." N.J.S.A. 26:2I-4.

The Authority has been empowered "to borrow money and to issue bonds," N.J.S.A. 26:2I-5(e), for "participating hospitals." N.J.S.A. 26:2I-6. The term "participating hospitals" is clearly and unequivocally limited to either governmental institutions or "non-profit [institutions] providing hospital or health care service to the public." N.J.S.A. 26:2I-3. The projects to be financed by the Authority must be in conformity with the Health Care Facilities Planning Act (N.J.S.A. 26:2H-1, *et seq.*), N.J.S.A. 26:2I-6; as such, they must have been the subjects of certificates of need pursuant to N.J.S.A. 26:2H-7 and be licensed prior to operation pursuant to N.J.S.A. 26:2H-12(a). N.J.S.A. 26:2I-28. The Authority may construct, acquire, operate and manage financed projects for the use and benefit of the participating hospital and its patients, employees and staff. N.J.S.A. 26:2I-28.

The bonds issued by the Authority may not "be deemed to constitute a debt or liability of the State or of any political subdivision thereof other than the authority, nor a pledge of the faith and credit of the State or of any such political subdivision, other than the authority," and the face of the bonds must bear a statement to that effect. N.J.S.A. 26:2I-9. In addition, the "issuance of bonds...shall not directly or indirectly or contingently obligate the state or any political subdivision thereof to levy or to pledge any form of taxation whatever therefor." N.J.S.A. 26:2I-9. The Authority is specifically limited to extinguishing its obligations which have arisen through the sale of bonds by securing for the bondholders the "rates, rents, fees and charges for the use of and for the services furnished or to be furnished by each project...." N.J.S.A. 26:2I-10.

The issue raised by the Authority is whether the inclusion of proprietary health care facilities within the definition of "participating hospitals" found in N.J.S.A. 26:2I-3 and the issuance of bonds on behalf of same would be repugnant to the following provisions of the New Jersey Constitution:

Article VIII, § II, par. 1 provides:

> "The credit of the State shall not be directly or indirectly loaned in any case."

Article VIII, § III, par. 3 provides:

> "No donation of land or appropriation of money shall be made by the State or any county or municipal corporation to or for the use of any society, association or corporation whatever."

When considering whether a specific governmental program conflicts with these constitutional provisions, the purpose of the program must be considered. Our courts have consistently held that the purpose of the program must be a public purpose. *N.J. Sports & Exposition Authority v. McCrane*, 61 N.J. 1, 15 (1972); *New Jersey Mortgage Finance Agency v. McCrane*, 56 N.J. 414, 420 (1970); *Clayton v. Kervick*, 52 N.J. 138, 156 (1968); *Roe v. Kervick*, 42 N.J. 191, 207 (1964); *Whelan v. N.J. Power & Light Co.*, 45 N.J. 237 (1965); *Lynch v. Borough of Edgewater*, 8 N.J. 279, 291, (1951). Declarations of a public purpose by the Legislature, as found in N.J.S.A. 26:2I-1, raise a strong presumption that the act in fact does effectuate a public purpose. *N.J. Sports & Exposition Authority v. McCrane*, *supra* at 8; *Roe v. Kervick*, *supra* at 229.

In *Roe v. Kervick*, *supra*, our Supreme Court discussed the general parameters of the concept of public purpose:

> "...The concept of public purpose is a broad one. Generally speaking, it connotes an activity which serves as a benefit to the community as a whole, and which, at the same time is directly related to the functions of government. Moreover, it cannot be static in its implications. To be serviceable it must expand when necessary to encompass changing public needs of a modern dynamic society. Thus it is incapable of exact or perduring definition. In each instance where the test is to be applied the decision must be reached with reference to the object sought to be accomplished and to the degree and manner in which the object affects the public welfare. *Hoglund v. City of Summit*, *supra* (28 N.J. at p. 549); *DeArmond v. Alaska State Development Corporation*, 376 P.2d 717 (Alaska Sup. Ct. 1962); *City of Frostberg v. Jenkins*, 215 Md. 9, 136 A.2d 852, 855 (Ct. App. 1957); *Opinion to the Governor*, 76 R.I. 249, 69 A.2d 531 (Sup. Ct. 1949); *Rhyne Municipal Law*, § 15-4, p. 341 (1957)." 42 N.J. at 207.

The court enumerated several criteria which must be met before a purpose can validly be considered a public one. The transaction must be contractual and the public must receive a substantial consideration in addition to the repayment of the obligation with interest. The primary purpose of the contract must be the accomplishment

of the public purpose, and any private benefit must be incidental and subordinate. If these criteria are met, then "[such] a transaction does not consitute a forbidden loan within the contemplation of *Article VIII* of the Constitution." *Roe v. Kervick, supra* at 218.

Numerous and varied governmental programs have been held to be imbued with a public purpose. *N.J. Sports & Exposition Authority v. McCrane, supra* (construction, operation and maintenance of a sports complex in the Hackensack meadowlands); *Levin v. Town Committee, Bridgewater Tp.*, 57 N.J. 506 (1971) (elimination of a blighted area); *New Jersey Mortgage Finance Agency v. McCrane, supra* (provision of mortgage funds by an independent state agency which sold bonds to raise capital and then reloaned the capital to private lending institutions at less than the prevailing rate.; *Brody v. City of Millville*, 120 N.J. Super. 1 (App. Div. 1972); *aff'd* 62 N.J. 244 (1973) (municipal operation of an airport and municipal financing, construction and leasing of a building to a private firm engaged in aircraft engine repair).

In *Clayton v. Kervick, supra*, the court considered whether the Education Facilities Authority, created by N.J.S.A. 18A:72A-1, *et seq.*, violated Article VIII, § II, par. 1 and Article VIII, § III, par. 3 of the New Jersey Constitution. The Educational Facilities Authority was empowered, *inter alia*, to construct projects for participating public and *private* educational institutions through the public sale of bonds and to enter into leasing arrangements with self-liquidating goals, in much the same manner as the Authority herein has been empowered.* The court held that, in light of the criteria as set forth in *Roe v. Kervick, supra*, the legislative plan embodied in the Educational Facilities Authority Law did not violate either of the aforementioned constitutional provisions, even though aid would be given to private nonsectarian educational institutions. The court was convinced that the law in question was designed to further a public purpose "without creating any state debt or liability and without granting private benefits except to the incidental extent necessay to achieve the public purpose." *Clayton v. Kervick, supra* at 156. In addition, the court noted the "safeguards and controls contemplated by the act (N.J.S. 18A:72A-5; N.J.S. 18A:72A-30)," along with other licensing and operating requirements for educational institutions, all of which reduced the danger "that public funds may be diverted to private profit-making." *Clayton v. Kervick, supra* at 156. See also *New Jersey Mortgage Finance Agency v. McCrane, supra* at 424.

In light of the holding of the court in *Clayton v. Kervick, supra*, dealing with a statute very similar to the proposed amendment to N.J.S.A. 26:2I-1, *et seq.*, it is clear that the New Jersey Health Care Facilities Financing Authority Law will continue to meet the criteria set forth by the New Jersey Supreme Court in *Roe v. Kervick, supra*. There can be no question that there is a valid public purpose in the provision of adequate financing to ensure the people of New Jersey the benefits of health care of the highest quality to be provided efficiently and promptly at a reasonable cost. N.J.S.A. 26:2H-1. Thus, the public will receive a substantial consideration from the issuance of bonds for the projects of proprietary health care facilities over and above the mere repayment of the obligation with interest. Any private benefit to be derived by a proprietary health care facility from the issuance of bonds would be incidental and subordinate to the achievement of the public purpose to be derived from the Authority's financing and as such would be permissable. Lastly, the control exercised by the Authority over the project itself under N.J.S.A. 26:2I-5 and N.J.S.A. 26:2I-28, in addition to the licensing and other requirements of N.J.S.A. 26:2H-1, *et seq.*, and N.J.S.A. 26:2J-1, *et seq.*, will serve to reduce the danger that public funds will be diverted for private gain.

You are therefore advised that an amendment to the Health Care Facilities Financing Authority Law to provide for the financing or refinancing of proprietary health care facility construction projects through the public sale of bonds by the Authority would not be in derogation of the provisions of Article VIII, § II, par. 1 or Article VIII, § III, par. 3 of the 1947 New Jersey Constitution.

Very truly yours,
WILLIAM F. HYLAND
Attorney General

By: JONATHAN WEINER
Deputy Attorney General

* The statues creating the Authority herein and the Educational Facilites Authority, and the resultant responsibilities and authorities of each, are strikingly similar. For example, both are public bodies corporate and politic and instrumentalities exercising public and governmental functions (N.J.S.A. 26:2I-4 and N.J.S.A. 18A:72A-4); both may borrow money and issue bonds which are not to be deemed debts or liabilities of the State or a pledge of the faith and credit of the State (N.J.S.A. 26:2I-5, 7 and 9 and N.J.S.A. 18A:72A-10); both may fix rates, rents, fees and charges to pay the cost of maintaining the project and to pay the principal and interest on the bonds issued on the project (N.J.S.A. 26:2I-10 and N.J.S.A. 18A:72A-11); and both may construct, operate and manage projects for the use and benefit of the participating entity and its students, faculty and staff (N.J.S.A. 26:2I-28 and N.J.S.A. 18A:72A-30).

September 13, 1974

JOHN P. CALLAHAN, *Director*
Division of State Auditing
Office of Fiscal Affairs
State House
Trenton, New Jersey

FORMAL OPINION NO. 9–1976

Dear Director Callahan:

You have requested an opinion concerning the appropriate disposition of property belonging to inmates of the New Jersey Home for Disabled Soldiers who die intestate without having been survived by any heirs at law or next of kin. The financial post-audit report of the New Jersey Memorial Home for Disabled Soldiers at Menlo Park has recommended that unclaimed monies be transferred to the State Treasurer as authorized by N.J.S.A. 30:4-132. This statute provides as follows:

> "Unclaimed personal property of deceased patients, and of other former patients of an institution supported in whole or in part by state funds, shall be held at such institution, awaiting claim therefor, for a period

of one year, after which time, under the direction of the commissioner and at a time named by him, unclaimed property may be sold, at public or private sale. The proceeds shall be held by the chief executive officer of the institution until the end of the succeeding fiscal year, at which time he shall turn into the state treasury all proceeds remaining unclaimed by the persons legally entitled thereto."

The Department of Institutions and Agencies, nevertheless, has urged that unclaimed funds should more properly be disposed of in accordance with N.J.S.A. 30:6AA-14, which provides as follows:

"Moneys, choses in action and effects deposited by a member in trust with the veterans facility and unclaimed at the death of the member, dying intestate, shall be deemed to be the property of the veterans facility. Such property shall be held in trust for 3 years following the death of the depositor, with power to invest the funds and to use the income for the benefit of the members as the council and the commissioner may deem most advisable."

. . . .

Such property remaining unclaimed 3 years after the death of its depositor shall be deemed to be the property of and subject to the absolute control and disposal of the veterans facility, to be used for such purposes as the council and the commissioner may deem most advisable."

A similar question was previously answered in 1961 by Formal Opinion No. 15 of the Attorney General. At that time an opinion was sought to resolve the apparent conflict between N.J.S.A. 30:6A-11 and N.J.S.A. 2A:37-12. N.J.S.A. 30:6A-11 provided that property of inmates of the New Jersey Home for Disabled Soldiers who had died intestate, and which property had remained unclaimed for 3 years after decedent's death, would escheat to and become the property of the board of managers of the Home. N.J.S.A. 2A:37-12 provided as follows:

"If any person, who at the time of his death, has been or shall have been, the owner of any personal property within this state, and shall have died, or shall die, intestate, without heirs or known kindred, capable of inheriting the same, and without leaving a surviving spouse, such personal property, of whatsoever nature the same may be, shall escheat to the state."

The Attorney General concluded that N.J.S.A. 30:6A-11 was impliedly repealed by the enactment of the General Escheat Act, L. 1946, c. 155 to the extent that the statutes were inconsistent.

The State was then informed by various Veterans' groups that if unclaimed funds belonging to veterans were escheated by the State under the general escheat statute, such funds would be deducted from grants by the Federal Government to the Soldiers' Homes. In addition, a hardship would be created by depriving the members of funds which had previously been escheated under N.J.S.A. 30:6A-11, as these funds were a source of revenue by which the inmates of the Soldiers' Homes could be furnished little conveniences for which no appropriate funds were available.

After this additional information had been brought to the State's attention, it was agreed that either N.J.S.A. 30:6A-11 or N.J.S.A. 2A:37-12 should be amended to permit funds of veterans to remain with the veterans' homes rather than being escheated by the State. To accomplish this, Assembly Bill No. 510 (1962) was prepared. This bill specifically excluded funds of a veteran dying intestate in a veterans' home and not having been survived by any next of kin from the general escheat statutes. The statement attached to the bill provided as follows:

"The purpose of this bill is to provide for the continued escheat for the benefit of inmates at the Soldiers' Homes at Vineland and Menlo Park of certain funds deposited by deceased inmates and to overcome an Attorney General's Opinion that such funds should escheat to the State Treasury under N.J.S. 2A:37-12."

This bill was not passed as it was believed that an administrative escheat by the Soldiers' Homes might be held unconstitutional in view of the statement by the court in *State v. Otis Elevator Co.*, 12 N.J. 1, 18 (1953):

"Finally, it is insisted that the State may escheat personal property administratively without judicial action. With this view we find ourselves in complete disagreement. Court action has been uniformly required in escheat proceedings. . . ."

Although Governor Hughes filed a statement that he was in full agreement with the purpose of Assembly Bill No. 510, the statement indicated that he had allowed the bill to expire by a pocket veto as he was concerned that the bill might fall within the constitutional ban on an administrative escheat suggested by the court in *State v. Otis Elevator Co., supra.*

Thereafter, A-670 (1963) was prepared by Governor's Counsel and the same bill was introduced in 1964 as A-171 and enacted into law as Laws of 1964, c. 90.[1] This statute, which is substantially the same as N.J.S.A. 30:6AA-14, provided that property deposited by an inmate in trust with a soldiers' home shall be deemed to be the property of the home if it is not claimed within three years following decedent's death.

In view of the legislative history of N.J.S.A. 30:6AA-14 discussed *supra*, there can be no question that this statute was enacted to permit funds of a veteran dying intestate in a soldiers' home without next of kin to become the property of the home rather than to be escheated to the State under N.J.S.A. 2A:37-12 or N.J.S.A 30:4-132. You are therefore advised that unclaimed monies of deceased members of the New Jersey Home for Disabled Soldiers should remain under the control of the Veterans' Facilities Council and the Commissioner of Institutions and Agencies in accordance with N.J.S.A. 30:6AA-14, rather than be transferred to the State Treasurer pursuant to N.J.S.A. 30:4-132 or N.J.S.A. 2A:37-12.

Very truly yours,
WILLIAM F. HYLAND
Attorney General

By: ROBERT W. DEMPSEY
Deputy Attorney General

1. "Moneys, choses in action and effects deposited by an inmate in trust with the chief executive officer of the home and unclaimed at the death of the inmate, dying intestate, shall be deemed to be the property of the home. Such property shall be held in trust by the chief executive officer for 3 years following the death of the depositor, with the power to invest the funds with the consent of the board of managers and to use the income for the benefit of the inmates as the board may deem most advisable.

. . . .

Such property remaining unclaimed 3 years after the death of its depositor shall be deemed to be the property of and subject to the absolute control and disposal of the board of managers to be used for such purposes as they deem most advisable."

September 23, 1974

DR FRED G. BURKE, *Commissioner*
Department of Education
225 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 10—1974

Dear Dr. Burke:

The Department of Education has asked for an opinion as to the validity of United States citizenship requirements imposed by law as a precondition to employment and the acquisition of tenure by a teacher in the public schools, as well as to the issuance of a teacher's certificate by the State Board of Examiners. The statutes governing the qualifications of a permanent teaching staff member and for the acquisition of tenure require an applicant to demonstrate that he is a citizen of the United States or that such applicant has declared his intent of becoming a citizen of the United States. N.J.S.A. 18A:26-1; N.J.S.A. 18A:28-3. The State Board of Examiners in the Department of Education is empowered by law to issue a teacher's certificate to an alien only on the filing of a declaration of intention to become a United States citizen within 5 years. N.J.S.A. 18A:6-39; N.J.S.A. 18A:26-8.1.

The issue raised by your inquiry has been authoritatively resolved by the United States Supreme Court. In *Sugarman, et al. v. McL. Dougall, et al.*, 413 U.S. 634, 93 S.Ct. 2842, 37 L.Ed. 2d 853 (1973), it was held that a broad provision of the New York Civil Service Law which indiscriminately prohibited the employment of aliens in the competitive Civil Service was in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. On the same day, the United States Supreme Court in a related case, *In Re Application of Griffiths*, 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed. 2d 910 (1973), held that a Connecticut rule of court, requiring an applicant for admission to the State Bar to be a United States citizen, created an inherently suspect classification that was unnecessary to promote or safeguard the legitimate interests of the State of Connecticut. The rule of court was found to be invalid as an unconstitutional infringement of the Equal Protection Clause of the Fourteenth Amendment of the United States Consttitution.

In *Sugarman, et al. v. McL. Dougall, et al., supra,* the appellees were federally registered aliens and residents of the State of New York. The appellees were employed by non-profit organizations that received funds from the United States Office of Economic Opportunity. These federally funded programs were absorbed by the Human Resource Administration of the City of New York. The appellees were thereupon informed that they were ineligible for continued employment by the City and would be dismissed due to their alienage pursuant to the Civil Service law of the State of New York. In his opinion, Justice Blackmun restated the long established rule that a resident alien is entitled to the shelter of the Equal Protection Clause of the Fourteenth Amendment and that this protection extended to the right to work for a living in the common occupations of a community. The court found that an indiscriminate classification based on alienage is inherently suspect, and there is a substantial burden on the state to justify citizenship as a qualification for public office. The court opined:

> "In Graham v. Richardson, 403 US, at 372, 29 L Ed 2d 534, we observed that aliens as a class 'are a prime example of a "discrete and insular" minority (see United States v. Carolene Products Co. 304 US 144, 152-153, n 4, 82 L Ed 1234, 58 S Ct 778 (1938)),' and that classifications based on alienage are 'subject to close judicial scrutiny.' And as long as a quarter century ago we held that the State's power 'to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits.' Takahashi v Fish Comm'n, 334 US, at 420, 92 L Ed 1478. We therefore look to the substantiality of the State's interest in enforcing the statute in question, and to the narrowness of the limits within which the discrimination is confined.
>
> . . . .
>
> We hold that § 53, which denies all aliens the right to hold positions in New York's classified competitive civil service, violates the Fourteenth Amendment's equal protection guarantee.
>
> . . . .
>
> While we rule that § 53 is unconstitutional, we do not hold that, on the basis of an individualized determination, an alien may not be refused, or discharged from, public employment, even on the basis of noncitizenship, if the refusal to hire, or the discharge, rests on legitimate state interests that relate to qualifications for a particular position or the characteristics of the employee. We hold only that a flat ban on the employment of aliens in positions that have little, if any, relation to a State's legitimate interest, cannot withstand scrutiny under the Fourteenth Amendment.
>
> Neither do we hold that a State may not, in an appropriately defined class of positions, require citizenship as a qualification for office. . . ." *Sugarman, et al. v. McL. Dougall, et al.*, 413 U.S. at 642, 646, 647.

The court reviewed several arguments made in support of the citizenship requirement and concluded that the State had not carried the burden of substantiating its legitimate interest in the imposition of a blanket citizenship requirement as a condition of holding an office or position in the classified Civil Service.

You are, therefore, advised that an indiscriminate statutory ban by reason of

alienage on the employment and acquisition of tenure by teachers in the public schools, as well as on the issuance of a teacher's certificate by the State Board of Examiners is constitutionally offensive, unless a substantial or special circumstance inherent in a particular teaching classification requires United States citizenship as a qualification of such a teacher. In the event you are of the opinion that United States citizenship is a bona fide qualification for any teaching classification in the public schools of this State under the supervision of the Department of Education, kindly advise us of your justification in order that an individual determination may be made in those cases.

Sincerely yours,
WILLIAM F. HYLAND
Attorney General

By: THEODORE A. WINARD
Assistant Attorney General

October 3, 1974

JOSEPH A. HOFFMAN, *Commissioner*
Department of Labor and Industry
Labor and Industry Bulding
Trenton, New Jersey 08625

FORMAL OPINION NO. 11—1974

Dear Commissioner Hoffman:

You have requested an opinion as to whether it is permissible for persons who are not admitted to the bar of this or any other jurisdiction to represent unemployment compensation claimants or respondent employers at hearings conducted by the Appeal Tribunal and/or Board of Review. For the following reasons, you are advised that it is not permissible for non-attorneys to represent claimants or employers at such hearings.

The Division of Unemployment and Disability Insurance (formerly the Division of Employment Security) is constituted as an agency within the Department of Labor and Industry. N.J.S.A. 34:1A-14. Within the Division of Unemployment and Disability Insurance, an Appeal Tribunal was established to hear and decide disputed benefit claims. N.J.S.A. 34:1A-20; N.J.S.A. 43:21-6. In addition, a Board of Review was established to act as a final appeals board in cases of benefit disputes. N.J.S.A. 34:1A-19; N.J.S.A. 43:21-6. It is well-settled that the Appeal Tribunal and Board of Review are quasi-judicial bodies which are "...under a duty to consider evidence and apply the law to the facts as found and to exercise a discretion of judgement judicial in nature on evidentiary facts. . . ." *Adolph v. Elastic Stop Nut Corp. of America*, 18 N.J. Super. 543, 546-47 (App. Div. 1952); see also *Borgia v. Board of Review*, 21 N.J. Super. 462 (App. Div. 1952).

The practice of law in this State is governed by Article VI, § II, par. 3 of the

1947 New Jersey Constitution, which provides in pertinent part that the Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted to the practice of law. Pursuant thereto, Rule 1:21 of the New Jersey Court Rules states that no person shall practice law in this State unless he is an attorney holding a plenary license to practice in this State or conforms with the applicable section of the rule concerning limited attorneys, *pro se* representation, or admission to the bar *pro hac vice*. The exclusive source for the definition of the practice of law therefore resides in the Supreme Court. Moreover, N.J.S.A. 2A:170-78 *et seq.* makes the unathorized practice of law a disorderly persons offense.

The question is therefore posed, in light of all the aforementioned authority, whether the representation of a claimant by a non-attorney in a hearing conducted by the Appeal Tribunal or Board of Review constitutes the proscribed practice of law. The Supreme Court of New Jersey has squarely held that the presentation of a case in a legal representative capacity in a quasi-judicial administrative proceeding constitutes engagement in the practice of law. In *Stack v. P.G. Garage*, 7 N.J. 118, 120 (1951), involving appearances before a county tax board, the court said:

> "In determining what is the practice of law it is well settled that it is the character of the acts performed and not the place where they are done that is decisive. The practice of law is not, therefore, necessarily limited to the conduct of cases in court but is engaged in whenever and wherever legal knowledge, training, skill and ability are required. As was stated in *Tumulty v. Rosenblum*, 134 N.J.L. 514, 517-18 (Sup. Ct. 1946):
>
> 'The practice of law is not confined to the conduct of litigation in courts of record. Apart from such, it consists, generally, in the rendition of legal service to another, or legal advice and counsel as to his rights and obligations under the law. *** calling for*** a fee or stipend, *i.e.*, that which an attorney as such is authorized to do; and the exercise of such professional skill certainly includes the pursuit, as an advocate for another, of a legal remedy within the jurisdiction of a *quasi*-judicial tribunal. Such is the concept of R.S. 2:111-1, classifying as a misdemeanor the practice of law by an unlicensed person.'
>
> "There can be little doubt that the jurisdiction of the county tax board is *quasi*-judicial in nature and that the prosecution of an appeal before it constitutes the practice of law. It requires the qualification of experts, the examination and cross-examination of witnesses, and the admission and exclusion of evidence. It frequently necessitates the construction of a statute, the application of court decisions, and occasionally the furnishing of a brief as to the law and facts."

In our judgment, the presentation of a case on behalf of a claimant or an employer in a proceeding designed to review the denial of unemployment compensation benefits requires legal knowledge, skill and training in examining witnesses, in presenting competent evidence, and in arguing the construction of statutes and the application of court decisions. Thus, there can be little doubt that an appearance in a hearing conducted by the Appeal Tribunal or Board of Review constitutes the "practice of law."

It should be added that a rule promulgated by the Supreme Court permits third-year law students or graduates of approved law schools to appear before an adminis-

trative agency in accordance with a program approved by the court on submission by such law school or by a legal aid office. R. 1:21-3(c). We have no knowledge in the present situation, however, of any authorization by the Supreme Court for the appearance by law students or graduates before the Appeal Tribunal or Board of Review.

You are therefore advised for all of the above stated reasons, that non-attorneys may not represent or render legal advice to claimants or employers at hearings or other formal proceedings conducted by the Appeal Tribunal or Board of Review of the Division of Unemployment and Disability Insurance.

Very truly yours,
WILLIAM F. HYLAND
Attorney General
By: MAX H. SCHLOFF
Deputy Attorney General

October 16, 1974

HONORABLE THOMAS G. DUNN
New Jersey State Senate
State House
Trenton, New Jersey 08625

FORMAL OPINION NO. 12—1974

Dear Senator Dunn:

You have asked for an opinion as to whether the Legislative Pension Act of 1972, Laws of 1972, c. 167, N.J.S.A. 43:15A-135 *et seq.*, is consistent with the provisions of Art. 4, § 4, par. 7 and 8 of the 1947 New Jersey Constitution. For the following reasons, you are advised that the Legislative Pension Act of 1972 is consistent with Art. 4, §4, par. 7 of the 1947 New Jersey Constitution. You are also advised, however, that the Act is violative of the provisions of Art. 4, §4, par. 8 of the State Constitution insofar as the Act specifies an effective date prior to January 1, 1974 but is otherwise in full force and effect as of and subsequent to that date.

A proper understanding of the issues posed by the inquiry requires a brief chronology of the provisions for pension benefits to members of the New Jersey State Legislature. From 1922 to 1954, the State Employees Retirement System, established under Laws of 1921, c. 109, administratively provided an option for a legislator to join that Retirement System. On December 30, 1954 the State Employees Retirement System was abolished as a result of the repeal of all Acts establishing that Retirement System. Laws of 1954, c. 84, § 4; N.J.S.A. 43:15A-4. The Public Employees Retirement System was then established as the State agency to provide pension benefits for state employees pursuant to the enactment of the Public Employees Retirement-Social Security Integration Act of 1954. Laws of 1954, c. 84, § 7; N.J.S.A. 43:15A-7. The Retirement System continued the administrative practice of

SERS to allow for the optional election of membership by legislators except that membership for legislators who had served in the Armed Forces of the United States in time of war was made compulsory. Laws of 1955, c. 261, § 5; N.J.S.A. 43:15A-7 (c). Amendatory legislation in 1966 provided express statutory authorization for the optional enrollment of non-veteran legislators. Laws of 1966, c. 217, § 2; N.J.S.A. 43:15A-7(d). We have been advised that considerable numbers of State legislators have joined the PERS and have received the many benefits provided by that Retirement System.[1]

In 1972 it was deemed advisable by the Legislature to establish a new benefit and contribution schedule for its members within the existing framework of the Public Employees Retirement System by the enactment of the Legislative Pension Act of 1972. The lawmakers decided to extend mandatory enrollment to non-veteran legislators. N.J.S.A. 43:15A-135. The Act continued to confer on the members of the Legislature all of the existing benefits provided by the Public Employees Retirement System. N.J.S.A. 43:15A-135. These benefits include *inter alia* ordinary and accidental death benefits, N.J.S.A. 43:15A-49, as well as a noncontributory and additional contributory life insurance program, N.J.S.A. 43:15A-57. In addition, by virtue of the enactment of Laws of 1972, c. 167, an improved benefit and contribution program was enacted. It included an advantageous retirement allowance for those legislators who had attained the age of 60 years, and further included an eight year vesting period for a deferred retirement allowance. N.J.S.A. 43:15A-138, 139. The Act provided for a flat 5% contribution rate for all members of the Legislature irrespective of age on entry into the retirement system. An opportunity was also given for the purchase of prior service credit for all previous legislative service at a uniform rate of 5% of the salary received during such prior legislative tenure. N.J.S.A. 43:15A-136, 137.

The first issue raised is whether any legislative grant of pension benefits for legislators is in conformity with the provisions of Art. 4, §4, par. 7, insofar as it constitutes a deferral of the payment of legislative compensation until after the expiration of the legislative term.[2] The pertinent constitutional language provides as follows:

> "Members of the Senate and General Assembly shall receive annually, during the term for which they shall have been elected and while they shall hold their office, such compensation as shall, from time to time, be fixed by law and no other allowance, or emolument, directly or indirectly, for any purpose whatever..."

A review of the historical origins of this constitutional provision is important to a determination as to whether the benefits conferred by the Act are a constitutionally permissable form of legislative compensation within the contemplation of the framers of the 1947 New Jersey Constitution. In drafting this provision, a change was effected from fixed legislative compensation as prescribed in the 1844 Constitution and in its 1875 amendment to a flexible mode of compensation, subject only to the limitation that an increase or decrease in such compensation shall not become effective until the electorate has had an opportunity to express its choice for members of the General Assembly in the next succeeding general election.[3] Art. 4, §4, par. 8, 1947 New Jersey Constitution.

The proceedings of the 1947 constitutional convention reveal in this connection an almost exclusive concern with the question of fixed constitutional compensation

versus flexible compensation to be established by legislative enactment. The only reference to the prohibition of allowance discovered is the remark, in Committee, that "members of a legislative council could not be paid for what might amount to considerable extra work." 3 *Proceedings of the Constitutional Convention of 1947*, p. 689. While the constitutional history of Art. 4, §4, par. 7, thus does not provide any definitive insight into the character of the permissable "compensation" contemplated by that provision, it may be assumed that the constitutional framers considered to be embraced within the term "compensation" all of those pecuniary benefits of public service commonly comprehended under that terminology. The detailed specification of such "compensation" was purposely left to the broad discretion of the Legislature.

A public pension is a mode or form of deferred compensation where an employee receives pension service credit in a retirement system as compensation during his government service and where the payment of benefits are postponed until after employment with government has been terminated. A long line of judicial precedent has, accordingly, held that the legitimate compensation of a public employee for services rendered includes the deferred payment of a pension benefit. *Salz v. State House Commission*, 18 N.J. 106 (1955); *Hayes v. Hoboken*, 93 N.J.L. 432, 433 (E. & A. 1919); *Emanuel v. Sproat*, 136 N.J.L. 154 (Sup. Ct. 1947), affirmed 137 N.J.L. 610 (E. & A. 1948); *Passaic National Bank & Trust Co. v. Eelman*, 116 N.J.L. 279, 283 (Sup. Ct. 1936). This proposition was well illustrated in *Hayes v. Hoboken, supra*, at 433, where the Court of Errors and Appeals was confronted with the issue of whether a governmental pension fund act was violative of the state constitutional prohibition against the donation of public funds to or in aid of any individual association or corporation. The Court upheld the constitutionality of the Act and concluded the monies paid for pensions are validly a part of the compensation to be paid for the services rendered by members of the government. See also *Giannettino v. McGoldrick*, 295 N.Y. 208, 66 N.E. 2d 57 (Ct. App. 1946); *Kneeland v. Administrator, Unemployment Compensation Act*, 138 Conn. 63, 88 A. 2d 376 (Sup. Ct. Err. 1952). Therefore, Art. 4, §4, par. 4, par. 7, should be construed in light of the fact that a pension has been considered to be a form of deferred "compensation" for government service.

The question of whether legislative pensions are constitutionally permissible should also be determined in view of certain broad policies and objectives underlying the terms of all pension enactments. It is well established in our case law that a pension is a means or inducement to conscientious, efficient and honorable government service. *Hozer v. State, etc.*, 95 N.J. Super. 196, 199 (App. Div. 1967). The Supreme Court most recently in *Geller v. Dept. of Treasury*, 53 N.J. 591, 597 (1969) opined as follows:

> "Pensions for public employees serve a public purpose. A primary objective in establishing them is *to induce able persons to enter and remain in public employment*, and to render faithful and efficient service while so employed. 3 *McQuillin, Municipal Corporations* (3d Ed. Rev. 1963) § 12.141. They are in the nature of compensation for services previously rendered and act as an *inducement to continued and faithful service*. Being remedial in character, statutes creating pensions should be liberally construed and administered *in favor* of the persons intended to be benefited thereby." (cites omitted) (Emphasis added.)

The inclusion of legislators in a pension fund or retirement system is designed to promote all of these salutary objectives. It is contemplated that pensions will be an inducement to attract qualified citizens to devote themselves to a period of elected government service. In light of these essential policies underlying the enactment of pension legislation, a constitutional purpose to foreclose the award of retirement benefits for members of the State Legislature should appear in unavoidable terms and with unmistakable clarity. The presumption is that a statute is constitutional and it will not be declared inoperative or unenforceable unless it is plainly in contravention of a constitutional prohibition. *Daly v. Daly*, 21 N.J. 599, 604 (1956), *Lynch v. Borough of Edgewater*, 8 N.J. 279 (1951). In this case, there does not appear to be any identifiable constitutional purpose to negate the award of pensions as a form of additional compensation for members of the Legislature.

There is no sound basis to assume that the constitution framers contemplated that a pension benefit paid to members of the Legislature would be a form of impermissible remuneration for legislative service. The concern of the drafters was to prohibit allowances and emoluments to legislators over their prescribed compensation and not the provision of a new mode or form of compensation to be fixed from time to time. In view of the firmly established characterization of a pension as a payment of a deferred benefit on account of previously earned compensation for the rendition of government service, it may be reasonably concluded that a pension is a constitutionally permissible form of compensation within the intendment of Art. 4, §4, par. 7 of our State Constitution.

The second question posed by your inquiry is whether the effective date of the Act, November 3, 1972, is violative of Art. 4, §4, par. 8, of the 1947 New Jersey Constitution which provides as follows:

> "The compensation of members of the Senate and General Assembly shall be fixed at the first session of the Legislature held after this Constitution takes effect, and may be increased or decreased by law from time to time thereafter, *but no increase* or decrease *shall be effective until the legislative year following the next general election for members of the General Assembly.*" (Emphasis added.)

It is clear from the foregoing language that any increase in the compensation of members of the Legislature shall not become effective until the legislative year following the next general election for members of the General Assembly. In this case, chapter 167 of the Laws of 1972 became effective on November 3, 1972 or fourteen months prior to the legislative year following the next general election held for the members of the Assembly on November 6, 1973. We are, therefore, constrained to conclude that the administrative implementation of the improved benefit structure provided by this Act as of November 3, 1972 is interdicted by Art. 4, §4, par. 8 of our State Constitution, since the administrative effectuation of the Act by the PERS as of that date would permit an increase in compensation prior to the expiration of the constitutional waiting period for an increase in the compensation of members of the Legislature.

As a consequence, it is now incumbent on the Public Employees Retirement System in the Division of Pensions to effectuate such adjustments as may be necessary to administer the provisions of this Act in a purely prospective manner as of its constitutionally acceptable effective date or January 1, 1974. Increased or additional

benefits shall not become effective until that date and a member of the Legislature may not purchase credit for prior legislative service rendered before January 1, 1974 by paying the 5% rate prescribed by Section 3 of the Act. N.J.S.A. 43:15A-137. Rather, credit for previous legislative service many only be purchased at the actuarial rate generally applicable to the purchase of prior service credit in the Public Employees Retirement System. As a result, legislative service rendered prior to January 1, 1974 shall not be creditable towards a "3% of final compensation" retirement allowance provided by section 4 of this Act, but only creditable towards the normal service retirement allowance provided for all members of the PERS.[4] It is our opinion that these administrative practices in the implementation of the Act are consistent with the spirit and purpose underlying Art. 4, §4, par. 8, since there is no retroactive effect to an increase in legislative compensation prior to the constitutionally effective date of the Act.

For these reasons, it is our opinion that the provisions of the Legislative Pension Act of 1972 are constitutional under Art. 4, §4, par. 7 of the 1947 New Jersey Constitution, but are unconstitutional under Art. 4, §4, par. 8, insofar as the At specifies an effective date prior to January 1, 1974 which is the constitutionally effective date of the Act.

Very truly yours,
ROBERT J. DEL TUFO
Acting Attorney General

1. The records of the Division of Pensions reveal that as of September 22, 1971, 28 of the 40 senators and 39 of the 80 assemblymen were members of the Public Employees Retirement System.

2. Even though the issue directly posed concerns the validity of the Legislative Pension Act of 1972 under the applicable provisions of our State Constitution, the conclusions reached herein have equal application to all pensions granted to members of the State Legislature.

3. The original language of 1844 specified:

> "Members of the senate and general assembly shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the State; which compensation shall not exceed the sum of three dollars per day for the period of forty days from the commencement of the session, and shall not exceed the sum of one dollar and fifty cents per day for the remainder of the session. When convened in extra session by the Governor they shall receive such sum as shall be fixed for the first forty days of the ordinary session. They shall also receive the sum of one dollar for every ten miles they shall travel in going to and returning from their place of meeting, on the most usual route."

Art. IV, §4, par. 7 of the 1844 document, as amended, directed:

> "Members of the senate and general assembly shall receive annually the sum of five hundred dollars during the time for which they shall have been elected, and while they shall hold their office, and no other allowance or emolument, directly or indirectly, for any purpose whatever."

4. A member of the PERS who has attained age 60 shall receive "a pension in the amount which, when added to the member's annuity, will provide a total retirement allowance of 1/70 of his final compensation for each year of service credited as Class A service, and 1/60 of his final compensation for each year of service credited as Class B service)" N.J.S.A. 43:15A-48. In sharp contrast, a member of the PERS who attained the age of 60 years upon retirement on the basis of legislative service shall receive a more advantageous retirement allowance of 3% of final compensation as a legislator for each year of creditable service as a member of the Legislature. N.J.S.A. 43:15A-138.

November 7, 1974

WILLIAM DRUZ
Chief Examiner & Secretary
Department of Civil Service
209 East State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 13—1974

Dear Mr. Druz:

A recent class action brought by the Public Advocate against the Department of Civil Service and the Civil Service Commission has raised the issue of the constitutionality of the 12-month State residency requirement set forth in N.J.S.A. 11:9-2 and the 12-month State and/or local residency requirement imposed by N.J.A.C. 4:1-8.8(a)(2). For the following reasons, you are advised that such requirements are unconstitutional and that 12-month residency, State or local, should no longer be a condition of admission to civil service examinations. You are, however, advised that a bona fide residency requirement immediately preceding the announced closing date for filing examination applications is required pursuant to N.J.S.A. 11:9-2 and N.J.A.C. 4:1-8.8, as construed, in addition to N.J.S.A. 11:22-7.

A 12-month State residency requirement for State civil service positions is set forth in N.J.S.A. 11:9-2 which provides in pertinent part that open competitive tests shall be:

> ". . .open to citizens who may be lawfully appointed to any position in the class for which they are held, *who have resided in this state for at least twelve months prior to the date of the test. . . .*" (emphasis added)

Consistent with this statute, N.J.A.C. 4:1-8.8(a) (2) requires 12 month State and/or, local residency immediately preceding the announced closing date for filing an application for open competitive examination.*

A

STATE RESIDENCY REQUIREMENT

Durational state residency requirements are suspect as penalizing the constitutional right to interstate travel and any such requirement must be justified by a compelling governmental interest. *Memorial Hospital v. Maricopa County,* 415 U.S. 250, 94 S. Ct. 1076, 39 L. Ed. 2d 306 (1974); *Dunn v. Blumstein,* 405 U.S. 330, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972); *Shapiro v. Thompson,* 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969).

In *Shapiro v. Thompson, supra,* the Supreme Court recognized that there existed a fundamental personal liberty known as the right to travel or freedom to migrate. Speaking in the context of a welfare setting wherein the plaintiffs were challenging various state regulations requiring them to reside in the state for at least one year before becoming eligible for benefits, the Supreme Court held that in order to justify such a penalty or burden upon the excercise of the right to travel the state had to demonstrate a compelling state interest. A mere rational relationship between the law and its goals, the traditional test, would no longer suffice. 394 U.S. at 634, 638. The various state interests advanced, protection of the local budget, past tax

contributions made by prior residents, and various administrative arguments relating to planning and protection against fraud, were all rejected as insufficiently compelling in order to justify penalizing those who had exercised their right to travel by depriving them for one year of welfare benefits. The court restricted its opinion by indicating in a footnote that it was implying "no view of the validity of waiting—period or residency requirements determining eligibility for tuition—free education, to obtain a license to practice a profession . . . and so forth." 39 U.S. at 638 n. 21.

Recent federal cases have shown no hesitancy in applying the compelling state interest test to invalidate other durational state residency requirements. In *Dunn v. Blumstein, supra,* the court invalidated a durational state residency voting requirement applied against a resident recently settled in the state. The court observed that the right to travel was fundamental and that any classification which serves to penalize the exercise of that right was invalid without a showing of compelling state interest. "Durational residence laws impermissibly condition and penalize the right to travel by imposing their prohibitions on only those persons who have recently exercised that right" *Id.* at 342. Most recently, in *Memorial Hospital v. Maricopa County, supra,* the United States Supreme Court invalidated a 12-month state residency requirement for free, state-funded medical care. In discussing what types of durational residency requirements would require the showing of a compelling state interest, the court stated that at the very least "the right of interstate travel must be seen as insuring new residents the same right to vital governmental benefits and privileges in the state to which they migrate as are enjoyed by other residents." *Id.* 415 U.S. at 261. The reasons given by the state, *i.e.*, fiscal integrity of its free medical care program, prevention of immigration, deterrence of those indigents who take up residence in the county solely to utilize public medical facilities and prevention of dilution of quality of services to long-time residents, were rejected.

Although the United States Supreme Court has not invalidated state residency requirements imposed upon applicants restricting their opportunity to apply for public employment, the court in *Shapiro* did describe the right to interstate travel as a right "to migrate, resettle, *find a new job* and start a new life," 394 U.S. at 629. The court has further said that the right to work for a living "is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth Amendment] to secure" *Truax v. Raich,* 239 U.S. 33, 36 S. Ct. 7, 60 L. Ed. 131 (1915). It has been said that "any limitation of the opportunity for employment impedes the achievement of economic security, which is essential for the pursuit of life, liberty and happiness. . ." *Purdy v. State,* 79 Cal. Rptr. 77, 456 P. 2d 645 (Sup. Ct. 1969). It might be argued that the provision of public jobs is not a benefit or service of the government. However, it can hardly be argued that the opportunity to apply for a public job is not directly related to a fundamental necessity of life and that a 12-month residency requirement is not a hindrance thereof.

Accordingly, that part of N.J.S.A. 11:9-2 and N.J.A.C. 4:1-8.8(a)(2) which imposes upon civil service examination applicants a 12-month residency requirement is inconsistent with the constitutionally protected right to travel as espoused by the United States Supreme Court in *Shapiro, Dunn* and *Maricopa County.* The rejection of a variety of proffered state interests by the United States Supreme Court in those cases leaves no doubt that the 12-month State residency requirement of N.J.S.A. 11:9-2 and N.J.A.C. 4:1-8.8(a)(2) cannot be justified and that such requirement is unconstitutional. See *State v. Wylie,* 516 P. 2d 142 (Sup. Ct. Alaska 1973); *York v. State,* 53 Hawaii 557, 498 P. 2d 644 (Sup. Ct. 1973). *Cf. Keenan v. North Carolina Board of Law Examiners,* 317 F. Supp. 1350 (D.N.C. 1970).

B
DURATIONAL LOCAL RESIDENCY REQUIREMENT

That which has been said concerning the durational State residency requirement is equally applicable to a local durational residency requirement as applied to an out-of-state resident. *Memorial Hospital v. Maricopa County, supra.* The United States Supreme Court, however, in that case left open the issue of whether the right to travel extended to intrastate travel and whether a local residency requirement imposed upon a state resident was subject to the compelling state interest test. Although several federal appellate courts have extended the right to travel to intrastate travel and have invalidated local durational residency requirements under the compelling state interest test, there is now considerable doubt with respect to such an extension of an individual's constitutional right to travel. *Id.; Abrahams v. Civil Service Commission,* 65 N.J. 61 (1974), n. 3.

It may be questionable as to whether the reasons advanced and accepted by the New Jersey Supreme Court in *Abrahams* in support of a bona fide residency requirement would justify a classification made between 12-month residents and less than 12-month residents or that any other reason would justify such a classification. Even assuming, however, there is a rational basis for the 12-month local residency requirement, the imposition of such requirement by the Department of Civil Service is beyond its statutory authority. Although the Chief Examiner and Secretary has the power to establish requirements for examinations, N.J.S.A. 11:9-2, the Legislature has, with respect to local service, already set a residency requirement. N.J.S.A 11:22-7 specifically states that eligibility of applicants for admission to civil service examination shall be limited to "qualified residents" of the particular county, municipality or school district. Thus the only residency requirement for admission to examinations is that the applicant be a bona fide resident. The Legislature having clearly expressed a determination that bona fide residency, without regard to duration, is sufficient to serve the State's interest, the imposition by the Chief Examiner and Secretary of a 12-month local requirement is beyond his authority and is unenforceable.

CONCLUSION

Accordingly, you are advised that the 12-month State residency requirement imposed by N.J.S.A. 11:9-2 and N.J.A.C. 4:1-8.8(a)(2) is inconsistent with the constitutionally protected right to interstate travel as espoused by the United States Supreme Court in *Shapiro, Dunn* and *Maricopa County* and is unenforceable. You are further advised that the 12-month local residency requirement imposed by N.J.A.C. 4:1-8.8(a)(2) is inconsistent with N.J.S.A. 11:22-7 and is therefore also unenforceable.

With respect to the remaining portions of N.J.S.A. 11:9-2 and N.J.A.C. 4:1-8.8 you are advised they remain effective since the objectionable 12-month requirement can be removed without substantial impairment of the principal object of the statute and regulation. See *N.J. Chapt. Am. I.P. v. N.J. State Board of Prof. Planners,* 48 N.J. 581, 593 (1967). As so construed, N.J.S.A. 11:9-2 and N.J.A.C. 4:1-8.8 impose a bona fide State and/or local residency requirement immediately preceding the announced closing date for filing an examination application.

You are advised that N.J.A.C. 4:1-8.8 should be immediately amended to conform with this opinion. Notice and an opportunity to be heard prior to final adoption of the amendment should be given pursuant to N.J.S.A. 52:14B-4. Prior to final

adoption, you should conditionally admit applicants to examinations with a residency requirement if such applicants are bona fide residents immediately preceding the announced closing date for filing examination applications and if they are otherwise qualified.

Very truly yours,
WILLIAM F. HYLAND
Attorney General
By: ERMINIE L. CONLEY
Deputy Attorney General

* In contrast, the controlling statute with respect to applicants for local civil service examinations, N.J.S.A. 11:22-7, imposes a mere bona fide continuing residency requirement. This requirement is not in question and is unquestionably valid. *Abrahams v. Civil Service Commission*, 65 N.J. 61 (1974).

October 7, 1974

MR. VERNON N. POTTER
Director
New Jersey Division on Civil Rights
1100 Raymond Boulevard
Newark, New Jersey 07102

FORMAL OPINION NO. 14—1974

Dear Director Potter:

You have requested our opinion whether an employer may lawfully refuse to employ an individual after a pre-employment examination shows that the individual suffers from diabetes. You are advised that diabetes constitutes a "physical handicap" as defined by the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 *et seq.*, and that an employer may not so discriminate except upon proof, as permitted by N.J.S.A. 10:5-4.1, that "the nature and extent of the handicap reasonably precludes the performance of the particular employment."

Preliminarily, it should be noted that, in those instances when the jurisdiction of the Division on Civil Rights has been challenged, the courts in New Jersey have consistently construed broadly the provisions of the Law Against Discrimination in the contexts of both employment and public accommodations. *Blair v. Mayor and Council of Borough of Freehold*, 117 N.J. Super. 415 (App. Div. 1971). See also *Clover Hill Swimming Club v. Goldsboro*, 47 N.J. 25 (1966); *Sellers v. Philip's Barber Shop*, 46 N.J. 340 (1966); *Fraser v. Robin Dee Day Camp*, 44 N.J. 480 (1965); *National Organization of Women v. Little League Baseball, Inc.*, 127 N.J. Super. 522 (App. Div. 1974). In fact, the Supreme Court of New Jersey has pointed out "the clear and positive policy of our state against discrimination" which "calls for

liberal interpretation of any legislative enactment designed to implement it." *Levitt & Sons, Inc. v. Division Against Discrimination*, 31 N.J. 514, 524 (1960). See also *Jackson v. Concord Company*, 53 N.J. 113 (1969).

When viewed especially from the perspective of the liberal interpretation given the statute by the courts, a reading of the New Jersey definition of "physical handicap" as well as a comparison of that provision with the earlier definition contained in the Law on Human Rights of the City of New York demonstrates the intention of the New Jersey Legislature to encompass the broadest variety of disabilities. N.J.S.A. 10:5-5 (q) provides:

> " 'Physical handicap' means any physical disability, infirmity, malformation or disfigurement which is caused by bodily injury, birth defect or illness including epilepsy, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment or physical reliance on a seeing eye dog, wheelchair, or other remedial appliance or device."

Four years before the effective date of the New Jersey amendment, New York City in 1968 had amended its Law on Human Rights so as to include the physically handicapped, but with a definition whose scope is rather narrow:

> "The term 'physically handicapped' means a person who, because of accident, illness or congenital condition may depend upon a brace, crutch, cane, seeing eye dog, hand controlled car or such other device or appliance in performance of his daily responsibilities as a self-sufficient, productive and complete human being," N.Y., N.Y., Administrative Code, Chapter I, Title B, Section B1-2.0 (16).

The major deficiency in this definition is its apparent requirement that an individual be encompassed by it only if he can show dependence upon a physical appliance or device such as crutches, canes or hand controlled cars. In a report entitled THE PHYSICALLY HANDICAPPED CITIZEN: A HUMAN RIGHTS ISSUE, released in September 1972, the New York City Commission on Human Rights pointed out that many persons do not rely upon physical devices, yet are physically handicapped nonetheless, and said that "definitions based on reliance on devices inevitably will be ambiguous and limited, given the rate of change in rehabilitative techniques." *Id.* at 13.

In contrast, the New Jersey statutory definition is conceptually based, not upon the fortuitous circumstances of reliance upon a physical device, but upon those physical manifestations which characterize virtually every physical handicap. This legislative philosophy and the language chosen to implement it mandate the conclusion that diabetes is encompassed. Diabetes is, of course, commonly understood to be an "infirmity", defined as "the state. . .of poor or deteriorated vitality." WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 432 (1972). "Vitality," in turn, is defined as "capacity to live and develop," "physical or mental vigor," and "power of enduring or continuing." *Id.* at 995. It is generally known that diabetes, if untreated, often results in disorientation, coma, and death. Diabetes falls also within

the dictionary definition of "physical disability," for the verb "disable" means "to deprive of physical, moral or intellectual strength," *id.* at 236, obviously the condition of an individual whose diabetic condition is not properly controlled. Interestingly, one definition of "disability" is "inability to pursue an occupation because of physical or mental impairment." *Id.* Undoubtedly the dictionary writer supposed such "inability" to mean an *absolute* incapacity to pursue the occupation, but when that definition is read in light of the mandate of the New Jersey Law Against Discrimination that employers not discriminate against the physically handicapped unless the nature and extent of the handicap reasonably precludes the performance of the particular employment," N.J.S.A. 10:5-4.1, the definition obviously encompasses conditions of physical impairment which, although they do not in fact reasonably preclude performance of the employment, are seen fit by employers to justify a refusal to hire.

A distinction has been suggested between physical impairment and medical impairment, by whose terms a diabetic applicant for employment would be deemed to suffer from a lingering, degenerative illness that does not constitute a physical handicap as such. The proposed distinction is, however, difficult to justify. "Physical" is defined as "of or relating to the body," WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 638 (1972), and it would appear conceptually impossible for a "medical" impairment involving bodily functions not to manifest itself physically in some manner; equally difficult to imagine are manifestation of bodily functions which would not be encompassed within the definition of "physical." The ultimate conclusion must be that if there are bodily manifestations fitting within the definitions of "physical disability," "infirmity," "malformation," or "disfigurement," those bodily manifestations constitute a "physical handicap."

Again, therefore, the "physical handicap" amendment is consistent with the breadth of the other provisions of the Law Against Discrimination. See *Levitt & Sons, Inc. v. Division Against Discrimination* and *Jackson v. Concord Company, supra.* Our conclusion that diabetes is encompassed within the definition does not imply, of course, that a refusal to employ a diabetic applicant must necessarily constitute unlawful discrimination, for, as noted at the outset, the Legislature was fully aware of the severity of some physical handicaps and consequently authorized employment discrimination when "the nature and extent of the handicap reasonably precludes the performance of the particular employment." N.J.S.A. 10:5-4.1. Nevertheless, that determination is one of fact which must be made by the Director of the Division on Civil Rights in the first instance when deciding the existence of probable cause and subsequently when reviewing all evidence submitted at hearing on behalf of both the complainant and the respondent. Our conclusion is, again, that diabetes is comprehended by the statutory provision and the Division may pursue complaints submitted by diabetic persons.

Very truly yours,
WILLIAM F. HYLAND
Attorney General
By: BERTRAM P. GOLTZ, JR.
Deputy Attorney General

November 20, 1974

RICHARD F. SCHAUB, *Commissioner*
Department of Banking
36 West State Steet
Trenton, New Jersey 08625

FORMAL OPINION NO. 15—1974

Dear Commissioner Schaub:

You have inquired whether the prohibition on the charging of points in connection with a mortgage loan contained in N.J.S.A. 46:10B-10 would prevent the participation of New Jersey mortgage lenders in the Conventional Home Mortgage Purchase Program (hereinafter referred to as the "Program") that is being offered by the Government National Mortgage Association (hereinafter referred to as "GNMA") pursuant to the Emergency Home Purchase Assistance Act of 1974* (hereinafter referred to as the "Act"), 12 U.S.C.A. §1723e. For the reason expressed below, it is our opinion that N.J.S.A. 46:10B-10 does not prohibit the participation of New Jersey mortgage lenders in the Program.

Heretofore, GNMA was authorized to purchase only FHA-insured or VA-guaranteed mortgages. See 12 U.S.C.A. § 1717b(1). The instant Program was designed to broaden federal support of the mortgage market by allowing GNMA to purchase conventionally financed home mortgages. To this end, Congress has made an initial appropriation of $1.5 billion, of which $47 million has been allocated to New Jersey. The Program, administered through the facilities of the Federal National Mortgage Association, will operate in the following manner: The private mortgage lenders will enter into a GNMA general commitment contract.** A lender would, before commitment, telephone GNMA stating that it has a mortgage and seeks GNMA approval. Then, having obtained approval, the lender would close the mortgage and subsequently negotiate it to GNMA. You have informed us that the Secretary of the Department of Housing and Urban Development will provide by regulation that an aggregate of 6 1/2 points will be charged to both the purchaser and seller, 2 points to be kept by the mortgage lender and 4 1/2 points to be retained by GNMA. As a matter of fact, this administrative determination has already been set forth in the *GNMA Conventional Seller/Servicer Guide.*

N.J.S.A. 46:10B-10 provides that:

> "Except as otherwise provided by law, no mortgage loan shall be made at an interest rate in excess of the rate authorized by section 31:1-1 of the Revised Statutes. The charging of points in connection with a mortgage loan is prohibited. For the purposes of this act, 'points' means an amount of money or other consideration paid for the making of a mortgage loan, other than interest payable pursuant to the terms of the mortgage loan, *but does not include any such sum paid pursuant to a statute of this State or of the United States,* nor does it include reasonable expenses and charges." (Emphasis added.)

The underscored language creates an exception to the prohibition on points. This exception has properly been the basis upon which the assessment of points has

been permitted in New Jersey in conjunction with the making of FHA/VA mortgage loans. It should be noted that the number and allocation of points charged in connection with FHA/VA loans are set by regulation, not by the enabling statute itself.*** *FHA Administrative Rules* subsection 203, ch. XIII, §§ 1301-03, 24 C.F.R. § 203.27; *FHA Administrative Rules; Application Through Commitment*, formerly the *FHA Mortgagee Handbook*. See also *Lord v. Marine Midland Trust Co.*, 61 Misc. 2d 776, 306 N.Y.S. 2d 82, 86 (Sup. Ct. 1969). The Program will operate in the same manner, *i.e.*, the Secretary of the Department of Housing and Urban Development will set by regulation the number and allocation of points to be charged.**** But the fact that the points are set by regulation and not by statute does not take either the FHA/VA programs or the new Program out of the above-noted exception. It is apparent, first of all, that points seem to be generally contemplated by the enabling statutes and, as such, points might well be considered as being paid pursuant to the statutes themselves. Beyond this, and more importantly, however, such regulations, when validly issued by an administrative agency, have the force and effect of law, *Paul v. United States*, 371 U.S. 245, 83 S. Ct. 426, 9 L. Ed. 2d 292 (1963), and have been held to be included within the term "the law of the state." *United States v. Howard*, 352 U.S. 212, 77 S. Ct. 303, 1 L. Ed. 2d 261 (1957). Furthermore, the word "statute" has been held to include regulations of an administrative agency. *Ala. Public Service Commission v. Southern Ry. Co.*, 341 U.S. 341, 342-43, 71 S. Ct. 762, 95 L. Ed. 1002 (1951); *Sigma Chi Fraternity v. Regents of University of Colorado* 258 F. Supp. 515, 521-22 (D. Colo. 1966). But see *United States v. Mersky*, 361 U.S. 431, 437, 80 S. Ct. 459, 4 L. Ed. 2d 423 (1959).

Based upon the foregoing, it is clear that the fact that points are set by regulation and are not specifically listed in the body of the enabling legislation is not of consequence in this context and both the FHA/VA programs and the Program with which we are here specifically concerned fall within the statutory exception of N.J.S. A. 46:10B-10. For the reasons expressed above, N.J.S.A. 46:10B-10 does not prohibit the participation of New Jersey mortgage lenders in the program.

Very truly yours,
WILLIAM F. HYLAND
Attorney General

By: MICHAEL E. GOLDMAN
Deputy Attorney General

* Public Law 93-449, approved October 18, 1974, a copy of which is attached hereto as "Exhibit A."

** Under present Federal guidelines, this contract must be entered by November 30, 1974.

*** For a full discussion of the points system on FHA/VA mortgages, see Hood and Kushner, *Real Estate Finance: The Discount Point System and Its Effects on Federally Insured Loans*, 40 U.Mo.K.C. Law Rev. 1 (1971).

**** We have been informed that there is some question as to the propriety of the Secretary's establishment of points in connection with the Program. See letter from Senator John Sparkman, *et als.* to James T. Lynn, Secretary of Housing and Urban Development, dated November 11, 1974, a copy of which is attached hereto as "Exhibit B." For purposes of this opinion, we assume the validity of the Secretary's regulation unless and until a contrary judicial decision is handed down.

December 13, 1974

To: ALL COUNTY PROSECUTORS
State of New Jersey

FORMAL OPINION NO. 16—1974

Dear Prosecutors:

As you are aware, questions have been raised as to the propriety of organizations or associations of law enforcement officers soliciting funds by mail or otherwise for advertising, which is included in annual dinner dance program booklets and the jurisdictional limitations, if any, which are placed on such solicitations.

As a result of existing statewide variations in both the interpretation of the provisions of N.J.S. 2A:170-20, *et seq.* and the practices to be employed thereunder, the Attorney General has been asked to render a formal opinion as to the legality of such solicitation practices and to establish a uniform procedure for the enforcement of the provisions of 2A:170-20, *et seq.*

Fund raising practices by organizations or associations of policemen, sheriffs, undersheriffs, deputy sheriffs, court officers, court attendants, detectives, constables, magistrates, or other such law enforcement officers, or any organization or association composed of one or more of said groups, are regulated by the provisions of N.J. S. 2A:170-20, *et seq.* as amended in 1954.

For the purpose of analysis, the questions presented may be outlined as follows.

1. *Solicitations for Advertisements*

On March 22, 1954, the New Jersey Law Enforcement Council submitted its second and final report on law enforcement solicitations. That report provides the historical basis for amendments to *N.J.S.* 2A:170-20 *et seq.* effected during that year, which in part relate specifically to solicitations for advertising.

Pursuant to the provisions of *N.J.S.* 2A:170-20, as amended, it is ". . . unlawful for any person to solicit funds or a contribution of any fund, by mail, telephone or in person or by any means whatsoever, whether in payment for tickets, admission, books, tokens, advertising, honorary or other membership, . . ." except that certain active members of such associations ". . . may personally solicit such funds or contributions, but only in payment for tickets, books or tokens . . ."

In its Letter of Transmittal and Recommendations, the New Jersey Law Enforcement Council specifically and strongly recommended, at page 8:

> "2. That solicitations of funds by associations or organizations composed of members or former members of law enforcement agencies through the sale of advertisements be prohibited."

Subsequent thereto, *N.J.S.* 2A:170-20 was amended and now states, in part, that:

> "it shall be unlawful for any person to solicit funds or contributions of any kind for or on behalf of any such organization or association *by any means whatsoever in payment for advertising of any kind.*" (Emphasis added).

Therefore, it is concluded that *N.J.S.* 2A:170-20 specifically prohibits the solic-

itation of funds by mail or otherwise for advertising of any kind, including, but not limited to, that which appears in annual dinner dance or other program booklets.

2. *Methods of Solicitation*

The method by which all other solicitations may be made is also delineated by the provisions of *N.J.S.* 2A:170-20. As noted above, only certain active members of law enforcement organizations or associations may personally solicit funds or contributions on behalf of such organizations.

No other persons are permitted to solicit funds, by any means whatsoever, on behalf of such organizations. Since the statutory exception specifically permits only personal solicitations, the use of that term necessarily limits all solicitations to face-to-face encounters between certain active members of such organizations or associations and potential contributors.

Therefore, it is concluded that telephone, mail or any other non face-to-face solicitation techniques are prohibited and unlawful.

In addition to the foregoing, the provisions of *N.J.S.* 2A:170-20 impose specific jurisdictional limitations upon solicitation practices by providing that only "bona-fide active members of such organizations or associations may personally solicit such funds or contributions, . . . in the municipality where they are employed as law enforcement officers, or where retired as such, or in case of county or state organizations or associations throughout the county or state where they are employed as law enforcement officers or retired as such."

It is concluded, therefore, that members of such organizations or associations may solicit contributions only within the boundaries of the jurisdiction where they are or were employed as law enforcement officers.

3. *Uniform Enforcement*

In order to provide for the uniform enforcement of the provisions of *N.J.S.* 2A:170-20 *et seq.*, each county prosecutor should be cognizant of the following additional statutory requirements.

Each law enforcement organization or association must submit a notice of intention to solicit funds with the county prosecutor's office in each county within which such solicitation is to be made, pursuant to *N.J.S.* 2A:170-20.2. A suggested format for such Notice of Intention to solicit funds is annexed.

It should be noted that if the anticipated or actual proceeds of any solicitation campaign exceed $10,000 then the provisions of the Charitable Fund Raising Act of 1971 (*N.J.S.* 45:17A-1 *et seq.*) must in addition to the provisions of *N.J.S.* 2A:170-20 *et seq.* be complied with.

Upon receipt of the Notice of Intention, the county prosecutor should review same and, if any prohibited means of solicitation are indicated, the filing organization or association may properly be notified and advised to not engage in such means of solicitation.

The proceeds of any program of solicitation conducted by a law enforcement agency must be deposited in a trust fund in accordance with *N.J.S.* 2A:170-20.3 and withdrawals of said funds must be effected in compliance with the provisions of that statute.

Pursuant to the provisions of 2A:170-20.2, at the close of a solicitation drive the organization or association must file a report and audit with each county prosecutor's office in which a Notice of Intention was filed and with the Attorney General's office if the soliciting organization or association is a state organization or association. A suggested format for such report and audit is annexed.

4. *Penalties*

Any violation of the provisions of *N.J.S.* 2A:170-20 *et seq.* subjects the violator to prosecution as a disorderly person. (See *N.J.S.* 2A:170-20, 20.1, 20.2, 20.3, 20.4 and 20.5).

CONCLUSION

Organizations or associations of law enforcement officers are prohibited, by the provisions of *N.J.S.* 2A:170-20 *et seq.* from soliciting funds by any means for advertising of any kind, including but not limited to advertising which is intended for inclusion in annual dinner dance program booklets.

In addition, members of such organizations or associations may only lawfully solicit certain types of contributions or funds, personally, and then only within the jurisdiction where each is employed or was retired as a law enforcement officer.

Very truly yours,
WILLIAM F. HYLAND
Attorney General

By: DENNIS L. BLISS
Deputy Attorney General

(NOTE: Any funds collected pursuant to solicitation campaign must be deposited in a trust fund in a bank licensed to do business in the State of New Jersey as provided by N.J.S. 2A:170-20.3. In addition to filing with the county prosecutor's office, a copy of this report must be filed with the Attorney General's office *if* the reporting agency is a state organization or association.)

REPORT OF COLLECTION OF FUNDS

Dear Sir:

Pursuant to N.J.S. 2A:170-20.2, the _____ (full name of organization) ____, located at _____ (street address, city, state, zip code), submits this REPORT concerning a solicitation conducted pursuant to a NOTICE OF INTENTION which this organization filed on _____ (date). In accordance with this law,his REPORT is filed within thirty (30) days (and in no event later than six (6) months) following the close of that solicitation. The NOTICE OF INTENTION can be found at _____ (street address, city, state and zip code).

The solicitation was conducted from _____ (date) to _____ (date) _____, and in the following manner:

From this solicitation a GROSS AMOUNT OF $_____ was received. After EXPENSES of $_____, itemized below, a NET AMOUNT of $_____ was realized. The itemized expenses were:

The name of the INDEPENDENT AUDITOR who made an AUDIT of the solicitation is _____ (name), and he resides at _____ (street address, city, state, zip code). This AUDIT is open to the public, and may be inspected at _____ (street address, city, state, and zip code), at _____ (dates and hours).

The proceeds of this solicitation have been deposited in a trust fund entitled _____ (name of trust fund) in the _____ (name of bank and address.).

A copy of this AUDIT is annexed to this REPORT, which is

subscribed and sworn to by:
1. _____
2. _____
Who are officers of the Association duly authorized to so subscribe and swear by resolution of the Association.

Subscribed and Sworn to
before me, a NOTARY PUBLIC
OF NEW JERSEY, this _____
day of _____, 1974.

_____
A Notary Public of New Jersey

(NOTE: This report must be filed with the county prosecutor's office of the county within which each organization intends to solicit. Said report must be filed no later than ten (10) days prior to the commencement of solicitation. Solicitation by telephone or by mail is prohibited. No funds may be solicited for advertisements or space in "Ad Books" or variations thereof.

NOTICE OF INTENTION
TO SOLICIT FUNDS

Dear Sir:

Pursuant to *N.J.S.* 2A:170-20.2, the _____ (full name of organization), located at _____ (street address, city, state, zip code), submits this NOTICE OF INTENTION to solicit or collect funds. In accordance with the Provisions of *N.J.S.* 2A:170-20, *et seq.*, this NOTICE is filed ten (10) or more days prior to the commencement of the desired solicitation. The solicitation will commence on _____ (date) and will terminate on _____ (date).

The names and addresses of the officers of this Association are:
1. _____
2. _____
3. _____
4. _____
5. _____
6. _____

The name(s) of the member(s) of this Association who will be in charge of this solicitation is (are):
1. _____
2. _____
3. _____
4. _____

The form of this solicitation or collection will be: (describe means of solicitation or collection)

The net proceeds (gross proceeds less expenses) of this solicitation shall be used for the following purpose(s):

An AUDIT will made of the solicitation or collection by _____ (name of auditor), an Independent Auditor.

This AUDIT will be available for public inspection at the office of the Association, who address is _____ (street address, city, state, and zip code)

Very truly yours,
This notice is subscribed and sworn to by:
1. _____
2. _____
Who are officers of the Association duly authorized to so subscribe and swear by resolution of the Association.

Subscribed and Sworn to
by me, a NOTARY PUBLIC of
NEW JERSEY, this _____
day of _____, 1974.

_____
A Notary Public of New Jersey

November 13, 1974

HONORABLE DAVID J. BARDIN
Commissioner, Department of
Environmental Protection
Rm. 801 – Labor & Industry Bldg.
John Fitch Plaza
Trenton, New Jersey 08625

FORMAL OPINION NO. 17–1974

Dear Commissioner Bardin:

You have requested an opinion as to whether revenue from the Water Conservation Bond Act of 1969 (L. 1969, c. 127), hereinafter referred to as the Bond Act of 1969, can be used by the Department of Environmental Protection to construct water transmission facilities from the Round Valley-Spruce Run reservoir complex (hereinafter referred to as the RV-SR complex). In particular, you are interested in knowing whether the aforementioned revenue can be used to construct an outlet water transmission pipeline, approximately 3.7 miles in length, from the north dam of the Round Valley reservoir to a point on the south branch of the Rockaway Creek. The outlet water transmission pipeline would allow the RV-SR complex to make available for sale at Bound Brook the maximum water yield of these reservoirs.

In answering the question posed, it is necessary to briefly examine the background of the RV-SR complex. In 1958 the Legislature enacted the "New Jersey Water Supply Law, 1958", N.J.S.A. 58:22-1, *et seq.*, which mandated the Department of Conservation and Economic Development to construct, operate and maintain reservoirs at Round Valley and Spruce Run. Simultaneously with the enactment of the aforementioned statute, the Legislature also passed the "New Jersey Water Bond Act, 1958" (L. 1958, c. 35), hereinafter referred to as the Bond Act of 1958, which was approved by public referendum in November 1958. Revenue from the Bond Act of 1958 was used to construct the RV-SR complex.

The RV-SR complex was completed in 1965. However, even before its completion it became apparent that the funds allocated to the project were not sufficient to construct a fully operational outlet water transmission system permitting the release of the maximum available water from the reservoirs. In 1962, the Legislature sought to deal with this problem by enacting the "Water Transmission Facilities Act", N.J.S.A. 58:5-31, *et seq.*, which authorized the North Jersey District Water Supply Commission (hereinafter referred to as the NJDWSC), to construct and operate water transmission distribution facilities from the RV-SR complex to the northern part of the State. Efforts to solve the problem pursuant to this statute were unsuccessful and no water transmission distribution facilities were built. It appears that the NJDWSC was unable to implement the construction in question because it was unable to reach the necessary underlying agreements with various municipalities and companies with whom it contracts for the sale of water.

In 1969, the issue of outlet water transmission facilities at the RV-SR complex once again came before the Legislature when it was considering the Bond Act of 1969. The aforementioned legislation, when initially introduced into the Assembly, made specific reference to the immediate need to make Round Valley reservoir fully operational by constructing outlet water transmission facilities and further estimated the cost of same at $4,000,000.00 (sections 2(b) and 2(i) respectively of Assembly Bill 940 as initially introduced[1]). However, when the Bond Act of 1969

was passed, all direct reference to the RV-SR complex had been omitted. In response to this omission, a new Bill entitled the "Round Valley Water Release Bond" (Assembly Bill No. 1010, Assembly Session 1969) was introduced into the Assembly. Said Bill provided for the creation of a debt by the State of New Jersey, by the issuance of bonds in the amount of $4,000,000.00 for the planning and constructing of outlet water transmission facilities at the Round Valley reservoir. This Bill was never passed by the Assembly. Since 1969 the Legislature has not dealt with the problem of outlet water transmission facilities at the RV-SR complex.

In light of this background of the construction of RV-SR complex and the need for outlet works, the issue posed by your inquiry is whether unappropriated monies[2] from the Bond Act of 1969 may be appropriated to construct an outlet water transmission pipeline at the RV-SR complex. It is clear that funds presently appropriated for other projects pursuant to the Act cannot be used to construct the pipeline in question.

The Bond Act of 1969 provides for the issuance of Bonds in the amount of $271,000,000.00 to establish new and additional "water supply facilities" and "waste water treatment facilities". It is clear from the language of this statute that the construction of a water transmission pipeline is a proper use of bond revenue from said Act. The preamble to the Bond Act of 1969 states specifically that the revenue from the bonds created thereby can be used for transmission facilities in order to provide water resources for public purposes. In addition, "water supply facilities" are defined therein to include real property, plants, structures, machinery and equipment used for the transmitting of water. The outlet water transmission facility contemplated at the RV-SR complex would carry water from the north dam at the Round Valley reservoir to the south branch of the Rockaway Creek in Readington Township and thus fits within the aforementioned statutory definition of "water supply facilities".

This conclusion is further supported by sections 13, 14 and 4 of the Bond Act of 1969.

Section 13 reads as follows:

> "The proceeds from the sale of the bonds shall be paid to the State Treasurer and be held by him in a separate fund, and be deposited in such depositories as may be selected by him to the credit of the fund, which fund shall be known as the 'Water Conservation Fund'."

Section 14 reads in part as follows:

> "*The moneys in said 'Water Conservation Fund' are hereby specifically dedicated and shall be applied to the cost of the purpose set forth in section 4 of this act*, and all such moneys are hereby appropriated for such purpose, ..." (Emphasis added).

Section 4, referred to above, reads as follows:

> "Bonds of the State of New Jersey are hereby authorized to be issued in the aggregate principal amount of $271,000,000.00, for the purposes of ... water supply facilities ... for the preservation, sale or exchange of

water for potable, industrial, commercial, irrigational, recreational and other public purposes and facilities appurtenant thereto."

The clear import of the aforementioned is that money from the "Water Conservation Fund" may be appropriated for any purpose enumerated in section 4, *supra*. Inasmuch as the contemplated pipeline comes within the statutory definition of "water supply facilities" and section 4, *supra*, states that the $271,000,000.000 authorized to be issued can be spent for construction of "water supply facilities", the remaining unappropriated revenues from the Bond Act of 1969 may be used to construct the outlet water transmission facility in question.

This conclusion is valid despite language in the Bond Act of 1969 indicating that $242,000,000.00 of the $271,000,000.00 was to be spent for "waste water treatment facilities" and $29,000,000.00 of said sum for the planning and acquisition of future sites for various "water supply facilities". Sections 2(h) and 2(i) of the Bond Act of 1969 read as follows:

Section 2(h):

"Current estimates of the total cost of sewerage treatment facilities (hereinafter referred to as waste water treatment facilities) now required to be constructed to conform with our statutes and the regulations and orders of the State Department of Health, eligible costs of such construction will be $242,000,000.00 including projects already certified for Federal grants as well as additional State aid for State approved projects approved for 1968 and 1969 to increase the State's share for such approved projects to 25% of the eligible costs."

Section 2(i)

"Current estimates of the cost of planning and site acquisitions for the future establishment of water supply facilities at the following sites:

South River Tidal Dam, Middlesex county; Raritan River Confluence Reservoir, Somerset county; Manasquan River Upper and Lower Reservoirs, Monmouth county; Six Mile Run Reservoir, Somerset county; Two Bridges Reservoir, Essex and Morris counties; Hackettstown Reservoir, Morris, Sussex and Warren counties is $29,000,000.00."

Section 2(h) and 2(i), *supra*, appear in the body of the Bond Act of 1969 under the caption of section 2 which is "The Legislature finds and determines that ". This is an indication that in 1969 the Legislature felt that the "current estimates" it had at its disposal indicated that $242,000,000.00 was the State's contributory share of the funds required to build various "waste water treatment facilities" throughout the State,[3] and that $29,000,000.00 was needed for the planning and acquisition of future sites for "water supply facilities". Neither section 2(h) nor 2(i), *supra*, of the Act contain language which requires that the bond revenues be spent in accordance with the legislative findings of "current estimates". Section 4, *supra*, of the Bond Act of 1969, which enumerates the purposes for which said revenue can be appropriated, makes no mention of how the $271,000,000.00 is to be divided. In addition, the Bond Act of 1969, as approved by the voters in a general election, appropriated no money, but rather provided a fund from which the Legislature might make future appropriations. Sections 13 and 14, *supra*, of the Act, when discussing the purposes for which bond revenue can be appropriated, refer to section 4, *supra*, of the Act and make no mention of sections 2(h) and 2(i), *supra*. The clear import of the aforementioned is that the Legislature intended to leave to the future how and when the bond revenue was to be spent subject to the limitations contained in section 4, *supra*, of the Act. This being the case, the legislative findings enumerated in sections 2(h) and 2(i), *supra*, are not a mandatory commitment of the bond revenues and a succeeding Legislature could decide to use the remaining unappropriated revenue for a purpose(s) consistent with section 4, but other than for "waste water treatment facilities".

It should also be noted that use of the funds in question, for an outlet water transmission pipeline at the Round Valley reservoir, is not precluded by reason of the fact that reference to such an outlet pipe was deleted from the Bond Act of 1969 prior to its passage. Once again reference to the Round Valley reservoir appeared in section 2, *supra* (the legislative findings section of the Act). Deletion of said reference merely indicates that in 1969 the Legislature did not view the pipeline in question as one of the State's "most immediate needs". Section 2(b), *supra*, of the Bond Act of 1969 is merely a legislative expression of what was felt to be the State's "most immediate needs" in the area of "water supply facilities" and "waste water treatment facilities" in 1969. Such an expression could not be binding on subsequent Legislatures. If the Legislature now deems the Round Valley outlet water transmission pipeline to be an immediate need, it would not be barred from appropriating money from the "Water Conservation Fund" for such purpose by reason of the deletion in question.

In addition, it should be pointed out that restrictions contained in the Bonds issued pursuant to the Bond Act of 1958, *supra*, revenue from which was used to build the RV-SR complex, do not prohibit the use of revenue from the Bond Act of 1969 to construct the outlet water transmission pipeline at the Round Valley reservoir.

Section 21 of the Bond Act of 1958 designates the sources of revenue which are to be used to pay off the principal and interest of the debt created by the Act as it falls due and further states the order in which said revenue should be appropriated. First, "the net revenues, from the operation of any water supply facility, costs of which were financed by the proceeds of bonds issued under this act", are to be used. Second, tax revenues from the Alcoholic Beverage Tax Law, subtitle 8 of Title 54 of the Revised Statutes, are to be used as may be required. Finally, if the aforementioned are insufficient or unavailable to pay off the indebtedness as it becomes due, then an additional assessment on the real and personal property tax levied and collected by municipalities in the State is authorized and can be used for such purpose. "Net revenue", as used in section 19, is defined in section 3(h) to mean revenues received from the operation of a water supply facility in excess of "operating, maintaining, managing, repairing and reconstructing a water supply facility...." "Water supply facility" is defined in section 3(f) to mean real property, plans, machinery and equipment used to augment the State's natural water resources and for making available an increased supply of water for all uses and any and all appurtenances necessary ". . . for the collection, storage, control, sale or exchange of water . . . ."

This earlier act clearly requires that net revenues received from the "water supply facilities" financed by its bonds are to be applied to the payment of the existing bond debt. However, the term "water supply facilities" as defined in the Bond Act of 1958, *supra*, does not include water transmission facilities and thus net revenues from the transmission of water, in particular water transmission facilities financed with money from other sources, need not be committed to pay off the earlier Bond debt.

This distinction is supported by the intervening legislative enactment of the "Water Transmission Facilities Act", *supra,* in 1962. When the Legislature empowered the NJDWSC to construct water distribution transmission facilities, it also delegated authority to it to issue and sell bonds, N.J.S.A. 58:5-44 and N.J.S.A. 58:5-45. In addition, the NJDWSC was authorized to apply revenue from the proposed transmission facilities to satisfy the bonds issued. N.J.S.A. 58:5-48(6). This clearly indicates that the Legislature felt that revenue from water transmission facilities at the RV-SR was not committed to payment of the 1958 Bond indebtedness.

It should be noted that the Bond Act of 1969 when initially introduced into the Assembly included $4,000,000.00 for the construction of outlet water transmission facilities at the Round Valley reservoir. Since this Act also contains language similar to the language contained in the Bond Act of 1958, *supra,* with regard to payment of principal and interest on bonds issued pursuant thereto, namely, that said bonds be paid out of "[n]et revenues, if any, with respect to water supply facilities funded in whole or in part by the bonds", section 19(a), it is clear that the Legislature saw no conflict between it and the earlier Bond Act. There is nothing to indicate that the deletion of reference to Round Valley outlet works had anything to do with the prior Bond Act, and in fact, the Governor's Counsel's file of the Bond Act of 1969 indicates that the Attorney General's office approved the Bill in its initial form.

This being the case, it is reasonable to conclude that the restrictions contained in the aforementioned Bond Acts merely require that the net revenue from the sale of water from the RV-SR complex must be used to pay off the 1958 Bond indebtedness and net revenue from the transmission of water through the proposed pipeline, if any, must be used to pay off the 1969 indebtedness.[4] If this is done, revenue from the Bond Act of 1969 can be used to finance the proposed pipeline.

Finally, it should be noted that nothing in the "Water Transmission Facilities Act", *supra,* precludes the State, and in particular the Department of Environmental Protection, from constructing and operating the outlet water transmission pipeline from the Round Valley reservoir. This Act merely permitted the NJDSWC to construct and operate water transmission facilities in the northern part of the State. Said Act does not give the NJDWSC exclusive jurisdiction in this area. The legislative history of the Act indicates that its purpose was to have the NJDWSC build a water transmission distribution system from Round Valley to the northern part of the State, as opposed to an outlet water transmission facility, as proposed here. This being the case, there would be no jurisdictional conflict were the Department of Environmental Protection to build the outlet water transmission pipeline at the Round Valley reservoir.

In conclusion, it is apparent that the construction of an outlet water transmission facility at the Round Valley reservoir with revenue from the Bond Act of 1969 would be a proper use of said money. However, before this revenue can be used for such a project, the Bond Act of 1969 requires that a specific appropriation be made by the Legislature. An Act should first appropriate the money for the project to the Department of Environmental Protection and second, authorize it to undertake the construction in question.[5]

Very truly yours,
WILLIAM F. HYLAND
Attorney General
By: RONALD P. HEKSCH
Deputy Attorney General

1. Sections 2(b) and 2(i) of the Bond Act of 1969 initially read as follows:
Section 2(b):

> "The State's growing population and expanding industrial development require the establishment of new and additional water supply facilities. The planning and, subject to specific authorization by law, the acquisition of sites for the future establishment of such water supply facilities, and the making of Round Valley reservoir fully operational by the construction of Round Valley Outlet Works, however, are the most immediate needs."

Section 2(i):

> "Current estimates of the cost of planning and site acquisitions for the future establishment of water supply facilities is $27,000,000.00, and for the construction of the Round Valley Outlet Works, $4,000,000.00."

2. Of the $271,000,000.00 indebtedness authorized by the Bond Act of 1969 approximately $215,000,000.00 has been appropriated by the Legislature. Approximately $185,000,000.00 has been appropriated for sewer projects; $27,000,000.00 for land acquisition; and $2,000,000.00 for planning. This leaves a balance of approximately $55,000,000.00 unappropriated. The unappropriated money is from the $242,000,000.00 referred to in section 2(h) of the Act. The $29,000,000.00 referred to in section 2(i) was appropriated by the Legislature in 1970, N.J.S.A. 58:21B-3.

3. It is important to note here that the waste water treatment plants contemplated by section 2 (h) of the Bond Act of 1969 were to be built with Federal, State and local funds. In 1969, under Federal Law, the State's contributory share was to be 25%. Since 1969 the Federal statutes have been amended and the State's contributory share is no longer prescribed by Federal Law. Most recently, the State has chosen to contribute 15%.

4. At present, the cost of water per million gallons sold from RV-SR complex is broken down into various units, i.e., principal and interest, operating and maintenance reserve, etc., and the Department of Environmental Protection has advised us that it would be feasible to tack on a separate charge for the transmission of water through the proposed pipeline.

5. The initial estimates for the cost of the pipeline in question were $40,000,000.00 in 1969; however, at present, the estimated cost of the project is between 10-15 million dollars.

January 6, 1975

JOSEPH A. HOFFMAN, *Commissioner*
Department of Labor and Industry
Room 1303 - Labor and Industry Bldg.
John Fitch Plaza
Trenton, New Jersey 08625

FORMAL OPINION NO. 1 - 1975

Dear Commissioner Hoffman:

The Department of Labor and Industry has asked for an opinion as to the constitutionality of the New Jersey laws which provide for the payment of temporary disability benefits to disabled workers, insofar as the provisions allow unemployed women to collect benefits by reason of pregnancy only for an eight-week period surrounding childbirth. For the following reasons, you are advised that the provisions in question appear to be consistent with all constitutional requirements.

The unemployment insurance programs in each of the 50 states, which were spawned by the Social Security Act of 1935, are intended to provide unemployed workers with a temporary substitute for wages during a period of unemployment that is not the fault of the worker. *California Dept. of Human Resources v. Java*, 402 U.S. 121 (1971). The New Jersey Unemployment Compensation Law sets forth a number of conditions of eligibility for unemployment benefits. N.J.S.A. 43:21-1 *et seq.* Among other requirements, a claimant must demonstrate that he is "able to work," "available for work," and "actively seeking work." N.J.S.A. 43:21-4(c).

Prior to 1948, a worker who suffered an illness or accident that arose out of his employment and rendered him unable to work could apply for workmen's compensation benefits, but a worker who sustained a disability that did not occur in the course of his employment and who was not among the relatively few who were covered by private disability insurance plans was wholly unprotected against the loss of wages. The worker was ineligible not only for workmen's compensation but for unemployment insurance benefits as well, since by definition he was not "able to work," "available for work," or "actively seeking work" as required by the Unemployment Compensation Law. N.J.S.A. 43:21-4(c). To remedy this situation, the Legislature in 1948 enacted the Temporary Disability Benefits Law (N.J.S.A. 43:21-25 *et seq.*) to provide partial income replacement for workers who sustain a non-occupational illness or injury while employed, or within two weeks after becoming unemployed, and who as a result are rendered temporarily but totally unable to perform the duties of their job. At the same time, the Legislature amended the Unemployment Compensation Law to provide identical protection to workers who become disabled more than two weeks after they lose their jobs. L. 1948, c. 110.

Before 1961, both the Unemployment Compensation Law and the Temporary Disability Benefits Law prohibited the payment of disability benefits to women "for any period of disability due to pregnancy or resulting childbirth. . . ." In addition, another provision of the Unemployment Compensation Law stated that a worker who quit his or her job "voluntarily without good cause" was disqualified for *unemployment* benefits until such time as the worker got another job, earned a specified amount of wages, and again became unemployed. N.J.S.A. 43:21-5 (a). The net result of these provisions was to render an unemployed pregnant woman, with one

exception, ineligible for both unemployment benefits and temporary disability benefits. The exception was that a woman who was laid off from her job through no fault of her own and, despite her pregnancy, was still able to work, available for work, and actively seeking work, was deemed qualified for unemployment benefits. *Medwick v. Board of Review*, 69 N.J. Super. 338, 343 (App. Div. 1961).

In 1961, certain amendments relating to pregnancy were added to both the Unemployment Compensation Law and the Temporary Disability Benefits Law, and it is with the meaning and validity of these amendments that this opinion is concerned. L. 1961, c. 43. The Unemployment Compensation Law was amended to provide that an unemployed pregnant woman will not be considered "able to work" or "available for work" for the four-week period preceding the expected birth of the child or for four weeks after birth, thereby rendering such women ineligible for *unemployment* benefits for the eight-week period in question. N.J.S.A. 43:21-4(c)(1). At the same time, the provisions of both the Unemployment Compensation Law and the Temporary Disability Benefits Law which disallowed *disability* benefits "for any period of disability due to pregnancy or resulting childbirth. . ." were amended to provide such benefits for the same eight-week period. N.J.S.A. 43:21-4 (f) (1) (B); 43:21-39(e).[1] Although the reason for these amendments is not explicitly articulated, one court has commented that the Legislature "apparently deemed it desirable, as a matter of public policy, that a pregnant woman should have leisure to take care of herself and her child for the eight-week period." *Iorio v. Board of Review*, 88 N.J. Super. 141, 152 (App. Div. 1965). Finally, N.J.S.A. 43:21-5(a) of the Unemployment Compensation Law, which under the old law had disqualified for *unemployment* benefits workers who "left work voluntarily without good cause," was amended by appending the words "attributable to such work" to the latter clause. At the same time, the Legislature provided that "no disqualification shall be applicable to a woman who left or was separated from her work solely by reason of her pregnancy."

The upshot of the foregoing amendments, as they have been interpreted by the New Jersey courts, is this: Whereas all other claimants must show that they are *actually* disabled and under medical care during *each and every week* for which they seek disability benefits, an unemployed expectant woman who otherwise meets the eligibility requirements of the statutes in question is *automatically* entitled to disability benefits for the four weeks before and after childbirth solely by reason of her pregnancy. *Iorio v. Board of Review, supra.* Which of the two laws she is eligible under depends on whether she becomes "disabled" during employment or within two weeks after she leaves her job, in which case the Temporary Disability Benefits Law applies, or more than two weeks after she leaves her job, in which case the disability provisions of the Unemployment Compensation Law apply. In addition, whereas all other workers who leave their jobs for reasons which are not "attributable to the work" are disqualified for *unemployment* benefits, a woman who is compelled to leave her job because of pregnancy may collect such benefits if she is still able to work, available for work, and actively seeking work, except for the eight-week period surrounding childbirth.[2] Finally, in contrast to the above provisions, which accord expectant mothers a benefit given to no other category of claimants, N.J.S.A. 43:21-4 (f)(1)(B) and 43:21-39(e) provide that a woman is not entitled to disability benefits for any disability resulting from pregnancy outside the eight-week period surrounding childbirth.

The New Jersey disability benefits system is completely self-sustaining; that is, it is funded entirely by "contributions," or taxes, paid by workers and their employers

based on the amount of wages earned, with the State treasury contributing nothing. As an alternative to paying contributions to the State disability benefits fund, the Temporary Disability Benefits Law permits the employer to establish a "private plan" for the payment of benefits to its employees. Such plans, however, which are usually implemented through insurance policies purchased by employers from private carriers, must be approved by the State, and their terms must be at least as beneficial to workers as the provisions of the statute itself. Like unemployment compensation benefits, temporary disability benefits are payable to eligible claimants for a maximum of 26 weeks,[3] with the amount of each weekly payment varying according to the worker's average weekly wage during the year preceding the filing of the claim.

This, then, is the essence of the present New Jersey law with regard to the payment of temporary disability benefits to pregnant women. The question to which we now turn is whether the foregoing provisions are consistent with the requirements of the United States Constitution.

An examination of this question must begin with the recent decision of the Supreme Court of the United States in *Geduldig v. Aiello*, 417 U.S. 484 (1974), where the Court upheld California's disability insurance law as applied to pregnant women. The California statute disallows benefits for any disability associated with normal pregnancy and childbirth, the ineligibility period extending through the 28th day after termination of the pregnancy. At the same time, the law allows benefits for disabilities resulting from medical complications of pregnancy, such as caesarian section delivery, ectopic pregnancy, toxemia, vaginitis, heart disease, hypertension, phlebitis, and varicose veins. Like the New Jersey disability insurance system, California's is totally self-supporting, but unlike New Jersey's, it is financed solely by contributions from workers, who pay 1% of their salary up to a maximum of $85 per year.

The plaintiff in *Geduldig* had a normal pregnancy and delivery and sought benefits for the period she was incapacitated by childbirth. She contended that insofar as the California law singled out a particular kind of female disability—one resulting from normal pregnancy and delivery—and excluded it from eligibility for benefits, while it at the same time covered all disabilities sustained by men, the statute unlawfully discriminated on the basis of sex in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. In rejecting this argument and upholding the statute, the Supreme Court observed that the law "does not discriminate with respect to the *persons or groups* which are eligible for disability insurance protection under the program," but merely excludes from its coverage a particular *risk*. 417 U.S. at 494. The Court noted that the inclusion of disabilities resulting from normal pregnancy would substantially increase the cost of the program, with total benefit payments increasing by about one-third, or $100 million per year. The plaintiff argued that this increased cost could be accommodated by making appropriate adjustments in the level of benefits payable under the program and in the contribution rates paid by workers. The Court responded, however, that the same thing could be said of other disabilities excluded from the law's coverage, such as those that do not extend beyond seven days and do not require hospitalization, or, on the other hand, those that extend beyond 26 weeks.[4] Noting that "a totally comprehensive program. . .would inevitably require state subsidy" as well as a higher rate of contributions and a lower scale of benefits, the Court held:

> "The State has a legitimate interest in maintaining the self-supporting nature of its insurance program. Similarly, it has an interest in distributing the available resources in such a way as to keep benefit payments at an adequate level for disabilities that are covered, rather than to cover all disabilities inadequately. Finally, California has a legitimate concern in maintaining the contribution rate at a level that will not unduly burden participating employees, particularly low-income employees who may be most in need of the disability insurance." *Id.* at 496.

These legitimate state interests, said the Court, "provide an objective and wholly noninvidious basis for the State's decision not to create a more comprehensive insurance program than it has," adding:

> "There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program.[5] There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." *Id.* at 496-497.

The Court found the case before it a "far cry" from cases involving "discrimination based upon gender as such," saying:

> "The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification. . . .Normal pregnancy is an objectively identifiable physical condition with unique characteristics. *Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.*
>
> "The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes." *Ibid.*, n. 20 (emphasis added).

See also *Kahn v. Shevin*, 416 U.S. 351 (1974) (upholding Florida statute granting widows, but not widowers, $500 exemption from local property tax); *Dandridge v. Williams*, 397 U.S. 471, 487 (1970) ("The Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients."); *Jefferson*

v. Hackney, 406 U.S. 535 (1972) (upholding Texas welfare statute that allowed recipients under the Aid to Families with Dependent Children program only 75% of their estimated financial needs, while the blind, disabled, and aged were allowed 95% or 100%).

The New Jersey provisions, to be sure, differ from the California law upheld in *Geduldig v. Aiello, supra,* by providing partial coverage of normal pregnancy for the eight-week period surrounding childbirth, but we do not perceive this distinction as legally significant. There is nothing in the Supreme Court's opinion in *Geduldig* to suggest that a state must choose between covering normal pregnancy on an equal basis with other covered risks or excluding it altogether. To the contrary, the Court held that "lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this *on any reasonable basis,* just as with respect to any other physical condition." 417 U.S. at 497, n. 20 (emphasis added).

You have also expressed concern over the "conclusive presumption" embodied in the provisions in question, under which otherwise eligible women are automatically entitled to disability benefits for the eight weeks surrounding childbirth irrespective of any actual inability to work, and you raise the question whether this "presumption" may discriminate against male claimants as well as against non-pregnant women, who in order to qualify for benefits must show that they are actually unable to work. We are aware of no Supreme Court decision, however, that has invalidated a presumption whose purpose and effect is to *benefit* a particular group. As noted earlier, the legislative purpose behind the New Jersey provisions was the feeling that "a pregnant woman should have leisure to take care of herself and her child for the eight-week period." *Iorio v. Board of Review, supra.* Moreover, the "presumption" of disability embodied in these provisions is not without foundation in medical reality. As the American College of Obstetricians and Gynecologists noted in a Policy Statement on Pregnancy-related Disabilities issued on March 2, 1974, "In an uncomplicated pregnancy, disability occurs near the termination of pregnancy, during labor, delivery and puerperium. *The process of labor and puerperium is disabling in itself. The usual duration of such disability is approximately six to eight weeks."* (Emphasis added.) *Cf., Cleveland Board of Education v. La Fleur,* 414 U.S. 632 (1974) (striking down school board regulations requiring pregnant teachers to take maternity leave without pay beginning four months and five months, respectively, before the expected date of birth, on the ground, among other things, that the regulations "contain an irrebutable presumption of physical incompetency"). Therefore, the New Jersey disability insurance provisions appear to be consistent with all constitutional requirements insofar as they exclude *normal* pregnancy from coverage except for the eight weeks surrounding birth.

We are advised, however, that the Department has departed to a limited extent from the scheme upheld in the *Geduldig* case by construing the provisions in question, which disallow benefits "for any period of disability due to pregnancy or resulting childbirth" except for the eight weeks surrounding delivery, to encompass not only normal pregnancy but also disabilities associated with medical complications of pregnancy, ranging from vaginitis to high blood pressure and heart disease. You are advised that such a construction of the language of N.J.S.A. 43:21-4(f)(1)(B) and 43:21-39(e) is erroneous. While it might be possible, from a strictly semantic viewpoint, to reach such a result from a literal rendering of the words of the statutes, such a restrictive reading is inappropriate in the present context for two reasons.

First, the laws in question explicitly provide that they are to be liberally construed in favor of claimants. See N.J.S.A. 43:21-2 and 43:21-26. Consequently, any

doubts as to the meaning of the provisions at issue must be resolved in favor of affording the broadest possible coverage. It is noteworthy in this regard that there is nothing in the legislative history either of the original statutes enacted in 1948 or of the 1961 amendments to suggest that the Legislature intended to include disabilities associated with "abnormal" pregnancies in the same category as normal pregnancy and birth. To the contrary, the absence of any reference to complications of pregnancy in the numerous statements submitted to the Governor and Legislature in connection with the original legislation strongly suggests that full coverage of these risks was contemplated.

Second, there is serious question whether the provisions in question could withstand constitutional scrutiny if they were construed to provide less than full coverage of disabilities associated with complications of pregnancy. *Geduldig v. Aiello, supra,* appears to stand for the proposition that while a particular risk may, for demonstrable fiscal or other legitimate reasons, be covered to a lesser extent than other risks under state disability insurance programs or even excluded altogether, once a state chooses to cover some physical condition, it must do so on an equal basis as to all persons who are potentially subject to that condition. Therefore, since non-pregnant women or men who become disabled by reason, for example, of a heart attack or varicose veins are potentially eligible for disability benefits for a maximum of 26 weeks under the law, the establishment of a less liberal scale of benefits for pregnant women who sustain the same disability merely because their condition may to some degree be related to the pregnancy might well constitute unlawful discrimination against such women in violation of the Equal Protection Clause of the Fourteenth Amendment. It is a well-established principle of statutory interpretation that "[e]ven though a statute may be open to a construction which would render it unconstitutional or permit its unconstitutional application, it is the duty of [the judiciary] to so construe the statute as to render it constitutional if it is reasonably susceptible to such interpretation." *State v. Profaci,* 56 N.J. 346, 350 (1970); *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 134 (1974). We therefore conclude that the Legislature intended to afford full coverage of medical complications of pregnancy.[b]

Finally, we see no reason to question the validity of the amendment to N.J.S.A. 43:21-5(a) of the Unemployment Compensation Law which exempts women who leave their jobs "solely by reason of [their] pregnancy" from the general disqualification for *unemployment* benefits of claimants who leave work for personal reasons unrelated to their work duties. As noted earlier, the immediate purpose of the exception apparently was to ensure that pregnant women who leave their jobs and subsequently sustain disabilities *not* related to their pregnancy will remain eligible for *disability* benefits for the maximum 26-week period provided by law, even though they cannot recover for the pregnancy itself outside of the eight weeks surrounding birth. A second consequence of the exception is that women who are forced to leave their jobs because of pregnancy will be eligible for *unemployment benefits* if they remain attached to the labor market and are still able to work in some capacity.

In creating the exception in question, the Legislature may well have been motivated by the feeling that an expectant woman who is unable because of her pregnancy to perform the duties of a particular job should be free to leave and search for another job more congenial to her condition, even though her reason for leaving—pregnancy—does not constitute "good cause attributable to the work" within the meaning of N.J.S.A. 43:21-5(a). The Legislature may also have regarded the exception as partial "compensation" for the fact that normal pregnancy is excluded from eligibility for disability benefits except for the eight-week period surrounding de-

livery. Nor is it significant that these possible purposes behind the amendment have not been explicitly articulated by the Legislature, because "[a] statutory discrimination will not be set aside *if any state of facts reasonably may be conceived to justify it.*" *Dandridge v. Williams, supra,* 397 U.S. at 485 (emphasis added).

For the foregoing reasons, you are advised that the provisions of the Unemployment Compensation Law and the Temporary Disability Benefits Law which disallow disability benefits for normal pregnancy except for the four weeks before the expected date of birth and the four weeks following delivery appear to be consistent with applicable constitutional requirements as explicated in recent decisions of the Supreme Court of the United States. You are further advised that claims based on medical complications of pregnancy are to be treated the same as any other claim for disability benefits, with the exception of claims arising from normal pregnancy and delivery. Finally, you are advised that the portion of N.J.S.A. 43:21-5(a) under which women who leave their jobs "solely by reason of [their] pregnancy" are not thereby disqualified for unemployment benefits appears to present no legal problem.

Very truly yours,

WILLIAM F. HYLAND
Attorney General of New Jersey

By: MICHAEL S. BOKAR
Deputy Attorney General

1. The meaning of this provision, as it has been applied in practice by the Department of Labor and Industry, can best be illustrated by a hypothetical example. Suppose a woman is told by her doctor that she is pregnant and that the expected date of birth is June 15. If the mother has a full-term pregnancy and the child is born on or about the estimated date, she is eligible for disability benefits for four weeks before and after the actual date of birth. Similarly, if the child is born prematurely on a date reasonably close to the expected birth date – one to four weeks early, for example – the mother will likewise be eligible for the eight-week period. If the mother has a premature delivery more than four weeks before the estimated birth date, she would have to show that her doctor's estimate was medically unreasonable at the time it was originally given in order to qualify for benefits for the four weeks before birth, although she would still be eligible for the four weeks after birth, since these would be weeks "following the termination of the pregnancy."

2. We are informed that the primary reason for this amendment is to enable pregnant women to qualify for *disability* benefits in cases where they suffer a disability *not* caused by pregnancy during the time they are unemployed. Under the Unemployment Compensation Law, a worker who becomes disabled while unemployed is not entitled to disability benefits unless he or she "would be eligible to receive benefits. . . except for his inability to work." N.J.S.A. 43:21-4(f)(1). Consequently, if the Legislature had not amended N.J.S.A. 43:21-5(a) to exclude pregnant women from the general prohibition against leaving work for personal reasons, a woman who was forced to leave her job because of pregnancy and later happened to sustain a disability unrelated to the pregnancy would have been ineligible for disability benefits except during the eight weeks surrounding delivery.

3. In periods of high nationwide unemployment, a claimant may also qualify for up to 26 additional weeks of unemployment compensation benefits.

4. New Jersey likewise does not pay for disabilities of seven days or less under the Temporary Disability Benefits Law, except where the disability lasts for three weeks or more. N.J.S.A. 43:21-39. Also, as noted earlier, benefits, as in California, are payable for a maximum of 26 weeks.

5. The Court noted in a footnote that evidence presented to the trial court indicated that women

as a whole were filing more disability claims and collecting more benefits than men, and were receiving more in benefits each year than they paid in contributions to the California disability insurance fund. *Id.*, n. 21. We are advised that the experience in New Jersey is similar. It might also be noted in this regard that for the period from January through August of this year, one of every eight disability claims paid by the New Jersey Disability Benefits Fund was based on pregnancy, $1 of every $10 paid was for pregnancy claims, and one of every nine benefit weeks was attributable to a pregnancy claim.

6. By "medical complications of pregnancy" we mean, of course, physical infirmities of the kind set forth in the new California law referred to earlier, as opposed to various non-disabling minor discomforts which frequently accompany pregnancy. We are advised in this regard that the California Department of Employment Development has adopted a procedure for implementing that state's law, which went into effect on January 1, 1974, under which claims for complications arising from pregnancy are allowed only where there is a convincing showing of actual inability to work. We are further advised that the California agency had paid out only $5 million in disability benefits for complications arising from pregnancy through October 1974.

Furthermore, under well-established principles of finality with respect to the administration of social welfare legislation such as that here involved, the Department of Labor and Industry is not required to reopen pregnancy claims which, as of the date of this opinion, have already been finally determined by the agency. See, *e.g., City of East Orange v McCorkle*, L-26927-69 (Law Div. 1969) (unreported) (refusing retroactive application of earlier decision requiring Division of Public Welfare to pay State share of municipal welfare assistance, because of "the resultant strain that will be imposed on the general assistance budget of the State of New Jersey in the light of the vast sums involved").

January 31, 1975

VERNON N. POTTER
Director
Division on Civil Rights, Room 400
1100 Raymond Boulevard
Newark, New Jersey 07102

FORMAL OPINION NO. 2–1975

Dear Director Potter:

You have asked whether the Division on Civil Rights has jurisdiction over a complaint by a young, unmarried male who contends that an insurer discriminated against him on sex and marital grounds in its automobile insurance rates and that the New Jersey Department of Insurance aided and abetted such discrimination by approving said rates. You are hereby advised that the Division on Civil Rights lacks subject matter jurisdiction since the Law Against Discrimination does not give it power to review rates approved by the Commissioner of Insurance.*

The Law Against Discrimination confers broad jurisdiction on the Division on Civil Rights to eradicate discrimination in matters involving real property, employment, and the use of public accommodations. See N.J.S.A. 10:5-12. While the statute does not discuss applicability to State agencies, it has been construed to confer

jurisdiction over state functions of the types clearly encompassed by the statute as, for example, when the State acts as an employer. It does not follow, however, that the Division has jurisdiction over all State conduct of every type whatever.

A comparison of State and federal law in this regard is informative. The federal Civil Rights Act of 1971 provides:

> "Every person who, under color of any statute. . . causes to be subjected, any citizen. . . or other person. . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C.A. §1983.

The New Jersey statute contains no such provisions for review of governmental action. Moreover, when the Law Against Discrimination is read in *pari materia* with the insurance rate statute, N.J.S.A. 17:29A-1 *et seq.*, it appears even less likely that the Legislature intended to grant this extraordinary power to the Division on Civil Rights. The Insurance Law sets forth a comprehensive plan of careful regulation by the Commissioner of Insurance. Rates only become effective after proposals are filed with the Commissioner and he is deemed to have approved them. N.J.S.A. 17:29A-6, 7, 11. The Commissioner is charged with responsibility to disallow any rates which are

> "unreasonably high or excessive, or are not adequate for the safeness and soundness of the insurer, or are unfairly discriminatory between risks in this State involving essentially the same hazards and expense elements." N.J.S.A. 17:29A-1.

As the Supreme Court held in *Coro Brokerage, Inc. v. Richard,* 29 N.J. 295, 298 (1959):

> "The act is a comprehensive statutory scheme designed to regulate and standardize the rates which insurance companies may charge for various forms of insurance coverage. The administrative control necessary to further the statutory objective is vested in the Commissioner of Banking and Insurance. This control is made operative by the Commissioner's authority to determine whether insurance rates are reasonable and adequate and not unfairly discriminatory."

It was further noted in *Insurance Co. of No. America v. Howell,* 80 N.J. Super. 236, 252 (App. Div. 1963):

> "The Insurance Rating Law clearly demonstrates that the purpose of the Legislature in granting the Commissioner power to approve or disapprove rating systems is to protect the public and the insurance industry from unreasonably high, inadequate, or discriminatory rates."

The courts have also recognized the Commissioner's expertise in rate-making mat-

ters. *See, e.g., In re Application of Insurance Rating Board,* 63 N.J. 413, 418 (1973).

Unlike the Division's jurisdiction over State employment disputes, rate approvals involve a purely governmental function. The usual remedy where such decisions are alleged to be in error is for the complaining party to seek review of the action on appeal. The power to review another State agency's exercise of its unique statutory functions is an unusual power which cannot be readily inferred absent a clear expression of legislative intent.

> ". . .[A] policy question of that significance lies in the legislative domain and should be resolved there. [We]. . .should not find such authority in an agency unless the statute under consideration confers it expressly or by unavoidable implication." *Burl. Cty. Evergreen Park Mental Hospital v. Cooper,* 56 N.J. 579, 598 (1960).

The United States Supreme Court faced a similar problem of statutory construction in the recent case of *Preiser v. Rodriguez,* 411 U.S. 475, 93 S. Ct. 1827, 36 L. Ed. 2d 439 (1973). There, three prisoners brought suit against New York State's Department of Correctional Services for depriving them of good-conduct-time credits. These suits were brought under the Civil Rights Act of 1971, 42 U.S.C.A. §1983, rather than under the habeas corpus statute, 28 U.S.C.A. §2254. Under the civil rights statute, state remedies need not be exhausted, while under the habeas corpus statute they must. The Court noted that the civil rights statute forbidding colorably governmental action which deprives a person of civil rights has been liberally construed. Nonetheless, the Court reasoned:

> "The broad language of §1983, however, is not conclusive of the issue before us. The statute is a general one, and, despite the literal applicability of its terms, the question remains whether the specific federal habeas corpus statute, explicitly and historically designed to provide the means for a state prisoner to attack the validity of his confinement, must be understood to be the exclusive remedy available in a situation like this where it so clearly applies." 411 U.S. 489.

The Court went on to hold that

> ". . . Congress has determined that habeas corpus is the appropriate remedy. . . and the specific determination must override the general terms of §1983." 411 U.S. 490.

The conclusion is even more evident under our Law Against Discrimination which makes no reference whatever to the right of the Division to review governmental actions of other State agencies. The Division cannot be presumed to possess such extraordinary authority in the absence of a clear legislative determination.

Nor can the complaint against the insurer proceed by removing the Department of Insurance from the action. The insurer's conduct cannot be severed from that of the Insurance Commissioner; the Commissioner's approval is necessary before rates become effective and the rate statute contemplates his extensive regulation of such plans. Thus, the complaint constitutes a frontal attack on the State action

itself. *See generally Stern v. Massachusetts Indemnity and Life Insurance Co.*, 360 F. Supp. 433, 438 (E.D. Pa. 1973). The Commissioner's rate approval is the very act being challenged and the Division's lack of jurisdiction to review his conduct means that the entire complaint should be dismissed.

We conclude that the Legislature conferred exclusive jurisdiction on the Commissioner of Insurance to review proposed insurance rates and to evaluate their fairness. This exclusive jurisdiction comports with the legislative intent to promote uniformity in rate-making and to place reliance on the Commissioner's expertise in such matters. Consequently, the Division on Civil Rights lacks jurisdiction under the Law Against Discrimination to review the Commissioner's approval of insurance rates.

Very truly yours,
WILLIAM F. HYLAND
Attorney General
By: RAYMOND A. NOBLE
Deputy Attorney General

* The complainant's contention that use of sex and marital criteria necessarily constitutes invidious discrimination even when it is based on actuarial loss statistics contradicts the only case precedent construing a similar question. In *Stern v. Massachusetts Indemnity and Life Insurance Co.*, 360 F. Supp. 433 (E.D. Pa. 1972), a female complainant was denied partial summary judgment on her claims of sex discrimination against an insurer and Pennsylvania's Insurance Commissioner, despite the insurer's admitted use of separate, state-approved disability insurance policies for men and for women. While holding that the complaint stated a cause of action under the federal Civil Rights Act of 1871, 42 U.S.C.A. §1983, the court held that defendants' contention that the classification was based on actuarial evidence stated a valid defense against the charge, requiring a factual determination. Thus, complainant's express admission that the rate classification was based on actuarial loss statistics would seem to rebut his own claim. We need not decide this question, however, in view of our conclusion regarding jurisdiction.

February 13, 1975

DR. FRED. G. BURKE, *Commissioner*
Department of Education
225 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 3–1975

Dear Dr. Burke:

You have asked what effect Laws of 1974, C. 191 has upon statutes governing elections in Type II and regional school districts and upon statutes governing the preparation of budgets in Type I, Type II and regional school districts.

The Act was signed by Governor Brendan T. Byrne on December 26, 1974, to

take effect immediately. Its purpose was to mitigate the confusion experienced by local school districts because of the Legislature's inability to devise a method of educational financing consistent with the decision of the New Jersey Supreme Court in *Robinson v. Cahill*, 62 N.J. 473 (1973). To achieve this purpose, "the various timelines for preparation of budgets and for school elections" were extended for one month (Statement on Bill).

Although no program of educational financing has yet been developed by the Legislature, the Supreme Court has taken action to avoid fiscal chaos in the local school districts. By Order dated January 23, 1975, the court directed no change in the present statutory scheme for the school year 1975-76 and stated that the

> ". . .Commissioner of Education may immediately advise all school districts of the amount of estimated State aid funds for said year based on present law." Order, *Robinson v. Cahill*, at 4.

In taking this action, the court noted that:

> "All school districts must, *even under recent legislation extending timetable dates*, commence within a very few days the process of adopting budgets for the school year 1975-76, arranging for elections and attending to other matters relevant thereto and must be advised prior thereto of the amount of state aid funds of various categories estimated to be received during said school year." (Emphasis added).

The legislation referred to by the Supreme Court, and which is the subject of the present inquiry, specifically provides that the annual school election for the year 1975 for each Type II local school district shall be held on March 11, 1975 and for regional districts on:

> "(1) March 11, 1975 in any all purpose regional district consisting of a consolidated school district, or of a school district comprising two or more municipalities, which is itself a constituent district of a larger regional district, or
> (2) March 4, 1975 in all other regional districts."

The remaining sections of the law concern the preparation of school budgets. Section 2 extends the date for the preparation of school budgets to (1) March 1, 1975 in districts having a board of school estimate, (2) February 11, 1975 for districts, other than regionals, not having a board of school estimate and (3) February 4, 1975 in regional districts. The dates for holding public hearings on school budgets, as required by N.J.S.A. 18A:22-10, are extended by Section 3 to (1) between March 1 and March 15 for districts having a board of school estimate, (2) between February 11 and March 1 for districts other than regionals, with no board of school estimate, and (3) between February 4 and February 25 for regional districts. Finally, Section 4 extends the last date on which the board of school estimate of a Type I district must fix and determine the budget to March 15, 1975 while Section 5 similarly extends the time for Type II districts.

Within this framework, you have specifically asked:

1) Whether notices concerning military or absentee ballots must be republished because of the change in the date of the election (N.J.S.A. 18A:14-25); and

2) Whether the dates pertaining to filing of nominating petitions (N.J.S.A. 18A:14-9), drawing for position on the ballot (N.J.S.A. 18A:14-13, 14) and withdrawing of a candidate from the election (N.J.S.A. 18A:14-12.1) must be extended as a result of the enactment of Laws of 1974, C. 191.

With regard to your initial inquiry, N.J.S.A. 18A:14-25 provides that:

> "Not less than 40 days whenever possible, and always as nearly 40 days as possible, *prior to the date fixed for the holding of any school election,* the secretary of the board of education shall cause notices, of the character provided in section 7 of the 'Absentee voting law (1953)', (C. 19:57-7) to be published at least once in one newspaper published in the county or each county in which the district is situate and circulating in such county or in each such county. . . ." (Emphasis added)

This statute requires that notices be published as nearly as possible to forty days prior to the "holding of any school election." Furthermore, N.J.S.A. 19:57-7, which governs the form of the notice, requires that the date of the election be set forth therein. Therefore, any school districts which arranged for the publication of such notices prior to December 26, 1974 would have to republish so that such publication would be as close to forty days prior to the new election date as possible, and in order that such notices would recite the correct date of the election. Quite clearly, notices for absentee voting purposes would be of little value if they recited the incorrect election date.

The second inquiry relates to a series of statutory requirements also concerning school elections. N.J.S.A. 18A:14-9 provides that:

> "Each candidate to be voted upon at a school election shall be nominated directly by petition, signed by at least 10 persons none of whom shall be the candidate himself, *and file with the secretary of the board of education of the district on or before four P.M. of the fortieth day preceding the date of the election* except that nominating petitions for special elections to be held pursuant to section 18A:9-10 shall be *so filed on or before four P.M. of the fifteenth day before said special election.* . . ." (Emphasis added).

Thereafter, N.J.S.A. 18A:14-13 states that the drawing of names of candidates for position on the ballot shall take place "on the day following the last day for filing petitions for the annual school elections" (forty days prior to the date of the school election). Finally, pursuant to N.J.S.A. 18A:14-12.1, a person may withdraw his name as a candidate by filing a notice in writing "on or before four P.M. of the thirty-second day before the date of the school election."

Each of the aforementioned statutory provisions refer to the "date of the school election." Laws of 1974, C. 191 has changed the date for the 1975 school elections. Therefore, the new date must be utilized in all calculations required by the above statutes. Furthermore, any other statutory provisions or departmental regulations which require calculations based upon the date of the school election should utilize the date as set forth in the newly enacted statute. Such interpretation is entirely consistent with the express legislative purpose that the "various timelines for preparation of budgets and for school elections" be extended for one month. It is well established that in absence of ambiguity, intent of the Legislature is to be found in the statute itself, *Borough of Highlands v. Davis,* 124 N.J. Super. 217 (Law Div. 1973), and that any construction which would render part of a statute meaningless is to be avoided. *Reisin Lumber & Millwork Co. v. Simonelli,* 98 N.J. Super. 335 (Law Div. 1967).

Based upon the foregoing considerations, please be advised that:

(1) Local school districts, consistent with N.J.S.A. 18A:14-25 and 19:57-7, must publish notices for absentee and military ballots as near as possible to forty days prior to the school election and these notices must set forth the correct date of such election; and

(2) The date of the school election set forth in Laws of 1974, C. 191 is to be used for the calculations required by N.J.S.A. 18A:14-9; 14-13; and 14-12.1 and for any other statutory provision or departmental regulations which require computations based on the "date of the school election."

Very truly yours,
WILLIAM F. HYLAND
Attorney General

By: MARY ANN BURGESS
Deputy Attorney General

April 14, 1975

LEONARD D. RONCO, *Director*
Division of Alcoholic Beverage Control
25 Commerce Drive
Cranford, New Jersey 07016

FORMAL OPINION NO. 4 – 1975

Dear Director Ronco:

You have requested an opinion as to whether Chapter 161 of the Laws of 1974, which amends and supplements Chapter 282 of the Laws of 1968 (titled "An Act relating to employment qualifications of rehabilitated convicted offenders"), applies to the Division of Alcoholic Beverage Control and municipal "other issuing authorities" as defined by N.J.S.A. 33:1-19. To place this inquiry in its proper perspective, some legislative background is in order.

The Alcoholic Beverage Law prohibits the issuance of any license of any class to any person who has been convicted of a crime involving moral turpitude, or to any partnership or corporation if any partner or any corporate officer or director or owner of more than 10% of the stock of the corporation is so criminally disqualified. N.J.S.A. 33:1-25; *Weinstein v. Div. of Alcoh. Bev. Control,* 70 N.J. Super. 164 (App. Div. 1961). Further, no person failing to qualify as a licensee personally may be

"knowingly employed by or connected in any business capacity whatsoever" with a licensee. N.J.S.A. 33:1-26; N.J.A.C. 13:2-13.1; *Severini v. State, etc., Div. of Alcoh. Bev. Contr.*, 82 N.J. Super. 1 (App. Div. 1964). These provisions, with certain variations not here pertinent, have been in effect since enactment of the Alcoholic Beverage Law in 1933. Chapter 436 of the Laws of 1933.

The Alcoholic Beverage Law also provides for the removal of the disqualification to obtain or hold a license resulting from criminal conviction. Under N.J.S.A. 33:1-31.2, the Director of the Division of Alcoholic Beverage Control may, in his discretion, enter an order removing such disqualification upon a finding that at least five years have elapsed from the conviction date, that the disqualified person has conducted himself in a law-abiding manner during such period and that his association with the alcoholic beverage industry will not be contrary to the public interest. Upon entry of the order, the subject is no longer mandatorily disqualified from being a licensee or being employed by a licensee.

In 1968, Chapter 282 (N.J.S.A. 2A:168A-1 to 3) was enacted. It then provided that "notwithstanding the contrary provisions of any law, or rule or regulation issued pursuant to law, any state, county or municipal department, board, officer or agency, hereinafter referred to as 'licensing authority,' " may grant an application for a license or certificate of admission to a qualifying examination even though the applicant has been convicted of a crime, other than a high misdemeanor, if it appears that the applicant had achieved a degree of rehabilitation indicating that his engaging in the profession or business in question would not be incompatible with the welfare of society or the aims and objectives of the licensing authority. It also provided that evidence of a pardon or expungement of a criminal conviction, or a certificate of a parole board or chief probation officer that the applicant had achieved a degree of rehabilitation indicating that his engaging in the proposed employment would not be incompatible with the welfare of society, shall be sufficient evidence of the achievement by the applicant of a degree of rehabilitation compatible with the welfare of society. Whether the rehabilitation would also not be incompatible with the "aims and objectives of the licensing authority" was left to the licensing authority's independent determination.

In 1973, Chapter 285 of the Laws of 1973 was enacted amending N.J.S.A 33:1-26 to authorize the Director to approve, pursuant to rules and regulations, the employment of criminally disqualified persons by liquor licensees. On February 15, 1974, the then Director implemented said Chapter 285 by the amendment of certain Division rules (N.J.A.C. 13:2-13.1, *et seq.* – see 6 N.J.R. 119(c)) to provide for the issuance by the Director of employment permits to rehabilitated criminally disqualified persons notwithstanding their lack of the statutory five year law-abiding period set forth in the aforementioned N.J.S.A. 33:1-31.2. These permits are currently being issued to appropriate applicants.

On November 15, 1974, Governor Byrne signed into law Chapter 161 of the Laws of 1974, the subject of your inquiry. In pertinent part, this legislation amends N.J.S.A. 2A:168A-1 and 2 to provide that "a person shall not be disqualified or discriminated against by any licensing authority because of any conviction for a crime" unless N.J.S.A. 2A93-5 (dealing with bribery offenses by legislators and public officials) is applicable or the conviction "relates adversely" to the occupation in question. Set forth in the legislation are eight specific criteria which a licensing authority must consider in determining such "adverse" relationship. Also, Chapter 161 amends N.J.S.A. 2A:168A-3 to provide that evidence of a pardon or expungement of a criminal conviction or a parole board's or chief probation officer's certifi-

cates as heretofore described "shall preclude a licensing authority from disqualifying or discriminating against an applicant." In such instances, no rehabilitation finding is left to the agency's independent determination. Included in this legislation is Section 7, a new section (N.J.S.A. 2A:168A-6), which states that Chapter 161 shall not be applicable to any law enforcement agency.

Under the dual licensing system set up by the Alcoholic Beverage Law, retail alcoholic beverage licenses are issuable by municipal issuing authorities, except where a conflict of interest exists (N.J.S.A. 33:1-20), and all other licenses (manufacturers', wholesalers', etc.) as well as retail licenses where a conflict of interest exists, are issuable by the Director. N.J.S.A. 33:1-18 and 19. Consequently, question arises whether the Director and municipal issuing authorities are "licensing authorities" subject to the provisions of N.J.S.A. 2A:168A-1 to 3, as amended and supplemented by the said Chapter 161. If so, the power of such authorities to exclude persons with criminal records from the alcoholic beverage industry would be substantially constricted from that which is contained in the Alcoholic Beverage Control Law. For the reasons hereinafter stated, you are advised that these statutory provisions are inapplicable to the State's alcoholic beverage control system.

The question posed herein is one of statutory interpretation, *i.e.*, whether N.J.S.A. 2A:168A-1, *et seq.* supersedes N.J.S.A. 33:1-25, 33:1-26 and 33:1-31.2 to the extent that they may be inconsistent. In construing statutes, it is the legislative intent which controls. *Hoffman v. Hock*, 8 N.J. 397, 408 (1952). In order to ascertain such intent, statutes must be considered in their relation and interaction with other laws which relate to the same subject or thing; they must be construed together with these related sections in order to learn and give effect to the true meaning, intent and purpose of the legislation as a whole; they cannot be considered in a vacuum. *Appeal of N.Y. State Realty & Terminal Co.*, 21 N.J. 90, 98 (1956). Repeals by implication are not favored; in the absence, as here, of an express repealer, there must be a clear showing of legislative intent to effect a repealer. *Swede v. City of Clifton*, 22 N.J. 303, 317 (1956). Further, the Legislature is presumed to be thoroughly conversant with its previous enactments. *Eckert v. New Jersey State Highway Department*, 1 N.J. 474, 479 (1949).

The subject involved herein is the liquor business. "The liquor business is an exceptional one and courts have always dealt with it exceptionally." *Fanwood v. Rocco*, 33 N.J. 404, 411 (1960). "Because of its inherent evils, liquor has always been dealt with as a subject apart." *Grand Union v. Sills*, 43 N.J. 390, 398 (1964).

> "From the earliest history of our State, the sale of intoxicating liquor has been dealt with by the Legislature in an exceptional way. Because of its *sui generis* nature and significance, it is a subject by itself, to the treatment of which all the analogies of the law appropriate to other administrative agencies, cannot be indiscriminately applied. *Paul v. Gloucester County*, 50 N.J.L. 585, 595 (E. & A. 1888). This field is peculiarly subject to strict governmental control. *Franklin Stores Co. v. Burnett*, 120 N.J.L. 596, 598 (Sup. Ct. 1938). Consistent therewith is the Legislature's mandate that 'This chapter is intended to be remedial of abuses inherent in liquor traffic and shall be liberally construed.' R.S. 33:1-73." *Blanck v. Mayor and Borough Council of Magnolia*, 38 N.J. 484, 490-491 (1962).

The Legislative has delegated to the Director the responsibility "to supervise

the manufacture, distribution and sale of alcoholic beverages in such a manner as to promote temperance and eliminate the racketeer and bootlegger," N.J.S.A. 33:1-3, and "to do, perform, take and adopt all other acts, procedures, and methods designed to insure the full, impartial, stringent and comprehensive administration" of the Alcoholic Beverage Law, N.J.S.A. 33:1-23. The Director has been deemed to possess wide discretion to comply with the mandate that "the liquor business is one which must be carefully supervised and it should be conducted by reputable people in a reputable manner." *Zicherman v. Driscoll,* 133 N.J.L. 586, 588 (Sup. Ct. 1946). A liquor license may be denied to persons with a criminal record which does not absolutely disqualify them from holding a license. *Paul v. Brass Rail Liquors,* 31 N.J. Super. 211, 216 (App. Div. 1954).

The various alcoholic beverage enactments of the Legislature "must be treated together 'for they represent a unified state policy'." *Grand Union v. Sills, supra,* 43 N.J. at 402. The Alcoholic Beverage Law, N.J.S.A. 33:1-1, *et seq.,* "is a comprehensive revision of the law relating to alcoholic beverages. It covers the entire industry from manufacturing, blending and storage to transportation and sale at both wholesale and retail," *Hudson, Bergen, & C., Assn. v. Hoboken,* 135 N.J.L. 502, 511 (E. & A. 1947).

Applying these principles herein, it is apparent that the Legislature has intended to treat the regulation of the alcoholic beverage industry separate and apart from those occupations and professions encompassed by the provisions of N.J.S.A. 2A: 168A-1, *et seq.* The Alcoholic Beverage Law contains a comprehensive design covering the exclusionary criterion applicable to persons convicted of crime and the mechanism whereby the Director may, in the exercise of his discretionary authority, remove any resulting disqualfication *in toto,* or with respect to employment only. The enactment by the Legislature of Chapter 285 of the Laws of 1973, expressly giving the Director such latter power, while it was presumably aware of its prior enactment of Chapter 282 of the Laws of 1968, constitutes significant evidence of the Legislature's intention that the Director be deemed to be excluded from the provisions of said Chapter 282. If Chapter 282 had been intended to be applicable to the alcoholic beverage industry, there would have been no need for the passage of Chapter 285 five years later since the Director could have acted under Chapter 282, rather than Chapter 285. It is assumed that the Legislature, in enacting Chapter 285, did not intend "something which it knew in practice would mean nothing." *Gualano v. Bd. of Estimate of Elizabeth School Dist.,* 39 N.J. 300, 313 (1963). And once it is determined that Chapter 282 is inapplicable to liquor control, it follows that its amendment and supplementation by Chapter 161, being one of degree and not application, effected no change in this respect.

This interpretation is consonant with, and in reinforcement of, the Legislature's longstanding *sui generis* treatment of the liquor business. It is also in accord with the rule of statutory construction that there must be a clear showing of legislative intent before Chapter 282 would be deemed to have impliedly repealed the aforementioned provisions of the Alcoholic Beverage Law.

Additionally, even if said Chapter 282 should be considered applicable to liquor control, the enactment of Chapter 161 must be deemed to have eliminated such status because of its express exclusion of "any law enforcement agency" in Section 7 thereof. The Director, his deputies and Division inspectors and investigators "have authority to arrest, without warrant, for violations of this chapter committed in their presence, and shall have all the authority and powers of peace officers to enforce this chapter." N.J.S.A. 33:1-4. Violation of any provisions of the Alcoholic Bev-

erage Law constitutes a misdemeanor, unless otherwise specified. N.J.S.A. 33:1-51. It is the duty of Division imspectors and investigators to arrest all persons whom they shall have reasonable ground to believe are committing or have committed a misdemeanor under said chapter and to make complaint against such persons as in other cases of misdemeanors. N.J.S.A. 33:1-66(a). The Director, his deputies and Division inspectors and investigators are exempt from the prohibitions of the concealed weapons act. N.J.S.A. 2A:151-43(p).

From the foregoing, it is apparent that the Division of Alcoholic Beverage Control is a "law enforcement agency" within the intendment of Chapter 161. With respect to the municipal authorities which issue retail licenses, it is unreasonable to believe that the Legislature intended to impose different standards of eligibility upon those whose licenses are issuable by municipal agencies, rather than by the Director. Indeed, in some instances, the selfsame type of license is issuable by both the Director and municipal issuing authorities. N.J.S.A. 33:1-20. Also, the Director is responsible for the overall supervision of the liquor control system, including the activities of the municipal authorities. In these circumstances, it is assumed that the Legislature intended to provide uniformity in the alcoholic beverage field and that, accordingly, the exemption in Section 7 inuring to the Division is equally applicable to other alcoholic beverage issuing authorities.

In sum, you are advised that neither Chapter 282 of the Laws of 1968 nor Chapter 161 of the Laws of 1974 is applicable to the determination of whether persons convicted of crime are eligible to be associated with the alcoholic beverage industry. Such eligibility continues to be governed by the provisions of the Alcoholic Beverage Law and the Division's rules and regulations adopted pursuant thereto.

Very truly yours,
WILLIAM F. HYLAND
Attorney General of New Jersey
BY: DAVID S. PILTZER
Deputy Attorney General

April 16, 1975

RICHARD C. LEONE, *State Treasurer*
Department of the Treasury
State House
Trenton, New Jersey 08625

FORMAL OPINION NO. 5 – 1975

Dear Treasurer Leone:

You have inquired as to the maximum interest payable on bonds issued pursuant to the New Jersey Green Acres and Recreation Opportunities Bond Act of 1974, P.L. 1974, c. 102 (hereinafter referred to as the "Bonds"). You have also inquired as to whether the State can be classified as a corporation for purposes of this Act, so

that there would be, in effect, no limit as to the interest rate payable on such Bonds. Please be advised that the maximum interest rate payable on these Bonds is 8%.

The Act provides with respect to the interest rate payable as follows:

> ". . . Each series of bonds shall bear such rate or rates of interest, that the aggregate amount of interest payable over the life of such series, less the premium, if any, received upon the sales thereof, shall not *exceed an amount not in excess of the maximum rate of interest per annum fixed pursuant to R.S. 31:1-1* computed over the life of such series, . . ." P.L. 1974, c. 102, § 12.

Inasmuch as N.J.S.A. 31:1-1 provides for two different rates and contains several exceptions, the applicable usury ceiling "fixed pursuant to R.S. 31:1-1" must be determined.

N.J.S.A. 31:1-1 provides in pertinent part:

> "(a) Except as otherwise provided by law, no person shall, upon contract, take, directly or indirectly for loan of any money, wares, merchandise, goods and chattels, above the value of $6.00 for the forebearance of $100.00 for a year, except that the Commissioner of Banking . . . may by regulation . . . provide that the value which may be taken for any such loan shall be a value more than $6.00 but not more than $9.50 for the forebearance of $100.00 for a year . . . .
>
> "(b) . . . Any such regulation shall have prospective effect only, and any rate established in excess of 8% shall apply only to loans secured by real estate on which there is erected or to be erected a one, two or three family dwelling occupied or to be occupied by the borrower. Notwithstanding the provisions of paragraph (a) of this section, contracts for the following classes or types of loans may provide for any rate of interest which the parties agree upon . . . .
>
> "(1) loans in the amount of $50,000.00 or more, except loans where the security given is a mortgage on real property consisting of a lot of land upon which there is constructed or in the course of construction a dwelling house of three family units or less. The rate of interest stated in such contract upon the origination of such loans may be taken notwithstanding that any payments thereon reduce the amount outstanding to less than $50,000.00;
>
> "(2) . . . ."

The Commissioner has set by regulation a rate of 9-¼% for all loans secured by real estate on which there is erected or to be erected a one, two or three family dwelling occupied or to be occupied by the borrower, and a rate of 8% for all other loans subject to a usury ceiling. N.J.A.C. 3:1-1.1.

The issue resolves itself to the question of which specific provision in the usury statute applies to the transaction contemplated by § 12 of the Act, *i.e.*, the 8% ceiling, the 9-¼% ceiling, or an unlimited rate. It is obvious that the 9-¼% rate does not apply, inasmuch as it is limited to loans secured by real estate on which there is erected or to be erected a one, two or three family dwelling occupied or to be occupied

by the borrower. The unlimited rate provided in N.J.S.A. 31:1-1(b)(1) for loans in the amount of $50,000.00 or more also would not logically apply. To construe this section in such a way that the reference to N.J.S.A. 31:1-1 would be a reference to no interest limit at all would be to render this section of the Bond Act meaningless. Such a construction is to be avoided. *State v. Sperry & Hutchinson*, 23 N.J. 38, 46 (1956). It is well settled that statutes are to be read to give purposeful significance to all of the words used by the Legislature. *Quinn v. Quinn*, 118 N.J. Super 413 (Ch. Div. 1972). It is also fair to assume legislation is intended to have a meaningful purpose and not be mere surplusage. Such a reasonable approach can be obtained by assuming that the Legislature intended to refer to the general usury limitation promulgated by the Commissioner pursuant to N.J.S.A. 31:1-1, *i.e.*, 8%.

This construction is further supported by the fact that where the Legislature in the same session intended to allow unlimited interest to be paid on State bonds, it clearly expressed its purpose in the following manner:

> ". . . Each series of bonds shall bear such rate or rates of interest as from time to time may be determined by the issuing officials, which interest shall be payable semi-annually; . . . ." P.L. 1974, c. 112, § 9; P.L. 1974, c. 113, § 8; P.L. 1974, c. 117, § 13.

If the Legislature intended to allow for unlimited interest in P.L. 1974, c. 102, § 12, it would probably have set forth its purpose in the same fashion.

This conclusion is not altered by the provisions of N.J.S.A. 31:1-6, which provides that:

> "No corporation shall plead or set up the defense of usury to any action brought against it to recover damages or enforce a remedy on any obligation executed by such corporation."

An analysis of the very nature of the State and a corporation discloses that the State cannot be considered a corporation. The State of New Jersey is a sovereign entity, *Mayor, etc., Elizabeth v. N.J. Turnpike Authority*, 7 N.J. Super. 540, 545 (Ch. Div. 1950), whereas a corporation is an artificial entity which derives its existence from a State franchise. *Harker v. McKissock*, 12 N.J. 310, 316 (1953). See also *Leonard v. State Highway Dept. of New Jersey*, 29 N.J. Super. 188, 196 (App. Div. 1954). Thus, it is clear that the State does not for this reason fall within the exception to the ceilings on allowable interest contained in N.J.S.A. 31:1-1.

For the reasons stated above, the maximum interest payable on bonds issued pursuant to the "New Jersey Green Acres and Recreation Opportunities Bond Act of 1974" is 8%.

Very truly yours,
WILLIAM F. HYLAND
Attorney General of New Jersey
By: MICHAEL E. GOLDMAN
Deputy Attorney General

April 16, 1975

DR. JOANNE E. FINLEY, *Commissioner*
Department of Health
Health and Agriculture Building
Trenton, New Jersey

FORMAL OPINION NO. 6 – 1975

Dear Dr. Finley:

You have asked us for further advice as to the nature and extent of your responsibilities in connection with abortions performed in health care facilities subject to the Health Care Facilities Planning Act, N.J.S.A. 26:2H-1 *et seq.* (hereafter "the Act"). First, you have asked whether the Act is applicable to abortion clinics which perform only first trimester abortions, or whether they are excluded from coverage of the Act as "services provided by a physician in his private practice." N.J.S.A. 26:2H-2(b). Second, you have asked whether the State may require that second and third trimester abortions be performed only in licensed hospitals. Our opinion, for the reasons set forth below, is that the Act is applicable to first trimester abortion clinics and that the Department should exercise its statutory jurisdiction over such clinics by regulations consistent with other Department regulations, or by stricter regulations if the Department feels there is a compelling need for such restrictions in order to meet the State's responsibilities in protecting patient health and safety. The Department will have to determine in each case whether a facility is a clinic or the private practice of a physician. It is also our opinion that the State may require second and third trimester abortions to be performed only in licensed hospitals.

In order for these questions to be properly discussed, it would be helpful to set forth the issue in the proper context. In 1973, the Supreme Court of the United States rendered two significant decisions dealing with the power of states to regulate abortions. *Roe v. Wade,* 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 157 (1973); *Doe v. Bolton,* 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973). On August 13, 1973 the Department of Health was advised that an abortion clinic would be a health care facility as defined by N.J.S.A. 26:2H-2(a) and that the Department of Health had the power under the Act to require such a clinic to obtain a certificate of need and a license, provided, however, that an abortion clinic's services were distinguishable from services provided by a physician in his private practice of medicine, excluded from coverage of the Act by N.J.S.A. 26:2H-2(b). It was concluded that the State, and therefore the Department of Health, would have powers over an abortion clinic performing first trimester procedures as it would over any other health care facility, for example in connection with staffing, types and amount of equipment to be used at the facility, and Life Safety Code considerations. The Department thereafter published notice of a proposed manual of standards for first trimester outpatient abortion facilities on March 7, 1974 (6 N.J.R. 103) and notice of proposed regulations governing second and third trimester abortion facilities on April 4, 1974 (6 N.J. R. 137). A public hearing was held on April 30, 1974 to permit interested persons to present their views on the proposals. On August 5, 1974 emergency interim regulations were adopted for abortion facilities receiving temporary licensure. 6 N.J.R. 345. Subsequently, the Department issued temporary licenses to the Planned Parenthood clinic in Jersey City and a clinic in Atlantic City. No other abortion clinic has yet received a license from the Department, although we understand that a prospective clinic in Montclair was granted a certificate of need and will soon apply for a license.

You have asked for additional clarification as to whether the Department has the power to license first trimester abortion clinics, or whether they are exempted from the Health Care Facilities Planning Act as "services provided by a physician in his private practice". It is established that abortion clinics are covered by the Act, even though it might be difficult in some cases to determine if a facility were a clinic or a doctor's private office. Obviously, this is a factual determination to be made in each case by the Department on the basis of its expertise in the health care area. The Department has the inherent authority to draw a meaningful distinction between "health care facilities" and the "private practice" of physicians. In fact, the Department has made such an effort in its proposed definition of health care facility. 6 N.J. R. 309. Significantly, the Department included in its definition of such facilities the provider of "abortion services." 6 N.J.R. 309 (proposed N.J.A.C. 3:33-1.14). Accordingly, it seems clear that at least some abortion clinics will not be synonymous with the private practice of a physician. They thus will be subject to the Department's licensing powers under the Health Care Facilities Planning Act.

Several courts in other jurisdictions have examined the propriety of the licensure of first trimester abortion clinics by state and local governments in light of the Supreme Court's pronouncements in *Roe* and *Doe.* These courts have uniformly struck down regulations which purport to single our first trimester abortion clinics for special treatment. Thus, in *Friendship Medical Center v. Chicago Board of Health,* 505 F. 2d 1141 (7th Cir. 1974), *cert.* den. 43 U.S.L.W. 3515, the court voided extensive regulations governing abortions applicable to any place or facility in which abortions were performed because the regulations were written without regard to the trimester involved. Cf. *Nyberg v. City of Virginia,* 495 F. 2d 1342, 1345 (8th Cir. 1974) appeal dismissed, 419 U.S. 891, 95 S. Ct. 169, 42 L. Ed. 2d 136 (1974). A separate basis for the court's holding in *Friendship Medical Center* was that since a first trimester abortion was a fundamental right, the regulations governing their performance could not be more comprehensive than for government restrictions applicable to medical procedures which in terms of health risk are not distinguishable from such abortions. The Chicago abortion regulations at issue in that case described what equipment and supplies had to be available, what medical tests had to be performed, the minimal time interval between initial examination and termination of the pregnancy, and what post-operative care had to be rendered. Finding that other medical procedures, "often much more complex and dangerous in terms of the patient's health," were left to the good judgment of the physician, the court declared the abortion regulations unconstitutional because no compelling state interest had been shown for the distinction. The court went on to say:

> "Furthermore, any proposed regulation, even if applied universally to all similar medical procedures, because of the fundamental right of a woman to procure an abortion during the first trimester, would have to meet a compelling governmental interest requirement. Thus, any general health regulations which would apply to first trimester abortions would have to be limited so as to give effect to the fundamental rights as established by *Roe* and *Doe*, that is not be burdensome on a woman's right to decide to abort a pregnancy. By this we mean that in all probability nothing broader than general requirements as to the maintaining of sanitary facilities and general

requirements as to meeting minimal building code standards would be permissible.

"We do not, however, completely rule out the possibility that there exist some inherent aspects of an abortion procedure which make it unique from other medical procedures of substantially the same risk. For such aspects, the Board of Health may be able to show that a narrowly drawn health regulation is compelling. Again we should point out that the state will bear a heavy burden in justifying any such regulation, both with respect to showing the existence of a unique medical complication and with respect to showing that the problem is of such a nature as to be beyond the general scope of a doctor's professional judgement." 505 F. 2d at 1153-54 (*Dictum*)

Similarly, in *Word v. Poelker,* 495 F. 2d 1349 (8th Cir. 1974), the court invalidated a St. Louis city ordinance regulating abortion clinics because it failed to exclude the first trimester of pregnancy from its coverage and was thus an overbroad enactment infringing unreasonably upon fundamental rights. The court said that the ordinance was "additionally invalid" in that the government's interests were already protected by (1) the physician's medical judgment and his professional, ethical standards and (2) the city and state health regulations which were already in effect and which had application to clinical procedures in general, so that the "extra layer of regulation" imposed by the abortion clinic regulations was unreasonably burdensome of patients' and physicians' rights and not legitimately related to recognized objectives of the state to protect maternal health and potential human life. 495 F. 2d at 1351. Accord, *Hodgson v. Anderson,* 378 F. Supp. 1008, 1018 (D. Minn. 1974), appeal dismissed, 420 U.S. 903, 95 S. Ct. 819, 42 L. Ed. 2d 832 (1975).

In *Hallmark Clinic v. North Carolina Department of Human Resources,* 380 F. Supp. 1153 (E.D.N.C. 1974) (3-judge court), the court said:

"Under *Roe* and *Doe,* if North Carolina may regulate the performance of first-trimester abortions at all, it may do so only to the extent that it regulates tonsillectomies and other relatively minor operations." 380 F. Supp. at 1157.

And further:

"If North Carolina can regulate first-trimester abortions at all, it may do so only in the interest of patient health and safety." 380 F. Supp. at 1158.

The court thus struck down a state regulation which conditioned an abortion clinic license on the clinic's having a transfer agreement with a local hospital, observing that nursing homes were the only other facilities required to seek such transfer agreements and their licenses were not conditioned on success in obtaining them. The court held this to be singling out the performance of first trimester abortions for special regulation.

This consistent judicial interpretation of the *Roe* and *Doe* opinions establishes the parameters of the permissible scope of the regulation of first trimester abortion clinics, *i.e.,* that governments may regulate first trimester abortion clinics in a general manner, so long as the regulations do not evidence particularized concern with abortion as a medical or surgical procedure. Stated another way, courts will carefully scrutinize any abortion regulations to ascertain whether they are bona fide regulations or part of an effort to avoid the holdings in *Roe* and *Doe.* Thus, the Department's emergency interim regulations dealing with requirements exceeding those in existence for medical procedures which in terms of health risk are not distinguishable from abortions are subject to constitutional question. For example, the following specific proposed regulations may require further consideration by the Department in order to determine whether they establish requirements exceeding those in existence for medical procedures indistinguishable from abortions in terms of health risk, and, if so, they would therefore be invalid: reporting requirements (proposed N.J.A.C. 8:40-1.3); written affiliation agreement with a hospital (proposed N.J.A.C. 8:40-15); availability of the services of a qualified social worker (proposed N.J.A.C. 8:40-1.6(f)); family planning counselling (proposed N.J.A.C. 8:40-1.7(g)); interval of not less than two days between initial examination and operation (proposed N.J.A.C. 8:40-1.7(h)); post-operative patient observation for not less than three hours (proposed N.J.A.C. 8:40-1.9(d)); and general counselling (proposed N.J.A.C. 8:40-1.12). On the other hand, if the Department concludes that its regulations are reasonably designed to deal with health problems and are consistent with the overall regulations of the Department, the abortion regulations would be proper. Since a determination as to whether any particular regulation is reasonably designed to deal with health problems and is consistent with other Departmental regulations is largely a medical question, the Department will have to decide whether each of its proposed and existing regulations is justifiable in light of the above criteria.

A careful review of pertinent judicial opinions and statutory provisions makes it clear that the State may adopt regulations mandating that second and third trimester abortions be performed exclusively in licensed hospitals. The Supreme Court of the United States said in both *Roe* and *Doe* that states may regulate abortion procedures from and after the first trimester of pregnancy to the extent that the regulations reasonably relate to the preservation and protection of maternal health. In each case the Court gave as an example of permissible state regulation the licensing of facilities in which the abortion procedure is to be performed. *Roe v. Wade, supra,* 410 U.S. at 163, 93 S. Ct. at 732, 35 L. Ed. 2d at 183;*Doe v. Bolton,* 410 U.S. at 195, 93 S. Ct. at 749, 35 L. Ed. 2d at 214. In *Roe,* the Court also indicated that it would be permissible for the states to issue regulations "as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status." 410 U.S. at 163, 93 S. Ct. at 732, 35 L. Ed. 2d at 183. The Department of Health, which has the authority to regulate the procedures to be followed by licensed hospitals and other health care facilities, N.J.S.A. 26:2H-1 *et seq.*, could limit the activities of abortion clinics to the performance of first trimester abortions if it finds that is necessary to the preservation and protection of maternal health.*

You are accordingly advised that while the Department of Health may require the performance of second and third trimester abortions in licensed hospitals, the Department should exercise its jurisdiction over first trimester abortion clinics either by regulations essentially the same as for other out-patient health care facilities or by narrowly drawn regulations which the Department is convinced are necessary to the State's recognized interest in protecting patient health and safety, consistent, of course, with the constitutional rights of women as set forth by the Supreme Court of

the United States in the *Roe* and *Doe* decisions.

Very truly yours,
WILLIAM F. HYLAND
Attorney General
RICHARD M. CONLEY
Deputy Attorney General

* The State Board of Medical Examiners would be the appropriate agency to adopt such a relation as it would affect the actions of the medical profession, pursuant to its statutory authority to regulate the practice of medicine (N.J.S.A. 45:9-1 *et seq.*).

April 18, 1975

HONORABLE ANN KLEIN
Commissioner
Department of Institutions and Agencies
135 West Hanover Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 7 – 1975

Dear Commissioner Klein:

The Division of Youth and Family Services has asked for an opinion as to whether certain of its procedures, regarding the role and participation of a putative father to an adoption proceeding, satisfy all relevant statutory and constitutional requirements. We have concluded based upon our review of present New Jersey law and the holding of the United States Supreme Court in *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 21 L. Ed. 2d 551 (1972), that existing procedures are consistent with all statutory and constitutional requirements.

Although the Adoption Act, N.J.S.A. 9:3-17 *et seq.*, does not provide for the notification of a putative father to contest an adoption or to assert his right to custody, the procedures used by the Division do make extensive provision for notification of putative fathers under several different circumstances:

(A) If the unwed mother has surrendered her child and refuses to name the father or states that she does not know who the father is, the surrender from the mother is accepted, and the child may be released for adoption. No effort is made to determine the identity of the father.*

(B) If the unwed mother surrenders the child and reveals the name of the father but indicates that she does not know his address or present whereabouts, the agency accepts the surrender, and the caseworker contacts local agencies in the area where the putative father last resided in an effort

to give him notice that the mother has surrendered the child. The caseworker contacts such agencies as the Police Department, Post Office, local Welfare Department, local Draft Board, etc. and makes inquiries with any relatives of the putative father, if any are known to the caseworker. If the putative father cannot be found, then the caseworker prepares an Affidavit of Inquiry indicating all the efforts made to locate the putative father. In many instances the affidavit will additionally indicate that the child is a certain age and that no attempt has been made by the putative father either to see or support the child. This affidavit is attached to the mother's surrender and the child may be cleared for adoption.

(C) If the unwed mother provides the caseworker with an address or telephone number for the putative father or if one is uncovered after inquiry, the putative father is notified, in person, that the mother has named him as the father of the child and that the mother has surrendered the child. If he denies paternity, the caseworker may then accept an affidavit from him indicating his denial. The affidavit is then attached to the surrender and the child may be cleared for adoption. If an affidavit cannot be obtained from him, the caseworker then prepares an affidavit, indicating conversations with the putative father, stating that he was made aware that the surrendering mother named him as a father of her child; that he is aware of her intent to surrender the child, and that he has no objection to such action. This affidavit is then attached to the surrender and the child may be cleared for adoption.

(D) If the putative father avoids contact with the caseworker, a certified letter is sent to him, and if there is no response, an Affidavit of Inquiry (see above) is prepared and attached to the surrender and the child may be cleared.

(E) If the putative father admits paternity, but has no interest in the child, then he may also sign surrenders or draw an affidavit indicating his lack of interest in the child and his consent to adoption.

(F) If the putative father evidences any objection to the surrender, the child is not cleared for adoption. An investigation of the putative father and his plan is made and a determination of its viability is decided upon. If it is decided that his plan is not suitable or there is objection to him as a parent, either by the agency or the natural mother, then a guardianship action is filed naming him as defendant, and the court decides the matter.

The issue therefore is whether the Division's procedures satisfy all constitutional requirements and whether the consent of a putative father is necessary before a child may be adopted.

In *Stanley v. Illinois, supra*, the United States Supreme Court held that a putative father is constitutionally entitled to reasonable notice and an opportunity to be heard before either a state or a private party may take custody or guardianship of his child.** However, it cannot be said that the affirmative consent of a putative father is required prior to the adoption of his child. The court in *Stanley* merely held that he must have notice that the custody of his child is in question and the right to have his views on the care of the child presented to a court.*** The Division's procedures provide the putative father access to a court whenever he expresses his objection to the adoption.

A careful examination of the procedures of the Division, in light of *Stanley*, reveals that such procedures are in full conformity with all constitutional requirements. The specific administrative procedures which are designed to provide for actual or constructive notice to a putative father are consistent with constitutional demands for due process of law. See generally *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1949). In fact, the Division has extended the *Stanley* mandate beyond the mere requirement of giving a putative father notice of any court proceeding involving the custody or guardianship of his children to a situation where the Division receives a surrender from an unwed mother. These procedures are designed to give a putative father notice that his child has been surrendered and to allow him the opportunity to be heard or to offer a proposal regarding the disposition of his child.

Very truly yours,
WILLIAM F. HYLAND
Attorney General of New Jersey
By: SHIRLEY A. TOLENTINO
Deputy Attorney General

* In order to fully satisfy all constitutional requirements it would appear that some responsibility should be placed on the Division to make reasonable inquiry as to the identity and whereabouts of the putative father.

** The father in the *Stanley* case was not the typical putative father seen in so many cases involving the custody of children. He was easily ascertainable, had lived with his children intermittently over a period of 18 years and had assumed his responsibilities. In other words, he was not a mere putative father, but had elevated himself to the status of an admitted father. Nevertheless, the *Stanley* case stands for the proposition that all putative fathers are constitutionally entitled to reasonable notice and a hearing on their fitness before children may be removed from their custody.

*** However, the Court indicated in *Stanley* that the father's right to be heard may be waived either by his signing a surrender or his failing to respond to the notice.

April 21, 1975

WILLIAM JOSEPH, *Director*
Division of Pensions
20 West Front St.
Trenton, New Jersey

FORMAL OPINION NO. 8—1975

Dear Mr. Joseph:

You have requested an opinion as to whether retroactive salary increases in collective negotiations agreements effective after retirement or death of an individual employee are creditable for calculation of retirement allowances, dependency pen-

sions, and insurance death benefits provided by the State administered retirement systems and pension funds. You are advised that such increases are creditable for pension purposes where they are regular salary increases for all employees in the same position and are payable regardless of the retirement or death status of the individual employee. You are also advised that an individual salary increase included in a collective negotiations agreement for a single individual or single group of individuals should be reviewed by the retirement system on a case by case basis to determine whether or not the salary adjustment was granted primarily in anticipation of retirement or additional remuneration for extra work beyond the regular work day or year.

The majority of statutory pension benefits are required to be calculated on the member's "final compensation," *See for example* N.J.S.A. 43:15A-48 (service retirement allowance). This term is defined as

> "...the average annual compensation for which contributions are made for the 3 years of creditable service in New Jersey immediately preceding his retirement or death, or it shall mean the average annual compensation for New Jersey service for which contributions are made during any 3 fiscal years of his or her membership providing the largest possible benefit to the member or his beneficiary." N.J.S.A. 43:15A-6(h) (Public Employees' Retirement System, hereafter PERS); N.J.S.A. 18A:66-2(f) (Teachers' Pension and Annuity Fund, hereafter TPAF).

The same basic definition with some variation in language and/or time period coverage is found in the acts governing the Prison Officers' Pension Fund (POPF, N.J.S.A. 43:7-8); The Consolidated Police and Firemen's Pension Fund (CP & FRS, N.J.S.A. 43:16-17(9)); the Police and Firemen's Retirement System (P&FRS, N.J.S.A. 43:16A-1(15)); the State Police Retirement System (SPRS, N.J.S.A. 53:5A-3(i)); and the Alternate Benefit Program (ABP, N.J.S.A. 18A:66-169(c)). The statutory term "compensation" as used in the definition of final compensation and as used for the basis of calculating employee pension contributions (*see for example* N.J.S.A. 43:15A-25 governing PERS contributions) is statutorily defined in PERS as:

> "... the base or contractual salary, for services as an employee, which is in accordance with established salary policies of the member's employer for all employees in the same position but shall not include individual salary adjustments which are granted primarily in anticipation of the member's retirement or additional remuneration for performing temporary or extracurricular duties beyond the regular work day or the regular work year. In cases where salary includes maintenance, the retirement system shall fix the value of that part of the salary not paid in money which shall be considered under this act." N.J.S.A. 43:15A-6(r).

The almost identical definition is also found in N.J.S.A. 18A:66-2(d) (TPAF); N.J.S.A. 18:66-169(b) (ABP); N.J.S.A. 43:16A-1(26) (P&FRS) and N.J.S.A. 53:5A-3(u) (SPRS). There is no definition of the statutory term "compensation" or "salary" in POPF or CP&FRS.

The above statutory definitions must be read together to determine the salary

basis for calculation of pension benefits. When so read, it is clear the Legislature intended pension benefits and employee contributions which partially finance these benefits be calculated in all cases on regular salaries as set by salary schedules and policies and as applicable to all persons holding the same position. Only salary increases, adjustments or payments for individual employees in excess of this regular salary are excluded, as for example for extra services, longevity, or in anticipation of retirement.

The statutory definitions do not *per se* exclude retroactive salary increases. Moreover, it would be unreasonable to assume a legislative purpose to preclude the use of retroactive regular salary adjustments merely on the fortuitous basis that retirement or death of the individual employee occurred during the pendency of contract negotiations and before the effective date of the agreement. Statutory enactments are to be construed reasonably to preclude unjust, absurd or incongruous results. *Roman v. Sharper*, 53 N.J. 338, 341 (1969); *Restaurant Enterprises, Inc. v. Sussex Mutual Ins. Co.*, 52 N.J. 73 (1968). These increases pursuant to the definitions controlling calculation of pension benefits are the average compensation for which contributions are required to be made, are regular salary increases, and are effective for the required period immediately preceding retirement or death. Accordingly, regular salary increases arising from collective negotiations agreements which are rendered retroactive by the approval of the contract after commencement of the fiscal year covered by the contract must be included in the base salary subject to employee pension contributions and upon which pension benefits are calculated.

The decision in *Casale v. Pension Com. etc. of Newark*, 78 N.J. Super. 38 (Law Div. 1963), which excluded a retroactive salary increase in the calculation of retirement benefits in a local pension fund is inapplicable to the State-administered retirement systems and broader in scope than the language of the act in *Casale*. Moreover, regular salary increases in accordance with uniform salary policies negate the possibility of individual favoritism in retroactive increases of retirement benefits which was the primary concern of the *Casale* court.

For these reasons, you are advised that retroactive salary increases arising from collective negotiations agreements which are applicable and payable to all employees in the same position are creditable for pension purposes including the calculation of retirement and death benefits on account of members who have retired or have died prior to the approval of the increase. You are cautioned, however, that not all salary items contained in a collective negotiations agreement are creditable compensation for pension purposes. Salary payments not payable to all persons in the same positions such as retroactive and prospective individual adjustments in anticipation of retirement and extra compensation are excludable. Accordingly, the appropriate pension board or commission must in each individual case determine whether the retroactive increase involved is creditable by examining the contract and surrounding factual circumstances in the context of the legal guidelines set forth above.

Very truly yours,
WILLIAM F. HYLAND
Attorney General
By PRUDENCE H. BISBEE
Deputy Attorney General

April 21, 1975

WILLIAM JOSEPH, *Director*
Division of Pensions
20 West Front Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 9—1975

Dear Director Joseph:

You have requested an opinion concerning a public employer's liability for an employee's pension contributions during a leave of absence for military service. Your inquiry was precipitated by the issuance by Governor Byrne of Executive Order No. 7, which proclaimed "[t]hat August 1, 1974 shall be the terminal date of the Vietnam conflict. . . ." L.1971, c. 119 and L.1972, c. 166 authorized the Governor to proclaim the date of termination of the Vietnam conflict to define veteran status for the purpose of coverage by the Public Employees' Retirement System (hereinafter PERS), the Teachers' Pension and Annuity Fund (hereinafter TPAF) and other statutes. For the following reasons, you are advised that a public employer is not liable for employee contributions and an employee is not entitled to service credit in a retirement system for any period of military service entered into after August 1, 1974, since the nation is no longer in a period of war or national emergency.*

N.J.S.A. 38:23-1 *et seq.* generally provides statutory guidelines concerning military leaves of absence for individuals in public employment. However, N.J.S.A. 38:23-5 and N.J.S.A. 38:23-6 are specifically concerned with the maintenance of pension rights. N.J.S.A. 38:23-5 provides that no member of a public pension fund who enters the active military service in time of war or in time of emergency will lose any rights, benefits or privileges accorded by the fund. Also, the period of military leave will be considered as creditable service in the retirement system. N.J.S.A. 38:23-5 specifically defines the period of emergency as follows:

> "as used in this act the term 'in time of emergency' shall mean and include any time after June twenty-third, one thousand nine hundred and fifty and prior to the termination, suspension or revocation of the proclamation of the existence of a national emergency issued by the President of the United States on December sixteenth, one thousand nine hundred and fifty, or termination of the existence of such national emergency by appropriate action of the President or Congress of the United States."

N.J.S.A. 38:23-6 requires a public employer to remit to the retirement system, in addition to its own contributions, the employee's pension contributions which are due during the employee's leave of absence for military service.

Pension rights are protected by N.J.S.A. 38:23-5 only for military service during periods of war or in time of emergency. It is apparent that we are not in a period of war, as war has been construed as strictly the period of actual fighting and hostilities. *Bashwiner v. Police & Firemen's Retirement System of N.J.*, 68 N.J. Super. 1 (App. Div. 1961). Also, there is no longer a period of national emergency within the meaning of N.J.S.A. 38:23-5.

The definition of "in time of emergency" was added to N.J.S.A. 38:23-5, as well as many other statutes, by amendment (L. 1951, c. 21, §2), shortly after President Truman declared a state of "national emergency" on December 16, 1950, by Presidential Proclamation No. 2914, 15 Fed. Reg. 9029 (1950). This definition has never been repealed or amended, and there has been no termination of the national emergency by appropriate action of the President or Congress. In fact, the continued existence of the national emergency has been recognized by subsequent Presidents in Executive Orders. *Veterans & Reservists for Peace in Vietnam v. Regional Commissioner of Customs*, 459 F.2d 676, 678 n. 1 (3rd Cir.), *cert.* den. 409 U.S. 933 (1972). On its face it would appear that the "time of emergency" continues to the present, requiring a continued implementation of N.J.S.A. 38:23-5 and N.J.S.A. 38:23-6. However, when considered *in pari materia* with related legislation this period of emergency has been impliedly terminated.

The original intent of N.J.S.A. 38:23-5 and N.J.S.A. 38:23-6 was to protect the pension rights of public employees performing military service during a period of war or national crisis. Nearly identical language defining the period of emergency as set forth in N.J.S.A. 38:23-5 was also found in PERS, N.J.S.A. 43:15A-6(1) (11) (L. 1954, c.84), to establish veterans' status and consequent rights, benefits and privileges. It was amended by L. 1966, c. 217 to limit the period of service cognizable for veteran status. To be considered a veteran under the Act required military service during the Korean conflict, between June 23, 1950 and July 27, 1953, or during the Vietnam conflict, between December 31, 1960 and the date of termination as proclaimed by the Governor. The TPAF was similarly amended by L. 1966, c.218 to also circumscribe the periods of service according to the dates of the Korean and Vietnam conflicts for purposes of veteran status.

The purpose of the 1966 amendments to PERS and TPAF was, according to the Statement on the Bills, to "redefine[s] the Korean Emergency by establishing the same period followed by the Civil Service statute." Language nearly identical to that found in N.J.S.A. 38:23-5 was originally found in the veterans' preference provision of the Civil Service Act, N.J.S.A. 11:27-1(11). The law was later amended to delimit veteran status according to actual service during the Korean and Vietnam conflicts within the above prescribed dates. (L. 1963, c.120; L. 1967, c.312; L. 1971, c.119).

When the probable legislative purpose of N.J.S.A. 38:23-5 is to be determined, it cannot be done in a vacuum. Consideration must be given to subsequent legislative action in related areas to avoid inconsistent or unreasonable results. The court in *Clifton v. Passaic County Bd. of Taxation*, 28 N.J. 411, 421 (1958), commented:

> "Statutes *in pari materia*, that is, those which relate to the same matter or subject, although some may be special and some general, are to be construed together as a unitary and harmonious whole, in order that each may be fully effective. *New Jersey Turnpike Authority v. Washington Township*, 16 N.J. 38 (1954); *Maritime Petroleum Corporation v. City of Jersey City*, 1 N.J. 287 (1949)."

The provisions of existing civil service and pension law evidence a legislative intent to circumscribe veterans' benefits to recognized periods of specific military crisis. Although there has been no express reference to the termination of a national emergency in N.J.S.A. 38:23-5, there has been a general legislative recognition of

that fact. The failure of the Legislature to similarly amend this obscure section of the New Jersey Statutes may be attributed to an oversight in draftsmanship rather than to a purposeful omission. It is, therefore, concluded that the termination date of the "emergency" in N.J.S.A. 38:23-5 is July 27, 1953 for the purposes of the Korean war and August 1, 1974 for the Vietnam conflict.

Thus, a public employer is not liable for an employee's pension contributions for a period of military service entered into after August 1, 1974, and the employee is not entitled to credit in the retirement system for such a period of military service.** Where military service is entered into prior to August 1, 1974, the employer is liable for pension contributions, and the employee is entitled to credit in the retirement system for the entire period of initial military service thereafter.

Very truly yours,

WILLIAM F. HYLAND
Attorney General

By STACY L. MOORE, JR.
Deputy Attorney General

* Military leaves of absence for service entered into before August 1, 1974 should be governed by prior legal and administrative requirements concerning such leaves, *i.e.* the public employer is liable for employee contributions and the employee is entitled to service credit for the period of initial military service. *State Highway Dept. v. Civil Service Comm.* 35 N.J. 320 (1961); Formal Opinion No. 15 (1958); Formal Opinion No. 17 (1959).

** A public employer should not voluntarily remit the employee's pension contributions, because to do so is no longer required by N.J.S.A. 38:23-5 and N.J.S.A. 38:23-6. Any such payments would constitute an unauthorized expenditure of public monies by the employer, which should not be accepted by the Division of Pensions. Also, the employee would not receive service credit in the retirement system.

April 24, 1975

WILLIAM M. LANNING, ESQ.
Chief Counsel
Law Revision and Legislative
Services Commission
State House, Rm. 227
Trenton, New Jersey 08625

FORMAL OPINION NO. 10–1975

Dear Mr. Lanning:

You have requested advice as to whether a professor at a State college may become a candidate for and accept membership in the New Jersey Legislature. For the following reasons, you are advised that a professor at a State college may become a candidate for the Legislature but, if elected, must resign as a professor at the State college before taking a seat in the Legislature.

Provisions concerning dual office holding by members of the Legislature have been included in each of the three New Jersey Constitutions. In Article XX of the 1776 Constitution, the people expressed their concern that "the legislative department. . . be preserved from all suspicion of corruption" and therefore prohibited any "persons possessed of any post of profit under the government, other than justices of the peace" from being entitled to a seat in the assembly. A similar provision was included in the Constitution of 1844 where Article IV, §V, par. 3 provided that "No . . . persons possessed of any office of profit under the government of this state, shall be entitled to a seat either in the senate or in the general assembly. . . ."

The prohibition of the 1844 Constitution was construed by the Court of Errors and Appeals in *Wilentz v. Stanger*, 129 N.J.L. 606 (E. & A. 1943). The respondent, George Stanger, during his term of office in the Senate, was appointed as counsel to the State Board of Milk Control. Among other things, it was alleged that Senator Stanger vacated his office in the Senate upon accepting his appointment as counsel. The court held that the constitutional provision related only to "offices" and found that counsel to the Director of Milk Control was not an "office" within the meaning of the prohibition.

The constitutional framers in 1947 considered the impact of the *Wilentz* decision on constitutional provisions dealing with dual office-holding. *See Reilly v. Ozzard*, 33 N.J. 529, 541 (1960). A monograph prepared for the Convention commented that one of the primary issues concerning the Constitutional prohibitions on dual-office holding was the legal definition of the term "office." *Monograph*, II *Constitutional Convention of 1947* at 1478. That monograph presented various arguments for strengthening the provisions on dual office holding. Those arguments included the doctrine of separation of powers, protection of legislation against improper motives and prevention of executive dominance or usurpation of the legislative branch of government. The rationale was also to afford protection against the executive promising an appointment in State government to a legislator or the legislator requesting an appointment in return for the legislator's cooperation in furthering the objectives of the administration. III *Constitutional Convention of 1947* at 703.

Accordingly, the framers extended the existing constitutional prohibition of dual office-holding by legislators to include a "position of profit" as well as an "office" heretofore set forth in the 1776 and 1844 Constitutions:

> "3. If any member of the Legislature shall become a member of Congress or shall accept any Federal of State office or *position, of profit,* his seat shall thereupon become vacant.
>
> "4. No member of Congress, no person holding any Federal or State office or *position of profit,* and no judge of any court shall be entitled to a seat in the Legislature." *N.J. Const.* (1947), Art. IV, §V, pars. 3 and 4. (Emphasis supplied)

Paragraph 4 which governs the present question prohibits a person holding any "State office or position of profit" from being entitled to a seat in the Legislature. The question that arises is whether a professor at a State college holds either a "State office or position of profit."

In order to determine the meaning of these terms in our Constitution, resort may be made to well established judicial interpretation. An "office" has been defined by the courts of this State to be:

> "a place in a governmental system created or recognized by the law of the state which, either directly or by delegated authority, assigns to the incumbent thereof the continuous performance of certain permanent public duties. . . ." *Fredericks v. Board of Health*, 82 N.J.L. 200 (Sup. Ct. 1912).

The question of whether teachers in government hold an office was brought before the court in *Thorp v. Board of Trustees of Schools for Industrial Educ.*, 6 N.J. 498 (1951), *vacated as moot*, 342 U.S. 803 (1951), which concerned a special lecturer at the Newark College of Engineering. There the New Jersey Supreme Court held that teaching was a profession and that in New Jersey, the practitioners of the profession in the public system were not to be deemed public officers. The court said that a teacher at the college exercised no governmental powers and that the mere attainment of tenure did not convert the teacher's employment into a public office. Since, as the court said in *Thorp, supra*, teachers do not exercise what is in essence governmental authority, it is concluded that a professor at a State college or university does not hold a State "office" within the meaning of Article IV, §V, par. 4 of our Constitution.

In the present situation, it must also be determined whether a professor at a State college holds a State "position." Initially, it should be noted that the State colleges are located in the Department of Higher Education and are under the supervision of the State Board of Higher Education and the Chancellor. The academic staffs of the colleges, including professors, associate professors, assistant professors, instructors etc. are set forth in the statutes establishing and relating to the administration of the State colleges. *E.g.*, N.J.S.A. 18A:64-1 *et seq.* 18A:64-6, 20. They carry out a permanent program of higher education for the citizens of the State as provided by law. N.J.S.A. 18A:64-1 *et seq.*

The definition of a "position" is found in *Fredericks v. Board of Health, supra*, where the court said:

> "A position is analogous to an office, in that the duties that pertain to it are permanent and certain, but it differs from an office, in that its duties may be nongovernmental and not assigned to it by any public law of the state. . . ." 82 N.J.L. at 201.

After explaining the nature of a position, the court also went on to differentiate a "position" from mere employment as follows:

> "An employment differs from both an office and a position, in that its duties, which are non-governmental, are neither certain nor permanent. . . ." 82 N.J.L. at 202.

In *Kovalycsik v. Garfield*, 58 N.J. Super. 229 (App. Div. 1959) the court found a senior clerk in a municipal tax receiver's office to be holding a position. The court there said:

> "These responsibilities, and hence his position, were neither casual, greatly varied nor subject to change. They were performed regularly and consti-

tuted a customary and usual work routine requiring skill, discretion and public confidence." 58 N.J. Super. at 236-37.[1]

The remarks of the Appellate Division appear to be particularly applicable to this situation. Although a professor at a State college does not hold an "office", his duties are of sufficient certainty and permanency to make him the holder of a State "position" within the meaning of Article IV, §V, par. 4 of the 1947 Constitution.

For the foregoing reasons, you are advised that a professor at a State college may become a candidate for a seat in the Legislature but, if elected, must resign as a professor at the State college before taking his seat.

Very truly yours,
WILLIAM F. HYLAND
Attorney General of New Jersey
By: MARK I. SIMAN
Deputy Attorney General

1. Other cases which have decided that a particular activity constituted a position include *Freeholders of Hudson Co. v. Brenner*, 25 N.J. Super. 557 (App. Div. 1953), *aff'd* 14 N.J. 348 (1954) (assistant county counsel); *Cavenaugh v. Essex*, 58 N.J.L. 531 (Sup. Ct. 1896) (guard in county jail); *Daily v. Essex*, 58 N.J.L. 319 (Sup. Ct. 1895) (janitor of a court house); *Lewis v. Jersey City*, 51 N.J.L. 240 (Sup. Ct. 1889) (bridge tender).

April 28, 1975

COLONEL EUGENE OLAFF
Superintendent
Division of State Police
Division Headquarters
West Trenton, New Jersey 08625

FORMAL OPINION NO. 11—1975

Dear Colonel Olaff:

In his former capacity as Superintendent, Colonel E. B. Kelly had inquired as to the effect of the decision in *State v. Shack*, 58 *N.J.* 297 (1971), on the prospective enforcement of New Jersey's general trespass statute embodied in *N.J.S.A.* 2A:170-31. Since *Shack* represents the only New Jersey Supreme Court decision construing *N.J.S.A.*2A:170-31, it will undoubtedly serve as a guide for future judicial resolution of controversies emerging from the conflict of interests between farmers and their seasonal migrant help. Accordingly, Colonel Kelly's inquiry warrants discussion of the decision's basis and scope.

It should be noted at the outset that the civil law of trespass is a field separate and distinct from criminal trespass. This dichotomy had its origin in English law

where no trespass to property was criminal unless it was accompanied by or tended to create a breach of the peace. Since civil trespass is a private wrong, penal sanctions against the trespasser must be statutory. Thus, the New Jersey Legislature has imposed penalties for trespass on occupied lands to fish or hunt; for trespass on railroad trains or property; and in general has provided that:

> "Any person who trespasses on any lands, except fresh-meadow land over which the tide has ebbed and flowed continuously for 20 years or more, after being forbidden so to trespass by the owner, occupant, lessee or license thereof, or after public notice on the part of the owner, occupant, lessee or licensee forbidding such trespassing, which notice has been conspicuously posted adjacent to the highway bounding or adjacent to a usual entry way thereto, is a disorderly person and shall be punished by a fine of not more than $50. [*N.J.S.A.* 2A:170-31]."

Although there is little case law applying the foregoing statute, it is clear that there is no single all-purpose test for determining whether the unauthorized conduct complained of is violative of *N.J.S.A.* 2A:170-31. Rather, courts have carefully scrutinized the totality of facts comprising each case in striking a balance between conflicting rights, interests and equities in ascertaining if there was such social harm as to render the trespass criminal. This decisional procedure is consonant with the broad aim of the criminal law in a utilitarian society: to prevent injury to the health, safety, morals and welfare of the public at the occasional expense of the property owner. Accordingly, in some situations, trespassory acts which are nominally criminal do not warrant imposition of penal sanctions because of circumstances justifying their commission. That is, upon balancing all considerations of public policy, the allegedly illicit behavior does not require proscription and punishment but is deemed sufficiently desirable to deserve encouragement and commendation even though some individual may sustain injury as a result. With these concepts in mind, we turn to the facts before the Court in *Shack*.

The complainant, Tedesco, was a farmer employing seasonal migrant workers, who as part of their remuneration, were housed at a camp on his property. Defendants, Tejeras and Shack, were employees of non-profit United States government funded corporations, whose mission, among others, was offering health and legal services to itinerant farm help. Defendants, after making an unauthorized entrance on farm property, confronted Tedesco and requested private employee consultation. When their demands were denied, defendants refused to leave the farm. Tedesco then summoned the State Police, who, upon execution of formal written complaints, arrested Tejeras and Shack for trespassing in contravention of *N.J.S.A.*2A:170-31. Defendants were convicted in the Municipal Court and again on appeal in the County Court in a second trial. The New Jersey Supreme Court then certified defendants' appeal prior to oral argument in the Appellate Division, and held that:

> [U]nder our State law the ownership of real property does not include the right to bar access to governmental services available to migrant workers and hence there was no trespass within the meaning of the penal statute. [*State v. Shack*, 58 *N.J.* at 302].

The result is predicated on the following policy considerations. Property rights are relative and must serve, not disparage, human values. Assuredly, they should not be the basis for exercising oppressive control over the lives of a rootless, isolated and disadvantaged class of citizens who the owner admits to his property to further his own pecuniary gain. Accordingly, the impotent group's fundamental and fragile right of communication can be neither stifled nor emasculated by erecting a trespass statute barrier, founded on minimal intrusions, thereby insulating migrants from services and edification proffered by a solicitous government. Necessarily, a societal accommodation is reached which recognizes that there is

> "[N]o legitimate need for a right in the farmer to deny the worker the opportunity for aid available from federal, State or local services, or from recognized charitable groups seeking to assist him. [*State v. Shack*, 58 *N.J.* at 307]."

Indeed, the Court went well beyond the facts before it to state that:

> "The migrant worker must be allowed to receive visitors there of his choice, as long as there is no behavior hurtful to others, and members of the press may not be denied reasonable access to workers who do not object to seeing them. [*Ibid*]."

The conclusion is the unavoidable realization that itinerant farm help is entitled to the very same opportunity to live with dignity and to enjoy the private associations which are customary among all citizens of our society.*

Thus, *N.J.S.A.*2A:170-31 cannot be invoked by farmers as an instrumentality for barring or removing representatives of government, newsmen and visitors, other than solicitors or peddlers of non-essentials, who reasonably seek out farm workers at their campsite dwellings. Nevertheless, *N.J.S.A.*2A:170-31 must be enforced by the State Police where there has been an unreasonable intrusion upon farm property.

Consequently, employees of state or federal agencies, legislators, representatives of the media, as well as would-be guests are not subject to arrest for trespassing at the behest of the property owner merely because he objects to their unauthorized but reasonable presence at his workers' homes.

Very truly yours,
WILLIAM F. HYLAND
Attorney General of New Jersey
By: GLENN E. KUSHEL
Deputy Attorney General

* The same result has been reached by a number of other courts applying First Amendment arguments in similar or analogous factual contexts. See, *Petersen v. Talisman Sugar Corp.* 478 *F.2d* 73, 80-83 (5th Cir.1973) (First Amendment right of access); *Velez v. Amenta*, 370 *F. Supp.* 1250, 1255-57 (D. Conn. 1974) (First Amendment right of acess); *United Farm Workers Union v. Finerman*, 364 *F.Supp.*, 326, 329 (D.Colorado 1973) (First Amendment right of access); *Franceschina v. Morgan*, 346 *F.Supp.* 833, 838 (S.D.Indiana 1971) (First Amendment right of access); *Folgueras v. Hassle*. 331 *F.Supp.* 615, 620 (W.D.Michigan 1971) (First Amendment right of access; limitation of owner's property rights; tenant's rights); *People v. Rewald*, 318 *N.Y.S.* 2*d* 40, 45 (1971) (First Amendment right of access).

April 30, 1975

CHAIRMAN MALCOLM BORG
Health Care Administration Board
Department of Health
Health & Agriculture Building
John Fitch Plaza
Trenton, New Jersey 08625

FORMAL OPIONION NO. 12–1975

Dear Chairman Borg:

You have requested an opinion as to whether the Commissioner of Health must submit the "1975 Hospital Rate Review Program, Guidelines" (hereinafter referred to as "guidelines"), dated February 1975, to the Health Care Administration Board (hereinafter referred to as HCAB) as regulations for its approval prior to their adoption under the Health Care Facilities Planning Act, N.J.S.A. 26:2H-1 *et seq.* (hereinafter referred to as HCFPA).

The guidelines, a joint effort by the Departments of Health and Insurance, provide analysts with an accounting mechanism to review proposed hospital budgets for 1975 and assess reasonable payment rates by hospital service corporations. While the guidelines provide an overview of the processes to be followed, schedules A through F in its appendix actually guide the analyst through the necessary computations, comparisons, and reviews required to evaluate a hospital's 1975 budget submission and allowable reimbursement rate. These guidelines have been distributed to all hospitals in the State of New Jersey by the Department of Health.

The underlying issue posed is whether these guidelines are in fact regulations of the Commissioner of Health under the HCFPA and thereby subject to HCAB approval under N.J.S.A. 26:2H-5(b), which provides:

> "The Commissioner, *with the approval of the board*, shall adopt and amend rules and regulations in accordance with the Administrative Procedure Act P.L.1968, c. 410 (C. 52:14B-1 *et seq.*) to effectuate the provisions and purposes of this act. . . ." (Emphasis supplied)

An analysis of the statutory procedure for the review and approval of hospital service corporation rates reveals a requirement for participation by both the Commissioners of Health and Insurance. The statutory mechanism for review and approval provides:

"The Commissioner of Health in consultation with the Commissioner of Insurance shall determine and certify the costs of providing health care services, as reported by health care facilities, which are derived in accordance with a uniform system of cost accounting approved by the Commissioner of Health. Said certificates shall specify the elements and details of costs taken into consideration." N.J.S.A. 26:2H-18(c).

"Rates of payment by such hospital service corporation pursuant to written contract with a hospital or institution for the services contracted thereunder may be in the form of a level per diem amount established for the particular hospital or institution for each day of health care services and prior to payment, shall be approved as to reasonableness by the Commissioner of Insurance following the certification made pursuant to section 18 of the Health Care Facilities Planning Act." N.J.S.A. 17:46-7.

"Payment by hospital service corporations, organized under the law of this State, for health care services provided by a health care facility shall be at rates approved as to reasonableness by the Commissioner of Insurance with the approval of the Commissioner of Health. In establishing such rates, the Commissioners shall take into consideration the total costs of the health care facility." N.J.S.A. 26:2H-18(d).

Thus, when N.J.S.A. 26:2H-18 is read in conjunction with N.J.S.A. 17:46-7, it appears that the Commissioner of Insurance has been assigned the initial responsibility for approving the reasonableness of these rates.

The Department of Insurance, in order to satisfactorily fulfill its statutory responsibilities, has requested the Department of Health to provide it with a mechanism for the review and evaluation of allowable 1975 hospital rates. This mechanism for assessing the reasonableness of rates has been encompassed in the 1975 guidelines, and the Commissioner of Insurance reviewed initial hospital rates based upon the application of these guidelines. In this respect, the guidelines have been tacitly accepted by the Commissioner of Insurance as the technique for the exercise of his authority pursuant to N.J.S.A. 17:46-7. They are therefore clearly regulations of the Department of Insurance.

There is, however, a corresponding responsibility of the Commissioner of Health under 26:2H-18(d) to also approve the reasonableness of reimbursement rates paid by hospital service corporations to health care facilities. The manner or the degree of the analysis conducted by the Commissioner of Health need not be the same as the review conducted by the Commissioner of Insurance. The Commissioner of Health may promulgate independent criteria which are different in content to those used by the Commissioner of Insurance. The Commissioner of Health's analysis of rates could conceivably be less demanding than the review conducted by the Commissioner of Insurance. Nevertheless, whatever the technique or manner of review conducted by the Commissioner of Health pursuant to Section 18, the established methodology must be promulgated as a regulation of the agency.

It is well established that rules and regulations of a State administrative agency must be promulgated to properly justify a change in the particular field of government regulation. The need for definite agency regulations was noted in *Boller Beverages v. Davis*, 38 N.J. 138, 151 (1962):

"The object is not legislation ad hoc after the fact, but rather the promulgation, through the basic statute and the implementing regulations taken as a unitary whole, of a code governing action and conduct in the particular field of regulation so those concerned may know in advance all the rules of the game, so to speak, and may act with reasonable assurance. Without sufficiently definite regulations and standards administrative control lacks the essential quality of fairly predictable decisions. Persons subject to regulation are entitled to something more than a general declaration of statutory purpose to guide their conduct before they are restricted or penalized by an agency for what it then decides was wrong from its hindsight conceptions of what the public interest requires in the particular situation."

In the instant situation, the Appellate Division reviewed the 1975 guidelines in *Monmouth Medical Center, et al. v. State of New Jersey*, et al, Docket No. A-2147-74 etc., decided April 30, 1975 and opined:

"We have no hesitancy in deciding that the guidelines issued were rules as that term is defined in *N.J.S.A.* 52:14B-2. The procedures are clearly established to implement the task of the Commissioners in carrying out their respective responsibilities under the provisions of *N.J.S.A.* 26:2H-18 (c) and (d) and *N.J.S.A.* 17:48-7.

The court, further, concluded that health care facilities should be sufficiently apprised in advance by proposed administrative regulations of the criteria used to determine the reasonableness of reimbursement rates.

You are accordingly advised that in the event the 1975 guidelines are used to determine the reasonableness of 1975 reimbursement rates, under N.J.S.A. 26:2H-18(d), these guidelines are administrative regulations subject to the approval of the HCAB and should be adopted in accordance with the Administrative Procedure Act.

Very truly yours,
WILLIAM F. HYLAND
Attorney General

BY: MURRAY J. KLEIN
Deputy Attorney General

June 12, 1975

HONORABLE RICHARD F. SCHAUB
Commissioner of Banking
36 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 13—1975

Dear Commissioner Schaub:

You have requested an opinion as to the legality of a State chartered savings and loan association issuing negotiable orders of withdrawal (hereinafter referred to by the popular acronym "NOW"). A NOW allows a depositor to transfer funds from his account to a third party via withdrawal orders in negotiable form (NOWs) without requiring the depositor or his representative to appear at the bank's offices. The NOW is an unconditional order to the bank signed by the drawer/depositor to pay a specified sum payable to order and on demand, and possesses the attributes of negotiability required by the Uniform Commercial Code, N.J.S.A. 12A:3-104 (1). *Consumers Savings Bank v. Commissioner of Banks,* 282 N.E. 2d 416 (Sup. Jud. Ct. Mass. 1972). The NOW account thus operates on much the same basis as a conventional checking account. For the following reasons, you are advised that State chartered savings and loan associations may not issue NOWs on either interest bearing or interest free accounts.[1]

A statement of relevant background is important to place the issue in the proper perspective. The proposal to create this new type of account was first made by the Consumer Savings Bank in Massachusetts in July of 1970. The Massachusetts Commissioner of Banks denied approval of the proposal. In May of 1972, the Supreme Judicial Court of Massachusetts overruled the Commissioner, holding that the Massachusetts banking statutes allow the savings banks to permit its depositors to make withdrawals via NOWs. *Consumers Savings Bank v. Commissioner of Banks, supra.* Subsequently, NOW accounts were introduced in savings banks in New Hampshire as well as in Massachusetts, but had spread no farther than these two states, due in part to certain exemptive language found in the regulations promulgated by the Federal Deposit Insurance Corporation.[2]

In August of 1973, Congress enacted legislation restricting the use of interest bearing NOW accounts to the states of Massachusetts and New Hampshire. 12 U.S. C.A. § 1832 provides as follows:

> "(a) No depository institution shall allow the owner of a deposit or account on which *interest or dividends are paid* to make withdrawals by negotiable or transferable instruments for the purpose of making transfers to third parties, except that such withdrawals may be made in the States of Massachusetts and New Hampshire.
>
> "(b) For purposes of this section, the term 'depository institution' means -
>
> * * *
>
> "(6) any . . . savings and loan association organized and operating according to the laws of the State in which it is chartered or organized, ..."

No limitation was enacted on the issuance of NOWs drawn on interest free accounts.[3]

The issue consequently posed is whether a State chartered savings and loan association may issue NOWs on interest free accounts under the applicable provisions of the New Jersey Savings and Loan Act of 1963, N.J.S.A. 17:12B-1 *et seq.*[4] It is initially clear that a savings and loan association has only such powers and rights with respect to types of withdrawals as are granted to it by statute. *Rodrock v. Materialman's Building & Loan,* 126 N.J. Eq. 457 (Ch. 1939), reargument den. 128 N.J. Eq. 72 (Ch. 1940). In this instance, the Act does not grant either express or implicit authority to a savings and loan association to issue NOWs.

N.J.S.A. 17:12B-133 does not appear to authorize interest free accounts, a prerequisite for NOW accounts consistent with 12 U.S.C.A. § 1832. That section provides, *inter alia*, that

> "The board of an association may classify savings deposits and savings accounts as to notice, amount and term, and may determine to pay different rates of earnings with respect to savings deposits and savings accounts in different classes. All accounts of the same type and class shall be paid the same rate of earnings. Such earnings of dividends may be described as interest."[5]

A review of the legislative history of N.J.S.A. 17:12B-133 discloses that it was not intended to permit interest free, demand accounts. This section originated in L. 1925, c. 65, sec. 67, which first established "reward profit plans," under which additional interest or reward was paid to regular depositors of building and loan associations. The section was carried forward in the Revised Statutes, R.S. 17:12-16, in 1937, the Savings and Loan Act of 1946 and the further revision now known as Section 133 of the Savings and Loan Act (1963). The 1963 Act read that accounts eligible for the reward profit "may be classified as to type and the reward profit may be a different rates for different classes of accounts . . . ." L. 1963, c. 144, sec. 133. The section was further revised by L. 1969, c. 28, sec. 3, but the intent remained the same, *i.e.*, to permit classification of accounts for purposes of promoting an effective reward or bonus plan for conscientious savers, not to allow interest free demand accounts.[6]

Likewise, N.J.S.A. 17:12B-130(a) cannot be deemed to authorize interest free checking accounts. Said statute provides:

> "At least annually and after determination of the net income for the accounting period and the establishment of reserves required or permitted by this act, the board of such State association shall determine by resolution, the rate or rates of dividend, if any, which shall be declared for each class of account. Such dividends shall be taken only from the net income or from the undivided profits accounts . . . ."

The language of the above quoted section clearly relates the rate of dividend to the availability of net income and reserves, implying that if there is sufficient net income and reserve, there should be dividends paid on the account.

In a recent analogous case, the New York Supreme Court, Appellate Division, struck down regulations issued by the Superintendent of the Banks of the State of New York permitting New York savings banks to offer NOW accounts. *N.Y. State Bankers Assn. et al v. Albright*, 46 App. Div. 2d 269, 361 N.Y.S. 2d 949 (App. Div. 1974). The court, in striking down the regulations, engaged in an historical analysis of the functional distinctions between commercial banks and savings institutions and, after analyzing provisions of the New York State Banking Law allowing for withdrawal without passbook, concluded that the Superintendent of Banks was without statutory authority to promulgate regulations permitting NOW accounts. The court concluded that such a fundamental change from the traditional functions of savings banks should be brought about through legislation and not by administrative fiat. The same conclusion is warranted with respect to the right of New Jersey savings and loan associations to offer NOW accounts, since in New Jersey the power to maintain accounts subject to withdrawal by check has traditionally been exercised only by (commercial) banks and savings banks.

For the reasons expressed above, it is our opinion that State chartered savings and loan associations do not have the authority under the Savings and Loan Act of 1963 to offer NOW accounts.

Very truly yours,
WILLIAM F. HYLAND
Attorney General
BY: MICHAEL E. GOLDMAN
Deputy Attorney General

1. Federal Savings and Loan Associations are prohibited from issuing NOWs. 12 U.S.C.A. § 1464(b)(1).
2. 12 C.F.R. § 329.0 *et seq.*
3. In response to this legislation, the three major federal banking regulatory agencies—Federal Reserve Board, the Federal Deposit Insurance Corporation and the Federal Home Loan Bank Board—have issued regulations dealing with NOW accounts. For an analysis of the current status of NOW accounts under 12 U.S.C.A. § 1832 and pertinent regulations, see Kaplan, *Federal Legislative and Regulatory Treatment of NOW Accounts*, 91 Banking Law Journal 439 (1974); Riordan, *NOW Accounts: A Legal Analysis*, 40 Legal Bulletin 1 (1974).
4. There were two bills introduced in the Legislature to expressly grant savings and loan associations the power to provide for accounts which would be subject to withdrawal by check, draft or other negotiable order. A-2306 was defeated in committee on January 23, 1975. A-2325 was defeated in the General Assembly and held over for future consideration on April 7, 1975 and again on May 5, 1975.
5. It has been stated that the right of savings banks to offer checking accounts is incident to the power of savings banks to maintain classes of depositors and to regulate interest according to class. *Hudson Co. Nat'l Bank v. Provident Inst. for Savings*, 80 N.J. Super. 339, 356 (Ch. Div. 1963), aff'd 44 N.J. 282 (1965). However, the precedential value of the *Hudson* case is questionable. The court in that case put primary reliance on the fact that savings banks had been offering checking accounts to their depositors for at least 20 years before the enactment of the Banking Act of 1948, N.J.S.A. 17:9A-1 *et seq.*, under which savings banks are organized, and that said practice had been condoned by the Department of Banking and Insurance. The offering of checking accounts was thus within the usual custom of savings banks and therefore within the powers conferred by N.J.S.A. 17:9A-26(1). In the case of savings and loan associations, there has been no similar customary practice to offer checking to their customers.
6. The statement attached to the bill, which was enacted as the 1969 amendment, states in pertinent part as follows:

> "This act. . .authorizes State chartered associations to classify their accounts as to amount and term in the same manner authorized by federally chartered associations by the Housing Act of 1948 and the regulations of the Federal Home Loan Bank Board."

In view of the fact that Federal Savings and Loan Associations are prohibited from issuing NOW accounts (12 U.S.C.A. § 1464(b) (1)), this amendment can hardly be used to support the contention that New Jersey associations can issue NOW accounts.

June 23, 1975

WILLIAM L. JOHNSTON
Acting Executive Director
New Jersey Housing Finance Agency
3535 Quakerbridge Road
Trenton, New Jersey

FORMAL OPINION NO. 14—1975

Dear Mr. Johnston:

You have asked for an opinion as to whether the New Jersey Housing Finance Agency (hereinafter "HFA") is empowered to finance housing projects which are fully constructed and occupied in instances where no rehabilitation is contemplated. You are hereby advised that the HFA does not have the statutory authority to provide financing, by mortgage loans or otherwise, to qualified sponsors of a fully constructed and occupied housing project. Such housing projects are solely eligible for HFA financing for rehabilitation, where appropriate, within the meaning of the act.

A reading of the statute in its entirely, including its history, demonstrates that the Legislature did not intend to authorize the HFA to make mortgage loans or other advances for fully constructed and completed housing projects; but rather to encourage through financial assistance the construction of new projects or the completion of projects in various stages of construction. The HFA was established by the New Jersey Housing Finance Agency Law of 1967, Laws of 1967, c. 81., N.J.S.A. 55:14J-2 *et seq.* The introductory policy declaration to the Act notes that there is a need in this State for the construction of new facilities and the rehabilitation of existing housing at rentals available for families of moderate means; and that a public agency has been created to accomplish the foregoing objectives through the use of public financing, loans and other financial assistance. N.J.S.A. 55:14J-2.

After establishing the HFA to administer the Act, the Legislature, in defining the scope of its responsibilities, used language clearly compatible with its declaration to allow for the use of public financial assistance for new construction of moderate income housing. The language of the Act clearly puts the emphasis on contemplated construction throughout the entire statutory framework. Housing projects are defined in part by N.J.S.A. 55:14J-3(g) to mean: "any work or undertaking, whether new construction or rehabilitation, which is designed for the primary pur-

pose of providing decent, safe and sanitary dwelling units for families of moderate income in need of housing. . . ." Pursuant to N.J.S.A. 55:14J-5(a) the HFA, in order to encourage the construction of safe and adequate housing, is empowered to finance by mortgage loans or otherwise, the construction of housing projects. No application for a loan for the construction of a housing project shall be processed unless there is a certified copy of a municipal resolution already filed with the Agency reciting that there is a need for moderate income housing projects in the municipality. N.J.S.A. 55:14J-6(b). Furthermore, upon the consideration of any application for a loan, the HFA shall first give priority to applications for loans for the construction of housing projects which will be part of or constructed in connection with urban renewal projects. N.J.S.A. 55:14J-8.

Other sections of the Act give additional support to the desired legislative purpose to authorize the financing of projects to be constructed with public assistance. N.J.S.A. 55:14J-9(7) provides that no loan shall be executed unless a qualified housing sponsor shall agree to certify the actual project cost upon completion of project construction and to refund to the Agency the amount by which the proceeds of the loan exceed the certified project cost. N.J.S.A. 55:14J-9(a)(9) makes it plain that the Legislature wished to finance new construction or construction in progress by virtue of its inclusion of a requirement for the payment of the prevailing wage to the workmen employed in the construction. See also N.J.S.A. 55:14J-37. Clearly, the tenor of the statutory language suggests the intercession of HFA financial assistance to aid in the inception of or the on-going construction of housing projects.

Moreover, the available legislative history of the Act indicates that it was enacted to identify a need for the construction of moderate income housing and the use of public financial resources to help alleviate a housing shortage. In the message which accompanied the signing of Assembly Bill No. 770 into law, Governor Hughes indicated a "need for a state program to encourage and support the construction. . . of such housing. . . ." Various companion enactments during the middle and late 1960's further demonstrate the commitment made by the Legislature to the construction of low and moderate income housing and the establishment of various agencies at both State and local levels designed to aid in the alleviation of the need. *See e.g.*, Department of Community Affairs Demonstration Grant Law, N.J.S.A. 52:27D-61 (Laws of 1967, c. 82); Senior Citizens Nonprofit Rental Housing Tax Law, N.J.S.A 55:14I-2 (Laws of 1965, c. 92); Limited-Dividend Nonprofit Housing Corporations or Associations Law, N.J.S.A. 55:16-2 (Laws of 1949, c. 184, as amended; Laws of 1967, c. 112). It is, therefore clear from the legislative history and companion enactments, that the emphasis was exclusively designed to encourage the actual construction of new dwelling units or their rehabilitation and the use of public financing techniques to meet those specific needs.*

An administrative agency has only such powers as are expressly or implicitly delegated to it by statute. *Burlington County Evergreen Park Mental Hospital v. Cooper,* 56 N.J. 579, 598 (1970). In the present situation the language of the Act and its underlying policy do not provide either express or implicit authority for the HFA to approve mortgage loans to sponsors of a fully constructed and occupied housing project. There is no legislative purpose to sanction, in essence, the use of the HFA as a low cost permanent mortgage lending or refinancing agency. A policy decision of the significance should be expressed with unmistakable clarity by the Legislature. Thus, pending any legislative expansion of the role of the HFA, there is no justification for the agency to finance by mortgage loans or otherwise completely

constructed projects or dwelling units other than for rehabilitation contemplated by the Act.

A further question raised is whether the HFA may make its financial assistance available for housing projects in various stages of construction which are short of full completion.** Presumably, construction has been terminated as a result of adverse economic factors in the construction industry, *e.g.* rising mortgage interest rates and the general unavailability of conventional mortgage financing. Under these circumstances, it may logically be concluded that such a mortgage loan is within the purview of the Act if it will tend to facilitate the actual completion of eligible housing projects at various stages of construction; or where the project has not progressed to the point where it may be characterized as "completed" in both practical and legal terms. Each application for that type of assistance must be evaluated by the HFA on a case by case basis in order to determine within the scope of its discretion whether the project is in a "partially completed" state and whether public financing will provide the economic stimulus for actual completion of the construction.

For these reasons, you are advised that the HFA does not have the authority under the "New Jersey Housing Finance Agency Law of 1967" to finance by mortgage loans or other means housing projects which are fully constructed and occupied unless such financial assistance is designed for rehabilitation of existing housing facilities within the intendment of the Act. You are also advised that it is within the permissible scope of the Agency's discretion to make mortgage loans or other financial assistance available for projects which are in various stages of construction if, in the judgment of the Agency, the project falls short of "completed" status and the assistance will facilitate the ultimate completion of construction.

Very truly yours,
WILLIAM F. HYLAND
Attorney General
By: THEODORE A. WINARD
Assistant Attorney General

* There can be doubt that at the time of the adoption of this Act, the Legislature was familiar with the need for new construction to deal with "urban renewal, highway construction, and other public work programs" and desired to lend the HFA's financial resources to encourage construction to deal with those problems. N.J.S.A. 55:14J-2.

** At its November, 1974 meeting HFA by resolution adopted a policy governing the permanent financing of projects funded for construction by conventional lenders. A number of applications are pending from sponsors of projects initiated without HFA financing and which are at various stages of completion. These sponsors have indicated that permanent financing is either unavailable or only available at rates so high that it would be necessary for them to fix rents at levels which families of moderate income could not afford.

June 25, 1975

EDWARD G. HOFGESANG, *Acting Director*
Division of Budget and Accounting
Department of the Treasury
State House
Trenton, New Jersey 08625

FORMAL OPINION NO. 15—1975

Dear Acting Director Hofgesang:

Inquiries have been made concerning whether the Legislature may transfer sums from the Motor Vehicle Liability Security Fund ("MVLSF") and the Unsatisfied Claim and Judgment Fund ("UCJF") to the General State Fund by provisions to be included in the general appropriations act for fiscal year 1975-76.* For the reasons discussed below, it is concluded that such transfers may be effected by means of substantive legislation directed to that purpose, but that the State Constitution appears to prohibit the use of an appropriations act to accomplish the transfers.

The MVLSF has been established by N.J.S.A. 39:6-29 *et seq.* to satisfy certain statutory claims which arise upon the insolvency of insurers authorized to transact the business of motor vehicle liability insurance on motor vehicles principally garaged in New Jersey. The original fund was provided by an assessment against such insurers for the privilege of issuing policies of motor vehicle liability insurance (L. 1952, c. 175, § 4), and was maintained at a level of $6 million by additional annual assessments by the Commissioner of Insurance, when required, against the insurers (N.J.S.A. 39:6-95, 96). The Treasurer is the custodian of the fund which is to be kept "separate and apart from any other fund and from all other state moneys." N.J.S.A. 39:6-98.

The functions of the fund are eventually to be assumed by the New Jersey Property-Liability Insurance Guaranty Association, established by L. 1974, c. 17, N.J.S.A. 17:30A-1 *et seq.* That statute provides for such assumption when the Commissioner of Insurance declares the existing balance in the MVLSF exhausted. N.J.S.A. 17:30A-2(b). On August 30, 1974, the Commissioner of Insurance determined that MVLSF assets, while adequate to satisfy pending and anticipated claims arising from previous insurer insolvencies, would not fully discharge the fund's obligations if it were required to respond to claims arising from the insolvency of the Gateway Insurance Company. N.J.A.C. 11:1-5(b). This determination underlay the Commissioner's consequent declaration of exhaustion of the MVLSF. N.J.A.C. 11:1-5.1(c). That declaration has had these consequences: *first,* Gateway motor vehicle liability claims (as well as all future motor vehicle liability claims upon insurer insolvency) have become chargeable to the Guaranty Association; and *second,* an amount, estimated by the Joint Appropriations Committee to exceed $5,000,000, remains in the MVLSF, but is no longer subject to claims of any kind. It is this sum which S-3175 proposes to transfer, virtually in its entirety, to the General State Fund.

The UCJF has been established under N.J.S.A. 39:6-61 *et seq.* to satisfy certain statutory claims for loss or injury caused by financially irresponsible or unidentified owners or operators of motor vehicles. The UCJF is currently maintained (apart from recoveries upon judgments against financially irresponsible defendants assigned to it by claimants against the fund under N.J.S.A. 39:6-77) by assessments by the Director of the Division of Motor Vehicles against insurers writing policies of liability insurance on motor vehicles principally garaged in New Jersey. N.J.S.A. 39:6-63. The sums paid into the Fund are remitted to the Treasurer and held by him in trust for the accomplishment of the purposes of the UCJF statute. N.J.S.A. 39:6-88.

The UCJF currently maintains a surplus, determined by the Joint Appropriations Committee to exceed $3,300,000, over and above sums necessary to meet pending and anticipated claims in the next fiscal year. It is this sum which the committee proposes to transfer to the General State Fund.

The purpose and intent of the proposed transfers is to remove the restrictions imposed upon expenditure of the subject sums by the UCJF and MVLSF statutes and to free those funds for use for general state purposes. The effect of that action is to convert the existing MVLSF balance and the UCJF surplus into general revenue, and also potentially to require assessment sometime in the future against insurers under the UCJF statute to restore the amount transferred from that fund, when and if it is needed to discharge UCJF obligations. Moreover, it is not entirely clear whether, under the Guaranty Association statute, that body has a claim upon any MVLSF assets remaining after the Commissioner's declaration of exhaustion. N.J.S.A. 17:30A-2(b) quite clearly contemplates that the Guaranty Association shall not succeed to MVLSF obligations until the MVLSF is in fact totally spent for the satisfaction of claims, and the Guaranty Association has asserted a claim against unexpended MVLSF balances. Legislative action transferring the funds would also extinguish any such claim by the Guaranty Association.

The restrictions which attach to the expenditure of MVLSF and UCJF funds (as well as any claim by the Guaranty Association) derive exclusively from the operative statutes. Since these provisions were enacted by the Legislature in the first place, there is no reason to believe that they are not revocable by legislative action. Cf. *McCutcheon v. State Building Authority,* 13 N.J. 46, 66 (1953).

The conversion of the sums so transferred, however, to general state revenue would necessarily be contingent upon the State's having the authority to utilize assessments against insurers for purposes of general revenue. The assessments against motor vehicle liability insurers, under both N.J.S.A. 39:6-63 and 39:6-95, 96, are calculated as a percentage of gross premiums, less certain deductions, received on policies of liability insurance upon motor vehicles principally garaged in this State. The gross premiums tax upon insurers for purposes of general revenue is a familiar and longstanding element in the State's revenue program (see N.J.S.A. 54:16-1 *et seq.*, 54:16A-1 *et seq.*, 54:17-4 *et seq.*, 54:18A-1 *et seq.*). The gross premiums tax has, moreover, consistently been sustained against constitutional challenge in the United States Supreme Court. *State Bd. of Insurance v. Todd Shipyards Corp.,* 370 U.S. 451 (1962); *Prudential Ins. Co. of America v. Benjamin,* 328 U.S. 408 (1946); *Lincoln National Ins. Co. v. Read,* 325 U.S. 673 (1945); *Connecticut General Life Ins. Co. v. Johnson,* 303 U.S. 77 (1938).

It would therefore appear that the statutory impediments, deriving from N.J.S.A. 39:6-61 *et seq.* and 39:6-92 *et seq.* and possibly from the Guaranty Association statute, to expenditure of UCJF and MVLSF funds for general state purposes may be rescinded validly by legislative action. However, the State constitutional provisions concerning the form and content of legislation and of the general appropriations act in particular, suggest that such rescission may not be accomplished in the manner proposed by S-3175.

Two constitutional restrictions are relevant to the question. The first is *N.J. Const.,* Art. IV, Sec. 7, par. 4, which provides in pertinent part:

"To avoid improper influences which may result from intermixing one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title."

The usual title of the general appropriations act (and of the as yet unenacted appropriations bill, S-3175, for fiscal year 1975-76) has been:

"An act making appropriations for the support of the state government and the several public purposes for the fiscal year ending June 30, 19 and regulating the disbursement thereof."

The act is passed to apply the various sources of state revenue to the purposes of government for which such sources may be utilized in accordance with the mandate found in Article VIII, Sec. 2, par. 2 of the State Constitution:

"All monies for the support of the state government, and for all other state purposes as far as can be ascertained or reasonably foreseen, shall be provided for in one general appropriation law covering one and the same fiscal year. . . ."

An appropriation is not the creation of revenue, but rather the statutory authorization to expend specified sums for specified purposes. See *Brown v. Honiss,* 74 N.J.L. 501, 521 (E. & A. 1906). The act thus constitutes and governs the state's spending program for the given fiscal year. By virtue of Article IV, Sec. 7, par. 4 of the State Constitution, every portion of an act must have a substantive force which the courts have variously expressed as "in furtherance of" its purpose or "germane" to that purpose, or "necessary and appropriate" to it, or "reasonably connected" therewith. See, *e.g. General Public Loan Corp. v. Director, Div. of Taxation,* 13 N.J. 393 (1953); *Bucino v. Malone,* 12 N.J. 330 (1953); *Jersey City v. Martin,* 126 N.J.L. 353 (E. & A. 1941); *Public Service Electric Gas Co. v. Camden,* 118 N.J.L. 245 (Sup. Ct. 1937).

The transfer provisions in question appear to do something other than, and not incidental to, the allocation of revenue or the regulation of the state's spending program. They actually create revenue, or more particularly, extend the permissible objects of given restricted revenues and thereby have the effect of amending the statutes that created those restrictions, as described above. This distinction between the creation of a revenue source and the allocation to a revenue object would appear crucial. There are no New Jersey cases directly in point, but decisions of other states in interpreting provisions similar to *N.J. Const.,* Art. IV, Sec. 7, par. 4 give guidance. The South Carolina courts have struck down or severely questioned revenue creating provisions in appropriations laws. *Colonia Life Ins. Co. v. South Carolina Tax Comm.,* 233 S.C. 129, 103 S.E. 2d 908 (1958); *Chesterfield City v. State Highway Dept.,* 191 S.C. 19, 3 S.E. 2d 686 (1939). More to the present point, the Missouri Supreme Court has declared that an appropriations act could not repeal restrictions upon the source from which salaries of certain state officers were to be paid. *State v. Smith,* 335 Mo. 1069, 75 S.W. 2d 828 (1934).

The amendatory effect of the proposed transfer provisions upon the MVLSF, UCJF and Guaranty Association statutes raises constitutional questions under both

Article IV, Sec. 7, par. 4 and also Article IV, Sec. 7, par. 5 which provides, in pertinent part:

"No law shall be revived or amended by reference to its title only, but the act revived or the section or sections amended, shall be inserted at length."

Under Article IV, Sec. 7, par. 4, it would appear that the purpose of appropriation legislation would not extend to the amendment of permanent law. Cf. *Rutgers College v. Morgan,* 70 N.J.L. 460, 477 (Sup. Ct. 1904), aff'd 71 N.J.L. 663, 664 (E. & A. 1905).

Under Article IV, Sec. 7, par. 5, the issue is more precisely presented. That section does not forbid an amendment, expressed or implied, of previous legislation, provided the amendment is in itself complete and sufficient, with its purpose, meaning and full scope apparent on its face. *Kline v. N.J. Racing Comm.,* 38 N.J. 109 (1962); *Evernham v. Hulit,* 45 N.J.L. 53 (Sup. Ct. 1883); *Baldwin Lumber-Junction Milling v. Moskowitz,* 15 N.J. Misc. 438 (Hudson Cty. Cir. Ct. 1937). The transfer provisions in question, however, are just that—naked transfers, notwithstanding the provisions of certain other laws. They do not indicate that specific UCJF and MVLSF trust and dedication provisions are revoked as to the transferred funds, that contingent obligations are created on the part of insurers, and that all possible claims of the Guaranty Association against the unspent MVLSF balance are extinguished. It would therefore appear that the transfer provisions are not a self-contained amendment.

For the reasons stated, it is concluded that transfers from the UCJF and the MVLSF to the General State Fund may be accomplished by means of substantive legislation specifically drafted for that purpose. However, the transfer provisions included in S-3175 appear to violate constitutional proscriptions governing the form and content of the general appropriations law, and it is our opinion that they ought not to be included in the Appropriations Act for fiscal 1975-76.

Very truly yours,

WILLIAM F. HYLAND
Attorney General of New Jersey

By: PETER D. PIZZUTO
Deputy Attorney General

* The following language has been included in the appropriations bill for fiscal 1975-76, S-3175, at page 14:

"Not withstanding any other provision of C. 39:6-61 *et seq.*, the amount of $3,395,610 shall be transferred from the unrestricted reserve of the Unsatisfied Claim and Judgment Fund to the General State Fund.

"Notwithstanding any other provision of C. 39:6-92 *et seq.* and P.L. 1974, c. 17, the amount of $4.2 million shall be transferred from balances remaining in the Motor Vehicle Liability Security Fund to the General State Fund."

July 30, 1975

HONORABLE DAVID J. BARDIN
Commissioner
Department of Environmental Protection
Rm. 801 – Labor & Industry Bldg.
John Fitch Plaza
Trenton, New Jersey 08625

FORMAL OPINION NO. 16 – 1975

Dear Commissioner Bardin:

You have requested advice on certain questions arising out of the mapping and rule making functions of the Department of Environmental Protection (hereinafter "Department") under the Coastal Wetlands Act. N.J.S.A. 13:9A-1, *et seq*. In particular, you have asked whether wetlands maps promulgated by the Department pursuant to the Act are considered part of the regulatory wetlands orders, and therefore whether a hearing as prescribed in N.J.S.A. 13:9A-3 must be held every time a wetlands map is amended to either include or to exclude areas. For the reasons which follow, you are hereby advised that wetlands maps are not part of a wetlands order, but that a hearing should nevertheless be held whenever a wetlands map is amended to add a new area that is owned by someone who was not given the notice prescribed by the Act prior to the adoption of the wetlands order for that location. Conversely, there is no need to hold a hearing when a wetlands map is amended to delete an area.

The mapping and regulatory rule making functions of the Department pursuant to the Coastal Wetlands Act are distinct yet related activities. The wetlands maps are developed by the Department pursuant to N.J.S.A. 13:9A-1(b) which provides that:

> "The Commissioner of Environmental Protection shall, within 2 years of the effective date of this act, make an inventory and maps of all tidal wetlands within the State. The boundaries of such wetlands shall generally define the areas that are at or below high water and shall be shown on suitable maps, which may be reproductions or aerial photographs. Each such map shall be filed in the office of the county recording officer of the county or counties in which the wetlands indicated thereon are located. Each wetland map shall bear a certificate of the commissioner to the effect that it is made and filed pursuant to this act. To be entitled to filing no wetlands map need meet the requirements of R.S. 47:1-6."

This office has been informed by the Bureau of Marine Lands Management, Division of Marine Services, that all of the aerial photography from which the actual maps were made was completed within the two year period referred to in the above quoted statute, and furthermore, that the resulting wetlands maps were filed with each county recording officer prior to the promulgation of the wetlands order for such county.

Distinguished from the mapping process, the regulatory rule making process regarding coastal wetlands was only recently completed. That process, known as the promulgation of wetlands orders, is provided for in N.J.S.A. 13:9A-2, which in pertinent part states:

> "The Commissioner may from time to time, for the purpose of promoting the public safety, health and welfare, and protecting public and private property, wildlife and marine fisheries, adopt, amend, modify or repeal orders regulating, restricting or prohibiting dredging, filling, removing or otherwise altering, or polluting, coastal wetlands."

N.J.S.A. 13:9A-3 specifies the procedure that must be followed in adopting a wetlands order. That statute in part provides:

> "The Commissioner shall, before adopting, amending, modifying or repealing any such order, hold a public hearing thereon in the county in which the coastal wetlands to be affected are located, giving notice thereof to each owner having a recorded interest in such wetlands by mail at least 21 days prior thereto addressed to his address as shown in the municipal tax office records and by publication thereof at least twice in each of the 3 weeks next preceding the date of such hearing in a newspaper of general circulation in the municipality or municipalities in which such coastal wetlands are located."

This office has also been advised by the Bureau of Marine Lands Management that as of February 21, 1975, identical wetlands orders have been promulgated for all eleven counties containing coastal wetlands, following a hearing in each county.

The above cited statutory scheme and implementation of same by the Department demonstrate that the mapping and regulatory functions regarding wetlands are distinct yet related. It is apparent from a reading of N.J.S.A. 13:9A-1 through 3 that the mapping of wetlands is a separate process from the regulation of wetlands through the process of promulgating wetlands orders. However, the maps have little real impact until a wetlands order regulating the use of the wetlands indicated on the maps is adopted.

Since the mapping and wetlands order process are separate, and since the only reference to a hearing in the Act is in connection with the adoption of a wetlands order, see N.J.S.A. 13:9A-3, it follows that there is no statutory requirement for a hearing in order to add or delete an area from a wetlands map.* However, the notice provisions of N.J.S.A. 13:9A-3 are very specific and strict in connection with the adoption of a wetlands order. As quoted above, that statute requires, among other things, individual written notice by mail to each owner having a recorded interest in the wetlands affected by the proposed order. In the face of such scrupulous concern by the Legislature for the right of wetlands owners to notice of their opportunity to object to the contents of a wetlands order at a public hearing in the county to be affected, it must be concluded that absent such notice a wetlands owner is not bound by the terms of an order. *Cf., Hepner v. Township Committee of Lawrence Twp.*, 115 N.J. Super. 155, 161-62 (App. Div. 1971).

This conclusion is reinforced by the fact that N.J.S.A. 13:9A-3, in addition to requiring notice of the proposed wetlands order for each owner of a recorded interest in such wetlands, also requires both individual written notice of the adoption of the order to such owners as well as the recordation of a copy of the order and plan of the lands affected as a judgment against each parcel of wetlands.** Moreover, N.J.S.A. 13:9A-6, which provides for a procedure whereby a wetlands order may be

challenged, is only triggered by the above described individual notice of the adoption of an order.

Because the consequence of lack of the prescribed statutory notice is the inapplicability of a wetlands order vis-a-vis a wetlands owner without notice of a wetlands order, it follows that whenever a wetlands map is amended to include a new area, the order is not effective against the owners of the additional wetlands since, it can be assumed, they would never have received the prescribed notice. Thus, a hearing after proper notice, see N.J.S.A. 13:9A-3, should be accorded to anyone with a recorded interest in any area of wetlands that is added to a wetlands map, if that person was not given the notice prescribed by the Act prior to the adoption of the wetlands order for that location, and conversely, since the requirement for a hearing springs from the need to follow the legislative notice mandate in order to bind wetlands owners by a wetlands order and not from the mapping process itself, there is no need to hold a hearing when a wetlands map is amended to delete an area. Of course, the Department is free to devise an expeditious hearing procedure to deal with map amendment problems, such as by inviting written comments from affected land owners in lieu of a personal appearance at the hearing and by only scheduling an actual hearing upon the request of a landowner.***

Very truly yours,
WILLIAM F. HYLAND
Attorney General

By: JOHN M. VAN DALEN
Deputy Attorney General

* This conclusion is reinforced by an analysis of the legislative history behind the Act, inasmuch as an earlier wetlands bill, A-768 (1969), specifically required a public hearing prior to designating any property as wetlands. The clear absence of such a requirement in the Act as passed evidences a legislative intent not to require a hearing in connection with the mapping process.

** It is assumed that if a wetlands owner were not given notice of the proposed adoption of an order that he also would not have received notice that the order had been adopted and that the order would not have been filed with the force of a judgment against his parcel of land.

*** The Department is already contemplating a second round of hearings in all counties except Cumberland because of the existence of a new series of wetlands maps encompassing very small parcels of wetlands that were not part of the original set of maps for most counties. This round of hearings can be utilized for the additional purpose of covering in unnoticed owners of any parcels of wetlands that the Department has added or would like to add by amendment to its original maps.

August 5, 1975

HONORABLE RICHARD F. SCHAUB
Commissioner of Banking
36 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 17—1975

Dear Commissioner Schaub:

You have inquired as to the legality of a commercial bank chartered under Pennsylvania law making loans to New Jersey residents secured by second mortgages on New Jersey residential property. More specifically, you have inquired whether a commercial bank chartered under the laws of the Commonwealth of Pennsylvania would be subject to the provisions of the Secondary Mortgage Loan Act, N.J.S.A. 17:11A-34 *et seq.* You have informed us that such a bank has been making loans to New Jersey residents upon the security of second mortgages on the borrower's New Jersey residence. Those loans were finalized at the Pennsylvania offices of the bank, with the documentation evidencing such loans executed and delivered by the borrowers to the bank in Pennsylvania. The terms of the loans comply in all respects with applicable federal and Pennsylvania banking laws.

The Secondary Mortgage Loan Act does not apply to the transactions described *supra.* N.J.S.A. 17:11A-61 provides as follows:

> "Nothing in this act shall be construed as expanding or restricting the powers otherwise conferred by law upon financial institutions, such as State and National banks, State and Federal savings and loan associations, savings banks and insurance companies, to engage in the secondary mortgage business as defined in Section 3 [N.J.S.A. 17:11A-36], and no such financial institution, in exercising any power otherwise so conferred upon it, shall be subject to any provision of this act."

The language of this exemption is quite broad, and on its face, would apply to commerical banks chartered in sister states. moreover, a review of the legislative history of the Secondary Mortgage Loan Act (1970) and its predecessor, the Secondary Mortgage Loan Act (1965), indicates clearly that the legislation was aimed primarily at foreign loan companines, not foreign banks, savings banks or savings and loan associations. *Oxford Consumer Disc. Co. of No. Phila. v. Stefanelli,* 102 N.J. Super 549 (App. Div. 1968), 104 N.J. Super. 512 (App. Div. 1969), mod. 55 N.J. 489 (1970), appeal dism. 400 U.S. 808, 91 S. Ct. 45, 27 L. Ed. 2d 38 (1970), order amended on other grounds 400 U.S. 923, 91 S. Ct. 183, 27 L. Ed. 2d 182 (1970).

It is also important to determine whether, in light of all activities surrounding the mortgage loan, a foreign banking institution is engaged in the prohibited transaction of business in this State in contravention of the Banking Act of 1948, N.J.S.A. 17:9A-316 *et seq.* Such impermissible transaction of business by a foreign bank may be illustrated by solicitation, advertisement or the use of brokers in New Jersey or other activities in this jurisdiction leading to the consummation of the secondary mortgage loan. However, in those cases where all of the activities surrounding the

loan occur exclusively in the foreign jurisdiction, there would appear to be no legal impediment to a foreign bank making loans to New Jersey residents on the security of residential property located in this State. In fact, a foreign bank may enforce a note in this State which was taken in connection with a loan and may also enforce or otherwise dispose of its interest in the New Jersey property which was taken as security for said loan. N.J.S.A. 17:9A-331(3) and (4) provide in pertinent part:

> "Nothing in this article shall prohibit a foreign bank from . . .
> "(3) enforcing in this State obligations heretofore or hereafter acquired by it in the transaction of business outside of this State, . . .;
> "(4) acquiring, holding, leasing, mortgaging, contracting with respect to, or otherwise protecting or conveying property in this State heretofore or hereafter . . . mortgaged . . . to it as security for, or in whole or part satisfaction of a loan or loans made by it or obligations acquired by it in the transaction of business outside of this State. . . ."

However, a foreign bank is not authorized to charge interest at the rates provided in N.J.S.A. 17:11A-44 inasmuch as it is not a secondary loan licensee.

For these reasons, a foreign commercial bank may make secondary mortgage loans to New Jersey residents consistent with the Secondary Mortgage Loan Act of 1970 and the Banking Act of 1948, where there is no transaction of business in whole or in part by such banking institution in the State of New Jersey within the meaning of the Act.

Very truly yours,
WILLIAM F. HYLAND
Attorney General of New Jersey
By: MICHAEL D. GOLDMAN
Deputy Attorney General

July 16, 1975

HONORABLE RALPH A. DUNGAN
Chancellor of Higher Education
Department of Higher Education
225 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 18—1975

Dear Chancellor Dungan:

You have asked for an opinion on several questions dealing with the reduction of the number of faculty at the state colleges as a result of the present state fiscal crisis. Specifically, you have inquired as to whether tenured faculty may be separated

from employment by a state college because of financial exigencies, whether a reduction in tenured faculty must be made on the basis of seniority or whether other factors such as rank, degrees earned, or performance may be used as additional or alternative criteria. You have also asked for our opinion as to the nature of the preferential reemployment rights of faculty separated from a state college due to financial considerations.

Non-tenured faculty are employed pursuant to one-year contracts. The contract between the Council of New Jersey State College Locals, NJSFT-AFT, AFL-CIO and the State provides that "Appointments and reappointments of employees are subject to the availability of funds and proper recording". Article XIII A. Therefore, non-tenured teachers who have received a reappointment for the forthcoming academic year may be released because of a reduction in the College budget necessitating a reduction of staff.

In regard to the rights of tenured faculty, N.J.S.A. 18A:60-3 states in pertinent part:

> "Nothing [in the tenure laws] shall be held to limit the right of the . . . board of trustees of a college . . . to reduce the numbers of professors, associate professors, assistant professors, instructors, supervisors, registrars, teachers, or other persons employed in a teaching capacity in any such institution or institutions *when the reduction is due to a natural diminution of the number of students or pupils in the institution or institutions.* . . ."

This statute further provides that when faculty are released by reason of such reduction, the faculty having the least number of years of service to their credit shall be released in preference to those having longer terms of service. Faculty released because of reduction in the number of students shall be placed on a preferred eligible list in order of the years of service for reemployment and shall be reemployed whenever a vacancy occurs for which they are qualified.

The tenure laws are silent on the matter of reduction of staff for financial reasons. N.J.S.A. 18A:60-3 refers only to reductions as a result of the natural diminution of students. However, in *Nichols v. Board of Education, Jersey City,* 9 N.J. 241 (1952), the court considered an education statute which also had only "natural diminution" as grounds for reducing the number of teachers; yet the court still recognized reductions based on economy as an inherent power of educational authorities. In *Seidel v. Board of Education of Ventnor City,* 110 N.J.L. 31 (Sup. Ct. 1933), the court acknowledged a right of economic reduction even when there was no statute whatsoever. While the Legislature intended the tenure laws to provide job security for teachers after a certain period of satisfactory service, it did not intend to favor private interest as against the public interest. Clearly, when economic pressures at a public institution of higher education are serious enough to warrant the reduction of the work force, the job security of individual persons must yield to the public interest. *See also Levitt v. Board of Trustees of Nebraska State Colleges,* 376 F. Supp. 945 (D. Neb. 1974); *Johnson v. Board of Regents of the University of Wisconsin,* 377 F. Supp. 227 (W.D. Wis. 1974) aff'd 5 F. 2d 975 (1975). Therefore you are advised that tenured faculty may be separated from employment because of financial exigencies.*

N.J.S.A. 18A:60-3 provides that seniority shall be the basis for the determina-

tion of the order of reduction of staff due to a natural diminution of the number of students in an educational institution. Although this statute does not expressly refer to reductions for other reasons, it may be reasonably inferred that the Legislature has directed this basis as well in situations where a reduction in staff is mandated by financial exigencies.

Accordingly, in instances where tenured faculty are separated from their employment due to reasons of economy, those persons with the least number of years of service to their credit shall be separated in preference to those having longer terms of service. Length of service is the only legislatively prescribed criterion for release, where the choice for separation is among tenured faculty. Other criteria, such as academic rank, degrees earned and actual performance may not be used to determine the order of separation except insofar as these criteria reflect on the qualifications of a faculty member to fill the remaining positions. You are, therefore, advised that in instances where tenured faculty are to be separated because of economic considerations, the order of separation shall be by years of service. However, the release of nontenured faculty may be based on such other considerations in the discretion of the employing authority.

The preference for the senior tenured employee is not absolute; it will only extend to positions for which he is qualified. In *Weider v. Board of Education of Borough of High Bridge*, 112 N.J.L. 289 (Sup. Ct. 1934), the position of physical training instructor was eliminated. There remained a position combining physical training and teaching. The court found that the physical training instructor was not qualified to discharge the additional teaching duties and therefore had no preferential status as to this position. However, in *Seidel, supra,* where an individual was qualified for general teaching duties but had been assigned to a special class which was merged with others, she retained her preferential status to the general teaching positions. Since jobs still existed for which plaintiff was qualified, she was held entitled to such positions as against a more junior individual occupying the position. It is also clear from the foregoing authority that all nontenured teachers need not be released before any tenured teachers are released. For example, if it was determined that there be a reduction in the number of French professors, the nontenured French professors must be released first, followed by the least senior tenured professors. A tenured French professor may be released even though a nontenured German professor remains on the staff. However, if the tenured French professor is also qualified to teach German, he has preference over the nontenured German professor. In every instance, the determination of faculty members' qualifications to fill an existing position is within the sound discretion of the college.

Another significant issue is whether the reemployent preference of separated tenured faculty set forth in N.J.S.A. 18A:60-3 applies only to the college at which the individual is tenured or whether such preference extends to the entire state system of higher education. The prior tenure law, N.J.S.A. 18A:60-1, states in pertinent part:

> "The services of all [teachers] *employed in any state college or in any county college shall be under tenure . . .*
> a. after the expiration of a period of employment of three consecutive calendar years in any such *institution or institutions;* or
> b. after employment for three consecutive academic years together with employment at the beginning of the next succeeding academic year in any such *institution or institutions;* or
> c. after employment in any such *institution or institutions,* within a period of any four consecutive academic years, for the equivalent of more than three academic years." (Emphasis added.)

Although one may be granted tenure under this statutory language by serving his or her probationary period in one or more institutions in the higher educational system, the status of tenure is applicable only in the educational institution where the faculty member is employed at the time of its acquisition. The enactment of the "State and County College Tenure Act", N.J.S.A. 18A:60-6 *et seq.*, has added further clarification to this interpretation of the tenure laws. N.J.S.A. 18A:60-8 provides that "faculty members shall be under tenure . . . after employment in such college or by such board of trustees" for a specified period of time. There can be no doubt of the legislative purpose to grant the status of tenure solely in the employing institution at the termination of probationary period. Accordingly, it follows that the reemployment preference provided by law for tenured faculty is confined to the specific college or educational institution where the status of tenure has been attained rather than to the entire statewide system of higher education.

To construe the tenure laws to authorize tenure and reemployment preference on a system-wide basis would be contrary to the express legislative purpose to grant the State and County colleges independence and autonomy in the governance of those institutions. State and County colleges are distinctive and independent of each other. N.J.S.A. 18A:64-1 *et seq.;* N.J.S.A. 18A:64A-1 *et seq.* Furthermore, the individual State colleges are distinctive and independent of each other as are the County colleges. N.J.S.A. 18A:64-1; 18A:64-2; 18A:64-6; 18A:64A-1; 18A:64A-8; 18A:64A-11; 18A:64A-12. Among the specific powers delegated to the individual colleges is the authority to appoint members of the teaching staffs and fix their terms of employment. N.J.S.A. 18A:64-6(h); 18A:64A-6(g). If teachers were given tenure and concommittant reemployment preference rights on a system-wide basis, circumstances might and probably will arise where a State or County college would be required to accept teachers as members of its staff without having any opportunity to review them and assess their capability for serving at the college. (For instance, a tenured teacher released from Glassboro State College whose field of expertise is biology could demand employment at Montclair State College or even Morris County College when a vacancy in the biology department at those institutions appeared.) The legislative purpose to invest each college with independence and autonomy in employment practices would be thwarted by such an interpretation. Statutes should not be construed to reach unreasonable, anomalous or absurd results. *Giordano v. City Commission of the City of Newark*, 2 N.J. 585 (1949). Accordingly, you are advised that the reemployment preference for released faculty set forth in N.J.S.A. 18A:60-3 applies only to the college where the individual was employed at the time tenure was attained.

For all of these reasons, it is our opinion that:

(1) N.J.S.A. 18A:60-3 permits reduction of tenured faculty for financial exigencies.
(2) When reductions are made in the tenured staff, the order of separation must be governed by length of service unless a senior faculty member is unqualified for the existing positions.
(3) Tenure is achieved by a teacher only at the institution where he is em-

ployed at the time tenure is vested under the law and, accordingly, preferential status as to reemployment resides only in that institution and not the entire system of higher education.

Very truly yours,
WILLIAM F. HYLAND
Attorney General
By: SHERRIE L. GIBBLE
Deputy Attorney General

August 14, 1975

LEWIS B. KADEN
Counsel to the Governor
State House
Trenton, New Jersey 08625

FORMAL OPINION NO. 19 – 1975

Dear Mr. Kaden:

You have requested my formal opinion as to whether the New Jersey public schools are required by law to remain open for a specific number of days each year. It is my opinion, for the following reasons, that the public schools in this State are mandated by law to remain open for instruction for a period of not less than 180 days in the school year. This will now formalize advice to the same effect given by me on an informal basis on several prior occasions.

N.J.S.A. 18A:36-1 provides that the school year for all public schools shall begin on July 1 and end on June 30. Each local board of education must determine annually the dates between which its schools shall be open "in accordance with law." N.J.S.A. 18A:36-2. The school laws do not directly specify the number of days during which local boards must keep their schools open. However, N.J.S.A. 18A:58-16 and 31 provide that no apportionment of current expense or school building aid respectively ". . . shall be paid to any district which has not provided public school facilities for at least 180 days during the preceding school year . . ." although the Commissioner may waive this penalty for good cause. This legislative prerequisite to the receipt of state aid has its historical origins in Chapter 1, § 37 of the Laws of 1903 (Second Special Session), which precluded apportionment of state aid ". . . to any district which shall not have maintained a public school for at least nine months during the preceding school year . . .". It is apparent that the Legislature's intent in enacting these provisions was in effect to compel districts to keep their schools open for instruction at least 180 days each school year.

This long standing legislative qualification on the entitlement to state school aid has been incorporated as a general requirement by the Department of Education in its regulations and administrative determinations. The requirement that schools remain open for 180 days has been made explicit by regulation for secondary schools.

N.J.A.C. 6:27-1.13. In a number of decisions, the Commissioner of Education has specifically set forth this requirement as one applicable to all schools in all districts. See, e.g., *Somma et al. v. Board of Education of Long Branch,* 1974 S.L.D. 276, decided March 13, 1974; *Goldman et al. v. Bergenfield Board of Education,* 1973 S.L.D. 441, aff'd State Board of Education, February 6, 1974 aff'd Docket No. A-1679-73, Appellate Division of the Superior Court, November 22, 1974; *Moldovan et al. v. Hamilton Board of Education,* 1971 S.L.D. 246. Furthermore, the absence of any legislative modification of this requirement indicates implicit acquiescence by the Legislature in the administrative directives of the commissioner on this aspect of the conduct of the public schools.

For these reasons, you are hereby advised that in setting its annual calendar a local board of education shall as a matter of law provide its facilities for not less than 180 days in any school year.

Very truly yours,
WILLIAM F. HYLAND
Attorney General

August 26, 1975

HONORABLE J. EDWARD CRABIEL
Secretary of State
State House
Trenton, New Jersey 08625

FORMAL OPINION NO. 20 – 1975

Dear Secretary Crabiel:

You have asked whether the requirements for voter reregistration set forth in N.J.S.A. 19:31-13 are applicable to registrants changing marital status but not changing their names, and whether women are compelled to reregister under the surname of a new spouse after marriage. For the reasons herein discussed, you are advised that a change of marital status does not necessitate reregistration unless such change also results in a change of name. You are further advised that the marriage of a woman voter registrant does not in itself change the registrant's name within the meaning of N.J.S.A. 19:31-13 if she continues to use her maiden name rather than assuming her husband's surname as her own.

In pertinent part, N.J.S.A. 19:31-13 reads:

> "Whenever the registrant after his or her original registration *shall change his or her name* due to marriage, divorce, or by judgment of court, the registrant shall be required to reregister and the commissioner upon receipt of information or notice of such change, shall transfer the permanent registration forms of such persons to the inactive file, subject to the provisions of this section." (emphasis added).

The statutory language directs only that if the registrant ". . . shall change his or her name . . ." reregistration must be accomplished. It does not compel a registrant who changes marital status but not name to comply, nor does it compel change of name itself. A registrant who divorces but does not change name is neither compelled to reregister or change name. Similarly, a women registrant who marries is neither compelled to reregister or change name under the provisions of N.J.S.A. 19:31-13 unless some other statutory or common law authority compels such a name change.

A review of the election law of this State reveals no such authority. N.J.S.A. 19:31-3 and 19:31-6.4 require only that prospective registrants give their full names, but there is no further qualification that married women give the surnames of their husbands. Any suggestion that the name the Legislature intended a married woman to enter was one using her husband's surname would appear rebutted by the relatively recent amendment to N.J.S.A. 19:31-3, enacted as L. 1972, c. 82, § 1, which deleted the requirement that the designation "Miss" or "Mrs." prefix the names of women registrants. Whatever contribution identification of the marital status of women registrants may have made towards efficient administration of electorate rolls was evidently not of sufficient value to merit retention.

Nor does there appear to be any other legal compulsion on a woman to assume her husband's surname upon marriage. In a recent decision concerning the effect of marriage on the use of a woman's surname, *In re Application of Lawrence*, 133 N.J. Super. 408 (App. Div. 1975), the Appellate Division reversed the trial court's refusal to grant an application of a married woman for a change of name from her married to her maiden name. The court upheld a married woman's right to resume her maiden name notwithstanding that upon marriage she had assumed her husband's surname. The court also held that a woman is "not compelled by law to assume her husband's surname as her legal name." This finding reinforced the existing common law rule in this jurisdiction that an emancipated person is free to adopt any name as his or her legal surname as long as such name is adopted without fraudulent or criminal purpose and is not obscene or otherwise offensive. *In re Application of Lawrence, supra*, at 411-412, and cases cited therein. There does not appear to be any legislative indication in N.J.S.A. 19:31-13 of a purpose to modify this longstanding common law rule or to mandate reregistration and the use of a husband's surname for purposes of voting. Only in the circumstance where a woman uses her husband's surname for other purposes is there an obligation to use the husband's surname for voting pursuant to N.J.S.A. 19:31-13.

For these reasons, it is concluded that the requirements for voter reregistration set forth in N.J.S.A. 19:31-13 are not applicable to registrants who change their marital status but retain their maiden names. You are further advised that the marriage of a woman voter registrant does not in itself compel the change of a registrant's maiden or pre-marriage name to that of her husband within the meeting of our election laws.

Very truly yours,
WILLIAM F. HYLAND
Attorney General of New Jersey
By: GREGORY E. NAGY
Deputy Attorney General

August 27, 1975

MS. KITTY C. O'NEIL, *Acting Director*
Division on Women
Department of Community Affairs
363 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 21 – 1975

Dear Ms. O'Neil:

You have asked for an opinion as to whether it is permissible for the Division on Women to actively promote or advocate an affirmative vote on a public referendum to add an Equal Rights Amendment to our State Constitution and to lend its resources to a private organization in support of this effort. You are hereby advised that the Division on Women has the authority and responsibility to commit its resources in furtherance of a strictly informational function. However, the authority to inform must not be conducted in a manner to urge or advocate an affirmative vote.

In order to allow the voters to intelligently consider the merits of a public question, they must have access to all of government's information bearing on the issue. The means by which this information can be made available to the public was the subject of a comprehensive opinion in *Citizens to Protect Public Funds v. Board of Education, et al.*, 13 N.J. 172 (1953). Justice (now Mr. Justice) Brennan established the controlling rule in this jurisdiction as follows:

> "The need for full disclosure of all relevant facts is obvious...but the defendant board was not content simply to present the facts. The exhortation 'VOTE YES' is repeated on three pages, and the dire consequences of failure so to do are over-dramatized on the page reproduced above. In that manner the board made use of public funds to advocate one side only of the controversial question without affording the dissenters the opportunity by means of that financed medium to present their side, and thus imperiled the propriety of the entire expenditure. The public funds entrusted to the board belong equally to the proponents and opponents of the proposition, and the use of the funds to finance not the presentation of facts merely but also arguements to persuade the voters that only one side has merit, gives the dissenters just cause for complaint. The expenditure is then not within the implied power and is not lawful in the absence of express authority from the Legislature.
>
> * * *
>
> "We do not mean that the public body formulating the program is otherwise restrained from advocating and espousing its adoption by the voters. Indeed, as in the instant case, when the program represents the body's judgment of what is required in the effective discharge of its responsibility, it is not only the right but perhaps the duty of the body to endeavor to secure the assent of the voters thereto. The question we are considering is simply the extent to and manner in which the funds may with justice to the rights of dissenters be expended for espousal of the voters' approval of the body's judgment. Even this the body may do within fair limits. The reasonable expense, for example, of the conduct of a public forum at which all

may appear and freely express their views pro and con would not be improper. The same may be said of reasonable expenses incurred for radio or television broadcasts taking the form of debates between proponents of the differing sides of the proposition. It is the expenditure of public funds in support of one side only in a manner which gives the dissenters no opportunity to present their side which is outside the pale." *Citizens to Protect Public Funds v. Board of Education, et al., supra*, at 180, 181, 182.

Thus, it is clear that the use of the resources of the Division on Women or the use of the Division's resources by a private group to sponsor the passage of a public referendum would be without any legal justification.

The Act creating the Division on Women directs that the Division promote and expand the rights and opportunites for the women of the State of New Jersey. N.J.S. A. 52:27D-43.13c. The enabling legislation, however, does not specifically authorize the Division to actively sponsor the passage of a public referendum contrary to the general rule established in *Citizens to Protect Public Funds, supra.*

For these reasons, it is our opinion that the Division on Women may not expend state funds or permit state facilities to be used to promote or advocate an affirmative vote on a public referendum. The resources of this agency may, however, be used to disseminate information which will enable the public to make an informed choice on this issue at the polls.

Very truly yours,
ROBERT J. DEL TUFO
Acting Attorney General

August 1, 1975

HONORABLE J. EDWARD CRABIEL
Secretary of State
State House
Trenton, New Jersey 08625

FORMAL OPINION NO. 22—1975

Dear Secretary Crabiel:

You have asked us to advise you whether the State would be acting in keeping with the provisions of *N.J. Const.* (1947), Art. IX, par. 3, if the proposed Equal Rights Amendment to the State Constitution is published three months prior to the next general election in newspapers given widespread circulation in counties which do not have their own newspapers will publish again prior to August 4, 1975. You inform us that there are three counties in the State in which the county newspaper publishes on a weekly basis and will not be published again until subsequent to August 4, 1975, the date by which amendments must be published pursuant to the above

provision of the State Constitution. You are advised that the State would be in substantial compliance with this provision of the Constitution if on or before August 4, 1975 it publishes the proposed amendment in newspapers having a wide circulation in all counties and if it also publishes the proposed amendment in every county newspaper as long as publication is as soon as practicable after August 4, 1975.

The provision of the State Constitution involved here is as follows:

"The Legislature shall cause the proposed amendment or amendments to be published at least once in one or more newspapers of each county, if any be published therein, not less than three months prior to submission to the people." *N.J. Const.*, Art. IX, par. 3.

This provision was added to the Constitution in 1844 and there is no recorded discussion of the purpose or meaning of this clause in the proceedings of that convention. There is very little case law in New Jersey discussing the publication of official advertisements in newspapers. There is, however, one case which deals with an analogous issue and which is helpful to the resolution of the question you have posed. In *Travis v. Borough of Highlands,* 136 N.J.L. 199 (Sup. Ct. 1947), the court held that there was substantial compliance with a statutory requirement for official advertising of a proposed municipal contract when timely publication was made in a daily paper published in a different municipality but circulated in the advertising municipality and when publication was also made in the weekly publication of the municipality's newspaper in the first issue practicable after the statutory limit had expired. In that case, the publication should have been made in the municipal newspaper by March 18 and was not included in the municipal publication until March 20, which according to the court "was the weekly publication date for the week of March 17...." 136 N.J.L. at 201.

The obvious intent of *N.J. Const.* (1947), Art. IX, par. 3, is to disseminate information regarding a proposed constitutional amendment to members of the public. See *Hunterdon County Democrat, Inc. v. Recorder Publishing Company of Bernardsville,* 117 N.J. Super. 552 (Ch. Div. 1971). It would, therefore, be in accordance with the constitutional purpose if the State were to make every effort to advertise the proposed amendment in newspapers having wide circulation in the three counties you have mentioned on or before August 4, 1975, in addition to the publication in county newspapers in other counties where there is no problem posed by the weekly publication date. In order to insure the widest possible dessemination of information pertaining to the proposed amendment even in the three counties, it would be advisable to publish the advertisements in the weekly newspapers there for the week of August 4, 1975 or as soon thereafter as it may be done.

Very truly yours,
WILLIAM F. HYLAND
Attorney General
BY: RICHARD M. CONLEY
Deputy Attorney General

September 8, 1975

ALAN SAGNER, *Commissioner*
Dept. of Transportation
1035 Parkway Avenue
Trenton, New Jersey

FORMAL OPINION NO. 23–1975

Dear Commissioner Sagner:

You have asked whether the State of New Jersey through its Department of Transportation may accept loans from the Federal Government pursuant to Section 3 of the Urban Mass Transportation Act of 1964 (49 U.S.C. § 1602) and Sections 211 and 403 of the Regional Rail Reorganization Act of 1973 (45 U.S.C. §§ 721 and 763). We understand that the federal loans would be made to the Commuter Operating Agency, established by N.J.S.A. 27:1A-15 to 26, for purposes generally authorized by the Agency's enabling legislation. The issue raised is whether the receipt of such federal loans would be violative of the Debt Limitation Clause of the State Constitution. *N.J. Const.* (1947), Art. VIII, § II, par. 3. It is our conclusion that the receipt of such loans from the Federal Government by the Department of Transportation would be consistent with this provision of our State Constitution.

The Debt Limitation Clause of our Constitution provides as follows:

> "The Legislature shall not, in any manner, create in any fiscal year a debt or debts, liability or liabilities of the State, which together with any previous debts or liabilities shall exceed at any time one per centum of the total amount appropriated by the general appropriation law for that fiscal year, unless the same shall be authorized by a law for some single object or work distinctly specified therein. Regardless of any limitation relating to taxation in this Constitution, such law shall provide the ways and means, exclusive of loans, to pay the interest of such debt or liability as it falls due, and also to pay and discharge the principal thereof within thirty-five years from the time it is contracted; and the law shall not be repealed until such debt or liability and the interest thereon are fully paid and discharged. No such law shall take effect until it shall have been submitted to the people at a general election and approved by a majority of the legally qualified voters of the State voting thereon. All money to be raised by the authority of such law shall be applied only to the specific object stated therein, and to the payment of the debt thereby created. *This paragraph shall not be construed to refer to any money that has been or may be deposited with this State by the government of the United States.* Nor shall anything in this paragraph contained apply to the creation of any debts or liabilities for purposes of war, to repel invasion, or to suppress insurrection or to meet an emergency caused by diaster or act of God." (Emphasis added.)

The sentence emphasized in the quotation is dispositive of your request. This sentence, in substantially the same form as it appears above, was added as an amendment to the Debt Limitation Clause under consideration by the New Jersey State Constitutional Convention of 1844. The only language which has survived to indicate the context in which the amendment was offered appears in a report of the Convention, having resolved itself into the committee of the whole, when the committee considered the content of the debt limitation provision to be included in that constitution. The language in the report is simply as follows:

> "After much debate Mr. Willis offered an amendment that the section should not apply to any monies that are or may be deposited with this State by the General Government—agreed to." *Proceedings of the New Jersey State Constitutional Convention of 1844* (1942) at 310.

The Convention itself later adopted the amendment made by the committee of the whole, but also without any reported discussion of the amendment. *Id.* at 522.

The history of the inclusion of the sentence excepting federal funds from the constitutional debt limitation provision is significant. While there does not appear to be any written history of this sentence, the reasons for its inclusion may be reasonably inferred from certain facts. As early as 1816, the Secretary of the Treasury of the United States indicated that the Federal Government would have an available surplus of revenues over all expenditures. In 1827, the first proposition to distribute the surplus was made in Congress by Mr. Dickerson of New Jersey. He stated that his principal object was to provide the States with money for educational and internal improvements. This suggestion was not adopted and the federal surplus continued to increase. There was considerable discussion at the federal level as to the constitutionality of Congress appropriating this surplus for internal improvements, such as roads and canals, and, in his message to Congress in 1829, President Andrew Jackson suggested the surplus be distributed among the States to enable them to make such internal improvements without the assistance of Congress. Ultimately, Congress enacted a statute to distribute the surplus among the states; however, during its pendency in the Senate, the measure was changed from a distribution to a deposit of monies with the states and the credit of the states was to be pledged to the return of the money. Act of June 23, 1836, Twenty-Fourth Congress, Session 1, Chapter 115, §§ 13 and 14. The federal statute made the distribution to any state contingent on the state authorizing by law its competent authorities to receive the monies on the terms specified in the federal legislation. On November 4, 1836, the State of New Jersey enacted "an act to authorize the reception of the surplus revenue of the United States", which specifically referred to the federal statute and authorized appropriate state officials to receive the federal deposit from the general government and to give certificates of deposit to the Secretary of the Treasury of the United States in the amount of the federal deposit. Act of November 4, 1836, Sixty-First General Assembly, First Sitting, p. 10. New Jersey was to receive $1,019,560.81 pursuant to the federal legislation, although the United States Government distributed only three out of the four installments specified in the federal act. No state paid back any of these monies to the Federal Government. See generally, John Jay Knox, *United States Notes* (1884) at 167-92.

Since the proposed State debt limitation provision of the Constitution of 1844 prohibited the Legislature from creating, with certain exceptions, any debt which singly or in the aggregate with any previous debts would exceed $100,000, it is readily apparent that the participants in the 1844 Constitutional Convention would have wanted to exclude from this amount the relatively recent deposit of over three quarters of a million dollars by the Federal Government in the State Treasury. However,

the sentence incorporated into the constitution referred not only to monies already deposited but also to monies which "may be" deposited with the State in the future. The specific original language of this sentence of the Debt Limitation Clause in the 1844 Constitution is as follows:

> "This section shall not be construed to refer to any money that has been *or may be*, deposited with this state by the government of the United States." *N.J. Const.* (1844), Art. IV, § VI, par. 4 (Emphasis added).

It was clear on January 1, 1839 that the fourth and final installment of the payment to the State pursuant to the Act of June 23, 1836 would never be made. Knox, *supra*, at 187-89. It seems reasonable to conclude, therefore, that the participants in the 1844 constitutional convention, five years after it was clear that no more payments under the 1836 Act would be made, included the exception of federal funds from the Debt Limitation Clause to provide the exception not only for the funds, distributed pursuant to the 1836 Act but also for any federal funds distributed to the states pursuant, at the very least, to analogous legislation.

There was no discussion of this sentence of the Debt Limitation Clause in the proceedings of the Constitutional Convention of 1947 nor has there been any construction of the same in any court opinion. The only reference to this constitutional language is found in Formal Opinion 1961—No. 21 of the Attorney General. In that opinion the Attorney General ruled, in part, that the sentence excepting federal funds from the constitutional debt limitation provision did not apply to a situation in which the entire cost of acquisition by a lease-purchase agreement of office space for the Division of Employment Security in the Department of Labor and Industry would be defrayed by grants from the Federal Government. The reasoning of the Attorney General was that the procedure for the payment of amounts due to a third party under the lease-purchase agreement would be the same as for any payment of funds from the State Treasury pursuant to an appropriation by the Legislature, so that, apparently, the Federal funds would not be distinguishable from State funds in terms of the applicability of the constitutional Debt Limitation Clause. It is significant that in the situation discussed in Formal Opinion 1961—No. 21, the role of the Federal Government was to grant funds to the State for the use of the State in connection with an agreement with a third party.

The Urban Mass Transportation Act of 1964 and the Regional Rail Reorganization Act of 1973 seem to be in many ways modern equivalents of the federal surplus distribution act of 1836. All of these statutes make federal funds available to the State, as loans to be repaid by the State, for the general purpose of internal improvements, specifically roads, canals and railways. This legislation is different from that discussed in Formal Opinion of the Attorney General 1961—No. 21 in that the monies made available in the present legislation would be loans and not grants and would not be treated the same as the general funds of the State. It is clear that all such funds would continue to be an obligation of the State to the Federal Government until repaid, and the basic agreement is thus between the two governments rather than between the State and a third party.

You are therefore advised that loans of federal funds to the State Department of Transportation under the terms of the Urban Mass Transportation Act of 1964 (49 U.S.C. § 1602) and Sections 211 and 403 of the Regional Rail Reorganization Act of 1973 (45 U.S.C. §§ 721 and 763) would be exempt from the Debt Limitation Clause

of the State Constitution. *N.J. Const.* (1947), Art. VIII, § II, par. 3.

Very truly yours,
WILLIAM F. HYLAND
Attorney General
BY: RICHARD M. CONLEY
Deputy Attorney General

September 17, 1975

HONORABLE RICHARD C. LEONE
State Treasurer
State House
Trenton, New Jersey 08625

FORMAL OPINION NO. 24—1975

Dear Treasurer Leone:

You have asked for an opinion on questions dealing with the discretion of the Director of the Division of Building and Construction (Director) to reject the lowest bidder on a public construction project solely on the basis that the bidder employs nonunion affiliated labor, and to award the contract to the next lowest bidder who employs only union affiliated labor.

In order to determine the correctness of this form of administrative decision making, it is necessary to consider the controlling legislative standard which bears on the discretion of a contracting officer in his award of a contract for the construction or repair of State public buildings. The relevant statutory provision in this instance is N.J.S.A. 52:32-2 which provides as follows:

> "When the entire cost of the erection, construction, alteration or repair by the State of any public buildings in this State will exceed $2,000,00, the person preparing the plans and specifications for such work shall prepare separate plans and specifications for the plumbing and gas fitting and all work kindred thereto, the steam and hot water heating and ventilating apparatus, steam power plants and all work kindred thereto, and electrical work, structural steel and ornamental iron work, and all other work and materials required for the completion of the project.
>
> "The board, body or person authorized by law to award contracts for such work shall advertise for, in the manner provided by law, and receive (a) separate bids for each of said branches of the work and (b) bids for all the work and materials required to complete the project to be included in a single over-all contract, in which case there shall be set forth in the bid the name or names of all subcontractors to whom the bidder will subcontract for the furnishing of any of the work and materials specified in (a)

above, each of which subcontractors shall be qualified in accordance with chapter 35 of Title 52 of the Revised Statutes.

"If the sum total of the amounts bid by the lowest responsible bidder for each such branch is less than the amount bid by the lowest responsible bidder for all of the work and materials, the board, body or person authorized to award contracts for such work shall award separate contracts for each of such branches to the lowest responsible bidder therefor, but if the sum total of the amount bid by the lowest responsible bidder for each such branch is not less than the amount bid by the lowest responsible bidder for all the work and materials, the board, body or person authorized to award the contract shall award a single overall contract to the lowest responsible bidder for all of such work and materials."

It is apparent that whether an award is made in a single overall contract or in separate contracts for each branch of work on a construction project, the statutory criteria mandate in unequivocal terms an award to the "lowest responsible bidder."

This statutory directive appears to be determinative of the resolution of the issue. Wherever the Legislature has chosen to mandate competitive bidding for state contracts, it has either authorized an award to the "lowest responsible bidder," N.J.S.A. 52:32-2; N.J.S.A. 24:7-30, or, in the alternative, has vested in the government contracting officer the significantly broader discretion to accept the bid of "that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the state, price and other factors considered." N.J.S.A. 52:34-12. *Trap Rock Industries, Inc. v. Kohl,* 59 N.J. 471, 479 (1971); *Commercial Cleaning Corp. v. Sullivan,* 47 N.J. 539, 548 (1966). In the case of public construction contracts, the legislative standard imposed upon the Director by N.J.S.A. 52:32-2 is set forth in more restrictive terms and the wide latitude granted to the State Treasurer and the Director of the Division of Purchase and Property by N.J.S.A. 52:34-12 in their award of state contracts would not be applicable.* The government contracting officer in this situation does not enjoy the same freedom of action to evaluate "that responsible bidder whose bid, ...will be most advantageous to the state, price and other factors considered." Nor may he reject a bid solely on the basis that it may be in his judgment in the public interest to do so. His discretion is exclusively circumscribed by an award to the "lowest responsible bidder." *Commercial Cleaning Corp., supra,* at 549.

The phrase "lowest responsible bidder" has acquired a meaning by judicial construction over the years. It is settled that, by virtue of such statutory language, the lowest bidder acquires a status which may not be rejected in the absence of "facts which would justify a belief on the part of fair minded and reasonable men that he was so lacking in experience, financial ability, machinery, employees and necessary facilities as to be unable to perfom the contract." *Commercial Cleaning Corp., supra,* at 547; *Sellitto v. Cedar Grove Township,* 132 N.J.L. 29, 32, 33 (S. Ct. 1944); *Paterson Contracting Co. v. Hackensack,* 99 N.J.L. 260, 263 (E. & A. 1923). *Cf. Trap Rock Industries, supra.* These criteria, including moral integrity and responsibility, have been established as the exclusive standards under which the judgment of a government contracting officer should be exercised. There is no express or implicit legislative authorization to allow for the consideration of "labor unrest" in the evaluation of the capacity of a bidder to satisfactorily perform the services required by government specifications.

Although there does not appear to be any specific judicial consideration of this issue in New Jersey, the decision of the Supreme Court of Ohio in *State ex rel. United District Heating, Inc. v. Office Building Commission,* 181 N.E. 129 (1932), is analogous. In that case, the court was squarely confronted with the issue of whether a public construction contract may be permissibly denied to the lowest bidder solely on the ground of his failure to employ union labor. The court held that the state's refusal to award the contract to the lowest bidder was an arbitrary abuse of its discretion. The court also directed its attention to the likelihood of labor unrest and the delays in the construction of the project and commented as follows:

"The claim is made that costly delays and added expenses may occur because of possible trouble if this contract be not awarded to the bidder employing union labor. This claim assumes that a great state cannot control its laws requiring public bidding; cannot protect its citizens from unconstitutional discrimination. If such discrimination be permitted, all the laws controlling public bidding and requiring awards to be made to the lowest bidder have no potency. The state would be helpless."

This conclusion is all the more compelling in an instance where the exertion of labor influence in the form of disruptive labor activities may constitute unlawful unfair labor practices specifically enjoinable under section 8 of the National Labor Relations Act, 29 U.S.C. § 158.**

In *Keyes Elec. Service v. Freeholders of Cumberland County,* 15 N.J. Super. 178 (Law Div. 1951), a New Jersey court held that the rejection of *all* bids and the issuance of an amended specification to the effect that there be no dissension between trades and all labor shall conform to local labor union practices was found neither an arbitrary nor capricious act on the part of the Freeholders. However, the court was careful to point out that the amended specification did not exclude the lowest bidder from becoming the lowest responsible bidder in his submission of bids to the second advertisement. More significantly, the court recognized that had the plaintiff been the lowest bidder on the second advertisement of proposals for bids and had been refused the award of a contract, his claim for redress would have been granted.

It is clear, therefore, that there is no legal justification under the standard established by the Legislature in N.J.S.A. 52:32-2 for the Director of Building and Construction to reject the bid of the lowest responsible bidder solely on the basis that his employment practices do not include the hiring of union labor and to award the contract to the next lowest bidder who hires only union affiliated labor.

Very truly yours,

WILLIAM F. HYLAND
Attorney General

BY THEODORE A. WINARD
Assistant Attorney General

* It must be emphasized that N.J.S.A. 52:32-2 is designed to deal with the award of contracts for the construction or repair of public buildings. It would not apply by its terms to contracts awarded by the Director of the Division of Building and Construction for other purposes which, by virtue of N.J.S.A. 52:18A-153, would be governed by the broader standard set forth in N.J.S.A. 52:34-12.

** A similar situation was found to exist in *Davenport v. Walker*, 68 N.Y.S. 161 (App. Div. 1901), where a board refused to award a contract to the lowest bidder because of his failure to agree to employ union employees. The New York court concluded that a threat of unlawful labor activity could not be a legitimate criterion to refuse to let any public work to those contractors who would not accede to employ union labor.

September 22, 1975

JOANNE E. FINLEY, M.D., M.P.H., *Commissioner*
Department of Health
Health and Agriculture Building
John Fitch Plaza
Trenton, New Jersey 08625

FORMAL OPINION NO. 25 – 1975

Dear Dr. Finley:

The Department of Health has asked for an opinion as to whether it has the legitimate authority to conduct unannounced inspections of private, licensed nursing homes under the provisions of the Health Care Facilities Planning Act. For the following reasons, you are advised that the Department of Health is fully empowered to conduct unannounced periodic, annual, follow-up or other forms of inspections in furtherance of its regulatory jurisdiction over private nursing homes and other health care facilities.

A "private nursing home" is defined to mean "any institution, whether operated for profit or not, which is not maintained, supervised or controlled by an agency of the government of the State or of any county or municipality, and which maintains and operates facilities for the diagnosis, treatment or care of 2 or more non-related individuals, who are patients as defined herein." N.J.S.A. 30:11-8. A "patient" is defined as "a person who is suffering from mental illness, mental deficiency, mental retardation, an acute or chronic illness or injury, or who is crippled, convalescent on a continuing basis, or who is in need of obstetrical or other medical or nursing care." *Id.* The Health Care Facilities Planning Act (N.J.S.A. 26:2H-1 *et seq.*) also includes nursing homes within the definition of a "health care facility", and the same is defined in administrative regulations of the Department of Health as an "institution which is primarily engaged in providing inpatients...nursing care and related services for convalescent and aged patients, [and/or] rehabilitation of injuried, disabled or sick persons." N.J.A.C. 8:32-3.3.

The State's regulation of private nursing homes had traditionally been vested in the Department of Institutions and Agencies pursuant to N.J.S.A. 30:11-1 *et seq.* To enable it to carry out its responsibility, the Department was expressly empowered to "make or cause to be made such inspections of the premises of the licensee from time to time as it may deem necessary to be assured that the licensee is at all times complying with the provisions of this chapter, with the rules and regulations promulgated hereunder and with the minimum standards of nursing and hospital care established

by virtue of the authority of this chapter." N.J.S.A. 30:11-3.1.

The Health Care Facilities Planning Act transferred this regulatory authority to the Department of Health in 1971, N.J.S.A. 26:2H-19, and the power to conduct inspections was supplemented to specifically empower the Commissioner of Health "to inquire into health care services and the operation of health care facilities and to conduct periodic inspections." N.J.S.A. 26:2H-5(a). This explicit legislative directive to conduct periodic inspections is further complemented by federal regulations which mandate an annual "compliance" inspection of facilities participating in Medicare and Medicaid programs. 20 C.F.R. § 405.1106 (1974) (Medicare); 45 C.F.R. §250.23 (3) (iii) (1974) (Medicaid). It may also be assumed that the Legislature intended to authorize the Department of Health to conduct reinspections or follow-up inspections of facilities found to be in violation of the Act, since it provides for penalties to be assessed for failure to rectify unsafe conditions or commence repairs within seven days of receiving notice of such violation. N.J.S.A. 26:2H-14.

For these reasons, it is clear that the Department is fully empowered to conduct unannounced annual, "periodic", follow-up and other forms of inspections as it shall deem necessary to assure compliance by private nursing homes and other health care facilities with the provisions of the Act and the rules and regulations of the Department of Health.

WILLIAM F. HYLAND
Attorney General

BY: THOMAS M. CURRY
Deputy Attorney General

October 1, 1975

ALAN SAGNER, *Commissioner*
Department of Transportation
1035 Parkway Avenue
Trenton, New Jersey 08625

FORMAL OPINION NO. 26 – 1975

Dear Commissioner Sagner:

The Department of Transportation has asked for an opinion as to whether the supervisory and regulatory authority of the Commissioner of the Department of Transportation over County Aid Programs, pursuant to chapters 13 and 14 of Title 27, may be limited to expenditures incurred by counties for labor and equipment on State aid projects, or whether it is required that all expenditures on State aid projects by the respective counties for the construction and reconstruction of county roads be subject to the standards and specifications established by the Department with respect to the design of construction, and the quality of materials, etc., used in such projects. Your concern is directed at those situations where a construction project is contemplated and where labor, equipment and administrative expenditures are in-

curred in the performance of that project with a view of there not being any State supervision over materials and construction. For the following reasons, you are advised that all expenditures made pursuant to a County Aid Program on any construction project which requires materials are subject to approval by the Commissioner of Transportation.

N.J.S.A. 27:13-1 provides that State aid to counties shall conform with standards prescribed by the Department. It provides:

> "No funds shall be expended for state aid to counties or municipalities unless the roads constructed therewith conform to standards prescribed by the department and the county or municipality shall have entered into an agreement with the department that the road will be kept in repair by patrol or such other method as shall be adopted by the commissioner."

Moreover, it is required that the counties prepare their annual work programs in such a way that they will be developed "in cooperation and coordination with the State highway system and with each other." N.J.S.A. 27:13-3. This provision vests in the Commissioner the right to reject a county annual work program. Additionally, those provisions of chapter 13 which deal with the reconstruction of roads damaged by construction equipment require the submission of plans and specifications to the Commissioner for approval N.J.S.A. 27:13-12, require that such work by a county or municipality shall be done under the supervision and control of the Commissioner, and require that no funds will be disbursed without his approval.

The provisions of chapter 14 of Title 27 provide solely "for the construction, reconstruction, maintenance and repair of county roads and bridges." N.J.S.A. 27:14-1. The county is required to submit all plans, cross-sections, and specifications of the work to be performed to the Commissioner for his approval. The Commissioner's responsibilities are then stated in N.J.S.A. 27:14-3. He is to approve or reject "plans, cross-sections and specifications" and is to be satisfied as to the "advisability" of the proposed improvement. Similar approval is needed for all bridge and culvert work accomplished under this chapter. N.J.S.A. 27:14-6. It should be noted that even after the award of such a contract by a county the Commissioner has the right to reject the contract if he deems such rejection to be in the best interest of the county. N.J.S.A. 27:14-3. The State Highway Engineer has the further responsibility of certifying that work performed under the subject contracts is in "strict conformity with the contracts, plans and specifications." N.J.S.A. 27:14-15. Thus, the Commissioner maintains an ongoing interest in all work under this chapter. There is clearly no intent to establish a grant-in-aid type program over which the State, through the Commissioner, has no control.

The regulations which apply to the County Aid Program further emphasize the interest of the State in insuring the overall quality of the product. N.J.A.C. 16:15-2.1. provides for the county to submit to the Commissioner "detailed plans and specifications prepared by a professional engineer registered in the State of New Jersey." Particularly, note should be taken of the requirement in this section for "detailed construction inspections." N.J.A.C. 16:15-2.2 then provides that improvement projects should "conform to the current New Jersey Department of Transportation Standard Specifications for Road and Bridges" and to the American Association of State Highway Officials' design criteria. This latter provision has additional requirements for projected 20-year traffic increases as well as material requirements.

In summary, it is clear that the underlying legislative purpose for the expenditure of State aid monies under both chapters 13 and 14 of the County Aid Program is premised on full compliance with the Department of Transportation's specifications as to materials and the design of construction used in such projects. The legislative language clearly contemplates comprehensive supervision and control by the Department of Transportation of projects performed pursuant to the statutory provisions. For these reasons, it is clear that no State aid funds shall be expended for labor, administrative or other purposes on county highway projects which require construction and materials, unless the design of construction and quality of materials strictly conform to State standards and specifications approved by the Department of Transportation.

Very truly yours,
WILLIAM F. HYLAND
Attorney General
BY: MICHAEL J. FICHERA, JR.
Deputy Attorney General

September 12, 1975

ANN KLEIN, *Commissioner*
Department of Institutions and Agencies
State Office Building
Trenton, New Jersey

FORMAL OPINION NO. 27 – 1975

Dear Commissioner Klein:

The Division of Correction and Parole has inquired whether a correction officer who has been convicted of a crime under N.J.S.A. 2A:151-5 may legally carry a firearm when required to do so by his superior officer in the performance of his duties. It has been indicated that in certain instances the carrying of a firearm by a correction officer may be part of assigned job responsibilites. This circumstance is most prevalent for correction officers assigned to the towers at the State Prison and officers who accompany inmates to various court proceedings throughout the State.

In order to place the issue in the proper perspective, a discussion of the pertinent statutes bearing on the right of certain convicted felons to carry a firearm is necessary. N.J.S.A. 2A:151-8 provides that any person having been convicted of a crime enumerated in N.J.S.A. 2A:151-5 when armed with or having in his possession a firearm shall be guilty of a misdemeanor. The crimes for which conviction precludes the use or possession of a firearm include assault, robbery, larceny, burglary or breaking and entering whether or not armed with or having possession of a firearm.

N.J.S.A. 2A:151-43(h) excepts from the criminal proscription of carrying a concealed weapon under N.J.S.A. 2A:151-41 "any person or jail warden or their deputies, or any guard or keeper of any penal institution in this State, while engaged in the

actual performance of the duties of their positions and when so required by their superior officers to carry firearms." This section also exempts many other classes of persons under specified circumstances from the criminal penalties for carrying a concealed weapon, e.g., members of the armed forces of the United States or of the National Guard when on duty; any duly authorized military organization or any member thereof when going to or from a meeting of the organization; members of government civilian rifle clubs, etc. It would be unreasonable to assume a legislative purpose to exempt these large classes of persons from the criminal prohibition on carrying a concealed weapon and at the same time subject convicted felons to criminal penalties on carrying a firearm under N.J.S.A. 2A:151-8 under the same set of circumstances. Statutes should be read in a harmonious fashion to avoid unreasonable, incongruent or inconsistent results. *Clifton v. Passaic City. Bd. of Taxation*, 28 N.J. 411, 421 (1958); *Marranca v. Harbo*, 41 N.J. 569, 574 (1964). It may, therefore be reasonably concluded to have been the implicit and probable legislative intention to exempt the class enumerated in section 43 not only from the prohibition on carrying a concealed weapon, but also from the ban on the carrying of a weapon by a convicted ex-offender under the identical circumstances. There consequently would not, in our opinion, be any statutory impediment to convicted ex-offenders carrying a firearm as correction officers "while engaged in the actual performance of the duties of their positions, and when so required, by their superior officers."

This conclusion is further reinforced by the recently enacted amendments to the Civil Service law set forth in Laws of 1974, c. 160. The Legislature has recognized that occupations in government account for a growing proportion of employment and that the provisions of Civil Service law unduly restrict the ability of rehabilitated convicted offenders to secure work in the public service. The legislation was framed to remove impediments solely based on a man's previous criminal record, unless such prior criminal activity relates directly to the nature of the job being sought.* You are, therefore, advised for this additional reason that the conviction of a crime under N.J.S.A. 2A:151-5 should not operate as an absolute bar to the carrying of a firearm by a correction officer where it is concluded by the Division of Correction and Parole that such a prior criminal record would not relate adversely to the performance of assigned job responsibilities.

It should be stressed, however, that the statutory authorization which excepts a correction officer from the criminal penalites associated with carrying a concealed weapon is strictly confined to those instances where a correction officer is engaged in the "actual performance of his duties." This would include, but not be limited to, patrolling the towers at the State Prison and escorting prisoners to and from court appearances. This shall not include activities during off duty hours or any other circumstances outside of the normal or commonly understood and assigned job responsibilities of a State correction officer.

Very truly yours,
WILLIAM F. HYLAND
Attorney General

BY THEODORE A. WINARD
Assistant Attorney General

* Section 5 of the Act repeals N.J.S.A. 11:23-2(d) which heretofore empowered the Chief Examiner to refuse to certify an eligible who had been guilty of a crime. Section 3 of the act

states that a prior criminal record shall not be a basis for the refusal to make an appointment to the classified service unless the criminal record includes a conviction for a crime that relates adversely to the employment sought. Section 3 of the Act further provides:

> "In determining that a conviction for a crime relates adversely to the employment sought, the appointing officer shall explain in writing how the following factors, or any other factors, relate to the employment sought:
>
> a. The nature and duties of the position for which the person is applying;
> b. Nature and seriousness of the crime;
> c. Circumstances under which the crime occurred;
> d. Date of the crime;
> e. Age of the person when the crime was committed;
> f. Whether the crime was an isolated or repeated incident;
> g. Social conditions which may have contributed to the crime;
> h. Any evidence of rehabilitation, including good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional academic vocational schooling, successful participation in correctional work-release programs, or the recommendations of persons who have or had had the applicant under their supervision."

July 12, 1976

ANN KLEIN, *Commissioner*
Department of Institutions and Agencies
135 West Hanover Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 27—1975—SUPPLEMENT

Dear Commissioner Klein:

In *Formal Opinion No. 27—1975* issued on September 12, 1975 we responded to your inquiry as to whether there was any legal impediment under State law to a rehabilitated ex-offender carrying a firearm as a correction officer. It was our conclusion that under the pertinent provisions of State law, a rehabilitated ex-offender could carry a firearm as a correction officer while engaged in the actual performance of the duties of his position and when so required by his superior officer. In your inquiry, we were not asked about the implications of federal law on this issue and, accordingly, did not express any opinion with respect thereto. However, there has been a subsequent inquiry made whether, apart from State law, the Omnibus Crime Control and Safe Streets Act of 1968 has any effect on the right of an ex-offender to carry a firearm.

That Act, enacted as Public Laws 90-351, 82 Stat. 236, is a comprehensive law enacted by Congress dealing with problems of criminal behavior and the criminal justice system. Title 4 of the Act, 18 U.S.C.A. § 921 *et seq.*, is a regulatory scheme designed to restrict the importation, manufacture and transportation of firearms in commerce to persons Congress believed to be unqualified to possess such weapons and whose carrying of firearms would present a danger to the public. In addition,

Congress also dealt with firearms control in Title 7 of the Act. That Title, 18 App. U.S.C.A., § 1201 *et seq.*, proscribes the receipt, possession or transportation of firearms by those who have been convicted of a felony in any state or political subdivision thereof. A felony is defined to mean "any offense punishable by imprisonment for a term exceeding one year but does not include any offense (other than one involving a firearm or explosive) classified as a misdemeanor under the laws of a state and punishable by a term of imprisonment of two years or less," 18 App. U.S.C.A. § 1202(c)(2). A person receives a firearm within the meaning of the Act if he takes a weapon into his possession and control and that weapon has been deemed to have previously traveled in or affected "interstate commerce."

Section 1203(1) of Title 7 of the Act specifically excepts from its provisions "any prisoner who by reason of duties connected with law enforcement has expressly been entrusted with a firearm by competent authority of the prison." We have been advised by the United States Department of Justice that this exception applies solely to current inmates and cannot be extended to include the ex-offender who no longer is serving time in a penal institution.

Thus, the only recourse for a rehabilitated ex-offender in order to maintain his right to carry a firearm, even during the course of his official law enforcement responsibilities, is application for relief from disability under 18 U.S.C. § 925 (c) or 18 App. U.S.C.A. § 1203(2). Section 925(c) permits a person previously convicted of a felony *not* involving the use of a firearm to apply to the Secretary of the Treasury for an exemption from the Act. Those persons convicted of a felony involving the use of a firearm may secure relief only under section 1203(2) of the Act by securing a gubernatorial pardon which expressly authorizes him to receive, possess or transport a firearm in commerce.

The Department of Institutions and Agencies should, therefore, take appropriate steps to have qualified ex-offenders in its employment who intend to carry a firearm during the course of their official responsibilities to first secure a waiver pursuant to the provisions of section 925(c) of the Act.

Very truly yours,
WILLIAM F. HYLAND
Attorney General
By: THEODORE A. WINARD
Assistant Attorney General

October 15, 1975

VERNON N. POTTER, *Director*
Division on Civil Rights
1100 Raymond Boulevard
Newark, New Jersey 07102

FORMAL OPINION NO. 28—1975

Dear Director Potter:

You have asked whether the Division on Civil Rights has jurisdiction over allegations of unlawful discrimination in public school curricula. This inquiry was generated by a series of complaints filed with the Division against various local school districts charging that they discriminatorily assigned students, on the basis of sex, to courses in shop and home economics. You are advised, for the reasons hereafter set forth, that the Division has no jurisdiction in this area since exclusive jurisdiction inheres in the Commissioner of Education over allegations of unlawful discrimination in public school curricula.

Since the present inquiry involves the alleged discriminatory practices of local boards of education, it necessarily raises serious questions as to the constitutional and statutory responsibility of the Commissioner of Education to oversee this important area. In recent years, the New Jersey Supreme Court has carefully scrutinized the Commissioner's powers and responsibilities and in *Jenkins, et al v. Tp. of Morris School Dist. and Bd. of Ed.*, 58 N.J. 483, 494 (1971), provided the following summary:

> "Our Constitution contains an explicit mandate for legislative 'maintenance and support of a thorough and efficient system of free public schools'. Art. 8, sec. 4, para. 1. In fulfillment of the mandate the Legislature has adopted comprehensive enactments which, *inter alia*, delegate the 'general supervision and control of public education' in the State to the State Board of Education in the Department of Education. N.J.S.A. 18A:4-10. As the chief executive and administrative officer of the Department, the State Commissioner of Education is vested with broad powers including the 'supervision of all schools of the state receiving support or aid from state appropriations' and the enforcement of 'all rules prescribed by the state board'. N.J.S.A. 18A:4-23. The Commissioner is authorized to 'inquire into and ascertain the thoroughness and efficiency of operation of any of the schools of the public school system of the state' (N.J.S.A. 18A:4-24)...and is empowered 'to hear and determine all controversies and disputes' arising under the school laws or under the rules of the State Board or the Commissioner. N.J.S.A. 18A:6-9"

In the *Jenkins* case, certain residents of Morristown and Morris Township had petitioned the Commissioner of Education for an order restraining the Board of Education of Morris Township from withdrawing its students from Morristown High School and to take steps to effectuate a merger of the Morris Township and Morristown school districts. In its decision, the court reaffirmed the "breadth of the Commissioner's powers under the State Constitution and the implementing legislation," 58 N.J. at 494, and found that the Commissioner had:

"...full power to direct a merger on his own if he finds such course ultimately necessary for fulfillment of the *State's educational and desegregation policies in the public scools.*" (Emphasis added.) 58 N.J. at 508.

The New Jersey Supreme Court in its earlier decision, *Booker v. Board of Education, Plainfield,* 45 N.J. 161 (1965), had held that the Commissioner had the responsibility and power of correcting *de facto* segregation or imbalance which frustrates State constitutional goals. The court pointed out that where the Commissioner determines that the local officials are not taking reasonably feasible steps towards the adoption of a suitable desegregation plan in fulfillment of the State's policies, he may either call for a further plan by the local officials or "prescribe a plan of his own." 45 N.J. at 178. In *Booker,* the Supreme Court also rejected the Commissioner's narrow view of his own powers, finding that he had been misled by an unduly restrictive view of his own responsibilities in the correction of substantial racial inbalance which may be educationally harmful.

In *Shepard v. Bd. of Ed. of City of Englewood,* 207 F. Supp. 341 (D.N.J. 1962), plaintiffs brought action in District Court to enjoin the operation of a racially segregated school system in the City of Englewood. It was concluded therein that the parties, who claimed that the neighborhood school policy resulted in racially segregated schools, had to exhaust their administrative remedies before the Commissioner of Education. The court found:

"... a determination of the manner in which the neighborhood school policy operates in any particular community requires a consideration and evaluation of a multitude of factors. This court feels that the Commissioner is especially well qualified, by reason of his knowledge and experience in the specialized field of education, to make these factual determinations. There is no reason to assume that the Commissioner, in the performance of his duty, will not be guided by the applicable legal principles. Under all of the circumstances, the Commissioner should be given the opportunity, at least in the first instance, to pass upon the matters set forth in plaintiffs' complaint. Until such time as plaintiffs have exhausted the state administrative remedies provided by N.J.S.A. 18:3-14 and 15, this court should not entertain the action." 207 F. Supp. at 348.

Cf. *Morean v. Bd. of Ed. of Montclair,* 42 N.J. 237 (1964), wherein it was held that racial balance is integral to a sound educational system. These cases clearly highlight the symbiotic relationship extant between the Commissioner's dual responsibilities of assuring a thorough and efficient system of public education and assuring that it is racially balanced.

In a further effort to eliminate discriminatory practices in the public schools, the Legislature recently enacted L. 1973, c. 380, § 1,* effective January 14, 1974. This law provides in its entirety:

"No pupil in a public school in this State shall be discriminated against in admission to, or in obtaining any advantages, privileges, or courses of study of the school by reason of race, color, creed, sex or national origin." N.J.S.A. 18A:36-20.

Although this statute does not specifically confer enforcement powers upon the Commissioner, it is clear, under *Jenkins,* that the Commissioner has general jurisdiction to enforce all requirements of the education laws of the State. He, therefore, does have jurisdiction to assure that the express provisions of N.J.S.A. 18A:36-20 are implemented by the local school districts.

The Commissioner has taken steps to discharge his positive responsibility to enforce this statute by developing regulations to implement the broad provisions of N.J.S.A. 18A:36-20. These regulations were published in 7 N.J.R. 136 (4/10/75) and formally adopted on May 7, 1975, 7 N.J.R. 252 (6/5/75). N.J.A.C. 6:4-1.5 provides in pertinent part:

"(a) All public school students shall have equal access to all educational programs and activities.
"(b) There shall be no differential requirements for completion of course offerings or courses of study solely based on race, color, creed, sex or national origin.

* * *

"(d) Public school students shall not be segregated on the basis of race, color, creed, sex or national origin in any duty, work, play, classroom or school practice.
"(e) *No course offering, including but not limited to physical education, health, industrial arts, business, vocation or technical courses, home economics, music and adult education, shall be limited on the basis of race, color, creed, sex or national origin.*" (Emphasis added.)

Pursuant to N.J.A.C. 6:4-1.3, each local school district must develop a policy of equal educational opportunity and must also enact affirmative action plans which include corrective measures "to overcome the effects of previous patterns of discrimination and a systematic, internal monitoring procedure to ensure continuing compliance." The regulations also contain a timetable for submission of such plans to the Commissioner for his approval. Furthermore, the Commissioner:

"... or his designee shall provide technical assistance to local school districts for the development of policy guidelines, procedures and in-service training for school personnel so as to aid in the elimination of bias on the basis of race, color, creed, sex or national origin." N.J.A.C. 6:4-1.4.

The question posed by your inquiry is whether the jurisdiction of the Division on Civil Rights over public accomodations duplicates the jurisdiction of the Commissioner of Education with respect to the subject of discrimination in public school curricula. In order to respond to this issue, the parameters of the jurisdiction of the Division on Civil Rights must be briefly examined. The Division has jurisdiction over those matters delegated to it by the Law Against Discrimination, N.J.S.A. 10:5-1 *et. seq.* Pursuant to this law, the Division has general jurisdiction over housing, employment and use of public accommodations and the power to eliminate discrimination in these areas based on "race, creed, color, national origin, ancestry, age, marital status or cause of ... liability for service in the Armed Forces of the United States." N.J.S.A. 10:5-6. This jurisdiction may be contrasted with the pervasive

jurisdiction and responsibility of the Commissioner of Education to enforce all laws pertaining to the operation and administration of the public schools. The Commissioner's broad authority unquestionably extends to all discriminatory practices in the public schools and clearly encompasses exclusive jurisdiction of allegations of sex discrimination in public school curricula.

The recent enactment of N.J.S.A. 18A:36-20 which expressly deals with discrimination in public schools curricula further reinforces the exclusive jurisdiction of the Commissioner of Education in this area. The specificity with which N.J.S.A. 18A:36-20 addresses the problem of discrimination in the public schools sharply contrasts with the general language of N.J.S.A. 10:5-1 *et seq*. Operation of the rule of statutory construction, that the specific supersedes the general,** fortifies the conclusion that exclusive jurisdiction inheres in the Commissioner of Education over complaints involving unlawful discrimination in public school curricula. It may be inferred that the reason for this legislative confirmation of authority was the realization that the elimination and correction of sex-based restrictions in the public schools necessarily involves the educational expertise of the Commissioner of Education. It is this official who is specifically charged with the responsibility of assuring that the public school students of this State receive a thorough and efficient education. N.J.S.A. 18A:36-20 specifically confirms and strengthens his obligation to eliminate those practices which foster discrimination, based on sex, and to eradicate through educational programs their negative impact upon the youth of this State. Such a program is essential to the provision of a sound education system and is, therefore, within the exclusive responsibility of the Commissioner of Education.

You are advised, therefore, that the Division on Civil Rights has no jurisdiction over complaints alleging unlawful discrimination in public school curricula since exclusive jurisdiction over such matters inheres in the Commissioner of Education, pursuant to N.J.S.A. 18A:36-20.

Very truly yours,
WILLIAM F. HYLAND
Attorney General

By: THEODORE A. WINARD
Assistant Attorney General

* A 823, introduced 3/13/72, referred to Committee on Education.

** It is a fundamental principle of statutory construction, that when two enactments deal with the same subject, one in specific and concrete terms and the other in a more general manner, the former will supersede the latter and be controlling in the given situation. *Lawrence v. Butcher*, 130 N.J. Super. 209, 212 (App. Div. 1974). This doctrine has consistently been applied by the Supreme Court of this jurisdiction whenever such an issue has arisen. *See, e.g., State, by State Highway Commissioner v. Dilley*, 48 N.J. 383, 387 (1967); *Goff v. Hunt*, 6 N.J. 600, 607 (1951); *Hackensack Water Co. v. Division of Tax Appeals*, 2 N.J. 157, 165 (1949). *See also Blasi v. Ehret*, 118 N.J. Super. 501, 503 (App. Div. 1973).

October 27, 1975

CHRISTOPHER DEITZ, *Chairman*
New Jersey State Parole Board
Trenton, New Jersey

FORMAL OPINION NO. 29 – 1975

Dear Mr. Deitz:

The Parole Board has requested an opinion as to whether it may engage in a system of contract parole as an innovative means for the rehabilitation and parole of inmates incarcerated in our correctional institutions. You are advised that a proposal for a system of contract parole is permissible within our existing statutory framework provided the terms of the contract are consistent with the statutory responsibilities of the Parole Board.

A contract of parole is a mutually agreed upon document stipulating specific rehabilitative programs to be provided by a correctional institution, the inmates' agreement to successfully complete the prescribed program and objectives specified, and a parole at a fixed time contingent upon the successful fulfillment of these objectives. We have been advised that inmates who have been convicted of less serious nonviolent crimes and whose minimum parole eligibility dates fall not more than 30 nor less than 9 months from the date of sentencing will be selected for participation in the program. The contract will consist of a standard format with flexibility to negotiate the individual rehabilitative objectives to be pursued by the inmate, such as vocational training, work assignments, education, treatment and discipline. The program represents a cooperative effort between an inmate, the correctional facility and the Parole Board to design an individualized program to prepare an inmate for successful re-entry into society on a fixed date in the future.

An analysis of this issue must proceed with a review of the applicable New Jersey statutory provisions governing the responsibilities of the Parole Board. The New Jersey State Parole Board (hereinafter "Board"), pursuant to N.J.S.A. 30:4-123.1 *et seq.*, is the State agency empowered to determine when, and under what conditions, persons serving sentences having fixed minimum terms or serving sentences for life in the several correctional institutions of the State may be released on parole. N.J.S.A. 30:4-123.5. The Board is authorized to promulgate reasonable rules and regulations establishing the general conditions under which parole might be granted or revoked. N.J.S.A. 30:4-123.6. Once an inmate becomes eligible for parole pursuant to the time limitations set forth in N.J.S.A. 30:4-123.10 *et seq.*, and "when the board has been furnished all existing available records pertaining to the prisoner it shall consider the merits of his parole and shall make such other investigation as it shall deem necessary and proper." N.J.S.A. 30:4-123.9. The Board shall also consider the institutional report of the inmate's "behavior, discipline, type and manner of work performed, his own efforts to improve his mental and moral condition and his attitude toward society and the law enforcement officials responsible for his arrest, conviction and sentence." N.J.S.A. 30:4-123.18. Additionally, the personal views and recommendations of at least one of the Board members as to the prisoner and his eligibility for release are considered. A prisoner is not to be released on parole merely as a reward for good conduct or efficient performance of institutional duties, but only when, in the opinion of the Board, there is a reasonable probability that he will assume his proper place in society, without violation of law, and that his release will not be incompatible with the welfare of society. N.J.S.A. 30:4-123.14.

The above statutory scheme evidences no legislative mandate as to the precise point in time prior to actual release when a meaningful determination may be made as to the probable compatibility of the inmate's release with the welfare of society. Consequently, there is no proscription against the Parole Board making its primary evaluation on this score prior to the time the inmate reaches his minimum eligibility date for parole. The Parole Board may initially consider all existing available records pertaining to the prisoner, consider the merits of his parole and make such other investigation as it shall deem necessary and proper to assure itself of the likelihood that the inmate upon release, after fulfilling his contract, will assume his proper and rightful place in society.

It should be understood, however, that the Board retains a continuing responsibility for the review consistent with all statutory requirements of the release of any inmate prior to his parole. Such a reservation of authority in the Board to consider an inmate's entire institutional record is an implicit and should be an express condition of any contract of parole and allows for its rescission under circumstances unforeseen at the time of the making of the agreement.

In any event, under the circumstances described by the Parole Board pertaining to the proposed program, it would appear that the exercise of its reserved authority to deny parole would be rare and does not realistically interfere with the binding nature of the commitment. It would simply assure against the inappropriate release of a socially unadaptive inmate. For these reasons, a system of contract parole is consistent with the New Jersey statutory framework for the parole and release of inmates confined to New Jersey State correctional institutions.

Very truly yours,
WILLIAM F. HYLAND
Attorney General

By: THEODORE A. WINARD
Assistant Attorney General

October 27, 1975

LEWIS B. KADEN, ESQ.
Counsel to the Governor
State House
Trenton, New Jersey 08625

FORMAL OPINION NO. 30—1975

Dear Mr. Kaden:

You have requested an opinion as to the constitutionality of Assembly Bill 587 Official Copy Reprint which would exempt individuals who have attained seventy years of age or older from jury duty at their own option. Assembly Bill 587 OCR would amend N.J.S.A. 2A:69-2 to provide in pertinent part:

> "The following persons shall be exempt from service on any panel of grand or petit jurors:
>
> * * *
>
> "m. Any person who is 70 years of age or older and who notifies the jury commissioners of the county of his residence that he does not wish to serve as a juror."

You are advised, for the following reasons, that the enactment of Assembly Bill 587 OCR would represent a constitutional exercise of the State's power to establish a system of juror qualifications and exemptions. There would not appear to be any constitutional infirmity by reason of either discrimination on the basis of age, or a deprivation of a criminal defendant's Sixth and Fourteenth Amendment rights to an impartial jury trial.

Thus far, no attack upon a jury system has been brought by a member of an excluded age group asserting that his own rights have been violated.* The exact language of the bill is for these purposes particularly critical. The requirement that the exempted individual first notify the jury commissioners indicates that he will have the prerogative of exercising the option which he has been granted. Consequently, the excluded citizen would merely refuse to utilize the optional exemption and thereby retain his eligibility for jury service. Since that determination is left to the personal preference of the individual, any constitutional defect based upon discrimination on the basis of age would not appear to be relevant.

There also would not seem to be any constitutional infirmity by reason of an alleged constitutional deprivation of a criminal defendant's rights pertaining to the composition of a jury. The New Jersey cases of *State v. Stewart*, 120 N.J. Super. 509 (App. Div. 1972), and *State v. Anderson*, 132 N.J. Super. 231 (App. Div. 1975) are illustrative. These decisions arose from contentions that the mandatory exclusion of 18 to 21 year olds from prospective jury service, a procedure subsequently eliminated by L. 1972, c. 81, violated the defendants' constitutional protections. *See* N.J.S.A. 2A:69-1. In *Stewart*, the court concluded that the exclusion did not result in the denial of a 19 year old's Sixth and Fourteenth Amendment rights to an impartial jury trial, since "[T]he constitutional power of the State to provide such age qualifications for jurors is clear." 120 N.J. Super. at 510. Similarly, the court in *Anderson* determined that the prohibition did "not offend constitutional standards of due process." 132 N.J. Super. at 233. These cases are generally representative of the most recent judicial decisions pertaining to mandatory exclusion of persons within particular age groups. *See also King v. United States*, 346 F. 2d 123, 124 (1st Cir. 1965).

In *Taylor v. Louisiana*, 419 U.S. 522 (1975), a convicted male criminal defendant challenged the constitutionality of a state law which excluded women from jury service unless they had previously taken affirmative action by filing a written declaration of their desire to participate. After carefully reviewing its earlier statements on the issue of an impartial jury trial, the United States Supreme Court affirmed that there need be a fair cross section of the community on venires, panels or lists from which petit juries are drawn, without setting down any specific guidelines for its satisfaction. *Taylor v. Louisiana, supra*, at 526-31. Although the Court found that the purposeful exclusion of women from the jury rolls violated this mandate, it did recognize that certain exemptions could be granted. It merely determined that states "must not systematically exclude distinctive groups in the community," to insure that the panels or venires will "be reasonably representative thereof." Id. at 538.**

Assembly Bill 587 OCR is distinguishable from the provision struck down in *Taylor* in two significant respects. The individual under the Louisiana scheme was presumptively excluded. In this case, Assembly Bill 587 OCR would include the affected person unless he took the affirmative step of claiming the exemption. Furthermore, although the class of all qualified women is readily identifiable, a group composed of members of a particular age has never been viewed as being cognizable for the validity of a jury selection process. Assembly Bill 587 OCR would not, therefore, result in the systematic and purposeful exclusion of an identifiable class in the community, as was the situation in *Taylor*.

For these reasons, you are advised that Assembly Bill 587 OCR, if enacted, would withstand a constitutional challenge, whether founded upon charges of discrimination on the basis of age or an alleged deprivation of a criminal defendant's Sixth and Fourteenth Amendment rights.

Very truly yours,
WILLIAM F. HYLAND
Attorney General

By: THEODORE A. WINARD
Assistant Attorney General

* Our own statutory scheme, in addition to the proposal which is the subject of your inquiry, specifically restricts the category of qualified jurors to individuals who are "under 75 years of age." N.J.S.A. 2A:69-1. The two provisions specify different ages for their application, and would, therefore, be entirely consistent. Consequently, the effect of Assembly Bill 587 OCR would be to establish a particular range, within which an individual would be able to avail himself of an exemption from service. It would have no impact upon the preexisting limit imposed by N.J.S.A. 2A:69-1.

** The Court's earlier recognition of "specified qualifications of age," both minimum and maximum, as being properly within the states' power to establish criteria for their own jury systems, *Carter v. Jury Commission*, 396 U.S. 320, 332, 335 (1970), is of direct relevance to this discussion. In *Taylor*, the Court expressly stated that it was not departing from the principles which had been set forth in *Carter*. *Taylor v. Louisiana, supra*, at 538. States would therefore still be empowered to utilize age guidelines both for the granting of exemptions and for the formulation of qualifications for potential jurors.

December 29, 1975

THE HONORABLE J. EDWARD CRABIEL
Secretary of State
State House
Trenton, New Jersey 08625

FORMAL OPINION NO. 31 – 1975

Dear Secretary Crabiel:

You have asked for our opinion as to the date of the primary election to be held in 1976, a presidential year in which delegates and alternates to the national conventions of the political parties will be elected. For the following reasons, you are advised that the 1976 primary election shall be held on the Tuesday following the first Monday in June as provided by N.J.S.A. 19:2-1, or June 8, 1976.

N.J.S.A. 19:2-1 provides, in pertinent part, as follows:

> "Primary elections *for delegates and alternates to national conventions of political parties* and for the general election shall be held in each year on *the Tuesday next after the first Monday in June*. . . ." (emphasis added)

That date was established by an amendment to N.J.S.A. 19:2-1, changing the date of the primary election for the election of delegates and alternates from the first Tuesday in June. L. 1968, c. 292, §1. A corresponding change was also made by the amendment and in N.J.S.A. 19:23-40 to establish the same date for the conduct of the primary election for the general election. L. 1968, c. 292, §5. The bill was enacted into law without any amendment, and without any legislative statement. (Assembly Bill No. 766 of 1968).

N.J.S.A. 19:3-3, however, provides in pertinent part:

> "Delegates and alternates to the national conventions of the political parties shall be elected at the primary election to be held on the *first Tuesday in June* in that year." (emphasis added)

The first Tuesday in June of 1976 falls on June 1; the Tuesday following the first Monday in June of 1976 falls on June 8. Because of the amendment to N.J.S.A. 19:2-1, it is apparent that the date established by the statute does not conform to the date described in N.J.S.A. 19:3-3. This discrepancy has apparently escaped detection until this time because in the presidential year primary election held in 1972, the last time delegates and alternates were elected, the first Tuesday in June and the Tuesday following the first Monday fell on the same date, i.e., June 6, 1972.

The source statutes of N.J.S.A. 19:2-1 and 19:3-3 provided that the primary elections for delegates and alternates shall be held on the day of the primary for the general election in presidential years. L. 1930, c. 187, paras. 5 and 10. Subsequently, a definite date was established for the primary election for the general election, L. 1935, c. 9, §1, and that date was correspondingly reflected in the description of the primary that could serve to elect delegates and alternates. L. 1935, c. 9, §3. Subsequent changes in the date established by N.J.S.A. 19:2-1 were correspondingly made in N.J.S.A. 19:3-3. See L. 1935, c. 299, §§1 and 2; L. 1946, c. 11, §§1 and 2; L. 1948, c. 2, §§1 and 2; L. 1965, c. 4, §§1 and 2.

In 1967 the primary election was assigned to a date in September by an amendment to N.J.S.A. 19:2-1 but a change in N.J.S.A. 19:3-3 was not made because such amendment excepted from its provisions those primary elections held in presidential years. Laws of 1967, c. 26, §1. However, in 1968 N.J.S.A. 19:2-1 was again amended to change the date for the conduct of the primary for the general election from the date in September to the Tuesday next after the first Monday in June, and also to change the date for the primary for the election of delegates to a national convention in a presidential year from the first Tuesday in June to the Tuesday next after the first Monday in June. A comparable change was not correspondingly made, undoubtedly as a result of legislative oversight, in N.J.S.A. 19:3-3 which then described the primary date used to elect delegates to a national convention in a presidential year as the first Tuesday in June. Accordingly, the longstanding consistency between these two statutes as to the date for the holding of an election for delegates to a national convention in a presidential year was not maintained and the present discrepancy arose.

The two statutes are in irreconcilable conflict because each enactment specifies a different date for the conduct of the same election in June. It is unreasonable to assume that the Legislature could have intended to authorize the holding of two separate primaries a week apart in June of 1976 for the election of delegates to the national convention. Statutes should not be interpreted to reach such an anomalous or absurd result. *State v. Gill,* 47 N.J. 441, 444 (1966); *Robinson v. Rodriguez,* 26 N.J. 517, 528 (1958). Rather, where two acts are clearly irreconcilable in their provisions, the later act will be deemed to govern as the most current expression of the Legislature on the subject. *Town of Montclair v. Stanoyevich,* 6 N.J. 479 (1951); *Bruck v. Credit Corp.,* 3 N.J. 401 (1950); 2A *Sutherland, Statutory Construction,* 4th ed., §51.02. In this case, the most recent legislative indication was the amendment to N.J.S.A. 19:3-3 in 1974 but that amendment did not address itself to the date to be established for election of delegates. L. 1974, c. 9. It was the comprehensive amendment to N.J.S.A. 19:2-1 in 1968 that provided the last legislative expression as to the date to be established for the election of delegates and alternates to national conventions in presidential years. L. 1968, c. 292 §1. For these reasons, it is our opinion that pending any further legislative clarification of these statutes, the primary election of delegates and alternates to the national convention and for the general election shall be held on the Tuesday next following the first Monday in June pursuant to N.J.S.A. 19:2-1, or June 8, 1976.

Very truly yours,
WILLIAM F. HYLAND
Attorney General of New Jersey
By: GREGORY E. NAGY
Deputy Attorney General

January 9, 1976

SIDNEY GLASER, *Director*
Division of Taxation
State and Willow Streets
Trenton, New Jersey 08625

FORMAL OPINION NO. 1–1976

Dear Director Glaser:

You have asked for an opinion as to whether a lump sum pension distribution to an employee on his retirement from a retirement fund qualified under section 401(a) of the Internal Revenue Code is taxable to him as unearned income under the New Jersey Capital Gains and other Unearned Income Act. Laws of 1975, c. 172. Unearned income is defined by the Act to mean and include income from an interest in an estate or trust pursuant to regulations promulgated by the Director of the Division of Taxation and gains from the sale or exchange of capital assets. Your specific inquiry then is whether such a lump sum pension distribution is either income from a trust or estate or gain from the sale or exchange of a capital asset within the meaning of the statutory definitions set forth in the Act. For the following reasons, it is our conclusion that a lump sum pension distribution is neither income from an interest in an estate or trust nor a gain from the exchange of a capital asset and would not thereby be taxable as unearned income under the Act.

In the statutory definition of unearned income to include income from an interest in an estate or trust, the Legislature has authorized the Director to promulgate regulations which shall be consistent with comparable provisions of the Internal Revenue Code and regulations issued thereunder. Sections 2, 19. In the Internal Revenue Code, pension plans are treated in a different manner from estates or trusts. Section 61 of the Code sets forth pensions and income from an interest in an estate or trust as separate categories of gross income. Taxation of employee retirement plans is treated generally in Sections 72, 402 and 403 of the Code, whereas income from interest in an estate or trust are taxed pursuant to Section 641. It may, therefore, be reasonably concluded that the Internal Revenue Code does not consider a distribution from a pension plan as income from an interest in an estate or trust. Accordingly, it would not appear to have been the legislative purpose to empower the Director to tax these distributions as income from an interest in an estate or trust as unearned income for purposes of this Act.

The second question posed is whether a lump sum distribution of a pension is taxable as a gain from the sale or exchange of capital asset. The Act defines gains from the sale or exchange of capital assets as "net gains as defined by regulation of the Director which shall be consistent with definitions prescribed for Federal income tax purposes, ..." Section 2. Generally, retirement benefits are taxed, for Federal purposes, as ordinary income to the extent they do not represent employee contributions. Int. Rev. Code of 1954 § 72 (d). However, Section 402(a) (2) of the Internal Revenue Code imposes capital gains treatment on a fraction of lump-sum distributions in cases of pension plans qualifying under Section 401(a) of the Code. The numerator of the fraction reflects the number of years the taxpayer participated in the plan prior to 1974 and the denominator consists of the total number of years of participation. This formula came into effect as a result of a 1974 amendment phasing out the previous preferential capital gains treatment in cases of lump-sum distributions. Act of September 2, 1974, Pub. L. No. 93-406, § 2005(b) (1), 88 St. 829, *amending* Int. Rev. Code of 1954, § 402(a) (2).

The issue, therefore, remains whether the Director to be consistent with the definition prescribed for federal income tax purposes is obliged to treat a lump sum pension distribution as a capital gain transaction in accordance with section 402 (a) (2) of the Code, or, rather, adopt the generally accepted definition of a pension distribution as a form of ordinary income. It is clear that the treatment of retirement benefits as ordinary income under section 72 of the Code is based upon the realization that these benefits are merely a form of deferred compensation for work previously performed. See *Heard v. C.I.A.*, 326 F. 2d 962 (8th Cir. 1964) *cert. denied* 377 U.S. 978 (1964). The deferral in the distribution of the sum representing the employer's contribution does not change the basic transaction as one invoving compensation to an employee. The congressional determination to treat lump sum pension distributions differently is simply based on underlying policy considerations in the administration of the Federal tax laws and not on a strict definition of the transaction involved.

The Act merely requires the Director to be consistent with definitions prescribed for federal income tax purposes. It does not require him to adopt a congressional policy to give this form of transaction capital gains treatment. The employee is simply collecting an obligation from his employer due to him as deferred compensation for previously rendered services. See *Pounds v. U.S.*, 372 F. 2d 342 (5th Cir. 1967). You are accordingly advised that a lump sum distribution from a pension fund does not constitute a sale or exchange of a capital asset under the Act and would not thereby be taxable to its recipient as unearned income.

Very truly yours,
WILLIAM F. HYLAND
Attorney General of New Jersey
By: BARRY D. SZAFERMAN
Deputy Attorney General

January 19, 1976

HON. PHILLIP ALAMPI
Secretary of Agriculture
Health & Agriculture Bldg., Rm. 304
Trenton, New Jersey 08625

FORMAL OPINION NO. 2—1976

Dear Secretary Alampi:

You have asked for our advice on certain questions pertaining to the notification provisions of the newly enacted Open Public Meetings Act, N.J.S.A. 10:4-6 *et seq.* In particular, you have asked whether the State Board of Agriculture is required to promulgate a schedule of its regular meetings for this year as soon as the Act takes effect on January 19, 1976 or whether the Board may delay the promulgation of its schedule of regular meetings until its reorganization meeting to be held in July of 1976.

The controlling statutory provision dealing with public notification of the schedule of the regular meetings of a public body is N.J.S.A. 10:4-18 which provides in pertinent part:

> "At least once each year, within 7 days following the annual organization or reorganization meeting of a public body, or if there be no such organization or reorganization meeting in the year, then by not later than January 10 of such year, every public body shall post and maintain posted throughout the year in the place described in subsection 3.d . . . a schedule of the regular meetings of the public body to be held during the succeeding year . . . ."

It is clear that every public body must promulgate a yearly schedule of its regular meetings within seven days of its annual organization or reorganization meeting. In the case of a public body which does not conduct an annual organization or reorganization meeting, the schedule of regular meetings must be promulgated not later than January 10 of each year. The Act, however, is silent as to whether an annual schedule of meetings must be promulgated as of the effective date of the Act, January 19, 1976, or whether a public body may wait to promulgate such a schedule until Janaury 10, 1977 or until it conducts its annual organization or reorganization meeting sometime during the year.

There is no question that a public body is empowered to promulgate a schedule of its regular meetings as of the effective date of the Act, January 19, 1976, notwithstanding that its annual organization or reorganization meeting may be scheduled many months in the future. The Act authorizes a public body to revise its annual notice schedule after it has been duly promulgated. N.J.S.A. 10:4-18. The statutory requirement that each public body "post and maintain posted throughout the year" a schedule of its regular meetings also suggests a legislative purpose that a public body have a schedule of regular meetings in existence throughout the year. In light of these legislative objectives, it would be unreasonable to assume a legislative purpose to delay the promulgation of the schedule of annual meetings to January 10, 1977 or to an annual organization or reorganization meeting to be held many months in the future. The Act should not be construed in a manner to frustrate the underlying legislative purpose for an unduly long period of time after its effective date. The statute should be construed in a manner to fully effectuate its beneficial purposes. *N.J. Builders, Owners and Managers Association v. Blair*, 60 N.J. 330, 338-40 (1972); *Leonard v. Werger*, 21 N.J. 539, 543 (1956).

It may, therefore, be concluded that every public body which does not hold an annual organization or reorganization meeting should promulgate a schedule of all regular meetings through January 10, 1977 at its next meeting to be held on or about January 19, 1976. Public bodies, including the State Board of Agriculture, whose annual organization or reorganization meeting is not held in close proximity to the effective date of the Act should promulgate a schedule of all regular meetings, through and including the next scheduled annual organization or reorganization meeting, at its next meeting to be held on or about January 19, 1976.

Very truly yours,
WILLIAM F. HYLAND
Attorney General of New Jersey
By: MICHAEL A. SANTANIELLO
Deputy Attorney General

January 13, 1976

STANLEY C. VAN NESS, ESQ.
Public Advocate
10-12 North Stockton Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 3 – 1976

Dear Mr. Van Ness:

You have asked whether the jurisdiction of the Division of Rate Counsel in the Department of the Public Advocate (N.J.S.A. 52:27E-16 to 20) extends to proceedings before the Commissioners of Health and Insurance wherein rates for hospital reimbursement are established pursuant to N.J.S.A. 26:2H-18, and, if so, whether the Division may assess hospitals for the costs of its involvment in the proceedings. You are advised that the Division of Rate Counsel has the power to participate in hospital rate review proceedings and to charge hospitals for the expense of such participation.

The Health Care Facilities Planning Act (N.J.S.A. 26:2H-1 *et seq.*) provides that the Commissioner of Health, in conjunction with the Commissioner of Insurance shall set the rates paid to a health care facility by government agencies and hospital service corporations. N.J.S.A. 26:2H-18. Payments by government agencies "shall be at rates established by the commissioner [of Health], based on elements of cost approved by him" (N.J.S.A. 26:2H-18(b)); payments by hospital service corporations (Blue Cross) "shall be at rates approved as to reasonableness by the Commissioner of Insurance, with the approval of the Commissioner of Health." N.J.S.A. 26:2H-18(d). See also N.J.S.A. 17:48-7. In joint effort, the Commissioners of Health and Insurance, with the approval of the Health Care Administration Board, have promulgated Guidelines to govern the rate review program for hospitals, N.J.A.C. 8:31-21.1 *et seq.*, 7 N.J.R. 502(b) (1975). These Guidelines describe in detail the factors and accounting mechanics of the process used in reviewing budget submission of health care facilities to determine the reasonableness of the rate requests. The rate established as a result of the review process represents the level at which a hospital's *per diem* inpatient expenditures can be reimbursed by hospital service corporations. The 1976 hospital rate review program Guidelines require health economics analysts in the Department of Health to review budgets and rate requests in accordance with criteria specified in the Guidelines and to develop early in the year an "administrative payment rate" which will serve as the approved interim reimbursement rate throughout the year. This rate is later adjusted, after the end of the year, based on actual costs of services provided. The major assessment of the reasonableness of a hospital's rate request in relation to the elements of cost, however, is reflected in the setting of the interim administrative payment rate rather than in the final rate. Therefore, the 1976 Guidelines allow appeals to be taken to the Commissioners of Health and Insurance after the determination of the administrative payment rate. The hearing on the appeal follows the standard rules of procedure of the Department of Health and is open to the public.

This rate-setting process furnishes a proper occasion for involvement by the Division of Rate Counsel. The Division is empowered to "represent and protect the public interest . . . in proceedings before and appeals from any State department, commission, authority, council, agency or board charged with the regulation or control of any business, industry or utility regarding a requirement that the business, industry or utility provide a service or regarding the fixing of a rate, toll, fare or charge for a product or service," N.J.S.A. 52:27E-18. By virtue of the rate-setting obligations imposed by the Health Care Facilites Planning Act in N.J.S.A. 26:2H-18, the Departments of Health and Insurance certainly are charged with regulation or control "regarding the fixing of a rate, toll, fare or charge for a product or service." The terms "business, industry or utility" are undefined in the Department of the Public Advocate Act of 1974 (N.J.S.A. 52:27E-1 *et. seq.*), but it appears that they were intended to be of wide scope (See Editorial, "The Proposed Department of the Public Advocate." 97 N.J.L.J., 252 (April 11, 1974)), and would include hospitals and health care facilities. The term "business" "has been said to be a very comprehensive term which 'embraces everything about which a person can be employed. . . . That which occupies the time, attention and labor of men for the purpose of a livelihood or profit.' " *Zahn v. Board of Adjustment,* 45 N.J. Super. 516, 520 (App. Div. 1957) (citations omitted). "Industry," too, has been broadly defined as "any department or branch of art, occupation, or business, especially one which employs much labor and capital and is a distinct branch of trade." 43 C.J.S. *Industry* at 39 (1951). In view of the number of people employed, the annual expenditures and amount of assets, the health care facilities system has frequently been described as a trade or industry, composed of various sectors similar in economic attributes, purposes and functions. *American Nursing Home Ass'n. v. Cost of Living Council,* 497 F. 2d 909, 914-915 (T.E.C.A. 1974); *National Labor Relations Board v. Central Dispensary & Emerg. Hosp.,* 145 F. 2d 852, 853 (D.C. Cir. 1944), *cert.* denied, 324 U.S. 847, 65 S. Ct. 864, 89 L. Ed. 1408 (1945); Somers, Hospital Regulation: The Dilemma of Public Policy ix (1969). Indeed, the regulatory framework of the Health Care Facilities Planning Act, including the licensing of facilities, the control over expansion of services or plant through the certificate of need program, and the rate-setting provisions, is said to be modeled upon the economic regulatory approach toward traditional public utility industries. Havighurst, "Regulation of Health Facilities and Services by 'Certificate of Need'," 59 Va. L. Rev. 1143, 1153-1154 (1973); Somers, State Regulation of Hospitals and Health Care: The New Jersey Story 4 (1973).

Participation in the hospital rate review process therefore is well within the jurisdiction of the Division of Rate Counsel, and may even be essential if the Division is to play a significant role in proceedings concerning applications by Blue Cross for rate increases. Over 90% of all Blue Cross premium income is devoted to payments to hospitals (Somers, Hospital Regulation: The Dilemma of Public Policy, *supra,* at 164), yet the hospital reimbursement rate is determined through the review program of the Commissioners of Health and Insurance and is uncontestable at the proceedings on a Blue Cross rate increase application. By participating in the process by which hospital reimbursement rates are established the Division of Rate Counsel will represent the interest of taxpayers and Blue Cross subscribers alike, as well as assist the Commissioners of Health and Insurance, in ensuring that the lowest premiums or amounts necessary for the efficient delivery of health care services are paid. See Lynch, "Reimbursement of Hospitals by Blue Cross: The Need for Subscriber Participation," 11 Colum. J.L. & Social Prob. 189, 215-216 (1975).

Certain characteristics of the hospital rate review process, while not detracting from the power of the Division of Rate Counsel to participate, do affect the timing of that participation. The interim rate is developed in the first instance by a Health

Department analyst who applies the specific, uniform standards incorporated in the Guidelines to the budget and requested rate submissions. A hearing open to the public is not held unless and until an appeal from the administrative payment rate is taken. It is at this stage of appeal, where there is the usual expectation of obtaining a rate in excess of that computed through the analyst's application of the Guidelines, that the Division of Rate Counsel may make appropriate and effective contributions. Indeed, the 1976 hospital rate review program Guidelines recognize the right of the Division to participate in an appeal and to take the appeal on its own accord, and provide that requests for an appeal by hospitals or their payors must be filed with the Division of Rate Counsel as well as with the Department of Health. 1976 Guidelines, p. G-15 to G-16, 7 N.J.R. 502(b) (1975).

In your request for advice you have also presented the question of reimbursement of the costs of the Division of Rate Counsel's participation in the hospital rate setting process. Funding of the work and activities of the Division is provided solely through an assessment which the Division is permitted to make upon a business, industry or utility whenever the Division is involved "in a proceeding initiated by application of a business, industry or utility . . . for authority to increase the rate, toll, fare or charge charged by it for any product or service . . . " N.J.S.A. 52:27E-19(a). No exception from some form of payment to the Division is mentioned in the statute, and since the hospital rate review process pursuant to N.J.S.A. 26:2H-18 is initiated by the hospitals' submission of a budget and rate request, the expenses of the Division's participation in the process should be borne by those hospitals which in their budget submissions request an increase in the rate approved for the previous year and which are involved in an appeal from the administrative payment rate wherein the Division participates.

The assessment which the Division is allowed to make upon the business, industry or utility may amount to "up to 1/10 of 1% of its revenues derived from its intrastate sales of the product supplied or intrastate service rendered, the rate, toll, fare or charge for which . . . is the subject matter of such proceeding . . ." N.J.S.A. 52:27E-19(a). Because the rate which is the subject matter of the hospital rate review program refers only to the amount reimbursable by government agencies and hospital service corporations, the revenue percentage permitted by N.J.S.A. 52:27E-19(a) cannot apply to the total revenues of a hospital but only to the revenues received from Blue Cross and government agencies.

In summary, you are advised that the Division of Rate Counsel is fully empowered to participate in the hospital rate review program at the time when an appeal from the interim administrative payment rate is taken, and, that the Division may charge those hospitals applying for approval of rate increases for the costs of its participation in the proceeding.

Very truly yours,
WILLIAM F. HYLAND
Attorney General of New Jersey
By: CHARLOTTE KITLER
Deputy Attorney General

January 23, 1976

JOSEPH A. HOFFMAN, *Commissioner*
Department of Labor and Industry
Room 1303-Labor and Industry Bldg.
John Fitch Plaza
Trenton, New Jersey 08625

FORMAL OPINION NO. 4 – 1976

Dear Commissioner Hoffman:

You have requested an opinion as to the constitutionality of provisions of the New Jersey Unemployment Compensation Law which render pregnant women ineligible for unemployment benefits for a four-week period preceding the expected birth of the child and the four weeks following termination of the pregnancy. You ask in particular whether the statutory provisions in question are consistent with a recent decision of the Supreme Court of the United States invalidating a similar provision of the Utah unemployment compensation law. For the following reasons, you are advised that the statutory provisions in question, subject to the exceptions hereafter noted, appear to be consistent with federal constitutional requirements as set forth in applicable Supreme Court decisions respecting the eligibility of pregnant women for governmental benefits.

The New Jersey Unemployment Compensation Law (N.J.S.A. 43:21-1 *et. seq.*) provides that in order to qualify for unemployment benefits a claimant must, among other things, be "able to work" and "available for work". N.J.S.A. 43:21-4(c). The statute further states, however, that pregnant claimants shall be deemed unable to work and unavailable for work for the four weeks preceding the expected birth of the child and the four weeks following termination of the pregnancy, thereby rendering such claimants by definition ineligible for unemployment benefits. N.J.S.A. 43:21-4 (c) (1). Your inquiry is directed to the validity of N.J.S.A. 43:21-4(c) (1) in light of the recent Supreme Court decision in *Turner v. Department of Employment Security*, 423 U.S. 44, 96 S. Ct. 249, 46 L. Ed. 2d 181 (Nov. 17, 1975).

In the *Turner* case, the Court concluded that a Utah statute which denied unemployment benefits to pregnant claimants for twelve weeks preceding the expected date of birth and six weeks after delivery created a "conclusive presumption" that such women were unable to work during the period in question, contrary to the due process clause of the Fourteenth Amendment to the United States Constitution. The Court held that a presumption of inability to work for "so long a period before and after childbirth" was inconsistent with the Court's earlier decision in *Cleveland Board of Education v. La Fleur*, 414 U.S. 632 (1974). In that case, the Court struck down school board maternity leave rules requiring pregnant teachers to quit their jobs four or five months before the expected date of birth and prohibiting their return to work until three months after birth, saying "the ability of any particular pregnant woman to continue at work past any fixed time in her pregnancy is very much an individual matter." Similarly, with respect to the Utah unemployment compensation law, the Court noted in *Turner* that "a substantial number of women are fully capable of working well into their last trimester of pregnancy and of resuming employment shortly after childbirth."

The New Jersey Unemployment Compensation Law does, to be sure, differ from the Utah law invalidated in *Turner* with respect to the number of weeks in

which pregnant women are deemed incapable of working and therefore ineligible for unemployment benefits, the period of presumed disability being eight weeks in New Jersey compared with eighteen weeks in Utah. Despite this distinction, however, we would—but for the presence of an additional provision to be referred to in a moment—have little hesitancy in concluding that the eight-week period under the New Jersey law would still be too long and therefore unconstitutional under the principles set forth in the *Turner* and *La Fleur* cases. The plain fact, readily perceivable as a matter of common experience, is that a substantial number of pregnant women are able to and do continue working until several days before delivery and are likewise able to return to work soon thereafter. Therefore, the eight-week presumption of incapacity to work contained in the New Jersey Unemployment Compensation Law would, without more, be subject to the same constitutional objections as the Utah eighteen-week presumption invalidated in the *Turner* case.

The New Jersey law, however, departs from the Utah statute and most other state provisions of this kind in one crucial respect. As discussed in our earlier opinion on the payment of disability benefits to pregnant claimants (Formal Opinion No. 1—1975), the Unemployment Compensation Law expressly states that although such claimants are ineligible for *unemployment* benefits for the eight-week period in question, a claimant who suffers a "disability due to pregnancy or resulting childbirth, miscarriage, or abortion" may, if she satisfies the eligibility requirements applicable to all claimants, obtain *disability* benefits, payable in the *same weekly amount,* for the same eight-week period, that is, "the 4 weeks immediately before the expected birth of the child, and the 4 weeks following the termination of the pregnancy." N.J.S.A. 43:21-4(f) (1) (B).* Disability benefits are payable under N.J. S.A. 43:21-4(f) (1) (B) and 43:21-39(e) for the eight-week period *whether or not* the claimant is *actually* disabled by reason of the pregnancy or its termination. The benefits are paid from the State Disability Benefits Fund rather than the Unemployment Trust Fund. And, as mentioned above, the amount of disability benefits payable for each of the eight weeks in question is identical to the weekly benefit rate under the unemployment compensation program.

Therefore, unlike the Utah provision invalidated by the Supreme Court in the *Turner* case in which female claimants were simply denied unemployment benefits for an eighteen-week period surrounding childbirth, New Jersey claimants *are* eligible for *disability benefits* for the eight weeks surrounding termination of pregnancy under either the Unemployment Compensation Law or the Temporary Disability Benefits Law. And since eligible claimants receive disability benefits for the eight-week period in the same weekly amount as that paid to unemployment compensation claimants, it is immaterial that there is no entitlement to *unemployment benefits* for the eight-week period in question. Consequently, the provisions of the Unemployment Compensation Law which deny unemployment benefits for eight-week period surrounding termination of pregnancy, but which allow disability benefits for the same period, are fully consistent with the requirements of the Fourteenth Amendment to the Constitution as set forth by the Supreme Court in the *Turner* and *La Fleur* cases. Moreover, the provisions in question also appear to be consistent with a new federal law, scheduled to go into effect next year, which explicitly states that "no person shall be denied compensation under [a state unemployment compensation law] solely on the basis of pregnancy or termination of pregnancy." Unemployment Compensation Amendments of 1975, § 312(a). Female claimants are not "denied compensation" under the New Jersey statutes for the eight weeks surrounding termination of pregnancy, since they are entitled to disability benefits for that period.

Thus far, we have been discussing claims for benefits based on pregnancy and its termination filed under the New Jersey Unemployment Compensation Law. We have concluded that even though claimants are not entitled to unemployment benefits under the statute for the eight weeks surrounding termination of pregnancy, the law is nevertheless constitutional in view of the fact that such claimants may collect disability benefits for that period either under § 4(f)(1)(B) of the Unemployment Compensation Law or under § 39(e) of the Temporary Disability Benefits Law. In addition to the regular unemployment benefits program set forth in the Unemployment Compensation Law, however, there are a number of other federally-funded unemployment compensation programs, including the Federal-State Extended Unemployment Compensation Act of 1970 (P.L. 91-373), the Emergency Unemployment Compensation Act of 1974 (P.L. 93-572), the Emergency Compensation and Special Unemployment Assistance Extension Act of 1974 (P.L. 94-45), the Emergency Jobs and Unemployment Assistance Act of 1974 (P.L. 93-567), and the unemployment benefits programs for federal employees (5 U.S.C. § 8502 *et. seq.*) and for ex-servicemen (5 U.S.C. § 8521 *et. seq.*). While each of these federal programs differs in particulars, they have in common the fact that the governing federal statutes do not themselves set forth the conditions of eligibility for benefits but rather look to the respective state unemployment compensation laws for eligibility criteria. In addition, the programs in question are strictly limited to the payment of *unemployment* benefits, and claimants may *not* apply for *disability* benefits. Therefore, a New Jersey claimant under one of these programs may not seek *disability* benefits under § 4(f)(1)(B) of the New Jersey Unemployment Compensation Law or § 39(e) of the Temporary Disability Benefits Law. At the same time, the Unemployment Compensation Law, as discussed earlier, prohibits the payment of *unemployment* benefits for the eight-week period surrounding termination of pregnancy. You have asked whether the Unemployment Compensation Law, insofar as it denies unemployment benefits under the federal programs in question for the eight-week period at issue, is constitutional.

We conclude that, as thus applied, the statute is inconsistent with the Supreme Court's holdings in the *Turner* and *La Fleur* cases as well as with the new federal law which prohibits the denial of unemployment benefits "solely on the basis of pregnancy or termination of pregnancy." The reasons for this conclusion, including the overlong duration of the eight-week conclusive presumption of incapacity to work embodied in N.J.S.A. 43:21-4(c)(1), have been discussed earlier in this opinion and need not be reiterated. In view of our conclusion that N.J.S.A. 43:21-4(c)(1) is unconstitutional as applied to the federal programs enumerated above, the Department should administer claims for unemployment benefits under these programs without reference to the provision in question. This means that the determination whether a pregnant claimant seeking unemployment benefits under these programs is "able to work" and "available for work" is required by § 4(c) of the Unemployment Compensation Law during the weeks immediately before and after termination of the pregnancy should, like any other claim, be made on an individual basis based on the appropriate medical and other evidence applicable to the particular case.

For these reasons, you are advised that the New Jersey statutory provisions which prohibit the payment of unemployment benefits for an eight-week period surrounding childbirth, miscarriage, or abortion but which allow disability benefits

for the same period satisfy all federal constitutional requirements and are consistent with § 312(a) of the federal Unemployment Compensation Amendments of 1975. You are further advised that N.J.S.A. 43:21-4(c)(1) is unconstitutional and inconsistent with the foregoing federal statute as applied to claims for unemployment benefits filed under the non-regular federal programs enumerated earlier. Unemployment compensation claims filed under the federal programs in question should be determined without reference to N.J.S.A. 43:21-4(c)(1).

Very truly yours,
WILLIAM F. HYLAND
Attorney General of New Jersey

By: MICHAEL S. BOKAR
Deputy Attorney General

* We are advised that the Division of Unemployment and Disability Insurance has construed the quoted portion of § 4(1)(B) of the Unemployment Compensation Law, as well as identical provisions of the Temporary Disability Benefits Law (N.J.S.A. 43:21-29 and 43:21-39(e)), to permit the payment of disability benefits for the four weeks *preceding* termination of the pregnancy only where childbirth actually occurs. On the other hand, the Division allows disability benefit payments for the four weeks after termination of pregnancy irrespective of whether the termination is the result of childbirth, miscarriage, or abortion. In making this distinction between the four-week periods before and after termination of pregnancy, the Division has relied on the use of the words "expected birth" in the first part of the provisions in question, in contrast to the more general language "termination of the pregnancy" found in the last portion of the same provisions.

Although the language of the provisions in question is concededly ambiguous, we cannot concur in the restrictive interpretation accorded them by the Division, particularly in light of the legislative mandate in favor of the liberal construction of the Unemployment Compensation Law and of the Temporary Disability Benefits Law. N.J.S.A. 43:21-2 and 43:21-26. The Division's narrow interpretation of the basis for payment of benefits for the four weeks before termination of pregnancy pays insufficient homage to the broad reference at the outset of both N.J.S.A. 43:21-4(f)(1)(B) and 43:21-39(e) to "disability due to pregnancy or resulting childbirth, *miscarriage, or abortion*." Furthermore, the Division's interpretation might well be open to constitutional challenge on grounds of arbitrariness, because no reason suggests itself why miscarriage or abortion should be treated differently from normal childbirth for the four weeks before termination of pregnancy when they are treated the same as childbirth for the four weeks after termination. Therefore, it would be more consonant with the purposes of the two statutes to construe the words "expected birth" to include termination of pregnancy by miscarriage or abortion as well as by childbirth.

February 9, 1976

VERNON N. POTTER, *Director*
Division on Civil Rights
1100 Raymond Boulevard
Newark, New Jersey 07102

FORMAL OPINION NO. 5—1976

Dear Director Potter:

You have asked for an opinion as to whether the Division on Civil Rights has jurisdiction over allegations charging the Department of Civil Service with violations of the Law Against Discrimination, N.J.S.A. 10:5-1 *et seq.*, in its promulgation and implementation of its statutorily authorized rules and regulations. You are hereby advised that the Division on Civil Rights lacks jurisdiction to review the exercise of the regulatory responsibilities of the Department of Civil Service under the provisions of N.J.S.A. 11:1-1, *et seq.*, Title 11.

The objectives of the Civil Service system are to obtain an efficient public service by merit appointments and to provide a modern personnel system for all levels of government in this State. *Mastrobattista v. Essex County Park Commission*, 46 N.J. 138, 145 (1965). These vital and significant functions carried out by the Department of Civil Service since 1908 were recognized by the framers at the 1947 New Jersey Constitutional Convention. The principles underlying our Civil Service system were then given permanent constitutional stature in Art. 7, § 1, par. 2, which provides:

> "Appointments and promotions in the civil service of the State, and of such political subdivisions as may be provided by law, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination, which, as far as practicable, shall be competitive; except that preference in appointments by reason of active service in any branch of the military or naval forces of the United States in time of war may be provided by law."

The broad regulatory authority imposed on the Department of Civil Service by the Legislature is essential to the proper administration of a constitutionally mandated merit and fitness system in the public service. It is through the implementation of the rules and regulations of the Department of Civil Service that the provisions of Title 11 are enforced in the various government subdivisions under its jurisdiction. In addition to the broad authority to promulgate rules and regulations to generally enforce the provisions of Title 11, the comprehensive legislative scheme envisions the exercise of regulatory authority over many specific and different aspects of a merit system government. Examples of the many areas subject to pervasive control by the Department of Civil Service are the following:

> "... a classification plan approved and supervised by Civil Service Commission representatives, N.J.S.A. 11:5-1, 11:7-1; Civil Service approval for the creation of new positions, promotions, transfers, demotions, etc., N.J.S.A. 11:7-5; determination by the Commission as to designation of positions in classified and unclassified service, N.J.S.A. 11:7-11, 13; estab-

lishment of a compensation plan by the Commission and payment in accordance with such plan, N.J.S.A. 11:8-2, 3; use of competitive tests for employment eligibility tests, N.J.S.A. 11:9-1, 2; filling of vacancies from eligibility lists, N.J.S.A. 11:10-1 to 6; regulations as to promotion following competitive tests, N.J.S.A. 11:10-7; provisions for emergency appointments, N.J.S.A. 11:11-2; regulations as to probationary period of employment, N.J.S.A 11:12-1, 2; establishment of service standards and ratings by the Commission, N.J.S.A. 11:13-1; regulation by the Commission of hours of work, vacations and sick leave, N.J.S.A. 11:14-1 to 4; establishment of machinery for appeal to the Commission in connection with suspension, demotion and removal, N.J.S.A. 11:15-1 to 6; reinstatement of employees separated for economy reasons, N.J.S.A. 11:15-10."

It is therefore apparent from this enumeration that the Legislature has established extensive regulatory authority in the Department of Civil Service to maintain a modern personnel system in government founded on merit and fitness.

This administrative authority is so compelling that courts have consistently declined to intervene in its application. As noted in *Flanagan v. Civil Service Department*, 29 N.J. 1, 12 (1959):

> "... It is important to the efficient functioning of the public service employment program that '[c]ourts should let [civil service] administrative boards and officers work out their problems with as little judicial interference as possible. They may decide a particular question wrong – but it is their question. [They are] vested with a high discretion, and its abuse must appear very clearly before the courts will interfere ...' "

Indeed, in *Mercer Council #4, N.J. Civil Service Association v. Alloway*, 119 N.J. Super. 94 (App. Div. 1972), aff'd o.b. 61 N.J. 516 (1972), the court invalidated a civil service regulation which authorized the Chief Examiner to assign to other state agencies certain duties and functions delegated to him. The court concluded that the comprehensive legislative scheme gave absolute responsibility over those duties to the Chief Examiner, since he was vested with "primary, original, administrative authority and responsibility" over those matters.

The comprehensive jurisdiction and specific responsibility of the Department of Civil Service over the maintenance of a merit and fitness system in personnel practices of government sharply contrast with the general jurisdiction of the Division on Civil Rights over those matters delegated to it by the Law Against Discrimination, N.J.S.A. 10:5-1 *et seq.* That law confers broad jurisdiction on the Division on Civil Rights to eliminate discrimination in matters involving real property, employment and the use of public accommodations.

Although the Law Against Discrimination has been construed to confer jurisdiction on the Division on Civil Rights over the state acting as an employer, it does not extend to the conduct of government in the exercise of its basic regulatory responsibility. In *Formal Opinion No. 2–1975* dated January 31, 1975, the Attorney General concluded that the Division on Civil Rights lacks subject matter jurisdiction under the Law Against Discrimination to review insurance rates approved by the Commissioner of Insurance. It was opined that rate-making involves a purely governmental function in the traditional sense and is reviewable for discrimination exclu-

sively by appeal to the courts. Similarly, in *Formal Opinion No. 28–1975* dated October 15, 1975, exclusive jurisdiction over complaints of discrimination in public school curricula was found to inhere in the Commissioner of Education rather than in the Division on Civil Rights. The pervasive constitutional and legislative responsibilities of the Commissioner of Education to supervise the administration of the education laws were held in that instance to take precedence over the general provisions of the Law Against Discrimination.

The power of an administrative agency to review another state agency's exercise of its unique statutory functions is an unusual power which cannot be readily inferred without a clear expression of legislative intent. *Burlington County Evergreen Park Mental Hospital v. Cooper*, 56 N.J. 579, 598 (1970). In this situation, N.J.S.A. 10:5-1 *et seq.*, contains no express or implicit authority for the Division on Civil Rights to review the governmental prerogative of the Department of Civil Service exemplified by its promulgation of rules and regulations governing the terms of employment in the public sector. Moreover, in light of the pervasive constitutional and statutory responsibility of the agency to administer a system of merit and fitness in government employment, it would be unreasonable to presume that the Legislature intended to grant such extraordinary power to review in the Division on Civil Rights. It is, therefore, our opinion that the Division on Civil Rights lacks jurisdiction to enforce the provisions of the Law Against Discrimination against the Department of Civil Service acting within the scope of its regulatory responsibilities under Title 11.*

Very truly yours,

WILLIAM F. HYLAND
Attorney General

By: THEODORE A. WINARD
Assistant Attorney General

* Although the Department of Civil Service is not subject to the provisions of the Law Against Discrimination in carrying out its basic regulatory responsibilities, it must conform its governmental conduct to the constitutional requirements of equal protection of the laws found in the Fourteenth Amendment to the United States Constitution and inherent in Art. 1, par 1, of our State Constitution. The judicial review of administrative agency determinations is comprehensive in New Jersey and has the support of a special constitutional provision. Art 6, § 5, par. 4. The courts are fully empowered to remedy discriminatory acts or practices violative of these constitutional guarantees.

February 10, 1976

COL. CLINTON PAGANO, *Superintendent*
Division of State Police
Box 68
West Trenton, New Jersey 08625

FORMAL OPINION NO. 6—1976

Dear Colonel Pagano:

You have asked for an opinion on certain questions concerning the activities of constables. In particular, you have asked whether a constable may carry a firearm during off duty hours without having a permit or firearms purchaser identification card in accordance with the law governing firearms or be employed as a security guard at a private building or business concern consistent with the provisions of the Private Detective Act of 1939, N.J.S.A. 45:19-8, *et seq.* It is our conclusion based upon a review of the pertinent statutory provisions that a constable may not permissibly carry a firearm during off duty hours without having obtained the requisite permit or firearms purchaser identification card and must be licensed under the Private Detective Act as a condition to his employment as a private security guard for hire.

N.J.S.A. 2A:151-41 provides in pertinent part that with certain exceptions persons may not carry pistols or revolvers without having obtained a permit and may not possess a rifle or shotgun without having obtained the appropriate firearms purchaser identification card. N.J.S.A. 2A:151-43(f), however, exempts from these requirements "any . . . constable . . . when in discharge of his duties." It is clear that the Legislature intended to restrict the possession of the firearm by a constable without the necessary permit to his official constabulary responsibilities carried out during his normal and commonly understood duty hours. In *State v. Nicol,* 120 N.J. Super. 503 (Law Div. 1972), the defendant constable was charged with possession of a revolver without a permit. The accused argued that the indictment should be dismissed because N.J.S.A. 2A:151-43(f) exempted him from the requirement of a permit. The court disagreed and held that the defendant who on the occasion in question had been serving a subpoena on behalf of an attorney was not engaged in constabulary duties and would not therefore come within the exception found in section 43(f). Accordingly, the constable's status during his off duty hours is comparable to that of a private citizen and he must possess a permit or purchaser identification card to legally carry a firearm.

There is a clear legislative distinction intended between those persons authorized to carry firearms at all times and those whose authority to carry firearms without a permit or firearms purchaser identification card is circumscribed. For example, United States marshals, sheriffs and police officers may possess firearms at all times without having obtained permits or purchaser identification cards. N.J.S.A. 2A:151-43(a), (c), (d) and (e). Other persons, including constables, members of the armed forces, prison guards and court attendants, may only carry unlicensed firearms during the performance of their duties. N.J.S.A. 2A:151-43(b), (f), (h) and (i).

The limitation placed on a constable's right to carry a firearm is grounded in the fact that a constable's obligations and responsibilities with respect to law enforcement and preservation of the peace are narrower than those of other officers. A police officer has an obligation to enforce the law at all times. It is the "nature of a policeman's job that he be fit and armed at all times, whether on or off duty, and subject to response to any call to enforce the laws and preserve the peace." See *Banks v. City*

of Chicago, 11 Ill. App.3d 543, 297 N.E.2d 343, 349 (1973). See also, *Ward v. Keenan,* 3 N.J. 298, 311 (1949). Similarly, a sheriff is under the duty to be constantly vigilant and alert to violations of the law. See *State v. Williams,* 346 Mo.1003, 144 S.W.2d 98, 104 (1940); *Commonwealth ex rel. Davis v. Mallon,* 195 Va.368, 78 S.E. 2d 683 (1953); *State v. Lombardi,* 8 Wisc.2d 421, 99 N.W.2d (1959). On the other hand, constables are not obligated to enforce the law when they are engaged in matters other than strictly the performance of constabulary duties. See 80 C.J.S., *Sheriffs and Constables,* §42(b); *In re Borough High Constables,* 32 Del.Col. 335 (Del. Co., Pa. 1944). See also, *Ferguson v. Kern County,* 26 Cal.App. 554, 147 P.603 (1915). For these reasons, a constable may not legally carry a firearm without a permit or identification card when not engaged in the performance of his constabulary duties pursuant to law.

It is also clear that a constable may not engage in the occupation of a security guard at various private business enterprises without a license under the Private Detective Act of 1939. N.J.S.A.45:19-8 *et seq.* That act prohibits any person from engaging in the private detective business or as a private detective without having first obtained a license to conduct such business from the Superintendent of State Police. Any person who shall engage in such a business without a license shall be guilty of a misdemeanor. N.J.S.A.45:19-10. The definition of a "private detective" is one who conducts a private detective business which includes the furnishing for hire or reward of watchmen or guards or other persons to protect persons or property either real or personal or for any other purpose whatsoever. N.J.S.A.45:19-9(a), (c). The constable is not empowered as part of his express or inherent official responsibilities to guard private property. 80 *C.J.S., Sheriffs and Constables,* §49. You are therefore advised that a constable who engages in the business of a security guard for hire in various private buildings or business enterprises is subject to licensure by the Superintendent of State Police in accordance with the provisions of the Private Detective Act and must be immediately licensed to avoid the criminal penalites imposed by the act.

Your very truly,
WILLIAM F. HYLAND
Attorney General of New Jersey
By: SOLOMON ROSENGARTEN
Deputy Attorney General

March 23, 1976

COLONEL CLINTON A. PAGANO, *Superintendent*
Division of State Police
Route 29
West Trenton, New Jersey 08625

FORMAL OPINION NO.6—1976—SUPPLEMENT

Dear Colonel Pagano:

In *Formal Opinion No. 6—1976* dated February 10, 1976, you were advised, among other things, that a constable who engages in the business of a security guard for hire in various private buildings or business enterprises is subject to licensure by the Superintendent of State Police pursuant to the provisions of the Private Detective Act of 1939. N.J.S.A. 45:19-8 *et seq*. Some question has arisen as to whether our ruling was also designed to include those constables who are employed by a licensed private detective or security guard business. I am writing at this time to confirm that *Formal Opinion No. 6* does not cover such constables.

The Private Detective Act requires a person engaged either in the "private detective business" or as a "private detective or investigator" to acquire a license from the Superintendent as a prerequisite to conducting operations. N.J.S.A. 45:19-10. A person engaged in a private detective business is defined to be one who engages in the business of a watch, guard or patrol agency and who employs one or more persons in conducting such a business. N.J.S.A. 45:19-9(a), (b). A private detective or investigator is defined as a person who singly and for his own account conducts a private detective business without the aid or assistance of any employees. N.J.S.A. 45:19-9 (c). Licensure requirements thus do not extend to persons employed by a private detective business.*

Very truly yours,
WILLIAM F. HYLAND
Attorney General
By: THEODORE A. WINARD
Assistant Attorney General

* It should be noted that although an employee of a private detective business is not personally subject to licensure, the holder of a license issued by the Superintendent is responsible for the actions and conduct of his employees. N.J.S.A. 45:19-15, 16, 17, 18. The Superintendent has also promulgated specific regulations dealing with the fingerprinting, identification and badges of employees. N.J.A.C. 13:55-1.2, 1.3, 1.4, 1.5.

February 20, 1976

SIDNEY GLASER, *Director*
Division of Taxation
State and Willow Streets
Trenton, New Jersey 08625

FORMAL OPINION NO. 7—1976

Dear Director Glaser:

You have asked for an opinion as to whether interest income received by an estate or trust from an exempt source is taxable to an individual taxpayer under the New Jersey Tax on Capital Gains and Other Unearned Income Act. Laws of 1975, c. 172. Unearned income is defined by the Act to mean and include income from an estate or trust pursuant to regulations promulgated by the Director of the Division of Taxation. The Act exempts from the tax "interest which the State is prohibited from taxing under the Constitution or the Statutes of the United States or on obligations of the State of New Jersey or its political subdivisions . . . ." Section 2. Your specific inquiry is whether interest exempt under the Act maintains its character as it passes through from the estate or trust to the individual taxpayer.

In the statutory definition of unearned income to include income from an interest in an estate or trust, the Legislature has authorized the Director to promulgate regulations which shall be consistent with comparable provisions of the Internal Revenue Code and the regulations issued thereunder. Sections 2, 19. The Code provides that income shall have the same character in the hands of the beneficiary as in the hands of the estate or trust. Int. Rev. Code of 1954 §652(b), §662(b). Accordingly, for federal tax purposes exempt interest maintains its exempt character as it passes through from an estate or trust to an individual. See *Ellis v. United States of America,* 416 F. 2d 894 (6th Cir. 1969). It can be reasonably concluded that it was the legislative purpose that the Director apply this same pass through concept in his administration of the Act. You are therefore advised that interest income received by an estate or trust from exempt obligations under the Act maintains its exempt character and is not taxable to an individual taxpayer.

Very truly yours,
ROBERT J. DEL TUFO
Acting Attorney General
By: BARRY D. SZAFERMAN
Deputy Attorney General

February 27, 1976

ANN KLEIN, *Commissioner*
Department of Institutions and Agencies
State Office Building
Trenton, New Jersey 08625

FORMAL OPINION NO. 8 – 1976

Dear Commissioner Klein:

You have requested an opinion as to whether the Legislature has authorized the Commissioner of Institutions and Agencies or the Commissioner of Health to set a rate at which the Division of Medical Assistance and Health Services in the Department of Institutions and Agencies may reimburse a health care facility for care provided to its eligible recipients. It is our opinion that the Commissioner of Institutions and Agencies has the specific and exclusive power to establish reasonable rates of reimbursement for authorized health care services provided to a Medicaid recipient.

It is necessary to review the statutory framework which governs the payment of Medicaid reimbursement to eligible recipients. Medical assistance in substantially its present form was enacted by Congress in 1965 and is one of several matching-fund programs administered by the Department of Health, Education and Welfare in conjunction with participating states. Subchapter XIX of the Social Security Act, 42 U.S.C. §1396 *et seq.* A state may receive federal funds to furnish medical assistance to needy individuals upon approval by the Secretary of Health, Education and Welfare of a state plan to provide such assistance. 42 U.S.C.A. §1396. A state plan in part must "provide for the establishment or designation of a *single* state agency to administer or supervise the administration of the plan. . ." 42 U.S.C.A. § 1396 a (a)(5) (emphasis supplied).

In 1968 the Legislature authorized the state to participate in this program and designated the Department of Institutions and Agencies as the single state agency to administer its provisions. N.J.S.A. 30:4D-3(c); N.J.S.A. 30:4D-5. The Department of Institutions and Agencies through the Division of Medical Assistance and Health Services was authorized to reimburse a provider for basic medical care rendered to a Medicaid recipient, including inpatient hospital care. N.J.S.A. 30:4D-6. In order to further implement its purpose, the Legislature also conferred specific and pervasive authority on the Commissioner of Institutions and Agencies to administer the program. N.J.S.A. 30:4D-7. The Commissioner was empowered to submit a plan for medical assistance as required by the Federal Social Security Act to the Department of Health, Education and Welfare for its approval; to act for the state in making negotiations relative to the submission and approval of such plan; and to make such arrangements as may be required to retain such approval and to secure for the state the benefits of the provisions of such law. N.J.S.A. 30:4D-7(a). In addition, the Commission was authorized to determine the amount and scope of services to be covered by the program, the duration of medical assistance to be furnished and to "determine . . . that *the amounts to be paid are reasonable* . . . ." N.J.S.A. 30:4D-7(b).

In 1971, the Legislature enacted the Health Care Facilities Planning Act, N.J.S.A. 26:2H-1 *et seq.*, which conferred upon the Commissioner of Health broad authority to assure that "hospital . . . services of the highest quality of demonstrated need, [are] efficiently provided and properly utilized at reasonable cost . . . ." N.J.S.A. 26:2H-1. In this regard, the Legislature generally empowered the Commissioner of Health to establish a rate by which a government agency may pay a provider for health care services. N.J.S.A. 26:2H-18(5). A government agency whose payments are controlled by this provision includes "a *department*, board, bureau office, agency, public benefit or other corporation, or any other unit, however described, of the state . . . ." N.J.S.A. 26:2H-2(e) (emphasis supplied). The issue therefore raised is whether the specific authority of the Commissioner of Institutions and Agencies to determine the reasonableness of a Medicaid payment rate as part of his administration of a program of medical assistance takes precedence over the general authority of the Commissioner of Health to establish a reimbursement rate paid by a government agency.

The general rule is that when two statutes deal with the same subject, one in specific and concrete terms and the other in a more general manner, the specific statute will supersede the general and govern a given situation. 2A Sutherland, *Statutory Construction*, §51.05 (4th Ed. 1973). The Supreme Court of New Jersey has consistently applied this doctrine whenever it is necessary to discern the probable legislative intent. See, *e.g., W. Kingsley v. Wes Outdoor Advertising Co.*, 55 N.J. 336, 339 (1970); *State, by Highway Com'r. v. Dilley*, 48 N.J. 383, 387 (1967). In the present circumstance, the specific and comprehensive manner with which the Legislature addressed the issue of Medicaid reimbursement leads one to conclude that the Commissioner of Institutions and Agencies possesses exclusive jurisdiction to establish and determine the reasonableness of reimbursement rates.

This conclusion is reinforced by the strong policy against a repeal of legislation by implication. In the absence of an express repealer, there must be a clear showing of legislative intent to effect a repeal. See, *e.g., N.J. State P.B.A. v. Morristown*, 65 N.J. 160, 164 (1974); *State v. States*, 44 N.J. 285, 291 (1965); *Goff v. Hunt*, 6 N.J. 600, 606 (1951). In the present situation, the Legislature did not expressly repeal the authority of the Commissioner of Institutions and Agencies to establish a Medicaid reimbursement rate. Moreover, there is no indication that it intended to repeal this authority by implication. It is significant to note in this connection that, with regard to reimbursement rates paid by a hospital service corporation (Blue Cross), the Legislature specifically amended N.J.S.A. 17:48-7 (which authorizes Blue Cross to contract with a hospital to provide services for a subscriber) to state that such reimbursement rates shall be approved by the Commissioner of Insurance *only* after certification of costs by the Commissioner of Health. See also N.J.S.A. 26:2H-18(a) and (d). Thus, the Legislature firmly established that the "responsibility for fixing [*Blue Cross*] reimbursement rates is that of the Commissioners [of Health and Insurance]." See *Formal Opinion No. 12 – 1975*, dated April 30, 1975. On the other hand, in this instance the Legislature has not in any way modified the exclusive preexisting authority of the Commissioner of Institutions and Agencies to administer the medical assistance program and to determine the reasonableness of a reimbursement rate paid for services rendered to an eligible recipient.

You are therefore advised that the Legislature has conferred upon the Commissioner of Institutions and Agencies the specific and exclusive authority to establish a rate of reimbursement for inpatient hospital and other authorized health care services provided to a Medicaid recipient.

Very truly yours,
WILLIAM F. HYLAND
Attorney General

By: THEODORE A. WINARD
Assistant Attorney General

March 12, 1976

JOANNE E. FINLEY, M.D., M.P.H.
Commissioner of Health
Health and Agriculture
John Fitch Plaza
Trenton, New Jersey 08625

FORMAL OPINION NO. 9—1976

Dear Commissioner Finley:

You have asked for our advice as to whether the Comhissioner of Health under the Health Care Facilities Planning Act may set a rate at which a county must reimburse a hospital for health care provided to an indigent. Such hospital care may qualify for reimbursement under a variety of programs. See N.J.S.A. 30:4D-1 *et seq.* (Medicaid); N.J.S.A. 44:8-107 *et seq.* (General Public Assistance). Your inquiry is limited in scope to reimbursement by a county under N.J.S.A. 44:5-11 *et seq.*, a wholly distinct program of hospital care for the poor. You are advised that the Legislature has conferred upon the Commissioner of Health the exclusive power to establish a reimbursement rate even though a county's fiscal ability to reimburse at this level may be limited by restrictions upon its authority to appropriate funds for such a purpose.

In 1971, the Legislature enacted the Health Care Facilities Planning Act, N.J.S.A.26:2H-1 *et seq.*, to assure that "hospital . . . services of the highest quality, of demonstrated need, [are] efficiently provided and properly utilized at reasonable cost." N.J.S.A. 26:2H-1. The Legislature conferred upon the Commissioner of Health "the central, comprehensive responsibility for the development and administration of the State's policy with respect to health planning, [and] hospital and related health care services. . . ." N.J.S.A. 26:2H-1. The powers conferred under this statute are to be liberally construed to permit the agency to achieve the assigned task. *Cooper River Convalescent Center v. Dougherty*, 133 N.J. Super. 226, 232 (App. Div. 1975). In particular, the Legislature expressly empowered the Commissioner of Health to establish a rate at which a government agency must pay a provider for health care services. N.J.S.A. 26:2H-18(b). A government agency whose payments are controlled by this provision includes "a department, board, bureau office, agency, public benefit or other corporation, or any other unit, however described, of the State *or political subdivision thereof.*" N.J.S.A. 26:2H-2(e) (emphasis supplied). The question therefore raised is whether the power of the Commissioner of Health to establish a rate of payment for hospital services provided an indigent is circumscribed by specific limitations upon a county's authority to appropriate funds for such a purpose.

The Legislature has specifically limited the amount of funds a county may make available for indigent medical care. By way of illustration, it is instructive to note that a county of less than 925,000 people may appropriate 1/10 of 1% of its property valuation to hospitals providing indigent care. N.J.S.A. 44:5-16(A) and (B). Such an appropriation, however, may not exceed either a hospital's annual operating deficit or the average cost of patient care at that county's county hospital, depending upon which of these options a county selects. N.J.S.A. 44:5-16(A) and (B). With regard to an appropriation to cover a hospital's operating deficit, and when such an appropriation is made "generally" rather than to a specifically named hospital, a county board of freeholders "may. . . apportion the amount so appropriated to any such hospital

in the manner which in their judgment may be deemed for the best interest of the county." N.J.S.A. 44:5-16(A). A county larger than 925,000 in population may appropriate up to $10,000 annually for each hospital treating indigents. N.J.S.A. 44:5-17 and 18. However, the amount paid by such a county for an individual patient "shall not exceed the sum charged in the hospital . . . for patients occupying beds in wards open to the public." N.J.S.A. 44:5-17. In addition, a county having no county hospital other than a hospital for treatment of tuberculosis, mental illness or "contagious or infectious disease" may appropriate a specified sum to certain hospitals. N.J.S.A. 44:5-11.* Thus, a county generally may appropriate funds up to certain specified ceilings to reimburse a hospital for care provided its indigent population.

In order to reconcile the broad authority of the Commissioner of Health to set reimbursement rates for county governments with existing limitations on the amount of money to be spent for indigent care, these statutory provisions must be interpreted as a single, consistent unit. *Loboda v. Clark Tp.*, 40 N.J. 424, 435 (1963). Our Supreme Court has consistently emphasized that statutory provisions on the same subject should be interpreted so that they "may reasonably stand together, each in . . . [their] own particular sphere." *Swede v. City of Clifton*, 22 N.J. 303, 317 (1956). In this situation, the Legislature has given the Commissioner of Health the exclusive power to establish a rate at which a county must pay a hospital for indigent care. A county in turn is empowered to reimburse a hospital for indigent care solely within the limits of certain maximum amounts provided by law. It may be reasonably concluded that the Legislature intended a county to now reimburse a hospital for indigent care at the rate established by the Commissioner of Health to the extent of its allowable appropriations for this purpose. As a result, it may be necessary for a county to establish new fiscal procedures for making payments due on account of free inpatient hospital care furnished its indigent population.

It is our opinion therefore that the Commissioner of Health has been given the exclusive authority under the Health Care Facilities Planning Act to fix a reimbursement rate at which a county government must pay a hospital for free inpatient hospital care provided its indigent residents.

Very truly yours
WILLIAM F. HYLAND
Attorney General

By: DOUGLASS L. DERRY
Deputy Attorney General

* The limitations on the amount of an appropriation under this method are as follows. A county with a population of less than 300,000 may appropriate up to $800,000 for such services, and a county with a larger population may appropriate up to $1,500,000. N.J.S.A. 44:5-11. In both instances such an appropriation may only be made to a nonprofit hospital. N.J.S.A. 44:5-11. In the event there is more than one such hospital in a county, funds must be distributed "on the basis of the free ward day's treatment furnished by each of them . . . ." N.J.S.A. 44:5-12. A county of the fourth (one having a population of less than 50,000) or sixth class (one bordering on the Atlantic Ocean and having a population of less than 100,000) may appropriate up to $15,000 to an individual hospital. N.J.S.A. 44:5-19. Such an appropriation may be made either to a private or a charitable hospital. N.J.S.A. 44:5-19.

March 24, 1976

LEWIS B. THURSTON, III
Executive Director
Election Law Enforcement Commission
28 West State Street
Trenton, New Jersey

FORMAL OPINION NO. 10—1976

Dear Director Thurston:

You have asked for an opinion as to the impact of a recent decision of the United States Supreme Court in *Buckley v. Valeo,* 96 S. Ct. 612 (1976), on the validity and continued enforcement of the New Jersey Campaign Contributions and Expenditures Reporting Act of 1973. It is our opinion for the following reasons that the expenditure limitation found in Section 7 of the Act is constitutionally impermissible under the First Amendment to the United States Constitution and all enforcement activities with respect to it should be discontinued. However, it is also our opinion that the Act is otherwise constitutional in its entirety and may be enforced by the Election Law Enforcement Commission in accordance with its statutory and regulatory responsibilities.

In *Buckley,* the United States Supreme Court was primarily concerned with the constitutional validity of the contribution and expenditure limitations set by the Federal Election Campaign Act of 1971, as amended, under the First Amendment. Initially, the Court in its majority opinion noted that both the contribution and expenditure limits of the federal act implicate fundamental First Amendment guarantees and impose "restrictions on policital communication and association by persons, groups, candidates and political parties . . ." 96 S. Ct. at 634.

In the area of contribution limitations, the Court concluded that the Act's primary purpose to limit the actuality and appearance of corruption resulting from large individual financial contributions was a constitutionally sufficient justification and does not directly impinge upon the rights of citizens and candidates to engage in political debate and discussion. On the other hand, the Court stressed that expenditure ceilings impose significantly more severe restrictions on protected political expression:

> "A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensible instruments of effective political speech." 96 S. Ct. at 634, 635.

Accordingly, the nation's highest Court held that although contribution ceilings constitutionally serve a basic governmental interest in safeguarding the electoral

process without impinging on the rights of citizens to engage in political debate and discussion, the First Amendment requires the invalidation of the Act's expenditure limitations as substantial and direct restrictions on the ability of candidates, citizens and associations to engage in protected political expression and association.

In addition, challenges to the Act's reporting and disclosure requirements as overbroad in their application and in their extension to contributions as small as $10 or $100 were rejected. The Court identified significant governmental interests to be vindicated by this form of disclosure and reporting, e.g., "disclosure provides the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek federal office." In addition, "disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." Finally, the Court noted that "disclosure requirements are an essential means of gathering the data necessary to detect violations of the limitations imposed by the Act." 96 S. Ct. at 657, 658. In view of these compelling governmental purposes, no constitutional infirmity was found with either the disclosure, or reporting requirements or the minimum monetary thresholds stipulated in the recordkeeping and reporting provisions.

It is clear that the protections afforded by the First Amendment against unwarranted interference by the Federal Government have equal application to the governmental activities of a state. *New York Times Company v. Sullivan,* 376 U.S. 254, 257 (1964). The question therefore raised is whether the provisions of our New Jersey Campaign Contributions and Expenditures Reporting Act of 1973 is interdicted in any manner by the First Amendment as construed by the majority of the Court in *Buckley.*

In many respects, the New Jersey act bears a striking similarity to its federal counterpart as a means to eliminate corrupting influences in the electoral process through regulation and identification of the flow of wealth aimed at affecting that process. Although the Act contains a statutory ceiling on allowable contributions only for purposes of a publicly financed gubernatorial campaign, it does spell out in explicit terms limits on spending in aid of the candidacy of any candidate for a public office at any election in this state. N.J.S.A. 19:44A-7 provides as follows:

> "The amount which may be spent in aid of the candidacy of any candidate for a public office at any election shall not exceed $0.50 for each voter who voted in the last preceding general election in a presidential year in the district in which the public office is sought.
>
> "No money or other thing of value shall be paid or promised, or expense authorized or incurred in behalf of any candidate for nomination or election to any office, whether such payment is made or promised, or expense authorized or incurred by the candidate himself or by any other person, political committee or organization, it furtherance or in aid of his candidacy, under any circumstances whatsoever, in excess of the sums provided; but such sums shall not include the travelling expenses of the candidate or of any person other than the candidate if such travelling expenses are voluntarily paid by such person without any understanding or agreement with the candidate that they shall be directly or indirectly, repaid to him by the candidate."

It is clear from the terms of this section that the New Jersey act imposes the same limitations on constitutionally guaranteed freedoms of expression and association as those condemned by the United States Supreme Court in *Buckley*. This restriction on the amount of money to be spent in aid of the candidacy of a candidate for public office in New Jersey similarly reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. It also represents a substantial restraint on the ability of a political committee or organization in this State ". . . from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association." 96 S. Ct. at 636.

On the other hand, the remainder of the Act appears to be constitutional in all other respects and entirely consistent with the United States Supreme Court's determination.* The disclosure and reporting requirements of the Act imposed upon those who influence or affect the electoral process serve a valid governmental interest consistent with the demands of the First Amendment.** Moreover, expenditure limitations on gubernatorial candidates who voluntarily accept public financing for general election campaign expenses under N.J.S.A. 19:44A-36 appear to be constitutionally sound and similar to expenditure ceilings specifically approved by the United States Supreme Court for publicly financed presidential election campaigns. 96 S. Ct. at 666, 671.

You are therefore advised that the spending limitation set forth in Section 7 of the Act, N.J.S.A. 19:44A-7, is unconstitutional under the First Amendment to the United States Constitution and all enforcement procedures of the Commission pertaining to that section of the Act should be terminated. You are also advised that the remainder of the Act is constitutionally sound in its entirety in light of the decision in *Buckley* and may be properly implemented without Section 7 and be consistent with the underlying broad objectives of the Act.

Very truly yours,

WILLIAM F. HYLAND
Attorney General

By: THEODORE A. WINARD
Assistant Attorney General

* The invalidity of the composition of the Federal Election Commission under Art. II, §2, cl. 2, of the Federal Constitution (Appointments Clause) has no relevance to the New Jersey agency under our State Constitution, which in any event is composed solely of gubernatorial appointees.

** It should be noted, however, that on July 1, 1975 the Chancery Division of the Superior Court in *New Jersey Chamber of Commerce v. New Jersey Election Law Enforcement Commission*, 135 N.J. Super. 577 (Ch. Div. 1975), held that certain regulatory and reporting requirements set forth in N.J.S.A. 19:44A-11 as applied to political information organizations and committees spending less than $100, were facially overbroad in contravention of the First Amendment to the United States Constitution and Art. I, par. 18 of the New Jersey Constitution. That decision is now on appeal to the Appellate Division of the Superior Court and will undoubtedly be reconsidered in light of the decision of the United States Supreme Court in *Buckley*.

March 31, 1976

HON. RICHARD J. WILLIAMS
President, County Prosecutors' Association
600 Guaranty Trust Building
Atlantic City, New Jersey 08401

FORMAL OPINION NO. 11 – 1976

Dear Prosecutor Williams:

You have requested an opinion on behalf of all the County Prosecutors with regard to the power of a prosecutor to administratively terminate a criminal prosecution. It is my opinion that a prosecutor may administratively dispose of a criminal complaint both prior to and following a probable cause hearing.

Certain prefatory comments are in order. All would agree that the role of the public prosecutor has become infinitely more complex in recent years. This evolution in the nature of the office reflects the rising expectations of our citizens with respect to the criminal law. Our Legislature has often responded to difficult problems of social control by denominating conduct as criminal because it offends a regulatory policy aimed at promoting or protecting the public interest. In this manner, overwhelming demands are being made on the criminal justice system by the ever increasing volume of cases. In response, the expanded responsibility of the prosecutor requires the development of expertise in social disciplines not traditionally within the realm of law enforcement, and increasingly demands the exercise of reasoned discretion in the performance of his duties. To be sure, the prosecutor's primary duty is to prosecute. Protection of the public against criminal attack is government's primary mission. Nevertheless, our obligation is more far-ranging. In short, our perspective cannot be confined to seeking convictions in all instances in which the law has been breached. Indeed, it has long been recognized that "[t]he primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done."[1] Thus, courts throughout the country have held that prosecutors are vested with broad discretionary powers.[2] In brief, prosecutorial discretion is deeply embedded in our history and was rooted in the common law of England long before the birth of this country. The exercise of discretion, within the parameters of good faith reasoning, is as much a part of the prosecutorial function as is obtaining convictions in criminal cases.

In New Jersey, every prosecutor is charged by statute with the duty "to use all reasonable and lawful diligence for the detection, arrest, indictment and conviction of offenders against the law."[3] Despite the seemingly mandatory nature of the statute, our courts have explicitly recognized that prosecution of criminal cases is not a ministerial function and that a "county prosecutor within the orbit of his discretion inevitably has various choices of action and even of inaction."[4] It is thus incumbent upon prosecutorial authorities to exercise discretion based upon their judgment and conscience. . .in accordance with established principles of law,"[5] "fairly, wisely, and with skill and reason."[6]

The concept of prosecutorial discretion implies conscientious judgment, not arbitrary action. Clearly, a prosecutor is duty-bound to perform his statutory responsibilities in good faith. Personal gain or favoritism are to play no part in decision-making. In point of fact, a prosecutor's range of choices, not unlike those within the judicial domain, depends upon the particular circumstances of each case.

Decision making occurs at every stage of a criminal prosecution. A county prosecutor has an "obligation to detect and arrest as well as to obtain indictments and prosecute them."[7] He is statutorily required "to investigate suspicious situations and to determine the facts in the process of detecting and arresting, especially when he receives information that makes it reasonably probable that the law has been violated.[8] Prosecutorial discretion is generally exercised after investigation is completed when alternative courses of action are available. It is at this stage of the proceedings that a prosecutor is confronted with the decision as to whether he must seek an indictment and, if so, the nature of the charge to be filed.

Research reveals that a prosecutor is vested with broad discretionary powers in determining whether to prosecute once an investigation has been completed.[9] However, such authority must be exercised within the parameters of the public interest. As with all discretionary powers, those of a prosecutor are subject to possible abuse. A prosecutor may not unilaterally suspend enforcement of a duly enacted statute. Surely, it is not within his power to willfully cripple or nullify the enforcement of the criminal law in his county or "to choose at his pleasure the portion of the criminal law he would enforce."[10] It has been aptly observed that the "suspending power sought so strenuously by the Stuart kings" was denied to them in the English Bill of Rights.[11] A prosecutor may not defy the law, nor may he prevent its effective execution. The discretion not to prosecute is, therefore, limited at the extreme where it becomes no longer a proper exercise of authority, but rather a criminal abuse of public office, *e.g.*, official misconduct.

These principles were made manifest by our Supreme Court in *State v. Winne*, 12 *N.J.* 162 (1973). There, a county prosecutor was charged with misconduct in office. The principle thrust of the indictment related to the prosecutor's alleged willful neglect to perform his duty to use all proper and lawful means to detect, arrest, indict and convict those responsible for gambling operations in his county. Our Supreme Court squarely confronted the issue whether a corrupt agreement had to be alleged and proven to support a charge of nonfeasance, and, if not, whether a quasi-judicial officer, such as a county prosecutor, could be liable for nonfeasance for failure to perform discretionary acts. The Court concluded that nonfeasance, required *mens rea* but not a corrupt motive. In other words, nonfeasance was alleged where it was said that the defendant "willfully or corruptly" refused to fulfill his duties. It was not necessary that some motive of personal gain or favoritism be shown. It was enough that the refusal was willful and for invalid reasons, *e.g.*, in bad faith. The Court agreed that the prosecutor was a quasi-judicial officer endowed with discretion, but found that a standard of good faith would not unduly obstruct him in the performance of his office. Rather, the Court noted that the public had a right to expect care, skill, diligence, reason and judgment by a prosecutor.

The principle that a prosecutor must exercise his discretion in a reasoned manner and in good faith has been reaffirmed in an unbroken line of judicial decisions.[12] Most recently, our Supreme Court, albeit in a somewhat different context, applied the rule in a case involving an alleged violation of this State's election laws. In *In re Investigation Regarding Ringwood Fact Finding Comm.*, 65 *N.J.* 512 (1974), the Passaic County Prosecutor appealed from an order denying his motion to dismiss an election law complaint and directing him to present the matter to the grand jury. The prosecutor's refusal to seek an indictment was based upon the fact that his investigation had disclosed a technical and unintentional infraction. The Supreme Court reversed the Superior Court's order emphasizing the "broad" discretionary authority of a prosecutor "in selecting matters for prosectuion." *Id.* at 516. While noting

that the exercise of prosecutorial discretion may be reviewed under the judiciary's comprehensive prerogative writ jurisdiction, the Court specifically recognized the authority to administratively terminate a prosecution. *Id.* at 519. Absent "a showing of arbitrariness or abuse," a prosecutor's decision not to present a matter to a grand jury cannot be the subject of judicial interference. *Id.* at 518.

In sum, prosecutors may administratively terminate prosecutions both prior to and following probable cause hearings. *R.* 3:4-3 provides that "[i]f, from the evidence, it appears . . . that there is probable cause to believe that an offense has been committed and the defendant has committed it, the court shall forthwith bind him over to await final determination of the cause . . . ." It is significant that the Rule does not state that the defendant must be bound over for grand jury action.

The determination of probable cause by a municipal court judge does not compel the prosecutor to present the case to the grand jury. While it is true that a recent amendment to *R.* 3:25-1 provides that "a complaint may be dismissed prior to trial only by order of the assignment judge," this provision does not militate against the view taken here. It is to be noted that the commentary which accompanied the submission of the Rule to the Supreme Court by the Criminal Practice Committee noted that it was not intended to preclude the exercise of prosecutorial discretion, and certainly the amendment does not imply that the court may compel a prosecutor to present a frivolous matter to a grand jury. In short, the amendment, standing alone, does not prohibit a prosecutor from administratively terminating a criminal prosecution. Thus, prosecutors are not obliged to indulge in a charade by presenting a frivolous matter to a grand jury and recommending that a "no bill" be returned.

The prosecutor's world is a factual one. He is the link between the general ideals of the law and the unforseeable complexities of reality. No rigid code or formulation of conduct is possible. While the presumption must be that violations call for prosecution, that presumption may be overcome in a particular case. The character and history of the offender, the nature of the offense, the harm to the victim, the sentiment of the community, the morals and mores of the locality and other factors must be considered. The prosecutor's discretion can be abused not only by a refusal to prosecute but also by prosecutions in cases where justice mandates otherwise. See *e.g.*, *State v. Hampton, supra.* Each decision must be made fairly, impartially and in good faith.

To recapitulate, it is my opinion that a criminal complaint may be disposed of by a prosecutor without presenting the matter to the grand jury. The reasoned exercise of discretion by prosecutors enables them to concentrate their resources on combating serious violations of the law. Administrative termination of frivolous prosecutions strengthens our grand jury system by effectively screening the matters presented, and protects the citizen who is the subject of an unwarranted charge. To be sure, standards, guidelines and office procedures must be adopted to prevent abuses. I note in this regard that the County Prosecutors' Association and the Division of Criminal Justice are presently preparing uniform standards toward this end. The American Bar Association has studied this question and has provided guidelines to assist prosecutors in this regard. In any event, the exercise of prosecutorial discretion permits the State's law enforcement resources to be wisely spent and protects the citizen who is unfairly charged. The reasoned exercise of prosecutorial authority is, thus, decidedly within the public interest.

Yours very truly,

WILLIAM F. HYLAND
Attorney General

1. *Canons of Professional Ethics*, Canon 5. See also *State v. Farrell*, 61 *N.J.* 99, 104 (1972).
2. Note, "Prosecutorial Discretion," 1 *Crim. Just. Q.* 154 (1973). See *e.g.*, *United States v. Cox*, 342 F. 2d 167 (5 Cir. 1965); *Moses v. Kennedy*, 219 *F. Supp.* 762 (D.D.C. 1963); *Pugach v. Klein*, 193 *F. Supp.* 630 (D.D.C. 1961).
3. *N.J.S.A.* 2A:158-5.
4. *State v. Winne*, 12 *N.J.* 152, 174 (1973).
5. *State v. LaVien*, 44 *N.J.* 323, 327 (1965).
6. *Id.*
7. *State v. Winne*, *supra* at 174.
8. *Id.*
9. See, *e.g.*, A.B.A. Project on Standards, "The Prosecution Function and the Defense Function," §3.4 (Tent. Draft 1971).
10. *State v. Winne*, *supra* at 171.
11. *Id.*
12. See *e.g.*, *State v. Zimmelman*, 62 *N.J.* 279 (1973); *State v. Hampton*, 61 *N.J.* 250 (1972); *State v. States*, 44 *N.J.* 285 (1965); *Kingsley v. Wes Outdoor Advertising Co.*, 59 *N.J.* 182 (1971); *State v. Reed*, 34 *N.J.* 554 (1961); *State v. Covington*, 113 *N.J. Super.* 229 (App. Div. 1961), aff'd 59 *N.J.* 536 (1971); *State v. White*, 105 *N.J. Super.* 234 (App. Div. 1969); *State v. Milano*, 94 *N.J. Super.* 337 (App. Div. 1967).

April 6, 1976

HONORABLE RICHARD LEONE
State Treasurer
State House
Trenton, New Jersey 08625

FORMAL OPINION NO. 12–1976

Dear Treasurer Leone:

The Division of Taxation has asked whether income derived by authors in the form of royalties paid for rights to utilize their writings is subject to taxation under N.J.S.A. 54:8B-1 *et seq.*, enacted as L. 1975, c. 172, and known as the "Tax on Capital Gains and Other Unearned Income Act." It is our opinion that royalty payments taxable under the Act include only royalties derived from a taxpayer's investment of his capital and do not include payments derived from property which has been created by a taxpayer's personal efforts.

Section 3 of the Act (N.J.S.A. 54:8B-3) imposes a tax upon "unearned income," which is defined in Section 2 (N.J.S.A. 54:8B-2) to consist of certain enumerated categories of income:

> " 'Unearned income' means dividends, gains from the sale or exhange of capital assets, interest, royalties, income from an interest in an estate or trust pursuant to regulations of the director and compensation derived from a partnership or corporation which represents a distribution of earnings or profits rather than a reasonable allowance as compensation for personal services actually rendered."

The term "royalties" is also defined in Section 2:

> " 'Royalties' means gross royalties as defined by regulations of the director consistent with those prescribed for Federal income tax purposes, less deductions allowed which are attributable to property held for the production of the royalties."

The ordinary and usual definition of the term "royalty" is a share of the product or profit reserved by the owner for permitting another to use property. 77 C.J.S., *Royalty*. Broadly speaking, royalty payments to authors (and also to inventors or others) for the license to utilize property created by the personal efforts of the one receiving payment would fall within the definition of the term royalty. See generally *American Photocopy Equipment Co. v. Ampto, Inc.*, 82 N.J. Super. 531 (App. Div. 1964); *LeDuc v. J.T. Baker Chemical Co.*, 23 N.J. Super. 28 (App. Div. 1952); *Pargman v. Maguth*, 2 N.J. Super. 33 (App. Div. 1949). In addition, such payments would be treated as royalty income, includable in gross income under § 61(6) of the Internal Revenue Code. Income Tax Reg. § 1.61-8. The present issue arises because the terms of the Act subsume royalty income under the general denomination of "unearned income." Since for some purposes having relevance to federal taxation, royalty income to those whose personal efforts created the property upon which the royalty is paid is considered to be "earned" rather than "unearned" income,* the question is posed whether such royalty payments are taxable under the Act. An examination of the provisions of the Act in their total context, in light of the apparent legislative purpose, leads to the conclusion that such forms of royalty payments are not taxable.

Initially, royalty income is included in taxable income under § 2 of the Act, *supra*, together with five other categories of income, all of which are the character of a return upon capital rather than a product of individual effort. The meaning of one of such a series of statutory terms is to be derived in the light of the other terms in the series, according to the familiar rule of *noscitur a sociis*. 2A *Sutherland on Statutory Construction* (4th ed.), § 47.16, p. 101. *Ford Motor Co. v. Dept. of Labor and Industry*, 5 N.J. 494, 502 (1950). It would therefore be a fair inference that in imposing a tax on royalty income under Section 3, the Legislature intended to include only those forms of royalty income which represent investment income or a return on capital.

The Act's title and structure give additional support for this conclusion. The Act is entitled "An act imposing a tax upon capital gains and other unearned income and supplementing Title 54 of the Revised Statutes." Section 1 of the Act (N.J.S.A. 54:8B-1) provides that the statute "shall be known and may be cited as the 'Tax on Capital Gains and other Unearned Income Act.' " While the title of a statute may not operate to limit or enlarge upon the plain meaning of the statute's language, it may be of resort in discovering the legislative meaning of particular ambiguous provisions. *St. John the Baptist Greek Catholic Church v. Gengor*, 121 N.J. Eq. 349, 353 (E. & A. 1937); *Pancoast v. Director General of Railroads*, 95 N.J.L. 428, 431 (E. & A. 1921); *Swede v. Clifton*, 39 N.J. Super. 366 (App. Div. 1956), aff'd 22 N.J. 303 (1956).

In its enactment of this statute, the Legislature chose the concept of "unearned" income to signify the character of income subject to taxation. Section 3 specifically *imposes* the tax upon "unearned" income. The title of the statute speaks of a tax

on capital gains and "*other* unearned income." Capital gains, of course, are clearly the product of invested capital. The title therefore reinforces the inference that the other unearned income subject to taxation is of that same general character. Cf. *Transcontinental Gas Pipe Line Corp. v. Dept. of Conservation and Economic Development*, 43 N.J. 135, 145-46 (1964); *DeFazio v. Haven Savings and Loan Ass'n.*, 22 N.J. 511, 518 (1956).

Section 2 of the Act provides that the director shall define royalties subject to taxation by regulations consistent with those prescribed for federal income tax purposes. Payments to authors or others for the license to use property created by their individual efforts are not generally treated as a form of unearned income for federal income tax purposes. See *Internal Revenue Code* §§ 401(c)(2)(C) and 1348(b), noted *supra*, and Regulations thereunder. Although the Act's definition of taxable royalties does not explicitly require the director to follow federal categories of earned or unearned income, the full statutory content of the Act, in light of its apparent underlying purpose, strongly suggest that the Legislature did not intend to subject to taxation those royalty payments received for the license to use property created by the individual efforts of the licensor.

Exclusion of this form of royalty from the purview of the Act is furthermore supported by the general rule of construction that any doubt as to the reach of a tax imposition provision should be resolved in favor of the taxpayer. *Kingsley v. Hawthorne Fabrics, Inc.*, 41 N.J. 521, 528-29 (1964). Application of this general rule to the present matter where the express intention of the Legislature to tax is not clearly manifested on the face of the Act would appear to be appropriate.

You are therefore advised that payments to authors or others for the license to use property created by their individual efforts are not subject to taxation as "royalties" under the Act.

Very truly yours,
WILLIAM F. HYLAND
Attorney General

By: THEODORE A. WINARD
Assistant Attorney General

* E.g., § 401(c)(2)(C) of the Internal Revenue Code would appear to include in the definition of earned income applicable to the qualification of pension plans under § 401 royalties paid both to authors and inventors. Similarly, under § 1348, such income is subject to taxation as earned income at a rate not to exceed 50%.

May 3, 1976

HONORABLE RICHARD F. SCHAUB
Commissioner of Banking
36 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 13 – 1976

Dear Commissioner Schaub:

You have asked whether a State chartered savings and loan association may offer a variable interest rate mortage under the Savings and Loan Act of 1963. A variable rate mortgage is a mortgage in which the interest rates move upward or downward in line with the prevailing money mortgage rates. The changes in rate may be reflected by either a change in the term of the loan or the monthly payments, or a combination of both.

There does not appear to be any statutory restriction to a savings and loan association offering a variable rate mortgage. The Savings and Loan Act authorizes an association to invest in, *inter alia*, direct reduction mortgage loans. A direct reduction mortgage loan is a loan the principal of which is repayable in periodical installments. N.J.S.A. 17:12B-5(11). The Act further provides that such periodical payments must be sufficient to pay the principal and interest of the loan in full in a period of 40 years of less. N.J.S.A. 17:12B-147. There is no legislative restriction imposed either to the amount of interest to be charged with each periodical payment or to an agreement where the amount of interest is varied in relation to an external economic indicator. The primary legislative concern with respect to direct reduction loans was to simply assure that the term of the loan would not extend beyond a specified number of years.

For these reasons, the State associations may issue variable rate mortgages so long as the maximum term does not exceed a period of 40 years and the maximum amount of interest chargeable, pursuant to the terms of the loan, does not exceed the applicable usury ceiling in effect at the time of the loan, written contract or commitment for such loan was made.

Very truly yours,
WILLIAM F. HYLAND
Attorney General

By: MICHAEL E. GOLDMAN
Deputy Attorney General

May 13, 1976

JOHN LAEZZA, *Chairman*
Local Finance Board
Department of Community Affairs
363 West State Street
Trenton, New Jersey

FORMAL OPINION NO. 14–1976

Dear Chairman Laezza:

You have asked our opinion whether the recent amendment (chapter 353 of the Laws of 1975) to the Local Public Contracts Law (N.J.S.A. 40A:11-1, *et seq.*, hereinafter the "Act") alters the exception of professional services from the competitive bidding requirements of the Act. You are advised that the Act continues to provide a complete exception from open competitive bidding for all professional services as defined by the Act.

The Act provides that units of local government shall bid by public advertisement for every contract or agreement for the performance of work or the furnishing of materials and supplies when the monies for same shall be paid from public funds and will exceed $2500 in the fiscal or calendar year. N.J.S.A. 40A:11-4. All contracts, agreements and purchases which are publicly advertised shall be awarded to the lowest responsible bidder. N.J.S.A. 40A:11-6.1; N.J.S.A. 40A:11-16. However, there are certain subject matters which are excepted entirely from the competitive bidding requirements of the Act. N.J.S.A. 40A:11-5. One such exception is for professional services. N.J.S.A. 40A:11-5(a). This exception was first codified as chapter 198 of the Laws of 1971 although the courts apparently had read a similar exception into the Act previously. See *Samuel v. South Plainfield*, 136 N.J.L. 187 (E. & A. 1947); *Murphy v. West New York*, 132 N.J.L. 595 (Sup. Ct. 1945). The question presented by your inquiry is whether this exception has been in any way altered by the recent amendment to the Act.

The exception from competitive bidding requirements for "professional services" contained in N.J.S.A. 40A:11-5(1) (a) has been amended by adding a further exception for "extraordinary unspecifiable services". The sub-section in its present form, with the part added by the recent amendment underlined, reads as follows:

> ". . .professional services *or extraordinary unspecifiable services which cannot reasonably be described by written specifications. The application of this exception to extraordinary unspecifiable services shall be construed narrowly in favor of open competitive bidding where possible and the Division of Local Government Services is authorized to establish rules and regulations limiting the use of this exception in accordance with the intention herein expressed. The governing body shall in each instance state supporting reasons for its action and the resolution awarding each contract and shall cause such resolution to be printed once in a newspaper authorized by law to publish its legal advertisements.*" (Emphasis added).

It has been suggested that the phrase "which cannot reasonably be described by written specifications" might be read to qualify not only the new exception for "extraordinary unspecifiable services" but also the exception for "professional services." However, we have concluded upon a full review of the statute that such a reading would not be consistent with the probable legislative intent. * First of all, it is significant that the exception for "professional services" is a well established one in the Local Public Contracts Law. It is therefore reasonable to assume that if the Legislature had intended to alter this exception, it would have done so in clear and unequivocable terms. See *Singleton v. Consolidated Freightway Corp.*, 64 N.J. 357, 362 (1974). Such a clear and unequivocable expression of legislative intent cannot be found in the recent amendment. Secondly, the suggestion that the phrase "which cannot be described by written specifications" should be read to modify not only "extraordinary unspecifiable services" but also "professional services" would be inconsistent with the rule of the last antecedent. This canon of statutory construction erects a presumption that a modifying phrase which is not set off by a comma refers only to its last antecedent, in this instance "extraordinary unspecifiable services". *New Jersey Underwriters Association v. Clifford*, 112 N.J. Super. 195, 204 (App. Div. 1970). This conclusion is further strengthened by the fact that the remainder of the recent amendment to N.J.S.A. 40A:11-5(1) (a) expressly refers solely to the new exception for "extraordinary unspecifiable services" and not to "professional services". Thus, the second sentence of the sub-section as amended provides:

> "The application of this exception to extraordinary unspecifiable services shall be construed narrowly in favor of open competitive bidding where possible and the Division of Local Government Services is authorized to establish rules and regulations limiting the use of this exception in accordance with the intention herein expressed."

Therefore, a reasonable inference may be drawn that the Legislature did not intend in any way to modify or change its policy that professional services are to be expected from public competitive bidding but intended only to define a new category of exempt services—"extraordinary unspecifiable services"—and apply the new portions of N.J.S.A. 40A:11-5(a) to that term.

You are accordingly advised that chapter 353 of the Laws of 1975 has not modified or altered in any way the blanket exemption from open competitive bidding professional services under the Act.

Very truly yours,
WILLIAM F. HYLAND
Attorney General

By: ARTHUR WINKLER
Deputy Attorney General

* We recognize that the statement of the Senate County and Municipal Government Committee to Senate Bill 3090 (which was enacted as chapter 353 of the Laws of 1975) stated in part that the amendments to the Act would "require(s) public advertisement for bids on any professional services for which specifications can be drawn." This portion of the Committee statement refers to section one of the amending legislation as the provision which would accomplish the described change in the Act. This apparently was designed to describe an earlier draft of Senate Bill 3090, which had redefined exempt "professional services" in section one as applying only to services which cannot reasonably be described by written specifications. However, there is nothing in section one of Senate Bill 3090 as ultimately enacted which even arguably achieves

that result. Therefore, it must be concluded that the Senate Committee statement inadvertently and mistakenly referred to the draft despite the amendments made to it by the Committee.

May 13, 1976

HONORABLE RAYMOND H. BATEMAN
Senator, 16th District
21 East High Street
Somerville, New Jersey 08876

FORMAL OPINION NO. 15—1976

Dear Senator Bateman:

You have asked for an opinion as to whether Assembly Bill No. 1330, which grants property tax relief to homeowners and certain additional tax relief to homeowners who are senior citizens,[1] is violative of the New Jersey Constitution. For the reasons set forth below, you are advised that the property tax relief provided to homeowners is permissible. However, the relief provided for senior citizens over and above the relief provided general homeowners is unconstitutional.

Article VIII, §1, par. 1 provides in part that "property shall be assessed for taxation under general laws and by uniform rules. . . ." Under this provision:

> "Exemptions from taxation. . .that are based not upon any characteristic possessed by such property, or upon the uses to which it is put, but upon the personal status of the owners of such property, are void." *Tippett v. McGrath,* 70 N.J.L. 110, 113 (Sup. Ct. 1903) *aff'd o.b.* 71 N.J.L. 338 (E. & A. 1904).

Therefore, in order to provide property tax relief based upon home ownership, a constitutional amendment was necessary to permit preferential treatment based upon "the personal status of the [home] owners".

The recent constitutional amendment adopted in November 1975 permits such preferential treatment for homeowners. The amendment, *inter alia,* adds paragraph 5 to Art. VIII, § 1 which states as follows:

> "The Legislature may adopt a homestead statute which entitles homeowners, residential tenants and net lease residential tenants to a rebate or a credit of a sum of money related to property taxes paid by or allocable to them at such rates, and subject to such limits, as may be provided by law."

A-1330 is designed to implement the aforesaid 1975 constitutional amendment. It provides a "homestead exemption" to every homeowner in the State "calculated at $2.00 per $100 to $10,000 of equalized value, or two-thirds of equalized value, whichever is less, plus 25% of the effective tax rate in the municipality wherein the exemption is claimed, multiplied by $10,000 of equalized value or two-thirds of equalized value whichever is less." Sec. 2a of A-1330.

The issue arises whether the relief granted in A-1330 constitutes a "rebate or credit" as used in Art. VIII, § 1, par. 5.[2] Although A-1330 describes the relief provided as a "homestead exemption",[3] the amount set forth in the formula is an actual partial satisfaction of the homeowner's final tax bill.[4] It is thus similar to the tax "credits" listed in the Internal Revenue Code (see § 40 to § 46) which provide partial satisfaction of tax liability.

The history of Art. VIII, § 1, par. 5 indicates an intent to use the term "rebate or credit" broadly. Earlier versions specifically limited the amount of relief that could be afforded and required that such relief be in relation to household income. S. Con. Res. 122, 140 (1974). The resolution finally adopted excluded such limitations apparently on the basis that they were too detailed and inflexible. See Public Hearing on SCR 120, 121, 122, 137, 139, 140; Assembly Committee Substitute for ACR 175, 177, 178; ACR 176, as amended; and ACR 180 and 187 at p. 22 (1974). Assemblyman Walter E. Foran while conducting the hearing on the resolution adopted made the following statement:

> "The passage of this resolution by both Houses of the Legislature and its subsequent adoption by the electorate would provide flexibility for the Legislature in dealing with property tax relief generally. The specific provisions of such relief would then appear in individual bills and the provisions of such bills could be altered as situations changed." Public Hearing on Assembly Substitute for ACR 175, 177 and 178, at p. 1-2 (1975).

The intent to provide the Legislature with flexibility coupled with the nature of the remedy in the form of a partial satisfaction of the homeowner's tax liability leads us to the conclusion that the relief provided in A-1330 constitutes a "rebate or credit" as used in Art. VIII, § 1, par. 5.

A-1330 also grants senior citizens who are homeowners an exemption for "an additional $2.00 per $100 on equalized value up to $5,000 or to an aggregate of $15,000 of equalized value or two-thirds of equalized value whichever is less; provided, however, in no instance shall the amount of the homestead exemption be greater than 50% of the property tax otherwise due." Sec. 2a of A-1330. The second issue presented, therefore, is the constitutionality of providing such an additional credit to senior citizens. This requires a brief review of the constitutional provision relating to senior citizen property tax reform.

Prior to 1960, senior citizens were treated in the same manner as general homeowners in accordance with the uniformity provisions of the Constitution. In order to provide preferential tax relief for senior citizens, a constitutional amendment was adopted in 1960 and was subsequently amended in 1962, 1970, 1971 and 1975. This constitutional provision, set forth in Article VIII, § 1, par. 4, presently limits senior citizens tax relief to a maximum $160 deduction from property taxes.[5] It also provides the following limitation:

> "Any such deduction when so granted by law shall be granted so that it will not be in addition to any other deduction or exemption to which the said citizen and resident may be entitled. . ." Art. IV, § 1, par. 4

This provision has been interpreted as prohibiting a senior citizen from simultaneously taking advantage of the veteran's property tax deduction permitted by Article VIII, § 1, par. 3. See Attorney General Formal Opinion 1962-3. Therefore, in order to permit senior citizens to additionally take advantage of the general homestead rebate or credit provided by the 1975 constitutional amendment in paragraph 5, it was necessary to amend the senior citizen tax provisions in paragraph 4. Accordingly, paragraph 4 was amended in the same 1975 referendum to provide that "Said [senior] citizen. . .may receive in addition any homestead rebate or credit provided by law."

In view of the aforementioned constitutional mandate in Article VIII, § 1, par. 1 requiring uniformity in property taxation, it is clear that deviations from that standard must be set forth in explicit terms. The senior citizen tax relief authorized in Article VIII, § 1, par. 4 limits such relief to a maximum $160 deduction from property taxes and cannot be used as the basis for the additional senior citizen homestead credit proposed in A-1330. To do so would grant senior citizens total preferential tax relief in excess of the $160 maximum deduction authorized in paragraph 4. Not only did the 1975 constitutional amendment retain the $160 senior citizen tax benefit limitation in paragraph 4, but also the change in language in paragraph 4 only permitted senior citizens to take advantage of a general homestead exemption in addition to the $160 senior citizen tax relief otherwise provided in paragraph 4. If senior citizens were permitted an additional tax credit beyond the $160 maximum authorized in paragraph 4 and the general homestead relief in paragraph 5, it would render meaningless the $160 maximum in paragraph 4. This is in contravention of well-settled canons of construction that all provisions are to be given full effect. *Hackensack Bd. of Education v. Hackensack*, 63 N.J. Super. 560, 569 (App. Div. 1960).

The homestead exemption authorized in paragraph 5 may be enjoyed by all "homeowners, residential tenants and net lease residential tenants". Absent specific enabling language relating to senior citizens only, it cannot be used as the basis for permitting an additional homestead exemption for senior citizens in derogation of the uniformity mandate of the New Jersey Constitution. Therefore, it is our conclusion that insofar as A-1330 provides such additional tax benefits for senior citizen homeowners, these provisions are unconstitutional.

Very truly yours,
WILLIAM F. HYLAND
Attorney General of New Jersey
HERBERT K. GLICKMAN
Deputy Attorney General

1. Senior citizen as used in this opinion refers to the following three classes:
(1) Any citizen and resident of this State who is 65 years or older.
(2) Any citizen and resident of this State who is permanently and totally disabled according to the provisions of the Federal Social Security Act.
(3) Certain surviving spouses of a deceased senior citizen and resident of this State as described in Art. VIII, § 1, par. 4 of the New Jersey Constitution.
2. The question whether the constitutional amendment permits the Legislature to provide relief only for homeowners and not for tenants, who are also included in Art. VIII, § 1, par. 5, need not be reached. A-1330 takes effect only upon the passage of an income tax and Assembly Committee Substitute for Assembly Bill No. 1513, which provides such a tax, contains an income tax credit for tenants.

3. An "exemption" from property taxes is usually regarded as a reduction in the real property assessment. For instance, the original constitutional amendment in Art.VIII, §1, par. 4 adopted in 1960 permitted an $800 "exemption" from the property tax assessment of senior citizens. This "exemption" was eventually changed to the present $160 "deduction" from the tax bill of senior citizens.
4. Sec. 14 of A-1330 specifically refers to the satisfaction of the homeowner's tax liability as a "credit". After the Director of Taxation certifies the amount due each taxing district for homestead exemptions, and the State Treasurer distributes to each taxing district the amount so certified, Sec. 14 provides that the local tax collector "shall *credit* the November 1 property tax payment in the amount due under the homestead exemption."
5. Legislation implementing the senior citizen deduction is set forth in N.J.S.A. 54:4-80.40, *et seq*.

May 17, 1976

CHRISTOPHER DIETZ, *Chairman*
MARIO R. RODRIGUEZ, *Associate Member*
VERNER V. HENRY, *Associate Member*
New Jersey State Parole Board
135 West Hanover Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 16—1976

Gentlemen:

You have requested an opinion concerning the administrative implementation of the commutation credits provided in N.J.S.A. 30:4-140 for purposes of determining the parole eligibility date of an inmate under the jurisdiction of the Parole Board. Specifically, you have inquired as to whether the present administrative practice by which the entire statutory entitlement is credited to an inmate on his incarceration and subject to divestment only for flagrant misconduct is consistent with the language and intent of the governing legislation. It is our opinion that this method for the application of good time credits is entirely in conformity with N.J.S.A. 30:4-140 since the statute requires that the prescribed credits are to be deducted from the minimum and maximum term of a sentence and fully accrued to the benefit of an inmate as of the date of the commencement of incarceration.

N.J.S.A. 30:4-140, as amended by Laws of 1957, c. 27, governs the allowance of time credits on account of continuous orderly deportment of inmates in our state correctional institutions. This statutory section provides as follows:

> "For every year or fractional part of a year of sentence imposed upon any person committed to any State correctional institution for a minimum-maximum term *there shall be remitted to him* from both the maximum and minimum term of his sentence, for continuous orderly deportment, the progressive time credits indicated in the schedule herein. When a sentence contains a fractional part of a year in either the minimum or maxi-

mum thereof, then time credits in reduction of such fractional part of a year shall be calculated at the rate set out in the schedule for each full month of such fractional part of a year of sentence. No time credits shall be calculated as provided for herein on time served by any person in custody between his arrest and the imposition of sentence. In case of any flagrant misconduct the board of managers may declare a forfeiture of *the time previously remitted*, either in whole or in part, as to them shall seem just.

SCHEDULE

A	B	C
Minimum and Maximum Sentences in Years	Progressive Credits for Minimum and Maximum Sentences in Years	Credits for Each Full Month or Fractional Part of a Year in Excess of Column A
	(days)	(days)
1	72	7
2	156	8
3	252	8
4	348	8
5	444	8
6	540	8
7	636	10
8	756	10
9	876	10
10	996	10
11	1,116	10
12	1,236	11
13	1,368	11
14	1,500	11
15	1,632	11
16	1,764	11
17	1,896	11
18	2,040	12
19	2,184	12
20	2,328	12
21	2,472	12
22	2,616	13
23	2,772	13
24	2,928	13
25	3,084	15
26	3,264	15
27	3,444	15
28	3,624	15
29	3,804	15
30	3,984	16

Any sentence in excess of 30 years shall be reduced by time credits for continuous orderly deportment at the rate of 192 days for each such addi-

tional year or 16 days for each full month of any fractional part of a year. Nothing herein contained shall be deemed to limit or affect a convict's eligibility for parole consideration as provided for in section 10, chapter 84, P.L. 1948, as amended, in any situation where the sentence or consecutive sentences imposed upon a convict shall exceed 25 years." (Emphasis supplied.)

It is clear from the literal terms of the statute that the Legislature has directed prison officials to remit to any person committed to a state correctional institution the progressive time credits from both the minimum and maximum of the sentence imposed by the court. The statutory language can admit of no construction other than an express legislative command to deduct the prescribed allowance immediately on the imposition of a sentence to a state correctional institution. Only in a case of flagrant misconduct may the time already *"previously remitted"* be forfeited in the discretion of the board of managers of the institution.

A comparison with previous versions of this statute (Laws of 1876, c. 155, and Laws of 1918, c. 147) sheds additional light on the presumed legislative purpose behind the enactment of the law in its present form. Prior to 1957, this section provided as follows:

> "For every month of faithful performance of assigned labor by any convict committed to the state prison there shall be remitted to him from the maximum and minimum term of his sentence two days, and in addition, for every month of continuous orderly deportment, two days, and for every month of manifest effort of self-improvement and control, two days. In any month in which a convict shall have merited and received punishment no remission of sentence shall be made, and in case of any flagrant misconduct the board of managers may declare a forfeiture of the time previously remitted, either in whole or in part, as to them shall seem just. On the recommendation of the principal keeper and moral instructor, there shall be remitted two additional days per month to every convict who for twelve months preceding shall have merited the same by continuous good conduct, and for each succeeding year of uninterrupted good conduct the remittance shall be progressively increased at the rate of one day per month for that year." L. 1918, c. 147, sec. 306.

That statute was plainly founded on the concept that the inmate would accumulate the statutory credits by his good behavior periodically certified to by prison officials. The personal qualities deemed essential to the monthly rate of remisssion were expressed as "faithful performance of assigned labor" (two days), "continuous orderly deportment" (two days), and "manifest effort at intellectual improvement and self-control" (two days). In addition, on the recommendation of the principal keeper and moral instructor at the prison two additional days would be remitted for continuous good conduct for the preceding 12 month period. Thus, these legislative standards guided prison officials in granting, withholding and forfeiting commutation credits. There was a clear legislative purpose to authorize the periodic accumulation of the statutory credits in accordance with the sole discretion of the appropriate prison officials.

The enactment of the statute in its present form by Laws of 1957, c. 27, reflects

a significant change in legislative policy from the periodic evaluation of inmate behavior and accumulation of good time credits to an automatic award of credit subject to divestment only in cases of obvious and flagrant misconduct. Instead of focusing upon certain attributes of commendable deportment in specified time periods during service of the term, the statutory scheme refers to the boundary of the sentence, the minimum and maximum term, as the integral factor in the computation of the credit. The credit is fixed and mandatory. It increases in direct proportion to the length of the sentence.

The legislative purpose behind the enactment of Laws of 1957, c. 27, is expressed in the Statement on Assembly Bill 177 as follows:

> "This bill is designed to provide for more uniformity in the application of the principle of reducing the sentence of prisoners in confinement for good behavior. The statute as presently drawn results in considerable inequity and it is deemed desirable and necessary to make provision in the statute for the exact credits that may be anticipated on each individual sentence or series of consecutive sentences.
>
> It is felt that this information will be beneficial to the courts that impose the sentences for it facilitates and simplifies the method of calculating good behavior credits so that each court will be informed of the maximum time credits in reduction of sentence and thus may impose a term of years of confinement consistent with the offense in light of such reduction of sentence.
>
> The proposed statute should eliminate much tension and discontent among the inmates resulting from the lack of uniformity in the present schedule. . . ."

Thus, the 1957 amendment which brought the statute to its present form indicates a strong legislative intention to insure uniformity in sentencing procedures, to avoid inequities among the prison population and to eliminate the enormous administrative burden attendant upon periodic individual evaluation of inmates.

Moreover, it appears that prior to the 1957 amendment and at least since 1951, prison officials have administratively remitted progressive time credits on a projected basis from the minimum and maximum term immediately on the incarceration of an inmate. The 1957 amendment represented an apparent legislative purpose to conform the governing statute in this area to the then existing administrative practice. This is a significant indication of specific legislative acquiescence and support for this method for the remission of good time credits. An administrative interpretation of a relevant statute is entitled to great weight, especially when such construction is substantially contemporaneous with the enactment of the statute and is followed for many years. *Essex County, etc., Stores Ass'n. v. Newark, etc. Bev. Cont.*, 64 N.J. Super. 314, 322 (App. Div. 1960).

In summary, the literal terms and historical development of the statute require that commutation credits be remitted to the inmate on a projected basis. The computation of the extent of the credit is linked directly by the law to the length of the sentence in years or fractional part thereof and not to time actually served in the appropriate behavioral mode. Thus, the credit functions as an allowance against the

sentence inposed for the purposes of delineating an adjusted minimum and maximum sentence and establishing a parole eligibility date.

Very truly yours,
WILLIAM F. HYLAND
Attorney General
By: THEODORE A. WINARD
Assistant Attorney General

June 8, 1976

GEORGE E. DAVIS, *President*
Hudson County Board of Taxation
595 Newark Avenue
Jersey City, New Jersey 07306

FORMAL OPINION NO. 17—1976

Dear Mr. Davis:

The Hudson County Board of Taxation has requested an opinion concerning the effect of certain provisions of the Administrative Code recently adopted by the Hudson County Board of Chosen Freeholders. The Code has been adopted as a consequence of the change in form of government effected in Hudson County under the provisions of the Optional County Charter Law (N.J.S.A. 40:41A-1 *et seq.*). The particular provisions purport to transfer all but several enumerated responsibilities of the existing County Board of Taxation to a newly-created Division of Tax Assessments. For the reasons expressed below, we are of the opinion that this action is not within the authority conferred upon a county government by the Optional County Charter Law.

Article 5 of the Hudson County Administrative Code contains the provisions in question. The article establishes a Department of Finance and prescribes its organization and functions. Among the Divisions of the Department of Finance, the Code includes a Division of Tax Assessments. Section 5.2(d). The Code subsequently describes the relationship between this Division and the existing County Board of Taxation as follows:

> "Section 5.7 *Division of Tax Assessments* The head of the Division of Tax Assessments shall be the Division Chief. Under the direction and supervision of the Director, the division shall:
>
> (a) have, exercise and discharge all of the functions, powers and duties of a County Board of Taxation under State statutes, except the functions of hearing appeals from municipal assessments and relating to the County equalization tables;
>
> (b) in cooperation with the Division of Data Processing, develop, install

and supervise systems of electronic data processing for the preparation of municipal property tax rolls and duplicates; and

(c) develop and administer cooperative assessing programs under contract with one or more municipalities of the County organized into tax assessment districts.

Section 5.8 *County Board of Taxation* There shall be a County Board of Taxation as provided by Article 12 of this Code.* Pursuant to statute, the Board shall hear and determine appeals from assessments by municipal tax assessors and such other appeals as are provided by law. All staff services to the Board shall be provided by the Division of Tax Assessments."

The purpose of the quoted provisions is to remove from the Board and vest in the Division of Tax Assessments most of the powers and responsibilities heretofore directly and specifically conferred upon the Board by State statute. These responsibilities include: the supervision of the assessors of the taxing districts within the county (N.J.S.A. 54:3-16); the revision and correction of the tax lists submitted by the assessors (N.J.S.A. 54:4-46, 4-47); the ascertainment of the various property tax levies and the striking of tax rates (N.J.S.A. 54:4-48 through 4-52); and the entry of added and omitted assessments upon the tax rolls (N.J.S.A. 54:4-63.1 through 4-63.40). The essential question to be determined is whether these and the other functions of the Board are those of county government subject to transfer in a reorganization of county government under N.J.S.A. 40:41A-1 *et seq.* or whether they are assigned by statute exclusively to the County Board. Cf. *AFSCME v. Hudson County Welfare Bd.*, 141 N.J. Super. 25 (Ch. Div. 1976). An analysis of the Optional County Charter Law and of the statutes governing the county boards of taxation requires the conclusion that the boards are state agencies, exercising powers directly delegated by the Legislature within the geographical boundaries of the several counties, and that those powers are not subject to transfer in a reorganization of county government.

The power of a county government operating under the Optional County Charter Law to establish an office with substantive authority over tax assessments and assessing officials or to transfer functions of a county board of taxation to such an office can be predicated, if at all, only on the basis of the general power to organize county government conferred by section 27 of the Charter Law (N.J.S.A. 40:41A-27); for there is no provision of law which reposes in a county governing board any specific authority over the tax assessment function. Section 27 provides, in pertinent part:

"Any county that has adopted a charter pursuant to this act may, subject to the provisions of such charter, general law and the State Constitution:

a. Organize and regulate its internal affairs; create, alter and abolish offices, positions and employments and define the functions, powers and duties thereof; establish qualifications for persons holding offices, positions and employments; and provide for the manner of their appointment and removal and for their term, tenure and compensation." N.J.S.A. 40:41A-27.

It can be readily seen that this provision extends only to those functions of government which, independently of the provisions of the Charter Law, are already the affairs of the county level of government. This conclusion is reinforced by the immediately succeeding section of the Charter Law, which specifically states that "[n]othing in this act shall be construed to impair or diminish or infringe on the powers and duties of municipalities and other units of government under the general law of this state." N.J.S.A. 40:41A-28. Unless, therefore, a county board of taxation is an agency of county government independently of the Charter Law, the Charter Law does not subject the board's functions to the organizational definition and control of the board of chosen freeholders.

The pre-existing relationship between the board of taxation and the board of chosen freeholders is so clearly established by statute and case law as to admit of no doubt. The status of a county board of taxation is that of a state agency, and is, therefore, not directly affected by the Optional County Charter Law. The county boards of taxation "are creatures of the Legislature", created by N.J.S.A. 54:3-1. *Baldwin Construction Company v. Essex County Board of Taxation*, 28 N.J. Super. 110, 116 (App. Div. 1953); *Board of Taxation of Essex County v. Belleville*, 92 N.J. Super. 338, 342 (Law Div. 1966), aff'd 95 N.J. Super. 327 (App. Div. 1967). The members of a county board of taxation are appointed by the Governor with the advice and consent of the Senate. N.J.S.A. 54:3-2. Their salaries are paid by the State Treasurer upon warrants drawn by the Director of the Division of Budget and Accounting and are specifically fixed by statute. N.J.S.A. 54:3-6. In *Warren v. Hudson County*, 135 N.J.L. 178 (E. & A. 1947), the court stated:

"The county boards of taxation are an integral part of the State tax system and as such their status is necessarily that of State agencies having specified functions in the administration of a system for the assessment and collection of taxes."

In *DeFeo v. Smith*, 31 N.J. Super. 474 (Law Div. 1954), reversed on other grounds, 17 N.J. 183 (1955), the very point at issue here was the subject of the court's attention:

"The county board of taxation is not subordinate to the board of chosen freeholders. While the county board of taxation exercises a jurisdiction that is confined within definite territorial limits, its duties concern the state at large in a government field of major importance . . . . Its status is necessarily that of a state agency having specific functions in the administration of a system for the assessment and collection of taxes." 31 N.J. Super. at 479.

The recent decision of the Chancery Division in *AFSCME v. Hudson County Welfare Bd., supra,* does not require a contrary conclusion. That case concerned the functions of the County Welfare Board, which was explicitly recognized to be an agency of county government. The question to be resolved by the court was whether legislation enacted previous to the Charter Law required the continued existence of the Welfare Board as an autonomous county agency. In the present case, the law is entirely clear that the county boards of taxation are not agencies of county government at all. They are, rather, agencies of the State government, whose functions are therefore not subject to reorganization under N.J.S.A. 40:40A-27.

The powers of a county's chosen freeholders with respect to a county board of taxation remain strictly limited by statute. They are to approve the appointment of clerical assistants by the board (N.J.S.A. 54:3-7), to fix, within limits, the salary of the board's secretary and assistants (N.J.S.A. 54:3-8), to provide space for the transaction of the board's business and the safekeeping of its records and to furnish necessary supplies to the board (N.J.S.A. 54:3-29, 3-30), and to defray travel expenses of the board's members and its secretary (N.J.S.A. 54:3-31). Doubtless these powers continue to be exercised by the county governing body under the Optional County Charter Law. However, neither that statute nor any other law permits the dilution of a county tax board's own responsibilities, which are those of an agency of *State* government, either by the establishment of a separate office with jurisdiction over the same subject matter or by the formal transfer of the board's independent statutory functions.

For these reasons, it is our opinion that the provisions of the Hudson County Administrative Code which purport to establish an office with substantive authority over tax assessments and to transfer to that office functions conferred by statute upon the County Board of Taxation are beyond the statutory authority of a county governing body and are therefore legally without force and effect.

Very truly yours,
WILLIAM F. HYLAND
Attorney General of New Jersey
By: PETER D. PIZZUTO
Deputy Attorney General

* Section 12.1 states that the Board continues as an agency not allocated among or within the departments of county government.

June 21, 1976

ELAINE B. GOLDSMITH, DIRECTOR
Executive Commission on Ethical Standards
222 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 18 - 1976

Dear Mrs. Goldsmith:

You have asked for our opinion as to whether the Conflicts of Interest Act prohibits a State officer or employee from holding or being employed in a separate State office or position at the same time. For the following reasons, you are advised that such dual State employment or officeholding is not proscribed by the Conflict of Interest Act. However, dual State officeholding may be regulated by the respective departments of State government when it is deemed that such officeholding might reasonably be expected to impair the objectivity and independence of the State employee in the exercise of his or her primary job responsibilities.

The subject of dual employment is extensively treated by the New Jersey Constitution, common law, and various statutes. See *N.J. Const.*, Art. IV, §5, par. 1,3, 5 and Art. VI, §6, par. 7; N.J.S.A. 19:3-5; N.J.S.A. 40A:9-4; N.J.S.A. 52:37B-69.1. See also N.J.A.C. 4:1-18.4. Except for certain specific proscriptions contained in the Constitution or statutes, there is no absolute bar to dual employment. Such employment is proscribed only where the duties of two positions are incompatible, inviting the incumbent to prefer one obligation to another. *E.g., Kaufman v. Pannuccio,* 121 N.J. Super. 27 (App. Div. 1972), certif. den. 62 N.J. 192 (1973). Indeed, the Legislature has, in the area of municipal government, specifically permitted dual employment of an elective county office and an elective municipal office and of a legislative office and nonelective or appointive office or position in the county or municipal government. N.J.S.A. 40A:9-4.

The Conflicts of Interest Act, however, predominently concerns the regulation and control of the activities of legislators, State officials and employees in their private business and commercial contractual dealings with the State. See generally 1969 *Report of Legislative Commission on Conflicts of Interest.* For instance, N.J.S.A. 52:13D-15 prohibits a legislator, State officer or employee from participating on behalf of any party other than the State in negotiations for the acquisition or sale of State property. Similarly, N.J.S.A. 52:13D-16 generally prohibits a legislator, State officer or employee from representing any party other than the State in proceedings before various State agencies. N.J.S.A. 52:13D-17 proscribes representation by a former State officer or employee involving matters in which the officer or employee was directly involved in during his State service. In like vein, N.J.S.A. 52:13D-20 proscribes the representation by a legislator, State officer or employee on behalf of the State for the transaction of any business with himself or a corporation of which he has an interest. It is thus apparent that the controls and proscriptions contained in the Conflicts of Interest Act are far removed from the area of dual public employment. Rather, the entire thrust of the Act is directed towards private business and commercial dealings with the State.

Nonetheless, it has been suggested that the restrictions contained in N.J.S.A. 52:13D-19 on obtaining contracts awarded by the State extend to and prohibit dual State employment.* This suggestion ignores the plain fact that the entire tenor of that provision, as the tenor of the Act itself, is directed towards dealings and negotiations with the State for contracts or agreements to supply the State with either commerical, business or the personal services of a person acting in his private capacity. Initially, this is indicated by the nature of the exceptions enacted to the general prohibition concerning contracts let by competitive bidding. The legislative preoccupation with contracts or agreements awarded through the competitive bidding process is indicative of an intention to deal with those contracts traditionally and normally associated with the competitive bidding process, *i.e.*, contracts for equipment, supplies, public works and buildings. See N.J.S.A. 2A:135-6; N.J.S.A. 40A:11-3. Moreover, the legislative reference in N.J.S.A. 52:13D-19 to "partners," "corporations" and "to undertake or execute" are terms normally associated with the typical business or commercial contract. In contrast, State officeholding or employment situations are not normally considered contractual in nature. The indicia of public service is essentially governed by statute and is considered *sui generis. Adams v. Mayor and Common Council of City of Plainfield,* 109 N.J.L. 282 (Sup. Ct. 1932), aff'd 110 N.J.L. 377 (E. & A. 1933).

Any remaining doubts that the Conflicts of Interest Act does not impose a general proscription on dual State officeholding or employment must be resolved in

light of the traditional rule of statutory construction that statutes should be construed to substantially conform to the Legislature's intent and to avoid unreasonable results. *County of Monmouth v. Wissel,* 68 N.J. 35, 42 (1975). A construction of the Act which would draw dual State employment within the parameters of its general proscriptions would simply not be consistent with its primary purpose, *i.e.*, to regulate and control the narrow area of private business and commercial relationships with the State by legislators, State officers and employees. Moreover, the consequences of such an interpretation would produce substantial hardships for many State employees in situations which are far removed from the Act's essential objectives. Surely, it cannot be suggested that the Legislature intended, for example, the harsh result of prohibiting a maintenance worker for the Department of Transportation earning $6500 a year from also being employed on a different shift as a maintenance worker in the Department of Environmental Protection earning a similar salary. Yet, this is precisely the type of dual State employment which would be prohibited under a contrary interpretation of the Conflicts of Interest Act.

It is thus apparent that the literal terms of the Conflicts of Interest Act and its underlying policy are not indicative of a legislative purpose to deal substantially with dual State officeholding or employment situations and to alter the general body of law on dual employment. However, consistent with that body of law the Act does recognize that, through departmental codes of ethics, State officers or employees should not act in their official capacity in any matter involving a direct or indirect financial interest which "might reasonably be expected to impair his objectivity or independence of judgment." N.J.S.A. 52:13D-23 (e) (5). Through this provision, dual officeholding or employment could be precluded where it tends to impair the objectivity of a particular officer or employee.

In light of the foregoing, it is our opinion that the Conflicts of Interest Act does not impose an absolute bar to dual State officeholding or employment. The departments of State government, however, are free to regulate dual officeholding in instances where it may be expected to impair the objectivity and independence of the State officer or employee in the exercise of his or her primary job responsibilities.

Very truly yours,

WILLIAM F. HYLAND
Attorney General

By: ERMINIE L. CONLEY
Deputy Attorney General

* N.J.S.A. 52:13D-19 provides in pertinent part:

"No member of the Legislature or State officer or employee shall . . . undertake or execute, in whole or in part, any contract, agreement, sale or purchase of the value of $25.00 or more, made, entered into, awarded or granted by any State agency; provided however, that the provisions of this section shall not apply to (a) purchases, contracts, agreements or sales which (1) are made or let after public notice and competitive bidding or which (2), pursuant to... [law], may be made, negotiated or awarded without public advertising or bids, or (b) any contract of insurance entered into by the Director of the Division of Purchase and Property . . . ."

June 22, 1976

HON. FRED G. BURKE, *Commissioner*
Department of Education
225 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 19 - 1976

Dear Commissioner Burke:

You have asked a series of questions involving the impact of the recently enacted Open Public Meetings Act upon various activities of the State Board of Education as well as those of local boards. These questions will be considered in the following sequence:

1. whether meetings of the Law Committee, Agenda Committee, other committees of the State Board of Education, and of committees of local boards of education, must be open to the public;
2. whether workshops or training sessions of the State Board and local boards of education must be open to the public;
3. what procedure must be followed regarding emergency meetings of the State Board of Education;
4. what is the scope of the term "agenda" as used in the Open Public Meetings Act?

The Legislature, in enacting the Open Public Meetings Law, specifically declared it to be the public policy of this State that with certain limited exceptions its citizens have adequate advance notice of and the right to attend all meetings of public bodies at which any business affecting the public is discussed or acted upon in any way. The law does allow, however, a public body to discuss certain enumerated subjects in closed session provided that the procedural requisites in the law are met. To avoid misunderstanding, the Legislature found, that to be subject to the provisions of the Act, a public body must be organized by law and be collectively empowered as a multi-member voting body to spend public funds or affect personal rights. The Act, therefore, does not extend to informal or purely advisory bodies with no effective authority, nor to groupings composed of an individual public official, such as a school superintendent and his subordinates or advisors, who are not collectively empowered to act by vote.* Furthermore, to be covered by the provisions of this Act, a meeting must be open to all the public body's members,** and the members present must intend to discuss or act on the public body's business.

To implement its legislative resolve, N.J.S.A. 10:4-9 mandates that "no public body shall hold a meeting unless adequate notice thereof has been provided to the public." N.J.S.A. 10:4-8 (a) defines a "public body" as:

> ". . . a commission, authority, board, council, committee or any other group of two or more persons organized under the laws of this State, and collectively empowered as a voting body to perform a public governmental function affecting the rights, duties, obligations, privileges, benefits, or other legal relations of any person, or collectively authorized to spend public funds including the Legislature. . . "

In order to answer your various inquiries, it is necessary to first determine whether the State Board and each local board is a "public body" within the meaning of the Open Public Meetings Act. Necessary to this determination is a clear understanding of the composition and responsibilities of both the State Board and local boards of education.

The State Board of Education has general supervision and control over public education in this state and may also make and enforce, and may alter and repeal, rules for its own government and for implementing and carrying out the school laws of this State. N.J.S.A. 18A:4-1, 10, 15. The State Board also has jurisdiction to hear appeals from determinations of the Commissioner of Education involving controversies arising under the education laws. N.J.S.A. 18A:6-9,27. Local boards of education supervise and have general responsibility for the schools within their districts. N.J.S.A. 18A:10-1. Each board may adopt rules for its own governance as well as for the local school system. N.J.S.A. 18A:11-1.

Clearly, the State Board of Education and each local board of education is a "public body" as defined in this Act. These boards are statutorily created and "collectively empowered as a multi-member voting body" to spend public funds or affect persons' rights. Boards of education are certainly not "informal or advisory boards with no effective authority" but have specific statutory authority to supervise and control the system of free public education in this State and to expend moneys necessary to maintain such system.

I

You initially ask whether meetings of (a) the Law Committee, (b) the Agenda Committee and (c) various other committees of the State Board and local boards of education must be open to the public.

The State Board organizes at its first regular meeting following June 30 of each year. N.J.S.A. 18A:4-8. With regard to committee structure, N.J.A.C. 6:1-4.1 provides:

> "(a) The Board shall act as a committee of the whole. The following standing Committees shall be constituted:
> 1. Legal;
> 2. Liaison;
> 3. Nominating."

Pursuant to State Board regulation, the Legal Committee consists of at least three Board members whose training and experience make them particularly valuable for the review of all cases appealed from the Commissioner of Education to the Board. Notices of all hearings held by the Legal Committee are sent to all members of the Board. The Liaison Committee meanwhile consists of the President of the State Board of Education and two members of the Board appointed by her. The President of the State Board also appoints three Board members, in May of each year, to serve on a Nominating Committee. Finally, the President, may, at any time, appoint a special committee to consider or take action on any matter. It is assumed that the Agenda Committee was organized under this general grant of authority.

As noted *ante,* N.J.S.A. 10:4-12 requires that all meetings of public bodies be open to the public. To answer the present inquiry, it is therefore necessary to determine whether the above mentioned sub-committees of the State Board are "public

bodies" as the term is defined in the Open Public Meetings Law and, thus, subject to the provisions of this Law. A public body is one "collectively empowered as a voting body to perform a public governmental function affecting the rights . . . of any person, or collectively authorized to spend public funds." N.J.S.A. 10:4-8(a). Since the sub-committees of the State Board do not consist of an effective majority of the Board's members, the question of whether they are subject to the requirements of the Open Public Meetings Law depends upon the nature and extent of the authority delegated to them by that body.

The functions of the legal committee are set forth in N.J.A.C. 6:2-1.4. This regulation provides that the legal committee shall supervise the preparation of the record of the matter before the Commissioner and make it available to the entire Board. The committee also transmits to each member of the entire Board the basic documents involved in such appeals from the Commissioner's decisions. However, N.J.A.C. 6:2-1.5 specifically provides:

> ". . . The *entire Board* shall make a final determination with respect to each controversy by resolution in open meeting." (Emphasis added)

The Legal Committee simply serves a preparatory function to the formal action of the State Board. The Legal Committee has no grant of power from the Board to take any definitive action affecting the rights of parties before it. Rather, by regulation, the determination of an appeal from a Commission's decision must be made by the entire State Board. Therefore, the Legal Committee is purely an advisory body with no authority to affect the rights, duties, privileges, benefits or legal relations of any person. Since the Open Public Meetings Law does not apply to advisory bodies with no effective authority, you are advised that the meetings of the Legal Committee, as it is now constituted, are not subject to its requirements.

With regard to the Agenda Committee, you indicate that it usually meets once each month on a day in advance of the regular State Board Meeting for the purpose of planning items to be included on the agenda for that meeting. If this group serves a purely administrative function, and merely determines which items are ready for Board discussion and action, it would have no effective authority and its meetings would not be governed by the Open Public Meetings Law. However, should this subcommittee discuss substantive issues and have effective authority to keep matters from coming before the board, it could be concluded that the State Board has delegated its agenda committee a grant of power. If this were the case, such committee would not be "purely advisory" and would, therefore, be subject to the requirements of N.J.S.A. 10:4-6. The operation and effective authority of this committee must be studied to determine whether it is advisory or not and, therefore, subject to the act.

You also pose the general question, as to whether other committees of the State Board as well as committees of local boards must be open to the public. As articulated above, it is essential in answering this question to determine whether the committee or sub-committee is composed of an effective majority of the members of the body and whether that body has delegated to the committee or sub-committee authority to affect personal rights or to expend public moneys. Such determination cannot be made in the abstract. The general principles expressed herein must be applied in a factual context to determine whether a committee is truly informal or advisory or whether it does have effective authority, in a legal or practical sense.

II

You also ask whether workshops or training sessions of the State Board and local boards must be open to the public. You give as examples a workshop conducted by a local board wherein guidance counsellors present a report of the year's activities in a comprehensive testing program, or one conducted by the State Board at which personnel from several Divisions report on activities of those Divisions for the previous year. In both instances you indicate board members would ask informational questions and receive answers from appropriate staff members.

Relative to this inquiry is N.J.S.A. 10:4-12 which provides that, with certain limited exceptions, "*all* public meetings of public bodies shall be open to the public at all times." A public meeting is defined as:

> "... any gathering whether corporeal or by means of communication equipment, which is attended by, or open to, all of the members of a public body, held with the intent, on the part of the members of the body present, to discuss or act as a unit upon the specific public business of that body. Meeting does not mean or include any such gathering (1) attended by less than an effective majority of the members of a public body, or (2) attended by or open to all the members of three or more similar public bodies at a convention or similar gathering." N.J.S.A. 10:4-8(b)

By simply classifying a gathering as a training session or workshop does not exclude it from the statutory definition of a public "meeting". Under this definition if the training session or workshop is attended by, or open to, all members of the State Board of Education or of a local board of education, and is held with the intent *to discuss* or act as a unit on the "specific business of that agency" it is subject to the provisions of the Open Public Meetings Act.

In this regard, N.J.S.A. 10:4-8(c) defines "public business" as those "matters which relate, in any way, directly or indirectly, to the performance of the public body's functions or the conduct of its business." In connection with your inquiry, you indicate that a board might receive, at a "workshop" session, a report of the year's activities in a comprehensive testing program. Such report certainly goes to the very heart of the board's educational responsibilities and relates to the performance of its functions. Similarly, the report by various departmental personnel to the State Board of their activities in implementing the education laws concerns the Board's public responsibilities and likewise involves its ability to perform its public function. It is clear, therefore, that such meetings concern the "public business" of the State or local board.

These workshops or training sessions would not, however, be subject to the provisions of the Open Public Meetings Act:

(a) if they were attended by less than an effective majority of the board;

(b) if they were attended by, or open to, all the members of three or more local boards of education at a convention or similar gathering;

Furthermore, if the subject matter of such meetings falls within the exceptions enumerated in N.J.S.A. 10:4-12(b)*, that portion of the meeting dealing with such exceptions may be closed to the public consistent with the provisions of N.J.S.A. 10:4-13.** You are advised therefore that, except for the above situations, workshop and training sessions of the State Board and local boards of education are subject to the requirements of the Open Public Meetings Act.

III

Advice has also been requested as to what procedure should be followed regarding emergency meetings of the State Board of Education.

The Legislature recognized the possibility of emergency situations and provided therefore. N.J.S.A. 10:4-9(b) specifically states that a public body may hold a meeting without adequate public notice if three-quarters of its members approve such action and if certain conditions are met. To be consistent with N.J.S.A. 10:4-9(b), the meeting must involve a matter of such urgency that to delay it, so that "adequate notice" might be given, would likely "result in substantial harm to the public interest." The Act also requires *that if the meeting is called, it* must be strictly limited to the emergent matter which necessitated it. Notice of the meeting must also be provided as soon as possible after such meeting is called. Finally, it must be determined that either the public body could not have foreseen the need for such meeting at time when adequate notice could have been given or that the body could have foreseen the need for such meeting, but failed to do so. At the commencement of the emergency meeting, the presiding officer of the body must announce the adequate notice has not been given and specifically set forth the manner in which the above conditions have been met. N.J.S.A. 10:4-10(b).

Emergency meetings may be defined as meetings, other than those regularly scheduled, called by the State Board to consider a crisis or emergent situation within the educational system of the State. It may be that the need for such meeting is great but the emergency not of such nature to require an "immediate" meeting. In that situation, "adequate notice" should be given of such meeting. The Open Public Meetings Act defines "adequate notice" as:

> "... written advance notice of at least *48 hours* giving the time, date, location and, to the extent known, the agenda of any regular, special, or rescheduled meeting, which notice shall accurately state whether formal action may or may not be taken ..." N.J.S.A. 10:4-8(d) (Emphasis added)

Such notice is to be distributed and published in the same manner as that of the schedule of regular meetings of the State Board. N.J.S.A. 10:4-8(d).

It is possible, however, that a crisis may arise in the educational system of such urgency that an "immediate" meeting must be held to deal with it. Such situation would not permit the giving of "adequate" or 48-hour notice to the general public. Before determining to call a meeting without adequate public notice, the above provisions should be carefully considered. The information required by these statutory sections should be fully articulated before the meeting is called to assure that the requirements of the statute will be met.

IV

Your final inquiry concerns the scope of the term "agenda" as used in the Open Public Meetings Act. You specifically ask whether the term may be construed to mean the several sheets of paper which enumerate the items for consideration by the Board, or whether the term must be defined to include all the pages of descriptive materials provided to members of the Board.

At the outset it should be noted that agenda information need not be given where annual notice of regularly scheduled meetings, distributed in accordance with N.J.S.A. 10:4-18, includes the time, date and location of those meetings. The only

inclusion of the term "agenda" in the Open Public Meetings Act is within the definition of "adequate notice." As noted *ante*, N.J.S.A. 10:4-2(a) defines "adequate notice" as

> ". . . written advance notice of at least 48 hours, giving the time, date, location and to the extent known, the *agenda* of any regular, special, or rescheduled meeting . . ." (Emphasis added)

The question of the scope of an agenda therefore is limited to the notice required to he given for those meetings whose time, date and location are not listed in the annual notice schedule.

There is no definition of "agenda" within the Public Meetings Law. Black's *Law Dictionary* (4th ed.), however, defines "agenda" as a memorandum of things to be done, as items of business or discussion to be brought at a meeting; a program consisting of such things. Webster's *Third New International Dictionary* (1965) defines agenda as a "memorandum book; a list or outline of things to be done, subjects to be discussed or business to be transacted." In common discourse, the work agenda clearly refers to the listing of items to be discussed by the Board and not to be supportive materials relative to such items. It is a cardinal rule of statutory construction that words and phrases:

> ". . . shall be read and construed with their context, and shall, unless inconsistent with the manifest intent of the legislature or unless another or different meaning is expressly indicated, be given their generally accepted meaning, according to the approved usage of the language." N.J.S.A. 1:1-1.

The courts of this State have consistently held that words in a statute are to be given their ordinary and well understood meaning in the absence of an explicit indication of a special meaning. *Service Armament Co. v. Hyland*, 131 N.J. Super. 38 (App. Div. 1974); *Lopez v. Santiago*, 125 N.J. Super. 268 (App. Div. 1973). There is no indication within the instant statute that the word "agenda" is to be accorded any special meaning. It is, therefore, reasonable to conclude that the word agenda refers solely to the list of items to be discussed or acted upon at the meeting. The notice required by N.J.S.A. 10:4-8(d), therefore, need only contain a listing of the items which will be before the Board at the meeting and need not include the supportive or explanatory materials and reports relative to such items.

It should be noted, however, that if certain of these supportive or explanatory materials are "public records", as the term is defined in N.J.S.A. 47:1A-2, they are open to public inspection. Duplicates of such records may be purchased pursuant to the fee schedule set forth in this statutory provision.

CONCLUSION

Based upon the foregoing considerations, you are advised that:

1. The meetings of the Law Committee of the State Board of Education are not subject to the requirements of the Open Public Meetings Act since this sub-committee is not composed of an effective majority of Board membership and is a purely advisory body with no effective authority to affect personal rights or expend public moneys. It is impossible to determine whether sub-committees of the State Board or local boards of education are generally excluded from this Law since such determination is a factual one which turns upon the composition of such sub-committees and a full evaluation of their authority. With regard to the Agenda Committee of the State Board, its operation and function must be reviewed to determine whether it is an "advisory body" and thus exempt from the requirements of the Law.

2. Training and workshop sessions of both the State Board and local boards of education are generally subject to the provisions of the Open Public Meetings Law. Excepted from the application of the Law are conference-type meetings (open to three or more local boards of education) or sessions attended by less than an effective majority of the Board memberhship. Furthermore, if the subject matter of such meetings falls within the exceptions enumerated in N.J.S.A. 10:4-12(b), that portion of the workshop or training session dealing with such matter may be closed to the public if the procedures required by N.J.S.A. 10:4-13 are followed.

3. The State Board of Education can hold an "emergency meeting" without giving 48-hour notice where it complies with the specific requirements of N.J.S.A. 10:4-9(b). The information required by this statutory provision should be articulated before the emergency meeting is called to assure that the statutory requirements will be met.

4. Agenda information need not be given where annual notice of regularly scheduled meetings, distributed in accordance with N.J.S.A. 10:4-18, includes the time, date and location of those meetings. Where agenda information is required, the term "agenda" may be construed as referring to the list of items to be discussed or acted upon at a State Board meeting. If materials relative to agenda items are "public records" as defined in N.J.S.A. 47:1A-2, they are open to the public and duplicates may be purchased pursuant to the fee schedule set forth in such statute.

Very truly yours,

WILLIAM F. HYLAND
Attorney General

BY MARY ANN BURGESS
Deputy Attorney General

* However, if a superintendent were in attendance at a meeting of a local board of education, he would be a participant at a public meeting which meeting would be subject to the provisions of this Act.

** N.J.S.A. 10:4-11 provides:

> "No person or public body shall fail to invite a portion of its members to a meeting for the purpose of circumventing the provisions of this act."

August 9, 1976

BOARD OF TRUSTEES
Public Employees' Retirement System
20 West Front Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 20 – 1976

Dear Members of the Board:

You have requested advice on several questions concerning the eligibility of former Governor Robert Meyner for receipt of a pension from the Public Employees' Retirement System. Specifically, you have asked whether Meyner properly received credit for his period of military service, whether he was entitled to purchase two years of municipal service where the annual salary was less than $300 and lastly whether such a purchase during his term of office was constitutional. Meyner has been receiving a retirement allowance of $485.35 per month since July 1968, upon attaining age 60, based on the approval of an application for deferred retirement by the Board of Trustees on January 23, 1962.*

A brief review of the factual background in this matter is necessary for a proper understanding of these issues. Robert Meyner enrolled in the Public Employees' Retirement System effective January 1, 1955, when he filed an enrollment application while serving as Governor of the State of New Jersey. At that time he was given prior service credit in the retirement system for the following periods:

Counsel for Warren County January 1, 1942 - January 15, 1943	1 year, ½ month
Senator in New Jersey Legislature January 1, 1948 - January 1, 1952 Attorney for Phillipsburg Board of Education February 1, 1949-November 11, 1953	5 years, 10½ months
Governor of State of New Jersey January 19, 1954-December 31, 1954	11½ months
TOTAL	7 years, 10½ months

Subsequent to January 1, 1955, Meyner was to continue as Governor of the State until mid-January, 1962, and receive an additional 7 years, ½ month creditable service in the retirement system, giving him a proposed total of 14 years, 11 months service credit upon leaving office.

However, on March 3, 1961 the Governor, through his personal secretary, provided the Division of Pensions with a copy of a resolution, adopted by the Board of Freeholders of Warren County on April 28, 1943, which acknowledged his entrance into military service necessitating a temporary absence and appointing another attorney to act in his place. On the basis of this approved military leave of absence, Meyner was granted additional service credit for the period of that leave (January 15, 1943 to December 23, 1945 plus 90 days), a total of 3 years, 2½ months, pursuant to the Correction of Errors section N.J.S.A. 43:15A-54. In addition, on January 3, 1962, Meyner was permitted to purchase two years of membership credit for his employment as counsel for the Township of Pohatcong, at an annual salary of $175, pursuant to the terms of N.J.S.A. 43:15A-128.

Based on the total service in the retirement system of 20 years 1½ months, Governor Meyner filed an application for deferred retirement. The Board of Trustees of the Public Employees' Retirement System approved this application on January 23, 1962. Meyner became eligible for his first retirement allowance payment on attainment of age 60, in his case July of 1968. He has since been regularly receiving a monthly retirement allowance from the Public Employees' Retirement System.

Initially, it is clear that there has been no constitutional violation committed by the enactment of N.J.S.A. 43:15A-128 (L. 1959, c. 196, as amended by L. 1960, c. 188) and by Meyner's purchase of prior service credit pursuant to its terms. Since N.J.S.A. 43:15A-128 was enacted and amended during Meyner's second term as Governor, the question arises whether by the enactment of legislation to confer a right to purchase pension service credit by a State employee, Meyner's "salary" had been increased during his term of office in derogation of Art. V, § 1, para. 10 of our State Constitution. That paragraph provides:

> "The Governor shall receive for his services a salary, which shall be neither increased nor diminished during the period for which he shall have been elected."

One apparent purpose of this provision is to insulate the Governor from direct pressures that otherwise could be brought to bear if legislation could be enacted affecting his salary during his term.

In this situation the Legislature did not by its enactment of N.J.S.A. 43:15A-128 increase Governor Meyner's "salary" *during his term* within the intendment of the constitutional prohibition. A pension is distinguishable from the term "salary" as used in the constitutional sense.** "Salary" is the regular, periodic payment made by employer to employee during the course of that relationship for services currently rendered. *Koribanics v. Board of Education of Clifton*, 48 N.J. 1, 6 (1966). It would not include "compensation" in other forms, such as a right to purchase pension service credit. *Cf. Salz v. State House Comm'n*, 18 N.J. 106 (1955). Since N.J.S.A. 43:15A-128 did not effectuate an increase in "salary" during Meyner's term of office there exists no constitutional impediment to his purchase of two years pension service credit on account of his employment by the Township of Pohatcong.

You have further inquired concerning the propriety of the purchase of prior service credit, pursuant to N.J.S.A. 43:15A-128, where the annual salary for that service did not meet the $300 minimum then required by N.J.S.A. 43:15A-39. N.J.S.A. 43:15A-128 provided as follows:

> "Notwithstanding any other provision of law, a member of the Public Employees' Retirement System of New Jersey, who is in the State service and who, prior to entering the State service, was the holder of office, position or employment in the service of a county or of a municipality, or both, shall be entitled to purchase prior service credit for the years of such county and municipal service or either thereof; but the said county or municipality shall not be liable for any payment to the system by reason of the said member's purchase of benefits under this act and any and all contributions required hereunder shall be made by the member. Proof of such prior county and municipal service shall be furnished by the affidavit of the member, supported by other evidence if required by the board of trustees of the said re-

> tirement system, and the said board may prescribe rules and regulations to effectuate the purposes of this act. Any such member desiring to acquire such credits for prior service shall be required to contribute either in a lump sum or by installment payments an amount calculated in accordance with the rules and regulations of the board of trustees to cover the required contribution for his acquisition of such prior service credits."

The legislative purpose underlying the enactment of this section was to authorize State employees to purchase credit for service previously rendered to a county or municipality. Normally, the purchase of prior service credit in the retirement system was allowable to members only where the annual salary was at least $500 for nonveterans and $300 for veterans. N.J.S.A. 43:15A-39. However, N.J.S.A. 43:15A-128 granted a new and independent right to State employees to purchase prior service with a county or municipality "*[n]otwithstanding any other provision of law.*" It is reasonable to assume that the Legislature intended thereby to avoid any statutory impediment to the purchase of prior service credit, including *inter alia* the existing $300 minimum salary requirement found in N.J.S.A. 43:15A-39.

This conclusion is further reinforced by L. 1962, c. 236, which further amended N.J.S.A. 43:15A-128 by granting the right to purchase prior service credit for prior county or municipal service to *any* member of the retirement system, not merely State employee members. However, in that case the Legislature expressly allowed a purchase of only "prior service credit for his years of other *eligible employment.*" It clearly delimited the purchase to period of service otherwise meeting the minimum requirements of creditable service.

Parenthetically, this issue was also considered by the then Attorney General Furman on November 29, 1961. He concluded that since N.J.S.A. 43:15A-128 provided that a State employee member would be entitled to purchase service credit for the years of county or municipal service "[n]otwithstanding any other provision of law," the minimum annual salary requirements of N.J.S.A. 43:15A-39 were "superseded." He also noted that unlike other pension provisions the entire liability for the cost of the purchase is the responsibility of the employee. Furthermore, N.J.S.A. 43:15A-128 did not set any minimum requirements or qualify in any way what prior service in a county or municipality may be purchased.

Based on our own review of the circumstances and the statutory framework at that time, it is our opinion that although the issue is not entirely free from doubt, the Board of Trustees arguably acted within the then governing legislation*** by allowing the purchase by Meyner of prior service credit on account of his employment by Pohatcong Township.

The Board has lastly questioned the propriety of granting prior service credit for Meyner's period of military service during World War II while on a leave of absence from his position as counsel for Warren County, to which Meyner had been appointed on January 2, 1942. That credit was originally based on a military leave of absence from January 15, 1943 to December 23, 1945 plus 90 days, a total of 3 years, 2½ months. However, it has been learned that the Warren County employer certification is incorrect in that Meyner was not actively serving as counsel through January 15, 1943, but in fact had commenced his military leave in August 1942. Thus Meyner's period of military service extends from August, 1942 to December 23, 1945 plus 90 days, or a total of 3 years, 8 months. You are advised that there exists no statutory basis for the grant of prior service credit in Meyner's case for that period of his military leave of absence.

A public employee member of a retirement system is entitled to continued service credit when he interrupts his public employment to enter the military service during a period of war or national emergency. The employee's retirement rights, benefits and privileges are preserved during the period of his military leave of absence. N.J.S.A. 38:23-5. However, Warren County was not a participating unit in the Public Employees' Retirement System at the time of Meyner's leave of absence.

N.J.S.A. 38:23-4 also preserves the pension rights, benefits and privileges of any public employee who entered active military service during a period of war or national emergency with no specific requirement that the public employee be a current member of a retirement system at the time the military leave of absence is taken. The intent of N.J.S.A. 38:23-4 is to protect the employment status of permanent public employees who serve in the military during a period of war or emergency. *State Highway Department v. Civil Service Comm'n,* 35 N.J. 320 (1961). However, N.J.S.A. 38:23-4 permits protection of pension rights for the period of a military leave of absence from a position in public employment "*other than for a fixed term or period.*" Meyner was appointed as Warren County counsel for a term of three years – from January 2, 1942 to January 1, 1945. N.J.S.A. 38:23-4 clearly does not afford protection of pension rights, benefits and privileges to public employees holding a position for a fixed term or period. In conclusion, it is our opinion that there was no specific statutory authority to allow prior service credit to Meyner for his military leave of absence. Accordingly, 3 years and 8 months service was improperly credited by the Board of Trustees in 1962 towards the minimum 20 years of creditable service then required for deferred retirement.

It should be recognized that the Board of Trustees may, in the exercise of its discretion, reopen, modify or correct a prior administrative determination in any instance when it may be found to have been erroneous or without a basis in law. However, our Supreme Court has identified certain factors to be considered by a pension board in weighing a vacation of a pension award. In *Ruvoldt v. Nolan,* 63 N.J. 171, 183-84 (1973), the court held that a pension board is required to act within a reasonable time or with reasonable diligence. Furthermore,

> "... what is a reasonable time must perforce depend on the interplay with the time element of a number of other attendant factors, such as the particular occasion for administrative reexamination of the matter, the fraud or illegality in the original action and any contribution thereto or participation therein by the beneficiary of the original action, as well as the extent of any reliance or justified change of position by parties affected by the action."

Thus, the Board of Trustees if it should reopen this matter, must determine whether 3 years, 8 months prior service credit for military leave should be approved or vacated in light of the principles laid down in *Ruvoldt.* The Board approved Meyner's application for a deferred retirement allowance in January 1962, some 14 years ago. Due to the passage of a substantial period of time, the current Board would be obligated in reopening the matter to consider (a) the reason for this administrative reexamination, (b) fraud or illegality, if any, in the request for service credit, (c) any contribution to or participation by Meyner, if any, in the erroneous award of service credit for his period of military leave, as well as (d) the extent that he reasonably relied on the prior determination and may have unalterably changed his position as a

result. It would also be incumbent on the Board to inquire into its administrative practice and procedure then in effect concerning the award of prior service credit for military leaves of absence. We have been advised by the Director of the Division of Pensions that an administrative practice existed whereby free prior service credit was uniformly granted to *any* public employee veteran for the period of an approved military leave of absence irrespective of membership in a retirement system, the nature of the employment position or whether the employee returned to his former position following termination of military service. Moreover, it would be essential to determine whether Meyner's request for service credit was made in the bona fide belief that he was statutorily entitled to that credit and whether he substantially relied upon the grant of that credit in terms of his foreclosure of alternate means to obtain the required 20 years service credit to qualify for a deferred pension. *Skulsky v. Nolan*, 68 N.J. 179 (1975). Based upon a thorough review of all these considerations, the Board could then render its final decision concerning the eligibility of Meyner for continued receipt of his pension and support the same with findings of fact and conclusions of law.

In conclusion, there exists no constitutional impediment to Meyner's purchase of service pursuant to N.J.S.A. 43:15A-128 as there occurred no increase in "salary" prohibited by Art. V, § 1, par. 10 of the New Jersey Constitution. Further, the purchase of two years service credit for employment with the Township of Pohatcong was authorized by and in accordance with N.J.S.A. 43:15A-128, irrespective of the minimum salary requirements contained in N.J.S.A. 43:15A-39. Lastly, although it has been the administrative practice of the Board of Trustees to grant military service credit in these cases, there exists no statutory authority permitting the award of prior service credit for a military leave of absence from an appointive position with an employer not participating in the retirement system. Accordingly, if the Meyner award is to be reopened, for reasons of fairness and consistency, pension awards to all other similarly situated veteran members or retirees should be examined.

Very truly yours,
WILLIAM F. HYLAND
Attorney General

By: THEODORE A. WINARD
Assistant Attorney General

* Such an application is made in advance of retirement where the individual is separated from service, before reaching retirement age, in order to "vest" accumulated service credits. N.J.S.A. 43:15A-38. At the time Meyner applied for deferred retirement, vesting required 20 years of service. In 1966 this requirement was reduced to 15 years. L. 1966, c. 217, § 6.

** In contrast to the specific prohibition of Art. V, § 1, par. 10, a broader prohibition may be found in Art. IV, § 4, par. 7:

> "Members of the Senate and General Assembly shall receive annually, during the term for which they shall have been elected and while they shall hold their office, such compensation as shall, from time to time, be fixed by law and no other allowance, or emolument, directly or indirectly, for any purpose whatever . . . "

See: Attorney General's *Formal Opinion No. 12 - 1974; Chamber of Commerce, et al. v. Leone*, 141 N.J. Super 114 (Ch. Div. 1976).

*** L. 1959, c. 196, as amended (N.J.S.A. 43:15A-128) was repealed by L. 1966, c. 217, § 30, effective August 1, 1966.

July 22, 1976

HON. RICHARD C. LEONE
State Treasurer
Department of the Treasury
State House
Trenton, New Jersey 08625

FORMAL OPINION NO. 21 - 1976

Dear Treasurer Leone:

The Divisions of Purchase and Property and Budget and Accounting in the Department of the Treasury have requested advice concerning the legality of disbursements of State funds commonly known as "U.A. payments". This term is used to signify disbursements from the State Treasury to satisfy obligations directly incurred by the several agencies of State government (the "using agencies"), as distinguished from those made to satisfy obligations incurred on behalf of the State by the Division of Purchase and Property (the "purchase agency"), which are designated as "P.A. payments". The legal question presented, therefore, is the determination of the conditions under which the State agencies may, in the course of their operations, incur direct obligations to be satisfied by U.A. payments without resort to the procedures of the Division of Purchase and Property.

This question necessarily entails, at the outset, a definition of the proper responsibilities of the Division of Purchase and Property as the State's central purchasing agency, as set forth in the Division's governing statutes. The Division was first established within the former Department of Taxation and Finance by the act which created that department (L. 1944, c. 112). N.J.S.A. 52:27B-3. Its powers and organization are set forth in that statute, as subsequently amended, at N.J.S.A. 52:27B-53 through 27B-68. By virtue of N.J.S.A. 52:27B-55, the Division is specifically vested with the powers of the former State Purchasing Department, which are in turn described in N.J.S.A. 52:25-1 *et seq*. The Division was transferred to the Treasury Department by the Department of the Treasury Act of 1948 (L. 1948, c. 92), which also deals with the agency's substantive operations. N.J.S.A. 52:18A-16 through 18A-19. Finally, the Director of the Division is responsible for the administration of the State's general purchase statute, N.J.S.A. 52:34-6 *et seq*.

The jurisdiction of the Division of Purchase and Property must be discerned within this statutory frame of reference. As successor to the State purchasing department, it exercises "the exclusive authority and duty to purchase all articles used or needed by the state and its using agencies."* N.J.S.A. 52:25-6. Under N.J.S.A. 52:27B-56, the Director is charged with the "efficient operation of a centralized State purchasing service." N.J.S.A. 52:34-6 establishes the procedural method and the substantive standards according to which the Director shall conclude "all purchases, contracts or agreements, the cost or contract price whereof is to be paid with or out of State funds."

A close review of these statutes demonstrates that the function of the Division of Purchase and Property is to protect the purchase interest of the State as a consumer of goods and services provided by vendors and necessary for the orderly operation of State government. The term "purchases, contracts or agreements" occurring in N.J.S.A. 52:34-6 must be understood in this sense, as is evident from its context. The purchase statutes and the responsibilities they impose upon the Director apply only

to those transactions in which the State contracts for the delivery of goods and services for its own consumption—to those transactions, in other words, to which the full application of all of the statutory provisions was intended. With respect to those transactions (where the purchase price exceeds $2500), the Division is responsible to design specifications describing the terms and conditions of the purchase contract for public advertisement, to evaluate vendors' responses to the advertisement, and to award and execute a contract in acceptance of that vendor's proposal which is "most advantageous to the State, price and other factors considered." N.J.S.A. 52:34-12. *Commercial Cleaning Corp. v. Sullivan,* 47 N.J. 539 (1966); *Motorola Communications and Electronics v. O'Connor,* 115 N.J. Super. 317 (App. Div. 1971). See also N.J.S.A. 52:18A-19, 52:27B-61. In the limited circumstances described in N.J.S.A. 52:34-8, 9 and 10, the Director is authorized to negotiate certain purchases directly with vendors and to forego competitive advertisement, upon specific approval of the State Treasurer (commonly referred to as a "waiver of advertisement"). However, the waiver of advertisement can in no way divest the Division of the responsibility to determine and approve all the substantive matters regarding selection of vendor and the price, quantity and quality of goods and services to be provided under the negotiated contract; the Division remains responsible for all aspects of the negotiated contract, with the waiver merely providing the authority to proceed without competitive advertisement.

In short, the Division of Purchase and Property is intended by statute to function exclusively as a procurement agency. With respect to those transactions where the State has an identifiable purchase interest as a consumer of goods and services to be obtained from a variety of potential suppliers on terms established pursuant to N.J.S.A. 52:34-6, *et seq.*, the Division must exercise its proper responsibilities.** As to any other transaction involving a disbursement from the State Treasury, the Division simply has no role to perform and should not be involved simply for purposes of fiscal or budgetary control. This is so regardless of whether the particular transactions occur pursuant to contracts or agreements which condition the use of State funds by the recipient. Several transactions of this variety are readily apparent. They would appear to include grant payments to public or private recipients for the accomplishment of a particular purpose or program, subsidy payments for the performance of specific services which the Legislature has chosen to allow an agency of State government to fund, in whole or in part, to advance a public purpose, and payments to third party providers in reimbursement for services to private individuals who are eligible for public assistance to defray the cost thereof. In these circumstances and in all others where the transaction does not involve an identifiable purchase interest of the State itself as a consumer of goods or services, we are convinced that the statutory law provides for no involvement of the Division of Purchase and Property, but instead allows the direct obligation of State funds by the agency whose appropriated funds are to be expended.

A using agency may, therefore, in a variety of circumstances, directly create obligations to be satisfied from the State Treasury without resort to the procedures of the Division of Purchase and Property. This is not to say, however, that fiscal and budgetary control over such transactions is lacking. Although the requirement for an encumbrance request by the Division of Purchase and Property for funds to satisfy a purchase obligation (N.J.S.A. 52:18A-19, 52:27B-61) would be inapplicable to using agency obligations, the Division of Budget and Accounting has independent statutory authority to require directly from the using agency a similar encumbrance request. N.J.S.A. 52:18A-9, 10; N.J.S.A. 52:27B-35. The Director of the Division of Budget

and Accounting is authorized by these statutes to prescribe any notice requirements he deems necessary to prevent the using agencies from incurring obligations in excess of the funds appropriated to them.

In conclusion, the determination, in any particular instance, of whether obligational authority exists in the purchase agency or the using agency depends upon the presence or absence of an "identifiable purchase interest" of the State as a consumer of goods and services which involves the selection of the supplier, and the determination of the price, quantity, and quality of the subject matter of the agreement. The existence of such a purchase interest is, in substantial measure, a question of a factual character which is presented in varying context. Accordingly, it is primarily the responsibility of the Division of Purchase and Property to examine the particulars of any given transaction in coordination with the using agency and the Division of Budget and Accounting, and to determine those areas in which the presence of an identified purchase interest requires the exercise of the totality of purchase responsibilities which its governing statutes vest in that agency.

Very truly yours,

WILLIAM F. HYLAND
Attorney General

PETER D. PIZZUTO
Deputy Attorney General

* The terms "articles" and "using agencies" are defined in N.J.S.A. 52:25-1 as follows:

> " 'Articles' mean and include any and all materials, supplies, furniture, equipment, printing, stationery, live stock and all other chattels, goods, wares and merchandise whatsoever.
>
> 'Using agencies' mean and include all institutions, boards, commissioners and officers of the State receiving legislative appropriations, or grants of money from the United States of America or any agency or department thereof."

** Where such an identifiable purchase interest exists, contracting authority is vested in the Division of Purchase and Property, except in two circumstances: *first,* where the statutes governing the operation of the using agency clearly and unequivocally exhibit the legislative intent that the using agency also function as purchase agency; and *second,* where the Director has, in the stricly limited areas permitted by N.J.S.A. 52:25-23, expressly delegated purchase authority to the using agency.

September 1, 1976

JOANNE E. FINLEY, M.D., M.P.H.
Commissioner
Department of Health
Health and Agriculture Building
John Fitch Plaza
Trenton, New Jersey 08625

FORMAL OPINION NO. 22—1976

Dear Commissioner Finley:

The Department of Health has asked for an opinion as to the validity of provisions of an Administrative Code adopted by the Union County Board of Chosen Freeholders (hereafter the Freeholders) abolishing the Union County Mosquito Extermination Commission and transferring the powers and duties of the Commission to another County agency. For the following reasons, you are advised that the provisions in question are inconsistent with both the Optional County Charter Law, L. 1972, c. 154, N.J.S.A. 40:41A-1 *et seq.*, and the State laws creating State and county mosquito extermination commissions. L. 1948, c. 383, as amended L. 1971, c. 207, N.J.S.A. 26:9-13 *et seq.*

On May 1, 1976, the Freeholders, acting pursuant to the Optional County Charter Law, adopted by ordinance an Administrative Code establishing a new county manager plan of government. See N.J.S.A. 40:41A-45 *et seq.* and 40:41A-125. The Code states that all County boards, committees, commissions, and other County agencies previously established by the Freeholders are abolished unless specifically provided otherwise in the Code. Another provision specifically includes the Union County Mosquito Extermination Commission among the abolished agencies. The Code vests the functions of the former Mosquito Control Commission in a new Division of Mosquito Control and Extermination headed by a Mosquito Control and Extermination Superintendent, who in turn is responsible to the Director of Public Works. Our inquiry into the validity of the Freeholders' action in abolishing the Mosquito Extermination Commission and transferring its functions to another County agency requires a brief examination of the provisions of the Optional County Charter Law under which the Freeholders purported to act as well as the law governing mosquito extermination commissions.

The Optional County Charter Law permits the voters of each county, upon the recommendation of an elected Charter Study Commission, to decide by referendum whether to reorganize the existing county governmental structure by adopting any of four optional plans of government. The statute confers on counties that elect to adopt a new charter broad powers to abolish or reorganize existing county agencies the establishment of which is required by State law, so long as the functions of the abolished or reorganized agencies continue to be performed. Thus, N.J.S.A. 40:41A-26 provides in pertinent part:

> "Nothing in this act shall be construed to prevent counties from abolishing or consolidating agencies the existence of which has heretofore been mandated by State statute providing that such abolition or consolidation shall not alter the obligation of the county to continue providing the services previously provided by such abolished or consolidated agency."

It is therefore necessary to determine at the outset whether a county mosquito commission is a purely *county agency* for purposes of this law.

L. 1948, c. 383, § 1 (N.J.S.A. 26:9-13) provides that the county board of freeholders of each county shall appoint a county mosquito extermination commission. The act originally provided with respect to the composition of county mosquito commissions:

> "Each county mosquito extermination commission shall be composed of six members in addition to the Director of the State Experiment Station and the Commissioner of Health, who shall be ex-officio members *and who shall cooperate with them for the effective carrying out of their plans and work*. . . ." N.J.S.A. 26:9-14 (emphasis added).

In December 1973, the following provision was added:

> "Notwithstanding the provisions of any other law, a county mosquito extermination commission shall be composed of the members appointed pursuant to R.S. 26:9-14 plus one additional member appointed for a term of 3 years." L. 1973, c. 295, § 1, N.J.S.A. 26:9-14.1.

Each county mosquito commission constitutes a "body politic" with power to sue and be sued and to make bylaws. N.J.S.A. 26:9-21. On or before November 1 of each year, each commission is required to file with the Director of the State Agricultural Experiment Station, who as noted above is an ex officio member of all such commissions, a detailed estimate of the funds required for the next year and a plan of work to be done. N.J.S.A. 26:9-22. The estimate must be reviewed and approved by the Director, *ibid.*, and the amount so approved must be appropriated by the board of freeholders subject to the maximum limits specified by N.J.S.A. 26:9-23. *Nolan v. Fitzpatrick*, 9 N.J. 477, 483 (1952). The act provides that nothing therein "shall be construed. . . to alter, amend, modify or repeal any law conferring upon the state department [of health] or local boards of health any powers or duties in connection with the extermination of mosquitoes, but shall be construed to be supplementary thereto." N.J.S.A. 26:9-25.

In addition to the above law creating county mosquito commissions, L. 1956, c. 135, § 1 (N.J.S.A. 26:9-12.3) creates in the Department of Environmental Protection a State Mosquito Control Commission consisting of six members appointed by the Governor with the advice and consent of the Senate, as well as the Director of the State Agricultural Experiment Station sitting ex officio. Among other duties, the Commission is required to "carry on a continuous study of mosquito control and extermination in the State," recommend to the Legislature the amount of appropriations needed for mosquito control purposes, and allocate among the counties, through the State Agricultural Experiment Station, funds appropriated for State aid for mosquito control. N.J.S.A. 26:9-12.6. The act further states that all county mosquito extermination commissions as well as the Agricultural Experiment Station "shall cooperate with the [state mosquito control] commission in the furnishing of information and the performance of any services which may be

requested of them by the commission in the carrying out of the purposes of this act." N.J.S.A. 26:9-12.8.

It is clear from the foregoing statutory provisions that county mosquito extermination commissions are an integral part of a State-county cooperative effort designed to control the mosquito population throughout the State. As previously noted, the Commissioner of Health and the Director of the State Agricultural Experiment Station, in addition to the substantial mosquito extermination powers vested in them by the applicable laws, are designated as ex officio members of every county mosquito commission. It is well-settled in this regard that ex officio members of state or local agencies, absent a clear legislative declaration to the contrary, may participate and vote on an equal basis with appointed members. See, *e.g., Barber Pure Milk Co. v. Alabama State Milk Cont. Bd.*, 156 So. 2nd 351 (Ala. Sup. Ct. 1963). The designation of the Commissioner and Director as ex officio members of county mosquito commissions is plainly intended to implement the reciprocal duty of cooperation between State and county mosquito control officials imposed by N.J.S.A. 26:9-12.8 and 26:9-14.

In *Formal Opinion No. 17—1976*, we concluded that provisions of an administrative code adopted by the Hudson County Board of Chosen Freeholders pursuant to the Optional County Charter Law which purported to transfer most of the functions of the Hudson County Board of Taxation to another County agency were invalid. In so holding, we cited the decision of the State's highest court in *Warren v. Hudson County*, 135 N.J.L. 178 (E. & A. 1947), where the court, in language whose underlying rationale is equally applicable here, said:

> ". . . *the county boards of taxation are an integral part of the state tax system,* and as such their status is necessarily that of state agencies having specific functions in the administration of a system for the assessment and collection of taxes. . . .
>
> ". . . While these boards of taxation exercise a jurisdiction that is confined within definite territorial limits, *their duties concern the state at large in a governmental field of major importance.*" 135 N.J.L. at 180-181 (emphasis added).

Although the structure and functions of county boards of taxation differ in some respects from those of county mosquito extermination commissions, it is clear from the membership and statutory responsibilities of such commissions that "their duties concern the state at large in a governmental field of major importance" and they are thus "an integral part of the state [mosquito extermination] system." *Warren v. Hudson County, supra.* Consequently, such commissions, no less than county boards of taxation, may not be deemed county agencies within the meaning of the Optional County Charter Law's authorization to freeholder boards to alter or abolish the structure of existing "county" agencies.* For these reasons, we conclude that a county mosquito commission is not a county agency within the contemplation of the Optional County Charter Law and that such commissions may not be abolished or reorganized pursuant to the provisions of the act.

Furthermore, the alteration or abolition of county mosquito commissions is prohibited by the plain terms of the law creating such commissions. Section

26 of the Optional County Charter Law states that freeholder boards may alter or abolish such commission "absent a clear legislative declaration to the contrary." Thus, where the law creating a particular county agency explicitly provides that the composition of the agency shall remain intact, the freeholders may not properly include in an administrative code adopted pursuant to the Optional County Charter Law a provision altering or abolishing such an agency. As one court has recently observed, "What constitutes such a legislative declaration so as to withdraw a particular statute from the operation of the Law must be determined on a case by case basis." *Am. Fed. State, Cty., Mun. Em. v. Hudson Welf. Bd.*, 141 N.J. Super. 251, 256 n. 3 (Ch. Div. 1976).

In December 1973, more than a year after enactment of the Optional County Charter Law, the Legislature adopted an amendment to the law creating county mosquito commissions which states that "notwithstanding the provisions of any other law" such commissions "shall be composed" of the members appointed pursuant to N.J.S.A. 26:9-14 plus an additional member appointed for a three-year term. L. 1973, c. 295, N.J.S.A. 26:9-14.1. Since there is nothing in the legislative history of this amendment that points in another direction, it is necessary to read the provision in accordance with its plain terms. It explicitly states that despite the provisions of "any other law", county mosquito commissions "shall be composed" of the specified members.** The reference to "any other law" must be read to include the Optional County Charter Law, and in particular those provisions generally authorizing the reorganization of county agencies following adoption of a new charter. The latter act expressly states that a county freeholder board may not exercise its general authority to abolish an existing county agency where there exists "a clear legislative declaration to the contrary." N.J.S.A. 26:9-14.1, which states that county mosquito extermination commissions "shall be composed" of the specified regular and ex officio members "notwithstanding the provisions of any other law," plainly constitutes such a declaration, thereby exempting county mosquito commissions from the provisions of the Optional County Charter Law respecting reorganization of county agencies.

You are advised, therefore, that a county board of freeholders lacks authority under the Optional County Charter Law as well as under the laws creating State and county mosquito extermination commissions to alter or abolish the structure of county mosquito commissions. Accordingly, the provisions of the Union County Administrative Code that purport to abolish the Union County Mosquito Extermination Commission and to transfer the powers and duties of the Commission to another County agency are invalid.

Very truly yours,
WILLIAM F. HYLAND
Attorney General of New Jersey

By MICHAEL S. BOKAR
Deputy Attorney General

* The Supreme Court in closely analogous contexts has adopted a practical and nondoctrinaire approach in declaring that nominally "county" agencies and officials may be considered "State" agencies and agents for various purposes. See, *e.g., Dunne v. Fireman's Fund Am. Ins. Co.*, 69 N.J. 244, 250-251 (1976) (county detectives are employees of county

for "certain administrative and remunerative purposes" but "agents of the State" for purposes of tort liability in executing search warrant); *Godfrey v. McGann*, 37 N.J. 28 (1962) (probation officers). In the words of the Supreme Court in the *Dunne* case, county mosquito commissions "possess a hybrid status." 69 N.J. at 248.

** Section 14.1 refers to "the members *appointed* pursuant to [§ *14*]" as well as "one additional member *appointed* for a term of 3 years." Although § 14.1 does not explicitly refer to the Commissioner of Health and the Director of the State Agricultural Experiment Station, who are made ex officio members of county mosquito commissions by § 14, there is no reason to suppose that the Legislature did not intend to continue these officials as ex officio members.

September 8, 1976

DR. STANLEY S. BERGEN, JR.
President, College of Medicine
and Dentistry of New Jersey
100 Bergen Street
Newark, New Jersey

FORMAL OPINION NO. 23 – 1976

Dear Mr. Bergen:

You have requested advice regarding the status of the Faculty Practice Service conducted by the College of Medicine and Dentistry of New Jersey at each professional school comprising the College. More specifically, you have inquired whether the Faculty Practice Services are operational units of the College and, therefore, subject to State statutes and regulations generally applicable to the College. In order to address this question, however, it is necessary to determine whether the College of Medicine and Dentistry is authorized to organize and establish a faculty practice program.

At the outset, some attention should be directed to the declared purpose of a faculty practice service. At the inception of the College, the Board of Trustees of the College of Medicine and Dentistry of New Jersey determined that it would be in the best interest of the College and the State of New Jersey for the College to rely principally on full-time faculty, i.e., instructional personnel who devote their total efforts and derive their principal compensation from the College. At the same time, the Board was cognizant of the professional, educational, and financial benefits which could accrue to the College, faculty, and State by virtue of a system which would allow supplemental faculty professional practice. The principal reasons highlighted by the Board in favor of a faculty practice program are the following:

1. The treatment of patients is an integral part of the training of medical and dental students and house staff. The College must take necessary steps to attract patients who will be treated by the faculty and observed by the students.
2. The salaries the College can pay under the State approved salary schedule from State appropriations for academic salaries are not competitive enough

to attract to the medical and dental schools many of the necessary qualified individuals, particularly in a number of the specialities. The College views the income from the patients of faculty as a source of funds which can be used to supplement the academic component of faculty salaries.
3. A faculty practice service will establish College faculties as a patient referral source for the entire State, thus providing an in-State location for specialized tertiary care for many New Jersey citizens. Currently, many such patients go to New York, Philadelphia, or elsewhere for diagnosis and treatment.
4. This type of practice allows the clinical teacher the opportunity to retain and continue to perfect his clinical skills. Such skills make him/her a better teacher and may contribute new techniques or approaches to health care.

For many of the same reasons, most medical and dental schools have either adopted a similar plan or allow their clinical faculty to see private patients and retain the earnings.

Pursuant to the Medical and Dental Education Act of 1970, N.J.S.A. 18A:64G-1 *et seq.*, the Board of Trustees has been granted broad authority to conduct the affairs of the College. N.J.S.A. 18A:64G-6 provides that the Board of Trustees shall have the "general supervision over and be vested with the conduct of the college." The section further provides:

> "It shall have the power and duty to:
>
> ...
>
> (c) Determine policies for the organization, administration, and development of the college;
>
> ...
>
> (h) *In accordance with the provisions of the State budget and appropriations acts of the Legislature,* appoint, upon nomination of the president, such deans and other members of the academic, administrative and teaching staffs as shall be required and fix their compensation and terms of employment; (emphasis added)
>
> ...
>
> (q) Adopt bylaws and make and promulgate such rules, regulations and orders, not inconsistent with the provisions of this chapter as are necessary and to implement the provisions of this act.

And N.J.S.A. 18A:64G-7 provides:

> The board of trustees, in addition to the other powers and duties provided herein, shall have and exercise the powers, rights and privileges that are incident to the proper government, conduct and management of the college, and the control of its properties and fund and such powers granted to the college or the board or reasonably implied, may be exercised without recourse or reference to any department or agency of the State, *except as otherwise provided by this act.* (emphasis added)

A review of the enumerated powers of the Board of Trustees reveals that it is clearly authorized to develop and establish a program calculated to enhance the clinical skills of the faculty, to provide a means to supplement the patient population thereby increasing clinical education opportunities, and to supplement faculty income. However, the program as established must be examined to assure that all features of the program comport with applicable statutes and regulations. Despite the far-reaching authority and discretion bestowed upon the board, that authority is clearly not absolute.

One component of each faculty practice plan is a salary supplementation feature. The salary of a clinical faculty member at the New Jersey Medical School may contain three components: academic base salary according to State compensation plan, patient service component, and Faculty Practice earnings which may be composed of a minimum guaranteed amount[1] and faculty practice earnings in excess of the minimum guarantee. The minimum guaranteed faculty practice income represents a conservative estimate of the amount the individual faculty member can be expected to earn from Faculty Practice activities. These figures must be approved by the Faculty Practice Professional Board and the Dean. If during the year it becomes clear that the faculty member's minimum guarantee was set too high, the amount can be reduced by the Board. Apart from the minimum guaranteed faculty practice earnings, a participant may earn additional money from Faculty Practice activities. In no event, however, may the maximum allowable total salary exceed twice the maximum base academic salary for a given rank. Fringe benefits are paid from two sources. Benefits related to the portion of clinical salary derived from Faculty Practice activities are borne by the Faculty Practice Service; benefits related to the portion of salary derived from academic base salary or the patient service component are paid by the State Treasurer in the case of employees funded by the State and the College's salary account in the case of employees funded by grants.

The compensation feature of the plan, i.e., receipt of earnings from faculty practice earnings, is compatible with the pertinent State statutes. As noted previously, the Board of Trustees may develop compensation policies for faculty as long as the Board action conforms to the budget and appropriations acts. The Appropriations Act of 1975, L. 1975, c. 128, provides in pertinent part:

> "The salary appropriations shall be subject to rules and regulations to be established by the President of the Civil Service Commission, the State Treasurer and the Director of the Division of Budget and Accounting; provided that the salary rate which may be paid to any employee, including cash salary and the value of maintenance received shall not be increased to a salary rate as high as the cash salary rate provided by law for the respective department head, including employees of the College of Medicine and Dentistry of New Jersey...; *except that the rates of pay of medical faculty at the College of Medicine and Dentistry of New Jersey...may be increased above the department head's salary rate with the approval of the President of the Civil Service Commission, the State Treasurer, and the Director of the Division of Budget and Accounting;*...." (emphasis added)

This provision provides the basic authority to adopt a compensation plan which allows individual physicians to earn in excess of the salary of the Chancellor or President of the College. Furthermore, pursuant to statutory directive, the compensation

plans incorporated in the faculty practice programs have been submitted to and approved by the Board of Trustees of the College, the Board of Higher Education, and the Salary Adjustment Committee.

Of more immediate concern, however, is the current operational structure of the program. Despite some organizational differences at the various schools, the faculty practice programs currently follow the general pattern established at the New Jersey Medical School. At the New Jersey Medical School, the Board of Trustees of the College of Medicine and Dentistry of New Jersey, through the College president, is responsible for the supervision of the Faculty Practice Service. Daily conduct of the service is delegated to a Professional Board composed of elected members of the clinical faculty who are Faculty Practice participants. An executive committee of the Professional Board is composed of one representative of each clinical department, the Dean of the Medical School, Chairman of the Executive Committee of Martland Hospital, Chairman and Vice Chairman of the Faculty Organization and the Business Manager of the Faculty Practice Service. The Business Manager is responsible for all billings and collections.[2]

Participation in a faculty practice program is required of all full-time faculty in clinical departments who elect to render patient services in excess of teaching requirements. Part-time faculty are required to join the program, but only that portion of a part-time faculty participant's income derived *directly* from patient care in or referral from Faculty Practice is to be paid into the plan. The degree, manner and number of hours of participation in the plan are matters of negotiation between the individual and his department chairperson. The chairperson must be able to certify to the Dean that the participant's activity will not compromise academic or other College responsibilities. As adequate faculty practice facilities are provided within the confines of the College, utilization of these facilties will be required of all full-time, full-salaried participants. In certain cases, a physician participant may petition the Board of Trustees for permission to conduct faculty practice activities at off premises facilities.[3]

The participating physician, other than physicians granted off-premise waivers, does not bill any patient in connection with services rendered. Rather, all fees are billed and collected by the College through the Business Office. All income derived from patient services at the College, affiliate or other health care facilities are deposited in the plan account for distribution according to the pre-arranged disbursement formula. The formulas require that operational expenses of the plan shall be deducted from total income. From the balance remaining after deduction of overhead, a contribution to the Dean's Fund is made on an annual basis according to the following formula: 5% of the first $150,000, 10% of the next $150,000 and 15% of any excess.[4] From the balance, guaranteed minimum faculty practice service salary compensation and cost of employee benefits are deducted. Any "overage" remaining from the above described disbursements shall be allocated in the following manner: 60% to departmental fund, 10% to a reserve fund and 30% to the Dean's Fund.

As presently organized, the faculty practice organizations of each unit of the College are creatures of the College. The concept was conceived, developed and instituted with the cooperation of and under the authority of the Board of Trustees. N.J.S.A. 18A:64G-6(c); N.J.S.A. 18A:64G-7. The plans are directly supervised by the President and the Board of Trustees; and amendments to an organization's operating document require the approval of the Board. The College, through the Board of Trustees, has reserved the right to dissolve the plans.

Moreover, the faculty practice plans have as their basic guiding principle en-

hancement of College development. In return for providing a program whereby participating physicians may garner the benefits of broadened professional experience and supplementary compensation, the College receives direct benefits through financial contributions to research and administrative funds, assistance in development of a solid core of full-time faculty, and augmentation of the patient pool. To facilitate these aims, the College makes available to the organizations College space, facilities and personnel. The College, through department chairpersons and deans, monitors the amount of participation in the plan by clinical faculty. The location of practice is in facilities under the direct maintenance, supervision and control of the College or in facilities which are duly designated affiliated institutions of the College. Indeed, professional activities undertaken by participating faculty physicians are considered within the scope of employment for purposes of ordinary liability and malpractice coverage. In short, as presently organized, the faculty practice organizations at each unit of the College enjoy a symbiotic relationship with the parent institution. The individual plans have no life apart from the College; indeed, as presently organized, the plans are designed solely to complement the policies and development of the College. *See New Jersey Turnpike Authority v. Parsons,* 3 N.J. 235, 243-244 (1949).

The practical consequences which flow from this determination are several. As a general proposition, the faculty practice programs are subject to all appropriate College regulations and are subject to all applicable State statutes and regulations in the same manner and degree as the College. In those instances where present practices or procedures deviate from applicable College or State regulations, the plans shall be amended to conform to the appropriate authorities. For example, administrative, professional and clerical personnel working directly for the faculty practice plans are employees of the College rather than the individual plan. This includes professional and clerical personnel employed by full-time faculty who maintain an office in facilities other than College facilities pursuant to an off-premises waiver. Each person working for the faculty practice plan is entitled to all benefits normally accorded College employees including vacation and sick time allowances, leave of absence policies and pension benefits. See N.J.S.A. 18A:64G-12. Salaries, employment duties, and employment qualifications shall conform to the rates and standards promulgated by the College. N.J.S.A. 18A:64G-6(i). All faculty practice program employees shall be members of the appropriate bargaining units.

Furthermore, the faculty practice programs should maintain financial records in the same manner as the College. All accounts shall be subject to audit by the State at any time. N.J.S.A. 18A:64G-6(f). Investment of funds earned by faculty practice programs shall be performed by the Director of the Division of Investment of the Department of the Treasury. The Board of Trustees of the College, however, shall have the right to accept or reject any proposed investment. In addition, the Board of Trustees shall determine the amount available for investment. N.J.S.A. 18A:64G-8. The State Treasurer shall be the custodian of the investment funds and shall select all depositories and custodians of such funds. N.J.S.A. 18A:64G-10. Non-investment funds of the plans shall be deposited in accounts in depositories designated by the Board of Trustees. N.J.S.A. 18A:64G-8; N.J.S.A. 52:18A-8.

Moreover, all purchases, contracts, and agreements, including lease of facilities required by the plans, should be concluded pursuant to State purchase procedures stipulated in N.J.S.A. 52:34-6 to 52:34-20. N.J.S.A. 18A:64G-13. Disposal of any materials or equipment procured by the faculty practice programs shall be in the manner and upon the terms and conditions established by the State House Commission. N.J.S.A. 18A:64G-6(o).

In summation, you are advised that the Board of Trustees of the College of Medicine and Dentistry of New Jersey is vested with the authority to establish a faculty practice plan for each professional school of the College. You are further advised that as presently organized the faculty practice plans at each educational unit of the College are creatures of and under the direct supervision and control of the governing body of the College. As a consequence of this relationship, each faculty practice program is subject to all appropriate rules and regulations promulgated by the College and all State statutes and regulations generally applicable to the College, including but not limited to, the requirements enumerated in the preceding paragraphs.

Very truly yours,
WILLIAM F. HYLAND
Attorney General
By: MARY CATHERINE CUFF
Deputy Attorney General

1. The New Jersey Dental School plan does not provide for a minimum guaranteed salary supplement.
2. The New Jersey Dental School utilizes the Office of Business Affairs for billing, collection and distribution services. Rutgers Medical School is serviced by a part-time business manager in the office of the Director of Business Affairs of the Rutgers Medical School.
3. Presently, all faculty practice activities at the New Jersey Dental School must occur within the confines of the dental school or an affiliated institution. There is no provision for an off-premises waiver.
4. At the New Jersey Dental School, 30% of plan income is deducted for overhead; 10% for an emergency reserve fund; 15% for distribution to the Dean's Discretionary Fund, Departmental Discretionary Fund and Research Fund; 45% for faculty salary supplementation.

September 17, 1976

RAYMOND J. COLANDUONI
Director of Administration
Department of Transportation
1035 Parkway Avenue
Trenton, New Jersey 08625

FORMAL OPINION NO. 24—1976

Dear Director Colanduoni:

You have asked for an opinion as to whether Department of Transportation Form PR-102 entitled "Certification by Employee Regarding Outside Employment" is a public record subejct to disclosure under the Right to Know Law. It appears that certain information with regard to the outside employment of employees in the

Department has been furnished to the news media. As a result, a member of the news media has asked for the opportunity to review the Form PR-102 in the custody of your office. For the following reasons, you are advised that the Form in question is a public record under the Right to Know Law and should be made available for inspection.

The requirement that Form PR-102 be completed is a condition of employment for each Department employee and is an integral part of the *Code of Ethics of the New Jersey Department of Transportation* promulgated on Febrauary 10, 1972 pursuant to the New Jersey Conflicts of Interest Law. *N.J.S.A.* 52:13D-23. See also *New Jersey Department of Transportation Policy and Procedures,* No. 2.109-B (March 20, 1974); *New Jersey Department of Transportation Policy and Procedures,* No. 2.1091 (June 14, 1976). The Form requires the employee to state whether or not he has outside employment, and if he does, to provide the name and address of the outside employer, the hours of outside employment and a general description of the nature of and duties involved in the outside employment. The Form also requires the employee to state whether or not he is licensed by a professional board, and if so, to name the issuing agency.

The policy behind the Right to Know Law, *N.J.S.A.* 47:1A-1 *et seq.*, and the common law right to know, is to guard against secrecy in government and to make public officers accountable to the citizens of the State. This policy was cogently stated by the Supreme Court of New Jersey in the recent case of *Irval Realty Co., Inc. v. Board of Public Utility Commissioners,* 61 N.J. 366 (1972). It is only where the need for confidentiality outweighs the compelling policy of public disclosure, that a governmental record may be withheld from public inspection.

The Right to Know Law permits the Governor to list various records which are to be excluded from the public's right to know, when in the opinion of the Governor disclosure will result in a greater harm to governmental operations and individuals than confidentiality. *N.J.S.A.* 47:1A-2. Accordingly, on October 1, 1963, Governor Hughes promulgated Executive Order No. 9, Section 3(b), which served to exclude personnel records from public inspection. More recently, Governor Byrne, through Executive Order No. 11 promulgated on November 15, 1974, reaffirmed the general exclusion for personnel records, while ordering that certain information in employees' pension records, which had been excluded under Executive Order No. 9, be deemed a public record.

Personnel records, within the meaning of Executive Orders No. 9 (1963) and 11 (1974z, include such items as employees' performance ratings, family history, medical and psychological information. Because of the invasion of privacy of government employees and the potential for abuse that the public disclosure of such information would engender, this type of personnel data should be kept confidential. On the other hand, Form PR-102 is not a personnel record in the sense contemplated by the Executive Order; rather it serves as a managerial device to assure that employees having outside employment are not in a conflict of interest position. Thus, the Form is a response by the Department of Transportation to the need to require its employees to meet the ethical standards of the Conflicts of Interest Law, *N.J.S.A.* 52:13D-12 *et seq.*, and is directly related to the Code of Ethics promulgated by the Department pursuant to *N.J.S.A.* 52:13D-23.

In our analysis of whether or not Form PR-102 is a public record, which should be disclosed in accordance with the Right to Know Law, we have paid particular attention to recognition by the Legislature that the requirement for State officials and employees to avoid conflicts of interest is particularly a *public* concern. *N.J.S.A.* 52:13D-12 provides:

> The Legislature finds and declares:
>
> (a) In our representative form of government, it is essential that the conduct of public officials and employees shall hold the respect and confidence of the people. Public officials must, therefore, avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated.
>
> (b) To ensure propriety and preserve public confidence, persons serving in government should have the benefit of specific standards to guide their conduct and of some disciplinary mechanism to ensure the uniform maintenance of those standards amongst them. Some standards of this type may be enacted as general statutory prohibitions or requirements; others, because of complexity and variety of circumstances, are best left to the governance of codes of ethics formulated to meet specific needs and conditions of the several agencies of government.

The right of the public to know whether an employee is sacrificing his capacity to work or objectivity in the performance of his public responsibilities because of the conflicting nature of his outside employment is of paramount importance and outweighs any incidential invasion of privacy. Thus, it would be entirely consistent with the legislative policy underlying the Conflict of Interest Law, as well as the Right to Know Law, to publicly disclose this information bearing on the ethical conduct of state employees.

For the foregoing reasons, Form PR-102 is a public document under the Right to Know Law, and this document should be made available to the member of the news media for his inspection.

Very truly yours,
WILLIAM F. HYLAND
Attorney General of New Jersey
By: RICHARD L. RUDIN
Deputy Attorney General

September 29, 1976

FRANK A. MASON, DIRECTOR
Office of Employee Relations
134 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 25 – 1976

Dear Director Mason:

You have requested our advice as to whether a managerial executive, a confidential employee or a supervisory employee, as defined by the New Jersey Employer-Employee Relations Act, has a right to join or actively participate in public

employee labor organizations. You are advised that managerial and confidential employees have no guaranteed statutory right to join in or participate in employee labor organiztions. You are also advised that, although supervisory employees may join either a supervisory or nonsupervisory employee labor organization, they may not be represented in collective negotiations by any labor organization which admits nonsupervisory employees to membership. Moreover, supervisory employees may not participate in public employee labor organization activities in a manner as to create a conflict of interest between their supervisory responsibilities for State government and their activities in furtherance of the labor relations of nonsupervisory employees.

The New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 *et seq.* is a legislative implementation of article I, paragraph 19 of the New Jersey Constitution. *See Lullo v. Intern. Assoc. of Fire Fighters,* 55 N.J. 409 (1970). N.J.S.A. 34:13A-5.3 provides that:

> "Except as hereinafter provided, public employees shall have, and shall be protected in the exercise of the right, freely and without fear of penalty or reprisal, to form, join and assist *any* employee organization or to refrain from any such activity; *provided however, that this right shall not extend to elected officials, members or boards and commissions, managerial executives, or confidential employees* . . . ." (Emphasis added)

Managerial executives are defined in the Act as follows:

> " 'Managerial executives' of a public employer means persons who formulate management policies and practices, and persons who are charged with the responsibility of directing the effectuation of such management policies and practices, except that in any school district this term shall include only the superintendent or other chief administrator, and the assistant superintendent of the district.: N.J.S.A. 34:13A-3(f).

Confidential employees are defined in the subsequent subsection as follows:

> " 'Confidential employees' of a public employer means employees whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process would make their membership in any appropriate negotiating unit incompatible with their official duties.' " N.J.S.A. 34:13A-3(g).

It is clear, therefore, that the Legislature has not provided a managerial or confidential employee with a statutory right to join or assist an employee organization.

This type of legislation is not unique to New Jersey. The New York State Legislature has enacted a similar provision:

> "No managerial or confidential employee, as determined pursuant to subdivision seven of section two hundred one of this article, shall hold office in or be a member of any employee organization which is or

> seeks to become pursuant to this article the certified or recognized representative of the public employees employed by the public employer of such managerial or confidential employee." Civil Service Law §214.

This provision has been reviewed by the Court of Appeals of New York, in *Shelofsky v. Helsby,* 295 N.E. 2d 774 (1973), *appeal dismissed,* 414 U.S. 804, 94 S.Ct. 60, 38 L.Ed.2d 41 (1973). The court upheld the provision as a legitimate exercise of the State's power to insure for itself "a responsible cadre of management personnel to formulate policy and to handle labor relations. . . ." 295 N.E.2d at 775. In conclusion, the court held that:

> "In sum, there has been no showing that exclusion of management personnel from association membership is an unreasonable limitation on State employees. Withholding the benefits of collective bargaining from management personnel has long been approved in private employment. Its carry-over into public employment is a reasonable means of promoting harmonious labor relations." 295 N.E.2d at 776-777.

See also *Elk Grove Firefighters Local No. 2340 v. Willis,* 400 F.Supp. 1097, 1099 (N.D. Ill., E.D. 1975); *City of Greenfield v. Local 1127,* 150 N.W.2d 476 (Wis. 1967); *Goodwin v. Oklahoma City,* 182 P2d 762 (Okl. 1947); *Perez v. Board of Police, Commissioner of City of Los Angeles,* 178 P2d 537 (D.Ct. of Appeals, Cal. 1947). These decisions are illustrative of a widespread policy to deny managerial and confidential employees in the public sector the right to join employee labor organizations. Section 5.3 of the Act reflects a similar legislative policy in our State to the effect that a right to membership by managerial and confidential employees in labor orgainizations interferes with the State's interest in maintaining a loyal and efficient managerial staff.

As contrasted with the managerial and confidential employee, a supervisor, defined by the Act as one having the power to hire, fire, discipline or effectively recommend the same, may join any employee labor organization with the proviso that such supervisory employee not be "represented in collective negotiations by an employee organization that admits non-supervisory personnel to membership . . ." N.J. S.A. 34:13A-5.3. Thus, a review of this provision of the Act provides no prohibition to the membership of supervisory employees in non-supervisory employee organizations; it merely prohibits a hybrid organizion from representing the supervisors in collective negotiations. As the court in *Bowman v. Hackensack Hospital,* 116 N.J. Super. 260, 273 (Ch. Div. 1971) stated:

> "It would appear that our policy, as set forth by the New Jersey Legislature, is not to disqualify an organization from functioning as the collective bargaining representative of non-supervisory employees *because of the fact that there might be supervisors included within its membership.* Rather, it would appear that the only prohibition under the New Jersey act is that supervisors not be included within the same unit as nonsupervisors." (Emphasis added.)

Cf., Pennsylvania Labor Relations Board v. Eastern Lancaster County School District, 315 A.2d 382 (Commonwealth Ct. of Pa. 1974).

Thus, although the Act does not expressly preclude the right of supervisory employees to join either supervisory or nonsupervisory labor organizations, it is necessary in the construction of the Act to avoid "conflicts of interest" and to preserve the loyalty which supervisors owe to the State in the performance of their official responsibilities. This proposition has been recognized by our Supreme Court in *Bd. of Ed. of West Orange v. Wilton,* 57 N.J. 404 (1971). In that case the court was concerned with the question of the propriety of a certain supervisory employee's inclusion in a unit of other employees whom the employee in question supervised. In the course of holding that such inclusion was inappropriate the court stated that:

> "One underlying concept which emerges from a study of statutes, texts and judicial decisions in employer-employee relations, whether in the public or private employment sector, is that representatives of the employer and the employees cannot sit on both sides of the negotiating table. Good faith negotiating requires that there be two parties confronting each other on opposite sides of the table. Obviously both employer and employee organizations need the undivided loyalty of their representatives and their members, if fair and equitable settlement of problems is to be accomplished. Unless the participation is of that calibre, the effectiveness of both protagonists at the discussion table would be sharply limited." 57 N.J. at 425.

The court noted that significant potential for conflict arises in performing such common supervisory functions as performance evaluation, discipline, and grievance administration. 57 N.J. at 423. With respect to the appellant in this regard the court stated:

> "In the performance of such tasks she owed undivided loyalty to the Board of Education. If she were joined in an employees' unit which included the principals whose work she was duty bound to appraise in the Board's interest, would she be under pressure, real or psychological, to be less faithful to the Board and more responsive to the wishes of her associates in the negotiating unit? She is obliged, of course, to be fair and nondiscriminatory in evaluating the principals, and if the Association felt that she was consciously or unconsciously in error in doing so, presentation of a grievance would undoubtedly result. In that event she would have to defend against a complaint made by an organization of which she was a member." 57 N.J. at 426.

Moreover, although the *Wilton* case dealt with unit membership, the determination of the question of organization membership may surely receive guidance from the above language and from the following *dicta* by the court:

> "The fact that potential conflict of interest in a given case may bar supervisiors from representation by an organization of nonsupervisory employees does not mean that the former have no organizational rights.

> Under our statute, supervisors are employees and ordinarily have the right to join and be represented by an organization of their own, ie.e., an organization of supervisory personnel. But here again, if there are grades or echelons of supervisors having differing relations to each other because of the quantum of managerial or supervisory authority or duty delegated by the employer, the general exclusory language of N.J.S.A. 34:13A-5.3, quoted above, would seem to throw some light on the legislative intention with respect to the organizational rights of such supervisors." 57 N.J. at 419.

Accordingly, you are hereby advised that supervisors may be prohibited from activity in public employee labor organizations when such activity conflicts with their duties and responsibilities in their supervisory role and that such activity may include serving as an officer or negotiations representative for a nonsupervisory employee organization.

You have also asked whether managerial, confidential or supervisory employees may be granted time off with pay for attendance at conventions of public employee labor organizations.

The Legislature has provided specific authorization for time off with pay for attendance at the conventions of certain organizations. In particular N.J.S.A. 11: 26C-4 provides that:

> "The head of every public department and of every court of this State, the heads of the county offices of the several counties and the head of every department, bureau and office in the government of the various municipalities, shall give a leave of absence with pay to every person in the service of the State, County or municipality who is a duly authorized representative of the New Jersey State Patrolmen's Benevolent Association, Inc., Fraternal Order of Police, Firemen's Mutual Benevolent Association, Inc., the Uniformed Firemen's Association, or the New Jersey State Association of Chiefs of Police, to attend any State or national convention of such organization.
>
> "A certificate of attendance to the State convention shall, upon request, be submitted by the representative so attending.
>
> "Leave of absence shall be for a period inclusive of the duration of the convention with a resonable time allowed for time to travel to and from the convention."

In addition, N.J.S.A. 38:23-2 speaks in very similar terms and grants such leave for attendance to the conventions of a great number of organizations including the New Jersey Civil Service Association and the Council of State Employees (now the State Employees' Association).

It is clear, however, that those persons entitled to leaves of absence with pay for attendance at conventions of labor organizations, either authorized by the above statutory provisions or by collective negotiations agreements, are limited by the applicable provisions of the Employer-Employee Relations Act, N.J.S.A. 34:13A-5.3. It is a well settled rule of statutory construction that the Legislature is charged with knowledge of its prior enactments. *Brewer v. Porch*, 53 N.J. 167 (1969). In

addition, where there is a conflict, the more recent statute will govern. *State v. Roberts*, 21 N.J. 552, 555 (1956). Thus, the dictates of the Employer-Employee Relations Act which does not grant a statutory right to managerial and confidential employees to participate in public employee labor organizations must be read to impliedly limit that class of persons who may qualify as "duly authorized representatives" under both N.J.S.A. 11:26C-4 and N.J.S.A. 38:23-2. Accordingly, you are hereby advised that since managerial and confidential employees do not have a statutory right to join or assist a public employee labor relations organization, they are not entitled to a leave of absence for attendance at conventions of those public employee labor organizations. A supervisory employee may receive a leave of absence with pay to attend conventions of either suprevisory or nonsupervisory employee labor organizations when the activity of such supervisory employees does not conflict in any manner with their undivided loyalty, responsibilities and obligations to the State government.

You have additionally requested advice on whether non-supervisory employees in one unit may be granted time off, with which represent other units.* To reiterate, N.J.S.A. 34:13A-5.3 provides in pertinent part that:

> ". . .public employees shall have, and shall be protected in the exercise of the right *to form, join and assist any employee organization*." (Emphasis added)

Accordingly, in this case there is no statutory impediment to the non-supervisory participation in this organizational activity.**

For the above reasons, you are hereby advised that (1) Managerial and confidential employees do not have a right under the Act to join or assist an employee organization; (2) Sypervisory employees having the power to hire, fire, discipline or effectively recommend the same, may join either supervisory or non-supervisory labor organizations in their discretion. However, a non-supervisory labor organization may not represent the interests of supervisors in collective negotiations and supervisors may not participate in the activities of non-supervisory labor organizations in any manner as to create a conflict of interest with the exercise of their supervisory responsibilities to the State government; (3) Managerial and confidential employees having no right to join a public employee labor relations organization are not entitled by law to time off for attendance at public employee labor organization conventions or meetings; (4) Supervisory employees having a right to join either a supervisory or non-supervisory employee labor organization are entitled to time off with pay for attendance at employee labor relations conventions or meetings, so long as the activities of supervisory employees do not conflict with their responsibilities to the State government.

Very truly yours,
WILLIAM F. HYLAND
Attorney General of New Jersey
By: GUY S. MICHAEL
Deputy Attorney General

* Since a public employee labor organization including non-supervisors may not represent supervisors, the instant question involves only units of non-supervisors.

**However, it should be made clear that employee organizations may not negotiate time off with pay provisions for convention attendance or for other functions for employees in negotiating units represented by other employee organizations. A certified employee representative is authorized to serve as the exclusive representative for collective negotiations solely for those employees in the unit of whom it represents. N.J.S.A. 34:13A-5.3; see also *Lullo v. Intern. Assoc. of Fire Fighters, supra.* This is an established proposition in labor relations and needs no further elaboration.

October 1, 1976

SIDNEY GLASER, *Director*
Division of Taxation
Taxation Building
Trenton, N.J.

FORMAL OPINION NO. 26 – 1976

Dear Director Glaser:

You have asked whether a general exemption of public pensions from any State tax set forth in various pension laws is applicable to the tax imposed under the New Jersey Gross Income Tax Act. For the following reasons, you are advised that a general exemption of public pensions, paid by this State, from any State tax is applicable to the New Jersey gross income tax.

All of the State administered retirement systems contain a specific statutory exemption from State or municipal taxation of the pensions and other benefits or rights accruing to pensioners in those systems.* In its enactment of the Income Tax Act the Legislature generally included "[P]ensions and annuities to the extent that the proceeds exceed the contributions made by the taxpayer" within the category of taxable gross income, N.J.S.A. 54A:5-1(j). Accordingly, the question arises whether the Legislature intended in any way to alter or eliminate the preexisting exemptions enjoyed by public pensioners for purposes of the application of the Income Tax Act.

The Act does not contain an express repeal of the exemption from any state tax set forth in the retirement system statutes. Moreover, there is no indication of an implicit legislative purpose to eliminate these exemptions for purposes of the income tax. It is important to note that as an aid in discerning the legislative intention, a repeal by implication is not favored. *N.J. State P.B.A. v. Morristown*, 65 N.J. 160, 164 (1976). A legislative intent to repeal the existing exemption of these pensions from all state taxation should appear in unequivocal terms. *Cf. N.J. State P.B.A. v. Morristown, supra,* at 164. Accordingly, in this case it was the clear legislative purpose to allow the general exemption of these public pensions from all state taxation to apply as well to the New Jersey gross income tax.

This legislative design is reinforced by the enactment of specific exemptions for certain additional similar public pensions paid by the federal or state governments and their political subdivisions. For instance, all payments received under the federal Social Security Act or Railroad Retirement Act are excludable income. N.J.S.A. 54A:6-2, 3. Similarly, income received from federal or any state pension, disability

or retirement program for persons not covered by Social Security or the Railroad Retirement Act is excludable to a specified maximum. N.J.S.A. 54A:6-12. The Legislature therefore provided for the exemption of certain additional public pensions from the purview of the Act and did not inferentially repeal the absolute exemption already set forth in the various state retirement system laws.

Moreover, the Legislature on its enactment of the Income Tax Law was familiar and conversant with its prior enactments, and in particular the well-known exemption of State public pensions from taxation. *Cf. New Ark Coop. Inc. v. Stalks,* 141 N.J. Super. 37 (Law Div. 1976). Its failure to include an express exlusion for State public pensions in the Income Tax Act was a result of its recognition of the already exempt status of these pension payments. You are therefore advised that the general exemption from all State taxes set forth in the various State pension laws is applicable to the New Jersey Gross Income Tax Act, and pension payments received from these sources are excludable from taxable gross income under the Act.

Very truly yours,
WILLIAM F. HYLAND
Attorney General of New Jersey

By: BARRY D. SZAFERMAN
Deputy Attorney General

* See for example the Public Employee Retirement System at N.J.S.A. 43:15A-53 which provides in pertinent part:

> "The right of a person to a pension, an annuity, or a retirement allowance, to the return of contributions, any benefit or right accrued or accuing to a person under the provisions of this act and the moneys in the various funds created under this act, *shall be exempt from any State* or municipal *tax* and from levy and sale, garnishment, attachment or any other process arising out of any State or Federal court and, except as in this section and in this act otherwise provided, shall be unassignable." (Emphasis added)

Similar provisions are set forth in the Teachers' Pension and Annuity Fund, N.J.S.A. 18A:66-51; State Police Retirement System, N.J.S.A. 53:5A-45; Police and Firemen's Retirement System, N.J.S.A. 43:16A-17; Judicial Retirement System, N.J.S.A. 43:6A-41.

October 25, 1976

WILLIAM JOSEPH
Director, Division of Pensions
20 West Front Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 27–1976

Dear Director Joseph:

You have asked for an opinion as to the compensation creditable toward the pension to be paid to William A. Fasolo, Esq., a multiple veteran enrollee in the Public Employees' Retirement System (hereafter PERS) who has served separate local government employers as a part-time municipal magistrate and a part-time borough attorney.

Your request presents two major questions. The first is whether $60,000 in compensation paid under a contract with the Borough of Demarest for legal services rendered in connection with the construction of a sanitary sewage system is includable in pension benefit calculations. The fees were paid in installments during the last four years preceding retirement in the amount of $5,000 in 1971, $12,000 in 1972, $18,000 in 1973 and $25,000 in 1974. The second question is more general and has significant application to local government part-time professional positions such as municipal attorney and engineer. It is whether public services compensated for by a basic minimum retainer (salary) and additional compensation paid on a fee basis for each item of extra work performed and fluctuating in amount from year to year with the professional service needs of the municipality are covered by the Act.[1]

You are advised for the following reasons that the compensation of a part-time municipal attorney and other similar part-time professional positions is covered by the Act to the extent of a regular fixed salary (retainer) covering services directly attributable to the functioning of the public office (as hereinafter more particularly defined). Compensation does not include for purposes of the calculation of the pension benefits provided by the Act those payments for professional services normally billed on a fee basis for each item of work performed in addition to the accepted statutory responsibilities of the government office.

It has been judicially established that not all salary receipts or other forms of compensation for public services are creditable for pension purposes. *Bd. of Trustees of Teachers' Pension, etc. v. La Tronica,* 81 N.J. Super. 461 (App. Div. 1963), *Matthews v. Bd. of Ed. of Irvington,* 31 N.J. Super. 292 (App. Div. 1954). The compensation covered by the Act for the explicit purpose of funding benefits by employee and employer contributions and for calculation of retirement and death benefits is defined by N.J.S.A. 43:15A-6(r). This definition also implicitly confines membership coverage to an employment, office, or position remunerated by the compensation basis statutorily accepted for benefit funding and payments. 43:15A-6(r) provides as follows:

> " 'Compensation' means the base or contractual *salary, for services as an employee,* which is in accordance with established salary policies of the member's employer for all employees in the same position but shall not include individual salary adjustments which are granted primarily in anticipation of the member's retirement or additional remuneration for perform-

ing temporary or extracurricular duties beyond the regular work day or the regular work year. In cases where salary includes maintenance, the retirement system shall fix the value of that part of the salary not paid in money which shall be considered under this act." (Emphasis supplied).

The statutory term "salary" as used in the above definition is not defined by the Act. Our Supreme Court however, has defined the statutory term "salary" in the general context of public employment in *Koribanics v. Board of Ed. of Clifton*, 48 N.J. 1, 6 (1966):

> "The term 'salary' used in a legislative enactment has been recognized judicially to apply to monies received by a person on a fixed and continuous basis, i.e., normally paid in regular periodic intervals in specific regular amounts. This is the commonly understood meaning of the term. *See White v. Koehler*, 70 N.J.L. 526 (Sup. Ct. 1904); *38 Words and Phrases* (perm. ed. 1940), pp. 37-55. Thus, in *Matthews v. Board of Ed. of Town of Irvington*, 29 N.J. Super. 232 (Law Div. 1953) affirmed 31 N.J. Super. 292 (App. Div. 1954), the term 'salary' in Pension Act N.J.S.A. 43: 4-1 *et seq.* was held not to include extra fees for coaching school teams. *See Flamm v. City of Passaic*, 14 N.J. Misc. 362, 138 A. 748 (C.P. 1936) (Workmen's Compensation Act)."

There is no indication in the Act that "salary" is used in other than this commonly understood manner. Accordingly, creditable compensation for purposes of the pension benefits provided by the Act is confined to the "base or contractual salary" which is in accordance with established salary policies of the member's employer and paid to its employees in regular periodic intervals in specific regular amounts. These installments are usually bi-weekly or monthly but not infrequently are paid quarterly or annually as for example the fixed $10,000 annual salary of legislative members.

Moreover, this limitation on creditable compensation is supported by the specific holding of the court in *Koribanics*. A suit was brought by an attorney for a board of education to obtain reinstatement and back pay as an occupant of a government office under the Veterans Tenure Act. It was urged that the plaintiff had received a salary in a government office, position, or employment within the meaning of that Act. The court denied the plaintiff's claim to veterans tenure and stated as follows:

> "Thus plaintiff, here, cannot be said to have 'received a salary' for an office, position or employment. The record clearly indicates that although the resolutions passed by the Board to provide for remuneration speak in terms of annual salary, plaintiff's services were of a type and quantity that are provided by an independent agent when work becomes available. He received nearly ⅓ of his total emolument on a fee basis, calculated, we assume, on the basis of the reasonable value of the work performed. *Because plaintiff's position as Board Counsel is partially based upon fees, he is not entitled to tenure under N.J.S.A. 38:16-1 as a person holding a 'position, office or employment *** receiving a salary'.*" (Emphasis supplied)

The court concluded that since tenure did not apply to the portion of the professional services compensated for on a fee basis, the total compensation paid could not be characterized as a regular salary of an "employee" for purposes of the Veterans Tenure Act.

On the other hand, the Supreme Court specifically compared the fee basis method of remuneration of a government attorney in that case with the compensation for legal work performed by a regular salaried attorney to a board of education, in *Fox v. Board of Education*, 129 N.J.L. 349 (Sup. Ct.), *aff'd o.b.* 130 N.J.L. 531 (E. & A. 1943).[2] In *Fox*, the plaintiff was appointed in July of 1940 as a legal assistant to the Board of Education of the City of Newark at a fixed salary of $7,000 per annum. In July of 1942 a successor Board of Education removed Fox from his position of legal assistant and replaced him with another person. It was argued that the removal was illegal, since Fox had acquired tenure in his position under the Veterans Tenure Act. The court concluded that plaintiff would be regarded as an "employee" compensated for by a regular salary under the Board of Education enabling legislation R.S. 18:6-27, 11:22-26B and would consequently be entitled to protection within the meaning of the Veterans Tenure Act.

The *Koribanics* and *Fox* holdings are clearly applicable to the coverage provided by the Act, since public employees tenure and pension statutes are to be construed *in pari materia, Schultz v. State Board of Education*, 132 N.J.L. 345, 351-352 (E. & A. 1944). Moreover, the two statutes have complimentary purposes. The tenure statute provides security to salary and position during active employment years while the pension act provides economic security during retirement years by continuing a portion of the salary earned during active employment. Both have similar language. The Veterans Tenure Act covers a person holding a "position, office or employment. . .receiving a salary." The Act covers a person who is a public employee, an elected or appointed official who receives a "base or contractual salary for services as an employee in accordance with established salary policies of the members employer. N.J.S.A. 43:15A-6(r). The intended identity of coverage is further underscored by the specific PERS membership exclusion providing in pertinent part:

> "No person in *employment, office or position for which the annual salary or remuneration is fixed* at less than $500.00, shall be eligible to become a member of the retirement system." (Emphasis supplied.) N.J.S.A. 43:15A-7(d).

and by N.J.S.A. 43:15A-39 providing in pertinent part:

> "In computing the service or in computing final compensation no time during which a member was in *employment, office, or position, for which the annual salary or remuneration was fixed* at less than $500.00 shall be credited. . . ." (Emphasis supplied.)

Accordingly, the decision of our Supreme Court in *Koribanics*, the decision of the former Supreme Court and the Court of Errors and Appeals in *Fox*, and the comparable terms of the statutory language governing eligible credit in the Act require that part-time professional services performed for a local governing body compensated for by fluctuating fees for each item of available work are not eligible for

pension credit. Those services are generally performed by an independent contractor on a case-by-case basis rather than as part of the basic responsibilities of a regularly salaried employee of a governmental entity. On the other hand those established professional services performed in a statutory office or position and compensated for by a fixed annual retainer (salary) paid at regular, periodic intervals in specific, regular amounts should be regarded as the services of an "employee" for pension credit purposes. It must be emphasized that what is involved is either the amount of compensation paid without regard to the actual performance of services simply to "retain" the professional or to cover those general services normally associated with the holding of the office itself.[3] Excluded would be items of work usually regarded as "extras" and rendered essentially on an independent contractor type basis.[4]

These principles are controlling in the disposition of this case. There are three separate employments to be considered. Fasolo initially enrolled in PERS on September 1, 1964 as a Tenafly Borough Magistrate. His total service credit through a purchase and current membership covers the period March 1, 1956 to his anticipated retirement date of August 1, 1975. The salaries for this position were fixed annual salaries increasing by normal annual increments from $1,166.60 in 1956 to $5,400 in 1974. There is no suggestion of extra compensation or fees above these fixed amounts. Magistrates or municipal judges are limited by law to fixed annual salaries and are prohibited from accepting fees or other additional remuneration for services rendered. The services to be rendered are controlled by statute. Accordingly, the entire period of service and the compensation for this position are creditable for pension purposes.

The second employment was borough attorney for New Milford from January 1, 1951 to January 1, 1963. A borough attorney is appointed pursuant to the authority of N.J.S.A. 40:87-15. Unless sooner removed, a borough attorney holds office for a period of one year and until his successor has been duly qualified. In this situation, the salary ordinance in New Milford fixed the remuneration of a borough attorney at "the annual compensation" of $500 "payable in quarterly installments, which compensation shall cover all legal services excepting" specifically enumerated services. It was certified by the Borough that the $500 salary was designed to cover only attendance at meetings. Additional compensation was also paid as fees for each separate item of legal services performed encompassing appearances before administrative boards, preparing ordinances, contracts and deeds, and litigation. These fees fluctuated widely with no uniform pattern from a low of $970 paid in 1955 to a high of $6,715 in 1960. The total compensation paid for these 12 years consisted of $24,644 in fees and $6,000 in salary-retainer. It is therefore clear that the position of borough attorney in New Milford was not a regularly salaried position in its entirety and only those services contemplated by the fixed annual salary (retainer) for attendance at meetings of the governing body would be creditable for pension purposes.

The third employment was Demarest borough attorney from January 1, 1953 to approximately December 1974. Fasolo was enrolled on September 1, 1970 on the basis of this employment and became a multiple enrollee in PERS. In November 1971 he administratively received credit retroactively to January 1, 1953, through a purchase and as free veteran service credit. Compensation recorded for this employment reveals that an amount fixed annually as a retainer was paid for attendance at regularly scheduled meetings and additional compensation as fees was paid during each year for various items of additional legal services. The additional compensation

for regular services performed was categorized as "contractual services" or "extra fees" or "fees paid by voucher" and compensation assigned to planning board, zoning board, police department and "salary paid as sewer attorney" and "as borough attorney". These additional payments were fees fluctuating widely both in total amount and within each separate category of extra compensation paid. Accordingly, the total scheme of compensation for the legal services of the borough attorney in Demarest indicates clearly that the fixed annual retainer was but a small portion of the total compensation received and, therefore, only that amount should be includable in the calculation of salaries eligible for pension service credit.

The Demarest compensation also encompasses a special $60,000 contract payment. On August 20, 1969 the member executed a contract to render legal services in connection with the construction of a sanitary sewage system for the borough. The compensation set in this contract was:

> " *** a fee equal to two and one-quarter (2¼%) per centum of the total cost of construction of the Borough Sanitary Sewer System***, but in no event shall said fee exceed Sixty Thousand ($60,000.00) Dollars. . . ."

Payment of the fee was subject to appropriation of the monies by the borough. The contract also provided that the method and means of payment are to be selected through mutually satisfactory arrangements of the contracting parties and authorized payment "in the form of an annual salary basis, quarter-annual basis or upon a partial periodic basis. . . ." Pursuant to this latter provision, the total maximum contract amount of $60,000 was paid in varying amounts from 1971 to 1974 as "salary".

It is clear from the terms of the contract and the distribution of the compensation in unequal amounts over a four year period that the compensation paid is not "salary" in the context of the definition of "compensation" in the Act. Moreover the legal services by their very nature were special temporary work and confined to legal work arising from the construction of the sewage system. Accordingly, even though the member had otherwise been a regular salaried borough attorney to the extent of his retainer (salary) this additional $60,000 of compensation clearly is excludable for pension purposes as an "extra" paid to an independent contractor.

There may be equitable assertions raised in this case since administratively credit has been recorded by the Retirement System for those services compensated for on a fee basis. However, equitable estoppel is generally not applicable to a government agency and has never been applied to pension boards except in those instances where pensions have been paid for a considerable period of time. *Ruvoldt v. Nolan* 63 N.J. 171 (1973); *Skulsky v. Nolan* 68 N.J. 179 (1975). See, also, *Tubridy v. Consolidated etc., Pensions Com.* 84 N.J. Super 257 (App. Div. 1964) where equitable estoppel against the pension board was denied on a claim of reliance and anticipation of a higher pension on acceptance of contributions for services not covered by the fund. Thus, although a pension may not normally be reopened to examine the basis of the service upon which the retirement allowance had been granted, in the case of this *active* member no service compensated for on a fee basis has yet been calculated into a final retirement allowance. A question as to the member's creditable compensation was raised as early as 1971 by the member and his entire creditable service has been under active investigation since that date. Moreover, the Retirement System has expressly reserved the issue of his creditable compensation for a subsequent de-

termination and the member has full knowledge that his pension award was not final and conclusive.

In conclusion, you are advised that for purposes of pension credit, services performed as a part-time municipal attorney or similar professional services for local governmental subdivisions compensated for by a fixed annual retainer are to the extent described above generally regarded to be eligible services for coverage by the Act where the retainer or salary can be demonstrated to be paid under regular salary policies of the governmental entity and as incident to services performed in a governmental office or employment. Those legal or other professional services performed for a fluctuating fee for each item of professional service rendered to the local unit should not be considered to be eligible for pension credit as remuneration for services performed in government office or employment.[5] In this case, then, and based upon all available factual information provided to us, the creditable service and compensation of Fasolo for eligible retirement credit should be limited to his service and compensation as magistrate to the Borough of Tenafly and for his professional services compensated by the fixed annual retainer-salary in the Boroughs of New Milford and Demarest. He does not qualify for any of the other professional services compensated for on a fee basis, including the special $60,000 fee for services rendered in connection with the construction of a sanitary sewage system for the Borough of Demarest.

Very truly yours,
WILLIAM F. HYLAND
Attorney General of New Jersey
By: THEODORE A. WINARD
Assistant Attorney General

1. Public Employees' Retirement-Social Security Integration Act of 1954 as amended, N.J.S.A. 43:15A-1 *et seq.*

2. The plaintiff in *Fox* received no "extras" in compensation but rather performed under a straight periodic $7,000 per annum salary. See *Koribanics*, 48 N.J. at 8. However, it must be emphasized that the intent and import of the pension law cannot be evaded simply by restructuring total professional compensation from a retainer plus fees to a flat compensation basis. See footnote 3, *infra* and accompanying text.

3. In the case of a municipal attorney, this is usually a comparatively nominal amount of compensation for work normally regarded as within the duties of the office such as: attendance at meetings of the governing body, the preparation of simple resolutions and other work related to such meetings and some day-to-day routine advice. The preparation of detailed opinion letters, the drafting of complex and involved ordinances and contracts, and the conduct of litigation would generally be excluded. However, due to the variety of governmental sub-divisions and their differing legal requirements, some factual situations may well dictate a contrary conclusion such as, for example, the circumstances of counsel for a city of substantial size who performs services for such purposes. Accordingly, whether a compensation arrangement or certain specific items of work are eventually eligible or ineligible for pension credit may involve a factual question as to the presence of a bona fide employer-employee arrangement between the parties in a given situation to be determined by the Board of Trustees of the Retirement System.

4. As indicated in Footnote 2 *supra*, this result would follow regardless of whether the compensation plan was one of nominal retainer plus fees for other work or a substantial retainer (salary) to cover all services. Rephrased, the conclusion is that the structuring of payment cannot be a device to defeat the purpose and intent of the pension statutes. The touchstone is the nature of the services rendered—*i.e.* are they nominal, directly related to the office itself and thus arguably rendered as an "employee" or are they more substantial, usually rendered on a

fee basis, and thus arguably performed by an "independent contractor" for his client? Only the actual or reasonably equivalent amount to compensate for the former is includable. The policy underlying our pension laws does not oblige the public to bear the financial burden of pension credit afforded to fees which a lawyer essentially charges to his client—at least over and above the normal retainer for professional services arising out of the occupancy of the statutory and usually mandatory office of municipal attorney.

5. As indicated above (see footnote 3, *supra* and accompanying text), it may be necessary in specific instances for the Board of Trustees to evaluate the factual circumstances applicable to the rendition of professional services to determine whether or not a bona fide employer-employee relationship existed within the meaning of the principles set forth above.

October 26, 1976

FRED G. BURKE
Commissioner of Education
Department of Education
225 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 28—1976

Dear Commissioner Burke:

The Department of Education has asked whether a local board of education must obtain the approval of the legal voters of its district at a public referendum for the construction of school facilities paid for in its entirety by federal grant moneys. You have indicated that this question was generated by the recent enactment of the Local Public Works Capital Development and Investment Act of 1976.* This law authorizes the Secretary of Commerce, acting through the Economic Development Administration, to make direct or supplemental grants to any State or local government for local public works projects which will stimulate employment. Pursuant to this law and the regulatory scheme implementing it, local school districts within the State of New Jersey may apply for direct grants for the construction of educational facilities.

The basic question involved herein is whether Type II or regional school districts applying for federal moneys for school construction must obtain voter approval for such projects. Local boards of education are political subdivisions created by the Legislature and empowered by it to provide, maintain and supervise local school districts. N.J.S.A. 18A:33-1 requires each local school district to provide "suitable educational facilities including proper school buildings and furniture and equipment" for children resident within the district.

Pursuant to this statutory requirement, local districts must prepare acceptable building proposals and financing plans which include, where necessary, the borrowing of funds and the issuance of bonds to finance such projects. The authority for such borrowing is found in N.J.S.A. 18A:20-4.2 which provides:

"The board of education of any school district may, for school purposes:

"(a) purchase, take and condemn lands. . . .

"(b) grade, drain and landscape lands owned or to be acquired by it and improve the same in like manner;

"(c) erect, lease for a term not exceeding 50 years, enlarge, improve, repair or furnish buildings;

"[d] *borrow money therefor, with or without mortgage; in the case of a type II district without a board of school estimate, when authorized so to do at any annual or special school election and in the case of a type II district having a board of school estimate, when the amount necessary to be provided therefor shall have been fixed, determined and certified by the board of school estimate, and in the case of a type I district when an ordinance authorizing expenditures for such purpose is finally adopted by the governing body of a municipality comprised within the district,. . .*"

(Emphasis added)

In order to answer the present inquiry, it is necessary to ascertain whether the Legislature intended the referendum requirement contained in N.J.S.A. 18A:20-4.2 (d) to apply to each of the subsections contained therein or whether this requirement is restricted to subsection (d). It is this latter provision which specifically authorizes local boards of education to borrow money in order to accomplish the various activities necessary for the construction of education facilities.

It is a general rule of statutory construction that qualifying words or phrases refer solely to the last antecedent which consists of the last word, phrase or clause that can be made an antecedent without impairing the meaning of the sentence. *State v. Wean,* 86 N.J. Super 283 (App. Div. 1965); *State v. Congdon* 76 N.J. Super. 493 (App. Div. 1962); 2A Sutherland, *Statutory Construction* (Sands, 4 ed. 1973), § 47.33 at 159. Consistent with this principle, the referendum requirement should be construed as applying solely to subsection (d) of N.J.S.A. 18A:20-4.2. Although the utilization of punctuation to set off the referendum requirement may be viewed as indicative of a "contrary intention," *Gudgeon v. County of Ocean,* 135 N.J. Super. 13 (App. Div. 1975), the language and underlying purpose of the provision indicates a legislative intent to restrict the referendum requirement solely to the borrowing of money in subsection (d).

The statute specifically requires that in a type II school district *with* a board of school estimate, the board of school estimate shall fix, determine and certify the "amount necessary to be provided therefor." In a type I district, the governing body of a municipality must finally adopt an ordinance "authorizing expenditures for such purposes." It follows by analogy that a public referendum would be necessary in a type II district without a board of school estimate only when it similarly will incur a substantial expenditure of local moneys to finance capital school construction.

Furthermore, a statute is to be interpreted in accord with related statutes. *Key Agency v. Continental Casualty Co.,* 31 N.J. 98, 103 (1959); *Bashwiner v. Police and Firemen's Retirement System of New Jersey,* 68 N.J. Super. 1 (App. Div. 1961). N.J.S.A. 18A:20-4.2 is therefore to be construed with reference to that statutory system of which it is a part. 2A Sutherland *Statutory Construction* (Sands, 4 ed. 1973), § 51.02. Significantly, N.J.S.A. 18A:22-39 which governs the formation of a

public question to be submitted to referendum pursuant to N.J.S.A. 18A:20-4.2 provides in pertinent part:

> "*Whenever the undertaking of any capital project or projects to be paid for from a special district tax or from the proceeds of an issue or issue of bonds is submitted to the voters of a type II district* at an annual or special school election for their approval or disapproval, the board shall frame the question or questions to be submitted so that each project is submitted in a separate question, or all or any number of them are submitted in one question, which shall state the project or projects so submitted and *the amounts to be raised for each of the projects* so separately submitted. . ." (Emphasis added).

Additionally, N.J.S.A. 18A:14-3 which authorizes special elections specifically requires that:

> "...no more than two special school elections shall be called by any board of education within any period of six months to submit to the legal voters of the district for their adoption or rejection *any proposal, resolution or question authorizing the raising of a special district tax or the issuance of bonds of the district,* for the same purpose, unless the commissioner shall first have certified in writing the necessity therefor." (Emphasis added)

It would appear to have been the probable legislative purpose to require voter approval of those long term capital construction projects with a substantial financial commitment through the issuance of bonds or the imposition of a special tax. It is therefore clear that the necessity of voter approval spelled out in subsection (d) consistent with this overall legislative purpose has application only to borrowing in that subsection and does not apply to subsections (a), (b) and (c) where a long term financial commitment is not mandated. In fact, at the time of the enactment of N.J.S.A. 18A:20-4.2 the Legislature could not have envisioned that total funding of a capital project may be received from federal sources not involving a financial commitment by the district, and it would be incongruous to assume a need for voters' approval under subsection (d) under these circumstances.

This conclusion is entirely consistent with N.J.S.A. 18A:20-4 which permits the acceptance of gifts or grants of money or land by a board of education "without additional authorization or authority. Such moneys may thereafter be expended for the construction of buildings for school purposes so long as such expenditures are "authorized" in the manner prescribed by law for the construction of buildings for school purposes or additions thereto." Pursuant to this statutory provision if the construction of a school facility requires the expenditure of grant moneys and local moneys to be raised either by a special tax or bond issue, the authorization of such project would have to include voter approval in either Type II district without a board of school estimate or a regional district as required by N.J.S.A. 18A:20-4.2 (d). However, in cases similar to those under consideration, where school construction is entirely financed by grant moneys, voter approval would not be a necessary element in the authorization of such project. These projects would be properly authorized by appropriate board action following the receipt of the requisite approvals for school construction.

We are informed that proposed projects may at some point require local expenditures either in the form of preparatory construction cost such as architectural fees or possible cost overruns. In this regard, it should be pointed out that the expenditure of any *local* moneys for purposes of school construction must be governed by the applicable provisions of Title 18A and those regulations and directives implementing such provisions. The fact that the actual construction of the school facility is basically funded by federal moneys does not relieve a school district from conformity with those statutory or regulatory requirements governing expenses which (a) might be incurred by the local district prior to the receipt of the federal grant and which are not reimbursable thereunder or (b) might be incurred by the local district after the expenditure of the total federal grant in order to complete the facility.

You are therefore advised that there is no legal requirement** that the anticipated construction of educational facilities by Type II school districts without a board of school estimate or by regional districts be submitted for voter approval where such construction is to be entirely financed with federal moneys. This conclusion does not concern Type I school districts, or Type II districts with boards of school estimate since such districts are not required by statute to obtain voter approval for construction projects under any circumstances.

Very truly yours,
WILLIAM F. HYLAND
Attorney General of New Jersey
BY MARY ANN BURGESS
Deputy Attorney General

* Public law 94-369, 42 USCA §6701, effective July 22, 1976.

** Pursuant to N.J.S.A. 18A:14-3, a local district could voluntarily choose to submit a question concerning the application and possible expenditure of federal moneys to its electorate at a special election. Consistent with this statutory provision, a board may take such action "at any time when in its judgment the interests of the schools require it."

October 28, 1976

HONORABLE CORNELIUS P. SULLIVAN
Acting Prosecutor, Burlington County
Burlington County Prosecutor's Office
49 Rancocas Road
Mt. Holly, New Jersey 08060

FORMAL OPINION NO. 29 – 1976

Dear Prosecutor Sullivan:

You have requested advice as to whether the Open Public Meetings Act requires a public body to provide 48 hour advance written notice before conducting a meeting in closed session.

The Open Public Meetings Act contains several provisions dealing with the notice to be given before a meeting is held by a public body. Initially, the Act requires every public body to promulgate, at least once each year, a schedule of regular meetings to be held by it during the succeeding year. N.J.S.A. 10:4-18; *cf. Formal Opinion No. 2 – 1976.* To be included in this schedule is the time, date and, to the extent known, the location of each regular meeting.

In addition to this annual notice provision, the Act also provides that ". . . no public body shall hold a meeting unless adequate notice thereof has been provided to the public." N.J.S.A. 10:4-9(a). Under the Act's definition of "adequate notice" there are two ways in which this requirement may be met. First, a public body can provide advanced 48 hour written notice of its meetings. In this respect, "adequate notice" is defined in the Act to mean "advance notice of at least 48 hours, giving the time, date, location and, to the extent known, the agenda of any regular, special, or rescheduled meeting" together with a statement as to whether formal action will or will not be taken at that meeting. N.J.S.A. 10:4-8(d). The major difference between this 48 hour notice and the annual schedule of regular meetings is that the former requires the agenda and location of the meeting to be stated as well as whether formal action will be taken at the meeting, whereas the annual schedule only requires that the time, date, and, to the extent known, the location of each regular meeting be listed.

"Adequate notice" may also be provided by placing the time, date and location of a meeting in the annual schedule of regular meetings promulgated in accordance with section 10:4-18 of the Act. Providing notice in this fashion complies with the "adequate notice" requirement since the definition of "adequate notice" specifically states that "[w]here annual notice or revisions thereof in compliance with section 13 [N.J.S.A. 10:4-18] of this Act sets forth the location of any meeting, no further notice shall be required for such meeting." N.J.S.A. 10:4-8(d). In summary, then, "adequate notice" can be provided by either distributing 48 hours in advance, the time, date, location and agenda of the meeting together with a statement as to whether formal action will be taken or by including in the annual schedule of regular meetings the time, date and location of the meeting to be held. In light of these statutory notice requirements, your specific inquiry is whether a public body must provide "adequate notice" of meetings which it holds in closed session under section 10:4-12 of the Act. In general, the Open Public Meetings Act requires that "all meetings of public bodies shall be open to the public at all times." N.J.S.A. 10:4-12. The Act, however, does permit a public body to exclude the public from that portion of a meeting at which it discusses any of the items listed in subsection b of N.J.S.A. 10:4-12. Before excluding the public, however, section 10:4-13 of the Act requires the public body to first pass a resolution at a public meeting. This resolution must state the general nature of the subject to be discussed in closed session and the approximate time when the circumstances under which that discussion can be disclosed to the public. Since this provision requires a resolution to be passed "at a meeting to which the public shall be admitted" and the Act prohibits a public body from holding a meeting "unless adequate notice thereof has been provided," N.J.S.A. 10:4-9, the resolution for going into closed session must be passed at a meeting for which adequate notice has been provided.

A question arises whether this conclusion is altered to any extent by subsection 10:4-9(a) which exempts from the "adequate notice" requirement those meetings dealing with items allowed by law to be discussed in closed session. When read by it-

self, subsection 10:4-9(a) suggests that "adequate notice" need not be given for a meeting held solely to consider items allowed by law to be discussed in closed session. However, in order to discern the probable legislative intent, subsection 10:4-9(a) must be read together and reconciled with subsection 10:4-13. Each part of a legislative enactment should be construed in connection with every other part to produce a harmonious whole. *Bravand v. Neeld*, 35 N.J. Super. 42, 52-53 (App. Div. 1955); *Wager v. Burlington Elevators, Inc.*, 116 N.J. Super. 390, 395 (Law Div. 1971). A statute should be construed so that effect is given to all its provisions so that no part will be inoperative, superfluous, void or insignificant. *Rainbow Inn, Inc. v. Clayton National Bank*, 86 N.J. Super. 13, 23 (App. Div. 1964) quoting from 2 Sutherland, *Statutory Construction* § 4705 (1943). Accordingly, it is our judgment that the probable legislative purpose underlying the enactment of these provisions was to allow a public body to hold a meeting limited to the items to be discussed in closed session without the need for "adequate notice" only if the public body has already passed a resolution required by section 10:4-13 at a prior public meeting for which adequate notice was given. In the event a resolution has not been passed by the public body at a prior public meeting for which "adequate notice" was given, the public body must then provide "adequate notice" of the meeting which it intends to hold in closed session and, at that meeting, pass the resolution required by section 10:4-13 of the Act.

You are therefore advised that the Open Public Meetings Act does not require a public body to provide "adequate notice" of a closed session provided that the public body, at a prior public meeting, has passed a resolution stating the specific items to be discussed in closed session. If the public body has not passed a resolution at a prior public meeting, then it must give "adequate notice" of the meeting to be held and, prior to going into closed session at that meeting, it must pass the required resolution.

Sincerely,
WILLIAM F. HYLAND
Attorney General

By: MICHAEL A. SANTANIELLO
Deputy Attorney General

October 28, 1976

HONORABLE RICHARD McGLYNN
Commissioner, Public Utilities Commission
1100 Raymond Boulevard
Newark, New Jersey 07102

FORMAL OPINION NO. 30—1976

Dear Commissioner McGlynn:

You have requested advice on whether the Public Utilities Commission may exclude the public, under the Open Public Meetings Act, N.J.S.A. 10:4-6, *et seq.*, from that portion of its meetings at which it discusses utility rate cases. More specifically, you ask whether these discussions of the Commission fall within the exceptions to the open meetings requirement pertaining to "the setting of banking rates," "pending or anticipated litigation," and "the attorney-client privilege." For the following reasons, you are advised that the Public Utilities Commission may not exclude the public when it discusses utility rate cases pending before it.

Briefly stated, the facts surrounding your inquiry are as follows: After a utility company files an application for a rate change with the Commission, a hearing is held before a hearing officer appointed by the Commission. At this hearing, the utility company and other interested parties have the opportunity to present evidence in support of or in opposition to the application for rate change. Following the hearing, a report and recommendation is submitted to the Commission by its hearing officer. Thereafter, the Commission discusses this report and recommendation and the various aspects of the case to determine the final disposition of the application. It is this discussion of the Commission to which your inquiry pertains.

In declaring the policy underlying the Open Public Meeting Act, the Legislature found "the right of the public to be present at all meetings of public bodies, and to witness in full detail all phases of the deliberation, policy formulation, and decision making of public bodies" to be "vital to the enhancement and proper functioning of the democratic process." It found that secrecy in public affairs undermines "the faith of the public in government and the public's effectiveness in fulfilling its role in a democratic society." Therefore, it declared the public policy of this State to be that of insuring "the right of its citizens to have adequate advance notice of and the right to attend all meetings of public bodies at which any business affecting the public is discussed or acted upon" except where otherwise clearly required by the public interest or by individual privacy. N.J.S.A. 10:4-7.

In accordance with this policy, the Open Public Meetings Act requires that "all meetings of public bodies shall be open to the public at all times." N.J.S.A. 10:4-12. To this general rule, the Act only carves out nine exceptions. N.J.S.A. 10:4-12(b). When a particular item falls under one of these exceptions, a public body may exclude the public from its discussion on that item.

An exception to the open meeting requirement permits a public body to exclude the public from that portion of a meeting at which it "discusses . . . [a]ny pending or anticipated litigation . . . in which the public body is, or may become a party." N.J.S.A. 10:4-12(b)(7). To invoke this exception, the public body must either be or expect to become a party to the litigation it wishes to discuss and the discussion must be limited to the pending or anticipated litigation. Assuming that a utility rate change proceeding before the Public Utilities Commission may be characterized as a form of "litigation," the Public Utilities Commission clearly is not a party to such litigation.

The "parties" to litigation are those persons directly involved in the litigation on both sides of the controversy, *i.e.*, the persons who institute the litigation, the persons against whom the litigation is instituted, and other persons who enter the litigation to support or oppose the claims being made. The person or agency that must decide the controversy, in this case the Public Utilities Commission, is not a "party" to the litigation but is instead the decision-maker in the controversy before whom the "parties" to the litigation are appearing.

The fact that the Public Utilities Commission may become a party to a judicial appeal if its decision on a utility rate application is appealed to the Appellate Division still does not permit it to utilize the exemption to conduct these deliberations in closed sessions. To invoke this exception, the subject under discussion must be the "pending or anticipated litigation" itself, *i.e.*, the public body must be discussing its strategy in the litigation, the position it will take, the strengths and weaknesses of that position with respect to the litigation, possible settlements of the litigation or some other facet of the litigation itself. Therefore, the mere fact that its decision on a utility rate application may become the subject of an appeal to the Appellate Division does not permit the Public Utilities Commission to conduct its deliberations on that application in closed session under the "pending or anticipated litigation" exception in the Act.

Another exception to the open meeting requirement permits a public body to exclude the public from that portion of a meeting at which it "discusses . . . [a]ny matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer." N.J.S.A. 10:4-12(b)(7). The attorney-client privilege is designed to protect those communications a client makes in confidence to an attorney for the purpose of obtaining legal assistance and the advice which the attorney, in return, gives to the client. *In re Richardson*, 31 N.J. 391, 396-97 (1960); *Russell v. Second National Bank of Paterson*, 136 N.J.L. 270, 278-79 (E. & A. 1947); *State v. Humphreys*, 89 N.J. Super. 322 (App. Div. 1965). The attorney-client exception in the Open Public Meetings Act is further qualified by making the exception applicable only "to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer." N.J.S.A. 10:4-12(b)(7).

It is manifest that this privilege cannot be used as carte blanche authority for the Public Utilities Commission to hold its deliberations on utility rate applications in closed session. These deliberations are not communications addressed to the Commission's attorney but are instead deliberations among the members of the Commission itself in order to reach a decision on the application before it. Simply because a public body's attorney is in attendance at a meeting does not enable it to invoke this exception. Although at times during the discussion, the Commission may seek to consult its attorney on some aspect of the case, it cannot be said that the Commission's entire deliberation on the application or even a major portion of it falls under the attorney-client privilege exception. *Cf. Sacramento Newspaper Guild v. Sacramento County Bd. of Super.* 69 Cal. Rptr. 480 (Cal. Ct. App. 1968); *Times Publishing Co. v. Williams*, 222 So. 2d 470 (Fla. Dist. Ct. App. 1969); *People ex rel. Hopf v. Barger*, 332 N.E. 2d 649 (Ill. App. Ct. 1975).

The Commission's deliberations on utility rate applications are also not permitted to be discussed in closed session under N.J.S.A. 10:4-12(b)(5). That section does not exclude all rate cases from the open meeting reqrement but only excludes discussion on the "setting of banking rates." If the Legislature had intended to exclude all types of rate cases from the open meeting requirement, it would not have

specifically limited this exception to "banking rates." Since the setting of utility rates does not constitute the setting of "banking rates," they may not be discussed in closed session under this exception.

In addition to the exceptions discussed above, there appears to be no other exception in the Act that would permit the Public Utilities Commission to conduct its deliberations on utility rate applications in closed session. There is also nothing to indicate a legislative intent to exempt these deliberations from public scrutiny. You are therefore advised that the Open Public Meetings Act requires the deliberations of the Public Utilities Commission on utility rate applications to be conducted in public session.

Very truly yours,
WILLIAM F. HYLAND
Attorney General

By: MICHAEL A. SANTANIELLO
Deputy Attorney General

January 19, 1977

HONORABLE RAYMOND H. BATEMAN
21 East High Street
Somerville, New Jersey 08876

FORMAL OPINION 1977 - No. 1

Dear Senator Bateman:

You have asked whether the procedures initiated by the New Jersey Education Association with various local boards of education for political action contributions are authorized under New Jersey law. This question has been generated by Bylaw 2 approved by the N.J.E.A. Delegate Assembly, effective September 1, 1976 in the following form:

> "*Professional Payment*—Each Active Professional Member shall remit to the Association, through the same procedures by which the dues of such member are paid and under standards established by the Executive Committee, an annual total professional payment which shall include, in addition to the established dues for such member, a contribution, in the amount of two ($2) dollars, for the NJEA Political Action Committee. Each fall when the Automatic Payroll Deduction members receive their membership cards, a letter explaining the Political Action Committee deduction, a form to request the return of the two ($2) dollars, and a self-addressed envelope to NJEA will be included. Upon receipt of a request in writing from any member, the Association shall return the member's two ($2) dollar contribution for the fiscal year during which the request was received. The Association shall transmit to the NJEA Political Action Committee those two ($2) dollar contributions for which no refund request is received."

Pursuant to Bylaw 2, material provided the N.J.E.A. membership indicates that:

> "Professional payment for 1976-77 in N.J.E.A. is $75. N.J.E.A. dues are $73. Two dollars is for a voluntary contribution to N.J.E.A. PAC. Contributions to N.J.E.A. PAC will be used to support candidates and issues on the state and federal level. Contributions are voluntary and are not required as a condition of membership in any organization. This agreement may be revoked and a request for a N.J.E.A. PAC refund may be submitted in writing to N.J.E.A. headquarters before June 30, 1977."

This explanatory note accompanies the form used by N.J.E.A. members to direct local boards of education to make certain deductions from their earnings under checkoff procedures.

The question presented is whether the Professional Payment and specifically the $2 contribution for N.J.E.A. Political Action Committee falls within N.J.S.A. 52:14-15.9e which states in pertinent part:

> "Whenever any person holding employment, whose compensation is paid by this State or by any county, municipality, *board of education* or authority in this State, or by any board, body, agency or commission thereof shall indicate in writing to the proper disbursing officer his desire to have any deductions made from his compensation, *for the purpose of paying the employee's dues to a bona fide employee organization*, designated by the employee in such request, and of which said employee is a member, such disbursing officer shall make such deduction from the compensation of such person and such disbursing officer shall transmit the sum so deducted to the employee organization designated by the employee in such request." (Emphasis added.)

A fair reading of this statute leads to the conclusion that public employers are only authorized to make deductions from the wages of their employees "for the purpose of paying the employee's *dues* to a bona fide employee organization." (Emphasis added.)

Dues have been defined as certain mandatory monetary sums paid by a member of an organization as a condition of his membership therein and for its direct support and maintenance. The term covers only fixed and definite charges applicable to all club members. *Black's Law Dictionary* (4th ed. 1968); *Greenwald v. Chiarello*, 57 N.Y.S. 2d 765 (1945). In *National Labor Relations Board v. Injection Molding Co.*, 211 F.2d 59 (8th Cir. 1954), the court construed a contract between union and employer which authorized deductions of "union membership dues (including assessments if they are regularly part of membership dues) and initiation fees." The court determined that this agreement did not authorize an employer at the request of a union to deduct from the wages of its employee a fine levied by the union against its member for non-attendance at meetings.

It was held in *Internation Longshoreman's Ass'n. v. Seatrain Lines Inc.*, 326 F. 2d 916 (2d Cir. 1964), that a form of alternative payment by an employer "in lieu of dues checkoff" could not be characterized as "dues" within the exclusive meaning of memberhip dues in the Labor Management Relations Act. Also, in *Culotta v. Pickett*, 448 F. 2d 255 (9th Cir. 1971), deductions for union dues were held not to include a sum which constitutes either a levy of back dues or an improper penalty assessed against a union member. The United States Supreme Court determined in *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 92 S. Ct. 2247, 33 L. Ed. 2d 11 (1972), that in order to comply with federal law, political contributions must be strictly segregated from union dues and assessments and that the solicitation for such funds must be conducted under circumstances which plainly indicate that these donations are exclusively for the political purposes of the labor organization. *Pipefitters, supra*, at 435. See also generally *United States v. Auto Workers*, 352 U.S. 68 S. Ct. 1349, 92 L.Ed. 1849 (1948).

Therefore, it is clear from these decisions that dues have been interpreted to mean those mandatory, monetary contributions which are exacted from all members of a labor organization as a condition of membership and which are used for the direct support and maintenance of that organization. It is reasonable to conclude that "dues" should have a similar meaning under New Jersey law and would not include within the probable legislative meaning of that term in N.J.S.A. 52:14-15.9e those voluntary contributions paid to support the political purposes of the labor organization.

Bylaw 2, approved by the N.J.E.A. Delegate Assembly, describes two components of "Professional Payment." The first represents a sum certain, required of all members, to be paid to the general purpose funds of the union for the union's support and maintenance and is a condition of membership in the union. This component possesses the traditional indicia of "dues," is expressly characterized as such and may properly be deducted from the wages of public employees pursuant to N.J.S.A. 52:14-15.9e. However, the second component is voluntary in nature, not exacted as a condition of membership, is segregated from the general funds received from payment of "dues" and is expended for political purposes. This component is essentially a voluntary political contribution distinct from the mandatory dues payment of union members, and is expressly characterized in Bylaw 2 as a "contribution." It is, therefore, our opinion that the controlling statute dealing with the checkoff of union dues set forth in N.J.S.A. 52:14-15.9e does not authorize school districts to deduct the "political contribution" component of the N.J.E.A. Professional Payment from the wages of its employees.

Very truly yours,
WILLIAM F. HYLAND
Attorney General

By: MARY ANN BURGESS
Deputy Attorney General

January 28, 1977

ELAINE B. GOLDSMITH, *Director*
Executive Commission on Ethical Standards
222 West State Street
Trenton, New Jersey 08625

FORMAL OPINION 1977—No. 2

Dear Mrs. Goldsmith:

You have requested advice as to whether certain functions of the Executive Commission on Ethical Standards may be discussed in closed session under the Open Public Meetings Act, N.J.S.A. 10:4-6, *et seq.* Initially you ask whether the Commission may discuss in closed session complaints alleging a violation of the Conflicts of Interest Law, N.J.S.A. 52:13D-12, *et seq.*, or of a code of ethics promulgated pursuant to the Law and investigations conducted by the Commission into a possible or alleged violation of the Law or of a code of ethics. The discussion concerning these complaints and investigations are those undertaken by the Commission prior to the holding of a formal hearing on the matter. In these discussions, the Commission reviews the complaint to determine whether an investigation should be undertaken, the manner in which the investigation should be conducted and the information to be sought in the investigation. It also analyzes and discusses information obtained from the investigation to determine what additional information is needed and whether there is sufficient cause to believe that a violation of the Law occurred necessitating the holding of a formal hearing. You also ask whether the Commission may discuss in closed session requests for an advisory opinion or inquiries conducted for the purpose of rendering an advisory opinion. Since these questions are general in nature and do not pertain to any specific factual situation, the response to them likewise can only express general standards which must be applied by the Commission on a case-by-case basis. In response to these questions and for the following reasons, it can be generally said that the Commission may discuss in closed session a complaint and the investigation into the allegations of such complaint but when the discussion relates to the issuance of an advisory opinion or an inquiry into the facts on which an advisory opinion is to be based, that discussion must be held in open session unless the specific material discussed would constitute an unwarranted invasion of individual privacy.

The Open Public Meetings Act, N.J.S.A. 10:4-6, *et seq.*, has as its purpose the opening of the processes of government to the public so that citizens may witness in full detail all phases of the deliberation, policy formulation, and decision making of public bodies. In enacting the Law, the Legislature declared "that secrecy in public affairs undermines the faith of the public in governing and the public's effectiveness in fulfilling its role in a democratic society." N.J.S.A. 10:4-7. In line with this policy, the Act requires that "all meetings of public bodies shall be open to the public at all times." N.J.S.A. 10:4-12. But in declaring the policy behind the Act, the Legislature also recognized that to require the holding of public sessions in some instances would cause "the public interest [to] to be clearly endangered or the personal privacy or guaranteed rights of individuals [to] be clearly in danger of unwarranted invasion." N.J.S.A. 10:4-7. Because of this, the Legislature placed in section 10:4-12 of the Act certain specific exceptions which permit, but do not require, a public body to hold a closed session when the matter under discussion falls within the scope of one of those exceptions.

One of the exceptions in N.J.S.A. 10:4-12, which permits a public body to exclude the public, concerns "[a]ny investigations of violations or possible violations of the law." N.J.S.A. 10:4-12 (b) (6). There are several reasons underlying this exception from the open meetings requirement. The first is to protect the government's case in a law enforcement proceeding by preventing premature disclosure of investigatory information. Secondly, it is intended to protect the investigatory techniques utilized by government; thirdly, it protects the free and candid flow of opinions and evaluations of investigatory personnel regarding the investigation; fourthly, it allows government to protect the identity of informers and other persons upon whom the government depends for information concerning a violation of the law; and lastly, it protects an individual under investigation from defamatory and baseless allegations that have been made against him and that are contained in the investigatory materials. *Cf. NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975); *Weisberg v. U.S. Department of Justice*, 489 F. 2d 1195 (D.C. Cir. 1973); *Koch v. Department of Justice*, 376 F. Supp. 313 (D. D.C. 1974); Conference Report No. 93-1200, 93d Cong., 2d Sess. (1974) (Conference Report), U.S. Code Cong. & Admin. News, 1974, p. 6285.

The discussions of the Executive Commission on Ethical Standards undertaken prior to a formal hearing concerning a complaint against an employee or an investigation which it initiates concerning a possible violation of the Conflicts Law or a Code of Ethics clearly falls within the scope of this exception. Those discussions encompass a review of the complaint, a discussion on how the investigation into the alleged violation should be undertaken and a discussion on what information is necessary in conducting the investigation. This exception therefore gives the Commission discretion to hold these discussions in closed session if it so chooses. Before going into closed session, however, section 10:4-13 of the Act requires the Commission to pass a resolution at a meeting to which the public is admitted. That resolution must state the general nature of the subject matter to be discussed in closed session and the time when and circumstances under which the discussion conducted in closed session can be disclosed to the public.

The Commission's discussions concerning the issuance of an advisory opinion and the facts on which an advisory opinion is to be based do not fall within the same category as its discussions concerning complaints and investigations into complaints. Unlike an investigation into a possible violation of the Law, a request for an advisory opinion usually is initiated by the individual himself with the basic facts being provided by that individual. Even when the request is initiated by a third party, the person involved is notified of the request and asked to provide information relevant to it. Unlike an investigation into a possible violation of the law, the goal of an advisory opinion is not to establish the past activities of the individual and to punish or deny him of rights, privileges or benefits because of those activities. It is instead prospective in nature with its purpose being to advise the individual of whether, in the opinion of the Commission, a certain course of action is permissible or prohibited under the Conflicts Law. For these reasons, the Commission's discussions concerning the issuance of an advisory opinion or the facts upon which an advisory opinion is to be based is not permitted to be held in closed session under the exception in the Act for "investigations of violations or possible violations of the law."[1]

Although the Commission's discussions concerning the issuance of advisory opinions cannot be held in closed session as "investigations of violations or possible violations of the law," there remains the question of whether they can be conducted in closed session under N.J.S.A. 10:4-12 (b) (3). That section allows a public body to

exclude the public from that portion of a meeting at which it discusses:

> "Any material the disclosure of which constitutes an unwarranted invasion of individual privacy such as any records, data, reports, recommendations, or other personal material of any educational, training, social service, medical, health, custodial, child protection, rehabilitation, legal defense, welfare, housing, relocation, insurance and similar program or institution operated by a public body pertaining to any specific individual admitted to or served by such institution or program, including but not limited to information relative to the individual's personal and family circumstances, and any material pertaining to admission, discharge, treatment, progress or condition of any individual, unless the individual concerned (or, in the case of a minor or incompetent, his guardian) shall request in writing that the same be disclosed publicly."

In order to hold a closed session under this exemption, the material to be discussed must, if publicly disclosed, constitute an "unwarranted invasion of individual privacy." The phrase "individual privacy" connotes that the material must relate to a specific person and must concern intimate details of a highly personal nature. See *Robles v. Environmental Protection Agency,* 484 F.2d 843, 845, (4th Cir. 1973); *Ditlow v. Schultz,* 517 F.2d 166, 169-172 (D.C. Cir. 1975); *Tennessean Newpaper, Inc. v. Levi,* 403 F. Supp. 1318 (D. Tenn. 1975). In addition, the resultant invasion of privacy must be an "unwarranted" one. In this context, the use of the term unwarranted requires a balancing of interests. *See Wine Hobby USA, Inc. v. United States Internal Revenue Service,* 502 F.2d 133, 136 (3rd Cir. 1974); *Sears, Roebuck & Co. v. General Services Administration,* 402 F. Supp. 378, 384 (D. D.C. 1975). In determining the applicability of the exemption, the protection of an individual's affairs from public scrutiny must be balanced against the public's interest in the subject to be deliberated and acted upon by the public body. *See generally Department of the Air Force v. Rose,* 425 U.S. 352, 372-73, 96 S. Ct. 1592, 48 L. Ed.2d 11 (1976; *Philadelphia Newspapers, Inc. v. United States Department of Justice,* 405 F. Supp. 8 (E.D. Pa. 1975). It is only when the interest of the individual predominates over that of the public that a public body may hold a closed session under this exemption.

In the absence of a specific factual pattern, it is impossible to define with precision those deliberations of the Executive Commission on requests for advisory opinions exempted from the open public meeting requirement. Whether the discussion of an application for an advisory opinion in public session would constitute an "unwarranted invasion of privacy" is dependent on whether the nature of the individual's privacy in the subject of an advisory opinion predominates over the general public interest in the ethical conduct of this or government employees in general. A significant factor in this respect may be a comparison between the less significant need for public disclosure of the anticipated course of conduct of a government employee about which an inquiry has been made with the significant public interest in the deliberations on the legality of his completed activities. Generally, there is a need to insure against unnecessary disclosure of personal and private matters and to thereby encourage persons to seek advice on whether an intended course of conduct is legal. Requests for advisory opinions likely to concern intimate and personal details of an individual and pertaining to conduct that has not yet occurred should ordinarily be discussed in closed session since the public interest in these matters is often minimal. On the other hand, where the legality of completed activity is inquired about,

there is significantly greater public interest in the performance of the public official's duties. Accordingly, deliberations on that category of advisory requests should normally be held in open public session.

In summary, the Executive Commission on Ethical Standards may hold a closed session to discuss complaints and investigations into complaints prior to holding a formal hearing on them provided that it passes the resolution required by N.J.S.A. 10:4-13. The discussions of the Commission concerning the issuance of advisory opinions and the facts on which those opinions are to be based may not be held in closed session under the exception in the act for investigations into violations or possible violations of the law. In certain circumstances, however, these discussions may relate to material allowed to be discussed in closed session under section 10:4-12(b)(3) which allows a public body to exclude the public from that portion of a meeting at which it discusses "any material the disclosure of which constitutes an unwarranted invasion of individual privacy . . . ." Whether the discussion relates to such material, however, must be determined on a case-by-case basis.

Very truly yours,
WILLIAM F. HYLAND
Attorney General

By: MICHAEL A. SANTANIELLO
Deputy Attorney General

1. Of course, where a request for an opinion received from a third party is in essence a complaint or is treated as a complaint by the Commission, it like other complaints, would fall under the exception for investigations of violations or possible violations of the law.

February 9, 1977

JOHN F. LAEZZA, *Director*
Division of Local Government Services
Department of Community Affairs
363 West State Street
Trenton, New Jersey 08625

FORMAL OPINION 1977—No. 3

Dear Director Laezza:

You have raised a series of questions concerning the interpretation of the Local Government Cap Law, N.J.S.A. 40A:4-45.1 *et seq.* (P.L. 1976, c. 68). This law was enacted as experimental legislation to limit spending by municipalities and counties without constraining them to the point where it is impossible to provide necessary governmental services (Section 1).

I

The most pressing questions that you have raised concern the statutory scheme

as a whole. First you have asked whether a county is prohibited from increasing its final appropriation by more than 5% over the previous year's appropriation or whether it is only prohibited from increasing its county tax levy by more than 5% over the previous year's tax levy subject to certain specified modifications. Section 2 of the statute provides that:

> "Beginning with the tax year 1977 municipalities other than those having a municipal purpose tax levy of $0.10 or less per $100.00 and counties shall be prohibited from increasing their final appropriations by more than 5% over the previous year except within the provisions set forth hereunder."

Section 4 of the statute provides that:

> "In the preparation of its budget, a county may not increase the county tax levies to be apportioned among its constituent municipalities in excess of 5% of the previous year's tax levy, subject to the following modifications:
> "a. The amount of revenue generated by the increase in valuations within the county based solely on applying the preceding year's county tax rate to the apportionment valuation of new construction or improvements within the county and such increase shall be levied in direct proportion to said valuation;
> "b. Capital expenditures funded by any source other than the county tax levy;
> "c. An increase based upon an ordinance declaring an emergency according to the definition provided in N.J.S. 40A:4-46 approved by at least two-thirds of the board of chosen freeholders of the county and, where pertinent, approved by the county executive;
> "d. All debt service;
> "e. Expenditures mandated after the effective date of this act pursuant to State or Federal law."

An initial reading of these two sections reveals an inherent inconsistency in which Section 2 seems to limit the final appropriation of a county for a particular year to 5% over the prior year's appropriation and Section 4 places the 5% limitation on the county tax levy to be apportioned among a county's constituent municipalities subject to certain specific modifications. However, it is a generally accepted principle of construction that when a reading of the literal terms of a statute leads to contradictory or incongruous results, a reasonable construction consistent with its underlying purpose should be preferred. *Schierstead v. Brigantine*, 29 N.J. 220, 230-31 (1959); *In re Petition of Gardiner*, 67 N.J. Super. 435, 444 (App. Div. 1961). In this case, the descriptive language in Section 2 generally outlines the purposes of the act to limit municipal and county spending, and the language, "except within the provisions set forth hereunder," suggests that Section 2 is dependent on separate sections for its force and effect. Accordingly, Section 4 provides the operative language of the statute, and specifically limits increases in county tax levies subject to a series of modifications. To the extent of any inconsistency between the descriptive language of Section 2 and the operative language of Section 4, the operative language should govern

the implementation of the spending limitation consistent with the legislative design.

This conclusion is buttressed by the fact that if the statute were to be read so as to limit expenditures by counties on the basis of their final appropriations, the modifications set forth in Section 4 would be inapplicable, since they refer only to the limits on county tax levies. This would result in defeating the legislative goal to provide enough flexibility for counties to provide necessary services (Section 1) contrary to the legislative purpose and, therefore, cannot be presumed to be what the Legislature intended. See *Albert F. Ruehl Co. v. Bd. of Trustees of Schools for Indus. Ed.*, 85 N.J. Super. 4 (Law Div. 1964). Thus, it is our opinion that the Act does not prohibit a county from increasing its final appropriation by more than 5% over the previous year's appropriation but, rather, only prohibits a county from increasing its county tax levy by more than 5% over the previous year's tax levy subject to certain modifications.

II

You have also asked whether appropriations for the transfer of funds by a municipality to a board of education pursuant to N.J.S.A. 40:48-17.1 and 17.3 are to be included within the limitation on municipal spending. N.J.S.A. 40:48-17.1 and 17.3 authorize municipalities to appropriate funds derived from unappropriated surplus revenues or unappropriated anticipated receipts to the boards of education of the local school districts serving them. This raises the question of whether local government expenditures for school district costs are to be included within the limitation on local government spending.

Within the past seventeen months the Legislature, with the approval of the Governor, has enacted laws limiting state government spending, N.J.S.A. 52:9H-5 *et seq.*, (P.L. 1976, c. 67, approved August 18, 1976), municipal and county spending, N.J.S.A. 40A:4-45.1 *et seq.*, (P.L. 1976, c. 68, approved August 18, 1976), and school district spending, N.J.S.A. 18A:7A-25 (P.L. 1975, c. 212, § 25, approved September 30, 1975). Since these statutes were passed as part of an overall legislative plan to limit government spending, the statutes must be considered together in construing the meaning of the provisions therein. See *Giles v. Gassert*, 23 N.J. 22 (1957). It cannot be presumed, moreover, that these statutes were intended to be duplicative. See *State v. Madewell*, 117 N.J. Super. 392 (App. Div. 1971), aff'd 63 N.J. 506 (1973). Since school district costs are subject to a separate statutory spending limitation, N.J.S.A. 18A:17A-25, it is reasonable to assume that the Legislature intended to exclude such costs from a second limitation on spending imposed by N.J.S.A. 40A:4-45.1 *et seq.*, (P.L. 1976, c. 68).

III

Your next inquiry concerning the general schematic framework of the statute raises the question as to how the modifications are to be treated for the purpose of calculating the "cap" or lid figure for final appropriations for municipalities and for tax levies for counties. The purpose of the modifications is to exclude from the limitation on spending amounts raised as a result of increases in valuations due to new construction or improvements, amounts raised through sources other than the local property tax and amounts deemed to be necessary to provide local governments with sufficient flexibility to provide emergency services and to participate in state or federal programs through which they can receive financial aid. Thus, the modifications are to be construed as exclusions from the act both in computing the base figure from the previous year to which the 5% is applied to arrive at the "cap" figure and in deter-

mining the expenses to be included within that amount for the current fiscal year, as demonstrated in the following equations:

Cap appropriation, which is the present year's final appropriation - modifications = 5% (previous year's final appropriation - modifications) + (previous year's final appropriation - modifications)

Cap tax levy, which is the present year's tax levy - modifications = 5% (previous year's tax levy - modifications) + (previous year's tax levy - modifications).

Otherwise, there would be no point of comparison between the two years.

In light of the previous answers, the answer to your question concerning the definition of "final appropriations" as used in Section 3 becomes clear. Please be advised that the term "final appropriations" as used in Section 3 refers to the final line item of appropriations in a municipal budget minus any appropriations for school costs covered within the limitation on spending in N.J.S.A. 18A:7A-25, but including all expenses excluded in subsections 3(a) through (i). As stated previously, the preceding year's costs excluded pursuant to the subsections are then subtracted from the preceding year's final appropriation, the 5% is computed and added to that amount to determine the amount permissible for the new year's final appropriation minus any modifications excluded pursuant to the subsections.

IV

Your next series of questions concerns the interpretation and application of the modifications included in the subsections to sections 3 and 4 of the act. First, you have asked whether the words "general tax rate of the municipality" as used in section 3(a) refer to the municipal tax rate or the aggregate municipal, county and school tax rate. Section 3(a) of the statute excludes from the limitation on municipal spending imposed by the law:

> "The amount of revenue generated by the increase in its valuations based solely on applying the preceding year's general tax rate of the municipality to the assessed value of new construction or improvements . . . :

Similarly, section 4 (a) excludes from the limitation on the county tax levies:

> "The amount of revenue generated by the increase in valuations within the county based solely on applying the preceding year's county tax rate to the apportionment valuation of new construction or improvements within the county and such increase shall be levied in direct proportion to said valuation . . ."

The purpose of these two provisions is to exclude from the limitation on local government spending expenditures equal to amounts generated by the increase in property valuations due to new construction and improvements. Thus, the act restrains local governments from increasing spending where such increases require increased local property tax rates, but does not restrain expenditures of income from these new sources. If the words "general tax rate of the municipality" as used in Section 3(a) were intended to mean the municipal tax rate plus the county tax rate plus the education tax rate, the act would provide a double exclusion for a portion of the amounts

generated from these new sources. Counties would be able to exclude from their limitation the proportion of monies generated by the increase in valuations due to new construction and improvements within the county and attributable to the county tax rate pursuant to section 4(a), and municipalities would be able to exclude from their limitation all monies generated by the increase in valuations due to new construction and improvements attributable to both the county and municipal rate within their territory pursuant to section 3(a). The result would be to permit aggregate spending in excess of the amount generated by the increase in valuations due to new construction and improvements. Since this would be inconsistent with the purposes of the act, it is reasonable to conclude that the Legislature intended municipalities to exclude from their spending ceilings only those amounts generated by increased valuations attributable to the municipal tax rate.

Moreover, this conclusion is reinforced by our opinion that school expenditures are excluded from the local government spending limitation. Since school expenditures are subject to a cap in N.J.S.A. 18A:7A-25 and are not within the limitation on local government spending, it seems reasonable that local governments should not have the advantages of spending for non-school purposes monies generated by increased valuations attributable to the school tax rate free from the limitation on spending. Thus, in construing the provisions consistent with the purposes of the act and the statutory scheme as a whole, it must be concluded that the words "general tax rate of the municipality" as used in section 3(a) refer to the municipal tax rate, or tax rate that raises revenue for municipal expenses.

V

Your next question concerns the interpretation of section 3(b), which excludes from the limitation on municipal spending:

> "Capital expenditures funded by any source other than the local property tax, and programs funded wholly or in part by Federal or State funds, in which the financial share of the municipality is not required to increase the final appropriations by more than 5% . . ."

Specifically, you have asked what types of expenditures may be excluded as "programs funded wholly or in part by Federal or State funds, in which the financial share of the municipality is not required to increase the final appropriations by more than 5% . . . .". This provision was intended to exclude from the spending limitation all expenditures for programs funded either wholly by federal or state funds or partly by local matching funds upon which receipt of federal or state funds is conditioned. Implicit in this provision is an underlying legislative policy to encourage and enable local governments to participate fully in this type of program free of the local government spending restriction. Thus, consistent with this purpose, the words, "in which the financial share of the municipality is not required to increase the final appropriations by more than 5%" appear merely to be a restatement of the overall legislative policy that federal and state aid and required local matching shares shall not be subject to the 5% local government spending limitation. Accordingly, it is our opinion that it was the probable legislative intent in the enactment of this modification to exclude from the local government spending limitation all expenditures of federal and state aid money as well as all local matching expenditures necessary to secure federal or state aid for municipal governments.

VI

Your next series of questions concerns the interpretation of section 3(c) and 4(c), which exclude from the limitation on local government spending certain types of emergency appropriations. Section 3(c) excludes from the limitation on a municipality's final appropriation:

> "... An increase based upon an ordinance declaring an emergency situation according to the definition provided in N.J.S. 40A:4-46 approved by at least two-thirds of the governing body and approved by the Local Finance Board; provided, however, any such emergency authorization shall not exceed 3% of current and utility operating appropriations made in the budget adopted for that year ...."

Similarly, section 4(c) excludes from the limitation on county tax levies:

> "... An increase based upon an ordinance declaring an emergency according to the definition provided in N.J.S. 40A:4-46 approved by at least two-thirds of the board of chosen freeholders of the county and, where pertinent, approved by the county executive ...."

Specifically, you have asked whether section 3(c) may be interpreted in a manner to allow for the declaration of an emergency by a resolution of a municipal governing body and that such a resolution need only be approved by the Director of Local Government Services as chairman of the Local Finance Board. Also, you have asked whether emergency appropriations in excess of 3% of current and utility operating appropriations in a fiscal year must be included in the limitation on municipal spending for the next succeeding fiscal year.

The express terms of these modifications dealing with emergency appropriations by counties and municipalities pose serious problems for the sound implementation of the law. The requirement for the adoption of an ordinance in Section 4(c) rather than a resolution is apparently inapplicable to counties and is in need of legislative revision. In Section 3(c) the requirement for the adoption of an ordinance rather than a resolution declaring an emergency and the requirement of approval by the Local Finance Board will cause serious delays before an emergency appropriation can be approved. Consequently, in the event of a true emergency where time is of the essence, local governments will be seriously hampered in their ability to respond. In addition, where emergency appropriations in any one fiscal year exceed the statutory ceiling of 3% of current and utility operating appropriations for that year, such appropriations must be included within the next fiscal year's spending limit. In the event this forces a municipality to exceed its following year's 5% "cap" limit, the municipality is in effect unable to provide the monetary resources necessary for such an emergency.

Although these conclusions appear to severely limit the ability of local governments to deal with emergency situations under the act, the legislative intent as to the meaning of these provisions must be ascertained from its express terms. *Lane v. Holderman,* 23 N.J. 304 (1957); *State v. Community Distributors, Inc.,* 123 N.J. Super. 589 (Law Div. 1973), aff'd 64 N.J. 479 (1974). This literal construction of the act is further reinforced by the fact that it departs from the existing statutory scheme

for emergency appropriations set forth in N.J.S.A. 40A:4-48, 49. N.J.S.A. 40A:4-48 provides that emergency appropriations not causing the aggregate of such emergency appropriations for that year to exceed 3% of the current and utility operating appropriations can be made if the governing body adopts a resolution by not less than a 2/3 vote of its full membership declaring an emergency. Where such an appropriation will cause the aggregate to exceed 3% of the current and utility operating appropriations for that year, N.J.S.A. 40A:4-49 additionally requires approval of the appropriation by the *Director* of Local Government Services. If the Legislature had intended to allow for the use of a resolution in this instance and to permit approval by the Director of Local Government Services, it could have stated its purpose in unequivocal terms. Consequently, it must be concluded that the departure from the procedure established in Title 40A was purposeful and designed to further restrict local government spending for emergencies.

You are therefore advised that under the express terms of section 3(c), only emergency appropriations passed pursuant to an *ordinance* declaring an emergency situation approved by at least 2/3 of the governing body and the Local Finance *Board* may be excluded from the limitation on municipal spending provided that such emergency appropriations in any one year do not exceed 3% of current and utility operating appropriations for that year. Those emergency appropriations approved in excess of 3% of current and utility operating appropriations for that year must be included within the limitation on municipal spending for the next succeeding fiscal year. You are also advised that since the requirement of an ordinance is clearly inapplicable to a county government under the terms of section 4(c), only emergency appropriations passed pursuant to a resolution declaring an emergency approved by at least 2/3 of the board of chosen freeholders and, where pertinent, approved by the county executive can be excluded from the limitation on county tax levies.

VII

You have also asked whether appropriations for cash deficits generated by utilities and for cash deficits in assessment programs are to be excluded from the limitation on municipal spending. Section 3(d) excludes from the spending limitation all "debt service." Section 3(e) excludes "[a]mounts required for funding a preceding year's deficit." The "debt service" exclusion was apparently intended to avoid jeopardizing the ability of local governments to satisfy bonded indebtedness under the Local Government Cap Law and to preserve their credit ratings. The section 3(e) exclusion apparently was intended by the legislature to exempt from the spending limitation amounts necessary to fund deficits from preceding years created by the failure of local governments to realize anticipated revenues.

When a municipally owned public utility operates at a deficit, the municipality is required by law to appropriate monies to finance that deficit. N.J.S.A. 40A:4-35. This type of expenditure was in all likelihood intended to be excluded under section 3(e) so that appropriations made to cover the preceding year's deficit will not occasion cuts in other governmental services in the following year. Similarly, where there are cash deficits in assessment programs due to the failure to collect special assessment monies, we are informed that municipalities must often appropriate additional funds to cover debt service on improvements that would ordinarily be financed by the special assessments. Since the municipality is in fact financing the previous year's deficit created by its failure to collect all assessments, the appropriation should be excluded from the spending limitation under section 3(e). Moreover, since the appropriation is designed to satisfy debt service, it can also be excluded under section 3(d).

VIII

Your next series of questions concern the interpretation of Sections 3(g) and 4(e) which exclude "[e]xpenditures mandated after the effective date of this act pursuant to State or Federal Law." Specifically, you have asked whether expenditures due to the increase in rates allowed by the Public Utilities Commission or caused by the decontrol of fuel oil prices by the federal government, the increase in Workmen's Compensation Insurance rates, the increase in pensions costs due to higher actuarial projections and the cost of court judgments should be excluded from the limitations on local government spending under these sections.

The purpose of the Local Government Cap Law is to limit increases in local government spending to 5% over the previous year's expenditures, except where specifically authorized, and to restrain increases in local property taxes. The exclusion for "[e]xpenditures mandated after the effective date of this act pursuant to State or Federal law" was intended to exclude expenditures for programs required by newly enacted legislation in order to avoid the harsh result of forcing local governments to cut other services to provide funds for newly created programs not included in previous budgets. It could be argued that increased expenditures for already existing mandated programs due to rate increases permitted or mandated by state or federal administrative agency decisions or otherwise will likewise cause the harsh result of forcing local governments to cut other services in order to provide for the increased expenditure while remaining within the 5% "cap," and that consequently such costs should be excluded since they are caused by "mandated" rate increases permitted after the effective date of the Local Government Cap Law. However, along that same line of reasoning, it is impossible to distinguish between situations where price or rate increases due to administrative agency action cause increased expenses for mandated programs and where ordinary, uncontrolled inflationary prices cause such increases. While both types of increased expenditures will occur after the effective date of the Local Government Cap Law, they are mandated by the preexisting state or federal legislation and are indirect consequences of maintaining the preexisting activity.

Moreover, if inflationary costs of preexisting programs were construed to be excluded, all expenditures for state or federal programs should likewise be excluded because, while the legislation may preexist the Local Government Cap Law, the expense must only occur after its effective date. Under this approach the Local Government Cap Law would limit only the small proportion of expenditures arising out of local initiatives. Since this construction would nullify the significance of the words "after the effective date of this act," an interpretation that gives meaning to all the words in the provision should be preferred. *Board of Education of Hackensack v. Hackensack*, 63 N.J. Super. 560 (App. Div. 1960). Also it cannot be presumed that the Legislature intended to have the exclusion cover such a broad category of expenditures so as to nullify the expressed purpose of the law to limit the spiraling costs of local government and provide property tax relief. Thus, in order to avoid undermining the expressed legislative purpose to limit local government spending, the language of these provisions must be interpreted strictly to exclude only those expenditures for mandatory programs enacted after the effective date of the Cap Law.

While this strict construction may cause local governments serious difficulty in preparing their budgets and may force reductions in existing services to provide for inflationary costs of mandatory programs, these problems must be resolved by further legislative action. Within constitutional limitations, it is the responsibility and exclusive domain of the Legislature to determine the priority to be given the act's conflicting policies of limiting local government spending and providing necessary gov-

ernment services and to authorize any relief deemed appropriate. Indeed, the Legislature apparently anticipated the difficulties the conflicting policies would cause when it declared the act be "experimental" legislation to be reviewed at the end of three years (Section 1), and in recognition of its policy making responsibility, amendatory legislation has already been introduced.*

Based upon this reasoning, it must be concluded that a court judgment requiring local government expenditures will not necessarily be an exception to the Local Government Cap Law. The underlying basis of the judgment must be reviewed to determine whether or not the underlying obligation itself would fall within a modification to the Cap Law, and if it does not, then the mere fact that the obligation has taken the form of a judgment would not serve to exempt the expense from the limitation on government spending. Any other result would enable local governments to circumvent and frustrate the intent of the law by refraining from paying lawful obligations that would otherwise be within the cap limitation until they are reduced to court judgment.

IX

Next you have asked whether the line item appropriation "Deferred Charges to Future Taxation - Unfunded" should be excluded from the spending limitation under sections 3(d) and 4(d), excluding debt service. Capital improvements not financed through notes or bonds are financed by a local government's general revenues through an appropriation in the budget for capital deferred charges under the title "Deferred Charges to Future Taxation - Unfunded." Just as with capital improvements financed through the issuance of notes or bonds, the process for an appropriation for this purpose is initiated by the passing of an ordinance authorizing the issuance of debt for capital purposes. The local government would then have the option of borrowing on a permanent or temporary basis from an outside source or of borrowing against its own reserves.

For the purposes of this act it would be illogical to assume a legislative intent to distinguish between situations where local governments borrow through the issuance of notes and bonds to pay for capital projects and where they borrow against their own reserves to cover such costs. On the contrary, a construction excluding "debt service" in its narrow generally accepted sense but not capital deferred charges would encourage local governments to borrow through notes and bonds, paying high interest rates in order to have capital expenses excluded from their spending limitation. The legislature cannot be presumed to have intended a result contrary to good reason and inconsistent with its essential purpose of limiting governmental spending. See *State v. Provenzano*, 34 N.J. 318, 322 (1961). Moreover, the purpose of the statute should not be frustrated by an unduly narrow interpretation of the phrase, "debt service," within the context of the act. See *Cammarata v. Essex County Park Commission*, 26 N.J. 404 (1958). Accordingly, it is our opinion that the appropriation for capital deferred charges was within the legislative contemplation of the debt service exclusion. See *Dvorkin v. Dover Tp.*, 29 N.J. 303 (1959).

X

Your last question concerns the administration of the Act. Specifically, you have asked whether the Division of Local Government Services has the authority to promulgate a timetable through regulations in order to allow for the referendum process described in Section 3(i) within the budget timetable provided in the Local Budget Law, N.J.S.A. 40A:4-1 *et seq.* For the following reasons, please be advised that the

Local Government Board and the Director of the Division of Local Government Services have the authority to promulgate such regulations.

While the statute does not expressly authorize any state agency to administer and enforce the law, the Director of the Division of Local Government Services supervises the local budget process pursuant to the Local Budget Law, N.J.S.A. 40A:4-1 *et seq.*, assuring that the timetables therein are followed and certifying that the budgets comply with the law, N.J.S.A. 40A:4-78. It is, therefore, implicit in this legislative scheme that the Division of Local Government Services will also be the agency with the responsibility of enforcing the local government spending limitation. See *East Orange v. Bd. of Water Commissioners of East Orange*, 73 N.J. Super. 440, 455 (Law Div. 1962), aff'd 40 N.J. 334 (1963).

The statute also does not expressly authorize any state agency to promulgate regulations interpreting the law or allowing for its practical administration. Nevertheless, under the Administrative Procedure Act, an agency should adopt an administrative rule whenever it makes "any statement of general applicability and continuing effect that implements or interprets law or policy or describes the organization, procedure or practice requirements of any agency," N.J.S.A. 52:14B-2(e). See N.J.S.A. 52:14B-3. Not only is such authority implied as a power necessary for the administration of the act, see *Boller Beverages, Inc. v. Davis*, 38 N.J. 138, 154 (1962), K. C. Davis, 1 *Administrative Law Treatise* § 5.03 (1958), C. O. Sands, 2A *Sutherland Statutory Construction* § 55.04 (4th Ed.); but proper administrative procedure, and perhaps even basic fairness, requires that agency interpretations and procedures should be the subject of agency regulations in order to apprise the public of their obligations under them. *R.H. Macy & Co., Inc. v. Director, Division of Taxation*, 41 N.J. 3, 4 (1963); *Mazza v. Cavicchia*, 15 N.J. 498, 510-11 (1954). Moreover, under N.J.S.A. 40A:4-83, the local government board and the Division Director are authorized to promulgate rules and regulations necessary to administer the provisions of the Local Budget Law, N.J.S.A. 40A:4-1 *et seq.* Since it will now be necessary to provide for the Local Government Cap Law in supervising the local budget process, it follows that the Local Government Board and the Division Director must as well provide for the Local Government Cap Law in the Local Budget Law regulations.

Very truly yours,
WILLIAM F. HYLAND
Attorney General of New Jersey
By: ANDREA KAHN
Deputy Attorney General

* S-1657 was introduced September 16, 1976; S-1810 was introduced December 14, 1976 and A-2405 was introduced December 20, 1976.

March 17, 1977

BOARD OF EXAMINERS OF OPHTHALMIC
DISPENSERS AND OPHTHALMIC TECHNICIANS
Division of Consumer Affairs
1100 Raymond Boulevard
Newark, New Jersey

FORMAL OPINION 1977—No. 4.

Dear Members of the Board:

You have asked for an opinion as to whether the statutory prohibition on the price advertising of ophthalmic goods by ophthalmic dispensers (opticians) and technicians set forth in N.J.S.A. 52:17B-41.17* is constitutional in light of the decision of the United States Supreme Court in *Virginia State Board of Pharmacy, et al. v. Virginia Citizens Consumer Council, Inc., et al.*, 425 U.S. 748 (1976). You are hereby advised that the statutory ban on the advertising of the price of ophthalmic goods by ophthalmic dispensers and technicians is an unconstitutional infringement of the public's First Amendment right to the free flow of commercial information.

In *Virginia State Board* the Court invalidated a Virginia statute which had declared it unprofessional conduct for a licensed pharmacist to advertise the price of prescription drugs. The Virginia statute which prohibited the dissemination of information concerning the cost and availability of prescription drugs was held to be beyond the bounds of permissible state restriction of commercial speech and violative of the First and Fourteenth Amendments to the United States Constitution. The Court noted:

> "*** Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable . . . ." 425 U.S. at 765.

The Court, in addition, stated that the removal of an advertising ban on prescription drugs would have no adverse effect on the state's interest in the professional standards of the pharmacist, since "high professional standards, to a substantial extent, are guaranteed by the close regulation to which pharmacists in Virginia are subject." 425 U.S. at 768.

It is therefore clear that the comparable ban on the advertising of prices of ophthalmic goods by ophthalmic dispensers and technicians is similarly violative of the First Amendment's protection of the free flow of commercial information. The ophthalmic dispenser and technician, like a pharmacist, dispense a standardized product solely on the written prescription of a physician or licensed optometrist. In this regard, ophthalmic frames and finished lenses are products which are similar to prescription drugs. There would be, in our opinion, no justification for the continuing validity of a statutory ban on the price advertising of ophthalmic goods beyond those considered by the Court in *Virginia State Board*. You have therefore advised that the

statutory ban on the advertising of prices of ophthalmic goods under N.J.S.A. 52:17B-41.17 is an unconstitutional infringement of the First and Fourteenth Amendments to the United States Constitution and all enforcement procedures of the Division of Consumer Affairs pertaining to that statute should be terminated.

Very truly yours,
WILLIAM F. HYLAND
Attorney General

By: THEODORE A. WINARD
Assistant Attorney General

* That statute provides in pertinent part:
"It shall be lawful for an ophthalmic dispenser or ophthalmic technician to advertise; *provided*, that no mention shall be made, either directly or indirectly by any means whatsoever, of a discount, any definite or indefinite price or credit terms on corrective ophthalmic lenses, frames, complete prescription or corrective glasses;. . . ."

April 15, 1977

G. THOMAS RITI, *Director*
Division of Public Welfare
3525 Quakerbridge Road
Trenton, New Jersey

FORMAL OPINION 1977—No. 5.

Dear Director Riti:

You have asked whether county and municipal shares of public welfare assistance may be excluded from the limitation on local government spending imposed by the Local Government Cap Law, N.J.S.A. 40A:4-45.1 *et seq.* (P.L. 1976, c. 68, amended by P.L. 1977, c. 10), as "[e]xpenditures mandated after the effective date of [that] act pursuant to State or Federal law." For the following reasons you are advised that while such expenditures may not be excluded as expenditures mandated after the effective date of the Local Government Cap Law pursuant to state or federal law, the financial share of a municipality in a public assistance program may be excluded from the municipal spending limitation as expenditures for "[p]rograms funded wholly or in part by Federal or State funds. . . ." You are also advised, however, that there is no similar authorization for the exclusion of the matching share of a county in a federal or state funded welfare program, and those expenditures must be included in the county spending limitation.

The purpose of the Local Government Cap Law is to limit increases in local government spending to 5% over the previous year's expenditures, except where specifically authorized, and to restrain increases in local property taxes. The exclusions for "[e]xpenditures mandated after the effective date of this act pursuant to State or Federal law" under sections 3(g) and 4(e) of the Act were intended to exclude expen-

ditures for programs required by newly enacted legislation in order to avoid the harsh result of forcing local governments to cut other services to provide funds for newly created programs not included in previous budgets.

While an initial reading of these provisions would seem to justify a construction whereby appropriations for preexisting state and Federal programs made after the effective date of the Local Government Cap Law could be excluded, such a construction has two inherent defects. First, this construction would nullify the significance of the words "after the effective date of this act" since all future appropriations would be after that date, and the same meaning could have been conveyed if these words were excluded. More significantly, such a construction would undermine the expressed legislative purpose to limit local government spending by limiting only the small proportion of expenditures arising out of local initiatives. For these reasons it has been determined that these provisions must be construed strictly to exclude only those expenditures for mandatory programs enacted after the effective date of the Local Government Cap Law. Formal Opinion No. 3—1977, pp. 10-11. It is thus clear that any county or municipal expenditures for public welfare assistance required by laws predating the Local Government Cap Law cannot be excluded from the spending limitation under sections 3(g) and 4(e) of that law.

However, it has also been determined that the exclusion for "programs funded wholly or in part by Federal or State funds" embodied in section 3(b) of the law was intended to exclude from the limitation on municipal spending all local matching expenditures necessary to secure federal or state financial aid for municipal governments. *Id.* at 6-7. Thus, municipal shares of public welfare assistance required for a municipality to be eligible for state or federal aid may be excluded from the municipal spending limitation under section 3(b).

There is, however, no similar legislative authorization to exclude from the county spending limitation county matching shares on which federal aid may be conditioned. Although this appears to be entirely inconsistent with the specific exclusion provided municipal matching shares under section 3(b), an exclusion from the spending limitation must be found in the plain language of the statute. Clearly, this apparent inconsistency is of legislative origin and should be corrected by further recourse to that body. However, pending the enactment of amendatory legislation, there is no authorization provided in the Act to exclude from the county spending limitation those expenditures for matching shares paid by a county as a condition for participation in federally funded public assistance programs.

Very truly yours,
WILLIAM F. HYLAND
Attorney General

By: ANDREA KAHN
Deputy Attorney General

April 28, 1977

MICHAEL KACHORSKY, *Chairman*
Public Health Council
Department of Health
John Fitch Plaza
Trenton, New Jersey 08625

FORMAL OPINION 1977—No. 6.

Dear Mr. Kachorsky:

The Public Health Council has asked for our opinion as to whether it may prohibit, by the exercise of its rule-making authority, the construction of a high containment facility to be used for artificially recombinant DNA research. It has also been asked whether the Public Health Council has the authority to either prohibit in its entirety or regulate the conduct of artificially recombinant DNA research and experimentation. Artificially recombinant DNA research entails removing pieces of DNA material from a particular organism and transplanting them into an entirely different organism. It is widely predicted that such research and experimentation may result in the discovery of effective methods for genetic engineering or the capacity to alter artificially a person's biological or behavioral characteristics.

The Public Health Council in the Department of Health has been given authorization by the Legislature to:

> "establish . . . such reasonable sanitary regulations . . . as may be necessary properly to preserve and improve the public health in this State. The regulations so established shall be called the State Sanitary Code.
>
> "The State Sanitary Code may cover any subject affecting public health, or the preservation and improvement of public health and the prevention of disease in the State of New Jersey . . . ." N.J.S.A. 26:1A-7.

Although there is no express mention of the authority to regulate artificially recombinant DNA research, it is clear that the grant of an express regulatory power to an administrative agency is accompanied by such implicit or incidental power as is necessary to carry out the legislative intent. *In re Promulgation of Rules of Practice,* 132 N.J. Super. 45, 48, 49 (App. Div. 1974). Moreover, the power delegated to an administrative agency should be construed in a manner so as to permit the fullest accomplishment of the underlying legislative purpose. *Cammarata v. Essex County Park Comm.,* 26 N.J. 404, 411 (1958). Thus, the apparent legislative intent behind the delegation of expansive rule-making authority to the Public Health Council was to enable that agency to protect the public from significant risks to its health.

In this instance, it has come to our attention that certain categories of artificially recombinant DNA experimentation may, under certain circumstances, involve a risk to the public health. Therefore, in the event the Public Health Council finds as a matter of its administrative expertise that the material used to construct a high containment biological facility would in and by itself pose a serious threat to the public health, without regard to the nature of the proposed experimentation to be conducted therein, it may promulgate appropriate regulations to prohibit the construction of such a facility. Also, in the event the Public Health Council concludes that the conduct of one or more categories of artificially recombinant DNA research and

experimentation, irrespective of all precautions, would constitute a serious threat to the public health, the Council may under those circumstances promulgate interim or permanent regulations proscribing the conduct of such category of experimentation and research. Finally, in the event the Council cannot, in its judgment, justify a total ban on one or more categories of the conduct of experimentation and research, it may promulgate reasonable interim or permanent regulations designed to regulate those categories of artificially recombinant DNA research and experimentation which, consistent with the statutory objective, pose a serious risk to the public health. Of course, it is clear that in each of these cases it would be incumbent on the Public Health Council under the requirements of the Act to solicit public and scientific comment on each of its proposals at a public hearing (N.J.S.A. 26:1A-7), to develop an adequate supporting record and to fully document the reasoning underlying its regulatory action.

In conclusion, the Public Health Council may, under its broad regulatory authority under the State Sanitary Code, adopt reasonable interim or permanent regulations to prohibit or regulate one or more categories of the conduct of artificially recombinant DNA research and experimentation where it specifically finds as an administrative determination that such prohibition or regulation is reasonably necessary and related to the prevention of a serious risk to the public health.

Very truly yours,
WILLIAM F. HYLAND
Attorney General

By: THEODORE A. WINARD
Assistant Attorney General

April 29, 1977

JOHN J. HORN, *Acting Commissioner*
Department of Labor and Industry
John Fitch Plaza
Trenton, New Jersey 08625

FORMAL OPINION 1977—No. 7.

Dear Commissioner Horn:

You have requested an opinion as to the taxability of the principal, interest income and capital gain profits relating to bonds issued by the New Jersey Economic Development Authority ("EDA") under the Corporation Business Tax Act, N.J.S.A. 54:10A-1 *et seq.*, the Corporation Income Tax Act, N.J.S.A. 54:10E-1 *et seq.*, the Savings Institution Tax Act, N.J.S.A. 54:10D-1 *et seq.*, and the Gross Income Tax Act, N.J.S.A. 54A:1-1 *et seq.* You are hereby advised that the capital gain and interest income derived from these bonds are exempt from being directly taxed under the corporation income tax and gross income tax but that EDA bonds are not exempt

from being reflected in the tax bases of the corporation business tax and the savings institution tax, with the exception of the interest income derived from EDA bonds which is exempt from being reflected in the income tax base under the savings institution tax.

The EDA is a public body corporate and politic established on August 7, 1974 (L. 1974, c. 80) by the New Jersey Economic Development Act, N.J.S.A. 34:1B-1 *et seq.* in, but not of, the Department of Labor and Industry. N.J.S.A. 34:1B-4. It was established to promote and foster the economy of the State,

> ". . . by inducing manufacturing, industrial, commercial and other employment promoting enterprises by making available financial assistance to locate, remain or expand within the State." N.J.S.A. 34:1B-2.

In order to facilitate the authority in financing the various projects undertaken pursuant to the enabling legislation, the EDA was authorized to issue bonds and notes (N.J.S.A. 34:1B-5(p) and 9), which obligations were accorded the following tax exempt status:

> ". . . any bonds and notes issued under the provisions of this act, their transfer and the income therefrom, including any profits made on the sale thereof, shall at all times be free from taxation of every kind by the State except for transfer, inheritance and estate taxes and by any political subdivision of the State; . . . ." N.J.S.A. 34:1B-15.

In determining the tax exempt nature of the bonds issued by the EDA under each of the four tax statutes in the context of N.J.S.A. 34:1B-15, it is necessary to initially analyze the nature and scope of these tax laws. The Corporation Income Tax Act,[1] which became effective June 7, 1973 (L. 1973, c. 170), imposes an annual income tax upon corporations deriving income from sources within New Jersey and not subject to the Corporation Business Tax Act. N.J.S.A. 54:10E-2 and 3. The tax is not a franchise levy and is imposed at a rate of 7¼% upon the entire net income of a corporation allocable to this State. N.J.S.A. 54:10E-5. The term "entire net income" is defined to include net income from all sources, including the gains derived from the employment of capital or labor as well as profit gained through the sale or conversion of capital assets. N.J.S.A. 54:10E-4 (i). It is clear from an analysis of these provisions that the corporation income tax is a direct tax on the allocable share of a corporation's entire net income, which term may be broadly defined to include the interest and capital gain income derived from the bonds issued by State authorities such as the EDA. Accordingly, under the terms of N.J.S.A. 34:1B-15 the interest income and gain derived from the transfer of EDA bonds is not taxable under the Corporation Income Tax Act.

Similarly, the New Jersey Gross Income Tax Act is a direct tax on the gross income of every individual, estate or trust subject thereto at the rate of 2% of taxable income under $20,000 and at the rate of 2.5% of the taxable income in excess of $20,000. N.J.S.A. 54A:2-1. The gross income tax, however, specifically excludes from taxable income the net gains and interest income derived from obligations issued by or on behalf of any State authority and body corporate politic and further exempts obligations which are statutorily free from State or local taxation under any

act of this State. N.J.S.A. 54A:5-1(c) and N.J.S.A. 54A:6-14. Pursuant to these provisions, the interest income and capital gain profits derived from the EDA bonds are exempt from the New Jersey gross income tax.

It is necessary before examing the impact of the exemption provided by N.J.S.A. 34:1B-15 on the corporation business tax and savings institution tax to discuss in some detail the significant provisions of these taxes. The corporation business tax and the savings institution tax differ conceptually from the direct income taxes (*e.g.* corporation income tax and gross income tax) and constitute excise taxes exacted by the State from corporations for the privilege of exercising their franchises within this State. The corporation business tax, which has been delineated as a franchise tax, *Werner Machine Co. v. Director, Division of Taxation,* 17 N.J. 121 (1954). aff'd 350 U.S. 492, 76 S. Ct. 534, 100 L. Ed. 634 (1956), imposes an annual levy upon a corporation ". . . for the privilege of having or exercising its corporate franchise in this State, or for the privilege of doing business, employing or owning capital or property, or maintaining an office, in this State." N.J.S.A. 54:10A-2. The tax is computed by adding together prescribed percentages of a net worth tax base (at the rate of .002 on the first $100,000,000), N.J.S.A. 54:10A-5, and a net income tax base[2] (at the rate of 7½%). Net worth constitutes in essence the stockholders' book equity in the corporation supplemented by certain compulsory adjustments not here relevant. N.J.S.A. 54:10A-4(d); *F.W. Woolworth Co. v. Director, Div. of Taxation,* 45 N.J. 466, 468 (1965). The net worth tax base, as defined by the statute, would thus reflect the principal value of the EDA bonds. *Motor Finance Corp. v. Director, Divison of Taxation,* 129 N.J. Super. 19 (App. Div. 1974), certif. den. 66 N.J. 319 (1974). Net income is defined as:

> ". . . total net income from all sources, . . . and shall include the gain derived from the employment of capital or labor, or from both combined, as well as profit gained through a sale or conversion of capital assets." N.J.S.A. 54:10A-4(k).

This broad definition of entire net income includes the interest income derived from EDA bonds as well as profits resulting from the sale of the EDA bonds.

The savings institution tax (L. 1973, c. 31), is a franchise tax imposed in lieu of any other state franchise tax upon savings institutions for the privilege of doing financial business in this State. N.J.S.A. 54:10D-3. The tax is payable in the year 1970 and each year thereafter at the rate of 5% upon net income of the institution as of the close of the preceding tax year. N.J.S.A. 54:10D-3. Net income under that statute, although broadly defined to include income from all sources as well as gains derived from the sale of capital assets (N.J.S.A. 54:10D-2(d)), specifically excludes interest or dividends derived from obligations issued by the State of New Jersey or its authorities. N.J.S.A. 54:10D-2(d) (1) (b) (i). This provision clearly exempts the interest income from the EDA bonds from being included in the net income tax base of the savings institutions tax. The savings institution tax, however, does not exclude profits derived from the sale of such obligations from being reflected in its tax base.

Thus, having described the significant operative provisions of the corporation business tax and savings institution tax, it must be determined in what manner the exemption established by N.J.S.A. 34:1B-15 affects the taxable status of the EDA bonds with respect to principal, interest income and capital gain income under those taxes. Initially it is important to discuss the proposition established by *Werner*

Machine v. Director, supra, that franchise taxes are not directly imposed upon either property or income. The issue in the *Werner* case involved whether federal bonds owned by the taxpayer, the income from which was specifically exempt from taxation by federal law, could properly be included in the calculation of the taxpayer's net worth tax base under the corporation business tax.[3] The federal exemption provided, in rather broad and comprehensive language, that:

> "Except as otherwise provided by law, all stocks, bonds, Treasury notes and other obligations of the United States, shall be exempt from taxation by or under state or municipal or local authority." 31 U.S.C.A. § 742.

In its decision, the New Jersey Supreme Court opined that the corporation business tax, since it taxed the privilege of corporations doing business in the State, was a franchise tax which "...is a type of excise tax, namely a form of taxation not laid directly upon persons or property." 17 N.J. at 125. The court concluded that the value of the bonds could lawfully be reflected in the net worth tax base notwithstanding the federal exemption:

> "The tax is imposed upon the corporation for the privilege of exercise by the corporation of corporate powers in this State. The measure of the tax is the net worth or present value of the investment in the corporation and the tax is not levied upon the property owned by the corporation, nor is it measured by the nature or source of the securities in which some or all of the assets of the corporation are invested. It may be said that a franchise tax imposed upon a corporation for the privilege of doing business under a corporate charter is based upon the potential of the corporation for doing business under the sanction and protection of the laws of the State. *Cf. Corporations: Theory of Organizational Franchise Taxation, Michigan Franchise Tax,* 48 Mich. L. Rev. 1130, 1132-1133 (1950).
>
> Property taxation and excise taxation have been said to be distinct and easily distinguishable." *Werner Machine Co., supra,* 17 N.J. at 126, 127.

In its decision, the United States Supreme Court agreed that the corporation business tax was not imposed directly on the property held by the corporation,

> "And since this is a tax on the corporate franchise, it is valid despite the inclusion of federal bonds in the determination of net worth. This Court has consistently upheld franchise taxes measured by a *yardstick which include tax-exempt income or property,* even though a part of the economic impact of the tax may be said to bear indirectly upon such income or property." (emphasis added). 350 U.S. at 484.

In conformity with the principle established in *Werner,* the Division of Taxation has consistently included in the tax bases of franchise taxes the principal and income derived from tax exempt obligations issued by State authorities.[4]

In construing a statute, it is to be assumed that the Legislature is familiar with its own enactments and the judicial and administrative interpretations thereof. *Barringer v. Miele,* 6 N.J. 139, 144 (1951). The failure of the Legislature to specifically exempt franchise taxes in its enactment of N.J.S.A. 34:1B-15 is a significant indication of legislative intent. It is persuasive that the Legislature did not intend to qualify the principle enunciated in *Werner Machine* and the administrative implementation of these statutes by the Division of Taxation as it relates to the EDA bonds. Thus, the exemption established by N.J.S.A. 34:1B-15 clearly does not affect the imposition of the tax on the value, income and gain on transfer of EDA bonds under the corporation business tax and on the gain derived from the transfer of EDA bonds under the savings institution tax.

You are, therefore, advised that the following tax treatment is to be accorded the obligations issued by the EDA:

(1) The interest income and gain derived from the transfer of EDA bonds should not be subject to the corporation income tax and the gross income tax.

(2) The interest income derived from EDA bonds should not be included in the net income tax base of the savings institution tax under the specific provisions of that statute.

(3) Pursuant to the principle established in the *Werner Machine* case, the principal of EDA bonds should be reflected in the net worth tax base of the corporation business tax; the interest income and gain derived from the transfer of EDA bonds should be reflected in the net income tax base of the corporation business tax; and the gain derived from the transfer of EDA bonds should be reflected in the net income tax base of the savings institution tax.

Very truly yours,
WILLIAM F. HYLAND
Attorney General of New Jersey
By: HARRY HAUSHALTER
Deputy Attorney General

1. The corporation income tax had its genesis in the *Report of the New Jersey Tax Policy Committee,* Vol. V, pp. 20 to 25, submitted to Governor William T. Cahill on February 23, 1972, which recommended that enactment of a second tier net income tax in order to impose a tax on foreign corporations neither qualified nor doing business within the State in the traditional franchise tax sense, but, nevertheless, deriving income from sources in the State and having adequate due process nexus with New Jersey to give this State jurisdiction to tax.

2. The net worth portion of the tax became effective for the 1946 tax year (L. 1945, c. 162), while the net income portion became effective for the 1959 tax year (L. 1958, c. 63).

3. At the time of the *Werner Machine* case, the net income portion of the corporation business tax had not yet been enacted.

4. It is noteworthy that the relevant language under N.J.S.A. 34:1B-15 provides that the bonds and notes issued under the provisions of the EDA, their transfer and the income therefrom, including any profits made on the sale thereof, shall at all times be free from taxation of every kind by the State except for "transfer, inheritance and estate taxes". This particular exception for inheritance and estate taxes is not found in the earlier enabling provisions of State authorities whose obligations are accorded tax exemption. See *e.g.* N.J. Highway Authority, N.J.S.A. 27:12B-16, L. 1952, c. 16; Delaware River Port Authority, N.J.S.A. 32:3-12, L. 1951, c. 288; N.J. Turnpike Authority, N.J.S.A. 27:23-12, L. 1948, c. 454. It appears that in more recent years the Legislature has been specifically referring to the exception for transfer inheritance and estate taxes when establishing tax exemptions for obligations issued by State authorities. See *e.g.* New Jersey Health Care Facilities Financing Authority, N.J.S.A. 26:2I-16, L. 1972, c. 29; New Jersey Sports and Exposition Authority, N.J.S.A. 5:10-18, L. 1971, c. 137. This exception

for inheritance and estate taxes was enacted undoubtedly to clear up an ambiguity as to the tax treatment of State authority bonds under New Jersey death taxes, which taxes are by their very nature distinguishable from corporate franchise taxes.

April 29, 1977

ROBERT E. MULCAHY, III
Commissioner
Department of Corrections
P.O. Box 7387
Whittlesey Road
Trenton, New Jersey 08625

FORMAL OPINION 1977—No. 8.

Dear Commissioner Mulcahy:

You have inquired as to the proper method for the calculation of the actual parole eligibility dates and the minimum-maximum expiration dates for those State Prison inmates who subsequently receive an additional minimum-maximum term, concurrent in part with, and consecutive in part to, the commitment then being served by the inmate. You have also requested advice with respect to the manner in which commutation credit, N.J.S.A. 30:4-140, work and minimum security credits, N.J.S.A. 30:4-92, and the county jail custodial credit, *R.*3:21-8, are to be incorporated therein. Finally, you have questioned whether the additional fixed minimum-maximum term may be lawfully aggregated with life sentences or indeterminate sentences.

On April 1, 1959, then Attorney General Furman concluded that minimum-maximum sentences, which are imposed at different times by different courts and are concurrent in part and consecutive in part, may be aggregated pursuant to the authority contained in L.1956, c.102, §2, p. 476 (N.J.S.A. 30:4-123.10), with the consent of the inmate and the permission of the State Parole Board, *Memorandum Opinion 1959-P-4.* The Attorney General declared that the aggregated term commences as of the date of imposition of the first sentence, and that it is determined by adding to both the minimum and maximum terms of the second commitment order the amount of time which has elapsed between the sentencing dates. This computation principle does not, however, apply to aggregation of minimum terms where the expiration date of the recently imposed minimum term occurs prior to the expiration date of the previously-imposed minimum term. In such cases, the minimum sentence decreed in the first judgment of conviction remains controlling in the calculation of the aggregated minimum term.*

The sound reasoning of the opinion concerning the aggregation of sentences which are concurrent in part and consecutive in part also pertains to the method for the computation of county jail custodial credits, *R.*3:21-8, county jail work credits, N.J.S.A. 30:8-28.1, and the work and minimum security credits provided for in N.J.S.A. 30:4-92. Sentences which are in character both concurrent and consecutive

in relation to each other should be treated as a unified, single term of incarceration, without regard to the component parts thereof, once the inmate and the State Parole Board have acceded to aggregation. Accordingly, all remission credits earned or allowed on the service of the first sentence prior to the imposition of the second term should be applied in diminution of the new aggregated term of imprisonment.

Of course, an unwarranted duplication in the provision of otherwise allowable credits must be avoided upon aggregation. Where an inmate, who is serving a state prison commitment, is transferred to the temporary custody of county officials for detention in a county jail facility pending the trial on and the disposition of other criminal charges, the potential for credit replication exists. In this circumstance, the inmate is not entitled, upon conviction of and sentence for the new charges, to:

(1) county jail custodial credits for the period of pretrial, presentence confinement in the county facility, since this would duplicate credit for time served on the state prison commitment during confinement in the county facility, Cf. *State v. Council,* 137 N.J. Super. 306, 308-309 (App. Div. 1975); *State v. Brandfon,* 38 N.J. Super. 412 (Cty. Ct. 1955) aff'd o.b. 40 N.J. Super 328 (App. Div. 1956);

(2) a separate commutation credit allowance apart from the basic credit granted on the total aggregate term, for the period of county detention since otherwise there would be a duplication of the commutation credit allowance for the same period of incarceration, Cf. *Lipschitz v. State,* 43 N.J. Super. 522, 526-527 (App. Div. 1957).

In addition, work or minimum security credits should not be allowed where remission is not earned in accordance with the provisions of N.J.S.A. 30:4-92 or N.J.S.A. 30:8-28.1; *Zink v. Lear,* 28 N.J. Super. 515, 520 (App. Div. 1954).

Finally, it is clear that aggregation is permissible only where the respective sentences for which aggregation is sought bear both minimum and maximum terms. Any minimum-maximum sentence, to be served following a discharge upon a life sentence, may not be aggregated with a life sentence under the provisions of N.J.S.A. 30:4-123.10. Inmates serving indeterminate rehabilitative sentences, which are imposed upon juvenile delinquents, N.J.S.A. 2A:4-61h., defendants who fall within the purview of the Sex Offender Act, N.J.S.A. 2A:164-6b., and youthful offenders, N.J.S.A. 30:4-148, 155, *State v. Chambers,* 63 N.J. 287 (1973), are also barred from applying for aggregation of such terms with a minimum-maximum commitments.

Therefore, you are advised that:

(1) the minimum and maximum limits of an aggregated sentence, where the base terms are concurrent in part and consecutive in part, are determined by adding to both the minimum and maximum terms of the second or subsequent commitment order the amount of time which has elapsed between the respective dates of sentence, subject to the exception noted above in the computation of aggregated minimum terms;

(2) the actual parole eligibility date is to be calculated pursuant to the provisions of N.J.S.A. 30:4-123.10 or N.J.S.A. 30:4-123.12, whichever is applicable, on the basis of the total aggregated minimum or maximum term;

(3) commutation credits are to allowed against the total length of the aggregated minimum and maximum terms of incarceration or the parole eligibility base term, in accordance with the schedule set forth in N.J.S.A. 30:4-140;

(4) all county jail, work and minimum security credits provided or earned

in remission of either commitment order are to be attributed against the total aggregated term of incarceration and the parole eligibility base terms; (5) minimum-maximum sentences, which are concurrent in part with and consecutive in part to life sentences or indeterminate commitments, should not be aggregated with those sentences.

Very sincerely yours,
WILLIAM F. HYLAND
Attorney General of New Jersey

By: LEONARD A. PEDUTO, JR.,
Deputy Attorney General

* A hypothetical will illustrate the proper method for the aggregation of such sentences. It is assumed for purposes of clarity in the examples that the inmate has not been granted parole and does not receive county jail, commutation, work or minimum security credits in remission of his sentences.

An inmate receives a five (5) to seven (7) year term in Bergen County on March 1, 1975. The maximum term of that sentence would not expire until March 1, 1982. After serving two years of the sentence in confinement, the inmate receives an additional sentence in Essex County of eight (8) to ten (10) years on March 1, 1977. The court does not specify that the commitment is to be served consecutively to the first sentence. Consequently, the term is assumed to be concurrent since a sentence commences upon date of imposition thereof. *In re Sabongy*, 18 N.J. Super. 334, 346 (Cty. Ct. 1952). Execution of the second order of commitment commences as of March 1, 1977, and would not terminate until March 1, 1987. Upon exercise of the right to aggregation the inmate is deemed to be serving a total minimum term of ten years duration and a total maximum term of twelve years duration. This aggregated term is the product of: (1) the minimum term (8 years) and the maximum term (10) years, as imposed in Essex County on March 1, 1977, and (2) the amount of time which has elapsed between the respective dates of sentencing. Accordingly, the curtailment of the inmate's liberty is initiated on March 1, 1975, the date of imposition of the first sentence, and is concluded on March 1, 1987, the expiration date of the second sentence. The service of two sentences will be concurrent in part (March 1, 1977 to March 1, 1982) and consecutive in part (after March 1, 1982).

If, however, the inmate had received a two (2) to ten (10) year sentence in Essex County on March 1, 1977, the former minimum term, imposed in Bergen County of March 1, 1975, would control in the event of aggregation. The aggregated maximum term would not be affected. Under that circumstance, the inmate is deemed to be serving a total minimum term of confinement of five (5) years duration, which commences on March 1, 1975, and a total maximum term of twelve (12) years duration, which expires on March 1, 1987.

Furthermore, commutation time for good behavior as provided in N.J.S.A. 30:4-140 should be calculated on the period which is the aggregate maximum of the combined maxima of the sentences described, assuming the inmate consents to the aggregation, *Memorandum Opinion 1959-P-4*. Thus, under this hypothetical the inmate would receive the good deportment credit allowance for a minimum sentence of 10 years (966 days) or a minimum sentence of five years (444 days), and for a maximum sentence of 12 years (1236 days), see *Attorney General Formal Opinion No. 16—1976*.

May 5, 1977

GEORGE W. LEE
Acting Secretary of State
Department of State
State House
Trenton, New Jersey 08625

FORMAL OPINION 1977—No. 9.

Dear Mr. Secretary:

You have asked whether a political party committee, a subcommittee thereof or a member thereof may, prior to a primary election, endorse a candidate for party nomination.

The relevant statute is N.J.S.A. 19:34-52 which reads as follows:

> "No state, county or municipal committee of any political party shall prior to any primary election indorse [*sic*] the candidacy of any candidate for a party nomination or position."*

It should be noted at the outset, that, of late, there has been much confusion surrounding the applicability of the aforementioned statute. Pursuant to chapter 67 of the Laws of 1975, the provisions of N.J.S.A. 19:34-52 were suspended from the effective date of chapter 67, *i.e.*, April 10, 1975, until February 1, 1977. Prior to the expiration of chapter 67, Assembly Bill No. 2435 was introduced to amend N.J.S.A. 19:34-52 to permit endorsements according to specified procedures. Assembly Bill No. 2435 would have an effective date retroactive to February 1, 1977. While the bill has passed both the General Assembly and the Senate, it has not yet been signed by the Governor. Thus, at present, N.J.S.A. 19:34-52 is in full force and effect.

Pursuant to Title 19 of the Revised Statutes, the selection of candidates for office is to be accomplished by the primary vote, not by party committee. *Rogers v. State Committee of Republican Party*, 96 N.J. Super. 265 (Law Div. 1967). Accordingly, N.J.S.A. 19:34-52 clearly prohibits pre-primary endorsements of candidates by state, county or municipal committees of any political party (as defined in N.J.S.A. 19:1-1). The Legislature, by restricting the pre-primary activities of party committees, "safeguard[ed] the right of individual voter participation in choice of party candidates." *Cavanagh v. Morris County Democratic Committee*, 121 N.J. Super. 430, 438 (Ch. Div. 1972).

Beyond the question of an endorsement by a state, county or municipal committee itself, the court in *Cavanagh* was faced with the problem of an endorsement given by committee, *viz.*, a "Candidate Screening Committee," established by the Morris County Democratic Committee. The court held that N.J.S.A. 19:34-52 was similarly applicable to said Candidate Screening Committee stating:

> "The Morris County Democratic Committee does not have the authority to create a committee independent from itself. N.J.S.A. 19:5-3, which provides for the organization of county committees, gives 'Such committee ...power to adopt a constitution and by-laws for *its* proper government.' (Emphasis added.) Any special committee established by defendant must be considered a part of the Democratic Committee. Since the screening

committee is an arm of the County Committee, it would completely circumvent the legislative prohibition in N.J.S.A. 19:34-52 to say that the statute only applied to the parent committee but not to a 'committee thereof'. If defendant's contention were true, then any state, county or municipal political committee could evade any regulatory provision it wished by establishing a subcommittee. For example, if a county committee desired to provide financial support for a primary candidate, an act strictly prohibited by N.J.S.A. 19:34-33, it could do so by creating a finance committee and avow its independence. A decision in compliance with defendant's position would render many electoral regulating provisions meaningless." *Cavanagh, supra,* at 435.

The court proceeded to compare the composition of the Candidate Screening Committee with the County Committee and noted that the former was the *"alter ego"* of the latter. The court further noted that the purpose of the Candidate Screening Committee was to endorse candidates prior to the primary election:

"The County Committee has an obvious interest in which persons receive the nomination of the county party. To think otherwise would be naive. To effectuate this interest a screening committee was established with the purpose of endorsing candidates prior to the primary election. The language of N.J.S.A. 19:34-52 clearly prohibits such activity. This statute cannot be given any other meaning." *Cavanagh, supra,* at 436, 437.

Thus, organizations similar to the Candidate Screening Committee in *Cavanagh* are prohibited, under N.J.S.A. 19:34-52, from endorsing candidates prior to the primary election.

Individual members of a party committee are not subject to a similar prohibition on pre-primary endorsements—the emphasis on members *qua* members being on the individual right of free expression under the First Amendment to the Constitution of the United States. Where such committee members consort to individually *and* collectively endorse a candidate, it seems clear, however, that the *alter ego* doctrine of the *Cavanagh* opinion would prohibit such activity.

Therefore, you are advised that political party committees or subcommittees thereof are prohibited from endorsing candidates prior to the primary election but that an individual member of a party committee is free to express individually his or her own preference.

Very truly yours,
WILLIAM F. HYLAND
Attorney General of New Jersey
By: GREGORY E. NAGY
Deputy Attorney General

* The remedy for a violation of the prohibition against endorsements by party committees enunciated in N.J.S.A. 19:34-52 is a matter of civil rather than the criminal law. Other sections of the act from which N.J.S.A. 19:34-52 derives—chapter 187 of the Laws of 1930—specifically carry misdemeanor penalties while N.J.S.A. 19:34-52 does not.

May 11, 1977

PROSECUTOR JOSEPH P. LORDI
President, New Jersey County Prosecutors Association
Essex County Courts Building
Newark, N.J. 07102

FORMAL OPINION 1977—No. 10.

Dear Prosecutor Lordi:

In accordance with the requests of Prosecutor Judson Hamlin and Prosecutor Burrell Ives Humphreys, you have asked advice as to whether the residency requirements of *N.J.S.A.* 40A:9-1 and *N.J.S.A.* 11:22-7 apply to assistant prosecutors and county investigators. This inquiry was prompted by the decision in *Skolski v. Woodcock et al.*, 149 *N.J. Super.* 340 (App. Div. decided April 11, 1977), which requires county detectives to reside in the county of their employ.

In *Skolski* the Bergen County Prosecutor, Joseph Woodcock, appealed a law Division judgment declaring that a county detective was not required to reside within the county as a condition of continued employment and enjoining his termination. Skolski instituted the action by complaint in lieu of prerogative writ, contending that the residency requirements of *N.J.S.A.* 40A:9-1[1] were inapplicable to county detectives or, in the alternative, were unconstitutional. Prosecutor Woodcock filed a complaint in lieu of prerogative writ seeking a declaratory judgment that *N.J.S.A.* 40A:9-1 was constitutional and applicable to the office of county detective, mandating the immediate termination of Skolski. Subsequently, Prosecutor Woodcock amended his complaint to seek a declaration that *N.J.S.A.* 11:22-7[2], which establishes residency requirements for employment in the classified civil service, was also applicable to the office of county detective, was constitutional and provided additional cause for Skolski's immediate termination.

The Appellate Division in *Skolski* rested its judgment solely on its interpretation of *N.J.S.A.* 11:22-7, which it held "requires residency within the county not only as a condition for eligibility for appointment to the office of county detective but also as a condition for continued employment in that office." 149 *N.J. Super.* at 346. In view of this conclusion, the Appellate Division found it unnecessary to consider the application and constitutionality of *N.J.S.A.* 40A:9-1. (*Id.*).

At the outset it should be noted that *N.J.S.A.* 11:22-7 applies only to classified civil service employees, and thus does not govern the two positions of assistant prosecutor and county investigator, which are in the unclassified service or at the pleasure of the prosecutor, respectively. *N.J.S.A.* 2A:157-10 and 2A:158-15; see *Rolleri v. Lordi,* 146 *N.J. Super.* 297 (App. Div. 1977). Consequently, these two positions fall outside the holding in *Skolski.*

The issue left unresolved in *Skolski* is whether *N.J.S.A.* 40A:9-1 applies to the prosecutor and his staff. It may be questioned whether the prosecutor and his staff fall into the category of county "office," as that term is employed in *N.J.S.A.* 40A:9-1. See *In re Application of Daggett for Appointment of a County Investigator and Incurring of other Expenses,* Docket No. L-11885-74 (Law Div. decided May 23, 1975), at pp. 3-5 (hereinafter *In re Daggett*). In this respect there is a distinct difference in wording between *N.J.S.A.* 11:22-7, where the statute applies to all positions and employments in the classified service, where the service is to be rendered in a par-

ticular county...and payment therefore is made from the funds of such county," and *N.J.S.A.* 40A:9-1, which applies to the more limited class of "every person holding *an office*, the authority and duties of which relate to *a county only.*" (emphasis added). The Chancery Division in *Skolski* held that *N.J.S.A.* 40A:9-1 did not apply to county detectives because the authority and duties of that office do not "relate to a county only." This holding was reiterated by the Appellate Division in *Skolski*, 149 *N.J. Super.* at 343, without comment but with authoritative reference to *Dunne v. Fireman's Fund Am. Ins. Co.*, 69 *N.J.* 244, 250-252 (1976); *Cashen v. Spann*, 66 *N.J.* 541, 552 (1975), cert. den. 423 *U.S.* 829 (1974); *cf. Cooper v. Imbriani*, 63 *N.J.* 535 n. 1 (1973).

The *Skolski* reference is clearly correct because the authority and duties of the prosecutor and the prosecutor's staff do not relate "to a county only." Rather, the prosecutors, assistant prosecutors and investigative staff occupy a hybrid status. *Dunne v. Fireman's Fund Am. Ins. Co.*, *supra* at 248. They may be characterized as county officers for some purposes such as the payment of salary, but as State officers for other purposes such as the enforcement of the criminal laws of the State. In this connection, *R.* 3:7-3(a) directs that an indictment allege a crime as "against the peace of this State, the government and dignity of the same." When a County Prosecutor and his staff pursue a criminal prosecution or investigation, they act as agents of the State rather than of the county only. *In re Dagget, supra.* Indeed, in many instances the prosecutor and his staff will be routinely engaged in multi-county investigations, with indictments being brought and trials held as a result of criminal acts in more than one county.[3] *Cf. State v. Seaman*, 114 *N.J. Super.* 19 (App. Div. 1971), certif. den. 58 *N.J.* 594 (1971), *cert.* den. 404 *U.S.* 1015 (1972). Thus, while the Prosecutor's Office exists primarily for the benefit of the local residents of the county, its function is not exclusive but is for the good of the entire State. *Cf. Godfrey v. McGann*, 37 *N.J.* 28, 35 (1962).

Moreover, public policy dictates that assistant prosecutors and investigators not be subject to residency limitations. The objective is to secure the services of the most highly qualified people to enforce the criminal laws of the State, a goal which is clearly inhibited if restricted by artificial geographical boundaries. The policy basis is especially evident in the more sparsely populated counties.

On this score, with specific reference to investigators, "undercover agents are commonly utilized to detect and eradicate crime, and in a small county it might be impractical or impossible to locate and hire qualified individuals for that purpose. Also, from a more practical standpoint, it might be extremely difficult to hire a local resident for this purpose who is not well known to the surrounding community. An undercover agent who is known by the general populace would find it impossible to properly perform his most difficult task." *In re Daggett, supra* at 5. While it is now required by *Skolski* that county detectives reside within the county of their employ, there is a rational basis for distinguishing between detectives and investigators. The clear legislative purpose and plan in providing for investigators was to "[afford] to the county prosecutor and confidential investigatory staff serving at his pleasure and removable at his will notwithstanding the terms of any earlier tenure enactments." *Brennan v. Byrne, supra* at 336. Despite the identity of duties and responsibilities among detectives and investigators, the two positions are not "fungible." Rather, it is clear that the Legislature intended to vest in the prosecutor a great deal of latitude and discretion in the selection of his investigative staff, with the tenured position of county detective balanced by investigators serving at his pleasure in whom, as was aptly put in the statement attached to the original bill creating the position (which became L. 1931,c. 164), "he has that degree of confidence resulting from personal intimate knowledge." *Rolleri v. Lordi, supra* at 306.

For the above reasons, then, assistant prosecutors[4] and county investigators are not subject to the mandatory residency requirements of *N.J.S.A.* 40A:9-1 because they are not exclusively "county" officers and since their duties clearly do not relate "to a county only...." Moreover, these officers are not in the classified service and thus not subject to the residency requirements for classified employees set forth in *N.J.S.A.* 11:22-7. Accordingly it is our conclusion that assistant prosecutors and county investigators need not be residents of the county in which they are employed.

Very truly yours,

WILLIAM F. HYLAND
Attorney General of New Jersey

By: Robert J. Del Tufo
First Assistant Attorney General

1. 40A:9-1. **Residence of Officers**

Except in the case of counsel, attorney, engineer, health officer, auditor, comptroller, appointed tax collector, elected assessors who have received tenure under P.L. 1967, c. 44 §7 (c. 51:1-35:31) appointed tax assessor, or members of boards of assessors or as otherwise provided by law, every person holding an office, the authority and duties of which relate to a county only, or to a municipality only, shall reside within said county or municipality as the case may be.

Any person holding or attempting to hold any such office in a county or municipality in violation hereof, may be ousted in a proceeding in lieu of prerogative writ.

2. 11:22-7. **Applicants limited to residents of county, municipality and school districts**

For all positions and employments in the classified service, where the service is to be rendered in a particular county, municipality or school district, or any judicial district of such county, and payment thereof is made from the funds of such county, municipality or school district, or judicial district of the county, the commission shall limit the eligibility of applicants to the qualified residents of the county, municipality or school district, or judicial district of such county, in which the service is to rendered and from the funds of which the employee is to be paid.

3. It is to be noted in this respect that the New Jersey County Prosecutors Association and the Division of Criminal Justice in the Attorney General's Office have established an Organized Crime Policy Board. The Board constitutes an administrative mechanism to insure the pooling of existing law enforcement resources in a concerted action by the State's prosecutorial community to combat and attack syndicated criminal activity.

4. Parenthetically, it is also most certainly arguable that assistant prosecutors fall within the category excepted by N.J.S.A. 40A:9-1, since the intent of the statute was clearly to exclude the whole professional class of counsel and attorney. Assistant prosecutors are attorneys representing the State and the county.

May 18, 1977

JOHN A. WADDINGTON, *Director*
Division of Motor Vehicles
25 South Montgomery Street
Trenton, New Jersey 08625

FORMAL OPINION 1977—No. 11.

Dear Director Waddington;

You have inquired as to the impact of L. 1977, c. 29, §6(a) upon motorists whose driving privileges have been suspended for violations of N.J.S.A. 39:4-50(a), driving while under the influence of intoxicants; N.J.S.A. 39:4-50(b), driving while impaired; and N.J.S.A. 39:4-50.2 *et seq.*, failing to undergo a breath alcohol determination test.[1] In particular, you ask for our advice with respect to the operation of the statute on those licensees subject to multiple suspensions imposed because of a first or subsequent intoxicated or impaired driving conviction in combination with a consecutive administrative suspension for refusing a breath test. You are also concerned with the application of §6(a) to those licensees with contemporaneous convictions of driving either while under the influence or while impaired, as well as with its effect upon licensees subject to two convictions imposed at the same time.

The primary focus of your inquiry, then, is the effect of §6(a) on multiply-suspended licensees and, specifically, whether they qualify for restoration upon service of a single six-month suspension. L. 1977, c. 29, §6(a) states that:

> "Any person who, prior to the effective date of this amendatory and supplementary act, had been convicted of an alcohol-related offense, may, after service of at least six months of *a driver license suspension imposed by reason of such conviction* apply to the Director of the Divison of Motor Vehicles for restoration of his license to operate a motor vehicle which application may be granted upon the condition that the person agrees to pursue and satisfy the requirements of a program of alcohol education or rehabilitation approved by the director." (Emphasis added).

The language of §6(a) clearly provides that, with respect to the conviction of an alcohol-related offense under the previous law, the service of a minimum suspension of at least six months' duration is required before a motorist may qualify for restoration of driving privileges. Following service of that minimum period of suspension, the individual may then apply to the Director for restoration and the Director may grant the application, if the motorist agrees to undertake and complete an approved alcohol education or rehabilitation program. As the language plainly indicates, the six-month minimum suspension requirement relates to *a* driver license suspension imposed by reason of a conviction of *an* alcohol-related offense. Nothing in the wording of the provision suggests that the minimum suspension period is designed to satisfy all outstanding multiple suspensions imposed by virtue of a series of previous alcohol-related offenses or convictions.

This construction of the terms of §6(a) is fully supported by the legislative history of the act. In this respect, it is to be noted that L. 1977, c. 29 was premised to a great degree upon the *Report of the New Jersey Motor Vehicle Study Commission* (September 1975) (hereinafter *"MV Report"*).[2] Those portions of the *MV Report*

pertaining to §6(a) clearly limited the applicability of the six-month minimum to a single offense. In this respect the Study Commission stated:

> "On the effective date of a new statute, any persons who have served at least six months of *a license suspension by reason of an alcohol-related offense*, should be eligible for restoration providing they agree to participate in an appropriate education or rehabilitation program, and providing they have made satisfactory progress in or successfully completed the program . . ." *MV Report* at 153. (Emphasis added). See also *MV Report* at 157.

There is nothing in the *MV Report* to substantiate an assumption that a multiply-suspended licensee would qualify for restoration upon service of a single six-month suspension. In fact, the Study Commission does not appear to have commented upon or considered the multiply-suspended driver at all. See *MV Report* at 153, 157; "Minutes, Motor Vehicle Study Commission" (May 23, 1975) at 5 (hereinafter "Minutes").

The Study Commission stated that individuals currently under license suspension be accorded some relief that would place them in a similar position as those who are convicted under the modified statute. *MV Report* at 151; "Minutes" at 2. To allow for restoration after service of a minimum of six months for a series of multiple suspensions would, on the contrary, place licensees convicted under pre-existing law in a more advantageous position than those subject to multiple suspension under the terms of the new law. See L. 1977, c. 29, §1. A statute should be construed in conformity with its underlying purposes and not so as to reach an inconsistent or incongruous result. *Federal Paper Board Co., Inc. v. Bogota*, 129 N.J. Super 308, 313 (App. Div. 1974), certif. den. 66 N.J. 317 (1974). It should not be assumed to have been the legislative purpose to allow for a single minimum six-month suspension in these circumstances. You are therefore advised that under the unequivocal terms of §6(a) an individual subject to multiple suspensions would qualify for restoration of driving privileges under the Act only after having served a minimum of six months of suspension independently attributable to each conviction of an alcohol-related offense.[3]

Very truly yours,
WILLIAM F. HYLAND
Attorney General of New Jersey

By: WILLIAM J. STOHLER
Deputy Attorney General

1. L. 1977, c. 29, §1 abrogates the distinction between driving while under the influence of alcohol and driving while ability to operate a motor vehicle is impaired, establishing instead the single offense of driving while under the influence of intoxicating liquor or drugs. See also L. 1977, c. 29, §8. L. 1977, c. 29, §6(a) provides the means for restoration of driving privileges for licensees convicted and subject to suspensions for alcohol-related offenses committed prior to the effective date of the Act.

2. The "Statement" on Senate No. 1423 (1976) which was ultimately enacted as L. 1977, c. 29 provided in part that:

"This bill implements a major recommendation of the Motor Vehicle Study Commission as contained on pages 133-162 ["Drinking and Driving"] of its September 1975 Report...."

The sponsors of the bill were Senators Maressa and Vreeland, both of whom were members of the Motor Vehicle Study Commission. See also "Statement to Senate, No. 1423 (1976)," p. 2, item 9 (May 24, 1976), prepared by the Senate Law, Public Safety and Defense Committee.

3. By its own terms, L. 1977, c. 29, §6(a) has no bearing upon a motorist whose sole ground of suspension is an offense having an applicable suspension period limited to six months. Likewise, it has no bearing upon a motorist subject to a series of suspensions, each of which is based on an offense having an applicable suspension period limited to six months. See, for example, N.J.S.A. 39:4-50(b) (first offense), N.J.S.A. 39:4-50.4, or the two in combination. In each case, the mandated six-month suspension would be completely served before the cited provision could be operative. As a result, these motorists are entitled to restoration without regard to §6(a) after serving the full six-month suspension or the appropriate multiple thereof.

Of course, to be eligible for restoration under §6(a), a motorist must also satisfy all other statutory requirements relevant to his or her situation. See, e.g., N.J.S.A. 39:6-31, N.J.S.A. 39:6-40, N.J.S.A. 39:3-10a.

May, 20, 1977

EDWARD G. HOFGESANG, *Director*
Division of Budget and Accounting
Department of the Treasury
State House
Trenton, New Jersey 08625

FORMAL OPINION 1977—No. 12.

Dear Director Hofgesang:

The adoption of Article VIII, Sec. 1. para. 7, of the State Constitution has precipitated the inquiry as to whether N.J.S.A. 54A:9-25.1 may be given effect consistently with the constitutional provision. Article VIII, Sec. 1, para. 7, approved at the general election held on November 2, 1976 effects a constitutional dedication of the proceeds of the Gross Income Tax:

> "No tax shall be levied on personal incomes of individuals, estates and trusts of this State unless the entire net receipts therefrom shall be received into the treasury, placed in a perpetual fund and be annually appropriated, pursuant to formulas established from time to time by the Legislature, to the several counties, municipalities and school districts of this State exclusively for the purpose of reducing or offsetting property taxes."

N.J.S.A. 54A:9-25.1, enacted as part of the Gross Income Tax Act (N.J.S.A. 54A: 9-1 *et seq.*; L. 1976, c. 47) approved by the Governor on July 8, 1976 provides:

> "There is hereby established within the General Treasury a special fund to be known as the 'Gubernatorial General Elections Fund.' Where a taxpayer has indicated on a return filed pursuant to this act that one dollar of his taxes is to be reserved for such fund, the Treasurer shall credit such fund from the taxes collected under the provisions of this act. The fund shall be available for appropriation pursuant to section 5 of P.L. 1974, c. 26 (C. 19:44A-30), provided however that establishment of the 'Gubernatorial General Elections Fund' shall in no way affect the operation of said section."

The question to be resolved is whether the constitutional provision, which was clearly adopted to regulate the expenditure of the revenue realized under the Gross Income Tax Act, should be regarded as superseding the specific provision set forth within that Act at N.J.S.A. 54A:9-25.1.

The statute and constitutional amendment were initiated at the same session of the Legislature as part of a single comprehensive program of revenue reform. Assembly Concurrent Resolution 140, proposing the amendment to the people, was introduced on the same day (February 19, 1976) as Assembly Bill No. 1513, which ultimately became the Gross Income Tax Act. N.J. Legislative Index, Vol. LXIII, pp. A39, A67. The course of legislative approval of the two measures was substantially contemporaneous. Final passage of the Gross Income Tax Act occurred in the Assembly on July 7 and in the Senate on July 8, and final approval of ACR 140 occurred in the Assembly on June 10 and in the Senate on July 8. *Id.*

It is an established canon of statutory construction that contemporaneous enactments of the Legislature are to be read consistently and harmoniously whenever possible. *Smith v. Hazlet Twp.*, 63 N.J. 523 (1973); *Dept. of Labor and Industry v. Cruz*, 45 N.J. 372 (1965). By a parity of reasoning, the same principle should also apply in the interpretation of a constitutional amendment proposed to the people contemporaneously with a statute in *pari materia.* Moreover, in specific regard to the construction of constitutional provisions, the courts have held that the contemporaneous legislative understanding of constitutional terms susceptible of different meanings is entitled to great weight in establishing the precise definition of those terms. *Lloyd v. Vermeulen*, 22 N.J. 200, 210 (1956); *In re Hudson County*, 106 N.J.L. 62 (E. & A. 1929). The usual situation in which this principle is applied is the case of a statute enacted subsequent to formal adoption of the constitutional provision. The principle would appear even more immediately applicable in the present situation of constitutional and statutory provisions approved contemporaneously by the Legislature and directed to the same subject matter.

In the application of these principles to the question of deduction of a portion of income tax revenue for use in public financing of gubernatorial election activities as set out in N.J.S.A. 54A:9-25.1, several points must be strictly noted and carefully considered. The first is that the constitutional dedication of the proceeds of the Gross Income Tax pertains by its terms only to the "entire net receipts" of the tax. There is manifestly no constitutional impediment to the prior deduction of the costs of collection of the tax in the computation of constitutionally dedicated "entire net receipts." Secondly, the action which, according to the terms of N.J.S.A. 54A:9-25.1, would effect the prior deduction of a portion of gross tax revenue to the Gubernatorial General Elections Fund is a specific election by the taxpayer to "reserve" one dollar of his total tax liability for that use. Finally, in the legislative process of total

revenue reform, the Legislature as a whole evidently regarded the provisions of N.J.S.A. 54A:9-25.1 as entirely consistent with the proposed constitutional amendment.

The specific question to be resolved under applicable principles of law in light of these considerations is whether the taxpayer's election, which is specifically provided for in the body of the tax statute, may be considered, like the prior deduction of collection costs, a permissible deduction from the gross tax revenue in the determination of the "entire net receipts" dedicated by the Art. VIII, Sec. 1, para. 7. In these circumstances, it is sound to conclude that such a deduction is consistent both with the Legislature's expression of law and the popular approval of the constitutional amendment. The taxpayer's election is specifically provided for in the tax statute approved contemporaneously with the constitutional amendment as part of a comprehensive integrated legislative program of tax reform. The meaning of "entire net receipts" constitutionally dedicated to property tax relief is not apparent on its face, and the presumed legislative intent should be discerned from the entire process of legislative tax reform. Since that process provided for a dedication of the "entire net receipts" of the Gross Income Tax and at the same time for a voluntary reservation by the taxpayer of a minimal portion of his tax liability for public financing of gubernatorial elections, it is logical to assume an implicit legislative purpose to allow for this reservation of tax liability as a permissible prior deduction in the computation of constitutionally dedicated "entire net receipts." For these reasons, you are advised that the transfer and expenditure of amounts reserved by taxpayers in the Gubernatorial General Elections Fund under N.J.S.A. 54A:9-25.1 is consistent with Art. VIII, Sec. 1, para. 7 of the State Constitution.

Very truly yours,
WILLIAM F. HYLAND
Attorney General

By: PETER D. PIZZUTO
Deputy Attorney General

June 8, 1977

JOHN A. WADDINGTON, *Director*
Division of Motor Vehicles
25 South Montgomery Street
Trenton, New Jersey 08625

FORMAL OPINION 1977—No. 13.

Dear Director Waddington:

The Division of Motor Vehicles has requested an opinion as to those circumstances in which a one-year revocation of driving privileges for refusing to submit to a breath chemical test shall be imposed under L. 1977, c. 29. Specifically, the inquiry is whether a one-year revocation shall be imposed only in the event of a previous

refusal to submit to a breath chemical test, or whether a one-year revocation invariably shall be imposed in connection with a subsequent offense of driving while intoxicated with or without regard to a prior breath refusal.

L. 1977, c. 29, §4(b) provides in pertinent part as follows:

> "Any revocation of the right to operate a motor vehicle over the highways of this State for refusing to submit to a chemical test shall be for 90 days unless the refusal was in connection with a subsequent offense of this section, in which case, the revocation period shall be for 1 year...."

An apparent inconsistency and ambiguity in the cited provision is occasioned by the use of the phrases "of this section" and "in connection with a subsequent offense." The term "section" appears to refer to §4 of L. 1977, c. 29, which pertains solely to breath refusal proceedings. The implication therefrom is that the one-year period of revocation is to be imposed only in instances where a motorist has been previously adjudged to have refused a breath chemical test. On the other hand, the statute provides that the refusal must be "*in connection with* a subsequent offense," which suggests that the one-year revocation period must be imposed only in instances where the refusal is "in connection with" a subsequent offense of driving while intoxicated.

In the construction of ambiguous statutory language, it is appropriate to consider the legislative history of the enactment in order to ascertain the legislative intent. See *Watt v. Mayor and Council of Borough of Franklin*, 21 N.J. 274, 277-8 (1956); *cf. Murphy v. Zink*, 136 N.J.L. 235 (Sup. Ct. 1947), aff'd o.b. 136 N.J.L. 635 (E. & A. 1948). The "Statement to Senate, No. 1423," page 2, item 8 (May 24, 1976), prepared by the Senate Law, Public Safety and Defense Committee, provided that the bill accomplished a "number of changes in existing law regarding drinking and driving." It summarized the major provisions of existing law and those proposed under the bill in respect to breath refusal matters as follows:

"Issue	Current Statute	[Motor Vehicle Study] Commission Recommendations
	* * *	
"8. Refusal	6 mos. DL suspension	1st - 6 mos.+Alcohol Education, or Rehabilitation Subsq. to Prior DWI Conv. in 15 yrs. - 1 yr.*

* * *

"*If more than 15 yrs. then treated as a first[.]

* * *

From the summary, it can be seen that a one-year revocation for refusing a breath chemical test was intended by the Legislature to be imposed only where the refusal occurs within 15 years of an earlier unrelated conviction of driving while intoxicated. In the event there has been no earlier conviction of driving while intoxicated or the earlier conviction of driving while intoxicated has occurred more than 15 years prior to the refusal, a six-month suspension would be imposed. See also Senate No. 1423, §1 (1976); *Report of the New Jersey Motor Vehicle Study Commission* (September 1975) 153, 161, 164. The six-month suspension for refusing to submit to a breath test was reduced to 90 days in the final version of the bill. However, the legislative purpose to impose a one-year revocation only for a refusal in connection with

a subsequent conviction of driving while intoxicated was not altered during the legislative process.

Therefore, you are advised that the one-year period of revocation for a refusal to take a breath chemical test should be imposed only in those instances where a motorist has previously been convicted of driving while intoxicated and has thereafter refused to undergo a breath chemical test in connection with a subsequent driving while intoxicated conviction.*

Very truly yours,
WILLIAM F. HYLAND
Attorney General of New Jersey
By: WILLIAM J. STOHLER
Deputy Attorney General

* Pursuant to L. 1977, c. 29, §1(a), N.J.S.A. 39:4-50(a), however, a second offense of driving while intoxicated occurring 15 or more years after the first conviction is to be treated as an initial offense. Accordingly, the revocation to be imposed pursuant to §4(b) for a breath refusal in these situations would be of 90-days' duration.

June 22, 1977

EDWARD J. HOWELL, *President*
New Jersey Real Estate Commission
201 East State Street
Trenton, New Jersey 08625

FORMAL OPINION 1977—No. 14.

Dear Commissioner Howell:

The Real Estate Commission has asked for an opinion as to whether a reciprocally licensed non-resident broker may open a real estate broker's office in New Jersey. You are advised that there is no statutory ban to prohibit a reciprocally licensed non-resident broker from opening a New Jersey branch office.

The New Jersey Real Estate License Act, N.J.S.A. 45:15-1 *et seq.* (hereinafter referred to as the License Act), specifically provides for the licensing of non-resident real estate brokers who are licensed in a state with which New Jersey has reciprocity. N.J.S.A. 45:15-20. In order to be authorized to transact the business of a real estate broker in New Jersey, the non-resident broker must be regularly engaged in the real estate business as a vocation, must maintain a definite place of business in the state of his original license, and must have been licensed as a real estate broker or salesperson for at least two years in this other state. *Id.* N.J.S.A. 45:15-12 in addition provides that

"Every real estate broker shall maintain a place of business in this State

except such non-resident brokers who qualify for licenses under the reciprocal provisions of N.J.S.A. 45:15-20 of this article."

Effective July 1, 1961 the New Jersey Real Estate Commission duly promulgated Rule 18, now N.J.A.C. 11:5-1.18, as follows:

"Every resident real estate broker should maintain a bona fide regularly established office for the transaction of business in the State of New Jersey. . . . *This regulation does not apply to . . . holders of the reciprocal licenses who, by statute, are not permitted to maintain offices in this State.*" N.J.A.C. 11:5-1.18(A) (Emphasis added).*

The question to be considered is whether the Real Estate Commission's regulatory bar against the maintenance of an office in New Jersey by a reciprocally licensed non-resident broker is consistent with the Act. There is no express provision either specifically authorizing or prohibiting a reciprocally licensed non-resident broker from opening an office in New Jersey. The provisions of N.J.S.A. 45:15-12 provide that every real estate broker shall maintain a place of business in the State, except such non-resident brokers who qualify for reciprocal licenses. An absolute statutory prohibition does not necessarily follow from the statutory exception created by that provision. Rather, the exception created for the non-resident brokers from the mandatory requirement to maintain a New Jersey office merely suggests that they may but are not required to maintain an office in New Jersey.

There is also nothing in the Act which can reasonably lead one to the conclusion that the Legislature impliedly intended to prohibit a non-resident broker from maintaining a New Jersey office. The general purpose of the Act is to provide for the regulation of the real estate business in the public interest (*Boise Cascade Homes v. Division of N.J. Real Estate Commission,* 121 N.J. Super. 228, 240 (Ch. Div. 1972), and the protection of the public is clearly encouraged by allowing reciprocally licensed brokers to maintain offices in New Jersey under the jurisdiction of the Real Estate Commission. In addition, the Legislature has specifically provided for the protection of the public from abuses by non-resident licensees. An applicant for reciprocity must consent to personal jurisdiction in this state (N.J.S.A. 45:15-21) and shall display a special license distinguishable from licenses issued to residents (N.J.S.A. 45:15-20). Thus, it may be assumed that the Legislature did not, in the absence of an express prohibition, intend to preclude absolutely the operation of an office in New Jersey.

This conclusion is further reinforced by the legislative history of the Act. The Act was adopted in 1921 and did not provide for reciprocity for non-resident brokers. L. 1921, c. 141. However, the Act did provide that a non-resident individual could obtain a resident license by conforming to all the provisions of the Act and by consenting to the jurisdiction of the New Jersey courts. All brokers including non-residents were required to maintain a place of business in New Jersey. In 1930 the Act was amended to authorize real estate brokers of other states to transact business in New Jersey, if those other states granted reciprocity to New Jersey brokers. L. 1930, c. 216. In 1938 the Legislature adopted a requirement that a non-resident broker applicant for reciprocity be licensed as a salesperson or broker for two years or more in the foreign state. L. 1938, c. 227. Reciprocity for real estate salespeople from other states was granted in 1949 (L. 1949, c. 214) and in 1953 reciprocally licensed brokers

were granted an exemption from the mandatory requirement of maintaining a place of business in New Jersey (L. 1953, c. 229; N.J.S.A. 45:15-12). Thus, there has been a continuing pattern of regulation of reciprocally licensed non-resident brokers for many years, and consequently, it cannot be concluded in the absence of an express prohibition that the Legislature intended to prohibit the operation of branch offices in New Jersey. In fact, to infer such prohibition would be inconsistent with the statutory policy in favor of reciprocal licensing.**

In view of our conclusion that there is no statutory prohibition on the maintenance of an office in New Jersey by a reciprocally licensed non-resident broker, a further question arises as to the conditions under which such a broker may maintain the New Jersey office. N.J.S.A. 45:15-20 allows a non-resident broker to do business in New Jersey so long as he maintains a definite place of business in the foreign jurisdiction. Accordingly, a New Jersey office maintained by the non-resident broker must be characterized as a branch office within the meaning of N.J.S.A. 45:15-12. That provision provides that a branch office must be under the direct supervision of a competent licensee. A competent licensee is either a New Jersey licensed broker or a qualified New Jersey salesperson. N.J.A.C. 11:5-1.19. In summary, then, a reciprocally licensed non-resident broker may maintain a New Jersey place of business which must be under the direct supervision of a competent licensee within the meaning of the regulations of the Real Estate Commission.

For the above reasons, you are advised that there is no statutory prohibition on the maintenance of a branch office by a reciprocally licensed non-resident broker in New Jersey. Rule 18 is inconsistent with the Act and accordingly is invalid. A reciprocally licensed non-resident broker may maintain a branch office in New Jersey so long as that office is under the direct, full-time supervision of a competent New Jersey licensee.

Very truly yours,
WILLIAM F. HYLAND
Attorney General of New Jersey

By: MARTIN L. WHEELWRIGHT
Deputy Attorney General

* Sometime in 1963 the commission members established the policy that this regulation would have no effect on those reciprocally licensed brokers maintaining New Jersey offices prior to that 1963 date. This policy of "grandfathering" reciprocally licensed brokers with a New Jersey office was reaffirmed on July 22, 1975. Also on that date the commissioners voted that no reciprocally licensed broker may sponsor a New Jersey license applicant for examination or license; and further, that any New Jersey licensed salespersons presently employed by a reciprocally licensed broker may continue to be so employed until such time as that employment has been terminated.

** It should be noted that nonresident brokers reciprocally licensed in New York and Pennsylvania may maintain offices in those states. In New York it is provided that ". . . such nonresident . . . who maintains a definite place of business in some other state which offers the same privileges to licensed brokers and salesmen of this state shall not be required to maintain a place of business within this state." N.Y. Real Property Law §442-g (McKinney). Pennsylvania law similarly provides that holders of nonresident reciprocal licenses "shall not be required to maintain a definite place of business within this state." Pa. Stat. Ann. tit. 63, § 437(f) (Purdon). There is no absolute statutory prohibition on a nonresident reciprocally licensed broker in New York and Pennsylvania from maintaining an office in those states.

June 22, 1977

JOANNE E. FINLEY, *M.D., M.P.H.*
Commissioner of Health
Health and Agriculture Building
John Fitch Plaza
Trenton, New Jersey 08625

FORMAL OPINION 1977—No. 15.

Dear Dr. Finley:

You have asked for an opinion as to whether the Department of Health may include in its health care facility licensing standards a requirement that nursing homes accept and care for a certain number of indigent persons. It is our opinion that the Department of Health may include this requirement in its health care facility licensing standards.

In 1971, the Legislature enacted the Health Care Facilities Planning Act to assure that health care services ". . . of the highest quality, of demonstrated need, [are] efficiently provided and properly utilized at a reasonable cost . . . ." *Borland v. Bayonne Hospital,* 72 N.J. 152, 158 (1977). It conferred upon the Department of Health the "central, comprehensive responsibility for the development and administration of the State's policy with respect to health planning [*and*] hospital and related health care services . . ." (N.J.S.A. 26:2H-1) and in part authorized the Commissioner of Health to issue certificates of need for new construction (N.J.S.A. 26:2H-9) and licenses to qualified health care facilities, including nursing homes (N.J.S.A. 26:2H-12). The powers conferred under the Act are to be liberally construed to permit the agency to achieve the assigned task. *Cooper River Convalescent Center v. Dougherty,* 133 N.J. Super. 226, 232 (App. Div. 1975).

We are informed that there is an acute shortage of nursing home beds available for indigent persons. At the present time, more than 1000 elderly persons, many of them eligible for Medicaid reimbursement, cannot obtain a nursing home bed. The approval of certificates of need for new construction of nursing homes by the Commissioner of Health has not alleviated this shortage because of a significant time lag between the issuance of a certificate and the actual construction of a nursing home. Consequently, it has been proposed that the Commissioner of Health require as a condition of licensure that existing nursing homes make a certain number of beds available for indigent persons. It has also been suggested that in the development of licensing standards for this purpose the Commissioner should consider the number of beds available for indigents in a particular area or region of the State, the period of time an eligible applicant must wait for placement and the ability of a licensed nursing home to make "a just and reasonable return on equity."

The Health Care Facilities Planning Act provides in pertinent part that:

> "A license shall be issued by the department upon its findings that the premises, equipment, personnel inluding principals and management, finances, *rules and bylaws, and standards of health care services are fit and adequate and there is reasonable assurance the health care facility will be operated in the manner required by this act and rules and regulations thereunder"* N.J.S.A. 26:2H-12(b) (emphasis supplied).

Thus, the Department is authorized to examine the rules and bylaws of a health care facility to ascertain that its rules are "fit and adequate" and that a licensee is in compliance with the Act.

It is instructive to note that since the enactment of the Health Care Facilities Planning Act the Department of Health, and before that, the Department of Institutions and Agencies (see N.J.S.A. 30:11-1 *et seq.*), has required that "[a]ll hospitals shall be expected to provide care for the needy sick . . ." (N.J.A.C. 8:43B-1.11(i)). Thus, for several years the agencies responsible for licensing health care facilities have required as a condition of licensure that certain facilities accept and treat indigents. This consistent administrative construction is entitled to considerable deference. *Service Armament Co. v. Hyland,* 70 N.J. 550, 561 (1976).

Moreover, nursing homes and other health care facilities have been afforded a "special status" under the Act. In order to avoid an unnecessary duplication of health care services, a new nursing home may not operate in an area of the State without first demonstrating to the Commissioner of Health the existence of a need for additional nursing care services. N.J.S.A. 26:2H-7. Nursing homes are therefore insulated by State regulation from the unfettered entry of new nursing homes into a given area or region of the State. It is, therefore, implicit under the Act that a nursing home must fully serve the public interest in its approved area or region. See *Greisman v. Newcomb Hospital,* 40 N.J. 389, 396 (1963) (a hospital which constituted a virtual monopoly in its area was ". . . in no position to claim immunity from public supervision and control because of its allegedly private nature"). Indeed, in connection with hospital rules and bylaws, our Supreme Court has specifically stated that such institutions ". . . must serve the public without discrimination. *Their boards of directors or trustees are managing quasi-public trusts and each has a fiduciary relationship with the public." Doe v. Bridgeton Hospital Ass'n., Inc.,* 71 N.J. 478, 487 (1976) (emphasis supplied). *Cf. Red Lion Broadcasting Co. v. F.C.C.,* 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969) (upholding the Fairness Doctrine of the Federal Communications Commission which in part requires a broadcaster to make air time available at its own expense to individuals who have been the subject of personal attacks on the air); *In re Bd. of Fire Commr's., Fire Dist. No. 3, Piscataway Tp.,* 27 N.J. 192, 201 (1958) (". . . a franchise holder who alone serves an important and essential public need in a limited area cannot pick and choose its customers solely on the basis of pecuniary advantage and refuse to supply those who constitute an integral part of the locality simply because, considered in isolation, their consumption of the product will not produce a profit . . ."); *Penna. R. Co. v. Bd. of Public Utilty Commissioners,* 11 N.J. 43, 50-51 (1952) (obligation of a railroad to provide reasonably adequate facilities for serving the public which "cannot be avoided merely because it will be attended by some pecuniary loss"). In the present situation, therefore, it is clear that having obtained State approval to operate pursuant to the certificate of need and licensure provisions of the Act, a nursing home is obliged to provide "adequate and effective health care" in the public interest. A requirement for the provision of a certain number of beds for indigent persons is in our judgment consistent with this beneficial statutory purpose.

In conclusion, you are advised that the Commissioner of Health may require the rules and by-laws of a nursing home to provide for the care and treatment of a specified number of indigent persons as a condition of licensure. In the exercise of her discretion, the Commissioner may consider the number of beds available in a given area for indigent persons, the time of an individual must wait for placement and the ability of a licensee to make "a just and reasonable return on equity." These and

other licensing standards should be adopted as rules and regulations with the approval of the Health Care Administration Board in accordance with the Administrative Procedure Act.

Very truly yours,
WILLIAM F. HYLAND
Attorney General

By: DOUGLASS L. DERRY
Deputy Attorney General

July 28, 1977

JOANNE E. FINLEY, M.D., M.P.H.
Commissioner of Health
Department of Health
Health and Agriculture Building
Trenton, New Jersey 08625

FORMAL OPINION 1977—No. 16

Dear Dr. Finley:

You have asked for an opinion as to which government entities have authority to inspect food preparation and service areas of county government facilities. In particular, you have inquired about county government jails. Also, you have asked us to discuss the legal remedies available against recalcitrant county government facilities generally, and county government jails in particular, which refuse to close their food preparation areas despite the receipt of an unsatisfactory rating.

Pursuant to the State Department of Health Reorganization Act (N.J.S.A 26:1A-1 *et seq.*), the Public Health Council, a citizen board within the Department of Health, is empowered to establish reasonable sanitary regulations "prescribing standards of cleanliness for public eating rooms and restaurants." N.J.S.A. 26:1A-7(m). In 1972, under this statutory grant, the Public Health Council promulgated Chapter XII of the State Sanitary Code (N.J.A.C. 8:24-1.1 *et seq.*) which specified sanitary requirements for various food establishments, including any "public or non-profit organization or institution serving food." N.J.A.C. 8:24-1.2. In order to enforce the public health laws and the State Sanitary Code, the Commissioner of Health is empowered to "exercise general supervision over all matters relating to sanitation and hygiene throughout the State." N.J.S.A. 26:1A-18. See N.J.S.A. 26:1A-15. To fulfill her responsibilities, the Commissioner is expressly authorized to "enter upon, examine and survey any . . . prison, public or private place of detention. . . ." N.J.S.A. 26:1A-18. See N.J.S.A. 26:1A-16; N.J.A.C. 8:24-9.2(a). Consequently, it is clear that the State Department of Health is authorized to enter and inspect the food preparation and service areas of county jails. Any inspection, however, should be coordinated with the legitimate operational and security requirements of the correctional institution.

Municipal or county health departments or local health agencies may inspect the food service and preparation areas of county facilities and county jails within their territorial jurisdictions. Local boards of health exercise a portion of the State's police power in order to implement a state oriented and supervised health program. *Myers v. Cedar Grove Tp.*, 66 N.J. Super. 530, 535-536 (App. Div. 1961), *modified on other grounds*, 36 N.J. 51 (1961); *Grosso v. Paterson*, 55 N.J. Super. 164, 172 (Law Div. 1959). The general statutory scheme envisions a statewide public health organization "with local boards charged *in the first instance* to safeguard public health in their several vicinages. . . ." *State v. Mundet Corp.*, 126 N.J. Eq. 100, 102 (Ch. 1939), *aff'd*, 127 N.J. Eq. 61 (E.&A. 1940) (emphasis supplied). In addition, the Local Health Services Act of 1975 (N.J.S.A. 26:3A2-1 *et seq.*) authorizes the creation of new county boards of health armed with "all the powers of a local board of health pursuant to law" within the geographic area of each municipality which arranges with the county board of health for the provision of public health services. N.J.S.A. 26:3A2-3(c). See also N.J.S.A. 26:3A2-3(h) and 5(c). Each board of health, whether it be a municipal board, a county board, or some other local health agency,[1] is empowered to enforce the State Sanitary Code, abate public nuisances on public property, and "[s]ecure the sanitary condition of every building, public or private" within the territorial limits of its jurisdiction. N.J.S.A. 26:3-33(a). See N.J.S.A. 26:1A-9; N.J.S.A. 26:3-48; N.J.S.A. 26:3A2-5(c). "Public building," as that term is customarily used, includes county offices and jails. See, *e.g.*, *State v. Freeholders of Bergen*, 46 N.J. Eq. 173 (Ch. 1889), *aff'd*, 48 N.J. Eq. 294 (E.&A. 1891). The power to "[s]ecure the sanitary condition of every building, public or private" thus encompasses the authority to inspect county jails and other public buildings. N.J.S.A. 26:3-33. *Cf. State v. Freeholders of Bergen, supra; Camden Board of Health v. Freeholders*, 50 N.J.L. 396, 397 (Sup. Ct. 1888). See also N.J.S.A. 24:3-1; N.J.A.C. 8:24-9.2. Consequently, municipal and county boards of health, as well as other duly constituted local health agencies, have concurrent jurisdiction with the State to inspect the food service and food preparation areas of county jails and to enforce the State Sanitary Code within their territorial jurisdictions. See N.J.S.A. 26:1A-9; N.J.A.C. 8:24-9.2(a). However, any inspection should be coordinated with the legitimate operational and security requirements of the correctional institution.

You have also asked what legal action may be taken by the Department, county or municipal boards or local health agencies to compel the closing of a county jail's food preparation area. This may occur when county officials will not do so voluntarily despite notice of an unsatisfactory assessment. Generally, "where procedural requirements are complied with, 'suits between political subdivisions will be entertained.' " *Bd. of Ed., E. Brunswick Tp. v. Tp. Council, E. Brunswick*, 48 N.J. 94, 108 (1966), quoting 17 *McQuillin, Municipal Corporations*, § 49.04 (3d ed. 1950). *Cf. Newark Aqueduct Board v. Passaic*, 45 N.J. Eq. 393, 400-401 (Ch. 1889), *aff'd*, 46 N.J. Eq. 552-553 (E.&A. 1890). If conditions in a county jail constitute a nuisance or source of foulness hazardous to the health of the inmates, the appropriate local government agency or board has the responsibility in the first instance to "institute an action in the Superior Court, in the name of the State, on relation of the board, for injunctive relief to prohibit the continuance of such nuisance." N.J.S.A. 26:3-56. *Cf. Myers v. Cedar Grove Tp., supra*, at 536; *State v. Freeholders of Bergen, supra*, at 173.[2] In the event the Commissioner is dissatisfied with the action taken or to be taken by a local board, she may exercise her general supervisory authority over all matters relating to sanitation and hygiene throughout the State.[3] "[T]he Commissioner may institute an action in the Superior Court in the name of the State on the

relation of the Commissioner to enjoin the continuance of the nuisance or the source of foulness." N.J.S.A. 26:1A-27. In addition, the Commissioner has been authorized to institute legal proceedings to enjoin specific violations of the State Sanitary Code. See N.J.S.A. 26:1A-15(d) and (h).

You are therefore advised that the State Department of Health and county or municipal boards of health and local health agencies have the right to enter upon, examine and inspect the food service and preparation areas of county government facilities and jails. The appropriate municipal or county board of health or local health agency has the responsibility, in the first instance, to institute judicial proceedings to close food service and preparation areas of county facilities and jails. The State Department of Health is also empowered to institute court action where it deems the local response inadequate to properly correct the hazard to the public health. In addition, the Department of Health or the appropriate local board or health agency may sue to recover monetary penalties for violations of the State Sanitary Code.

Very Truly Yours,
WILLIAM F. HYLAND
Attorney General
By FREDERICK S. TITLE
Deputy Attorney General

1. Each municipality has the option of providing public health services which meet the applicable public health laws by utilizing either its own local health agency, contracting with another town's local health agency, joining a regional health commission, or using the services of a county health department. See N.J.S.A. 26:3-83 to 94; N.J.S.A. 26:3A2-1 *et seq.*

2. Chapter XII of the State Sanitary Code states that retail food establishments, including nonprofit or public organizations or institutions serving food, which are found to be "in violation of this Chapter [N.J.A.C. 8:24-1.1 *et seq.*] are hereby declared to be *nuisances*, hazardous to health." N.J.A.C. 8:24-1.1. See also N.J.A.C. 8:24-1.2 (emphasis supplied).

3. The Commissioner may cause a written notice to be sent to the local board requiring it to abate the nuisance within a specified time. N.J.S.A. 26:1A-26.

August 9, 1977

CLIFFORD A. GOLDMAN
Treasurer
Department of the Treasury
State House
Trenton, New Jersey 08625

FORMAL OPINION 1977—No. 17.

Dear Treasurer Goldman:

The Department of the Treasury has asked whether information derived from State income tax forms can be compared with information maintained by the Division of Public Welfare and/or county welfare agencies in order to insure that persons receiving aid to families with dependent children (AFDC) under N.J.S.A. 44:10-1 *et seq.* (recently amended by L. 1977, c. 127) have reported the correct amount of their income to the Division of Public Welfare.

The Director of the Division of Taxation may not provide the Division of Public Welfare or a county welfare agency with information derived from a taxpayer's income tax return. The State Tax Uniform Procedure Law, made applicable to the administration of the Gross Income Tax by N.J.S.A. 54A:9-1, states that neither the Director of the Division of Taxation nor his employees may divulge or disclose any information obtained from the records or files of the Division of Taxation with exceptions not here relevant. N.J.S.A. 54:50-8 and 54:50-9. However, an applicant's income tax return can be disclosed to the Division of Public Welfare or a county welfare agency if the applicant has consented to the disclosure pursuant to N.J.S.A. 54:50-9(a) which provides that:

> "Nothing herein contained shall be construed to prevent *** [the] delivery to a taxpayer *or his duly authorized representative* of a copy of any other paper filed by him pursuant to the provisions of [the Gross Income Tax Act]." (emphasis added).

The Commissioner of Human Services is empowered by statute to make all rules and regulations and to take all other actions necessary to secure the greatest amount of federal assistance for the AFDC program, as well as to accomplish the purpose of the Act. N.J.S.A. 44:10-3. The statute specifically authorizes and directs the Commissioner to take action necessary "to provide that, in determining eligibility for financial assistance and the amount of assistance to be granted, there shall be taken into consideration all other income and resources of the dependent child and of the parent, parents, or other relatives with whom such child is living ***." N.J.S.A. 44:10-3(c). To implement this statutory directive, the Director of the Division of Public Welfare, N.J.S.A. 44:10-2 and N.J.S.A. 44:7-6*, and the directors of the county welfare agencies, N.J.S.A. 44:7-20, have been given broad subpoena power to compel the production of books, records and other documents pertinent to an examination of facts concerning an application for aid. Rules have been promulgated which stress the need for documenting the eligibility of each claimant, N.J.A.C. 10:81-3.2, and which state that the county welfare agencies will contact sources other than the applicant to obtain all information necessary to document the applicant's eligibility. N.J.A.C. 10:81-3.4(a). These rules specifically provide that verification from public

records should be exhausted before other sources are utilized. N.J.A.C. 10:81-3.4 (a) (1). Thus, the county welfare agencies are empowered and directed to verify all applicants' income, and the Division has provided for their obtaining that information from public records.

An administrative agency has such powers as are expressly conferred upon it by law and those implied or incidental powers necessary to achieve its essential statutory purpose. See *Board of Education of Plainfield v. Plainfield Education Association,* 144 N.J. Super. 521, 524 (App. Div. 1976). In order to further enable the Division of Public Welfare and county welfare agencies to verify or document statements or representations made to establish eligibility for financial assistance, the Commissioner may promulgate rules and regulations that require as a condition of continued public assistance an applicant to authorize and consent to the disclosure of relevant State income tax information. Such rules and regulations would clearly serve to insure that all of an applicant's income and resources are fully considered in determining eligibility under the public assistance statutes. N.J.S.A. 44:10-3(c). Accordingly, the Division of Public Welfare or the county welfare agencies may, after securing the necessary authorization and consent of an applicant for public assistance, obtain copies of the applicant's income tax return or information derived from that return from the Division of Taxation consistent with the provisions of the Uniform Tax Procedure Act.

Very truly yours,
WILLIAM F. HYLAND
Attorney General
By DOUGLAS G. SANBORN
Deputy Attorney General

* The "division of old age assistance" referred to in N.J.S.A. 44:7-6 denominates the present Division of Public Welfare. L. 1967, c. 206, §1; L. 1962, c. 197, §4; L. 1950, c. 166, §1.

August 9, 1977

HONORABLE VIRGINIA LONG
Commissioner of Banking
Department of Banking
36 West State Street
Trenton, New Jersey 08625

FORMAL OPINION 1977—No. 18.

Dear Commissioner Long:

You have requested our opinion on whether state-chartered commercial banks, savings banks, and savings and loan associations may make graduated mortgage loans on residential property. A graduated mortgage loan is a loan, the terms of

which provide for gradually increasing payments of principal and interest over the term of the loan rather than the customary level payments. Such loans necessarily require the deferral of substantial accrued unpaid interest, particularly in the early years of the loan.

Initially, it should be noted that commercial banks and savings and loan associations may require only the payment of interest during the first five years of a mortgage loan. N.J.S.A. 17:9A-65.1. However, since interest is by far the largest part of an ordinary mortgage payment in the early years of the payment of the loan, the postponement of payments of principal for five years will not significantly lower the amount of periodic mortgage payments in the early years of the indebtedness. Hence this provision alone would not in practical effect permit commercial banks and savings and loan associations to make meaningful graduated mortgage loans.

However, commercial banks and savings and loan associations have the authority to make graduated mortgage loans under other statutory provisions. N.J.S.A. 17:9A-65A(5)[1], which regulates the amortization of mortgage loans made by commercial banks, including loans on residential property, requires either that such loans be paid off in equal (level) monthly installments applicable to principal and an amount sufficient to pay current interest, or that the principal amount of the loan be annually reduced by a minimum amount specified in the statute. This latter method of amortization does not require that interest be paid currently, in significant contrast to the level payment method. Therefore, insofar as commercial banks choose to make mortgage loans pursuant to the second method, they may, in effect, make graduated mortgage loans on residential property by requiring in the early years of such loans the annual payment of only the minimum amount of principal required and by deferring interest payments.

Article X of the Savings and Loan Act of 1963, N.J.S.A. 17:12B-1, N.J.S.A. 17:12B-147 to 169, regulates investments by savings and loan associations. N.J.S.A. 17:12B-147 and 150 deal with ordinary mortgage installment loans on residential property, called "direct reduction loans" and "special direct reduction loans"[2]. With certain exceptions not relevant to this opinion, payment of "special direct reduction loans" is governed by the statutory provisions dealing with direct reduction loans.

N.J.S.A. 17:12B-147 provides in part:

> "Each direct reduction loan as defined in section 5 of this act, made in accordance with the provisions of this section, shall require periodical payments sufficient to pay the principal and interest of the loan in full in a period of 40 years or less . . . " (footnote omitted).

The only amortization requirements of the section are that the interest and principal be paid periodically and that the loan be paid within forty years. The payments need not be level. Savings and loan associations therefore are free to make graduated mortgage loans on residential property by deferring the payment of principal and the substantial interest due in the early years of the indebtedness.

Savings banks on the other hand may not make graduated mortgage loans on residential property. N.J.S.A. 17:9A-181 F,[3] which regulates the amortization of mortgage loans on residential property made by savings banks, requires that under all circumstances the interest on such loans be paid monthly.

You are therefore advised that savings and loan associations and commercial

banks may make graduated mortgage loans on residential property, in which the payment of interest accruing in the early years of the loan is deferred to some later period in the life of the loan.[4]

Very truly yours,
WILLIAM F. HYLAND
Attorney General of New Jersey

By: HARLEY A. WILLIAMS
Deputy Attorney General

1. N.J.S.A. 17:9A-65A(5) provides in pertinent part:

> "No bank shall make a mortgage loan secured by a mortgage upon real property unless:
>
> (5) the instrument evidencing the loan shall require payment to be made during each year on account of the principal amount of the loan at a rate not less than 1% per annum of the original amount of the loan, if the original amount of the loan does not exceed 50% of the appraised value of the mortaged property; or 2% per annum of the original amount of the loan, if the loan exceeds 50% but does not exceed 66⅔% of such appraised value; or 4% per annum of the original amount of the loan, if the loan exceeds 66⅔% of such appraised value; provided, that, in lieu of such principal payments, the instrument evidencing any mortage loan may require equal monthly payments, each applicable to principal and interest, in an amount sufficient to pay current interest and to repay the amount of the loan in not more than 40 years from its date . . ."

2. A "direct reduction loan" is an installment mortgage loan in which the principal amount of the loan is 80% or less of the appraised value of the property. A "special direct reduction loan" is the same as a "direct reduction loan" except that the principal amount of the loan may be for as much as 90%, or in some cases 95%, of the appraised value of the property.

3. N.J.S.A. 17:9A-181 F provides:

> "F. The instrument evidencing a mortgage loan made pursuant to either subsection D or subsection E of this section shall require that
>
> (1) interest shal be paid on such loan monthly, and that equal monthly payments be made in reduction of such loan of an annual rate equal to at least 3⅓% of the original amount of such loan; or
>
> (2) that a constant sum be paid monthly in an amount sufficient for current interest and for the payment of the loan in full in not more than 40 years and 1 month from the making of such loan."

4. It should be noted that government mortgage loan programs, such as those administered by the VA or the FHA, may have amortization requirements different from those of the Banking Act of 1948 and the Savings and Loan Act of 1963. Of course this opinion is inapplicable to loans made pursuant to such programs.

August 15, 1977

JOHN A. WADDINGTON, *Director*
Division of Motor Vehicles
25 South Montgomery Street
Trenton, New Jersey 08625

FORMAL OPINION 1977—No. 19.

Dear Director Waddington:

You have inquired as to whether a motorist who has refused to undergo a breath chemical test prior to the effective date of recent amendments to the Motor Vehicle Act is to be penalized pursuant to the law applicable at the time the refusal occurred or pursuant to the law as amended. This question refers to breath refusal matters pending or initiated before the Division of Motor Vehicles on or after the effective date of the amendatory legislation on May 25, 1977. It does not apply where a final Order of Suspension was issued or became effective prior to that time.

The pertinent amendments to the Motor Vehicle Act provide that in circumstances where a motorist refuses a breath chemical test following an arrest for a violation of the substantive offense of driving while intoxicated, the Director shall revoke such motorist's driving privileges. Laws of 1977, c. 29.* A revocation:

> "shall be for 90 days unless the refusal was in connection with a subsequent offense of this section, in which case the revocation period shall be for one year . . ."**

In addition, a motorist whose license has been revoked under this section must satisfy the requirements of an alcohol education or rehabilitation program. Prior to its amendment, the statute provided for a license suspension of six months. Laws of 1966, c. 142.

The statute, however, does not speak in direct terms to the applicable period of revocation where a breath refusal occurs prior to the effective date of the Act and a period of revocation has not been ordered by the Director prior to that time. Moreover, there is no controlling principle of law whether a civil penalty of this nature should generally be applied in a prospective or retroactive manner. It is therefore necessary to resort to companion provisions of the Act, the legislative purpose underlying these amendments and to general principles of statutory construction.

Although the Act is silent on this issue, it does provide some guidance in a related area dealing with the substantive offense of driving while under the influence. Section 7 of the Act provides:

> "In any case pending on or initiated after the effective date of this act involving an offense committed prior to such date, the court, with the consent of the defendant, shall impose sentence under the provisions of this act. If the defendant does not consent to the imposition of sentence under the provisions of the act, the court shall impose sentence under the law which was in effect at the time of the commission of the offense."

Thus, under the terms of this section the applicable period of revocation for an offense which occurs prior to the effective date of the Act is in effect entirely at the discretion and with the consent of the defendant.

This statutory section was interpreted by the Appellate Division in *State v. Fahrendorf*, Docket No. A-4673-75 (App. Div. June 6, 1977). The defendant had been convicted of driving while under the influence of narcotic drugs under the statute prior to its amendment. Her driver's license was revoked until her 21st birthday and she was ordered to pay a fine of $200. The court held that under the provisions of section 7 and the particular circumstances of that case, the matter be remanded to the county court for resentencing under the statute as amended. The amended statute provided for sentencing solely at the discretion of the court.

It is fair to infer that the Legislature intended an administrative proceeding pending before the Director of Motor Vehicles for a breath refusal to be governed by the same general principle. This assumption is buttressed by the general policy underlying the 1977 amendments to the motor vehicle laws to provide for lesser punishment and greater reeducation and rehabilitation of drivers for alcohol related offenses. In the interpretation of a statute to discern legislative intent, primary regard should be given to the overall legislative purpose. *New Jersey Builders, Owners and Managers Association v. Blair*, 60 N.J. 330, 338-339 (1972). As stated by the Appellate Division in *Fahrendorf*:

> " . . . sentencing defendant under the new Act would be more in keeping with the public policy declared by the legislature *in favor of lesser punishment* and greater reeducation and rehabilitation of drivers who operate while under the influence. This legislative policy is evidenced not only by the terms of the new Act but also by the report which led to its passage. Report of the New Jersey Motor Vehicle Study Commission, pp. 133-168 (September 1975)." (Emphasis supplied.)

Accordingly, consistent with this legislative policy and the comparable legislative treatment of the offense of driving while under the influence in Section 7, it is our judgment that the statute should be construed to allow a motorist whose breath refusal matter is administratively pending or initiated before the Division on or after May 25, 1977 for a breath refusal which occurred prior to that date to have the benefit of the lesser period of revocation provided in either the repealed or amended statute.

For these reasons, you are advised that with respect to those unresolved breath refusal matters pending or initiated before the Division on or after May 25, 1977 for breath refusals which have occurred prior to that date, the Director with the consent of the motorist should impose the period of revocation prescribed under the provisions of Laws of 1977, c. 29. If the motorist does not consent to the imposition of a period of revocation provided under the provisions of Laws of 1977, c. 29, the Director should impose the period of revocation under the law (Laws of 1966, c. 142) which was in effect at the time of the commission of the offense. This would not apply in a situation where a final Order of Suspension was issued or became effective prior to May 25, 1977, the effective date of the amendatory act.

Very truly yours,
WILLIAM F. HYLAND
Attorney General

By: THEODORE I. WINARD
Assistant Attorney General

* "If an operator of a motor vehicle, after being arrested for a violation of R.S. 39:4-50, shall refuse to submit to the chemical test provided for in section 2 of this act when requested to do so, the arresting officer shall cause to be delivered to the Director of Motor Vehicles his sworn report of such refusal in which report he shall specify the circumstances surrounding the arrest and the grounds upon which his belief was based that the person was driving or operating a motor vehicle in violation of the provisions of R.S. 39:4-50. Upon receipt of such a report, if the director shall find that the arresting officer acted in accordance with the provisions of this act, he shall, upon written notice, suspend the person's license or permit to drive or operate a motor vehicle, . . . unless such person, within 10 days of the date of such notice, shall have requested, in writing, a hearing before the director. Upon such request, the director shall hold a hearing on the issues of whether the arresting officer had reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle on the public highways or quasi-public areas of this State while under the influence of intoxicating liquor, whether the person was placed under arrest, and whether he refused to submit to the test upon request of the officer. If no such hearing is requested within the time allowed or if after a hearing the director shall find against the person on such issues, he shall revoke such person's license or permit to drive or operate a motor vehicle, ... Such revocation shall be independent of any revocation imposed by virtue of a conviction under the provisons of R.S. 39:4-50."

**"[I]n connection with a subsequent offense of this section" requires revocation for one year in connection with a subsequent offense of driving while intoxicated with or without regard to a prior breath refusal. *Attorney General's Formal Opinion* No. 13—1977.

September 20, 1977

TO THE MEMBERS OF ALL PROFESSIONAL BOARDS

FORMAL OPINION 1977—No. 20.

As you are probably aware, the Supreme Court of the United States has recently decided several cases which have a significant impact upon the authority of the states to regulate advertising by professionals. These decisions represent definitive interpretations of the requirements of the United States Constitution and are binding upon the State of New Jersey. We therefore have concluded that it would be appropriate to set forth our interpretation of these decisions for the benefit of the professional boards.

In *Virginia State Board of Pharmacy, et al. v. Virginia Citizens Consumer Council, Inc., et al.*, 425 U.S. 748 (1976) the Court invalidated a Virginia statute which had declared it unprofessional conduct for a licensed pharmacist to advertise the price of prescription drugs. The Virginia statute which prohibited the dissemination of information concerning the cost and availability of prescription drugs was found to be inconsistent with the First Amendment to the United States Constitution. The Court noted:

> ". . . Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large

> measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable . . ." 425 U.S. at 765.

After the decision in the *Virginia Board of Pharmacy* case, the New Jersey Board of Examiners of Ophthalmic Dispensers and Ophthalmic Technicians asked this office for an opinion concerning the constitutionality of N.J.S.A. 52:17B-41.17, which prohibited price advertising of ophthalmic goods by ophthalmic dispensers and technicians. In *Formal Opinion No. 4 of 1977*, issued on March 17, 1977, we concluded that this blanket statutory prohibition against price advertising of ophthalmic goods was substantially similar to the prohibition against price advertising by pharmacists declared unconstitutional in the *Virginia Board of Pharmacy* case and therefore was similarly unconstitutional. We refrained in that opinion from considering the constitutionality of other forms of advertising by professionals, not involving the selling of standardized products such as ophthalmic frames and lenses or prescription drugs, since *Bates v. State Bar of Arizona* was then pending before the Supreme Court of the United States and we anticipated that the decision in that case would further illuminate the constitutional restrictions upon the regulation of advertising by professionals.

In its decision in *Bates*, issued on June 27, 1977, the Supreme Court held that the First Amendment protects the right of lawyers to advertise the prices at which certain routine services will be performed. It also indicated that there could be no prohibition against advertisements which include other factual materials, such as an attorney's name, address, and telephone number, office hours and the like. The Court therefore held that a State may not prevent the publication in a newspaper of a truthful advertisement concerning the availability and terms of routine legal services.

Although the immediate subject of the Court's opinion in *Bates* was advertising by attorneys, the Court's analysis of the First Amendment protections provided professional advertising is equally applicable to other professions. The Court's reasons for rejecting various justifications proffered for the prohibition against price advertising by attorneys, such as the adverse effect on professionalism, the inherently misleading nature of attorney advertising, the undesirable economic effects of advertising and the adverse effect of advertising on the quality of service, indicates quite clearly that the Court would not accept such justifications for a blanket prohibition against advertising by other professionals. We further note that the Court in a footnote quoted at length from new guidelines on advertising adopted by the Judicial Council of the American Medical Association. There also are references in the Court's opinion to other professions, such as pharmacy and barbering, which reinforce our conclusion that the Court's basic reasoning is equally applicable to all professions. We therefore advise you that in light of the *Bates* decision, any total prohibition against advertising by professionals is violative of the First Amendment to the United States Constitution.

The Court also made it very clear, however, that its holding in *Bates* does not preclude reasonable regulation of advertising where the responsibilities of a particular professional demand such regulation. The Court said:

> "In holding that advertising by attorneys may not be subjected to blanket suppression, and that the advertisement at issue is protected, we, of

course, do not hold that advertising by attorneys may not be regulated in any way. We mention some of the clearly permissible limitations on advertising not foreclosed by our holding.

"Advertising that is false, deceptive, or misleading of course is subject to restraint . . . . In fact, because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising. For example, advertising claims as to the quality of services—a matter we do not address today—are not susceptible to measurement or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction. Similar objections might justify restraints on in-person solicitation. We do not foreclose the possibility that some limited supplementation, by way of warning or disclaimer or the like, might be required of even an advertisement of the kind ruled upon today so as to assure that the consumer is not mislead. In sum, we recognize that many of the problems in defining the boundary between deceptive and non-deceptive advertising remain to be resolved, and we expect that the bar will have a special role to play in assuring that advertising by attorneys flows both freely and cleanly.

"As with other varieties of speech, it follows as well that there may be reasonable restrictions on the time, place, and manner of advertising . . . . Advertising concerning transactions that are themselves illegal obviously may be suppressed . . . . And the special problems of advertising on the electronic broadcast media will warrant special consideration . . . .

"The constitutional issue in this case is only whether the State may prevent the publication in a newspaper of appellants' truthful advertisement concerning the availability and terms of routine legal services. We rule simply that the flow of such information may not be restrained . . . ." *Bates v. State Bar of Arizona*, 97 S. Ct. at 2708-2709.

It is our opinion that just as the Court in *Bates* recognized that there are permissible limitations upon advertising within the legal profession, it also would sustain similar limitations in other professions. However, the justifications for limitations upon advertising undoubtedly will vary depending upon the services provided by each particular profession and other pertinent considerations. Therefore, it would be impossible to set forth a single guideline for permissible limitations on professional advertising that would govern every profession. Rather, we feel that it should be the responsibility of the respective professional boards, at least in the first instance, to review the regulatory requirements of the professions they are charged with regulating in light of the Court's decision in *Bates*. We would urge the boards in such review to consult with appropriate professional societies and associations to secure their views. The deputy attorneys general assigned to the boards also will be available to provide further legal guidance where appropriate.

I look forward to an early completion by the boards of the required reexamination of all limitations upon advertising by the professions so that we may have assurance professional advertising in New Jersey is being regulated in a manner consistent with the *Bates* decision.

Very truly yours,
WILLIAM F. HYLAND
Attorney General

October 6, 1977

EDWARD J. BAMBACH, *Executive Director*
New Jersey Educational Facilities Authority
120 Sanhican Drive, Suite 2A
Trenton, New Jersey 08618

FORMAL OPINION 1977—No. 21.

Dear Mr. Bambach:

You have asked whether religious services organized by students and conducted in facilities leased by the Educational Facilities Authority to Ramapo College violate the New Jersey Educational Facilities Authority Law. For the following reasons, it is our opinion that the incidental use of college facilities by students for these purposes does not conflict with the provisions of the Law.

We have been informed that within the past few years Catholic masses have been organized by resident students at the College. They have been conducted weekly and on church holidays in a conference room of the campus life building. Rooms in the campus life building are generally reserved by students for various activities and in this instance Catholic students reserve the conference room by submitting a reservation request to the director of student activities. A Catholic priest has been invited by these students to conduct the masses. The campus life building has several rooms available in addition to the conference room in which the masses have been held. The reservation of the conference room for the masses has never prevented other students from using the campus life building at the same time. Furthermore, officials of Ramapo College have indicated that students have organized a weekly mass in student dormitory apartment living rooms. College officials have neither encouraged nor discouraged students to conduct masses nor have they organized such activities on their behalf. We also have been informed that these religious activities have no relationship whatsoever to the educational curriculum of Ramapo College.

The New Jersey Educational Facilities Authority Law, N.J.S.A. 18A:72A-1 *et seq.*, is designed to provide funds to finance the construction of dormitories and educational facilities for public and private institutions of higher education. The statute created the New Jersey Educational Facilities Authority (Authority) within the Department of Higher Education to provide financial assistance in order to enable institutions of higher education to construct these facilities. The educational facilities which may be constructed are defined by the act, but expressly exclude "any facility used or to be used for sectarian instruction or as a place for religious worship." N.J.S.A. 18A:72A-3.

Under this statutory framework, the Authority has acquired land and constructed buildings to be used as a dormitory and campus life building at Ramapo College. The Authority has, in turn, leased these facilities to the College pursuant to separate lease agreements for each facility. Each lease contains a covenant against the use of the facility for sectarian instruction or religious worship.

The question, therefore, is whether this conduct by Catholic students at Ramapo College falls within the legislative prohibition against the use of that facility for sectarian instruction or as a place for religious worship." N.J.S.A. 18A:72A-3.

Under this statutory framework, the Authority has acquired land and constructed buildings to be used as a dormitory and campus life building at Ramapo College. The Authority has, in turn, leased these facilities to the College pursuant

to separate lease agreements for each facility. Each lease contains a covenant against the use of the facility for sectarian instruction or religious worship.

The question, therefore, is whether this conduct by Catholic students at Ramapo College falls within the legislative prohibition against the use of that facility for sectarian instruction or as a place for religious worship. The legislative history of the act does not provide any definitive insight into this prohibition. It may be assumed, however, that it was designed by the Legislature to insure that state aid provided by the act would support a secular and not a religious educational function consistent with the Freedom of Religion Clause of the First Amendment.* This implicit legislative purpose was referred to by the New Jersey Supreme Court in its decisions in *Clayton v. Kervick*, 56 N.J. 523 (1970), *vacated* 403 U.S. 945 (1971), *reconsidered* 59 N.J. 583 (1971). In the first *Clayton* decision, the Supreme Court held the act to be consistent with the Establishment Clause, since its primary effect neither advances nor inhibits religion. The court noted that in order to insure that the assistance provided by the act would not fall within the prohibition of the Establishment Clause, the Legislature expressly excluded from its definition of an educational facility any facility used or to be used for sectarian instruction or as a place for religious worship. This legislative purpose was further pointed out in the reconsideration of the question in *Clayton II*. In that decision the court concluded that the legislative scheme satisfied the requirements of the First Amendment expressed by the United States Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and *Tilton v. Richardson*, 403 U.S. 672 (1971). The court stated that even though a loan transaction under the act may confer a benefit to a sectarian institution, the primary effect of the statute would not improperly aid religion. As stated by the court:

> "the facility may never be used for sectarian purposes. Our statute can be construed to meet that demand. As already noted, N.J.S.A. 18A:72A-3, in its definition of an educational facility, provides that it shall not include any facility 'used or to be used for sectarian instruction or as a place for religious worship.' The words 'to be used' can be read to satisfy this constitutional requirement . . . ." *Clayton* at 599-600.

Thus, the legislative prohibition against the use of these facilities for religious purposes spelled out in N.J.S.A. 18A:72A-3 was designed to avoid active governmental sponsorship, involvement or aid to religion inconsistent with the requirements of the Establishment Clause.**

The incidental and voluntary use of the facilities of the Authority at Ramapo College for religious activities organized by resident students would not conflict with the Establishment Clause and thus does not fall within the prohibition of the statute. The campus life building and dormitory serve secular purposes to provide students with an activities center and convenient living accommodations. By permitting voluntary religious worship among other activities in these facilities, the State has not advanced religion but is merely fulfilling their primary secular purposes. Any accommodation or benefit for a religious group resulting from this activity is purely incidental to their essential secular purposes. Accordingly, since the Authority and College do not sponsor, encourage or participate in this religious activity, there is not present the type of governmental activity proscribed by the Establishment Clause and falling within the intent of the statute.

Furthermore, to interpret the statute to prohibit voluntary worship by resident

students at Ramapo would inhibit the practice of religion and would raise a serious question under the Free Exercise Clause of the First Amendment. The United States Supreme Court explained the import of this Clause in *Zorach v. Clauson*, 343 U.S. 306 (1952). In that case, school authorities cooperated with the religious needs of its students by permitting them to take religious instruction, if they wished, elsewhere than upon the school premises. Students who wished to participate were released from school early in the day so that they might do so, while pupils who did not wish to participate were kept in the classrooms until the end of the school day. The Court held that this practice was a permissible accommodation by the secular authorities to meet the religious needs and desires of its citizens. The Court stated:

> "We are a religious people whose institutions presuppose a Supreme Being. *We guarantee the freedom to worship as one chooses.* We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and *accommodates* the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence." (Emphasis added.) 343 U.S. at 313-314.

Also, in *Everson v. Board of Education*, 330 U.S. 1 (1947), local school authorities provided for reimbursement to parents of parochial school students for the costs of transporting their children between home and school on public transportation pursuant to N.J.S.A. 18:14-8. In upholding this form of governmental aid under the Freedom of Religion Clause, the court said:

> ". . . New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation . . . ."330 U.S. at 16.

More recently, in *Keegan v. University of Delaware*, 349 A.2d 14 (Del. Sup. Ct. 1975), the Delaware Supreme Court struck down under the Free Exercise Clause a

college regulation prohibiting religious worship in the commons room of a dormitory. The court held that an absolute ban on religious worship constituted an unjustifiable burden on the free exercise of religion, since the commons area was made available for general student use and only the religious activities forbidden therein. See also *Pratt v. Arizona Board of Regents,* 520 P.2d 514 (Ariz. Sup. Ct. 1974). Similarly, in *Lewis v. Mandeville,* 107 N.Y.S. 2d 865 (Sup. Ct. 1951), the use of an auditorium in a municipal firehouse for religious worship was determined to be constitutional. Since the facility was made equally available to religious or non-religious groups, the court concluded that the use of the auditorium for religious worship could not be prohibited under the freedom of worship provision in the New York Constitution.

In *Zorach, Everson* and *Keegan,* therefore, while school authorities facilitated the observance of religious practices, they did not in any way combine with, direct, or influence them. There are clear examples of permissible uses of government resources to constitutionally promote an accommodation of the religious interests of the public. Similarly, voluntary religious worship by resident students in the campus life building and dormitories on the college campus would constitute an incidental accommodation by the State of the religious interests and needs of its student body.

Consequently, an interpretation of the statute to impose an absolute bar to voluntary religious worship would subject it to serious constitutional question under the Free Exercise Clause. Legislation, whenever possible, should be construed to avoid any constitutional infirmity. *Schulman v. Kelly,* 54 N.J. 364, 370 (1969). Therefore, it should not be assumed that the Legislature intended to foreclose the incidental use of these facilities to accommodate the religious needs of the student body, but rather intended to prohibit active sponsorship or involvement by the State in an affirmative way in religious activity. Thus, based upon the facts provided to us, it is our opinion that the provisions of N.J.S.A. 18A:72A-3 would not preclude voluntary religious worship by resident students at educational facilities assisted and maintained by the Authority and Ramapo College.

Very truly yours,
WILLIAM F. HYLAND
Attorney General

By: THEODORE A. WINARD
Assistant Attorney General

*The First Amendment to the United States Constitution made applicable to the states by the Fourteenth Amendment provides in pertinent part:

> "Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof . . . ."

** In this respect, the New Jersey Educational Facilities Authority Law enacted in 1966 is substantially similar to the Higher Education Facilities Act passed by Congress in 1963. The Act authorizes federal grants and loans to "institutions of higher education" for the construction of a wide variety of "academic facilities" but expressly excludes "any facility used or to be used for sectarian instruction or as a place for religious worship . . . ". The United States Supreme Court in *Tilton v. Richardson, supra,* held that insofar as the Act authorizes federal aid to church related universities to be used exclusively for secular educational purposes, it did not violate the Religion Clauses of the First Amendment. The Court noted that:

> "The Act itself was carefully drafted to ensure that the federally subsidized facilities would be devoted to the secular and not the religious functions of the recipient institutions. It authorizes grants and loans only for academic facilities that will be used for defined secular purposes and expressly prohibits their use for religious instruction training or worship." *Tilton, supra,* at 679-680.

This congressional purpose to avoid governmental sponsorship, financial aid or involvement in the religious activities of recipient institutions is similar to the legislative purpose underlying the exclusion of facilities used for sectarian instruction or religious worship in N.J.S.A. 18A:72A-3.

December 1, 1977

RALPH P. SHAW, *Chief Examiner and Secretary*
Department of Civil Service
State and Montgomery Streets
Trenton, New Jersey 08625

FORMAL OPINION 1977—No. 22.

Dear Mr. Shaw:

You have asked for our advice as to the legitimate duties and responsibilities of special police officers appointed in municipalities throughout the state. In particular, you have asked whether special police may consistent with the civil service laws perform the duties and responsibilities of regular permanent members of a municipal police force. Although your inquiry is directed toward local civil service jurisdictions, the issue has equal application to both civil service and non-civil service communities.*

We have been informed that special police officers perform a variety of police related work. In many instances they are used to perform general police duties in a fashion similar to members of the regular force. Some municipalities use special police officers to perform only certain specified police responsibilities such as acting as a police dispatcher. Other municipalities use them for spectator or traffic control, either on a regular basis such as school or church crossing guards or in emergent situations. Finally, special police officers are often used to provide additional protection and security for banks, taverns, construction projects, railroad yards and amusement or public parks.

It is necessary to consider the statute authorizing the appointment of special police officers, civil service law and police training statutes in making a determination as to the appropriate responsibilities of a special police officer. N.J.S.A. 40A:14-146 provides for the appointment of special police officers. The statute authorizes the governing body of any municipality to appoint special police personnel for terms not to exceed one year. They are declared " . . . not (to) be members of the police force . . . ." and they may be removed without cause or hearing. Special police officers may be furnished badges and charged a fee for the issuance of a certificate of appointment. Special police officers serve under the supervision of the municipal police chief

and they are required to conform with rules and regulations applicable to the conduct and decorum of regular police officers.

The statute contains little guidance as to the scope of duties to be performed by special police officers. However, it provides that " . . . they . . . not be members of the police force . . . " and that they not carry weapons during off-duty hours. This would appear to reflect a legislative determination that special police officers should not be equated with the regular permanent members of a municipal police force. This proposition was reinforced in *State v. Jones*, 4 N.J. Super 599 (Law Div. 1949), *rev'd* on other grounds, 4 N.J. 207 (1949). A challenge was brought to the appointment of Jones as a regular police officer on the ground that he exceeded the maximum age limitation established by law. The court upheld the appointment by characterizing a prior appointment as a special policeman to have been one of a regular policeman. The court determined that the duties performed by Jones were not consistent with the limited responsibilities allocated to a special police officer. The court stated:

> "The purpose of the statute is to permit the appointment of special guards or watchmen, having police powers, for guarding banks, railroad yards, warehouses, parks, school crossings, and other places where extra or special protection is required, and also to permit the appointment of special policemen to assist temporarily the regular police force during an emergency or during unusual conditions." 4 N.J. Super. at 608.

The court further pointed out that the statute did not "provide any authority to appoint a 'special policeman' to perform those duties which come within the scope of the usual and ordinary duties that are performed regularly by members of a municipal police force." *Supra* at 608. The court therefore concluded that the appointment of special policemen to perform during normal conditions the same duties which are performed by the members of the regular police force would undermine the statutory tenure protection afforded to regular members of a municipal police force.

Implicit legislative restriction on the use of special police officers is also provided by civil service law and by police training legislation. Special police officers are, under the terms of civil service law, exempt from competitive testing requirements. N.J.S.A. 11:22-2(q). There is, accordingly, no comprehensive mechanism provided for testing the qualifications and capabilities of these persons. Furthermore, the Legislature has enacted legislation dealing with the training of law enforcement personnel. N.J.S.A. 52:17B-66 *et seq.* No person may be a permanent police officer prior to the completion of a training course at an approved police training school. N.J.S.A. 52:17B-68. There is, however, no mandatory training provided by statute for special police officers and their qualifications and training are solely at the discretion of the chief of police of the appointing municipality. Accordingly, there is a further legislative indication that special police officers should not be used to perform on a full or part-time basis the usual and ordinary responsibilities of a regular member of a municipal police department.

It is apparent that it is the underlying legislative purpose to allow for the use of special police officers to provide intermittent or temporary assistance to the regular police force during unusual or emergency circumstances. This would not by definition include responsibilities coincident with those of regular police personnel. The use of special police officers as dispatchers or for other limited police responsibilities on a

regular basis would be impermissible. Similarly, special police officers may not be used for spectator and traffic control or for other police related activities in the absence of unusual or emergency circumstances which require assistance to the regular police department. On the other hand, the use of special police officers for intermittent or unusual crowd control or traffic direction or to provide extra security as a supplement to the regular police force in individual cases would be appropriate. An unusual condition would include an unpredictable event such as a natural disaster, riot or major fire. It would also include a predictable circumstance which requires extraordinary temporary assistance to the regular police force in individual cases, such as the use of special police during the summer at a resort community to handle the seasonal influx of visitors, to direct heavy traffic and handle large crowds at regularly scheduled sporting events and rock concerts.

Finally, before a special policeman may be appointed, the chief of police of a municipality shall ascertain whether the applicant is eligible and qualified. Every special policeman shall thereafter be under the supervision and direction of the chief of police of the municipality wherein he is appointed. N.J.S.A. 40A:4-146. Inherent in this statutory provision dealing with the appointment, supervision and direction of special policemen is the requirement that municipalities provide adequate training and experience in firearms and in general police duties commensurate with the hazards of general police work. A municipality is generally empowered to adopt and enforce such rules and regulations consistent with the laws of the State, as it may deem necessary for the preservation of the public safety or welfare. N.J.S.A. 40:48-2. Although the uniform legislative scheme for the mandatory training of law enforcement personnel is restricted to those given a permanent appointment, it is incumbent on a municipality to independently provide in the public's interest for satisfactory training of special police designated to assist and/or supplement the regular police department.

This obligation is particularly compelling in training for the safe and proper handling and use of firearms. In *McAndrew v. Mularchuk*, 33 N.J. 172 (1960) a reserve patrolman was appointed by the Borough of Keansburg to work at elections, parades and to engage in regular patrol activity on foot and in police cars. The defendant police officer was never given any education nor was he required to submit to any training with respect to the use of his revolver. As a result, a young man was seriously wounded in an altercation outside of a local night club. The New Jersey Supreme Court in passing on the responsibility of the municipality for the actions of the reserve patrolman expressed its concern with the lack of training in the use and handling of firearms:

> "Loaded revolvers are dangerous instruments. Their potentiality for infliction of serious injury is such that the law has imposed a duty to employ 'extraordinary' care in their handling and use. . . . . Municipal entities must take cognizance of the hazards of sidearms. That knowledge casts an obligation on them when they arm or sanction the arming of reserve patrolmen for active police duty. The obligation is to use care commensurate with the risk to see to it that such persons are adequately trained or experienced in the proper handling and use of the weapons they are to carry. If the official in general authority in the police department sends or permits a reserve officer to go out on police duty without such training or experience, his action is one of negligent commission—of active wrongdoing—

and if an injury results from an unjustified or negligent shooting by that officer in the course of performance of his duty, which is chargeable to the lack of training or experience, the municipality is liable." *McAndrew* at 183-184.

See also: *Peer v. Newark,* 71 N.J. Super. 12 (App. Div. 1961) aff'd 36 N.J. 300 (1962). Accordingly, the court held that the reserve police officer was legally responsible for the wounding of the plaintiff. Since the administrative control of the department was in the chief of police, the borough also was found liable for authorizing the reserve police officer to carry a revolver on duty without adequate training in its handling or use.

Consequently, municipalities should arrange to provide adequate training and experience in the handling and use of firearms and in carrying out general police responsibilities to avoid a serious risk of liability for injury caused by an act or omission of its special police appointees. N.J.S.A. 59:2-2. Also, training of special policemen will generally improve the caliber of local law enforcement and serve to satisfy a municipal responsibility to protect the safety and welfare of its citizens in their respective communities.

In conclusion, therefore, special police officers should not be appointed by municipalities to perform the regular responsibilities of a municipal police department on a continuous basis or on a full or part-time basis. This would include general police work, police dispatching and routine traffic and crowd control. Special police, on the other hand, may be appointed to serve on a temporary or intermittent basis for emergent or unusual conditions, to supplement the regular police department for traffic and crowd control and/or to provide extra security at summer resorts, parades, sporting events, riots, natural disasters and for other similar purposes.

Very truly yours,
WILLIAM F. HYLAND
Attorney General

By THEODORE A. WINARD
Assistant Attorney General

* In an opinion to you dated June 23, 1976 we advised that special police officers may be used in limited circumstances such as the provision of protection to ". . . banks and other commercial establishments, parks and school crossings, and to generally assist the regular police during emergency or unusual conditions." This was supplemented by our opinion to you dated June 21, 1977 wherein it was concluded that special police officers may be used by resort communities to handle the unusual influx of visitors and security problems during the summer season. The present opinion will further expand on our previous advice and provide a more comprehensive and definitive opinion on this subject.

January 13, 1978

RALPH P. SHAW, *Chief Examiner and Secretary*
Department of Civil Service
East State and Montgomery Streets
Trenton, New Jersey 08625

FORMAL OPINION 1977—No. 22—SUPPLEMENT

Dear Mr. Shaw:

In *Formal Opinion No. 22 - 1977* issued on December 1, 1977 we advised that special police officers should not be appointed by municipalities to perform the regular responsibilities of a municipal police force on a continuous or a full or part time basis. Several questions have arisen as to the effect of our opinion on the use of school crossing guards and police radio dispatchers throughout the State.

A school crossing guard is a civilian municipal employee who is generally responsible for the regulation and supervision of the movement of school children at street intersections. These job responsibilities have been classified by the Department of Civil Service in the job title, School Traffic Guard. A police radio dispatcher is similarly a civilian municipal employee whose principal job is to receive and relay messages to police patrol vehicles or to fire, ambulance and other emergency units. These job responsibilities have also been classified by the Department of Civil Service in the title, Police Radio Dispatcher, in the classified service.

The conclusion of *Formal Opinion No. 22—1977* was that special police should be appointed by municipalities to assist or supplement the regular police force only on an intermittent or temporary basis under unusual and emergency circumstances. This would not include the assignment of special police on a regular basis to perform the routine duties of traffic control at school crossings or as a police radio dispatcher. These duties fall within the inherent authority of a regular police department where the exercise of police powers is indicated. In other instances, supervision of children at school crossings and radio dispatching functions may be performed by school crossing guards or radio dispatchers as a civilian nonpolice related activity either in the Civil Service job classification appropriate to those responsibilities or in comparable positions in non-Civil Service communities.

In conclusion, therefore, *Formal Opinion No. 22 - 1977* was designed to deal exclusively with the role of special police. Traffic control at school crossings and police radio dispatching may appropriately be carried out on a regular basis either by regular members of a municipal police force or by appointed civilian school crossing guards and radio dispatchers in both Civil Service and non-Civil Service communities.

Very truly yours,
WILLIAM F. HYLAND
Attorney General

By THEODORE A. WINARD
Assistant Attorney General

December 1, 1977

COLONEL CLINTON L. PAGANO, *Superintendent*
Division of State Police
Box 68
West Trenton, New Jersey 08625

FORMAL OPINION 1977 – No. 23

Dear Colonel Pagano:

You have asked for our opinion as to whether members of a municipal police department may, during their off-duty hours, engage in police related activities for private persons or entities such as serving as a patrolman to direct traffic at shopping centers or at construction sites or at office complexes during rush hours and the like as well as serving as a watchman at construction projects. It is our opinion that such activities are permissible for regular members of the police department if arrangements are made with the employing municipality to use the policemen in this fashion during off-duty hours. A direct relationship between the policeman and the private party would violate the requirements of the Private Detective Act of 1939.[1]

With respect to the Private Detective Act, the definition of a "private detective business" and of a "private detective or investigator" would include a policeman or policemen who act in capacities such as those mentioned above during off-duty hours. The term "private detective business" is defined by N.J.S.A. 45:19-9(a) to mean:

> . . . the furnishing for hire or reward of watchmen or guards of private patrolmen or other persons to protect persons or property, either real or personal, or for any purpose whatsoever . . .

A "private detective or investigator" has been defined to mean any person who singly and for his own account conducts a private detective business without the aid or assistance of any employees. N.J.S.A. 45:19-9(c). However, the Act provides certain exemptions for persons acting in their official capacity:

> . . . The term [private detective business] shall not include and nothing in this act shall apply to any lawful activity of any board, body, commission or agency of the United States of America, *or any county, municipality, school district, or any officer or employee solely, exclusively and regularly employed by any of the foregoing* . . . . N.J.S.A. 45:19-9(a) (Emphasis added)

It is therefore clear from this definitional section of the Act that in any instance where provision is made with a municipal police department to secure the services of a regular police officer[2] for those purposes during his off-duty hours with remuneration channeled through the municipality, the police officer would be acting in his official capacity and would fall within the exemption to the licensing requirements of the Act.[3]

This conclusion is reinforced by the legislative history of the Act. The predecessor to the present Act, Laws of 1931, c. 183, pp. 410-413, §§ 1-3, provided that nothing in that law applied ". . . to any detective or officer duly appointed or elected

to the police force of the State or of any county or municipality thereof . . . .". By sharp contrast, however, the Legislature in the present Act narrowed the exemption to "employees *solely, exclusively* and *regularly* employed by a governmental body." This amendatory language suggests that whereas it may have been permissible for a police officer to engage in the private detective business without a license prior to 1939, the exemption is now available only when the police officer acts strictly in his official capacity.

You are therefore advised that only those police officers privately employed on their own account during their off-duty hours would incur the interdiction of the Private Detective Act.[4] Regular members of a police department may engage in police related activities for private persons or entities during off-duty hours where arrangements are made with the employing municipality to use them in this fashion.

Very truly yours,
WILLIAM F. HYLAND
Attorney General

By ROBERT J. DEL TUFO
First Assistant Attorney General

1. An officer who was licensed under the Act would of course be in a different category.

2. By its terms, the exemption refers only to regular police officers and does not include special police offiers appointed pursuant to N.J.S.A. 40A:14-146.

3. Moreover, in the construction of the literal terms of a statute, primary regard must be given to the fundamental purpose for which the legislation was enacted. *N.J. Builders, Owner, etc. v. Blair*, 60 N.J. 330, 338 (1960). This strict interpretation of the exemption of municipal police officers from the purview of the Act is fully consistent with the underlying legislative policy to protect the public from the abuse inherent in the private detective business. *Schulman v. Kelly*, 54 N.J. 364, 370-71 (1969); Formal Opinion No. 11 – 1961 dated August 1, 1961.

4. In *Formal Opinion No. 6 - 1976* dated February 10, 1976, and *Formal Opinion No. 6 - 1976 – Supplement* dated March 9, 1976, it was similarly concluded that a constable may not permissibly act as a private security guard for hire during off-duty hours without having obtained a license under the Private Detective Act from the Superintendent of State Police.

December 1, 1977

COLONEL CLINTON PAGANO
Superintendent,
Division of State Police
West Trenton, New Jersey 08625

J. MORGAN VAN HISE
Acting Director,
State Civil Defense & Disaster Control
Eggert Crossing Road – Box 979
Trenton, New Jersey 08625

FORMAL OPINION 1977 – No. 24

Gentlemen:

You have asked for an opinion with respect to the authority of the Civil Defense Auxiliary Police to carry firearms without a permit at times other than periods of emergency. As you know, New Jersey law generally prohibits the carrying of firearms without a permit. *N.J.S.A.* 2A:151-41. Nevertheless, certain classes of persons such as regularly employed federal, state and local law enforcement officers, members of the armed forces while on duty and others as specified in *N.J.S.A.* 2A:151-43 are exempt from this prohibition. Also exempt is "any jailer, constable, railway police or any other peace officer, when in the discharge of his duties." *N.J.S.A.* 2A:151-43(f). It is our conclusion based upon a construction of the Civil Defense and Disaster Control Act and the regulations promulgated by the Governor pursuant to the statutory scheme that the Civil Defense Auxiliary Police are "peace officers" within the meaning of *N.J.S.A.* 2A:151-43(f). As such, they are statutorily authorized to carry firearms when acting within "the discharge of [their] duties."

Our inquiry must thus focus upon the parameters of the official duties of auxiliary police officers. The auxiliary police in New Jersey are a volunteer force organized under the Civil Defense and Disaster Control Act. *App.* A:9-30, *et seq.* As noted in a previous Attorney General's Opinion, "the Act is broadly drawn to provide a system of protection to public rescue operations and maintenance of law and order in the event of emergency or local disaster . . . ." Formal Opinion - 1961 No. 4. Toward this end, it is evident that members of the auxiliary police must "be adequately trained to supplement local police officers in safeguarding against emergency disasters." *Id.* In order to accomplish the purpose of the Act, the Governor is statutorily empowered to "make such orders, rules and regulations as may be necessary [c]oncerning the organization, recruiting, training, conduct, duties, and powers" of the auxiliary police. *App.* A:9-45.

Under the authority of this provision, Governor Meyner issued a proclamation on September 23, 1954, prescribing rules and regulations for the development and training of Civil Defense Auxiliary Police. The proclamation declared that such officers have full police power during any emergency as defined in the statute.[1] More importantly for the purpose of this opinion, the proclamation stated that "within time limits and rules and regulations to be prescribed by the State Civil Defense Director and with the approval of the governing body of any municipality the auxiliary police . . . may be attached to the local police force for the purpose of training [and] during such period . . . shall have all the powers of peace officers, police officers and constables except as may otherwise be prescribed by the municipality."

Thus, it is clear that auxiliary police act in the discharge of their official duties when engaged in emergency disaster control as defined by statute and during periods of actual training.

The remaining question concerns the proper delineation of such training periods. Quite obviously, "training must be bona fide and not abused as to extent." Formal Opinion 1961 - No. 4. A municipality may not substitute civil defense auxiliary police for local or special police officers. Extension of the period of training to accomplish such a result would be unlawful and inconsistent with the purposes underlying the Civil Defense and Disaster Control Act. Further, Directive No. 30 which was issued on November 7, 1966 states that "the length of time the auxiliary police may be attached to the local police for training shall be determined by the governing body and the Civil Defense Director subject to the approval of the Chief of Police and as set forth in the Civil Defense and Disaster Control Auxiliary Police Code." The same directive provides that "the arming of the auxiliary police with weapons during such periods of training shall be determined by the governing body of the municipality subject to the approval of the Chief of Police."

Until this time, no specific rules and regulations were established to govern the extent of training of auxiliary police. As noted, Directive No. 30 leaves the determination of the time limitations to the Civil Defense Director and the municipality. While it may be desirable to have a degree of flexibility to meet differing community needs, it is important that statewide rules and regulations governing training be adopted in order to insure that the purposes of the Civil Defense and Disaster Control Act are not circumvented. A comprehensive directive has thus been prepared and approved and will be formally promulgated. Under the directive, each municipality must submit an annual plan for the proposed activities and manpower utilization of auxiliary police for the coming year. The plan must specify the man hours to be spent by each auxiliary police officer in each particular activity. The State Civil Defense Director is to review each plan to insure that such activities and manpower assignments are in furtherance of bona fide training and in keeping with the spirit of the Attorney General's Formal Opinion 1961 - No. 4. In addition to the annual plan, each municipality is to submit an annual report summarizing manpower utilization for the preceding year. The State Civil Defense Director is to monitor these reports to insure compliance with the annual plan as approved by him. The directive further requires local police to investigate the background of candidates for auxiliary police officers. Thereafter, such candidates must successfully complete a Civil Defense Basic Training Course as prescribed in the directive. Before being authorized to participate in on-the-job training assignments while armed, the governing body and the Chief of Police of the municipality must request authorization from the State Civil Defense Director. Such requests are to be included in the annual plan and must specifically detail the activities in which the auxiliary police are to be armed and the duration of the proposed activities. Auxiliary police must successfully complete the firearms training course prescribed by the Police Training Commission in order to be authorized to carry a weapon. Thereafter, such auxiliary police must be qualified semi-annually by a competent and sanctioned police firearms instructor. The annual report is to include, by individual auxiliary police officer, the number of man hours spent on assigned duties while armed.

In sum, it is our opinion that auxiliary police officers may carry firearms during

those periods when acting within the discharge of their official duties subject to the guidelines about to be promulgated.

Very truly yours,
WILLIAM F. HYLAND
Attorney General of New Jersey
By: PETER H. BRENNAN
Deputy Attorney General

1. *App.* A:9-33.1 provides that:
(!) "Disaster" shall mean any unusual incident resulting from natural or unnatural causes which endangers the health safety or resources of the residents of one or more municipalities of the State, and which is or may become too large in scope or unusual in type to be handled in its entirety by regular municipal operating services.
(2) "Local disaster emergency" shall mean and include any disaster, or the imminence thereof, resulting from natural or unnatural causes other than enemy attack and limited to the extent that action by the Governor under this act is not required.
(3) "War emergency" shall mean and include any disaster occurring anywhere within the State as the result of enemy attack or the imminent danger thereof.
(4) "Emergency" shall mean and include "Disaster" and "war emergency" as above in this section defined.

December 1, 1977

HONORABLE BURRELL IVES HUMPHREYS
Prosecutor of Passaic County
Court House
Paterson, New Jersey 07505

FORMAL OPINION 1977—No. 25

Dear Prosecutor Humphreys:

You have requested an opinion with respect to three questions which have been posed concerning individuals employed by certain municipal police departments in Passaic County whose salaries are drawn from funds provided by the Federal Comprehensive Employment and Training Act of 1973 (CETA), 29 *U.S.C.A.* §801 *et seq.*. The individuals in question have been hired as members of their respective police departments and perform the regular duties of a police officer. However, in accordance with the provisions of CETA, their employment status is not permanent.[1] You have asked whether the identification card badge or other identifying insignia of a CETA-paid individual must clearly distinguish his status from that of a regular and permanent member of the police force in accordance with Chapter 131 of the Laws of 1977, *N.J.S.A.* 40A:14-146.6. Additionally, you have inquired whether and under what circumstances a CETA employee is authorized to carry a firearm. Finally, you have asked whether CETA officers fall within the scope of the Police Training Act, *N.J.S.A.* 52:17B-66 *et seq.*. It is our conclusion based upon a review of the pertinent

statutory provisions, legislative history and case law that a CETA-paid officer falls within the ambit of the newly enacted *N.J.S.A.* 40A:14-146.6, and that his identifying insignia must therefore display his separate status. With regard to the question of firearms, we conclude that a CETA policeman is a "peace officer" within the meaning of *N.J.S.A.* 2A:151-43(f) and that he may, therefore, carry firearms only during his normal and commonly understood duty hours. He, in particular, may not carry a weapon 24 hours a day. Finally, we conclude that CETA officers fall within the intendment of *N.J.S.A.* 52:17B-68 and 52:17B-69 and must, therefore, complete the New Jersey police training course.

Chapter 131 of the Laws of 1977 was approved on June 30, 1977. It is entitled "an act concerning persons who perform special police or law enforcement functions and providing a penalty for violations." Section 1 of the act, codified as *N.J.S.A.* 40A:14-146.6, provides:

> Any other law to the contrary notwithstanding, the identification card, badge or other identifying insignia of any person who serves as a special policeman, auxiliary policeman, civil defense worker, or who performs under the law any special police or law enforcement function in the State or any of its political subdivisions, shall clearly state the name of the agency by which any such person is employed and shall clearly distinguish any such person from the members of any regular and permanent State, county or municipal police department.

We conclude that the purpose of this statute is to enable the public to distinguish the permanently employed, regular, professional police officers from other police and quasi-police employees and volunteers. Common canons of statutory construction, together with the act's legislative history, support this view.

Excluded from the act's prescription are "members of any regular and permanent . . . municipal police department." The appearance in the statute of the phrase "regular and permanent" to modify the noun "police department" initially seems redundant, because, as the term "police department" is commonly used, it is hard to envision one which is not "regular and permanent." The law does not favor redundancies in statutory construction, *e.g., County of Monmouth v. Wissell*, 68 *N.J.* 35, 42-44 (1975), and the problem can be eliminated by surmising the obvious legislative intent to exclude regular and permanent *members* of any police department, *i.e.*, the permanently employed professionals. This conclusion is supported by the legislative history. The statement accompanying Assembly Bill No. 1639 (1976), from which the act originated, eschewed the noun "police department" and employed instead the generically interpretable term "police forces":

> This bill would facilitate the identification of those who perform special police functions in the State, and would aid in distinguishing them from members of regular and permanent police forces.

Likewise, the statement to the bill as it was released from the Senate Law, Public Safety and Defense Committee stated:

> This bill would require the identification of special police or others performing special police functions to clearly state the name of the organization

with which they are affiliated. The purpose is to facilitate immediate identification of them and to distinguish them from members of regular and permanent police forces.[2]

Included within the statutory prescription is "any person . . . who performs under the law any special police or law enforcement function." The term "special police or law enforcement function" is not defined, but the statute and the statements accompanying the bill from which it originated, *supra*, manifest an intent to dichotomize all police and quasi-police appointments into two categories: those which perform under the law a special police function, and those which are regular and permanent. Accordingly, a person performs under the law a special function if his engagement in police duties is in some sense not regular, or temporary, or both.

The CETA employment contract is in many senses not regular, and it is certainly not permanent. Indeed, under certain circumstances, municipalities are under a federally imposed affirmative obligation to remove CETA policemen from their duties as police officers. In particular, if there is a CETA position and a regular position in which the employees are performing substantially equivalent jobs and the regular employee is laid off, then the CETA employee cannot remain working in that position. He must either be transferred or laid off. In *White v. City of Paterson*, 137 *N.J. Super.* 220, 225-226 (App. Div. 1975), the court discussed this requirement and many of the other distinctions between CETA employees and those holding regular positions, and demonstrated the tenuous status of CETA employment. For example, CETA-paid policemen have none of the protections against dismissal or demotion that is accorded regular policemen in those jurisdictions which have not adopted civil service. See *N.J.S.A.* 40A:14-147; 40A:14-150. In civil service municipalities, they have none of the protections against dismissal or demotion that are accorded regular civil service employees. Nor do they have the reemployment rights that such employees receive. If a CETA employee desires to secure a permanent municipal job in a jurisdiction which has adopted civil service, he must take the appropriate Civil Service test and achieve appointment in the usual way.

It is these aspects of the CETA work contract which induce our conclusion that CETA policemen are not permanently employed, regular, professional officers. Despite the wide scope of their duties, their function under the law is somewhat akin to that of special policemen (*N.J.S.A.* 40A:14-146) who are temporarily employed and can be terminated without hearing, and who are, moreover, specifically enumerated in *N.J.S.A.* 40A:14-146.6 among those police employees to which the act applies. Because of his distinctive and nonpermanent status, we conclude that the CETA officer performs under the law a special police function and that, in accordance with the act, his identifying insignia must therefore display his separate status.

Additionally, the inquiry poses the question whether and under what circumstances a CETA policeman or policewoman may carry a firearm. New Jersey law generally prohibits the carrying of firearms without a permit. *N.J.S.A.* 2A:151-41. Nevertheless, certain classes of persons such as regularly employed federal, state and local law enforcement officers, members of the armed forces while on duty and others as specified in *N.J.S.A.* 2A:151-43 are exempt from this prohibition.

In particular, *N.J.S.A.* 2A:151-43(d) provides:

> Section 2A:151-41 . . . does not apply to . . . [t]he *regularly employed* members, including detectives, of the police department of any county or

> municipality . . . at all times . . . or any special policeman appointed by the governing body of any county or municipality . . . while engaged in the actual performance of his official duties . . . [emphasis supplied]

Thus, only "regularly employed" police officers may carry a firearm 24 hours a day, and the question arises whether a CETA officer is regularly employed. For the reasons previously enumerated in *White v. City of Paterson, supra*, we conclude that CETA officers are not regularly employed. Accordingly, the firearm exemption for CETA policemen must be contained in *N.J.S.A.* 2A:151-43(f), which provides:

> Section 2A:141-41 does not apply to . . . [a]ny jailer, constable, railway police, or *any other peace officer*, when in discharge of his duties. [emphasis supplied]

It is our conclusion that CETA police officers are "peace officers" within the meaning of *N.J.S.A.* 2A:151-43(f). Thus, a CETA officer may carry firearms only during his normal and commonly understood duty hours, He, in particular, may not carry a weapon 24 hours a day. See *McAndrew v. Mularchuk*, 33 *N.J.* 172, 177 (1960); *State v. Suarez*, 144 *N.J. Super.* 98 (Law Div. 1976); *State v. Nicol*, 120 *N.J. Super.* 503 (Law Div. 1972).

Finally, the question is posed whether CETA officers must be provided with the New Jersey police training course in accordance with the Police Training Act, *N.J.S.A.* 52:17B-66 *et seq.* In previous informal opinions from the Attorney General, it has been advised that police officers hired pursuant to CETA and pursuant to its predecessor, the Emergency Employment Act of 1971, *Pub. L. No.* 92-54, 85 *Stat.* 146, fall within the ambit of the Police Taining Act and must receive the instruction therein set forth. We continue to affirm this view. The definition of "police officer" to which the act applies is very broad and on its fact encompasses CETA employees:

> "Police officer" shall mean any employee of a law enforcement unit, including sheriffs' officers, other than civilian heads thereof, assistant prosecutors and legal assistants, special investigators in the office of the county prosecutor as defined by statute, persons appointed pursuant to the provisions of *R.S.* 40:47-19, persons whose duties do not include any police function, court attendants and county corrections officers. [*N.J.S.A.* 52:17B-67]

CETA officers are "employees of a law enforcement unit," and they do not fall into any of the enumerated exceptions.

Thus *N.J.S.A.* 52:17B-68 becomes applicable. It provides that "[e]very municipality shall authorize attendance at an approved school by persons holding a probationary appointment as a police officer . . ." Although the act's definition of "police officer" precludes any dispute that CETA employees are not "police officers" within the meaning of this language, the question nevertheless arises whether a CETA officer is capable of holding a "probationary appointment" as that term used in *N.J.S.A.* 52:17B-68. This issue is posed because the term "probationary appointment" is frequently associated with the Civil Service statutes in regard to employees for whom permanent employment is envisioned, *e.g.*, *N.J.S.A.* 11:22-6, and as previously noted, a CETA position cannot be permanent.

The term "probationary appointment" is not defined in the Police Training Act, but we have no difficulty in concluding that CETA officers, like regular officers, do receive a "probationary appointment." A previous formal opinion of the Attorney General held:

> In our opinion the probationary appointment of police officers pursuant to the Police Training Act is separate from and supplementary to the probationary period provided for in *R.S.* 11:22-6 of the Civil Service law. [Atty. Gen. F.O. 1963, No. 6].

Moreover:

> It is clear that the probationary appointment under the Police Training Act is for the purpose of training and educating local police officers; it was not intended to preclude or take the place of the probationary period used to evaluate the conduct of a police officer on the job before his permanent, Civil Service appointment becomes final. [*Id.*].

Thus the inapplicability of the Civil Service statutes to CETA employees does not relieve municipalities of their obligation imposed by *N.J.S.A.* 52:17B-68 to provide CETA officers with the New Jersey police training course.

Similarly, it may be asserted that there is an anomaly in that the Police Training Act establishes the course of instruction as a condition precedent for appointment to a permanent police position, *N.J.S.A.* 52:17B-68 and 52:17B-69, and CETA employees are precluded from permanent employment at least until they pass the civil service examination or regularly enter the police department of municipalities without civil service. *DeLarmi v. Borough of Fort Lee,* 132 *N.J. Super.* 501 (App. Div. 1975), certif. den., 68 *N.J.* 135 (1975). However, the completion of a police training course was not established as a guarantee to a permanent police position. *DeLarmi, supra* at 510. Rather, it was, in part, established in order to "improve . . . the administration of local and county law enforcement" and "to better protect the health, safety and welfare of [New Jersey's] citizens," and in the realization that "police work . . . is professional in nature, and requires proper educational and clinical training . . ." *N.J.S.A.* 52:17B-68.

Nevertheless, there is little doubt that the completion of a police training course will enhance the marketability of CETA officers who later seek permanent police employment through regular channels. In this regard, it may be noted that federal law imposes upon CETA employing agencies the obligations to enhance the job opportunities of program participants and to act towards the transfer of CETA workers into regular employment unsubsidized by the federal funds. *E.g.,* 29 *C.F.R.* §§96.21 (d), 96.23(b) (8), 96.33 (1976). Thus, providing CETA employees with the police training course will serve the dual purpose of fulfilling both State and federal legislative goals.

Moreover, municipalities are strictly obliged to utilize trained personnel in the performance of police duties. The legislative authorization to "create and establish a police department . . . and to provide for the maintenance, regulation and control thereof . . ." *N.J.S.A.* 40A:14-118, carries with it the concomitant duty to furnish public security and to provide for the safety of the citizenry. In particular, this requires that police officers be trained. See also *N.J.S.A.* 52:17B-66.

The obligation to train police officers is enforceable, *inter alia,* by means of the law of torts. The common law of New Jersey held a municipality liable for its negligence in permitting an officer to go on duty without proper training or experience in handling firearms. *E.g., McAndrew v. Mularchuk,* 38 *N.J.* 156 (1962); *Peer v. Newark,* 71 *N.J. Super.* 12 (App. Div. 1961), certif. den. 36 *N.J.* 300 (1962); see also *Corridon v. City of Bayonne,* 129 *N.J. Super.* 393 (App. Div. 1974). Moreover, a municipality was liable under the doctrine or *respondeat superior* for the negligent actions of its police, who were obligated to employ "extraordinary" care in the handling and using of loaded revolvers. *McAndrew v. Mularchuk, supra.* These principles of the common law are probably carried forth in the New Jersey Tort Claims Act. *N.J.S.A.* 59:2-2 and accompanying comment. No reason suggests itself why liability would be less stringent for a CETA than a regular police officer.

In summary, it is our opinion that the identifying insignia of a CETA officer must display his separate status in accordance with the provisions of *N.J.S.A.* 40A:14-146.6. Moreover, we conclude that CETA policemen are permitted by the Gun Control Law, *N.J.S.A.* 2A:151-41 *et seq.,* to carry firearms only during their normal and commonly understood duty hours. Finally, we conclude that municipalities are under an obligation imposed by *N.J.S.A.* 52:17B-68 to provide CETA officers with the New Jersey police training course.

Very truly yours,
WILLIAM H. HYLAND
Attorney General of New Jersey

By: LARRY ETZWEILER
Deputy Attorney General

1. This opinion does not address the propriety under New Jersey law of hiring CETA-paid individuals to perform all the regular duties of a police officer. Admittedly, such hiring is not violative of the Civil Service provisions of the State Constitution or the relevant Civil Service statutes. *White v. City of Paterson,* 137 *N.J. Super.* 220 (App. Div. 1975). Nevertheless, it is at least arguable that the legislature intended that only persons who are or who, after a probationary period, will become permanently employed professionals should perform all the usual and regular duties of a police officer. See *N.J.S.A.* 40A:14-118; 40A:14-122 (previously *R.S.* 40:47-3); 40A:14-128 (previously *R.S.* 40:47-5); 40A:14-146.6; 40A:14-147 (previously *R.S.* 40:76-6); *Sprague v. Seaside Park,* 9 *N.J. Misc.* 305, 153 A. 641 (Sup. Ct. 1931), aff'd o.b., 109 *N.J.L.* 347 (E. A. 1932); *Kinnard v. Geiler,* 15 *N.J. Misc.* 42, 188 *A.*670 (Sup. Ct. 1937); *Travaline v. Borough of Paulsboro,* 121 *N.J.L.* 453 (Sup. Ct. 1938); *Sastokas v. Borough of Freehold,* 134 *N.J.L.* 305 (Sup. Ct. 1946); *Caronia v. Civil Service Comm'n,* 6 *N.J. Super.* 275 (App. Div. 1950); *State v. Jones,* 4 *N.J. Super.* 599, 608 (Law Div. 1949), rev'd on other grounds, 4 *N.J.* 207 (1950), petition for reargument denied, 4 *N.J.* 374 (1950); *cf. DeLarmi v. Borough of Fort Lee,* 132 *N.J. Super.* 501 (App. Div. 1975), certif. den., 68 *N.J.* 135 (1975). Exceptions to this principle exist for emergent circumstances; for officers appointed only for certain parts of the year (such as during the summer at resort areas); for officers appointed temporarily to fulfill the duties of another officer on leave of absence; or, possibly, for special police officers whose terms encompass at most one year (but see *State v. Jones, supra,* stating that even special officers should not perform all the usual and regular duties of a regular police officer). *N.J.S.A.* 40A:14-122 (previously *R.S.* 40:47-3); 40A:14-144; 40A:14-145; 40A:14-146; *Freas v. Cape May,* 77 *N.J.L.* 164 (Sup. Ct. 1908); *Siebke v. Township Committee of Chester Tp.,* 4 *N.J. Misc.* 226, 132 *A.* 341 (Sup. Ct. 1926); *Kinnard v. Geiler, supra; Sastokas v. Borough of Freehold, supra; Clifton v. Civil Service Comm'n,* 1 *N.J. Super.* 269 (App. Div. 1949). An argument can be made, however, that these exceptions are exhaustive, and that CETA police officers fall into none of these categories.

2. The first sentence of the textual statement by the Senate Law, Public Safety and Defense Committee, *supra,* noted only the requirement that the identification of persons performing special police functions must state their organizational affiliation. Although the second sentence went on to explain that the purpose of the statute is to facilitate the public's ability to distinguish such persons from regular and permanent police forces, nevertheless the statement did not explicitly acknowledge the further requirement imposed by the statute that persons performing special functions must also "clearly distinguish" their separate status. This omission should not be interpreted as the Committee's belief that the mere listing of organizational affiliation will always suffice to "clearly distinguish" such separate status. For example, the special policeman is arguably affiliated with his local police department, even though he is not a member thereof, by virtue of his obligations to obey the local police department rules and to subject himself to the supervision of the chief of police. *N.J.S.A.* 40A:14-146. Nevertheless, his separate status must clearly be distinguished on his identifying insignia.

Accordingly, the Committee's statement, *supra,* should certainly not be interpreted as an endorsement of the proposition that mere affiliation with a police department automatically removes an officer from the ambit of the statute.

December 23, 1977

FRED G. BURKE, *Commissioner*
Department of Education
225 West State St.
Trenton, New Jersey 08625

FORMAL OPINION 1977—No. 26

Dear Commissioner Burke:

The question frequently arises whether the Commissioner of Education and the State Board of Education have the authority under the Public School Education Act of 1975, N.J.S.A. 18A:7A-1 *et seq.* (hereafter Act), to direct a local board of education to undertake a capital project after the voters of a school district have rejected referenda for the issuance of bonds to finance such a project. In particular, the issue arises in circumstances where it has been administratively determined that the school district does not offer a thorough and efficient education to its students and that nothing short of capital improvement would bring the district into compliance with the Education Clause of the 1947 New Jersey Constitution.

Initially, it is clear that the courts of this State have always considered the Commissioner of Education to have broad powers to effectuate constitutional and statutory goals. For example, in *Booker v. Plainfield Bd. of Educ.*, 45 N.J. 161 (1965), the court held that where the Commissioner determined that a local board had taken insufficient action to correct *de facto* segregation, it was within his power to remand the matter to the local board and order that it submit a remedial plan or prescribe a plan of his own. He could take that action notwithstanding that no statute specifically provided him with such authority. The court referred to his broad responsibility to decide controversies under the school laws pursuant to N.J.S.A. 18A:6-9 and New Jersey's strong policy against racial segregation expressed in Article I, paragraph 5 of the 1947 New Jersey Constitution and in the education laws.

Similarly, in *Elizabeth Bd. of Educ. v. Elizabeth City Council,* 55 N.J. 501 (1970), and *East Brunswick Bd. of Educ. v. East Brunswick Township Council,* 48 N.J. 94 (1966), the court found that N.J.S.A. 18A:6-9 and the Education Clause armed the Commissioner with power to restore cuts made in a board of education budget by a governing body. Again, there existed no statutory warrant for such administrative action other than the Commissioner's overall responsibility for supervision of the schools of the State. In *Elizabeth Bd. of Educ. v. Elizabeth City Council, supra,* the court said:

> ". . . [I]t is the duty of the Commissioner to see to it that every district provides a thorough and efficient school system. This necessarily includes adequate physical facilities and educational materials, proper curriculum and staff and sufficient funds." 55 N.J. at 506.

Then in *Jenkins v. Morris Township School Dist.*, 58 N.J. 483 (1971), the court held that not only could the Commissioner properly refuse to allow termination of a sending-receiving relationship between districts, but he could also direct a district to proceed toward regionalization. That power was based not in the literal words of any statute, but in the wide grant of authority given the Commissioner to implement State educational policy.

Thus, from this judicial precedent it can be seen that the Commissioner possessed adequate authority to direct capital improvements even prior to the enactment of the 1975 law. However, the 1975 Act has now unequivocally confirmed the pervasive and comprehensive authority of the Commissioner and the State Board to direct a local board to undertake capital improvements, even where a proposal for the issuance of bonds to finance such a project has been rejected by the voters.

Passed in response to the Supreme Court's demand that the Legislature define the content of the education which the Constitution requires and provide some means to compel local districts to raise the moneys necessary to meet that obligation, *Robinson v. Cahill,* 62 N.J. 473, 519-20 (1972), *cert.* den. 414 U.S. 976 (1973) (hereafter *Robinson* I), the Act establishes a legislative framework for the delivery of a thorough and efficient education. It gives the Commissioner and State Board broad powers to ensure that that mandate is met locally.

Section 4 of the Act, N.J.S.A. 18A:7A-4, contains a statement of the Act's goal. It is:

> ". . . to provide to all children in New Jersey, regardless of socioeconomic status or geographic location, the educational opportunity which will prepare them to function politically, economically and socially in a democratic society."

Section 5 sets out the elements of which a thorough and efficient education is comprised:

> "a. Establishment of educational goals at both the State and local levels;
> b. Encouragement of public involvement in the establishment of educational goals;
> c. Instruction intended to produce the attainment of reasonable levels of

proficiency in the basic communications and computational skills;

d. A breadth of program offerings designed to develop the individual talents and abilities of pupils;

e. Programs and supportive services for all pupils especially those who are educationally disadvantaged or who have special educational needs;

f. *Adequately equipped, sanitary and secure physicial facilities and adequate materials and supplies;*

g. Qualified instructional and other personnel;

h. Efficient administrative procedures;

i. An adequate State program of research and development; and

j. Evaluation and monitoring programs at both the State and local levels." (Emphasis added.)

Section 6 requires that the State Board, after consultation with the Commissioner, establishes goals and standards, consistent with sections 4 and 5 of the Act and applicable to all public schools in the State. Under section 7, each school district must establish its own goals, objectives and standards pursuant to State Board rules and, pursuant to section 11, report on its progress in conforming to those goals, standards and objectives.

Sections 14 through 16 are crucial to the whole plan. They delegate to the Commissioner and State Board the responsibility for maintaining a constant awareness of what constitutes a thorough and efficient education and for ensuring that each child in the State receives the education which the Constitution guarantees. *Robinson v. Cahill,* 69 N.J. 449, 459-60 (1976) (hereafter *Robinson* V). If, after reviewing the evaluations of local districts, the Commissioner finds that any district has failed to make sufficient progress toward either standards set by the State or those set locally, he shall so advise the local board and direct that a remedial plan be submitted. If that plan as well is insufficient, the Commissioner shall then order the local boards to show cause why he should not direct that corrective action be taken. Section 14. If, after a plenary hearing, the Commissioner determines that corrective action is necessary, under section 15 he may order budgetary changes or further training of school personnel, or both. Should he find that even these measures are insufficient, section 15 also empowers him:

> ". . . to recommend to the State board that it take appropriate action. The State board, on determining that the school district is not providing a thorough and efficient education, notwithstanding any provision of law to the contrary, shall have the power to issue an administrative order specifying a remedial plan to the local board of education, which plan may include budgetary changes or other measures the State board determines to be appropriate . . . ."

Finally, if a local board refuses to comply with such an order, the State Board shall apply to the Superior Court for an order directing compliance. Section 16.

The court in *Robinson* V aptly summarized the effect of the scheme:

> ". . . The Constitution imposes upon the Legislature the obligation '. . . to provide for the maintenance and support of a thorough and efficient

> system of free public schools . . . .' The imposition of this duty of course carries with it such power as may be needed to fulfill the obligation. The statutory language [of the Act] constitutes a delegation of this power to the State Commissioner of Education as well as to the State Board of Education to see that the constitutional mandate is met. They have for this purpose been made legislative agents. They have received a vast grant of power and upon them has been placed a great and ongoing responsibility."

The court also confirmed that the power given the Commissioner and State Board to direct budgetary changes includes the power to compel increases in the local school budget. Otherwise, the legislative scheme would be frustrated and the State would be powerless to compel a local district to meet its constitutional obligation. Thus, in the court's view, the Act was responsive to the demand it made in *Robinson* I that some means be afforded "by which local districts could be *compelled* to raise the necessary funds." *Robinson* V, *supra* at 463 (emphasis original); see *Robinson* I, *supra* at 513, 519.

Although the 1975 Act and our Supreme Court did not address the specific authority of the Commissioner to direct capital expenditures at the local level, this authority may be readily inferred from the pervasive and comprehensive authority given to the Commissioner by the Act and the Education Clause of the Constitution. An administrative agency has not only the express powers delegated to it but also those implied and incidental powers necessary to allow it to achieve its purposes. It is thus reasonable to assume that in addition to the express authority to order budgetary adjustments or additional training of personnel to insure an adequate educational system, the Commissioner and the State Board may also compel local districts to correct more profound deficiences which result from inadequate capital facilities. N.J.S.A. 18A:7A-15. Furthermore, the statute should be construed in a manner consistent with the general object of the Education Clause. The Supreme Court has stated the preeminence of the Clause over other expressions of constitutional or statutory public policy. This was demonstrated in *Robinson v. Cahill,* 69 N.J. 133, 154 (1975), where it was contended that a redistribution of State aid to schools, in the absence of legislative action, would violate the Appropriations Clause. N.J. Const. art. VIII, §2, par. 2. The court discerned no such conflict, but added that if one existed, the Education Clause would control. For these reasons, it is our opinion that under the Education Clause of the State Constitution and the Public School Education Act of 1975, the Commissioner and the State Board are authorized to direct a local district to undertake a capital project where such a project is deemed essential to a constitutionally mandated thorough and efficient educational system even though the issuance of bonds for such expenditures may have been disapproved by the voters.

Very truly yours,

WILLIAM F. HYLAND
Attorney General of New Jersey

By MARK SCHORR
Deputy Attorney General

Index to Attorney General's Opinions 1974-1977

A.

Abortion—
State may regulate first trimester abortion clinics in general manner. F.O. 6, 1975.

Administrative Law—
Hearings—Non-attorneys may not represent claimants at unemployment compensation hearings. F.O. 11, 1974.
Jurisdiction—Dept. of Health empowered to conduct unannounced inspections in private nursing homes and other health care facilities. F.O. 25, 1975.

Administrative Procedure Act—
Hospital Rate Review Program Guidelines are administrative regulations and should be adopted in accordance with Administrative Procedure Act. F.O. 12, 1975.

Administrative Rules—
Force and effect of law—New Jersey mortgage lenders not barred by N.J.S.A. 46:10B-10 from participation in Government National Mortgage Association program. F.O. 15, 1974.
Hospital Rate Review Program Guidelines are administrative regulations and should be adopted in accordance with Administrative Procedure Act. F.O. 12, 1975

Adoption—
Procedures of Division of Youth and Family Services *re* role of putative father in adoption proceedings satisfy relevant statutory and constitutional requirements. F.O. 7, 1975.

Advertising—
Ophthalmic goods—Ban on advertising of ophthalmic goods under N.J.S.A. 52:17B-41.17 violates first and fourteenth amendments of U.S. Constitution. F.O. 4, 1977.
Professional advertising in New Jersey must be regulated in manner consistent with U.S. Supreme Court decision in *Bates v. State Bar of Arizona*. F.O. 20, 1977.

Age—
State's powers to establish system of juror qualifications and exemptions permits exemption from jury duty of persons seventy years of age or older. F.O. 30, 1975.

Agriculture—
Migrant workers—Representatives of government, newsmen or would-be visitors who seek out farm workers at campsite dwellings not subject to arrest for trespass. F.O. 11, 1975.
State Board of—Promulgation of meeting schedule required by N.J.S.A. 10:4-6 *et seq.* may not be delayed past effective date of Act. F.O. 2, 1976.

Alcohol Beverage Control—
Licenses—Determination of eligibility of persons convicted of crimes to associate with alcoholic beverage industry. F.O. 4, 1975.

Alcoholism—
Breath chemical test—Under certain circumstances, one-year revocation of driving privileges for refusal to submit to breath chemical test shall be imposed under L. 1977, c. 29. F.O. 13, 1977.
Motorist subject to multiple suspensions under N.J.S.A. 39:4-50(a) or (b) or N.J.S.A. 39:4-50.2 can qualify for restoration of driving privileges only after having served minimum of six-month suspension under each conviction for alcohol-related offense. F.O. 11, 1977.

Appropriations—
Transfer of funds—Transfer of sums from Motor Vehicle Liability Security Fund and Unsatisfied Claim and Judgment Fund to General State Fund may be effected by substantive legislation but not by use of appropriations act. F.O. 15, 1975.

Attorneys—
Unauthorized practice of law—F.O. 11, 1974.

B.

Banking, Commissioner of—
Powers and duties—Maximum interest payable on bonds issued pursuant to New Jersey Green Acres and Recreation Opportunities Bond Act. of 1974 is 8%. F.O. 5, 1975.

Banks and Banking—
Mortgages—New Jersey mortgage lenders not barred by N.J.S.A. 46:10B-10 from participation in Government National Mortgage Association program. F.O. 15, 1974.
Mortgages—Foreign commercial bank may make secondary mortgage loans to New Jersey residents consistent with Secondary Mortgage Loan Act of 1970 and Banking Act of 1948. F.O. 17, 1975.
Savings and loan associations—May issue variable rate mortgages so long as maximum term does not exceed 40 years and maximum interest does not exceed usury ceiling in effect at time of loan. F.O. 13, 1976.
Savings and loan associations—May not issue negotiable orders of withdrawal on either interest bearing or interest free accounts. F.O. 13, 1975.

Bonds—
Capital gain and interest income derived from N.J. Economic Development Authority bonds exempt from direct taxation. F.O. 7, 1977.
Interest—Maximum interest payable on bonds issued pursuant to New Jersey Green Acres and Recreation Opportunities Bond Act of 1974 is 8%. F.O. 5, 1975.
Health Care Facilities Financing Authority—
Public sale of bonds to refinance proprietary health care facility construction projects does not violate N.J. Constitution. F.O. 8, 1974.

Brokers—
Real Estate—No statutory prohibition on the maintenance of a branch office by a reciprocally licensed real estate broker. F.O. 14, 1977.

Budget and Accounting, Division of—
Jurisdiction—Division of Purchase and Property has responsibility to determine conditions under which using agencies may incur direct obligations satisfied by U.A. payments. F.O. 21, 1976.
Transfer and expenditure of amounts reserved by taxpayers in Gubernatorial Elections Fund is consistent with N.J. Constitution. F.O. 12, 1977.

Building and Construction, Division of—
Director of Division of Building and Construction may not reject bid of lowest responsible bidder solely because he does not use union labor. F.O. 24, 1975.

Buses—
Subsidies—Audit report of financial status of Transport of New Jersey prepared by Department of Transportation prior to grant of bus subsidy is public record. F.O. 5, 1974.

C.

Citizens and Citizenship—
Employment—Citizenship requirements for employment and acquisition of tenure by public school teachers is unconstitutional. F.O. 10, 1974.

Civil Rights—
Handicapped—Diabetes constitutes "physical handicap" as defined in N.J.S.A. 10:5-1 *et seq.*

Civil Rights, Division on—
Jurisdiction—Cannot enforce provisions of Law Against Discrimination against Department of Civil Service acting within scope of its responsibilities under Title 11. F.O. 5, 1976.
Jurisdiction—Exclusive jurisdiction over complaints alleging unlawful discrimination in public school curricula inheres in Commissioner of Education. F.O. 28, 1975.
Jurisdiction—May not review Commissioner of Insurance's approval of insurance rates. F.O. 2, 1975.

Civil Service—
Residency requirements—Durational residency requirements imposed by N.J.S.A. 11:9-2 are inconsistent with constitutionally protected right to travel. F.O. 13, 1974.

Civil Service, Department of—
Division on Civil Rights lacks jurisdiction to enforce provisions of Law Against Discrimination against Dept. of Civil Service acting within scope of its responsibilities under Title 11. F.O. 5, 1976.

College of Medicine and Dentistry of New Jersey—
Faculty practice plans of CMDNJ subject to all statutes and regulations applicable to College. F.O. 23, 1976.

Colleges and Universities—
Separation of tenured faculty from State Colleges as a result of financial exigencies must be governed by seniority in institution where employed. F.O. 18, 1975.

Commuter Operating Agency—
Loans of federal funds to Dept. of Transportation exempt from Debt Limitation Clause of State Constitution. F.O. 23, 1975.

Constitutional Law—
Elections—Establishment of 29 day period for preparation of adequate voter lists in N.J.S.A. 19:31-5 creates substantial likelihood that 40 day durational residency provision of N.J. Const. Art. II, par. 3 (a) may violate Equal Protection Clause. F.O. 3, 1974.
Legislative Pension Act of 1972—Constitutional under Art. 4, Sec. 4, par. 7 of the 1947 N.J. Const. but unconstitutional under Art. 4, Sec. 4, par. 8 since Act specifies effective date prior to constitutionally effective date. F.O. 12, 1974.

Corrections, Department of—
Calculation of actual parole eligibility dates and minimum-maximum expiration dates for State Prison inmates who subsequently receive additional minimum-maximum term. F.O. 8, 1977.
Correction officer convicted of crime under N.J.S.A. 2A:151-5 may legally carry firearm when required to do so by superior officer in performance of his duties. F.O. 27, 1975.

Counties—
Budgets—Municipal share of public welfare assistance may be excluded from limitation on government spending imposed by N.J.S.A. 40A:4-45.1 *et seq.* but county share may not. F.O. 5, 1977.
Finance—Calculation of "cap" figures and the limitations on spending by municipalities and counties imposed by N.J.S.A. 40A:4-45.1 *et seq.* F.O. 3, 1977.
Indigents—Commissioner of Health has exclusive authority under Health Care Facilities Planning Act to fix reimbursement rate county government must pay for hospital care of indigents. F.O. 9, 1976.
Jails—Dept. of Health and county or municipal boards of Health have right to enter and inspect food service areas of county government facilities and jails and to institute court action to correct hazard. F.O. 16, 1977.
Juvenile Shelters—Counties responsible for establishment of shelter care facilities for juveniles in need of supervision under N.J.S.A. 2A:4-42 *et seq.* F.O. 7, 1974.
Optional County Charter Law—N.J.S.A. 40:41A-1 *et seq.* does not authorize county board of freeholders to alter or abolish struc-

ture of county mosquito commissions. F.O. 22, 1976.
Prosecutors—Assistant prosecutors and county investigators are not exclusively county officers and are not subject to mandatory residency requirements of N.J.S.A. 40A:9-1. F.O. 10, 1977.
Prosecutors—County prosecutor may administratively dispose of a criminal complaint both prior to and following probable cause hearing. F.O. 11, 1976.
State aid projects—All expenditures made pursuant to County Aid Program or any construction project which requires materials are subject to approval by Commissioner of Transportation. F.O. 26, 1975.

Criminal Law—
Juries—State's powers to establish system or juror qualifications and exemptions permits exemption from jury duty of persons seventy years of age or older. F.O. 30, 1975.
Prosecutors—County prosecutor may administratively dispose of a criminal complaint both prior to and following probable cause hearing. F.O. 11, 1976.

D.

Detectives—
Constable may not carry firearm during off duty hours without permit or firearms purchaser ID card or be employed as security by private business unless pursuant to N.J.S.A. 45:19-8 *et seq.* F.O. 6, 1976.

Discrimination—
Division of Civil Rights lacks jurisdiction under Law Against Discrimination to review Commissioner of Insurance's approval of insurance rates. F.O. 2, 1975.
Employment practices—Diabetes constitutes "physical handicap" as defined in New Jersey Law Against Discrimination. F.O. 14, 1974.

Domicile and Residence—
Assistant prosecutors and county investigators not exclusively county officers and not subject to mandatory residency requirements of N.J.S.A. 40A:9-1. F.O. 10, 1977.
Durational residency requirements of N.J.S.A. 11:9-2 inconsistent with constitutionally protected right to travel. F.O. 13, 1974.

E.

Education—
Teachers—Except in special circumstances, citizenship requirements for employment and acquisition of tenure by public school teachers is unconstitutional. F.O. 10, 1974.

Education, Commissioner of—
Jurisdiction—Exclusive jurisdiction over complaints alleging unlawful discrimination in public school curricula. F.O. 28, 1975.
Length of school year—Public schools must remain open for instruction for minimum of 180 days each year. F.O. 19, 1975.
Powers and duties—Commissioner and State Board of Education have authority to direct local district to undertake necessary capital construction even though bond issue has been rejected by voters. F.O. 26, 1977.

Education, Department of—
Construction of school facilities entirely financed by federal moneys need not be submitted for voter approval. F.O. 28, 1976.

Education, State Board of—
Impact of Open Public Meetings Act upon various activities of State Board. F.O. 19, 1976.

Educational Facilities Authority, New Jersey—
Incidental use of state college facilities for religious services organized by students does not conflict with N.J.S.A. 18A:72A-1 *et seq.* F.O. 21, 1977.

Election Law Enforcement Commission—
Campaign spending limitation of Section 7 of N.J.S.A. 19A:44A-7 is unconstitutional. F.O. 10, 1976.

Elections—
Dual Office Holding—Professor at State college may become candidate for Legislature but if elected must resign college post before taking seat in Legislature. F.O. 10, 1975.
Finances—Campaign spending limitation of Section 7 of N.J.S.A. 19:44A-7 is unconstitutional but Act is otherwise constitutional. F.O. 10, 1976.
Gubernatorial General Elections Fund—Transfer and expenditure of amounts reserved by taxpayers in Gubernatorial General Elections Fund is consistent with N.J. Constitution. F.O. 12, 1977.
Notice requirements—Publication of proposed constitutional amendment in newspapers having wide circulation in all counties would be in substantial compliance with N.J. Const., Art. IX, par. 3. F.O. 22, 1975.
Primaries—Political party committees may not endorse candidates prior to primary election but individual members are free to express personal preference. F.O. 9, 1977.
Public Funds—Division on Women may not expend state funds or permit use of state facilities to advocate affirmative vote on public referendum. F.O. 21, 1975.
Registration—Woman's marriage does not in itself change registrant's name within meaning of N.J.S.A. 19:13 if she continues to use maiden name rather than assume husband's surname. F.O. 20, 1975.
Residency—Establishment of 29 day period for preparation of adequate voter lists in N.J.S.A. 19:31-5 creates likelihood that 40 day durational residency provision of N.J. Const. Art. II, par. 3(a) may violate Equal Protection clause of U.S. Const. F.O. 3, 1974.

Schools—Date of school election set forth in L. 1974, c. 191 is to be used for computation of timetables required by statute or departmental regulation. F.O. 3, 1975.

Employee Relations, Office of—
Public managerial and confidential employees have no statutory right to participate in employee labor organizations although supervisory employees may do so if their activities do not conflict with supervisory responsibilities. F.O. 25, 1976.

Employer and Employee—
Discrimination—Diabetes constitutes "physical handicap" as defined in New Jersey Law against Discrimination. F.O. 14, 1974.

Energy—
Bidding requirements of N.J.S.A. 40A:11-1 *et seq.* may be superseded by regulations under Federal Petroleum Allocation Act of 1973. F.O. 4, 1974.

Environmental Protection—
Hearing should be held whenever wetlands map is amended to add new area but no hearing required when wetlands map is amended to delete an area. F.O. 16, 1975.

Equal Rights Amendment—
Publication of proposed constitutional amendment in newspapers having wide circulation in all counties would be substantial compliance with N.J. Const., Art. IX, par. 3. F.O. 22, 1975.

Escheat—
Funds of veteran without next of kin who dies intestate in soldiers' home becomes property of home and does not escheat to general State treasury. F.O. 9, 1974.

Estates—
Interest income received by estate or trust from exempt obligations under L. 1975, c. 172 maintains its exempt character. F.O. 7, 1976.

Ethical Standards, Executive Commission on—
Conflicts of Interest Act does not impose absolute bar to dual State office holding or employment. F.O. 18, 1976.
Commission may hold closed session to discuss complaints of violations of N.J.S.A. 52:13D-12 *et seq.* but with certain exceptions discussions *re* issuance of advisory opinions must be public. F.O. 2, 1977.

F.

Firearms—
See Weapons and Firearms.

Food—
Inspection—Dept. of Health and county or municipal boards of health have right to enter and inspect food service areas of county government facilities and jails. F.O. 16, 1977.

Freedom of Religion—
Incidental use of state college facilities for religious services organized by students does not conflict with N.J.S.A. 18A:72A-1 *et seq.* F.O. 21, 1977.
Moratorium on approval of certificates of need to health care facilities requesting care beds applies to religious as well as non-religious nursing homes. F.O. 2, 1974.

G.

Government National Mortgage Association—
Prohibition against charging of points in connection with mortgage loan does not prevent New Jersey mortgage lenders from participation in program of Government National Mortgage Association. F.O. 15, 1974.

H.

Health—
Physical handicap—Diabetes constitutes "physical handicap" as defined in New Jersey Law Against Discrimination. F.O. 14, 1974.
Pregnancy—Payment of disability benefits for normal pregnancy limited to eight weeks except for claims based on medical complications. F.O. 1, 1975.
Pregnancy—Statutory prohibition of payment of unemployment benefits is unconstitutional but allowance for disability benefit meets Federal requirements. F.O. 4, 1976.

Health—
See also Hospitals and Nursing Homes.

Health Care Facilities Financing Authority—
Public sale of bonds to finance or refinance proprietary health care facility construction project does not violate N.J. Constitution. F.O. 8, 1974.

Health, Commissioner of Health has exclusive authority under Health Care Facilities Planning Act to fix reimbursement rate county government must pay for hospital care of indigents. F.O. 9, 1976.
Jurisdiction—Commissioner of Institutions and Agencies has specific and inclusive power to establish reimbursement rates for services provided to Medicaid recipients. F.O. 8, 1976.
Rate Review Hearings—Division of Rate Counsel has power to participate in rate review proceedings and to charge hospitals applying for approval of rate increases for costs of such participation. F.O. 3, 1976.

Health, Department of—
Abortion Clinics—State may regulate first trimester abortion clinics in general manner. F.O. 6, 1975.
Certificates of Need—Moratorium on approval of certificates of need for care beds applies to religious as well as to non-religious institutions. F.O. 2, 1974.
Jurisdiction—Fully empowered to conduct unannounced inspections of health care facilities. F.O. 25, 1975.

Jurisdiction—Department and county boards of health have right to enter and inspect food service areas of county government facilities and jails. F.O. 16, 1977.
Licenses—Department of Health may include in its health care facility licensing standards a requirement that nursing homes accept and care for a certain number of indigent persons. F.O. 15, 1977.
Public Health Council—May regulate conduct of artificially recombitant DNA research and experimentation. F.O. 6, 1977.

Highways and Streets—
Construction Projects—All expenditures made pursuant to County Aid Program on any construction project which requires materials are subject to approval by the Commissioner of Transportation. F.O. 26, 1975.

Hospitals and Nursing Homes—
Department of Health fully empowered to conduct unannounced inspections health care facilities. F.O. 25, 1975.
Department of Health's moratorium on approval of certificates of need for care beds applies to religious as well as non-religious institutions. F.O. 2, 1974.
Division of Rate Counsel has power to participate in rate review proceedings and to charge hospitals applying for approval of rate increases for costs of such participation. F.O. 3, 1976.
Public sale of bonds by Health Care Facility Financing Authority to finance or refinance proprietary health care facility construction projects does not violate N.J. Constitution. F.O. 8, 1974.
1975 Hospital Rate Review Program Guidelines are administrative regulations subject to Administrative Procedure Act. F.O. 12, 1975.

Hudson County Board of Taxation—
Transfer of certain responsibilities from Hudson County Board to Division of Tax Assessments not authorized by Optional Charter Law. F.O. 17, 1976.

Husband and Wife—
Marriage does not in itself change woman voter registrant's name if she continues to use maiden name rather than assume husband's surname. F.O. 20, 1975.

I.

Institutions and Agencies, Commissioner of—
Powers and Duties—Specific and inclusive power to establish reimbursement rates for authorized health care services provided to Medicaid recipients. F.O. 8, 1976.

Insurance—
1975 Hospital Rate Review Program Guidelines are administrative regulations and should be adopted in accordance with Administrative Procedure Act. F.O. 12, 1975.
Transfer of sums from Motor Vehicle Liability Security Fund and Unsatisfied Claim and Judgment Fund to General State Fund may be affected by substantive legislation but not by use of appropriations act. F.O. 15, 1975.

Insurance, Commissioner of—
Jurisdiction—Division of Civil Rights lacks jurisdiction under Law Against Discrimination to review and to charge hospitals applying for approval of insurance rates. F.O. 2, 1975.
Jurisdiction—Division of Rate Counsel has power to participate in hospital rate review proceedings and to charge hospitals applying for approval of rate increases for costs of such participation. F.O. 3, 1976.
1975 Hospital Rate Review Program Guidelines are administrative regulations and should be adopted in accordance with the Administrative Procedure Act. F.O. 12, 1975.

Interest—
Maximum interest payable on bonds issued pursuant to New Jersey Green Acres and Recreation Opportunities Bond Act of 1974 is 8%. F.O. 5, 1975.

J.

Juries—
State's power to establish system of juror qualifications and exemptions permits exemption from jury duty of person seventy years of age or older. F.O. 30, 1975.

Juveniles—
Except for those children in programs of Division of Youth and Family Services, county government is responsible for establishing shelter care facilities for juveniles in need of supervision. F.O. 7, 1974.

L.

Law Enforcement Officers—
See Police and Peace Officers.

Legislature—
Appropriation to provide legislators with office space in home districts is constitutionally valid. F.O. 6, 1974.
Compensation—Legislative Pension Act of 1972 constitutional under Art. 4, sec. 4, par. 7 of the 1947 N.J. Constitution but unconstitutional under Art. 4, sec. 4, par. 8 since Act specifies effective date prior to constitutionally effective date. F.O. 12, 1974.
Dual Office Holding—Professor at State college may become candidate for Legislature but if elected must resign post before taking seat in Legislature. F.O. 10, 1975.

Loan Associations—
Checking Accounts—State chartered savings and loan associations may not issue negotiable orders of withdrawal on either interest bearing or interest free accounts. F.O. 13, 1975.

Local Government Services, Division of—

The calculation of "cap" figures and the limitations on spending by municipalities and counties imposed by N.J.S.A. 40A:4-45.1 F.O. 3, 1977.

M.

Marriage—
See Husband and Wife.

Medicare and Medicaid—
Commissioner of Institutions and Agencies has specific and inclusive power to establish reimbursement rates for authorized health care services provided to Medicaid recipients. F.O. 8, 1976.

Meetings—
See Public Meetings.

Meyner, Governor Robert—
Pension eligibility. F.O. 20, 1976.

Mortgages—
Foreign commercial bank may make secondary mortgage loans to New Jersey residents. F.O. 17, 1975.
New Jersey Housing Finance Authority lacks statutory authority to finance fully constructed projects or dwelling units. F.O. 14, 1975.
Prohibition of N.J.S.A. 46:10B-10 against charging of points in connection with mortgage loan does not prevent New Jersey mortgage lenders from participation in program of Government National Mortgage Association. F.O. 15, 1974.
State savings and loan associations may issue variable rate mortgages. F.O. 13, 1976.

Motor Vehicle Liability Security Fund—
Transfer of sums from Motor Vehicle Liability Security Fund and Unsatisfied Claim and Judgment Fund to General State Fund may be effected by substantive legislation but not by use of appropriations act. F.O. 15, 1975.

Motor Vehicles—
Alcohol Offenses—Motorist subject to multiple suspensions can qualify for restoration of driving privileges under L. 1977, c. 29 only after having served a minimum six-month suspension under each conviction for alcohol related offense. F.O. 11, 1977.
License Revocation—Under certain circumstances, one-year revocation of driving privileges for refusal to submit to breath chemical test shall be imposed under L. 1977, c. 29. F.O. 13, 1977.

Municipal Corporations—
Budgets—Municipal share of public welfare assistance may be excluded from limitation on government spending imposed by N.J.S.A. 40A:4-45.1 *et seq.* F.O. 5, 1977.

Finance—Calculation of "cap" figures and the limitations on spending by municipalities and counties imposed by N.J.S.A. 40A:4-45.1 *et seq.* F.O. 3, 1977.
Special Police Officers—Should not be appointed to perform regular responsibilities of municipal police department on continuous full or part-time basis. F.O. 22, 1977.

N.

Names—
Marriage of woman voter registrant does not in itself change registrant's name if she continues to use maiden name rather than assume husband's surname. F.O. 20, 1975.

New Jersey Education Association—
Public employee union checkoff authorized by N.J.S.A. 52:14-15.9e does not permit school districts to deduct political contribution component of N.J.E.A. professional payment from wages of its employees. F.O. 1, 1977.

New Jersey Housing Finance Agency—
Lacks statutory authority to finance, by mortgage loans or otherwise, fully contructed projects or dwelling units. F.O. 14, 1975.

New Jersey Property Liability Guarantee Association—
Transfer of sums from Motor Vehicle Liability Fund and Unsatisfied Claim and Judgment Fund to General State Fund may be effected by substantive legislation but not by use of appropriation act. F.O. 15, 1975.

New Jersey Real Estate Commission—
No statutory prohibition on the maintenance of a branch office by a reciprocally licensed nonresident real estate broker. F.O. 14, 1977.

O.

Officers—
Dual Office Holding—
Professor at State College may become candidate for Legislature but if elected must resign college post before taking seat in Legislature. F.O. 10, 1975.
State/County—Assistant prosecutors and county investigators are not exclusively county officers and are not subject to mandatory residency requirements of N.J.S.A. 40A:9-1. F.O. 10, 1977.

P.

Parent and Child—
Procedures of Division of Youth and Family Services *re* role of putative father in adoption proceedings satisfy relevant statutory and constitutional requirements. F.O. 7, 1975.

Parole—
See Prisons and Parole.

Parole Board, New Jersey State—
Contract Parole—Permissible if terms of contract are consistent with statutory responsibilities of the Parole Board. F.O. 29, 1975.
Eligibility—For purposes of determining date commutation credits prescribed in N.J.S.A. 30:4-140 are to be deducted from sentence as of

date of incarceration. F.O. 16, 1976.

Peace Officers—
See Police and Peace Officers.

Pensions—
Compensation Creditable—Confined to base or contractual salary paid to part time professional employees in regular periodic intervals in specific amounts. F.O. 27, 1976.
Compensation Creditable—Retroactive salary increases arising from collective negotiation agreements. F.O. 8, 1975.
Contributions—Public employer not liable for employee's pension contributions nor employee to retirement credit for period of military service entered into after termination date of national emergency. F.O. 9, 1975.
Eligibility of Governor Robert Meyner. F.O. 20, 1976.
Legislature—Part of Legislative Pension Act of 1972 which specifies effective date prior to constitutionally effective date is unconstitutional. F.O. 12, 1974.
Taxation—General exemption from all State taxes set forth in various State pension laws is applicable to New Jersey Gross Income Tax Act. F.O. 26, 1976.
Taxation—Lump sum pension distribution not taxable as unearned income under New Jersey Capital Gains and other Unearned Income Act. F.O. 1, 1976.

Police and Peace Officers—
CETA Officers—Required to wear identifying insignia showing separate status and may carry firearms on normal duty hours only. F.O. 25, 1977.
Civil Defense Auxiliary Police—Authorized to carry firearms when acting in discharge of official duties. F.O. 24, 1977.
Constables—May not carry firearm during off duty hours without permit or firearms purchaser ID card or be employed as security by private business unless licensed. F.O. 6, 1976.
Corrections Officer—Convicted of a crime under N.J.S.A. 2A:151-5 may legally carry a firearm when required to do so by his superior officer in performance of his duties. F.O. 27, 1975.
Law Enforcement Officers—Prohibited by N.J.S.A. 2A:170-20 *et seq.* from solicitation of funds for advertising of any kind. F.O. 16, 1974.
Off Duty Employment—Regular members of a police department may not engage in police related activities for private parties during off duty hours unless arrangements are made through employing municipality. F.O. 23, 1977.
Special Police Officers—Should not be appointed by municipalities to perform regular responsibilities of municipal police department on continuous full or part time basis. F.O. 22, 1977.

Prisons and Parole—
Contract parole—Permissible if terms of contract are consistent with statutory responsibilities of the Parole Board. F.O. 29, 1975.
Corrections Officer—Convicted of a crime under N.J.S.A. 2A:151-5 may legally carry a firearm when required to do so by his superior officer in performance of his duties. F.O. 27, 1975.
Parole Eligibility—For purposes of determining parole eligibility date commutation credits prescribed in N.J.S.A. 30:4-140 are to be deducted from sentence as a date of incarceration. F.O. 16, 1976.
Parole Eligibility—Calculation of actual parole eligibility dates for State Prison inmates who subsequently receive additional minimum-maximum term. F.O. 8, 1977.

Professions and Occupations—
Ban on advertising of prices of ophthalmic goods under N.J.S.A. 52:17B-41.17 violates 1st and 14th amendments of U.S. Constitution. F.O. 4, 1977.
Professional advertising in New Jersey must be regulated in manner consistent with U.S. Supreme Court decision in *Bates* v. *State Bar* of Arizona. F.O. 20, 1977.

Public Contracts—
Bid of lowest responsible bidder may not be rejected solely because he does not hire union labor. F.O. 24, 1975.
Bidding requirements of Local Public Contracts Law may be superseded by regulations under Federal Petroleum Allocation Act of 1973. F.O. 4, 1974.
Professional services excepted from open competitive bidding requirement. F.O. 14, 1976.

Public Employees—
See Public Officials and Employees.

Public Employees Retirement System—
Pension eligibility of Governor Robert Meyner. F.O. 20, 1976.

Public Employees Retirement System—
See also Pensions.

Public Finance—
Appropriations—Transfer of sums from Motor Vehicle Liability Security Fund and Unsatisfied Claim and Judgment Fund to General State Fund may be effected by substantive legislation but not by use of appropriations act. F.O. 15, 1975.
Bonds—Public sale of bonds by Health Care Facilities Financing Authority to finance or refinance proprietary health care facility construction projects does not violate N.J. Constitution. F.O. 8, 1974.
Debt Limitation—Loans of federal funds to Department of Transportation exempt from Debt Limitation Clause of State Constitution. F.O. 23, 1975.
Limitations on spending—Calculation of "cap" figures and limitations on spending by municipalities and counties imposed by N.J.S.A. 40A:4-45.1 *et seq.* F.O. 3, 1977.

State Aid—All expenditures made pursuant to County Aid Program on any construction project which requires materials are subject to approval by Commissioner of Transportation. F.O. 26, 1975.
Use of Public Funds—Division on Women may not expend state funds or permit use of state facilities to advocate affirmative vote on public referendum. F.O. 21, 1975.

Public Health Council—
Public Health Council may regulate conduct of artificially recombitant DNA research and experimentation. F.O. 6, 1977.

Public Meetings—
Deliberations of Public Utilities Commission on rate applications to be conducted in public session. F.O. 30, 1976.
Impact of Open Public Meetings Act upon various activities of State Board of Education. F.O. 19, 1976.
Notice—N.J.S.A. 10:4-6 *et seq.* does not require public body to provide "adequate notice" of closed session provided it has passed, at prior public meeting, resolution stating specific items to be discussed in closed session. F.O. 29, 1976.
Notice—Promulgation of meeting schedule required by N.J.S.A. 10:4-6 *et seq.* may not be delayed past effective date of Act. F.O. 2, 1976.

Public Officials and Employees—
County Prosecutors—May administratively dispose of a criminal complaint both prior to and following probable cause hearing. F.O. 11, 1976.
Dual Office Holding—Conflicts of Interest Act does not impose absolute bar to dual State office holding or employment. F.O. 18, 1976.
Dual Office Holding—Professor at State college may become candidate for legislature but if elected must resign college post before taking seat in Legislature. F.O. 10, 1975.
Labor Organizations—Managerial and confidential employees have no statutory right to participate in employee labor organizations although supervisory employees may do so if their activities do not conflict with supervisory responsibilities. F.O. 25, 1976.
Legislators—Appropriation to provide legislators with office space in home districts is constitutionally valid. F.O. 15, 1974.
Public employee union checkoff authorized by N.J.S.A. 52:14-159e does not permit school districts to deduct political contribution component of N.J.E.A. professional payment from wages of its employees. F.O. 1, 1977.

Public Records—
Audit report of financial status of Transport of New Jersey prepared by Department of Transportation prior to grant of bus subsidies is public record. F.O. 5, 1974.
Department of Transportation records concerning outside employment of employees are public records subject to disclosure. F.O. 24, 1976.

Public Schools—
See Schools and School Districts.

Public Utilities Commission—
Deliberations of Public Utilities Commission on rate applications to be conducted in public session. F.O. 30, 1976.

Public Welfare—
Municipal share of public welfare assistance may be excluded from limitation on government spending imposed by N.J.S.A. 40A:4-45.1 *et seq.* but county share may not. F.O. 5, 1977.

Purchase and Property, Division of—
Jurisdiction—Division has responsibility to determine conditions under which using agencies may incur direct obligations satisfied by U.A. payments. F.O. 21, 1976.

R.

Rate Counsel, Division of—
Jurisdiction—May participate in hospital rate review proceedings and to charge hospitals applying for approval of rate increases for costs of such participation. F.O. 3, 1976.

Religion—
See Freedom of Religion.

Residency—
See Domicile and Residency.

Right to Know—
Promulgation of meeting schedule required by N.J.S.A. 10:4-6 *et seq.* may not be delayed past effective date of Act. F.O. 2, 1976.

Round Valley—Spruce Run Reservoir Complex—
Revenue from Water Conservation Bond Act of 1969 may be used to construct an outlet water transmission facility at the Round Valley Reservoir. F.O. 17, 1974.

S.

Sanitary Code, State—
Department of Health and county or municipal boards of Health have right to enter and inspect food service areas of county government facilities. F.O. 16, 1977.

Savings and Loan Associations—
See Banks and Banking.

Schools and School Districts—
Capital Construction—Commissioner and State Board of Education have authority to direct local district to undertake necessary capital construction even though bond issue has been rejected by voters. F.O. 26, 1977.
Capital Construction—Construction of school facilities entirely financed with federal moneys need not be submitted for voter approval. F.O. 28, 1976.
Elections—Date of school election set forth in L. 1974, c. 191 is to be used for computation of

timetables required by statute or departmental regulation. F.O. 3, 1975.
State-Aid—Public schools in New Jersey are mandated by law to remain open for instruction for a minimum of 180 days each school year. F.O. 19, 1975.
Teachers—Union checkoff authorized by N.J.S.A. 52:14-159e does not permit school districts to deduct political contribution component of N.J.E.A. professional payment. F.O. 1, 1977.
Secondary Mortgage Loan Act—
Foreign commercial bank may make secondary loans to New Jersey residents. F.O. 17, 1975.
Sentences—
See Prison and Parole.
Statutes—
Effective Date—Legislative Pension Act of 1972 is constitutional under Art. 4, sec. 4, par. 7 of the 1947 N.J. Constitution but unconstitutional under Art. 4, sec. 4, par. 8 since Act specifies effective date prior to constitutionally effective date. F.O. 12, 1974.
Inconsistency—Funds of veteran without next of kin who dies intestate in soldiers home becomes property of home and does not escheat to general State treasury. F.O. 9, 1974.
Inconsistency—Establishment of 29 day period for preparation of adequate voter lists in N.J.S.A. 19:31-5 creates substantial likelihood that 40 day durational residency provision of the N.J. Constitution, Art. 2, par. 3(a) may violate Equal Protection Clause of U.S. Constitution. F.O. 3, 1974.
Neither L. 1968, c. 282 nor L. 1975, c. 161 applicable to determination of eligibility of persons convicted of crimes to associate with alcoholic beverage industry. F.O. 4, 1975.
Transfer of sums from Motor Vehicle Liability Security Fund and Unsatisfied Claim and Judgment Fund to General State Fund may be affected by substantive legislation but not by use of appropriations act. F.O. 15, 1975.
Supremacy Clause—
In certain cases bidding requirements of Local Public Contracts Law, N.J.S.A. 40A:11-1 *et seq.*, superseded by regulations under Federal Petroleum Allocation Act of 1973. F.O. 4, 1974.

T.

Taxation—
County Boards of—Transfer of certain responsibilities from Hudson County Board of Taxation to Division of Tax Assessments not authorized by Optional County Charter Law. F.O. 17, 1976.
Income—General exemption from all State taxes set forth in various State pension laws is applicable to New Jersey Gross Income Tax Act. F.O. 26, 1976.
Interest income received by estate or trust from exempt obligations under L. 1975, c. 172 maintains its exempt character and is not taxable individual taxpayer. F.O. 7, 1976.
Lump sum pension distribution not taxable as unearned income under New Jersey Capital Gains and Other Unearned Income Act. F.O. 1, 1976.
New Jersey Economic Development Authority—Bonds exempt from direct taxation of capital gains and interest income under N.J.S.A. 54:10E-1 *et seq.* and N.J.S.A. 54A:-1- *et seq.* F.O. 7, 1977.
Payments to authors or others for license to use property created by their individual efforts are not subject to taxation as royalties under N.J.S.A. 54A:8B-1. F.O. 12, 1976.
Property—Bill authorizing property tax relief for senior citizens over and above relief provided general homeowners violates uniformity mandate of New Jersey Constitution. F.O. 15, 1976.
Temporary Disability Benefits Law—
Payment of disability benefits for normal pregnancy limited to eight weeks except for claims based on medical complications. F.O. 1, 1975.
Transportation, Commissioner of—
All expenditures made pursuant to County Aid Program on any construction project which requires materials are subject to approval by the Commissioner of Transportation. F.O. 26, 1975.
Transportation, Department of—
Commuter Operating Agency—Audit report of financial status of Transport of New Jersey prepared by Department of Transportation prior to grant of bus subsidies is public record. F.O. 5, 1974.
Loans to DOT under terms of 49 U.S.C.A. 721 and 763 exempt from Debt Limitation Clause of New Jersey Constitution. F.O. 23, 1975.
Records concerning outside employment of employees are public records subject to disclosure. F.O. 24, 1976.
Trespass—
Representatives of government, newsmen or would-be visitors who seek out farm workers at their campsite dwellings not subject to arrest for trespass. F.O. 11, 1975.
Trusts and Trustees—
Interest income received by estate or trust from exempt obligations under L. 1975, c. 172 maintains its exempt character is not taxable to individual taxpayer. F.O. 7, 1976.

U.

Unauthorized Practice of Law—
Non-attorneys may not represent or advise claimants at unemployment compensation hearings conducted by Appeal Tribunal or Board of Review. F.O. 11, 1974.

Unemployment Compensation—
Non-attorneys may not represent or advise claimants at unemployment compensation hearings conducted by Appeal Tribunal or Board of Review. F.O. 11, 1974.
Statutory prohibition of unemployment benefit payments for eight week period surrounding termination of pregnancy is unconstitutional. F.O. 4, 1976.
Temporary disability benefits for normal pregnancy limited to eight weeks except for claims based on medical complications. F.O. 1, 1975.
Unsatisfied Claim and Judgment Fund—
Transfer of sums from Motor Vehicle Liability Security Fund and Unsatisfied Claim and Judgment Fund to General State Fund may be effected by substantive legislation but not by use of appropriations act. F.O. 15, 1975.

V.

Veterans—
Funds of veteran without next of kin who dies intestate in soldiers' home becomes property of home and does not escheat to general State treasury. F.O. 9, 1974.
Public employer not liable for employee's pension contributions nor employee to retirement credit for period of military service entered into after termination date of national emergency. F.O. 9, 1975.

W.

Water Conservation Bond Act of 1969—
Revenue from Water Conservation Bond Act of 1969 may be used to construct an outlet water transmission facility at the Round Valley Reservoir. F.O. 17, 1974.
Weapons and Firearms—
Constable may not carry firearm during off duty hours without permit or firearms purchaser ID card. F.O. 6, 1976.
Corrections officer who has been convicted of a crime under N.J.S.A. 2A:151-5 may legally carry a firearm when required to do so by his superior officer in performance of his duties. F.O. 27, 1975.
Civil Defense Auxiliary Police are peace officers authorized by N.J.S.A. 2A:151-43(f) to carry firearms when acting in discharge of official duties. F.O. 24, 1977.
Wetlands Act—
Hearing should be held whenever wetlands map is amended to add new area but no hearing required when wetland map is amended to delete an area. F.O. 16, 1975.
Women—
Marriage does not in itself change registered voter's name if she continues to use maiden name rather than assume husband's surname. F.O. 20, 1975.
Statutory prohibition of unemployment benefit payments for eight week period surrounding termination of pregnancy is unconstitutional. F.O. 4, 1976.
Temporary disability benefits for normal pregnancy limited to eight weeks except for claims based on medical complications. F.O. 1, 1975.
Women, Division on—
State funds or state facilities may not be used to advocate affirmative vote on public referendum but may disseminate information which will enable public to make informed choice. F.O. 21, 1975.
Words and Phrases—
"Compensation"—Certain retroactive salary increases arising from collective negotiations are creditable for calculation of State administered pension and insurance death benefits. F.O. 8, 1975.
"Emergency"—Public employer not liable for employee's pension contributions nor employee to retirement credit for period of military service entered into after termination date of national emergency. F.O. 9, 1975.
"Identifiable Purchase Interest"—Division of Purchase and Property has responsibility to determine conditions under which using agencies may incur direct obligations satisfied by U.A. payments. F.O. 21, 1976.
"Physically Handicapped"—Diabetes constitutes physical handicap as defined in New Jersey Law Against Discrimination. F.O. 14, 1974.
"Position"—Professor at State College may become candidate for Legislature but if elected must resign college post before taking seat in Legislature. F.O. 10, 1975.
"Royalties"—Payments to authors or others for license to use property created by their individual efforts are not subject to taxation as royalties under N.J.S.A. 54:8B-1. F.O. 12, 1976.
"Statute"—Prohibition of N.J.S.A. 46:10B-10 against charging of points in connection with mortgage loan does not prevent New Jersey mortgage lenders from participation in program of Government National Mortgage Association. F.O. 15, 1974.

Y.

Youth and Family Services, Division of—
Procedures of Division of Youth and Family Services *re* role of putative father in adoption proceedings satisfy relevant statutory and constitutional requirements. F.O. 7, 1975.
Except for those children in programs of Division of Youth and Family Services county government is responsible for establishing shelter care facilities for juveniles in need of supervision under N.J.S.A. 2A:4-52 *et seq.* F.O. 7, 1974.

Statutes Cited 1974-1977

2A:4-42 *et seq.*	F.O. 7, 1974	19:34-52	F.O. 9, 1977
2A:37-12	F.O. 9, 1974	19:44A-7	F.O. 10, 1976
2A:69-1	F.O. 30, 1975	19:57-7	F.O. 3, 1975
2A:69-2	F.O. 30, 1975	24:7-30	F.O. 24, 1975
2A:151-5	F.O. 27, 1975	26:1A-7	F.O. 6, 1977
2A:151-8	F.O. 27, 1975	26:2H-1 *et seq.*	F.O. 6, 1975
2A:151-41	F.O. 6, 1976	26:2H-1 *et seq.*	F.O. 8, 1976
2A:151-41	F.O. 24, 1977	26:2H-1 *et seq.*	F.O. 9, 1976
2A:151-41	F.O. 25, 1977	26:2H-5(a)	F.O. 25, 1975
2A:168A-1 *et seq.*	F.O. 4, 1975	26:2H-5(b)	F.O. 12, 1975
2A:170-20 *et seq.*	F.O. 16, 1974	26:2H-7	F.O. 2, 1974
2A:170-31	F.O. 11, 1975	26:2H-8	F.O. 2, 1974
2A:170-78 *et seq.*	F.O. 11, 1974	26:2H-12	F.O. 15, 1977
9:3-17 *et seq.*	F.O. 7, 1975	26:2H-18(d)	F.O. 12, 1975
10:4-1 *et seq.*	F.O. 19, 1976	26:21-1 *et seq.*	F.O. 8, 1974
10:4-6 *et seq.*	F.O. 29, 1976	26:9-13 *et seq.*	F.O. 22, 1976
10:4-6 *et seq.*	F.O. 30, 1976	27:1A-15	F.O. 23, 1975
10:4-6 *et seq.*	F.O. 2, 1977	27:13-1 *et seq.*	F.O. 26, 1975
10:5-1 *et seq.*	F.O. 14, 1974	27:14-1 *et seq.*	F.O. 26, 1975
10:5-1 *et seq.*	F.O. 5, 1976	30:4-92	F.O. 8, 1977
10:5-4.1	F.O. 14, 1974	30:4-123.1 *et seq.*	F.O. 29, 1975
10:5-12	F.O. 2, 1975	30:4-132	F.O. 9, 1974
11:1-1 *et seq.*	F.O. 5, 1976	30:4-140	F.O. 16, 1976
11:9-2	F.O. 13, 1974	30:4-140	F.O. 8, 1977
11:22-7	F.O. 10, 1977	30:4C-11	F.O. 7, 1974
13:9A-1 *et seq.*	F.O. 16, 1975	30:4C-27	F.O. 7, 1974
17:9A-316 *et seq.*	F.O. 17, 1975	30:4D-1 *et seq.*	F.O. 8, 1976
17:11A-34 *et seq.*	F.O. 17, 1975	30:6AA-14	F.O. 9, 1974
17:12B-130(a)	F.O. 13, 1975	31:1-1	F.O. 5, 1975
17:12B-133	F.O. 13, 1975	33:1 *et seq.*	F.O. 4, 1975
17:29A-1 *et seq.*	F.O. 2, 1975	33:1-19	F.O. 4, 1975
17:29A-6	F.O. 2, 1975	34:13A-1 *et seq.*	F.O. 25, 1976
17:29A-7	F.O. 2, 1975	38:23-5	F.O. 9, 1975
17:29A-11	F.O. 2, 1975	38:23-6	F.O. 9, 1975
17:30A-1 *et seq.*	F.O. 15, 1975	39:4-50	F.O. 11, 1977
17:48-7	F.O. 12, 1975	39:6-92 *et seq.*	F.O. 15, 1975
18A:6-39	F.O. 10, 1974	40:41A-1 *et seq.*	F.O. 17, 1976
18A:7A-15	F.O. 26, 1977	40:41A-1	F.O. 22, 1976
18A:7A-25	F.O. 3, 1977	40A:4-1 *et seq.*	F.O. 3, 1977
18A:14-9	F.O. 3, 1975	40A:4-45.1 *et seq.*	F.O. 5, 1977
18A:14-12.1	F.O. 3, 1975	40A:4-45.1 *et seq.*	F.O. 3, 1977
18A:14-13	F.O. 3, 1975	40A:9-1	F.O. 10, 1977
18A:14-25	F.O. 3, 1975	40A:11-1 *et seq.*	F.O. 4, 1974
18A:20-4.2(d)	F.O. 28, 1976	40A:11-1 *et seq.*	F.O. 14, 1976
18A:26-1	F.O. 10, 1974	40A:14-146	F.O. 22, 1977
18A:26-8.1	F.O. 10, 1974	40A:14-146.6	F.O. 25, 1977
18A:28-3	F.O. 10, 1974	43:15A-6(r)	F.O. 27, 1976
18A:36-1	F.O. 19, 1975	43:15A-39	F.O. 20, 1976
18A:36-2	F.O. 19, 1975	43:15A-48	F.O. 8, 1975
18A:36-20	F.O. 28, 1975	43:15A-128	F.O. 20, 1976
18A:58-16	F.O. 19, 1975	43:15A-135	F.O. 12, 1974
18A:60-3	F.O. 18, 1975	43:21-2	F.O. 1, 1975
18A:60-6 *et seq.*	F.O. 18, 1975	43:21-6	F.O. 11, 1974
18A:64-1 *et seq.*	F.O. 18, 1975	43:21-4(c)(1)	F.O. 1, 1975
18A:64C-6(c)	F.O. 23, 1976	43:21-4(c)(1)	F.O. 4, 1976
18A:64G-7	F.O. 23, 1976	43:21-4(f)(1)(B)	F.O. 1, 1975
18A:72A-1 *et seq.*	F.O. 21, 1977	43:21-4(f)(1)(B)	F.O. 4, 1976
19:31-5	F.O. 3, 1974	43:21-5(a)	F.O. 1, 1975
19:31-13	F.O. 20, 1975	43:21-26	F.O. 1, 1975

43:21-39(e)	F.O. 1, 1975	52:14-15.9e	F.O. 1, 1977
44:5-11 *et seq.*	F.O. 9, 1976	52:17B-41.17	F.O. 4, 1977
45:19-8 *et seq.*	F.O. 6, 1976	52:17B-68	F.O. 25, 1977
45:19-9(a)	F.O. 23, 1977	52:32-2	F.O. 24, 1975
45:15-20	F.O. 14, 1977	52:34-6	F.O. 21, 1976
46:10B-10	F.O. 14, 1974	52:34-12	F.O. 24, 1975
47:1A *et seq.*	F.O. 5, 1974	54:8B-1	F.O. 12, 1976
47:1A-1 *et seq.*	F.O. 24, 1976	54:8B-1 *et seq.*	F.O. 26, 1976
52:9H-5 *et seq.*	F.O. 3, 1977	54A:1-1 *et seq.*	F.O. 7, 1977
52:13D-1 *et seq.*	F.O. 18, 1976	54A:9-25.1	F.O. 12, 1977
52:13D-12 *et seq.*	F.O. 24, 1976	55:14J-2 *et seq.*	F.O. 14, 1975
52:13D-12 *et seq.*	F.O. 2, 1977		

New Jersey Constitution of 1947 Cited

Art. II, par. 3(a)	F.O. 3, 1974	Art. VI, sec. 2, par. 3	F.O. 11, 1974
Art. IV, sec. 4, par. 7	F.O. 5, 1974	Art. VII, sec. 1, par. 1	F.O. 15, 1976
Art. IV, sec. 4, par. 7	F.O. 12, 1974	Art. VII, sec. 1, par. 2	F.O. 5, 1976
Art. IV, sec. 4, par. 8	F.O. 12, 1974	Art. VII, sec. 2, par. 3	F.O. 23, 1975
Art. IV, sec. 5, par. 3	F.O. 10, 1975	Art. VIII, sec. 1, par. 7	F.O. 12, 1977
Art. IV, sec. 5, par. 4	F.O. 10, 1975	Art. VIII, sec. 2, par. 1	F.O. 8, 1974
Art. IV, sec. 7, par. 4	F.O. 15, 1975	Art. VIII, sec. 3, par. 3	F.O. 8, 1974
Art. IV, sec. 7, par. 5	F.O. 15, 1975	Art. IX, par. 3	F.O. 22, 1975

New Jersey Administrative Code Cited

3:1-1.1	F.O. 5, 1975	8:24-1.1 *et seq.*	F.O. 16, 1977
4:1-8.8(a)(2)	F.O. 13, 1974	8:33-1.11	F.O. 2, 1974
6:4-1.5	F.O. 28, 1975	11:1-5.1	F.O. 15, 1975
6:27-1.13	F.O. 19, 1975	13:2-13.1 *et seq.*	F.O. 4, 1975

Session Laws Cited

L. 1903, c. 1	F.O. 19, 1975	L. 1974, c. 102	F.O. 5, 1975
L. 1957, c. 27	F.O. 16, 1976	L. 1974, c. 161	F.O. 4, 1975
L. 1961, c. 43	F.O. 1, 1975	L. 1974, c. 191	F.O. 3, 1975
L. 1967, c. 81	F.O. 14, 1975	L. 1975, c. 172	F.O. 1, 1976
L. 1968, c. 282	F.O. 4, 1975	L. 1975, c. 172	F.O. 7, 1976
L. 1969, c. 127	F.O. 17, 1974	L. 1975, c. 353	F.O. 14, 1976
L. 1973, c. 285	F.O. 4, 1975	L. 1977, c. 29	F.O. 11, 1977
L. 1974, c. 17	F.O. 15, 1975	L. 1977, c. 29	F.O. 13, 1977
L. 1974, c. 30	F.O. 3, 1974		