TITLE OF WORK

STATE OF HAWAII

ATTORNEY GENERAL

OPINIONS

AUGUST 1959 - APRIL 1963

1959

INDEXING INSTRUCTIONS

August 7, 1959

I SEAL

Seal of State of Hawaii

(a) The year "1959" on the great seal of the State of Hawaii may be placed in the same position as the year "1900" on the great seal of the Territory of Hawaii.

(b) The greal seal of the Territory of Hawaii has been adopted as the great seal of the State of Hawaii with proper modifications.

Seal of the Territory of Hawaii

(a) The great seal of the Territory of Hawaii has been adopted as the great seal of the State of Hawaii with proper modifications.

(b) The position of the year "1900" is top-center below the legend Territory of Hawaii.

II SESSION LAWS OF HAWAII 1959

Act 272

(Seal of the State of Hawaii)

III REVISED LAWS OF HAWAII 1955

Section 14-5 amended 1957

The purpose of the amendment was simply to change portions of the language describing the great seal of the Territory, without changing the seal itself.

III REVISED LAWS OF HAWAII 1955

Section 14-5

The position of the year "1900" is to center below the legend Territory of Hawaii.

IV. SESSION LAWS OF HAWAII 1957

ACT 29

Description of Seal.

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TERRITORY OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

August 7, 1959

Honorable Edward E. Johnston
Secretary of Hawaii
Iolani Palace
Honolulu, Hawaii

Dear Sir:

Your request for an opinion as to whether the year "1959" on the great seal of the State of Hawaii may not be placed in the same position as the year "1900" on the great seal of the Territory of Hawaii has had our attention.

The first legislative enactment governing the great seal of the Territory of Hawaii in so far as the crest is concerned contained the words "Territory of Hawaii, 1900". L. 1901, c. 16, s. 1; Sec. 114, R.L.H. 1905, p. 126. A design for the seal was represented and indicated in the statute itself. Sec. 114, R.L.H. 1905, p. 127; Sec. 132, R.L.H. 1915, p. 150; Sec. 7771, R.L.H. 1935, p. 1194; Sec. 14-5, R.L.H. 1955, p. 194. This design indicated that the approved and proper position for the year "1900" was at top-center under the words "Territory of Hawaii".

The legislature in 1957 amended Sec. 14-5, R.L.H. 1955 by Act 29, Sec. 14-5, R.L.H. 1955, 1957 Supplement, p. 30. The purpose of the amendment was simply to change portions of the language describing the great seal of the Territory without changing the seal itself. Standing Committee Rep. No. 243, dated April 11, 1957. The principal purpose was to put the description of the seal in a more readable language. The legend at the crest was not changed.

In preparation for the transition from the status as a Territory to that of a State - to provide for the great seal of the State of Hawaii - the 30th Legislature of the Territory of Hawaii adopted the great seal of the Territory of Hawaii, with appropriate modifications as the great seal of the State of Hawaii. The modifications indicated were the substitution of the words "State" for "Territorial" or "Territory" and the year "1959" for "1900". This was effected by

Act 272 of the 30th Legislature of the Territory of Hawaii and was to take effect upon admission of Hawaii into the Union as a State. The legend at the crest is to be "State of Hawaii, 1959".

Thus, this office is of the opinion that the year "1959" may be placed at top-center of the seal under the legend "State of Hawaii" on the great seal of the State of Hawaii in the similar position as the year "1900" on the great seal of the Territory of Hawaii. This is in harmony with past legislative indications and continues the outstanding design used by the Republic of Hawaii and adopted by the Territory of Hawaii. This same seal has been adopted for the State of Hawaii.

Very truly yours,

Tenny Hon Tom

TENNY HON TOM
Deputy Attorney General

APPROVED:

JACK H. MIZUHA
Attorney General

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ADDRESS REPLY TO
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TERRITORY OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

August 10, 1959

Hawaii Aeronautics Commission
Honolulu International Airport
Honolulu 17, Hawaii

Attention: Mr. A. P. Storrs, Director

Subject: Amendment of Lease No. 50--The Airport Parking Company, Lessee

Gentlemen:

This is in response to your letter of July 22, 1959 (your file no. 9912). As we understand the situation, at the time the subject concession was put out to bid, it was your desire that the concessionaire operate the parking area adjacent to the existing terminal only until the parking area at the new terminal was completed and ready for occupancy. Both the present and the proposed new parking areas would be separately put out for bid and might be operated by different concessionaires, but the existing area near the present terminal would be operated only until the new terminal parking area was completed. At the time for the bid for and execution of the subject lease, this interim was to the best of your then estimate a period of some two years, i.e. the new area would have to be occupied and the present area vacated no more than two years after the subject lessee began operations on the present area, which was on or about January 1, 1959. It is presently estimated that the new area will not be ready by January 1, 1961, thus necessitating an extension of the subject lessee's tenancy until some time on or near April 1, 1961.

Your letter requests our opinion as to whether it is legally proper to amend H. A. C. Lease No. 50 so as to allow the lessee thereunder to "holdover" from the termination period of the present lease to April 1, 1961. Your letter additionally requests our advice on the form of the amendment of the subject lease if there are no legal objections thereto.

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Please be advised that it is the opinion of this office that the Commission may amend the subject lease so as to allow the lessee to continue to occupy the premises for several months beyond the existing term of Lease No. 50. It is our opinion that such an amendment is not prohibited by the intent of Act 245, S. L. H. 1959, which requires certain concessions to be leased by public bid only. It would appear impractical to disrupt the parking operation at the present terminal to put out to bid operation of this area for such a short period after the expiration of the present lease. Therefore, it is our opinion that if the holding over is for a period not to exceed six months, the existing lease may be so amended without requiring the additional period to be the subject of a separate public bid.

On the question of the proper form of the amendment above authorized, please be advised that we suggest you utilize the form of Lease No. 34 (Lockheed Air Terminals) and the Addendum thereto we recently prepared to: (1) prepare an Addendum for use with respect to Lease No. 50, and (2) insert therein a provision that the lessee thereunder shall continue to occupy the premises as a month-to-month tenant (terminable by the giving of 30 days' notice by either party) similar to the like provision contained in Lease No. 34. We feel that by the use of these forms in the manner indicated, the matter of drafting the desired amendment to Lease No. 50 will be a relatively simple matter, but should you encounter any difficulty, we will be pleased to furnish such further assistance on this matter as you may require or desire.

Yours very truly,

(s) Willson C. Moore, Jr., by
(s) Henry H. Shigekane
Acting Assistant Attorney General
Willson C. Moore, Jr.
Special Deputy Attorney General

Enc.
Lease no. 50 w/exhibit A

APPROVED:

Jack H. Mizuha
Attorney General

No indexing necessary--WCM, Jr.

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INDEXING INSTRUCTIONS

Op. 59-103

I. HAWAII INSURANCE LAW

The Insurance Commissioner of the Territory of Hawaii, under the Hawaii Insurance Law, does not have the power, by rules and regulations, to alter or change the law as enacted by the legislature of the Territory of Hawaii or to impose a penalty for their violation.

II. RULES AND REGULATIONS

Same as above

III. INSURANCE COMMISSIONER

Same as above.

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TERRITORY OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

August 13, 1959

Honorable Kam Tai Lee
Insurance Commissioner
Territory of Hawaii
Honolulu, Hawaii

Dear Sir:

This is in response to your letter of July 27, 1959, requesting advice on the following questions:

1. Does the Insurance Commissioner of the Territory of Hawaii, under the Hawaii Insurance Law, have the authority to adopt regulations like the regulations of the State of Washington as set forth below?

2. If the answer to Question 1 is "yes," must the Insurance Commissioner of the Territory of Hawaii adopt such regulations pursuant to section 181-35(c)(1), R.L.H. 1955 and according to section 7-29, R.L.H. 1955?

3. Instead of limiting the period of the temporary or trainee license to six months as provided by the regulations of the State of Washington, is it legally possible to establish a maximum period of two years for such temporary or trainee license by such regulations?

The regulations of the State of Washington mentioned above and hereinafter referred to provide as follows:

"1. As used herein or hereafter the term 'trainee' shall refer to anyone employed to receive training and experience to qualify as an adjuster. The regulations set forth herein or hereafter shall apply to all acts relative to adjustment activities performed by any trainee. Unless and until the regulations set forth herein are complied with in full the benefits of these regulations shall not be available to any person.

"2. Trainees shall at all times be under the supervision of a licensed adjuster, and all adjusting transactions shall be in the name of such licensed adjuster who shall be responsible for the acts of the trainee.

"3. Activities of the trainee shall be restricted to participation in factual investigation and tentative closing of losses, subject always to review and final confirmation by the licensed adjuster.

"4. Both the individual trainee and his supervisory licensed adjuster shall be residents of this state. Compensation of such trainees shall be on a salary basis only. No person may be a trainee under the provisions of this regulation more than one time.

"5. Anyone employing trainees shall immediately advise the Insurance Commissioner by letter, of such employment, giving the exact date of employment of each trainee and enclosing an adjuster's license application form properly completed with a remittance for $3.00 to cover the application fee.

"6. Each trainee shall, within six months from the date of his employment and in no event later than six months after receipt of his application, take and pass the adjuster's examination required by the Insurance Commissioner. A violation of this requirement or any provision of the Insurance Code shall subject both the trainee and his supervisory to penalties of the Code."

In regards to Question 1, it is the opinion of this office that the Insurance Commissioner of the Territory of Hawaii, under the Hawaii Insurance Law, does not have the authority to adopt regulations like the regulations of the State of Washington. This opinion makes the consideration of Questions 2 and 3 unnecessary.

Sections 181-1 to 181-726, R.L.H. 1955, as amended, constitute the Hawaii Insurance Law. Section 181-364, R.L.H. 1955 defines an adjuster and excepts certain individuals from such definition. Section 181-365, R.L.H. 1955 requires the licensing of an adjuster. Section 181-392, R.L.H. 1955 permits, under certain circumstances, a general agent, a subagent and a nonresident independent adjuster to adjust without a license. There is no statutory provision authorizing the Insurance Commissioner of the Territory of Hawaii, by rules and regulations, to permit others to adjust without a license. Under the circumstances, it appears that the legislature of the Territory of Hawaii has intended that, until it has acted otherwise, only those individuals excepted in said section 181-364 and permitted in said section 181-392 could adjust without a license.

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The regulations of the State of Washington permit an individual employed by a licensed adjuster to adjust without a license for a certain period. Such an individual is not permitted to adjust without a license under the law as enacted by the legislature of the Territory of Hawaii. If the Insurance Commissioner of the Territory of Hawaii could adopt such regulations, the regulations would effect a change in the law as enacted by the legislature of the Territory of Hawaii.

Although section 181-35(c)(1), R.L.H. 1955 empowers the Insurance Commissioner of the Territory of Hawaii to make rules and regulations, it does not authorize the said Insurance Commissioner to alter or change the law as enacted by the legislature of the Territory of Hawaii. Said section 181-35(c)(1) merely authorizes the said Insurance Commissioner to make rules and regulations to effectuate the provisions of the Hawaii Insurance Law as enacted by the legislature of the Territory of Hawaii. An administrative officer, such as the Insurance Commissioner of the Territory of Hawaii, does not have the power, by rules and regulations, to alter or change the law as enacted by the legislature.

> "Since the power to make regulations is administrative in nature, legislation may not be enacted under the guise of its exercise by issuing a 'regulation' which is out of harmony with, or which alters, extends, or limits, the statute being administered, or which is inconsistent with the expression of the lawmakers' intent in other statutes." 42 Am. Jur. Public Administrative Law § 53, pp. 358, 359.

Even if the regulations of the State of Washington are construed to provide a temporary license to adjust, the Insurance Commissioner of the Territory of Hawaii, under the Hawaii Insurance Law, does not have the authority to adopt such regulations.

The legislature of the Territory of Hawaii has made no provision for a limited license or a temporary license in respect to a license for an adjuster. It also has made no provision authorizing the Insurance Commissioner of the Territory of Hawaii, by rules and regulations, to provide for such limited license or temporary license. However, the legislature of the Territory of Hawaii has made provisions for a limited license (section 181-379, R.L.H. 1955) and for a temporary license (section 181-400, R.L.H. 1955, as amended) in respect to licenses for a general agent, a subagent and a solicitor. Under the circumstances, it appears that the legislature of the Territory of Hawaii has intended that, until it has acted otherwise, there shall be no limited license or temporary license in respect to a license for an adjuster.

If the Insurance Commissioner of the Territory of Hawaii could adopt regulations like the regulations of the State of

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Washington, construed to provide a temporary license to adjust, the regulations would effect a change in the law as enacted by the legislature of the Territory of Hawaii. As stated previously, the rules and regulations of an administrative officer cannot have such an effect.

The Insurance Commissioner of the Territory of Hawaii, under the Hawaii Insurance Law, does not have the authority to adopt regulations like the regulations of the State of Washington also because the regulations of the State of Washington provide for the imposition of a penalty for a violation of one of their requirements.

Although section 181-35(c)(1), R.L.H. 1955 empowers the Insurance Commissioner of the Territory of Hawaii to make rules and regulations to effectuate the provisions of the Hawaii Insurance Law as enacted by the legislature of the Territory of Hawaii, it does not authorize the said Insurance Commissioner to impose a penalty for the violation of such rules and regulations. An administrative officer, by rules and regulations, does not have the power to impose a penalty for the violation of the rules and regulations. Such power rests with the legislature and cannot be delegated.

> "Administrative authorities may be empowered to enact rules and regulations having the force and effect of law, but any criminal or penal sanction for the violation of such rules and regulations must come from the legislature itself. Administrative authorities may not initiate such sanctions. To declare what shall constitute a crime and how it shall be punished is a power vested solely in the legislature, and it may not be delegated to any other body or agency. Prescribing of penalties is a legislative function, and a commission may not be empowered to impose penalties for violations of duties which it creates under a statute permitting it to make rules." 42 Am. Jur., Public Administrative Law § 50, p. 355.

Very truly yours,

/s/ Noboru Nakagawa

NOBORU NAKAGAWA
Special Deputy Attorney General

APPROVED:

JACK H. MIZUHA
Attorney General

Op. 59-103.

Op. 59-104
August 13, 1959

INDEXING INSTRUCTIONS

I. EMPLOYEES' RETIREMENT SYSTEM

Payment of Benefit

A beneficiary who collects a lump sum payment is deemed to have waived his right under the original contract of annuity.

IA Beneficiary (Same syllabus as I)

II. REVISED LAWS OF HAWAII 1955

Section 6-51

III. SESSION LAWS OF HAWAII 1959

Joint Resolution No. 20

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TERRITORY OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

August 13, 1959

Mr. Charles L. Hapai
Deputy Director
Employees' Retirement System
Territory of Hawaii
Honolulu, Hawaii

Dear Mr. Hapai:

Re: A. G. No. 11793
W. Lloyd Lederer

This is in response to your letter of June 30, 1959, as to whether there will be any liability in the Territory on the contract made with Mrs. Lederer to pay her an annuity under Option D of section 6-51, Revised Laws of Hawaii 1955 upon compliance with Joint Resolution No. 20. Said resolution authorizes and directs the Employees' Retirement System to pay Mrs. Lederer the balance of her reserve in the System in one lump sum.

It is the opinion of this office that upon her collecting said lump sum payment she will be deemed to have waived her rights under said contract, and this should be confirmed by her executing a release of any rights under said contract.

Since she is the sole beneficiary of the death benefit, there is no other person whose consent would be necessary or whose interest would be affected. Certainly she cannot claim double payment, and by virtue of a release executed by her, there can remain no question of the termination of the original contract.

Yours very truly,

APPROVED:

/s/ Arthur S. Komori
ARTHUR KOMORI

JACK H. MIZUHA
Attorney General

Op. 59-104

INDEXING INSTRUCTIONS

August 14, 1959

NURSES, BOARD OF

Has power to establish 3 different curriculum standards for 3 different programs for professional nurses, or to establish own standard to meet the needs of all three.

REVISED LAWS OF HAWAII 1955

Sec. 67-4(6)

SESSION LAWS OF HAWAII 1959

Act 268

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TERRITORY OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

August 14, 1959

Miss Alison MacBride
Executive Secretary
Board for the Licensing of Nurses
Mabel L. Smyth Memorial Building
Honolulu 13, Hawaii

Dear Madam:

Reference is made to your letter of June 1, 1959, wherein you requested this office to determine whether the board for the licensing of nurses is permitted to establish three different curriculum standards for the three different programs for professional nurses, or to establish one standard sufficiently flexible to meet the needs of all three.

It is our opinion that the board is permitted to establish three different curriculum standards for the three different programs for professional nurses, or to establish one standard sufficiently flexible to meet the needs of all three. This opinion is based on section 67-4(b), Revised Laws of Hawaii 1955, as amended by Act 268, Session Laws of Hawaii 1959, which gives the board the power "to prescribe curricula and standards for educational programs" preparing persons for a nursing licensure. In addition, the board has the power to accredit and to survey for accredition an institution's entire nursing program (sections 67-21 and 67-22, Revised Laws of Hawaii 1955 as amended by Act 268, Session Laws of Hawaii 1959). The only restriction of the board's power is that it cannot set up arbitrary and unreasonable standards that tend to discriminate one school from the other. 41 Am. Jur., Physicians & Surgeons, sec. 37, pp. 166, 167.

Very truly yours,

Peter A. Aduja

PETER A. ADUJA
Deputy Attorney General

APPROVED:

James Mizuha

JACK H. MIZUHA
Attorney General

Op. 59-105

INDEXING INSTRUCTIONS

Op. 59-106

I. HEALTH, BOARD OF

Hawaii Food, Drug, and Cosmetic Act

Enacted in the exercise of the police power.

Not invalidated by the commerce clause of the Constitution of the United States of America and not repugnant to nor in conflict with the Federal Food, Drug, and Cosmetic Act.

II. CONSTITUTIONAL LAW

Hawaii Food, Drug, and Cosmetic Act

Not invalidated by the commerce clause of the Constitution of the United States of America and not repugnant to nor in conflict with the Federal Food, Drug, and Cosmetic Act.

III. FOOD

Hawaii Food, Drug, and Cosmetic Act

Enacted in the exercise of the police power.

Not invalidated by the commerce clause of the Constitution of the United States of America and not repugnant to nor in conflict with the Federal Food, Drug, and Cosmetic Act.

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TERRITORY OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

August 17, 1959

Dr. Leo Bernstein, Acting Executive Officer
Department of Health
Territory of Hawaii
Honolulu 13, Hawaii

Dear Dr. Bernstein:

This is in response to your letter of June 1, 1959.

In your absence from the Territory, the matter of your request was discussed with Mr. George Akau, the food commissioner, and Mr. Y. S. Lee, and it is our understanding that the request is for an opinion concerning a rather general question, to wit: Whether or not Hawaii has the authority to exercise control over foods, drugs, devices, and cosmetics in its intrastate commerce.

Statehood for Hawaii being imminent, this opinion is based upon the fact that Hawaii is a state.

It is the opinion of this office that Hawaii does have the authority to exercise control over foods, drugs, devices, and cosmetics in its intrastate commerce. However, because of our dual form of government--federal government and state government--the exercise of such authority by a state is subject to the restraints and limitations of the Constitution of the United States of America.

In our dual system of government, Hawaii, as a state, possesses what are often referred to as the reserved powers. 11 Am. Jur., Constitutional Law, section 171, p. 866. Although it is difficult to specify what those reserved powers are, there seems to be no question but that the police power is one of the reserved powers. 11 Am. Jur., Constitutional Law, section 245, pp. 966, 967. Many attempts have been made, but so far there has been no exact definition of police power. Generally, however, police power appears to be the power of a sovereign to regulate its internal affairs in the interest of the health, safety, and welfare of its people. 11 Am. Jur., Constitutional Law, section 247, pp. 971-974.

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In the exercise of the police power, Hawaii has the authority to exercise control over foods, drugs, devices, and cosmetics in its intrastate commerce. Thus, in the exercise of such power, Hawaii has enacted the Hawaii Food, Drug, and Cosmetic Act, Chapter 51, Revised Laws of Hawaii 1955, as amended, which prohibits the adulteration or misbranding of foods, drugs, devices, and cosmetics in the intrastate commerce of Hawaii.

However, because of our dual system of government, wherein the federal government has enumerated powers and the state government reserved powers, the exercise of the police power by a state is subject to the restraints and limitations of the Constitution of the United States of America.

Article I, section 8, paragraph 3 of the Constitution of the United States of America gives to Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." This power of Congress is supreme. It operates to invalidate the exercise of the police power or any other power by a state, be it by statute, regulation or otherwise, which amounts to a regulation of the commerce entrusted to the protection of Congress or which imposes a direct burden upon such commerce.

> "The state cannot, under cover of exerting its police powers, undertake what amounts essentially to a regulation of interstate commerce, or impose a direct burden upon that commerce." Savage v. Jones, U. S. Sup. Ct., 1912, 56 L. Ed. 1182, 1191.

The Hawaii Food, Drug, and Cosmetic Act, as an exercise of the police power by Hawaii, does not appear to be a regulation of the commerce entrusted to the protection of Congress nor to impose a direct burden upon such commerce. The Act appears to have been enacted not as a regulation against commerce but to protect the people of Hawaii from articles injurious to their health and from deception and fraud. Under the circumstances, any effect of the Act upon the commerce entrusted to the protection of Congress is merely incidental and indirect. Leisy v. Hardin, U. S. Sup. Ct., 1890, 135 U. S. 100; Plumley v. Massachusetts, U. S. Sup. Ct., 1894, 155 U. S. 461; Crossman v. Lurman, U. S. Sup. Ct., 1904, 192 U. S. 189; Asbell v. Kansas, U. S. Sup. Ct., 1908, 209 U. S. 251; Baldwin et al. v. Seelig, Inc., U. S. Sup. Ct., 1935, 294 U. S. 511.

Article VI, paragraph 2 of the Constitution of the United States of America declares that the Constitution of the United States of America, the laws of the United States, and the treaties made by the United States shall be the supreme law of the land. This provision of the said Constitution operates to make inoperative any law of a state in conflict therewith.

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"The Constitution of the United States declares that that Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land. It follows that a law of Congress regulating commerce with foreign nations, or among the several states, is the supreme law; and if the law of a State is in conflict with it, the law of Congress must prevail, and the State law cease to operate so far as it is repugnant to the law of the United States." License Cases, U. S. Sup. Ct., 1847, Opinion of C. J. Taney, 12 L. Ed. 504, 572.

The Federal Food, Drug, and Cosmetic Act (52 Stat. 1040; 21 USCA, sections 301 et seq.) was enacted by Congress in the exercise of its commerce power. United States v. Walsh, U. S. Sup. Ct., 1947, 331 U.S. 432, 91 L. Ed. 1585. "The purpose of the Act is to safeguard the consumer by applying its requirements to articles from the moment of their introduction into interstate commerce all the way to the moment of their delivery to the ultimate consumer." United States v. Four Devices, Labeled in Part "Color-Therm" et. al., CCA, 10th Circuit, 176 F. 2d 652, 654.

As the supreme law of the land, the scope of the Federal Food, Drug, and Cosmetic Act may be broad, but it does not appear to occupy the whole field concerning the adulteration or misbranding of foods, drugs, devices, and cosmetics. Except for colored oleomargarine or colored margarine (21 USCA, section 347), the Act does not concern itself with the adulteration or misbranding of foods, drugs, devices, and cosmetics in the purely intrastate commerce of a state, such as where foods, drugs, devices, and cosmetics are manufactured or produced within a state and sold within such state.

In view of the Federal Food, Drug, and Cosmetic Act and the restraints and limitations of the Constitution of the United States of America, the Hawaii Food, Drug, and Cosmetic Act can only be construed to prohibit the adulteration or misbranding of foods, drugs, devices, and cosmetics in the purely intrastate commerce of Hawaii. So construed, the Hawaii Food, Drug, and Cosmetic Act occupies an area outside the field occupied by the Federal Food, Drug, and Cosmetic Act. As such, the Hawaii Food, Drug, and Cosmetic Act is not repugnant to nor in conflict with the Federal Food, Drug, and Cosmetic Act. As such, the Hawaii Food, Drug, and Cosmetic Act is reconcilable and can consistently stand together with the Federal Food, Drug, and Cosmetic Act.

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". . .when Congress does exercise its paramount authority, it is obvious that Congress may determine how far its regulation shall go. There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulations and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by Federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'" Kelly v. Washington, U. S. Sup. Ct., 1937, 302 U. S. 1, 10, 82 L. Ed. 3.

Very truly yours,

(s) Noboru Nakagawa

Noboru Nakagawa
Special Deputy Attorney General

APPROVED:

Jack H. Mizuha
Attorney General

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INDEXING INSTRUCTIONS

August 17, 1959

I. NATIONAL GUARD

National Guard may participate with the federal government in a project for joint utilization of National Guard facilities.

II. INTERGOVERNMENTAL RELATIONS

State funds may be appropriated to effect cooperation between the Federal Government and the State of Hawaii.

State legislature may provide for cooperation between the state and the federal government.

ART. XIV. Sec. 5

III. CONSTITUTION OF HAWAII

ART. XIV, sec. 5

IV. CONSTITUTION OF HAWAII

ART.VI, Sec. 6

V. CONSTITUTION OF HAWAII

ART. XVI, sec. 2

VI. PUBLIC MONEYS

Public moneys may be appropriated to effect cooperation between the state and the federal government.

Public money is limited to use for a public purpose.

VII. APPROPRIATIONS

Same Syllabus as II

VIII. ARMED FORCES

United States armed forces may participate in a joint utilization project of National Guard facilities

IX. ORGANIC ACT

Sec. 52

X. ORGANIC ACT

Sec. 55

XI. REVISED LAWS OF HAWAII 1955

Sec. 353-15 as amended. (See supplement 1957, p. 353

XII. REVISED LAWS OF HAWAII 1955
Sec. 353-12

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TERRITORY OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

August 17, 1959

Major General F. W. Makinney
The Adjutant General
Army National Guard of Hawaii
Fort Ruger
Honolulu 16, Hawaii

Sir:

By letter dated August 7, 1959, you requested an opinion as to whether the State of Hawaii could enter into a joint utilization agreement for use of the state's National Guard facilities with the Government of the United States.

The specific question presented to us is whether any of the circumstances enumerated below or other state legal restrictions would preclude participation by Hawaii in a joint utilization project of Army National Guard facilities pursuant to chap. 133, Title 10, U.S.C. and Department of Defense Directive No. 1225.2. The circumstances enumerated were (1) the existence of restrictions as to the use of state appropriations solely for state departmental uses and cannot be used where other than state agencies benefit, (2) existence of permissive legislation for the State Adjutant General to enter into a joint utilization agreement, (3) existence of restrictive clause in site transfers to the state by donors, limiting uses for National Guard purposes alone, and (4) existence of statutes requiring ownership of land by the state as a requisite to expenditure of state funds for construction thereon.

Laws of the Territory of Hawaii do not restrict use of legislative appropriations for Territorial use only. The legislative powers of the Territory are broad and appropriation powers are not restrictive. Secs. 52, 55, Organic Act of Hawaii. The Constitution of the State of Hawaii does not restrict the state's power of appropriation of public money. Art. VI, sec. 6. The legislature of the State of Hawaii is empowered to appropriate funds to effect cooperation between the state and the United States in matters affecting the public health, safety and general welfare. Art. XIV, sec. 5, Constitution of the State of Hawaii.

There is no permissive legislation in existence authorizing the Adjutant General (National Guard) to enter into a joint utilization agreement. Powers of the Adjutant General as provided

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by territorial statute do not allow it. Sec. 353-15, R.L.H. 1955, am. 1957, Supplement 1957 p. 353. However, such intergovernmental relations may be provided for under Article XIV, sec. 5 of the Constitution of the State of Hawaii; consequently, when and if authorized by the state legislature, the Adjutant General might enter into such a cooperative agreement. An alternative method whereby the Adjutant General might effect a joint utilization agreement is by direction of the governor who by statute is the commander in chief of the National Guard and as commander in chief may establish rules, regulations, forms and precedents having the force of law. Sec. 353-12, R.L.H. 1955.

At the present time the Territory does not hold land donated for the sole use of the National Guard which would preclude a joint utilization project for armory construction. There are no statutes requiring ownership of land by the Territory before Territorial funds may be expended for construction thereon. The use of public money is limited for public purpose under Article VI, section 6 of the Constitution of the State of Hawaii.

Thus, this office is of the opinion that none of the circumstances enumerated above exist to preclude particiation by the State of Hawaii in a joint utilization project with the Federal Government for use of National Guard facilities and legislative authority to effectuate such participation may be enacted by the state legislature under the Constitution of the State of Hawaii.

Very truly yours,

Tenny Hoon Tom

TENNY HOON TOM
Deputy Attorney General

APPROVED:

JACK H. MIZUHA
Attorney General

Op. 59-107

ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
AND REFER TO
INITIALS AND NUMBER
HHS:AH
108:6;10

Op. 59-108

TERRITORY OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

August 18, 1959

Mr. K. O. Soong
Personnel Director
Department of Civil Service
County of Kauai
Lihue, Kauai

Dear Sir:

This is in reply to your inquiry of July 15, 1959 asking this office for an opinion on the question of whether "an employee must answer all questions to enable us (the Kauai County Civil Service Commission) to certify that he has complied with the requirements prescribed by the Territorial Loyalty Board?"

That section of law dealing with this problem is section 5-97, RLH 1955. The last sentence of this section reads as follows:

> " ... The territorial civil service commission shall immediately certify to the appropriate auditor or disbursing officer the name and position of each registrant who shall execute and file such personal history statement." (Emphasis added).

The only kind of certification required with respect to the execution and filing of a personal history statement is that which is provided for in this section of law, and the duty for making such certification is lodged with the territorial civil service commission and not with the corresponding commissions of each county. This is also true with respect to the certification that is to follow the execution and filing of the loyalty oath. Since there is by law a specific designation of the certifying body, only that body, the territorial civil service commission, can make the certification and only such certification may be accepted by the appropriate auditor or the disbursing officer.

In view of the above considerations the Kauai County Civil Service Commission need not be concerned about the certification which may or may not follow the filing of the incomplete personal history statement of the employee.

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By way of information we might add that the total import of part IV of chapter 5, RLH 1955, entitled "Loyalty Board" and which deals with the personal history statement, is that all public officers and employees are required to execute that statement. Furthermore, execution of that statement means the furnishing of all requested information and the answering of all questions. If this is not done, then the public officer or employee who fails to comply with this requirement should not be allowed to continue in public employment and should not be paid.

Yours very truly,

Henry H. Shigekane

HENRY H. SHIGEKANE
Acting Assistant Attorney
General

APPROVED:

JACK H. MIZUHA
Attorney General

Op. 59-108

ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
AND REFER TO
INITIALS AND NUMBER

HHS:AH

109:6;10

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TERRITORY OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

August 18, 1959

Mr. K. O. Soong
Personnel Director
Department of Civil Service
County of Kauai
Lihue, Kauai

Dear Sir:

This is in reply to your letter of July 24, 1959 wherein you ask this office for an opinion on the question of whether, when dealing with General Labor I class vacancy, the Personnel Director of Kauai County (1) must certify the first five names or less in accordance with section 3-21(e), RLH 1955, or (2) can he certify all names on the eligible list for this class.

Section 3-21(e) states in part:

"(e) Filling vacancy. All vacancies and new positions in civil service shall be filled in the manner prescribed in this part or in section 5-1.

Whenever there is a position to be filled, the appointing authority shall request the director to submit a list of eligibles. The director shall thereupon certify a list of five or such fewer number as may be available, taken from eligible lists in the following order: ...." (Emphasis added).

Additionally your Commission's Rule No. 52(c) states that "qualified applicants shall be placed on unskilled labor registration lists in the chronological order of their application."

At the outset, we think that the language of section 3-21(e) is clear insofar as it contemplates an application complete and inclusive of all positions, which means that the filling of a vacancy or a new position involving General Labor I class applicants and employees is governed by the provisions of that section. This means that the Personnel Director must certify five names or such fewer number as may be available, for the vacancy or position. The language of this section is mandatory in tone and also specific in its requirement so as to

preclude the use of alternative methods in certifying eligibles to the appointing authority. Further, unless this statutory scheme is followed, your Commission Rule No. 5.2(c) would be rendered nugatory as the preference or benefit which is expected to flow from a chronological listing of eligibles would be dissipated.

It is also my understanding that the civil service commissions of the territory and of the city and county of Honolulu abide by the mandate of section 3-21(e) in certifying eligible for comparable classes of employees. This is not to say that the corresponding commissions of Hawaii and Maui counties do not follow this practice; they are not enumerated here because of lack of knowledge on the part of this office on this point at this time.

Therefore, it is the opinion of this office that you must, in certifying eligibles in General Labor I class, follow the formula set out in section 3-21(e), RLH 1955.

Yours very truly,

Henry H. Shigekane

HENRY H. SHIGEKANE
Acting Assistant Attorney
General

APPROVED:

JACK H. MIZUHA
Attorney General

Op. 59-109

ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
AND REFER TO
INITIALS AND NUMBER

~~HHS:AH~~
~~110:6;10~~

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TERRITORY OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

August 18, 1959

Mr. K. O. Soong
Personnel Director
Department of Civil Service
County of Kauai
Lihue, Kauai

Dear Sir:

This is in reply to your letter wherein you ask whether the assistant Kauai county engineer, who presently enjoys civil service status, may accept temporary appointment as acting Kauai county engineer, a position exempt from civil service, without jeopardizing his civil service status as assistant county engineer.

Presumably the job of Kauai county engineer is exempt from civil service on account of its being a position of head of a department whose appointment is made by the county chairman with the approval of the board of supervisors. Section 3-61(b), RLH 1955. It is also presumed that your assistant county engineer enjoys civil service in spite of the provisions of section 3-61(k), RLH 1955 which exempts the position of one first deputy or first assistant of heads of departments, because of his incumbency in such position as of July 1, 1955.

This office is of the opinion that provided the change of offices contemplated above is done in accordance with procedure set out by law, the assistant county engineer should be assured of his right to return to his former job.

This conclusion is based on the strength of the provisions dealing with leaves which appears in section 3-21(m), RLH 1955. It provides as follows:

"Educational leaves; other leaves. Any regular employee may be granted a leave of absence not to exceed one year by the department head in order to pursue a course of instruction, to engage in research or otherwise improve his ability and increase his fitness for public employment. When such employee has carried out the plan stated by him at the time such leave was granted, he shall have the right to return to his position at the expiration of his leave of absence. ..."

This section of law is made applicable to Kauai county by section 3-62, RLH 1955.

A similar provision appears in the Rules and Regulations of the Kauai County Civil Service Commission. Rule 10 provides for leaves of absence without pay for the reason of improving one's ability and increasing his fitness for public employment for a period not to exceed one year and also assures his reinstatement to his former position. Thus it is entirely possible for the assistant county engineer, within this framework, to obtain a leave of absence without pay and assume the position of acting county engineer but not for a period longer than one year and still be assured his being retained by the county, upon the expiration of this period of temporary service, in his former capacity as assistant and with civil service status.

In this case, since there is a vacancy in the job of county engineer and the assistant seems to be carrying out his duties, the leave of absence which is to be granted by the department head, in this case the assistant, to himself should, in order to dispel any question of impropriety, carry the approval of the chairman of the board of supervisors.

Under such a procedure as outlined above, it is the opinion of this office that the assistant county engineer may assume the job of acting county engineer for Kauai county and still retain his right to return to his present job with civil service status.

Yours very truly,

Henry H. Shigekane

HENRY H. SHIGEKANE
Acting Assistant Attorney
General

APPROVED:

JACK H. MIZUHA
Attorney General

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ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
AND REFER TO
INITIALS AND NUMBER

HRS:ks

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Op. 59-111

TERRITORY OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

August 20, 1959

Mr. Arthur A. Akina, Jr.
Personnel Director
Department of Civil Service
825 Mililani Street
Honolulu 13, Hawaii

Dear Sir:

This is in reply to your inquiry of July 15, 1959 asking this office for further clarification of the effect of Public Law 85-650 on the status of certain employees in the Office of the Land Commissioner.

The pertinent portions of Public Law 85-650 are:

"Sec. 2. Paragraph (q) of section 73 of the Hawaiian Organic Act (48 U.S.C., sec. 677), is amended by adding at the end thereof the following sentence: 'All officers and employees under the jurisdiction of the commissioner shall be appointed by him, subject to the Territorial laws of Hawaii relating to the civil service of Hawaii and all such officers and employees shall be subject to such civil service laws.'

"Sec. 3. All officers and employees who on the date of enactment of this Act are under the

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> jurisdiction of . . . the land commissioner of the Territory of Hawaii, are hereby covered into the civil service of Hawaii under the job classification and status held as of the date of enactment hereof and are made subject to the Territorial laws of Hawaii relating to such civil service."

Generally it may be said that section 2 above quoted refers only to officers and employees under the jurisdiction of the public lands commissioner who shall, in the future, be appointed by said commissioner. The status of present employees is governed by section 3.

The entire thrust of this federal act was to place officers and employees of the public lands commissioner (and the harbor board) in civil service and give them such status as was enjoyed by other officers and employees of the Territory in comparable positions. This appears from Senate Report No. 2065, U. S. Code and Administrative News 1958, p. 3750, which states in part:

> "This legislation is desirable since the employees are presently the only Territorial employees not under the civil service laws of Hawaii
>
> . . .
>
> "Since 1895 these employees have been solely under the jurisdiction of these respective departments of the Territorial Government. The Territorial Legislature is without jurisdiction to provide civil-service laws for the employees because they are covered by Federal legislation. In order to change the status of these employees it is necessary to amend the Hawaiian Organic Act (48 U.S.C. 543, 677)."

House Concurrent Resolution 71 of the 29th Territorial Legislature (1957) also supports this supposition as it recites the following in its opening paragraph:

> "Whereas the employees of the commissioner of public lands of the Territory of Hawaii do not enjoy the benefits of civil-service status: . . ."

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In items 1 and 3 of your letter you state the following:

"Some employees are hired by contract and there is indication that some of these contractual hires were entered into with no intention of extending beyond a temporary period of time.

"We know of one employee whose services were contracted for on part-time basis and who is reported to be a regular member of the Federal civil service system."

Contract employees are not civil service employees. The terms and condition of employment of contract employees are governed by the provisions of the contract which makes them employees; on the other hand, the terms and conditions of employment of civil service employment are those which are set in our laws dealing with civil service and the supplementing rules and regulations of the appropriate commissions. A civil service employee is one who is also hired in accordance with such laws and rules and regulations. However, contract employees, in general, do not need to meet similar requirements. It appears that even if the department of the public lands commissioner had been a completely territorial agency, these employees hired by contract would nevertheless not have been included within the civil service. Therefore, by measuring these facts and observations against the reason behind the Act, we conclude that contract employees do not reap the benefits of Public Law 85-650 and obtain therefrom the grant of civil service status.

Under item 2 of your letter are employees who "were merely hired by the Land Commissioner." By being merely hired, we take this to mean that these employees were engaged without any contract or regard for any classifications and salary ranges set out by the civil service commission, and further that the nature of their jobs is amorphous and the jobs may or may not be amenable to civil service classification and regulation. On this assumption, this office quite agrees with you that it is now your responsibility to decide (a) jurisdiction and (b) classification and salary range, if applicable. However to this extent will your actions be bound: that if you should find that the positions now being served by these employees are amenable to civil service classification and regulation, then these employees will be endowed with civil service status. If you should find to the contrary, then it follows that you should conclude them not within the civil service of the territory or the state.

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In the closing paragraph of your letter you question the correctness of our ruling that the first deputy and private secretary to the public lands commissioner are, by virtue of Public Law 85-650, granted civil service status. Your entertaining a doubt is understandable when the problem is scrutinized from the viewpoint you mention, that since these workers had no civil service status prior to the enactment of Public Law 85-650, they cannot be "grandfathered" as civil service officers and employees now.

This office abides by its earlier opinion that these workers are now granted civil service status for the following reasons. As stated in the preceding portion of this opinion, there is marked difference between the provisions of section 2 and section 3 of Public Law 85-650. Section 2 deals with appointments to be made in the future and requires that appointments shall be made in conformity to civil service laws, and ensuing employment relation shall be governed by civil service laws. Section 3, on the other hand, broadly states that "all officers and employees . . . are hereby covered into the civil service of Hawaii under job classification and status held as of the date of enactment hereof" and the ensuing employment relation shall again be governed by civil service laws. It will be noted that section 3 does not say that officers and employees of the public lands commissioner (on the date of the enactment of Public Law 85-650) shall be covered into the civil service "subject to the Territorial laws of Hawaii relating to the civil service of Hawaii," whereas, with respect to future appointments, section 2 clearly says that they be made subject to such laws. Thus it appears that a different kind of treatment was intended for such employees as contrasted to those who were to be hired in the future.

While it is true that on the effective date of Public Law 85-650, the positions of first deputy and private secretary generally were exempted from Hawaii's civil service system (Section 3-20 (c), Revised Laws of Hawaii 1955), this fact alone does not dictate the conclusion that therefore the first deputy and private secretary to the public lands commissioner were not meant to be nor cannot be included in the civil service. The language of section 3 is not that only those officers and employees who are not serving in positions comparable to those exempt under territorial civil service laws are covered into the civil service. Section 3 refers to "all officers and employees". Furthermore though these two mentioned positions were exempt

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positions on the effective date of Public Law 85-650, there were exceptions to this rule resulting from the savings clause which presently appears as the last paragraph of section 3-20, Revised Laws of Hawaii 1955. Thus there was in 1958 an employment situation in the territory which encompassed first deputies and private secretaries, some of whom were exempt from civil service and some of whom were covered in civil service. Thus the inclusion of the first deputy and private secretary to the public lands commissioner does not do violence to the pattern of employment existing in the territory in 1958. It does not create an anomaly. Such a conclusion finds merit in giving full meaning to the words "all officers and employees" as they appear in section 3 of Public Law 85-650 and does nothing to jar the civil service system of Hawaii.

Finally since Public Law 85-650 is a remedial statute, we believe that its provisions should be construed liberally to confer the benefits granted by this law to all who reasonably fall within the categories of workers mentioned therein.

Yours very truly,

Henry H. Shigekane

Henry H. Shigekane
Acting Assistant Attorney General

APPROVED:

Jack H. Mizuha
Attorney General

59-111

OP. 59-112
August 26, 1959

INDEXING INSTRUCTIONS

I. EMPLOYEES' RETIREMENT SYSTEM

Service retirement allowance

Any member with service as fireman or policeman has the right to have his retirement allowance computed on a more favorable basis should his service as such prove to be his longest period of creditable service regardless of whether his last service was in any other capacity.

II. SESSION LAWS OF HAWAII 1957

Act 231.

III. SESSION LAWS OF HAWAII 1959

Act 60

IV. SPECIAL BENEFITS FOR POLICEMEN AND FIREMEN

(Same syllabus as I above.)

Op. 59-112

ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
AND REFER TO
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60

Op. 59-112

STATE
~~TERRITORY~~ OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

August 26, 1959

Mr. Harold C. Hill
Secretary
Employees' Retirement System
Honolulu, Hawaii

Dear Mr. Hill:

This is in answer to your letter of July 9, 1959, requesting the opinion of this office on the following question:

> "Is an employee with prior service as fireman or policeman entitled to fireman or police retirement benefits?"

It is the opinion of this office that the answer to the above question is in the affirmative where such service is his longest period of creditable service. Act 231, Session Laws of Hawaii 1957, permitted firemen and policemen to retire subsequent to June 30, 1957, at an earlier age than other system members at rates which produce higher retirement allowances than may be obtained by other members. The question that arose under Act 231 was the method of computing the retirement allowance where a fireman or policeman had prior service in other types of employment.

In order to clarify this problem, the legislature passed Act 60, S.L.H. 1959, which allows any member whose creditable service includes service as a fireman or policeman to retire in the category in which he has the longest period of creditable service, regardless of the capacity in which he may be serving at the time of his application for retirement.

Act 60, S.L.H. 1959, does not appear to have expanded the definition of the terms "fireman" and "policeman" except to include certain type employments under section 1. Under section 2, it allows one who had such prior service "to retire in the category in which he has the longest period of creditable service." The section was added as a new section following

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"Sec. 6-82. Computing employee contributions," as follows:

> "Sec. 6-82.01. Retirement of members with service as fireman or policeman. Any member whose creditable service includes service as a fireman or policeman regardless of the capacity in which he may be serving at the time of his application for retirement, shall be allowed to retire in the category in which he has the longest period of creditable service."

In solving the problem of divided service, the legislature did not merely provide for policemen and firemen now in service, but also for those who had such service prior to becoming a general employee. In other words, the legislature not only solved the question that arose subsequent to the passage of Act 231, but also provided an answer to the question now sought to be answered.

House Standing Committee Report No. 428, dated April 23, 1959, states that one of the purposes of H.B. No. 287 is "3. Redefining retirement benefits based on the category in which the employee has the longest period of creditable service." It explains this amendment as follows:

> "3. Added a new paragraph setting a yardstick for determining the retirement allowances to be given employees who have creditable service with the retirement system as both general employees and policemen or firemen. Under this provision, employees will receive retirement benefits under the retirement provisions in the category in which they have the longest period of creditable service."

Senate Standing Committee Report No. 766, dated April 30, 1959, states as follows:

> ". . . Further, to prevent any doubt arising under which category an employee should be retired, this bill will solve the difficulty by fixing the category in which the particular employee shall be retired as that in which he has the longest period of creditable service."

The House Committee report removes all doubt as to the mandatory feature of the act which states that "Any member . . . shall be retired under the provisions of this part governing the retirement of members employed in the

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category in which he has the longest period of creditable service." The Senate Committee report also indicates the mandatory feature of the act, although it changed the wording of the above sentence to read as follows:

> ". . . any member . . . shall be allowed to retire in the category in which he has the longest period of creditable service."

The change is explained in the Senate Committee report as follows:

> "Section 2 of this bill was likewise amended to eliminate verbiage, to properly number it as well as correct its title."

Clearly, Act 60, Session Laws of Hawaii 1959, did not amend the provisions of Act 231, Session Laws of Hawaii 1957 as to the requirements that must be met as to years of service and age. Act 60 merely clarified the right of one with service as a policeman or fireman to have his retirement allowance computed on a more favorable basis should his service as such prove to be his longest period of creditable service regardless of whether his last service was as a general employee or policeman or fireman.

Yours very truly,

Arthur S. Komori

ARTHUR S. KOMORI
Deputy Attorney General

APPROVED:

JACK H. MIZUHA
Attorney General

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Op. 59-113
August 26, 1959

INDEXING INSTRUCTIONS

I. EMPLOYEES' RETIREMENT SYSTEM

Return of voluntary additional contributions made by policemen and firemen.

Intention of the legislature was to allow refunds to policemen and firemen only.

II. REVISED LAWS OF HAWAII 1955

Section 6-84

III. SESSION LAWS OF HAWAII 1957

Act 231

IV. SESSION LAWS OF HAWAII 1959

Joint Resolution 23.

Op. 59-113

ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
AND REFER TO
INITIALS AND NUMBER

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60

Op. 59-113

STATE
~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

August 26, 1959

Mr. Harold C. Hill
Secretary
Employees' Retirement System
State of Hawaii
Honolulu, Hawaii

Dear Mr. Hill:

This is in answer to your letter of June 23, 1959 requesting the opinion of this office on the following two questions with reference to Joint Resolution 23.

1. Is the intent of this resolution to be construed as applying only to policemen and firemen?

2. When such refunds are made, should the member be paid just the amount he paid in additional contributions or should accrued interest be also included in such refunds?

It is the opinion of this office that the answer to the first question should be in the affirmative. Up to the enactment of Joint Resolution 23, the title of which is "Regarding the Refund of all Deposits Made by Any Member of the Employees' Retirement System of the Territory of Hawaii to Purchase Additional Annuities in the System," there was no provision in law allowing a refund to members of the Retirement System except as to disabled members.

Attached hereto as Exhibit "A" is a copy of Joint Resolution 23, Session Laws of Hawaii 1959. It appears from the wording of the resolution that the legislature was concerned with refunds of additional contributions made by any member of the Retirement System. The title of the resolution also appears to include all members without qualification.

However, a study of the body of the resolution discloses that the real intention of this resolution is to limit the scope of its effect to only policemen and firemen. This

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is clearly stated in the Whereas clauses of the resolution, and the reason for this limitation is that such additional contributions were no longer necessary to accord this group of members the full benefits made available to them by Act 231, S.L.H. 1957. It was primarily to take care of an oversight in the 1957 legislation according policemen and firemen special benefits that this resolution was introduced.

When the committee reports concerning this resolution are examined, they shed some light as to how the ambiguity was created in the final form of the resolution. This resolution was introduced as Senate Joint Resolution No. 95. Senate Standing Committee Report No. 581, dated April 25, 1959, states as follows:

> "Your Committee on Ways and Means, to which was referred S.J.R. No. 95, regarding:
>
> 'THE REFUND OF ALL DEPOSITS MADE BY ANY MEMBER OF THE EMPLOYEES' RETIREMENT SYSTEM OF THE TERRITORY OF HAWAII TO PURCHASE ADDITIONAL ANNUITIES IN THE SYSTEM,'
>
> begs leave to report as follows:
>
> The purpose of this Joint Resolution is to allow any member of the Employees' Retirement System of the Territory of Hawaii who was <u>such a member</u> on or before June 30, 1937, to have a refund for any additional annuity that he may have purchased upon application, . . . " (Emphasis supplied.)

When the Committee Report is read in conjunction with S.J.R. No. 95, as the Committee intended it should be, it will be noted that the phrase "such members" or "such member" is used four times. It may be contended that all references to "such a member," "such members," or "such member" at all times referred to policemen and firemen only, and that poor draftsmanship caused the literal meaning to obscure the real intention of the proponents of this resolution.

Another example of an inadvertent error in phraseology becomes apparent when the House Standing Committee Report No. 829, dated May 2, 1959, is examined. In attempting to give a title to S.J.R. No. 95, by way of amendment, the Committee drafted the title as follows:

"JOINT RESOLUTION REGARDING THE REFUND OF ALL DEPOSITS MADE BY ANY MEMBER OF THE EMPLOYEES' RETIREMENT SYSTEM OF THE TERRITORY OF HAWAII TO PURCHASE ADDITIONAL ANNUITIES IN THE SYSTEM."

It is apparent that the "title" as used in Senate Standing Committee Report No. 581 was followed without much thought given to limiting the scope of the phrase, "any member." Otherwise, the House Standing Committee Report was also in accord with the Senate Committee as to the purpose of the resolution. It can be contended therefore that the controlling words as not "any member," but "such a member," "such members," and "such member" with reference to policemen and firemen only.

In Employees' Retirement System v. Chang, et als., 42 Haw. 532, at 540, the Supreme Court of Hawaii stated as follows:

> ". . . it is stated that the purpose of a statute frequently justifies a departure from the literal construction of the wording; that a thing which is within the intention of the statute is as much within the statute as if it were within the letter . . . the cause that induced the legislature to enact the statute and the reason and spirit of the law must be considered, and that while a more desirable construction of a statute is that which is consistent with both the spirit and the letter of the law, frequently the purpose of the Act justifies a departure from the literal construction of the wording."

An additional reason for construing said Joint Resolution 23 as applying only to policemen and firemen is to preserve the present system of permitting other members of the Retirement System to make additional contributions under existing law. Section 6-84, Revised Laws of Hawaii 1955, was enacted for the benefit of employees who were allowed to deposit additional amounts over and above the normal contribution for the purpose of obtaining a total retirement allowance of one-half of his average final compensation at the age of sixty years. To give full effect to the word "any member" in said Joint Resolution would in effect nullify the beneficial provision of said section 6-84, and such a result could not have been intended by the legislature.

In answering the second question, it is the opinion of this office that accrued interest should be also included in such refunds.

Section 6-84 authorizes the making of additional contributions and states that "Such additional amounts so deposited shall become a part of his accumulated contributions." Section 6-20, includes as a definition of accumulated contributions, "regular interest." Therefore, refunds made to policemen and firemen under Joint Resolution 23 should include such interest.

Yours very truly,

Arthur S. Komori

ARTHUR S. KOMORI
Deputy Attorney General

APPROVED:

JACK H. MIZUHA
Attorney General

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INDEXING INSTRUCTIONS

Op. 59-114

I. PLANNING OFFICE, STATE

Powers

Mere fact that legislature has withdrawn original appropriation to accomplish Kona Airport relocation does not prohibit present expenditure of planning funds to study uses for present site of airport in the event such is in the future relocated.

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ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
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STATE ~~TERRITORY~~ OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

August 28, 1959

Territorial Planning Office
195 South King Street
Honolulu 13, Hawaii

Attention: Mr. Frank Lombardi, Director

Subject: Planning re re-use of present site of Kona Airport

Gentlemen:

This is in response to your letter of July 30, 1959. By Op. Atty. Gen. No. 59-88 (July 10, 1959) we advised the Hawaii Aeronautics Commission that the $265,000 originally appropriated by Section 8(a)3g of Act 150, S. L. H. 1957, for the relocation of the Kona Airport from its present site, was no longer available for such purpose by reason of the terms of Section 2(a)3A(1) of Act 224, S. L. H. 1959, reappropriating a portion of said sum for extension of the existing runway. In that opinion, we advised the Aeronautics Commission that they were without the authority to expend further Act 150 funds for relocation purposes.

In the light thereof, we understand your question to be whether either the enactment of Section 2(a)3A(1) of Act 224, our prior opinion mentioned above, or the terms of Section 5 of Act 150 relating to the planning Development Fund, prohibit or in any way restrict planning expenditure from this Fund with respect to re-use of the present site of Kona Airport if and when the Airport is relocated. Additionally, you also ask our opinion as to whether there is anything connected with the terms of the original acquisition of the present Kona Airport property which would prohibit or restrict the same being sold or leased to private individuals.

Please be advised that it is the opinion of this office that the Planning Office may expend funds from the Development Fund for the contemplated purpose with legal propriety. It is also our opinion that the Commissioner of Public Lands, or his legislatively appointed successor, has the authority under the Organic Act to sell or lease at public auction the subject lands to private parties if and in the event the present site of Kona Airport becomes so available as a result of relocation.

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The foregoing is predicated upon the following considerations: The Development Fund created by the 1957 Legislature under the terms of Act 150, Section 5, may be expended for two general purposes:

1. "To supplement funds available to various agencies for authorized projects. . . ." It is our opinion that this language contains no authority to support the proposed expenditure since, as we noted in our prior opinion to the Aeronautics Commission, no funds are presently available to that Commission for any purpose connected with the relocation of Kona Airport by reason of the enactment of Section 2(a)3A(1) of Act 224.

2. "To make grants to develop physical facilities and set up or extend promotional activities in furtherance of the purposes of this Act." If the expenditure is within this authorization Section 5 of Act 150 further provides that the Development Fund may be so used upon the specific written recommendation of the Planning Director.

We do not consider the planning of proposed uses to which raw land will be put to be planning with respect to a "physical facility", as we note that you have stated the planning will be with a view to sale or lease of the area and not sale of lease of the State Kona Airport facilities to be used for other airport purposes. Thus, we feel that the prohibition contained in the second paragraph of Section 5(b) of Act 150, i.e. to the effect that the Development Fund may not be used with respect to the development of a physical facility to be owned or operated for private profit, is inapplicable.

The question therefor presents itself as to whether the planning expenditure is otherwise authorized by Section 5 of Act 150. We feel that that planning expenditure with respect to this land area adjacent to the rapidly expanding and tourist-important community of Kailua, Kona, is authorized by Act 150. The mere fact that the Legislature presently has seen fit to reappropriate for another purpose funds once available to the Aeronautics Commission for relocation of this Airport is in our mind no restriction upon the exercise by your office of carrying out your planning duties and functions set forth in Act 150 and in planning for the future. As was said on pages 6 and 7 of House Standing Committee Report No. 1096 (May 7, 1957) re the Development Fund of Act 150:

> "It is also possible that additional promotional money might be needed to encourage a convention to locate in Hawaii, or a business to establish here,

Op. 59-114

and this need could also be met. This developmental fund should give the director and the governor sufficient flexibility to meet the many unforseeable needs which may arise in the course of administering the provisions of this act".

Therefore, it is our opinion that if it is the specific recommendation of the Planning Director that the contemplated study be undertaken, sums may be expended therefor from the Development Fund. Of course, pursuant to the provisions of Section 5 of Act 150, before such recommendation is made, any legislative holdover committee then extant must be consulted.

On the question as to whether the Territory has the legal authority to sell or lease the lands presently occupied by the Kona Airport if and in the event of a relocation of that facility, as we said hereinbefore we feel that the Commissioner of Public Lands may so do. It is our understanding that the major portion of these airport lands were the subject of condemnation by the Territory. See T. H. v. Liliuokalani Trust, et al., Law No. 2883, Third Circuit. An additional area and an aviation easement over the condemnation lands were the subject of purchase. Title in each case was obtained in the name of the Territory of Hawaii and then turned over to the Aeronautics Commission by gubernatorial executive order.

In the event Kona Airport is relocated, and the lands transferred by executive order to the Commissioner of Public Lands, it is our opinion that such Commissioner would have the authority under Section 73(1) of the Organic Act to sell or lease such property to private individuals at public auction.

We are in hopes that the foregoing satisfactorily answers the questions posed by your letter.

Yours very truly,

Willson C. Moore, Jr.
Special Deputy Attorney General

APPROVED:

Jack H. Mizuha
Attorney General

Op. 59-114

INDEXING INSTRUCTIONS

Op. 59-115

I. HARBOR COMMISSIONERS, BOARD OF

Liability for tort

Harbor Board liable for damage to vessel for failure to make public pier reasonably safe for purposes for which Board invites use. Administrative settlement of claim upon execution of release by claimant approved.

Wharves

Same syllabus

II. REVISED LAWS OF HAWAII 1955

Chapter 245A (Act 312, S.L.H. 1957), Section 11

Op. 59-115

ADDRESS REPLY TO
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STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

August 31, 1959

Board of Harbor Commissioners
P. O. Box 397
Honolulu 9, Hawaii

Subject: Damage to vessel DREAMCRAFT, claim of R. Hoffman

Gentlemen:

This is in response to your letter of June 5, 1959 (your file number HB 2060) in which you ask our advice as to the legality of payment of the subject claim. As we understand it, by registered letter dated October 6, 1958 addressed to the Harbor Board, Mr. Robert Hoffman informed your body that the Kewalo Basin pier to which the subject vessel owned by him was moored, was in a state of disrepair sufficient to pose a threat to his vessel. Some three months later swells engendered by a winter storm caused some 22 feet of this pier to collapse thus causing damage to the subject vessel. Mr. Hoffman has presented a certified bill in the amount of $414.07 to you for payment, the same representing the repair charges for the damage done by the pier to the DREAMCRAFT.

You wish to know whether the Harbor Board may in any way be legally obligated to pay this claim, and if so, may payment thereof be legally made by the Board.

Please be advised that it is the opinion of this office that the Board of Harbor Commissioners may legally pay this claim and that payment to Mr. Hoffman of the amount of $414.07 is recommended upon the execution by him of the enclosed release.

The law seems to clearly provi de that the proprietor of a pier or wharf must use reasonable care to maintain his structures and premises, including the immediate adjacent waters, in a reasonably safe condition for the use of vessels which he expressly or impliedly invites to use his facilities. 56 Am.Jur. "Wharves", § 21, p. 1080. This rule holds true even in situations where the wharf is a public one. Ibid, § 41, p. 1094.

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This is not to say that the owner of the wharf is an insurer and liable in every case where damage ensues. See Tracy v. Marks (2 Cir. 1922) 283 F. 100. However, under the facts of this matter as presented to us, we feel that there is a sufficient possibility of an adverse decision in the event the Harbor Board were to be sued for negligence in this matter to recommend payment of the claim.

It is our further understanding as to the background facts of this matter that the subject collapse of the Harbor Board pier likewise caused damage in the amount of $208.40 to another vessel of Mr. Hoffman's, the PAPOOSE. However, the claimant has agreed to assume this expense himself and to settle and compromise any claim he has with the Harbor Board for the amount of $414.07, which is the amount of the damage to the DREAMCRAFT.

In view of the foregoing we are of the opinion that it would be in the best interests of the Harbor Board to settle this matter by payment of the claim in question and execution by Mr. Hoffman of the enclosed release prepared for the purpose.

Transmitted herewith for your files is a copy of the Complaint filed by Mr. Hoffman in the District Court, a copy of the Stipulation for Entry of Judgment executed by the Attorney General in settlement of the claim noted in the Complaint, a copy of the report of an investigator of this office with respect to the facts giving rise to such claim, and three certified copies of the statement by Mr. Hoffman of the expenses incurred in the repair of his vessel. Upon receipt by you of a copy of the Release prepared by this office and executed by Mr. Hoffman, you are authorized to make payment to Mr. Hoffman of the sums noted in the enclosed Stipulation for Entry of Judgment.

Yours very truly,

Willson C. Moore, Jr.

9 Encs.

Willson C. Moore, Jr.
Special Deputy Attorney General

APPROVED:

Jack H. Mizuha
Attorney General

Op. 59-115

INDEXING INSTRUCTIONS

I. Employment Security Law:

Present amendment effected by Act 265 of the Session Laws of Hawaii, 1959 upon Section 93-124 of the Hawaii Rev. Laws, 1955 continues to conform with federal requirements under Title III of the Social Security Act.

II. Grants:

A. Federal grants under Title III of the Social Security Act must be expended only for expenses incurred in administering the Employment Security Law.

B. Present amendment effect by Act 265 of the Session Laws of Hawaii 1959 upon Section 93-124 of the Hawaii Rev. Laws, 1955 continues to conform with federal requirements under Title III of the Social Security Act.

III. Public Moneys -- Special Funds:

Same as paragraph II.

IV. Statutes -- Construction:

Same as paragraph II.

V. Statutes -- Provisions Construed:

Same as paragraph II.

VI. Words and Phrases -- Revenue:

The term "revenue" does not include a federal grant-in-aid within its meaning.

VII. Session Laws of Hawaii, 1959:

Act 265, Section 2.

A federal grant-in-aid is not within the meaning of the term "revenue" as used in section 9-1.1.

VIII. Revised Laws of Hawaii, 1955:

Section 9-1.1.

A federal grant-in-aid is not within the meaning of the term "revenue" as used in section 9-1.1.

IX. Session Laws of Hawaii, 1959:

Section 13 (b).

Present amendment effected by Act 265 of the Session Laws of Hawaii, 1959 upon Section 93-124 of the Hawaii Rev. Laws, 1955 continues to conform with federal requirements under Title III of the Social Security Act.

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X. Revised Laws of Hawaii 1955:

Section 93-124.

Present amendment effected by Act 265 of the Session Laws of Hawaii 1959 upon section 93-124 of the Revised Laws of Hawaii 1955 continues to conform with federal requirements under Title III of the Social Security Act.

Carlos Ramelb

Carlos Ramelb

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STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

Honolulu, Hawaii

August 31, 1959

Mr. E. B. Peterson, Director
Department of Labor and
Industrial Relations
825 Mililani Street
Honolulu, Hawaii

Dear Mr. Peterson:

This is in reply to your letter of May 19, 1959 inquiring about the effect of Act 265, L. 1959 upon the employment security administration fund. The question raised is whether the present amendment effected by Act 265 continues to conform with federal requirements under Title III of the Social Security Act.

The answer is yes, and the reasons for this conclusion are discussed below.

I. The Impact of the Amendment to Sections 93-124 and 9-1.1.

Under the provision of Section 303(a)(8) of the Social Security Act, a state law must provide that all funds obtained by the state under Title III of the Act must be expended solely for the purposes of administering the Employment Security Law. While Section 303(a)(9) of the Act ostensibly allows other uses of such funds as long as the funds are replaced, that provision is really only designed to require replacement where funds have been expended (by the administrators of the Employment Security Law) contrary to or in excess of what the Secretary of Labor finally determines to be a necessary purpose or a necessary amount. Therefore, even if these funds have been effectively deposited in the general funds of the state, because of the restrictive conditions attached to the use of the funds, the funds may never be used for other than employment security administration purposes. In practice, in order to meet the requirements of the Social Security Act, the administration fund is being maintained in a separate account in the bank and on the books of the custodian so

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that there will be assurance that these funds will be used only for purposes specified in the Act and for proper and efficient administration of the employment security program and in order that a detailed audit of the use of these funds by the federal authorities can be made without the necessity of examining the state's whole financial structure.

Moreover, since Title III requires such stringent controls, the state budgetary control would have to conform in all respects to the federal controls and could not be lesser or greater than those imposed by the Secretary of Labor. But the state budgeting system is different from that used by the Bureau of Employment Security and, as it is, does not meet the federal requirements. Unless the legislature revises its budgeting system so as to meet the federal requirements, it must work through the Bureau of Employment Security or risk the discontinuance of the federal grants. Consequently, the net effect of the amendment to Section 93-124 was merely to enable the legislature to have a say in the determination of the annual budget which must still be approved by the Secretary of Labor to be final.

But the important question involved is whether the Legislature, by Act 265, effectively allocated the Title III funds into the general fund of the state by amending Sections 93-103 and 93-124 and by adding Section 9-1.1.

Section 9-1.1 provides that:

> "All revenues of the Territory not specifically appropriated to other purposes shall be general realizations of the Territory to be available for general use in financing government operations and services, which revenues and realizations in their aggregate are herein referred to as the 'general fund' ..... "

Under this provision, two problems arise.

"Revenue" is defined as "the annual or periodical yield of taxes, excise, customs, duties, rents, etc., which a state collects for public use." Thus, a federal grant-in-aid is not within the meaning of the term. Hence, Section 9-1.1 by itself does not affect the grant-in-funds.

Furthermore, even if the grant were within the meaning of the term "revenue", under Title III the funds are "specifically appropriated to other purposes" and cannot be available for general state government use. The dissolution of the

employment security administration fund did not affect the status of the special funds. The employment security administration fund was created by the state probably in order to more easily account for these funds. But because the funds are required by federal law to be used solely for a special purpose, the dissolution of the state created employment security administration fund in no way affected the fact that the funds are also federally created special funds. Consequently, neither Section 22 nor Section 9-1.1 is applicable to the special funds from a federal source.

Thus, since the Section 93-124 amendment does not (unlike the other provisions of Act 265) expressly allocate these special funds to the state general fund, and since the employment security administration fund is now abolished, Section 12-6 operates to deposit the funds with the State Treasurer. This is not equivalent to disposition into the general funds, however, for the Treasurer is entrusted with many funds and accounts. Hence, by federal law, the funds are to be kept segregated from other funds.

The amendment to Section 93-103 deposits Wagner-Peyser Act funds into the general fund. In recent years, the state has been using Title III funds to finance that which was formerly financed by the Wagner-Peyser funds but, except for this fact, the two federal acts are not in terms related so that the disposal of Wagner-Peyser funds by Section 93-103 does not affect Section 93-124 funds.

II. Interpretation of the Section 93-124 Amendment.

The amendment, because it is couched in very general terms, raises the difficult question of whether it still conforms to the requirements imposed as conditions to the grant of funds under Title III. Here are the conclusions arrived at:

1. The employment security administration special fund has been eliminated but such a special fund is not a federal requirement.

2. Research has shown that it is not necessary that there be an express provision stating that Title III funds be continuously available and not to lapse or to be transferred. However, this is an implied condition of the grant which cannot be violated without risking loss of the grant.

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3. The provision dealing with Section 93-122 funds has been eliminated, but since Section 93-122 governs such funds, the elimination is not important.

4. The elimination of other provisions dealing with disbursements and warrants is also not important.

5. Title III specifically requires that a state law contain an express provision that Title III funds must be spent solely for the purposes and amounts found necessary by the Secretary of Labor. The Legislature has omitted these two underscored words. However, a fair and reasonable reading of the amendment as a whole allows the interpretation that such funds be thus solely expended by virtue of the clause in Section 93-124 stating " ..... not inconsistent with federal laws and regulations governing such money."

Nevertheless, the last conclusion presented above is endangered by two factors: the seemingly apparent legislative intent to allocate such funds into the general fund and the omission of the words "solely" and "necessary". With these factors in mind, it could be argued that the intended thrust of the amendment is to allow general use of the funds despite the federal restrictions imposed. If this interpretation is controlling, the requirements of Title III are then not satisfied and grants pursuant to it may be withheld from the state.

However, under the theory that a favorable interpretation should always prevail over an unfavorable interpretation of an ambiguous provision, the better conclusion is that Title III requirements are satisfied but only because, in practice, the procedure for appropriating, budgeting and accounting for the funds has not been affected by the amendment. This fact alone enables the amendment to be read as being in compliance with the federal requirements. If this procedure is in fact

changed or deviated from, the favorable interpretation accepted above might become illusory and thus violative of Title III requirements. Hence, no such change should be attempted.

Very truly yours,

/s/ Carlos Ramelb

APPROVED:

/s/ Toshimi Sodetani
Deputy Attorney General

APPROVED:

/s/ Jack H. Mizuha
JACK H. MIZUHA
Attorney General

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INDEXING INSTRUCTIONS

Op. 59-117

EMPLOYEES' RETIREMENT SYSTEM

Benefits:

Election by a member of the Retirement System for "retirement allowance payable throughout his life" precludes election by a beneficiary of the actuarial equivalent and any of the options provided by said section.

REVISED LAWS OF HAWAII 1955

Section 6-50

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STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

September 1, 1959

Mr. Harold C. Hill, Secretary
Employees' Retirement System
State of Hawaii
Honolulu, Hawaii

Dear Mr. Hill:

Re: Claim of Mrs. Lena K. Reiman

This is with reference to your letter of August 20, 1959, concerning the claim of Mrs. Lena K. Reiman, alleged beneficiary of Mrs. Alice K. Banham, deceased, against the Employees' Retirement System.

We reiterate our position that the election of Mrs. Banham for "Maximum Allowance" under Section 6-50 of the Revised Laws of Hawaii 1955, as amended, precludes any claim for further benefits by her alleged beneficiary under Option 1 of the same section.

Section 6-50 clearly shows that Option 1 may be exercised only in the event that the member elects to receive the actuarial equivalent and not where he elects to receive his benefit in a retirement allowance payable throughout his life.

We have examined the history of said section, including Standing Committee Report No. 955 referred to in letter of Ton Seek Pai dated August 3, 1959 and addressed to the Board of Trustees of the Employees' Retirement System, and found nothing therein leading to a contrary conclusion. Annexed hereto is a copy of said Standing Committee Report No. 955 as shown in House Journals 1955 at page 869.

Yours very truly,

APPROVED:

JACK H. MIZUHA
Attorney General

WALTER T. SHIMODA
Deputy Attorney General

Op. 59-117

COPY OF
STANDING COMMITTEE REPORT NO. 955
HOUSE JOURNAL 1955, Page 869

"Standing Committee Report No. 955: Civil Service on S.B. No. 483:

The purposes of this bill are as follows:

(1) To clarify the provisions in the retirement system law authorizing investments secured by "unencumbered improved real estate'. This bill provides that certain technical encumbrances are not to be considered 'encumbrances' within the meaning of the law.

(2) To increase the limit of funds of the retirement system that may be invested in common stocks from five per cent to thirty per cent.

Your Committee approves of the first purpose and recommends its enactment. As to the second proposal, your Committee believes that a limit of twenty per cent should be fixed at this time and therefore recommends that this bill be so amended.

Your Committee proposes a further change in the retirement system act. The law now requires that applications for retirement be filed thirty days in advance of the desired date of retirement and further that the member must survive another thirty days after such retirement date to make the retirement effective. There have been several cases where members have died during the second thirty-day period and thereby caused their beneficiaries to lose substantial benefits. Your Committee believes that such a result is unfair and recommends that the second waiting period be eliminated.

Your Committee has prepared an amended form of the bill, attached hereto, incorporating the foregoing recommendations. Your Committee urges passage of the bill as so amended.

Signed by all members of the Committee."

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ADDRESS REPLY TO
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Op. 59:118

TERRITORY OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

September 4, 1959

Mr. Eric C. Reppun
Commissioner of Public Lands
State of Hawaii
Honolulu, Hawaii

Dear Sir:

Re: Our Opinion 58:C-4674;37, dated December 5, 1956, Relating to Public Law 839, 84th Congress, Second Session.

Pursuant to request from various parties concerned, we have reviewed the above-captioned opinion, which is attached hereto, rendered by this office on December 5, 1956.

The aforesaid opinion discusses the fair and reasonable price concept incorporated in the Public Law and reaches a conclusion based upon the various Congressional committee reports on said Public Law. The committee reports and the Public Law were based on J.R. 33, Session Laws of Hawaii 1955 which had memorialized Congress to pass the legislation which resulted in Public Law 839 of the 84th Congress. It should be noted that at the time J.R. 33 was enacted by the territorial legislature, the various committee reports of the territorial legislature reported that the purpose of the joint resolution was to quit claim the subject lands for a nominal consideration as a manner of resolving the controversy between the territory and those claiming said lands.

Senate Standing Committee Report Number 615, dated April 27, 1955 states:

> "The purpose of the joint resolution is to request Congress to enact legislation permitting the commissioner of public lands with the approval of the governor to quit claim for nominal consideration to persons claiming interest therein a portion of government land of Weliweli, Kona, Island of Kauai . . . .

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> "Your committee approves the manner of resolving the lengthy and costly controversies between the territory and those claiming said lands under color of title, and therefore, recommends that the joint resolution be passed, . . ." (emphasis supplied)

In light of the committee reports of the territorial legislature considered in conjunction with the various Congressional reports, it is now the opinion of this office that the conclusions reached in the opinion of December 5, 1956 are to be amended. In our opinion the "fair and reasonable price" concept should operate in the following manner:

1. The appraisers would pay no attention to the land which the claimant will quit claim to the state. (i.e., the land upon which a road is located). This is mandated by section 1 of the Congressional bill. (See exclusion beginning immediately after the description of the gross area).

2. The appraisers would fix the fair value as of the date of original entry (1919) upon said lands by the claimants or their predecessors in interest. Upon the land which the state will quit claim to the claimant, the appraisers would not consider any portion of the value which is attributable to utility type improvements which were not installed by the government.

It is our opinion that the determination of the consideration to be paid by the claimants of such lands as described by paragraphs number 1 and 2 hereinabove would result in a "fair and reasonable price" concept as intended by the drafters of J.R. 33, Session Laws of Hawaii 1955, which in effect became Public Law 839 of the 84th Congress, Second Session. Appraisal of the land as of the date of original entry will more closely approximate a nominal consideration which was intended than the method set out in our previous opinion of December 5, 1956.

Sincerely yours,

APPROVED:

Philip T. Chun
Deputy Attorney General

Jack H. Mizuha
Attorney General

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INDEXING INSTRUCTIONS

Op. 59-119

HARBOR COMMISSIONERS, BOARD OF

Revenue Bonds

The Harbor Board Bond Resolution dated September 18, 1950, prohibits the Board of Harbor Commissioners from transferring funds from the Special Fund to the Small Boat Harbor Fund, notwithstanding the provisions in section 112-21, Revised Laws of Hawaii 1955.

Op. 59-119

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STATE [redacted]Y OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

September 4, 1959

Mr. Harold W. Butzine
Manager and Chief Engineer
Board of Harbor Commissioners
P. O. Box 397
Honolulu, Hawaii

Dear Mr. Butzine:

This is in response to your letter HB 87, dated August 5, 1959, requesting our opinion on the following questions:

> "(1) Can the Board of Harbor Commissioners expend the monies authorized under Act 172 for the construction of small boat harbor facilities at Nawiliwili Harbor and Port Allen?
>
> "(2) If the answer to question number 1 is affirmative, can the Board of Harbor Commissioners expend monies from its Special Fund for commercial harbors for the construction of small boat harbor facilities which cannot return enough income to offset the cost of construction or operation?"

Section 1 of Act 172, Session Laws of Hawaii 1959, reads as follows:

> "Sec. 1. The board of harbor commissioners at its discretion is authorized to expend from its special fund a sum not to exceed $100,000 for the construction of harbor improvements at Nawiliwili Harbor on the island of Kauai and a sum not to exceed $100,000 for the construction of harbor improvements at Port Allen on the island of Kauai."

This Act does not specify whether the construction of harbor improvements are for commercial harbors or small boat harbors. The committee report does not throw any light on this matter either. (Standing Committee Report No. 684, April 28, 1959)

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However, even if the legislative intent was for the purpose of improving small boat harbors, we are of the opinion that the moneys appropriated out of the special fund for commercial harbors under Act 172 cannot be used for the construction of small boat harbor facilities at Nawiliwili Harbor and Port Allen, Kauai.

The special fund out of which the moneys were appropriated was created by section 112-20 of the Revised Laws of Hawaii 1955. This fund has been committed to the payment of the harbor revenue bonds issued in 1950 of which $4,000,000 are still outstanding.

Under Article VII of the Board of Harbor Commissioners resolution authorizing the issuance of harbor revenue bonds, the use and disposition of the special fund are specified. The legislature cannot authorize the expenditure from this fund without impairing the contract obligations unless such expenditure is authorized under the said Article VII of the resolution.

The bond resolution authorizes, with certain restrictions, the expenditure from this fund for the construction of commercial harbor facilities. The small boat harbor facilities are expressly excluded, except for Kewalo Basin. It is, therefore, the opinion of this office that any attempt to expend the amounts appropriated by Act 172 for small boat harbor facilities will be inavlid as impairing the revenue bond contract obligations.

See also opinion 943:15 OLC, dated September 3, 1957, and Op. 59-64, dated May 25, 1959, wherein we rendered a similar opinion on the question of using the commercial harbor special fund for purposes of small boat harbors.

Yours very truly,

Harold Y. Shintaku

Harold Y. Shintaku
Deputy Attorney General

APPROVED:

JACK H. MIZUHA
Attorney General

Op. 59-119

INDEXING INSTRUCTIONS

Op. 59-120

I. STATUTES

Construction

Where Act 113, S. L. H. 1959 uses the term "e-a" when "3-a" was manifestly intended, and the error is a clerical error rendering the statute incapable of reasonable construction, the proper numeral will be deemed substituted.

II. Act 113, S. L. H. 1959

Section 1(b)

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STATE ~~TERRITORY~~ OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

September 10, 1959

Mr. L. H. Herschler
Manager-Chief Engineer
Hawaii Water Authority
P. O. Box 373
Honolulu 9, Hawaii

Subject: Act 113, S.L.H. 1959

Dear Sir:

This is in response to your letters of July 7, 1959 and September 1, 1959 posing the following question:

> "Act 113 passed by the Thirtieth Territorial Legislature and signed by Governor Quinn amends Section 8 of Act 150, Session Laws of Hawaii 1957. In (b) of Section 1 of this Act, reference is made to the term 'e-a', of Act 150. This should have been termed '3-a', and this error came about, apparently, when the bill passed by the Legislature was engrossed for transmission to the Governor.
>
> "Would you please advise us if this error will affect the validity of Act 113."

It is the opinion of this office that the error will not affect the validity of said Act. The reasons are as follows:

(1) Use of the term "e-a" in Section 1(b) of Act 113, S.L.H. 1959, is manifest error, inasmuch as there is no such term in line three, paragraph (f), Section 8 of Act 150, S.L.H. 1957.

(2) Examination of the legislative history of Act 113 leads to the conclusion that the error is a clerical error in the engrossment of the bill.

(3) Under the circumstances, the applicable rule is that:

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"If a clerical error renders a statute incapable of reasonable construction, the proper word or numeral will be deemed substituted, where it can be supplied by reference to the context or other statutes." 50 Am. Jur., Statutes, sec. 232, p. 220.

(4) The subject matter, "Kona Water Development", expressed in the title of Act 113 and Section 1(a) of said Act indicate that the legislature intended to delete the term "3-a" from line three of paragraph (f) in Section 8 of Act 150. This legislative intendment is further borne out by the original bill introduced in the House, (H.B. No. 1127), House Standing Committee Report No. 702 and Senate Standing Committee Report No. 791.

(5) Based on the foregoing, the probability is that the courts will enforce the legislative intent rather than declare the statute invalid.

Yours very truly,

WALTER T. SHIMODA
Deputy Attorney General

APPROVED:

JACK H. MIZUHA
Attorney General

Op 59-120

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STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

September 21, 1959

Mr. C. Eric Reppun, President
Board of Commissioners of
Agriculture and Forestry
State of Hawaii
Honolulu 14, Hawaii

Dear Sir:

In your letter of July 31, 1959, you requested the opinion of this office regarding Act 58, SLH 1959, which provides for the overtime pay for your meat inspectors.

You posed the following questions:

"1. Can the full amount of $5 for each man-hour of overtime work performed by the meat inspector and received by the Department be paid to the employee invdved? If not, how do we compute the overtime pay?

"2. Does Act 238, SLH 1959 relating to overtime work of public employees affect in any way the payment of this overtime?

"3. Can the money received for the overtime inspection services be deposited into our Meat Inspection General Fund Appropriation?"

Act 58, SLH 1959 in pertinent part reads as follows:

"SECTION 1. Section 23-27, Revised Laws of Hawaii 1955 as amended, is hereby further amended by adding the following paragraphs thereto, to read as follows:

'The management of any slaughterhouse, or the owner of any animal to be slaughtered requiring the services of a meat inspector after the normal working hours of such inspector in any work day, or on Sundays, or other legal

holidays, shall pay to the board of agriculture and forestry for such overtime inspection services, the sum of $5.00 for each man-hour of work performed by the inspector.

'The board of agriculture and forestry shall pay the inspector or inspectors for all overtime inspection services performed, provided that the party requesting or requiring the overtime inspection services shall sufficiently in advance of the overtime period, arrange with the board for such services.'"

The answer to your first question is in the affirmative. Not only can the board make this payment, but it is mandatory upon the board to make this payment, provided that the party requesting the overtime inspection services shall have satisfactorily arranged with the board for such services.

Although the language of the statute does not specifically state that the board of agriculture and forestry shall pay the sum of $5 for each overtime hour to the inspectors, that such is the intent is evident when section 23-27, RLH 1955 is read in its entirety. The first paragraph of section 23-27 among other things, provides for the assessment of inspection fees on a per capita basis, i.e., 25 cents per capita for swine, sheep and goats and $1 per capita for all other animals.

On the other hand, the second paragraph of section 23-27, imposes the additional assessment of $5 a man-hour for overtime inspection services. From this observation, one may infer that the legislature intended to assess the owner of the slaughtered animal an additional fee based upon the value of the hourly service of the meat inspectors.

And the subsequent provision which mandates the board to pay the inspectors for all overtime inspection services performed can be reasonably interpreted to mean that the additional amount of assessment to the owner of the animal should be paid to the meat inspectors. This interpretation is strengthened by the absence of any other provision for the overtime payment to meat inspectors.

Moreover, the above interpretation of the Act is supported by Standing Committee Report 557, 1959, which states in part as follows:

> "The purpose of this bill is to provide for the payment of premium pay for meat inspectors required to work after the normal working hours in any work day, or for work performed on Saturdays, Sundays, or other legal holidays.
>
> . . .
>
> "Evidence adduced at the hearing of this measure disclosed that making such payments to meat inspectors for all services performed outside of their normal working hours greatly facilitates the rendering of this service. . . .
>
> . . .
>
> "Your Committee on Agriculture and Forestry and Marketing upon consideration of this measure recommend that the sum of $5 an hour be payable for each hour of overtime work performed by the meat inspectors and that the bill so amended, as illustrated in H.D. 1 attached hereto."

The answer to your second question is in the negative. Act 238, SLH 1959, relating to overtime work of public employees, does not affect in any way the payment of this overtime. Act 238 provides for the granting of compensatory time off for overtime. There is no prohibition for the payment of overtime pay when such payment is authorized by statute, or by ordinance. Section 1 of Act 238 provides in part as follows: "This section shall not be construed to limit the power of any political subdivision to provide by ordinance for the payment of overtime."

The answer to your third question is yes and no. The Act calls for the assessment of $5 for each man hour of overtime service as defined in the Act. This amount must be paid to the board by the party requesting the service, whether such owner had prearranged properly for such overtime services or not. If the party requesting the overtime services had not made the proper arrangement, then such amount as he is assessed will have to be deposited in the General Fund of the Territory or State, as required by section 23-29, RLH 1955. However, if the requesting party complies with the provision of making arrangement sufficiently in advance of the services with the board for such services, then the fees collected for such services may be deposited into your Meat Inspection General Fund Appropriation. Since such fees are for the overtime pay of the

meat inspectors, and for no other purpose, the legislature effectively appropriated same to just such use.

Yours very truly,

Henry H. Shigekane

Henry H. Shigekane
Acting Assistant Attorney General

APPROVED:

Jack H. Mizuha
Attorney General

INDEXING INSTRUCTIONS

I. TAXATION, GENERAL EXCISE TAX

Exemptions, Charitable Organizations

The exemption from the general excise tax granted corporations, associations or societies organized and operated exclusively for religious, charitable, scientific or educational purposes is limited to the religious, charitable, scientific or educational activities of such persons and does not apply to any activity the primary purpose of which is to produce income even though such income is to be used for the exempt activities of such persons.

* * * * *

II. TAXATION, GENERAL EXCISE TAX

Exemptions, Charitable Organizations

Whether an activity carried on by a charitable organization is a charitable one depends on the dominant purpose of the activity.

* * * * *

III. TAXATION, GENERAL EXCISE TAX

Exemptions, Charitable Organizations

A charity may be defined as a gift applied for the benefit of an indefinite number of persons, by bringing them under the influence of religion, by providing them with medical or social welfare care, or by relieving the government of any burden which it would be under an obligation to assume.

* * * * *

59-12-2

IV. TAXATION, GENERAL EXCISE TAX

Exemptions, Charitable Organizations

Where a charitable organization assumes a service to patients of a government hospital thereby relieving a member of the hospital staff from the duty of operating and providing such service, if the organization's primary purpose is not to produce income such activity is exempt from the general excise tax.

* * * * *

V. REVISED LAWS OF HAWAII, 1955, Sec. 117-20

* * * * *

ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
AND REFER TO
INITIALS AND NUMBER

NK:n
122:45
Op. 59-122

STATE ~~TERRITORY~~ OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

September 11, 1959

Honorable Earl W. Fase
Tax Commissioner
State of Hawaii
Honolulu, Hawaii

Attention: Mr. John A. Bell
Deputy Tax Commissioner

Dear Sir:

This is in response to your request for advice concerning the application for exemption from general excise tax made by the Territorial Hospital Auxiliary under the following circumstances:

The auxiliary is a corporation organized under secs. 172-16 and 172-17, R.L.H. 1955, for the purpose of promoting and improving the care, comfort and welfare of patients and former patients of the Territorial Hospital. Approximately three-fourths of the total hours volunteered by the members of the auxiliary are devoted to such work as operating the hospital library, serving at the reception desk at the convalescent center and at the visitors' desk at the hospital, processing and distributing clothing to the various wards, guiding visitors through the hospital, conducting art therapy classes, and assisting in the occupational, recreation and physio-therapy departments of the hospital. The remainder of the volunteer hours is spent in operating at the hospital two canteens which sell sundry items to patients.

For several years the canteens have been operated by the hospital itself. In February of last year the auxiliary, then an unincorporated association, took over the operations and purchased the inventory of the canteens with the view of relieving the hospital staff from what was considered a necessary but non-medical service. It was felt, furthermore, that staffing the canteens with volunteers from the outside would have a therapeutic effect on the patients.

The application is for the activity of selling sundries to the patients at the canteens.

59-122
Op. ~~122~~

Section 117-20, R.L.H. 1955, states that the provisions of chapter 117, the general excise tax law, shall not apply, among others, to:

> "(g) Corporations, associations or societies organized and operated exclusively for religious, charitable, scientific or educational purposes;"

That the auxiliary is a corporation organized and operated exclusively for charitable purpose there is no question. But not all of the activities of such persons are exempt, for sec. 117-20 goes on further to provide that the exemption shall apply only:

> "(3) to the * * * religious, charitable, scientific, educational * * * activities of such persons * * * and not to any activity the primary purpose of which is to produce income even though such income is to be used for or in furtherance of the exemption activities of such persons."

A charity is defined in the leading and much cited case of Jackson vs. Phillips, 96 Mass. (14 Allen) 539, at page 556, in the following language:

> "A charity, in the legal sense, may be more fully defined as a gift, to be applied to consistently with existing laws for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of religion, by relieving their bodies of disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government."

And the lessening of any burden which the government would be under an obligation to assume is frequently put forward as the fundamental reason for exempting charities from taxation. Boston Chamber of Commerce vs. Assessors of Boston, 315 Mass. 712, 54 N.E.2d 199.

Whether an activity carried on by a charitable organization is a charitable one depends upon the dominant purpose of the activity concerned. If its primary purpose is to obtain revenue or profit, it is not charitable even though the revenue or profit

derived therefrom is used for the charitable purposes of the organization. But the realization of revenue or profit from an activity does not make the activity any less charitable if such realization is incidental and secondary. Congregational Sunday School & Publishing Soc. vs. Board of Review, 290 Ill. 108, 125 N.E. 7; Commonwealth vs. Lynchburg Y.M.C.A., 115 Va. 745, 80 S.E. 589; Union Pac. Ry. Co. vs. Artist, 60 Fed. 365. See also Contributors to Pa. Hospital vs. Delaware County, 169 Pa. St. 305, 32 Atl. 456. Compare Allison vs. Mennonite Publications Board, 123 Fed. Supp. 23. This rule has been expressly adopted in paragraph (3) of sec. 117-20, set out above.

The fundamental purpose of the auxiliary in taking over the canteens being that of relieving the Hospital of the burden of providing an essential service to its patients, which resulted in making available the full time of at least one member of the Hospital staff for other work, and considering the limited nature of the patronage of the canteens, we are of the opinion the application should be allowed.

As our conclusion herein is based on the data presented with the application for exemption, its applicability to other claims would depend upon the specific facts of such claims. Moreover, in the future should it appear that the facts of this claim might have changed, it should be reexamined in the light of the new facts; and in this connection, it might be noted that section 117-20 requires persons claiming exemption hereunder to register annually.

Very truly yours,

Nobuki Kamida

NOBUKI KAMIDA
Deputy Attorney General

APPROVED:

/s/ Jack H. Mizuha

JACK H. MIZUHA
Attorney General

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INDEXING INSTRUCTIONS - OP. 59-123

EMPLOYEES RETIREMENT SYSTEM

Prior service credit for per diem employees

Per diem workers are entitled to prior service credit when they attain monthly status on or after January 1, 1952.

RLH 1955

Sec. 4-13

RLH 1955

Sec. 6-20

SLH 1959

Act 173

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ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
AND REFER TO
INITIALS AND NUMBER

AK:ss
123:60

Op. 59-123

STATE TERRITORY OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

September 10, 1959

Mr. Charles L. Hapai
Deputy Director
Employees' Retirement System
State of Hawaii
Honolulu, Hawaii

Dear Sir:

This is in answer to your request dated September 9, 1959 for an opinion on the following question:

> Should prior service credit be given to all formerly and presently employed per diem workers who are still in government service when they attain monthly status?

It is the opinion of this office that such per diem workers are entitled to prior service credit from the time of initial employment until they attain monthly status any time on and after January 1, 1952, irrespective of whether they have been per diem employees prior to or after January 1, 1952.

Act 173, Session Laws of Hawaii 1959, states:

> "SECTION 1. Notwithstanding any other provision of law to the contrary, employees in per diem positions and employees who formerly filled per diem positions shall be allowed full prior service credit in the employees' retirement system from the date they entered government employment as per diem employees until the date they attain monthly status.
>
> "SECTION 2. The various counties are authorized and directed to pay to the employees' retirement system sums necessary for the purpose of granting prior service credit in the employees' retirement system to the per diem workers in the respective counties still in service and covered by this Act."

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House Standing Committee Report No. 417, dated April 23, 1959 states as follows:

> "The purpose of this bill is to grant prior service credit to per diem workers and former per diem workers who must join the retirement system at the time they become monthly salaried employees.
>
> "Under section 4-13 of the Revised Laws of Hawaii 1955, all per diem workers are to be placed on regular monthly status by January 1, 1960. Act 200 of the Session Laws of Hawaii 1957 intended to grant these per diem workers full prior service credit in the employees' retirement system for the entire period from they time they entered government service until they become members of the employees' retirement system.
>
> "An opinion of the Attorney General's office on September 9, 1957 stated that the effect of Act 200 was only to grant such prior service credit for the period ending on January 1, 1952. This bill covers the period from January 1, 1952 to the date that these workers attain monthly status.
>
> "Your Committee believes that this full prior service credit should be granted to these per diem workers. Your Committee has amended this bill by adding the words 'still in service and' between the words 'counties' and 'covered' in section 2 to make it clear that this bill relates only to government employees still in government service on the effective date of this Act."

It is clear from the Committee Report that the Legislature's intent is to allow such prior service credit to all members of the employees' retirement system still in service for the period when they were per diem employees. The intention is of course also to include per diem workers who attain monthly status hereafter.

Section 6-20, Revised Laws of Hawaii 1955, states:

> "'Prior service': service credited as prior service under the provisions of sections 6-30 to 6-45."

The definition of "prior service" remained the same on the enactment of Act 200, S.L.H. 1957. However, under Act 173, S.L.H. 1959, by the broad terms of the Act, the meaning of "prior service" was no longer restricted to the provisions of sections 6-30 to 6-45, although said sections were not expressly amended.

Op. 59-123

As explained in detail in Attorney General's opinion 57-102, dated September 9, 1957, various Acts therein presented have taken up the problem of integrating per diem workers into the Employees' Retirement System. Since 1951, when Act 110, S.L.H. 1951, took effect there has been a marked trend in favor of such integration. At that time membership into the System was made mandatory and said per diem employees were given prior service credit for any service prior to January 1, 1952. In 1953, Act 37, S.L.H. 1953, allowed the per diem employees with service prior to 1952 to withdraw from the System. In 1955, Act 274, S.L.H. 1953, the policy was laid down that there would be no further employment on a per diem basis under the Civil Service, and the deadline for conversion from per diem to monthly status was set for January 1, 1960.

Act 274, S.L.H. 1955, (Section 4-13, R.L.H. 1955) states:

> "SECTION 6. It is hereby declared that the practice of compensating employees in the Civil Service at per diem rates is contrary to the best interests of the government and of the employees concerned. All positions in the civil service of the Territory or of any county shall, therefore, hereafter be filled by persons employed on other than a per diem basis. In order that employees now in the civil service who are presently receiving compensation at per diem rates shall not be unduly prejudiced by the provisions hereof, the provisions of this section shall not be applicable to any position which is, on the effective date of this Act, filled by an employee receiving compensation at per diem rates, but every position shall, on or after January 1, 1960, be filled in the appropriate manner by his appointing authority as provided in this section. All positions which are vacant on the effective date of this Act, shall be filled in the manner as herein provided."

In 1957, Act 200, S.L.H. 1957, attempted to allow prior service credit for those attaining monthly status for their entire period of per diem service, but obviously the Legislature failed to express that intent clearly because the effect of said Act was to take care of only those with service prior to 1952, who in 1953 had elected to withdraw from the System. The purpose of Act 200 was to implement the declared policy of 1955 of encouraging the change-over to a monthly status. Act 173, S.L.H. 1959, has now fully implemented the goal of the Legislature in encouraging such change-over by 1960 by giving prior service credit to

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In 1957, Act 200, S.L.H. 1957, attempted to allow prior service credit for those attaining monthly status for their entire period of per diem service, but obviously the Legislature failed to express that intent clearly because the effect of said Act was to take care of only those with service prior to 1952, who in 1953 had elected to withdraw from the System. The purpose of Act 200 was to implement the declared policy of 1955 of encouraging the change-over to a monthly status. Act 173, S.L.H. 1959, has now fully implemented the goal of the Legislature in encouraging such change-over by 1960 by giving prior service credit to

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everyone attaining monthly status on and after January 1, 1952, whether he is presently a member of the System or not, so long as he is still in government service.

Yours very truly,

Arthur S. Komori

ARTHUR KOMORI
Deputy Attorney General

APPROVED:

JACK H. MIZUHA
Attorney General

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INDEXING INSTRUCTIONS

Op. 59-124

I. HAWAII AERONAUTICS COMMISSION

Lease of Lands

Prospective use of airport lands for aircraft maintenance or servicing proper.

Use of lands for airport hotel proper only if such established and maintained for comfort, convenience, and accommodation of air travelers within meaning of statute.

II. REVISED LAWS OF HAWAII 1955

Section 15-9(a).

III. CONCESSIONS

Requirement of Public Bid

Use of airport lands for aircraft maintenance or servicing is not concession within meaning of statute requiring concessions upon public lands to be let only upon public auction.

Use of airport lands for airport hotel is concession within meaning of same statute and may not be let except upon public auction.

IV. SESSION LAWS OF HAWAII 1959

Act 245

Op. 59-124

ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
AND REFER TO
INITIALS AND NUMBER
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51

Op. 59-124

STATE TERRITORY OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

September 15, 1959

Hawaii Aeronautics Commission
Honolulu International Airport
Honolulu, Hawaii

Attention: Mr. A. P. Storrs, Director of Aeronautics

Gentlemen:

Subject: Necessity of Public bid for airport hotel site and aircraft maintenance areas.

This is in response to your letter of August 13, 1959 (your file number D-3932). We understand your question to be whether the provisions of Act 245, S.L.H. 1959, relating to the granting of concessions on public lands, require that the leasing of airport property for the purpose of a hotel site and for aircraft maintenance areas be the result of public auction only. Put another way, do the provisions of the law mentioned prohibit the direct negotiation for proposed lease of airport property for such hotel and aircraft maintenance purposes?

Please be advised that it is the opinion of this office that the provisions of Act 245 would require that any proposed leasing of airport property for an airport hotel be only as the result of public auction. On the other hand, it is our opinion that the leasing of areas at the airport for the purpose of aircraft maintenance may be directly negotiated. In short, we feel that a hotel site in such a locale is a concession within the meaning of the public auction requirements of Act 245, while an aircraft maintenance area is not.

Although the point is not specifically raised in your letter, the questions therein set forth presuppose that the Commission has the legal authority to construct or permit the construction and operation of a hotel, and aircraft maintenance areas on the public lands at the airport. We agree that the Commission may with legal propriety unquestionably permit the use of a portion of airport lands for aircraft maintenance purposes, since such a use goes to the very reason for the

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existence of the airport, i.e. the airport is maintained to facilitate air transportation and the latter is impossible without the repair and maintenance of transportation equipment. See also Section 15-9(a), R.L.H. 1955.

On the question as to whether the leasing of public lands at the airport for a hotel site would be legally proper, it is our opinion that such would be proper under certain conditions. Section 15-9(a), R.L.H. 1955, provides in part:

> "The commission may on behalf of the Territory.. plan, acquire, and establish, construct, enlarge, and improve in the manner herein provided, maintain, equip, operate, regulate, and protect, airports and air navigation facilities, including the construction, installation, equipment, maintenance and operation at such airports of <u>buildings and other facilities for the servicing of aircraft or for the comfort, and accommodation and convenience of air travelers</u>....." (underscoring supplied).

The above language in our mind not only specifically authorizes the establishment of aircraft servicing or maintenance areas, but also would authorize the establishment of an airport hotel. Such a facility could be operated by a concessionaire in much the same fashion are the restaurants, bars, lei stands, and the like at the airport; however, as per the statute such facilities must be primarily for "the comfort, and accommodation and convenience of air travelers". Therefore, we feel that there might be serious legal question as to the propriety of the establishment of a concession on public land at the airport whose principal purpose was not the comfort, convenience and accommodation of air travelers, but rather an attempt to utilize public lands to set up an operation in competition with other like businesses located elsewhere on private lands. It follows then that it is our opinion that the establishment of a hotel at the airport must be for the primary purpose of, and derive the major portion of its revenue from, catering to the comfort, convenience, and accommodation of air travelers. If so established and operated, however, we feel that the legal propriety of the operation would be unaffected by any incidental use of such facilities by other than air travelers.

The question then arises, as set forth in your letter, as to whether either or both such hotel site and aircraft servicing area may be the subject of direct negotiation, or must be permitted only as the result of public auction. Section 1 of Act 245, S.L.H. 1959, provides in part:

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"No concessions or concession space to sell goods, wares, merchandise, and services or to operate restaurants, cocktail lounges, soda fountains and parking areas in any building or on any land owned or under the jurisdiction of the Territory or any county or any independent board, commission, bureau or the Territory or of the various counties..... shall be leased, rented out, let, assigned or disposed of either by contract, lease, license, permit or any other arrangement to any private person, except under contract let after public advertisement for sealed tenders, in the manner provided by law."

It would seem that a hotel site would clearly be space upon which "goods, wares, merchandise, and services" (and especially the latter) would be sold, to say nothing of the other activities spelled out in the Act which are normally an adjunct of hotel management. On the other hand, little if anything is sold on an aircraft maintenance area itself, even though such premises are used for the care and repair of equipment which in turn is used to sell the services connected with air transportation. Moreover, as we have said above the maintenance of aircraft at the airport is more susceptible to being considered as essential to the very nature and purpose of the airport itself than are hotel accommodations for air travelers which may be readily available through adequate existing facilities.

We conclude that it was not the intent of Act 245 to require that an integral portion of a government facility such as an aircraft maintenance or servicing area at an airport, the use of which area is unalterably connected with the use of the airport for the purpose for which it was established and is being maintained, be leased or let only through public auction if the public interests are best served by direct negotiation for such letting. On the other hand, we feel that such an airport facility as a hotel is not in the same category and is properly a concession within the meaning of Act 245 requiring concessions on public lands to be let only after public auction.

Yours very truly,

WILLSON C. MOORE, JR.
Special Deputy Attorney General

APPROVED:

JACK H. MIZUHA
Attorney General

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INDEXING INSTRUCTIONS

Op. 59-125

I. EMPLOYEES' RETIREMENT SYSTEM

Payment of Pension Bonus

Pension bonus presently must be paid to firemen and policemen where 29th Legislature denied such payment under specific pension bonus legislation of that biennium, but 30th Legislature enacted new pension bonus legislation without similarly denying entitlement of such pensioners thereto.

Policemen and Firemen

(Same syllabus as above)

II. SESSION LAWS OF HAWAII 1957

Acts 146, 231.

III. SESSION LAWS OF HAWAII 1959

Act 242.

Op. 59-125

ADDRESS REPLY TO
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INITIALS AND NUMBER

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60

Op. 59-125

STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

September 17, 1959

Employees' Retirement System
Keelikolani Building
Honolulu, Hawaii

Attention: Mr. Harold C. Hill, Secretary

Gentlemen:

Subject: Payment of pension bonus to fire and policemen-Act 231, S.L.H. 1957 and Act 242, S.L.H. 1959

This is in response to your letter of June 15, 1959 for an opinion of this office on the subject matter. As we understand the problem, in 1957 the Twenty-Ninth Legislature enacted a pension bonus bill (Act 146, S.L.H. 1957), but the same legislative session also enacted a law (Act 231, S.L.H. 1957) redefining and amending certain provisions relating to firemen and policemen but specifically providing that they were to receive no pension bonus payable under Act 146. In 1959, the Thirtieth Legislature likewise enacted a pension bonus bill (Act 242, S.L.H. 1959), but did not specifically provide that the provisions of said bonus bill were not to apply to firemen and policemen.

With respect thereto, you ask:

"Does the language of Section 2 of Act 231, S.L.H. 1957 apply only to bonuses payable under authority of House Bill 1229, (Act 146, S.L.H. 1957), or does it state a policy the intent of which is to deny any bonus payable under a subsequently enacted Bonus to Pensioners' Act to beneficiaries who are retired under the provisions of Section 1 of Act 231, S.L.H. 1957?"

Please be advised that it is the opinion of this office that the prohibition contained in Act 231, S.L.H. 1957, relates only to such pension bonus payments to firemen and policemen to which they might otherwise have been entitled under the provisions of Act 146, S.L.H. 1957, and does not deny, nor authorize the

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withholding of, payment of such bonus to said classes of pensioners who are otherwise entitled to receive such payment under the provisions of Section 242, S.L.H. 1959.

The foregoing is predicated upon the following considerations. A pension bonus bill in a form substantially identical with the terms of Act 242 has been enacted by the Territorial Legislature biennially since Act 376, S.L.H. 1949. See Ops. Attorney General No. 58-42 (February 13, 1958). Section 1 of Act 242, S.L.H. 1959, provides in part:

> "Every pension payable under the employees' retirement system . . . shall be increased by a bonus for each month for the period commencing July 1, 1959, and ending June 30, 1961, any provision in any law to the contrary notwithstanding . . ." (Underscoring supplied)

Section 1 of Act 146, S.L.H. 1957, contains language identical to the foregoing, with the exception naturally, that the effective period of the pension bonus therein provided was to be July 1, 1957 to June 30, 1959. Were there nothing else in the picture, clearly the firemen and policemen otherwise entitled to a pension bonus during the effective period of Act 146 would be entitled to receive such bonus. However, Section 2 of Act 231, S.L.H. 1957, enacted in the same session as, but subsequent to, the bonus provisions of Act 146, provides:

> "Notwithstanding the provisions of House Bill No. 1229 of the Twenty-Ninth Legislature of the Territory of Hawaii, Regular Session of 1957, entitled: 'AN ACT PROVIDING A BONUS FOR PENSIONERS . . .' no policeman or fireman receiving retirement allowances under the provisions of section 1 of this Act shall be entitled to receive any bonus."

As we mentioned before, House Bill No. 1229 of the 1957 session became Act 146 upon enactment. At any rate, by legislative declaration the firemen and policemen were to receive no pension bonus during the 1957-1959 biennium. Now the question is, was it the intent of the legislature to restrict this prohibition only to the 1957-1959 biennium, or do the provisions of Act 231 operate to bar the subject pensioners from receiving such pension bonuses as may be the subject of future bonus legislation and which is the subject of Act 242, S.L.H. 1959? As we denoted hereinbefore, we believe the answer to this question to be in the negative.

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We think that since the provisions of Section 1 of Act 242 expressly say that every pension shall be increased, any law to the contrary notwithstanding, that literal effect should be given to this language. It is our opinion that the entitlement of the firemen and policemen to the bonus indicated by the express terms of Act 242 is not qualified by the language of Section 2 of Act 231, for it is clear from the language of the latter statute that the prohibition therein contained was intended to operate only with respect to specific bonus legislation, viz. Act 146, S.L.H. 1957. Since by its terms Act 146 is no longer effective from and after July 1, 1959, and has been succeeded by Act 242, it is our opinion that it was the intent of the Thirtieth Legislature in enacting Act 242 without express qualification as to the subject pensioners that the firemen and policemen are to receive the pension bonus provided for in Act 242 if they were otherwise entitled to receive the same.

The above conclusion is bolstered by the information that when the Thirtieth Legislature was considering the provisions of House Bill No. 739 (which became upon enactment, Act 242), the figures which were submitted to the legislature to determine the adequacy of the appropriation for the bonuses, included police and firemen among the pensioners qualified therefor. The information given to the Legislature by the Budget Bureau (which apparently was a compilation of information provided by both the Retirement System and the Budget Bureau) was to the effect that 2,544 pensioners would receive the basic bonus of $50: 1,181 of which would receive an additional $20; 1,541 (with 21 or more years of service) would receive an additional $20; and that 450 of these pensioners would receive additional amounts sufficient to raise their minimum pension to $130 per month. According to the Budget Bureau, these figures included police and firemen pensioners, and were the figures upon which the Legislature based its appropriation for Act 242.

We therefore feel that both the express language, and underlying intent of the enacting Legislature, of and with respect to Act 242 compels the conclusion that the police and firemen pensioners are to be accorded the benefits therein provided, if otherwise qualified to receive the same, and the exclusion contained in Act 231, S.L.H. 1957, was not intended to apply to other than the bonus provisions contained in Act 146, S.L.H. 1957.

Yours very truly,

WILLSON C. MOORE, JR.
Special Deputy Attorney General

APPROVED:

JACK H. MIZUHA
Attorney General

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INDEXING INSTRUCTIONS

September 21, 1959

I. Laboratory DIRECTORS

An individual other than a physician, or veterinarian, who examines or supervises examinations of specimen from his own patients, who employs, or directs the duties of one or more laboratory technicians in the course of operation or administration of the functions of a laboratory, or who, if a laboratory technician is not employed, operates a laboratory and personally performs such duties.

Medical practitioners and veterinarians who conduct a laboratory chiefly to examine their own patients are exempted from the provisions of Chapter 30, Hawaii Public Health Regulations.

II. PUBLIC HEALTH REGULATIONS, CHAPTER 30.

III. SESSION LAWS OF HAWAII 1957

Act 316.

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STATE ~~TERRITORY~~ OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

September 21, 1959

Dr. Max Levine, Chairman
Licensing Advisory Committee
For Laboratory Directors and
Laboratory Technicians
Department of Health
Honolulu 1, Hawaii

Dear Sir:

Reference is made to your letter of September 2, 1959, wherein you requested our opinion on whether certain physicians and veterinarians fall within the definition of "laboratory directors" set out in the provisions of Chapter 30, Hawaii Public Health Regulations.

Our answer is "yes." Chapter 30, Hawaii Public Health Regulations deals with laboratory directors and laboratory technicians. Section 6(a) of said chapter 30 refers to requirements for a laboratory director and the fees to be paid for the license. Section 1(g) of the same chapter defines a laboratory director as "An individual, other than a physician, or veterinarian, who examines or supervises examinations of specimens from his own patients, who employs, or directs the duties of one or more laboratory technicians in the course of operation or administration of the functions of a laboratory, or who, if a laboratory technician is not employed, operates a laboratory and personally performs such duties." This definition excludes a physician and a veterinarian, who examines or supervises examinations of specimens from his own patients. (See underscoring above.)

The controversial area in the regulations is found in section 6(b) which reads: "A fee of $25 shall be paid by each applicant for initial licensing ... and a fee of $5 shall be paid annually for renewal of license; provided that medical practitioners and veterinarians ... shall be exempt from such fees." and section 12, which reads: "The provisions of this chapter shall not be applicable to qualified medical practitioners, or veterinarians ...." But these exemptions apply only to physicians and veterinarians who conduct a laboratory for the purpose of examining their own patients and are not to be classified and licensed as laboratory director.

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In section 6 of said chapter, there is a 5 year laboratory or teaching experience requirement. A person who holds a degree in medicine will be credited with the equivalent of 5 years experience and a person who holds a degree in veterinary medicine will be credited with the equivalent of 4 years experience. It would be meaningless to have these requirements in one paragraph and then exempt veterinarians and physicians in another paragraph. It is reasonable to assume that the intent of the committee was that only licensed veterinarians and physicians who conduct a laboratory for the purpose of examining their own patients shall be exempt from paying the fees.

Therefore, the exemption of fees in section 6(b) and the exemption of medical practitioners and veterinarians in section 12 of chapter 30, Hawaii Public Health Regulations, apply only to those medical practitioners and veterinarians who confine their laboratory practice to the examination of their own patients.

Very truly yours,

Peter A. Aduja

PETER A. ADUJA
Deputy Attorney General

APPROVED:

JACK H. MIZUHA
Attorney General

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ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
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STATE ~~TERRITORY~~ OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

September 21, 1959

Honorable Robert W. B. Chang
Chairman, Judiciary Committee
House of Representatives
First State Legislature
Honolulu, Hawaii

Dear Sir:

This is in reply to your oral request of September 16, 1959, for an opinion on the following questions:

(1) In view of the doctrine of the Separation of Powers in our government, does the legislature have the authority to prescribe the duties of the Lieutenant Governor within the Executive Department of the State? If so, can the legislature transfer to the Lieutenant Governor some of the duties given to the Governor by the State Constitution?

(2) Does the legislature have the authority to establish the office of Secretary of State within the Executive Department?

(3) May the legislature designate the Lieutenant Governor as the head of one of the principal departments within the Executive Department?

(4) May the Governor assign ministerial duties to the Lieutenant Governor under our present Constitution?

1. It is the opinion of this office that the legislature has the authority to prescribe the duties of the Lieutenant Governor of the State of Hawaii within the Executive Department. However, the legislature cannot infringe nor encroach upon the powers of the Governor of the State of Hawaii. Langerer v. Miller, 124 Tex. 80, 76 S.W.(2) 1025 (1934). Thus, though the legislature may prescribe the

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duties of the Lieutenant Governor, it has no authority to transfer to the Lieutenant Governor any of the executive powers given to the Governor by the Constitution.

Section 2 of Article IV of the Constitution of the State of Hawaii provides in part:

> "He [Lieutenant Governor] shall perform such duties as may be prescribed by law."

Under said section, it is clear that the legislature is authorized to prescribe the duties of the Lieutenant Governor.

However, section 1 of Article IV provides in part:

> "The executive power of the State shall be vested in a governor."

Thus, no person other than the Governor has the authority to exercise the executive powers granted to him by the Constitution. As the supreme court of Indiana said in Tucker v. State, 218 Ind. 614, 35 N.W.(2) 270 (1941),

> ". . . it may be reasonably concluded that the principal reason for creating the office of Lieutenant Governor was to provide an available substitute to fill the Governor's office in case of the Governor's death, resignation, or inability to discharge the duties of his office, and it is expressly provided in Section 10 of Article 5 [of the Indiana State Constitution, which is similar to that of section 4 of Article IV of the Hawaii State Constitution] that in such case the duties of the office of Governor shall devolve upon the Lieutenant Governor. We must conclude from this that it was not intended that he should exercise any of the functions of the Governor's office except in such a contingency. No executive powers are otherwise conferred upon him. He is not the Governor, and clearly was not intended to have power equal to the powers of the Governor, and there is nothing in the Constitution to indicate that he was to exercise any executive powers or functions whatever except in the contingency provided for in

Section 10 of Article 5." (Sec. 4 of Art. IV of Hawaii State Constitution.)

2. The legislature has the authority to create the office of Secretary of State and prescribe the functions and duties for that office, provided that there is no conflict with the duties and functions given to the Governor and Lieutenant Governor of the State by the Constitution. 81 Corpus Juris Secundum, States, section 54, at 974, states:

> "It is a fundamental attribute of a state that it may create its own offices. In the absence of express or implied constitutional restriction, the legislature has inherent power to create state offices."

There is nothing in the Constitution of the State of Hawaii which prohibits the creation of the office of the Secretary of State. However, it should be noted that the Constitutional Convention, in failing to create the office of Secretary of State, contemplated that the duties normally performed by a Secretary of State would be carried out by the Lieutenant Governor. Standing Committee Report No. 67 of the Committee on Executive Powers and Functions, page 4, contains the following statement:

> "The office of Secretary of State, although it exists in all states, is no longer an important office. The Secretary is usually the custodian of the Great Seal of the State and carries on correspondence with other states . . . . The duties of the office have come to be of such a miscellaneous nature that it may almost be described as a sort of scrap basket of governmental authority. Because the Lieutenant Governor has very little to do, your Committee recommends that the legislature by law allocate the usual duties of the Secretary, hereinabove mentioned, to the office of Lieutenant Governor."

3. The legislature has no authority to designate the Lieutenant Governor as the head of one of the principal departments within the Executive Department.

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Section 6 of Article IV of the Hawaii State Constitution provides that the head of a principal department of the state government shall be nominated and, by and with the consent of the senate, appointed by the Governor.

It is settled that, where a power is given to the Governor by the Constitution in unrestricted terms it cannot be taken away, nor can a like power be given by the state legislature to any other officer. 81 C.J.S., States, sec. 60, page 982. Ex parte Costello, 157 P.(2d) 713, 22 Wash. (2) 697. Since the Constitution has given to the Governor the authority to nominate and, with the consent of the senate, appoint the head of each principal department of the state government, the legislature has no authority to designate the Lieutenant Governor as the head of any of such principal department.

3. "A ministerial act is defined to be 'one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act being done.'" Gray, Governor et al. v. State ex rel. Coghlen, 72 Ind. 567 (1890); Tucker v. State, supra.

Under the Hawaii State Constitution, the Governor may delegate ministerial duties to the Lieutenant Governor without any further act by the State legislature. Committee of the Whole Report No. 17, pages 4-6, contain the following statement:

"SECTION II

"Section 2 as originally proposed, read as follows:

"Lieutenant Governor. 'SECTION 2. There shall be a Lieutenant Governor, who shall have the same qualifications as the Governor. The Lieutenant Governor shall be elected at the same time, for the same term, and in the same manner as the Governor. The Lieutenant Governor shall perform such duties as may be prescribed by law or as may be delegated to him by the Governor.'

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"Recommendations, Reasons or Explanation:

"Your Committee recommends that this Section be adopted in the following form:

"'There shall be a Lieutenant Governor who shall have the same qualifications as the Governor. The Lieutenant Governor shall be elected at the same time, for the same term, and in the same manner as the Governor. The Lieutenant Governor shall perform such duties as may be prescribed by law . . . .'

"Your Committee understands that the Committee on Ordinances and Continuity of Law will submit a section providing that the Lieutenant Governor shall be ex officio, and act as Secretary of State or such other officer as may be required for certification of the election of the first United States Representatives and Senators of the State under the terms of the Enabling Act.

"The words 'or as may be delegated to him by the Governor', were recommended to be deleted with the understanding that such deletion would not prevent the Governor from delegating routine or ministerial duties and would not prevent the legislature from authorizing him to delegate other duties."

Respectfully submitted,

JON J. CHINEN
Deputy Attorney General

APPROVED:

JACK H. MIZUHA
Attorney General

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INDEXING INSTRUCTIONS

Op. 59-128

I. HAWAII HOUSING AUTHORITY

Bonds

The sale of notes for purpose of interim financing is constitutional and valid under the provisions of paragraph 7, section 3, Article VI of the State Constitution.

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STATE [redacted] OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

September 22, 1959

Hawaii Housing Authority
P. O. Box 3046
Honolulu 2, Hawaii

Attention: Mr. Lee Maice, Executive Director

Gentlemen:

This is in reference to your letter No. 1-101/1793, dated September 10, 1959, requesting our opinion on whether or not the sale of notes for purpose of interim financing is constitutional and valid.

It is our opinion that the sale of notes by the Hawaii Housing Authority is permissible under paragraph 7, section 3, Article VI of the State Constitution. The sale of notes is an indebtedness incurred under a revenue bond statute by a public corporation and the only security for such indebtedness is the revenues of the public corporation.

Under the provisions of section 74-27, Revised Laws of Hawaii, 1955, the Hawaii Housing Authority is authorized to issue bonds with the approval of the Governor. Under section 74-3 "Bonds" is defined as:

> ". . . any bonds, interim certificates, notes, debentures or other evidences of indebtedness of the authority issued pursuant to this chapter."

It is therefore, the opinion of this office that the sale of notes for purpose of interim financing is constitutional and valid.

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As requested by you, we have informed the Public Housing Administration, by telegram, that the sale of notes for purpose of interim financing is constitutional and valid.

Very truly yours,

HAROLD Y. SHINTAKU
Deputy Attorney General

APPROVED:

JACK H. MIZUHA
Attorney General

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STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

September 23, 1959

Mr. Herman Doi
Chief Clerk
House Finance Committee
First State Legislature
Iolani Palace
Honolulu, Hawaii

Dear Sir:

Re: Citizenship Training Group

This is in answer to your letter of September 12, 1959 in which you have requested a formal opinion regarding the legality of an appropriation to the Citizenship Training Group, an unincorporated eleemosynary association with post office address of P. O. Box 764, Hilo, Hawaii.

The facts included within your letter and attachment are insufficient for us to form a definite opinion as to the public purpose which any appropriation would serve. Our opinion will, therefore, discuss only the general question as to what purposes appropriations may be made.

Article VI, Section 6 of the State Constitution provides:

> "No tax shall be levied or appropriation of public money or property made, nor shall the public credit be used, directly or indirectly, except for a public purpose."

American Jurisprudence in discussing the use of public funds for particular purposes states:

> "Whether an enterprise for the advancement of which it is proposed to loan or invest public funds has a public purpose is dependent upon the facts of the particular case. The extent and importance of the interest to be promoted or the general desirableness of the enterprise

are not conclusive factors. Such elements only go to the propriety and expediency of the expenditures." (42 Am. Jur., Public Funds, Section 57 at p. 757)

The section further provides "What is for the public good and what are public purposes for which appropriations may be made are questions which the legislature must in the first instance decide." (42 Am. Jur., Public Funds, Section 57 at p. 758)

In the draft of the proposed bill which you were kind enough to make available to us, the proposed appropriation is not made to a private organization but to an executive department of the State government. This procedure, provided that the purpose for the appropriation is a public purpose, may eliminate any question as to the legality of appropriating money to a private organization.

With respect to the reference to an oral opinion rendered by this office in the past, we can make no comment inasmuch as the tenor and the author of such an opinion is unknown to us.

With respect to the Citizenship Training Group, without additional information it is our opinion that an appropriation made directly to such an organization without clearly defining the specific use of such an appropriation and moreover that such use is a public use, would raise a question as to the legality of such an appropriation. It is our opinion that before such an appropriation is made careful consideration be given to whether or not such would be for a public purpose.

Yours very truly,

Philip T. Chun
Deputy Attorney General

APPROVED:

Jack H. Mizuha
Attorney General

ADDRESS REPLY TO
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STATE ~~TERRITORY~~ OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

September 28, 1959

Mr. Tim Ho
Superintendent of Public Works
State Highway Department
869 Punchbowl Street
Honolulu 13, Hawaii

Dear Mr. Ho:

This is in response to your letter No. 2.234, dated September 22, 1959, requesting our opinion on whether or not highway fuel tax maintenance funds can be legally expended by the department for the construction of Kirkwood Drain Seawall, Project No. C 72 02 59.

It is the opinion of this office that the highway fuel tax maintenance funds may be expended for the construction of the said project.

As indicated in your letter, the State Highway Department assumed all responsibility for any damage occurring as a result of the construction of the Kirkwood Drain in 1956. If the determination of your engineers is that the present damage was caused by such construction, the State Highway Department is liable and should repair the damage before further damages are caused to private property.

Yours very truly,

Harold Y. Shintaku

HAROLD Y. SHINTAKU
Deputy Attorney General

APPROVED:

JACK H. MIZUHA
Attorney General

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PUBLIC WORKS

Expenditure of Public Money

Highway fuel maintenance funds may be expended for the construction of a seawall to repair the damage caused by a drain constructed by the Highway Department.

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PUBLIC WORKS

Expenditure of Public Money

Highway fuel maintenance funds may be expended for the construction of a seawall to repair the damage caused by a drain constructed by the Highway Department.

INDEXING INSTRUCTIONS

Op. 59-131

I. LEGISLATURE

Senate

The Senate as a body does not come within the definition of the term "board" as defined in section 1(a) of Act 43, Session Laws of Hawaii 1959.

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STATE ~~TERRITORY~~ OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

October 1, 1959

Honorable Sakae Takahashi
Senator, Fifth Senatorial District
The First Legislature
State of Hawaii
Honolulu, Hawaii

Dear Sir:

This is in reply to your letter of September 22, 1959, addressed to the Attorney General of the State of Hawaii, wherein you ask whether or not the senate as a body comes within the definition of the term "board" as defined in section 1(a) of Act 43, Session Laws of Hawaii 1959, and, if so, whether it is necessary to require a two-thirds recorded vote of the body to meet in executive session, as provided in section 3 of said act.

It is the opinion of this office that the senate as a body does not come within the term "board" as defined in section 1(a) of Act 43, Session Laws of Hawaii 1959.

Said section 1(a) defines "board" to mean "any agency, board, commission, authority or committee of the Territory or its political subdivisions, either legislative or executive, . . . established by law . . . ." The term "established by law" is generally understood to mean that which is established by the legislature. Healey v. Dudley, N.Y., 5 Lans. 115, 120; Dane v. Smith, 54 Ala. 47. The senate is not established by the legislature. It is one of the legislative bodies created by the Constitution of the State of Hawaii. Thus, it is not covered by section 1(a) of Act 43, Session Laws of Hawaii 1959.

In addition, a study of said Act 43 shows that it was not the intent of the legislature to include the senate within the term "board" as defined in section 1(a).

Section 5 of said Act 43 provides that the chief executive of the State or the different counties, as the

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case may be, has the sole power to determine whether or not the minutes of the board shall be a verbatim record. And section 6 of said Act 43 provides that any person denied the opportunity to inspect the records of such a "board" may apply to a circuit court for relief.

Our government is founded on the principle of the separation of powers among the three branches: the executive, the legislative, and the judiciary. To hold that the court may order the senate to open its records to the public is a violation of said principle of separation of powers. In addition, section 13 of Article III of the Constitution clearly provides that each house shall determine the rules of its own proceedings. A view that the governor may determine the rules of proceedings in the senate will be a violation of said section 13, Article III. In addition, rules of procedure expire with the legislature adopting them, unless readopted by subsequent legislatures. 81 C.J.S., States, section 39, p. 956. Thus, it is not likely that Article 43 was intended to include the senate as a body within the term "board" as defined in section 1(a).

Because of the foregoing opinion, the second portion of your question is made moot and not herein discussed.

Yours very truly,

Jon J. Chinen

JON J. CHINEN
Deputy Attorney General

APPROVED:

JACK H. MIZUHA
Attorney General

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INDEXING INSTRUCTIONS

Op. 59-132

I. LIEUTENANT GOVERNOR

Office

The office of lieutenant governor is created by the State Constitution as a part of the executive branch of our government, separate and independent of the departments provided for in Article IV, section 6, of the State Constitution.

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STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

September 30, 1959

Honorable Robert W. B. Chang
Chairman, Judiciary Committee
House of Representatives
State of Hawaii
Honolulu, Hawaii

Dear Sir:

This is in reply to your letter addressed to the Attorney General, dated September 29, 1959, wherein you ask for an opinion on the following question:

> "Under the proposed draft of House Bill No. 1, the 'Office of the Lieutenant Governor' appears in Section 9 of said draft. Does the title 'Office of the Lieutenant Governor' create a new department under Section 6 of Article IV of the Constitution of the State of Hawaii?"

It is the opinion of this office that the title "Office of the Lieutenant Governor" in section 9 of the proposed draft of House Bill No. 1 does not create a new department under section 6 of Article IV of the State Constitution.

The office of lieutenant governor is specifically created by the State Constitution as a part of the executive branch of our government, separate and independent of the departments provided for in section 6 of Article IV of the Constitution. Section 2 of Article IV provides that the lieutenant governor shall be elected at the same time, for the same term, and in the same manner, as the governor. Section 4 of Article IV provides that when the office of governor is vacant, etc., the lieutenant governor shall become governor and that when the office of lieutenant governor is vacant, etc., the powers and duties of that

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office shall devolve upon such officers as may be provided by law.

Section 6 of Article IV provides for the allocation of the executive and administrative offices, departments and instrumentalities of the state government and their respective functions, powers and duties among not more than twenty principal departments, and further provides that the head of these departments, whether a single executive or a board, commission or other body, shall be nominated and, by and with the advice and consent of the senate, appointed by the governor. This section further provides that the governor may remove these department heads, with the advice and consent of the senate.

Since the lieutenant governor is elected by the voters of the State of Hawaii to head the office of lieutenant governor, said office cannot be classified as one of the departments provided for in section 6 of Article IV, which departments are to be headed by individuals appointed by the governor and subject to removal by the governor with the advice and consent of the senate.

Respectfully submitted.

JON J. CHINEN
Deputy Attorney General

APPROVED:

JACK H. MIZUHA
Attorney General

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Op. 59-133

I. SEAL, State, Regulation

The legislature has the right to regulate the use of the Great Seal of the State and restrict its use or prohibit its proper use.

II. LIEUTENANT GOVERNOR, Seal

In the absence of legislation conferring this power on the lieutenant governor, he is without authority to issue permits for reproduction of the Great Seal for commercial purposes.

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STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

October 5, 1959

Honorable James Kealoha
Lieutenant Governor
State of Hawaii
Iolani Palace
Honolulu, Hawaii

Dear Sir:

This is in reply to your request for an opinion dated September 24, 1959, on the question whether you may grant the Maui Chamber of Commerce permission to reproduce the Great Seal of the State to be used as souvenir pieces.

The legislature has the right to regulate the use of the Great Seal and restrict its use or prohibit its improper use. Commonwealth v. R.I. Sherman Manufacturing Co., 75 N.E. 71, 189 Mass. 76, 4 Ann. Cas. 268; Halter v. Nebraska, 205 U.S. 34, 51 L. Ed. 696. The Hawaii Legislature has not enacted any law regulating the use of the Great Seal or delegating its power to do so. In the absence of legislation conferring this power on the lieutenant governor, he is without authority to issue permits for reproduction of the Great Seal for commercial purposes.

It is, therefore, our opinion that the lieutenant governor has no authority to grant to the Maui Chamber of Commerce permission to reproduce the Great Seal of the State to be used as souvenir pieces.

Very truly yours,

Alana W. Lau

ALANA W. LAU
Deputy Attorney General

APPROVED:

JACK H. MIZUHA
Attorney General

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STATE OF HAWAII

Department of the Attorney General

Honolulu

October 6, 1959

Mr. Tim Ho, Superintendent
Department of Public Works
869 Punchbowl Street
Honolulu 13, Hawaii

Dear Sir:

This is in reply to your letter of September 1, 1959 wherein you ask whether a department head may, "as a matter of policy, require all employees to submit a doctor's certificate for any illness of five or more consecutive days".

The present applicable law, as you correctly state, is that "whenever it is deemed necessary, particularly where an abuse is indicated, a department head shall have authority to investigate any absence for which sick leave with pay is indicated". Section 5-39, Revised Laws of Hawaii 1955. This language was introduced through Act 166 by the 1959 legislature.

Prior to the changes brought about by Act 166, section 5-39 specifically provided that "A licensed physician's certificate shall be required only when absences are five or more consecutive days." Because this requirement, once existing, was, by process of amendment, deleted from section 5-39, it would at first look appear that your proposed policy might contravene legislative intent. But a study of Act 166 and its accompanying committee report contribute toward establishing a basis for your proposed policy.

Prior to the enactment of Act 166, a doctor's certificate was to be required only in cases of sick leave with pay for five or more consecutive days. In cases of sick leave with pay for a period less than five consecutive days, the rule was, apparently, that no medical certificate

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would be required. Act 166, though it deletes the above mentioned specific requirement, endows the department head with greater powers than those placed in him prior to the enactment of Act 166. His power of investigating any absence of sick leave extends to all cases where an investigation is deemed necessary by him and not only to cases where absences are for five or more consecutive days. Further, it appears that his power of investigation is not limited only to the requiring of a doctor's certificate of those who are absent.

These considerations find support in House Standing Committee Report No. 669, relating to H.B. 768 which was to become Act 166. This report states in part:

> "Your Committee held extensive hearings on this bill, in addition to doing much research. We have found that in those jurisdictions, which have unlimited sick leave privileges but which grant the authority to the departments to investigate the allegations of sickness, have a lower sick leave ratio.
>
> "Your Committee agrees with those who testified before your Committee that there would be less abuse of sick leave if it was on an unlimited basis but with the authority to the department heads to investigate the same."

This clearly shows that Act 166 was not intended to curb the powers of the department heads to check on sick leaves taken by their subordinates, but, on the contrary, that the department heads were to be given more extensive powers of investigation of sick leaves.

In view of the above circumstances, it is the opinion of this office that if you, as a department head, deem it necessary, in the discharge of your responsibility to see to it that sick leave privileges are not abused by

the workers in your department, to have a policy requiring "all employees to submit a doctor's certificate for any illness of five or more consecutive days", your course of action would not be inconsistent with law.

Yours very truly,

Henry H. Shigekane

Henry H. Shigekane
Deputy Attorney General

APPROVED:

Jack H. Mizuha
Attorney General

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TERRITORY OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

October 7, 1959

Honorable Francis M. F. Ching
Chairman, Senate Lands Committee
First State Legislature
State of Hawaii
Honolulu, Hawaii

Dear Sir:

Subject: Senate Bill No. 76

This is in answer to your letter of October 5, 1959, by which you have asked our opinion as to whether or not the amendment to Article X, section 5 of the State Constitution as proposed by Senate Bill No. 76 is necessary.

The purpose of Senate Bill No. 76 is to amend the Constitution to provide for the use of public lands for the development of recreation, tourism and industries. Article X, section 5 of the Constitution now provides:

> "The public lands shall be used for the development of farm and home ownership on as widespread a basis as possible, in accordance with procedures and limitations prescribed by law."

It is the opinion of this office that Article X, section 5 of the Constitution does not restrict the use of public lands solely for farm and home ownership. We have interpreted this section to allow for the use of public lands for other purposes such as those contemplated by Senate Bill No. 76. This determination is reached by considering section 5 of Article X together with section 1 of Article X which provides:

> "The legislature shall promote the conservation, development and utilization of agricultural resources, and fish, mineral, forest, water, land, game and other natural resources."

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Standing Committee Report No. 78 of the Constitutional Convention of Hawaii of 1950 dated June 15, 1950 in discussing Article X, section 1 states:

> "It is the feeling of this Committee that the State should promote conservation, development and utilization of all resources of the State regardless of whether said assets are publicly or privately owned. Your Committee feels that, should conditions warrant, the State, for the public good, should be able to acquire private interest to promote the over-all conservation, development and utilization."

Clearly, it is indicated the intention of the framers of the Constitution is that public lands should be conserved, developed and utilized for the good of the public. If we are to consider the general over-all use of public lands, such lands must be used for the over-all development of the economy of the State. To restrict the use of lands for the specific purposes stated in section 5 would not be carrying out the provisions of the Constitution as stated in section 1 of Article X. For these reasons it is our opinion that public lands may be used for purposes other than farm and home ownership if such uses are instrumental in developing the over-all economy of the State and in the promotion of such over-all conservation, development and utilization.

Very truly yours,

Philip T. Chun

PHILIP T. CHUN
Deputy Attorney General

APPROVED:

James Mizuha

JACK H. MIZUHA
Attorney General

Op. 59-135

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ADDRESS REPLY TO
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INITIALS AND NUMBER

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Op. 59-136

STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

October 7, 1959

Mr. Robert Ellis
Administrative Assistant
to the Governor
Iolani Palace
Honolulu, Hawaii

Dear Sir:

Re: Rehabilitation of Executive Suite, Iolani Palace

This is in reply to an oral request made by you on October 7, 1959 relating to the above-captioned matter. You have asked our opinion as to whether or not expenditures may be made from the appropriation of $100,000 for the rehabilitation of Iolani Palace in section 8 of Act 150, Session Laws of 1957, for the specific rehabilitation of a portion of Iolani Palace, to-wit, the executive suite.

The specific use of moneys from this appropriation, as I understand, is to be for the rehabilitation of the executive suite of offices on the second floor of Iolani Palace to provide for better working conditions in the office of the governor and the lieutenant governor. It is our opinion that moneys appropriated by Act 150, Session Laws of Hawaii 1957 for the rehabilitation of Iolani Palace may be used for improvements made to the executive suites located on the second floor of said Iolani Palace. The appropriation made by Act 150 is general in nature, so may be used for such rehabilitation and improvements as deemed necessary.

Very truly yours,

Philip T. Chun

Philip T. Chun
Deputy Attorney General

APPROVED:

Jack H. Mizuha

Jack H. Mizuha
Attorney General

Op. 59-136

INDEXING INSTRUCTIONS----OPINION 59-137

Concessions

Requirements of public bid
of
Private use/area at airport open to general public

for advertising sign or display is concession within meaning of statute requiring the letting of such concession to be the result of public bid only. Space permit for this purpose which was the result of direct negotiation invalid.

Session Laws of Nawaii 1959

Act 245

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137:51

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STATE ~~TERRITORY~~ OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

October 8, 1959

Hawaii Aeronautics Commission
Honolulu International Airport
Honolulu, Hawaii

Dear Sir: Attention: Mr. A. P. Storrs, Director

Re: Space permits for airport advertising

This is in response to your recent oral request for the opinion of this office as to the legal duties and rights of the Commission relative to Space Permit No. 758, dated July 14, 1959. As we understand the situation, A. D. Starr, Incorporated, applied for permission to use one or more of the bays at the baggage claiming area for the purpose of installing and displaying certain advertising signs thereat. By direct negotiation, this permission was granted upon a revocable basis for a fee of $70 per month per bay for the use of two bays and the above space permit was executed by the Assistant Director of Aeronautics and the permittee.

It appears that, first, the form of this "space permit" and the manner of letting this type of airport space by direct negotiation was not first approved by this office and, secondly, although the permit requires by its terms that the content of advertising signs be first approved by the Commission prior to installation such was not done in this instance. You have posed certain questions relative to the duties and rights of the Commission in this posture.

Please be advised that it is the opinion of this office that the letting of public space at the airport for purposes such as the above is within the meaning of Act 245, S.L.H. 1959, requiring such letting to be the result of public bid only. Therefore, we must advise you that the direct negotiation under which the permittee obtained the space in question was legally improper and the above space permit therefore of no legal effect.

Section 1 of Act 245, S.L.H. 1959, provides in part:

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"No concessions or concession space to sell goods, wares, merchandise, and services ... in any building or on any land owned or under the jurisdiction of the Territory or any ... independent board, commission, bureau, or agency of the Territory ... shall be leased, rented out, let, assigned or disposed of either by contract, lease, license, permit or any other arrangement to any private person, except under contract let after public advertisement for sealed tenders, in the manner provided by law."

We are of the opinion that the space permit noted above in effect purported to grant permission to use public land for the selling of services which we feel is a concession within the meaning of Act 245 requiring concessions to be let only as the result of public bid. Since there was no public bid in this situation we must advise you that the Space Permit No. 758 is invalid and without legal effect.

May we suggest that this matter be given further study by the Commission and that permission to use the space in question for advertising or other authorized purposes be the subject of public auction open to all interested persons. This office would be pleased to render such assistance as the Commission may require in formulating the language of the bid proposals and the lease or permit forms for this purpose.

We respectfully reserve opinion on the questions you have raised with respect to the rights of the Commission to revoke a permit for non-compliance with the requirement of prior approval of the content of advertising signs. We feel that the foregoing is determinative of the matter at this time.

Yours very truly,

WILLSON C. MOORE, JR.
Deputy Attorney General

APPROVED:

JACK H. MIZUHA
Attorney General

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INDEXING INSTRUCTIONS

Op. 59-138

I. BOARDS AND COMMISSIONS

Qualifications of

See officers.

II. OFFICERS

Qualification

A. Under Art. III, section 9 of the State Constitution, a legislator cannot be appointed to a board or commission of which the members are invested with some portion of the sovereign functions of the government to be exercised by them for the benefit of the public.

B. However, if the legislator resigns his position, he may be appointed to such a board or commission, provided that said board or commission was not created nor the emoluments thereof increased by legislative act during the term for which the legislator was elected.

C. Where a board or commission is not invested with any sovereign functions of the government, see Opinion No. 1010 of the Attorney General, T. H., February 24, 1922.

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STATE ~~TERRITORY~~ OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

October 12, 1959

Honorable James H. Wakatsuki
Chairman, Education Committee
House of Representatives
The First Legislature
State of Hawaii

Dear Sir:

This is with reference to your letter to the Attorney General, dated October 6, 1959, wherein you requested an opinion as to whether or not, under section 9 of Article III of the State Constitution, a legislator can be appointed to a board or commission.

It is the opinion of this office that under said section 9, a legislator cannot be appointed to a board or commission of which the members are invested with some portion of the sovereign functions of the government to be exercised by them for the benefit of the public. Mechem on Public Officers, section 1. However, if the legislator resigns his position, he may be appointed to such a board or commission, provided that said board or commission was not created nor the emoluments thereof increased by legislative act during the term for which the legislator was elected.

Said section 9 provides in part:

> "No member of the legislature shall hold any other public office under the State, nor shall he, during the term for which he is elected or appointed, be elected or appointed to any public office or employment which shall have been created, or the emoluments whereof shall have been increased, by legislative act during such term." (Emphasis added.)

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The term "public office" is not restricted to an office to which persons are elected or appointed to perform independent duties not imposed on other officials jointly with them, but includes boards and commissions on which are imposed public duties and responsibilities. Public Officers, 42 Am. Jur. § 30, p. 901; Morrill County v. Bliss, 125 Neb. 97, 249 N.W. 98, 1933; People v. Board of State Canvassers, 129 N.Y. 360, 29 N.E. 345, 1891.

The debates of the Constitutional Convention show that the delegates did intend the term "public office" to include boards and commissions. The minutes of the Committee of the Whole, page 430, show the following:

> "HEEN: Mr. Chairman.
>
> "CHAIR: Delegate Heen.
>
> "HEEN: I believe there is a defect in this Section 10 with reference to the use of the term 'of profit' after the word 'employment' in the third line. I believe that those two words should be deleted, otherwise members of the legislature may hold the position of police commissioner over on Kauai or police commissioner in Honolulu when there is no salary or profit attached . . . ."

The minutes also show that, under certain circumstances, a legislator may resign his position to accept another public office. Page 697 of the Minutes of the Committee of the Whole read, in part, as follows:

> "TAVARES: . . . But these are legislators and unless the pay has been increased or the job created during the legislator's term he could resign and take the office but if the office had been created or the emoluments had been increased by legislative act during his term then he would be disqualified the remainder of his term from taking those particular offices."

It is to be here noted that, where a board or commission is created to serve in an advisory capacity, to perform a specific act and for a temporary and incidental

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purpose, and is not invested with any sovereign functions of the government, it is not considered a public office as above defined. Thus, the legislators may be appointed to such boards or commissions. See Opinion No. 1010 of the Attorney General, Territory of Hawaii, February 24, 1922.

Respectfully submitted.

JON J. SHINEN
Deputy Attorney General

APPROVED:

JACK H. MIZUHA
Attorney General

Op. 59-138

INDEXING INSTRUCTIONS

October 12, 1959

I. MEDICAL LICENSURE

Applicant born in Hawaii who has graduated from a medical school not approved by the American Medical Association may apply for examination for medical licensure before June 30, 1960.

The clause "or who is a graduate of a foreign medical school and who has had at least three years' experience or training..." applies to applicants born in Hawaii.

II. SESSION LAWS OF HAWAII 1959

Act 149

(Medical Licensure)

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ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
AND REFER TO
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PAA:LNC

26:17

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STATE TERRITORY OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

October 12, 1959

Dr. I. L. Tilden, M.D.
Secretary, Board of Medical Examiners
1020 Kapiolani Street
Honolulu 14, Hawaii

Dear Dr. Tilden:

Reference is made to your letter of June 13, 1959, wherein you requested our opinion whether the clause "or who is a graduate of a foreign medical school and who has had at least three years' medical experience or training..." as quoted from section 64-3(d), Revised Laws of Hawaii 1955 as amended by Act 149, Session Laws of Hawaii 1959, refers only to a graduate who was born in the Territory of Hawaii.

Our answer is "yes". The provision of said Act 149 allows an applicant born in Hawaii who has graduated from a medical school not approved by the American Medical Association to apply for examination for medical licensure before June 30, 1960. (See also section 64-3(d), Revised Laws of Hawaii 1955 and Act 219, Session Laws of Hawaii 1957).

The original bill (Senate bill 1080, Senate draft 1) as passed by the upper house did not include the three years' experience clause. The experience clause was added by the lower house on third reading of the bill presumably to continue the provisions of Act 219, Session Laws of Hawaii 1957. Act 219 allowed all applicants, whether born in Hawaii or somewhere else, who graduated from foreign medical schools not approved by the American Medical Association to take the examination for medical licensure provided they apply before June 30, 1958. However, when Act 149, Session Laws of Hawaii 1959, changed this same section, the amendment read as follows:

> "provided, that an applicant born in the Territory of Hawaii who is a graduate of a foreign medical school, who has had at least ten years of training under the direct supervision and preceptorship of a duly licensed physician or surgeon in the Territory of Hawaii, who has had at least one year's medical experience or training in

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a hospital approved by the council on medical education and hospitals of the American Medical Association for internship or residency, or who is a graduate of a foreign medical school and who has had at least three years' medical experience or training in such approved hospital as aforesaid, ..."

Grammatically, this proviso is so constructed that the modifying clause "who is a graduate ... and who has had at least three years' medical experience ..." does not stand alone but rather refers to the subject of the proviso, "an applicant born in the Territory of Hawaii."

Also, Senate Standing Committee Report No. 430, dated April 21, 1959, specifically states that the bill "amends the present law (section 64-3, Revised Laws of Hawaii 1955, as amended by Act 219, Session Laws of Hawaii 1957) by restricting the class of applicants to those born in the Territory of Hawaii." (See also House Standing Committee Report No. 765, dated April 30, 1959).

Therefore, it is our conclusion that the clause "or who is a graduate of a foreign medical school and who has at least three years' medical experience or training ..." in Act 149, Session Laws of Hawaii 1959, applies only to applicants born in Hawaii.

Very truly yours,

Peter A. Aduja

PETER A. ADUJA
Deputy Attorney General

APPROVED:

James Mizuha

JACK H. MIZUHA
Attorney General

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No Opinion

No. 59-140

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STATE ~~TERRITORY~~ OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

October 14, 1959

Mr. Lee Maice
Executive Director and Treasurer
Hawaii Housing Authority
P. O. Box 3046
Honolulu 2, Hawaii

Dear Mr. Maice:

This is in reference to your letter 4-14/2034, dated October 9, 1959, requesting our opinion on the legality of entering into the types of financing contemplated under contract entered into by the Hawaii Housing Authority and the Public Housing Administration prior to statehood.

It is the opinion of this office that, under the provisions of Article XVI, section 2 of the Constitution of the State of Hawaii and the provisions of Article I, section 10 of the United States Constitution, the contract entered into prior to statehood is valid, and that the types of financing contemplated under such existing contract may be legally entered into by the Hawaii Housing Authority.

Sincerely yours,

Harold Y. Shintaku

HAROLD Y. SHINTAKU
Deputy Attorney General

APPROVED:

JACK H. MIZUHA
Attorney General

HYS: No indexing necessary

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ADDRESS REPLY TO
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STATE TERRITORY OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

October 14, 1959

The Honorable Robert W. B. Chang
Chairman, Judiciary Committee
House of Representatives
First Legislature of the
State of Hawaii
Honolulu, Hawaii

Dear Sir:

This is in reply to your letter of September 26, 1959 in which you ask several questions, two of which are the following:

(a) Can the legislature legally appropriate money for a luau where only invited members of the public will be fed for the celebration of the admission of Hawaii into statehood? The same question with the public-at-large invited, will your answer be the same?

(b) Can the legislature legally appropriate money for publicity music and other matters necessary to set the stage for the celebration?

In answer to these questions, it is our opinion that public moneys may be appropriated for the purpose of giving a luau whether only invited members of the public will be fed or whether the public-at-large is invited and fed, and publicity, music and other matters necessary to set the stage for the statehood celebration is an appropriate expenditure of public funds.

In appropriating money for the statehood celebration, the legislature of Hawaii is providing funds to celebrate an important historical event of the State of Hawaii, to-wit, its admission as a state of the Union. In discussing the use of revenues derived from taxation, American Jurisprudence states:

"The observance of a historical event by celebration is a purpose of the same character as that of the creation of a monument to commemorate a great historical event, and accordingly is a public one. The legislature undoubtedly

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> has power to authorize the expenditure of public money for fireworks, decorations, and other like purposes in order to celebrate a holiday or the anniversary of some important historical, military, or civil occurrence."
>
> 51 Am. Jur., Taxation, Sec. 346, p. 392

Further, it is stated in American Law Reports in its annotation entitled Promotion of Patriotism:

> "'But it has never been doubted that the state could confer upon a city or town the authority to celebrate such important events in the history of the country as appeal to the patriotism or higher sentiments of the people, and to tax their citizens to pay the expense thereof. Thus, it was held that the city of Philadelphia had the power under its charter to provide for the entertainment of distinguished visitors upon the occasion of the celebration of the centennial anniversary of American independence. Tatham v. Philadelphia (1876), 11 Phila. (Pa.) 276. So, also, in Massachusetts, by general statutes, the power has been conferred upon towns to celebrate the centennial anniversary of their incorporation (Hill v. Easthampton [1886], 140 Mass. 381, 4 N.E. 611), and also to appropriate money for the celebration of holidays, and for other public purposes (Hubbard v. Taunton [1886], 140 Mass. 467, 5 N.E. 157). These cases are authority for the proposition that the state itself, unless restrained by its Constitution, has the power to make appropriations for such purposes, because, unless it possesses the power, it could not confer it upon its municipal corporations. Such expenditures are justified under the general power which the state has to provide for the public welfare,--the limits of which are, perhaps, not capable of exact definition,--and are the same in principle as appropriation made for the building of monuments to commemorate great historical events, or for the erection in public places of the statues of those who by common consent are classed among the patriots or benefactors of the nation. Undoubtedly this power may be the subject of great abuse, but this is no argument against its existence.' Daggett v. Colgan (1891) 92 Cal. 53, 14 L.R.A. 474, 27 Am. St. Rep. 95, 28 Pac. 51." (Annot., 30 A.L.R. 1040)

In the case of Campbell v. Stainback, et al., 38 Haw. 310, the question whether liquor, luaus and dinners are within the meaning and intent of the word "entertainment" and thus proper items for expenditure of public funds is discussed. In this case, it was pointed out that appropriations of public funds have been made by the Territorial legislature for "entertainment" generally and "entertainment" for specific purposes such as members of Congress and other distinguished visitors.

The luau, publicity and music under consideration are incidental to the execution and fulfillment of the celebration of the admission of Hawaii into statehood. There is no doubt as to the validity of an appropriation for the celebration of this event. Expenditures for a luau, publicity and music, being incidental to and a part of the celebration, would also be proper and a valid expenditure of public funds.

Respectfully submitted,

Philip T. Chun

PHILIP T. CHUN
Deputy Attorney General

APPROVED:

JACK H. MIZUHA
Attorney General

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STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

October 16, 1959

The Honorable Robert W. B. Chang
Chairman, Judiciary Committee
House of Representatives
The First Legislature of the
State of Hawaii
Honolulu, Hawaii

Dear Sir:

Re: Article V, Section 6 of the State Constitution

This is in reply to an oral request made by you relating to the above captioned matter. With respect to Article V, section 6 of the State Constitution, you have raised the question as to whether or not the legislation proposed by S. B. 2 of the First State Legislature may possibly be in conflict with the authority granted to the Supreme Court by Article V, section 6?

Please be advised that it is the opinion of this office that the legislation proposed by S. B. 2 does not conflict with provisions of Article V, section 6.

It is our opinion that the authority granted by Article V, section 6, is not an exclusive and full grant of authority. The legislature may, whenever the Supreme Court has not promulgated rules and regulations, legislate as to matters relating to the courts. However, should rules and regulations be subsequently promulgated by the court, then such rules and regulations would, to the extent of any inconsistency, supersede the statutes.

Appended hereto are two memoranda relating to Article V, section 6, prepared for this office by Mr. Herman Doi, Esq. In these memoranda the authority of the Supreme Court is discussed. It should be noted that a distinction is made between substantive law as distinguished from pleading and practice.

Very truly yours,

Philip T. Chun

PHILIP T. CHUN
Deputy Attorney General

APPROVED:

Henry H. Shigekane

Henry H. Shigekane
Acting Asst. Attorney General

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INDEXING INSTRUCTIONS

Op. 59-144

I. AGRICULTURE AND FORESTRY

Section 21-159 of the Revised Laws of Hawaii 1955 does not permit the Board of Agriculture and Forestry to enter into a cooperative agreement whereby a private concern will plant grain on public land in consideration for exclusive harvesting rights.

II. AGRICULTURE AND FORESTRY, BOARD OF

Powers

Same syllabus as in I

III. REVISED LAWS OF HAWAII 1955

Section 21-159

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STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

October 20, 1959

Ernest H. Willers, D.V.M., Acting President
Board of Commissioners of Agriculture and Forestry
1428 South King Street
Honolulu 14, Hawaii

Dear Sir:

Re: The power to enter into a cooperative agreement under Section 21-159 of the Revised Laws of Hawaii 1955

This is in reply to your letter of September 18, 1959, requesting an opinion on whether the Board of Commissioners of Agriculture and Forestry may, under Section 21-159 of the Revised Laws of Hawaii 1955, legally enter into a cooperative agreement with a private concern regarding the improvement of the Wailua Game Management Area.

As we understand the proposed contract, Valley Farms Co. will undertake to plow, fertilize and plant portions of the Wailua Game Management Area with alfalfa, corn and other grain crops under the direction of the State Division of Fish and Game. Furthermore, the only interest accruing to Valley Farms Co. under the contract is the right to harvest the alfalfa for their own use. No rental payments are to be made by Valley Farms Co. and all phases of the planting operation are to be supervised by the Division of Fish and Game personnel.

Although the proposed contract seems reasonable and economical to the State, in our opinion it is not permissible under the terms of Section 21-159 of the Revised Laws of Hawaii 1955.

Section 21-159 provides in part:

"For the purpose of preserving, protecting, conserving and propagating birds and mammals, the board of commissioners of agriculture and forestry may establish, maintain, manage and operate game reserves and refuges and public shooting grounds on such lands under its control as it may deem desirable; . . . ."

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Even though it may be admitted that the ultimate purpose sought by the proposal here is the preservation and propagation of birds and mammals the means of achieving that purpose is in question.

In substance, the proposed agreement is tantamount to a lease. Although no money rent is to be paid and plowing, planting and fertilizing are to be State supervised, the elements of a lease arrangement are present here.

A lease has been defined as "a contract for the exclusive possession of lands and tenements for some certain number of years or other determinate period, and a contract for such exclusive possession is a lease although there may be certain reservations or a restriction of the purpose for which the possession may be used, and although it may be described as a license". Barnett v. Lincoln, 299 Pac. 392, 394, 162 Wash. 613. Thus, the necessary requirement is that there has been a conveyance of exclusive possessory interest, exclusive even as against the conveyor.

Here the contract proposes to grant Valley Farms the exclusive right to harvest the alfalfa for its own use. This exclusive right would, for the term of the contract, prohibit the State from disturbing Valley Farms' use of the lands so long as plowing, planting and fertilizing were in accordance with State requirements. This, of course, is a conveyance of an exclusive possessory interest in land.

Furthermore, a form of hidden rent is being paid here in that Valley Farms must use its own materials and labor in the development of the land from which there eventually will accrue benefits to the State; and it is the obtaining of such benefits that prompts the State to consider the arrangement under discussion. Rental payments need not be made in money. The benefit accruing to the State here is a substantial consideration for permitting Valley Farms to have the exclusive possession and use of the land in the manner outlined above.

This conclusion is substantiated by the fact that the proposal here, if executed, will result in profits to Valley Farms from the sale or use of the harvested alfalfa. Valley Farms is a private concern engaged in profit-making activities and since the suggested term of the proposed contract is at least twenty years, it can readily be seen that the benefits accruing to the State are merely incidental and much less than the substantial benefits accruing to Valley Farms. So viewed, the major consequence of the

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proposed contract is not the development and improvement of the lands for the purposes defined by Section 21-159 but the accrual to Valley Farms of a substantial profit.

The arrangement of this exclusive use can only be properly called a lease contract and, as such, must comply with the requirements of Chapter 99 of the Revised Laws of Hawaii 1955.

Sincerely yours,

Carlos Ramelb

CARLOS RAMELB
Junior Deputy Attorney General

APPROVED: H. Shigekane

HENRY H. SHIGEKANE
Acting Assistant Attorney General

Op. 59-144

ADDRESS REPLY TO
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INITIALS AND NUMBER

HHS:ft

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STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

October 21, 1959

Mr. Arthur A. Akina, Jr.
Personnel Director
Department of Civil Service
State of Hawaii
Honolulu, Hawaii

Dear Sir:

This is in reply to your letter of September 23, 1959 wherein you ask whether "Judge Dyer had the authority to act by himself to dismiss Mrs. Hutchinson without the concurrence of a majority of the judges of the First Circuit Court".

Judge Dyer is one of the judges of the First Circuit Court. The First Circuit Court is composed of seven judges. Mrs. Hutchinson was an appointee to the civil service position of court clerk who worked in that division of the First Circuit Court which was headed by Judge Dyer.

That section of the laws which deals with the power to remove clerks of the circuit courts is section 218-1, Revised Laws of Hawaii 1955. It provides as follows:

> "Clerks of supreme and circuit courts; appointment, removal. There shall be a clerk of the supreme court and as many deputy clerks and assistant clerks as the business of the supreme court require, appointed and removable by the justices of the supreme court. The clerk of the supreme court shall be ex-officio clerk of all the courts of record, and as such may issue process returnable in all such courts.
>
> "There shall be as many clerks of the circuit courts as may be necessary, appointed and removable by the judge or judges thereof, as the case may be."

The second paragraph of the above quoted statute pertains to the issue before us. This portion of the law was construed by the Supreme Court of the Territory of Hawaii in the case of In re Pringle, 22 Haw. 557 (1915) wherein the court was faced with the question identical with the one you now pose. The opinion of the Court was that:

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> ". . . the language of the statute is clear that in a circuit where there are more judges than one the clerks shall be appointed and removable by the judges of the court, acting conjointly." (22 Haw. at 565.)

By this statement, the Supreme Court has given to what is now section 218-1 a meaning which is an integral part of that statute. Since its pronouncement in 1915, the Court has neither changed nor veered away from this interpretation. Additionally, the statute which it construed in 1915 has remained unamended to this day.

A point has been made that the law dealing with the appointment and removal of circuit court clerks has undergone a change since 1915 by the enactment of the following provision found in Act 35, Session Laws of Hawaii 1945:

> "Section 3. Transitional provisions. . . . Provided further, however, that this subsection shall not apply to one clerk for each judge designated by such judge as not a member of the civil service system."

This language falls far short of affecting the power of appointing and removing circuit court clerks as provided in section 218-1. This provision, by its very terms, is limited only to the power of designating a clerk as not within the civil service system; it does not deal with the power of appointing ~~=~~ court clerks, both civil service and noncivil service, nor with the power of removing such clerks. Thus, though the transitional provision of Act 35 reposes this designating power with each judge, it in no way attempts to change the then existing scheme for appointing and removing circuit court clerks; nor can such an attempt be inferred from the above quoted language, from the provisions of Act 35 or from the purpose of Act 35.

The Supreme Court of Hawaii has spoken. Its opinion is conclusive. Accordingly, it is the opinion of this office that Judge Dyer is not empowered to dismiss Mrs. Hutchinson without the concurrence of the majority of the judges of the First Circuit Court.

Yours very truly,

Henry H. Shigekane

HENRY H. SHIGEKANE
Acting Assistant Attorney General

Op. 59-145

INDEXING INSTRUCTION

Op. 59-146

I. CORPORATE ENTITY

The term "corporate entity" is nothing more than a precise designation of a corporation whose entity, in law, is recognized apart from its constituent members. As such, a private corporation is a legally independent person. Since a public corporation is not a legal entity but is a corporation which is created by the people or the government for political or public purposes and is an instrumentality of the State, it is an error to designate a governmental body as a corporate entity.
33 Words and Phrases, p. 677, et seq.
35 Words and Phrases, p. 75, et seq.

II. PUBLIC ENTERPRISE

The phrase "public enterprise", as used in Article VI, section 3, paragraph 7, of the State Constitution, means those activities that were being operated by the State in its proprietary capacity, as distinguished from a governmental capacity.

III. CONSTITUTION - STATE - ARTICLE VI

The phrase "public enterprise", as used in Article VI, section 3, paragraph 7, of the State Constitution, means those activities that were being operated by the State in its proprietary capacity, as distinguished from a governmental capacity.

IV. HAWAII HOUSING AUTHORITY - CONTROL OF

The powers granted by the legislature to this public corporation are enacted exclusively for such corporation and the department head cannot overrule or interfere with such granted powers.

V. CORPORATIONS, PUBLIC - CONTROL OF

The powers granted by the legislature to this public corporation are enacted exclusively for such corporation and the department head cannot overrule or interfere with such granted powers.

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VI. CORPORATIONS, PUBLIC - HEAD OF

There is no legal requirement that a public corporation be headed by a board or commission. Since it is an instrumentality of the State, created by the legislature and the legislature has supreme power over it, the legislature may properly designate one person to be the head of the public corporation.

cp. v-9-146

HYS:mym
20 (State)

Op. 59-146

STATE OF HAWAII

Department of the Attorney General

HONOLULU

October 21, 1959

Honorable Thomas P. Gill
Majority Floor Leader
House of Representatives
First State Legislature
Iolani Palace
Honolulu 13, Hawaii

Dear Sir:

This is in response to your letter dated October 7, 1959, requesting this office for an opinion on questions regarding a public corporation or a public enterprise:

1. What does "corporate entity" mean when applied to a government body?

This question can be best answered by defining a private corporation and a public corporation. A private corporation has been defined as an association of persons to whom the sovereign has offered a franchise to become an article, juridical person, with a name of its own under which they can act and contract, and sue and be sued. The idea of the corporation as a legal entity or person apart from its members is a fiction of law introduced for the convenience in conducting the business in a privileged way. 33 Words and Phrases, p. 677, et seq.; Lehl v. Strong Mercantile Co., 82 Col. 343, 259 Pac. 512; Paul v. University Motor Sales Co., 283 Mich. 587, 278 N.W. 714.

On the other hand, a public corporation has been defined as one having for its object the administration of a portion of the powers of government, delegated to it for that purpose; such as a municipal corporation. It is not a legal entity, or person, whose interests can be considered separate and apart from the people. It is but an instrumentality created and perpetuated for the benefit of the public. Its officers, as such, are nothing more than agents of the public. They must act within the scope of their authority, and their acts outside are perfectly impotent.

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35 Words and Phrases, p. 75 et seq.; Ogden City v. Bear Lake and River Water Works and Irrigation Co., 16 Utah 440, 52 Pac. 697.

These definitions appear to indicate that the term "corporate entity" is nothing more than a precise designation of a corporation whose entity, in law, is recognized apart from its constituent members. As such, a private corporation is a legally independent person. Since a public corporation is not a legal entity but is a corporation which is created by the people or the government for political or public purposes and is an instrumentality of the State, it is an error to designate a governmental body as a corporate entity.

The question posed by you and under consideration is so broad in its import that this office cannot render an opinion dispositive of the question. The above should be considered as merely a discussion of the problem and not a conclusion or determination.

2(a). What are the structural and functional requirements of a "public enterprise"?

In an opinion rendered by this office on September 16, 1959, addressed to Mr. Herman S. Doi, chief clerk, House Finance Committee, on page 13, we concluded that the phrase "public enterprise," as used in Article VI, section 3, paragraph 7, of the State Constitution, meant those activities that were being operated by the State in its proprietary capacity, as distinguished from a governmental capacity. Further definition is found in volume 18 of the 1959 edition of the Encyclopedia Britannica. The phrase "public enterprise" is defined as: "Although there is no standard definition of public enterprise, the term usually refers to government ownership and active operation of agencies engaged in supplying the public with goods and services which alternatively might be supplied by privately-owned, profit-motivated firms (private enterprise). Typically, public enterprise operations, the same as private, are financed wholly or largely by receipts from the sale of goods or services."

2(b). What are the structural and functional requirements of a "public corporation"?

As previously defined, a public corporation is one having for its object the administration of a portion of the powers of government, delegated to it for that purpose. It is also subject to the control of the legislature and its members are officers of the government appointed for the discharge of public duties. The government has the sole right, as trustees of the public interests,

to regulate, control, and direct the corporation, its funds, and its franchises at its own good will and pleasure. See 35 Words and Phrases, p. 80. It is created to administer designated affairs in their respective areas. They exercise delegated powers of government and are usually regarded as subordinate departments, auxiliaries, or convenient instrumentalities of the State. 1 McQuillin on Municipal Corporations, section 1.84, p. 294.

3. Can the Hawaii Aeronautics Commission, the Board of Harbor Commissioners and the Hawaii Housing Authority be transferred to the department of transportation and the department of health and social services and still maintain their identity as public corporations or enterprises within the definition of a public corporation or enterprise contained in Paragraph 7, Section 3, Article VI, of the State Constitution and be exempted from the debt limitation provision?

We are of the opinion that the Hawaii Housing Authority, a public corporation, may be transferred to the department of health and social services and still maintain its identity as a public corporation. However, we are of the further opinion that the powers granted by the legislature to this public corporation are enacted exclusively for such corporation and that the department head cannot overrule or interfere with such granted powers. The department head may act as a liaison between the governor and the public corporation placed within his department in those matters which the public corporation do not have exclusive jurisdiction. It is also possible for the department head to be an ex officio member of the board or commission of the public corporation.

We are of the opinion that the Hawaii Aeronautics Commission and the Board of Harbor Commissioners may be transferred to the department of transportation and still maintain their identity as public enterprises of the State. As previously defined, public enterprises are those activities operated by the State in its proprietary capacity as distinguished from a governmental capacity. Since the definition of a public enterprise is derived by looking at the function of an organization, the fact that it is placed within another department does not change the public enterprise feature. The department head, with respect to these public enterprises, is not limited to mere liaison functions as is the case when dealing with a public corporation like the Hawaii Housing Authority.

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4. Can the Hawaii Aeronautics Commission, the Board of Harbor Commissioners and the Hawaii Housing Authority maintain their identity as public corporations or enterprises without the existence of their respective boards or commissions?

It is our opinion that a public corporation or enterprise may exist without their boards or commissions.

Research on this matter indicate that there is no legal requirement that a public corporation or enterprise be headed by a board or commission. Since it is an instrumentality of the State, created by the legislature and the legislature has supreme power over it, the legislature may properly designate one person to be the head of the public corporation or enterprise, as may be the case of a department of the government. However, all of the cases researched indicate that the usual practice is for a public corporation or enterprise to be headed by a board or commission.

Very truly yours,

(s) Harold Y. Shintaku

Harold Y. Shintaku
Deputy Attorney General

APPROVED:

(s) Henry H. Shigekane

Henry H. Shigekane
Acting Assistant Attorney General

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INDEXING INSTRUCTION

Op. 59-147

PUBLIC EMPLOYEES

I. Compensation for Standby Time

No State statute requiring or authorizing payment of compensation to territorial pilots for standby time performed at home.

II. Federal Wages & Hours Act

The Federal Wages & Hours Act is not applicable to employees of the Territory or of the State under 29 U.S.C.A. § 203.

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ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
AND REFER TO
INITIALS AND NUMBER

HYS:ssm

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STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

October 23, 1959

Mr. Harold W Butzine
Manager and Chief Engineer,
Board of Harbor Commissioners
P. O. Box 397
Honolulu, Hawaii

Dear Sir:

This is in reference to your letter HB 29, dated July 10, 1959, requesting our opinion as to whether standby time performed at home by territorial pilots and the time spent coming to and from their home to the office is compensable. The specific questions you ask will be answered in the order as they appear in your letter

> "(1). Under Territorial statutes, is standby time performed by a Territorial employee at his own home or in places other than upon the premises of his employer compensable either as straight time, overtime, compensatory time off, or in any other manner?"

Research on this matter failed to disclose any state statute requiring or authorizing the payment of compensation for standby time as described above. Chapter V, Revised Laws of Hawaii 1955, as amended, does not authorize such payment. Section 5-76, Revised Laws of Hawaii 1955 is applicable only where the government employee is required to report to work and reports to work but is unable to work because of inclement weather, breakdown of machinery, or other conditions beyond the employee's control. (Emphasis added.)

> "(2) Is any of the standby time mentioned in paragraph numbered (1) compensable in any way under the Federal Wages and Hours Act, i.e., are the provisions of that law applicable to Territorial employees?"

The Federal Wages and Hours Act, which is part of the Fair Labor Standard Act, is not applicable to employees under the Territory or of the State under 29 U.S C.A section 203. The word "employer" is defined as follows:

Op. 1-9-147

> "'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

The State as an employer is specifically exempted from the Fair Labor Standards Act.

> "(3) Either under Territorial law or any Federal statute, may Territorial employees be compensated for the time spent going to and from their home to their place of employment either as straight time, overtime, compensatory time off, or in any other manner?"

The answer to this question is identical with the answer given for questions 1 and 2.

> "(4) If your answer to the foregoing questions is such that the Territorial employees in question may be compensated in some manner for standby or portal-to-portal time, does the Manager of the Harbor Board have the authority to determine what percentage of time so spent shall be compensable and which shall not be compensable?"

Since questions 1 through 3 have been answered in the negative, question 4 will not be answered.

Very truly yours,

Harold Y. Shintaku

HAROLD Y. SHINTAKU
Deputy Attorney General

APPROVED:

Henry H. Shigekane

HENRY H. SHIGEKANE
Acting Assistant Attorney General

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INDEXING INSTRUCTIONS

Op. 59-148

I. Resident

Means domicile

Word "prior" in section 170-7(e), R.L.H. 1955, as amended in 1957, relating to residence means immediately prior.

II. Prior

Term "prior" in section 170-7(e), R.L.H. 1955, as amended, means the period immediately prior to issuance of such license.

III. Section 170-7(e), R.L.H. 1955, as amended in 1957.

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ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
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STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

October 29, 1959

Real Estate License Commission
P. O. Box 1141
Honolulu, Hawaii

Attn. Mr. Robt E. Bekeart

Gentlemen:

Re: Meaning of the Term "prior" in
Section 170-7(e), Revised Laws
of Hawaii 1955, as Amended

In response to your letter of September 15, 1959, it is the opinion of this department that the term "prior" in section 170-7(e), Revised Laws of Hawaii 1955, as amended, must be taken to mean a period immediately before the issuance of a license and not to mean a period any time before the issuance of a license.

Section 170-7(e), supra, prescribes the residence requirement for real estate license; an applicant must be a resident of Hawaii for a period at least two years prior to the issuance of such license under said section of the law.

The term "resident" is generally taken to mean domicile. Willenbrock v. Rogers, 255 F. 2d 236, 237; State ex rel. v. La Driere, 273 S.W. 2d 776, 781; 77 C.J.S. 305-307, Op. 1776. In this jurisdiction the term "reside" is generally understood to be used in the sense of domicile. Op. 56-115. Nothing appears in chapter 170 of the Revised Laws of Hawaii 1955, as amended, to indicate that the word "resident" in section 170-7(e), supra, is to be given a meaning different from its related term "reside." Domicile is easily abandoned upon absence with an intent to remain elsewhere and this is true even though there is a floating intention to return at some indefinite time. 28 C.J.S. 19, 20, sec. 11, Domicile; 17 Am. Jur. 218. One's former domicile can in no way be used, having been voluntarily terminated.

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The law specifically requires that the applicant have a knowledge of the laws of the state relating to interests in real estate, modes of conveyance, the rights and duties of agents and laws of the state as to real estate brokers and salesmen. Section 170-7, supra. The two-year residence requirement was in all probability thought desirable in order to insure a familiarization of local conditions; it is highly doubtful that this requirement could be properly fulfilled by residence not immediately prior to the examination. This department has held in a letter opinion (16:26) that if an applicant had been allowed to take an examination before completing two years residence in the state and if the law were changed since the time of his examination but prior to his completion of two years residence, the applicant would still be required to be re-examined since he would not have been properly examined; two years residence immediately prior to the examination is properly indicated in the light of opinion 16:26.

Thusly, to qualify as a licensed real estate salesman, section 170-7(e), supra, requires that an applicant be domiciled here for two years immediately prior to the issuance of a license. An applicant, who at one time had been domiciled here for many years, had moved and had established a bonafide residence in another jurisdiction, and subsequently had returned here to live but had not remained here for two years or more, cannot qualify for a license to sell real estate.

Very truly yours,

Tenny Hoon Tom

Tenny Hoon Tom
Deputy Attorney General

APPROVED:

Henry H. Shigekane

Henry H. Shigekane
Acting Attorney General

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INDEXING INSTRUCTIONS

Op. 59-149

I. Complaint

not needed to initiate a hearing before real estate commission.

II. Real Estate Commission

A formal complaint is not necessary to initiate a hearing before the real estate commission and that jurisdiction under the law depends upon adequate written notice to the parties concerned by the Commission.

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ADDRESS REPLY TO
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STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

October 29, 1959

Real Estate License Commission
P. O. Box 1141
Honolulu, Hawaii

Attn. Mr. Robt. E. Bekeart, Executive Secretary

Gentlemen:

Re: Necessity for Complaint in an Administrative Hearing Before the Real Estate Commission.

Your letter of October 16, 1959 asks whether the Commission may proceed with a case against a broker where the complainant has by writing withdrawn his written complaint.

Statutes or rules and regulations of the administrative body generally regulate the manner in which administrative proceedings may be instituted. 73 C.J.S., supra, sec. 117, citing NLRB v. Indiana and Michigan Electric Co., 63 S. Ct. 394, 318 U.S. 9, 87 L. Ed. 579. Under some statutes, an administrative body may act only after complaint, charge, or petition by a proper person, but under other statutes, it may institute proceedings on its own initiative. 73 C.J.S., supra, sec. 117, p. 436. In our state an administrative hearing before the Real Estate Commission is controlled by section 170-13, R.L.H. 1955. Section 170-13, supra, indicates that the hearing is to be initiated by the commission upon written notice to the persons concerned specifying the cause or causes for which it is proposed to take such action. Application for a hearing to the board is not required. There are no rules and regulations of the Commission requiring a complaint, charge or application to effect jurisdiction of the Real Estate Commission. Adequate notice is the only statutory requirement for jurisdiction before the commission.

It is the Commission's duty to protect public interest; to deny the Commission the right to institute action unless a complaint is filed by some aggrieved party would unduly hamper the powers of the Commission as a regulatory agency of the state. A

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regulatory agency acts primarily for the public benefit as well as for those specifically aggrieved. A requirement that jurisdiction for an administrative hearing rests only upon a formal complaint by an aggrieved party would run contrary to section 170-13, supra, and the desired remedial aims of the regulatory agency.

Thusly, it is the opinion of this department that a formal complaint is not necessary to initiate a hearing before the Real Estate Commission and that jurisdiction under the law depends upon adequate written notice to the parties concerned by the commission.

Very truly yours,

Tenny Hoon Tom

Tenny Hoon Tom
Deputy Attorney General

APPROVED:

Henry H. Shigekane

Henry H. Shigekane
Acting Attorney General

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INDEXING INSTRUCTION

Op. 59-150

I. Hawaii Aeronautics Commission:

Question of partial payment to Hood Construction Co. in view of coral borrowed from H.A.C. and not yet replaced.

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ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
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AIM:ssm

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Op. 59-150

STATE ~~TERRITORY~~ OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

November 3, 1959

Mr. A. P. Storrs
Director of Aeronautics
Hawaii Aeronautics Commission
Honolulu International Airport
Honolulu 17, Hawaii

Dear Mr. Storrs:

This is to acknowledge receipt of your letter dated October 27, 1959 in which you request of this office an opinion concerning the entitlement of Hood Construction Company for partial payment of work performed where part of the payment includes use of 159,600 cubic yards of coral borrowed from H.A.C. More specifically, you request an opinion concerning the following two questions:

1) Is a contractor entitled to payment for material borrowed from H.A.C. and incorporated in this project?

2) Is it within the H.A.C.'s administrative discretion to withhold from payment the value of the borrowed coral until such time as the coral is replaced?

Article V of General Provisions for Airport Construction Specifications entitled Payment and Release provides that the contractor shall be entitled to partial payment as the work progresses subject to any unsettled claims the Public Agency has against the contractor for materials or in connection with the contract. The Revocable Permit provides that the contractor replace all dredged coral by October 1, 1959. However, upon a request by the contractor to extend the deadline to December 15, 1959, the Commission granted such an extension.

The right of the Public Agency to withhold any payments is predicated upon the determination of whether the Public Agency

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has any "claim" against the contractor. In view of the permission of extension granted until December 15, 1959, a serious question is raised as to whether the Public Agency has any claim against the contractor. Claim as used in the juridical sense presupposes an existing right in favor of the claimant with a concurrent duty on the other to do or to forbear to do some act or thing. Prigg v. Commonwealth of Pennsylvania, 41 U.S. (16 Pet) 539, 10 L.Ed 1060 (1842); U.S. v. Spaulding, 3 Dak. 85, 13 N.W. 357 (1882); Buhl v. Fort Street Union Depot Company, 98 Mich. 596, 57 N.W. 829, (1894). The court in Mellus v. Potter, 91 Cal. App. 700, 704, 267 Pac. 563, 564 (1928) declared:

> "'Claim' in its primary meaning is used to indicate the assertion of an existing right. In its secondary meaning, it may be used to indicate the right itself.... The claim mentioned in the code refers to an existing right...and not to rights which have not yet accrued... ."

In this particular case the right to enforce the contractor to replace the dredged coral does not presently exist, since the contractor's obligation to perform does not arise until December 15, 1959. In the absence of a duty on the one party to perform there does not give rise to any concurrent right in the other. Without an existing right there can be no claim in the sense commonly used by the courts. Therefore, the contractor is entitled to partial payment which cannot be withheld in the absence of any claim against the contractor.

We do not pass on the second question for the opinion on the first question negates any right in the H.A.C. to withhold such payment.

On the basis of the foregoing discussion, it is the opinion of this office that the contractor is entitled to receive partial payment despite the fact that the voucher for such payment includes coral borrowed from H.A.C. and not yet replaced.

Very truly yours,

Allen I. Marutani

ALLEN I. MARUTANI
Deputy Attorney General

APPROVED:

Henry H. Shigekane

HENRY H. SHIGEKANE
Acting Attorney General

Cc: Mr. Tim Ho, Supt. of Public Works
Honolulu, Hawaii

Op 59-150.

ADDRESS REPLY TO
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PTC:ru

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STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

November 5, 1959

Honorable Raymond Y. C. Ho
Treasurer
State of Hawaii
Honolulu, Hawaii

Dear Sir:

Re: The Operation of Qantas Empire Airways, Limited With Respect to Maintaining and Handling BOAC's Aircraft Operating Through Honolulu

This is in answer to your letter of March 16, 1959 with respect to the above-captioned subject matter. You have asked our advice as to whether the performance of such services as described in your letter will make Qantas Airlines subject to a foreign corporation license fee prescribed by section 174-9, Revised Laws of Hawaii 1955, as amended.

It is our opinion that the services being performed by Qantas for BOAC in Honolulu is not in any way connected with the interstate aspects of Qantas' own airline operation, and therefore, the services being performed by Qantas Airlines for BOAC would make Qantas subject to the license fee prescribed by section 174-9, Revised Laws of Hawaii 1955, as amended.

Section 174-9 prescribes a license fee for foreign corporations doing business in the State. This section, therefore, prescribes for a license fee for foreign corporations which are doing intrastate business in the State.

It is stated in 23 American Jurisprudence, Foreign Corporations, section 280:

"A state has unquestionably the power to impose reasonable terms on the right of a foreign corporation to carry on intrastate commerce, even though such corporation may be also engaged in interstate commerce, at least so long as the intrastate business of the

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corporation is substantial in its essence rather than by comparison with the interstate business and reasonably susceptible of separation from the latter...."

Qantas, in serving BOAC, in our opinion, is carrying on a function completely detached from its operation of an interstate airlines, and is a service which is intrastate in nature. Therefore, it is our opinion that Qantas is subject to the license fee prescribed by section 174-9, Revised Laws of Hawaii 1955, as amended.

Very truly yours,

Philip T. Chun

Philip T. Chun
Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa

Shiro Kashiwa
Attorney General

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ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
AND REFER TO
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Op. 59-152

STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

November 5, 1959

Mr. Dan Liu
Chief of Police
City & County of Honolulu
Honolulu, Hawaii

Dear Sir:

Re: Soldiers' and Sailors' Civil Relief Act of 1940 With Respect to Motor Vehicles

This is in answer to your letter of September 19, 1959 with respect to the above-captioned matter. In your letter you have asked our advice as to three specific questions which arise out of section 574, Title 50, Appendix, United States Code. The three questions are as follows:

> "1. Under Title 50, paragraph 574, UNITED STATES CODE, are Servicemen exempt from obtaining a State of Hawaii operator's license if they possess a valid operator's license issued in their home state, or does the 90-day nonresident clause apply to them?
>
> "2. If they are exempt from obtaining a Hawaii operator's license, must a serviceman under the age of twenty years comply with our statutes requiring the filing of a parental consent form or do the statutes in his home state prevail in this regard?
>
> "3. Should the answer to question #1 be in the affirmative, will we be required to refund fees paid after July 3, 1944 for a Hawaii operator's license, if requested to do so by the serviceman who obtained the license."

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It is our opinion that under said section 574 of Title 50, Appendix, of the United States Code, servicemen are not exempt from obtaining a State of Hawaii operator's license, and that the 90-day nonresident clause does apply to servicemen who possess valid operator's license issued in their home state. Having answered your first question in the negative, it is not necessary that the second and third questions be considered.

Section 574 is entitled "Residence for tax purposes" and in effect provides for certain exemptions to servicemen with respect to taxation of personal property, income, or gross income. Subsection 2 of section 574 provides, "When used in this section (a) the term 'personal property' shall include tangible and intangible property (including motor vehicles), and (b) the term 'taxation' shall include but not be limited to licenses, fees, or excises imposed with respect to motor vehicles or the use thereof...."

It is our opinion that this is interpreted to mean that servicemen are exempt from taxes regarding the motor vehicle itself and does not apply to operators' licenses. The license granted to operate a vehicle within the State is not a right but a privilege which the State under its police powers has sovereign authority to regulate. The granting of an exemption for personal property taxes in no way affects the State's authority to regulate operators of motor vehicles.

Very truly yours,

Philip T. Chun

Philip T. Chun
Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa

Shiro Kashiwa
Attorney General

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ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
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STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

November 9, 1959

Honorable Raymond Y. C. Ho
Insurance Commissioner
State of Hawaii
Honolulu, Hawaii

Re: Blood Service Plan of Hawaii

Dear Sir:

This is in response to a letter from your office dated September 1, 1959, relating to the above-captioned matter. This letter requested an opinion from our office as to whether or not the Blood Service Plan of Hawaii is subject to regulation under the provisions of chapter 185, Revised Laws of Hawaii 1955, Mutual and Fraternal Benefit Societies.

Please be advised that it is our opinion that the plan formulated as the Blood Service Plan of Hawaii does not come within the scope of chapter 185 and therefore is not subject to the provisions of said chapter.

Our opinion with respect to the Blood Service Plan of Hawaii is based upon our opinion No. 58-130, dated July 11, 1958, addressed to your predecessor, relating to the Kaiser Foundation Health Plan, Inc. In said opinion it was our conclusion that the Kaiser Foundation Health Plan, Inc. was not within the scope of chapter 185. The facts presented by the letter of September 1, 1959 is similar to the correspondence in our files relating to the Kaiser Foundation Health Plan, Inc. For this reason it is our opinion that opinion No. 58-130 is also applicable to the Blood Service Plan of Hawaii.

Very truly yours,

Philip T. Chun

Philip T. Chun
Deputy Attorney General

APPROVED:

(s) Shiro Kashiwa

Shiro Kashiwa
Attorney General

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INDEXING INSTRUCTIONS

November 10, 1959

POISON

Neodane Pellet, an economic poison, is covered by the provisions of Chapter 16, Public Health Regulations.

FUMIGATION

Chapter 11, Public Health Regulation is intended to control the practice of fumigation and not the control of sales of household fumigants.

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ADDRESS REPLY TO
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STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

November 10, 1959

Dr. Richard K. C. Lee, M. D.
President, Board of Health
Kapuaiwa Building
Honolulu, Hawaii

Dear Sir:

Reference is made to letter dated October 23, 1959, wherein the following questions were posed:

"1. Is the poison (neodane pellet) for which a permit is requested subject only to the coverage of the poison regulations, Chapter 16, because it is sold in pellet form and the poison package contains cautionary advice to purchasers?"

"2. Is the poison (neodane pellet) a fumigant because its sale is intended for use in vaporizers which would cause it to release vapors for insect killing purposes and because these vapors in our opinion may be 'lethal, poisonous, noxious or dangerous to human life'?"

Our answer to question 1 is "yes." Neodane pellet is an economic poison according to the definition in Act 60, Session Laws of Hawaii 1945, as "any substance used for the prevention, destruction or repulsion of insects ... which may be a pest or detrimental to vegetation, man, animals or household." It is classified in Chapter 16 of the Public Health Regulations as an item to be sold by a permittee without record. (See Public Health Regulations, Chapter 16, section 7).

Our answer to question 2 is "no" Act 153, Session Laws of Hawaii 1957 gives the Board of Health, with the approval of the Governor, the power to make regulations relating to "fumigation" as a health hazard and for the practice of fumigation.

However, Chapter 11 of the Public Health Regulations of the Board of Health dealing with fumigation, appears to be

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designed for the regulation of the practice of fumigation and the licensing of individuals and businesses only in conducting the business of fumigation. It does not contemplate the control of sales of household fumigants.

Therefore, the sale of neodane pellet does not come under the provisions of Chapter 11, "fumigation" of the Public Health Regulations. However, should the Board of Health determine that there is a need for the regulation of household fumigants, there is ample authorization in law for the Board to implement such a determination.

Very truly yours,

Peter A. Aduja

PETER A. ADUJA
Deputy Attorney General

APPROVED:

(s) Shiro Kashiwa

SHIRO KASHIWA
Attorney General

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a. Definition of appropriations bill.

b. Definition of capital expenditures.

c. Definition of Revenue bills.

d. Definition of urgency measures.

e. Definition of bills calling for elections.

f. Proposed constitutional amendments.

g. Expenses of session and special session for reconsideration of bills after adjournment.

h. Impeachment or removal of officers.

II. CONSTITUTION OF HAWAII

A. Article III, section 11.

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20(State);14
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STATE OF HAWAII
Department of the Attorney General
HONOLULU

November 24, 1959

Mr. Robert F. Ellis
Administrative Assistant to
the Governor
State of Hawaii
Iolani Palace
Honolulu, Hawaii

Dear Mr. Ellis:

Re: Matters taken up in the budget session

This is in reply to your letter of October 20, 1959 requesting an opinion on the types of legislation which can be considered and acted upon during the coming budget session.

Article III, section 11, paragraph 2, of the Constitution provides as follows:

> "At budget sessions the legislature shall be limited to the consideration and enactment of the general appropriations bills for the succeeding fiscal year and bills to authorize proposed capital expenditures, revenue bills necessary therefor, urgency measures deemed necessary in the public interest, bills calling elections, proposed constitutional amendments and bills to provide for the expenses of such session and special session to be convened thereafter in accordance with the provisions of section 17 of this article. The legislature may also consider and act upon matters relating to the impeachment or removal of officers. No urgency measure shall be considered unless a statement of facts constituting such urgency shall be set forth in one section thereof and until such section shall have been first approved by each house. The approval of such section and the final passage of such measure in each house shall require a two-thirds vote of all members to which such house is entitled, taken by ayes and noes and entered upon its journal."

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The budget session is a regular session held on even numbered years. The coming session shall commence at 10:00 o'clock a. m. on February 17, 1960 (the third Wednesday in February). It shall be limited to thirty days. However, the Governor may extend it up to an additional thirty days. In computing the number of days, Sundays and holidays shall not be counted. Article III, section 11 of the Constitution.

Since the budget session is authorized by the Constitution and the subject matter is therein limited, neither the Governor nor the Legislature has any power to expand the scope of the budget session.

There is no limitation in the Constitution on the number of bills a member may introduce, although the possibility was suggested in the constitutional convention. See page 489 of the record. That and other matters of internal procedure are subject to legislative rules.

The section of the Constitution does not preclude the Senate from acting in cases of confirmation or approval of officers. The matter was discussed in the constitutional convention. See page 437 of the record of the debates. The limitations on the types of legislation considered are only on the Legislature. Since the confirmation is acted upon solely by the Senate, as contrasted from the Legislature, the limitations of the section do not apply.

THE GENERAL APPROPRIATIONS BILL

The Legislature may consider and enact the "general appropriations bill" for the succeeding fiscal year. By current practice the period referred to is from July 1, 1960, through June 30, 1961. It is clear from the debates of the constitutional convention (page 438 through page 443 of the record) that the appropriation bill was to take care of general operating expenses for a one-year period only. Therefore the budget session may consider and enact a general appropriation bill for the succeeding fiscal year and thereafter the general session would enact a general appropriations bill for the next succeeding fiscal year.

An appropriation bill is the measure before a legislative body authorizing the expenditure of public moneys and may stipulate the amount, manner, and purpose of the various items of expenditure. The section of the Constitution on the budget session does not define what matters may be included as a part of the "general appropriations bill". The constitutional convention debates on the section (pages 438 through 443 of the

record) do indicate that matters of general operating expenses were contemplated. This is confirmed by section 5 of Article VI on Taxation and Finance, which provides in part ". . .bill authorizing operating expenditures for the ensuing fiscal period, to be known as the general appropriations bill. . ." The operating expenditures may cover the current needs of each governmental division such as salaries, wages, supplies, equipment, maintenance, and other recurring expenditures. See Standing Committee Report No. 51, pages 172 through 177.

The general appropriations bill is the only bill which appropriates money for general government expenses. Any other proposal for appropriation of money will have to be submitted as an amendment to the general appropriations bill unless the proposal can be enacted as a capital expenditure, urgency measure, or provision for expenses of such session and the special session in accordance with section 17 of Article III.

CAPITAL EXPENDITURES

The term "capital expenditures" in the context of governmental spending indicates moneys appropriated for purchase, construction, or improvements of assets of a fairly fixed or permanent nature as contrasted to an immediate and complete use. The term is used in contrast to the matters of the general appropriations bill and the two types of authorizations complement each other.

An analogous use of the terms is found in the budget section, Article VI, section 4. There the term "capital improvements expenditures" is used along with the term "operating expenses". See constitutional convention debates, page 435. The Standing Committee Report No. 51, page 172, defines "capital" as that "which as the term implies, covers permanent structures and improvements. . ."

REVENUE BILLS

The coming budget session may consider and enact revenue bills necessary for the general appropriations bill and capital expenditures. Revenue acts deal with any form of income to the government such as taxes and fees. The act may increase or decrease the income. The bills are limited to consideration of revenue necessary to the general appropriations bill and capital expenditures considered and enacted in that particular budget session and therefore may not deal with sources of income for other purposes.

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URGENCY MEASURES

A letter on the meaning of "urgency measures" has previously been written and is enclosed and incorporated into this report. The following is to supplement the incorporated statements.

Urgency is characterized by a pressing need or a demand for prompt action or attention. The determination of what is urgent appears to rest with the Legislature. Once the Legislature has arrived at a finding of fact that urgency does exist, the courts will probably presume in favor of the findings. Other state courts have given a conclusive presumption to such findings of fact by the Legislature.

BILLS CALLING FOR ELECTIONS

The definition of this phrase is also found in the previous letter enclosed with this report. The following is to supplement the incorporated statements.

Bills calling elections may further enact provisions to implement the Constitution or existing laws where a vote is required by the public. It should also be added that this constitutional provision may provide for elections wherein specific public matters are submitted to the voters by other than the Legislature, such as amendments to the Constitution submitted by a constitutional convention.

PROPOSED CONSTITUTIONAL AMENDMENTS

The Legislature may consider and propose amendments to any portion of the Constitution. See Article XV, section 3 of the Constitution for the relevant provisions.

EXPENSES OF SESSION AND SPECIAL SESSION FOR RECONSIDERATION OF BILLS AFTER ADJOURNMENT

Legislation may be enacted to provide for the expenses of that particular budget session. Expenses may also be provided for a special session to reconsider bills after adjournment sine die as set forth in Article III, section 17.

IMPEACHMENT OR REMOVAL OF OFFICERS

The Legislature during a budget session may also consider and act upon the impeachment or removal of officers. The officers which are referred to are public officers. See

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Constitutional Convention Debate, page 437. It is interesting to note that this provision was added to the Constitution despite the consideration of application of the urgency measures clause in some situations.

Very truly yours,

(s) Shiro Kashiwa

Shiro Kashiwa
Attorney General

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STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

September 23, 1959

Honorable Thomas P. Gill
Majority Floor Leader
House of Representatives
First State Legislature
Honolulu, Hawaii

Dear Sir:

This is in reply to your letter of September 15, 1959 wherein you posed several questions regarding Article III, section 11, paragraph 2 (Budget Sessions).

1. What is meant by "bills calling elections."

The records of the Constitutional Convention do not reveal what the framers meant by the term "bills calling elections." But the words "bills calling elections" would make it appear that this phrase was not intended to mean the same thing as election laws which prescribe the methods and procedures for holding elections. Rather, it would seem that this provision was designed to cover situations, not otherwise covered by the Constitution or laws of the State, wherein specific public matters are submitted to the voters by the legislature.

2. What is meant by the words "urgency measures."

So far as we have been able to ascertain, the phrase "urgency measures" was never defined during the course of the Constitutional Convention.

But the minutes of the Constitutional Convention's Committee on Legislative Powers and Functions, dated May 29, 1950 indicate that at least the idea of "urgency measures" was borrowed from the Constitution of the State of California, Article IV, sec. 1, which states:

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> "Whenever it is deemed necessary for the immediate preservation of the public peace, health or safety that a law shall go into immediate effect, a statement of the facts constituting such necessity shall be set forth in one section of the act, which section shall be passed only upon a yea or nay vote, upon a separate roll call thereon; provided, however, that no measure creating or abolishing any office or changing the salary, term or duties of any office, or granting any franchise or special privilege, or creating any vested right or interest, shall be construed to be an urgency measure. Any law so passed by the legislature and declared to be an urgency measure shall go into immediate effect."

3. What is the procedure by which "urgency measures" can be considered in the budget session.

A bill purporting to be an "urgency measure" must contain a separate section stating the facts constituting the urgency, and this section must be first approved by each house before the measure can be considered by either house. A two-thirds vote of all the members to which each house is entitled is required for the approval of the section containing the statement of urgency and also for the final passage of the measure.

The phrase "approval of such section ..." by a 2/3 vote "is not intended to require anything more than a single reading and vote, as distinguished from the passage of the urgency measure itself which requires three readings." Committee on Legislative Powers and Functions, Standing Committee Report No. 92, p. 13.

Respectfully submitted,

/s/ Yoshio Shigezawa

YOSHIO SHIGEZAWA
Deputy Attorney General

APPROVED:

/s/ Jack H. Mizuha

JACK H. MIZUHA
Attorney General

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I. STATUTE

Construction

Provides that "any child" entering a school is exempted from vaccination on religious grounds; that this does not apply to private schools.

II. DEPARTMENT OF PUBLIC INSTRUCTION

Private schools exempted from provisions of R. L. H. 1955, section 46-13 (V) as amended by S. L. H. 1957, section 153-1.

III. BOARD OF HEALTH

Public Health Regulations, chapter 7, section 1 (1951) re exemption from vaccination on religious grounds not applicable to private schools.

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ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
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STATE ~~TERRITORY~~ OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

November 25, 1959

Honorable Eureka Forbes
Representative, 15th District
House of Representatives
First Legislature, State of Hawaii
Iolani Palace
Honolulu, Hawaii

Dear Mrs. Forbes:

This is to acknowledge receipt of your letter dated October 7, 1959 requesting an opinion concerning the legality of a private school to require vaccination as a condition for enrollment in the school despite the Act, Revised Laws of Hawaii 1955, section 46-13 (V) as amended, S. L. H. 1957, section 153-1 granting exemption from vaccination on religious grounds. The pertinent Act provides:

> ". . .No child shall be subjected to such medical examination, vaccination, re-vaccination or immunization, whose parent or guardian shall, in writing, object thereto on grounds that such requirements are not in accordance with their religious tenets of an established church of which he is a member or adherent. . ."

The above-mentioned statute does not specifically delineate the scope of its applicability. A further examination of the pertinent board of health regulations adopted pursuant to the powers granted to it by R. L. H. 1955, section 46-13 (V) does not clarify such an ambiguity for it provides ". . .any child entering school in the Territory of Hawaii. . ." Public Health Regulations, chapter 7, section 1 (1951). We are, therefore, immediately posed with the problem of the scope of the relevant provisions as used in the statute and regulation so that if such provisions are interpreted to apply merely to public schools, then private schools are not restricted in their actions by such a requirement. A reading of the pertinent committee reports, when this exemption provision was initially enacted into law in

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1951, fails to disclose the intention of the legislature on this very question. Senate Journal 1951, Twenty-Sixth Session, page 503, Standing Committee Report No. 154.

A reading of the statute "No child shall be subjected . . ." and the regulations "Any child. . ." seem broad enough to include any child entering the school, public as well as private. This result is substantiated by a series of cases which attempted to define the term "school" as used in the statute. The definitions advanced by the courts in In Re Sanders, 53 Kansas 191, 36 Pac. 348 (1894) and in Alexander v. Phillips, Ariz. 254 Pac. 1056 (1927), are broad enough to encompass the private systems as well as the public. The court in Attorney General v. Soule, 28 Michigan 153 (1873), interpreted the term "school" as used in a will to mean either public or private. A similar interpretation was advanced by the court in State v. Leighton, 35 Me. 195 (1853) where the statute provided for ". . .any school . . . ."

Though these cases lead us to conclude that the Hawaii statute should be read so as to restrict private schools as well in their actions, yet we do not feel that this should be the proper interpretation. A private school, being a private body, is free to accept or reject any child for whatever reasons, farfetched though they may be, subject to certain qualifications imposed by the state. But these qualifications would have to effectuate certain public policies of the state which would perpetuate the public welfare, health and safety of the community. Failing that, the statute can not restrict private persons and organizations in their actions. Thus, had the statute provided for compulsory vaccinations for all children entering public as well as private schools, we have no hesitancy in concluding the reasonableness of the requirement as a proper health measure. Rosalyn Zucht v. W. A. King et al, 260 U. S. 174, 67 L. Ed. 194 (1922). Or if the statute had provided that all teachers in private schools should meet certain educational qualifications, this requirement upon private schools seems reasonable as a proper measure securing the welfare of the people. The regulation of the state in restricting private actions must not be arbitrary and capricious but must be reasonable, and the criterion used by the courts is whether such regulations promote the general welfare, health and safety.

In the Hawaii statute the connection between providing an exemption of vaccination on religious ground and the promotion of health, safety or general welfare is not as clear-cut and well-defined. Certainly the health and safety of the public are

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not promoted by such an exemption and whether this secures the general welfare, comfort and convenience is questionable. This provision seems more like merely a state acknowledgement of a religious belief. Furthermore, the child is not deprived of any equal protection of the laws for he has always the alternative of entering a public school and being granted the exemption. He is not forced to attend a private school, nor is he restricted in entering a public school. In such situations where it is highly dubious that restricting private actions would promote the proper objectives of the state, the statute must be construed liberally and in support of it. (See cases cited in footnote[1] - Sutherland Statutory Construction, 3rd Edition, section 4509 (1943)). Following the oft-quoted presumption that the legislature acted with integrity and with a honest purpose to keep within constitutional limits, (Sutherland Statutory Construction, 3rd Edition, section 4509 (1943)) we feel that the operation of the statute was not intended to apply to private schools but merely to public schools.

On the basis of the foregoing discussion, it is the opinion of the Attorney General that a private school can refuse admission of a child if he refuses to vaccinate despite the Act granting exemption on religious grounds.

Very truly yours,

Allen I. Marutani

ALLEN I. MARUTANI
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

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INDEXING INSTRUCTIONS

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I. APPROPRIATIONS

Land Commissioner may use unexpended balance of a prior special appropriation for matching fund where the same project is involved in the prior appropriation and current matching fund legislation.

II. S. L. H. 1951

Act 79

III. S. L. H. 1959

Act 224

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ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
AND REFER TO
INITIALS AND NUMBER

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STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

November 24, 1959

Mr. Tim Ho, Superintendent
Department of Public Works
P. O. Box 162
Honolulu 10, Hawaii

Dear Mr. Ho:

This is in reply to your letter No. 1.662 dated November 17, 1959, relating to the Kapaa Swamp Development. The question you ask is: "Is the Land Commissioner within his rights to use the unexpended balance of a prior appropriation for his matching funds or was it the intent of the Legislature to have the Land Commissioner provide matching funds from other sources?"

It is the opinion of this office that a prior appropriation may be used by the Land Commissioner to match the amount provided by the Legislature.

In 1951 the Legislature appropriated $150,000. The purpose of this enactment was ". . . of surveying the public lands formerly known as 'Kapaa Swamp', Kapaa, Kauai, for subdivision and sale and also for engineering work in connection therewith, and also for the construction of roads, water lines, bridges and other improvements necessary to place said lands in condition for subdivision and sale for such purposes as the land commissioner and the board of public lands may decide." Act 79, Session Laws of Hawaii 1951.

In 1959 the Legislature appropriated $75,000 in general funds and another $75,000 in obligation bonds for the Kapaa Swamp Development; both amounts were to be matched

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by the Land Commissioner. The uses of the 1951 and 1959 appropriations are the same. The appropriation under Act 79, S.L.H. 1951 has not lapsed and nothing in the 1951 enactment prohibits application of that appropriation for the purposes of matching legislated sums where the same project is involved. Therefore, the Land Commissioner may legally use the 1951 appropriation to match the 1959 enactment.

Very truly yours,

Harold Y. Shintaku

HAROLD Y. SHINTAKU
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

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INDEXING INSTRUCTION

Op. 59-158

COUNTIES

Limit of Indebtedness

Since Hawaii is now a State and the pertinent section on the debt limitation of the counties is Article VI, section 3, paragraph 4 of the State Constitution, the County of Maui may issue its own bonds within the ten per cent limitation and other limitations provided for under the above mentioned section of the Constitution.

Op. V-9 - IV-8

ADDRESS REPLY TO
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TERRITORY OF HAWAII

STATE DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

November 28, 1959

Mr. Robert F. Ellis
Administrative Director
Office of the Governor
State of Hawaii
Iolani Palace
Honolulu, Hawaii

Dear Sir:

This is in reference to your Memorandum dated October 24, 1959, requesting our opinion on questions relating to the construction of the Kula, Maui, water system. The specific questions you ask will be answered in the order appearing in your Memorandum.

"1. Can the County of Maui, under Act 235, SLH 1959, issue its own bonds, within a 5% limitation, for this project?"

Under Act 235, Session Laws of Hawaii 1959, the treasurer of each county was authorized to issue general obligation bonds for county projects. However, we were of the opinion that there was a substantial question as to the constitutionality of certain provisions of this Act and, therefore, recommended to the First State Legislature that Act 235 be amended. The amended bill, S.B. No. 97, was passed by the First State Legislature and approved by the Governor as Act 24. Therefore, the County of Maui may issue its own bonds under this Act.

Since Hawaii is now a State and the pertinent section on the debt limitation of the counties is Article VI, section 3, paragraph 4 of the Constitution, the County of Maui may issue its own bonds within the ten per cent limitation and other limitations provided for under the above-mentioned section of the Constitution.

"a. Within the 10% limitation?"

Question 1-a has been answered under question 1.

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"b. Can the State Treasurer make a loan to the County predicated on a resolution adopted by the Maui Board of Supervisors authorizing issuance of such bonds?"

Under the provisions of section 132-12, Revised Laws of Hawaii 1955, the State Treasurer is authorized to make loans to the counties in the sum not to exceed $100,000 over the amount of tax monies which the treasurer estimates will be paid by him to such county during the balance of the calendar year. Therefore, the County of Maui may borrow from the State Treasurer the amount necessary for the construction of the Kula, Maui, water system based on the resolution adopted by the Maui Board of Supervisors authorizing issuance of bonds. However, this is a discretional matter on the part of the treasurer as indicated in section 132-12.

"2. Is sufficient latitude provided, by Sec. 3(d) of Act 224, SLH 1959, to permit expenditure of funds appropriated under 3(a) of said Act, to be used for Maui projects other than those specified, following Board action declaring the amounts appropriated as unrequired balances?"

Under the provisions of section 3(d) of Act 224, the amount required for any item specified in subsection 3(a) may be expended for other items within subsection 3(a).

Upon completion of all of the items specified for Maui County in subsection 3(a), the unrequired balance is to be transferred to the permanent improvement fund of the same county. Therefore, the Kula, Maui, water system, being authorized under section 4(a) of Act 224, cannot be constructed by the use of the excess amount from subsection 3(a) of Act 224 until completion of all of the projects listed under subsection 3(a).

Respectfully submitted,

Harold Y. Shintaku

HAROLD Y. SHINTAKU
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

Op. 59-158

INDEXING INSTRUCTIONS - OP. 59-159

SEAL

The use of the great seal of Hawaii for commercial purposes is not prohibited by law

GREAT SEAL OF HAWAII

The use of the great seal of Hawaii for commercial purposes is not prohibited by law.

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ADDRESS REPLY TO
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AND REFER TO
INITIALS AND NUMBER
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TERRITORY OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

December 7, 1959

The Honorable James Kealoha
Lieutenant Governor
State of Hawaii
Iolani Palace
Honolulu, Hawaii

Dear Sir:

Re: Sale of Medallions Having State Seal

This is in reply to your request for an opinion concerning the use of the Great Seal of Hawaii on medallions issued in accordance with Senate Concurrent Resolution No. 12.

The First Legislature of the State of Hawaii has expressed a desire in S.C.R. No. 12 to issue medallions of a replica of the Great Seal of Hawaii on one side. There appears to be no legal prohibition against the use. The dignity of the great seals symbolizing supreme authority has been guarded in some states of this country through legislation prohibiting their use for advertising or commercial purposes, and such laws have generally been upheld. See Seals, paragraph 2, 47 Am. Jur. 488; Commonwealth v. R. I. Sherman, 189 Mass. 76; 75 N.E. 71 (1905).

Hawaii has no legislation prohibiting such use. Act 272, Session Laws of Hawaii 1959, amended section 14-5, Revised Laws of Hawaii 1955. In the absence of express legislation against commercial purposes, it is the opinion of this office that the use contemplated is not illegal.

Respectfully submitted,

Vernon F. L. Char
VERNON F. L. CHAR
Deputy Attorney General

APPROVED:
Shiro Kashiwa
SHIRO KASHIWA
Attorney General

But see OP. 59-133 and 391:41 (memo, 1954) from Asst. A.G. Tashiro to Secretary of Hawaii?

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ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
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INITIALS AND NUMBER

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TERRITORY OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

December 7, 1959

Honorable James Kealoha
Acting Governor
State of Hawaii
Iolani Palace
Honolulu, Hawaii

Dear Sir:

This is in reply to your verbal request for an opinion as to whether or not an officer or employee of the State of Hawaii may be designated to perform the duties pertaining to the office of Land Commissioner, which office is now vacant as a result of the unfortunate death of the Honorable C. Eric Reppun.

It is the opinion of this office that section 7-23 of the Revised Laws of Hawaii 1955 authorizes the Governor to designate an officer or employee of the State of Hawaii to perform the duties of a vacant office. Said section 7-23 provides as follows:

> "In the event of a vacancy in any office for which the governor has the power of appointment or nomination, the governor may designate some other officer or employee of the Territory to perform the duties of the vacant office until the office is filled. The authority derived from this section shall not continue for a longer period than sixty days after such vacancy occurs.
>
> "An officer or employee designated to perform the duties of a vacant office shall, so long as such authority continues, receive the compensation attached to the vacant office, or the compensation attached to his regular office or employment, whichever is the higher."

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Where an officer or employee, who is covered by civil service statutes, is designated to perform the duties of an appointive position, it is the opinion of this office that, to protect the civil service status of said officer or employee, said officer or employee should obtain a "leave without pay" from his civil service position. Section 3-21(m) provides for such leave of absence.

Yours very truly,

Jon J. Chinen

JON J. CHINEN
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

Op. 59-764 (160)

ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
AND REFER TO
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Op. 59-161

STATE [redacted] OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

December 9, 1959

Major General F. W. Makinney
Adjutant General
H.A.R.N.G.
Honolulu 16, Hawaii

Dear General Makinney:

This is in reply to your letter of December 3, 1959, which was supplemented by a telephone conversation with Colonel Silva of your office on the afternoon of December 4, 1959, requesting an opinion concerning the use of State National Guard troops within the boundaries of Federal lands upon which are located active volcanoes. The specific questions presented and our replying opinions are discussed below.

1. Can the State National Guard be activated and used for the policing of traffic upon Federal lands? This question arises out of the increased need for traffic control when sight-seers flock to a volcanic eruption.

The answer is no. Section 353-36 of the Revised Laws of Hawaii 1955 enumerate the only reasons for which the State National Guard and the unorganized militia of the State of Hawaii may be called into service. It provides:

> "In case of war, insurrection, invasion, riot or imminent danger thereof, or any forcible obstruction to the execution of the laws, or reasonable apprehension thereof, or to assist civil authorities in disaster relief or civil defense, the President of the United States or the governor, may call the national guard or air national guard or the unorganized militia or any part thereof into active service."

Obviously, the policing of traffic alone is not within the objectives listed by the section above.

2. Can the State National Guard be called into active service to protect and provide for the public safety and welfare

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endangered by an erupting volcano even though such dangers are presented upon Federal land?

The answer is yes if it is determined that lives and property are endangered by the erupting volcano and evacuation of persons and isolation of the area are found to be necessary for the protection and safety of the public.

In cases of disaster relief, the provisions of chapter 358 are ordinarily controlling. But because that chapter is in temporary suspension, by virtue of section 358-11, the provisions of chapter 359 (the Civil Defense and Emergency Act) enable the governor to utilize the machinery of the State Civil Defense Agency instead. However, the governor has an alternative to the use of the Civil Defense Agency.

Under section 353-36 which is quoted above, the State National Guard may be called into active service ". . . to assist civil authorities in disaster relief. . ." The Federal lands upon which the volcanoes are located are under the control and direction of the Federal parks authority which is a "civil authority" contemplated by the terms of the statute.

3. If a state of emergency (disaster period) is found to exist within the boundaries of Federal lands and the governor has called the State National Guard into active service to assist the Federal authorities, is ultimate control over the State National Guard personnel vested in the Federal or in the State authorities?

The answer is that such ultimate control is vested in the State authorities. Under section 353-12, Revised Laws of Hawaii 1955, the governor is the commander in chief of the State National Guard. The President of the United States (and his subordinates) are in charge only when the state militia has been called into actual service of the United States. Since the objective for which the National Guard troops will have been activated is primarily of state interest and since the Governor of the State (and not the President) will have called such unit into active service, the ultimate authority over the activated National Guard troops lies in the state authorities. This is so because such troops will have been activated primarily to protect and provide for the local welfare and safety and only incidentally to help the Federal authorities police their property.

Very truly yours,

Carlos Ramelb
Deputy Attorney General

APPROVED:

Shiro Kashiwa
SHIRO KASHIWA
Attorney General

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INDEXING INSTRUCTIONS

December 9, 1959

REGULATIONS, HEALTH

Alley - a public space... dedicated to public use. A drainage easement in favor of the City and County of Honolulu is an alley under definition of Chapter 2, Public Health Regulations.

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ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
AND REFER TO
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PAA:mym

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STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

December 9, 1959

Dr. Richard K. C. Lee, President
Board of Health
State of Hawaii
Honolulu 1, Hawaii

Dear Dr. Lee:

Reference is made to your letter dated December 7, 1959, wherein you requested our opinion on whether the 10-foot strip drainage easement in favor of the City and County of Honolulu from the U. S. government is an alley according to chapter 2, section 5.08(a) of the Public Health Regulations.

Our answer is "yes." By definition, an alley is "any public space. . . which has been dedicated for public use." Chapter 2, Public Health Regulations. Here, the 10-foot strip has been granted to the City and County of Honolulu for storm drainage and sewer line for 50 years by the U. S. government under an agreement dated December 4, 1956. Honolulu is a municipal corporation and as such it is a public institution created for public purposes (27 Words & Phrases 770; section 149-3, RLH 1955).

Therefore the 10-foot strip drainage easement is an alley according to chapter 2, section 5.08(a) of the Public Health Regulations.

Very truly yours,

Peter A. Aduja
Deputy Attorney General

APPROVED:

H. Rodger Betts
Assistant Attorney General

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ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
AND REFER TO
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STATE ~~TERRITORY~~ OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

December 14, 1959

Hawaii Water Authority
State of Hawaii
P. O. Box 373
Honolulu 9, Hawaii

Attention: Mr. L. H. Herschler
Manager-Chief Engineer

Gentlemen:

This is in reply to your letter of November 23, 1959, requesting an opinion on Act 22 (S. B. No. 86) passed by the First State Legislature in the First Special Session of 1959.

Section 2, subsection (b) of Act 22 provides:

"SECTION 2. The appropriation made in section 1 shall be for projects designated by any Act of prior Territorial Legislature for which projects moneys have not been heretofore partially or fully allotted and shall be expended as follows:

(b) Water development projects in the County of Hawaii; (1) Kona Water Development $400,000.00
(2) East Hawaii Water Development $800,000.00
(To be expended by the Board of Water Supply, County of Hawaii, on the advice and consent of the Board of Supervisors, County of Hawaii.)"

The question posed is whether the language enclosed within the parentheses applies only to item (2) or to both items (1) and (2), inasmuch as the Hawaii Water Authority has full control over the expenditure of funds for the Kona water development appropriated by Act 150, S.L.H. 1957 and Act 224, S.L.H. 1959.

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Based on the legislative intent as disclosed in the legislative history of S. B. No. 86, it is the opinion of this office that the sums appropriated for items (1) and (2) in Act 22, section 2, subsection (b) are within the control of the Board of Water Supply and Board of Supervisors of the County of Hawaii.

The declared purpose of S. B. No. 86 is as stated in Senate Standing Committee Report No. 140:

> "Your Committee finds, after hearing several witnesses, that this bill is to test whether or not the revenue bonds issued by the Hawaii Aeronautics Commission thus far are "revenue bonds" as described in the Constitution.
>
> "The distinction is important in that, if the airport bonds are 'revenue bonds' under the Constitution, the State may authorize approximately $6 million in general obligation bonds without exceeding the constitutional debt limit. A court ruling is the only method by which the question can be finally answered.
>
> "The legislature, by passing this bill by a two-thirds vote in each house, would be exceeding the authorized debt limit if the airport revenue bonds are not 'revenue bonds' within the meaning in the Constitution. On the other hand, if the airport bonds are 'revenue bonds', the $6 million in general obligation bonds authorized by this bill will be within the debt limit and will be valid authorizations."

It was decided that the projects for which bonds would be issued to test the revenue bonds of the Hawaii Aeronautics Commission would be water projects urgently needed throughout the state. (See Committee Report, supra.)

S. B. No. 86, S. D. 1, inter alia, provided as follows:

> "Such general obligation bonds may be issued as provided by law to the extent necessary to yield the amounts herein appropriated or so much thereof as may be necessary.
>
> 4. Kona Water Development. (To be expended by the Hawaii Water Authority and the work turned over to the Board of Water Supply of the County upon completion.) . . . . . $ 500,000

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5. East Hawaii Water Development. (To be expended by the Hawaii Water Authority as indicated in No. 4 above.) . . . . . $1,000,000"

The itemized projects were deleted in S. B. No. 86, S. D. 2, but were consolidated in S. B. No. 86, S. D. 4 to read:

"SECTION 2. The appropriation made in section 1 shall be expended as follows:

(b) Water development projects in the County of Hawaii; (1) Kona Water Development. . . $ 400,000
(2) East Hzwaii Water Development. . . $ 800,000
(To be expended by the Hawaii Water Authority on projects recommended by the Board of Water Supply, County of Hawaii.)"

The House Finance Committee in Standing Committee Report No. 194, however, recommended that the above provisions be amended by deleting the words "the Hawaii Water Authority on projects recommended by", and in S. B. No. 86, S. D. 4, H. D. 1 it was provided:

"SECTION 2. The appropriation made in section 1 shall be expended as follows:

(b) Water development projects in the County of Hawaii; (1) Kona Water Development . . . . . $ 400,000
(b) East Hawaii Water Development . . . $ 800,000
(To be expended by the Board of Water Supply, County of Hawaii.)"

The last mentioned bill was amended on the floor of the House and Act 22 reads as so amended.

The legislative intendment, therefore, was clearly to deprive the Hawaii Water Authority of any control of the above sums and the conclusion is inevitable that the control of said sums under Act 22 is vested in the Board of Water Supply and Board of Supervisors of the County of Hawaii.

Yours very truly,

Walter T. Shimoda

WALTER T. SHIMODA
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

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Op. 59-164

INDEXING INSTRUCTIONS

HAWAII AERONAUTICS COMMISSION:

Whether distribution of advertising material to incoming travelers at the Honolulu International Airport is a concession within the meaning of Act 245, S. L. H. 1959 so as to necessitate public bid.

STATUTES:

Act 245, S. L. H. 1959

Whether distribution of advertising material to incoming travelers at the Honolulu International Airport is a concession

SESSION LAWS OF HAWAII 1959

Act 245

ADDRESS REPLY TO
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STATE ~~TERRITORY~~ OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

December 14, 1959

Mr. A. P. Storrs
Director of Aeronautics
Hawaii Aeronautics Commission
Honolulu International Airport
Honolulu, Hawaii

Dear Sir:

This is in response to your letter of November 30, 1959 in which you request an opinion whether the distribution of advertising material to travelers arriving at the Honolulu International Airport are concessions within the meaning of Act 245, S. L. H. 1959 so as to necessitate public bid.

The proposed distribution of advertising material will be to incoming travelers at the airport. There will be no charge to persons receiving this material on a hand-out basis.

Act 245 provides that no concession or concession space to sell goods, wares, merchandise and services or to operate certain types of business on any land owned or under the jurisdiction of the Territory or any independent commission shall be let out either by contract, lease, etc. except under contract let after public advertisement in the manner provided by law. The Act further specifies that such contracts shall be let to the highest responsible bidder if he qualifies by providing the necessary security.

In this operation of distribution of advertising material, though it can be argued that the operators will not be selling any merchandise or ware but will merely be distributing hand-outs without charge and so the operation cannot be characterized as a concession to sell, yet the ultimate purpose of this operation is to sell the goods advertised. Though the actual act of selling is not performed on the premises, yet all steps preparatory to the ultimate sale are being conducted by this operation. Since much of the incoming traffic will not be familiar with local business establishments and business operations,

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such distribution of material becomes even more significant toward the ultimate sale. The court in State v. Guardian Foundation of Texas, Tex. Civ. App., 128 S. W. 2d 880, 882 (1939) quoted portions of an article by Starch, in his Principles of Advertising (1925):

> "'Advertising . . . means more than merely announcing, making known, or turning the attention of the public toward a certain product. Its ultimate purpose is to sell or to help sell . . .'"

The court in Ansel v. Brooks, 141 Conn. 288, 106 A. 2d. 152 (1954) advanced a similar definition quoting Webster's Dictionary saying that advertising is to call public attention by emphasizing desirable qualities for the purpose of arousing a desire to purchase. This particular operation is an important ingredient of the whole business process leading up to the ultimate sale. We can therefore characterize this operation of such distribution as tantamount to sale itself.

Whether such operation is a concession or not, two of Webster's definitions of "concession" in Webster, "New Collegiate Dictionary", p. 171 (2nd Ed. 1956) are:

> "4. A grant by a government of land or property or of a right to use land or property for some specified use.
>
> "5. U. S. A grant or lease of a portion of premises for some specific use; as a concession to sell peanuts at a baseball park."

A similar definition was advanced by the court in Rendall v. Pioneer Hotel, 71 Ariz. 10, 14; 222 P. 2d. 986, 989 (1950) quoting Webster's dictionary:

> "'A grant or lease of a portion of premises for some specific use or of a right to enter upon premises for some specific purpose as a concession at a fair for a lunch counter.'"

These definitions would apply to the operation of distributing advertising material since this business would be performed in pursuance to a right granted by the Commission to enter the premises for a specific purpose. An opinion from this office (Atty. Gen. Op. 59-137, dated October 8, 1959) as it related to a space at the baggage claiming area for the purpose of installing and displaying certain advertising signs, concluded:

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> ". . . Space permit noted above in effect purported to grant permission to use public land for the selling of services which we feel is a concession within the meaning of Act 245 requiring concessions to be let only as the result of public bid. . ."

Though our particular case does not purport to let a particular area or space at the airport for advertising, yet we can not see any substantial difference from the operations noted by our prior opinion. The operators here will be allowed to enter the premises and will be free to roam within reasonable limitation wherever business dictates their presence. Through the medium of advertising the operators will ply their trade on government property with the ultimate goal of selling their respective goods. This, we feel, is a concession to sell goods on public property within the meaning of Act 245, S. L. H. 1959.

On the basis of the foregoing discussion, it is the opinion of this office that the distribution of advertising material to incoming travelers at the Honolulu International Airport is a concession within the meaning of Act 245, S. L. H. 1959 necessitating public bid in the manner provided by law.

Very truly yours,

Allen I. Marutani

ALLEN I. MARUTANI
Deputy Attorney General

APPROVED:

Shiro Kashima

SHIRO KASHIMA
Attorney General

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INDEXING INSTRUCTIONS

Op. 59-165

I. Corporation

Incorporation - Requisites of non-profit.

"Benevolent" purpose, one for general welfare.

II. Corporation

Eleemosynary

"Benevolent" purpose, defined.

III. Revised Laws of Hawaii 1955

172-16

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STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

December 14, 1959

Mr. H. H. Adams
First Deputy Treasurer
Office of the Treasurer
Honolulu, Hawaii

Dear Sir:

This is in reply to your letter of October 7, 1959, wherein you requested the opinion of this office relating to the approval of the petition of the Professional Golfers Association for incorporation. More specifically, you ask if the purposes of this organization come within the scope of section 172-16, Revised Laws of Hawaii.

It is the opinion of this office that the Professional Golfers Association does not meet the requisites of section 172-16, Revised Laws of Hawaii 1955.

In relation to this question, section 172-16, Revised Laws of Hawaii 1955 was revised in 1959 by the Thirtieth Legislature. Act 202, Session Laws of Hawaii 1959. That act states in part: "Non profit corporations; . . . The treasurer . . . shall grant to all applicants . . . charters of incorporation for the establishment and control of any lawful purpose. . . ." It should be noted, however, that the power of the legislature to grant charters to corporations was restricted by section 55 of the Organic Act. Therefore, in that connection, it was necessary to set forth in Act 202 that the effective date was contingent on Congressional consent or ratification by the legislature of the State of Hawaii.

The question, therefore, is restricted to the application of section 172-16, Revised Laws of Hawaii 1955. This section states in part: "The treasurer . . . shall grant to all applicants who file petitions . . . charters of incorporation for the establishment and control of cemeteries, colleges, seminaries, churches, libraries or any other benevolent, charitable or scientific associations." In this particular situation, the

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association, to fall under the list of purposes, if at all, must come under the term "benevolent association."

The term "benevolent" is often used and not always with the same meaning. In a general sense, it may mean any act prompted by good will or wishing well to others. However, the scope of the term has been confined to be synonymous with "charity" when used for restrictive purposes such as tax statutes or trust interpretations. The statute in this situation involves the restriction of the legislative power to grant charters of incorporation. The term "benevolent" is used with "charitable and scientific". Furthermore, the statutes (Organic Act, section 55; section 172-16, Revised Laws of Hawaii 1955) lists cemeteries, colleges, seminaries, churches and libraries as examples of "benevolent, charitable, scientific associations." All of the specific examples listed are for the general welfare of the community either directly or indirectly.

It is, therefore, the opinion of this office, that the term "benevolent" as found in section 172-16, Revised Laws of Hawaii 1955 and the Organic Act, section 55, contemplated that the "benevolent" purpose be one of general welfare and of direct or indirect benefit to the public at large rather than restricted to members of a select group. See 1 Fletcher, Cyclopedia Corporations, sections 79 and 110.

Each situation requires a determination of fact to ascertain fulfillment of the purposes set forth. In this situation, the petition states purposes which primarily benefit the members and which are confined to a small select group. Although the promotion of interest of golf is of some interest to the public, the public good is incidental. For instance, a tennis group formed for the recreational benefit of its members is not for benevolent purposes. Rockhill Tennis Club of Kansas City v. Volker, 56 S.W. 2d, 9 (1932). Corporations organized not for the administration of a charity, but for the gain or benefit, pecuniary or otherwise, of its members do not come within the meaning

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of groups organized for "charitable or benevolent purposes." Newcomb v. Boston Protective Department, 24 N.E. 39 (1809).

Respectfully submitted,

Vernon F. L. Char
VERNON F. L. CHAR
Deputy Attorney General

APPROVED:
Shiro Kashiwa
SHIRO KASHIWA
Attorney General

cc: Mr. Maurice Sapienza

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ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
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STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

December 15, 1959

Housing and Home Finance Agency
Urban Renewal Administration

Dear Sirs:

This opinion has been prepared at the request of the State Planning Office pursuant to, and in compliance with, Section J-2 of Form H-6702, "Urban Planning Assistance Project Data (In Support of Application for Urban Planning Grant)", forwarded herewith.

Please be advised that, in the opinion of this office, the statements contained in Section J-1 a, b, c, d (1), (2) and (3) of said Form H-6702 are true and correct; that the Applicant, State of Hawaii, is a legal entity, and has the legal powers referred to in said section.

Yours very truly,

Harold Y. Shintaku

HAROLD Y. SHINTAKU
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

No indexing necessary

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INDEXING INSTRUCTIONS

Op. 59-167

HAWAIIAN AERONAUTICS COMMISSION

Whether taxi, tour, and U-drive operations at the airport are concessions within the meaning of Act 245, S. L. H. 1959 necessitating public bid.

STATUTE S

Construction of Act 245, S. L. H. 1959

Whether taxi, tour and U-Drive operations are concessions within the meaning of Act 245, S. L. H. 1959

SESSION LAWS OF HAWAII, 1959

Act 245

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STATE ~~TERRITORY~~ OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

December 15, 1959

Mr. A. P. Storrs
Director of Aeronautics
Hawaii Aeronautics Commission
Honolulu International Airport
Honolulu 17, Hawaii

Dear Sir:

This is in response to your letter dated November 4, 1959 in which you request an opinion from this office whether the provisions of Act 245, S. L. H. 1959 apply to the taxi, tour, and U-Drive operations at the airports located at Hilo, Lihue, Kahului and Kona.

Under the present operations, any taxi, tour, and U-drive operator is allowed to obtain a license on a non-exclusive basis from the Hawaii Aeronautics Commission to provide ground transportation service, provided that he is able to pay on a per annum basis a license fee of $25.00, a fee of $12.00 per motor vehicle, and a $1.00 fee for each driver's badge. These licenses run for a period of one year from January 1 to December 31. Because anyone can enter into the ground transportation business on a yearly contract basis, you mention in your letter that your staff has not considered this a concession but rather a service to the traveling public.

Act 245 provides that no concession or concession space to sell services, among other things, on any land owned or under the jurisdiction of the Territory, or any independent commission of the Territory, shall be disposed of either by contract, license, etc., except under contract let after public advertisement for sealed tenders in the manner provided by law. The Act further provides that such contract shall be made with the highest pesponsible bidder if he shall qualify by providing the necessary security.

Whether public bid is necessary for future operations of this ground transportation business or whether the present practice of issuing yearly contracts can continue is dependent upon the construction of the term concession.

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Two of Webster's definitions of "concession" in Webster, "New Collegiate Dictionary", p. 171 (2nd ed. 1956) are:

> "4. A grant by a government of land or property or of a right to use land or property for some specified purpose.
>
> "5. U. S. A grant or lease of a portion of premises for some specific use; as, a concession to sell peanuts at a baseball park."

A similar definition was advanced by the court in Rendall v. Pioneer Hotel, 71 Ariz. 10, 14; 222 P. 2nd 986, 989 (1950) quoting Webster's dictionary:

> "'A grant or lease of a portion of premises for some specific use or of a right to enter upon premises for some specific purpose as a concession at a fair for a lunch counter.'"

These definitions would certainly apply to the ground transportation business since this is a performance of services for the general public for profit where the commission grants the operators the right to use the premises for a specific purpose. The taxicab service as a concession was so discussed in Rocky Mountain Motor Co. v. Airport Transit Co., 124 Colo. 147, 235 P. 2nd 580, 584 (1951) where the City ordinance in part provided:

> "'(b) The Manager . . . is authorized and directed to solicit or advertise for proposals or bids for a taxicab concession for taxicab service to and from Stapleton Airfield. . . .'" (underscoring supplied)

In Miami Beach Airline Service v. Crandon, 159 Fla. 504, 32 So. 2d 153 (1947) the court discussed the contract that the Dade County Authority entered into with Red Top Cab & Baggage Company as one granting the cab company the exclusive "concession to transport passengers from the Miami International Airport to points about the city." The court in King County v. Port of Seattle, 37 Wash. 2d 338, 223 P. 2d 834 (1950) similarly talked of the taxicab service as a concession. All of these cases lend weight to the conclusion that the ground transportation business is a concession. Being a concession, such a business would have to be put out for public bid in accordance with the provisions of Act 245.

We now discuss a subsidiary problem of whether a concession would imply a grant to operate such a business on an exclusive basis. The court in Williams v. Belvedere Hotel Co.,

137 Md. 665, 113 A. 335 (1921) held that the grant of a concession to operate a business gave the concessionaire the exclusive right to operate that particular type of business on the leased premises. Thus the court granted the concessionaire an injunction to enjoin the lessor from allowing another to operate a similar business on the premises. But this case is all alone on this particular construction of concession and the majority of the cases hold otherwise. As discussed in 14 A.L.R. 622 at 627 concerning the Williams case, supra:

> "No other case seems to have construed the term 'concession' as used in such connection."

It is therefore possible for the Hawaii Aeronautics Commission to grant several concessions on the ground transportation business provided that each concession is granted in the manner provided by Act 245.

On the basis of the foregoing discussion, it is the opinion of this office that the ground transportation business is a concession within the meaning of Act 245, and therefore it has to be put out for public bid in accordance with the provisions of said Act. However, it is not necessary that such concession be granted on an exclusive basis.

Very truly yours,

Allen I. Marutani

ALLEN I. MARUTANI
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

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INDEXING INSTRUCTIONS

Op. 59-168

HAWAII AERONAUTICS COMMISSION

Whether the operation of an in-flight kitchen with food to be delivered to the airlines pursuant to a contract previously entered into by the parties is a concession within the meaning of Act 245, S. L. H. 1959

STATUTES:

Construction - Act 245, S. L. H. 1959.

Whether operation of an in-flight kitchen is a concession within the meaning of Act 245, S. L. H. 1959

SESSION LAWS OF HAWAII 1959

Act 245, S. L. H. 1959.

ADDRESS REPLY TO
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STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

December 21, 1959

Mr. A. P. Storrs
Director of Aeronautics
Hawaii Aeronautics Commission
Honolulu International Airport
Honolulu 17, Hawaii

Dear Sir:

This is in response to your letter of November 18, 1959, in which you request an opinion whether an operation of an in-flight kitchen off the airport with delivery of food and beverages to the airlines by truck is a concession within the meaning of Act 245, S. L. H. 1959.

The proposed operations of the in-flight kitchen will be such that the food and beverages will be neither prepared nor consumed at the airport. They will merely be delivered to the airlines pursuant to a contract entered into by the parties. There will be no solicitation done at the airport, nor will the food and beverages be sold directly to individual persons.

Act 245 provides that no concession or concession space to sell goods, wares, merchandise and services or to operate certain types of business on any land owned or under the jurisdiction of the Territory or any independent commission shall be let out either by contract, lease, etc. except under contract let after public advertisement in the manner provided by law. The Act further specifies that such contracts shall be let to the highest responsible bidder if he qualifies by providing the necessary security.

An opinion from this office, Op. 59-164 dated December 14, 1959, discusses the meaning and construction of the term concession. In essence this opinion concludes that concession is a grant or lease of a portion of premises for some specific use or of a right to enter upon premises for some specific purpose.

Under the proposed operation, there will be no solicitation of any business done on the premises. The sale will not be made to the public generally but will be strictly confined to the airlines. The extent of the use of the premises will merely be to

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deliver the food pursuant to a contract previously entered into between the parties. There will be no business conducted on the premises except for the mere act of delivery. There will be no separate space or booth set aside for this operation. Neither will the food be consumed on the premises as it will be served aloft to the passengers. If the airlines hired their own truck and picked the food and beverages off the airport and brought them on to the premises, this will be an operation normally incident to airline business and it is difficult to characterize that as a concession. The only difference in our particular operation is that instead of the airlines picking the food up, the food operators deliver it to the airport. Should this minor difference in operations make any difference in characterizing one as not a concession and the other as a concession? We feel not.

In City of Houston v. Dobs, 232 F. 2d. 428 (1956) the court characterized the distribution of food to the airlines to be served aloft as a concession, but in that case the concessionaire operated a restaurant on the premises and prepared the food right at the airport. Space was set aside on the airport premises for his operation. Such is not the case in our situation.

In view of the fact that the airlines are free to contract with whomever it wishes to procure food and beverages, we do not feel that this is that type of operation envisioned by the drafters of the bill. Reading Standing Committee Report No. 619, H. B. No. 1549, H. D. 1, Thirtieth Legislature, 1959 Session, we feel that the purpose of the bill was to let concessions or concession space to operate a business on public land on a fair and equitable basis by providing for public bidding. Portions of the report reads:

> "The purpose of this bill is to make the bidding procedure required for public contracts . . . generally applicable to the award by a territorial or county agency of a license, permit, lease . . . to any private person to operate a concession for profit, except that the award shall be made to the highest bidder. At present . . . different governmental agencies release concessions to persons without the advertisement of bids."

Clearly the statute intended to prevent any governmental agency from favoring particular persons or organizations in the operation of a concession on public land. The object of advertising for tenders is to secure fair competition and prevent favoritism and extravagance. /Lucas v. American-Hawaiian Engineering & Construction Co., 16 H. 80 (1904); Wilson v. Lord-Young Engineering Co., 21 H. 87 (1912); Ramsey v. City & County of Honolulu, 29 H. 366 (1926)/ But where the airlines are free to buy food and beverages

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from whomever it wishes, we do not feel that the evils aimed at by the statute are present in such a situation.

On the basis of the foregoing discussion it is the opinion of this office that the proposed operations of the in-flight kitchen are not concessions within the meaning of Act 245 so as to necessitate public bid.

Yours very truly,

Allen I. Marutani

ALLEN I. MARUTANI
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

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STATE ~~TERRITORY~~ OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

December 23, 1959

Board of Harbor Commissioners
P. O. Box 397
Honolulu 9, Hawaii

Gentlemen:

Re: Bid for installation and operation of container freight handling facilities at Diamond Head Terminal (Pier 2)

This is in reference to the bid submitted by Oahu Railway & Land Company for the installation and operation of container freight handling facilities at Diamond Head Terminal, Pier 2.

The question involved is whether or not the form submitted by Oahu Railway & Land Company was in fact a bid called for by the Board of Harbor Commissioners. The envelope in which the form was submitted is marked as "BID FOR INSTALLATION AND OPERATION OF CONTAINER FREIGHT HANDLING FACILITIES AT DIAMOND HEAD TERMINAL (PIER 2), HONOLULU, HAWAII." The envelope was presented to the Board of Harbor Commissioners in compliance with the date and time advertised for such bid. The envelope contained a certified check and also an annual report of Oahu Railway & Land Company in compliance with the Board of Harbor Commissioners' bid proposal. However, the bid form and the proposed license and agreement of the Harbor Board was redrafted and the contents changed by Oahu Railway & Land Company.

Assuming that it was the intention of Oahu Railway & Land Company to submit a bid in compliance with the proposal of the Harbor Board, the changes in the proposed license and agreement and the bid form did not comply with the requirements of the call for tenders. It is the general rule of law that all bids which do not comply with the requirements of the call for tenders must be rejected.

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The non-compliance with the requirements of the call for tenders are as follows:

1. The bid form starts out by stating that Oahu Railway & Land Company is unable to submit a bid because of certain irregularities in the bid proposal and requirements.

2. The form then contains an alternate bid for the privilege of operating all of the pier and terminal facilities at the Diamond Head Terminal, and all the other areas are shown on the attached map, including, without limitation, the right to carry on a cargo, container, storage, wharfage and freight handling operation and other uses thereon and to construct, if necessary, additional facilities thereon for said purposes. The areas indicated on the map include the Pier 2 freight terminal as well as the proposed container pier marshalling yard and container freight station.

3. The bid guarantees the Board of Harbor Commissioners $500,000.00 per annum and a percentage to be negotiated in amounts in excess of the guaranteed minimum.

4. The bid form incorporates a proposed license and agreement to be entered into between the Board of Harbor Commissioners and Oahu Railway & Land Company.

5. The proposed license and agreement provides:

(a) Strengthening of the container pier according to the plans and specifications supplied by the Harbor Board, but subject to the approval of the private operator.

(b) The private operator will charge wharfage and dockage fees in accordance with the rates established and published from time to time by the private operator. The Harbor Board loses the power of setting wharfage and dockage fees.

(c) The Harbor Board agrees to lease the proposed container freight station and the marshalling yard to the private operator for a term of twenty (20) years at an annual rental of thirty cents per square foot.

(d) The guaranteed minimum payable to the Board

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of Harbor Commissioners includes all taxes, including, without limitation, public utilities taxes, real property taxes, gross income taxes, transportation taxes, and all rental paid to the Harbor Board for the use of the marshalling area and the container freight station.

The foregoing are the major items of non-compliance and there are other minor discrepancies with the proposal of the Harbor Board. Therefore, it is clear that the bid submitted by Oahu Railway & Land Company does not comply with the requirements of the Board of Harbor Commissioners' call for tender and must be rejected by the Harbor Board.

Very truly yours,

HAROLD Y. SHINTAKU
Deputy Attorney General

APPROVED:

SHIRO KASHIWA
Attorney General

cc: Governor William F. Quinn

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INDEXING INSTRUCTION

Op. 59-170

PUBLIC EMPLOYEES

I. Compensation, Extra.

All overtime work performed under the provisions of Chapter 9-A, Revised Laws of Hawaii 1955, by inspectors on public works is compensable under the provisions of Act 7, Special Session Laws of 1959.

II. Compensation, Extra.

Compensatory time accumulated by an employee from July 1, 1959, should be paid in cash when the employee terminates his employment with the State under provision of section 1, paragraph (k), of Act 7, Special Session Laws of 1959.

III. Compensatory Time.

Under provisions of Act 7, Special Session Laws of 1959, compensation for overtime work, not granted as compensatory time off, is converted to vacation allowance.

IV. Vacation.

Compensatory time added to vacation allowance must comply with the provision of section 5-30, Revised Laws of Hawaii 1955, as amended by Act 143, Session Laws of Hawaii 1959.

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ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
AND REFER TO
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STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

December 28, 1959

Mr. E. H. Cook
Deputy Comptroller
Department of the Comptroller
State of Hawaii
Honolulu, Hawaii

Dear Mr. Cook:

This is in response to letter No. A-3, dated December 9, 1959, requesting our opinion on questions relating to hours of work and overtime of public employees under Act 7, Special Session of the First State Legislature, 1959. The specific questions asked will be answered in the order presented in your letter.

> "1. What is the effect of Act 7 on Sec. 9A-9, R.L.H. 1959? Specifically, is overtime performed by inspectors on public works subject to Sec. 9A-9 or to Act 7, S.S.L. 1959?"

Section 5-72 of the Revised Laws of Hawaii 1955, as amended by Act 7, provides in part as follows:

> "The provisions of this section shall apply to every officer or employee of the State or any of its political subdivisions, or of any department, board, commission or other agency of the State or any of its political subdivisions . . . ."

The wording of this section makes it clear that it applies to all of the employees of the State, including the inspectors of public works. The exceptions provided in Act 7 are inapplicable to the question under consideration.

Section 9A-9, Revised Laws of Hawaii 1955, was enacted for the purpose of paying overtime to inspectors of public works because they would have been unable to receive

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overtime pay under the provision of section 5-72 , Revised Laws of Hawaii 1955, before the amendment by Act 7.

It is therefore the opinion of this office that all overtime work performed under the provisions of Chapter 9-A, Revised Laws of Hawaii 1955, by inspectors on public works is compensable under the provisions of Act 7.

"2. What retroactivity has Act 7? May overtime accumulated prior to November 13, 1959, the effective date of Act 7, be now adjusted by payment as provided in paragraphs (i) or (k) of Section 1 of Act 7, or must such overtime be adjusted pursuant to Act 238, S.L. 1959?"

Paragraphs (i) and (k) of section 1, Act 7, read as follows:

"(i) Compensation for overtime work may be paid in cash, provided, that in the case of state personnel, funds are available and approval of the governor is had, or in the case of personnel of the political subdivisions of the state, an ordinance authorizes such payment.

"(k) If compensation for overtime worked is due an officer or employee at the time of severance, it shall be paid in cash."

Payment for overtime work under paragraph (i) became effective on November 13, 1959, the date the governor signed the act into law. Therefore, compensation for overtime work under said paragraph may be paid in cash from November 13, 1959.

However, in the case where the officer or employee terminates his employment with the State, we must also compensate him for the compensatory time accumulated under Act 238, Session Laws of Hawaii 1959. Under the provisions of Act 238, an employee working overtime is granted compensatory time and a half off. If a department is unable to grant the compensatory time off during a specified period, the compensatory time off is to be added to and taken at the same time the employee takes his vacation. In other words, compensatory time is treated as vacation time after the specified period.

Therefore, compensatory time accumulated by an

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employee from July 1, 1959, effective date of Act 238, should be paid in cash when the employee terminates his employment with the State under the provision of section 1, paragraph (k), of Act 7.

> "3. If overtime earned prior to the effective date of Act 7 is recognized as vacation credit or for pay-off under the provisions of Act 7, is overtime performed prior to July 1, 1959, the effective date of Act 238, S.L. 1959 (providing for 1 1/2 time as compensatory time off), adjustable as straight time or 1 1/2 time?"

This question assumes that overtime performed prior to July 1, 1959 [effective date of Act 238] is recognized as vacation credit or for pay-off under the provisions of Act 7. We are of the opinion that overtime worked prior to July 1, 1959 should not be recognized as vacation credit or for pay-off. Prior to July 1, 1959, an employee working overtime was permitted compensatory time off only if the granting of compensatory time off did not adversely affect the furnishing of government service. He could not be paid for such overtime work unless an exception was provided by statute similar to section 9A-9, Revised Laws of Hawaii 1959, relating to overtime performed by inspectors on public works.

Therefore, an employee who has worked overtime prior to July 1, 1959, may be granted only compensatory time off based on the number of hours of excess time worked under the provisions of section 5-72, Revised Laws of Hawaii 1955, prior to the amendments.

> "4. Does any conversion of hours of compensatory time off to vacation allowance under Section 1(j) of Act 7 increase the 90 working day maximum vacation accumulation as provided by Sec. 5-30, R.L.H. 1955, as amended by Act 143, S.L.H. 1959?"

Under paragraph (j), section 1 of Act 7, compensation for overtime work, not granted as compensatory time off, is converted to vacation allowance.

Therefore, such compensatory time added to vacation allowance must comply with the provision of section 5-30, Revised Laws of Hawaii 1955, as amended by Act 143, Session Laws of Hawaii 1959. The vacation accumulation, including the

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compensatory time which has been converted to vacation allowance, cannot exceed 90 working days.

"5. May the conversion of hours of compensatory time off to vacation allowance increase the maximum annual vacation accumulation over the 15 days allowed by Sec. 5-30, R.L.H. 1955, as amended by Act 143, S.L.H. 1959?"

The answer to this question is identical to question 4. The maximum annual vacation accumulation, including the compensatory time converted to vacation allowance, is 15 days under the provision of section 5-30, Revised Laws of Hawaii 1955, as amended by Act 143, Session Laws of Hawaii 1959.

Very truly yours,

Harold Y. Shintaku

HAROLD Y. SHINTAKU
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

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INDEXING INSTRUCTIONS

Op. 59-171

EMPLOYEES' RETIREMENT SYSTEM

Membership of Judges

Article V, section 3 of the State Constitution does not nullify provisions of section 6-24.5, R.L.H. 1955, as amended, which provide for optional membership of judges.

However, said section 6-24.5 is now functus and justices of the supreme court and judges of the circuit courts are compulsory members of the retirement system under section 6-23, R. L. H. 1955, as amended.

CONSTITUTION OF THE STATE OF HAWAII

Article V, section 3

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STATE ~~TERRITORY~~ OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

December 29, 1959

Employees' Retirement System
State of Hawaii
Keelikolani Building
Honolulu, Hawaii

Attention: Mr. Harold C. Hill, Secretary

Gentlemen:

This is in reply to your letter of December 1, 1959, requesting an opinion as to whether the optional membership provisions for judges contained in Section 6-24.5, R.L.H. 1955, are nullified by Article V, Section 3 of the Constitution of the State of Hawaii.

Article V, Section 3 of the State Constitution provides, inter alia, that the justices of the supreme court and judges of the circuit courts "shall be included in any retirement law of the State."

Section 6-24.5, R.L.H. 1955, provides:

> "Notwithstanding the provisions of Section 4 of Act 261 of the Session Laws of Hawaii 1945, as amended by Act 72, Session Laws of Hawaii 1951, the payment of the sums authorized to be paid by Act 261 to any judges of the supreme court and the circuit courts of the Territory shall allow such judges at their option, at any time subsequent to May 22, 1945, to remain in, to be, or to become members of the employees' retirement system of the Territory, to be entitled to membership service credit and to purchase credit for former service with the government of the Territory or any county, including service prior to May 22, 1945."

Please be advised that it is the opinion of this office that the constitutional provision of Article V, Section 3 does not serve to nullify the provisions of Section 6-24.5 aforesaid. However, it is the further opinion of this office that said

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Section 6-24.5 is now functus and that the justices of the supreme court and judges of the circuit courts are compulsory members of the retirement system under Section 6-23, R.L.H. 1955, as amended.

Examination of the records of the Constitutional Convention of 1950 shows that the provision of Article V, Section 3 initially evolved out of the proposal of the Committee on Judiciary in Section 6 of Committee Proposal #7 which provided that "Provision for pensioning them shall be made by law."

The proposal of the Committee on Judiciary was amended by the Committee of the Whole to read: "Provision shall be made by law for the inclusion of such justices and judges in any retirement law of the State." The manner in which this amendment came about may be found in Tape 32 of June 13, 1950, at pages 34-50 of the transcript. (See also Committee of the Whole Report No. 8, pages 12-14.)

The amendment was further amended by the Committee on Style. In Standing Committee Report No. 100 at pages 6-7, it is reported: "The sentence 'They shall be included in any retirement law of the State' has been substituted for the sentence 'Provision shall be made by law for the inclusion of such justices and judges in any retirement law of the State.' (Sec. 6, RD. 1). There is no change in substance." (Emphasis supplied.) This last amendment was adopted by the convention.

It is evident from the foregoing that Article V, Section 3 merely mandates the legislature to make provision for the justices and judges and was not intended per se to require the compulsory membership of justices and judges in the retirement system. As such, the constitutional provision does not nullify the provisions of Section 6-24.5 aforesaid. It may be mentioned here parenthetically that there has been as yet no statute passed by the state legislature directly implementing the provision of Article V, Section 3.

Section 6-24.5, while providing for the optional membership of judges, is premised upon the payment of the sums authorized to be paid by Act 261. Its purpose is stated in Standing Committee Report No. 432, Senate Journal 1955, page 589, as follows:

> "Prior to May 22, 1945, judges of the supreme court and of the circuit courts received compensation only from the federal government and, not being in receipt of any compensation from the territory, were not,

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because of such judicial service, entitled to membership in the employees' retirement system.

"Act 261 of the Session Laws of Hawaii 1945, supplemented the salaries of such judges by territorial appropriations, and, under the retirement system laws, became entitled to membership, with contributions based upon the compensation received from the territory. Since the receipt of such additional compensation, the several judges have, if they so desired, become members and have contributed to the system.

"Section 4 of Act 261 was in apparent conflict with the provisions of the retirement system law, and there has been some doubt as to whether that section precluded such membership.

"The purpose of Senate Bill No. 499 is to remove any such doubt by expressly stating that, notwithstanding such section, the several judges can be members of the system, contributing thereto on the basis after the compensation received from the territory. The bill applies retroactively to the effective date of Act 261 and confirms the existing past membership of any judge who has contributed to the system in the past."

See also: Standing Committee Report 894, House Journal 1955, p. 850.

However, with statehood, the justices and judges are no longer paid by the federal government and under Act 261, but are exclusively paid by the State of Hawaii under Act 4 of the First Special Session of the First State Legislature, Section 6-24.5, therefore, is inoperative.

We conclude that, in the absence of Section 6-24.5, Section 6-23, R.L.H. 1955, as amended, controls and that the justices of the supreme court and judges of the circuit courts are compulsory members of the system thereunder.

Respectfully submitted,

Walter T. Shimoda

WALTER T. SHIMODA
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

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INDEXING INSTRUCTIONS

Op. 59-172

POLICE COMMISSION

Outside employment of officers.

Limitation by commission regulations is proper.

POLICE OFFICERS

(Same as above)

POLICE OFFICERS

Membership in associations or organizations.

Should not be limited in contravention of section 2, Article XII of Constitution of Hawaii or section 3-8, Revised Laws of Hawaii 1955.

PUBLIC EMPLOYEES

(Same as above)

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ADDRESS REPLY TO
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AND REFER TO
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STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

December 30, 1959

Police Commission
County of Hawaii
Hilo, Hawaii

Gentlemen:

Please accept our sincere regrets for any inconvenience we may have caused you in not replying more promptly to your inquiry as to the Hawaii County Police Department's General Order No. 40.

It is the belief of this office that Hawaii County Police Department's General Order No. 40, except for paragraph 6, is not in conflict with State or Federal law.

Section 3-83 of the Revised Laws of Hawaii 1955 provides:

> "Outside employment. Any other law to the contrary notwithstanding, an employee subject to any provision of this chapter may engage in outside employment after working hours, but is prohibited and restricted from engaging in any outside employment which is inconsistent or incompatible with or interferes with, the proper discharge of the employee's duties to the Territory or the county, as the case may be. This provision shall supersede all rules and regulations on the subject of outside employment."

A police officer "shall devote his full time to the duties of his office" since that is the amount of time required by the scope of the duties assigned to the chief of police in section 145-6, Revised Laws of Hawaii 1955, and the duties of the chief of police may be assigned by him to any of his subordinates under the provisions of said section 145-6, which states of the chief of police that, "subject to the rules and

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regulations prescribed by the commission, he shall have control, management and direction of all officers and employees serving under him with full power to detail any of such officers or employees to such public service as he may direct." That a police officer is expected to be available for the call of duty on a twenty-four-hour a day basis can also be implied from section 145-8, Revised Laws of Hawaii 1955, which states in part, "except as otherwise provided, all acts or duties which may be performed by the chief of police may in like manner and with like effect be performed by any police officer under him." It seems clear that the above provisions impliedly intend a police officer to be on duty at all times, even though he has specific regular duty hours assigned.

Under the provisions of section 145-4, Revised Laws of Hawaii 1955, the police commission "shall adopt such rules and regulations as it may consider necessary for the conduct of its business and regulation of the matters herein committed to its charge." Under this provision the commission may adopt rules regarding outside employment as long as those rules do not conflict with the law.

The chief of police and the officers under him have the duty to carry out the policies prescribed by the police commission. If outside employment interferes with the ability of the police officers to carry out their assigned duties, the employment is contrary to the law.

It follows that where the police commission has determined under said section 3-83 that any outside employment is inconsistent with or incompatible to the proper discharge of a police officer's duty, the police commission may prohibit or restrict the officer's engaging in such employment.

While the State statutes imply that a police officer is on duty at all times and that any outside employment is prohibited, it is the feeling of this office that such a reasoning is too narrow an interpretation of the intent of the law. It is felt that a better interpretation is that an officer may engage in certain types of outside employment which will not affect the performance of his regularly assigned duties and limited by the condition that the officer is "on call" at all times.

Except for paragraph 6, it appears General Order No. 40 would not in any manner contravene the State laws. Under

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General Order No. 40, each officer would be permitted to engage in outside employment of a very limited nature and to the extent and subject to the restriction that such employment must be authorized by the chief of police with the approval of the police commission. It would seem that each individual employment would be approved or disapproved on its own merits after being thoroughly scrutinized.

It is suggested that paragraph 6 of your General Order No. 40 be reconsidered in light of section 2, Article XII of the Constitution of Hawaii and section 3-80 of the Revised Laws of Hawaii 1955.

Said section 2 of Article XII states:

> "Persons in public employment shall have the right to organize and to present and make known their grievances and proposals to the State, or any political subdivision or any department or agency thereof."

Said section 3-80 states:

> "Membership in organizations; grievances and proposals. Membership in any association or organization of public employees not affiliated with any other organization imposing an obligation or duty upon them to engage in any strike, or proposing to assist them in any strike, by any person in civil service, or the presenting by any such person or groups of persons of any grievance or proposal to the legislature or any public officer or body, shall not constitute or be cause for reduction in rank or compensation or removal from civil service. The right of any individual officer or employee in civil service, or any group of officers or employees, or of officers and employees, to present grievances or to petition for redress of grievances to the legislature or any member thereof, or any other public officer or body, shall not be denied or interfered with. Further, no person in civil service shall be required as a condition of employment or promotion to be a member of any association or organization."

It is particularly felt that, for example, restriction 6(c)(2) of General Order No. 40 pertaining to membership in a group that is "opposed to minority groups" is an undue

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restriction of an employee's right to membership in organizations, and it is also noted the restriction of 6(c)(1) appears to be unnecessary when it is remembered that section 5-8 of the Revised Laws of Hawaii 1955 provides:

> "Acts, activities and conduct prohibited. It shall be unlawful:
>
> (a) For any government employee to participate in any strike against the government;
>
> (b) For any person, by picketing or otherwise, to instigate, induce, procure, order, direct, coerce, or incite any violation of sections 5-7 to 5-12, or to undertake to concert with another to violate such sections."

It is also noted that section 6(c)(3) might be interpreted to "frown upon" the presentation of any police officer's grievance as to the nature of his duties or other work assignments. The same comment also applies to subparagraph 6(b).

Since subparagraph 6(a) apparently is intended to apply to matters other than the problem of police officers who are members of the National Guard or Army Reserve, etc., it is suggested the language be made more specific because the phrase "the activities or purposes of which will in any manner * * * prevent members from performing their full duties" could be interpreted very broadly in view of the twenty-four-hour a day duty required by paragraph 3.

Very truly yours,

W. K. WATKINS, JR.
Deputy Attorney General

APPROVED:

SHIRO KASHIWA
Attorney General

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1960

INDEXING INSTRUCTIONS

Op. 60-1

PUBLIC EMPLOYEES, EXTRA COMPENSATION

Act 7, First Special Session of the First State Legislature 1959, amending section 5-72, Revised Laws of Hawaii 1955, providing for overtime payment, is applicable to all employees of the State except those specifically excluded by said act.

CIVIL SERVICE - COMPENSATION - OVERTIME

Act 7, First Special Session of the First State Legislature 1959, amending section 5-72, Revised Laws of Hawaii 1955, providing for overtime payment, is applicable to all employees of the State except those specifically excluded by said act.

PUBLIC EMPLOYEES, EXTRA COMPENSATION

Act 7, First Special Session of the First State Legislature 1959, amending section 5-72, Revised Laws of Hawaii 1955, does not make illegal the schedule of work in excess of the hours of work provided in said act. It requires compensation for all hours of work in excess of the hours of work limitation, whether granted as compensatory time off or paid in cash at the rate of one and one-half hours for each hour of overtime work.

ADDRESS REPLY TO
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STATE ~~TERRITORY~~ OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

January 11, 1959

Mr. August Markham
Probation Administrator
Juvenile Court, Second Circuit
Wailuku, Maui

Dear Mr. Markham:

This is in response to your letter dated January 4, 1960, requesting our opinion on certain problems arising with the passage of Act 7, Special Session of the First State Legislature 1959.

The first question you ask is whether or not Act 7 is applicable to your detention home staff. It is the opinion of this office that Act 7 is applicable to your detention home staff. Section 5-72, Revised Laws of Hawaii 1955, as amended by Act 7, provides in part as follows:

> "The provisions of this section shall apply to every officer or employee of the state or any of its political subdivisions, or of any department, board, commission or other agency of the state or any of its political subdivisions . . ." (exceptions omitted as not pertinent here).

The wording of this section makes it clear that it applies to all employees of the State, including the employees of your detention home. Therefore, the hours of work of the matrons of your staff must comply with the provisions of section 5-72, as amended by Act 7.

The second question you ask is whether or not the existing work schedule outlined in your letter is in violation of the provisions of Act 7. Act 7 does not make illegal the schedule of work in excess of the hours of work provided in said Act. It requires compensation for all hours of work in excess of the hours of work limitation, whether granted as compensatory time off or paid in cash at the rate of one and

Op. 60-1

one-half hours for each hour of overtime work. Therefore, you will be required to compensate the matrons for all hours worked in excess of the hours of work limitation provided by Act 7.

Very truly yours,

Harold Y. Shintaku

HAROLD Y. SHINTAKU
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

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INDEXING INSTRUCTIONS

BOARD OF AGRICULTURE & FORESTRY

Whether the sum of $30,000 appropriated by the legislature under Act 224, S. L. H. 1959 & labelled "Pohakuloa Camp" can be used for the development of Ahumoa, an area within the Pohakuloa reserve but approximately seven miles from the actual Pohakuloa camp.

STATUTES

Construction: Act 224, 1E(2), S. L. H. 1959

Whether Item 1E(2), of Act 224, S. L. H. 1959 appropriating $30,000 for the development of Pohakuloa Camp" can be construed to use such sum for the development of Ahumoa, an area within the Pohakuloa reserve but approximately seven miles from the actual Pohakuloa Camp.

SESSION LAWS OF HAWAII 1959

Act 224, 1E(2)

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TERRITORY OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

January 11, 1960

Mr. Wayne Collins, President
Board of Commissioners of
Agriculture and Forestry
1428 S. King Street
Honolulu, Hawaii

Dear Mr. Collins:

Receipt is acknowledged of letter dated December 2, 1959 from Dr. Ernest H. Willers, then Acting President of the Board of Agriculture and Forestry, requesting an opinion from this office on the question of whether the $30,000 appropriated by the legislature under Item 1E(2) of Act 224, S.L.H. 1959, for the use of "Pohakuloa Camp" can be used for the development of Ahumoa. This site is located in the Pohakuloa area but is approximately seven miles from the actual Pohakuloa Camp.

The initial budget presented by the Board to the legislature through the State Planning Office called for the sum of $112,000 for development of "Pohakuloa Camp". The State Planning Office in turn reduced the sum to $70,000 but labelled the appropriation "Pohakuloa (Mauna Kea Game Reserve) -- Territory". But the Governor's budgetary document showed this $70,000 earmarked for "Pohakuloa Camp". The legislature finally appropriated the sum of $30,000 for development of "Pohakuloa Camp".

It is significant to note that the Board did not specifically request appropriation for development and improvements to Ahumoa as such. In fact the budget showed a request for appropriation for the development of Pohakuloa Camp, the area finally designated by the legislature for development. Throughout the whole process of initiating, screening, examining, and finally approving the budget, only one department ever labelled the appropriation other than Pohakuloa Camp. The Board, the Governor, and the legislature all designated the appropriation under the heading "Pohakuloa Camp". The State Planning Office was the only agency to

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label the appropriation as "Pohakuloa (Mauna Kea Game Reserve) -- Territory", from which, it is argued, the authority to use such funds for development of Ahumoa arises. In view of the fact that the final authority, the legislative body, saw fit to appropriate sums for the development of Pohakuloa Camp, and in view of the fact that the initiating body, the Board, requested appropriation for Pohakuloa Camp and not for Ahumoa, we feel that such sums as appropriated by the legislature cannot be used for the development and improvement to an area other than Pohakuloa Camp.

On the basis of the foregoing discussion, it is the opinion of this office that the sum of $30,000 appropriated by the legislature for the development of Pohakuloa Camp under Act 224, S.L.H. 1959, cannot be used for the development and improvement to Ahumoa.

Very truly yours,

Allen I. Marutani

ALLEN I. MARUTANI
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

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OP. 60-3

INDEXING INSTRUCTIONS

CITY AND COUNTY OF HONOLULU

Whether or not the City & County of Honolulu, under Act 255, S. L. H. 1959, is entitled to reimbursement for pay increases granted to employees whose compensation is paid from the Special School Fund which is financed by transfers from the City's General Fund.

STATUTES:

Act 255, S. L. H. 1959

Whether or not the C & C of Honolulu is entitled to reimbursement for pay increases granted to employees whose compensation is paid from the Special School Fund which is financed by transfers from City's General Fund.

SESSION LAWS OF HAWAII 1959

Act 255

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STATE [redacted] OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

January 12, 1960

Reversed by
Op. 60-98

Mr. Charles G. Clark
Acting Mayor
City and County of Honolulu
Honolulu, Hawaii

Dear Sir:

This is in response to your letter dated November 10, 1959, addressed to the Honorable William F. Quinn, requesting an opinion from this office on the question of whether or not the City and County of Honolulu, under Act 255, S. L. H. 1959, is entitled to reimbursement for pay increases granted to employees where compensation is paid from the Special School Fund which is financed by transfers from the City's General Fund.

Paragraph 3 of section 4 of Act 255, S. L. H. 1959, reads:

> "The funds appropriated by this section shall cover the compensation of all officers and employees of the Territory and counties except--
>
> "a. Officers and employees of the Territory whose compensation is paid from federal funds or from special funds of the Territory, whether in whole or in part and whether directly or indirectly, to the extent that the amount required to pay the increase in compensation authorized by sections 2 and 3 of this Act can be obtained from such federal funds or special funds;
>
> "b. Officers and employees of the city and county of Honolulu whose compensation is paid from federal or special funds."

The statutory language is very clear that the compensation paid from special funds to officers and employees of the City and County of Honolulu is not to be covered by the funds appropriated by section 4 of Act 255. Where no ambiguity or uncertainty is present, we are bound by the literal language of the statute.

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The rule of statutory construction with respect to liberal or strict interpretation of the statutory language has no application where the language of the statute is clear. (3 Sutherland, Statutes & Statutory Construction, sec. 5504 (and cases cited in footnote 7), 3rd Ed., (1943)).

The fact that the Special School Fund is financed by transfers from the City's General Fund is not significant in the ultimate determination. The employees are paid from this Special Fund, whatever the source of such fund may be. The statute is very clear that an exception is made where the compensation is paid from special funds.

In your letter you mention "We do not believe that the legislature intended to discriminate against the City and County of Honolulu in any way . . . ." However, an examination of prior legislation on this matter shows that in 1957 the legislature did not make any distinction in the counties making a blanket provision applicable to all counties. (S. L. H. 1957, c. 148, sec 3). The funds appropriated by such a bill did not apply to officers and employees of all counties where compensation was paid from federal funds or special funds of the Territory or counties. But, in 1959, the legislature expressly excepted the City and County of Honolulu from participating in the use of such funds while at the same time eliminating the other counties from the exception proviso. This short legislative history of this particular provision shows that the legislature intended to except the City and County of Honolulu

On the basis of the foregoing discussion it is the opinion of this office that the City and County of Honolulu, under Act 255, S. L. H. 1959, is not entitled to reimbursement for pay increases granted to employees where compensation is paid from the Special School Fund.

Very truly yours,

Allen I. Marutani

ALLEN I. MARUTANI
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

Op 60-3

YS:ft
I-C
Op. 60-4 ✓

January 27, 1960

Mr. Michael M. Miyake
Comptroller
Department of Accounting
and General Services
State of Hawaii
Honolulu, Hawaii

Dear Sir:

This is to confirm our verbal opinion of an earlier date upon the question of whether warrants printed as orders on the State Treasurer may continue to be issued after the reorganization of the State government has been effectuated.

The question arises out of the fact that the Hawaii State Government Reorganization Act of 1959 transfers the functions of funds custody and cash management from the State Treasurer to the newly established Department of Budget and Review. This Act also establishes the Department of Treasury and Regulation to be headed by a single executive called the "Treasurer" who, however, is given no fiscal functions responsibilities. Strictly speaking, after the effective date of the Reorganization Act, warrants should be drawn on the Director of the Budget rather than the Treasurer. This problem is resolved by section 31 of the Reorganization Act which states:

> "Whenever the functions of a previously existing department, office or other agency are transferred to any department established by this Act, the newly established department shall succeed to all of the rights and powers exercised, and all of the duties and obligations incurred by the previously existing department, office or agency in the exercise of the functions transferred, whether such powers, duties and obligations are mentioned in or granted by any law, contract or other document. All references in any such law, contract or document to such previously existing department, office or agency in connection

Op. 60-4

with the functions transferred shall apply to the newly established department as if the latter were specifically named in such law, contract or document in place of the previously existing department, office or agency."

It is therefore the opinion of this office that warrants printed as orders on the State Treasurer may continue to be issued until the present supply is exhausted. However, to minimize the confusion and to avoid unnecessary delays, we suggest that all banks, depositories, and fiscal agents, into whose hands these warrants might fall, be apprised of your intention to continue to use the present form of treasury warrants. We also invite your attention to an urgency measure now under consideration by this office which would change the name of the Department of Budget and Review to that of the Department of Finance to be headed by a single executive to be called the Director of Finance.

Very truly yours,

YOSHIO SHIGEZAWA
Deputy Attorney General

APPROVED:

SHIRO KASHIWA
Attorney General

Op. 60-4

INDEXING INSTRUCTIONS - OP. 60-5

Governor

Powers

Except as empowered by the Constitution executive officers may not act without legislative authority and the governor of the State of Hawaii may not join the Western Governors in forming a committee to employ and supervise a land agent in Washington to further the needs of the public land states and to fix the assessments due from each state which will defray the expenses of such committee and land agent.

Op 60-5

ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
AND REFER TO
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Op. 60-5

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

February 1, 1960

Office of the Governor
State of Hawaii
Iolani Palace
Honolulu, Hawaii

Attention: Mr. Jess H. Walters

Gentlemen:

Subject: "Land Agent" for Public Land States.

This is with reference to the letter of Mr. Jess H. Walters, Legislative Assistant to the Governor, dated January 26, 1960, requesting our advice as to "whether there are any existing constitutional or statutory barriers standing in the way of Hawaii's participating in a joint Western State Plan to hire a 'land agent'." The plan is more fully set forth in the attachments thereto.

It is the basic principle of law that, "except as empowered by the constitution, executive officers may not act without legislative authority . . . ." 16 C.J.S., Constitutional Law, sec. 167, p. 845. See also: 24 Am. Jur., Governor, sec. 5.

We know of no constitutional or statutory sanction for such a plan and advise the Governor against participation without express legislative authority. This is further predicated upon the following reasons:

Article XIV, section 5 of the State Constitution, dealing with intergovernmental relations, provides:

"The legislature may provide for cooperation on the part of this State and its political subdivisions with the United States, or other states and territories, or their political subdivisions, in matters affecting the public health, safety and general welfare, and funds may be appropriated to effect such cooperation."

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This would appear to confirm the general principle of law stated above.

The case of Campbell v. Stainback, et al., 38 Haw. 310, upholds the expenditure of public funds for lobbying. But it must be noted that the legislature made express provision therefor, which, again, indicates the necessity for legislation.

Act 270 of the Session Laws of Hawaii 1959, in providing for a contingent fund, states:

> "Expenditures from this fund may be made with the approval of the Governor for urgent needs for which no specific appropriation or an insufficient appropriation is made herein or otherwise . . . ."

However, we doubt whether this constitutes adequate authority for participation in the plan aforesaid. Further, it is questionable whether the plan can be deemed an "urgent need".

Yours very truly,

Walter T. Shimoda

WALTER T. SHIMODA
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

Op 60-5

INDEXING INSTRUCTION

Op. 60-6

AGRICULTURE & FORESTRY, Board of

Whether the board is empowered to accept a cashier's check in lieu of a bond for the importation of a monkey into the islands.

Op 60-6

ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
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~~AIM:sbm~~
~~II-A~~

Op. 60-6

STATE ~~TERRITORY~~ OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

February 2, 1960

Mr. Wayne L. Collins, Director
Department of Agriculture and
Conservation
State of Hawaii
Honolulu 14, Hawaii

Dear Sir:

This is to acknowledge receipt of your letter dated December 8, 1959 in which you request an opinion from this office whether the Board of Commissioners of Agriculture and Forestry is empowered to accept a $50 cashier's check from a private individual in lieu of a $50 bond to insure compliance with the conditions imposed by the board for the importation of a monkey.

The board adopted a policy on November 30, 1955 requiring an importer of an animal to put up a bond to insure that he will abide by the conditions imposed by the board for its admission.

Sections 18-8(c) and 20-2 of the Revised Laws of Hawaii 1955 provide that the board may make rules and regulations, subject to the approval of the governor, concerning the inspection, quarantine, or disinfection upon introduction into the State, of animals and the premises and effects used in connection with such animals. Reading these two sections together with the other related provisions under sections 18-8 and 20-2, we feel that the board is empowered to establish such rules and regulations as imposition of a bond upon importing of an animal. However, the present contention that the board can exact a bond from importers is based upon board approval of a policy for processing the admission of animals into Hawaii. We feel that this authority is insufficient, but such authority to exact a bond must be derived from rules and regulations properly promulgated with the approval of the governor.

It is within the power of the board to require deposit of a cashier's check in lieu of a bond. But this power can only be effectuated by rules and regulations of the board properly promulgated.

Op 60-6

On the basis of the foregoing discussion, it is the opinion of this office that the board can accept a cashier's check for $50 in lieu of a bond for the importation of a monkey, if such is pursuant to rules and regulations adopted by the board and approved by the governor.

Yours very truly,

Allen I. Marutani

ALLEN I. MARUTANI
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

Of 60-6

ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
AND REFER TO
INITIALS AND NUMBER

HHS:ft

V. XIII
Op. 60-7

TERRITORY OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

February 16, 1960

Mr. Arthur A. Akina, Jr.
Director of Personnel Services
State of Hawaii
Keelikolani Building
Honolulu, Hawaii

Dear Sir:

This is in reply to your letter of January 15, 1960, wherein you asked the opinion of this office on several questions.

The first question was:

> "Is Mr. Paul Thurston's status as Director, Bureau of the Budget, and the salary attendant to that status to be preserved under the provision of Section 32 if he subsequently and immediately upon the formulation of the new State agency accepts appointment to the position of a division head, even though that position may come within the provision of Chapters 3 and 4, for purposes of classification and pay, and of appointment?"

You further specify this question in the following form:

> "Whether or not the change from a department head's status to that of a division head within a department, carries with it consideration for an adjustment in his salary or is it intended that the salary derived from this former department head's status is to continue."

Pursuant to Act 1, Second Special Session 1959, a new Department of Budget and Review was established. The former Bureau of the Budget was abolished and its director, Mr. Paul Thurston, and most of its functions were transferred to this new Department. Though

Mr. Thurston was not selected to head this department he is, you state, being considered for the position of head of one of the divisions to be created within this new Department.

Prior to his transfer, Mr. Thurston's salary was $16,500 per annum as set by law. Mr. Thurston was an appointee of the governor and did not have civil service status.

Under these facts you ask: Is Mr. Thurston still entitled to his $16,500 per annum salary, when, as a result of Act 1, he is transferred to this Department in a status less than that of a department head and accepts a civil service position?

Section 32 of Act 1 deals generally with the transfer of personnel. It is a section composed of four paragraphs. The first states in general that employees and officers shall follow the functions. The second preserves certain rights of those employees having tenure. The fourth makes special provision for those officers or employees having tenure whose positions are abolished. The third paragraph which appears most closely related to your question provides as follows:

> "An employee of the state who does not have tenure and who may be transferred or appointed to a civil service position as a consequence of this Act shall become a civil service employee without the loss of salary, seniority, prior service credit, vacation, sick leave or other employee benefits or privileges and without the necessity of examination; provided, that such employee or officer possesses the minimum qualifications for the position to which he is transferred or appointed."

While paragraphs one and four of this section mention officers and employees, paragraph three, with which we are concerned, refers only to employees. There is a recognized distinction between officers and employees, and by the use of these terms, the legislature evidences an awareness of such distinction, or at least an intention to refer to two different groups of government workers.

In referring only to employees in paragraph three, was the legislature purposely attempting to limit the class of workers to whom the provisions of that paragraph were to apply? The answer to this question is vital

inasmuch as there is hardly any room for argument that Mr. Thurston, prior to his transfer, as Director of the Bureau of the Budget was an officer as contrasted to an employee.

We must confess that there is nothing in section 32 nor in the entire act which specifically prohibits the application of the provisions of the third paragraph of section 32 to officers as well as employees. We know that section 32 was intended to be a general section and an attempt to make provision for all changes and shifts in personnel resulting from the reorganization of our state government. This being so, a construction which is consonant with the broad and sweeping aim of section 32 should attach to this section. Therefore, where there are omissions, which appear not purposeful but rather inadvertent, the law should be so construed by supplying such omissions to make it whole. Accordingly, the third paragraph of section 32 should be expanded in scope so as to apply to officers as well as employees; otherwise, officers placed in situations provided for paragraph three would be in limbo. Such a result could not have been intended by the legislature.

Paragraph three is further limited to those who do not have tenure. You ask what is meant by the word "tenure". Paragraph two of section 2 provides as follows:

> "No employee of the state having tenure shall suffer any loss of salary, seniority, prior service credit, vacation, sick leave or other employee benefit or privilege as a consequence of this Act; provided that subsequent changes in status may be made pursuant to chapters 3 and 4 of the Revised Laws of Hawaii 1955, as amended."

The benefits and privileges enumerated in this paragraph are those which accrue to civil service employees. Further, the fact that employees having tenure may have their status changed pursuant to chapters 3 and 4 of the Revised Laws of Hawaii 1955 indicate that civil service employees are involved. Chapter 3 embodies the state civil service laws and chapter 4, the state compensation law. "Employees having tenure" must therefore mean civil service employees, and "tenure" must refer to that kind of employment security afforded by our civil service laws. Conversely this must mean that "an employee of the state who does not have tenure" is an employee who is not within the civil service of the state.

From the foregoing, it is established that Mr. Thurston is a state employee or officer who is covered by the provisions of paragraph three of section 32. This provides that any such person transferred or appointed to a civil service position "as a consequence of this Act shall become a civil service employee without the loss of salary, . . ." provided he meets the minimum qualifications for the position. We shall assume that Mr. Thurston meets such qualifications. We shall further assume that Mr. Thurston was or will be transferred to a civil service position and "as a consequence of thic Act". Under these circumstances, this office feels that when the transfer takes place, Mr. Thurston will serve in his new position "without loss of salary". This means without diminution in salary; if he were receiving $16,500 per annum as Director of the Bureau of the Budget, he will continue to receive this same salary in his new civil service position.

The second question was:

> "Assuming that in the natural course of public administration, further changes in the Department of Budget and Review take place and as a result of these changes the duties and responsibilities of Mr. Thurston's position also undergo changes, do the provisions of the State Personnel Laws still apply?"

This office feels that the answer to this question is yes. The orderly and nondiscriminatory application of the state personnel laws dictates such a conclusion. While it is true that specific provision for this kind of subsequent change is made only with respect to those employees having tenure before transfer (see paragraph two of section 32) and no similar provision appears with respect to those employees referred to those in paragraph three of section 32, we cannot, from this omission find a deliberate intent on the part of the legislature to forever preserve for this latter group of employees the salary to which they were entitled before the transfer. It should be borne in mind that Act 1 is designed principally to provide for situations and problems arising from the reorganization and does not attempt to govern the course of action after the reorganization has been completed. It is this latter situation to which your question is addressed. If an employee having tenure is transferred to a civil service position, then he should be subject to all the processes of the civil service laws.

And if these include reclassification and salary changes, then he and his position must abide with these changes. We can find no reason to exclude such employees from this process. If employees who, prior to reorganization, are civil service employees and who are transferred to civil service positions are made subject to these changes, then noncivil service employees who are transferred to civil service positions should likewise be made subject to these changes. It is not prior status that is determinative, rather it is their present status.

Yours very truly,

Henry H. Shigekane

HENRY H. SHIGEKANE
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

AG

ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
AND REFER TO
INITIALS AND NUMBER
NK:n

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Op. 60-8

STATE
~~XXXXXXXXX~~ TERRITORY OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

February 18, 1960

Mr. Charles J. Gillespie
Deputy Bank Examiner
Department of Treasury and Regulation
State of Hawaii
Honolulu, Hawaii

Dear Sir:

This is in response to your letter of February 9, 1960, requesting a ruling on the question whether an industrial loan company may charge the general excise tax to its customers.

You have requested a review of the opinion of the Attorney General dated September 3, 1957 (RVL:rs; 946-46, OLC). In that opinion this office said that it would not be permissible for a loan company to charge its customers for the general excise tax unless it could lawfully increase the interest rate itself; that whether the interest rate could be increased turned on the terms of the loan agreement and the provisions of Chapter 194, Revised Laws of Hawaii 1955; and that nothing in the general excise tax law permitted an addition to the allowable maximum.

As there has been no legislation subsequent to that opinion changing the nature of the tax, our view of the question concerned has not changed.

With respect to section 194-15 (h)(1), Revised Laws of Hawaii 1955, to which reference was made in your letter, the "actual taxes" which industrial loan companies may lawfully charge their customers are limited to the taxes therein specified. Therefore, it does not authorize the passing on of the general excise tax.

Very truly yours,

Nobuki Kamida

NOBUKI KAMIDA
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

Op. 60-8

INDEXING INSTRUCTIONS

I. GENERAL EXCISE TAX - OP. 60-8

Industrial Loan Companies

It is not permissible for an industrial loan company to charge its customers for the general excise tax unless it can lawfully increase the interest rate; whether the interest rate can be increased turns on the terms of the loan agreement and the provisions of Chapter 194, Revised Laws of Hawaii 1955; nothing in the general excise tax law permits an addition to the allowable maximum. The general excise tax is not among the "actual taxes" which may lawfully be charged by industrial loan companies to their customers.

* * * * *

II. REVISED LAWS OF HAWAII 1955, CHAP. 117

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III. REVISED LAWS OF HAWAII 1955, CHAP. 194, SEC. 194-15(h)(1)

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ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
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Op. 60-9

STATE TERRITORY OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

February 17, 1960

Sgt. Roy Marchesi
Honolulu Police Department
Honolulu 13, Hawaii

Dear Sir:

This is to confirm our recent conversation on the Geneva Convention on Road Traffic held in 1949.

It is the opinion of this office that the Convention on Road Traffic which was ratified by the United States Senate on August 9, 1950 and signed by the President on April 16, 1952, has the force and effect of law. As a consequence, it is binding upon the jurisidictions of the State of Hawaii and the City and County of Honolulu. See United States Treaties and Other International Agreements, Vol. 3, Part III (1952) at page 3008; 52 Am. Jur. 805.

Yours truly,

Vernon F. L. Char

VERNON F. L. CHAR
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

Op. 60-9

INDEXING INSTRUCTIONS

I. GENERAL EXCISE TAX - OP. 60-8

Industrial Loan Companies

It is not permissible for an industrial loan company to charge its customers for the general excise tax unless it can lawfully increase the interest rate; whether the interest rate can be increased turns on the terms of the loan agreement and the provisions of Chapter 194, Revised Laws of Hawaii 1955; nothing in the general excise tax law permits an addition to the allowable maximum. The general excise tax is not among the "actual taxes" which may lawfully be charged by industrial loan companies to their customers.

* * * * *

II. REVISED LAWS OF HAWAII 1955, CHAP. 117

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III. REVISED LAWS OF HAWAII 1955, CHAP. 194, SEC. 194-15(h)(1)

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ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
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Op. 60-8

STATE
~~TERRITORY~~ OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

February 18, 1960

Mr. Charles J. Gillespie
Deputy Bank Examiner
Department of Treasury and Regulation
State of Hawaii
Honolulu, Hawaii

Dear Sir:

This is in response to your letter of February 9, 1960, requesting a ruling on the question whether an industrial loan company may charge the general excise tax to its customers.

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Very truly yours,

Nobuki Kamida

NOBUKI KAMIDA
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

Op. 60-8

INDEXING INSTRUCTIONS

Op. 60-9

I. Geneva Convention on Road Traffic

A. Geneva Convention on Road Traffic, which was ratified by the Senate and signed by the President of the United States, is binding upon jurisdictions of the State and the City and County.

II. Treaties

A. Conventions ratified by the Senate and signed by the President of the United States have the force and effect of law.

VFLC:ru

Op. 60-9

ADDRESS REPLY TO
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Op. 60-9

STATE ~~TERRITORY~~ OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

February 17, 1960

Sgt. Roy Marchesi
Honolulu Police Department
Honolulu 13, Hawaii

Dear Sir:

This is to confirm our recent conversation on the Geneva Convention on Road Traffic held in 1949.

It is the opinion of this office that the Convention on Road Traffic which was ratified by the United States Senate on August 9, 1950 and signed by the President on April 16, 1952, has the force and effect of law. As a consequence, it is binding upon the jurisidictions of the State of Hawaii and the City and County of Honolulu. See United States Treaties and Other International Agreements, Vol. 3, Part III (1952) at page 3008; 52 Am. Jur. 805.

Yours truly,

Vernon F. L. Char

VERNON F. L. CHAR
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

Op. 60-9

ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
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Op. 60:10 ✓

STATE ~~TERRITORY~~ OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

February 26, 1960

Dr. Richard K. C. Lee
Director of Health
State of Hawaii
Honolulu, Hawaii

Dear Sir:

This is in reply to your letter of February 23, 1960, requesting our consideration of the problem of whether the term "enclosed projections" as used in section 5.08 (d) 3 of Chapter Two of the Public Health Regulations includes enclosed public stairways serving multi-story dwellings. It is our opinion that the term does include such enclosed public stairways.

Article V of the Housing Code of the Board of Health is designed to regulate the construction of new buildings. A reading of the sectional provisions of that article clearly indicates that they are not intended to be mutually exclusive in application. Instead, it is obvious that those sections should be interpreted and applied in light of each other.

Section 5.03 is concerned only with the lighting and ventilation of public stairways. It says nothing about set-back areas because it does not seek to regulate that aspect. The spacing requirements of new buildings are set out in sections 5.05 through 5.08 and these requirements must also be complied with.

Section 5.08 sets out maximum projections into required yard space by "eaves and vertical fins", "other enclosed projections", and "enclosed projections". It is our opinion that the term "enclosed projections" is not limited to projections specifically mentioned in section 5.08 (d). Therefore, an enclosed public stairway is within the meaning of the term "enclosed projection".

Very truly yours,
Carlos Ramelb
CARLOS RAMELB
Deputy Attorney General

APPROVED:
Shiro Kashiwa
SHIRO KASHIWA
Attorney General

60-10

INDEXING INSTRUCTIONS

I. LEGISLATURE

Budget Session

Power to consider and enact tax revenue measures reducing taxes.

A tax bill intended to reduce taxes may be considered and enacted during a budget session of the legislature without qualifying as an urgency measure.

* * * * *

II. LEGISLATURE

Power of appropriation

Power of the legislature to appropriate public moneys is co-extensive with the power to levy and collect taxes.

* * * * *

III. LEGISLATURE

Power of taxation

Power of the legislature to levy and collect taxes is co-extensive with the power to appropriate public funds.

* * * * *

IV. WORDS AND PHRASES

"Revenue bills necessary therefor."

A tax bill intended to reduce taxes may be "a revenue bill necessary therefor" within the meaning of Article III, section 2, second paragraph, State Constitution.

A bill decreasing taxes may be a bill for "raising revenue."

"Necessary" means adapted or appropriate to a purpose.

* * * * *

V. WORDS AND PHRASES

"Raising revenue"

A bill decreasing taxes is a bill for raising revenue within the meaning of a constitutional provision requiring all "bills for raising revenue" to originate in the lower branch of a bicameral legislature.

"Necessary" means adapted or appropriate to a purpose.

* * * * *

VI. CONSTITUTION OF THE STATE OF HAWAII

Article III, Section 2.

* * * * *

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NK:n
11:XXIV
Op. 60-11

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU, HAWAII

February 25, 1960

The Honorable William H. Hill
President of the Senate
and
The Honorable Elmer Cravalho
Speaker of the House of Representatives
Regular Session of 1960
First State Legislature, State of Hawaii
Honolulu, Hawaii

Gentlemen:

This concerns the question whether a bill which decreases tax revenues is a revenue bill within the meaning of the second paragraph of section 11 of Article III of the State Constitution which provides in part as follows:

> "At budget sessions the legislature shall be limited to the consideration and enactment of the general appropriations bill for the succeeding fiscal year and bills to authorize proposed capital expenditures, revenue bills necessary therefor, . . ."

This office is of the opinion that the words "necessary therefor" do not exclude a revenue bill intended to reduce taxes.

It has been held that a bill decreasing taxes is a bill for "raising revenue" within the meaning of a constitutional provision stating that "all bills raising revenue shall originate in the House of Representatives" if it amends an act to raise revenue, for the amendatory act becomes, when enacted, a part of such act thereafter effective as though it had been incorporated in it as originally enacted. In Re Opinions of the Justices, 190 So. 824, 825 (Ala. 1939). See also In Re Opinions of the Justices, 31 So.2d 558 (Ala. 1947).

The power of the legislature to appropriate public funds is co-extensive with the power to levy and collect taxes. See Mills v. Stewart, 247 Pac. 332, 334 (Mont. 1926) and the cases cited therein. It would not be doubted that the Legislature could appropriate more than the receipts estimated under existing tax laws and that bills

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increasing taxes to meet the proposed expenditures would be necessary therefor. On the other hand, it will seem that a bill decreasing taxes may be considered "necessary therefor" if by the word "necessary" is meant appropriate or adapted to a purpose.

Discussing the word "necessary" in the case of McCulloch v. Maryland, 4 Wheat. 315, 413, Chief Justice Marshall said:

> "If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. . . . It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense--in that sense which common usage justifies. The word 'necessary' is of this description. It has not a fixed character, peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases."

And in Juilliard v. Greenman, 110 U.S. 421, 440, the phrase "necessary and proper" in section 8 of Article 1 of the Federal Constitution was said to include all appropriate means, conducive and adapted to the end to be accomplished.

A like meaning may be ascribed to the constitutional provision in question.

The Constitution of the State of California has an almost identical provision which reads:

> "All regular sessions in even-numbered years shall be known as budget sessions, at which the Legislature shall consider only the budget bill for the succeeding fiscal year, revenue acts necessary therefor, . . ." (Article IV, section 2(a)).

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This office has been informed by the Attorney General of the State of California that it is the opinion of his office as well as that of the Legislative Counsel that the phrase "revenue acts necessary therefor" includes any revenue act which will increase or decrease state revenues. See 15 Cal. Op. Atty. Gen., page 81 at page 82; Opinion of the Legislative Counsel, Journal of the Assembly of California Regular Session 1948, page 27; Id. page 388; Opinion of the Legislative Counsel, Assembly Journal, Extraordinary Session 1956, page 240.

Respectfully submitted,

/s/ Nobuki Kamida

NOBUKI KAMIDA
Deputy Attorney General

APPROVED:

SHIRO KASHIWA
Attorney General

60-11

ADDRESS REPLY TO
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X-A; XVIII-C
Op. 60-12

STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

February 26, 1960

Dr. Richard K. C. Lee
Director, Department of Health
and
Dr. Charles H. Silva, Treasurer
Department of Treasury and Regulation
State of Hawaii
Honolulu, Hawaii

Gentlemen:

This is to confirm our oral opinion of an earlier date upon the following question:

> "Under Act 1, First Special Session, First State Legislature 1959, Hawaii State Government Reorganization Act of 1959, does the function of issuing licenses to practice medicine and surgery rest with the Director of Health as head of the Department of Health or with the Treasurer as head of the Department of Treasury and Regulation?"

It is the opinion of this office that the director of health, rather than the treasurer, is the proper authority to issue licenses to practice medicine and surgery.

Chapter 64 of the Revised Laws of Hawaii 1955 provides for a Board of Medical Examiners which is empowered to screen applications and to prepare and administer examinations to persons seeking licenses to practice medicine and surgery. But the Board of Medical Examiners has no authority to issue, revoke or suspend licenses. Chapter 64 prescribes that licenses shall be issued by the Board of Health upon the written recommendation of the Board of Medical Examiners.

Act 1 abolished the Board of Health and established the Department of Health under a single executive called the "director of health". At the same time, the Board of Medical Examiners, along with some twenty-six other boards and commissions, was placed within the Department of Treasury and

Regulation for administrative purposes. And the Department of Treasury and Regulation is required by section 15 of Act 1 to:

> "set standards and enforce all laws, rules, and regulations governing the licensing and operation of, register and supervise the conduct of trades, businesses and professions . . ."

Despite this broad language, we cannot construe section 15 to mean that the treasurer, as head of the Department of Treasury and Regulation, has succeeded to the function of receiving the recommendation of the Board of Medical Examiners and, on the basis thereof, of issuing licenses to practice medicine and surgery. In fact, a careful consideration of other provisions of Act 1 leads to a different conclusion.

First, the authority of the treasurer over the boards and commissions placed within his new department for administrative purposes is limited to matters specifically enumerated in section 6 of Act 1. There is nothing in section 6 which can be interpreted as authorizing the treasurer to issue licenses.

Secondly, in abolishing the Board of Health and establishing the Department of Health, the legislature in section 19 of Act 1 specifically provided that the functions and authority formerly exercised by the Board of Health are transferred to the Department of Health. The function of issuing the licenses in question was a function heretofore exercised by the Board of Health. Hence, we conclude that this function of issuing licenses to practice medicine and surgery has been transferred to the Department of Health and that the director of health shall issue such licenses.

While the foregoing discussion has been limited to licenses to practice medicine and surgery, the same reasoning and conclusion are equally applicable to the issuance of licenses to practice naturopathy, osteopathy, and chiropractic.

Very truly yours,

YOSHIO SHIGEZAWA
Deputy Attorney General

APPROVED:

SHIRO KASHIWA
Attorney General

TS:NMI
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Op. 60-13

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
Honolulu

February 29, 1960

Honorable Robert W. B. Chang,
Chairman, House Judiciary Committee
First Legislature, State of Hawaii
Honolulu, Hawaii

Dear Sir:

This is in response to your request for advice regarding coverage under the Hawaii Employment Security Law of employees of the state legislature.

Act 222 (H.B.247), L. 1959, amended the employment security law to extend the benefits of the unemployment insurance program to all employees of the state and county governments. The amendment defines an employing unit to include "... the Territory, any of its political subdivisions, any instrumentality of the Territory or its political subdivisions..."

The state legislature is a branch of the state government and in the exercise of its governmental powers hires employees. Salaries of these employees are appropriated from state funds. As such the employees must be considered employees of the State. An employee performing services for a state legislative body has been considered a state employee. (Temple v. Brooks, 151 N.Y.S. 490).

Act 222, unlike the federal law granting unemployment insurance coverage to federal employees, does not exclude or exempt any particular group of governmental employees, nor can such an intent be gathered from the standing committee reports.

It is the opinion of this office that employees of the legislature are state employees, and are entitled to all benefits granted under Act 222 and the Hawaii Employment Security Law.

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In financing benefits paid to legislative employees, the State is not required to pay contributions. However, the State must reimburse the unemployment compensation fund the proportionate share of the benefits paid based on wages paid by the legislature.

Respectfully,

Toshimi Sodetani

TOSHIMI SODETANI
Deputy Attorney General

APPROVED:

Shiro Kashiwa

Attorney General

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INDEXING INSTRUCTIONS

Op. 60-14

HAWAII AERONAUTICS COMMISSION:

Whether operations of commercial movie & TV companies on airport premises come under the provision of Act 245, S. L. H. 1959, so as to necessitate public bid.

STATUTE:

Construction of Act 245, S. L. H. 1959 as it relates to filming operations of commercial movie & TV companies on airport premises

SESSION LAWS SF HAWAII 1959

Act 245

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Op. 60-14

STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

March 2, 1960

Mr. A. P. Storrs
Director of Aeronautics
Hawaii Aeronautics Commission
Honolulu International Airport
Honolulu 17, Hawaii

Dear Mr. Storrs:

This is in response to your request for an opinion concerning the proposed agreement between commercial movie or television companies and HAC relating to photographic activities for profit at Honolulu International Airport.

Under the provisions of Act 245, Session Laws of Hawaii 1959, no concession or concession space to sell goods, merchandise, ware, services, among other things, in any building or on any land owned or under the jurisdiction of the State or county, or agency of the State or county, shall be let out either by contract, lease, etc., except under contract let after public advertisement in the manner provided by law.

An opinion from this office dated December 14, 1959 (Op. 59-164) discusses the meaning and construction of the term "concession". In essence, that opinion concludes that a concession is a grant by a government of land or property or of a right to use land or property for some specified use.

In our particular case, under the proposed agreement, the companies are allowed to enter airport premises for the purpose of photographing motion picture scenes for use in commercial movies or television. The companies are granted the right to erect such sets or scenes as they desire on the premises, subject to HAC approval, and the right of ingress and egress on the premises for the purpose of preparing for photographing such scenes or removing sets or equipment. In essence, the companies are granted the right to enter airport premises for the purpose of engaging in a business activity.

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This arrangement can be characterized as a grant by the government of a right to use government land for the purpose of conducting a business venture. This arrangement, then, falls into the category of a concession defined by the opinion above-mentioned.

However, an examination of this concession operation leads us to believe that this is not that type of concession envisioned under Act 245 so as to necessitate public bid. Here the operators will simply erect the sets, take the pictures for re-sale and this will complete their project. It is not a continuing operation over a period of time. This is not that type of situation where the operators will have a right to enter the premises for a period of five years and take pictures for the granted period of time. On the contrary, the operators desire to take certain sets of pictures, the completion of which will terminate the operations completely. Hence, this type of operation can be easily distinguished from a restaurant concession, photography concession, gift shop concession or a taxicab concession. In every one of these instances, the operators ply their trade on airport premises for a continuing period of time, whereas in our particular case it is not a continuing or sustaining operation. It operates only so long as the project continues. When it is completed, operations cease altogether. In that type of situation, we feel that the provisions of Act 245 are not applicable.

Furthermore, these services are unique so that only that particular company which proposes the operation can perform the project. To illustrate, if Company A has an exclusive contract with Actor John Doe, and it wishes to film a scene at the airport involving said actor, only that company, and no other, will be able to do it. In such a situation, it is hardly proper for it to be the subject of public bidding.

As to the agreement itself, there is no provision which gives either party the right to terminate the agreement, for cause or otherwise. It is important that HAC be able to terminate especially if the company's operations disrupt normal airport operations.

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On the basis of the foregoing discussion, the proposed agreement between the commercial movie or television companies and the HAC is approved, subject to the objection noted above, and such operations need not be put out to public bid in accordance with Act 245, Session Laws of Hawaii 1959.

Yours very truly,

Allen I. Marutani

ALLEN I. MARUTANI
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

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Op. 60-15

HAWAII AERONAUTICS COMMISSION:

Whether bids may be called 3 1/2 years prior to the actual commencement of the restaurant concession.

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STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

March 3, 1960

Mr. A. P. Storrs
Director of Aeronautics
Hawaii Aeronautics Commission
Honolulu International Airport
Honolulu 17, Hawaii

Dear Mr. Storrs:

This is in response to your letter dated December 21, 1959, in which you request an opinion whether bids may be called at this time for operation of the new restaurant and bar facilities at the new Honolulu International Airport to begin operation on August 15, 1963, or sooner, if an agreement can be worked out with the present concessionaire, Spencecliff Corporation.

Since the present operator at the airport, Spencecliff Corporation, has a lease that is effective until August 15, 1963, and since the operation at the new airport is expected to commence sometime in 1961, the need for an early call for bids is apparent to facilitate the planning with the architect.

An opinion from this office dated May 14, 1959 (Op. 59-57) concluded that call for bids for the restaurant concession in the new terminal building at Honolulu to commence August, 1963, cannot be made at the time citing City of Princeton v. Princeton Electric Light & Power Co., 166 Ky. 730, 179 S.W. 1074 (1915) as authority for the conclusion. The court held there that a call for bids more than four and one-half years before the franchise could be enjoyed was void as against public policy. The court reasoned that the time period was an unreasonable length of time resulting in injury to the public interests. However, a subsequent opinion dated June 17, 1959 (Op. 59-73) from this office advised the Commission that present

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advertisement for the subject concessions was legally proper. However, the latter opinion confined its discussion for concession operation to commence in 1961, a period of approximately two years. Our present opinion discusses the situation where the call for bids is approximately three and a half years, or less, prior to the actual operation.

The objection against any early bidding centers around the unpredictable and uncertain conditions existing at the start of the initial operation. The proposals submitted by the bidder, therefore, might not be realistic and thus, might not work to the best interests of the public. As stated in the Princeton case, supra, at p. 1078, the court, fearful that the grantee of the franchise might be more benefited than the public, declared:

> ". . . the time should not be so great as to make it apparent that the arrangement looks more to the benefits of the purchaser of the franchise than it does to those of the public. . . ."

But the court in City of Biddeford v. Yates, 104 Me. 506, 72 A. 335 (1908) at p. 339 indicated that a municipal government should under certain circumstances be allowed to advertise for bids early:

> "A municipal government, represented by its city council, should be regarded as a business institution with reference to those transactions or matters permitted by the terms of its charter. When not limited to a prescribed method, it should be permitted to act with the same business foresight that is accorded to other business institutions. A corporation or individual dealing in the letting of property might find it of the highest importance to make a lease to-day to take effect months or even years hence. They might find it equally detrimental to be limited in their power to thus anticipate the future. This idea is so apparent as a business proposition as to become self-evident."

It is most important in the present instance that HAC know who will operate the restaurant concession subsequent to August, 1963. Presently, a controversy exists between the present concessionaire and HAC over the interpretation and scope of several

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provisions in the lease concerning the obligation and responsibility of furnishing and equipping the new restaurant. If, prior to operation of the new restaurant, the new successful bidder is known, then there is a strong possibility that much of the present controversy can be resolved. If the present concessionaire becomes the successful bidder, then the present dispute all but disappears. If the present concessionaire does not become the successful bidder, then some arrangement can be worked out among the present concessionaire, the successful bidder, the architect and the HAC concerning the restaurant layout and the manner by which it is to be furnished and equipped. In any event, the plans for the restaurant must be submitted immediately if the deadline for completion of the airport is to be met. And the plans cannot be completed until the present dispute is resolved, and until the successful bidder submits his plans for the layout of the restaurant. It is imperative that the architect know exactly where the electrical outlets, the elevator shafts, the plumbing facilities, etc. are to be located. We feel this is one of those types of situation envisioned by the court in the Yates case, supra, when it recognized the importance under certain conditions of an early bid.

The court in the Princeton case, supra, found the early call for bid objectionable because such is contrary to sound public policy. The court at p. 1078 defined public policy as "being the equivalent to the policy of the law, and is a principle of law which holds that no one can lawfully do a thing which tends to be injurious to the public or is contrary to the public good." In our particular case, we feel that the public policy will best be served if the plans for the restaurant layout are known immediately so that the construction of the terminal facilities will not be unduly delayed. Thus, the need for an early call for bid.

On the basis of the foregoing discussion, it is the opinion of this office that a call for bids for the restaurant concession at the new airport to commence in August, 1963, or sooner, is proper at this time.

Yours very truly,

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

Allen I. Marutani

ALLEN I. MARUTANI
Deputy Attorney General

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March 9, 1960

INDEXING INSTRUCTIONS

I. CONSTITUTIONAL CONVENTION

Beginning date of 10-year period pertaining to mandatory certification by lieutenant governor to electorate on question whether there shall be a convention to propose a revision of or amendments to State Constitution, under section 2, Article XV of the State Constitution begins from date Constitution takes effect - August 21, 1959.

II. CONSTITUTION OF STATE OF HAWAII

Revision and amendment.

Legislature may submit to the electorate at any general or special election the question, "Shall there be a convention to propose a revision of or amendments to the Constitution?"

III. CONSTITUTION OF STATE OF HAWAII

Effective date August 21, 1959.

IV. CONSTITUTION OF THE STATE OF HAWAII

Section 2 of Article XV

(Constitutional Convention)

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STATE ~~TERRITORY~~ OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

March 9, 1960

Honorable William Bains-Jordan
Representative, Tenth District
The First Legislature, State of Hawaii
Iolani Palace
Honolulu 13, Hawaii

Dear Sir:

This is in reply to your communication to the Attorney General, dated March 2, 1960, in which you requested an opinion regarding the date of commencement of the "ten-year period" appearing in section 2, Article XV (revision and Amendment), of our State Constitution.

Section 2, Article XV, Constitution of the State of Hawaii, so far as material, reads as follows:

> "Section 2. The legislature may submit to the electorate at any general or special election the question, 'Shall there be a convention to propose a revision of or amendments to the Constitution?' If any ten-year period shall elapse during which the question shall not have been submitted, the lieutenant governor shall certify the question, to be voted on at the first general election following the expiration of such period."

In reading the above-quoted section, it is apparent that the term "legislature" therein refers to our State legislature, and the term "lieutenant governor" therein refers to the lieutenant governor of the State. It thus appears clear that what this section contemplates is this: the State legislature may, at any general or special election, submit to the electorate for determination the question whether a constitutional convention shall be had for proposing any revision of or amendments to the State Constitution, but if the State legislature fails to so submit the question to the electorate for any period of ten years, then the lieutenant governor shall be required to certify the question to the voters to be voted on at the first general election following the expiration of such period.

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Viewed in this light the language appearing in the above-quoted section clearly implies that the "ten-year period" for mandatory certification by the lieutenant governor commenced to run from the date the Constitution became effective as the organic law of the State.1/ This interpretation will effectuate the purpose of said section providing for mandatory certification, which aims to provide assurance of a reasonable opportunity by the people to adapt the State Constitution to changing or new conditions, if the legislature should fail to do so, for any period of ten years once the Constitution takes effect.2/

Accordingly, we are of the opinion that the ten-year period under consideration commenced to run from the date the Constitution of the State of Hawaii became effective, which date falls on August 21, 1959.

1/ It is a fundamental principle of constitutional construction that what is implied by the language of a constitution is as much a part of the instrument as what is expressed. 11 Am. Jur., Constitutional Law, Sec. 56; Gaines v. O'Connell, 204 S.W. 2d 425, 427, 305 Ky. 397.

2/ For purpose and history covering adoption of above-quoted paragraph from section 2 of Article XV, Constitution of State of Hawaii, see Committee of the Whole Minutes on Standing Committee Report 48 on Committee Proposal No. 9 from the Committee on Amendments, etc., June 15, 1950, Records of Constitution Convention 1950.

Very truly yours,

David Y. Mar

DAVID Y. MAR
Deputy Attorney General

APPROVED:

H. Rodger Betts

H. RODGER BETTS
Acting Attorney General

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INDEXING INSTRUCTION

Op. 60-17

AGRICULTURE & CONSERVATION, Dept. of

(1) Can the Dept of Agriculture be obligated to pay for the hospital treatment of a dog injured while under the custody and care of the department where no negligence has been shown?

(2) Can the Dept pay the hospital bill, in the interest of public relations, if it so chooses?

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STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

March 11, 1960

Mr. Wayne L. Collins, Director
Department of Agriculture & Conservation
1428 So. King Street
Honolulu, Hawaii

Dear Sir:

This is in response to your letter dated February 10, 1960, in which you seek the opinion of this office to the following questions:

1. Is the Department of Agriculture & Conservation obliged to pay for the hospital treatment of Mrs. Ebbesen's dog?

2. Can the Department legally pay the bill, in the interest of public relations, if it so chooses?

A dog belonging to Mrs. Margaret Ebbesen injured its leg while being confined at the Quarantine Station. Due to such injury, the dog was hospitalized for almost two weeks at the Nomura Hospital, the bill totalling $42.50. There is no question that the dog sustained its injury while confined at the Quarantine Station, but the cause of it remains undetermined. Mrs. Ebbesen is now seeking compensation from the State for payment of the hospital bill.

The Department is not responsible for payment of any damages when its negligence is not conclusively shown. In this case, though the dog suffered a broken leg while under the Department's custody, yet there is no evidence that the Department was responsible for this injury. Any number of reasons could have caused it. The burden of proving such negligence rests with the party seeking damages. Mrs. Ebbesen has failed to prove such negligence. Certainly the Department can not be treated as an insurer for the safety of all animals under its custody and care. Such a result will impose an unreasonable burden on the Department in maintaining its quarantine station. Where the party has failed to prove breach of due care on the part of the Department for such injury, the Department is not obligated to pay for the hospital treatment of the dog.

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The Department can not, in the interest of public relations pay the hospital bill, without first the commencement of an action by the injured party. Section 245A-11, Revised Laws of Hawaii 1955, as amended, provides that the Attorney General, with the approval of the court, may compromise or settle any claim after the commencement of an action thereon.

On the basis of the foregoing discussion, it is the opinion of this office that the Department is not obligated to pay the hospital bill of Mrs. Ebbesen's dog where she has failed to show negligence, and the Department is not authorized to pay the bill, in the interest of public relations, without the commencement of an action by the injured party and without the approval of the court.

Yours very truly,

Allen I. Marutani

ALLEN I. MARUTANI
Deputy Attorney General

APPROVED:

H. RODGER BETTS
Acting Attorney General

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INDEXING INSTRUCTIONS

Op. 60-18

AGRICULTURE & CONSERVATION, Dept of:

Whether owners of conflicting claims to similar brands on livestocks could resolve the problem themselves by assigning the brands to separate locations on the animal body despite sections 20-40 & 20-42, R.L.H. 1955.

STATUTE:

Construction:

Does section 20-42, R.L.H. 1955, authorize a private organization to settle conflicting claims to similar brands on livestocks.

REVISED LAWS OF HAWAII 1955:

Sections 20-40 & 20-42.

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STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

March 11, 1960

Mr. Wayne L. Collins, Director,
Department of Agriculture & Conservation
1428 So. King Street
Honolulu, Hawaii

Dear Sir:

This is in response to your letter dated January 18, 1960, requesting an opinion whether owners of conflicting claims to similar brands could resolve the problem themselves by assigning the brands to separate locations on the animal body.

Section 20-40, Revised Laws of Hawaii 1955, requires all owners of livestock in the State to have his brand or mark recorded in a separate book kept by the board of agriculture to be known as the "Hawaiian Brand Book", forbidding any brand or mark to be recorded which is similar or approximate in design to any brand or mark previously recorded. Section 20-42, Revised Laws of Hawaii 1955, provides that the board shall determine conflicting claims by the applicants for a brand of similar or approximate design and shall be guided by the length of time each has used the brand, record of original registration, the number of animals then branded by each, and the priority of application.

Looking at the pertinent committee reports, we find such language:

> "This bill would create a central Hawaiian brand book for all livestock brands registered in the Territory. It prohibits the registration of brands which may be similar or approximate in design to any brand or which has been previously recorded.
>
> "In the event of conflicting brand claims the final determination thereof rests with the board of commissioners of agriculture and forestry." Standing Committee Report No. 284, S. B. No. 739, Senate Journal 1955, p. 540, 28th Legislature.

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"The board of commissioners is to settle conflicting claims for registration of brands which are similar in design, being guided by the duration of time the brand has been used by the applicants, past records, number of animals so branded and the priority of the application." Standing Committee Report No. 487, H. B. No. 1934, Senate Journal 1955, p. 604, 28th Legislature.

It is significant to note that the statute uses the word "shall" and not "may" in authorizing the board to settle conflicting claims of similar brands. In such a situation it is highly questionable whether another organization can undertake such a function specifically delegated by the legislature to the board. The cases generally hold that the word "shall" as used in a statute imposes a duty which may be enforced, and implies mandatory and directory power while the word "may" implies discretion or permission. People v. Picone, 43 N.Y.S. 2d. 4, 181 Misc. 958 (1943); North Hampton Racing & Breeding Ass'n, Inc. v. Conway, 94 N.H. 156, 48 A. 2d. 472 (1946); State v. Cola, Ohio App. 35 N.E. 2d. 758 (1940); Spokane County ex rel. Sullivan v. Glover, 2 Wash. 2d. 162, 97 P. 2d. 628 (1940); National Auto v. Casualty Ins. Co. v. Garrison, 76 Cal. App. 2d. 415, 173 P. 2d. 67 (1946). Looking at the statute and the pertinent committee reports, we feel that the legislature intended the settlement of conflicting brand claims to be vested in the board and the board can not delegate this function to a private organization.

On the basis of the foregoing discussion, it is the opinion of this office that the board of agriculture and conservation must be the body to settle conflicting claims for registration of brands and this function can not be delegated to the cattle industry.

Yours very truly,

Allen I. Marutani

ALLEN I. MARUTANI,
Deputy Attorney General

APPROVED:

H. Rodger Betts

H. RODGER BETTS
Acting Attorney General

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INDEXING INSTRUCTIONS

Op. 60-19

HAWAII AERONAUTICS COMMISSION:

Whether House Concurrent Resolution 22, 25th Legislature 1949, requires HAC to give visually handicapped persons newsstand concessions rent free at the new Honolulu Airport terminal buildings

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Op. 60-19

STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

MARCH 14, 1960

Mr. A. P. Storrs
Director of Aeronautics
Hawaii Aeronautics Commission
Honolulu International Airport
Honolulu 17, Hawaii

Dear Sir:

This is in response to your letter dated November 9, 1959, where you request an opinion from this office whether Hawaii Aeronautics Commission can put out to bid the newsstand concession at the new Honolulu Airport terminal building or whether Hawaii Aeronautics Commission must let it go rent free to blind vendors.

House Concurrent Resolution No. 22, 25th Legislature 1949, adopted by both houses of the legislature, requests the Hawaii Aeronautics Commission to permit blind vendors to continue without interruption to occupy space at the different airport terminal buildings so long as the present structures are in use as terminal buildings. Present projected plans now call for the erection of a new terminal building to be completed sometime in 1961.

The resolution itself is very clear that the Hawaii Aeronautics Commission is requested to permit blind vendors to operate their concession only so long as the present structures are used as terminal buildings. From this it is not difficult to conclude that if there are new structures to be used as terminal buildings, then the operation of this resolution will not apply. The words "present structures" clearly show that the resolution applies only to presently existing structures.

However, section 7-20, Revised Laws of Hawaii 1955, as amended, establishes a legislative policy which should not be lightly passed over, which recognizes the importance of providing blind persons with remunerative employment, enlarging their economic opportunity, and stimulating them to greater efforts

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in striving to make themselves self-supporting. In accomplishing these virtuous goals, the legislature under said section authorizes the custodians of public buildings to permit, in such buildings, subject to rules and regulations prescribed by them, blind persons to operate stands for the vending of newspapers, periodicals, etc. A clear-cut legislative policy of this nature is not to be ignored and is worthy of consideration. This legislative policy is further implemented by the provisions of Act 245, S. L. H. 1959, which exempts visually handicapped persons from requiring them to submit bids for concessions set aside for their use. This again emphasizes the legislature's concern over the status of these handicapped persons. However, there is nothing in these sections which require Hawaii Aeronautics Commission to let these concessions to blind vendors.

On the basis of the foregoing discussion, it is the opinion of this office that the House Concurrent Resolution No. 22 of April 8, 1949 does not apply to the newsstand concessions at the new Honolulu Airport terminal buildings, and therefore, Hawaii Aeronautics Commission can put such concession out to public bid.

Yours very truly,

Allen I. Marutani

ALLEN I. MARUTANI
Deputy Attorney General

APPROVED:

H. Rodger Betts

H. RODGER BETTS
Acting Attorney General

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INDEXING INSTRUCTIONS

I. CONSTITUTION OF THE STATE OF HAWAII

Legislature

Session, Budget

Revenue Bills

1. A bill increasing or decreasing taxes appropriated by or reflected in the general appropriations bill is a revenue bill within the meaning of Article III, Section 11, State Constitution.

2. Although a bill intended to increase or decrease the amount of exemption from real property may not be a revenue bill within the meaning of Article III, Section 11 of the State Constitution, it may be considered and enacted during a budget session without qualifying as an urgency measure.

3. A bill providing for relief of disaster victims by exempting them from taxation is not a revenue bill within the meaning of Article III, Section 11, State Constitution.

4. A bill intended to increase or decrease general excise or income taxes is a revenue bill within the meaning of Article III, Section 11, State Constitution.

5. A bill providing for refund of taxes paid is not a revenue bill within the meaning of Article III, Section 11, State Constitution.

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II. STATUTES

Subject Matter, Plurality of

A bill containing a plurality of subjects violates Article III, Section 15, State Constitution.

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III. WORDS AND PHRASES

"Revenue bills necessary therefor"

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IV. WORDS AND PHRASES

"Budget Sessions"

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V. REVISED LAWS OF HAWAII 1955, SEC. 117-26

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VI. REVISED LAWS OF HAWAII 1955, SEC. 118-14

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VII. REVISED LAWS OF HAWAII 1955, SEC. 119-20

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VIII. REVISED LAWS OF HAWAII 1955, SEC. 121-52

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IX. REVISED LAWS OF HAWAII 1955, SEC. 122-43

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X. REVISED LAWS OF HAWAII 1955, SEC. 124-17

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XI. REVISED LAWS OF HAWAII 1955, SEC. 125-15

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XII. REVISED LAWS OF HAWAII 1955, SEC. 126-8

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XIII. REVISED LAWS OF HAWAII 1955, SEC. 127-7

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XIV. REVISED LAWS OF HAWAII 1955, SEC. 129-8

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XV. SESSION LAWS OF HAWAII 1957, ACT 320

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XVI. REVISED LAWS OF HAWAII 1955, SEC. 129-2

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XVII. REVISED LAWS OF HAWAII 1955, SEC. 128-13

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XVIII. REVISED LAWS OF HAWAII 1955, SEC. 128-18

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STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU, HAWAII

March 14, 1960

Honorable Elmer F. Cravalho
Speaker of the House of Representatives
Regular Session of 1960
First State Legislature, State of Hawaii
Honolulu, Hawaii

Dear Sir:

This supplements the opinion letter of February 25, 1960, to the President of the Senate and the Speaker of the House of Representatives and is in response to your letter of March 3, 1960, in which was asked the following questions:

"1. Are bills which provide for increase or reduction in exemptions from real property taxes 'revenue bills necessary therefor' within the meaning of the Constitution?

"2. Are bills which provide for relief to victims of the Puna volcanic eruption or other classes of taxpayers by exempting them from payment of real property or other taxes 'revenue bills necessary therefor'?

"3. Are bills which contain provisions increasing or reducing excise or income taxes and which also contain provisions other than revenue matters 'revenue bills necessary therefor'? This question is relevant to situations such as where a bill provides for a reduction in general excise taxes and also provides for state loans or exchanges of real property.

"4. Are bills which provide for <u>refund</u> of taxes paid (not because of over-payment but to give tax relief to certain classes of taxpayers) 'revenue bills necessary therefor'? These are bills which do not reduce the rate or amount of taxes as such but return portions of taxes previously paid."

<u>Question 1</u>

Section 11 of Article III of the Constitution of Hawaii limits the types of bills that may be considered

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and enacted during a budget session to "the general appropriations bill for the succeeding fiscal year and bills to authorize proposed capital expenditures, revenue bills necessary therefor, urgency measures deemed necessary to the public interest," and other measures not material to the subject of this inquiry.

It is to be noted that the phrase "revenue bills necessary therefor" has reference to "the general appropriations bill for the succeeding fiscal year" and bills authorizing proposed capital expenditures. Section 5 of Article VI of the Constitution provides that the general appropriations bill is the "bill authorizing operating expenditures for the ensuing fiscal period."

With the exception of fuel taxes collected under Chapter 123, the taxes collected under the provisions of Chapters 117 to 127, inclusive, are expressly made state realizations. See sections 117-26, 118-14, 119-20, 121-52, 122-43, 124-17, 125-15, 126-8, and 127-7, R.L.H. 1955, as amended. These are among the revenues which under existing laws would be appropriated by and reflected in the general appropriations bill. There being a direct relationship between such taxes and the general appropriations bills, a tax measure which would decrease such revenues may be considered "a revenue bill necessary therefor." This was the view in the opinion letter of February 25, 1960.

However, under the existing statutory scheme, the real property taxes levied under Chapter 128 are not general revenues of the state. Section 129-8 of Chapter 129 which deals with county budgets and related tax funds provides that real property taxes collected upon property in each county shall be paid over by the state treasurer to the county treasurer, after deducting therefrom sufficient amounts to pay the annual service charges on state bonds issued for the purposes of the county and the county's annual contributions to the State Employees' Retirement System, and that the taxes so paid shall be "a general fund revenue of the county, and shall be expended or allotted as authorized by the board of supervisors." In this connection it might be noted that real property tax funds are not special funds covered by the provisions of Act 320, S.L. 1957.

Thus it appears that real property taxes are not one of the generating sources of the fund out of which appropriations are made for the various proposed operating expenditures in the general appropriations bill. Although a measure increasing or decreasing real property taxes would have a correlative effect on county budgets as

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contemplated in section 129-2, R.L.H. 1955 as amended, such increases or reductions would not have the same effect upon the state budget as provided in the general appropriations bill.

It may be that bills of the nature herein concerned can be said to be reasonably related to a general appropriations bill for to the extent that there is a lessening of their revenues there is a greater likelihood of counties seeking and being granted appropriations from the state. But see Mikell v. Philadelphia School Dist., 359 Pa. 113, 58 A.2d 339, wherein it was held a statute imposing a personal property tax upon residents of school districts having a population of more than a certain number was not a bill for raising revenue on the ground that the tax imposed was not coverable into the state treasury for the state's own general governmental uses.

However, there is another basis for concluding that such bills are, without qualifying as urgency measures, proper subjects of a budget session. The words "revenue bills necessary therefor," as earlier pointed out, also refer to "bills to authorize proposed capital expenditures."

Under section 3 of Article VI of the State Constitution, the debt limit of the State of Hawaii as well as that of a political subdivision thereof is based upon the total assessed values used in determining real property tax rates; and under the provisions of section 129-2, R.L.H. 1955 as amended, for purposes of determining the rate of tax upon real property the total assessed values used is the aggregate of taxable values, the sum remaining after deducting from the gross valuations or assessments the amounts of exemptions allowed. See also Minutes of the Committee of the Whole on Standing Committee Report No. 51 and Committee Proposal No. 10, Committee on Taxation and Finance, Constitutional Convention, June 19 and 22, 1950. Increases or decreases in the amounts of exemptions would result in corresponding increases or decreases in aggregate taxable valuations. This in turn would bear directly upon the financing of proposed capital expenditures by means of instruments of indebtedness includible in the amount of debt limitation. The relation between taxable assessed values of realty and capital expenditures can be analogized to that existing between the general appropriations bill and taxes which are general revenues of the State.

Accordingly, this office is of the opinion that bills which provide for increase or reduction in the amount of exemption from real property taxation, such as bills intended to increase or decrease the amount of home exemption

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provided by section 128-13 of the Revised Laws or to enlarge or diminish the scope of the exemption provided by section 128-18 of the Revised Laws, may be considered and enacted during a budget session without being urgency measures.

Question 2

It is generally held that a bill for raising revenue within the meaning of a constitutional provision concerning the branch of the legislature in which such a bill should originate is one which levies a tax. This is a rule even in the jurisdiction in which the courts have held that a measure which decreases taxes is a bill for raising revenue. Perry County v. The Selma, Marion & Memphis R. Co., 58 Ala. 546. The same principle has been applied in cases involving the interpretation of a clause in a state constitution providing "No revenue bills shall be passed during the last five days of the Legislature." Anderson v. Ritterbush, 22 Okla.761, 98 Pac. 1002. Furthermore, unless a measure has as its primary objective the levying of a tax, it is not a bill for raising revenue although taxation may be involved. See 51 Am. Jur. Taxation, § 298, and the cases cited therein.

In view of the foregoing it is the opinion of this office that bills providing for relief of disaster victims by exempting them from the payment of general revenue taxes, not having as their purpose the levying of more or less taxes, would not be within the purview of "revenue bills necessary therefor." Nor would bills exempting such taxpayers from the payment of real property taxes be within the quoted constitutional provision for they would not reduce taxable assessed valuations.

Although these measures are in the nature of appropriation bills, they would be proper subjects of a budget session only by qualifying as urgency measures as they are neither the "general appropriations bill" nor "bills to authorize proposed capital expenditures."

Question 3

As previously indicated, bills containing provisions limited to increasing or reducing general excise or income taxes could be considered and enacted during a budget session without meeting the requisites of urgency measures. Should, however, such bills go beyond increasing or decreasing such and contain provisions pertaining to other than revenue matters, the question would be not so much whether those bills would be "revenue bills necessary

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therefor" but rather whether they might not contain a plurality of subjects and thus violate section 15 of Article III which provides: "Each law shall embrace but one subject, which shall be expressed in its title." This provision, which is also found in the Organic Act, is mandatory, not directory. In Re Goddard, 35 Haw. 204. If an act contains a plurality of subjects it would be unconstitutional and void in its entirety. L. Marchant v. Hattie F. Marchant, 3 Haw. 661.

Should, therefore, the provisions on state loans or exchanges of real property be not germane to the subject of excise or income taxes, the bills concerned under this question would be illegal. And in response to the question posed, even if it is to be assumed that there is not a duality of subjects in those bills, without more, this office is not in a position to say whether a bill of that nature is in its entirety a revenue bill within the meaning of the Constitution or only those provisions relating to the reduction in excise or income taxes.

Question 4

It is the opinion of this office that bills providing for refund of taxes paid would not be within the meaning of the constitutional provision in question. Opinion of the Justices, 31 So.2d 558.

In the cited case the issue was whether a bill providing for a refund of a portion of the state tax paid on gasoline when gasoline was used in tractors exclusively for agricultural purposes was a "bill to raise revenue." The court held it was not; that it was, instead, an appropriations bill.

Respectfully submitted,

/s/ Nobuki Kamida

NOBUKI KAMIDA
Deputy Attorney General

APPROVED:

/s/ H. Rodger Betts

H. RODGER BETTS
Acting Attorney General

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INDEXING INSTRUCTIONS

Op. 60-21

AGRICULTURE & CONSERVATION, Department of:

Whether section 20-40, R.L.H. 1955, will prohibit the transfer of a registered brand on livestocks.

STATUTE:

Construction:

Whether section 20-40, R.L.H. 1955, applies to transfer of a registered brand on livestocks.

REVISED LAWS OF HAWAII 1955

Section 20-40.

ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
AND REFER TO
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~~II-A~~

Op. 60-21

STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

March 15, 1960

Mr. Wayne L. Collins, Director
Department of Agriculture and Conservation
1428 So. King Street
Honolulu, Hawaii

Dear Sir:

This is in response to your letter dated February 16, 1960, where you request an opinion from this office whether section 20-40, Revised Laws of Hawaii 1955, will prohibit the transfer of a registered brand.

An application has been received to transfer a brand from Mrs. Mamie Lewis, Hoolehua, Molokai, to Henry K. Kamalo, Sr., Hoolehua, Molokai, because of the death of Mrs. Lewis. There is a similar brand registered to Martin Martinson, Jr., North Kona, Hawaii.

Section 20-40, Revised Laws of Hawaii 1955, prohibits the registration of brand or mark similar or approximate in design to any brand or mark which has been previously recorded. In the event of conflicting claims by the applicants for a brand of similar or approximate design, section 20-42, Revised Laws of Hawaii 1955, authorizes the board to resolve these claims.

The whole purpose of such provisions in the statute is to establish a uniform centralized method of recording which prohibits the registration of brands similar or approximate in design to any brand or mark which has been previously recorded. As stated in Standing Committee Report No. 487 on H. B. 1034, Senate Journal 1955, p. 604, 28th Legislature,

> "The purpose of this bill is to establish centralized recordation of livestock brands. The board of commissioners of agriculture and forestry is to maintain a separate book for this purpose called the 'Hawaii Brand Book'."

Since the whole purpose of such a statute is to provide uniformity, to effect a centralized method of recordation, and to prevent any

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duplication of brands, to conclude that the provisions in the statute do not apply to the transfer of a registered brand would serve to subvert the purpose of such legislation. If such is not the case, then it is conceivable to have several similar registered brands recorded in the books, a result certainly not envisioned by the drafters. We feel this is one of those situations where the board must determine such conflicting claims, being guided by the length of time each has used the brand, record of original registration, the number of animals then branded by each, and the priority of application.

On the basis of the foregoing discussion, it is the opinion of this office that the provisions under section 20-40, Revised Laws of Hawaii 1955, apply to the transfer of a registered brand.

Yours very truly,

Allen I. Marutani

ALLEN I. MARUTANI
Deputy Attorney General

APPROVED:

H. Rodger Betts

H. RODGER BETTS
Acting Attorney General

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INDEXING INSTRUCTIONS

Op. 60-23

STATUTE

Whether section 46-13(v), Revised Laws of Hawaii 1955, exempts a child from vaccination, revaccination or immunization as a condition of his enrollment in a public school if his religion forbids it.

LEGISLATIVE MATTERS

Whether section 46-13(v), Revised Laws of Hawaii 1955, exempts a child from vaccination, revaccination or immunization as a condition of his enrollment in a public school if his religion forbids it.

DEPARTMENT OF PUBLIC INSTRUCTION

What conditions must be met if a child refuses to take vaccination, revaccination or immunization shots because of his religion before he is admitted into a public school under § 46-13(v), RLH 1955 & pertinent Board of Health Regulations.

HEALTH, DEPARTMENT OF

Board of Health Regulation exempts a child entering school from having to undergo vaccination, revaccination or immunization if his parent, guardian or other person objects on the grounds that such requirement is not in accordance with his religion. However, this regulation does not apply when, in the opinion of the Board of Health there is danger of an epidemic from any communicable disease. Regulation further provides that such objection shall be in writing on a form to be provided by the Board.

REVISED LAWS OF HAWAII 1955

Section 46-13(v).

No Opinion

No. 60-22

ADDRESS REPLY TO
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STATE ~~OF~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

March 16, 1960

Honorable Eureka Forbes
Representative, 15th District
First Legislature, State of Hawaii
Iolani Palace
Honolulu, Hawaii

Dear Mrs. Forbes:

This is in response to your letter dated March 10, 1960, in which you request an opinion from this office whether section 46-13(v), Revised Laws of Hawaii 1955, as amended, provides an exemption in basic vaccination and immunization because of religion. The pertinent provisions of the statute provide:

> "(v) Medical examination, vaccination, revaccination and immunization of school children. No child shall be subjected to such medical examination, vaccination, revaccination or immunization, whose parent or guardian shall in writing object thereto on grounds that such requirements are not in accordance with the religious tenets of an established church of which he is a member or adherent, but no such objection shall be recognized when, in the opinion of the board, there is danger of an epidemic from any communicable disease;"

The Board of Health adopted a regulation, pursuant to such a provision above, exempting a child entering school in the Territory of Hawaii, from having to undergo vaccination, revaccination, or immunization if his parent, guardian, or other person having the care, custody or control of such child objects to this requirement on the grounds that such requirement is not in accordance with the religious tenets of an established church of which he is a member or adherent. This provision in the regulation does not apply when, in the opinion of the Board of Health, there is a danger of an epidemic from any communicable disease. The regulation further provides that such objection shall be in writing on a form to be provided by the Board.

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Such a form, properly signed by the parent or guardian, shall set forth the name of the established church of which he or she is a member or adherent and a statement, certified to as being correct by the pastor or president of such church, that such requirement of vaccination is not in accordance with the religious tenets of such church.

Based on the above statute and regulation, the opinion of this office is that a child entering any public school in the State of Hawaii can not be required to undergo vaccination and immunization shots if the following conditions are met:

(1) His parent, guardian, or other person having the care, custody, or control of such child objects to this requirement that it is not in accordance with the religious tenets of his church;

(2) This objection is in writing on a form provided for by the Board of Health. To this form which is properly executed by the parent or guardian and which sets forth the name of the established church of which he or she is a member or adherent, is appended a statement, certified to as being correct by the pastor or president of the church, that such requirement of vaccination is not in accordance with the religious tenets of such church;

(3) The Board of Health has not declared that, in its opinion, there is danger of an epidemic from any communicable disease; and

(4) Sections 49-30 - 49-37, R. L. H. 1955, inclusive, have been complied with.

I trust that this will clarify the interpretation and application of the above-mentioned statute and the pertinent Board of Health Regulations.

Yours very truly,

Allen I. Marutani

ALLEN I. MARUTANI
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

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ADDRESS REPLY TO
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XVIII

Op. 60-24

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

MARCH 17, 1960

State Board of Accountancy
1060 Bishop Street
Honolulu 13, Hawaii

Attention: Mr. R. H. Paris, Secretary

Gentlemen:

In your letter of February 25, 1960, you requested the opinion of this office regarding the qualifications of Mr. James Wong of Eleele, Kauai, to sit as a member of the Board of Accountants.

Mr. Wong's qualifications were questioned in view of the fact that section 164-2 of the Revised Laws of Hawaii 1955 provides that members of the board who are selected by virtue of their being public accountants "shall be in active practice as public accountants". The question was raised because Mr. Wong "is a full time employee of McBryde Sugar Company and does not maintain an office as a Public Accountant".

This office is of the opinion that Mr. Wong is not qualified to sit as a member of the Board since he is not engaged in active practice.

Section 164-1 defines public accountancy in several different ways which are set forth in subsections (a), (b), (c), (d) and (e). The subsection that Mr. Wong would seem to come closest to of these definitions is perhaps either that of 164-1(a) or 164-1(e). However, it is not apparent from the above statement regarding Mr. Wong's employment that he is holding himself out as being ready to serve the public as a public accountant nor is it apparent from the statement that Mr. Wong has rendered professional services to clients for compensation in addition to his regular duties with the McBryde Sugar Company.

The Board of Accountants was created by Act 158 of the Session Laws of 1923. Section 2 of that Act reads as follows:

"For the purpose of this Act, a public accountant is hereby defined as a person skilled in the knowledge and science of accounting, who holds himself out to the public as a practicing accountant for compensation, and who maintains an office for the transaction of business as such, whose time during the regular business hours of the day is devoted to the practice of accounting as a professional public accountant."

The question was raised in June, 1923 as to the qualifications of a person to serve on the board as a public accountant when the person did not hold "himself out to the public as a practicing accountant for compensation" nor did he maintain "an office for the transaction of business as such" nor was he one "whose time during the regular business hours of the day is devoted to the practice of accounting as a professional public accountant."

In opinion No. 1087 of this office, dated July 16, 1923, it was held that such a person was not qualified to serve as a member of the board since he did not come within the aforequoted definition of said section 2. From the information known to this office, as previously stated, it does not appear that Mr. Wong's present employment alone is sufficient to place him within the definition of said section 164-1 as to "the practice of public accountancy".

Because of Mr. Wong's apparent failure to hold himself out to the public, such as by listing his home phone number as a public accountant, or to render services to clients for compensation and for the foregoing reasons, this office regretfully hold that Mr. Wong is not qualified to be one of the two members of the State Board of Accountants who are selected as such because of being public accountants "in active practice as public accountants".

Respectfully yours,

W. K. WATKINS, JR.
Deputy Attorney General

APPROVED:

SHIRO KASHIWA
Attorney General

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INDEXING INSTRUCTIONS

March 17, 1960

ACCOUNTANTS, STATE BOARD OF

Qualifications to sit as member of the board

Members of the board shall be in active practice as public accountants.

ACCOUNTANT, PUBLIC

A public accountant is defined as a person skilled in the knowledge and science of accounting, who holds himself out to the public as a practicing accountant for compensation, and who maintains an office for the transaction of business as such, whose time during the regular business hours of the day is devoted to the practice of accounting as a professional public accountant.

SESSION LAWS OF HAWAII 1923
Act 158
Section 2.,

REVISED LAWS OF HAWAII 1955

Section 164-1

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Op. 60-25

DEPARTMENT OF SOCIAL SERVICES:

APPROPRIATIONS

1. Medical care funds transferred by the Hawaii State Government Reorganization Act of 1959 from Board of Health to Department of Social Services remain as medical care funds and are not public assistance funds.

2. Specific appropriations (characterization of funds) in appropriation bill not altered by reorganization act which merely transferred functions.

3. Funds transferred for specific purposes may not be expended for another purpose.

4. Medical care funds are not public assistance funds.

PUBLIC ASSISTANCE

1. Medical care funds are not public assistance funds.

HAWAII STATE GOVERNMENT REORGANIZATION ACT OF 1959

Sec. 33. Transfer of funds along with transfer of functions does not alter specific appropriations existing for a specific function.

Sec. 1 and 31. Reorganization does not merge functions; it merely transferred these functions to a department.

Sec. 20. Medical care funds do not become public assistance funds when transferred from another department to the Department of Social Services.

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Op. 60-25

STATE ~~TERRITORY~~ OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

March 17, 1960

Miss Mary L. Noonan
Director of Social Services
Department of Social Services
Liliuokalani Building
Honolulu, Hawaii

Dear Madam:

RE: FUNDS FOR PAYING COST OF MEDICAL CARE FOR THE MEDICALLY INDIGENT AND INDIGENT.

This is in response to a request by your department for an opinion as to whether or not the medical care funds for the medically indigent and indigent which were transferred from the Board of Health to the Department of Social Services as a result of the reorganization, recently effected, are "public assistance" funds as defined in the provisions of Chapter 108, Revised Laws of Hawaii 1955, as amended.

As a result of the recent reorganization of the various state agencies, funds for medical care of the medically indigent and indigent formerly appropriated to the Board of Health were transferred to the Department of Social Services along with the transfer of functions of assistance and care of the medically indigent and indigent. This was authorized by sections 19, 20, 23, and 40 of the Hawaii State Government Reorganization Act of 1959, which empowered the governor to make this transfer of functions and existing appropriations from one department to another by executive order. Executive Order Number 9, dated January 19, 1959, effectuated all the provisions of said Act necessary to create the Department of Social Services as established by said Act.

The functions of assistance and care of the medically indigent and indigent are authorized by Chapter 48, Revised Laws of Hawaii 1955, as amended, as a part of the functions of the former Board of Health. The function of providing public assistance to needy persons administered by the former Department

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of Public Welfare is authorized by Chapters 107 and 108, Revised Laws of Hawaii 1955, as amended. These functions are only two of many functions transferred to the Department of Social Services. Section 20, supra, also states that the Department of Social Services shall concern itself with economic assistance (including the costs of medical care); this statement is a part of a general purpose statement.

Act 270, Session Laws of Hawaii 1959, the general appropriations bill for this fiscal year, appropriated funds for these two functions separately, since these two functions were administered by different departments and are different functions. Reorganization did not merge these two functions; reorganization merely transferred the administration of these functions to one department. Sections 1 and 31, Hawaii State Government Reorganization Act of 1959. The separate and specific appropriation of funds for these two functions by the legislature in Act 270, surpa, have not been changed by the Hawaii State Government Reorganization Act of 1959; this is true though assistance and care of the medically indigent and indigent may now be classified as a part of economic assistance and though the definition of the term "public assistance" is broad enough to embody medical care payments. The fact that section 20, supra, describes the costs of medical care payments as a part of economic assistance does not alter the provisions of Act 270, supra, to change the character of such funds to "public assistance" funds.

The legislature may appropriate funds for specific purposes or functions; funds appropriated for specific functions or purposes may not be expended for other functions or purposes.

> "The appropriation of public money and the granting of authority to expend the same is purely a legislative function, and the manner and conditions under which it may be used rest entirely with the Legislature. Therefore, when the Legislature has appropriated public money for a specific object, the fund thus established can be used only for the purpose specified in the appropriation. (Appeal of Dellaripa, 92 Atl. 116 and note, Ann. Cas., 1917B, 864.)" Opinions of the Attorney General of the Territory of Hawaii #1543, 1929-33; Opinion 58-207, Opinions of Attorney General of Hawaii.

The specific appropriation of funds for these two functions by the legislature is not without significance. Section 108-15, Revised Laws of Hawaii 1955, as amended, limits the expenditure of public assistance funds; medical care funds are not limited by section 108-15, supra. The cost of medical care for the medically indigent and indigent is paid by the State through the several

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counties (section 48-9, Revised Laws of Hawaii 1955, as amended in 1957); but, this provision does not apply to public assistance payments.

It is noted in passing that prior to 1951, when the former Department of Public Welfare administered the programs of medical care and public assistance to needy persons, medical care funds had been considered as an addition to, and not in lieu of, public assistance funds, for any of the same or similar purpose. Section 4828, Revised Laws of Hawaii 1945, repealed by Act 129, Session Laws of Hawaii 1951, Regular Session. Appropriations for these functions by the legislature for the then Department of Public Welfare were specific appropriations; historically, medical care funds have not been considered "public assistance" funds. See: Sec. 4828, supra; Act 346, Session Laws of Hawaii 1949, p. 276; Act 318, Session Laws of Hawaii 1951, Regular Session, p. 670.

Consequently, it is the opinion of this department that the medical care funds for the medically indigent and indigent which were transferred to the Department of Social Services along with the functions of assistance and care for the medically indigent and indigent are not "public assistance" funds as defined in Chapter 108, Revised Laws of Hawaii 1955, as amended, unless so characterized by the legislature.

Yours very truly,

Terry H. Tom

TERRY H. TOM
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

Op. 60-21

INDEXING INSTRUCTION

Op. 60-26

BUDGET & REVIEW, DEPARTMENT OF:

EMPLOYEES' RETIREMENT SYSTEM _

Subject: Investment of Social Security Contributions

Social security contributions may be invested by the Secretary of the Employees' Retirement System pending the quarterly payments to the federal government but the earnings thereon may not be credited to the System.

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ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
AND REFER TO
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Op. 60-26

STATE ~~TERRITORY~~ OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

March 21, 1960

The Board of Trustees of the
Employees' Retirement System
State of Hawaii
Keelikolani Building
Honolulu, Hawaii

Gentlemen:

Subject: Investment of Social Security Contributions

This is in response to the letter of Mr. Charles L. Hapai, Assistant Secretary, dated February 12, 1960, which states your request for an opinion as to whether or not the social security contributions may be invested pending the quarterly payments to the federal government and whether the earnings thereon can lawfully be credited to the Employees' Retirement System.

It is our opinion that social security contributions may be invested as aforesaid, but that the earnings thereon may not be credited to the System.

It is fundamental law that:

> "The powers and authority of administrative officers and agencies are wholly derived from, and defined and limited by, constitution, statute, or other legislative or organic enactment." 73 C.J.S., Public Administrative Bodies and Procedure, sec. 49.

and that

> "The powers of administrative officers and agencies are not derived from mere inference, and jurisdiction cannot be conferred by implication; but they generally have such implied powers, and only such, as are necessarily inferred or implied from, or incident to, the powers and duties expressly granted and imposed on them." Id. sec. 50.

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Section 6-200, Revised Laws of Hawaii 1955, as amended, provides as follows:

> "There is hereby established a special fund to be known as the contribution fund. Such fund shall consist of and there shall be deposited in such fund: (a) all contributions, interest, and penalties collected under sections 6-192 and 6-197 to 6-199; (b) all moneys appropriated thereto under this part; (c) any property or securities and earnings thereof acquired through the use of moneys belonging to the fund; (d) interest earned upon any moneys in the fund; and (e) all sums recovered upon the bond of the custodian or otherwise for losees sustained by the fund and all other moneys received for the fund shall be mingled and undivided. Subject to the provisions of this part, the territorial agency is vested with full power, authority and jurisdiction over the fund, including all moneys and property or securities belonging thereto, and may perform any and all acts whether or not specifically designated, which are necessary to the administration thereof and are consistent with the provisions of this part." (Emphasis supplied)

Subsections (c) and (d) of the above section, by providing for the deposit in the contribution fund of property or securities and earnings thereof acquired through the use of moneys belonging to the fund and of interest earned upon any moneys in the fund, necessarily assumes the power and authority to invest social security contributions and, by necessary implication, we find such power and authority to be vested in the Secretary of the Employees' Retirement System, who is designated by section 6-194, Revised Laws of Hawaii 1955, as amended, as the "territorial agency".

It may be mentioned here that we have found no prohibition in the federal statutes against such investment and, with respect to federal regulations, we are transmitting herewith a copy of a wire from the Department of Health, Education and Welfare in San Francisco stating that there are no federal regulations restricting or prohibiting the same.

Section 6-201, Revised Laws of Hawaii 1955, as amended, further provides:

> "The contribution fund shall be established and held separate and apart from any other funds or moneys of the Territory and shall be used and administered exclusively for the purpose of this part. Withdrawals

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from such fund shall be made for, and solely for (a) payment of amounts required to be paid to the Secretary of the treasury pursuant to an agreement entered into under section 6-191; (b) payment of refunds provided for in section 6-194; and (c) refunds of overpayments, not otherwise adjustable, made by a political subdivision or instrumentality.' (Emphasis supplied)

There is therefore no authorization for the crediting of earnings on the contributions to the Employees' Retirement System.

Please be advised, however, that we do not regard an investment of the contributions as a "withdrawal" as the term is used and intended in said section 6-201.

Yours very truly,

Walter T. Shimoda

WALTER T. SHIMODA
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

Enc. copy of wire

(WIRE FROM DEPT. OF HEALTH, EDUCATION, & WELFARE - San Francisco

"To Harold S. Burr, Honolulu

"Reurtel 2/16/60 THERE ARE NO FEDERAL REGULATIONS RESTRICTING OR PROHIBITING SHORT-TERM INVESTMENT OF SOCIAL SECURITY CONTRIBUTIONS PENDING THEIR USUAL QUARTERLY PAYMENT TO SECRETARY OF HEW.

WEIKEL."

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BONDS, STATE - OBLIGATION

The veterans' mortgage loan bond authorization contemplated by H. B. No. 289, First State Legislature 1960, is to be included in the computation of the debt limit of the State under the provisions of Article VI, section 3 of the State Constitution.

CONSTITUTION OF THE STATE OF HAWAII - ARTICLE VI, SECTION 3.

The veterans' mortgage loan bond authorization contemplated by H. B. No. 289, First State Legislature 1960, is to be included in the computation of the debt limit of the State under the provisions of Article VI, section 3 of the State Constitution.

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STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

March 22, 1960

Honorable William M. Furtado, Chairman
Committee on Veterans, Police and Military
House of Representatives
First State Legislature
State of Hawaii

Dear Sir:

This is in reference to the question posed by you to the House attorney's office which has been referred to this office for reply.

The question is whether a bond issued to realize funds for the making or purchasing of veterans' mortgages, as provided for in H. B. No. 289, would be a general obligation bond of the State.

It is the opinion of this office that the bond authorization contained in H. B. No. 289 for purposes of veterans' mortgage loans will be general obligation bonds and will be included in the computation of the debt limits of the State.

Section 3, Article VI of the Constitution of the State of Hawaii contains the debt limitation provisions of the State of Hawaii. The exception to the debt limitation provisions is provided in paragraph 7 of said constitutional provision. Under this paragraph, the bonds must meet the following conditions:

(1) Authorized under revenue bond statute;
(2) Issued by a public corporation or public enterprise of the State; and
(3) The only security for the indebtedness be the revenues of such enterprise or corporation.

Under H. B. No. 289, the State treasurer is authorized to issue the bonds. Clearly, the State treasurer is not a public corporation or a public enterprise. The security for

the bonds as provided by section 350-9, Revised Laws of Hawaii 1955, includes the moneys in the general fund of the State that are not otherwise appropriated. Furthermore, under section 350-9, the bonds authorized to be issued by the treasurer are specifically designated as general obligation bonds. The fact that the general obligation bonds issued by the Territory for this purpose were specifically excluded from the debt limitation provision of the Organic Act by Congress did not change the character of the bonds to revenue bonds.

Since any new authorization must comply with the abovementioned provision of the State constitution, the authorization contemplated under H. B. No. 289 is clearly a general obligation bond authorization.

We would like to call your attention to the fact that H. B. No. 289 authorizes the State treasurer to issue State bonds. Under the Reorganization Act, H. B. No. 1, Second Special Session of the State Legislature 1959, the fiscal functions of the treasurer were transferred to the director of the budget. Therefore, H. B. No. 289 should be amended by inserting director of the budget in place of the treasurer.

Yours very truly,

/s/ HAROLD Y. SHINTAKU

HAROLD Y. SHINTAKU
Deputy Attorney General

APPROVED:

/s/ SHIRO KASHIWA

SHIRO KASHIWA
Attorney General

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I. LICENSE, DRIVER'S

A. The right to operate a motor vehicle is a privilege which can be exercised only in accordance with legislative restrictions.

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STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU, HAWAII

March 23, 1960

Honorable William M. Furtado
Chairman, Veterans, Police & Military
House of Representatives
First State Legislature
Honolulu, Hawaii

Dear Sir:

This is in reply to your letter of March 17, 1960, relating to a revocation or suspension of an operator's driver license. The question you ask is, whether House Bill No. 644 is in conflict with section 6 of Article V of the Hawaii State Constitution. House Bill No. 644 attempts to amend section 160-57, Revised Laws of Hawaii 1955, by adding a new sentence at the end thereof to read as follows:

> "The appeal from an order of the court to revoke or suspend a license shall not operate as a stay to the order appealed from."

Section 6, Article V of the Hawaii Constitution provides:

> "The supreme court shall have power to promulgate rules and regulations in all civil and criminal cases for all courts relating to process, practice, procedure and appeals, which shall have the force and effect of law."

The answer to the above question involves initial inquiries into (1) the scope and authority of the judicial rule-making power, and (2) the nature of the proposed amendment.

The rule-making powers, so far as rules of procedure and appeals, were historically considered as being part of the legislative power. These powers were in fact partially conferred

upon the Supreme Court by the legislature.* As so conferred, it was still subject to legislative action. The Constitution has since revolutionarily transferred this historical legislative power to the Supreme Court. This allocation of function is initially conferred upon the Supreme Court and is no longer subject to superseding legislative action.

The full extent of section 6, Article V of the Constitution is not clear. Questions arise as to what type of rules the Supreme Court may have power to promulgate; whether such rules are subject to legislative action; whether exclusive or concurrent power is given to the judiciary branch of government.

The parliamentary history of the section of the Constitution is relevant. See Standing Committee Report No. 37 (Committee on Judiciary), Constitutional Convention, June 2, 1950, pages 3 and 8. This report states that the judiciary article of the Constitution was patterned after the New Jersey plan of the constitution designed by Chief Justice Arthur Vanderbilt. The report further states that (page 3), "The rule-making power is deposited where it belongs--in the Supreme Court, which will make for an efficient and orderly dispatch of the business of the courts." Specifically, it is stated in section 10 (page 8):

> "SECTION 10 [later renumbered section 6] deposits full rule-making power in the supreme court. Under this section, the court may by the promulgation of rules of court abolish archaic procedures relating to practice, procedure, process, appeals and general administration of the business of the courts. It has flexibility in that amendments to rules can be made from time to time by the court without resort to the slower legislative process."

More discussion on section 10 (as later renumbered section 6) is found in Committee of the Whole minutes on June 8, 1950, page 8. Delegate Anthony states:

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* "In 1939 the legislature conferred upon the Supreme Court full rule-making power in civil actions (R.L.H. 1945, Sec. 9614); ten years later it conferred upon the Court the same power with respect to criminal practice and procedure (Act 380, S.L. 1949). Rules adopted pursuant to these statutes have the force and effect of law. The wisdom of depositing rule-making authority in the Court rather than leaving it to the intermittent action by the legislature is apparent. It places the responsibility for the administration of justice on the courts and the bar where it belongs." Foreword to the Hawaii Rules of Civil Procedure.

> "SECTION 10 is an extremely important Section and that is the Section which deposits in the Supreme Court the rule-making power covering practice, procedure and appeals in all of the court. That is one of the most needed provisions we have and the way it will work is this: The Supreme Court following the pattern set by the Supreme Court of the United State will call in a group of lawyers and have them draft the rules and then there will be publication of the rules for a stated number of months and after everybody has had a say, the rules will become effective. When they become effective they will have the force and effect of law. It has the great merit of this--if there is something awkward or inconvenient in any rule that can be called to the attention of the court and after full exploration can be promptly corrected. In other words, they don't have to wait until the next session of the Legislature."

From the above quoted parliamentary history of the Constitution, there are indications that the framers of our Constitution intended to deposit the "rule-making power in the Supreme Court." Further that the rule-making power related to "procedures relating to practice, procedure, process, appeals and general administration of the business of the courts."

For an extensive treatment of this problem see two memorandums by Herman Doi dated June 18, 1959 and June 30, 1959, worked on during the transitional investigations. See also Kaplan and Greene, "The Legislature's Relation to Judicial Rule-Making: An Appraisal of Winberry v. Salisbury," Harvard Law Review 234 (1951). This article analyzes the very relevant case of Winberry v. Salisbury * which deals with the New Jersey judiciary article of the constitution upon which our constitutional provision is based and which case is decided by Chief Justice Vanderbilt who designed the New Jersey judiciary article of the constitution.

It appears that the Supreme Court of the State now has the original rule-making power. However, legislative action is not necessarily entirely precluded. It may be contended that the legislature may act effectively in an area of practice or procedure left untouched by judicial action by the court's sufferance. Also relevant is an analogous situation. It has been held that

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* 5 N.J. 240, 74 A. 2d 406 (1950); Cert. den. 340 U.S. 877, (1950).

a statute is not unconstitutional as an interference with purely judicial function to determine who may practice law, but is a valid enactment in aid of court's powers to make a determination. Homer Budget Service, Inc. et al. v. Boston Bar Association, et al. 139 N.E. 2d 387 (1957). See also In Re Rosebier, 284 P. 611, 613, wherein it is stated:

> "While it is inherently a judicial function of courts to control the conduct of attorneys . . . yet it is the indisputable prerogative of the Legislature to declare the public policy of the state. . . ."

It thus appears that legislative action may be appropriate.

The second inquiry is as to the nature of the proposed amendment. Is the stay of execution on appeal, based on a court order to revoke or suspend a license, a procedural or a substantive matter? It is clear that if the proposed amendment is substantive, the legislature may act in the area. "Substantive law" relates to right and duties which give rise to a cause of action. "Procedural law" is the mode by which the legal rights or duties is enforced. As related to crimes, "substantive law" is that which declares the acts of crimes and prescribes punishment. "Procedural law" relates to those legal rules which direct the course of the proceedings to bring parties into court and the course of the court after they are brought in. State v. Elmore, 155 So. 896 (1934).

The right to operate a motor vehicle is not an unrestricted right but is a privilege which can be exercised only in accordance with legislative restrictions. "Motor Vehicles", 60 C.J.S., sec. 14 at page 124. As such, the legislative regulation is a matter of substance.

A stay of execution on appeal is to hold a judgment in abeyance and suspend enforcement of judgment and execution of process thereon until appeal is finally made. Provisions for stay of execution may be statutory (sec. 208-6, R.L.H. 1955), or promulgated by rules of the court (Hawaii Rules of Civil Procedure--Rule 72(i), Rule 62; Proposed Rules of Criminal Procedure--Rule 38(a)(2)). "Appeal and Error", 4A C.J.S., sec. 629 at page 424. The stay of execution on appeal may be considered a procedural matter. Angevine v. Fleischman, et al., 67 N.Y. Supp. 182 (1900). An indication of this is the action taken

by the supreme court in including rules on stay of execution on appeal in the civil rules and criminal rules. See also People v. Jackson, 212 P. 4 (1923), for authority on legislative action on stay of execution on appeal.

The nature of the proposed amendment therefore, may be said to be both a substantive matter and a procedural matter. It is not possible to definitely state whether the legislative action on the amendment would be legal. The constitutional provision creates a novel situation and until judicial law is made, the full scope and meaning of section 6, Article V is uncertain. There is basis for proposed legislation. It is therefore, the opinion of this office that the legislature may enact the proposed amendment as a substantive matter or in conjunction with the court's power. It should be considered that such legislation may be prone to attack based on alleged constitutional conflict. The attack may not arise. However, if it does, equally significant is consideration that this legislation may be the vehicle to establish an answer to the separation of powers between the judicial and legislative branches in the area of court-made rules. Parenthetically, it may be added that the Supreme Court may establish a rule to remedy the situation.

Very truly yours,

/s/ Vernon F. L. Char

Vernon F. L. Char
Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa

Shiro Kashiwa
Attorney General

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INDEXING INSTRUCTIONS

Op. 60-29

AGRICULTURE & CONSERVATION, Dept. of

Whether Dept. of Agriculture can deny the owners of private land within a proclaimed forest reserve the right to use it for grazing or pasturage purposes if the Dept. were to clarify this land as being most valuable for watershed purposes

STATUTE:

Act 234, S.L.H. 1957:

Interpretation = what are the powers of the Dept. of Agriculture & Conservation under Act 234, S.L.H. 1957 to deny the owners of private land within a proclaimed forest reserve the right to use it for grazing or pasturage purposes if the Dept. were to clarify this land as being most valuable for watershed purposes

SESSION LAWS OF HAWAII 1957

Act 234

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STATE [redacted]Y OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

March 24, 1960

Mr. Wayne L. Collins, Director
Department of Agriculture and
Conservation
1428 So. King Street
Honolulu, Hawaii

Dear Sir:

This is in response to your letter dated March 14, 1960 in which you request an opinion from this office whether the Department of Agriculture and Conservation can deny the owners of private land within a proclaimed forest reserve, the right to use it for grazing or pasturage purposes, if the Department were to classify this land as being most valuable for watershed purposes.

Kukaiau Ranch Company is presently leasing from various owners lands situated at North Hilo, Hawaii being devoted to the grazing of range cattle. The Company is now interested in extending this grazing area in a makai direction into areas designated as forest reserve land. Cooke Trust Company, one of the lessors of the Kukaiau Ranch Company, and owner of a one-sixth undivided interest in the questioned property, is asking the Department to give serious consideration to this request.

Under the provisions of Act 234, Session Laws of Hawaii 1957, the Department has the power to review and redefine, after notice and hearing, the boundaries of forest and water reserve zones. No use shall be made of such areas unless such use is in accord with a zoning regulation properly adopted or unless the Department grants a temporary variance. However, if the owner of the land desires to establish a different use or uses for his land, he can make an application to the Department in the form of a proposed regulation, and if the Department fails to give notice, hold a hearing, and render a decision within 180 days after receipt of such application; then the owner may automatically put his land to the use or uses requested in his application. The Department is empowered to establish subzones within the forest and water reserve zones restricting them to certain uses. In establishing such permitted uses, the Department shall give full

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consideration to all available data as to soil classification and physical use capabilities of the land so as to allow and encourage the highest economic use consonant with requirements for the conservation and maintenance of the purity of the water supplies.

Based on the statute, the Department may zone the questioned area for watershed purposes thus forbidding it to be used for grazing or pasturage uses. However, the Department, if it so chooses, may allow a temporary variance from zoned use where good cause is shown and where the proposed variance is for a use determined by the Department to be in accordance with good conservation practices. Furthermore, if Cooke Trust Company submits an application in the form of a proposed regulation to establish a use or uses for its land different from the zoned uses, and the Department fails to give notice, hold a hearing, and render a decision within 180 days after receipt of such application, then Cooke Trust Company can use its land for such uses as requested in its application.

On the basis of the foregoing discussion, it is the opinion of this office that the Department of Agriculture and Conservation can deny Cooke Trust Company its request to allow the questioned area for grazing and pasturage purposes, provided:

(1) The Department has zoned this area for a use other than grazing and pasturage; and

(2) The request for a variance would be acted on by the Department within 180 days after the receipt of such application in the form of a proposed regulation, after having given notice, held a hearing and rendered a decision.

Yours very truly,

Allen I. Marutani

ALLEN I. MARUTANI
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

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No Opinion

No. 60-30

No Opinion

No. 60-31

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CONSTITUTION OF THE STATE OF HAWAII - Article VI, section 3.

The phrase "at the time of authorization", as found in Article VI, section 3 of the State Constitution, means the time that such authorization is enacted into law under Article III, section 17 of the State Constitution.

BONDS - STATE - AUTHORIZATION

A bill authorizing the issuance of veterans' mortgage loan bonds with a postdating feature is unconstitutional as exceeding the debt limit of the State. But such a bill may be passed and approved without constitutional objections if the final steps necessary for the enactment into loan, under Article III, section 17 of the State Constitution, take place after the assessment rolls become effective.

HYS:es
XXIV;C-7577
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STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

March 31, 1960

Mr. Herman S. Doi, Clerk
House Finance Committee
First State Legislature
State of Hawaii
Honolulu, Hawaii

Dear Mr. Doi:

This is in reference to your letter dated March 31, 1960, requesting our opinion on the legality of the issuance of $20,000,000 in veterans' mortgage loan bonds. The specific question you ask is:

> ". . . whether or not any bill authorizing the issuance of such bonds could be postdated until after the new tax assessment rolls become effective."

The pertinent section found in the Constitution of the State of Hawaii reads as follows:

> ". . . Bonds and other instruments of indebtedness in excess of such limit may be issued when authorized by a two-thirds vote of all the members to which each house of the legislature is entitled, provided such excess debt, <u>at the time of authorization</u>, would not cause the total of state indebtedness to exceed a sum equal to fifteen percent of the total of assessed values for tax rate purposes of real property in the State, as determined by the last tax assessment rolls pursuant to law." Article VI, section 3, paragraph 2.

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The phrase "at the time of authorization", as found in the above quotation, was interpreted by the Supreme Court of Hawaii as "the time of the enactment of such act" in the recent test case submitted on an agreed statement of facts. Employees' Retirement System of the State of Hawaii v. Raymond Y. C. Ho, Director of Budget, State of Hawaii, No. 4178, p. 9.

The word "enactment" has been interpreted by the courts as the time the bill becomes law. The fact that the effective date of the act is delayed does not alter the date of enactment of law. In re Hendricks, 57 P. 965, 967, 60 Kan. 796; In re Initiative State Question No. 10, 110 P. 647, 648, 26 Okl. 554; State v. Gibbons, 203 P. 390, 392, 118 Wash. 171; Stadle v. Battle Creek Tp., 77 N.W. 2d 329, 346 Mich. 64. In one of the cases cited above, the court discusses the possibility that the time of enactment might be the time the act takes effect, but concludes that the enactment of an act is complete when the legislature passes the bill and the governor signs it into law. State v. Gibbons, supra, p. 392. Therefore, the phrase "at the time of authorization", as found in Article VI, section 3 of the Constitution, means the time that such authorization is enacted into law under Article III, section 17 of the Constitution of the State of Hawaii.

It is therefore the opinion of this office that the bill, with the postdating feature suggested by you, authorizing the issuance of the veterans' mortgage loan bonds would be unconstitutional as exceeding the debt limit of the State. This is on an assumption that your proposal contemplates that the bill will be enacted into law before the new tax assessment rolls become effective. But it is the opinion of this office that such a bill without the postdating feature may be passed and approved without constitutional objections if the final steps necessary for the enactment into law, under Article III, section 17 of the Constitution of the State of Hawaii, take place after the assessment rolls become effective.

We assume that the question you ask is based on H. B. No. 289 under consideration by your committee at the present time. We have recently rendered an opinion on this bill for Representative William M. Furtado, Chairman of the

Committee on Veterans, Police and Military Affairs. A copy of such opinion is attached hereto for your information.

Yours very truly,

/s/ HAROLD Y. SHINTAKU
HAROLD Y. SHINTAKU
Deputy Attorney General

APPROVED:

/s/ SHIRO KASHIWA
SHIRO KASHIWA
Attorney General

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No Opinion

No. 60-33

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Op. 60-34

AGRICULTURE & CONSERVATION, DEPT OF:

Whether, under the applicable statutory provisions, the Dept of Agriculture & Conservation is empowered to sell state-owned timber on state-owned forest reservations.

STATUTE:

Construction:

Whether there is sufficient statutory authority under sections 18-7(f), 18-7(e), 18-8(b), R.L.H. 1955, and Act 265, S.L.H. 1959, to authorize the Dept of Agriculture & Conservation to sell state-owned timber on state-owned forest reservations.

REVISED LAWS OF HAWAII 1955

Sections 18-7(f), 18-7(e), 18-8(b)

SESSION LAWS OF HAWAII 1959

Act 265

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STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

April 4, 1960

The Honorable John C. Lanham, Chairman
Economic Development Committee
House of Representatives
First Legislature, State of Hawaii
Honolulu, Hawaii

Dear Sir:

This is in response to your oral request for an opinion from this office whether the Department of Agriculture and Conservation is empowered to authorize the sale of state-owned timber on state-owned forest reservations under the applicable statutory provisions.

Section 18-7(f), Revised Laws of Hawaii 1955, provides that the Board of Agriculture shall:

> "Devise and carry into operation, ways and means by which forests and forest reservations can, with due regard to the main objects in chapters 18-27 set forth, be made self-supporting in whole or in part;"

Looking at the language of this provision, we feel that the statute imposes an obligation or duty on the part of the Board to devise ways by which the forest and forest reservations can be made self-supporting. Under the present operations, the sale of forest products brings in a relatively small sum into the treasury, far from making the forest program self-supporting. The sale of state timber would increase the revenues of the State considerably and would contribute substantially and immeasurably toward making the forest and forest reservations self-supporting. In an examination of the provisions in chapters 18 - 27, we find nothing that will make the sale of state timber inconsistent with the main objects therein set forth.

Section 18-7(e), Revised Laws of Hawaii 1955, provides that the Board shall devise ways and means of utilizing forest and forest reservations. Similar language is found in section 18-8(b),

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Revised Laws of Hawaii 1955, which authorizes the Board to make rules and regulations for and concerning the utilization of forest reserves. Webster defines "utilize" as:

> "To make useful; to turn to profitable account or use; to make use of."

The sale of state timber would certainly turn the forest reservation to profitable account. We feel that these two sections of authorizing the Board to utilize forest reservations would empower the Board to sell state timber and enact rules and regulations for such sale.

Act 265, Session Laws of Hawaii 1959, provides that the income accruing from any forest reservation, or the products thereof, shall be deposited with the treasurer to the credit of the general fund. Such a provision indicates that the legislature contemplated income accruing from forest reservation or the sale of the products thereof. Since sale of forest products other than timber presently constitutes such an insignificant sum, income accruing from the sale of state timber would not be inconsistent with this provision.

Taking all these statutory provisions as a whole, we feel that there is sufficient authority on the part of the Department of Agriculture and Conservation to authorize the sale of state timber on state-owned forest reservations.

Respectfully submitted,

Allen I. Marutani

ALLEN I. MARUTANI
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

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HAWAII STATE GOVERNMENT REORGANIZATION ACT OF 1959

Section 6:

Executive head of a department is not responsible for the administration of the functions and authority of an agency transferred to his department for administrative purpose.

Section 20:

Established two types of functions, duties and powers in a department: (1) administrative control and (2) complete transfer of all functions, powers and duties.

Section 6:

Transfer to a department of an agency for administrative control or purpose is a limited transfer of function and authority.

Section 7:

Executive head of a department is directly responsible for the administration of his department.

Administrative control:

Transfer to a department of an agency for administrative control or purpose is a limited transfer of functions and authority.

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STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

April 4, 1960

Miss Mary L. Noonan
Director of Social Services
Department of Social Services
Liliuokalani Building
Honolulu, Hawaii

Dear Madam:

Re: (1) Relationship of Board of Social Services to the Hawaii Housing Authority Commission and to the Board of Paroles & Pardons

(2) Relationship of the Director of Social Services to the Board of Paroles & Pardons

On January 27, 1960, your department asked (1) whether or not the Board of Social Services should advise on matters being handled by the Hawaii Housing Authority and the Board of Paroles and Pardons, and (2) whether or not the functions performed by the Board of Paroles and Pardons are subject to review and decision by the Director of Social Services.

1. Section 20 of the Hawaii State Government Reorganization Act of 1959 created the Department of Social Services with certain functions together with the Board of Social Services which was created to sit in an advisory capacity on matters within the jurisdiction of the Department of Social Services. The same reorganization act established two types or classes of powers, duties, functions and authority which were transferred by said act; one type or class is the transfer of administrative control or for administrative purposes which, as defined in section 6 of the Hawaii State Government Reorganization Act of 1959, is a limited transfer of administrative powers only; the other type of transfer is a complete transfer of all the functions and authority of an agency.

Section 20, supra, specifically enumerated the various functions and authority transferred to the Department of Social Services. The functions and authority of the Hawaii Housing Authority and the Board of Paroles and Pardons have not

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been transferred to the Department of Social Services but have been retained by these two agencies which have been placed in the Department of Social Services for administrative purposes only. This is established by section 20, supra, thusly:

> ". . . Notwithstanding any other provision of this Act, but subject to the administrative control of the director of social services, the functions, duties and powers of the housing authority, as heretofore provided by law, shall be vested in the Hawaii housing authority.
>
> "The board of paroles and pardons is hereby placed within the department of social services for administrative purposes. The functions, duties and powers, subject to the administrative control of the director of social services, and the composition of the board shall be as heretofore provided by law.
>
> "The functions and authority heretofore exercised by the department of public welfare, the department of institutions (except for Waimano home and the state hospital transferred to the department of health), the boards of prison inspectors, the bureau of sight conservation and work with the blind, the council on veterans' affairs, and any other agency with respect to the assistance and care of the indigent and medically indigent as heretofore constituted are hereby transferred to the department of social services established by this Act."

The language of section 20, supra, defining the status of the Hawaii Housing Authority and the Board of Paroles and Pardons are not similar but the meaning is the same; this is clear by the enumeration of the functions and authority transferred to the Department of Social Services and by the definition of administrative control or purpose contained in section 6 of the Hawaii State Government Reorganization Act of 1959; section 6, supra, makes no differentiation between administrative purpose or control.

Thusly, it is the opinion of the Department of the Attorney General that the Board of Social Services does not sit in an advisory capacity over matters of the Hawaii Housing Authority and the Board of Paroles and Pardons, since the functions, duties and powers of these two agencies are not within the jurisdiction of the Department of Social Services

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and since the Board of Social Services sits only in an advisory capacity on matters within the jurisdiction of the Department of Social Services.

2. The executive head of the Department of Social Services, the Director of Social Services, is directly responsible for the administration of the department's functions and authority as established by section 20, supra. Section 7, Hawaii State Government Reorganization Act of 1959. These functions and authority are conferred and transferred to the Department of Social Services by the reorganization act. The Board of Paroles and Pardons has been placed within the Department of Social Services for administrative control and, as aforementioned, this is a limited transfer of that agency to the Department of Social Services and precludes the supervision and control of the Director of Social Services over all activities which are not administrative and set forth in section 6(h) of the reorganization act.

Thusly, it is the opinion of the Department of the Attorney General that it was not intended that the functions performed by the Board of Paroles and Pardons be subject to review and decision of the Director of Social Services, since the functions and authority other than those having to do with administrative matters of the Board of Paroles and Pardons have not been transferred to the Department of Social Services.

Consequently, it is respectfully submitted that the answers to the two questions are in the negative.

Yours very truly,

Tenny H. Tom

TENNY H. TOM
Deputy Attorney General

APPROVED:

H. Rodger Betts

H. RODGER BETTS
Acting Attorney General

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INDEXING INSTRUCTIONS

Op. 60-36

BLIND VENDORS, PUBLIC BUILDINGS

Space may be set aside for blind vendors in public buildings - permissive rather than mandatory.

Act 245, S.L.H. 1959

Section 7-20, R.L.H. 1955

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STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

April 5, 1960

Miss Mary L. Noonan
Director of Social Services
Department of Social Services
Liliuokalani Building
Honolulu, Hawaii

Dear Miss Noonan:

Re: Blind Vendors in Public Buildings

Your letter of March 25, 1960, asked whether or not a blind person is exempted from having to bid for the right to operate a snack-bar or vending concession stand in a public building.

It is the opinion of this department that a blind or visually handicapped person may be exempted from having to bid for the right to operate a snack-bar or vending concession stand in a public building, if such space is set aside for such a person by the custodian of the public building which is being considered.

Our laws show a decided bias to provide them opportunity for employment and self-support. This legislative intent is clear and should not be overlooked.

Section 7-20, Revised Laws of Hawaii 1955, as amended, authorizes the properly constituted custodian of a public building to permit visually handicapped persons to operate vending stands within a public building. Act 245, Session Laws of Hawaii 1959, exempts the blind and handicapped persons where space is set aside for their use from the requirement of submitting bids to operate concessions to sell goods, wares, merchandise, and services or to operate restaurants, cocktail lounges, soda fountains and parking areas in any public building or on any public lands owned by or under the jurisdiction of the State or county or public agency. The law is permissive rather than mandatory in regards to use of space in public buildings by the visually handicapped person.

Op. 60-36

The strong legislative policy or intent embodied in these two sections, which recognize the importance of providing the visually handicapped persons with remunerative employment, enlarging their economic opportunity, and stimulating them to greater efforts to make themselves self-supporting, should not be overlooked. Op. 60-19. This is consistent and reasonable legislative policy since a substantial amount of public money is provided for the vocational rehabilitation of the visually and physically handicapped. A failure by the State to provide the opportunity for these persons to use the training which the State has provided them would be contrary to the spirit of the law and intent of the legislature.

Yours very truly,

Tenny Hoon Tom

TENNY H. TOM
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

Op. 60-36

ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
AND REFER TO
INITIALS AND NUMBER

HHS:rt

XIII-A
Op. 60-37

STATE TERRITORY OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

April 5, 1960

Mr. Arthur A. Akina, Jr.
Director of Personnel Services
State of Hawaii
825 Mililani Street
Honolulu 13, Hawaii

Dear Mr. Akina:

This is in response to your request of February 5, 1960, wherein you ask for an interpretation of sections 4-6 and 5-1, Revised Laws of Hawaii 1955, as they apply to the hiring of a librarian III under certain factual conditions which you have outlined in great detail.

You ask three questions:

1. Is it legally proper for the resident who is on the eligible list to be initially appointed and compensated immediately at the pay rate for the "C" step of Salary Range 16 without determining whether the non-resident eligibles who are on the eligible list and who are residing on the mainland will accept employment at the pay rate for either the "A" or "B" steps of Salary Range 16?

According to the provisions of section 4-6, Revised Laws of Hawaii 1955, all initial appointments are to be made in the first step of the appropriate salary range, and only in the event that recruitment of an employee is not possible for such first step may the director recruit at a step other than the lowest step in such range. This being so, it is not proper that a resident who is on the eligible list be initially appointed and compensated immediately at the pay rate for a "C" step of the appropriate salary range without determining whether the non-resident eligible will accept employment and can be hired at either an "A" or "B" step within the same salary range. However, if such determination cannot promptly

Op 60-37

be made and if the appointing officer should determine that it is essential that the position be immediately filled, then the appointment at such "C" step should be authorized, subject to such modification as is set out in the provisions of said section 4-6.

Accordingly, if in the factual condition you outlined above, the appointing officer had determined that it was important to hire a librarian III immediately and before a determination could be or was made of the non-resident eligibles qualifying for the job, then it was proper for that officer to appoint Miss Kuniyoshi for that position at the "C" step of SR-16.

2. If one of the non-resident eligibles will accept employment at the pay rate for the "A" step, does it mean that the resident who was initially employed at the "C" step is subject to removal or a reduction in pay rate to that for the "A" step if she wishes to continue her employment?

The contingency described in this second question is, we think, clearly provided for in section 4-6. The fourth sentence therein provides as follows:

> "Any employee so recruited at a step above the minimum of the appropriate salary range shall, upon a qualified recruit having been found willing to accept employment at the minimum step in the salary range, have the option to accept an appointment at such minimum step in the salary range, otherwise the appointment shall be made of the recruit willing to accept such appointment, provided that this shall not apply in the event that the employee is receiving compensation at a step which would then be appropriate had his original appointment been made at the minimum step. . . ."

The law provides here that although an employee may be appointed to a position at a step higher than a lower or the lowest step within the salary range, if it later turns out that there is another recruit who is willing to accept appointment to the same position at a lower or the lowest step within the same salary range, the employee then would have to make a choice of either resigning his position or accepting that position at such lower or lowest step. This option will again be subject to a proviso which is appended to this same provision in the same sentence. However, in determining whether there has been found a qualified recruit "willing to accept employment at the minimum step in the salary range," we think that the mere expression of willingness stated by such qualified non-resident recruit is not adequate compliance with this provision so as to force the

Op 60-37

employee to make the choice outlined above under facts you describe. We think that the term "willing to accept employment at the minimum step in the salary range" should be enlarged, in the case of a non-resident recruit, to mean that there must be a recruit not only willing to be employed at a lower rate but that, in the case of a state, the governor in his discretion must also have tentatively approved the appointment. This is so because the mere expression of willingness on the part of the recruit may not necessarily result in his being employed. If a mere expression of willingness of such a recruit were to be the contingency upon which the employee will have to exercise her choice, the choice exercised by the employee may be entirely unnecessary if the governor at a later date chooses not to approve such employment of a non-resident eligible.

3. Is it legally proper for us to certify three non-resident eligibles to fill a vacancy because the non-residents declared they will accept employment at the pay rate for the "A" step of Salary Range 16 but not to certify the one eligible who is a resident since she declared that she will not accept employment except at the pay rate for the "C" step?

Because of the consideration outlined in our answer to the second question, the necessity for the governor's approval of the hiring by contract of a non-resident eligible, we feel that it would be better and proper for the Civil Service Department to certify to an appointing authority not only the three non-resident eligibles who have expressed a willingness to accept employment at the lowest step of the salary but also to certify any other eligible residents or non-residents who are willing to accept employment for the same position at steps other than the lowest step within the same salary range.

Very truly yours,

Henry H. Shigekane

HENRY H. SHIGEKANE
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

Op 60-37

op file

ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
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537:VII-B;XIII-A
~~Supersedes Op.~~ 60-37

STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

May 16, 1960

Mr. Arthur A. Akina, Jr.
Director of Personnel Services
State of Hawaii
825 Mililani Street
Honolulu 13, Hawaii

Dear Mr. Akina:

This is in reply to your letter of May 11, 1960, concerning the facts cited therein and the opinion issued from this office (Op. 60-37) under date of April 5, 1960.

Since the issuance of the last-mentioned opinion, this office has been reconsidering the ruling incorporated therein and had been, before receipt of your letter of May 11, 1960, determined that change in that opinion was necessary. This change will not bring about any difficulty in the solution of the problem which occasioned that opinion and will also serve to answer the question posed in your letter of May 11, 1960.

Nonresidents can be appointed to government positions only according to the terms set out in section 5-1, Revised Laws of Hawaii 1955. That section points out that:

> "(b) For the purpose of filling a position for which no competent person with the foregoing qualifications applies . . ."

The "foregoing qualifications" refer to the requirements (1) of United States citizenship; and (2) of residence in the state or territory for three years immediately preceding the appointment. These two qualifications are specifically stated in the opening paragraph of said section 5-1. The term "competent person" in sub-section (b) of section 5-1 should not be limited by the requirements of initial appointments found in section 4-6, Revised Laws of Hawaii 1955, especially that portion which states that the recruit must first be appointed at the lowest step of the salary range. Competency, on its face, has no relation to the amount of compensation the recruit should be paid when initially appointed.

Supersedes
Op. 60-37

This being the case, it follows that if there is a position open and a resident eligible for that position, then the possibility of hiring a nonresident eligible is foreclosed, and this is so even if the resident eligible will have to be appointed to that position at a step other than the lowest in the salary range to which that position is assigned.

To the extent that the opinion of this office, Op. 60-37, dated April 5, 1960, is in conflict with this opinion, it is hereby withdrawn.

Accordingly, it follows that Mrs. Jacqueline H. Enequist may be appointed to the "C" step of salary range 18, provided there is no obstacle arising from the fact that she was transferred, rather than appointed, to the job of librarian IV for the Maui County Free Library.

Yours very truly,

Henry H. Shigekane

Henry H. Shigekane
Deputy Attorney General

APPROVED:

Shiro Kashiwa

Shiro Kashiwa
Attorney General

INDEXING INSTRUCTIONS

Op. 60-38

COMPTROLLER, DEPUTY

Salary

Act 255, Session Laws of Hawaii 1959, fixes the salary of Deputy Comptroller despite increased workload due to subsequent reorganization of State government until such time as legislature repeals or amends such act.

PUBLIC MONEYS

Compensation, Additional

Act 255, Session Laws of Hawaii 1959, fixes the salary of Deputy Comptroller despite increased workload due to subsequent reorganization of State government until such time as legislature repeals or amends such act.

ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
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Op. 60-38

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

April 12, 1960

Mr. Michael M. Miyake
Comptroller, State of Hawaii
Department of Accounting and
General Services
State Office Building
Honolulu, Hawaii

Dear Mr. Miyake:

This is in reply to your letter of April 5, 1960 which posed the following problem:

When Act 255, Session Laws of Hawaii 1959, was enacted, the salary of the Deputy Comptroller of the Territorial Comptroller's Office was set at $13,000. With the subsequent enactment of the Hawaii State Government Reorganization Act of 1959, however, the Comptroller's Office was abolished and its functions transferred to the newly created Department of Accounting and General Services. Furthermore, as a result of the reorganization, the Deputy Comptroller assumed more and different duties. The question is then raised whether Act 255 is presently effective to fix the salary of the Deputy Comptroller in the Department of Accounting and General Services despite the increased work-load.

It is our opinion that Act 255 is operative and controlling with respect to the salary of the Deputy Comptroller.

Act 255 clearly anticipated the problem posed by your letter when it expressly set out section 6(b) which provides:

> "In view of the pending reorganization of the executive departments to conform to the requirement of the Hawaii State Constitution that there be not more than twenty principal departments, the salaries for department heads and deputies

Not sent

Op. 60-38

established by this section shall be subject to increase or decrease by the Legislature."
(Underscoring added.)

The Reorganization Act did not change the above requirement that any change in the salary schedule set out by Act 255 be done by the Legislature. Section 32 of the Reorganization Act was designed to protect the salaries and statuses of incumbent officers and employees whose functions are transferred, but it does not authorize any change in salary (with certain exceptions not relevant here) nor repeal or amend the salary schedule set out by Act 255. Section 44 of the Reorganization Act is applicable only to officers and employees whose salaries are not provided for by existent laws. We do not think that the additional workload placed upon the office of the Deputy Comptroller is by itself a basis for holding otherwise.

Very truly yours,

Carlos Ramelb

CARLOS RAMELB
Deputy Attorney General

APPROVED:

SHIRO KASHIWA
Attorney General

Op. 60-38

INDEXING INSTRUCTIONS

Op. 60-39

EMPLOYEES' RETIREMENT SYSTEM

Investment: Act 144, S.L.H. 1959

Term "improvements" as used in Act 144, S.L.H. 1959 means any enhancement or betterment of real property which adds to the value of the leasehold interest and as such, may include pavements for parking, removal, demolition of buildings, grading of land, excavation, filling, back filling, and the like.

SESSION LAWS OF HAWAII 1959

Act 144

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Op. 60-39

STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

April 18, 1960

Employees' Retirement System
State of Hawaii
Keelikolani Building
Honolulu, Hawaii

Attention: Mr. Victor Kahn

Gentlemen:

This is with reference to the letter of Mr. Victor Kahn, dated April 13, 1960, conveying the request of the Board of Trustess for our opinion on the meaning of the term "improvements" as used in Act 144, S. L. H. 1959.

It is the opinion of this office that the term "improvements" in Act 144 means any enhancement or betterment of real property which adds to the value of the leasehold interest.

Act 144 authorizes the investment of the retirement system funds in mortgages of leasehold interests in improved real property, one of the limitations being that the mortgage "does not secure an amount greater than seventy per cent of the value of the improvements."

The obvious purpose of the limitation is to provide for a margin of security in case foreclosure is necessitated by default of the obligor. In view of such purpose, it would appear to us that there is no good reason to restrict the term to buildings or to any class of improvements, but that any enhancement may be considered which has a value when the leasehold interest is sold in the open market.

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We conclude, therefore, that pavements for parking, removal or demolition of buildings, grading of land, excavation, filling, back filling, and the like, may be considered to the extent that they add to the value of the leasehold interest.

Yours very truly,

Walter T. Shimoda

WALTER T. SHIMODA
Deputy Attorney General

APPROVED:

H. Rodger Betts

H. RODGER BETTS
Assistant Attorney General

Op 60-39

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OP. 60-40

EMPLOYEES' RETIREMENT SYSTEM

SOcial Security Section:

Contribution Fund - Earnings from the investment of social security contributions may not be used to defray the administrative expenses of the social security section of the Employees' Retirement System

REVISED LAWS OF HAWAII, 1955

section 6-201 as amended.

ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
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Op. 60-40

STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

April 20, 1960

Board of Trustees
Employees' Retirement System
State of Hawaii
Keelikolani Building
Honolulu, Hawaii

Attention: Mr. Harold C. Hill, Secretary

Gentlemen:

This is with reference to your request conveyed by letter of Mr. Charles L. Hapai, dated April 14, 1960, for our opinion on the question whether the earnings from the investment of social security contributions may be used to defray administrative expenses of the Social Security Section of the Employees' Retirement System.

Please be advised that it is the opinion of this office that such earnings may not be used to defray the administrative expenses of the Social Security Section. We again refer you to section 6-201, Revised Laws of Hawaii 1955, as amended, which provides:

> "The contribution fund shall be established and held separate and apart from any other funds or moneys of the Territory and shall be used and administered exclusively for the purpose of this part. Withdrawals from such fund shall be made for, and solely for (a) payment of amounts required to be paid to the secretary of the treasury pursuant to an agreement entered into under section 6-191; (b) payment of refunds provided for in section 6-194; and (c) refunds of overpayments, not otherwise adjustable, made by a political subdivision or instrumentality." (Emphasis supplied.)

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We might mention here that any change in the law above must come by way of legislation.

Yours very truly,

Walter T. Shimoda

WALTER T. SHIMODA
Deputy Attorney General

APPROVED:

H. Rodger Betts

H. RODGER BETTS
Acting Attorney General

Op 60-40

No Opinion

No. 60-41

INDEXING INSTRUCTIONS

Op. 60-42

SECTION 166-13, REVISED LAWS OF HAWAII 1955

Applies to all licensed contractors regardless of main base of operation and a failure to substantially comply with said section would justify revocation, suspension or failure to renew license.

PLACE OF BUSINESS

Applies to all licensed contractors regardless of main base of operation and a failure to substantially comply with said section would justify revocation, suspension or failure to renew license.

Op. 60-42

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Op. 60-42

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

April 22, 1960

Mr. Robert A. Shaw, Executive Secretary
Contractors License Board
Honolulu Armory
410 S. Hotel Street
Honolulu, Hawaii

Dear Mr. Shaw:

Re: Place of business for licensed mainland contractors

This is in response to your request for an interpretation of section 13 of Act 305, Session Laws of Hawaii 1957. You requested an interpretation of said section in relation to licensed mainland contractors who, after completion of work in this state, return to the mainland, closing their Hawaii office, but who continue to bid for work in this state from the mainland.

It is the opinion of this department that section 13, supra, applies to all licensed contractors regardless of their main base of operation and that a failure to materially comply with said section would justify a revocation, suspension or refusal to renew a license issued under Act 305, supra.

Section 13, supra, requires a licensed contractor to maintain a definite place of business in the state and to display his contractor's license therein; this section applies to all licensed contractors.

Section 16(m), Act 305, Session Laws of Hawaii 1957 authorizes the Contractors License Board to revoke, suspend or refuse to renew the license of any contractor for a willful failure in any material respect in complying with provisions of this chapter. It is clear that some compliance of section 13, supra, is required by section 16(m), supra. A complete failure to maintain an office

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and to display a license would be a material violation; some substantial attempt to maintain a definite place of business and to display a license within the state is required of a licensed contractor. The law requires some business situs within the state and a complete failure to provide such a situs would not satisfy the statute.

Yours very truly,

Tenny Hoon Tom

TENNY H. TOM
Deputy Attorney General

APPROVED:

H. Rodger Betts

H. RODGER BETTS
Acting Attorney General

Op. 60-42

INDEXING INSTRUCTIONS

Op. 60-43

EMPLOYEES' RETIREMENT SYSTEM

Termination date of the service credit which may be granted to the legislators of the Territory of Hawaii, and

the effective date of the service credit which may be granted to legislators of the State of Hawaii were coterminous as of August 21, 1959.

ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
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Op 60-43

STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

April 27, 1960

Mr. Harold C. Hill, Secretary
Employees' Retirement System
State of Hawaii
Keelikolani Building
Honolulu, Hawaii

Dear Mr. Hill:

This is in reply to your letter of April 4, 1960 requesting our opinion on (1) the termination date of the service credit which may be granted to the legislators of the Territory of Hawaii, and (2) the effective date of the service credit which may be granted to legislators of the State of Hawaii.

It is our opinion that the answer to both questions is August 21, 1959.

In the year that Hawaii obtained statehood, the members of both houses of the State legislature were elected to their positions on July 28, 1959 which is a date prior to the official admission of Hawaii to the Union. It is obvious that the State offices for which the officials were elected were not then existent.

It was not until Hawaii was officially admitted to the Union on August 21, 1959 that the offices of the State legislature came into existence and only then did the elected State legislators assume their offices. This conclusion is held despite the express provisions of section 15, Article XVI of the State Constitution* because the Constitution did not become operative until statehood was officially obtained.

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*Section 15, Article XVI provides in part:

"The terms of office of the members of the first legislature shall be as follows:
"Members of the house of representatives shall hold office for a term beginning with their election

Op 60-43

Furthermore, as mentioned by your letter, this office has previously opined that Territorial legislators earn credit for the full term for which they are elected and serve even though they may be in session for only sixty days of that term. (see Atty. Gen. Op. 1098:60, dated February 26, 1953.)

Since the Territory of Hawaii and the Territorial legislative offices continued until Hawaii was admitted to the Union and since the State legislators immediately took office upon such admission, the termination date of the service credit of the Territorial legislators and the effective date of the service credit of the State legislators were coterminous.

Very truly yours,

CARLOS RAMELB
Deputy Attorney General

APPROVED:

SHIRO KASHIWA
Attorney General

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*(continued from p. 1):

and ending on the day of the second general election held thereafter.

"Members of the senate shall be divided into two classes. . . . Members of the first class shall hold office for a term beginning with their election. . . . The remaining members elected shall constitute the second class and shall hold office for a term beginning with their election. . . ." (Emphasis supplied.)

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Op. 60-44

BUDGET & REVIEW, Department of

Powers of the Director of the Budget:

The Powers of the Director of the Budget/prescribed are by section 6 of the Hawaii State Government Reorganization Act of 1959 and the Director of the Budget has only those powers which can be credited on said section.

EMPLOYEES' RETIREMENT SYSTEM

Powers of the Director of the Budget:

as above.

STATUTES:

Section 6 - Hawaii State Government Reorganization Act of 1959

Op 60-44

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Op. 60-44

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

May 9, 1960

Board of Trustees
Employees' Retirement System
State of Hawaii
Keelikolani Building
Honolulu, Hawaii

Attention: Mr. Harold C. Hill, Secretary

Gentlemen:

This is in response to your request made verbally at the meeting of April 19, 1960, for an opinion on the memorandum submitted by Mr. Raymond Ho, Director of the Budget, proposing an administrative procedure for the Director of the Budget and the Board of Trustees of the Employees' Retirement System.

Please be advised that, in the opinion of this office, the powers of the Director of the Budget are prescribed by section 6 of the Hawaii State Government Reorganization Act of 1959 and that the Director of the Budget has only those powers which can be predicated on said section.

Section 14 of the above Act provides in part as follows:

> "The employees' retirement system as constituted by chapter 6 of the Revised Laws of Hawaii 1955, as amended, is hereby placed within the department of budget and review for <u>administrative purposes</u>. The functions, duties and powers, subject to the <u>administrative control</u> of the director of the budget, and the composition of the board of trustees of the employees' retirement system shall be as heretofore provided by law." (Emphasis supplied.)

And section 6 provides as follows:

> "<u>Administrative supervision of boards and commissions</u>. Whenever any board or commission is established or placed within or transferred to a principal department for

Op 60-44

administrative purposes or subject to the administrative control or supervision of the head of the department, the following provisions shall apply except as otherwise specifically provided by this Act:

"(a) The head of the department shall represent the board or commission in communications with the governor and with the legislature.

"(b) The financial requirements from state funds of the board or commission shall be submitted through the head of the department and included in the budget for the department.

"(c) All rules and regulations adopted by the board or commission shall be subject to the approval of the head of the department.

"(d) The employment, appointment, promotion, transfer, demotion, discharge and job descriptions of all officers and employees of or under the jurisdiction of the board or commission shall be determined by the board or commission subject to the approval of the head of the department and to applicable personnel laws.

"(e) All purchases of supplies, equipment or furniture by the board or commission shall be subject to the approval of the head of the department.

"(f) The head of the department shall have the power to allocate the space or spaces available to the department and which are to be occupied by the board or commission.

"(g) Any quasi-judicial functions of the board or commission shall not be subject to the approval, review or control of the head of the department.

"(h) Except as set forth hereinabove, the head of the department shall not have the power to supervise or control the board or commission in the exercise of its functions, duties and powers."

Based on section 6, supra, we make the following comments:

(1) Budget preparation is governed by subsection (b) of section 6, personnel transactions by subsection (d), and

Op 60.44

purchasing by subsection (e). The terms "housekeeping services" are vague and indefinite and use of such terms should be avoided.

(2) A statement of the "prime functions of the Retirement System", we feel, is unnecessary. The question that arises each time any control is contemplated over the Retirement System by the Director of the Budget is whether such control is authorized by section 6.

(3) Control over the employees of the Retirement System by the Director of the Budget is only as provided by subsection (d). As such, the Secretary of the Retirement System is not responsible to the Director of the Budget.

(4) Sections 7 and 8 of the Reorganization Act have no application to a board or commission placed within a department for administrative purposes.

Despite the limitations of section 6 on the powers of the Director of the Budget, however, it should be clearly understood that there is nothing to prevent co-operation between the Director of the Budget and the Board of Trustees. Instead, such co-operation would seem to be assumed.

Yours very truly,

Walter T. Shimoda

WALTER T. SHIMODA
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

Op 60-44

INDEXING INSTRUCTIONS

May 11, 1960

STATUTES CONSTRUED

Act 1 of 2nd Special Session of 1959.

Section 32 of the Reorganization Act did not create a special group of civil service employees who would be employed on the basis of the school hours and school year of the Department of Public Instruction.

REORGANIZATION ACT OF 1959

Same syllabus as above

STATUTES

Reorganization Act of 1959

(Same syllabus as above)

STATUTES

Legislative history

Includes legislative history of similar bills considered by previous legislatures but not enacted.

HEALTH, DEPARTMENT OF

Reorganization Act of 1959

Section 32 did not create a special group of civil service employees to be employed on the basis of the school hours and year of the Department of Public Instruction.

Op. 60-45

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WKW:LNC
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Op. 60-45

STATE OF HAWAII

Department of the Attorney General

HONOLULU

May 11, 1960

Honorable Richard K. C. Lee, M.D.
Director, Department of Health
State of Hawaii
Honolulu, Hawaii

Dear Sir:

In response to your inquiry of March 24 and having in mind the facts contained in your office's letter of May 6 providing essential background information, this office is of the opinion that the dental hygienists transferring to the Department of Health, in accordance with Act 1 of the Second Special Session of 1959, First State Legislature, are to become a part of your department's regular civil service staff and be accorded all of the privileges and perquisites attendant thereunto.

Said Act 1 provides in section 19 in part as follows:

> "The functions and authority heretofore exercised by the board of health (excluding assistance and care for the indigent and the medically indigent) and the department of institutions with respect to Waimano home and the state hospital and the dental health treatment function of the department of public instruction as heretofore constituted are hereby transferred to the department of health established by this Act.
>
> "The governor shall define and differentiate dental health treatment from dental health instruction and shall provide for the gradual transfer of any personnel within the definition of dental health treatment to the department of health. The provisions of this section shall not be construed to require the transfer from the department of education to the department of health of any dental hygienist having a teacher's certificate and employed by the department of public instruction immediately prior to the effective date of this Act." (Underscoring supplied)

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In regard to the transfer of personnel from the Department of Public Instruction to the Department of Health the following part of section 32 of said Act 1 entitled "Transfer of personnel" would seem to apply, since section 32 apparently uses "tenure" to mean "civil service tenure":

> "An employee of the state who does not have tenure and who may be transferred or appointed to a civil service position as a consequence of this Act shall become a civil service employee without the loss of salary, seniority, prior service credit, vacation, sick leave or other employee benefits or privileges and without the necessity of examination; provided, that such employee or officer possesses the minimum qualifications for the position to which he is transferred or appointed."

It has been suggested the language "without the loss of ... other employee benefits or privileges" requires that transferred personnel, i.e. those without a teacher's certificate, and those with certificates voluntarily transferring are to be continued on the work schedule and work hours of their former department and are to be given the same opportunities for sabbatical leave which are offered to teachers, etc.

That the First State Legislature by the above phrase intended to create within civil service, without further ado or discussion, a special group of employees, who would normally work at most from about 8:00 A.M. to 2:00 P.M. five days a week for some forty weeks a year, would appear to be highly unlikely and unreasonable in view of the economic consequences and possible effect on the morale of the other members of civil service.

Since no legislative reports were written on said Act 1 during the Second Special Session, it might be thought only logic and sound economic principles were left to serve as guides to the Legislature's intent. (Petroleum Casualty Co. v. Williams, 15 S.W. 2d 553). However, such need not be the case since the same Legislature in its First Special Session of 1959 had an identical bill before it whose legislative history includes a Conference Committee report dated October 22, 1959 which can be referred to in determining the subject legislative intent. (Transcontinental & Western Air v. C.A.B., footnote 6, 336 U.S. 601, 93 L. Ed. 911, 916). That Conference Committee report in discussing the section of that bill entitled "Transfer of personnel" stated in part as follows:

> "(a) Delete the provisions providing that the section shall not apply to department heads and untenured employees and provide that an untenured employee affected by this act shall have the opportunity of

acquiring civil service status if he is able to meet the minimum qualifications of the position to which he is transferred.

> "Your committee believes that employees who have served the public as employees without tenure should not be penalized as a consequence of this act. Further, that the experience of such employees may be utilized to the advantage of the state."

Clearly the foregoing statement does not indicate an intent to create a preferred and very special category of civil service employees within the Department of Health.

For the aforementioned facts and law this office offers the following numbered statements in response to the correspondingly numbered questions contained in your letter of inquiry.

1. Persons with teaching certificates should be given a reasonable period of time in which to decide whether or not to transfer.

2. The positions for the new function are to be a regular part of your department's civil service staff.

3. The transferees have full civil service status without a probationary period.

4. The transferees will be subject to all the provisions of Chapter 3, Revised Laws of Hawaii 1955.

5. There appears no reason to abnormally limit the expansion of the function of dental health treatment.

6. Transferees are being reasonably protected, not "frozen" for life, and later necessary reclassifications are permitted.

7. The transferees' salaries are to be red-circled at the current Department of Public Instruction pay and treated as is customary with such cases.

8. The transferees will abide by customary department policies and working hours.

9. Accumulated leave is to be transferred as usual. Vacation and sick leave of the transferee will be handled in the same way as other civil service employees.

Op. 60-45

10. The transferee is entitled to pro-rated sabbatical leave under Department of Public Instruction policies in the manner your department handled the transfer of some psychologists a few years ago from the University Psychological Clinic. Sabbatical leave in the future will be treated as is customary in the civil service.

Very truly yours,

W. K. WATKINS, JR.
Deputy Attorney General

APPROVED:

SHIRO KASHIWA
Attorney General

cc: Governor
Department of Public Instruction
Department of Personnel Services
Division of Dental Health

Op. 60-45

No Opinion

No. 60-46

INDEXING INSTRUCTIONS

OP. 60-47

I. CLAIMS COMMISSION

Under Act 29, First Special Session, First State Legislature 1959, the method of computing losses for tax relief is to relate the tax liability to the damaged property (re "Hurricane Dot").

II. HURRICANE

Same syllabus as above.

III. DISASTER

Same syllabus as above.

IV. TAX RELIEF

Same syllabus as above.

Op. 60-47

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INITIALS AND NUMBER

VFLC:es

XVI-A;XXI-A;C-7687

Op. 60-47

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

May 19, 1960

Mr. Earl W. Fase, Director,
Department of Taxation
Hawaii Claims Commission
Kauai Claims Commission

Gentlemen:

This is in reply to your oral requests for an opinion relating to hurricane "Dot" losses. The question you ask is, what relation is there between the loss due to property damage and tax relief.

Act 29 of the First Special Session, First State Legislature 1959, provides that certain claims commissions would determine loss suffered by reason of the damage or destruction of real or personal property. Thereafter, the tax commissioner was to remit, refund, or forgive, for a period not to exceed five years commencing with the year 1959, (1) all real property taxes, and (2) taxes due under the provisions of chapter 117, Revised Laws of Hawaii 1955, as amended. In this connection, section 5 of said Act states: "Nor shall such tax relief be applicable if the tax liability of such taxpayer has no reasonable connection to real or personal property so damaged or destroyed."

It is the opinion of this office that the damage to property must be related to the tax liability in order that tax relief may be given pursuant to the Act.

The standard which the Act provides is that there must be a reasonable connection between the tax liability and property damaged. The operation of the provision may be made clear by several examples.

(1) A claimant who has his house and car damaged will have a loss computed by the damage to the house, which house can be related to the real property tax liability.

Op. 60-47

The car, which we assume is for personal use only, is not a loss which is compensated for, since it has no reasonable connection to the real property tax. Furthermore, the claimant has no general excise tax liability or, at least, no general excise tax liability which can be related to the car for personal uses. On the other hand, a business may use a car which is damaged. In that case, tax relief is given since the damage is related to a business and hence the general excise tax liability.

(2) Another hypothetical situation may be given. A sugar plantation claims a loss due to damage of the sugar cane crop. Under the Act, the loss may be attributed to the general excise tax since it is related to business. However, relief may not be obtained from real property tax liability since the crop is not realty and has no reasonable connection to that class of tax.

There may be certain damage to property which can be related to both the real property tax liability and the general excise tax liability. For example, a man may have a cactus garden at his home which is also used for commercial exhibition purposes. It can be said in this connection that the damage to the cactus is related to both the real property tax liability and general excise tax liability; similarly, for a building which is destroyed on a sugar plantation. The question then arises, against which tax is the relief to be given. This is not a matter for the claims commission to be concerned with. However, as a point of information, it is my understanding that the tax commissioner will use a method of giving tax relief based on setting off the loss against whichever tax becomes due first.

In summary, the standard to use is that the loss due to property damage must be related to the tax liability before relief can be given. It is therefore necessary for the claims commissions to categorize the losses under three headings: (1) the loss reasonably connected to real property tax liability, (2) loss reasonably connected to general excise tax liability, and (3) loss reasonably connected to either tax liability.

Yours very truly,

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

Vernon F. L. Char

VERNON F. L. CHAR
Deputy Attorney General

Op. 60-47

INDEXING INSTRUCTIONS

May 19, 1960

APPROPRIATIONS

Objects:

Determined by Hawaiian statutes and precedents.

Expenditures must be made for the purposes and in the manner specified by the Act concerned.

APPROPRIATIONS

Objects:

An appropriation to erec t a memorial does not impliedly include the payment of a portion for services in raising monies to erect said memorial.

SESSION LAWS OF HAWAII 1959

Act 224, item 21 of sec. 1(a)
1(c)

PACIFIC WAR MEMORIAL COMMISSION

APPROPRIATIONS determined by statutes and precedents

Op. 60.48

WSD:LBC
C-5206
Op. 60-48

May 19, 1960

Pacific War Memorial Commission
P. O. Box 3901
Honolulu, Hawaii

Attention: Mr. Joe James Custer, Executive Secretary

Dear Commissioners:

This will confirm my verbal opinion to you this morning concerning the matter of whether or not you might be indebted to Darrel Brady and Associates, Inc., on account of the agreement of June 16, 1958, when you request payment of the $50,000.00 appropriated by item 21 of section 1(a) of Act 224 of the Session Laws of the Regular Session 1959.

It is the opinion of this office that the agreement of June 16, 1958 is not applicable to the appropriation by said Act 224 of the Thirtieth Territorial Legislature.

Section 8 of said agreement entitled Compensation provides in part that Brady and Associates will receive a commission of 15% on "contributions received from all sources, whether or not solicited directly by Associates, including ... contributions from domestic and foreign political bodies, except where it is prohibited by law."

The objects of appropriations by the territorial legislature are always determined by application of the appropriate territorial statutes and precedents. It has long been a maxim of Hawaiian law that the legislature's appropriations must be expended directly for the purposes and in the manner stated by the Act concerned. In an opinion of this office applying that rule, Opinion #1562 dated July 23, 1930, there is cited, amongst other cases, Potter v. Fowzer, 78 Cal. 493, 21 Pac. 118 (1889) wherein is stated "the rule being that public moneys can be used only for the purposes and in the manner prescribed by law."

Op. 60-48

Regarding the subject appropriation said Act 224 states "to be expended ... toward the erection of a memorial" and further provides in subsection 1(c) such an appropriation shall be used for "land purchase, plans, improvements to land, construction and necessary equipment." Nothing appears which might seem to indicate the legislature intended to include a commission to Brady and Associates in the sum appropriated for building an Arizona Memorial. On the contrary, it would seem there is evidence of a lack of such intent because the legislature customarily spells out in detail the scope of an appropriation for the employment of a non-resident.

Accordingly, it is the opinion of this office, for the reasons of law and fact stated above, that no commission will be payable to Darrel Brady and Associates as the result of your receipt of said $50,000.00.

No comment is offered on the effect of the termination of said agreement, of June 16, 1958, on December 15, 1959 since this opinion has been determined on other grounds.

Very truly yours,

W. K. WATKINS, JR.
Deputy Attorney General

APPROVED:

SHIRO KASHIWA
Attorney General

cc: Governor

Op. 60-48

INDEXING INSTRUCTIONS

OP. 60-49

I. DENTAL HYGIENIST

Under Reorganization Act (Sec. 19, Act 1, Second Special Session, First State Legislature 1959), dental hygienists are given the option of remaining with the Department of Public Instruction for any instructional duties or transferring to the Department of Health.

Under Reorganization Act (Sec. 32, Act 1, Second Special Session, First State Legislature 1959), dental hygienists retain rate of pay whether transferred to Department of Health or remain in the Department of Public Instruction.

II. DEPARTMENT OF PUBLIC INSTRUCTION

Same syllabus as above.

III. DEPARTMENT OF HEALTH

Same syllabus as above.

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VII-A
C-7558
Op. 60-49

STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

May 20, 1960

Mr. Walton M. Gordon, Superintendent
Department of Public Instruction
Liliuokalani Building
1390 Miller Street
Honolulu, Hawaii

Dear Sir:

This is in reply to numerous conferences held and your many requests for an opinion concerning Mrs. Leila Tokunaga, a dental hygienist affected by the Reorganization Act, Act 1 of the Second Special Session of 1959, First State Legislature.

The first question you ask is whether Mrs. Tokunaga is to be retained by the Department of Public Instruction and, if so, whether at her current hygienist supervisor's pay.

It is the opinion of this office that Mrs. Tokunaga may remain with the Department of Public Instruction with a retention of her present salary rate.

Going first to the issue of a retention of her present salary, section 32 (transfer of personnel) of said Act 1 is relevant. Paragraphs 2 and 3 of section 32 state in effect that no employee shall suffer any loss of salary, seniority, prior service credit, vacation, sick leave or other employee benefit privilege as a consequence of this Act.

Mrs. Tokunaga has been an employee of the Department of Public Instruction in its dental health program for several years. It thus appears, Mrs. Tokunaga should not lose any economic right as a result of reorganization should she remain with the Department. It is therefore the opinion of this office that Mrs. Tokunaga should retain her current salary rate if she remains with the Department of Public Instruction, i.e. she should be presently "red circled" if her new duties were of a lessor nature than her present assignment.

Op. 60-49

The next question is whether Mrs. Tokunaga may remain with the Department of Public Instruction and, if so, in what capacity.

To be considered in this connection is the last sentence of section 19 (Department of Health) of said Act 1, which states: "The provisions of this section shall not be construed to require the transfer from the department of education to the department of health of any dental hygienist having a teacher's certificate and employed by the department of public instruction immediately prior to the effective date of this Act."

As part of the legislative history of Act 1, we can consider the history of the identical bill which was before the same legislature in the First Special Session of 1959. The last sentence in section 19(e) of the Committee Report on that bill, dated October 22, 1959, states: "Dental hygienists with teaching certificates are to remain with the department of education for instruction purposes." Thus it appears clear that a dental hygienist with a teacher's certificate can remain with the Department of Education. Since Mrs. Tokunaga has a teacher's certificate, it is the opinion of this office that she may, at her option, remain with the Department of Public Instruction.

The final question is, what position is Mrs. Tokunaga to occupy if she remains with the Department of Public Instruction. Returning to the statement of the Committee Report, supra, the hygienists are, "to remain with the department for instruction purposes." It is not clear whether the teacher-hygienists were to remain for any instructional purpose such as classroom teaching, or whether for dental health instruction work only. Since it was generally known by the legislators that there were more teacher-hygienists than probable dental health instruction positions, the provision, to have had any meaning to the legislators, must have meant remaining with the Department of Public Instruction for any instructional purpose. It is, therefore, the opinion of this office that Mrs. Tokunaga is to be given the option of remaining with the Department of Public Instruction for any administrative assignment or for any instructional purpose for which she is qualified and to which the Department may appoint her.

Op. 60-49

Accordingly, it is the opinion of this office, for the reasons of law and fact stated above, that Mrs. Leila Tokunaga may remain with the Department of Public Instruction and should she be assigned duties of a lesser nature than her present assignment then her pay should be for the present "red-circled" at its present level.

Very truly yours,

Vernon F. L. Char

Vernon F. L. Char
Deputy Attorney General

APPROVED:

Shiro Kashiwa

Shiro Kashiwa
Attorney General

Op. 60-49

ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
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HHS:ft

XXI-A; XIII-A
Op. 60-50

STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

May 20, 1960

Mr. William E. Henry
Probation Administrator
Third Circuit Court
State of Hawaii
Federal Building
Hilo, Hawaii

Dear Mr. Henry:

This is in reply to your letter of May 3, 1960, wherein you ask whether judges have the power to make appointments for referees under section 333-3, Revised Laws of Hawaii 1955, from other than eligible lists secured through competitive examinations where no compensation is attached to such appointment.

In asking this question you also made reference to a letter written by the Civil Service Department of the Territory to Judge Sapienza in 1954 with respect to a related matter. This office has checked that letter and has found nothing therein which is determinative of the question now before us. This office has reviewed the problem and finds that the provision of this section 333-3 is rather specific in that it requires the appointment to be made from "eligible lists secured through competitive examinations." No exception to this requirement is included therein. This requirement, we feel, was inserted not only to assure the qualification of one who is compensated for his work as a referee but more importantly to assure the Juvenile Court of a competent and qualified person to serve in the capacity of a referee. In the light of this consideration, it seems that whether compensation is or is not to be paid the referee, such referee must be qualified and competent, and the method of determining competency and qualification is as set out in that section.

Accordingly, it is the opinion of this office that even though no compensation is to be paid the referee, he must be appointed from "eligible lists secured through competitive examinations."

APPROVED:

Shiro Kashiwa

Shiro Kashiwa
Attorney General

Yours very truly,

Henry H. Shigekane

Henry H. Shigekane
Deputy Attorney General

Op. 60-50

~~May 20, 1960~~

OPINION 60-51

INDEXING INSTRUCTIONS

I. Wages and Hours

A. Employee:

Tour drivers are to be considered employees under the Wage and Hour Law and do not come within the exception of Sec. 94-2(h), R. L. H. 1955

* * *

B. Driver:

As used in Sec. 94-2(h), R. L. H. 1955 refers to taxicab drivers

* * *

II. Revised Laws of Hawaii 1955

Sec. 94-2(h)

* * *

III. Revised Ordinances of Honolulu 1957

Title IV, Sec. 12-1.1(f)

60-51

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DHCL:NMI
51:XI-C

Op. 60-51

TERRITORY OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

May 31, 1960

Mr. Takashi Kitaoka
Director of Labor and
Industrial Relations
State of Hawaii
825 Mililani Street
Honolulu 13, Hawaii

Attention: Mr. Antone Rodrigues, Administrator
Bureau of Labor Law Enforcement

Dear Sir:

You have verbally requested the opinion of this office as to whether or not drivers of motor vehicles hired for sightseeing tours are considered employees under the Hawaii Wage and Hour Law.

You inform us that these tour drivers:

1. Operate motor vehicles hired solely for touring and sightseeing purposes;

2. Serve only those passengers who are referred to them by a tour agent or hotel;

3. Do not transport passengers making calls, or transport them as may be directed by such passengers;

4. Carry passengers whose destination or points of travel are determined by the party selling the tours.

Based on the foregoing facts and the applicable statutory provisions we are of the opinion that these tour drivers do not come within the provision of Section 94-2(h) of the Wage and Hour Law which exempts from coverage any "driver of a vehicle carrying passengers for hire operated solely on call from a fixed stand."

60-51

The term "driver" as used in the statutory section was intended to be restricted to a taxicab driver. This intent was clearly expressed by the legislature when it adopted the exclusionary provision of Section 94-2(h). (House Stand. Comm. Rep. No. 726, House Journal 1949, p. 1870 and Senate Stand. Comm. Rep. No. 567, Senate Journal 1949, p. 1477.

A taxicab is generally defined and recognized as a vehicle designed to carry passengers operating for hire solely on call or demand from a fixed stand, and transporting passengers making such call or demand between such points as may be directed by such passengers, and does not include a vehicle used solely for touring or sightseeing purposes. (Section 104-1, R. L. 1955, as amended; Section 12-1.1(f), Title IV, Rev. Ord. of Honolulu. See also Hawaii, Maui and Kauai County ordinances).

A vehicle used solely for excursion purposes, as described by you, does not fall into the category of a taxicab as it is generally recognized and defined. Therefore, a driver of such vehicle is without the exempt class specified in Section 94-2(h), and must be considered an employee, if under a contract of hire, for the purposes of the Wage and Hour Law.

Respectfully,

D Dale

DONALD H. C. LOW
Deputy Attorney General

APPROVED:

H. Rodger Betts

Acting Attorney General

60-51

INDEXING INSTRUCTIONS

Op. 60-52

I. TEACHERS, DEPARTMENT OF PUBLIC INSTRUCTION

A. In granting sabbatical leaves, considerations of factors other than seniority may be made.

B. In order to fulfill a condition of sabbatical leave, a teacher must devote 1/3 of such leave in travel or professional educational work. Such work done in summer prior to actual sabbatical leave time is not sufficient to comply with statute.

II. PUBLIC INSTRUCTION, DEPARTMENT OF

A. Same syllabus as above

B. Same syllabus as above

III. SABBATICAL LEAVES

A. Same as above

B. Same as above

IV. LEAVES, SABBATICAL

A. Same as above

B. Same as above

V. REVISED LAWS OF HAWAII 1955

Section 38-20

VI. REVISED LAWS OF HAWAII 1955

Section 38-22

Op. 60-52

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VII-A

Op. 60-52

STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

May 31, 1960

Mr. William H. Coulter
Acting Superintendent
Department of Public Instruction
Honolulu, Hawaii

Dear Mr. Coulter:

This is in reply to your letter of May 12, 1960, requesting an opinion of this office relative to sabbatical leaves. The first question you ask is, "whether the commissioners have the authority, under the law, to grant sabbatical leaves to teachers on the basis of criteria other than seniority so long as the basic requirement of seven years of service has been met."

In this connection, section 38-20, Revised Laws of Hawaii 1955, states in part, "The department of public instruction may grant a year's sabbatical leave of absence to any teacher who has served seven years in public schools. . . . In granting such leave, teachers with the longest period of service should be given first consideration."

shall

It is the opinion of this office that factors other than seniority may be considered in granting sabbatical leaves.

It is clear from the statute that the Department of Public Instruction is given the discretion in granting sabbatical leaves. In exercising this discretion, the Department was to "consider" the situation. Although seniority was to be the prime factor, and teachers with the longest period of service were to be given a priority for consideration, other factors were to be recognized. The word "consider" indicates that the Department was to give careful thought and judgment, and not be restricted to the sole criteria of seniority. The general uses for a sabbatical leave are education, travel, and rest. Although seniority may relate to these uses, other factors may have a more direct bearing. We therefore interpret the statute to allow for a consideration of factors other than seniority in granting sabbatical leaves.

Op. 60-52

The second question you ask is, whether "the commissioners have the authority to allow teachers to meet the requirements [of a sabbatical leave] in part or in whole during the summer prior to the beginning of the year of leave?".

In this connection section 38-22, Revised Laws of Hawaii 1955 states, "such teacher on sabbatical leave shall devote one-third of his total leave either to travel or in professional educational work or both such as would contribute to the value of such teacher in the public school system of this Territory [State]."

It is the opinion of this office that the requirement of section 38-22, Revised Laws of Hawaii 1955 can not be met during the summer prior to the beginning of the year of leave.

The sabbatical leave is for one year. Section 38-20, Revised Laws of Hawaii 1955. The condition imposed on the authorization of such a leave requires one-third of the leave to be devoted to either travel or in educational work. This has been interpreted to constitute seventeen weeks of travel or ten semester credits at a recognized university. See section 379, Rules and Regulations, Department of Public Instruction. Since the summer prior to the year of leave can in no way be stated as part of the leave, the condition is not fulfilled. The law states that one-third of the leave itself must be devoted to the requirement. We therefore answer the second question in the negative.

Yours very truly,

Vernon F. L. Char

Vernon F. L. Char
Deputy Attorney General

APPROVED:

H. Rodger Betts

H. Rodger Betts
Acting Attorney General

Op. 60-52

INDEXING INSTRUCTIONS

May 31, 1960

DEFENSE, CIVIL

Contract - Rotation of drugs on annual basis or at least one year prior to expiration dates.

CONTRACTS

Civil Defense - Fee for rotation of drugs to be determined for new contract under Part II, Chapter 9, R.L.H. 1955.

CONTRACTS

In absence of termination provision, contract is binding for reasonable period of time and may be terminated by either party on giving reasonable notice of intention to terminate.

REVISED LAWS OF HAWAII 1955

Part II, Chapter 9.

(Expenditure of public monies and contracts to be let after public advertisement of sealed tenders.)

Op. 60-53

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DYA:LNC

VIII-A

Op. 60-53

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

May 31, 1960

Mr. T. G. S. Walker, Vice Director
Civil Defense Agency
State of Hawaii
Building 29 Fort Ruger
Honolulu 16, Hawaii

Dear Mr. Walker:

This opinion will confirm the oral advice heretofore given you in our conferences concerning the several questions raised in your memorandum, dated April 13, 1960, to the Attorney General on the following matters:

(1) The contract executed November 12, 1952, by Dr. C.L. Wilbur, Jr., Territorial Coordinator, Health Services, Territorial Civil Defense Agency, for the purchase of certain antibiotic drugs costing $44,370.00 for civil defense stockpile purposes from American Factors, Ltd., which agreed to periodically replace or rotate the antibiotic drugs so purchased, either on an annual basis or at least one year prior to their expiration dates, whichever is earlier, in order to minimize loss due to deterioration; and

(2) The letter, written April 1, 1960, by the manager of the drug department of American Factors, Ltd., to inform Dr. Richard K. C. Lee, Assistant Director, Health Medical Services, State Civil Defense Agency, that Lederle Laboratories will, under the contract, replace once more all antibiotic drugs so sold through American Factors, Ltd., to the State, with expiration dates ranging from March 1961 through October 1964; and will agree to keep all such drugs now stored in the Diamond Head Tunnel in good date for a period of ten years, beginning July 1, 1961, providing the State of Hawaii would agree to pay a rotation fee of 5% of the total purchase price per annum.

It appears unnecessary to render an opinion, although requested in your memorandum, on the question of the validity of the above mentioned contract between the State and American Factors, Ltd. Both the State, acting through the State Civil Defense Agency, and Lederle Laboratories, by American Factors, Ltd., have to date performed their obligations under the contract

with mutual satisfaction since its inception in November 1952; and neither party has had occasion to question the validity of the contract, including the subsequent amendment made thereto by the parties on January 3, 1953. Pursuant to the terms of this contract, the State has paid forty four thousand four hundred and thirty dollars for 600 skin pencils and 1450 bottles of aureomycin hydrochloride capsules (0.25 mg.) to American Factors, Ltd.; and the latter party has sold and delivered to the State the items mentioned, and has periodically replaced or rotated the drugs so sold in accordance with the specifications agreed upon by the parties. Under these circumstances, it appears that such an opinion would hardly serve any useful purpose at this time.

The question is raised as to the legal effect of the two "proposals" appearing in the letter written by Charles L. Malang, Manager of the Drug Department of American Factors, Ltd., to Dr. Richard K. C. Lee, State Civil Defense Agency, on the contractual relations of the parties under the existing contract. The so-called "proposal" designated under Number 1 therein provides that Lederle Laboratories will replace through American Factors, Ltd., all achromycin (replaced on rotation, the aureomysin originally sold by mutual consent) now stored in the Diamond Head Tunnel once more upon expiration of dating of the drugs. This means a replacement of the present stock of 1440 packages of 100 capsules with expiration dates ranging from March 1961 through October 1964. Once this second complete replacement has been made, neither Lederle Laboratories or American Factors, Ltd. would have any further obligation, and the material, if it should outdate before usage, would not be returnable for credit or replacement. The proposal designated under Number 2 in the same communication from Mr. Malang provides that Lederle Laboratories will agree to keep all packages in good date for a period of ten years beginning July 1, 1961, providing the State of Hawaii would agree to pay a rotation fee of 5% of the total purchase price per annum. Rotation would be made by American Factors, Ltd., and payment of rotation fee would be made to American Factors, Ltd., on behalf of Lederle Laboratories.

In our opinion, these two "proposals" do not adversely affect the legal rights of the State under the existing contract. The first so-called "proposal" may be regarded as the giving of reasonable notice by Lederle Laboratories, acting through its agent, American Factors, Ltd., of its intention to terminate the existing contract. We have examined the contract in question, including the said subsequent amendment made thereto, and the other documents which you have transmitted to us relating

to the same subject matter. We are unable to find any provision which specifies the period of duration of the contract. In the absence of any such provision, the only reasonable intention that can be imputed to the parties is that the contract is to be binding for a reasonable period of time, and that it may be terminated by either party on giving reasonable notice of his intention to the other. It appears clear from an examination of all the documents in the file in this case, and from our conferences with you and with Dr. Leo Bernstein, Acting Assistant Director, State Civil Defense Agency, that there was no intention on the part of either the State or American Factors, Ltd., in behalf of Lederle Laboratories, to enter into a perpetual contract or one which would bind the drug company to perpetually rotate or replace the antibiotic drugs sold in November 1952, without adding a reasonable charge for rotation services after the contract had been in existence for a reasonable period of time. The proposal Numbered 2 from American Factors, Ltd., may be regarded as an offer to enter into a new agreement commencing July 1, 1961, with the State for the purpose of continuing the rotation of the antibiotic drugs stockpiled for civil defense purposes in the Diamond Head Tunnel for a period of 10 years, if the State would pay a fee of 5% of the total purchase price per annum to American Factors, Ltd.

This opinion does not consider the question whether the proposed charge of 5% of the total purchase price per annum for rotation of the drugs by American Factors, Ltd., under a new agreement, would or would not constitute a proper charge, since that question is one which you should determine in accordance with the provisions of Part II, Chapter 9, Revised Laws of Hawaii 1955, as amended, governing the expenditure of public monies and contracts to be let after public advertisement for sealed tenders.

Very truly yours,

David Y. Mar

DAVID Y. MAR
Deputy Attorney General

APPROVED:

H. Rodger Betts

H. RODGER BETTS
Acting Attorney General

Op. 60-53

INDEXING INSTRUCTION

Op. 60-54

APPROPRIATIONS

Specific purpose

The appropriation for a cattle producing study cannot be expended for the purpose of production of a State commercial livestock show.

Op. 60-V-4

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"THE ATTORNEY GENERAL OF HAWAII"
AND REFER TO
INITIALS AND NUMBER

HYS:xu

XIV-C

Op. 60-54

STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

June 1, 1960

Mr. Frank Lombardi
Director of State Planning
195 South King Street
Honolulu 13, Hawaii

Dear Mr. Lombardi:

This is in reference to your letter No. SPO 3318, dated May 19, 1960, requesting an opinion on the legality of the appropriation of $5,000 for a "cattle producing study" on Maui under item B 2 of section 1(a), Act 23, Session Laws of Hawaii 1960.

You state that you have been informed by Mr. Colin C. Cameron that the appropriation is "actually for the production of a State commercial livestock show"; that your understanding of the purpose of the appropriation was that the funds were to be used for experimental purposes to improve the quality of beef production.

We are of the opinion that the appropriation of $5,000 for a cattle producing study on Maui cannot be expended for the purpose of production of a State commercial livestock show. The use of the funds for such a purpose will be contrary to the specific wording of the appropriation in question. Furthermore, an appropriation for such purpose would be contrary to the provision of Article VI, section 6 of the Constitution of the State of Hawaii which reads:

> "No tax shall be levied or appropriation of public money or property made, nor shall the public credit be used, directly or indirectly, except for a public purpose. No grant shall be made in violation of Section 3 of Article I of this constitution."

Op. 60-54

Similar grants to fair associations have been held to violate similar provisions of the state constitution in other jurisdictions (116 A.L.R. p. 894, et seq.).

Therefore, it is the opinion of this office that the appropriation of $5,000 for cattle producing study cannot be expended to produce a livestock show to be held on the Island of Maui.

Yours very truly,

Harold Y. Shintaku

Harold Y. Shintaku
Deputy Attorney General

cc: Department of Economic
Development

APPROVED:

Shiro Kashiwa

Shiro Kashiwa
Attorney General

Op. 60-54

ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
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Op. 60-55

STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

June 6, 1960

Mr. George Mason
Director of Economic Development
1124 Miller Street
Honolulu 13, Hawaii

Dear Sir:

This is in response to your letter of June 3, 1960, wherein you pose the following question:

> "Question: May the Economic Research and Development Commission of the County of Hawaii appropriate $1,000 to the use of the Association for the purpose of transmitting the money to the Department of Economic Development in order that the Association may meet its commitment to match State funds?"

Please be advised that the opinion of this office is in the negative.

The Association referred to above is the Hawaiian Fruit Shippers, Inc., an association of exporters of fresh pineapple and papaya.

As we understand the facts, the Association is the recipient of $12,000 from the State pursuant to Section 28A-3, R.L.H. 1955, as amended, as a grant to assist said Association in the introduction of "products which are new or inadequately known to consumers." The Association is required by said Section to match at least forty per cent of the funds granted, but is unable to raise the matching fund by June 30, 1960, as required by contract, and the Economic Research and Development Commission of the County of Hawaii contemplates contributing $1,000 from its own funds to aid the Association in raising the necessary fund.

We presume from your letter that the said Commission is a commission created pursuant to Senate Standing Committee Report No. 732 (1959) to expend the grant of $50,000 made to the County of Hawaii in Act 270 of the S.L.H. 1959 for the promotion of economic development in that county and that the contemplated contribution of $1,000 is to be made from the $50,000 grant to the County of Hawaii.

Section 28A-3, aforementioned, provides inter alia:

> ". . . that grants to assist associations of producers, processors, or distributors of agricultural or industrial products to introduce products which are new or inadequately known to consumers shall be matched by funds equal to at least forty per cent of the funds granted by the authority or expenses incurred by the authority in behalf of such associations."

We do not feel that public funds, under the above provisions, may be used to match state grants to private entities. To do so, in our opinion, is to defeat the purpose of the statute.

Furthermore, we do not feel that it was within the contemplation of the legislature that any part of the $50,000 grant to the County of Hawaii in Act 270 could be used to pay the obligations of private parties to the State.

Yours very truly,

Walter T. Shimoda

Walter T. Shimoda
Deputy Attorney General

APPROVED:

Shiro Kashiwa

Shiro Kashiwa
Attorney General

WTS:ru
VI-B ✓

Op. 60-55

June 6, 1960

Mr. George Mason
Director of Economic Development
1124 Miller Street
Honolulu 13, Hawaii

Dear Sir:

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Yours very truly,

Walter T. Shimoda
Deputy Attorney General

APPROVED:

Shiro Kashiwa
Attorney General

RcB

INDEXING INSTRUCTION

Op. 60-56

SPECIAL FUNDS

Transfer to General Fund

Transfer of Kewalo Basin income to general fund from the Harbor Board special fund is unconstitutional.

Op. 60-56

ADDRESS REPLY TO
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Op. 60-56

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

June 7, 1960

Board of Harbor Commissioners
P. O. Box 397
Honolulu, Hawaii

Gentlemen:

This is in reference to letter No. HB 2073 written by your Manager and Chief Engineer, Mr. Harold W. Butzine, dated April 28, 1960, requesting our opinion on the status of Kewalo Basin and whether or not section 15, Act 265, Session Laws of Hawaii 1959, as it relates to transfer of Kewalo Basin to general fund from the Harbor Board special fund, is legal.

We have made a study of the appropriate section of Act 265, Session Laws of Hawaii 1959, and are of the opinion that said section is unconstitutional.

Under section 15, Act 265, the income from Kewalo Basin is transferred from the harbor board special fund to the general fund of the State. However, under Resolution Authorizing the Issuance of Harbor Revenue Bonds, adopted by the Board of Harbor Commissioners on September 18, 1950, the revenues from Kewalo Basin are specifically pledged to revenue bonds issued under said resolution. Article I, paragraph (i) of said resolution reads, in part, as follows:

> . . . it being specifically provided that the term 'Public Undertaking,' the revenues of which are charged with the payment of principal and interest of the bonds herein authorized, means and includes all of the harbor and waterfront improvements and other properties under the jurisdiction, control and management of the Board, except such as are principally used for recreation or the landing of fish, but such exception shall not apply to the properties under the jurisdiction, control and management of the Board at Kewalo Basin, ewa of Ala Moana Park, Honolulu, T. H. (Underscoring added.)

This definition of "public undertaking" is in accord with section 112-20, Revised Laws of Hawaii 1955, prior to the amendment by Act 265 in 1959. Therefore, Act 265, Session Laws of Hawaii 1959, as pertaining to transfer of revenues of Kewalo Basin to general fund from the harbor board special fund, is unconstitutional as an impairment of a contract obligation under the provision of Article I, section 10, United States Constitution. Trustees of the Wabash and Erie Canal Co. v. Beers, 2 Black 448, 17 L. Ed. 327; Louisiana v. Jumel, 2 S. Ct. 128, 107 U.S. 711, 17 L. Ed. 448; McClintic v. Dunbar Land Co., 127 W. Va. 454, 33 S.E.2d 593; Re Fidelity State Bank, 35 Idaho 797, 209 P. 449; 16 C.J.S., Constitutional Law, § 289; 12 Am. Jur., Constitutional Law, §§ 390, 396.

A copy of this opinion is being sent to the Governor's Office, Department of Budget and Review, and Department of Accounting and General Services for their information and appropriate action.

Yours very truly,

Harold Y. Shintaku

HAROLD Y. SHINTAKU
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
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Op. 60-57

STATE ~~TERRITORY~~ OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

June 9, 1960

Commissioner Bruce Savage
Public Housing Administration
Longfellow Building
Washington 25, D.C.

Dear Sir:

This opinion is a discussion of the question whether or not amendments to an existing annual contributions contract dated July 22, 1957, entered into between the Hawaii Housing Authority and the Public Housing Administration will be in conflict with Article VI, section 3, of the Constitution of the State of Hawaii.

In a prior opinion rendered by this office, we held that under the provisions of paragraph 7, section 3, Article VI of the State Constitution, a public enterprise of the State, or a public corporation, cannot issue revenue bonds which are secured by something other than the revenues of the enterprise or public corporation, i. e., mortgage. We have also issued an opinion which held that any contract entered into prior to statehood is binding on the State regardless of constitutional objection because the State cannot impair contract obligations by a subsequent legislation or constitutional provision. Therefore, the only question before us at this time is whether or not amendments to an existing contract will cause the original contract to be superseded by a new contract.

It is our understanding that the Hawaii Housing Authority is contemplating amending an existing contract with the Public Housing Administration by changing the area designated for the construction of public housing from one locality to another locality within the State; that there might be other amendments necessary to effectuate such change; and that the amendments contemplated will not affect the contribution by the Public Housing Administration nor the security to be pledged for such contribution. That section 512 of "Terms and Conditions Constituting Part Two of an Annual Contribution Contract between Local Authority and Public Housing Administration" provides:

Superseded by Op. 60-91 HYS

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> "Any right or remedy which the PHA may have under this Contract may be waived in writing by the PHA without the execution of a new or supplemental agreement; or by mutual agreement of the parties hereto this Contract may be amended in writing. . . ."

The general rule applicable to this type of situation is that, where a contract is modified or amended, the rights of the parties are to be determined by the contract in its modified form. Slight modifications and variations made with the consent of the parties do not abrogate the entire contract and the rights and obligations of the parties thereto, but the original continues in force except as altered by such modifications and alterations; and this is especially true where the original contract expressly provides that modifications and amendments may be made. General Outdoor Advertising Co. v. Dougherty, 65 N.W. (2d) 634 (S.D.); 17 C.J.S., Contracts, section 379.

It is therefore the opinion of this office that amendments to an existing contract do not render the original contract to be superseded by a new contract, but that the original continues in force except as altered, modified, or amended. Accordingly, the annual contributions contract dated July 22, 1957, between the Hawaii Housing Authority and the Public Housing Administration, as amended, will be valid and the provisions of Article VI, section 3, of the Constitution of the State of Hawaii are not applicable.

Yours very truly,

(s) Shiro Kashiwa

Shiro Kashiwa
Attorney General

cc: Governor of Hawaii
Hawaii Housing Authority

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REVISED LAWS OF HAWAII 1955

Sections 170-7
170-12
213-4

SESSION LAWS OF HAWAII 1957

Act 170, section 5

REAL ESTATE LICENSE COMMISSION

Commission may not deny an application for license except for grounds set out by section 170-7, Revised Laws of Hawaii 1955.

There is no statutory prohibition against a circuit court judge from engaging in other gainful occupational employment.

The mere application and/or issuance of a real estate broker's license is not an act of gainful occupational employment (Act 170, SLH 1957, sec. 5) without an actual sale of real estate.

Violation of section 5, Act 170, Session Laws of Hawaii 1957, is not a ground for denial of a real estate license or for a revocation or a suspension of such a license by the Real Estate License Commission.

GAINFUL OCCUPATIONAL EMPLOYMENT

There is no statutory prohibition against a circuit court judge from engaging in other gainful occupational employment.

The mere application and/or issuance of a real estate broker's license is not an act of gainful occupational employment (Act 170, SLH 1957, sec. 5) without an actual sale of real estate.

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REVISED LAWS OF HAWAII 1955

Sections 170-7
170-12
213-4

SESSION LAWS OF HAWAII 1957

Act 170, section 5

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ADDRESS REPLY TO
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Op. 60-58 ✓

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

June 13, 1960

Mr. Robert E. Bekeart
Executive Secretary
Real Estate License Commission
State of Hawaii
205 Empire Building
Honolulu, Hawaii

Dear Mr. Bekeart:

Re: Real Estate Salesman's License for
(1) County Deputy Attorneys and
(2) City and County Clerk of Honolulu;
Broker's License for a Judge of a
Circuit Court

This is in reply to your written request of February 17, 1960, for an opinion as to whether section 5, Act 170, Regular Session of 1957, prevents a county deputy attorney of a county from applying for a real estate salesman's license and your like oral request in regards to the city and county clerk of the City and County of Honolulu; it is also a reply to your oral request for an opinion as to whether or not an application for reactivation of a broker's license by a judge of a circuit court is proper.

This department is of the opinion that you may not deny an application for real estate salesman's or broker's license to an individual because a sale of real estate by the individual violates section 5, supra, or other related statutes.

Section 170-7, Revised Laws of Hawaii 1955, as amended, sets out the grounds when no real estate license may be issued; other than section 170-7(b), Revised Laws of Hawaii 1955, as amended in 1957, no statutory indication can be found for the proposition that the violation of any other laws of the State would prevent the issuance of a license. Section 170-7(b) has to do with a conviction for a high crime.

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Assuming that a sale of realty is an act of gainful occupational employment, a sale of real estate by a licensee who is a public officer within the framework of section 5, supra, would not be sufficient for your commission to revoke or suspend the license of such licensee; section 170-12, Revised Laws of Hawaii 1955, as amended, which sets out the causes for which any license may be revoked or suspended, does not contain such a cause for revocation or suspension. Presumably, it would be the duty of the appointing officer or superior public officer to see to it that section 5, supra, is not violated.

Assuming that section 5, supra, is applicable to this discussion, the mere application of a license accompanied with its issuance cannot be said to be a violation of section 5, supra, without an actual sale of real estate. The individuals in the present situation are merely applying for a right to sell and the statute governing the issuance of real estate license contains no such prohibition against public officers.

With relation to your oral request as to whether or not an application to reactivate a broker's license held by a circuit court judge is proper, it is the opinion of the Department of the Attorney General that such an application is proper.

Act 170, supra, has no application to the office of a circuit court judge; Act 170, supra, relates to salaries and restrictions of outside employment of certain officers listed therein (Op. 57-82, Aug. 7, 1957); the offices of the many circuit court judges are not contained therein. Section 213-4, Revised Laws of Hawaii 1955, as amended, which is the comparable statute for the offices of the circuit court judges, merely restricts a circuit court judge from engaging in the practice of law. There is no statutory prohibition against a circuit court judge from engaging in other gainful occupational employment; however, this department expresses no opinion as to whether or not any connection with or operation of a real estate brokerage firm by one in a judicial capacity would violate the canons of judicial ethics.

Yours very truly,

Tenny Hoon Tom

APPROVED:

Tenny H. Tom
Deputy Attorney General

Shiro Kashiwa
Attorney General

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INDEXING INSTRUCTIONS

June 13, 1960

STATUTES

Construction of Sec. 64-3(d), R.L.H. 1955 as amended by Act 149, S.L.H. 1959 (30th Territorial Legislature) limited the proviso to persons born In Hawaii.

HEALTH, DEPARTMENT OF

Board of Medical Examiners

Proviso of Sec. 64-3(d), R.L.H. 1955 as amended by Act 149, S.L.H.1959, is limited to persons born in Hawaii.

SESSION LAWS OF HAWAII 1959

Act 149

Amends Sec. 64-3(d) - proviso is limited to persons born in Hawaii

REVISED LAWS OF HAWAII 1955

Sec. 64-3(d) as amended by Act 149,S.L.H. 1959 - proviso is limited to persons born in Hawaii.

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Op. 60-59

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

June 13, 1960

Honorable Thomas P. Gill
Majority Floor Leader
House of Representatives
First Legislature
State of Hawaii
Honolulu, Hawaii

Dear Mr. Gill:

In your letter of May 31, 1960, you inquired as to the opinion of this office regarding whether or not Act 149 of the 30th Territorial Legislature restricts the proviso contained in section 64-3(d), Revised Laws of Hawaii 1955 as amended by said Act 149 to applicants born only in the Territory of Hawaii.

It is the opinion of this office that said Act 149 amended the proviso contained in said section 64-3(d) so that the proviso now pertains only to applicants who were born in the Territory of Hawaii.

The subject proviso first became part of said section 64-3(d) as a result of Act 219 of the regular session of 1957. Said Act 219 did not restrict the proviso as to persons who were applying to take the Board of Medical Examiners professional examination to persons who were born in the Territory of Hawaii. Instead, the Act provided for all applicants who were graduates of a foreign medical school and who had at least three years of medical experience or training in a hospital approved by the council of medical education and hospitals of the American Medical Association for internship or residency and who had all the other qualifications enumerated in the other subsections of section 64-3.

Act 149 of the 30th Territorial Legislature was the enactment of its Senate Bill No. 1080. The legislative history of Senate Bill No. 1080 discloses that on April 21, 1959 the Senate Committee on Judiciary reported on that bill in Standing Committee Report No. 430 to President Lee

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favorably and that in commenting on the intent of Senate Bill No. 1080 stated as follows:

> "This bill extends the provisions of the law to not later than June 30, 1962. It further amends the present law by restricting the class of applicants to those born in the Territory of Hawaii." It further amends the present law by permitting a new class of applicants to take the examination; namely those graduates of foreign medical schools, born in the Territory who have had at least ten years of training under direct supervision and preceptorship of a duly licensed physician or surgeon in the Territory.
>
> "After having held a hearing on this bill, your Committee feels that the deadline of June 30, 1962 as provided for in this bill is too long a period and has, therefore, amended it so that all those who wish to apply for examination under the provisions of this bill must do so not later than June 30, 1960."

House Standing Committee Report No. 765 of the Committee on Public Health dated April 30, 1959 also pertains;to Senate Bill No. 1080 and in that report the Committee in reporting favorable on the bill to the Speaker of the House commented:

> "It further amends the present law by restricting the class of applicants to those born in the Territory of Hawaii and by permitting a new class of applicants to take the examination, namely, graduates of foreign medical schools, born in the Territory who have had at least ten years of training under direct supervision and preceptorship of a duly licensed physician or surgeon in the Territory."

It is further noted that the proviso contained in said section 64-3(d) as amended by said Act 149 in effect now reads as follows:

> "provided, that an applicant born in the Territory of Hawaii who is a graduate of a foreign medical school, who has had at least ten years of training *** or who is a graduate of a foreign medical school and who has had at least three years' medical experience or training in such approved hospital as aforesaid, and who has all the other qualifications enumerated in this section, except those listed in the first portion of this subsection, may apply for such examination not later than June 30, 1960."

It appears from the reading of said Act 149 and the statements contained in the legislative history pertaining to the Act that it is the meaning of the language of the Act that the proviso appearing in said section 64-3(d) shall now apply only to persons born in Hawaii.

For the aforementioned reasons, this office informs you that it is of the opinion that in order for a person to be qualified to apply for the professional examination given by the State Board of Medical Examiners under the requirements of the proviso contained in said subsection 64-3(d) that said person must have been born in the Territory of Hawaii.

Respectfully,

W. K. WATKINS, JR.
Deputy Attorney General

APPROVED:

SHIRO KASHIWA
Attorney General

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REVISED LAWS OF HAWAII 1955

1) Sections 342-50, 343-25

2) Chapter 170-1, -2, -6

REAL ESTATE LICENSE COMMISSION

Owners of property are exempt from provisions of Chapter 170 and need not obtain a real estate broker's license to sell their property.

DEEDS

Necessary elements of a deed are an orderly statement of the agreement and meaning of parties so as to bind them.

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REVISED LAWS OF HAWAII 1955

1) Sections 342-50, 343-25

2) Chapter 170-1, -2, -6

REAL ESTATE LICENSE COMMISSION

Owners of property are exempt from provisions of Chapter 170 and need not obtain a real estate broker's license to sell their property.

DEEDS

Necessary elements of a deed are an orderly statement of the agreement and meaning of parties so as to bind them.

ADDRESS REPLY TO
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STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

June 14, 1960

Mr. Robert E. Bekeart
Executive Secretary
Real Estate License Commission
205 Empire Building
Honolulu 13, Hawaii

Dear Mr. Bekeart:

Re: Grass-Shack Village of Hawaii, Ltd.,
Warranty Deed for Equivalent of One
Square Inch of Land

This is in reply to your request of April 8, 1960, for an opinion as to whether the sale of the so-called "Warranty Deed" of Grass-Shack Village of Hawaii, Ltd., a copy of which was enclosed for our examination, violates the laws pertaining to the licensing of real estate brokers and salesmen.

At the outset, this department would like to point out to you that the question as to whether or not certain facts, when established, violate the laws pertaining to your commission, is a matter within the jurisdiction of the commission. Consequently, this department responds to your request by providing you with an opinion as to whether or not the selling of the warranty deed of Grass-Shack Village of Hawaii, Ltd., comes within the jurisdiction of the Real Estate License Commission, chapter 170, Revised Laws of Hawaii 1955, as amended.

Section 170-6, Revised Laws of Hawaii 1955, as amended, prescribes that no person shall act or advertise or assume to act as a real estate broker or salesman without a license previously obtained from your commission.

The warranty deed of Grass-Shack Village of Hawaii, Ltd., examined by this office, contains the necessary elements of a deed, which is an orderly statement of the agreement and meaning of the parties so as to bind them. 26 C.J.S., Deeds, § 22(a), pp. 625-626. The declaration referred to in the warranty deed indicates an intention by Grass-Shack Village of

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Hawaii, Ltd., to sell real estate (Document No. 248862 on Transfer Certificate of Title No. 78216). Registered land may be conveyed by voluntary instruments now in use and sufficient in law for the purpose intended. However, such an instrument shall not take effect as a conveyance or bind registered land, but shall only operate as a contract between the parties and as evidence of authority to make registration. Section 342-50, Revised Laws of Hawaii 1955, as amended. Since the warranty deed contains no acknowledgement, it will not be accepted for recordation by the Bureau of Conveyance (sec. 343-25, Revised Laws of Hawaii 1955, as amended), but this does not affect its validity as between the parties.

If the warranty deed is sold by Grass-Shack Village of Hawaii, Ltd., the grantor, chapter 170, Revised Laws of Hawaii 1955, as amended, is not applicable, since owners are exempt from the provisions of chapter 170, supra, and may sell their property without first obtaining a license from your commission. Section 170-2, Revised Laws of Hawaii 1955, as amended. Where, as your letter indicates, normal commercial outlets are used to sell these warranty deeds in form of a post card by persons other than the owners, a sale under such circumstances is one which comes within the framework of your commission. Section 170-1 and -6, Revised Laws of Hawaii 1955, as amended.

Thusly, it is the opinion of this department that your commission should regard this warranty deed as a proper instrument between the parties for the transfer of an interest in land and may not be sold for valuable consideration or compensation by a person other than the owner without compliance with the provisions of chapter 170, supra.

Yours very truly,

Tenny Hoon Tom

Tenny H. Tom
Deputy Attorney General

APPROVED:

Shiro Kashiwa

Shiro Kashiwa
Attorney General

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INDEXING INSTRUCTION

Op. 60-61

PUBLIC CONTRACT

Printing

The provisions of sections 9-38 and 9-39, Revised Laws of Hawaii 1955, are not applicable to a printing contract.

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STATE ~~TERRITORY~~ OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

June 16, 1960

Mr. Hidehiko Uyenoyama
Revisor of Statutes
Judiciary Building
Honolulu 13, Hawaii

Dear Mr. Uyenoyama:

This is in response to your letter dated June 13, 1960, requesting our opinion on whether the Filmer Brothers Press of San Francisco, California, may be awarded the contract for printing the 1960 supplement to the Revised Laws of Hawaii 1955.

The pertinent facts as stated in your letter are as follows:

> That your office, in compliance with section 7 of Act 191, Session Laws of Hawaii 1959, and chapter 9, Revised Laws of Hawaii 1955, advertised for bids for the printing of the 1960 supplement;
>
> That two bids were received, one from the Filmer Brothers Press at $25.90 a printed page, and the other from The Advertiser Publishing Co., Ltd., at a price of $26.91 a printed page;
>
> That you intend to award the contract to Filmer Brothers Press but The Advertiser Publishing Co., Ltd., has challenged your authority to award the contract to Filmer.

The Advertiser Publishing Co., Ltd., claims that sections 9-38 and 9-39, Revised Laws of Hawaii 1955, are applicable and as its bid is less than five per cent higher than Filmer's, it must be deemed the lower bidder and awarded the contract.

Section 7 of Act 191, Session Laws of 1959, reads as follows:

> Section 7. Printing; contracts. The revisor shall cause sufficient copies of the session laws and

Thermofax copy given to
Mrs. Patricia Putnam of
Legislative Reference Bureau,
U. H. 10/24/60.

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> supplements to be printed. The printing of such session laws and supplements shall be let under contracts pursuant to chapter 9, Revised Laws of Hawaii 1955; provided that all work under such contracts may be performed within or without Hawaii, or partly within and partly without Hawaii. The completed volumes of the session laws and supplements shall be delivered to the secretary of Hawaii for distribution.

This section authorized the work for the printing of the Session Laws and supplements to be performed outside of the State if the contract had been let pursuant to the provisions of chapter 9, Revised Laws of Hawaii 1955. Your letter states that the applicable sections of chapter 9 dealing with letting of public contracts has been complied with, as is evidenced by your advertisement for sealed tenders in the Honolulu Star-Bulletin, published on May 26, 28, 30, June 1, and 3, 1960, and the contents of the proposal and specifications made available to all interested bidders.

Therefore, the pertinent question that must be answered is whether sections 9-38 and 9-39, Revised Laws of Hawaii 1955, are applicable to a printing contract.

The provisions of sections 9-38 and 9-39 are not applicable to a printing contract. These sections apply only to purchase of materials, supplies, goods, wares, merchandise or produce for public use, as specifically stated in each section. If printing, binding, and stationery work were to be included under sections 9-38 and 9-39, there is no reason to have specific provision for printing, binding, and stationery work as found in section 9-45, Revised Laws of Hawaii 1955. Furthermore, the committee report on section 9-45, Revised Laws of Hawaii 1955 (Act 150, Session Laws of Hawaii 1933) states:

> The purpose of this bill is to provide that all contracts relating to furnishing supplies, materials and work for public use for or on behalf of the Territory of Hawaii or any political subdivision thereof or municipality therein shall be performed within the Territory of Hawaii. * * * Senate Journal 1933, p. 668, Seventeenth Territorial Legislature.

This conclusively shows that the word "work" as used in section 9-45 includes the furnishing of supplies and materials for printing, binding, and stationery work, and that sections 9-38 and 9-39, Revised Laws of Hawaii 1955, are inapplicable to a printing contract. Of course, the application of section 9-45 has been changed by section 7 of Act 191 as far as it relates to printing of session laws and supplements.

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Therefore, it is the opinion of this office that sections 9-38 and 9-39, Revised Laws of Hawaii 1955, are not applicable to printing contract let under section 7, Act 191, Session Laws of Hawaii 1955, and that Filmer Brothers Press of San Francisco, California, may be awarded the contract for printing the 1960 supplement to the Revised Laws of Hawaii 1955.

Very truly yours,

Harold Y. Shintaku

Harold Y. Shintaku
Deputy Attorney General

APPROVED:

Shiro Kashiwa

Shiro Kashiwa
Attorney General

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June 17, 1960

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STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

June 17, 1960

Mr. Edward L. Silva, Secretary
Civil Service Commission
County of Hawaii
Hilo, Hawaii

Dear Mr. Silva:

This opinion will confirm the oral advice heretofore given you on the question whether the Board of Supervisors of the County of Hawaii has the right to set the initial salary of deputy county clerk at $9,000.00 and the initial annual salary of the first assistant purchasing agent at $7,860.00. This question was raised in your communication, dated December 2, 1959, to the Attorney General concerning the same subject matter.

As stated in your letter, the department of civil service of the County of Hawaii assigned the classes of these two positions to salary range 24. Salary range 24 in the salary schedule prescribed under section 4-10, Revised Laws of Hawaii 1955, as amended by section 3, Act 255, Session Laws of Hawaii 1959, establishes a minimum step of $7,860.00 per year and a maximum step of $10,536.00 per year.

Under section 3-61(k), Revised Laws of Hawaii 1955, these positions in the County of Hawaii are exempt from civil service, but are included in the position classification plan which the personnel director is empowered to develop and maintain under section 3-19(h), Revised Laws of Hawaii 1955, as amended, which latter section is made applicable to the County of Hawaii under section 3-62 of the statutes thereof. These positions, moreover, are by statute placed under the coverage of chapter 4 (Compensation Law), Revised Laws of Hawaii 1955, as amended. Section 4-3 thereof reads as follows:

> "Section 4-3. Coverage. This chapter shall apply to all classes of positions covered by the position classification plan as provided for by chapter 3."

and section 4-30 thereof provides that the same chapter shall

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apply to all positions included in the position classification plan for the County of Hawaii.

If said chapter 4 applies to all positions included in the position classification plan for the County of Hawaii, who is authorized by law to set the initial annual salary of the deputy county clerk and of the first assistant purchasing agent of said county? Section 4 of said chapter 4 provides that the personnel director shall maintain the compensation plan by assigning new classes to appropriate salary ranges in the salary schedule and reassigning classes to appropriate salary ranges whenever internal salary relationships are disrupted by modifications or revisions to an existing class or classes or whenever review of the plan discloses a need for salary adjustments for a class or classes. Section 4-11 of the same chapter provides that the director may, from and after July 1, 1955, assign or reassign any of the classes in the position classification plan to a salary range in the salary schedule in accordance with the expressed purpose of section 4-4.

Section 4-6 thereof provides, so far as material, in part that all initial appointments shall be made at the first step of the appropriate salary range; but that in the event that the recruitment of an employee is not possible at such first step, the director may, after appropriate notice and advertising, recruit at the lowest step within the appropriate salary range at which an employee may be recruited. It appears clear from the foregoing provisions of the compensation law in chapter 4, Revised Laws of Hawaii 1955, as amended, that the personnel director is empowered to assign the classes of positions in the position classification plan to an appropriate salary range in the salary schedule prescribed under said section 4-10 of said chapter, as amended, and to establish the beginning salaries in accordance with the minimum rates specified in said section 4-6, if the classes of positions were under civil service.

The exemption of the two classes of positions, that of deputy county clerk and that of first assistant purchasing agent,1/ from civil service, with their inclusion in the

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1/ Under the Revised Laws of Hawaii 1955, section 144-90 thereof provides that the clerk may appoint a deputy with the approval of the board of supervisors, but makes no provision therein for the fixing of the deputy's salary; and section 146-32 thereof provides that the county purchasing agent shall have the aid of such assistants as the chairman of the board of supervisors, with the approval of the board, may appoint, after provision has been made for such assistants by the board of supervisors, without specifying the amounts of the initial salaries of such assistants.

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position classification plan, together with their being placed under the coverage of the provisions of said chapter 4, raise, first, the question whether the personnel director acting under the authority vested in his office under said section 4-4 and said section 4-11, may assign the said positions of deputy county clerk and first assistant purchasing agent to salary range 24 in the said salary schedule. The assignment of these two positions to range 24 in the salary schedule by the department of civil service, and the acceptance of such assignment by the board of supervisors, renders it sufficient for the present purpose merely to point out that the power so vested in the personnel director to assign said classes of positions to salary range 24 in the salary schedule is not questioned, and appears clear from said sections 4-3, 4-4, and 4-11 of the Revised Laws of Hawaii 1955, as amended.

We face, secondly, the question whether said section 4-6, which prescribes the minimum rate of salary for each class of position assigned to an appropriate salary range in the said salary schedule, applies to the two classes of county positions included in the position classification plan but exempt from civil service. That this section is inapplicable to positions exempt from civil service, although included in the position classification plan, is clear under a ruling of the Attorney General issued on December 18, 1957. In that opinion, former Deputy Attorney General Hidehiko Uyenoyama points out that said section contemplates merely positions for which the director recruits and is inapplicable to positions exempt from civil service. (See Op. Atty. Gen. 273:8:6: OLC, December 10, 1957.) In harmony with that opinion, this department holds that the provisions of said section 4-6, Revised Laws of Hawaii 1955, are inapplicable to the existing positions of deputy county clerk and first assistant purchasing agent of the County of Hawaii.

The remaining question for consideration in the problem before us is this: whether the department of civil service or the board of supervisors of the County of Hawaii is the proper governmental agency to fix the initial salaries of the first assistant purchasing agent and the deputy county clerk within range 24, as assigned by the department of civil service, in the salary schedule mentioned.

A careful reading of the provisions of chapter 4, Revised Laws of Hawaii 1955, as amended, discloses that the legislature has not provided therein any provisions which empowers the department of civil service to fix the initial salaries of those two non-civil service positions within a salary range in the said salary schedule. On the other hand,

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examination of the provisions of chapter 138, Revised Laws of Hawaii 1955, relating to governmental provisions common to all counties, discloses that the legislature has vested such power under section 6 thereof in the board of supervisors of the County of Hawaii to so fix the initial salaries of said positions, subject to the provisions of said section 4-3 thereof. Thus, said section 138-6 so far as pertinent reads, in part, as follows:

> "... salaries of deputies or assistants of any department, whose head is elected or appointed, shall be fixed by the board of supervisors of the respective county governments, where no other provision is made in the Revised Laws of Hawaii 1955, or any amendatory acts thereto, for fixing such salaries."

It appears clear that in order to ascertain the intention of the legislature, the said section 138-6 must be read together with said sections 4-3, 4-4 and 4-11, harmonized and construed together, for the reason that they relate to separate phases of the same subject matter. When these statutory provisions appearing in said chapter 138 and in said chapter 4, Revised Laws of Hawaii 1955, as amended, are read and construed together, the intention of the legislature seems to vest authority, on the one hand, in the personnel director, under the applicable provisions of said chapter 4 abovementioned, to assign the classes of the two county non-civil service positions to the appropriate salary range in the salary schedule, and, on the other hand, to vest authority in the board of supervisors to fix the initial salaries of those two classes of positions at such steps within the salary range in the salary schedule, so assigned by said director, as the board of supervisors deems fitting or proper. Viewed in this light, it appears clear that the board of supervisors of the County of Hawaii acted within the power conferred upon it under the law when it fixed the initial rate of salary for the position of first assistant purchasing agent at $7,860.00 per annum and for the position of deputy county clerk at $9,000.00 per annum. Both initial salaries of said positions so fixed fall within salary range 24, which prescribes a minimum initial first step in salary at $7,860.00 per annum and a maximum final step in salary at $10,536.00 per annum.

We conclude, therefore, by advising you that, in our opinion, the said board of supervisors has the authority

to set the initial salary of the first assistant purchasing agent at $7,860.00 per annum and the initial salary of the deputy county clerk at $9,000.00 per annum, within range 24 of the said salary schedule.

Very truly yours,

David Y. Mar

DAVID Y. MAR
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

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INDEXING INSTRUCTIONS

June 20, 1960

RESIDENCE

Same meaning as domicile.

Established by independant acts and ownership of a house in Hawaii even though the husband and wife live on a Hawaiian military base rather than in their house.

REVISED LAWS OF HAWAII 1955

Section 64-3.

Construction of subsection 64-3(b)

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STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

June 20, 1960

Honorable B. Allen Richardson, M.D.
Chairman, Board of Medical Examiners
1000 Ward Avenue
Honolulu 14, Hawaii

Dear Sir:

In your letter of June 6, 1960 you inquired as to whether or not Captain Wilbur Sayre Lummis, Jr. was a resident of Hawaii in view of the information and supporting exhibits submitted to the Board by his attorney, J. Harold Hughes.

This office is of the opinion that Captain Wilbur S. Lummis, Jr. (MC) USN is presently a resident of Hawaii as required by the provisions of section 64-3, Revised Laws of Hawaii 1955, as amended.

The word "resident" as used in subsection 64-3(b) refers to the person having established his domicile or legal residence in Hawaii.

Our Supreme Court has stated that "Domicile is proved by evidence of two facts: physical presence at a particular place and intention of the party to reside there permanently; or, as is sometimes said, to make the place his home with no present intent to leave at any foreseeable future time." Blackburn v. Blackburn, 41 Haw. 37, 40.

The fact that Captain Lummis may be ordered by the Navy to a duty station outside of Hawaii at sometime in the future does not affect his present status since a change of station of a person serving the government does not, without more, change his domicile so long as the individual continues in his intent to preserve his domicile at whatever place he formerly resided.

Thus, in this matter Captain Lummis did not become a resident of Hawaii upon arrival in the islands on June 16, 1959 nor did he become a resident by virtue of marrying Miss Kay Mary Pentecost on June 27, 1959, since the wife's domicile follows that of the husband.

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However, on July 30, 1959 Captain Lummis requested the Bureau of Naval Personnel to change his naval record to reflect the fact that he was establishing Honolulu as his permanent home address. Having intended to establish his domicile in Hawaii he so indicated that fact on his 1959 Federal Income Tax return on March 29, 1960 and his wife indicated their belief that their home was in Hawaii on her 1959 Hawaiian Income Tax return executed on March 29, 1960.

The weight to be given to the letter to the Bureau of Naval Personnel and the tax returns is aptly stated in Blackburn v. Blackburn, wherein Judge Stainback commented on page 41:

> "Where the declarations of the party have no object or inducement to deceive those to whom such declarations are made and before any controversy, they are of great weight. Such declarations as affidavits filed with the tax assessors, declarations made before or at the time of leaving a former domicile, and all acts and conduct which fairly indicate his purpose, even though it may not be a part of the res gestae, are admissible in evidence; such acts as the exercise of political rights, the payment of personal taxes, the sale of a former house together with its furniture, selection of a burial place for members of his family or for his burial, and his identification in regard to the social and business life of a place, his membership in lodges and clubs, his church activities, are all evidence to be considered."

It is believed that the claimed intention of Captain Lummis to be domiciled in Hawaii is clearly supported by his actions on and after July 30, 1959 reported by his attorney.

For the foregoing reasons of law and fact it is the opinion of this office that Captain and Mrs. Wilbur S. Lummis, Jr. established their domicile in Hawaii on July 30, 1959 and have been residents of Hawaii within the provisions of said subsection 64-3(b) as of and after said date, unless Captain Lummis has not been physically present in Hawaii for at least nine months since that date.

Respectfully yours,

W. K. WATKINS, JR.
Deputy Attorney General

APPROVED:

SHIRO KASHIWA
Attorney General

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AGRICULTURE & CONSERVATION, Dept. of

Whether the transfer of the function of managing state parks from the Dept. of Agriculture to the Department of Land & Natural Resources includes the transfer of the jurisdiction of the land on which state parks are located.

STATUTE

Construction

Whether the Hawaii State Government Reorganization Act of 1959 in transferring the function of managing state parks also transferred the jurisdiction of the land on which state parks are located.

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STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

June 21, 1960

Mr. Wayne L. Collins
Director of Agriculture and Conservation
Department of Agriculture and Conservation
Honolulu 14, Hawaii

Dear Mr. Collins:

This is in response to your letter dated May 16, 1960, for an opinion from this office regarding the interpretation and meaning of section 21 of the Hawaii State Government Reorganization Act of 1959 with respect to the transfer of State parks.

More specifically, you wish to have answered the following three questions:

(1) What is involved in the transfer of the function of managing the State parks heretofore exercised by the Board of Commissioners of Agriculture and Forestry?

(2) In transferring the function of managing the State parks to the Department of Land and Natural Resources, does this transfer include the jurisdiction of the land on which State parks are located?

(3) If the answer to question No. 2 is in the affirmative, who is responsible for the enforcement, control, maintenance of facilities, etc., where State parks are located within proclaimed Forest Reserves?

The pertinent provisions of section 21 of the above-mentioned Act state:

"The department shall manage and administer the public lands of the state and the water resources and minerals thereon; and manage the state parks, including historical sites."

. . . . .

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> "[T]he function of managing the state parks heretofore exercised by the board of commissioners of agriculture and forestry as heretofore constituted are hereby transferred to the department of land and natural resources established by this Act."

The pertinent provisions of section 22 of the above-mentioned Act state:

> "The functions and authority heretofore exercised by the board of commissioners of agriculture and forestry (except . . . the management of State parks transferred to the department of land and natural resources) . . . are hereby transferred to the department of agriculture and conservation established by this Act."

This transfer includes the transfer of all rights, powers heretofore exercised, and all duties and obligations heretofore incurred by the previously existing department (sec. 31, Hawaii State Government Reorganization Act of 1959). Section 32 of the same Act transfers the personnel with the functions to the new department, and they are to perform their regular duties upon their transfer, subject to the provisions of State personnel laws and of this Act. Similarly, all records, equipment, files, supplies, contracts, books, papers, documents, maps, appropriations, and other property theretofore made, used, acquired or held by the previously existing department in the exercise of the function transferred shall be transferred under the direction of the Governor to the department succeeding to such functions (sec. 32, Hawaii State Government Reorganization Act of 1959).

In answer to your second question, we feel that the jurisdiction of the land on which State parks are located automatically transferred to the Department of Land and Natural Resources by the Reorganization Act without the need of an executive order by the Governor to transfer jurisdiction of such land. When government land within State forest reserves or under the jurisdiction of the Department of Agriculture or other government land is set aside for park purposes, an executive order by the governor is necessary to designate it as such. But the executive order merely sets aside such land for such purposes under the control and management of the Department of Agriculture but no legal interest in the land is transferred.

When the Reorganization Act transferred the function of managing State parks to the Department of Land and Natural Resources, we feel that the jurisdiction of such land for management and control went along with the transfer of function. The

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executive order merely designated the area for park purposes without giving any legal interest in such land in the particular department exercising jurisdiction. The transfer of function of managing State parks would necessarily involve the transfer of jurisdiction over such land.

In answer to your third question, the Department of Land and Natural Resources has the responsibility for the enforcement, control, maintenance of facilities, etc. of all the State parks, even though such parks are within proclaimed forest reserves. Since the Department of Land and Natural Resources has assumed the function of managing State parks, all acts necessary for the proper management and control of such parks must be borne by the Department of Land and Natural Resources.

On the basis of the foregoing discussion, it is the opinion of this office that the Reorganization Act, while transferring the function of managing State parks, similarly transferred jurisdiction of the land on which the State parks are located to the Department of Land and Natural Resources, and it is not necessary that an executive order be issued to accomplish same.

Very truly yours,

Allen I. Marutani

Allen I. Marutani
Deputy Attorney General

APPROVED:

Shiro Kashiwa

Shiro Kashiwa
Attorney General

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Op. 60-65

CONTRACTORS LICENSE BOARD

Contractors License Board may not levy fines authorized by section 166A-22, Revised Laws of Hawaii 1955, 1957 Supplement.

FINES AND PENALTIES

Contractors License Board may not levy fines for violations of chapter 166A, Revised Laws of Hawaii 1955, 1957 Supplement.

REVISED LAWS OF HAWAII 1955

Section 159-15.

1957 SUPPLEMENT

Sections 4(c), 166A-22, -19, -17, -8.

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STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

June 21, 1960

Mr. Robert E. Shaw
Executive Secretary
Contractors License Board
410 South Hotel Street
Honolulu, Hawaii

Dear Mr. Shaw:

Re: Power of Board to Levy Fines Under Section 166A-22, Revised Laws of Hawaii 1955, 1957 Supplement

On April 5, 1960, you asked whether or not the Contractors License Board was empowered to levy fines under section 166A-22, Revised Laws of Hawaii 1955, 1957 Supplement, and if so, what disposition should be made of such fines when collected.

It is the opinion of this department that the Contractors License Board may not levy fines authorized by said section 166A-22.

Section 166A-17, R.L.H. 1955, 1957 Supplement, sets out the jurisdiction of your Board in regard to the matter of administrative hearings; this section does not authorize you and your Board to levy fines. This interpretation is borne out by an examination of section 166A-19, R.L.H. 1955, 1957 Supplement, which has to do with the disposition of the fees received by the Board into a special fund and which contains no provision as to the disposition of fines or of other moneys collected by the Board. The absence of such a provision indicates an intention not to empower your Board to collect fines. In comparison with section 159-15, R.L.H. 1955, which contains provisions for disposition as to moneys other than fees received by the liquor commission under provisions of Chapter 159, R.L.H. 1955, as amended, and which show an intent and inference that the liquor commission is authorized to levy the fines imposed under Chapter 159, section 166A-19 strongly indicates that the Board may not levy fines under section 166A-22, by not providing for the disposition of funds other than fees.

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This interpretation is in harmony with the purpose of Chapter 166A, R.L.H. 1955, 1957 Supplement. The Board has jurisdiction over all licensees, including applicants for a contractor's license, and may deny an application or suspend or revoke the license of a licensee. Section 166A-16, -17, R.L.H. 1955, 1957 Supplement. A person not licensed by the Board and who is engaged in the contracting business has violated Chapter 166A (section 166A-8, R.L.H. 1955, 1957 Supplement); such a person does not fall within the normal scope of section 166A-16, -17, but falls within section 166A-22. The Board may enforce section 166A-22 by invoking the district courts of the various counties to prevent further violations of Chapter 166A. Section 166A-4(c), R.L.H. 1955, 1957 Supplement.

This procedure leaves much to be desired. Better administration of Chapter 166A by the Board requires the additional power to enjoin a person from engaging in the contracting business without a license or/and to allow the Board to fine such persons after due notice and a full hearing. Our laws presently do not provide for these desirable safeguards; legislative fiat must be used to correct the deficiency.

Of course, it is true that section 166A-22 may be viewed as an administration penalty or fine which may be levied by the Board itself. However, the absence of authority to convene in a hearing against an unlicensed person for violation of section 166A-8 indicates the contrary. Section 166A-17. Statutory regulations of business conduct for the benefit of the general public is in derogation of common law; statutues in derogation of common law must be strictly construed and cannot be extended by implication. Attorney General, Opinion 59-21.

Very truly yours,

Tenny H. Tom
Deputy Attorney General

APPROVED:

Shiro Kashiwa
Attorney General

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PILOTS

Status of

The harbor pilots are placed in civil service status by law and the Governor has no authority to remove them from civil service status.

Governor - Powers

The harbor pilots are placed in civil service status by law and the Governor has no authority to remove them from civil service status.

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STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

June 21, 1960

Representative Mamoru Yamasaki
Chairman, Committee on Public Employment
House of Representatives
The First Legislature, State of Hawaii
Iolani Palace
Honolulu 13, Hawaii

Dear Sir:

This is in reference to your letter dated June 17, 1960, requesting our opinion as to whether or not the Governor has the authority to remove Honolulu Harbor pilots from civil service status.

It is the opinion of this office that the Governor does not have the authority to remove Honolulu Harbor pilots from civil service status.

The harbor pilots and other employees of the Board of Harbor Commissioners were placed under civil service status by Public Law 85-650 72 Stat. 606, dated August 14, 1958, which amended section 106 of the Hawaiian Organic Act. The provision of Public Law 86-3, more popularly called The Admission Act, dated March 18, 1959, provides as follows:

> Section 15. * * * That, except as herein otherwise provided, a Territorial law enacted by the Congress shall be terminated two years after the date of admission of the State of Hawaii into the Union or upon the effective date of any law enacted by the State of Hawaii which amends or repeals it, whichever may occur first. * * *

Under said provisions, the provisions of the Organic Act are laws of the state until August 21, 1961, even without state ratification.

Therefore, at the present time, the harbor pilots are placed in civil service status by law and the Governor has no authority

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to remove them from civil service status. It will require state legislative action before such action can be taken.

Very truly yours,

Harold Y. Shintaku

Harold Y. Shintaku
Deputy Attorney General

APPROVED:

Shiro Kashiwa
Attorney General

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EMPLOYEES' RETIREMENT SYSTEM

Military Benefits

Section 6-111. RLH 1955, as amended, and other sections dependent upon said section, do not apply to a member of the retirement system who enters military service but who does not leave his position or employment.

REVISED LAWS OF HAWAII 1955

Sec. 6-110 to 6-121

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STATE ~~TERRITORY~~ OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

June 22, 1960

Employees' Retirement System
State of Hawaii
Keelikolani Building
Honolulu, Hawaii

Gentlemen: Attention: Mr. Harold C. Hill
Secretary

This is with reference to your letter of May 10, 1960, requesting our opinion on the applicability of Sections 6-110 to 6-121, RLH 1955, in the following situation:

Mr. Kuroda is a school teacher employed by the Department of Public Instruction (now the Department of Education) at the Aliamanu Elementary School and is a Captain in the U. S. Army Reserves. He has applied for and has been ordered to a special course of military instruction for approximately ten weeks at Camp Wolters, Texas. The Department of Public Instruction has granted Mr. Kuroda military leave with pay from May 16 to June 6, 1960, and military leave without pay for the remainder of his absence, in accordance with Section 5-46, RLH 1955.

Under the above set of facts, it is our opinion that Mr. Kuroda is not entitled to the military benefits provided in Sections 6-110 to 6-121.

The legal history of Sections 6-110 to 6-121 shows that Section 6-111 had its inception in Act 72, Sp. SLH 1941, and Sections 6-110 and 6-112 to 6-121 in Act 215, SLH 1943. Said provisions were repealed by Act 370, SLH 1949 and were reactivitated in Act 262, SLH 1951.

Section 6-111 provides as follows:

"Sec. 6-111. Service credit; payment of contributions. Every active member of the system entering the military service (which term as used in this section shall include national guard, air, naval and coast guard services) of the United States on or after June 25, 1950, shall so long as he remains in military service, be allowed service credit in the system to the same extent as if he were continuously in

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the active service of the Territory or a county, as the case may be, in the position which he held immediately prior to his induction (whether as a volunteer, a member of the reserve, a national guardsman, or as a selectee) into military service.

> "The Territory or county, as the case may be, in whose service such member was employed immediately prior to his induction into military service shall, so long as he remains in military service, pay all contributions both to the pension accumulation fund and to the annuity savings fund, and any other payments to the system by the Territory, the county, or such member, if he were continuously in the active service of the territory, or county, as the case may be." (Emphasis supplied).

In the absence of express provision, we are placing heavy emphasis on the underscored portions of the above section in determining the legislative intent. We take the reference to employment and position in the past tense to mean that the section does not apply to an active member of the system who enters military service but does not leave his position or employment. We are of the opinion that Mr. Kuroda, in the situation above, has not left his employment and that Section 6-111 does not therefore apply to him.

Similarly, Sections 6-112 to 6-119 do not apply to Mr. Kuroda inasmuch as he is not a service member as the term is defined in Section 6-110.

We might mention in passing that we have examined House Standing Committee Report No. 606 and Senate Standing Committee Report No. 356 in the 1951 Legislative Journals, but have found them to shed no light on the problem at hand.

We might mention too, should there be any question later on, that we do not feel there is any conflict between our interpretation of Section 6-111 and the provisions of Section 5-48, RLH 1955. In fact, we have used said Section 5-48 as an aid in the construction of Section 6-111.

Yours very truly,

Walter T. Shimoda

WALTER T. SHIMODA
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

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INDEXING INSTRUCTIONS

June 22, 1960

GARNISHMENT

Transfer of Order - Change of Employment

The ability of the judgment creditor to garnish, under section 237-5, the debtor's wages earned from a new employer was not limited by Act 65, S.L. 1959.

GARNISHMENT

Change of Employment - Transfer of Order

Same Syllabus as above.

STATUTES

REVISED LAWS OF HAWAII 1955

Section 237-5

(Construed in light of Act 65, S.L. 1959.

SESSION LAWS OF HAWAII 1959

Act 65.

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STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

June 22, 1960

Honorable Manuel S. Henriques
Vice Speaker, House of Representatives
First State Legislature
Honolulu, Hawaii

Dear Mr. Speaker:

Your letter to Representative Mirikitani regarding the affect of Act 65 of the Session Laws of 1959 upon sections 237-5 and 237-6, Revised Laws of Hawaii 1955 was referred to this office for our opinion.

It is our belief Act 65 of the 1959 Session of the Territorial Legislature did not affect the scope or application of said sections 237-5 and 237-6.

As you know section 237-5 provides in part:

> "Whenever any judgment debtor has left the employ of any garnishee, against whom an order has duly issued, before the full amount of the judment has been paid, and has entered the employment of some other person *** then the judgment creditor may sequester any wages due the judgment debtor from such new employer by filing with such person *** a certified copy of the judgment and an affidavit of the judgment creditor ***."

House Bill No. 19, which became said Act 65 did not specifically amend said section 237-5 and apparently was not so intended. On April 1, 1959 the Judiciary Committee in Standing Committee Report No. 47 to the Speaker stated as to the intent of the committee regarding House Bill No. 19 on page 2 as follows:

> "It is the intent of your Committee that under this bill as amended: *** (c) that wages after judgment may be garnisheed in the same manner as is now provided by law ***."

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House Bill No. 19 had been submitted in the "short form" and the Committee recommended on page 3 of said report that said bill be amended in section 2 to provide "(c) that wages after judgment may be garnisheed in the same manner as is now provided by law."

The Senate Committee on Judiciary in S.C.R. No. 621 on House Bill No. 19 on April 27, 1959 in reporting to President Lee made no comment regarding the preservation of the method of garnisheeing wages.

Said House Bill No. 19, as enacted, amended only sections 237-1, 237-2, 237-3, 237-8, 237-9, 238-6 and 238-11, Revised Laws of Hawaii 1955. From the aforementioned committee reports it clearly appears that House Bill No. 19 was not intended to amend sections 237-5 and 237-6.

For the aforementioned reasons and law this office believes the applicability of sections 237-5 and 237-6, Revised Laws of Hawaii 1955, was not amended by said Act 65 and therefore the new employer may be made subject to the garnishment order obtained to satisfy a judgment debt by filing with such new employer a certified copy of the judgment and the judgment creditor's affidavit showing the amount remaining due and unpaid on account of the judgment.

Respectfully yours,

W. K. WATKINS, JR.
Deputy Attorney General

APPROVED:

SHIRO KASHIWA
Attorney General

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INDEXING INSTRUCTIONS

Op. 60-69

I. HAWAII AERONAUTICS COMMISSION

A. Whether an administrative body, such as the Hawaii Aeronautics Commission, may expend public funds for private purposes where a moral obligation exists.

II. PUBLIC FUNDS

A. Whether an administrative body, such as the Hawaii Aeronautics Commission, may expend public funds for private purposes where a moral obligation exists.

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Op. 60-69

STATE ~~TERRITORY~~ OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

June 23, 1960

Hawaii Aeronautics Commission
Honolulu International Airport
Honolulu 17, Hawaii

Attention Mr. R. M. Walton, Acting Director of Aeronautics

Gentlemen:

This is in response to your letter No. D-4227, dated May 27, 1960, for an opinion from this office concerning the legality of refunding certain sums of money to Aloha Airlines by the Hawaii Aeronautics Commission.

Dr. Hung Wo Ching, president of Aloha Airlines, testified at the Hawaii Aeronautics Commission's meeting of May 17, 1960, that there was a "gentlemen's agreement" that parking lot concessions would be put out to bid for both the Honolulu International Airport terminal and the Hawaiian Airlines terminal. However, only the Honolulu International Airport terminal is operating a paid parking lot concession, while free parking is allowed at the Hawaiian Airlines terminal. Dr. Ching stated that in order for Aloha Airlines to remain on a competitive basis, it was necessary for Aloha to validate parking tickets for its customers in the face of advertisements by Hawaiian Airlines which offered free parking to its patrons. This sum, Dr. Ching states, amounts to $10,600, and he is now requesting the Hawaii Aeronautics Commission for reimbursement of such sum.

Aloha's claim must be founded on some moral or equitable grounds such that good conscience would dictate the reimbursement of such sums. The court in In Re Tavares, 26 Haw. 101, 104 (1921), defined moral obligation:

> A moral obligation is defined as one 'which cannot be enforced by action but which is binding on the party who incurs it in conscience and according to natural justice. It is that imperative duty which would be

> enforcible [sic.] by law were it not for some positive rule which with a view to general benefit exempts the party in that particular instance from legal liability.'"

A definition comparable to that in the Tavares case above was advanced by a New York court in People v. Westchester County National Bank of Peekskill, 231 N.Y. 465, 132 N.E. 241, 245 (1921):

> ". . . some direct benefit was received by the state as a state or some direct injury suffered by the claimant under circumstances where in fairness the state might be asked to respond--where something more than a mere gratuity was involved."

And on page 246 the court continued:

> "In every case that we have found, therefore, there was the foundation of a claim against the state itself, however imperfect. In all there was some obligation, not enforceable against it, perhaps because it might not be sued, perhaps because the maxim of respondeat superior may not be invoked against it, perhaps because of the absence of some small element, the presence of which would give a legal cause of action and where without that element payment might still be morally required. They are cases where the state is allowed to make compensation for benefits which it has received or for injuries which have been suffered in its service or because of its acts or acts done under its authority or because of the acts of its servants. So far, at least, when we have used the term we have implied an obligation, something that binds, if not in law, at least in morals. There must be a duty, even if it is a duty not enforceable. The desire to compensate those to whom we owe gratitude is a natural one. It finds expression every day in common life. It is entirely to be praised. But a 'moral obligation,' when we use that term in relation to the spending of public funds, means more than this. Gratitude is not enough."

In our particular case, Aloha claims that the Hawaii Aeronautics Commission verbally agreed to put both parking lots out to bid. However, only the Aloha Airlines area is operating a paid parking lot concession, which operation, in the opinion of Aloha, necessitated it to validate parking tickets. Aloha has

incurred expenditure of great sums of money in validating these tickets. If such a fact situation presents one that courts would consider that good conscience and natural justice would require the State to respond, or where the claimant has suffered some direct injury that in fairness the State should pay, then a moral obligation arises in the State to reimburse Aloha Airlines.

Even if we can assume that Aloha's claim is founded on a moral obligation incurred by the State, nonetheless, we don't feel that an administrative body, such as the Hawaii Aeronautics Commission, can expend public funds for private purposes. Such expenditure can only be done by the legislature. As stated in the Tavares case, supra, on page 104:

> "The legislative power was conferred by Congress (Sec. 55 Organic Act) upon the territorial legislature in broad and liberal terms (In re Craig, 20 Haw. 483, 490). Under such a grant of legislative power it is proper for the territorial legislature to appropriate any moneys in the public treasury to discharge the moral and equitable obligations of the Territory (United States v. Realty Co., 163 U.S. 427). But in the absence of a legal obligation to make such a payment there must be at least a moral or equitable obligation to do so otherwise the payment would not be for a public purpose but a mere gratuity and beyond the power of the legislature to make (Bailey v. Philadelphia, 167 Pa. 569, 573)."

This conclusion is further fortified by prior opinions from this office:

(1) Opinion No. 1216, dated May 13, 1925, by William Lymer
(2) Opinion No. 1219, dated May 14, 1925, by Charles Dwight
(3) Opinion No. 965, dated March 11, 1921, by Harry Irwin

On the basis of the foregoing discussion, it is the opinion of this office that an administrative body, such as the Hawaii Aeronautics Commission, can not expend public funds for private purposes even though a moral obligation exists on the part of the State.

Very truly yours,

Allen I. Marutani

Allen I. Marutani
Deputy Attorney General

APPROVED:

Shiro Kashiwa
Attorney General

Op. 60-69

INDEXING INSTRUCTIONS

June 22, 1960

HEALTH

Birth Certificate

Christian name of child may be changed with due safeguards by administrative action once before child is three months old.

CHANGE OF NAME

Child

Christian name of child of less than three months may be changed once by administrative action with due safeguards.

REVISED LAWS OF HAWAII 1955

Section 327-5

(Construed with regard to the provisions and history of section 327-4).

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June 22, 1960

Honorable Richard K. C. Lee, M.D.
Director of Health
Honolulu, Hawaii

Dear Dr. Lee:

This office was asked verbally for its opinion as to whether the name of a child less than a week old could be changed on its birth certificate by the Office of Health Statistics in view of the provisions of chapter 327, Revised Laws of Hawaii 1955.

It is the opinion of this office in light of your Department's long standing administrative practices and the provisions of said chapter 327 that such a change of name can be made when accompanied by sufficient safeguards against the practice becoming unduly burdensome.

The Act of August 24, 1860 as to the regulation of names (L. 1860, p. 32) provided in section 7:

> "The father or mother of any children born subsequently to the passage of this Act, shall report the name or names of such child to the Registrar of Births for the district in which such child was born, within three months after the birth of such child."

The language of section 327-4, Revised Laws of Hawaii 1955 is the same, except for style changes, and should be considered when construing section 327-5, Revised Laws of Hawaii 1955 pertaining to means of changing a name, especially since said section 327-5 was first enacted as section 6 of aforesaid Act of August 24, 1860 and provided no means for a person to change their name. The Act of July 29, 1872 relating to this matter (L. 1872, p. 27) provided for a change of name to be accomplished by means of a decree of the King in Privy Council with certain public notice.

The present administrative procedures resulting from the necessities of present day living require the attending physician or midwife to file the birth certificate within seven

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days of the child's birth. A child's birth may be registered with only the family name and the parents are allowed to give it its christian name, as required by Sections 327-2 and 327-3, Revised Laws of Hawaii 1955, at a later date, without further ado until it enters school. The administrative practice as to children who have received a christian name requires that changes be accomplished by petitioning the Lieutenant Governor under the provisions of said section 237-5.

The case presently before the Department of Health involves a child which was named by the mother while she was still under sedation and now, less than a week after birth, the parents wish to give it a new middle name.

In view of the foregoing administrative practices and law and the intent of the law to stabilize persons' names and give notice of change to the public, which may know the individual only by the former name, it is believed reasonable to allow the parents to change the name of the child once anytime within three months after the birth of the child.

It is recommended the change be accomplished only after the legal parents have presented the Office of Health Statistics with sworn statements as to the circumstances or reasons for the change of name and the agreement upon the new name.

For the aforementioned reasons and law this office believes it is proper for the Office of Health Statistics to permit the change of the name of a child once within three months after the birth of the child upon the above stated conditions or similar safeguards.

Respectfully yours,

W. K. WATKINS, JR.
Deputy Attorney General

APPROVED:

SHIRO KASHIWA
Attorney General

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INDEXING INSTRUCTIONS

June 24, 1960

HEALTH

Regulations for mortuaries, etc.

Section 9(a) of Chapter 8 of Department of Health Regulations does not prevent a "full time" embalmer in all cases from having another"full-time" occupation.

FUNERAL PARLORS, MORTUARIES, ETC.

Same syllabus as above.

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STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

June 24, 1960

Honorable Richard K. C. Lee
Director of Health
Honolulu, Hawaii

Dear Dr. Lee:

You have queried this office as to whether or not a person already employed on a "full-time" basis can work for a funeral parlor as its "full-time" embalmer as required by section 9(a) of chapter 8 of the Public Health regulations.

It is our belief such other employment may affect in some cases the ability of the person to perform his duties as the "full-time" embalmer for a funeral establishment but in many other circumstances the employments will be compatible.

Section 9(a) of said chapter 8, which was promulgated on December 21, 1957, states in part as follows regarding funeral parolos, mortuaries and other funeral establishments:

> "*** provided that an embalmer, licensed by the president of the Board of Health, is employed full-time by the funeral establishment, except that said president may approve a part-time embalmer in unusual circumstances ***."

It is our understanding the aforestated part of section 9(a) is intended to prevent funeral establishments from employing only "itinerant" embalmers, i.e. on the irregular employment of the preparation of a single body. We are informed it was deemed desireable that all funeral parlors, etc. have a licensed embalmer always available on the basis of a regular employment so as to be "on call" at any time of the day and any day of the week.

Consequently it appears the "full-time" employment required by said section 9(a) is met when the funeral establishment has employed a licensed embalmer to be "on call" on a 24 hour a day basis seven days a week. It does not appear

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that the embalmer must be physically present at the establishment eight hours a day, five days a week.

For the foregoing reasons it is the opinion of this office that each case of aforesaid "full-time" employment required by said section 9(a) when performed by an individual otherwise "fully" employed should be evaluated as to the employee's ability to meet the "on-call" requirements of section 9(a) applied to the establishment concerned.

Very truly yours,

W. K. WATKINS, JR.
Deputy Attorney General

APPROVED:

SHIRO KASHIWA
Attorney General

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INDEXING INSTRUCTIONS

June 28, 1960

HEALTH

Waimano Home

Director becomes guardian of the committed upon receiving custody of the individual and there cannot be a voluntary commitment.

WAIMANO HOME

Guardianship

Same Syllabus as above.

REVISED LAWS OF HAWAII 1955

Chapter 82

(Interpreted as to guardianship and voluntary commitment)

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STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

June 28, 1960

Honorable Richard K. C. Lee, M.D.
Director of Health
Honolulu, Hawaii

Dear Dr. Lee:

In your letter of June 13, 1960 regarding clarification of certain provisions of chapter 82, Revised Laws of Hawaii 1955 you asked for the opinion of this office on the following matters:

(1) Has the guardianship provided for by Act 53, Session Laws of 1943 been changed since 1945?

(2) Who makes the investigation for the financial evaluation required by section 82-9?

(3) Who has the responsibility to transport a committed person to Waimano Home?

(4) Can a person enter Waimano Home voluntarily, as seemingly provided for in section 82-15?

The following is offered as the replies to the above similarly numbered questions:

(1) Section 82-15, Revised Laws of Hawaii 1955 has not been amended since it was enacted as Act 53, Session Laws of 1943. Consequently Deputy Attorney General Ronald B. Jamieson's letter of January 19, 1942 to Director T. B. Vance, stating the Director becomes the guardian of a person committed to Waimano Home at the time the individual enters or is received at the Home or is taken into custody by Home authorities, still represents the opinion of this office.

(2) The responsibility for gathering the financial information pertaining to the parents, quardians,etc. of an inmate of the Home and evaluating that data for the guidance of the Court would logically seem to rest upon the moving party in the commitment proceeding. The information should

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be presented to the Court at the time of its determination as to the commitment so that the family, etc. and attorneys need not return to court at a later date.

(3) The Waimano Home staff does not have the responsibility of transporting the committed person to the Home since such is not provided for in section 82-7 and would be contrary to the intent of section 82-15. As stated in (1) above the Home's responsibility, i.e. guardianship, commences at the time of taking custody of the individual by physical possession rather than at the time of the Court Order.

(4) There are no provisions in the law for a person to be admitted to Waimano Home by voluntary agreement instead of by a court's commitment. When Act 53, Session Laws of 1943 was enacted the law so provided but the provisions permitting admission to the Home by agreement were repealed by Act 114, Session Laws of 1953. The questioned provision in section 4074, Revised Laws of Hawaii 1945, was not repealed, in order to preserve the status of the inmates who had been admitted voluntarily, and continues in effect to the present in section 82-15, Revised Laws of Hawaii 1955.

Respectfully yours,

W. K. WATKINS, JR.
Deputy Attorney General

APPROVED:

SHIRO KASHIWA
Attorney General

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INDEXING INSTRUCTIONS

Op. 60-73

I. PUBLIC INSTRUCTION, DEPARTMENT OF

A. Pay of supervisory and administrative staff increased by $75 plus differential on the $75 based upon the salary classification.

II. SESSION LAWS OF HAWAII 1959

Act 255, Section 2

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STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

June 28, 1960

Mr. Walton M. Gordon
Superintendent
Department of Public Instruction
P. O. Box 2360
Honolulu 4, Hawaii

Dear Sir:

This is in reply to your letter of June 6, 1960, and a letter addressed to you on June 13, 1960, by Mr. Paul Thurston relating to pay for administrative and supervisory positions. Act 255, Session Laws of Hawaii 1959 authorized increases of $75. The question asked is whether the salaries of administrative and supervisory employees are also to include a differential on the $75 raise besides.

It is the opinion of this office that such salary increases include a differential on the $75.

Section 2, Act 255, Session Laws of Hawaii 1959 provides:

> "The monthly salary ratings of teachers prescribed in section 38-31 of the Revised Laws of Hawaii 1955, as amended, and in effect on the effective date of this Act, and the monthly salaries of professional officers and employees of the department of public instruction whose positions are classified under section 38-38 of the Revised Laws of Hawaii 1955, and in effect on the effective date of this Act, are hereby increased by $75 effective September 1, 1959. Such differentials as are payable to principals, vice principals, vocational teachers and <u>others</u> shall be computed on the appropriate salary ratings or salaries as increased in this section.
>
> "Any law to the contrary notwithstanding, further salary increases to any person covered by part III of chapter 38 of

the Revised Laws of Hawaii 1955, as amended, are prohibited unless specific authority is granted by the Legislature." (Underscoring supplied.)

The question arises as to whether "others" include section 38-38, Revised Laws of Hawaii 1955 employees. The employees classified under section 38-38, R.L.H. 1955, as referred to in the above quoted statute, are certain professional officers and employees in the Department of Public Instruction, including deputy superintendents of public instruction, district superintendents, vocational supervisors, and other professional officers and employees in the Department not covered by section 38-31 (for teachers and principals). The commissioners were authorized to establish salary classifications for these positions. As a consequence, a salary schedule was set up based upon the maximum pay of the teacher plus a range of percentage differentials depending on the position.

The commissioners established this means of pay classification in order to align the administrative and supervisory positions with teachers and principals in terms of work, responsibilities, experience, and ability. To interpret the act to give all positions (teachers and administrators) $75 only, would impute to the legislature an intention to disrupt this alignment of positions and pay. This appears to be unreasonable especially in light of differentials being granted in the act to principals, vice principals, and vocational teachers.

Furthermore, legislative history strongly indicates the legislative intent to give administrative and supervisory employees the differential. Standing Committee Report No. 937, Thirtieth Territorial Legislature, 1959, on page 4, re S.B. NO. 350, S.D. 2, H.D. 1, states in part, on the identical provision as it was later enacted into section 2, Act 255, S.L.H. 1959:

> "The teachers and principals and other professional personnel of the department of Public Instruction are to receive $75 a month across the board raise. The differentials for the principals and others are to apply on the increased pay, except where the differential will result in an increase beyond the 95% differential between the superintendent and his deputies. In that event the commissioners should revise the differential to comply with the legislative policy not to have subordinates be in a position to claim a salary in excess of his superior."

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The legislators must have intended that the differential be given to supervisory and administrative employees since contemplation is made of the possibility of deputies getting more than 95 per cent of the superintendent's salary which is fixed by law. Section 6, Act 255, S.L.H. 1959.

In the letter from the Department of Budget and Review, it is suggested that if the legislature intended to grant professional officers and employees the differential, it was not necessary to specifically grant them the $75 raise. In answer to that assertion, it appears that the legislature wanted to specifically legislate an increase of salaries for the administrative and supervisory employees. This was necessary in view of the second paragraph of section 2. Act 255 in line with the interpretation of this office makes clear that these employees are to get a $75 raise plus the differential. Without such specific language relative to the $75 raise for section 38-38, R.L.H. 1955 employees, and with language in the second paragraph of said section 2, which prevent salary increases for any person covered by Part III of Chapter 38, R.L.H. 1955, the administrative and supervisory employees may have not even obtained the $75 raise itself.

Based upon the above considerations, it is the opinion of this office that section 38-38, R.L.H. 1955 employees do get a $75 raise plus an applicable differential based upon the $75.

Very truly yours,

Vernon F. L. Char

Vernon F. L. Char
Deputy Attorney General

APPROVED:

Shiro Kashiwa
Attorney General

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TERRITORY OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

June 29, 1960

Mr. Edward L. Silva
Personnel Director
Department of Civil Service
County of Hawaii
Hilo, Hawaii

Dear Mr. Silva:

This is in reply to your letter of May 20, 1960, wherein you asked the following four questions which will be answered in the order stated.

"1. Does Act 82, S.L. 1959, supersede provisions made by Chapter 3, R.L.H. 1955, Sec. 21-n (sabbatical leaves) or are they mutually exclusive?"

Act 82, Session Laws of Hawaii 1959, does not supersede the provisions of section 3-21(n), Revised Laws of Hawaii 1955, nor are these two laws mutually exclusive. Act 82, by express language, only purports to amend section 4-9, Revised Laws of Hawaii 1955, and does not affect the provisions of section 3-21(n).

"2. Must all accumulated vacation time be used prior to taking an educational or sabbatical leave?"

Sections 3-21(m) and 3-21(n), which govern the granting and taking of educational leaves and sabbatical leaves, respectively, contain no requirement that all accumulated vacation must be used prior to taking an educational or sabbatical leave. I have not been able to find any such requirement in other sections of the law or in the applicable rules and regulations.

"3. During the present reorganizational transition, if an employee in a political subdivision of the State takes a sabbatical leave; and finds upon his return, that his agency was absorbed by a State department, what effect does this transfer have upon the employee's sabbatical leave benefits?"

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The sabbatical leave benefits of an employee so circumstanced are unaffected by the transfer. This is so because section 32 of the Hawaii State Reorganization Act of 1959 specifically provides in part that:

> "No employee of the state having tenure shall suffer any loss of salary, seniority, prior service credit, vacation, sick leave or other employee benefit or privilege as a consequence of this Act; provided that subsequent changes in status may be made pursuant to chapters 3 and 4 of the Revised Laws of Hawaii 1955, as amended.
>
> "An employee of the state who does not have tenure and who may be transferred or appointed to a civil service position as a consequence of this Act shall become a civil service employee without the loss of salary, seniority, prior service credit, vacation, sick leave or other employee benefits or privileges and without the necessity of examination; provided, that such employee or officer possesses the minimum qualifications for the position to which he is transferred or appointed."

> "4. Salary Schedule - Under the sabbatical law (Ch. 3:21-n, R.L.H. 1955) the employee is entitled, upon his return to work, the difference between the minimum compensation provided by law, and the actual compensation received by the employee at the time of such leave. What effect has this provision on an employee who begins his leave while at the C-level of the schedule? (A and B steps to be abolished by 1961, July). The substitute would begin at the B-level after July 1, 1960."

As stated in your question, section 3-21(n) states clearly that the employee returning from sabbatical leave is entitled to "the difference between the minimum compensation and the actual compensation received by the employee at the time such leave was granted." We think that the qualifying clause "at the time such leave was granted" modifies, not the subject of that sentence which is the word "difference" but rather the term "actual compensation." Under this reading there is a flexibility to the amount which may constitute the difference depending on the amount which constitutes the minimum compensation. This reading is given some support by the preceding sentence of that section which merely provides that:

> "Such substitute shall be paid the minimum compensation provided by law for the position."

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It is that minimum compensation which is provided by law that is to be paid the substitute. If the minimum compensation changes by law, then the substitute is entitled to that changed minimum compensation. This being the case, it follows that the difference between the minimum compensation for the substitute and the actual compensation of the departing employee is subject to change.

Subsection c of section 3 of Act 255 of the Session Laws of Hawaii 1959 provides for the deletion of step A in the new salary schedule enacted by that Act on July 1, 1960. This provision for deletion is unqualified. There is no provision in said Act 255 checking or ameliorating the effects of such deletion under other provisions of the law which may be dependent upon the maintenance of this step in the salary schedule. The result is that if the minimum compensation is raised, then the difference between such minimum compensation and the actual compensation is reduced.

Yours very truly,

Henry H. Shigekane

Henry H. Shigekane
Deputy Attorney General

APPROVED:

Shiro Kashiwa

Shiro Kashiwa
Attorney General

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No Opinion

No. 60-75

INDEXING INSTRUCTIONS

July 6, 1960

HEALTH

Transfer of Funds

Kalaupapa Store Fund provided by section 50-29 R.L.H. 1955 aids in accomplishing the objectives of the State's Hansen Disease program.

REVISED LAWS OF HAWAII 1955

Section 50-29.

Kalaupapa Store Fund aids in accomplishing the objectives of the Hansen's Disease program.

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STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

July 6, 1960

Honorable Richard K. C. Lee, M. D.
Director of Health
Honolulu, Hawaii

Dear Dr. Lee:

The opinion of this office was verbally requested as to the transfer of $20,000, which your department saved during fiscal 1960 from Health appropriations, to the Kalaupapa Store Special Fund, S4806.

This office believes the transfer of $20,000 of savings to the Kalaupapa Store Fund was proper if it was done by your office with the approval of the Bureau of the Budget.

The Kalaupapa Store Special Fund is a revolving fund provided for by section 50-29, Revised Laws of Hawaii 1955, to enable the department to operate and maintain a store situated at Kalaupapa, Molokai. Under the provisions of section 50-30, Revised Laws of Hawaii 1955 it is unlawful for the store to sell merchandise at prices exceeding the actual cost thereof F.O.B. Honolulu with the result the fund has been steadily diminishing by the amount of the unrecovered freight costs.

The store supplies all rations to patients living in their own quarters and the other goods all patients need to purchase from time to time. Consequently, the quantity and quality of merchandise the store stocks has a direct bearing on the patients' morale and the success of the department's program at Kalaupapa.

It is our further understanding the present size of the fund causes merchants selling goods shipped on the September barge to often have to wait several months before their accounts can be paid in full because part of the supplies have to be sold to patients before the store has funds to pay its accounts. The delay in payment is a detriment to the quantity and quality of goods the store must stock from September until the following May, when the weather again permits barges to be safely docked at Kalaupapa, and the State's credit rating.

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The subject $20,000 was part of the money saved by the department, generally because of unplanned vacancies, and thus could be transferred under the provisions of section 6, Act 270, Session Laws of 1959 since the program objectives, where the savings occurred, were accomplished as outlined in said Act 270 to the best of the department's ability.

Act 270 provided in section 6:

> "Changes and transfers in allocations within each fiscal year may be made by the head of a department, agency, or commission upon his certification, and approval by the Director of the Bureau of the Budget, that appropriation balances are available for such transfers after the program objectives intended by the Legislature have been or will be accomplished and that such transfers are necessary to accomplish program objectives authorized by the Legislature." (Underscoring added)

The welfare of the patients of the Division of Hansen's Disease in the Kalaupapa Settlement unquestionably is part of the scope of that program of the Department of Health. Consequently, the subject transfer of funds to better stock the Kalaupapa Store and thereby appreciably improve the patients' morale would clearly seem to be a transfer which will materially aid in accomplishing said program's objectives; to say nothing of the resulting improvement in the State's credit reputation.

For reasons of the aforementioned facts and law this office believes your transfer of $20,000 of savings in various department programs to the Kalaupapa Store Special Fund was properly within the scope of the provisions of section 6, Act 270, Session Laws of 1959.

Respectfully yours,

W. K. Watkins Jr

W. K. WATKINS, JR.
Deputy Attorney General

APPROVED:

H. Rodger Betts

H. RODGER BETTS
Acting Attorney General

Op. 60-76

INDEXING INSTRUCTIONS

Op. 60-77

I. HAWAIIAN HOMES COMMISSION

A. Public utility may not acquire H.H.C. lands through eminent proceedings.

II. EMINENT DOMAIN

A. Public utility may not acquire Hawaiian Homes Commission land through eminent domain proceedings.

III. HAWAIIAN HOMES COMMISSION ACT

Section 207(c)

ADDRESS REPLY TO
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STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

July 7, 1960

Mr. A. K. Piianaia
Executive Director
Hawaiian Homes Commission
P. O. Box 1879
Honolulu 5, Hawaii

Dear Mr. Piianaia:

This is in reply to a letter of June 15, 1960, regarding eminent domain proceedings. The question you ask is "whether a public utility company may acquire land in the Department of Hawaiian Home Lands through eminent domain proceedings."

It is the opinion of this office that the answer is in the negative.

Under the Hawaiian Homes Commission Act, certain parcels of land were designated as "available lands." These lands were to be used generally for leasing purposes to qualified Hawaiians.

It is a general rule of law that a private corporation, to whom the power of eminent domain has been delegated, may not condemn public lands unless there is specific legislative authorization or necessary implication. The reasoning for this rule is that such a condemnation will destroy or interefere with property already devoted to public use. 1 Nichols, The Law on Eminent Domain, 132, paragraph 2.2; 18 Am. Jur., 713, paragraph 83. No provisions are found in either the Revised Laws of Hawaii 1955, as amended, or the Hawaiian Homes Commission Act authorizing such an ability to condemn by public utility companies.

Section 207(c) of the Hawaiian Homes Commission Act specifically authorizes the Commission to grant licenses for 21 years to public utility companies as easements. This provision

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would appear to satisfy the needs of the public utility. The provision further indicates condemnation of these lands was not intended. In the absence of specific authorization to condemn the Hawaiian Homes Commission lands and the general rule of law as stated above, it is the opinion of this office that public utility companies may not acquire land from the Department of Hawaiian Home Lands through eminent domain proceedings. See also Opinion 58-128, dated July 10, 1958, of this affice addressed to the Hawaiian Homes Commission.

Very truly yours,

Vernon F. L. Char

Vernon F. L. Char
Deputy Attorney General

APPROVED:

H. Rodger Betts

H. Rodger Betts
Acting Attorney General

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STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

July 7, 1960

Dr. Charles H. Silva
Treasurer
Department of Treasury
and Regulation
State of Hawaii
Honolulu, Hawaii

Dear Dr. Silva:

This is in reply to your request of June 30, 1960, for an opinion on a question raised by a Mr. Edward Klein in a letter which was attached to your request.

The question raised by Mr. Klein is found in the second and third paragraphs of his letter which read as follows:

> "One such company represents some 56 banks buying mortgages for the banks portfolios providing it's [sic] clients with policy determination, and management services, as well as marketing of mortgage holdings. By virtue of it's size, the firm has nationwide access to financial resources from which Hawaii could benefit considerably.
>
> "Under our present law, there appears to be a need for interpretation. Section 174-30 provides for limited licensing of foreign corporations conducting certain types of business in Hawaii. Section 174-32 calls, among other things, for a $500 annual license fee. The question raised: must a company (of the type mentioned) register, and pay a separate annual license fee for, itself and/or every one of the client institutions for which it makes Hawaiian investments?"

Section 174-30 provides as follows:

> "Foreign corporations; real estate loans, limited license. Any other law to the contrary notwithstanding, foreign corporations authorized under their articles, charters or certificates of incorporation and the laws of their states of domicile to engage in a banking, insurance or other business and to invest in notes

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secured by real estate mortgages, may apply for and receive limited licenses permitting such corporations to engage solely in the making, servicing and collecting of loans secured by mortgages and as an incident thereto the taking, holding and disposing of any of such property acquired in enforcement of the rights of the mortgagee in the event of default by the mortgagor. The permitted mortgages are only those secured by real property or an interest therein; however, incidental personal property may be included in the mortgage. Such limited license shall exempt the holder thereof from any additional territorial registration requirement for the purpose of qualifying such corporation to do business in the Territory or for holding or disposing of real property."

Section 174-32 provides in part that "Such limited license (referring to the license provided for in section 174-30) shall be granted those corporations meeting the requirements of this part upon the payment of a license fee of $500 for a one year license."

The limited license is required if a corporation does not wish to qualify to do business in Hawaii under any other portions of Hawaii law and wish to "engage solely in the making, servicing and collecting of loans secured by mortgages and as an incident thereto the taking, holding and disposing of any of such property acquired in enforcement of the rights of the mortgagee in the event of default by the mortgagor." By the very terms of this section of law, the licensing requirement applies to any foreign corporation wishing to engage in the limited business activities just mentioned. If any of the banks or the representative company itself should engage in any of the activities mentioned above, then it appears that each corporation shall have to obtain a limited license and pay the $500 license fee.

To substantiate this conclusion, this office has checked Act 267, Session Laws of Hawaii 1953, and more importantly, its history. Senate Bill 698 eventually became Act 267. The committee reports attending the passage of Senate Bill 698 merely indicate an intention to make available more money for building and to this end aimed to provide a special limited license and exemption from other more onerous licensing requirements. There is nothing in these reports which indicate that the legislature wanted to go further to make this limited licensing requirement apply only to a "representative" company. In any event, it seems that language of the act is self-explanatory of its scope. Act 241 of the Session Laws of

Hawaii 1957 sheds no light on our problem. Committee reports attending the passage of Senate Bill 781, which became Act 241, again show nothing relevant to our problem.

Yours very truly,

Henry H. Shigekane

Henry H. Shigekane
Deputy Attorney General

APPROVED:

H. Rodger Betts

H. Rodger Betts
Acting Attorney General

Op. 60-78

INDEXING INSTRUCTIONS

Op. 60-79

I. AGRICULTURAL COOPERATIVE ASSOCIATION ACT, UNIFORM

A. Cooperatives may engage in cannery operations by renting or purchasing shares where such activity is proper to accomplish purpose of organization.

II. REVISED LAWS OF HAWAII 1955

Chapter 176

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Op. 60-79

STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

July 7, 1960

Mr. Shiro Takei
Assistant Marketing Specialist
Agricultural Extension Service
University of Hawaii
Honolulu, Hawaii

Dear Mr. Takei:

This is in reply to your letter of June 8, 1960, and a conversation had with you on July 6, 1960, regarding the Agricultural Cooperative Association Act, Chapter 176, Revised Laws of Hawaii 1955. The hypothetical situation you pose involves an agricultural cooperative association which desires to rent or purchase shares of a pineapple company. The question you ask is whether such activity is permissible under the Agricultural Cooperative Association Act.

It is the opinion of this office that such activity is generally permissible.

Agricultural cooperative associations are established pursuant to Chapter 176, Revised Laws of Hawaii 1955. Statutory purposes of such organizations include:

> "§ 176-4. Purposes. Such association may be organized for the purpose of engaging in any cooperative activity for producers of agricultural products in connection with:
>
> "(a) Producing, assembling, marketing, buying or selling agricultural products of Hawaiian origin, or harvesting, preserving, drying, processing, manufacturing, blending, canning, packing, ginning, grading, storing, warehousing, handling, shipping, or utilizing such products, or manufacturing or marketing the by-products, thereof;..."

The powers of such organizations are very broad as stated in section 176-10(a), Revised Laws of Hawaii 1955.

> "(a) An association formed under this chapter, or an association which might be formed under this chapter and which existed at the time this chapter took effect, shall have the capacity to act possessed by natural persons, but such association shall have the authority to perform only such acts as are necessary or proper to accomplish the purposes as set forth in its articles and which are not repugnant to law."

Pineapple cannery operations involve marketing, producing, and canning agricultural produce. Furthermore, natural persons may rent or purchase shares of canneries. Thus, agricultural cooperative associations may engage in such activities. This statement is made on the assumption of an initial finding that involvement in cannery activity is "necessary or proper to accomplish the purpose" of the particular agricultural cooperative association.

As to your questions relative to percentage of ownership and stock control, the amount of ownership is immaterial. As long as the cannery is a separate and legal entity it may not be deemed incorporated into the agricultural cooperative association. This would be for tax and other purposes.

Yours very truly,

Vernon F. L. Char

Vernon F. L. Char
Deputy Attorney General

APPROVED:

H. Rodger Betts

H. Rodger Betts
Acting Attorney General

Op. 60-79

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STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

July 11, 1960

Socialist Workers Party
116 University Place
New York 3, N. Y.

Attention: George Lavan

Gentlemen:

Re: The Socialist Workers Party and the Nomination of Presidential Electors in Hawaii.

Your letter of April 15, 1960 requesting an opinion on the above matter from the office of the Lieutenant Governor of the State of Hawaii has been referred to our office. The following questions are presented:

I. Would the nomination of Presidential electors and their alternates at a state convention of supporters of the Socialist Workers Party and the filing of a certificate of nomination by October 15 be in compliance with section 11-94.5 as set forth by Act 9, S.L.H., First State Legislature, 1959?

We think not. Section 11-94.5 provides in part:

"Beginning with the year 1960. . .each of the political parties shall hold a state party convention pursuant to the constitution, by-laws and rules of such political party, and nominate as candidates for its party as many electors, and a first and second alternate for each elector, of president and vice president of the United States as the state is then entitled. . . .The names and addresses of the nominees shall be certified by the chairman and secretary of the convention of the respective parties and submitted to the Lieutenant Governor no later than October 15 of the same year. . . ."

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The term "party" as used by section 11-94.5 is defined under section 11-90, R.L.H. 1955, as "an association of voters united for the purpose of promoting a common political end or carrying out a particular line of political policy which maintains a general organization throughout the [State], including a regularly constituted central committee and county committees."

Since, by your admission, the Socialist Workers Party presently has no general organization throughout Hawaii nor any such regularly constituted central or county committees, it would seem that the Socialist Workers Party is not within the regulatory terms of section 11-94.5.

II. Does section 11-94.5 exclusively govern the manner of placing presidential electors on the election ballot?

In terms, we do not think so but the practical effect is to render it exclusive. A close reading of section 11-94.5 evidences no express words of exclusiveness. In fact, a reading would indicate that it attempts to regulate only political parties as defined by section 11-90.

However, granting that ambiguity, section 11-91 (as amended by Act 9 cited above) becomes pertinent. That section provides:

> "Nomination of Candidates. All candidates for elective office, except as provided in section 11-94.5, shall be nominated in accordance with the provisions of this part [Part II, Chapter 11, R.L.H. 1955] and not otherwise. This part shall apply to special elections, except as otherwise provided by law for special primary elections."

If we assume that presidential electors are "candidates for elective office" within the meaning of section 11-91,* the other provisions of Part II, R.L.H. 1955, as amended by Act 9 become relevant.

III. Does the procedure outlined in section 11-96 apply?

We think not. Section 11-96 provides:

---

*We do not here answer the question whether presidential electors hold "offices" within the meaning of section 11-91. See 153 ALR 1066 for general discussion.

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> "Nonpartisan candidates. Nomination papers may also be filed on behalf of nonpartisan candidates. Such papers shall be similar in form and signed in the same manner as in the case of party candidates, and no nominator shall be allowed to sign any such paper who has previously signed any nomination paper for the same primary as a member of a political party."

Section 11-96 is applicable only to nonpartisan candidates. "Nonpartisan" is defined by Webster's Dictionary as ". . .pertaining to, or consisting of person appointed or elected without regard to political affiliations; not controlled by parties or party spirit or interests; . . ."

While nominees of the Socialist Workers Party would not be affiliated with any of the political parties having a general organization in Hawaii, such nominees are obviously politically affiliated to the interests of the Socialist Workers Party which is presumably a political party. Hence, they would not be "nonpartisan".

Furthermore, we do not think that section 11-96 is applicable at all with respect to the nomination of presidential electors. Under the procedure set out by Act 9, the general election ballots will contain only the names of the presidential and vice presidential candidates whose names will be placed in such a manner that a voter must vote for candidates for both offices who belong to the same political party. A vote for such candidates will be counted as a vote for the whole slate of electoral nominees who are of the same political party as the candidates.

Since nonpartisan presidential elector nominees are not, by definition, politically affiliated, the procedure set forth by Act 9 precludes the use of section 11-96 as a means of nominating a presidential elector.

IV. Does the procedure cumulatively outlined by sections 11-93, 11-94 and 11-97 provide a means of nominating presidential electors?

We think not. Those provisions were initially designed to regulate nominations for elective offices which must undergo primary elections. In view of the obvious terms of those provisions, we cannot say now that they are equally applicable to nominations for presidential electors which must undergo only general elections.

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V. Despite non-compliance with the requirements of Part II, Chapter 11, R.L.H. 1955, as amended by Act 9, S.L.H., First State Legislature 1959, can the Socialist Workers Party call a state convention of its supporters in Hawaii and file a certificate of nomination to the Lieutenant Governor by October 15?

We think not. The Constitution of the United States, in Article II, section 1, provides that each state shall appoint, in such manner as the legislature may direct, the number of electors equal to the whole number of senators and representatives to which the state may be entitled in Congress. Under this provision of the Constitution, it is the responsibility of the state legislature to provide means of selecting presidential electors. This authority in the state legislature is said to be plenary, (McPherson v. Blacker, 146 U.S. 1, 36 L. Ed. 869), that is, the state legislature may provide any means of selecting presidential electors, so long as such means do not contravene the federal or state constitutions.

Since the Hawaiian Legislature has provided a means of nominating presidential electors, we think that a logical extension of the reasoning of the McPherson case precludes nomination by other means which are not statutorily provided.

VI. What may the Socialist Workers Party do in order to be eligible to nominate presidential electors?

There are no legal requirements for the organization of a political party in Hawaii. Such an organization need not even register its name with the Treasurer's Office of the State unless it wishes to be sole user of such name.

Consequently, we think it sufficient for purposes of section 11-90 if the Socialist Workers Party organize its supporters in the State and form the necessary central and county committees. Once the Socialist Workers Party has been generally defined by such an organization, we think that the nomination procedures set forth by section 11-94.5 would become applicable.

Very truly yours,

H. Rodger Betts

H. RODGER BETTS
Acting Attorney General

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INDEXING INSTRUCTIONS

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CIVIL SERVICE

Commission is empowered to prescribe rules and regulations to carry out provisions of Civil Service Law.

PUBLIC EMPLOYEES

County of Maui - non-competitive examinations

Rule 4.2a(4) of Civil Service Rules and Regulations of County of Maui defines a non-competitive examination as one given to determine fitness of an applicant for a particular position.

Rule 4.2c thereof provides, in part, that the director may authorize a non-competitive examination where examination is to test a regular employee whose position has been reclassified to a class which requires a new skill.

PUBLIC EMPLOYEES

Qualifying non-competitive examination

Under Rules and Regulation on Civil Service for County of Maui, personnel director has authority to prescribe a qualifying non-competitive examination to test fitness of a regular employee for a position reclassified from Laborer II (SR-5) to Clerk (SR-7), in a different series, and which requires different training and new skills.

PUBLIC EMPLOYEE

If an employee meets the minimum qualifications of the position as reclassified, he is not required to take an examination provided he was in service on May 1, 1957 and his position is reclassified on the basis of the duties and responsibilities of the position as they existed on May 1,1957 or whose position was reclassified prior to May 1, 1957 on the basis of the duties and responsibilities of the position as they existed at the time of such reclassification.

REVISED LAWS OF HAWAII 1955

Section 3-62 (Civil Service for Hawaii, Maui & Kauai)

SESSION LAWS OF HAWAII 1957

Act 47 (Civil service examinations)

SESSION LAWS OF HAWAII 1957

Act 51 (Promotions of public officers and employees)

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INDEXING INSTRUCTIONS

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Section 3-62 (Civil Service for Hawaii, Maui & Kauai)

SESSION LAWS OF HAWAII 1957

Act 47 (Civil service examinations)

SESSION LAWS OF HAWAII 1957

Act 51 (Promotions of public officers and employees)

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SESSION LAWS OF HAWAII 1957

Act 198 (Examinations of general character for public employment.)

SESSION LAWS OF HAWAII 1957

Act 206 (Amending sec. 3-19)

(Reclassification of position in public service)

SESSION LAWS OF HAWAII 1957

Act 254 (Exchanges and transfer of public officers and employees.)

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STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

July 12, 1960

Mr. Eugene Bal
Personnel Director
Department of Civil Service
County of Maui
Wailuku, Maui

Dear Sir:

This opinion confirms the advice orally given you on April 13, 1960 concerning your authority as personnel director of the department of civil service of the County of Maui to prescribe a qualifying non-competitive examination for James I. Tanabe, a civil service employee of the County of Maui, for the purpose of testing his fitness for a position which was recently reclassified.

We summarize some of the facts appearing in your letter of March 28, 1960 to the Attorney General, as follows:

James I. Tanabe's appointing authority on January 26, 1960 requested the department of civil service to reclassify the position then held by this civil service employee from that of Laborer II (SR-5) to that of clerk (SR-7). Previously, on October 1, 1959, this employee had received a promotion from a Laborer I (SR-3) position to the Laborer II (SR-5) position. The Laborer II (SR-5) position was reclassified as requested, and the employee was "subjected to a qualifying non-competitive examination to demonstrate his fitness for the new classification." The requirement by the department of civil service of this examination is stated to be "based amongst other things on the fact that reallocation is to a class in an entirely different series, that is laborer to clerk, and that the basic concepts, training and skills pertinent to clerical work are totally unrelated to those found in laboring work." It is also stated in your letter that "any other course of action would have been in clear violation of merit principles" as set forth in section 3-1, Revised Laws of Hawaii 1955, as amended. The employee took the qualifying examination four times, each time failing to attain a passing score. He questions your decision prescribing the said qualifying non-competitive examination for the reclassified position.

The question thus raised by the facts mentioned is this: whether the personnel director may, in this case, prescribe a qualifying non-competitive examination to determine the fitness of the regular employee whose position has been reclassified to a class in a different series and which requires different training and skills. The Rules and Regulations on Civil Service, which were duly adopted for the County of Maui on July 18, 1958, 1/ contain provisions which leave no doubt on this question. Rule 4.2a(4) thereof contains this provision:

> "(4) A non-competitive examination is one given to determine the fitness of an applicant for a particular position, as provided for in Rule 4.2c."

Rule 4.2c reads, in part, as follows:

> "c. The Director may authorize a non-competitive examination in any of the following cases:
>
> ...
>
> "(2) Where the examination is to test a regular employee whose position has been reclassified to a class which requires a new skill." 2/

The provisions of the above quoted rule appear in clear language, and need no interpretation. Under Rule 1 of the above cited civil service rules of the County of Maui, the above quoted

---

1/ Section 3-21, Revised Laws of Hawaii 1955, as amended by Acts 47, 51, 198, and 254, Session Laws of Hawaii 1957, empowers the civil service commission to prescribe rules and regulations to carry out the provisions of the Civil Service Law in chapter 3, Revised Laws of Hawaii 1955, as amended. Said section 3-21 is made applicable to the County of Maui under section 3-62 of said statutory laws.

2/ See section 3-19, Revised Laws of Hawaii 1955, as amended, which provides that the director shall direct and supervise all the administrative and technical activities of the department of civil service, and furthermore, in part, that in addition to other duties imposed upon him by the Civil Service Law and the Compensation Law, he shall create and adjust classes of positions and adopt class specifications including title, description of typical duties and responsibilities, statement of training and experience and other requirements to be met by applicants, covering all positions.

provisions apply to all civil service employees of that county, including the employee in the case at hand. It appears clear, therefore, that under the above quoted provisions the director may prescribe a qualifying non-competitive examination to test the fitness of an employee whose position was reclassified or reallocated to one in a class in an unrelated series, and which reallocated position is determined by him to call for different basic concepts, training and skills.

It should be pointed out, in passing that the proviso in section 3-19(h)(4), Revised Laws of Hawaii 1955, as amended by Act 206, Session Laws of Hawaii 1957, which is mentioned in your letter, is inapplicable to this case. That proviso which, in effect, excuses an employee from taking a qualifying examination, if he meets the minimum qualifications of the position as reclassified, applies only to a case involving "any employee who was in service on May 1, 1957 and whose position is reclassified on the basis of the duties and responsibilities of the position as they existed on May 1, 1957 or whose position was reclassified prior to May 1, 1957 on the basis of the duties and responsibilities of the position as they existed at the time of such reclassification." The express language of this proviso thus clearly precludes its application to James I. Tanabe, whose Laborer II (SR-5) position, upon the facts as reported, was neither reclassified on the basis of the duties and responsibilities of the position as they existed on May 1, 1957, nor reclassified prior to May 1, 1957.

We conclude therefore by advising you that, on the basis of the facts stated in your letter, you were authorized under the Rules and Regulations on Civil Service of the County of Maui to prescribe a qualifying non-competitive examination to test the fitness of the said employee for the newly reclassified position of clerk (SR-7).

Very truly yours,

David Y. Mar

DAVID Y. MAR
Deputy Attorney General

APPROVED:

H. Rodger Betts

H. RODGER BETTS
Acting Attorney General

Op. 60-81

INDEXING INSTRUCTIONS

July 13, 1960

AGRICULTURE AND CONSERVATION

Cattle Destruction

Tubercular cattle and those reasonably suspected of infection may be destroyed under section 20-7, R.L.H. 1955, when they endanger other herds and their owner stubbornly refuses to comply with sections 20-17 through 20-20 and the department regulations.

REVISED LAWS OF HAWAII 1955

Section 20-7. Interpreted in light of the provisions of sections 20-17 through 20-20.

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STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

July 13, 1960

Honorable Wayne L. Collins
Director of Agriculture and Conservation
State of Hawaii
Honolulu 14, Hawaii

Dear Mr. Collins:

In your letter of June 27, 1960, regarding the bovine tuberculosis eradication program and Mr. Harold Chung-Hoon's unwillingness to make his cattle available for testing, you asked for the opinion of this office on the following matters:

1. Under section 20-7, Revised Laws of Hawaii 1955, may the department have Mr. Chung-Hoon's cattle killed?

2. May the department recover the indemnity money previously paid to Mr. Chung-Hoon?

The following is offered in reply to the above similarly numbered questions:

1. The language of said section 20-7 is the same as was added by the House of Representatives in its Standing Committee Report No. 543 on April 18, 1905 to the provisions of Senate Bill No. 112. The addition was accepted by the Senate Revision Committee without comment on April 26, 1905 and the bill became Act 83 of the 1905 Session Laws. Whether or not section 20-7 is applicable to the destruction of tubercular cattle such as Mr. Chung-Hoon's in view of sections 20-17 through 20-20, Revised Laws of Hawaii 1955, depends on the degree of the owner's refusal to comply with the requirements of said sections 20-17 through 20-20 and your department's Regulation No. 110.

The provisions of sections 20-17 through 20-20 originated in Act 121, Session Laws of 1917 and in discussing House Bill No. 318, which became said Act 121, both the House in Standing Committee Report No. 384 of April 10, 1917 and the Senate in Standing Committee

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Report No. 302 on April 17, 1917 stated the bill was "to make it compulsory that all dairy cattle within the Territory, more than six months old * * * be tested * * * for bovine tuberculosis; and also to provide for the indemnification to the owners thereof of all cattle so tested and ordered destroyed" after noting that from 1910 to 1916 inclusive a total of 1616 head of cattle had been "found to be infected with bovine tuberculosis and destroyed, without direct compensation on the part of the Territory to the owners thereof." Thus it appears the provisions of said sections 20-17 through 20-20, providing for the testing of cattle and compensation for the animals destroyed, were not intended by the legislature to be controlling in a situation where the owner of tubercular cattle has stubbornly refused to comply with the laws pertaining to the eradication of bovine tuberculosis and should not limit the applicability of said section 20-7 to such a situation.

Upon the expiration of the sixty-day period provided by section 4 of said Regulation No. 110, action under the provisions of said section 20-7 may be taken where deemed necessary.

2. Section 20-20, Revised Laws of Hawaii 1955, provides in part "no indemnification shall be paid (a) unless the owner has cooperated with the board in complying with all rules and regulations * * * and has presented his whole herd for testing." Fortunately the department's possibly premature payment was made on the express agreement of the owner of July 21, 1959 that he would present the rest of his herd on August 8, 1959.

In view of the owner's failure to perform his obligation the payment is clearly recoverable but it is suggested, in view of the amount involved, recovery efforts be suspended until after Mr. Chung-Hoon has been convicted of violating your department's Regulation No. 110.

Your inquiry as to the amendment of Regulation No. 110 was discussed in detail with Dr. E. H. Willers upon receipt of your letter.

Respectfully yours,

W. K. WATKINS, JR.
Deputy Attorney General

APPROVED:

SHIRO KASHIWA
Attorney General

Op. 60-82

ADDRESS REPLY TO
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Op. 60-83

STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

July 13, 1960

Mr. John V. Cockett
Clerk, Second Circuit Court
State of Hawaii
Wailuku, Maui

Dear Mr. Cockett:

This is in reply to your letter of July 1, 1960, wherein you requested an opinion from this office on the question of whether you, as clerk of the Second Circuit Court, are authorized by Federal law to retain 50 percent of the first $6,000 in authorized fees collected by you, or whether it should be deposited in the State Treasury.

The pertinent provisions of Federal law are found in Title 8, Ch. 12, § 1455, wherein it is provided that:

> "(c) The clerk of any naturalization court specified in subsection (a) of section 1421 of this title (except the courts specified in subsection (d) of this section) shall account for and pay over to the Attorney General one-half of all fees up to the sum of $6,000, and all fees in excess of $6,000, collected by any such clerk in naturalization proceedings in any fiscal year."
>
> . . . . .
>
> "(f) The clerks of the various naturalization courts shall pay all additional clerical force that may be required in performing the duties imposed by this subchapter upon clerks of courts from fees retained under the provisions of this section by such clerks in naturalization proceedings."

These provisions of law do not require a conclusion that the clerk of the Court is entitled to retain naturalization fees collected by him. The case of Mulcrevy v. San Francisco, 231 U.S. 669, 34 S.Ct. 260 (1914), is dispositive of this question. To be sure, the applicable Federal laws at the time of the Mulcrevy case were not identical to those set

out above, but they, nonetheless, provided for substantially the same kind of arrangement with respect to collection of naturalization fees by clerks of the Court. The laws then provided as follows:

> "'Sec. 13. . . . The clerk of any court collecting such fees is hereby authorized to retain one-half of the fees collected by him in such naturalization proceeding; the remaining one-half of the naturalization fees in each case collected by such clerks, respectively, shall be accounted for in their quarterly accounts, which they are hereby required to render the Bureau of Immigration and Naturalization, . . .
>
> "'Provided, That the clerks of courts exercising jurisdiction in naturalization proceedings shall be permitted to retain one-half of the fees in any fiscal year up to the sum of three thousand dollars, and that all fees received by such clerks in naturalization proceedings in excess of such amount shall be accounted for and paid over to said Bureau as in case of other fees to which the United States may be entitled under the provisions of this Act. The clerks of the various courts exercising jurisdiction in naturalization proceedings shall pay all additional clerical force that may be required in performing the duties imposed by this Act upon the clerks of courts from fees received by such clerks in naturalization proceedings. And in case the clerk of any court collects fees in excess of the sum of six thousand dollars in any one year, the Secretary of Commerce and Labor may allow to such clerk from the money which the United States shall receive additional compensation for the employment of additional clerical assistance, but for no other purpose, if in the opinion of the said Secretary the business of such clerk warrants such allowance.' 34 Stat. 600." (Mulcrevy v. San Francisco, 231 U.S. 669, 671.)

In that case the Supreme Court said as follows:

> "But it is contended by plaintiffs in error that fees having been received officially is not of importance, that nevertheless he acted as the representative of the United States in execution of the policies of the United States and being by the act of Congress invested with his powers he is entitled for himself to the compensation prescribed by the act for their execution, without any liability to account for them

to the city. The last proposition, however, does not follow from the others, and the others are but confusing. If it be granted that he was made an agent of the National Government, his relations to the city were not thereby changed. He was still its officer, receiving fees because he was--not earning them otherwise or receiving them otherwise, but under compact with the city to pay them into the city treasury within twenty-four hours after their receipt.

"Under the contention of plaintiffs in error a rather curious situation is presented. Mulcrevy was elected to an office constituted by the municipality under the authority of the State. He was given a fixed salary of $4,000 with the express limitation that it should be his complete compensation. He agreed that all other moneys received by him officially should be paid into the treasury of the city . He was given office accommodations, clerks to assist him, and yet contends that notwithstanding such equipment and assistance, notwithstanding his compact, he may retain part of the revenues of his office as fees for his own personal use. We cannot yield to the contention. Nor do we think the act of Congress compels it. The act does not purport to deal with the relations of a state officer with the State. To so construe it might raise serious questions of power, and such questions are always to be avoided. We do not have to go to such lengths. The act is entirely satisfied without putting the officers of a State in antagonism to the laws of the State--the laws which give them their official status. It is easily construed and its purpose entirely accomplished by requiring an accounting of one-half of the fees to the United States, leaving the other half to whatever disposition may be provided by the state law. . . ." (231 U.S. 669, 673-674.)

The facts underlying that case approximate those which you outlined in your letter which apply to your situation. You are a salaried employee of the State. Your duties pursuant to Federal law are discharged on State time. Facilities that you use to discharge your duties under Federal law are facilities owned by the State. Your duties under Federal law fall upon you by virtue of your position of employment with the State. Additional clerical force that you call upon for assistance again involves an employee of the State. He, too, is similarly circumstanced as you are.

In view of these considerations of law and fact, it is the opinion of this office that that portion of fees that you are entitled to retain under Federal law should be deposited in the State Treasury.

Yours very truly,

Henry H. Shigekane

Henry H. Shigekane
Deputy Attorney General

APPROVED:

Shiro Kashiwa

Shiro Kashiwa
Attorney General

INDEXING INSTRUCTIONS

Op. 60-84

I. REAL ESTATE LICENSE COMMISSION

A. Requirements for notice of hearing for suspension or revocation of license.

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Op. 60-84

STATE ~~TERRITORY~~ OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

July 18, 1960

Mr. Robt E. Bekeart
Executive Secretary
Real Estate License Commission
205 Empire Building
Honolulu 13, Hawaii

Dear Mr. Bekeart:

This letter is written in response to your request of July 15, 1960, for an opinion specifying the requirements necessary in a letter of notification to a licensee of a hearing to revoke or suspend said licensee's license for the causes specified in section 170-12, Revised Laws of Hawaii 1955.

Please be advised that section 170-13 of the Revised Laws of Hawaii 1955 provides that "written notice shall be given the person concerned specifying the cause or causes for which it is proposed to take such action . . . at least five days before the hearing."

It is our opinion that the "cause or causes requirement" of this section cannot be fulfilled by merely setting out the section number, 170-12(a), -(b), -(c), or other violated section, in the letter of notification. The licensee must specifically be given written notice of the cause or causes for which the Commission proposes to take action. This does not necessarily mean that the Commission must set out in its letter of notification a detailed account of the wrongful activities committed which constitute a violation of either the Commission rules or the statutory requirements of a licensed broker or salesman. A fixed and fast rule cannot be given as to what is satisfactory compliance with section 170-13, except that there must be enough information to sufficiently inform the licensee of cause or causes for which the Commission proposes to act. The letters of notification dated July 15, 1960, to Elsie Lui-Kwan and A Place To Stay, Ltd. of a hearing scheduled for August 16, 1960, fulfill such requirements save for (e).

Very truly yours,

Arthur S. K. Fong

Arthur S. K. Fong
Deputy Attorney General

APPROVED:

Shiro Kashiwa

Shiro Kashiwa
Attorney General

Op. 60-84

INDEXING INSTRUCTIONS

Op. 60-85

I. HAWAIIAN HOMES COMMISSION

A. Liens

Statutory right of first lien given to the Hawaiian Homes Commission may not be waived.

II. LIENS

A. Same syllabus

III. HAWAIIAN HOMES COMMISSION ACT

A. Section 216

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Op. 60-85

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

July 21, 1960

Hawaiian Homes Commission
P. O. Box 1879
Honolulu 5, Hawaii

Attention: Mr. A. K. Piianaia, Executive Director

Gentlemen:

This is in reply to your oral request to confirm statements made at the July 15, 1960 meeting of the Commission regarding liens. The question asked is whether the Commission may waive its statutory right of first lien as set forth in section 216 of the Hawaiian Homes Commission Act, as amended.

It is the opinion of this office that the Commission generally may not waive its statutory right of first lien.

Section 216, Hawaiian Homes Commission Act 1920, as amended, states in part:

> "The Commission shall have a first lien upon the borrower's or lessee's interest in his tract, growing crops, either on the tract or in any collective contract or program, dwellings, or other permanent improvements thereon, and his livestock, to the amount of all principal and interest due and unpaid and of all taxes and insurance upon such tract and improvements paid by the Commission, and of all indebtedness of the lessee, the payment of which has been assured by the Commission. Such lien shall have priority over any other obligation for which the tract, said growing crops, dwellings, other improvements, or livestock may be security.
>
> "The Commission may, at such times as it deems advisable, enforce any such lien. . . ."

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"The Commission shall have a first lien" is a mandatory provision. It is a grant of power designed to protect funds entrusted to the Commission. This right may not be waived contrary to the provisions of the statute. See 39 Words and Phrases 123, Shall-In Statutes as Permissive or Mandatory, wherein the imperative character of the word "shall" is defined.

"The Commission may, at such times as it deems advisable enforce any such lien", on the other hand, is a permissive provision. The Commission may, in its discretion, enforce or not enforce the statutory right of first lien. The words "may" and "at such times as it deems advisable" indicate that the enforcement provision is not required. See 39 Words and Phrases 143, May or must synonymous and distinguished.

Therefore, it is the opinion of this office that the Commission has been granted by statute the power of first lien which can not be waived.

Yours very truly,

Vernon F. L. Char

VERNON F. L. CHAR
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

Op 60-85

No Opinion

No. 60-86

INDEXING INSTRUCTIONS

I. TAXATION, INHERITANCE

Exemptions

1. For the purpose of determining the amount of exemption a child legally adopted by a decedent's child is a grandchild within the meaning of section 122-5, R.L.H. 1955.

2. For the purpose of determining the amount of exemption a great grandchild is not a grandchild within the meaning of section 122-5, R.L.H. 1955.

* * * * * * *

II. TAXATION, INHERITANCE

Rate of Tax

1. For the purpose of determining the amount of exemption a child legally adopted by a decedent's child is a grandchild within the meaning of section 122-5, R.L.H. 1955.

2. For the purpose of determining the amount of exemption a great grandchild is not a grandchild within the meaning of section 122-5, R.L.H. 1955.

* * * * * * *

III. ADOPTION

Status of Adopted Child

By the provisions of section 331-16 an adopted child is given the status of a natural child for all legal purposes.

* * * * * * *

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IV. WORDS AND PHRASES

Adopted Child

* * * * * * *

V. WORDS AND PHRASES

Grandchild

* * * * * * *

VI. WORDS AND PHRASES

Great Grandchild

* * * * * * *

VII. **REVISED** LAWS OF HAWAII 1955, SEC. 122-5

* * * * * * *

VIII. REVISED LAWS OF HAWAII 1955, SEC. 331-16

* * * * * * *

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Op. 60-87

TERRITORY OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

July 25, 1960

Honorable Earl W. Fase
Director of Taxation
State of Hawaii
Hale Auhau
Honolulu, Hawaii

Attention: Mr. J. A. Bell
Deputy Director of Taxation

Dear Sir:

This concerns the amount of exemption and the tax rate applicable under the inheritance tax law (Chapter 122, Revised Laws of Hawaii 1955 as amended) to testamentary dispositions by a decedent to (1) a child adopted by the decedent's daughter and (2) to a great grandchild of the decedent.

Section 122-5, R.L.H. 1955 as amended, sets forth three categories of exemptions and inheritance tax rates as follows:

> "When the beneficial interest in any property or income therefrom passes as above provided to or for use of decedent's surviving spouse, the rate of the tax shall be at the following percentage rate of the market value of such property, received by such persons in excess of $20,000, viz:
>
> . . . .
>
> "When the beneficial interest in any property or income therefrom passes as above provided to or for the use of decedent's father, mother, child, grandchild, or any child adopted as such in conformity with the laws of the Territory, the rate of the tax shall be at the following percentage rate of the market value of such property, received by each person in excess of $5,000, viz:
>
> . . . .

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> "In all other cases, the rate of tax on the market value of such property in excess of $500 shall be as follows, viz:
>
> . . . ."

The question presented is whether either of the devisees herein concerned is a "grandchild" as the word is used in the second paragraph of section 122-5.

This office is of the opinion that the adopted child of the decedent's daughter is the decedent's grandchild within the meaning of the statute, it being assumed for the purpose of this opinion that the child was legally adopted.

Section 331-16, R.L.H. 1955 as amended, on the subject of the effect of adoption provides in part:

> ". . . for all other purposes [a legally] adopted child and his adopting parent or parents shall sustain towards each other the legal relationship of parents and child and shall have all the rights and be subject to all the duties of that relationship, the same as if the child were the natural child of such adopting parent or parents, . . ."

In the case of Estate of Kamauoha, 26 Haw. 439, there was involved an earlier statute on the effect of adoption, which statute contained a clause substantially identical to that above quoted from section 331-16. It was there said that if by statute an adopted child is deemed to be for all legal purposes a child of the adopting mother, it would follow that for all legal purposes the child is the grandchild of the father of that mother.

Concerning the great grandchild, this office is of the opinion that such child does not qualify as "grandchild."

In common understanding a grandchild means the child of a child, and not a great grandchild. Thomas v. Thomas, 537 So. 630; Reick v. Richards, 178 N.E. 276; Spencer v. Title Guaranty Loan & Trust Co., 132 So. 32. There is nothing in the context of section 122-5 indicating that a meaning other than that commonly understood should be

attributed to "grandchild." See section 1-17, R.L.H. 1955, which provides that the words of a statute are to be given the popular use or meaning. Furthermore, statutes providing for exemptions from taxation, such as section 122-5, are generally strictly construed against the exemption. A great grandchild does not fall within the plain terms of the statute.

Very truly yours,

Nobuki Kamida

NOBUKI KAMIDA
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

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STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

July 28, 1960

Mr. Arthur A. Akina, Jr.
Director of Personnel Services
State of Hawaii
825 Mililani Street
Honolulu 13, Hawaii

Dear Mr. Akina:

This is in reply to your letter of June 21, 1960, wherein you generally ask for advice "concerning the employment status of my present deputy, Mr. Ellwood E. Van Gieson." Your specific questions were:

> "Does Section 32 of Act 1 have any effect on the Civil Service status held by Mr. Van Gieson prior to its enactment?
>
> "If your answer to this question is that it does not, then we ask a further question:
>
> > "Would Mr. Van Gieson's status, including conditions of tenure, change if I were to find it necessary to shift emphasis on the role he plays as my assistant?
> >
> > "Would Mr. Van Gieson's civil service status be affected if I were to continue him in his present position with his present duties and responsibilities but without designating him Deputy?"

Instead of answering your questions in the manner you have framed them, we submit to you a general discussion of this office's understanding of Mr. Van Gieson's present status, of the office of deputy director of personnel services, and of your responsibilities as director of personnel services.

Prior to the enactment of Act 1, First State Legislature, Second Special Session 1959 (hereinafter referred to as Act 1), the job of deputy to the then personnel director

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was a position authorized by and existing by virtue of section 3-19, Revised Laws of Hawaii 1955, as amended. That section provided in pertinent part that:

> "The director may designate a qualified employee of the department of civil service as his deputy. Except in the case of temporary assignment as such deputy, any such employee shall be thoroughly familiar with the principles and methods of personnel administration and shall believe in applying merit principles and scientific administrative methods to public personnel administration. In case of a vacancy in the office of director or of the absence of the director or his inability from any cause to discharge the powers and duties of his office, such powers and duties shall devolve upon his deputy. . . ."

Inasmuch as this deputy had to be someone already in the employ of the Department of Civil Service, and also as the deputy had to be a qualified individual, the law providing certain qualifications, it was logical that the deputy should be placed within the civil service. This, we understand, was the case prior to the said Act 1. Mr. Van Gieson was designated by you, in your capacity as personnel director, as your deputy in a civil service position.

The job of this deputy was not one exempt from civil service because it was not covered by any of the subsections of section 3-20 which enumerates the exemptions from civil service. That subsection therein approaching, but not quite reaching, this deputy's job was 3-20(o) which provides as follows:

> "One first deputy or first assistant and one private secretary of each department head appointed under or in the manner provided in the first paragraph of section 80 of the Organic Act; . . ."

The above did not apply to the deputy of the personnel director because the personnel director was not a department head appointed in the manner described in section 3-20(o); the personnel director was an appointee of the Civil Service Commission (section 3-18, Revised Laws of Hawaii 1955).

This organizational structure was completely overhauled and superseded by Act 1.

Section 11 of Act 1 creates a Department of Personnel Services and provides that it "shall be headed by a single executive to be known as the director of personnel services."

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Section 4 of the same Act states:

"Except as otherwise provided by the constitution of the state of Hawaii or by this Act, each principal department shall be headed by a single executive, who shall be nominated and, by and with the advice and consent of the senate, appointed by the governor, for a term to expire at the end of the term for which the governor was elected. . . ."

There are no contrary provisions governing the appointment of the director of personnel services in either the State Constitution or Act 1. On the other hand, the Constitution requires that:

> "Each principal department shall be under the supervision of the governor and, unless otherwise provided in this constitution or by law, shall be headed by a single executive. Such single executive shall be nominated and, by and with the advice and consent of the senate, appointed by the governor. . . ." (Article IV, section 6, 2d paragraph.)

Therefore, the director of personnel services is an appointee of the governor, and you were so appointed to your office.

Section 7 of the same Act relates to the powers and duties of heads of departments and provides:

> "Except as otherwise provided by this Act, every power and duty conferred by law and required to be performed by any officer, board, department, bureau, commission, administrative agency, or instrumentality of the state existing immediately prior to the effective date of this Act shall hereafter be exercised and performed by the head of the respective department established by this Act, whether the head of the department be a single executive, board or commission.
>
> "Except as otherwise provided by this Act, the head of a department may assign any function vested in his department to any subordinate officer or employee as he deems desirable. With the approval of the governor, the head of a department may establish or abolish within his department any division or other administrative unit to achieve economy and efficiency and in accord with sound administrative principles and practices and procedures set forth in section 1 of this Act."

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This section also provides that:

"For the purposes of section 3-20(o) of the Revised Laws of Hawaii 1955, as amended, the phrase 'department head appointed under or in the manner provided in the first paragraph of section 80 of the Organic Act' shall be construed to include a single executive who is a head of a principal department and the executive officer of a board or commission which is the head of a principal department established by this Act."

These various provisions of Act 1 indicate that a new organizational structure was intended for the Department of Personnel Services which is substantially the successor of the Territorial, then State, Department of Civil Service.

The new department of personnel services is now headed by a single executive who is an appointee of the governor in contrast to the old department of civil service which was headed by a commission which in turn appointed a personnel director. The provisions of section 3-19 providing for the designation of a deputy to the personnel director no longer applies as (1) there is now no personnel director and (2) the provisions of section 3-20(o) now come into play and govern the status of your first deputy's position. As to the correctness of this latter conclusion, there can be little doubt as the above-quoted last paragraph of section 7 of Act 1 makes a special and specific effort to establish firmly the coverage of the provisions of section 3-20(o). The coverage so established by this legislative construction of section 3-20 (o) clearly extends to and includes the position of first deputy or first assistant to the director of personnel services.

You have suggested that the provisions of section 32 of Act 1 may require a different conclusion. This office is of the opinion that provisions of section 32 and the other provisions of Act 1 are consistent and all combine to support the conclusion developed above.

The first paragraph of section 32 states that:

"All officers and employees whose functions are transferred by this Act shall be transferred with their functions to the department in which their functions, or a major part thereof, have been transferred, and shall continue to perform their regular duties upon their transfer, subject to the provisions of state personnel laws and of this Act."

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The provision means that the deputy personnel director who was designated pursuant to section 3-19 prior to the enactment and implementation of the Act is now transferred to the Department of Personnel Services and "shall continue to perform [his] regular duties upon their transfer, subject to the provisions of state personnel laws and of this Act." (Emphasis supplied.)

The provisions of this Act contemplate that there is to be a deputy to the director of personnel services and that this deputy director is to be one exempt from civil service. (See above discussion.)

The first deputy or first assistant to a department head has certain characteristic functions and duties. One of these is the duty to act in the capacity of department head during the department head's absence. This particular duty is one of those provided for the deputy personnel director in section 3-19. Accordingly, unless this former deputy personnel director is to be appointed and become the deputy director of personnel, this duty no longer pertains to his continued employment by the terms of section 32 of Act 1.

Paragraph two of section 32 provides as follows:

> "No employee of the state having tenure shall suffer any loss of salary, seniority, prior service credit, vacation, sick leave or other employee benefit or privilege as a consequence of this Act; provided that subsequent changes in status may be made pursuant to chapters 3 and 4 of the Revised Laws of Hawaii 1955, as amended."

Now, while this paragraph merely refers to an employee, and assuming that Mr. Van Gieson is an officer as contrasted to an employee, we are nonetheless of the opinion that this provision covers him as well. (See opinion 60-7, February 16, 1960.) This provision, by the very words used therein, purports merely to secure "any officer or employee" from the loss of "salary, seniority, prior service credit, vacation, sick leave or other employee benefit or privilege as a consequence of this Act . . ." It says no more, and that it attempted or intended no more is partially established by the provisions of the first paragraph of this section 32. (See discussion above.) Further evidence that this provision in no way attempts to preserve his job in a way that he must continue to discharge the same functions and duties and that he would be entitled to the same title or position designation is found in the last paragraph of the same section 32 where it is provided that:

"In the event that an office or position held by any officer or employee having tenure is abolished, such officer or employee shall not thereby be separated from public employment, but shall remain in the employment of the state with the same pay and classification and shall be transferred to some other office or position for which such officer or employee is eligible under the personnel laws of the state as determined by the head of the department or the governor."

This clearly shows that the legislature contemplated, provided for, and expected that certain offices and positions, in the process of reorganization, would have to be or would be abolished and, accordingly, provided for such contingencies.

This office is of the opinion that the office of deputy designated in the manner contemplated by section 3-19, Revised Laws of Hawaii 1955, has been abolished. The provisions therein were designed to implement an organizational structure which contemplated a personnel director who was not the head of the department but was merely an appointee of a commission which was the head of the department. Act 1 has completely changed this so that the director of personnel services is now the head of the department. Specific reference has been made to the fact that deputies of new department heads under Act 1 are now exempt. Under section 3-19, the deputy personnel director is covered by civil service. There is here clearly a conflict, and the resolution of such a conflict must be made in accordance with section 42 of the Reorganization Act which says that:

"All laws and parts of laws heretofore enacted which are in conflict with the provisions of this Act are hereby amended to conform herewith. All acts passed during this special session 1959, whether enacted before or after the passage of this Act, shall be amended to conform to this Act, unless such acts specifically provide that the Hawaii State Government Reorganization Act of 1959 is being amended."

Accordingly, the office has been abolished and the incumbent of such office is, by the terms of the last paragraph of section 32 of Act 1, entitled only to "remain in the employment of the state with the same pay and classification and shall be transferred to some other office or position for which such officer or employee is eligible under the personnel laws of the state as determined by the head of the department or the governor."

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Your last two questions are not specific enough to enable this office to render legal opinions thereon. However, we submit for your consideration these guidelines in dealing with the subject matter. We think that it was the intent of the legislature in enacting Act 1 to provide for department heads, single executives, and chief executives appointed by commissions or boards as department heads, who were to appoint and have within their respective departments a first deputy or first assistant and further, that such first deputy or first assistant should be exempt from civil service. This is in line with the constitutional plan for a strong executive and his control over and responsibility for the actions of his chosen subordinates.

While we cannot conclude that the law mandates the department heads to appoint first deputies or first assistants, we must, at the same time, admonish you that the pattern of executive responsibility and appointment to executive offices, as contemplated in Act 1, in the applicable state laws, and in the State Constitution, would not countenance a manuever designed to or having the effect of circumventing the legal requirement that the office of first deputy or first assistant to a department head is one exempt from civil service. Generally, the duties which are properly assignable to the first deputy or first assistant should not be imposed on and discharged by an employee or officer in civil service and of the same department serving under a different title or job description.

Yours very truly,

Henry H. Shigekane

Henry H. Shigekane
Deputy Attorney General

APPROVED:

Shiro Kashiwa

Shiro Kashiwa
Attorney General

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INDEXING INSTRUCTIONS

OP. 60-89

I. MAUI COUNTY

A. Resident elector of the island of Molokai or Lanai shall have at least one year's residence immediately prior to his election and shall have qualified to vote on one of these islands for at least one year.

II. RESIDENT ELECTOR

A. Same syllabus as above.

III. BOARD OF SUPERVISORS

A. Same syllabus as above.

IV. REVISED LAWS OF HAWAII 1955

A. Section 148-2

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STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

July 29, 1960

Mr. G. N. Toshi Enomoto
County Clerk
County of Maui
Wailuku, Maui

Dear Mr. Enomoto:

This is in reply to your letter of July 25, 1960, requesting the opinion of this office on the question:

> "Can a citizen who has been a resident of the island of Molokai or Lanai for at least one (1) year but not an elector for a full year be elected as a member of the Maui County Board of Supervisors?".

It is the opinion of this office that the answer is no.

Section 148-2, Revised Laws of Hawaii 1955, provides that of the nine members of the Board of Supervisors of Maui County, one shall have been a resident elector of the island of Molokai for at least one year immediately prior to his election and one similarly of Lanai. The meaning of "resident elector" must be ascertained.

An "elector" is defined as a qualified voter. 14 Words and Phrases 324, Elector. Article II of the State Constitution sets forth the qualifications of voters. Registration, as therein mentioned, is provided for by section 144-5, Revised Laws of Hawaii 1955. Further, regarding registration, when an elector changes residence from one state precinct or county to another, a three months waiting period is required for re-registration. Sections 11-12 and -13, Revised Laws of Hawaii 1955.

The application of these statutes, as related to the question you ask, creates a situation whereby a person may have resided on either Molokai or Lanai for a year without having been qualified to vote there for a year.

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The word "resident" annexed to the word "elector" makes clear the requirement of residence on Molokai or Lanai for one year. It does not dismiss the requirement of having been an "elector" on the island of Molokai or Lanai for a year. The term "resident" may be said to be redundant in that an "elector on the island of Molokai" implies compliance with the residence required there. However, annexation of the word "resident" clarifies the meaning of the term "elector." The term "resident elector" emphasizes the requirement that the particular supervisor must be qualified to vote on the island and also be a resident there. As stated in Hackett v. City of New Haven, 130 A. 121, 124 (1925), in defining the term "resident elector":

> "[W]hile a person is made an elector, it is as an elector of some town of which he remains an elector."

The use of the term "resident elector" is unique in the statutes. The similar qualification provisions for the Hawaii County supervisors, the Kauai County supervisors, and general Maui County supervisors, all state that the supervisors shall have been a qualified elector of the county. Sections 147-2, 146-3, 148-2, Revised Laws of Hawaii 1955. See also sections 144-8, 149-20, Revised Laws of Hawaii 1955. Only in this section, regarding the Molokai and Lanai members of the Maui Board of Supervisors, is the term "resident elector" used. Maui County is composed of three islands. A qualified elector on Molokai or Lanai is also a qualified elector of the County of Maui. Thus, to further qualify the requirements of the Molokai and Lanai members, the term "resident elector" of the island of Molokai was employed as distinguished from "qualified elector" of the county.

Legislative history indicates that the Legislature was very cautious in establishing the qualifications of the Molokai and Lanai supervisors. Prior to 1953, Maui County was represented by seven supervisors, all elected at large. As such, the two less populated islands of the county were not often adequately represented. Act 10, Session Laws of Hawaii 1953, changed the composition of the board by adding one member each from the two islands. These two new members were to adequately represent Molokai and Lanai, and were to be thoroughly familiar with their local problems and conditions. Senate Committee Report No. 139 and Specific Committee Report No. 19, S. B. 64, Twenty-Seventh Territorial Legislature 1953. With this legislative history, it is reasonable to ascribe to the Legislature the desire to impose strict statutory qualifications on the two supervisors' office. Not merely was the person to have resided on the island for a year, but also to have qualified to vote there for one year.

It is therefore the opinion of this office that a citizen who has been a resident of the island of Molokai or Lanai for at least one year, but not an elector there for a full year, may not be elected as a member of the Maui County Board of Supervisors representing Molokai or Lanai.

Yours very truly,

Vernon F. L. Char

Vernon F. L. Char
Deputy Attorney General

APPROVED:

Shiro Kashiwa

Shiro Kashiwa
Attorney General

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INDEXING INSTRUCTIONS

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EMPLOYEES' RETIREMENT SYSTEM

Board of Trustees

The director of the budget, and not the treasurer of the State, should sit as the ex officio member of the Board of Trustees of the Employees' Retirement System of the State of Hawaii.

ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
AND REFER TO
INITIALS AND NUMBER

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Op. 60-90

STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

August 1, 1960

Mr. Jess H. Walters
Legislative Assistant to the Governor
Office of the Governor
Iolani Palace
Honolulu, Hawaii

Dear Mr. Walters:

This is in reference to your memorandum dated July 20, 1960, requesting our opinion on whether the director of the budget or the treasurer of the State should sit as the ex officio member of the Board of Trustees of the Employees' Retirement System of the State of Hawaii.

The composition of the retirement board, as set out by section 6-61, Revised Laws of Hawaii 1955, provides that "the board shall consist of seven trustees as follows: (a) the treasurer of the Territory, ex officio; . . ." Therefore, it will be necessary to determine whether the phrase "treasurer of the Territory" has been amended to read "treasurer of the State" or "director of the budget" by Act 1, Session Laws of Hawaii, First State Legislature, Second Special Session of 1959.

Under the provisions of section 14 of said Act 1, the functions of custody of State funds and the responsibility for the safekeeping, management, investment and disbursement of State funds were placed in the Department of Budget and Review, headed by a single executive to be known as the director of the budget. The Employees' Retirement System, as constituted by chapter 6 of the Revised Laws of Hawaii 1955, as amended, was placed within the Department of Budget and Review for administrative purposes. The functions, duties and powers, subject to the administrative control of the director of the budget, and the composition of the Board of Trustees of the Employees' Retirement System remained as heretofore provided by law.

Under section 15 of said act, a Department of Treasury and Regulation was created, to be headed by a single

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executive to be known as the treasurer. Some of the duties assumed by this department are: setting standards and enforcing laws, rules and regulations covering the licensing and operation of, and register and supervise the conduct of, trades, business and professions, including banks, insurance companies, brokerage firms, and other financial institutions. Many specific boards and commissions of the State were placed under this department for administrative purposes.

The phrase "treasurer of the Territory" is found in three different sections in the chapter dealing with the retirement system in the Revised Laws of Hawaii 1955. Section 6-61 has been quoted above. Furthermore, the phrase "treasurer of the Territory" is found in section 6-73, Revised Laws of Hawaii 1955, as the custodian of the retirement system funds, and in section 6-102, Revised Laws of Hawaii 1955, for the certification and payment of contributions to the retirement system. It is clear that the functions of the treasurer of the Territory, relating to said sections 6-73 and 6-102, have been transferred to the director of the budget. It is therefore clear that, under the general rule of statutory construction that all of the language of an act must be brought into accord and that the various provisions of an act should be read so that all may, if possible, have their due and conjoint effect without repugnancy or inconsistency so as to render the statute a consistent and harmonious whole, the phrase "treasurer of the Territory", as found in section 6-61, should be read as the director of the budget", consistent with sections 6-73 and 6-102 (see 50 Am. Jur., Statutes, sec. 363).

This interpretation will be consistent with the format used in Act 1 where the department head having administrative control of boards and commissions, is placed as an ex officio member of the board or commission (see Board of Harbor Commissioners, the Hawaii Aeronautics Commission, placed under the Department of Transportation; and Hawaii Housing Authority, placed under the Department of Social Services).

The fact that the Department of Treasury and Regulation sets standards and enforces laws, rules and regulations covering the licensing and operation of, and registering and supervising the conduct of banks and other financial institutions, does not create the right in the treasurer of the State to sit on the Board of Trustees of the Employees' Retirement System. These are general matters applicable to all of the institutions mentioned. Furthermore, as stated previously, the Employees' Retirement System

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was placed within the Department of Budget and Review for administrative purposes, and not within the Department of Treasury and Regulation.

It is therefore the opinion of this office that the director of the budget should sit as the ex officio member of the Board of Trustees of the Employees' Retirement System of the State of Hawaii.

It is our understanding that the treasurer of the State has been sitting as the ex officio member of the board up to the present time. It is therefore necessary to determine whether the prior decisions of the Board of Trustees are valid. We feel that the decisions in which the treasurer of the State had participated are valid under the de facto doctrine set out in 43 American Jurisprudence, Public Officers, section 470, et seq.; that the treasurer of the State entered into the duties as a member of the board in good faith and pursuant to apparent authority. Therefore, under the doctrine of de facto officer, the actions of the board, subsequent to the effective date of H. B. 1 and prior to the date of this opinion, are valid.

Yours very truly,

Harold Y. Shintaku

HAROLD Y. SHINTAKU
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

cc: Treasurer
Director of Budget & Review
Board of Trustees, Employees' Retirement System

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HAWAII HOUSING AUTHORITY

Bonds

Hawaii Housing Authority may issue revenue bonds under the provisions of the Annual Contributions Contract entered into and said indebtedness does not violate the provisions of Article VI, section 3, of the Constitution of the State of Hawaii.

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HAWAII HOUSING AUTHORITY

Bonds

Hawaii Housing Authority may issue revenue bonds under the provisions of the Annual Contributions Contract entered into and said indebtedness does not violate the provisions of Article VI, section 3, of the Constitution of the State of Hawaii.

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ADDRESS REPLY TO
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STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

August 2, 1960

Commissioner Bruce Savage
Public Housing Administration
Longfellow Building
Washington 25, D. C.

Dear Sir:

This opinion is a discussion of the question on whether or not the Hawaii Housing Authority may issue revenue bonds under the provisions of the Annual Contributions Contract, dated July 22, 1957, entered into between the Hawaii Housing Authority and the Public Housing Administration, without violating the provisions of Article VI, section 3, of the Constitution of the State of Hawaii.

In an opinion rendered on September 16, 1959, by this office, we held that under the provisions of Article VI, section 3, paragraph 7, of the Constitution of the State of Hawaii, a public enterprise of the State or a public corporation cannot incur indebtedness under revenue bond statutes which is secured by something other than the revenues of the enterprise or public corporation, i.e., mortgage. Therefore, the question before us at this time is whether or not the indebtedness incurred by the Hawaii Housing Authority under the terms of the Annual Contributions Contract is secured by something other than the revenues of the Hawaii Housing Authority.

The pertinent portions of the Annual Contributions Contract are found in Article V, "Terms and Conditions Constituting Part Two of an Annual Contributions Contract between Local Authority and Public Housing Administration", and provide as follows:

"Sec. 501. <u>Conveyance of Title or Delivery of Possession in Event of Substantial Default</u>

Upon the occurrence of a Substantial Default (as hereinafter in Sec. 506 defined) in respect to the covenants or conditions to which

the Local Authority is subject hereunder, the Local Authority shall, at the option of the PHA, either (a) convey to the PHA title to the Projects as then constituted if, in the determination of the PHA (which determination shall be final and conclusive), such conveyance of title is necessary to achieve the purposes of the Act, or (b) deliver possession to the PHA of the Projects as then constituted.

* * *

"Sec. 503. Reconveyance or Redelivery

(A) If the PHA shall acquire title to or possession of the Projects pursuant to Sec. 501 or Sec. 502, the PHA shall reconvey or redeliver possession of the Projects, as constituted at the time of such reconveyance or redelivery, to the Local Authority (if it then exists) or to its successor (if a successor exists at the time of such reconveyance or such redelivery) as soon as practicable: (1) after the PHA shall be satisfied that all defaults and breaches with respect to the Projects have been cured and that the Projects will, in order to fulfill the purposes of the Act, thereafter be operated in accordance with the terms of this Contract; or (2) after the termination of the obligations of the PHA to make annual contributions available unless there are any obligations or covenants of the Local Authority to the PHA which are then in default.

* * *

"Sec. 506. Definition of Substantial Default

For the purposes of this Contract a 'Substantial Default' is defined to be the occurrence of any of the following events:

(1) If any Project shall cease to be exempt from all real and personal property taxes levied or imposed by the State, city, county, or other political subdivisions, or if the Local Authority without the approval of the PHA shall make or agree to make any payments in lieu of taxes in excess of those provided in the Cooperation Agreement; or

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(2) If the Local Authority shall default in the observance of any of the provisions of Sec. 313, or if any Project shall be acquired by any third party in any manner including a bona fide foreclosure under a mortgage or other lien held by a third party; or

(3) If the Local Authority shall fail to furnish certification as to compliance with the provisions of Sec. 16 (2) of the Act relating to the payment of prevailing salaries and wages as required by subsection (c) of Sec. 419; or

(4) If the Local Authority shall (a) refuse or neglect to issue and sell its Bonds in the amounts and at the time required by this Contract, or (b) fail to maintain the low-rent character of each Project as required by Sec. 202, or (c) fail to prosecute diligently the reconstruction, restoration, or repair of any Project as required by Sec. 214; and such refusal, neglect, or failure is not remedied within three months after the PHA has notified the Local Authority thereof; or

(5) If the Local Authority is in default in the performance or observance of any of the provisions of this Contract or of the Act, which default (except for the provisions of Sec. 504) would have the effect of preventing the PHA from paying or making available the annual contributions provided for in this Contract; or

(6) If the Local Authority shall abandon any Project, or if the powers of the Local Authority to operate the Projects in accordance with the provisions of this Contract are curtailed or limited to an extent which will prevent accomplishment of the objectives of this Contract."

The terms and conditions set out above are for purposes of insuring that the project be of public nature and that the revenue security not be impaired. Section 15 of the United States Housing Act of 1937, as amended, which

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is the basis of the provisions found in Article V of the Annual Contributions Contract, provides:

> "In order to insure that the low-rent character of housing projects will be preserved, and that the other purposes of this Act will be achieved, it is hereby provided that--
>
> * * *
>
> "(3) When a contract for annual contributions is made pursuant to section 10, the Authority shall retain the right, in the event of a substantial breach of the condition (which shall be embodied in such contract) providing for the maintenance of the low-rent character of the housing project involved, to reduce or terminate the annual contributions payable under such contract. . . ."

The right of the Public Housing Administration to take title to the project in case of substantial default is a temporary measure to correct the default specified above and does not authorize the Public Housing Administration to sell the project to pay the indebtedness.

Furthermore, the indebtedness incurred under the Annual Contributions Contract is clearly within the exception provided for in Article VI of the State Constitution. In Employees' Retirement System of the State of Hawaii v. Raymond Y. C. Ho, Director of Budget, State of Hawaii, No. 4178, decided on March 25, 1960, the Supreme Court of the State of Hawaii stated:

> "According to the Committee of the Whole, the provision covers 'bonds such as those which might be issued by a local redevelopment agency under the Urban Redevelopment Act or similar legislation.' The bonds referred to by the Committee on Taxation and Finance and the Committee of the Whole are bonds that may be issued either under R.L.H. 1955, c. 137, pt. III, or R.L.H. 1955, c. 140, and depend for their payment solely upon the revenue producing potential of the undertakings for which they are issued, and are not like the highway revenue bonds, which depend for their payment on the exercise of the taxing power of the State." (Emphasis added.)

The proposed bonds of the Hawaii Housing Authority do not involve any of the taxing powers of the State or of any of the political subdivisions of the State for the payment of the bonds. They will not be issued in the name of the State. Under section 74-28, Revised Laws of Hawaii 1955, they are not a debt of the State nor payable out of any funds other than those of the Hawaii Housing Authority. They do not involve the credit of the State in any way.

It is therefore the opinion of this office that the Hawaii Housing Authority may issue revenue bonds under the provisions of the Annual Contributions Contract entered into between the Hawaii Housing Authority and the Public Housing Administration, and said indebtedness does not violate the provisions of Article VI, section 3, of the Constitution of the State of Hawaii.

Very truly yours,

Harold Y. Shintaku

HAROLD Y. SHINTAKU
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

cc to: Mr. James E. Prisin-Zano
Public Housing Administration

Mr. George Herrington
Orrick, Dahlquist, Herrington & Sutcliffe

Mr. John N. Mitchell
Caldwell, Marshall, Trinble & Mitchell

Mr. John Dawson
Wood, King, Dawson & Logan

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INDEXING INSTRUCTIONS

STATUTE - Construction -

Whether the operation of coin operated locks on the doors of certain toilet partitions in the public restrooms of the new International Airport is a coin operated vending machine within the meaning of Act 14, S.L.H. 1960.

HAC - Whether HAC may enter into a private contract without advertising for bids for the installation and operation of coin locks on the doors of certain toilet partitions in the public restrooms of the new Honolulu International Airport.

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ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
AND REFER TO
INITIALS AND NUMBER

~~AIM:clk~~
XVII-B

Op 60-92

STATE TERRITORY OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

August 4, 1960

Mr. A. P. Storrs
Director of Aeronautics
Hawaii Aeronautics Commission
Honolulu International Airport
Honolulu 17, Hawaii

Dear Sir:

This is in response to your letter dated July 15, 1960 requesting an opinion from this office whether the Hawaii Aeronautics Commission may enter into a private contract without advertising for bids for the installation and operation of coin locks on the doors of certain toilet partitions in the public restrooms of the new terminal buildings now under construction at the Honolulu International Airport.

The determination of this issue hinges on the construction of Act 245 S.L.H. 1959, as amended. Said Act provides that no concession or concession space to sell goods, wares, merchandise, and services or to operate certain types of business on any land owned or under the jurisdiction of the State or any independent commission shall be let out either by contract, lease, etc., except under contract let after public advertisement in the manner provided by law. The State Legislature in 1960 amended Act 245 by excepting operation of coin operated vending machines from the bidding requirements (Act 14, S.L.H. 1960).

The Hawaii Aeronautics Commission proposes to grant the operator the right to install, equip, and maintain coin operated locks on toilet partitions. In consideration for this grant, Hawaii Aeronautics Commission will receive revenues based on gross intake. Previous opinions from this office have ruled that a concession within the meaning of Act 245 is a grant by a government of land or property or of a right to use land or property for some specified use. (Atty. Gen. Op. 59:164, December 14, 1959; Atty. Gen. Op. 59:167, December 15, 1959). The operation of coin operated locks on toilet partition for profit on Commission property

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clearly falls within this definition of concession and thus, would necessarily have to be put out for public bid, unless we can classify it as falling within the nature of a vending machine.

A brief legislative history of this particular statutory provision is relevent at this point to determine whether or not we can characterize coin operated pay locks on toilet doors as falling within the concept of vending machines.

When the original bill, S. B. No. 240, was introduced, no mention was made for coin operated vending machines. The House subsequently amended this bill, S. B. No. 240, H. D. 1, to include coin operated vending machines as coming within the exception to the bidding requirement. Upon a disagreement of the Senate to the amendments proposed by the House, the Conference Committee resolved the differences by excluding coin operated vending machines from the bidding requirement, but not including coin operated insurance vending machines within this exception. This was the draft that was finally approved by both bodies and is the present law in effect today. The final Conference Committee Report (Conference Committee Report No. 9) on S. B. No. 240, H. C. 1, C. D. 1 mentioned such machines as coin operated telescope, weighing machines, insurance machine, hot or cold drinks machines and "other similar types of coin operated machines" to be included within the category of coin operated vending machines. Though we realize that this Standing Committee Report has no legal sanction of the Legislature as being its official committee report, yet for informational purposes, it can prove helpful. This becomes even more significant when the Conference Committee having before it this Standing Committee Report which elaborated on the types of operation as being included within vending machines and including insurance machines, specifically excluded coin operated insurance vending machines from the category of coin operated vending machines. It is then not too far fetched to say that the Conference Committee approved the other types of operation as falling within the category of vending machines since it merely excluded insurance vending machines and was silent

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on the other types of enumerated machines. If that is so, then the Standing Committee Report might prove material in probing into the intention of the Legislature.

When the Committee Report specifically enumerates certain types of machines to be included within the category of coin operated vending machines, followed by a general word or phrase, then the doctrine of ejusdem generis would apply to refer to things of the same kind as previously enumerated. (State of South Dakota v. William C. Fairbanks, 273 N.W. 188 (1937)). In the Fairbanks case, supra, where South Dakota had a statute enumerating certain types of vending machine followed by the clause "or any other machine requiring the deposit of money or metal chips therein before operating", the court held that a player phonograph machine that can be operated by placing a nickel in the machine and moving a dial to the desired record, comes within the statute since music vending machine was sufficiently similar to, and in the same class with, the enumerated machines. Similarly in our case, the Committee Report enumerates coin operated telescope, weighing machine, insurance machine, hot or cold drinks machines followed by the phrase "and other similar types of coin operated machines." But unlike the Fairbanks case, supra, we feel that in applying the doctrine of ejusdem generis, the general phrase "other similar types of coin operated machines," will not permit us to conclude that coin operated locks on toilet doors is of the same class with, and sufficiently similar to, the enumerated machines. An examination of these enumerated machines shows that in every instance the machine itself delivers the article of sale. The insertion of a coin in the telescope machine will allow the operator to use the telescope to view the area, and similarly, the insertion of a coin in the weighing machine will allow the operator to use the scales to weigh. In each instance the machine itself is used to deliver or vend the service. In a hot or cold drinks machine, the machine itself delivers the drink by the insertion of a coin. In contrast to the operation of these enumerated machines, a coin operated pay lock doesn't in and of itself deliver, vend, or sell the service but merely allows the operator

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the privilege of using the toilet facilities, which is in no way physically connected to the lock. The insertion of a coin merely opens the door. We feel this element is crucial in concluding that coin operated lock is different from and is not in the same class with, the enumerated machines.

The court in American Meter Co. v. McCaughn, 1 F Supp. 753 (1932) at p. 754 said:

> "'Vending' carries with it the idea of offering and selling article of merchandise in relatively small quantities, accompanied by a display of the stock. . . in order to be a vending machine the machine itself must sell. Now when we talk about a machine selling anything we really mean a machine which delivers the subject of the sale." (On Appeal to Circuit Court of Appeals, Third Circuit, Judgment reversed and remanded. McCaughn v. American Meter Co., 67 F 2d 148 (1933). The Circuit Court of Appeals concluded that a gas meter was an automatic slot-vending machine since "it is a machine, that it is a selling machine, a product delivery machine.")

The courts also classify vending machines into different categories as commodity vending, amusement vending, and service vending. Under the first category, upon the insertion of a coin, the machine furnishes one of the particular commodity which it is made to vend viz: gum, candy, cigarettes. Under the second category upon the insertion of a coin, the operator can use the machine for his entertainment or amusement, viz: pin-ball, rifle shooting, bowling. Under the last category, the machine vends some kind of service viz: pay telephone, telescope machine. It is arguable to say that the operation of coin operated locks falls in the last category since it vends a service and as such, should be classified as a vending machine. We feel again that the lock itself does not vend the service but that the service comes from the use of the toilet facilities which is in no way physically connected to the lock.

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On the basis of the foregoing discussion, it is the opinion of this office that the operation of coin-operated locks on the doors of certain toilet partitions in the public restrooms of the new terminal buildings now under construction at the Honolulu International Airport is a concession within the meaning of Act 245, S.L.H. 1959 and does not fall within the category of coin-operated vending machines as excepted under the statute. It is not permissible, therefore, to enter into private negotiation for its installation and operation, but must be advertised for bid in the manner provided by law.

Very truly yours

Allen I. Marutani

ALLEN I. MARUTANI
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

AIM/clk

INDEXING INSTRUCTIONS

OP. 60-93

I. BANKS

A. Foreign Bank Advertisements

1. Foreign banks may not solicit accounts by either newspaper advertisements or direct mail solicitations without certificate of authority.

2. Foreign banks may do institutional advertising where there is no solicitation for accounts.

II. REVISED LAWS OF HAWAII 1955

A. Section 178-11

ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
AND REFER TO
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Op. 60-93 ✓

STATE ~~TERRITORY~~ OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

August 4, 1960

Dr. Charles H. Silva
Treasurer
Department of Treasury
and Regulation
State of Hawaii
Honolulu, Hawaii

Attention Mr. Charles J. Gillespie, Deputy Bank Examiner

Dear Sir:

This is in reply to your letter of July 20, 1960, with documents attached, regarding foreign bank advertisements. The question you ask is, to what extent, if any, a foreign bank may advertise in Hawaii. Three situations are cited: (1) solicitations for deposits through newspaper advertisements; (2) institutional advertising; and (3) direct mail solicitations for deposits.

It is the opinion of this office that foreign banks may not solicit deposits through local newspaper advertisements nor through direct mailing. Institutional advertising is permissible.

Section 178-11, Revised Laws of Hawaii 1955, states in part:

> "No person (including . . . corporation . . . either domestic or foreign . . .) without having received a certificate of authority from the treasurer: shall advertise that he or it is receiving or accepting money or savings and issuing notes or certificates of deposit or passbooks therefor; . . ."

The statute clearly expresses that a foreign corporation may not advertise that it is accepting money for issuing certificates of deposits. Newspaper advertisements of the nature enclosed in your letter with attachments (attachment 7), soliciting deposits, violate the statute and are hence prohibited. However,

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institutional advertisements in local newspapers of the nature enclosed in your letter with attachments (attachment 8) appear to be permissible. This type of advertisement does not violate the statutes since there is no holding out of receiving or accepting money and issuing certificates of deposits.

Section 178-11, Revised Laws of Hawaii 1955, also states in part:

> "Nor shall any person or any agent of a foreign corporation solicit or receive deposits or transact any business in the way or manner of a banking business or in such a way or manner as to lead the public to believe that it is so engaged."

Direct mail solicitations of the nature enclosed in your letter with attachment (attachment 9) are accordingly prohibited.

Yours very truly,

Vernon F. L. Char

Vernon F. L. Char
Deputy Attorney General

APPROVED:

Shiro Kashiwa
Attorney General

Op. 60-93

August 9, 1960

INDEXING INSTRUCTIONS

I. Hawaii Aeronautics Commission

Whether the Airport Parking Company, as Lessee of HAC, is obligated to pay the real estate taxes applicable to the portion of the leased premises.

II Statute - Construction

Whether the provisions of Chapter 128, R.L.H. 1955 would require the Airport Parking Company as Lessee of the HAC to pay the real estate taxes on the portion of the leased land where the lease terms provide that the Lessee is liable to pay for only those taxes applicable to his operation.

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TERRITORY OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

August 9, 1960

Mr. A. P. Storrs
Director of Aeronautics
Hawaii Aeronautics Commission
Honolulu International Airport
Honolulu 17, Hawaii

Dear Sir:

This is in response to your letter No. 60.212, dated April 28, 1960, for an opinion from this office concerning the request of the Airport Parking Company that the Hawaii Aeronautics Commission refund to it the amount of $1,766.05 which was paid by said Company as the Lessee of the parking lot at Honolulu International Airport for real property taxes. It is the contention of the above-named company that it, as the Lessee, was not obligated to pay the above real property tax since the then Territory of Hawaii, acting by and through the Hawaii Aeronautics Commission, is the actual owner of the property and should properly pay the same. The Lessee further contends that the lease provides that the Lessee is only required to pay the taxes which are applicable to the operation of the parking lot and does not require that the Lessee pay the real estate taxes. Finally, the Lessee alleges that it was not put on notice by the Lessor regarding its obligation to pay such taxes.

Paragraph 18 of the lease in question provides in part as follows:

> "The Lessee covenants and agrees to pay promptly all taxes, excises, license fees and permit fees of whatever nature, applicable to its operation, and to take out and keep current all licenses, municipal, territorial, state or federal required for the conduct of its business

> at and upon the demised premises, and further agrees not to permit any of said taxes, excises, or license fees to become delinquent. . . The Lessee further covenants and agrees to pay promptly when due, all bills, debts and obligations incurred by it in connection with its operation of said business on or in the demised premises, and not to permit the same to become delinquent and to suffer no lien, mortgage, judgment, or execution to be filed against said premises or improvements thereon which will in any way impair the rights of Lessor under this lease."

In Section 128-4, R.L.H. 1955, which deals with the real property tax law of the State of Hawaii, it is provided that real property shall be assessed for tax purposes in its entirety to the owner or owners thereof. However, in the last sentence of said section an exception is made with regard to lessees of government property which construes such lessees to be the owners for the term of their lease. Said section reads in part as follows:

> "The real property shall be assessed in its entirety to the owner or owners thereof;. . .
>
> "Lessees holding under any government lease shall be considered as owners during the time any real property is held and controlled by them as such, as more fully provided in Section 128-22."

Section 128-22 of R.L.H. 1955 further expressly provides that real property belonging to the government of Hawaii shall not be taxed. Said section states as follows:

> "The following real property shall be exempt from taxation:
>
> "(a) Real property belonging to the United States, to the Territory or to any county. . ."

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The above section then provides for the manner in which leased government property is to be assessed for tax purposes and further defines the particular types of leases covered by the pertinent statutes.

In further clarification of the above, Section 128-36, R.L.H. 1955, provides that whenever any government lease or other tenancy terminates that the taxes due thereon shall be remitted for the balance of the taxation year.

It is clear from a reading of the above statutes that the intent of the Legislature was to require the lessee of any government land to pay the real estate taxes as the owner of the real property during the period of the lease. As such, unless otherwise expressly provided in the statute, the Airport Parking Company, the Lessee in the instant matter, is obligated to pay the real property taxes during the period of its lease. This obligation cannot be altered by private agreement between the parties, since it is a matter of legislative mandate that the payment of real estate taxes be the responsibility of the Lessee.

The Lessee further contends that it is not obligated to pay the taxes in question due to the fact that the lease only requires it to pay taxes which are applicable to the operation of the parking lot. Though it might be arguable whether the above phrase includes real estate taxes, it is clear that it does not expressly exonerate or relieve the Lessee from the obligation to pay the same. Furthermore, there is nothing in the statute which requires that the lease terms expressly provide for the payment of the real estate taxes by the Lessee in order to obligate the latter. Absent such a statutory provision, the Lessee is bound by the provisions of Chapter 128, R.L.H. 1955. In addition, it is not the duty of the State as the Lessor to advise or put the Lessee on notice of its various duties, including its obligation to pay real estate taxes. In other words, the Lessee is bound to comply with its statutory obligations notwithstanding the acts or omissions of the Hawaii Aeronautics Commission as the Lessor in the instant matter.

On the basis of the foregoing, it is the opinion of this office that the Airport Parking Company, as the Lessee of land belonging to the State of Hawaii, acting by and through the Hawaii Aeronautics Commission, is clearly obligated to pay the real property taxes on the property which it has leased from the government.

Yours very truly,

Allen I. Marutani

ALLEN I. MARUTANI
Deputy Attorney General

AIM:acs

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

R.B. OK.

Op. 60-94

INDEXING INSTRUCTIONS

August 9, 1960

ACCOUNTING & GENERAL SERVICES

Deputy Comptroller

Salary and duties to be determined by Comptroller under provisions of section 8 of Reorganization Act (Act I, 2nd Special Session 1959).

GOVERNMENT OFFICERS

Salaries of Deputies

Salaries and duties of certain subordinates are determined by the department head under the provisions of section 8 of Reorganization Act (Act I, 2nd Special Session of 1959).

REVISED LAWS OF HAWAII 1955

Section 4A-1, as amended.

Superseded by provisions of Sec. 8 of Act I- second Special Session of 1959 (Reorganization Act).

SPECIAL SESSION LAWS OF HAWAII 1959

Act I, Section 8.

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STATE ~~TERRITORY~~ OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

August 9, 1960

Honorable Michael M. Miyake
Comptroller, Department of
Accounting and General Services
Honolulu, Hawaii

Dear Mr. Miyake:

You have asked this office whether the salary of the Deputy Comptroller may be raised above the ceiling of $13,000 per annum established for the Territorial Deputy Comptroller by section 4A-1, Revised Laws of Hawaii 1955, as amended by section 5 of Act 255, Session Laws of 1959, in view of the provisions of the Reorganization Act of 1959 (Act 1 of the Second Special Session of the First State Legislature).

It is our opinion said section 4A-1 is not controlling and the salary of the Deputy Comptroller may be raised or lowered with the approval of the Governor.

Section 44 of said Reorganization Act provided in part regarding the salary of the head of a department headed by a single executive, such as the Department of Accounting and General Services headed by the Comptroller, as follows:

> "The salary of any such single executive shall be set by the governor, but at not more than $17,500 per annum. The amount of such salary, *** shall be subject to review by the legislature."

The salary of the Comptroller was so set by the Governor on March 22, 1960 and the legislature, which was meeting in its first budget session, took no action, before it adjourned on April 7, 1960, to modify the Comptroller's salary as set by the Governor under said section 44.

Section 8 of said Reorganization Act, pertaining to department staffs, provided as follows:

> "Except as otherwise provided by this Act and with the approval of the governor, the head of a department may establish or abolish any subordinate office or position, transfer officers and employees between positions,

appoint and remove any subordinate, and change the duties, titles and compensation of offices and positions as deemed necessary by the head of the department for the efficient functioning of the department, subject to the limitations of available appropriations and of the provisions of chapters 3 and 4 of the Revised Laws of Hawaii 1955, as amended.

> "All officers and employees within a department shall be under the supervision, direction and control of the head of the department, except as otherwise provided by this Act." (Underscoring supplied.)

The purpose of section 8 clearly is that of implementing the reorganization mandated by Act 1 through the grant of a range of administrative discretion to the department heads to be used when deemed necessary "for the efficient functioning of the department". It is understood an appreciable increase in morale with a corresponding increase in efficiency will be accomplished should the salary of the Deputy Comptroller be raised. This factor was recognized by the Senate Committee on Ways and Means in S.C.R. No. 82 of March 18, 1960, on S.U.M. No. 22, wherein the Committee indicated it believed the situation regarding your deputy's salary was "inequitable treatment *** that should not be permitted to continue." It is understood the House Finance Committee felt the same way about the situation and it would seem the reason S.U.M. 22 was not reported out from the House Committee and the companion House Bill No. 240 filed by it on April 7, 1960, was possibly because the Committee believed such an act was not needed in view of the specific language of section 8.

The limitations of said section 8 on the Comptroller's authority to change the compensation of his immediate subordinate are the need to obtain the Governor's approval, the availability of appropriations and the provisions of chapters 3 and 4 of the Revised Laws of Hawaii 1955, as amended. In view of the language of section 8 and the other provisions of the Reorganization Act, it seems clear that when section 8 authorizes the department head to change the compensation of the department's personnel it is intended that the salaries so affected may be raised or lowered.

Said section 4A-1 limiting the salary of the Territorial Deputy Comptroller is not part of either of said chapters 3 or 4. It is found in chapter 4A of said Revised Laws and, accordingly, is not a limitation on the salary of the Deputy Comptroller of the State Department of Accounting and General Services.

It is apparent, of course, the legislature did not intend and the Governor, undoubtedly, will not allow the subject discretionary authority to be used indiscriminately to revise the salaries of subordinates. Salary revisions would clearly seem to have been intended to be accomplished only when inequities

exist, as noted in said S.C.R. No. 82, or where there has been an appreciable change in duties. It is our understanding such a change may have taken place in your deputy's duties by virtue of the Reorganization Act having created in the Department of Accounting and General Services a department appreciably greater than the Territorial Comptroller's office.

For the reasons of the aforementioned facts and law this office believes the salary of the Deputy Comptroller may be raised under the provisions and limitations of section 8 of the Reorganization Act of 1959.

Respectfully yours,

W. K. WATKINS, JR.
Deputy Attorney General

APPROVED:

SHIRO KASHIWA
Attorney General

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INDEXING INSTRUCTION

Op. 60-96

COURTS

District Courts

Construed to be within courthouses for purposes of section 110-4, Revised Laws of Hawaii 1955, which makes an appropriation for flags.

STATUTE

Section 110-4, Revised Laws of Hawaii 1955, construed to provide flags for district courts within meaning of courthouses.

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Op. 60-96

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

August 17, 1960

Mr. Francis Wee, Finance Executive
Department of Accounting and
General Services
State Office Building
Honolulu, Hawaii

Dear Sir:

This is in response to your oral inquiry to this office as to whether the superintendent of public works may grant the request of a district magistrate's court to provide the latter with a flag and staff at the expense of the State government.

Section 110-4, Revised Laws of Hawaii 1955, provides in part as follows:

> "When suitable appropriations are made for such purpose, the superintendent of public works shall provide each public schoolhouse and courthouse in the Territory with a suitable United States flag of bunting or cotton, and a suitable flag staff or other arrangement whereby such flags may be displayed."

As the district courts of Hawaii are provided for by our State Constitution, and as such courts enforce our criminal and civil laws to the extent of their limited jurisdiction, it is the opinion of this office that a district court is such a court within the meaning of the above statute as to be entitled to have a flag and staff provided for by the State administration where funds are available for that purpose.

Very truly yours,

Robert M. Botts

ROBERT M. BOTTS
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

Op. 60-96

WKW:LNC
XXIV

Op. 60-97

August 25, 1960

Honorable George M. Okano
Chairman, Accounts Committee
House of Representatives
Iolani Palace
Honolulu, Hawaii

Dear Sir:

The inquiry of your office as to whether or not employees of the House are covered by the Hawaii Workmen's Compensation Law was referred to this office.

It is our belief that employees of the House of Representatives are State employees and are covered by the benefits of our Workmen's Compensation Law.

The inquiry specifically concerned seven persons currently employed by the House on a full-time basis and the many persons it employs for a Legislative Session.

Act 240 of the 1959 Regular Session amended section 97-1 of the Revised Laws of Hawaii 1955, regarding definitions, in part as follows:

> "'Workman' is used as synonymous with 'employee' ***. 'Employee' as used in this chapter means every person including officials in the service of the Territory *** whether elected or under any appointment or contract of hire express or implied."

Said Act 240 also amended section 97-5 to read as follows in part:

> "This chapter shall apply to employees as defined in section 97-1, including employees of the Territory ***."

The intent of the Legislature as to the scope of employment by the Territory was clearly stated in Stand. Com. Rep. No. 873 of the Senate Committee on Labor to President Lee on May 2, 1959 wherein the first purpose of House Bill

No. 232, which became said Act 240, was set forth as follows:

> "Broaden workmen's compensation coverage to include elected officials and any other person, appointed or hired, in the service of the Territory or its political subdivisions."

By reason of the foregoing facts and law it is the opinion of this office that all employees of the Legislature for purposes of our Workmen's Compensation Law are employees of the State and are covered by the benefits of the Workmen's Compensation Law.

Very truly yours,

W. K. WATKINS, JR.
Deputy Attorney General

APPROVED:

SHIRO KASHIWA
Attorney General

R.B.

cc: Wm. Douglas
Bur. of Workmen's Comp.

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Op. 60-98

STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

August 25, 1960

Mr. Raymond Y. C. Ho, Director
Department of Budget and Review
State of Hawaii
Honolulu, Hawaii

Dear Mr. Ho:

This letter is written in response to the City's request for reimbursement of $98,098.49, representing salary increases from July 1959 to December 31, 1959, paid to school custodians and other City employees whose wages were chargeable to the "special school fund." As you know, Act 255, Session Laws of Hawaii 1959, provided increases in salaries for most government workers, excepting officers or employees of the City and County of Honolulu whose compensation is paid from Federal or special funds. Whether the City is entitled to reimbursement for salary increases paid to employees out of the "special school fund" is dependent, therefore, upon the determination whether said fund is a special fund within the meaning of Act 255. Nowhere in the Act was the term "special fund" defined.

Please be advised that after careful re-examination of the problems posed and fully considering all factors involved, including our earlier opinion No. 60-3, and a thorough review of the intent of the legislature enacting Act 255, this office feels that the special school fund is not a special fund within the exceptions specified in sections 2 and 3 of said Act 255. See State vs. Miser, 72 P. 2d 408.

Accordingly, we feel that the City and County is entitled to reimbursement for the above wages paid to said school employees.

Very truly yours,

Arthur S. K. Fong

Arthur S. K. Fong
Deputy Attorney General

APPROVED:

Shiro Kashiwa

Shiro Kashiwa
Attorney General

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STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU
August 29, 1960

Honorable Richard K. C. Lee, M.D.
Director of Health
State of Hawaii
Honolulu 13, Hawaii

Dear Dr. Lee:

Returned herewith is the form formerly used by the Director of Institutions to transfer persons to the Territorial Hospital, which accompanied the letter of your office of August 18 and our comments thereon as to its adoption for use by your department.

You additionally asked our advice concerning the applicability of Section 81-44, Revised Laws of Hawaii 1955 to the matter of transferring inmates of Oahu Prison and the Training Schools to the State Hospital for observation and treatment in view of the abolishment of the Department of Institutions by Section 38 of Act 1 of the Second Special Session of 1959 (The Reorganization Act).

It is our opinion that said Section 81-44 continues in effect as the means for temporarily transferring inmates of Oahu Prison or the Training Schools to the State Hospital even though the Department of Institutions no longer exists.

Said Section 81-44 was enacted by Act 50 of Session Laws of 1949, which was the enactment of H.B. No. 573. In reporting to Speaker Hiram Fong on H.B. No. 573 on March 25, 1949 the Committee on Public Institutions commented in Stand. Com. Rep. No. 221 in part as follows:

> "According to current and immediate future plans of the Territorial Hospital, its medical and hospital facilities for the treatment of the sick, mentally and otherwise, will be greatly expanded. On the other hand, the other institutions within the Department of Institutions including the Waimano Home, are without those facilities necessary to treat its patients and inmates. Your Committee believes it is a good, sound and economical practice to have this coordinated program of treatment."

The Senate Committee on Public Health in reporting on H.B. No. 573 in Stand. Com. Rep. No. 225 on April 13, 1949 noted in part:

> "The purpose of this bill is to provide for the care of inmates of other institutions who require treatment for mental or physical illness, and for which proper facilities are not available in the institutions. It would allow the transfer of such inmates in need of treatment to the Territorial Hospital for care ***."

Thus it seems clear said Section 81-44 was intended to prevent an unnecessary duplication by an institution, such as Oahu Prison or a Training School, of facilities already existing in the State Hospital for the observation or treatment of an inmate of said institution.

Since said Reorganization Act provided in Sections 19 and 20 that the functions of the Department of Institutions were thenceforth to be provided by the Departments of Health and Social Services and since there appears no reason to believe the Legislature thereby intended to necessitate an uneconomical duplication of facilities, it would seem the Legislature intended a temporary transfer of inmates to take place between the Department of Social Services and the Department of Health when necessary rather than the alternative of, in effect, repealing Section 81-44.

For the aforementioned reasons of law and fact it is the opinion of this office that inmates of Oahu Prison or the Training Schools may be temporarily transferred to the State Hospital for needed psychiatric, medical, surgical or hospital care under the provisions of Section 81-44, Revised Laws of Hawaii 1955.

Respectfully yours,

W. K. WATKINS, JR.
Deputy Attorney General

APPROVED:

SHIRO KASHIWA
Attorney General

No Opinion

No. 60-100

No Opinion

No. 60-101

INDEXING INSTRUCTIONS

OP. 60-102

I. REAL ESTATE LICENSE

A. One acting under power of attorney in real estate transactions needs a real estate license.

II. POWER OF ATTORNEY

A. In real estate transactions a real estate license is required.

III. REVISED LAWS OF HAWAII 1955

A. Section 170-1

B. Section 170-2(a)

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Op. 60-102

STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

August 30, 1960

Mr. Robt E. Bekeart
Administrative Officer
Real Estate License Commission
205 Empire Building
Honolulu 13, Hawaii

Dear Mr. Bekeart:

This letter is written in response to your inquiry as to whether or not Liberty House and its employees or any other public establishment may, under a special power of attorney from Grass-Shack Village of Hawaii, Ltd., sell one square inch of property as described in Warranty Deed No. A 03150, therein enclosed.

Our earlier opinion No. 60-60, dated June 14, 1960, by Deputy Attorney General Tenny H. Tom, indicated that said warranty deed may not be used to transfer an interest in land for valuable consideration or compensation by a person other than the owner without complying with Chapter 170, Revised Laws of Hawaii 1955. By means of the special power of attorney, Grass-Shack Village of Hawaii, Ltd. is again attempting to do that which we proscribed in our earlier opinion without fulfilling the requirements of Chapter 170, Revised Laws of Hawaii 1955.

The provisions of section 170-2(a), which set forth as an exemption "any person who, as owner of any real estate or acting under power of attorney from the owner" was not meant to apply to persons who deal with, purchase, sell or exchange real estate for commercial profit. The definitions under section 170-1, which contain these words, "for the purpose or as a means of evading the licensing requirements of this chapter", point out clearly the intent of the legislature in this field. The term "power of attorney" contemplated as an exception by section 170-2(a) is one authorizing a particular person to perform a certain act or acts on behalf of the grantor more or less ministerial in nature with very little, if any, discretion in the attorney in fact, as to the act or acts to be done. The attorney in fact under such circumstances is not entitled to a commission for such services. Brown v. Van Pelt, 263 S.W. 2d 956.

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It is clear that by the device of a special power of attorney, Grass-Shack Village of Hawaii, Ltd. is attempting to circumvent the license requirements of Chapter 170. Chapter 170 clearly prohibits anyone other than the owner and other specified exceptions from selling or dealing with real estate for compensation or other valuable consideration without the supervision and control by the Real Estate License Commission. Opinion 60-60 aptly covers the present situation, and Grass-Shack Village of Hawaii may not, through a special power of attorney, sell any interest in land through commercial outlets by other than licensed real estate dealers.

Very truly yours,

Arthur S. K. Fong

Arthur S. K. Fong
Deputy Attorney General

APPROVED:

Shiro Kashiwa
Attorney General

No Opinion

No. 60-103

INDEXING INSTRUCTIONS - OP. 69-104

Election expenses

Requirements for filing by candidates, etc.

Candidates

Filing of election expenses

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Op. 60-104

STATE [redacted] OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

September 8, 1960

Honorable James Kealoha
Lieutenant Governor, State of Hawaii
Honolulu, Hawaii

Dear Lieutenant Governor:

This is in response to your inquiry whether under section 11-78, Revised Laws of Hawaii 1955, all expenses expended on behalf of a candidate for public office must be filed. Specifically, the three questions asked by you are answered as follows:

1. Section 11-78, RLH 1955, requires that within 20 days following an election each candidate and each agent or committee acting for or on behalf of such candidate must file an itemized statement of his or their expenses, etc. The crux of the problem is found in the words "by, for or on behalf of the candidate". Unless the agent or committee be acting for or on behalf of a candidate filing of a statement is not required. There is a plethora of cases beginning with the classic case of State v. Kohler, 228 N.W. 895 and including Hicks v. Frazer, 1 P.2d 1096, dealing with these words. There is no difficulty in understanding what is meant by the term "by"; the phrase "on his behalf" when it refers to a candidate, means someone who acts for him in the sense that an agent acts for or on behalf of his principal. The authority may be expressed or implied but it must exist; otherwise the disbursement is not made on behalf of the person. The term "for" is interpreted to mean in behalf of and may be used as indicating that in place of which. The cases do specifically point out, however, that even if a person has announced or declares himself a candidate for public office, the statute makes no limitation upon the disbursements made by citizens who may upon their own initiative or on their own behalf support candidates or any person of their choice. Such voluntary support may be given by an individual or by a group of individuals and such expenditures need only be recorded if incurred by persons who are acting as his agents or as a committee acting for or on behalf of said candidate.

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2. The term "agent" is defined by law to mean a person authorized by another (the principal) expressly or impliedly, to act on his account and under his control.

3. The cases indicate that a committee required to file under section 11-78, RLH 1955, is an association of two or more individuals working on behalf of the particular candidate by authority, expressly or impliedly, granted by him and under his control and supervision. The voluntary committee working for a candidate without his express or implied authority or control need not file the required statement of section 11-78. Trones v. Olson, 265 N.W. 806.

Presumably all expenditures made by political committees organized to work for the election of a particular candidate are for the benefit of such candidate. In that sense the expenditures are made on his behalf. However, because the candidate has knowledge of the activities of the committee and approves same but gives no direction and has no knowledge of any particular disbursements, does not make him chargeable with the disbursements made by the committee. Mariette v. Murray, 242 N.W. 331.

Yours very truly,

ARTHUR S. K. FONG
Deputy Attorney General

APPROVED:

H. RODGER BETTS
Acting Attorney General

60-104

INDEXING INSTRUCTIONS

STATUTE - CONSTRUCTION -

Whether the Harbor Board Special Fund would fall under budgetary control as provided for under Act 320 S.L.H. 1957 and Act 12, First Special Session, First State Legislature.

HARBOR BOARD -

Whether the Harbor Board Special Fund is excepted from budgetary control under Act 320, S.L.H. 1957 and Act 12, First Special Session, First State Legislature.

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Op. 60-105

STATE TERRITORY OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

September 12, 1960

Mr. Harold W. Butzine
Manager and Chief Engineer
Board of Harbor Commissioners
Honolulu, Hawaii

Dear Mr. Butzine:

This is in response to your letter dated July 8, 1960 in which you request an opinion from this office whether the Harbor Board Special Fund would fall under budgetary control as provided for under Act 320 S.L.H. 1957, and Act 12, First Special Session, First State Legislature.

More specifically you pose two questions:

(1) Is the Harbor Board Special Fund as a fund "subject to payments on principal and interest on revenue bonds" excepted from budgetary control under Act 320, S.L.H. 1957?

(2) Do Sections 35-20 and 35-29, Act 12, First Special Session, First State Legislature apply to the Harbor Board Special Fund?

Section 1 of Act 320 reads in part:

"The purpose of this act is to place all special funds under legislative and executive budgetary control in the same manner as the general fund, with the exception of those funds subject to applicable federal laws or regulations and/or payments on principals and interest on revenue bonds".

Section 2 of Act 320 reads:

"All special funds maintained by all departments, commissions, boards, agencies, and

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establishments of the Territory shall be governed by the provisions of Chapter 35, Revised Laws of Hawaii 1955..."

The purpose of Act 320 as set forth in Section 1 is to place all special funds under legislative and budgetary control, except those funds which are subject to applicable federal laws or regulations and/or payments on principal and interest on revenue bonds. The revenues from Harbor Board operation which are deposited into the Harbor Board Special Fund are specifically pledged for the repayment of principal and interest of revenue bonds. Section 2 of the Act would then have to be read in the light of Section 1, and the phrase "All special funds" in Section 2 must be qualified by Section 1 which limits the scope of the meaning of special funds. It is then clear that the provisions of Act 320, S.L.H. 1957 do not apply to the Harbor Board Special Fund.

Section 35-20 of Act 12, First Special Session, First State Legislature provides that no officer, department, or establishment shall be allowed to expend any sum not specifically authorized by the legislature for expenditure during that particular fiscal year and not made available pursuant to the allotment system. Section 35-21 of Act 12 provides that the provisions of the allotment system shall apply to all appropriations (including standing, continuing or annual appropriations and special funds). Section 35-29 provides that every appropriation made subject to the provisions of Sections 35-19 to 35-28 remaining unexpended and unencumbered at the close of any fiscal year shall lapse into the general fund. The statutory provisions relating to the allotment system and lapsing mention appropriations. The Harbor Board Special Fund is in no way dependent upon legislative appropriations for its source of income but is wholly self-sustaining, the source of which is traceable to revenues realized from Harbor Board operations. The legislature must have intended certain types of legislative appropriations to fall within the scope of special funds, for in advancing a definition, the legislature under Section 1 of Act 12, defined special fund as any fund that by law is set aside or <u>appropriated</u> or dedicated for a limited object or purpose. Thus when Section 35-21 includes special funds within the requirement of the allotment system, these special funds must be limited

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merely to those special funds which are dependent upon legislative appropriations, for the statute reads:

> "The provisions of this Act relating to the allotment system shall apply to all appropriations (including ... special funds) ..."

We feel therefore that the Harbor Board Special Fund, being in no way dependent upon legislative appropriation, does not fall within the requirement of the allotment system. Similarly we feel that Section 35-29 of Act 12 relating to lapsing of funds into the general fund applies merely to appropriations, for the statute reads:

> ". . . every appropriation or part thereof of any kind made subject to the provisions of Sections 35-19 to 35-28, . . . shall lapse. . ."

A brief legislative history of this particular provision is relevant at this point to determine whether or not the Harbor Board type of special fund comes under the provisions of Act 12.

When the original bill S. B. No. 27 was introduced, a special section was included relating to special funds. Such a section read:

> "Any revenue or income that by law are to be credited to a special fund shall continue to be so credited, subject to the restrictions upon allotment and withdrawal imposed by Sections 35-19 to 35-31, it being expressly intended that no special fund...be available for expenditures except in accordance with, . . . the provisions of Sections...relating to budgeting and allotments."

This provision would have clearly applied to the Harbor Board type of special fund. But when this original bill was amended by S. B. No. 27, S. D. 1, this provision was eliminated altogether. The final Standing Committee Report No. 99 on S. B. No. 27, S. D. 1, H. D. 1 reads:

"Your Committee notes that the sections dealing with special funds and capital improvements from special funds have been deleted by the Senate. Your Committee feels that some legislative control should be exercised in this area but does not think that these provisions can be amended without careful studies being made of the problems involved. Therefore, this Committee will not attempt to restore these sections but rather study these problems and try to arrive at some solution by the budget session."

We feel then that the Legislature by eliminating this special fund section, the language of which would have included the Harbor Board type of special fund, did not intend that the provisions of Act 12 apply to the Harbor Board type of special fund.

On the basis of the foregoing discussion, it is the opinion of this office that the provision of Act 320 S.L.H. 1957 and the provisions of Sections 35-20 and 35-29, Act 12, First Special Session, First State Legislature, do not apply to the Harbor Board Special Fund.

Very truly yours,

Allen I. Marutani

ALLEN I. MARUTANI
Deputy Attorney General

APPROVED:

H. Rodger Betts

H. RODGER BETTS
Acting Attorney General

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INDEXING INSTRUCTIONS - OP. 60-106

COMPENSATION

Extra

Deputy or first assistant upon assuming duties of supirior in his absence

CIVIL SERVICE

Compensation of deputy or first assistant upon assuming duties of superior in his absence

COMPENSATION

Extra

When temporary duties for more than thirty days included in job description

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STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

September 13, 1960

Mr. Eugene Bal
Personnel Director
Department of Civil Service
County of Maui
Wailuku, Maui

Dear Mr. Bal:

This is in response to your inquiry dated September 7, 1960, whether the Assistant Supervisor of Building Inspection who upon assuming the duties normally performed by the Supervisor of Building Inspection while the latter is on leave is entitled to compensation at the higher position when such duties are performed for more than thirty consecutive days.

Rule 2(a) of the Maui County Civil Service Commission provides that:

> "An employee who performs a temporary assignment to a higher position for more than thirty consecutive days shall be compensated at the proper rate for the higher class as though a formal appointment had been made on the thirty-first day, except as provided for in Section 3, Exclusions."

Section 3(a), Exclusions, provides as follows:

> "Deputies and first assistant whose positions include assuming the duties and responsibilities of their superior in the absence of such superior. There shall be no change in the compensation of these employees."

The job description forwarded to me of the Assistant Supervisor of Building Inspection indicates that he "assumes the responsibility of the Supervisor of Building Inspection in his absence."

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Please be advised that it is the opinion of our office that Section 3(a), Exclusions, clearly covers the situation outlined in your letter of September 7. Under the Rules of the Maui County Civil Service Commission the Assistant Supervisor of Building Inspection is not entitled to extra compensation after the 30th day for performing the duties and responsibilities normally performed by the Supervisor of Building Inspection while the latter is on leave. It is clear from the job description that the compensation of the Assistant was taken into consideration in setting up the salary range of said Assistant Supervisor and that such compensation clearly covers the assumption of duties of the Supervisor herein performed.

Very truly yours,

Arthur S. K. Fong

ARTHUR S. K. FONG
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

60-106

ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
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XIII-A

Op. 60-107

STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

September 14, 1960

Mr. Arthur A. Akina, Jr.
Director of Personnel Services
Department of Personnel Services
825 Mililani Street
Honolulu, Hawaii

Dear Mr. Akina:

This is in response to your letter dated September 7, 1960, requesting our opinion on the following questions:

> "'Did the provisions of Act 255, S.L.H. 1959 or any of the laws enacted subsequent to July 1, 1955 serve to change the date on which an employee would have been entitled to receive a longevity pay increase?'
>
> "If a change in effective date took place, what is the earliest date on which such an employee may be entitled to receive a longevity pay increase?"

The pertinent provisions of Act 255 are found in section 3b, Session Laws of Hawaii 1959, which reads:

> "b. Conversion from the existing salary schedule (hereinafter referred to as 'existing schedule') to the new salary schedule set forth in this section (hereinafter referred to as the 'new schedule') shall be effected in the following manner:
>
> "The incumbent of each position shall be transferred as of July 1, 1959, to the same range to which his class is assigned. The step in the salary range to which the incumbent's position is to be assigned shall

be determined as follows:

* * *

"2. Each incumbent who is, under the existing schedule, at or beyond the maximum step shall be credited with an amount equal to a longevity step under the existing schedule;

"3. Each incumbent shall have added to his present salary (including the increment or longevity credits provided for above) the sum of $20;

* * *

"Any provision of law to the contrary notwithstanding, the service anniversary date of any incumbent who was employed on or before July 1, 1959, shall be July 1."

Under these provisions, all employees of the State employed on or before July 1, 1959, will have a service anniversary date of July 1. Therefore, the longevity and increment increases will be determined on July 1 of each year for these employees. To effectuate the conversion of the service anniversary date of any incumbent employee, Act 255 provided that he should get an increment or a longevity increase regardless of whether such employee was entitled to such increase under the old salary schedule. Therefore, all employees of the State were given an increment or longevity increase, plus $20.00, for purposes of computing their salaries under the new salary schedule provided by Act 255, Session Laws of Hawaii 1959.

It is therefore the opinion of this office that the service anniversary date of all incumbents who were employed on or before July 1, 1959, have been changed to July 1. Since an incumbent employee received a longevity pay increase on July 1, 1959, regardless of whether he had served the five years as required by section 4-9, Revised Laws of Hawaii 1955, the earliest date on which such an employee may be entitled to receive a longevity pay increase will be July 1, 1964.

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It should be noted that the change of service anniversary dates to July 1 applies only to incumbent employees employed on or before July 1, 1959, and does not affect any employee employed subsequent to said date.

Yours very truly,

Harold Y. Shintaku

HAROLD Y. SHINTAKU
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

Op. 60-107

ADDRESS REPLY TO
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Op. 60-108

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

September 19, 1960

Mr. Harold C. Hill, Secretary
Employees' Retirement System
of the State of Hawaii
Keelikolani Building
Honolulu, Hawaii

Dear Mr. Hill:

This is in reference to your letter dated September 7, 1960, requesting our opinion on questions arising from the application of the provisions of Act 173, Session Laws of Hawaii 1959, and Act 22, First Regular Session of the First State Legislature 1960. Since the questions you ask are lengthy and numerous, we will not repeat them but will discuss the general application of the provisions of said acts.

The pertinent portions of Act 173 read as follows:

> "Notwithstanding any other provision of law to the contrary, employees in per diem positions and employees who formerly filled per diem positions shall be allowed full prior service credit in the employees' retirement system from the date they entered government employment as per diem employees until the date they attain monthly status.
>
> "The various counties are authorized and directed to pay to the employees' retirement system sums necessary for the purpose of granting prior service credit in the employees' retirement system to the per diem workers and former per diem workers in the respective counties still in service and covered by this Act."

Act 22 reads in part as follows:

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"The accrued liabilities of the various counties to the employees' retirement system authorized and directed by Act 173, Session Laws of Hawaii 1959, are hereby authorized to be liquidated by installment payments extending over a period of thirty years from the effective date of this Act.

* * *

"Notwithstanding any other provision of the law to the contrary, employees in per diem positions, employees who formerly filled per diem positions, and former employees who filled per diem positions on or after January 1, 1928, shall be allowed full prior service credit in the employees' retirement system from the date they entered government employment as per diem employees until the date they attain or attained monthly status."

Our Opinion 59-123, dated September 10, 1959, interpreting Act 173, held that:

"In 1957, Act 200, S.L.H. 1957, attempted to allow prior service credit for those attaining monthly status for their entire period of per diem service, but obviously the Legislature failed to express that intent clearly because the effect of said Act was to take care of only those with service prior to 1952, who in 1953 had elected to withdraw from the System. The purpose of Act 200 was to implement the declared policy of 1955 of encouraging the change-over to a monthly status. Act 173, S.L.H. 1959, has now implemented the goal of the Legislature in encouraging such change-over by 1960 by giving prior service credit to everyone attaining monthly status on and after January 1, 1952, whether he is presently a member of the System or not, so long as he is still in government service."

Section 3 of Act 22 now requires that the retirement system give full prior service credit for per diem employment to all former employees and present employees of the State or county who, at some period subsequent to January 1, 1928, were per diem employees. Of course, the application of the phrase

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"former employees who filled per diem positions on or after January 1, 1928" is limited to former employees who can benefit by the service credits granted by Act 22. Those benefiting will be former employees who have retained their status as members of the retirement system or former employees who are re-employed.

Section 2 of Act 173 directs the various counties to pay to the retirement system moneys necessary for the purpose of effectuating section 1 of said Act.

Section 2 of Act 22 authorizes the various counties to liquidate the above sum by installment payments extending over a period of thirty years. However, the legislature failed to direct the counties to pay for the liabilities that are incurred by including former employees who were granted service credits under Act 22 but were excluded under Act 173. Therefore, appropriate legislation should be immediately drafted to direct the counties to pay for liabilities incurred for former employees. Furthermore, the legislature has failed to provide a reasonable closing date for claiming the prior service credit granted by Act 22 which, we have been informed, will cause numerous administrative problems. This matter should also be taken up with the next legislature since an administrative body cannot establish a rule, without legislative authority, which would limit the application of any law. 49 American Jurisprudence, Public Administrative Law, section 53.

We believe that the foregoing answers all your questions.

Yours very truly,

Harold Y. Shintaku

HAROLD Y. SHINTAKU
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

Op. 60-108

INDEXING INSTRUCTIONS

I. Hawaii Aeronautics Commission

The commission cannot contract with a private firm to provide janitorial services for the New Inter-Island Terminal.

II. Chapter 15, Revised Laws of Hawaii, 1955.

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109:XVII-B

Op. 60-109

STATE ~~TERRITORY~~ OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

October 3, 1960

Mr. A. P. Storrs
Director of Aeronautics
Hawaii Aeronautics Commission
Honolulu International Airport
Honolulu 17, Hawaii

Dear Sir:

This is in response to your letter No. 60.491, dated July 20, 1960, for an opinion as to whether the Hawaii Aeronautics Commission can contract with a private firm to provide ~~complete~~ janitorial services for the New Inter-Island Terminal.

You state in your letter, (1) That the contract will call for the contracted firm to provide complete janitorial services in the Terminal for the public areas such as lobby and rest rooms, and for the areas leased to the airlines for their exclusive use; (2) That the floor area of the New Inter-Island Terminal closely approximates that of the present Honolulu Airport Terminal which has twenty (20) HAC civil service employees providing janitorial services twenty-four hours daily, seven days a week; (3) That the Inter-Island Terminal will be operated approximately sixteen hours daily, seven days a week, and will require an estimated fifteen employees if HAC were to continue providing the service.

You further state that the practice of contracting for janitorial services is widely utilized and highly successful on mainland airports in terms of economy and efficiency.

The Hawaii Aeronautics Commission has the power to enter into contracts necessary to the execution of the powers granted it by Chapter 15 of the Revised Laws of Hawaii, 1955. (Sec. 15-15, Revised Laws of Hawaii 1955). However, this seemingly broad power of contract does not

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apply where employees are to be hired to carry out the functions of the Commission.

As to the hiring of employees the law is quite specific. Section 15-5, provides for the hiring of a Director of Aeronautics and other employees as may be required and authorized for the proper discharge of the functions of the Commission. As to these "other employees" this section reads as follows:

> "Other employees, appointment. The director shall appoint, subject to the approval of the commission and pursuant to the provisions of chapters 3 and 4, such assistant directors, experts, field and office assistants, clerks, and other employees as may be required and authorized for the proper discharge of the functions of the commission, provided, that one first assistant director may be appointed without regard to the provisions of chapter 3; provided further, that no such appointments shall be made unless the governor shall have approved the position to be filled."

The Civil Service system which was intended to apply to all services performed for the State provides for certain exemptions. A perusal of the exemptions listed in Section 3-20, Revised Laws of Hawaii, 1955, as amended does not include the type of employment concerned here.

Based on the foregoing discussion, it is our opinion that the Hawaii Aeronautics Commission is not authorized to contract with a private firm to provide janitorial services for the Inter-Island Terminal.

Very truly yours,

/s/ Lincoln J. Ishida

LINCOLN J. ISHIDA
Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa

SHIRO KASHIWA
Attorney General

60-109

INDEXING INSTRUCTIONS

1. Dedication - Easement

The width of a highway, created by implied dedication is determined by the extent of the actual use. When utility facilities within a private easement, lying outside the area of such actual use, must be relocated for the widening of the highway, the State must pay for the cost of such relocation.

L. Kam
10/3/60

60-110

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Op. 60-110 ✓

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

October 7, 1960

Mr. J. C. Myatt
Deputy State Highway Engineer
869 Punchbowl Street
Honolulu, Hawaii

Dear Mr. Myatt:

Re: Kauai Belt Road, Emergency Relief Project No. ER 7(1), Kalihiwai Section

This is in response to your letter dated September 14, 1960, requesting our opinion on the following question:

> "Does the power line easement acquired by Kauai Electric Company, Limited and Hawaiian Telephone Company, Limited by Deed from Kilauea Sugar Company, Limited dated September 30, 1949, have legal value?"

We understand that Kilauea Sugar Co., Ltd. has fee simple title to Kuhio Highway. A width of approximately 18-20 feet thereof has been used as a public right-of-way for more than 60 years. In 1949, Kilauea Sugar Co., Ltd. granted a power line easement (10' wide) to Kauai Electric Co., Ltd. and to Hawaiian Telephone Co. by Deed dated September 30, 1949, recorded in Liber 2270, pages 56-64. Said easement lies outside of the traveled way. The utility companies erected poles and wires within the area of this easement.

The subject highway is being reconstructed and widened, necessitating the relocation of several poles and wires by the two utility companies, at a cost of approximately $783.00.

Mr. Frank R. Carlson, Division Engineer of the U.S. Bureau of Public Roads, by letter dated September 8, 1960,

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notes that the utility poles are immediately adjacent to the public way. And since the road was apparently improved by the County of Kauai with county funds, he feels that a dedication of the roadway has resulted and therefore the easement has no legal value. He further states that if this is correct, the provisions of Sec. 111-20, R.L.H. 1955, would then apply.

It is well settled that the dedication of property to the public use may be created at common law by virtue of an express deed or by implication from long acquiescence in a public use (26 C.J.S. Dedication, Sec. 13, p. 420). A dedication may also arise by force of statute, setting forth the procedure for the offer and acceptance of the property to be dedicated (Id. Sec. 1, p. 398).

Sec. 142-1, R.L.H. 1955, as amended, provides the means for a statutory dedication. So far as pertinent, it reads:

> "All roads, alleys, streets, ways, lanes, trails and bridges in the Territory, opened, laid out or built by private parties and dedicated or surrendered to the public use, are declared to be public highways. Such dedication shall be by deed of conveyance naming the Territory as grantee, which, in the case of a county highway, shall be delivered to the county and accepted by its board of supervisors... In every case where such road, alley, street, way, lane, trail, bridge or highway has been constructed and completed as required by any ordinance of the county or any rule, regulation or resolution thereof having the effect of law, the board of supervisors of the county shall accept the dedication or surrender of the same without exercise of discretion."

There has been no compliance with the above provision. The owner, Kilauea Sugar Co., Ltd., has not made a deed of conveyance nor has there been any acceptance of the subject

60-110

portion of Kuhio Highway. Hence, Sec. 142-1 does not apply. Nor has there been an express offer of dedication made by the owner. We, therefore, conclude that a dedication was created by implication.[1] In such a case, the width of the highway is determined by the extent of the use (16 Am. Jur., Dedication, Sec. 55, p.402). This principle was recognized by the Hawaii Supreme Court as early as 1858 in Kamehameha v. Kahoohano, 2 H. 118, where it is stated the public has the right to use a dedicated way "secundum formam doni", which is defined as "according to the form of the gift or grant" (Black's Law Dictionary, 4th Ed., p. 1521).

According to the form of the use of Kuhio Highway, there would be, at most, a dedication of the 18-20 feet because that was the width actually used by the public. The utility pole area, lying outside of the traveled way, would not be included in the area dedicated. Kilauea Sugar Co., Ltd. therefore made a valid conveyance of this easement area to the utility companies.

Since the widening of the Kuhio Highway requires the relocation of the utility facilities located within a privately owned easement, Sec. 111-20, R.L.H. 1955, would be inapplicable. This section requires the utility company to pay the first $3,000 of the cost and one-half in excess thereof, with the State contributing the other half. It applies only where the facilities are within an existing State or federal-aid highway (A.G. Opinion 58-138, July 28, 1958). Such is not the case here.

We therefore conclude that the easement to Kauai Electric Co., Ltd. and Hawaiian Telephone Co. is valid. Accordingly, the cost of relocating the poles and wires therefrom to widen Kuhio Highway should be borne by the State under the general rules providing for the just compensation for the taking of easements (17 Am. Jur., Easements, Sec. 3, p. 619).

Very truly yours,
Lawrence H. Kam

LAWRENCE H. KAM
Deputy Attorney General

APPROVED:
Shiro Kashiwa

SHIRO KASHIWA
Attorney General

[1]/Cf: Op. dated Nov. 16, 1956
by Deputy Attorney General Tamura

60-110

ADDRESS REPLY TO
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XXI-B

Op. 60-111

STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

October 12, 1960

Honorable Manuel Souza Henriques
Vice Speaker, House of Representatives
First Legislature, State of Hawaii
Kapaa, Kauai

Dear Sir:

This is in reference to your letter of September 6, 1960, requesting our opinion on Kauai County Board of Water Supply's liability for interest charges on $130,000 reallocated by the Governor - deducted from the county's real property tax.

The specific questions you ask are:

"1) Since the County of Kauai was not required to pay interest & Principal on items (B) & (C) for which bonds were sold on June 15, 1959 shouldn't the Debt service charges be borne by the State?

"2) If the State is not responsible for these charges, shouldn't the Kauai County Board of Water Supply reimburse the County of Kauai for the amounts withheld by the State from the County's real property tax on account of the above-mentioned charges?"

In answering your first question, we are of the opinion that the County of Kauai is responsible for the payment of interest and principal as provided by section 4(f), Act 224, Session Laws of Hawaii 1959.

The facts as stated in your letter, and verified with the Department of Budget and Review, indicate that the Governor, in issuing the general obligation bonds in 1959, allocated $130,000 for the construction of retaining walls and park development in Kauai. However, when the proceeds of the bonds were distributed, the Governor allocated the

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sum of $130,000 for the development of domestic water sources and construction of main lines in the Island of Kauai (see Allotment Advice No. 70, dated October 22, 1959). Under the provisions of section 137-2, the Governor is authorized to allocate the proceeds of any issue to a particular improvement or to several public improvements, and he may amend his allocations from time to time. Therefore, the fact that the sum of $130,000 was originally allocated for another purpose or purposes does not affect the liability of the County of Kauai to pay for the interest and principal as provided by said section 4(f). The final designation of the project and the allocation of the proceeds of the bonds by the Governor will determine the statutory provision that must be complied with. In this case, the provision of said section 4(f) must be complied with by the County of Kauai since the final allocation was for Item D(1), section 4(a) of said Act 224.

As to your second question, we feel that this is a matter that should be passed on by the County Attorney of Kauai. The statutory provision requires that the State, through the Hawaii Water Authority, construct the main lines and further requires that the project be turned over to the Kauai County for operation. The statute does not provide the manner by which the County of Kauai may turn over the project to the Kauai County Board of Water Supply. This is entirely a matter to be decided by the County of Kauai and the Kauai County Board of Water Supply. Therefore, the question of reimbursement by the Kauai County Board of Water Supply to the County of Kauai should be presented to the Kauai County Attorney.

Yours very truly,

Harold Y. Shintaku

HAROLD Y. SHINTAKU
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

Op. 60-111

INDEXING INSTRUCTIONS - OP. 60-112

LABOR AND INDUSTRIAL RELATIONS, DEPARTMENT OF

Employment security coverage

a. Cafeteria helpers
b. Retired state employees
c. Teachers, part-time lecturers, contract appointees, substitutes, limited-term appointees
d. Teachers on maternity leave

EMPLOYMENT SECURITY LAW

Payment of benefits to

(see a, b, d, c above)

PUBLIC INSTRUCTION

Unemployment benefits payable to teachers

UNEMPLOYMENT COMPENSATION

Employees covered

SCHOOLS, PUBLIC

Unemployment benefits

UNIVERSITY OF HAWAII

Unemployment coverage

REVISED LAWS OF HAWAII 1955

Sec. 93-61 as amended by Act 222, sec. 1, SLH 1959

RLH 1955

Sec. 93-28(c)

RLH 1955

Sec. 93-29, as amended

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

August 19, 1960

Mr. William H. Coulter
Assistant Superintendent
Department of Public Instruction
State of Hawaii
Honolulu, Hawaii

Dear Sir:

Your letter of August 10, 1960, has been referred to me for an opinion as to whether or not a teacher on maternity leave is eligible to receive unemployment compensation beginning six months after birth of her child and no vacancy exists. Your question may be answered in the affirmative.

Under Section 93-28, R. L. 1955, an unemployed individual shall be eligible to receive benefits:

(a) if she has made a claim for benefits,

(b) if she is registered for work and thereafter continues to report at an employment office in accordance with regulations,

(c) if she is <u>able and available for work</u>,

(d) if she has been unemployed for a waiting period of one week during her benefit year,

(e) if she has during her base period been paid wages for insured work.

Section 93-29, R. L. 1955, lists the disqualifications for benefits. If a claimant is found to be so disqualified, benefits are postponed for a period of from two to seven weeks in addition to the week of separation. Section 93-29(g) provides that an individual shall be disqualified for benefits within four months prior to the anticipated date of such individual's giving birth to her child and two months after child birth. In other words the teacher may be eligible to receive unemployment benefits two months after giving birth rather than having to wait six months.

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We must remember that the above is a general rule and since each claimant's case is reviewed individually unemployment compensation benefits will necessarily vary.

Very truly yours,

(s) Donald H. C. Low

DONALD H. C. LOW
Deputy Attorney General

APPROVED:

(s) Shiro Kashiwa

Attorney General

60-112

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

August 25, 1960

Mr. W. M. Wachter
Administrative Vice President
University of Hawaii
Honolulu 14, Hawaii

Dear Sir:

Your letter of July 26, 1960 has been referred to me for an opinion as to whether or not University of Hawaii employees who are appointed as part-time lecturers, contract appointees, and limited-term appointees are eligible for unemployment benefits. Your question may be answered in the affirmative.

Under Section 93-28, R. L. H. 1955, an unemployed individual shall be eligible to receive benefits:

"(a) if he has made a claim for benefits.....,

"(b) if he is registered for work and thereafter continued to report at an employment office in accordance with regulations.....,

"(c) if he is <u>able and available</u> for work.....,

"(d) if he has been unemployed for a waiting period of one week during his benefit year.....,

"(e) if he has during his base period been paid wages for insured work....."

Act 222, L. 1959, which became effective on July 5, 1959 extended coverage of unemployment benefits to government workers. Therefore, since the employees that you specify in your letter were government employees and since the Bureau of Employment Security has found that they met the eligibility requirements as provided in Section 93-28, R. L. H. 1955, they are eligible to receive unemployment benefits. We must remember that because each claimant's case is reviewed individually unemployment benefits will necessarily vary.

I may also state that Act 222 amended Section 93-1(h), R. L. H. 1955, to include government agencies under the definition of an "employing unit".

60-112

Section 93-1(i) defines "employer" as "any employint unit....." And because the University was the "employer" of the employees you specified in your letter, the State must reimburse the unemployment compensation fund the proportionate share of benefits paid as provided by Section 93-61, R. L. H. 1955, as amended by Act 222, Session Laws 1959.

Very truly yours,

(s) Donald H. C. Low

DONALD H. C. LOW
Deputy Attorney General

APPROVED:

(s) Shiro Kashiwa

Attorney General

60-112

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Op. 60-112

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

October 19, 1960

Honorable William F. Quinn
Governor of Hawaii
Iolani Palace
Honolulu, Hawaii

Dear Sir:

Your request for information concerning payments of unemployment benefits to certain state employees has been referred to me.

Act 222, L. 1959, which became effective on July 5, 1959, extended coverage of unemployment benefits to government workers. But, before a governmental employee may receive benefits, he must first meet the same eligibility requirements as non-governmental employees which are provided for under Section 93-28, R. L. 1955.

Turning now to the specific questions you ask:

1. WHETHER OR NOT A CAFETERIA HELPER WHO RESIGNS HER JOB AT THE CLOSE OF SCHOOL IN JUNE TO TAKE CARE OF HER MINOR CHILDREN IS ENTITLED TO BENEFITS.

If the employer cannot show that the employee should be disqualified for benefits under Section 93-29, R. L. 1955, as amended, the bureau will make a determination that she left her work voluntarily with good cause. The cafeteria worker must then affirmatively meet the availability provision of Section 93-28(c), R. L. 1955. If she can prove to the bureau that she has subsequently made arrangements to have her minor children cared for and that there are no other restrictions placed upon her availability, she will then be entitled to draw benefits.

2. WHETHER OR NOT A STATE EMPLOYEE WHO RETIRES IS ENTITLED TO DRAW UNEMPLOYMENT BENEFITS.

There are two types of retirement, voluntary and involuntary.

The bureau has classified voluntary retirement as a "voluntary quit". Examples of this type are disability,

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disagreement with superior and domestic reasons. If it is found that this voluntary quit was for good cause, the employee will not be disqualified for benefits as long as he meets the eligibility requirements of being able and available for work.

Involuntary retirement is classified as a discharge. Mandatory retirement at age 70 is an example of this type of discharge. If no misconduct was involved in the discharge, the employee will not be disqualified from benefits as long as he meets the eligibility requirements of being able and available for work.

3. WHETHER OR NOT TEACHERS WHO ARE APPOINTED AS PART-TIME LECTURERS, CONTRACT APPOINTEES, SUBSTITUTES, AND LIMITED-TERM APPOINTEES ARE ELIGIBLE FOR UNEMPLOYMENT BENEFITS.

Attached is a copy of the letter, dated August 25, 1960, sent to Mr. W. M. Wachter which answers this question.

4. WHETHER OR NOT A TEACHER ON MATERNITY LEAVE IS ELIGIBLE TO RECEIVE UNEMPLOYMENT COMPENSATION BEGINNING SIX MONTHS AFTER BIRTH OF HER CHILD AND NO VACANCY EXISTS.

Attached is a copy of the letter, dated August 19, 1960, sent to Mr. William H. Coulter which answers this question.

5. WHO FINANCES BENEFITS PAID TO GOVERNMENT EMPLOYEES.

Act 222, L. 1959, which became effective July 5, 1959, states that:

> "(b) In lieu of contributions required of employers under this chapter, the Territory and its political subdivisions and instrumentalities (hereinafter referred to as 'governmental employers' or 'governmental employer' as the case may be) shall pay into the fund an amount equivalent to the amount of benefits paid to individuals based on wages paid by governmental employers. If benefits paid an individual are based on wages paid by both a governmental employer and one or more other employers, the amount payable by such governmental employer to the fund shall bear the same ratio to total benefits paid to the individual as the base period wages paid to the individual by such governmental employer bear to the total amount of base

> period wages paid to the individual by all his base period employers. If the base period wages of an individual include wages from more than one governmental employer, the amount to be paid into the fund with respect to the benefits paid to such individual shall be prorated among the liable governmental employers in proportion to the wages paid to such individual by each such employer during the base period. The amount of payment required from governmental employers shall be ascertained by the board quarterly and shall be paid from the general funds of such governmental employers at such time and in such manner as may be prescribed by the board and approved by the comptrollers or auditors of the respective governmental employers, ..."

We interpret this provision to mean that each department, e.g., the Department of Public Instruction, will not be charged. In other words, benefit payments will not come from the budgets of the respective departments but from the general fund of either the State or County as the case may be.

Very truly yours,

DONALD H. C. LOW
Deputy Attorney General

Encs.

APPROVED:

Attorney General

60-112

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Op. 60-113 ✓

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

October 21, 1960

Mr. Edward L. Silva
Personnel Director
Department of Civil Service
County of Hawaii
Hilo, Hawaii

Dear Mr. Silva:

Subject: Increment Pay Credit While on Sabbatical Leave or Educational Leave

This is in reply to your letter of October 7, 1960, wherein you requested an opinion to the question raised in the letter of Mrs. Helen Wakai, County Medical Social Work Supervisor, to you of October 6, 1960. We quote from Mrs. Wakai's letter:

> "It is our understanding that Chapter 82, SLH 1959, allows an employee on an educational leave to earn service credits during his leave, which upon his return to his former position, will be applicable towards his next increment. We wonder whether such service credit is allowed to an employee who is on a sabbatical leave."

Be advised that you are correct in construing Act 82, S.L.H. 1959, as authorizing an employee on educational leave to earn service credits during his leave, which upon his return to his former position will be credited towards his next increment or longevity. Such service credit, however, is not authorized under Act 82 to an employee who is on sabbatical leave. The language in Act 82 makes no mention of sabbatical leave nor is the language similar to that of section 3-21(n), R.L.H. 1955 which covers sabbatical leave. Rather, the language in Act 82 is the language used to define educational leave under section 3-21(m), R.L.H. 1955. The pertinent language in subsection (m) reads:

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> ". . .to pursue a course of instruction, to engage in research or otherwise to improve his ability and increase his fitness for public employment. . . ."

The pertinent language in Act 82 reads:

> ". . .to pursue a course of instruction or engage in research, thereby improving his ability and increasing his fitness for public employment. . . ."

On the other hand, the language under subsection (n) reads:

> "An employee on sabbatical leave shall not engage in any form of employment except such as shall tend to promote his professional education and training. . . shall devote at least two-thirds of the period of leave to such educational activities as will contribute to the value of his service to the Territory [State]."

Although an employee on sabbatical leave does not earn service credits for the period he is on leave, the employee, however, is entitled to the difference in compensation between the minimum compensation paid to the substitute for the employee on sabbatical leave and the actual compensation received by the employee on sabbatical leave at the time such leave was granted. On the other hand, although an employee on educational leave under section 3-21(m) is entitled to service credits during the period of his leave, such employee is not entitled to any difference in compensation paid the substitute and the employee on sabbatical leave.

Hence, an employee contemplating a leave of absence should weigh the advantages and disadvantages under the educational leave provision and the sabbatical leave provision of our law. The employee should also take note that under a sabbatical leave, he will not be deprived of "any accumulated vacation allowance or sick leave but shall accrue no additional vacation allowance or sick leave during the period of such leave."

Very truly yours,

Andrew S. O. Lee

Andrew S. O. Lee
Deputy Attorney General

APPROVED:

Shiro Kashiwa

Shiro Kashiwa
Attorney General

Op. 60-113

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~~XXIII~~

Op. 60-114

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

October 24, 1960

Mr. John H. Felix
Administrative Assistant
to the Governor
Iolani Palace
Honolulu, Hawaii

Dear Mr. Felix:

This is in response to the letter of J. C. Myatt, Deputy State Highway Engineer, dated October 12, 1960, requesting an opinion from this office as to whether the State Highway Department may properly expend part of the funds appropriated by the legislature for the continuation of the access road for the Kula Forest Reserve on a road outside the Forest Reserve area connecting the latter with a completed State highway.

The facts are briefly as follows. Several years ago the State constructed a highway leading toward the Kula Forest Reserve, but which did not quite reach the same. Subsequently, the State built a rough dirt road from the end of the completed highway to the border of the Forest Reserve over private property. In 1957 the legislature made an appropriation of $25,000 designated "Continuance of Access Road, Kula Forest Reserve." Pursuant to such, $21,000 was expended to construct a road extending from the above dirt road at the edge of the Forest Reserve to a spring in the Kula Forest, to which it had long been the desire of the Public Works and Parks officials to have access. A balance in the amount of $4,000 remains after the completion of the road in the Forest Reserve area, and the question has risen as to whether this sum may be expended for the necessary surveys and plans for the construction of a paved road connecting the State highway extension with the Kula Forest Reserve road.

The statute appropriating the money in question simply states "Continuance of Access Road, Kula Forest Reserve." As the above language is ambiguous as to whether it is intended to include a continuation of the access road outside of the Forest

Op. 60-114

Reserve, it is necessary to construe the same in light of the factual background in order to determine its meaning and scope. A search of the record discloses that there are no committee reports commenting upon the intent of the legislature with regard to the use of the funds appropriated. Inasmuch as it has long been the intent of the governmental bodies concerned to have an improved road extending from the main highway to the springs of the Forest Reserve, and as the present statute generally provides for a continuance of the access road, the language of the appropriation is sufficiently broad to cover the probable intent of the legislature to provide funds for the construction of a paved road both in and outside of the Forest Reserve area to connect with the previously completed State highway.

Therefore, it is the opinion of this office that the balance in the amount of $4,000 remaining after the construction of the road within the Kula Forest Reserve may properly be expended for the preparation of plans and surveys necessary for the completion of an improved road between the Forest Reserve area and the terminus of the State highway extension.

Very truly yours,

Robert M. Botts

Robert M. Botts
Deputy Attorney General

APPROVED:

Shiro Kashiwa
Attorney General

Op. 60-114
Indexing not necessary.

Op. 60-114

INDEXING INSTRUCTIONS

I. Photo Concession at the Honolulu International Airport.

   a. The Hawaii Aeronautics Commission is authorized to reduce the rental rates.

   b. The Hawaii Aeronautics Commission can grant a change from one of individual ownership to one of a corporate entity if a sublease is executed with the prior written approval of the Commission.

II. Act 245 is inapplicable.

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XVII-B

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

October 14, 1960

Mr. A. P. Storrs
Director of Aeronautics
Hawaii Aeronautics Commission
Honolulu International Airport
Honolulu, Hawaii

Dear Sir:

This is in response to your letter No. 60.671, dated September 27, 1960, for an opinion concerning the photo concession operated at the Honolulu International Airport by Arthur S. Carter. You state that Mr. Carter, who was awarded the photo concession on June 1, 1958 on a month-to-month revocable permit basis, requests that his fees be reduced and for permission to change the concession from one of individual ownership to one of corporate ownership. Specifically, you ask:

1. Can the Commission reduce the fees as per the request initiated?

2. Can the Commission grant a change of individual ownership to one of corporate ownership?

We refer you to Sections 3 and 16 of the Terms and Conditions in the Agreement entered into between Arthur S. Carter and the Hawaii Aeronautics Commission which read as follows:

"3. Change in Rental Rate. The Commission may at any time increase or decrease the monthly rental rate by giving to the Permittee written notice thereof at least twenty-five days prior to the end of the particular fee period."

60-115

"16. Assignment and Sublease. The permit may not be assigned. The permittee shall not sublet without the prior written approval of the Commission."

Section 3 is quite clear and reserves to the Commission the power to change rental rates.

Section 16 specifically states that an assignment cannot be made, but provides for the subletting of the concession with the prior written approval of the Commission. As such, the proposed change from one of individual ownership to one of a corporate entity can only be effected if a sublease is executed. It should be noted, however, that under such an arrangement, the Permittee would still be primarily liable to the Commission.

Act 245, Session Laws of Hawaii 1959, as amended, though intended to cover situations of this nature, is inapplicable here. Crucial in this determination is the fact that the Agreement was entered into before Act 245 became law.

It is clear that a state may not pass a law impairing the obligation of contracts (Art. 1, Section 10, United States Constitution). Subsequent legislation may not contravene or interfere with any of the provisions of a contract, whether the contract be between individuals or between a state agency and an individual. (Sweet v. Wilkinson, 40 So. 2d 427 (1949))

Therefore as between the requirements of Act 245 and a provision in an agreement entered into before the passage of the Act, the provision prevails.

Based on the above discussion, our opinion is that the Commission is authorized to reduce the fees as per the request initiated and grant the change of individual ownership to one of corporate ownership only after a sublease is executed with the prior written approval of the Commission.

Very truly yours,

APPROVED:

/s/ Shiro Kashiwa

SHIRO KASHIWA
Attorney General

LINCOLN J. ISHIDA
Deputy Attorney General

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INDEXING INSTRUCTION

Op. 60-116

EMPLOYEES' RETIREMENT SYSTEM

Membership, Eligibility to

An employee eligible to benefits from a county's Policemen, Firemen and Bandsmen's Pension Fund is not entitled to membership in the Employees' Retirement System under Act 239, S.L.H. 1931.

COUNTIES

Policemen, Firemen and Bandsmen's Pension Fund

An employee eligible to benefits from a county's Policemen, Firemen and Bandsmen's Pension Fund is not entitled to membership in the Employees' Retirement System under Act 239, S.L.H. 1931.

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Op. 60-116

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

October 27, 1960

Mr. Harold C. Hill, Secretary
Employees' Retirement System
of the State of Hawaii
Keelikolani Building
Honolulu, Hawaii

Dear Sir:

This is in reply to your letter of October 3, 1960, requesting our opinion on the applicability of Chapter 6, Parts II (Retirement System) and III (Pensions for Policemen, Firemen and Bandsmen), in the following situation:

Mr. Urban C. Carvalho has been a member of the Hawaii County Band since 1926. He has also been a school teacher under the Department of Public Instruction since September, 1935, and has been a regular member of the Employees' Retirement System since September, 1935 upon the basis of his employment as a school teacher. The question concerns Mr. Carvalho's status as a member of the Policemen, Firemen and Bandsmen's Pension Fund under Part III, Chapter 6, Revised Laws of Hawaii 1955, and as a member of the Employees' Retirement System under Part II, Chapter 6, Revised Laws of Hawaii 1955.

Under the above set of facts, it is our opinion that Mr. Carvalho is not entitled to membership in the Employees' Retirement System if he is today eligible for benefits from the county's Policemen, Firemen and Bandsmen's Pension Fund. On the other hand, if he is not eligible under the county's Pension Fund, he is deemed to be a member of the Retirement System by virtue of having been a county bandsman since 1926.

Pensions for policemen, firemen and bandsmen were first provided for by Act 220, Session Laws of Hawaii 1917 (now Part III, Chapter 6, Revised Laws of Hawaii 1955). The act limited its benefits to policemen, firemen and bandsmen. See Standing Committee Report No. 399, Senate Journal 1917, page 1036.

Op. 60-116

It was not until 1925 that the legislature enacted Act 55, establishing a retirement system "for the purpose of providing retirement allowances for employees of the Territory of Hawaii." The benefits of the system were extended to county and city and county employees by Act 251, Session Laws of Hawaii 1927. Excepted were policemen, firemen and bandsmen entering service after January 1, 1928 and entitled to membership in the Pension Fund created in 1917.

Mr. Carvalho, having entered service in 1926, was therefore at one time entitled to benefits under both the Policemen, Firemen and Bandsmen's Pension Fund and the Employees' Retirement System of the Territory of Hawaii.

This possibility of dual benefits was pointed out to the legislature and the result was Act 239, Session Laws of Hawaii 1931, entitled "An Act Providing for the Determination of the Status of Certain Members of, or Claimants to Membership in, Pension Funds Provided for by Chapter 130 of the Revised Laws of Hawaii 1925, or the Employees' Retirement System of the Territory of Hawaii", the pertinent sections of which read as follows:

> "SECTION 1. It shall be incumbent upon (1) all persons who claim to be members of any pension fund provided for by Chapter 130 of the Revised Laws of Hawaii 1925, and whose names are not now enrolled upon the records of such fund as members thereof (either as beneficiaries or otherwise) and (2) all persons who claim to be such members and whose names are enrolled upon the records of the employees' retirement system of the Territory of Hawaii as alleged compulsory members thereof, to inquire of the trustees of such pension fund concerning their present status and to make application to the trustees of such fund for the adjudication of their present status with respect to such fund. It shall be incumbent upon the trustees of such pension fund to give to all such applicants such information as shall be so requested and to hear all such applications as may be so presented, and to determine the status of all such applicants with respect to such fund, subject to appeal on questions of law only from decisions of such trustees in the same manner, to the same tribunals, and subject to the same conditions, as nearly as may be, as in the cases of

appeals on points of law from decisions of district magistrates.

"SECTION 2. Any such applicant who shall be so adjudicated to be still a member of such pension fund shall continue, subject to the provisions of law, to be a member of such fund and shall not, so long as he is still such member, be entitled to become or deemed to be a member of the employees' retirement system of the Territory of Hawaii and any amounts which may have been contributed by him to such system as a supposed compulsory member thereof shall be refunded to him. Every such applicant who shall be so adjudicated to be no longer a member of such pension fund shall be deemed to have the same status, with respect to membership or eligibility to membership in said employees' retirement system as if he had never been a member of such pension fund.

"SECTION 3. All persons mentioned in Section 1 of this Act who shall fail to make application, as in this Act required, prior to the first day of January, 1932, for adjudication as to their present status with respect to such pension fund shall be conclusively deemed to have waived any rights or claims which they had or might have in or against such pension fund or to membership therein and shall be deemed to have the same status with respect to membership or eligibility to membership in the said employees' retirement system as if they had never been members of such pension fund."

Regarding Act 239, Standing Committee Report No. 341, Senate Journal 1931, page 1079, states:

"Your Committee is advised by the Secretary of the Employees' Retirement System that there are a number of former policemen, firemen and bandsmen of the counties and city and county who have left service and who are eligible to benefits under the pension funds but who have never failed [sic] claims for

Op. 60-116

pensions due them, and that some of these former employees who have become members of the Employees' Retirement System will file claims for pensions against the pension funds and will have their applications approved while still active members of the system. Such a condition will undoubtedly prove detrimental to the morale of the other members of the system and expensive to the various counties and city and county.

"Your Committee feels that this legislation is desirable, and therefore recommends the passage of the Bill."

It is clear, therefore, that it was incumbent upon Mr. Carvalho to make a selection prior to January 1, 1932. It is clear also what the legislature intended to accomplish by Act 239. Assuming that he did make a selection and was adjudicated to be a member of the Pension Fund, any contributions made by Mr. Carvalho should be refunded to him as erroneous contributions. He does not have to resign his position as a teacher.

The fact that eligibility to membership in the Retirement System arose through other employment (as a teacher) than that which qualified him for membership in the Policemen, Firemen and Bandsmen's Pension Fund (as a bandsman), in our opinion, does not lead to the conclusion that Mr. Carvalho might possibly belong to the Pension Fund as well as the Retirement System. Section 2 of Act 239 above is very clear in showing that coverage from only one pension fund or system was intended. Similarly, sections 6-130, 6-25 and 6-22, Revised Laws of Hawaii 1955, all point to the same conclusion.

In passing, we might mention that section 6-22 is not applicable in this case. Section 6-22 was originally part of section 14 of the act establishing the Retirement System in 1925 and it merely states that no other statute providing for pensions shall apply to a member of the Retirement System. It has no application here because Mr. Carvalho and other county employees were not even covered by the Retirement System in 1925. On the contrary, it reaffirms the idea that only one pension fund or system is intended for each government employee.

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

Yours very truly,

Daniel R. Matsukage

DANIEL R. MATSUKAGE
Deputy Attorney General

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Op. 60-117

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

November 7, 1960

Dr. Katsumi Kometani
Chairman, Commissioners of
Department of Public Instruction
Honolulu, Hawaii

Dear Sir:

This is in reference to your letter dated October 31, 1960, requesting our opinion on the question raised by Representative James H. Wakatsuki in his letter of October 17, 1960. In his letter to you, Representative Wakatsuki questions the legality of the appointment of Mr. Robert F. Ellis as Deputy Superintendent for Business Administration on the basis that section 5-1, Revised Laws of Hawaii 1955, was not complied with.

The pertinent portion of section 5-1, Revised Laws of Hawaii 1955, provides that all officers and employees of the State be citizens of the United States and residents of the State for at least three years. This section further provides that persons without the above qualifications may be hired if no qualified person applies within ninety days after first publication of an advertisement of such position.

There is no question that this provision has been complied with. Mr. Ellis is a citizen of the United States and has been a resident of Hawaii for the past fifteen years. Therefore, there was no necessity to publish an advertisement of the position.

The appointment of Mr. Ellis as one of the deputy superintendents by the Commissioners of the Department of Public Instruction under the provisions of sections 37-10 and 38-38, Revised Laws of Hawaii 1955, is proper and valid.

Sincerely yours,

Harold Y. Shintaku

HAROLD Y. SHINTAKU
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

Op. 60-117

No Opinion

No. 60-118

November 14, 1960

INDEXING INSTRUCTIONS

RESIDENCE

Same meaning as domicile

Established by independent acts and declarations accomplished at time of decision to establish residency, not merely by living "off the military post".

REVISED LAWS OF HAWAII 1955

Organic Act

Construction of section 63 - Domicile

HAWAIIAN ORGANIC ACT

Section 63 - domicile

CONSTITUTION OF HAWAII

Article II, Section 3

Residence established by independent acts and declarations at time Of decision to establish same, not merely by living "off military post".

Op-60-119

WKW:LNC
XVIII
Op. 60-119

November 14, 1960

Board of Medical Examiners
1000 Ward Avenue
Honolulu 14, Hawaii

Attention: Harry L. Arnold, Jr., M.D., Secretary

Gentlemen:

You have requested the opinion of this office regarding whether or not a serviceman living "off the post" while stationed in Hawaii for two years has acquired the status of a local resident of Hawaii for purposes of medical licensure.

This opinion will be supplemental to the opinion of June 20, 1960 to your chairman as to the status of a Naval officer in Hawaii who had taken definite steps to establish residency shortly after his arrival in Hawaii.

In order to conclusively answer your query of November 7 it will be necessary for this office to have more information such as: whether or not the serviceman involved, Dr. Donald A. Schutt, notified the armed service concerned of his desire to establish residency in Hawaii and had his service records changed, accordingly, back in 1956; where he has voted since August 1956; whether he registered to vote in Hawaii in 1957 or 1958; whether he did anything else in 1956 or 1957 to indicate his intention of establishing residency in Hawaii.

As indicated in our opinion of June 20, the intention of a party to establish residency in Hawaii must be manifested by specific declarations and other acts and conduct, consistent with his professed desire to establish domicile in Hawaii, uttered and accomplished contemporaneously with his decision to become a resident of Hawaii.

Section 63 of the Organic Act, which continues to be the law of Hawaii until August 21, 1961, provides:

> "That no person shall be allowed to vote who is in the Territory by reason of being in the Army or Navy or by reason of being attached to troops in the service of the United States."

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The intention of section 63 is clearly to provide that no person attached to the armed forces of the United States becomes a resident of Hawaii merely by reason of being in Hawaii by virtue of being stationed here as a serviceman.

The Constitution of the State of Hawaii provides in section 3 of Article II:

> "No person shall be deemed to have gained or lost residence simply because of his presence or absence while employed in the service of the United States, or while engaged in navigation or while a student at any institution of learning."

This section also seems to clearly provide that no person shall be deemed to have been domiciled in Hawaii simply because of his presence here while employed in the service of the United States.

For the aforementioned reasons of law and fact this office is presently of the belief that Dr. Donald A. Schutt did not establish domicile in Hawaii as required by the provisions of section 64-3, Revised Laws of Hawaii 1955 merely by reason of living "off the military post from August 11, 1956 to September 8, 1958" while stationed here at Barbers Point Naval Air Station.

Very truly yours,

W. K. WATKINS, JR.
Deputy Attorney General

APPROVED:

SHIRO KASHIWA
Attorney General

Op. 60-119

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Op. 60-120

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

November 15, 1960

Mr. Walton M. Gordon
Superintendent, Department of
Public Instruction
State of Hawaii
P. O. Box 2360
Honolulu, Hawaii

Dear Sir:

This is in response to your letter dated October 31, 1960 requesting our opinion on the question--at what age should the department of public instruction assume the responsibility for the education program of exceptional children under the provisions of chapter 43, part II, Revised Laws of Hawaii 1955.

It is our understanding that the Oahu Society for Crippled Children and Adults wants to turn the operation of the Sultan School over to your department. The Sultan School trains crippled children at the pre-school level, between the ages of 2 1/2 to 6 years.

The provisions of said chapter 43 place the duty to provide instruction, special facilities and special services for education, therapy and training of exceptional children below the age of 20 upon the department of public instruction. There is no minimum age specified but the provision is made that "The eligibility of exceptional children for instruction, special facilities and special services shall be determined in accordance with those standards established by the department." (§ 43-24, RLH 1955). The provision of § 43-25, RLH 1955 makes it mandatory upon the department to establish and make studies, surveys, evaluations and rules and regulations as are necessary to carry out the purposes of part II, chapter 43, RLH 1955.

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Therefore, based on studies, surveys and evaluations, the department should establish the minimum age or standards for the eligibility of crippled children to the program established under part II, chapter 43, RLH 1955. This is true of all exceptional children programs carried on by the department.

Yours very truly,

Harold Y. Shintaku

HAROLD Y. SHINTAKU
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

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OP. 60-121

INDEXING INSTRUCTIONS

1. Highways - Relocation of Poles

Where utility facilities in an existing public way must be relocated for the widening thereof, the utility company is required by Sec. 111-20 R.L.H. 1955 to pay the first $3,000 of the cost and one-half in excess thereof, with the State paying the other half.

2. Highways - Relocation of Poles per License

When the licensee, who installed utility poles on private land refuses to relinquish possession and relocate the poles at its own expense pursuant to the terms of the license, the State can condemn the subject property and proceed as licensor to oust the utility company and relocate the poles at the latter's expense.

3. Highways - Payment for Taller Utility Poles

A utility company desirous of erecting its poles and wires in a public way is subject to the regulations of the Public Utilities Commission under its franchise and must bear the expense for taller poles.

RLH 1955

Sec. 111-20

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Op. 60-121

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

November 22, 1960

Mr. J. C. Myatt
Deputy State Highway Engineer
Department of Transportation
Division of Highways
Honolulu, Hawaii

Dear Mr. Myatt:

Re: Legal Opinion - Volcano Road, Federal Aid Project No. F-011-2(2)

By letter dated October 25, 1960, you requested our opinion as to whether the State should participate in the cost of relocating seventeen electric poles of the Hilo Electric Light Company, Limited, required by the construction of the Volcano Road.

Three of the poles are to be relocated at a cost of below $2,000, from within the boundaries of the Volcano Road owned by the State. The remaining fourteen poles are located outside of the Volcano Road, within the confines of property owned by W. H. Shipman, Limited, and leased to Olaa Sugar Company, Limited. By agreement executed on August 9, 1934, Olaa Sugar Company, Limited, as Licensor, granted Interurban Electric Company, Limited, now known as Hilo Electric Light Company, Limited, as Licensee, the right to construct, maintain and operate electric power and light transmission lines over and across all lands owned and/or held by the Licensor, for a period not to exceed thirty years. These poles are to be relocated within the newly constructed highway.

In order to relocate within the new highway, poles of greater height than those now in use are required by Rule GO-6 of the Public Utilities Commission to provide for minimum wire clearance.

We will answer your questions in the order set forth in your letter.

60-121

1. Who is to bear the cost of relocating the three poles located in the public right of way?

Section 111-20, R.L.H. 1955, provides for the contribution by the State for the costs of relocating utility facilities. It reads in part:

> "Whenever, as the result of the work of construction, reconstruction or maintenance of any territorial highway or federal-aid highway, it is necessary to provide for or require the removal, relocation, replacement or reconstruction of any utility facility, and the expense of such removal, relocation, replacement or reconstruction exceeds $3,000, one-half of such excess expense shall be a proper charge against the territorial funds available for the construction or maintenance of such territorial highways..."

Thereunder, the utility company is to pay the first $3,000 of the cost and one-half in excess thereof, with the State contributing the other half. Since the cost of removing the three poles located within the Volcano Road is below $3,000, the Hilo Electric Light Company, Limited must relocate the poles at its own expense.

2. Who is to bear the cost of relocating the fourteen poles located on the land leased to Olaa Sugar Company, Limited?

The license expressly provides for the relinquishing of possession of the premises by the utility company to the licensor in the event of condemnation or requirement for public use. The pertinent portions of the license state:

> "THAT it (the Licensee) will, whenever requested by the Licensor so to do, deliver up to the Licensor peaceable possession of any part of the land hereby demised, which may at any time be crossed by said

transmission lines, which land now is, or may hereafter during the continuance of the said term, be required or condemned for any public use or purpose, or for public roads or road purposes without indemnity or reduction of rent;

"THAT at the end of said term or other termination thereof, it will peaceably deliver up to the Licensor possession of any lands occupied by the Licensee and all rights granted by this license, together with all erections or improvements thereon belonging to or used by the Licensor, and will make good any damage done by the removal of poles, wires, appliances and appurtenances of the Licensee;

"...the term 'Licensor' used in these presents, shall include the Licensor above named, its successors and assigns,..."

Section 111-20 is inapplicable in this situation since the subject poles are not situated within an existing State or Federal-aid highway. (A.G. Ops. 60-110, 58-138)

By the terms of the agreement, the Licensee must deliver peaceable possession of any part of the premises when requested to do so by the Licensor. We therefore recommend that the State ask the Licensor to make such a request of the Licensee, including the removal of the utility facilities under consideration.

In the event the Licensor does not make the aforesaid request, it is recommended that the State proceed in an action of condemnation against the owner of the land, W. H. Shipman, Limited, and the Licensor, Olaa Sugar Company, Limited (Akana v. Damon, 42 H. 415, 1958). After the final order of condemnation is filed, the State would acquire fee simple title to the land as well as succeed to

the interests of the Licensor (McCandless v. John II Est., 11 H. 777, 789, 1899). In such case, the State could then proceed as licensor, pursuant to the terms of the license, and require the utility company to relocate the poles at the latter's expense.

3. Who is to bear the cost of providing taller poles as required by the Public Utilities Commission?

Under its franchise, the Hilo Electric Light Company, Limited was granted the right to construct, operate and maintain electric utility facilities along or under the public streets, sidewalks and roads (Sec. 1, Note 2, Franchises, Vol. II, R.L.H. 1955, p. 1721). The company is subject, however, to the rules and regulations of the public Utilities Commission (Sec. 10, R.L.H. 1925, Vol. II, Appendix, p. 2010). For failure to comply therewith, its rights and privileges may be forfeited and declared null and void (Ibid, Sec. 11).

It is clear, therefore, that if Hilo Electric Light Company, Limited is desirous of placing its poles within the newly constructed public road, it must comply with the regulations of the Public Utilities Commission and must bear the expense for the taller poles.

Very truly yours,

/S/ LAWRENCE H. KAM
LAWRENCE H. KAM
Deputy Attorney General

LHK:ec

APPROVED:

H. Rodger Betts
Attorney General
State of Hawaii

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Op. 60-122 ✓

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

November 23, 1960

Mr. William H. Coulter
Acting Superintendent
Department of Public Instruction
Honolulu, Hawaii

Dear Mr. Coulter:

This is in response to your letter dated November 17, 1960, requesting our opinion on the following questions:

"1. Should the increment date of Cafeteria Managers be September 1 as for teachers and as required in Act 196 for Cafeteria Managers as the first effective date, or should it be the anniversary date as shown on Civil Service Form D-10A?

"2. What should have been the payment procedure for a Manager employed on Step A subsequent to 7-1-59 since Step A was eliminated by statute as of 7-1-60?

"3. If Managers are paid on the basis of their Form D-10A increment date and not as teachers, what payment, if any, will be made to a Manager who resigns, goes on leave, or dies prior to June 30, 1961?"

In answer to your first question, the increment date of cafeteria managers should be the anniversary date as shown on the Civil Service Form D-10A.

Under the provisions of Act 196, Session Laws of Hawaii 1959, amending section 38-37, Revised Laws of Hawaii 1955, cafeteria managers are to be paid over a twelve-month period without proration or deduction for periods when school is not in session, effective September 1, 1959, and, further, their employment and salaries are fixed in accordance with

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Chapter 3 and Chapter 4, Revised Laws of Hawaii 1955. Therefore, the increment date should be determined according to section 4-10, Revised Laws of Hawaii 1955, as amended by Act 255, Session Laws of Hawaii 1959.

Under the provision of paragraph b-1, section 3 of Act 255, all employees of the State, employed prior to July 1, 1959, were granted an increment raise regardless of their anniversary date, and under paragraph b-6, the anniversary date was converted for all employees to July 1. Under this provision, all cafeteria managers employed on or prior to July 1, 1959, have an anniversary date of July 1 for purposes of increment raises.

In answer to your second question, a manager employed on Step A subsequent to July 1, 1959, will be entitled to an increment raise on July 1, 1960, as provided for by paragraph c of said Act 255.

In answer to your third question, a cafeteria manager who either resigns, goes on leave, or dies prior to June 30, 1961, is paid on the basis of Form D-10A increment date and not as a teacher. Therefore, the manager will receive no additional payment except those benefits provided for under Chapters 3 and 4, Revised Laws of Hawaii 1955, i.e., accumulated leave.

Yours very truly,

Harold Y. Shintaku

HAROLD Y. SHINTAKU
Deputy Attorney General

APPROVED:

H. Rodger Betts

H. RODGER BETTS
Acting Attorney General

Op. 60-122

INDEXING INSTRUCTION

Op. 60-123

I. EMPLOYEES' RETIREMENT SYSTEM

Social Security

Pensioner qualified to receive social security benefits based on contributions made by the Territory of Hawaii or by any of its political subdivisions cannot waive the privilege of applying for such benefits and still be entitled to receive pension bonus from the State. Act 242, S.L.H. 1959.

Pension Bonus, Payment of

Pensioner qualified to receive social security benefits based on contributions made by the Territory of Hawaii or by any of its political subdivisions cannot waive the privilege of applying for such benefits and still be entitled to receive pension bonus from the State. Act 242, S.L.H. 1959.

II. PENSIONS

Bonus

Pensioner qualified to receive social security benefits based on contributions made by the Territory of Hawaii or by any of its political subdivisions cannot waive the privilege of applying for such benefits and still be entitled to receive pension bonus from the State. Act 242, S.L.H. 1959.

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ADDRESS REPLY TO
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AND REFER TO
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Op. 60-123

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

December 2, 1960

Mr. Harold C. Hill, Secretary
Employees' Retirement System
of the State of Hawaii
Keelikolani Building
Honolulu, Hawaii

Dear Mr. Hill:

This is in reply to your letter of November 25, 1960, wherein you asked:

> "May a pensioner who is qualified to receive social security benefits waive the privilege of applying for such benefits in order that he may receive the state bonus as provided for by Act 242, SLH 1959?"

Pertinent here is section 3 of Act 242 which reads as follows:

> "The provisions of this Act shall not apply to any person who may retire or may have retired on or after July 1, 1957, and who will receive or who is receiving social security benefits upon his retirement when said benefits are based on contributions made by the Territory of Hawaii or any of its political subdivisions."

It is our opinion that a pensioner qualified to receive social security benefits based on contributions made by the Territory of Hawaii or any of its political subdivisions cannot waive the privilege of applying for such benefits and still be entitled to the State bonus as provided for by Act 242. The language of the Act is clear in stating that the Act shall not apply to any person who may have retired and who is receiving social security benefits based on contributions made by the Territory of Hawaii or any of its political subdivisions. The language is also clear in

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stating that the Act shall not apply to any person who may retire and who will receive social security benefits upon his retirement based on contributions made by the Territory of Hawaii or any of its political subdivisions. It is not the State's failing when a person, upon his retirement, conveniently disqualifies himself from social security benefits which he is entitled to.

Act 146, Session Laws of Hawaii 1957, which pertained to bonus payments during the period July 1, 1957 to June 30, 1959, contained a similar restriction. The Committee on Finance, in reporting on this restriction in HB No. 1229, stated:

> "The provisions of this Act shall not apply to any person who may retire on or after July 1, 1957, the reason for this being that on or after July 1, 1957 any person who will be retiring may have the opportunity to secure the benefits under the Social Security Act." (Emphasis added.) (Standing Committee Report No. 702.)

The purpose of these Acts obviously is to provide a bonus to pensioners not eligible for social security benefits. A pensioner eligible for social security benefits cannot, through his voluntary action, make himself eligible for the bonus, and thereby work a detriment to the State.

Very truly yours,

Daniel R. Matsukage

DANIEL R. MATSUKAGE
Deputy Attorney General

APPROVED:

H. Rodger Betts

H. RODGER BETTS
Acting Attorney General

Ap. 60-123

INDEXING INSTRUCTION

HARBOR BOARD

The legality of issuing $6,500,000.00 Harbor Board Revenue Bond pursuant to Act 103 S.L.H. 1959.

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ADDRESS REPLY TO
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124:XVII-A

Op. 60-124 ✓

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

December 2, 1960

Hon. Tim Ho, Chairman
Board of Harbor Commissioners
State of Hawaii
Honolulu, Hawaii

Board of Harbor Commissioners, State of Hawaii,
Harbor Revenue Bonds, Issue of 1960

Dear Mr. Ho:

At your request I have read and considered for the purpose of stating an opinion with respect to the validity of the above mentioned bond issue: (i) Part 3, Chapter 137, Revised Laws of Hawaii 1955; (ii) Act of the 29th Legislature of the Territory of Hawaii entitled "An Act Relating to Territorial Public Improvements and the Financing Thereof by the Issuance of Revenue Bonds or from Current Revenues" (Session Laws of Hawaii, Regular Session of 1957, page 100); (iii) Resolution authorizing the issuance of Harbor Revenue Bonds adopted by the Board of Harbor Commissioners of the Territory of Hawaii, September 18, 1950 (hereinafter called the "Resolution"); (iv) Resolution of the Board of Harbor Commissioners of the State of Hawaii authorizing the issuance of $6,500,000 principal amount of Harbor Revenue Bonds, Issue of 1960 (hereinafter called the "Second Supplemental Resolution"); and (v) deeds, title reports and other evidence relating to the title to harbor lands and improvements thereon.

As a result thereof, I conclude that:

(1) The execution and delivery of said Bonds of the Issue of 1960 authorized by the Second Supplemental Resolution have been sufficiently and duly authorized by the Board of Harbor Commissioners.

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(ii) The issuance of the Bonds of the Issue of 1960 in the aggregate principal amount of $6,500,000 has been duly authorized by the Legislature of the State of Hawaii. No specific additional consent or approval of any governmental authority is required for the valid issuance of the Bonds of the Issue of 1960.

(iii) Said Bonds of the Issue of 1960, when executed and delivered and duly issued by the Board of Harbor Commissioners, will be valid and binding obligations of the Board of Harbor Commissioners payable from Revenues in accordance with the terms of the Resolution and the Second Supplemental Resolution.

(iv) That upon the delivery of said Bonds of the Issue of 1960 the aggregate principal amount of bonds then outstanding under the Resolution and the Second Supplemental Resolution will not exceed the amount at the time permitted by law or authorized pursuant to the provisions of the Resolution and the Second Supplemental Resolution.

(v) The Board of Harbor Commissioners has, or will have, upon the completion of the Additional Undertaking (authorized by Session Laws of Hawaii, Regular Session 1957, page 100) good merchantable title thereto, free and clear of all liens and encumbrances and will be authorized to own, use and operate such Public Undertaking and to use and apply the revenues therefrom for the payment of the Bonds issued under the Resolution and the Second Supplemental Resolution. As used in this opinion the term "good merchantable title" has the same meaning as set forth in Section 3.03 of the Resolution.

Very truly yours,

H. Rodger Betts

H. RODGER BETTS
Acting Attorney General

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INDEXING INSTRUCTIONS

OPINION 60-125

PUBLIC IMPROVEMENT REVOLVING FUND

Use for purchase of permanent equipment

It is not proper for the comptroller to expend moneys from the Public Improvement Revolving Fund to purchase permanent equipment regardless of provisions for the reimbursement of the fund from other public improvement projects.

PUBLIC IMPROVEMENT REVOLVING FUND

USE FOR PAYMENT OF INSPECTION SERVICES DURING CONSTRUCTION

It is not proper for the comptrollet to expend moneys from the public improvement revolving fund to purchase permanent equipment or supplies which are to be used for inspectional services during the construction of public improvement projects.

REVISED LAWS OF HAWAII 1955

Sec. 110-3

ADDRESS REPLY TO
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125:I-C

Op. 60-125

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

December 8, 1960

Honorable Michael M. Miyake
Comptroller, State of Hawaii
Honolulu, Hawaii

Attention: H. Iwamoto

Subject: Public Improvement Revolving Fund

Dear Sir:

This is in answer to your letter requesting an opinion of this office as to whether the Comptroller, with the approval of the Governor, may legally expend money from the public improvement revolving fund, which was appropriated by the legislature to make surveys and prepare plans for the construction of public improvements, to purchase equipment of a permanent nature which would be used in conjunction with the above and for inspectional services during such construction with the provision that the revolving fund should be reimbursed by the making of rental or of actual cost charges against specific public improvement projects.

The statute in question, section 110-3 of the Revised Laws of Hawaii 1955, reads in part as follows:

> "There is appropriated out of the general revenues of the State the sum of $25,000 which is a revolving fund to be known as the public improvement revolving fund for the use of the department of public works in defraying the costs and expenses incurred in making the necessary surveys and in the preparation of necessary plans and specifications for the construction of public improvements."

It is obvious that the legislature by the above statute intended to make funds available for the purchase of materials and supplies and for the payment of services which are directly required for the preparation of plans for construction projects.

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ADDRESS REPLY TO
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125:I-C

Op. 60-125

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

December 8, 1960

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Comptroller, State of Hawaii
Honolulu, Hawaii

Attention: H. Iwamoto

Subject: Public Improvement Revolving Fund

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Op. 60-125

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

December 8, 1960

Honorable Michael M. Miyake
Comptroller, State of Hawaii
Honolulu, Hawaii

Attention: H. Iwamoto

Subject: Public Improvement Revolving Fund

Dear Sir:

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It is obvious that the legislature by the above statute intended to make funds available for the purchase of materials and supplies and for the payment of services which are directly required for the preparation of plans for construction projects.

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As such, it was not the purpose of the above fund that it should be dispersed for the acquisition of equipment or material of a permanent nature which could be used generally and would be available for other construction projects. As an appropriation may not be spent for purposes other than as designated by the legislature, it is the opinion of this office that it is not proper for the Comptroller to expend moneys from the revolving fund in question for the purchase of permanent equipment or material which is not to be used in its entirety for a specific public improvement project regardless of plans or provisions for the later reimbursement of the fund from other public improvement projects.

In response to your second query, please be advised that as the fund in question has been specifically appropriated to make surveys and to prepare plans and specifications for the construction of public improvements, it is the opinion of this office that such moneys may not be expended by the Comptroller for the purchase of equipment or supplies which are to be used for inspectional services during the construction of public improvement projects.

Yours very truly,

Robert M. Botts

ROBERT M. BOTTS
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
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Op. 60-126 ✓

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

December 8, 1960

Mr. George K. Tanabe
Comptroller
University of Hawaii
Honolulu 14, Hawaii

Dear Mr. Tanabe:

This is in reference to your letter dated November 30, 1960, requesting our opinion on the legal relationship between the Board of Regents of the University of Hawaii (hereinafter referred to as "Regents") and the Associated Students of the University of Hawaii (hereinafter referred to as "ASUH"). We understand this request is made due to the proposals the Regents have received for the disposal of the stadium stock held by the University and the ASUH.

Based on the information supplied by you, it is the opinion of this office that the ASUH is an independent unincorporated association created under the authority granted by the Regents.

Under the provisions of section 44-3, Revised Laws of Hawaii 1955, as amended, the Regents have general management and control of the affairs of the university. This includes control and supervision of student activities. The preamble to the ASUH Constitution specifically provides that the ASUH is established by authority granted by the Board of Regents. The ASUH Constitution indicates that the ASUH is an unincorporated association acting independently of the Regents, under the powers granted by the Regents.

Therefore, the proposal for the disposal of the stadium stock held by the ASUH should be decided on by the ASUH Senate, as provided for under Article IV, section B, of the ASUH Constitution.

Yours very truly,

Harold Y. Shintaku

HAROLD Y. SHINTAKU
Deputy Attorney General

APPROVED:

H. Rodger Betts

H. RODGER BETTS
Acting Attorney General

Op. 60-126

No Opinion

No. 60-127

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Op. 60-128

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

December 15, 1960

Honorable William F. Quinn
Governor of Hawaii
Iolani Palace
Honolulu, Hawaii

Dear Sir:

This is in response to queries on certain considerations involved in your attendance at the official events, such as the Hostess Reception and Ball, accompanying the inauguration of President-Elect Kennedy.

You were informed of the official events by the Pre-Inaugural Committee's letter of October 31, 1960 and asked whether you would participate "in your official capacity."

Your attendance in your official capacity would be a matter of State business since you represent the State of Hawaii in its matters of Federal concern, just as you have spoken for Hawaii before the Civil Aeronautics Board and would, if the occasion required, represent Hawaii by appearing as a party plaintiff on its behalf in the United States Supreme Court (Ex Parte Kentucky v. Dennison, 24 How. (U.S.) 66, 16 L. Ed. 717 (1861)).

Inasmuch as you will be travelling on official business it lies within the area of your administrative responsibility to determine who else should be a member of Hawaii's official party in order to most effectively accomplish the purposes of the trip.

In view of the fact the inaugural events include a Hostess Reception and Ball and the fact that the Inaugural Housing Committee on December 1 informed you of its concern as to arrangements for "your personal accommodations *** for yourself and your family" it would seem that your Lady, Mrs. Quinn, was clearly expected to participate in the official events in her capacity as Hawaii's First Lady. Such being the case, should Mrs. Quinn be able to accompany you to Washington she would be attending the inauguration on a matter of official

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business as Hawaii's First Lady. In the instant case it would also seem appropriate that the Governor of Hawaii and his Lady should be accompanied by at least one personal aide to assist you in effectuating the purposes of Hawaii's attendance at the inaugural events and to maintain Hawaii's position amongst her forty-nine sister states.

Should the funds appropriated for your official travels be insufficient, you may use monies from your Contingent Fund because your party's travel will be on a State matter for which no specific appropriation was otherwise made and will have to be accomplished before the Legislature convenes in February (See our opinions to your office of November 20, 1923 and June 25, 1956 regarding expenses of travel to Washington, D. C.)

Respectfully submitted,

W. K. Watkins Jr.

W. K. WATKINS, JR.
Deputy Attorney General

APPROVED:

H. Rodger Betts

H. RODGER BETTS
Acting Attorney General

Op. 60-128

INDEXING INSTRUCTIONS

Redevelopment Corporation:

I. Real Property Tax Exemption

A redevelopment corporation organized under Chapter 143, R.L.H. 1955, as amended, is entitled to a partial property tax exemption.

* * * * *

Redevelopment Corporation:

II. Real Property Tax Exemption

Measure of the Exemption

The extent of real property exemption is set forth in the phrase:

"shall be exempted . . . from real property taxes paid upon such land and improvements in excess of the total real property taxes paid upon such land and improvements for the year prior to the commencement of proceedings by the agency for the acquisition of such lands and improvements . . . "

* * * * *

III. Revised Laws of Hawaii 1955, as amended, Sec. 143-37.

* * * * *

IV. Session Laws of Hawaii 1949, Act 379, Sec. 21.

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INDEXING INSTRUCTIONS

Redevelopment Corporation:

I. Real Property Tax Exemption

A redevelopment corporation organized under Chapter 143, R.L.H. 1955, as amended, is entitled to a partial property tax exemption.

* * * * *

Redevelopment Corporation:

II. Real Property Tax Exemption

Measure of the Exemption

The extent of real property exemption is set forth in the phrase:

"shall be exempted . . . from real property taxes paid upon such land and improvements in excess of the total real property taxes paid upon such land and improvements for the year prior to the commencement of proceedings by the agency for the acquisition of such lands and improvements . . . "

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III. Revised Laws of Hawaii 1955, as amended, Sec. 143-37.

* * * * *

IV. Session Laws of Hawaii 1949, Act 379, Sec. 21.

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Lewis Rivers

ADDRESS REPLY TO
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Op. 60-129

STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

December 16, 1960

Mr. Lee Maice, Manager
Honolulu Redevelopment Agency
City and County of Honolulu
Honolulu Hale
Honolulu 13, Hawaii

Dear Mr. Maice:

This is in response to your request for an opinion with regard to the interpretation of the phrase "prior to commencement of proceedings by the agency for the acquisition of such lands and improvements" found in Section 143-37, Revised Laws of Hawaii 1955, as amended. The pertinent portion of the statute to which your request is directed reads as follows:

> Sec. 143-37. Tax Exemption. Where so long as the major portion of a redevelopment project of a redevelopment corporation is composed of residential units and the rents for such residential unit are reasonable as compared with prevailing rental levels for comparable accomodations, the land and improvements in such project shall be exempted (a) for ten years from the date of acquisition of such project by the redevelopment corporation, from real property taxes, other than assessments for local improvements, in excess of the total real property taxes paid upon such land and improvements for the year prior to the commencement of proceedings by the agency for the acquisition of such lands and improvements; . . . (Emphasis added.)

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The language of the statute clearly indicates that the redevelopment corporation, to whom the Honolulu Redevelopment Agency (hereinafter referred to as the Agency) transfers the land and improvements acquired for the redevelopment project (hereinafter referred to as the "redevelopment realty") shall be exempted for a period of ten years from the date of acquisition of such project. Consequently it is only from the date of acquisition of the realty by the redevelopment corporation from the Agency that the period of exemption runs. The measure of the real property taxes that is to be exempted is set forth in the statement:

> ". . . real property taxes, other than assessments for local improvements, in excess of the total real property taxes paid upon such land and improvements for the year prior to the commencement of proceedings by the agency for the acquisition of such lands and improvements".

The quoted phrase indicates that the redevelopment corporation will be granted an exemption from that portion of the real property taxes which exceeds the total obligation for real property taxes which were levied upon the redevelopment realty for the year prior to the commencement of proceedings by the Agency. The legislative history of Sec. 143-37 does not offer any indication in establishing the meaning of the phrase "commencement of proceedings". It has been pointed out by the Manager of the Agency that this phrase is capable of several interpretations: (1) the day of public hearing on the project, or the day following the 30 day stay (Section 143-7, R.L.H. 1955, as amended); (2) the date on which the Agency files condemnation proceedings or takes possession thereunder; (3) the day on which a deed vesting title in the Agency is recorded.

In reading Chapter 143 of the Revised Laws of Hawaii 1955, as amended, the term "proceeding" is not used to identify any one particular act or series of acts. For example in Section

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143-7, the term "proceedings" is used to identify the public hearing and other acts of the Board of Supervisors (now the City Council) in adopting the redevelopment plan. In the last paragraph of Section 143-8, the term "proceeding" is used to identify the condemnation suit brought by the Agency. The term "proceedings" in Section 143-7 used to identify the actions taken by the Board of Supervisors and the public hearing attendant therewith leaves no doubt that said term refers to the legislative function of the Board in adopting the redevelopment plan. In such an instance, the term "proceeding" refers to the law making function of the Board of Supervisors and not to the administrative acts by an agency which puts into use the law made by such Board. See State v. Chandler, 138 N.E. 67. Generally speaking, the term "proceeding" or "proceedings" has been held to mean the form and manner of conducting judicial business before a court or judicial officers, including all possible steps in an action, from its commencement to the execution of a judgment, and in a more particular sense to any application to a court of justice for aid in enforcement of rights, for relief, for redress of injuries, or damages or for any remedial objective. Lane County v. Bristow, 173 P.2d 954; also see Words and Phrases, "Proceeding". However, it has also been held that "proceeding" may sometimes be used as a comprehensive term and may have different meanings according to context and the subject to which it relates, such as by its combination with other words and phrases which vary its ordinary meaning. Zangerle v. Evatt, 4 N.E.2d 369. An example of a more comprehensive meaning of "proceeding" would be the situation covered by the Chandler case cited above. Efforts to settle by negotiation the purchase of the redevelopment realty would appear not to constitute a "proceeding" in a condemnation suit. See Federal Deposit Ins. Corp. v. Lotsch, 3 F.R.D. 464. In the instant case the Agency may proceed to acquire land in the redevelopment project only after the redevelopment plan has been adopted. The term "proceeding" as used in Section 143-37 when given a reasonable meaning appears to be directed to a condemnation proceeding before a judicial body. This would mean that the date on which the condemnation suit has been filed with the court would be the commencement of proceeding by the Agency to acquire the

redevelopment realty. To say that the Agency commenced the proceeding on the redevelopment plan adoption date or the day after the expiration of the 30 day stay granted by Section 143-7, R.L.H. 1955, as amended, would be an unreasonable extension of the ordinary meaning attached to the term "proceeding". In fact the Agency's bringing of a condemnation proceeding is an administrative act wholly apart from the adoption of the redevelopment plan by the Board of Supervisors. See State v. Chandler, supra.

Inasmuch as the redevelopment realty in certain instances has been obtained without resorting to a condemnation suit, the date on which a contract which includes a specific price for the purchase of such realty is signed or if such contract is not utilized, the date on which the deed is delivered to the Agency should be considered to be within the meaning of the phrase "commencement of proceeding by the agency for the acquisition of such lands and improvements" in Section 143-37.

In view of the foregoing, it is the opinion of this office that the phrase "prior to the commencement of proceedings by the agency for the acquisition of such land and improvements" should be construed to include the earliest of the following dates:

1. The date on which the condemnation suit is filed;

2. The date on which the contract which sets forth a specific price for the purchase of the realty and improvements is signed by the City and County of Honolulu and the seller; or

3. The date on which the deed is delivered to the City and County of Honolulu by the seller.

Yours very truly,

Shuichi Miyasaki

SHUICHI MIYASAKI
Deputy Attorney General
State of Hawaii

APPROVED:

H. Rodger Betts

H. Rodger Betts
Acting Attorney General

Ltr. 129

ADDRESS REPLY TO
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XIX
Op. 60-130

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

December 21, 1960

Board of Regents
University of Hawaii
Honolulu 14, Hawaii

Gentlemen:

This is in reference to letter dated December 9, 1960, written by Mr. J. Garner Anthony, requesting that this office review and comment on the proposed agreement between the Board of Regents of the University of Hawaii and Messrs. Chinn Ho and Ralph Matsumura relating to the sale of the Stadium stock.

The first paragraph of the proposal offers to sell the shares held by the Regents and the ASUH to the minority stockholders on the following terms and conditions:

1. There shall be a simultaneous transfer of the shares of stock and the delivery of a deed, the deed to contain covenants of warranty transferring the title to 358,912 sq. ft. of land described to the Regents and the ASUH free and clear of encumbrances of every nature, including taxes and improvement district assessments.

2. All costs and expenses to be borne by the minority stockholders.

3. The agreement is conditioned upon the minority stockholders entering into a satisfactory contract with the holders of the franchise for the Pacific Coast Baseball League to be brought to Honolulu by April 1, 1961.

4. The Regents agree to lease the land on the following terms and conditions:

(a) Term of lease to be 61 years.

(b) The lessee agrees to expend an unspecified

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minimum amount to rehabilitate and improve the stadium facilities within an unspecified time.

(c) Lessee to indemnify lessor from all mechanics' and materialmen's liens by posting a bond.

(d) The principal use of the premises to be restricted to those designated. The restrictive use for stadium purposes to continue until another facility is developed in Honolulu and in operation. Upon completion of adequate stadium facilities, the restrictive use is to be terminated by mutual agreement or by arbitration.

(e) Rental of $25,000 per annum for as long as the premises are used for stadium purposes.

(f) The $25,000 per annum rental to be for the first 25 years, subject to renegotiation every 10 years.

(g) Subletting permitted with the approval of the lessor and rental adjustment.

(h) In the event of the change of use from stadium purposes, the net rental to be based upon the fair market value of the property appraised at its highest and best use.

(i) General terms, conditions and covenants are included in this paragraph.

(j) Provision for condemnation by governmental authority.

5. Lessee required to furnish written report and financial statement of its operations, etc.

We have reviewed the proposal and we make the following observations on the legal aspects of the proposal.

Paragraph No. 1 of the proposal specifically mentions that the shares of stock are being exchanged for real

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property that is free and clear of all encumbrances. If this is true, the question arises as to whether or not the proposal for the leasing of the property to the minority stockholders for the term specified is in violation of Act 245, Session Laws of Hawaii 1959. Act 245 requires bidding for all licenses, permits, leases and other agreements whereby a governmental agency grants to private persons the right to operate concessions for profit on any land owned or under the jurisdiction of the State, county, independent board, commission, bureau or agency of the State or of the various counties. The question also arises as to whether Act 245 is applicable to trust property held by public officials acting as trustees of a private charitable trust. However, we need not pass on the last question since it is our opinion that Act 245 does not apply to the proposal as presented to us. It is a general rule of law that a contract document (the proposal when signed by all parties) must be construed in its entirety. The requirement that the deed be a warranty deed, free and clear of all encumbrances, is one of the terms or conditions of the proposal. Reading the proposal as a whole, the offer to transfer the shares of stock held by the university and the ASUH is based on the terms and conditions outlined in the proposal. This will mean that the university will be acquiring land from a private corporation subject to the terms and conditions contained in the proposal, which includes the leasing provisions. There is no law prohibiting the State or its agencies from acquiring real property subject to conditions or encumbrances, except for public highways as provided by section 142-2, Revised Laws of Hawaii 1955. Therefore, the leasing provision, which is one of the conditions in the acquisition of the subject land, is not subject to Act 245.

Paragraph No. 1 should be rewritten to show that the Board of Regents of the University of Hawaii are acting as trustees of the University Scholarship Trust Fund created by the gifts and acquisition of stadium stocks, instead of the present language which states that they are acting on behalf of the University of Hawaii.

Paragraph 4(d) should be further clarified since it restricts the principal use of the stadium but does not specify what other events may be held there. At the present time, it seems that the stadium may be used for other events not specified so long as its use does not conflict with the

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words "used principally".

Paragraph 4(h) should also include a provision for the determination of the percentage that will be used to arrive at the net rental.

The proposal presently indicates that the Board of Regents are offering both the shares of stock held by them in trust and those of the ASUH. Since we have already ruled, in Op. 60-126, dated December 8, 1960, that the disposal of the stadium stock held by the ASUH should be decided on by the ASUH Senate, the proposal should not include the ASUH unless they are willing to become a party to the proposal. A copy of said opinion is hereto attached.

Aside from the legal questions above reviewed, we have not passed on the question of whether the Board of Regents, as trustees of a charitable trust, are properly discharging their duties under the trust in entering into the exchange as outlined in the proposal. We understand that questions have been raised regarding the words of limitation contained in the trust and, also, the appraisal used for the basis of the exchange. Under these circumstances, the Board of Regents, as trustees, should take immediate steps to file a petition for instructions in the circuit court of the State to protect themselves from suit for breach of trust.

Yours very truly,

Harold Y. Shintaku

HAROLD Y. SHINTAKU
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

Attach.

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1961

INDEXING INSTRUCTIONS - OP. 61-1

PUBLIC CONTRACTS

Bids, Acceptance of

Comptroller may award contract to lowest bidder on basis of alternatives most advantageous to the state though such bidder did not submit the lowest basic bid for the project

ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
AND REFER TO
INITIALS AND NUMBER
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Op. 61-1

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

January 3, 1961

1.3920

Mr. Michael M. Miyake, Comptroller
Dept. of Accounting & General Services
State Office Building
Honolulu 10, Hawaii

Dear Mr. Miyake:

This is in response to your letter of December 19, 1960 requesting an opinion of this office as to whether the Comptroller may legally award a contract to the lowest bidder on the basis of the alternatives selected by your department where another contractor has submitted the lowest base bid for the construction of the project in question.

In the present instance the net amount available for construction was less than any bid received and as a consequence the contract could not be awarded without considering the alternatives provided in the specifications. Therefore, the office of the Comptroller, in order to bring the contractors' bids within the funds available for the construction, desires to exercise its right under paragraph 3.2 of the specifications to select the alternates which it considers most advantageous to the State. In so doing, the contractor who submitted the second lowest basic bid has become the lowest alternative bidder and you have asked if the State might award the contract to the latter.

Paragraph 3.2 - Award of Contract, of the Standard Specifications, (General Requirements and Covenants) provides in part as follows:

> "The award of the contract, if it be awarded, will be to the lowest responsible bidder (under that alternate which may be considered by the Superintendent to be most advantageous to the State) whose proposal shall comply with all the requirements necessary to render it formal. . . ."

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Pursuant to the above, it is clear that the Comptroller may award the contract to the lowest responsible bidder on the basis of the alternates which he considers most advantageous to the State. As such, it is the opinion of this office that you may award the contract in question to the Abe Contracting Co., the lowest bidder under the alternates selected by your department, in spite of the fact that the latter company did not submit the lowest basic bid for the above project.

Very truly yours,

Robert M. Botts

Robert M. Botts
Deputy Attorney General

APPROVED:

Shiro Kashiwa

Shiro Kashiwa
Attorney General

61-1

INDEXING INSTRUCTION

Op. 61-2

I. EMPLOYEES RETIREMENT SYSTEM

Membership service, purchase of

A current member has only one year after beginning membership to file his statement of past services and have the opportunity to purchase membership service. Payment may be made only by having the deduction from his compensation doubled.

II. Revised Laws of Hawaii 1955
Section 6-35

III. Session Laws of Hawaii 1951
Act 110

Op. 61-2

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Op. 61-2

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

January 5, 1961

Mr. Harold C. Hill, Secretary
Employees' Retirement System
of the State of Hawaii
Keelikolani Building
Honolulu, Hawaii

Dear Mr. Hill:

This is in reply to your letter of November 15, 1960, requesting our opinion on the question:

> "May membership service be purchased by current members of the Retirement System at any time, while they are members of the System, without any time limit imposed and may such member purchase this membership service either in a lump sum or through monthly deductions as provided for by board ruling?"

It is the opinion of this office that membership service cannot be purchased by current members of the Retirement System at any time without any time limit imposed. A current member has only one year after beginning membership to file his statement of past services and have the opportunity to purchase membership service.

It is also the opinion of this office that a current member purchasing membership service may pay the deficiency in his accumulated contributions only by having the deduction from his monthly compensation doubled. A lump sum payment is not authorized under the statute.

The opportunity to purchase past membership service first arose in 1945 with the passage of Act 73 (Series A-19). This Act required "each employee who on July 1, 1945, is, or thereafter shall become, a member [to] file a statement of all service as an employee rendered by him prior to the filing thereof for which he claims credit." Then upon

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verification of the statement, the employee was credited with additional membership service, provided payment of the deficiency in his accumulated contributions was made in a lump sum or in installments. When reporting on the bill, the Senate Committee on Ways and Means stated:

> "This bill in its amended form proposes to grant to territorial employees who were in the service of the Territory at the time of the establishment of the Employees' Retirement System in 1925 credit for 'prior service' in territorial employment and further to allow to territorial employees who have re-entered the service of the Territory after a period of separation credit for 'membership service' for previous periods of service in territorial employment upon the payment of the contributions payable by the member on account of such periods of service, together with simple interest at four per cent per annum." (Stand. Comm. Rep. No. 14, Senate Journal, p. 429.)

In 1947, Act 140 (Series A-22), provided a cut-off date so that only an "employee who on July 1, 1945, is a member, or thereafter shall become a member prior to July 1, 1947, shall file, on or before July 1, 1947, a detailed statement of all service as an employee rendered by him prior to the filing thereof for which he claims credit." Act 140 also required the employee to notify the board "within thirty days after notification of the amount of deficiency in his contributions, or prior to July 1, 1947, whichever is later, but in no event later than December 31, 1947" of his election to pay his deficiency. Both Acts 73 and 140 have been retained as sections 6-33 and 6-34, Revised Laws of Hawaii 1955.

A second opportunity to purchase membership service was afforded in 1949 with the passage of Act 269 (Series A-22). See Standing Committee Report No. 390, Senate Journal, page 1156; also, Standing Committee Report No. 840, House Journal, page 2148. The Act permitted any member to file "on or before January 1, 1951, or within one year after beginning membership . . . a statement of all service as an employee or other service paid for by the Territory or county rendered prior to the date of his last becoming a member which is not otherwise creditable to him, for which

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he claims membership service credit and for which he agrees to have additional deductions made from his compensation. . . ." The Act provided for payment of the deficiency by doubling the deduction from the member's compensation for a period equal to the period for which membership service credit is sought and allowable.

Thus, with the passage of Act 269 in 1949, employees who were members prior to July 1, 1947 had another opportunity, and this time until January 1, 1951, to file their statement of service. Employees who became members after July 1, 1947 also had until January 1, 1951, or one year after beginning membership, whichever is later, within which to file their statement. In all cases, however, the deficiency had to be paid by doubling the deduction from the member's compensation. It might be noted also that Act 269 dealt only with membership service and was not concerned with prior service credit.

But in 1951, Act 110 (Series A-22) permitted any member one year after beginning membership within which to file "a statement of all service as an employee or other service paid for by the territory or county rendered prior to the date of his last becoming a member which is not otherwise creditable to him, for which he claimed prior service credit and also a statement of such service for which he claims membership service credit and for which he agrees to have additional deductions made from his compensation. . . ." The Act permitted those who were members on the effective date of the Act one year within which to file their statement, notwithstanding that such filing was more than one year subsequent to the date of his last becoming a member. It is this Act 110 and Act 269, Session Laws of Hawaii 1949, which were incorporated into section 6-35, Revised Laws of Hawaii 1955 and which governs the granting of prior service credit to and the purchasing of membership service by current members of the Retirement System.

Yours very truly,

Daniel R. Matsukage

DANIEL R. MATSUKAGE
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

Op. 61-2

INDEXING INSTRUCTION

Op. 61-3

I. EMPLOYEES' RETIREMENT SYSTEM

Accidental death benefit

The degree of dependency need not be established for any dependent parent to receive the death benefit. The word "dependent" should be construed in the simple, commonly accepted sense. Where both parents are designated as beneficiaries the board has discretion to direct to whom the pension shall be payable.

II. REVISED LAWS OF HAWAII 1955

Section 6-52.

Op. 61-3

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Op. 61-3

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

January 6, 1961

Mr. Harold C. Hill, Secretary
Employees' Retirement System
of the State of Hawaii
Keelikolani Building
Honolulu, Hawaii

Dear Mr. Hill:

Re: Active Service No. 23275
Salvadore Lorenzo

This is in reply to your letter of December 29, 1960, requesting our opinion as to the degree of dependency that must be established before any accidental death benefit can be paid to any dependent father or dependent mother under section 6-52, Revised Laws of Hawaii 1955.

Section 6-52 provides as follows:

"Accidental death benefit. Upon the receipt of proper proofs of the death of a member by the board there shall be paid to the member's designated beneficiary or to his estate the amount of his accumulated contributions and if, upon the receipt of evidence or proofs that such death was the natural and proximate result of an accident occurring at some definite time and place while the member was in the actual performance of duty, the board shall decide that the death was the result of an accident in the performance of duty and not caused by negligence on the part of the member, there shall be paid in lieu of the ordinary death benefit provided by the contributions of the Territory or county, a pension of one-half of the average final compensation of such employee, (a) to his widow, to continue during her widowhood; or (b) if there be no widow, or if the widow dies or remarries

Op. 61-3

> before any child of such deceased member shall have attained the age of eighteen years, then to his child or children under such age, divided in such manner as the board in its discretion shall determine, to continue as a joint and survivor pension of one-half his final compensation until every child dies, or attains such age; or (c) if there be no widow or child under the age of eighteen years surviving such deceased member, then to his dependent father or dependent mother, as the deceased member shall have nominated by written designation duly acknowledged and filed with the board, or if there be no such nomination, then to his dependent father or to his dependent mother as the board in its discretion shall direct, to continue for life."

We understand that the decedent did designate upon his enrollment as a member that any accidental death benefit be payable to his father and mother. We understand also that the father is presently receiving a pension from the Waialua Agricultural Company and a social security benefit for himself and his wife.

It is our opinion that the degree of dependency need not be established for a dependent parent to receive the accidental death benefit provided under section 6-52. The board need only be satisfied that the father and/or mother were actually dependent on their deceased son at the time of his death. In deciding that question, the word "dependent" should be construed in the simple, commonly accepted sense. "It is a general rule of statutory construction that words of a statute will be interpreted in their ordinary acceptation and significance and the meaning commonly attributed to them." 50 American Jurisprudence, Statutes, section 238.

The fact that the father and mother might have had other income or might have been receiving some support from others is merely a factor to be considered by the board in reaching its decision.

We might also point out that where, as in this case, the decedent designated both his parents to be his beneficiaries, the board has the discretion to direct to whom the pension shall be payable.

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We have examined the committee reports of both the House and the Senate but have found them to shed no light on the question at hand.

Yours very truly,

Daniel R. Matsukage

DANIEL R. MATSUKAGE
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

Op. 61-3

INDEXING INSTRUCTIONS

op. 61-4

I

CONSTITUTION, ARTICLE X, SECTION 5, INTERPRETATION OF.

Article X, Section 5 of the Hawaii State Constitution should be interpreted to mean that the legislature may enact a law for disposition of farm lots by any of the following methods:

(a) Disposition of farm lots by sale or lease and the enactment of standards to determine whether disposition should be made by sale or lease;

(b) Disposition of farm lots by lease only;

(c) Disposition of farm lots in fee simple only.

Article X, Section 5 does not require that the existing homestead laws be retained and the legislature may abolish said laws.

II

PUBLIC LANDS, HOMESTEADING, LEASE OR SALE.

Same

AWL:mh
22a

Op. 61-4

January 6, 1961

Honorable Francis M. F. Ching
Chairman, Senate Lands Committee
Honolulu, Hawaii

Dear Sir:

This is in reply to your letter dated December 12, 1960 for advice on the question whether, in view of the provisions contained in Section 5, Article X of the State Constitution, the legislature may provide for the disposition of farm lots in either of the following manner:

1. Disposition of farm lots by sale in fee simple only;

2. Disposition of farm lots by leasing only;

3. Disposition of farm lots by sale or lease at the discretion of the Board of Land and Natural Resources in accordance with procedures and restrictions prescribed by law.

You also ask whether the legislature may abolish homesteading in the State.

I

Section 5, Article X of the State Constitution provides:

"Section 5. The public lands shall be used for the development of farm and home ownership on as widespread a basis as possible in accordance with procedures and limitations prescribed by law."

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The Committee on Agriculture, Conservation and Land of the State Constitutional Convention in Standing Committee Report 78 commented on Section 5 as follows:

> "This Section represents the telescoping of many ideas and proposals considered by this Committee. The Committee unanimously agreed that for the public good <u>fee simple homes and farms</u> should be made available on as widespread basis as possible. However, it was felt by the Committee that reasonable judgment should be exercised in the manner of making these lands available." (Underscore added).

Provision was, therefore, made by the drafters of the Constitution for the development of fee simple homes and farms on as widespread a basis as possible.

On the question whether leasing is included within the scope of Section 5, the report discusses the term of leases and decided that the legislature should study this further. However, the Committee of the Whole of the Constitutional Convention on June 21, 1950 (See Tape 50-A) debated the question regarding leasing under Section 5 as follows:

> Castro: "Mr. Chairman, I am in complete sympathy with the thoughts of Mr. Fong and Mr. Mau on this that we must make sure that leaseholds are allowed...."
>
> * * *
>
> Delegate Shimamura: "Mr. Chairman, the words 'farm and home ownership', 'ownership' includes leaseholds when you own land, an owner of land, an ownership of land includes, lessee, an owner of land...*****Legally, it does include leases."
>
> * * *

Delegate Fong: "...and then since our learned friend Mr. Shimamura here stated that the word 'ownership' includes 'tenant', and I think that he is correct, I'll withdraw my motion with the understanding that that includes leasing of land."

The intent of the drafters of the Constitution, therefore, appears clear that the word "ownership" as used in Section 5 of Article X should include ownership in fee as well as a leasehold. It has been held that the court, in construing language of the Constitution, should place itself as nearly as possible in the condition of the men who drafted the instrument. Ex Parte Bain, 121 U.S. 1, 30 L. ed. 849, 7 S. Ct. 781. Even where terms of a constitutional provision are not entirely free from doubt, debates in a constitutional convention may be considered. Story v. Richardson, 186 Cal. 162, 198 P. 1057, 18 A.L.R. 750.

It has been held that the word "own" is used both colloquially and in the law to designate the great variety of interest in property. As titles and rights to real property vary from the absolute and unqualified fee simple to that of the mere occupant, so the word "own" or "ownership" varies in its significance. "Hence...the word in statutes (is) given the widest variety of construction usually guided in some measure by the objects sought to be accomplished in the particular instance. The instances where the word 'own' has been satisfied by something less than absolute and entire ownership are far too numerous to permit citation...(citing cases in which mere leasehold interest has been deemed sufficient)." Merrill Railway and Lighting Company v. Merrill, 96 N.W. 686, 119 Wis. 249.

It is our opinion that, in connection with the use of public lands for farm lots, Section 5 of Article X of the State Constitution should be interpreted to mean that the legislature may enact a law providing that the disposition of farm lots shall be by sale or lease, and providing reasonable standards pursuant to which the power to determine whether disposition should be made by sale or lease can be

exercised by the Board of Land and Natural Resources. Under such a law, the Board of Land and Natural Resources, guided by adequate standards established by the legislature, may determine whether the disposition of particular farm lots shall be by sale or lease.

Under Section 5, the legislature could in the alternative enact a law providing that when public lands are used for farm lots the disposition of such lands shall be by sale in fee simple only. Such a law would require that should public lands be opened for farm lots, the disposition of such lots shall be by fee simple only.

Conversely, the legislature may enact a law requiring that the disposition of farm lots shall be by lease only. It appears from the records of the Constitutional Convention that the drafters of this section originally thought only in terms of ownership in fee simple. However, in the debate that followed, the question arose as to whether the word "ownership" also embraced disposition by lease as well as sale in fee simple. The debate ended with what appears to be an understanding that the word "ownership" in Section 5 did include leases as well as sale in fee simple. At least there is no indication that the members of the Constitutional Convention intended that the term "ownership" be narrowly defined to mean title in fee simple. An examination of the records of the Constitutional Convention seems to indicate that in Section 5, the framers of the Constitution felt that public welfare would be best advanced by the use of public lands "for the development of farm and home ownership on as widespread a basis as possible" whether the ownership be evidenced by titles in fee simple or by leases, or both.

II

With reference to your question whether the legislature may abolish homesteading in the State, you are advised that the existing homestead laws may be abolished since the Constitution does not require that the existing laws be retained. The legislature, however, should under Section 5, Article X of the State Constitution provide for the sale or

lease of the public lands for farm and home ownership, together with restrictions and limitations on such sale or lease. It should be noted that our existing laws on public lands, apart from the homestead laws, allow (1) the sale of public lands for houselots and business purposes; (2) the leasing of lands for any purpose which may include agricultural purposes.

Respectfully yours,

Alana W. Lau

ALANA W. LAU
Deputy Attorney General

APPROVED
Shiro Kashiwa

SHIRO KASHIWA
Attorney General

61-4

EMPLOYEES' RETIREMENT SYSTEM

Members

The Retirement System does not have any members performing services classified as "proprietary functions" for social security law purposes.

The Retirement System has members who could be classified as "agricultural employees" for social security law purposes.

ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
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4c

Op. 61-5

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

January 9, 1961

Mr. Harold C. Hill, Secretary
Employees' Retirement System
of the State of Hawaii
Keelikolani Building
Honolulu, Hawaii

Dear Mr. Hill:

This is in reply to your letter of January 6, 1961, requesting our opinion on whether there are any members of the Retirement System performing services classified as "proprietary functions" and whether there are any members who may be classified as "agricultural employees" under Social Security law.

It is our opinion that the Employees' Retirement System of the State of Hawaii does not have any members who are performing services classified as "proprietary functions". Our conclusion is based on the discussion on proprietary and governmental functions found in section 218 of the Handbook for State OASI Administrators.

It is our further opinion that the Retirement System does have members who could be classified as "agricultural employees" as the term is defined by section 210(f) of the Compilation of the Social Security Laws, Document No. 454, House of Representatives, 85th Congress, 2d Session.

Yours very truly,

Daniel R. Matsukage

DANIEL R. MATSUKAGE
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

Op. 61-5

INDEXING INSTRUCTIONS

Opinion No. 61-6

CIVIL SERVICE COMMISSION

Deception

An applicant who was arrested for being unlawfully on the premises of another, and knowingly gives a negative answer when the question is put to him, commits deception or fraud.

Requirement of section 3-21(j), Revised Laws of Hawaii 1955, is mandatory.

CIVIL SERVICE COMMISSION

Fraud

An applicant who was arrested for being unlawfully on the premises of another, and knowingly gives a negative answer when the question is put to him, commits deception or fraud.

Requirement of section 3-21(j), Revised Laws of Hawaii 1955, is mandatory.

REVISED LAWS OF HAWAII 1955

Section 3-21(j)

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ASOL:ru

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Op. 61-6

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

January 9, 1961

Mr. Edward L. Silva, Secretary
Civil Service Commission
County of Hawaii
Hilo, Hawaii

Dear Mr. Silva:

This is in reply to your request for an opinion by your letter of the 30th of November, 1960, concerning an employee who was arrested for being unlawfully on the premises of another and who in his application form failed to disclose this fact under paragraph 4 which reads:

> "Have you ever been arrested or convicted for any violation of law other than minor traffic violations?"

In reply to the above question the person concerned checked the "No" block.

Section 3-21(j), Revised Laws of Hawaii 1955, reads:

> "Persons ineligible for appointment. No person who has been convicted of any felony, or who has committed or attempted any deception or fraud in connection with any application or examination, shall be eligible for any appointment in the civil service;" (Emphasis supplied.)

The person concerned was arrested for being unlawfully on the premises of another on May 7, 1957, in Honolulu, and he filed the application for employment as a school janitor on October 9, 1958.

Fraud is defined as "conscious wrongdoing, an intention to cheat or be dishonest." 17A Words and Phrases 7, Jeffries v. Olsen, D.C. Cal., 121 F. Supp. 463, 473.

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Hence, an applicant who was arrested for being unlawfully on the premises of another, and knowingly gives a negative answer when the question is put to him, commits deception or fraud.

The other two arrests of the person in question for the same crime on October 25, 1958 and February 7, 1959, in Hilo, would not constitute fraud because these arrests occurred after the application was filed.

In your letter you posed the following two questions:

"1. Does the law and/or regulation mandate strict application of the penalty provisions (termination of employment)?

"2. Is there any special provision or disciplinary action which could be applied to allow for continued employment of the person?"

In answer to your first question, be advised that the language of the statute is mandatory. The law makes no exception. It provides that "No person" who commits deception or fraud in connection with any application for employment "shall be eligible for any appointment in the civil service." And further, the law being mandatory, any civil service rule or regulation in derogation of the law would be null and void.

The answer to your second question is fully covered in the above discussion. The answer is no.

Very truly yours,

Andrew S. O. Lee

Andrew S. O. Lee
Deputy Attorney General

APPROVED:

Shiro Kashiwa

Shiro Kashiwa
Attorney General

Op. 61-6

INDEXING INSTRUCTION

Op. 61-7

I. EMPLOYEES' RETIREMENT SYSTEM

Membership service

A former legislator may purchase membership service for any service rendered to the State or any county.

Membership service may not be purchased for employment by the Hawaii Bureau of Governmental Research, Tax Foundation of Hawaii, Territorial Loyalty Board and Visitors' Bureau.

Minimum service retirement allowance

Employment by the Hawaii Bureau of Governmental Research, Tax Foundation of Hawaii, Territorial Loyalty Board and Visitors' Bureau are not the type of services required to qualify for the minimum service retirement allowance.

A pensioner not eligible for the minimum service retirement allowance is not eligible for the pension bonus provided by Act 242, SLH 1959.

II. REVISED LAWS OF HAWAII 1955

Sections 6-35, 6-43

III. SESSION LAWS OF HAWAII 1959

Act 242, section 2.

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Op. 61-7

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

January 9, 1961

Mr. Harold C. Hill, Secretary
Employees' Retirement System
of the State of Hawaii
Keelikolani Building
Honolulu, Hawaii

Dear Mr. Hill:

This is in reply to your letter of December 21, 1960, regarding Mr. Nolle R. Smith's request for a "State pension".

We understand that Mr. Smith was employed by the City and County of Honolulu and by the Territory of Hawaii in the following capacities:

1. Junior Engineer, C & C of Honolulu
June 1, 1916 to January 1, 1917 (6 months).

2. Member, Territorial Legislature, House of Representatives
November 1, 1928 to November 1, 1932 (4 years).

3. Assistant Director of the Budget, Territory of Hawaii
October 23, 1939 to March 1, 1942 (2 years, 3 months).

4. Director, Territorial Civil Service & Classification System
March 1, 1942 to June 30, 1943 (1 year, 4 months).

We further understand that he is not now a member of the Retirement System.

It is also our understanding that Mr. Smith was employed in the following additional capacities during the period May, 1932 to May, 1952:

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1. Staff Member and Executive Secretary, Hawaii Bureau of Governmental Research
May 1, 1932 to September 30, 1939 (7 years, 4 months).

2. Assistant Director, Tax Foundation of Hawaii
September 1, 1947 to June 20, 1954 (6 years, 9 months).

3. Member, Territory Loyalty Board
April 25, 1952 to June 4, 1953 (1 year, 2 months).

4. Governor's Representative, Visitors Bureau
May 19, 1951 to May 18, 1952 (1 year).

The suggestion now is that Mr. Smith might be eligible for a pension if he enrolled as a former legislator under section 6-38, Revised Laws of Hawaii 1955, and if he were able to purchase some membership service for services rendered in the various capacities outlined above. Or, in the alternative, you asked whether some of his service can be considered as "in the service and employ of any of the Counties or of the Territory" to qualify him to receive the minimum pension as described in section 6-43, Revised Laws of Hawaii 1955, and further, whether such services as he rendered could form the basis of qualification to receive the pensioner's bonus provided by Act 242, Session Laws of Hawaii 1959.

It is our opinion that Mr. Smith, as a former legislator, may be enrolled and granted prior service credit for his service in the territorial legislature by authority of section 6-38, Revised Laws of Hawaii 1955. It is also our opinion that he may purchase membership service as authorized by section 6-35 for services rendered as an employee of a county or the territory. However, membership service may not be purchased for employment by the Hawaii Bureau of Governmental Research, Tax Foundation of Hawaii, Territorial Loyalty Board and the Visitors' Bureau. Please be reminded, too, that any service credit allowable cannot exceed the number of years the member lacks of being age sixty.

It is also our opinion that Mr. Smith's services with the City and County of Honolulu, the Territorial Legislature, the Budget Bureau and the Civil Service Commission

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are such services as are required to qualify him for the minimum service retirement allowance under section 6-43, but the same cannot be said for his services with the Hawaii Bureau of Governmental Research, Tax Foundation, Loyalty Board and the Visitors' Bureau. Section 6-43 specifically limits the applicability of the allowance to those who have been "in the service and employ of any of the counties or of the Territory." (Emphasis added.)

Mr. Smith is ineligible for the pensioner's bonus provided by Act 242, Session Laws of Hawaii 1959, because section 2 of said Act states that no pension shall be increased by any bonus unless the pensioner has had sufficient service to qualify for the minimum service retirement allowance.

Yours very truly,

Daniel R. Matsukage

DANIEL R. MATSUKAGE
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

Op. 61-7

INDEXING INSTRUCTIONS

Op. 61-8

I. TAXATION, GENERAL EXCISE TAX

Security Dealer, Division of Commission

No division of commission allowed except for those instances set forth in Sec. 117-16(e), R.L.H. 1955, as amended.

* * * * * *

II. TAXATION, GENERAL EXCISE TAX

Security Dealer, Taxable Commission

A local security dealer (independent contractor) who sells stocks for a mainland security firm is taxable for all the commission to which he has a claim of right against said mainland firm.

* * * * * *

III. REVISED LAWS OF HAWAII, 1955, AS AMENDED

Section 117-14(f).

* * * * * *

IV. REVISED LAWS OF HAWAII, 1955, AS AMENDED

Section 117-14(h).

* * * * * *

V. REVISED LAWS OF HAWAII, 1955, AS AMENDED

Section 117-16(e).

* * * * * *

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ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
AND REFER TO
INITIALS AND NUMBER
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Op. 61-8

AG

TERRITORY OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

January 13, 1961

Honorable Earl W. Fase
Director of Taxation
State of Hawaii
Honolulu, Hawaii

Attention: Mr. John A. Bell
Deputy Director of Taxation

Dear Sir:

This is in response to your request for our advice with regard to the application of the Hawaii General Excise Tax to the following two factual situations:

The first situation involves X, a mutual fund dealer who is a registered security dealer in the State of Hawaii. X has agreements with mainland security dealers to sell those securities handled by the mainland dealers in the State of Hawaii for a stated commission. The agreement provides that X is deemed to be a principal at all times except for the sale of certain securities in which instance X acts as the agent of the mainland dealers. X's selling activity is not controlled by the mainland dealers except that X's representation with regard to any security must be in accordance with the official prospectus. In carrying out his selling activity, X entered into an agreement with an associate who agreed to sell securities for X for a percentage of the commission which X receives from the mainland dealers. The associate is free to exercise his judgment in the solicitation of business.

The second situation concerns Y, another mutual fund dealer who is also a registered security dealer in the State of Hawaii. Y has an agreement with Z Co., a mainland security dealer, which states that Y shall devote his full time and attention to the sale and promotion of securities handled by Z Co. The agreement further states that Y shall employ, instruct and train local associates for carrying out the selling of securities. The agreement also states that Y is not to be construed a partner, employee, or agent of Z Co. Under the agreement, Y is entitled to a specific amount of commission from Z Co. for sales made by Y personally and an overriding commission of 5% for sales consummated by the associate. There is a second agreement between Y, Z Co. and an associate which provides for the amount of commission to be paid to

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the associate from Z Co. based on the associate's sales. The tri-party agreement provides that the associate shall not be deemed to be an employee of Z Co. and that as between Y and the associate, the associate is free to exercise his own judgment in the solicitation of business.

Under Section 117-14, R.L.H. 1955, as amended, one who sells securities is taxable on the gross income from his selling activity unless such an individual is considered an employee. Section 117-21(f), R.L.H. 1955, as amended. Although no question has been raised with regard to the relationship between the dealers and their associates, we are satisfied that in both situations, there is no existence of an employer-employee relationship. The controlling factor in the employer-employee relationship is the retention by the person employing the services of another of the right or power to exercise control over the employed on details and method of performing the desired result. Byrne v. Pennsylvania R. Co., 262 F.2d 906, 912 (3rd Cir. 1959); 35 Am. Jur., Master and Servants, Sec. 3; 2 C.J.S., Agency, p. 1027-1028. Cimorolli v. New York Cent. R. Co., 148 F.2d 575, 578 (6th Cir. 1945); Restatement, Agency 2d, Sec. 220, Illus. 7. When the retention of control by the employer is only with respect to the result, the employed is an independent contractor. Sutton v. Industrial Commission, 344 P.2d 538; Kippen v. Jewkes, 258 P.2d 869; Christean v. Industrial Commission, 196 P.2d 502. In both fact situations, the associate is free to use his own judgment in the solicitation of business. The control retained by the dealers is over the desired result and not as to the method of solicitation of business by the associate. Consequently, the associates are independent contractors. This means that the dealer and the associate in both fact situations are subject to the General Excise Tax under Sec. 117-14, R.L.H. 1955, as amended.

With regard to the specific question of what is the gross income of the dealers, it is the opinion of this office that the dealers in both fact situations are subject to the General Excise Tax to the extent of compensation which they can rightfully claim against the mainland dealer or dealers. Under the first situation, X is entitled to all of the commission paid by the mainland dealer. In fact X is the only one who has the right to demand the total commission from the mainland dealers under the contractual obligation between them. The commission which X pays to his associate, which is measured in terms of a percentage of the commission which X receives from the mainland dealers, is a division of X's commission. Such a division of commission is not allowed under our General Excise Tax Law, Chapter 117, R.L.H. 1955, as amended, except for those instances set forth under Section 117-16(e) which reads as follows:

sec. 117-16(e). Where insurance agents, including general agents, subagents or solicitors, who are not employees and are licensed pursuant to chapter 181, or real estate brokers who are not employees and are licensed pursuant to chapter 170, produce commissions which are divided between such general agents, subagents or solicitors, or between such real estate brokers, as the case may be, the tax levied under subsection (f) of section 117-14, or under section 117-14.6, shall apply to each such person with respect to his portion of the commissions, and no more.

Inasmuch as a security dealer such as X does not fall within the scope of Section 117-16(e), X is taxable for all the commission which he has a right to claim from the mainland dealers which includes the commission which X pays to his associate.

Turning to the second fact situation, Y is also subject to the General Excise Tax for all the commission he has a right to claim against Z Co., the mainland dealer. The total compensation that Y can claim against the mainland dealer is the commission on his personal sales and the overriding commission of 5% on the sales by the associate. The commission paid to Y's associate directly by Z Co., the mainland dealer, is not part of Y's compensation at all. In fact Z Co. is obligated to pay the associate's commission directly to the associate. The tri-party agreement signed by Y, Z Co. and the associate sets forth the compensation payable to Y and the associate by Z Co. Consequently, there is no division of commission.

The situation presented in the instant case is similar to the General Excise Tax liability of an insurance general agent which existed prior to the enactment of Section 117-16(e). See opinion of the Attorney General dated June 2, 1943, 45 O.L.C. 2232. In the absence of legislation authorizing the division of commission for security dealers such as X in the first situation, X is subject to the General Excise Tax for the total commission he is entitled to receive from the mainland dealers and X's associate is also subject to a tax on the amount of his own commission.

Respectfully,

/s/ Shuichi Miyasaki

SHUICHI MIYASAKI
Deputy Attorney General

APPROVED:

SHIRO KASHIWA
Attorney General

Shuichi Miyasaki
6-1-79

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INDEXING INSTRUCTIONS

I. TAXATION, INHERITANCE TAX

Shares of Stock

The "blockage theory" is not applicable under Sec. 122-25, R.L.H. 1955.

* * * * *

II. REVISED LAWS OF HAWAII 1955

Section 122-25.

* * * * *

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ADDRESS REPLY TO
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STATE
TERRITORY OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

January 13, 1961

Honorable Earl W. Fase
Director of Taxation
State of Hawaii
Honolulu, Hawaii

Attention: Mr. John A. Bell
Deputy Director of Taxation

Dear Sir:

This is in response to your request for our advice with regard to whether the "blockage theory" is applicable in the valuation of large blocks of stocks under the Hawaii inheritance tax statute, Section 122-25, R.L.H. 1955, as amended. The pertinant portion of Section 122-25 reads as follows:

> Sec. 122-25. Valuation. All property, the transfer of which is subject to tax under the provisions of this chapter, shall be appraised at its full cash value as of the date of death. Whenever, by reason of the provisions of this chapter, it becomes necessary to appraise or ascertain the value of any stocks, bonds or securities, such as are customarily bought or sold in open market in the city of Honolulu or elsewhere, the value of such stocks, bonds or securities shall be ascertained by taking the price for which such stocks, bonds or securities were bought and sold upon the date of death, or if there were no sales upon such day, then by ascertaining the range of the market and the average of prices as thus found running through a reasonable period of time before and after the date of death. . . .

The phrase "full cash value" found in our old ad valorem taxes statute, Civil Law, Section 820 and the phrase "fair and reasonable value" in Section 21, Act 40, 2d Sp. S.L. 1932 have been interpreted to be terms of like import. In Re Taxes B. P. Bishop Estate, 33 Haw. 149. Cases from other jurisdictions have held that "full cash value" is commonly construed to mean

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"fair market value". Kaiser Co. v. Reid, 184 P.2d 879; Rogan v. County Com'rs of Calvert County, 71 A.2d 47. Consequently it is reasonable to interpret the phrase "full cash value" found in Section 122-25 to mean fair and reasonable value or fair market value. It should be noted that the phrase "full cash value" is used in a general sense and refers to the valuation of all property. However a more specific method of valuation is set forth in the statute with regard to certain types of negotiable securities. In the case of stocks, a specific method of valuation is set forth in the second sentence of Section 122-25 which indicates that the value of stocks sold in the open market in Honolulu or elsewhere is ascertained by taking the price for which such stocks were bought and sold upon the date of death or if there were no sales on the date of death, then by ascertaining the range of the market and the average of prices through a reasonable period of time before and after the date of death. It is an old and familiar principle that where there is a specific provision and a general provision in the same statute, the specific provision must control, and the general provision must be taken to affect only such cases within its general language as are not within the provisions of the particular provision. 50 Am.Jur. § 367. Since the specific provision pertaining to the valuation of stocks prescribes the stock exchange price method to be utilized in arriving at its fair and reasonable value, the particular question involved is whether the "blockage theory" is permissible to be utilized in the present instance. The "blockage theory" in short is one which recognizes that a large block of stock may not be as readily liquidated as a few shares and thus resulting in a lower valuation of the large block of stocks if they were to be put on sale at a given date. 2 Paul, Federal Estate and Gift Taxation, Sec. 18.27 (1942).

There are numerous Hawaii cases which allowed the blockage theory to be applied under the old ad valorem taxes statute, Section 1320, R.L.H. 1925. See Re Taxes, Waialua Agricultural Company, Ltd., 30 Haw. 755; In re Taxes, Ewa Plantation Company, Ltd., 30 Haw. 775; Re Taxes, Consolidated Railway, Ltd., 32 Haw. 312. However, Section 1320, R.L.H. 1925 clearly provided within the statute that the market quotation as well as other facts and circumstances which reasonably and fairly reflected upon the valuation of the stocks were to be considered in the valuation method utilized. In our instant situation, there is no language in Section 122-25 which gives rise to the inclusion of "such other facts and circumstances" in the valuation of stocks for our inheritance tax purpose. Section 122-25 clearly states that where the stocks are of the kind that are traded on the open market, "the value of such stocks, bonds or securities shall be ascertained by taking the price for which such stocks, bonds or securities were bought and sold upon the date of death."

The averaging provision becomes applicable when no sales are found on the date of death. It is of particular significance to note that the amendment which added the stock valuation method for the first time in 1911 was accompanied by a Senate Judiciary Committee report of our Legislature, Report No. 284 (The Sixth Legislature, Hawaii, Senate Journal 1911, pp. 893, 894) which stated that the purpose of the amendment was to provide "a more certain method of fixing the value of certain negotiable securities." In view of the certainty that our Legislature desired in amending our then existing statute, it appears as a matter of legislative intent that stocks be valued on the unit price basis prevailing on the stock market for inheritance tax purposes without regard to the number of stocks being held.

Case law from other jurisdictions have taken contrary positions on the adoption of the "blockage theory" for state inheritance tax purposes. If one were to adopt the Minnesota view, no "blockage theory" would be allowable. State v. Wagner, 46 N.W.2d 676 (1951). The Minnesota court feels that the "blockage theory" discriminates against beneficiaries of small estates which may be administered at about the same time as a large estate where the estates contain blocks of the same stock. The Wagner case also held that the Minnesota inheritance tax is imposed upon the privilege of receiving property rather than upon the privilege of transferring it and as such the "blockage theory" of the Federal estate tax statute which applies its tax on the privilege of transferring a decedent's property should not apply. As such the Minnesota court in the Wagner case states that because "our inheritance tax is imposed upon the value of what the beneficiary receives, there is as much reason to look to evidence of what the beneficiary would have to pay for the stock he receives as there is to look to evidence of what he might realize in money from selling it." Obviously the sudden demand for stocks would cause the market value of a stock to rise.

The Minnesota statute which was interpreted in the Wagner case as not allowing the use of the "blockage theory" when there is a market or sales value was worded in broader terminology than our Section 122-25. The pertinent statutory provisions of the Minnesota statute M.S.A. 291.23 read as follows:

> "Every inheritance, . . . upon which a tax is imposed under this chapter shall be appraised at its full and true value immediately upon the death of decedent, . . ."

Minnesota statute, M.S.A. 272.03, subd. 8 defined "full and true value" as follows:

> "'Full and true value' means the usual selling price at the place where the property to which the term is applied shall be at the time of assessment; being the price which could be obtained at private sale and not at forced or auction sale."

Our inheritance tax statute, Section 122-25 which sets forth the stock exchange price method on the date of death is a much narrower valuation scheme than one worded in the manner of the Minnesota statutes quoted above which rely on such phrase as "the price which could be obtained at private sale and not at forced or auction sale."

The New Jersey view on the "blockage theory" is one which allows the consideration of the "blockage theory" among other relevant elements of valuation even in a situation when there is market or sale value established for a stock on a stock exchange. Newberry v. Walsh, 120 A.2d 242. However, the New Jersey view is one which does not permit consideration of the "blockage theory" as a dominant, decisive or exclusive criterion of taxable value. The Newberry case held that the application of the "blockage theory" must be supported by requisite proofs which "embrace information concerning such matters as the amount of the outstanding stock, the number of shareholders, the recorded number of shares traded in each week or month . . . , the favorable or unfavorable technical position of the company, the attractive or unattractive state and trend of the market, etc., all of course within the reasonable proximity in point of time to the essential date." The New Jersey statute prescribed that the inheritance tax be computed upon the "clear market value" of the property transferred. R.S. 54:34-5, N.J.S.A. Here again the valuation method is couched in a broad phrase "clear market value" and not in the more specific stock exchange price method set forth in Section 122-25 of our inheritance tax statute.

There appears to be no Hawaii case which deals with the application of the "blockage theory" under our inheritance tax statute, Section 122-25, R.L.H. 1955, as amended. While the "blockage theory" was adopted in the application of the ad valorem taxes under Section 1320, R.L.H. 1925, which permitted the use of stock market quotation and other facts and circumstances which affected valuation, it should not be considered as controlling in the application of the inheritance tax because the language of Section 122-25 does not include the liberality and breadth of the ad valorem tax statute.

In view of the clear and specific valuation method set forth in Section 122-25 which prescribes the ascertainment of valuation of stocks bought and sold in the city of Honolulu or

elsewhere by taking the price for which such stocks were bought and sold upon the date of death or by use of the averaging method should there be no sales on the date of death, the tax office should adhere to the long established practice of assessing stocks for inheritance tax purposes at their unit sales price as quoted on the stock exchange. This advice adheres to the position stated in an opinion of the Attorney General of Hawaii dated October 24, 1934 pertaining to the same subject matter. No significant change in the law has transpired since the previous opinion and there appears to be no cogent reason to change our position in view of the evident legislative intent to provide certainty in the valuation of these negotiable securities prescribed in Section 122-25, R.L.H. 1955, as amended. See Senate Judiciary Committee Report No. 284, The Sixth Legislature Hawaii, Senate Journal 1911, pp. 893, 894.

In addition this office subscribes to the Minnesota view with regard to the application of the "blockage theory" in our inheritance tax statute primarily because it is compatible with the intent of our statute which prescribes certainty of the valuation method. The Hawaii inheritance tax statute, Section 122-25 is also a tax on the privilege of receiving as in the Minnesota statute and not a tax on the transfer of the decedent's property as applied by the Federal estate tax statute. See Chase v. Commissioner, 33 N.W.2d 706; see also In Re Madison's Estate, 159 P.2d 630. In Chase v. Commissioner, supra, at page 711, the Minnesota court clearly stated that under its inheritance tax statute, "the thing burdened is the right to receive. . . . With reference to the federal tax, a transfer and not a succession tax was used in Reinecke v. Northern Trust Co., 278 U.S. 339, 49 S.Ct. 123." The distinction is evidenced by the differentiation of the rates applied to the various classes of beneficiaries under Section 122-5, R.L.H. 1955 as amended, dependent on the legal relationship between the decedent and the beneficiaries. A spouse of the decedent is given an exemption of $20,000 while a child is allowed an exemption of only $5,000. Such a distinction in the privilege of exemption can only be justified by the legislative policy of granting a spouse a greater privilege of receiving a decedent's property. Consequently, it appears only reasonable to adopt the Minnesota view that the application of the inheritance tax on the privilege of receiving means that there is as much reason to look to evidence of what the beneficiary would have to pay for the stock he receives as there is to look to evidence of what he might realize in money from selling it. In addition, the valuation of large blocks of the same stock at a lesser value than a small lot of the same stock would involve a disregard of the uniformity or equality required in the assessment

of like properties. Magoun v. Illinois Trust & Savings, 170 U.S. 283; 51 Am. Jur. Sections 150, 153; see also Section 116-2.1(2), R.L.H. 1955, as amended.

Very truly yours,

Shuichi Miyasaki

SHUICHI MIYASAKI
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

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INDEX

Pardon

A pardon does not erase record of conviction.

Pardon defined.

Judgment

Pardon does not obliterate or reverse or set aside judgment of conviction.

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ADDRESS REPLY TO
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Op. 61-10

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

January 24, 1961

Honorable William F. Quinn
Governor of Hawaii
Iolani Palace
Honolulu, Hawaii

Attention Mr. John Felix

Dear Sir:

Re: Effect of Pardon on Record

This is in response to the oral request made by your office as to whether or not a full and free pardon expunges the record of the individual with regard to his conviction.

It is the opinion of this department that the record of conviction is not expunged by a full and free pardon.

A pardon is a declaration on record by the chief of a state or country that a person named is relieved from the legal consequences of a specific crime. 39 Am. Jur., Pardon, Reprieve and Amnesty, Section 4. A full pardon absolves one from all legal consequences of his crime; if granted after conviction, it removes the penalties and disabilities which ordinarily follow from conviction, and, generally speaking, restores the offender to all his civil rights. 39 Am. Jur., supra, Section 52. Generally speaking, the specific civil rights restored by pardon are the right to suffrage, to serve on a jury, and to be a witness. 39 Am. Jur., supra, Section 60.

A full and free pardon involves a forgiveness and not a forgetfulness, and does not nullify the conviction or judgment of the court.

The executive in our form of government has no such power. He can pardon, but, "as the very essence of a pardon is forgiveness or remission of penalty, a pardon implies guilt; it does not obliterate the fact of the commission of the crime and conviction therefor; it does not wash out the moral stain. As has been tersely said, 'it involves forgiveness and not forgetfulness.'" Jones v. State, 147 S.W. 2d 508, 510; Sec. 67, C.J.S., Pardon, Sec. 11.

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"In our state, as in other states of the Union, the executive is not given appellate jurisdiction over the acts of the judicial branch of government, and without which he can have no power to destroy its judgments and decrees. He must take them as he finds them. . . .

"The governor can forgive the penalty, but he has no power to direct that the courts shall forget either the crime or the conviction." Jones v. State, supra, 511; 139 A.L.R. 683 n.

A pardon has no retroactive effect on the judgment of conviction which remains unreversed and has not been set aside. 67 C.J.S., Pardons, Section 11, page 578.

The judgment of guilt is, as a matter of law, conclusive upon the executive as well as upon all others, except where a statute provides otherwise. People ex rel Prisament v. Brophy, 287 N.Y. 132, 38 N.E. 2d 468, 139 A.L.R. 667, 671-72.

Respectfully yours,

Tenny Hoon Tom

TENNY HOON TOM
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

R.B.

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ADDRESS REPLY TO
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Op. 61-11

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

January 26, 1961

Dr. Charles H. Silva
Dept. of Treasury & Regulation
P. O. Box 3469
Iolani Barracks
Honolulu, Hawaii

Attn. Mr. Rod Gudgel

Dear Sir:

This is in regard to your oral request for an opinion. The question is:

> "Under what conditions may a person be permitted to demonstrate any hair or cosmetic preparation or product identifiable by trade name or trademark."

Section 59-13(b), Revised Laws of Hawaii 1955, clearly provides that the Beauty Culture Board may issue and revoke a temporary certificate to any person for the limited purpose of demonstrating in the State any hair or cosmetic preparation or product identifiable by trade name or trademark. However, this section requires that such certificate may be issued only to a person holding a valid, existing instructor's license in another territory, county, or state having standards substantially equivalent to those in force in the State.

Thus, when a person seeks a temporary certificate from the Beauty Culture Board for the purpose of demonstrating hair or cosmetic preparation or product, such person must show that he holds a valid instructor's license issued in another jurisdiction.

Very truly yours,

Yoshio Shigezawa
Deputy Attorney General

APPROVED:

Shiro Kashiwa
Attorney General

Op. 61-11

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64:19a

I N D E X

CONSTITUTIONAL CONVENTION - LEGISLATURE

Legislature has no legal power to provide for limited constitutional convention.

ADDRESS REPLY TO
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OP. 61-12

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

January 25, 1961

Honorable William F. Quinn
Governor of Hawaii
Iolani Palace
Honolulu, Hawaii

Attention: Mr. Jess H. Walters
Legislative Assistant to the Governor

Dear Sir:

In compliance with your memorandum, dated January 14, 1961, we transmit herewith a draft of a bill (50 copies) designated A-9 and entitled: "An Act Providing for the Submission to the Electorate for Determination the Question Whether There Shall Be a Constitutional Convention to Propose a Revision of or Amendments to the Constitution, and Making an Appropriation Therefor."

From our examination of our State Constitution with reference particularly to section 1 of Article III, pertaining to legislative power, and to sections 1, 2, and 3 of Article XV, pertaining to revision and amendment, we are of the opinion that our legislature has no power to enact a measure to provide for the submission to the electorate of the question whether there shall be a limited constitutional convention. We summarize the reasons for our opinion as follows:

> First, section 1 of Article III of our State Constitution, in vesting the legislative power in the State legislature, provides that such power shall extend to all rightful subjects of legislation not inconsistent with our State Constitution. It appears clear from this that, so far as the exercise of this power to provide for a constitutional convention is concerned, our legislature is, under Article XV, legally empowered to enact legislation for this purpose only if the enactment is consistent with the provisions of said Article XV. Any measure passed in contravention of this Article would be unconstitutional and hence void.

Secondly, section 2 of Article XV of our State Constitution prescribes, in part, as follows:

> "The legislature may submit to the electorate at any general or special election the question, "Shall there be a convention to propose a revision of or amendments to the Constitution?" If any ten-year period shall elapse during which the question shall not have been submitted, the lieutenant governor shall certify the question, to be voted on at the first general election following the expiration of such period.
>
> "If a majority of the ballots cast upon such question be in the affirmative, delegates to the convention shall be chosen at the next regular election unless the legislature shall provide for the election of delegates at a special election."

It appears clear from the above-quoted provisions that the question thus specified therein for submission by our legislature to the electorate, or if the legislature should fail to so submit it in ten years, then by the lieutenant governor, constitutes a mandatory one, with respect to both its form and its substance. Although the legislature may refrain from submitting said question to the electorate, it is not legally empowered to submit it in any form other than that prescribed in the language appearing in the above-quoted section.

Thirdly, while said Article XV of our State Constitution expressly confers the power of proposing constitutional revision and amendments upon the delegates at a constitutional convention under section 2 thereof, it does not confer any such power of proposing revision upon the legislature, either under said section or under any other section thereof. The word "revision" is noticeably absent from the provisions of section 3 thereof which prescribes the authority of the legislature to propose amendments to the Constitution, and the manner in which this authority may be exercised.

It is well settled by legal authorities that while the function vested in a constitutional convention to propose revision of a constitution includes the lesser function to propose particular amendments thereto, the function vested in a legislature to propose amendments does not, without more, include that of proposing revision.

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As stated by the Supreme Court of Rhode Island in In Re Opinion to the Governor (178 A. 433, 55 R.I. 56):

> "The purpose of the legislative mode is to bring about amendments which are few and simple and independent; and on the other hand, that of the mode through Conventions is to revise the entire Constitution, with a view to propose either a new one, or, as the greater includes the lesser, to propose specific and particular amendments to it . . . . In general, whenever a Convention is called, the intention is to authorize a revision of the entire Constitution, though, upon its meeting, the result of its labors may be only to recommend specific amendments. But, where the legislative mode is adopted, it is never intended to do more than to formulate certain specific amendments . . . . "

It appears clear from what has been said, therefore, that the said provisions of sections 2 and 3, of Article XV of our State Constitution, preclude the enactment of any statute by the legislature to limit the power of a constitutional convention to propose revision of the Constitution or of amendments thereto.

Lastly, section 2 (last paragraph thereof) of Article XV of our State Constitution expressly provides that the provisions of said section shall be self-executing, but that the legislature shall make the necessary appropriations and may enact legislation to facilitate their operation. It is well settled by legal authorities (16 C.J.S., Constitutional Law, Section 8) that self-executing provisions of a constitution may neither be abridged, impaired, nor limited by the legislature.

Our conclusion, therefore, is that our legislature must submit to the electorate the question on whether there shall be a constitutional convention in the manner that that question is framed and prescribed in section 2, Article XV, of our State Constitution, and that it is without legal power to provide for the submission of the question in such language as to call for a limited constitutional convention.

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As soon as we are able to complete our study of the major provisions of our State Constitution which may require amendments thereto, we shall list them in a memorandum for submission to you.

Respectfully submitted,

David Y. Mar

DAVID Y. MAR
Deputy Attorney General

Enc.

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

cc: Lt. Governor Kealoha
Senate Majority Leader Francis Ching
County Clerks (4)
County Attorneys (4)

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PUBLIC EMPLOYEES

Civil service, exclusions

Director of department of agriculture and conservation may establish the position of first deputy and provide a salary which is not subject to civil service limitations

PUBLIC EMPLOYEES

Compensation

The position of deputy director of agriculture and conservation is exempt from the provisions of the civil service laws with regard to limitation of salary

SLH 1959

Act 255

SECOND SPECIAL SESSION LAWS OF HAWAII 1959

Act 1

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Op. 61-13

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

January 27, 1961

Gordon P. Chung-Hoon, Director
Department of Agriculture and Conservation
State of Hawaii
Honolulu, Hawaii

Dear Sir:

This is in response to the request of your department for an opinion from this office as to whether the position of Deputy Director of Agriculture and Conservation is exempt from the civil service provisions of chapters 3 and 4 of the Revised Laws of Hawaii 1955.

Section 3-20 of the Revised Laws of Hawaii 1955 with regard to civil service exemptions reads as follows:

> "The civil service to which this part shall apply comprises all positions in the territorial service now existing or hereafter established and embraces all personal services performed for the Territory, except the following:
>
> (o) One first deputy or first assistant and one private secretary of each department head appointed under or in the manner provided in the first paragraph of section 80 of the Organic Act;"

The above provisions of section 3-20(o) were partially amended by section 7 of Act 1 of the Second Special Session, First State Legislature 1959, to clarify and define a department head. The fourth paragraph of the above uses the following language:

> "For the purposes of section 3-20(o) of the Revised Laws of Hawaii 1955, as amended, the phrase 'department head appointed under or in the manner provided in the first paragraph of section 80 of the Organic Act' shall be construed to include a single executive who is a head of a principal department and the executive officer of a board, or commission which is the head of a principal department established by this Act."

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Section 8 of Act 1 of the Second Special Session of the First State Legislature 1959 grants to the head of a department, with the approval of the governor, the power to exercise a wide discretion in establishing subordinate positions and changing the duties, titles and compensation of the offices in his respective department. Said section provides as follows:

> "Except as otherwise provided by this Act and with the approval of the governor, the head of a department may establish or abolish any subordinate office or position, transfer officers and employees between positions, appoint and remove any subordinate, and change the duties, titles and compensation of offices and positions as is deemed necessary by the head of the department for the efficient functioning of the department, subject to the limitations of available appropriations and of the provisions of chapters 3 and 4 of the Revised Laws of Hawaii 1955, as amended.
>
> All officers and employees within a department shall be under the supervision, direction and control of the head of the department, except as otherwise provided by this Act."

By section 5-20 of the Revised Laws of Hawaii 1955, as amended by Act 255 of the Session Laws of Hawaii 1959, the compensation of the first deputy or assistant to a department head is limited to 95% of the salary of the latter. The section states in part as follows:

> "'a. Notwithstanding any other law to the contrary, the salary of any first deputy or first assistant to the head of any department of the territorial or county government shall not exceed a sum equal to ninety-five per cent of the salary of such department head. The salary of any such first deputy or first assistant, which shall exceed such limitation as of July 1, 1957, is hereby reduced to comply with the provisions of this section.'
>
> b. Section 5-20 as amended by this section shall be effective retroactively to July 1, 1957, and any first deputy or first assistant who would have received a salary equal to ninety-five per cent of the salary of his department head but for the provision of section 5-20 as it existed prior to the amendment made by this section may be granted salary adjustments retroactive to the date he would have received such salary, but in no event beyond July 1, 1957."

Pursuant to the above, please be advised that it is the opinion of this office that the Director of the Department of Agriculture and Conservation may, with the approval of the Governor, establish the position for First Deputy and provide a salary for the same which is not subject to civil service limitations. As you have indicated that the above has been done, it is hereby determined that the status of the position of Richard H. Toyoshiba, the newly appointed Deputy Director of the Department of Agriculture and Conservation, is exempt from the provisions of civil service laws of the State of Hawaii.

Yours very truly,

Robert M. Botts

ROBERT M. BOTTS
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

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I N D E X

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9a, 17c

BOARD OF MEDICAL EXAMINERS

Applicant's Qualifications:

A person who has not graduated from an approved school as required by subsection 64-3(d) is not qualified to be admitted to practice in Hawaii.

STATUTES

Subsection 64-3(d), RLH 1955:

Passing the ECFMG examination is not the same as graduating from an approved medical school.

ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
AND REFER TO
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OP. 61-14

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

February 17, 1961 (original date 1-61)

Dr. Harry L. Arnold, Jr.
Secretary, Board of Medical Examiners
State of Hawaii
1000 Ward Avenue
Honolulu 14, Hawaii

Dear Dr. Arnold:

You have asked for the opinion of this office regarding the interpretation of subsection 64-3(d), Revised Laws of Hawaii 1955 as amended, wherein it is provided that an applicant for a license to practice medicine must be a graduate of a medical school or college approved by the Council on Medical Education and Hospitals of the American Medical Association. You are concerned because said Council no longer officially approves of foreign medical schools but instead accepts the results of an examination for foreign medical graduates given by the Educational Council for Foreign Medical Graduates. You have further called to our attention Assistant Secretary Ruhe's letter of January 9, 1961, from said Council on Medical Education and Hospitals wherein Dr. Ruhe states: "For the foreign graduate, the examination of the Educational Council for Foreign Medical Graduates remains the best single measure for determining his qualification for licensure and positions of responsibility. We are still assuming, therefore, that his having passed the examination is the equivalent of his having graduated from an approved medical school or college."

It is the opinion of this office that receiving a passing grade on the examination of the Educational Council for Foreign Medical Graduates is not the equivalent to the individual's having graduated from a medical school or college approved by said Council on Medical Education and Hospitals since the subject provision of subsection 64-3(d) is not ambiguous.

In June of 1958 the Council on Medical Education and Hospitals announced that effective January 1, 1960, it was withdrawing its list of approved foreign medical schools and

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accepting in lieu thereof the requirement of passing the ECFMG examination. Subsequently, the legislature in Act 149 of the Regular Session of 1959 amended said subsection 64-3(d) as to the content of its proviso but did not change the requirement that all candidates must have graduated from a medical school approved by the Council on Medical Education and Hospitals. Thus, it can be inferred that the legislature in 1959 chose not to amend subsection 64-3(d) to provide that a foreign medical school graduate seeking to take the medical examination of the Hawaii State Board of Medical Examiners would need only to have received a passing mark on the ECFMG examination instead of the requirement of having to be a graduate from an approved medical school.

For reasons of the above-stated laws and facts, it is the opinion of this office that receiving a passing grade on the ECFMG examination is not the equivalent of having graduated from a medical school or college approved by the Council on Medical Education and Hospitals of the American Medical Association.

Very truly yours,

W. K. WATKINS, JR.
Deputy Attorney General

Enclosures: (1) The Present and Future Status of Foreign Medical School Credentials in the United States by Council on Medical Education and Hospitals, June 1, 1958;
(2) Medical Licensure Statistics from Journal of the American Medical Association, May 28, 1960;
(3) Medical Education in the United States and Canada from Journal of the American Medical Association, November 12, 1960.

cc: Dr. Frank H. Jackson
Econ. Survey Dept., Univ. of Hawaii

APPROVED:

SHIRO KASHIWA
Attorney General

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INDEXING INSTRUCTION

I. HAWAII AERONAUTICS COMMISSION
   a. All concessions will be put on public bid unless specifically exempted.

II. Act 245, as amended, Session Laws of Hawaii, 1959.

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ADDRESS REPLY TO
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~~16b~~

Op. 61-15

STATE ~~TERRITORY~~ OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

January 31, 1961

Mr. A. P. Storrs
Director of Aeronautics
Hawaii Aeronautics Commission
Honolulu International Airport
Honolulu 17, Hawaii

Dear Sir:

This is in response to your letter No. O-1978, dated December 20, 1960, for an opinion concerning the applicability of Act 245, pertaining to the award of concessions. Specifically you ask:

1. Does Act 245, Session Laws of Hawaii 1958, as amended, pertain to the award of concessions only on an exclusive basis?

2. If the Hawaii Aeronautics Commission desires to have one or more concessionaires or licensees at the Honolulu International Airport performing the same or identical functions (such as U-drive operations, etc.), does the Hawaii Aeronautics Commission or Airport Management have the right to negotiate and enter into agreements with these concessionaires without soliciting public bids as required under the Act?

Section 1 of Act 245, Session Laws of Hawaii 1959, as amended by Act 14, Session Laws of Hawaii 1960, reads as follows:

"No concessions or concession space to sell goods, wares, merchandise and services or to operate restaurants, cocktail lounges, soda fountains and parking areas in any building or on any land owned or under the jurisdiction of the State or any county or any independent board, commission, bureau or agency of the State or of the various counties, except concessions or space for taxi or other ground

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> transportation services at airports other than Honolulu International Airport, concessions or space for lei vendors, airline operations and coin operated vending machines, but not including coin operated insurance vending machines, and except also concessions or space set aside without any charge or for the use of handicapped persons, or blind persons or any department, bureau, organization or municipal or political subdivision of the federal, state, municipal or county governments, shall be leased, rented out, let, assigned or disposed of either by contract, lease, license, permit or any other arrangement to any private person, firm, or corporation, except under contract let after public advertisement for sealed tenders, in the manner provided by law."

This section appears clear and unambiguous. It is explicit in requiring public bids for the letting of concessions for certain types of businesses, and excepting therefrom certain other types of businesses.

However, in Act 14, the language quoted above was preceded by a statement of facts declaring the urgency and necessity of this bill. The statement in part said:

> "The purpose of this Act is to limit the requirement of bidding only to exclusive concessions and concession spaces. . ."

We note that in spite of the stated legislative purpose of Act 14, the legislature did not in amending Section 1 of Act 245 make reference to exclusive and non-exclusive concessions. Instead, it chose to make specific listings of types of businesses that are excepted and exempt from public bid.

The reading of the State Constitution of Hawaii shows that this statement of facts declaring the purpose of the amendment was specifically required in order to set forth the urgent nature of the bill. Bills in the Budget Session, other than revenue, expenditure and appropriation bills, were mandated to have these statements of facts. These statements were never intended to be part

of the law. As such, in this instance, its purpose was to relate the urgency of the bill and thereby satisfy the constitutional provision.

(Section 11, Article III, Constitution of the State of Hawaii)

The general rule of statutory construction is that where a statute is clear and unambiguous, there is no room for construction (Terr. v. Morita, 41 Haw. 1, 1955; 50 Am. Jur. Statutes 204, Sec. 225). Accordingly, in the instant case, it would be improper to resort to the statement of purpose to construe Section 1 of Act 245, which appears clear and unambiguous, as written.

Therefore, based on the foregoing discussion, it is the opinion of this office that concessions will either be put on public bid or be exempted therefrom according to the listing appearing in Section of Act 245, as amended, and the matter of exclusiveness or non-exclusiveness of the concession is not a consideration.

Very truly yours,

LINCOLN J. ISHIDA
Deputy Attorney General

APPROVED:

SHIRO KASHIWA
Attorney General

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INDEXING INSTRUCTION

I. HAWAII AERONAUTICS COMMISSION
   a. Letting of space for a bank and a doctor's office must be put out for public bid.

II. Act 245, as amended, Session Laws of Hawaii, 1959.

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STATE TERRITORY OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

January 31, 1961

Mr. A. P. Storrs
Director of Aeronautics
Hawaii Aeronautics Commission
Honolulu International Airport
Honolulu 17, Hawaii

Dear Sir:

This is in response to your letter No. 61.22, dated January 6, 1961, for an opinion concerning the applicability of Act 245 pertaining to the award of concessions to a bank and a doctor's office. You ask:

1. Under the meaning of Act 245 is it mandatory to put out to bid a bank and a doctor's office?

Act 245 provides that "No concession or concession space to sell . . . . services . . . shall be leased . . . except under contract let after public advertisement for sealed tenders. . ." Then it goes on to list certain exceptions not pertinent here.

"Concession" has already been interpreted by our office as a grant or lease of a portion of premises for some specific use or of a right to enter upon premises for some specific purpose.

(Attorney General's Opinions 59-168; 59-167; 59-164)

"Concession space" obviously is that space to be used and occupied by a concession.

Although the practice of medicine is a profession and a bank, essentially a commercial enterprise; both activities would involve the sale of services to the public.

Banks are in competition with each other and they, among other things in order to obtain the public trade, advertise their interest rates and the value of the various services which are available.

Op. 61-16

Doctors, although engaged in a profession and normally would not be in open competition with each other for their services, nontheless in this situation would or could be in competition with each other in bidding for office space at the new terminal buildings.

In both instances, in relation to the Hawaii Aeronautics Commission, they would be competing for "concession space" in order to carry on their business and profession respectively.

Therefore, based on the foregoing discussion, it is the opinion of this office that the letting of space for a bank and doctor's office are required to be put out for public bid under the provisions of Act 245.

Very truly yours,

LINCOLN J. ISHIDA
Deputy Attorney General

APPROVED:

SHIRO KASHIWA
Attorney General

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INDEXING INSTRUCTIONS

I. HAWAII AERONAUTICS COMMISSION

Gray Line Hawaii Ltd. has an exclusive contract for ground transportation at the airport limited by certain qualifications in the contract.

II. Act 245, Session Laws of Hawaii 1959, as amended.

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STATE ~~TERRITORY~~ OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

January 31, 1961

Mr. A. P. Storrs
Director of Aeronautics
Hawaii Aeronautics Commission
Honolulu International Airport
Honolulu 17, Hawaii

Dear Sir:

This is in response to your letter No. 61.55 dated January 16, 1961 for an opinion concerning the Gray Line Hawaii Ltd., Ground Transportation Contract with the Hawaii Aeronautics Commission. You specifically ask:

1. Can the Commission construe Gray Line as the exclusive limousine and bus transportation operator at Honolulu International Airport?

2. Can other companies be permitted to pick up passengers (at their request) for delivery to destinations from the Honolulu International Airport?

3. If the answer is in the affirmative under (2), how could the Commission apply Act 245, SLH 1959?

Gray Line Hawaii Ltd., under the agreement entered into on June 13, 1958 was granted the exclusive right to pick up passengers at Passenger Terminal Buildings at the Airport for delivery to their destination on or beyond the Airport. The agreement further limited Gray Line Hawaii's exclusive rights by those certain provisions in Item 3(b) of the Agreement.

Item 3(b) reads as follows:

"The exclusive right granted shall be interpreted to mean that the Commission will put forth its best effort in order that other companies do not pick up passengers at the Airport, but it shall not mean that patrons of the Airport cannot call especially for other services nor shall it mean that such other companies cannot render such services

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> when especially called to the Airport by Airport customers or patrons, nor shall it mean that other companies which are authorized by the Commission to pick up prepaid passengers cannot render such services whenever required."

The provisions of the Agreement are clear. Gray Line Hawaii Ltd., has an exclusive contract limited by those qualifications as set forth in Item 3(b).

In the determination of Question 2, we are concerned with Section 5, Part 1, of the Rules and Regulations. It reads as follows:

> "No person shall operate any vehicles for hire from the airport unless such operation is with the approval of the Commission and under such terms and conditions as may be prescribed by the Commission."

We believe that the situation where passengers request companies to come to the Airport to pick them up is not in violation of the Gray Line contract nor the regulation set forth above.

The Gray Line contract specifically excepted that situation where patrons called for services. The regulation seeks to restrict any person who operates a vehicle for hire from the Airport. A person, outside the Airport premises need not receive Commission approval for he is not operating a vehicle for hire from the Airport. Therefore even in the situation where he is called to the Airport, he is not in violation of the regulations for he is not operating a vehicle for hire from the Airport, but on the contrary from his place of business.

Act 245 is applicable where a government agency grants to private persons the right to operate a concession for profit. Since we are not concerned here with a concession, Act 245 would be inapplicable.

Based on the foregoing discussion, it is the opinion of this office that Gray Line Hawaii Ltd., is the

exclusive limousine and bus transportation operator subject to certain qualifications at the Honolulu International Airport; that other companies may pick up passengers who call from the Honolulu International Airport, and Act 245 is inapplicable in such situations.

Very truly yours,

/s/ Lincoln J. Ishida

LINCOLN J. ISHIDA
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

61-16a

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Parole

The granting and revocation of parole by the Board of Paroles and Pardons is an executive function and not a judicial function, and the rules of the Supreme Court are not applicable.

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STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

January 31, 1961

Dr. Ferris Laune, Chairman
Board of Paroles and Pardons
State of Hawaii
Honolulu, Hawaii

Attention Mr. Arthur A. Hoke
Executive Secretary

Dear Dr. Laune:

Subject: Nature of Parole and Parole Revocation by Board of Paroles and Pardons

In reply to your inquiry as to whether or not the functions of the Board of Paroles and Pardons in regard to its granting and revocation of parole are judicial proceedings under the law and are covered by the rules of the Supreme Court of the State of Hawaii, this department is of the opinion that said functions of the Board of Paroles and Pardons are not judicial proceedings.

The administration of a parole law is the exercise, through the administrative department, of the state's power to keep safely, supervise, and discipline its prisoners. 67 C.J.S., Pardons, Section 18, page 600. The revocation of parole has been held to be a ministerial function and not a judicial function. 14 C.J.S., Certiorari, Section 18, page 18. In the absence of statutory authority, the court has no authority to exercise the power of parole. 67 C.J.S., Pardons, Section 19.

The law of paroles is largely a matter of expressed statutory law. 39 Am. Jur., Pardon, Reprieve and Amnesty, Section 81. The law of this state provides that paroles may be granted by the Board of Paroles and Pardons and the Governor of the State. Section 83-66, R.L.H. 1955, as amended 1957. Where paroles are granted by the Governor, it is an exercise of executive clemency; where paroles are granted by a board, which members are appointed by the Governor, the board is a branch of the Executive Department of the State Government.

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Dr. Ferris Laune

In view of the above, the function of granting and revocation of parole by the Board of Paroles and Pardons is an executive and not judicial function; the rules of the Supreme Court of Hawaii are not applicable to the functions and duties of the Board of Paroles and Pardons with respect to granting and revocation of parole.

Very truly yours,

Tenny Hoon Tom

TENNY HOON TOM
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

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Pardon

Pardon may be extended to one on probation.

The Governor is authorized to grant pardons, after conviction, for all offenses.

A pardon sets an accused free from the custody of the law, prevents further court action, terminates existing probation, and makes anticipated probation impossible.

The power of pardon is separate from the power of probation; the power of pardon is vested in the executive, the power to grant probation is within the jurisdiction of the courts.

Constitution, State of Hawaii

The Governor is authorized to grant pardons, after conviction, for all offenses. Section 5, Article IV.

Probation

Probation is within the jurisdiction of the courts in comparison with the power of pardon, which is vested in the executive.

Probation is not a pardon for the power to pardon is vested in the executive; probation is an authorized mode of punishment; a probationer is not a free man and is subject to surveillance and such restrictions as the court may impose.

A pardon by the governor terminates probation. If pardon has been granted after conviction, it prevents probation or imposition of sentence.

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STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

January 31, 1961

Honorable William F. Quinn
Governor of Hawaii
Iolani Palace
Honolulu, Hawaii

Attention Mr. John Felix

Dear Sir:

Re: Pardon for Probationers

This is in response to your verbal request as to whether or not pardon may be granted to one on probation.

It is the opinion of this department that the Governor may grant a pardon, after conviction, for all offenses and such a pardon may be granted to one on probation.

The Constitution of the State of Hawaii authorizes the Governor to grant reprieves, commutations and pardons, after conviction, for all offenses. Section 5, Article IV, Constitution of the State of Hawaii. A full pardon absolves one from all legal consequences of his crime; if granted after conviction, it removes the penalties and disabilities which ordinarily follow from conviction, and, generally speaking, restores the offender to all his civil rights. 39 Am. Jur., Pardon, Reprieve and Amnesty, Section 52. An "absolute pardon" sets an accused free from the custody of the law, prevents further court action, terminates existing probation, and makes anticipated probation impossible. State ex rel. Gordon v. Zangerle. 26 N.E. 2d 190, 194; 136 Ohio S. 371.

Section 258-53 of the Revised Laws of Hawaii 1955, 1957 Supplement, authorizes the circuit court to suspend the imposition or execution of a sentence, in full or in part, and place the defendant upon probation for such period and upon such terms and conditions that the court may deem best; the court is also empowered to revoke or to modify any condition of probation or change the period of probation. Probation is not a pardon for the power to pardon is vested in the executive; probation is an authorized mode of punishment; a

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probationer is not a free man and is subject to surveillance and such restrictions as the court may impose. Cooper v. U.S., 91 F. 2d 195, 199.

The power to suspend sentence and power to grant reprieves and pardons are totally distinct in their origin and nature; the former power has always been a part of judicial power, while the latter is a part of executive power. Moore v. Thorn, 281 N.Y.S. 49, 245 App. Div. 180, reversing 277 N.Y.S. 544, 154 Misc. 136, and affirmed 200 N.E. 290, 270 N.Y. 502. A statute authorizing the suspension of the execution of sentences or providing for probation in case of such suspension, is not unconstitutional, and does not encroach on the constitutional power of the executive to grant reprieves and pardons, or to remit fines and forfeitures. 24 C.J.S., Criminal Law, Section 1618, page 173.

> "It thus appears that a pardon, which is granted after conviction but before sentence, whether full or partial, absolute or conditional, suspends the power of the judge or magistrate to proceed further, either by way of sentence or probation, and if probation has been previously granted, lifts it; therefore, suspending the imposition of sentence and granting probation does not and cannot impair or affect the constitutional right of pardon vested in the executive." State v. Zangerle, supra, 195.

The executive power to grant pardons is thus separated from the court's power to suspend imposition or execution of sentence and to grant probation; one is an executive function, the other a judicial function. Our constitution authorizes the Governor to grant pardons, after conviction, for all offenses. A pardon may be granted to one who has been convicted and placed on probation even though the probation has not been terminated. State v. Zangerle, supra. Once the power to grant a pardon is exercised, the legal consequences of the crime--the penalties and disabilities--are removed.

Respectfully yours,

Tenny Hoon Tom

TENNY HOON TOM
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

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No Opinion

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ADDRESS REPLY TO
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STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

February 1, 1961

Frank Lombardi, Director
Department of Planning and Research
State of Hawaii
195 S. King Street
Honolulu, Hawaii

Dear Mr. Lombardi:

This is in reference to your letter SPO-3019, dated January 19, 1961, requesting this office to review, make comments, and prepare necessary legislation for the creation of an air ferry system in the State of Hawaii as outlined in said letter. Instead of answering the questions in the order you have presented them, I have undertaken to discuss the problems generally.

Your proposal is based on the assumption that the air ferry will be operated by private interest with financial aid from the State and not by the State itself. This immediately raises the question as to whether any financial aid by the State to the private interest will be considered a public purpose. As discussed during our meeting on January 18th, section 6, Article VI of our State Constitution provides:

> "No ... appropriation of public money or property made, nor shall the public credit be used, directly or indirectly, except for a public purpose. ..."

Preliminary research indicates that the question of whether a surface ferry operated by a private interest is considered a "public purpose" has been litigated only once.

In State v. Pierce County, 51 P2d 407 (Wash) the court held, in interpreting similar constitutional provisions, that a public ferry (Municipal owned and operated) is a part of a highway and subserves public interest and convenience and therefore is for a public purpose, but after the sale of the ferry, the maintenance and operation by a private common carrier is for private purpose and any subsidy to such common carrier by a municipality was unconstitutional. If our courts follow this case, your proposal to guarantee loan payments will be held unconstitutional since the State would be lending its credit for a private purpose.

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Therefore, further research must be made before we can definitely rule whether the plan presented by your office is constitutional.

On the question of whether the State may lease the air ferries to a private interest, it has been held that a municipal corporation authorized to maintain a ferry, or charged with the duty of doing so, may lease it to a private individual. (22 Am. Jur., Ferries, § 29, and 63 A.L.R. 629). It is our belief that leasing of the airplanes by competitive bid is the best legal method.

Assuming that the plan is within the constitutional provision of section 6, Article VI, the method of assistance by the State must be decided. The sale of revenue bonds requires compliance with paragraph 7, section 3, Article VI of the Constitution. The sale of general obligation bonds requires compliance with paragraphs 2 and 6 of said constitutional provision. The method of State guaranteeing loan payments will require compliance with section 3, Article VI of the Constitution, and will be included in the debt of the State.

Furthermore, definite decision should be made as to who will be empowered to regulate the air ferry. In this regard, the question of franchise arises. In the case of surface ferry, it has been conclusively decided that the State and not the Federal government has the power to give franchises. However, in the case of an air ferry, we have the same question as the "sky bus" case that is before the State Supreme Court at the present time--whether jurisdiction over airlines is in the Public Utilities Commission or the Civil Aeronuatics Board. If the air ferries are to carry U. S. mail, the C.A.B. will have exclusive jurisdiction.

Your proposal for the creation of a board within the Department of Transportation should be given further consideration. As you know, under the reorganization plan the Board of Harbor Commissioners and the Hawaii Aeronautics Commission placed within the Department of Transportation are to be abolished on July 1. The creation of a new board under the Director of Transportation seems to be contrary to the reorganization plan and may run into legislative difficulty.

We therefore recommend that we meet with the Governor to discuss the problems and to decide a definite course of action before attempting to prepare legislation.

Yours very truly,

SHIRO KASHIWA
Attorney General

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File

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

February 1, 1961

Frank Lombardi, Director
Department of Planning and Research
State of Hawaii
195 S. King Street
Honolulu, Hawaii

Dear Mr. Lombardi:

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> "No ... appropriation of public money or property made, nor shall the public credit be used, directly or indirectly, except for a public purpose. ..."

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Therefore, further research must be made before we can definitely rule whether the plan presented by your office is constitutional.

On the question of whether the State may lease the air ferries to a private interest, it has been held that a municipal corporation authorized to maintain a ferry, or charged with the duty of doing so, may lease it to a private individual. (22 Am. Jur., Ferries, § 29, and 63 A.L.R. 629). It is our belief that leasing of the airplanes by competitive bid is the best legal method.

Assuming that the plan is within the constitutional provision of section 6, Article VI, the method of assistance by the State must be decided. The sale of revenue bonds requires compliance with paragraph 7, section 3, Article VI of the Constitution. The sale of general obligation bonds requires compliance with paragraphs 2 and 6 of said constitutional provision. The method of State guaranteeing loan payments will require compliance with section 3, Article VI of the Constitution, and will be included in the debt of the State.

Furthermore, definite decision should be made as to who will be empowered to regulate the air ferry. In this regard, the question of franchise arises. In the case of surface ferry, it has been conclusively decided that the State and not the Federal government has the power to give franchises. However, in the case of an air ferry, we have the same question as the "sky bus" case that is before the State Supreme Court at the present time--whether jurisdiction over airlines is in the Public Utilities Commission or the Civil Aeronuatics Board. If the air ferries are to carry U. S. mail, the C.A.B. will have exclusive jurisdiction.

Your proposal for the creation of a board within the Department of Transportation should be given further consideration. As you know, under the reorganization plan the Board of Harbor Commissioners and the Hawaii Aeronautics Commission placed within the Department of Transportation are to be abolished on July 1. The creation of a new board under the Director of Transportation seems to be contrary to the reorganization plan and may run into legislative difficulty.

We therefore recommend that we meet with the Governor to discuss the problems and to decide a definite course of action before attempting to prepare legislation.

Yours very truly,

SHIRO KASHIWA
Attorney General

61-21
8a, 22a

I N D E X

LEGISLATION - CONSTITUTION - HAWAIIAN HOMES COMMISSION ACT

(1) Hawaiian Homes Commission Act may be amended by state legislation with or without the consent of Congress as provided in section 4 of the Admission Act.

(2) Article XI of the State Constitution, as amended, includes provisions of section 4 of the Admission Act providing that, as a compact with the State, the State Constitution includes a provision providing for the adoption of the Hawaiian Homes Act as a law of the State, subject to amendment or repeal by state legislation, with or without the consent of Congress as set forth in section 4 of the Admission Act. Hawaiian Homes Commission Act, in its entirety, is not adopted as a provision of State Constitution.

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

8a, 22a
OP. 61-21

February 2, 1961

Honorable Francis Ching, Chairman
Senate Committee on Public Lands
State Legislature
Honolulu, Hawaii

Dear Senator Ching:

Please be advised that the Attorney General has approved the legislative mode for amending the Hawaiian Homes Commission Act, 1920, as amended, in the manner proposed for the bills designated J-1 and J-2, preliminary drafts of which were presented to your committee by the Director of Hawaiian Home Lands, Commissioner V. Thomas Rice, and Commission Counsel last Friday afternoon. As you may recall, the preliminary draft of J-1 contains proposed amendments to sections 201, 207, 208, 209, 210, 215 and 223 of the Hawaiian Homes Commission Act, while the preliminary draft of J-2 contains provisions for amendments to sections 202, 204, 206, 213 and 222 of the same Act.

The question whether basic amendments of the Hawaiian Homes Commission Act may be effected by state legislation with the consent of Congress is a serious one. It arises because of the conflicts appearing, on the one hand, in the language in sections 1 and 2 of Article XI of our State Constitution and, on the other hand, in the literal wording of section 4 of the Admission Act. The provisions of this section of the Admission Act, which was approved by the President on March 17, 1959, were deemed by Congress, under section 7(b) of the same Act, to be included in Article XI of our State Constitution. Subsequently, at the plebiscite held in Hawaii on June 27, 1959, the electorate adopted that section verbatim in the amendment to said article of our State Constitution. Article XI, prior to said amendment, provides in essence, that as a compact with the United States, the State and its people accept as a trust the continuance of the Hawaiian Homes projects for the rehabilitation of the Hawaiian race, and that the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a law of the State, subject to amendment or repeal by the legislature, only with the consent of the United

(Extra copies on top 3 opinion index files)

Op. 61-21

States and in no other manner, except for such provisions thereof that Congress may specify as being amendable by our legislature without its consent. The amendment to said Article XI, briefly, provides in part, that as a compact with the United States, the Hawaiian Homes Commission Act shall be adopted as a provision of our State Constitution, subject to amendment or repeal only with the consent of the United States, provided, however, that certain sections and parts of sections thereof, as enumerated therein, may be amended in the Constitution or in the manner of state legislation.

To hold that the Hawaiian Homes Commission Act, in its entirety, is adopted as a provision of our State Constitution would, aside from other serious objections, create a difficult, cumbersome, and time-consuming process for effectuating amendments thereto. It is extremely doubtful that the Congress ever intended that the Hawaiian Homes Commission Act, in its entirety, were to be adopted as a provision of our State Constitution. It seems that the literal language appearing in section 4 of the Admission Act has beclouded the true intent of the Congress. What Congress contemplated appears to be this: that Article XI of our State Constitution shall be deemed amended to include the basic provisions of section 4 of the Admission Act, to wit, the provisions providing that as a compact with the United States, the Constitution of the State of Hawaii shall include a provision under Article XI thereof providing for the continuance of the Hawaiian Homes Commission Act for the rehabilitation of the Hawaiian race as a state law, subject to amendment, whether by constitutional amendment or by state legislative act or repeal, only with the consent of the United States unless otherwise expressly provided therein by Congress. This interpretation is consistent with the intent expressed by Congress in Senate Report No. 80, dated March 5, 1959, which recommended passage of the Admission Act. This Report states, in part, as follows:

> "Section 4 requires the State of Hawaii to adopt the Hawaiian Homes Commission Act, 1920, as a provision of its constitution and provides that it shall not be changed in its basic provisions except with the consent of the United States. Article XI of the constitution of Hawaii conforms to this requirement. The Hawaiian Homes Commission Act is a law which set aside certain lands in order to provide for the welfare of native Hawaiians.

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> While the new State will be able to make changes in the administration of the act without the consent of Congress, it will not be authorized, without such consent, to impair by legislation or constitutional amendment the funds set up under it or to disturb in other ways its substantive provisions to the detriment of the intended beneficiaries." (See 2 U. S. Code, Congressional and Administrative News, First Session, 1959, pp. 1346-1361 at 1361. Underlining added for emphasis.)

In accordance with your request, we transmit herewith memoranda prepared by former deputies of the Attorney General, Rhoda V. Lewis, Morio Omori and Philip T. Chun, and Vernon F. L. Char, relating to the same subject matter. The memorandum prepared by former Deputy Attorney General Vernon F. L. Char, dated April 4, 1960, according to a notation in the file, was not mailed because the legislature adjourned and the bill mentioned in that memorandum was "killed." It is retained for reference purposes.

See 1960 file IX-A

Respectfully submitted,

/s/ DAVID Y. MAR

DAVID Y. MAR
Deputy Attorney General

APPROVED:

/s/ SHIRO KASHIWA

SHIRO KASHIWA
Attorney General

cc: Hawaiian Homes Commission

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I N D E X

61-22
8a, 11b

HAWAIIAN HOMES COMMISSION - MOLOKAI IRRIGATION PROJECT

Cost of water irrigation projects affecting Hawaiian homesteaders.

Commission has authority under section 220, Hawaiian Homes Commission Act, 1920, as amended, to agree to pay for homesteaders' share of cost of construction of water irrigation projects benefiting their homestead lands.

ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
AND REFER TO
INITIALS AND NUMBER

WKW:hmm

8a, 11b

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STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

February 3, 1961

Mr. E. H. Cook, Director
Dept. of Land & Natural Resources
State of Hawaii
Honolulu, Hawaii

Dear Sir:

By communication dated December 28, 1960, you stated that in connection with the application for a Federal loan under the Small Reclamation Projects Act for the construction of the irrigation project to serve land in the Hawaiian Homes Hoolehua Homestead area and other lands on Molokai, you are in need of an opinion on the question whether the Department of Hawaiian Home Lands can contract with the Department of Land and Natural Resources to guarantee the payment of the homesteaders' "obligations for water charges".

Mr. Robert Chuck, manager-engineer with the Division of Water and Land Development, and I have recently discussed this Molokai project in the light of your letter to the Attorney General. He indicated that the so-called obligations referred to in your letter would cover assessments to be paid by the homesteaders for their share of the cost of construction of the project to serve homestead lands. If this be correct, then there is no room for doubt as to the authority of the Hawaiian Homes Commission to enter into a contract guaranteeing payment of the homesteaders' share of the cost of construction of the project, in the event any of the homesteaders fail to pay their share of the assessments for the construction of the improvements under the project. That authority is clearly stated in section 220 of the Hawaiian Homes Commission Act, 1920, as amended, pertaining to the construction of irrigation projects to serve the needs of Hawaiian homesteaders. We excerpt, so far as pertinent, the provisions from that section of said Act as follows:

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"To enable the construction of irrigation projects which will service Hawaiian homelands, either exclusively or in conjunction with other lands served by such projects, the Commission is authorized . . . to request any such irrigation agency [Hawaiian Irrigation Authority or any other agency of the State or of the United States Government] to organize irrigation projects for Hawaiian homelands and to transfer irrigation facilities constructed by the Commission to any such irrigation agency; to agree to pay the tolls and assessments made against community pastures for irrigation water supplied to such pastures; and to agree to pay the costs of construction of projects constructed for Hawaiian homelands at the request of the Commission, in the event the assessments paid by the homesteaders upon lands are not sufficient to pay such costs . . . "

Very truly yours,

David Y. Mar

DAVID Y. MAR
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

Op. 61-22

INDEXING INSTRUCTIONS

1. Highways - Installation of Street Lights by the State.

Although the State has jurisdiction and responsibility over State highways, the State will not install street lights on said highways unless the requirements of the Federal Government as outlined in the Instuctional Memorandum 40-2-60 dated April 15, 1960 issued by the Bureau of Public Roads, U. S. Department of Commerce, have been met and the Federal Government has approved the same.

2. Highways - Installation of Street Lights on State Highways by the Counties.

There does not appear to be any Federal or State laws prohibiting the State from authorizing the counties to install street lights on State highways, provided the counties will assume the cost of installation and maintenance and the plans and specifications for the same are approved by the Department of Transportation and the Federal Bureau of Public Roads.

ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
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24b & 16c

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STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

February 6, 1961

Cyril Kanemitsu, Esq.
Deputy County Attorney
County of Hawaii
Hilo, Hawaii

Dear Sir:

Re: Installation of Street Lights on State Highways.

The above subject matter in your letter dated January 3, 1961, addressed to the Honorable Shiro Kashiwa, Attorney General, has been forwarded to me for reply. The questions you pose are:

1. Who has the responsibility of providing adequate street lights on State highways?

2. Assuming that it is a State responsibility, but the State fails to provide said lighting, may the County with authorization of the State install street lights on State Highways?

3. Who has the responsibility where a county road intersects a State highway?

Under the Reorganization Act of 1959, the functions and authority with respect to highways have been transferred to the Department of Transportation. As a result, the Department of Transportation has jurisdiction, control and responsibility of State highways, subject, however, to compliance with Federal Highway laws, regulations and decisions wherever Federal-aid highways are concerned. (Title 23, USCA; Chapter 111, R.L.H. 1955).

With regard to the installation of street lights on State highways and to obtain Federal aid for the same, the Department of Transportation is required to comply with the standards of the Federal Government. Some of

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these standards as outlined in the Instructional Memorandum 40-2-60 dated April 15, 1960 issued by the Bureau of Public Roads, U. S. Department of Commerce, limit the installation of street lights to the following circumstances:

1. Where the traffic served is entirely or predominantly through traffic, as on the through lanes of the Lunalilo Freeway in Honolulu, Oahu;

2. Where the Federal-aid project makes necessary the replacement of previously existing lighting fixture; and

3. At non-signalized intersections or locations where there are high frequency night traffic accidents due to inadequate illumination.

The State, therefore, would assume the responsibility of installing street lights when any of the above circumstances exists and the Federal Government has approved the same.

Regarding your second question, there does not appear to be any Federal or State laws which would prohibit the State from authorizing the counties to install street lights on State highways, provided the counties will assume the cost of installation and maintenance and the plans and specifications for the same are approved by the Director of Transportation and the Federal Bureau of Public Roads.

As to your third question, the installation of street lights by the State at the intersection of a county road and State highway would be governed by the Federal standards listed above.

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I trust that this letter answers your question.

Yours very truly,

Johnson Wong

JOHNSON H. WONG
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

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INDEXING INSTRUCTION

Op. 61-24

I. BOARDS AND COMMISSIONS

Qualifications of members

While the Constitution has prescribed certain qualifications, the legislature may prescribe additional qualifications unless it appears that such action is prohibited.

II. CONSTITUTIONAL LAW

Separation of powers

It is not an encroachment by the legislature upon the executive power of appointment to prescribe certain qualifications for members of boards who are appointed by the governor.

III. GOVERNOR

Appointments - Legislative power

It is not an encroachment by the legislature upon the executive power of appointment to prescribe certain qualifications for members of boards who are appointed by the governor.

IV. LEGISLATURE

Executive power

It is not an encroachment by the legislature upon the executive power of appointment to prescribe certain qualifications for members of boards who are appointed by the governor.

V. REGENTS, BOARD OF

Appointment

Appointment to Board of Regents under Article IX, section 5, of the Constitution.

VI. UNIVERSITY OF HAWAII

Board of Regents

Article IX, section 5, held constitutional.

CONSTITUTION OF THE STATE OF HAWAII
Article IX, section 5

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STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

February 7, 1961

Honorable William F. Quinn
Governor of Hawaii
Iolani Palace
Honolulu, Hawaii

Attention: Mr. Jess H. Walters
Legislative Assistant to the Governor

Dear Sir:

This is in response to your oral request for an opinion on the constitutionality of the requirements set forth in Act 1, Second Special Session, First State Legislature 1959, for the appointment of members to the Board of Regents of the University of Hawaii, to wit:

(1) "The board shall consist of eleven members, one from each senatorial district and three at large. . . ."

(2) "No more than six of the members shall be members of the same political party. . . ."

(3) ". . . at least five members shall be former students of the University of Hawaii. . . ."

Article IX, section 5 of the Constitution of the State of Hawaii provides:

"There shall be a board of regents of the University of Hawaii, the members of which shall be nominated and, by and with the advice and consent of the senate, appointed by the governor. At least part of the membership of the board shall represent geographic subdivisions of the State."

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Requirement No. (1) that "The board shall consist of eleven members, one from each senatorial district and three at large . . ." complies with the "geographic subdivisions" requirement of Article IX, section 5 of the Constitution and is therefore constitutional.

The Constitution is silent with regard to requirements No. (2) and (3) of Act 1, Second Special Session, First State Legislature 1959. The additional question arises as to whether or not said requirements are an encroachment by the legislature upon the executive function, that of appointing the members of the Board of Regents, and therefore unconstitutional.

With respect to requirement No. (2), statutes have been sustained which provide that not more than a given number of members of a board or commission shall be taken from the same political party (Shurtleff v. United States, 189 U.S. 311; Rogers v. Buffalo, 123 N.Y. 173; 25 N.E. 274; anno. 140 A.L.R. 473). One of the primary reasons for sustaining this type of statute is to make administrative boards or commissions nonpartisan and at the same time not limit the board to only "the two leading political parties". Requirement No. (2) of said Act 1, by its very words, falls into this category. We therefore are of the opinion that this requirement of said Act is not an encroachment of the legislature upon the executive department, and constitutional.

The general rule with respect to requirement No. (3) is that, where the constitution has prescribed certain qualifications, the legislature may prescribe additional qualifications unless it appears that such action is prohibited (42 Am. Jur. 909). These qualifications must be reasonable (Attorney General ex rel. Cook et al. v. O'Neill, 274 N.W. 445, 452). In Miami Laundry Co. v. Florida Dry Cleaning & L. Board, 183 So. 764, the court said:

> "In requiring that three members of the Board should be chosen from the cleaning industry, three members from the laundry industry and one member to represent the public, we do not understand the act to do more than require that three members of the Board must have had experience in the laundry business and three members must have had experience in the cleaning business. In

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other words, all the act does is to prescribe certain qualifications for those appointed to it. We do not construe such requirements to unduly restrict the appointive power."

We are of the opinion that requirement No. (3) does not unduly restrict the appointive power and hence constitutional.

Yours very truly,

Donald H. C. Low

DONALD H. C. LOW
Deputy Attorney General

APPROVED:

Shiro Kashiwa

Shiro Kashiwa
Attorney General

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INDEXING INSTRUCTION

Op. 61-25

GIFTS

Municipal corporation

By section 137-52, Revised Laws of Hawaii 1955, the state department of labor may accept a monetary contribution from the city to improve its truck safety program and create additional positions therewith regardless of section 13 of Act 18, Session Lawa of Hawaii 1960.

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STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

February 14, 1961

Mr. Takashi Kitaoka
Director of Labor and Industrial Relations
825 Mililani Street
Honolulu, Hawaii

Dear Mr. Kitaoka:

This is in response to your letter of January 24, 1961, requesting our opinion pertaining to a monetary contribution by the City and County of Honolulu. By letter dated January 19, 1961, Mr. H. Au, Traffic Engineer, stated that the said City and County is willing to contribute $10,000 towards the truck safety inspection program administered by the state department of labor, and to participate therein pending determination of whether the state or the city shall assume sole responsibility for the program on Oahu.* Action on the offer is dependent upon the answers to the following questions:

1. May the state accept this monetary contribution from the city?

2. May the money be used to create additional positions of inspectors although such positions are not included in the present department budget?

The answer to the first question is "Yes". Section 137-52, Revised Laws of Hawaii 1955, provides in part as follows:

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* See Corp. Counsel Op. 61-1, dated January 3, 1961, advising that it would be within the scope of the municipality's police powers to carry out a similar program.

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> "In addition to the powers which it may otherwise have, any department shall have power under this part: (a) to construct, acquire by gift, purchase or the exercise of the right of eminent domain, reconstruct, improve, better or extend any undertaking within its jurisdiction, and to acquire by gift, purchase or the exercise of the right of eminent domain, lands or rights in land or water rights in connection therewith. . . ." (Emphasis added.)

By virtue of the foregoing provision, this office is of the opinion that the state department of labor may accept the monetary contribution from the city to improve its truck safety inspection program. (See also 81 C.J.S., States, § 134, p. 1159.)

With respect to the second question, we believe that the money may be used to create the additional inspectors positions. The budget, Act 18, Session Laws of Hawaii 1960, authorizes twenty-four positions for the division of workmen's compensation, department of labor and industrial relations. The safety inspectors are included within the said division. However, section 13 of the Act states:

> "The maximum number of positions unless authorized for the State government at the end of fiscal year 1960-1961 is the sum of the positions enclosed in parenthesis after the appropriation or approved amounts stated for all departments and any department having positions over and above the authorized number of positions shall reduce the number of positions by normal attrition or transfer of positions authorized by the Government pursuant to Section 4 of this Act, provided, that this section shall not apply to any position required to perform a function or service of a temporary or non-recurring character nor shall it apply to the classroom teaching positions in the Department of Education and the University of Hawaii." (Emphasis added.)

Since the offer is being made pending the determination of responsibility for the program on Oahu, it is temporary and non-recurring in character. Therefore, the

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portion of section 13 that sets forth the maximum number of positions does not apply.

Accordingly, under the general powers granted to the department of personnel services (section 11 of Act 1, Session Laws of Hawaii, Second Special Session 1959), new positions of inspectors may be created with the $10,000.

Very truly yours,

Lawrence H. Kam

LAWRENCE H. KAM
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

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Op. 61-26

MORAL TURPITUDE

Whether conviction of failing to file quarterly tax returns constitute.

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STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

February 16, 1961

Mr. Robert E. Bekeart
Executive Secretary
Real Estate License Commission
205 Empire Building
Honolulu 14, Hawaii

Dear Mr. Bekeart:

This is in response to your letter dated February 1, 1961, requesting an opinion on whether Daniel L. Abdul's convictions for violation of sections 2707(b) and 7203, Title 26 of the United States Code, constitute offenses involving moral turpitude such as to bring them within the provisions of section 170-12(a), Revised Laws of Hawaii 1955.

Daniel L. Abdul, presently a real estate salesman, was convicted on various counts of failing to file quarterly returns to the United States Internal Revenue Service showing withholding, income and social security taxes for his employees for certain periods from 1953 to 1955. The convictions were misdemeanors, he having been acquitted on other felony counts, all taxes having been paid.

Black's Law Dictionary (4th Ed.) defines moral turpitude as: "An act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man."

The crucial question is whether or not moral turpitude is an essential element of the misdemeanors for which Mr. Abdul was convicted. Although the courts have not decided the precise question of convictions based on these particular sections, the Federal courts in a number of deportation proceedings involving income tax violations under section 145(b) of the United States Code, have held that such offenses do not involve moral turpitude. United States v. Carrollo, DC 1939, 30 F.Supp. 3 and Baker v. Miller, 138 N.E. 2d 145. In United States v. Carrollo, supra, the court held that:

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> "We are not prepared to rule that an attempt to evade the payment of a tax due the nation, or the commonwealth, or the city, or the school district, wrong as it is, unlawful as it is, immoral as it is, is an act evidencing baseness, vileness or depravity of moral character. The number of men who have at some time sought to evade the payment of a tax or some part of a tax to some taxing authority is legion. Any man who does that should be punished civilly or by criminal sentence, but to say that he is base or vile or depraved is to misuse words."

Accordingly, we do not feel that the misdemeanors for which Mr. Abdul was convicted is an offense involving moral turpitude.

Very truly yours,

Arthur S. K. Fong

Arthur S. K. Fong
Deputy Attorney General

APPROVED:

Shiro Kashiwa
Attorney General

Op. 61-24

e1-27

FILING INSTRUCTIONS

I. TAXATION, FUEL TAX

Applicability

Sales of aviation fuel imported and stored in bond by a distributor to aircraft bound for foreign ports are subject to the tax imposed by section 123-3, R.L.H. 1955 as amended.

* * * * *

II. TAXATION, FUEL TAX

Aviation Fuel

a. Sales of aviation fuel imported and stored in bond by a distributor to aircraft bound for foreign ports are subject to the tax imposed by section 123-3, R.L.H. 1955 as amended.

b. Read in the light of its legislative background, P.L. 85-534 (72 Stat. 379) may fairly be construed as Congressional authorization to the imposition of the aviation fuel tax (Section 123-3(a)(2), R.L.H. 1955 as amended) upon any person falling within the meaning of a "distributor" as defined in Section 123-1, R.L.H. 1955 as amended.

* * * * *

III. TAXATION, FUEL TAX

Foreign Commerce

By 19 U.S.C. § 1309, 26 U.S.C. §§ 4221, 4521 and 4601 Congress has not expressed a policy of superseding state action in taxation of fuel sold to aircraft in foreign commerce. * * * * *

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IV. CONSTITUTIONAL LAW

Foreign Commerce

By 19 U.S.C. § 1309, 26 U.S.C. §§ 4221, 4521 and 4601 Congress has not expressed a policy of superseding state action in taxation of fuel sold to aircraft in foreign commerce.

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V. REVISED LAWS OF HAWAII 1955, AS AMENDED

Chapter 123

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VI. REVISED LAWS OF HAWAII 1955, AS AMENDED

Section 123-3(a)(2)

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VII. REVISED LAWS OF HAWAII 1955,AS AMENDED

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IX. 19 U.S.C. 1309(a)(3)

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X. 19 U.S.C. 1352

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XI. 26 U.S.C. 4221(e)

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XII. 26 U.S.C. 4521

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XIII. 26 U.S.C. 4601

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XIV. PUBLIC LAWS 85-534

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XV. REVENUE ACT OF 1930

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XVI. REVENUE ACT OF 1932

Section 601(c)(4)

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XVII. REVENUE ACT OF 1932

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XVIII. TARIFF ACT OF 1930

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State
~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

February 16, 1961

Honorable Earl W. Fase
Director of Taxation
State of Hawaii
Honolulu, Hawaii

Attention: Mr. John A. Bell
Deputy Director of Taxation

Hawaii Aeronautics Commission
State of Hawaii
Honolulu International Airport
Honolulu, Hawaii

Attention: Mr. A. P. Storrs
Director of Aeronautics

Gentlemen:

This is in response to your request for advice as to whether the sales of fuel made under the following circumstances are subject to the tax imposed by Chapter 123 (Fuel Tax Law) of the Revised Laws of Hawaii 1955 as amended:

> [X] company proposes to import to Hawaii, a product designated as [X] turbine fuel #1, from a foreign country or countries in the Caribbean area. The turbine fuel will be manufactured in the country of export and no further processing will be accomplished in Hawaii. It is proposed that the product will be admitted to the State without the payment of duty and will be stored in tanks pursuant to bonds known as Proprietor's Warehouse Bonds given by the company to the United States in accordance with Treasury regulations. The bonds are conditioned upon a compliance with the provisions and requirements of the Customs laws and regulations relating to the custody and control of the product in bond and its lawful withdrawal under permit of Customs officials.
>
> "The product will be transported by pipeline

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from the storage tanks to other tanks located adjacent to International Airport near Honolulu. At this point it will be pumped into tank trucks operated by employees, bonded by the Customs Service, who will deliver and pump the product into aircraft owned by carriers who purchase the turbine fuel to propel the aircraft in foreign commerce. From the moment the fuel is imported to Hawaii and stored in facilities of the company (used exclusively for this purpose) until it is pumped into the tanks of the foreign-bound aircraft, it is subject to the supervision and control of Federal Customs officials."

It is the opinion of this office that the tax imposed by section 123-3, R.L.H. 1955 as amended, should be assessed upon the sales of the bonded fuel to aircraft bound for foreign ports.

There would be no question as to the legality of the fuel tax upon the sales herein concerned but for the case of McGoldrick v. Gulf Oil Corp., 309 U.S. 414, which was decided by the United States Supreme Court in 1940. The case involved the validity of the New York City tax on purchasers for consumption of tangible personal property as laid on bunker fuel oil delivered in New York City to foreign bound vessels purchasing the oil as ships' stores for consumption as fuel in propelling them in foreign commerce. The fuel oil had been refined in a bonded manufacturing warehouse from crude petroleum imported in bond. The bonds had been given for the purpose of permitting the importer, under the provisions of Section 309 of the Tariff Act of 1930, Sections 601 and 630 of the Revenue Act of 1932, and the regulations prescribed thereunder by the Secretary of the Treasury, to bring the crude petroleum into the United States, to manufacture it while in bond into fuel oil, and then to withdraw it for sale free of import duty otherwise payable. The Court struck down the city's tax because it was in conflict with Congressional policy expressed through the foregoing Acts of Congress for the regulation of foreign commerce in the interest of and for the protection of American manufacturers. Provisions similar to those federal statutes are found in 19 U.S.C. § 1309, 26 U.S.C. §§ 4221, 4521 and 4601. This office is of the view, however, the legality of the Hawaii fuel tax upon bonded aviation fuel herein concerned is governed by West India Oil Co. (Puerto Rico) v. Domenech, 311 U.S. 20 (1940), decided by the United States Supreme Court several months after the Gulf Oil Corp. case.

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In the Puerto Rico case the tax challenged was laid on the sale and delivery in Puerto Rico ports of fuel oil imported and stored in bond and then withdrawn, free of federal duty, for use as fuel to vessels covered by Section 309, Revenue Act of 1930 and §§ 601 and 630 of the Revenue Act of 1932, the same federal statutes involved in the Gulf Oil Corp. case. The Court distinguished the Gulf Oil Corp. case and sustained the assessment on the ground that Congress had given its consent to the tax by an amendment to § 3 of the Organic Act of Puerto Rico (44 Stat. 1418). There is here, with respect to the imposition of the aviation fuel tax, an analogous grant of taxing power. By Public Law 85-534, approved July 18, 1958, 72 Stat. 379, Congress amended the Hawaiian Organic Act, approved and ratified Joint Resolution 32, Session Laws of Hawaii 1957 as amended by it, and authorized the issuance of aviation revenue bonds in a sum not to exceed $14,000,000 payable from funds derived from aviation fuel taxes and all other revenues of the Hawaii Aeronautics Commission. It further provided that (a) those bonds "shall be issued pursuant to legislation enacted by the legislature of the Territory which shall provide that so long as any of the bonds are outstanding, aviation fuel taxes shall be levied and collected in amounts at least sufficient to provide for the payment of the principal of the bonds and the interest thereon, as such principal and interest become due, and for such reserve funds and sinking funds as may be provided therefor;" and (b) "the term 'aviation fuel taxes' shall have the same meaning as is now or hereafter ascribed to it by the laws of the Territory of Hawaii." Read in the light of its legislative background, P.L. 85-534 may fairly be construed as Congressional authorization to the imposition of the aviation fuel tax (Section 123-3(a)(2), R.L.H. 1955 as amended) upon any person falling within the meaning of a "distributor" as defined in Section 123-1, R.L.H. 1955 as amended.

Assuming the imposition of the aviation fuel tax on bonded fuel is not governed by the Puerto Rico case, the Gulf Oil Corp. case is still distinguishable on other grounds. Since the time of the latter case, the dominant scheme for the regulation of the importation and exportation of petroleum products has shifted from exemption from customs duty and internal revenue taxes to delegation of power to the Executive branch to control exports and imports (50 App. U.S.C. § 2021-2032; 19 U.S.C. § 1352). Furthermore, it might be noted that in discussing the purpose of § 601 and § 630 of the Revenue Act of 1932, the Court in the Gulf Oil Corp. case said:

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> ". . . The obvious tendency of the exemption, from the tax laid upon importation of crude petroleum, when it or its product is used for ships' stores by vessels engaged in foreign commerce is to encourage importation of the crude oil for such use and thus to enable American refiners to meet foreign competition and to recover trade which had been lost by the imposition of the tax." (309 U.S. at 427.)
>
> ". . . 'It is believed that this amendment will enable the American manufacturers to compete more favorably with their foreign competitors for this business without any substantial loss of revenue, since the effect of the present law is to force purchases abroad.' It added that the provisions for drawback of the tax on importation 'also relieves American manufacturers from a competitive disadvantage.' From statements made on the floor of the Senate by the sponsor of the bill it appears that one purpose of the exemption was to increase the trade in fuel oil in American ports which had been lost through purchase of fuel in foreign ports by vessels engaged in foreign commerce following the imposition of the tax by § 601(c)(4). 77 Cong. Rec., Part III, 3212-3214." (309 U.S. at pp. 427-428.)

Such a purpose of protecting American manufacturers of fuel is not present with respect to aircraft fuel, for while foreign vessels can bring with them to American ports sufficient fuel for their return voyage, airplanes cannot. Then again in the case of sale of bonded fuel (supplies for aircraft of foreign registry) a specific finding of allowance of reciprocal privileges in respect of aircraft of American registry by the foreign country is required to qualify the sale for exemption from federal customs duties and internal revenue taxes. See 19 U.S.C. § 1309(a)(3); 26 U.S.C. § 4221(e). Reciprocity, on the other hand, is not required in the case of sales to ships registered in foreign countries. These considerations lead to the conclusion that the reasoning of the Gulf Oil Corp. case which was based on provisions relating to supplies for vessels is not applicable to aircraft fuel.

For the foregoing reasons it is advised that the aviation fuel tax may be assessed upon the sales of the imported bonded fuel.

Very truly yours,

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

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Full and Fair Hearing - Elements

Administrative Hearing, Eviction Board

The opportunity to defend is the necessary element for a full and fair hearing; it is not necessary for a defendant to appear personally or by counsel so long as proper notice has been accorded.

Hawaii Housing Authority Eviction Board

The Eviction Board may order an eviction on the basis of prima facie evidence presented at the regular hearing of the Eviction Board at which the tenant fails to appear personally or by counsel though proper statutory notice has been accorded the tenant.

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STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

February 17, 1961

Mr. A. V. Sullivan
Acting Executive Director
Hawaii Housing Authority
Honolulu, Hawaii

Dear Mr. Sullivan:

Re: Full and Fair Hearing

In response to your request as to whether the Eviction Board of the Authority may order an eviction on the basis of prima facie evidence presented at the regular hearing of the Eviction Board at which the tenant fails to appear personally or by counsel though proper statutory notice has been accorded the tenant, this department is of the opinion that the Eviction Board of the Authority may so order.

Section 78-1, Revised Laws of Hawaii 1955, authorizes the Authority to evict from any premise any tenant, licensee, or occupant for the various reasons listed therein. Section 78-2, Revised Laws of Hawaii 1955, provides that written notice shall be given to the person concerned, specifying the cause or causes for which it is proposed to evict him; the same section provides that the notice shall fix a date and place of the hearing, and further provides that the person shall be accorded a full and fair hearing.

The principal question raised in your query is whether or not a full and fair hearing requires that the defendant or person concerned be actually present or, stated in another way, what is the scope of a full and fair hearing?

Due process of law does not necessarily mean a judicial process, and a hearing before a judicial tribunal is not necessary to due process of law if opportunity for a hearing before some tribunal is afforded. Section 137, Public Administrative Law, Volume 42, Am. Jur., page 479. The opportunity to defend by argument, proof, and cross examination is the necessary element for a full and fair hearing.

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"Under general requirements applicable to quasi-judicial proceedings, or under the requirement of a full hearing, a party has the right, and the hearing must afford him opportunity, to defend the right involved, by argument, proof, and the cross examination of witness, and the trier of the facts must reach his decision in accordance with the facts proved." Section 138, Public Administrative Law, Volume 42, Am. Jur., page 481.

An ample opportunity must be afforded all parties to make by evidence and argument an adequate showing to establish the propriety or impropriety, from the standpoint of justice and law, of the steps asked to be taken to satisfy the requirement of a full hearing. Akron C. & Y. R. Co. v. U. S. N. Y. 43, St. Ct. 270; 261 U. S. 184, 200.

Where statutory notice is provided stating the cause or causes for which certain administrative action is proposed to be taken and where a time and place for hearing is set forth and when at the time and place of the hearing an opportunity to be heard has been afforded and the person concerned has not personally or by counsel appeared and further, after a prima facie evidence has been presented at the hearing, a ruling by the board adverse to the person concerned is proper and does not violate due process of law; a full and fair hearing has thus been accorded the person concerned when an adequate opportunity was available for the person concerned to meet the claims of the opposing party by argument, proof, and cross examination of any witness. It is to be noted, however, that the ruling of the board must be based upon evidence presented and, in such a case, it must be based at least upon prima facie evidence.

Consequently, in view of the foregoing, the reply of this department is in the affirmative.

Very truly yours,

Tenny Hoon Tom

TENNY HOON TOM
Deputy Attorney General

APPROVED:

SHIRO KASHIWA
Attorney General

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No Opinion

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PUBLIC EMPLOYEES

Personal history statement

In Shelton v. Tucker, the United States Supreme Court held unconstitutional an Arkansas statute requiring a public employee to list every organization to which he has belonged for the past five years. Its unlimited scope infringes upon personal liberties. Hawaii's personal history statement as required by section 5-97, Revised Laws of Hawaii 1955, is similar, and should be amended.

STATUTES

Section 5-97, Revised Laws of Hawaii 1955

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STATE ~~TERRITORY~~ OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

February 27, 1961

Mr. Arthur A. Akina
Director of Personnel Services
825 Mililani Street
Honolulu 13, Hawaii

Dear Mr. Akina:

This is in reply to your request for an opinion regarding the applicability of a recent United States Supreme Court decision, Shelton v. Tucker, decided December 12, 1960, to the personal history statement required of applicants for public employment in Hawaii.

Section 5-97, Revised Laws of Hawaii 1955, provides for the execution of such statement. It reads, in part:

> "Every public officer and public employee required by Part V to take, subscribe and file a loyalty oath or affirmation shall execute and subscribe under oath or affirmation the form of personal history statement prescribed by the (loyalty) board."

On the personal history statement is a request for the following information:

> "I have been (or am) a member, during the past ten years, of the following organizations or associations:"

Thereunder, space is given for the listing of dates of membership and the names and addresses of the associations.

With respect to the filling out of this statement, this office has advised, by Op. 59-108, dated August 18, 1959:

> ". . . execution of that (personal history) statement means the furnishing of all requested information and the answering of all questions. If this is not done, then the public officer or employee who fails to comply

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with this requirement should not be allowed to continue in public employment and should not be paid."

In the event it is determined that an applicant is disloyal, he may be disqualified from public employment. (Art. XIV, Constitution of the State of Hawaii; Sec. 5-4 and Parts IV and V of Ch. 5, Revised Laws of Hawaii 1955.)

The case referred to above, Shelton v. Tucker, involved the discharge of two public school teachers for failure to comply with Act 10 of an Arkansas statute. Act 10 compelled every teacher, as a condition of employment in a public school, to file annually an affidavit listing without limitation every organization to which he has belonged or regularly contributed within the preceding five years. The act further voids any contract entered into with a person who has not filed the prescribed affidavit. The validity of the statute was questioned under the Fourteenth Amendment to the Constitution. The Arkansas Supreme Court upheld the statute in both cases. On appeal, the United States Supreme Court reversed. In support of its decision, the Court stated:

"The question to be decided here is not whether the State of Arkansas can ask certain of its teachers about all their organizational relationships. It is not whether the State can ask all of its teachers about certain of their associational ties. It is not whether teachers can be asked how many organizations they belong to, or how much time they spend in organizational activity. The question is whether the State can ask every one of its teachers to disclose every single organization with which he has been associated over a five-year period. The scope of the inquiry required by Act 10 is completely unlimited. The statute requires a teacher to reveal the church to which he belongs, or to which he has given financial support. It requires him to disclose his political party, and every political organization to which he may have contributed over a five-year period. It requires him to list, without number, every conceivable kind of associational tie -- social, professional, political, avocational, or religious. Many such relationships could have no possible bearing upon the teacher's occupational competence or fitness.

"In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means

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> that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." (Emphasis added.)

In concluding that the Arkansas statute was unconstitutional, the Supreme Court reiterated:

> "The unlimited and indiscriminate sweep of the statute now before us brings it within the ban of our prior cases. The statute's comprehensive interference with associational freedom goes far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers. The judgments in both cases must be reversed."

Other than the fact that the request is for membership during the past ten years, the question posed in Hawaii's personal history statement is similar to the one required of applicants in Arkansas. As pointed out by the United States Supreme Court, the evil of such a question is that its unlimited and indiscriminate scope infringes upon fundamental personal liberties.

Accordingly, in view of the case of Shelton v. Tucker, we recommend either the deletion of the subject question from Hawaii's personal history statement or an amendment thereof which limits the scope of the inquiry.

Very truly yours,

Lawrence H. Kam

LAWRENCE H. KAM
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

cc: The Honorable William F. Quinn
Governor of Hawaii

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STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

March 3, 1961

Honorable Yasutaka Fukushima
Chairman, Senate Judiciary Committee
First Legislature, State of Hawaii
Iolani Palace
Honolulu, Hawaii

Dear Sir:

This is in response to your letter of February 21, 1961, requesting our opinion as to the constitutionality of H.B. No. 38, H.D. 1, entitled: "A BILL FOR AN ACT RELATING TO EDUCATION, PROVIDING FOR THE ELECTION OF THE BOARD OF EDUCATION OF THE STATE OF HAWAII, APPOINTMENT OF LOCAL SCHOOL ADVISORY COUNCILS, AND MAKING AN APPROPRIATION THEREFOR."

Section 1 of H.B. No. 38, H.D. 1, provides that sections 2 and 3 of Article IX of the State Constitution be amended to allow the members of the Board of Education to be elected on a nonpartisan basis. The adoption and subsequent effect of this amendment would mean that the elected members of the Board of Education would be directly responsible to the electorate, that the board would be autonomous, and that they would nothave to be confirmed by the senate. Such a result would conflict with Article IV, section 6 of the State Constitution, which provides:

> "All executive and administrative offices, departments and instrumentalities of the state government and their respective functions, powers and duties shall be allocated by law among and within not more than twenty principal departments in such manner as to group the same according to major purposes so far as practicable. Temporary commissions or agencies for special purposes may be established by law and need not be allocated within a principal department.

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> "Each principal department shall be under the supervision of the governor and, unless otherwise provided in this constitution or by law, shall be headed by a single executive. Such single executive shall be nominated and, by and with the advice and consent of the senate, appointed by the governor and he shall hold office for a term to expire at the end of the term for which the governor was elected. The governor may, by and with the advice and consent of the senate, remove such single executive.
>
> "Whenever a board, commission or other body shall be the head of a principal department of the state government, the members thereof shall be nominated and, by and with the advice and consent of the senate, appointed by the governor. The term of office and removal of such members shall be as prescribed by law. Such board, commission or other body may appoint a principal executive officer, who, when authorized by law, may be ex officio a voting member thereof, and who may be removed by a majority vote of the members appointed by the governor. . . ." (Underscoring supplied.)

One of the basic desires of any constitutional amendment is to clarify existing provisions. It is the opinion of this office that section 1 of H.B. No. 38, H.D. 1, amending sections 2 and 3 of Article IX of the State Constitution, conflicts with section 6 of Article IV of the State Constitution in its present form and would create future uncertainty in its application. The public should not be requested to vote on amendments which would create further problems of interpretation.

Article III, section 15, provides:

> "No law shall be passed except by bill. Each law shall embrace but one subject, which shall be expressed in its title. The enacting clause of each law shall be, 'Be it enacted by the legislature of the State of Hawaii.'"

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H.B. No. 38, H.D. 1, contains two subject matters: (1) that of amending sections 2 and 3 of the State Constitution, and (2) that of revising sections 37-1 to 37-_____ of the Revised Laws of Hawaii 1955.

The proposed constitutional amendments must be submitted to the electorate for approval or rejection. If approved, they cannot be vetoed by the governor. Revision of any statute requires a different procedure, that of passage by both houses by bill of the desired change. Such bill may be vetoed by the governor.

Therefore, it is the opinion of this office that H.B. No. 38, H.D. 1, in its present form, violates Article III, section 15 of the State Constitution.

The sections of H.B. No. 38, H.D. 1, pertaining to eligibility of member to board, on page 4, and eligibility of member to advisory council, on page 6, conflict with Article I, section 4 of the Constitution of the State of Hawaii, which reads as follows:

> "No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of his civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry." (Underscoring supplied.)

It is the opinion of this office that if the above sections were enacted, persons in holy orders and ministers of religion would be discriminated against because of religion.

Yours very truly,

H. Rodger Betts

H. RODGER BETTS
Acting Attorney General

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STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU, HAWAII

March 9, 1961

Mr. Arthur A. Akina, Director
Dept. of Personnel Services
Keelikolani Building
Honolulu, Hawaii

Dear Mr. Akina:

This is in reply to a question which has arisen recently as a result of a legislative inquiry concerning the contractual hiring of Mr. Ray V. Belnap by the Department of Social Services. Specifically, the question is:

> Does the contractual hiring under section 3-20(b), Revised Laws of Hawaii 1955, require a 90-day publication notice in accordance with section 5-1(b), as a condition precedent?

As you know, this question of 90-day publication notice has been a thorny problem in the past, and an opinion of this office, to my knowledge, has never resolved this specific question.

The pertinent sections in our laws touching on the instant question are listed hereinafter.

Section 5-1 reads:

> "Government officials and employees to be citizens and residents; exceptions. All officers, whether elective or appointive, and all employees in the service of the government. . .shall be citizens of the United States and residents of the Territory [State] for at least three years immediately preceding their appointment, provided:" (Emphasis supplied.)

Subsection (b) thereunder, which is an exception to the foregoing reads:

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> "For the purpose of filling a position for which no competent person with the foregoing qualifications applies within ninety days after the first publication of an advertisement of such position or a notice of an examination therefor, . . .a person without such qualifications may, with the approval of the governor . . .be employed under a contract;"

Chapter 3 covers all persons under civil service and section 3-20 thereunder provides that "The civil service to which this part shall apply comprises all positions in the territorial [State] service. . .and embraces all personal services performed for the Territory [State] except the following:" (Emphasis supplied.)

Subsection (b) thereunder provides:

> "Positions filled by persons employed by contract where the director has certified and where such certification has received the approval of the commission that the service is special or unique, is essential to the public interest and that, because of circumstances surrounding its fulfillment, personnel to perform such service cannot be obtained through normal civil service recruitment procedures. Any such contract may be for any period not exceeding one year."

All persons serving our State government fall into two major categories: (1) civil service under chapter 3, and (2) non-civil service or exempt persons under section 3-20. Within the exempt category we have the following basic classes: (a) elected, (b) appointed, and (c) contracted.

Section 5-1 covers "All officers, whether elective or appointive and all employees. . . ." Clearly the language covers the two major categories of persons in our government--the exempt class and civil service class. The word "employees" refer to persons under civil service and the word "officers" refer to exempt class of persons who are "elective" or "appointive" in our government service. There is nothing in this section which makes reference to our third class of exempt persons, the class of persons under contract. As explained above, these exempt groups are listed under section 3-20.

Hence, the classes covered under section 5-1 include both civil service and non-civil service. In the non-civil service class or exempt class, only two groups are covered--the elective and appointive. The contractual group is not covered.

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However, as to the elective group of public officers, there cannot be a waiver of citizenship nor residence requirements under section 5-1(b) because such requirements are mandatory under section 7 of article III of our State Constitution. Hence, it can be said that section 5-1 covers the appointive group of non-civil service or exempt persons and persons and positions under civil service.

In the hiring of persons covered under section 5-1, United States citizenship and three years' State residence is mandatory. Subsection (b), however, provides an exception to this requirement.

Under subsection (b), a person failing to meet the citizenship and residence requirements may be employed under contract, if no competent person with citizenship and residence requirements applies within 90 days after the first publication of an advertisement for a position or a notice of an examination therefor.

The subsection uses the phrase "For the purpose of filling a position," which raises the question as to whether the word "position" is used in the sense of a position in the civil service classification plan or whether the word is used in the broader sense of a job or service. I take the word "position" to be used in a broader scope and not restricted to a civil service position, in view of the coverage of civil service as well as certain non-civil service persons under section 5-1 as above discussed.

Mr. Belnap was retained under contract pursuant to section 3-20(b), for a period not to exceed one year, because of his special and unique service and because his service was essential to the public interest. The director of personnel services made due certification in accordance with said section.

There is a distinction between a contract hiring under section 3-20(b) and section 5-1(b). In this instance, Mr. Belnap is retained under contract to perform services to fill a position where the type of service called for or the position he is filling is not listed in the position classification plan of our civil service system. There are situations where a person is hired under contract to fill a position in the position classification plan of our civil service system. In the latter situation, the 90-day advertising requirement is applicable because the contract hiring is under section 5-1(b); whereas in the former situation no 90-day advertising is required because the contract hiring is under section 3-20(b). This distinction is ever important.

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In conclusion, you are advised that contract hiring under section 3-20(b) does not require a 90-day publication notice and that section 5-1(b) is not applicable.

I trust that this opinion alleviates much of the unresolved problems connected with the requirement of 90-day publication notice under section 5-1(b).

Very truly yours,

/s/ Andrew S. O. Lee

Andrew S. O. Lee
Deputy Attorney General

APPROVED:

/s/ H. Rodger Betts

H. Rodger Betts
Acting Attorney General

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INDEXING INSTRUCTIONS

Whether or not funds from the Harbor Board Special Fund may be expended, exceeding $25,000, for the installation of an escalator at Pier 10, Honolulu Harbor, for the purpose of replacing the existing stairway.

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March 15, 1961

Mr. E. F. Morrison
Manager and Chief Engineer
Board of Harbor Commissioners
Honolulu, Hawaii

Dear Sir:

Subject: Proposed Installation of Escalator at Pier 10, Honolulu

This is to acknowledge receipt of your letter dated February 28, 1961 wherein you request an opinion from this office whether approximately $75,000 from the Harbor Board Special Fund can be used to install an escalator to replace the existing Pier 10 stairway, Honolulu Harbor.

The expenditure of funds from the Harbor Board Special Fund is limited in scope and amount by the Bond Resolutions of the Board of Harbor Commissioners duly adopted by the Board for the issuance of Harbor Board revenue bonds, and by the provisions of Section 112-20, R.L.H. 1955.

Under the provisions of Article VII of the "Resolution of the Board of Harbor Commissioners of the Territory of Hawaii Authorizing the Issuance of Harbor Revenue Bonds" adopted on September 18, 1950, the Board covenanted to pledge all the revenues realized from the Public Undertaking in trust for the benefit of the bondholders subject only to the reasonable cost of maintenance and operation of the Public Undertaking. Under the provisions of Article I Section 1.01 subsection (i) "Public Undertaking" is defined to mean and include all of the harbor and waterfront improvements and other properties under the jurisdiction, control and management of the Board except such as are principally used for recreation or the landing of fish, but such exception shall not apply to the properties under the jurisdiction, control and management of the Board at Kewalo Basin, ewa of Ala Moana Park, Honolulu.

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Since Pier 10 is a waterfront improvement under the control and management of the Board which is not principally used for recreation or the landing of fish, it clearly falls within the definition of a Public Undertaking advanced above.

Under the provisions of Section 7.05 of Article VII of the Bond Resolution of 1950, the Board covenanted that "it will use its best efforts to see to it that the Public Undertaking, and each and every undertaking authorized hereunder, shall at all times be operated and maintained in first class repair and condition and in such manner that the operating efficiency thereof shall be of the highest character". If the Board determines that the need for an escalator at Pier 10 is essential for the convenience and safety to the public using these facilities, and that it will enhance the operating efficiency of the Public Undertaking thereof, then we are of the view that the expenditure of funds for this purpose would not violate the provisions of the bond resolutions of the Board.

Under the provisions of Section 112-20 R.L.H. 1955 the Board may expend moneys from its special fund only in the order of priority as specified in the statute. Under the fifth order of priority the Board is allowed to expend its fund for any purpose within its jurisdiction, powers, duties, and functions (except in respect to properties principally used for the recreation or the landing of fish, but such exception shall not apply to properties located at Kewalo Basin ewa of Ala Moana Park, Honolulu). However, the amount of such expenditure is limited to an amount not to exceed $100,000 in any one year, of which a sum not to exceed $25,000 shall be expended on any one island. But this limitation does not apply to expenditures for replacement or reconstruction of existing harbor board facilities.

Since the purpose of this expenditure, which exceeds $25,000, is to replace an existing harbor board facility, we feel that the statutory limitation on the amount of the expenditures would not apply in this case.

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On the basis of the foregoing discussion, it is the opinion of this office, and you are so advised, that the expenditure of approximately $75,000 from the harbor board special fund for the purpose of replacing the existing stairway at Pier 10, Honolulu Harbor, with an escalator, would be in order.

Very truly yours,

Allen I. Marutani

ALLEN I. MARUTANI
Deputy Attorney General

APPROVED

Thos Kashiwa

Attorney General

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No Opinion

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STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

March 17, 1961

Honorable Tim Ho
Director of Transportation
State Highway Building
Honolulu, Hawaii

Re: Expenditure of Highway Funds for Renovation and Expansion of the Materials and Research Laboratory Building.

Dear Sir:

This is in reply to your Letter No. 2.6255 on the above subject matter. The question sought to be answered is:

> "Whether or not an estimated sum of $84,000 may be expended for the renovation and expansion of the laboratory building without any specific legislative authority therefor."

Basically, this question is the same as that put to the Attorney General in 1958 concerning the legality of expending money from the highway fund for the new highway building without specific legislative authority. The answer to that question, found in Opinion 58-87, was that the Highway Engineer may expend so much as may be necessary for the highway building under the authority of Sections 129-12(b), 111-3 and 111-4, Revised Laws of Hawaii 1955, out of the excess in the territorial highway fund after the deductions specified in Section 129-12(a) have been made. Section 129-12(b) specifies that after the deductions pursuant to the preceding section have been made, the remaining money in the fund may be expended:

> ". . . pursuant to the provisions of Chapter 111 and the Federal Highway Act and legislation supplementary thereto;"

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Chapter 111 recites the specific powers and duties of the Territorial Highway Engineer and in addition, he is given:

> ". . . any and all further powers which may be necessary for the full and effective performance and discharge of the duties imposed upon him by this part or which may be necessary fully and completely to carry out and effectuate the purposes of this part."

Assuming that the renovation and expansion of the testing laboratory is necessary for the Federal-aid highway program, the answer would be unqualifiedly the same in the instant case except for one fact which was not present in the earlier case. Letter No. 2.6185 from H. Tateishi, Testing Engineer, to J. C. Myatt, Deputy State Highway Engineer, concerning the proposed expenditure indicates that the testing laboratory serves other agencies of the State, such as the Department of Accounting and General Services and the Hawaii Aeronautics Commission. That fact creates a situation somewhat different from that of the highway building in that it cannot be said that the testing laboratory is used exclusively for highway purposes. As you well know, Chapter 129 authorizes the disbursement of the highway fund for highway purposes exclusively.

However, Mr. Tateishi by Letter No. 2.6533 to the undersigned gave a rough breakdown of the work done by his section during 1960. It showed highway work to be 82%, Hawaii Aeronautics Commission 14%, Department of Accounting and General Services 3.5% and others 0.5%. The work for Aeronautics was high only because of the construction of the new airport facilities presently going on. Normally, it is less than half of that. Very significantly, he also indicated that the State Highway Division is reimbursed in full for all services rendered to non-highway agencies. That being the case, there is no danger that the highway fund is being used for unauthorized purposes.

Therefore, you are advised that a reasonable amount from the excess in the highway fund after the requirements of Section 129-12(a) have been met may be used for the expansion of the testing laboratory, provided that your Department continues the policy of having the other agencies reimburse the highway fund for expenses incurred in the course of any service rendered them.

Yours truly,

Charles M. Tonaki

CHARLES M. TONAKI
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

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CONSTITUTIONAL LAW

Statutes

The term "general laws" in section 1, Article VII of the Hawaii State Constitution means that the legislature is required to confer powers on the political subdivisions of the State by "general laws" rather than "special" or "local laws".

Water

The legislature is prohibited by section 1, Article VII of the Hawaii State Constitution from enacting a local law which creates a board of water supply for the County of Maui only.

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STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU, HAWAII

March 17, 1961

Honorable Elmer F. Cravalho
Speaker, House of Representatives
State Legislature
Iolani Palace
Honolulu, Hawaii

Dear Mr. Cravalho:

This is in response to your request, by letter dated February 16, 1961, for our opinion on the following questions:

> 1. What is the meaning of the term "general laws" as used in section 1, Article VII of the Constitution of the State of Hawaii?
>
> 2. "Does the Legislature have the power to enact a law creating a Board of Water Supply only for the County of Maui?"

With respect to your first question, section 1, Article VII of our Constitution provides, in part, as follows:

> "Each political subdivision shall have and exercise such powers as shall be conferred under general laws."

The intent of the framers of the Constitution, requiring the conferring of powers "under general laws",[1/] was

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1/ Requiring the legislature to enact general laws and prohibiting local laws is regarded by the courts as a wholesome one, to discourage the practice of trading and logrolling (50 Am. Jur., Statutes, § 50, p. 66).

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to provide as much self-government to the counties with a minimum of interference by the legislature, and to prohibit "discrimination as to particular localities". (Vol. 1, Constitutional Convention of Hawaii, p. 229.)

50 American Jurisprudence, Statutes, section 6, page 17, defines a general law as follows:

> "A statute is ordinarily regarded as a general law, if it has a uniform operation. Within the meaning of this rule, a statute has a uniform operation, if it operates equally or alike upon all persons, entities, or subjects within the relations, conditions, and circumstances prescribed by the law, or affected by the conditions to be remedied, or, in general, where the statute operates equally or alike upon all persons, entities, or subjects under the same circumstances. Mere classification does not preclude a statute from being a general law. A law is a general one where it relates to persons, entities, or things as a class, or operates equally or alike upon all of a class, omitting no person, entity, or thing belonging to the class."

By contrast, a law is "special" if it "relates to particular persons or things, or to particular persons or things of a class . . . instead of all the class."[2/] (82 C.J.S., Statutes, § 166, p. 279.) So also, a law is "local" if it "operates over a particular locality instead of over the whole territory of the state or any properly constituted class or locality therein." (Id., § 168, p. 283; 50 Am. Jur., Statutes, §§ 7, 8, pp. 21-27.)

2/ "The general effect of constitutional provisions against special legislation is to prohibit class legislation of the character inhibited by the clause of the Fourteenth Amendment to the Federal Constitution securing the equal protection of the laws." (50 Am. Jur., Statutes, § 52, p. 71.)

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Thus, construing the intent of the framers of our Constitution together with the foregoing definitions, a "general law" is one that operates equally, without discrimination as to particular localities, upon all of the people or certain things within the territorial jurisdiction of the State of Hawaii, or operates equally and affects particular persons or things of a class based upon a reasonable and proper classification.

Applying the preceding principles to your second question then, the legislature may create a board of water supply for the County of Maui if it does so by means of a general law; the same may not be accomplished by legislation limited to Maui County only.

The controlling statutory provisions are section 144-2(e) and chapter 145A, as amended, Revised Laws of Hawaii 1955. Under the former, section 144-2(e), the Counties of Hawaii, Kauai and Maui generally have the power "to establish and maintain water works. . . ." Under the latter provision, chapter 145A, the same power is more specifically granted to Maui County.

Also pertinent to this discussion is the definition of the phrase "political subdivision" as used in the constitutional provision under consideration. In Volume 1, Constitutional Convention of Hawaii, page 229, we find the following:

> ". . . The phrase 'political subdivisions' has been used often in the proposal and this report. The phrase refers to counties and cities and counties as now constituted, and other local units of government including municipal corporations."

It is unnecessary to the final result to determine whether a board of water supply is within the meaning of a "political subdivision". If it is, the constitutional prohibition would, of course, apply. If it is not, the same result would be reached for the reason that the constitutional right of the legislature to confer powers on the counties by general laws necessarily implies that the removal of the same

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must be achieved by the same means.[3] (82 C.J.S., Statutes, § 183, pp. 299-301.)

Hence, by enacting the proposed legislation, power would be taken away from Maui County by a local discriminatory act and not by means of a general law, in violation of the constitutional prohibition.

Also lending support to our opinion that it would be unconstitutional to create a board of water supply for the County of Maui only, are the numerous cases on this subject. Exemplifying this principle is Idol v. Street, 233 N.C. 730, 65 S.E.2d 313 (1951). Under the Organic Act of 1776, the legislature of North Carolina had virtually unlimited constitutional power to enact local and private statutes. As an inevitable consequence, the law frequently differed in one locality from another. To minimize the resultant confusion, the constitution was amended in 1916 to prohibit the enactment of local or special legislation. Later, in 1945, the legislature, by statute, authorized two counties, namely, Winston-Salem and Forsyth, to create a joint public health agency to regulate the production and sale of milk in their respective counties. Acting thereunder, the Board of Aldermen adopted an ordinance and appointed health officers for said purpose. The court ruled that since the statute operated "only in a limited territory or specified locality" of the state, it violated the constitutional prohibition against local acts, stating:

> "In thus amending their organic law, the people were motivated by the desire that the General Assembly should legislate for North Carolina in respect to the subjects specified as a single united commonwealth rather than as a conglomeration of innumerable discordant communities. To prevent this laudable desire from degenerating into a mere

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3/ McKenzie v. Wilson, 31 H. 216; Terr. v. C. & C., 38 H. 329, re absolute power of the legislature over a county prior to statehood.

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> pious hope, they decreed in emphatic and express terms that 'Any local, private, or special act or resolution passed in violation of the provisions of this section shall be void', no matter how praiseworthy or wise such local, private, or special act or resolution may be."

In addition, the court concluded that all of the health officials were not officers de facto since the ordinance enacted to an unconstitutional statute is also invalid.

So also in State v. Warren, 211 N.C. 75, 189 S.E. 108 (1937), and State v. Dixon, 215 N.C. 161, 1 S.E.2d 521 (1939), statutes which attempted to apply the real estate licensing act to designated counties were declared unconstitutional as local acts. To the same effect is State v. Devine, 98 N.C. 778, 783, 4 S.E. 477 (1887), where an act purporting to make it a misdemeanor for any railroad to kill livestock within twelve named counties was ruled invalid. And in State v. Fowler, 193 N.C. 290, 136 S.E. 709 (1927), a criminal law changing the punishment in prohibition offenses committed in five specified counties was declared unconstitutional as a local measure. Similarly, in Board of Managers v. City of Wilmington, 237 N.C. 179, 74 S.E.2d 749 (1953), three legislative acts authorizing the cities of Wilmington and New Hanover to provide hospitalization, medical attention, and care of indigent sick and poor for the respective counties were held void as "local act[s] . . . operating only in a specified locality."

Legislation relating to the board of education of certain designated counties were also declared void in State v. Board of Education of Braxton County, 58 S.E.2d 279 (W. Va., 1950), and in Lamb v. Board of Education of Randolph County, 235 N.C. 377, 70 S.E.2d 201 (1952).

Similar rulings are found in the analogous cases of Smith v. Baltimore & O. R. Co., 85 A.2d 73 (Del., 1951); State v. Bachman, 131 W. Va. 562, 48 S.E.2d 420 (1948); and Vincent v. State, 235 S.W. 1084 (Tex., 1921).

Although not asked, we believe we should further advise that to be consistent with the foregoing ruling, all special or local acts passed after the adoption of the Constitution which conferred powers upon the political subdivisions of the State

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are void. On the other hand, special or local legislation enacted prior thereto are not invalidated if the constitutional provision in question is not self-executing, regardless of the "inconsistency" clause contained in the Constitution.

On this point, section 1 of Article VII, requiring the conferring of power on political subdivisions under general laws, must be construed together with two other constitutional provisions, namely, section 2 of Article XVI containing the inconsistency clause, and section 14 of Article XIV containing the self-executing clause.

The first provision, section 2 of Article XVI, reads, in part:

> "All laws in force at the time this constitution takes effect and not inconsistent therewith, including, among others, acts of the Congress relating to the lands in the possession, use and control of the Territory of Hawaii, shall be the laws of the State and remain in force, mutatis mutandis, until they expire by their own limitation, or are altered or repealed by the legislature." (Emphasis added.)

The second constitutional provision, section 14 of Article XIV, prescribes:

> "The provisions of this constitution shall be self-executing to the fullest extent that their respective natures permit."

The general rules of law relative to the inconsistency clause of section 2 of Article XVI are found in 11 American Jurisprudence, Constitutional Law:

Section 35, page 641:

> ". . . The general rule is that prospective effect alone is given to provisions of state Constitutions, such as those prescribing the form and method of passing appropriation bills and those prohibiting private and local bills, special legislation, and constitutional exemptions from taxation.

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> "Limitations on future legislation against special laws do not operate to repeal existing laws enacted in the manner allowed by the former Constitution." (Emphasis added.)

Section 36, page 642:

> "When a new Constitution is established, it is customary to insert a provision that all statutes in force and not inconsistent with the new Constitution shall continue until amended or repealed by the legislature, although it is generally recognized that such laws remain in force without an express provision to that effect. . . ." (Emphasis added.)

Similar language is contained in 16 Corpus Juris Secundum, Constitutional Law, § 40, p. 121, § 43, p. 138; 50 American Jurisprudence, Statutes, § 60, p. 83; and 2 Sutherland, Statutory Construction, § 2201, p. 115.

To illustrate, in Smith v. Simmons, 129 Ky. 93, 110 S.W. 336 (1908), the court upheld a local tax measure against a subsequent constitutional amendment prohibiting local legislation, stating:

> "The makers of the Constitution intended to prohibit special legislation, but they contemplated that existing special legislation should continue until changed by the legislature, unless in conflict with some of its provisions. To have blotted out at once all special legislation in the State would have been to throw the business of the State into chaos." (Emphasis added.)

The cases are legion which follow the rule that a constitutional amendment, which is not self-executing, is to be given a prospective effect and does not invalidate pre-existing laws. County of Callaway v. Foster, 93 U.S. 567 (1876); Leser v. Lowenstein, 129 Md. 244, 98 A. 712 (1916); State v. Leipner, 138 Conn. 153, 83 A.2d 169 (1951); Gaslight Co. of New Brunswick v. Borough of So. River, 77 N.J. Eq. 487, 77 A. 473 (1910); Washington Nat. Ins. Co. v. Bd. of Review, 1 N.J. 545, 64 A. 2d 443 (1949); Evans v. Phillipi, 117 Pa. St.

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226, 11 A. 630 (1887); Barber Asphalt Paving Co. v. Jergens, 170 Cal. 273, 149 P. 560 (1915); State v. Frazier, 98 Mo. 426, 11 S.W. 973 (1889).

With respect to the second constitutional provision, section 14 of Article XIV, the authorities state that if the constitutional amendment is self-executing, pre-existing laws are superseded; otherwise not if it is not self-executing. Generally, a provision is presumed to be self-executing if it is detailed and complete in itself to carry it into effect. On the contrary, a provision is not self-executing if it lays down general principles or is a general one directed to the legislature for implementing measures. 11 American Jurisprudence, Constitutional Law, § 73-76, pp. 690-697. Davis v. Burke, 179 U.S. 399, 21 S. Ct. 210, 45 L. Ed. 249 (1900); Leser v. Lowenstein, 129 Md. 244, 98 A. 712 (1916); Doherty v. Ransom County, 5 N.D. 1, 63 N.W. 148 (1895); City of Newport News v. Woodward, 104 Va. 58, 51 S.E. 193 (1905); Ingersoll v. Nassau El. R. Co., 157 N.Y. 453, 52 N.E. 545 (1899).

Applying these rules to section 1 of Article VII, it appears to this office that the requirement that powers shall be conferred to political subdivisions "under general laws" lays down a general principle which is directed to the legislature for implementing laws. The presumption that constitutional provisions are self-executing is therefore rebutted, and local laws governing the Counties of Hawaii, Kauai and Maui, passed prior to the adoption of the Constitution, remain in force and effect. To blot out at once all such local laws would throw the business of the State into chaos.

In view of the definition of a "general law" and other authorities heretofore mentioned, it is the opinion of this office (1) that legislation creating a board of water supply for the County of Maui only would be unconstitutional; (2) that all legislation enacted after the adoption of the Constitution conferring powers on the various counties by local laws are also unconstitutional; and (3) that such local legislation passed prior to the adoption of the Constitution remain in force.

Very truly yours,

/s/ LAWRENCE H. KAM

LAWRENCE H. KAM
Deputy Attorney General

APPROVED:

/s/ SHIRO KASHIWA

SHIRO KASHIWA
Attorney General

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I N D E X

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EMPLOYMENT SECURITY

Coverage:

Temporary employees of the government covered by Act 222, 1959 Session Laws, including session employees of Legislature.

STATUTES

Section 93-1(h)

Act 222, 1959 Session Laws amendment applies to all government employees.

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STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

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Honolulu

March 21, 1961

Honorable Elmer F. Cravalho
Speaker, House of Representatives
General Session of 1961
First State Legislature of Hawaii
Honolulu, Hawaii

Dear Mr. Speaker:

Your letter of March 8, 1961, requesting a review of the opinion of this office concerning the scope of Act 222 of the 1959 Session Laws was referred to the undersigned for said review.

After rereading House Standing Committee Reports Nos. 512 and 756 and Senate Standing Committee Report No. 940 concerning H.B. No. 247, H.D. 1, which became said Act 222, it is still the opinion of this office that all employees of the State, including the session employees of the Legislature, are entitled to the benefits granted under the Hawaii Employment Security Law, as amended by Act 222.

Section 1 of said Act 222 amended Chapter 93 of the Revised Laws of Hawaii 1955, the Hawaii Employment Security Law, by its subsection (1) by inserting into subsection (h) of section 93-1 relating to the definition of an "employing unit" the words "the Territory, any of its political subdivisions, any instrumentality of the Territory or its political subdivisions."

In commenting on the purpose of H.B. No. 247, H.D. 1, the members of the House Committee on Civil Service in Standing Committee Report No. 512 dated April 27, 1959, stated in part as follows:

"The purpose of this bill is to extend the coverage of Chapter 93 of the Revised Laws of Hawaii 1955, as amended, which provides benefits to separated employees, to public officers and employees of the Territory and the several counties.

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"At the present time, territorial and county employees are the only major group of employees in Hawaii who do not receive employment security benefits when they are separated from their employment.

"Your Committee believes that officers and employees of the Territory and counties should have the security provided in this bill when they become unemployed on the same basis as other employees. The Department of Labor and Industrial Relations estimates that this coverage will cost a total of $236,000 during the next biennium."

The House Committee on Finance in its Standing Committee Report No. 756 dated April 30, 1959, in commenting on H.B. No. 247, H.D. 1, stated in part:

"The purpose of this Bill is to extend employment security coverage to employees of the Territory and its political subdivisions.

"At the present time the territorial and county employees are the only major group of employees in Hawaii who do not receive employment security benefits when they are separated from government service."

The Senate Committee on Public Employment in its Standing Committee Report No. 940 to President Herbert K. H. Lee on May 2, 1959, stated in regard to H.B. No. 247, H.D. 1, in part as follows:

"The purpose of this bill is to extend the coverage of Chapter 93 of the Revised Laws of Hawaii 1955, as amended, and which provides employment security coverage, to employees separated from government employment.

"At the present time, the territorial and county employees are the only major group in Hawaii who do not receive employment security benefits when they are separated from their employment.

"Your committee is in accord with the principles stated in House Standing Committee Report No. 512 * * * ."

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Neither the language amending subsection 93-1(h), Revised Laws of Hawaii 1955, nor the statements in the above-mentioned Standing Committee Reports contain any language from which it appears logical to conclude that the Legislature intended to treat persons the Legislature temporarily employs (session employees) any different from other persons employed by the State on either a temporary or continuing basis.

That the cost of extending this protection to the persons employed by the Legislature during a session should result in increasing the expected cost of H.B. 274, H.D. 1, beyond the figure of $236,000 mentioned in Standing Committee Report No. 512 **was** and is not considered by this office as being the primary determinative fact as to the intent of the Legislature because the committee reports do not indicate that the cost of H.B. No. 247, H.D. 1, is to be the basic consideration in construing the effect of said H.B. No. 247.

It was and is believed the various committee reports clearly evidenced the intent that all governmental employees in Hawaii are to receive the protection of the Hawaii Employment Security Law since no intent to exclude any group of governmental employees was evidenced by the Legislature.

Similar reasoning was used by this office when we informed the Honorable George M. Okano, Chairman of the Accounts Committee of the House of Representatives, on August 25, 1960, that Act 240 of the 1959 Regular Session in amending section 97-1, Revised Laws of Hawaii 1955, to provide that "every person including officials in the service of the Territory * * * whether elected or under any appointment or contract of hire express or implied" was to receive the protection of the Workmen's Compensation Law had extended said protection to the many persons the House of Representatives employs for a legislative session.

By reason of the foregoing facts and law, it is the opinion of this office that subsection 93-1(h), as amended by said Act 222, provides unemployment insurance coverage to all the employees of the State without exception since neither Act 222 nor the Standing Committee Reports contain language clearly excluding any one or more particular groups of governmental employees.

Respectfully submitted,

/s/ W. K. Watkins, Jr.

W. K. WATKINS, JR.
Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa

SHIRO KASHIWA
Attorney General

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CONSTITUTIONAL LAW

Land

S.B. No. 378, providing for the acquisition of private property on Oahu only does not violate section 1, Article VII of the Hawaii State Constitution since the board of land and natural resources is not a political subdivision, nor does it violate section 4, Article X of the Constitution, for once the land is acquired anyone meeting the qualifications may participate in the program.

Statutes; General Laws

S.B. No. 378, providing for the acquisition of private property on Oahu only does not violate section 1, Article VII of the Hawaii State Constitution since the board of land and natural resources is not a political subdivision, nor does it violate section 4, Article X of the Constitution, for once the land is acquired anyone meeting the qualifications may participate in the program.

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STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

March 23, 1961

Honorable Randolph Crossley and David McClung
Joint Chairmen of Senate and House Conferees,
respectively, re S.B. No. 378
First State Legislature of Hawaii
Iolani Palace
Honolulu, Hawaii

Gentlemen:

This is in response to your oral request of March 22, 1961 to render an opinion as to whether Senate Bill No. 378 violates section 1, Article VII of the Constitution of the State of Hawaii.

In essence, S.B. No. 378 (S.D.1) provides for the purchase or condemnation of private property on the island of Oahu[1/] by the board of land and natural resources. The property is to be resold, leased, or leased with option to purchase, to private parties for the development of residential uses and other facilities in connection therewith. Section 10 thereof sets forth the qualifications to be eligible for a lot, a few of which relate to an applicant's citizenship, residency, age, and gross income.

Section 1, Article VII of our State Constitution provides, in part, as follows:

> ". . . Each political subdivision shall have and exercise such powers as shall be conferred under general laws."

1/ We note that House Draft 2 modifies the bill by deleting the words "on the island of Oahu", thus making it applicable to all of the counties.

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By Op. 61-36, dated March 17, 1961, this office construed the above provision to mean that whenever the legislature confers powers on the political subdivisions of the State, it must do so by means of a general law applicable throughout the territorial jurisdiction of the State, and not by means of a special or local law applicable only to one county.

As applied to the instant situation, the board of land and natural resources does not come within the definition of a "political subdivision". On the contrary, it is a department of the State government. (Sec. 21 of Act 1, S.L.H. 1959.) We are therefore of the opinion that S.B. No. 378 is not violative of section 1, Article VII of our State Constitution. However, S.B. No. 378 should be construed together with a more pertinent provision of our Constitution, to wit, section 4, Article X of the Constitution, which prescribes:

> "The legislative power over the lands owned by or under the control of the State and its political subdivisions shall be exercised only by general laws, except in respect to transfers to or for the use of the State, a political subdivision, or any department or agency thereof."

A cardinal rule of statutory construction is that a statute should be construed in favor of its validity. (82 C.J.S., Statutes, § 316, pp. 540-548.) Another such rule is that, if a statute is susceptible of more than one construction, it must be given that which will best effect its purpose rather than one which would defeat it. (Id. § 323, p. 608.)

Applying the foregoing rules to S.B. No. 378, it is clear that once land was "owned by the State or under its control," the framers of the Constitution intended that it be distributed by means of general laws and to prohibit its dissipation "through private, or special laws".[2/] (Vol. 1, Proceedings of the Constitutional Convention of Hawaii, pp. 233, 336.) It does not appear that the above section was intended to prohibit the legislature from purchasing designated property.

2/ The exceptions mentioned in said section 4 relate only to land used by the government or "land transfers between departments of government." Id. p. 233.

Accordingly, we are of the opinion that S.B. No. 378, applying to Oahu only, is constitutional. Under its provisions, once the board of land and natural resources acquires the land, only then is it "owned by the State or under its control". Thereafter, anyone meeting the qualifications of section 10 thereof may purchase a lot for residential use.[3/] As such, it is a general law, rather than a private or special law. Since S.B. No. 378 has not been enacted into law as yet, it is suggested that the legislature take precautionary measures to insure that all future questions will be resolved in favor of its validity, such as, by limiting the operation of the statute to counties of a certain size.

To illustrate, in State v. Urban Renewal Agency of Kansas City, 179 Kan. 435, 276 P.2d 656, a statute provided that cities having a population of more than 75,000 could participate in an urban renewal program. No other limitation was mentioned. It was conceded that the act applied only to three cities, Wichita, Kansas City and Topeka. The court found the act to be general legislation and not a special act prohibited by the constitution, saying:

> "Classifications based solely on population quite uniformly have been held valid, provided, of course, they were based upon real and substantial distinctions which bore a reasonable and substantial relation to the subject matter involved. (Citations omitted.) . . . We therefore hold the act is not a special law within the prohibition of article 2, section 17 of the constitution."

In conclusion, this office is of the opinion that S.B. No. 378 does not violate section 1 of Article VII, nor does it violate section 4, Article X of our Constitution.

3/ Cf: A.G. opinion dated April 14, 1960, advising that S.B. No. 239, 1960 session, was a local law prohibited by section 5, Article X. Under said bill, only the victims of the Puna volcanic eruption could purchase or lease public lands in the Puna district. The bill, as finally enacted, was modified to apply to all victims of a natural disaster. (See Act 4, S.L.H. 1960.)

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However, to avoid any possible questions as to the constitutionality of S.B. No. 378, it is recommended that the legislature take the prudent course by distinguishing the other counties from Oahu on the basis of size of population.

Very truly yours,

/s/ LAWRENCE H. KAM
LAWRENCE H. KAM
Deputy Attorney General

APPROVED:

/s/ SHIRO KASHIWA
SHIRO KASHIWA
Attorney General

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CONSTITUTIONAL LAW

Statutes

The term "final reading" in section 5, Article VI of the State Constitution, lies to either of the legislative chambers, depending on which house considers a bill last.

An "appropriation bill" is an authorization by the legislature to apply a designated sum from a certain fund for a specified object.

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STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

March 24, 1961

Honorable Nelson K. Doi
Senate Minority Floor Leader
The First Legislature of Hawaii
Iolani Palace
Honolulu, Hawaii

Dear Sir:

By letter dated March 16, 1961, we were requested to render an opinion on the following questions:

> (1) Does the term "final reading" in section 5, Article VI of our State Constitution apply to either or both houses of the legislature?
>
> (2) What is the meaning of an "appropriation bill" as used in said section 5?

The constitutional provision, section 5 of Article VI, prescribes:

> "No appropriation bill, except bills recommended by the governor for immediate passage, or to cover the expenses of the legislature, shall be passed on final reading until the bill authorizing operating expenditures for the ensuing fiscal period, to be known as the general appropriations bill, shall have been transmitted to the governor." (Emphasis added.)

The answer to your first question is that the term "final reading" applies to either of the legislative chambers, depending on which house considers the bill last prior to its

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being transmitted to the governor.

Generally, the interpretation of an expression as "final passage" of an act is dependent upon the intent of those utilizing the expression. (50 Am. Jur., Statutes, § 504, p. 520; 82 C.J.S., Statutes, § 37, p. 60; Scott v. State Board of Ass'mts and Review, 221 Iowa 1060, 267 N.W. 111 (1936); see also 11 Am. Jur., Constitutional Law, § 61, p. 674.) We believe that the same applies to the term "final reading" as used in section 5 of Article VI.

Research into the legislative history of section 5 discloses that, in the first and second drafts thereof, the term "final reading" was followed by words "by either house". (Vol. 1, Constitutional Convention of Hawaii, pp. 198, 327.) The constitutional intent is further clarified by the following comment (Id. p. 327):

> "In making this recommendation your committee believes that the Legislature will not be substantially hampered by the above provisions in acting upon other appropriation measures, for the prohibition against passing such other measures 'on final reading by either house' refers to the 'final reading' in either house whereby the bill will become law unless vetoed by the Governor. Hence, any such other measure may be passed on three readings in one house and on two readings in the other prior to the Governor receiving the General Appropriation Bill, and may even be so passed on third reading in the latter house if it has been amended by such latter, for in such case the 'final reading' would be in the house of the bill's origin." (Emphasis added.)

In the third draft, the Committee on Style deleted the words "by either house" from section 5 "in the interest of improved language construction." (Id. p. 276.)

It is evident then that the framers of the Constitution intended to prohibit passage of appropriation measures, other than those excepted, on final reading by either house until the general appropriations bill has been transmitted to the governor.[1/] Thus, in a simple case, if an appropriation

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1/ The framers of the Constitution originally "considered including a provision to the effect that the legislature should take action on the General Appropriations Bill within 30 days after assembling." (Id. p. 193.)

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bill originates in the house, it may pass three readings therein and two readings in the senate. The senate is prohibited by section 5 from passing on it the third time until the general appropriations bill has been transmitted to the governor.[2] But if the senate amends the bill, it becomes the originating chamber and may pass on the amended bill three times; in such a situation "final reading" would be in the house of representatives.

With respect to your second question requesting a definition of "appropriation bill", reference was made to five senate bills which have already passed third and final reading in the senate, to wit, S.B. No. 17, appropriating $1,141,000 for the public employees' medical and hospital care program; S.B. No. 38, accepting the land-grant college aid from the United States Congress; S.B. No. 258, appropriating $85,000 for the State's polio immunization program; S.B. No. 338, appropriating $2,000 for an oil portrait of the late chief justice, E. C. Peters; and S.B. No. 349, appropriating $50 per month for pensioner's bonus.

The terms "appropriation bill", "appropriations" and "appropriations of money" are generally given similar definitions. Thus, in Ballentine's Law Dictionary, Second Edition, 1948, page 95, we find the following:

> "appropriation bill. A statute or proposed statute authorizing the appropriation of government funds for particular objects or purposes."
>
> "appropriation of money. An authority of the legislature, given at the proper time and in legal form to the proper officers, to apply a distinctly specified sum from a designated fund out of the treasury, in a given year, for a specified object or demand against the state."

So also, Webster's New International Dictionary, Second Edition, 1943, page 133, defines an "appropriation bill":

2/ Cf: Haw'n Airlines v. P.U.C., 43 H. 216, re pocket veto of a bill when legislature adjourns sine die.

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"Govt. A measure before a legislative body authorizing the expenditure of public moneys and stipulating the amount, manner and purpose of the various items of expenditure."

In Boyd Co. v. Blachly, 171 Okla. 626, 43 P.2d 462, it was held that an appropriation is the setting apart of a designated sum of money formally or officially for a special use or purpose by clear, unequivocal terms in a duly enacted law by the legislature. Similar language is contained in Bonsteel v. Allen, 83 Fla. 214, 91 So. 104; Hiers v. Mitchell, 95 Fla. 345, 116 So. 81; and Edward v. Childers, 102 Okla. 158, 228 P. 472; see also 3A Words and Phrases, pp. 486-492, and A.G. opinion dated September 16, 1959.

On the other hand, a bill that does not expressly authorize that certain specified funds shall be used for certain specified purposes is not an appropriation. Herrick v. Gallet, 35 Ida. 13, 204 P. 477. For example, in Opinion of the Justices, 323 Mass. 764, 79 N.E.2d 881, it was held that a pending bill providing for 20% pay increase for certain officers and employees of the commonwealth, without designating any sum of money to be devoted to such purposes was not an appropriation bill. Too, a bill containing no appropriation but amending statutes regulating motor carriers and thereby indirectly affecting continuing revolving fund appropriations theretofore enacted by increasing permit fees of various types of motor carriers was held not to be an appropriation bill. Finnegan v. Dammann, 220 Wis. 143, 264 N.W. 622.

Hence, a bill appropriating a specified sum of money from a designated fund for a specified purpose or which constitutes an obligation of the State is an appropriation bill.

It is the opinion of this office, therefore, that the bill expressly appropriating funds for the employees' medical and hospital program (S.B. No. 17), the polio immunization program (S.B. No. 258), the portrait of the chief justice (S.B. No. 338), and bonus for pensioners (S.B. No. 349), are clearly appropriation bills within the meaning of section 5, Article VI.

Since S.B. No. 38, accepting the land-grant college aid from the United States Congress does not contain any designated amount, it is questionable whether it is an appropriation bill. In resolving this question, resort will be made to the statutory rule of construction that all statutes which relate to the same

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persons or things are to be construed in pari materia, especially where one of the statutes refers to another. (Kamanu v. E.E. Black, Ltd., 41 H. 442; Lord v. Lord, 35 H. 834; 82 C.J.S., Statutes, § 366, pp. 801-812.) To illustrate, in Town of Highgate v. State, 59 Vt. 39, 7 A. 898, the legislature passed Act 11 which granted aid from the state to towns for highway purposes, but contained no appropriation. Later Act 18 was adopted, appropriating a designated sum of money for the purpose of paying monetary demands against the state. The court held that the former Act 11 was an appropriation measure, stating that the two acts should be construed together, reasoning:

> "It is well settled that all statutes in pari materia are to be read and construed together, as if they formed parts of the same statute, and were enacted at the time. . . . 'Statutes are in pari materia which relate to the same person or thing, or to the same class of persons or things.' The phrase is applicable to public statutes or general laws, made at different times and in reference to the same subject."

Further, there is authority that state statutes may be so construed as to harmonize with federal legislation on the same subject. (82 C.J.S., Statutes, § 366, p. 813.) So also, in State v. Board of Com'rs of Clinton County, 166 Ind. 162, 76 N.E. 986, 994 (1906), it was held that a "donation" or "grant" from the counties to aid in the construction of railroads constituted an appropriation.

Here, although S.B. No. 38 does not designate a sum of money to be expended, it refers to paragraph 14(e) of the Act of Congress, approved July 12, 1960 (P. L. 86-626), which expressly appropriates the sum of $6,000,000 to the State of Hawaii under the federal land-grant college aid program.

In view of the foregoing authorities, we believe that S.B. No. 38 should be read and construed together with said Act of Congress inasmuch as they relate to the same thing. We are therefore of the opinion that said S.B. No. 38, accepting the "donation" or "grant" of $6,000,000 from the United States Congress, is an appropriation measure.

In the final analysis (1) the term "final reading" in section 5, Article VI, refers to the last act of the legislature on an appropriation bill prior to its being sent to the governor; and (2) that bills appropriating designated sums of money for

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specific purposes are appropriation bills as used in section 5; S.B. Nos. 17, 38, 258, 338, and 339 are within said definition. Since these five bills have already passed third and final reading in the senate, the house of representatives may pass on them twice. Barring amendments thereto, the house is prohibited by section 5, Article VI, from passing on them for the third and final reading until the general appropriations bill has been transmitted to the governor.

Yours very truly,

/s/ LAWRENCE H. KAM
LAWRENCE H. KAM
Deputy Attorney General

APPROVED:

/s/ SHIRO KASHIWA
SHIRO KASHIWA
Attorney General

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CONSTITUTIONAL LAW

Statutes

The term "final reading" in section 5, Article VI of the State Constitution, lies to either of the legislative chambers, depending on which house considers a bill last.

Section 5, Article VI of the State Constitution refers to the enactment of the general appropriations bill by the last legislative body considering the same.

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STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

March 28, 1961

The Honorable Stanley I. Hara
Chairman, Finance Committee
House of Representatives
The First Legislature of Hawaii
Iolani Palace
Honolulu, Hawaii

Dear Sir:

This is in reply to your letter dated March 21, 1961, asking our advice with respect to section 5, Article VI of the Constitution of the State of Hawaii, which provides:

> "No appropriation bill, except bills recommended by the governor for immediate passage, or to cover the expenses of the legislature, shall be passed on final reading until the bill authorizing operating expenditures for the ensuing fiscal period, to be known as the general appropriations bill, shall have been transmitted to the governor."

The following inquiries were made regarding the definition of certain words used in the above section:

> (1) "Specifically, do the words 'final reading' mean third reading in one house, third reading in the second house, the final vote adopting a conference committee report by either house or does it mean at the time the governor signs the bill?
>
> (2) "Specifically, does this word [transmitted] mean when the bill is

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sent to the governor by the passage of such bill by the last house, or does it mean upon receipt of such bill by the governor?"

With respect to your first inquiry, the term "final reading" has reference to the last act of the legislative body. This office rendered an opinion to this effect on March 24, 1961 (A.G. Op. 61-39). We noted there that, in the first and second drafts of section 5, the term "final reading" was followed by the words "in either house". (Vol. 1, Constitutional Convention of Hawaii, pp. 198, 327.) However, the latter words were ultimately deleted "in the interest of improved language construction." (Id. p. 276.)

In answering your specific questions, the following comments, recommending the adoption of section 5, are pertinent:

> ". . . In making this recommendation your committee believes that the Legislature will not be substantially hampered by the above provisions in acting upon other appropriation measures, for the prohibition against passing such other measures 'on final reading by either house' refers to the 'final reading' in either house whereby the bill will become law unless vetoed by the Governor. Hence, any such other measure may be passed on three readings in one house and on two readings in the other prior to the Governor receiving the General Appropriation Bill, and may even be so passed on third reading in the latter house if it has been amended by such latter house, for in such case the 'final reading' would be in the house of the bill's origin." (Emphasis added.)

Specifically, then, we are of the opinion that the words "final reading" do not mean third reading in one house if the appropriation measure originates there. If action on an appropriation bill initiates in the house of representatives and passes three readings there, the bill may pass two readings in the senate before the term "final reading" is applicable; the senate is then prohibited by section 5 from passing the bill the third time until the general appropriations bill has been sent to the governor. However, if the appropriation bill is amended by the senate or by a conference committee, the "final reading" refers to the last legislative chamber acting thereon.

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The term is not intended to apply to the time the governor signs the bill.

Our reply to your second question is that the word "transmitted" relates to the time the general appropriations bill is sent to the governor after passage of the same by the last legislative body. In reaching this result, resort is made to Volume 1, Constitutional Convention of Hawaii, to determine constitutional intent, and from which we quote (pp. 193-194):

> ". . . In order that the General Appropriations Bill, which provides in effect for the housekeeping expenses of the State, will receive full, careful and deliberate consideration by the legislature, your Committee proposes that this will be passed prior to the passage of other appropriation measures, with the exception of appropriations for the expenses of the legislature and of special appropriations, the immediate passage of which is recommended by the governor. . . .
>
> * * *
>
> ". . . the passage of the General Appropriations Bill in the early period of the legislature is desirable in order to prevent the confusion, which in the past has taken place in Hawaii . . . of passing the governor's budget in the dying moments of the legislative session. . . .
>
> "Your Committee considered including a provision to the effect that the legislature should take action on the General Appropriations Bill within 30 days after assembling. However, the recommendation of the Committee now provides that this measure be enacted before any other appropriation bills (with the exceptions above noted) are passed on final reading by either House. . . .
>
> * * *
>
> ". . . The power of the governor to strike out, or to reduce items, once the

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appropriation bill has passed the legislature, is a common executive power and should be vested with the governor if a strong centralized financial system is to be established. . . ." (Emphasis added.)

It is manifest from the use of such words as "passed", "passage", and "enacted", above, in connection with the general appropriations bill, that the word "transmitted" relates to the passage or enactment of the general appropriations bill by the legislature. "Transmitted" does not refer to the receipt of such bill by the governor unless the word "receipt" is construed to relate to the time after the general appropriations bill has been passed by the legislature.

In conclusion, therefore, we interpret section 5, Article VI as follows: No appropriation bill (with the exceptions noted therein) shall pass third and final reading by the legislative chamber considering the bill last, until the general appropriations bill, which has been passed by the legislature, has been sent to the governor.

Very truly yours,

/s/ LAWRENCE H. KAM
LAWRENCE H. KAM
Deputy Attorney General

APPROVED:

/s/ SHIRO KASHIWA
SHIRO KASHIWA
Attorney General

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ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
AND REFER TO
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Op. 61:41

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

April 4, 1961

Mrs. Rachael S. Chang, Secretary
Beauty Culture Board
State of Hawaii
P. O. Box 3469
Honolulu, Hawaii

Dear Mrs. Chang:

This is in reply to your letter of March 7, 1961, asking whether the opinion of the Attorney General, dated March 4, 1940, is still valid. The opinion in question defines the jurisdictional boundaries of the Beauty Culture Board and the Department of Public Instruction in the licensing and regulation of beauty schools.

We find that section 952, Revised Laws of Hawaii 1935, providing for the registration of schools for hairdressers, cosmeticians and cosmetologists has been substantially amended, and as amended appears in section 59-19, Revised Laws of Hawaii 1955. Act 255, Session Laws of Hawaii 1939, pertaining to regulation of private vocational schools by the Department of Public Instruction has not been amended and now appears in chapter 42 of the Revised Laws of Hawaii 1955.

In its present form, section 59-19, Revised Laws of Hawaii 1955, differs from section 952, Revised Laws of Hawaii 1935. Therefore, those paragraphs in the opinion of March 4, 1940, which discuss the provisions of section 952, Revised Laws of Hawaii 1935, should be conformed to the language which now appears in section 59-19, Revised Laws of Hawaii 1955. However, the discussion in the opinion of March 4, 1940, relating to dual responsibilities for registration and regulation of these schools is still valid and should be observed. Chapter 42, Revised Laws of Hawaii 1955, and section 59-19 are both applicable to schools for hairdressers, cosmeticians and cosmetologists, and the Beauty Culture Board does not have sole and exclusive jurisdiction to register and regulate these schools.

APPROVED:

Shiro Kashiwa
Attorney General

Yours very truly,

Yoshio Shigezawa
Deputy Attorney General

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Op. 61-42

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

April 5, 1961

Honorable Yoshito Takamine
Representative, Third District
First Legislature, State of Hawaii
Iolani Palace
Honolulu, Hawaii

Dear Sir:

Subject: H.B. 160, H. D. 1
Relating to employment security

This is in response to your communication of April 4, 1961, wherein you request an opinion as to whether or not House Bill 160, H. D. 1 violates Article III, Section 15 of the State Constitution.

Article III, Section 15 reads as follows:

> "No law shall be passed except by bill. Each law shall embrace but one subject, which shall be expressed in its title. The enacting clause of each law shall be, 'Be it enacted by the legislature of the State of Hawaii.'"

House Bill 160, H. D. 1, amends Section 93-21, R.L.H. 1955, as amended, pertaining to the benefit schedule in the Hawaii Employment Security Law and also amends Section 93-60(b), RLH 1955, relating to the taxable wage base of the same law.

This office is of the opinion that House Bill 160, H. D. 1, is constitutional and does not violate Article III, Section 15 of the State Constitution since both proposed amendments are of the same subject matter in that they both pertain to the Hawaii Employment Security Law under Chapter 93, R.L.H. 1955.

Yours very truly,
/s/ Donald C. H. Low
DONALD C. H. LOW
Deputy Attorney General

APPROVED:

SHIRO KASHIWA
Attorney General

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INDEXING INSTRUCTION

Op. 61-43

CONSTITUTIONAL LAW

General Laws

S.B. 276, relating to the bailiffs of the City and County of Honolulu District Courts, is violative of section 2, Article VII of the State Constitution which prohibits the conferring of powers on political subdivisions except by general laws.

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STATE OF HAWAII

Department of the Attorney General

HONOLULU

April 6, 1961

The Honorable Julian R. Yates, Sr., Chairman
Senate Committee on Public Employment
The First Legislature of the State of Hawaii
General Session 1961
Honolulu, Hawaii

Dear Senator Yates:

By letter of April 4, 1961, you requested us to render an opinion as to the constitutionality of Senate Bill No. 276, S.D. 1, entitled "An act relating to the bailiffs of the district courts of the City and County of Honolulu."

Section 1 of the bill places the bailiffs under the supervision and control of the magistrate of the district courts of the City and County of Honolulu and provides for their appointment by the same authority that appoints the clerks and interpreters for said courts. Section 2 excludes the functions of bailiffs from the jurisdiction of the chief of police and section 3 thereof grants civil service status to them.

Section 1, Article VII, of our Constitution provides, inter alia:

". . . Each political subdivision shall have and exercise such powers as shall be conferred under general laws."

In construing the above section, this office, by Opinion 61-36, dated March 17, 1961, advised that in conferring powers upon the counties or political subdivisions of the State, the legislature must do so by means of "general laws" that "operate[s] equally without discrimination as to particular localities, upon all of the people of the State of Hawaii, or operate[s] equally and affect[s] particular persons or things of a class based upon a reasonable and proper classification." We there ruled that a statute creating a board of water supply for the County of Maui only would be unconstitutional as a local law.

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Subsequently, the corporation counsel of the City and County of Honolulu, by Opinion 61-41, dated March 23, 1961, held invalid Act 27, Session Laws of Hawaii 1959, which provided that certain City and County employees affected by the Charter shall enjoy civil service status without taking examinations. We concur with the opinion and quote therefrom:

> "There is no question that Act 27, being applicable only to the City and County, is a local law. We believe that it, in effect, confers the power on the City and County, acting through its officers, to appoint or transfer persons to civil service positions, without the necessity of examinations. In the absence of Act 27, the appointing authorities of the City would not have had this power."

The same reasoning is applicable to the instant situation. In the absence of Senate Bill No. 276, the magistrates and appointing officers of the City and County of Honolulu would not have the power to appoint, supervise, and control the bailiffs of the district courts. As such, Senate Bill No. 276 is a local law.

We therefore conclude that Senate Bill No. 276, in its present form, is unconstitutional and violative of section 1, Article VII, of our State Constitution.

Very truly yours,

/s/ Lawrence H. Kam

LAWRENCE H. KAM
Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa

SHIRO KASHIWA
Attorney General

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Op. 61-44

PUBLIC FUNDS

By Act 139, Session Laws of Hawaii 1957, the counties may receive unlimited amounts of federal aid but cannot float bonds or borrow money thereunder.

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STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

April 10, 1961

The Honorable John C. Lanham, Chairman
Economic Development Committee
House of Representatives
First Legislature, State of Hawaii
Honolulu 13, Hawaii

Dear Sir:

This is in answer to your letter of March 22, 1961, requesting our advice on three questions which will be considered seriatim.

> (1) "Does the underlined word 'it' (in Act 139, S.L.H. 1957) refer to the federal or state government?"

We believe that "it" refers to the county government. Act 139, Session Laws of Hawaii 1957, governing agreements between the counties and the federal government, reads:

> "The governing body of the planning commission of the various counties, with the consent of the boards of supervisors, may enter into agreements (which may extend over any period, notwithstanding any provision or rule of law to the contrary) with the Federal Government or any other public body or bodies respecting action to be taken pursuant to any of the powers granted to it by law and furnish, expend and/or receive any funds or other assistance in connection with projects being or to be undertaken pursuant to such powers." (Emphasis added.)

The legislative history of Act 139 sheds no light on the subject. Reliance will therefore be placed on the well known rule of statutory construction codified by section 1-18,

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Revised Laws of Hawaii 1955, which states:

> "(a) The meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases and sentences may be compared, in order to ascertain their true meaning." (See also 82 C.J.S., Statutes, § 348, p. 723.)

In examining the context of Act 139 and the use of the word "it" therein, it appears that Act 139 is directed to "action to be taken pursuant to any of the powers granted" to the "governing body or the planning commission of the various counties. . . ."[1/] We are therefore of the opinion that "it" relates to the counties and not to the state or the federal government.

> (2) "Does Act 139 mean that the Counties have unlimited power to borrow from the Federal Government if the Federal laws so permit?"

The answer is "no". Under the provisions of Act 139, the counties are vested with the authority to "furnish, expend and/or receive funds" without limitation as to amount. However, the power to borrow is neither expressly given therein nor is it necessarily implied.[2/] In the absence thereof, the general rule is that a municipality cannot exercise such power (15 McQuillin, Municipal Corporations, § 39.97, p. 15).

In your letter, reference was made to section 138-11, Revised Laws of Hawaii 1955, which provides, inter alia:

> ". . . in the case of the counties of Hawaii, Kauai or Maui, the total of liabilities and obligations incurred, authorized or contracted during any fiscal year in excess of the moneys available to such county during such year shall not exceed $100,000. . . ."

1/ The proviso that agreements may be made "notwithstanding any provision or rule of law to the contrary" relates to the period of time of the agreements.

2/ The committee reports on Act 139 do not disclose legislative intent.

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The purpose of the above section is to enable the various counties to make "temporary loans." (1949 Senate Journal, p. 1242.) Generally, municipal corporations have no power to issue bonds unless expressly authorized to do so (15 McQuillin, Municipal Corporations, § 43.19, p. 495).

In construing the two statutes, this office is of the view that under section 138-11, the counties may borrow or make temporary loans not in excess of $100,000, from any source, including the federal government; said section does not relate to the issuance of bonds or to monetary grants. Under Act 139 the counties may receive an unlimited amount of funds in the form of federal aid or grant from the federal government in excess of $100,000; they are not, however, expressly or impliedly authorized to float bonds thereunder; nor do they have the power to borrow an unlimited amount of money from the federal government.

> (3) "How do the first and fourth paragraphs of section 3, Article VI of the State Constitution, requiring legislative authorization of county obligation and setting forth certain debt limitations, respectively, affect funds received under Act 139 and section 138-11?"[3/]

The first paragraph of section 3, Article VI, of our Constitution prescribes that "All bonds and other instruments of indebtedness issued by . . . a political subdivision . . . must be authorized by the legislature. . . ." The fourth paragraph thereof states that the funded debt of a county must not exceed 10% of the real property tax assessments or 2% thereof in any fiscal year. The 10% or 2% limitation applies only to "funded debt," which is defined to mean bonded indebtedness (Employees' Ret. Sys. v. Budget Dir. Ho, 44 H. 154, 161, 1960; A.G. Op. dated Sept. 16, 1959 and A.G. Op. 59-158).

Insofar as legislative authorization is concerned, the legislature, by Act 139, has authorized the counties to receive an unlimited amount of federal aid. Similarly, by section 138-11, the counties have been vested with authority by the legislature to issue instruments of indebtedness not to exceed $100,000. The same is true with respect to the issuance of bonds inasmuch as the legislature, by Act 24, Session Laws

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3/ Pursuant to our conversation on April 3, 1961, your third question was rephrased.

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of Hawaii 1959, empowered the counties to issue bonds up to the constitutional limitations.

Insofar as the debt limitation is concerned, since Act 139 and section 138-11 do not pertain to the issuance of county bonds, funds received thereunder are not included in the total of the bonded indebtedness of the political subdivision. Whereas, bonds issued pursuant to said Act 24 are clearly counted towards the funded debt of the political subdivision as prescribed by section 3, Article VI of the State Constitution.

Very truly yours,

/s/ LAWRENCE H. KAM
LAWRENCE H. KAM
Deputy Attorney General

APPROVED:

/s/ SHIRO KASHIWA
SHIRO KASHIWA
Attorney General

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INDEXING INSTRUCTIONS

Op. 61-45

OBSCENE, LEWD PUBLICATIONS AND PICTURES--constitutionality

ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
AND REFER TO
INITIALS AND NUMBER

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Op. 61-45

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

April 11, 1961

Honorable Yasutaka Fukushima
Chairman, Senate Judiciary Committee
General Session of 1961
Honolulu, Hawaii

Dear Senator Fukushima:

Re: Senate Bill Nos. 188 and 356

This is in response to your request of February 28, 1961, for an opinion relative to the constitutionality of Senate Bill Nos. 188 and 356--proposals dealing with obscene, lewd, etc. motion pictures and publications and obscene printed or written matter or material.

The Supreme Court of the United States in 1957 last considered the constitutional problems in this area in Kingsley Books Inc. vs. Brown, 354 U.S. 436 and Roth vs. United States, 354 U.S. 476. These cases indicated clearly that the First Amendment was not intended as a constitutional protection of every utterance and that the area of constitutionality protecting speech and press were not violated by statutes prohibiting the use or mailing of obscene, lewd, lascivious, indecent, filthy material and making possession, mailing, distribution, etc. of such material criminally punishable and enjoinable.

The statute in the above cases were also upheld against claims of unconstitutional vagueness, the Court holding that standards of obscenity, lewdness, etc. have been clearly set out in the community to provide sufficient standards against which conduct may be gauged.

The Court, likewise, considered fully the possible pre-emption problem by Congress in this field. Section 461, 18 U.S.C., provides that obscene, lewd, etc. material is non-mailable and whoever knowingly deposits such for mail or delivery

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is criminally punishable. Section 5 of Senate Bill No. 356 authorizes the attorney general or county attorney or public prosecutor of any county to bring injunctive action against any one engaged in sending or causing to be sent such material.

The Roth case decided that the Federal obscenity statute punishing the use of the mail for obscene matter is a proper exercise of the postal power delegated by Congress by Article I and is not an infringement of the rights reserved to the states by the Ninth and Tenth Amendments. It also indicated that Congress had not pre-empted the regulatory field in this area and states may, through its police power, pass laws prohibiting the publication or use of obscene printed or written matter or material and that these state statutes in no way impose a burden or interferes with the Federal postal functions.

There were strong dissenting opinions in both cases. However, in the light of these two cases and the historical background of prohibition against obscene literature and pictures, we feel the two bills to be constitutional.

Very truly yours,

Arthur S. K. Fong

Arthur S. K. Fong
Deputy Attorney General

APPROVED:

Shiro Kashiwa

Shiro Kashiwa
Attorney General

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NIIHAU

Beaches below high water mark

HIGH WATER MARK

Beaches on the Island of Niihau

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STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

April 14, 1961

Honorable Members
First State Legislature
1961 General Session
State of Hawaii

Sirs:

This is in response to House Resolution No. 64, requesting the Attorney General to investigate and to render an opinion as to whether or not the beaches below high-water mark on the Island of Niihau belong to the State of Hawaii.

It was on January 27, 1848 that, in return for certain lands quitclaimed to her by King Kamehameha III, V. Kamamalu quitclaimed, among other lands, the Island of Niihau to the King. Subsequent thereto, on February 13, 1848, I. Koakanu applied to the Board of Commissioners to Quiet Land Titles, hereafter referred to as the Land Commission, for the lands of Halawela and Kahuku on the Island of Niihau. A day later, on February 14, 1848, in return for certain lands quitclaimed to him by Koakanu, King Kamehameha III quitclaimed to Koakanu the Ahupuaas of Kahuku and Halawela on Niihau.

Following the completion of The Great Mahele between King Kamehameha III on the one hand and over 240 of the highest ranking chiefs and Konohikis on the other hand, on March 8, 1848 King Kamehameha III divided into two parts the lands he had retained for himself in The Great Mahele. One part he gave to the government, and the other part he reserved unto himself and his heirs, forever. This action on the part of the King was ratified by the Legislature in

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June of 1848. Among the lands set apart to the government was the Island of Niihau, except for the two ahupuaas quitclaimed to Koakanu.

After the lands on the Island of Niihau were offered for sale, on January 20, 1855, Royal Patent Grant 1615, covering 50 acres more or less at Omaumalua and Kamalino, was issued to Papapa. This grant excepted the church lot, the school house and canoe landing places, and also reserved unto the government all mineral and metallic mines. Subsequent thereto, on November 27, 1861, after the Land Commission had been abolished on March 31, 1855, Mahele Awards 20 and 20-B were issued to Koakanu for the Ahupuaas of Kahuku and Halawela on Niihau by the Minister of the Interior, pursuant to the Act of August 24, 1860 for the relief of konohikis.

On January 14, 1864, James M. Sinclair and Francis Sinclair sent a letter to G. M. Robertson, Minister of the Interior, offering to purchase "all the lands on the Island of Niihau together with all the rights and appurtenances thereunto belonging. With the exception of two Ilis and seven acres of land situated upon the aforesaid Island." For the said land rights and appurtenances the Sinclairs offered the sum of $6000.00.

On January 19, 1864 the offer of James and Francis Sinclair to purchase the government lands on the Island of Niihau was brought before the Cabinet Council by G. M. Robertson. After some discussion on the Matter, at which time there was no mention at all of the lands below high-water mark, the Cabinet Council adopted the following resolution:

> "RESOLVED that the Minister of the Interior be authorized to sell the Government lands in the Island of Niihau to the Messrs. Sinclair for the sum of $10,000.00 or to lease the same for a term of 50 years at the annual rent of $750, or even $650."

Following the above action of the Cabinet Council, on the same day, G. M. Robertson sent to Messrs. Sinclair a letter which read in part:

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" ... I am now authorized to offer you as follows, viz:

"To sell you all the Government Lands on Niihau, in Fee Simple, (reserving the rights of the Government in the two lands of Koakanu) for the sum of $10,000.00 ..."

In reply to the above letter, on January 20, 1864, James McH. Sinclair wrote to G. M. Robertson, offering to purchase the government lands on the Island of Niihau for $10,000.00. In said letter Mr. Sinclair also wrote:

"I respectfully request that your excellency will cause to be embodied in the Patent a declaration to the effect that the Government lands mentioned comprise all the lands on the Island of Niihau, excepting the two lands of Koakanu and 50 acres already sold by the Government."

Upon completion of the negotiation between the government and the Sinclairs, on January 23, 1864 the government issued to the Sinclairs Royal Patent Grant 2944. The important and pertinent provisions of said Grant 2944 read as follows:

"King Kamehameha V ... has ... this day granted and given, absolutely, in Fee Simple, unto James McHutcheson Sinclair and Francis Sinclair ... for the consideration of Ten Thousand Dollars paid into the Royal Exchequer,

"The whole of the lands now belonging to the Government on the Island of Niihau, it being understood, that under this Patent the Whole of the land on the said Island of Niihau is conveyed to the said James McHutcheson Sinclair and Francis Sinclair; with the exception of the two lands known as Kahuku and Halawela, set off to Koakanu, in the Great Division of 1848, and that tract of land sold to Papapa, containing fifty acres, which is more particularly described in Royal Patent No. 1615 of Land Sales, which Patent, in the diagram, also describes the pieces of land set apart for church and school lots; and also

excepting and reserving to the Hawaiian Government the mineral and metallic mines of every description.

...

Kamehameha R.

M. Kekuanaoa

By the King

G. M. Robertson"

Shortly thereafter, on February 13, 1864, the Sinclairs acquired from Koakanu the Ahupuaas of Kahuku and Halawela, upon which was issued Royal Patent 5573 on Mahele Awards 20 and 20-B on August 24, 1864. Subsequent thereto, on July 8, 1880, one of the Sinclairs acquired from Papapa the land at Omaumalua and Kamalino, as described in Grant 1615.

At the time of the issuance of Royal Patent Grant 2944 to the Sinclairs, the Civil Code of 1859 authorized the "Minister of Interior, by and with the authority of the King in Cabinet Council" to lease, sell or otherwise dispose of "public lands." The foregoing facts show that Royal Patent Grant 2944 was issued through the proper authorities. Thus, the important question is: Did Royal Patent Grant 2944 convey to the Sinclairs the beach lands below high-water mark?

There is no doubt that King Kamehameha V, who authorized the sale of the government lands on Niihau and who signed Royal Patent Grant 2944, did have the authority to convey to private individuals the beach lands below high-water mark. Territory of Hawaii v. Liliuokalani, 14 Haw. 88, 1902. However, to warrant the inference that it was intended to permit the lands below high-water mark to be converted into private property, there must be an express and specific declaration in the grant or deed. Territory of Hawaii v. Liliuokalani, supra; Shively v. Bowlby, 152 U. S. 1.

All grants from the government are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of grants, on the ground that the intention on the part of the government to grant to private persons property or rights in which the whole public is interested cannot be presumed unless unequivocally expressed or necessarily implied in the terms of the grant. Central Transportation Co. v. Pullman's Car Co., 139 U. S. 24, 1891; Shively v. Bowlby, 152 U. S. 1, 1894; The Rebeckah, 1 C. Rob. 227; Martin v. Waddell, 16 Pet. 367.

A careful study of Royal Patent Grant 2944 shows that there is no express or specific declaration that the lands beneath high-water mark on Niihau were conveyed to the Sinclairs. In fact, a careful study of the facts surrounding the issuance of said Grant and the history of the Hawaiian Islands shows that there could not have been any intent in said Grant to convey the lands below high-water mark.

At the time of the issuance of Royal Patent Grant 2944, a portion of Niihau had already been conveyed to private individuals. Grant 1615 to Papapa covered 50 acres along the beach at Omaumalua and Kamalino on Niihau, and Mahele Awards 20 and 20-B to Koakanu covered the Ahupuaas of Kahuku and Halawela. Though the exact locations of said Ahupuaas are not known, according to a report dated December 3, 1863 to G. M. Robertson by Valdemar Knudsen, who was requested to study and appraise the Island of Niihau, Halawela and Kahuku covered the best parts of the Island and contained about 2000 acres of land. In addition thereto, at the time of the issuance of Royal Patent Grant 2944, Niihau had a population of approximately 800 natives.

With over 2000 acres of the best lands privately owned and with approximately 800 natives living on Niihau, it is unlikely that it was the intent of King Kamehameha V and the other officials to convey the lands below high-water mark on Niihau to the Sinclairs. Such an action would have cut the natives off from the ocean upon which they relied heavily for their daily subsistence.

A study of the history of Hawaii's lands shows that with the exception of fish ponds, it was only in a few instances that lands below high-water mark were conveyed by the government. And, in those instances, the deed explicitly stated that the lands conveyed extended along or down to the

"low-water mark." In fact, the Privy Council which, until the enactment of the Civil Code of 1859, advised the Minister of the Interior on the sale of government lands, on August 29, 1850, made it definitely known that it would not look upon with favor the sale to anyone of any land below high-water mark. On that date, the Privy Council passed a resolution as follows:

> "RESOLVED, that the rights of the King as sovereign extend from high-water mark a marine league to sea, and to all navigable straits and passages among the Islands, and no private right can be sustained, except private rights of fishing and of cutting stone from the rocks, as provided and reserved by law."
>
> 3 Privy Council Record, page 425

The Resolution did not have the effect of law, but it indicated the thinking of the officials who gave their approval or disapproval on the sale of government lands.

Of the five members of the Cabinet Council which approved the sale of the government lands on Niihau, one --Wyllie--was a member of the Privy Council that had earlier adopted the Resolution of August 29, 1850. Thus, without any specific declaration in Royal Patent Grant 2944 that the lands conveyed included lands below high-water mark, there is no alternative but to construe that the grant did not include the lands below high-water mark.

Based on the foregoing, it is the opinion of this office that Royal Patent Grant 2944 did not include the lands below high-water mark. Title thereto is in the State of Hawaii.

Respectfully submitted,

/s/ Jon J. Chinen

JON J. CHINEN
Special Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa

SHIRO KASHIWA
Attorney General

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REPORT TO THE FIRST LEGISLATURE OF THE

STATE OF HAWAII

ON

HOUSE RESOLUTION NO. 64

GENERAL SESSION OF 1961, FIRST LEGISLATURE

OF THE STATE OF HAWAII

STATE OF HAWAII

APRIL 1961

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STATE OF HAWAII

EXECUTIVE CHAMBERS

April 15, 1961

Honorable Members
First State Legislature
State of Hawaii

Dear Sirs:

I am transmitting herewith for your information and consideration the report prepared by the Attorney General in compliance with the request of House Resolution No. 64 of the General Session of 1961 of the First Legislature of the State of Hawaii.

House Resolution No. 64 requested the Attorney General to investigate and render an opinion as to whether the beaches on the Island of Niihau belong to the State of Hawaii.

The attached legal opinion was prepared in response to the above request.

Sincerely yours,

/s/ William F. Quinn

WILLIAM F. QUINN
GOVERNOR OF HAWAII

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HOUSE RESOLUTION NO. 64

General Session of 1961,
First Legislature, State of Hawaii

WHEREAS, the State owns all beaches from the highwater mark to the ocean; and

WHEREAS, a question has arisen concerning title to the beaches from the highwater mark to the ocean on the Island of Niihau; now, therefore,

BE IT RESOLVED by the House of Representatives of the First Legislature of the State of Hawaii, 1961 General Session, that the Attorney General be and he is hereby respectfully requested to investigate and render an opinion as to whether the beaches on the Island of Niihau belong to the State and to report on his findings or progress thereof within fifteen (15) days after the receipt of this Resolution and transmit said report to the House of Representatives; and

BE IT FURTHER RESOLVED that duly authenticated copies of this Resolution be forwarded to the Governor and the Attorney General.

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INDEXING INSTRUCTION

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PUBLIC EMPLOYEES

Personal history statement

The legislature may delegate to the loyalty board the authority to prescribe the form of the personal history. If a person answers "Yes" to any questions on the reverse side thereof, he may not be compelled to answer further questions concerning himself or his fellow associates in a hearing before the loyalty board or in a trial in another matter in the State courts.

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STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

April 14, 1961

The Honorable Julian R. Yates, Sr.
Chairman, Senate Committee on Public Employment
First Legislature, State of Hawaii
Iolani Palace
Honolulu, Hawaii

Sir:

On March 31, 1961, at the State Senate Committee on Public Employment hearing on S.B. No. 379, known as the "Frank Silva Bill", we were requested to render a written opinion with respect to the personal history statement.

The first set of questions are: (a) May the legislature validly delegate to a state agency the authority to prescribe the form of the personal history statement? (b) If so, are the questions on the reverse side thereof proper?

The answer to (a) is "Yes".

The legislature, by sections 5-93 and 5-96, Revised Laws of Hawaii 1955, conferred broad powers upon the loyalty board,[1/] including the power to prescribe the form of the personal history statement. The said sections read as follows:

> "5-93. . . . The board, in exercising the powers and performing the functions vested in it by this part, shall have <u>all powers necessary or convenient to</u> accomplish the objects and purposes of this part. . . .

1/ Section 12 of the Reorganization Act, Act 1, 2nd Special Session Laws of 1959, transferred the functions of the loyalty board to the department of personnel services.

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* * *

> "5-96. . . . The board shall prescribe a form of personal history statement to be executed by every registrant. Such statement may call for such information as the board shall prescribe. Whenever the board deems it necessary or advisable, the form and content of the personal history statement may be revised." (Emphasis added.)

In administering the above sections, the loyalty board is governed by the provisions of Part IV of chapter 5, comprising twenty-seven sections (§§ 5-90 to 5-116, R.L.H. 1955). In particular, section 5-108 outlines the standards for the refusal of public employment which, in essence, relate to activities of disloyalty to the United States, such as sabotage, treason, membership in communist organizations, etc.

A fundamental principle of law is that the legislature may delegate non-legislative power which it may itself lawfully exercise. As stated in 11 American Jurisprudence, Constitutional Law, § 214, page 923:

> "While it (the legislature) cannot abdicate its general lawmaking powers, it may authorize others to do things which it might properly do, but which it cannot conveniently or advantageously perform."

Illustrations where the state delegated to one of its boards or commissions the authority to probe into subversive activities are Lerner v. Casey, 357 U.S. 468 (1958); Adler v. Bd. of Education, 342 U.S. 485 (1952); Beilan v. Bd. of Education, 357 U.S. 399 (1958); Uphaus v. Wyman, 360 U.S. 72 (1959); cf: Garner v. L. A. Bd. of Pub. Wks., 341 U.S. 716 (1951); Nelson v. L. A. County, 362 U.S. 1 (1960). See also 11 American Jurisprudence, Constitutional Law, § 241, p. 959, and 16 Corpus Juris Secundum, Constitutional Law, § 133, p. 552.

An important limitation on that authority, however, is that the legislature must establish sufficiently definite and certain policies and standards for the guidance of the instrumentality that is to administer the law (16 C.J.S., Constitutional Law, § 133, p. 561; 11 Am. Jur., Constitutional Law, § 214, p. 924).

A study and review of the authorities lead us to the

conclusion that the legislature may validly delegate to the loyalty board the task of administering the provisions of the personal history statement. Too, by outlining the standards in detail for refusal of public employment, in addition to the other provisions relating to the personal history, the legislature has established sufficiently definite guides for the loyalty board.

The answer to (b) is also in the affirmative, i.e., the questions are proper.

On the reverse side of the personal history statement are six inquiries, limited in scope[2/] and specifically designed to test an applicant's loyalty to the United States, as, membership in fascist or communist organizations or attendance at meetings thereof, employment by a foreign government, conviction of treason, etc.

As case in point is Dworken v. Cleveland Board of Education, 42 Ohio Ops. 240, 94 N.E.2d 18 (1950). The General Code of Ohio empowered the Board of Education to "make such rules and regulations as it deems necessary for its government and the government of its employees and the pupils" of the school. Pursuant thereto, the board passed a resolution, which became part of its rules and regulations, requiring all new employees to execute loyalty oaths and affidavits. Blank forms of the oath and affidavit were printed, containing questions limited to the sphere of subversive activities and affiliations. The court rejected the argument that the questions were invalid, stating:

> "Therefore, in the consideration of all the information the Board possessed, from whatever the source, it had the right to formulate the rule involved for the government of the schools. The justice, wisdom or necessity of the rule belongs solely where the legislature placed it, - on the Board. The Board has here acted fully within its rights, powers and duties."

It should be noted that in the above case, the Board of Education did not have the express authorization to require an employee to execute the loyalty oath and affidavit, but only

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2/ Cf: A.G. Op. 61-30 re question on front side of personal history statement.

the general power to make rules and regulations. A fortiori, where, as here, the legislature expressly confers to an agency the power to prescribe the form of a loyalty oath, it seems clear that action taken thereunder would be unassailable.

This office is therefore of the opinion that since all of the questions on the reverse side of the personal history statement refer to activities of disloyalty they are proper and designed to accomplish the objects and purposes of the law.

The next query is: If a person answers "Yes" to any of the questions under consideration, may he be compelled to answer further questions concerning himself or his fellow associates in a hearing before the loyalty board, or in a trial on another matter in the state or federal courts?

Insofar as loyalty board hearings are concerned, subsection (c) of section 5-103, Revised Laws of Hawaii 1955, prescribes that the board may:

> "(c) Notify the registrant in writing that the board is considering certain derogatory information concerning the registrant, and request (but not require) the registrant to answer under oath an interrogatory propounded by the board; . . ." (Emphasis added.)

So also section 5-104, Revised Laws of Hawaii 1955, setting forth the procedure for a hearing, reads, inter alia:

> "(e) . . . the respondent and his counsel or other representative may appear if he so desires.
>
> "(f) . . . Before making a determination, however, the board . . . may, in its discretion . . . request the respondent to appear for a hearing, but cannot require him to appear and cannot require him to be a witness if he does appear.
>
> * * *
>
> "(l) The respondent may not be required to testify in the proceeding, but may testify in his own behalf if he so

> desires. If he so testifies, he shall be subject to cross-examination by the board." (Emphasis added.)

Thereunder, the registrant may appear at the hearing "if he so desires." The loyalty board "cannot require him to appear and cannot require him to be a witness if he does appear." Although a registrant is subject to cross-examination if he testifies, it is doubtful if he can be forced to incriminate himself or his fellow associates in view of subsection (c) of section 5-103, which expressly states that the board may "request (but not require) the registrant to answer under oath an interrogatory propounded by the board." It may be argued that said subsection refers to a written answer. However, it would be inconsistent to say that a person can be compelled to incriminate himself orally but cannot be so compelled in writing. The law abhors inconsistencies (11 Am. Jur., Constitutional Law, § 50, p. 660) and construes ambiguities against the state in favor of the individual citizen (14 Am. Jur., Criminal Law, § 20, p. 776).

Further, a registrant who testifies is not precluded from seeking refuge in the Fifth Amendment(14 Am. Jur., Criminal Law, § 144, p. 869; § 148, p. 872). Hence, the registrant is fully protected under our present system of laws. Any answers given to interrogatories at the loyalty hearing concerning himself or his associates are purely voluntary on his part.[3/]

With respect to the use of the information in the personal history statement in a subsequent trial in the state or federal courts, section 5-110, Revised Laws of Hawaii 1955, is material. It reads:

> "The files and records of the board shall be confidential records. Such files and records shall not be subject to subpoena in any matter or proceeding, nor shall the testimony of any member or subordinate of the

---

3/ The result would be otherwise in a congressional hearing. In Liveright v. U.S. (CA-DC), 280 F.2d 708, 1960; Price v. U.S. (CA-DC), 280 F.2d 715, 1960; Deutch v. U.S.(CA-DC), 280 F.2d 691, 1960, certiorari granted 364 U.S. 312, convictions were sustained for refusal of admitted ex-communists to answer questions concerning their communist affiliations and activities of their associates. "The proper balance between individual rights and the broad public interest at stake here must be resolved in favor of the latter." (Shelton v. U.S., (CA-DC) 280 F.2d 701, 1960.)

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> board be compellable or given concerning such files and records and any contents thereof." (Emphasis added.)

The term "any matter or proceeding", as used therein, ordinarily relates to action before a court of law or quasi-judicial body (Queens-Nassau Transit Line v. Maltbie, 51 N.Y.S.2d 841, 183 Misc. 924; 34 Words & Phrases, pp. 141-147; Ballentine's Law Dictionary, 2nd Ed., 1948, p. 1023).

Clearly then, in a subsequent trial in a state court, the personal history statement cannot be subpoenaed. Whether the same applies in a federal court depends on the nature of the case and the discretion of the trial judge. In a civil action, the federal court may follow the rule of evidence of the state (Rule 43(a), Federal Rules of Civil Procedure; 54 Am. Jur., United States Courts, § 347, p. 969).

The same applies in criminal cases[4/] in a federal court. Thus, in U.S. v. Bucur (CCA Ind. 1952), 194 F.2d 297, wherein it was held that the admissibility of a prior state conviction of the defendant, for purposes of impeachment, was discretionary with the trial court notwithstanding the fact that under the statutes of Illinois and Indiana such evidence was inadmissible.

Also relevant is Adams v. Maryland, 347 U.S. 179 (1954), presenting a situation converse to the one at bar. There, the petitioner confessed to running a gambling business in Maryland before a Senate committee investigating crime. Subsequently, his confession was used to convict him in the Maryland courts for violating the state's anti-lottery laws. A federal statute, 18 U.S.C. § 3486, provides that no testimony given by a witness in congressional inquiries "shall be used as evidence in any criminal proceeding against him in any court. . . ." The conviction was reversed. Mr. Justice Black, speaking for the United States Supreme Court, rejected the contention that the petitioner had waived his constitutional privilege of self-incrimination by testifying before the congressional committee and that the phrase "in any court"

4/ Rule 26, Federal Rules of Criminal Procedure: ". . . The admissibility of evidence shall be governed . . . by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." (54 Am. Jur., United States Courts, § 348, p. 970.)

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related to state as well as the federal courts. (See also, Reina v. U.S., 364 U.S. 507, 1960.)

We are therefore of the opinion that under section 5-110, a personal history statement is not subject to subpoena in a state court. It follows, therefore, that any information contained therein cannot be used against the registrant. The same result obtains in a federal court if the trial judge, in his discretion, refuses to admit the subject statement into evidence.

Your final question is: What organizations are involved in the cases cited at the Senate committee hearing, sustaining convictions of persons who refused to answer specific questions concerning their communistic activities?

In general, it may be stated that the organizations involved were those on the subversive organizations list published by the United States Attorney General. The cases and organizations are as follows:

1. Barrenblatt v. U.S., 360 U.S. 109 (1959), Communist Party; Hadlane Club of the Communist Party.

2. Nelson v. L.A. County, 362 U.S. 1 (1960), John Reid Club, Communist Party.

3. Garner v. L. A. Bd. of Public Works, 341 U.S. 716 (1951), Communist Party, Communist Political Assn.

4. Lerner v. Casey, 357 U.S. 468 (1958), Communist Party of the United States.

5. Beilan v. Bd. of Education, 357 U.S. 399 (1958), Professional Section of the Communist Political Assn.

6. Braden v. U.S., No. 54, Oct. Term 1960, Emergency Civil Liberties Committee; Southern Conference Educational Fund.

Very truly yours,

/s/ LAWRENCE H. KAM

LAWRENCE H. KAM
Deputy Attorney General

APPROVED:

/s/ SHIRO KASHIWA

SHIRO KASHIWA
Attorney General

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INDEXING INSTRUCTIONS

I. TAXATION, REAL PROPERTY

Disposition of tax moneys

Appropriation of tax moneys to Castle Memorial Hospital, Inc. (a private sectarian hospital) does not violate Article VI, Section 6 of the Constitution of the State of Hawaii as an appropriation not made for a public purpose nor as a grant in respect of the establishment of religion.

* * * * *

II. TAXATION, REAL PROPERTY

Rates

Classification of property for purposes of increased rates.

Classification imposing an increased rate on "sections 1 to 7 of zone 4 of Koolaupoko taxation district in the City and County of Honolulu" is not per se unreasonable or arbitrary and therefore violative of the "due process" and "equal protection" clauses of the 14th Amendment to the Federal Constitution and of Article I, Section 4 of the Hawaii Constitution.

* * * * *

III. CONSTITUTIONAL LAW

Due Process of Law

Classification for purposes of taxation imposing an increased rate of real property tax on "sections 1 to 7

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of zone 4 of Koolaupoko taxation district in the City and County of Honolulu" does not per se constitute an unreasonable or arbitrary classification so as to be violative of the "due process" clause of the 14th Amendment to the Federal Constitution.

* * * * *

IV. CONSTITUTIONAL LAW.

Equal Protection

Classification for purposes of taxation imposing an increased rate of real property on "sections 1 to 7 of zone 4 of Koolaupoko taxation district in the City and County of Honolulu" does not per se constitute an unreasonable or arbitrary classification so as to be violative of the "equal protection" clause of the 14th Amendment to the Federal Constitution.

* * * * *

V. CONSTITUTION OF THE STATE OF HAWAII

Due Process of Law

Classification for purposes of taxation imposing an increased rate of real property tax on "sections 1 to 7 of zone 4 of Koolaupoko taxation district in the City and County of Honolulu" does not per se constitute an unreasonable or arbitrary classification so as to be violative of the "due process" clause of Article I, Section 4 of the Constitution of the State of Hawaii.

* * * * *

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VI. CONSTITUTION OF THE STATE OF HAWAII

Equal Protection

Classification for purposes of taxation imposing an increased rate of real property tax on "sections 1 to 7 of zone 4 of Koolaupoko taxation district in the City and County of H nolulu" does not per se constitute an unreasonable or arbitrary classification so as to be violative of the "equal protection" clause of Article I, Section 4 of the Constitution of the State of Hawaii.

* * * * *

VII. CONSTITUTION OF THE STATE OF HAWAII

Public Purpose

Appropriation of tax moneys to Castle Memorial Hospital, Inc. (a private sectarian hospital) does not violate Article VI, Section 6 of the Constitution of the State of Hawaii as an appropriation not made for a public purpose.

* * * * *

VIII. CONSTITUTION OF THE STATE OF HAWAII

Establishment of Religion

Appropriation of tax moneys to Castle Memorial Hospital, Inc. (a private sectarian hospital) does not violate Article VI, Section 6 of the Constitution of the State of Hawaii as a grant in respect of the establishment of religion.

* * * * *

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IX. CHARITIES

Castle Memorial Hospital, Inc.

Appropriation of tax moneys to Castle Memorial Hospital, Inc. (a private sectarian hospital) does not violate Article VI, Section 6 of the Constitution of the State of Hawaii as an appropriation not made for a public purpose nor as a grant in respect of the establishment of religion.

* * * * *

X. KOOLAUPOKO TAXATION DISTRICT

Rates

Classification of property for purposes of increased rates.

Classification imposing an increased rate on "sections 1 to 7 of zone 4 of Koolaupoko taxation district in the City and County of Honolulu" is not per se unreasonable or arbitrary and therefore violative of the "due process" and "equal protection" clauses of the 14th Amendment to the Federal Constitution and of Article I, Section 4 of the Hawaii Constitution.

* * * * *

XI. REVISED LAWS OF HAWAII 1955, AS AMENDED

Chapter 129.

* * * * *

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ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
AND REFER TO
INITIALS AND NUMBER

SBKC:n
22a

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STATE
TERRITORY OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

April 17, 1961

Honorable Richard M. Kennedy
Representative, Eighth District
House of Representatives
First Legislature
State of Hawaii
Honolulu, Hawaii

Dear Sir:

In response to your request by letter dated April 5, 1961 regarding the constitutionality of H. B. 1268, it is our opinion that the bill, if passed, would be constitutional subject to qualifications as to the provisions in lines 5 to 10 of page 1. Questions of constitutionality are raised primarily by two sections of the bill:

Firstly, by that portion of H. B. 1268 contained in lines 5 to 10 of page 1, reading as follows:

> "Notwithstanding any provision in section 129-2 to the contrary, there shall be added to the real property tax rate determined pursuant to the provisions of section 129-2 for taxation sections 1 to 7 of zone 4 of Koolaupoko taxation district in the City and County of Honolulu, the sum of $_____ per $1,000 of assessed value of taxable real property . . ."
> (Underscoring for emphasis added.)

Secondly, by that portion of the bill contained in lines 11 to 16 of page 1, reading as follows:

> "which additional sums shall be levied upon properties located in said taxation sections only and collected by the State tax collector to be expended solely for the construction of or to be contributed to any organization, public or private, for use in constructing the Castle Memorial

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> Hospital, Inc., in Kailua, in the City and County of Honolulu . . ." (Underscoring for emphasis added.)

Discussion of the problems raised by the above will be taken in reverse order.

The proviso, set forth in lines 11 to 16, insofar as it allows contribution of taxes collected to any private organization or organizations for use in constructing "the Castle Memorial Hospital, Inc., in Kailua, in the City and County of Honolulu" raises the question of whether Article VI, section 6 of the Constitution of the State of Hawaii[1/] is violated.

The wording of H. B. 1268 commencing with the "or" clause in line 13 of page 1 should be noted. This alternative permits channelling of public moneys through an intermediary, public or private, before the funds for constructing "the Castle Memorial Hospital, Inc." are actually put to such use.

Let us first consider the case where taxes are directly given over to the construction of a private hospital since if the appropriation is not permitted in that instance, a fortiori, passing the same through a middleman would also be prohibited.

That the recipient hospital in this case would be a private one does not per se eliminate the possibility of a public purpose. In the case of In re Queen's Hospital, 15 Haw. 663, the court said:

> "What is a public purpose . . . is not always easy to determine. No general definition, to apply in all cases, need be laid down. It is sufficient to determine in each particular case whether, upon all the facts and circumstances, the purpose is a public one."

1/ The portion of Art. VI, section 6, germane to this part of the discussion is as follows: "No tax shall be levied or appropriation of public money or property made, nor shall the public credit be used directly or indirectly, except for a public purpose."

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Stating the rule which should be applied to given facts, the court continued:

> "'. . . (the courts) must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether State or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation.' Loan Association v. Topeka, 87 U.S. 655, 665."

It decided that an appropriation by the Hawaiian legislature for the benefit of the Queen's Hospital, a private institution, would be for a public purpose. In applying the rules previously stated, the court looked to the charter of incorporation of Queen's as well as to its going practices and found that since profits of the Hospital under said charter were restricted to charitable purposes specifically enumerated and that "no part of such profits(could) inure to the benefit of any private individual, whether a corporation or not", there could be no doubt that Queen's could be given public aid.

The court in the principal case seemed to have intimated that had the hospital followed its charter strictly, that is, given relief only to "sick and destitute Hawaiians" (the latter in the literal sense) there would have been a question as to whether the appropriation would be valid.

The rule to be derived from In re Queen's Hospital is this: Appropriation of public moneys to a hospital, even though a private one, would be for a public purpose if such hospital were an eleemosynary institution and its charitable functions were available to all alike. As to the constitutionality of handling the financing through a middleman organization, whether turning over public moneys to it would constitute a public purpose, would under the rationale of In re Queen's Hospital turn on the charter or purpose of that organization itself. The same requirements as imposed upon the ultimate beneficiary would apply to such intermediaries.

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Applying the facts to the legal tests above enunciated, we find stated in Article III of the Charter of Incorporation of Castle Memorial Hospital, Inc. its objects and purposes to be:

> "(a) To establish and maintain a sanitarium and hospital for the care of persons suffering from illnesses or disabilities which require that the patients receive in or out patient care.
>
> "(b) To carry on any educational activities, including the operation of a school of nursing, related to rendering care to the sick and injured, or the promotion of health, which in the opinion of the Board of Trustees may be justified by the facilities, personnel, funds or other requirements that are or can be made available.
>
> "(c) To promote and carry on scientific research related to the care of the sick and injured insofar as, in the opinion of the board of trustees, such research can be carried on in, or in connection with the hospital.
>
> "(d) To participate, so far as circumstances may warrant, in any activity designed and carried on to promote the general health of mankind."

That Castle Memorial qualifies as an eleemosynary institution can be seen from the objects and purposes hereinabove stated. Its Charter of Incorporation also shows that Castle Memorial is a nonprofit corporation[2/] incorporated under

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2/ Art. 8 of the charter of incorporation reads:

> "The corporation is not organized for profit and it will not issue any stock, and no part of its assets, income or earnings shall be used for dividends, or otherwise withdrawn or distributed to any of its members; provided, however, that nothing herein contained shall prevent the payment in good faith of remuneration to any

the laws of the State of Hawaii by members of the denomination of the Seventh-day Adventists. In our opinion, an appropriation to Castle Memorial out of taxes collected would be for a public purpose since no part of the profits therefrom will inure to any individual and since such corporation is organized for charitable purposes beneficial to the general public.

However the connection between Castle Memorial Hospital and a religious body presents another constitutional issue, namely, that raised by the second sentence of Article VI, section 6 of the Hawaii Constitution, which reads as follows: "No grant shall be made in violation of Section 3 of Article I of this constitution." Section 3 in turn reads "No law shall be enacted respecting an establishment of religion. . ." The interpretation of these provisions was brought up before the 1950 Constitutional Convention. In a letter[3/] from the Attorney General of the Territory of Hawaii to Mr. Henry A. White, Chairman of the Committee on Public Finance and Taxation, the former wrote:

> "With reference to the provision of section 10 that 'No grant shall be made which is contrary to or in conflict with section 5 of Article ____ of this Constitution,' the section to which reference is made in turn providing that 'No law shall be passed respecting the establishment of religion * * * ,' it is my opinion that this clause adopts the

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2/ cont'd
of them in return for services actually rendered or to be rendered to the corporation. Upon dissolution of the corporation, title to all of its assets and properties shall vest in the Hawaiian Association of Seventh-day Adventists, or its successor, to be held in trust for the purposes set forth in this Charter. Should the Hawaiian Association of Seventh-day Adventists, or its successor, for any reason not qualify to receive the assets, then they shall be transferred to the next higher organization within the Seventh-day Adventist denomination, which is qualified to receive them."

3/ Proceedings of the Constitutional Convention of Hawaii, vol. 1, p. 200.

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> construction placed on language of the First Amendment similarly prohibiting any law respecting the establishment of religion. That construction is that the Constitution erects 'a wall of separation between church and state' which precludes support by the State of 'any religious activities or institutions whatever they may be called, or whatever form they may adopt to teach or practice religion,' in the words of the majority in Everson v. Board of Education, 330 U.S. 1, 16, and McCollum v. Board of Education, 333 U.S. 203, 210, or in the words of the minority, 'the Amendment forbids any appropriation, large or small, from public funds to aid or support any and all religious exercises * * *. Legislatures are free to make, and courts to sustain, appropriations only when it can be found that in fact they do not aid, promote, encourage or sustain religious teaching or observances, be the amount large or small,' Everson v. Board of Education, 300 U.S. 1, 41, 52-53, quoted in McCollum v. Board of Education, 333 U.S. 203, 210, note 7."

The Attorney General then continues:

> "Exactly how this doctrine applies in particular situations will have to be developed upon consideration of the relevant facts and judicial opinions."

Analyzing our problem in the vein suggested by the above letter, we believe the controlling case to be Bradfield v. Roberts, 175 U.S. 291, 20 S.Ct. 121, 44 L.Ed. 168 (1899). In that case the question was whether a hospital chartered to care for the sick could receive a grant of aid from the federal government under a contract between the District of Columbia and the directors of the hospital, composed of a monastic order or sisterhood of the Catholic Church, without there being a violation of Article I of the Amendments of the Federal Constitution. Declaring that the charter powers of a corporation control and not the religious beliefs of the stockholders, the Supreme Court of the United States upheld the appropriation.

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More recently, Kentucky Building Comm. et al. v. Effron (310 Ky. 335, 220 S.W.(2d) 836, 1949) upheld the state in a test case in which a taxpayer questioned the allocation of state funds (a procedure designed to acquire matching federal funds in the construction of public and other non-profit hospitals) to sectarian hospitals. The provision of the state constitution invoked by the taxpayer declared that "no preference shall ever be given by law to any religious sect, society or denomination." Under the applicable facts, in the court's opinion:

> "Religion is not taught in these hospitals nor is any one sect given preference over another. The fact that members of the governing boards of these hospitals, which perform a recognized public service to all people regardless of faith or creed, are all of one religious faith does not signify that the money allotted the hospitals is to aid their particular denomination."

Other cases upholding appropriations of the type in issue here are Opinion of the Justices, (113 A.(2d) 114, N.H., 1955) and Craig v. Mercy Hospital-Street Memorial (45 So.(2d) 809, Miss., 1950). Compare Collins v. Kephart, (117 Atl. 440, Pa., 1921).

Our opinion, following the interpretation of the weight of authority is that the appropriation of the type here contemplated to Castle Memorial (a hospital administered under a religious or sectarian group) would not on the face of its charter be a law respecting the establishment of religion. However a word of caution is necessary because if the actual operation of the hospital tends to the "establishment of religion," regardless of what appears on the face of the charter, the continued assessment of properties in the sections indicated may be questioned constitutionally.

Having discussed the constitutional aspects relating to the provisions in lines 11 to 16, we now turn our attention to lines 5 to 10. This section of the bill purports to increase the real property tax rate upon only a portion of the Koolaupoko taxation district. Ostensibly the line of demarcation of property subject to this higher tax is so drawn to encompass an area within which the inhabitants will be most benefitted. Taxation maps indicate that zone 4 contains 9 sections. However the present bill does not include sections 8 and 9. Nor does it include zone 5 which is contiguous to zone 4, both zones being separated from the rest of the island of Oahu by the Koolau mountains. Were the bill drafted to subject both zones to the greater rate of taxation a

rationale might be forwarded that such additional burden was imposed because these zones would benefit most from the erection of a hospital on the windward side of Oahu and because the difficulty of access would make use of such hospital by persons in other zones less likely. Similar but less persuasive reasoning might apply if all of zone 4 only were subject to the higher rate. We do not say the present classification is wholly without good reason. We do say that if such there be, the same is not apparent on the face of the bill. Discussion of the reasoning behind a particular classification for purposes of taxation is necessary because the "due process" and "equal protection" clauses of the 14th Amendment to the Federal Constitution and of section 4, Article I of the Hawaii Constitution require that the burden of additional taxes must not be imposed arbitrarily. In the words of 12 American Jurisprudence at 135:

> "Due process of law as guaranteed by the Fourteenth Amendment (is) defined in terms of the equal protection of the laws--that is, as being secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice."

The requirement as to "due process of law" is satisfied

> "if the law under consideration operated equally upon all who came within the class to be affected, embracing all persons who were or might be in like situation and circumstances, and the designation of the class was reasonable, not unjust, capricious, or arbitrary, but based upon a real distinction, and the law operated uniformly, and that if, added to this, the law was enforced by usual and appropriate methods."

At 12 Am. Jur. 140, the power of the legislature to classify is considered:

> "The equal protection clause of the Fourteenth Amendment does not intend to take from the states the right and power to classify the subjects of legislation. It does not prohibit or prevent classification, provided such classification of persons and things is reasonable for the purposes of legislation, is based on

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> proper and justifiable distinction, considering the purpose of the law, is not clearly arbitrary, and is not a subterfuge to shield one class or unduly to burden another or to oppress unlawfully in its administration."

While emphasis is placed upon "reasonableness" and "non-arbitrariness" of classification, what constitutes a reasonable classification for taxation according to Cooley[4/] "cannot be determined by any fixed rule". And continues Cooley, "the legislature has a broad discretion in the matter of classification."

> "Classification for taxation is not reviewable by the courts unless palpably arbitrary. It is no concern of the court whether the classification is the wisest or the best that could be made. The classification need not be 'reasonable and proper' according to the judgment of reviewing judges, but the court must be able to see that legislators could regard it as reasonable and proper without doing violence to common sense. In other words, 'there must be enough reason for it to support an argument, even if the reason is unsound.' However, a discriminatory tax cannot be sustained if the classification is wholly illusory."

In view of the foregoing authorities, it is our opinion that on the face of H. B. 1268, those provisions with relation to the classification of certain sections of zone 4 subject to increased tax rates do not indicate one way or the other whether a valid reason for such treatment exists. However the constitutionality of the present classification is aided, according to Robertson v. Pratt, 13 Haw. 601 (1901) by "a very strong presumption not only that the legislature intended to act constitutionally, but that it succeeded in doing so, and that the court should not declare an act of the legislature unconstitutional except in a very clear case."

4/ 1 Cooley on Taxation 714 et seq.

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In summary, our conclusions with respect to the constitutional points at issue in H. B. 1268 are:

(1) Classification for purposes of increased rates of taxation, restricting the property involved to "sections 1 to 7 of zone 4 of the Koolaupoko taxation district" is not per se unreasonable. However if an aggrieved taxpayer can show that such a classification is arbitrary or discriminatory, the bill would be declared unconstitutional;

(2) An appropriation of State taxes, if given directly to Castle Memorial Hospital, Inc. to be expended in the construction of a private hospital open to all the public would be for a public purpose and would not constitute a grant in respect of an establishment of religion;

(3) If instead of directly appropriating tax moneys to Castle Memorial, financing is done through an intermediary, such arrangement may or may not be violative of Article VI, section 6 of the Constitution of the State of Hawaii depending on the charter and functions of the intermediary itself.

Respectfully,

Samuel B K Chang

SAMUEL B. K. CHANG
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

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STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

April 19, 1961

Representative William E. Fernandes
Chairman, Harbors and Airports
First Legislature, State of Hawaii
Iolani Palace
Honolulu, Hawaii

Dear Sir: Re: Kapaa Beach Natatorium

Reference is made to your letter of April 18, 1961, requesting our office to render an opinion as to whether or not the construction of the subject Natatorim as provided for in Act 150, Session Laws 1957 and Act 224, Session Laws 1959, can be constructed on the Kapaa Beach Park grounds located between the old Kapaa Court House and the shoreline.

After careful consideration of all the pertinent facts pertaining to the subject matter, it is the opinion of this office that the question can be answered in the affirmative.

> "Where the intention of the legislature is so apparent from the face of a statute there can be no question as to the meaning, there is no room for construction."
>
> Sutherland, Statutory Construction, Vol 3, § 4701

In the Acts mentioned above which provided appropriations for the construction of a Kapaa Beach Natatorium, on Kauai, the legislators intended that the Natatorium be built within the area of Kapaa Beach, as such area is generally known to the citizens and authorities of Kauai.

Very truly yours,

/s/ Richard M. C. Lum

Richard M. C. Lum
Deputy Attorney General

APPROVED:

/s/ H. Rodger Betts

H. RODGER BETTS
Acting Attorney General

Op. 61-49

I N D E X

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Legislation to vest power for management and disposition of Hawaiian home lands in a single executive head of Department of Hawaiian Homes would violate section 2, Article 10 of State Constitution, requiring legislature to vest power for management and disposition of natural resources of State in one or more executive boards or commissions.

Section 1 of Article II of State Constitution confers power in legislature to pass legislation if such legislation is not inconsistent with State Constitution.

Legislature has no legal power to pass an amendment to Hawaiian Homes Commission Act, if such amendment is inconsistent with State Constitution.

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Op. 61-50

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

April 25, 1961

The Honorable David C. McClung
Chairman, House Lands Committee
General Session of 1961
First State Legislature of Hawaii
Honolulu, Hawaii

Dear Sir:

By communication dated April 11, 1961, to the Attorney General, you asked for an opinion on the following questions:

"1. Under the Hawaiian Homes Commission Act and the Statehood Admission Act, can the State Legislature amend the Hawaiian Homes Commission Act to provide for a single executive head of the Department of Hawaiian Home lands and eliminate the commission?

"2. Under the Hawaiian Homes Commission Act and the Statehood Admission Act, can the State Legislature amend the Hawaiian Homes Commission Act to allow the Department of Hawaiian Homes lands to manage its own lands?

"3. Under section 5 (f) of the Statehood Admission Act and other related provisions, what is the status of proceeds from the sale and disposition of public lands? Similarly what is the status of the Department of Land and Natural Resources Revolving Fund and Land Development Fund and would it be legal to effect a transfer from these two funds to the Hawaiian Home-Loan Fund as contemplated in House Bill No. 930 and House Bill No. 1006?"

Op. 61-50

Our answer to your third question was conveyed to you by memorandum dated April 14, 1961. Our reply to your first and second questions follows.

1. The answer to Question No. 1 is in the negative. An amendment to the Hawaiian Homes Commission Act to provide for the elimination of the Hawaiian Homes Commission and to substitute therefor a single executive to manage Hawaiian home lands under that Act would violate section 2 of Article X of the Constitution of the State of Hawaii. The first sentence of this section, which is pertinent, reads as follows:

> "Section 2. The legislature shall vest in one or more executive boards or commissions powers for the management of natural resources owned or controlled by the State, and such powers of disposition thereof as may be authorized by law; but land set aside for public use, other than for a reserve for conservation purposes, need not be placed under the jurisdiction of such a board or commission." (Emphasis added.)

Since section 202 of the Hawaiian Homes Commission Act provides for the establishment of the Hawaiian Homes Commission, this section constitutes the principal one which would have to be amended if the Commission were to be eliminated and a single executive substituted therefor with powers for the management and disposition of Hawaiian home lands under the Act.[1] Under the compact existing between the United States and the State of Hawaii, as set forth in section 4 of the Admission Act, which section is also a part of our State Constitution,[2]

1/ Congress, by the enactment of the Hawaiian Homes Commission Act in 1920, originally set aside 200,000 acres of land in Hawaii for the rehabilitation and resettlement of native Hawaiians under the management of the Hawaiian Homes Commission. Title to these Hawaiian home lands remained in the United States prior to statehood, but vested in the State of Hawaii upon the admission of Hawaii into the Union. (Sections 203 and 207, Hawaiian Homes Commission Act, 1920, as amended; U. S. Code, Congressional Service, p. 1751, 80th Congress, Second Session, 1948; Public Law 86-3, 86th Congress, section 5(b) and (g)).

2/ In accordance with section 7(b) of Public Law 86-3, 86th Congress, section 4 of the Admission Act became a part of our State Constitution when, at the election held on June 27, 1959,

Op. 61-50

said section 202 of the Hawaiian Homes Commission Act, and other provisions thereof relating to administration, may be amended without congressional consent in the Constitution or in the manner required for State legislation. If an amendment to said section 202 is to be made in the manner required for State legislation, the legislature can pass it, if it is not inconsistent with our State Constitution. If it is inconsistent with our State Constitution, the legislature is without legal power to pass it; and, if passed, it would be null and void. For section 1 of Article III of our State Constitution expressly declares that the legislative power "shall extend to all rightful subjects of legislation not inconsistent with this Constitution or the Constitution of the United States."

Since the proposed amendment under consideration would violate section 2 of Article X of our State Constitution, it is thus clear that the legislature is without legal power to enact it.

2. Question No. 2 is answered in the affirmative, if your inquiry is whether section 204(2) and section 212 of the Hawaiian Homes Commission Act may be amended by the legislature to empower the Department of Hawaiian Home Lands, as presently constituted, to directly lease out Hawaiian home lands not immediately needed for the purposes of section 207 thereof or for a community pasture, without returning such lands to the control of the Department of Land and Natural Resources for disposition in accordance with the procedure prescribed in said section 204(2) and said section 212.[3] Section 204(2) and

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a majority of the legal votes cast in Hawaii were in favor of the proposition of including said section 4 as an amendment to Article XI of our State Constitution.

3/ The Department of Hawaiian Home Lands already is empowered by law to manage and control lands set aside for homesteading by people of Hawaiian ancestry under the Hawaiian Homes Commission Act, 1920, as amended. See sections 203, 204, 207, 208, 210, 211, 213, 214 and 220 of the Act; Article 11, Constitution of the State of Hawaii; and section 24, Hawaii State Government Reorganization Act of 1959. For this reason, we interpret your question to mean whether the legislature can amend the Hawaiian Homes Commission Act to empower that commission to directly lease out land not immediately needed for the purposes of section 207 or for a community pasture, and have prepared the above answer accordingly.

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section 212 of the Hawaiian Homes Commission Act are expressly enumerated as sections which may be amended in the manner required for State legislation in section 4 of the Admission Act.

Respectfully submitted,

/s/ DAVID Y. MAR

DAVID Y. MAR
Deputy Attorney General

APPROVED:

/s/ SHIRO KASHIWA

SHIRO KASHIWA
Attorney General

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No Opinion

No. 61-51

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LEGISLATURE

Recall of Bill from committee

Procedures to be followed in effecting a recall of a bill from a committee less than 20 days after the referral of the bill to the committee.

CONSTITUTION OF HAWAII

Article III, Sec. 13

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STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU, HAWAII

May 3, 1961

Honorable Yoshito Takamine
Representative
First Legislature of the
State of Hawaii
General Session of 1961
Iolani Palace
Honolulu, Hawaii

Dear Sir:

This is in reference to your letter of May 2, 1961, requesting our advice as to procedures to be followed in effecting a recall of a bill from a committee less than 20 days after the referral of the bill to the committee.

Article III, section 13 of the Constitution of the State of Hawaii, which provides for the recall of bills from committee by the vote of 1/3 of the members of a house, applies, of course, only in the case where 20 days has elapsed since the bill had been referred to committee. This provision, however, would not prevent the recall of a bill from committee by such other means as may be appropriate under the rules of a house.

We have examined the Official Rules of Procedure Adopted by the House of Representatives, and we find no rule specifically covering the situation. Nor have we found such a rule in our copy of Cushing's Law and Practice of Legislative Assemblies. However, we invite your attention to Rule 15(2) of your Rules of Procedure which provides that,

> "All committees shall be subject to the orders of the House and shall faithfully carry out such orders."

Under this rule, we believe that a majority of the members of the House of Representatives may cause a bill to be recalled from a committee.

For your information, the following is found in Mason's Manual of Legislative Procedure:

"Sec. 491. Withdrawing Bills From Committee

1. When a legislative body wishes to give consideration to or to act upon a bill or other matter which has been referred to a committee, a motion may be made to withdraw the matter from the committee, or to discharge the committee from further consideration of the matter referred to it.

2. The motion to withdraw a question or discharge a committee from further consideration is not a suspension of the rules, and may be made without previous notice.

3. The motion, in either form, takes precedence as a main motion. It is not subject to the motions to postpone, to refer to committee, to lay on the table, nor to amendment.

4. It is not in order to discuss the merits of a bill upon a motion to discharge a committee or withdraw the bill from committee. Debate in such cases must be confined strictly to the purpose of the motion, for if this were not true, the merits of any question could be forced under discussion merely by such a motion.

5. A motion to discharge a committee or withdraw a bill requires a majority vote, or the action may be taken by unanimous consent.

6. A single motion to withdraw a bill from committee, amend the bill, reprint it and recommit it to the committe, is in order."

Very truly yours,

/s/ Yoshio Shigezawa

YOSHIO SHIGEZAWA
Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa

SHIRO KASHIWA
Attorney General

cc: Governor

INDEXING INSTRUCTION

Op. 61-53

CAPITAL IMPROVEMENTS

Magic Island Development Authority

S.B. No. 905, creating the Magic Island Development Authority, will not violate the provisions of Article X of the State Constitution since any qualified person could participate in the project.

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Op. 61-53

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

May 4, 1961

The Honorable O. Vincent Esposito
Senator, and
The Honorable David C. McClung
Representative
First Legislature, State of Hawaii
Iolani Palace
Honolulu, Hawaii

Gentlemen:

This is in reply to your request of April 20, 1961, for our opinion regarding the constitutionality of S.B. No. 905 (S.D. 1), creating the Magic Island Development Authority.

Briefly, the bill provides for the development of the coral reef offshore from Ala Moana Park, Honolulu, which was given the status of State public land by Public Law 85-677, 85th Congress of the United States (72 Stat. 628). Title to the land will vest, in fee simple, in the Magic Island Development Authority, which is granted broad powers to sell, lease, exchange, assign or otherwise dispose of or develop the property in substantial compliance with the report entitled "The Comprehensive Plan, Ala Moana Reef, Honolulu, Oahu", dated February, 1961.

Section 2, Article X of the Constitution of the State of Hawaii provides that the legislature shall vest in one or more executive boards or commissions powers for the management and disposition "of natural resources owned or controlled by the State". Section 4 thereof further states:

> "The legislative power over the lands owned by or under the control of the State and its political subdivisions shall be exercised only by general laws, except

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> in respect to transfers to or for the use of the State, a political subdivision, or any department or agency thereof."

The public land here involved is being transferred by S.B. No. 905 to or for the use of a State agency, i.e., the Magic Island Development Authority. It therefore appears that the exception in section 4 is applicable.

However, since the land will be ultimately sold, leased or otherwise disposed of, further scrutiny must be given to the bill. The general rules with respect to the disposition of State lands are found in 73 Corpus Juris Secundum, Public Lands, to wit:

> "§ 235. States have the right to dispose of their public lands in any manner they see fit." (P. 878)
>
> "§ 236. The legislature of a state has the power to dispose of the unappropriated lands within the state. . . ." (P. 878)
>
> "§ 237. Constitutional and statutory provisions are generally controlling and will be applied in so far as they relate, explicitly or implicitly, to the powers and duties of the various land officers and agents of the state, the finality of their decisions, and other considerations." (P. 879)

Thus, in State v. Duhe, 201 La. 192, 9 So.2d 517 (1942), the legislature, by statute, authorized the general manager of the Louisiana State Penitentiary, with the approval and concurrence of the governor, to sell a designated portion of state property used for farming purposes, i.e., "Hope Plantation", upon such terms, price, and conditions as he might deem expedient and practicable. Acting thereunder, the manager sold the property to the defendant. In sustaining the validity of the sale, the court reiterated the general rules of law, supra, stating:

> "The legislature, where unrestrained by constitutional prohibition, has plenary power to convey the property of the State on such terms and conditions as in its wisdom it sees fit to impose. . . ."

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This office, by Opinion 61-34, dated March 23, 1961, upheld the constitutionality of S.B. No. 378 (S.D. 1) providing for the resale of residential property condemned on the island of Oahu only. We construed section 4 of Article X to mean that the Constitution did not intend to prohibit the State from purchasing designated property. Once the land was purchased and "owned by the State or under its control" any qualified person could thereafter purchase a lot for residential use. This being so, the legislature was disposing of its land by means of a general law operating equally upon all persons in the State, and not by means of "private or special laws" applicable to only a few or limited class of people. (Vol. 1, Constitutional Convention of Hawaii, pp. 233, 336; 50 Am. Jur., Statutes, § 6, p. 17, § 8, p. 24.)

Under the foregoing authorities, the legislature may exercise the same power over its public lands as a proprietor or private individual[1/] and may dispose of the same in any manner it sees fit, subject, of course, to limitations imposed by the Constitution or by statute.

As applied here, the legislature, pursuant to section 2 of Article X, is empowered to vest title to the subject property in the Magic Island Development Authority and provide for the manner of its disposition in S.B. No. 905. In acting thereunder, the Authority must act in a reasonable and non-discriminatory manner so as to allow all qualified members of the general public to participate in the project.

It is the conclusion of this office, therefore, that S.B. No. 905 (S.D. 1) is a general law and does not violate the provisions of sections 2 and 4, Article X of our State Constitution.

Very truly yours,

/s/ LAWRENCE H. KAM
LAWRENCE H. KAM
Deputy Attorney General

APPROVED:

/s/ SHIRO KASHIWA
SHIRO KASHIWA
Attorney General

1/ Cf: Alabama v. Texas, 347 U.S. 279 (1954), rehearing denied 347 U.S. 950; Camfield v. U.S., 167 U.S. 524; Light v. U.S., 220 U.S. 536.

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INDEXING INSTRUCTIONS

Op. 61-54

LEGISLATURE

Stop-clock sessions

Legislature's practice of using the stop-the-clock fiction to avoid going beyond the session time limit set by Article III, section 11, of the Constitution is unconstitutional but it is doubtful if the courts will take any action to interfere with the practice or invalidate laws passed during such session.

LEGISLATURE

Injunction of

Courts will not enjoin stop-clock practice of the legislature even though it violates the Constitution.

LEGISLATURE

Writ of mandamus to legislators

Courts will not issue writs of mandamus to legislative officers.

STATE CONSTITUTION

Article III, section 11

'Stopped clock sessions"

Under said provision, sessions beyond the sixty-day period for general sessions and thirty-day period for special or budget sessions, unless extended, are unconstitutional.

LEGISLATURE

Enrolled bill

Presumption is conclusive as to the validity of an enrolled bill properly signed according to law. It is the final and conclusive evidence of its status as a law and is unimpeachable.

STATE CONSTITUTION

Article III, section 17

Even if bills are presented to the governor after adjournment, if the governor is given a reasonable time to consider the bill, then there are no constitutional objections.

GOVERNOR

Veto

Even if bills are presented to the governor after adjournment, if the governor is given a reasonable time to consider the bill, then there are no constitutional objections.

STATUTE

Section 2-20, Revised Laws of Hawaii 1955

Per diem payments to members of the legislature may be properly paid from the first to the last day of each session. Any other payments would violate section 2-20, Revised Laws of Hawaii 1955.

LEGISLATURE

Compensation of members--per diem

Per diem payments to members of the legislature may be properly paid from the first to the last day of each session. Any other payments would violate section 2-20, Revised Laws of Hawaii 1955.

PER DIEM EMPLOYEES

Per diem payments to members of the legislature may be properly paid from the first to the last day of each session. Any other payments would violate section 2-20, Revised Laws of Hawaii 1955.

INJUNCTIONS

Legislature

Courts will not enjoin stop-clock practice of the legislature even though it violates the constitution.

WRIT OF MANDAMUS

Legislators

Courts will not issue writs of mandamus to legislative officers.

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Op. 61-54

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

May 8, 1961

The Honorable William F. Quinn
Governor of Hawaii
Iolani Palace
Honolulu 13, Hawaii

Dear Sir:

This is in answer to your communication of May 1, 1961, whereby you requested an opinion as to the constitutionality of "stopped clock" sessions of the legislature. The following will answer your specific questions:

In answer to your first question, Article III, section 11, of the Constitution of the State of Hawaii is pertinent. It provides, in part:

> ". . . General sessions shall be limited to a period of sixty days and budget sessions and special sessions to a period of thirty days, but the governor may extend any session for not more than thirty days. . . ."

Under said provision, sessions beyond the sixty-day period for general sessions and thirty days for special or budget sessions, unless extended, are unconstitutional. Where a bill on its face, by the attached certifications, clearly shows that it was passed after the limited period, the bill is unconstitutional. Before going into the question of enforceability of such a provision when "stopped clock" practices are involved, it may be well here to quote from a decision of the Supreme Court of the State of Washington rendered in Gottstein v. Lister, 88 Wash. 462, 153 P. 595 (1915) regarding constitutional duties of the legislature in similar situations. The court stated:

> "Suppose the legislature had neglected to obey the constitutional mandate that it shall pass the necessary laws to render effective the recall amendment to the Constitution. It is not at all uncommon for Constitutions to contain commands to the legislature to

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> pass laws upon given subjects. There are other commands akin to this in our Constitution. It is manifest that the courts have no power to correct such a violation or neglect of constitutional duty, though nothing seems plainer than that such constitutional provisions are mandatory in the constitutional sense. Manifestly, such provisions are no less mandatory, nor is the duty imposed thereby any less sacred, because of the fact that the courts may be powerless to enforce such mandates. Those vested with legislative and executive powers of the state have duties and obligations resting upon them by the mandates of the Constitution for the performance of which they are answerable alone to their own consciences and to the people; just as the courts have duties and obligations resting upon them by the mandates of the Constitution for the performance of which the judges are answerable alone to their own consciences and to the people. It will not do to say that because there may be no correcting remedy for neglect of legislative or executive duties, the courts by that fact alone acquire some correcting power over legislative and executive acts. Our Constitution is not framed upon the assumption that official integrity resides alone in the courts. Some things, though mandatory, are entrusted for their performance to the legislative and executive branches of the state government, branches coequal, within their spheres, with the courts." (Emphasis added.)

Similar provisions appear in constitutions of other states. These provisions have been tested and there is a line of decisions, including decisions of the Supreme Court of the United States, wherein it has been held that the presumption is conclusive as to the validity of an enrolled bill properly signed according to law. It is the final and conclusive evidence of its status as a law and is unimpeachable. It is presumed that the constitutional provisions were followed in enacting the bill. Field v. Clark, 143 U.S. 649, 672, 36 L.Ed. 294; Lyons v. Woods, 153 U.S. 649, 663, 14 S.Ct. 959, 38 L.Ed. 854.

State courts have held that they will not look beyond an enrolled bill to determine its constitutionality and that it will be conclusively presumed to have been regularly passed by the legislature when, from the face of the bill, it appears to be properly authenticated. Western Union Telegraph Co. v. Taggart, 141 Ind. 281, 40 N.E. 1051, 60 L.R.A. 671; Territory

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ex rel. Haller v. Clayton, 5 Utah 598, 18 P. 628; Morrow v. Henneford, 182 Wash. 625, 47 P.2d 1016; Atchison, Topeka & Santa Fe Railway Co. v. State of Oklahoma, 28 Okl. 94, 113 P. 921, 40 L.R.A., N.S. Other courts have held that they may look to the journals of the legislature, but not to extrinsic evidence, to determine whether an act has been passed in accordance with the constitutional requirements. Wise v. Bigger, 79 Va. 269; Jackson v. State, 131 Ala. 21, 31 So. 380; Andrews v. People, 33 Colo. 193, 79 P. 1031; Koehler v. Hill, 60 Iowa 543, 14 N.W. 738, 15 N.W. 609; Attorney General v. Rice, 64 Mich. 385, 31 N.W. 203; State ex rel. McKinley v. Martin, 160 Ala. 181, 48 So. 846; White v. Hinton, 3 Wyo. 753, 30 P. 953, 17 L.R.A. 66; Weeks v. Smith, 81 Me. 538, 18 A. 325; State ex rel. Herron v. Smith, 44 Ohio St. 348, 7 N.E. 447, 12 N.E. 829; Homrighausen v. Knoche, 58 Kan. 646, 50 P. 879; Integration of Bar Case, 244 Wis. 8, 11 N.W.2d 604, 12 N.W.2d 699, 151 A.L.R. 586; State ex rel. Cline v. Schricker, 228 Ind. 41, 88 N.E.2d 746, 89 N.E.2d 547.

The rule to be derived from the decisions is that a bill duly enrolled, authenticated and approved, is presumed to have been passed by the legislature in conformity with the requirements of the Constitution unless the contrary affirmatively appears from the journal of either house. Failure of the legislature to comply with constitutional requirements can be considered only when disclosed by ambiguity, omission or conflict in such journal. It must be clearly and convincingly established to overcome such presumption. See State ex rel. Armbrecht v. Thornburg, W.Va., 70 S.E.2d 73; Charleston National Bank v. Fox, 119 W.Va. 438, 194 S.E. 4; Combs v. City of Bluefield, 97 W.Va. 395, 125 S.E. 239; Anderson v. Bowen, 78 W.Va. 559, 89 S.E. 677.

To answer question 2, reference is made to section 17, Article III of our State Constitution which in part provides:

> "The governor shall have ten days to consider bills presented to him ten or more days before the adjournment of the legislature sine die, and if any such bill is neither signed nor returned by the governor within that time, it shall become law in like manner as if he had signed it.
>
> "The governor shall have forty-five days, after the adjournment of the legislature sine die, to consider bills presented to him less than ten days before such adjournment, or presented after adjournment, and any such bill shall become law on the forty-fifth day unless the governor by proclamation shall have given ten days' notice to the legislature that he plans to return such bill with his objections on that day. . . ."

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Under the foregoing constitutional provision, assuming that a session ends without any "stopped clock" practices at 12 midnight of the sixtieth day and a bill is passed at 11:30 p. m., the constitutional provision contemplates that such a bill may be delivered to the governor's office after the midnight adjournment. This delivery may take place within a day or two after adjournment or perhaps within a longer period. Such a delivery will reduce the forty-five day period mentioned in the foregoing constitutional provision. It is the position of this office that even if bills are presented to the governor after adjournment, if the governor is given a reasonable time to consider the bill, then there are no constitutional objections. It is for the courts to determine what is reasonable under the circumstances. Of course, if the bill is presented on the thirty-sixth day after adjournment, the governor will not be given the time allotted for him to issue a proclamation to give the required notice to the legislature that he plans to return such bill with his reasons and such bill will not become law even if the forty-fifth day passes.

Is this situation any different during or after a "stopped clock" session? Assuming that the certification and the journals purport passage of the bill within the sixty-day period, the same reasoning as expressed in the next preceding paragraph would apply--that is to say, the delivery date must be reasonable so that the governor will have an opportunity to issue his proclamation together with his reasons. Bills delivered to the governor after the thirty-sixth day of adjournment will obviously be bad. In determining reasonablenss of any delivery on or prior to the thirty-fifth day, courts will consider the fact all bills presented to the governor ten days before adjournment as well are subject to the forty-five day rule. In other words, there will naturally be a large number of bills sent to the governor during the ending days of any session; and "stopped clock" sessions, if allowed to go too far, may result in concentration of bills being presented to the governor just a few days prior to the thirty-fifth day. Our courts may be inclined to lean in favor of an early delivery after adjournment because the very power of the legislature to meet on the forty-fifth day to vote on an amended bill to meet the governor's objections depends on the governor's opportunity to issue his proclamation containing his objections on or before the thirty-fifth day of adjournment. By carrying "stopped clock" sessions too far the legislature may prejudice its own power to reconsider legislation on the forty-fifth day.

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In answer to question 3 regarding the possibility of effective action by a citizen or taxpayer in preventing the continuation of a "stopped clock" situation, it appears that no remedy is available to prevent the continuation of such a situation. Two possibilities suggest themselves: a bill seeking to enjoin the legislature from continuing to act, and a writ of quo warranto ordering either the presiding officers to adjourn sine die or ordering the clerks to correctly indicate in the respective journals the correct time and date of the passage of various bills (thus, making the journals usable in impeaching the validity of the bills in a subsequent attack upon their constitutionality).

The courts throughout the United States seem to be extremely disinclined to interfere with the activities of the respective state legislatures. In case after case, the statement is made that where the government is divided into three separate and equal departments, executive, legislative, and judicial, it is unwise and usually improper for the judicial branch to interfere with the exercise of the powers assigned to other branches.

An extensive search of cases uncovered no case where a complainant has sought to enjoin the continued activity of the legislature on the ground that it was violating the state constitution. However, there are a number of cases where injunctive relief against state legislatures, which have failed to pass laws as mandated by the state constitution or to reapportion election districts at the time required by the state constitution, has been refused. See note, 153 A.L.R. 522 and cases cited therein. In addition, although the question does not seem to be squarely presented for decision, there are many statements to the effect that a court cannot enjoin a state legislature from adopting statutes and resolutions. See note, 140 A.L.R. 439 at 442.

The vast majority of cases involving injunctive relief against legislative bodies concern municipal governments acting in a legislative capacity. In these cases also, courts as a general rule will not enjoin the legislative functions of the municipal bodies, although certain exceptions exist. The exceptions to some extent may be explained by the fact that a municipal body rather than a state legislative body is the subject of the injunctive action. See Connell v. Commission Counsel (La.), 96 So. 657; Durett Hardware, a Furniture Company v. City of Monroe, 5 So. 2d 911 (La. 1942).

The paucity of cases involving injunctions against state legislatures indicate that this remedy is seldom sought. The only case which we have been able to locate where the court has interfered with the activities of the state legislature is the case of Gilbreath v. Willett, 251 S.W. 910 (Tenn.). In that case, the state legislature had passed a resolution authorizing the appointment of an interim legislative committee to investigate

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certain morals charges against the plaintiff in the case. The plaintiff requested the lower court to enjoin the committee from carrying out the investigation, among other reasons, because the committee had no authority since the resolution under which it was acting had not been signed by the governor of the state as required by the state constitution and was, therefore, invalid.

The Tennessee Supreme Court upholding the decision of the lower court granting the injunction said that since the resolution was invalid, it was proper for the court to enjoin the legislative committee acting from carrying out the investigation. While the court in the Gilbreath case did interfere with the legislative committee, the committee cannot be said to have been acting as part of the legislature in the same sense that the legislature acts during a regular session. To any extent that the case indicates a court's willingness to interfere with legislative functions, it conflicts with the general policy of other courts.

A second possible course of action would be for the taxpayer or citizen to seek a writ of mandamus requiring the presiding officers of the respective houses to adjourn sine die or require the respective clerks to complete the house journals properly. Here also, the courts show great reluctance to interfere with the activities of the legislature. As stated in a note in 136 A.L.R. 677:

> "The general principle is well settled that a court will not issue a writ of mandamus to compel a state legislature or an officer of the legislature to exercise the legislative functions or to perform duties involving the exercise of discretion."

A few courts have issued writs of mandamus to legislators requiring them to perform acts involving mere ministerial duties (as distinguished from duties involving the exercise of any discretion or legislative functions) of their legislative office.

In our opinion it is clear that the question of adjournment of the legislature comes within the category of a legislative function by the presiding officer rather than a mere ministerial duty.

The keeping of the journals is not so clearly a legislative function and the courts are apparently divided on this question. The Supreme Court in Clough v. Curtis, 134 U.S. 361, 10 S.Ct. 573, 33 L.Ed. 945 (1890), upheld the refusal of a lower court to issue a mandamus which would require clerks to correct journal entries in order to show that the legislature had acted on a number of bills past the time limitation set for the legislative session. The Supreme Court said in that case:

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> "We are all of opinion that there was no error in denying these applications for writs of mandamus. We have not been referred to any adjudged case that would justify a court in giving the relief asked by the petitioners. And we do not suppose that such a case can be found in any State whose powers of government are distributed--as is the case in the Territory of Idaho--among separate, independent and coordinate departments, the legislative, the executive and the judicial. 12 Stat. 808, c. 97; Rev. Stat. §§ 1841, 1846, 1907. 'One branch of the government,' this court said in the Sinking Fund Cases 99 U.S. 700, 718, 'cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule.' It is not one of the functions of a court to make up the records of the proceedings of legislative bodies. . . ."

See also Fox v. Harris, 79 W. Va. 419, 91 S.E. 209 (1916); note 136 A.L.R. 677.

On the other hand, the court in Wise v. Bigger, 79 Va. 269 (1884), indicated that in some cases it might be appropriate to require the respective clerks of the legislature to strike from the rolls a pretended act of the legislature which in fact was never passed. It is certainly arguable that the statement for the Wise case was based on the assumption that fraud was involved. In any event, the majority view is clearly that even the proper keeping of legislative journals is the concern of the legislative branch of government and not the judicial branch.

In question 4 you requested our advice as to the status of legislation which has been passed during "stopped clock" situations since statehood. As indicated by the foregoing discussion, the validity of legislation passed in previous sessions in all probability cannot be successfully assailed since the respective journals of the respective houses of the legislature give no indication as to what bills were passed during "stopped clock" periods. We are unable to give you any list of such legislation. Such a list would have to be compiled from the memories or notes of persons present at such "stopped clock" sessions.

With relation to your question on the legality of making per diem payments to members of the legislature during "stopped clock" sessions, we refer you to Article III, section 10, of the Constitution of the State of Hawaii which reads in part:

> "The members of the legislature shall receive such salary and allowances as may be prescribed by law, ..."

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Section 2-20, Revised Laws of Hawaii, as amended, provides:

> "Members of the legislature other than members whose legal residences are on the island of Oahu, while attending any session of the legislature, shall be allowed $45 per day, which amount is to cover all personal expenses, such as board, lodging, and incidental expenses, but not travel expenses, and the members of the legislature whose legal residences are on the island of Oahu, while attending any session of the legislature, shall be allowed $32.50 per day, which amount is to cover incidental expenses. Such allowance shall be paid, out of any available appropriation made by the legislature for expenses of the house concerned, in the same manner as other expenses of the legislature, to each such member for such purpose, at such rate, from the first to the last day of each session, including Sundays and holidays, during which it shall be certified by the chairman of the accounts committee or other official or officials of such house designated by the rules thereof for such purpose, that such member was in attendance. . . ." (Emphasis added.)

This office is of the opinion that per diem payments to members of the legislature may be properly paid from the first to the last day of each session. Any other payments would violate section 2-20, Revised Laws of Hawaii, as amended.

Very truly yours,

(s) Shiro Kashiwa

Shiro Kashiwa
Attorney General

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ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
AND REFER TO
INITIALS AND NUMBER
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STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

May 15, 1961

The Honorable John C. Lanham
Chairman, Economic Development Committee
House of Representatives
The First Legislature of the State of Hawaii
Honolulu, Hawaii

Dear Representative Lanham:

This is in reply to your request for our opinion regarding the constitutionality of a mandate by the State Legislature requiring the Department of Economic Development to award the entire contract for the promotion of tourism with State funds to the Hawaii Visitors Bureau without a determination or finding that no other person or firm in Hawaii is capable of performing the work or any part thereof.

In our opinion, there is no constitutional prohibition against such action. The constitutional limitation upon the appropriation of public moneys is that it must be for a public purpose. Article VI, section 6, Constitution of the State of Hawaii. Assuming the requisite public purpose, an appropriation will not be invalid because it involves payment to private individuals. 42 Am. Jur., Public Funds, § 57.

We enclose herewith a thermofax copy of our opinion No. 59-39, dated April 10, 1959, regarding this question and related questions directed to Representative Stanley I. Hara.

The Supreme Court in Carmichael v. Southern Coal and Coke Co., 301 U.S. 495, 81 L.Ed. 1245, in reviewing the propriety of taxing employers to pay unemployment compensation to persons who had never been employed by the employers taxed said that if the purpose is legitimate because public, it will not be defeated because its execution involves payment to individuals. The court indicated that the power to contract and the power to select appropriate agencies and instruments for the execution of state policy are attributes of state sovereignty.

In Kerr v. Enoch Pratt Free Library of Baltimore City, 54 F.Supp. 514 (1944), one of the plaintiffs alleged that his

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constitutional rights were violated because of the fact that the City of Baltimore pursuant to the authorization of the state legislature made appropriations to a free library operated by a private corporation. The court said at page 527:

> "No provision of the Maryland Constitution is referred to by counsel, and none is known to the court, that would make the legislative authority [to authorize the City of Baltimore to make appropriations to a free library operated by a private corporation] invalid. Nor have counsel for the plaintiff cited any Federal authority for the proposition that the voluntary appropriations by the City takes the plaintiff's property without due process."

Although the above cases concern different fact situations, they stand for the principal that under constitutional provisions such as ours, inquiry as to the validity of an appropriation is directed toward the question of whether the appropriation is for a public purpose and not to whom the appropriation is made to accomplish the purpose.

Very truly yours,

Allen W. Wooddell

Allen W. Wooddell
Deputy Attorney General

APPROVED:

Shiro Kashiwa

Shiro Kashiwa
Attorney General

Enc.

RKF:AH
39:20

Op. 59-39 ✓

TERRITORY OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

Honolulu, Hawaii

April 10, 1959

Honorable Stanley I. Hara
Chairman, House Finance Committee
Thirtieth Legislature
Territory of Hawaii
Honolulu, Hawaii

Dear Sir:

This is in answer to your request for two opinions, as follows:

1. Whether the proposed charter of the Hawaii Visitors Bureau comes within the statutory requirements of Secs. 172-16 and 172-17 of the Revised Laws of Hawaii 1955.

2. Whether an appropriation of the territorial legislature "to the HVB" would be legal.

In answer to the first question, please be advised that we have examined the proposed charter of the Hawaii Visitors Bureau as transmitted to this office for approval by the Treasurer of the Territory, and it is our conclusion that the proposed charter satisfies the requirements of Secs. 172-16 and 172-17.

In answer to the second question, it is our opinion that the contemplated appropriation should be phrased in language which is more specific, and which sets forth on its face the ultimate purpose of the appropriation, as for instance "for the promotion and development of the tourist industry". Such an appropriation, if phrased in the suggested language, would be for a public purpose, and therefore legal. Sacramento Chamber of Commerce v. Stephens, 299 Pac. 728; Davis, et al. v. City of Taylor, et al., 67 S.W.2d 1033; 84 C.J.S. "Taxation", Sec. 15, p. 64; 37 Am. Jur., "Municipal Corporations", Sec. 127, p. 740.

This office has taken a position from as early as 1919, that appropriations for the promotion and development of the tourist industry are legal. (See Opinion No. 877, August 7, 1919, re appropriation of the Hawaii Publicity Committee and the Hawaii Tourist Bureau. See also "Appendix Exhibit No. 1", dated May 29, 1950, attached to Standing Committee Report No.

Op. 59-39

51 of the Committee on Taxation and Finance of the Hawaii State Constitutional Convention of 1950). The latter was an opinion by Attorney General Ackerman to the Committee, which states in part:

> "I wish to herewith confirm my oral opinion to you to the effect that it is not necessary to specifically authorize the Legislature to make grants to private institutions of an eleemysonary nature, or to specifically authorize it to expend money for advertising the Territory. These powers have been repeatedly upheld under the doctrine of 'public purposes'."

The Committee on Taxation and Finance accepted the advice of the Attorney General, and stated on page 15 of its report:

> "Section 16 prohibits appropriations for private purposes. Your committee considered in some detail the question of including in this section specific listings of the private purposes, including religious, for which public funds could not be spent. It also considered the inclusion of a provision which would specifically authorize grants to assist private hospitals and to support community efforts in advertising and promoting Hawaii (such as the Hawaii Visitors Bureau). Upon the advice of the Attorney General that it is not necessary to specifically authorize the legislature to make grants to private institutions of an eleemysonary nature, or to specifically authorize it to spend money for advertising the Territory, since these powers have been repeatedly upheld under the doctrine of 'public purposes' --- this Committee recommends Section 6 in the form set forth in the proposal attached hereto."

From the above, it is apparent that the framers of the Hawaii State Constitution considered the long-standing practice of the territorial legislature in appropriating moneys for the promotion and development of the tourist industry, and upon express opinion of the Attorney General that such appropriations are legal, anticipated the continuation of such appropriations by the State legislature.

Since appropriations for the promotion and development of the tourist industry are legal under present territorial laws, and will be so under the State Constitution, the principal remaining question is the legality of the means or method of disbursing and expending the appropriation. Although this question was not expressly asked in your request, we shall state an opinion in regard to the same since the question is implicit in the statement

of the second question, above. It is our opinion that the legislature may properly require any reasonable conditions upon which the money shall be disbursed or expended. Thus, as a condition of the appropriation, the legislature may specify in the appropriation act, that the appropriation shall be expended by the Hawaii Visitors Bureau or any other private organization or by any governmental agency, or both; or the legislature may require that the Hawaii Visitors Bureau shall include any specified number of persons on its Board of Directors, to be appointed by the Governor by and with the consent of the Senate. The legislature may also require as a condition of the appropriation, that all expenditures shall be first approved by the Bureau of the Budget.

Yours truly,

ROBERT K. FUKUDA
Deputy Attorney General

APPROVED:

JACK H. MIZUHA
Attorney General

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INDEXING INSTRUCTION

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CONSTITUTIONAL LAW

Statutes

Statutes may become effective on the happening of certain conditions or contingencies specified in the act.

STATUTES

Effective date

Upon the passage of a valid statute, which by its terms is to go into effect on the happening of a certain contingency, or on compliance with certain conditions, its language must be strictly followed; and it will take effect only from the happening of the contingency or the performance of the conditions.

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ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
AND REFER TO
INITIALS AND NUMBER
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Op. 61-56

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

May 16, 1961

Honorable James H. Wakatsuki
Chairman, Education Committee
First Legislature, State of Hawaii
General Session of 1961
Iolani Palace
Honolulu, Hawaii

Dear Sir:

This is in response to your communication of May 1, 1961, wherein you requested an opinion as to the legality of Section 7, Senate Bill No. 9, Senate Draft 1, wherein the operation of said section is contingent upon an amendment to our Constitution.

In the absence of constitutional or statutory provisions to the contrary, the general rule is that statutes may become effective on the happening of certain conditions or contingencies specified in the act. 82 C.J.S. 978. Upon the passage of a valid statute, which by its terms is to go into effect on the happening of a certain contingency, or on compliance with certain conditions, its language must be strictly followed; and it will take effect only from the happening of the contingency or the performance of the conditions. State v. Liedthe, 4 N.W. 75, 9 Neb. 490; Savage v. Walshe, 26 Ala. 619.

The Hawaii Supreme Court has passed upon this same question in In re Marques, 37 Haw. 260. The court stated:

"Where an act of the legislature contains provisions that are postponed, to take effect at a future date, and there is no implication or expression therein that the act itself should be postponed, the act itself takes effect upon approval and the only sections postponed to take effect are those where the postponement is expressed therein or is to be implied therefrom."

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Upon careful scrutiny of our Constitution, we are of the opinion that section 7 of Senate Bill No. 9, Senate Draft 1, contains no violation thereof.

Very truly yours,

Donald H. C. Low

DONALD H. C. LOW
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

Op. 61-56

ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
AND REFER TO
INITIALS AND NUMBER

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Op. 61-57 ✓

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

May 18, 1961

The Honorable Elmer F. Cravalho
Speaker, House of Representatives
First State Legislature of Hawaii
Iolani Palace
Honolulu, Hawaii

Dear Sir:

Reference is made to your letter of May 16, 1961 relative to the legality of the wording in the operating budget for the fiscal year 1961-1962 regarding the appropriation for tourist promotion as contained in House Bill No. 39, House Draft 1.

H.B. No. 39, H.D. 1 reads in part as follows:

> "Provided, that in the tourist promotion program, not less than $600,000 shall be used by the department, with the aid of the county advisory committees, to contract with the Hawaii Visitors Bureau for tourist promotion; and provided further, that not more than $500,000 of the Hawaii Visitors Bureau privately donated funds shall be used to match state funds at a matching ratio of one and one-half (state funds) to one (Hawaii Visitors Bureau privately donated funds)." [Emphasis added.]

At first glance, one would attempt to challenge the legality of the above appropriation on the following grounds, to wit: (1) that the appropriation of the legislature to the Hawaii Visitors Bureau would be illegal for it is not for a public purpose; and (2) that the appropriation providing for the Department of Economic Development to contract with the Hawaii Visitors Bureau would be in violation of sections 9-21 and 9-22, Revised Laws of Hawaii 1955, relative to public advertisement for bids for public works and contracts.

Not necessary. RBJ

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In answer to the first question, the contemplated appropriation contains specific language which sets forth on its face the ultimate purpose of the appropriation as "for tourist promotion". Such an appropriation would be for a public purpose, and therefore legal. See Daggett v. Colgan, 92 Cal. 53, 28 P. 51; Sacramento Chamber of Commerce v. Stephens, 212 Cal. 607, 299 P. 728; Davis v. City of Taylor, 67 S.W.2d 1033; and Attorney General (Hawaii) Opinion No. 59-39, dated April 10, 1959 (copy hereto attached).

Furthermore, although the legislature has established a practice in the past of requiring private matching contribution as a condition upon the expenditure of state funds or appropriation, it is the opinion of this office that since the purpose of the appropriation is a public purpose, the condition of private matching contributions is merely a matter of legislative policy, and may be modified or completely eliminated at the will of the legislature. In other words, the legislature can make outright appropriations for the promotion of the tourist industry without any condition of any kind, since the purpose is a public purpose. Consequently, the legislature can eliminate the condition of matching private contributions as proposed in H.B. No. 39, H.D. 1, S.D. 1. The above-mentioned Opinion No. 59-39 of April 10, 1959, clearly supports this position.

As to the second question, the contemplated appropriation also directs the Department of Economic Development to contract with the Hawaii Visitors Bureau for tourist promotion. This is not in violation of section 9-21, Revised Laws of Hawaii 1955, providing for advertisement of bids on any public works and contract where expenditure of public funds over $4,000 is involved.

Under section 9-21, no expenditure of public funds shall be made where the sum to be expended shall be $4,000 or more except by public advertisement for sealed tenders in the manner provided by law. Said section contains certain exceptions, one of which is "subsidies".

"Subsidy" is defined as "aid, assistance or gift of money or property made by one to another by way of financial aid." Aid, assistance or grant of money to Hawaii Visitors Bureau for a public purpose is in the nature of a subsidy and is excepted from the requirements of public advertisement for bids where expenditure of public funds is involved.

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In conclusion, the contemplated appropriation provision without matching feature to Hawaii Visitors Bureau would be legally unobjectionable.

Very truly yours,

Richard M. C. Lum

RICHARD M. C. LUM
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

Op. 61-57

RKF:AH
39:20

Op. 59-39 ✓

TERRITORY OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

Honolulu, Hawaii

April 10, 1959

Honorable Stanley I. Hara
Chairman, House Finance Committee
Thirtieth Legislature
Territory of Hawaii
Honolulu, Hawaii

Dear Sir:

This is in answer to your request for two opinions, as follows:

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This office has taken a position from as early as 1919, that appropriations for the promotion and development of the tourist industry are legal. (See Opinion No. 877, August 7, 1919, re appropriation of the Hawaii Publicity Committee and the Hawaii Tourist Bureau. See also "Appendix Exhibit No. 1", dated May 29, 1950, attached to Standing Committee Report No.

Op. 59-39

51 of the Committee on Taxation and Finance of the Hawaii State Constitutional Convention of 1950). The latter was an opinion by Attorney General Ackerman to the Committee, which states in part:

> "I wish to herewith confirm my oral opinion to you to the effect that it is not necessary to specifically authorize the Legislature to make grants to private institutions of an eleemysonary nature, or to specifically authorize it to expend money for advertising the Territory. These powers have been repeatedly upheld under the doctrine of 'public purposes'."

The Committee on Taxation and Finance accepted the advice of the Attorney General, and stated on page 15 of its report:

> "Section 16 prohibits appropriations for private purposes. Your committee considered in some detail the question of including in this section specific listings of the private purposes, including religious, for which public funds could not be spent. It also considered the inclusion of a provision which would specifically authorize grants to assist private hospitals and to support community efforts in advertising and promoting Hawaii (such as the Hawaii Visitors Bureau). Upon the advice of the Attorney General that it is not necessary to specifically authorize the legislature to make grants to private institutions of an eleemysonary nature, or to specifically authorize it to spend money for advertising the Territory, since these powers have been repeatedly upheld under the doctrine of 'public purposes' --- this Committee recommends Section 6 in the form set forth in the proposal attached hereto."

From the above, it is apparent that the framers of the Hawaii State Constitution considered the long-standing practice of the territorial legislature in appropriating moneys for the promotion and development of the tourist industry, and upon express opinion of the Attorney General that such appropriations are legal, anticipated the continuation of such appropriations by the State legislature.

Since appropriations for the promotion and development of the tourist industry are legal under present territorial laws, and will be so under the State Constitution, the principal remaining question is the legality of the means or method of disbursing and expending the appropriation. Although this question was not expressly asked in your request, we shall state an opinion in regard to the same since the question is implicit in the statement

of the second question, above. It is our opinion that the legislature may properly require any reasonable conditions upon which the money shall be disbursed or expended. Thus, as a condition of the appropriation, the legislature may specify in the appropriation act, that the appropriation shall be expended by the Hawaii Visitors Bureau or any other private organization or by any governmental agency, or both; or the legislature may require that the Hawaii Visitors Bureau shall include any specified number of persons on its Board of Directors, to be appointed by the Governor by and with the consent of the Senate. The legislature may also require as a condition of the appropriation, that all expenditures shall be first approved by the Bureau of the Budget.

Yours truly,

ROBERT K. FUKUDA
Deputy Attorney General

APPROVED:

JACK H. MIZUHA
Attorney General

op. 59-39

INDEXING INSTRUCTION

Op. 61-58

INSURANCE, MEDICAL

S.B. No. 17, providing medical insurance benefits for government employees, payable to participating physicians only, does not violate the provisions of sections 181-463(b)(2) and 181-511(b), Revised Laws of Hawaii 1955.

Op. 61-V-8

ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
AND REFER TO
INITIALS AND NUMBER

LHK:es

22a

Op. 61-58 ✓

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

May 24, 1961

The Honorable Richard M. Kennedy
House of Representatives
The First Legislature of Hawaii
Iolani Palace
Honolulu, Hawaii

Dear Sir:

This is in response to your letter of May 1, 1961, requesting an opinion on the following question:

> Would a bill providing medical insurance benefits for government employees, payable to participating physicians only, violate the provisions of chapter 181, specifically sections 181-463(b)(2) and 181-511(b), Revised Laws of Hawaii 1955?

We note that the legislature is presently considering S.B. No. 17, the pertinent portion of which provides that the agency charged with the administration of the plan may contract with a private insurance company for medical benefits for government employees. Under the plan, the insurance company would contract with and pay physicians or hospitals for services rendered pursuant thereto.

Section 181-463(b)(2) relates to the payment of claims of accident and sickness insurance. It states that a policy may contain a proviso that all or a portion of medical benefits may "be paid directly to the hospital or person rendering such services; but it is not required that the service be rendered by a particular hospital or person." Under section 181-451, the provisions relating to accident and sickness insurance, including section 181-463, shall not apply to or affect any blanket or group policy of insurance. Further, section 181-489 specifically permits the issuance of group accident and sickness insurance to "Five or more employees of . . . any governmental corporation, agency or department thereof. . . ."

Op. 61-58

In construing the foregoing sections, it is apparent that section 181-463(b)(2) applies only to individual accident and sickness policies. It does not apply to or prohibit the issuance of any blanket or group policy of insurance, but, by section 181-489, expressly permits the issuance of such a policy for the benefit of government employees as provided for in S.B. No. 17.

The other section referred to, section 181-511(b), governs group or blanket disability insurance. It provides that such a "policy may not require that the service be rendered by a particular hospital or person." It would appear that the provision in S.B. No. 17 conflicts with section 181-511(b). However, the general rule of law is that where there are conflicting provisions, the one last adopted by the legislature will prevail (82 C.J.S., Statutes, § 385, p. 912).

In conclusion, therefore, this office is of the opinion that S.B. No. 17, providing medical insurance benefits for government employees payable to participating physicians only, would not violate the provisions of section 181-463(b)(2) or section 181-511(b), Revised Laws of Hawaii 1955.

Very truly yours,

Lawrence H. Kam

LAWRENCE H. KAM
Deputy Attorney General

APPROVED:

H. Rodger Betts

H. RODGER BETTS
Acting Attorney General

Op. 61-58

INDEXING INSTRUCTIONS

OP. 61-59

LABOR & INDUSTRIAL RELATIONS, DEPT. OF

Referee

The referee appointed by the Director of Labor and Industrial Relations under the Employment Security Law does not come under civil service except as provided in chapters 3 and 4 of the Revised Laws of Hawaii 1955.

CIVIL SERVICE

Referee

Same syllubus

REVISED LAWS OF HAWAII 1955

Section 3-20(h)

Section 93-90(b)

Section 93-97

ASOL:ft
10a
Op. No. 61-59

STATE OF HAWAII

Department of the Attorney General

HONOLULU

June 5, 1961

Mr. Takashi Kitaoka, Director
Department of Labor and
Industrial Relations
825 Mililani Street
Honolulu 13, Hawaii

Dear Mr. Kitaoka:

This is in reply to your letter of May 11, 1961, requesting an opinion regarding the status of the referee appointed by the Director of Labor and Industrial Relations as provided in section 93-97 and section 93-90(b) of the Revised Laws of Hawaii 1955.

The question posed is whether the referee mentioned in section 93-97 has civil service status or whether the position comes under the exemption from civil service as provided in section 3-20(h), Revised Laws of Hawaii 1955, as amended.

Be advised that the referee under the Employment Security Law comes under civil service as provided in chapters 3 and 4 of the Revised Laws of Hawaii 1955.

Section 93-97 reads in part as follows:

> "§ 93-97. Referee. (a) The referee shall be appointed by the director of labor and industrial relations, by an appointment in accordance with the provisions of paragraph (b) of section 93-90. . . ."

Section 93-90(b) reads:

> ". . . Appointments of all persons employed in the administration of this chapter shall be on a merit basis and shall be made in accordance with the applicable provisions of any territorial civil service law; . . ."

Section 3-20(h) pertaining to civil service and exemptions reads:

"Judges, referees, receivers, masters, jurors, jury commissioners, notaries public, land court examiners, court commissioners and attorneys appointed by a territorial court for a special temporary service;"

Inasmuch as the referee under the Employment Security Law is expressly placed under civil service in section 93-90(b), the express provisions of the law shall govern. The exemption listed under section 3-20 would be applicable where a referee is not otherwise expressly mentioned as coming under our civil service laws.

Yours very truly,

/s/ Andrew S. O. Lee

Andrew S. O. Lee
Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa

Shiro Kashiwa
Attorney General

INDEXING INSTRUCTIONS

Opinion No. 61-60

AGRICULTURE

Labeling of poultry meatbird

Act 109, Session Laws of Hawaii 1961, relating to labeling of poultry meatbird, by providing proper identification as to geographical origin of poultry meatbird in Hawaii, is clear and unambiguous. All uncooked poultry meatbird shall be labelled as provided in the Act.

SESSION LAWS OF HAWAII 1961

Act 109

Act 109, Session Laws of Hawaii 1961, relating to labeling of poultry meatbird, by providing proper identification as to geographical origin of poultry meatbird in Hawaii, is clear and unambiguous. All uncooked poultry meatbird shall be labelled as provided in the Act.

RMCL:ai
2a
Op. No. 61-60

STATE OF HAWAII

Department of the Attorney General

HONOLULU

June 5, 1961

Mr. Gordon P. Chung-Hoon, Director
Department of Agriculture
and Conservation
State of Hawaii
Honolulu, Hawaii

Dear Sir:

Reference is made to your letter of May 29, 1961, requesting an opinion relative to the interpretation and clarification of certain provisions of Act 109, Session Laws of Hawaii 1961, General Session (House Bill No. 1235).

Act 109 relates to labeling of poultry meatbird, by providing proper identification as to the geographic origin of poultry meatbird sold in Hawaii, which is necessary for the protection of the consumer. The purpose and intent of said Act is found in Standing Committee Report No. 978, dated May 6, 1961, to Honorable William H. Hill, President of the Senate.

Section 1 of Act 109 reads in part as follows:

> "No person shall sell or offer to sell any uncooked poultry meatbird without a label, ... The foregoing provision shall not apply to New York-dress poultry meatbird, or to poultry meatbird which is sold to an ultimate consumer at the farm or ranch where the poultry meatbird was grown or to sales subsequent to a sale at retail."

The language of said Section 1 is clear and unambiguous, which requires that "no person shall sell any uncooked poultry meatbird without a label".

1. "Any uncooked poultry meatbird" includes but not limited to whole birds not cut up, whole birds cut up and parts of birds which are sold separately from other parts

thereof and to "institutional or bulk pack". It does not include New York-dress poultry meatbird, which is specifically exempted by said Act.

As to "institutional or bulk pack", label must be provided as required by law on the original package, crate or carton without individually labeling each poultry meatbird therein. However, should the original package, crate or carton be broken or opened, each poultry meatbird must be individually labeled to comply with the provisions of this Act.

2. "Sell" covers all sales of uncooked poultry meatbird to the ultimate consumer either at wholesale or at retail, except as to poultry meatbird sold to an ultimate consumer at the farm or ranch where the poultry meatbird was grown, or to sales subsequent to a sale at retail, which are specifically excepted by said Act.

Section 2 of Act 109 reads in part as follows:

> "Label" . . . shall be at least two inches by three inches with legible letters or figures of at least one-half of an inch in height and with the words '(insert the geographic origin as either MAINLAND or FOREIGN or LOCAL) GROWN'."

The language in Section 2 is also very clear and unambiguous, which requires:

1. That "letters or figures" placed on the label shall be at least one-half of an inch in height. The Act specifies the minimum height for the letters or figures to be placed on the label, which label shall be two inches by three inches.

2. That the identification of the geographic place of origin shall be either MAINLAND GROWN or FOREIGN GROWN or

LOCAL GROWN. Any other manner of identification is not in compliance with Act 109 and therefore prohibited.

Very truly yours,

/s/ RICHARD M. C. LUM

RICHARD M. C. LUM
Deputy Attorney General

APPROVED:

/s/ SHIRO KASHIWA

SHIRO KASHIWA
Attorney General

INDEXING INSTRUCTIONS

Opinion No. 61-61

APPROPRIATIONS

Particular Items

A. Where money is appropriated from general revenues for a specific purpose it can be used only for the purpose specified in the appropriation.

B. An exception to the above general rule arises where the money is used for an incidental part of the work which would have been included in the purpose for which the original fund was created.

APPROPRIATIONS

Expenditure

A. See above.

B. See above.

PUBLIC MONEYS

Appropriations

A. See above.

B. See above.

SESSION LAWS OF HAWAII 1959

Act 224, Section 3(a), Item D(10)

RMCL:GF
13a
Op. No. 61-61

STATE OF HAWAII

Department of the Attorney General

HONOLULU

June 5, 1961

Mr. Frank Lombardi, Director
Department of Planning and Research
State of Hawaii
195 South King Street
Honolulu 13, Hawaii

Dear Mr. Lombardi:

Reference is made to your memorandum of May 31, 1961 (Ref. No. DPR 10206), requesting this Department to render an opinion as to whether or not it is permissible to allocate the sum of $5,000 from the appropriation made by Item D(10), Section 3(a), Act 224, Session Laws of Hawaii 1959, for the purchase of furniture and fixtures for the Kauai Planning and Traffic Commission Building.

We note in your memorandum that you have specific reference to Item D(7) rather than Item D(10). We have interpreted it to mean that said reference is a typographical error and proceeded to render the opinion of said question as hereinabove stated.

Section 3(a), Item D(10), Act 224, Session Laws of Hawaii 1959 reads in part as follows:

> "Section 3(a). County Projects Financed From Territorial General Fund. The following sums or so much thereof shall be sufficient to accomplish the purposes designated by the appropriations are hereby appropriated, to be expended by the department of public works, unless otherwise specified in the subsection, for the biennial period ending June 30, 1961 out of the moneys in the treasury received from general revenues."
>
> * * *
>
> "D. Kauai County
>
> The following projects to be expended by the County of Kauai:
>
> * * *

Thermofax copy given to
Mrs. Patricia Putnam of
Legislative Reference Bureau of U.H
10/24/61

(10) Kauai Planning and Traffic Commission Building, furniture and fixtures ..... $40,000."

We have further noted from your memorandum that part of the $40,000, to wit: $35,000, have been reallocated for the Wailua Golf Course project. The County of Kauai, by resolution No. 73, dated May 3, 1961, requested that the sum of $5,000, or the balance available from the appropriation under Item D(10), Section 3(a) of Act 224, be made available to the County of Kauai to purchase additional furniture and fixtures vitally needed by the ever-expanding work of the Kauai Planning and Traffic Commission. The Kauai Planning and Traffic Commission Building has not been built and in all probability will not be built because of the lack of funds.

The general question of whether or not there is an unlawful diversion of funds if the sum of $5,000 is allotted to the County of Kauai for the purchase of furniture and fixtures for the Kauai Planning and Traffic Commission depends to a large extent upon statutory provisions and constitutional limitations. Our Answer to said question is that it is an unlawful diversion of funds.

The general rule is that "where money is appropriated from general revenues for a specific purpose, it cannot be used for any other purposes either permanently or temporarily until the purpose for which it was intended has been fully accomplished." 42 Am Jur § 79, p 775; see Appeal of Dellaripa, 88 Conn 565, 92 Atl 146, Ann Cas 1917B 862.

"The appropriation of public money and the granting of authority to expend said money is purely a legislative function, and the manner and condition under which it may be used rest entirely with the legislature. Therefore, when the legislature has appropriated public money for a specific object, the fund thus established can be used only for the purpose specified in the appropriation." Attorney General of Hawaii, Opinion No. 1543. See also Attorney General of Hawaii, Opinion No. 1653.

The statutory provision of Act 224, Session Laws of Hawaii 1959 is clear in that the sum of $40,000 is appropriated for the "Kauai Planning and Traffic Commission Building, furniture and fixtures". It cannot be interpreted and construed to mean that the funds can be used for the purchase of furniture and fixtures for the Kauai Planning and Traffic Commission as such, but must be interpreted and construed to mean that the funds be used for the purchase of furniture and fixtures for the Kauai Planning and Traffic Commission Building.

However, there is an exception and would be considered not a diversion of funds "where the money is used for an incidental part of the improvements for which the funds were intended, especially where the incidental part of the work would have been included in the purpose for which the original fund was created." 42 Am Jur § 79, p 776.

In the instant situation before us, it does not fall within the exception. The Kauai Planning and Traffic Commission Building has not been built and will never be constructed within a reasonable foreseeable future due to the lack of funds.

In conclusion, it is the opinion of this department that it is not permissible to allocate the sum of $5,000 to the County of Kauai for the purchase of furniture and fixtures for the Kauai Planning and Traffic Commission.

Very truly yours,

(s) Richard M. C. Lum

Richard M. C. Lum
Deputy Attorney General

APPROVED:

(s) Shiro Kashiwa

Shiro Kashiwa
Attorney General

INDEX

Use of Firearms at Oahu Prison

Section 83-3, RLH 1955

The use of firearms in the government of a correctional facility when necessary for the control, supervision and administration of correctional facilities under the Department of Social Services is implied by law.

* Op 61-6
.961

61-62

THT:hos
14a
Op. No. 61-62

STATE OF HAWAII

Department of the Attorney General

HONOLULU

June 6, 1961

Miss Mary L. Noonan, Director
Department of Social Services
State of Hawaii
Honolulu, Hawaii

Dear Miss Noonan:

Subject: Use of Firearms at Oahu Prison

This is in response to an oral request from Mr. Ray Belnap, Administrator, Corrections Division, Department of Social Services, as to whether or not firearms may be used at Oahu Prison by custodial employees in preventing escapes, serious assaults upon employees, prison officials, inmates or authorized visitors and in quelling disturbances and disorders. It is the opinion of the Department of the Attorney General that firearms may be used at Oahu Prison and other prison camps of the State for the control of prisoners.

Section 83-3, RLH 1955, provides that the Director of Social Services shall have the entire government, control and supervision of all State prisons and camps, and authorizes the Director to provide for the conduct and management of these facilities and the care, control, treatment and discipline of its prisoners.

The primary objective and obligation of any correctional facility including Oahu Prison is to protect society by safely keeping the prisoners, and every effort is expected of the Department of Social Services and must be made at prison levels to insure the security of the prison and the effectiveness of redirectional measures within the framework of security.

Should the Department of Social Services find it necessary to utilize firearms at prison levels to provide for the safekeeping and the enforcement of proper order and discipline among and concerning prisoners and prison officers and employees, the Department is authorized to provide for this necessity; the use of firearms in this manner when necessary would be directly related to the conduct and management of a prison and the control of its prisoners. The scope of

authority of the Director by necessity then permits direction for the use of firearms where control and supervision of prisoners so require. This is an obvious and necessary implication of the law providing for the control, supervision and administration of the prison. The power and duties of those vested with the control of a prison are such as are conferred and imposed on it expressly and impliedly by law. 72 C. J. S. 862, Section 11, Prisons.

Thusly, the use of firearms in the government of a correctional facility when necessary for the control, supervision and administration of correctional facilities under the Department of Social Services is implied by law.

Yours very truly,

(s) Tenny Hoon Tom

Tenny Hoon Tom
Deputy Attorney General

APPROVED:

(s) Shiro Kashiwa

Shiro Kashiwa
Attorney General

INDEXING INSTRUCTIONS

Op. 61-63

UNEMPLOYMENT SECURITY BENEFITS - LEGISLATIVE EMPLOYEES

Under Act 222, S.L.H. 1959, the general fund of the state should be charged for unemployment benefits to legislative employees; the funds appropriated by Act 1, S.L.H. 1960, to defray legislative costs should not be assessed therefor.

LHK:ft
22a
Op. No. 61-63

STATE OF HAWAII

Department of the Attorney General

HONOLULU

June 22, 1961

Mr. Walter G. Chuck
Chief Clerk of the Senate
First Legislature of the State of Hawaii
Iolani Palace
Honolulu, Hawaii

Dear Mr. Chuck:

By letter dated June 2, 1961, you requested an opinion from this office as to whether the general fund of the State may be expended for the payment of unemployment benefits to legislative employees. The answer is "Yes."

Under Act 1, Session Laws of Hawaii 1960, $445,000 and $650,000 were appropriated to defray the expenses of the Senate and House of Representatives, respectively. The Bureau of Employment Security submitted a statement alleging that the Senate and House owe approximately $3,400 and $7,400, respectively, for the payment of said unemployment benefits. As of this date, it was indicated that the balances remaining in both legislative chambers are insufficient to pay said claims.

The statute governing this subject matter is Act 222, Session Laws of Hawaii 1959, which reads in part:

> ". . . the Territory and its political subdivisions and instrumentalities (hereinafter referred to as 'governmental employers' or 'governmental employer' as the case may be) shall pay into the [unemployment compensation] fund an amount equivalent to the amount of benefits paid to individuals based on wages paid by the governmental employers. . . . The amount of payment required from governmental employers shall be ascertained by the board quarterly and shall be paid from the general funds of such governmental employers at such time and in such manner as may be prescribed by the board and approved by the comptrollers or auditors of the respective governmental employers, except that to the extent that benefits are paid on the basis of wages paid by

7-14-61 3 copies to Herbert Kokubun

governmental employers from special administrative funds, the payment into the unemployment compensation fund shall be made from such special funds." (Emphasis added.)

We construed the foregoing section (Opinion No. 61-37, March 21, 1961) to mean that employees of the legislature are clearly entitled to benefits granted under the Hawaii Employment Security Law. (Cf. A.G. opinion, August 25, 1960.)

In furtherance thereof, the said employees were granted unemployment benefits. However, the charges for these benefits will be made against the sums appropriated by the aforesaid Act 1, rather than against the general fund as directed by Act 222. This will be done, we understand, because the legislature did not appropriate any specific sum of money therein. It is therefore believed that Act 222 is not an appropriation bill and accordingly warrants cannot be drawn against the general fund of the State. Charges will also be assessed against Act 1 because of section 35-20, Act 12, First Special Session of 1959, which states:

> "No officer, department or establishment shall expend or be allowed to expend during any fiscal year any sum for any purpose not specifically authorized by the legislature for expenditure during that particular fiscal year, . . ."

In adopting the above Act 12, the legislature had the following intention:

> ". . . (1) that the total appropriation made by the legislature is the maximum amount authorized to meet the requirements of a department for the period of the appropriation; (2) that expenditures of appropriated funds shall be only expended for specific purposes authorized by the legislature and made available pursuant to the allotment system; . . ." (Senate Stand. Com. Rep. No. 99, October 14, 1959; emphasis added.)

Act 1 providing for the defraying of the costs of the 1960 legislature, like other departmental appropriations, did not specifically authorize the expenditure for the purpose here involved. Hence, use of the funds appropriated thereby for unemployment benefit purposes would be improper.

Further, the prior reason advanced for charging Act 1 is invalid for it is the opinion of this office that Act 222 is an appropriation bill. The applicable rule of law is found in 81 C.J.S. States § 160, p. 1202, as follows:

> "Where the state constitution is silent, special appropriations are not necessary for the disbursement of funds of the state, and the authorizing of an expenditure is in itself an appropriation of money for its payment in the absence of any special appropriation."

A case in point is State v. Staub, Comptroller, 61 Conn. 553, 23 Atl. 924. The state statute provided that the "income of the school fund . . . shall annually be divided and distributed by the comptroller among the several towns. . . ." One of the defenses asserted against the writ of mandamus, which was instituted to compel the comptroller to comply with the statute, was that the statute was not an appropriation because a specific sum was not mentioned. In rejecting this argument and affirming the issuance of the mandamus, the court stated:

> "In the absence of a special appropriation, the existence of a law requiring an expenditure to be incurred is in itself an appropriation of money. For that purpose of authorizing the application of state funds to the payment of authorized expenditures, a special appropriation is a work of supererogation. In the absence of a special appropriation, the existence of a law requiring an expenditure to be incurred is an appropriation of money for that purpose, and the law imposes on the comptroller the duty of settling and adjusting demands against the state for such expenses." (Emphasis added.)

See also 42 Am. Jur. Public Funds § 46, p. 749. (Cf. House Stand. Com. Rep. No. 756, April 30, 1959.)

So here, although the legislature did not appropriate a specific sum of money in Act 222, they expressly stated that the "amount of payment required from governmental employers . . . shall be paid from the general funds of such governmental employers. . . ." The only exception provided therein is that the government need not contribute to the unemployment compensation fund from its general revenues in cases where the employees' wages were paid from a "special administrative fund."

According to the great weight of authority, acts providing for unemployment compensation benefits should not be given a technical interpretation but should be construed in favor of those claiming the benefits thereof. (81 C.J.S. Social Security and Public Welfare § 96, p. 138.) Moreover:

> "All public moneys and revenue coming into the state treasury, not specifically authorized by the constitution or by statute to be placed in a separate fund and not given or paid over in trust for a particular purpose, constitute a part of the general fund of the state. . . ." (81 C.J.S. States § 158, p. 1197.)

In view of the foregoing statutes and authorities, we are of the opinion that since the sums appropriated under Act 1 were not specifically authorized to be placed in a separate or special fund, the said appropriation is not to be construed as a special administrative fund. In the absence of such specific authorization, we further conclude that it would be contrary to section 35-20 of Act 12 to assess the unemployment insurance benefits against the sums appropriated by Act 1. Too, Act 222 is an appropriation measure which expressly requires the State to pay for the cost of unemployment benefits from its general fund; to assess any other fund for said benefits violates the provisions thereof.

Yours very truly,

/s/ Lawrence H. Kam

LAWRENCE H. KAM
Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa

SHIRO KASHIWA
Attorney General

INDEXING INSTRUCTIONS

Opinion No. 61-64

HAWAIIAN HOMES COMMISSION

Power to grant licenses to individuals

The Commission is without authority to grant permit to live on Hawaiian homes premises from month to month on a monthly charge.

Power of Commission to grant rights to lessees and licensees of Hawaiian home lands is defined by and limited in section 207 of the Hawaiian Homes Act, 1920.

HAWAIIAN HOMES COMMISSION ACT, 1920

Sec. 207

DYM:hmm
8a
OP. 61-64

STATE OF HAWAII

Department of the Attorney General

HONOLULU

June 9, 1961

Mr. William Kea, Chairman
Hawaiian Homes Commission
Department of Hawaiian Home Lands
State of Hawaii
Honolulu, Hawaii

Dear Mr. Chairman:

This is in reply to the letter, dated June 1, 1961, from your department concerning the question whether the Hawaiian Homes Commission may grant a permit, with a monthly charge therefor, to Charles Kahoalii to live on Hawaiian home lands in the Leleiwi area on the island of Hawaii. We are informed that the Commission has no road or utilities installed in this area, and that the land located thereat is not presently used for homestead purposes.

You are hereby advised that under the Hawaiian Homes Commission Act 1920, as amended, the Hawaiian Homes Commission is without authority to grant any such permit on a monthly charge, as proposed, to Charles Kahoalii. The powers of the Commission relating to the granting of rights to Hawaiian lessees and licensees to use and occupy Hawaiian home lands are clearly prescribed and limited in section 207 of said Act. These powers, however, do not include authority to grant a license, on a monthly charge basis, to any individual to occupy Hawaiian home lands. In the absence in the said Act of any provision vesting such authority in the Commission, the Commission may not grant such a permit to Charles Kahoalii. (See 73 C.J.S., Pub. Adm. Bodies and Proc., sec. 49, pp.368-372.)

Very truly yours,

/s/ David Y. Mar

DAVID Y. MAR
Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa

SHIRO KASHIWA
Attorney General

OP. 61-64

INDEXING INSTRUCTIONS

Opinion No. 61-65

HAWAIIAN HOMES COMMISSION

Subleases

Lessee of Hawaiian home lands prohibited by statute to sublet his interest in the tract or the improvements thereon.

Commission is without authority to approve lessee's plan to subdivide tract and to sublease portion of such subdivision to daughter.

DYM:hmm
8a
OP. 61-65

STATE OF HAWAII

Department of the Attorney General

HONOLULU

June 9, 1961

Mr. William Kea, Chairman
Hawaiian Homes Commission
Department of Hawaiian Home Lands
State of Hawaii
Honolulu, Hawaii

Dear Mr. Chairman:

This is in reply to the letter from your department, dated June 5, 1961, concerning the question presented by Mrs. Marion Peter's written request of May 26, 1961, for your approval of her plan to subdivide her tract of homestead land on Molokai for the purpose of subleasing a portion thereof to her daughter, Mrs. Rose May Enos, for a houselot.

You are hereby advised that, under the law, the Hawaiian Homes Commission is without power to approve the plan as proposed by Mrs. Peters to subdivide her tract on Molokai and to sublease a portion thereof to her daughter.

Mrs. Peter's plan is contrary to the Hawaiian Homes Commission Act. This appears apparent upon examination of the provisions relating to lessees in section 207, and the provisions relating to conditions in such leases in section 208, of the said statute. Section 207 thereof, so far as pertinent, empowers the Commission to lease to native Hawaiians the right to the use and occupancy of a tract or tracts of Hawaiian home lands. It provides, in part, that application for tracts shall be made to and granted by the Commission which shall, whenever tracts are available, enter into such a lease with any applicant who, in the opinion of the Commission, is qualified to perform the conditions of such lease. Section 208 thereof prescribes the following pertinent conditions, which are but a few of those expressly made a part of each lease:

(a) That the lessee shall be not less than twenty-one years of age, and shall be a "native Hawaiian," who is defined under section 201

of the Act to mean "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1788";

(b) That the lessee shall pay a rental of $1 a year for the tract and the lease shall be for a term of ninety-nine years;

(c) That the lessee shall occupy and commence to use or cultivate the tract as his home or farm within one year after the lease is made;

(d) <u>That the lessee shall not sublet his interest in the tract or improvements thereon</u> (emphasis added).

Considered in the light of the abovementioned provisions of the Hawaiian Homes Commission Act, it is clear that Mrs. Marion Peters, as lessee, may not subdivide her homestead tract on Molokai and sublease a portion thereof to her daughter, and that the Commission is without authority to approve her plan as proposed.

Very truly yours,

/s/ David Y. Mar

DAVID Y. MAR
Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa

SHIRO KASHIWA
Attorney General

INDEXING INSTRUCTIONS

Opinion No. 61-66

HAWAIIAN HOMES COMMISSION

Appraisal of Lessee's Crops and Improvements upon Surrendering of Lease

A. Lessee surrendering lease entitled to payment for appraised value, if any, of improvements and crops on leasehold tract by commission, less any indebtedness to commission, or for taxes, or for any other indebtedness, payment of which has been assured by commission under section 209 of Hawaiian Homes Commission Act.

B. Where tract is surrendered by lessee and the pineapple crops growing thereon, commission should secure appraisal of value, if any, of such crops, and pay lessee for value, if any, of such crops, less indebtedness to commission, or for taxes, or for any other debts, payment of which has been assured by commission.

HAWAIIAN HOMES COMMISSION ACT of 1920

Section 209, as amended.

DYM:GF
8a
Op. No. 61-66

STATE OF HAWAII

Department of the Attorney General

HONOLULU

June 20, 1961

Mr. William Kea, Chairman
Department of Hawaiian Home Lands
Hawaiian Homes Commission
Honolulu, Hawaii

Dear Mr. Chairman:

This is in response to your request for an opinion on the question whether the Hawaiian Homes Commission may collect from Libby, McNeill & Libby $3,205.61, which represents net proceeds, distributable as of June 1, 1961, from the marketing of pineapples harvested and sold by that company from crops planted on three tracts of homestead lands at Hoolehua on Molokai.

We are informed that the said pineapple company has indicated that of this total of $3,205.61, the sum of $1,248.87 thereof is for net proceeds from the sale of fruits gathered from the crops grown on a tract previously leased by you to Anthony Rodrigues; a like sum of $1,248.87 is for the sale of fruits harvested from the crops planted on another tract previously leased by you to Francis Rosehill as lessee; and the sum of $707.87 is for fruits marketed by the pineapple company from the crops planted on a third tract previously leased by you to Edwina Q. Freeman as lessee. We are also informed by your executive officer that Anthony Rodrigues, who executed a pineapple block-planting agreement with the said pineapple company on August 29, 1958, to plant and grow pineapple crops on his leasehold tract to supply fruits to said company, surrendered his lease thereon to you on May 31, 1960; that Francis Rosehill, who executed a similar agreement on March 30, 1959, with the pineapple company, surrendered his tract of homestead land to you on May 31, 1960; and that Edwina Q. Freeman, in whose behalf a similar planting agreement had been entered on January 16, 1957, surrendered her lease of the tract of homestead land, on which she had cultivated pineapples, to you on November 3, 1960.

It is apparent from the information furnished us by your executive officer that, under the pineapple block-planting agreements executed between the pineapple company, on the one hand, as buyer, and the three above-named previous lessees, on the other hand, as planters, the said net proceeds as of June 1, 1961, would have been distributed to them as owners of the pineapple crops from which fruits had been harvested and sold, if they had not terminated their respective tenancies in 1960 by surrendering their leases on the tracts mentioned.

It is reported by your executive officer that Libby, McNeill & Libby has agreed to pay over the said total of $3,205.61 to your department, provided that the Attorney General will give you an opinion stating that it would be proper for you to receive this money. May the Hawaiian Homes Commission receive the said $3,205.61 from the pineapple company? Our answer to this question is in the affirmative. We are not aware of any legal impediment to the collection of this money by your commission.

We advise further that the money so collected from Libby, McNeill & Libby be deposited by you, with the approval of the Comptroller, in a special account for such disposition thereof as may be in conformity with the law. It is clear that when Anthony Rodrigues, Francis Rosehill, and Edwina Q. Freeman terminated their tenancies in 1960 by surrendering their leases of the three agricultural tracts at Hoolehua, no appraisal was secured or made by your department of the value of the pineapple crops then growing on each of the three tracts being surrendered to you, and no payment was then made by you to these three previous lessees for such appraised valuation of the pineapple crops growing thereon. Under section 209 of the Hawaiian Homes Commission Act 1920, as amended, a lessee surrendering a lease is entitled to payment from the commission for the appraised value of the improvements and the crops on the homestead tract as of the date of surrender, less any indebtedness to the commission, or for taxes, or for any other indebtedness the payment of which has been assured by the commission. Such payment ordinarily is made from the loan fund as an advance therefrom, which is reimbursable out of payments to be made by the successor or successors to the tract involved.

We advise that, in keeping with the spirit and intent of the statute, you take appropriate steps to have an appraisal made of the value of the pineapple crops growing on each of the above-mentioned three tracts, as of the date in 1960 that each tract was surrendered, in the manner prescribed in paragraph 5 of said section 209. We understand from your department that there were no improvements (besides crops) on these tracts at the time they were surrendered. If this is correct, then no appraisal of the value of improvements on such tracts need be obtained. After securing such appraised valuation of the pineapple crops for each of the said three tracts, appropriate payments should be made to the three previous lessees herein named of the appraised values of their said crops from the $3,205.61, so collected and deposited in the special account, by paying that portion thereof which represents the appraised value of the pineapple crops for each particular tract as leased to Anthony Rodrigues, Francis Rosehill, and Edwina Q. Freeman, respectively. If there is any money remaining in said special account after you have made such payments, such remainder may subsequently be disposed of in such manner as may be considered proper under the law, as advised hereafter by this department.

Very truly yours,

(s) David Y. Mar

David Y. Mar
Deputy Attorney General

APPROVED:

(s) Shiro Kashiwa

Shiro Kashiwa
Attorney General

No Opinion

No. 61-67

INDEXING INSTRUCTIONS

Op. 61-68

CONSTITUTION, STATE OF HAWAII, Article XVI, Section 2.

Article XVI, Section 2 of the State Constitution clearly provides that all laws in force at the time the Constitution takes effect and not inconsistent thereto, including the Acts of Congress relating to the public lands, shall be the laws of the State and remain in force until they expire by their own limitation, or are altered or repealed by the legislature.

ADMISSION ACT, Section 15.

The two year proviso of Section 15 was intended by Congress to apply specifically to the administration of laws regulating intrastate commerce and was not intended to apply to the land laws.

AWL:GF
19a, 11a
Op. No. 61-68

STATE OF HAWAII

Department of the Attorney General

HONOLULU

July 3, 1961

The Honorable William F. Quinn
Governor of Hawaii
Iolani Palace
Honolulu 13, Hawaii

Dear Sir:

I have the honor to present my opinion upon a question by you concerning the effect of the existing land laws after August 21, 1961 as a result of the failure of passage of Senate Bill No. 3, the omnibus land bill, during the 1961 General Session of the Legislature. The question arises because of the ambiguity contained in Section 15 of the Admission Act (P. L. 86-3, 73 Stat. 4, approved March 18, 1959).

It is my opinion that the land laws of the State, being mainly Section 73 of the Organic Act and other Acts of Congress relating to the public lands in existence at the time of Statehood, have always been in effect since Hawaii became a State except as modified or changed by the Admission Act or by the Constitution and will continue in effect unless altered or repealed by the legislature.

Section 2 of Article XVI of the Constitution of the State of Hawaii, providing for the continuity of laws on admission of Hawaii into the Union, reads as follows:

> "Section 2. All laws in force at the time this constitution takes effect and not inconsistent therewith, including, among others, acts of the Congress relating to the lands in the possession, use and control of the Territory of Hawaii, shall be the laws of the State and remain in force, mutatis mutandis, until they expire by their own limitation, or are altered or repealed by the legislature."

The foregoing constitutional provision clearly provides that all laws in force at the time the Constitution takes effect and not inconsistent thereto, including the Acts of Congress relating to the public lands, shall be the laws of the State and remain in force, mutatis mutandis. The words "mutatis mutandis" were intended so that such changes as substituting the word "state" for "territory" or "treasurer of the State of Hawaii" for the words "treasurer of the Territory of Hawaii" and other similar changes would be effected. Standing Committee Report 68. Proceedings of the Constitutional Convention, Vol. 1, page 222.

In the Committee of the Whole Report No. 25, Proceedings of the Constitutional Convention, Vol. 1, page 351, the effect of Section 2, Article XVI, of the State Constitution was stated as follows:

> "This section continues in effect (a) not only the land laws of Hawaii (territorial and federal) except as otherwise provided in the constitution, but also (b) the provisions of other federal laws (not inconsistent with the state constitution or incongruous with the state system or scheme of government or laws) such as the Hawaiian Organic Act, insofar as the same constitute part of the system of laws that are local in their nature and, if not continued in effect, would cause a hiatus in our local or state government or system of laws. On the other hand, section 2 would, of course, not continue in effect laws of purely federal nature, such as the Mann Act, or the Interstate Commerce laws having both an interstate commerce application and an express intra-territorial application, which, as applied to a state would be incongruous with the state system."

It should be noted that the framers of the Constitution recognized that the land laws of Hawaii (territorial and federal) were continued by this section, that the laws which are continued by Section 2 are local laws and that if these laws are not continued would cause a hiatus in our state government. The report emphasized further that

Section 2 would not continue in effect laws of purely federal nature, such as the Mann Act or the Interstate Commerce laws having both an interstate application and an express intra-territorial application.

The Supreme Court of the State of Hawaii also recognized the effect of Section 2 of Article XVI of the State Constitution and Section 15 of the Admission Act in In the Matter of Island Airlines, Inc., 44 Hawaii 634, decided February 21, 1961, where the jurisdiction of the Federal Civil Aeronautics Board under the Federal Aviation Act of 1958 after Statehood was questioned. The court in that case stated:

> "We first consider the situation in 1950, when Article XVI, section 2 was agreed upon by the delegates to the Constitutional Convention. At that time, it was not the intention of the framers that this section should continue in effect 'laws of purely federal nature, such as the Mann Act, or the Interstate Commerce laws having both an interstate commerce application and an express intra-territorial application, which, as applied to a state would be incongruous with the state system'. (Com. Whole Rep. No. 25; I Proceedings of the Constitutional Convention 351.) It is important to note that the delegates did not then have before them the provision for federal enforcement of such laws for a limited period, which finally was evolved."

It should be noted that upon admission of a State into the Union it is well settled that all of the Territorial laws are abrogated except as continued in force by competent authority. In the Matter of Island Airlines, Inc., supra. In the case of Benner v. Porter, 50 U. S. (9 How.) 235, where a provision of the Florida Constitution similar to Article XVI, Section 2, of the Hawaii State Constitution was at issue, the court stated:

> "The [constitutional] convention being the fountain of all political power . . . [was] of course, competent to prescribe the laws and

> appoint the officers . . . by means whereof the government could be put into immediate operation and thus avoid an interregnum that must have intervened, . . .
>
> * * * * *
>
> "We think it clear, therefore, that on the unconditional admission of Florida into the Union as a State, . . . the Territorial government was displaced, abrogated, every part of it; and that no power of jurisdiction existed within her limits except that derived from the State authority . . . ."

The principle was also expressed in Permoli v. First Municipality of City of New Orleans, 44 U. S. (3 How.) 589, where the court held that the Act of 1805 had no further force after the adoption of the State Constitution of Louisiana, than other acts of Congress, organizing the Territorial government. The court said:

> ". . . the laws of Congress were all superseded by the State Constitution; nor is any part of them in force, unless they were adopted by the Constitution of Louisiana, as laws of the State."

It is therefore the opinion of this office, supported by the reports of the Constitutional Convention, that Section 2 of Article XVI of the State Constitution continued in force upon Statehood all laws, territorial or federal, relating to the public lands of Hawaii. As was stated in the Committee of the Whole Report of the Constitutional Convention, quoted in In the Matter of Island Airlines, Inc., supra, the laws not continued in effect under Section 2 of Article XVI consist of laws purely of a federal nature such as the Mann Act or the Interstate Commerce laws, having both an interstate commerce application and intra-territorial application, which as applied to a state would be incongruous with the state system.

Section 15 of the Admission Act reads as follows:

"Sec. 15. All Territorial laws in force in the Territory of Hawaii at the time of its admission into the Union shall continue in force in the State of Hawaii, except as modified or changed by this Act or by the constitution of the State, and shall be subject to repeal or amendment by the Legislature of the State of Hawaii, except as provided in section 4 of this Act with respect to the Hawaiian Homes Commission Act, 1920, as amended; and the laws of the United States shall have the same force and effect within the said State as elsewhere within the United States: Provided, That, except as herein otherwise provided, a Territorial law enacted by the Congress shall be terminated two years after the date of admission of the State of Hawaii into the Union or upon the effective date of any law enacted by the State of Hawaii which amends or repeals it, whichever may occur first. As used in this section, the term 'Territorial laws' includes (in addition to laws enacted by the Territorial Legislature of Hawaii) all laws or parts thereof enacted by the Congress the validity of which is dependent solely upon the authority of the Congress to provide for the government of Hawaii prior to its admission into the Union, and the term 'laws of the United States' includes all laws or parts thereof enacted by the Congress that (1) apply to or within Hawaii at the time of its admission into the Union, (2) are not 'Territorial laws' as defined in this paragraph, and (3) are not in conflict with any other provision of this Act." (Underscore added.)

The first underscored portion of Section 15, which starts with the words "all Territorial laws" up to the first semicolon, shall be referred to as the "permanent law

provision". The underscored proviso for termination at the expiration of two years shall be hereinafter referred to as the "two year proviso".

The permanent law provision commences with the provision that all "Territorial laws" in force in the Territory of Hawaii at the time of its admission into the Union shall continue in force except as modified or changed by the Admission Act or by the State Constitution. There is no inconsistency in Section 15 of the Admission Act with Article XVI, Section 2 of the State Constitution. The first question which arises is whether the public land laws of the Territory enacted by the Congress are included in the term "Territorial laws" as used in the permanent law provision of Section 15. It is the opinion of this office that the public land laws of the Territory enacted by the Congress are included in the term "Territorial laws" as used in the permanent law provision of Section 15.

The term "Territorial laws" is defined in Section 15 to include (1) laws of the legislature of the Territory of Hawaii and (2) laws enacted by Congress, the validity of which is dependent solely upon the authority of the Congress to provide for the government of the Territory. The authority of the Congress to enact the public land laws of the Territory was derived from Article IV, section 3, clause 2, of the Federal Constitution. In the Matter of Island Airlines, Inc., supra. Article IV, section 3, clause 2, reads as follows:

> "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be construed so as to Prejudice any claims of the United States, or of any particular State." (Underscore added.)

Under this provision of the Federal Constitution, Congress is authorized to pass laws respecting the Territory. The public land laws are therefore laws enacted by the Congress the validity of which is dependent solely upon the authority of Congress to provide for the Territory and are also included within the term "Territorial laws" as used in Section 15.

Section 15 of the Admission Act further provides in its two year proviso that "except as herein otherwise provided, a Territorial law enacted by the Congress shall be terminated two years after the date of admission of the State of Hawaii into the Union or upon the effective date of any law enacted by the State of Hawaii which amends or repeals it, whichever may occur first." Senate Report No. 80, 86th Congress, page 26, explains that this proviso was inserted as an amendment to Senate Bill 50 at the request of the Bureau of the Budget and refers specifically to the administration of laws regulating intrastate commerce. The court, in In the Matter of Island Airlines, Inc., supra, explains the background and reason for the proviso to Section 15 as follows:

> "That by the section 15 provision as to 'Territorial laws' Congress had in view the intraterritorial coverage of commerce acts is plain from the similar provisions of the Alaska Admission Act . . . . Interior Airways, Inc. v. Wien Alaska Airlines, Inc., supra. This also appears from the amendment of section 15 made in passage, inserting a provision terminating the congressionally enacted Territorial laws two years after the admission of the State, which as explained at pages 4 and 26 of the Committee Report in the Senate . . . was to introduce a cutoff period specifically with a view to the termination of federal responsibility for the administration of laws regulating intrastate commerce." (Underscore added.)

The two year proviso of Section 15 was therefore intended by Congress to apply specifically to the administration of laws regulating intrastate commerce. The two year proviso was not intended to apply to the land laws.

Irrespective of the argument that the two year proviso of Section 15 was inserted as an amendment to Senate Bill 50 by Congress to refer specifically to the administration of laws regulating intrastate commerce during the transition period, a careful scrutiny of Section 15 reveals that the permanent law provision was intended to include the land laws

of the Territory of Hawaii at the time of its admission into the Union and is consistent with Section 2 of Article XVI of the State Constitution. The permanent law provision commences with the provision that all Territorial laws in the Territory at the time of Statehood "shall continue in force in the State of Hawaii, except as modified or changed by this Act or by the Constitution of the State . . . ." It is logical and consistent that the land laws of the Territory should continue as laws of the State except as modified by the Admission Act or changed by the Constitution. Section 5 of the Admission Act has certainly modified the public land laws of the State. Some of the major changes were: (a) the lands ceded to the United States by the Republic of Hawaii were returned to the State by the Admission Act imposed under Section 5(f) with a public trust; (b) by Section 5(h) all laws of the United States reserving the free use or enjoyment of property which vests in or is conveyed to the State of Hawaii ceased to be effective upon Statehood; (c) by Section 5(g) the Submerged Land Act was made applicable to Hawaii. The Constitution has certainly changed in certain respects the public land laws of the Territory. In this area we note especially Section 4 of Article IX of the State Constitution which provides that the University of Hawaii shall have title to all the real and personal property "now or hereafter set aside or conveyed to it which shall be held in public trust for its purposes, to be administered and disposed of according to law." See Attorney General Opinion, dated February 27, 1961, by Deputy Attorney General Tenney Tongg, regarding the status of title set aside for the University of Hawaii by Executive Order of the Governor. It is significant that the permanent law provision of Section 15 mentioned continuation of the Territorial laws except as modified or changed by the State Constitution. Section 2 of Article XVI of the State Constitution continues in force all the laws in force at the time the Constitution became effective and not inconsistent thereto including specifically "the acts of Congress relating to the public lands." In this respect the permanent law provision of Section 15 and Section 2 of Article XVI of the Constitution are consistent. It should also be noted that in Section 1 of the Admission Act, the Constitution of the State of Hawaii was accepted, ratified and confirmed by Congress.

Section 15 in its permanent law provision further provides that all Territorial laws should continue as modified or changed by the Admission Act or by the State Constitution

and subject to repeal or amendment by the Legislature "except as provided in Section 4 of the Admission Act with respect to the Hawaiian Homes Commission Act, 1920, as amended . . . ." It is especially pertinent that the Hawaiian Homes Commission Act is inserted here to show that it is dealing with the public land laws.

With reference to provisos generally, it has been held:

> "The natural and appropriate office of a proviso is to modify the operation of the part of the statute immediately preceding the proviso, or to restrain or qualify the generality of the language that it follows. Indeed, the presumption is that a proviso in a statute refers only to the provision to which it is attached, and, as a general rule, a proviso is deemed to apply only to that immediately preceding clause or provision. It should be confined to what precedes . . . ." Dahlberg v. Young, 42 N. W. (2) 570, quoting 50 Am. Jur., Statutes, sec. 438. Fireside Mutual Life Insurance Co. v. Martin, 60 So. (2) 224.

It is also the rule that no proviso should be so construed as to destroy the preceding clause or provision. The interpretation of the two year proviso is in conformance with this very basic rule of construction.

Careful scrutiny of the two year proviso of Section 15 supports the contention that the land laws were not intended to be included in the scope of this proviso. The words "except as herein otherwise provided" refer to the preceding permanent law provision that all Territorial laws are continued except as modified or changed. The land laws by this language are excepted from the scope of the proviso. It should be noted that it was also probably the intention to except the Hawaiian Homes Commission Act of 1920, as amended, from the scope of the proviso. In the case of Sutton v. U. S., 157 F.(2) 661, the court stated that an exception is something that otherwise ought to be included in the category from which it is eliminated.

The land laws could not logically be included within the scope of the two year proviso of Section 15. The proviso contains no reference to modifications or changes by the Admission Act or Constitution but merely provides a termination date. Neither does it provide for legislative amendments. Logically therefore the permanent law provision of Section 15 applies to the public land laws and the two year proviso by its terms cannot logically be applied to these laws. In this regard, Senate Report No. 80 of the U. S. Congress previously discussed should be noted again. The report explained that this proviso was inserted to refer specifically to the administration of laws regulating intrastate commerce.

In the case of State Board of Optometrists v. S. S. Kresge Co., 174 A. 353, the court stated the principles regarding provisos as follows:

> "The law, however, does not attach a fixed and invariable meaning to a proviso. Its function generally is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the Legislature to be brought within its purview. Austin v. U. S., 155 U. S. 417, Lewis Sutherland Statutory Construction (2nd Edition) section 351. . . . A proviso follows the enacting clause and serves to defeat its operation conditionally. Western Assurance Co. v. J. H. Mohlman Co. (C.C.A.) 83 F. 811, 40 L.R.A. 561. Rowell v. Janvrin, 151 N. Y. 60, 45 N. E. 398.
>
> "But the guiding principle after all, in the interpretation of statutes, is to ascertain and effectuate the legislative intention and purpose.
>
> * * * * *
>
> "The true principle is that the sound interpretation and meaning of the statute on a view of the enacting clause, saving clause and proviso, taken and construed together is to prevail. . . .

* * * * *

"Proviso . . . are to be construed with the enacting clause, so as to carry out the intention of the legislature.

* * * * *

"Provisos are to be given a rational construction in harmony with the ascertainable general purpose and intent of the enactment considered in its entirety, aided when possible, by any other legislation in pari materia. Kelley v. Boyne, 239 Mich. 204, 214 N. W. 316, 319. 53 A.L.R. 273."

It is therefore my opinion that Section 2, Article XVI of the State Constitution, by its terms, clearly continued in force on Statehood the land laws of the Territory not inconsistent with the Constitution. The two year proviso of Section 15 terminating a Territorial law enacted by the Congress was intended by Congress to apply specifically to the administration of laws regulating intrastate commerce and is not applicable to the public land laws.

Respectfully submitted,

(s) Shiro Kashiwa

SHIRO KASHIWA
Attorney General

INDEXING INSTRUCTIONS

Op. 61-69

POWER OF ATTORNEY - Assignment

A power of attorney is a document creating a principal-agency relationship; it does not constitute an assignment.

LHK:ft
4c
Op. No. 61-69

STATE OF HAWAII

Department of the Attorney General

HONOLULU

June 29, 1961

Mr. Harold C. Hill, Secretary
Employees' Retirement System
State of Hawaii
Honolulu, Hawaii

Dear Mr. Hill:

This is in reply to your letter of June 19, 1961, requesting our opinion as to whether the document entitled "Special Power of Attorney" constitutes an assignment which is prohibited by law.

The Special Power of Attorney authorizes the Hawaiian Finance and Investment Company, Limited, to act as attorney to "receive, endorse and collect checks" payable to Taetafe Uperesa and Marian F. Uperesa, issued by the Employees' Retirement System. The document further reads as follows:

> "This power of attorney is not given to carry into effect an assignment to the attorney, or to any other person, of the right of the undersigned to receive the above described payments."

The applicable statute is section 6-58, Revised Laws of Hawaii 1955, which reads in part as follows:

> "The right of a person to a pension, an annuity or a retirement allowance . . . shall be unassignable except as in this part specifically provided."

The express terms of the Special Power of Attorney states that it is not given for the purpose of creating an assignment. Further, the general rule of law is that a power of attorney is a written authorization to an agent to perform specified acts on behalf of the principal. (2 Am. Jur. Agency § 27, p. 30.)

If the retirement checks are in fact paid to Taetafe Uperesa and Marian F. Uperesa by means of the subject document, it is the conclusion of this office that the document under consideration is not an assignment and does not violate section 6-58 of the Revised Laws of Hawaii 1955.

Yours very truly,

/s/ Lawrence H. Kam

Lawrence H. Kam
Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa

Shiro Kashiwa
Attorney General

Enclosures:
Ltr of 6/16/61
Document

INDEXING INSTRUCTION

Op. 61-70

INSURANCE

Dental care

HMSA may include dental care in its medical program (§ 185-1 to 185-19, R.L.H. 1955) but would lose its special operating allowance (§ 185-5) and tax exemption (§ 185-19, R.L.H. 1955).

Op. No. 61-70

LHK:es
17c
Op. 61-70 ✓

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

July 3, 1961

Dr. Charles H. Silva
Insurance Commissioner
Department of Treasury and Regulation
State of Hawaii
Honolulu, Hawaii

Dear Dr. Silva:

In your letter of March 9, 1961, you requested our opinion regarding the applicability of chapter 185, Revised Laws of Hawaii 1955, as amended, to the Hawaii Medical Service Association (hereinafter referred to as HMSA) should it offer a prepaid dental care program to the public.

Chapter 185 authorizes the formation of mutual and fraternal benefit societies for the purpose of providing sick, disability, death, and/or "other benefits" to its members. (Sections 185-1 to 185-19, Revised Laws of Hawaii 1955, as amended.)

The term "other benefits" was included in said chapter 185 in 1939 by the legislature. The Hawaii case construing this term is Godbold v. Manibog, 36 Haw. 206 (1942). There, the insurance commissioner sought to have a receiver appointed for the Filipino Aid Association, a registered fraternal benefit society, alleging, inter alia, that its funds were not sufficient to pay the rightful claims of its members for "going home" benefits, i.e., money to return to the Philippines. In commenting on the statutory change, the court stated at page 212 that:

> "The 1939 amendment made it quite clear that the protection theretofore given by governmental regulation to the contracts of members for death, sick and disability benefits was to be extended to such contracts for all other benefits offered by such an association. In other words, the statement

> in the opinion of this court in the cited case to the effect that 'if the society in question offered only going-home benefits it would not be subject to the provisions of the regulatory Act in question,' is no longer the law, since the 1939 amendment makes mutual benefit societies offering to pay death, sick, disability, or 'other benefits' subject to all of the provisions of the Act. . . ." (Emphasis added.)

The cited case referred to above is Martinez v. Parado, 35 Haw. 149. (See also Stdg. Com. Rep. #161, 1939 House Journal, p. 619; and Stdg. Com. Rep. #371, 1939 Senate Journal, p. 1343.)

In view of the foregoing, it is our opinion that the phrase "other benefits" is broad enough to include a dental care benefit program.

However, should HMSA elect to include dental care in its program, we believe that it would lose the benefits accorded by sections 185-5 and 185-19, Revised Laws of Hawaii 1955, as amended. Thereunder, an association or a society organized and operating "solely as a nonprofit medical indemnity and/or hospital service association or society" is granted a special operating allowance by section 185-5 and a tax exemption by section 185-19. (Emphasis added.)

The legislative journals do not shed any light as to whether dentists are to be included within the meaning of a medical and/or hospital service association. (Stdg. Com. Rep. #246 and #229, 1941 Senate Journal, pp. 612 and 582, respectively, and Stdg. Com. Rep. #678 and #435, 1941 House Journal, pp. 2100 and 1525, respectively.) That being the case, resort will be made to the following rule of statutory construction as contained in 51 American Jurisprudence, Taxation, section 524, page 526:

> "The fundamental theory of the tax structure of the several states is that all taxable property should bear its fair share of the cost and expense of government; and while property is taxable only when declared so by legislative enactment, the law does not read into the taxing statutes any implied exemption of particular property or particular property owners unless the intendment of the statute to make an exemption is plain. When

> the statute purports to grant an exemption from taxation, the universal rule of construction is that the tax exemption provision is to be construed strictly against the one who asserts the claim of exemption, in the absence of expressed legislative intent that the exemption is to be construed otherwise. . . . An exemption from taxation must be clearly defined and founded upon plain language. . . . Whenever doubt arises it is to be resolved against the exemption. . . ." (Emphasis added.)

The same rule of construction applies to a statute, such as section 185-5, which confers special privileges on corporations. (82 C.J.S., Statutes, § 387, p. 916; see H.C.&S. Co. v. Kahului Ry. Co., 11 Haw. 479, 486.)

So also, the dental and medical professions are generally regarded as being separate and distinct from each other. The practice of each is regulated by different statutory provisions (chapter 61 - "Dentistry"; chapter 64 - "Medicine and Surgery"), and the legal rights, duties, and responsibilities of each are dissimilar in many respects. (12 Words & Phrases, Dentists, p. 111; 86 A.L.R. 623, 625.)

In the absence of express language granting an operating allowance or tax exemption to dentists, the rule of strict construction should be followed and the doubt resolved against allowing any claim for such special privileges.

We are, therefore, of the opinion that although HMSA may include dental care within its program, it would, in so doing, forfeit its right to claim the special operating allowance and tax exemption as provided by sections 185-5 and 185-19, respectively.

Very truly yours,

/s/ LAWRENCE H. KAM
LAWRENCE H. KAM
Deputy Attorney General

APPROVED:

/s/ H. RODGER BETTS
H. RODGER BETTS
Acting Attorney General

Opinion No. 61-70

No Opinion

No. 61-71

INDEXING INSTRUCTIONS

Op. 61-72

SOCIAL SECURITY

Under section 3, Act 242, S.L.H. 1959, bonus payments made to two retirants who subsequently qualified for social security benefits through other employers should be discontinued even though the benefits are only partially attributable to contributions made by the government.

LHK:ft
4c
Op. No. 61-72

STATE OF HAWAII

Department of the Attorney General

HONOLULU

July 10, 1961

Mr. Harold C. Hill, Secretary
Employees' Retirement System
State of Hawaii
Honolulu, Hawaii

Dear Mr. Hill:

This is in response to your letter of June 20, 1961, requesting our opinion with respect to section 3 of Act 242, Session Laws of Hawaii 1959, which reads as follows:

> "The provisions of this Act shall not apply to any person who may retire or may have retired on or after July 1, 1957, and who will receive or who is receiving social security benefits upon his retirement when said benefits are based on contributions made by the Territory of Hawaii or any of its political subdivisions." (Emphasis added.)

In applying the above section, bonuses were paid to two retirants upon certification by the Social Security Administration that they were not qualified to receive social security benefits because they did not have a sufficient period of employment. However, after retirement the said claimants obtained the necessary period of coverage to qualify for social security benefits through other employers, who contributed statutory social security taxes.

The question is: Should the bonus payments be discontinued since the claimants are now qualified to receive social security benefits, or continued since the benefits are only partially attributable to contributions made by the government?

We feel that the payments should be discontinued.

The committee reports on said Act 242 do not contain any language from which we can ascertain legislative intent or from which we can conclude that the benefit must be based

on contributions made only by the government. (Stdg. Com. Rep. #752, 1959 House Jr., p. 844; Stdg. Com. Rep. #971, 1959 Sen. Jr., p. 61.)

Generally, the words of a statute are to be given their general or popular use or meaning (Sec. 1-17, R.L.H. 1955). Webster's New International Dictionary (2d ed. 1943), page 580, defines the word "contribution" as follows:

> "To give or grant in common with others, as to a common stock or for a common purpose; to furnish or supply in part; . . ." (Emphasis added.)

So, also, in Ballentine's Law Dictionary on Pronunciation (1948 ed.), page 284, "contribution" is defined as:

> "A payment made by each, or by any of several having a common interest or liability of his share in the loss suffered, or in the money necessarily paid by one of the parties in behalf of the others." (Emphasis added.)

From the above, it appears that the general or popular definition of "contribution" is that it means a payment by more than one party. Thus, in Carey v. Social Security Board, 62 F.Supp. 458 (1945), a child, through his guardian, sought to obtain insurance benefits under the Social Security Act, alleging that he was dependent upon the wage earner, his mother, at the time of the latter's death. The evidence indicated that the father, who divorced the mother, contributed only 25 percent of the child's total expenses at the time of the mother's death. Under the Social Security Act, a child is deemed dependent on the mother only if no other parent was "contributing to the support of such child." In construing the statute, the court recited the definition of "contribution" from Webster, above, stating:

> "Obviously, it [contribution] means to furnish or give the necessary funds only in part, in common with similar payments by others, many of which are often much larger than our own. It does not mean to give or furnish the major portion of the common fund being raised."

In the light of the foregoing authorities, this office is of the opinion that the word "contribution" in Act 242 should not be construed to mean a contribution paid only

by the government. Therefore, since the two claimants are now qualified to receive social security benefits, the bonuses provided by said Act 242, Session Laws of Hawaii 1959, should be discontinued even though said benefits are only partially attributable to contributions made by the State or any of its local subdivisions.

Very truly yours,

/s/ Lawrence H. Kam

Lawrence H. Kam
Deputy Attorney General

APPROVED:

/s/ H. Rodger Betts

H. Rodger Betts
Acting Attorney General

INDEXING INSTRUCTIONS

Op. 61-73

INSURANCE - TRADE ASSOCIATION

The Hawaii Employers Council is not a trade association as provided by section 181-568.5, R.L.H. 1955, as it is not comprised of persons belonging to a single trade engaged in business for profit.

LHK:ft
~~46~~ 17a
Op. No. 61-73

STATE OF HAWAII

Department of the Attorney General

HONOLULU

July 13, 1961

Dr. Charles H. Silva
Insurance Commissioner
Department of Treasury and Regulation
Iolani Barracks
Honolulu, Hawaii

Dear Dr. Silva:

By letter dated July 5, 1961, we were requested to render an opinion as to whether the Hawaii Employers Council is a "trade association" within the provisions of section 181-568.5, Revised Laws of Hawaii 1955 (Act 245, Session Laws of Hawaii 1959).

The Hawaii Employers Council is a voluntary, non-profit association organized to promote employer-employee relations. Its membership consists of 252 companies which are engaged in many diversified business activities. (Hawaii Employers Council's 16th Annual Report, 1959.) In the event the Council is a "trade association," a group insurance policy will be issued to it to insure the lives of its members.

The statute here involved, said section 181-568.5, reads as follows:

> "The lives of a group of individuals may be insured under a policy issued to an association of individuals belonging to a single occupation, industry or trade association, which shall be deemed the policyholder, to insure members of such association for the benefit of persons other than the association or any of its officials subject to the following requirements . . ." (Emphasis added.)

The term "trade association" has been defined in People ex rel. Padula et al. v. Hughes, 296 Ill. App. 587, 16 N.E.2d 922, 924, as follows:

> "In general use the words 'trade associations' convey the meaning of an association of employers in the same trade. . . ." (Emphasis added.)

So, also, "trade" is defined in Ballentine's Dictionary in Pronunciation (1948 ed.), p. 1291, to mean:

> "In its broadest significance, the word includes any bargain or sale . . . any occupation or business carried on for subsistence or profit . . . the usual meaning of the word has reference to the business of selling or exchanging some tangible substance or commodity, by the business of dealing by way of sale or exchange in commodities." (Emphasis added.)

It is evident that since the members of the Hawaii Employers Council are engaged in many diversified business activities, the Council is not an association of individuals belonging to a single or the same trade; nor is the Council in the business of carrying on a business for profit.

We are, therefore, of the opinion that a group life insurance may not be issued to the Hawaii Employers Council since it is not a "trade association" as provided by section 181-568.5, Revised Laws of Hawaii 1955.

Very truly yours,

/s/ Lawrence H. Kam

Lawrence H. Kam
Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa

Shiro Kashiwa
Attorney General

INDEXING INSTRUCTION

Op. 61-74

PUBLIC FUNDS

State Disaster Commercial Loan

Act 6, Special Session Laws of Hawaii 1960, authorizes the Department of Economic Development to request $600,000 at the start of the fiscal year; said fund can exceed $600,000 which will not lapse into the general fund after one year.

SPECIAL SESSION LAWS OF HAWAII 1960

Act 6

LHK:GF
5a
Op. No. 61-74

STATE OF HAWAII

Department of the Attorney General

HONOLULU

July 17, 1961

Mr. George Mason, Director
Department of Economic Development
1124 Miller Street
Honolulu 13, Hawaii

Dear Mr. Mason:

This is in response to your request for an opinion regarding Act 6, Special Session Laws of Hawaii 1960, entitled "A Bill for An Act Providing for State Disaster Commercial Loans to Rehabilitate Businessmen and Businesses Suffering Losses Resulting from a Disaster Occurring on or after May 23, 1960, and Making an Appropriation." 1/

Your questions will be answered in the order set forth in your letter.

> "1. Does this Act authorize our Department to request sufficient monies to bring the State Disaster Commercial Loan Fund up to $600,000 at the beginning of a fiscal period in anticipation of a disaster or is it contemplated that funds should be applied for after the occurrence of a disaster?"

Section 12(b) of Act 6, which establishes the loan fund under consideration, reads:

> "(b) There is hereby created a fund to be known as the 'State Disaster Commercial Loan Fund,' the moneys from which or so much thereof as may be necessary shall be used by or under the direction of the administrator for the making of loans under this Act. There is hereby appropriated to the State Disaster Commercial Loan Fund sufficient moneys from the general revenues not otherwise appropriated as will from time to time be required to re-establish the said fund at the total of $600,000; provided that the administrator may not apply or may not use in excess of $600,000 for loans for any single disaster."

1/ See also Act 189, S.L.H. 1961.

While considering the above subsection, the legislature stated:

> "It is the intent of the committee that this bill should take care of future disasters . . . Section 12(b) appropriates moneys for future disasters." (Stdg. Com. Rep. #13, Hse. Jud. Com.)

So, also, Conference Committee Report #1 by the Committee on Conference stated:

> "Section 12(b) has been amended to avoid annual appropriation by the legislature, yet assure the availability of the total sum when a disaster occurs."

From the above, it is clear that the legislature intended to have funds readily available should a disaster occur. Therefore, Act 6 does authorize your department to request $600,000 for the State Disaster Commercial Loan Fund at the beginning of the fiscal year in anticipation of a disaster.

> "2. If more than one disaster occurs within a year, can the total of the fund exceed $600,000 at any one time?"

The only limitation imposed by subsection (b) above is that the "administrator may not apply or may not use in excess of $600,000 for loans for any single disaster." Should there be more than one disaster within a year, it is the opinion of this office that the total fund can exceed $600,000.

> "3. If monies are to be appropriated to the loan fund rather than to a specific disaster, will these monies lapse to the general fund of the State of Hawaii after one year in the same manner that monies appropriated to a specific disaster would lapse?"

The answer is "no". Subsection (d) of Act 6 provides for the lapsing of funds appropriated for a <u>specific</u> disaster area. It reads:

> "All repayments of loans made under this Act and interest collected thereon shall be credited to the

general fund of the State. Any amounts appropriated for a specific disaster area and remaining uncommitted one (1) year after the occurrence of the respective disaster shall lapse into the general fund of the State of Hawaii."

The above proviso does not relate to moneys appropriated to the commercial loan fund. (See Stdg. Com. Rep. No. 13, Hse. Jud. Com. Sp.S.L. 1960)

However, subsection (b) appropriates "to the State Disaster Commercial Loan Fund sufficient moneys from the general revenues not otherwise appropriated as will from time to time be required to re-establish the said fund at the total of $600,000 . . . ." As stated hereinbefore, the purpose of adopting Act 6 is to have $600,000 ready and available for future disasters. To rule that this sum will lapse into the general fund after one year would defeat the very purpose of the bill.

We therefore conclude that moneys appropriated to the State Disaster Commercial Loan Fund do not lapse into the general fund in the same manner as funds appropriated for a specific disaster area.

Very truly yours,

/s/ Lawrence H. Kam

Lawrence H. Kam
Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa

Shiro Kashiwa
Attorney General

INDEXING INSTRUCTIONS

OP. 61-75

HAWAIIAN HOMES COMMISSION

HAWAIIAN HOMES COMMISSION

Selecting successor to deceased lessee

Selection of successor by Commissioners following the death of a lessee without designating a successor in his lifeline

Appraisal of value of improvements on tract leased to lessee before his death

Where lessee dies leaving improvements on tract Commission shall cause value of improvements to be appraised in accordance with procedure in sec. 209 of the Hawaiian Homes Commission Act, 1920

Payment of appraised value of improvements following death of lessee

Where lessee dies leaving improvements on tract, the Commission, after appraising value of improvements in accordance with procedure prescribed in the Hawaiian Homes Commission Act, 1920, shall pay the legal representative of the deceased lessee the appraised value of the improvements less any indebtedness to the Commission, or for taxes or for any indebtedness the payment of which has been assured by the Commission from the deceased lessee.

HAWAIIAN HOMES COMMISSION ACT 1920, as amended

Sec. 209

STATE OF HAWAII

Department of the Attorney General

DYM:hmm
441:8a

HONOLULU

July 19, 1961

OP. 61-75

Mr. William Kea, Chairman
Hawaiian Homes Commission
Department of Hawaiian Home Lands
State of Hawaii
Honolulu, Hawaii

Dear Mr. Chairman:

This is in response to your request for advice on the procedure which your Commission may properly follow in selecting a successor to take over the tract heretofore leased to James Spencer in Waimea on the Island of Hawaii. According to your department, James Spencer died on March 6, 1961, leaving a widow and two daughters who are married. During his lifetime, he did not designate any beneficiary or beneficiaries to succeed to his interests in the tract following his death. Nor did the Commission select, while he was living, any qualified person from his relatives in the order named in, and as provided by, section 209(1), Hawaiian Homes Commission Act, to succeed to his interests in the tract upon his death. His widow and his daughters, although of mixed Hawaiian descent, cannot meet the statutory requirement that a lessee be a "native Hawaiian" descendant having not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778. James Spencer's surviving brothers and sisters, and one son-in-law, however, are reported to be able to meet such blood requirements under the statute. Partly for this reason, the widow has requested that the Commission appoint this son-in-law, as her deceased husband's successor of the tract.

What is the proper procedure for the Commission to follow in this case? The law governing the selection of successors to deceased lessees is set forth under section 209 of the Hawaiian Homes Commission Act. In brief, and so far as material to our consideration of this case, it provides that the lessee shall designate the person to whom he directs his interests in the tract to vest upon his death from his relatives in the following order: "husband and wife, children, widows or widowers of the children, grandchildren, brothers or sisters, widows or widowers of the brothers and sisters, or nieces and nephews". If such designation

is made in writing, and in conformity with other requisites prescribed under subsection (1) of said section 209 of the Act, and if the designation is properly approved by and filed with the Commission, upon death the lessee's interest in the tract and his improvements thereon, including growing crops, shall vest in the relative so designated as a successor, provided that the person so designated can qualify as such successor under the Act. In the absence of such designation, the law also provides that the Commission shall, while the lessee is living, select from the relatives of the lessee in the order named under said section 209 the person who can qualify as a successor under the Act, and upon the death of such lessee, his interest in the tract shall vest in the relative so selected by the Commission. Where no such designation, and no such selection, have been made during the lifetime of the lessee, the Commission, following the death of the lessee, may select such a successor, and make the rights to the use and occupancy of the tract effective as of the date of the death of such lessee.

Considering the facts in this case, as reported to us, in the light of the intent of the statute as manifested by the pertinent provisions of section 209 of the Hawaiian Homes Commission Act, as summarized hereinabove, we are of the opinion that the Commission is vested with broad discretion under said section 209 of the Act to consider the qualifications of the persons representing the classes of relatives of the deceased lessee, as named for purposes of succession in the statute, and to select therefrom that person who, in the judgment of the Commission, is most qualified for the purpose of succession to perform the conditions of the lease under the statute. The widow and the children of the deceased lessee, being unable to meet the blood requirements under the Act, are disqualified by law, thus leaving the brothers and sisters and such other relatives, if any, of the deceased lessee as may be able to qualify under the law for selection by the Commission. If the Commission, in the exercise of its discretion, should be unable to choose a qualified successor from the relatives of the decedent represented in the classes of relatives named in said section 209 of the statute, as mentioned, or if the Commission after choosing from such relatives a person who declines to become, or who, for other reasons cannot become, such a successor--in any such event the Commission may properly consider the qualifications of the son-in-law hereinbefore mentioned, and if, after such consideration, the Commission should select the deceased lessee's said son-in-law to succeed to the rights to the use and occupancy of the said tract in Waimea, the Commission would be acting within the discretionary authority conferred upon it under said section 209 of the statute to select a successor after the death of the lessee.

The Commission is also advised to secure an appraisal of the value of the improvements, including growing crops, on the tract leased to James Spencer, as of the date of his death, and to pay to the legal representative of the deceased lessee the value thereof, less any indebtedness to the Commission, or for taxes, or for any other indebtedness the payment of which has been assured by the Commission, from the deceased lessee. Under said section 209 of the Act, the law provides that such payments shall be made out of the loan fund, and shall be considered an advance therefrom reimbursable out of payments to be made by the successor or successors to the tract involved. In this connection it is well to point out also that the law provides that such appraisal shall be made by three appraisers, one of whom shall be named by the Commission, one by the legal representative of the deceased lessee, and the third to be selected by the two appraisers hereinbefore mentioned.

Very truly yours,

/s/ David Y. Mar

DAVID Y. MAR
Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa

SHIRO KASHIWA
Attorney General

INDEXING INSTRUCTION

Op. 61-76

INSURANCE

Mililani Memorial Park

Mililani Memorial Park would be engaged in the insurance business (§ 181-4(a), R.L.H. 1955) if it sold installment contracts for cemetery plots, which contracts would cancel any balance remaining unpaid in the event of the buyer's death before payment in full.

LHK:es
17a
Op. 61-76

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

July 20, 1961

Dr. Charles H. Silva
Insurance Commissioner
Department of Treasury and Regulation
P. O. Box 3614
Honolulu 11, Hawaii

Dear Sir:

This is in reply to your request for a formal opinion from our office as to whether or not Mililani Memorial Park is engaged in the business of insurance.

Mililani Memorial Park is not registered to conduct such business. However, they contemplate selling contracts to the general public which, in essence, provides for the purchase of a cemetery plot on an installment plan. In the event of death before payment in full, the Park agrees to cancel any balance then remaining unpaid.

Before selling insurance within the State, section 181-2, Revised Laws of Hawaii 1955, requires:

> "No person shall transact a business of insurance in this Territory without complying with the applicable provisions of this chapter. . . ."

A contract of insurance is defined in section 181-4(a) as follows:

> "Insurance is a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies."

The general rule is that "Whether or not a contract is one of insurance is to be determined by its purpose, effect, contents, and import, and not necessarily by the terminology used, and even though it contains declarations to the contrary."

(29 Am. Jur., Insurance, § 5, p. 436; Ware v. Heath, ___ Tex. ___, 237 S.W.2d 362; A.G. Ops. 58-160, 59-53.)

In particular, 29 American Jurisprudence, Insurance, § 9, page 438, states:

> "In several cases it has been held that a contract providing that the obligation thereof should be canceled in case of death or other extrinsic event was a contract of insurance. For instance, it has been ruled that an undertaking on the part of one selling merchandise on the instalment plan to cancel the debt in case the buyer dies before its satisfaction is insurance within the meaning of a statute prohibiting the making of insurance contracts except by the companies and in the manner authorized by law." (Emphasis added.)

A case in point is Ruto v. Italian Burial Casket Co., 104 Pa. Sup. Ct. 288, 158 A. 657. Contracts for funeral services and burial equipment were issued to the plaintiffs, obligees, in consideration of weekly payments until the payments totalled $200 on each contract. The contracts provided, however, that "in the event of the death" of the obligees, "all payments provided for shall absolutely cease." The court pointed out that the distinguishing characteristic of a contract of insurance was:

> ". . . the chance of gain to the estate of the obligee and loss to the obligor if the obligee should die before the payments aggregate $200. . . .
>
> "We think the contracts now in suit were contracts of insurance, and were unlawfully issued."

Arlington Cemetery Co. v. Baldridge (Pa.), 19 Del. Co. Rep. 625 (1929), also involves an installment contract for the sale of a cemetery plot. The contract provided that on the death of the purchaser, the balance of the installments due shall be cancelled and the deed to the lot delivered to the purchaser. The court held that the contract was one of insurance, requiring the seller to comply with the statutory regulations applicable to insurance companies.

Similar rulings are found in Ware v. Heath, supra; Atty. Gen. v. Osgood, 249 Mass. 473, 144 N.E. 371; see also 35 A.L.R. 1039 and 100 A.L.R. 1454.

The foregoing principles apply to the instant case. The chance of gain to the estate of the buyer and loss to the seller is the characteristic which distinguishes it as a contract of insurance. The purpose and effect of the contract is to indemnify the purchaser upon the contingency of his death prior to payment of the contract price in full.

In conclusion, this office is of the opinion that the contract is one of indemnity as defined by section 181-4, Revised Laws of Hawaii 1955. Pursuant to the aforesaid section 181-2, Mililani Memorial Park must therefore comply with the provisions of chapter 181, Revised Laws of Hawaii 1955, before it can issue any such contracts for the sale of cemetery plots.

Very truly yours,

/s/ LAWRENCE H. KAM

LAWRENCE H. KAM
Deputy Attorney General

APPROVED:

/s/ SHIRO KASHIWA

SHIRO KASHIWA
Attorney General

INDEXING INSTRUCTIONS

OP-61-77

COURTS

Fees

Section 219-5(b) requires a filing fee of $10 in certain prescribed actions and proceedings. An amended complaint being merely a substitution for the original complaint does not require the fee chargeable under section 219-5(b).

RECORDS

Charge

Same Syllabus

REVISED LAWS OF HAWAII 1955

Section 219-5(a)

Section 219-5(b)

Op. 61-77

ASKF:ru
21a

Op. 61-77

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU, HAWAII

July 21, 1961

Mr. Elmer E. Poston
Administrative Director
Judiciary Department
State of Hawaii
Honolulu, Hawaii

Dear Mr. Poston:

This is in response to your letter of July 14, 1961, requesting an opinion as to whether or not a fee of $10 should be collected under the provisions of section 219-5(b), Revised Laws of Hawaii 1955, whenever an amended complaint is filed. You indicated in your letter that the practice in the First Circuit Court is that no fee is currently charged when an amended complaint and summons is filed and issued. Because of the question raised by Judge Tamao Monden of the Third Circuit Court, your inquiry was whether such fee is required under the provisions of the above-mentioned section.

Chapter 219, Revised Laws of Hawaii 1955, entitled "Costs and Fees" prescribes the filing costs and other fees which are to be imposed in the courts of the State--district, circuit and supreme. This chapter does not require that all papers filed in courts be imposed costs but only in certain prescribed actions and proceedings.

Section 219-5(a), Revised Laws of Hawaii 1955, as amended, provides that:

> "Upon the institution of any suit, action or other proceeding in the circuit court, whether by original process, complaint, libel, petition, information or otherwise, . . .there shall be paid to the clerk of the circuit court by the person so instituting such suit, action or other proceeding, as costs of court, except as otherwise provided, the following sums:" (Emphasis added.)

Section 219-5(b), Revised Laws of Hawaii 1955, as amended, provides that:

> "Upon the filing of any paper in the nature of a cross bill or petition, cross libel, counter-claim, intervention or wherein any affirmative relief is sought, there shall be paid to the clerk of the circuit court by the person filing the same, as costs of court, the sum of $10.00 and, in addition, for every copy of process to be served $1.00."

From the above quoted sections, it is clear that the statute requires that a filing fee of $10 be paid upon the instituting of any suit, action or proceeding in any circuit court and upon the filing of papers seeking any affirmative relief.

An amended complaint does not fall into the category of any of the classes of papers filed for which section (b) requires a filing fee of $10 or the $1 copy of process to be served. An amended complaint is merely a substitution for the original complaint filed with the court and, in many cases, may be made if accepted by the court orally or even after trial and proof of the issues have been commenced.

We feel that no fee is required or chargeable under section 219-5(b) for an amended complaint. To hold otherwise would mean that a filing fee should also be charged in cases where motions and other documents were filed with the court even though not enumerated and specified in the statute.

Very truly yours,

/s/ Arthur S. K. Fong

Arthur S. K. Fong
Deputy Attorney General

cc: Third Circuit Court

APPROVED:

/s/ Shiro Kashiwa

Shiro Kashiwa
Attorney General

Op. 61-77

INDEXING INSTRUCTIONS

Opinion No. 61-78

PUBLIC MONEYS

Expenditures

A. Section 9-45, Revised Laws of Hawaii 1955, as amended by Act 55, General Session of 1961, provides for the performance of printing outside the State if it can be established that the work cannot be performed within the State or the lowest price within the State exceeds the bid of a Mainland firm by five per cent.

B. Section 9-45, Revised Laws of Hawaii 1955, as amended, is not an exception to the requirement of competitive bidding set forth in Section 9-21, Revised Laws of Hawaii 1955, and sealed tenders must be received from Mainland firms interested in doing the job.

PUBLIC CONTRACTS

Advertisement and Bids

A. See above.

B. See above.

REVISED LAWS OF HAWAII 1955

Section 9-45, as amended by Act 55, General Session 1961.

AWL:ai
22a
Op. No. 61-78

STATE OF HAWAII

Department of the Attorney General

HONOLULU

July 25, 1961

Mr. Walter G. Chuck
Clerk of the Senate
First State Legislature
Iolani Palace
Honolulu, Hawaii

Dear Sir:

This is in reply to your request dated July 11, 1961, for an opinion on the questions:

> "1. Can the printing and binding of the Senate Journal be done outside the State of Hawaii?
>
> "2. If such printing can be done outside the State must I request bids from firms who might be interested in doing the job or may I negotiate the same as long as the price is below $10.96 per page and more than 5% difference exists between the successful price and the said amount of $10.96?"

Senate Resolution No. 123 authorizes the Clerk of the Senate to call for bids for the printing and binding of the Journal of the Senate, General Session of 1961. This resolution is sufficient authorization to carry out the inner administration of the Senate. Pursuant to a call for sealed tenders you have received bids from Tongg Publishing Company on Alternate A for $15.84 a page and from Fisher Corporation on Alternate B for $10.96 a page.

Section 9-45, Revised Laws of Hawaii 1955, as amended by Act 55, General Session of 1961, provides that:

> "Printing, binding and stationery work. All printing, binding and stationery work for the State or any county, or other political subdivision thereof shall be performed within the State, and all requests for bids or contracts for such work shall so stipulate; provided that whenever it

Thermofax copy given to Mrs. Patricia Putnam of Legislative Reference Bureau, U.H. 10/24/61.

shall be established that any such work cannot be performed within the State or that the lowest price for which such work can be procured within the State exceeds the bid or charge of a mainland manufacturer of such item by five per cent, such work or any part thereof so affected may be performed outside the State."

Since the printing and binding of the Senate Journal involves the expenditure of public monies, it is our opinion that Section 9-45, Revised Laws of Hawaii 1955, as amended, is applicable. Your first question is, therefore, answered in the affirmative if the bids from firms within the State exceeds the bid of a mainland firm by five per cent.

With reference to your second question, it is our opinion that if such printing is to be done outside the State you may not negotiate a price which is five per cent below the lowest bid submitted. Sealed bids must be requested from mainland firms who might be interested in doing the job. Said Section 9-45 merely provides that the work may be performed outside the State and is not an exception to the requirement of competitive bidding set forth in Section 9-21, R.L.H. 1955. Section 9-21 provides that all expenditures of public money over $4,000 shall be by sealed bids in the manner set forth in Chapter 9. The exceptions to competitive bidding set forth in Sections 9-21 and 9-22, R.L.H. 1955, do not apply in this situation.

You may, however, under Section 9-26, R.L.H. 1955 reject all bids submitted and readvertise for bids in the manner provided in Section 9-21. Mainland firms may participate in such bidding and if the bid price of any mainland firm as evidenced by such bids is five per cent lower than the bid price of local firms, the work may be performed outside the State under the provisions of said Section 9-55, R.L.H. 1955, as amended. This is in compliance with the requirement for competitive bidding in the expenditures of public money over said $4,000.

Respectfully submitted,
/s/ ALANA W. LAU
ALANA W. LAU
Deputy Attorney General

APPROVED:
/s/ SHIRO KASHIWA

SHIRO KASHIWA
Attorney General

pb.

Opinion No. 61-78

INDEXING INSTRUCTIONS

OP. 61-79

PARDON

Effect on revoked motor vehicle license.

LICENSES

Motor vehicle license revoked as affected by pardon.

REVISED LAWS OF HAWAII 1955

Section 160-57

Section 160-75

Op. 61-79

ASKF:ru
454:19a,19b

Op. 61-79

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU, HAWAII

July 26, 1961

Honorable James K. Kealoha
Acting Governor
State of Hawaii
Iolani Palace Grounds
Honolulu, Hawaii

Dear Sir:

Re: George B. Paris

This is in reply to your letter of July 20, 1961, inquiring into the effect of the granting of a pardon to George B. Paris and his right to a new driver's license in view of his recent conviction for drunk driving. As you indicated, George B. Paris was convicted in the First Circuit Court on May 26, 1961, for the offense of drunk driving, for which conviction Judge Allen R. Hawkins imposed a $50 fine, suspended for 13 months, and revoked his chauffeur's license.

Section 5, Article IV of the Constitution of the State of Hawaii provides that the governor may grant reprieves, commutations and pardons for all offenses.

Section 160-57, Revised Laws of Hawaii 1955, provides that:

> "A court of competent jurisdiction shall not suspend a license for a longer period than one year; and when a court has revoked a license, the examiner of chauffeurs shall not <u>in any event</u> grant an application for a new license until the expiration of one year after the date of such revocation." (Emphasis added.)

A pardon is an executive act of grace which exempts an individual from the punishment the law inflicts for a crime he has committed.

The purposes of requiring chauffeurs and operators of motor vehicles to be licensed are to insure the competency of the operators and to regulate the use of motor vehicles on the public highways in the interest of public safety.

A pardon by the governor does not restore the right to a license, which has been revoked either finally or with provisions for reissuance, by certain conditions to the operator of the motor vehicle. 67 C.J.S., para. 11(b) 5, p. 580. Pritchard v. Battle, 17 S.E. 2d 393, Baldi v. Gilchrist, 198 N.Y. Sup. 493.

It seems clear from the above authorities that where the license to operate a motor vehicle has been revoked pursuant to a conviction enumerated under the statute, a subsequent pardon by the governor does not wipe out the fact of the conviction or the fact that by reason of the act committed the petitioner was put in a class regarded by the state as being unfit to drive automobiles on highways without making additional provisions for the safety of others. The pardon merely acts to exempt the pardoned from punishment due to the conviction, but not as to the revocation of license.

Accordingly, we feel that the granting of a pardon in this particular instance to George B. Paris would not in any way waive a revocation period of one year stipulated by section 160-75, Revised Laws of Hawaii 1955.

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Very truly yours,

/s/ Arthur S. K. Fong

Arthur S. K. Fong
Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa

Shiro Kashiwa
Attorney General

PUBLIC LANDS

Rules and Regulations

The rules and regulations of the Fish and Game Division must comply with the public hearing, etc. requirements contained in 7-29, R.L.H. 1955 in order to have the force and effect of law.

RULES AND REGULATIONS

Fish and Game

See above.

SECTION 29, CHAPTER 7, REVISED LAWS OF HAWAII 1955

Rules and Regulations

See above.

KO:mh
11a
Op. No. 61-80

STATE OF HAWAII

Department of the Attorney General

HONOLULU

August 1, 1961

Mr. E. H. Cook, Director
Department of Land and Natural Resources
State Office Building
Honolulu, Hawaii

Subject: Rules and Regulations for Fish and Game Division

Dear Sir:

This is in reply to a letter dated April 11, 1961 from Mr. Gordon P. Chung-Hoon, the Director of Agriculture and Conservation, requesting a written opinion on the following question:

> "Specifically, can the Board of Agriculture and Conservation adopt special permit rules governing hunting and fishing having the force and effect of law, pursuant to the provisions and guide lines prescribed in a regulation promulgated in accordance with Section 7-29, Revised Laws of Hawaii 1955, without holding a public hearing on such proposed rules and without publishing a notice therefor?"

Because the Fish and Game Division has been transferred to the Department of Land and Natural Resources pursuant to Act 132 (S.B. 363), of the 1961 General Session of the State Legislature, this reply to the question above is submitted to your department rather than the Department of Agriculture.

The laws applicable to the adopting, amending and repealing of the rules and regulations for fishing and hunting

having the force and effect of law are at the present time covered by Chapters 7, 18, and 21 of the Revised Laws of Hawaii 1955.

Section 8, Chapter 18 of the Revised Laws of Hawaii 1955 reads in part as follows:

> "§ 18-8. Rules and regulations. The board shall make rules and regulations in conformity with chapters 18-27 and amend the same as occasion requires subject to the approval of the governor, for and concerning:
>
> "...
>
> "(d) The protection of introduced and transplanted fish, game and shellfish, or the conservation of the natural supply of fish in any area where, in the judgment of the board, such supply has been or may soon be seriously depleted; such rules and regulations may include the following: size limits, bag limits, open and closed seasons, specifications of fishing gear which may be used or possessed in the fishing areas and the conditions for entry into fishing areas; such rules and regulations shall not be inconsistent with any existing territorial law;
>
> "...
>
> "All rules and regulations made as aforesaid, when approved by the governor and duly published, shall have the force and effect of law."

In addition to the above requirements that the Board must obtain the approval of the governor and duly publish same, the legislature has deemed it wise to require a public hearing after published notice before such rules

and regulations have the force and effect of law. This further requirement is contained in Section 29, Chapter 7, Revised Laws of Hawaii 1955 which reads as follows:

> "§ 7-29. Public hearings on rules and regulations having the force and effect of law; notice thereof. Prior to making, amending or repealing any rule or regulation, having the force and effect of law, all officers who, and all boards, commissions and other governmental agencies which, have the power to make such rules and regulations shall hold a public hearing upon such proposed rule or regulation, or amendment or repeal of any rule or regulation, of which public hearing a notice shall first be published in a newspaper of general circulation (one publication) not less than four days before the date set for such hearing. Such notice shall state the time and place for such hearing and the general purpose of the proposed rule or regulation, to be considered at such hearings."

The law is clear and explicit that, at the present time, a public hearing after published notice is necessary before any such rule and regulation can have the force and effect of law. The procedural requirements for the adoption, etc. of these rules and regulations set forth in 7-29, Revised Laws of Hawaii 1955 quoted above must be complied with before the rules and regulations can have the force and effect of law.

We would like to call to your attention at this time the Hawaii Administrative Procedure Act (Act 103, H.B. 5) passed at the last session of the legislature. This Act 103 sets up an entirely new procedure on rules and regulations and will become effective January 2, 1962. It would be wise

to be thoroughly familiar with the matters contained in the Act which are applicable to your department and to be prepared to set into motion the procedure outlined therein.

Very truly yours,

Koozo Okamoto
Deputy Attorney General

APPROVED:

Shiro Kashiwa
Attorney General

INDEX

Hawaii Housing Authority

HHA may grant a sewage easement to the City & County of Honolulu through land owned by the Authority.

Statutes

Section 74-11, RLH 1955.

Opinion No. 61-81

THT:hos
14b
Op. No. 61-81

STATE OF HAWAII

Department of the Attorney General

HONOLULU

August 2, 1961

Hawaii Housing Authority
Department of Social Services
State of Hawaii
Honolulu, Hawaii

Attention: Mr. A. V. Sullivan

Gentlemen:

Subject: Sewer Easement for City & County of Honolulu Through Southern Boundary of Kalakaua Housing

This is in response to your oral request for an opinion requested by the Public Housing Authority from the Department of the Attorney General as to whether or not the Hawaii Housing Authority may grant an easement to the City and County of Honolulu for a sewer line through the southern boundary of Kalakaua Housing (Kaheka Street to Kalakaua Avenue: Land Court Application No. 1263), which is property owned and administered by the Hawaii Housing Authority.

The answer to your query is yes.

The Authority is empowered to sell, exchange, transfer, assign or pledge any property, real or personal, or any interest therein to any person, firm, corporation or government. Section 74-11, RLH 1955. An easement is an interest in realty which may be transferred.

Yours very truly,

(s) Tenny Hoon Tom
Tenny Hoon Tom
Deputy Attorney General

APPROVED:

(s) Shiro Kashiwa
Shiro Kashiwa
Attorney General

INDEXING INSTRUCTION

Op. 61-82

INSURANCE

Group policy, certificate of

Where a group policy is issued on the mainland, the certificate issued thereunder to individual Hawaii residents is not a contract of insurance as provided by section 181-561, Revised Laws of Hawaii 1955, relative to group policies, but is merely evidence of the contract.

LHK:es
17a
Op. 61-82

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

August 10, 1961

Mr. Carl J. Allenbaugh
Acting First Deputy Treasurer
Department of Treasury and Regulation
P. O. Box 3614
Honolulu 11, Hawaii

Dear Mr. Allenbaugh:

This is in response to your request for an opinion as to whether or not the three following group insurance policies issued on the mainland and covering residents in Hawaii are subject to the Hawaii Insurance Law:

(1) A group life policy issued and delivered in Alabama to the GEM Benefit Association, Alabama, as a policyholder, which includes coverage of Hawaii residents who are members of GEM of Honolulu, and states:

> "The policy, the application of the policyholder, and the individual applications of the insured members shall constitute the entire contract between the parties."

(2) A group disability policy issued and delivered in Delaware to Hawaii residents, and credit card holders of hotels doing business in Hawaii, which provides:

> "This policy and the individual enrollment cards of the insured constitute the entire contract between the parties."

The contract is expressly made subject to the laws of the state where the policy is issued and delivered.

(3) A group life policy issued to the Deposit Guarantee Bank and Trust Company, Jackson, Mississippi, as trustee of the National Credit Union Group Insurance Trust Fund

covering Hawaii resident members of credit unions in Hawaii. The master policy is not available for the details mentioned in the two other contracts.

All of the insurance companies here involved are licensed to do business in Hawaii[1/] as well as in the states where the master policies were issued and delivered.

Section 181-561, Revised Laws of Hawaii 1955, contains the following prohibition:

> "(a) No contract of life insurance shall hereafter be delivered or issued for delivery in this [State] insuring the lives of more than one individual unless to one of the groups as provided for in sections 181-561 to 181-580 and unless in compliance with the other provisions of such sections."

Sections 181-562 to 181-582, Revised Laws of Hawaii 1955, as amended, permit the issuance of insurance contracts to such groups as employees, debtors, credit unions, etc. The groups under consideration are not included.

The issue raised under the circumstances is: Does the certificate constitute a contract of insurance within section 181-561? It is our opinion that it does not.

There is a split of authority as to whether the certificate, which is issued to an individual member pursuant to the master policy, constitutes a contract. It appears that the majority of the courts take the negative view. They regard the certificate merely as evidence of a contract and not as an essential part thereof, and conclude that the contract of insurance consists of the master policy issued by the insurer to the policyholder, the latter usually being the employer (29 Am. Jur., Insurance, § 30, p. 449; § 38, p. 455; Id. Vol. 29A, § 1760, p. 835; 44 C.J.S., Insurance, § 299(b), p. 1202; 110 A.L.R. 738; 115 A.L.R. 1307; 72 A.L.R.2d 695).

The leading case on this subject is Boseman v. Conn. Gen. L. Ins. Co., 301 U.S. 196, 81 L. ed. 1036, 57 S. Ct. 686,

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1/ (1) American Life Ins. Co., (2) Continental Casualty Co., and (3) Occidental Life Ins. Co., respectively.

110 A.L.R. 732 (1937). Suit was brought to recover under a group insurance policy issued in Pennsylvania by the defendant to the Gulf Oil Corporation. It covered employees of that corporation and its subsidiaries of which the Gulf Refining Company was one. The petitioner, an employee of that company in Texas, was issued a certificate providing for insurance coverage under the master policy, specifying:

> "The policy and the application of the Employer . . . and the applications of the employees, if any, shall constitute the entire contract between the parties. . . . This contract is issued and delivered . . . in the Commonwealth of Pennsylvania and is governed by the laws of that Commonwealth."

At that time, the defendant was not authorized to engage in the insurance business in Texas.[2/] The United States Supreme Court held that Pennsylvania law governed the issuance of the contract, saying:

> ". . . the certificate is not a part of the contract of, or necessary to, the insurance. It is not included among the documents declared 'to constitute the entire contract of insurance.' . . . It served merely as evidence of the insurance of the employee. Petitioner's rights and respondent's liability would have been the same if the policy had not provided for issue of the certificate. . . ."

The authorities following this line of reasoning are: Vandenberg v. Hancock Mut. L. Ins. Co., 48 N.J. Sup. 1, 136 A.2d 661 (1957); Metropolitan L. Ins. Co. v. Anderson (D.C. - La.), 101 F. Supp. 808 (1951); Hancock Mut. L. Ins. Co. v. Sykes (D C. - Va.), 106 F. Supp. 116 (1952); Wall v. Conn. Gen. L. Ins.

2/ The Texas courts have used this as a distinguishing factor to reach a contrary result (Metro. L. Ins. Co. v. Wann, 130 Tex. 400, 109 S.W.2d 470, 115 A.L.R. 1301 (1937); Internat'l Bro. of Boilermakers, etc. v. Huval, 140 Tex. 21, 166 S.W.2d 107 (1942)). But cf: Wash. Nat. Ins. Co. v. Shaw, ___ Tex. ___, 180 S.W.2d 1003 (1944); Internat'l Bro., etc. v. Rodriguez, ___ Tex. Civ. App. ___, 193 S.W.2d 835 (1945).

Co. (D.C. - Dist. Col.), 82 F. Supp. 421 (1949); Bynum v. Prudential Ins. Co. of Am. (D.C. - S.C.) 77 F. Supp. 56 (1948); Continental Assur. Co. v. Henson, 297 Ky. 764, 181 S.W.2d 431 (1944); Fisher v. U.S. (C.A. - Md.), 249 F.2d 879 (1957); Tormey v. Travelers Ins. Co., 6 App. Div.2d 13, 174 N.Y.S.2d 496 (1958); Connecticut Gen. L. Ins. Co. v. Hickman (Tex. Civ. App.), 150 S.W.2d 121 (1941); Fritz v. Metro. L. Ins. Co., 50 Cal. App.2d 570, 123 P.2d 622 (1942); Germain v. Aetna L. Ins. Co., 285 Mich. 318, 280 N.W. 773 (1938); Kloidt v. Metro. L. Ins. Co., 18 N.J. Misc. 661, 16 A.2d 274 (1939); Davis v. Metro. L. Ins. Co., 161 Tenn. 655, 32 S.W.2d 1034 (1930); Thigpen v. Metro. L. Ins. Co., ___ Ga. ___, 195 S.E. 591 (1938); Rasmussen v. Equitable L. A. S. of U.S., 293 Mich. 482, 292 N.W. 377; and American Nat. Ins. Co. v. Branch, ___ Va. ___, 191 S.E. 668 (1937).

A few courts have concluded otherwise, stating that the certificate is a contract, on the ground that it contained terms which conflicted with the master policy. Thus, in Thieme v. Union Labor Law Ins. Co., 12 Ill. App.2d 110, 138 N.E.2d 857 (1956), where the certificate provided for $1500 coverage as contrasted to $1000 in the master policy, the court held that the certificate controlled. See also: Hancock Mut. L. Ins. Co. v. Dorman (C.C.A. - 9th), 108 F.2d 220 (1940); Parks v. Prudential L. Ins. Co. (D.C. - Tenn.), 103 F. Supp. 493 (1951)).

Others have reached a similar conclusion where the policy itself was silent as to what law should govern, and the public policy of the state was to apply local law.[3/] (Thieme v. Union Labor Law Ins. Co., supra; Coleman v. Aetna L. Ins. Co. (C.A. - Ill.), 261 F.2d 296 (1958)).

There is a dearth of Hawaii decisions on the subject matter under consideration. In the final analysis, if the provisions of the certificate do not conflict with those contained in the master policy, we are of the opinion that the individual certificate is not a part of the contract but merely evidences rights of the employee as set forth in the master policy.

Accordingly, since the group policies offered by GEM and credit card holders of hotels provide that the policy and

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3/ § 181-2, Revised Laws of Hawaii 1955, states: "The business of insurance is one affected by a public interest. . . ."

applications of the insured constitute the entire contract between the parties, and since the latter contract is expressly subject to the laws of the state where the policy is issued and delivered, the certificates issued thereunder are not contracts of insurance. Hence, the group policies are not subject to the provisions of section 181-561, Revised Laws of Hawaii 1955. Although the master policy for the credit union policy is not available, we believe that the same applies thereto, unless a variance exists between the master policy and the certificate.

Very truly yours,

Lawrence H. Kam

LAWRENCE H. KAM
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General

INDEXING INSTRUCTIONS

Opinion 61 - 83

AUTOPSIES

In the counties of Hawaii, Maui and Kauai, autopsies in relation to certain deaths within the counties come under the jurisdiction of the county government.

GOVERNMENT PHYSICIANS

Definition - Traditional. Government physicians are traditionally those government (State) subsidized physicians performing needed medical services to people in certain areas of the State.

Duties - General. Principal task has been and is to provide medical care for the medical indigent and indigent in certain areas of the State.

Duties - Specific. Specific duties of government physicians are found in the statute (see Sections 6-4, 46-22, 81-26, 260-18 and 311-30, RLH 1955, as amended).

Coroner's Physician. Government physicians may be designated as coroner's physician for the counties of Hawaii, Maui and Kauai, and when so designated, are not performing the duties as State government physician; instead, the services are performed pursuant to Chapter 260, RLH 1955, and thus fall within the structure of the county government rather than the jurisdiction of the State.

Coroner's Physician - Autopsies/ - Compensation. Should a government physician of the State be designated or selected as coroner's physician, compensation for this duty would be the responsibility of the county rather than the State.

THT:hos
24d
Op. No. 61-83

STATE OF HAWAII

Department of the Attorney General

HONOLULU

August 10, 1961

Mr. Harold L. Duponte
County Attorney
County of Maui
Wailuku, Hawaii

Dear Sir:

Subject: Government Physicians: Autopsies

This is in response to your past inquiry asking whether or not, with relation to autopsies, a government physician comes within the jurisdiction of the State or county government.

With relation to autopsies, a government physician comes within the jurisdiction of the counties rather than the State.

The term "government physician" is not defined by law. Traditionally, government physicians have been those government (State) subsidized physicians performing needed medical services to the people in certain areas of the State. The specific duties of these government physicians are generally found in the statute (see Sections 6-4, 46-22, 81-26, 260-18 and 311-30, RLH 1955, as amended). The principal task of government physicians has been and is to provide medical care for the medical indigent and indigent in certain areas of the State.

Chapter 260, RLH 1955, as amended, contains the provisions of law relating to government physicians and autopsies. It is the duty of the coroners in the various counties (except the City and County of Honolulu) to inquire and investigate certain deaths within the counties. Section 260-3, RLH 1955. Where autopsies are needed, the coroner or coroner's physician in these counties is authorized to perform such autopsies and the expenses are to be paid by the county concerned. Section 260-14, supra. Government physicians on Hawaii, Maui and Kauai may be designated by the coroner as coroner's physician for the counties. Section 260-18, supra.

The law provides that the duties outlined by Chapter 260, supra, are functions or responsibilities of the county government rather than

the State. A coroner's physician may be a regular physician employed by the county or a government physician designated as coroner's physician by the coroner. Should a government physician of the State be designated or selected as coroner's physician, compensation for this duty would be the responsibility of the county rather than the State.

Thus, the statute provides that a government physician of the State may be designated as coroner's physician for the counties of Hawaii, Maui and Kauai. Since the duties of the coroner with respect to investigation of certain enumerated deaths and autopsies necessitated thereby are county responsibilities, and since the government physicians are designated as coroner's physicians in the performance of services under Chapter 260, supra, and are not performing duties as State government physicians, the services of government physicians pursuant to Chapter 260, supra, fall within the structure of the county governments rather than the jurisdiction of the State.

Yours very truly,

Tenny Hoon Tom

Tenny Hoon Tom
Deputy Attorney General

APPROVED:

Shiro Kashiwa

Shiro Kashiwa
Attorney General

INDEXING INSTRUCTIONS

Opinion No. 61-84

UNIVERSITY OF HAWAII

Appointment of President

Under the State Constitution, the University of Hawaii is not an administrative or executive department or instrumentality within the executive branch of government and hence the three-year residence requirement set forth in Article IV, section 6, of the Constitution does not apply to the office of the president of the University.

CONSTITUTION, STATE OF HAWAII

Article IV, section 6.

Article IX, sections 4 and 5.

op file

YS:GF
18a
Op. No. 61-84

STATE OF HAWAII

Department of the Attorney General

HONOLULU

August 18, 1961

Mr. Herbert C. Cornuelle
Chairman, Board of Regents
University of Hawaii
Honolulu 14, Hawaii

Dear Sir:

By letter dated July 17, 1961, the Board of Regents of the University of Hawaii requested the opinion of this office on the question whether the three-year residence requirement set forth in the final paragraph of Article IV, section 6, of the Constitution of the State of Hawaii applies to the appointment of the president of the University of Hawaii by the Board of Regents.

The problem involves the status of the University of Hawaii under the Constitution. That the University is an agency of the State government admits of no argument. The real question is whether the University is a department or instrumentality within the executive branch of government or whether it is an agency separate and independent of the executive branch.

If it is assumed that the University belongs within the executive branch of government, then there must be compliance with the provisions of Article IV, section 6, of the Constitution. Under Article IV, section 6, all executive and administrative offices, departments and instrumentalities, together with their respective functions, powers and duties, must be allocated among and within not more than twenty departments. And if in this process the University is designated a principal department of the State government, Article IV, section 6, would also require that the office of the president of the University be held by one who has been a resident of the State of Hawaii for at least three years immediately prior to his appointment.

It is our view, however, that the University of Hawaii is not an executive or administrative department or

instrumentality of the State government under Article IV, section 6. The status of the University under the Constitution is special and unique. The University of Hawaii, by Article IX, section 4, is established as a state university and constituted a body corporate with title to all real and personal property set aside or conveyed to it. Article IX, section 5, then provides for a board of regents with power "in accordance with law, to formulate policy, and to exercise control over the University through its executive officer, the president of the University, who shall be appointed by the board." By reason of these constitutional provisions there is created a constitutional corporation of independent authority.1/ The establishment by the Constitution of a state university as a body corporate with power to govern itself through a board of regents results in the creation of a separate entity independent of the executive branch of the government. Such an entity is not an administrative or executive agency of the State government subject to the requirements of Article IV, section 6. Since the University of Hawaii is not within Article IV, section 6, it follows that the three-year residence requirement contained therein can have no application to the office of the president of the University. And there is nothing in Article IX which restricts the Board of Regents in the selection and appointment of a president to residents of this state. It is

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1/ The concept of a state university as a constitutionally independent corporation finds support in decisions of other states. Sterling v. Regents, 110 Mich. 369, 68 N.W. 253 (1896); State Board of Agriculture v. Auditor General, 180 Mich. 349, 147 N.W. 529 (1914); State v. Chase, 175 Minn. 259, 220 N.W. 951 (1928); State v. Board of Education, 33 Idaho 415, 196 Pac. 201 (1921); King v. Board of Regents (Nev.), 200 P.2d 221. See also: Constitutions of the following states: Okla., Art. VI, § 31; Calif., Art. IX, § 9; and Colo., Art. IX, § 14.

Elliott and Chambers, "The Colleges and the Courts," 1936; Chambers, "The Colleges and the Courts, 1936-40," (1941).

Contra: University of Utah v. Board of Examiners, 4 Utah 2d 408, 295 P.2d 348 (1956). But see 55 Mich. Law Rev. 728.

therefore our opinion that the Board of Regents of the University of Hawaii may properly appoint as president of the University a person not a resident of the State of Hawaii at the time of his appointment.

This opinion, however, should not be construed to mean that the University of Hawaii and its Board of Regents are completely independent and beyond the law-making power of the legislature. For example, the legislature can, within reason, attach conditions to its appropriations to the University, and, if the University accepts the funds, it will be bound by the conditions. At this time it is neither possible nor wise to draw a distinct line between conditions which the legislature can attach and those it cannot. From time to time these questions will be raised and we will answer them as they arise.

Yours very truly,

/s/ SHIRO KASHIWA

SHIRO KASHIWA
Attorney General

AG

INDEXING INSTRUCTIONS

I. TAXATION, GENERAL EXCISE TAX

Capehart contractors

A Capehart contractor is subject to general excise taxes on his total contract price less "pre-bid" costs.

* * * * *

II. CAPEHART HOUSING PROJECTS

Taxation

A Capehart contractor is subject to general excise taxes on his total contract price less "pre-bid" costs.

* * * * *

III. REVISED LAWS OF HAWAII 1955, AS AMENDED.

Chapter 117.

* * * * *

IV. PUBLIC LAW 345, TITLE IV OF THE HOUSING AMENDMENTS OF 1955, 84TH CONGRESS (69 STAT. 635)

* * * * *

SBKC:n
Op. No. 61-85

STATE OF HAWAII

Department of the Attorney General

Honolulu, Hawaii

August 22, 1961

Mr. J. A. Bell
Deputy Director of Taxation
State of Hawaii
425 S. Queen Street
Honolulu, Hawaii

Dear Mr. Bell:

This is in response to your question concerning the treatment of "non-construction" costs of Capehart Project contractors under the general excise tax law (chapter 117 of the Revised Laws of Hawaii 1955 as amended) under the following circumstances:

Under the authority of Title IV of the Housing Amendments of 1955 (P.L. 345, 84th Congress; 69 Stat. 635), a military department of the United States issues an invitation for bids upon a particular project. In the total bid price is to be put construction costs, including overhead, profit, etc., plus any additional non-construction costs such as supervision, inspection and administration costs during construction and financing charges. On the basis of the lowest acceptable bid, a letter of acceptability is issued to the successful bidder called the "eligible builder." This eligible builder is then required to take four actions: first, to form a new corporation (called the "mortgagor-builder"); second, to arrange financing for the total cost of the project, including profit, by means of a building loan agreement between the mortgagor-builder and a mortgagee-lender; third, to cause the mortgagee-lender to obtain the Federal Housing Commissioner's commitment for insurance, and fourth, to execute a housing contract which defines the rights and obligations of the department, the eligible builder and the mortgagor-builder.

The primary functions of the mortgagor-builder corporation are: to lease from the government the land on which the project is to be built, to obtain funds for said project by mortgaging the leasehold interest, to pay the mortgage proceeds

to the builder as the construction progresses up to the amount of the bid price, and to hold title to houses constructed. Immediately upon organization of the corporation, its stock along with the resignations of its officers and directors is irrevocably placed in escrow during the period of construction. As each housing unit is completed, it is placed under the control of the Secretary of Defense and when the entire project is completed the stock in escrow is delivered to him. The corporation itself thus remains in existence and continues to be the mortgagor. The mortgage loan, insured by FHA, is paid off with funds furnished by the Department of Defense and derived from quarters allowance of the military occupants of the housing. Apparently the mortgagor-builder corporation is not designed to make a profit on a project since any profit is to accrue only to the eligible builder who organized the corporation.

Under the above situation, it is the view of this office that all items entering into the total contract price, with the exception of pre-bid costs, constitute gross income subject to general excise taxation.

Section 117-3, Revised Laws of Hawaii 1955 as amended, defines "gross income" as meaning "the gross receipts of the taxpayer derived from trade, business, commerce or sales and the value proceeding or accruing from the sale of tangible personal property, or service, or both, and all receipts, actual or accrued as hereinafter provided, by reason of the investment of the capital of the business engaged in, including interest, discount, rentals, royalties, fees, or other emoluments however designated and without any deductions on account of the cost of property sold, the cost of materials used, labor costs, taxes, royalties, interest or discount paid or any other expenses whatsoever." See also section 117-2, Revised Laws of Hawaii 1955 as amended, which defines "business" as including "all activities (personal, professional or corporate) engaged in or caused to be engaged in with the object of gain or economic benefit either direct or indirect, but does not include casual sales."

"Non-construction" costs relating to the organization of the mortgagor-builder corporation as well as the other "non-construction" costs involved in the project enter into the gross income of the eligible builder because such costs are included under the contract obligations; that is, when the incorporators, insurers, FHA and others are paid, obligations of the eligible builder upon the contract (obligations

of which he is cognizant when making the bid for a project) are discharged. See Alabama v. King and Boozer, 314 U.S. 1, where it was held that the fact that government contractors were working under a cost-plus contract which entitled them to be reimbursed by the federal government for all materials purchased did not alter the fact that the contractors were the purchasers of the materials and the federal government had no direct liability for the purchase price. Where a taxpayer pays out money to meet his own liability and receives the money from another pursuant to an agreement by which he recoups this expense, in whole or in part, even though there is no direct object of gain or profit, such receipt is taxable gross income. North Pacific Coast Freight Bureau v. State, 122 P.2d 467; Peninsula Light Co. v. Tax Commission of Washington, 56 P.2d 720; Walgreen Co. v. Gross Income Tax Division, 75 N.E.2d 784. The same tax consequences follow even if the second party makes good the taxpayer's liability by direct payment to the third person involved. Vause & Striegel, Inc. v. McKibbin, 39 N.E.2d 1006; Merchants Cigar and Candy Co. v. City of Birmingham, 18 So.2d 137; Old Colony Trust Co. v. Commissioner, 279 U.S. 716.

However, with respect to "pre-bid" costs relating to two items, namely architect-engineer services and inspection fees, such amounts do not enter into the tax base since they are amounts incurred and disbursed by the military for services rendered to it even prior to the selection of an eligible builder. Thus the obligations met when these charges were paid, although included in the contract price, were the obligations of the military establishment initially contracting for such work.

In summary, under the contractual situation set out above, a Capehart contractor is subject to general excise taxes on the total contract price less "pre-bid" costs.

Very truly yours,

/s/ Samuel B. K. Chang

Samuel B. K. Chang
Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa

Shiro Kashiwa
Attorney General

Opinion No. 61-85

INDEXING INSTRUCTIONS

Opinion No. 61-86

Hawaii Housing Authority - Eviction Boards or Examiners

Section 78-2, RLH 1955

The Authority may appoint trial examiners or eviction boards for the different counties of the State.

THT:hos
14b
Op. No. 61-86

STATE OF HAWAII

Department of the Attorney General

HONOLULU

August 22, 1961

Mr. A. V. Sullivan, Executive Director
Hawaii Housing Authority
Department of Social Services
State of Hawaii
Honolulu, Hawaii

Dear Mr. Sullivan:

Subject: Eviction Boards
(Your ref. 4-14/838)

This is in reply to your inquiry as to whether the Hawaii Housing Authority may appoint additional boards or examiners for each of the other islands on which the Authority is operating public housing projects.

It is the opinion of the Department of the Attorney General that, pursuant to Section 78-2, RLH 1955, the Authority may appoint trial examiners or additional boards for operating public housing projects on other islands.

Section 78-2, supra, provides that "hearings shall be conducted by a trial examiner or board appointed for the purpose by the authority. Trial examiners or members of any board may be commissioners or employees of the authority. The decision and order of eviction of the trial examiner or board shall be final unless an appeal is taken as hereinafter provided." This constitutes statutory power for the Authority in relation to its powers to evict or terminate any lease or license covering use and occupation of any dwelling unit or other premises owned or controlled by it, or to evict its occupants.

The statutes provide that there may be a trial examiner or a board, and does not indicate whether or not one board shall serve the whole Authority. The statute states that trial examiners may be commissioners or employees of the Authority. The utilization of the plural nouns "examiners," "commissioners" and "employees" indicates that a number of examiners may be appointed by the Authority. This is a reasonable interpretation of the statute in view of the fact that the

Authority operates within the several counties of the State and it may be reasonably contemplated that the Authority would provide a trial examiner for each of the counties; the same interpretation could be applied for board members. Should the Authority wish to appoint trial examiners for the outside islands with relation to Section 78-2, supra, or to appoint additional boards for the same purpose, the Authority would be acting within the framework of the law.

Yours very truly,

Tenny Hoon Tom
Deputy Attorney General

APPROVED:

Shiro Kashiwa
Attorney General

INDEXING INSTRUCTION

Op. No. 61-87

GOVERNOR

Executive order; emergency powers

The governor may not, under his emergency powers, by executive order, provide for the succession to the offices of the governor and the lieutenant governor.

The governor may not, by executive order, issue a standing instruction that would automatically declare the existence of a state of emergency in Hawaii in the event of military attack against any part of the United States.

CIVIL DEFENSE

Governor's emergency powers

The governor may not, under his emergency powers, by executive order, provide for the succession to the offices of the governor and the lieutenant governor.

The governor may not, by executive order, issue a standing instruction that would automatically declare the existence of a state of emergency in Hawaii in the event of military attack against any part of the United States.

CONSTITUTION, STATE OF HAWAII

Article IV, section 4

STATUTES

Revised Laws of Hawaii 1955

Chapter 357
Section 357-1
Section 357-2

Chapter 358

Chapter 359
Section 359-5
Section 359-9
Section 359-10

DHCL:es
19a
Op. No. 61-87

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

August 23, 1961

The Honorable William F. Quinn
Governor of Hawaii
Iolani Palace
Honolulu, Hawaii

Dear Sir:

This is in response to your oral request of August 16, 1961, for our opinion on the following questions:

(1) Whether the governor, under his emergency powers, by executive order, could provide for the succession to the offices of the governor and the lieutenant governor; and

(2) Whether the governor, by proclamation, executive order, or other means, may issue a standing instruction that would automatically declare the existence of a state of emergency in Hawaii in the event of military attack against any part of the United States or other designated emergency.

To answer your first question, we must determine the governor's emergency powers.

Chapter 357, Revised Laws of Hawaii 1955, defines the governor's emergency powers. Section 357-1 thereof defines an emergency, and reads as follows:

"As used in this chapter, unless otherwise indicated by the context, 'emergency' means any state of affairs or circumstances which imperils the availability to the public of commodities necessary to public health, safety or welfare."

Section 357-2 provides for the powers of the governor in the event of an emergency contemplated by section 357-1. Section 357-2 reads as follows:

> "In the event the governor declares that an emergency as defined in section 357-1 exists, he or his authorized representatives, in order to make available commodities necessary to the public health, safety or welfare, may:
>
> (a) Whenever the availability of shipping space depends upon determination by the governor or his authorized representatives, of the emergency needs of the population, allocate such space to and among types of commodities and consignees, such distribution of space among consignees to be upon an equitable basis so far as reasonably practicable.
>
> (b) Charter or affreight a ship or ships, make any other arrangements, including contracts of guaranty, for the procurement of ships and any other means of transportation, and transport cargoes to the [State]. Cargoes from the [State] may be transported on any return voyage.
>
> (c) Purchase and resell, or otherwise distribute commodities."

This section basically envisions the availability to the public of commodities necessary to public health, safety and welfare.

Chapter 358, Revised Laws of Hawaii 1955, entitled "Disaster Relief", contemplates the possibility of disasters from fire, flood, tidal wave, earthquake, volcanic eruption or other natural causes, or from enemy attack, sabotage or other hostile action. This chapter contemplates the preparedness for carrying out all emergency functions other than functions for which military forces are primarily responsible. The primary duty given to the governor under this chapter is to appoint a director of disaster relief.

Chapter 359, Revised Laws of Hawaii 1955, entitled "Civil Defense And Emergency Act", deals with the possibility of disasters or emergencies resulting from enemy attack, sabotage or other hostile action. Under this chapter, the governor is authorized and empowered to (a) prepare comprehensive plans and programs for civil defense of the State,

(b) institute training programs and public information programs, (c) direct operational control, (d) provide suitable insignia of authority, (e) provide for compulsory registration and identification of blood types, (f) require each public utility to protect and safeguard its property, (g) regulate explosives, and (h) direct and control air raid patrols. The governor is given additional powers in civil defense emergency period (a) to require that persons provide themselves with shelters, (b) to require quarantine or segregation of persons affected with any infectious or communicable disease, (c) to summarily remove or suspend any member of the police or fire departments, and (d) to suspend any law which impedes or tends to impede or be detrimental to the efficient execution of civil defense or other emergency functions.

Sections 359-9 and 359-10 give the governor other functions and powers irrespective of the existence of the civil defense emergency period.

Nowhere in the above mentioned chapters is the governor given any emergency power to provide for the succession to the offices of the governor and the lieutenant governor. The only mention of succession to the offices of the governor and the lieutenant governor is made in Article IV, section 4 of the Constitution of the State of Hawaii, which provides:

> "When the office of governor is vacant, the lieutenant governor shall become governor. In the event of the absence of the governor from the State, or his inability to exercise and discharge the powers and duties of his office, such powers and duties shall devolve upon the lieutenant governor during such absence or disability.
>
> "When the office of lieutenant governor is vacant, or in the event of the absence of the lieutenant governor from the State, or his inability to exercise and discharge the powers and duties of his office, <u>such powers and duties shall devolve upon such officers in such order of succession as may be provided by law</u>. . . ." (Emphasis added.)

Under this section, any succession must be provided by law. In the absence of statutory provision, this office is of the opinion that the governor may not, under his emergency powers, provide by executive order for the succession to the offices of the governor and the lieutenant governor. The void

which presently exists in the matter of succession should be remedied by appropriate legislation in the coming session of the legislature.

Section 359-5, Revised Laws of Hawaii 1955, is pertinent to your second question. It provides:

> "Except as otherwise expressly provided, all of the powers conferred by this chapter are hereby conferred on the governor, who may delegate to agencies, officers, employees and other persons, or any of them, created, appointed or employed under, or engaged in carrying out, the provisions of this chapter, or to any government agency, officer or employee, [State] or otherwise, or provide for the subdelegation of, any of such powers, except the power (a) to proclaim a civil defense emergency period or to proclaim such period terminated, or to make any other proclamation provided for by this chapter, (b) to prescribe rules or regulations having the force and effect of law, and (c) to make allotments of funds appropriated or available for the purposes of this chapter. Until or unless otherwise directed by the governor, all of the powers pertaining to civil defense, hereby authorized to be delegated by the governor, shall be deemed to have been delegated by him to the director, with the further authority to subdelegate such powers to any agency or person to whom the governor could delegate such powers." (Emphasis added.)

This particular section allows the governor to delegate certain powers to agencies, officers, employees and other persons. It specifically does not allow the governor to delegate the power to proclaim a civil defense emergency period. We therefore are of the opinion that the governor may not issue a standing instruction by proclamation, executive order, or other means, that would automatically declare the existence of a state of emergency in Hawaii in the event of military attack against any part of the United States.

Respectfully submitted,

/s/ DONALD H. C. LOW

DONALD H. C. LOW
Deputy Attorney General

APPROVED:

/s/ SHIRO KASHIWA

SHIRO KASHIWA
Attorney General

Approved 9/8/61

Opinion No. 61-87

INDEXING INSTRUCTIONS

Opinion No. 61-88

HAWAIIAN HOMES COMMISSION

Upon surrender of lease, lessee not entitled to monthly advances for planting expenditures from pineapple company

Where lessee of Hawaiian Homes Commission enters into contract with Libby, McNeill & Libby to grow pineapple crops on homestead tract for sale to pineapple company, and company makes monthly advances under contract for planting expenditures to lessee, such lessee ceases to have the right under the contract to receive further advances from the company for monthly planting expenditures upon surrender of his lease and such tract to Hawaiian Homes Commission.

Lessee surrendering lease should receive equitable portion of excess over advances and taxes resulting from sale of pineapples to pineapple company

Where lessee of Hawaiian Homes Commission contracts to plant, harvest and sell pineapples to pineapple company, and contract provides that pineapple company pay monthly advances to lessee for planting expenditures and for taxes, and also provides for payment to lessee, at end of each calendar year, of any amount due the lessee for the excess from the annual sale of pineapples over such advances and taxes, the lessee who surrenders his lease and tract on which pineapple crops are growing before end of calendar year should receive an equitable portion of such excess, calculated up to the date of surrender of his lease and the tract to the Commission, as the lessee's share of the annual net proceeds resulting from the sale of pineapples to the company.

DYM:jk
8a
Op. No. 61-88

STATE OF HAWAII

Department of the Attorney General

HONOLULU

September 6, 1961

Mr. William Kea, Chairman
Hawaiian Homes Commission
Department of Hawaiian Home Lands
Honolulu, Hawaii

Dear Mr. Chairman:

We are orally informed that Libby, McNeill & Libby has added further sums to the $3,205.61 heretofore reported by your Department to represent net proceeds, distributable as of June 1, 1961, by the company for the purchase of pineapples harvested from tracts leased by Anthony Rodrigues and Francis Rosehill up to May 31, 1960, and by Edwina Q. Freeman up to November 3, 1960. Previously, at your request and on the basis of information from your Department, we advised (opinion dated June 20, 1961) that there was no legal impediment to your collection of said sum of $3,205.61 from the pineapple company, that appraisals be made of the pineapple crops on each of the said three tracts as of the date of surrender in each case, and that the total so collected be deposited into a special account for appropriate disposition as advised by us upon further facts.

Since it now appears that the said sum of $3,205.61 may include monthly "advances" from the pineapple company for expenditures for planting and cultivating pineapple crops, as provided for under paragraphs 7 and 13(a) of the pineapple contract between Libby, McNeill & Libby and the lessee-planters, we advise further that your Department:

(1) Ascertain whether any part of this sum of $3,205.61 includes any payment for such "advances" ($90 per month for each planter under section 13(a) of such contract) by the company, and, if so, to specify the amount which represents any such "advances" and the month or months for which they are made on account of any of the three tracts surrendered;

(2) Specify that amount thereof which represents the "excess," if any, of the "price" of the pineapples

over "advances" made by the company for "planting expenditures" and for taxes, as provided under paragraph 13(b) of the contract between the pineapple company and the above-named lessees for the calendar year 1960.*

Obviously, any lessee who surrenders his lease to the Commission ceases, from the date of such surrender, to have any further right to continue to receive from the pineapple company monthly "advances" for expenditures to be made for the cultivation of pineapple crops upon the tract surrendered. Hence, any money which the pineapple company turns over to the Commission for such "advances" for any tract, if made for the period during which the tract has been surrendered by the previous lessee, should be retained by the Commission in the special account for such further disposition thereof as may be determined hereafter to be proper.

Any amount which the pineapple company offers to turn over to the Commission as such "excess" over advances for planting expenditures and for taxes on account of any such tract, may be equitably calculated and proportionately distributed in such manner that each of the above-named previous lessees would receive an equitable portion thereof, as his or her share, of such "excess" up to the date of the surrender of the lease.

If this procedure meets with your approval, and is agreed upon by the other parties concerned, it may be followed in handling the so-called "pineapple money problem"

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* This information should appear in the statement, which, under paragraph 13(d) of the said contract, is to be given to each planter on or before the 15th day of January of each year to show whether any amount is due the planter from the company in excess of advances for expenditures and taxes, and to show the calculations for the previous calendar year concerning the price paid for pineapples, as provided under paragraph 12 of said contract.

involving the above-mentioned three tracts without resorting to the securing of formal appraisals, as heretofore advised, for accomplishing the same purpose.

Sincerely yours,

/s/ David Y. Mar

DAVID Y. MAR
Deputy Attorney General

APPROVED:

/s/ H. Rodger Betts

H. RODGER BETTS
Acting Attorney General

INDEXING INSTRUCTION

Opinion No. 61-89

INSURANCE

Variable annuities

Annuity contracts which provide for a return which varies, depending upon the success of corporate investments, are subject to the State securities act rather than to our insurance laws.

Securities

Annuity contracts which provide for a return which varies, depending upon the success of corporate investments, are subject to the State securities act rather than to our insurance laws.

STATUTES

Revised Laws of Hawaii 1955

Sections: 181-7
199-1
199-4(e)
199-6

LHK:es
17a
Op. 61-89

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

September 12, 1961

Dr. Charles H. Silva
Insurance Commissioner
Department of Treasury and Regulation
Iolani Barracks
Honolulu, Hawaii

Dear Sir:

By letter dated August 18, 1961, you requested an opinion from this office as to whether the securities sought to be registered by the United Variable Annuities Fund and Trust, Inc., under the State securities act are also subject to our insurance laws.

Under the plan of the foregoing corporation, investors who purchase capital stock will be offered variable annuity contracts which provide for a return which varies depending upon the success of the corporate investments.

Chapter 199 of the Revised Laws of Hawaii 1955, the "Uniform Sale of Securities Act (Modified)", defines a "security" to include:

> ". . . any note, stock, treasury stock, bond, debenture, evidence of indebtedness, . . . investment contract, or beneficial interest in title to property, profits or earnings or any other instrument commonly known as a security. . . ." (§ 199-1)

Section 199-6 prohibits the selling of unregistered securities except those that are specifically exempted by the Act. Section 199-4(e), Revised Laws of Hawaii 1955, as amended, exempts from registration:

> "Any security issued by and representing an interest in or a debt of, or guaranteed by, any insurance company organized

> under the laws of any State or Territory and authorized to do business in the Territory; but this exemption does not apply to an annuity contract, investment contract, or similar security under which the promised payments are not fixed in dollars but are substantially dependent upon the investment results of a segregated fund or account invested in securities." (Emphasis added.)

Thereunder, "an annuity contract . . . or similar security under which the promised payments are not fixed in dollars" must be registered.

On the other hand, section 181-7 of the Revised Laws of Hawaii 1955, our insurance law, clearly states that "the transacting of life insurance includes the granting of annuities. . . ."

As a general rule, the courts refuse to give an exact definition of the word "security". They will look to the substance and not to the form of the instrument and will broadly construe the Securities Act in view of its remedial purpose (79 C.J.S., Securities, p. 44; 47 Am. Jur., Securities Act, § 16, p. 574).

The subject of variable annuities has received previous consideration by this office. There is a split of opinion as to whether or not a variable annuity is a contract of insurance or a security (Opinions 58-135; 58-163; PCT:AH, 38:46, dated February 10, 1959).

Subsequently, the issue was decided by the United States Supreme Court in S.E.C. v. Variable Annuity Co., 359 U.S. 65 (1959). There, the SEC sought to enjoin the respondents from selling their variable annuity contracts without registering under the Federal Securities Act. The respondents argued that they were already regulated under the insurance laws of the District of Columbia and several other states, and that the annuity contracts are contracts of insurance. The court held otherwise, stating that the variable annuity contracts are securities and must, therefore, be registered. Mr. Justice Douglas, spokesman for the majority court, pointed out:

> "While all the States regulate 'annuities' under the 'insurance' laws, traditionally and customarily they have been fixed annuities, offering the annuitant

specified and definite amounts beginning with a certain year of his or her life. The standards for investment of funds underlying these annuities have been conservative. The variable annuity introduced two new features. First, premiums collected are invested to a greater degree in common stocks and other equities. Second, benefit payments vary with the success of the investment policy. . . ."

The supreme court observed that "the concept of 'insurance' involves some investment risk-taking on the part of the company", whereas "In hard reality the issuer of a variable annuity that has no element of a fixed return assumes no true risk in the insurance sense."

In a concurring opinion, Mr. Justice Brennan emphasized that at the time the Securities Act was adopted, "the sort of 'variable annuity' contract with which we are concerned in this case did not exist." Only the traditional forms of insurance and annuity contracts were contemplated by the federal act. (48 Georgetown 641 (1960), "The Variable Annuity -- Insurance, Investment, Or Both?")

Similarly, at the time of the adoption of section 181-7 of our insurance laws, the variable annuity contract under consideration was not in existence. The subject contract was not, therefore, within the contemplation of said section. This view is supported by section 199-4, which was amended in 1959 to apply to securities which promise payments on investments which do not have a fixed return. Regardless of the form of a variable annuity contract, the element of risk is predominant. In substance, then, we feel that it is a security as defined by section 199-1, Revised Laws of Hawaii 1955.

We therefore conclude that the insurance laws are not involved in the instant situation, and that the application which you received from the United Variable Annuity Fund and Trust, Inc., should be registered in accordance with our securities act, chapter 199, Revised Laws of Hawaii 1955, as amended.

Very truly yours,

APPROVED:

/s/ SHIRO KASHIWA
SHIRO KASHIWA
Attorney General

/s/ LAWRENCE H. KAM
LAWRENCE H. KAM
Deputy Attorney General

Opinion No. 61-89

INDEXING INSTRUCTIONS

Opinion No. 61-90

District Magistrates

Judiciary

Judiciary without authority to release prisoners in case of emergency of nuclear attack.

Prisoners

Prisoners may not be discharged before expiration of term of imprisonment except by proper authority such as through parole or pardon, exercised in manner prescribed by law. Prisoners not to be released because endangered by nuclear attack.

THT:hos
24b
Op. No. 61-90

STATE OF HAWAII

Department of the Attorney General

HONOLULU

October 9, 1961

Mr. Thomas T. Sakakihara
District Magistrate of Hamakua,
North and South Kohala
County and State of Hawaii
206-210 Lycurgus Building
Hilo, Hawaii

Dear Mr. Sakakihara:

Subject: Authority of Judiciary To Release Prisoners in Case of Emergency of Nuclear Attack

This is in response to your communication with regard to your authority or the authority of the judges or magistrates of the Third Judicial Circuit with respect to whether or not the sentencing judge or magistrates possess the authority to grant permission to the chief of police for the release of prisoner or prisoners in case of a nuclear attack. The fact situation presented in the attachment to your letter described the situation of a nuclear attack that is imminent and points to the fact that the county lacks facilities to protect the lives of prisoners and that the release of the prisoners under such a condition will give the prisoners opportunity to seek means of survival for themselves and their families.

It is the opinion of this department that the sentencing judge and/or magistrate possesses no authority to grant permission to the chief of police for the release of prisoner or prisoners in case of emergency of an imminent nuclear attack.

Where the sentence of a judge or magistrate is executed and the prisoner committed to the custody of the institution wherein he is to be detained, the jurisdiction and authority of the sentencing judge terminates and the judge and/or magistrate possesses no authority or control with respect to the prisoner. The care, custody and treatment of a person convicted of a crime and sentenced to incarceration is not a matter of the judiciary.

A prisoner may not be discharged before the expiration, by law, of the term of imprisonment duly imposed on him except by proper authority exercised in the manner prescribed by law. 72 C.J.S., Section 20, Prisons, 8878.

The law provides no method of early release of prisoners other than through parole and pardon. This department can see no other authority for release of prisoners without further legislative action.

Yours very truly,

(s) Tenny Hoon Tom

TENNY HOON TOM
Deputy Attorney General

APPROVED:

(s) Shiro Kashiwa

SHIRO KASHIWA
Attorney General

INDEXING INSTRUCTIONS

Opinion No. 61-91

Tuberculosis Test

Universities and colleges fall within the term "school" as used in Section 5, Chapter 23, Public Health Regulations, with regard to personnel submitting to examination for tuberculosis.

School

Universities and Colleges

The term "school" does include universities and colleges in the State with regard to public health regulations.

The meaning of the term "school" in relation to Section 5, Chapter 23, Public Health Regulations, should not be taken in the technical sense limiting its definition to institutions or places where instruction is given to children, such as kindergartens and primary schools, but should be reviewed in its wider context having to do with health, more particularly the control and prevention of tuberculosis.

THT:hos
9a
Op. No. 61-91

STATE OF HAWAII

Department of the Attorney General

HONOLULU

October 9, 1961

Dr. Richard K. C. Lee
Director of Health
Department of Health
State of Hawaii
Honolulu, Hawaii

Dear Dr. Lee:

Subject: Interpretation of Public Health Regulations, Chapter 23 (Tuberculosis), Section 5

This is in response to your inquiry with regard to Section 5, Chapter 23, Public Health Regulations, respecting tuberculosis as to whether the term "school" includes universities and colleges.

It is the opinion of this department that the term "school" as used in Section 5, Chapter 23, Public Health Regulations, does include universities and colleges in the State.

Chapter 23 of the Public Health Regulations of the Department of Health, State of Hawaii, is based upon protection of the public with regard to control and prevention of infectious and communicable disease. The regulation is designed to protect the public with regard to the control of tuberculosis, which is an infectious and communicable disease. Adults as well as children are susceptible to and may be infected by tuberculous bacilli.

The term "school" may mean an institution consisting of a teacher and pupils, irrespective of age, gathered together for instruction in any branch of learning. State ex rel. Shoreline School District #412 vs. Superior Court of King County, Juvenile Court, Washington, 346 Pacific 2d 999, 1002; Weisse vs. Board of Education, City of New York, 32 N.Y.S. 2d 258, 261, 178 Misc., 118. The terms "school," "college" and "university" have been said to convey the same idea, differing only in grade, and indicate an institution of learning. State vs. Erickson, 244 Pacific 287, 291, 75 Montana 429.

The term "school" is one of broad significance and may appear, by the connection in which the term is utilized, to include higher institutions of learning; but ordinarily, and without something to indicate that a wider meaning was intended, it will not be taken to include higher institutions of learning such as colleges, universities or institutions for the teaching of trades, professions or businesses. Murphy vs. Worcester Consolidated St. Railway Co., 85 N.E. 507, 512, 199 Mass. 279.

Thus, the meaning of the term "school" in relation to Section 5, Chapter 23, Public Health Regulations, should not be taken in the technical sense limiting its definition to institutions or places where instruction is given to children, such as kindergartens and primary schools, but should be reviewed in its wider context having to do with health, more particularly the control and prevention of tuberculosis. In this sense, the term "school" would then relate to all places of learning regardless of whether or not the learners are children or adults. This interpretation is necessary in order to give the public health regulation its intended meaning and effect. Any other interpretation would be restrictive and unintended in view of the purpose of the specific health regulation involved.

Yours very truly,

(s) Tenny Hoon Tom

TENNY HOON TOM
Deputy Attorney General

APPROVED:

(s) Shiro Kashiwa

SHIRO KASHIWA
Attorney General

R.b.

No Opinion

No. 61-92

INDEXING INSTRUCTION

Op. 61-93

EMPLOYEES' RETIREMENT SYSTEM

Additional contributions

Act 175, Session Laws of Hawaii 1961, which increases the basic retirement formula, should not be construed to penalize members who made additional contributions pursuant to section 6-84, Revised Laws of Hawaii 1955.

LHK:es
4c
Op. 61-93

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

October 17, 1961

Mr. Harold C. Hill, Secretary
Employees' Retirement System
of the State of Hawaii
Keelikolani Building
Honolulu, Hawaii

Dear Sir:

This is in response to your letter dated August 30, 1961, requesting our opinion on the effect of Act 175, Session Laws of Hawaii 1961.

Act 175 increases the retirement benefits of members of the retirement system by amending the 1 1/40 formula to 1/60 of average final compensation. Many members of the retirement system have made additional contributions pursuant to section 6-84, Revised Laws of Hawaii 1955, to increase their annuity. In order that such members will not be at a disadvantage as compared to those who have not made additional contributions, a provision was inserted in the original draft of Act 175 that such contributions shall purchase additional annuity. Said provision was, however, omitted in the final bill.1/

The issue is: Is said omission fatal so as to penalize members making additional contributions? We believe not.

Within the framework of our laws as applicable here, a member may receive a retirement allowance consisting of (1) an annuity, (2) a pension, and (3) additional contributions converted to additional annuity. With respect to (1) and (2), section 2 of said Act 175 provides that the retirement allowance shall consist of:

1/ The reason for the omission is not apparent in the legislative committee reports.

> "(a) An annuity which shall be the actuarial equivalent of his accumulated contributions at the time of his retirement; and
>
> "(b) If the member has attained age 65 at the time of his service retirement, a pension which together with such annuity will provide a total retirement allowance equal to one-sixtieth of the average final compensation of the member multiplied by the total number of years of his creditable service; . . ."

In addition to an annuity and pension, section 6-84, Revised Laws of Hawaii 1955, provides:

> "In addition to the contributions deducted from compensation as hereinbefore provided, . . . <u>any member may deposit therein</u> [the annuity savings fund] by a single payment or by an increased rate of contribution <u>an amount computed to be sufficient to purchase an additional annuity, which, together with his prospective retirement allowance</u>, will provide for him a total retirement allowance of not to exceed one-half of his average final compensation at the age of sixty years. Such additional amounts so deposited shall become a part of his accumulated contributions. . . ." (Emphasis added.)

As a general rule, "Laws creating the right to pensions must be liberally construed with the view of promoting the objects of the lawmaking body." (70 C.J.S., <u>Pensions</u>, § 2, p. 425; 40 Am. Jur., <u>Pensions</u>, § 4, p. 963.)

The object of the legislature, in adopting Act 175, is expressed in the House of Representatives' Standing Committee Report No. 977, to wit:

> "The purpose of this bill is to increase the benefits to our employees.
>
> "Sections 1 through 6 <u>increases the basic retirement benefit by changing the formula</u> from 1/70th of average final compensation for each year of service to a guaranteed 1/60th of such average final compensation

at age 65. This would increase the normal retirement benefits by approximately 16-2/3%". (Emphasis added.)

In construing the above laws, it is evident that the legislature contemplated an increase in the "basic retirement benefit" in sections 1 through 6. Said sections involve the basic pension and annuity provisions as contained in section 2 of Act 175. In other words, the annuity portion of the retirement allowance that is increased by Act 175 is that based upon a member's regular contributions, rather than upon his additional contributions.

To hold otherwise would penalize members who purchased additional annuities and defeat the purpose of Act 175, for then, members who do not make additional contributions would receive the same total benefit as those who make such contributions. In order to remove any future questions on this matter, we recommend that the law be made more specific in the next legislative session by reinserting the provision that those who purchase additional annuity pursuant to section 6-84 shall not lose the benefits thereof by virtue of Act 175.

Very truly yours,

/s/ LAWRENCE H. KAM

LAWRENCE H. KAM
Deputy Attorney General

APPROVED:

/s/ SHIRO KASHIWA

SHIRO KASHIWA
Attorney General

1/19/61

AG

INDEXING INSTRUCTIONS

I. TAXATION, GENERALLY

Tax relief to partnerships.

Under the tax relief granted in Act 173, 1961 General Session, 1st State Legislature, partnership losses may be applied against taxes of the individuals who comprised such partnership at the time of the natural disaster.

* * * * *

II. MARKET VALUE

Act 173, 1961 General Session, 1st State Legislature.

Synonymous with "fair value," "reasonable value," "fair cash value," "actual cash value" and "fair and reasonable cash value."

* * * * *

III. MARKET VALUE

Act 173, 1961 General Session, 1st State Legislature.

Means "such a price as a capable and diligent businessman could presently obtain for the property."

* * * * *

IV. GENERAL SESSION LAWS OF HAWAII, 1961, 1ST STATE LEGISLATURE

Act 173, section 4(b).

* * * * *

AG

OK HK

SBKC:n
24b
Op. No. 61-94 ✓

STATE
xxxxxxxxx

October 19, 1961

Mr. Richard M. Jitchaku, Chairman
Natural Disaster Claims Commission
County of Hawaii
P. O. Box 423
Hilo, Hawaii

Dear Mr. Jitchaku:

This is in response to your letter of September 25, 1961, firstly inquiring whether or not "a partnership loss could be claimed by an individual" and secondly asking for some guidelines in the determination of "market value" as referred to in section 4(b) of Act 173, 1961 General Session, 1st State Legislature.

It is the opinion of this office that under the tax relief granted in Act 173, partnership losses may be applied against taxes of the individuals who comprised such partnership at the time of the natural disaster.

Section 8 of the Act states: "The original claimant may be an individual or a legal entity recognized as a separate entity under chapter 121, Revised Laws of Hawaii 1955 by the director of taxation." "Person" in said chapter 121 includes a "partnership." Section 8 of Act 173 then continues: "The tax relief authorized by this Act shall not be applicable to transferees, heirs or assignees of a claimant unless such transferees, heirs or assignees are either the spouse or children of the original claimant." Under chapter 121, R.L.H. 1955 as amended, a partnership as such is not the taxable entity although it does file information tax returns. Individual members of the partnership are jointly and severally liable for partnership debts including taxes. Thus in allowing relief on a partnership loss, the amount of claims certified to a partnership may be apportioned to the individual members who made up such partnership at the time of the natural disaster on the basis of percentages set forth under the loss sharing ratio in the partnership agreement.

With reference to the determination of "a basis of what is market value," you will find Bonbright, Valuation of Property, (vols. 1 and 2), particularly chapter three, entitled

"Market Value or Exchange Value" of considerable merit for a general discussion of valuation problems.

Hawaii case law treats "market value" as synonymous with "fair value," "reasonable value," "fair cash value," "actual cash value" and "fair and reasonable cash value." In re Taxes, B. P. Bishop Estate, 33 Haw. 149. As defined there at page 152 such term means "such a price as a capable and diligent businessman could presently obtain for the property." This concept is also sometimes stated as the price a willing seller would receive from a willing buyer in a fair market. Black's Law Dictionary, 4th ed.; 55 C.J.S. 793; United States v. Miller, 317 U.S. 369. However "market value" "excludes, on the one hand, the sacrifice price that would result from an execution or foreclosure sale, and, on the other hand, the retail price that could be realized in the slow process of trade." Neither is it the credit price nor the value to the owner. In re Taxes, B. P. Bishop Estate, 33 Haw. 149, 152, 153. Kash Co. v. Assessor, 15 Haw. 476.

As far as what constitutes the proper appraisal technique to be applied, the use of the following approaches have been approved in judicial decisions: Market data approach, Parmenter v. Fitzpatrick, 135 N.Y. 190, 31 N.E. 1032, 1034; Peninsular Naval Stores Co. v. State, 20 Ga.App. 501, 93 S.E. 159, 161. Cost approach, In re Taxes, Onomea Sugar Co., 31 Haw. 769, 776; Rosenkranz v. Jacabowitz, 99 N.Y.S. 469, 470. Income approach, In re Taxes, B. P. Bishop Estate, 27 Haw. 190, 196; In re Taxes, Kapiolani Estate, 21 Haw. 667, 671.

In concluding our guidelines on the determination of market value under Act 173, we quote from II Bonbright, Valuation of Property 1016, summarizing a discussion on "evidence of 'fair market value'":

> "The 'value' of the property means what the property would sell for as between a willing buyer and a willing seller. Actual cost is some evidence of this value, and so is replacement cost, and so are actual sales, and so are established earnings, and so even are estimated future earnings under certain conditions. But all these factors are to be given merely such weight as will lead to an answer to the question, What was the property <u>really worth</u>? Events subsequent to date of valuation may sometimes be considered, but only as bearing on what the property was then worth, and not as

reflecting what the property has subsequently come to be worth. These same statements, with variations, are found in eminent domain, in damages, in estate taxation, etc."

Act 173 recognizes that the determination of market value is a technical matter within the competence of specially trained individuals. To that end at least one appraiser is required to be a member of the Commission. We trust the foregoing discussion on the generally accepted legal definition of market value and other guides designed to arrive at such value will serve the needs of the Commission and the appraiser member.

Very truly yours,

Samuel B K Chang

SAMUEL B. K. CHANG
Deputy Attorney General

APPROVED:

Shiro Kashiwa

SHIRO KASHIWA
Attorney General
R.B.

No Opinion

No. 61-95

INDEXING INSTRUCTIONS

OP. 61-96

STATUTES

Section 3-21(m), R.L.H. 1955, as amended, educational leave of absence provision, does not apply to deputy or second deputy county auditor taking leave of absence to fill position of county auditor until coming election.

Section 3-21(m), R.L.H. 1955, as amended, leave of absence pursuant to said section should not and cannot be used as a license for a civil service employee to seek other gainful employment and at the same time retain his civil service position.

CIVIL SERVICE

Educational Leave of Absence.

Educational leave of absence, under section 3-21(m), R.L.H. 1955, as amended, does not apply to deputy or second deputy county auditor taking leave of absence to fill position of county auditor until coming election.

Section 3-21(m), R.L.H. 1955, as amended, leave of absence pursuant to said section should not and cannot be used as a license for a civil service employee to seek other gainful employment and at the same time retain his civil service position.

ASOL:ru
12a,24c

Op. 61-96

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU, HAWAII

October 25, 1961

Mr. K. O. Soong
Personnel Director
Department of Civil Service
County of Kauai
Lihue, Kauai

Dear Mr. Soong:

This is in reply to your letter of October 23, 1961, wherein you ask whether or not the second deputy auditor of the County of Kauai, who is a civil service employee, may take a leave of absence without pay under section 3-21(m), Revised Laws of Hawaii 1955, as amended, to accept an appointment as county auditor, an elected post, and in accordance with the provisions for filling of vacancies under section 144-3, Revised Laws of Hawaii 1955.

The second deputy auditor would fill the vacancy created by the retirement of the elected auditor, until the next election for county auditor.

Section 3-21(m) reads as follows:

> "Educational leaves; other leaves. Any regular employee may be granted a leave of absence not to exceed one year by the department head in order to pursue a course of instruction, to engage in research or otherwise to improve his ability and increase his fitness for public employment. . . ."

The intent and purpose of the above law is to encourage a regular employee, that is, civil service employee, to pursue further studies in order that such person may better qualify himself as an employee under our civil service system. Upon termination of studies, the employee is granted the right to return to his former position.

It is the opinion of this office, however, that a leave of absence pursuant to section 3-21(m) should not and cannot be used as a license for a civil service employee to seek other gainful employment and at the same time retain his civil service position. By other employment, I mean by engaging in

other gainful employment other than as an in-job trainee under a prescribed schedule of instruction and under proper supervision.

In this instance, the second deputy would be filling the auditor's post, an elected post, which office is the head of a department within the county government structure. There are no facts given to indicate any job-training and instructional program under proper supervision set up for the second deputy.

To construe the language of the above section "to improve his ability and increase his fitness for public employment" as permitting a civil service employee to engage in other gainful employment where there is no educational or in-job training program under proper supervision would be a license for any civil service employee to have two jobs at the same time.

To construe the section otherwise would permit an accountant in our civil service system to take a leave of absence to work as an accountant or auditor in the Federal civil service system or in private industry. Such cannot be the intent and purpose of an educational leave of absence. Hence, be advised that the second deputy auditor cannot take a leave of absence pursuant to section 3-21(m) and fill the position of county auditor.

This office has also received a request for an opinion from the Director of Personnel Services of the State Department of Personnel Services, by letter of October 4, 1961, on the question as to whether the deputy county auditor for the County of Kauai may take a leave of absence under section 3-21(m) to fill the position of county auditor. The answer to this question would also be the same as in the case of the second deputy county auditor. I am assuming, of course, that the deputy county auditor does have civil service standing under a "grandfather" clause.

Very truly yours,

/s/ Andrew S. O. Lee

Andrew S. O. Lee
Deputy Attorney General

APPROVED:

/s/ H. Rodger Betts

H. Rodger Betts
Acting Attorney General

Op. 61-96

INDEXING INSTRUCTIONS

Opinion No. 61-97

1. PUBLIC EMPLOYEES

Dual Employment

An employee of government may obtain a license and engage in the contracting business during after working hours and on week ends if he is otherwise qualified for a license.

2. CONTRACTORS LICENSE BOARD

Same as above.

YS:GF
24d, 17c
Op. No. 61-97✓

STATE OF HAWAII

Department of the Attorney General

HONOLULU

October 26, 1961

Mr. Robert A. Shaw
Executive Secretary
Contractors License Board
Room 202, Honolulu Armory
Honolulu, Hawaii

Dear Mr. Shaw:

This is in regard to your letter of September 28, 1961, requesting our advice as to what action the commission should take with respect to applications for contractor's licenses submitted by two full-time employees of the County of Maui.

In our opinion, no special significance should be attached to the fact that the applicants are full-time employees of a municipal government. Being a public employee does not ipso facto disqualify an individual from obtaining a license to engage in a lawful trade or business. If an applicant is qualified and complies with all the requirements set forth in the statutes and in the rules and regulations of the Contractors License Board, then he should be issued a license.

A public employee, unless prohibited by law, may within reasonable limits engage in a trade or other form of gainful employment after normal working hours and on week ends. The County government has adequate authority to safeguard against possible conflict of interest situations and to insure that an employee's after-hours employment or business does not interfere with the proper performance of his duties with the County. Similarly, the Contractors License Board has adequate powers to deal with a licensee

whose employment with the County interferes with or makes it impossible for him to properly discharge his responsibilities towards members of the public who retain his services.

Yours truly,

/s/ Yoshio Shigezawa

Yoshio Shigezawa
Deputy Attorney General

APPROVED:

/s/ H. Rodger Betts

H. Rodger Betts
Acting Attorney General

INDEXING INSTRUCTIONS

Opinion No. 61-98

EMPLOYEES' RETIREMENT SYSTEM

Accidental disability benefits

The application for accidental disability benefits may be filed any time after the injury. The board of trustees must determine the effective date of the application. Compensation received pursuant to Workmen's Compensation Act must be offset pursuant to section 6-46, Revised Laws of Hawaii 1955.

WORKMEN'S COMPENSATION

Accidental disability benefits

The application for accidental disability benefits may be filed any time after the injury. The board of trustees must determine the effective date of the application. Compensation received pursuant to Workmen's Compensation Act must be offset pursuant to section 6-46, Revised Laws of Hawaii 1955.

REVISED LAWS OF HAWAII 1955

Section 6-46

LHK:jk
4c
Op. 61-98

STATE OF HAWAII

Department of the Attorney General

HONOLULU

November 22, 1961

Mr. Harold C. Hill, Secretary
Employees' Retirement System
Keelikolani Building
Honolulu, Hawaii

Dear Sir:

This is in reply to your letter of September 27, 1961, requesting an interpretation of sections 6-46 and 6-56, Revised Laws of Hawaii 1955.[1]

We understand that, in some instances, it takes anywhere from six months to two years before the retirement system's medical board determines that a member is permanently incapacitated as a result of an accident. In the interim, the member receives medical care, and after a year his services are terminated pursuant to civil service regulations (a leave of absence without pay shall not exceed one year). Too, during said period, the member usually obtains workmen's compensation pursuant to chapter 97, Revised Laws of Hawaii 1955, as amended.

The questions posed by these facts are:

(1) When should the application for accidental disability benefits be filed?

(2) What is the effective date of the application--the date of filing, or the date the board of trustees approve the claim?

(3) What effect does the Workmen's Compensation Act have on accidental disability benefits?

1/ It is unnecessary to the instant problem to discuss section 6-47 to which you referred in your letter.

Section 6-46, Revised Laws of Hawaii 1955, relating to accidental disability benefits, reads as follows:

> "Upon application of a member, or of the head of his department, any member who has been totally and permanently incapacitated for duty as the natural and proximate result of an accident occurring while in the actual performance of duty at some definite time and place, through no negligence on his part, shall be retired by the board if the medical board certifies that such member is mentally or physically incapacitated for the further performance of duty, that such incapacity is likely to be permanent, and that such member shall be retired."

Thereunder, it is apparent that the application must first be filed by the member before any action will be taken by the medical board. Further, in order to claim accidental disability benefits, a member may file his application any time after his injury.

The medical board will then, under section 6-68, "investigate all essential statements and certificates by or on behalf of a member in connection with application for disability retirement, and shall report in writing to the board its conclusions and recommendations upon all the matters referred to it." However, the certification by the medical board that an applicant is permanently incapacitated is effective only as of the date of examination, which date may take place two years after the injury. Moreover, although we advised, by A.G. Op. 58-73, dated April 15, 1958, that the medical board's finding of permanent incapacity is binding on the trustees, its finding that the disability is accidental is advisory only and not conclusive. That being the case, we are of the opinion that the trustees must make their own determination as of the effective date of the payment of accidental disability benefits.

Any workmen's compensation which the member receives in the interim should be offset against the accidental disability benefits. Section 6-56, Revised Laws of Hawaii 1955, is applicable.

> "Any amounts which may be paid or payable by the [State] or any county under the provisions of any workmen's compensation or similar law to a member or to the dependents of a member on account of any disability or death shall be offset against and payable in lieu of any benefits payable out of funds provided by the [State] or county under the provisions of this part on account of the same disability or death. In case the present value of the total commuted benefits under any workmen's compensation or similar law is less than the pension reserve on the benefits otherwise payable from funds provided by the [State] or county under the provisions of this part, then the present value of the commuted payments shall be deducted from the pension reserve and such benefits as may be provided by the pension reserve so reduced shall be payable under the provisions of this part."

The purpose of the above section is apparently to insure that the member will receive an amount which will be equivalent to that which he is entitled under our pension laws.

We therefore conclude that the application for accidental disability benefits may be filed anytime after the injury, and that the board of trustees must determine the effective date of the application. Any moneys received by the member under the Workmen's Compensation Act should be offset against the sums payable under section 6-46, Revised Laws of Hawaii 1955.

Very truly yours,

/s/ LAWRENCE H. KAM

LAWRENCE H. KAM
Deputy Attorney General

APPROVED:

/s/ SHIRO KASHIWA

SHIRO KASHIWA
Attorney General

INDEXING INSTRUCTIONS

Op. No. 61-99

STATUTES

Session Laws of Hawaii 1961

Act 182, Sections 1, 3, 4, 5(a)

REVISED LAWS OF HAWAII 1955

Chapter 37

COUNTIES

Local School Advisory Council

Mayor may fill the vacant positions on the Oahu Local School Advisory Council.

PUBLIC INSTRUCTION, DEPARTMENT OF

Local School Advisory Council

Mayor may fill the vacant positions on the Oahu Local School Advisory Council.

SCHOOLS, PUBLIC

Local School Advisory Council

Mayor may fill the vacant positions on the Oahu Local School Advisory Council.

DEPARTMENT OF EDUCATION

Local School Advisory Council

Mayor may fill the vacant positions on the Oahu Local School Advisory Council.

DHCL:GF
6b, 24a
Op. No. 61-99

STATE OF HAWAII

Department of the Attorney General

HONOLULU

December 12, 1961

Mr. Stanley Ling
Corporation Counsel
City and County of Honolulu
Honolulu 13, Hawaii

Dear Sir:

This is in response to your request of November 2, 1961, wherein you asked whether the Mayor may appoint replacements to the four vacant positions on the Oahu Local School Advisory Council.

Act 182, Session Laws of Hawaii 1961, provides for the election of local school advisory councils beginning in 1962. This Act was approved July 11, 1961. Section 1 of this Act contemplated the immediate organization of the Board of Education. This was done after the local school advisory councils had been appointed by the chairman or mayor of each respective county. The appointment of four members of the local school advisory council to the Board of Education has now left the Oahu Local School Advisory Council with four vacant positions. Section 4 of Act 182 reads as follows:

> "Within 20 days of the date of approval of this Act, each member of each local school advisory council shall be appointed by the chairman of the board of supervisors or the mayor of each respective county, by and with the advice and consent of the respective boards of supervisors or city council, or, in default thereof, by the governor. . . ."

Nowhere in Act 182 is provision specifically made for the filling of vacancies to the first appointed local school advisory councils. The filling of vacancies is only

mentioned in connection with the first elected local school advisory councils. This takes place in 1962, as provided for in section 3 of Act 182, amending section 37-5, Revised Laws of Hawaii 1955. Reading the bill as a whole, the intent is clear and manifested throughout that vacancies should be filled as soon as possible.

Subsection 37-5 of section 3 of Act 182 provides in the last sentence of the last paragraph:

> "In case a vacancy occurs through the appointment of a council member to fill an unexpired term on the board of education or for any cause other than the expiration of the term of office, such a vacancy shall be filled by appointment by the chairman of the board of supervisors or the mayor of the county, by and with the advice and consent of the board of supervisors or the city council." (Emphasis added.)

It could be stated that the language of this section also appears to cover the situation we are faced with. Although section 5(a) of the Act states that subsection 37-5 shall apply to the "elections in 1962," this is not exclusive and may apply to the present situation. Whether this is controlling, the intention to fill vacancies seems apparent when the language speaks of having either the mayor or chairman fill a vacancy.

The general rule on this subject is readily expressed in 67 C.J.S. Officers §§ 51a and b, which reads as follows:

> "a. General Rules
>
> "When an office has become vacant, generally the authority having power of appointment may fill it; the policy is to fill vacancies as soon as practicable.
>
> "Where acts or events have rendered an office vacant, the authority having power to fill the vacancy may treat it as vacant and proceed to appoint or elect another to fill it. The power to

appoint implies the power to determine whether a vacancy exists. It is the general policy of the law to fill vacancies. . . ."

"b. Power and Authority

. . . . .

"Unless otherwise provided, the power to appoint to office is regarded as including the power to fill vacancies.

"In the absence of any constitutional or statutory provision, the power to appoint to office is regarded as including the power to fill vacancies. . . ."

Based upon the above enumerated principles, this office is of the opinion that the Mayor may fill the four vacant positions on the Oahu Local School Advisory Council.

Very truly yours,

/s/ Donald H. C. Low

Donald H. C. Low
Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa

Shiro Kashiwa
Attorney General

INDEXING INSTRUCTIONS

Opinion No. 61-100

PUBLIC UTILITIES COMMISSION

Fee

Non-utility revenues includable in computing.

REVISED LAWS OF HAWAII 1955

Section 104-27, as amended.

Opinion file

ASKF:ai
17b

Op. 61-100

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU, HAWAII

December 29, 1961

Mr. Jack E. Conley, Director
Public Utilities Commission
1311 Kapiolani Boulevard
Honolulu 14, Hawaii

Dear Mr. Conley:

This is in response to your letter of December 19, 1961, requesting our opinion whether non-utility gross revenues, claimed to be exempt by Hawaiian Airlines, Incorporated, should be included in computing the Public Utilities fees imposed by section 104-27, Revised Laws of Hawaii 1955, as amended.

We concur with, and therefore affirm, the opinion of September 19, 1945, written by Miss Rhoda V. Lewis, then Assistant Attorney General of the Territory of Hawaii, holding that non-utility income should be included in computing the Public Utilities tax. As indicated in that opinion, the case of Hawaii Consolidated Railway vs. Borthwick, 34 Haw. 269, is controlling on this point. Except for the change in the statutory references, there has been no reason to depart from that finding in which the court said:

> "The statute, in using the words 'gross income from its utility business', clearly contemplates gross income from both its operating utility business and its non-operating utility business."

Accordingly, we conclude that all gross income, both utility and non-utility, should be used in computing the Public Utilities fee imposed by section 104-27, Revised Laws of Hawaii 1955, as amended.

Very truly yours,

/s/ Arthur S. K. Fong

Arthur S. K. Fong
Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa

SHIRO KASHIWA
Attorney General

OPINION LETTERS
of
1962

INDEXING INSTRUCTIONS

I. TAXATION, GROSS INCOME

Subjects Taxable

Interest derived from agreement of sale of realty by partnership engaged in business of acquiring, holding, using and leasing its real property for the production of income constitutes taxable gross income within the meaning of Chapter 117, Revised Laws of Hawaii 1955, as amended.

* * * * * *

II. TAXATION, GROSS INCOME

Exemptions

An agreement of sale of realty transaction is not a "sale" within the meaning of the term "casual sale" as used in section 117-2, R.L.H. 1955, as amended, nor within the meaning of the clause "from the sale of land in fee simple" as used in the third paragraph of section 117-3, R.L.H. 1955, as amended.

* * * * * *

III. TAXATION, INCOME TAX LAW OF 1957

Exemptions

An agreement of sale of realty transaction is not a "sale" within the meaning of the term "casual sale" as used in section 117-2, R.L.H. 1955, as amended, nor within the meaning of the clause "from the sale of land in fee simple" as used in the third paragraph of section 117-3, R.L.H. 1955, as amended.

* * * * * *

IV. TAXATION, INCOME TAX LAW OF 1957

Subjects Taxable

Interest derived from agreement of sale of realty by partnership engaged in business of acquiring, holding, using and leasing its real property for the production of income constitutes taxable gross income within the meaning of Chapter 117, Revised Laws of Hawaii 1955, as amended.

* * * * * * *

V. TAXATION, INCOME TAX LAW OF 1957

Words and Phrases

An agreement of sale of realty transaction is not a "sale" within the meaning of the term "casual sale" as used in section 117-2, R.L.H 1955, as amended, nor within the meaning of the clause "from the sale of land in fee simple" as used in the third paragraph of section 117-3, R.L.H. 1955, as amended.

* * * * * * *

VI. TAXATION, GENERAL EXCISE TAX

Exemptions

An agreement of sale of realty transaction is not a "sale" within the meaning of the term "casual sale" as used in section 117-2, R.L.H. 1955, as amended, nor within the meaning of the clause "from the sale of land in fee simple" as used in the third paragraph of section 117-3, R.L.H. 1955, as amended.

* * * * * * *

VII. TAXATION, GENERAL EXCISE TAX

Subjects Taxable

Interest derived from agreement of sale of realty by partnership engaged in business of acquiring, holding, using and leasing its real property for the production of income constitutes taxable gross income within the meaning of Chapter 117, Revised Laws of Hawaii 1955, as amended.

* * * * * * *

VIII. TAXATION, GENERALLY

Exemptions

An agreement of sale of realty transaction is not a "sale" within the meaning of the term "casual sale" as used in section 117-2, R.L.H. 1955, as amended, nor within the meaning of the clause "from the sale of land in fee simple" as used in the third paragraph of section 117-3, R.L.H. 1955, as amended.

* * * * * * *

IX. TAXATION, GENERALLY

Subjects of Taxation

Interest derived from agreement of sale of realty by partnership engaged in business of acquiring, holding, using and leasing its real property for the production of income constitutes taxable gross income within the meaning of Chapter 117, Revised Laws of Hawaii 1955, as amended.

* * * * * * *

X. TAXATION, REAL PROPERTY

Exemptions

An agreement of sale of realty transaction is not a "sale" within the meaning of the term "casual sale" as used in section 117-2, R.L.H. 1955, as amended, nor within the meaning of the clause "from the sale of land in fee simple" as used in the third paragraph of section 117-3, R.L.H. 1955, as amended.

* * * * * * *

XI. INTEREST

Gross Income Tax

Interest derived from agreement of sale of realty by partnership engaged in business of acquiring, holding, using and leasing its real property for the production of income constitutes taxable gross income within the meaning of chapter 117, Revised Laws of Hawaii 1955, as amended.

* * * * * * *

XII. WORDS AND PHRASES

Sale; Agreement of Sale

An agreement of sale of realty transaction is not a "sale" within the meaning of the term "casual sale" as used in section 117-2, R.L.H. 1955, as amended, nor within the meaning of the clause "from the sale of land in fee simple" as used in the third paragraph of section 117-3, R.L.H. 1955, as amended.

* * * * * * *

XIII. WORDS AND PHRASES

Casual Sale; Agreement of Sale

An agreement of sale of realty transaction is not a "sale" within the meaning of the term "casual sale" as used in section 117-2, R.L.H. 1955, as amended, nor within the meaning of the clause "from the sale of land in fee simple" as used in the third paragraph of section 117-3, R.L.H. 1955, as amended.

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XIV. REVISED LAWS OF HAWAII, 1955

Section 117-2.

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XV. REVISED LAWS OF HAWAII, 1955

Section 117-3.

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CR:n
15a
Op. No. 62-1

STATE OF HAWAII

Department of the Attorney General

HONOLULU

January 10, 1962

Honorable Earl W. Fase
Director of Taxation
Hale Auhau
Honolulu, Hawaii

Attention: Mr. John A. Bell
Deputy Director of Taxation

Dear Sir:

This is in response to your letter requesting our opinion on the following problem:

X Company is a partnership primarily engaged in the business of acquiring, holding, using and leasing its real property for the production of income. A portion of the property, however, has been "sold" by agreement of sale to Y Associates, the purchase price to be paid in at least two installments with interest to be paid on the unpaid balance. Your question is whether the income received by X Company as interest payments on account of the agreement of sale is taxable gross income within the meaning of the General Excise Tax Law, Chapter 117, Revised Laws of Hawaii 1955, as amended.

Our opinion is that such interest payments constitute taxable gross income.

R.L.H. 1955, Sec. 117-2 defines business to include:

> ". . . all activities, (personal, professional or corporate) engaged in or caused to be engaged in with the object of gain or economic benefit either direct or indirect, but does not include casual sales."

It is not disputed that the activities of X Company are such as to fall within the terms of that definition. But it is urged by X Company that since it is not engaged in the business of selling land, the agreement of sale transaction is a "casual sale" within the meaning of the exception. We do not think so.

The partnership business deals primarily and extensively in real estate. The nature of such a business is such that the sale of real estate would not be unexpected nor unrelated nor unusual but rather would be a transaction ". . . within the course of the business." (See In Re Taxes, Gay & Robinson, 40 Haw. 722, at 729.) The fact that such a sale is the only one made by the business venture does not of itself render it a "casual sale" within the meaning of the exception above quoted.

It is further urged by X Company that since section 117-3, R.L.H. 1955 excludes from taxable gross income the "gross receipts . . . from the sale of land in fee simple", the interest income is exempt from taxation because the term "gross receipts" includes all installment payments of both principal and interest made on account of the agreement of sale. We are of the view, however, that as used in that exclusion, the term would exempt only the amount paid as purchase price for the land.

Furthermore, it is our opinion that the interest income arising from the agreement of sale is taxable gross income because the transaction from which it is derived is an executory contract and not a "sale" within the meaning of either of the exceptions provided by sections 117-2 and 117-3, R.L.H. 1955.

> "A sale of land is the actual transfer of the title from the grantor to the grantee by an appropriate instrument of conveyance. A 'sale' of property transfers ownership thereof, which includes both title and the right of possession. . . .
>
> "An agreement to sell land is a contract to be performed in the future, and if fulfilled, it results in a sale. It is preliminary to a sale but is not a sale in itself. (Ide v. Leiser, 10 Mont. 5, 24 Pac. 695.) Breaches, rescission or release may occur, by reason of which the contemplated sale never takes place. A contract to sell land on the installment plan is an agreement to sell, and not a sale. . . ." (Neponsit Holding Corp. v. Ansorge (1926), 215 App.Div. 371, 214 N.Y.S. 91; Franke v. Fergus County (1926), 76 Mont. 150, 245 Pac. 962.) (Citations added.)
>
> Thompson on Real Property, Vol. 8, Vendor & Purchaser, p. 460.

The distinction between a "sale" and an "agreement of sale" is clearly illustrated in Smith v. Messner (1952), 372 Pa. 60, 92 A.2d 417. There, the State of Pennsylvania imposed a documentary stamp tax on all instruments of writing whereby any lands, tenements or hereditaments within the Commonwealth or any interest therein were "granted, bargained, sold or otherwise conveyed" to any other person. The State Secretary of Revenue sought to enforce that tax on an agreement of sale of realty upon the theory that the document conveyed equitable interest to the vendee and the document therefore conveyed an interest in land within the meaning of the Realty Transfer Tax Act.

The Supreme Court of Pennsylvania rejected the Revenue Secretary's argument by stating that the agreement of sale does not convey equitable interest to the vendee but rather that, by reason of the contractual agreement of sale between the parties thereto, the vendee's equitable interest in the property is created by operation of law. The Court held that the agreement of sale was not a taxable document under the tax provision because:

> "An agreement of sale is an undertaking to execute and deliver an instrument of conveyance and the latter is something separate and apart from the agreement of sale itself. The words 'or otherwise conveyed' contemplate an executed conveyance and impliedly exclude agreements to convey which are executory in nature with mutual promissory obligations."

Conceivably, however, it may be argued that, broadly construed, the term "sales" includes agreements of sale since they are tantamount to documents of conveyance. But we do not think that the legislature intended to include such business transactions within the exemption provisions of sections 117-2 and 117-3. It is a generally accepted rule of statutory construction that unless it appears by the context or otherwise in the statute that a different sense was intended, words are to be given their ordinarily accepted meaning. (See Hawaii Consol. Ry., Ltd. v. Borthwick, 34 Haw. 269.) Furthermore, it is a rule of construction that exemption provisions be strictly construed against the exemption.

A close look at the facts discloses the following:

The agreement of sale involved here states that "the Sellers agree to sell and the Buyers jointly and severally agree to buy" the parcel of land for a set price upon the satisfaction of all of the covenants and conditions contained in the agreement. Stated otherwise, the agreement of sale

is a contract binding the Sellers to sell (at a later date) and the Buyers to buy (at the same later date) the land but the sale is to take place only if all of the conditions of the contract are subsequently satisfied. If the Buyers fail to meet their contractual obligations, the Sellers may unilaterally annul the contract, keep all payments made as liquidated damages and dispose of the land "as if (the) agreement had never been made."

Thus, in light of the executory nature of the agreement of sale, it is our opinion that by promising to sell only to the Buyers while the agreement of sale was in force in return for the payment of interest on the unpaid portion of the purchase price agreed upon, X Company thereby invested the capital (the land) of the business in which it was engaged (utilization of land for the production of income) within the meaning of sections 117-2 and 117-3, R.L.H. 1955.

Until the Buyers have fully satisfied all of the covenants and conditions of the agreement of sale and the deed of transfer is executed by the Seller, the agreement of sale is merely an investment in the form of a contract restricting the use of the parcel of land with the object of yielding interest income.

Stated otherwise, the interest income is not derived from the sale of the land (for such a sale would yield no interest but merely the purchase price) but instead from a contractual agreement which calls for the sale of land at some future date subject to the prior fulfillment of certain conditions.

Respectfully,

Carlos Ramelb
CARLOS RAMELB
Deputy Attorney General

APPROVED:
Shiro Kashiwa
SHIRO KASHIWA
Attorney General

INDEXING INSTRUCTIONS

OP. 62-2

CIVIL SERVICE COMMISSION

Finality of Appeal

An appeal is not final until all questions on appeal have been decided. Where pursuant to an appeal on classification and pricing the commission renders a decision on classification and withholds its decision on pricing pending its decision on another appeal on pricing, the appeal is not final until a ruling is made on pricing.

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Op. 62-2

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU, HAWAII

January 16, 1962

Mr. William V. Pacheco, Chairman
State Civil Service Commission
825 Mililani Street
Honolulu 13, Hawaii

Dear Mr. Pacheco:

This is in reply to your request for an opinion submitted October 4, 1961, concerning an appeal before the Commission on classification and pricing and the finality of such appeal.

From the facts submitted, it appears that in September 1958, as part of the classification review project, three positions in existence were reallocated to a new class. The new class was assigned to a salary range one level above the class from which it had been removed. The incumbents of the three reallocated positions appealed both the classification and the pricing actions, and a hearing was held in November 1958. At the hearing, the question of classification was first considered because until this was settled, it was felt that a determination of pricing would be premature.

In May 1959, the Commission in its decision upheld the action of the director by denying the classification appeal. The Commission also at that time announced that the pricing appeal was to be considered if there were any change in the salary range assignment of <u>another class</u>, then pending a pricing appeal. The pricing appeal in this other class was determined by the Commission in October 1960.

In February 1961, the department concerned and one of the incumbents of the three positions reallocated requested a reopening of the appeal decided in May 1959 on the question of pricing in view of the decision by the Commission in the pricing appeal of <u>another class</u>. Pursuant thereto, the

Commission held a hearing on or about May 12, 1961. A decision has not been rendered by the Commission on this appeal on pricing pending advice from our office on the following questions:

> "Does an employee have a right to a reconsideration of an appeal heard and decided by the Commission, when the request for reconsideration is based upon a subsequent action by the Commission with respect to a different class, and when there has been no further action taken by the Director since the appeal was determined?
>
> "If the answer to the above is yes, at what point is there finality to an appeal after it has been decided by the Commission and when there has been no new action taken by the Director?"

Both questions deal with the finality of an appeal. Be advised that an appeal is not final until all questions appealed from have been decided. In this instance, incumbents to the reallocated class appealed on two questions--one, classification, and secondly, pricing.

The Commission held a hearing and first determined the question of classification. In May 1959, the Commission rendered a decision solely on the question of classification by denying the appeal and sustaining the actions of the director. At that time, you stated that the Commission "also announced at this time that the questioned pricing of the new class was to be considered if there were any change in the salary range assignment of another class, then-pending a pricing appeal."

In view of the decision and announcement of the Commission in May 1959, the appeal on pricing was still pending before the Commission. Upon the determination by the Commission on the other pricing appeal, the Commission was duty-bound to render a final decision on pricing in the original appeal by the incumbents of the three positions reallocated. For this reason, there has not been a final decision in the original appeal; hence, the Commission still has jurisdiction over the subject matter and may at this time render a decision on the question of pricing.

In answer to your second question, there is finality to an appeal when the pertinent questions on appeal have all

been decided. Where the Commission decides a question on classification and withholds its decision on pricing, the appeal is not final until the question on pricing has also been decided.

Very truly yours,

/s/ Andrew S. O. Lee

Andrew S. O. Lee
Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa

Shiro Kashiwa
Attorney General

INDEXING INSTRUCTIONS

Opinion No. 62-3

Hawaii Housing Authority

Commercial Facilities

Hawaii Housing Authority may provide commercial facilities in its low rent housing projects when designed primarily for the benefit and use of the Authority or the occupants of the dwelling accommodations.

Hawaii Housing Authority

Taxation

Property of the Hawaii Housing Authority and the Authority itself cannot be taxed and/or assessed by the State. This applies to any commercial facilities acquired or constructed or to be acquired or constructed by the Authority pursuant to a single plan or undertaking.

Statutory Provisions Interpreted

Sections 74-1
74-3
74-10
74-21
74-24

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14b
Op. No. 62-3

STATE OF HAWAII

Department of the Attorney General

HONOLULU

January 23, 1962

Mr. A. V. Sullivan, Executive Director
Hawaii Housing Authority
Department of Social Services
State of Hawaii
Honolulu, Hawaii

Dear Mr. Sullivan:

Subject: Commercial Facilities in Low Rent Projects (Your Ref. 4-14/55)

This is in response to your request for an opinion as to (1) whether or not the Hawaii Housing Authority can legally enter into transaction with the Public Housing Administration for assistance in financing the cost of development of commercial facilities in a low rent project, (2) whether or not the facility would be subject to taxation, and (3) what effect, if any, the taxation of this facility would have on the remainder of the low rent project. In your letter dated January 10, 1962, you stated that the Federal Housing Act of 1961 permitted commercial facilities to be constructed in low rent housing projects with assistance of Federal financing.

It is the opinion of this department, as attorney for the Hawaii Housing Authority, that the Authority is empowered to take advantage of the provisions of the Federal Housing Act of 1961 with relation to inclusion of commercial facilities in low rent housing projects and that, if the Authority decides to provide for commercial facilities in its housing areas, such property would not be subject to taxation.

With relation to your first inquiry, the Authority is empowered to do all things necessary and convenient to carry out the powers especially provided for in Chapter 74, RLH 1955. The general purpose of the Authority is to provide for safe and sanitary dwelling accommodations for persons of low income so as to improve public health, safety, morals and welfare of the inhabitants of the State. Section 74-1, RLH 1955. To this end, the Authority has been granted broad powers to do all things necessary and convenient to carry out and effectuate its purpose. Section 74-10, RLH 1955. The Authority is empowered to borrow money or to accept grants

from the Federal Government for or in aid of any housing projects and may enter into agreements with the Federal Government as to operation of the Housing Authority; it is authorized to do any and all things necessary to secure financial aid and the cooperation of the Federal Government in the undertaking, construction, maintenance and operation of any housing project. Section 74-21, RLH 1955. A housing project may be defined to include all real and personal property, buildings, improvements, stores, offices, lands for farming and gardening, and community facilities acquired or constructed or to be acquired or constructed pursuant to a single plan or undertaking. Community facilities included in housing projects may include buildings, equipment, lands and grounds for recreational or social assemblies, for educational, health or welfare purposes and necessary or convenient utilities, when designed primarily for the benefit and use of the Housing Authority or the occupants of the dwelling accommodations. Section 74-3, RLH 1955.

It is then evident that the Authority may provide for facilities which are designed primarily for the benefit and use of the Housing Authority or the occupants of the dwelling accommodations. That which is necessary and convenient to carry out and effectuate the purposes of the Authority may include provisions for buildings, improvements, stores, offices and community facilities designed primarily for the benefit and use of the Authority or its occupants. Certainly the Authority may provide for community facilities, including commercial facilities. In your deliberation as to whether or not the Authority should provide commercial facilities within its housing units, the Authority should provide for only those facilities which are directed primarily for the benefit and use of the Housing Authority or the occupants of the dwelling accommodations.

Your second and third inquiries may be answered together. Property of the Authority and the Authority itself cannot be taxed and assessed by the State; Section 74-24, RLH 1955, exempts the Authority and its property from any and all taxes and assessments of whatsoever nature. This exemption, of course, applies only to the Authority and its property, which includes any commercial facilities acquired or constructed or to be acquired or constructed by the Authority pursuant to a single plan or undertaking. This statement should not be construed to cover the taxation of occupants, lessees or licensees of commercial facilities by the State or any of its political subdivisions.

Yours very truly,

(s) Tenny Hoon Tom

Tenny Hoon Tom
Deputy Attorney General

APPROVED:

(s) Shiro Kashiwa

Shiro Kashiwa
Attorney General

Opinion No. 62-3

INDEXING INSTRUCTIONS

I. AUDITOR, STATE

Warrant for Salary

Notices of Levy served on State Comptroller by United States Treasury Department-Internal Revenue Service seizing unclaimed State tax refund warrants for application towards the satisfaction of unpaid federal taxes should be honored. Refusal to comply might create personal liability.

* * * * *

II. LIEN, TAX

Federal Notice of Levy upon State Official

Notices of Levy served on State Comptroller by United States Treasury Department-Internal Revenue Service seizing unclaimed State tax refund warrants for application towards the satisfaction of unpaid federal taxes should be honored. Refusal to comply might create personal liability.

* * * * *

III. COMPTROLLER

Federal Notice of Levy upon Comptroller

Notices of Levy served on State Comptroller by United States Treasury Department-Internal Revenue Service seizing unclaimed State tax refund warrants for application towards the satisfaction of unpaid federal taxes should be honored. Refusal to comply might create personal liability.

* * * * *

IV. TAXATION, GENERALLY

Tax Lien, Federal

Notices of Levy served on State Comptroller by United States Treasury Department-Internal Revenue Service seizing unclaimed State tax refund warrants for application towards the satisfaction of unpaid federal taxes should be honored. Refusal to comply might create personal liability.

* * * * *

V. TREASURER, STATE

Warrant Notes

Notice of Levy served on State Comptroller by United States Treasury Department-Internal Revenue Service seizing unclaimed State tax refund warrants for application towards the satisfaction of unpaid federal taxes should be honored. Refusal to comply might create personal liability.

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Op. 62-4

STATE OF HAWAII

Department of the Attorney General

HONOLULU

January 26, 1962

Mr. Quentin I. Smith
Deputy Comptroller
Dept. of Accounting and General Service
State of Hawaii
Honolulu 10, Hawaii

Dear Sir:

This is in reply to your letter requesting our opinion on whether or not you should honor the Notices of Levy issued by the United States Treasury Department-Internal Revenue Service upon unclaimed State tax refund warrants to secure payment of delinquent federal taxes.

You are advised that the levies should be honored.

Under § 6321 of the Internal Revenue Code of 1954, a lien existed upon all property or rights to property belonging to the delinquent taxpayers prior to service upon you of the Notices of Levy. Pursuant to §§ 6331 and 6332, IRC 1954, levies were made upon the unclaimed tax refund warrants by the Internal Revenue Service. We see no objection to the levies made upon the warrants but the question remains whether a State official may be ordered to observe the terms of the Notices of Levy by service thereof.

It is our view that the State Comptroller is subject to the Notices of Levy under the particular facts presented and any refusal to comply with the terms thereof might create personal liability. See Sims v. United States (1959), 79 Sup.Ct. 641, 359 U.S. 108, 3 L.Ed.2d 667.

Very truly yours,

Carlos Ramelb

CARLOS RAMELB
Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa

SHIRO KASHIWA
Attorney General

INDEXING INSTRUCTIONS

Opinion No. 62-5

1. CONSTITUTION OF HAWAII

ARTICLE IV, section 6

Three-year residence requirement does apply to superintendent of public instruction

2. CONSTITUTION OF HAWAII

ARTICLE IX

Board of Education -- intention of legislature was to set the maximum salary of the superintendent of public instruction at not more than $17,500 per annum.

3. SECOND SPECIAL SESSION LAWS OF HAWAII 1959

Act 1, Sections 8 and 44

Compensation of executive officers of boards or commissions.

Intention of legislature was to set the maximum salary of superintendent of public instruction at not more than $17,500 per annum.

4. PUBLIC INSTRUCTION, DEPARTMENT OF

Three-year residence requirement does apply to superintendent of public instruction.

Intention of legislature was to set the maximum salary of superintendent of public instruction at not more than $17,500 per annum.

DHCL:ft
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Op. No. 62-5

STATE OF HAWAII

Department of the Attorney General

HONOLULU

February 9, 1962

Dr. Katsumi Kometani
Chairman, Board of Education
P. O. Box 2360
Honolulu 4, Hawaii

Dear Sir:

This is in reply to your request for an opinion dated January 29, 1962, wherein you ask:

"1. Does the three-year residence requirement apply to the Superintendent of Public Instruction?

"2. Has the Board of Education the authority to set the salary of the Superintendent of Public Instruction at any figure it deems necessary to attract and hold a competent man or does the $17,500 ceiling for certain department heads apply?"

Article IV, section 6, of the State Constitution in part reads as follows:

"Whenever a board, commission or other body shall be the head of a principal department of the state government, the members thereof shall be nominated and, by and with the advice and consent of the senate, appointed by the governor. The term of office and removal of such members shall be as prescribed by law. Such board, commission or other body may appoint a principal executive officer, who, when authorized by law, may be ex officio a voting member thereof, and who may be removed by a majority vote of the members appointed by the governor."

. . . . .

"All officers appointed under the provisions of this section shall be citizens of this State and shall have been residents of the State for at least three years next preceding their appointment."

Based on the above constitutional provision, it is the opinion of this office that the three-year residence requirement does apply to the Superintendent of Public Instruction.

Section 18 of Act 1, Second Special Session Laws of Hawaii 1959, the Reorganization Act, pursuant to Article IX of the State Constitution, provides for the Superintendent of Public Instruction.

Section 8 of this Act provides for the compensation of the Superintendent who is the executive officer of the Board of Education. It reads as follows:

> "Except as otherwise provided by this Act and with the approval of the governor, the head of a department may establish or abolish any subordinate office or position, transfer officers and employees between positions, appoint and remove any subordinate, and change the duties, titles and compensation of officers and positions as is deemed necessary by the head of the department for the efficient functioning of the department, . . ."

The statute is silent as to the salary of an executive officer of a board or commission who is the head of a principal department.

Section 44, the appropriation section of this Act, reads in part:

> "The salary of any such single executive shall be set by the governor, but at not more than $17,500 per annum."

This appropriation section refers only to a single executive. It is also silent as to the salary of an executive officer of a board or commission. However, the indication appears that it was the intention of the legislature to set the maximum salary of any executive at not more than the $17,500 per annum as provided for in section 44.

If the Board of Education wishes to set the salary of the Superintendent of Public Instruction at a figure higher than $17,500, we suggest that legislation be enacted to that effect.

Yours very truly,

APPROVED:

/s/ Shiro Kashiwa

Shiro Kashiwa
Attorney General

/s/ Donald H. C. Low

Donald H. C. Low
Deputy Attorney General

Opinion No. 62-5

INDEXING INSTRUCTIONS

Opinion No. 62-6

HAWAIIAN HOMES COMMISSION

Hawaiian Homes Commission may not expend funds under Hawaiian Homes Commission Act, 1920, to subsidize operations of nursery schools on Hawaiian home lands after December 31, 1961.

STATE OF HAWAII

Department of the Attorney General

DYM:hmm
8a
OP. 62-6

HONOLULU

January 22, 1962

Mr. William C. Kea, Chairman
Hawaiian Homes Commission
State of Hawaii
State Office Building
Honolulu, Hawaii

Dear Mr. Kea:

This is in response to your request that we confirm for the records the opinion heretofore given by Counsel to your Executive Officer concerning the matter whether the Hawaiian Homes Commission may expend money under the Hawaiian Homes Commission Act for the purpose of subsidizing the operation of nursery schools after December 31, 1961. Since that opinion was given informally by memorandum dated January 3, 1962, we reproduce hereunder the contents of that memorandum as follows:

"TO: Mr. Ainsley K. Mahikoa, Director
Hawaiian Home Lands, State of Hawaii

FROM: David Y. Mar, Deputy Attorney General

SUBJECT: Whether Hawaiian Homes Commission may expend money under Hawaiian Homes Commission Act to subsidize operation of nursery schools after December 31, 1961

"Following up on our conference (12/29/61) concerning the matter whether the Hawaiian Homes Commission is authorized under the Hawaiian Homes Commission Act, 1920, as amended, to assist hereafter in the operation of the nursery schools at Papakolea in Honolulu and at Keaukaha on the island of Hawaii by expending money from the Hawaiian Home-Operating Fund, or from some other fund under the said Act, I wish to quote hereunder the expression of legislative intent by both chambers of our State Legislature when they passed Act 125, Session Laws of Hawaii 1961, as follows:

'It is the intent of your Committee that the nursery school should be terminated by December 31, 1961 and that such schools, if maintained, should be supported by the community. The nursery school employees and those in other positions which are affected by the recommendations of Booz, Allen & Hamilton shall have super-seniority and shall be placed in authorized positions without examination if such position meets the minimum qualifications of the vacant authorized position. The Commission and the Department of Budget and Review shall either transfer the persons occupying surplus positions into authorized positions within the Department of Hawaiian Home Lands or into authorized positions within the State government. . . .'

(From Senate Conf. Com. Rep. No. 18 on H. B. No. 39 [Act 125, S.L.H. 1961], H.D. 1, S.D. 1, C.D. 1, adopted May 26, 1961. House Conf. Com. Rep. No. 15 on H. B. No. 39, H.D. 1, S.D. 1, C.D. 1, adopted May 26, 1961, expresses the same intent in identical language.)

"As indicated in your letter of December 21, 1961, to us, the Legislature, in passing said Act 125, deleted from your proposed budget $5,320.00 allocated for the nursery school, and specified under section 2 thereof that in the administration program the positions in the nursery school shall not become surplus until December 31, 1961. It follows from the above-quoted legislative committee report and the above-mentioned provision of said Act 125 that, if there is a need by certain homestead residents at Papakolea and at Keaukaha for the continuation of the nursery schools thereat after December 31, 1961, then such schools should be operated with financial support from private sources* rather than with public money from any of the several funds created under section 213 of the Hawaiian Homes Commission Act for purposes other than for the operation of nursery schools as provided thereunder.

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* The following excerpts are quoted from pp. 96-97 of the Booz, Allen & Hamilton Report, dated February 15, 1961, to the Governor:

"While section 213(d) of the Hawaiian Homes Commission Act authorizes the Commission to expend money from the Hawaiian Home-Operating Fund 'for the purchase of water or other utilities, goods, commodities, supplies, or equipment and for services,' and while this literal language appears broad in scope, it will be observed that this language is accompanied by words which clearly specify that the items so prescribed to be purchasable out of money from that fund are 'to be resold, rented, or furnished on a charged basis to the occupants of Hawaiian home lands.' Moreover, it appears that the authorization to expend money from said Home-Operating Fund, as thus given, limited and circumscribed in said Act, should be read and given that interpretation which is in harmony with the provisions of other state statutes covering matters placed by law under the control and operation of the Department of Hawaiian Home Lands, inasmuch as the said Hawaiian Homes Commission Act has been adopted as a law of the State of Hawaii under our State Constitution, and inasmuch as our State Legislature, by the Hawaii State

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"(7) Discontinue the Operation of Nursery Schools

The present nursery schools operated by the department provide a useful service. However, there is not evident authorization for either such services or for the assignment of state employees to these activities. It is therefore recommended that their operation by the department be discontinued.

To avoid cessation of the nursery school activity, project managers should make every effort to assist in developing alternative means of operation. A first consideration should be the possibility of cooperative efforts by parents. Such a cooperative effort could use project facilities and parents could share the cost of paid teachers and participate in the day-to-day supervision of the children. Such cooperative endeavors could have important by-product effects for the communities as a whole.

Project residents should, of course, take advantage of needed public and private services provided to the

Government Reorganization Act of 1959, has permanently established the Department of Hawaiian Home Lands as one of the eighteen principal departments of our State government. Viewed in this light, I am inclined to believe that where the language of any provision of the Hawaiian Homes Commission Act (excluding for our present consideration basic provisions which cannot be changed without Congressional consent and provisions involving constitutional questions) is susceptible to several possible modes of interpretation, where one mode of interpretation would render said Act consistent with other state legislation covering related subject matter while the other would render it either in conflict with, or tend to be inconsistent with, such other state legislation, then in such event the interpretation that should be followed must be the one which is in harmony with other state legislation. If for nothing else, this procedure is indispensable to avoid creating inconsistencies in our State laws. It therefore does not appear proper for your Department at this time to use money from the Hawaiian Home-Operating Fund to subsidize the continuation of said nursery schools, after the Legislature has unequivocally expressed its intent as aforesaid that the operation by the Department of Hawaiian Home Lands of nursery schools be terminated on December 31, 1961.

"I see no objection, however, in the proposal by your Department, as stated orally by you, that the nursery school at Papakolea be continued on a privately supported basis, with the parents contributing money to pay for the salary or salaries of the teacher or teachers as needed, and with the City and County of Honolulu (recreational department) consenting to allow the parents at Papakolea to continue to use the recreational building on the park premises thereat for nursery school classes. The operation of the nursery school under such private sponsorship at the Papakolea homestead would not be contrary to the legislative intent of our Legislature as above indicated, for the school thus sponsored and supported would be from

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population as a whole. Where some subsidy is considered essential, consideration should be given to approaching the important private organizations administering funds dedicated to the welfare of native Hawaiian citizens."

OP. 62-6

private rather than from public funds. If there is a further need involving incidental expenses which may be necessary, and for which the parents are unable to provide, it would seem that here too the proper procedure lies in approaching private organizations administering funds dedicated to the welfare of needy Hawaiian citizens, rather than the Commission, for such financial assistance as needed to meet such incidental expenses."

Very truly yours,

/s/ David Y. Mar

DAVID Y. MAR
Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa

SHIRO KASHIWA
Attorney General

INDEXING INSTRUCTIONS

Opinion No. 62-7

LOYALTY OATH STATUTE

The decision of the United States Supreme Court in the case of Cramp v. Board of Public Instruction, _____ U.S. _____, 7 L.ed. 285, 82 S. Ct. _____, declaring Florida's "Loyalty Oath" statute unconstitutional, does not directly affect our loyalty oath statute.

STATE OF HAWAII

Department of the Attorney General

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22a,C-6615
OP. 62-7

HONOLULU

February 15, 1962

Honorable John C. Lanham
House of Representatives
The First Legislature
State of Hawaii
Honolulu, Hawaii

Dear Sir:

This is in reply to your request dated February 6, 1962, for an opinion on the following question: "Does the recent decision of the United States Supreme Court in the case of Cramp v. Board of Public Instruction, _____ U.S. _____, 7 L.ed. 285, 82 S. Ct. _____, necessitate an amendment of our 'Loyalty Oath' statutes (Secs. 5-120 and 5-127, R.L.H. 1955, as amended), especially with respect to school teachers?"

It is the opinion of this office that the decision in the Cramp case does not necessitate an amendment of our "Loyalty Oath" statutes.

In the Cramp case the constitutionality of Florida's "Loyalty Oath" statute was in question. The Supreme Court of the United States held that it was unconstitutional because it exacted obedience to a rule or standard which was so vague and indefinite as to be really no rule or standard at all and, thus, constituted a denial of due process of law.

The language of Florida's loyalty oath is substantially different from ours. The objectionable part of Florida's loyalty oath reads as follows: " . . . that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party."

As to this part the Court said:

> "The provision of the oath here in question, it is to be noted, says nothing of advocacy of violent

> overthrow of state or federal government. It says nothing of membership or affiliation with the Communist Party, past or present. The provision is completely lacking in these or any other terms susceptible of objective measurement. Those who take this oath must swear, rather, that they have not in the unending past ever knowingly lent their 'aid', or 'support', or 'advice', or 'counsel' or 'influence' to the Communist Party. What do these phrases mean?"

The portion of our loyalty oath which is closest related to that portion of Florida's loyalty oath in question, as stated in Section 5-120, R.L.H. 1955, reads as follows:

> " . . . that I do not hold membership in, pay assessments, dues, or make contributions to any organization or any political party which advocates the overthrow of the constitutional form of government of the United States of America or any change in the government of the United States of America, except as provided by its Constitution;".

The language of our statute is clear and definite. The standard set up by the Legislature is objective and adequately spelled out so that men of ordinary intelligence would know its meaning. Moreover, our statute deals with the present tense and does not delve into the "unending past".

Thus, it is our opinion that the decision of the Supreme Court of the United States in Cramp v. Board of Public Instruction does not directly affect our loyalty oath statute and no legislation is required in order to conform with that decision.

Very truly yours,

/s/ Shiro Kashiwa

SHIRO KASHIWA
Attorney General

February 19, 1962

INDEXING INSTRUCTIONS

I. Highways - Utility relocation, temporary, cost of.

The cost of temporary relocations of utilities necessitated by the construction, reconstruction, or maintenance of state or federal-aid highways should be included in the overall relocation costs to which Sec. 111-20 is to be applied.

II. Public Utilities - Utility relocation, temporary, cost of.

The cost of temporary relocations of utilities necessitated by the construction, reconstruction, or maintenance of state or federal-aid highways should be included in the overall relocation costs to which Sec. 111-20 is to be applied.

III. Statute - Section 111-20, Revised Laws of Hawaii 1955

The cost of temporary relocations of utilities necessitated by the construction, reconstruction, or maintenance of state or federal-aid highways should be included in the overall relocation costs to which Sec. 111-20 is to be applied.

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16c
Op. No. 62-8

STATE OF HAWAII

Department of the Attorney General

HONOLULU

February 19, 1962

Honorable Tim Ho
Director of Transportation
869 Punchbowl Street
Honolulu, Hawaii

Dear Mr. Ho:

This is in response to your request dated January 30, 1962 regarding the application of Sec. 111-20, R.L.H. 1955, to the costs of temporary relocations of utility facilities necessitated by highway construction.

Sec. 111-20 states in effect that the cost of relocations of privately-owned utility facilities made necessary by the construction, reconstruction or maintenance of any state or federal-aid highway shall be split between the state and the private utility after the first $3,000 is paid by the private utility.[1] No differentiation is made in the statute between temporary or permanent relocations.

Under the common law all utility removal, relocation, replacement or reconstruction costs reasonably necessitated by highway construction were generally held to be payable by the utility companies. The case of Southern Bell Telephone and Telegraph Co. v. Commonwealth, 266 S.W.2d 308, quoted with approval from New York City Tunnel Authority v. Consolidated Edison Co. of New York, Inc., 295 N.Y. 467, 68 N.E.2d 445, 448, as follows:

> "The 'fundamental common-law right applicable to franchises in streets' is that a utility company must relocate its facilities in the public streets

[1] Although there exists a present conflict of authorities regarding the constitutionality of statutes such as Sec. 111-20 which require the state to share in relocation costs of private utilities, for the purpose of this opinion we presume that Sec. 111-20 is constitutional.

when changes are required by public necessity (cases cited). ... 'Although authorized to lay its pipes in the public streets, the company takes the risk of their location and is bound to make such changes as the public convenience and security require, at its own cost and charge (citing cases). All these cases are in point, that these public service corporations maintain their rights in the streets, subject to reasonable regulation and control, and are bound to relocate their structures at their own expense whenever the public health, safety, or convenience requires the change to be made'."

The fact that any particular relocation was only temporary does not affect the fundamental proposition in any way. In the case of County Court of Wyoming County v. White, et al., 79 W.Va. 475, 91 S.E. 350, LRA 1917D 660, wherein the question of temporary removal was directly involved, the court there upheld the issuance of a writ of mandamus to compel a telephone company to fulfill its duty and remove its poles and lines. In its decision the court stated as follows:

"It may therefore be necessary for respondents to remove their lines off the right of way entirely in places, at least temporarily, and until the permanent road improvement is completed. Respondents' duty in this respect is to be determined by the necessity of the case. They must care for their own line. This does not mean that the court or the contractors have any right to wilfully or wantonly destroy or injure respondents' property. They must use reasonable care not to injure the property any more than is reasonably necessary in the execution of work."

In 52 Am.Jur. "Telegraph and Telephones", § 49, the respective rights of the government and private utility companies in the use of streets and highways are explained as follows:

"Where a telegraph or telephone company has placed its poles, wires, and other fixtures in a public street in accordance with state and municipal permission, the municipality cannot arbitrarily order their removal or a different arrangement without reason or necessity, as this would be an interference with vested rights. If a telephone company has, by

> the acceptance of an ordinance and expenditure of money, acquired vested contract rights, no new, burdensome, and unreasonable conditions, such as being compelled to remove its wires and repair them whenever called upon to do so by an extraordinary use of the streets by private interests, can be thereafter imposed by ordinance. In such a case the telephone company when accepting its grant or franchise would have a right to rest upon the presumption that its rights would be paramount to any extraordinary street uses by private interests which would jeopardize its interests, and would only be subject to impairment by the usual and necessary use of the streets, or where public interest would demand it."

It is apparent from the foregoing that, absent Sec. 111-20, the test of whether the State or a utility company shall pay for any particular relocation is not whether the relocation is temporary or permanent, but whether the relocation, be it either temporary or permanent, is reasonable and necessary in the public interest under the circumstances. Once this determination is made, the application of Sec. 111-20 becomes automatic. What is reasonable and necessary will always depend upon the facts of each case, however, the following quotation from the White case, supra, indicates what the general attitude of courts would be regarding a temporary relocation:

> "The widening and permanently improving the road now being done is for the benefit of the travelling public, and the interference by the poles and wires with this work, while not within the letter of the statute,[2/] is clearly within its spirit and intendment, and the duty to remove the poles is as imperative upon respondents as if they stood in the old roadbed and did actually hinder travel thereon. It is clearly such an interference as is contemplated by the statute. Interference with the work of improving a highway for better travelling is necessarily and incidental interference with public travel." (Footnote added)

2/ Sec. 56a(77), C.43, Barnes' Code (W.Va. Code 1913, § 1844) "It shall be the duty of all telephone, telegraph, electric railway or other electrical companies, to remove and reset, telephone, telegraph, trolley, and other poles and wires connected therewith, when the same constitute obstructions to the use of the public road by the traveling public."

To answer specifically your request regarding Sec. 111-20, it is our opinion that, inasmuch as no distinction is made between temporary or permanent relocations either in the common law or in Sec. 111-20 itself, the cost of reasonably required temporary relocations of utility lines should be included as part of the overall utility relocation cost to which Sec. 111-20 would be applicable.3/

Very truly yours,

/s/ Robert K. Richardson

ROBERT K. RICHARDSON
Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa

SHIRO KASHIWA
Attorney General

3/This opinion supplements a prior opinion of the Attorney General (Op. 58-204, 12/12/58).

Opinion No. 62-9

DEPARTMENT OF HAWAIIAN HOME LANDS

Multi-unit dwellings

Under the Hawaiian Homes Commission Act of 1920, as amended, and the Compact with the United States by which the same is adopted as a provision of the Constitution of the State of Hawaii, neither the Department of Hawaiian Home Lands nor and of the lessees of its land is authorized to develop multi-unit dwellings on the land.

MULTI-UNIT DWELLINGS

Use of Hawaiian Home Lands for

Under the Hawaiian Homes Commission Act of 1920, as amended, and the Compact with the United States by which the same is adopted as a provision of the Constitution of the State of Hawaii, neither the Department of Hawaiian Home Lands nor and of the lessees of its land is authorized to develop multi-unit dwellings on the land.

CONSTITUTION OF THE STATE OF HAWAII

Multi-unit dwellings on Hawaiian Home Lands

Under the Hawaiian Homes Commission Act of 1920,as amended, and the Compact with the United States by which the same is adopted as a provision of the Constitution of the State of Hawaii, neither the Department of Hawaiian Home Lands nor and of the lessees of its land is authorized to develop multi-unit dwellings on the land.

Hawaiian Homes Commission Act of 1920, Act of July 9, 1921, 42 Stat. 108, c. 42, as amended.

The Admission Act, Act of March 18, 1959, 73 Stat. 4, Section 4.

O.A.G. 1532, July 24, 1929

JRC:mm
8A;22A
Op. No. 62-9

STATE OF HAWAII

Department of the Attorney General

HONOLULU

February 21, 1962

Honorable Noboru Miyake
Chairman, Senate Ways and Mean Committee
Iolani Palace
Honolulu, Hawaii

Dear Sir:

Re: Use of Hawaiian Home lands for multi-unit dwelling

You requested an opinion as to the legal possibility of using Hawaiian Home lands for multi-unit dwellings rather than single unit and the affect of the condominium law on this problem. Your request has been referred to the undersigned.

The question of the possibility of using Hawaiian Home Commission land for multi-unit dwellings rather than single units involves two questions, viz.: (1) the power of the lessee to use it that way and (2) the power of the Hawaiian Home Land Department to develop such projects.

As to the lessee's power, it is clear from a reading of the Act that it was the intent that the residence lot was granted to the lessee for his residence only. It is specifically provided that he may not sub-let it. (Sec. 208).

As to the Department's power, the Act requires somewhat closer scrutiny, but carefully analyzed, it is apparent that it was intended that the Department lease land to native Hawaiians and that the latter use and improve it. At the outset, it should be noted that in the Admission Act, the United States specifically reserved to itself that last word in deciding how Hawaiian Home lands should be used. (P.L. 86-3, 86th Congress, Section 4). Congress has exercised

strict control of the use of such lands for residential purposes even since the inception of the Act. In the 41 years since then, it has amended the Act with respect to residential use six (6) times.

The Act, in its present form provides (in Sec. 207) for the granting of leases of tracts of not more than one acre of any class of land to be used as a residence lot. It does not expressly authorize or prohibit multi-unit dwellings. Since the Act is silent upon the matter, it is necessary that the Act be construed upon the basis of established principles.

The basic principle in statutory construction is that it is the legislative intent that governs. To ascertain the legislative intent, both the letter and the spirit of the law as they may be gleaned from a reading of the law should be considered.

The letter of the law is simple; that the Department is authorized to lease tracts of land within acreage limits per each lessee of not more than one acre of any class of land to be used as a residence lot. It sets up many ways in which the Department is authorized to assist the lessee to use and improve the lot, but there is not one word about the Department doing it for him.

As to the spirit of the law, it is all in accord with the letter. All of its provisions contemplate the Department providing land and the lessee doing the developing. The subject matter of all leases is described in terms of acreage. (Sec. 207(a)). Provision is made for loans to lessees for erection of improvements. (Sec. 215). Upon change of lessees, provision is made to reimburse the original lessee for the improvements built by him. (Sec. 209). Lessees are prohibited from sub-letting the premises. (Sec. 208(5)). The Department is authorized to assist the lessees by bringing in water and arranging for other utility services. (Sec. 220).

When the letter and the spirit of the law are in one accord, it needs no further interpretation. It has been said that the sole purpose of the law in its inception was to encourage native Hawaiians to go back to agriculture and to assist them in engaging in agricultural pursuits. (OAG 1532, July 24, 1929). The Congress has waivered from that policy in some measure, from time to time, and has extended it to include providing land for homes, but there is no indication in the law as yet that it intends simply to provide housing under the provisions of this Act.

Inasmuch as the Hawaiian Home Land Department neither has, nor without the further authority of the Congress of the United States can have, the authority to undertake multi-unit projects, the question as to the applicability of the condominium law, Act 180, SLH 1961, is moot and, hence, not considered.

Very truly yours,

J. R. Canright
Deputy Attorney General

APPROVED:

Shiro Kashiwa
Attorney General

INDEXING INSTRUCTIONS

I. THE HAWAII INSURANCE LAW

Taxation

The "premium deposits" received by a factory mutual insurance company constitute its "gross premiums".

* * * * *

II. THE HAWAII INSURANCE LAW

Taxation

The "unabsorbed" portion of the premium deposit received by a factory mutual insurance company is not a "return premium".

* * * * *

III. REVISED LAWS OF HAWAII 1955, AS AMENDED

Section 181-313

* * * * *

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17a
Op. No. 62-10

STATE OF HAWAII

Department of the Attorney General

HONOLULU

February 27, 1962

Honorable Chas. H. Silva
Insurance Commissioner
State of Hawaii
P. O. Box 3614
Honolulu 11, Hawaii

Dear Sir:

This concerns the matter of determining the amount of the tax base of factory mutual insurance companies under the provisions of Section 181-313, Revised Laws of Hawaii 1955 as amended.

A factory mutual fire insurance company's method of charging for insurance consists of requiring, at the time of the issuance of the policy, the deposit of a sum of money referred to by the company as a "premium deposit," the amount of which varies with the size and character of the risk but not with the term of the policy. For example, assuming a rate of 50 cents per $100 of insurance for a certain class of risk, that rate is used as the basis for computing the amount of the premium deposit irrespective of the term of the policy. From the premium deposit there is "absorbed" each month by the company a sum computed by taking its total expenses, adding thereto its total incurred losses, and then subtracting therefrom its investment income. There is also included in the amount absorbed an appropriate contribution to reserve. The balance of the premium deposit remaining at the time of the termination of the policy is returned to the policyholder or it may be used by the insured as part payment of the premium deposit on a renewal policy.

Section 181-313 provides in part:

> "§ 181-313. Taxation. (a) Each authorized insurer, except life insurers and ocean marine insurers, shall pay to the treasurer, through the commissioner, in the case of domestic insurers a tax of two and one-quarter per cent, and in the case of other insurers a tax of three and one-quarter per cent, on the

gross premiums received from all risks or property resident, situated, or located within this State, during the year ending on the preceding December 31 less return premiums (but not including dividends paid or credited to policyholders), and less any reinsurance accepted (the tax upon such business being payable by the direct writing insurer)."

"(d) No return premium shall be deductible unless the original gross premium, or an adjustment thereof, in an amount equal to or in excess of the return premium, shall have been concurrently or previously reported as taxable under this section or a prior similar law of the State."

The statutory formula is "gross premiums" less "return premiums" and reinsurance. No question of reinsurance is presented.

This office is of the opinion that the "premium deposit" constitutes "gross premium" but that the "unabsorbed" portion thereof is not a "return premium" within the meaning of the statute.

In the field of insurance the word "premium" means the amount paid to the insurer for insurance. Allstate Ins. Co. v. State Board of Equalization, 336 P.2d 961; 44 C.J.S. Insurance, § 340. It is the consideration for the assumption of risk by the insurer. Hence it has been held to include charges denominated "dues" instead of "premium." Clay v. Hartford Life Ins. Co., 179 S.W. 1024. "Gross" means whole, entire or total. Thus "gross premium" has been held to mean the amount of the premium stated in the face of the policy (State v. Tomlinson, 124 N.E. 200; New York Life Ins. Co. v. Burbank, 216 N.W. 742; see also 84 C.J.S. Taxation, § 167) and to include even return premiums where the applicable statute did not expressly allow them as deductible items. United Pacific Ins. Co. v. Bakes, 67 P.2d 1024. However, Section 181-313 does permit the deduction of return premiums. This expression is generally understood to mean the return of the whole or a part of the premium paid for a policy of insurance upon cancellation thereof prior to the time fixed for its expiration. Northwestern Mut. Life Ins. Co. v. Roberts, 171 Pac. 313. It is usually applied to situations where the risk has not attached, as where the policy is void or is voidable and voided. Northwestern Mut. Life Ins. Co. v. Robert, supra; 3 Joye on Insurance, Chapter

XLV (2d ed.). As the risk which the factory mutual insurer contracts for attaches to the entire amount of the premium deposit, it would seem to follow that the "unabsorbed" portion of the premium and deposit would not be a return premium.

It might be noted, additionally, that Section 181-313 specifically states that dividends are not deductible from gross premiums. The unabsorbed premium of the factory mutual company appears to be similar to the dividends which were held not to be "return premiums" in Northwestern Mut. Life Ins. Co. v. Roberts, supra.

For the reasons stated above, this office is of the opinion that factory mutual insurance companies should be taxed the amount of the "premium deposits" without allowing deductions for the "unabsorbed" portions thereof.

Very truly yours,

/s/ Nobuki Kamida

NOBUKI KAMIDA
Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa

SHIRO KASHIWA
Attorney General

INDEXING INSTRUCTIONS

Opinion No. 62-11

1. CONSTITUTION OF HAWAII

Article VII, section 1

Under Art. VII, sec. 1, providing that each political subdivision shall have and exercise such powers as conferred under general laws, a pre-statehood local law limiting number of fire stations in the County of Kauai (Act 296, SLH 1957) not only is still valid but may not now be abolished or repealed by a special or local law. The repeal of such a law can only be effected by general laws.

2. ACT 296, SESSION LAWS OF HAWAII 1957

Same (Under Art. VII, sec. 1, providing etc.)

3. Section 147-36.5, RLH 1955 (1960 Supp.)

Same

4. Statutes

Repeal of local laws

5. Kauai County -- number of fire stations

Same as No. 1

YS:ft
22a
Op. No. 62-11

STATE OF HAWAII

Department of the Attorney General

HONOLULU

March 5, 1962

The Honorable Elmer F. Cravalho
Speaker, House of Representatives
First Legislature, State of Hawaii
Budget Session of 1962
Honolulu, Hawaii

Dear Sir:

This is in regard to your letter of February 20, 1962, raising a question under that provision of Article VII, section 1, which provides that "each political subdivision shall have and exercise such powers as shall be conferred under general laws."

The factual situation is as follows:

Act 296, Session Laws of Hawaii 1957, amended Chapter 147 of the Revised Laws of Hawaii 1955 so as to provide, in effect, that the number of fire stations for the County of Kauai be gradually reduced from seven to three. Act 296 was directed solely to the County of Kauai. No other county was then or is now similarly situated.

In view of Article VII, section 1, of the Constitution requiring the conferring of power to political subdivisions by general laws only, the specific problem is whether the legislature can effect a repeal of Act 296, Session Laws of Hawaii 1957.

In our opinion, the restriction against the County of Kauai can be removed, provided that the same be accomplished by a general law and not by a special or local law specifically repealing Act 296, Session Laws of Hawaii 1957.

A general law, broadly speaking, is a law which affects all the people of the State or all persons or things of a particular class. On the other hand, a special or local

law is one which relates to a particular person or thing, or to particular persons or things of a class, or which operates on or over a portion of a class instead of all of the class. Thus, it has been held that a special law relates to particular places rather than the whole territory or a state. (See generally, 82 C.J.S. Statutes §§ 152-168 (1953).)

Act 296 which applies only to the County of Kauai is an example of a special or local law. Nevertheless, as a law enacted prior to statehood, Act 296 retains its validity and effect notwithstanding the general laws provision of Article VII, section 1, of the Constitution. This is for the reason that a constitutional provision, such as Article VII, section 1, is given prospective effect only and does not repeal existing laws enacted in the manner allowed under the Organic Act. (See Atty. Gen.'s Op. No. 61-36, dated March 17, 1961.) But a valid special or local law pertaining to the powers of a single political subdivision of the State, such as Act 296, cannot now be repealed by another special or local law even though the effect of the repeal might be to remove a discriminatory limitation and place that political subdivision, with respect to the particular subject matter, on an equal footing with all other political subdivisions. Such a law would be in direct conflict with the general laws provision of Article VII, section 1. Hence, a law specifically repealing Act 296, Session Laws of Hawaii 1955, so as to authorize a greater number of fire stations or as many fire stations as the Kauai County Board of Supervisors shall determine to be necessary for the public safety would be void as a special or local statute.

However, the restrictive effect of Act 296 can be nullified by the enactment of a general statute, i.e., one which would have uniform operation in all the political subdivisions of the State. As mentioned earlier, only the County of Kauai is restricted in the number of fire stations which it may have. Laws relating to the fire departments of other political subdivisions contain no limitation as to the number of fire stations. Indeed, section 149-86(13), Revised Laws of Hawaii 1955, as amended, pertaining to the City and County of Honolulu, states as follows:

> "Except as otherwise provided by law, the board of supervisors [city council] shall have power:
>
> . . . . .

"13. Fire department, fire control, etc. Notwithstanding any law to the contrary, to establish, maintain and extend the fire department, including the creation of new fire stations; to create and classify positions and to provide salaries for such positions; to provide for the acquisition, maintenance and use of appurtenances for extinguishing fires; and to provide all necessary regulations and restrictions for the control of fire hazards and the prevention of fires." (Emphasis ours.)

We think a statute similar in substance to section 149-86(13) but worded so as to be applicable to all counties would be valid and would effectively free the County of Kauai from the restriction imposed by Act 296, Session Laws of Hawaii 1957, without at the same time enlarging or restricting the powers held by other counties.

Yours very truly,

/s/ Yoshio Shigezawa

Yoshio Shigezawa
Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa

Shiro Kashiwa
Attorney General

INDEXING INSTRUCTIONS

Opinion No. 62-12

EXPENDITURE OF FUNDS

Public Purpose

The expenditure of money from the airport and harbor special funds for the construction of cooling and refrigeration systems at harbors and airports is an expenditure of public money for a public purpose.

REVISED LAWS OF HAWAII 1955

Sections 15-9
15-17
112-3

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22a
OP. 62-12

STATE OF HAWAII

Department of the Attorney General

HONOLULU

March 21, 1962

Honorable Noboru Miyake, Chairman
Senate Ways & Means Committee
The First Legislature of the
State of Hawaii
Honolulu, Hawaii

Dear Senator Miyake:

Re: S.B.No. 57, S.D. 1

This is in reply to your request dated March 14, 1962, for an opinion on the following question: Whether an expenditure authorized by the Legislature from the Airport and Harbor Special Funds for the installation of cooling and refrigeration systems for farm products being shipped between the islands is a proper expenditure of public money?

Expenditures of public money, whether from the general fund or any special fund, must be for a public purpose. In 81 C.J.S., States, §133, p. 1147, is found the following:

> "Generally, under express or implied constitutional limitations, public funds may be used only for a public purpose, and the determination of such purpose ordinarily is a matter for the legislature as to which it is vested with a wide discretion. Whether an appropriation is for a public purpose depends on the particular facts in each case, and a public purpose is shown if the appropriation is for the support of government or for any of the recognized objects of government."

The Department of Transportation, Airports Division and Harbors Division, are given broad powers to construct, maintain and operate the various facilities used in our air and sea transportation systems. Under section 15-9 of the Revised Laws of Hawaii 1955, the airports authority can construct and maintain at airports any facility for the comfort, accommodation and convenience of the public. Under section 112-3 of

said Revised Laws, the harbors authority is vested with broad powers of regulating and managing ships, harbors, ports, docks, warehouses and storage spaces, collecting fees therefor, and is empowered to construct whatever facilities are needed in carrying out these functions.

The installation of cooling and refrigeration systems at airports and harbors would be within the scope of the functions of the harbors and airports authorities since they will provide needed refrigerated storage space for the use, accommodation and convenience of users of these transportation systems.

Being within the proper scope of airport activities, expenditures from the airport special fund would be expenditures for a public purpose. Section 15-17, Revised Laws of Hawaii 1955, in part, reads as follows:

> "§ 15-17. Public purpose of activities. The acquisition of any lands or interests therein pursuant to this chapter, the planning, acquisition, establishment, construction, improvement, maintenance, equipment, and operation of airports and air navigation facilities, and the exercise of any other powers granted by this chapter to the commission are hereby declared to be public and governmental functions, exercised for a public purpose, and matters of public necessity."

As for the activities of the harbors authorities, there is no such express declaration of policy. However, there is no distinction between public airport and public harbor activities as to the broad powers and the type of service provided, and for all practical purposes, if construction of such facilities is considered to be for a public purpose in regards to airports, it should also be the same in regards to harbors.

In your request you state that some of the members of your committee feel that this is legislation in the area of private use and private business enterprise, and should not be an expenditure for the State. It is assumed that by this you mean that aid to farmers might be considered to be the aiding of private business enterprise.

The following is found in 2 Am. Jur., Agriculture, § 15, p. 408, to wit:

"While authority, particularly in the older cases, in accordance with the rule prohibiting discrimination by the State between different classes of occupations, supports the proposition that those engaged in agriculture are not entitled to be favored with public aid for individual private enterprise at the expense of those engaged in other occupations, the view taken by many authorities, especially in recent years, holds that agriculture is an industry upon which the public welfare ultimately depends, and its stimulation has accordingly been held to be a sovereign function of government."

Following this recent trend, statutes providing for tax benefits and special loans to farmers, compensation to farmers for animals and crops destroyed by disease, and direct grants to agricultural societies to promote diversified farming, have all been held valid as expenditures for public purposes. Thus, the aiding of farmers under the modern trend is affixed with a public purpose.

As a suggestion, it may be wise to omit the term "farm products" from the bill and use the term "perishables", so as to minimize the chances of having this question arise.

The amount charged users of these facilities has no bearing on the initial question as to whether the money used to construct these facilities is a proper expenditure. Having first determined that the cost of construction is a proper expenditure, the amount users are to be charged is a question of policy.

Yours very truly,

/s/ Tenney Z. Tongg

TENNEY Z. TONGG
Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa

SHIRO KASHIWA
Attorney General

Opinion No. 62-12

CANCELLED

Opinion No. 62-13

INDEXING INSTRUCTIONS

I. TAX CLEARANCE

REQUIREMENT

Section 9-46, R.L.H. 1955, requires a tax clearance when applied to Section 9-21, R.L.H. 1955, for personal service contracts and contracts let on a competitive bid basis.

NOT REQUIRED

Redevelopment Agencies pursuant to Chapter 143, R.L.H. 1955, as amended, are not "political subdivisions" within the meaning of Section 9-46, R.L.H. 1955, and are therefore not subject to the requirements of a tax clearance.

II. COUNTIES

POLITICAL SUBDIVISIONS

The words "political subdivision" as used in Section 9-46, R.L.H. 1955, refers to the counties and does not include Redevelopment Agencies created under Chapter 143, R.L.H. 1955, as amended.

RBG:y
24b
Op. No. 62-14

STATE OF HAWAII

Department of the Attorney General

HONOLULU

March 22, 1962

Mr. Yoshito Tanaka
County Attorney
County of Hawaii
Hilo, Hawaii

Dear Mr. Tanaka:

This is in reply to your letter requesting our opinion on the following matters:

1. Whether Section 9-46, R.L.H. 1955, requiring a tax clearance under certain circumstances, when applied to Section 9-21, R.L.H. 1955, includes personal service contracts not admitting of competition as well as contracts let on a competitive basis. You are advised that both types of contracts are subject to the requirements of a tax clearance.

2. Whether Redevelopment Agencies subject to Chapter 143, R.L.H. 1955, as amended, (Hawaii Urban Renewal Law) are "political subdivisions" under the interpretation of Section 9-46, R.L.H. 1955, and therefore subject to the requirements of a tax clearance. This question we answer in the negative.

We will first discuss our reasoning in arriving at a conclusion for question No. 1 above.

Section 9-46, R.L.H. 1955, reads in part as follows:

> "All territorial and county officers and agents making contracts on behalf of the Territory or any political subdivision thereof shall withhold payment in the final settlement of such contracts until the receipt of a tax clearance from the tax commissioner to the effect that all delinquent taxes levied or accrued under territorial statutes against the contractor have been paid; . . ."

Section 9-21, R.L.H. 1955, reads in part as follows:

> "No expenditure of public money, except . . . for other purposes which do not admit of competition . . . where the sum to be expended shall be $4,000 or more, shall be made, except under contract let after public advertisement for sealed tenders, in the manner provided by law. . . ."

The provisions requiring public bidding are covered between Sections 9-20 to 9-36, R.L.H. 1955. Intersectional arrangements of a statute are usually of limited value in ascertaining the extensiveness of the provision in question; however, they may be an aid in logically grouping similar subject matters. 82 CJS Statutes, § 345. The penalty for the violation of the bidding provision is found in Section 9-36, R.L.H. 1955, and other penalties are included in the chapter such as for the violation of the provisions relating to materials and supplies which are found in Sections 9-43 and 9-44, R.L.H. 1955. No express penalty is found for the violation of Section 9-46, R.L.H. 1955. If Section 9-46, R.L.H. 1955 is meant to cover only those contracts requiring bidding, in the light of the separate specific penalty provisions, it would seemingly be similarly so provided by inclusion of the word "bid" before contract in the section.

We further believe that the legislative history of this section indicates that the legislature intended to cover all government contracts whether contractual employment services or public works awards. Act 213, S.L.H. 1939, of which this provision is a part, was enacted as an extensive revision of the methods of collecting taxes.

As stated by the Senate Committee on Ways and Means and the House Committee on Finance, which considered this Act, it was drafted to provide "improved methods of administering the tax laws and collecting delinquent taxes". Stand. Com. Rep. No. 254, Senate Journal 1939, p. 996; Stand. Com. Rep. No. 601, House Journal 1939, p. 1910. It would follow that one of the improved methods of collecting taxes was through the withholding of delinquent taxes of a taxpayer receiving contractual remuneration from the government, including those rendering professional and personal services which do not admit of bid.

A study of other legislation relating to tax clearances is also of assistance in determining the legislative intent here. In Section 117-42, R.L.H. 1955, relating to the General Excise Tax,almost the exact language is found, to wit:

> "Section 117-42. Prerequisite for final settlement of contracts with the Territory or subdivisions thereof. All territorial and county officers and agents making contracts on behalf of the Territory or any political subdivision thereof shall withhold payment in the final settlement of such contracts until the receipt of a certificate from the commissioner to the effect that all taxes levied or accrued under this chapter against the contract with respect to such contracts have been paid."

To construe these statutes as limiting their coverage to only "bid" contracts would seem to be most illogical. The words used therein and their meanings are clear and unambiguous. Thus intrinsic aids to construe the extensiveness of this provision seem unnecessary. 82 CJS Statutes, § 345.

The reasoning supporting our conclusion in answering question No. 2 above will now be discussed.

The question to be resolved is the meaning of the term "political subdivision" of the Territory (now State) as used in Section 9-46, supra. The authorities in general are not clear on just exactly what is meant by the words "political subdivision", there being several definitions depending on the various factors involved in the use of said words in the particular situation under consideration.

We, therefore, must construe the particular sense in which these words are used in Section 9-46 and as they apply to a Redevelopment Agency subject to Chapter 143, R.L.H. 1955, as amended.

The term "political subdivision" has been defined as "the counties" by the Legislature in Section 74-2 of the Revised Laws of Hawaii 1955, relating to the Hawaii Housing Authority. We do not feel that a different or inconsistent meaning was intended by the usage of the term in the present situation. We consider this definition to be very significant.

The Redevelopment Agencies are not dissimilar from the Hawaii Housing authority which, as is indicated by Section 74-5, is created as "a public body and a body corporate and politic with perpetual existence."

Chapter 143 (Hawaii Urban Renewal Law) was enacted in 1949 to enable any county in the State (then Territory) to qualify for Federal financial assistance for urban redevelopment purposes by the creation of special public bodies with extraordinary powers to undertake such projects and secure Federal aid therefor. Section 110(h) of Title I, Housing Act of 1949, as amended, (42 USC 1441 et seq.) provides that "a 'local public agency' means any State, county, municipality, or other governmental entity or public body, or two or more such entities or bodies, authorized to undertake the project for which assistance is sought." While a county or municipality could have been authorized as such "local public agency" if the statute was so worded, Chapter 143 was specifically drafted to create such "governmental entity or public body" other than the county or municipality to undertake urban renewal for any county in the State of Hawaii. In other words, a county or municipality has no status or powers of a "local public agency," conversely, a redevelopment agency has no municipal or county functions or powers under our laws.

There is no argument whatever that a redevelopment agency, generally described, is a city agency or an agency organized and functioning at a county level (Sections 143-2 (a) and 143-3, R.L.H. 1955, as amended). However, this is not the same thing as saying that it is an integral unit or part of the municipality of the city and county of Honolulu or any other county because the redevelopment agency, also, is created as "a public body, corporate and politic" (Section 143-3, R.L.H. 1955, as amended,) separate and apart from the county.

The Honolulu Redevelopment Agency does not contract on behalf of the State or any of its subdivisions, but for itself. Section 143-6(a), R.L.H. 1955.

Another indication of legislative intent which is of some help is Act 143, S.L.H. 1961, amending Section 143-15, R.L.H. 1955 in certain respects, which states in part:

> "In the event that any contract for federal assistance or any federal law or regulations applicable thereto shall require any

> action, practice, procedure or remedy to be undertaken by the agency in any urban renewal project that is contrary to or conflicts with any State or local law, then such federal requirements or provisions shall govern and prevail over any provision of State or local law to the contrary. The foregoing provision shall be liberally applied and construed as to any case of conflicting federal and local requirements to the end that federal financial assistance for any urban renewal project shall not be hindered, impaired or jeopardized."
> (Emphasis added)

In Wong Nin v. City and County, 33 H. 379 (1935), the legislature had passed a private bill appropriating money and authorizing the plaintiff to bring action against the "Territory of Hawaii and/or any subdivision thereof." The action involved a claim for injuries suffered on account of the alleged wrongful diversion of water by the Board of Water Supply. Act 96, S.L.H. 1929, which created the Board of Water Supply, provided that any action for damages caused by the Board shall be brought against the Board. In view of this provision, the City contended that it was not a proper party defendant. In answer thereto, the Court said:

> "The legislature by express terms conferred upon the plaintiff the right to adjudicate such legal claim as he may have for the injuries in question by final judgment against the Territory of Hawaii and/or any subdivision thereof. The City and County of Honolulu is a subdivision of the Territory. The Board of Water Supply is not. Its status is that of a board or bureau and nothing more."
> (Emphasis added)

The Honolulu Redevelopment Agency has a definite similarity in organization and corporate powers to the Board of Water Supply.

In the case of Maricopa County Municipal Water Conservation Dist. No. 1 v. La Prade, Atty. Gen., 40 P.2d 94, 45 Ariz. 61, the Court said:

> "Counties, cities, towns and municipalities all belong to a class of subdivisions of the state primarily established for what

> are commonly called political and governmental, as aside from business purposes. . . .
>
> On the other hand, irrigation districts and similar public corporations, while in some senses subdivisions of the state, are in a very different class. Their function is purely business and economic, and not political and governmental . . . Probably the best definition we can give then is to say that they are corporations having a public purpose, which may be vested with so much of the attributes of sovereignty as are necessary to carry out that purpose." (Emphasis added)

Very truly yours,

/s/ Ronald B. Greig

Ronald B. Greig
Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa

Shiro Kashiwa
Attorney General

INDEXING INSTRUCTIONS

OPINION 62-15

Statutory Construction

(1) Where Appeals Board under Act 188, SLH 1961, is empowered to "make whatever adjustments that are necessary" to the tentative compensation plan compiled by the Conference of Personnel Directors in carrying out its primary task to adjust improper salary range assignments for classes of positions under the State, including its political subdivisions, the power thus conferred includes a lesser power to readjust improper salary range assignments and correct inadvertent errors, made by the Board in the course of its work, as adjudged necessary and appropriate by the Board upon discovery of the same.

(2) Use of the word "shall" in a statutory provision is not decisive of whether the statute is mandatory or directory.

The word "shall" in a statutory provision, which literally imports or signifies a command, should not be given a mandatory construction, when such construction would frustrate and defeat the purpose of the statute.

(3) The word "shall" when used in a statute should be given a reasonable and sensible construction so as to express the general intent of the statute and to make the statute workable and effective.

(4) Where the statute provides that the compensation plan, after final adjustments, shall be completed by the third Wednesday of February, such provision should be given a directory construction to make the statute workable and effective, in the absence of negative words restraining performance by the Board after the time specified.

(5) Where the Appeals Board is empowered and required to "make whatever adjustments that are necessary" under the statute, and where the Board has in the course of its work made improper adjustments and inadvertent errors, the Board, upon discovery of the same, is duty bound to readjust the maladjustments and correct such errors after determining such action is needed.

(6) Where the statute provides that the adjustments of the Board to the compensation plan shall be completed by a specified date, and where it contains no negative words restraining performance after the time specified in the absence of any legislative intent to the contrary, the Board may properly take corrective action to undo maladjustments and correct errors on the compensation plan several days after the time specified has elapsed.

DYM:ft
22a; C-7962
Op. No. 62-15

STATE OF HAWAII

Department of the Attorney General

HONOLULU

March 22, 1962

The Honorable Mamoru Yamasaki, Chairman
Public Employment Committee
House of Representatives
First Legislature of the State of Hawaii
Honolulu, Hawaii

Dear Mr. Chairman:

This is in response to your request that we confirm for the written records of your committee the opinion heretofore orally given by counsel to the chairman of the Appeals Board under Act 188, Session Laws of Hawaii 1961, on the question whether under Act 188, S.L.H. 1961, the Appeals Board has the power to meet on Thursday, March 1, 1962, to take such appropriate action as the Board deems necessary to correct inadvertent errors and to readjust certain salary range assignments for classes of positions which had been previously improperly adjusted by the Board, which errors and improper adjustments appear on the duplicate copies of the compensation plan which were distributed by him on Saturday afternoon, February 24, 1962, to the Governor, the chairman of the Ways and Means Committee of the Senate, the chairman of the House Finance Committee, the Conference of Personnel Directors, and to the Honolulu Advertiser for publication.

We hereby confirm for the written records of your committee that, in our opinion, the answer to the foregoing question lies in the affirmative.

The question whether the Board possesses such power was first raised by the chairman of the Appeals Board in a telephone call to counsel late on Wednesday night, February 28, 1962, at which time he informed counsel that he had discovered apparent errors and improper adjustments of salary range assignments for certain classes of positions in the copies of the compensation plan which he had delivered to State officials, the Conference of Personnel Directors, and to the Honolulu Advertiser late on Saturday afternoon. He inquired whether the Appeals Board had the authority to meet on

the next day to consider and to take such action as the Board may adjudge to be necessary to correct such errors and to readjust such improper salary range assignments made by the Board in its final review of the compensation plan. He was thereupon advised that, consistent with the opinion of counsel that the statute fixing the "deadline" for the completion of final adjustments on the compensation plan by the Board must be given a directory rather than a mandatory construction, in order for practical considerations not to frustrate and defeat the purpose of the statute, The Board must be viewed to possess such power. Counsel's opinion thus given over the telephone is predicated mainly on these considerations: Section 3(d) of Act 188 empowers and requires the Appeals Board, after public hearing, if any is held, and after hearing all appeals, to "make whatever adjustments that are necessary," in carrying out the primary task assigned by the legislature to the Appeals Board to assist in achieving the goal of uniformity in pay administration and to correct inequitable salaries paid to persons holding positions of comparable difficulty and responsibility within and among the State and its political subdivisions, subject to the limitations, and in accordance with the policies, standards and procedures prescribed in the statute. It appears clear from the broad power thus conferred on the Board to "make whatever adjustments that are necessary" to the tentative compensation plan that the very nature of this broad power must, of necessity, include the authority to take such corrective action as the Board deems necessary and appropriate to readjust improper adjustments previously made, and to correct inadvertent errors, when such improper adjustments and such errors are discovered by the Board in the course of its work. Otherwise, the Board would be unable to effectively carry out its major function to make whatever adjustments that are necessary as required by the statute.[1/]

Does the fact that the Board did not take corrective action as mentioned until Wednesday, March 1, 1962, to undo the inadvertent errors and to readjust prior improper adjustments of

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1/ "In determining whether a board or commission has a certain power, the authority given should be liberally construed in light of the purposes for which it was created, and that which is incidentally necessary to a full exposition of the legislative intent should be upheld as being germane to the law. In the construction of a grant of powers, it is a general principle of law that where the end is required the appropriate means are given." 42 Am. Jur. Public Administrative Law § 26, pp. 317-318.

salary range assignments for certain classes of positions preclude the Board from exercising such authority? Act 188 contains no express prohibition of such action. It is silent, in so far as our problem is concerned, excepting for the related provisions which reads:

> "The final adjustment of the compensation plan shall be completed by the third (3rd) Wednesday of February. The compensation plan, after final adjustments, shall be effective as of July 1. . . ."

Clearly, if the word "shall" appearing in the first sentence above quoted is literally construed to signify a command, the sentence would constitute a mandatory provision which would require the Board to complete all necessary work, including final adjustments thereon, by the third Wednesday of February--which fell on February 28, 1962. Inability on the part of the Board to finish necessary work, or impossibility of completion of such work by the deadline, irrespective of whether such inability or impossibility is due to the fault of the Board or not, would constitute no excuse for failure to obey the statutory command, for the law is well established that where a statute is mandatory, compliance with the command of the statute is a condition precedent to the validity of the act, and a failure to follow the statutory command renders the act or proceeding to which it relates illegal and void. 82 C.J.S. Statutes § 374, pp. 868-869, § 379, pp. 876-877; Oda v. Elk Grove Union Grammar School Dist., 143 P.2d 490, 61 Cal. App. 2d 551.

Viewed in this light it appears clear that, given a mandatory construction, the statute by thus providing that the final adjustments be completed by the third Wednesday of February, which is February 28 last, would have precluded the Board from acting with lawful authority on March 1 to correct errors and readjust salary range assignments previously improperly made for certain classes of positions in the compensation plan. It appears also clear that, under such mandatory construction, the Board would have been unable to complete its work on the compensation plan as required by the "deadline" on February 21, 1962.[2] The purpose of Act 188 with regard to the Board and its work on the compensation plan would thus have been frustrated, and the statutory intent and provisions relating thereto nullified. According to testimony had before your committee at the hearing held on

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2/ At this writing, we're informed that the Board's records and minutes are still being transcribed from shorthand notes for typing.

Thursday night, March 15, 1962, the Appeals Board, although working continuously daily and until late hours at night, excepting for Sundays and a few other occasions, from January 22 onward, in the face of rigid time limitations and the great mass of appeals before it (reportedly 1,144 appellants heard) was unable to finish its adjustments and other work on the compensation plan until Saturday, February 24, 1962, on which date the chairman released copies of said plan to various State officials and the Conference of Personnel Directors and the press for publication as above mentioned.

Faced with practical necessities in this situation, counsel advised the Appeals Board in the course of its proceedings that the statutory provision in question must be given a directory construction in order that the legislative purpose of the statute can be carried out. This construction finds support in established legal principles and judicial authorities. Thus, in State v. Jones, 48 N.W.2d 662, 234 Minn. 438, the court held that the word "shall" is not decisive of whether a statute is mandatory or directory. In 82 C.J.S. Statutes § 329, p. 651, § 379, pp. 876-877, the text-writers point out that the words employed in a statute should be given a reasonable and sensible construction so as to make the statute workable and effective; furthermore that statutory provisions fixing the time for performance of an act will ordinarily be held directory where there are no negative words restraining the doing of the act after the time specified, and no penalty is imposed for delay. In Olp v. Town of Brighton, 19 N.Y.S.2d 546, the court held that rules of mandatory construction of statutes affecting public interest are merely rules of interpretation which are useful to a limited degree, but never to be followed slavishly where blind obedience would do violence to the manifest intention of the statute. Again in John C. Winston Co. v. Vaughan, 11 F.Supp. 954, affirmed 83 F.2d 370, it was judicially held that a reasonable construction, rather than one rendering the statute absurd, must be given in determining its mandatory or directory character.

Consistent with our view that the statute must be given a directory construction, counsel expressed the opinion that the Appeals Board is not precluded on March 1, 1962, from exercising its authority to take such corrective action as it deemed necessary and appropriate to correct errors inadvertently made and to readjust previously improperly adjusted salary range assignments for certain classes of positions in the final compensation plan. The lapse of several days--from Saturday, February 24, 1962, when the Board finished adjustments on the compensation plan and delivered copies thereof to the Governor and other State officials, the personnel directors, and to the press--to Wednesday, March 1, 1962, does not constitute such a long or unreasonable lapse of time

which in our view would justify a denial to the Appeals Board of its right, as a public body, to take such corrective action, as it, upon fuller consideration of all facts and circumstances, adjudged to be necessary in discharging its duties. It is clear that Act 188 does not contemplate that the Appeals Board should leave errors and maladjustments in the compensation plan without taking corrective action forthwith upon discovery of the same. On the contrary, it is clear that the Board is duty bound under the requirement in the statute that it "shall make whatever adjustments that are necessary." See O'Neal v. Spencer, 47 S.E.2d 646, 203 Ga. 588; and State v. Industrial Commission, 289 N.W. 769, 233 Wis. 461, where it is judicially declared that the courts will deem a statute directory merely, where there is no substantial reason why the thing by the statute required to be done may not as well be done after the prescribed time as before, and nothing in the statute indicates legislative intention against the doing of the thing after the prescribed time rather than not at all. See also Commonwealth ex rel. Duff v. Eichmann, 45 A.2d 38, 353 Pa. 301, where the court points out that where a statute directs certain proceedings to be done at a certain time, the law would be regarded as directory, in the absence of a clear indication to the contrary, and proceedings under it will be held valid, even though the command of the statute as to form and time has not been strictly obeyed, since the time is not the essence of the thing required to be done.

Respectfully yours,

/s/ David Y. Mar

DAVID Y. MAR
Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa

SHIRO KASHIWA
Attorney General

INDEXING INSTRUCTION

Op. No. 62-16

COCONUT ISLAND (MOKU O LOE ISLAND)

Title to submerged areas

Title to the submerged areas reclaimed by the owners of Coconut Island in the 1930's is in the State of Hawaii.

Riparian rights

A riparian owner on the seashore does not acquire title to submerged lands below high-water mark merely by filling it in and making it dry.

TZT:es
la
Op. 62-16

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

March 28, 1962

Mr. James M. Dunn
Surveyor, State of Hawaii
Department of Accounting
and General Services
Honolulu, Hawaii

Dear Mr. Dunn:

Re: Ownership of Moku O Loe Island (Coconut Island) in Kaneohe Bay

This is in reply to your request dated March 1, 1962, as to the status of the title to Moku O Loe Island, commonly known as "Coconut Island".

Moku O Loe Island, which originally consisted of 12.5 acres, now has an area of more than 23 acres. The title to the original 12.5 acres of land, which was registered in our Land Court under Land Court Application No. 1134 in the year 1937, is conceded to be in R. O. Wegfors, as trustee, and the American Life Insurance Company.

The additional area of more than 11 acres was formed by filling in land which was originally under water. Mr. Christian Holmes, in the 1930's, dredged several channels in various spots around the island and used the displaced material to fill in areas alongside the channels. As far as it can be determined, from time to time Mr. Holmes asked for and received permission from the Board of Harbor Commissioners of the then Territory of Hawaii and the United States Corps of Engineers to dredge these channels. In two of the requests for permission to dredge, Mr. Holmes stated that the displaced material would, in one instance, be used on the island for making roads and paths, and in the other instance, be disposed of alongside the dredged channel. Actually, most of this displaced material was used to build up areas which were formerly under water, thereby increasing the total area of the island. The status of the

title to the more than 11 acres of land created by this reclamation is what we are concerned with here.

It is the opinion of this office that the title to the more than 11 acres of land reclaimed by Mr. Holmes is in the State of Hawaii.

Under the common law of England the title to the bed of the sea below high-water mark, and to the bed of all rivers as far as the flow of the tide extended, was in the Crown, but the title to the bed of all fresh-water rivers above the ebb and flow of the tide, whether navigable or non-navigable, where the river formed the boundary between adjoining proprietors, was in the riparian owner to the thread of the stream. Generally speaking, this is the common law adopted in this country by those states bounded by tidal waters. 56 Am. Jur., Waters, 864, § 452.

In the case of Bishop v. Mahiko, 35 H. 608, the court quoted with approval from the statement of the United States Supreme Court in Shively v. Bowlby, 152 U.S. 1, 11 (1894), as to the common law title and dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all lands below high-water mark, within the jurisdiction of the Crown of England. The Court held that the tidal waters and the soil thereunder within the jurisdiction of the Territory was owned by the Territory and became the property of the United States upon annexation of the Islands.

Thus, prior to the filling in of the submerged lands in question, the title to such lands was vested in the United States, holding such title in trust for the then Territory of Hawaii. Being that the United States Government did not grant these areas to Mr. Holmes, the question presented is whether the title to these areas was divested from the United States by the conduct of Mr. Holmes in filling in such areas. We think not.

The authorities are generally agreed that the riparian owner will not be permitted to increase his estate by himself creating an artificial condition for the purpose of effecting such an increase, and that the doctrine of accretion does not apply to land reclaimed by man through filling in land once under water and making it dry. The title to land thus filled in remains where it was before, unless the filling in was done wrongfully by another, in which case it will pass to the riparian proprietor. 1 R.C.L. 233.

In the case of Tiffany v. Oyster Bay, 234 N.Y. 15, 136 N.E. 224, 24 A.L.R. 1267, the plaintiff, a riparian owner, brought a suit to enjoin the Town of Oyster Bay from constructing

a public bathhouse on land which was formerly below the high-water mark but which had been filled in by the plaintiff. Although the injunction was granted, the court said:

> "When a riparian owner having no title below high-water mark, unlawfully, but honestly, under authority of a court decision, fills in the foreshore, the owner of the foreshore holds the made land subject to the riparian rights of the owner of the upland, as though the fill had not been made."

In Saunders et al. v. New York Central & H.R.R. Co., 144 N.Y. 75, 38 N.E. 992, the plaintiff, a riparian owner, sought to enjoin the defendant from using lands which were formerly below the high-water mark but which had been filled in by the plaintiff. The defendant claimed title by a later grant from the State. The court held that the defendant had a valid grant from the State and said:

> "A riparian owner cannot acquire title to land in his front, under the waters of a navigable river and below high-water mark, by filling up and displacing the water with soil from his land."

Thus, Mr. Holmes did not acquire title to the reclaimed areas by his acts of reclamation. Nor did possession and the passage of time vest title to these areas in Mr. Holmes or his successors since title by adverse possession cannot be acquired as against the United States or the State of Hawaii.

Being that the title to these reclaimed areas was transferred back to the State of Hawaii under the Admission Act, P.L. 86-3, 86th Congress, the title to the more than 11 acres of land reclaimed by Mr. Holmes is in the State of Hawaii.

It should be noted that Mr. Holmes and his successors in interest, although occupying some of these reclaimed areas, have never attempted to convey these areas by description and none of the deeds in their chain of title describe them. Moreover, they have not paid any taxes on the areas which were reclaimed.

For your information, the maps furnished us by your office, dated March 1, 1962, do not show a filled in extension

on the northwest side of the island. Mr. Joseph A. Aiu of your office is familiar with this area.

Very truly yours,

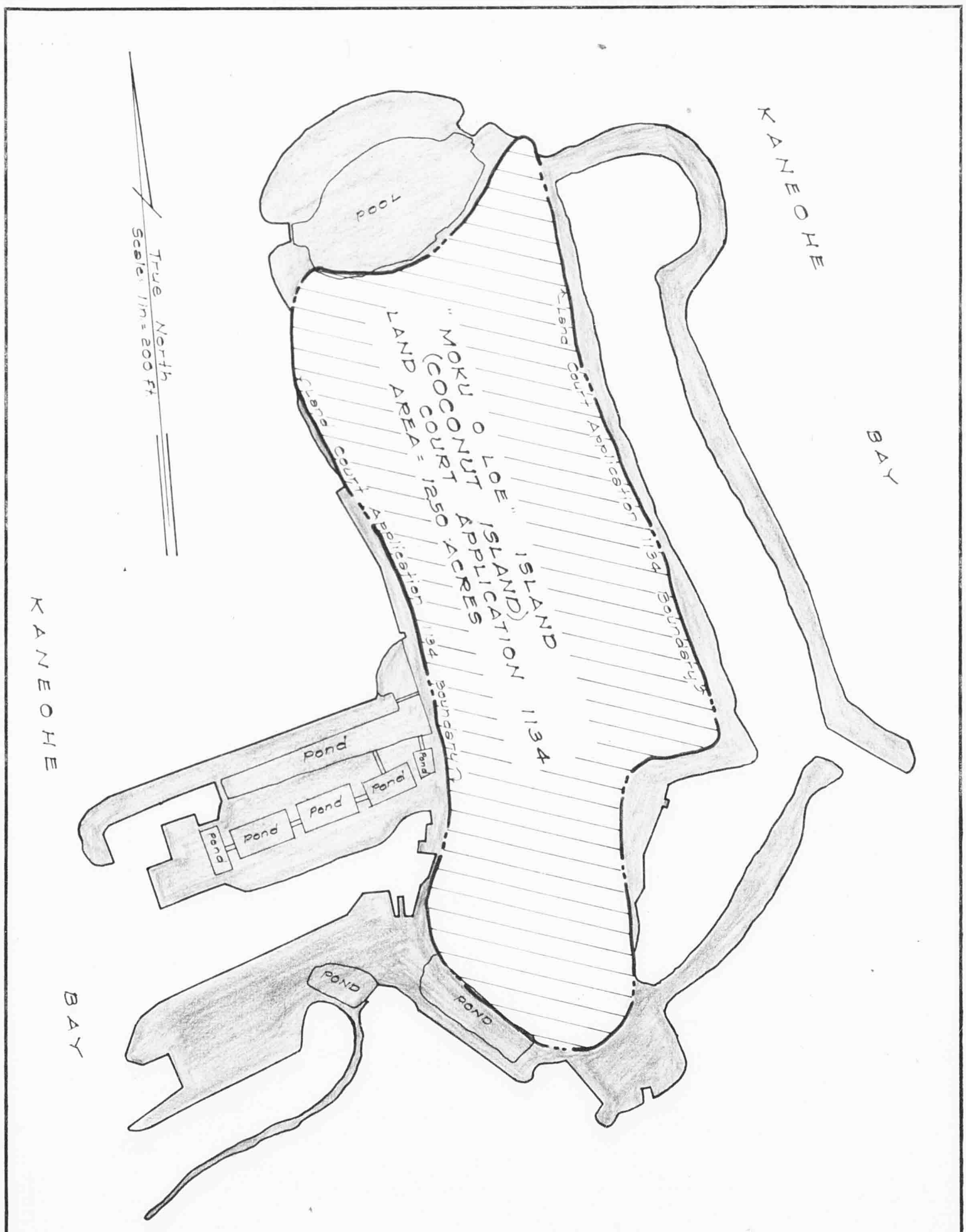
/s/ TENNEY Z. TONGG

TENNEY Z. TONGG
Deputy Attorney General

APPROVED:

/s/ SHIRO KASHIWA

SHIRO KASHIWA
Attorney General



"MOKU O LOE" ISLAND
(COCONUT ISLAND)

Heeia, Koolaupoko, Oahu, Hawaii

Scale: 1 inch = 200 feet

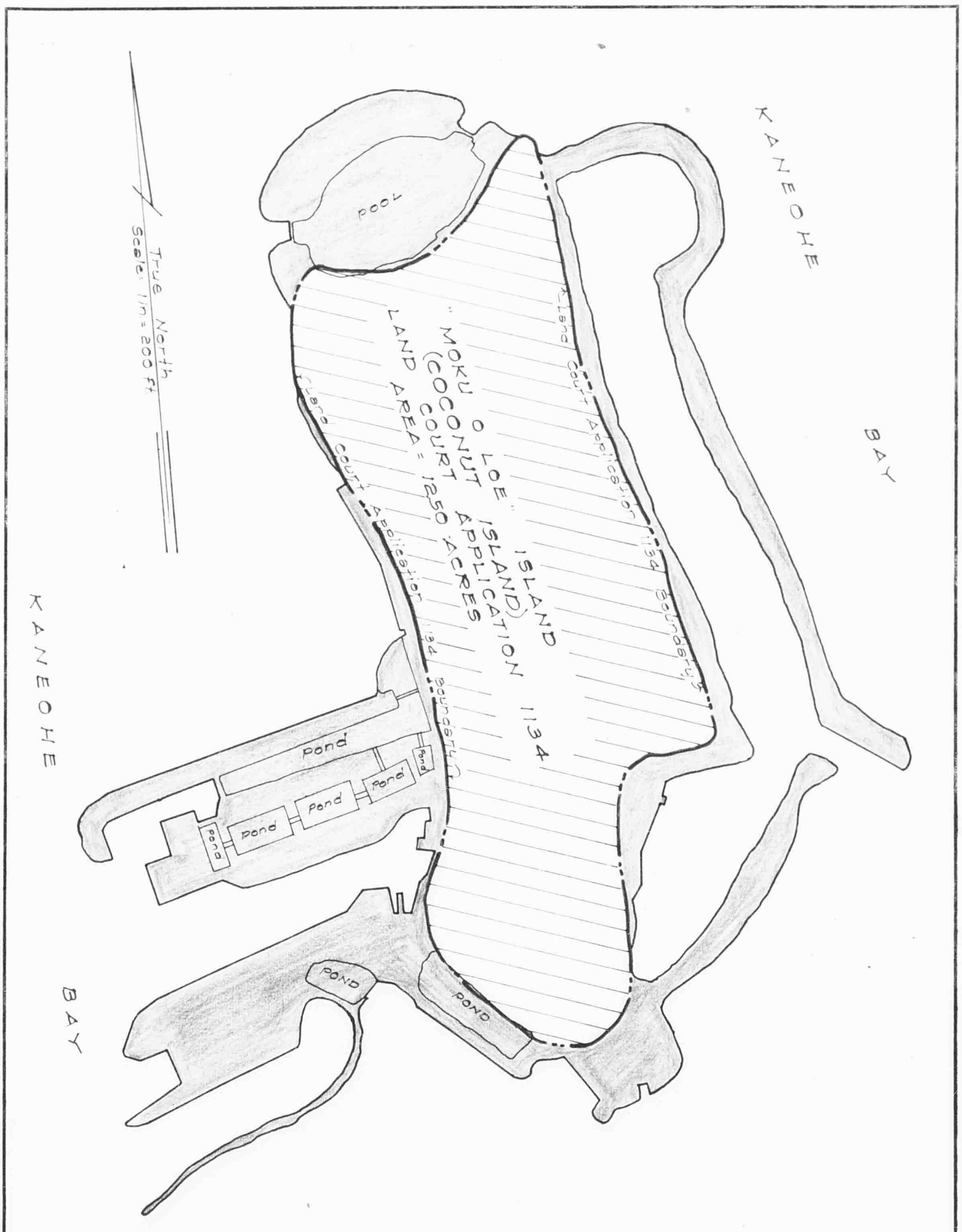
Area described in Ld. Ct. App. 1134

Filled area claimed by State of Hawaii Area = 11.00 Acres ±

TAX MAP 4-6-01 "A"

SURVEY DIVISION
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
STATE OF HAWAII

RTH Mar. 1, 1962



"MOKU O LOE" ISLAND
(COCONUT ISLAND)

Heeia, Koolaupoko, Oahu, Hawaii

Scale: 1 inch = 200 feet

Area described in Ld. Ct. App. 1134

Filled area claimed by State of Hawaii Area: 11.00 Acres ±

TAX MAP 4-6-01 "A"

SURVEY DIVISION
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
STATE OF HAWAII

RTH Mar. 1, 1962

INDEXING INSTRUCTIONS

Opinion No. 62-17

1. CONSTITUTION OF HAWAII

Article III, section 11

Amendments to an urgency measure arising after the approval of the statement of urgency and in the course of consideration of the substantive provisions of the bill must be germane to the specific facts recited in the statement of urgency. Matters which are foreign to or bear no reasonable relationship to the facts contained in the statement of urgency cannot be inserted in the bill.

2. SESSION LAWS OF HAWAII 1961

Act 121, The Hawaii Motor Carrier Act

(Comments same as above.)

3. PUBLIC UTILITIES COMMISSION

(Comments same as above.)

YS:jk
22a (rev.)
Op. No. 62-17

STATE OF HAWAII

Department of the Attorney General

HONOLULU

March 30, 1962

The Honorable Richard Lyman, Jr.
Senator, First District
The First Legislature
State of Hawaii

Dear Senator Lyman:

This is in response to your letter of March 28, 1962, requesting our opinion on the following questions relating to urgency measures:

1. Is the inclusion of section 2(b) in H.B. No. 664, H.D. 3, constitutionally valid so that upon the final passage of H.B. No. 664, H.D. 3, it can be given binding effect?

2. After a statement of facts constituting urgency has been approved by each house and while the urgency measure is under consideration, can the bill be amended by adding provisions not related to or which fall outside the scope of the statement of urgency?

Before attempting to answer these questions, it would be only fair to point out that the usual external aids to constitutional or statutory construction are not available in this instance. The provision in our constitution permitting consideration and enactment at budget sessions of urgency measures deemed necessary in the public interest is unique and to our knowledge exist in no other state constitution. Hence, we know of no judicial precedents directly in point. Furthermore, the records of the Constitutional Convention of 1950 are for all practical purposes silent in this area. We have therefore tried to construe this constitutional provision in a manner which we believe to be most consistent with the purposes and intent of Article III, § 11, without unduly impairing the efficiency of the legislature.

Question 1. It is our opinion that section 2(b) of H.B. No. 664, H.D. 3, cannot be validly included in that

bill and if H.B. No. 664, H.D. 3, is enacted into law in its present form, § 2(b) cannot be given legal effect. However, in accordance with general rules governing partial invalidity of statutes where the several parts are separable, § 2(a) of H.B. No. 664, H.D. 3, would be valid and enforceable in the event the bill is enacted into law.

The title of H.B. No. 664, H.D. 3, related to Act 121, Session Laws of Hawaii 1961, The Hawaii Motor Carrier Act. Section 1 of the bill, the statement of facts constituting the urgency, related to only that part of Act 121 which deals with the cut-off date of June 27, 1959, whereby carriers who were in operation prior to that date would be given grandfather rights. The statement of urgency recites that the date of June 27, 1959, was arbitrarily selected, that it discriminates against and works an economic hardship upon many carriers who were in business subsequent to that date but prior to the enactment of Act 121, and that it is in the nature of an ex post facto determination which is repugnant to the principles of a free society. Section 2(a) amends sections 10 and 11 of Act 121 by deleting the June 27, 1959, date and substituting in its place the date July 1, 1961. Section 2(b) would in addition postpone the effective date of enforcement of the act from August 1961 to July 1, 1963. Thus, of the two substantive provisions of section 2 of H.B. No. 664 only one is directly related to the statement of urgency; the other, while falling within the broad subject of the bill as expressed in its title, is in no way pertinent or related to the facts recited in the statement of urgency.

Article III, § 11, of our constitution restricting budget sessions of the legislature to those matters specifically enumerated therein, including urgency measures deemed necessary in the public interest, constitutes a limitation on legislative power. The constitution provides that no urgency measure can be considered by the legislature unless and until a statement of facts constituting such urgency shall be set forth in one section of the bill and that section is approved by a two-thirds vote of each house. The nature of these requirements is such as to place severe qualitative and quantitative restrictions upon the legislature at budget sessions.

Both the Senate and the House of Representatives have approved the statement of facts constituting urgency. But the legislature has not made a finding of urgency that any

and all parts of The Hawaii Motor Carrier Act should be re-examined and, if necessary, changed. The legislature has found that the public interest requires that the cut-off date of June 27, 1959, should be changed to June 1, 1961. For the purposes of H.B. No. 664, there has been no finding of urgency that the public interest requires the effective date of enforcement of Act 121 itself be postponed until July of 1963. The extension of the effective date of the enforcement of Act 121 has not been deemed an urgent matter by the legislature in the manner prescribed by the constitution. Therefore, section 2(b) of H.B. No. 664 relating to the effective date of enforcement of Act 121 does not properly belong in H.B. No. 664, and, notwithstanding the eventual passage of the bill itself, section 2(b) cannot be given legal effect.

Question 2. As a general proposition, it is our opinion that amendments to an urgency measure arising after the approval of the statement of urgency and in the course of consideration of the substantive provisions of the bill must be germane to the specific facts recited in the statement of urgency. Matters which are foreign to or bear no reasonable relationship to the facts contained in the statement of urgency cannot be inserted in the bill. The fact that the bill expresses but one subject and that subject is expressed in its title does not satisfy the requirements of the constitution. Otherwise, the title of a bill, as in this case, ("An act relating to Act 121, First State Legislature, Regular Session of 1961, 'The Hawaii Motor Carrier Act'") can be so broadly drawn that the limitation on legislative power at budget sessions would be rendered meaningless and inoperative and the way to mischief opened wide. The true test is whether the two parts of an urgency measure, i.e., the preliminary statement of urgency and the substantive provisions of the bill, are logically consistent with each other.

Yours very truly,

/s/ SHIRO KASHIWA

SHIRO KASHIWA
Attorney General

INDEXING INSTRUCTIONS
Opinion No. 62-18

Public Officers' Qualifications

The legislature may prescribe qualifications for executive heads of the various State departments.

Statutes imposing disqualifications for public officers are construed strictly while those declaring qualifications are to receive a liberal construction; words that limit the right of a person to hold office are to be given a liberal construction favoring those seeking to hold office.

Section 20, Hawaii State Government Reorganization Act, 1959, was designed to provide the State with a qualified director of social services; this is the spirit and intent of the law.

Mrs. Myrtle D. Ward qualifies for appointment as director of social services under requirements for director of social services.

Statutory Construction

Provisions of Hawaii State Government Reorganization Act, 1959, are to be given a liberal construction.

Section 20 relative to qualifications of director of social services does not require four years of experience in supervision and administration, but merely requires four years of practical experience in social service work which must include supervisory or administrative experience during that time.

An interpretation that would lead to palpable absurdity and injustice must be avoided.

The legislative intent is the lodestar of statutory interpretation.

Mrs. Myrtle D. Ward qualifies for appointment as director of social services under requirements for director of social services.

Statutory Provisions Interpreted

Section 14-A-19, RLH 1955, as amended.

Sections 20 and 43, Hawaii State Government Reorganization Act, 1959.

THT:hos
22a
Op. No. 62-18

STATE OF HAWAII

Department of the Attorney General

HONOLULU

April 6, 1962

The Honorable William H. Hill
President of the Senate
First State Legislature
Budget Session of 1962
State of Hawaii
Honolulu, Hawaii

Sir:

Subject: Director of Social Services - Mrs. Myrtle D. Ward's Qualifications for

This is in response to your query as to whether or not Mrs. Myrtle D. Ward qualifies for appointment as Director of Social Services, State Department of Social Services. It is the opinion of this department that Mrs. Ward qualifies for appointment as Director, State Department of Social Services.

The Department of Social Services is one of the few executive departments of the State of Hawaii for which qualifications are specifically prescribed by law for its director. The qualifications for the director of social services are:

> "The director of social services shall be a person who (a) by reason of graduate study or extensive experience is generally recognized as being professionally associated with the field of social services and (b) has had, during the ten years next preceding his appointment, at least four years of practical experience in public social service work, including supervision or administration of such work in communities of not less than 100,000 population." Section 20, Hawaii State Government Reorganization Act, 1959.

Such qualifications are valid.

With regard to eligibility and qualifications of public officers, the law generally declares that (1) qualifications of public officers may be prescribed by constitutional provision or legislative enactment,

(2) statutes imposing disqualifications are construed strictly while those declaring qualifications are to receive a liberal construction, (3) ambiguities are resolved in favor of eligibility to office, and (4) the courts may determine whether the qualifications which the law requires are possessed by the person selected. 42 Am. Jur., Public Officers, Sections 37 and 145. The Hawaii State Government Reorganization Act, 1959, which is the statutory basis for the State Department of Social Services, provides that the provision of the act shall be construed liberally. Section 43, Hawaii State Government Reorganization Act, 1959. Words that limit the right of a person to hold office are to be given a liberal construction favoring those seeking to hold office in order that the public may have the benefit of choice from all those who are in fact and in law qualified. Gazan vs. Heery, 187 S. E. 371; 106 A. L. R. 498, 507. Our State law provides that:

(1) The reason and intention of the law givers will control the strict letter of the law when the letter would lead to palpable injustice, contradiction and absurdity (Shillaber vs. Walters, 1 Haw. 31); and

(2) The legislative intent is the guiding star in the interpretation of the statute (Territory of Hawaii vs. Morita, 41 Haw. 1, 6, 1955); and

(3) In ascertaining the intent of the legislature, a cardinal rule of interpretation is that the reason and spirit of the law must be considered and this frequently justifies a departure from the literal construction of the wording --if a literal interpretation of the language used in the statute would lead to palpable injustice, the courts will search for a more reasonable meaning of the language which will also be in accord with the spirit of the enactment (Harrington vs. Harrington, 41 Haw. 89, 103-104, 1955).

There are two basic requirements for the position of director of social services; one is that he must be generally recognized as being professionally associated with the field of social services by reason of graduate study or extensive experience; the other is that he must have had during the ten years next preceding his appointment at least four years of practical experience in public social service work, including supervision or administration of such work in communities of not less than 100,000 population.

The first question is whether or not Mrs. Myrtle Ward is recognized professionally as indicated by the law. Professional

recognition is satisfied by either graduate study or extensive experience in the field of social services. Mrs. Ward meets both requirements. In 1941 Mrs. Ward obtained a bachelor of arts degree from the University of Iowa with a major in sociology. In 1947 she obtained a professional degree in social work from the University of Pennsylvania. Complementing her formal education, she had been actively engaged in social service work as a social worker and as a supervisor in the Territorial Department of Public Welfare. Her employment in this field has continued to the present with the State Department of Social Services in the capacity as administrator of the Department's Hawaii County Division responsible for social welfare functions of the Department of Social Services.

The second requirement may be segmented into four parts. It requires at least four years of practical experience in public social service work, including supervision or administration in such work; the law requires that this experience must have occurred during the ten years next preceding his appointment and in communities of not less than 100,000 population. Welfare services comprise a large part of the field of social services; to this there can be no argument.

With regard to the requirement for practical experience in public social service work, Mrs. Ward has been a social worker throughout her professional career. She began as a social worker in 1929 and had experience as a child welfare worker in Hawaii County before assuming the duties of a unit supervisor in 1950, which she held until 1953, when she became the administrator of the Hawaii County Division, Territorial Department of Public Welfare. With the forming of the Department of Social Services, Mrs. Ward continued as the Hawaii Division Administrator on the Island of Hawaii.

Mrs. Ward's work experience with the Territorial Department of Public Welfare and the State Department of Social Services satisfies the requirement of four years of practical experience in public social service work during the ten years next preceding her appointment.

With regard to the requirement for supervision or administration in such work, Mrs. Ward's experience has included supervision and administration. Mrs. Ward has had supervisory experience for over ten years. She began working as a unit supervisor in 1950 and became administrator of the Hawaii County division of the Territorial Department of Public Welfare in 1953.

Mrs. Ward has had experience in administration in both the former Territorial Department of Public Welfare and the State

Department of Social Services. Total departmental administration has been the responsibility of the division administrators of the Department. The Territorial Department of Public Welfare held a minimum of four quarterly meetings of its county administrators; the new State Department of Social Services has continued this practice and responsibility of the division administrators. Direction and decisions with respect to and implementing the basic policies and programs affecting the entire Department are discussed and made at the various meetings of the Department's division administrators. These administrators participate in the administration of the functions and authority of the entire Department. The former Territorial Department of Public Welfare served, and the State Department of Social Services now serves, the entire State of Hawaii having a population of over 500,000.

The administrative requirement of the statute necessarily implies administrative experience at a divisional level or higher; the position of director of social services would require a highly qualified person.

The statute does not require four years of experience in supervision or administration; it merely requires four years of practical experience in social service work, including supervision or administration. Supervisory or administrative experience during the four years of practical experience satisfies the statute so long as the required years of practical experience occur within ten years next preceding the appointment. To declare that the administrators of the various county divisions of the former Department of Public Welfare and the State Department of Social Services who actively and continually participate in the total administration of the entire Department do not satisfy the prescription of the statute is an unjust and unfair construction of the statute. An interpretation of the statute limiting the appointment to those with experience in the City and County of Honolulu would be unreasonably and undesirably discriminatory.

Basically, the statute with regard to the director of social services was designed to provide the State with a qualified director of social services. This is undeniably the spirit and intent of the law. Mrs. Ward's experience in the field of social services dates back to 1929. She has been a government servant on Hawaii since 1937, when she began her government service as a social worker, and has worked her way up professionally as well as administratively to her present position as an administrator in the Department of Social Services. An outline of Mrs. Ward's professional career is attached. Her long and eminent record in her profession leads to but one interpretation--that

she meets the qualifications of the statute relative to the director of social services; any other interpretation would be a palpable absurdity and injustice.

The interpretation presented in this opinion is in keeping with the law relative to eligibility and qualifications of public officers. Statutes declaring qualifications of public officers are construed liberally and any ambiguities are resolved in favor of eligibility to hold office. Section 42, Am. Jur., supra; Gazan vs. Heery, supra. The interpretation adheres to the spirit and intent of the law.

Yours very truly,

(s) Tenny Hoon Tom

Tenny Hoon Tom
Deputy Attorney General

APPROVED:

(s) Shiro Kashiwa

Shiro Kashiwa
Attorney General

Mrs. Myrtle D. Ward

1929 - 1931	Illinois Children's Home and Aid Society, Chicago, Illinois, Division for Foster Home Placement, Unit Supervisor
1932 - 1937	Social Service League, Honolulu
1932	Relieved Nora Lange as Supervisor, Social Service League
1933	Social Worker
1937 - 1941	Department of Public Welfare, Hawaii County, Social Worker
1941	Bachelor of Arts - Sociology, University of Iowa (Finished college requirement in spring, 1941)
1941 - 1943	Department of Public Welfare, Moiliili Unit, Social Worker
1944 - 1945	Department of Public Welfare, Hawaii County, Child Welfare Worker
1945 - 1947	University of Pennsylvania, School of Social Work, 1947 - Professional Degree
1947 - 1962	Department of Public Welfare; Department of Social Services
1947	Child Welfare Worker
1950	Unit Supervisor
1953	County Administrator

INDEXING INSTRUCTIONS

Opinion No. 62-19

LEGISLATURE

Statement of Urgency

Teachers, teaching principals, vice principals, principals and other professional officers and employees of the Department of Education; personnel of the University of Hawaii; public officers and employees of the State and its political subdivisions, elective, appointive and classified are included in the term "public officers and employees."

A statement of urgency relating to pay raises for "public officers and employees" generally is sufficiently broad in scope to include these categories.

AWL:ai
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Op. No. 62-19

STATE OF HAWAII

Department of the Attorney General

HONOLULU

April 11, 1962

Honorable Stanley I. Hara
Chairman, Finance Committee
House of Representatives
First State Legislature
State of Hawaii
Honolulu, Hawaii

Dear Sir:

This is in response to your letter dated April 8, 1962, for an opinion on the question whether, under the title and statement of facts constituting urgency in H.B. No. 37, H.D. 1, the legislature may legally include pay raises for persons and positions covered in S.U.M. 94, S.D. 2.

The statement of urgency to H.B. No. 37, H.D. 1, states that public officers and employees as a whole, and taken generally, have not received increases since July 1, 1959, that the cost of living in Hawaii has increased and that Federal employees have received increases. It is also stated that a general increase of compensation is urgent for purposes of morale and efficiency and to discourage such personnel from leaving public employment. It is the opinion of this office that the statement of facts constituting urgency contained in H.B. No. 37, H.D. 1, is sufficiently broad in scope to include all the persons and positions covered in S.U.M. 94, S.D. 2. All of the categories mentioned in S.U.M. 94, S.D. 2, may be included in said H.B. No. 37, H.D. 1. Said categories include teachers, teaching principals, vice principals, principals and other professional officers and employees of the Department of Education; personnel of the University of Hawaii; public officers and employees of the State and its political subdivisions. It should be noted that elective officers are included in the term "public officers."

The title of H.B. No. 37, H.D. 1, reads as follows:

"A Bill For An Act Making An Appropriation To Increase The Salaries Of Public Employees And Officers."

The reference to "public employees and officers" is sufficiently broad in scope to include all persons and positions covered in S.U.M. 94, S.D. 2. It is, however, recommended that the title be amended to read as follows:

"An Act Relating To The Compensation Of Public Officers And Employees And Making Appropriations Therefor."

This amendment is deemed necessary since H.B. No. 37, H.D. 1, provides only for an appropriation and S.U.M. 94, S.D. 2, makes certain substantive changes to the various positions involved in addition to providing for an appropriation.

Respectfully submitted,

/s/ Alana W. Lau

ALANA W. LAU
Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa

SHIRO KASHIWA
Attorney General

No Opinion

No. 62-20

No Opinion

No. 62-21

INDEXING INSTRUCTIONS

OPINION NO. 62-22

Employees' Retirement System

(1) Trustees of Retirement System have a duty to assert their right to prepayment premium charge provided for in long-term mortgage loan contract involving investment by Trustees of funds belonging to Retirement System and members thereof.

(2) Where borrower makes prepayment of long-term mortgage loan in full, in advance of maturity date of loan and includes the premium charge in such prepayment in accordance with the provisions of such contract, the Trustees cannot refund the sum representing such premium charge so paid by the borrower, but must hold such sum in trust for the exclusive use and benefit of the Retirement System and its members as provided under section 6-103, R.L.H. 1955.

(3) Where Trustees of the Retirement System invest Retirement System funds in long-term real estate loans with provision in contract for such loan providing that if borrower makes prepayment of loan in full during second year of mortgage, in advance of maturity date, borrower shall be subject to a premium charge as specified in contract, Trustees may not waive the right, which vests in their name for the benefit of the Retirement System and its members, to collect such premium charge upon prepayment of the loan in full by the borrower, in advance of the maturity date of the loan.

STATE OF HAWAII

Department of the Attorney General

DYM:hmm
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OP. No. 62-22

HONOLULU

May 7, 1962

Trustees
Employees' Retirement System
State of Hawaii
Honolulu, Hawaii

Attention Mr. Harold C. Hill, Secretary

Dear Sirs:

This is in response to your request to the Attorney General for an opinion on the question whether you may waive the "prepayment penalty" clause in the mortgage note executed by the Marianist Province of the Pacific.

The facts, so far as pertinent, are these: Marianist Province of the Pacific, the mortgagor, on July 15, 1960, obtained a loan of $400,000 from the Retirement System, the mortgagee. The mortgage note, which is part of the loan contract in this transaction, provides for monthly payments of principal and interest by the mortgagor until the maturity date on July 1, 1981, and provides furthermore for a five per cent premium charge against the mortgagor if prepayment in excess of one per cent of the original amount of principal is made in any one year during the first five years of the loan.1/

1/ The provisions of the note providing for such premium charge read as follows:

> "Privilege is reserved to make prepayment of principal in whole or in an amount equal to one or more of said installments of principal and interest at any installment due upon thirty (30) days' prior written notice to the payee. Such prepayment may be made in the aggregate up to one per cent (1%) of the original amount of principal in any one year (non-cumulative) without premium charge. Any prepayment in excess of one per cent (1%) of the original amount of principal in any one year shall be subject to the following premium charge on the amount in excess:
>
> First five years 5%
> Sixth through eighth year . . . 3%
> After eighth year . . . . . 2% "

The mortgagor, apparently after obtaining refinancing with a lower interest rate elsewhere, paid the note in full on February 1, 1962, including in such payment the sum of $19,509.81 2/ for the five per cent premium charge for prepayment of the loan in full during the second year of the loan. The mortgagor also requested the Trustees to consider whether it would be permissible for them to waive their right to collect this prepayment premium charge.

You are hereby advised that, under the facts stated, the prepayment premium charge amounting to $19,509.81 so paid by Marianist Province of the Pacific, in fulfillment of the mortgagor's obligations under the loan contract must be held in trust by the Board for the exclusive use and benefit of the Retirement System and for the members of the System as provided under Section 6-103, Revised Laws of Hawaii 1955. The Trustees of the Retirement System cannot, therefore, refund the sum so paid for the premium charge under the contract of loan by the mortgagor.

In this connection, we wish to point out that insofar as the question of waiver raised by you is concerned, upon prepayment by the mortgagor of the loan in full on February 1, 1962, the right to said five per cent premium charge under the loan contract immediately vested in the name of the Trustees for the benefit of the Retirement System and its members whose funds the Trustees invested in the said long-term mortgage loan to Marianist Province of the Pacific. Under such circumstances, the duty of the Trustees is to assert that right to a five per cent premium charge in accordance with the terms of the mortgage loan contract.

2/ This is amount reported by Mr. Charles Anamizu, the accountant with the Employees' Retirement System.

Any attempt to waive such right arising from the investment of Retirement System funds would constitute a breach of that duty by the Trustees.3/

Very truly yours,

/s/ David Y. Mar

DAVID Y. MAR
Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa

SHIRO KASHIWA
Attorney General

3/ Section 6-103, R.L.H. 1955, provides, among other things, that all income, interest and dividends derived from investments of Retirement System funds shall be used for the payment of obligations created and arising under the Retirement System laws. It also provides that all funds of the System including any and all interest and earnings of the same are and shall be held in trust by the Board for the exclusive use and benefit of the System and the members of the System.

INDEXING INSTRUCTION

Op. No. 62-23

LEGISLATOR, RESIGNATION OF

1. A member of the legislature may resign prior to the expiration of his term of office.

2. A State Senator, prior to the expiration of his term of office, may run for an elective federal office without the necessity of resigning before the election.

3. A State Senator, whose term extends beyond the next general election, cannot be a qualified candidate for a public office where the emoluments of that office have been increased by legislative act during his term and where that office is up for election in the next general election.

Statute

Constitution of the State of Hawaii
Article III, section 9

AIM:es
22a
Op. 62-23

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

May 11, 1962

Honorable Nelson K. Doi
Senate Minority Floor Leader
First Legislature, State of Hawaii
Iolani Palace
Honolulu, Hawaii

Dear Sir:

This is in response to your letter dated May 8, 1962, wherein you request an opinion from this office relating to the qualification of members of the State Legislature seeking another public office. More specifically, the questions asked are:

"1. Whether a State Senator may resign at any time before the expiration of his term of office.

2. Whether a State Senator before the expiration of his term of office, may run for an elective federal office (U. S. Senate or House). If yes, must he resign before offering himself in an election?

3. Whether a State Senator, before the expiration of his term of office, may run for an elective County office (Chairman, Mayor, Board member) or other State office (Governor, Lieutenant Governor). If no, could he do so by resigning before offering himself in an election for such office?"

The pertinent portions of the Constitution of the State

of Hawaii are as follows:[1]

> "SECTION 9. No member of the legislature shall hold any other public office under the State, nor shall he, during the term for which he is elected or appointed, be elected or appointed to any public office or employment which shall have been created, or the emoluments whereof shall have been increased, by legislative act during such term. The term 'public office', for the purposes of this section, shall not include notaries public, reserve police officers or officers of emergency organizations for civilian defense or disaster relief. The legislature may prescribe further disqualifications."

With respect to question number 1, we find nothing in the Constitution, nor in the statutes, which directly deals with this question. However, this question has appeared before the courts on many occasions. The generally accepted view in this country seems to be that a public officer has a right to resign his office prior to the expiration of the term for which he was so elected or appointed.[2] The common law of England takes a contra position and requires every person duly elected or appointed to a public office, possessing the requisite qualification, to accept the same and discharge the duties thereof, refusal of which to do so would subject him to punishment.[3] The courts in our country have not felt the great public necessity to require a public officer to continue to accept the obligations of the office for the full term for which he was so elected or appointed.[4]

With respect to question number 2, again we find nothing in the Constitution or in the statutes directly relating to this question. The only limitation we find in the Constitution

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1/ Constitution of the State of Hawaii, Article III, section 9.

2/ See cases cited in the discussion in 19 A.L.R. 39 (1922).

3/ See discussion in 19 A.L.R. 39 (1922).

4/ See cases cited in footnote 3, 43 Am. Jur., Public Officers, § 166, pp. 22-23.

is that no member of the legislature shall hold any other public office under the State. Where a member of the legislature is simply seeking another elective office, but not yet elected to it, it would appear that the prohibition of this section in the Constitution would not apply, as he is not holding another public office until he assumes the duties of his new office.

It would be appropriate at this point, not only for an elucidation of question number 2 but also on question number 3, to examine and analyze the various cases that touch on the question of resignation from a public office prior to election or appointment to another office. The courts categorize the cases into (1) the situation where the constitution or statute provides for "eligibility" to another public office; and (2) the situation where the constitution or statute provides for "holding" of another public office.

I. PROVISION OF CONSTITUTION OR STATUTE DECLARING OFFICER "INELIGIBLE" TO ANOTHER PUBLIC OFFICE

Where the constitution or statute provides that an officer shall not be "eligible" to another public office, the courts generally hold that eligibility will be determined at the time of election so that a person who has not resigned his office at the time of election or appointment to the second office is not qualified to hold the second office. In Searcy v. Grow, 15 Cal. 118 (1860), where there was a provision that "no person holding any lucrative office under the United States or any other power shall be eligible to any civil office of profit under the state", and where the appellant was elected to the office of sheriff while holding the office of postmaster under the United States, but had resigned the latter office at the time of his qualification to the former, the court held that appellant was ineligible since the disqualification had not been removed at the time of election. In People v. Purdy, 154 N.Y. 439, 61 Am. St. Rep. 624, 48 N.E. 821 (1897), where there was a provision that "No trustee of a school district shall be eligible to the office of supervisor of any town or ward in this town", and where a trustee of one of the school districts were elected supervisor and then resigned his office of trustee, the court there held that eligibility was to be determined at the time of election, and since the defendant had not at that time resigned the office of trustee, he was not entitled to the office of supervisor. In Re Corliss, 11 R.I. 638, 23 Am. Rep. 538, where the language of the provision involved read that "no person holding an office of trust or profit under the United States shall be appointed an elector", the court held that the

disqualification of a commissioner of the United States centennial commission elected to the office of an elector was not removed by the resignation from the office of trust, unless the office is resigned before the election.

II. PROVISION IN THE CONSTITUTION OR STATUTE FORBIDDING OFFICERS TO "HOLD" OR "EXERCISE" ANOTHER PUBLIC OFFICE

The cases in this category generally seem to hold that where the statute or constitution prohibits a public officer from holding two offices at the same time, the prohibition is against the "holding" of the second office, so that an officer becomes eligible to the second office where he resigns the first office prior to assuming the duties of the second.

In State v. Fowler, 66 Conn. 294, 32 Atl. 162, where the statute provided that no selectman shall hold the office of collector of town taxes of the same town during the same official year, the defendant resigned as a member of the board of selectmen and in the same official year was elected to the office of collector of town taxes in the same term. The court held the defendant was qualified to assume the duties of the latter office. The court said, at page 163:

> "The prohibition in this statute seems directed against the holding by a selectman, at the same time he is a selectman, of either of the other named offices. It forbids the holding of incompatible offices at the same time, rather than creates the disability for a certain period. So far as the terms of this statute extend, if one who had been elected a selectman should resign that office he might enter upon the duties of either of the other offices, although the year for which he had been elected a selectman had not ended. When the disability is the holding of the office merely, it is no disability to be elected, if the disability be removed before the holding begins. . . ."

In Shepherd v. Sartain, 185 Ala. 439, 64 So. 57 (1913), the statute provided "no person holding an office of profit under the United States shall, during his continuance in such office, hold any office of profit under this state." The court in the instant case held that the officer who had held the office of postmaster under the United States at the time of his election

to the office of probate judge, but who resigned the office of postmaster before entering on the duties of the office of probate judge, was qualified for the latter office. The court, at pages 61-62, said:

> "It is clear that the rule forbidding the holding of two offices at the same time, whether at the common law or under Constitutions and statutes, never contemplated a disability to be elected to the second office, but, on the contrary, conclusively affirms the legality and efficiency of such election. It is only the holding -- that is, the occupation -- of two offices at the same time that offends public policy, and is therefore forbidden by law. . . ."

In our case, the State Constitution contains language similar to the cases in situation number II above. The prohibition in our Constitution is against a member of the legislature "holding" any other public office under the State. Therefore, his eligibility is determined at the time of his assumption of the duties of his new office, and not at the time of his election. A member of a legislature therefore may seek another public office without resigning his legislative office prior to the election.

Furthermore, the limitation in our Constitution is directed to public offices under the State. Since the office of Representative to the United States House of Representatives and the office of Senator to the United States Senate are offices of the United States government, the prohibition in the Constitution would not apply. As stated in Committee of the Whole Report No. 24:5/

> ". . . The term 'public office' was not intended to include any office of the Federal government, including officers of the armed services. . . ."

With respect to question number 3, section 9, Article III of our Constitution prohibits any member of the legislature, during the term for which he is elected or appointed, to be elected or appointed to any public office or employment where

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5/ Proceedings of the Constitutional Convention of Hawaii, Vol. 1, pp. 342-343 (1950).

the emoluments whereof shall have been increased by legislative act during such term. We are assuming, for the purpose of this opinion, that the term of a member of the legislature extends beyond the next general election.

Initially, it is to be noted that the language of our Constitution differs in some respects with that of the United States Constitution as it relates to the discussion at hand. Our Constitution prohibits a member of the legislature from being appointed as well as elected to another public office or employment where the emoluments of that office have been increased by legislative act during the term of that member. In contrast, the United States Constitution simply prohibits a United States Senator or Representative from being appointed to any civil office of the United States where the emoluments have been increased. Even though the offices in question number 3 are elective ones, therefore, the limitation in our Constitution would equally apply to them.

The State Legislature, in the 1962 Budget Session, passed a measure increasing the salaries of public officers and employees, including those of the various County Chairmen, the Mayor, members of the Board of Supervisors of the various counties, Councilmen of the City Council of the City and County of Honolulu, the Governor of the State of Hawaii, and the Lieutenant Governor of the State of Hawaii.[6/] The measure has not as yet been approved and signed into law by the Governor. However, we are assuming, for the purpose of this opinion, that the measure will eventually become law.

6/ S.B. No. 113, First Legislature, State of Hawaii, Budget Session of 1962, provides for a salary increase effective July 1, 1962, in the following manner:

(a) The salary of each Chairman and Executive Officer of the Counties of Hawaii, Kauai, and Maui is raised from the present salary of $14,500 per annum to $15,500 per annum.
(b) The salary of the Mayor of the City and County of Honolulu is raised from the present salary of $20,000 per annum to $21,000 per annum.
(c) The salary of each member of the Board of Supervisors of the Counties of Hawaii, Kauai, and Maui is raised from the present salary of $4,200 per annum to $4,800 per annum.
(d) The salary of each Councilman of the City and County of Honolulu is raised from the present salary of $6,000 per annum to $6,300 per annum, except that the Chairman

In People v. Curtis, 1 Idaho 753 (1879), where the Revised Statutes of the United States provided that no member of the legislative assembly of any organized territory should be appointed to any office where the salary or emoluments of which had been increased, while he was a member, during the term for which he was elected and one year after the expiration of such term, the court held that a member of the legislative assembly elected in 1876 for a period of two years was not eligible to hold the office of probate judge in 1879 where in 1877 the legislative assembly increased the salary of the probate judge.

In the case of State v. Erickson, 180 Minn. 246, 230 N.W. 637 (1930), the State Constitution prohibited any member of the legislature from holding an office under the state, created, or the emoluments of which had been increased during his term, until one year after the expiration of his term. The respondent in the instant case was elected a member of the legislature at the general election in November, 1928, for the term commencing January 7, 1929 and expiring January 5, 1931. During the session of 1929, the legislature, of which he was a member, passed an act fixing the salaries of county commissioners in all counties of the state, resulting in increasing the salary of the county commissioner of Hennepin County by $600. The respondent submitted his name as a candidate for the office of county commissioner of Hennepin County for the term beginning January 5, 1931. The court directed that respondent's name be stricken from the list of eligible candidates to the office in question. The court, holding that an office of the county commissioner is just as much an office under the state, reasoned, at page 638:

> ". . . All else aside, the plain purpose of the constitutional prohibition would be thwarted in proportion as we denied its effect upon any such officers, the creation of whose official place or the fixing or increasing of whose salaries or other emoluments are within the power of the Legislature. The purpose was to protect the taxpayers from the working of selfish interest in the creation of public place

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of the City Council shall receive an additional $525 per annum.

(e) The salary of the Governor of the State of Hawaii is raised from the present salary of $25,000 per annum to $27,500 per annum.

(f) The salary of the Lieutenant Governor of the State of Hawaii is raised from the present salary of $19,000 per annum to $21,500 per annum.

Opinion No. 62-23

> and the fixing of compensation for public service. Local taxpayers are as much entitled to that protection as those of the state at large, and the plain purpose of the Constitution is to extend it to them."

In State v. Wiseheart, 28 So.2d 589 (1946), the Florida Constitution contained a provision similar to our Constitution with respect to disqualification of the members of the legislature. The defendant was duly elected to the office of Representative to the State House of Representatives. He resigned as member of the House of Representatives and was appointed a circuit court judge. The legislature, of which he was a member, increased the salary of the circuit court judges. The court here held that the appointment to the office of circuit court judge was void and in violation of the constitutional provision. The court, at page 592, stated:

> "The purpose of Section 5, Article III of the Constitution, was to remove the temptation on the part of the Legislature or any of its members to 'featherbed' on the public domain during the period of their election, by raising the salary of or creating public offices and getting themselves appointed thereto. Any device to circumvent this provision of the Constitution should be stricken down. . . ."

In State v. Gay, 28 So.2d 901 (1947), where the Florida Constitution contained language similar to our Constitution with respect to disqualification of members of the legislature, the court held that Fraser, a member of the State Senate, was not qualified to be appointed to the office of Comptroller during his term as a member of the Senate, since the legislature of which he was a member raised the salary of certain offices, including that of Comptroller. The court reached this result even despite the existence of a state statute which permitted a member of the legislature to accept a civil office during his term, the emoluments whereof have been increased by the legislature during his term, provided that such member shall receive a salary appertaining to such office at the beginning of the time for which he was elected a member of the legislature.

The prohibition in our Constitution against any member of the legislature from being elected or appointed to any public office, the emoluments whereof have been increased by legislative act during his term, is a provision commonly found in

many state constitutions. Commenting on such a provision in the Federal Constitution, Mr. Justice Story said that the purpose of such a clause is "to take away, as far as possible, any improper bias in the vote of the representative, and to secure to the constituents some solemn pledge of his disinterestedness." Commenting further, he said:

> ". . . The actual provision, however, does not go to the extent of the principle; for his appointment is restricted only 'during the time for which he was elected;' thus leaving in full force every influence upon his mind, if the period of his election is short, or the duration of it is approaching its natural termination. It has sometimes been matter of regret, that the disqualification had not been made coextensive with the supposed mischief; and thus have forever excluded members from the possession of offices created, or rendered more lucrative, by themselves. Perhaps there is quite as much wisdom in leaving the provision where it now is."[7/]

On the basis of the foregoing discussion, therefore, we are of the view that any member of the First Legislature of the State of Hawaii whose term extends beyond the 1962 general election cannot be a qualified candidate for any of the public offices, where the emoluments have been increased by legislative act during his term, and where the office will be up for election in the 1962 general election. Furthermore, his disqualification to these public offices cannot be removed by his resignation prior to the expiration of his term.

Very truly yours,

/s/ ALLEN I. MARUTANI

ALLEN I. MARUTANI
Deputy Attorney General

APPROVED:

/s/ SHIRO KASHIWA

SHIRO KASHIWA
Attorney General

(Signed 5-14-62)
Distributed 5-14-62

7/ Commentaries on the Constitution of the United States by Joseph Story, Vol. 1, § 867, p. 603 (1851).

INDEXING INSTRUCTIONS

OPINION NO. 62-24

1. BANKS AND BANKING

Under the constitutional prohibition against impairment of obligation of a contract, selection of officers of a bank by its shareholders pursuant to a provision contained in a bank's charter is valid notwithstanding the clause in section 178-35, RLH 1955, empowering the Board of Directors to elect or appoint officers, where the bank was organized and incorporated prior to the enactment of section 178-35.

2. SECTION 178-35, REVISED LAWS OF HAWAII 1955

(Same as above)

3. CONSTITUTION OF THE UNITED STATES

(Same as above)

YS:ft
17a
Op. No. 62-24

STATE OF HAWAII

Department of the Attorney General

HONOLULU

May 14, 1962

Dr. Charles H. Silva, Treasurer
Department of Treasury and Regulation
P. O. Box 40
Honolulu, Hawaii

Dear Sir:

This is in reply to your letter of April 12, 1962, pointing out that the charter of a certain bank requires its officers to be elected by the shareholders rather than by its board of directors and asking whether this method of selecting officers of a bank is proper under our banking statutes.

It is our opinion that under the peculiar facts of the case, selection of officers by shareholders rather than by the board of directors is valid.

The bank was incorporated on February 17, 1922, and its charter contained a provision that the shareholders shall elect the officers of the bank. The applicable statute at the time did not require that officers of a bank be appointed by the board of directors. The present statutory provision, section 178-35, Revised Laws of Hawaii 1955, was enacted in 1931. Section 178-35 states that the directors:

> "[S]hall elect a president and one or more vice-presidents, and may appoint and employ a cashier, and all other necessary officers, agents and servants, define their duties, fix their compensation, dismiss them, fill vacancies and require bonds for the faithful performance of their duties; . . ."

Notwithstanding section 178-35, shareholders of the bank in question have continued to elect the officers of the bank.

Did the enactment of section 178-35 cause or require a change in the bank's charter so as to place the duty and authority to appoint officers of the bank in the hands of the board of directors instead of the shareholders? We think not.

Since Dartmouth College v. Woodward, 4 Wheat. 518, was decided by the Supreme Court in 1819, the rule has become firmly established that a charter granted by a state to a private corporation constitutes a contract between the state and the incorporators within the protection of that clause of the federal Constitution which prohibits a state from passing any law impairing the obligation of a contract. Thus, whether a corporation was organized and incorporated under the general laws of the state or under a charter granted by a special act of the legislature, the state cannot amend the charter of a private corporation against the will of the corporation unless the state, either in the charter itself or in a general statute or constitutional provision operative at the date of the granting of the charter, has reserved the right of amendment, or unless the amendment is made in the exercise of the police power of the state or in the exercise of the right of eminent domain. 16 C.J.S. Constitutional Law § 319.

The statute under which the bank was organized and incorporated contains no provision reserving the right of amendment, nor does section 178-35 as applied to the facts before us constitute the exercise of police power or the right of eminent domain.

Moreover, the fact that section 178-35 was enacted prior to statehood by the Territorial legislature can make no difference. Although Congress may apparently pass laws impairing the obligation of contract and the federal Constitution contains no express prohibition on the exercise of this power by territories organized by Congress, it has been said that it would be inconsistent with the whole scheme of government to accord to the territories greater power in this respect than to the states, and it has accordingly been held that territorial legislatures have no power to pass laws impairing the obligation of contracts. 16 C.J.S. Constitutional Law § 277.

Therefore, we conclude that the selection of officers of the bank in question by its shareholders pursuant to a provision contained in the bank's charter is valid notwithstanding the clause in section 178-35, Revised Laws of Hawaii 1955, which empowers the board of directors to select the officers of the bank.

Yours very truly,

/s/ Yoshio Shigezawa
Yoshio Shigezawa
Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa
Shiro Kashiwa
Attorney General

Opinion No. 62-24

INDEXING INSTRUCTIONS

I. THE HAWAII INSURANCE LAW

Taxation

Payments made by insurance companies to policyholders on coupon policies may not be deducted from taxable gross premiums under the provisions of Section 181-313, R.L.H. 1955 as amended.

* * * * * * *

II. THE HAWAII INSURANCE LAW

Taxation

Payments made by insurance companies to policyholders on matured endowment policies may not be deducted from taxable gross premiums as cash surrender value under the provisions of Section 181-313, R.L.H. 1955 as amended.

* * * * * * *

III. THE HAWAII INSURANCE LAW

Taxation

There is no restriction on the period of time during which the State may require the going back and the filing of reports and determination of additional tax liability, in the absence of a specific statute of limitation.

* * * * * * *

IV. REVISED LAWS OF HAWAII 1955, AS AMENDED

Section 181-313

* * * * * * *

RBG:y
17 c
Op. No. 62-25

STATE OF HAWAII

Department of the Attorney General

HONOLULU

May 23, 1962

Honorable Charles H. Silva
Insurance Commissioner
Department of Treasury & Regulation
State of Hawaii
P. O. Box 3614
Honolulu 11, Hawaii

Dear Sir:

This is in response to your letters requesting our opinion on the following three matters:

1. Whether payments made to policyholders on "coupon policies" may be deducted from gross premiums under the provisions of Section 181-313, R.L.H. 1955 as amended. Our answer is that they may not.

2. Whether proceeds paid policyholders on matured endowment policies may be deducted from gross premiums as "cash surrender value" paid under the provisions of Section 181-313, R.L.H. 1955 as amended. Our answer is that they may not.

3. The period of time during which the State may require the going back and the filing of reports and the determination of additional tax liability. You are advised that in the absence of a specific statute of limitations there is no restriction on this requirement.

Our analysis and reasoning in support of the three answers given to your questions follow. We will first consider the status of "coupon policies" under Section 181-313, R.L.H. 1955 as amended, that is, whether payments made thereunder can be deducted from "gross premium" as: (a) "return premium" or (b) "cash surrender value paid" or (c) "dividends paid" or "credited". The term "coupons" as used in the trade refers to detachable certificates attached to and made a part of a life insurance policy. Each "coupon" is a benefit above the face value of the policy and may be torn off by the insured and redeemed for cash after a specific maturity date noted on the coupon or it may be used to reduce the next annual premium on the policy or may be

left with the company to draw interest. A "coupon" is also defined as something intended to be cut off from another thing. See Williams v. Moody, 22 S.E. 30, 95 Ga. 8.

To consider the applicability of these authorized deductions in Section 181-313, R.L.H. 1955 as amended, to the "coupon policies" it is first necessary to determine the meaning given to these terms. We consider first (a) above:

> "The term 'premium' ordinarily relates to the stipulated periodical payment exacted from the holder of an insurance contract." See Ancient Order of United Workmen of Kansas v. Hobbs, 18 P.2d 561, 562, 136 Kan. 708.

It is the return of this premium to the party paying same which may be deducted from reportable gross premiums. This does not bear any similarity to payment under a coupon policy.

We consider next (b) above:

> "The term cash surrender value means a cash value, ascertainable by known rules, of a contract of insurance abandoned and given up for cancellation by the insured to the owner, having contract right to do so." Van Kirk v. Vermont State Co., 140 F. 38, 45, quoting and adopting the definition in Re Welling, 113 F. 189, 192, 51 C.C.A. 151, 154, 7 Am. Bank. Rep. 340, 344, 345.

It is difficult to see how the coupon policies could be construed to fall into this category for exclusion purposes.

In (c) the term "dividend" as used in the insurance business is defined in AN INTRODUCTION TO LIFE UNDERWRITING (1958 Edition) prepared by the Insurance Research and Review Service of Indianapolis, Indiana, in the following manner:

> "A dividend on participating life insurance contracts is the refund of that part of the premium paid at the beginning of the year which still remains after the company has set aside the necessary reserve and made deductions for claims and expenses. The dividend may also include a

> share in the company's investment, mortality and operating profits.
>
> Coupon policies issued by some non-participating companies. The coupons represent fixed and guaranteed dividends which may be applied on the payment of premiums. The so-called dividends are a series of pure endowments maturing each year."

There is some basis it seems to relate the "coupons" to the term dividend; however, this is not in the normal or customary use of the term as seen in the usual interpretation by the authorities.

The definitions in the decided cases seem to be to the effect that dividend payments depend on a number of factors and are not a set guaranteed return in the nature of an endowment. See the following cases:

> "Dividends upon life policies are returns by mutual company of portion of premium for past year which is unearned because of saving in expected mortality, in expense loading, and increase in investment earnings." See Atlantic Life Ins. Co. v. Pharr, 59 F.2d 1024, 1026.

The case of Union Cent. Life Ins. Co. v. Williams, 65 F.2d 240, involved the construction of a provision in a life insurance policy relating to the accumulation of dividends. The court in arriving at a decision analyzed at length the distinction between dividends and reserves, which of necessity are set up for "coupon policies", as these provisions are utilized in the law of insurance, as follows:

> "A dividend is in its nature clearly to be distinguished from the reserve on a policy both from the standpoint of the insurer and the insured. The reserve is usually required to be set up by law, as well as by the dictates of sound business. Very generally stated, it represents the excess charge in level premiums required to take care of the increasing risk of death as the insured grows older, and the accumulation increases with each premium paid. It is accurately computable, and is considered to inhere in and belong to

> the policy. Policy reserves from the standpoint of the insurer are a fixed liability required to be offset by assets in order to maintain solvency. A dividend is a profit, in its nature uncertain, which accrues when by reason of good management, good risks, or the like, the insurer's business shows results above death losses, expenses, and reserves. It is a distribution from a distributable surplus. Dividends normally belong to the stockholders, which in a mutual company are the policyholders, but the insured though not a stockholder may by contract be allowed to participate. This share in profits more naturally belongs to the insured than to the beneficiary, and is a return to him of a part of his premium which the year's results have shown was not necessary to have been paid to maintain the insurance with its legal reserve. Some decisions on policy provisions less definite than those of the policy in suit have confused dividends and reserves, and have applied dividends along with the reserve to extend the insurance. The present policy most carefully distinguishes them and disposes separately of each, the one under the hearing 'Premiums and Dividends' and the other under the hearing 'Policy Values'."

The policies involving coupons herein have separate provisions covering dividends in line with the above cited authorities. They refer to the dividends as profit sharing or annual dividends where they are authorized. Whereas in the case of coupons these are covered by separate provisions setting forth the arrangements under which payments are made or to be credited. These practices seem to be consistent amongst the several companies involved locally with this type of policy.

In addition other jurisdictions such as California treat the coupons as being in the nature of endowment policies. Bulletin No. 108 dated January 24, 1951 of the State of California, Department of Insurance, states in part as follows:

> "Coupons should be treated as a series of pure endowments in the calculation of

> minimum cash values under the Standard Nonforfeiture Law. This applies whether, by terms of the policy, the coupons are (automatically or otherwise) to be paid in cash, left to accumulate at interest, applied to reduce premiums, or applied to purchase paid-up additions. Each coupon is to be treated as a pure endowment for its cash value on the date it becomes due."

On the basis of the cited authorities, we conclude that the word dividend as used in Section 181-313, R.L.H. 1955 as amended, was not contemplated to include coupons.

(2) You have posed the question as to whether payments made by insurance companies pursuant to matured endowment policies may be classed as "cash surrender value" and thereby allowed as a deduction from gross premiums. Endowment policies are generally classed as follows:

> "Endowment insurance differs from ordinary life insurance in that, in the case of endowment insurance, a certain period is fixed within which the obligation of insurer runs to the beneficiaries under the policy." Miller v. Campbell, 35 N.E. 651, 140 N.Y. 457.
>
> "Endowment insurance is a contract to pay a certain sum to insured if he lives a certain length of time, or, if he dies before that time, to some other person indicated." McKee v. Columbus Mut. Life Insur. Co., 42 P.2d 831, 833, 172 Okl. 250.
>
> "This form of insurance in one respect is a contract payable in the event of a continuance of life, Industrial Life Insur. Co. v. Hunt, 6 A.2d 781, 335 P. 305, in another, in the event of death before the period specified; Brummer v. Cohn, 86 N.Y. 11, 40 Am. R. 503, and it is an investment as well as life insurance." See McKee case supra.

These definitions obviously do not place payments made under a matured endowment policy into the category of "cash surrender values" as we interpret that term earlier in this opinion. We see no basis or justification for classifying this type of policy as being "abandoned" or "given up" when maturing so as to authorize the deduction of these payments from computation as gross premiums.

In general the rule of construction is well settled that an exemption from taxation does not exist unless plainly granted and is to be strictly construed against the taxpayer. This rule is well settled in Hawaii. Re Excise Tax Robert Hind, Ltd., 34 Haw. 40; In re Perry, 36 Haw. 340; In re Yerian, 35 Haw. 855, aff'd 130 F.2d 786; Re Taxes Henry A. White.

In the White case, at 33 Haw. 318, this court said:

> "* * * If the legislature had intended to allow an exemption such as is claimed in this case it could and would have expressed that purpose by words not admitting of doubt.
>
> "It is a well-known rule of law applicable here that exemptions from taxation must be strictly construed against the exemption. Berryman v. Board of Trustees of Whitman College, 222 U.S. 334. And it is also fundamental that the burden of proof is upon the party claiming an exemption to make it entirely clear by contract or otherwise the property is not subject to taxation. Metropolitan St. Ry. Co. v. New York, 199 U.S. 1. The rule also is, exemption from taxation is never to be presumed. The legislature itself cannot be held to have intended to surrender the taxing power unless its intention to do so has been declared in clear and unmistakable terms." St. Louis v. United Ry. Co., 210 U.S. 266, 275.

(3) In answer to this question see the case of Keola v. Parker, 21 Haw. 597, in which the court said:

> "In the absence of express statutory provisions to the contrary, statutes of limitations do not as a general rule run against the sovereign or government, whether State or Federal."

Respectfully submitted,

/s/ Ronald B. Greig

RONALD B. GREIG
Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa

SHIRO KASHIWA
Attorney General

Op. No. 62-25

INDEXING INSTRUCTIONS

Opinion No. 62-26

PUBLIC OFFICERS

Public office has respect to a permanent trust and it does not include appointment to meet special exigencies of the individual to perform transient, occasional or incidental duties.

STATE CONSTITUTION

Article III, section 9

AWL:ai
5a, 22a
Op. No. 62-26

STATE OF HAWAII

Department of the Attorney General

HONOLULU

June 5, 1962

Honorable Elmer Cravalho
Speaker, House of Representatives
First State Legislature
State of Hawaii
Honolulu, Hawaii

Dear Sir:

This is in response to your oral request for an opinion on the question whether members of the legislature may be appointed to serve on the New York World's Fair Committee.

Act 4, Budget Session of 1961, provides for a temporary committee, known as the New York World's Fair Committee to consist of sixteen members, five appointed by the Speaker of the House, five appointed by the President of the Senate and five appointed by the Governor and the Lieutenant Governor as chairman to serve for terms expiring six months after the close of the Fair.

Section 9 of Article III of the Hawaii State Constitution provides in part as follows:

> "No member of the legislature shall hold any other public office under the State, nor shall he, during the term for which he is elected or appointed, be elected or appointed to any public office or employment which shall have created, . . . by legislative act during such term."

In Gillespie v. Barrett, 368 Illinois 612, 15 N.E.(2) 513 (1938), involving several acts creating the Gettsburg Memorial Commission, Golden Gate Exposition Commission and New York World's Fair Commission, composed partly of state legislators, the court stated:

> "To come within its proscription, an appointment must be of a permanent nature and

> must lend itself to personal aggrandizement with an opportunity for private gain, pecuniary or otherwise. Such is not the case here. The appointments are merely temporary; the statute forbids the payment of salaries directly or indirectly and no policy-making power is delegated. The members of the commissions are merely intrusted with the supervision of the ministerial details of a legislative enactment. Upon disposing of the property after the close of this exposition it is clearly the intent of these acts that the proceeds received from liquidation thereof be accounted for and paid into the state treasury."

See also Mulnix v. Elliott, 62 Colo. 46, 156 P. 216 and State v. Hawkins, 79 Mont. 506, 257 P. 411, 53 A.L.R. 583, State v. Yelle, 185 P.(2) 723, 29 Wash.(2) 68. Parker v. Riley, 18 Cal.(2) 83, 113 P.(2) 873, 875, 134 A.L.R. 1425.

See also Attorney General Opinion No. 1010, 1922, holding that Senator Chillingworth may be appointed to membership on the Hawaii Emergency Labor Commission notwithstanding section 16 of the Organic Act which provided that "no member of the Legislature shall, during the term for which he is elected, be appointed or elected to any office of the Territory of Hawaii." The opinion states:

> ". . . there is a further principle announced in the cases that a public office or public officer involves the idea of permanency.
>
> "An office has been defined to be an employment on behalf of the government in any situation of public trust, not merely transient, occasional or incidental . . . .
>
> "'Public office' as used in the constitution has respect to a permanent trust . . . and it does not include appointment to meet special exigencies of the individual to perform transient, occasional or incidental duties."

While there are authorities to the effect that exercise of the "sovereign functions of government" will amount to a public office, there are authorities holding that one of the essential

elements of a public office is permanency and that appointments to meet transient or incidental duties are not appointments to public office, such as Gillespie v. Illinois, supra.

Based on the above discussed cases and opinion, it is the opinion of this office that members of the legislature may be appointed to the New York World's Fair Committee.

Very truly yours,

/s/ ALANA W. LAU

ALANA W. LAU
Deputy Attorney General

APPROVED:

/s/ SHIRO KASHIWA

SHIRO KASHIWA
Attorney General

INDEXING INSTRUCTIONS

OP. 62-27

CIVIL SERVICE

Under the Reorganization Act (Act 1, 2SSLH 1959), the newly-created positions of the chief of harbors division and of the chief of aeronautics division are covered within the provisions of chapters 3 and 4, Revised Laws of Hawaii 1955, as amended.

REVISED LAWS OF HAWAII

Chapter 3, as amended

Chapter 4, as amended

RMM:ru
12a

OP. 62-27

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU, HAWAII

June 5, 1962

Mr. Arthur A. Akina, Jr.
Director of Personnel Services
Department of Personnel Services
825 Mililani Street
Honolulu 13, Hawaii

Dear Mr. Akina:

Re: Chief of Harbors Division and
Chief of Aeronautics Division

This is in response to your communication, dated April 30, 1962, requesting our reply as to whether the above-referenced and newly-created positions are covered within the provisions of Chapters 3 and 4, Revised Laws of Hawaii 1955, as amended.

Section 8 of the Reorganization Act (Act 1, SSSLH 1959) provides, in part, as follows:

> "Except as otherwise provided by this Act and with the approval of the governor, the head of a department may establish or abolish any subordinate office or position, transfer officers and employees between positions, appoint and remove any subordinate, and change the duties, titles and compensation of offices and positions as is deemed necessary by the head of the department for the efficient functioning of the department, subject to the limitations of available appropriations and of the provisions of chapters 3 and 4 of the Revised Laws of Hawaii 1955, as amended." (Emphasis added.)

Clearly, the action establishing the above-referenced positions was consistent with the terms of section 8.

Therefore, the question remains whether these postions are within the scope of Chapters 3 and 4 of the Revised Laws of Hawaii 1955, as amended.

Section 3-20, R.L.H. 1955, as amended, directs that:

> "The civil service to which this part shall apply comprises all positions in the state service now existing or hereafter established and embraces all personal services performed for the State, except the following: . . ."

As may be seen, neither of the above-referenced positions fall within any of the exemptions listed therein. Therefore, it is appropriate to conclude that they are covered within the provisions of Chapters 3 and 4, R.L.H. 1955, as amended.

Your attention is called to section 32, sub-paragraph 3 of the Reorganization Act.

In view of the foregoing considerations, we must answer the question presented in the affirmative; that is, these positions are covered within the provisions of Chapters 3 and 4, R.L.H. 1955, as amended.

Very truly yours,

/s/ Roy M. Miyamoto

Roy M. Miyamoto
Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa

Shiro Kashiwa
Attorney General

INDEXING INSTRUCTIONS

OP. 62-28

PUBLIC WORKS

A. Eligibility of workers

The phrase "eligible to become such a citizen" used in section 9-50, RLH 1955, refers to a class of foreign nationals to whom the privilege of acquiring citizenship through naturalization has been extended.

Section 9-50, RLH 1955, does not prohibit hiring of any person, who is a permanent resident of the United States, on a state public work solely on the ground that he is an alien who has not applied for citizenship.

B. Alien Labor

Same

C. Citizen Labor

Same

D. Laborers Eligible to Become Citizens

Same

CITIZENS

A. Eligible to Become a Citizen

Same

REVISED LAWS OF HAWAII, 1955

Section 9-50

TS:ru
10a

OP. 62-28

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU, HAWAII

June 7, 1962

Mr. C. F. Damon, Jr.
Director of Labor and
Industrial Relations
825 Mililani Street
Honolulu 13, Hawaii

Dear Mr. Damon:

Section 9-50, Revised Laws of Hawaii 1955, provides that no person shall be employed as a mechanic or laborer on any public work carried on by the State unless such person is a citizen of the United States or eligible to become such a citizen.

You have asked this office to construe the words "eligible to become such a citizen" used in said section, specifically in its application to an alien Japanese who, presumably, has not applied for United States citizenship.

The statute prohibiting hiring of non-citizens or persons ineligible for citizenship was first enacted in 1903. Committee reports of the 1903 legislature shed no light on the meaning of the phrase "eligible to become such a citizen." However, in 1904 the attorney general concluded that the words in question applied to a person who "can go before a court today and become naturalized." (Atty. Gen. Op. 39, 1904) Subsequently, this conclusion was modified and in 1905 the attorney general ruled that:

> "Section 121 of the Revised Laws is obviously intended to exclude that class of labor which by the laws of the United States cannot be or become naturalized citizens thereof.
>
> "It was not intended that the law in question should apply to persons who could become citizens of the United States, and it is our opinion further

that persons possessing the qualifications for citizenship, from the race standpoint, may be employed upon the public works of the Territory irrespective of whether or not they have declared their intentions to become citizens of the United States." (Atty. Gen. Op. 61, 1905)

In 1925, the phrase "eligible to become such a citizen" was stricken by the legislature (Act 231, L. 1925), and until 1951 only citizens were allowed to work on public work projects.

In 1951, the phrase was restored. In doing so, the legislature expressed a desire to allow Filipino aliens to work on public work projects.1/ The diminishing labor force and the fact that persons eligible for citizenship were acceptable on federal public work projects were also reasons given for the restoration. (S.C. Rep. 325, H.J. 487, 1951; S.C. Rep. 674, S.J. 674, 1951)

Both the attorney general's opinion of 1905 and the legislative standing committee reports of 1951 indicate that the phrase "eligible to become such a citizen" refers to a class of foreign nationals to whom the privilege of acquiring citizenship through naturalization has been extended.

Where a similar question was presented in the case of Gorman v. Forty-Second St. M & St. N. Ave. Ry. Co., 203 N. Y. Supp. 632 (1924), the court said:

> "That person is eligible who is 'fit to be chosen; worthy of choice; desirable.' Century Dictionary. In the strict sense no person is 'fit to be chosen' as a citizen until he has complied with the statutory provisions in relation to residence and the filing of a notice of intention, and has been pronounced by a court of naturalization, after a prescribed examination, a qualified applicant for citizenship. . . . In

---

1/ Right of citizenship through naturalization was granted to Filipino aliens in 1946. Prior to 1946 Filipinos were permitted to work on public works as Nationals. The Philippine independence in 1946 changed their status to aliens, and as such they lost their right to work on public works.

> this sense the class of eligibles would be confined to those possessing eligibility during the brief interval ordinarily elapsing between the determination of eligibility and the taking of the required oath to support the Constitution of the United States. It would be nothing less than absurd to suppose that Congress considered all persons, other than the members of this restricted class, 'ineligible to citizenship.'
>
> "In our view Congress made reference to natives of foreign countries whose nationals, as a class, are incapable of naturalization."

Based on the foregoing authorities, it is our conclusion that since race is no longer a factor barring citizenship (Public Law 82-414 (1952), 66 Stat. 238; 8 U.S.C.A. 1422), Section 9-50, Revised Laws of Hawaii 1955, does not prohibit hiring of any person who is a permanent resident of the United States, on a State public work solely on the ground that he is an alien who has not applied for citizenship.

Very truly yours,

/s/ Toshimi Sodetani

Toshimi Sodetani
Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa

Shiro Kashiwa
Attorney General

INDEXING INSTRUCTIONS

OP. 62-29

MOTOR CARRIER EXEMPTIONS

Farm operations do not include pineapple companies' plantation operations.

FARM OPERATION EXEMPTIONS

The Motor Carrier Act does not exclude pineapple companies' plantation operations.

ASKF:ru
17b, C-7929

✓ Op. 62-29

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU, HAWAII

June 12, 1962

Mr. Jack E. Conley, Director
Public Utilities Commission
313 So. Beretania Street
Honolulu, Hawaii

Dear Mr. Conley:

This is in response to your letter of May 23, 1962, requesting clarification of Mr. Watanabe's inquiry in a letter of even date, whether pineapple companies in their plantation operations are now exempt from requirements of Act 121, Session Laws of Hawaii 1961, as amended.

As you know, Act 12, First State Legislature, Budget Session of 1962, amended in part, the Motor Carrier Law, Act 121, Session Laws of Hawaii 1961, providing, inter alia, exemption to "all motor vehicles used by farmers exclusively for their farm operations, . . ."

Under Act 121, save for the exemptions provided in section 5, all motor carriers, private, contract or common, were subject to regulation. Farm operations were exempt from regulation only insofar as economic regulations were concerned in sections 5(e), (i), (l) and (m).

In the enactment of Senate Bill 93, now Act 12, the Legislature provided in section 6 as follows:

> "Notwithstanding any other provisions of this chapter all motor vehicles used by farmers exclusively for their farm operations and all motor vehicles used by such farmers who infrequently transport from the place of production to a warehouse, regular market, place of storage, or place of shipment, the farm products of neighboring farmers in exchange for like or reciprocal services, for farm products, or for a

> cash consideration not exceeding $1,500 per year, and provided that such transportation shall constitute the sole transportation of property for hire or compensation of such farmers are exempted from the provisions of this chapter; provided, however, that such motor vehicles comply with the safety ordinances and rules and regulations of the county or city and county where they are operated and other applicable state safety laws and rules and regulations."

Section 7 of the said Act further amended Act 121 by repealing section 5(i) with the request that the remaining paragraphs of section 5 be appropriately re-lettered. Sections 5(l) and (m) were not touched in any way in these amendments.

In construing a statute, one must look to the objects to be accomplished, evils and mischiefs to be remedied, the history of the statute, the history of its passage including reports of committees, etc. to ascertain the intent of the Legislature. (Retirement System v. Chang, 42 Haw. 532)

From the legislative history of Act 121, it is clear that there has been much discussion, grievances and complaints primarily after enactment of the said Act. The amendments were the final results of these hearings. The various committee reports clearly indicate that during the many hearings held after its enactment, representatives of the sugar and pineapple companies represented to the committees that they were satisfied with the provisions of Act 121 and have either complied, begun compliance or would comply with all safety provisions of the Act.

We can but conclude from the legislative history, particularly in view of the repeal of section 5(i) dealing with farmers and the failure to amend or repeal sections 5(l) and (m), that it was the intent of the Legislature in

enacting Act 12 that pineapple companies transporting unprocessed pineapples to a cannery and returning any containers used in such transportation to the fields be covered by the safety provisions of Act 121.

Very truly yours,

/s/ Arthur S. K. Fong

Arthur S. K. Fong
Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa

Shiro Kashiwa
Attorney General

INDEXING INSTRUCTIONS

OP. 62-30

CIVIL SERVICE

Service Awards. Military service time cannot be accounted in determining whether 25 years or more of government service were completed.

REVISED LAWS OF HAWAII 1955

Section 3-8

RMM:ru
12a

OP. 62-30

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU, HAWAII

June 14, 1962

Mr. Arthur A. Akina, Jr.
Director of Personnel Services
Department of Personnel Services
825 Mililani Street
Honolulu 13, Hawaii

Dear Mr. Akina:

This is in response to your communication, dated June 26, 1961, requesting our opinion as to whether military service is to be included in the term "federal service" under section 3-8, Revised Laws of Hawaii 1955, as amended.

The answer to this question depends on the determination of the scope of the term "government service" as found in line 6 of the above-mentioned section of our statutes. Section 3-8 provides, in part:

> "The head of each department of the state or county governments, or where appropriate the chief executive of such respective governments, may present to any public officer or employee who has completed twenty-five years or more of government service, or in conjunction with such service in other departments of the federal, territorial or county governments, a certificate, plaque or other suitable memento. . . ." (Underscore added)

In other words, "such service" is to be equated with "government service".

Basically, this is a question concerning the intent of the Legislature. However, the term "government service" as used in this section is not therein expressly defined. Further, Standing Committee Report 484, Senate Journal 1959, informs us that one of the purposes of the amending legislation was to make public officers and employees eligible for service awards though the service was rendered to the Federal

government or more than a single department of the Territory (State) or its political subdivisions. The term is again undefined.

Under the rule of statutory construction of statutes in pari materia, statutes are not to be considered as isolated fragments of law, but as a whole, or as parts of a single and complete statutory arrangement. Indeed, as a general rule, where legislation dealing with a particular subject consists of a system of related general provisions indicative of a settled policy, new enactments of a fragmentary nature on that subject are to be taken as intended to fit into the existing system and to be carried into effect conformably to it, in the absence of words specifically indicating the contrary.

Chapter 3 of the Revised Laws of Hawaii 1955, as amended, provides for the establishment of a system of personnel administration in civil service.

"Civil service" means all service rendered to and paid for by the state or nation, or by political subdivisions thereof, other than that pertaining to naval or military affairs. Hope v. City of New Orleans, 136 La. 345, 30 So. 842 (1901). Therefore, applying the rules of construction discussed above, where section 3-8 subsequently provided for service awards for long and faithful "government service" to public officers and employees, "government service" must necessarily be limited to exclude performance outside the scope of civil service in order to conform to the existing system.

In view of the foregoing considerations, the language of the statute before us seems clear and free of ambiguities. "Government service" here involves only services rendered under the controlling civil service laws. Therefore, military service, which is not rendered under such laws, cannot be included in arriving at the number of years required to be eligible for the award.

However, this conclusion does not decide that military service per se must be excluded. As stated in your communication, an employee is entitled to receive credit for military service if he leaves the State employment to enter the military and returns to the State. Under the statutes

applicable, such employees are allowed service credit to the same extent as if they were continuously in the active service of the government in the position which they held immediately prior to entry into military service. Such substituted credit avoids imposing a penalty on this class of citizens serving the country in time of need. Therefore, to this limited extent, military service may be included as a substitute for government service.

Very truly yours,

/s/ Roy M. Miyamoto

Roy M. Miyamoto
Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa

Shiro Kashiwa
Attorney General

INDEXING INSTRUCTION

Op. 62-31

CIVIL SERVICE

Private Secretaries

1. Current status of incumbent private secretaries with respect to the Reorganization Act:

   (a) Appointed before 7/1/55: civil service.
   (b) Appointed after 7/1/55, but before 11/25/59: exempt.
   (c) Appointed after 11/25/59: exempt.

2. Department head may terminate services of incumbents under section 8 of the Reorganization Act.

RMM:es
12a
Op. 62-31

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

June 20, 1962

Mr. Arthur A. Akina, Jr.
Director of Personnel Services
Department of Personnel Services
State of Hawaii
Honolulu, Hawaii

Dear Sir:

Re: Private secretaries to appointive heads of departments

This is in response to your communication, dated April 18, 1962, requesting our answer as to the following questions with respect to the Reorganization Act, Act 1, 2SSLH 1959:

1. What is the current appointment status of an incumbent private secretary who had acquired civil service appointment status prior to or by July 1, 1955 and who has continued in service to date?

2. What is the current appointment status of an incumbent private secretary who was hired after July 1, 1955 on an exempt appointment and who has continued in service to date?

3. What is the current appointment status of an incumbent private secretary who was hired after November 25, 1959, the date of Act 1, 2SSLH 1959, took effect, and who has continued in service to date?

4. May a department head, after the plan of reorganization for his department has been approved by the Governor and after the plan has been implemented, elect to hire someone either from within or

outside of the state service to serve as his private secretary and in so doing to terminate the services of the incumbent private secretary?

The first three questions will be discussed together under two categories, i.e., prior to the enactment of the Reorganization Act, and after the enactment of the Act. The former classification will be subdivided into two areas, i.e., prior to July 1, 1955, and after July 1, 1955.

For clarity in presentation we will initially consider the category designated as after the enactment of the Reorganization Act. The basic question involved is whether Act 1, 2SSLH 1959, in effect removed the exemption status of private secretaries to department heads from the State personnel laws.

Paragraph 4, section 7, Act 1, 2SSLH 1959 directs that:

> "For the purposes of section 3-20(o) of the Revised Laws of Hawaii 1955, as amended, the phrase 'department head appointed under or in the manner provided in the first paragraph of section 80 of the Organic Act' shall be construed to include a single executive who is a head of a principal department and the executive officer of a board or commission which is the head of a principal department established by this Act."

Further, the legislative history of section 7 discloses that paragraph 4 was intended to authorize department heads to make appointments under section 3-20(o), R.L.H. 1955, as amended, subject to the classification laws, but not the personnel laws of the State. (C.C.R._____, p. 7.) We take note of section 3-20(p), at this point, which provides that the positions defined in 3-20(o) are to be included in the position classification plan.

These factors clearly indicate that the legislative intendment was to have sections 3-20(o) and 3-20(p) of the Revised Laws continue after the Reorganization Act. Although the term "department head" was modified to conform to the reorganization of the State government, the operation of these sections was not otherwise modified.

Therefore, where section 8, 2SSLH 1959 provides that a department head may appoint any subordinate subject to the limitations of the provisions of chapters 3 and 4, we must conclude that the current appointment status of private secretaries hired after November 25, 1959, is subject to the classification

laws, but is exempt from the personnel laws.

With respect to appointments made prior to the effective date of Act 1 (November 25, 1959), we may consider section 32 of that Act. The first paragraph of section 32 provides that:

> "All officers and employees whose functions are transferred by this Act shall be transferred with their functions to the department in which their functions, or a major part thereof, have been transferred, and shall continue to perform their regular duties upon their transfer, subject to the provisions of state personnel laws and of this Act." (Emphasis added.)

This paragraph shows that the transfers of personnel upon reorganization were subject, first, to the personnel laws, and, second, to Act 1, 2SSLH 1959.

In dealing with the transfer of incumbent private secretaries appointed prior to July 1, 1955, with respect to the personnel laws, we may note that sections 3-20(o) and 3-20(p) of the Revised Laws were not modified under the Reorganization Act, except for the definition of the term "department head." And under the last paragraph of section 3-20 of the Revised Laws, we see that the civil service status of such private secretaries was not affected by any of the provisions of section 3-20. Therefore, under the personnel laws the civil service status of private secretaries appointed prior to July 1, 1955, was not affected.

Then with regard to the applicable provisions of the Reorganization Act, we interpret paragraph 2, section 32, Act 1, 2SSLH 1959, as further continuing the civil service status of any incumbent private secretary appointed prior to July 1, 1955. That paragraph provides, in part, that:

> "No employee of the state having tenure shall suffer any loss of salary, seniority, prior service credit, vacation, sick leave or other employee benefit or privilege as a consequence of this Act. . . ."

In view of the foregoing considerations, we must conclude that under the state personnel laws and the Reorganization Act, the section 32 transfer of private secretaries appointed prior to July 1, 1955, did not alter the civil service status of such employees.

In dealing with the transfer of incumbent private secretaries appointed after July 1, 1955, but before November 25, 1959, with respect to the personnel laws, we may note that under sections 3-20(o) and (p) of the Revised Laws the position was exempt from the personnel laws, but not the classification plan. Therefore, under the effective personnel laws the exempt status of incumbent private secretaries appointed after July 1, 1955, was not affected.

Then with regard to the Reorganization Act, we direct your attention to paragraph 3, section 32, Act 1, 2SSLH 1959. That paragraph directs, in part, that:

> "An employee of the state who does not have tenure and who may be transferred or appointed to a civil service position as a consequence of this Act, shall become a civil service employee. . . ." (Emphasis added.)

As earlier indicated, the exempt status of private secretaries was not affected under Act 1. Although private secretaries appointed after July 1, 1955, were without tenure, they were not transferred or appointed under the Reorganization Act to a civil service position as a consequence of the Act. Therefore, where these incumbents without tenure were transferred to non-civil service positions, they did not become civil service employees.

In view of the foregoing considerations, we must conclude that, under the State personnel laws and the Reorganization Act, the section 32 transfer of private secretaries appointed after July 1, 1955, did not alter the exempt status of such employees.

With respect to question 4, we direct your attention to section 8 of Act 1, 2SSLH 1959, which provides, in part, that:

> "Except as otherwise provided by this Act and with the approval of the governor, the head of a department may . . . appoint and remove any subordinate, . . . subject to the limitations of available appropriations and of the provisions of chapters 3 and 4 of the Revised Laws of Hawaii 1955, as amended." (Emphasis added.)

In view of the foregoing consideration, it is our opinion that, where the position involved is exempt from the personnel laws, a department head may hire someone either from within or outside of the State service to serve as his private secretary and in so doing to terminate the services of the incumbent secretary. The only limitations to this authorized act are those expressly enumerated in section 8 of the Reorganization Act.

Very truly yours,

/s/ ROY M. MIYAMOTO

ROY M. MIYAMOTO
Deputy Attorney General

APPROVED:

/s/ SHIRO KASHIWA

SHIRO KASHIWA
Attorney General

INDEXING INSTRUCTION

Op. No. 62-32

INSURANCE

Dental care

HMSA may include dental care in its medical program, but would not forfeit its special operating allowance and tax exemption (§§ 185-5 and 185-19, RLH 1955, as amended). [Modifies Op. No.61-70, July 3, 1961]

RMM:es
17a
Op. 62-32

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

June 20, 1962

Dr. Charles H. Silva
Insurance Commissioner
Department of Treasury and Regulation
State of Hawaii
Honolulu, Hawaii

Dear Dr. Silva:

This is in response to your communication of November 20, 1961, requesting our reply should there be any change in Opinion 61-70, dated July 3, 1961, regarding the special operating allowance and the tax exemption (sections 185-5 and 185-19, R.L.H. 1955, as amended) if the Hawaii Medical Service Association were to include "dental care" in its medical program.

The purpose of section 185-19 of the Revised Laws of Hawaii 1955, as amended, was to exempt from taxation certain associations and societies organized and operating solely as non-profit medical indemnity and/or hospital service associations or societies.

The general rule of statutory construction, expressed in the referenced opinion, provides, in part, that:

> "The fundamental theory of the tax structure of the several states is that all taxable property should bear its fair share of the cost and expense of government; and while property is taxable only when declared so by legislative enactment, the law does not read into the taxing statutes any implied exemption of particular property or particular property owners unless the intendment of the statute to make an exemption is plain. When the statute purports to grant an exemption from taxation, the universal rule of construction is that the tax exemption provision is

> to be construed strictly against the one who asserts the claim of exemption, in the absence of expressed legislative intent that the exemption is to be construed otherwise . . . . An exemption from taxation must be clearly defined and founded upon plain language. . . . Whenever doubt arises it is to be resolved against the exemption."

Neither the statute itself nor the legislative history specifically sheds any light as to whether "dental care" is to be included within the meaning of "medical care." Therefore, in looking for the legislative intent, the rule of construction of words in statutes, as presented in Advertiser Pub. Co. v. Tax Com'r Fase, 43 Haw. 154, 163 (1959), may properly be considered. The following statement was therein adopted:

> "The interpretation of words in their popular sense rather than according to their scientific meaning is peculiarly required in the construction of tax laws, in the enactment of which the legislature must needs adopt a classification of persons and property for purposes of taxation -- a classification determined by the legislative conception of the policy of subjecting certain persons, property, occupations or business to taxation according to popular notions or ideas of the propriety of such taxation. In the construction of such laws the courts will incline strongly towards the popular signification of language. In that way the legislative intent is most apt to be reached." (Emphasis added.)

To this end of determining the popular meaning of the words involved here, we may note that a "dentist" is defined as: "One whose profession is to treat diseases to the teeth and associated tissues, and to make and insert artificial teeth; -- called also dental surgeon." (Webster's New International Dictionary, 2d Ed., 1951.) Further, the Encyclopedia Britannica, 11th Ed., Vol. 8, p. 50, calls dentistry "a special department of medical science."

In State v. Beck, 21 R.I. 288, 43 Atl. 366, 367 (1898), the court declared as follows:

> "A dentist is a dental surgeon. He performs surgical operations upon the teeth and jaw, and, as incidental thereto, upon the flesh connected therewith. His sphere of operations is included in the larger one of the physician and surgeon."

Finally, in Bender v. People, 115 N.Y.S.2d 810 (1952), petitioner contended that "denture work" was not a matter of "medical or surgical treatment" as expressed in the statute. In disagreeing with the petitioner's contention, the court held:

> "It is true, Section 508 speaks of 'medical or surgical treatment', and not specifically of dental care or related denture work and attention. And it speaks of hospitalization, which is normally of some duration, and is not ordinarily a concomitant of usual dental treatment. But I am of the view that denture work may properly be included in the generic term of 'medical or surgical treatment'." (Emphasis added.)

In view of the foregoing consideration, the language of the statute before us seems clear and free from ambiguities, i.e., "medical care" ordinarily includes "dental care." However, we do not here suggest that the dental and medical professions are the same; they are regarded as being separate and distinct from each other (12 Words and Phrases, Dentists, p. 111). This distinction is clearly recognized under our licensing laws. Yet, this distinction for licensing purposes does not purport to set the profession of dentistry completely apart from medical science per se. Some interrelationship is recognized under chapter 61, Revised Laws of Hawaii 1955, as amended. In section 61-1(a), rendering dental relief in emergency cases in the licensed practice of a physician's or surgeon's profession is exempt from the operation of the chapter.

Therefore, where the exemption from taxation is founded upon plain language which would include "dental care" in the term "medical care", the strict rule of construction to resolve against allowing any such claim of exemption does not apply. Under the popular meaning of the word, such construction of the statute does not lead to any absurdity or inconsistency with the rest of the statute.

In proceeding to consider the terms of section 185-5 of the Revised Laws of Hawaii 1955, as amended, which provides for special operating allowances to "non-profit medical indemnity and/or hospital service associations", we may look to the rule of construction of statutes in pari materia. This rule of construction states, in part, that:

> "It is a fundamental rule of statutory construction that sections and acts in pari materia, and all parts thereof, should be construed together, and compared with each other. . . . Recourse is had to

> the several statutes or sections for the purpose of arriving at a correct interpretation of any particular one. The object of the rule is to ascertain and carry into effect the intention of the legislature." (50 Am. Jur., Statutes, § 348.)

Further, in 50 American Jurisprudence, Statutes, section 350, we find the general rule that "statutes or statutory provisions which relate to the same person or thing, or to the same class of persons or things, or to the same or closely allied subject or object may be regarded as in pari materia."

Here, both sections 185-5 and 185-19 of the Revised Laws relate to the same class of persons or things, i.e., non-profit medical indemnity and/or hospital service associations. Therefore, under the rule of construction of statutes in pari materia, a like interpretation should be given to the class designated under both sections where, as here, there is nothing peculiar in the question under consideration requiring a different conclusion.

Consequently, we must answer the question presented in the negative, i.e., Hawaii Medical Service Association would not forfeit its right to claim the special operating allowance and tax exemption granted to non-profit medical indemnity and/or hospital service associations by including dental care in its program. In reaching this conclusion, we make the appropriate additions and modifications to the above-referenced opinion.

Very truly yours,

/s/ ROY M. MIYAMOTO
ROY M. MIYAMOTO
Deputy Attorney General

APPROVED:

/s/ SHIRO KASHIWA
SHIRO KASHIWA
Attorney General

INDEXING INSTRUCTIONS

Opinion No. 62-33

1. LAND USE COMMISSION

The State Land Use Commission is without power to prescribe minimum or maximum lot sizes within an agricultural district. The power is preserved in the counties by Act 187, SLH 1961.

2. REVISED LAWS OF HAWAII 1955

Section 138-42

The State Land Use Commission is without power to prescribe minimum or maximum lot sizes within an agricultural district. The power is preserved in the counties by Act 187, SLH 1961.

3. SESSION LAWS OF HAWAII 1961

Act 187, section 3

[Same as above.]

4. SESSION LAWS OF HAWAII 1961

Act 187, section 8

[Same as above.]

5. COUNTIES

[Same as above.]

YS:ft
13a
Op. No. 62-33

STATE OF HAWAII

Department of the Attorney General

HONOLULU

June 25, 1962

Mr. E. C. Bryan, Chairman
Land Use Commission
Department of Planning and Research
426 Queen Street
Honolulu 13, Hawaii

Dear Mr. Bryan:

This is in answer to your question whether the Land Use Commission has the power to prescribe by regulation the minimum lot size within an agricultural district. The specific instance giving rise to this question is that part of the Commission's Interim Regulation 2.1(b) which, in the course of prescribing the appropriate uses of land situated within an agricultural district, states as follows:

> "Minimum lot size within this district shall be five acres."

In our opinion the Land Use Commission is without power to prescribe the minimum size of lots within an agricultural district. The power instead rests in the counties under section 138-42, Revised Laws of Hawaii 1955, as amended. Accordingly, the requirement of Interim Regulation 2.1(b) that the minimum lot size within an agricultural district shall be five acres is null and void.

Section 8 of Act 187, Session Laws of Hawaii 1961, provides that "the Commission shall, within 18 months from the effective date of this chapter, prepare proposed regulations prescribing the appropriate uses for the land in the various classes of districts." Prior to the adoption of the regulations in their final form, the Commission is required to adopt and enforce temporary regulations.

In the absence of any other provision to the contrary, the above-cited section 8 of Act 187 would be sufficient to empower the Land Use Commission to adopt and enforce minimum lot-size regulations. However, the last paragraph of section 3 of Act 187 provides that:

> "Zoning powers now granted to counties under section 138-42 shall govern the zoning within the districts, with

the exception that areas may not be zoned for urban uses except in those districts that are designatcd as urban by the commission. Zoning powers within conservation districts shall be exercised by the department to which is assigned the responsibility of administering the provisions of Act 234, SLH 1957."

The zoning powers granted to counties in section 138-42 specifically include the power to pass ordinances regulating the minimum and maximum lot sizes. Section 138-42 states in part:

"The zoning power granted herein shall be exercised by ordinance which may relate:

. . . . .

"(11) Minimum and maximum lot sizes. . . ."

The Land Use Commission in adopting land use regulations must give due consideration to the zoning powers of the counties, and in the instant case, we conclude that the power to prescribe minimum or maximum lot sizes within an agricultural district rests in the counties.

Yours very truly,

/s/ Yoshio Shigezawa

YOSHIO SHIGEZAWA
Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa

SHIRO KASHIWA
Attorney General

INDEXING INSTRUCTION

Op. No. 62-34

CIVIL SERVICE

Secretary to Farm Loan Board

1. An authorized change in civil service status of the Secretary to the Farm Loan Board by the Board would not be "as a consequence of" the Reorganization Act. Thus, where the position is granted civil service status, an appointment thereto requires examination.

Section 102-4(a), R.L.H. 1955, as amended.
Act 1, S.L.H. 1959, as amended.

2. Positions other than the Secretary are subject to the personnel laws of the State, thus requiring appointment after examination.

Section 102-4(a), R.L.H. 1955, as amended.
Act 1, S.L.H. 1959, as amended.

Op. 62-34

RMM:es
12a
Op. 62-34

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

July 23, 1962

Mr. Arthur A. Akina, Jr.
Director of Personnel Services
Department of Personnel Services
State of Hawaii

Dear Mr. Akina:

This is in response to your communication, dated May 9, 1962, requesting our determination as to the following questions:

> 1. If the position of Secretary to the Farm Loan Board is placed under the provisions of Chapters 3 and 4, R.L.H. 1955, will it be necessary for Mr. Rathburn to compete in an open-competitive examination in order to continue his employment?
>
> 2. Is it legally permissible for Mr. Rathburn to be given a civil service appointment, without the necessity of competing in an open-competitive examination, to the position which will be next lower in level to that of the Secretary to the Farm Loan Board?

Act 132, Session Laws of Hawaii 1961, amended Act 1, Second Special Session Laws of Hawaii 1959. This amendment included the transfer of the Farm Loan Board to the newly organized Department of Agriculture. Although Act 132 did not specifically provide for the preservation of tenure, status, etc., of personnel transferred, it is our belief that the provisions of Act 1, supra, apply. We direct your attention to section 468 of 50 American Jurisprudence, Statutes, which provides, in part:

> "Strictly speaking, an amendatory act is not regarded as an independent statute. Of course, the statute in its old form is superseded by the statute in its amended form, the amended section of the statute taking the place of the original section, for all intents and purposes as if the amendment had always been there. The amendment should be considered as if embodied in the whole statute of which it has become a part. Unless a contrary intent is clearly indicated, the amended statute is regarded as if the original statute had been repealed, and the whole statute re-enacted with the amendment." (Emphasis added.)

Having decided that the transfer of personnel provisions of the Reorganization Act are controlling, we consider paragraph 3, section 32 of that Act, which provides, in part:

> "An employee of the state who does not have tenure and who may be transferred or appointed to a civil service position as a consequence of this Act shall become a civil service employee . . . without the necessity of examination. . . ." (Emphasis added.)

Under section 102-4(a) of the Revised Laws of Hawaii 1955, the legislature gave to the Farm Loan Board the option to exempt the secretary from the provisions of chapters 3 and 4. This authorization is independent of the Reorganization Act, as amended. A change in status, due to the Board's action, would not be "as a consequence of this Act". Therefore, we must conclude that Mr. Rathburn would not be exempt from an examination in order to be presently employed as a civil service personnel.

With regard to the second question, employees hired by the Board, other than the secretary, are subject to the personnel laws of the State. (See section 102-4(a), R.L.H. 1955, as amended.) Again the act would not be as a consequence of the Reorganization Act. There appears to be no other provision in our laws that would permit a regular appointment to a civil service position without the necessity of examination.

Very truly yours,

/s/ ROY M. MIYAMOTO
ROY M. MIYAMOTO
Deputy Attorney General

APPROVED:

/s/ SHIRO KASHIWA
SHIRO KASHIWA
Attorney General
7/31/62

Opinion No. 62-34

INDEXING INSTRUCTION

Op. No. 62-35

CIVIL SERVICE

1. The State director of personnel services is impliedly the chairman of the conference of directors under Act 188, S.L.H. 1961.

2. Under Act 188, S.L.H. 1961, employee organizations may appear in their own behalf in pricing appeals; however, personal representatives must appear in behalf of those enumerated in the Act.

3. While the Appeal Board is to be guided by the general policies set up by the conference of directors, the Board may use its own criteria and judgment within these prescribed limitations in exercising its discretionary powers.
Section 4-4(d), R.L.H. 1955, as amended.

4. The clause "his compensation shall be increased to the next higher step," where salary adjustments are made pursuant to Act 188, is to be practically interpreted as granting an increase to the rate in the higher range which is next higher.
Section 4-11(b), R.L.H. 1955, as amended.

Op. 62-35

RMM:es
12a
Op. 62-35

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

July 24, 1962

Mr. Arthur A. Akina, Jr.
Director of Personnel Services
Department of Personnel Services
State of Hawaii

Dear Mr. Akina:

This is in response to your communication, dated September 27, 1961, requesting our reply as to several questions involving various aspects of personnel administration under Act 188 of the Session Laws of Hawaii 1961. The questions and their respective discussions are as follows:

> "1. Does Act 188, Session Laws of Hawaii 1961, intend that the State Director of Personnel Services be the Chairman of the Conference of Directors?"

Under section 3 of Act 188, the directors are to meet annually in joint conference at the call of the State director. Normally, the authorization to call meetings is vested in the chairman of the group. Therefore, while the statute does not expressly create the office of chairman of the conference of directors, such office was impliedly recognized by the statute.

> "2. Act 188, Section 1(o), includes employee organizations and representatives of persons within the definition of 'affected persons or parties.' . . . It is not clear as to whether employee organizations or personal representatives may enter appeals at appeal hearings without doing so specifically in behalf of employees or officers affected by pricing actions. This point appears to require clarification."

Under Act 188, the Appeal Board is authorized to hear pricing appeals from "affected persons or parties." That term, under section 4-1(o) of the Revised Laws of Hawaii 1955, as amended, includes employee organizations, departments, persons and their respective representatives. It is quite clear under the statute that employee organizations may appear as persons in their own behalf. However, the term "representatives" necessarily calls for appearance in behalf of another, and under the statute representatives may be heard on appeal in behalf of employee organizations, of departments and of persons.

Question 3 basically asks whether the Board may use its own criteria and judgment when making "whatever adjustments that are necessary" under section 4-4(d) of the Revised Laws of Hawaii 1955, as amended. This section provides that these adjustments are to be based on the policies and standards relative to compensation as determined by the conference of directors. Clearly, the Appeal Board is to be guided by the general policies set up by the conference, but the Board itself is nevertheless authorized to exercise its own knowledge, good sense and responsibility in acting reasonably within these limits. The directors are not empowered to impose restrictions on matters within the discretionary powers of the Appeal Board. To do so would reduce the Board's powers to merely ministerial functions, and would completely disregard the intent of the legislature in delegating broad discretionary powers to the Appeal Board.

Question 4 deals with salary adjustments for incumbents in positions in each class which is assigned to a different salary range as a result of the adoption of the compensation plan. An interpretation of the clause ". . . his compensation shall be increased to the next higher <u>step</u> . . ." is requested.

The workings of our laws are generally of a practical nature, and should not be carried beyond this point in construing these laws. Act 188 is not a pay-increase legislation. Further, the legislative history of the Act announces that no automatic financial effect was to result (S.C.R. 90, Senate Journals 1961). Therefore, we feel that an interpretation of such a salary adjustment provision which would permit a 15.8% increase or an additional $1,368.00 per year, under the second situation presented in your communication, is untenable as a practical matter.

Questions 5, 6, 7 and 8 deal with jurisdictional problems which were material during the transitional period in the change-over of procedures to be followed in adopting a compensation plan. These matters are presently moot and elaboration at this date would be purely academic.

Very truly yours,

/s/ ROY M. MIYAMOTO
ROY M. MIYAMOTO
Deputy Attorney General

APPROVED:

/s/ SHIRO KASHIWA
SHIRO KASHIWA
Attorney General
7/21/62

INDEXING INSTRUCTION

Op. No. 62-36

CIVIL SERVICE

Appeal Board

Appeal Board

1. When an Appeal Board, such as that which is established under Act 188, S.L.H. 1961, holds a hearing and makes a decision, the Board is not required to make findings as a part of its decision.

Act 103, S.L.H. 1961
Act 188, S.L.H. 1961
Act 28, S.L.H. 1962

2. Where pricing adjustments are made by the Appeal Board of classes which were not appealed, public hearings must first be held before these classes may be properly adjusted.

Section 4-4(d), R.L.H. 1955, as amended.

3. Provision in Act 188, S.L.H. 1961, requiring final adjustments to the Compensation Plan be completed by third Wednesday of February, is directory, and not a limitation on the exercise of the power to make necessary adjustments in the pricing process.

Section 4-4(d), R.L.H. 1955, as amended.

Op. 62-36

RMM:es
12a
Op. 62-36

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

July 24, 1962

Mr. Arthur A. Akina, Jr.
Director of Personnel Services
Department of Personnel Services
State of Hawaii

Dear Mr. Akina:

This is in response to your communication, dated March 15, 1962, requesting our reply as to six questions regarding the appeal board's pricing actions under Act 188 of the Session Laws of Hawaii 1961. The questions and their respective discussions are as follows:

> "1. When an Appeal Board, such as that which is established under Act 188, holds a hearing and makes a decision on an appeal, is the Board required to make findings as a part of its decision?"

Under Act 188, policies and procedures were established to attain uniformity in the compensation of public officers and employees. The conference of directors and the appeal board, in pursuance of the power delegated by the legislature and in accord with the prescribed procedures, were authorized to assign each class of positions to salary ranges within the statutory limitations prescribed by the legislature.

Subsequently, Act 28 of the Session Laws of Hawaii 1962 made it mandatory that the appeal board "comply with the Administrative Procedures Act, Act 103, Session Laws 1961, in all respects." The effective date of Act 28 was May 28, 1962, and, therefore, this provision presently applies.

As a consequence, the question to be initially resolved is whether compliance with the Administrative Procedures Act requires the appeal board to make findings as part of its decisions on an appeal. Section 1(a) of Act 103 defines the term

"agency" as ". . . each state or county board, commission, department, or officer authorized by law to make rules or to adjudicate contested cases, except those in the legislative or judicial branches." (Underscoring added.) Under this definition, it must be borne in mind that the rule-making and the adjudicatory functions may be separated.

A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws in existence. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power. Admittedly, this analogy to statutes and decisions of courts is not always perfect and is of relatively limited use in trying to classify borderline or mixed activities. Here, as elsewhere throughout the law, a proper classification of rule-making or adjudication requires that both the purpose and the effect of the particular classification be taken into account.

Act 188 deals with procedures for the establishment of uniform compensation plans to take effect the following July. Further, the power to fix the compensation of public officers is primarily a legislative function. Therefore, we are involved with the making of rules for the future, and consequently with an act legislative, not judicial. For these reasons we feel that, where the appeal board is not exercising adjudicatory powers, section 12 of Act 103, requiring decisions to be accompanied by findings of fact and conclusions of law, does not apply.

Having decided that the quasi-legislative functions are here being exercised, we may now consider whether compliance with Act 103 requires findings to accompany the board's decisions on appeals. Section 3 of Act 103 requires agencies to issue a concise statement of the principal reasons for and against its determination of hearings if requested to do so by interested persons.

Section 1(d) of Act 103, in defining the term "rule", excludes regulations not affecting private rights. The right of a public officer or employee to compensation, until it is earned, does not spring from contract; therefore, changes in the salary of the office do not infringe his constitutional rights. Nor is the prospective salary of an office the property of an incumbent within the constitutional provision against depriving a man of his property. Therefore, where neither contract nor

property rights are involved in changing the salary of offices or positions, we are of the opinion that private rights are not affected thereby, and that the procedures for adopting rules under section 3 of Act 103, Session Laws of Hawaii 1961, do not apply.

In view of the foregoing considerations, we must answer the question whether compliance by the appeal board with the Administrative Procedures Act requires findings to accompany its decisions on pricing appeals in the negative.

Finally, we may consider whether Act 188, Session Laws of Hawaii 1961, in and of itself makes it mandatory for the appeal board to prepare findings in connection with its decisions on appeal. Act 188 is completely silent on this matter.

Special findings are not necessary to support a regulation of an administrative body which is in the nature of general legislation where the statute authorizing the making of the regulation does not require such findings. In giving due recognition to administrative knowledge, good sense and responsibility, it has generally been said that boards and commissions exercising legislative power are not limited to the evidence presented before them on a hearing required by statute.

As earlier indicated in the discussion of compliance with the Administrative Procedures Act, the power to fix the compensation of public offices is primarily a legislative function. Therefore, it is our view that even under said Act 188, the appeal board, in adopting a compensation plan, need not make findings to accompany its decisions. In any event, the appeal board's decisions are to be made by majority vote under the Act, and the minutes of the board meetings should show an accurate record of votes and actions taken at its meetings to conform with section 7A-4, Revised Laws of Hawaii 1955 (1961 Supplement).

Having answered the first question in the negative, we are not called upon to consider questions 2 and 3 by your communication.

> "4. Section 3 of Act 188 mentions in subparagraph (d), public hearings and appeal hearings. Where pricing adjustments are made by the Appeal Board of classes which were not appealed, must public hearings first be held before these kinds of classes may be properly adjusted?"

Section 4-4 of the Revised Laws of Hawaii 1955, as amended by Act 188, provides, in part: "(d) After public hearings and hearing all appeals, the appeal board shall make whatever adjustments that are necessary based on the policies and standards referred to in section 4-4(a)." Therefore, it appears that before changes are made in the tentative compensation plan by the appeal board, either public hearings on the compensation plan or pricing appeal hearings must first be had.

Hearings in administrative rule-making or quasi-legislative procedure are usually either investigatory or designed to permit party participation on issues of law, policy or discretion. The purpose is not to make a quasi-judicial determination of adjudicative facts in dispute, but rather to enlighten the administrative agency in arriving at an informed and responsible decision in the exercise of its quasi-legislative powers.

> "5. Where hearings are held on appeals which were rejected by the Board as not complying with the requirements of its rules and where adjustments are made to the pricing of such classes, would these actions be proper and legal?"

Without further particulars as to the degree of deviation and the surrounding facts and circumstances, we are unable to present any legal discussion on question 5 in your communication.

> "6. Act 188 requires that final adjustments to the Compensation Plan shall be completed by the third Wednesday of February. Are actions taken by the Board after that date legal and valid? Reference is made in this instance to actions other than of the kind which merely correct obvious errors, such as those which occur in typing, etc."

Section 4-4(d), supra, further provides: ". . . The final adjustment of the compensation plan shall be completed by the third (3rd) Wednesday of February." (Underscoring added.) Should this provision be construed to be mandatory, failure to comply with the statutory command would render the action to which it relates null and void. (82 C.J.S., Statutes, §§ 374, 379.)

Generally, the word "may" is permissive only, and the word "shall" is mandatory. But the latter, as used in statutes, though mandatory in its common meaning, is not of inflexible

signification. It may be construed as permissive or directory in order to effectuate the legislative purpose or where the subject matter requires. City of Boston v. Quincy Market Cold Storage & W. Co., 312 Mass. 638, 45 N.E.2d 959 (1942).

In Black, Interpretation of Laws, page 343, the rule is stated as follows:

> "When a statute specifies a time at or within which an act is to be done by a public officer or body, it is generally held to be directory only as to the time, and not mandatory, unless time is of the essence of the thing to be done, or the language of the statute contains negative words, or shows that the designation of the time was intended as a limitation of power, authority or right."

Again, on page 346, it is said:

> "Irregularities in official action, consisting in the lack of strict compliance with statutory directions should not be allowed to vitiate the proceedings taken under a statute, when the objects and ends of the statute have been substantially accomplished, and neither the public nor private persons are injured by the course of proceedings."

This above-mentioned rule of construction was supported by the following authorities: Fay v. Wood, 25 Mich. 390, 32 N.W. 614 (1887); Gallup v. Smith, 59 Conn. 354, 22 Atl. 334 (1890); People v. Earl, 42 Colo. 238, 94 Pac. 294 (1908).

Under Act 188, section 4-4(d) provides, in part, that: ". . . The compensation plan, after final adjustments, shall be effective as of July 1. . . ." Further, section 4-4(e) reads: "Following the final adjustments, each director shall submit to the legislative body of his jurisdiction, through the chief executive officer, a report setting forth the said compensation plan and the cost thereof, for its information." These factors, which shed some light on the nature of the duty to be performed by the appeal board, appear to be opposed to the inference that if it were not performed within the time specified it should not be performed at all. It is manifest that if the statute should be given a mandatory construction the purpose of the statute -- which is to enable the appeal board to make "whatever adjustments that are necessary" in the adoption of uniform compensation plans in the several jurisdictions -- would only warrant the perpetuation of errors which are brought to the board's attention. In

John C. Winston Co. v. Vaughn, 11 F. Supp. 954 (1935), it was held that a reasonable construction, rather than one rendering the statute absurd, must be given in determining its mandatory or directory character.

In view of the foregoing considerations, we are of the opinion that the time specified in which the appeal board shall make final adjustments should be regarded as directory, and not a limitation on the exercise of the power to make necessary adjustments in the pricing process. This view is in agreement with our Opinion No. 62-15, dated March 22, 1962, to Mr. Mamoru Yamasaki. In reaching this conclusion, we are aware that full compliance with the statutory terms is nevertheless highly desirable in expediting the pricing process, and that the rule of substantial compliance does not warrant an unreasonable lapse of time in making adjustments. The latter must be considered in light of the particular facts and the practical necessities in each situation, and we cannot render a proper opinion on this last matter without considering the specific facts involved.

Very truly yours,

/s/ ROY M. MIYAMOTO

ROY M. MIYAMOTO
Deputy Attorney General

APPROVED:

/s/ SHIRO KASHIWA

SHIRO KASHIWA
Attorney General

7/31/62

INDEXING INSTRUCTIONS

OP. 62-37

MOTOR CARRIER

A motor carrier must first secure approval of the Public Utilities Commission to add different additional equipment to its fleet.

REVISED LAWS OF HAWAII 1955

Section 106C-10(d)

ASKF:ru
17b

Op. 62-37

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU, HAWAII

July 26, 1962

Mr. Jack E. Conley, Director
Public Utilities Commission
State of Hawaii
313 So. Beretania Street
Honolulu, Hawaii

Dear Mr. Conley:

This is in response to your letter of July 11, 1962, requesting our opinion as to whether a certificated carrier seeking to add a different type of equipment to its fleet may do so without first making application to your Commission for approval to amend its certificate.

Section 10(d) of Act 121, the Motor Carrier Act, provides, inter alia, that the Commission in issuing certificates of public convenience and necessity to motor carriers may impose such reasonable terms, conditions and limitations as public convenience and necessity may require,

> ". . . provided, however, that the terms, conditions, or limitations shall not restrict the right of the carrier to add to his or its equipment and facilities in the service territory or over the routes or between the termini as the development of business and the demands of the public shall require."

In Crescent Express Line v. United States, 64 S. Ct. 167, 320 U.S. 401, 88 L.Ed. 137, the court interpreting similar language held that, "the proviso is a prohibition against limitation on the addition of more vehicles of the authorized type, not a prohibition of the specification of the type."

One of the purposes of the Act (set out in section 1), is to provide for fair and impartial regulation

of transportation of property and persons over the public highway, and to promote safe, adequate, economic and efficient service and foster sound economic transportation among the public carriers.

The legislative intent in enacting the grandfather clause contained in section 10 was to preserve the status quo of the existing carriers in their bona fide operations on July 1, 1961, without requiring the showing of public need and necessity. If such carriers were permitted without permission or authorization to change the whole or a portion of their operation so that service or the area served will substantially differ from the original service offered or area served without first showing need and necessity in the public interest, the Commission's ability to carry out its duties and regulations would be seriously impaired.

It is clear from the Crescent case, infra, and the legislative intent of Act 121, that the provision of section 10(d), prohibiting limitations or restrictions of the right of motor carriers entitled to the certificate to add to their equipment as development of business demands, is a prohibition against limitation on the addition of more vehicles of the authorized type, not a prohibition of the specification of the type.

An application by a certified carrier to amend or add a different type of equipment to its fleet must of necessity comply with the orderly rules of practice and procedure set out by this Commission for new carriers desiring a certificate of convenience and necessity, merger, sale of equipment or other operation required by the Act. Such treatment must be uniform in its application.

As the Commission's present policy does not require an application be circulated to competitive carriers, there seems no reason to require that an application to operate a different type of equipment be required to be circulated to competitive carriers.

Very truly yours,

/s/ Arthur S. K. Fong

Arthur S. K. Fong
Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa

Shiro Kashiwa
Attorney General

Op. 62-37

INDEXING INSTRUCTIONS

Opinion No. 62-38

1. LAND USE COMMISSION

   Interim Regulations adopted by the Land Use Commission on April 4, 1962, pertaining to single-family dwelling units in agricultural districts is void and unenforceable in that said Regulation is not susceptible to the construction reasonably consistent with and in furtherance of Act 187, nor capable of being administered with certainty, uniformity, and efficiency.

2. REVISED LAWS OF HAWAII 1955

   Section 138-42

   [Same remarks as above.]

3. SESSION LAWS OF HAWAII 1961

   Act 187, section 3

   [Same as above.]

4. SESSION LAWS OF HAWAII 1961

   Act 187, section 8

   [Same as above.]

5. COUNTIES

   [Same as above.]

YS:ft
13b
Op. No. 62-38

STATE OF HAWAII

Department of the Attorney General

HONOLULU

July 31, 1962

Mr. E. C. Bryan, Chairman
Land Use Commission
Department of Planning and Research
426 Queen Street
Honolulu 13, Hawaii

Dear Mr. Bryan:

On June 25, 1962, this office issued Opinion No. 62-33 wherein we concluded that the Land Use Commission had no power under Act 187, Session Laws of Hawaii 1961, to set the minimum size of lots within an agricultural district and that therefore the provision in the Commission's Interim Regulation 2.1(b), establishing the minimum lot size of five acres within agricultural districts, was invalid.

Since then, the suggestion has been made that if the Land Use Commission is without power to set minimum lot size requirements, then, in view of another provision of the Interim Regulations which allows single-family dwelling units within agricultural districts, the Commission is powerless to prevent lands situated in an agricultural district from being developed into residential subdivisions under existing county zoning ordinances.

We think the suggestion is untenable. The power granted to the Land Use Commission in sections 8 and 9 of Act 187 to enact land use regulations is the power to enact regulations which tend to promote the purpose and spirit of the Act and carry it into effect. This power to make regulations cannot be extended to the making of regulations which would subvert, repeal or abrogate the Act or any other statute. Any regulation which has such an effect is void and unenforceable. For this very reason we held in Opinion

No. 62-33 that the five-acre minimum lot size requirement was invalid.[1]

And for the same reason, the provision in Interim Regulation 2.1(b) permitting lands situated in agricultural districts to be used for single-family dwelling units cannot be sustained if it operates to defeat or frustrate the purposes and intent of the legislature as expressed in section 1 of Act 187.[2] It cannot be sustained if the provision is to be interpreted and applied so as to allow any and all lands in agricultural districts to be withdrawn from agricultural use, subdivided and developed into residential uses, subject only to restrictions which may be imposed under county ordinances. Such an interpretation would accomplish the very result the legislature sought to prevent in enacting the statute. Thus, unless the provision is susceptible to a reasonable construction, consistent with and in furtherance of the purposes and aims of Act 187, it must fall.

It is our opinion that in its present form the Interim Regulations relating to single-family dwelling units is void and unenforceable. Said Regulation is not susceptible to a construction

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[1] Act 187 specifically provided that, with the exception that areas may not be zoned for urban uses except in those districts designated as urban by the Commission, zoning powers granted to counties under section 138-42, Revised Laws of Hawaii 1955, as amended, shall govern zoning within urban and agricultural districts. One of the zoning powers granted to the counties under the said section 138-42 is the power to prescribe minimum and maximum lot sizes. The requirement of Interim Regulation 2.1(b) that minimum lot sizes within agricultural districts shall be five acres operates to deprive the counties of the power to prescribe minimum lot sizes for lands which happen to be situated in an agricultural district. In effect, Interim Regulation 2.1(b) works a partial repeal of section 138-42, R.L.H. 1955, as amended, and hence is invalid.

[2] Section 1 of Act 187 entitled "Findings and declaration of purpose" states in part: "Inadequate controls have caused many of Hawaii's limited and valuable lands to be used for purposes that may have a short-term gain to a few but result in a long-term loss to the income and growth potential of our economy. . . . Scattered subdivisions with expensive, yet reduced, public services; the shifting of prime agricultural lands into non-revenue producing residential uses when other lands are available that could serve adequately the urban needs; failure to utilize fully multiple-purpose lands; these are evidences of the need for public concern and action."

reasonably consistent with and in furtherance of Act 187 nor capable of being administered with certainty, uniformity, and efficiency.

As presently written, Interim Regulation 2.1(b) simply provides as follows:

> "Subject to any ordinances and regulations of the county in which the agricultural district is situated, which ordinances and regulations may be more restrictive, the following uses are permitted:
>
> . . . . .
>
> (2) Single-family dwelling units."

No other terms, specifications or conditions have been imposed upon such use except as quoted above and as may be found in the Act itself.[3]

A single-family dwelling unit as used here does not refer to the traditional farm house. The farmer's home is included in subsection 2.1(b)(9) of the Interim Regulations having to do with buildings and uses normally considered accessory to a specific agricultural use. As used here, a single-family dwelling unit is a place of residence situated on land classified as agricultural but which is not accessory to or used in connection with a primary agricultural activity. It is in effect the uses of land solely for residential purposes where the land has been designated as agricultural.

Clearly the Land Use Commission cannot allow lands classified as agricultural for residential purposes if in so doing, the essential character of the area is changed from agricultural to urban. To do so would render the district boundaries meaningless and defeat the purpose of Act 187. Moreover, it must be remembered that we are concerned here with <u>interim regulations</u> to govern land uses within <u>temporary district boundaries</u>. The Act prescribes that temporary district boundaries may be determined "in so far as practicable and reasonable to maintain existing uses and only permit changes in use that are already in progress until the district boundaries are adopted in final form." With respect to Interim Regulations, such regulations "shall be related to and

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[3] The provision in Interim Regulation 2.1(b) that minimum lot size within an agricultural district shall be five acres has been previously declared invalid. Atty. Gen.'s Op. No. 62-33.

shall be designed to maintain the existing conditions in so far as practicable and reasonable until the adoption of regulations in their final form." To permit the use of areas classified as agricultural for single-family dwelling units having no direct relationship to primary agricultural activities would, in the absence of adequate standards and controls, constitute an unwarranted deviation from the policy and requirements of Act 187 that temporary district boundaries and Interim Regulations be designed to maintain existing conditions until final district boundaries and regulations are adopted. Any changes in district boundaries or land use regulation during this period must be made by amendments approved by the Commission in accordance with procedures set forth in Act 187 and the rules of the Commission.

Nor are we able to find in Act 187 reasonable standards and guidelines which can be applied so as to confine the operation of the rule within proper and acceptable limits. The powers preserved in the counties to zone within urban and agricultural districts are qualified by Act 187 with the requirement that areas may not be zoned for urban uses except in those districts that are designated urban by the Land Use Commission. By law the county planning commission is responsible for the enforcement within its county of the use classification districts and regulations adopted by the Land Use Commission. In any given case involving the use of agricultural lands for single-family dwelling units, can a county planning commission approve such use with any degree of confidence that in so doing it is not violating the provision that areas may not be zoned by counties for urban uses except in those districts that are designated as urban by the Land Use Commission? In other words, there is a complete absence of guidelines and standards to enable the counties to properly administer and enforce the regulations relating to single-family dwelling units.

Therefore, we conclude that the Interim Regulation pertaining to single-family dwelling units is invalid and unenforceable. This does not mean, however, that single-family dwelling units cannot under any circumstance be considered an appropriate use within an agricultural district. The Commission may by regulation prescribe appropriate standards and conditions by which lands situated in an agricultural district may be used for residential purposes even though such use may not be accessory to a primary agricultural activity, provided that such regulations be consistent with the letter and spirit of Act 187.

Yours very truly,

/s/ Yoshio Shigezawa
Yoshio Shigezawa
Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa
Shiro Kashiwa
Attorney General

Opinion No. 62-38

INDEXING INSTRUCTIONS

Opinion No. 62-39

1. ANTITRUST

Land and land activities are subject to the Hawaii Antitrust Act pursuant to provisions of the Act and prior court interpretation of Federal Antitrust laws.

2. REVISED LAWS OF HAWAII 1955, as amended

Section 205A, sections 1, 2 and 5

Land and activities involving land are considered "commodity", "article of commerce", "business" and "assets" under State Antitrust Law and, therefore, unless specifically excluded are subject to the provision of the Act.

3. SESSION LAWS OF HAWAII 1961

Act 190, sections 1, 2 and 5

[Same as above]

VFLC:ai
19a; C-7817
Op. No. 62-39

STATE OF HAWAII

Department of the Attorney General

HONOLULU

August 7, 1962

The Honorable William F. Quinn
Governor of Hawaii
Iolani Palace
Honolulu 13, Hawaii

Dear Sir:

This is in reply to your oral request of August 6, 1962, for an opinion. The question posed is whether land and the selling, leasing and dealing with land is subject to the Hawaii Antitrust Law.

Perhaps unique to this State is the value of land. This situation has been created by various factors. This State is isolated from any other large mass of land. The volcanic origin of the islands renders much of the land of little utilitarian value. And in contrast to the natural restrictions and perhaps as a result of the problem, a high rate of concentration of private land ownership has developed in a relatively few companies, trusts and individuals.[1] In this context the application of the Hawaii Antitrust Law to the article of land becomes very cogent.

It is necessary to examine the applicable provisions of Act 190, Session Laws of Hawaii 1961, in relation to land.

Section 1 of the Hawaii Antitrust Law contains the term "commodity" as follows:

> "(1) 'Commodity' shall include, but not be restricted to, goods, merchandise, produce, choses

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[1] Forty-six percent of land in 65 companies, trusts and individuals; 12% small landholdings; 42% government owned.

in action and any other article of commerce. It also includes trade or business in service trades, transportation, insurance, banking, lending, advertising, bonding, and any other business." (Underscore added.)

The definition of commodity appears to be broad and all inclusive. The Legislative Reference Bureau has commented on this wording as follows:[2] "The definition of 'commodity' is intended to include all aspects of trade and commerce within the state." The term "any other article of commerce" appears to cover land. "Article" meaning a material object; "commerce" being the exchange of goods or property of any kind.[3] Also the word "trade" in its broadest signification includes that of buying and selling for money or commerce and traffic generally and includes the sale of and dealing with land.[4] The clause "but not be restricted to" indicates that the definition was to be an all inclusive one. Furthermore, the enlargement of the term "commodity" is shown by the inclusion of trade or business in intangible activities such as lending and banking, areas which have previously been excluded from the scope of certain antitrust laws.[5] The application of land would also be included in the clause "any other business."

The Act appears to prohibit all restraints of trade with the exception of certain exemptions enumerated in the Act.[6] It would, therefore, cover land and the activity involving it. Specifically, section 2(3)(c) specifically excludes certain activity on land leases.

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2 L.R.B. "State Antitrust Legislation", Dec., 1960, Request No. 7950.

3 Jeu Jo Wan v. Nagle, 9 F.2d 309.

4 May v. Sloan, 101 U.S. 231, 237.

5 United States v. Investors Diversified Services, 102 F. Supp. 645.

6 Sections 6(3), 8 and 9.

> [In certain instances] "A covenant or agreement of the lessee to be restricted in the use of the leased premises to certain business or agricultural uses, or covenant or agreement of the lessee to be restricted in the use of the leased premises to certain business uses and of the lessor to be restricted in the use of premises reasonably proximate to any such leased premises to certain business uses;" (Underscore added.)

It is, therefore, apparent that land activity was generally included within the scope of the antitrust law except where expressly excluded.

The term "purchase" or "buy" is similarly defined as including ". . . 'contract to buy', 'lease', 'contract to lease', 'acquire a license' and 'contract to acquire a license'."[7]

The term "sale" or "sell" is defined as including "'contract to sell', 'lease', 'contract to lease', 'license', and 'contract to license'."[8] The use of the term "lease" as contrasted to the term "license" further implies the contemplation of prohibition of restrictive land practices.

The wording of one other section is relevant to the consideration herein. Throughout the Act the words "commodity", "commerce" and "trade" are generally found. However, in section 5 (Mergers, Acquisitions, Holdings and Divestitures) the word "assets" is utilized.

> "No corporation shall acquire and hold, directly or indirectly, . . . the assets of any other corporation where the effect of such acquisition and holding may be substantially

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[7] Section 1(3)

[8] Section 1(5)

> to lessen competition or to tend to create a monopoly in any line of commerce in any section of the State." (Underscore added.)

The term "assets" is generally accepted to cover both real and personal property. Under this section, therefore, a corporation may be prohibited in the acquisition of land where the effect may be to lessen competition or tend to create a monopoly in land or any other line of commerce.

The statutory construction theory of ejusdem generis may initially appear relevant. The theory is invoked where general words follow specific words in an enumeration describing the legal subject. In such cases, it is often held that the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.[9] In this particular instance, the attack may be on the term "commodity".[10] "Commodity shall include, . . . goods, merchandise, produce, choses in action and any other article of commerce." It could be rationalized that since the terms "goods", "merchandise" and "choses in action" all relate to personal as contrasted from real property, that the phrase "other articles of commerce" is likewise limited. Hence, it can be argued that the coverage of the Act where the words "commodity" and "articles of commerce" are utilized, excludes land and land activity.

United States v. Investors Diversified Services, Inc., et al., 102 F. Supp. 645 (U.S. D. Ct., D. Minn. 1951) held that the ejusdem generis theory applied to the Clayton Act provision on tying arrangements, ". . . goods, wares, merchandise, machinery, supplies or other commodities."[11] It was held in the case that a loan of money was not a "commodity" for the purpose of the specific Clayton section

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[9] Sutherland Statutory Construction, Vol. 2, § 4909, p. 395.

[10] Section 1(1)

[11] Section 3 of Clayton Act; 15 U.S.C.A., par. 14

which legislative history indicated should be given a narrow construction. The Court conceded, however, that the loan of money could constitute commerce or be an article of commerce under the broader Sherman Act. The same rationale holds true for inclusion of land in the broad scope and intention of the Hawaii Antitrust Law, as the Sherman Act.

The rule of ejusdem generis does not apply to the definition of "commodity" in the Act. First of all, where the terms preceding the general term are themselves general or if of diversity in character the theory does not apply.[12] Also, the rule of ejusdem generis is not applicable where the restrictive construction is contrary to legislative history.[13]

The pressing land problem in this State was known by the Legislature at the time of the enactment of the Antitrust Law. The Law was purposely enacted in very broad terms and with a broad scope. Furthermore, legislative history indicates that the interpretation and application of the State Act was to be tested and guided by comparable provisions of Federal Antitrust Acts.[14] It is, therefore, necessary to examine the judicial interpretation and application of the Federal laws.

In exhaustively checking on cases relating to the subject matter of land and antitrust, only several cases were found to be on point.

The earliest case is Nasman et al. v. Bank of New York et al., 49 N.Y.S. 2d 181 (S.C. New York County, 144). Involved was the interpretation of the New York Donnelly Act. The plaintiff attempted to require defendant to negotiate

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[12] Sutherland Statutory Construction, Vol. 2, § 4912, p. 403.

[13] Supra, § 4914, p. 411.

[14] Conference Committee Report No. 19 on H.B. No. 27, H.D. 2, S.D. 2, C.D. 1, First State Legislature, 1961.

with him in the sale of realty alleging that defendant and others had conspired to prevent such sale in violation of State Antitrust laws. The court in the interpretation of the New York anti-monopoly statute ruled that "commodity", "article" and "product" related to only personalty and not land. Further that "trade and commerce" related only to exchange of personalty and, therefore, did not include acquisition of real property. The court went on to rule that even if the scope of that Act included land, no violation was present under the Act.

Since the litigation of the case, the New York Act has been amended to cover services which it did not previously contain, indicating the broadened scope of the Act. Further, later litigation and interpretation of the scope of antitrust laws in general have proven the decision to be wrong. Before discussing the Northern Pacific Railway case it should also be noted from the legislative history of the Hawaii Antitrust Law that it was contemplated that judicial interpretation of Federal cases was to be followed and not State cases such as Nasman.

The leading case and precedence for the position taken in this memorandum, that is, land and land activities are covered by the Hawaii Antitrust Act, is United States v. Northern Pacific Railway Company, 142 F. Supp. 679 (W.D. Washington, N.D., 1956); 356 U.S. 1 (1957). In that case the government sued in a Federal District Court for a declaration that appellant's railroad "preferential routing" agreements were unlawful as unreasonable restraints of trade under section 1 of the Sherman Act.[15] Such agreements were incorporated in deeds and leases to several million acres of land in several Northwestern States, which land was originally granted to the railroad to facilitate its construction. Defendant would compel the grantees and lessees to ship over the railroad's lines all commodities produced or manufactured

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15 Clause similar to section 2(1) of Hawaii Antitrust Law. "(1) Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in the State, or in any section of this State is declared illegal."

on the land, provided its rates were equal to or below those of competing carriers. The Government was granted a summary judgment and upon appeal to the Supreme Court of the United States the judgment was affirmed.

The rationale of the decision and judgment was that, the railroad's practice of selling or leasing the land on the premise that the grantees and lessees utilize the railroad shipping services, was unreasonable per se as a tying agreement in violation of the Sherman Act and, therefore, void. The railroad was enjoined from enforcing the voided contracts and from entering into any others. The facts of the case showed that the railroad had substantial economic power by virtue of its extensive landholdings which enabled it to force the grantees and lessees to utilize its services. As a result the competitors of the railroad was excluded from the commerce of transporting a substantial amount of commodities.

There leaves no doubt that land is considered as a "commodity", an "article of commerce", "commerce" and "trade". The lower court opinion states:

> "The tying commodity in the present case is the land presently or formerly title to land vests in the owner absolute domination of the market in such land. By the ownership of the lands and resulting dominance in the market therefor defendants were able to impose the traffic clauses in question on the grantees and lessees of the land."[16] (Underscore added.)

The Supreme Court opinion speaks of land in terms of "tying product" and the leases and titles to land in terms of "tying arrangements in restraint of trade or commerce."

Similarly in Osborn v. Sinclair Refining Company, 286 F.2d 832 (1960) the Court there held that requiring plaintiff to purchase Goodyear tires, tubes and accessories

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16 Supra, 142 F.2d 678.

as a condition to leasing the plaintiff a service station and making it a dealer of Sinclair gasoline was violative of the Sherman Act.

The Federal Antitrust Law included land and land activities within its scope at the time Act 190 was passed and the interpretation was to be adopted into the State Antitrust Act.

It is, therefore, the opinion of this office that land and land activities are within the scope of the State Antitrust Act and that certain restrictive activities in the commodity of land are prohibited by the law.

Respectfully,

/s/ SHIRO KASHIWA

SHIRO KASHIWA
Attorney General

INDEXING INSTRUCTIONS

OP. 62-40

SENTENCES

Consecutive sentence presumed concurrent in absence of judge's intent

ASKF:ru
24a

Op. 62-40

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU, HAWAII

August 8, 1962

Mr. Daniel S. C. Liu
Chief of Police
Honolulu Police Department
Honolulu 14, Hawaii

Dear Mr. Liu:

This is in response to your letter of July 27, 1962, inquirying whether sentences should be served concurrently or consecutively when a judge has not so clearly indicated in imposing said sentences.

In Hawaii where cumulative sentences are permissible, an accused convicted of more than one offense or under more than one count, will be construed to have been sentenced to terms running concurrently, and the defendant discharged at the end of the longest term, unless for other reasons (as the imprisonment is in different places) it clearly appears that the court intended that the sentences run consecutively and not concurrently. If the court inadvertently fails to have the sentence recorded in such form as to show the imposition of a consecutive sentence or from leniency intentionally omits to add such a provision, and the defendant is committed pursuant to such a sentence and another or other sentences, his sentence is presumed to be concurrent. No presumption will be indulged in favor of sustaining a sentence as consecutive. 15 Am. Jur., Criminal Law, par. 465, p. 123; In Re Tam Fook, 7 Haw. 162.

The intent of the court is at all times controlling as to whether the sentence shall run concurrently or consecutively. In meting out a sentence of imprisonment upon conviction of a second offense or second count commencing at the expiration of a pending term, the language of the court must be definite and certain, giving ordinary legal

meaning, if possible, to the intention of the judge who imposed it. Where, therefore, there is doubt as to what the judge intended, wherever possible your department should make every effort to ascertain the judge's intention by bringing such matter to his attention at the earliest date for clarification.

Often the sentencing judge is unaware of a prior sentence or conviction which the defendant has had imposed by it or another court and would properly take the matter into account had he been so informed. We strongly urge that you use every effort to inform the judge either through the prosecutor or personally through your actions of this fact at the time of sentencing.

Therefore, under all four fact situations outlined in your letter, it must be presumed that the sentence should run concurrently unless the intent of the court can otherwise be ascertained through clarification by the court, which should be done if at all possible.

Very truly yours,

/s/ Arthur S. K. Fong

Arthur S. K. Fong
Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa

Shiro Kashiwa
Attorney General

INDEXING INSTRUCTIONS

OP. 62-41

MOTOR CARRIER

The Public Utilities Commission has power to prescribe gross weight fee for calendar year.

REVISED LAWS OF HAWAII 1955

Section 106C-34(b)

ASKF:ru
17b

Op. 62-41

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU, HAWAII

August 9, 1962

Mr. Jack E. Conley, Director
Public Utilities Commission
State of Hawaii
313 So. Beretania Street
Honolulu, Hawaii

Dear Mr. Conley:

This is in response to your letter of July 10, 1962, requesting our opinion on whether the Commission may impose one-half of the gross weight fee for the calendar year 1962.

During the recent budget session of the Legislature, the Public Utilities Commission, by resolution, was requested by the Legislature to defer enforcement of the Motor Carrier Law (Chapter 106C, Revised Laws of Hawaii 1955, as amended) until such time as it (the Legislature) had an opportunity to study complaints and grievances voiced on enforcement of the Law. The Commission, in honoring said request, deferred the enforcement of its safety regulations until June 1, 1962 and its economic regulation until July 1, 1962.

Section 106C-34(b), R.L.H. 1955, as amended, provides, inter alia, that "the commission may determine, however, that the full amounts of aforesaid fees are not needed for any calendar year and may determine fees of lesser amounts to be necessary and reasonable for the year and may vary the aforesaid schedule of fees accordingly". It is clear from this provision of this section that the Public Utilities Commission was given considerable discretion in determining the applicable gross weight fees to be assessed in any calendar year. Therefore, it would be within its discretion under circumstances indicated to provide in the

calendar year 1962 that the gross weight fee shall be one-half the amount specified in the statute in view of the deferred enforcement date.

Very truly yours,

/s/ Arthur S. K. Fong

Arthur S. K. Fong
Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa

Shiro Kashiwa
Attorney General

COMPENSATION

Overtime for holiday work

Government personnel, having been credited with 8 hours as if worked when granted holiday pay, are generally entitled to overtime compensation for all hours worked on legal holidays under section 5-72, Revised Laws of Hawaii 1955.

RMM:es
9a
Op. 62-42✓

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

August 14, 1962

Dr. Leo Bernstein
Director of Health
Department of Health
State of Hawaii

Dear Dr. Bernstein:

This is in response to your office's communication requesting our opinion as to whether certain government personnel are entitled to receive time and a half compensation for all hours worked on a legal holiday.

Subsection 5-72(b), Revised Laws of Hawaii 1955, as amended (1961 Supplement) provides, in part, as follows:

> "Except as otherwise provided in this section, the normal work week of all government personnel shall be forty hours with not more than eight hours of work in any day."

The exceptions relate to waiver of the limitations under subsection 5-72(c), Revised Laws of Hawaii 1955, as amended, and to the fire fighting members of the fire department under subsection 5-72(d). Therefore, under the existing facts we must conclude that the limitations found in subsection 5-72(b) apply here.

Further, subsection 5-72(e) of the Revised Laws provides that employees not excepted under the section must be paid for all hours worked in excess of the prescribed limitations in cash at the rate of one and one-half hours for each hour of overtime worked.

An understanding of the application of these above-mentioned sections of our statutes when related to working on holidays requires an analysis of the basic theory behind holiday pay. Under our statutes, government personnel are generally entitled to holiday pay equal to that which they would have

received had that holiday been a regular working day. In being granted holiday pay, government personnel are credited with eight hours worked, although these hours are not, in fact, worked. Therefore, these hours credited are applied for the purpose of computing the eight hours in any day or the forty hours in any work week. Technically, the eight-hour and the forty-hour limitations are in no way altered.

We appreciate the argument presented that no inference of the legislature's intent to pay special overtime for holidays worked can be made because of its failure to enact any one of the several bills introduced in the same legislative session. However, may we direct your attention to the fact that these bills did not uniformly propose time and a half compensation for holiday work. These bills varied between an additional day off and an additional day's pay at straight time or time and a half. Therefore, the failure of enactment does not disclose to our satisfaction a legislative intent to deny time and a half premium pay.

In any event, these several bills introduced in the 1961 legislature generally proposed additional compensation for work on a holiday. More logically, the inference to be drawn from the failure to enact the proposed bills would be that personnel working on a holiday were not entitled to additional pay. But we cannot imagine a practice whereby an employee who actually worked on a legal holiday should receive merely the same pay as one who did not work, in view of subsection 5-72(e), supra, which expressly provides for extra compensation for extra work performed.

In view of the foregoing considerations, we must answer your question in the affirmative, i.e., government personnel are generally entitled to overtime compensation for all hours worked on legal holidays under section 5-72 of our Revised Laws. Having been automatically credited with eight hours as if worked on holidays when granted holiday pay, they are necessarily working in excess of the eight-hour limitation when they actually work beyond the credited hours.

Very truly yours,

/s/ ROY M. MIYAMOTO
ROY M. MIYAMOTO
Deputy Attorney General

APPROVED:

/s/ SHIRO KASHIWA
SHIRO KASHIWA
Attorney General

Opinion No. 62-42

INDEXING INSTRUCTION

Op. 62-43

LEGISLATOR

Eligibility of

A member of the House of Representatives, who was elected for a term to end in 1962, is not disqualified under Article III, section 9, of the Constitution of the State of Hawaii from being elected to the office of the Lieutenant Governor in the general election of 1962.

Op. 62-43

RMM:es
22a
Op. 62-43

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

August 10, 1962

Senator Thomas S. Ogata
2121 Main Street
Wailuku, Maui, Hawaii

Dear Senator Ogata:

This is in response to your communication, dated July 26, 1962, requesting our opinion on the question of whether a member of the House of Representatives, who was elected for a term to end in 1962, may be elected in the 1962 general election to the office of the Lieutenant Governor, since the emolument of the latter office was increased by legislative act during the 1962 session.

Sections 5 and 9, Article III, of the Constitution of the State of Hawaii are pertinent to the question presented. Section 5, supra, provides in part:

> "The members of the legislature shall be elected at general elections. The term of office of members of the house of representatives shall be two years beginning with their election and ending on the day of the next general election. . . ." (Underscoring ours)

Section 9, supra, states in part as follows:

> "No member of the legislature shall hold any other public office under the State, nor shall he, during the term for which he is elected or appointed, be elected or appointed to any public office or employment which shall have been created, or the emoluments whereof shall have been increased, by legislative act during such term." (Underscoring ours)

Preliminarily, we will examine the question whether the phrase "with their election" may in substance be distinguished with the phrase "on the day of . . . election" as found in section 5, Article III, of the Constitution of the State of Hawaii. In analyzing these words, it may be noted that the above-referenced phrases may be reasonably construed to be identical or different points of time.

It is well established that where the meaning of language used is fairly susceptible of two constructions, any construction which would lead to absurd results should be rejected since absurd results are not supposed to have been contemplated. 50 American Jurisprudence, Statutes, section 377.

Let us apply this rule to the section under discussion. May we direct your attention to 67 Corpus Juris Secundum, Officers, section 45, which announces the following general rule regarding the commencement of the term of officers:

> "Where no time is fixed by the constitution or statute, the term begins, in the case of elected officers, on the day of election, and, in the case of appointive officers, on the date of appointment, but it is only where the constitution or statute fails to prescribe when the term of office shall begin that it begins on election or appointment." (Underscoring ours)

While the substance of the statement is not directly applicable because our Constitution does, in fact, define the term of office of legislators, we nevertheless recognize that "on the day of election" is used interchangeably with "on election". Now where we apply these basic phrases interchangeably in section 5, Article III, supra, the result is arrived at wherein the incumbent legislator's term ends and the newly elected member's term begins at the same point of time. This interpretation given to said section of our Constitution is in full accord with the rule announced in Whitney v. Patrick, 120 N.Y.S. 550, 64 Misc. 191 (1909), aff'd, 120 N.Y.S. 1151, 134 App. Div. 988 (1909). The court therein stated that where there is a provision for the time when a term shall end, the new term shall commence when the old one ends.

Now let us consider the other possible interpretation wherein the incumbent legislator's term is deemed to end at midnight of the day of election, and the newly elected member's term is deemed to begin at the time the polls are closed on election day. This view necessarily results in overlapping terms of office

or the existence of two groups of duly elected members of the House during the period between the time when the polls closed and midnight of election day. Carrying this interpretation one step further, incumbent legislators, who were in office during a term when a legislative pay-raise bill was enacted, would then be precluded from running for re-election.

To hold the learned drafters of our Constitution responsible for producing such unsatisfactory results would be a reflection upon them which, we think, they do not deserve. It is our belief that they intended the orderly and harmonious procedure first above outlined rather than the conflicting method which we have just described. This reason alone amply justifies the construction which calls for the commencement of the new term when the old one ends.

We will now proceed to answer the question presented in your letter. Under the Constitution of the State of Hawaii, the members of the legislature are elected at general elections (Art. III, § 5). The Lieutenant Governor is also elected at general elections (Art. IV, § 2). There appears to be no tenable grounds upon which we could conclude that these respective parties were not elected at the same point of time on election day. Therefore, where the new members of the legislature are elected at the general election and begin their terms of office at such time when the incumbents' terms end, we must conclude that the Lieutenant Governor would also be elected at the general election after the incumbent legislators' terms have ended.

In view of the foregoing considerations, we must answer your question in the affirmative, i.e., a member of the House of Representatives, who was elected for a term to end in 1962, is not disqualified from being elected to the office of the Lieutenant Governor in the general election of 1962, where the emolument of the Lieutenant Governor's office was increased by legislative act during the 1962 session.

Very truly yours,

/s/ ROY M. MIYAMOTO
ROY M. MIYAMOTO
Deputy Attorney General

APPROVED:

/s/ SHIRO KASHIWA
SHIRO KASHIWA
Attorney General
8/14/62

Opinion No. 62-43

INDEXING INSTRUCTION

Op. No. 62-44

SPECIAL FUNDS

Revenues

The term "revenues" found in section 6, Act 4, Session Laws of Hawaii 1962, dealing with the New York World's Fair 1964-65 Special Fund, must be interpreted to mean "net revenues".

Op. 62-44

RMM:es
20a
Op. 62-44

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

August 15, 1962

The Honorable James Kealoha, Chairman
New York World's Fair Committee
Iolani Palace
Honolulu, Hawaii

Dear Sir:

This is in response to the New York World's Fair Committee's request, made at its meeting held on August 3, 1962, for our opinion regarding revenues under section 6, Act 4, Session Laws of Hawaii 1962.

Section 6, supra, provides as follows:

> "There is hereby created a special fund in the state treasury to be known as the 'New York World's Fair 1964-65 Special Fund.' All revenues derived from the operation of the exhibit or from the disposition of properties of the exhibit after the completion of the fair shall be paid into the fund and be used solely for the purpose of paying the principal of, the premium, if any, and the interest on the general obligation bonds issued by the state for the exhibit and for any borrowings made and any loans secured for the exhibit. The balance, if any, in the special fund, after all obligations have been paid, shall lapse into the general fund of the state. A deficiency, if any, in the special fund shall be a charge to the general fund of the state." (Underscoring ours).

The question presented is whether the term "all revenues" found in said section is to be interpreted as "gross revenues" or as "net revenues". In the interpretation of statutes, the legislative will is the all-important or controlling factor. However, a statute is not open to construction as a matter of course. It is open to construction only where

the statute is ambiguous, or will bear two or more constructions. Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to rules of statutory interpretation.

In explaining the word "revenue", in Bates v. Porter, 74 Cal. 224, 15 Pac. 732 (1887), it was said:

> "The word 'revenue' is used in many senses. It is like thousands of words in our language, ambiguous in meaning, the significance of which can only properly be determined by the words with which it is connected." (Underscoring ours).

Therefore, where an apparent ambiguity exists, we may resort to the rules of construction of statutes. In determining the proper construction of a statute, the judicial decisions are substantially in agreement that committee reports may be considered where the language of the statute is ambiguous. Wright v. Vinton Mountain Trust Bank, 300 U.S. 440, 57 S.Ct. 556, 81 L.Ed. 736 (1937); Hood Rubber Co. v. Commissioner of Corporations & Taxation, 268 Mass. 355, 167 N.E. 670 (1929).

Standing Committee Report 350, House Journal 1962, announces, in part, that "$2,328,000.00 will be sufficient to build the necessary exhibits and do the necessary landscaping, and that the proposed income from the fair can provide any additional funds that may be needed." (Underscoring ours).

This committee report clearly indicates that the $2,328,000.00 would only be sufficient for construction and landscaping. The cost for operating the exhibit was excluded from that amount, and was to be obtained from the proposed income from the fair. It is therefore evident to us that the reference to "revenues" in said section 6 should be read in the light of Standing Committee Report 350.

In any event, should "revenues" be construed to mean "gross revenues", the entire amount would be earmarked solely for "paying the principal of, the premium, if any, and the interest on the general obligation bonds issued by the state for the exhibit and for any borrowings made and any loans secured for the exhibit." This view necessarily prevents operating the exhibit after its construction and effectively participating in the New York World's Fair. However, a statute subject to interpretation is presumed not to have been intended to produce absurd consequences, but to have the most reasonable operation that its language permits.

In view of the foregoing considerations, we are of the opinion that where "revenues" is employed in section 6, Act 4, Session Laws of Hawaii 1962, it must be presumed that "net revenues" was intended. Such construction is necessary to preserve the intention of the legislature to obtain additional funds for the successful operation of the exhibit from the income from the fair, and to avoid the unsatisfactory result of having to construct a "white elephant."

Very truly yours,

/s/ ROY M. MIYAMOTO

ROY M. MIYAMOTO
Deputy Attorney General

APPROVED:

/s/ SHIRO KASHIWA

SHIRO KASHIWA
Attorney General

INDEXING INSTRUCTION

Op. 62-45

CIVIL SERVICE

Compensation

(1) Personnel in positions under subsections 3-61(a) and (k), Revised Laws of Hawaii 1955, are not entitled to increments granted in section 4-9, Revised Laws of Hawaii 1955.

(2) The above personnel are entitled to pay increases under Act 28, Session Laws of Hawaii 1962.

Op. 62-45

RMM:es
24b
Op. 62-45✓

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

August 21, 1962

Mr. Thomas K. Cook
Chairman and Executive Officer
County of Hawaii
Hilo, Hawaii

Dear Mr. Cook:

This is in response to your communication, dated July 30, 1962, requesting our opinion on the following questions:

> "1: Are employees in the Chairman's Office, private secretaries, first deputies or first assistants who are not covered by civil service '... entitled to an increase in compensation from that received during such year to that provided for by the next higher step in the salary range for the class to which his position has been assigned.'? (Sec 4-9, RLH 1955).
>
> "2: Are the employees mentioned in #1 preceding entitled to the increases in pay as granted by Act 28, SLH 1962?"

Regarding the first question, may we direct your attention to our Opinion No. 56-101, dated October 1, 1956, concluding that an employee exempted from civil service is not an "employee in the civil service," under section 4-9, Revised Laws of Hawaii 1955, as amended, and is consequently not entitled to increment increases and longevity increases thereunder. A copy of the referenced opinion is hereto attached.

However, said opinion must be modified in view of section 22, Act 28, Session Laws of Hawaii 1962. The second paragraph of section 4-9 of the Revised Laws presently applies to "any employee who is paid under the provisions of the salary schedule contained in section 4-10." Clearly, under the amendment, employees exempt from civil service but subject to the position classification plan are entitled to longevity increases.

With regards to the second question, section 19 of Act 28, Session Laws of Hawaii 1962, provides for the conversion of "salaries of public officers and employees under Chapter 4" to the new salary schedule. The purpose of the Act was, in part, to provide for an increase in compensation for "public officers and employees of the State and its political subdivisions whose compensation is determined under Chapter 4." Chapter 4 applies to all classes of positions covered by the position classification plan (§ 4-3, R.L.H. 1955), although every section thereunder might not be applicable to all classes. The positions with which we are concerned here are included in the position classification plan under sections 3-61(a) and (k), Revised Laws of Hawaii 1955, and therefore we must conclude that the personnel in these positions are entitled to the pay increases granted under Act 28, Session Laws of Hawaii 1962.

Very truly yours,

/s/ ROY M. MIYAMOTO

ROY M. MIYAMOTO
Deputy Attorney General

APPROVED:

/s/ SHIRO KASHIWA

SHIRO KASHIWA
Attorney General

INDEXING INSTRUCTION

Op. 62-46

CIVIL SERVICE

Compensation

The term "salary" in section 32, Act 1, 2SSLH 1959, as amended, does not per se include increments due at a particular salary range.

Op. 62-46

RMM:es
2a
Op. 62-46

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

August 22, 1962

Mr. Gordon P. Chung-Hoon, Director
Department of Agriculture
State of Hawaii
Honolulu, Hawaii

Dear Mr. Chung-Hoon:

This is in response to your communication, dated August 2, 1961, regarding the interpretation of recent legislation concerning salary adjustments of public employees whose positions were affected by the reorganization of the executive and administrative offices, departments and instrumentalities of the State government. The question presented was whether the term "salary" in the phrase "any loss of salary" found in section 32 of the Reorganization Act of 1959, as amended, includes all increments that would be due at a particular salary range at the time of the reorganization transfer. Your communication further points out that county and city and county employees were given that assurance by the "without reduction of salary range" provision found in Act 117, Session Laws of Hawaii 1961.

In the interpretation of statutes, the legislative will and intent is controlling. United States v. Rosenblum Trunk Lines, 315 U.S. 50, 62 S.Ct. 445, 86 L.Ed. 671 (1942). A statute is open to construction only where the language used requires interpretation, i.e., where the statute bears two or more constructions. Where the language of the statute is plain and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation. In the case of such unambiguity, it is the established policy of the courts to regard the statute as meaning what it says, and to avoid giving it any other construction than that which its words demand.

The term "salary range" is defined in subsection 4-1(i) of the Revised Laws of Hawaii 1955 (1961 Supplement) as "the group of salary rates from the minimum to maximum to which a class may

be assigned." The term "increments" is "an increase in compensation from that received during such year to that provided for by the next higher step in the salary range for the class to which his position has been assigned" due to employees after rendering a year's satisfactory service (§ 4-9, R.L.H. 1955, as amended). "Salary" is the compensation paid to an employee for service in a position (subsection 4-1(d), R.L.H. 1955, as amended). While these terms are closely interrelated, they are, nevertheless, separate and distinct. We feel that the above-referenced language found in section 32 of the Reorganization Act conveys a definite meaning, thus precluding our interpreting the provision against "loss of salary" to include increases in salary.

In reaching this conclusion, we are aware of the unequal operation that would result as a practical matter under the separate statutes. However, neither the language nor the legislative history of these statutes discloses to our satisfaction a legislative purpose to insure identical treatment. Standing Committee Report 188 to Act 117, Session Laws of Hawaii 1961, explains that the revision deleting State employees was made because adequate, not identical, protection was afforded under Act 1, Second Special Session Laws of Hawaii 1959. In any event, where the language of the statute is clear and unambiguous, the correction of asserted inequalities in the operation of statutes must be effected by the legislature, and not by administrative action in the guise of interpretation.

Very truly yours,

/s/ ROY M. MIYAMOTO

ROY M. MIYAMOTO
Deputy Attorney General

APPROVED:

/s/ SHIRO KASHIWA

SHIRO KASHIWA
Attorney General

INDEXING INSTRUCTIONS

I. TAXATION, GENERAL EXCISE TAX

Business, what constitutes

A corporation or association operated for the economic benefit of its shareholders or members is operated "with the object of gain or economic benefit" and is "engaged in business" within the meaning of the statute.

* * * * *

II. TAXATION, GENERAL EXCISE TAX

Cooperative Apartment Corporation

The operation and management of a cooperative apartment building by the cooperative apartment corporation for the purpose of meeting taxes, rents and maintenance expenses is "with the object of gain or economic benefit either direct or indirect," and the monthly payments collected for that purpose constitute taxable gross income.

* * * * *

III. REVISED LAWS OF HAWAII 1955, SEC. 117-17.1

* * * * *

IV. REVISED LAWS OF HAWAII 1955, SEC. 117-2

* * * * *

NK:n
15a
Op. 62-47

STATE OF HAWAII

Department of the Attorney General

HONOLULU

August 22, 1962

Honorable Earl W. Fase
Director of Taxation
State of Hawaii
Honolulu, Hawaii

Attention: Mr. J. A. Bell
Deputy Director of Taxation

Dear Sir:

This is in response to your letter of August 3, 1962, concerning the tax liability of a cooperative apartment corporation. It contends that it is not engaged in any business within the meaning of the general excise tax law (Chapter 117, R.L.H. 1955) and hence is not taxable on its receipts of monthly "maintenance" charges from its stockholder-lessees.

In accordance with your request we have reviewed Opinion of the Attorney General No. 1750, dated October 2, 1939, in which the Tax Commissioner was advised that a corporation or association operated for the economic benefit of its shareholders or members is operated "with the object of gain or economic benefit" and is "engaged in business" within the meaning of the statute. (Section 1(7) of Act 141, S.L. 1935, which is section 117-2 of the Revised Laws of Hawaii 1955.) We affirm that opinion and think it sufficiently covers the question presented by the cooperative apartment corporation; that is, it is our opinion that the operation and management of the apartment building or buildings for the purpose of meeting taxes, rents and maintenance expenses is "with the object of gain or economic benefit either direct or indirect," and the monthly payments collected for that purpose constitute taxable gross income. See also Opinion of the Attorney General No. 1703, dated May 2, 1939.

In addition to the cases cited in the opinion of October 2, 1939, see Union League Club v. Johnson, 115 P.2d 425 (1941); Bonnar-Vawter, Inc. v. Johnson, 173 A.2d 141 (1961).

We are also of the view that section 117-17.1, R.L.H. 1955 as amended (Section 11(i), Act 34, S.L. 1957), which provides in part as follows applies:

> ". . . A person or company, whether or not called a cooperative, through which shareholders or members are pursuing a common

objective (for example, the obtaining of property or services for their individual businesses or use, or the marketing of their individual products) is a taxable person, and such facts do not give rise to any tax exemption or tax benefit except as specifically provided. Even though a business has some of the aspects of agency it shall not be so regarded unless it is a true agency. Without prejudice to the generality of the foregoing, the reimbursement by one person of the amount of costs incurred by another constitutes gross income of the latter, unless the person making the reimbursement was himself, as principal, liable in that amount to the third party who furnish the property, services and the like for which the costs were incurred."

The shareholders in the corporation are pursuing the common objective of obtaining property and services for their individual use; furthermore, it is the corporation which is primarily liable to the owner of the land for the taxes and rents and to those providing other property and services, the charges for which are included in the monthly "maintenance" charges.

Very truly yours,

/s/ Nobuki Kamida

NOBUKI KAMIDA
Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa

SHIRO KASHIWA
Attorney General

No Opinion

No. 62-48

INDEXING INSTRUCTIONS

Opinion No. 62-49

R.L.H. 1955

Section 323-1

R.L.H. 1955

Section 331-16

ADOPTION

Adopted Child, Status

Adoption terminates the relationship between the adopted child and its former legal parents but it does not destroy the relationship existing between the adopted child and his natural brothers and sisters or other natural relatives.

MARRIAGE

Consanguinity as Bar

The prohibition of section 323-1 that the parties shall not stand in relation to each other of ancestor and descendant of any degree whatsoever does not apply when an individual seeks to marry a person who was adopted by the individual's grandparents.

MARRIAGE

Cousins

First cousins are permitted to marry even after one was adopted by the other cousin's grandparents.

WKW:js
9a
Op. No. 62-49

STATE OF HAWAII

Department of the Attorney General

HONOLULU

August 27, 1962

Leo Bernstein, M.D.
Director of Health
Department of Health
Honolulu, Hawaii

Dear Dr. Bernstein:

You have inquired as to whether a marriage is permissible when the parties bear the relationship by adoption of uncle and niece, that is, when one of the persons is the adopted child of the grandparents of the other person.

It is the opinion of this office that a marriage between an individual and a person adopted by the individual's grandparents is not prohibited by section 323-1, Revised Laws of Hawaii 1955. While section 323-1 requires that the respective parties do not stand in relation to each other of ancestor and descendant of any degree whatsoever, such as uncle and niece, its prohibition would not be applicable to the subject situation since an adoption generally does not change the former relationship which existed between the adopted child and its natural relatives, other than its living natural parents.

You are specifically concerned with the fact that an individual named George was adopted by his grandparents at the age of ten, approximately at the time the adoptive parents' granddaughter Lorraine was born. Thus George, through adoption, became an adoptive uncle of Lorraine and you question the effect of section 331-16, Revised Laws of Hawaii 1955, which in part provides that "a legally adopted child shall be considered to be a natural child of the whole blood of the adopting parent or parents . . . an adopted child and his adopting parent or parents shall sustain towards each other the legal relationship of parents and child and shall have all the rights and be subject to all

the duties of that relationship." You particularly question whether section 331-16 creates an impediment to a marriage between George and Lorraine because the grandparents' adoption changed George's status from that of a first cousin to that of an uncle.

Section 331-16 provides that the rights and duties between an adopted child and its former legal parent or parents shall cease from the time of the adoption, but it does not provide that the relationship between the adopted child and its other natural relatives is to be destroyed except as to the descent of property.

The general rule is set forth in the article entitled "Adoption of Children," 2 C.J.S. 451, section 59b, wherein it notes:

> "In the absence of an express statutory provision to the contrary, adoption of a child does not destroy the relationship existing between the adopted child and his natural brothers and sisters, or his natural grandparents."

An example of the application of that rule is found in the case of Hale v. Department of Labor and Industries, 20 Wash. 2d, 14, 145 P. 2d 285, wherein the court held that the adoption of a child did not terminate its right to receive compensation for the death of its natural father and said:

> "We are committed to the rule that by adoption there is no dissolution of the natural relationship of kindred and that an adopted child will not be deprived of the benefits arising from such natural relationship."

In view of the above-stated law and facts, it is the opinion of this office that the relationship between natural first cousins is not changed to that of an uncle or aunt and niece and nephew by the fact that one of the first cousins is adopted by the common grandparents.

Respectfully submitted,

W. K. WATKINS, JR.
Deputy Attorney General

APPROVED:

SHIRO KASHIWA
Attorney General

Opinion No. 62-49

INDEXING INSTRUCTIONS

Op. 62-50

BOARDS AND COMMISSIONS

Service on more than one prohibited. Although citizen presently serving on board or commission may seek seat on the Local School Advisory Council, he may not hold both offices at the same time.

OFFICERS

Dual Positions

(same)

PUBLIC OFFICERS

Dual Office Holding

(same)

SCHOOLS, PUBLIC

Local School Advisory Council

(same)

REVISED LAWS OF HAWAII 1955

Section 7-25.5

DHCL:ru
6a
Op. 62-50

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU, HAWAII

September 10, 1962

Honorable Tadao Beppu
Assistant Floor Leader
House of Representatives
State of Hawaii
Iolani Palace
Honolulu, Hawaii

Dear Sir:

This is in response to your communication of September 5, 1962, wherein you ask whether a citizen of this State presently serving on a board or commission can seek a seat on the Advisory Council on Education.

Section 7-25.5, Revised Laws of Hawaii 1955, 1961 Supplement, provides as follows:

> "Any other provision of law to the contrary notwithstanding, no person shall be allowed to serve on more than one board or commission of a public character, created by the State or any of its political subdivisions.
>
> "The provisions of this section shall apply to appointments, whether for interim or regular terms, made subsequent to May 22, 1957.
>
> "The provisions of this section shall not apply when in conflict with any provision of federal law."

In essence, the above section states that no person shall be allowed to serve on more than one board or commission of a public character. We must now determine whether the Local School Advisory Council is a board or commission of a public character.

Act 182, Session Laws of Hawaii 1961, establishes the Local School Advisory Council, making it one of a "public character". Webster in his dictionary, gives this as one of the definitions of the term "board": "A body of men constituting a quorum, a court, or council, as a board of trustees, a board of supervisors, etc." Broadwell v. People, 76 Ill. 554, 558.

This office is of the opinion that the Local School Advisory Council comes within the meaning of section 7-25.5, Revised Laws of Hawaii 1955, 1961 Supplement, pertaining to boards and commissions. We therefore advise you that although a citizen presently serving on a board or commission may seek a seat on the Local School Advisory Council, he may not hold both offices at the same time.

Very truly yours,

/s/ Donald H. C. Low

Donald H. C. Low
Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa

Shiro Kashiwa
Attorney General

INDEXING INSTRUCTIONS

Op. 62-51

MOTOR CARRIERS

Grandfather rights

Extent of "grandfather" rights under sections 106C-10 and -11, R.L.H. 1955, as amended

PUBLIC UTILITIES COMMISSION

Grandfather rights

Commission's power to set conditions and limitation on "grandfather" rights under the Motor Carrier Act.

Certificates

Certificates granted to motor carriers under "grandfather" clause.

ASKF:ru
17b
Op. 62-51

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU, HAWAII

September 12, 1962

Mr. Jack E. Conley, Director
Public Utilities Commission
State of Hawaii
313 So. Beretania Street
Honolulu, Hawaii

Dear Mr. Conley:

This is in response to your letter of September 6, 1962, requesting clarification of sections 106C-10 and -11, Revised Laws of Hawaii 1955, as amended, specifically, on the provisions dealing with "grandfather" rights of applicants.

Sections 106C-10 and -11 authorize the Public Utilities Commission to issue a certificate (or permit) without a showing of public convenience and necessity if the carrier or its predecessor was "in bona fide operation as a common carrier (or contract carrier) by motor vehicle on July 1, 1961, over the route or routes or within the territory for which application is made and has operated since that time". Subsection 106C-10(d) requires that the certificate issued shall specify the island or islands or portion or portions thereof for which service may be rendered.

It is clear from these provisions that the Commission has authority to limit future operations of common carriers within an island. Authority to operate within a specified territory may include permission to service all points in that area or be restricted to designated areas therein. The "grandfather" clause, however, of section 106C-10 contemplates that common carriers by motor vehicles should retain their status within the transportation system which they occupied on July 1, 1961, and that the rights granted to them to continue operations without proof of public convenience and necessity should equal actual, rather than potential or simulated service, which will be required on that date. McDonald v. Thompson, 305 U.S. 263; Alton R. Co. v. United States, 315 U.S. 15. See also Chicago, St. P., M. & O. Ry. Co. v. United States, 50 F. Supp. 249, aff'd 322 U.S. 1.

The Act provides the test of "bona fide operation". That standard carries the connotation of substantiality, as distinguished from incidental, sporadic, or infrequent service. Loving v. United States, 32 F. Supp. 464, aff'd 310 U.S. 609. Mere holding out to serve a specified area is not alone sufficient.

The Interstate Commerce Commission, faced with comparable responsibilities as the Hawaii Public Utilities Commission, has however, on past occasions interpreted similar statutory language to mean that the Commission is not compelled to limit "grandfather" applicants to the exact pattern of operations prior to the "grandfather" date, but could take into consideration the services which he was offering as well as that which he was actually performing on that date. United States v. Carolina Carriers Corp., 315 U.S. 475. There had to be, however, substantial parity between future operations and prior bona fide operations. The applicant has the burden of establishing his right to the statutory grant or privilege contained in the "grandfather" clause. Since that clause "confers a special privilege the proviso defines exemption to be extended only to carriers within its terms." McDonald v. Thompson, 305 U.S. 263; Gregg v. United States, 316 U.S. 74. These carriers may then expand their territory or extend their service by showing that public convenience and necessity will be served thereby.

In Noble v. United States, 319 U. S. 88, the court held that in a permit to operate as a contract carrier under the "grandfather" clause it is within the power of the Interstate Commerce Commission to specify in such permit "the business of the carrier covered thereby and the scope thereof"--to specify the shippers or type of shippers for whom the carrier may haul designated commodities. The court in discussing the scope of the Commission in limiting "grandfather" rights pointed out that unless the Commission accurately described the scope of the enterprise by a statement of the commodities handled, permits under the "grandfather" clause may greatly distort the prior activities of the carrier.

> "That would make a basic alteration in the characteristics of the enterprise of the contract carrier--a change as fundamental as we thought was effected by a disregard of the nature and scope of the holding out of the common carrier in United States

> v. Carolina Freight Carriers Corp., 315 U.S. 475. If the business of the contract carrier were not defined in terms of the type or class of shippers served, that 'substantial parity between future operations and prior bona fide operations' which is contemplated by the Act (Alton R. Co. v. United States, 315 U.S. 15, 22) would be frequently disregarded. The 'grandfather' clause would be utilized not to preserve the position which the carrier had obtained in the nation's transportation system, but to enlarge and expand the business beyond the pattern which it had acquired prior to July 1, 1935. The result in the present case would be a conversion, for all practical purposes, of this contract carrier into a common carrier--a step which would tend to nullify a distinction which Congress has preserved throughout the Act. If such a metamorphosis is to be effected or if the appellant is to obtain a permit broader than the actual scope of his established business, the showing required by other provisions of the Act must be made." 319 U.S. 92.

The Legislature in enacting the "grandfather" clause of sections 106C-10 and -11 indicated two paramount purposes: to avoid disruption of settled lawful motor carrier service by permitting such operators to continue to serve without showing proof of public convenience and necessity, and to require all other carriers to obtain from the Commission certificates of public convenience and necessity. It contemplated by the "grandfather" proviso continuation of any service by motor carriers in the transportation field, whether regular, irregular, seasonal or continuous, actually required or not, and intended to protect the property and business of carriers previously engaged in bona fide transportation of persons or property by motor vehicles. Maher v. United States, 23 F. Supp. 810, rev. on other grounds 307 U.S. 148.

Summarizing, therefore, the Public Utilities Commission may issue certificates (or permits) under the "grandfather" clause of sections 106C-10 and -11, after being fully satisfied that the applicant's prior bona fide activities were actual, substantial and continuous on July 1, 1961 and that there be substantial parity between such operations with

future operations. In granting such certificates (or permits), the Commission should specify the scope thereof, including territory to be served and commodities to be carried.

Very truly yours,

/s/ Arthur S. K. Fong

Arthur S. K. Fong
Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa

Shiro Kashiwa
Attorney General

INDEXING INSTRUCTION

OP. NO. 62-52

PUBLIC EMPLOYEES

Salary adjustments

Personnel of Crop & Livestock Reporting Service and Market News Service, transferred under reorganization provisions of Act 132, S.L.H. 1961, to the Department of Agriculture, should be placed in appropriate steps in the State Compensation Plan in order to afford them the benefits of increments.

Op. 62-52

RMM:es
2a;12a
Op. 62-52

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

October 22, 1962

Mr. Gordon P. Chung-Hoon, Director
Department of Agriculture
State of Hawaii
1428 So. King Street
Honolulu 14, Hawaii

Dear Mr. Chung-Hoon:

This is in response to your letter of September 26, 1962, regarding the salary range step placement of certain employees transferred under the reorganization provisions of Act 132, Session Laws of Hawaii 1961, from non-civil service to civil service positions. The following contentions were presented in your letter:

(1) That on March 1, 1962, these employees should have been placed in the State Compensation Plan, including placement at a step in the prescribed salary range.

(2) That on March 1, 1962, if these employees were receiving compensation within the salary range prescribed for the class, but not at one of the steps fixed therein, their compensation should be increased to the next higher step as provided for in section 4-11, Revised Laws of Hawaii 1955, as amended.

(3) That these employees were entitled to full increment increases on July 1, 1962, since they were in established civil service classified positions at the time and their increment due date was July 1, 1962.

(4) That Act 28, Session Laws of Hawaii 1962, subsection 21(1)(a) provides that increment step

increase shall be given under the existing salary range in the said existing schedule on said date.

Act 132, Session Laws of Hawaii 1961, amended Act 1, Second Special Session Laws of Hawaii 1959, and provided, in part, for the transfer of the functions exercised by the University of Hawaii with respect to the crop and livestock reporting service and market news service to the newly organized Department of Agriculture. Although said Act 132 did not specifically include a preservation provision, it is our opinion that the provisions of Act 1, supra, apply. May we direct your attention to section 468 of 50 American Jurisprudence, Statutes, which provides, in part: "The amendment should be considered as if embodied in the whole statute of which it has become a part."

Paragraph 3, section 32, of Act 1, supra, provides as follows:

> "An employee of the State who does not have tenure and who may be transferred or appointed to a civil service position as a consequence of this Act shall become a civil service employee without the loss of salary, seniority, prior service credit, vacation, sick leave or other employee benefits or privileges and without the necessity of examination; provided, that such employee or officer possesses the minimum qualifications for the position to which he is transferred or appointed." (Emphasis ours.)

That employees with tenure and employees without tenure refer to civil service and non-civil service personnel, respectively, is clear (Standing Committee Report No. 296, House Journal 1961; A.G. Op. 60-7).

We now proceed to discuss those matters dealing with increments. Applying the civil service increment provisions (§ 4-9, R.L.H. 1955, as amended), we find that certain personnel are "entitled to an increase in compensation from that received during such year to that provided for by the next higher step in the salary range for the class to which his position has been assigned" upon satisfying two conditions, (1) be a civil service employee (A.G. Op. 56-101), and (2) render a year's satisfactory service.

Under the above-recited portion of paragraph 3, section 32, Act 1, Second Special Session Laws of Hawaii 1959, as amended, the personnel here involved became civil service employees.

Under section 44-10 of our Revised Laws, the Board of Regents of the University of Hawaii is mandated to classify certain personnel under its jurisdiction and to adopt a classification schedule conforming, as nearly as may be practicable, to the schedules set forth in chapter 4. Said section 44-10 provides, in part:

> "Annual increases of compensation shall be allowable, and shall be allowed, in general accordance, so far as may be practical, with the provisions of chapter 4; providing for the allowance of annual increases to territorial employees for efficient service, and the board of regents shall adopt a fair and reasonable plan for rating the efficiency of individual employees affected by this section."

Here, we find the legislature providing for increment benefits to certain employees under the University in accordance with section 4-9, Revised Laws of Hawaii 1955, as amended. The Board of Regents is called upon to implement this provision.

As a sidelight to section 44-10, supra, as amended, it may be of interest that said section was originally enacted as a part of Act 97, Special Session Laws of Hawaii 1941, and was to "take effect only in the event that House Bill No. 49 of the present Special Session shall be enacted into law. . . ." House Bill No. 49, which was then enacted in 1941 as Act 88, was the Classification Laws effective as of that date.

While under the University's jurisdiction and immediately preceding the effective date of the reorganization transfer, the employees herein concerned had their service anniversary dates and duration of services performed, for increment purposes, established. These may properly be said to have been preserved upon transfer under reorganization by paragraph 3 of section 32, Act 1, Second Special Session Laws of Hawaii 1959, and may now be substituted in the application of section 4-9, Revised Laws of Hawaii 1955, as amended.

Having shown that these personnel <u>may</u> qualify for annual increment increases, we now proceed to discuss your contentions dealing with the appropriate salary range step placement on March 1, 1962. Such placement in the classified civil service by the Director of Personnel Services must here be dependent on the operation of the protective provision of Act 1, Second Special Session Laws of Hawaii 1959, as amended. As has been earlier determined, these employees would be legally

entitled to a full step increase should they satisfy the necessary conditions precedent. This benefit, accorded by section 4-9, Revised Laws of Hawaii 1955, as amended, can here be effectuated only where the personnel involved are placed in an appropriate step in the established salary schedule. However, the applicable "without loss of salary" provision in section 32 of Act 1, supra, precludes placement at a step wherein the pay rate would be less than that the employee was receiving immediately preceding the reorganization transfer.

In view of the foregoing consideration, we must conclude that on March 1, 1962, these employees should have been placed in the State Compensation Plan at a step coinciding with their pay rate while under the University of Hawaii, or at the next higher step if such pay rate fails to so coincide. This view is warranted under section 43 of the Hawaii State Government Reorganization Act of 1959 which states that the Act shall be given a liberal construction in order to accomplish the purposes of reorganization.

The conclusions herein expressed are limited exclusively to the fact situation presented in your letter and should not be otherwise applied.

Very truly yours,

/s/ ROY M. MIYAMOTO

ROY M. MIYAMOTO
Deputy Attorney General

cc: Dept. of Personnel Services

APPROVED:

/s/ SHIRO KASHIWA

SHIRO KASHIWA
Attorney General
10/26/62

INDEXING INSTRUCTION

Op. No. 62-53

LEGISLATURE

Officer of county cannot hold office of member of legislature.

Under the common law rule that a public officer cannot hold two incompatible offices at the same time, a county supervisor is prohibited from concurrently holding a position in the State legislature.

Op. No. 62-53

RMM:es
22a
Op. 62-53

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

November 2, 1962

November 2, 1962

Honorable Robert C. Oshiro
Representative, Ninth District
First State Legislature
P. O. Box 958
Wahiawa, Oahu, Hawaii

Dear Sir:

This is in response to your letter of October 18, 1962, regarding the legal status of an elected county supervisor seeking election to elective office in the State legislature. On the basis of this fact situation, the following questions were presented:

"1. Should such a person be successful, does he automatically vacate the office as a supervisor?

"2. Must he resign his position as a supervisor just prior to the November 6th election?

"3. If he must resign, should it be in writing and accepted by the Board of Supervisors?

"4. Will holding the office of supervisor affect his election to the respective state office?

"5. Can he serve as a supervisor after he is elected to the State House or State Senate prior to January 1, 1963 or his term for supervisor ends?"

The inquiry here goes to the propriety of one person holding more than one public office at the same time. In this regard, it is a settled rule of the common law that a public

officer cannot hold two incompatible offices at the same time. It should be noted, however, that at common law there was no inhibition against the holding by the same person of more than one office, provided they were not incompatible with each other. 42 American Jurisprudence, Public Officers, section 59.

Under section 1-1, Revised Laws of Hawaii 1955, as amended, the "common law of England, as ascertained by the English and American decisions, is declared to be the common law of the Territory of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the Territory, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage."

That this common law rule against the dual holding of incompatible public offices is applicable in this jurisdiction is demonstrated in Woods v. Treadway, 31 Haw. 792 (1931), and is recognized in Hollinger v. Kumalae, 25 Haw. 669, 689 (1920). It may be noted, however, that in the latter case the court was not called upon to apply the common law rule with which we are here concerned.

The fact that one of the offices is in the county and the other is in the state is of no consequence. In Jones v. MacDonald, 33 N.J. 132, 162 At1.2d 817 (1960), the defendants urged that the common law doctrine was not offended because the councilman was a local office whereas his office on the county board was a state office. In ruling that the distinction was not pertinent, the court announced that:

> ". . . the division of government for the purpose of home rule does not insulate the public from the injury occasioned by dual holding of incompatible offices. The public interest is equally evident whether the offices be both local or state or one of each."

Further, the applicability of the common law rule where one is a county office and the other is a state office is demonstrated in the Woods case, supra.

This policy of the law with respect to holding two offices is commonly expressed in various constitutional and statutory provisions which vary in their wording and scope. They may be merely declaratory of the common law rule, or may

adopt severer standards and prohibit the holding of double offices by the same person irrespective of the compatibility.

However, on the issue of incompatibility, if the statute and the common law rule can stand together, the statute should not be so construed as to abolish the common law rule. Childs v. Moses, 265 App. Div. 353, 38 N.Y.S.2d 704 (1942). That the concurrent application of statutory provisions and of the common law rule is permitted in this jurisdiction is recognized in both the Woods and Hollinger cases, supra. Finally, there appears to be no reason why such ruling should not equally apply where constitutional provisions are involved.

It is extremely difficult to lay down any clear and comprehensive rule as to what constitutes incompatibility of offices. As a general rule, when it comes to stating what constitutes incompatibility, the courts have not formulated a general definition to be decisive in every case but have proceeded with a discussion of specific cases and the particular facts which have been looked on as creating incompatibility. 42 American Jurisprudence, Public Officers, section 70.

In Weza v. Auditor General et al., 297 Mich. 686, 298 N.W. 368 (1941), petitioner, while a member of the county school commission, sought a writ of mandamus to compel payment of his compensation as a member of the state legislature. In answering the question whether the two offices were incompatible in the affirmative, the court stated:

> "The office of county school commissioner is not a constitutional office, but instead is one created by the legislature. Eligibility to that office and the powers and duties of county school commissioners are fixed by legislative action. These may be increased or diminished by the legislature. The compensation of one holding that office might be fixed by the legislature, and in fact the minimum salary of county school commissioners is fixed by statute. The manner of electing one to the office and of filling a vacancy therein are likewise determined by legislative action. * * * Clearly the office of county school commissioner is subordinate to that of a member of the legislature. The former owes its creation and continuation to legislative enactment and is completely

subject to legislative control. Further, as a matter of sound public policy these two offices should be held incompatible."

In the present case, section 1, Article VII of the Constitution of the State of Hawaii provides as follows:

"The legislature shall create counties, and may create other political subdivisions within the State, and provide for the government thereof. Each political subdivision shall have and exercise such powers as shall be conferred under general laws."

Further, under the Revised Laws of Hawaii 1955, as amended, the legislature created the political subdivisions of the State (§§ 144-1 and 149-1); created the county offices of board of supervisors and provided for the election of members thereto (§§ 144-5 and 149-20); provided for the tenure of office of members of the board of supervisors (§§ 144-7 and 149-21); provided for the general qualifications of board members (§§ 144-8 and 149-28); provided for the manner of filling vacancies (§§ 144-31 and 149-24); provided for the compensation of board members (§§ 146-2, 147-1, 148-1 and Act 28, S.L.H. 1962); and provided for the general powers of the board of supervisors (§§ 144-33 and 149-86).

In view of the foregoing considerations, we believe that the facts present in this case fall clearly within the scope and ruling of the Weza case, supra, and as a consequence the office of the county supervisors must be deemed incompatible with the office of the state legislator. Accord: A.G. Op. No. 348 (1906).

We now proceed to consider the terms of office of a state legislator and a county supervisor. With respect to the former, section 5, Article III of our Constitution designates that "The term of office of members of the house of representatives shall be two years beginning with their election and ending on the day of the next general election, and the term of office of members of the senate shall be four years beginning with their election and ending on the day of the second general election after their election."

With respect to the latter, section 144-6, Revised Laws of Hawaii 1955, as amended, provides that county supervisors

"shall take office at twelve o'clock meridian on January 2 following their election" and that they shall "hold office until their successors shall be elected and qualified."

The application of these provisions of our Constitution and of our statutes clearly shows that a county supervisor, elected and qualified to the state legislature on November 6, 1962, would be necessarily holding two public offices in violation of the common law rule here involved.

With regard to the effect of holding incompatible offices, the general rule is that the acceptance of a second office, incompatible with one already held, vacates the first. The theory is that an office is ipso facto vacated by the acceptance of an incompatible office, and that no judicial proceedings are necessary to determine the title. Such doctrine seems to be based on the presumption of an election between the two as evidenced by the acceptance of the second office. 42 American Jurisprudence, Public Officers, section 78.

An exception to the above rule occurs where the law expressly provides that the holder of one office is ineligible to another office. In such cases an acceptance of another office does not vacate the first because such provision precludes the incumbent of an office from accepting or holding the second, and renders his election to the second void, or voidable. 42 American Jurisprudence, Public Officers, section 80. Nevertheless, these persons may become eligible by resigning the first office before his election to the second, but not where the resignation occurs thereafter. 42 American Jurisprudence, Public Officers, section 82.

The above-recited general rule, and not the exception, appears to prevail in this jurisdiction. We direct your attention to a proposed provision for our Constitution, which provision was deleted from the adopted form of the Constitution of the State of Hawaii. That proposal would have disqualified any person, while holding any public office, from seeking election to the legislature. Committee of the Whole Report No. 24 and Standing Committee Report No. 92, Proceedings of the Constitutional Convention of Hawaii, Vol. 1.

Numerous cases, discussed in Attorney General's Opinion No. 62-23, rule that, where a public officer is prohibited from holding two offices at the same time, a disability

to be elected to the second office is not contemplated. That opinion concluded that section 9, Article III of our State Constitution contained language similar to that found in this category.

Paragraph 5, section 1, Article IV of the Constitution of the State of Hawaii is a provision of similar nature. It was to be understood that a public officer could seek election to the governorship without first relinquishing his then office and that his actual assumption of the governorship after election would have automatically vacated his prior office. Committee of the Whole Report No. 17, Proceedings of the Constitutional Convention of Hawaii, Vol. 1.

Further, in Hollinger v. Kumalae, supra, the court concluded that, under the then applicable Organic Act, "the acceptance by respondents of the office of supervisor automatically vacated the office of senator and representative then held by them." This demonstrates that the respondents therein were not required to tender their resignations prior to election to the second office.

In view of the foregoing considerations, we conclude as follows:

a) A county supervisor need not resign his position prior to the November 6, 1962 general election in seeking a seat in the legislature.

b) His holding the office of supervisor would not affect his election to the State legislature.

c) Should a county supervisor be successful in such election, he would be deemed to have automatically vacated the office of supervisor upon election to the legislature, and cannot thereafter continue to serve as a supervisor.

d) Should a county supervisor be unsuccessful in such election, he may continue to serve as a supervisor.

Very truly yours,

/s/ ROY M. MIYAMOTO

ROY M. MIYAMOTO
Deputy Attorney General

APPROVED:

/s/ SHIRO KASHIWA

SHIRO KASHIWA
Attorney General

Op. 62-53

INDEXING INSTRUCTIONS

Opinion No. 62-54

1. Section 180-56, R.L.H. 1955

Under section 180-56, R.L.H. 1955, it is illegal for savings and loan associations to charge unreasonable service charges which are in excess of actual services rendered.

2. Savings and loan associations

[Same remarks]

3. Building and loan associations

[Same remarks]

4. Service charges

[Same remarks]

5. Interest

[Same remarks]

ASO:ft
17a
Op. No. 62-54

STATE OF HAWAII

Department of the Attorney General

HONOLULU

December 27, 1962

Treasurer
Department of Treasury
and Regulation
State of Hawaii
Honolulu, Hawaii

Dear Sir:

This is in answer to your letter of August 8, 1962. I understand the problem to be as follows:

It has become fairly common practice among savings and loan associations to charge flat fees of from one percent (1%) to six percent (6%) of the amounts of real estate loans as initial service charges. Such charges are in addition to the usual interest charges, but treated differently by the lending institutions to the extent that they are, unlike interest charges, neither compounded nor assessed on the declining balance. The question is whether such service charges violate section 180-56, Revised Laws of Hawaii 1955.

Please be advised that the validity of service charges depends upon whether they reasonably reflect expenses for services actually rendered.

Borrowing an analogy from a case involving usury, it was held in Collins v. Carver Federal Savings and Loan Association, 216 N.Y.S.2d 172 (1961), that a two percent (2%) service charge, over and above a six percent (6%) interest (the latter rate being the maximum interest rate permitted by the New York usury law), was not usurious. The test applied in that case was whether the charge of two percent (2%) was a reasonable sum to reimburse the lending institution for expenses incurred in good faith in connection with the loan.

Again, in usury cases, it has been held that service charges required of a borrower, when no services were in fact rendered or to be rendered, are charges for the use of money, and

therefore interests. See First Federal Savings and Loan Association of Atlanta v. Norwood Realty Company, 93 S.E.2d 763 (1956) and Dickey v. Bank of Clarksdale, 184 So. 314 (1938).

More basically, the very structure of section 180-56, Revised Laws of Hawaii 1955, indicates that the legislature intended service charges, required by savings and loan associations of its borrowers, to reasonably reflect services actually rendered.

Most notably, the legislature, in section 180-56, appears to have made a tedious attempt to describe, without limiting the generality of such descriptions, the various sorts of charges that may conceivably be imposed by the associations upon the borrowers, and to have specifically coupled such impositions with the requirement that they be "reasonable" with respect to "expenses incurred" and "services rendered."[1]

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[1] Section 180-56, Revised Laws of Hawaii 1955, reads in the entirety as follows:

> "Loan expenses; initial charges; statements. Every association may require borrowing members to pay all reasonable expenses incurred in connection with the making, closing, disbursing, extending, readjusting or renewing of real estate loans. Without limiting the generality of the foregoing, such expenses may include appraisal, attorney's, abstract, recording and registration fees, title examination, credit report, survey, drawing of papers, loan closing costs and taxes or fees imposed upon or in connection with the making and recording of any mortgage.
>
> "Costs. Every association may also require borrowing members to pay the cost of all other necessary and incidental services rendered by the association or by others in connection with real estate loans in such reasonable amounts as may be fixed by the board of directors. Without limiting the generality of the foregoing, such costs may include the cost of services of inspectors, engineers and architects. Such reasonable initial charges may be collected by the association from the borrower and paid to any person, including any director, officer or employee of the association, rendering such services, or paid directly by the borrower. In lieu of such initial charges to cover such expenses and costs, an association may charge a reasonable service charge, part or all of which may be retained by the association

Furthermore, section 180-56 appears to be emphatic in the statement that "[n]o director, officer or employee of an association shall receive any fee or other compensation of any kind in connection with procuring any loan for any association, except for services actually rendered as above provided." (Emphasis added.) The section reiterates this proviso by also requiring that no loan be made by an association if the borrower is required to pay "any charges or fees, except as herein provided."

Finally, a savings and loan association, by section 180-56, is required to furnish the borrower a

> "loan settlement statement to each borrower upon the closing of the loan, indicating in detail the charges and fees such borrower has paid or obligated himself to pay to the association in connection with such loan, the rate of interest charged and the method of computing interest, the amount of periodic payments and a statement of whether or not payments include both interest and principal." (Emphasis added.)

We interpret this last requirement as a measure to facilitate enforcement of this section, as well as to enable the borrower

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> which renders such service, or part or all of which may be paid to others who render such services. No director, officer or employee of an association shall receive any fee or other compensation of any kind in connection with procuring any loan for any association, except for services actually rendered as above provided.
>
> "Statements. No loan shall be made when the borrower is required to pay to the association in connection with the loan any charges or fees, except as herein provided. The association shall ascertain the total amount paid by each borrower to it in connection with the loan, and shall furnish a loan settlement statement to each borrower upon the closing of the loan, indicating in detail the charges and fees such borrower has paid or obligated himself to pay to the association in connection with such loan, the rate of interest charged and the method of computing interest, the amount of periodic payments and a statement of whether or not payments include both interest and principal. A copy of such statement signed by the borrower shall be retained in the records of the association."
> (Emphasis added.)

opportunity to know in detail the nature of payments he is being obligated to make in the course of obtaining the loan.

It must also be observed at this point that section 180-56 treats and lists "charges and fees" separately from "rate of interest charged." We take this to mean that the legislature intended such items to be distinct in nature, and to prohibit their being confused or commingled when computed and listed on the loan settlement statements.

Thus, upon careful scrutiny, it is our opinion that the purpose of section 180-56, Revised Laws of Hawaii 1955, was to protect the borrowing public from being assessed unreasonable service charges. Accordingly, please be advised that service charges by savings and loan associations disproportionate to services actually rendered are in violation of such section.

The question of reasonableness is one of factual determination, and the validity of each case will necessarily turn upon its own facts and circumstances. Please be further advised, however, that the investigations of savings and loan associations to ascertain whether they are operating conformably with law, is within the proper authority of the Treasurer, pursuant to section 180-64, Revised Laws of Hawaii 1955. If a violation is found, the Treasurer may take the preliminary step of directing discontinuance of such violation by an order to that effect. If the savings and loan association refuses or neglects to comply with such order, the more drastic step of appointing a conservator will be in order. See subsection (b) of section 180-64, Revised Laws of Hawaii 1955. If such appointment is challenged by a suit for injunction, the association, as plaintiff in such suit, will have the burden of proof to show that the service charges are reasonable.

Very truly yours,

/s/ Andrew S. Ono

Andrew S. Ono
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi

Bert T. Kobayashi
Attorney General

Opinion No. 62-54

I N D E X

Op. 62-55

INSURANCE

State fleet insurance policy must comply with public bids, under the provisions of Chapter 9, RLH 1955

PUBLIC BIDS

As above

REVISED LAWS OF HAWAII 1955

Sec 9-21

Op. 62-55

ASKF:es
lb
Op. 62-55

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

December 27, 1962

Mr. Val Marciel, Comptroller
Department of Accounting and General Services
State Office Building
Honolulu, Hawaii

Dear Mr. Marciel:

This is in response to a letter of October 1, 1962, by your predecessor, Mr. Michael Miyake, inquiring whether the State's fleet insurance policy, which premiums amount to over $66,000 per annum, fall within the purview of section 9-21, Revised Laws of Hawaii 1955.

Section 9-21 provides inter alia: "No expenditure of public money, except . . . for other purposes which do not admit of competition . . . where the sum to be expended shall be $4,000 or more, shall be made, except under contract let after public advertisement for sealed tenders, in the manner provided by law. . . ."

Hawaii case laws follow the universal rule that the object of provisions of this type requiring advertising for tenders is to secure fair competition and prevent favoritism and extravagance. Whether the expenditure of public money is for a purpose which does or does not admit of competition is clearly a question of fact which must be determined from all facts and circumstances on the matter. At the last monthly meeting of the State's Risk Management Committee, where this request for an opinion first arose, it was the unanimous consensus of this committee, experts in the field of insurance and risk management, that fleet insurance does admit of competition, particularly between stock insurance companies and the mutual companies.

In Austin v. The Housing Authority of the City of Hartford, 122 Atl. 2d, 399, 403, the court held that the

contract of fire insurance to be purchased with public funds can only be made after compliance with the lowest bidder statute, since the opportunity to expend public money improvidently is as great in the purchase of fire insurance policy as in the purchase of any other personal property. See also Burt v. City of Cleveland, 62 N.E.2d. 274.

Accordingly, it is our opinion that under these facts and circumstances the State's fleet insurance policy must presently comply with the provisions of section 9-21 before any expenditure of public moneys be made.

Very truly yours,

/s/ Arthur S. K. Fong

ARTHUR S. K. FONG
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi

BERT T. KOBAYASHI
Attorney General

INDEXING INSTRUCTION

Op. No. 62-56

Public Employees, Termination of

The effective date of termination from employment would depend on the date in which the vacation allowance has been satisfied.

Compensation

Although legislature provided for two paydays a month for public employees, a "payroll period" means the end of the month.

Health Fund

A person will be considered an employee of the State and entitled to the fringe benefits under the Health Fund, until his vacation allowance has been satisfied.

Session Laws of Hawaii 1961

Act 130

Revised Laws of Hawaii 1955

Section 5-38

SSM:js
4a
Op. No. 62-56

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

December 27, 1962

Mr. Andrew T. F. Ing, Director
Department of Budget and Review
State of Hawaii
P. O. Box 150
Honolulu 10, Hawaii

Dear Mr Ing:

With reference to your letter of December 17, 1962, in which you had requested an opinion clarifying the interpretation of Rule No. 10 of the Hawaii Public Employees Health Fund Operating Manual, which states that "coverage with respect to an employee will terminate on the last day of the payroll period in which the employee terminates employment with a State or County agency. . . ."

It is the opinion of this office that the meaning of "payroll period," means the last day of the employee's employment, providing his vacation allowance has been satisfied. However, we must look to Section 5-38, Revised Laws of Hawaii 1955, Vacation Allowances on Termination of Employment, to determine the effective date of termination.

1. In the case where the employee terminates his services but continues to receive his pay in the normal manner until his accumulated annual leave is exhausted, such person will be considered an employee of the State and entitled to the fringe benefits under the Health Fund. This opinion is based on Section 5-38, R.L.H. 1955, which provides in part as follows:

> "An employee whose employment is voluntarily terminated without prejudice during any calendar year shall be entitled to all of his accumulated vacation allowance plus his current accrued vacation allowance to and including the date of termination, notwithstanding that such current accrued vacation allowance may not have been recorded at such time.

> An employee whose employment is involuntarily terminated otherwise than for cause due to his own misconduct shall be entitled to all of his accumulated vacation allowance and current accrued vacation allowance, and the date of such termination shall be fixed so as to permit him to take such leave. . . ." (Emphasis added)

2. In the case where the employee takes his accumulated annual leave in a lump sum payment, his effective termination date is as of the date he no longer renders actual service as an employee. The employee has exercised his option and has received his pay at an earlier time; therefore, he is no longer an employee of the State and not entitled to the fringe benefits of the Health Fund.

This conclusion is based upon the second paragraph of Section 5-38, R.L.H. 1955, which reads in part as follows:

> "Whenever an employee's service is to be terminated, voluntarily or involuntarily, such service, at the option of the department head or other appointing power concerned, may be terminated forthwith and such retiring employee may be paid forthwith, in lieu of his vacation allowance. . . and in such case his position may be declared vacant and may be permanently filled by a new appointee before the expiration of any vacation period following the date of such termination. . . ." (Emphasis added)

Therefore, the effective date of termination from employment would depend on the date in which the vacation allowance has been satisfied.

Sincerely yours,

/s/ Stanley S. Mah

Stanley S. Mah
Special Deputy Attorney General

cc Hawaii Employees
Health Fund

APPROVED:

/s/ Bert T. Kobayashi

Bert T. Kobayashi
Attorney General

Op. No. 62-56

Opinions of the Attorney General

1963

ASK:rt
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Op. No. 63-1

STATE OF HAWAII

Department of the Attorney General

HONOLULU

January 3, 1963

Dr. Laurence H. Snyder
President
University of Hawaii
Honolulu 14, Hawaii

Dear Dr. Snyder:

This is in response to your letter of December 18, 1962, informing us of the recent action taken by your Board of Regents in creating a subprofessional (SP) schedule for certain East-West Center positions.

Section 3-20, Revised Laws of Hawaii 1955, as amended, provides, inter alia, that

> "The civil service to which this part shall apply comprises all positions in the state service now existing or hereafter established and embraces all personal services performed for the State, except the following:"

An examination of the positions in the subprofessional schedule proposed by the Board of Regents would apparently not meet the exemptions thereafter provided. Accordingly, it is our opinion that such employees would be within and subject to the provisions of Chapters 3 and 4 of the Revised Laws of Hawaii 1955, as amended.

While this office is cognizant of the problems of recruitment raised by Dr. Spoehr, Chancellor of the East-West Center, these objectives cannot be met by the proposed plan under presently existing laws. These factors may be the basis upon which legislative amendments may be proposed. However, in the meantime, Chapters 3 and 4, Revised Laws of Hawaii 1955, pertaining to State employees, must be adhered to unless otherwise exempted by law.

Yours very truly,

/s/ Arthur S. K. Fong

Arthur S. K. Fong
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi

Bert T. Kobayashi
Attorney General

Opinion No. 63-1

RMM:es
lb
Op. 63-2

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

January 11, 1963

The Honorable Valentine Marciel, Comptroller
Department of Accounting and General Services
State of Hawaii
Honolulu, Hawaii

Dear Mr. Marciel:

This is in response to your letter of December 19, 1962, requesting our views on whether the University of Hawaii is subject to any legislative restrictions or executive control over funds for its expenditure. Sections 44-7 and 34-17, Revised Laws of Hawaii 1955, as amended, hereinafter quoted, are in issue.

"The proceedings, including the debates, of the convention which framed the constitution are valuable aids in ascertaining the meaning and purpose of a doubtful constitutional provision. . . ." 16 Corpus Juris Secundum, Constitutional Law, section 31.

In announcing the basic purpose for establishing the entity of the University of Hawaii, Committee of the Whole Report No. 10, Proceedings of the Constitutional Convention of Hawaii (hereinafter referred to as Proceedings), Volume I, provided that:

> "It is designed to put the University in a position to take advantage of low interest Federal funds available to land grant colleges, for the construction of dormitories, etc., and at the same time provide that 'the corporate body' shall hold and administer university property in accordance with law and in a manner consistent with its responsibility as a public institution." (Underscoring ours).

This express intent to impose certain limitations on the University is further supported in the Debates of the Committee of the Whole, Proceedings, Volume II, which report that:

> "I question very much the advisability of turning over the entire setup to the board of regents. In the past we've had a lot of difficulty. In fact, the board of regents have even ignored the legislature. . . . So I think that we've got to give more power to the legislature to hold these fellows down out there." (Page 612)

> "There is no desire to put them all out in compartments by themselves where no one can reach it at all." (Page 614)

> "I think that the language as has been suggested in the amendment puts the University in a better status but does not remove it from control; does permit it to have the power to borrow money, but it will be subject to legislative restraint." (Page 614)

> ". . . it was the intention in this language, the last four or five words, 'to be administered in accordance with law,' to establish definitely in this section that the university would be limited in what it could do with its lands by laws passed by the legislature." (Page 613)

> "Obviously, the university would have to comply with the disposal statute, and any property that it administered has to be administered in accordance with law. That means disposal in accordance with law. It couldn't go ahead and ignore the disposal statutes." (Page 615)

> "The title is in the university, but under the words, 'to be administered in accordance with law,' the legislature can amend this statute or pass another law saying that the university shall not dispose of personal property except in a certain way." (Page 615)

Refining this intent to impose restrictions specifically to funds of the University of Hawaii, we take full notice of Standing Committee Report No. 52, Proceedings, Volume I, which announced, in part, as follows:

> "The University Board of Regents presented to your Committee two further suggestions, both of which were given consideration. . . .
>
> "The University authority also presented to your Committee the problem of financial control. Data were presented which indicate that in all but two of the State Universities, the board of regents have unrestricted control over funds appropriated for university expenditure. In the present Territorial setup the Bureau of the Budget exercises certain controls over the Board of Regents. Your Committee felt that this problem is one faced by other departments of government as well as the University and that it should properly be referred by the University to the Committee on Taxation and Finance for consideration as to general fiscal policy, or be presented to the legislature for consideration and action.
>
> . . .
>
> "Disposition of Proposals
>
> . . .
>
> "No. 2. Higher Education-- incorporated in Committee Proposal Sections 4 and 5, except: . . . (b) '. . . exclusive control of all funds' was deleted, leaving this matter to the legislature." (Underscoring ours)

The power to formulate policy and to exercise control over the University, or the power of management, is vested in the Board of Regents. This power, however, must also be carried out "in accordance with law."

Therefore, we are constrained to presently consider the specific legislative enactments raised in your letter, i.e.,

sections 44-7 and 34-17, Revised Laws of Hawaii 1955, as amended.

Section 44-7, Revised Laws of Hawaii 1955, as amended, provides that:

> "Appropriations; accounts; reports. Moneys appropriated by the legislature for the university shall be payable by the director of the budget, upon vouchers approved by the board of regents or by any officer elected or appointed by the board of regents or by any officer elected or appointed by the board under section 44-3 and authorized by the board to approve such vouchers on behalf of the board. All moneys received by or in behalf of the board or the university shall be deposited with the director of the budget, except that any moneys received from the federal government or from private contributions shall be deposited and accounted for in accordance with conditions established by the agencies or persons from whom the moneys are received. Income from fees for tuition and similar charges against students and income derived from sale of goods or services, shall be deposited to the credit of the general fund of the state; provided, that income from university projects, as defined and described in sections 44-60 to 44-72, may be credited to special or other funds, and provided further that the comptroller may require such separate accounts or special funds for designated revenues as he deems in the best interest of the State."

A thorough understanding of said section 44-7 requires a review of Act 320, Session Laws of Hawaii 1957; Act 265, Session Laws of Hawaii 1959; and Act 184, Session Laws of Hawaii 1961.

With stated exceptions, Act 320, supra, placed all special funds under legislative and executive budgetary control in the same manner as the general fund, to be governed by the provisions of Chapter 35, Revised Laws of Hawaii 1955. Standing Committee Report No. 815, House Journal 1957, announced that:

> "During the course of the review of the operating budget, there were occasions on which the matter of the review of the special funds was brought up. It did not appear to be reasonable for the Committee to merely consider the general fund appropriations since at times the special funds appropriations would comprise a great part of the operating revenues of the department. In view of those considerations, it is felt that this is a bill which could make the necessary study of these various special funds and to determine the feasibility of transferring these various special funds to the general fund of the Territory."

Subsequently, Act 265, supra, eliminated some of the then existing special funds, not including those of the University. Standing Committee Report No. 494, Senate Journal 1959, provides that:

> "Your Committee is of the opinion, however, that all of the special funds which were not abolished should continue to be subject to budgetary control as provided in Act 320, Session Laws of Hawaii 1957."

Finally, Act 184, supra, of which section 44-7 was a part, eliminated the special funds of the University and credited the revenues to the general fund thereafter. Standing Committee Report No. 536, House Journal 1961, states as follows:

> "<u>The purpose of this bill is to simplify the fund structure of the State government by the elimination of special funds thereby providing greater budgetary control and legislative review</u>.
>
> "Act 265, Session Laws of Hawaii 1959, made a start in the elimination of special funds. That Act and this bill will greatly aid in the control of programs financed in part from special funds since it will provide the legislature with an opportunity to review the scope of the program at the time that it is evaluating the necessity of making appropriations.

. . .

"The special funds that are eliminated by this bill are as follows: . . .
(3) University of Hawaii funds. . . ."
(Underscoring ours)

In addition to said section 44-7, we point out Act 158, Session Laws of Hawaii 1961, and section 12-6, Revised Laws of Hawaii 1955, as amended. These provisions provide that:

Act 158:

"SECTION 1. The State of Hawaii hereby accepts and assents to the terms and provisions of paragraph 14(e) of the Act of Congress, approved July 12, 1960, entitled: 'TO AMEND CERTAIN LAWS OF THE UNITED STATES IN LIGHT OF THE ADMISSION OF THE STATE OF HAWAII INTO THE UNION, AND FOR OTHER PURPOSES' (Public Law 86-624), and hereby consents to receive the benefits thereof in the manner and form and for the purpose in said act intended and provided.

"SECTION 2. Until otherwise provided by law, the University of Hawaii, established by Article IX, Section 4 of the Constitution of the State of Hawaii, shall be the beneficiary of the income from the funds in said act mentioned, and shall use and disburse the income from the funds only for the purposes and in the manner provided in said act. In addition, the income shall be subject to the provisions of Chapter 35, Revised Laws of Hawaii 1955, as amended.

"SECTION 3. The director of the budget is hereby authorized to receive and shall be the custodian of the funds. He shall invest the funds in the manner provided by said act and pay to the University of Hawaii the income earned by the funds."

Section 12-6:

"Treasury as depository; duties of comptroller. All federal-aid moneys received by

the State, except as otherwise provided for by the federal government, shall be deposited with the treasurer of the State, and shall be disbursed upon warrants drawn by the comptroller of the State supported by vouchers approved by the board, commission, department or officer having charge of the expenditure of such moneys by virtue of the plan, agreement or arrangement entered into or made with the proper federal agency.

"The comptroller may prescribe and maintain such system of accounts and accounting as may be required by the federal government, or any agency thereof, in carrying out the objects and purposes of the plan, agreement or arrangement."

Finally, section 34-17, Revised Laws of Hawaii 1955, as amended, provides as follows:

"Accounting systems and internal control; enforcing the use of and inspection of the same. The accounting system installed by the commission on public accountancy under the provisions of Act 181, Session Laws of Hawaii 1923, as amended by Act 220, Session Laws of Hawaii 1925, for use in the offices of the comptroller, treasurer, departmental and agency services of the State and the auditors, treasurers, departmental and agency services of the several counties shall be the accounting and reporting systems of the State and counties.

"The comptroller shall enforce the use of such accounting and internal control systems, make such investigations and audits from time to time as may be necessary and make such changes and modifications in such systems as shall from time to time appear to be in the best interest of the State and counties.

"The departmental and agency services of the State are respectively charged with the responsibility to maintain an adequate system

of internal control and with the further responsibility to see that the internal control system continues to function effectively as designed."

In view of the foregoing considerations, we are of the opinion that the University is subject to legislative and executive control over funds for its expenditures. While University special funds were abolished by Act 184, Session Laws of Hawaii 1961, any such funds thereafter created are to be subject to budgetary control and legislative review pursuant to the general provisions of Act 320, Session Laws of Hawaii 1957 (see § 35-14.5, R.L.H. 1955). Therefore, all of its funds (general, special or otherwise), regardless of source, are subject to the above restrictions. The comptroller may, however, in his discretion, if found necessary, separate any amount to prevent intermingling of funds.

Finally, subject to the qualifications hereinabove stated, the accounting system to be adopted and utilized therefor is that prescribed in section 34-17, Revised Laws of Hawaii 1955, as amended. The ministerial responsibility of implementing the law by adopting and maintaining the appropriate systems of internal control is placed upon the departments and agencies of the government. However, the enforcement of the use of such systems, adoption of changes in such systems, and investigations and audits as may be necessary are to be accomplished by the comptroller, or under his supervision. Therefore, the University of Hawaii must adopt and utilize the accounting systems prescribed by law, and all necessary investigations and audits of all accounts shall be conducted by your office or under its supervision. The University of Hawaii may not, without your authorization, retain private auditors to conduct audits of any of its funds.

Very truly yours,

/s/ ROY M. MIYAMOTO

ROY M. MIYAMOTO
Deputy Attorney General

APPROVED:

/s/ BERT T. KOBAYASHI

BERT T. KOBAYASHI
Attorney General

ASKF:ft
17b
Op. No. 63-3

STATE OF HAWAII

Department of the Attorney General

HONOLULU

January 11, 1963

Mr. Jack E. Conley
Director
Public Utilities Commission
State of Hawaii
Honolulu, Hawaii

Dear Mr. Conley:

This is in response to your request of December 12, 1962, seeking our opinion on whether common carriers of property engaged in contract work with the Federal Government or its agencies may transport property at rates lower than published in its tariff.

Section 106C-18, Revised Laws of Hawaii 1955, as amended, provides in part as follows:

> "(c) All charges made for any service rendered by any common carrier by motor vehicle in the transportation of passengers or property or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle to make, give, or cause any undue or unreasonable preference or advantage to any particular person, locality, region, district, island or description of traffic, in any respect whatsoever; or to subject any particular person, locality, region, district, island, or description of traffic to any unjust discrimination or undue or unreasonable prejudice or disadvantage in any respect whatsoever; provided, however, that this subsection shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description. (Emphasis supplied.)

Section 106C-19(b) provides, inter alia, that:

"No common carrier by motor vehicle shall charge or demand or collect or receive a greater or less

or different compensation for transportation or for any service in connection therewith between the points enumerated in such tariff than the rates, fares, and charges specified in the tariffs in effect at the time; . . ."

It is clear from the above provisions of law[1] that a common carrier of property may not charge more than the prescribed reasonable and just rate in its tariff. There is presently no statutory provision providing any exception to either the United States Government or any of its departments, bureaus, or agencies or any state, territory or political subdivisions thereof. The credit exemption provisions of section 106C-26, Revised Laws of Hawaii 1955, as amended, follows similar legislation found in the Interstate Commerce Commission Act, 49 U.S.C.A. 323, providing that carriers may extend credit to the United States, its subdivisions or states or territories or their political subdivisions thereof.

Aside from this credit proviso, however, the Hawaii Motor Carrier Act not only does not permit preferential treatment but expressly also does prohibit unjust discrimination or undue preference or prejudice. Accordingly, we can but conclude that the present provisions of the Hawaii Motor Carrier Act do not permit preferences or advantages given to any party, including the United States, in the setting of rates.

In Hughes Transp. v. United States, 121 F.Supp. 212, the court on page 234 also quoted from St. Louis B. & M. Ry. v. United States, 268 U.S. 169, and held:

> "It would seem unthinkable, in our opinion, that the federal government which is responsible for the enactment and enforcement of such regulatory statutes as the Interstate Commerce Act and the Motor Carrier Act, among others, and which endorses and encourages similar regulatory acts on the part of the states in the exercise of the states' police powers in the same field, should not be bound by the same statutory limitations on its rights of contract as other shippers and users when it acts by contract in its nonsovereign capacity, as it did here, as a shipper in intrastate commerce."

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[1] See also § 106C-28, R.L.H. 1955.

Therefore, please be advised that common carriers of property may not transport property at lower than rates established in their tariffs, even in their contracts with the Federal government.

Yours very truly,

/s/ Arthur S. K. Fong

Arthur S. K. Fong
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi

Bert T. Kobayashi
Attorney General

ASKF:ft
4b
Op. No. 63-4

STATE OF HAWAII

Department of the Attorney General

HONOLULU

January 16, 1963

Mr. Harold C. Hill
Secretary
Employees' Retirement System
State of Hawaii
Honolulu, Hawaii

Dear Mr. Hill:

This is in response to your letter of December 11, 1962, requesting our opinion on the requisite vote for decision by your Board of Trustees.

The law governing votes required by the Board of Trustees of the Retirement System, comprised of seven members, is set forth in sections 6-65, 6-66, and 7-26, Revised Laws of Hawaii 1955. Section 6-65 provides, inter alia, that:

> "Each trustee shall be entitled to one vote in the board. Four votes shall be necessary for a decision by the trustees at any meeting of the board."

Section 6-66 provides in part that:

> "The board shall elect from its membership a chairman and shall by a majority vote of all its members appoint a secretary, . . ." (Emphasis added.)

Section 7-26 provides, inter alia, that:

> "[A] majority of all the members to which [such] board or commission is entitled shall constitute a quorum to do business, and the concurrence of a majority of all the members to which [such] board or commission is entitled shall be necessary to make any action of [such] board or commission valid . . ."

It is clear that from the above cited provisions of law that a decision by the Board of Trustees of the Retirement System requires an affirmative vote of not less than four to make any action legal.

Yours very truly,

/s/ Arthur S. K. Fong

ARTHUR S. K. FONG
Deputy Attorney General

APPROVED:

/s/ H. Rodger Betts

H. RODGER BETTS
Acting Attorney General

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

KKS:hmm
6a
OP. NO. 5

Honolulu

January 17, 1963

Mr. R. Burl Yarberry
Supt. of Public Instruction
Department of Education
State of Hawaii
P. O. Box 2360
Honolulu 4, Hawaii

Dear Mr. Yarberry:

You have asked for an opinion from the office of the Attorney General on the following question:

> WHETHER A PROBATIONARY TEACHER DISCHARGED FOR ANY OF THE CAUSES ENUMERATED BY LAW IS ENTITLED TO THE SAME RIGHTS AND PRIVILEGES AS A TEACHER RE-EMPLOYED AFTER SERVING THE REQUIRED PROBATIONARY PERIOD.

Section 38-5, Revised Laws of Hawaii 1955, as amended,1/ provides for the discharge or demotion of a probationary teacher.

1/ Section 38-5, R.L.H. 1955, was amended by deleting it in its entirety and substituting therefor sections 38-5 to 38-5.4 of Act 28, S.L.H. 1959. Section 38-5, Act 28, S.L.H. 1959, was in turn amended by Act 16, S.L.H. 1961, which reads, in part, as follows:

> " . . . The department of education may, during such probationary period, discharge or demote a teacher for any of the causes specified in section 38-5.2 . . . "

Section 38-5.2, Act 28, Session Laws of Hawaii 1959,[2] specifies the causes referred to by section 38-5.

Section 38-5.3, Act 28, S.L.H. 1959,[3] prescribes the manner in which any contract may be terminated and reserves certain rights to teachers.

We can find no applicable law which negatives the necessity of a hearing.

The general rule followed by the courts is expressed thusly at 78 C.J.S. 1093:

> "In accordance with statutory provisions, the notice and hearing required for the dismissal of tenure teachers are not necessary for the dismissal of probationary or nontenure teachers. Where the statute permits the dismissal of probationary or nontenure teachers without cause, such a teacher is not entitled to a hearing, but where the statute provides that a probationary teacher may be dismissed only for cause a hearing is necessary." (underscoring ours)

2/ Section 38-5.2, Act 28, S.L.H. 1959, reads, in its applicable parts, as follows:

> "Causes for discharge or demotion; preferred eligibility list. Causes for the discharge or demotion of a teacher either during or after the probationary period shall be gross inefficiency or immorality; willful and persistent violations of reasonable regulations of the department of public instruction; or for other good and just cause . . . "

3/ Section 38-5.3, Act 28, S.L.H. 1959, provides, among other things, for a written notice of intention to consider demotion or termination of any contract, the contents of the notice, rights of a teacher so notified, the procedures to be followed by the department after such notice is served, the character and conduct of a hearing, subpoenas, oaths, decision, effect of a decision, finality of findings and decisions, and appeal rights.

Since a probationary teacher, by statute, may only be discharged or removed for certain causes, and the law does not expressly negative the necessity of a hearing, the clear implication, based upon common fairness and justice, is that an opportunity for a full hearing to accomplish the discharge or removal must be afforded. Keenan v. San Francisco Unified School Dist., 34 Cal. 2d 708, 214 P.2d 382.

Please be advised that we answer the question in the affirmative.

Very truly yours,

/s/ Kenneth K. Saruwatari

KENNETH K. SARUWATARI
Deputy Attorney General

APPROVED:

/s/ H. Rodger Betts

H. RODGER BETTS
Acting Attorney General

SSM:es
16c
Op. 63-6

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

January 25, 1963

Dr. Fujio Matsuda, Director
Department of Transportation
State of Hawaii
Honolulu, Hawaii

Dear Dr. Matsuda:

This is in response to your letter No. 2.14991, dated January 3, 1963, requesting our opinion whether 33% of the bid amount used for local labor, taxes, overhead, and other expenditures qualifies this manufacturer for a claim of preference under section 9-41, Revised Laws of Hawaii 1955. This section, as amended by Act 118, Session Laws of Hawaii 1959, reads as follows:

> "Where any bid is made to furnish materials, supplies, goods, wares, merchandise, or produce, manufactured or produced in the State, such bid shall be deemed the lowest bid for the award of such contract, if such bid is less than five per centum higher than the lowest bid to furnish like material, supplies, goods, wares, merchandise, or produce, which has not been manufactured or produced in the State.
>
> "All advertisement for bids shall give notice of the preference provided by this section and all contracts and specifications shall contain the statement that the bidder shall designate whether the products are produced or manufactured in the State if he desires to claim the preference allowed by this section.
>
> "This section shall supersede any other provision of sections 9-37 to 9-44 in any case in which it may apply." (Act 118 added the second paragraph.)

It is the opinion of this office that Honolulu Sign Co. is a local manufacturer of signs under section 9-41. The amount of labor which is put into a product is not the controlling factor in defining a manufacturer.

Webster's New International Dictionary, Second Edition, defines the transitive verb, manufacture, as: "1. to make (wares or other products) by hand, by machinery, or by other agency; as, to manufacture cloth, nails, glass, etc.; to produce by labor, especially, now, according to an organized plan and with division of labor, and usually with machinery. 2. To work, as raw or partly wrought materials, into suitable forms for use; as, to manufacture wood, iron, etc. 3. To fabricate; to invent; also, to produce mechanically."

In the enactment of section 9-41, the legislature did not intend to create any limitation on the amount of labor which had to be put into a product. Therefore, the ordinary meaning of manufacturer will be presumed to have been intended.

In Commonwealth v. Peerless Paper Specialty, Inc., 25 A.2d 323, 324 (Pa. 1942), which defined "manufacturing" thus:

> "In discussing the meaning of the word 'manufacturing', this Court said, in the early case of Norris Brothers v. Commonwealth, 27 Pa. 494, 496: 'It is making. To make in the mechanical sense does not signify to create out of nothing; for that surpasses all human power. It does not often mean the production of a new article out of materials entirely raw. It generally consists in giving new shapes, new qualities, or new combinations to matter which has already gone through some other artificial process.' In elaborating upon this definition, it was said in Commonwealth v. Weiland Packing Co., 292 Pa. 447, 450, 141 A. 148, 149: '. . . the process of manufacture brings about the production of some new article by the application of skill and labor to the original substance or material out of which such new product emerges.' We said in Commonwealth v. McCrady-Rodgers Co., 316 Pa. 155, 158, 174 A. 395, 396, in which an exemption was sustained for appellee on the ground that it was engaged in manufacturing, '. . . a thing is a "manufactured article" when the product is a new and different article with

> a distinct name, character, and use, . . . "manufacturing" is the application of labor or skill to materials whereby the original articles are changed to a new, different and useful article. . . .' The basic principle is that a new product is made out of existing materials."

In the present case, the application of skill and labor to the materials going into the making of a traffic safety sign included the following: the aluminum plates are purchased in various sizes. The corrosive-resistant plate is cleaned to assure proper adhesion. Special reflective sheeting used for traffic signs are cut to size. Then the cleaned aluminum plate is placed in a vacuum machine under heat with the cut reflective sheeting. After the sign has been placed in the machine the proper length of time, it is taken out and is ready for lettering. The lettering process is either done by making a stencil or silk screen. The stencil or silk screen method assures of uniform lettering required by Federal regulation where Federal funds have aided in the construction of roads. After the sign has been painted, it is then sprayed with a clear plastic paint for protection against the weather elements.

The finished product is a permanent traffic sign. It can not be used for any other purpose. Thus, a new product is made out of existing materials which in combinations are changed into an article with a distinct character and use.

Having observed the operations of Honolulu Sign Co. in the making of signs and applying the test of Peerless Paper Specialty case, supra, it is clear that the company is a manufacturer of the traffic signs as required by the contract. Therefore, preference should be given to Honolulu Sign Co. under section 9-41, Revised Laws of Hawaii 1955, as amended, as a local manufacturer.

Very truly yours,

/s/ STANLEY S. MAH
STANLEY S. MAH
Deputy Attorney General

APPROVED:

/s/ BERT T. KOBAYASHI
BERT T. KOBAYASHI
Attorney General

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

RYT:hmm
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OP. NO. 63-7

Honolulu

January 25, 1963

Mr. R. Burl Yarberry
Supt. of Public Instruction
Department of Education
State of Hawaii
Honolulu, Hawaii

Dear Mr. Yarberry:

Your letter dated January 3, 1963, requests an opinion from this office on the question of whether the present regulations relating to sabbatical leaves can be modified to grant such leaves according to the following formula:

Group	Years of Service	Percentage of Leaves
1	7-13	20
2	14-20	20
3	21-27	20
4	28-34	20
5	35-over	20

The formula further provides that unexpended allotments within one group may be used by another group.

Relative to this inquiry, Section 38-20, Revised Laws of Hawaii 1955 (1961 Supplement), provides in part:

> " . . . In granting such leave, teachers with the longest period of service shall be given first consideration . . . "

We are of the opinion that the proposed change is not within the purview of the statute stated hereinabove.

The plan fails to consider length of service fully. It arbitrarily prevents a teacher with high seniority from being considered for sabbatical leave if all the groups have reached their maximum allotments. The result is that teachers

with low seniority would be given "first consideration" over teachers with high seniority.

The language of the statute is unequivocal: " . . . teachers with the longest period of service shall be given first consideration . . . " The presumption is that when the word "shall" is used in a statute, it is mandatory. Swift v. Smith, 201 P.2d 609, 119 Colo. 126 (1948); State v. Meeker, 105 N.E. 906, 182 Ind. 240 (1914). Manifestly, the plan must consider length of service as a prime factor in granting sabbatical leave. (See Opinion 60-52, dated May 31, 1960, Attorney General's Office.)

Accordingly, we are of the opinion that the proposed modification to the present regulation is not within statutory bounds.

Very truly yours,

/s/ Roy Y. Takeyama

ROY Y. TAKEYAMA
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi

BERT T. KOBAYASHI
Attorney General

ASKF:ru
17b

Op. 63-8

DEPARTMENT OF THE ATTORNEY GENERAL

STATE OF HAWAII

HONOLULU, HAWAII

February 14, 1963

Mr. Jack E. Conley, Director
Public Utilities Commission
State of Hawaii
313 So. Beretania Street
Honolulu, Hawaii

Dear Mr. Conley:

This is to advise you that our opinion of January 11, 1963 (Op. 63-3), holding that common carriers of property engaged in contract work with the Federal Government may not transport property at lower than published rates in its tariff, must now be overruled in view of the United States Supreme Court's holding on January 14, 1963 in United States v. Georgia Public Service Commission (31 LW 4121).

The United States Supreme Court in the Georgia Public Service Commission case, supra, indicated that the Federal Property and Administrative Services Act of 1949 (63 Stat. 383, 40 U.S.C. 481 and 63 Stat. 393, as amended, 41 U.S.C. 251, etc.) authorized the Administrator to seek preferential treatment before State agencies for Federal shipments. The Court further indicated that because of the clear Congressional policy therein enunciated, State policy in opposition thereto must, by reason of the Supremacy Clause, give way.

Accordingly, you are advised that our earlier opinion of January 11, 1963 (Op. 63-3) is hereby overruled and that pursuant to the Federal Property and Administrative Services Act of 1949, as amended, and the United States Supreme Court's ruling in the Georgia Public Service Commission case, supra, the Federal Government, either through competitive bidding or negotiation with common or contract carriers, may obtain rates other than those established tariffs filed with the Public Utilities Commission.

Very truly yours,

/s/ Arthur S. K. Fong
Arthur S. K. Fong
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi
Bert T. Kobayashi
Attorney General

ASOL:ft
2a
Op. No. 63-9

STATE OF HAWAII

Department of the Attorney General

HONOLULU

February 18, 1963

The Honorable Gordon P. Chung-Hoon
Director, Department of Agriculture
State of Hawaii
Honolulu, Hawaii

Dear Sir:

Subject: Naalehu Watershed Project and the Power of the County of Hawaii in Connection Therewith

In your letter of February 7, 1963, you asked the Department of the Attorney General as to whether or not the County of Hawaii has the power to engage in a proposal entitled "Watershed Work Plan, Naalehu Watershed, Island of Hawaii," and, particularly, to construct a channel and a system of ditches as part of the project. In connection therewith, our attention was called to section 144-33(i), Revised Laws of Hawaii 1955, as amended, which reads:

> "§ 144-33. Powers of the board of supervisors. The board of supervisors of each county shall have general supervision and control of all the public affairs of the county and the supervision of all subordinate officers, and, without prejudice to the generality of the foregoing powers, shall, except as otherwise provided, have the following specific powers:
>
> * * * * *
>
> "(i) Drainage of storm waters and removal of debris. To maintain channels, whether natural or artificial, including their exits to the ocean, in suitable condition to carry off storm waters; and to remove from such channels, and from the shores and beaches, any debris which is likely to create an unsanitary condition or to otherwise become a public nuisance; provided, that to the extent any of the foregoing work is a private responsibility such responsibility may be enforced by the county in lieu of the work being done at public expense;".

There was a question raised as to whether or not the above-quoted section restricts the power of the County of Hawaii to the maintenance of channels diverting storm waters; hence,

would prevent the County of Hawaii from engaging in the construction of a channel and system of ditches in connection with the soil conservation and watershed protection program contemplated in Naalehu, Island of Hawaii.

Upon review of the Naalehu watershed project, it appears that the project is basically for the conservation of watershed and the prevention of soil erosion, and, incidental thereto, the channeling and diversion of runoff waters from the watershed area to prevent soil erosion and flooding. The program contemplates extensive land treatment measures which call for the conversion from up and down hill plots to cross slope farming with practices of conservation cropping system, contour farming, crop residue use, critical area planting (which includes grassed field roads), strip cropping (with new harvest roads proposed), diversions and outlets as supporting protecting measures. Much of this program will be carried out in cooperation with the Hutchinson Sugar Company, a private corporation. The success of these land treatment measures will be dependent on the construction of improvements to divert runoff waters by a main channel and a system of diversion ditches. A good resume of the entire project is given on page 8 of the proposal.

Clearly, such a project comes within the intent of Chapter 28 of the Revised Laws of Hawaii 1955, as amended, entitled "Soil and Water Conservation Districts."

Section 28-2 defines "district" and "soil and water conservation district" to mean a "governmental subdivision of this State, and a public body corporate and politic," and defines "director" to mean a "member of the governing body of a district."

Section 28-16 empowers the districts and directors:

> '(b) to provide for and encourage demonstrations relative to the control and prevention of erosion and the conservation of soil and water resources, and carry out preventive and control measures, on publicly owned lands within the district with the consent of the agency having jurisdiction thereof, and on other lands with the consent of the occupier of the lands;
>
> * * * * *
>
> (d) to acquire property, real or personal, or rights or interest therein; . . ."

"(e) to construct, improve, and maintain any structures necessary for carrying out the purposes of this chapter;

"(f) to develop plans for the conservation of soil and water resources and the control and prevention of erosion within the district, . . ."

Under the above sections, the Kau Soil and Water Conservation District has the power to engage in all of the activities contemplated in the Naalehu project, including the power to construct improvements. The program as above contemplated includes the participation of the Hutchinson Sugar Company, and such participation is fully authorized under the above subsection (b). There can be no objection to the County's participation in the program for the reason that section 28-17 provides that agencies of the State government or other governmental subdivisions of the State, meaning the various counties, including the Hawaii County, which have jurisdiction over publicly owned lands within any soil and water conservation district, may cooperate with such district in the effectuation of programs and operations of such districts. The Kau Soil and Water Conservation District includes the Naalehu watershed and both are within the jurisdiction of the County of Hawaii. The cooperative agreement, which contemplates the construction of improvements by Hawaii County, clearly comes within the purview of the above section 28-17 wherein the County of Hawaii may be engaged to do the construction of improvements to effectuate the Kau Soil and Water Conservation District program at Naalehu.

Very truly yours,

/s/ Andrew S. O. Lee

Andrew S. O. Lee
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi

Bert T. Kobayashi
Attorney General

RBG:ru
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Op. 63-10

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU, HAWAII

February 26, 1963

The Honorable Howard Y. Miyake
Majority Leader
House of Representatives
Second Legislature of the
State of Hawaii
Iolani Palace Grounds
Honolulu, Hawaii

Dear Sir:

This is in reply to your inquiry by letter dated February 14, 1963 as to whether a pari-mutuel gambling bill, specifically for a single county (with or without a referendum provision) would violate Article VII, section 1 of the State Constitution which provides:

> "Each political subdivision shall have and exercise such powers as shall be conferred under general laws."*

We answer your question in the affirmative.

In Attorney General's opinion No. 62-11, dated March 15, 1962, it was stated that a special or local law, as contrasted with "general laws" prescribed by the State Constitution, is one which relates to a particular person or thing, or to particular persons or things of a class, or which operates on or over a portion of a class instead of all the class. Thus, it has been held that a law which relates to particular places rather than the whole territory or a state is a special law. (See generally, 82 C.J.S. Statutes §§ 152-168 (1953).)

The issue presented in that opinion was to determine the legislative means by which the number of fire stations for the County of Kauai could be gradually reduced. The opinion advised that a statute applicable to all counties, rather than one applicable only to Kauai, was necessary to accomplish this purpose.

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* The remaining questions posed in the same letter are the subject of a separate opinion (Op. No. 63-11).

In Attorney General's opinion No. 61-36, dated March 17, 1961, a question was presented concerning the legislative power to enact a law creating a Board of Water Supply only for the County of Maui. Reference was made to section 1, Article VII, of our Constitution, above quoted.

That opinion, construing said section 1, Article VII and considering the intent of the framers of our Constitution, together with the above-mentioned definitions, advised that a bill to create a Board of Water Supply only for the County of Maui was unconstitutional.

In view of the foregoing, it is the opinion of this office that a pari-mutuel gambling bill for a specific county only would be unconstitutional. The presence or absence of a referendum provision would not affect our conclusion on this point.

Very truly yours,

/s/ Ronald B. Greig

Ronald B. Greig
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi

Bert T. Kobayashi
Attorney General

RMM:ft
22a
Op. No. 63-11

STATE OF HAWAII

Department of the Attorney General

HONOLULU

February 26, 1963

The Honorable Howard Y. Miyake
Majority Leader
House of Representatives
Second Legislature of the
State of Hawaii
Iolani Palace Grounds
Honolulu, Hawaii

Dear Sir:

This is in response to your letter of February 14, 1963, requesting our opinion on the following questions:

> "1. Can a pari-mutuel gambling legislative bill contain a referendum provision when the Constitution of the State of Hawaii does not provide for a referendum?
>
> "(a) Will such a referendum provision amount to an unauthorized delegation of legislative powers of the State legislature?
>
> "(b) However, is there any objection to the taking by the legislature of an opinion poll, or 'advisory referendum' (plebiscite), as differentiated from a Constitutional or Statutory referendum?"[1]

At the outset, a distinction should be made between (1) reference of a bill to the electorate to vote on whether or not the bill shall become law, which procedure is hereinafter referred to as "referendum," and (2) a local option law, an act which is complete in itself, but provides that it shall not apply in any county unless the people of the county vote in favor thereof.

In the first, the people must vote on a measure before it can become law; in the second, there is a valid and complete law on the books but the application of that law to any county is subject to the vote thereon by the people of the county.

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[1] The remaining question on special legislation, posed in the same letter, is the subject of a separate opinion (Op. No. 63-10).

Please be advised that the first (referendum) is not permissible under the State Constitution; the second (local option law) is permissible, provided, such an option is conferred under a general law. Please be further advised that we see no constitutional prohibition against the taking of an opinion poll or "advisory referendum," provided, again, that the power of taking such a poll is conferred under a general law.

Article III, section 1 of the State Constitution, provides, in part, that:

> "The legislative power of the State shall be vested in a legislature, which shall consist of two houses, a senate and a house of representatives."

In People ex rel. Thompson v. Barnett, 344 Ill. 62, 176 N.E. 108, 76 A.L.R. 1044 (1931), the court interpreted a similar provision of the Illinois Constitution:

> "Thus all the legislative power inherent in the people of the state of Illinois has been vested in the General Assembly, except in those cases in which the power has by express limitation or necessary implication been withheld. Since it alone has the power, the General Assembly has also the duty, and upon it alone rests the full responsibility, of legislation. This power it may not delegate to any other officers or persons or groups of persons, or even to the whole body of the people, or to a majority of the voters of the state voting at a general election or at a special election. The Constitution has made no general provision for a referendum of any act of the General Assembly to a vote of the people of the whole state to determine whether or not that act shall become a law. . . ." (Underscoring ours.)

In this regard, 11 Am. Jur. Constitutional Law § 214 states:

> "The legislature may not escape its duties and responsibilities by delegating such legislative powers to the people at large. Thus, a state legislature may not delegate its power by a referendum to a majority of the voters of the state voting at an election, except where the Constitution permits such reference. . . ." (Underscoring ours.)

Accord: Annot., 76 A.L.R. 1053; 1 Sutherland, Statutory Construction (3d ed.) § 306; Barto v. Himrod, 8 N.Y. 483, 59 Am. Dec. 506 (1863).

Our Constitution makes no provision for a referendum to determine whether or not a proposed statute shall become law. The omission was deliberate and made with the intent that that right was not being reserved to the people. This is indicated in Standing Committee Report No. 47, which noted:

> "In addition, it is believed that the referendum, whether compulsory or optional,[2] tends to further weaken the legislature and to encourage it to 'pass the buck' and thereby avoid the responsibility to make laws and decisions for which it is elected. A strong, responsible and responsive legislature can best be assured by giving it full and sole responsibility and holding its members thereto.
>
> . . . . .
>
> "Accordingly, the majority of your Committee recommends against the inclusion in the constitution of any provision for the statutory referendum, believing, as it does, that the only effective remedy for legislative short-comings lies in improving the legislature and the other departments of government so as to make them more efficient and more responsive." (Underscoring ours.) 1 Proceedings of the Constitutional Convention of Hawaii 185.

This recommendation of the Committee on Revision, Amendments, Initiative, Referendum and Recall with respect to statutory referenda was thereafter adopted by the Convention. 2 Proceedings of the Constitutional Convention of Hawaii 779.

In view of the foregoing considerations, we are of the opinion that the Constitution vests in the legislature alone the power to enact statutes and that an attempt to surrender that power by referendum to the people would violate the Constitution.

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[2] By "compulsory" referendum the Committee was referring to referendum mandated by a constitutional provision for certain types of measures; by "optional" referendum it was referring to a referendum not so mandated, but placed on the ballot at the option of the legislature or of the people by petition. 1 Proceedings of the Constitutional Convention of Hawaii 185.

Therefore, a pari-mutuel bill may not legally contain a referendum provision which would leave to the determination of the people of the whole state whether or not the statute should become effective as law.

It is to be noted that the subject prohibition relates to referral of a proposed law to the people to determine whether or not the proposal shall become law. Such prohibition does not extend to local option laws, according to the overwhelming weight of authority. Currin v. Wallace, 306 U.S. 1; People ex rel. Thompson v. Barnett, supra; Annot., 79 L.Ed. 562 (1934); 1 Sutherland, Statutory Construction (3d ed.) § 308; 30 Am. Jur. Intoxicating Liquor § 83.[3]

A local option law is a statute which has been enacted by the legislature, whose operation or application in a political subdivision of the state is contingent upon a vote by the voters in such political subdivision. See Sutherland, ibid.

The Illinois constitutional provision discussed by the court in People ex rel. Thompson v. Barnett, supra, which invalidated a referendum to make a law, distinguished between such referenda and referrals under local option laws:

> "Delegation of power to make the law is forbidden as necessarily involving discretion as to what the law shall be, but there can be no valid objection to a law which confers an authority or discretion as to its execution, to be exercised under and in pursuance of the law itself. 'The true distinction . . . is this: The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend.'" (Underscoring ours.) 176 N.E. at 113.

Moreover the Proceedings of the Constitutional Convention do not indicate that the Convention intended to prohibit local option laws. On the contrary, it appears that the delegates in discussing "referendum" had in mind, and defined it as, "a device to permit the people to accept or reject a statute or constitutional amendment proposed either by the legislative body or by

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[3] It has been stated that a local option law that is of general applicability does not violate a constitutional prohibition against special legislation. 1 Sutherland, ibid.

the people." (Underscoring ours.) 1 Proceedings of the Constitutional Convention of Hawaii 185.

The underscored language indicates that the delegates were concerned with referral to the people of proposed legislation that would not become law without a favorable vote by the people, and were not concerned with local option laws.

In view of the foregoing, we are of the opinion that local option laws do not involve the making of laws by persons other than the legislature and thus would not entail an invalid delegation of legislative authority. Therefore, we are of the opinion that a pari-mutuel bill, complete in itself, with provision for local option to determine whether or not the general law should operate in the locality would not violate the Constitution.

With respect to the legality of advisory referenda, Standing Committee Report No. 47 of the Constitutional Convention noted:

> "In this connection, unless the constitution otherwise expressly provides, there is nothing to prevent the legislature, if it so desires, from providing for the taking of an opinion poll, or advisory referendum, as was done with respect to Statehood sentiment in this Territory in 1940 under our Organic Act, which contains no specific provision for such advisory referendum. This is mentioned here, because of a suggestion made by a member of your Committee that we adopt an advisory referendum system. We consider this unnecessary for the reason just stated." 1 Proceedings of the Constitutional Convention of Hawaii 185.

The "advisory referendum" would have no legal effect if the ultimate determination of policy and the enactment of a statute would be the sole responsibility of the legislature. As such, the doctrine of nondelegability of legislative powers would not be violated.

Very truly yours,

/s/ Roy M. Miyamoto

Roy M. Miyamoto
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi

Bert T. Kobayashi
Attorney General

Opinion No. 63-11

WDG:hbl
22a
Op. 63-12

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

MARCH 5, 1963

The Honorable Nelson K. Doi
President of the Senate
Second Legislature, State of Hawaii
General Session of 1963
Iolani Palace
Honolulu, Hawaii

Dear Mr. President:

You have requested the opinion of this office directed to the Senate "as to whether the Senate of the State of Hawaii as assembled, or through any of its standing committees, has the power and authority (1) to subpoena persons, documents, etc., in the execution of its legislative functions, and, further, (2) to administer oaths to any witness in order to receive any testimony under oath, together with powers to compel and enforce the same as well as to penalize disobedience or refusal to comply."

Section 2-1, Revised Laws of Hawaii 1955, grants the power to the legislature, under circumstances as stated in this section, to take testimony of witnesses or other evidence as follows:

> "Section 2-1. Power to take testimony. The President or Speaker or other presiding officer of either House of the Legislature, and the chairman or acting chairman of any joint committee established by a joint or concurrent resolution of the two Houses of the Legislature, or of a committee of the whole, or of any committee of either House of the Legislature, when such committee has been authorized by the House or Houses, as the case may be, to take testimony or other evidence, may issue subpoenas requiring the attendance of witnesses or the production of books, documents or other evidence, in any matter pending before the House, or committee, as the case may be."

The power to administer oaths to witnesses before the legislature is granted in Section 2-5, Revised Laws of Hawaii 1955, as follows:

> "Section 2-5. Oaths to witnesses. The President of the Senate, the Speaker of the House of Representatives, or a chairman (or acting chairman) of any joint committee established by a joint or concurrent resolution of the two Houses of the Legislature, or of a committee of the whole, or of any committee of either House of the Legislature of the State, may administer oaths to witnesses in any case under their examination. Any member of either House of the Legislature may administer oaths to witnesses in any matter depending in the House, or any committee of such House, of which he is a member."

It will be noted that Section 2-1 authorizes and empowers:

> (a) The President of the Senate, acting on behalf of the Senate of the State of Hawaii, to issue subpoenas requiring the attendance of witnesses or the production of books, documents or other evidence, in any matter pending before the Senate;
>
> (b) The Chairman or acting Chairman of any Joint Committee, established by a concurrent (or joint) resolution of the two Houses of the Legislature, to issue subpoenas in any matter pending before the particular committee;
>
> (c) The Chairman or acting Chairman of a Committee of the Whole of the Senate to issue subpoenas in any matter pending before such Committee;
>
> (d) The Chairman or acting Chairman of any committee of the Senate to issue subpoenas when such committee has been authorized by the Senate to take testimony or other evidence in a matter pending before such committee.

Part I entitled Legislative Hearings and Procedure contained in Chapter 2 of the Revised Laws of Hawaii 1955, also contains the following:

> Section 2-2 which provides for the form of process to be issued by the Legislature. Section 2-3 which provides for service of process. Section 2-4 which provides for reimbursement of certain actual expenses to the servicing officers and witnesses.
>
> Section 2-5 gives broad authority to any member of the Senate to administer oaths to witnesses in any matter before the Senate or to any member of any committee of the Senate of which such Senator is a member, when such committee has been authorized by the Senate to take testimony.
>
> Section 2-6 provides that "No witness is privileged to refuse to testify to any fact or to produce any paper, respecting which he shall be examined by the Senate or by any joint committee established by a joint or concurrent resolution of the two Houses of the Legislature, or by any committee of either House, upon the ground that his testimony to such fact or his production of any such paper may tend to disgrace him or otherwise render him infamous."
>
> Section 2-7 provides penalties for the wilful default of any witness who has been subpoenaed to testify before the Legislature or for the perjured testimony of a witness. Section 2-8 provides for the prosecution of witnesses failing to testify or produce records.
>
> Section 2-9 authorizes the Sergeant-at-arms of each House of the Legislature and each of his Deputies to service all processes issued by the authority of the Legislature. Section 2-10 provides that the Sergeant-at-arms shall have an official badge.

Section 2-11 provides for holdover committees and extends certain powers of Legislature to such committees. This section provides that "This part shall apply, not only to proceedings during a session of the Legislature, or of the Senate when the Senate alone is called into session, but also, as far as may be, to proceedings before a holdover committee of either or both of the Houses of the Legislature when the Legislature is not in session."

Section 2-12 directs all officers and employees of the State and of each county to "cooperate with any such holdover committee or committees or with their representatives and to furnish such committees or their representatives with such information as may be called for in connection with the research activities of such committees."

The sections of the law hereinabove referred to have been in effect without amendment since 1949. There is nothing in the Constitution of the State of Hawaii or in the Statehood Enabling Act restricting the powers of the Legislature as spelled out in Part I, Chapter 2, Revised Laws of Hawaii 1955.

It is hoped that the above adequately answers the questions presented.

Respectfully submitted,

/s/ Wilford D. Godbold

WILFORD D. GODBOLD
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi

BERT T. KOBAYASHI
Attorney General

RMM:us
22a
Op. No 63-13

STATE OF HAWAII

Department of the Attorney General

HONOLULU

March 8, 1963

The Honorable S. George Fukuoka
Senator, Third District
State of Hawaii
Iolani Palace
Honolulu, Hawaii

Dear Sir:

This is in response to your letter of February 27, 1963 requesting our opinion on the following question:

> "Whether a constitutional amendment would be required to permit the election of the governor and lieutenant governor of the State of Hawaii of the same political party by one ballot, or whether this can be accomplished by statutory provision as provided in S. B. 33 and 127."

We are of the opinion that a constitutional amendment would be necessary.

The constitutional provisions dealing with the election of the governor and the lieutenant governor are as follows:

> "The governor shall be elected by the qualified voters of this state at a general election. <u>The person receiving the highest number of votes shall be the governor</u>. In case of a tie vote, the selection of the governor shall be determined in accordance with law." Article IV, section 1, par. 2 (Underscoring ours.)

> "There shall be a lieutenant governor, who shall have the same qualifications as the governor. He shall be elected at the same time, for the same term, and in the same manner, as the governor. He shall perform such duties as may be prescribed by law." Article IV, section 2.

As stated in 11 Am. Jur., Constitutional Law, section 64, the general rule is that:

> "...a constitutional provision which is positive and free from all ambiguity must be accepted by the courts as it reads... Language which is plain and easily understood should be looked to without extrinsic aid for the meaning intended."

Although the above-quoted portions of sections 1 and 2, Article IV, of our Constitution clearly provide for the election of the governor and lieutenant governor and that the lieutenant governor shall be elected in the same manner as the governor, the language of these constitutional provisions does not indicate in clear and unambiguous terms whether a single ballot can be used in electing both officers.

Therefore it is necessary to construe these provisions. In construing ambiguous provisions, the intent of the framers should be sought, and wherever possible, be given effect in ascertaining their true meaning. 11 Am Jur., id., section 61 In that connection, the rule is well established that:

> "The proceedings, including the debates, of the convention which framed the constitution are valuable aids in ascertaining the meaning and purpose of a doubtful constitutional provision,..." 16 Corpus Juris Secundum, Constitutional Law, Section 31.
>
> Accord: 11 Am. Jur., id., Section 84.

The Committee on Executive Powers and Functions proposed the subject provisions in the form that they now appear in the Constitution. Committee Proposal No. 22, 1 Proceedings of the Constitutional Convention 221.

Immediately after the adoption thereof, the following amendment to Article IV was proposed in the Committee of the Whole:

> "Section 2A. The governor and the lieutenant governor, representing the same political party, shall be voted for together upon the same ballot." 2 Proceedings of the Constitutional Convention of Hawaii 283. The

proposed amendment was defeated. Ibid.

In the course of the debates on the proposed amendment the opponents thereof made it abundantly clear that they were in favor of having separate balloting for governor and lieutenant governor. Id. 278--282. Typical is the statement of Delegate Charles A. Rice:

> I'd like to speak against the amendment. It doesn't matter whether the lieutenant governor and governor belong to the same party ... If the lieutenant governor is a strong man, he'll have his own ideas, and I believe that the man should be voted for by the people. I was the one that put in there, in the Committee, that he should be elected, and I think as it reads in here in our proposal is right. Id., 282.

It appears from the foregoing that the subject provision in Proposal No. 22 from the Committee on Executive Powers and Functions, which was adopted by the Convention, was intended to provide for separate balloting for the governor and lieutenant governor, and we accordingly so construe that provision. Under the circumstances, we believe that a constitutional amendment would be necessary to authorize a single vote for governor and lieutenant governor.

Very truly yours,

(s) Roy M. Miyamoto

ROY M. MIYAMOTO
Deputy Attorney General

APPROVED:

(s) Bert T. Kobayashi

Bert T. Kobayashi
Attorney General

WDG:es
22a
Op. 63-14

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

March 12, 1963

The Honorable John C. Lanham
Representative, 9th District
Second Legislature, State of Hawaii
Honolulu, Hawaii

Dear Representative Lanham:

You have requested the opinion of this department as to the legality of House Bill No. 362.

The referred-to bill, in the form as attached to your letter, proposes to amend Section 5-96 of the Revised Laws of Hawaii 1955 relative to "Personal history statement." This section is presently worded as follows:

> "5-96. Personal history statement. The department of personnel services shall prescribe a form of personal history statement to be executed by every registrant. Such statement may call for such information as the department of personnel services shall prescribe. Whenever the department of personnel services deems it necessary or advisable, the form and content of the personal history statement may be revised. Each such form of personal history statement shall be approved by the governor before its use shall be authorized and required. Blank copies of the form of personal history statement shall be printed and distributed free of charge to all departments, commissions, boards, agencies, officers and employees having need for the same, the cost of such printing and distribution to be borne by the department of personnel services."

Section 5-97, Revised Laws of Hawaii 1955, provides in part:

> "Execution of statement. Every public officer and public employee required by Part V to take, subscribe and file a loyalty oath or affirmation shall execute and subscribe under oath or affirmation the form of personal history statement prescribed by the department of personnel services."

House Bill No. 362 would amend Section 5-96, Revised Laws of Hawaii 1955, by deleting the period (.) following the word "prescribe" in the second sentence thereof and inserting a comma (,) therefor and the following words and punctuations thereafter:

> "provided that such statement shall not require the registrant to answer any questions of the registrant's personal history beyond eight years with respect to or in connection with any matters relating to communist, facist [fascist] or any subversive activity or association of any kind whatsoever."

A somewhat similar question was before the Supreme Court of the United States in the case of Shelton v. Tucker, 364 U.S. 479. In the Shelton v. Tucker case, decided by the U.S. Supreme Court on December 12, 1960, an Arkansas statute required every teacher, as a condition of employment in a state-supported school or college, to file annually an affidavit listing, without limitation, every organization to which he or she belonged or regularly contributed to within the preceding five years. Teachers in the state-supported schools and colleges in Arkansas are not covered by a civil service system, they are hired on a year-to-year basis, and have no job security beyond the end of each school year. The contracts of the teachers involved in the Shelton case were not renewed because they refused to file the required personal history statements. These teachers appealed to the courts and finally the matter was appealed to the Supreme Court of the United States.

The U.S. Supreme Court held the Arkansas statute invalid, because it deprived teachers of their right of associational freedom protected by the Due Process Clause of the Fourteenth Amendment of the United States Constitution from

invasion by state action. The Supreme Court further held that: (1) there can be no doubt of the right of a state to investigate the competence and fitness of those whom it hires to teach at schools; (2) to compel a teacher to disclose his every associational tie is to impair his right of free association, a right closely allied to the freedom of speech and a right which, like free speech, lies at the foundation of a free society; and (3) the unlimited and indiscriminate sweep of the statute involved and its comprehensive interference with associational freedom go far beyond what might be justified in the exercise of the state's legitimate inquiry into the fitness and competence of its teachers.

It is of interest to note that the Shelton v. Tucker decision was a split one; the majority opinion was written by Mr. Justice Stewart, and dissenting opinions by Mr. Justice Frankfurter and Mr. Justice Harlan, in which dissenting opinions Justices Clark and Whittaker concurred. As pointed out in both the majority opinion and the dissenting opinions, the question was not as to whether a state could investigate into the competence and fitness of those whom it employs. Mr. Justice Stewart, in his majority opinion, stated:

> ". . . there can be no doubt of the right of a State to investigate the competence and fitness of those whom it hires to teach in its schools, as this Court before now has had occasion to recognize."

The controlling inquiry is whether such action by the state is justifiable on the basis of a superior governmental interest to which such individual rights must yield. There appears to be no doubt that the government may inquire into matters relative to the proposed employee's fitness for public employment.

In the present personal history statement form, which is required to be filled out by all prospective officers and employees of the State of Hawaii, the requirement that the prospective employee list all the organizations or associations of which he was a member during the past ten years has now been deleted. However, the form for personal history statement does require the answers to the following questions:

> "1. Are you now or have you ever been a member of the Communist Party of the United States of America, or the Communist Party of any other country or a member of the Communist Political Association?

"2. Have you ever attended any meeting of a cell, fraction, school, or other unit of either the Communist Party of the United States of America or the Communist Political Association, knowing it to be such?

"3. Are you now or have you ever been a member of any fascist organization or association?

"4. Have you ever been removed from employment or refused employment by the United States of America or any State, territory, county or municipality for reasons of alleged disloyalty to any government?

"5. Are you now or have you ever been employed by a foreign government?

"6. Have you ever been convicted of treason, sedition, criminal syndicalism or any other offense involving disloyalty to the United States of America?"

Please be advised that, in the opinion of this department, the amendments proposed by House Bill No. 362 to Section 5-96, Revised Laws of Hawaii 1955, as amended, are within the legislative discretion of your Honorable Body and would, so far as such amendments are concerned, be constitutional and within the purview of the opinion of the Supreme Court of the United States in the case of Shelton v. Tucker.

For your information, I attach a copy of Attorney General's Opinion No. 61-30 rendered to the Director of Personnel Services on February 27, 1961.

Respectfully,

/s/ WILFORD D. GODBOLD
WILFORD D. GODBOLD
Deputy Attorney General

APPROVED:

/s/ BERT T. KOBAYASHI
BERT T. KOBAYASHI
Attorney General

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Op. 61-30

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STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

February 27, 1961

Mr. Arthur A. Akina
Director of Personnel Services
825 Mililani Street
Honolulu 13, Hawaii

Dear Mr. Akina:

This is in reply to your request for an opinion regarding the applicability of a recent United States Supreme Court decision, Shelton v. Tucker, decided December 12, 1960, to the personal history statement required of applicants for public employment in Hawaii.

Section 5-97, Revised Laws of Hawaii 1955, provides for the execution of such statement. It reads, in part:

> "Every public officer and public employee required by Part V to take, subscribe and file a loyalty oath or affirmation shall execute and subscribe under oath or affirmation the form of personal history statement prescribed by the (loyalty) board."

On the personal history statement is a request for the following information:

> "I have been (or am) a member, during the past ten years, of the following organizations or associations:"

Thereunder, space is given for the listing of dates of membership and the names and addresses of the associations.

With respect to the filling out of this statement, this office has advised, by Op. 59-108, dated August 18, 1959:

> ". . . execution of that (personal history) statement means the furnishing of all requested information and the answering of all questions. If this is not done, then the public officer or employee who fails to comply

with this requirement should not be allowed to continue in public employment and should not be paid."

In the event it is determined that an applicant is disloyal, he may be disqualified from public employment. (Art. XIV, Constitution of the State of Hawaii; Sec. 5-4 and Parts IV and V of Ch. 5, Revised Laws of Hawaii 1955.)

The case referred to above, Shelton v. Tucker, involved the discharge of two public school teachers for failure to comply with Act 10 of an Arkansas statute. Act 10 compelled every teacher, as a condition of employment in a public school, to file annually an affidavit listing without limitation every organization to which he has belonged or regularly contributed within the preceding five years. The act further voids any contract entered into with a person who has not filed the prescribed affidavit. The validity of the statute was questioned under the Fourteenth Amendment to the Constitution. The Arkansas Supreme Court upheld the statute in both cases. On appeal, the United States Supreme Court reversed. In support of its decision, the Court stated:

"The question to be decided here is not whether the State of Arkansas can ask certain of its teachers about all their organizational relationships. It is not whether the State can ask all of its teachers about certain of their associational ties. It is not whether teachers can be asked how many organizations they belong to, or how much time they spend in organizational activity. The question is whether the State can ask every one of its teachers to disclose every single organization with which he has been associated over a five-year period. The scope of the inquiry required by Act 10 is completely unlimited. The statute requires a teacher to reveal the church to which he belongs, or to which he has given financial support. It requires him to disclose his political party, and every political organization to which he may have contributed over a five-year period. It requires him to list, without number, every conceivable kind of associational tie -- social, professional, political, avocational, or religious. Many such relationships could have no possible bearing upon the teacher's occupational competence or fitness.

"In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means

that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." (Emphasis added.)

In concluding that the Arkansas statute was unconstitutional, the Supreme Court reiterated:

> "The unlimited and indiscriminate sweep of the statute now before us brings it within the ban of our prior cases. The statute's comprehensive interference with associational freedom goes far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers. The judgments in both cases must be reversed."

Other than the fact that the request is for membership during the past ten years, the question posed in Hawaii's personal history statement is similar to the one required of applicants in Arkansas. As pointed out by the United States Supreme Court, the evil of such a question is that its unlimited and indiscriminate scope infringes upon fundamental personal liberties.

Accordingly, in view of the case of Shelton v. Tucker, we recommend either the deletion of the subject question from Hawaii's personal history statement or an amendment thereof which limits the scope of the inquiry.

Very truly yours,

/s/ Lawrence H. Kam

LAWRENCE H. KAM
Deputy Attorney General

APPROVED:

/s/ Shiro Kashiwa

SHIRO KASHIWA
Attorney General

cc: The Honorable William F. Quinn
Governor of Hawaii

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Op. No. 63-15

STATE OF HAWAII

Department of the Attorney General

HONOLULU

March 18, 1963

Mr. Harold C. Hill
Secretary
Employees' Retirement System
of the State of Hawaii
Honolulu, Hawaii

Dear Mr. Hill:

This is in reply to your letter of March 5, 1963, requesting the opinion of this office with respect to retirement system benefits for judges and elected officials under Act 20, Session Laws of Hawaii 1962. The question posed is whether the act permits a judge or elected official to retire upon completion of his term of office regardless of the age of the individual at that time, with the full benefits described in the act.

It is the opinion of this office that the answer to the question posed is in the negative. Act 20, Session Laws of Hawaii 1962, relates to preferential rates of computation and not to exempting officials from the requirement concerning eligibility for retirement before age 60, as set forth in section 6-41, Revised Laws of Hawaii 1955, as amended (1961 Supplement).

Section 2, Act 20, Session Laws of Hawaii 1962, states in part:

"Sec. 6- . Allowance of judges and elective officers. The service retirement

> allowance or disability retirement allowance of a member who has had ten years of service credit, including service as a judge or an elective officer . . . shall be computed on the following basis . . ."

The section thereafter provides a preferential rate in computing the retirement allowance.

The provisions relating to age for retirement and adjustment for early retirement are set forth in section 6-41. That section refers to "any member", a general term which includes judges and elected officers. Accordingly we believe that the eligibility requirements set forth therein apply to and govern the eligibility for retirement of all members, including judges and elected officials. Act 20 is complementary to and not in conflict with section 6-41. Act 20 contains no provisions on the requisite age for retirement or adjustment for early retirement. The Act is confined to the method of computation of the service retirement allowance, providing a preferential basis for certain judges and elected officers.

Furthermore, the original context of the provisions relating to the judges and elected officers indicate that these officials were subject to the age eligibility and adjustment for early retirement provisions of section 6-41.

The judges' allowance on service retirement was originally placed in section 6-42, relating to the allowance for all members. Act 181, Session Laws of Hawaii 1961. The allowance for all members, including special groups such as firemen, policemen, judges and elected officers, was expressly made subject to the provisions on age eligibility and adjustment for early retirement contained in section 6-41.

> "Sec. 6-42. Allowance on service retirement. Except as otherwise provided in section 6-41, upon retirement for service a member shall receive a service retirement allowance as follows." (Underscoring added.)

Act 20 subsequently removed judges and elected officials from section 6-42 and enacted a new section; however, legislative history indicates that the only purpose of the enactment was to correct an oversight not relevant to the present question.

In reviewing section 2, Act 20, Session Laws of Hawaii 1962, above quoted in part, and the similar language of the earlier Act 181, Session Laws of Hawaii 1961, it may appear that after 10 years of service credit a judge or elected officer may be eligible to retire at the preferred rate without any reduction for early retirement. However, the legislative committee reports indicate that the 10 years of service credits relate to qualification for the preferential rates of computation and not to age of eligibility for retirement or adjustment for early retirement. Stand. Com. Rep. No. 628, Senate, General Session 1961.

Based upon the foregoing consideration, it is the opinion of this office that judges are subject to the provisions of section 6-41, Revised Laws of Hawaii 1955, as amended (1961 Supplement), relating to age of retirement and adjustments for early retirement.

Yours truly,

/s/ Vernon F. L. Char

Vernon F. L. Char
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi

Bert T. Kobayashi
Attorney General

Opinion No. 63-15

WDG:us
22a
Op. 63-16

STATE OF HAWAII

Department of the Attorney General

HONOLULU

March 20, 1963

The Honorable Manuel S. Henriques
Representative, Eighteenth District
Chairman, Committee on Hawaiian Homes
Iolani Palace
Honolulu, Hawaii

Dear Sir:

On March 19, 1963 you requested the opinion of this office as to whether the Department of Hawaiian Home Lands comes under The Administrative Procedures Act of 1961 (Act 103, Session Laws of Hawaii 1961).

Section 4 of the Statehood Enabling Act (Public Law 86-3, 86th Congress) relating to Hawaiian home lands provides as follows:

> "Sec. 4. As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the Constitution of said State, as provided in section 7, subsection (b) of this Act, subject to amendment or repeal only with the consent of the United States, and in no other manner: Provided, That (1) sections 202, 213, 219, 220, 222, 224, and 225 and other provisions relating to administration, and paragraph (2) of section 204, sections 206 and 212, and other provisions relating to the powers and duties of officers other than those charged with the administration of said Act, may be amended in the constitution, or in the manner required for State legislation, but the Hawaiian home-loan fund, the Hawaiian home-operating fund, and the Hawaiian home-development fund shall not be reduced or impaired by any such amendment, whether made in the constitution or in the manner required for State

> legislation, and the encumbrances authorized to be placed on Hawaiian home lands by officers other than those charged with the administration of said Act, shall not be increased, except with the consent of the United States; (2) that any amendment to increase the benefits to lessees of Hawaiian home lands may be made in the constitution, or in the manner required for State legislation, but the qualifications of lessees shall not be changed except with the consent of the United States; and (3) that all proceeds and income from the 'available lands', as defined by said Act, shall be used only in carrying out the provisions of said Act." (Underscoring added).

Article XI, Constitution of the State of Hawaii, provides:

> "Section 1. Anything in this constitution to the contrary notwithstanding, the Hawaiian Homes Commission Act, 1920, enacted by the Congress, as the same has been or may be amended prior to the admission of the State, is hereby adopted as a law of the State, subject to amendment or repeal by the legislature, provided, that, if and to the extent that the United States shall so require, said law shall be subject to amendment or repeal only with the consent of the United States and in no other manner, provided, further, that, if the United States shall have been provided or shall provide that particular provisions or types of provisions of said Act may be amended in the manner required for ordinary state legislation, such provisions or types of provisions may be so amended. The proceeds and income from Hawaiian home lands shall be used only in accordance with the terms of said Act, and the legislature may, from time to time, make additional sums available for the purposes of said Act by appropriating the same in the manner provided by law.
>
> "Section 2. The State and its people do hereby accept, as a compact with the United States, or as conditions or trust provisions imposed by the United States, relating to the management and disposition of the Hawaiian home lands, the requirement that Section 1

> hereof be included in this constitution, in whole or in part, it being intended that the Act or Acts of the Congress pertaining thereto shall be definitive of the extent and nature of such compact, conditions or trust provisions, as the case may be. The State and its people do further agree and declare that the spirit of the Hawaiian Homes Commission Act looking to the continuance of the Hawaiian homes projects for the further rehabilitation of the Hawaiian race shall be faithfully carried out." (Underscoring added).

Act 103, Session Laws of Hawaii 1961, The Administrative Procedures Act, defines the word "agency", for the purpose of the Act, to mean:

> ". . . each state or county board, commission, department, or officer authorized by law to make rules or to adjudicate contested cases, except those in the legislative or judicial branches."

The Department of Hawaiian Home Lands is one of the several departments of the State government, although originally created by Federal legislation, and comes within the meaning of the word "agency" as hereinabove defined and would therefore, in the opinion of this department, come within the purview of The Administrative Procedures Act of 1961. This result would apply to State legislation only so long as such legislation and the rules adopted pursuant thereto are not within the types of provisions requiring the "consent of the United States".

Respectfully,

/s/ Wilford D. Godbold

WILFORD D. GODBOLD
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi

BERT T. KOBAYASHI
Attorney General

WDG:us
22a
Op. No. 63-17

STATE OF HAWAII

Department of the Attorney General

HONOLULU

March 21, 1963

The Honorable Kazuhisa Abe
Vice President of the Senate and
Chairman of the Hawaii Select Committee
Second Legislature, State of Hawaii
General Session, 1963
Iolani Palace
Honolulu, Hawaii

Dear Sir:

You have requested the opinion of this office as to whether Act 123, Session Laws of Hawaii 1949, prevents the closing of the Kalapana School.

The Act in question is entitled "An Act Providing for the Reopening of the Kalapana School for the First Three Grades." Section 1 of the Act is as follows:

> "Section 1. The commissioners and superintendents of public instruction are hereby authorized and directed to reopen as soon as possible the school at Kalapana, district of Puna, county of Hawaii, for the teaching of grades one, two, and three, within the limits of existing and future appropriations." (Underscoring added).

Please be advised that in the opinion of this department Kalapana School can only be operated within the limits of existing appropriations. In the absence of such appropriations the school must be closed.

If there are existing appropriations for the school, a legislative act either repealing Act 123, Session Laws of Hawaii 1949, or in the alternative directing the Department of Education to close the school would appear to be necessary,

if such is the present legislative intent, in view of the mandatory language used in Act 123.

Respectfully,

/s/ Wilford D. Godbold

WILFORD D. GODBOLD

APPROVED:

/s/ Bert T. Kobayashi

BERT T. KOBAYASHI
Attorney General

BTK:es
14b
Op. 63-18

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

March 21, 1963

Mr. Alonzo V. Sullivan
Executive Director
Hawaii Housing Authority
1002 N. School Street
Honolulu, Hawaii

Dear Mr. Sullivan:

This is in reply to your inquiry as to whether the Hawaii Housing Authority is subject to the provisions of the Administrative Procedure Act [Act 103, S.L.H. 1961, codified in chapter 6C, R.L.H. 1955, as amended (1961 Suppl.)].

We answer your questions in the affirmative, subject to the qualifications indicated below.

The Act requires "agencies" of the State and counties to meet certain procedural requirements in their exercise of certain rule-making and adjudicatory powers.

"Agency" is defined as "each state or county board, commission, department, or officer authorized by law to make rules or to adjudicate contested cases, except those in the legislative or judicial branches." (Section 6C-1(a), R.L.H. 1955, as amended.)

The Hawaii Housing Authority consists of six commissioners appointed by the governor, plus the director of social services, ex officio. It is part of the department of social services. There is no question that it is a State commission. However, under the definition, only those public boards, commissions, departments or officers authorized "to make rules or to adjudicate contested cases" are covered by the Act.

"Rule" is defined as "each agency statement of general or particular applicability and future effect that implements,

interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term does not include regulations concerning only the internal management of an agency and not affecting private rights of or procedures available to the public, nor does the term include declaratory rulings issued pursuant to section 6C-8, nor intra-agency memoranda." (Sec. 6C-1(d)).

"Contested case" is defined as "a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing." (Sec. 6C-1(e)).

The Authority is empowered to make rules and regulations. (Sec. 74-10). If such rules and regulations are of the type within the above-quoted definition of the term "rule," then the Authority must comply with the procedures prescribed in the Administrative Procedure Act governing rule-making.[1/]

If the Authority conducts any proceeding in which the legal rights, duties or privileges of specific parties are required by law to be determined after an opportunity for agency hearing, it must do so pursuant to the procedures prescribed in the Act therefor.[2/]

You stated that the second sentence in section 74-15, Revised Laws of Hawaii 1955, appears to make the Administrative Procedure Act inapplicable to the Authority. That sentence states:

> ". . . No provisions with respect to the acquisition, operation or disposition of property by other public bodies shall be applicable to the authority unless the legislature shall specifically so state."

That provision relates to the acquisition, operation or disposition of property, and we do not think that it has any bearing on the matter in question.

1/ These include such requirements as public notice, hearing and adoption of the rules and filing thereof.

2/ These include such requirements as notice, hearing, decisions and orders.

Your letter of inquiry, addressed to the prior administration, came to our attention only recently. We apologize for the delay in replying to your inquiry.

Very truly yours,

/s/ BERTRAM T. KANBARA

BERTRAM T. KANBARA
Deputy Attorney General

APPROVED:

/s/ BERT T. KOBAYASHI

BERT T. KOBAYASHI
Attorney General

WDG:es
22a
Op. 63-19

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

March 25, 1963

Honorable Manuel S. Henriques
Chairman, Hawaiian Homes Committee
Second Legislature, State of Hawaii
Honolulu, Hawaii

Dear Mr. Henriques:

You have requested the opinion of this department as to whether tenants of public property are exempt from paying real property tax under section 128-22, Revised Laws of Hawaii 1955, as amended. It is assumed, for the purpose of this opinion, that by "public property" is meant "real property belonging to the State of Hawaii or any county thereof."

Section 128-22, Revised Laws of Hawaii 1955, as amended, provides, inter alia, that real property belonging to the State of Hawaii or any county thereof shall be taxed on the fee simple value thereof, and private persons shall pay the taxes thereon and shall be deemed "the owners" thereof, for the purposes of this section, in the following circumstances:

> "(1) Such property held on January 1 of any tax year under an agreement for its conveyance by the government to private persons shall be deemed fully taxable, the same as if such conveyance had been made;
>
> "(2) Such property held on January 1 of any tax year under a government lease shall be entered in the assessment lists and tax rolls for that year as fully taxable for the entire year, but adjustments of the taxes so assessed may be made as provided in section 128-36, so that such tenants are required to pay only so much of the taxes as is proportionate to the portion of the tax year during which such real property is held or controlled by them;

"(3) Such property held under a government lease commencing after January 1 of any tax year, or under an agreement for its conveyance or a conveyance by the government, made after January 1 of any tax year, shall be assessed as omitted property as provided in section 128-34, but the taxes thereon shall be prorated so as to require the payment of only so much of the taxes as is proportionate to the remainder of the tax year.

"For the purposes of paragraphs (2) and (3) of this subsection: "Lease" means any lease for a term of one year or more, or which is renewable for such period as to constitute a total term of one year or more. A lease having a stated term shall, if it otherwise comes within the meaning of the term "lease," be deemed a lease notwithstanding any right of revocation, cancellation or termination reserved therein or provided for thereby. In any case of occupancy of a building or structure by two or more tenants, or by the government and a tenant, the tenancy shall not be deemed a lease, irrespective of the term thereof. Whenever a lease is such that the highest and best use cannot be made of the property by the lessee, the measure of the tax imposed on such property pursuant to paragraphs (2) and (3) shall be its fee simple value upon consideration of the highest and best use which can be made of the property by the lessee."

You are therefore respectfully advised that, under the circumstances as above stated, tenants of real property belonging to the State of Hawaii or any county thereof are not exempt from paying real property taxes.

Of course, an entirely different situation exists where the real property involved belongs to the United States.

Respectfully,

/s/ WILFORD D. GODBOLD
WILFORD D. GODBOLD
Deputy Attorney General

APPROVED:

/s/ BERT T. KOBAYASHI
BERT T. KOBAYASHI
Attorney General

Opinion No. 63-19

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

CIA:hmm

OP. 63-20

Honolulu, Hawaii

April 1, 1963

The Honorable John G. Duarte
Chairman, Committee on
Government Efficiency
House of Representatives
Second Legislature
State of Hawaii
Honolulu, Hawaii

Dear Sir:

Your letter of March 18, 1963, requests an opinion concerning the constitutionality of certain provisions of House Bills 124, 125, and 150. House Bills 124 and 125 provide that the Department of Personnel Services shall be responsible for the administration of the provisions relating to vacation and sick leave and the provisions relating to hours of work and overtime compensation, respectively. House Bill 124 and 150 in essence authorize the Director of Personnel Services to promulgate rules and regulations, subject to approval by the Governor, with respect to vacations and sick leaves of State officers and employees. House Bill 125 authorizes the Director of Personnel Services to promulgate rules and regulations, subject to approval by the Governor, with respect to hours of work and overtime compensation of State officers and employees.

The letter from the administrative director of the Judiciary Department, Elmer E. Poston, which you referred to this office, questions the constitutionality of the above-mentioned bills on the ground that in so far as such rules and regulations authorized by the bills may affect personnel in the judicial branch, the bills violate the principle of separation of powers, which vests in the judiciary branch the judicial power of the State. He relies upon Article V, Section 5, State Constitution, and Section 213-2, Revised Laws of Hawaii 1955.

We are of the opinion that the subject bills do not violate the State Constitution or any statute.*

The Constitution of the State of Hawaii provides for three independent branches of government. Articles III (executive), IV (legislative), V (judicial). Article V, Section 1, provides:

> "The judicial power of the State shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish. The several courts shall have original and appellate jurisdiction as provided by law."

Article V, Section 5, provides:

> "The chief justice of the supreme court shall be the administrative head of the courts. He may assign judges from one circuit court to another for temporary service. With the approval of the supreme court he shall appoint an administrative director to serve at his pleasure."

The courts have long recognized that the primary purpose of the separation of powers doctrine is "to prevent the combination in the hands of a single person or group of the basic or fundamental powers of government." Parker v. Riley, 113 P.2d 873, 877 (1941). See also State v. Cunningham, 101 P. 962, 963 (1909). (Each of the three coordinate branches of government "may act as a check upon the other, and thus may be prevented the tyranny and oppression which would be the inevitable result of a lodgment of all power in the hands of one body.") Although the broad outline of the doctrine of separation of powers may be clear, the application of the doctrine becomes difficult in the interstitial areas where the boundaries of one branch of government may overlap into the boundaries of the other. The legal question that the administrative director of the Judiciary Department presents lies in these overlapping areas.

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*Section 213-2, Revised Laws of Hawaii 1955, relates to the independence of the judiciary with respect to the exercise of judicial functions. The discussion herein relative to the applicable constitutional provisions is also referable to Section 213-2.

It is appropriate to note that the doctrine of separation of powers does not require "the rigid classification of all the incidental activities of government." Parker v. Riley, supra, at 877. Neither does the doctrine mean "that the three departments of government are not in many respects mutually dependent"; furthermore, "of necessity the judicial department as well as the executive must in most matters yield to the power of statutory enactments." Brydonjack v. State Bar of California, 281 P. 1018, 1020 (1929). In 11 Am.Jur., Constitutional Law, § 206 at 909, the Brydonjack case is cited as authority for the following statement:

> "The fact that courts have all the inherent and implied powers necessary to function properly and effectively does not mean that they are wholly independent of the legislature, which may put reasonable restrictions upon constitutional functions of the courts, provided that such restrictions do not defeat or materially impair the exercise of those functions."

In the Brydonjack case, the power to admit a person to practice law in the State was held to be an inherent power of the court. But the court did recognize that the legislature could impose reasonable restrictions in the effectuation of this power.

From the discussion above, it becomes appropriate to determine next whether matters pertaining to hours of work, vacation, and sick leave of officers and employees of the Judiciary Department are matters that necessarily fall within the administrative purview of the Chief Justice of the Supreme Court. Hours of work, vacation, and sick leave are personnel matters that do not necessarily invade the province of judicial power. In this respect they are distinguishable, for example, from the power to appoint or to remove certain officers whose duties are closely connected with the judicial function of the court. In Lachapelle v. United Shoe Machinery Corp., 61 N.E.2d 8 (1945), the court held that the power to appoint or to remove certain officers whose duties are closely connected with the judicial work of the court resided in the court because the power was intimately connected with and necessary or auxiliary to the exercise of the judicial power. It would seem that the power to appoint and to remove such officers must reside in the court in order to preserve the independence of the judiciary. See State v. Noble, 21 N.E. 244 (1889) and State v. Cunningham, 101 P. 962 (1909). On the other hand, the regulation of hours

of work, vacation, and sick leave can have general uniformity of application to employees in the three branches of government without subverting the fundamental power of each branch of government. Such regulations would not invade the judicial power. Therefore, legislation pertaining to hours of work, vacation, and sick leave should not materially impair the exercise of the judicial power.

On the contrary, employees of the judiciary branch are employees of the government, no less than are employees in other branches of the State government, and the desirability of uniform standards as to hours of work, overtime compensation, and vacation and sick leave, applicable to all public employees, is obvious. In this connection, we believe that the Legislature may legitimately delegate to the personnel officer of the State, whose department is responsible for central administration of the subject provisions, the authority to promulgate reasonable rules and regulations within the scope of the applicable statutes and constitutional requirements.

Very truly yours,

/s/ Clifford I. Arinaga

CLIFFORD I. ARINAGA
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi

BERT T. KOBAYASHI
Attorney General

VFLC:GF
9a
Op. No. 63-21

STATE OF HAWAII

Department of the Attorney General

HONOLULU

April 4, 1963

Honorable David K. Trask, Jr.
Representative, Seventh District
House of Representatives
Second Legislature of the
State of Hawaii
Iolani Palace Grounds
Honolulu, Hawaii

Dear Representative Trask:

This is in reply to your letter of March 15, 1963, with attachments regarding Mr. Edward K. Bell. The question you have asked is whether under the present provisions of section 50-25, R.L.H. 1955, as amended (1961 Supplement), Mr. Bell's service qualifies for a pension.

It is the opinion of this office that Mr. Bell in his former capacity as District Magistrate of Kalawao would not qualify for the pension stated in the above-cited section.

Section 50-25 applies to "all patient employees or patient laborers at every ... settlement ... maintained for the treatment and care of persons affected with Hansen's disease [who have had] ... twenty years or more service <u>with the board of health</u> ...." The service as a district magistrate does not meet the qualification of "service with the board of health." A magistrate is appointed by the Chief Justice of the Supreme Court pursuant to other sections of law, and as such is not under the department of health.

Yours truly,

/s/ Vernon F. L. Char

VERNON F. L. CHAR
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi

BERT T. KOBAYASHI
Attorney General

Opinion No. 63-21

VFLC:GF
9a
Op. No. 63-21

STATE OF HAWAII

Department of the Attorney General

HONOLULU

April 4, 1963

Honorable David K. Trask, Jr.
Representative, Seventh District
House of Representatives
Second Legislature of the
State of Hawaii
Iolani Palace Grounds
Honolulu, Hawaii

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Yours truly,

/s/ Vernon F. L. Char

VERNON F. L. CHAR
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi

BERT T. KOBAYASHI
Attorney General

VFLC/RBG:GF
22a
Op. No. 63-22

STATE OF HAWAII

Department of the Attorney General

HONOLULU

April 5, 1963

Honorable John J. Hulten
Senator, 5th Senatorial District
Second Legislature of the
State of Hawaii
Iolani Palace Grounds
Honolulu, Hawaii

Dear Sir:

This is in reply to your letter of April 4, 1963 regarding the constitutionality of certain bills proposing to amend sections in Chapter 144 of Title 19, Revised Laws of Hawaii 1955, as amended, entitled "General Provisions Affecting Hawaii, Kauai, Maui." S. B. No. 646 proposes to amend the section on meetings of the board so as to permit meetings at places other than the county seat. S. B. No. 695 proposes to amend the section on powers of the boards of supervisors, by repealing the section on the county planning and traffic commission and authorizing separate county planning commissions and county traffic commissions. You have asked three questions which are discussed seriatim.

1. "Title 19, Revised Laws of Hawaii 1955, concerns only the counties of Hawaii, Kauai and Maui. Does Section 1, Article VII of the State Constitution render the chapters presently existing under Title 19 unconstitutional?"

It is the opinion of this office that Title 19 and the provisions therein are constitutional. Laws in effect at the time of statehood remain in force. (Section 2, Article XVI of the Constitution). Article VII, Section 1, is given prospective effect only and does not repeal existing laws enacted prior to statehood in the manner allowed under the Organic Act. Limitations on future legislation against special laws do not repeal pre-existing laws enacted in the

manner allowed by the Organic Act. (11 Am. Jur., Constitutional Law, § 35, p. 641). We respectfully refer you to Opinion No. 61-36 and Op. No. 62-11 of this office, in which the subject is discussed in detail.

2. "If the chapters under Title 19 are presently constitutional, would prospective amendments to sections under those chapters violate Section 1, Article VII of the State Constitution?"

It is the opinion of this office that prospective amendments to sections under those chapters, such as S. B. No. 646 and S. B. No. 695, would be violative of Section 1, Article VII of the State Constitution.

Title 19 relates only to Hawaii, Kauai and Maui. Section 1 of Article VII provides that the political subdivisions shall have powers conferred under general laws. A law conferring powers only on certain specified counties is a special, and not a general, law and consequently is invalid.

A general law, broadly speaking, is one which affects all the people of the State, or all the persons or things of a reasonable class, in contrast to a special or local law, which pertains to particular persons, things or places. See the above-cited opinions for detailed discussion of the meaning of "general laws."

The intent of the framers of the Constitution was to provide as much self-government to the counties as possible and to prohibit discrimination as to particular localities. The intention is indicated in statements made at the Constitutional Convention. (II Proceedings of the Constitutional Convention, 500-542).

On page 519, in referring to the powers conferred upon political subdivisions, it is said:

"It should be by general law, we feel, so that all the counties shall have a like chance."

On page 528 it is further stated on the same provision:

"I take it that under the language of the last sentence, the legislature may by general law provide

> . . . so long as the general law applies uniformly to all of the political subdivisions."

Therefore, a law conferring power on only one or some of named counties of the State is invalid.

3. You have asked for our opinion as to the meaning of the word "powers" as used in Section 1, Article VII of the State Constitution.

It has been stated that:

> "Power is synonymous with authority or right." State v. District Court, etc., 238 Pac. 545, 33 Wyo. 281.

As used in relation to political subdivisions generally and counties in particular, the case of Hersey v. Nelson, 131 Pac. 30, 47 Mont. 132, states:

> "It is a well established law that a county is an involuntary corporation for governmental purposes, and is in no sense a business corporation; that the powers and obligations of the county are such only as the law prescribes or arise by necessary implication therefrom."

Special laws that confer powers on counties are to be distinguished from laws applicable to specific localities but which involve the exercise by the State of its taxing, police or other powers, e.g., the regulation of fishing in specified coastal waters.

The determination as to whether or not a particular bill is a special bill conferring a power on a political subdivision may be made only by examining the provisions of the bill.

S. B. No. 646 and S. B. No. 695, which confer powers on the respective boards of supervisors to meet at certain places and to establish separate planning and traffic commissions, clearly entail the conferring of powers and therefore are within the constitutional proscription.

It is our opinion that legislation similar in substance to Senate Bills 646 and 695, but applicable to all

counties or to certain classes of counties based on a reasonable classification, such as population, would be valid. See II Proceedings of the Constitutional Convention, 528; Commissioners etc. v. Davis, 213 Ga. 792, 102 S.E.2d 180.

Very truly yours,

/s/ Vernon F. L. Char

VERNON F. L. CHAR
Deputy Attorney General

/s/ Ronald B. Greig

RONALD B. GREIG
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi

BERT T. KOBAYASHI
Attorney General

BTK:GF
19a, 22a
Op. No. 63-23

STATE OF HAWAII

Department of the Attorney General

HONOLULU

April 8, 1963

The Honorable John A. Burns
Governor of Hawaii
Iolani Palace
Honolulu, Hawaii

Dear Sir:

Re: Validity of interstate and defense highway system extra tax, to be imposed only in City and County of Honolulu, H. B. No. 1251

This is in reply to your inquiry as to the validity of the proposed "interstate and defense highway system extra tax" of two cents per gallon of liquid fuel (other than diesel oil or aviation fuel), to be imposed only in the City and County of Honolulu, as provided in H. B. No. 1251.[1]

We are of the opinion that the extra tax would not be unconstitutional.

At the outset, it should be noted that the instant question does not involve Article VII, Section 1 of the State Constitution, which provides in part that: "Each political subdivision shall have and exercise such powers as shall be conferred under general laws." This provision has been construed as prohibiting the enactment of special laws conferring powers on a political subdivision. (Attorney General Op. No. 61-36). H. B. No. 1251 does not confer any

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[1] We understand that an amendment to the bill is being proposed to specify that the proceeds of that tax would be deposited into a special "interstate and defense highway system fund" to be used only for such system.

power on the City and County of Honolulu. Rather, it entails the exercise by the State government of a power vested in the State government.[2] Accordingly, no question of violation of Article VII, Section 1, is here involved.

The issue is whether the imposition of the extra tax only in the City and County of Honolulu violates the due process and equal protection clauses of the 14th amendment to the U. S. Constitution and the cognate provisions in Article I, Section 4 of the State Constitution.

The general rule is stated in 12 Am. Jur., Constitutional Law, section 518, pp. 209-210:

> ". . . [W]ith respect to taxation, the Fourteenth Amendment was not intended to compel the state to adopt any iron rule of equality or to prevent the classification of property for taxation at different rates or to prohibit legislation in that regard which is special either in the extent to which it operates or the objects sought to be obtained by it. Here, as in other cases, it is enough that there is no discrimination in favor of one as against another of the same class. Clear and hostile discriminations against particular persons and classes, however, especially such as are of an unusual character and unreasonable, are in every case held to be obnoxious to the constitutional prohibition as to the equal protection of the laws."

With respect to the power of the legislature to make distinctions based on reasonable classifications of persons or things, on the one hand, and the power of the judiciary to review the validity of such classification, on the other, it has been stated:

> "The authorities state with unanimity that the question of classification is primarily for the legislature and that it can never become a judicial question except for the purpose of

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[2] "The taxing power shall be reserved to the State . . . ." State Constitution, Article VII, Section 3.

> determining, in any given situation, whether the legislative action is clearly unreasonable. It is subject to judicial revision only to the extent of seeing that it is founded on real distinctions in the subjects classified, and not on artificial or irrelevant ones used for the purpose of evading the constitutional prohibition. Therefore, unless a classification is arbitrary and not founded on any substantial distinction or apparent natural reason which suggests the necessity or propriety of different legislation, a court has no right to interfere with the exercise of legislative discretion." 12 Am. Jur., Constitutional Law, § 519, pp. 211-212.

We have not found any cases directly in point.

However, it has been held that a statute which required a license fee of $750 for a banking business in Honolulu, of $500 for Hilo and of $250 for all other parts of the Territory, was not unconstitutional. Trust Company v. Treasurer, 19 H. 262 (1908).

In upholding the classification the Court stated:

> ". . . [T]here is a natural distinction between the different places in this Territory where banking may be carried on. This, of course, allows the legislature to reasonably and fairly classify the amount of the license fee required for banking. Even if the judgment exercised by the legislature in a matter of this kind is in our opinion unwise or perhaps oppressive, still that is not of itself sufficient to declare that a statute passed pursuant to such judgment violates the equal protection provisions of the constitution." Id. 263.

Similarly, it has been held that a statute levying an auction license fee of $600 for the district of Honolulu and $15 for other parts in the Territory was not unconstitutional. Territory v. Toyota, 19 H. 651 (1909).

It should be noted that the two cited cases involved license or privilege fees, and we do not mean to imply that an excise tax, such as the gasoline tax, with different rates based simply on geographic location, without more, would

ipso facto be valid. There must be a further basis for the distinction in rates.

In Bollinger v. Watson, 187 Ark. 1044, 63 S.W.2d 642 (1933), a statute imposing a state gasoline tax, which provided that where a city in Arkansas adjoins a city in another state at the state line, the tax in such Arkansas city shall be at the same rate as that in the adjoining state, provided such rate is no higher than the Arkansas rate, did not violate the due process and equal protection provisions of the 14th Amendment.[3] It had been contended that the statute was unconstitutional in that it provided for a tax possibly lower in border cities than in the remainder of the state. The Supreme Court of Arkansas rejected this contention, holding that the classification rested on substantial differences and was founded upon a reasonable basis:

> "[A] reasonable classification may be made with respect to the localities or classes of citizens upon which the law may operate, and that it is not the form, but the operation and effect, which determines its constitutionality. . . . The legislation had in mind that the rate of taxation on motor fuel was much lower in some of the bordering states than in this, made possible because of their greater wealth and population. It took into consideration the well-known human trait of getting as much for as little as possible, and therefore recognized that the inhabitants of the border towns and cities would drive across the state line and purchase fuel in the adjoining state, thereby depriving this State of all revenue from the operation of cars. To meet that situation . . . those border towns were placed in a

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[3] Some state constitutions mandate uniformity of taxes within the state, e.g., Idaho Constitution (Art. 7, Sec. 5): "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax . . . ." See Board of Trustees, etc. v. Board of County Commissioners, 83 Ida. 172, 359 P.2d 635 (1961). The Hawaii Constitution does not contain such a provision.

separate classification, and, while under the operation of the general act, it did not operate upon them in the same degree as upon citizens residing elsewhere, this classification was not arbitrary, but made necessary by the situation, and bore a reasonable relation to the purpose and object sought to be accomplished by the act." 63 S.W.2d at 644.

It has also been stated that there may be special or local taxation for special or local purposes of a public character and beneficial to the community which pays the tax. 84 C.J.S., Taxation, § 17.

In this instance, the interstate and defense highway system in Hawaii is confined to the island of Oahu and therefore is primarily of benefit to Oahu motorists. The amount of the extra tax is calculated so as to be sufficient to meet the State's share of the cost of construction thereof. We believe that these considerations provide a sufficient basis for a separate classification of the City and County of Honolulu and imposition of the interstate and defense highway system extra tax therein, and that accordingly such tax would not violate the due process and equal protection provisions in the U. S. and State Constitutions.

Very truly yours,

/s/ Bertram T. Kanbara

BERTRAM T. KANBARA
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi

BERT T. KOBAYASHI
Attorney General

BGT:ec
16c
Op. No. 63-24

STATE OF HAWAII

Department of the Attorney General

HONOLULU

April 10, 1963

Dr. Fujio Matsuda
Director of Transportation
869 Punchbowl Street
Honolulu 13, Hawaii

Dear Dr. Matsuda:

This is in reply to your letter of March 27, 1963 inquiring as to the possibility of loans to the highway fund from surplus general revenues of the State. Specifically, you asked:

> "Is it legally possible, under the law, for the Director of the Budget, to loan money from the surplus general revenues on a short term, with or without interest, to the Department of Transportation, secured by the anticipated motor vehicle fuel tax revenues?"

Your question brings into issue two provisions of Section 132-13, R.L.H. 1955, which deal with loans to government agencies from surpluses in the general, special and revolving funds of the State. The second paragraph of Section 132-13 provides in part as follows:

> "When there are moneys in the general, special or revolving funds of the Territory which in the treasurer's judgment are in excess of the amounts necessary for the immediate territorial requirements, the treasurer may make temporary loans therefrom to the employees' retirement system, the board of water supply of the city and county of Honolulu, the Hawaii housing authority, or to any territorial or county department, board, commission, officer, authority or agency authorized under the laws of the Territory to issue bonds, or to the several counties, if in his judgment such action will not impede or hamper the necessary financial operations of the Territory." (Emphasis added)

Under this provision, agencies "authorized under the laws of the state to issue bonds" are eligible for such loans. This in turn raises the question as to what agencies are so authorized. Section 137-1 dealing with state general obligation bond authorizations, provides in part:

> "Such bonds shall only be issued pursuant to an act or acts of the legislature defining and expressing the purposes for which the same are to be used." (Emphasis added)

Similarly, the situation is no different relative to the issuance of revenue bonds (Sec. 137-52). Under Sections 132-1 and -52, a department is "authorized to issue bonds" only by specific legislative acts. Thus, it can be concluded that the Department of Transportation may borrow from the state general, special or revolving funds only if it has legislative authority to issue bonds.

The second provision related to your question is found in a later portion of Section 132-13 which states as follows:

> "Such loans to other organizations shall not at any time exceed the amount of moneys which the treasurer estimates the organization will be in receipt of, from bond funds or other sources, during the twelve months following the loan." (Emphasis added)

It is noted that under this provision loans are limited to the amount of the bonds authorized or income from other sources. The words "other sources" are not defined anywhere in the statutes but it is likely that the fuel tax would fall within that category. For instance, by the same section limits on loans to counties are set in relationship to tax proceeds which will be distributed to the counties. This raises a question as to whether this provision allows a loan to an agency which is not authorized to issue bonds but anticipates income from "other sources." The answer is in the negative since the provision, read with the remainder of the section, gives the inference that it is a limitation as to the amount of the loan, if any, and does not create an additional criterion as to eligibility for a loan. This inference is fortified by the final two sentences of Section 132-13

which limits the loan fund in the State treasury to "...the sum of unissued general obligation bonds of the Territory as authorized by the Legislature" and requiring the reimbursement of the loan from the proceeds of the sale of the bonds.

Therefore, please be advised that the Department of Transportation may borrow money from the surplus funds in the State treasury only if at the time the loan is sought, it is authorized by the Legislature to issue either general obligation or revenue bonds. The fact that the department is the recipient of fuel taxes does not in itself make it eligible for a loan.

Very truly yours

/s/ Ben G. Takayesu

Ben G. Takayesu
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi

Bert T. Kobayashi
Attorney General

WDG:GF
22a, 8a
Op. 63-25

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

April 19, 1963

The Honorable Manuel S. Henriques
Chairman, Committee on Hawaiian Homes, and
Members of the House of Representatives
Second Legislature of the State of Hawaii
Iolani Palace
Honolulu, Hawaii

Gentlemen:

By letter dated April 18, 1963, you have requested the opinion of this office as to whether it is "legal to put a lien against the Hawaiian home lands, to serve as security for improvement bonds."

Section 220 of the Hawaiian Homes Commission Act, as amended, authorizes the legislature to issue bonds to the extent required to yield the amount of any sums appropriated to carry on certain development projects and activities of the Hawaiian Home Lands Department. However, there is no provision in the Hawaiian Homes Commission Act specifying that Hawaiian Home Lands will serve as security for such bonds.

Placing a lien against Hawaiian Home Lands, would, if the enforcement of the lien became necessary, be tantamount to a disposition of such lands.

The power of disposition, either temporary or permanent, of such lands is provided for in sections 204, 207, and 212 of the Act. The authority relative to the disposition of Hawaiian Home Lands is limited to:

(1) Leases to native Hawaiians as provided by section 207.

(2) Leases to public utility companies as provided in said section 207.

(3) Leases to the United States, also provided in section 207.

(4) Return of Hawaiian Home Lands to the Commissioner of Public Lands, subject to recall by the Commission, with the approval of the Secretary of the Interior, all as provided in section 212.

(5) Exchanges for other publicly owned lands as provided in section 204.

It is the conclusion of this office that since a lien could conceivably constitute a disposition of Hawaiian Home Lands, which is not permitted by the Act, that establishing such a lien as security for improvement bonds would not be legal.

Very truly yours,

/s/ Wilford D. Godbold

WILFORD D. GODBOLD
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi

BERT T. KOBAYASHI
Attorney General

ASKF:ru
17b

Op. 63-26

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU, HAWAII

April 23, 1963

Mr. Jack E. Conley, Director
Public Utilities Commission
State of Hawaii
313 So. Beretania Street
Honolulu, Hawaii

Dear Mr. Conley:

This is in response to your earlier inquiry requesting clarification of the Commission's jurisdiction over various common carriers of property within the State of Hawaii.

The Public Utilities Commission of the State of Hawaii, under Chapter 106C, Revised Laws of Hawaii 1955, 1961 Supplement (the Hawaii Motor Carrier Act), was given general duties and powers to regulate common, contract and private carriers of property as defined in said Act, establishing such reasonable requirements as may be deemed necessary. It was clearly intended, therefore, that all contract and common carriers hauling property in the State of Hawaii, except those specifically exempt under the Act, must file their rates, charges and tariffs with the Commission covering transportation services in the handling of said property in the State.

Section 106C-3 of said chapter provides, inter alia, that the Hawaii motor carrier regulations shall not apply to "commerce with foreign nations or to interstate commerce, except in so far as such application is permitted under the constitution and laws of the United States". (Emphasis added.)

The Interstate Commerce Commission, in Ex parte MC-59 (Motor Carrier Operations in the State of Hawaii, 84 MCC 5), decided December 5, 1960, reaffirmed September 20, 1961, granted an exemption to transportation by motor carriers operated solely within the State of Hawaii. The Commission held such transportation was of such nature, character or quantity that an exception from regulation of such carriers from the Interstate Commerce Act did not substantially affect

or impair uniform regulation by the Commission of transportation of motor carriers engaged in interstate or foreign commerce in effectuating the national transportation policy.

Moreover, Public Law 87-595 (76 Stat. 397), enacted August 24, 1962, dealing with the establishment of through routes and joint rates, apparently does not change the status of the exemption provided in Ex parte MC-59. The committee report accompanying said Act indicates that "Hawaii motor common carriers would not be eligible to enter into such joint arrangements as are made available by this Act, H.R. 11643 [P.L. 87-595]. Even without the amendment, therefore, enactment of this measure would not affect the status of motor carriers in Hawaii. In addition, if the Commission should at some future date find that it would be in the public interest to revoke the exemption as to some or all of these carriers, the carriers could not participate in through route and joint rate arrangements with water carriers serving Hawaii without additional legislative action." There is presently no exemption provided by Chapter 106C, Revised Laws of Hawaii 1955, as amended, for motor carriers handling property within the State under through route and joint fare arrangements, nor has Congress yet seen fit to pre-empt this field in Hawaii.

Therefore, under the present provisions of said Act, all motor carriers handling property within the State under joint-through arrangements or serving household movers or freight forwarders must file their tariffs, rates and charges with the Public Utilities Commission, except where intrastate operations unduly burden or discriminate against interstate commerce.

Very truly yours,

/s/ Arthur S. K. Fong

Arthur S. K. Fong
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi

Bert T. Kobayashi
Attorney General

OP. 63-26

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

VFLC:hmm
OP. NO. 63-27

Honolulu

April 25, 1963

Dr. Thomas H. Hamilton
President
University of Hawaii
Honolulu, Hawaii

Dear President Hamilton:

This is in reply to your letter of April 18, 1963, requesting an opinion of this office regarding the legality of an amendment to the East-West Center Agreement between the University and the Federal Government. The amendment authorizes the University to employ personnel regardless of residency or citizenship and subject to terms and conditions established by it.

It is the opinion of this office that the amendment may be legal, depending on a factual determination by you, after consideration of relevant provisions of law.

The East-West Center, being a functional part of the University of Hawaii which is an instrumentality of the State government, is subject to State law. As indicated in an earlier opinion of this office (Opinion No. 63-1), employment practices at the East-West Center are subject to Chapters 3 and 4 of the Revised Laws of Hawaii 1955, as amended, relating to civil service and compensation. Section 5-1, R.L.H. 1955, as amended, requiring American citizenship and three years' residence as a qualification for employment in the service of the government of the State is also applicable.

The proposed amendment is in conflict with the above-cited provisions of law. However, Section 12-5, R.L.H. 1955, provides as follows:

> "Conflict between federal and territorial [State] requirements. In the case of any contract, the funds for which have been wholly or in part promised, loaned or furnished by the United States, or any instrumentality thereof, if the United States, . . . requires

> that the . . . contract contain terms or provisions contrary to any territorial [State] law, then as to such . . . contracts the terms and provisions <u>required</u> by the United States, . . . shall govern and are made applicable, and the officer expending such funds shall conform to such requirements as the United States, . . . shall provide or require, any other law or laws of the Territory [State] to the contrary notwithstanding. . . . " (Underscoring added)

The quoted section therefore permits the terms of contracts with the United States to be contrary to Hawaii law where Federal funds are involved and the said terms are required by the United States.

It is suggested that you make a factual determination as to whether the United States required the amendment. Also germane to your considerations is the possible jeopardy of Federal funds or termination of the Agreement.

It is therefore the opinion of this office that if, as a result of a review of the facts, you find that the United States Government requires the proposed amendment, the terms of which are contrary to provisions of law cited, the amendment is legal and valid.

If we can be of further legal assistance in this matter, please feel free to consult with this office.

Yours truly,

/s/ Vernon F. L. Char

VERNON F. L. CHAR
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi

BERT T. KOBAYASHI
Attorney General

OP. NO. 63-27

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Op. 63-28

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

April 30, 1963

Honorable John G. Duarte
Representative, Seventh District
State of Hawaii
Iolani Palace
Honolulu, Hawaii

Dear Mr. Duarte:

This is in reply to your oral request of April 26, 1963 and to confirm the oral opinion of this office on the same date regarding the validity of legislation to regulate the size of bread manufactured and sold in this State. The question asked is whether the State may constitutionally regulate the size and form of bread in the manner proposed in S. B. No. 913, S. D. 2.

It is the opinion of this office that the State may regulate the size and form of bread manufactured and sold in this State, consistent with the Constitution.

The question was recently resolved in Oregon in State v. Hudson House, Inc., 371 P. 2d. 675 (1962). An Oregon statute authorized the State Department of Agriculture to regulate the dimensions and sizes of bread pans in order to control the size of bread. The Oregon Supreme Court held that it was within the scope of the legislature to pass such a law under the police power. Justice Warner for the Court stated: " . . . the business of baking also involves the business of selling, and the business of selling offers opportunities, unless restrained, to employ to the advantage of the baker or retailer, and the disadvantage of the consumer, deceptive devices contrary to what may be 'reasonably necessary in order that the consumer will

not be deceived or misled by deceptive shapes, dimensions, sizes, contents or the value of loaves of bread'." (371 P. 2d at 679.) The Oregon case therefore provides legal precedence for S. B. No. 913, S. D. 2. Washington State has a similar law.

It has come to the attention of this office that the Oregon statute has recently been attacked on another constitutional point. Certain Oregon bakeries claimed that they had been denied equal rights protection under the Fourteenth Amendment of the Federal Constitution because the bread pan regulation affected only the manufacture and not the sale of bread. Certain bakeries were producing various sizes of bread outside of Oregon and selling it in the State. The statute was considered discriminatory in practice and held unconstitutional. (State v. Davidson Bakery, Multnomeh County Circuit Court, State of Oregon, October 17, 1962). This constitutional point is not relevant in the situation here, as S. B. No. 913, S. D. 2, applies to both manufacture or sale of bread.

It is therefore the opinion of this office that S. B. No. 913, S. D. 2, is not inconsistent with the constitutional issues raised. The decision as to whether or not the law is necessary or desirable is one for the legislature to make.

Very truly yours,

/s/ VERNON F. L. CHAR

VERNON F. L. CHAR
Deputy Attorney General

APPROVED:

/s/ BERT T. KOBAYASHI

BERT T. KOBAYASHI
Attorney General

TITLE OF WORK

STATE OF HAWAII

ATTORNEY GENERAL

OPINIONS

MAY - DECEMBER 1963

No Opinions

Issued in May 1963

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Op. 63-29

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU, HAWAII

June 10, 1963

Senator John T. Ushijima
Assistant Majority Leader
The Second Legislature
State of Hawaii
Iolani Palace
Honolulu, Hawaii

Dear Senator Ushijima:

This is in reply to your request by letter dated June 6, 1963 for our opinion as to whether a person who is now serving on a State board or commission is eligible for appointment to a Charter Commission under Act 73, S.L.H. 1963.

We reply in the negative.

With respect to qualifications of Charter Commission members, Act 73 provides:

> "Section 4. QUALIFICATIONS OF COMMISSION MEMBERS. Each commission member shall be a registered voter and resident of the county for at least three years prior to his appointment. Except for members of the school advisory councils of the counties, elected officials of the state or county governments shall not be eligible for appointment." (Emphasis added.)

No reference is made therein to disqualification of persons who are serving on State boards or commissions. However, section 7-25.5, R.L.H. 1955, as amended, a general statute governing service on all boards and commissions, provides:

> "Any other provision of law to the contrary notwithstanding, no person shall be allowed to serve on more than one board or commission of a public character, created by the State or any of its political subdivisions."

The respective Charter Commissions provided for by Act 73 are commissions "of a public character, created by the State." Therefore, we are of the opinion that said section 7-25.5 prohibits a person now serving on a State or county "board or commission of a public character" from serving on a Charter Commission. The only exception is a person serving on a county school advisory council, as provided in section 4 in Act 73, above-quoted.

We do not think that the underscored sentence in section 4 in Act 73 can reasonably be construed as amending section 7-25.5 by implication with respect to qualification for service on a Charter Commission. The sole import of that sentence is to expressly prohibit elected officials from service on a Charter Commission. We do not read it as impliedly making appointive public officials eligible for membership on a Charter Commission. Amendment by implication is not favored,* and we believe that stronger evidence would be required to show an implied amendment of section 7-25.5.

We note that the pre-conference committee draft of House Bill No. 18 (which bill became Act 73) provided:

> "Except as otherwise provided by the State Constitution, no person shall forfeit nor be precluded from accepting any office or emolument thereof by reason of his appointment to the charter commission." (Part of section 4 in H.B. No. 18, H.D. 2, S.D. 3.)

We believe that such a provision would have superseded the contrary provision in section 7-25.5, R.L.H. 1955, as amended, with respect to service on a Charter Commission, and that an appointive member of a State board would have been eligible for membership on a Charter Commission. However, this sentence was not included in H.B. No. 18 as enacted. The conference committee report states that this provision "was excluded as surplusage." (Conference Committee Report dated April 29, 1963, p. 2.) However, in view of the express prohibition in section 7-25.5,

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* 82 C.J.S., Statutes, sec. 252.

R.L.H. 1955, as amended, we think that the sentence was not mere surplusage, and that the effect of the deletion was to retain the said prohibition.

For the foregoing reasons, we are of the opinion that a person who is serving on a State or county board or commission is not eligible for appointment to a Charter Commission.

Very truly yours,

/s/ Bertram T. Kanbara

Bertram T. Kanbara
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi

Bert T. Kobayashi
Attorney General

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Op. 63-30

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU, HAWAII

July 18, 1963

Mrs. Edna Tavares Taufaasau
Director of Personnel Services
Department of Personnel Services
State of Hawaii
825 Mililani Street
Honolulu 13, Hawaii

Dear Mrs. Taufaasau:

This is in reply to your letter of June 25, 1963, requesting our opinion on whether the State may pay the cost of transportation and moving from Hilo to Honolulu incurred by a State employee under the circumstances described below.

We understand that Employee A (class Patrolman I), employed by the State Department of Defense on the island of Hawaii, is scheduled for layoff because of abolition of his position. Employee B (class Patrolman I), employed by the Department of Transportation on the island of Hawaii, is junior in service to Employee A. Under Civil Service Rule 11.2, Employee A will displace or "bump" Employee B. The Department of Transportation has a vacant position (Patrolman I) on Oahu and has offered Employee B this position and he has accepted it. The question is whether the State may pay the cost of transporting Employee B and shipping his household goods from Hilo to Honolulu.

Relative to use of public funds, Article VI, section 6, Constitution of the State of Hawaii, provides in part as follows:

"No tax shall be levied or appropriation of public money or property made, nor shall the public credit be used, directly or indirectly, except for a public purpose. . . ."

As stated in 42 Am. Jur., Public Funds, section 57, under such provisions the incidental advantage to the public does not justify aid to private interests by the use of public money.*

In this instance, if there were no vacancy on Oahu, Employee B presumably would have had to be laid off. However, it happens that there is a vacancy on Oahu, and his transfer thereto would ordinarily be regarded as being in lieu of a layoff and therefore for his personal accommodation, and not particularly for the convenience and benefit of the government. The involuntary nature of the movement is generally not material in determining the question. Thus, ordinarily the employee should bear the cost of moving.

Ordinarily this would be so. However, if the receiving department (in this case, the Department of Transportation) can show to the Comptroller's satisfaction that it would be to the convenience and benefit of the government to have Employee B rather than a new employee fill the vacancy on Oahu because of considerations such as Employee B's special qualifications, experience or familiarity with operations (and consequent minimization of the need for training), or the lack of suitable personnel on Oahu, then we believe that there would be a basis for finding sufficient public purpose to warrant payment of the transportation and moving costs by the government.

Very truly yours,

/s/ Bertram T. Kanbara

Bertram T. Kanbara
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi

Bert T. Kobayashi
Attorney General

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* It may be noted that federal statutes prohibit the payment of transportation and moving expenses of federal employees where transfers are primarily for the benefit of the employee. 5 U.S.C.A. 73b(1).

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Op. No. 63-31

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU, HAWAII

August 1, 1963

The Honorable George M. Okano
Representative of the 10th District
The Second Legislature
State of Hawaii
Honolulu, Hawaii

Dear Sir:

By letter of July 11, 1963, you asked for an opinion concerning the practice of holding government employees financially responsible to the State for damages to government vehicles resulting from their negligent acts.

We are of the opinion that the State may lawfully do so.

A State employee is an agent of his employer, the State. The law is clear that as agent, he is "under a duty to use reasonable care to protect the property of his principal by keeping it in a safe place and he must exercise due care and diligence to keep the property from coming to harm, or from being lost, destroyed, or stolen". 3 Am.Jur.2d, Agency § 212, pp 588, 589. Furthermore, an agent is subject to liability for loss caused to the principal by any breach of duty. Restatement (Second), Agency § 401 (1958).

Where a State employee is negligent and thereby causes a State vehicle to be damaged, he has committed a

breach of the duty of care owed his principal, and the State is entitled to hold the employee financially responsible for such damage.

Very truly yours,

/s/ Clifford I. Arinaga

CLIFFORD I. ARINAGA
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi

BERT T. KOBAYASHI
Attorney General

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Op. No. 63-32

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU, HAWAII

August 7, 1963

The Honorable John A. Burns
Governor, State of Hawaii
Iolani Palace
Honolulu, Hawaii

Dear Sir:

You have referred to this office a letter from the Kauai Liquor Commission inquiring as to the status of the commission under the following circumstances.

Act 172, Session Laws of Hawaii 1963, provides for the transfer of functions of the respective liquor commissions to the counties, effective January 1, 1965. The State Constitution, Article XVI, section 8, provides that within three years from the date of admission to statehood (i.e. by August 21, 1962) the Legislature shall allocate the executive agencies of the State government and their respective functions among the principal departments of the State pursuant to section 6 of Article IV of the Constitution. Otherwise, "the governor, within one year thereafter [i.e. by August 21, 1963], by executive order, shall make such allocation and grouping."1/

1/ That section, in full, provides:

"The provisions of Section 6 of Article IV shall not be mandatory until four years from the date of admission of this State to the Union. The legislature shall within three years from said date allocate and group the executive and administrative offices, departments and instrumentalities of the state government and their respective functions, powers and duties among and within the principal departments pursuant to said section.

"If such allocation and grouping shall not have been completed within such period, the governor, within one year thereafter, by executive order, shall make such allocation and grouping."

STATE OF HAWAII
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At present, the liquor commissions are not allocated to any department of the State; nor has the Legislature made provision for such allocation prior to January 1, 1965. Thus as of August 21, 1963, they would not have been allocated to any department by the Legislature.

Under the circumstances, we are of the opinion that Article XVI, section 8 of the Constitution requires that by August 21, 1963, the Governor issue an executive order allocating the liquor commissions to a State department until the effective date of Act 172, or subject to such prior modification of such effective date as may be made by the Legislature.

We are cognizant of the provision in Section 14A-33, Revised Laws of Hawaii 1955, as amended, which states:

> "Any other provision of this chapter to the contrary notwithstanding, the functions and powers of the police and liquor commissions of the respective counties as provided in chapters 145, 150 and 159, as amended, shall not be assigned by the governor to any department established by this chapter."

This provision was inserted in 1959 in expectation of legislation in forthcoming legislative sessions providing for transfer of the said commissions to the counties, with the hope of avoiding "unnecessary disruptions in the state government." (See House Journal, First Special Session 1959, p. 294.)

With respect to the subject situation, the above quoted statutory provision is in conflict with the Constitutional provision.2/

2/ Originally, the effective date in S.B. 11, which became Act 172, was July 1, 1963. In the House it was changed to January 1, 1965. It appears that the effect of the constitutional provision was overlooked at that time.

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It is clear that when a statutory provision conflicts with a constitutional provision, the latter prevails. Accordingly, we conclude that Article XVI, section 8, of the State Constitution prevails. That provision requires that by August 21, 1963, the Governor by executive order allocate the liquor commissions to a State department[3/] until the effective date of Act 172 (January 1, 1965) or such earlier modification thereof as may be made by the Legislature.

Attached hereto is a draft of an executive order providing for allocation of the liquor commissions to a State department in the interim.

Very truly yours,

/s/ BERTRAM T. KANBARA

BERTRAM T. KANBARA
Deputy Attorney General

Attach.

APPROVED:

/s/ BERT T. KOBAYASHI

BERT T. KOBAYASHI
Attorney General

3/ Act 21, Session Laws of Hawaii 1963, empowers the Director of Regulatory Agencies, with respect to officers or employees of agencies placed in the Department of Regulatory Agencies for administrative purposes, to appoint, transfer and take other personnel actions. Heads of other departments in which an agency is placed for administrative purposes do not have such authority. (Section 14A-4, Revised Laws of Hawaii 1955, as amended.)

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EXECUTIVE ORDER NO. ____

WHEREAS, Article XVI, Section 8 of the Constitution of the State of Hawaii provides:

> "The provisions of Section 6 of Article IV shall not be mandatory until four years from the date of admission of this State to the Union. The legislature shall within three years from said date allocate and group the executive and administrative offices, departments and instrumentalities of the state government and their respective functions, powers and duties among and within the principal departments pursuant to said section.
>
> "If such allocation and grouping shall not have been completed within such period, the governor, within one year thereafter, by executive order, shall make such allocation and grouping."

WHEREAS, Act 172, of the Session Laws of Hawaii 1963, provides for the transfer of the respective liquor commissions to the counties effective January 1, 1965; and

WHEREAS, said commissions are not now allocated to any department of the State; nor has the Legislature made provision for such allocation prior to January 1, 1965; and

WHEREAS, it is desirable that the status of the respective liquor commissions in the interim not be left in doubt or jeopardy; now, therefore,

Pursuant to the authority vested in me by Article XVI, Section 8 of the Constitution of the State of Hawaii, I hereby order that the liquor commissions for the Counties of Hawaii, Maui, Kauai and the City and County of Honolulu be, and they are hereby, placed within the department of _____ for administrative purposes until the effective date of Act 172, Session Laws of Hawaii 1963, said effective date being January 1, 1965, or such modification of such effective date as may be made by the Legislature.

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Except as otherwise provided by Chapter 14A, Revised Laws of Hawaii 1955, as amended, the functions, duties and powers, subject to the administrative control of _____ and the composition of the respective liquor commissions shall be as provided by Chapter 159, Revised Laws of Hawaii 1955, as amended, and other applicable laws.

All officers and employees of the respective liquor commissions shall continue to perform their duties as heretofore, without loss in pay, vacation allowances, service credits and other rights and privileges, subject to such subsequent changes as may be made in accordance with personnel laws and other applicable laws.

All rules and regulations heretofore adopted by the respective liquor commissions and approved by the Governor shall continue in full force and effect until they are repealed or amended in accordance with law.

DONE at Iolani Palace, Honolulu, State of Hawaii, this ____ day of _____, 1963.

_____
JOHN A. BURNS
Governor of Hawaii

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STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

August 12, 1963

Honorable Andrew T. F. Ing
Director, Department of Finance
State Office Building
Honolulu, Hawaii

Dear Sir:

By letter dated July 23, 1963, you have posed the question as to whether Manuel V. Ferreira is, for the purposes of the Hawaii Public Employees Health Fund, to be regarded as an employee or as a "retired" member of the State Employees' Retirement System.

The following circumstances are stated in your letter relative to this matter:

(a) that Mr. Ferreira was an employee of the Department of Transportation, State of Hawaii, at the time he was put on authorized leave of absence during the period December, 1961[1] to January, 1963 for injury sustained during the course of his employment;

(b) that Mr. Ferreira has been receiving workmen's compensation beginning from December, 1961, and that he will continue to receive workmen's compensation until January, 1964;

(c) that upon the expiration of his authorized leave of absence on January 31, 1963, his services with

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1/ Letter contained the date December, 1962. However, the Executive Secretary of the Hawaii Public Employees Health Fund stated this date should be December, 1961.

the Department of Transportation were terminated; and

(d) that the State Employees' Retirement System will consider a retirement application from him as soon as a permanent disability award, if any, is made by the Bureau of Workmen's Compensation.

We are informed by the Executive Secretary of the Health Fund that the referred-to question arose as a result of Mr. Ferreira's filing an application for membership in the Health Fund in June of 1963, some four to five months after the termination of his employment by the State.

The question presented is, in substance, whether or not Mr. Ferreira was at the time of his June, 1963 application qualified for membership in the Hawaii Public Employees Health Fund.

Section 15 of Act 146, Session Laws of Hawaii 1961, authorizes the Board of Trustees of the Health Fund to establish and adopt eligibility requirements to determine which "employee" may qualify as an "employee-beneficiary". This section further provides that only an "employee" satisfying such eligibility requirements may qualify as an employee-beneficiary of the fund. Paragraph (e) of section 1 of said Act 146 defines "employee" to mean "an employee or officer of the state or county government including . . . a retired member of the employees' retirement system. . . ." Paragraph (f) of said section 1 defines "employee-beneficiary" to mean "an employee deemed eligible by the board to receive health services of a health benefits plan."

Effective as of January 1, 1963, the trustees of the Health Fund adopted eligibility provisions for retired employees providing that such retired employees shall meet the following requirements:

"12. An employee who retires under a retirement system of the State or County is eligible to participate in the Hawaii Public Employees Health Fund if he meets these requirements:

(a) at least ten years of active service in the employ of a State or County Agency; and

(b) at least five years of active service in the employ of a State or County Agency in the ten-year period immediately preceding his entitlement to benefits from the State or a County retirement system; and

(c) if he was employed on active service immediately prior to his retirement, he was enrolled in the Health Fund from the time he first became eligible until his retirement, or he was enrolled for the two years immediately preceding his retirment, whichever is the shorter period of time.

"13. A retired employee who is eligible to participate in the Health Fund and who was not on active service immediately prior to the effective date of his retirement benefits must elect to enroll within 31 days of the effective date of his retirement benefits."

In analyzing the status of Mr. Ferreira on information furnished us by your letter and by the Executive Secretary of the Health Fund, the following facts appear:

(a) that Mr. Ferreira did have more than ten years of active service in the employ of the State;

(b) that he had at least five years of active service in the employ of the State in the ten-year period immediately preceding his retirement;

(c) that subparagraph (c) of requirement 12 is not applicable to Mr. Ferreira as he was not employed on active service for the State "immediately prior to his retirement;" and

(d) that although the Employees' Retirement System has not yet acted upon his application for disability retirement, he (being 62 years of age)[2] would be entitled to a service retirement under the system even in the event he is denied such disability retirement.[3]

Requirement "13", as to eligibility, requires a retired employee who was not on active service immediately prior to the effective date of his retirement benefits to elect to enroll within thirty-one days of the effective date of his retirement benefits. Mr. Ferreira has already elected to enroll in the Health Fund although his application for retirement has not been

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2/ Mr. Ferreira was born on November 15, 1901.

3/ Section 6-41, Revised Laws of Hawaii 1955, as amended.

acted upon. Under this requirement, numbered 13, Mr. Ferreira would have thirty-one days after the effective date of his retirement benefits to file such election.

Since Mr. Ferreira is entitled to retire and actually is retiring under the State Employees' Retirement System, and has otherwise met the eligibility requirements established and adopted by the Board of Trustees of the Health Fund he is, under the above-stated circumstances, in our opinion, eligible and qualified to join the Hawaii Public Employees Health Fund as an employee who is retiring under a retirement system of the State.

Very truly yours,

/s/ WILFORD D. GODBOLD

WILFORD D. GODBOLD
Deputy Attorney General

APPROVED:

/s/ BERT T. KOBAYASHI

BERT T. KOBAYASHI
Attorney General

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Op. 63-34

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

August 20, 1963

Board of Trustees
Employees' Retirement System
State of Hawaii
Keelikolani Building
Honolulu, Hawaii

Attention: Mr. Harold C. Hill, Secretary

Dear Sirs:

You have requested the advice of this office as to the propriety of allowing the benefits provided in the Servicemen's Act (§§ 6-110 through 6-121, R.L.H. 1955) to active members of the Employees' Retirement System called to active military service as members of the armed services reserve. The benefits under this Act include, among others, the payment by the State of the employee's share as well as the State's of all contributions, both to the pension accumulation and to the annuity savings funds, and any other payments to the system, so long as he remains in military service.

You point out that a number of the members of the system hold reserve status in the armed forces and are called to military duty for periods varying in duration from a few weeks to a year or more.

Provisions of the law relating to the qualifications of a member of the armed forces reserve for military service benefits are included in sections 6-110 and 6-111, Revised Laws of Hawaii 1955, and are as follows:

"§ 6-110. Definitions. As used in sections 6-110 to 6-121:

"'Servicemen's Act' means and includes section 6-111 and any other act extending benefits

similar to those of the section to other classes of persons in essential war services.

"'Service member' means a member of the system who is entitled to the benefits provided by the Servicemen's Act.

"'Service in the armed forces' means active service (a) in 'military service' as defined in section 6-111, or (b) in any other essential war service covered by the Servicemen's Act.

"§ 6-111. Service credit; payment of contributions. Every active member of the system entering the military service (which term as used in this section shall include national guard, air, naval and coast guard services) of the United States on or after June 25, 1950, shall, so long as he remains in military service, be allowed service credit in the system to the same extent as if he were continuously in the active service of the [State] or a county, as the case may be, in the position which he held immediately prior to his induction (whether as a volunteer, a member of the reserve, a national guardsman, or as a selectee) into military service. (Emphasis added.)

"The [State] or county, as the case may be, in whose service such member was employed immediately prior to his induction into military service shall, so long as he remains in military service, pay all contributions both to the pension accumulation fund and to the annuity savings fund, and any other payments to the system, which would otherwise be payable to the system by the [State], the county, or such member, if he were continuously in the active service of the [State], or county, as the case may be."

While the phrases "entering the military service" and "induction into military service" used in the above-quoted sections, when taken alone without reference to any other expression of legislative intent, could possibly be construed as not including a member of the reserve entering active service, this is not the situation here. In the first paragraph of section 6-111, the legislature expressly spelled out that "a member

of the reserve" was included in the categories to be benefited by the Servicemen's Act. The provisions of the two sections of the statute, as quoted, when read in pari materia with each other and the other provisions of the Servicemen's Act would appear to entitle an active member of the retirement system called up for military duty as a reserve to all the benefits of the Act regardless of the length of time such active military duty continues.

However, if the use in the above-quoted provisions of the Act of the words "entering the military service" or the word "induction" should create an ambiguity in their application to a member of the reserve, the actual practical construction placed upon these provisions by the administrative agency involved should be given great weight (White v. Winchester Country Club, 62 S. Ct. 425).

The rule is stated thusly in 42 American Jurisprudence, Public Administrative Law, section 78 at page 392:

> "The practical interpretation of an ambiguous or uncertain statute by the executive department charged with its administration or enforcement is entitled to the highest respect by the courts, especially when long-continued and uniform, or contemporaneous with the first workings of the statute. . . ."

You have informed this office that the retirement system has, from the inception of the law to this date, followed the rule that an active member of the retirement system, called to duty as a reserve, is given all of the benefits as provided in the Servicemen's Act.

In considering the administrative interpretation given an act, "It is what is done rather than what is said that establishes an administrative construction." (42 Am. Jur., Public Administrative Law, § 79, p. 398; Hill v. Reynolds, 242 U.S. 361.)

Interpretation of a statute by action of those charged with its execution, especially when it has long prevailed, is entitled to great weight and should not be disregarded or overturned except for cogent reasons and unless it is clear that such construction is erroneous. Dismuke v. United States, 297 U.S. 167; United States v. Missouri P. & R. Co., 278 U.S. 269; First National Bank v. United States, 206 Fed. 374; Bernays v. Major, 344 Mo. 135; Wysong v. Automobile Underwriters, 204 Ind. 493.

Since the interpretation placed upon the Servicemen's Act as to reserves going on active duty has always been to allow such reserves all of the fringe benefits of the Act, and since such action was not clearly wrong, this interpretation should prevail.

You are respectfully advised that, in the opinion of this office, an active member of the retirement system called to duty as a reserve is entitled under the Servicemen's Act to all the benefits therein provided.

You have also requested the advice of this office as to the propriety of the system's initiating action either to revoke certain sections of the Servicemen's Act or to repeal the Act entirely. This action, of course, is subject to the discretion of the legislature. However, if you feel a legislative review of the Act is in order, the legislature's attention should be called to the situation.

Very truly yours,

/s/ WILFORD D. GODBOLD

WILFORD D. GODBOLD
Deputy Attorney General

APPROVED:

/s/ BERT T. KOBAYASHI

BERT T. KOBAYASHI
Attorney General

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Op. No. 63-35

STATE OF HAWAII

Department of the Attorney General

HONOLULU

August 21, 1963

Miss Euphie Shields
Assistant Librarian
University of Hawaii
Honolulu, Hawaii

Dear Miss Shields:

Re: Mrs. Arlene Luster

This is in response to your request for our opinion on the following questions:1/

1. What is Mrs. Luster's residence status for purposes of public employment under Section 5-1, Revised Laws of Hawaii 1955, as amended?

2. Was she not entitled to an increase in compensation when her position was reallocated to a class assigned to a higher salary range?

3. When will her next increment be due?

1. Residence

With respect to your first question, the common law rule is as stated in 17A American Jurisprudence, Domicil, Section 49:

> "Following the rule established at common law, a woman on her marriage loses her own domicil and, by operation of law, acquires that of her husband, no matter where the wife actually lives or what she believes or intends. . . . The rule that the matrimonial domicil is that of the husband obtains irrespective of the state in which the marriage ceremony was performed."

1/ We have taken the liberty of rephrasing your questions.

There appearing to be nothing to the contrary "provided by the Constitution or laws of the United States, or by the laws of the Territory (State), or fixed by Hawaiian judicial precedent, or established by Hawaiian usage," the common law rule would be deemed applicable in this jurisdiction, pursuant to Section 1-1, Revised Laws of Hawaii 1955.

In view of the foregoing considerations, we conclude that Mrs. Luster lost her domicil in Hawaii upon her marriage to a non-resident. For purposes of public employment, however, we invite your attention to our letter of December 26, 1962, wherein it was concluded that pursuant to subsection 5-1(e), Revised Laws of Hawaii 1955, the three years' residence requirement did not apply to Mrs. Luster as an exception provided by law. Accordingly, although Mrs. Luster is a non-resident, the residence requirement would not apply to her; stated otherwise, Mrs. Luster is treated as a resident for public employment purposes.

2. Reallocation Pay Adjustment

We answer the second question in the affirmative. We invite your attention to Section 4-7, Revised Laws of Hawaii 1955, which provides in part as follows:

> ". . . In the case of . . . reallocations to higher grades the rules shall provide that the employee shall receive compensation at the lowest step of the higher grade which exceeds his existing compensation with no change in the employee's anniversary date." (Emphasis added.)

The underscored portion indicates that increases following reallocation to higher grades are granted independent of any consideration of increment step increases.

On April 23, 1963, the Director of Personnel Services reallocated position 10434 from the class Librarian I (at S.R. 13e at $489) to the class Librarian II, the latter class being assigned to salary range 15. Under Section 4-7, above quoted, upon reallocation she was entitled to compensation at the

lowest step in the higher grade of salary range 15 which exceeded her existing compensation of $489, i.e., at $513 (S.R. 15d). And under Section 3-19(h), Revised Laws of Hawaii 1955, as amended, the reallocation was retroactive to October 1, 1962.

In view of the foregoing, we conclude that upon reallocation, Mrs. Luster's compensation would have been automatically increased from $489 to $513 per month, and that such increased pay would be retroactive to October 1, 1962.

3. Increments

We are of the opinion that her next increment would be due May 1, 1965. Preliminarily, we observe that Mrs. Luster terminated her employment on April 4, 1962. Because she did not have more than one year of service at that time, maternity leave could not have been granted under Section 3-20(o), Revised Laws of Hawaii 1955. Therefore, she had no alternative but to terminate her employment.

Inasmuch as such termination of employment would not continue a person's former service anniversary date upon re-employment, we may dismiss the discussion of increments for the period prior to May 1, 1962. On May 1, 1962, Mrs. Luster was selected from a certified list and hired in the position Librarian I at a monthly salary of $466 in salary range 12 (step F). Thus, from and after this date, a discussion as to increments and service anniversary dates is material.

Section 4-6, Revised Laws of Hawaii 1955, provides in part as follows:

> ". . . No person accepting an initial appointment at a step above the minimum rate shall be eligible for a step increase in compensation, until such time as his compensation would be so increased if he had been appointed at the minimum step." (Emphasis added.)

Clearly, the above-quoted provision establishes the basic formula in determining the date as of which persons accepting appointments above the minimum rate would be eligible for increments, as follows: Assume that employment began at the initial step; then determine where such person would be had he begun at the initial step and compare the same with his actual rate. Therefrom one may determine when the employee would be eligible for a step increase in compensation.

Had Mrs. Luster been hired at the lowest rate under the salary schedule existing on May 1, 1962, her monthly salary would have been $403, with her service anniversary date fixed at May 1. Due to repricing of the class Librarian I from salary range 12 to 13, Mrs. Luster's salary adjustment under Section 21 of Act 28, Session Laws of Hawaii 1962, would have been increased to $423 as of July 1, 1962. Then, because her position was reallocated to the class Librarian II (S. R. 15), Mrs. Luster's monthly salary would have been adjusted to $466 (the lowest step in S. R. 15 which exceeded $423) pursuant to Section 4-7, Revised Laws of Hawaii 1955; and the effective date therefor would have been October 1, 1962, pursuant to subsection 3-19(h), Revised Laws of Hawaii 1955.[2/] Finally, as of May 1, 1963, she would have been entitled to an increment increase which would have raised her monthly salary to $489.[3/]

Proceeding to compare this rate with that which she is now entitled to be receiving as discussed above in Part 2, i.e., $513 per month, it becomes clear that Mrs. Luster would first be entitled to earn increments on May 1, 1965, under the existing circumstances.

Very truly yours,

/s/ Bertram T. Kanbara

BERTRAM T. KANBARA
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi

BERT T. KOBAYASHI
Attorney General

cc: Department of Personnel Services

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2/ Mrs. Luster's service anniversary date was not changed by reallocation (see Section 4-7, supra).

3/ Under that assumption of commencement at the initial step, she would have been entitled as of May 1, 1964, to a step increase to $513, and as of May 1, 1965, to the next step at $539.

ASKF:ek
la; lla
Op. No. 63-36

STATE OF HAWAII

Department of the Attorney General

HONOLULU

August 23, 1963

Mr. Valentine U. Marciel
Comptroller, State of Hawaii
Department of Accounting and General Services
Honolulu, Hawaii

Dear Mr. Marciel:

This is in response to your letter of August 19, 1963, inquiring whether, in an action brought by the State of Hawaii against an insured for damages sustained more than two years previous thereto, the statute of limitations is a valid defense.

In the absence of express statutory provision to the contrary, the statute of limitations does not run against the sovereign or government, whether state or federal. 34 Am. Jur., Limitation of Actions, Section 393. This principle, embodied in the ancient maxim, nullum tempus occurrit regi, has been held applicable in Hawaii. Territory v. Est. Lucy Kealoha, Decsd, 43 Haw. 237; Keola v. Parker, 21 Haw. 597; and Kunewa v. Kaanaana, 18 Haw. 252.

There is presently no statutory provision making the statute of limitations applicable to civil actions instituted by the State. Accordingly, the State of Hawaii may bring civil action for damages sustained by the Department of Land and Natural Resources due to alleged negligence of another, even though two years have elapsed since the accident.

Very truly yours,

/s/ Arthur S. K. Fong

ARTHUR S. K. FONG
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi

BERT T. KOBAYASHI
Attorney General

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

Honolulu, Hawaii

August 27, 1963

RYT:hmm
OP. 63-37

Mr. Frederick K. F. Lee
Planning Director
City and County of Honolulu
Honolulu Hale Annex
Honolulu 13, Hawaii

Dear Mr. Lee:

Your letter dated July 17, 1963, requests clarification and guidance relative to an application for a special permit filed with the Zoning Board of Appeals in accordance with Chapter 98H, Revised Laws of Hawaii 1955, as amended by Act 205, Session Laws of Hawaii 1963. Your question is whether a request entailing a change in use of approximately 240 acres of land,1/ situated in an agricultural district, which is proposed to be used for commercial, industrial and residential uses, is a proper subject for a special permit application.

We answer the question in the negative. We are of the opinion that authorization of the proposed use should properly be sought by amendment to the temporary boundaries rather than by petition for a special permit.

1/ The petition, as submitted, involves approximately 340 acres of land. It is our understanding, however, that approximately 100 acres are to be used for a private golf course. If such be the case, only 240 acres are involved herein, for a private golf course is a permissible use within an agricultural district.

Chapter 98H, as amended, provides two methods whereby property might be put to a use for a purpose not presently allowed as a permissible use. Under section 98H-4 the affected landowner may petition the Land Use Commission "for a change in the boundary of any district, interim or permanent." Under section 98H-6 he may petition the county planning commission or the zoning board of appeals, as the case may be, for a special permit to put the land to uses other than those for which it is classified (except in conservation districts).

In the instant case, the affected landowner filed a special permit petition with the Zoning Board of Appeals for change in use of approximately 240 acres of land situate in an agricultural district, to be used for commercial, industrial and residential uses. The question we face is whether it is a proper subject for a special permit petition when such a large area is involved and for such contemplated uses.

The instant case is similar to Harte v. Zoning Board of Review of City of Cranston, 91 A.2d 33 (R.I. 1952). In that case, the Rhode Island Supreme Court reversed the Zoning Board of Review that had granted an application for an exception to the zoning ordinance to permit use of approximately 100,000 square feet of land located in a residential district for a supermarket and parking lot. The court held that the zoning board had abused its discretion and authority in granting the exception.

In reversing the zoning board, the court relied mainly upon the following reasons: (1) that the exception applied for was not in harmony with the general purposes and intent of the enabling statute; and (2) that, considering the large area involved, the granting of said exception would amount to amending the district boundary under the guise of an exception.

Let us consider the first reason. The enabling statute clearly distinguished between the grant of authority to amend the zoning ordinance and the grant of power to the zoning board to allow certain exceptions. The city council, within limits set forth in the enabling act, passed an ordinance giving the zoning board the power to grant exceptions. It provided:

" . . . When in its judgment the public convenience and welfare will be substantially served and the appropriate use of neighboring property will not be substantially or permanently injured, the board of review may in a specific case, after public notice and hearing and subject to appropriate conditions and safeguards, authorize special exceptions to the regulations herein established as follows:

[enumerating various exceptions]

"(8) In any district any use or building deemed by the said board to be in harmony with the character of the neighborhood and appropriate to the uses or buildings authorized in such district . . . "

The ordinance, read literally and separately from the enabling statute, appears to give the zoning board unlimited discretionary power in granting exceptions. However, the court held that such was not the intent of the legislature.

"Obviously these subparagraphs, if read literally and separately from other provisions of the ordinance and statute, purport to give an almost unlimited discretion to the board in a great variety of cases. But in our judgment they must be read in connection with the enabling statute, G.L. 1938, chap. 342. That statute clearly distinguishes between power granted to the council as provided in §2 thereof to amend an ordinance by substantially changing a zoning line and the power given to a zoning board to grant an exception in a proper case under the ordinance within the limitations as specified in §8 of that statute." (91 A.2d at 37) (Emphasis added)

The court further stated that:

"The enabling statute provides in §2 for a proper procedure to amend an ordinance and to make substantial changes in the lines of a zone.

> This power is delegated to and is reserved for the city council. The board is not authorized by any language of the statute requiring the creation of a zoning board of review to substitute its discretion in all cases to achieve what is reserved for appropriate action by the council." (Emphasis added)

As stated earlier, Chapter 98H distinguishes between changing of district boundaries and granting of special permits. The power to change district boundaries is similar to the powers vested in the city council or similar body to make zoning changes. It is vested in the Land Use Commission, and such redistricting may be effected only upon the affirmative vote of at least two-thirds of the Commission. The power to grant special permits, on the other hand, is closely akin to the power granted to a zoning board or similar body to grant variances, exceptions and special uses. It is vested in the zoning board and the Land Use Commission, and a majority vote of both agencies is required.

Moreover, the criteria for amendment of district boundaries differ from those for granting of special permits. (Compare section 98H-4 with section 98H-6.)

It is clear that the Legislature did not intend the two remedies to be identical or that either would interchangeably be applicable to the same set of circumstances. The court in the Harte case had this to say on this point:

> " . . . if the zoning board may have the power to grant such an exception as is involved here, there would seem to be no need to seek the council's approval of an amendment of zoning lines or to have recourse at any time to an application for a variance. Apparently the board assumed that it had such a broad power. But we are of the opinion that in this regard it misconceived the true purpose and intent of the statute in relation to the power to grant an exception." (pp. 37-38) (Emphasis added)

The second reason relied on by the court in the Harte case goes to the substance of the problem we are confronted with in the instant case, i.e. whether this is actually a redistricting petition in the guise of a special permit application. In the Harte case, the landowner owned lots 68 and 129 consisting of 116,053 square feet of land in a residential district. He sought a change in use of approximately 100,000 square feet to build a supermarket and a parking lot. The facts indicated that the surrounding neighborhood, with the exception of one nonconforming use, consisted of one-family dwelling houses and lots platted for that purpose. The court refused to affirm the order of the zoning board which had approved the exception, stating on page 38:

> " . . . The decision is so extensive that it would transform the larger part of lot 129 and all of the still larger lot 68 together having an area of more than 100,000 square feet or the equivalent of 20 average house lots, from a restricted residence district into a business zone for a supermarket and a parking lot for 200 cars. Indeed this is not so much extending a business use as it is introducing a new business into a strictly residential zone . . . Such a result . . . certainly is so extensive in effect as to amount to amending the ordinance under the guise of granting an exception for a substantial change in the zoning line." (Emphasis added)

The court continued:

> "In our judgment such language did not contemplate that applications for an exception would become a routine alternative method to provide extensive changes in zones that were fixed by the council . . . " (Emphasis added)

In Bray v. Beyer, 166 S.W.2d 290 (Ky. 1942), the Board of Adjustment of the City Planning and Zoning Commission of Paducah, Kentucky, excepted certain lands zoned as residential from the restrictions of the zoning ordinances. The landowner Beyer intended to use such lands for business

purposes (service station). The Kentucky appellate court reversed the decision of the circuit court which had affirmed the granting of the variance, stating:

> " . . . if the Board of Adjustment may grant special exceptions or authorize variances, such as the one in the present case, it may eventually destroy the restrictions imposed by the zoning ordinance and, in effect, amend or repeal the ordinance.
>
> . . .
>
> " . . . the power of authorizing special exceptions to and variations from the general provisions of the zoning law is designed to be exercised only under exceptional circumstances and not for the purpose of amending the law or changing its scheme in essential particulars such as making changes in boundary lines of districts or authorizing the erection of a building forbidden by the zoning law to be erected." (166 S.W.2d at 292-293)

In Van Meter v. H. F. Wilcox Oil & Gas Co., 41 P. 2d 904 (Okla. 1935), application for permission to locate, drill and operate a second oil and gas well on an unplatted tract of land comprising 5.5 acres located within U-7 oil and gas drilling zone was filed by Wilcox Oil & Gas Co. The zoning ordinance provided that only one well to 5 acres of unplatted land was permissible. The building superintendent, Van Meter, refused to grant a permit; thereupon the landowner filed a petition for an exception with the Board of Adjustment, which also refused to grant a permit. The petitioner then appealed to the district court which reversed the order of the Board of Adjustment and mandated the Board to grant the permit. From that judgment, Van Meter, the building superintendent, appealed. The Supreme Court of Oklahoma reversed the lower court and remanded the case with directions to deny the permit, stating:

> " . . . The board of adjustment cannot have unconfined and unrestrained freedom of action. It is not at liberty to depart from the comprehensive plan embodied in the ordinance and it

> cannot, under the guise of exceptions and variances, modify, amend, repeal, or nullify the ordinance by establishing new zone lines and creating different areas for the drilling of oil and gas wells and thereby essentially change and substantially derogate from the fundamental character, intent, and true purpose of the zoning law . . . "
> (41 P.2d at 909) (Emphasis added)

In Allan v. Zoning Board of Review of City of Warwick, 89 A.2d 364 (R.I. 1952), the landowner sought an exception or variance from the provisions of the zoning ordinance in order to permit him to erect an addition to his real estate office situated in a residential zone. The zoning board granted the variance on grounds that the area in which the land is situate had become unsuitable for residential purposes and that denial of application would result in undue hardship to him. The court reversed the order of the zoning board, stating:

> " . . . It appears therefrom that the board based such decision largely upon its own expressed opinion that the entire area upon which the lots in question are situated, although zoned for residential purposes, is no longer suitable for such purposes and, inferentially, that in reality it should be zoned for business. The board seeks to bring about that result in the instant case by granting a variance from the present zoning law. It thus tries by indirection to do for the westerly side of Post Road what amounted to an attempt to amend the ordinance, which is clearly beyond the powers expressly delegated to it. Such a change can be brought about only by the body authorized to enact and amend the ordinance, . . . "
> (89 A.2d at 365) (Emphasis added)

Similarly, in the instant case, the granting of a special permit involving such a large area to authorize a use not otherwise allowed in the district would be tantamount to amending the district boundary under the guise of a special permit. The request for change in use covers approximately 240 acres of land. Said area is districted

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as an agricultural zone and almost all of the land is being used for agricultural purposes. It is contiguous with Waipio Acres, a small urban community, but not contiguous with Wahiawa, a major urban community.2/

Further facts indicate that petitioner also filed a request to amend the temporary boundary with the Land Use Commission. Said boundary change encompasses approximately 2,000 acres of land. The same 240 acres involved in the special permit petition are also included in the request for boundary change. The map submitted with the special permit petition indicates that the petitioner intends to develop the entire 2,000 acres into a satellite city at Waipio.3/ This strengthens the observation that the true intent here is a change of district boundary.

Variances and special permits are intended to permit amelioration of the strict letter of the law in individual cases.4/ The fundamental purpose of variances is to afford a safety valve against individual hardships and

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2/ It is approximately 2 miles from the southern rim of Wahiawa to the northern rim of the proposed satellite city of Waipio.

3/ See page 3, Special Permit Petition of Oceanic Properties, Inc., and Dole Corporation, wherein it is stated:

> " . . . The desired uses are in accord with the planned development by Oceanic Properties, Inc. of the said satellite city at Waipio, which will ultimately occupy the area designated on Exhibit A." (Emphasis added)
>
> Exhibit A is a map submitted by the same petitioners to the Land Use Commission requesting a boundary change for approximately 2,000 acres of land.

4/ Leighton v. Minneapolis, Minn., 16 F. Supp. 101.

to provide relief against unnecessary and unjust invasions of the right of private property, and to provide a flexibility of procedure necessary to the protection of constitutional rights.5/

The zoning board or a similar body vested with the power to grant variances should not use variances as a means to correct errors of judgment in zoning laws;6/ or to give them effect as amending zoning ordinances;7/ or to change the zoning scheme in essentials.8/ Furthermore, variances should not be granted if they do not comply with the spirit9/ or the general purpose and intent of the enabling statute.10/ As well-stated by the North Carolina Supreme Court in Lee v. Board of Adjustment:11/

5/ McQuillin, Municipal Corporations, Sec.25.160 relating to zoning, page 370.

6/ V. F. Zahodiakin Engineering Corp. v. Zoning Ordinance Board of Adjustment of City of Summit, 82 A.2d 493 (N.J. 1951).

7/ Essick v. City of Los Angeles, 213 P.2d 492 (Cal. 1950).

8/ Bray v. Beyer, 166 S.W.2d 290 (Ky. 1942).

9/ Application of Shadid, 238 P.2d 794 (Okla.1951).

10/ Sitgreaves v. Board of Adjustment of Town of Nutley, 54 A.2d 451 (N.J. 1947); Bassett, Zoning, p. 128.

11/ 37 S.E.2d 128 (N.C. 1946).

" . . . the determination, variation or application must be 'in harmony with their general purpose and intent and in accordance with general or specific rules therein contained' . . . 'so that the spirit of the ordinance shall be observed, public safety and welfare secured and substantial justice done.'

. . .

" The board cannot disregard the provisions of the statute or its regulations. It can merely 'vary' them to prevent injustice when the strict letter of the provisions would work 'unnecessary hardships.'" (Citing authorities)

The court further stated that:

"As the new building and its use must harmonize with the spirit and purpose of the ordinance, Bassett, Zoning, 128, no variance is lawful which does precisely what a change of map would accomplish. It follows that the privilege to erect a nonconforming building or a building for a nonconforming use may not be granted under the guise of a variance permit. Bassett, Zoning, 201 Action to that effect is in direct conflict with the general purpose and intent of the ordinance and does violence to its spirit." (37 S.E.2d at 132-133) (Emphasis added)

Special permit petitions are intended to allow certain "unusual and reasonable" uses within agricultural and rural districts. Its purpose is to provide a landowner relief in exceptional situations, that would not change the essential character of the district nor be inconsistent therewith, and is basically analogous to a variance. Its function is not to effectuate a boundary change or create a new district. Such powers are legally vested in the Land Use Commission, to be exercised under different procedures and different criteria.

On the basis of the foregoing, we are of the opinion that the subject request may be a proper subject for change in the temporary boundaries, but not for a special permit.12/

Very truly yours,

/s/ Roy Y. Takeyama

ROY Y. TAKEYAMA
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi

BERT T. KOBAYASHI
Attorney General

cc: Director, Land Use Commission

12/ However, petitioner cannot be prohibited from filing said permit application with the Zoning Board of Appeals, nor can he be denied the right to a public hearing to be heard on behalf of his petition.

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

Honolulu, Hawaii

HMN:hmm
OP. 63-38

August 30, 1963

Honorable John A. Burns
Governor of Hawaii
Iolani Palace
Honolulu, Hawaii

Attention Mr. Daniel T. Aoki

Dear Sir:

This is in response to your oral inquiry of August 28, 1963, as to whether the Governor's pardoning power includes the power to grant pardons and commutations for offenses against ordinances of political subdivisions of the State, as well as those against State laws.

We answer in the affirmative.

Article IV, Section 5 of the Constitution of the State of Hawaii, provides as follows:

> "The governor may grant reprieves, commutations and pardons, after conviction, for all offenses, subject to regulation by law as to the manner of applying for the same . . . "

This provision was discussed in Committee of the Whole Report No. 17 of the Constitutional Convention of Hawaii. It states in part:

> "Your committee agrees that the pardoning power thus granted includes the power to grant pardons and commutations for offenses created by ordinances of counties and other political subdivisions, as well as those created by State laws." (Const. Conv. of Hawaii, Vol. 1, p. 324)

It is clear therefrom that the Constitutional Convention intended the Governor's pardoning power to extend to offenses against ordinances as well as those against State laws, and we so construe Article IV, Section 5.

Accordingly, please be advised that the Governor may grant pardons for offenses against ordinances of counties as well as those against State laws.

Very truly yours,

/s/ Henry M. Nitta

HENRY M. NITTA
Legal Assistant to the
Attorney General

APPROVED:

/s/ Kenneth K. Saruwatari

KENNETH K. SARUWATARI
Acting Attorney General

BTK:ek
5a
Op. No. 63-39

STATE OF HAWAII

Department of the Attorney General

HONOLULU

September 3, 1963

Dr. Shelley M. Mark, Director
Department of Planning and
Economic Development
State of Hawaii
Honolulu, Hawaii

Dear Dr. Mark:

This is in reply to your request for an opinion on the following problems:

1. Section 1 of Act 195, Session Laws of Hawaii 1961, appropriated general revenues, special funds and proceeds of general obligation bond issues, for specific public improvement projects.

a. Where Section 1 of the Act designates a project to be financed by proceeds of a general obligation bond issue and the amount appropriated for said project is not wholly required to complete the project, may such excess be transferred to other projects that are in the same county and are provided for in the same section of the act, but are designated to be financed by general revenues or special funds?*

b. Where Section 1 of the Act designates a project to be financed by general revenues and the amount appropriated therefor is not wholly required to complete the project, may such excess be transferred to other projects that are

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*It is assumed that proper allocation has been made and that the appropriation has not lapsed.

in the same county and are provided for in the same section of the Act but are designated to be financed by general obligation bonds or special funds?*

2. Re Act 30, Session Laws of Hawaii 1962. Each year there are a few projects which, because of changing conditions, are not carried out to completion. Some never get started, others are dropped after unforeseen cost and other conditions are found during the planning stages which preclude further work on the project. Under Section 6 of the Act, can funds from such "abandoned" projects be transferred to other projects in the same Act and County?

We answer both parts of your first question in the affirmative, and the second question in the negative.

Section 1, Act 195, Session Laws of Hawaii 1961, provides, in part, as follows:

> ". . . General obligation bonds may be issued as provided by law to yield the amount that may be necessary to finance the projects herein indicated which are designated as being financed from general obligation bonds." (Emphasis added.)

This provision is not an absolute restriction on the use of the funds, but rather places a ceiling on the total amount of bonds that may be issued.

Although projects are to be financed in the first instance from the respective particular funds designated in said Act 195, Section 10 provides for a contingent method of additional financing where surplus amounts are subsequently found to be available. Section 10 provides:

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*It is assumed that proper allocation has been made and that the appropriation has not lapsed.

"In case the amount specified in any item in Section 1 shall not be wholly required to complete the work of such item or after it is definitely found by the Comptroller that not more than a specified amount will be required to complete said work, such unrequired amounts may be expended for any other item in the same county in Section 1 with the approval of the Governor, upon recommendation of the Director of State Planning and the Director of the Department of Budget and Review; provided, that the provisions of Section 2 shall be applicable to all highway projects in Sections 1 and 2. Transfers or anticipated lapsing of funds under Sections 1, 2, 3 or 4 shall be reported to the next legislature at least 20 days prior to its convening and shall be accompanied with the reason or reasons therefor." (Emphasis added.)

Thereunder, in case "the amount specified in any item in Section 1" is not wholly required for completion of the work, such excess may be used "for any other item in the same county in Section 1" upon proper approval.

By the broad language of Section 10, the Legislature, in our opinion, has authorized the use of general obligation bond funds not required for completion of a project, for other Section 1 projects that are in the same county upon proper approval, even if the latter projects are designated for financing in the first instance by general revenues or special funds. Conversely, the Legislature has authorized the use of general revenues not required for completion of a project, for other Section 1 projects that are in the same county, upon proper approval, even if the latter projects are designated for financing in the first instance by general obligation bond funds or special funds.

We caution that the foregoing states the general rule. Particular situations might entail peculiarities that would require distinction from the general rule.

We answer your second question in the negative.

Section 6, Act 30, Session Laws of Hawaii 1962, provides, in part:

> "In case the amount specified in any item in Section 1 shall not be wholly required to complete the work of such item or after it is definitely found by the expending officer that not more than a specified amount will be required to complete said work, such unrequired amounts may be expended for any other item in the same county in Section 1 . . ." (Emphasis added.)

The apparent purpose of this provision was to allow the use of amounts not required to complete a project, for other projects. It implies that the determination of such unrequired amount would be made after completion of the work, or be made prior to completion of the work after the expending officer had definitely found that not more than a specified amount would be required to complete the work. (Compare Section 7(c), Act 150, S.L.H. 1957.) It was clearly not intended to allow the transfer of funds from projects that had not been started or had been abandoned.

Furthermore, a contrary conclusion could lead to frustration, and make a mockery, of the appropriation process, which is essentially a legislative function and prerogative.

Very truly yours,

/s/ Bertram T. Kanbara

BERTRAM T. KANBARA
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi

BERT T. KOBAYASHI
Attorney General

ASKF:hmm
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OP. 63-40

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU, HAWAII

September 11, 1963

Mrs. Lily M. Okamoto
Acting Comptroller
Department of Accounting
and General Services
State of Hawaii
Honolulu, Hawaii

Dear Mrs. Okamoto:

This is in response to your letter of September 9, 1963, inquiring whether pursuant to Act 161, Session Laws of Hawaii 1963, sums from the State Parking Revolving Fund may be expended for the operation of other parking facilities within the Comptroller's jurisdiction.

Act 161, S.L.H. 1963, provides, inter alia, as follows:

> "Such amounts shall be expended by the comptroller from such fund, as may be necessary, to defray the cost of paving parking areas, the purchase and installation of parking meters and the operation thereof, and of other parking facilities on State land within his jurisdiction."

The Legislature, in enacting Act 161, indicated that it intended to regulate and control parking on State lands, provide penalties for violation of same and appropriate $50,000 to purchase and install parking meters

and other parking facilities on State lands.1/ The original bill provided that the proceeds from parking facilities on State lands, including parking meters, would be deposited into the General Fund of the State of Hawaii. Fifty thousand dollars was authorized to be used to defray costs and expenses incurred during the first year of operation for the purchase and installation of parking meters and other parking facilities on State lands. Subsequent amendments to the Act, including its title, created the State Parking Revolving Fund and authorized various expenditures including money for the operation of the parking meters. Act 166 was thereafter enacted, authorizing the Comptroller to issue revenue bonds to construct a multi-deck parking structure to be reimbursed from fees collected from parking meters and other parking facilities.

Act 161 presents an ambiguity in its interpretation only because of the comma following the words "operation thereof" as to whether funds therein may be expended for the expenses of operating other parking facilities. In the absence of said comma, it would be clear that the statute would enable the Comptroller to expend funds from the State Parking Revolving Fund for operation of other parking facilities.

In seeking to determine whether the Legislature intended to provide funds for the operation of other parking facilities out of the State Parking Revolving Fund, the reason and spirit of the law should first be ascertained. Every construction which leads to absurdity should be rejected.2/

1/ Act 161, whose title and contents were amended a number of times during its legislative history, is entitled: "A BILL FOR AN ACT RELATING TO THE POWERS OF THE COMPTROLLER OF THE DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES TO MAKE RULES AND REGULATIONS CONTROLLING PARKING ON STATE LANDS AND TO PROVIDE FOR PENALTIES FOR VIOLATION OF THE SAME, AND APPROPRIATE THE SUM OF $50,000 TO PURCHASE AND INSTALL PARKING METERS AND OTHER PARKING FACILITIES ON STATE LANDS AND PROVIDING THAT THE PROCEEDS THEREFROM BE DEPOSITED INTO THE STATE PARKING REVOLVING FUND OF THE STATE OF HAWAII, AND AMENDING CHAPTER 110 OF THE REVISED LAWS OF HAWAII 1955."

2/ Section 1-18, Revised Laws of Hawaii 1955.

The history of this Act indicates that the question of the Revolving Fund versus the General Fund was considered at great length in determining where revenues from State parking facilities should be deposited. After much discussion, the State Parking Revolving Fund finally created was intended as a self-sustaining profit-earning operation from which expenses would be incurred in the creation, installation and operation of all State parking facilities and toward payment of the milti-deck parking structure authorized in Act 166, S.L.H. 1963. The Legislature had already authorized expenditures from the State Parking Revolving Fund to be incurred for the operation of the parking meters. To find that the comma was intentionally placed would lead to the awkward interpretation that the Legislature intended to distinguish between the operations of parking meters from other parking facilities, authorizing expenditures for the first, but not for the latter. This does not seem to reflect the Legislature's intent.

Moreover, the courts have indicated that in the interpretation of statutes little reliance should be placed upon punctuations thereof; and that the insertion of a comma does not necessarily indicate a severance of that which precedes from that which follows. 50 Am. Jur. 250, par. 255. See also Crawford v. Burke, 195 U.S. 176.

Therefore, it is the opinion of this office that Act 161 authorized the Comptroller to expend sums from the State Parking Revolving Fund for operations of the parking meters and other parking facilities on State land within his jurisdiction within the limits authorized by law, including manpower allocations by the Department of Budget and Finance and the Governor.

Very truly yours,

/s/ Arthur S. K. Fong

ARTHUR S. K. FONG
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi

BERT T. KOBAYASHI
Attorney General

OP. 63-40

BTK:ek
12a;C-7962
Op. No. 63-41

STATE OF HAWAII

Department of the Attorney General

HONOLULU

September 11, 1963

Mrs. Edna T. Taufaasau, Director
Department of Personnel Services
State of Hawaii
Honolulu, Hawaii

Dear Mrs. Taufaasau:

This is to confirm our oral opinion given you earlier in reply to your letter dated July 15, 1963, concerning certain provisions in Section 4-4, Revised Laws of Hawaii 1955, as last amended by Act 121, Session Laws of Hawaii 1963.

Your letter raises the following questions:

(1) Who may appeal to the appeals board?

(2) What is the scope of the appeals board's authority to make adjustments to the tentative compensation plan?

Preliminarily, we note that said Section 4-4 provides that the conference of personnel directors shall review the existing compensation plan and recommend and submit a new tentative compensation plan to the appeals board. The appeals board is required to hold appeal hearings and adopt "policies and standards relative to compensation." Thereafter, the appeals board makes adjustments and submits the completed compensation plan to the Legislature for approval.

Relative to your first question, Section 4-4(c) provides in part:

> "The appeals board shall meet biennially to receive recommendations and comments relating to the compensation plan. The board <u>shall</u>

schedule hearings for pricing appeals from affected persons and parties and may hold public hearings as well." (Emphasis added.)

We read "affected persons" to mean persons affected by the compensation plan (i.e., employees, generally) who believe that their respective classes are improperly priced, as distinguished from strangers. "Affected parties" would include public employee organizations speaking on behalf of their members. It appears that the purpose of the underscored provision was to restrict outsiders not affected by the compensation plan from speaking at the appeal hearings, in the interests of conserving time. This is further indicated by the fact that the mandate to hear pricing appeals from affected persons is juxtaposed with an authorization in the same sentence to "hold public hearings as well." Presumably members of the general public not directly affected by the compensation plan could speak at the public hearings, but not at the appeal hearings.

The fact that the conference of personnel directors has not recommended any change in the pricing of an employee's class would not preclude the employee from filing an appeal and being heard. It is to be noted that the final compensation plan is not subject to appeal for two years. We do not think that the Legislature intended that pricing of classes would remain frozen by the mere act of the conference of personnel directors in not recommending any change in the pricing of that class. The fact that the directors have not recommended a change does not preclude the possibility that the class could be mispriced. We do not think the Legislature intended to bar appeals in such instances.

Relative to your second question, Section 4-4(d) provides, in part:

> "Based on the policies and standards referred to in section 4-4(c),1/ the appeals board shall make whatever adjustments to the affected classes where the appeals have been filed in the compensation plan that are necessary. . . ."

1/ Section 4-4(c) requires the appeals board to "adopt policies and standards relative to compensation."

This provision is imprecisely worded, and it is not clear therefrom whether the appeals board may make pricing adjustments only for those classes in which appeals have been filed, or whether it may also make adjustments for other classes (such as related classes) affected by action on an appealed class.

Prior to the 1963 amendment, Section 4-4(d) provided very broadly:

> "After public hearings and hearing all appeals, the appeal board shall make whatever adjustments that are necessary based on the policies and standards referred to in section 4-4(a). . . ."[2/]

In the 1963 session, the parallel provision in S. B. 657 (which became Act 121) as introduced was substantially the same, and provided:

> "After completing all hearings, the appeals board shall make whatever adjustments to the compensation plan that are necessary based on the policies and standards referred to in section 4-4(c)."

In Senate Draft 1, this was changed to read:

> "Based on the policies and standards referred to in section 4-4(c), the appeals board shall make whatever adjustments to the compensation plan that are necessary, provided,

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2/ Former Section 4-4(a) provided that the conference of personnel directors shall "determine policies and standards relative to compensation, whereby on the basis of similarity of duties performed and responsibilities assumed, the same qualifications may reasonably be required and the same schedule of pay may be equitably applied to all positions in the same class, without regard to the particular job title that may be assigned to the position; and (2) to determine those classes which are bench mark classes, and assign the same to the proper salary range."

however, that there shall be no downgrading of classes where the employees of such classes had no notice of downgrading and opportunity to be heard."

In Senate Draft 2, the proviso was deleted, and the provision in question was changed to its present form:

"Based on the policies and standards referred to in section 4-4(c), the appeals board shall make whatever adjustments to the affected classes where the appeals have been filed in the compensation plan that are necessary. . . ."

In the committee report accompanying Senate Draft 2 and explaining the above amendment made in that draft, the Senate Committee on Ways and Means reported:

"This bill has been amended from S. D. 1 in the following respects:

* * * * *

"To clarify that the Appeals Board, in the consideration of the appeals filed by employees, is to consider the appeals in their respective areas and not to reconsider the entire compensation plan." (Standing Committee Report No. 713, April 27, 1963. 3/) (Emphasis added.)

3/ Standing Committee Report No. 1125 of the House Finance Committee, dated May 3, 1963, states that the bill "provides that there shall be no downgrading of classes where no appeals have been registered with the Appeals Board by either the departments or the employees until such a time as notice of such downgrading has been publicized and the departments and the employees have had an opportunity to appeal and to be heard." That language was appropriate to the proviso added by S. D. 1. However, that proviso was deleted by S. D. 2, which substituted therefor the present language in Section 4-4(d). It appears that the quoted section of the said Committee Report was inadvertently referring to the superseded bill draft and therefore is not relevant here.

It appears that formerly, under its broad authority under the pre-existing law, the appeals board had made adjustments throughout the entire compensation plan at will, even in areas where no appeals had been filed. The underscored language indicates that the amendment was intended to prohibit this practice, but that it was not intended to limit the board's authority to make adjustments to appealed classes only. The committee report does not state that the board may consider the appealed classes only; it states that the board is to consider the appeals "in their respective areas." Similarly, Section 4-4 does not merely state that whatever adjustments are necessary may be made to classes where appeals have been filed, but states that such adjustments may be made to "affected" classes where appeals have been filed. If the former were intended, use of the word "affected" would not have been necessary. The deliberate use of the word indicates that a different meaning was intended.4/ And adjustments, according to Section 4-4(d), are to be based on the board's policies and standards relative to compensation. Thus, for example, such policies and standards might prescribe appropriate progression of salary range differentials between classes within a related series of classes (e.g., in Civil Engineer I, Civil Engineer II, etc.). Assume that an employee occupying a position in the class, Civil Engineer I, files an appeal; that no one in the other classes in the Civil Engineer series does; that the board agrees that the appealed class has been mispriced; but that repricing of that class without repricing of the other Civil Engineer classes would result in misalignment within the related series and would conflict with the board's policies and standards. In this example, we believe that such classes within the series are "affected classes" within the meaning of Section 4-4(d), notwithstanding the absence of an appeal therefrom, and that the Legislature did not intend to prohibit the appeals board from making adjustments thereto.

To summarize, it is the opinion of this department that:

4/ No sentence, clause or word should "be construed as unmeaning or surplusage if a construction can be legitimately found which will give force to and preserve all the words of the statute." In re Pringle, 22 Haw. 557, 564.

(1) Appeals to the appeals board may be made by public employees who believe that their respective classes are improperly priced in the tentative compensation plan; and

(2) Where an appeal has been filed, the appeals board may make an adjustment to the appealed class; it may also make adjustments to other unappealed classes in the same series that are affected by the appeal.

Very truly yours,

/s/ Bertram T. Kanbara

BERTRAM T. KANBARA
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi

BERT T. KOBAYASHI
Attorney General

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

Honolulu, Hawaii

September 12, 1963

WDG:hmm
OP. 63-42

Board of Trustees
Employees' Retirement System
of the State of Hawaii
Honolulu, Hawaii

Gentlemen:

On June 3, 1963, Governor Burns signed into law House Bill No. 1135 as Act 166, Session Laws of Hawaii 1963. This Act authorizes the Comptroller of the Department of Accounting and General Services to issue revenue bonds for the construction of a multi-deck parking structure on State land, such bonds to be paid from fees collected from parking meters and other parking facilities. On September 3, last past, Mr. V. Marciel, the State Comptroller and head of the Department of Accounting and General Services attended the meeting of your Board and at that time inquired as to the interest of the Trustees in acquiring for the State Retirement System the entire issue of revenue bonds in the amount of $920,000.

Your Board has, by letter dated September 4, 1963, requested the advice of this office as to whether the Comptroller has authority to sell, and the Retirement System has authority to buy, the bond issue on a negotiated basis.

We answer your question in the affirmative.

Act 166, Session Laws of Hawaii 1963, provides as follows:

"SECTION 1. Bonds. For the purpose of paying the cost of the construction of a

multi-deck parking structure on state land, the comptroller of the Department of Accounting and General Services is authorized by certificate to issue revenue bonds in the amount of $920,000 or such amount thereof as may be necessary, pursuant to chapter 137, Part III, Revised Laws of Hawaii 1955, as amended, which such bonds shall constitute obligations of the undertaking and shall be payable from all or such part of the gross revenues from the operation of a multi-deck parking structure on state land and from other fees and charges collected from parking meters and other parking facilities as may be provided for in the certificate of the comptroller.

"SECTION 2. Repayment of bonds. The revenue bonds shall contain such recital that the payment or redemption of the bonds and payment of the interest thereon is secured by the direct charge and lien upon the tolls, charges, rents, and gross revenues pledged for that purpose in the certificate issued by the comptroller and that such bonds do not constitute an indebtedness of the State." (Emphasis added.)

First, it should be noted that the bonds authorized by said Act 166 are revenue bonds dependent for payment of both principal and interest upon the allotted revenue of the undertaking. Second, the Comptroller's Certificate to be issued pursuant to Act 166 and in accordance with Chapter 137, Part III, Revised Laws of Hawaii 1955, as amended, shall pledge that all or only certain specific gross revenues received from the undertaking are to be used for the payment or redemption of the bonds and the payment of the interest thereon. Obviously, if the Comptroller's Certificate pledges only a part of the gross revenues from the undertaking to the payment of the bonds (principal and interest), the value and security of these revenue bonds as an investment are lessened.

Chapter 137, Part III, Revised Laws of Hawaii 1955, as amended, prescribes the procedure for the issuance of revenue bonds and sets forth certain provisions related

thereto. For example, section 137-52(c), R.L.H. 1955, authorizes any State department "to issue revenue bonds of the State, in such sums only as may be authorized by specific act or acts of the legislature of the State, to finance in whole or in part the cost of . . . construction . . . of any undertaking,". "Undertaking" is defined in section 137-50 to mean "any public works and properties of the State, or combination thereof, designated by the legislature as such in an act providing for the issuance of revenue bonds." Section 137-53, R.L.H. 1955, provides in part that such revenue bonds "may be sold at private sale to the United States, or any agency, instrumentality or corporation thereof, or to the employees' retirement system of the State, or to any political subdivision of the State." (Emphasis added.)

The Retirement System is specifically authorized to invest in revenue bonds of the State by section 6-75(d), R.L.H. 1955, as amended.

You are therefore respectfully advised that the revenue bond issue specifically authorized by Act 166, Session Laws of Hawaii 1963, is a legally authorized investment for the moneys from the State Employees' Retirement Fund and that the State Comptroller as head of the Department of Accounting and General Services is vested with authority to sell such revenue bonds at private sale to the Employees' Retirement System.

Very truly yours,

/s/ Wilford D. Godbold

WILFORD D. GODBOLD
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi

BERT T. KOBAYASHI
Attorney General

OP. 63-42

BTK:ai
12a
Op. No. 63-43

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

September 13, 1963

Mrs. Edna Tavares Taufaasau
Director of Personnel Services
Department of Personnel Services
State of Hawaii
825 Mililani Street
Honolulu 13, Hawaii

Dear Mrs. Taufaasau:

This is in reply to your oral request of September 11, 1963, as to whether the Director of Personnel Services has authority to promulgate rules and regulations to carry out the provisions of Part V of Chapter 3, Revised Laws of Hawaii 1955, relative to political activities of State officers and employees.

We reply in the affirmative.

Section 3-21, R.L.H. 1955, as amended, which is in Chapter 3, provides, in part:

> "The [director of personnel services][1] shall prescribe rules and regulations to carry out the provisions of this chapter..." (Emphasis added.)

Part V (consisting of Sections 3-70 and 3-71), relating to political activities of public officers and employees, is contained in Chapter 3. It follows that the Director of Personnel Services has been authorized to prescribe rules and regulations to carry out the provisions of said Part V, by virtue of Section 3-21.

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[1] The rule-making powers of the Civil Service Commission were transferred to the Director of Personnel Services by the reorganization act. Section 14A-10, R.L.H. 1955, as amended.

Our attention has been called to Attorney General Op. No. 56-45, dated April 4, 1956, which advised that under Act 274, Session Laws of Hawaii 1955, the Civil Service Commissions have no authority to issue rules restricting political activities. This conclusion was reached on the ground that prior to 1955, Section 74, R.L.H. 1945, as amended by Act 319, S.L.H. 1951 (which corresponds to the present Section 3-21, R.L.H. 1955, as amended), contained a provision reading: "Any rules or regulations restricting political activities by employees shall uniformly apply to the territory and all counties."; that the Legislature in enacting Act 274, S.L.H. 1955, omitted the quoted language, thus indicating that it intended "to withdraw from the commissions the authority for issuing rules restricting political activities".

Unfortunately, that opinion did not discuss and apparently did not consider the provision in Act 274, S.L.H. 1955, which stated: "The commission shall prescribe rules and regulations to carry out the provisions of this chapter . . ."[2] (Section 78, R.L.H. 1945, as amended.)

We note that prior to the enactment of Act 274 in 1955, the civil service law provided that: "The commission shall prescribe a code of rules and regulations to carry out the provisions of <u>this subtitle</u>[3] . . . . Any rules or regulations restricting political activities by employees shall uniformly apply to the territory and all counties . . . ." (Section 74, R.L.H. 1945, as amended by Act 319, S.L.H. 1951)

Act 274, S.L.H. 1955, amended this provision by extending the rule-making power to cover the entire chapter, rather than only provisions in one subtitle,

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[2] Said chapter included the provisions relating to political activities. (Part IV of Chapter 2, R.L.H. 1945)

[3] The political activities provisions were in a separate subtitle.

and by deleting the second sentence above quoted. We believe that the Legislature in so extending the rule-making power, intended to include within such power, the authority to make rules and regulations to carry out the portions of that chapter relating to political activities.

Opinion No. 56-45, being inconsistent with this opinion, is hereby withdrawn and superseded.

Very truly yours,

/s/ Bertram T. Kanbara

BERTRAM T. KANBARA
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi

BERT T. KOBAYASHI
Attorney General

PCL:ai
2a
Op. No. 63-44

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

September 16, 1963

Dr. Kenneth K. Otagaki, Chairman
Department of Agriculture
1428 South King Street
Honolulu 14, Hawaii

Dear Sir:

This is to confirm our oral opinion given you earlier in response to your letter of July 31, 1963, inquiring whether Section 23-26, Revised Laws of Hawaii 1955, prohibits Livestock Disease Control Branch veterinarians from carrying on private practice for profit involving the treatment of any animal which may be slaughtered for human consumption while working at the same time as meat inspectors.

We reply in the affirmative.

The pertinent part of Section 23-26 states as follows:

> ". . . All meat inspectors shall be under the supervision and control of a veterinarian of the board of commissioners of agriculture and forestry [now the Department of Agriculture] and such veterinarians as are charged with meat inspection shall be prohibited from carrying on private practice for profit which involves the treatment of any animal which may be slaughtered for human consumption."

In accordance therewith, your veterinarians who perform meat inspection may not, and do not, engage in the private practice of treatment of meat-food producing animals.

We understand that you also have veterinarians in the Livestock Disease Control Branch of your department. Their duties do not include meat inspection, and accordingly, they are not prohibited from engaging in the type of private practice prohibited by Section 23-26. Your question is whether they may be assigned for short periods to relieve meat inspectors who are on vacation or sick leave, and if so, whether such Livestock Disease Control Branch veterinarians would have to suspend private practice during the interval of such relief.

There is no question that as department head, you may direct your employees in the Livestock Disease Control Branch to serve temporarily as meat inspectors as exigencies may require. Section 14A-5, Revised Laws of Hawaii 1955, as amended.

That part of Section 23-26 which states "such veterinarians as are charged with meat inspection" does not specify the duration of such employment; to wit, whether it be on a full-time basis, part-time basis, or merely as an interim relief measure to cover vacation or sick leave contingencies. The absence of any such specific limitation requires that the restrictive language of Section 23-26 apply regardless of the temporary nature of the veterinarian's employment as a meat inspector.

It is therefore the opinion of this office that Section 23-26, Revised Laws of Hawaii 1955, prohibits a veterinarian from carrying on any form of private practice involving the treatment of any animal which may be slaughtered for human consumption while being employed at the same time by the State in the capacity of a meat inspector.

Very truly yours,

/s/ Peter C. Lewis

PETER C. LEWIS
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi

BERT T. KOBAYASHI
Attorney General

Op. No. 63-44

WDG:es
4a
Op. 63-45

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

September 18, 1963

The Honorable Andrew T. F. Ing
Director of Finance
Department of Budget and Finance
P. O. Box 150
Honolulu 10, Hawaii

Re: Hawaii Public Employees' Health Fund

Dear Sir:

Receipt is acknowledged of your letter of August 15, 1963, requesting the opinion of this office as to the proper uses and disposition to be made of certain "rate credits and other returns" to be received by the Hawaii Public Employees' Health Fund as a result of experience rating agreements with two of the three carriers in this employees' health benefit program. You point out that you expect reimbursement from one of these carriers, namely, Hawaii Medical Service Association, on or about October 1, 1963.

The Hawaii Medical Service Association agreement stipulates that in the event the cost of utilization for the agreed period is less than 91 per cent of the total premium for such period, the difference between the benefit utilization and 91 per cent of the total premium may be reimbursed to the fund.

Chapter 5A, Revised Laws of Hawaii 1955, as amended, sets up the fund and prescribes the functions of the fund and the procedure to be followed in its administration.

Section 5A-2, Revised Laws of Hawaii 1955, provides that the fund be under the control of the Board of Trustees and placed within the Department of Budget and Finance for administrative purposes and that the Director of Finance shall have custody of the fund. Section 5A-2 further provides that:

> "The fund shall consist of contributions, interest, income, dividends, refunds, rate credits and other returns." (Emphasis added.)

Section 5A-17, in addition to giving the Board of Trustees of the Hawaii Public Employees' Health Fund the power to administer the fund, provides that the Board may:

> "(a) collect, receive, deposit, withdraw and invest money in behalf of the fund;"

Section 5A-3 sets forth the purpose of the fund in the following language:

> "The fund shall be used solely for the purpose of providing employee-beneficiaries and dependent-beneficiaries with a health benefits plan, provided that the fund may be used for other expenses necessary to effectuate such purpose." (Emphasis added.)

Since Section 5A-2 provides, inter alia, that "refunds, rate credits and other returns" are part of the fund, it is clear that reimbursements resulting from the experience rating agreements with carriers become a part of the fund and, becoming a part of the fund, are limited to the uses of the fund as provided by Section 5A-3.

The guide in determining the purpose, use and disposition of refunds and reimbursements added to the fund as a result of rating experience agreements is exactly the same as the limitations on expenditures from the fund itself; that is to say, such expenditures are limited to (1) providing employee-beneficiaries and dependent-beneficiaries with a health-benefits plan, and (2) using the fund for other expenses necessary to effectuate such health-benefits plan.

In closing your letter of August 15, you raise these "basic" questions:

> "Does the State and/or the individual employee have an equity in these moneys" and "Can such future additional moneys be co-mingled?"

In our opinion, under the provisions of Section 5A-2, Revised Laws of Hawaii 1955, refunds, rate credits and other returns become a part of the fund as a whole and the fund is to be administered by the Board of Trustees under the provisions of Chapter 5A, Revised Laws of Hawaii 1955, as amended, for the benefit of all of the beneficiaries thereof, there being no provision in the Hawaii Public Employees' Health Fund Act for separate equities in separate individual employees.

We have not attempted to go into the many separate variations for which the fund could be applied (at the discretion of the trustees), provided that such expenditures are restricted to providing beneficiaries with a health-benefits plan and for other expenses necessary to effectuate such health-benefits plan. Instead, we have attempted to set up certain guidelines in accordance with the provisions of Chapter 5A, Revised Laws of Hawaii 1955, as amended.

However, in addition, it should be pointed out that the State cannot use refunds, credit rates, or other returns to reduce the State's contributions to the health benefits plan. Section 5A-4, Revised Laws of Hawaii 1955, requires the State to pay to the fund a monthly contribution of $3.00 for each employee-beneficiary and $10.00 monthly for each employee-beneficiary with a dependent-beneficiary, while Section 5A-5 provides for each employee-beneficiary to make up the difference between the monthly charge of the health benefits plan selected by the employee-beneficiary and the State's contribution to the fund.

Very truly yours,

Wilford D. Godbold

WILFORD D. GODBOLD
Deputy Attorney General

APPROVED:

Bert T. Kobayashi

BERT T. KOBAYASHI
Attorney General

Opinion No. 63-45

ASKF:ai
lb

Op. 63-46

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU, HAWAII

September 30, 1963

Mrs. Lily M. Okamoto
Acting State Comptroller
Department of Accounting
and General Services
State of Hawaii
Honolulu, Hawaii

Dear Mrs. Okamoto:

This is in response to your letter of September 25, 1963, inquiring as to the responsibility for relocating and/or adjustments to utilities necessitated by the State's constructing its Capitol Building on Beretania Street between Richards and Punchbowl Streets. Specifically, you inquire whether this cost of relocation and/or adjustment should be borne by the utility companies or by the State or both.

The law is well established that a statutory permissive right of use for public highways by public utilities is subordinate to the rights of the public. The original location of poles for other facilities on public highways does not create an irrevocable right to have such poles and facilities remain forever in the same place. Duquesne Light Co. v. City of Pittsburgh, 251 Pa. 557, 97 A. 85.

> "Since the police power cannot be surrendered, the privileges or franchises of private individuals or corporations must be conclusively presumed to have been acquired with reference to its

existence, and contract rights must yield to the proper burdens imposed by growth and development." 25 Am.Jur., § 182, pp. 479-481.

A utility company, therefore, may be required to relocate its lines at its own expense when such relocation is demanded for public necessity and for public safety and welfare. 52 Am.Jur., par. 28, pp. 57-58; par. 34, p. 64. See also New Orleans Gas Light Company v. Drainage Commission of New Orleans, 197 U.S. 453; Nichols on Eminent Domain, Vol. 2, § 5.85.

Since Beretania Street between Richards and Punchbowl Streets is a City and County Street and not a State or Federal-aid highway, the provisions of section 111-20, Revised Laws of Hawaii 1955 are inapplicable in the instant case.

Hence, it is the opinion of this office that the public utility companies affected should bear the full cost of relocation and/or adjustments necessitated by construction of the State Capitol Building.[1/]

Very truly yours,

/s/ Arthur S. K. Fong

ARTHUR S. K. FONG
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi

BERT T. KOBAYASHI
Attorney General

1/ See also opinion 55-181 issued by Honolulu City and County Attorney's Office on December 30, 1955.

BTK:es
24d
Op. 63-47

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

October 1, 1963

Mr. James J. Izumi
Personnel Director
Department of Civil Service
County of Maui
Wailuku, Maui, Hawaii

Dear Sir:

You have raised a question as to whether or not Section 5-20, Revised Laws of Hawaii 1955, as amended, has been repealed by Act 28, Session Laws of Hawaii 1962.

We reply in the negative.

Section 5-20 provides that the salary of any first deputy to a head of any department in the State or County governments shall not exceed a sum equal to 95% of the salary of such department head.

Your letter states:

> "The question arises because Section 38 of Act 28, SLH 1962, states that all laws in conflict with the provisions of said Act 28 are amended to conform with the provisions of said Act 28. It has been contended that Section 26 of said Act 28 is not a 'general law' within the meaning of 'general law' as contained in Section 1 of Article VII of the State Constitution. If Section 26 of Act 28 is not a general law, then it could be declared to be unconstitutional and of no effect. Since Section 38 of said Act 28 amends all conflicting laws to conform with Act 28, it could be construed that Section 5-20, RLH 1955, as amended, conflicts with Act 28 and is therefore repealed."

We are not certain as to what is meant.

Section 26 of Act 28, Session Laws of Hawaii 1962, provides in relevant part:

> "The salaries of first deputies or first assistants to the head of any department of the State in effect on the effective date of this Act are hereby increased by 5% effective July 1, 1962, provided however, Section 5-20, Revised Laws of Hawaii 1955, as amended, shall not be deemed repealed."

Section 1 of Article VII of the State Constitution, to which you refer, requires that the Legislature, in conferring powers upon political subdivisions, do so by general laws, as distinguished from special laws that are applicable only to specified counties. Section 26 of Act 28 relates to salaries of first deputies in the State government. It has no relation to powers of the counties, and therefore is not within the scope of the said constitutional provision. Since the above-quoted contention turns on the applicability of the said constitutional provision, our conclusion that it is not applicable is dispositive thereof.

It has also been contended that Section 21 of Act 28, Session Laws of Hawaii 1962, has impliedly repealed Section 5-20, Revised Laws of Hawaii 1955, as amended, by providing in its first sentence that:

> "Notwithstanding any other provision to the contrary, all public officers and employees re-assigned by Act 188, Session Laws of Hawaii 1961, shall be converted on July 1, 1962, from the existing schedule to the new schedule as follows. . . ." (Emphasis added.)

The section then sets out the formula for conversion as to employees who had been reassigned by Act 188, Session Laws of Hawaii 1961.1/

1/ The question was prompted by the situation of the Deputy Chief of Police of Maui County, whose position had been repriced by Act 188.

It may be noted that Section 19 of said Act 28 sets forth the formula for conversion to the new schedule of officers and employees covered by the position classification plan (Chapter 4) generally. We believe that the underscored phrase in Section 21 was mainly intended to make clear that an exception to the general formula, otherwise applicable to all Chapter 4 employees, was being made as to those employees who had been re-assigned by Act 188, Session Laws of Hawaii 1961, and that the Legislature did not thereby intend to repeal Section 5-20.

This is indicated in Section 26 of Act 28, discussed above, which provided for a five per cent increase in salaries of first deputies in the State government, but which also specifically provided that "Section 5-20, Revised Laws of Hawaii 1955, as amended, shall not be deemed repealed."

Similarly, Section 34 of Act 28, in providing for a five per cent increase in salaries of executive officers of regulatory boards, takes the precaution of specifically providing that "Section 5-20, Revised Laws of Hawaii 1955, as amended, shall not be deemed repealed."

Moreover, the principle of pay uniformity among all jurisdictions which pervades both Act 188 and Act 28 supports the view that the Legislature did not intend to repeal the 95% limitation as to certain first deputies while retaining it for others.

Finally, repeals by implication are not favored,[2/] and we believe that stronger evidence would be required to show such repeal of Section 5-20 by Act 28.

Very truly yours,

/s/ BERTRAM T. KANBARA

BERTRAM T. KANBARA
Deputy Attorney General

APPROVED:

/s/ BERT T. KOBAYASHI

BERT T. KOBAYASHI
Attorney General

cc: Representative David K. Trask, Jr.
Mrs. Edna T. Taufaasau, Personnel Director

2/ Territory v. Wills, 26 H. 469; In re Matsuji, 9 H. 402.

ASKF:es
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Op. 63-48

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

October 3, 1963

Mrs. Lily M. Okamoto
Acting State Comptroller
Department of Accounting and
General Services
Honolulu, Hawaii

Dear Mrs. Okamoto:

You have inquired whether Act 161, Session Laws of Hawaii 1963, is inconsistent with Act 166, Session Laws of Hawaii 1963, or in any way jeopardizes the proposed bond issue or the proposed certificate of the Comptroller therein.

We reply in the negative.

Acts 161 and 166 were enacted by the 1963 legislature at the same time after detailed hearings, including revenue and expense projections by the Comptroller to remedy the acute parking needs of State employees and the public. As indicated in our earlier opinion, No. 63-40, issued September 11, 1963, the State Parking Revolving Fund created by Act 161 was "intended as a self-sustaining profit-earning operation from which expenses would be incurred in the creation, installation and operation of all State parking facilities and toward payment of the multi-deck parking structure authorized in Act 166, S.L.H. 1963."

The provisions of Act 166 provide, inter alia, that the revenue bonds "shall be payable from all or such part of the gross revenues from the operation of a multi-deck parking structure on state land and from other fees and charges collected from parking meters and other parking facilities as may be provided for in the certificate of the comptroller."

From the legislative history, the reason and spirit of these acts indicate clearly that all funds collected from the operation of the multi-deck parking structure and other fees and charges from parking meters and parking facilities are a first charge toward payment of the revenue bonds authorized under Act 166. After such payments by the Comptroller, the expenses and operations of the purchase and installation of parking meters and other parking facilities on State lands can be made with the remaining revenues.

It is therefore the opinion of this office that Acts 161 and 166 are consistent with each other and that Act 161 does not jeopardize the proposed bond issue or the proposed certificate of the Comptroller authorized by Act 166. The certificate of the Comptroller should contain a recital of language in accordance with the above provisions and following substantially the statutory language.

Very truly yours,

/s/ ARTHUR S. K. FONG

ARTHUR S. K. FONG
Deputy Attorney General

APPROVED:

/s/ BERT T. KOBAYASHI

BERT T. KOBAYASHI
Attorney General

AWL:es
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Op. 63-49

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

October 14, 1963

Mr. Richard S. Takasaki
Vice President for Business Affairs
University of Hawaii
Honolulu 14, Hawaii

Dear Sir:

By letter dated August 5, 1963, you have requested advice as to whether the University of Hawaii may sell property which had been conveyed to the Territory of Hawaii in 1927 for University purposes and subsequently set aside by Executive Order No. 1807 to the University of Hawaii. By Article IX, section 4 of the Hawaii State Constitution, the University of Hawaii is vested with title to all real property set aside to it "which shall be held in public trust for its purposes, to be administered and disposed of according to law."

The property in question is located on Ocean View Drive, containing 6,974 square feet, and was conveyed to the Territory of Hawaii by deed of Harry F. Lewis, dated May 14, 1927, recorded in the Bureau of Conveyances in Liber 893, pages 161-163. The question arises whether a fee simple on condition subsequent, fee simple determinable, covenant or trust is created by the language of the deed.

The granting clause of said deed quitclaims to the "Territory of Hawaii, its successors and assigns, all of my right, title and interest . . . together with all and singular the tenements, hereditaments and appurtenances . . . and reversion and reversions, remainder and remeinders (sic), rents, issues and profits thereof; . . ."

The habendum appears without limitation or qualification save and except a proviso attached after the habendum. The habendum and proviso read as follows:

> "TO HAVE AND TO HOLD, the same unto the said Territory of Hawaii, its successors and assigns, forever."
>
> "PROVIDED, HOWEVER, that the premises herein conveyed shall be used by the University of Hawaii or its successors or assigns for the purposes of said University." (Underscoring added.)

The deed contains no provision for reversion or reconveyance to the grantor upon breach of the condition. Under the facts of the present case, the decision of our Supreme Court in Bishop Estate Trustees v. Castle & Cooke, 45 Haw. 409, is controlling. The Court followed the majority rule and held that the purpose clause in the habendum did not qualify or limit the estate granted by the deed. The Court said:

> "The principal reason given for this general rule is that the purpose clause is a mere expression or declaration or recital of the anticipated use by the grantee of the land and that such an expression or declaration or recital does not indicate an intent to qualify or limit the estate granted by the deed."

The nature of the consideration ($1.00) in the present conveyance to the Territory does not change the general rule. The Court stated that this general rule holds irrespective of various collateral circumstances such as the nature of the consideration recited.

As the Court stated, the purpose clause in the habendum created, at most, a covenant and not a condition. Regarding the status of this covenant or condition, the Court was of the view that compliance over a period of years satisfied the covenant. It stated as follows:

> "Hence, in the case that we have before us--an asserted reverter after railroad use for nearly fifty years--the statement of purposes in the first part of the deed is without significance."

In the present situation, the University has used the premises from 1927 to 1960, a period of thirty-three years for University purposes.

Confining ourselves to the specific deed to the Territory, and to the specific facts of this case, it is our opinion that the purpose clause in the habendum of the deed to the Territory did not limit or qualify the fee conveyed. The University of Hawaii may therefore sell its Kaimuki property located on Ocean View Drive. Under Article IX, section 4 of the Hawaii State Constitution, disposition can be made only "according to law." Section 44-1.5, Revised Laws of Hawaii 1955, as amended, provides that the University of Hawaii, under the direction of the Board of Regents, shall have the power to sell, lease or otherwise dispose of real property. The manner of sale and use of the proceeds should, of course, be consistent with the "public trust" requirement of said Article IX, section 4 of our Constitution.

Very truly yours,

/s/ ALANA W. LAU

ALANA W. LAU
Deputy Attorney General

APPROVED:

/s/ BERT T. KOBAYASHI

BERT T. KOBAYASHI
Attorney General

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

Honolulu, Hawaii

October 18, 1963

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OP. 63-50

Mr. R. Burl Yarberry
Superintendent of Public
Instruction
Department of Education
State of Hawaii
Honolulu, Hawaii

Dear Mr. Yarberry:

Your letter dated April 29, 1963, requests our opinion relative to student cafeteria services in the public schools. More specifically, you pose the following questions:

1. Whether the Department of Education can legally require students to perform cafeteria services during school hours;

2. Whether the Department of Education must secure child labor certificates and conform with other provisions of the child labor laws when students are required to perform cafeteria services during school hours;

3. Whether the Department of Education is violating any health regulations or laws or jeopardizing the health and safety of the child in requiring students to perform cafeteria services.

1. WHETHER THE DEPARTMENT OF EDUCATION CAN LEGALLY REQUIRE STUDENTS TO PERFORM CAFETERIA SERVICES DURING SCHOOL HOURS.

We answer the first question in the affirmative.

The power to promulgate rules and regulations with respect to carrying out the general scheme of public education and for the transaction of its business has been delegated by the legislature to the Department of Education. Section 37-7, Revised Laws of Hawaii 1955, provides that:

> "Rules, regulations. Subject to the provisions of sections 7-28 to 7-41, the department may adopt rules and regulations not contrary to law, for the government of all teachers and pupils, its officers, agents and servants, and for carrying out the general scheme of education and for the transaction of its business, which, when approved by the governor and published, shall have the force and effect of law."

Pursuant to said Section, the Department of Education adopted the following regulation:

> "Cafeteria Assistance. Not more than one full day of cafeteria duty shall be required of any child in any one month or more than a total of seven full days in one school year. Any exception must be with the full knowledge and approval of the District Superintendent.
>
> "Every effort should be made to reduce the time students spend in the cafeteria. This can be done in some situations by having them start work later, report back to class earlier and by using some students only during the rush period.
>
> "Other General School Service. Not more than ten days a year or one day a month may be devoted to all forms of school service, including cafeteria duty." (Series No. 5137, School Code)

There is no question that the Board of Education has the authority to promulgate regulations with respect to management and control of public education. (See 78 C.J.S., Schools and School Districts, Section 721.) In Stromberg v. French, 236 N.W. 477, 479 (N.D. 1931), the court stated that:

> "' . . . The power of the board of education to control and manage the schools and to adopt rules and regulations necessary for that purpose is ample and full. The rules . . . necessary to a proper conduct and management of the schools are, and must necessarily be, left to the discretion of the board, and its acts will not be interfered with nor set aside by the courts, unless there is a clear abuse of the power and discretion conferred.'" (Emphasis added.)

The question we then face is whether the Board of Education, which heads the Department of Education, abused its power in passing such a regulation. To make this determination, the courts have consistently applied the test of reasonableness. Richardson v. Braham, 249 N.W. 557 (Neb. 1933).

In Stromberg v. French, supra, the school board passed a rule forbidding students to wear shoes with metal heel plates to school. Murray Stromberg, a student, violated the rule and was suspended. His parents instituted an action to restrain the board from enforcing the regulation. They contended that, as parents, they had the right to determine what apparel their son should wear at school, and that the regulation was arbitrary and unreasonable. The court denied them relief stating at page 479:

> " . . . As a general rule the decision of a school board, 'if exercised in good faith on matters affecting the good order and discipline of the school, is final so far as it relates to the rights of pupils to enjoy school privileges, and the courts will not interfere with the exercise of such authority unless it has been illegally or unreasonably exercised.' . . . Presumptively, rules and regulations established by a school board are reasonable

and proper. Kinzer v. Directors of Independent School District of Marion, 129 Iowa 441, 105 N.W. 686, . . . And whether or not such rules and regulations are reasonable is a question of law to be determined by the court." (Citing cases) (Emphasis added.)

The court further stated that:

" . . . Of course, in most instances, the right of the parent is paramount, but sometimes the interests of the public generally require that the parent shall give way. We think this is so in the instant case. The trial court found, and we think rightly, that under the circumstances there was no abuse of authority and the rule was proper and reasonable. Certainly there was no hardship or indignity imposed upon the plaintiff or his son by it. It is aimed at the remedying of a condition which the school authorities consider detrimental to the best conduct of the school . . . " (Emphasis added.) (page 480)

In Casey County Board of Education v. Luster, 282 S.W.2d 333 (Ky. 1955), the court held that a regulation prohibiting children from entering or patronizing a cafe, which was adjacent to the school grounds, during school hours was not unreasonable or arbitrary, stating:

" . . . The law commits the government and conduct of public schools, in general, to the discretion of the school board and places same beyond that of the patrons. The courts will not interfere with the discretion of school authorities in the rules they may promulgate unless it appears they have acted arbitrarily or maliciously. . . . " (page 334)

In Flory v. Smith, 134 S.E. 360 (Va. 1926), the legality of a regulation prohibiting students from leaving the school campus between 9:00 a.m. and 3:35 p.m. was questioned. The parents asked to be relieved of the restriction by permitting their children to eat their lunch at home or have lunch with their father at a nearby hotel.

The request was denied by the school authorities. The parents, despite the denial, withdrew their children from school during the lunch hour. The school authorities suspended the children. The court upheld the suspension and said that the regulation was reasonable:

> "'The law commits the government and conduct of the school, in general, to the discretion of the board of education of the district, and places it beyond that of the patrons. Let the results be good or bad, there is no remedy, so long as the board acts within the limits of its legal power and authority. . . . '" (page 362)
>
> " . . . [I]t is neither restraint nor infringement for the Legislature to enact laws to debar a child from the mere privilege of acquiring an education at the expense of the state until he is willing to submit himself to all reasonable regulations enacted for the purpose of promoting efficiency and maintaining discipline. . . . " (page 363)

Similarly, the regulation involved in the instant case is no more arbitrary and unreasonable than the above-referenced cases. There the regulation prohibited students from wearing shoes with steel plates, forbade students from patronizing a nearby cafe, and prohibited students from leaving the campus during certain hours. Here the regulation requires students to perform cafeteria services. It does not vest unlimited discretionary powers in the school authorities to determine the frequency of such services. The regulation restricts them from sending students to the cafeteria more often than once a month and in any case, not more than seven full days in one school year. Furthermore, there is also an over-all restriction prohibiting students from performing any type of school services for more than ten days in a school year.

It might be argued that the experiences gained from performing cafeteria services are not part of the school curriculum and are of little educational value.

On the other hand, it is contended that the requirement of performing cafeteria services is not completely foreign or unrelated to the process of education. The term "education" is defined in Weyl v. Comm'r. of Internal Revenue, 48 F.2d 811 (1911), as follows:

> "'Education as understood today, connotes all those processes cultivated by a given society as means for the realization in the individual of the ideals of the community as a whole. It has for its aim the development of the powers of man (1) by exercising each along its particular line, (2) by properly co-ordinating and subordinating them, (3) by taking advantage of the law of habit, and (4) by appealing to human interest and enthusiasm. It includes not only the narrow conception of instruction, to which it was formerly limited, but embraces all forms of human experience, owing to the recognition of the fact that every stimulus with its corresponding reaction has a definite effect on character. It may be either mainly esthetic, ethical, intellectual, physical or technical, but to be most satisfactory it must involve and develop all these sides of human capacity.'" (Emphasis added.)

Further, in Gregg v. United States, 22 F. Supp. 802, it was stated that:

> " . . . Perhaps the introduction of a balanced meal gave some instruction in dietetics. To that extent, at least, it was educational." (page 804)

The Department of Education, in support of its rule, contends that school cafeteria services, as an incidental adjunct to education, place students in a practical environment wherein they tend to develop certain desirable qualities, not purely by the performance of menial tasks required, but by learning to accept responsibility and to work successfully with their fellow students. Said Department is further of the opinion that these intangible factors, which tend to contribute to the over-all development of a student, are not necessarily acquired in the purely formal aspects of our educational system.

In light of the foregoing, we are of the opinion that the regulation is not unreasonable nor arbitrary.

It has also been contended that the fact that students injured while performing cafeteria services receive workmen's compensation benefits removes the activity from the realm of educational experience and places it in an employment situation.

We fail to see any legal merit to this position. The medical and hospital benefits received by students injured while performing cafeteria services are derived from Section 97-120, Revised Laws of Hawaii 1955, which states:

> " . . . Any person who is injured in performing service for the State or any county in any voluntary or unpaid capacity under the authorized direction of a public officer or employee, . . . shall be paid his reasonable hospital and medical expenses under the provisions of this part."

It seems illogical to hold that such an activity is an employment situation merely because injured students receive such benefits.

A corollary issue involved is whether the regulation violates section 1 of the 13th Amendment of the United States Constitution which reads:

> "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

In Butler v. Perry, 240 U.S. 328 (1915), the constitutionality of a Florida statute requiring men between the ages of 21 and 45 to work on the roads and bridges of the several counties for six days in each year when summoned to do so was involved. In finding the statute constitutional, the court announced that:

> "In view of the ancient usage and the unanimity of judicial opinion, it must be taken as settled that . . . a State has inherent power to require every able-bodied man within its jurisdiction to labor for a reasonable time on public roads near his residence without direct compensation. This is part of the duty which he owes to the public. . . .
>
> "It [13th Amendment] was not intended to interdict enforcement of those duties which individuals owe to the State . . . "
>
> Accord: United States v. Sugar, 243 F. 423 (1917); In re Dassler, 12 Pac. 130 (1886).

In State v. City of Topeka, 12 Pac. 310 (1886), the court ruled that work upon the roads was not prohibited under the 13th Amendment stating:

> "Good public roads or streets is a sufficient compensation for the labor required to be performed by each individual in keeping them in good order and condition; . . . " (page 315)

Such service was deemed similar to service on juries, in the militia, in the army, or in removing snow or ice from sidewalks, gutters, etc.

A close analogy may be drawn between the circumstances in the foregoing cases with that in the instant case. There men were required to work on roads a given number of days in a year; under the Department rules, the students are required to perform school services, including cafeteria duty, up to 10 days in a year but no more than once a month.

Finally, in In re Santillanes, 138 P.2d 503 (1943), the New Mexico court stated that:

> " . . . [T]he provisions of the State and Federal Constitutions relating to involuntary servitude do not have reference to the legitimate authority for the control and education of children. 'A child may be subjected to restraints that may be necessary for his proper education

and discipline that could not be applied to adults.'" (Emphasis added.)

Another corollary issue involved is whether the school authorities can take disciplinary action against students violating the regulation. It is our understanding that, in certain instances, students have been sent home or requested to stay home if they refused to comply with the regulation.

Section 40-11, Revised Laws of Hawaii 1955, provides that:

> "If for any reason a child becomes a detriment to the morals or discipline of any school such child may be dropped by the principal with the approval of the district superintendent. . . . " (Emphasis added.)

Furthermore, Regulation 5114a of the School Code lists "Insubordination" as one of the offenses which may result in suspension or dismissal from school.

The question we then face is whether a refusal to comply with the regulation warrants suspending the student on grounds of insubordination or conduct which has injurious effect on the discipline of the school.

In Stromberg v. French, supra, the court upheld the suspension of a student who had refused to comply with the board's regulation prohibiting the wearing of shoes with metal plates to school. The student argued that he was not insubordinate because he was only following his parents' command. The court stated:

> " . . . It seems to us that even so his conduct amounted to insubordination. Any other construction put upon the term as used in the statute might result in an intolerable situation. No rule or regulation could be enforced, provided the parent directed the pupil not to observe it. So we hold that the action of Murray, though taken at the command of his parents, constituted insubordination within the meaning of that term as used in the statute." (page 480) (Emphasis added.)

In Byrd v. Begley, 90 S.W.2d 370 (Ky. 1936), the court upheld the expulsion of a student for violating a rule requiring boys living in the dormitory to be in their rooms by 7:00 p.m., stating that:

> " . . . [E]ducation prepares the boys and girls for the duties and obligations of citizenship. Neither the schools nor the state can carry on without rules or laws regulating the conduct of the student or citizen, and those who are taught obedience to the rules and regulations of the school will be less apt to violate the laws of the state. Appreciating the necessity therefor, the general assembly has provided that all pupils who may be admitted to the common schools shall comply with the regulations in pursuance of law for the government of such schools; that willful disobedience or defiance of the authority of the teachers, habitual profanity or vulgarity, or other gross violation of propriety or law shall constitute good cause for suspension or expulsion from school; . . . "
> (page 371)

Finally, in 79 C.J.S., Schools and School Districts, Section 503, it is stated that:

> "A pupil may properly be expelled or suspended for an infraction of, or for a refusal to comply with, a reasonable rule or regulation of the school authorities, or he may be expelled or suspended for persistent disobedience, insubordination, or other misconduct for which no formal rule is prescribed, but which has an injurious effect on the discipline and government of the school; . . . "
> (Emphasis added.)

Based on the foregoing, we are of the opinion that a student refusing to comply with the regulation is insubordinate and violates the discipline of the school; thereby justifying the school authorities in suspending him.

2. WHETHER THE DEPARTMENT OF EDUCATION MUST SECURE CHILD LABOR CERTIFICATES AND CONFORM WITH OTHER PROVISIONS OF THE CHILD LABOR LAWS WHEN STUDENTS ARE REQUIRED TO PERFORM CAFETERIA SERVICES DURING SCHOOL HOURS.

We answer the second question in the negative.

The Child Labor Law regulates the employment of minors of certain ages in certain occupations. The Department of Labor administers this law and any person who hires a minor under eighteen is required to procure a certificate from the Department of Labor.

Generally, the State, as a sovereign, is not bound by the terms of a general statute that tends to injuriously encroach upon the affairs of the government, unless the contrary is expressly declared or necessarily implied. (Nutter v. City of Santa Monica, 168 P.2d 741 (Calif. 1946); State v. Merrill, 185 N.E. 56 (Ohio 1933); Sutherland, Statutory Construction, 183 (3rd ed. 1943).)

Section 88-22, Revised Laws of Hawaii (1961 Supplement), is a general statute and nothing therein expressly or impliedly indicates that the provisions are applicable to the State Government. And where a statute is not expressly made applicable to the government, courts must determine whether the Legislature intended the statute to so apply by considering all matters which, under rules of statutory interpretation, shed light on legislative intent. (Nutter v. City of Santa Monica, supra)

Such terms as "person" and "employer" used in the section seem to negate the inclusion of government agencies within its application. The word "person" generally does not include the sovereign, in common usage, nor, ordinarily, when employed in statutes. (United States v. Cooper Corp., 312 U. S. 600) And the word "employer" is defined in Section 88-1, Revised Laws of Hawaii (1961 Supplement) as ". . . every person having control or custody of any employment, place of employment or any employee, but shall not include the United States, or the State or any political subdivision thereof."

It is true that courts will relax the stringency of the general rule of sovereign immunity where the demands

of a contrary policy include the government within the purpose and intendment of the statute. And it is said that a contrary policy is indicated where the inclusion of a particular activity within the meaning of the statute would not vitally interfere with State functions. (3 Sutherland, Statutory Construction, 191, 3rd ed.; West Norman Timber v. State, 224 P.2d 635 (Wash. 1950).)

In Clements v. Sherwood, 45 N.E.2d 805, the Ohio Court of Appeals in construing a statute limiting the hours of employment of minors of certain ages in certain employment held that such statute pertains to the general employment of such persons and does not control the State and State's employment of minors.

Based on the foregoing reasons and authorities, it is our opinion that the State and its agencies are not within the reach of the requirements of Section 88-22.

3. WHETHER THE DEPARTMENT OF EDUCATION IS VIOLATING ANY HEALTH REGULATIONS OR LAWS OR JEOPARDIZING THE HEALTH AND SAFETY OF THE CHILD IN REQUIRING STUDENTS TO PERFORM CAFETERIA SERVICES.

We answer the third question in the negative.

The issue of alleged violations of the regulations of the Department of Health will be discussed first. It is a generally accepted maxim of law that the State, including administrative agencies as subdivisions of the State, are exempt from the operation of the general provisions of a statute or the regulations promulgated pursuant to a statute. This general rule applies unless a contrary result is expressly dictated by the statutory language or necessarily implied from same. Nutter v. City of Santa Monica, supra; MacFarlane v. Rep. Haw., 11 Haw. 387, 389 (1898); 3 Sutherland, Statutory Construction, 184-85 (3rd ed. 1943). It can therefore be argued that Section 6(a) of Chapter 23 of the Public Health Regulations, promulgated pursuant to Section 46-13, Revised Laws of Hawaii 1955 (1961 Supplement), requiring that all food handlers regardless of age be examined annually for tuberculosis, does not include within its scope the sovereign or any agency thereof. However, it has been determined by

the Department of Health that a general exception of this nature would not be in the best interest of the public health. The Department of Health has therefore arrived at an alternative solution which involves amending the regulations relating to tuberculosis to bring them in line with the current technological status of tuberculosis in Hawaii today. Such an amendment would exclude the requirement that all food handlers under the age of 20 be examined annually for tuberculosis. And from a point of view of practical application, the Health Department has stated that all food handlers 20 years of age or over would then be required to be examined regardless of their affiliation with the State. School students 20 years of age or over working in cafeterias would then fall within this category.

As pointed out above, the Department of Health, based on information provided by Dr. Robert H. Marks, Chief, Tuberculosis Branch, Department of Health, is in the process of amending Chapter 23 of the Public Health Regulations relating to tuberculosis, the general import of the change being that only food handlers 20 years of age or over will be required to submit to tuberculosis examinations. This office has been delegated the responsibility of determining legal questions. The Department of Health must make the determination that the health and safety of school children working in the cafeterias as well as the public in general will not be compromised by eliminating the necessity for all food handlers under 20 years of age, regardless of their relation to the sovereign, to be examined for tuberculosis.

Subsequent to the effective date of the amendment, the Department of Health has stated that it will be their policy to require all food handlers 20 years of age or over, regardless of affiliation with the sovereign, to submit to a tuberculosis examination pursuant to Chapter 23 of the Department of Health Regulations. This will apply equally to all workers in the school cafeterias 20 years of age or over as well as to those 20 years of age or over connected with all other establishments connected with food handling as covered under Chapter 1 of the Public Health Regulations dealing with sanitation. We see no legal objection to said amendment.

The next issue with which we are concerned is whether school children working in the cafeterias constitute

a menace to the public health. The Department of Education in conjunction with the Department of Health has promulgated directives in the field of sanitation and safety which have allegedly been distributed to all school principals, teachers and cafeteria managers. From the standpoint of sanitation, these directives cover the cleanliness of the kitchen, dining room and storage areas, the cleaning of equipment, utensils and dishes, and specific sanitation procedures to be followed by cafeteria and student helpers. Safety precautions are covered under the heading of "general rules for accident prevention." These rules deal with areas such as lifting heavy objects and similar aspects of health from a standpoint of the safety of the school children. The Department of Health and Department of Education must determine whether these standards are adequate. In discussing the matter with said departments, they have so indicated in the affirmative. A legal issue is not involved herein. These departments have, however, been examining the directives and are in the process of updating the rules to include any current problems which may have arisen. Whether or not there is compliance with these standards is a question of fact which must be determined by the Department of Health in conjunction with the Department of Education.

The final issue to be covered from the standpoint of the Department of Health is whether the health and safety of the children are jeopardized due to inadequate supervision. To properly insure that the health and safety of the children are protected while they work in the cafeteria, it is necessary that the children be adequately supervised by someone other than their peers during all phases of their work in the cafeteria. It is the delegated responsibility of the Department of Health and Department of Education to determine what constitutes adequate supervision and to then answer the question whether the supervision meets the standards set by said departments.

Based on the foregoing, we are of the opinion that the Department of Health regulations relating to food handlers and the necessity that they be examined annually for tuberculosis before handling food is generally not binding on the State or agencies thereof. Nevertheless, the Department of Health is in the process of amending their regulations to comply with current epidemiological and statistical facts relating to tuberculosis in Hawaii today, the end result being that from a viewpoint of practical application, all food handlers 20 years of age

or over, will be required to be examined regardless of whether they are connected in any manner with the sovereign and subject to possible sovereign immunity. From a standpoint of sanitation, safety and proper supervision in the cafeterias, the Department of Health and Department of Education must provide the answer as to whether the public health and safety are in jeopardy. These departments must provide the standards and determine if there is any violation of same, these being questions of fact which do not fall within the purview of the authority delegated to this office.

It might be stated here that in the preparation of this opinion letter this office enlisted the aid of various persons, officers and organizations, including, among others, the American Bar Association, the Council of State Governments, National Education Association, National Institute of Municipal Law Officers, American Association of School Administrators and the Office of the Attorney General, State of California.

We were also favored with the written views of parties opposed to the requirement presently in the School Code relative to student help in school cafeterias.

In conclusion, please be advised that we present in this opinion the legal aspects of the questions involved. As we indicate herein, the Board of Education and the Department of Health, where it is concerned, are the policy-making bodies. Our office sets forth the legal bounds beyond which these boards should refrain from encroaching.

Very truly yours,

/s/ Roy Y. Takeyama

ROY Y. TAKEYAMA
Deputy Attorney General

/s/ Peter C. Lewis

PETER C. LEWIS
Deputy Attorney General

/s/ Toshimi Sodetani

TOSHIMI SODETANI
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi

BERT T. KOBAYASHI
Attorney General

Op. No. 63-50

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Op. No. 63-51

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU, HAWAII

October 29, 1963

Mr. Edward Silva, Member
Conference of Personnel Directors
County of Hawaii
Hilo, Hawaii

Dear Mr. Silva:

This is in reply to your inquiry of October 25, 1963, made at the request of the Conference of Personnel Directors, as to whether positions of first deputy or first assistant to a department head in the counties of Hawaii, Maui or Kauai, referred to in subparagraph (k) of section 3-61, Revised Laws of Hawaii 1955, as amended, are required to be included in the position classification and pay plans.*

We reply in the affirmative.

Said subparagraph (k) of section 3-61 excludes certain positions of first deputy or first assistant from civil service. However, the same subparagraph provides: "but such positions shall be included in the position classification plan."

And these positions have been placed under the coverage of Chapter 4, Revised Laws of Hawaii 1955, as amended (the Compensation Law), by virtue of section 4-3 thereof, which provides:

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* Positions of first deputy to department heads in the City and County of Honolulu are covered by section 5-603, subparagraph (k), of the City Charter, which is identical in substance with the provisions of section 3-61, subparagraph (k), Revised Laws of Hawaii 1955, as amended. The provisions of section 26 of Act 28, Session Laws of Hawaii 1962, cast a cloud on the status of first deputies in the State government, which should be clarified by legislation.

"Coverage. This chapter shall apply to all classes of positions covered by the position classification plan as provided for by chapter 3."

Chapter 4 requires that such classes be included in the pay plan.

It follows that the positions of first deputy or first assistant to a department head, referred to in section 3-61(k), Revised Laws of Hawaii 1955, as amended, being required to be included in the position classification plan, are required to be included in the pay plan provided for in Chapter 4.

We do not think that section 5-20, Revised Laws of Hawaii 1955, as amended, bears upon the question. That section provides in part:

"Notwithstanding any other law to the contrary, the salary of any first deputy or first assistant to the head of any department of the state or county governments shall not exceed a sum equal to ninety-five per cent of the salary of such department head."

We read this provision as merely setting a ceiling upon the salary of a first deputy or first assistant vis-a-vis that of his department head. We cannot read it as repealing by implication the rather explicit provisions of sections 3-61 and 4-3, Revised Laws of Hawaii 1955, discussed above.

Very truly yours,

/s/ Bertram T. Kanbara

Bertram T. Kanbara
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi

Bert T. Kobayashi
Attorney General

OP. NO. 63-51

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

Honolulu, Hawaii

November 12, 1963

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OP. 63-52

Board of Trustees
Employees' Retirement System
of the State of Hawaii
Honolulu, Hawaii

Attention Mr. Harold C. Hill, Secretary

Dear Sirs:

You have requested the opinion of this office as to whether the date of the accident or the date of filing of the application for disability retirement should be used in determining the applicability of newly enacted Act 127, Session Laws of Hawaii 1963.

We also have your letter of October 24, 1963, relative to Miss Aileen K. Ukauaka who filed an application for service-connected total disability retirement on July 17, 1963, basing her disability on an accident which occurred on August 21, 1962 and before the enactment of said Act 127.

You are respectfully advised that in our opinion the date of the accident on which application is based should be used in determining the applicability or inapplicability of said Act 127.

As pointed out in your letter requesting this opinion, section 6-46, Revised Laws of Hawaii 1955, prior to its amendment by Act 127, provided for the granting of accidental disability benefit to a member of the System if he was found to be totally and permanently incapacitated for duty. Upon such a finding, the disabled member received a retirement allowance which consisted of (a) an annuity

which was the actuarial equivalent of his accumulated contribution at the time of his retirement and (b) two-thirds of his average final compensation (with certain exceptions not herein material).

Act 127 amended said section 6-46 to provide for "service-connected total disability benefit" and also added a new section designated as 6-46.1, "service-connected occupational disability benefit," thereby creating two classes of disability benefits: (1) a total disability benefit and (2) an occupational disability benefit.

Act 127 also amended section 6-47, R.L.H. 1955, as amended, and also added a new section designated as 6-47.1. This Act provided different benefits in the amended section 6-47 for total disability than the benefits provided by 6-47.1 for occupational disability. Under total disability retirement, the member will receive two-thirds of the average final compensation for his lifetime as also heretofore provided; whereas under occupational disability, when a member is determined to be disabled for further duty only, he will receive for a three-year period full benefits as if he were totally disabled and in addition the System will pay all medical expenses (not paid for by the Hawaii Public Employees' Health Fund) and physical and vocational rehabilitation expenses. At the end of three years, however, under occupational disability, his retirement allowance will be reduced to "thirty-three and two-thirds per cent" of his average final compensation unless the Medical Board, within said three-year period, find and certify that the disabled "pensioner is totally incapacitated for gainful employment," in which event the Retirement System Board of Trustees shall award him a service-connected total disability benefit, thereby entitling him to two-thirds of his average final compensation.

Act 127 provides in its final section that "This Act shall take effect as of July 1, 1963." This makes it certain that all applications based on accidents which occurred on July 1, 1963, or subsequent thereto, shall be determined in compliance with Act 127. This also makes it certain that accidents which occurred prior to July 1, 1963, on which applications for disability benefits were also filed prior to July 1, 1963, will be determined on the basis of the law as it was prior to the 1963 amendment.

This leaves for determination only the circumstance of the accident happening prior to July 1, 1963, and the application for disability benefits being filed thereon subsequent to July 1, 1963.

If the rule were adopted that the date of the application is the deciding factor even though the accident on which the disability claim is based occurred before the effective date of the Act, the Act would thereby be given retrospective operation and could impair rights to additional monetary benefits given by the law in force prior to the announced effective date of the Act under circumstances such as are present in Miss Ukauka's case.

Section 1-6, R.L.H. 1955, provides: "Laws not Retrospective. No law has any retrospective operation, unless otherwise expressed or obviously intended." There is no language in Act 127 or in the committee reports of the legislature on said Act which either expressed or indicated in any way that any of its provisions be retrospective in operation.

In Palea v. Rice, 34 Haw. 150, the Supreme Court of Hawaii stated the rule on the interpretation of statutes thusly that the paramount rule in the construction of a statute "is to give effect to the intention of the legislature if it does not run counter to some constitutional inhibition."

The opinion of the Supreme Court of Hawaii in Employees' Retirement System v. Chang, et al., 42 Haw. 532 (1958), although similar in some aspects, is not on all fours with the present circumstance. This case held that the legislative intent controlled and, in construing the legislative intent, arrived at its conclusion. However, it cited the Palea v. Rice case with approval but at the same time added to the rule therein set forth as follows:

> "Although there is a well established general rule that statutes are to be construed as having only prospective operation, it is well settled that where the legislative intent is clearly manifest that they should operate retroactively, this intent will be given effect unless it violates a constitutional provision."

Both of the above cases were decided prior to the granting of statehood to Hawaii.

Section 2 of Article XIV of the Constitution of the State of Hawaii provides: "Membership in any employees' retirement system of the State or any political subdivision thereof shall be a contractual relationship, the accrued benefits of which shall not be diminished or impaired."

It is apparent that the above-quoted section 2 of Article XIV of the Constitution of the State of Hawaii controls in this matter.

Very truly yours,

/s/ Wilford D. Godbold

WILFORD D. GODBOLD
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi

BERT T. KOBAYASHI
Attorney General

OP. 63-52

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Op. 63-53

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

November 18, 1963

Mr. James M. Izumi
Personnel Director
Department of Civil Service
County of Maui
Wailuku, Maui, Hawaii

Dear Mr. Izumi:

Re: Employment of Mrs. Bula Mott Stewart
Medical Laboratory Technician I

By letter dated October 8, 1963, you have raised several questions regarding the appointment of Mrs. Stewart to the position of Medical Laboratory Technician I at Kula Sanatorium effective July 1, 1963.

We understand that from November 1, 1960 to June 30, 1962, Mrs. Stewart had been employed under several non-resident contracts continuously, beginning at the minimum rate of the salary range for the class Medical Laboratory Technician, due to the County's inability to recruit qualified residents.

Under the contract for the period July 1, 1962 to June 30, 1963, Mrs. Stewart was given the benefit of the re-pricing of the class Medical Laboratory Technician I from SR-14 to SR-15 under Act 188, SLH 1961. The repricing was effective July 1, 1962. Mrs. Stewart was compensated at $489.00 per month (SR-15C).

Prior to the expiration of the contract, in April, 1963, you recruited for the position at the then existing minimum rate of $466.00 per month (SR-15B). Mrs. Stewart applied as a resident and was so qualified. She was the only applicant. Effective July 1, 1963, the class Medical Laboratory Technician I was repriced from SR-15 to SR-14 under Act 188, SLH 1961.

With regard to her appointment as of July 1, 1963, you ask:

1. Must Mrs. Stewart be appointed at the minimum rate in SR-14, in view of the provisions of Sec. 4-6, RLH 1955, which provide for all initial appointments at the first step of the salary range?1/

2. Is Mrs. Stewart required to serve an initial probationary period as provided by Sec. 3-21(h), RLH 1955, as amended?

3. May the period of service under the non-resident contract be credited to and subtracted from the period of probationary service as provided in said Sec. 3-21(h) and in Rule 7.2a, Rules and Regulations on Civil Service, Maui County?

We shall answer your questions in numerical order.

1. We answer your first question in the negative.

Section 4-6, RLH 1955, provides:

"Initial appointments. All initial appointments shall be made at the first step of the appropriate salary range. In the event that the recruitment of an employee is not possible at such first step, the director may, after appropriate notice and advertising, recruit at the lowest step within the appropriate salary range at which an employee may be recruited. In the event that recruitment is not possible at any step in the appropriate salary range, and upon the certification of this fact and that the work required is of an essential public nature, the commission may authorize the recruitment of an employee at a salary which is fair and reasonable. Any employee so recruited at a step above the minimum of the appropriate salary range shall, upon a qualified recruit having been found willing to accept employment at the

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1/ Pursuant to our discussion, we have rephrased your question.

minimum step in the salary range, have the option to accept an appointment at such minimum step in the salary range, otherwise the appointment shall be made of the recruit willing to accept such appointment, provided that this shall not apply in the event that the employee is receiving compensation at a step which would then be appropriate had his original appointment been made at the minimum step. No person accepting an initial appointment at a step above the minimum rate shall be eligible for a step increase in compensation, until such time as his compensation would be so increased if he had been appointed at the minimum step."

We do not think that this provision requires that Mrs. Stewart be appointed at the minimum step.

This provision must be read in conjunction with Section 4-9, RLH 1955, as amended, which provides for an increment increase in compensation for "any employee in the civil service" who has rendered a year's satisfactory service and has not received a substandard performance rating. Section 4-1, RLH 1955, as amended, defines the term "employee", as used in Chapter 4, as "a person holding a position in accordance with the provisions of Chapter 3, whether permanently or otherwise." (Emphasis added.) This would include a non-resident contractual employee in a civil service position. Also, the term "employee in the civil service" has been construed to refer to persons occupying positions in the civil service and not to exclude such persons who have not yet acquired regular status.2/ Op. No. 56-41.

In this instance, where the employee has served continuously in the same position, we believe that she has earned such periodic increments as may be due her. Under the circumstances, in determining the proper rate at which she should have been appointed as of July 1, 1963, you should proceed on the hypothesis that she had been initially appointed on November 1, 1960 at the minimum step of the salary range for

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2/ Your Rule 16.3a provides that a non-resident contractual employee "shall not be considered a regular employee or a member of the classified service."

the class, thence consider what movements in the salary schedule, including changes resulting from increments and repricing, would have taken place in the normal course and where in the salary schedule the employee would properly be located as of July 1, 1963. That would be the proper rate at which Mrs. Stewart should be appointed as of said date. See Op. No. 63-35, pp. 3 and 4.

If Mrs. Stewart's services cannot be obtained at such rate, she may be hired at a higher rate, subject to compliance with the requirements set forth in Section 4-6. However, in that instance, she would not be eligible for a step increase in compensation until such time as her compensation would be so increased had she been appointed as of July 1, 1963 at the proper rate, discussed above. See Op. No. 63-35.3/

2 and 3. The requirement of serving a probationary period is applicable; however, the period of service under the non-resident contract shall be credited to and subtracted from the period of probationary service. Section 3-21(h), RLH 1955.

The first paragraph of said Section 3-21(h) provides in part:

> "All employees shall successfully serve an initial probation period before becoming members of the civil service. In

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3/ We do not think that your Rule 16.3b affects our conclusion. That Rule provides:

> "16.3. Status.
>
> "b. A position filled by a non-resident or non-citizen appointment shall be deemed vacant upon expiration of the contract covering such appointment and recruitment therefor shall be conducted in the same manner as for a new position, provided that if the non-resident or non-citizen employee is re-employed, re-examination may be waived."

This provision requires recruitment in compliance with Chapter 3, RLH 1955, as amended (notice, advertising, eligibility, certification), to fill a position upon termination of the contract. This had been done here. It does not govern the compensation to be paid the employee.

> addition, membership in the civil service shall require that the employee . . . shall have satisfied all the requirements for employment . . . including those qualifications prescribed by section 5-1 [among them, residence]. . . ."

Likewise, relative to the status of a non-resident contractual appointee, your Rule 16.3a provides that such appointee "shall not be considered a regular employee or a member of the classified service."

The first paragraph of Section 3-21(h) requires that in order to become a regular employee, the employee serve an initial probationary period after having met the residence requirement and having been duly appointed.

However, the second paragraph of said Section 3-21(h) provides:

> "In the event that an employee who is serving a temporary appointment subsequently becomes a probationary employee in the same position or a related position in the same class within the department in accordance with the rules and regulations of the commission, the period of service performed as a temporary appointee shall be subtracted from the period of probationary service required by this subsection, and the employee shall serve only the remaining period as a probationary employee; provided, that the employee shall have been hired initially from the appropriate eligible list, and that the temporary period of service shall have immediately preceded the change to probationary status. . . ."

The identical provision is contained in your Rule 7.2a.

We believe that the contractual employment immediately preceding her regular appointment was a "temporary appointment" within the meaning of the above-quoted provision, as distinguished from a permanent appointment. Accordingly, the period of service

under the contract must be subtracted from the period of probationary service. The net effect under the circumstances is that Mrs. Stewart need not now serve any probationary period.

Very truly yours,

/s/ BERTRAM T. KANBARA

BERTRAM T. KANBARA
Deputy Attorney General

APPROVED:

/s/ BERT T. KOBAYASHI
Attorney General

cc: Other Personnel Directors

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Op. 63-54

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU, HAWAII

November 26, 1963

Mr. Yoshito Tanaka
County Attorney
County of Hawaii
Hilo, Hawaii

Dear Mr. Tanaka:

Re: Status of Road Reserve
Ahualoa Homesteads

You have raised a question by letter dated October 30, 1963 as to whether a parcel of State land reserved for a road by the State, over which no road was ever constructed, may be sold by the County of Hawaii under Act 190, Session Laws of Hawaii 1963.

We reply in the negative.

The parcel in question is located between Grant 4170 and Grant 3683, being Lots 38 and 37 of the Ahualoa Homesteads, Hamakua, Hawaii.

A search of the records in the Land Department reveals that this parcel has not been granted out by the State and is still owned by the State of Hawaii. The descriptions of Grant 4170 and Grant 3683 describe the lots as being along a 30-foot roadway.

Act 190 provides in Section 4 as follows:

> "The ownership of all county highways heretofore acquired by the counties by eminent domain, purchase, dedication or surrender is hereby transferred to and vested in the respective counties in which such county highways lie."

Standing Committee Report No. 1056 of the House Committee on County and Municipal Affairs accompanying S. B. No. 535 states that "Section 4 of the bill has been amended to make it clear that the county highways involved are only such highways acquired by the counties by eminent domain, purchase, dedication or surrender." Since the County of Hawaii has not acquired said road reserve by any of the means enumerated in Section 4, it is our conclusion that Act 190 is not applicable to this road reserve.

In addition, it should be noted that in Section 142-1, Revised Laws of Hawaii 1955, as amended, "public highways" are defined as follows:

> "all roads. . .opened, laid out or built by the State or any political subdivision thereof are declared to be public highways."

Within the meaning of said Section, a "public highway" is a road or street actually constructed and existing on the ground. It does not refer to a mere "paper" road or an unimproved way not open to the general public as a road.

Based on the foregoing, it is our conclusion that the County of Hawaii has not been vested with fee simple title to the abovementioned road reserve and it may not therefore sell said road reserve.

Very truly yours,

/s/ Alana W. Lau

Alana W. Lau
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi

Bert T. Kobayashi
Attorney General

OP. 63-54

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Op. No. 63-55

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU, HAWAII

December 2, 1963

Dr. Leo Bernstein
Director of Health
State of Hawaii
Honolulu, Hawaii

Dear Dr. Bernstein:

This is in response to your oral request for an opinion to (1) clarify prior opinions rendered by this office re the practice of medicine by an unlicensed physician under the direction of a licensed physician pursuant to Section 64-1, Revised Laws of Hawaii 1955 (Medical Practice Act), and (2) to amplify the meaning of Section 64-2 in so far as it pertains to an unlicensed physician holding himself out as a "doctor" licensed pursuant to Chapter 64, Revised Laws of Hawaii 1955.

Section 64-2, Revised Laws of Hawaii 1955, specifies that those persons practicing medicine or surgery must have a license. Specifically, the pertinent portions of this section state:

> "Except as otherwise provided by law, no person shall practice medicine or surgery in the State either gratuitously or for pay, or shall offer to so practice, or shall advertise or announce himself, either publicly or privately, as prepared or qualified to so practice, or shall append the letters "Dr." to his name, with the intent thereby to imply that he is a practitioner of medicine or surgery, without having a valid unrevoked license or a limited and temporary license, obtained from the department of health ..." (For medical specialist in a hospital operated by the state, Section 64-3.)

An exception to the above licensing requirement is provided for in Section 64-1, Revised Laws of Hawaii 1955. The application and interpretation of this proviso, however, has resulted in a considerable difference of opinion within the medical profession. Section 64-1 begins with a definition of the practice of medicine which is followed by the exception phrase which states: ". . . provided, that nothing herein contained shall forbid any person from the practice of any method, or the application of any remedial agent or measure under the direction of a licensed physician; . . ." (Emphasis added.) The type of ambiguity created by this proviso best lends itself to clarification by the Legislature or the courts of law. This opinion is therefore intended as an interim measure until the necessary, clarifying legislation is passed or a final determination is rendered as the result of litigation. It should also be noted that this opinion is not intended as a rescission of any prior opinions on the subject, but rather that it supersedes said opinions only where a direct conflict arises.

As noted in a prior opinion rendered by this office on July 31, 1946, "An unlicensed physician can lawfully do medical and surgical work under the direction . . . of a licensed physician. The burden of proof is, however, upon the unlicensed physician to show that he is doing such work under such direction . . . and that such direction . . . is sufficient to include the reasonableness, comprehensiveness, and honesty which are a necessary part of such direction . . ." The burden of proof also applies to the licensed physician to show that his direction meets the above standards.

In attempting to designate guidelines for defining "direction," perhaps the proper approach to the issue is to state what does not constitute proper "direction." It is clear that a licensed physician may not leave the State, whether on business or on a vacation, and still be considered to be directing an unlicensed physician within the intent of Section 64-1. A licensed physician may not lawfully turn over his medical practice to an unlicensed physician. Rather, it may only be turned over to another licensed physician. As noted in the prior opinion from this office of July 31, 1946, "If the unlicensed physician practices apart from the licensed

physician so that he is in a separate establishment and appears to be a practitioner practicing without connection with the licensed physician, proof of sufficient direction . . . would, I believe, be either impossible or extremely difficult." Practicing in a separate establishment would also seem to be contrary to the intent of Section 64-2, as the patient would most likely be led to believe that this unlicensed person is in fact licensed. This would in effect constitute, by implication, advertising or announcing oneself as prepared or qualified to practice medicine and, as noted above, this would be contrary to the intent of Section 64-2.

A licensed physician can direct an unlicensed physician only from the same office building complex or hospital and said "direction" must involve appropriate communication between the subject persons. Furthermore, there can be no direction when the licensed physician has neither seen the patient nor consulted with the unlicensed physician about the patient.

In determining what constitutes proper direction, it must be pointed out and stressed that the medical capability of the unlicensed physician is <u>not</u> the only criterion to be taken into consideration. The mere fact that a particular unlicensed physician is considered to be the most qualified in his specialty field in the United States does not thereby eliminate the requirement of direction. Capability is undoubtedly one of the subjective factors which the licensed physician considers, in agreeing to direct the unlicensed man. Nevertheless, from a legal standpoint, the word direction must be given an objective meaning. Furthermore, mere willingness on the part of the licensed physician to assume the responsibility for the actions of the unlicensed man has no bearing on the issue of whether proper "direction" is being given the unlicensed physician.

Direction must continue until the unlicensed physician is granted a license pursuant to Chapter 64. It is not sufficient to give proper direction for a period of several weeks, and then, feeling confident that the unlicensed man is fully qualified, cease to give direction. On the other hand, there is nothing to prevent an unlicensed man from working

365 days a year as long as that person is given proper direction during said period. As stated in the opinion rendered by this office on July 31, 1946, "He [the unlicensed physician] need not have specific and detailed direction . . . for every act if the direction . . . is sufficiently reasonable, comprehensive, and honest to include every act." Therefore, to meet the requirements of the law, there is not necessarily a need for the detailed type of direction which includes every act.

On the issue where the greatest difference of opinion exists, the statute has given no legal guidelines. The case of the unlicensed specialist being directed by the non-specialist general practitioner is not covered in the statute. There is nothing in the statute which legally mandates a specialist for a specialist. From a practical standpoint numerous guidelines have been offered, but from a legal standpoint none have been provided by the statute. If this determination is to be made, the Legislature or the court is the proper determining body.

Concerning the use of the agency relationship by some parties, it must be pointed out that the only factor to be considered in evaluating whether there is sufficient direction, is the actual relationship between the two parties. The parties may wish to continue to refer to themselves as agent and principal, but they must be reminded that they are judged by their actions and actual relationships and not by the terminology they utilize. It should also be noted that when an unlicensed person is performing surgery or assisting in same and his principal is not present, then the unlicensed person cannot be under the direction of his principal. Therefore, the licensed physician with whom he is working on that particular operation would be the person supplying the "direction" and not the alleged principal. This immediate licensed physician would be the person responsible for giving legally sufficient direction and he shall be equally liable for the actions of the person he is directing in spite of the absence of any agency agreement between these two individuals. The actual relationship between the two individuals is the only factor considered, the use of agency agreements serving no useful purpose insofar as they would tend to establish sufficient "direction" as required by law.

Op. No. 63-55

Aside from the issue of what constitutes "direction," questions have been raised as to the ramifications of an unlicensed physician holding himself out to the general public as a licensed physician. As noted previously, Section 64-2 covers this particular problem. An unlicensed physician shall not advertise or announce himself, whether directly or by implication from his acts, either publicly or privately, as prepared or qualified to practice medicine. He may not append the letters "Dr." to his name either by oral communication or by placing the letters "Dr." on his door, or placing the letters "Dr." in billing statements. The end result, from the standpoint of the patient, would be that the patient is led to believe that he is dealing with a licensed physician. In those instances where a written agency agreement is utilized, any reference to the unlicensed physician as "Dr." would be in violation of Section 64-2. If the unlicensed physician works in a room other than that of the licensed physician, the patient should not be sent by the receptionist, or her counterpart, directly to the office of the unlicensed physician if, by such action, the patient is given the impression that he, the patient, is being treated by a licensed physician. In addition, the billings for services rendered by the unlicensed physician shall not leave the impression with the patient that the services were performed by a licensed doctor. Billings for services rendered shall be by the licensed physician. References and statements in medical journals published for dissemination within the State must not leave the reader with the impression that the unlicensed author is a licensed physician, or "Dr.", who has been granted a license to practice surgery or medicine pursuant to Chapter 64. This implication can be left in the reader's mind by a statement that the subject person is "on the staff at" or "associated with" some licensed physician or association of physicians.

While remaining cognizant of some of the aforementioned difficulties of interpretation and application of Chapter 64, it is nevertheless mandatory at this point to stress the consequences of any violations of said chapter. A physician licensed to practice medicine or surgery under the laws of the State of Hawaii who gives direction insufficient to meet any of the above requirements or employs unlicensed

physicians and does not clearly indicate their status may have his license revoked or suspended in a proceeding before the Department of Health pursuant to Section 64-7(l), or possibly Section 64-7(e), R.L.H. 1955. Subsection (l) lists as a ground for revocation: "Professional misconduct or gross carelessness or manifest incapacity in the practice of medicine or surgery." Subsection (e) states: "Making any untruthful and improbable statement in advertising one's medical or surgical practice or business." If the above sanctions are not deemed applicable to a particular case, the licensed physician may be found guilty of a misdemeanor in a court of law under Section 64-12, R.L.H. 1955, which states:

> "Any person who violates any of the provisions of this chapter, or who offers or in any way attempts to engage in the practice of medicine as defined in section 64-1 and fails to comply with any of the requirements or provisions of this chapter, penalty for which violation or failure to comply is not otherwise provided for, shall be fined not more than $500 or imprisoned not more than six months and each day's violation or failure to comply shall be deemed a separate offense."

This penalty section with its companion criminal sanctions would also be applicable to the unlicensed physician as well as the licensed physician, as the unlicensed physician might be found to be either in violation of one of the provisions of Chapter 64 or found to be offering or attempting to engage in the practice of medicine while failing to comply with any of the requirements or provisions of Chapter 64. The aforementioned criminal and administrative sanctions speak for themselves and therefore need no amplification at this time.

Having concluded that the word "direction" is difficult to define and that consequently Section 64-1, R.L.H. 1955, has been susceptible to varying interpretations, it has then been suggested that legislation or court action may be necessary to provide the final definition of what

constitutes proper "direction." On the one hand, clear instances of improper direction have been covered, while on the other, it was pointed out that from a legal viewpoint Chapter 64 does not state that "direction" encompasses the theory "specialist for specialist". It was also noted that an unlicensed physician may not, directly or by implication, leave the impression in the patient's mind that he, the unlicensed physician, is in fact prepared or qualified to practice medicine in the State as a licensed physician. Failure to comply with the above will result in either administrative or criminal sanctions.

Respectfully submitted,

/s/ Peter C. Lewis

Peter C. Lewis
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi

Bert T. Kobayashi
Attorney General

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Supplement to
Op. No. 63-55

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU, HAWAII

December 26, 1963

Dr. Leo Bernstein
Director of Health
State of Hawaii
Honolulu, Hawaii

Dear Dr. Bernstein:

This is in response to your oral inquiry requesting additional information concerning a part of the Attorney General's Opinion of December 2, 1963 (Op. No. 63-55) on the Medical Practice Act (Chapter 64, Revised Laws of Hawaii 1955). You requested an opinion on the use of synonyms for the letters "Dr." and also raised the question whether the prohibition against appending the letters "Dr." to the name of an unlicensed physician is an absolute prohibition.

Turning first to the question of whether the prohibition against using the letters "Dr." by an unlicensed physician is an absolute rule, this prohibition against calling oneself "Dr." or "M.D." or anything equivalent becomes applicable only if there exists an intent by the unlicensed physician to imply that he is a lawful practitioner of medicine or surgery under the laws of this State. The prohibition noted in the Attorney General's opinion of December 2, 1963, was based on the presumption that the patient would in fact be led to believe that he is dealing with a licensed physician whenever the letters "Dr." or other synonyms were appended to the name of the unlicensed physician. If, however, the intent to imply the above is negated in the eyes of the patient, there would be no prohibition against appending the letters "Dr.," "M.D." or any similar title to the name of the unlicensed physician. The statute is only concerned with deception and, if the possibility for deception is removed or eliminated, there can be no prohibition against the use of the letters "Dr." or synonyms thereof.

It should be re-emphasized, however, that under no circumstance can the unlicensed physician hold himself out independently as a practitioner of medicine and surgery under the laws of the State of Hawaii.

Turning to the question of whether it is permissible to use a synonym for the letters "Dr.", it should be noted that even though Section 64-2 refers only to the letters "Dr.", the word "doctor" or the letters "Dr." in the field of medicine and surgery are in fact synonymous with the phrase "doctor of medicine" or its abbreviation "M.D.". It must therefore be concluded that under those circumstances where it would be illegal to use the letters "Dr.", it would be equally unlawful to use the letters "M.D." or any other descriptive letters or words symbolizing that the unlicensed physician is in fact a lawful practitioner of any of the branches of medicine or surgery under the laws of this State. The purpose of this section of the statute is to prevent deception. The use of the letters "M.D." or other synonyms other than "Dr.", would be equally as deceiving to the patient as the letters "Dr.".

To avoid any additional misunderstanding, if anything contained in a prior opinion on this same subject is considered contra to the statements contained herein, then the latter will be deemed binding.

Respectfully submitted,

/s/ Peter C. Lewis

Peter C. Lewis
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi

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Attorney General

Supplement to
Op. No. 63-55

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

Honolulu, Hawaii, 96810

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OP. 63-56

Honorable Hiram K. Kamaka
Representative, Eighth District
Second State Legislature
304 Int'l. Savings & Loan Bldg.
1022 Bethel Street
Honolulu, Hawaii

Dear Mr. Kamaka:

This is in reply to your inquiry as to whether Act 4, Session Laws of Hawaii 1962, creating the New York World's Fair 1964-65 Special Fund, contains an invalid delegation of legislative powers insofar as it grants "virtually uncontrolled fiscal authority" to the New York World's Fair Committee.

We think not.

The New York World's Fair 1964-65 Special Fund was created by Section 6 of said Act 4, which provides:

> "There is hereby created a special fund in the state treasury to be known as the 'New York World's Fair 1964-65 Special Fund'. All revenues derived from the operation of the exhibit or from the disposition of properties of the exhibit after the completion of the Fair shall be paid into the fund and be used solely for the purpose of paying the principal of, the premium, if any, and the

interest on the general obligation bonds[1] issued by the state for the exhibit and for any borrowings made and any loans secured for the exhibit. The balance, if any, in the special fund, after all obligations have been paid, shall lapse into the general fund of the state. A deficiency, if any, in the special fund shall be a charge to the general fund of the state." (Emphasis added.)

The term "revenues" therein has been construed to mean net revenues and not gross revenues. A.G. Op. No. 62-44. The opinion indicates that gross revenues could be applied toward payment of operating expenses of the Fair.

Your inquiry brings into question the validity of the delegation of powers to the New York World's Fair Committee from the standpoint of (1) the broadness of the purposes for which the Committee may expend monies, and (2) the degree of certainty as to the amount or extent of the appropriation.

Relative to the former, Section 3 of the Act describes the scope of powers of the Committee. It provides in relevant part:

" . . . The committee may provide for and maintain such state exhibits or projects it deems appropriate to insure that the customs, culture, history, development, and natural and industrial products of the state of Hawaii will be shown to their best advantage. The committee is vested with all necessary and appropriate powers to carry out effectively by contract or otherwise the selection of an appropriate site for such exhibits

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1/ Section 5 of Act 4 authorizes the issuance of general obligation bonds, notes or other evidences of indebtedness in an amount not to exceed $2,328,000, to be used for Fair expenditures.

or projects, the erection of any buildings or other structures on the site, the displaying of such exhibits or projects, the maintenance and operation of such buildings or structures and to do all acts necessary and appropriate to carry out the purposes of this Act."

The general rule with respect to delegation of powers by the legislature to administrative agencies has been stated as follows:

" . . . There is no unconstitutional delegation of power where the legislature acts upon a subject as far as is reasonably practicable but, from the necessities of the case, leaves to executive officials the duty of bringing about the result pointed out by the statute, or where a statute sufficiently indicates the legislative purpose and merely leaves the administrative details to some agency. However, as a general rule, to avoid an unlawful delegation of power, the legislature must declare the policy or purpose of the law and fix the legal principles which are to control in given cases by setting up standards or guides to indicate the extent, and prescribe the limits, of the discretion which may be exercised under the statute by administrative officers. . . . " 42 Am.Jur., Public Administrative Law, sec. 44, p. 340.

" . . . [T]he guide fixed in the statute must be as definite as is practicable. In fact, it has been held that a standard which is as definitely described as is reasonably practicable under the necessities of the circumstances is sufficient. The validity of a grant of discretion in any particular instance depends largely upon the nature of the business or thing with respect to which it is to be exercised and also upon whether or not the proper regulation or control thereof requires that a discretion be vested in one or more public officers. The modern tendency is to be more liberal in permitting grants of discretion to administrative authorities in order to facilitate the administration

> of laws as the complexity of economic and governmental conditions increases. Where the statute or ordinance provides controlling standards, a large measure of discretion to be exercised within those standards may be permitted the administrative authorities. . . . " Id., sec. 45, pp. 345-346.

Broadly stated purposes for which appropriated funds could be spent have been upheld as not being too vague or an invalid delegation of authority. E.g.: Wells v. Childers, 196 Okla. 339, 165 P.2d 358 (1945) (governor's contingency fund); State v. Lee, 157 Fla. 773, 27 So.2d 84 (1946) (post-war building fund).

As stated in State v. Lee, supra:

> "In a public project the magnitude of this, it would hardly be possible to give a detailed specification for items of expenditure in the authorization with prices fluctuating as they are now. Some discretion must be vested in those who execute large plans for public benefit. . . . " 27 So.2d at 87.

In this instance, participation in the New York World's Fair is a novel experience for the State, the time for planning and execution is limited, and maximum flexibility is required in view of uncertainty as to conditions or circumstances to be encountered. Under the circumstances, we believe that the standards set forth in Section 3 are as definite as can practicably be expected, and that the delegation of authority, with respect to the scope of the Committee's powers, is not invalid.

A more difficult question is whether the extent of the appropriation is indicated with sufficient certainty.

It has been stated that:

> "Certainty in the amount appropriated is essential to a valid appropriation of public moneys. . . . However, it has been held that an appropriation bill is not void for uncertainty in not specifying a stated amount if it fixes the extent to which the treasury will be drawn upon." 42 Am.Jur., Public Funds, sec. 46.

Among cases holding appropriations invalid for lack of certainty as to amount are the following:

In Cockrill v. Jordan, 72 Ariz. 318, 235 P.2d 1009 (1951), petitioner's lease of State land was cancelled by the State because the land was required for another public purpose. Petitioner filed a claim for the improvements he had made and for damages. As authorization for the State to pay therefor, he relied on a general statute which provided that "Upon the surrender of the (state) lands to the state, the owner of said improvements shall be paid, from the general fund of the state, the appraised value thereof, and the amount of such damages." The court held that this was not a valid appropriation:

> " . . . No rule is better settled than that to constitute a valid appropriation payable out of the general fund the Act must fix a maximum limit as to the amount that can be drawn under it. (Cases omitted.) If this was not the law there would be no limit to the amount of money that could be drawn thereunder and the public treasury would be wholly unprotected against claims of an undetermined amount. Furthermore the state government would never be able to ascertain with any degree of certainty where it stood financially.
>
> "It will be seen that the attempted appropriation . . . does not meet the requirements of the above rule. It does not appropriate a definite and certain amount to the payment of these claims. It is an attempt to make an unlimited appropriation from the general fund. This is in effect giving a blank check against the public treasury, with no maximum amount beyond which the appropriation cannot go." 235 P.2d at 1010.

Similarly, Eide v. Frohmiller, 70 Ariz. 128, 216 P.2d 726 (1950), held invalid a purported appropriation which read: "There is hereby appropriated annually

to the (public employees' retirement) fund from funds of the state not otherwise appropriated, an amount necessary to carry out the provisions of this (the public employees' retirement) act."

State ex rel. Norfolk Beet-Sugar Co. v. Moore, 50 Neb. 88, 69 N.W. 373 (1896), held that a statutory provision for payment of bounties for sugar manufactured in the State, at a certain rate per pound, did not constitute a valid appropriation. The court stated that the amount to be expended was limited only by the extent of claims which might be made by applicants for the bounty, the amounts of such claims being uncertain, and that such indeterminability of the maximum amount appropriated was violative of the State Constitution, which required that appropriations be specific.

To similar effect is Ingram v. Colgan, 106 Cal. 113, 39 P. 437 (1895), holding that a statute providing for payment of a bounty of $5.00 for each coyote killed, without specifying the total amount appropriated, was not a valid appropriation.

On the other hand, the following cases indicate that even if an appropriation does not specify a stated amount, it would not be invalidated if the extent of the appropriation can be ascertained before expenditure, and that this is so even if it were not ascertainable at the time the appropriation had been made. This is particularly true where revenues other than general fund monies are involved.

In State v. Babcock, 24 Neb. 787, 40 N.W. 316 (1888), the court considered an act to provide for the sale of certain State lands and appropriating the proceeds of such sale to the construction of the capitol. It held that, the lands having been sold under the provisions of that act, there was an appropriation of the amount realized, for the purpose designated. Later, discussing this case, the Nebraska Supreme Court stated in State ex rel. Norfolk Beet-Sugar Co. v. Moore, supra:

> " . . . It is true that, at the time of the passage of this act, the amount appropriated thereby was not in dollars ascertained. It was equivalent to the appropriation of the lands themselves, and was limited to the proceeds of those lands. The uncertainty in amount arose, not in regard to demands of the claimant to the fund, but in regard to the amount of the fund itself. No discretion was vested in the executive office as to the amount to be disbursed. . . . By section 1 of article 9 of the constitution, the legislature is required to 'provide such revenue as may be needful,' by levying taxes, etc. It is essential that appropriations shall be limited in amount in order that the legislature may know what revenue shall be needful, and provide therefor. But, when the state has property in its possession, there can be no objection to appropriating the proceeds of the sale of that property, because the value of the property itseif limits the appropriation, and no uncertainty arises in regard to the revenue. An appropriation may be specific, according to any of the definitions heretofore given, when its amount is to be ascertained in the future from the collection of the revenue. It cannot be specific when it is to be ascertained only by the requisitions which may be made by the recipients. . . . " (Emphasis added.)
> 69 N.W. at 376.

In Riley v. Johnson, 219 Cal. 513, 27 P.2d 760 (1933), the legislature, foreseeing that the general fund would be exhausted by the end of the fiscal period, provided for the issuance of interest-bearing warrants to creditors of the State. The statute also provided for payment of such warrants from the unapplied monies in the general fund, as such monies are received into the fund. The court held that this constituted "a legal appropriation of so much money as will be necessary to make such payment," and that interest and principal of registered warrants would be a charge upon the unapplied monies in the general fund, as they accrue.

To the contention that the purported appropriation was void for uncertainty in that the exact amount thus appropriated could not then be ascertained, the court replied:

> " . . . All that is necessary is that the Legislature fix in the appropriation bill the extent to which the treasury will be drawn upon. This it has done in the instant case. The amount appropriated from the unapplied moneys in the general fund by the act in question is limited by the extent of the principal of the warrants, which, in turn, is limited by the various appropriations made by the Legislature. The amount of interest on the warrants is limited by the amount of principal of the warrants, and can be ascertained by applying a simple mathematical formula to the amount of the principal. This renders the appropriation sufficiently certain." 27 P.2d at 763.

In accord: Riley v. Johnson, 6 Cal.2d 529, 58 P.2d 631 (1936).

In City of New London v. County of New London, 148 Conn. 605, 173 A.2d 492 (1961), the County of New London, in anticipation of dissolution of the county as of a certain date, appropriated "all available surplus funds" of the county as of such date for a particular purpose. It was contended that the appropriation violated a general statute requiring that all county appropriations be for a specific sum. The court rejected this contention, stating:

> " . . . While the precise amount was not, and could not be, fixed at the time of the vote, that sum could be ascertained with exactitude as of the close of business on September 30, when the appropriation was to become effective. The county meeting had a right to anticipate the accumulation of surplus funds as of the date when the business of the county terminated by operation of law and possessed the power to dispose of all of the surplus as it did." 173 A.2d at 495-496.

In State v. Lee, 157 Fla. 773, 27 So.2d 84 (1946), the legislature appropriated $3,000,000 for a State post-war building fund and empowered the budget commission to find any surplus balances in State agencies and with the approval of the governor, to effect a transfer of such monies to the building fund, and provided that thereupon such monies would be appropriated and available for the purposes specified. The court rejected a contention that the Act was invalid because of indefiniteness of the amount appropriated, indicating that the amounts of departmental surplus funds transferred to the fund become certain upon such transfer.

With regard to the situation at hand, if Section 6 of Act 4 is read as allowing expenditure of anticipated or estimated, but not realized, Fair revenues, it appears that the extent of authorized expenditures would be unascertainable for the reason that the amount of such revenues is not ascertainable. This being so, expenditures may exceed revenues, and theoretically could drain the general fund beyond expectation or control of the legislature.2/ Such an appropriation would very likely be held to be an invalid delegation of legislative authority. Cockrill v. Jordan, Eide v. Frohmiller, State ex rel, Norfolk Beet-Sugar Co. v. Moore, Ingram v. Colgan, supra.

On the other hand, Section 6, in our opinion, may properly be read as limiting expenditure of gross revenues to expenditure of those revenues that are received (i.e. on a cash basis) or revenues that are legally receivable. The amounts would then be ascertainable even if they were not at the time of enactment of the statute, and the authorization would likely not be considered to be an invalid delegation of legislative authority. State v. Babcock, Riley v. Johnson, City of New London v. County of New London, State v. Lee, supra.

2/ Section 6 of Act 4 provides for payment of any deficiency from the general fund.

If a statute is susceptible of a constitutional and unconstitutional construction, the one rendering it constitutional will be adopted. Godbold v. Mainbog, 36 H. 206 (1942).

Accordingly, we construe Act 4 as limiting any expenditure of revenues to revenues that are received or are legally receivable. So construed, the statutory authorization, in our opinion, does not constitute an invalid delegation of legislative authority.

Very truly yours,

/s/ Bertram T. Kanbara

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APPROVED:

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cc: Chairman, New York
World's Fair Committee

OP. 63-56