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**ANNUAL REPORT**

*And*

**OFFICIAL OPINIONS**

*Of The*

**ATTORNEY GENERAL**

*Of*

**MARYLAND**

---

1992

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**J. JOSEPH CURRAN, JR.**

**ATTORNEY GENERAL**



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## ATTORNEYS GENERAL OF MARYLAND

This office was permanently separated from that of Secretary in 1657. Under royal government (1690-1715) there were two Attorneys General, one for the Proprietary and one for the King. The office was continued under the Constitution of 1776. Other places held by any Attorney General during his incumbency are indicated in each case.

**Lt. Richard Smith, Sr.**, of Calvert County (Prot.), appointed by the Provincial Court, 28 Sept. 1657.

**Capt. Thomas Manning** of Calvert County (Prot.), com. by the Let. Gen., 20 Feb. 1660/1.

**Col. William Calvert** of St. Mary's City (Cath.), sworn 12 June 1666.

**Col. Vincent Lowe** of Talbot County (Cath.), sworn 13 Dec. 1670. Resigned after appointed Sheriff of Talbot County.

**Kenelm Cheseldyne** of St. Mary's City (Prot.), sworn 6 April 1676.

**Thomas Burford** of Charles County (Prot.), appointed by His Lordship and sworn 4 Oct. 1681; died in office in March, 1686/7.

**Robert Carville** of St. Mary's City (Cath.), com. by Chancellor Henry Darnall, pursuant to Lord Baltimore's instructions, 3 April 1688. Superseded by Carroll.

**Charles Carroll** of St. Mary's City and of Anne Arundel County (Cath.), formerly of the Inner Temple, London; com. by the Proprietary, to hold office during good behavior, 18 July 1688; arrived in Maryland 1 Oct. and was confirmed in office by the Deputy Governors, 13 Oct. 1688. After 1 Aug. 1689 he continued as Lord Baltimore's Attorney General until the restoration of Proprietary government. On the death 17 June 1711, of Col. Henry Darnall I, his father-in-law, he succeeded to the offices of Agent and Receiver General and Keeper of His Lordship's Great Seal.

**Col. George Plater I** of St. Mary's County (Prot.), appears as acting Attorney General, for the crown, as early as 23 April 1691; superseded by Wynne.

**Edward Wynne** of St. Mary's County (Prot.), sworn crown Attorney General, 5 April 1692; died in office shortly before 8 Sept. 1692.

**Col. George Plater I**, sworn 8 Sept. 1692; resigned to be Naval Officer of Patuxent shortly before 21 Oct. 1698. He was Receiver of Patuxent and, until Nov. 1696, Collector of the Same. He married, about 1694, Anne, dau. of Thomas Burford above.

**Maj. William Dent** of Charles County (Prot.), com. by Gov. Nicholson, 22 Oct. 1698, resigned 8 May 1702. He was again commissioned by Gov. Seymour, 16 May 1704, and continued to serve until his death in Nov. 1704. He was also Naval Officer of North Potomac, and in May, 1704, he became joint Commissary General.

**Col. William Bladen** of Annapolis (Prot.), wife (Cath.), com. by Gov. Seymour as Her Majesty's Attorney General, succeeding Dent, 4 Dec. 1704; sworn His Lordship's Attorney General, succeeding Carroll, 1 May 1716; died in office 1 Aug. 1718. He was Naval Officer of Annapolis, and in Aug., 1708, he became sole Commissary General.

**Thomas Bordley** of Annapolis (Prot.), sworn 6 Sept. 1718; dismissed in September, 1721. He was sole Commissary General. He died 11 Oct. 1726.

**Daniel Dulany, Sr.**, of Annapolis (Prot. protege and former clerk of George Plater above), succeeded Bordley, 10 Oct. 1721. Until July, 1724, he was joint Commissary General. He resigned in 1725.

**Michael Howard** of Talbot County (Prot.), sworn 19 Oct. 1725. He was appointed Surveyor General of the Eastern Shore in June, 1726, and Naval Officer of Oxford about 1727. He resigned in 1734.

**Daniel Dulany, Sr.**, succeeded Howard in Oct. 1734, and was also sole Commissary General; resigned in 1744.

**Henry Darnall III** of Prince George's County (Prot., convert, wife and children Cath.), com. and sworn 19 April 1744; appointed Naval Officer of Patuxent, 24 May 1755; persuaded to resign early in 1756.

**Stephen Bordley** of Annapolis (Prot., son of Thomas Bordley above), com. 26 March and sworn 26 May 1756; suffered a paralytic stroke and resigned in Dec. 1763; died 6 Dec. 1764. He was Naval Officer of Annapolis until March, 1762, when he became sole Commissary General.

**Edmund Key** of Annapolis (Prot., mother Cath.) com. 26 Dec. 1763 and sworn 10 April 1764; resigned shortly before his death on 4 May 1766.

**Robert Goldsborough** of Dorchester County (Prot.), sworn 8 April and com. 4 June 1766. Resigned in October, 1768; member of the Continental Congress 1774-1776; High Sheriff of Dorchester County, September 1761 to 1764; member of the Council of Safety in 1775; member of the Provincial Assembly from 1764 to 1766; member of the Convention which framed Maryland's Constitution; State Senator from 1777 to 1782; Died Dec. 22, 1788.

**Thomas Jennings** of Annapolis (Prot.), sworn 18 Oct. and com. 27 Oct. 1768; recom. 29 April 1773. He was appointed State Attorney General in April 1777, but was succeeded, on 6 Jan. 1778, by Benjamin Galloway. He was a relative of former Deputy Secretary Edmund Jennings.

Luther Martin . . . . .	1778
William Pinkney . . . . .	1805
John Thomas Mason . . . . .	1806
John Johnson . . . . .	1806
John Montgomery . . . . .	1811
Luther Martin . . . . .	1818
<sup>1</sup> Nathanial Williams, Assistant Attorney General . . . . .	1820
Thomas B. Dorsey . . . . .	1822
Thomas Kell . . . . .	1824
Roger B. Taney . . . . .	1827
Josiah Bayley . . . . .	1831
George R. Richardson . . . . .	1845
Robert J. Brent . . . . .	1851
<sup>2</sup> Alexander Randall . . . . .	1864
Isaac D. Jones . . . . .	1867
Andrew K. Syester . . . . .	1871
Charles J. M. Gwynn . . . . .	1875
Charles B. Roberts . . . . .	1882

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<sup>1</sup> During the physical incapacity of Luther Martin, 1820-1822, the Governor appointed Nanthanial Williams, Assistant Attorney General to act as Attorney General.

<sup>2</sup> The office of Attorney General was abolished by the Constitution of 1851, but was re-established by the Constitution of 1864 (Art. V. Sec. 1).

William Pinkney Whyte . . . . .	1887
John P. Poe . . . . .	1891
Harry M. Clabaugh . . . . .	1896
George R. Gaither, Jr. . . . .	1899
Isidor Rayner . . . . .	1900
William S. Bryan, Jr. . . . .	1904
Isaac Lobe Straus . . . . .	1908
Edgar Allan Poe . . . . .	1912
Albert C. Ritchie . . . . .	1916
<sup>3</sup> Ogle Marbury . . . . .	1918
Alexander Armstrong . . . . .	1920
Thomas H. Robinson . . . . .	1924
William Preston Lane, Jr. . . . .	1930
Herbert R. O'Connor . . . . .	1934
William C. Walsh . . . . .	1938
William Curran . . . . .	1945
<sup>4</sup> Hall Hammond . . . . .	1946

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<sup>3</sup> During Mr. Ritchie's absence, June 1918-January 1919, while serving as General Counsel of the United States War Industries Board, Ogle Marbury became Acting Attorney General.

<sup>4</sup> On September 30, 1952, Mr. Hammond resigned as Attorney General to accept an appointment to the Court of Appeals of Maryland. Mr. Harvey was designated by Governor McKeldin to be Acting Attorney General until the new Attorney General qualified.

<sup>5</sup> J. Edgar Harvey . . . . .	1952
<sup>6</sup> Edward D. E. Rollins . . . . .	1952
<sup>7</sup> C. Ferdinand Sybert . . . . .	1954
<sup>8</sup> <sup>9</sup> <sup>10</sup> Thomas B. Finan . . . . .	1961
<sup>11</sup> Robert C. Murphy . . . . .	1966
<sup>12</sup> Francis B. Burch . . . . .	1966
Stephen H. Sachs . . . . .	1979
J. Joseph Curran, Jr. . . . .	1987

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<sup>5</sup> See note 4.

<sup>6</sup> Mr. Edward D. E. Rollins qualified as Attorney General on the 14th of November, 1952.

<sup>7</sup> Resigned January 12, 1961, to accept an appointment to the Court of Appeals of Maryland.

<sup>8</sup> Appointed January 13, 1961, to serve unexpired term of former Attorney General.

<sup>9</sup> Elected at election of November, 1962.

<sup>10</sup> On October 13, 1966, Mr. Finan resigned as Attorney General to accept an appointment as an Associate Judge of the Court of Appeals of Maryland.

<sup>11</sup> October 13, 1966, Mr. Robert C. Murphy was sworn in as Attorney General to serve for Mr. Finan's unexpired term.

<sup>12</sup> Mr. Francis B. Burch was elected Attorney General in the November, 1966 election and was sworn in on December 16, 1966.

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## EXCEPTIONAL SERVICE AWARDS

In 1981, Attorney General Stephen H. Sachs inaugurated a special awards program to recognize unique achievements on behalf of the State. Each year, Exceptional Service Awards are presented to Assistant Attorneys General who have demonstrated special "ability, dedication, leadership and imagination" in carrying out their work for the State. The recipients of the 1992 awards are:

*Diane Krejsa*  
Civil Litigation

*Bruce Spizler*  
Department of Licensing and Regulation

*Rona S. Finkelstein*  
Injured Workers' Insurance Fund

*Julie Tewey*  
Securities Division

*Andrew M. McDonald*  
Educational Affairs Division

*Esther H. Goldring*  
Uninsured Employers' Fund

*Nicolette Prevost*  
Special Litigation Division

*C. Dale Janney*  
Department of Housing and Community Development

## **JENNIFER LAUTERBACH ROBBINS AWARD**

In 1987, the Attorney General established an award in honor and memory of former Assistant Attorney General, Jennifer Lauterbach Robbins. Annually, the Attorney General selects one Assistant Attorney General to receive this award in recognition of special achievement in the field of health, human services or education. The award recognizes a special achievement that demonstrates the same high level of commitment to public service and law as that demonstrated by Jennifer Robbins throughout her professional career and particularly her service with the Office of the Attorney General.

The recipient of the 1992 award is:

*Kathleen A. Morse*

## **THE ATTORNEY GENERAL'S PRO BONO AWARD**

In 1989, the Attorney General established a community service award to honor an attorney in the Attorney General's office who has made a significant contribution, whether of time, effort, or accomplishment, to organizations or individuals in need of free legal assistance.

The recipient of the 1992 award is:

*Jack Schwartz*

## ANNUAL REPORT FOR 1992

January 31, 1993

*The Honorable William Donald Schaefer*  
*Governor*  
*State House*  
*Annapolis, Maryland 21401*

Dear Governor Schaefer:

In accordance with Section 6-108(b) of the State Government Article, I am submitting this report of the business and proceedings of the Office of the Attorney General for the calendar year 1992.

In carrying out its role under the Constitution and laws of Maryland, the Attorney General's Office engages in an extraordinary variety of activities. Rather than attempt a comprehensive (and unduly lengthy) catalog, I shall select by a small sample of our initiatives and cases during 1992. In this way, I hope to illustrate the work that we do on behalf of the people of Maryland and our State agency clients.

### LAW ENFORCEMENT

The Criminal Investigations Division presented and investigated a variety of cases in 1992. One of the most distressing cases involved Joseph M. Staubitz, Jr., 43, a former official in the Department of Health and Mental Hygiene who was charged with conspiracy and misconduct in his supervision of the Maryland State Games program. This program, aimed at promoting amateur sports among the young as an alternative to drug and alcohol abuse and attracting a U.S. Olympic festival to Maryland, was supervised by Staubitz and run by James W. Narron, who earlier pled guilty to conspiracy charges. Staubitz used State Games money for personal luxuries, including a 1989 gambling trip to Las Vegas and membership into a country club. Changing his plea to guilty moments before his trial was to begin, Staubitz was ordered to pay \$30,000. Several of these charges are still pending.

In another case, the Baltimore City grand jury has returned indictments against three employees of a health care facility in an ongoing, undercover probe of insurance fraud. Charges of filing false insurance claims and attempted theft were returned against Dr. Reginald Stallings, Michael J. Sterrett, and Ahmad Nourbakhsh. Sterrett

and Nourbakhsh were also accused of misrepresenting themselves as physicians and practicing medicine without a license. As part of the year-long investigation, undercover State Police troopers posed as patients, approached the three defendants, and sought treatment for non-existent injuries. In each case, the defendants allegedly billed insurance companies for the medical service they claimed to have provided.

An eight year jail sentence has been imposed on Paul Gerald Patterson, Jr., a one-time Baltimore County insurance executive for stealing more than \$600,000 from clients. Patterson placed his clients' funds in bank accounts he controlled and then used the money to buy an Ocean City condominium, luxury cars, yacht, speedboat, and other personal expenses. The judge also ordered Patterson to pay \$436,750 in restitution to the victims.

The thirteen Assistant Attorneys General in the Criminal Appeals Division filed over 1200 briefs in Maryland Appellate Courts in 1992. In one of the most important cases argued by the Division, a three-judge Court of Special Appeals panel affirmed the conviction of Dr. William Allen, Jr., an Allegany County dentist, who was convicted of common law solicitation to commit murder. Allen paid an undercover police officer to kill a Deputy State's Attorney, who was involved in a previous case that led to Allen's arrest and conviction on drug charges. Allen was sentenced to fifteen years in prison on the murder-for-hire conviction. In challenging his conviction, Allen questioned the constitutionality of the Maryland statute regarding solicitation, raising the issue of whether it was recognized as a common law crime in England at the time of American independence in 1776, when English common law was adopted as part of the Maryland Constitution. But our lawyers successfully argued that Maryland recognizes the common law crime of solicitation to commit murder.

The Medicaid Fraud Unit successfully prosecuted Dr. Mahmoud F. Abbas, 61, a Howard County psychiatrist who worked at the Clifton T. Perkins State Hospital. He pleaded guilty to defrauding Medicaid and prescribing unnecessary medications for drug abusers. In addition to paying over \$40,000 in fines and restitutions, Abbas had his license to practice medicine immediately suspended.

In another case prosecuted by the Unit, Celestyn Singleton, 26, a one-time medicine aide at the Eastpoint Nursing Home, was convicted in Baltimore County Circuit Court of battering an 86-year-old female patient at the nursing home last February. At the time of the incident, Singleton was supposed to have been administering medicine to the victim, who suffers from dementia and other ailments.

Charges involving 124 counts of Medicaid Fraud, as well as one count of obstruction of justice, have been returned against Dr. Carter J. Williams, a Baltimore County obstetrician who allegedly submitted phoney charges for services rendered to 124 patients. He is accused of falsifying records that had been subpoenaed by the grand jury.

1992 was a successful year for the Environmental Crimes Unit. Attorneys prosecuted the first case under the State's new criminal air pollution statute, resulting in a \$25,000 fine imposed on Pinnacle Industries, Inc., a Baltimore contracting firm that admitted illegally transporting hazardous waste to a cemetery in Armistead Gardens and dumping the waste there.

In another case argued by the Unit, David Hoff of Hoff Brothers Logging in Westminster pleaded guilty to illegal logging charges in Carroll County. Our lawyers told the court that Hoff began cutting down trees in a 25-acre wooded area that is part of a residential community in Eldersburg. He did so without a wetlands approval, logging plan, or sediment and erosion control plan. In the process, he threatened permanent damage to a naturally breeding trout stream situated in the center of the woods.

Finally in 1992, Bethlehem Steel Corporation agreed to pay \$3.5 million in civil penalties, the largest environmental fine ever assessed in Maryland, in order to settle State and federal lawsuits stemming from air pollution violations traced to the now-idle coke ovens at its Sparrows Point plant. Of the fine, \$1.75 million will go to the Maryland Clean Air Fund which pays for air pollution control activities in the State.

Among the several investigations conducted by the Antitrust Division this year, one focused on the pricing activities of two major American motor bicycle companies, Trek Bicycle Corporation, and Schwinn Bicycle Company. Based on evidence that the companies had implicitly agreed with their respective dealers on the price at which bicycles and related products would be advertised for sale during special advertising events, in violation of Maryland's antitrust laws, our lawyers obtained formal Assurances of Discontinuance from Trek and Schwinn, allowing dealers to engage in competitive pricing and requiring pricing disclaimers in dealer advertisements.

Another investigation by the Antitrust Division secured a guilty plea by Clayton J. Myers, III, a former construction project manager at the University of Maryland at Baltimore, to charges of rigging bids on UMAB construction projects. Approximately \$96,500 in State funds was spent on these contracts. Myers was given

a \$15 thousand dollar fine and sentenced to six months each for two counts of violating the Maryland Antitrust Act.

## CONSUMER PROTECTION

In its continuing effort to prevent practices by deceptive automobile dealership activities, the Division argued a case in which Koons Ford of Baltimore and Koons Mercury-Markur in Owings Mills agreed to pay more than \$100,000 in restitution to 83 consumers who were sold vehicles between 1988 and 1991. These vehicles were labeled as "new," but in fact, they had been stolen, damaged, or delivered to other consumers and then reclaimed by the dealership before any title was issued. Both dealerships agreed that, in the future, they would disclose the full history of a vehicle to all prospective car buyers. In addition to consumer reimbursement, the Koons dealerships agreed to pay \$10,000 to the State to cover the costs of the Division's investigation.

In another case this year, Billing Systems, Inc., a Towson-based firm that provides billing services for Maryland physicians, agreed to pay up to \$10,000 in refunds to consumers who were improperly billed for care that was covered by their membership in a health maintenance organization.

Grand Piano & Furniture Company, a Roanoke, Virginia-based firm, signed an agreement letter promising to adhere to the comparison-price advertising standards of the Consumer Protection Act when promoting discount sales in Maryland. The company, which has an outlet in Hagerstown, was not charged with violating Maryland law but agreed that in the future it will not compare the "sale" price of its products to a previous "regular" or "reference" price unless it has evidence to substantiate that the regular price is bona fide. This agreement with Grand Piano is part of the Division's ongoing program of monitoring comparative price advertising by merchants. The Division entered into earlier agreements concerning such advertising with the Hub, the Hecht Company, Woodward & Lothrop, and Montgomery Ward.

In another major action, imprisoned former time-share developer H. Lloyd Hensley has been ordered to pay millions of dollars in restitution to consumers who were deceptively persuaded to visit his resort developments and then pressured into purchasing time-shares in the buildings in Ocean City and Western Maryland.

In a case involving Outdoor World, a State court gave partial victory to our Consumer Protection Division attorneys who had sought refunds for Marylanders

who received direct mail ads in which Outdoor World Corp., a campsite promoter, promised prizes without clearly stating that recipients had to pay redemption fees in order to claim them. By the court's action, the Division is permitted to seek travel expenses for the 43,000 Maryland residents who visited these Outdoor World campsites in expectation of being awarded free prizes.

Administrative charges were filed against Luskins, Inc. for ads that offered "free" air fares to Hawaii, Florida and the Bahamas but that filed to disclose to consumers not only that they had to purchase merchandise in order to get "free" certificates offered by Florida-based Vacation Ventures, Inc., but also, that in order to redeem the certificates, the travelers had to make hotel and other arrangements through Vacation Ventures Inc. at a cost ranging from \$470 to \$1,875.

### **REPRESENTING STATE AGENCIES**

Our Annapolis office spent a significant amount of time defending the congressional redistricting plan this year. In 1992, the United States Supreme Court upheld the new plan that the General Assembly drew up for Maryland's eight-member delegation in the U.S. House of Representatives following a 1990 census order. But a week before the Supreme Court's decision, the National Association for the Advancement of Colored People and the American Civil Liberties Union filed suit in Baltimore to challenge the State's legislative redistricting plan, contending that the plan dilutes minority voting strength in Baltimore City and on the Eastern Shore. In filing suit, the NAACP and ACLU joined with the Maryland Republican Party, which had challenged the legislative redistricting plan on the ground that it unconstitutionally favors Democrats. Our lawyers are presenting a rigorous defense and hope for a prompt resolution.

The Educational Affairs Division continued to litigate a nationally important case involving a scholarship program for minorities. The full Fourth Circuit Court of Appeals ruled 10-2 to uphold a decision by a three-judge panel of that court, which found that the University of Maryland should discontinue its blacks-only Benjamin Banneker Scholarship Program unless it can prove that racial discrimination still exists on the College Park campus. The United States District Court in Baltimore initially upheld the scholarship program in 1991, saying it properly sought to counteract the effects of the previous racial discrimination on the campus. The three-member appellate court panel ruled, however, that the university must compile new data to demonstrate that discrimination still exists at Maryland and is being remedied by the scholarship. The District Court has set a hearing date for April 1993, at which time

our lawyers will present evidence that the Banneker Scholarship Program is still justified.

Our attorneys assigned to the Special Litigation Unit of the Department of Budget and Fiscal planning filed over 700 actions in 1992, bringing almost \$1.5 million into State coffers.

As in past years, the Contract Litigation Unit dealt this year with a number of issues involving millions of State contract dollars. One such dispute with Copeland and Associates, arising out of a contract at DHR, was a particularly long and hard fought battle. The Division won the case at the Board of Contract Appeals, but the case is currently on appeal to the Court of Special Appeals.

In 1992, our lawyers representing the Department of Natural Resources continued to defend a lawsuit filed by the Maryland Aggregates Association, Inc., a group representing 30 mining companies, which is seeking to void a 1991 State law designed to protect residents from damage to their property or its water supply due to mining. The law applies to Baltimore, Carroll, Frederick and Washington counties, where limestone is mined. Residents living near limestone quarries sought the statute, fearing that such mining operations, which pump large amounts of water, could make their wells run dry or cause depressions in their properties.

In a hotly contested proceeding this year, counsel to the Department of Licensing and Regulation successfully prosecuted a license revocation case against a Chevy Chase real estate broker who had defrauded purchasers. The Department also successfully defended a challenge to the 10% tax imposed pay-per-view boxing and wrestling matches, thus saving millions of dollars in revenue for the State.

Among the citizens hardest hit by the State's fiscal crisis in 1992 are those who are the beneficiaries of the programs administered by the Department of Human Services. Positive efforts by Assistant Attorneys General during the past year include representing DHR in obtaining a waiver from certain AFDC requirements so that the agency could promote a school attendance and immunization program for low-income children.

In one of the most important cases argued by counsel to the Comptroller this year, the Court of Special Appeals ruled that a bi-weekly newsletter does not qualify as a newspaper for State sales tax purposes. In *Bancroft Information Group, Inc., et al. v. Comptroller*, the Court upheld Maryland tax regulations requiring publications to be published weekly or more often in order to qualify for an exemption to the State's sales tax. The decision rejected the contentions of Bancroft Information

Group, publisher of *The Maryland Report*, that the Comptroller's definition of "newspaper" harms small publications and violates the First Amendment guarantee of freedom of speech and press.

In 1992, my staff at the Department of Economic and Community Development played a critical role in arranging almost \$5 million in financing for Northwest Airlines. This financing attracted Northwest's reservation system to BWI Airport, thereby saving approximately 200 jobs in the State with the prospect of creating 150 more jobs. In addition, to address the great need for additional child care facilities, our lawyers participated in closing 27 loans to child care facilities in Maryland.

I am pleased to report these accomplishments and I am grateful to all of the lawyers and support staff of the office for their dedication and professionalism. I also wish to take this opportunity to thank you and the members of your staff and cabinet for the courtesies extended to me and my staff during this past year.

J. Joseph Curran, Jr.  
*Attorney General*



**OFFICIAL OPINIONS  
OF THE  
ATTORNEY GENERAL  
OF  
MARYLAND**



**OPINIONS PUBLISHED**  
**IN FULL**

**See also page 243 for synopses of additional opinions**



## ADMINISTRATIVE LAW

### CONTESTED CASES – CHIEF ADMINISTRATIVE LAW JUDGE MAY PROVIDE BY REGULATION FOR DISMISSAL OF APPEAL FOR NONINDIGENT PARTY'S FAILURE TO PAY FILING FEE

May 29, 1992

*The Honorable John W. Hardwicke*  
*Chief Administrative Law Judge*

You have requested our opinion whether, upon the effectiveness of Chapter 134 of the Laws of Maryland 1992, a nonindigent party's request for a hearing may be dismissed if the party fails to pay a filing fee.

For the reasons stated below, we conclude that the Chief Administrative Law Judge has the discretion to provide by regulation that a nonindigent party's appeal will be dismissed if the party fails to pay a required filing fee.

#### I

#### Chapter 134

Chapter 134 (House Bill 248) of the Laws of Maryland 1992 was enacted, according to the bill title, for "the purpose of authorizing the Chief Administrative Law Judge to assess fees to cover certain administrative expenses." When the law becomes effective on July 1 1992, §9-1604(b)(1) of the State Government Article ("SG" Article) will contain the following new grant of authority:

The Chief Administrative Law Judge may:

...

(vi) Assess fees to cover administrative expenses as follows:

1. To file an appeal, a fee not exceeding \$15; and a subpoena, a fee not exceeding \$5.

Chapter 134 also adds the following new paragraphs to SG §9-1604(b):

(2) Fees charged under paragraph (1) of this subsection for administrative expenses may not be charged to:

(i) State agencies; or

(ii) Petitioners who are determined by the Office of Administrative Hearings to be unable to pay the fees.

(3) A fee charged under paragraph (1) of this subsection for filing an appeal shall be refunded to a party who initiates the appeal if the party receives a favorable decision from the Administrative Law Judge.

## II

### Analysis

Chapter 134 does not expressly state the consequence of a nonindigent party’s failure to pay a fee that has been assessed for the filing of an appeal. That is, Chapter 134 did not enact a provision akin to §7-201(a) of the Courts and Judicial Proceedings Article (“CJ” Article), which provides that, with certain exceptions, “no case may be docketed and no writ of attachment, fieri facias, or execution on judgment may be issued unless the plaintiff or appellant pays the required fee.” In the absence of such a provision, the mere fact that fees are payable does not itself authorize the Office of Administrative Hearings to dismiss an appeal upon a party’s failure to pay the filing fee. See *Glanville v. David Hairstylist*, 249 Md. 162, 238 A.2d 1917 (1968). Cf. *Parissi v. Telechron, Inc.*, 349 U.S. 46 (1955); *Gould v. Members of N.J. Div. of Water Policy & Supply*, 555 F.2d 340 (3d Cir. 1977); *In re Marriage of Gray*, 144 Ariz. 89, 695 P.2d 1127 (1955). But see *Prowswood, Inc. v. Mountain Fuel Supply Co.*, 676 P.2d 952 (Utah 1984).

In our view, however, the Office of Administrative Hearings may dismiss an appeal because of an unpaid filing fee if you first adopt a regulation stating that a nonindigent party's failure to pay the fee will result in dismissal of an appeal. The Chief Administrative Law Judge has authority to "adopt regulations to implement this subtitle." SG §9-1604(b)(1)(v). A regulation imposing the sanction of dismissal for nonpayment would be a reasonable implementation of this new component of the OAH subtitle, because the manifest legislative objective underlying Chapter 134 is to secure prompt payment of the fees. Otherwise, Chapter 134 would not have provided that a fee "shall be *refunded* to a party who initiates the appeal if the party receives a favorable decision from the Administrative Law Judge." SG §9-1604(b)(3) (emphasis added).<sup>1</sup>

A similar grant of fee-setting authority to the State Court Administrator has been authoritatively construed to encompass more than the mere designation of amounts. Under CJ §7-102, "The State Court Administrator shall determine the amount of fees to be charged by the Clerk of the Court of Appeals and the Clerk of the Court of Special Appeals, with the approval of the Board of Public Works." The statute does not expressly require payment in advance. Nevertheless, acting under this authority, the State Court Administrator has not only determined the amount of the fees but also provided that "[e]ach fee set forth in this schedule shall be paid in advance of or concurrently with the filing or delivery of the record, document, copy, or certificate specified. No fee is refundable." Revised Schedule of Fees ¶III.A.<sup>2</sup>

### III

#### Conclusion

In summary, it is our opinion that the Chief Administrative Law Judge has the discretion to adopt a regulation providing that a nonindigent

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<sup>1</sup> Of course, other regulatory choices – for example, a regulation stating that no hearing would be scheduled until the fee was paid – would also serve the legislative objective. The General Assembly has left this policy decision to your discretion. *See also* note 3 below.

<sup>2</sup> This aspect of the appellate fee schedule is underscored by provisions in the Maryland Rules requiring an appellant or petitioner to pay the required fee at the time of filing a notice of appeal in a civil case or at the time of filing a petition for a writ of certiorari. *See* Rules 8-201(b) and 8-303(a).

party’s failure to pay a filing fee will result in the dismissal of the party’s appeal.<sup>3</sup>

J. Joseph Curran, Jr.  
*Attorney General*

Jack Schwartz  
*Chief Counsel*  
*Opinions & Advice*

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<sup>3</sup> We recognize that, given the large numbers of appeals involving the suspension of a driver’s license, the mechanics of implementing such a regulation will require careful coordination with the Motor Vehicle Administration. We also note that a delay in a hearing caused by a party’s failure to pay the prescribed fee, with the result that a suspension of the party’s driver’s license would take effect, would not be a case of “the Administration’s delay or oversight.” Hence, the dismissal sanction in COMAR 11.11.03.08A(3) would not apply.

**ALCOHOLIC BEVERAGES****LIQUOR BOARDS – COUNTIES – OBLIGATION OF TALBOT COUNTY TO  
FUND LIQUOR BOARD**

October 22, 1992

*Mr. W. Francis Callahan*  
*Chairman, Board of Liquor License*  
*Commissioners of Talbot County*

You have requested our opinion concerning the obligations of the Talbot County Council to provide appropriations to the liquor board. Specifically, you ask whether the rationale of *State Administrative Board of Elections Laws v. Talbot County*, Case No. CG1622 (Cir. Ct. for Talbot Cty. May 27, 1992) (Sause, J.), applies to the funding of the liquor board. If so, the Talbot County Council will be required to revisit its decision to reduce the appropriation requested by the liquor board.<sup>1</sup>

For the reasons stated below, we conclude as follows: The rationale of *SABEL v. Talbot County* is applicable to the County Council's obligation to fund the liquor board. Unless an expense is unnecessary, the County Council must appropriate the full amount requested by the liquor board.

**I****Background**

As we understand the facts, the Board of Liquor License Commissioners submitted a budget request contemplating operating expenses of \$15,970, plus an additional expense of \$3,000 to revise and print license application forms. The liquor board estimated that it would generate revenues of approximately \$145,000, out of which its budget would be funded. The County Council imposed reductions in the budget, although the materials supplied us do not reveal the exact amount of the cut.

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<sup>1</sup> You also posed a question, the background facts of which are not clear from the materials provided, about a "furlough" of the liquor board's attorney ordered by the county. See note 3 below.

The liquor board contends that the requested budget embraced only necessary expenses and therefore was required to be fully funded under the rationale of *SABEL v. Talbot County*. The County Council contends that *SABEL v. Talbot County* is inapplicable to the liquor board.

## II

### *SABEL v. Talbot County*

This case involved the obligation of Talbot County to fund the local board of supervisors of elections. Under Article 33, §2-4(b) of the Maryland Code, “all ... necessary and reasonable expenses of each [election] board shall be an expenditure of the county or Baltimore City in which the board is located ....” The case arose when the Talbot County Council declined to fund two staff positions at the election board on a full-time basis. The position of the election board, supported by SABEL, was that full funding was “reasonable and necessary.”

In a very thorough opinion, the circuit court held that the county was under an “imperative duty” to fund the positions as proposed by the local board, unless the county had a basis in fact for concluding that the expenses in question were not “necessary and reasonable.” Slip op. at 52. The circuit court’s decision was not appealed.

## III

### **Funding of Talbot County Liquor Board**

Under Article 2B, §63(a), revenues from license fees are paid to each county. In Talbot County, those license fees are the source of the liquor board’s funding: “In Talbot County the salaries of the Board of License Commissioners and the necessary office, clerical, and investigational expenses of the Board shall be paid by the County Council out of receipts from licenses from the sale of alcoholic beverages. However, the Board may expend in its discretion not more than \$3,500 in any year for salaries and expenses.” Article 2B, §63(q).

The statute thus imposes a duty on the County Council: It “*shall*” pay “the necessary office, clerical and investigational expenses of the Board ....” There is no material difference between §63(q) and the election board funding statute construed in *SABEL v. Talbot County*. Hence,

unless some other provision of law requires a different result, the reasoning of *SABEL v. Talbot County* would be applicable.<sup>2</sup>

We are not aware of any other such law. It is true that under Article 2B, §206, the County Council has been given power under certain circumstances to enact local laws that would supplant otherwise applicable requirements of Article 2B:

(a) The Talbot County Commissioners shall regulate the retail sale of alcoholic beverages within Talbot County.

(b) Any law enacted by the Talbot County Commissioners pursuant to §3(ee) of Article 25 shall prevail over any provision of the Code of Public General Laws of Maryland regulating the retail sales of alcoholic beverages. However, unless and until the Talbot County Commissioners enact a law which is contrary to a provision of the Code of Public General Laws regulating the retail sale of alcoholic beverages, the provisions of the Code of Public General Laws shall remain in effect.

The cross-referred provision, Article 25, §3(ee), is an identically worded authorization to “regulate the retail sale of alcoholic beverages within Talbot County.”

Whatever may be the result of an exercise of this power in other contexts, we do not believe that this provision is relevant to the present issue. Although the source of the liquor board’s funding derives from “the retail sale of alcoholic beverages,” the provision in §63(q) that imposes the duty on the County Council to fund the necessary expenses of the liquor board is not itself an aspect of “regulat[ing] the retail sale of alcoholic beverages.” Thus, no enactment by the County Council pursuant to §206 could affect its duty to provide the funding required under §63(q).

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<sup>2</sup> We do not mean to suggest that *SABEL v. Talbot County*, an unappealed circuit court decision, itself has any binding or even precedential effect beyond that case itself. Our conclusion is that the analysis undertaken by Judge Sause of the county’s obligation under Article 33, §2-4(b) is the same analysis that should be applied to the county’s obligation under Article 2B, §63(q).

## IV

## Conclusion

In summary, it is our opinion that the reasoning of the decision of *SABEL v. Talbot County* applies to the funding of the Board of Liquor License Commissioners of Talbot County. Therefore, the County Council is required to fund the "necessary" expenses of the liquor board.<sup>3</sup>

An Attorney General's opinion cannot probe the details of this question of necessity, which the County Council apparently did not address. We recommend that the County Council and liquor board reexamine the issue of the liquor board's budget in light of *SABEL v. Talbot County*.<sup>4</sup>

J. Joseph Curran, Jr.  
*Attorney General*

Jack Schwartz  
*Chief Counsel*  
*Opinions & Advice*

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<sup>3</sup> The "necessity" test, calling for the ascertainment of objective facts, is to be applied *after* the liquor board determines the manner in which its statutory duties are to be carried out. See *SABEL v. Talbot County*, slip op. at 20-21.

<sup>4</sup> Likewise, the issue of the "furlough" of the liquor board's attorney should be reconsidered.

**CIVIL RIGHTS AND DISCRIMINATION****ELECTIONS – REAPPORTIONMENT AND REDISTRICTING – COURTS AND JUDGES – JURISDICTION AND PROCEDURE – JURISDICTION OVER PRIVATE CHALLENGES TO LEGISLATIVE REDISTRICTING PLAN UNDER SECTION 2 OF VOTING RIGHTS ACT**

February 19, 1992

*The Honorable R. Clayton Mitchell, Jr.*  
*Speaker of the House of Delegates*

You have requested our opinion on the jurisdiction of the Maryland Court of Appeals to hear and decide a private civil action alleging that the State legislative redistricting plan violates Section 2 of the federal Voting Rights Act, 42 U.S.C. §1973. Specifically, you ask whether a challenge based on this federal law may be initiated in the Court of Appeals “or whether such an issue is one within the sole province of the federal courts.”

For the reasons detailed below, we conclude that federal courts do not have exclusive jurisdiction over private actions under Section 2 of the Voting Rights Act and that a Section 2 voting rights challenge to the State legislative redistricting plan may be brought as an original action in the Court of Appeals. Moreover, we conclude that under Article III, §5 of the Maryland Constitution, any such challenge must be brought in the Court of Appeals and may not be brought in a circuit court.

**I****Background****A. Section 2 Claims**

Section 2 of the Voting Rights Act of 1965, as amended in 1982, prohibits the denial or abridgement of the right of citizens of the United States to vote on account of race, color, or foreign language. 42 U.S.C. §1973(a). The Act seeks to ensure that racial and linguistic minorities do not “have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” 42 U.S.C. §1973(b). *See generally Thornburg v. Gingles*, 478 U.S. 30 (1986).

A typical Section 2 claim in federal court might invoke a number of federal court jurisdictional and remedial statutes, such as 28 U.S.C. §1331 (federal questions); 28 U.S.C. §1343(a)(3) (civil rights actions); 28 U.S.C. §1343(a)(4) (actions to protect the right to vote); and 42 U.S.C. §1973j(f) (certain actions under the Voting Rights Act).<sup>1</sup> See, e.g., *McDaniels v. Mehfoud*, 702 F. Supp. 588, 589 (E.D. Va. 1988); *East Jefferson Coalition v. Jefferson Parish*, 691 F. Supp. 991, 994 (E.D. La. 1988); *Jordan v. Winter*, 541 F. Supp. 1135, 1137-38 (N.D. Miss. 1982). If a Section 2 claim is joined with a Fourteenth or Fifteenth Amendment constitutional challenge to a state legislative redistricting plan, a federal court plaintiff would seek the empanelment of a three judge district court pursuant to 28 U.S.C. §2284(a).

The jurisdictional provisions typically invoked when a Section 2 claim is brought are thus broad ones, not unique to Section 2 claims. The contrast with another provision of the Voting Rights Act, Section 5, is instructive. Section 5, 42 U.S.C. §1973c, establishes a preclearance mechanism for changes in voting qualifications and procedures undertaken by certain states and political subdivisions and authorizes specific judicial relief in federal courts. Section 5, which does not apply in Maryland, provides that “[a]ny action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code.” And Section 14(b), 42 U.S.C. §1973l(b), which governs declaratory judgments approving proposed changes in voting procedures states that “[n]o court other than the District Court for the District of Columbia ... shall have jurisdiction to issue any declaratory judgment pursuant to ... Section 5 ....” Looking at these provisions, some courts have concluded that a Section 5 action can be brought only in federal court. See *Beatty v. Esposito*, 411 F. Supp. 107 (E.D.N.Y. 1976); *Carr v. Secretary of State*, 441 So. 2d 223 (La. App.), writ denied 442 So. 2d 445 (La. 1983); *Ortiz v. Thompson*, 604 S.W.2d 443 (Tex. Civ. App. 1980).<sup>2</sup>

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<sup>1</sup> Section 12(f) of the Act, 42 U.S.C. §1973j(f), states that “[t]he district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section....” Although courts have cited this provision as a basis for district court jurisdiction of a private Section 2 action, read literally, §1973j applies only to criminal proceedings and civil actions brought by the U.S. Attorney General, which are the only proceedings named in “this section.” The Attorney General of the United States may bring a civil action to enforce Section 2 pursuant to 42 U.S.C. §1973j(d).

<sup>2</sup> In *Hathorn v. Lovorn*, 457 U.S. 255, 268-69 (1982), the Supreme Court noted that it was “possible that these sections grant the federal courts exclusive jurisdiction” over actions under Section 5. However, the justices declined to decide the question, finding in that case that the Section 5 issue had been raised

(continued...)

### ***B. Legislative Redistricting Claims***

The portion of Article III, §5 of the Maryland Constitution that governs State court review of a legislative redistricting plan provides as follows:

Upon petition of any registered voter, the Court of Appeals shall have original jurisdiction to review the legislative districting of the State and may grant appropriate relief, if it finds that the districting of the State is not consistent with requirements of either the Constitution of the United States of America, or the Constitution of Maryland.

On the basis of the history of this provision, the Court of Appeals has said that the Court's original jurisdiction in State legislative redistricting cases is exclusive. *See State Administrative Board of Election Laws v. Calvert*, 272 Md. 659, 678-84, 327 A.2d 290 (1974). The *Calvert* opinion traced the evolution of Article III, §5 from its genesis as a proposal of the Constitutional Convention Commission to its adoption by the voters in 1970. According to the Convention Commission and a committee of the Convention itself, the purposes of original Court of Appeals jurisdiction were to reduce litigation and shorten the time required to dispose of redistricting cases so that there would be a prompt and final settlement of any constitutional issues. 272 Md. at 680-82.

Thus, State trial courts may not entertain a challenge to the constitutionality of a legislative redistricting plan. 272 Md. at 684. *See also Smith-Greenspring Assoc., Inc. v William Donald Schaefer*, Case No. CC-92-00289 (Cir. Ct. for Anne Arundel Cty., Feb. 4, 1992).

### ***C. Issues***

In light of these provisions, we must consider (1) whether federal law divests state courts of jurisdiction over a private party's Section 2 claim and, if not, (2) whether such a statutory claim is within the exclusive original jurisdiction of the Maryland Court of Appeals, in light of the language of Article III, §5 apparently limiting judicial intervention to relief for violations of *constitutional* requirements.

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<sup>2</sup> (...continued)

collaterally, i.e., not directly under federal law, and thus could be decided in state court. 457 U.S. at 268.

## II

### Federal Jurisdiction Is Not Exclusive

The U.S. Supreme Court has consistently held that, under our “system of dual sovereignty ... state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States.” *Tafflin v. Levitt*, 110 S.Ct. 792, 795 (1990). Thus, “[t]o give federal courts exclusive jurisdiction over a federal cause of action, Congress must, in an exercise of its powers under the Supremacy Clause, affirmatively divest state courts of their presumptively concurrent jurisdiction.” *Yellow Freight System, Inc. v. Donnelly*, 110 S.Ct. 1566, 1568 (1990).

Section 2 of the Voting Rights Act contains no language that expressly confines jurisdiction to federal courts or ousts state courts of their presumptive jurisdiction.<sup>3</sup> According to the Supreme Court, “[t]he omission of any such provision is strong, and arguably sufficient, evidence that Congress had no such intent.” *Yellow Freight System, Inc. v. Donnelly*, 110 S.Ct. at 1569. In addition, the federal jurisdictional statutes relied upon in a typical Section 2 suit in federal court are, for the most part, merely general grants of power that have never been read as ousting concurrent state court jurisdiction. *See, e.g., Grubb v. Public Utilities Commission*, 281 U.S. 470 (1930); *Rzeznik v. Chief of Police*, 373 N.E.2d 1128 (Mass. 1978). *See also Yellow Freight System, Inc. v. Donnelly*, 110 S.Ct. at 1569 (concurrent state court jurisdiction is not divested by a statute that “affirmatively describes the jurisdiction of the federal courts, but is completely silent on any role of the state courts ...”).

Moreover, state court jurisdiction is in no way functionally incompatible with Section 2 of the Voting Rights Act. No special procedures, federal agency review, or jurisdictional prerequisites must be met before the filing of such a suit. State courts are presumed to be “just as able as federal courts to adjudicate” federal anti-discrimination claims. *Yellow Freight System, Inc. v. Donnelly*, 110 S.Ct. at 1570 (Title VII cases). *See also Sweeney v. Hartz Mountain Corp.*, 319 Md. 440, 573 A.2d 32 (1990) (claim under Title VII of the 1964 Civil Rights Act); *Maryland-National Capital Park & Planning Comm’n v. Crawford*, 307 Md. 1, 511 A.2d 1079 (1986) (racial discrimination claim under 42 U.S.C. §1983).

Finally, the Court of Appeals has already adjudicated voting rights claims under the Fourteenth and Fifteenth Amendments to the U.S.

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<sup>3</sup> Nor does Section 12(f), even if it were deemed applicable to private claims under Section 2. *See* note 1 above.

Constitution. See *In re Legislative Districting*, 299 Md. 658, 475 A.2d 428 (1982). And “[t]he theories of liability and the proof underlying both the constitutional and statutory [Section 2] claims are intimately related ....” *Armour v. State of Ohio*, 925 F.2d 987, 988 (6th Cir. 1991).<sup>4</sup>

For all of these reasons, it is our opinion that Maryland courts are not divested by federal law of jurisdiction over a private action for violation of Section 2 of the Voting Rights Act.

### III

#### Court of Appeals Jurisdiction Is Exclusive

Even though federal law does not prevent a Maryland court from hearing a Section 2 claim, the question remains whether as a matter of State law such a claim must be brought in the circuit court or in the Court of Appeals. The pertinent sentence in Article III, §5 consists of two distinct clauses: The first clause states that “the Court of Appeals shall have original jurisdiction to review the legislative districting of the State”; the second authorizes the Court to “grant appropriate relief, if it finds that the districting of the State is not consistent with the requirements of either the Constitution of the United States of America, or the Constitution of Maryland.” Hence, although Article III, §5 refers only to *remedying* violations of the federal and state constitutions, it does not expressly bar *jurisdiction* over a statutory claim under the Voting Rights Act.

Even the provision about remedies should not be construed too literally.<sup>5</sup>

[W]hile the principles of the Constitution are unchangeable, in interpreting the language by which they are expressed it will be given a meaning which will permit the application of those principles to changes in the economic, social, and political life of the people, which the framers did not and could not foresee .... [I]t is an accepted canon of constitutional

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<sup>4</sup> We are also informed that the Michigan Supreme Court, which has original jurisdiction of legislative reapportionment claims under Article IV, §6 of that state’s constitution, is presently entertaining a Section 2 claim.

<sup>5</sup> In any event, a plausible literal construction of Article III, §5 is that it extends to federal statutory claims like Section 2, enforcement of which is authorized directly by the Fourteenth and Fifteenth Amendments to the U.S. Constitution.

construction that such instruments are to be liberally construed to accomplish the purpose for which they were adopted.

*Norris v. Mayor & City Council*, 172 Md. 667, 675-76, 192 A. 531 (1937).

Article III, §5 was framed at a time when Section 2 of the Voting Rights Act was simply not a factor in State redistricting litigation.<sup>6</sup> And it is highly unlikely that the framers and the voters intended that §5 freeze Court of Appeals jurisdiction in reapportionment cases only to claims that were likely to be brought at that particular time. *Cf. Kindley v. Governor*, 289 Md. 620, 625, 426 A.2d 908 (1981) (“Where, as here, a statute is phrased in broad general terms, it suggests that the legislature intended the provision to be capable of encompassing circumstances and situations which did not exist at the time of its enactment.”)

Furthermore, the purpose of original Court of Appeals jurisdiction, the prompt and final settlement of redistricting cases, could be frustrated if jurisdiction in a legislative redistricting case were bifurcated between a circuit court and the appellate court. *See State Administrative Board of Election Laws v. Calvert*, 272 Md. at 680-82.

Finally, we draw support for our conclusion by analogy to the construction given a federal statute, 28 U.S.C. §2284, which provides for the convening of a three-judge district court “when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.” The express reference to constitutional claims in 28 U.S.C. §2284 has not prevented three-judge federal courts from also entertaining pendent Voting

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<sup>6</sup> Although an earlier version of Section 2 existed in 1970 and was part of the law enacted by Congress in 1965, it is safe to say that as of 1970 most Voting Rights Act litigation involved Section 5 of the Act or states in the Deep South. In fact, the first reported decision involving a Voting Rights Act claim in Maryland was decided in 1986 and dealt only with a procedural issue. *United States v. City of Cambridge, Maryland*, 799 F.2d 137 (4th Cir. 1986).

Rights Act claims.<sup>7</sup> In our view, Article III, §5 should receive a similar construction.

#### IV

#### Conclusion

In summary, it is our opinion that federal courts do not have exclusive jurisdiction over private claims premised upon a violation of Section 2 of the Voting Rights Act. The Court of Appeals has original and exclusive State court jurisdiction to hear and decide such private party challenges to the State legislative redistricting plan.

J. Joseph Curran, Jr.  
*Attorney General*

Jack Schwartz  
*Chief Counsel*  
*Opinions and Advice*

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<sup>7</sup> In *Allen v. State Board of Elections*, 393 U.S. 544, 583, n. 1 (1969), Justice Harlan noted in a concurring and dissenting opinion that:

While I consider the question of whether §5 authorizes a three-judge court a close one, it is clear to me that we would not avoid very many three-judge courts whatever we decide [under the Voting Rights Act] ... [G]enerally a plaintiff attacking a state statute ... could also make at least a substantial constitutional claim that the state statute is discriminatory in its purpose or effect. Consequently, in the usual case a three-judge court would always be convened ....

*See also Armour v. State of Ohio*, 925 F.2d at 988-89.

**CIVIL RIGHTS AND DISCRIMINATION – DISABILITY – GENERAL  
ASSEMBLY – APPLICABILITY OF AMERICANS WITH DISABILITIES  
ACT TO LEGISLATIVE BRANCH**

October 14, 1992

*Ms. Cindy Mease, Chair  
Maryland Advisory Council for  
Individuals With Disabilities*

You have requested our opinion concerning the application of the federal Americans with Disabilities Act ("ADA") to the Legislative Branch of State Government. In your letter, you specifically asked about access by the hearing impaired to public meetings and by the visually impaired to printed material.

For the reasons stated below, we conclude that the ADA applies to the Legislative Branch, including the respective Houses of the General Assembly. The ADA and its implementing regulations contemplate a process in which problems of access by the individuals with disabilities are identified and a plan is developed to address these issues. With respect to the specific concerns you mentioned, it is our opinion that on request the Legislative Branch has the obligation to provide appropriate auxiliary aids to the hearing and visually impaired to enable such individuals to understand and participate in the legislative process.

**I**

**Background**

The Americans With Disabilities Act was enacted by Congress in 1990. Pub. L. No. 101-336, 104 Stat. 327, 42 U.S.C. §12101 *et seq.* It was approved by the President on July 26 of that year.

The central provision of Subtitle A of Title II, which is the portion of the ADA relevant to your inquiry, states as follows:

[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

§12132. The term “disability” includes a “physical or mental impairment which substantially limits one or more major life activities.” §12102(s)(A). Among the entities encompassed in the term “public entity” are “any State or local government” and any instrumentality of such governments. §12131(1)(A) and (B). The ADA preempts State and local laws that do not afford “greater or equal protection for the rights of individuals with disabilities than are afforded by [the ADA].” §12201(b).

Violations of the subtitle are subject to the remedies prescribed by the Rehabilitation Act of 1973, which incorporates the remedies of the Civil Rights Act of 1964. *See* §12133. *See also* 29 U.S.C. §794a and 42 U.S.C. §§2000d *et seq.* and 2000e5. Except for a provision on regulations, which took effect immediately, the subtitle became effective January 26, 1992. Pub. L. No. 101-336, §205.

As required by 42 U.S.C. §12134, the Attorney General of the United States has promulgated regulations to implement Subtitle A of Title II. 56 Fed. Reg. 35716-23 (July 26, 1991), *codified at* 28 C.F.R. Part 35. The regulations, which took effect January 26, 1992, broadly prohibit discrimination by any public entity against a qualified person with a disability on the basis of disability. 28 C.F.R. §35.130(a). There are specific prohibitions on discrimination against such persons in matters of employment and access to facilities. §§35.140(a) and 35.149.<sup>1</sup>

Among the general obligations of public entities is the following:

A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modification would fundamentally alter the nature of the service, program, or activity.

§35.130(b)(7). Public entities also have an obligation to conduct activities in the most integrated setting appropriate to the needs of persons with disabilities. §35.130(d). Additionally, they are obligated to “operate each service program or activity, when viewed in its entirety,” in such a way as to make it “readily accessible to and usable by individuals with disabilities.” §35.150(a). However, there is no

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<sup>1</sup> Employment is also subject to Title I of the ADA and, where Title I is inapplicable, to the federal Rehabilitation Act. §35.140.

requirement that each facility be accessible or that any action be taken that would threaten or destroy the historic significance of historic property. §35.150(a)(1) and (2).

With respect to matters of communications, a public entity's overall duty is to "take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others." §35.160(a). The regulation also imposes the following specific obligation:

A public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.

§35.160(b)(1). In deciding which aid is appropriate, the public entity is to give primary consideration to the request of the individual with the disability. §35.150(b)(2). Telecommunication devices for the deaf ("TDD") or equally effective alternatives may be required for the telephone system. §35.161. However, in matters of program accessibility and communications, a public entity need not take any action that would fundamentally alter the nature of the activity or result in an undue administrative or financial burden. §§35.150(a)(3) and 35.164.

Within a year of the effective date of the regulations, a public entity is to evaluate its services, policies, and practices and make necessary modifications. In conducting the evaluations, a public entity is to accept comments by interested individuals, including organizations representing people with disabilities. §35.105(a) and (b). A public entity is also required to disseminate information about the ADA's applicability to the entity. §35.106. A public entity that employs at least 50 people is to designate at least one employee to coordinate compliance, including complaints of noncompliance. Further, such an entity is to adopt and publish grievance procedures for the prompt and equitable resolution of complaints alleging a violation of the regulations. §35.107.

## II

### Applicability to Legislative Branch

Neither the ADA nor the regulations specifically refer to the legislative branch of state governments as a "public entity." The Department of Justice, however, has concluded that Title II of the ADA

applies to all activities of state and local government, including the legislative branch. See 56 Fed. Reg. at 35697 (analysis of 28 C.F.R. §35.102). See also U.S. Department of Justice, *Technical Assistance Manual, Title II of the Americans with Disabilities Act* II-1.2000 ("Justice Department Manual"). In light of this interpretation, we likewise conclude that the Legislative Branch of Maryland government is a "public entity" subject to the ADA.

Whether the different elements of the Legislative Branch, *i.e.*, House, Senate and staff agencies, may be regarded as separate public entities is not entirely clear. However, even the smallest units of a government are subject to all the requirements of the ADA so long as there are at least 50 employees in the government as a whole. Justice Department Manual, II-9.1000. As all states have at least 50 employees, all state departments, agencies, and other divisional units are subject to requirements applicable to public entities with 50 or more employees. *Id.*

Under the ADA and its regulations, the Legislative Branch is generally prohibited from discriminating against individuals with disabilities. Moreover, there is an obligation to make reasonable accommodations to facilitate the integration of such persons in the activities of the Legislative Branch. It is especially important that there be an ongoing process of consultation with people with disabilities or their representatives concerning their needs and appropriate ways to accommodate them.

As an initial matter, there needs to be an identification of specific problems that people with disabilities encounter in the activities of the Legislative Branch. This evaluation would encompass matters like employment; access to legislative buildings, information, and communications; and participation in public meetings.<sup>2</sup> In deciding on appropriate ways to address identifiable problems in program accessibility or communications, the Legislative Branch need not take a particular action if it would result in an undue administrative or financial burden. 25 C.F.R. §§35.150(a)(3) and 35.164.

With respect to the specific issues of access by the hearing impaired to public meetings and of the visually impaired to printed materials, the ADA and regulations clearly contemplate that the Legislative Branch will facilitate access by furnishing appropriate

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<sup>2</sup> It is our understanding that the Legislature is in the process of conducting such a self-evaluation. Of course, compliance with the obligations of the ADA is not excused during the period of self-evaluation.

auxiliary aids. See 28 CFR §35.160. In the case of the hearing impaired, these include qualified interpreters, written materials, and assistive listening systems.<sup>3</sup> For the visually impaired, they include qualified readers, taped texts, and brailled material. §35.104. In determining the device to be used, a public entity must give “primary consideration” to the requests of individuals with disabilities. §35.160(b)(2). The Justice Department advises as follows: “‘Primary consideration’ means that the public entity must honor the choice, unless it can demonstrate that another equally effective means of communication is available, or that use of the means chosen would result in a fundamental alternation in the service, program, or activity or in undue financial and administrative burdens.” Justice Department Manual, II-7.1100. As we understand the matter, there is no requirement that every public meeting be equipped to accommodate the hearing impaired or that all printed material be available in a form to accommodate suitable for the visually impaired. However, officials in the Legislative Branch must be prepared to accommodate such needs on request.

### III

#### Conclusion

In summary, it is our opinion that the Legislative Branch of State Government is subject to the Americans with Disabilities Act. As regards the hearing and visually impaired, a reasonable accommodation must be made upon request to facilitate their access to the legislative process.

J. Joseph Curran, Jr.  
*Attorney General*

Richard E. Israel  
*Assistant Attorney General*

Jack Schwartz  
*Chief Counsel*  
*Opinions and Advice*

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<sup>3</sup> It is our understanding that the Legislature has two TDDs and is now part of the State relay system, which enables the hearing-impaired to communicate by telephone.

## CONSTITUTIONAL LAW

### FREEDOM OF SPEECH – HATE CRIMES LAW IS CONSTITUTIONAL

December 3, 1992

*The Honorable Samuel I. Rosenberg  
House of Delegates*

*Mr. Michael S. Glushakow  
Chairman, Governor's Racial, Religious  
and Ethnic Advisory Committee*

You have each asked for our opinion concerning the effect of the decision of the United States Supreme Court in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), on the validity of Article 27, §10A of the Maryland Code (“Burning cross or other religious symbol”) and Article 27, §470A (“Crimes against religious property or persons or property because of race, religious beliefs, etc.”).

With respect to Article 27, §10A, the cross-burning statute, we note that the issue of the statute’s constitutionality will likely be decided by the courts in the near future. In a very recent case arising from Prince George’s County, the trial court dismissed certain charges on the basis of the court’s view that, under *R.A.V.*, Article 27, §10A is unconstitutional. The State anticipates taking an appeal, and this office will argue for the constitutionality of the statute. Under these circumstances, our longstanding office policy precludes our issuing an opinion on the matter.

With respect to Article 27, §470A, the hate crimes statute, it is our opinion that the statute is constitutional.

## I

**The *R.A.V.* Decision**

*R.A.V.* involved a challenge to a St. Paul ordinance that provided as follows:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

The Minnesota Supreme Court upheld the statute against an overbreadth challenge. The Minnesota court concluded that the modifying phrase “arouses anger, alarm or resentment in others” limited the reach of the ordinance to “fighting words” and that fighting words were not protected by the First Amendment. *In re Welfare of R.A.V.*, 464 N.W.2d 507 (Minn. 1991).

The Supreme Court reversed. Justice Scalia, writing for the majority, did not reach the overbreadth issue but instead held that, while fighting words may be proscribed altogether, they are not completely without First Amendment protection. Content-based regulation of even fighting words must meet strict scrutiny, the Court held, unless the regulation falls within certain exceptions.

The first exception mentioned by the Court is for content-based discrimination justified by the very reason that the entire class of fighting words may be proscribed. Thus, for example, the federal government may criminalize threats of violence directed against the President, because “the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President.” *R.A.V.*, 505 U.S. at 388.

Another exception is where a subclass of proscribable speech is associated with particular secondary effects because of its content or where a particular subcategory of speech is “swept up incidentally within the reach of a statute directed at conduct rather than speech.” For example, the Court noted that sexually derogatory “fighting words” may produce a violation of Title VII’s prohibition against sexual discrimination in employment. *Id.*<sup>1</sup>

The majority recognized that other exceptions might exist but found that none applied to the St. Paul ordinance. Therefore, they applied strict scrutiny and found the statute to be invalid. While recognizing that a state has a compelling interest in ensuring the basic human rights of members of groups that have historically been subjected to discrimination, the majority held that the ordinance was not necessary to the accomplishment of that interest, because content-neutral alternatives were available.

The remaining four justices agreed that the ordinance was unconstitutional but disagreed with the majority’s analysis. They would have found the ordinance overbroad instead. No justice would have upheld the ordinance.

## II

### Maryland’s Hate Crimes Law

Article 27, §470A provides, in relevant part, as follows:

(b) A person may not:

(1) Deface, damage, or destroy or attempt to deface, damage, or destroy religious real or personal property that is owned, leased, or used by a religious entity;

(2) Obstruct, or attempt to obstruct by force or threat of force, a person in the free exercise of that person’s religious beliefs;

(3) Harass or commit a crime upon a person or damage the real or personal property of:

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<sup>1</sup> The Court also cited 18 U.S.C. §242 and 42 U.S.C. §§1981 and 1982, and concluded: “Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.” 505 U.S. at 388-91.

(i) A person because of that person's race, color, religious beliefs, or national origin; or

(ii) An institution:

1. Because of the institution's contacts or association with a person or group of a particular race, color, religious belief, or national origin; or

2. Where there is evidence that exhibits animosity on the part of the person committing the act against a person or group because of that person's or group's race, color, religious beliefs, or national origin; or

(4) Deface, damage, or destroy or attempt to deface, damage, or destroy the real or personal property of:

(i) A person because of that person's race, color, religious beliefs, or national origin; or

(ii) An institution:

1. Because of the institution's contacts or association with a person or group of a particular race, color, religious belief, or national origin; or

2. Where there is evidence that exhibits animosity on the part of the person committing the act against a person or group because of that person's or group's race, color, religious beliefs, or national origin.

Paragraph (1), which prohibits damage to religious property, does not raise significant freedom of speech concerns, because it prohibits only conduct, regardless of any communicative intent. The First Amendment

does not protect a right of any person to damage or destroy property. *United States v. Best*, 476 F. Supp. 34 (D. Colo. 1979).<sup>2</sup>

Paragraph (2), which prohibits interference with a person's free exercise of religion by force or threat of force, is also clearly constitutional. Statutes punishing threats of physical violence do not violate the First Amendment. *Mozzochi v. Borden*, 959 F.2d 1174, 1178 (2d Cir. 1992); *Lanthrip v. State*, 218 S.E. 2d 771 (Ga. 1975); *Thomas v. Commonwealth*, 574 S.W.2d 903 (Ky. 1978); *People v. Mirmirani*, 171 Cal. Rptr. 562 (Cal. App. 1981); *Masson v. Slaton*, 320 F. Supp. 669 (N.D. Ga. 1970). Similar federal laws protecting citizens in the exercise of their rights have been upheld. *United States v. Guest*, 383 U.S. 745 (1966) (18 U.S.C. §241); *Griffin v. Breckinridge*, 403 U.S. 88 (1971) (42 U.S.C. §1985(3)).

The remainder of §470A raises more significant constitutional issues. These issues were first discussed by this office in a 1983 opinion concerning a proposed hate crimes statute that would have created enhanced penalties for certain offenses if committed "by reason of the race, religion or national origin of another person, or group of persons." 68 *Opinions of the Attorney General* 136 (1983). At that time, Attorney General Sachs questioned whether an act that penalized one offender more heavily than another solely on the basis of motivation was not an act punishing beliefs or expression that would violate the First Amendment. However, in the absence of any case law on point, and in consideration of federal anti-discrimination laws that prohibited acts taken with a specific discriminatory motivation, the Attorney General determined he "would not disapprove of the bill."

Subsequent to the issuance of that opinion, hate crime statutes were upheld by courts in Oregon and New York. *State v. Hendrix*, 813 P.2d 1115 (Or. App. 1991), *aff'd*, 829 P.2d 1059 (Or. 1992); *People v. Grupe*, 532 N.Y.S.2d 815 (Crim. Ct. N.Y. City 1988); *State v. Beebe*, 680 P.2d 11 (Or. App.), *review denied*, 683 P.2d 1372 (Or. 1984). Each of these cases involved a statute that barred physical violence against a person

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<sup>2</sup> While provisions such as §470A(b)(1) do implicate Establishment Clause concerns, they are generally recognized as serving the legitimate state purpose of ensuring religious freedom and they have been upheld. *Central Presbyterian Church v. Black Liberation Front*, 303 F. Supp. 894 (E.D. Mo. 1969); *State v. Vogenthaler*, 548 P.2d 112 (N.M. 1976). See generally *Protecting Religious Exercise*:

The First Amendment and Legislative Responses to Religious Vandalism, 97 Harv. L. Rev. 547 (1983). See also *Riley v. District of Columbia*, 283 A.2d 819 (D.C. 1971) (upholding law prohibiting disturbance of religious congregation).

based on the race or other protected status of that person. And in each case the statute was found not to violate the First Amendment because the statute was directed at conduct, not at speech.<sup>3</sup> The courts noted that the statutes could be violated without uttering a word, and that bigoted speech and publication was not prohibited. *See, e.g., Grupe*, 532 N.Y. S.2d at 818. In addition, the court in *Beebe* noted that many crimes provided for harsher penalties based on the identity of the victim or the intent of the defendant, and that the use of speech to prove motive does not, in itself, violate the First Amendment.

However, in the wake of the *R.A.V.* decision, the Supreme Court of Wisconsin struck down Wisconsin’s hate crime statute. The Wisconsin statute, like the proposed statute considered in this office’s earlier opinion, provided enhanced penalties for certain criminal offenses when the defendant:

[I]ntentionally selects the person against whom the crime ... is committed or selects the property which is damaged or otherwise affected by the crime ... because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.

The Wisconsin court found that the hate crimes statute “punishes bigoted thought” and was “specifically designed to punish personal prejudice,” thereby violating the First Amendment. *State v. Mitchell*, 169 Wis. 2d 153, 485 N.W.2d 807 (1992). The court also found that the statute was overbroad and would chill protected speech because:

In addition to any words that a person may speak during, just prior to, or in association with the commission of one of the underlying offenses, all of his or her remarks upon earlier occasions, any books ever read, speakers ever listened to, or associations ever held could be introduced as evidence that he or she held racist views and was acting upon them at the time of the offense.

*Mitchell*, 485 N.W.2d at 816 (quoting Gellman, “*Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence?*” *Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 U.C.L.A. L. Rev. 333 (1991)). This ruling is being appealed to the Supreme Court.

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<sup>3</sup> The Court in *Beebe* also held that the statute did not violate the Equal Protection Clause, because anyone could be the victim of bigotry and all persons were protected equally.

Two dissenting opinions were filed. In the first, Judge Abramson argued that the statute should be given a narrow interpretation, and, as so interpreted, should be upheld. As interpreted by Judge Abramson, the bill would not permit evidence that a defendant has bigoted beliefs or has made bigoted statements unrelated to the particular crime.<sup>4</sup> According to the dissent, the statute, so construed, would be a prohibition on conduct, not on belief or expression, and would do “nothing more than assign consequences to invidiously discriminatory acts.” The enhanced punishment, then, would simply reflect the crime’s “enhanced negative consequences on society.” 485 N.W.2d at 819.<sup>5</sup>

The second dissenter, Judge Bablitch, would have held that the law was an anti-discrimination law that could not be distinguished constitutionally from other anti-discrimination laws, such as Title VII, which are undeniably valid. In his view:

The statute does not impede or punish the right of persons to have bigoted thoughts or to express themselves in a bigoted fashion or otherwise, regarding race, religion, or other status of a person. It does attempt to limit the effects of bigotry. What the statute does punish is acting upon those thoughts.

485 N.W.2d at 820.

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<sup>4</sup> We have given similar advice concerning the application of Article 27, §470A. See Bill Review Letter on House Bill 95 and Senate Bill 352 of 1992 (May 19, 1992).

<sup>5</sup> As explained by the dissent:

[O]ur law recognizes the harmful effects of invidious classification and discrimination. We acknowledge that when individuals are victimized because of their status, such as race or religion, the resulting harm is greater than the harm that would have been caused by the injurious conduct alone. In addition to the injury inflicted, the victim may suffer feelings of fear, shame, isolation and inability to enjoy the rights and opportunities that should be available to all persons. Furthermore, all members of the group to which the victim belongs may suffer when the individual is victimized.

485 N.W. 2d at 818.

In our view, the dissenting opinions in *Mitchell* more accurately characterize the key elements of Maryland’s hate crimes statute. Article 27, §470A(b)(3) prohibits harassment, the commission of crimes, and damaging property on the basis of race, color, religious beliefs, or national origin. Paragraph (4) prohibits defacing, damaging, or destroying property or attempting to do so because of these prohibited factors.

While we continue to have concerns about potentially unconstitutional applications of these provisions, to the extent that they are directed at commission of crimes or damage to property, they are constitutionally defensible because, as the courts in Oregon and New York held, these provisions are directed at conduct, not at speech. And we feel very strongly that violent conduct and destruction of property should never be given protection as expressive speech.

*R.A.V.* does not require a different result. In *R.A.V.*, the statute prohibited speech that would cause a reaction based on race, color, creed, religion, or gender, as opposed to other types of speech. Thus, the statute effectively reached only racial slurs and similar speech. Under the Maryland statute, no specific type of speech is singled out, and none is required in order to violate the statute. *Accord, Oregon v. Plowman*, 838 P2d 558(1992). Thus, while we would emphasize our previous advice that only speech actually connected with the offense in question should be used as evidence of motivation, we feel that this portion of the statute is defensible.<sup>6</sup>

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<sup>6</sup> The portion of §470A(b)(3) dealing with harassment requires special care in its construction and application. Harassment is conduct that is designed and intended to badger, disturb, or pester. *United States v. Wilson*, 796 F.2d 55 (4th Cir. 1976). *See also CISPEES v. FBI*, 770 F.2d 468 (5th Cir. 1985). The activity that would be encompassed by “harass[ment]” would often include elements of speech. If speech alone, as distinct from a pattern of behavior of which speech was but a part, were the gravamen of a charge of harassment, this portion of the statute might be held to be unconstitutionally overbroad. *See UWM Post v. Board of Regents of U. of Wis.*, 774 F. Supp. 1163 (E.D. Wis. 1991). It is likely, however, that the Maryland courts, asked to construe the harassment portion of §470A(b)(3) in a case involving speech alone, would limit the reach of the provision to the category of fighting words, akin to the limiting construction given the St. Paul ordinance by the Minnesota Supreme Court in *R.A.V.* As so construed, in our view the harassment aspect of the statute would be constitutional, for the reasons discussed in the text.

**III**

**Conclusion**

In summary, it is our opinion that Article 27, §470A is constitutional.

J. Joseph Curran, Jr.  
*Attorney General*

Kathryn M. Rowe  
*Assistant Attorney General*

Jack Schwartz  
*Chief Counsel*  
*Opinions & Advice*

**COUNTIES****TAXATION – INCOME TAX – TIMING OF ACTION TO INCREASE  
“PIGGYBACK” TAX RATE**

May 8, 1992

*Michael P. Whalen, Esquire*  
*County Attorney for*  
*Prince George's County*

You have requested our opinion whether Chapter 2 of the Laws of Maryland 1992 (First Special Session) prevents a county from increasing the local income or “piggyback” tax in excess of 50% by a resolution or ordinance enacted or adopted before, but effective on June 1, 1992.

For the reasons stated below, we conclude that the language of Chapter 2, construed in light of its purpose, does not forbid a county's enactment or adoption before June 1 of a measure increasing the piggyback tax effective June 1, 1992.

**I****Background**

Chapter 2 (Senate Bill 2) was one of a series of enactments designed to deal with a State fiscal crisis resulting from projected multi-million dollar budget shortfalls for Fiscal Years 1992 and 1993. *See* Department of Fiscal Services, *Legislative Fiscal Program* (April 10, 1992). Two of these measures mandated massive cuts in State aid to local governments in both fiscal years. *See* Chapter 62 (House Bill 458) of the Laws of Maryland 1992 (Regular Session) and Chapter 1 (Senate Bill 1) of the Laws of Maryland 1992 (First Special Session).<sup>1</sup>

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<sup>1</sup> Because these and some other components of the budget financing package were clearly “appropriation[s] for maintaining the State Government,” within the meaning of Article XVI, §2 of the Maryland Constitution, they permissibly had an effective date prior to June 1. *See generally Kelly v. Marylanders for Sports Sanity, Inc.*, 310 Md. 437, 530 A.2d 245 (1987).

To compensate for these local aid reductions, Chapter 2, among other things, authorized the counties and Baltimore City to raise their local piggyback tax rate up to 60%. This authorization was accomplished by an amendment to §10-106 of the Tax-General Article (“TG” Article) and the inclusion of uncodified Section 5 in Chapter 2. The latter section provides in pertinent part as follows:

[N]otwithstanding §10-106(b)(2) of the Tax-General Article, but subject to §10-106(a)(3), (b)(1), (c), and (d) of the Tax-General Article, for personal income taxes payable for calendar year 1992, a county or Baltimore City may increase by ordinance or resolution its county income tax to not more than 60% of the State income tax for an individual.<sup>2</sup> An increase in a county income tax rate under this section may not take effect unless the county notifies the Comptroller of the rate change *on or before June 1, 1992*. The Comptroller shall issue new employer withholding tables, to be effective as of July 1, 1992, reflecting the new tax rates under this Act including any new county income tax rates.

(Emphasis added.) TG §10-106(a)(1) was amended to increase the maximum piggyback rate to 60%, and TG §10-106(c) was added to specify the multiples that a county might employ. In addition, the Senate Budget and Taxation Committee added the following language to the bill as new §10-106(a)(3):

(i) A county may not increase its county income tax rate above 50% until after the county has held a public hearing on the proposed act, ordinance, or resolution to increase the rate.

(ii) The county shall publish at least once each week for 2 successive weeks in a newspaper of general circulation in the county:

1. Notice of the public hearing; and

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<sup>2</sup> We have advised that the phrase “by ordinance or resolution” authorizes charter counties to increase their tax rates by either method. Letter to Senator Thomas M. Yeager from Attorney General J. Joseph Curran, Jr. (May 1, 1992).

2. A fair summary of the proposed act, ordinance, or resolution to increase the county income tax rate above 50%.

Finally, the Committee proposed, and the General Assembly adopted, an amendment to Section 11 of Chapter 2, which as enacted provides as follows:

Section 5 of this Act *shall take effect June 1, 1992*; and provided further that for calendar year 1992 the publication, hearing, and summary requirements of §10-106(a)(3) of the Tax-General Article may be satisfied by a county by actions taken prior to June 1, 1992.

(Emphasis added.) The effective date of June 1, coupled with the requirement that the Comptroller be notified of a rate change not later than June 1, has given rise to concern that a county may enact a rate change on June 1 only.

## II

### Analysis

There is no absolute legal or constitutional bar to the enactment of “anticipatory” legislation, the effectiveness of which is contingent upon subsequent authorization. *See Baltimore v. Chonet*, 23 Md. 449, 469-70 (1865); 2 *Sutherland Statutory Construction* §33.07, at 17 (4th ed. 1986); 61 *Opinions of the Attorney General* 234, 236 (1976). For example, the General Assembly may enact a law contingent upon the passage of a constitutional amendment granting the General Assembly the power to enact the legislation. *See* 61 *Opinions of the Attorney General* at 236. Similarly, it is within the Governor’s budget “lawmaking” power, *see* 76 *Opinions of the Attorney General* 330 (1991) to submit a budget, balanced by revenues derived from sources not yet in existence, such as those dependent upon additional legislation. *See* 61 *Opinions of the Attorney General* 50, 56 (1976). It is also valid for the Legislature to trigger the operation of legislation on a factual finding that preceded the effective date of the law. *See Ogrinz v. James*, 309 Md. 381, 390-92, 524 A.2d 77 (1987).

No express sanction is necessary for a legislative body to enact such contingent or anticipatory legislation, particularly where, as here, the contingency is fixed, definite, and outside the county's control – namely, the arrival on June 1 of new State-conferred taxing authority. Rather, the power to do so is inherent in the power to enact laws. *Sutherland Statutory Construction* §33.07, at 16.

County legislative bodies unquestionably have this same power to enact contingent or anticipatory legislation. *Cf. 5 McQuillan Municipal Corporations* §15.41, at 168 (3d ed. 1989) (municipal ordinances). And, in our view, nothing in either the language or purpose of Chapter 2 divests the counties of this power. To be sure, the counties are expressly authorized by Section 11 of the Act to satisfy certain hearing, publication, and summary requirements prior to June 1. However, this express reference was not intended to otherwise limit the counties from enacting a tax increase before June 1 with a June 1 effective date.<sup>3</sup> In fact, Section 5 of the legislation specifically states that the change in the tax rate may not take effect unless the Comptroller is notified of “the rate change” on or “before” June 1, 1992. This language indicates that a rate change might be accomplished before June 1, 1992.

Moreover, the purpose of the piggyback tax authorization was to allow counties to deal effectively and speedily with their own fiscal problems as well as those resulting from the scheduled reductions in State aid to local jurisdictions. In light of this purpose, the General Assembly would not likely have intended to tie the hands of the subdivisions by requiring the tax rate change to be finalized only on June 1.<sup>4</sup>

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<sup>3</sup> One possible reason for inclusion of such a provision in Chapter 2 was concern expressed by both the Maryland Association of Counties and the Attorney General's Office that counties with fast-approaching budget deadlines be accorded some flexibility to deal with the consequences of the General Assembly's budget and tax package. In addition, one reason why Chapter 2, unlike other components of the package, had a June 1, 1992 effective date was some uncertainty over whether the piggyback tax authorization was an appropriation for the maintaining of State government exempt from a June 1 effective date. *See* note 1 above.

<sup>4</sup> It is also noteworthy that a tax rate change authorized by Chapter 2 applies to the entire 1992 calendar year. Thus, whatever the enactment date, the effect on taxpayers is the same.

**III****Conclusion**

In summary, it is our opinion that under Chapter 2 a county may increase the local piggyback tax in excess of 50% by a resolution or ordinance enacted or adopted before but effective on June 1, 1992.

J. Joseph Curran, Jr.  
*Attorney General*

Robert A. Zarnoch  
*Assistant Attorney General*

Jack Schwartz  
*Chief Counsel*  
*Opinions and Advice*

**COUNTIES – CODE HOME RULE COUNTIES – TAXATION – INCREASE IN  
RATE OF WORCESTER COUNTY HOTEL ROOM TAX**

August 21, 1992

*Edward H. Hammond, Esquire*  
*County Attorney for Worcester County*

You have requested our opinion whether the Worcester County Commissioners may increase the rate of the county hotel room tax. If the rate may be increased, you have asked whether the county may retain all of the additional revenue.

For the reasons stated below, we conclude that the commissioners may increase the rate from the current 3% to up to 5% with unanimous consent. Under the applicable law, the proceeds collected within municipalities are to be paid to the respective municipal corporations.

**I**

**Current Taxing Authority**

At the present time, two separate statutes authorize the levy of this hotel tax. One of these statutes applies only to the resort area of Worcester County and is found in the local code. Worcester County Code, Taxation and Revenue (“T & R”) §1-601. The other applies to various counties, including code home rule counties, and is found in Article 24, §§9-301 through 9-326 of the Maryland Code.<sup>1</sup>

Both statutes authorize Worcester County to levy a hotel tax of up to 3%. T & R §1-601(a) and Article 24, §9-304(b)(1). However, the public general law authorizes a code county to increase the rate up to 5% “with the unanimous consent of the county commissioners for the county.” Article 24, §9-304(c). Both statutes also provide for the distribution of proceeds collected within municipalities to the respective municipal corporation. T & R §1-601(f)(ii) and Article 24, §9-318(a)(2).

The law that applies to Worcester County only was initially enacted as Chapter 68 of the Laws of Maryland 1971 and was formerly codified as

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<sup>1</sup> Worcester County became a code county in 1976.

Article 81, §411D of the Maryland Code. Similarly, an authorization for three code counties, including Worcester County, to levy a hotel tax was formerly codified as Article 81, §411H. In the enactment of the Tax-General Article of the Maryland Code, the General Assembly transferred the law for Worcester County to the public local laws for Worcester County. Chapter 2, Laws of Maryland 1988, Section 9. In the same enactment, various provisions of law, including §411H, were revised and enacted as Article 24, §§9-301 through 9-326. Chapter 2, Laws of Maryland 1988, Section 4, at 658-72. *See also* Chapters 580 and 592 of the Laws of Maryland 1991.

The Revisor’s Note to the 1988 enactment pointed out that two separate statutes authorized Worcester County to levy a hotel tax and suggested that the General Assembly might wish to combine them. *See* Chapter 2, Laws of Maryland 1988, at 632. Because the General Assembly did not adopt the Revisor’s suggestion but instead dealt with both statutes in the same enactment, the clear implication is that there remains concurrent authority to levy the hotel tax in Worcester County.

## II

### Amendment of Local Law

Although the local law for Worcester County limits the tax to not more than 3%, the law for all the code counties explicitly allows the rate to be raised up to 5% by unanimous consent of the commissioners. As a code county, Worcester County could avail itself of this authority.

It has been suggested, however, that the county itself might also amend the local law in an exercise of the powers conferred by the Code County Home Rule Article, Article XI-F of the Maryland Constitution. In relevant part, this article authorizes any county that has adopted code home rule to enact, amend, or repeal its public local laws. Article XI-F, §§1 and 3. A public local law “means a law applicable to the incorporation, organization or government of a code county and contained in the county’s code of public local laws.” §1.

Although the hotel room tax authorization for Worcester County is now part of its code of public local laws, the question remains whether a tax authorization is a law relating to the “incorporation, organization or government” of a code county. This office has suggested that the scope of this lawmaking power is to be broadly construed, but the matter has not been definitely resolved by the courts. *See generally* 62 *Opinions of the Attorney General* 275 (1977). Moreover, the levying of taxes is subject to a special constitutional limitation:

A code county shall not levy any type of tax, license fee, franchise tax, or fee which was not in effect or authorized in the code county at the time it came under the provision of this Article, until an express authorization of the General Assembly has been enacted for this purpose by a general law which in its terms and effect applies alike to all code counties in one or more of the classes provided for in Section 5 of this Article.

Article XI-F, §9.<sup>2</sup>

As this office has noted, the provisions of the Code Home Rule Article are generally modeled on the Municipal Home Rule Article, Article XI-E. See 62 *Opinions of the Attorney General* 275, 289 (1977). This parallelism is especially true of the tax levy limitation in §9 of the Code Home Rule Article, which is very similar to the limitation in §5 of the Municipal Home Rule Article. In interpreting §5, the Court of Appeals has said that it applies not only to revenue-raising levies but to regulatory levies as well. *Campbell v. Mayor and Aldermen of the City of Annapolis*, 289 Md. 300, 308, 424 A.2d 738 (1981). Such a broad interpretation of this limitation suggests that the entire subject of the levying of taxes and fees by code counties has been reserved to the General Assembly.<sup>3</sup> This understanding is consistent with the practice of other counties, including the charter home rule counties. See *Montgomery County Board of Realtors v. Montgomery County*, 287 Md. 101, 106-07, 411 A.2d 97 (1980).

In exercising its reserved power, the General Assembly could simply authorize the code counties to levy a particular type of tax but leave the rate and other terms to the counties. However, it is clearly within the reserved powers of the General Assembly in this matter to specify the rate and other terms. Moreover, where a local law authorizes a county that subsequently adopts code home rule to levy tax at a specified rate, the county may not use its code home rule powers to raise the rate or otherwise alter the terms of this law, for such an action would be

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<sup>2</sup> There is but one class for code counties. Article 25B, §2.

<sup>3</sup> The General Assembly's Committee on Local Legislation, which proposed the Code Home Rule Article, did not focus specifically on this issue in its report. After pointing out that code counties would have the power to enact, amend, or repeal laws in their local codes, the report simply noted that certain local powers were reserved to the General Assembly, including the authority to cap the tax rate and the amount of debt. See *Legislative Council of Maryland, Report to the General Assembly of Maryland of 1965* at 362.

inconsistent with the reserved powers of the General Assembly. Of course, other than by repealing such a local law, the General Assembly may exercise its reserved powers in matters of taxation for code counties only by general law.

### III

#### Conclusion

In summary, it is our opinion that Worcester County may not exercise its code home rule powers to amend the local law that authorizes the county to levy a hotel tax of up to 3%. However, under a general law for all code counties, the commissioners could, by unanimous consent, increase the rate of the hotel tax from 3% up to 5%.

J. Joseph Curran, Jr.  
*Attorney General*

Richard E. Israel  
*Assistant Attorney General*

Jack Schwartz  
*Chief Counsel*  
*Opinions and Advice*

**COURTS AND JUDGES**

**CIRCUIT COURTS – ORPHANS’ COURTS – JURISDICTION AND  
PROCEDURE – LIMITATIONS ON ORPHANS’ COURT’S  
JURISDICTION TO APPOINT A GUARDIAN OF THE PERSON OF A  
MINOR**

March 20, 1992

*The Honorable Grace G. Connolly  
Judge of the Orphans’ Court  
for Baltimore County*

You have requested our opinion on various issues concerning the jurisdiction of orphans’ courts to appoint a guardian of the person of a minor. Specifically, you have asked:

1. Do orphans’ courts and circuit courts have concurrent jurisdiction in all cases involving the appointment of a guardian of the person of a minor?
2. If the jurisdiction of the orphans’ courts and circuit courts is not co-extensive, in what circumstances do orphans’ courts have jurisdiction to appoint a guardian of the person of a minor?
3. Do orphans’ courts have jurisdiction to appoint the guardian of the person of a minor for the sole purpose of allowing the minor to attend public school without paying tuition?

For the reasons set forth below, we conclude as follows:

1. The jurisdiction of orphans’ courts and circuit courts to appoint a guardian of the person of the minor is not co-extensive. Orphans’ courts and circuit courts exercise concurrent jurisdiction only over the appointment of a guardian of the person of a minor in cases arising under Title 13, Subtitle 7 of the Estates and Trusts Article (“ET” Article).
2. The jurisdiction of orphans’ courts to appoint a guardian of the person of a minor is confined to cases in which neither parent is serving as guardian and no testamentary appointment of a guardian of the person of the minor has been made.

3. Orphans’ courts do not have jurisdiction to appoint a guardian of the person of the minor for the sole purpose of allowing the minor to attend public school without paying tuition.

## I

### Jurisdiction of Orphans’ Courts and Circuit Courts

#### A. Introduction

A court must have personal and subject matter jurisdiction in order to exercise its judicial authority:

[T]he term “jurisdiction” encompasses a number of different meanings. As applied to courts, it refers to “the power to act with regard to a subject matter which is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in the authority specially conferred.” ... “[I]f by that law which defines the authority of a court, a judicial body is given the power to render a judgment over that class of cases within which a particular one falls, then its acts cannot be assailed for want of subject matter jurisdiction.”

*Carroll County v. Edelmann*, 320 Md. 150, 169, 577 A.2d 14 (1990) (citations omitted, emphasis in original).

#### B. Orphans’ Court

Orphans’ courts are courts of limited, rather than general, jurisdiction. *Kaouris v. Kaouris*, 324 Md. 687, 598 A.2 1193 (1991); *Carrier v. Crestar Bank*, 316 Md. 700, 561 A.2d 227 (1989); *Crandall v. Crandall*, 218 Md. 598, 147 A.2d 754 (1959). ET §13-106(b) confirms the settled principle that “[t]he orphans’ court, under the pretext of incidental power or constructive authority, may not exercise jurisdiction not expressly conferred by law”. See also *Talbot Packing Corp. v. Wheatley*, 172 Md. 365, 369, 190 A.2d 833, 837 (1937) (before orphans’ courts may exercise jurisdiction, “the facts necessary to clothe them with jurisdiction must affirmatively appear upon the face of their proceedings”).

The concurrent jurisdiction of orphans’ courts and circuit courts over guardianships is set forth in ET §13-105(a), which provides that “[t]he orphans’ courts and the circuit courts have concurrent jurisdiction over the

guardian of the person of a minor and over protective proceedings for minors.” As we shall explain, this language does *not* mean that the jurisdiction of the orphans’ courts is equivalent to that of the circuit courts.

“Guardian” and “protective proceedings” are defined terms for purposes of ET Title 13: “‘Guardian’ means a guardian of an estate appointed by a court under Subtitle 2 of this title to manage the property of a disabled person or minor or a guardian of a person appointed by a court under Subtitle 7 of this title, according to the context in which it is used.” ET §13-101(g).<sup>1</sup> “‘Protective proceeding’ is a proceeding to protect an estate in accordance with Subtitle 2 of this title or a proceeding to appoint a guardian of the person brought pursuant to Subtitle 7 of this title.” ET §13-101(n).

Subtitle 7 of ET Title 13 sets forth the provisions governing the appointment of a guardian of the person of a minor. This subtitle contains the only jurisdictional grant expressly conferred on the orphans’ courts with respect to appointment of a guardian of the person for a minor.

ET §13-701, applicable when one parent is deceased, authorizes the surviving parent to appoint the guardian of a minor:

Unless prohibited by agreement or court order, the surviving parent of a minor may appoint by will one or more guardians and successor guardians of the person of an unmarried minor. The guardian need not be approved by or qualified in any court.

ET §13-702(a) sets out the circumstances under which the orphans’ court is to appoint the guardian of a minor:

If neither parent is serving as guardian of the person and no testamentary appointment has been made, on petition by any person interested in the welfare of the minor, and after notice and hearing, the court may appoint a guardian of the person of an unmarried minor. If the minor has attained his 14th birthday, and if the person otherwise is qualified, the court shall appoint a person designated by the minor, unless the decision is not in the best interests of the minor. This section may not be construed to require court appointment of a guardian of the person of a

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<sup>1</sup> Subtitle 7, Part II, of ET Title 13 provides for the appointment of a guardian of the person of a disabled person. The circuit courts have exclusive jurisdiction over protective proceedings for disabled persons. ET §13-105(b).

minor if there is no good reason, such as a dispute, for a court appointment.

ET §13-702 thus addresses *only* the situation where “neither parent is serving as guardian” and no guardian was appointed by will as allowed by ET §13-701. In this instance, orphans’ courts have jurisdiction to appoint a guardian of the person of a minor. Although the phrase “neither parent is serving as guardian” in ET §13-702(a) is not defined, that provision reasonably must be interpreted to refer to the instance in which there is no surviving parent who is legally responsible for the minor, either because both parents are deceased or the surviving parent is no longer legally responsible for the minor.<sup>2</sup>

The history of the provisions addressing the jurisdiction of the orphans’ courts relating to guardianship of a minor confirms that the jurisdiction is limited to this circumstance. Prior to enactment of former Article 93A in 1969, the testamentary law, including provisions dealing with appointment of guardians, was set forth in former Article 93. Under §164 of former Article 93, the orphans’ court could appoint a guardian only when a minor was entitled to receive property by devise or bequest under a will or pursuant to the laws of intestacy and no guardian had been appointed by will. Former Article 72A, §1 provided that the father and mother were the joint natural guardians of their minor child and that upon the death, abandonment of family, or incapacity to act of one parent, the guardianship devolved onto the other. Former Article 72A, §4 provided that the sole surviving parent, by will, could appoint a guardian of the person or property or both of the minor child and that either parent, by will, could appoint a guardian of the property that a minor would inherit from that parent.

In Chapter 3 of the Laws of Maryland 1969, the General Assembly amended former Article 93 and enacted a new Article 93A. Article 93 was titled “Decedents’ Estates”, and Article 93A was titled “Protection of Minors and Other Persons Under Disability.” In Article 93A, provisions dealing with appointment of a guardian of property were set forth in Subtitle 2, while provisions dealing with appointment of a guardian of the person were set forth in Subtitle 7. Former 93A, §702(a), like current ET §13-702(a), permitted the orphans’ courts to appoint a guardian of the person of a minor only when neither parent was serving as guardian of the person and no testamentary appointment had been made.

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<sup>2</sup> As discussed in Part IC below, a surviving natural parent’s legal responsibility for a minor is within the circuit court’s jurisdiction. Unless a circuit court has acted to end the natural parent’s legal responsibility, the orphans’ court would not have jurisdiction to appoint a guardian of the person of a surviving parent’s minor child, even if the parent had abandoned the child.

### C. *Circuit Court*

In addition to concurrent jurisdiction with the orphans' courts under ET §13-105(a), the circuit courts have jurisdiction with respect to guardianship of the person of a minor under the Family Law Article ("FL" Article) and the Courts and Judicial Proceedings Article ("CJ" Article). This additional jurisdiction is not shared with the orphans' courts.

The circuit courts have equity jurisdiction over guardianship, as well as adoption and custody of minors. FL §1-201(a)(5) confirms that "[a]n equity court has jurisdiction over . . . custody or guardianship of a child." See also *Carroll County v. Edelmann*, 320 Md. 150, 577 A.2d 14 (1990); *In re Adoption/Guardianship No. 87A262*, 323 Md. 12, 590 A.2d 165 (1991); *Kicherer v. Kicherer*, 285 Md. 114, 400 A.2d 1097 (1979). In *Wentzel v. Montgomery General Hospital*, 293 Md. 685, 447 A.2d 1244 (1982), *cert. denied*, 459 U.S. 1147 (1983), the Court of Appeals stated:

The *parens patriae* jurisdiction of the circuit court in this State is well established. The words "*parens patriae*," meaning "father of the country," refer to the State's sovereign power of guardianship over minors and other persons under disability.... It is a fundamental common law concept that the jurisdiction of courts of equity over such persons is plenary so as to afford whatever relief may be necessary to protect the individual's best interest.

293 Md. at 702.

Parents are the joint, natural guardians of their minor child. FL §5-203(a)(1). A parent may become the sole natural guardian of a minor child if the other parent dies, abandons the family, or is incapable of acting as a parent. FL §5-203(a)(2). A decree of guardianship terminates the natural parents' rights, duties, and obligations towards the child and eliminates the need for further consent by the natural parent to adoption of the child. FL §5-317(f). In *Carroll County v. Edelmann*, the Court of Appeals stated that:

The only express statutory authority for a court to terminate parental rights and obligations short of adoption is contained in Fam. Law. Art. §§5-313 and 5-317, which permit a circuit court to terminate those rights and obligations through a decree of guardianship. But such a decree may be entered only upon the petition of a child placement agency or an attorney for the child. Moreover, the statute looks to

the termination of rights of *both* natural parents and the granting of custody of the child to the placement agency for adoption.

(Emphasis in original.) Only circuit courts can enter a decree terminating parental rights. *In re Adoption*, 323 Md. at 21.

In addition, Subtitle 8 of CJ Title 3 gives the circuit court (or, in Montgomery County, the District Court) sitting as the juvenile court the authority to adjudicate a child in need of assistance, “CINA,” or a child in need of supervision, “CINS.” The juvenile court may award custody or guardianship of a CINA to “a relative or other fit person, upon terms the court deems appropriate.” CJ §3-820(c)(1)(i). The juvenile court may also commit a child to temporary custody or guardianship under the Department of Juvenile Services, local department of social services, Department of Health and Mental Hygiene, or a public or licensed private agency on the terms the court considers appropriate. CJ §3-820(c)(1)(ii). Jurisdiction over the child continues until that person reaches 21 years of age unless terminated sooner. CJ §3-806.<sup>3</sup>

#### **D. Conclusion**

The jurisdiction of the circuit courts under the Family Law Article and the Courts Article is exercised generally in derogation of the rights of the natural parents. The jurisdiction of the circuit courts and orphans’ courts under the Estates and Trusts Article is exercised generally in the absence of a living natural parent with rights over the minor. Because the orphans’ courts have been given authority to appoint a guardian of the person of a minor only in the circumstances set out in ET §13-702(a), they may not do so in other circumstances.

## **II**

### **Guardianship for Tuition-Free Public School Placement**

Article VIII, §1 of the Maryland Constitution guarantees a system of “Free Public Schools.” See also §§1-201 and 7-101(a) of the Education Article (“ED” Article). See generally *72 Opinions of the Attorney General* 262 (1987); *57 Opinions of the Attorney General* 176 (1972).

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<sup>3</sup> FL §1-201(c) and (d) provide that the jurisdiction of the juvenile court over a child in a CINA or CINS case is not impaired by the jurisdiction of the equity court unless the latter orders, with respect to the child, adoption or guardianship with right to consent to adoption or long-term care short of adoption.

The State's free public schools are only open to residents, however. The compulsory school attendance law refers to "[e]ach child *who resides in this State ...*," ED §7-301(a), and the State Board of Education has observed as follows:

Of course, a student must be a bona fide resident of the school district in order to be eligible for free school privileges. Obviously, a child who resides in Delaware, Pennsylvania, or Washington, D.C. should not be eligible for free attendance within Maryland's public school system. Further, a child who has established a superficial residence in a school district for the sole purpose of attending its schools is not a bona fide resident.... Nor does a temporary resident of a school district qualify for free public education....

From the cases we have cited above, it appears that a child is a bona fide resident if at a minimum that child actually lives within the school district with a parent, guardian, or other individual who has legal custody of that child. The determination of whether a child is a bona fide resident is a factual one and must be made on an individual basis.

*2 Opinions of the Maryland State Board of Education 123, 130 (1979).*

ED §4-120.1 addresses the situation when a child is in an out-of-county living arrangement. This statute defines "child in an out-of-county living arrangement" as "a child who is placed by a State agency, a licensed child placement agency as provided by §5-507 of the Family Law Article, or a court in a county other than where the child's parent or legal guardian resides." The statute goes on to provide that the term "does not include a child living with a relative, stepparent or a person exercising temporary care, custody or control over a child at the request of a parent or guardian of the child."<sup>4</sup>

Because the law generally restricts free public education for a child to the county of residence of the child's parents or legal guardian, some individuals seek court appointment of a guardian, even when the parents

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<sup>4</sup> In *Martinez v. Bynum*, 461 U.S. 321 (1983), the Supreme Court upheld the constitutionality of a Texas statute that denied free public school education to a child living separately from a parent, guardian, or other person having lawful control if the child was residing in the district solely for the purpose of attending the free public school.

are living, for the sole purpose of establishing eligibility for the child to attend free public school in a county of choice.

For the reasons given in Part I above, orphans’ courts only have jurisdiction to appoint a guardian of the person of a minor when neither parent is serving as guardian, because both parents have died or the surviving parent does not have legal responsibility for the minor, and no testamentary appointment has been made. When appointment of a guardian is sought for the sole purpose of permitting a child to attend a public school in a county other than where the child’s parents reside, the orphans’ courts are without jurisdiction to appoint a guardian. Such an appointment is not made under Subtitle 7 of ET Title 13.

### III

#### Conclusion

In summary, it is our opinion that orphans’ courts have jurisdiction to appoint a guardian of the person of a minor only in those instances when neither parent is serving as guardian and no testamentary appointment has been made. Orphans’ courts may not in effect invoke the doctrine of *parens patriae*, reserved to the circuit courts, to appoint guardians in other circumstances. Likewise, to the extent any doubt may exist concerning the jurisdiction of the orphans’ courts to appoint a guardian of the person of a minor, that doubt must be resolved in favor of denying jurisdiction, because under ET §13-106(b) the orphans’ courts may only exercise jurisdiction “expressly conferred by law.”

J. Joseph Curran, Jr.  
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Susan P. Whiteford  
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**COURTS AND JUDGES – DISTRICT COURT – GEOGRAPHICAL SCOPE OF  
SEARCH WARRANT AUTHORITY**

July 14, 1992

*Alexander J. Palenscar, Esquire*  
*Deputy State's Attorney*  
*for Baltimore City*

You have requested our opinion on the authority of a District Court judge sitting in Baltimore County to issue a search warrant for property in Baltimore City. You indicate that in *Birthead v. State*, 317 Md. 691, 566 A.2d 488 (1989), the Court of Appeals upheld a warrant issued by a District Court judge in one county but executed in another, both in the same district. You question whether *Birthead* would apply to uphold a similar warrant executed outside a judge's district in Baltimore City.

For the reasons stated below, we conclude that such a warrant would be upheld because *Birthead* indicates that a District Court judge has statewide authority, not limited to a judge's district, to issue a search warrant and to have it executed anywhere in the State.

**I**

**Background**

Article IV, §§1 and 41A of the Maryland Constitution provide for the creation of the District Court of Maryland and establish its statewide, uniform jurisdiction. Under §1-602 of the Courts and Judicial Proceedings Article ("CJ" Article), the State is divided into twelve districts "for the purpose of operation and administration." Baltimore City itself is district one, with one or more counties falling within districts two through twelve. Judges are allocated among the districts with 23 in the Baltimore City district and "at least one District Court judge resident and holding court in each county of the district." CJ §1-603(b)(2). Article 27, §551(a) grants authority to each District Court judge "to issue a warrant to search any individual or in any building, apartment, premises, place or thing *within the territorial jurisdiction of such judge*." (Emphasis supplied.)

## II

### Analysis

In *57 Opinions of the Attorney General 155* (1972), this office was called upon to answer the same question on the territorial jurisdiction of a District Court judge to issue a search warrant. At that time Maryland law was unclear, and Attorney General Burch, referring to the law in another state, opined that the territorial jurisdiction of a District Court judge to issue a search warrant was limited to the district of a judge’s appointment or assignment. *57 Opinions of the Attorney General* at 157.

However, *Birthead v. State*, indicates that a judge has statewide jurisdiction to issue a search warrant beyond the confines of a judge’s district. 317 Md. at 691. *Birthead* went beyond the immediate question of whether it was within the authority of a District Court judge sitting in Wicomico County to issue a search warrant for persons and property in Worcester County, which is in the same district. The Court of Appeals indicated in its holding that a judge has statewide authority to issue a search warrant:

It is clear from the Maryland Constitution and the implementing statutes relating to the District Court that it is a single unified court, divided into districts, with statewide uniform jurisdiction. See *Greenbelt Consumer v. Acme Mkts.*, 272 Md. 222, 224 n.1, 332 A.2d 521 (1974). The geographic division of the District Court into twelve districts, as set forth in §1-602 of the Courts Article, was solely for the purposes of operation and administration; it did not limit the exercise of jurisdiction by a District Court judge to the county or district of resident. Consequently, as the jurisdiction of judges of the District Court is uniform and statewide, we think Judge Warren had “territorial jurisdiction” within the contemplation of Maryland’s search warrant statute, §551(a), to issue a search warrant for execution in any other county of the State.

317 Md. at 699.

We conclude, based on *Birthead*, that if a court were called upon to determine the issue that you raise, it would hold that a District Court judge has the authority to issue a search warrant for execution in any other county of this State. This scope of authority includes District Court judges

in Baltimore City, because the city is a district within the jurisdiction of the court, and according to *Birthead*, its judges have statewide uniform jurisdiction to issue search warrants anywhere in Maryland.

In light of *Birthead*, 57 *Opinions of the Attorney General* 155 is overruled.

### III

#### Conclusion

In summary, it is our opinion that a district court judge sitting in Baltimore County has the authority to issue a search warrant for property in Baltimore City.

J. Joseph Curran, Jr.  
*Attorney General*

Craig A. Nielsen  
*Assistant Attorney General*

Jack Schwartz  
*Chief Counsel*  
*Opinions and Advice*

**COURTS AND JUDGES - JURISDICTION AND PROCEDURE -  
CONSTITUTIONAL LAW - AMENDMENT PROCESS -  
APPLICABILITY OF CONSTITUTIONAL AMENDMENTS AFFECTING  
JURY TRIALS**

December 10, 1992

*George B. Riggin, Jr., Esquire*  
*State Court Administrator*

You have requested our opinion on the effective date of recently approved constitutional amendments on civil jury trials. You have also asked to what degree, if any, the amendments and implementing legislation apply to pending cases.

For the reasons stated below, we conclude that the jury trial amendments and implementing statutes took effect December 1, 1992 and that they apply to pending cases. The jurisdictional amount statute applies to jury trials prayed after December 1, 1992. The six-person jury statute applies to juries impaneled on or after December 1, 1992.

## I

### **Background**

Chapters 203 (Senate Bill 262) and 204 (House Bill 320) of the Laws of Maryland 1992 proposed identical constitutional amendments allowing fewer than twelve, but at least six, jurors to sit in a civil proceeding. Chapter 85 (Senate Bill 263) of the Laws of Maryland 1992, which took effect October 1, 1992, contingent on the approval of these constitutional amendments, fixed the number of jurors in a civil case at six.

Chapters 205 (Senate Bill 434) and 206 (House Bill 489) of the Laws of Maryland 1992 proposed identical constitutional amendments raising the amount in controversy triggering a right to jury trial from \$500 to \$5,000. Chapter 95 (Senate Bill 433) of the Laws of Maryland 1992, which took effect October 1, 1992, contingent on the approval of these constitutional amendments, amends the District Court jurisdictional statute to provide that a party may demand a jury trial in a civil action and transfer the action to the Circuit Court if the amount in controversy exceeds \$5,000.

On December 1, 1992, the Governor signed a proclamation declaring that the four amendments in question had been approved by the voters and thus "shall become part of the Constitution." As a result of this proclamation, the amendments are adopted and effective. Article XIV, §1 of the Maryland Constitution. Therefore, the effective date of the amendments and the legislation contingent upon them is December 1, 1992.

## II

### Analysis

Because the statutes contain no special applicability provision or an express prospectivity or retroactivity clause, their operative effect should be determined by common law principles of statutory construction aimed at determining the intent of the General Assembly.<sup>1</sup> Under Maryland common law, if a statute affects a procedure or remedy, it will be given retroactive effect. *See State Comm'n on Human Relations v. Amecom Div.*, 278 Md. 120, 124, 360 A.2d 1 (1976). On the other hand, if the legislation affects substantive rights, it is presumed to operate prospectively and will not be applicable to a pending case, absent a clear expression of legislative intent. *WSSC v. Riverdale Fire Co.*, 308 Md. 556, 520 A.2d 1319 (1987). Presumptively prospective legislation may still be found to be retroactive to a degree, even in the absence of an express retroactivity clause, although such an intent must be clearly stated. *See, e.g., State v. Burning Tree Club*, 315 Md. 254, 263-68, 554 A.2d 366 (1989); *State Comm'n on Human Relations v. Amecom Div.*, 278 Md. at 127.

Although the need for immediate advice precludes an exhaustive examination of all relevant out-of-state authorities, we note that a Michigan court has said that "the manner" of demanding trial by jury is "procedural." *Estate of Dauer v. Zabel*, 156 N.W.2d 34, 37 (Mich. App. 1967). A federal appellate court, moreover, has described a change in an amount-in-controversy requirement as "directed at the remedy." *Eikenberry v. Callahan*, 653 F.2d 632, 635-36, n.14 (D.C. Cir. 1981). In addition, in *Ex Parte Johnson*, 215 Md. 391, 395, 138

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<sup>1</sup> In the past, the practice of the General Assembly on similar measures has not been consistent. For example, Chapter 758 of the Laws of Maryland 1981, which raised the jurisdictional amount in the District Court from \$5,000 to \$10,000, contained no express applicability provision. On the other hand, Chapter 512 of the Laws of Maryland 1982, which excluded attorney's fees from the amount-in-controversy computation, expressly applied only to cases filed after July 1, 1982.

A.2d 347 (1958), the Court of Appeals, in concluding that denial of a jury trial was not immediately appealable, stated that:

It has even been held that an order denying a jury trial neither affects a substantial right nor involves the merits of an action, and hence is not appealable because the ruling or order relates only to the method of trying facts, and leaves the rights of the parties on the merits of the matter entirely unadjudicated.

But even if the new jury trial legislation relates to substantive rights, the intent of the General Assembly was that the measure apply in some degree to pending cases. The constitutional amendments and implementing legislation were "intended to promote economy and efficiency in the judicial branch." See Senate Judicial Proceedings Committee Floor Report on Senate Bills 262 and 263; Fiscal Note on Senate Bill 433. In fact, the fiscal note to Senate Bill 433 anticipates that, as a result of enactment of the new jury trial jurisdictional amount requirement, local expenditures for juries "would decrease in fiscal year 1993" – a highly unlikely prospect if the measure applied only to cases filed on or after December 1, 1992. In light of these indications of legislative intent and the fact that legislation contingent upon the constitutional amendments was enacted by the General Assembly to implement the measures immediately, we believe that the statutes were not intended to be fully prospective, but rather were designed to apply to pending cases.

The question remains as to the degree that the statutes were intended to apply to pending cases. In other words, what event triggers the application of the new provisions?<sup>2</sup> In our view, a reasonable construction of the new legislation that gives due regard to the expectations of parties, the nature of the jury trial right, and the goals of the legislation would hinge present application of the increased jurisdictional amount statute to the time when a jury trial was prayed. Thus, if a jury trial were prayed before December 1, 1992, the request would be honored and the case transferred to circuit court, even if the amount in controversy involved only \$501. However, on or after December 1, 1992, a jury trial request would be granted and the case transferred only if the amount in controversy exceeded \$5,000.

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<sup>2</sup> A key question in many retroactivity cases is not whether a statute should be applied retroactively, but how. For example, in *State Human Relations Comm'n v. Division of Amecom*, the Court held that a statute was intended to apply prospectively to acts of discrimination occurring after its effective date, but at the same time was designed to apply "retroactively" to existing employee contracts.

Similarly, the six-person jury statute can be reasonably construed to apply to juries impaneled on or after December 1, 1992. Twelve-person juries presently sitting need not be reduced. While such a construction would be retroactive in the sense that it applies to pending cases, it would also be prospective in that the triggering event takes place after the effective date of the statute.

### III

#### Conclusion

In summary, it is our opinion that the jury trial amendments and implementing statutes took effect December 1, 1992 and that they apply to pending cases. The jurisdictional amount statute applies to jury trials prayed after December 1, 1992, and the six-person jury statute applies to juries impaneled on or after December 1, 1992.

*J. Joseph Curran, Jr.*  
Attorney General

*Robert A. Zarnoch*  
Assistant Attorney General

*Jack Schwartz*  
Chief Counsel  
Opinions & Advice

## EDUCATION

### PUBLIC SCHOOLS – STATE BOARD OF EDUCATION HAS AUTHORITY TO ADOPT TOBACCO-FREE SCHOOL ENVIRONMENT REGULATIONS

October 7, 1992

*The Honorable Paula C. Hollinger  
The Honorable Kenneth H. Masters  
Joint Committee on Administrative,  
Executive and Legislative Review*

You have requested our opinion concerning the authority of the State Board of Education to adopt regulations calling for a “tobacco-free school environment.” Specifically, you question the statutory provisions cited by the State Board in support of its regulations, and you ask whether a prohibition of smoking by staff members on school premises is a matter that is subject by law to collective bargaining.

For the reasons stated below, we conclude as follows:

1. The State Board correctly cited §2-205 of the Education Article (“ED” Article) as a basis for its regulation. The other provision cited by the State Board, ED §7-401, does not provide any authority for the regulation.

2. The State Board reasonably determined that an across-the-board prohibition of smoking on school premises is within the Board’s “general control and supervision over the public schools and educational interests of the State” under ED §2-205(g)(2) and is not a “matte[r] that relate[s] to ... working conditions” subject to collective bargaining under ED §6-408.

## I

### Tobacco-Free School Environment Regulations

The new regulations “require each local school system to maintain a tobacco-free school environment.” COMAR 13A.02.04.01. The core of the regulatory scheme is as follows:

The sale or use of tobacco in any form is prohibited in school buildings at all times. In addition, the sale or use of tobacco in any form is prohibited on school grounds during the official school day.

COMAR 13A.02.04.03.

The regulations derive primarily from the State Board's concern, supported by public comments and testimony, that tobacco smoke poses a health risk to nonsmokers.<sup>1</sup> In addition, the State Board seeks to ensure that students are not exposed to behavior by teachers and other school employees that would undermine educational efforts to reduce tobacco use by students.

## II

### Cited Authority

In both the proposal and final submission stages of the regulatory process, the State Board cited as its authority ED §§2-205 and 7-401. Taking them in reverse order, we conclude that ED §7-401 is not a basis for the regulation. ED §2-205 is a sufficient basis, however.

#### A. *ED §7-401*

ED Title 7, Subtitle 4 deals with the health and safety of students. ED §7-401(a) imposes certain duties on local school boards, not on the State Board:

With the assistance of the county health department, each county board shall provide:

- (i) Adequate school health services;
- (ii) Instruction in health education; and
- (iii) A healthful school environment.

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<sup>1</sup> In his recent executive order prohibiting smoking in State buildings and facilities, the Governor pointed out that “[e]nvironmental tobacco smoke (second hand smoke) is a proven cause of cancer in nonsmokers” and “[e]nvironmental tobacco smoke can worsen cardiac, respiratory, and allergic conditions both in individuals who do not as well as those who do smoke.” Executive Order 01.01.1992.20 (preamble).

The provision then goes on to require the State Department of Education and the Department of Health and Mental Hygiene jointly to “[d]evelop public standards and guidelines for school health programs” and to “[o]ffer assistance to the county boards and county health departments in their implementation.”

Manifestly, the tobacco-free school environment regulations are not the kind of joint standards and guidelines for school health programs contemplated by ED §7-401(b). Moreover, while we do not doubt the State Board’s authority to regulate local boards in the exercise of their authority under ED §7-401(a), the State Board’s authority to do so must emanate from another source, for ED §7-401(a) does not itself provide any authority to the State Board.

For these reasons, we conclude that the State Board incorrectly cited ED §7-401 as a basis for its regulation.

**B. ED §2-205**

The State Board is empowered to “[d]etermine the elementary and secondary educational policies of this State.” ED §2-205(b)(1). It may “adopt bylaws, rules, and regulations for the administration of the public schools,” which “have the force of law when adopted and published.” ED §2-205(c)(1) and (2). Finally, the State Board, through the State Superintendent of Schools, “shall exercise general control and supervision over the public schools and educational interests of the State.” ED §2-205(g)(2).

As a general proposition, these grants of statutory authority are sufficient to authorize the State Board to regulate aspects of the school environment that pose a risk to the health of students. The “general control and supervision over the public schools” surely extends to aspects of the school environment that pose immediate health or safety risks or long-term health risks. Existing regulations deal with such matters as student tobacco use on school premises, COMAR 13A.08.01.08(B); fire prevention, COMAR 13A.06.04.01; protective eye devices, COMAR 13A.06.06.01; and student transportation, COMAR 13A.06.07.

Unlike earlier environmental regulations, however, the tobacco-free school environment regulations directly affect teachers and other staff members by ending longstanding practices like smoking in teachers’ lounges. Hence, we next turn to the issue whether the regulations effect a change in “working conditions” subject to negotiation under ED §6-408. If ED §6-408 were applicable, the State Board would not be empowered by ED §2-205 to impose a change in working conditions by regulation. In Part III of this opinion, however, we conclude that the State Board’s

judgment – that ED §6-408 is not applicable – is within the Board’s legal authority.

### III

#### Boundaries of Collective Bargaining

ED §6-408(b)(1) identifies certain subjects of collective bargaining between a local school board and certificated employees:

On request a public school employer or at least two of its designated representatives shall meet and negotiate with at least two representatives of the employee organization that is designated as the exclusive negotiating agent for the public school employees in a unit of the county on all matters that relate to salaries, wages, hours, and other working conditions.<sup>2</sup>

The section goes on to provide certain procedures for these negotiations. The key issue presented by your inquiry is whether a restriction on the use of tobacco by school employees deals with “working conditions” and is therefore subject to collective bargaining, or whether it deals with a matter of educational governance subject to direct regulation by the State Board.

At one time, the State Board was of the view that smoking restrictions affecting employees were the subject of mandatory bargaining. In an adjudicatory opinion issued in 1988, the State Board articulated “a balancing test to determine whether the interests of the employee in the topic or the interests of the school system as a whole in the topic are the greater. If the employee’s interests outweigh the interests of the school community, it is a negotiable subject of bargaining. If the school system’s interests predominate, it is a non-negotiable matter of educational policy which remains within the local board’s control.” State Board Opinion No. 88-4, at 3.<sup>3</sup>

Applying this balancing test, the State Board affirmed the conclusion of a hearing examiner “that a ban on smoking [in Frederick County

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<sup>2</sup> An identical provision applicable to noncertificated employees is set out in ED §6-510(b).

<sup>3</sup> This balancing test is used whenever the school board is carrying out its general statutory duty to operate the school system, rather than a specific statutory duty related to the topic at issue. State Board Opinion at 2-3.

schools] ‘does not involve a matter of education policy, for whether or not teachers are permitted to smoke in areas of school buildings set aside for their exclusive use has no bearing on the quality or content of the education of Frederick County children.’” State Board Opinion at 3-4. The tobacco-free school environment regulations strike the balance differently and overrule this prior opinion.<sup>4</sup>

The balancing test used in the State Board’s 1988 opinion derives from *Montgomery County Education Association, Inc. v. Board of Education of Montgomery County*, 311 Md. 303, 534 A.2d 980 (1987), a case in which the Court of Appeals considered the boundaries of collective bargaining and the power of the State Board to determine what fell outside those boundaries. The issue in the case was the determination of the school calendar, but the decisional principles announced by the Court are pertinent here.

First, the Court held that ED §6-408, the collective bargaining statute, “may not be construed to encompass matters that predominantly concern the determination of educational policy or the administration of the public schools.” 311 Md. at 318. Second, great deference is accorded to the State Board’s expert determination whether a particular matter is outside ED §6-408: “Unless it is demonstrated in a particular case that the line drawn by the State Board under §6-408 is arbitrary, or clearly in violation of the Education Article, or otherwise contrary to law, the State Board’s determination will normally be controlling.” *Id.*

As the emphasized phrase from the *Montgomery County* case suggests, the authority of the State Board to circumscribe the reach of ED §6-408 is not linked solely to “educational policy” narrowly conceived, as the hearing examiner in the 1988 adjudication seemed to think. The hearing examiner’s focus on the “quality or content of the education” of the school children did not take account of the possibility that management policy prerogatives over the school environment might be broader.<sup>5</sup>

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<sup>4</sup> When an agency, exercising its statutory discretion, reaches a policy conclusion by means of an adjudicatory opinion, it may later reach a different policy conclusion by means of a regulation, so long as the regulation is itself within the scope of the agency’s authority. 2 Davis, *Administrative Law Treatise* §7:29, at 155 (2d ed. 1979).

<sup>5</sup> The State Board’s current regulations might well fit within even a narrow construction of “educational policy.” Anti-smoking education surely has an important place in the curriculum, and the State Board might reasonably determine that inconsistent behavior on school premises by role models undermines the educational effort.

There is nothing arbitrary about the State Board's current regulatory determination that teachers' interest in smoking does not, in the words of the portion of the 1988 opinion that better captures the legal standard, "outweigh the interests of the school community." Few community interests could be greater than the health of school children. The State Board, in our view, had a reasonable basis for deciding that tobacco use on school premises predominantly concerns a matter of public school administration not subject to collective bargaining. Given the deference owed to such determinations, the Board's regulations are lawful.<sup>6</sup>

#### IV

#### Conclusion

In summary, it is our opinion that the State Board of Education has the statutory authority to adopt COMAR 13A.02.04, regulations requiring a tobacco-free school environment.

J. Joseph Curran, Jr.  
*Attorney General*

Jack Schwartz  
*Chief Counsel*  
*Opinions & Advice*

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<sup>6</sup> Our conclusion is limited solely to the regulations in question; each issue concerning the scope of ED §6-408 must be analyzed in its own context.

## ELECTIONS

### CONSTITUTIONAL LAW – FREEDOM OF SPEECH – POLITICAL SPEECH – 300 FOOT ELECTIONEERING BAN IN CERTAIN COUNTIES LIKELY VIOLATES FIRST AMENDMENT

October 20, 1992

*Mr. Gene M. Raynor*  
*State Administrator of Election Laws*

You requested our opinion on the enforceability of Article 33, §24-23(a)(4)(ii) of the Maryland Code, which creates in seven Maryland counties a more stringent ban on electioneering than in the rest of the State.<sup>1</sup> Whereas Article 33, §24-23(a)(4)(i) generally prohibits electioneering within 100 feet of polling places on election day, the exception in §24-23(a)(4)(ii) widens the prohibited zone to 300 feet in the affected counties. Specifically, you question the impact on the 300 foot ban of the recent Supreme Court decision in *Burson v. Freeman*, 112 S.Ct. 1846 (1992), which upheld a Tennessee law prohibiting electioneering within 100 feet of a polling place entrance on election day.

For the reasons stated below, we conclude that the 300 foot ban would so likely be held unconstitutional after *Burson* that it should not be enforced to the fullest in the November 3, 1992 general election. We suggest that prosecutors use their discretion to enforce the law in the seven affected counties only as to electioneering that takes place within 100 feet of a polling place. Furthermore, we recommend that the State Administrative Board of Election Laws ("SABEL") introduce departmental legislation in the 1993 legislative session to repeal §24-23(a)(4)(ii).

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<sup>1</sup> Those counties are Anne Arundel, Cecil, Charles, Garrett, Harford, Kent, and Queen Anne's.

## I

**Maryland's Electioneering Bans**

Article 33, §24-23 provides in pertinent part as follows:

- (a) The following offenses shall be punished as in this section provided. For any person:

...

- (4) (i) To canvass, electioneer or post any campaign material in the polling place or beyond a line established by signs posted in accordance with this paragraph. At each polling place, 2 election judges, 1 from each principal political party, ... shall post signs outlining a line around the entrance and exit of the building closest to that part of the building in which voting occurs. The line shall be located as near as practicable to 100 feet from the entrance and exit .... The signs shall contain the following or comparable language: "No Electioneering Beyond this Point".

- (ii) In Anne Arundel, Cecil, Charles, Garrett, Harford, Kent and Queen Anne's Counties, to canvass, electioneer, or post any campaign literature or material on election day in a polling place or within a 300 foot radius from the entrance and exit of the building closest to that part of the building in which voting occurs.<sup>2</sup>

Although not defined in Article 33, the term "electioneering" has a generally accepted meaning: "to work for, or in the interest of, a person, ticket, party, or the like, in an election." *Webster's New International Dictionary* 825 (2d ed. 1953). "Canvassing" covers activity designed "to solicit pledges, votes, etc., to try to secure political support, or to ascertain the probable number of one's adherents." *Id.* at 395. The electioneering ban thus prohibits activities like posting signs and handing out campaign literature for or against a candidate or ballot issue. It also extends to soliciting signatures on petitions like charter

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<sup>2</sup> Violation of this provision is a misdemeanor, punishable by a fine, or imprisonment, or both. See Article 33, §24-27(a).

board or charter amendment petitions with the intent to have an issue placed on a future election ballot.<sup>3</sup>

The 100 foot electioneering provisions were first enacted in Chapter 202 of the Laws of Maryland 1896 and were applicable statewide until fairly recently. Approximately 80 years after enactment, the Legislature approved a 300 foot ban for Anne Arundel County in Chapter 202 of the Laws of Maryland 1974. Approval for other counties to widen the protective zone to 300 feet has been granted sporadically by the Legislature: to Harford County in Chapter 592 of the Laws of Maryland 1975; to Cecil, Kent, and Queen Anne's Counties in Chapter 99 of the Laws of Maryland 1987; and to Garrett and Charles Counties in Chapters 145 and 584 of the Laws of Maryland 1988, respectively.

## II

### *Burson v. Freeman*

The United States Supreme Court, by a 5-3 vote, recently upheld a Tennessee law prohibiting the solicitation of votes and the display of campaign material within 100 feet of the entrance to polling places. *Burson v. Freeman*, 112 S.Ct. 1846 (1992). Justice Blackman, writing for the majority, found that the ban regulated political speech in a public forum and regulated that speech based on its content. The Court emphasized that "the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." 112 S. Ct. at 1850 (quoting *Eu v. San Francisco Dem. Comm.*, 489 U.S. 214, 223 (1989)).

Clarifying the level of scrutiny applicable to electioneering bans, the Court decided that the ban was *not* a content-neutral time, place, or manner restriction and must be subjected to strict scrutiny.<sup>4</sup> Under strict scrutiny analysis, a ban must serve a compelling state interest and be narrowly drawn to achieve that end. 112 S.Ct. at 1851. The Court

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<sup>3</sup> The electioneering ban does not prohibit exit polling by the media within the "depoliticized" zone. See *Daily Herald Co. v. Munro*, 838 F.2d 380 (9th Cir. 1988).

<sup>4</sup> Although our office suggested in various prior letters that imposition of the 300 foot ban was constitutional, that conclusion resulted from a "reasonable time, place, and manner" analysis that can no longer be advanced.

agreed that preserving the right to vote freely and protecting voters from confusion and undue influence are compelling state interests.

Emphasizing that laws rarely survive strict scrutiny, Justice Blackmun shifted to a state's burden to demonstrate that its law is necessary to serve the acknowledged compelling interests. In a comprehensive examination of the development of election law reform, the Court decided that the following historical factors, in and of themselves, justified Tennessee's electioneering prohibition: A compelling national history of voter intimidation, fraud, and outright bribery established the necessity for a restricted area in and around polling places. All 50 states instituted varying electioneering prohibitions to deal with the most egregious problems.<sup>5</sup> Finally, a wide-spread and time-tested national consensus exists that some restricted zone is necessary to restrain the potential for an "open-auction" atmosphere around polling places. The Court acknowledged that since electioneering bans have been in place, blatant attempts to intimidate or bribe voters on their way to vote have been few and far between. Therefore, the very existence of the bans has made it impossible for states in any practical way to prove necessity.

The Court specifically did not decide how large a restricted zone is permissible, although the 100-foot boundary line was deemed not a significant impingement upon First Amendment rights and a "minor geographic limitation." 112 S. Ct. at 1857. It noted that at some measurable distance from the polls, governmental regulation of vote solicitation could effectively become an impermissible burden. 112 S. Ct. at 1857.

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<sup>5</sup> Cited in the Court's opinion were electioneering bans of 100 feet or less passed by Kentucky, Massachusetts, and New York in 1888. The bans were widely praised as triumphant successes at the time. "In early times our polling places were frequently, to quote the litany, "scenes of battle, murder and sudden death." This also has come to an end and until nightfall, when the jubilation begins, our election days are now as peaceful as our Sabbaths." 112 S. Ct. at 1854 (quoting a 1906 commentator).

### III

#### Implications of *Burson*

Looking to the three factors considered by the Supreme Court in *Burson* in upholding the 100 foot ban – a long history of use, a substantial consensus about need, and simple common sense – we do not believe that Maryland’s erratically-imposed 300 foot ban can survive.

First, we doubt that a defense of §24-23(a)(4)(ii) could escape the usual requirement under the First Amendment for proof of the necessity of a checkerboard, county-by-county enlargement of what is otherwise a longstanding, uniform electioneering prohibition. Legislative history reveals no special cause in any of the seven counties for the imposition of prohibition zones larger than 100 feet, except for a passing reference in testimony to voter dissatisfaction with running a gauntlet of political handouts. But as a federal district court stated in *Florida Committee for Liability Reform v. McMillan*, 682 F. Supp 1536, 1542 (M.D. Fla. 1988): “[I]f the quality of this interest [in preventing voter harassment] is merely the offense suffered by a voter who approaches the polls only to be approached by a petitioner, this brief exposure to grassroots democratic process, however unpalatable to some individuals, cannot justify a restriction on speech when the offensive activity can be avoided readily by communicating a declination of interest to the petitioner.”

Furthermore, the legislative history contains an indication from a past SABEL administrator that “election officials from [two named counties] agree the 300 foot limit eliminates electioneering.” Indeed, a 300 foot ban, the length of a football field, verges on an elimination of any meaningful visual or informational contact between voters making their way to the polls and political activists trying to get their attention.<sup>6</sup>

Complete silencing of the exposition of political views at a time when political discourse can be most effective has been deemed a violation of the First Amendment. *Mills v. Alabama*, 384 U.S. 214 (1966) (criminal penalties for publication of newspaper editorials on election day urging people to vote a certain way violated constitutional

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<sup>6</sup> Three hundred foot bans – one electioneering, one exit polling – have not withstood constitutional attack in two recent (but pre-*Burson*) challenges. In *Clean-Up ‘84 v. Heinrich*, 759 F.2d 1511 (11th Cir. 1985), the Eleventh Circuit held that a Florida statute prohibiting the solicitation of signatures on petitions within 300 feet of a polling place is unconstitutionally overbroad on its face. In *Daily Herald Co. v. Munro*, 838 F.2d 380 (9th Cir. 1988), the Ninth Circuit held that a Washington statute which prohibits exit polling within 300 feet of the polling place could not survive a strict scrutiny analysis.

protection of free speech and the press). See also *Meyer v. Grant*, 486 U.S. 414 (1988) (prohibition on paying signature collectors burdens most effective method of political communication, face-to-face contact).

Finally, it is difficult to conceive of a viable "narrow tailoring" justification in order to save the law under a strict scrutiny standard. The fact that the 300 foot electioneering ban extension dribbled into the law in a county-by-county manner beginning in 1974, without any apparent demonstration that each county had levels of disruption different in kind or degree from the 100 foot counties, creates an entirely different factual predicate than that for the uniform, preexisting 100 foot ban. None of the justifications pointed to by the Supreme Court in *Burson* exists for the 300 foot ban. The 300 foot ban was imposed in a scattered array of rural, suburban, and urban counties. It is unlikely that the State could offer an adequate justification for the imposition of additional burden on political speech created by the 300 foot extension.

In fact, *Burson's* strict scrutiny analysis makes the piecemeal imposition of the 300 foot ban vulnerable to attack on equal protection grounds. 112 S.Ct. at 1850-51 n.3. The standards for scrutinizing content-based statutes is the same under either the First or Fourteenth Amendment. *Daily Herald Co. v. Munro*, 838 F.2d 380, 385 n. 6 (9th Cir. 1988). In *Clayton v. North Carolina State Board of Elections*, 317 F. Supp. 915 (E.D.N.C. 1970) the court held unconstitutional a statute imposing a 500 foot limitation in six of North Carolina's 100 counties and leaving a 50 foot limitation in effect in the remaining 94 counties. Closely scrutinizing the state's classification because the 500 foot ban implicated fundamental rights and liberties, the court found that "counsel tell us they know of no reason why the possibility of disruption at the polls in these six counties is any greater than in the other counties throughout the State." 317 F. Supp at 921.<sup>7</sup>

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<sup>7</sup> What the federal court wrote of the excepted counties in the North Carolina statute is largely true of the counties excepted in §24-23(a)(4)(ii): "While the ... counties are dissimilar among themselves, each has its counterpart in one or more of the [remaining counties] with regard to size, racial composition, and rural or urban character." *Clayton*, 317 F. Supp. at 921.

#### IV

#### Conclusion

In summary, it is our opinion that the 300 foot electioneering ban in Article 33, §24-23(a)(4)(ii) ban is of such doubtful constitutionality that it should no longer be enforced to the letter. Instead, §24-23(a)(4)(ii) should be enforced in this election only when electioneering occurs within the 100 foot zone identified in §24-23(a)(4)(i). Furthermore, we recommend that the State Administrative Board of Election Laws seek to repeal §24-23(a)(4)(ii).

J. Joseph Curran, Jr.  
*Attorney General*

Elizabeth L. Nilson  
*Special Assistant to the Attorney General*

Jack Schwartz  
*Chief Counsel*  
*Opinions & Advice*

## ENVIRONMENT

### TORTS – IMMUNITY – SCOPE OF IMMUNITY FOR RESPONDERS TO POTENTIAL OR ACTUAL OIL SPILLS

December 14, 1992

*The Honorable Robert Perciasepe  
Secretary of the Environment*

You have requested our opinion on several questions related to §4-419 of the Environment Article (“EN” Article), as recently amended by Chapter 459 (Senate Bill 199) of the Laws of Maryland 1992, the short title of which is “Oil Spills – Liability.” Specifically, you ask:

1. Would the immunity provided by EN §4-419 extend to a person who renders care, assistance, or advice in an unsuccessful attempt to *prevent* a discharge of oil?
2. Is immunity lost if a person responds to a spill without first contacting the federal on-scene coordinator or appropriate State official?
3. Does the Maryland Department of the Environment (“MDE”) have the authority to define by regulation the actions that will be consistent with EN Title 4, Subtitle 4?

For the reasons stated below, we conclude as follows:

1. The immunity from liability for certain damages provided by EN §4-419 applies to a responder who renders care, assistance, or advice in an unsuccessful attempt to prevent a discharge of oil, provided the person meets the other requirements of EN §4-419.
2. A responder may qualify for the immunity provided by EN §4-419 even though the responder did not contact the federal on-scene coordinator or appropriate State official prior to initiating a response action, *if* the responder rendered care, assistance, or advice consistent with EN Title 4, Subtitle 4 and the National Contingency Plan.

3. MDE has the authority to define by regulation actions that are consistent with Subtitle 4.

## I

### Background

In the wake of the massive oil spill from the *Exxon Valdez* in Alaskan waters and similar, though smaller, spills elsewhere, the General Assembly considered methods to minimize the threat presented by vessels transporting oil on State waters. In a series of amendments to EN Title 4, Subtitle 4, the General Assembly provided MDE with the authority to regulate the transportation of oil more strictly and with additional tools to contain and remediate spills.

In addition to providing examples of the potential threat, the spills in other states provoked concern among private oil emergency responders about potential liability during a response to an oil spill emergency.<sup>1</sup> Without statutory immunity, a responder might be subject to suit resulting from claims that the responder's actions, or inactions, resulted in greater damage from the spill.<sup>2</sup>

In response to those concerns, the General Assembly enacted Chapter 459 of the Laws of Maryland 1992. Chapter 459 amended EN §4-419(a) to provide as follows:

Notwithstanding any other provision of law, a person is not liable for costs of containment, cleanup, and removal of the discharge or damages as a result of acts or omissions taken in the course of rendering care, assistance, or advice consistent with this subtitle and the National Contingency Plan, or as otherwise directed by the federal on-scene coordinator or other appropriate State official unless:

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<sup>1</sup> In this opinion, we use the term "responder" to refer to any person who renders care, assistance, or advice to clean up, mitigate, or prevent a discharge of oil in waters of the State.

<sup>2</sup> We understand that during one "table top" oil spill response exercise run by the U.S. Coast Guard in Baltimore in 1991, oil spill contractors refused to respond to governmental requests for assistance in cleaning up the hypothetical spill because of concern about "unlimited" liability under Maryland law at the time.

(1) The person is a person responsible for the discharge in accordance with §4-401(g) of this subtitle.<sup>3</sup>

(2) The person is a responsible party as defined by the federal Oil Pollution Act of 1990,<sup>4</sup> or

(3) The person is grossly negligent or engages in willful misconduct.

The legislative history of Chapter 459 shows that the General Assembly's objective in amending EN §4-419 was to adopt a standard similar to the federal standard of "responder" immunity. *See* Bill Analysis - Senate Bill 199 of the Senate Economic and Environmental Affairs Committee; and Floor Report - Senate Bill 199 of the Senate Economic and Environmental Affairs Committee. The House Environmental Matters Committee and the Senate Economic and Environmental Affairs Committee files contain numerous references to the federal standard of immunity in floor reports, a bill analysis, MDE's position statement, and testimony provided by industry trade groups.

The federal immunity standard is set forth in the Oil Pollution Act of 1990, 33 U.S.C. §1321(c)(4), and provides, in relevant part, as follows:

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<sup>3</sup> EN §4-401(g) provides that "the person responsible for the discharge" is: (i) the owner of the oil; (ii) the owner, operator, or person in charge of the oil storage facility at the time of or immediately before the discharge; or (iii) any other person who through act or omission caused the discharge.

<sup>4</sup> The Oil Pollution Act of 1990 provides that the "responsible party" in the case of a vessel is "any person owning, operating, or demise chartering the vessel." §1001(32), Oil Pollution Act of 1990, *codified* at 33 U.S.C. §2701(32).

A person is not liable for removal costs or damages which result from actions taken or omitted to be taken in the course of rendering care, assistance or advice consistent with the National Contingency Plan or as otherwise directed by the President.<sup>5</sup>

The General Assembly evidently concluded that enactment of a standard similar to the federal immunity standard would encourage quick and thorough response to oil spill emergencies and thereby protect the Chesapeake Bay and other Maryland waters.

## II

### Actions Taken to Prevent Spills

In general, a primary purpose of “good samaritan” immunity statutes is to encourage those who can do so to prevent harm by quick intervention.<sup>6</sup> In the case of oil spills, the potential harm to the Bay and other Maryland waters is so great that quick and decisive preventive action is essential.

It would be illogical to provide immunity once a spill occurred but to deny immunity for activities taken in an attempt to prevent a spill. Such an interpretation would encourage responders to wait until the spill occurred before taking any activities to minimize damage. In other words, such an interpretation would increase the likelihood of the harm that the General Assembly sought to minimize by enactment of the bill. For example, one hypothetical situation suggested by responders concerns an oil laden vessel that is drifting, powerless, towards a rocky shore. No public purpose is served by protecting the responder only if assistance is withheld until the vessel founders on the rocks.

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<sup>5</sup> The Oil Pollution Act of 1990 requires that the National Contingency Plan mandated by the Clean Water Act be revised in accordance with the criteria set forth in §4201 of the Oil Pollution Act. Those criteria require the President to “provide for efficient, coordinated, and effective action to minimize damage from oil ...” The Plan includes designation of the federal official who shall be the federal on-scene coordinator for each area subject to an Area Contingency Plan; procedures and techniques to be employed in identifying, containing, dispersing, and removing oil; and establishment of a system whereby states affected by a discharge of oil may act to remove the discharge and be reimbursed in accordance with the Oil Pollution Act for reasonable costs incurred from the Oil Spill Liability Trust Fund.

<sup>6</sup> A discussion of the purpose of “good samaritan” laws, as well as the history and development of Maryland law on this topic, may be found in 64 *Opinions of the Attorney General* 169 (1979).

The clear intent of that statutory scheme, like the federal scheme, is not merely to remediate spills but to prevent an oil discharge from occurring. “Discharge” is defined in EN §4-401 as “the addition, introduction, leaking, spilling, or emitting [of] any oil to State waters or *the placing of any oil in a location where it is likely to reach State waters.*” (Emphasis added.) Any “discharge” is prohibited by EN §4-410(a). Further, EN §4-405 states, in part, that MDE shall have the duty to “[d]evelop comprehensive programs and plans for the *prevention, control, and abatement of pollution of waters of the State by oil ....*” (Emphasis added.)<sup>7</sup>

In addition, the legislative history of the immunity provisions of the federal Oil Pollution Act, which shares a similar purpose, supports this reading. The conference committee report on the Act states that the relevant subsection “provides immunity from liability ... for those taking action in the response to an oil spill or the *threat* of a spill ....” H.R. Rep. No. 101-653, at 146, 101st Cong., 2d Sess. (1990), *reprinted in* 1990 U.S. Code Cong. & Adm. Report 727, 825 (emphasis added). Given the references in the legislative history of Chapter 459 to enactment of the federal standard, this congressional statement is persuasive. *See, e.g., Faulk v. State’s Attorney*, 299 Md. 493, 474 A.2d 880 (1984).

In sum, to be consistent with this legislative intent and the manifest purpose of the bill, we must interpret the statute to provide immunity to a person who is rendering assistance to prevent an oil spill as well as to a person who is rendering assistance to clean up a spill.

You specifically asked whether the immunity is available if the responder’s actions are unsuccessful. Assuming other requirements of the statute have been met and the responder has not been grossly negligent or engaged in willful misconduct, the fact that the actions of the responder fail to prevent the threatened spill does not deprive the responder of immunity. A reading to the contrary would nullify much of the beneficial effect of EN §4-419. Immunity is not needed if the responder’s actions are successful

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<sup>7</sup> Maryland courts have recognized the Legislature’s evident emphasis on the prevention of pollution. In *American Recovery Co. v. Department of Health*, 306 Md. 12, 506 A.2d 1171 (1986), the Court of Appeals, in determining whether civil penalties could be assessed for the improper storage and treatment of hazardous wastes despite the fact that there was no actual pollution, stated that “[f]or a civil penalty assessment to be effective in preventing pollution, the agency cannot wait until the pollution occurs to assess the penalty.” 306 Md. at 19. In reaching its conclusion, the Court pointed to statutory language indicating that one of the goals of Maryland’s hazardous waste laws is to prevent water pollution. *Id.* The language of EN Title 4, Subtitle 4 is very similar. It too is aimed toward prevention of pollution.

in preventing the spill. The statute is meant to protect responders when a spill occurs and actual harm results.

To receive the immunity provided by EN §4-419, a person must be in the course of “rendering care, assistance, or advice.” The specific actions that will constitute “care, assistance, or advice” must be determined on a case by case basis. A responder, however, may look to the National Contingency Plan, and the regional response and oil spill contingency plans for guidance as to the type of actions that are contemplated. Generally, if a responder can show that its actions were conducted for the purpose of containing, cleaning up, removing or preventing a discharge of oil, a responder should be able to meet its burden to show it was in the course of rendering care, assistance, or advice.

Of course, a commercial firm that is not responding to a discharge or a threat of a discharge cannot claim immunity for ordinary commercial activities. Whether certain circumstances constitute a real threat of a spill and whether a person is rendering care, assistance, or advice to prevent a discharge are factual determinations to be made on a case by case basis. We cannot anticipate all the circumstances that might establish the existence of a threat or the purpose of the care, assistance, or advice. Moreover, the responder will also need to meet the other requirements of the bill regardless of whether the spill has occurred or is merely threatened.

### III

#### **Prior Approval of Actions**

Immunity applies to a person who provides assistance to a vessel in distress to prevent a discharge of oil only if the responder meets the other requirements set forth in the statute. One of those requirements is that the care, assistance, or advice must be “consistent with [Subtitle 4] and the National Contingency Plan, *or* as otherwise directed by the federal on-scene coordinator or appropriate State official.” EN §4-419(a) (emphasis added).

Since the two requirements are stated in the disjunctive, it follows that consistency with Subtitle 4 as well as the National Contingency Plan are alternatives to acting at the direction of the federal on-scene coordinator or appropriate State official. Put another way, immunity is not

lost by failure to receive direction from federal or State officials provided that the actions taken are consistent with Subtitle 4 and the Plan.<sup>8</sup>

Consistency with the National Contingency Plan should be relatively straightforward since the Plan will be specifically written to guide the actions of responders.<sup>9</sup> Subtitle 4 does not set forth specific criteria for responses to oil spills. Subtitle 4 does, however, set forth certain prohibitions and requirements. If the responder has acted in accordance with those prohibitions and standards, then the responder has acted in a manner consistent with Subtitle 4.<sup>10</sup> In addition, as discussed in the following part of this opinion, the MDE has the authority to define actions that are consistent with Subtitle 4.

#### IV

#### Authority to Enact Regulations

A State agency may enact binding regulations only to the extent that a statute so authorizes. EN §4-405 provides just such authority for the adoption of regulations. MDE has been given explicit authority in EN §4-

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<sup>8</sup> Although this opinion concludes that such explicit direction is not essential for immunity if the actions are consistent with the National Contingency Plan and Subtitle 4, prudence suggests that authorization for an action should be sought when time and the exigencies of a particular situation allow. Prior authorization makes it unnecessary to attempt to determine, in hindsight, whether the actions were consistent with the National Contingency Plan and Subtitle 4. As we understand the situation, obtaining such direction from the federal on-scene coordinator and appropriate State official, both of whom are identified in the National Contingency Plan and Regional Response Team Plan, is not difficult. Direction may be obtained by using traditional maritime emergency radio channels. Both the U.S. Coast Guard and the Natural Resources Police monitor emergency channel 16. MDE also maintains a 24 hour telephone number at its Emergency Response Center.

<sup>9</sup> Section 4201(c) of the Oil Pollution Act of 1990 required that the National Contingency Plan be revised within one year of the enactment of the Act. Although this revision is overdue, we understand that a draft of the revisions to the National Contingency Plan has been prepared, albeit not yet adopted.

<sup>10</sup> At least one responder has expressed concern that an unsuccessful attempt to prevent a discharge might be inconsistent with the prohibition of the discharge of oil set forth in Subtitle 4. However, as discussed in Part II above, the immunity is intended to apply to any responder who attempts, although unsuccessfully, to prevent a discharge. Therefore, the fact that the responder's efforts to prevent the discharge ultimately fail does not mean that those efforts were inconsistent with Subtitle 4.

405(b)(1) to issue regulations concerning procedures for responding to oil spills:

The Department shall prescribe by rule or regulation approved methods, facilities, standards and devices for transfer, storage, separating, removing, treating, transporting, or disposing of oil and other unctuous substances to prevent pollution of waters of the State, which may include rules or regulations:

(i) Outlining procedures for addressing water pollution episodes or emergencies which constitute an acute danger to health or the environment ....

Moreover, EN §4-405(a)(7) and (9) broadly authorize MDE to enact regulations to carry out Subtitle 4. Any person, including a responder, who violates a rule or regulation issued under Subtitle 4 is liable for civil and criminal penalties. EN §4-417. Therefore, MDE may specify by regulation those procedures that a responder must follow in responding to an oil spill emergency and to define by regulation the actions that are consistent with Subtitle 5.

To be sure, regulations may not conflict with statutory requirements. *Falik v. Prince George's Hosp. & Medical Center*, 322 Md. 409, 416, 588 A.2d 324 (1991). The General Assembly did not intend for a responder to enjoy immunity if the responder acted in a manner inconsistent with the National Contingency Plan, Subtitle 4, and the directions of proper federal and State officials. Thus, MDE may not enact regulations that confer immunity on responders who act in such a manner. Nor may MDE confer regulatory immunity on responders who are grossly negligent or who are not, in fact, rendering care, assistance, or advice as specified in the statute. Finally, MDE may not issue regulations that change the requirements of the National Contingency Plan. In accordance with the federal Act, the Plan is adopted by the President and subject to his authority to revise it. 33 U.S.C. §1321(d)(3).

## V

### Conclusion

1. The immunity from liability for certain damages provided by EN §4-419 applies to a responder who renders care, assistance, or advice in an unsuccessful attempt to prevent a discharge of oil, provided the person meets the other requirements of EN §4-419.

2. A responder may qualify for the immunity provided by EN §4-419 even though the responder did not contact the federal on-scene coordinator or appropriate State official prior to initiating a response action, *if* the responder rendered care, assistance, or advice consistent with EN Title 4, Subtitle 4 and the National Contingency Plan.

3. MDE has the authority to define by regulation actions that are consistent with EN Title 4, Subtitle 4.

*J. Joseph Curran, Jr.*  
Attorney General

*Michael C. Powell*  
Assistant Attorney General

*Jack Schwartz*  
Chief Counsel  
Opinions & Advice

## GAMING

### LOTTERIES – PURCHASE OF OUT-OF-STATE LOTTERY TICKETS BY COMPUTER UNLAWFUL

January 22, 1992

*The Honorable Alexander Williams, Jr.  
State's Attorney for Prince George's County*

You have requested our opinion whether a person in Maryland may lawfully use a computer terminal, part of a computer network encompassing several states, to initiate the purchase of out-of-state lottery tickets.

For the reasons stated below, we conclude that a person may not use a computer in Maryland to initiate or otherwise facilitate the purchase of out-of-state lottery tickets.

#### I

#### Background

The specific activity described in the materials accompanying your request for our opinion indicates that a Maryland order entry agent would receive orders from customers in Maryland for the purchase of out-of-state lottery tickets. The requests would be electronically transmitted to a computer in New Jersey that would, in turn, transmit orders to buyers in other states conducting lotteries. The buyers would retain custody of the actual lottery tickets in their state of origin. In the event of a winning ticket, the Maryland customer would be informed and travel to the state of issue to claim the ticket and prize. This network would encompass 23 state lotteries.

One can readily imagine variations of this particular enterprise - for example, transport of the purchased tickets to a central location, either within or outside of Maryland, or the elimination of the conduit computer in New Jersey. However, it is our opinion that the scheme you described, or these variations of it, would violate Maryland law.

## II

### Analysis

The General Assembly has long sought to combat lotteries. The core prohibition, first enacted in 1828, is Article 27, §356 of the Maryland Code:

No person shall draw any lottery or sell any lottery ticket in this State; nor shall any person sell what are called policies, certificates or anything by which the vendor or other person promises or guarantees that any particular number, character, ticket or certificate shall in any event or on the happening of contingency entitle the purchaser or holder to receive money, property or evidence of debt.

Various provisions in the Lotteries subtitle of Article 27 reinforce this prohibition. For example, §360 forbids anyone from “keep[ing] any house, office or other place for the purpose of selling ... any lottery ticket ....” *See also* §§362 (prohibiting possession of lottery tickets) and 363 (prohibiting publication of “an account of any lottery”). Moreover, §357 broadly outlaws “[a]ll devices and contrivances designed to evade the provisions of §356 of this article ....” Finally, §358 states the following interpretive principle:

The courts shall construe the foregoing provisions [§§356 through 367] relating to lotteries liberally, and shall adjudge all tickets, parts of tickets, certificates, or any other device, whatsoever, by which money or any other thing is to be paid or delivered or the happening of any event or contingency, in the nature of a lottery, to be lottery tickets.<sup>1</sup>

The scope of legal lottery activities in Maryland is narrow. In 1972, the voters ratified Article III, §36 of the Maryland Constitution, which authorized the General Assembly to issue a “lottery grant” for “a lottery to be operated by and for the benefit of the State” only.<sup>2</sup>

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<sup>1</sup> This direction that the anti-lottery provisions of Maryland law be liberally construed mirrors similar language found in Maryland’s anti-gaming statute. *See* Article 27, §246. *See generally* *Gaither v. Cate*, 156 Md. 254, 144 A.239 (1929); *Allen v. State*, 18 Md. App. 459, 307 A.2d 493 (1973).

<sup>2</sup> The statutory provisions authorizing the Maryland State Lottery Agency are set out in Title 9, Subtitle 1 of the State Government Article.

During the session of the General Assembly following the ratification of Article III, §36, two specific exceptions were added to Maryland’s criminal lottery statutes. Chapter 584 of the Laws of Maryland 1973 amended Article 27, §363 to permit the publication of the results of governmental lotteries in Maryland. This office had opined a year earlier that the publishing in Maryland of an account of an out-of-state lottery would be a violation of §363. See *57 Opinions of the Attorney General* 346 (1972). Chapter 774 of the Laws of Maryland 1973 amended Article 27, §362 to permit the possession by persons in Maryland of out-of-state lottery tickets if issued by a government. The amendment also permitted the possession of lottery tickets issued by the State of Maryland. In *57 Opinions of the Attorney General* 346 (1972) and *49 Opinions of the Attorney General* 300 (1964), this office had advised that it was unlawful to possess out-of-state lottery tickets in Maryland.

These narrow exceptions are the only statutory changes that have altered in any way Maryland law relating to lotteries. All other lottery-related activity remains illegal, including that described in your letter.

Article 27, §356 itself would render unlawful the transaction in which the computer entry operator would receive money for the purchase of the out-of-state lottery ticket. Although the actual lottery ticket would not be conveyed to the purchaser at the time of order, §356 prohibits the sale of a lottery ticket, certificate, “or anything” that promises or guarantees to the holder that upon the happening of a contingency (the out-of-state lottery drawing) the holder will receive money or property.

Applying the liberal construction requirements of §368, the Court of Special Appeals held in *Silbert v. State*, 12 Md. App. 516, 280 A.2d 55 (1971), that a “lottery ticket” may be “anything, tangible or intangible, by which the sale of a chance or share in a lottery is manifested,” including “a mere exchange of words between the lottery operator and the bettor by which they agree upon the terms under which a chance or share in the lottery is being acquired.” 12 Md. App. at 535. In our opinion, a customer’s receipt from a computer operator of a piece of paper, a print-out, or merely a spoken promise concerning the customer’s “stake” in an out-of-state lottery would be illegal under §356.

Moreover, the computer terminal device in Maryland that would receive orders and presumably issue receipts would violate Article 27, §357, which outlaws “any devic[e] [or] contrivanc[e]” designed to evade the provisions of §356.<sup>3</sup> In *State v. Fiola*, 242 N.J. Super. 240, 576 A.2d

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<sup>3</sup> The maintenance of a house, office, or other place for the purpose of conducting a computer entry operation such as that described in your inquiry would also violate §360.

338 (App. Div. 1990), the New Jersey Attorney General obtained an injunction to prevent the conduct of a business in which an intermediary would arrange for the purchase of out-of-state lottery tickets. The court held that, in light of New Jersey's "strict approach to the construction" of laws authorizing gambling under state auspices only, the defendants' "unregulated activities involving lotteries operated by other states" violated the New Jersey constitutional prohibition against gambling. 576 A.2d at 340. The court also concluded that the defendants' "enterprise violated a criminal statute much like §357. 576 A.2d at 340-41."<sup>4</sup>

### III

#### Conclusion

In summary, it is our opinion that the maintenance of a computer entry order device in Maryland to permit the electronic purchase of out-of-state lottery tickets is unlawful.

J. Joseph Curran, Jr.  
*Attorney General*

Michael G. Comeau  
*Assistant Attorney General*

Jack Schwartz  
*Chief Counsel*  
*Opinions & Advice*

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<sup>4</sup> The New Jersey statute prohibits acts that "materially ai[d] [a] form of gambling activity." See 576 A.2d at 340-41. We recognize that the business in question in *Fiola*, unlike the one about which you ask, involved the actual delivery of out-of-state lottery tickets to New Jersey customers. The court, however, took account of the effect of the scheme as a whole in reaching its conclusion, and we believe that its reasoning is applicable even if one fact is different.

**GAMING – STATE LOTTERY – LOTTERY AGENCY MAY OFFER “KENO”  
GAME UNDER CURRENT LAW – “VIDEO LOTTERY” GAME MAY  
BE OFFERED ONLY WITH NEW LEGISLATIVE AUTHORIZATION**

November 13, 1992

*Mr. Fred Puddester  
Deputy Secretary  
Department of Budget and Fiscal Planning*

You have requested our opinion whether the Maryland State Lottery Agency has authority under current Maryland law to implement two new forms of lottery games, “keno” and “video lottery.”

For the reasons stated below, we conclude as follows:

1. The type of “keno” game proposed to be initiated by the State Lottery Agency is authorized by current law.
2. A form of “video lottery” that entails a player’s bet on a device like a video poker machine is not authorized under current law. Such a form of gambling may be offered by the Lottery Agency only with additional authorization from the General Assembly.<sup>1</sup>

**I**

**Proposed New Games**

**A. *Keno***

In the game of keno, as we understand it, players would be provided with a game card on which they choose a set of numbers (from 1 through 10) and a dollar value of how much they want to play (from \$1 to \$20 per game). The players’ selections are registered on a computer terminal by a licensed lottery agent. A central computer randomly selects numbers, which would be displayed on video monitors at the authorized keno game locations. Players win by matching some or all of the numbers displayed

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<sup>1</sup> These conclusions were set forth in a summary letter sent to you shortly after our receipt of your request. This opinion explains the basis for our conclusions.

on the video screen with the numbers they have selected. Winning numbers are displayed on the video monitor every five minutes.

The Lottery Agency would operate keno in a manner similar to the manner in which it operates its instant ticket lottery games. The Lottery Agency would purchase computer terminals for ticketing and video monitors for players to view the keno game results. The Lottery Agency would place the keno equipment with authorized lottery agents in retail establishments like bars, restaurants, and taverns. The lottery agent would provide game cards to the players, register the players' selections on the computer terminal, and pay off most winners. The principal difference between keno and the traditional lottery games currently offered by the Lottery Agency is that keno would be played mainly in social settings because of its interactive nature.

### ***B. Video Lottery***

We understand that video lottery games would be played on individual stand-alone video game terminals that would usually be placed in retail establishments. One terminal might offer a variety of video games, such as draw poker, blackjack, bingo, and keno. The player inserts money or tokens in the video terminal, chooses a game, and then follows directions displayed on the video screen to play the selected game. In the case of video poker, for example, a player would be "dealt" cards by the computer and would match his or her "hand" to the computer's cards, which are randomly drawn. Wins and losses are based on the traditional rules of draw poker.

Unlike keno terminals and monitors, the video lottery terminals would not be owned by the Lottery Agency. Rather, the terminals would be owned by private sector entrepreneurs, in cooperation with the owners of the retail establishments that wish to offer video lottery on their premises. As currently envisioned, the Lottery Agency would act as a licensing agency and monitor and audit the video lottery system. The Lottery Agency would receive a licensing fee for each video lottery terminal in place, as well as a percentage of net video lottery sales.

## **II**

### **"Lottery" and "Gaming"**

The question whether keno and video lottery are authorized under current Maryland law depends upon whether those games are "lotteries" within the meaning of Article 27, §356 *et seq.* of the Maryland Code or are forms of "gaming" within the meaning of Article 27, §264B. As we

explain, the State Lottery Agency has current authority to offer any lottery game. If the games constitute anything other than a lottery, the Lottery Agency would need express authorization from the General Assembly to implement them.

In essentially the same form as they now are, the lottery laws and the gaming laws have been on the books since long before the first Maryland Code, that of 1860. See *Bender v. Arundel Arena, Inc.*, 248 Md. 181, 189, 236 A.2d 7 (1967). As currently codified, the Lotteries subtitle, Article 27, §356 *et seq.*, prohibits the operation of lotteries in Maryland. Section 371A, however, provides an exception to this general prohibition for “the State lottery system established in Title 9, Subtitle 1 of the State Government Article.”

While neither Article 27 nor the State Government Article defines what constitutes a “lottery,” that term has been judicially defined to encompass the essential elements of consideration, prize, and chance. *Ballock v. State*, 73 Md. 1, 20 A. 184 (1890); *Silbert v. State*, 12 Md. App. 516, 280 A.2d 55 (1971). In many instances, the distinction between a lottery and “gambling” or “gaming” is unclear. Gaming also has been defined as consisting of three elements: “price or consideration, chance, and prize or reward.” *Black’s Law Dictionary* 679 (6th ed. 1991). In Maryland, keeping any gaming table or any house for the purpose of gambling is prohibited under Article 27, §237.

The Gaming subtitle of Article 27 is replete with exceptions to the general prohibition against gambling, such as bingo for charitable or civic purposes. There is no exception under the Gaming subtitle, however, for the State lottery system. Thus, the Maryland Legislature intended that the Lottery Agency be authorized to operate only those games that are in the nature of a lottery and not those games that are in the nature of gambling.

In *Bender v. Anne Arundel Arena, Inc.*, the Court of Appeals discussed the historical distinctions between lotteries and gambling in Maryland. The Court found that the General Assembly considered bingo to be a game in the nature of gambling rather than a lottery. The Court noted that, while other states had held coin-operated gambling machines and bingo to be lotteries (because they each combined the classic elements of consideration, chance, and prize), Maryland took “a more restrictive, precise, and technical” view of the term “lottery” and drew “a distinction between *games* of chance and *schemes* of lottery.” 248 Md. at 189 (emphasis in original). The Court further stated that “[a]ll lottery is a form of gambling but all gambling need not be legislatively considered to be or actually be lottery....” 248 Md. at 192. The Court noted:

Officials and courts in Maryland appear to have considered (a) that the lottery laws covered schemes for awarding a prize by lot or chance in which the only direct or personal participation by the seeker of the prize is his purchase of a ticket or its equivalent; and (b) that the gaming laws covered gambling by games of chance or gaming tables, as broadly defined (even though skill plays no part), in which the player participates personally and directly and is present when the game ends and the result becomes known.

248 Md. at 189-90.

As we understand it, this portion of *Bender* does not reflect an effort to establish a definitive test for determining whether a given activity is a lottery within the scope of the Lotteries subtitle or a game within the scope of the Gaming subtitle. Rather, the Court in *Bender* simply was engaging in a historical review of a basis previously used to distinguish between a lottery and a game. See *American Legion v. State*, 294 Md. 1, 7 n.3, 447 A.2d 842 (1982).

That historical distinction is far from a sure guide in an era of technological sophistication in which lottery games and devices have significantly evolved. For example, the Court in *Bender* noted that gambling laws involving machines or mechanical devices were always prosecuted under the gaming and not the lottery law. 248 Md. at 190. Present day lottery games, however, are played using very sophisticated computerized machines. The General Assembly surely did not intend that the Lottery Agency be limited to operating its lotteries in the same manner as lotteries were operated in years past, without the benefit of modern technology.

In the case of keno, the Lottery Agency intends to operate that game in a manner similar to the games that the Lottery Agency already operates.<sup>2</sup> The keno game is played in a social setting and not on individual computer terminals. Numbers are drawn from a computerized matrix, and players choose numbers that they hope will match the winning sequence. Players look to a central computer system to determine whether they have won or lost. The Lottery agency will own the computers that operate the keno game.

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<sup>2</sup> In *Bender*, the Court noted that bingo is sometimes called keno in this country. We believe that the Court's passing reference to keno in this context does not relate to the form of keno that the Lottery Agency intends to implement and that is the subject of this opinion. See 248 Md. at 191.

In our view, keno is sufficiently similar to those games that were traditionally considered to be "lotteries" to fit within the concept of a "lottery" envisioned by the Legislature. Indeed, for many years the Lottery Agency has had a regulation contemplating the advent of:

Keno type games where a player is required to select a group of numbers from a large matrix. The player wins by matching the selected numbers against the series of numbers drawn for that game. Prizes can be either fixed, pari-mutuel, or a combination of both. The cost of a play or tickets, the prizes awarded, and the drawing frequency shall be determined by the Director and published in the consumer brochure available at agent locations.

COMAR 14.01.03.12B.(4). The General Assembly has evidently acquiesced in this regulatory description of one possible type of "lottery" game.<sup>3</sup> The Lottery Agency may proceed, therefore, to implement that game.<sup>3</sup>

In the case of video lottery, players would make wagers against randomly derived game results on individual computer terminals. These games are quite unlike what is, and has always been considered to be, lotteries. The games offered by video lottery machines – draw poker, blackjack, and bingo, for example – are generally considered to be types of gambling rather than types of lotteries. *See generally* R. Rychlak, *Video Gambling Devices*, 37 U.C.L.A. L. Rev. 555 (1990). As such, we believe that the proposed video lottery game is a type of gambling that the Legislature did not intend for the Lottery Agency to operate under its current statutory authority.

We note further that the video gambling devices at issue appear to constitute "slot machines" as defined in Article 27, §264B:

Any machine, apparatus or device is a slot machine ..., if it is one that ..., as a result of the insertion or deposit therein ..., of any piece of money, coin, token, or other object, such machine, apparatus or device is caused to operate or may be operated, and by reason of any element of chance or of other outcome of such operation unpredictable by him, the user may receive or become entitled to receive any piece of money, coin,

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<sup>3</sup> Under COMAR 14.01.03.12A., the Lottery Director, with the advice and consent of the Lottery Commission, determines that additional lottery games may be offered to the public.

token or other object representative of and convertible into money ....

In the case of video lottery, the player inserts money or a token and plays a game of chance. A winning player is entitled to receive payment based on an outcome that was unpredictable by that player. Therefore, the video lottery machines, in addition to being devices for gambling, are slot machines, and the Lottery Agency is prohibited from operating them under both §§237 and 264B.

### III

#### Conclusion

In summary, it is our opinion that the keno game proposed to be implemented by the Lottery Agency is authorized by current Maryland law, and the Lottery Agency may proceed to implement this game in accordance with its statute and regulations. It is also our opinion, however, that the game of video lottery is not authorized under current law. In order to implement the video lottery game, additional authorization must be obtained from the General Assembly.

J. Joseph Curran, Jr.  
*Attorney General*

Romaine N. Williams  
*Assistant Attorney General*

Dale E. Cantone  
*Assistant Attorney General*

Jack Schwartz  
*Chief Counsel*  
*Opinions and Advice*

**GENERAL ASSEMBLY****LEGISLATIVE AUDITOR – COLLEGES AND UNIVERSITIES – UNIVERSITY OF MARYLAND SYSTEM – CORPORATION ADMINISTERING FACULTY MEMBERS' PRIVATE MEDICAL PRACTICE NOT REQUIRED BY LAW TO PROVIDE AUDITOR WITH ACCESS TO ITS RECORDS**

September 1, 1992

*Mr. Anthony J. Verdecchia*  
*Legislative Auditor*

You have requested our opinion whether certain records of the Medical Service Plan ("the Plan") of the University of Maryland School of Medicine are subject to access by the Legislative Auditor under current law. Specifically, you ask whether §2-1218(a) of the State Government Article ("SG" Article) authorizes the Division of Audits to obtain access to the records of University Physicians, Inc., the non-profit corporation that administers the practice of faculty clinicians under the Plan; and, if SG §2-1218 does not authorize such access, whether the Board of Regents of the University of Maryland System has the authority to approve the creation of such an entity outside the purview of the Division of Audits.

For the reasons stated below, we conclude as follows:

1. SG §2-1218(a) does not authorize the Division of Audits to obtain access to the records of University Physicians, Inc., or the professional associations affiliated with it.
2. The Board of Regents of the University of Maryland System had statutory authority to approve the Medical Service Plan that led to the creation of University Physicians, Inc.

As we readily acknowledge and explain in detail in Part I below, intimate links exist between the corporation and the School of Medicine. If there are problems in the way that the Plan is administered, the School would be hurt. We take no position on the policy question whether, under such circumstances, the records of the corporation *should* be open to the Legislative Auditor. It is our opinion, however, that a change in the law is needed to accomplish that end.

## I

**The Medical Service Plan****A. Introduction**

Full-time faculty members at the University of Maryland School of Medicine, like their counterparts in other disciplines, teach, conduct research, and help in the governance of the institution through service on committees. But unlike faculty members in some other professional schools, faculty clinicians at the School of Medicine must *demonstrate* the science and art of their profession through regular practice:

Clinical instruction refers to teaching medical knowledge, skills, and procedures in the course of rendering medical care to patients. It includes the performance of medical services by faculty members in the presence of students and patient care by students under supervision. Clinical instruction is an indispensable primary component of training undergraduate and graduate students at the Medical School.

*University of Maryland Physicians, P.A. v. Commissioner*, T.C. Memo. 1981-23, 42 T.C.M. (CCH) Dec. 37,633, at 732 (1981).

That faculty clinicians treat patients is a given, and this activity bears a direct relation to the physicians' role as teachers in a State school. And, indeed, one could hypothesize arrangements under which patient care would fall under the aegis of the State – if, for example, the faculty clinicians supervised students who themselves treated patients at a University-affiliated clinic.<sup>1</sup>

But an economic reality pervades this issue: The institutional arrangements for patient care by full-time faculty clinicians reflect the need to bridge a chasm between what physicians expect to earn and what the State in fact pays them with tax dollars.

In 1990 the median income of physicians in the United States was \$141,720. Owens, *Doctors Struggle to Stay Ahead of Inflation*, Medical Economics, Sep. 2, 1991, at 122. For some specialties, median income was much higher – for example, the median for orthopedic surgeons was \$237,120. *Id.* at 123. The University of Maryland School of Medicine

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<sup>1</sup> See note 10 below.

employs 479 full-time clinical faculty. If these faculty members were all to be paid from State appropriations at the 1990 national median, the required appropriation for their salaries would be \$67.9 million. In fact, for fiscal year 1992, the appropriation for their salaries was \$15.1 million.

In short, while it is undoubtedly true that the instructional needs of the School of Medicine dictate that faculty clinicians practice medicine, so that the teachers can remain proficient and the students can observe, the economics of the situation dictate that this practice be a private one, augmenting the teachers' income with fees derived from their services to patients. Indeed, the danger is that a profit-maximizing physician will give short shrift to core faculty responsibilities in pursuit of these fees.

The Medical Service Plan is in part a response to this danger. The Plan is a regulatory scheme for the full-time faculty's private practice, ensuring that the fees earned for patient care services benefit the School as well as the individual faculty members and that faculty clinicians give primary attention to their responsibilities to the School.<sup>2</sup>

### ***B. Origin and History of the Medical Service Plan***<sup>3</sup>

In the 1960s, appropriated tax revenues for clinical faculty salaries were quite limited, and there were almost no full-time faculty in the clinical departments of the School of Medicine.<sup>4</sup> Faculty support in the 1960s was provided chiefly by a part-time or volunteer clinical faculty, comprising community physicians who might receive a stipend from the School but who supported themselves with an outside private practice. The faculty could benefit economically from the prestige of association with the School, but the School and Hospital did not benefit academically or economically from the practice activities of the faculty. They had no incentive to admit their patients to University Hospital, where the care of the patients would provide teaching cases for students, a patient base for research protocols, and a revenue source to defray the Hospital's costs of

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<sup>2</sup> The University of Maryland School of Medicine is hardly unique in this regard. Nearly every major medical school has some kind of practice plan. See Association of American Medical Colleges, *Faculty Practice Plans: The Organization and Characteristics of Academic Medical Practice* (1991).

<sup>3</sup> This narrative relies on information that we received from the University.

<sup>4</sup> The clinical departments (for example, internal medicine, pediatrics, and surgery) are those that instruct students and residents in hands-on care, providing most of this instruction in the third and fourth years of medical school and the subsequent residency programs.

operation. Moreover, the outside practices were a distraction from the business of teaching.

The School began to experiment with the idea of making part-time faculty full-time, allowing them to conduct outside practices on an individual basis but requiring them to turn over their net income to the School. It was understood that a good part of the income would be turned back to the faculty members as salary, and the School would determine in general terms when the faculty would be on campus and when they would be in their practices. The faculty members' respective medical practices remained independent of the School in all respects. Faculty within a department did not practice together as a group. Oversight of this situation was difficult. Monitoring of outside practice income caused conflict between the School and its faculty. Faculty practices often were under the auspices of groups of physicians having no connection to the School of Medicine, and no cooperation was obtainable to verify faculty income.

In 1972, the School and its faculty agreed on the first Medical Service Plan, which permitted faculty with partial State support from tax money to be recognized as full-time faculty. They were given the academic status of full-time staff and consequently were eligible for tenure and appointment to the more prestigious academic ranks and titles in the School of Medicine. In exchange, the faculty limited their professional activities to teaching and research for the School and private practice with their University colleagues through a department partnership or professional corporation.

The 1972 plan was not a "privatization" of activities previously undertaken by the School. Private practice was considered secondary to the faculty's functions *qua* faculty – teaching, research, and public service. The Medical Service Plan was an effort to make the private practices more complementary to the School's functions by having colleagues practice together, preferably at or near the campus. The Medical Service Plan also was an effort to capture a portion of the potential revenues of private practice for the School itself by transfer of a portion of earnings from the practice plan groups to funds earmarked for the School's benefit. Further the Plan was an effort to impose reasonable control over outside earning potential so that faculty had no incentive to shortchange their time commitments to the teaching program. It is for this reason (as recited in the 1972 and 1983 Plans) that faculty salaries, including the portion derived from practice under the Plan, are subject to the approval of the Dean of the School and the President of the University of Maryland at Baltimore.

When the 1972 Plan was adopted, the possibility of establishing it as a University operation was not considered because of an assumption that the State would not venture support for the personnel positions (for example, billing and appointment clerks), required to carry out fee-for-service billing. There is no record of discussion of the possibility of operating the Medical Service Plan as a University business activity or "auxiliary enterprise." The faculty clinicians' practice of medicine was viewed as totally outside the purview of the School of Medicine itself.

The 1983 amendments to the Medical Service Plan added the concept of University Physicians, Inc. as a tax-exempt organization managed by the clinical department chairmen and the Dean of the School.<sup>5</sup> The corporation was established to provide a structure for coordinated business activities by the clinical departments' various faculty practices. Subsequent to the 1983 amendments, all 16 departmental practice groups have become tax-exempt professional associations.

### *C. Nature of the Current Medical Service Plan*

The current plan was approved by the Board of Regents on June 17, 1983, and has not been changed substantially since then. The Plan recites that it has the following purposes:

1. To attract and retain high quality faculty to teach, do research and engage in patient care.
2. To enable faculty of the School to maintain their skill as health care providers in addition to their duties as teachers and researchers.
3. To encourage and assist each clinical department to develop and mature within itself in relation to other departments so that the full clinical potential of the school and the University of Maryland Medical System can be reached.
4. To assist the department chairman in utilizing their personnel, space, and finances such that all departmental functions and duties are carried out in this most efficient manner.

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<sup>5</sup> University Physicians is described in the 1983 Plan document as University of Maryland Medical Faculty Foundation, Inc. As a result of an amendment of the Plan and subsequent corporate action in 1991, the name of the entity now is University Physicians, Inc.

5. To assist the faculty in understanding and influencing outside economic forces such as third-party carriers, governmental agencies and public, regarding health care provided by the faculty of the school.
6. To create a mechanism where competitive fringe benefits and amenities are provided to each faculty member.

Plan at 2-3.

At the heart of the Plan is the requirement that any full-time faculty member in a clinical department who earns fees for direct patient care participate in the Plan. Although the faculty clinicians practice in separate professional associations paralleling the School's clinical departments, University Physicians, Inc. is the focal point of billing and other administrative functions; such centralization achieves economies of scale. The corporation is managed by a board of trustees comprising the Dean of the School of Medicine and the chairmen of the various clinical departments. Articles of Incorporation ¶6. "Each person who holds full-time or part-time faculty appointment in a clinical department of the School [and who] receives a salary for patient care which is set by the Dean of the School and approved by the Chancellor ... shall be a member of [University Physicians]." Bylaws Article II, §1.

The fees that the physicians earn are to be disbursed in accordance with the Plan. That is, the fees are pooled and are allocated in specified ways. Seven and a half percent of the gross is allocated to the Dean of the School of Medicine, to be used for the School's operational support, and another 1.5% goes to a trust fund for special projects. Plan at 7-8. The balance of the pooled fees is then to be used to defray the operating costs associated with the faculty members' fee-for-service practice and to augment the salary of faculty members (the latter in amounts approved by the University). Plan at 8. Finally, the remainder of the fee income is allocated to the departments in the School of Medicine, for the support of their education and research mission, and to an account "for incentive practice income and supplemental fringe benefits." Plan 8-9. We are told that, in fiscal year 1991, the School and its departments derived over \$17.5 million under the Plan.

## II

### Legislative Auditor Access

SG §2-1218(a) provides as follows: “Except as prohibited by the federal Internal Revenue Code, during an audit, the employees of the Division of Audits shall have access to and may inspect the records, including those that are confidential by law, of any unit of the State Government or of a person or other body receiving State funds, with respect to any matter under the jurisdiction of the Division of Audits.” The “jurisdiction of the Division of Audits” is broad: “[I]n general terms the Legislative Auditor has broad authority to inquire into the performance of State agencies and to examine their records in making an assessment of their performance.” 63 *Opinions of the Attorney General* 453, 455 (1978). We have described SG §2-1218(a) as affording “those conducting an audit ... a comparably broad right of access to records.” 76 *Opinions of the Attorney General* 287, 290 (1991).

This “broad right of access,” however, is limited by the statute to two categories of recordholders – “any unit of the State government,” or any “person or other body receiving State funds.” The question, then, is whether University Physicians, Inc. falls within either category.<sup>6</sup>

#### A. *Unit of State Government*

The term “unit of State government” is used throughout the State Government Article but is not defined. The Revisor’s Note explains that “[t]he term ‘unit’ is used as the general term for an organization in the State government, because it is broad enough to include all such entities.” General Revisor’s Note to Article, State Government Article at 428 (1984).

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<sup>6</sup> If the corporation is a “unit of the State government,” it would be not only required to disclose its records to the Division of Audits but also subject to audit by the Division under SG §2-1215(a)(2). If it is not a unit of State government, it is not subject to audit, for it is not “a corporation ... to which the General Assembly has appropriated money from the State Treasury.” SG §2-1215(b).

That the Corporation would not itself be subject to audit under SG §2-1215 does not foreclose the possibility that its records would be open to inspection under SG §2-1218(a). That is, if the Division of Audits were conducting an audit of a unit of State government (the University) and if the corporation were a recipient of State funds (albeit unappropriated funds), the corporation’s records would be open to the Division of Audits. In Part IIB below, however, we conclude that the corporation is not a recipient of State funds.

University Physicians, Inc. is a non-profit, private corporation incorporated in 1983 for charitable, scientific, and educational purposes. In form, then, it is not a “unit of State government.”

The corporate form is not dispositive, however. *See Moberly v. Herboldsheimer*, 276 Md. 211, 345 A.2d 855 (1975). *Cf. 77 Opinions of the Attorney General* 173, 178 (1992) (a “corporation can be treated as a unit of State government even if not created by statute”). Nor is there a litmus test. “All aspects of the interrelationship between the State and the ... entity must be examined in order to determine its status.” *A. S. Abell Pub. Co. v. Mezzanotte*, 297 Md. 26, 35, 464 A.2d 1068 (1983).<sup>7</sup>

Applying the “unit of State government” rubric to the University Physicians, Inc. poses uniquely difficult problems. The corporation, or more exactly the Medical Service Plan that is its *raison d’etre*, is both intimately linked to the public purposes of the School of Medicine and yet designed to regulate the private interest of faculty clinicians in earning competitive incomes. Given this dual function, the corporation may not be susceptible to the same analysis as State-created entities that are unconcerned with the private employment of State employees.

For example, ordinarily we would give considerable weight to the fact that the corporation’s board of trustees is composed entirely of State employees. *See Mezzanotte*, 297 Md. at 38. *See also 76 Opinions of the Attorney General* 59 (1991) Director and staff of Maryland Environmental Trust are State employees). *Cf. 77 Opinions of the Attorney General* at 180 (1992) (board of Maryland Corporate Partnership, Inc. composed primarily of individuals from outside State government). In this instance, however, that fact is of little analytical importance, because an entity that exists to regulate the private employment of State employees could hardly be governed by outsiders.

Enumerating the links between the corporation and the School of Medicine, via the medium of the Plan, would merely prove what no one could deny: The corporation is closely linked to the School. Indeed, the corporation’s basic documents recite that its purposes include “improving and developing the quality of medical education at the University of Maryland School of Medicine through the operation and maintenance of the Medical Service Plan ... [and] assisting the School in remaining competitive with other medical schools in order to continue the high degree of excellence in the pursuit of academic and clinical education ....” Articles of Incorporation ¶3(a); Bylaws Article I, §2. As described in Part

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<sup>7</sup> In both *Moberly* and *Mezzanotte*, the entities were created by statute. This fact, while undoubtedly relevant, is not itself dispositive. *Cf. 77 Opinions of the Attorney General* 178 (1992).

I above, the Medical Service Plan provides substantial funding to the School and its departments.

Nevertheless, the corporation, like the Medical Service Plan itself, reflects an accord between the school and its faculty to regulate the faculty's *private* practice. The faculty clinicians engage in private practice because they cannot otherwise achieve competitive incomes and because, from the School's point of view, they cannot effectively teach what they do not practice. Since the faculty want to be affiliated with a high-quality medical school, they have agreed to share their fees with the School and to be governed by the School in the conduct of their private practices. But, in our view, these accords do not transform a private corporation that operates the faculty's private practice into a "unit of State government."<sup>8</sup>

### ***B. Recipient of State Funds***

The corporation's records would be accessible to the Division of Audits if the corporation were "receiving State funds." In our view, however, the fees collected and held by the corporation prior to their disbursement to the School of Medicine are private funds that in part later become State funds; they are not State funds when held by the corporation.

This conclusion follows from our analysis of the Medical Service Plan and University Physicians, Inc. Because we view the Plan and the corporation as methods by which the faculty have organized their private practice, subject to close regulation by the School of Medicine, the fees that they earn under the Plan are earned in their private capacity, not in their capacity as State employees.

In their capacity as teachers at the University, the faculty clinicians receive funds from two main sources: appropriated State funds and payments under the Plan that, upon receipt by the University, become State funds.<sup>9</sup> In their capacity as physicians providing services for fees to private patients, the faculty clinicians receive payments that flow to the corporation and that in part are used for wholly private purposes – defraying the operational costs of the physicians' private practice. When a patient, or, more likely, a third-party payor, sends money to the

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<sup>8</sup> Our conclusion is consistent with that of the Comptroller's office, which determined that "the Medical Service Plan was not meant to be part of the entity of the University of Maryland." Letter from Arnold G. Holz, Director of the General Accounting Division, to Dr. John S. Toll, President of the University of Maryland (March 31, 1983).

<sup>9</sup> Some clinicians are also awarded federal and other research grants.

corporation to pay a bill rendered by a physician who is also a faculty member, the money is simply a medium of exchange in the private transaction.<sup>10</sup> That the use of the money is subject to University-ordained regulation pursuant to the Plan and will subsequently be partially disbursed to the School of Medicine no more makes the money "State funds" at that point than a statute requiring the physician to withhold and remit a portion of the money to the State for employees' income tax.

In short, University Physicians, Inc. in this respect is like any other fundraising foundation affiliated with the University: The money generated by a foundation, whether through traditional solicitation or the provision of professional services, is private money until the fundraising entity transmits it to the University. Only then does the money become "State funds."

### III

#### Authority of Board of Regents

You asked whether the Board of Regents of the University of Maryland System has the authority to approve the Medical Service Plan.<sup>11</sup>

Under §12-104(b)(1) of the Education Article ("ED" Article), the Board of Regents "[i]s responsible for the management of the University of Maryland System and has all the powers, rights, and privileges that go with that responsibility, including the power to conduct or maintain any institutions, schools, or departments in the University at the locations the Board determines." The Board also has "all the powers of a Maryland

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<sup>10</sup> The line-drawing in this area is difficult, to say the least. This office has advised that fees paid by patients at a clinic operated by the University of Maryland School of Dentistry are "moneys of the State." Letter from Attorney General Curran to Dr. James A. (Dolph) Norton (July 2, 1990). At the Dental School clinic, students were the primary caregivers to patients, and the students performed these services to satisfy a curriculum requirement. Here, by contrast, the teacher-physicians are rendering services in their private capacity, not in their capacity as University faculty members; the fact that medical students observe the physicians (without themselves performing billable services) does not transform these privately earned fees into public funds.

<sup>11</sup> Your question was phrased somewhat more generally, inquiring whether the Board of Regents has authority to approve the creation of affiliated entities like University Physicians, Inc. Because these issues are best dealt with in light of particular facts, we limit our opinion to the authority of the Board of Regents to approve the Medical Service Plan that led to the incorporation of University Physicians, Inc.

corporation which are not expressly limited by law.” ED §12-104(b)(3). *See also* ED §12-104(c). In addition, the Board of Regents is to “establish general standards and guidelines governing the appointment, compensation, advancement, tenure, and termination of all faculty and administrative personnel in the University of Maryland System.” ED §12-110(a)(1). These “standards and guidelines” may be tailored in order to “recognize the diverse missions of the constituent institutions.” ED §12-110(a)(2). Finally, under the General Corporation Law, a Maryland corporation (and therefore, by virtue of ED §12-104(b)(3), the Board of Regents) has broad authority to make contracts, accept personal property including money, and “adopt and carry into effect employee ... benefit plans.” §2-103(5), (8), and (14) of the Corporations and Associations Article.

The Plan directly promotes the interests of the School of Medicine. The Plan not only generates sizeable sums for the School and its departments but also promotes clinical instruction and fosters faculty commitment by preventing private practice from becoming all-consuming. Given the beneficial effects of the Medical Service Plan for the School of Medicine, we have no doubt that the Board of Regents acted within the scope of its statutory authority when it approved the Plan. *See generally* 77 Opinions of the Attorney General 173 (1992).

We should not be taken as broadly endorsing the Board’s authority to devolve the conduct of faculty responsibilities to private corporations. The key to our thinking on all of the questions that you posed is that direct patient care by faculty clinicians has been defined by the faculty and School of Medicine together as beyond the scope of the faculty’s responsibility to the University, though plainly the *consequences* of that private clinical practice are important to the School and so the private practice is extensively regulated. Under different facts, our answers might well be different.<sup>12</sup>

## IV

### Conclusion

In summary, it is our opinion that:

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<sup>12</sup> Further, we do not address any issues that might arise under the Maryland Public Ethics Law. Interpretations of that law are the prerogative of the State Ethics Commission.

1. SG §2-1218(a) does not authorize the Division of Audits to obtain access to the records of University Physicians, Inc., or the professional associations affiliated with it.

2. The Board of Regents of the University of Maryland System was authorized by law to approve the Medical Service Plan of the University of Maryland School of Medicine.

J. Joseph Curran, Jr.  
*Attorney General*

Jack Schwartz  
*Chief Counsel*  
*Opinions & Advice*

**HEALTH****COMMUNICABLE DISEASES – HEALTH OCCUPATIONS – MORTICIANS  
– CIVIL RIGHTS AND DISCRIMINATION – DISABILITY –  
DISCRIMINATORY PRACTICES INVOLVING BODIES INFECTED  
WITH HIV**

June 9, 1992

*Mr. Erich March*  
*President, Board of Morticians*

Your predecessor, Mr. Robert Foard, asked our opinion on the scope of §7-317(a)(27) of the Health-Occupations Article (“HO” Article), which subjects a licensed mortician to disciplinary action for “discriminat[ing]” against an individual who is infected with the human immunodeficiency virus (“HIV”). Specifically, Mr. Foard asked whether certain practices would constitute actionable discrimination under HO §7-317(a)(27). These practices can be stated in the following factual examples:

Case A: A funeral home that normally embalms bodies, upon learning that the deceased was HIV-positive, tells the next-of-kin that it will make funeral arrangements but will not embalm the body. The funeral home refers the next-of-kin to another funeral home if there is to be an embalming and a viewing.

Case B: A funeral home, upon learning that the deceased was HIV-positive, accepts the body for final disposition but contracts the embalming out to another mortuary service and adds the extra cost to the bill. If the deceased were not HIV-positive, the funeral home would do the embalming.

Case C: A funeral home informs the potential client that it will impose an extra charge for “handling” an HIV-positive body to be cremated.

Case D: A funeral home states on its price list that embalming any body with a contagious disease entails an extra charge for contagious disease equipment.

Case E: A funeral home, which normally embalms autopsied bodies, refuses to embalm an autopsied body that has a contagious disease and sends the body to another mortuary service, adding an extra charge to the bill.

For the reasons set forth below, we conclude that all five cases constitute prohibited discrimination under HO §7-317(a)(27). Additionally, these practices violate the Maryland Public Accommodations Law and the Americans with Disabilities Act.

## I

### Background

The letter requesting our opinion describes in detail the process involved in embalming a body. Unquestionably, this is a highly invasive procedure that exposes an embalmer to risks of cuts and needle pricks. As the letter indicates, embalming an autopsied body poses a much more significant risk, because the embalmer is exposed to open body cavities, jagged bone edges, and bone slivers; moreover, for autopsied bodies the embalmer must perform 200 stitches with a needle to close the body cavity.

Understandably, these procedures cause concern to the morticians handling a body infected with a contagious disease, particularly AIDS. Accordingly, on September 12, 1990, the Board of Morticians adopted Guidelines for the Control of Human Immunodeficiency Virus Infection, as set forth by the Maryland Governor's Advisory Council on AIDS in May of 1989. Those guidelines state that since the majority of persons who are infected with HIV have no symptoms, the embalmer must consider every case as potentially infectious and therefore must exercise precautions including wearing "disposable double gloves, masks, goggles, gowns, waterproof aprons and waterproof shoe coverings." *Guidelines for Control of the Human Immuno-deficiency Virus, Governor's Council on AIDS* at 47 ("HIV Infection Control"). However, because these guidelines were not formally adopted as regulations of the Board of Morticians, compliance is voluntary, not mandatory. See *76 Opinions of the Attorney General* 3, 6 (1991). Hence, you indicate that, in general, morticians who embalm bodies thought to be infected use greater precautions than when they embalm bodies not thought to be infected, despite the obvious risk of such a practice.<sup>1</sup>

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<sup>1</sup> A mortician is not always informed that the deceased was infected with a contagious disease. Sometimes the fact of infection might not be known at all.

Indeed, as the letter explains, a mortician performing an autopsy on a noninfected body ordinarily wears street clothes, covered with an apron, two pairs of plastic gloves, and goggles. In contrast, when embalming an infected body, the mortician wears a disposable coverall garment designed to protect the embalmer from any accidental exposure to infected body fluids. Additionally, the embalmer takes special precautions with the body. These precautions include use of a disposable body pouch, a protective garment on the remains to contain any leakage of body fluids from incisions, and a fortified embalming solution to maximize disinfection. Waste from an infected body must be disposed of by the use of a certified medical waste disposal company. Finally, a transparent veil is placed on the open portion of the coffin to protect a viewer against exposure to any potentially infectious fluids that might have leaked from the orifices.<sup>2</sup> Your predecessor suggested that these added precautions result in an increase in costs that should be passed on to the consumer.

## II

### Discrimination on Basis of HIV Status

In 1989, the General Assembly enacted Chapter 789 of the Laws of Maryland, titled “Human Immunodeficiency Virus – Omnibus Bill,” a wide-ranging bill that, among other things, sought to protect people infected with HIV from discrimination by health care providers.<sup>3</sup> One provision of that legislation, codified as HO §7-317(a)(27), provides as follows:

Subject to the hearing provisions of §7-318 of this subtitle and except as to a funeral establishment license, the Board [of Morticians] may deny a license to any applicant, reprimand any licensee, place any

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<sup>2</sup> HIV is transmitted from person to person “by sexual contact, by contact with contaminated needles, from mother to baby, by transfusion of infected blood or blood products, and from infected blood or bloody body fluids in contact through breaks in the skin or mucous membranes.” *HIV Infection Control* at 1. The Governor’s Advisory Council reports “no documented spread of HIV by ordinary household, social or office contacts.” *Id.* Thus, a person simply viewing a body is at no risk. Moreover, as we understand it, once a body has been embalmed there is virtually no risk of transmission even if there were direct contact.

<sup>3</sup> Other provisions of Chapter 789 were intended to provide information and protection to those at risk of infection and to set forth guidelines for health care workers with regard to counseling, testing, and notification. Additionally, Chapter 789 made it a crime for an individual to knowingly transfer HIV to others and approved attendance at AIDS education programs as a sentencing option.

licensee on probation, or suspend or revoke any license if the applicant or licensee:

...

(27) Refuses, withholds from, denies, or discriminates against an individual with regard to the provision of professional services for which the licensee is licensed and qualified to render because the individual is HIV positive.

In our view, HO §7-317(a)(27) is clear in its mandate: A mortician is subject to disciplinary action if the mortician “discriminates” against an individual who is HIV-positive. Absent any indication that the General Assembly intended a special or unusually narrow meaning of the key term “discriminates,” we give the term its natural and ordinary meaning. See *Washington National Arena v. Comptroller*, 308 Md. 370, 375, 519 A.2d 1277, 1280 (1987). “Discrimination” means “a failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored.” *Baker v. California Land Title Co.*, 349 F. Supp. 235, 239 (C.D. Cal. 1972).

As we shall explain, the refusal to treat, or the imposition of higher costs for treating, an HIV-positive or otherwise infected body constitutes discrimination in violation of HO §7-317(a)(27). There is no reasonable basis in science or law for treating HIV-positive bodies differently than bodies thought to be noninfected.

While this opinion request was pending, the General Assembly enacted Chapter 154 (House Bill 388) of the Laws of Maryland 1992, which amends HO §7-317(a) to add the following new ground for discipline, if the licensee:

(28) Except in an emergency life-threatening situation where it is not feasible or practicable, fails to comply with the Centers for Disease Control’s guidelines on universal precautions.

The reference is to Centers for Disease Control (“CDC”), *Recommendations For Prevention of HIV Transmission in Health Care Settings*, 36 Morbidity and Mortality Weekly Rep. (“MMWR”) 1 (1987); 36 MMWR 377 (1988). The guidelines adopted by the Governor’s Advisory Council on AIDS are virtually identical to those promulgated by the CDC.

According to the concept of universal precautions embodied in these guidelines, *all* human blood and certain human body fluids are treated as if known to be infectious for HIV, hepatitis B virus ("HBV"), and other bloodborne pathogens. The CDC guidelines specifically promote the use of universal precautions by morticians. *See* 36 MMWR at 8.

Chapter 154 makes mandatory practices that were previously voluntary and precludes a mortician from taking different precautions with an infected body than a body not thought to be infected. In short, morticians are legally obligated to don the protective clothes and adopt the protective procedures that have previously been used only when the mortician *knew* a body was infected. Failure to observe universal precautions with all bodies may subject a mortician to discipline.

Additionally, we direct your attention to regulations recently adopted by the Occupational Safety and Health Administration of the federal Department of Labor ("OSHA") and thereafter adopted by the Maryland Occupation Safety and Health Office. *See* 56 Fed. Reg. 64175 (December 6, 1991); 19:10 Md. R. 930 (May 15, 1992); 19:6 Md. R. 682-684 (March 20, 1992). These regulations are intended to reduce occupational exposure to HIV, HBV, and other bloodborne pathogens by requiring health care workers to observe universal precautions. Under these regulations, all human blood and body fluids are to be treated as if infected. 29 C.F.R. §1910.1030(b). These regulations require engineering and work practice controls to be implemented and personal protective equipment to be used. This personal protective equipment includes gloves, gowns, laboratory coats, face shields or masks and eye protection, and mouth pieces. Personal protective equipment will be considered "appropriate" only if it does not permit blood or other potentially infectious materials to pass through to or reach the employee's work clothes, street clothes, undergarments, skin, eyes, mouth, or other mucus membranes under normal conditions of use and for the duration of time that the protective equipment will be used. 29 C.F.R. §1910.1030(d)(3). These regulations do not permit a mortician to treat a body known to be infected differently than any other body.

Turning to the specific cases in your predecessor's letter, we are told that Board members generally agree that Case A - refusal to embalm - violates the statute. We are in accord. Unquestionably, embalming is a fundamental service provided by a funeral home.<sup>4</sup> Accordingly, a mortician's refusal to embalm because the deceased was HIV-positive is

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<sup>4</sup> Indeed, to be licensed as a mortician, an applicant must pass a written and practical examination demonstrating an ability to embalm. HO §7-305(d); COMAR 10.29.02.03.

both a refusal to provide services and “discriminat[ion]” prohibited by HO §7-317(a)(27).

Cases B and C present a slightly different problem. In these two cases, the mortician either contracts out the embalming to a different funeral home, charging a higher fee, or charges an additional “handling” fee if the body is to be cremated. These practices, too, constitute discrimination. In both cases, the mortician would be taking actions that increase the cost of the service solely because the deceased was HIV-positive.

An analogy to federal law is instructive. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, provides in general that “[n]o otherwise qualified individual with handicaps ... shall, solely by reason of his or her handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance ....” 29 U.S.C. §794(a).<sup>5</sup> The Rehabilitation Act imposes an affirmative duty upon a doctor or an institution to treat an “otherwise qualified” handicapped individual. If a refusal to treat were based solely on the handicap, the refusal may violate the Act. See *Glanz v. Vernick*, 750 F. Supp. 39 (D. Mass. 1990) (patient for surgery infected with HIV was “otherwise qualified”; refusal to treat actionable under the Rehabilitation Act).<sup>6</sup>

The goal of HO §7-317(a)(27) is analogous to that of the Rehabilitation Act: to prohibit discrimination against people infected with HIV and those who seek funeral services on their behalf. Embalming is a fundamental service provided by a mortician, and a mortician’s refusal to provide this service solely because the deceased was HIV-positive is unjustifiable discrimination.<sup>7</sup> Additionally, since morticians are required to employ universal precautions with all bodies, there is no rational basis for charging a higher “handling” fee to the family or friends of the deceased because the body was HIV-positive.

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<sup>5</sup> We are not suggesting that funeral homes in this State are subject to the Rehabilitation Act. Individual morticians should direct inquiries to their counsel to determine whether the Act applies to them.

<sup>6</sup> Of course, HIV status may be relevant to a determination of whether treatment is advisable. See, e.g., *Doe v. New York University*, 666 F.2d 761, 767 (2d Cir. 1981).

<sup>7</sup> We recognize that nonpretextual circumstances may arise that legitimately warrant contracting out embalming work – for example, staff shortages. Contracting out the embalming of an HIV – positive deceased does not violate HO §7-317(a)(27) if the reason for doing so is unrelated to the deceased’s HIV status.

We do recognize that adopting universal precautions may ultimately increase a mortician’s cost of doing business. We are not suggesting that this increase in operating costs may not be passed on to the consumer. However, increased costs associated with universal precautions should be passed on to the universe of consumers, not to the small subset of consumers seeking services for those known to be infected with HIV.

Finally, cases D and E too constitute discrimination under HO §7-317(a)(27). In these cases, the funeral home does not specifically single out HIV-infected bodies for disparate treatment but rather lumps together all bodies infected with any contagious disease and either charges an additional “handling” fee or contracts the embalming out to another funeral home.

In Case D, the increased fee is for additional contagious disease equipment. In light of newly enacted HO §7-317(a)(28) and the pertinent OSHA and MOSH regulations, such equipment is required with *all* bodies. Thus, the additional fee is unnecessary and discriminatory.<sup>8</sup>

In our view, it makes no difference that HIV is not being singled out. While on its face treating all contagious diseases alike does not appear to discriminate specifically against HIV-positive individuals, the effect of the categorization is the same: A person who is HIV-positive suffers from discrimination solely because of that fact. In our view, such disparate treatment amounts to discrimination under HO §7-317(a)(27).

A similar analysis applies to Case E. Assuming that the funeral home is qualified to perform embalming services, which presumably it is as a consequence of licensure, HO §7-317(a)(27) does not allow the funeral home to contract out and charge more for that service solely because a body is categorized as contagious. The net effect, like in Case D, is that an additional charge for a service is imposed solely because of the fact that a body is HIV – infected.

### III

#### Public Accommodations Law

We have been advised by counsel to the Maryland Human Relations Commission that Article 49B’s prohibition of discrimination in public accommodations based on handicap applies to funeral homes. Article 49B, §5. HIV infection is a “handicap,” according to the Human Relations

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<sup>8</sup> Charging an additional fee only to families of contagious decedents in all likelihood also violates the Americans With Disabilities Act. See Part IV below.

Commission. COMAR 14.03.02.02. *See generally* 76 *Opinions of the Attorney General* 260, 273 (1991).

In pertinent part, a public accommodation is defined as “a retail establishment, whether offering goods, services, entertainment, recreation, or transportation.” Article 49B, §5(d)(1)(iii). Since a funeral home provides services to consumers, the Human Relations Commission maintains that a funeral home is a public accommodation within the meaning of the Public Accommodation Law and thus is subject to the jurisdiction of the Human Relations Commission. We agree.

Indeed, a similar approach was applied by the New York Human Relations Commission in *Dimiceli and Sons Funeral Home v. New York City Comm'n on Human Rights*, No. 19527/86 (Sup. Ct. January 9, 1987), reprinted in *New York Law Journal*, January 14, 1987, at 12. In this case, also involving discrimination against persons infected with HIV, the trial court upheld a New York Human Relations Commission decision that a funeral home's practice of inflating fees for services and requiring families of the deceased to pay for “unnecessary” precautions was discrimination under the New York Human Rights Act. In *Dimiceli*, the defendants did not deny that HIV infection was a “handicap” under the applicable statute, but rather argued that the term “physically handicapped” did not encompass those persons who are already dead. The court, rejecting that argument, wrote as follows:

There is adequate precedent for affording the individual dignity and freedom from discrimination not only in those activities and services performed during one's life, but also in those activities and services performed at one's death.

*New York Law Journal* at 12. *See also Pennsylvania Human Relations Comm'n v. Alto-Rest Park Cemetery Assoc.*, 453 Pa. 124, 306 A.2d 881 (1973) (nonsectarian cemeteries were places of public accommodation under the Pennsylvania Human Relations Act).

Accordingly, not only would the five practices that you presented to us violate HO §7-317(a)(27), they would also be actionable under Article 49B, §5.

## IV

**Americans With Disabilities Act**

Title III of the Americans With Disabilities Act (“ADA”), 42 U.S.C. §12181 *et seq.*, prohibits discrimination against persons with disabilities in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation. 42 U.S.C. §12182. HIV infection, whether or not it has developed into AIDS, is a “disability” under the ADA. 28 C.F.R. §36.104. A funeral parlor is expressly included within the definition of “public accommodation.” 42 U.S.C. §12181(7)(F). Although in this situation the deceased is the disabled individual, the ADA prohibits discrimination against an individual because of the individual’s association with someone else known to be disabled. 42 U.S.C. §12182(b)(1)(E); 28 C.F.R. §36.205. Thus, the family or friends of the deceased, as the victims of discrimination, would have standing to bring an action.

Under the ADA a funeral home is to make reasonable modifications in policies, practices, and procedures to avoid discrimination. 42 U.S.C. §12181(b)(2)(A)(iii). While the issue is subject to debate, in our view adherence to universal precautions by morticians, in lieu of special precautions when a body is thought to be HIV-positive, is precisely the type of reasonable change in practice to avoid discrimination that the ADA contemplates. Funeral homes may only be excused from compliance if they can demonstrate that taking such steps would result in an “undue burden.” 42 U.S.C. §12182(b)(2)(A)(iii). It is unlikely that the use of added precautions such as disposable gloves is a demonstrably undue burden, particularly in light of newly enacted HO §7-317(a)(28), which mandates the use of universal precautions.

Finally, ADA regulations prohibit a public accommodation from imposing a surcharge on a particular individual or group of individuals with a disability to cover the costs of reasonable modifications in policies, practices, and procedures, if such modifications are required to provide that group with the nondiscriminatory treatment required by the ADA. 28 C.F.R. §36.301(c). Consequently, the imposition of a surcharge or “handling fee” for an HIV-infected body would be actionable under the ADA. The vice is not passing on added costs, but rather forcing people with a particular disability, HIV infection, to bear a disproportionate share of those costs. The cost of universal precautions should be treated as just another cost of doing business, spread among all of an establishment’s customers.

## V

**Conclusion**

In summary, it is our opinion that the funeral home practices involving a refusal of service to, or the imposition of higher charges on, HIV-positive individuals, including the five examples identified in your predecessor's request to us, violate HO §7-317(a)(27). Moreover, all five practices also violate the Maryland Public Accommodations Law and the Americans With Disabilities Act.

J. Joseph Curran, Jr.  
*Attorney General*

Mary O'Malley Lunden  
*Assistant Attorney General*

Jack Schwartz  
*Chief Counsel*  
*Opinions and Advice*

***Editor's Note:***

The provision discussed in this opinion was recodified at HO §7-316 by Chapter 155 of the Laws of Maryland 1992.

**HEALTH - MEDICAID - STATUTORY CONSTRUCTION -  
CONSTITUTIONAL LAW - PROPOSED PHARMACEUTICAL REBATE  
REGULATIONS ARE LAWFUL**

August 13, 1992

*The Honorable Paula C. Hollinger  
The Honorable Kenneth H. Masters  
Committee on Administrative, Executive,  
and Legislative Review*

You have requested our opinion regarding the statutory authority for, and constitutionality of, proposed emergency regulations of the Department of Health and Mental Hygiene ("Department") that generally restrict the coverage of drugs under two State-funded health care programs to drugs manufactured by pharmaceutical companies that provide certain rebates to the State.

You asked that, during our review of the statutory authority of the Department, we consider in particular whether the Department's authority is affected by the failure of bills proposed in the 1991 and 1992 Sessions that would have provided the Department with specific statutory authority to require rebates in the two programs at issue. Further, regarding the constitutionality of the regulations, you asked whether the "pharmacy rebate program [is] an unconstitutional usurpation of the power to tax, which is reserved to the General Assembly under Article 14 of the Maryland Declaration of Rights, and therefore [violates] ... the doctrine of separation of powers contained in Article 8 of the Maryland Declaration of Rights."

For the reasons stated below, we conclude as follows:

1. The Department of Health and Mental Hygiene has statutory authority to adopt the proposed regulations on pharmaceutical rebates.
2. The proposed regulations do not violate Article 14 of the Maryland Declaration of Rights and are not otherwise unconstitutional.

## I

**Background**

The Maryland Medical Assistance Program comprises two parts. One part, referred to as the federal/State program or “Medicaid,” is funded by both the federal and State governments and is subject to federal and State statutes and regulations. The other part of the Maryland program is referred to as Medical Assistance State-Only (“MASO”). The State provides all funding for MASO and is its sole architect. *See generally 75 Opinions of the Attorney General 241, 242 (1990)*. A third program, the Pharmacy Assistance Program, is also funded entirely by the State and subject only to State law. During fiscal year 1991, MASO and the Pharmacy Assistance Program spent \$19.5 million on prescription drugs.

Currently, federal law conditions coverage of most prescription drugs in the Medicaid Program on drug manufacturers’ providing rebates to the states. Section 1927(a) of the federal Social Security Act, with limited exceptions, makes Medicaid coverage of drugs conditional on the manufacturers’ entering into rebate agreements with the federal Department of Health and Human Services on behalf of the states. 42 U.S.C. §1396s(a). Under the agreement, manufacturers must provide quarterly rebate payments to the States, calculated in accordance with Section 1927(c) of the Social Security Act, 42 U.S.C. §1396s(c).<sup>1</sup> Under Section 1927(a)(3), rebate agreements are excused only when, among other conditions, “the State has made a determination that the availability of the drug is essential to the health of beneficiaries under the State plan for medical assistance.”

The Department’s proposed emergency regulations are modeled on the federal rebate program for Medicaid.<sup>2</sup> The Department’s regulations

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<sup>1</sup> Section 1927(c)(1) provides for a “basic rebate” amount, which is generally proportional to the greater of either a particular percentage of the average manufacturer price or the difference between the average manufacturer price and best price for the drug. Section 1927(c)(2) goes on to provide an “additional rebate” amount.

<sup>2</sup> The emergency regulations for MASO at COMAR 10.09.03.05-1 state as follows:

A drug in this program is not covered for State-Only recipients if:

(A) the manufacturer has not provided the same rebate to the State for State-Only and Pharmacy Assistance recipients’ purchases of drugs as is required under Section 1927(c)(1) of the federal Social Security Act (42 U.S.C. §1396s(c)(1));

(continued...)

would authorize the Secretary to limit coverage of drugs in the Medical Assistance State-Only and Pharmacy Assistance Programs to (i) drugs produced by manufacturers that provide the same “basic rebate” provided under Section 1927(c)(1) to the MASO and Pharmacy Assistance Programs;<sup>3</sup> and (ii) other drugs the availability of which has been determined by the Secretary to be essential to the MASO and Pharmacy Assistance Program recipients.

## II

### Statutory Authority

“[A]gency rules and regulations must be reasonable and consistent with the letter and spirit of the law under which the agency works.” *Department of Transportation v. Armacost*, 311 Md. 64, 74, 532 A.2d 1056 (1987). In this instance, “the law under which the agency works” gives the Department not only general rulemaking authority but also a broadly worded warrant to save tax dollars through its indirect purchase of drugs under the two programs.

In proposing the MASO and Pharmacy Assistance regulations for emergency status, the Department relies on statutory authority at, among other provisions, §§2-104(b) and 15-103.1 of the Health-General Article (“HG” Article).<sup>4</sup> HG §2-104(b)(1) provides the Secretary with authority “to adopt rules and regulations to carry out the provisions of law that are

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<sup>2</sup> (...continued)

(B) the Program has provided notice to the manufacturer of its failure to provide adequate rebates and its opportunity to request a waiver from the rebate requirement under (C) of this Regulation; and

(C) the manufacturer has failed to demonstrate to the Secretary that the drug’s availability is essential to State-Only recipients.

The wording of the proposed emergency regulations for the Pharmacy Assistance Program at COMAR 10.45.02.05-1 is quite similar.

<sup>3</sup> The Department’s rebate programs would not impose the “additional rebate” imposed under the federal Social Security Act at Section 1927(c)(2). *See* note 1 above.

<sup>4</sup> The Department also cites HG §15-103, which mandates the Secretary to administer the Maryland Medical Assistance Program; §15-105, which addresses reimbursement procedures; and §15-124, which mandates the Department to maintain a Pharmacy Assistance Program.

within the jurisdiction of the Secretary.” HG §15-103.1, enacted in 1989 as part of a set of amendments generally relating to the Medical Assistance Program, states simply: “The Program shall use its leverage as a high volume purchaser to promote the cost effectiveness of Maryland’s Health Care System.”

In determining whether this authority extends to the Department’s proposed pharmaceutical rebate programs, we seek “to ascertain and effectuate the legislative intention .... The language of the statute itself is the primary source of this intent; and the words used are to be given ‘their ordinary and popularly understood meaning, absent a manifest contrary legislative intention.’” *Privette v. State*, 320 Md. 738, 744, 580 A.2d 188 (1990) (citations omitted).

HG §15-103.1 supports the Department’s proposed regulations. By conditioning drug coverage on rebates to the MASO and Pharmacy Assistance Programs, the emergency regulations at issue reflect the Program’s use of its leverage as a high-volume purchaser to reduce the pharmaceutical costs to the two programs. According to the Department, the regulations will achieve savings of approximately \$2.5 million during the remainder of this fiscal year. The regulations thus “promote the cost effectiveness of” these State programs, two important components of Maryland’s health care system.<sup>5</sup>

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<sup>5</sup> Because the term “Program” is defined by HG §15-101(c) to mean the Maryland Medical Assistance Program, HG §15-103.1, read literally, only mandates that the Medical Assistance Program alone is to use its leverage to promote the cost-effectiveness of it and other health care programs. This narrow reading of §15-103.1 would lead to the conclusion that a cognate program like Pharmacy Assistance may not use *its* leverage to promote health care cost-effectiveness. In light of recent Court of Appeals’ decisions, however, a reading of §15-103.1 that would exclude Pharmacy Assistance should be rejected. In *Kazorowski v. City of Baltimore*, 309 Md. 505, 514, 525 A.2d 628 (1987), the Court of Appeals stated:

[T]he plain-meaning rule does not force us to read legislative provisions in rote fashion and in isolation. What we are engaged in is the divination of legislative purpose or goal. Indeed, as we have explained, the plain-meaning rule “is not a complete, all-sufficient rule for ascertaining a legislative intention ....” The “meaning of the plainest language” is controlled by the context in which it appears. (Citations omitted.)

Because the General Assembly intended HG §15-103.1 to encourage the cost-effectiveness of State-funded health care programs, the provision should not be read to exclude cost-effectiveness efforts such as those embodied in the emergency regulations for the Pharmacy Assistance Program at issue here. We arc “adopt[ing] that construction which avoids an illogical or unreasonable result, or one which is inconsistent with common sense.” *Tucker v. Fireman’s Fund Ins. Co.*, 308 Md. 69, 75, 517 A.2d 730 (1986).

Moreover, the legislative history of the bill that included HG §15-103.1 reflects concern about the high costs of drugs to the Program and consideration of pharmaceutical rebates to control costs. For example, a November 9, 1988 memorandum from Senator Barbara Hoffman, a member of the Special Joint Legislative Committee on the Medical Assistance Program involved in the development of the legislation, recognizes that “[t]he state is probably the largest purchaser of pharmaceuticals through our Medical Assistance Program and state hospitals, etc., but we don’t get a volume discount because our clients for the most part go to various pharmacies as individuals.” She goes on to discuss the implications of the State’s obtaining “a rebate on a quarterly basis from the drug manufacturers based on our volume purchases ....” Memorandum at 2. This legislative background buttresses a reading of the provision that authorizes the Department’s proposed regulations.

We have considered whether legislative action occurring after the enactment of HG §15-103.1 in 1989 undermines reliance on this statutory authority. In both the 1991 and 1992 Sessions, bills were introduced in the General Assembly that would have specifically authorized the Department to require rebates from pharmaceutical manufacturers as a condition of drug coverage in the MASO and Pharmacy Assistance Programs. In 1991, Senate Bill 493 was introduced in the Senate and referred to the Senate Finance Committee, where it never came to a vote.

House Bill 194 of 1992, a similar bill, passed unanimously in the House. It was then referred to the Senate Finance Committee. An amended version, which altered the rebate methodology and added other amendments limiting the Department’s authority to impose drug preauthorization requirements, passed the Senate. According to a July 9, 1992 memorandum from Jolie H. Matthews, Esquire, Committee Counsel to the Members of the AELR Committee: “House Bill 194 failed in the last few days of the 1992 Session because the House refused to concur in a set of amendments added to the bill by the Senate and the Senate never appointed a Conference Committee.”

In our view, the General Assembly’s failure to pass these bills does not affect the existing statutory authority for the emergency regulations on which the Department relies. Bills fail to pass for a host of reasons, some of which do not necessarily reflect disagreement with the substance of the legislation. A bill to confirm agency authority might be thought

unnecessary, for example.<sup>6</sup> In the case of House Bill 194 of 1992, the bill appears to have died because restrictive amendments were added.

In general, reliable conclusions as to the prior legislative intent for enacted legislation cannot readily be drawn from the subsequent failure of the General Assembly to enact proposed legislation.<sup>7</sup> As the United States Supreme Court said in *United States v. Wise*, 370 U.S. 405, 411 (1962):

[S]tatutes are construed by the courts with reference to the circumstances existing at the time of the passage. The interpretation placed upon an existing statute by a subsequent group of Congressmen who are promoting legislation and who are unsuccessful has no persuasive significance here .... Logically, several equally tenable inferences could be drawn from the failure of the Congress to adopt an amendment in the light of the interpretation placed upon the existing law by some of its members, including the inference that the existing legislation already incorporated the offered change.

(Citations omitted).

Moreover, the Department's role in promoting the proposed legislation is largely irrelevant, as well. "The advocacy of legislation by an administrative agency – and even the assertion of the need for it to accomplish a desired result – is an unsure and unreliable, and not a highly desirable, guide to statutory construction. The possibility of its use to prove more than it means may, but should not, deter administrative agencies from seeking helpful clarification of authority or a fresh and specific congressional mandate." *American Trucking Ass'ns, Inc. v. Atchison, T. & S.F. Ry. Co.*, 387 U.S. 397, 418 (1967).

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<sup>6</sup> Your request presents the issue of the effect of legislative failure to enact specific authority on a claim of existing general authority. In the "reverse" situation, where the General Assembly failed to enact a bill that would have repealed authority claimed to exist, the Maryland Court of Appeals found that such failure could be used to "buttress" a finding of existing statutory authority. See *Demory Brothers v. Board of Public Works*, 20 Md. App. 467, 473, 316 A. 2d 529 (1974), *aff'd*, 273 Md. 320, 329 A. 2d 674 (1974).

<sup>7</sup> To be sure, where there are serious doubts about statutory authority for an action, coupled with an agency's longstanding failure to act upon such authority, legislative rejection of amendments designed to provide specific authority may "strengthen" the conclusion that statutory authority is lacking. See *Bosley v. Dorsey*, 191 Md. 229, 60 A.2d 691 (1948). Here, by contrast, the Department relied upon legislation that was enacted relatively recently and that confers authority embracing the Department's proposed rebate programs.

In a case with a number of parallels to the facts at hand, the Pharmaceutical Manufacturers Association and other plaintiffs challenged regulations of the then-U.S. Department of Health, Education and Welfare to limit payment for prescription drugs for Medicare and Medicaid. In response to plaintiffs’ arguments that Congress had rejected bills that would have given specific authority to the Secretary of HEW to establish the regulatory program, a federal district court stated:

[U]nsuccessful attempts at legislation are not the best of guides to legislative intent .... Legislators may merely wish to make clear what form a program should take rather than leave its details to an administrator’s discretion. Similarly, the fact that Congress has failed to adopt HEW recommendations for specific limitations on drug reimbursement does not establish that such a proposal is excluded from a general provision on the subject.

*American Medical Ass’n v. Mathews*, 429 F. Supp. 1179, 1200 (N.D. Ill. 1977) (citation omitted). We reach the same conclusion here.

### III

#### Constitutionality

You asked if the rebate requirement is “an unconstitutional usurpation of the power to tax, which is reserved to the General Assembly by Article 14 of the Maryland Declaration of Rights ...” and is thus a violation of the separation of powers clause, Article 8 of the Declaration of Rights. We conclude that Article 14 is not violated by the proposed regulation.

Article 14 of the Declaration of Rights provides “[t]hat no aid, charge, tax, burthen or fees ought to be rated or levied, under any pretense, without the consent of the Legislature.” This clause was first adopted as part of the Constitution of 1776 and has undergone no substantive change in the succeeding constitutions. *See* Constitutional Convention Commission, *Constitutional Revision Study Documents* at 606-07 (1968). The clause was adopted as proposed to the Convention of 1776. *See Proceedings of the Convention of 1774, 1775, and 1776* at 296-97 and 310-12 (Lucas & Deaver ed. 1836). Thus, there is no documented history of the meaning of this limitation.

In our view, a State agency’s monetary gain in the ordinary course of commercial dealing is not a “tax” or “fee” within the scope of Article

14. The only reported case that deals in more than a summary fashion with Article 14, *State Roads Commission v. Postal Telegraph Cable Co.*, 123 Md. 73, 91 A. 147 (1914), supports our understanding of the scope of Article 14. In this case, the Court of Appeals held that even in the absence of legislative authorization, the State Roads Commission could charge a fee for the use of a bridge that the Commission had acquired from a private party. The private party had charged a fee for the use of the bridge and the Commission had the same right by contract as an assignee. This right was part of the consideration in the purchase of the bridge. 123 Md. at 76-7. In so ruling, the Court rejected the holding of the trial court that charging the fee violated Article 14. 123 Md. at 74 and 77.

While the scope of Article 14 remains unclear, the implication of the *Postal Telegraph* case is that Article 14 does not apply to a State agency that generates money in a commercial transaction concerning particular goods or services. The same distinction is commonly made in the definition of a tax. As the United States Supreme Court wrote many years ago:

Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens.

*Welch v. Henry*, 305 U.S. 134, 146 (1938). See also, e.g., *Meriwether v. Garrett*, 102 U.S. 472, 513 (1880).<sup>8</sup>

In our opinion, the rebate called for under the Department's proposed regulations is not a tax or other levy within the meaning of

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<sup>8</sup> A treatise summarizes the point this way:

The essential characteristics of a tax are that it is not a voluntary payment or donation, but an enforced contribution, exacted pursuant to legislative authority in the exercise of the taxing power, the contribution being of a proportionate character, payable in money, and imposed, levied, and collected for the purpose of raising revenue to be used for public or governmental purposes and *not as payment for some special privilege granted or service rendered.*

19 M.L.E. *Revenue and Taxation* §1, at 66 (1961) (emphasis added).

Analogously, in a recent opinion we distinguished the kind of "fees" encompassed by Article 14 – those "that a citizen must pay to receive a service that only a public officer can provide ..." – from those incident to commercial transactions. 76 *Opinions of the Attorney General* 95, 98 (1991).

Article 14. Rather, it is money that is generated as part of the consideration in the acquisition of particular goods. Essentially, the State is promising to continue to purchase drugs made by companies that refund part of the purchase price ultimately paid to them as manufacturers. Although it is true that the State and the pharmaceutical manufacturers do not contract directly with each other, nevertheless they have a commercial relationship through the distribution network for prescription drugs, and the rebate will simply be a cost of the manufacturers' doing business with participants in the two programs. The logic of the distinction drawn by the Supreme Court fully applies in this context: The rebate is not a tax.<sup>9</sup>

The proposed rebate requirement, in short, is not encompassed by, and therefore does not require express legislative approval under, Article 14 of the Declaration of Rights. Hence, the Department's proposed regulation does not usurp the General Assembly's prerogative to levy taxes, in violation of the separation of powers clause.

Moreover, as explained in Part II above, the General Assembly has delegated ample authority to the Secretary to establish the rebate program. Although the separation of powers clause generally requires that there be legislatively prescribed standards for the exercise of this kind of authority, "it has been recognized that the complexity of modern economic conditions may make it impossible to tailor specific guidelines for every conceivable situation and that latitude in granting discretion is necessary." *Governor v. Exxon Corp.*, 279 Md. 410, 440, 370 A.2d 1102 (1977), *aff'd*, 437 U.S. 117 (1978). The complexities of the health care market make greater legislative specificity virtually impossible in this instance.

#### IV

#### Conclusion

In summary, it is our opinion that:

1. The Department of Health and Mental Hygiene has statutory authority to adopt the proposed regulations on pharmaceutical rebates.

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<sup>9</sup> An alternative reason for rejecting the characterization of the rebate as a tax derives from the purpose of the rebate. "[T]he essential characteristics of a tax are that it is ... imposed, levied, and collected for the purpose of raising revenue ...." 84 C.J.S. *Taxation* §1b, at 32-33 (1954). The purpose of the rebate programs is not to raise State revenue but rather to reduce program costs incurred in covering drugs for MASO and Pharmacy Assistance recipients.

2. The proposed regulations do not violate Article 14 of the Maryland Declaration of Rights and are not otherwise unconstitutional.

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**INSURANCE****HEALTH - AUTHORITY OF INSURANCE COMMISSIONER OVER  
PROPOSED SALE BY BLUE CROSS AND BLUE SHIELD OF  
MARYLAND OF A MINORITY INTEREST IN A FOR-PROFIT  
SUBSIDIARY**

October 15, 1992

*Mr. John A. Donaho*  
*Insurance Commissioner*

You have requested our opinion on certain issues related to the sale by Blue Cross and Blue Shield of Maryland, Inc. ("Blue Cross") of an interest in certain for-profit subsidiaries. Specifically, you ask:

1. May Blue Cross create a new subsidiary corporation ("Newco") to operate Blue Cross's managed care subsidiaries, with the intent of selling a minority interest in Newco in an arms-length transaction?
2. May the Insurance Commissioner approve the contemplated sale of a portion of Newco, perhaps 20 percent, or the already consummated sale of a 20 percent interest in Greenspring Mental Health Services, Inc. and Greenspring Health Services, Inc. ("Greenspring"), for-profit corporations providing utilization review and managed care of mental health care services?

For the reasons stated below, we conclude as follows:

1. Blue Cross may create a new for-profit subsidiary, Newco, as a holding company for the managed care subsidiaries that Blue Cross currently owns.
2. The Insurance Commissioner may not approve the sale of a minority interest in Newco or Greenspring to private investors unless the Commissioner is satisfied that the duties imposed upon Blue Cross as majority shareholder would be compatible with its statutory duties to its health service plan subscribers.

**I****Operation of For-Profit Subsidiaries By Blue Cross**

Blue Cross is a “nonprofit health service plan” regulated under Subtitle 20 of Article 48A of the Maryland Code.<sup>1</sup> That is, Blue Cross is a “corporation without capital stock ... organized for the purpose of establishing, maintaining and operating a nonprofit health service plan whereby” certain health care services are provided to subscribers to the plan. §354(a). In exchange for certain regulatory and tax benefits granted to a Subtitle 20 corporation, Blue Cross must accept the limitations that are imposed by the statute on a Subtitle 20 corporation.

Many of these limitations are by no means self-evident from the statutory text. Since 1978, the Attorney General’s office has attempted to discern criteria that give meaning to the legislative objectives underlying Subtitle 20 and to apply them to an ever-changing array of subsidiary endeavors by Blue Cross.

We regard certain broad principles as settled, at least as far as the Attorney General’s Office is concerned:

1. Blue Cross may not engage in an insurance or other activity that is unrelated to the statutorily limited purpose of a Subtitle 20 corporation. 63 *Opinions of the Attorney General* 415 (1978). See *Woodyard v. Arkansas Diversified Ins. Co.*, 594 S.W.2d 13 (Ark. 1980); *Blue Cross of Southwestern Va. v. Commonwealth of Va.*, 338 S.E.2d 849 (Va. 1986). A business endeavor by Blue Cross is permissible only if it is “reasonably incidental” to one of the following:

(i) Establishing, maintaining and operating an insurance product or plan which provides for coverage of medical expenses of subscribers in which [Blue Cross] assumes the risk of loss;

(ii) The administration of a benefit plan through which an employer, government agency, or comparable entity provides, at its own risk of loss, for the coverage of medical expenses of employees or plan beneficiaries;  
or

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<sup>1</sup> Except as otherwise specified, all statutory references in this opinion are to Article 48A, the Insurance Code.

(iii) Other endeavors expressly authorized in, or regulated by, Subtitle 20, *e.g.* the operation of health maintenance organizations.<sup>2</sup>

Letter from Assistant Attorney General Francis X. Pugh to Deputy Insurance Commissioner Martha C. Roach, at 4 (September 16, 1988) ("1988 Advice Letter").

2. Blue Cross may invest in a business entity unrelated to its purpose as a nonprofit health service plan, so long as the investment is permitted by §359 and Blue Cross does not control or operate the unrelated entity. 63 *Opinions of the Attorney General* at 419; letter from Assistant Attorney General Francis X. Pugh to Insurance Commissioner John A. Donaho (July 7, 1989).

3. Blue Cross may "engage in profit-making activities that are within the scope of its operations as a nonprofit subscription health services plan." Letter from Assistant Attorneys General Francis X. Pugh and Robert deV. Frierson to Insurance Commissioner Edward J. Muhl, at 12 (January 2, 1987) ("1987 Advice Letter").

4. Blue Cross "may engage in corporate activities (profit and nonprofit) through subsidiaries that are reasonably incidental to its corporate purpose under Subtitle 20." 1987 Advice Letter at 13. Conversely, Blue Cross may not engage in an activity "without any attendant connection to the subscriber plan other than generation of profits for the effective administration of the ... plan ...." *Id.* at 15. *See also* letter from Assistant Attorney General Francis X. Pugh to Insurance Commissioner Edward J. Muhl at 4 (May 28, 1987). "[A]ny financing activities by [Blue Cross] and any other Subtitle 20 licensee must also meet the 'reasonably incidental' test. Clearly, a Subtitle 20 corporation may not engage in financing activities more broadly as if it were a bank or other financing institution." 1988 Advice Letter at 4 n. 7.

5. If a subsidiary activity is otherwise permissible and is operated to make a profit, the profitmaking endeavor may not "become so substantial that the Commissioner could determine that [Blue Cross's] purpose may no longer characterized as ... 'operating a nonprofit health service plan ....'" 1987 Advice Letter at 13.

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<sup>2</sup> Blue Cross is expressly authorized by §19-702(a)(3)(i) of the Health-General Article to operate health maintenance organizations.

## II

### Creation of Newco

Blue Cross currently owns and operates through subsidiaries certain “managed care” operations. These subsidiaries are: a health maintenance organization, Columbia Medical Plan; two other health maintenance organizations, FreeState and CareFirst, operated under single management; and a managed care company specializing in mental health care services and utilization review, Greenspring. All of these subsidiaries are operated to make profits. We assume, having heard no suggestion to the contrary, that the current operation of these subsidiaries is fully in accord with the limiting principles outlined in Part I of this opinion.

The questions that you raise are prompted by two events: the sale of a 20 percent interest in Greenspring to a different Blue Cross plan, operating in Western Pennsylvania; and a proposal by Blue Cross to create a new subsidiary, Newco, that would operate the managed care subsidiaries and attempt to sell a minority stake to outside investors. As we understand it, Newco’s directors would come from the ranks of Blue Cross’ directors, and Newco’s officers would be the people holding counterpart offices in Blue Cross. So, for example, the chief executive officer of Blue Cross would become the CEO of Newco.

In our view, there is no legal bar to your approval of the creation of Newco. As a general proposition, if Blue Cross may lawfully operate subsidiaries, it may also determine the corporate structure, including the formation of a holding company, that most effectively permits governance and operation of the subsidiaries. *See* 1987 Advice Letter at 14 n.15.<sup>3</sup>

This conclusion does not mark any retreat from the principles outlined in Part I of this opinion. The Insurance Commissioner continues to have the authority to define the limits of the profit-making aspect of the Blue Cross corporate structure:

Conceptually, the profit-making activities of [Blue Cross] could become so substantial that the Commissioner could determine that its purpose may no

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<sup>3</sup> There are limits to this generalization. In their advice letter, Assistant Attorneys General Pugh and Frierson cautioned against a holding company structure under which the Blue Cross parent “could become nothing more than a corporate shell providing all the benefits of Subtitle 20 while circumventing its prohibitions.” 1987 Advice Letter at 14 n. 15. The Newco proposal does not present this danger.

longer be characterized as “establishing, maintaining and operating a nonprofit health service plan ....” §354 in Subtitle 20. The determination of when this line is crossed so that [Blue Cross’s] purpose is altered rests within the sound discretion of the Commissioner upon a proper evidentiary record.

1987 Advice Letter at 13. Our point in this context is a simple one: If the activities to be encompassed by Newco collectively do not run afoul of this “substantiality” test – and we assume that they do not – then the creation of Newco itself does not alter the balance.

### III

#### Sale of Subsidiaries

Furthermore, in our view, the sale by Blue Cross of an interest in a for-profit subsidiary is not inherently unlawful. Rather, the Insurance Commissioner has the discretion to approve or disapprove the proposed transaction by assessing its nature and consequences.

If Blue Cross successfully operates a for-profit subsidiary, it will generate a future stream of profits. It basically has three choices about the use of those future profits. It can continue to own the subsidiary entirely and thereby retain fully both the future prospect of gain (and, of course, the risk of loss); it can borrow against the value of the subsidiary, a part of which would reflect an expectation about future profits; or it can extract all or part of the present value of the anticipated stream of profits by the sale of all or part of the subsidiary.

In the abstract, Subtitle 20 does not force Blue Cross to exclude any of these options from the exercise of its business judgment. The statute, for example, does not bar Blue Cross from selling all of its interest in a for-profit subsidiary or from selling enough of its interest so as to become an investor in the business instead of its operator (assuming that such an investment is legally permissible). Running a competitive business, even a regulated one, often involves decisions of this kind.

The sale of a minority interest in a subsidiary entails special problems, as we shall explain. But from Blue Cross’ perspective, it might also yield a significant benefit beyond the money derived from the sale itself. Blue Cross is required to maintain what we have termed a “surplus reserve,” which the Insurance Commissioner may require to be up to two months’ worth of the prior calendar year’s claims and operating expenses. *See* §355(b)(4) and (6). *See generally* letter from Attorney General J.

Joseph Curran, Jr. to Delegate Casper R. Taylor, Jr., (July 24, 1992). As we understand the situation, a bona fide sale in an arm's length transaction of a portion of a subsidiary might enable Blue Cross to assign a value to its remaining interest in the subsidiary that could be recognized as part of its surplus reserve. In this respect, you would act within your authority as Insurance Commissioner to view such a sale as intended to achieve a purpose consistent with the obligations of Blue Cross under Subtitle 20.<sup>4</sup>

At the same time, Blue Cross' sale of a minority interest raises unique issues about compliance with the purposes of Subtitle 20. As the majority shareholder in Newco, Blue Cross will have a "duty not to abuse its power of control to the minority's detriment." *Twenty-Seven Trust v. Realty Growth Investors and RGI Holding Co.*, 533 F. Supp. 1028, 1039 (D. Md. 1982). From the time of sale, Blue Cross will have a divided, and potentially conflicting, duty: to operate a nonprofit health service plan solely for the benefit of subscribers, while managing the for-profit subsidiary with proper regard for the interests of the outside investors. In general, majority shareholders may not "use their voting power for their own benefit, for some ulterior purpose adverse to the interests of the corporation and its stockholders as such ...." *Cooperative Milk Service v. Hepner*, 198 Md. 104, 114, 81 A.2d 219 (1951). See also, e.g., *Clagett v. Hutchison*, 583 F.2d 1259, 1265 (4th Cir. 1978). One can anticipate situations – the pursuit of a business opportunity, for example – in which the interest of Blue Cross and its subscribers might be adverse to the interest of Newco and its minority stockholders.

We do not know enough about the consequences either of the already consummated sale of 20 percent of Greenspring or the proposed sale of a portion of Newco to advise whether these transactions pose so significant a risk of conflict as to warrant disapproval. Our conclusion, however, is that you may not approve the transactions if you reasonably judge this risk to be unacceptable. Alternatively, your approval of the Newco transaction could be conditioned on resolution of key conflict problems in advance. That is, the terms of the sale could make clear that in areas of potential conflict, Newco will continue to be run to benefit Blue Cross as a whole. If outside investors are told in offering documents that these are the ground rules, the investors will have no grounds for complaint later if they choose to go forward with their purchase.

A legal analysis, in short, cannot itself determine the outcome. You should be satisfied that you have enough information about the transactions to judge the risk of harm to Blue Cross subscribers. If you determine that

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<sup>4</sup> We are not called upon in this opinion to explore the details of this valuation issue (including the question whether Blue Cross might achieve the same objective by other means), and we express no conclusions about it.

the risk to the subscribers has not been adequately addressed, you must disapprove the transactions. If, on the other hand, you determine that such risks have been adequately addressed and that the transactions are otherwise proper from a regulatory point of view, you may approve them.

### III

#### Conclusion

In summary, it is our opinion that:

1. Blue Cross may create a new for-profit subsidiary, Newco, as a holding company for certain managed care subsidiaries that Blue Cross currently owns.

2. The Insurance Commissioner may not approve the sale of a minority interest in Newco or Greenspring to private investors unless the Commissioner is satisfied that the duties imposed upon Blue Cross as majority shareholder would be compatible with its statutory duties to its health service plan subscribers.

J. Joseph Curran, Jr.  
*Attorney General*

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*Opinions & Advice*

**NATURAL RESOURCES****FOREST CONSERVATION ACT – LOCAL GOVERNMENTS ARE REQUIRED  
TO ADOPT FOREST CONSERVATION PROGRAMS**

April 29, 1992

*The Honorable Donald I. Dell*  
*The Honorable Elmer Lippy*  
*The Honorable Julia W. Gouge*  
*Board of Commissioners of Carroll County*

You have requested our opinion whether the Forest Conservation Act, codified as Subtitle 16 of Title 5 of the Natural Resources Article (“NR” Article), mandates that a local government having planning and zoning authority adopt a forest conservation program, or whether the act gives the local government the option of deferring to the State’s implementation of the forest conservation program in that jurisdiction. You have included with your request for an opinion the advice of the County Attorney, concluding that the statute requires these local governments to adopt a forest conservation program. Memorandum from County Attorney Charles W. Thompson, Jr. to County Commissioners of Carroll County (March 26, 1992).

For the reasons stated below, we agree with the County Attorney’s conclusion. The Forest Conservation Act mandates that a local government adopt a local forest conservation program, consistent with the intent, requirements, and standards of the act.

**I****Summary of Forest Conservation Act**

The Forest Conservation Act, Chapter 255 of the Laws of Maryland 1991, establishes a complex program including conservation thresholds, afforestation and reforestation standards, and requirements for forest stand

delineation and for forest conservation plans.<sup>1</sup> The statutory requirements are generally applicable to any public or private subdivision and to any grading or sediment control permit by any person, including a unit of State or local government, on areas 40,000 square feet or more. NR §5-1602(a).<sup>2</sup>

Under the act, minimum levels or “thresholds” are established, based on designated land use categories, for the conservation of trees on certain tracts of land where development is scheduled to occur. NR §5-1606. Under specified circumstances, if retention of existing forest is not possible, the loss of forest must be mitigated by either on-site or off-site planting. NR §5-1607. Where little or no tree cover exists, minimum “afforestation” levels must be met to create a new forest. *See* NR §5-1606(a)(3). To ensure the success of reforestation and afforestation projects, a binding two-year management agreement is required for maintenance and protection of planted areas. NR §5-1605(c)(9). Conservation easements, deed restrictions, and other techniques for management, preservation, and retention of forest are to be provided. NR §5-1607.

## II

### County Attorney’s Advice

The advice given to you by the County Attorney included an analysis of the language in NR §5-1603(a), which provides that “[a] unit of local government having planning and zoning authority *shall develop* a local forest conservation program.” (Emphasis supplied.) The advice also referred to two other provisions using the mandatory phrase “shall submit”: NR §5-1603(a)(1), which states that all units of government with planning and zoning authority “shall submit” to the Department of Natural Resources (“DNR”) a proposed forest conservation program by April 30, 1992; and NR §5-1603, which provides that local governments “shall submit to the Department, by December 31, 1992, their adopted forest conservation program which meets or is more stringent than the requirements and standards of this subtitle.” Finally, the County Attorney

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<sup>1</sup> “Afforestation” refers to the establishment of a tree cover on land not now forested; “reforestation” refers to “the creation of a biological community dominated by trees and other woody plants ....” NR §5-1601(b) and (dd).

<sup>2</sup> NR §5-1602(b) lists a number of activities to which the act does not apply. The act is also inapplicable to “[a] county that has and maintains 200,000 acres or more of its land area in forest cover.” NR §5-1602(b)(10). This exception applies to Garrett and Allegany Counties.

cited NR §5-1603(c)(2), pursuant to which a local government “shall review and amend” all “local ordinances, policies and procedures that are inconsistent with the intent and requirements of the” Forest Conservation Act. From these four provisions of the Forest Conservation Act, the County Attorney concluded “that this program is mandatory.”

The County Attorney did observe that some doubt on the matter might be thought to arise from NR §5-1603(d), which provides that a local government’s failure to submit a proposed local forest conservation program or failure to adopt one by December 31, 1992 “shall result in the Department’s assumption of review and approval of all forest conservation plans within the jurisdiction of that local authority.” If the consequence of a failure to submit or adopt a plan is that DNR undertakes the task, some might argue that the local government’s duty is not really mandatory. After a review of the legislative history of the Forest Conservation Act and DNR’s interpretation of the requirements for local program adoption, however, the County Attorney concluded that there “can be little doubt that this program was intended to be mandatory.” We agree.

### III

#### Analysis

We concur in the County Attorney’s analysis that the four pertinent statutory provisions in NR §5-1603 create the obligation of a local government to develop, submit for DNR’s review and approval, and adopt a local forest conservation program. The wording of NR §5-1603(d), whereby the failure of a local government to adopt a forest conservation program “shall result in the Department’s assumption of review and approval of all forest conservation plans” in that jurisdiction, does not, in our view, create an option for the local jurisdiction. The Forest Conservation Act reflects a legislative judgment that the forest conservation program is best implemented and administered at the local level. The State’s administration of the forest conservation program in a local jurisdiction appears to be merely a residual safeguard, to assure some program implementation in the worst case, should a local government not comply with the statutory requirement.

Our conclusion that NR §5-1603(d) creates a safety net and not an alternative program is evident from the legislative deadlines imposed by the statute. Implementation under the act is on a fast track: DNR was required to adopt regulations by December 31, 1991, NR §5-1609(a); proposed local programs are due on April 30, 1992, NR §5-1603(a)(1); DNR is expected to review and approve or disapprove each program within two months of its submission, NR §5-1603(b); and local programs

are to be adopted by December 31, 1992, NR §5-1603(c). All of these dates culminate in the crucial compliance date of January 1, 1993 (or even earlier if a local government has acted sooner):

After December 31, 1992, or after the date on which a local program has been adopted under §5-1603 of this subtitle, whichever occurs first, a person making application for subdivision or grading or sediment control permits on areas greater than 40,000 square feet shall submit a forest stand delineation ....

NR §5-1604(a).

The General Assembly recognized the importance of establishing an early and specified compliance date to assure that the goal of the statute, the conservation of forest, can be achieved. If a local government fails in its obligation to develop a forest conservation program, the residual State program ensures that development and construction plans will be subject to some forest conservation requirements after December 31, 1992, despite the absence of a local program.

Other statutory provisions also disclose a legislative intent to mandate local programs. For example, the only exception to the program adoption requirement is that a municipality with planning and zoning authority may, with the concurrence of DNR and the county within which it is located, “assign its *obligations* under this subtitle to the county by December 31, 1991.” NR §5-1603(a)(3) (emphasis supplied). No comparable provision authorizes a county to “assign” its programmatic obligations to the State.

Indeed, the General Assembly normally spells out a decision to allow a local government to choose between its own or a State program. For example, NR §8-1204(a) provides that DNR “may delegate all or part of its authority under this subtitle to any county that enacts a nontidal wetland protection program ... that meets at least the minimum standards adopted by the Department.” A county in that instance may choose to adopt a local program by enacting a program as stringent as the State program, but it is not told that it “shall” do so, the language that appears in the local program description in the Forest Conservation Act. *See also* NR §8-9A-06 (Flood Control and Watershed Management program).

Local program development under the Forest Conservation Act is not a delegation system. Indeed, there is no primary State program. Under NR §5-1609(a)(1), DNR is required to adopt regulations establishing:

- (i) Standards of performance required in forest stand delineations and forest conservation plans including the submittal process;
  - (ii) Criteria for local forest conservation programs; and
  - (iii) Implementation processes for the Department's administration in the absence of a local forest conservation program;
- (2) Assist and guide local authorities in the development of their local forest conservation program by providing:
- (i) Training of local officials; and
  - (ii) A model local government ordinance that meets the requirements of this subtitle; ....

The major portion of DNR's regulations are thus to be aimed at guiding local governments in fashioning and implementing their local programs. The State's own "implementation" role is one of back-up "in the absence of a local forest conservation program."

In addition, the methodology by which the Forest Conservation Act requirements are imposed lends support to the conclusion that local program development is mandatory, not optional. To achieve the requirement that certain percentages of a tract be retained or that afforestation or reforestation levels be accomplished, a person making application for subdivision or grading or sediment control permits on areas greater than 40,000 square feet must submit a forest stand delineation prepared by a licensed forester, licensed landscape architect, or other qualified professional. NR §5-1604(a). Before the approval of the final subdivision plan or the issuance of the grading or sediment control permit, the applicant must have an approved forest conservation plan based on the forest stand delineation and containing other requirements, such as methods for management and preservation of retained forest and reforested areas. NR §5-1608(b).

These requirements do not exist in isolation. Rather, the act recognizes that the forest conservation program is an integral part of the local governmental process for the review and approval of any development project. Thus, NR §5-1608(a) states that “[t]he review of the forest conservation plan shall be concurrent with the review process of the State or local authority for the subdivision plan, or the grading or sediment control permit, whichever may be submitted first.”<sup>3</sup> Since the subdivision development review process is a local planning and zoning function, a forest conservation program prepared at the local level will come closest to achieving the goals of the concurrent review requirement of NR §5-1608(a).

Finally, the County Attorney quoted the Fiscal Note accompanying the Forest Conservation Act, which observed that “[i]ncreased expenditures do not include costs that would be incurred if DNR assumes responsibility for developing and/or administering local programs because it will not be known if DNR has to assume such responsibilities until December 31, 1992.” This discussion in the Fiscal Note reflects a legislative view that program implementation is primarily a duty of local government, while the State program is a limited, interstitial one designed merely for the exceptional case of local program failure.<sup>4</sup>

### III

#### Conclusion

We concur in the County Attorney’s conclusion that the Forest Conservation Act requires Carroll County, like every other nonexempt local government with planning and zoning authority (except municipalities assigning the obligation to their counties), to develop and adopt a forest

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<sup>3</sup> The reference to the State appears to be a recognition of the State’s substituted role in the absence of a local program and also a recognition of the State’s function of reviewing forest conservation plans for State projects. See NR §5-103.

<sup>4</sup> DNR also has certain oversight responsibilities after a local government adopts its program. See NR §5-1604(e).

conservation program.<sup>5</sup> The statute does not permit a county to choose at its option either to adopt a program or, in the alternative, to allow the State's program to go into effect.

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<sup>5</sup> See note 2 above.

**PERSONNEL****MODIFICATION OF RATES OF PAY**

May 7, 1992

*The Honorable Alan M. Wilner  
Chief Judge  
Court of Special Appeals of Maryland*

You have requested our opinion on the authority of the Secretary of Personnel to modify rates of pay of classified and unclassified employees. You make this request in your capacity as chairman of the Code Revision Committee, which presently is working on a revision of the Merit System Law, Article 64A of the Maryland Code.<sup>1</sup>

The pay plan amendment process set out in Article 64A, §27(a)(1)(v) authorizes the Secretary of Personnel, with the Governor's approval, to amend the pay plan for specific classes of positions. Amendments to the pay plan must be reported to the General Assembly. However, another provision of the Merit System Law, Article 64A, §30(a)(2), authorizes the Secretary at any time to increase or decrease any rates of pay for all employees in the classified and the unclassified service, subject to the Governor's approval but without any requirement that the pay rate change be reported to the General Assembly. The apparent tension between these two provisions has led the Committee to ask whether the Secretary may modify rates of pay pursuant to §30(a)(2) outside of the pay plan amendment process found in §27.

For the reasons stated below, we conclude that the pay plan amendment process established under Article 64A, §27 applies only to increases in rates of pay. Therefore, the Secretary may decrease rates of pay outside of the pay plan amendment process and is not required to notify the General Assembly of decreases in rates of pay undertaken pursuant to §30(a)(2). We also conclude, however, that the Secretary of

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<sup>1</sup> Your request also poses a number of other questions, which we shall address in a later opinion.

Personnel does not possess authority under Article 64A, §30(a)(2) to increase rates of pay without also having to report the increase to the General Assembly.

## I

### Statutory Text

The starting point of any exercise in statutory construction is the language of the provision in question. *Morris v. Prince George's County*, 319 Md. 597, 603, 573 A.2d 1346 (1990).

The pay plan statute, §27, calls on the Secretary of Personnel “to recommend to the Governor a pay plan for all classified and unclassified positions for which the Secretary has authority to administer pay ....” §27(a)(1)(i). The statute sets out certain factors that the Secretary is to consider and provides that “[t]he pay plan shall take effect when funds for that purpose are available in the budget.” §27(a)(1)(ii) and (iii).

Subparagraphs (iv) and (v) of §27(a)(1) deal with pay plan amendments:

(iv) 1. The Secretary, with approval of the Governor, may amend the pay plan for specific classifications of positions in order to recruit or retain competent personnel or to ensure that compensation rates adequately compensate the skills, knowledge, effort, responsibility, and working conditions.

2. An amendment may not take effect unless sufficient funds have been included within the budget for that purpose.

3. Except as provided in paragraph (2) of this subsection, salary adjustments to those executive branch positions listed in the budget bill in accordance with §7-109 of the State Finance and Procurement Article shall be contingent upon the approval of the Board of Public Works.

(v) Amendments to the pay plan shall be reported to the General Assembly by the 15th day of the next regular session. The General Assembly may reject amendments to the pay plan. If an amendment is

rejected, the appropriate salary reduction shall become effective in the next fiscal year.

The “rates of pay” statute, §30, calls on the Secretary to “formulate rules” dealing with salary-setting generally, including under the pay plan statute. §30(a)(1).<sup>2</sup> Then §30(a)(2) gives the Secretary seemingly sweeping authority to raise or cut rates of pay:

The Secretary shall have the power and authority at any time to increase or decrease any rates of pay for all employees in the classified and in the unclassified service, and said increased or decreased rates of pay shall, after approval by the Governor, apply to all employees in the classification or classifications so affected, including incumbent employees and new employees.

Article 64A, §27 and Article 64A, §30 concern the same subject matter and therefore they must be interpreted together.<sup>3</sup> When different statutes deal with the same subject matter, any interpretation of one provision must be made with an awareness of all the relevant enactments. *State v. Bricker*, 321 Md. 86, 92, 581 A.2d 9 (1990). It is presumed that the Legislature has acted “with full knowledge of prior legislation and intended statutes that affect the same subject matter to blend into a consistent and harmonious body of law.” *Id.* “Therefore, various consistent and related enactments, although made at different times and without reference to one another, nevertheless should be harmonized as much as possible.” *Id.*

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<sup>2</sup> This provision is as follows:

The Secretary of Personnel shall formulate rules and regulations for the administration of §§27-30, which shall include provisions for automatic increases, from minimum to maximum, of the rates established by the schedule, except that the Secretary shall have the power to establish flat or fixed salaries and wage rates for special classifications or cases, (for a period not to exceed two years) where provision for automatic increases are deemed inadvisable; and such rules shall, after approval by the Governor, have the force of law in the same manner as other conditions herein prescribed.

<sup>3</sup> Indeed, §30(a)(1) states that the two statutes are part of the same legislative scheme by giving the Secretary of Personnel rulemaking authority for the administration of “§§27-30.”

Unfortunately, as the Code Revision Committee has found, when §§27 and 30 are read together, their meanings cannot readily be harmonized. The language of §27 suggests that pay plan amendments are synonymous with pay plan increases. Section 27(a)(1)(iv) states that the Secretary of Personnel, with the Governor's approval, may amend the pay plan to recruit or retain competent personnel or to ensure that compensation rates adequately compensate the "skills, knowledge, effort, responsibility, and working conditions" associated with a classification. Plainly, decreases in pay rates cannot be squared with those statutory objectives. Likewise, in §27(a)(1)(v) the General Assembly reserves the right to reject amendments and if an amendment is rejected, "the appropriate salary *reduction* shall become effective in the next fiscal year." (Emphasis supplied.) That language seems to demonstrate the legislative view that pay plan amendments operate only to increase rates of pay.

Section 30(a)(2) contains an express grant of authority for the Secretary, with the Governor's approval, to decrease rates of pay for all employees in the classified and unclassified services. It also grants the authority to the Secretary to increase rates of pay, a grant of authority which largely coincides with the authority given under §27. Section 27 establishes a pay plan amendment process, but does not define what a pay plan amendment is.

A facial analysis of the language in the two statutes does not readily lead to an understanding of the legislative purposes or goals underlying the statutes, or how the two statutes should be harmonized with one another. Accordingly, we must dig deeper and look at the context within which the different statutory language appears, which includes the legislative history of the statutes. *See Morris v. Prince George's County*, 319 Md. at 604. Like much else in the Merit System Law, these provisions are best understood when viewed from an historical perspective.

## II

### Legislative History

The original Merit System Law of 1920 required the Commissioner of Employment and Registration to recommend schedules of compensation for each class. The practical reality, however, was that an employee's pay was a function of non-merit factors such as the closeness of his or her department head to the Governor and the availability of federal or special funds. *See John S. Shriver, The History of Administration of State*

*Employees Salaries in Maryland* p.28 (1956) (“Shriver”).<sup>4</sup> In fact, when one employee was replaced by another, the new employee was either paid the predecessor’s salary or was hired at a lower wage and the difference was divided among older workers.

Maryland’s pay plan statute, Article 64A, §27, was first enacted in 1939 to correct such inequitable and chaotic conditions. As originally enacted by Chapter 385 of the Laws of Maryland 1939, the statute created a “Salary Standards Board” consisting of the Commissioner of State Employment and Registration, the Director of the Budget, and a member appointed by the Governor. The Board was charged with preparing a pay plan for all classes of positions in the classified service to the end that “all positions in the Classified Service involving comparable duties, experience, responsibilities, and authority shall be paid in accordance with the standard salary schedule.” The pay plan was to take effect and have the force of law when approved by the Governor and was to be used by the Governor in the preparation and submission of his budget. Article 64A, §13B (1939 Supp.). The Board also was authorized to recommend amendments to the plan, which, if approved by the Governor, were to have the same force of law as if they had been incorporated originally in the salary schedule.

In 1941 the General Assembly renamed the Salary Standards Board as the State Employees Standard Salary Board and increased the membership from three to seven members. The Board also was instructed to include within the pay plan all classes of positions in both the classified and unclassified services. Chapter 395, Laws of Maryland 1941.

During the World War II the Board exercised its functions without much controversy, perhaps due to wartime wage controls. But the inflationary spiral that occurred after the war led to a flood of requests by employees and department heads for pay adjustments and increases in the pay scales. In September 1946 the Governor, with the concurrence of the Board of Public Works, approved a general increase in the salaries of State employees as had been recommended by the Standard Salary Board. *See* Shriver at 29. Unhappily, the economic forces that required the salary increase also led to increases in other costs to the State, with the result that it became necessary for the General Assembly to meet in a special session on December 27, 1946 for the purpose of making emergency appropriations for the remainder of the fiscal year. *See* Chapter 2, Laws of Maryland 1946 (Extraordinary Session); the 1946 Senate Journal,

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<sup>4</sup> Shriver was Director of the Fiscal Research Bureau. His monograph is reprinted as Appendix 11 to “Executive, Legislative, and Judicial Salaries in Maryland, A Report to the Legislative Council and General Assembly of Maryland” (November 1956) (Committee on Taxation and Fiscal Matters). *See also* Twenty-Third Annual Report of the State Employment Commissioner 1-2 (1943).

Special Session, at 7 (December 26, 1946) (message of Governor Herbert R. O'Connor). Through Chapter 2, the Legislature authorized emergency appropriations from the general surplus fund account.

William Preston Lane, Jr. became Governor in 1946 and inherited the fiscal crisis. On February 19, 1947, Governor Lane delivered a "Message on Additional Revenue Requirements" to the General Assembly and requested that the General Assembly raise taxes in order to meet what he identified as the State's needs, appropriations for which he had been forced to cut in order to present a balanced budget bill. 1947 Senate Journal at 973. One day later Senate Bill 266 was introduced, which amended Article 64A, former §17 to give the Salary Board "the power and authority at any time to increase or decrease any rates of pay for all employees in the classified and in the unclassified service, and said increased or decreased rates of pay shall, after approval by the Governor, apply to all employees in the classification or classifications so affected, including incumbent employees and new employees."<sup>5</sup> That language, now found in §30(a)(2), has existed without substantive change ever since.

Despite being given the authority to decrease rates of pay, in calendar year 1947 the Board continued to process requests for salary increases, with the result that the State's budget became unbalanced. *See* Shriver at 29-30. The Governor called a special session of the Legislature on May 25, 1948 to appropriate funds to restore the budget to balance and also to grant a 10 percent general salary increase, to be paid from surplus funds. Chapter 37, Laws of Maryland 1948 (Extraordinary Session).

The next eight years were years of turbulence and discord between the Standard Salary Board and the Commissioner of State Employment and Registration (who was renamed the State Commissioner of Personnel in 1953). For example, employees at State mental hospitals were removed from the State classification plan and given new classifications, even though employees in other institutions were performing comparable duties; yet a few years later the employees at mental health institutions were placed back in their former class titles. In 1954 a subcommittee of the Legislative Council found that the Salary Board has been reluctant to grant salary increases for classes containing large numbers of employees and had granted increases only when funds were specifically appropriated, as had been done by general salary increases in 1951 and 1953. Shriver at 33-34. This reluctance to give class-wide salary increases led to requests by

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<sup>5</sup> The 1939 statute and its subsequent amendments protected incumbent employees from having to take a reduction in their rates of pay by reason of the Salary Board's establishment of the standard rates of pay. *See* Chapter 385, Laws of Maryland 1939; Chapter 395, Laws of Maryland 1941; Chapter 9, Laws of Maryland 1945.

department heads that their employees’ positions be reclassified, either to an existing higher level classification or to a newly created classification with the salary set at a higher level. Shriver at 34.<sup>6</sup>

In 1956 the General Assembly created a new Standard Salary Board, chaired by the State Commissioner of Personnel and comprising the Baltimore City Civil Service Commission chairman, two representatives from the general public picked by the Governor, and a member picked by the Governor from a list of three nominees proposed by the Maryland Classified Employees’ Association. Chapter 87, Laws of Maryland 1956. In the 1956 budget bill, Chapter 42 of the Laws of Maryland 1956, the Legislature provided a general increase in the salary scales of State employees; provided funds for payments “required as a result of restudy and pay adjustments” pursuant to the pay plan statute; directed the elimination of arbitrary salary differentials; provided for “comparable increases” consistent with revised salary scales; and provided funds to make adjustments for employees changing to a five-day, forty-hour work week. *See 42 Opinions of the Attorney General 279 (1957).*

After the adjournment of the 1956 session of the General Assembly and prior to the announcement of the results of the State-wide study required by the budget bill, the Standard Salary Board considered the requests of numerous individual agencies for pay changes and approved increases for approximately 180 separate classifications. In the fall of 1956, the Committee on Taxation and Fiscal Matters reviewed the Standard Salary Board’s activity and criticized the Board for limiting its salary adjustments to classifications that were unique to a particular agency. *See Committee on Taxation and Fiscal Matters, Executive, Legislative, and Judicial Salaries in Maryland, A Report to the Legislative Council and General Assembly of Maryland 8-9 (November 1956).* The Committee observed:

Naturally it was expected that the Salary Board would be prepared to receive and act upon emergency changes to secure needed recruits or to retain valued employees who could not easily be replaced; *but it never could have been contemplated that the Board would proceed to make wholesale changes for special groups while the great mass were advised that they*

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<sup>6</sup> Political solutions were sought as well. For example, the University of Maryland “Autonomy Act,” Chapter 14 of the Laws of Maryland 1952, gave the University pay-setting authority over both its instructional and non-instructional personnel, free of Standard Salary Board rules, regulations, and control. *See 41 Opinions of the Attorney General 250 (1956).*

*would have to await the general study and could not expect salary adjustments at least until October.*

(Emphasis in original).

As a result of this controversy over how best to implement pay increases for State employees while simultaneously requiring the Salary Board to restudy the classifications of State employees, the Legislature in 1957 attempted once again to set right the administration of pay for State employees. Toward that end, the General Assembly passed Senate Bill 289 (Chapter 396 of the Laws of Maryland 1957), which for the first time placed a condition on the approval and effectiveness of pay plan amendments. As originally introduced, Senate Bill 289 amended the pay plan statute, then found at §25 of Article 64A, to provide that the pay plan would “take effect” and “have the force and effect of law after approval by the Governor, at the time the next State Budget takes effect, if funds for such pay plan are provided therein.” Furthermore, amendments to the pay plan were to have the force of law when approved by the Governor “and so included in the next State budget.”

Senate Bill 289 was amended by the House of Delegates at its third reading to add the following language regarding pay plan amendments:

Notwithstanding anything to the contrary hereinbefore, and solely in cases of acute emergency, amendments may be made from time to time in the pay plan to take effect at anytime prior to the effective date of the next State Budget, if the amendment is necessary in order to procure or to retain in the State service essential career administrative employees, performing executive functions, or essential professional or technical employees, and upon approval of the Board of Public Works, after recommendation by the Board, shall have the force of law in the same manner as if they had been originally incorporated in the schedule.

1957 House Journal at 1355-56 (March 21, 1957).

At the same time the House considered related legislation proposed in the Senate, Senate Bill 170, relating to budget amendments under former Article 15A, §8 (now recodified as §7-209 of the State Finance and Procurement Article (“SF” Article)). The House amended the bill by adding a new paragraph (f) to §8:

A budget amendment shall not increase the salary or salaries of any office or position beyond the amount for

each such salary which is contained in the most recent State budget, and its supporting documents which specify in detail the salaries of all personnel, whether or not that budget is yet in effect, except for budget amendments to effectuate salary changes authorized in cases of actual emergency in order to procure or to retain in the State service essential professional, technical and administrative personnel as set forth in §25 of Article 64A of the Annotated Code of Maryland (1956 Supp.) as amended from time to time.

1957 House Journal at 1353-54 (March 21, 1957). The Senate concurred in the amendments and the bills were enacted as Chapters 396 and 383 of the Laws of Maryland 1957.

It seems plain from the language added to both bills that the General Assembly viewed the pay plan amendment process as applying only to increases in rates of pay, not to decreases. A contrary reading would lead to the absurd result of the Legislature’s having required the Standard Salary Board to demonstrate to the Governor and Board of Public Works the urgent necessity of approving a pay *decrease* in order to recruit or retain essential employees.

In 1988 the pay plan statute was amended as part of Chapter 543 (House Bill 741) of the Laws of Maryland 1988. As we recounted in an earlier opinion about the effect of the legislation, Chapter 543 “significantly expanded the authority of the Secretary to make pay plan amendments that are effective immediately. No longer are such amendments limited to acute emergencies.” 73 *Opinions of the Attorney General* 43, 44-45 (1988). Instead, the Secretary may now amend the pay plan for specific classifications of positions “in order to recruit or retain competent personnel or to ensure that compensation rates adequately compensate the skills, knowledge, effort, responsibility, and working conditions.” Article 64A, §27(a).

However, the Secretary was not given unbridled discretion to make pay plan amendments. First, the Secretary must obtain the approval of the Governor. Second, an amendment cannot take effect unless “sufficient funds [are] included in the budget for that purpose.”<sup>7</sup> *Id.* Third, amendments have to be reported to the General Assembly by the 15th day of the next regular session. The General Assembly in that next session can

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<sup>7</sup> If a budget amendment was required in order to fund a pay plan amendment, the Board of Public Works still had to approve the pay plan amendment. See SF §7-209(d) (1988 Repl. Vol.); 73 *Opinions of the Attorney General* 43 at 45 n.4.

reject the amendment, in which case “the appropriate salary reduction shall become effective the next fiscal year.” *Id.*

In its 1989 session the General Assembly again modified the pay plan statute, this time to create the “Executive Pay Plan.” Chapter 831 (House Bill 1475) of the Laws of Maryland 1989 required the Secretary of Personnel to create an executive pay plan that would include high-salaried executive branch employees.<sup>8</sup> The statute also sets forth different ways by which a salary can be increased from one salary grade to another or from one step to another within a grade.<sup>9</sup> The increases in salaries made in accordance with the executive pay plan provisions are to be made “to retain or recruit competent individuals in positions within the executive pay plan or for any other reasons approved by the Board of Public Works.” §27(a)(2)(v)2.

The General Assembly retains the right to exercise control over salaries of positions in the executive pay plan by providing that “the salary grade and the salary paid for a position in the executive pay plan shall be subject to any limitations included in the annual budget bill.” §27(a)(2)(vii). Furthermore, SF §7-109(c) was also amended by Chapter 831 to provide that the salary schedule, proposed salary grade, and proposed salary for job classifications shall be subject to the General Assembly’s approval.<sup>10</sup>

SF §7-209 was changed accordingly to permit the Governor to approve an amendment to the budget that increases the salary of a position

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<sup>8</sup> The defining criteria as to which employees are included are somewhat circular: all permanent positions “with a salary above the lowest salary in the executive pay plan and which are not included in the pay plan for graded State employees” are to be included in the executive pay plan. §27(a)(2)(i).

<sup>9</sup> A department head may increase, with the Governor’s approval, the salary of an employee by one step based on the employee’s performance or two steps for exceptional performance. §27(a)(2)(iv) 2 and 3. Subject to the additional approval of the Board of Public Works, the Governor may approve a salary adjustment of more than two steps within the same grade, a change from the current grade to a different grade, a change from one classification in a series to a different classification in that series, the creation of a new classification or position in the executive pay plan, or “[ano]ther type of salary increase for a position within the executive pay plan.” §27(a)(2)(v)1.

<sup>10</sup> Chapter 831 also amended SF §7-109 to require a listing in the budget bill of the job title and salary for each position in the executive pay plan. Additionally, each budget bill has to contain a listing of the job classification of each position with a flat rate of per diem compensation in excess of the minimum salary in the proposed executive pay plan, the number of positions in each of the classifications, and the proposed salary for each of the classifications.

in the executive pay plan, if the Board of Public Works has approved the increase. SF §7-209(d)(2)(i). However, the budget amendment remains in effect only until the State budget for the next fiscal year becomes effective. SF §7-209(d)(2)(ii). With respect to all graded positions in the regular pay plan, §7-209(d)(1) further provides that a budget amendment “may not increase a salary so that it exceeds the amount set by the most recently enacted State budget.”

### III

#### Analysis

The legislative history of Article 64A, §§27 and 30 leads us to conclude that the Legislature regards pay plan amendments to be synonymous with increases in pay. This understanding was made clear in 1957, when the General Assembly limited pay plan amendments to “acute emergencies,” where the amendment was necessary to procure or retain essential employees. While the requirements for obtaining a pay plan amendment have been softened significantly since 1957, the underlying rationale of provisions permitting the amendment of the pay plan has been the same: to recruit, retain, and adequately compensate State employees in the pay plan. The 1988 legislation reinforces that conclusion by providing that the General Assembly’s rejection of a pay plan amendment results in a salary reduction. Therefore, we conclude that the pay plan amendment provisions of §27 apply only to increases in salary. Accordingly, the Secretary’s authority under Article 64A, §30(a)(2) to decrease rates of pay exists independently of her authority to amend the pay plan.

Reductions in pay accomplished pursuant to Article 64A, §30(a)(2) need not be reported to the General Assembly, because a reduction in pay rates is not a pay plan amendment.<sup>11</sup> We reach the same conclusion about decreases in pay of positions in the executive pay plan: the duty to report pay adjustments is limited to salary increases. See Article 64A, §§27(a)(2)(iv) and (v). We do not mean to suggest that the Secretary is forbidden from notifying the General Assembly of pay rate decreases.

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<sup>11</sup> It has been suggested that the recent decision of *Maryland Classified Employees Association v. Schaefer*, 325 Md. 19, 599 A.2d 91 (1991) stands for the proposition that a reduction in pay is an amendment to the pay plan. We do not read the decision so broadly. Instead, the Court of Appeals simply concluded that a change in the work week “did not cause a reduction of any salaries within the pay plan.” 325 Md. at 37-38. Therefore, there was no change made in the pay plan. The Court did not address the specific question whether a decrease in salaries is an amendment to the salary plan.

Indeed, such information properly could be included in the Secretary's annual reports to the Governor and General Assembly required by Article 64A, §10(b), which deal with the Secretary's "work and proceedings."

Article 64A, §§27 and 30 overlap to the extent that they both confer authority on the Secretary of Personnel to increase rates of pay. However, even in that respect they are not identical. Section 30(a)(2) gives the Secretary, with the Governor's approval, the authority to increase rates of pay for *all* employees in the classified and unclassified service. Section 27, on the other hand, authorizes the Secretary to amend the pay plan with the Governor's approval, but it also creates an entirely different process for executive pay plan amendments. Increases in salary steps for positions in the executive pay plan may occur without the Secretary's involvement, requiring instead the Governor's approval of a recommendation by the head of a department, agency, board or commission. Article 64A, §27(a)(2)(iv). Changes in salary grade require the Governor's approval, with the additional approval of the Board of Public Works, but again do not require the intercession of the Secretary. §27(a)(2)(v).

Therefore, §§27 and 30 are not completely consistent with respect to pay increases. To the extent we can harmonize the two statutes, we will do so. See *Farmers & Merchants Bank v. Schlossberg*, 306 Md. 48, 61, 507 A.2d 48 (1986). Section 30(a)(2), the earlier enacted statute, states that the Secretary has the authority to increase rates of pay for *all* employees. However, the creation of the executive pay plan divested authority from the Secretary to increase rates of pay for those positions within the executive pay plan.

We reconcile the inconsistency by concluding that the provisions of §27 relating to the executive pay plan have repealed by implication the language of §30(a)(2) giving the Secretary authority to increase rates of pay for *all* employees.<sup>12</sup> Now, the Secretary's authority to increase rates of pay extends *only* to employees in the regular pay plan. With respect to employees in the regular pay plan, the Secretary is given the same authority by both §§27 and 30 to effect a change in a classification's pay rate. Section 27, whose relevant provisions were most recently enacted, plainly expresses a legislative intent that the General Assembly be notified of pay increases and have the opportunity to reverse them. To conclude that the Secretary could increase rates of pay under §30 and not notify the General Assembly would run counter to the most recently expressed legislative will.

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<sup>12</sup> If two statutes contain an irreconcilable conflict, it is presumed that the Legislature intended that "the statute whose relevant substantive provisions were enacted most recently be held to have repealed by implication any conflicting provisions of the earlier statute." *Farmers & Merchants Bank v. Schlossberg*, 306 Md. at 48.

Therefore, we harmonize the two statutes by concluding that the Secretary must notify the General Assembly of any increase in the rates of pay or classifications in the regular pay plan.

#### IV

#### Conclusion

In summary, it is our opinion that the Secretary has the authority under Article 64A, §30(a)(2) to reduce the rates of pay of all employees, classified and unclassified, under her salary-setting authority. She may, but is not required to, report any such pay rate decreases to the General Assembly. With respect to employees in the regular pay plan, the Secretary must report to the General Assembly any increases to rates of pay that she and the Governor have approved, whether under §27 or §30.<sup>13</sup>

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#### *Editor's Note:*

The provisions discussed in this opinion have been amended and recodified. Provisions on the authority of the Secretary of Budget and Management over pay plans may be found in Title 8 of the State Personnel and Pensions Article.

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<sup>13</sup> While these conclusions represent our best efforts to ascertain and effectuate the legislative objective underlying Article 64A, §§27 and 30, we certainly would encourage the Revisor of Statutes to recommend that the language of the two provisions be clarified.

**PERSONNEL - APPLICABILITY OF EQUAL EMPLOYMENT OPPORTUNITY, WHISTLEBLOWER, LEAVE, HOLIDAY, PRESERVATION OF PROMOTIONAL OPPORTUNITIES, AND OVERTIME PROVISIONS**

May 20, 1992

*The Honorable Alan M. Wilner  
Chief Judge  
Court of Special Appeals  
of Maryland*

As Chairman of the Code Revision Committee, you have asked us several questions relating to the scope of authority of the Secretary of Personnel over different categories of State employees under several different statutes. These questions have arisen during the Committee's efforts to revise the present Merit System Law, Article 64A of the Maryland Code, as well as several other statutes not found in that article but that nonetheless relate to the Secretary of Personnel.

Your specific questions, and our responses, are as follows:

1. What employees are covered by Article 64A, §§12A through 12E, which establish an equal employment opportunity program under the auspices of the Secretary of Personnel?

Article 64A, §§12A through 12E apply to classified service employees in the executive branch only.

2. What employees are covered by Article 64A, §§12F through 12K, which establish a whistleblower protection program?

Article 64A, §§12F through 12K apply to classified service employees, unclassified employees, and applicants for classified employment in the executive branch; these provisions do not apply to applicants for unclassified employment.

3. What employees are covered by the provisions of Article 64A, §37, which relate to employee annual, sick, personal, and accident leave?

The provisions governing these forms of leave apply to all classified and unclassified employees over whom the Secretary of Personnel exercises leave authority.

4. What employees are covered by Article 89, §28, which provides certain State holidays, and Article 89, §29, which protects against the denial of promotional opportunity caused by use of sick or maternity leave?

Article 89, §§28 and 29 apply to all State employees in all three branches of government.

5. What employees are covered by Article 89, §27(c), which grants the Secretary of Personnel authority to regulate the payment of overtime compensation?

Article 89, §27(c) applies to all State employees in all three branches of government, although the Secretary of Personnel may not exercise the authority granted by that provision in a manner that would interfere with the essential functions of the legislative and judicial branches.

## I

### Background

In 1920, Maryland enacted its Merit System Law, becoming the tenth state to enact such a law. *See State Administrative Bd. of Election Laws v. Billhimer*, 314 Md. 46, 63, 548 A.2d 819 (1988) (Adkins, J., dissenting). At the time of its enactment, the Merit System Law divided the public service into two groups: the classified service and the unclassified service. In 1928, Oliver Short, the second State Employment Commissioner, distinguished the classified service from the unclassified service as follows:

The term “classified service” is used to describe positions which come under the provision of the Merit System law and its rules and regulations, and under the jurisdiction of the public personnel administrator. The unclassified service refers to all other positions in the service. This division of public employees is known as jurisdictional classification and is made either by direct legal provision in the basic law or by the civil service commission, with or without the approval of the chief executive, by authority so delegated in the Merit System law. Such a division is necessary in order that the personnel agency may know its authority with

regard to the various positions in the service. The personnel agency has no authority, either in the selection or in the regulation of the personnel filling unclassified positions. Its authority is confined to those in the classified service.

O. Short, *The Merit System* 27 (1928). The original Merit System Law defined the terms “classified service employee” and “employee” to mean the same thing: “a person who holds under the terms of this Article, a position in the classified service.” Article 64A, §1 (1924 Repl. Vol.).

This definition remained substantially unchanged for the next 68 years, until the passage of Chapter 543 of the Laws of Maryland 1988, which rewrote many of the definitions used in Article 64A. The “classified service” is now defined to mean “all positions for which persons are selected on a competitive basis in accordance with §§17 and 18 of this article and from which a non-probationary employee may be dismissed only for cause.”<sup>1</sup> Article 64A, §1(6). The unclassified service is now defined to mean “all positions specifically excluded from the classified service by the Annotated Code of Maryland.” Article 64A, §1(20). The term “employee” is no longer defined.

Despite the recent change in the definition of “classified service position,” the basic jurisdictional dichotomy established by the original Merit System Law continues to the present. Article 64A, §44 describes the purpose of the Merit System Law as follows:

[The law’s] purpose is to provide candidates for appointment to positions in the classified service after determining by practical tests of the fitness of such candidates for the positions which they seek, without regard to the political or religious opinions or affiliations of such candidates, or of any other standard except the business efficiency of the classified service, and to provide adequate means for the prompt removal from positions in the classified service of all persons therein who may be indolent, incompetent, inefficient, or otherwise unfit to remain therein, and to keep in a workable state the provisions for the promotion of employees as provided in this article to the end that the

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<sup>1</sup> Article 64A, §17 pertains to the creation of eligible lists for filling vacant positions and the selection process from the lists. Section 18 pertains to the form and character of examinations and special preference points awarded to some applicants, like veterans, in order to raise their examination scores.

same shall be so administered as to attract the best class of candidates to the classified service.

Article 64A, §44. As the quoted language demonstrates, the purpose of the Merit System Law is to set up a system of administration for classified service employment.<sup>2</sup> Accordingly, our office has determined that the Secretary possesses no authority over unclassified employment unless a statute provides otherwise. *See* 63 *Opinions of the Attorney General* 524, 525 (1978); 58 *Opinions of the Attorney General* 503 (1973).

Over the history of the Merit System Law, the General Assembly gradually has made the unclassified service subject to many of the provisions of the law. The first instance was its bringing unclassified service classifications into the State’s pay plan through Chapter 395 of the Laws of Maryland 1941.<sup>3</sup> More recently, unclassified employees were given the right to file grievances. *See* 62 *Opinions of the Attorney General* 686 (1977).

In addition to the unclassified and classified services, some positions in State employment fall outside the provisions of the Merit System Law altogether. For lack of a statutory definition, we referred to such employees in a 1988 opinion as “independent employees.” 73 *Opinions of the Attorney General* 285, 286 (1988). *See also* 61 *Opinions of the Attorney General* 596 (1976); 41 *Opinions of the Attorney General* 250, 262 (1956). These employees are neither classified nor unclassified as those terms are used in the Merit System Law. Instead, these employees work in personnel systems that the General Assembly has established, explicitly or by necessary implication, largely free from the Secretary of Personnel’s control.<sup>4</sup> *See* 73 *Opinions of the Attorney General* at 288.

Even this category of “independent employees,” however, defies application of any hard-and-fast rule regarding the Secretary of Personnel’s authority. For example, despite the fact that University of Maryland

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<sup>2</sup> Historically, classified service employees also have been referred to as merit system employees. *See Ahlgren v. Cromwell*, 179 Md. 243, 248, 17 A.2d 134 (1941). *See also* 63 *Opinions of the Attorney General* 524, 525 (1978); 24 *Opinions of the Attorney General* 547, 548-50 (1939).

<sup>3</sup> Although it may seem counterintuitive, positions in the unclassified service nevertheless are placed in “classifications” or “classes” for the purpose of determining their proper pay grade. *See* Article 64A, §§1(4) and 27.

<sup>4</sup> In the legislative session just ended, the General Assembly created a separate personnel system, which it called a “human resources management system,” for the Department of Transportation. Chapter 168 (House Bill 610), Laws of Maryland 1992.

System employees are governed by an independent personnel system, the General Assembly nevertheless has given the Secretary of Personnel authority over them with respect to the promulgation of rules on all aspects of annual leave, sick leave, personal leave, compensatory time, the keeping of time records, and the filling of a full-time position by two or more part-time employees. *See* Article 64A, §37A.

To summarize, the State service presently is broken into three general groupings: the classified service, the unclassified service, and employees of independent personnel systems.<sup>5</sup> The underlying theme of the questions posed by the Code Revision Committee is how far the Secretary of Personnel's authority extends to these groups of employees under particular statutes, given statutory language that is used inconsistently. Although the conclusions that we reach in the following analysis represent our best efforts to fathom current law, the General Assembly should be urged to express its policy determinations unambiguously in the revised law.

## II

### The Equal Employment Opportunity Program

You have asked whether unclassified employees are covered by Article 64A, §§12A through 12E, which establish an equal employment opportunity ("EEO") program. The stated purpose of §§12A through 12E "is to establish under the auspices of the Secretary of Personnel an equal opportunity program to ensure that State Merit System employees and applicants for State Merit System employment are provided equal opportunity in employment on the basis of merit and fitness." §12A. *See also* §12B (Secretary to administer EEO program "for State Merit System employees and applicants ...). The program, enacted by Chapter 306 of the Laws of Maryland 1978, was a codification of an earlier executive order of the Governor on this subject.

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<sup>5</sup> The Merit System Law also authorizes the employment of another category of employee under the general control of the Secretary: the contractual employee. A contractual employee is defined as "a person with whom the State has an employer-employee relationship but whose employment is not dependent on a budgeted position." Article 64A, §1(7). The law elsewhere requires that there be a written agreement between the contractual employee and the State, specifying the services and remuneration to be provided, and that the person "not [be] employed as a classified, unclassified, or temporary extra employee." Article 64A, §15A(a)(2). The employment of a contractual employee is generally authorized only under certain limited circumstances. *See* §15A(b)(1).

Shortly after the passage of Chapter 306, this office responded to a request by the Secretary of Personnel for an opinion whether the Secretary's EEO program extended to employees of the University of Maryland. 63 *Opinions of the Attorney General* 524 (1978). Attorney General Burch concluded that the Secretary did not have jurisdiction over University of Maryland employees because they were not "Merit System employees." Although the law giving the University of Maryland autonomy over its personnel system stated that its employees were to be regarded and treated as classified employees, the fact remained that they were not actually classified employees. 63 *Opinions of the Attorney General* at 527-28 and 530 n.3. Therefore, they did not fall within the Secretary of Personnel's jurisdiction over the equal employment opportunity program. Since that opinion, the General Assembly has not acted in any way to alter its conclusion, to which we adhere: that the EEO program is limited to classified service employees.

You also ask whether the Secretary's jurisdiction extends over the legislative and judicial branches of government. We conclude that it does not, for three reasons.

First, the statutory text on balance indicates that the EEO program applies to executive branch employees only. Section 12B states that "[t]he head of each agency *within the executive branch* of State government shall comply with the rules, regulations, and guidelines issued by the Department of Personnel and shall prepare an annual affirmative action plan in accordance with them." *See also* §12D (executive branch departments to appoint fair practices officers). Although §12D also speaks of the duty of "[a]ll State agencies" to cooperate with the Secretary of Personnel and comply with her rules, we interpret this phrase to refer to all executive branch agencies.

In addition, the legislative history indicates that the General Assembly intended to codify an existing executive order. Executive orders are confined in their applicability to the executive branch. *See* SG §3-302. *See also* 74 *Opinions of the Attorney General* 200, at 206 n. 8 (1989).

Finally, most legislative and judicial employees are subject to statutorily authorized independent personnel systems and therefore are not "Merit System employees" subject to the control of the Secretary of Personnel. The term "Merit system employees" refers to employees in the classified service.<sup>6</sup>

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<sup>6</sup> *See* note 2 above.

With respect to the Legislature, all positions within the Department of Legislative Reference and Department of Fiscal Services are unclassified and subject to personnel systems managed by the Legislative Policy Committee. SG §§2-1207(b) and 2-1307(b).<sup>7</sup> For each of these legislative departments, “[t]he Legislative Policy Committee shall adopt guidelines that are not inconsistent with law and that, for professional and non-professional employees of the Department, govern hiring, tenure, promotion, grievance procedures, and political activity.” SG §§2-1207(c) and 2-1307(c). This office has concluded that the quoted phrase “not inconsistent with law” does not require that the guidelines be consistent with laws governing State personnel generally. Instead, that language merely requires that the guidelines be consistent with the provisions of the State Government Article and with more broadly applicable laws. See Opinion No. 86-006 (February 10, 1986) (unpublished). Therefore, we conclude that Article 64A, §§12A through 12E do not place “unclassified” legislative branch employees under the authority of the Secretary.

Judicial branch employees are, with one exception, likewise outside the Secretary’s jurisdiction. See §2-601(b) of the Courts Article (“CJ” Article). As this office has concluded previously, appellate court employees and employees of the Administrative Office of the Courts are not merit system employees. See CJ §§2-402, 2-403, and 13-101. See also 62 *Opinions of the Attorney General* 674 (1977). Furthermore, CJ §2-505(b) gives the Court of Appeals rulemaking authority to determine whether personnel in circuit court clerks’ offices are “classified, unclassified, or in the personnel system of the judicial branch.”<sup>8</sup> Rule 1212(b) indicates that the Court has opted to establish an independent personnel system, which “shall provide for *equal opportunity*, shall be based on merit principles, and shall include appropriate job classifications

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<sup>7</sup> Although the statutes say that employees of the Department of Fiscal Services and Department of Legislative Reference are “unclassified,” it seems to us that the employees should more properly be considered “independent.” When the General Assembly grants an agency plenary authority to establish its own personnel system, the provisions of Article 64A that give the Secretary of Personnel authority over “unclassified” employees do not give her authority over employees in those separate personnel enclaves. When the General Assembly has wanted to extend the Secretary’s authority over employees in independent personnel systems, it has done so clearly and directly. See Article 64A, §37A (giving Secretary authority over University of Maryland employees with respect to leave). Unfortunately, the reality of the administration of public service in this State has advanced beyond the terminology used in the statutes. There is no adequate definition in the Merit System Law or elsewhere for employees in public service who are neither unclassified nor classified.

<sup>8</sup> CJ §2-5A-02 establishes an independent personnel merit system for the Office of the Clerk of the Circuit Court for Baltimore City.

and compensation scales.” (Emphasis supplied). Rule 1212(d) directs the State Court Administrator “to develop standards and procedures for the selection and appointment of new employees and the promotion, reclassification, transfer, demotion, suspension, discharge or other discipline of employees in the clerks’ offices.” Plainly, the clerks’ offices are independent of the Secretary’s authority under the Merit System Law.

The one group of judicial branch employees who remain part of the classified service comprises “the clerical, administrative, and constabulary employees of the District Court ...,” except for certain court officials. CJ §2-601(b). But since we have concluded that the requirements of §§12A through 12E are limited by its text and history to executive branch agencies, even these classified employees are excluded. Thus, in our view, no judicial branch employee is within the Secretary’s EEO program jurisdiction.

### III

#### **The Whistleblower Law**

You have asked whether Article 64A, §§12F through 12K, the Whistleblower Law, apply to applicants for unclassified employment, or within those sections are limited to classified employees, unclassified employees, and applicants for classified employment. You also have asked whether the Whistleblower Law applies to employees in the legislative and judicial branches of government.

The Whistleblower Law was enacted as Chapter 850 of the Laws of Maryland 1980. The evident purpose of the law is to protect certain employees from reprisals by their employer for making certain disclosures. Section 12G(a) provides that, in general, “an appointing authority may not take or refuse to take a personnel action with respect to an employee or applicant for employment as a reprisal for any disclosure of information ...

which disclosure the employee or applicant reasonably believes evidences” certain unlawful, wasteful, or hazardous practices.<sup>9</sup>

As originally enacted, the Whistleblower Law covered only classified employees and applicants for classified employment. However, the law was amended by Chapter 232 of the Laws of Maryland 1988 to apply to unclassified as well as classified employees. Section 12F(a) now defines “employee,” for purposes of the Whistleblower Law, to mean “a classified or unclassified employee of the State.”

The history of the 1988 bill indicates a legislative purpose to extend the scope of the Whistleblower Law to unclassified employees but it does not reveal any purpose to include applicants for unclassified employment as well. The bill’s title stated that its purpose was to clarify that both classified and unclassified State employees are covered by the Whistleblower Law. Delegate Rosenberg, the sponsor of the bill, testified that the amendments to the Whistleblower Law were a direct response to reprisals taken against unclassified employees in two instances. The bill file contains no mention of an objection to expand the scope of the Whistleblower Law to applicants for unclassified employment as well.

Inasmuch as neither the language of the statute nor its legislative history indicate that applicants for unclassified employment are protected under the Whistleblower Law, we conclude that they are not protected. This conclusion is consistent with other elements of the Merit System Law. With regard to applicants for classified employment, the Secretary of Personnel has statutory authority to set qualifications standards, control recruitment procedures, and oversee the selection process. *See* Article 64A, §§17, 18, 22 and 44. By contrast, the Secretary has no control over the hiring of unclassified employees. *Cf.* 58 *Opinions of the Attorney General* 503 (1973) (the Secretary had no authority to extend the grievance procedure to unclassified employees).<sup>10</sup> The General Assembly would not likely have intended to extend the Whistleblower Law to protect

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<sup>9</sup> The practices about which the law safeguards disclosures are these:

- (i) A violation of any law, rule, or regulation;
- (ii) Gross mismanagement, gross waste of funds, or abuse of authority; or
- (iii) A substantial and specific danger to public health or safety.

§12G(a)(1).

<sup>10</sup> The General Assembly amended Article 64A, §53 to permit some unclassified employees to file grievances. *See* 62 *Opinions of the Attorney General* 686 (1977).

individuals from reprisals arising from a hiring process over which the Secretary otherwise has no control.

We also conclude that the Whistleblower Law extends only to executive branch employees. The Whistleblower Law provides remedies that “are supplemental to ordinary grievance procedures prescribed by this article and rules and regulations promulgated thereto.” §12G(a)(2). Grievance procedures are limited to the executive branch. *See* Article 64A, §53(a).<sup>11</sup> Additionally, the State’s law was patterned on the federal whistleblower protections in the Civil Service Reform Act, which applies only to executive branch employees. *See* 5 U.S.C. §2302(a)(2)(A) and (C).

Accordingly, we conclude that the Whistleblower Law is limited to classified and unclassified employees in the executive branch and applicants for classified employment in the executive branch.<sup>12</sup>

## IV

### Leave

#### A. *Introduction*

Article 64A, §37, contains provisions relating to employee annual, sick, personal, and accident leave. Some of the provisions in §37 specifically refer to “classified” or “unclassified” employees, while others refer to “an employee,” “any employee,” and “every employee.” This statutory inconsistency has led you to ask us to differentiate the provisions of §37 that apply to classified employees only from those that apply to both classified and unclassified employees.

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<sup>11</sup> The 1988 amendments to the Whistleblower Law stemmed from two incidents involving executive branch employees. No changes were made that would indicate an intent to extend the reach of the law to other branches.

<sup>12</sup> We also conclude that the Whistleblower Law does not extend to employees in the executive branch who work for independent personnel systems, such as the University of Maryland System, the Maryland Transportation Authority, the Mass Transit Administration, or the Maryland Wholesale Food Center. *See* 73 *Opinions of the Attorney General* 285 (1988). If the General Assembly creates an independent personnel system in the executive branch, the employees within that system fall wholly outside the provisions of the Merit System Law, unless there is a clear indication of legislative intent otherwise.

Confronted with the statute's terminological inconsistency, our search for a construction that furthers the legislative objective is further hampered by the fact that since at least the late 1950's the Secretary of Personnel's leave regulations have made no distinction between classified employees and unclassified employees.<sup>13</sup> We find it difficult to untangle those leave policies that are based on the statute from those that derive from the Secretary's exercise of rulemaking authority. With these barriers to understanding the statute acknowledged, we turn to the specific provisions themselves.

### *B. Annual and Sick Leave*

Article 64A, §37(a) discusses annual and sick leave. With respect to annual leave, §37(a)(1)(i) provides as follows:

Every classified employee shall receive as annual vacation in each calendar year, a leave of absence with pay as follows:

Less than 5 years of service – 10 working days

5 to less than 10 years of service – 15 working days

10 to less than 20 years of service – 20 working days

20 years of service and more – 25 working days. The term "years of service," as used herein shall include any previous continuous State service.

With respect to sick leave, §37(a)(3)(i) provides that:

In addition to annual vacation leave, any employee shall be entitled to sick leave with sick pay for not in excess of 15 working days in any calendar year; provided, however, that if any employee in any

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<sup>13</sup> The chapter of the regulations dealing with paid leave, COMAR 06.01.11, became effective December 9, 1991. Regulation .01A states that "[t]his regulation applies to all employees and appointed officials except employees of the offices of the clerks of the circuit courts and registers of wills." This provision formerly was found in the preface to COMAR 06.01.01.42 and can be traced back to 1976. See 6:17 Md. Reg. 1392 (May 12, 1976). Additionally, the introductory provision to the chapter that until 1991 included leave regulations, COMAR 06.01.01.01A, provides as follows: "The regulations of this chapter, to the extent permitted by law, apply to classified positions, with the exceptions of appointment and discharge." That provision can be traced back to Rule I of the Commissioner of Personnel's State Employees Personnel Rules as it existed in the late 1950's.

calendar year uses less than the full amount of sick leave allowable, such unused leave shall be accumulated and shall be available to such employee for sick leave at any time. Nothing in this section may cause an employee to lose any sick leave accumulated as of December 21, 1974.

Were we constrained to follow the plain meaning rule in the construction of statutes, we would have to conclude that annual and sick leave are available under §37 to classified employees only. At the time that employees were first given the right to earn sick leave by the predecessor statute to §37, the term “employee” was defined by §1 of Article 64A to be synonymous with “classified employee.” Further, §37(a)(1)(i) expressly states that annual leave is earned by “classified” employees.

However, we are not bound to read a statutory text literally, without regard to its purpose and context. In particular, we are not precluded from studying the legislative history of the statute as part of the task of determining the legislative purpose or goal underlying the law. *Morris v. Prince George’s County*, 319 Md. 597, 604, 573 A.2d 1346 (1990). We may also take note of any longstanding administrative construction of a statute and its predecessor statutes by the agency charged with administering them. That construction is entitled to deference, and legislative acquiescence in a longstanding administrative construction “gives rise to a strong presumption that the interpretation is correct.” 319 Md. at 613 (quoting *Sinai Hosp. v. Dep’t of Employment*, 309 Md. 28, 46, 522 A.2d 382 (1987)). See also, e.g., *Maryland Pennysaver Group, Inc. v. Comptroller*, 323 Md. 697, 707, 594 A.2d 1142 (1991). “In a like vein,” the Court has written, “the consistent construction by an administrative agency responsible for administering a statute, particularly where the administrative interpretation has been made known to the legislature in various annual reports of the agency ... is entitled to considerable weight.” *Falik v. Prince George’s Hosp.*, 322 Md. 409, 416, 588 A.2d 324 (1991). Furthermore, the Legislature is presumed to have acted with full knowledge and information as to prior and existing law on the subject of the statute and policy of the prior law. *Maryland Classified Employees v. Schaefer*, 325 Md. 19, 34, 599 A.2d 19 (1991) (quoting *Board of Educ. v. Lendo*, 295 Md. 55, 63, 453 A.2d 1185 (1982)).

Prior to 1957, Article 64A, former §32 (the predecessor statute to §37) established a formula for the rate of earning of vacation leave by classified employees based on years of service. However, Chapter 485 of the Laws of Maryland 1957 amended the statute to define “years of service ... [to] include any previous State service in excess of one year as an unclassified employee.” Shortly thereafter, Commissioner of Personnel Davis received correspondence from the Maryland Port Authority to the

effect that he had no authority with respect to the accrual of vacation leave credits by unclassified employees of the Port. In a letter dated May 14, 1958 to the Executive Director of the Port, Commissioner Davis responded as follows:

It is our understanding, that Ch. 377, Acts of 1957 exempted key personnel from the jurisdiction of the Standard Salary Board and from the Merit System regarding appointment and separation; however, it appears any application for the granting of annual or sick leave, would be the same as that applying to all other State employees. By action of the Board of Public Works, it was established that leave with pay provisions could be applied to Unclassified employees, and in conformity therewith, the current Merit System Rule 1 was established, viz. “\*\*\*the Merit System Rules shall to the extent permitted by law also apply to unclassified positions with the exception of appointment and discharge\*\*\*”. Further Ch. 485, Acts of 1957 excluded the first year of service for Unclassified employees; however, knowing the intent was to cover certain hourly paid employees, we have ignored the limitation of excluding the first year of service for annual paid employees, and intend to have such section (37) of Article 64A, 1957 amended by the next legislative session.

Commissioner Davis evidently was of the view that he had authority to promulgate vacation and sick leave rules with respect to unclassified as well as classified employees. Further, he viewed Chapter 485 of the Laws of Maryland 1957 as having been intended to extend benefits to certain hourly paid employees and therefore felt free to ignore the limitation that years of service did not include the first year of service as an unclassified employee.<sup>14</sup>

In 1966 the General Assembly amended the leave statute, now Article 64A, §37, to redefine the term “years of service.” In Chapter 659 of the Laws of Maryland 1966, the term “years of service” was redefined to “include any previous State service.” The former language, “in excess of one year as an unclassified employee,” was deleted. The Commissioner

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<sup>14</sup> The dispute between the Commission of Personnel and the Port Authority was directed to the Attorney General. In 43 *Opinions of the Attorney General* 237 (1958), Attorney General Sybert concluded that unclassified employees of the Port Authority were subject to Rule 42 of the Merit System rules, which prescribed the conditions of vacation and sick leave.

of Personnel summarized this bill as having “eliminated the requirement that the first year of service as an unclassified employee does not count toward the earning of leave credits.” Forty-Eighth Annual Report of the Commissioner of Personnel 35-36 (1968). Thus, in the view of the Commissioner, the purpose of Chapter 659 was not to restrict the earning of leave by unclassified employees. Rather, the effect was to liberalize the law so that unclassified employees no longer had to wait until the end of their first year to earn leave credits. In other words, the legislative intent was to eliminate the distinction between classified and unclassified employees with respect to earning annual leave.

Seven years later, the Legislature enacted Chapter 660 of the Laws of Maryland 1973, creating a new §37A of Article 64A. Section 37A provided as follows:

Notwithstanding any other provisions of any law to the contrary, the Secretary shall promulgate rules and regulations for all persons paid by the State except employees of the offices of clerks of the court and registers of wills, whether or not in the classified service, including but not limited to, all appointed officials and employees, all key employees and officials, all employees or officials holding totally or partially federally funded positions, all attorneys in the State Law Department, all hourly-paid employees, all employees and officials specifically exempted from the classified service by any statute, all employees and officials exempted under §3 of this Article, all persons employed or appointed, whether faculty, administrative, clerical or any other form of employment at all State educational institutions, including but not limited to, all State colleges, and the University of Maryland, concerning all aspects of annual leave, compensatory time, the keeping of time records, and the filling of any one full-time position by two or more part-time employees.

In an unpublished opinion the next year, Attorney General Burch advised the Secretary of Personnel that unclassified employees were entitled to earn sick leave. Opinion No. 74-121 (June 19, 1974) (unpublished). The Attorney General based that conclusion on the Department of Personnel’s longstanding practice of construing §37 and its implementing rule, COMAR 06.01.42C, as applying to all employees, classified and unclassified, except employees appointed by the Governor or with the Governor’s concurrence. The Attorney General also based his

conclusion on the fact that the Legislature had tacitly approved the Department's construction of §37 by its longstanding acquiescence.

Legislative affirmation of the scope of the Secretary's leave policies was further evidenced by a 1975 change in §37A. The law, as originally enacted, was silent on the question of sick leave and personal leave. Consequently, the Department of Personnel sponsored Senate Bill 253 in the 1975 Session in order to include sick leave and personal leave within the Secretary of Personnel's rulemaking authority. Senate Bill 253 also clarified §37A by substituting the term "all State employees, classified or unclassified, and appointed officials" for the more general term "persons paid by the State." Senate Bill 253 was enacted as Chapter 302 of the Laws of Maryland 1975. As we view it, §37A establishes the contours of the Secretary's authority over employee leave, listing those employees whose leave the Secretary has jurisdiction to regulate.

The Department's interpretation of §37, that unclassified employees were entitled to earn annual leave, was tacitly approved again in 1976 through passage of Chapter 651 (House Bill 351) of the Laws of Maryland 1976. Chapter 651 amended §37(b) to permit unclassified employees and appointed officials to be compensated for earned and unused annual leave upon separation from State service. Previously, only classified employees received compensation at the time of separation.<sup>15</sup> The minutes of the House Committee on Appropriations indicate that Francis X. O'Brien of the Department of Personnel (later to become Secretary of Personnel) testified that House Bill 351 "would bring the law to conform with the rules already adopted by the Secretary of Personnel." By enacting Chapter 651, the General Assembly recognized that unclassified employees had the right to earn annual leave; otherwise this law, providing compensation for unused annual leave upon separation from State service, would make no sense.

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<sup>15</sup> In 58 *Opinions of the Attorney General* 506, 510-11 (1973), this office concluded that under Article 64A, §37(b) an employee had to be compensated for earned and unused annual leave at the time of termination of service as a classified employee. In Opinion 75-079 (June 17, 1975) (unpublished), this office further concluded that unclassified employees were entitled to be compensated for earned and unused annual leave at the end of their unclassified service pursuant to Rule 42 of the Merit System Rules. Consequently, a State employee who left the classified service for the unclassified service would be compensated twice for unused annual leave: once at the end of classified service employment and again at the end of unclassified service employment.

This lengthy history supports our view that Article 64A, §37 gives unclassified employees the right to earn annual and sick leave.<sup>16</sup>

### C. *Accident Leave*

You have also asked whether unclassified employees are entitled to accident leave. We conclude that they are. Section 37(g)(l) states that an employee who is accidentally injured in the actual performance of his or her job duties and receives a personal injury that would be compensable under the Workers’ Compensation Law “shall be granted accident leave with full sick pay.” See generally *77 Opinions of the Attorney General* 207 (1992). See generally *Falik v. Prince George’s Hosp.*, 322 Md. at 415-16.

As is true of sick leave, the Secretary of Personnel’s longstanding construction of this aspect of §37 is that all employees, classified and unclassified, are entitled to this form of leave. See COMAR 06.01.11.09. Recent changes to the accident leave provisions did not disturb this construction and therefore imply legislative acquiescence. See Chapter 21 of the Laws of Maryland 1991.

### D. *Personal Leave*

Section 37(a)(5) states that “[e]very employee shall be entitled to personal leave with pay for not in excess of three days in any calendar year ....” Personal leave was added to §37 by Chapter 581 of the Laws of Maryland 1971. Immediately after the passage of Chapter 581, the Secretary of Personnel adopted Rule 42E.3, which provided in part that “[e]mployees shall be entitled to three days personal leave in any calendar year.” See Letter of William Smearman, Director, Administrative Division, to the Court of Appeals (announcing amendments to Rule 42, effective

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<sup>16</sup> We acknowledge our office’s prior opinions on this subject might have contributed to the present confusion over the meaning of the statute. In *58 Opinions of the Attorney General* 69 (1973), Attorney General Burch addressed the question whether Clerks and deputy clerks (with the exception of those in Washington County) were subject to the State vacation and sick leave plan set forth in Article 64A, §37. The opinion concluded that because Clerks and deputy clerks were excluded from the merit system, the State vacation and sick leave plan was inapplicable.

The reasoning in that opinion is faulty, at least by contemporary principles of statutory construction, because it reflects too rigid an application of the plain meaning rule and too little attention to the true legislative purpose underlying §37. Moreover, *58 Opinions of the Attorney General* 69 (1973) is inconsistent with *43 Opinions of the Attorney General* 237 (1958), in which Attorney General Sybert concluded that unclassified employees were subject to the State vacation and sick leave plan.

July 1, 1971). As we have previously noted, Rule 1 of the State Employees Personnel Rules provides that, for the purposes of the Secretary of Personnel's rules and regulations, "The State Employees Personnel Rules shall to the extent permitted by the law also apply to unclassified positions with the exception of appointment and discharge." Therefore, it appears that the Department of Personnel has always viewed personal leave as applying to both classified and unclassified employees.

Given this longstanding administrative practice, which has never been disturbed by the Legislature, we conclude that every employee subject to the Secretary of Personnel's authority, classified or unclassified, is entitled to personal leave with pay pursuant to Article 64A, §37(a)(5).

## V

### Holidays

Article 89, §28 provides that "[e]very State employee is entitled to observe with pay" certain legal holidays. Section 28 is a recodification of former Article 100, §77, which originally was enacted as part of Chapter 130 of the Laws of Maryland 1956.

Section 130 dealt with three related subjects. First, it established the number of days of annual leave every classified employee was entitled to receive, amending §32 of the Merit System Law. Second, it amended Article 100, §76 to establish criteria for awarding overtime compensation to different categories of State employees. *See Maryland Classified Employees Assoc. v. Schaefer*, 325 Md. at 31. It also amended §76 to give the Secretary of Personnel the power to approve the designation of supervisory employees who were not eligible for overtime compensation and the power to adopt regulations to prevent an abuse of that section. *See Part VII* below. Third, it enacted a new §77 to Article 100 to provide that "every State employee" was entitled to observe with pay certain legal holidays.

While Article 89, §28 does not explain what it means by "every State employee," we believe that the statute does apply to every State employee, including employees in the unclassified service, employees in independent personnel systems, and employees in all three branches of government. We think it significant that the section was not enacted within the framework of the Merit System Law but instead was placed in Article 100. This choice had the effect of avoiding any confusion over what was meant by the term "every State employee." Article 64A, §1 at the time defined the term "employee" to mean "classified service employee" when those terms were used in Article 64A. However, that definition would not apply to

Article 100. Furthermore, the General Assembly's use of the term "every *State* employee" demonstrates that the General Assembly was not limiting the statute to employees in any particular category of public service – classified, unclassified, or independent – but rather wanted the statute to apply to all categories of employees of the State.

Thus, we conclude, Article 89, §28 applies to all State employees.

## VI

### **Denial of Promotion Opportunities Because of Sick or Maternity Leave**

Article 89, §29 provides:

No State employee shall be denied the opportunity to seek, to qualify for and to be awarded any promotion in State government service solely on the ground that the employee is currently on sick leave or maternity leave if that employee is expected to return to active State service within sixty days after notification of the availability of the promotional opportunity. Notification shall have been given when the job-seeker receives a request that the employee call for an interview for the position.

Section 29 was enacted as Chapter 698 of the Laws of Maryland 1974.

For reasons similar to those which lead us to conclude that the holiday leave statute applies to all categories of employees in State service, we conclude that §29 likewise applies to all categories of employees in State service. Article 89, §29 was not placed in the Merit System Law and therefore was evidently intended to have a broad application. Moreover, the statute speaks in terms of *State* employees generally and therefore was intended to extend beyond employees of any particular personnel system. Accordingly, the protection of promotional opportunities for persons on sick or maternity leave found in Article 89, §29 applies to all State employees throughout State service.

## VII

### **Overtime**

Article 89, §27(c) provides as follows:

The Secretary of Personnel is authorized and empowered to designate those bona fide administrative, executive, and professional employees who shall not be eligible to receive overtime compensation but who may be compensated by compensatory time. The Secretary of Personnel is authorized and empowered to adopt and promulgate reasonable regulations to prevent an abuse of this section by the granting of unnecessary and unwarranted overtime or by the failure to grant overtime compensation when the employee is eligible to receive it under the provisions of this section.

As we have previously discussed, this provision was enacted originally as part of Chapter 130 of the Laws of Maryland 1956, which amended former Article 100, §76. The principle substantive difference between Chapter 130 and Article 89, §27(c) today is that the provision as originally enacted limited the Secretary's rulemaking authority to the prevention of the granting of unnecessary and unwarranted overtime. By Chapter 31 of the Laws of Maryland 1958, the Secretary also gained the authority to prevent an abuse of the law by "the failure to grant overtime compensation when the employee is eligible to receive it...."

You have asked whether the Secretary's authority under §27 extends to the judicial and legislative branches. We conclude that §27 gives the Secretary authority over all employees in all three branches of government, with the exception of employees of the Comptroller's Alcohol and Tobacco Tax Enforcement Unit, who are expressly excluded in the statute. See Article 89, §27(d).

In 53 *Opinions of the Attorney General* 241 (1968), Attorney General Burch considered a somewhat similar question from the Commissioner of Personnel. The Commissioner advised that it was the practice of his office to determine the eligibility for overtime payments only for those positions that were within the jurisdiction of the Standard Salary Board. The Attorney General disagreed with the Commissioner's interpretation, concluding that his authority to approve exemptions from overtime and to promulgate rules and regulations to guide department heads in determining whether an eligible employee was entitled to overtime was broader than the jurisdiction of the Standard Salary Board. 53 *Opinions of the Attorney General* at 242. The only exceptions were employees who were expressly exempted under the statute. 53 *Opinions of the Attorney General* at 242-43.

The significance of that earlier opinion lies in its conclusion that the Commissioner's authority to regulate in the area of overtime extended

beyond classified and unclassified employees. At the time of the 1968 opinion, the Salary Board had jurisdiction to prepare a pay plan "for all classes of positions in both the classified and unclassified service." Article 64A, §27(a) (1968 Repl. Vol.). Therefore, Attorney General Burch necessarily concluded that the Commissioner's overtime authority extended even to employees who were in independent personnel systems - that is, who were in neither the classified nor the unclassified services.

The overtime statute has not been amended subsequently in a way that would call into question this conclusion. Nor do we read any of the statutes authorizing various units of the judicial and legislative branches to establish independent personnel systems as depriving the Secretary of her overtime authority. While we recognize that several statutes give various units of the judiciary and the Legislature independent personnel authority, none of those general statutes specifically discusses the ability of those independent systems to regulate in the area of overtime. When the General Assembly has enacted both a specific and a general statute and the general statute includes the same subject matter as the more specific, the general statute governs only those provisions that do not fall within the provisions of the specific statute. *See Lumberman's Mut. Casualty v. Ins. Comm'r.*, 302 Md. 248, 268-69, 487 A.2d 271 (1985) (citing earlier authority).

Article 89, §27 is such a specific statute, and in our view it prevails over other legislation that only generally authorizes creation of independent personnel authorities. Furthermore, the Legislature must be presumed to have been aware of the construction given the overtime statute by the 1968 Attorney General's opinion. *Crest Investment v. Cohen*, 245 Md. 639, 648, 227 A.2d 8 (1967). Therefore, when the General Assembly has enacted legislation creating independent personnel systems, it has been aware of the opinion's conclusion that the only employees who did not fall under the Secretary's overtime jurisdiction were those specifically named in the statute. Thus, the Secretary's authority to determine eligibility for overtime and to adopt regulations applies to all State employees except those specifically excluded in Article 89, §27.

We realize that our conclusion runs counter to the prevailing practices of units in the judicial and legislative branches. We also realize that the Department of Personnel has long acquiesced in independent personnel systems' making their own determinations as to which employees are entitled to overtime. Nevertheless, while we recognize that certain customs and understandings may have developed, those customs, however venerable, must now conform to Article 89, §27. *See Maryland Classified Employees v. Schaefer*, 325 Md. at 33.

We do not view the Secretary of Personnel's authority as unlimited, however. She cannot exercise her authority to determine which employees

are eligible to receive overtime in such a way as to interfere with the core functions of the judicial or legislative branches.

In 62 *Opinions of the Attorney General* 674, 678 (1977), Attorney General Burch concluded that positions in the Administrative Office of the Courts and in the appellate courts were not under the Secretary's salary-setting authority, because the inclusion of such positions in the pay plan would be violative of the separation of powers doctrine in Article 8 of the Maryland Declaration of Rights.<sup>17</sup> However, in 65 *Opinions of the Attorney General* 309 (1980), Attorney General Sachs significantly narrowed that conclusion. According to the later opinion, the doctrine of separation of powers did not require that the judiciary be given exclusive control over its personnel system. Rather, the General Assembly could establish a personnel system "governing matters [such] as the hiring, compensation, promotion, or discipline of employees in the Judicial Branch, whether those employees are compensated by the State or the subdivisions, so long as the courts can still exercise their judicial powers effectively." 65 *Opinions of the Attorney General* 309. The 1980 opinion distinguished the earlier opinion by pointing out that the focus of the earlier opinion was on intrusion by the executive into the judiciary, whereas the focus of the later opinion was the plenary authority of the General Assembly to enact authorizing legislation. 65 *Opinions of the Attorney General* at 314-15 n.2.

As we see it, the analysis is the same whether the focus is on a legislative intrusion into the judiciary's authority through the legislature's enactment of a statute or an executive intrusion into the judiciary's authority through adoption of a regulation promulgated pursuant to a delegation of legislative power. See *Department of Transportation v. Armacost*, 311 Md. 64, 72, 532 A.2d 1056 (1987). The separation of powers doctrine imposes the same limits on the Legislature in enacting a statute and an executive agency in adopting a rule: Neither a statute nor a rule may intrude upon the core functions of another branch. See 73 *Opinions of the Attorney General* 92 (1988).

In general, the authority to determine overtime eligibility is distinguishable from the authority to establish a position's salary, because salary-setting authority is a direct exercise of control over the budget. A statute may not effectively give the executive branch the power to revise the budget of the legislative or judicial branches. See Article III, §52(11) of the Constitution. A determination of overtime eligibility only has an

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<sup>17</sup> The opinion based its conclusion not only on Article 8 of the Declaration of Rights but also on Article III, §§52(11) and (12) of the Constitution, which deny the Governor any revisory power over the budgetary estimates submitted to him by the legislative and judicial branches. 62 *Opinions of the Attorney General* at 678.

indirect effect, however, and the employer retains the authority to control the employee’s work hours so that the employee does not exceed 40 hours per week and does not earn overtime. Hence, in our view, the Secretary of Personnel may exercise the authority given her by Article 89, §27 over all employees in State government except those expressly excluded in that statute, provided that any particular exercise of that authority does not intrude into the core functions of the legislative and judicial branches.

Our legal conclusion should not be taken for a policy endorsement. Ultimately the General Assembly should consider whether the preferable policy might be to integrate the decision of which employees should receive overtime with the decision of what the proper rates of pay should be. Furthermore, recent federal court decisions in the area of overtime eligibility under the federal Fair Labor Standards Act point to the importance of controlling the use of unpaid leave by employees exempt from overtime. *See Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 785 (1991). These policy considerations suggest that the decision about who should receive overtime compensation should be made by the same official who has control over leave policies. Therefore, the General Assembly should be asked to consider giving the heads of the various salary-setting authorities and personnel systems the authority to determine which employees are eligible to receive overtime compensation and which are not.

Finally, we point out that Article IV, §18(a) of the Constitution of Maryland authorizes the Court of Appeals to adopt rules and regulations concerning the administration of the courts. These rules have the force of law until they are rescinded, changed, or modified by the Court of Appeals or otherwise by law. Therefore, the Court of Appeals has the authority to adopt its own overtime compensation procedures by court rule for judicial employees, despite the fact that Article 89, §27 now gives that authority to the Secretary of Personnel, and the court rule would prevail until modified by the Court or by act of the Legislature. *See County Fed. Sav. & Loan Ass’n. v. Equitable Savings and Loan Ass’n.*, 261 Md. 246, 274 A.2d 363 (1971).

## VIII

### Conclusion

In summary, it is our opinion that:

1. Article 64, §§12A through 12E, which establish an equal employment opportunity program under the auspices of the Secretary of

Personnel, apply to classified service employees in the executive branch only.

2. Article 64A, §§12F through 12K, which establish a whistleblower protection program, do not apply to applicants for unclassified employment, but do apply to classified service employees, unclassified service employees, and applicants for classified service employment in the executive branch.

3. The provisions of Article 64A, §37, which relate to employee annual, sick, personal, and accident leave, apply to all classified and unclassified employees over whom the Secretary of Personnel exercises leave authority.

4. Article 89, §§28 and 29, which provide State holidays and protect against the denial of promotional opportunity caused by use of sick or maternity leave, apply to all State employees in all three branches of government.

5. Under Article 89, §27(e) the Secretary of Personnel may regulate the payment of overtime compensation for all State employees in all three branches of government, subject to constitutional limits on the manner in which she may exercise that authority with respect to employees in the legislative and judicial branches.

J. Joseph Curran, Jr.  
*Attorney General*

David R. Durfee, Jr.  
*Assistant Attorney General*

Jack Schwartz  
*Chief Counsel*  
*Opinions and Advice*

*Editor's Note:*

Following extensive recodification, the provisions on equal employment opportunity may be found in Title 5, Subtitle 2 of the State Personnel and Pensions ("SPP") Article; the whistleblower law, in SPP Title 5, Subtitle 3; the provisions on annual, personal, sick, and accident leave, in SPP Title 9, Subtitle 3, 4, 5, and 7, respectively; the provisions on State holidays, SPP Title 9, Subtitle 2; the protection of promotional opportunities for those who use sick or maternity leave, SPP §2-303(c); and the provisions on overtime compensation, SPP Title 8, Subtitle 3.

**PROPERTY****MILITARY SERVICE – TERMINATION OF RESIDENTIAL LEASES**

September 15, 1992

*The Honorable John C. Astle*  
*House of Delegates*

You have requested our opinion concerning §8-212.1 of the Real Property (“RP”) Article, the law that gives military personnel the right to terminate a residential lease upon the receipt of permanent change of station orders. Specifically, you ask if this law is applicable to military personnel who are released from service and sent to their home of permanent record.

For the reasons stated below, we conclude that RP §8-212.1 gives military personnel who are released from service and sent to their home of permanent record the right to terminate their residential leases.

**I****Lease Termination Law**

Enacted as Chapter 449 of the Laws of Maryland 1985, RP §8-212.1 provides as follows:

Notwithstanding any other provision of this title, if a person who is on active duty with the United States military enters into a residential lease of property and subsequently receives permanent change of station orders or temporary duty orders for a period in excess of 3 months, any liability of the person for rent under the lease may not exceed: (1) 30 days’ rent after written notice and proof of the assignment is given to the landlord; and (2) the cost of repairing damage to the premises caused by an act or omission of the tenant.

The legislative history of this provision, which has not been amended subsequently, suggests that its main objective was to ameliorate the problem that arises when military personnel enter leases for a term of one

or more years but then receive orders to report to another post. Thus, your own testimony before the Senate Judicial Proceedings Committee on the 1985 bill, House Bill 1478, was summarized as follows:

Delegate Astle testified that the bill was drafted in response to a problem in areas adjacent to Ft. Meade in Anne Arundel County. The enlisted military personnel are frequently forced to break a lease as a result of being transferred. Since there are no standard policies regarding leases that are broken due to a change of duty station orders this bill standardizes leases between landlords and military personnel. The Maryland Association of Realtors supports H.B. 1478.

Senate Judicial Proceedings Committee, Report on House Bill 1478. Your question now is whether this enactment also applies to military personnel who are released from service and sent to their home of permanent record.

Although the focus may have been on personnel who receive orders to report to another post, the law employs the military terms "permanent change of station orders" and "temporary duty orders," which have well-settled meanings. The term "permanent change of station" is defined by federal regulations to include not only transfer to a different permanent duty station but also:

[C]hange from the last [permanent duty station] to home upon:

1. discharge, resignation, or separation from the Service under honorable conditions;
2. release from active duty to which called for 20 weeks or more or from active duty for training to which called for 20 weeks or more;
3. transfer to the Fleet Reserve or to the Fleet Marine Corps Reserve;
4. retirement;
5. temporary disability retirement.

Department of Defense Per Diem, Travel, Transportation and Allowance Committee, *Joint Federal Travel Regulations, Uniformed Service Members* Appendix A. We are advised by the Compensation Office of the Pentagon that the regulation was substantively the same in 1985.

The use in RP §8-212.1 of terms defined in these federal regulations suggests an intent that the terms have the same meaning in RP §8-212.1. *See, e.g., Unsatisfied Claim & Judgment Fund v. Hamilton*, 256 Md. 56, 59, 259 A.2d 303 (1969). *See generally* 2A *Sutherland Statutory Construction* §47.30, at 262 (1992) (“When the language of the statute is adopted from another state or country, the construction utilized on such legal language is adopted.”). Thus, the statutory term “permanent change of station orders” should be construed to extend to orders effecting a discharge, resignation, or separation from military service under honorable conditions.

## II

### Conclusion

In summary, it is our opinion that when military personnel receive change of station orders upon release from service, they have the same right to terminate a residential lease as personnel who are ordered to another post.

J. Joseph Curran, Jr.  
*Attorney General*

Richard E. Israel  
*Assistant Attorney General*

Jack Schwartz  
*Chief Counsel*  
*Opinions & Advice*

**PUBLIC AGENCIES AND ENTITIES****BUDGETARY ADMINISTRATION – DISABLED PERSONS – CREATION OF PRIVATE CORPORATION TO CARRY OUT PROGRAM OF OFFICE FOR INDIVIDUALS WITH DISABILITIES – STATUS OF CORPORATION’S FUNDS**

August 17, 1992

*Ms. Diane K. Ebberts  
Director, Governor’s Office for  
Individuals with Disabilities*

You have requested our opinion concerning the privatization of the Maryland Corporate Partnership Project (the “Project”), a program developed by the Governor’s Office for Individuals with Disabilities (“OID”) to increase opportunities for employees with disabilities. Specifically, you ask (1) whether OID’s transfer of the operation of the Project to the Maryland Corporate Partnership, Incorporated (“MCP”), a private nonprofit corporation, required the approval of the General Assembly or the Board of Public Works, and (2) whether MCP’s cash receipts for fiscal years 1990 and 1991 were public funds subject to deposit in the State Treasury.

For the reasons discussed below, we conclude as follows:

1. OID has sufficient statutory authority to transfer operation of the Project to a private entity. The privatization of the program thus was valid without either legislative action or Board of Public Works approval.
2. MCP was not required to deposit revenue received during fiscal years 1990 and 1991 into the State Treasury. Because MCP is not a State agency, the constitutional restrictions relevant to State funds are inapplicable.

## I

**Background**

The Office for Individuals with Disabilities, created by and operating under Subtitle 11 of Title 9 of the State Government Article ("SG" Article), is a unit within the Office of the Governor.<sup>1</sup> In brief, OID's purpose is to examine State, public, and private programs and services for individual with disabilities in order to provide assistance and coordination as needed. *See* SG §9-1105.

Early in 1988, OID initiated the Maryland Corporate Partnership Project, a program to improve employment opportunities for individuals with disabilities through the establishment of a "partnership," or network, between private and public agencies and corporate employers. To implement the Project, OID enlisted the aid of the Department of Economic and Employment Development ("DEED") and the Division of Vocational Rehabilitation ("DVR") within the State Department of Education.<sup>2</sup> DEED, through its Division of Employment and Training, is responsible for coordinating the State's public and private resources for employment and job training. *See* Article 83A, §§3-101(c) and 3-103 of the Maryland Code.<sup>3</sup> DVR's functions include vocationally rehabilitating individuals with disabilities and placing them in gainful occupations. *See* §21-303(b)(3) and (6) of the Education Article.

In June 1989, OID, DEED, and DVR entered into a "Cooperative Agreement Concerning the Maryland Corporate Partnership." The agreement stated that DEED would provide office space and furnishings for the Project; that all three agencies would participate in the selection of Project staff; that OID would supervise the staff; and that the

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<sup>1</sup> Chapter 946 of the Laws of Maryland 1977 created an "Office for the Coordination of Services to the Handicapped." Chapter 295 of the Laws of Maryland 1984 renamed the unit "Office for Handicapped Individuals." The most recent amendment, Chapter 103 of the Laws of Maryland 1991, redesignated the unit "Office for Individuals with Disabilities".

<sup>2</sup> Under Chapter 42 (House Bill 251) of the Laws of Maryland 1992, the name of the Division of Vocational Rehabilitation will be changed to the Division of Rehabilitation Services on October 1, 1992.

<sup>3</sup> DEED is responsible for coordinating federal and State funded training, employment, and unemployment programs and placing trained program graduates and other unemployed persons in jobs. DEED also assists employers in developing a qualified work force and advises of the availability of public financial hiring incentives.

agencies would work together to educate "corporate partners" regarding the hiring and retention of employees with disabilities. The agreement further provided for funding of the Project by DEED and DVR.<sup>4</sup>

The parties to the agreement, we are told, contemplated from the outset that the Project would be transferred to the private sector once it became operational. Responsibility for the day-to-day operations of the Project was not assigned to regular OID staff but, rather, to a contractual employee hired as director of the Project pursuant to Article 64A, §15A. A major task assigned to the director was incorporation of the Project.

On August 16, 1989, the Maryland Corporate Partnership, Incorporated was established as a private, nonprofit corporation. The Project director assumed full-time duties with the corporation, initially as an acting director and then as president of MCP.<sup>5</sup> Funding from DVR and DEED, budgeted for the Project as reimbursable funds in OID's fiscal year 1991 budget, did not pass through OID but instead was directed to the Project through grant agreements executed between MCP and DEED and DVR.

## II

### Authority of OID to Privatize the Project

The Legislative Auditor has asked whether OID was empowered to transfer operation of the Project to a private entity without approval by the General Assembly or the Board of Public Works. In our opinion,

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<sup>4</sup> The budget bill for fiscal year 1990 appropriated \$27,323 in the budget of the Department of Education and \$27,324 in the budget of DEED to reimburse OID for the Project. The budget bill for fiscal year 1991 appropriated \$33,840 each in the budgets of the Department of Education and DEED for this purpose. OID was granted authorization to use the reimbursable fund income for operating expenses. See budget bill for fiscal years 1990 and 1991 at item 23.01.02.01.

<sup>5</sup> The president and his assistant, who continue to serve in those positions today, remained under contract with the OID until June 30, 1990.

OID's privatization of the Project was legally authorized without these approvals.<sup>6</sup>

State agencies have those powers expressly granted by the General Assembly and those powers impliedly necessary to carry out such express powers. See *73 Opinions of the Attorney General* 295, 297 (1988) (citing cases). In the absence of express legislative authorization, these powers may not be relinquished by the agency. *73 Opinions of the Attorney General* at 302.

The establishment of a private entity to assume a function of a State agency, however, does not necessarily amount to an improper relinquishment of that agency's statutory powers. Generally speaking, a function may legally be carried out by a contractor if the agency has the power to carry out the activity in question but is under no legal mandate to perform the function itself. See *In re North Jersey District Water Supply Commission*, 417 A.2d 1115 (N.J. Super. Ct. App. Div. 1980). Cf. *71 Opinions of the Attorney General* 274, 277 (1986) (recognizing "essential discretion in the contracting process").

OID's development of the Maryland Corporate Partnership Project and its subsequent transfer to a private entity was accomplished in accordance with these basic principles. MCP's purpose, as stated in its articles of incorporation, is to provide employers with a centralized information source for locating qualified employees with disabilities, finding suitable training programs, and obtaining information to facilitate the hiring and retention of these individuals. This purpose falls squarely within OID's powers under SG §9-1105 to:

- (1) identify and evaluate the programs and services for handicapped individuals in the State;
- (2) collect information to identify programs and services that handicapped individuals need;
- (3) identify barriers to the delivery of adequate services and recommend procedures to remove the barriers;

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<sup>6</sup> Senate Joint Resolution 14 (1992 Session) requests the Governor and the General Assembly to appoint a Commission on Privatization to review State government functions and develop guidelines for the use of privatization by the State. This opinion attempts to set out considerations pertinent to your inquiry; it does not purport to be an exhaustive treatment of the issues concerning privatization, which the new commission presumably will explore.

(4) develop an information and referral service for programs and services for handicapped individuals; [and]

(5) foster coordination of and support for public and private agencies that provide programs and services to handicapped individuals.

Moreover, OID was under no statutory mandate to operate the program itself. The statutory language makes it clear that OID's overall function is to serve as the advocate, or supporter and protector, of individuals with disabilities, and not as a direct provider of services. The statute does not assign to OID the duty of executing a specific program but makes the agency responsible for "identifying" and "evaluating" programs, for "fostering" and "coordinating" support for agencies, and for "promoting" programs.<sup>7</sup>

A prior Attorney General's opinion on privatization supports the approach set out here. In *71 Opinions of the Attorney General* 197 (1986), the Attorney General concluded that Talbot County could contract with a private entity for custody of inmates in a county detention facility. The county had broad statutory authority "to establish, maintain, regulate and control" county jails and "to regulate all persons confined therein." *71 Opinions of the Attorney General* at 201. This grant of authority, the opinion went on, "necessarily includes choosing whether to operate the institution with county employees or through the use of a contractor." *Id.* The opinion concluded that while the county may contract for prison services, it may not by contract "wholly abdicate its [statutory] responsibility for the operation of a county jail." *71 Opinions of the Attorney General* at 203.

In our view, establishment of the Maryland Corporate Partnership Project by means of a private corporation, MCP, was proper because MCP performs a function within the powers of OID and because the transfer of that function to MCP did not divest the OID of any authority that it was required to carry out directly.

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<sup>7</sup> Certain direct support activities are carried out by the Maryland State Planning Council on Developmental Disabilities and the Technology Assistance Program, operationally separate components within OID.

### III

#### Fiscal Accountability

The Legislative Auditor's second question is whether the deposit of MCP's cash receipts for fiscal years 1990 and 1991 into the corporation's checking account, instead of the State Treasury, was proper. This question arises for two reasons. First, in fiscal year 1990 these cash receipts, primarily representing fees paid by various organizations for services provided and donations, were generated largely as a result of the work of the president of the corporation under his contract with the State. Second, in fiscal year 1991, reimbursable funds were budgeted to OID for the Project but channeled to the MCP through grant agreements between DEED and DVR and MCP.<sup>8</sup>

The deposit of funds into the State Treasury is governed by Article VI, §3 of the Maryland Constitution, which requires the State Treasurer to "receive the moneys of the State, and, until otherwise prescribed by law, deposit them, as soon as received, to the credit of the State ...." Correspondingly, §6-213(a) of the State Finance and Procurement Article ("SF" Article) provides that "each unit of the State government monthly shall ... pay into the State Treasury all collections, fees, income, and other revenues that are received by the unit ... and ... account to the Comptroller for those revenues." Article VI, §3 and SF §6-213 apply only to State agencies.

In form, MCP is not a State agency but a private, non-profit corporation. However, we must still consider whether OID created a corporate entity that nonetheless serves as an instrumentality of the State. A corporation can be treated as a unit of state government even if not created by statute. In *Graham v. Baker*, 447 N.W.2d 397 (Iowa 1989), state law required a particular state agency to contract with a private nonprofit organization to provide mediation services between farmers and creditors. The court considered whether the private organization was a state agency for purposes of that state's Administrative Procedure Act. See also *League General Insurance Company v. Michigan Catastrophic*, 458 N.W.2d 632 (Mich. 1990) (an

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<sup>8</sup> During fiscal year 1990, MCP received fees totaling \$35,281 from various organizations for services provided in developing corporate interest in hiring employees with disabilities. For fiscal year 1991, the MCP received fees for services and donations from various organizations totalling \$32,666. In addition, MCP received grants during both fiscal years from DVR and DEED. These grants were funded by moneys appropriated to the two departments and budgeted as reimbursable funds to OID for purposes of the Project. (The figures stated in this note are as of March 25, 1991, the date that the audit was concluded.)

entity can be an “agency” not only if created by constitution or statute but also if created by agency action). Cf. *Alaska Commercial Fishing v. O/S Alaska Coast*, 715 P.2d 707 (Alaska 1986) (corporate status is a neutral factor that neither precludes nor mandates a finding of state “agency”). In other words, we must consider whether MCP is functionally the State’s “alter ego.”<sup>9</sup> If MCP is but an “alter ego” of a State agency, its revenues would be State monies subject to deposit in the State Treasury.

In 71 *Opinions of the Attorney General* 10 (1986), an opinion dealing with the Chesapeake Bay Trust, the Attorney General identified several factors to determine whether an entity falls within the purview of constitutional and statutory provisions governing State moneys.<sup>10</sup> We shall apply these same criteria to MCP to determine whether the MCP is a State unit for purposes of fiscal control.

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<sup>9</sup> Such an “alter ego” analysis was used in *Ram Ditta v. Md. Nat. Capital Park and Planning Commission*, 822 F.2d 456 (4th Cir. 1987), where the question was whether the Maryland National Park and Planning Commission was the State’s “alter ego” for purposes of Eleventh Amendment immunity. There the factors used by the court to determine the agency’s status were: whether the State Treasury will be responsible for paying any judgment that might be awarded; whether the entity exercises a significant degree of autonomy; whether it is involved with statewide concerns; and how it is treated as a matter of State law. Other decisions using an “alter ego” analysis include *First National City Bank v. Banco Para El Comercio*, 462 U.S. 618 (1983); *Hester International Corp. v. Federal Republic of Nigeria*, 879 F.2d 170 (5th Cir. 1989); and *Patterson v. Ramsey*, 413 F. Supp. 523 (D.Md. 1976), *aff’d on other grounds*, 552 F.2d 117 (4th Cir. 1977).

<sup>10</sup> That opinion distinguished among entities expressly identified by the General Assembly as part of State government and thus generally subject to Article VI, §3; entities expressly identified as excluded from State government and thus generally exempt from the constitutional requirement; and entities that the General Assembly neither excluded from nor included in State government, in which case the applicability of Article VI, §3 was to be discerned by examining all aspects of the interrelationship between the entity and the State. 71 *Opinions of the Attorney General* at 12.

Other opinions addressing aspects of the “moneys of the State” problem include 76 *Opinions of the Attorney General* 59 (1991); 70 *Opinions of the Attorney General* 35 (1985); 68 *Opinions of the Attorney General* 86 (1983); 67 *Opinions of the Attorney General* 356 (1982); 58 *Opinions of the Attorney General* 88 (1973); and 53 *Opinions of the Attorney General* 3 (1968).

### A. *State Oversight Responsibility*

When an entity's decisionmaker is appointed by a State official, the inference is that the State is able to influence the entity's operations significantly. State oversight of this nature is characteristic of units of the State. 71 *Opinions of the Attorney General* at 18.

MCP's president was selected by MCP's board of directors, not by a State official. To be sure, the individual who served as president was a contractual employee of the OID subject to its "control and direction" in the performance of his duties. Article 64A, §15A(3). However, control and direction of the business and affairs of MCP is not vested in any one officer of the corporation under its articles of incorporation, but in its board of directors. And, of the 13 board members of MCP during fiscal year 1990, only three were from the public sector. Hence, the State did not control policy and other decisions made by the board, and, consequently, the affairs of MCP, by either the contractual employment of MCP's president or through its board of directors. We therefore conclude that the president's status as a State employee was not indicative of MCP's State agency status.<sup>11</sup>

### B. *Fiscal Responsibility*

A second relevant inquiry is whether State officials determine the agency's budget or manage its assets. 71 *Opinions of the Attorney General* at 21. See also 76 *Opinions of the Attorney General* 59 (1991).

Under its articles of incorporation, MCP and not the State controls the corporation's fiscal affairs. The articles of incorporation establish MCP's power to receive and administer funds, to acquire real and personal property without limitation as to amount of value and to dispose of any such property, to invest and reinvest the principal thereof, and to deal with and expend the income for any of its lawful purposes.

MCP does not derive its funds through a direct legislative appropriation, but through fees, donations, and State grants. To the extent of the terms of the grant agreements, the State has control over the disposition of the grant funds. But the receipt of grant funds in itself does not subject MCP to Article VI, §3. As the Court of Appeals

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<sup>11</sup> If there is an issue with regard to the president's employment, we think it is that OID failed to terminate its contract with this individual once he ceased performing services for OID. See note 5 above. The continuation of the employer-employee relationship under the existing contract was incongruous given the incorporation of the Project.

recently observed about the relationship between Baltimore City and a private corporation that furthered a city cultural project, the city's duty to maintain control over the subject matter of the contract with the corporation and to require accountability for city grants "does not mean, however, that the corporation with which a city contracts, or to which it contributes funds, *ipso facto* becomes an agency of the city for all purposes, or that the city may control other aspects of the corporation's activities." *Baltimore Arts Festival, Inc. v. Mayor and City Council*, 326 Md. 653, 657, 607 A.2d 1 (1992). *Accord, Kentucky Region Eight v. Commonwealth*, 507 S.W.2d 489, 490 (Ky. 1974) ("the mere fact that private corporations receive and administer grants of state funds does not mean that they are state agencies"). See also *71 Opinions of the Attorney General* at 22 (where revenues are grant receipts, in contrast to being derived by means of a public levy or charge, there should be no presumption to include the unit's revenues or expenditures within the purview of State fiscal controls).

### C. *Scope of Public Services*

If an entity's activity "benefits the citizens of Maryland generally, not merely some small or discrete segment of the population," that fact is evidence of the entity's State status. *71 Opinions of the Attorney General* at 23. Although no one can seriously question the public policy wisdom of encouraging the employment of individuals with disabilities, the services offered by MCP are not directly for the benefit of an agency of the State or for the general public, but for individuals within a discrete segment of the population. Consequently, the public nature of the services performed by MCP is not an indicium of State agency status.

### D. *Special Financing Arrangements*

A final factor to be taken into account in determining the applicability of Article VI, §3 to MCP is whether the State provides any unusual financial support to that corporation. *71 Opinions of the Attorney General* at 23.

Although MCP has no special financing relationship with the State, it does maintain rent-free office space in a State-owned building. We are told that the location of the MCP at the same site as DEED is mutually beneficial to both entities in the operation of the Project and that the value of the space was taken into account in determining the amount of DEED's grant to MCP. Under these circumstances, the provision of State-owned office space to MCP is not evidence of continuing State control or State agency status.

**IV****Conclusion**

In summary, it is our opinion that OID's privatization of the Maryland Corporate Partnership Project was consistent with that agency's statutory powers. It is further our opinion that the cash receipts of MCP are not public moneys subject to deposit in the State Treasury, inasmuch as MCP is a private corporation separate and apart from the State.

J. Joseph Curran, Jr.  
*Attorney General*

Gail Rudie Cohn  
*Assistant Attorney General*

Jack Schwartz  
*Chief Counsel*  
*Opinions and Advice*

**PUBLIC INFORMATION ACT****CONSTITUTIONAL LAW – FREEDOM OF SPEECH AND PRESS –  
NONDISCLOSURE OF NAMES AND ADDRESSES OF CRIME VICTIMS**

November 16, 1992

*The Honorable Janice Piccinini  
Maryland Senate*

You have requested our opinion on several issues related to the application of the Maryland Public Information Act (“PIA”) to complaints by victims of crime. You also ask about the constitutionality of legislation designed to maintain the confidentiality of the names and addresses of the victims of crime. Specifically, your questions are as follows:

1. Are complaints about alleged crimes public records?
2. Is the name and address of a victim of crime disclosable under the PIA?
3. Do victims of crimes presently have a right to maintain the confidentiality of their names and addresses? If not, would the General Assembly be able to afford such a right by amending Article 27, §761 of the Maryland Code?
4. May the General Assembly constitutionally direct all law enforcement agencies in Maryland to enact regulations to maintain the confidentiality of the names and addresses of victims of crime? May the General Assembly constitutionally direct all law enforcement agencies in Maryland to enact regulations to inform victims of crime of their rights, including the right to have their names and addresses maintained in confidence?

For the reasons stated below, we conclude as follows:

1. A complaint filed with a law enforcement agency becomes a “public record,” within the meaning of that term in the PIA, when it is memorialized in any form by the law enforcement agency.
2. A record containing the name and address of a victim of a crime would be subject to disclosure under the PIA unless an exemption required

or permitted its nondisclosure. The “investigatory records” exception in the PIA would often permit nondisclosure.

3. Although the PIA recognizes the policy of protecting personal privacy, victims of crime do not presently have an enforceable right to the maintenance of their names and addresses in confidence. That is, no provision in the PIA or other law prohibits disclosure of such names and addresses. Because the PIA in effect incorporates other pertinent law, an amendment to Article 27, §761 affording such a right of confidentiality would effectively prevent disclosure of a crime victim’s name and address, should a public record containing them be requested under the PIA.

4. The General Assembly is constitutionally free to direct all law enforcement agencies in Maryland to enact regulations to maintain the confidentiality of the names and addresses of victims of crime and to inform victims of crime of their rights, including any right to confidentiality that might also be enacted by the General Assembly.

## I

### “Public Records”

The Public Information Act creates a general right on the part of members of the public to examine “any public record”: “Except as otherwise provided by law, a custodian shall permit a person or governmental unit to inspect any public record at any reasonable time.” §10-613(a) of the State Government Article (“SG” Article). The term “public record” is defined quite broadly to mean “the original or any copy of any documentary material that ... is made by a unit or instrumentality of the State government or of a political subdivision or received by the unit or the instrumentality in connection with the transaction of public business.” SG §10-611(f)(1).<sup>1</sup>

Thus, a complaint of a crime to a law enforcement agency is a “public record” as soon as it is embodied in any form by the agency. From that moment on, the complaint would be amenable to a request under the PIA. Whether the complaint or any portion of it would be disclosable is addressed in Part II below.

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<sup>1</sup> A public record can be in any form, including a computerized record. SG §10-611(f)(1)(ii).

## II

### Status of Crime Complaints

A public record must be disclosed upon request unless a provision of the PIA or other law prohibits the custodian from disclosing the record or a provision of the PIA or other law authorizes the custodian to refrain from disclosing it. If a request for a public record is to be denied, the custodian must notify the applicant of the reasons and legal authority for the denial. SG §10-614(b)(3)(ii)1 and 2.

No provision in the PIA prohibits disclosure of the name and address of a victim of crime. Although the PIA states a rule of construction that seeks to prevent “an unwarranted invasion of privacy of a person in interest ...,” SG §10-612(b), nevertheless none of the specific exemptions in the law mandates the withholding of a crime victim’s name and address.

One of the discretionary grounds for denial would be applicable to the particulars of a complaint that is in an investigatory file. Under SG §10-618(f)(1), “a custodian may deny inspection of records of investigations conducted by ... a police department ... [or] an investigatory file compiled for any other law enforcement ... or prosecution purpose.” *See generally Faulk v. State’s Attorney*, 299 Md. 493, 474 A.2d 880 (1984).

The custodian is not required to withhold this information, however. Indeed, SG §10-618(a) requires the custodian to release information within any of the grounds for permissible denial in SG §10-618, including the investigatory file exemption, unless “inspection of a part of a public record by the applicant would be contrary to the public interest ....” Thus, for example, a custodian of an investigatory record containing the name and address of a victim of crime would be required under the PIA to consider not only the privacy interests of the victim but also assertions about the public interest in disclosure that are made by the requester. In the end, the decision is left to the discretion of the custodian; notwithstanding the privacy interests at stake, the PIA does not forbid such disclosure.

## III

### Constitutionality and Effect of New Legislation

Except as constrained by federal law or the Maryland Constitution, the General Assembly has plenary lawmaking power. *See, e.g., Board of Supervisors of Elections v. Attorney General*, 246 Md. 417, 229 A.2d 388

(1967); *Richards Furn. Corp. v. Board of County Comm'rs*, 233 Md. 249, 196 A.2d 621 (1964).

Legislation that would bar the disclosure of the names and addresses of crime victims raises only one potential constitutional objection: the claim that a law of this kind would violate the free press guarantee of the First Amendment. The First Amendment, however, does not grant a right of access to this information. The “undoubted right [of the press] to gather news ... affords no basis for the claim that the First Amendment compels others – private persons or governments – to supply information.” *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978).

To be sure, once information is made available, the First Amendment generally bars the government from preventing or punishing its publication. *The Florida Star v. B.J.F.*, 491 U.S. 554 (1989). But “it is one thing to say that the government may not restrict the [press] from telling the news to their readers, and quite another to argue that the government has a constitutional duty to supply the [press] with the news to write about. It is for the Congress” – or, in Maryland, the General Assembly – “to establish the extent of access to government documents; the first amendment does not do so.” *Gartner v. United States Information Agency*, 726 F. Supp. 1183, 1188 (S.D. Iowa 1989). See also *Herald Co. v. McNeal*, 511 F. Supp. 269 (E.D. Mo. 1981) (no first Amendment right of access to closed arrest reports); Stewart, *Or of the Press*, 26 Hastings L.J. 631, 636 (1975) (“The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.”)<sup>2</sup>

Thus, we conclude that there is no constitutional inhibition against the General Assembly’s enacting a law that would require all law enforcement agencies to maintain the names and addresses of victims of crime in confidence. The General Assembly is also free to impose on law enforcement agencies a duty to inform victims of crime of their rights, including any right that the General Assembly might provide for the maintenance of their names and addresses in confidence.

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<sup>2</sup> This discussion addresses only the status of documents prior to the filing of charges. The First Amendment considerations are different once the judicial process has begun. See generally, e.g., *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986).

Should the General Assembly determine to add such a right to Article 27, §761, as your letter suggests, the legal effect would be the same as if the PIA itself were amended.<sup>3</sup> That is, the PIA recognizes in several places that the status of a public record might be determined by other law. *See* SG §§10-613(a), 10-615, 10-616(a), 10-617(a), and 10-618(a).

#### IV

#### Conclusion

In summary, it is our opinion that no provision of current law affords victims of crime the right to insist on maintenance of the confidentiality of their names and addresses. There is no constitutional bar to the General Assembly's enacting such legislation, should it make the policy decision to do so.

J. Joseph Curran, Jr.  
*Attorney General*

Jack Schwartz  
*Chief Counsel*  
*Opinions & Advice*

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<sup>3</sup> Care would need to be taken in the drafting of such an amendment to achieve a mandatory effect. At present, all of the provisions of Article 27, §761 are stated as nonmandatory guidelines.

**PUBLIC INFORMATION ACT - COMPTROLLER - CERTAIN  
INFORMATION ABOUT ABANDONED PROPERTY MAY NOT BE  
DISCLOSED**

November 17, 1992

*Mr. Stephen M. Cordi  
Director, Comptroller of the Treasury*

You have requested our opinion whether a part of a public record that discloses the monetary value or description of property reported to the Unclaimed Property Section as abandoned property must be withheld from public disclosure.

For the reasons given below, we conclude that this information must be withheld from public disclosure.

**I**

**Background**

You have advised us that the Unclaimed Property Section periodically receives requests for inspection, via computer or hard copy, of lists of property reported as abandoned under the Maryland Uniform Disposition of Abandoned Property Act, §17-101 *et seq.* of the Commercial Law Article ("CL" Article). Among other information, these lists contain the name and last known address of the putative owner and the monetary value or description of each item reported as abandoned.

These requests are usually filed by individuals who are in the business of tracing owners of abandoned property. The tracers use the lists to attempt to locate the owners. The tracers then may contract with the owners to assist the owners in recovering their property, for a fee.<sup>1</sup>

As a practical matter, the tracers cannot maintain their business unless they are able to differentiate owners of significant amounts of abandoned property from owners of comparatively small amounts. Canvassing everyone on the list would be prohibitively expensive. Thus,

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<sup>1</sup> CL §17-325 renders unenforceable any agreement "to pay compensation to recover or assist in the recovery of property made within 24 months of the date the property is paid or delivered to the abandoned property office ...."

information about the monetary value of the property is crucial to these requesters.

## II

### Confidentiality and Public Disclosure Provisions

Section 10-617 of the State Government Article ("SG" Article) provides that, "[u]nless otherwise provided by law," certain information in public records must be withheld from public inspection. SG §10-617(a). "[I]nformation about the finances of an individual, including assets, income, liabilities, net worth, bank balances, financial history or activities, or credit worthiness," is made ordinarily nondisclosable by SG §10-617(f)(2).

It is self-evident that a list showing how much money or what type of property people have left unclaimed reveals information about the "assets" of those people. Indeed, this office has concluded in the past that the bare fact of ownership of an asset is ordinarily nondisclosable under SG §10-617(f)(2). Opinion No. 85-011 (April 15, 1985) (unpublished).<sup>2</sup>

Thus, unless something in the Abandoned Property Act itself provides otherwise, you have no discretion in the matter: You must withhold this personal financial information.<sup>3</sup> *Accord, Twiss v. Department of the Treasury*, 124 N.J. 461, 591 A.2d 913 (1991) (amounts in unclaimed bank accounts transferred to the state remain confidential under New Jersey's Right to Know Law and may not be disclosed to tracers); *Merill v. Oklahoma Tax Commission*, 831 P.2d 634 (Okla. 1992) (even in the absence of a statute requiring confidentiality, Oklahoma Tax Commission had validly exercised its administrative authority in promulgating a regulation maintaining the confidentiality of reports filed by holders of abandoned property).

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<sup>2</sup> The legislative history confirms that SG §10-617(f)(2) is meant to require "that personally identifiable data which is financial in character not be disclosed, unless otherwise provided by law." Governor's Information Practices Commission, *Final Report* at 534-35 (1981).

<sup>3</sup> SG §10-617(f)(3) authorizes a custodian to permit inspection of financial information by the person in interest. As applied to SG §10-617(f), a "person in interest" is the person who is the subject of a public record or a designee of that person. SG §10-611(e)(1). If the person has a legal disability, the "person in interest" would include the parent or legal representative of the person. SG §10-611(e)(2).

CL §17-311(b)(1) requires the Unclaimed Property Section to publish the names and last known addresses of owners of abandoned property before the holders remit the property to the Unclaimed Property Section. Consequently, such information is not confidential under SG §10-617(a) and may be disclosed upon request. Moreover, the Abandoned Property Act authorizes a limited disclosure about the amount of assets. That is, under CL §17-311(c), the Unclaimed Property Section is not required to publish “any item valued at less than \$50.” Thus, the statute renders two pieces of information nonconfidential: that a person owns abandoned property, and that it is worth at least \$50. We cannot discern any other information about the property that is subject to disclosure, and therefore only to this limited extent does “other law” provide an exception to the nondisclosure mandate of SG §10-617(f)(2).

### III

#### Conclusion

In summary, it is our opinion that the Unclaimed Property Section is prohibited by law from disclosing the value or description of assets reported to it as abandoned property, other than to the owner or the owner’s designee.

Our conclusion about current law is not intended to address the underlying policy issue. Some of those whose businesses are severely affected by the lack of information about prospective customers have argued to us that the private sector has an important role to play in helping people get their unclaimed property back. If the General Assembly agrees with these policy arguments, it can amend the Abandoned Property Act to authorize disclosures that are not now permitted.

J. Joseph Curran, Jr.  
*Attorney General*

Jack Schwartz  
*Chief Counsel*  
*Opinions & Advice*

Sheldon H. Laskin  
*Assistant Attorney General*

**RETIREMENT SYSTEMS****COUNTIES – SHERIFFS – STATE’S ATTORNEYS – STATE MUST PAY  
EMPLOYER’S SHARE OF PENSION CONTRIBUTIONS**

January 15, 1992

*The Honorable Charles L. Benton*  
*Secretary of Budget and Fiscal Planning*

*The Honorable Louis L. Goldstein*  
*Chairman, Board of Trustees of Maryland*  
*State Retirement & Pension Systems*

You have requested our opinion whether the State may assess the cost of certain retirement benefits for elected or appointed officials, such as local sheriffs, to the counties in which the officials serve or, alternatively, to the officials themselves. The officials in question are those who exercise the option to participate in the State’s Employees Retirement System or the Pension System for Employees (the “Pension Systems”).

For the reasons given below, we conclude that under current law the State may assess neither the counties nor the officials for the contributions, because the State has a statutory duty to pay the contributions to the Pension Systems.

**I****Background**

As a general rule, membership in the State’s Pension Systems is limited to those employees “for whom compensation is provided by State appropriation, or whose compensation is paid by State funds ....” Article 73B, §§1(3) and 111(4) of the Maryland Code.<sup>1</sup> The General Assembly has enacted certain exceptions to this general rule, however.

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<sup>1</sup> Unless otherwise indicated, all statutory references in this opinion are to Article 73B of the Code.

“Elected or appointed” officials of the State have the option to participate in the Pension Systems. §§3(2)(a) and 113(a)(i).<sup>2</sup> As a result, certain elected or appointed officials of the State who serve at the county level, such as sheriffs, State’s Attorneys, orphans’ court judges, and liquor board commissioners, may choose to participate in the Pension Systems.<sup>3</sup>

Article 73B provides for payment by the State of the employer’s contribution to the Pension Systems “[a]s payrolls are paid ....” §§14(4)(b) and 122(4)(b). Thus, contributions by the State are made to the Pension Systems, via Central Payroll, 26 times per year.<sup>4</sup> When the State is the paymaster – that is, when the member is paid by Central Payroll – this funding mechanism assures that the State’s obligation to make the employer contribution is readily satisfied.

The member-officials about whom you ask are paid by the counties in which they serve, not by the State. Thus, your opinion request calls on us to consider whether the State is obligated to make the employer’s contribution to the Pension System when the State does not compensate the member official and therefore cannot readily satisfy its obligation to make the contribution under the current statutory funding mechanism.

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<sup>2</sup> See also §§1(3) and 111(4)(b)(1). Since membership in the Employees’ Retirement System was closed by Chapters 23 and 24 of the Laws of Maryland 1979, any official elected or appointed on or after January 1, 1980 may elect to join the State’s Pension System only.

<sup>3</sup> For convenience’s sake, the elected and appointed officials who have opted to participate in the Pension Systems will be referred to in this opinion simply as “the member-officials.” For brevity, we also use the term “county” to include Baltimore City. See Article 1, §14(a).

<sup>4</sup> Prior to 1985, the State’s payment to the Pension Systems of the employer contribution was made in four quarterly installments. Chapter 747 of the Laws of Maryland 1985 was enacted on the recommendation of the Joint Committee of Pensions to revise the way the State budgets its pension contributions and to change the dates on which the contributions were made. Joint Committee on Pensions, *1984 Interim Report to the Maryland General Assembly* 106-08.

## II

### State Payment Obligation

#### A. *Statutory Text and Context*

Article 73B, §162(1) provides in pertinent part as follows:

Each year, on behalf of the members of the several systems, the State shall pay an amount that is at least equal to a percentage of the aggregate annual earnable compensation of the members that is known as the “normal contribution” and an additional amount that is equal to a certain percentage of the aggregate annual earnable compensation of the members that is known as the “accrued liability contribution” ....

This provision could not be clearer: By its terms, the State is obligated to make the employer’s contributions “on behalf of the *members* of the several systems ....”<sup>5</sup> For the reasons given in Part I above, the officials in question are properly included in the membership of the Pension Systems. Hence, §162(1) mandates that the State pay the employer’s contribution on behalf of the member-officials unless some other provision of law shifts this obligation to the counties or to the officials themselves.

Our conclusion in this regard is supported by evidence that when the General Assembly decides to shift the burden of paying the employer’s share of pension costs away from the State, it does so expressly.

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<sup>5</sup> Section 162 was added to the pension article in 1984 for the purpose, according to the bill title, of “providing for the funding of the State pension and retirement and pension systems by changing provisions for employer contributions to the State systems ....” Chapter 290 of the Laws of Maryland 1984. The 1984 General Assembly intended to implement the recommendations of the Joint Legislative and Executive Committee on Pensions. *See* Chapter 290 (preamble).

Section 162 codifies two of the recommendations of the Joint Committee. Paragraphs (2) and (3) of §162 change the actuarial method from the “accrued benefit cost” method to the “entry age normal” method. Paragraph (1), quoted in the text, reflects an intention to unify the payroll base of the Employees Retirement and Pension Systems and to make the contribution a function of payroll. The Joint Committee was “hopeful” that the change in method “will stabilize the State’s annual contribution as a relatively constant percentage of payroll.” *Report of the Joint Legislative and Executive Committee on Pensions*, 17-19 (1984).

The pension article extends membership in the Pension Systems to other classes of employees who are not paid by the State, including National Guard technicians employed by the State Military Department (§1(3)); employees of the boards of supervisors of elections (§3(6)); and certain Dorchester County employees (§3(7)).<sup>6</sup> When these employees were admitted to membership in the Pension Systems, the General Assembly included a proviso shifting the State’s obligation for payment of the employer’s share of the retirement cost from the State to the employer that paid the compensation of the member. Thus, for example, when National Guard technicians became members of the Pensions Systems, §1(3) was amended to provide that the employer’s contribution was the responsibility of the United States rather than the State. Chapter 403 of the Laws of Maryland 1961. When employees of the local boards of supervisors of elections became members, the law explicitly shifted the State’s obligation for payment of the employer contribution to “[t]he county or Baltimore City, where the member is employed ....” §§3(6) and 113(7)(b). Similarly, §3(7) expressly provides that Dorchester County must pay the contribution for those of its employees who elect to participate in the Pension Systems.

By contrast, no provision in the pension article shifts to the counties in which the member-officials serve the obligation of the State to make the payment of the employer’s contribution to the Pension Systems on behalf of these members. Since the statute expressly sets forth those instances in which the counties must pay the employer’s contribution for certain members, the General Assembly evidently intended that the State make the payment of the employer’s contribution in all other cases. “It is a settled principle of statutory construction that the Legislature’s enumeration of one item, purpose, *etc.*, ordinarily implies the exclusion of all others.” *Office and Prof. Employees Int’l v. MTA*, 295 Md. 88, 96, 453 A.2d 1191 (1982). *See also Rucker v. Harford County*, 316 Md. 275, 294, 558 A.2d 399 (1989); *Goldberg v. State*, 315 Md. 653, 662, 556 A.2d 257 (1989).

We find additional support for our conclusion in recent legislation dealing with pensions for masters in chancery and masters in juvenile causes. Like the member-officials, the compensation of the masters is paid by the county in which the masters serve. Prior to June 30, 1989, masters were members of the Judicial Pension Plan.

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<sup>6</sup> Masters in chancery and masters in juvenile causes who are appointed on or after June 30, 1989 to serve on a full-time basis are required to join the Pension Systems. §§111(4)(b)(v) and 113(8). The masters are not paid by the State; however, for the reasons discussed below, the State rather than the local jurisdiction is obligated to pay the employer’s share of the retirement costs for the masters’ service.

In Chapter 779 of the Laws of Maryland 1989, Article 73B was amended to provide that masters appointed after June 30, 1989 to serve on a full-time basis become members of the Pension Systems. See §§111(4)(v) and 113(8). With respect to those masters who continue as members of the Judicial Pension Plan, Chapter 779 amended §57(4) so as to allocate the obligation for payment of a portion of the State's contribution to the counties. Moreover, the General Assembly not only provided for payment by the counties of a portion of the amount otherwise payable by the State under §162(1) but also included a mechanism for collection of the amount due from the counties. §57(4)(iv).

With respect to those masters who become members of the Pension Systems, the law does not specify whether the State or counties pay the employer's share of the cost. Our review of the legislative history of Chapter 779 indicates that the General Assembly understood that the State was obligated to make the contribution for the masters under §162(1). The Revised Fiscal Note explains that "[t]he State will pay for the new masters hired after June 30, 1989." Since the member-officials, like the masters, are compensated by the counties, the State is likewise obligated to pay the employer's share of the retirement costs when no law provides to the contrary.

#### ***B. Sheriffs and State's Attorneys***

The Court of Appeals' treatment of an analogous issue in *Rucker v. Harford County* makes clear that seemingly broad language in the statutes governing sheriffs and State's Attorneys does not afford a basis on which the State may shift the cost of the employer's contribution to the counties.

In *Rucker*, the Court considered whether Harford County or the State was obligated to pay the expenses of tort liability claims associated with the office of the Harford County Sheriff. Expenses for tort liability claims are not among the expenses expressly enumerated in §2-309 of the Courts and Judicial Proceedings Article ("CJ" Article), which is a list of specific cost elements of a sheriff's office, all to be paid by the county. Thus, the issue was whether the expenses associated with tort liability claims were payable by Harford County under CJ §2-309(aa), which requires the counties to pay "necessary expenses for telephone, stationery and for other purposes ..." of the sheriff's office. Finding that the tort liability expenses were payable by the State rather than Harford County, the Court of Appeals reasoned as follows:

In §2-309, the general words “and for other purposes” follow the specific language “furnish an office ... and pay the necessary expenses for telephones, stationery.” Applying the principle of *ejusdem generis*, we conclude that the general language of §2-309 encompasses only expenses of a similar type, *e.g.*, for space, supplies, equipment, utilities and similar services which are necessary for the operation of the sheriff’s function .... [T]he language of §2-309 should not be read to include tort liability expenses, which are dissimilar and not necessary for the operation of the sheriff’s function.

316 Md. at 295-96.<sup>7</sup>

Like tort liability expenses, retirement costs are not among the expenses expressly enumerated and therefore payable by the counties for the sheriff and the sheriff’s office under CJ §2-309. Nor is the employer’s share of the retirement costs for sheriffs similar to those necessary to “furnish an office ... and pay the necessary expenses for telephones, stationery,” and the like. We conclude, therefore, that neither this nor any other provision of Maryland law has shifted the obligation to make the employer’s payment away from the State to the counties (or to the sheriffs themselves).

Article 10, §40, like CJ §2-309, enumerates the expenses payable by the local jurisdictions for the State’s Attorney of each county and their respective offices. The statute does not require county payment of the employer’s share of the retirement costs for a State’s Attorney who elects to join the State’s Pensions Systems.

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<sup>7</sup> Under the principle of *ejusdem generis*, “where ‘the general words in a statute, such as “other things of value” ... follow the designation of particular things or classes of subjects, ... the general words in the statute will usually be construed to include only those things of the same class or general nature of those specifically antecedently mentioned.’” *Rucker*, 316 Md. at 295 (quoting *State v. Sinclair*, 274 Md. 646, 658, 337 A.2d 703 (1975)).

### III

#### Conclusion

In summary, it is our opinion that the State is required to pay the employer's contribution on behalf of the officials in question.

J. Joseph Curran, Jr.  
*Attorney General*

Harriet B. Granet  
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*Chief Counsel*  
*Opinions and Advice*

#### *Editor's Note:*

Following amendment and recodification, the provision on employer contributions by the State may be found in §21-304 of the State Personnel and Pensions Article.

## STATE'S ATTORNEYS

### CIVIL RIGHTS – IMMUNITY – *HAFER v. MELO* DOES NOT CHANGE IMMUNITY LAW

January 8, 1992

*The Honorable William R. Hymes*  
*State's Attorney for Howard County*

You have requested our opinion concerning the extent of potential personal liability that might be imposed on the State's Attorney and other prosecutors for the performance of the public duties of your office. Your inquiry is prompted by the Supreme Court's recent decision in *Hafer v. Melo*, 112 S.Ct. 358 (1991).

For the reasons stated below, we conclude that *Hafer v. Melo* does not change the law that has governed actions brought under 42 U.S.C. §1983 in either federal or State courts in Maryland. Individual State employees who violate a person's civil rights may be personally liable for any damages caused. The State employees, however, may assert the well-established forms of immunity previously recognized in the law.

## I

### *Hafer v. Melo*

In *Hafer v. Melo*, the Supreme Court unanimously held that state officers may be personally liable for damages under 42 U.S.C. §1983 based upon actions taken in their official capacities. The Court rejected as "unpersuasive" the argument that "state officials may not be held liable in their personal capacity for actions they take in their official capacity." 112 S.Ct. at 363. Such a theory, if accepted, would "absolutely immunize state officials from personal liability for acts within their authority and necessary to fulfilling governmental responsibilities," an expansion of absolute immunity inconsistent with the Court's precedents. *Id.*<sup>1</sup>

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<sup>1</sup> The decision does not affect the immunity from liability for State officials sued in their official capacities. A suit against a State official in his or her official capacity is, in effect, a suit against the official's office and is no different from a suit against the State. Neither the State nor its officials acting in their official capacities are "persons" within the meaning of §1983. *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989).

The Supreme Court emphasized that its holding does not change existing law set forth in *Scheuer v. Rhodes*, 416 U.S. 232, 243 (1974), that §1983 “enforce[s] provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it.” In *Scheuer v. Rhodes*, the governor of Ohio was protected only by qualified immunity in a §1983 action arising from his actions, taken under color of state law, during the campus disorder at Kent State University. The Supreme Court rejected the state executive official’s defense of absolute immunity. Indeed, the Supreme Court’s decisions in *Hafer* and *Scheuer* are consistent with the longstanding doctrine of *Ex parte Young*, 209 U.S. 123, 159-60 (1908), that State officers may be personally liable for violations of another person’s federal rights under the color of state law. *Accord, Ritchie v. Donnelly*, 324 Md. 344, 597 A.2d 432 (1991).

## II

### Immunities From Personal Liability Under §1983

Although *Hafer* reasserted that state officials may be held personally liable under §1983 for actions taken under color of state law, the Supreme Court made equally clear that it was not changing the status of personal immunity defenses. In other words, state officials acting in the course of their duties may nevertheless be protected from liability by an absolute or qualified immunity.

In *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976), the Supreme Court granted prosecutors absolute immunity from liability for damages resulting from prosecutorial functions intimately associated with the judicial phase of the criminal process. Although the Supreme Court left open the question whether immunity also attaches to prosecutorial functions that are administrative or investigative, 424 U.S. at 430-31, courts have consistently found that “[t]he scope of prosecutorial immunity under *Imbler* is wide.” *Hayes v. Hall*, 604 F. Supp. 1063, 1067 (W.D. Mich. 1989). In *Pachaly v. City of Lynchburg*, 897 F.2d 723 (4th Cir. 1990), for example, the Fourth Circuit concluded that a prosecutor’s participation in a post-indictment search to obtain evidence to prosecute is protected by absolute immunity. See *Imbler v. Pachtman*, 424 U.S. at 431 n.33 (prosecutor’s role as advocate for the state includes actions preliminary to initiation of prosecution and outside the courtroom).

This last Term, the Supreme Court again considered the question of prosecutorial immunity and resolved one of the questions left open in *Imbler*. In *Burns v. Reed*, 500 U.S. 479, 111 S.Ct. 1934 (1991), the Court held that a prosecutor was absolutely immune for his actions at a probable

cause hearing to seek a search warrant after an arrest, because such conduct is intimately associated with the judicial phase of the criminal process. By contrast, the Court concluded that the prosecutor's pre-indictment advice to police officers contemplating the use of hypnosis to interview a suspect was more in the nature of investigative activity and was protected only by qualified, not absolute, immunity. *See also Mitchell v. Forsyth*, 472 U.S. 511, 521-22 (1985) (U.S. Attorney General's actions in furtherance of national security were not prosecutorial and not protected by absolute immunity).<sup>2</sup>

In sum, even though the Supreme Court in *Hafer v. Melo* rejected the claim that state officials are absolutely immune from liability under §1983 for actions within the official's authority and necessary to the performance of governmental functions, it did not displace the well-established forms of immunity, including absolute or qualified immunity for State's Attorneys and other prosecutors.

### III

#### Conclusion

In summary, it is our opinion that the Supreme Court's decision in *Hafer v. Melo* does not change the scope of liability of State officials sued in their personal capacities.

J. Joseph Curran, Jr.  
*Attorney General*

Lucy A. Cardwell  
*Assistant Attorney General*

Jack Schwartz  
*Chief Counsel*  
*Opinions and Advice*

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<sup>2</sup> In *Burns v. Reed*, the Court noted that qualified immunity after *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), provides greater protections to state officials than the standard governing at the time *Imbler* was decided. 111 S.Ct. at 1944 n.8 and accompanying text.

**TAXATION****ESTATE TAXES – COMPTROLLER – STATUTES – RETROACTIVITY –  
APPLICABILITY OF STATUTE INCREASING INTEREST RATE ON  
UNPAID TAXES**

February 5, 1992

*Mr. J. Basil Wisner*  
*Chief Deputy Comptroller*

You have requested our opinion whether a statute imposing an increased rate of interest should have been applied to certain deferred estate tax payments. The statute in question, Chapter 615 of the Laws of Maryland 1982, became effective on July 1, 1982 and substituted a variable rate of interest for the lower fixed rate set by prior law. You ask whether the Comptroller's Office was correct in charging an interest rate lower than that specified by Chapter 615 in the following three circumstances:

1. On estates of individuals who died prior to July 1, 1982 and whose estate tax returns were also due prior to July 1, 1982;
2. On estates of individuals who died prior to July 1, 1982 but whose estate tax returns were due on or after July 1, 1982; and
3. On estates of individuals who died on or after July 1, 1982.

For the reasons stated below, we conclude that the Comptroller's Office should have applied the new rate established by Chapter 615 to all deferred estate tax payments due on or after July 1, 1982, regardless of the decedent's date of death or the date on which the estate tax return was due.

You also asked a second question contingent on our answer to the first: If the Comptroller's Office should have charged the higher rate of interest, is the office now permitted to waive such interest in accordance with §13-606 of the Tax-General Article ("TG" Article)? In our opinion, the Comptroller has broad discretion to determine "reasonable cause" for waiver under TG §13-606 and may consider all pertinent facts about the estates in question in making that determination.

**I****Background**

Prior to July 1, 1982, the estate tax law generally provided for an interest rate of nine percent "from the due date to the date of payment." Former Article 62A, §3 of the Maryland Code. *See also* Article 62A, §5 (interest applicable to increases in State tax resulting from liability for additional federal tax). The "due date" prescribed by §3 was "15 months after [the decedent's] date of death ...." The law at the time also stated that the generally applicable nine percent rate "shall be reduced to agree with a reduced federal interest rate." Former Article 62A, §§3 and 5.

Under federal law and corresponding Maryland practice, if at least 35 percent of the adjusted gross estate was attributable to an interest in a closely held business, the estate was permitted to defer payment of a portion of the estate tax over a number of years. *See* 26 U.S.C. §6166.<sup>1</sup> The federal interest rate on the deferral was (and remains) four percent. *See* 26 U.S.C. §6601(j). Hence, the corresponding Maryland interest rate applied to such deferred payments was not nine percent, the generally applicable rate, but four percent, the "reduced federal interest rate."

Chapter 615 of the Laws of Maryland 1982 was an overall reform of Maryland law on interest rates applicable to unpaid taxes. Instead of specifying fixed rates, Chapter 615 tied virtually all tax interest rates, including the estate tax interest rate, to a variable, federally determined interest rate.<sup>2</sup> Chapter 615 also repealed the provision in former Article 62A, §§3 and 5 directing the Comptroller to reduce the Maryland rate to "agree with a reduced federal interest rate." Chapter 615 was effective on July 1, 1982.

The Legislative Auditor identified 13 estates for which the Comptroller's Office continued to charge the reduced four percent rate after July 1, 1982 on deferred estate tax payments. Seven were estates of individuals who had died prior to July 1, 1982 and whose Maryland estate tax returns were also due prior to that date. Another four involved

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<sup>1</sup> The Maryland practice is now codified at TG §7-307.

<sup>2</sup> After amendment, former Article 62A, §3 read as follows: "The 'Maryland estate tax' shall be payable 15 months after date of death of the 'decedent' and shall bear interest thereon at the rate determined under Section 204 of Article 81 of the Code from the due date to the date of payment." Former Article 81, §204, in turn, tied the interest rate to a rate established periodically by the Secretary of the Treasury under 26 U.S.C. §6621, but "not in excess of 1.25 percent nor less than 1 percent" per month. For the current provision, *see* TG §13-604.

individuals who died prior to July 1, 1982, but whose estate tax returns were due after that date. Finally, two estates involved individuals who died after July 1, 1982. The Legislative Auditor questioned this application of the reduced interest rate in light of the repeal by Chapter 615 of the provision in former Article 62A, §§3 and 5 granting the reduction.

In an advice memorandum on the subject, the counsel to the Comptroller concluded that the new, higher rate of interest should have been charged on the two estates of persons who died after July 1, 1982 but that the Comptroller's application of the lower rate to the other eleven estates was correct. Memorandum from Assistant Attorney General Gerald I. Langbaum to Chief Deputy Comptroller J. Basil Wisner (February 16, 1989). In essence, the advice memorandum concluded that Chapter 615 was to be applied prospectively and that, thus applied, it did not reach the estate of a person who had died prior to July 1, 1982.

## II

### Applicability of Chapter 615

We concur in the advice that Chapter 615 applied prospectively only. The general rule is that a statute is to be applied prospectively unless the General Assembly manifests a clear intent that it be applied retroactively. *See, e.g., Washington Suburban Sanitary Comm'n v. Riverdale Vol. Fire Co.*, 308 Md. 556, 568, 520 A.2d 1319 (1987). No such manifestation of legislative intent exists with regard to Chapter 615.

This conclusion does not end the analysis, however. In our view, Chapter 615, given its proper prospective application, nonetheless applies to all estate tax obligations payable after July 1, 1982.

We base this conclusion primarily on the reasoning of the Court of Appeals in *City of Baltimore v. Kelso Corp.*, 294 Md. 267, 449 A.2d 406 (1982). In *Kelso*, the City of Baltimore had used its "quick-take" condemnation authority to condemn some of Kelso's property. When the matter was tried, Kelso was awarded a judgment higher than the amount that the City had previously deposited. Under the governing rule, Kelso was entitled to "the legal rate" of interest on the amount of the judgment (less the City's deposit) from the date of the judgment until payment. *See* former Rule 642. When the judgment was entered against the City, the legal rate of interest was six percent. A later statute, effective July 1, 1980, changed the legal rate of interest to ten percent. The City argued that it was not obliged to pay the higher rate on the unpaid judgment, because the statute charging the interest rate should be applied only to judgments entered after July 1, 1980. Applying the new interest rate to all

outstanding judgments, whenever they were entered, “would result in a retroactive application of the law,” the City contended. 294 Md. at 273.

The Court of Appeals rejected the City’s contention and held that the new interest rate applied to all outstanding judgments. The Court pointed out that, contrary to the City’s argument, it was not applying the statute retroactively: “A retroactive application would not only apply the 10 percent interest rate to all outstanding judgments, but the 10 percent rate would run *from the date of the judgment*, even if it was entered before July 1, 1980. Ours is a prospective application of the *new rate*, *i.e.*, the new rate applies after July 1, 1980, to all outstanding judgments. Before that date interest will accrue at the old rate.” 294 Md. at 276 (emphasis in original).

The Court of Appeals observed that this application of the statute would best serve the legislative purpose. The new statute “compensates the judgment creditor at a rate of return deemed fair by the legislature on the monies owed to him. Applying the statute only to those judgments entered after its effective date fails to accomplish the legislative purpose.... Those whose judgments were entered before that date would not be fairly compensated for the loss, after July 1, 1980, of the use of the monies owed to them, and those judgment debtors would receive an unfair windfall.” 294 Md. at 273-74. In sum, the Court held, “[s]hould the legislature deem it wise to change the interest rate from time to time in order to fairly compensate judgment creditors for the damages they sustain because of the non-payment of judgments, the new rate will apply from the effective date of the change to all outstanding judgments.” 294 Md. at 275-76.

*Kelso* was recently found dispositive by the Court of Special Appeals in a case involving interest on taxes. In *Ocean City v. Purnell-Jarvis, Ltd.*, 86 Md. App. 390, 586 A.2d 816 (1991), Purnell-Jarvis sought a refund of certain fees. Under the law in effect at the time that the fees were paid, Ocean City would have owed a six percent interest rate on the refund. But under a statute effective on July 1, 1987, the interest rate was increased and made variable, much as the General Assembly had done in Chapter 615 of the Laws of Maryland 1982.

The Court of Special Appeals held that the six percent interest rate applied to any refund due from the date that the taxes were paid until July 1, 1987, but that the new interest rate applied from July 1, 1987 until the refund was paid. 86 Md. App. at 412-13. The court agreed that the

statute raising the interest rate was to be applied prospectively.<sup>3</sup> But that holding, the Court went on, “does not end our analysis”:

The purpose of providing interest on tax refunds, like the purpose of prejudgment or postjudgment interest, is to “compensate the aggrieved party for the loss of the use of the principal liquidated sum found due it and the loss of income from such funds.” ... The rate of interest on tax refunds provided by statute represents a legislative determination of what constitutes fair compensation.... A change in that interest represents a legislative recognition that the old rate no longer fairly compensates the taxpayer.

86 Md. App. 413-14 (quoting *Kelso*, 294 Md. at 272) (other citations omitted).

These interpretive principles should apply as well to interest owed to the State on unpaid taxes. Mirroring the purpose of interest on unpaid refunds discussed in *Purnell-Jarvis*, the purpose of interest on unpaid taxes is to compensate the government for the loss of the use of funds. See *Manning v. Seeley Tube and Box Co.*, 338 U.S. 561 (1950); *United States v. Childs*, 266 U.S. 304 (1924); *United States v. Goldstein*, 189 F.2d 752, 755 (1st Cir. 1951); *Owens v. Commissioner*, 125 F.2d 210, 213 (10th Cir. 1942).

Thus, in our view, the determinative issue regarding the application of Chapter 615 is not when the decedent died or when the estate tax return was due. Rather, it is whether estate tax was owed to the State on which interest was chargeable. If a payment obligation was outstanding prior to July 1, 1982 for any of the estates in question, the interest rate properly chargeable was four percent through June 30, 1982. Effective July 1, 1982, the applicable interest rate was that prescribed by Chapter 615.

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<sup>3</sup> “[A]pplying the new interest rate in this case to the entire time period in which interest would accrue would require a retroactive application of the statute. As noted previously, the Legislature did not indicate that the statute should be applied retroactively and so the statute requires a prospective application.” 86 Md. App. at 415.

### III

#### Waiver

TG §13-606 authorizes the Comptroller to waive interest on unpaid tax “[f]or reasonable cause.” In making this judgment, the Comptroller is free to consider all relevant facts about the particular cases, including the current status of the estates and the practicability of collecting the interest.

Because we do not have the facts concerning the 13 estates in question, and because in any event we could not appropriately substitute our judgment for that of the Comptroller where the discretion is his, we offer no opinion about the grant of a waiver. We observe, however, that a taxpayer’s good-faith reliance on the views of the Comptroller’s Office about the amount of interest owed would be a relevant factor in a “reasonable cause” determination. *Cf. Gilmore v. United States*, 443 F. Supp. 91 (D. Md. 1977); *Hessman v. Campbell*, 134 F. Supp. 416 (D. Ind. 1955); *H. Fort Flowers Found., Inc. v. Commissioner of Int. Rev.*, 72 T.C. 399 (1979).

### IV

#### Conclusion

In summary, it is our opinion that the rate of interest prescribed in Chapter 615 of the Laws of Maryland 1982 should have been charged on all deferred estate tax payments due on or after July 1, 1982.

J. Joseph Curran, Jr.  
*Attorney General*

Jack Schwartz  
*Chief Counsel*  
*Opinions & Advice*

**TAXATION – INCOME TAX – PERSONNEL – PAY RECEIVED BY AN  
EMPLOYEE ON ACCIDENT LEAVE IS NOT SUBJECT TO TAX**

May 14, 1992

*The Honorable Timothy F. Maloney  
House of Delegates*

You have requested our opinion whether payments received pursuant to the accident leave statute, Article 64A, §37(g) of the Maryland Code, are subject to federal and State income tax.

For the reasons stated below, we conclude that payments received under Article 64A, §37(g) may be excluded from federal adjusted gross income and therefore are not subject to either federal or State income tax.<sup>1</sup>

**I**

**Income Tax Statutes and Regulation**

Section 104(a)(1) of the Internal Revenue Code (“I.R.C.”) provides, with an exception not pertinent here, that “gross income does not include ... amounts received under workmen’s compensation acts as compensation for personal injuries or sickness.” 26 U.S.C. §104(a)(1). The relevant regulation makes clear that this exclusion applies not only to payments received under a workers’ compensation act as such but also “under a statute in the nature of a workmen’s compensation act which provides compensation to employees for personal injuries or sickness incurred in the course of employment.” Treasury Reg. §1.104-1(b).

Under §10-203 of the Tax-General Article, an individual’s adjusted gross income for purposes of the Maryland income tax is “the individual’s federal adjusted gross income for the taxable year as determined under the Internal Revenue Code ...,” with certain adjustments required under Maryland law. Maryland law does not require any adjustment for income excluded under I.R.C. §104(a)(1). Hence, if income is excludable under

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<sup>1</sup> This conclusion is contrary to earlier advice from this office to the Central Payroll Bureau of the Comptroller’s Office. However, the original advice on this subject predated the court decisions and many of the revenue rulings discussed in this opinion.

§104(a)(1) for federal income tax purposes, it is likewise excludable for State income tax purposes.

## II

### Accident Leave Statute and Regulations

Article 64A, §37(g) provides as follows:

(1) An employee who, in the actual performance of his job duties, sustains an accidental injury which would be compensable under the Maryland Workers' Compensation Act shall be granted accident leave with full sick pay if, after medical examination, a physician certifies that the injury or accident disables the employee.

(2) Accident leave shall be granted from the date of the job related injury until a physician certifies that the employee is healed and is physically able to return to work, but may not be extended beyond one year from the injury date. The employer's physician may examine the injured employee periodically to determine the progress of and length of time necessary for his recovery.

(3) The injured employee shall not receive temporary total benefits under workers' compensation while receiving full sick pay under this subsection.<sup>2</sup>

Accident leave thus has several distinctive characteristics: It is paid because of a State statute; it is paid only for absence from work attributable to an injury sustained in the "actual performance" of the job; the injury must be one that would be compensable under the Maryland Workers' Compensation Act;<sup>3</sup> and the amount that is paid is not related to

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<sup>2</sup> Article 64A, §37(g)(4), not set forth in text, deals with the State's subrogation rights if a third person causes a compensable injury under the accident leave statute. *See generally* 76 *Opinions of the Attorney General* 323 (1991).

<sup>3</sup> As we pointed out in a recent opinion, §37(g) requires "a much closer nexus between the employment and [the] cause of injury" than does the Workers' Compensation Law. *See* 76 *Opinions of the Attorney General* at 326 n.4.

or coordinated with traditional pension formulae, such as years of service. *See generally* Opinion No. 79-043 (July 20, 1979) (unpublished).

Although the income received by an employee on accident leave is labeled "sick pay," accident leave is *not* a form of sick leave.<sup>4</sup> The two are treated quite separately in the Secretary of Personnel's regulations. *Compare* COMAR 06.01.11.05 with COMAR 06.01.11.09. An employee earns sick leave at a prescribed rate and accumulates unused sick leave; an employee neither earns nor accumulates accident leave. An injured employee eligible for accident leave would use sick leave or other forms of paid leave only after the employee was no longer able to use accident leave. *See* COMAR 06.01.11.09F.

### III

#### Analysis

Pay received by an employee under the Maryland accident leave statute meets the criteria for the exclusion in I.R.C. §104(a)(1):

- (1) The benefit derives from a statute, amplified by a regulation issued pursuant to a statute, and not from a nonstatutory source like a contract.
- (2) Payments are limited to instances of work-related disability.
- (3) The payments are not determined by reference to the employee's age or length of service.

*See Rutter v. Commissioner*, 760 F.2d 466 (2nd Cir.), *cert. denied* 474 U.S. 848 (1985); *Givens v. Commissioner*, 90 T.C. 1145 (1988), *non-acq. in part* 1989-1 C.B.1; Rev. Ruling 83-77, 1983-1 C.B. 37; Rev. Ruling 80-84, 1980-1 C.B. 35; Rev. Ruling 68-10, 1968-1 C.B. 50. *See generally* 1 *Merten's Law of Federal Income Taxation* §7.123 (1991). As discussed in Part II above, accident leave is not sick leave, though it is termed "sick

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<sup>4</sup> Sick leave also results in "sick pay." *See* Article 64A, §37(a)(3)(i). All "sick pay" (except for sick leave taken because of a death in the family) is paid "as a separate benefit ... and not as a continuation of salary." Article 64A, §37(h). This latter subsection was added by Chapter 504 of the Laws of Maryland 1981 with the intent of exempting sick pay from social security taxes under the Federal Insurance Contribution Act. *See* Fiscal Note to Senate Bill 491 (1981 Session).

pay” and is paid at the same rate as sick leave – 100 percent of salary.<sup>5</sup> Indeed, one of the principal purposes of accident leave is to permit the injured employee to preserve his or her sick leave.

In our view, Maryland’s accident leave statute is substantively indistinguishable from a federal statute determined by the Internal Revenue Service to result in payments that are excludable from gross income. In Rev. Ruling 75-500, 1975-2 C.B. 44, the IRS discussed the status of a D.C. firefighter who received full pay during a period of incapacity resulting from a work-related injury. Under federal law, “[t]he individual received full pay for this period of time, and the absence was charged to administrative leave (rather than sick leave) ....”<sup>6</sup> The IRS concluded that these payments were “paid under a statute in the nature of a workmen’s compensation act and, therefore, are excludable in full from the individual’s gross income under §104(a)(1) ....”<sup>7</sup>

Moreover, “[t]he fact that the amount received is equal to the employee’s salary at the date of the disability ... does not disqualify the payment from qualifying as one in the nature of workmen’s compensation.” Rev. Ruling 85-104, 1985-2 C.B. 52, 53; Rev. Ruling 68-10, 1968-1 C.B. 50. As the United States Tax Court put it, “It is not the amount of the pay which is received which controls [the] determination whether it falls within the exclusion .... Rather, it is the reason for which it has been paid.” *Givens*, 90 T.C. at 1152.

To summarize, “[i]f disability benefits are received under a workmen’s compensation act or under a statute in the nature of a workmen’s compensation act, they qualify for the Section 104(a)(1) exclusion.” Rev. Ruling 85-104, 1985-2 C.B. 52, 53. Moreover, the IRS has written, “[a] statute is in the nature of a workmen’s compensation act

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<sup>5</sup> See note 4 above and accompanying text.

<sup>6</sup> The relevant statute, 5 U.S.C. §6234(a), provides that no sick leave is to be charged to certain firefighters and law enforcement officers “for an absence due to injury or illness resulting from the performance of duty.” Similarly, the regulations implementing Article 64A, §37(g) make clear that sick leave is not to be charged during the period of accident leave. See COMAR 06.01.11.09E and F.

<sup>7</sup> The pertinent IRS regulation states that the exclusion “does not apply ... to amounts received as compensation for an occupational injury or sickness to the extent that they are in excess of the amount provided in the applicable workmen’s compensation act or acts.” Treasury Reg. §1.104-1(b). Payments received under a statute like the accident leave statute, however, “are excludable even if they are in excess of the normal disability benefits payable under a workmen’s compensation act.” Rev. Ruling 68-10, 1968-1 C.B. 50, 51. See also Rev. Ruling 83-91, 1983-1 C.B. 38.

if it provides compensation to employees only for personal injuries or sickness incurred in the course of employment.” *Id.* Article 64A, §37(g) is such a statute. Finally, “[i]f benefits are computed by a formula that does not refer to the employee’s age, length of service, or prior contributions and are provided to a class that is restricted to employee’s service-incurred injuries, then the benefits are payments for those injuries, and the statute under which the benefits are paid qualifies as a statute in the nature of a workmen’s compensation act.” *Id.* Unlike sick leave itself, which of course is available to employees who are incapacitated as a result of injuries or sickness wholly unrelated to the job, accident leave fully satisfies these criteria.<sup>8</sup>

This exclusion from income for accident leave at full salary may be viewed as an economic incongruity. It is no more so, however, than the general exclusion from income for damages collected by reason of a lawsuit or settlement. *See* I.R.C. §104(a)(2).

#### IV

#### Conclusion

In summary, it is our opinion that payments received by an injured employee under Article 64A, §37(g) are excludable from gross income and therefore are not subject to federal or State income tax.<sup>9</sup>

J. Joseph Curran, Jr.  
*Attorney General*

Jack Schwartz  
*Chief Counsel*  
*Opinions & Advice*

John K. Barry  
*Assistant Attorney General*

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<sup>8</sup> We express no opinion about the tax status of payments received for sick leave taken after the exhaustion of accident leave. *See* COMAR 06.01.11.09F. Under *Givens v. Commissioner*, 90 T.C. at 1152, such payments arguably are also within the §104(a)(1) exclusion. The Internal Revenue Service, however, has indicated its nonacquiescence in this part of *Givens*. *See* 1989-1 C.B. 1.

<sup>9</sup> While we are confident of this conclusion, individual taxpayers should consult their own tax advisers about their appropriate course of action.

**TRANSPORTATION AUTHORITY****JURISDICTION OF TOLL FACILITIES POLICE**

May 11, 1992

*Dario Broccolino, Esquire*  
*State's Attorneys' Coordinator*

You have requested our opinion concerning the jurisdiction of the Toll Facilities Police at various toll facilities within the State of Maryland.

For the reasons set forth below, we conclude as follows: With certain exceptions set out in §4-208 of the Transportation Article, the Toll Facilities Police may only exercise their powers on property owned, leased, or operated under the control of the Maryland Transportation Authority ("Authority"). Plats defining these property boundaries are available as need be should this jurisdictional limit become an issue in a prosecution.

**I****Background**

As we understand it, your request for our opinion resulted from a case in the District Court for Anne Arundel County. In that case, the defendant claimed that the arrest occurred outside the Toll Facilities Police officer's jurisdiction. Because the State had not established in writing the property lines of the toll facilities' project at the Francis Scott Key Bridge, the charges were dismissed.

**II****Analysis**

Section 4-208 of the Transportation Article ("TR" Article) sets forth the powers of the Toll Facilities Police. In pertinent part, this statute provides as follows:

(b)(1) A toll facilities police officer has all the powers granted to a peace officer and a police officer of this State.

(2) However, the toll facilities police officer may exercise these powers only on property owned, leased, or operated by or under the control of the Authority. The police officer may not exercise these powers on any other property unless:

(i) Engaged in fresh pursuit of a suspected offender;

(ii) Specially requested or permitted to do so in a political subdivision by its chief executive officer or its chief police officer; or

(iii) Ordered to do so by the Governor.<sup>1</sup>

Generally, a peace officer's authority to make an arrest is limited, in the absence of statutory authority expanding it, to the confines of the geographical unit of which he is an officer. *Stevenson v. State*, 287 Md. 504, 509, 413 A.2d 1340 (1980). Hence, as a general proposition, the Toll Facilities Police may make arrests only on the Authority's property, as delineated on plats or other authoritative evidence. Both TR §4-208 and the common law of Maryland, however, provide some exceptions to this general proposition.

First, TR §4-208 (b)(2)(i) permits an officer who is in "fresh pursuit" of a suspected felon to make a legally binding arrest on "other property." While "fresh pursuit" is not defined in this statute, the term is defined under an analogous provision, Article 27, §602A which authorizes a law enforcement officer to arrest a person beyond the officer's territorial jurisdiction if the officer is engaged in fresh pursuit of the suspect. The circumstances under which an officer may engage in fresh pursuit under §602A are if the person:

(1) Has committed or is reasonably believed by the law enforcement officer to have committed a felony in the jurisdiction in which the law enforcement officer has the power of arrest; or

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<sup>1</sup> Senate Bill 121, enacted during the 1992 regular session and scheduled to be signed by the Governor on May 12, will broaden the jurisdiction of the Toll Facilities Police by adding a new subparagraph (iii) to provide that an officer may exercise police power if "[s]pecially requested or permitted to do so on property owned, leased, or operated by or under the control of the Maryland Port Administration by its chief police officer ...." Former subparagraph (iii) will be renumbered as subparagraph (iv).

(2) Has committed a misdemeanor in the presence of the law enforcement officer and in the jurisdiction in which the law enforcement officer has the power of arrest.

Article 27, §602A(c).

In our view, that definition is equally applicable in the case of a Toll Facilities police officer under TR §4-208(b)(2)(i). Thus, if either of the circumstances outlined above occurred, and a Toll Facilities Police officer began chase on property owned, leased, or operated under the control of the Authority, and that pursuit continued beyond the Authority's property, nonetheless the officer would be empowered to make an arrest.

If a Toll Facilities Police officer effected an arrest beyond the Authority's property and neither the "fresh pursuit" nor other exception applied, the lack of jurisdiction would be clear. The real question is one of remedy.

In the case you described, the District Court dismissed the charge. In our view, dismissal of the charge is not necessarily the appropriate remedy. See *Hammond v. State*, 7 Md. App. 588, 594, 256 A.2d 768, cert. denied, 256 Md. 745 (1970) (illegal arrest does not affect the jurisdiction of the court, is not a ground for quashing the indictment, and does not preclude trial for the offense). Rather, the remedy for an illegal arrest might well be suppression of evidence obtained as a result of the illegality, if the officers are viewed as agents of the State.<sup>2</sup> For example, if a defendant were to make an incriminating statement, that statement could be suppressed. See *Wong Sun v. United States*, 371 U.S. 471 (1963).

On the other hand, the simple fact that an officer not in fresh pursuit makes an arrest while in another jurisdiction does not automatically render the arrest illegal. Rather, in that instance "the officer is said to do so as a private person, and they only act beyond [their] bailiwick to the extent that the law of the place of arrest authorizes such individuals to do so." *Stevenson*, 287 Md. at 510. In the case of an officer acting as a private person, the exclusionary rule does not apply. In other words, if appropriate, the State could argue that the Toll Facility Police officer effected a valid citizen's arrest.

In Maryland, a private citizen presently may make an arrest if he has reasonable grounds (probable cause) to believe that a felony has been

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<sup>2</sup> We recognize that in some instances the suppression of critical evidence could render prosecution futile.

committed and that the person arrested committed it. Furthermore, a private citizen may make an arrest when a misdemeanor, amounting to a breach of the peace, has been committed in the view or presence of the arrestor. *Stevenson v. State*, 287 Md. at 520; *Wright v. State*, 58 Md. App. 447, 454, 473 A.2d 530 (1984). In our view, in the case of an illegal citizen's arrest, much like an illegal arrest by an officer, the appropriate remedy is not necessarily dismissal of the charges. For example, if the citizen lacked probable cause to believe a felony had been committed, and the defendant challenged the charge on that basis, provided the State had sufficient independent evidence to support the charge, the case would proceed.<sup>3</sup> The only effect of the illegal citizen's arrest would be the suppression of evidence, if any, obtained as a result of that illegal arrest. *See e.g., Crowley v. State*, 25 Md. App. 417, 341 A.2d 886 (1975).

### III

#### Conclusion

In summary, it is our opinion that, with the exceptions provided in TR §4-208, the Toll Facilities Police may exercise their powers only on property owned, leased, or operated under the control of the Maryland Transportation Authority.

J. Joseph Curran, Jr.  
*Attorney General*

Mary O'Malley Lunden  
*Assistant Attorney General*

Jack Schwartz  
*Chief Counsel*  
*Opinions and Advice*

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<sup>3</sup> See note 2 above.

## VEHICLE LAWS

### DEALERS – OUT-OF-STATE SALES BY WHOLESALE DEALERS

January 14, 1992

*Mr. W. Marshall Rickert*  
*Motor Vehicle Administrator*

You have requested our opinion whether a wholesale dealer licensed by the Maryland Motor Vehicle Administration (“MVA”) may be disciplined for selling vehicles to retail buyers in a neighboring state.

For the reasons stated below, we conclude that, although a wholesale dealer may be prosecuted by the other state if the sales violate that state’s laws, the dealer may not be disciplined by the MVA for these out-of-state sales alone.<sup>1</sup> However, a dealer who sells a vehicle to a resident of Maryland and fails to perform certain statutory duties imposed on dealers when transferring a vehicle may be disciplined for those violations.

#### I

#### Activities of Wholesale Dealers

Section 15-302 of the Transportation Article (“TR” Article) provides that a “person may not conduct the business of a dealer unless the person is licensed” by the MVA. In Chapter 639 of the Laws of Maryland 1985, the General Assembly created a new class of dealers, known as wholesale dealers, who are licensed to sell vehicles on a wholesale basis only.

A wholesale dealer licensed by the MVA may “buy a vehicle from, sell a vehicle to, or exchange vehicles only with another dealer or auto auction ....” TR §15-305.1(a)(1). Conversely, a wholesale dealer “may not buy a vehicle from, sell a vehicle to, or exchange vehicles with a retail buyer.” TR §15-305.1(a)(2).

A violation of TR §15-305.1(a)(2) may constitute grounds to suspend or revoke the dealer’s license. *See* TR §§15-109(1), 15-314(g),

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<sup>1</sup> *But see* note 6 below and accompanying text.

and 15-315(a)(4).<sup>2</sup> A violation of TR §15-305.1(a)(2) is also a misdemeanor. *See* TR §27-101.

This office has previously given advice about one aspect of a wholesale dealer's permissible activities. On April 22, 1991, Assistant Attorney General Kathryn M. Rowe advised Senator William Amoss that while a wholesale dealer may typically only engage in vehicle transactions with other dealers, sales conducted at auto auctions are an exception to this rule. Ms. Rowe advised that a dealer may purchase a vehicle from, or sell a vehicle to, someone other than a dealer if the sale occurs at an auto auction and the sale does not involve a "retail" buyer or seller. We agree with this conclusion.

When a vehicle dealer purchases a vehicle at auction, that sale is clearly wholesale if the seller – for example, a secured creditor or an insurance company – has taken ownership merely for the sake of engaging in a further sale of the vehicle. Conversely, a wholesale dealer who buys a vehicle from a "consumer," as defined in §13-101(c) and (d) of the Commercial Law Article, has clearly purchased from a retail buyer. This practice is prohibited by TR §15-305.1(a)(2).<sup>3</sup>

Your opinion request focuses on a different practice. You indicated that some wholesale dealers have apparently been selling vehicles at auctions in one or more neighboring states to retail purchasers. You ask whether a Maryland's State's Attorney or the MVA has authority to, respectively, prosecute or sanction the dealer for these out-of-state activities.

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<sup>2</sup> These provisions authorize licensing sanctions if a person "has violated or is attempting to violate any provisions of" TR Title 15, has "willfully violate[d] any of the dealer licensing laws," or "has failed to comply with any of the provisions of the Maryland Vehicle Law relating to ... the sale of vehicles."

<sup>3</sup> When the seller at an auction had originally purchased the vehicle to be used as part of a business enterprise, the wholesale dealer would, in other contexts, be deemed to have purchased from a "retail buyer," since the original purchase was a retail sale. *See* §11-101(e) of the Tax-General Article (definition of "retail sale") and *Black's Law Dictionary* 1478 (6th ed. 1990) (definition of "retail"). If the Legislature's intent was to permit a wholesale dealer to purchase at auction under these circumstances, the statute should be so clarified.

## II

### Out-of-State Sales

#### A. Introduction

Subtitle 3 of TR Title 15 generally describes a series of advertising, sales, and licensing violations that would subject the licensee to either administrative or criminal action. These provisions prohibit or require specific activities by the dealer. For example, TR §15-312 prohibits a dealer from engaging in certain sales techniques; TR §15-313 prohibits a dealer from engaging in certain advertising practices; and TR §15-314 requires a dealer to comply with the licensing provisions of the Maryland Vehicle Law and to conduct the dealer’s business within the licensing structure established under Title 15. TR §15-305.1(a)(2), prohibiting a wholesale dealer from engaging in transactions with a retail buyer, is another such licensing requirement.

#### B. Criminal Sanctions

In our opinion, Maryland has no jurisdiction to enforce TR §15-305.1(a)(2) through a criminal prosecution if all aspects of the prohibited transaction occurred in another state. As a general matter, the State of Maryland has criminal jurisdiction only over offenses committed within the territorial boundaries of the State. *See, e.g., Goodman v. State*, 237 Md. 64, 67, 205 A.2d 53 (1964); *Bowen v. State*, 206 Md. 368, 375, 111 A.2d 844 (1954); *Frye v. State*, 62 Md. App. 310, 317, 489 A.2d 71 (1985); *State v. Jones*, 51 Md. App. 321, 326-40, 443 A.2d 967 (1982), *vacated on other grounds*, 298 Md. 634, 471 A.2d 1055 (1984). *See generally Urciolo v. State*, 272 Md. 607, 636-40, 325 A.2d 878 (1974); *Breeding v. State*, 220 Md. 193, 200, 151 A.2d 743 (1959).<sup>4</sup>

The crime arising from a violation of TR §15-305.1(a)(2) is the act of a wholesale dealer buying a vehicle from, selling a vehicle to, or exchanging vehicles with a retail buyer. The situs of that act determines the jurisdiction in which the crime occurred. If the sale or exchange occurred in Maryland, Maryland has criminal jurisdiction; if it occurred in another state, Maryland does not have criminal jurisdiction.

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<sup>4</sup> This opinion does not attempt to catalog all possible exceptions to this general principle. For example, Maryland would not lack jurisdiction over a crime consisting of an interstate series of acts, where at least one overt act takes place within Maryland. *See State v. Jones*, 51 Md. App. at 339. *Cf. Maryland v. Dickson*, 717 F.Supp. 1090, 1101 (D. Md. 1989) (evidence supported the conclusion that Maryland was the situs of a scheme to roll back odometers even though some actions may have taken place in other states).

This opinion should not be taken to suggest that Maryland may not define a crime by reference to its intended results as well as specific acts. *See, e.g., Pennington v. State*, 308 Md. 727, 521 A.2d 1216 (1987) (jurisdiction conferred when acts in the District of Columbia resulted in the obstruction of justice in Maryland) and *Grindstaff v. State*, 57 Md. App. 412, 470 A.2d 809 (1984) (jurisdiction conferred where duties sought to be affected by a bribe paid out-of-state were to be performed in Maryland). The crime in TR §15-305.1(a)(2) is defined solely in terms of specific prohibited acts, however, without any mention of an intended result.

Furthermore, we are not addressing the instance in which a wholesale dealer suggests that a Maryland retail customer cross the State line in order to complete a sale begun in Maryland. That action might well be viewed as part of a series of acts spanning state boundaries and subjecting the dealer to criminal sanctions in Maryland. *See State v. Jones*, 51 Md. App. at 330-40; 59 *Opinions of the Attorney General* 32 (1974).<sup>5</sup>

### C. *Licensing Sanctions*

For purposes of this opinion, we need not explore in the abstract potential differences between the potential reach of this State's criminal law enforcement, discussed in Part IIB above, and its administrative law enforcement. Within broad constitutional limits, the State would not be prohibited from imposing civil sanctions for out-of-state misdeeds by its licensees. A state's prohibitory regulation does not violate the Commerce Clause of the United States Constitution as long as the regulation is applied even-handedly, its effects on interstate commerce are only incidental, and the burden imposed on interstate commerce is not clearly excessive in relation to the local benefits sought to be achieved. *See generally, e.g., Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)

The issue presented by your inquiry, rather, is whether the prohibition in TR §15-305.1(a)(2) reaches wholly out-of-state transactions. We find no indication in its language or context to suggest that the General Assembly meant to subject a wholesale dealer to license revocation or suspension for a sales transaction occurring wholly out-of-state. The licensing scheme required by the Maryland Vehicle Law is intended "to foster dealer accountability in the context of consumer transactions." *Automobile Trade Association v. Harold Folk Enterprises*, 301 Md. 642, 663-64, 484 A.2d 612 (1984); *Detroit Automotive Purchasing Services v. Lee*, 463 F. Supp. 954, 957-58 (D. Md. 1978); *Aero Motors v. Administrator, Motor Vehicle Administration*, 274 Md. 567, 579-81 and 590, 337 A.2d 685 (1975). In general, the "transactions" that invoke the

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<sup>5</sup> *See also* note 4 above.

State’s interest in “dealer accountability” are those that occur in Maryland.<sup>6</sup> A person who engages in a vehicle sales transaction in another state is accountable for compliance with the dealer licensing laws of that state.

By contrast, the provisions of the Maryland Vehicle Law regulating title transfers and inspections establish that the State *does* intend to require compliance by a wholesale dealer with these statutory duties if the dealer chooses to sell to a Maryland resident who is not a dealer, regardless of where the sale occurs. If a retail buyer intends to title and register the vehicle in Maryland, the dealer is required to obtain a title application from the transferee, collect all taxes and fees owed the MVA, and otherwise comply with the requirements in TR §§13-113(e) and 13-812. Further, subject to certain exceptions, the dealer may transfer the vehicle only after the vehicle has been approved by an inspection station licensed by the Maryland State Police. TR §23-106(b)(2).<sup>7</sup> This duty is not normally imposed on a wholesale dealer, because in Maryland a wholesale dealer may only transfer to another dealer and thus is not required to obtain an inspection certificate before such a transfer. TR §23-106(a)(1). However, a licensed wholesale dealer is a dealer licensed to sell vehicles in Maryland. TR §§11-111 and 15-101(b). The duties imposed on a licensed dealer to obtain an inspection certificate do not terminate at the State boundaries if the transferor is a licensed dealer in this State and the transferee is a resident of the State who intends to title and register the vehicle in Maryland.<sup>8</sup>

A dealer’s failure to obtain the title application and to collect and remit the tax due to the MVA may result in both a licensing sanction and a deficiency assessment against the dealer. TR §§15-109(a), 15-315(a)(4), and 13-812. The dealer’s failure to comply with the inspection

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<sup>6</sup> Depending on the particular facts, out-of-state practices might constitute “untrustworthy[iness], ... a practice of failure to perform contracts or ... fraud or bad faith” or result in a conviction of a crime of moral turpitude. These circumstances, even if they occurred in another state, may result in licensing sanctions under TR §15-315(a)(1) or (2).

<sup>7</sup> An inspection of the vehicle is not required if the transfer falls within the exceptions provided in TR §23-106(b)(4) and (5).

<sup>8</sup> Both TR §§13-113 and 23-106 speak to the “transfer,” of the vehicle, while TR §15-305.1 speaks to the “sale” of the vehicle. This difference in wording is significant: While a vehicle *sold* in another state to a Maryland resident by a Maryland licensed dealer does not involve the State of Maryland in the sale *per se*, Maryland is nonetheless involved in the *transfer* of the vehicle since the transferee will be required to submit an application for a title to the MVA. While a sale is part of the transfer process, the transfer encompasses actions apart from, and in addition to, the sale of the vehicle.

requirements may also result in the MVA's suspending or revoking the dealer's license. TR §15-109(2).

### III

#### Conclusion

In summary, it is our opinion that a wholesale dealer may not be disciplined by the MVA for the mere act of selling vehicles to retail buyers in a neighboring state.<sup>9</sup> Instead, the dealer would face charges under the laws of the other state unless the dealer were licensed to engage in retail sales there and otherwise complied with the other state's laws. However, the dealer would be required to comply with the duties imposed by TR §§13-113 and 23-106 if the transfer of the vehicle was to a person (other than another dealer) who intends to title and register the vehicle in Maryland.

J. Joseph Curran, Jr.  
*Attorney General*

Edward R. K. Hargadon  
*Assistant Attorney General*

Jack Schwartz  
*Chief Counsel*  
*Opinions & Advice*

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<sup>9</sup> *But see* note 6 above and accompanying text.

**VEHICLE LAWS - TAXATION - ENVIRONMENT - PREEMPTION -  
VALIDITY OF "GAS GUZZLER LAW"**

June 24, 1992

*Mr. W. Marshall Rickert*  
*Motor Vehicle Administrator*

You have asked for our opinion whether federal law preempts the Motor Vehicle Administration ("MVA") from enforcing certain provisions of the recently enacted Chapter 3 of the Laws of Maryland 1992 (First Special Session). These provisions, which were enacted as new §13-818 of the Transportation Article ("TR" Article) and become effective on July 1, 1992, require an excise tax surcharge to be imposed on a buyer of a vehicle with a low fuel mileage rating, a tax credit to be given to a buyer of a vehicle with a high fuel mileage rating, and a notice to be affixed to vehicles offered for sale telling consumers about the applicability of the surcharge or credit. By letter dated June 8, 1992, the Chief Counsel of the National Highway Traffic Safety Administration ("NHTSA") expressed NHTSA's view that TR §13-818 is preempted in its entirety and may not be enforced.

We do not agree with NHTSA's overall assessment, which we find to be too broad. While we share its conclusion that the consumer notice requirement in TR §13-818(f) is preempted, we do not concede that the tax surcharge-tax credit aspect of the Maryland law is likewise preempted. In our view, Maryland and the other states are not barred from enacting important environmental legislation merely because the State law uses fuel economy numbers as a point of reference.

Nevertheless, applying principles of Maryland law, we advise that the tax surcharge and tax credit provisions of TR §13-818 should not now be enforced, because they are not severable from the invalid notice requirement in TR §13-818(f). If the legal defect in the notice requirement is corrected in the future, the surcharge and credit provisions could then be applied, and we will defend the statute if it is challenged in court.

## I

**TR §13-818**

The April Special Session of the General Assembly enacted a number of measures related to transportation funding, combined in Chapter 3. These measures included the tax mechanism summarized in TR §13-818(b): “In conjunction with the tax imposed under §13-809 of this Article, a fuel efficiency surcharge or fuel efficiency credit shall be imposed under this section based on the fuel economy rating of the model type of the passenger car.”

“[T]he tax imposed under §13-809” refers to the vehicle excise tax. The term “fuel economy” is defined to have “the meaning stated in § 4064 of the Internal Revenue Code as determined and adjusted by the U.S. Environmental Protection Agency to account for the difference between controlled laboratory conditions and actual road driving.” TR §13-818(a)(3). Section 4064 of the Internal Revenue Code defines “fuel economy” as “the average number of miles traveled by an automobile per gallon of gasoline (or equivalent amount of other fuel) consumed as determined by the EPA Administrator ....”

For passenger cars with a model year of 1993 or 1994, a surcharge of \$100 is to be imposed if the car has a fuel economy rating that is less than 21 miles per gallon. TR §13-818(c)(1)(i). For cars with a model year of 1995 or later, the fuel efficiency surcharge is computed by multiplying by \$50 the “nearest whole number of miles per gallon that the fuel economy rating of the model type of the automobile is less than 27 miles per gallon.” TR §13-818(c)(1)(ii)2. So, for example, the purchaser of a 1995 model with a fuel economy rating of 23 miles per gallon would pay \$200  $((27-23) \times \$50)$ . However, the surcharge for cars with a model year of 1995 or later may not exceed 1% of the purchase price of the car. TR §13-818(c)(2).

As an incentive for people to buy vehicles with a high fuel economy rating, the General Assembly provided a \$50 credit against the excise tax paid for any passenger cars with a model year of 1993 or 1994 that have a fuel economy rating greater than 35 miles per gallon. TR §13-818(c)(3)(ii). For cars with a model year of 1995 or later and with a fuel economy rating over 35 miles per gallon, the credit is computed by multiplying \$50 by the number of miles per gallon that the fuel economy rating exceeds 35 miles per gallon. TR §13-818(c)(3)(ii). The buyer of a 1995 model year car with a fuel economy rating of 38 miles per gallon, for example, would receive a \$150 tax credit against the excise tax owed under TR §13-809  $((38-35) \times \$50)$ . As with the surcharge, though, the

amount of the tax credit is limited to an amount not to exceed 1% of the purchase price of the car. TR §13-818(c)(4).

The law also requires a dealer to “prominently display on a vehicle offered for sale” a notice to its customers indicating whether the car being purchased is subject to a surcharge or a tax credit. TR §13-818(f). The customer is informed, generally, that the mileage or credit is based on the fuel economy rating, as that rating is determined by the Environmental Protection Agency. The MVA is to develop the exact form that will appear on vehicles, but the statute sets out the basic requirements. The notice is to begin as follows:

“For this vehicle, the fuel economy rating is \_\_\_\_\_. The fuel efficiency surcharge is \_\_\_\_\_ or the fuel efficiency credit is \_\_\_\_\_.”

The notice goes on to describe the manner in which the fuel economy rating is determined, the legislative requirements for a surcharge, and the legislative requirements for a credit.

Finally, the law grants to the MVA authority to “adopt rules and regulations to implement and operate the fuel efficiency surcharge and credit program under this section.” TR §13-818(g).

## II

### Federal Cost Savings Act

Subchapter V of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. §§2001 through 2013 (the “Cost Savings Act”), establishes a comprehensive average fuel economy program. The Cost Savings Act, enacted as part of the 1975 Energy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 90 (1975), was intended to bring “measured savings in consumption of energy by improving the efficiency of the cars we drive.” H.R. Rep. No. 94-340, 94th Cong., 1st Sess. 1 (1975), *reprinted in* 1975 *U.S. Cong. & Admin. News* 1762, 1763 (94th Cong. 1st Sess.).

Specifically, the Cost Savings Act authorizes the federal Secretary of Transportation to establish the average fuel economy standards for manufacturers of passenger automobiles. 15 U.S.C. §2002(a)(4). “The term ‘average fuel economy standard’ means a performance standard which specifies a minimum level of average fuel economy which is applicable to a manufacturer in a model year.” 15 U.S.C. §2001(7). “The term ‘fuel economy’ means the average number of miles traveled by an automobile per gallon of gasoline (or equivalent amount of other fuel)

consumed, as determined by the EPA Administrator in accordance with procedures established under section 2003(d) of this title.” 15 U.S.C. §2001(6).<sup>1</sup>

The Cost Savings Act contains the following preemption provisions:

(a) Whenever an average fuel economy standard established under this subchapter is in effect, no State or political subdivision of a State shall have authority to adopt or enforce any law or regulation relating to fuel economy standards or average fuel economy standards applicable to automobiles covered by such Federal Standard.

(b) Whenever any requirement under section 2006 of this title is in effect with respect to any automobile, no State or political subdivision of a State shall have authority to adopt or enforce any law or regulation with respect to the disclosure of fuel economy of such automobile, or the fuel cost associated with the operation of such automobile, if such law or regulation is not identical with such requirement.

15 U.S.C. §2009.<sup>2</sup>

### III

#### Preemption of the Notice Requirement

Turning first to the notice requirement in TR §13-818(f), we conclude that it is a law “with respect to the disclosure of fuel economy ... [that] is not identical with” the federal disclosure requirement.

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<sup>1</sup> The standards are established by regulation. *See* 49 C.F.R. §531.5 (1991). Failure by a manufacturer to meet the standards established by NHTSA results in the imposition of civil penalties. 15 U.S.C. §2008.

<sup>2</sup> 15 U.S.C. §2009(c) contains language preserving the prerogative of a state to establish “requirements with respect to fuel economy of automobiles procured for its own use.”

Accordingly, TR §13-818(f) is preempted by 15 U.S.C. §2009(b) and is unenforceable.<sup>3</sup>

There can be no doubt that TR §13-818(f) is a provision “with respect to the disclosure of fuel economy of [an] automobile ....” It requires notice of a car’s “fuel economy rating” and explains the method by which that rating was determined.

Furthermore, TR §13-818(b) is not “identical with” the federal requirement. Under 15 U.S.C. §2006(a)(1)(A), automobile manufacturers are required to affix a label on each automobile indicating, among other things:

- (i) the fuel economy of such automobile,
- (ii) the estimated annual fuel cost associated with the operation of such automobile, and
- (iii) the range of fuel economy of comparable automobiles (whether or not manufactured by such manufacturer),

as determined in accordance with rules of the EPA Administrator ....

The “form and content” of this label is to be determined by the EPA Administrator. 15 U.S.C. §2006(a)(3). EPA has in fact issued a regulation specifying in elaborate detail the content and appearance of the familiar window sticker with “gas mileage information.” See 40 C.F.R. §600.307-86 and Part 600, App. III.

The notice required by TR §13-818(f) departs from the federal label. For example, the federal label shows separate “City MPG” and “Highway MPG” figures; TR §13-818(f) mandates disclosure of a single “fuel economy rating.” As NHTSA points out in its letter, these differing versions of information on the same topic – “fuel economy,” defined by 15 U.S.C. §2001(6) to mean miles per gallon as determined by EPA – potentially give rise to consumer confusion. Congress evidently sought to allay that risk by allowing states to use only the federal disclosure information if a state wishes to legislate with respect to the disclosure of “fuel economy,” as defined in the Cost Savings Act.

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<sup>3</sup> When federal law preempts the state from enacting a law, Article VI, Clause 2 of the U.S. Constitution requires that the federal law shall prevail. Any attempt by a state to enforce a law preempted by Congress is unconstitutional. *City of New York v. F.C.C.*, 486 U.S. 57, 63 (1988).

The General Assembly could correct the problem by amending TR §13-818(f) to eliminate any reference to “fuel economy” – that is, a car’s miles-per-gallon rating. Presumably consumers can be informed about the tax surcharge-tax credit mechanism in other ways. For example, the notice could refer to the fact that a surcharge is imposed “because this car’s excessive use of energy harms the environment.” Such a general disclosure, devoid of any reference to the car’s miles-per-gallon rating, would not be one “with respect to the disclosure of fuel economy” and would not be preempted by 15 U.S.C. §2009(b).<sup>4</sup>

#### IV

#### Preemption of Tax Surcharge and Credit

A second issue is whether the tax surcharge-tax credit mechanism in TR §13-818 “relates to [federal] fuel economy standards or average fuel economy standards” and so is preempted under 15 U.S.C. §2009(a).

At the outset, we reject any suggestion that Maryland is generally barred from acting to encourage the purchase of fuel-efficient cars. The federal preemption provision speaks only of “fuel economy standards,” which by definition concern only the miles per gallon attained by a car. *See* 15 U.S.C. §2001(6). Thus, if the Maryland General Assembly used its tax power to shift consumer demand away from gas guzzlers toward fuel-efficient cars without reference to the federal fuel economy standards – by linking the tax surcharge and credit to factors like engine displacement and vehicle weight, for example, rather than miles per gallon – the State law would not be preempted.

TR §13-818 is problematic because it describes the incidence of the tax surcharge and credit by explicit reference to the federal fuel economy standards. NHTSA is of the view that the Maryland law is preempted for

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<sup>4</sup> TR §13-818(f) authorizes the MVA to prescribe the form used for the notice. Because the statute sets out specific language and requires that the notice “be in substantially [that] form,” however, we conclude that the MVA may not itself simply alter the notice to eliminate references to fuel economy.

The MVA could, however, exercise its regulatory authority to “implement” the program by fashioning some alternative method for informing consumers about the surcharge-credit mechanism. A regulation adopted under TR §13-818(g) would have the force and effect of law. Like a legislative change in the notice, however, any regulatory alternative must avoid fuel economy disclosures that are not identical with federal disclosures. *See also* note 8 below.

this reason.<sup>5</sup> And, indeed, we acknowledge that the case for preemption has seemingly been bolstered by a recent decision of the United States Supreme Court interpreting a different preemption provision using the term “relating to.”

On June 1 of this year, the Supreme Court ruled that a federal statute prohibiting states from enacting laws “relating to” airline rates preempted the Texas Attorney General from enforcing certain guidelines on airline advertising that had been established by the National Association of Attorneys General (“NAAG”). *Morales v. Trans World Airlines*, 60 U.S.L.W. 4444, 4448 (June 1, 1992).

The Court, in construing the preemption clause of the Airline Deregulation Act contained in 49 U.S.C. §1305(a), stated that the words “relating to” had a broad meaning. They mean “‘to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with ...,’ and the words thus express a broad pre-emptive purpose.” 60 U.S.L.W. at 4446 (citing Black’s Law Dictionary 1158 (5th ed. 1979)). Relying on a series of cases construing the same phrase in the preemption provision of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§1001 et. seq., the Court held that “State enforcement actions having a connection with or reference to airline ‘rates ...’ are pre-empted ....” *Id.* The Court specifically rejected the Texas Attorney General’s argument that the preemption language in the Airline Deregulation Act simply precluded a State from establishing or prescribing rates. The Court stated:

This [argument] simply reads the words “relating to” out of the statute. Had the statute been designed to pre-empt state law in such a limited fashion, it would have forbidden the States to “*regulate* rates ....”

*Id.* (emphasis in original).

In its letter urging the view that the Cost Savings Act preempted TR §13-818 in its entirety, NHTSA quoted some of the language from *Morales* set out above as if it were dispositive. We do not view the issue as quite so simple.

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<sup>5</sup> NHTSA’s prompt decision to assert that TR §13-818 is wholly preempted is somewhat surprising in light of Executive Order 12611 (October 15, 1987), in which President Reagan ordered federal executive branch agencies to “closely examine the constitutional and statutory authority supporting any federal action that would limit the policy making discretion of the States, and [to] carefully assess the necessity for such action.” Sec. 3(a).

The Court was careful to end its opinion with the observation that “[s]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner’ to have pre-emptive effect.” 60 U.S.L.W. at 4448 (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21 (1983)). And the Court was at pains to point out the “significant effect” that the NAAG Guidelines supposedly would have on fares: Enforcement of the guidelines, according to the Court, would “curtail the airlines’ ability to communicate fares to their customers”; would “severely burden [the airlines’] ability” to both restrict the availability of cheap seats and advertise cheap fares; would “effectively prevent the airlines from using [certain] terms to call attention to the fares ...”; and “may make it impossible [for the airlines] to use this marketing process at all.” 60 U.S.L.W. at 4447. In our view, the point of the contrast is that some state laws, although they might literally “refer to” a matter within the zone of federal preemption, have so little actual impact on those subject to federal regulation as to avoid preemption.

At the appropriate time, we are prepared to argue to a court that the tax surcharge-tax credit mechanism of TR §13-818, despite its use of federal fuel economy standards as a point of reference, has at most a “tenuous, remote, [and] peripheral” effect on those standards. Unlike the NAAG Guidelines at issue in *Morales*, TR §13-818 does not impose any obligations or restrictions on the federally regulated industry. Automobile manufacturers may continue to market their cars in Maryland whatever the cars’ fuel economy. The tax program affects only consumers, not manufacturers or dealers. And if the Maryland law succeeds in its objective of shifting consumer demand incrementally away from the most environmentally harmful cars to more fuel-efficient ones, that change in demand will have no effect on the operation of the federal fuel economy program (except to make it marginally easier for manufacturers to achieve their minimum corporate average standard, if they produce more fuel-efficient cars to meet the incremental demand).

No immediate court test of the validity of TR §13-818 will be necessary, for the reasons explained in Part V of this opinion. But if and when that time comes, we shall seek to convince the court that, “guided by respect for the separate spheres of governmental authority preserved in our federalist system,” *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981), it should uphold Maryland’s exercise of its sovereign tax power to protect its environment.<sup>6</sup>

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<sup>6</sup> The Supreme Court itself is hardly of one mind about close preemption questions. See *Gade v. National Solid Wastes Management Ass’n*, No. 90-1676 (U.S. June 18, 1992).

## V

**Severability**

Because the notice provision of TR §13-818(f) is invalid, running afoul of the preemption provision in 15 U.S.C. §2009(b), we must consider whether the otherwise enforceable balance of TR §13-818 is severable. The issue of severability is entirely a matter of State law.

As we observed in a prior opinion, “The question of severability is in every case a question of legislative intent. Of course, the intent to be ascertained is not the actual legislative intent (which is always that the entire law should be effective), but what the General Assembly would have intended had it known that the statute could be only partially effective.” *73 Opinions of the Attorney General* 78, 83 (1988). See, e.g., *Porten Sullivan Corp. v. State*, 318 Md. 387, 410, 568 A.2d 1111 (1990).

TR §13-818 as a whole is primarily intended to achieve environmental benefits by encouraging car buyers to choose fuel-efficient cars (although in the long run it is also expected to yield significant revenue). It can achieve this objective only if consumers learn about the tax consequences of their purchasing decisions while they are considering various car models. The notice in TR §13-818(f) would give them that information. Indeed, this subsection was the result of an amendment by the sponsors, who saw the value of this uniform method of consumer notification.

Without the notice, the law loses much of its capacity to affect consumer choice. A tax surcharge buried in the excise tax line item on the purchase agreement, if it is noticed by the buyer at all, is not likely to change a decision already made. The program will work as intended only if the surcharge-credit mechanism is brought forcefully to the buyer’s attention early in the transaction, when even the comparatively small sums involved might be enough to shift a buyer’s preference. We cannot conclude that the General Assembly would have intended to have the surcharge-credit mechanism operate without any real opportunity to sway buying decisions. Hence, we advise that the tax surcharge-tax credit mechanism cannot now be given effect.<sup>7</sup>

That TR §13-818 is not presently enforceable because of a combination of federal preemption of one part of the statute and nonseverability of the rest does not take the statute out of the code. It

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<sup>7</sup> The rest of Chapter 3, a compendium of crucially important transportation revenue measures, is manifestly severable from TR §13-818. See *Porten Sullivan*, 318 Md. at 410.

remains a part of Maryland law, albeit dormant for now, and it could become enforceable in the future if TR §13-818(f) were no longer invalid.

One possibility is that Congress could amend 15 U.S.C. §2009(b) to permit the kind of notice now contained in TR §13-818(f). If Congress did so, all of TR §13-818 would become enforceable without further action by the General Assembly. *See Home Utilities Co. v. Revere Copper & Brass, Inc.*, 209 Md. 610, 619, 122 A.109 (1956).

If Congress does not act to change federal law, the General Assembly nevertheless could amend TR §13-818(f) to eliminate the preemption problem. *See Part IV above.* Once the amendment became effective, all of TR §13-818 would become enforceable, even if the General Assembly only amended subsection (f). *Cf. Perkins v. Eskridge*, 278 Md. 619, 651, 366 A.2d 21 (1976).<sup>8</sup>

## VI

### Conclusion

In summary, it is our opinion that the notice requirement in TR §13-818(f) is invalid under federal law and is not severable from the rest of TR §13-818. Therefore, the MVA should refrain from enforcing the entire provision until the problem with TR §13-818(f) is corrected. If and when the law does become effective, this office will defend its validity if it is challenged in court.

We conclude by observing that Congress could give meaning to basic principles of federalism, as it has done in related contexts, by amending the Costs Savings Act's preemption provision to explicitly authorize state laws like TR §13-818.<sup>9</sup> Like many other states, Maryland faces a formidable task in meeting Clean Air Act requirements. An effort to promote use of more fuel-efficient cars would help reduce air pollution and might translate into jobs saved in the industrial sector of our economy. Such a law does

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<sup>8</sup> The MVA has authority under TR §13-818(g) to adopt a regulation embodying an alternative form of consumer notification. *See* note 4 above. Whether such action by an administrative agency could have the effect of restoring the enforceability of the statute is a novel question that we need not presently address. We understand from the MVA that other, unrelated issues might prevent implementation even if the problem resulting from the present invalidity of TR §13-818(f) were corrected. This opinion does not address those other issues.

<sup>9</sup> Congress, for example, has wisely chosen to allow first California and then the other states to adopt and enforce certain emission control standards more stringent than federal standards. 42 U.S.C. §§7507 and 7543.

no harm to national policy and could potentially achieve significant environmental benefits locally. Congress should act in the interests of both the federal system and the environment to ratify the validity of laws like TR §13-818.

J. Joseph Curran, Jr.  
*Attorney General*

Jack Schwartz  
*Chief Counsel*  
*Opinions and Advice*

Edward R. K. Hargadon  
*Assistant Attorney General*

**VEHICLE LAWS – MOTOR VEHICLE ADMINISTRATION – CARRYING OF  
HANDGUNS BY INVESTIGATORS**

July 14, 1992

*Mr. W. Marshall Rickert*  
*Motor Vehicle Administrator*

You have asked for our opinion on a series of questions related to the authority of certain investigators employed by the Motor Vehicle Administration (“MVA”) to carry handguns. Specifically, you ask the following questions:

1. May the MVA authorize its investigative personnel to be armed, and if so, what legal requirements are connected with implementing such a decision?
2. May the MVA require certain investigators who have permits to carry weapons and yet not require other investigators to do so even though they perform the same function? May a decision to allow investigators to be armed be made on a geographic basis or must such a decision affect all agents?
3. Are agents of the MVA’s Division of Investigative Services (“Division”) considered police officers as a result of recent legislation providing them with citation authority?

For the reasons stated below, we conclude as follows:

1. The MVA may authorize the Division’s investigators to carry handguns, subject to the approval of, and conditions imposed by, the Superintendent of the Maryland State Police. Although the MVA may authorize its investigators to carry handguns, it must ensure that each investigator receives adequate training in the use of a handgun before carrying, wearing, or transporting the handgun, and it must establish rules and guidelines on the appropriate conditions under which an investigator is permitted to use a handgun. In addition, the Division’s investigators may not wear, carry, or transport a handgun without a permit.
2. The MVA may require that all investigators be armed or it may impose reasonable criteria on who are to be armed – for example, by requiring that only investigators assigned to certain geographic areas of the State be armed.

3. The Division's investigators are not law enforcement personnel or police officers.

## I

### Background

The Division is responsible for conducting all MVA investigations except those concerning persons licensed in an occupation or profession regulated by the MVA under Title 15 of the Transportation Article ("TR" Article).<sup>1</sup> The purposes behind the investigations are varied. The Division's investigators repossess driver's licenses, vehicle registration cards, and registration plates, after a licensee, registrant, or owner has failed to comply with an order of the MVA to return the document or plate. The investigators may also be required to conduct interviews or engage in surveillance concerning a person who seeks reinstatement of a driver's license or a person who is the subject of a complaint that the licensee is an unfit or unsafe driver.

On April 4, 1972, the MVA instituted a policy barring a field agent or investigator assigned to the Division from carrying firearms on his or her person or in State vehicles while the agent or investigator is on duty. Since then, this policy has been the subject of some discussion within the MVA, but it has been in force the entire 20 year period. We understand that the MVA is currently considering whether to rescind the 1972 policy and to permit investigators to carry firearms.

## II

### Carrying of Handguns by Investigators

Under Article 27, §36B(b), it is a misdemeanor for a person to "wear, carry, or transport any handgun" on or about his person or to "wear, carry, or knowingly transport any handgun" in a vehicle. This prohibition does not apply if the person is considered "law enforcement personnel ... of this State ...." Article 27, §36B(c)(1)(i). In addition, a person may carry a handgun if the Superintendent of the Maryland State Police has issued a permit authorizing the person to do so. *See* Article 27, §36B(c)(2).

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<sup>1</sup> Investigations of persons licensed under Title 15 are conducted by investigators assigned to the MVA's Division of Licensing and Consumer Services.

### A. “Law Enforcement Personnel” Exception

The term “law enforcement personnel” means any “full-time member of a police force or other agency of ... a state ... who is responsible for the prevention and detection of crime and the enforcement of the laws of ... a state ....” Article 27, §36F(i). A “police force” is “a body of persons trained in methods of law enforcement and crime prevention and detection, and given authority to maintain the peace, safety, and order of the community.” *Huger v. State*, 285 Md. 347, 352, 402 A.2d 880 (1979) (quoting Black’s Law Dictionary (4th ed. rev. 1968)).

The MVA, unlike some of the other modal administrations with the Department of Transportation, does not have a designated “police force.” See TR §§5-212 (State Aviation Administration Police Force), 6-210 (Maryland Port Administration Police Force), 4-208 (Toll Facilities Police Force), and 7-207 (Mass Transit Administration Police Force). Nor do the Division’s investigators constitute a police force in fact, since they are neither authorized nor trained to maintain the peace, safety, and order of the community. Under TR §12-104.1, the Division’s investigators may issue citations for violations of the vehicle registration, titling, and excise tax provisions of TR Title 13 and the provisions of TR Title 17 relating to required security. However, the powers that may be exercised by an investigator for the Division do not extend to general enforcement of the laws of Maryland.

Further, the Division’s investigators are not police officers under the Maryland Vehicle Law. To be a police officer under the Maryland Vehicle Law, the person must be authorized “to make arrests for violations of any of the provisions of the Maryland Vehicle Law ....” TR §11-147. An arrest is the “detention of a known or suspected offender for the purpose of prosecuting him for a crime.” *Bouldin v. State*, 276 Md. 511, 516, 350 A.2d 130 (1976). An arrest occurs when the arrestee is physically restrained or when the arrestee voluntarily submits to an arrest. *Little v. State*, 300 Md. 485, 510, 479 A.2d 903 (1984).<sup>2</sup>

An investigator with the Division may issue citations for certain violations of TR Titles 13 and 17. However, the investigator is not specifically authorized to arrest an offender and the issuance of a citation does not constitute an arrest. Cf. *Dougherty v. State*, 40 Md. App. 535,

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<sup>2</sup> Any individual may arrest without a warrant if the arrester has reasonable grounds to believe a felony has been committed by the arrestee or a misdemeanor, which amounts to a breach of peace, is being committed in front of the arrester. *Stevenson v. State*, 287 Md. 504, 513, 413 A.2d 1340 (1980). Only a police officer is authorized to arrest for a misdemeanor if the misdemeanor does not amount to a breach of peace. *Id.*

537, 392 A.2d 1165 (1978) (issuance of a game law citation was not an arrest.)

Inasmuch as an investigator is not authorized to make arrests for violations of the Maryland Vehicle Law, the investigator is not a police officer under TR §11-147. Further, since an investigator is not "law enforcement personnel" under Article 27, §36B(c)(1), the Division's investigators are not exempt from the statute that bars the transportation of a handgun without a permit.

### ***B. Permits for Investigators***

Article 27, §36E(a) allows the State Police Superintendent to issue a permit to carry a handgun if the applicant satisfies the following condition, among others:

(6) Has, based on the results of investigation, good and substantial reasons to wear, carry, or transport a handgun, provided however, that the phrase "good and substantial reason" as used herein shall be deemed to include a finding that such permit is necessary as a reasonable precaution against apprehended danger.<sup>3</sup>

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<sup>3</sup> The other criteria are as follows:

- (1) Is eighteen years of age or older; and
- (2) Has not been convicted of a felony or of a misdemeanor for which a sentence of imprisonment for more than one year has been imposed or, if convicted of such a crime, has been pardoned or has been granted relief pursuant to Title 18, §925 of the United State Code; and
- (3) Has not been committed to any detention, training, or correctional institution for juveniles for longer than one year after an adjudication of delinquency by a juvenile court; provided, however, that a person shall not be disqualified by virtue of this paragraph (3) if, at the time of the application, more than ten years has elapsed since his release from such institution; and
- (4) Has not been convicted of any offense involving the possession, use, or distribution of controlled dangerous substances; and is not presently an addict, an habitual user of any controlled dangerous substance not under legitimate medical direction, or an alcoholic; and
- (5) Has, based on the results of investigation, not exhibited a propensity for violence or instability which may reasonable render his possession of a handgun a danger to himself or other law-abiding persons.

Under this provision, the Superintendent and the Handgun Permit Review Board (“Board”) determine, on a case-by-case basis, whether an applicant should be issued a permit.<sup>4</sup>

Moreover, the Superintendent may limit the geographic area, circumstances, or times during which the permit is effective. Article 27, §36E(d). Thus, the Superintendent and the Board may determine that the issuance of a handgun is to be limited to certain geographic areas since only in those areas are there “good and substantial reasons” for the investigator to wear, carry, or transport a handgun. The Superintendent and the Board, as opposed to the applicant or the MVA, determine whether there is “apprehended danger” to the applicant for the permit. *Snowden v. Handgun Permit Review Board*, 45 Md. App. 465-69, 413 A.2d 295 (1980). Therefore, if the MVA chooses to allow its investigators to carry handguns, it must limit the transportation of the weapons to the geographic limitations and conditions imposed by the Superintendent.

If the Superintendent issues permits without limitations, there is no reason why the MVA could not impose its own geographic, temporal, or circumstantial limitations. It simply cannot broaden the restrictions imposed by the Superintendent.

### III

#### Potential Liability of the MVA and Its Employees

In determining whether the MVA should permit the wearing and transporting of handguns by the Division’s investigators, several issues of potential liability should be considered by the MVA and the State Treasurer’s Office. If a person is injured by an investigator, that individual may have a cause of action for the common law torts of negligence, assault, or battery or for violating the individual’s constitutional or civil rights.

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<sup>4</sup> Whether the MVA may require that all applicants for investigator positions be eligible for handgun permits need only be addressed if the Superintendent decides that the Division’s investigators need handguns as a reasonable precaution against apprehended danger. With that assumption, the MVA may, as a condition or qualification of employment, require that an applicant for an investigator’s position with the Division either (i) have a permit to carry a handgun or (ii) meet the prerequisite requirements of §36E(a)(1) through (4) and receive a permit during the probationary period. Under Chapter 168 (House Bill 610) of the Laws of Maryland 1992, the Department of Transportation may incorporate any qualifications it chooses to adopt into its new classification system.

The investigator would be immune from liability for the common law torts if the investigator was acting within the scope of the investigator's public duties when the alleged tort occurred and if the actions of the investigator did not constitute gross negligence or malicious conduct. §12-105 of the State Government Article ("SG" Article) and §5-399.2 of the Courts and Judicial Proceedings Article ("CJ" Article). Subject to the provisions of CJ §5-399.2, the MVA would be liable for a tort committed by an investigator up to the limits of self-insurance. SG §12-104.

An investigator could be personally liable, however, for a violation of an individuals' civil rights under Title 42 U.S.C., §1983.<sup>5</sup> For example, the shooting of a person amounts to a seizure if the defendant intends to terminate the person's movement. *Brower v. County of Inyo*, 489 U.S. 593 (1989). *Cf. Rucker v. Harford County*, 946 F.2d 278, 281 (4th Cir. 1991) (unintended shooting of an innocent bystander was not a seizure under the Fourth Amendment). A claim that excessive force was used in the course of a seizure could succeed if the investigator's actions were "objectively unreasonable" in light of the facts and circumstances confronting the investigator. *Graham v. Connor*, 490 U.S. 386 (1989).

Finally, liability for a civil rights violation could extend to those individuals within the State who are responsible for training investigators regarding the use of handguns, including the circumstances under which firearms may be used and the degree of force authorized. To be liable, a defendant must be shown to be deliberately indifferent to the need for training. *City of Canton v. Harris*, 489 U.S. 381 (1989). Moreover, the inadequate training must be shown to have caused the injury. *Revene v. Charles County Commissioners*, 882 F.2d 870, 875 (4th Cir. 1989).

Thus, it is critical that specific guidelines be established regarding the circumstances justifying the use of handguns. While the Police Training Commission may provide training on the use of handguns and the degree of force authorized by police officers, the Division's investigators are not police officers, and the allowable threshold of force for the investigators would not be the same as that for police officers.

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<sup>5</sup> The Board of Public Works is authorized to pay damages against a State employee under SG §§12-404 and 12-405.

V

**Conclusion**

In summary, it is our opinion that:

1. The MVA may authorize the Division's investigators to carry handguns, subject to the approval of, and conditions imposed by, the Superintendent of the Maryland State Police. Although the MVA may authorize its investigators to carry handguns, it must ensure that each investigator receives adequate training in the use of a handgun before carrying, wearing, or transporting the handgun, and it must establish rules and guidelines on the appropriate conditions under which an investigator is permitted to use a handgun. In addition, the Division's investigators may not wear, carry, or transport a handgun without a permit.

2. The MVA may require that all investigators be armed or it may impose reasonable criteria on who are to be armed - for example, by requiring that only investigators assigned to certain geographic areas of the State be armed.

3. The Division's investigators are not law enforcement personnel or police officers.

J. Joseph Curran, Jr.  
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*Chief Counsel*  
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**SYNOPSIS OF  
UNPUBLISHED OPINIONS**



## SYNOPSIS OF UNPUBLISHED OPINIONS

### COLLEGES AND UNIVERSITIES

#### *Retirement Systems – Investments*

The opinion concurs with the conclusions in an earlier letter of advice addressing certain issues relating to investments under the optional retirement program for faculty and professional staff of Maryland's higher education institutions.

Opinion No. 92-024

To: *The Honorable William H. Amoss*  
*Maryland Senate*

August 13, 1992

### ELECTIONS

#### *Ballots – Constitutional Amendment*

The opinion concurs with the conclusion of an earlier letter of advice concerning the legal requirements that led to two sets of identical constitutional amendments appearing on the November 3, 1992 general election ballot.

Opinion No. 92-045

To: *The Honorable W. Ray Huff*  
*House of Delegates*

December 22, 1992

### INSURANCE

#### *Counties – Volunteer Fire and Rescue Companies*

The Board of County Commissioners of Calvert County is legally authorized to enter into an insurance pool arrangement for certain volunteer fire, rescue, and life-support companies.

Opinion No. 92-027

To: *William R. Bailey, Esquire*  
*County Attorney for Calvert County*

August 14, 1992

## PROCUREMENT

### *Board of Public Works – Contracts*

The Board of Public Works may, in its discretion, approve two contracts between the Department of Health and Mental Hygiene and The Johns Hopkins University School of Medicine presented for approval to the Board at the Board's July 22, 1992 meeting.

Opinion No. 92-023

To: *The Honorable William Donald Schaefer*  
*The Honorable Louis L. Goldstein*  
*The Honorable Lucille Maurer*  
*Board of Public Works*

August 10, 1992

## PUBLIC AGENCIES AND ENTITIES

### *Torts – Immunity – Taxation – Sales and Use Tax*

The Downtown Management District Authority is a "governmental entity" under Article 26, a "local government" for purposes of the Local Government Tort Claims Act, and a "political subdivision of the State" for purposes of the exemption in §11-220 of the Tax-General Article.

Opinion No. 92-037

To: *Neal M. Janey, Esquire*  
*Ambrose T. Hartman, Esquire*  
*Baltimore City Law Department*

November 13, 1992

## PUBLIC OFFICERS AND EMPLOYEES

### *Constitutional Law – Agriculture*

The opinion concurs with the conclusion in an earlier letter of advice that simultaneous service as a member of the State Board of Veterinary Medical Examiners and as Mayor of the Town of Emmitsburg would violate Article 35 of the Maryland Declaration of Rights.

Opinion No. 92-025

To: *The Honorable Robert L. Walker*  
*Secretary of Agriculture*

August 13, 1992

## WORKERS' COMPENSATION

### *Tort Claims - Hazardous Materials Incidents*

The opinion concurs with the advice in an earlier letter of advice about potential liability when State or local government employees respond to a hazardous materials ("HAZMAT") incident.

Opinion No. 92-044

To: *Brigadier General Donald B. Barshay*  
*Maryland Army National Guard*

December 16, 1992



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