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**NORTH CAROLINA
ATTORNEY GENERAL REPORTS**

**VOLUME 49
NUMBER 1**

**FUS L. EDMISTEN
ATTORNEY GENERAL**

NORTH CAROLINA
ATTORNEY GENERAL
REPORTS

Opinions of the Attorney General
July 1, 1979 through December 31, 1979

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1979
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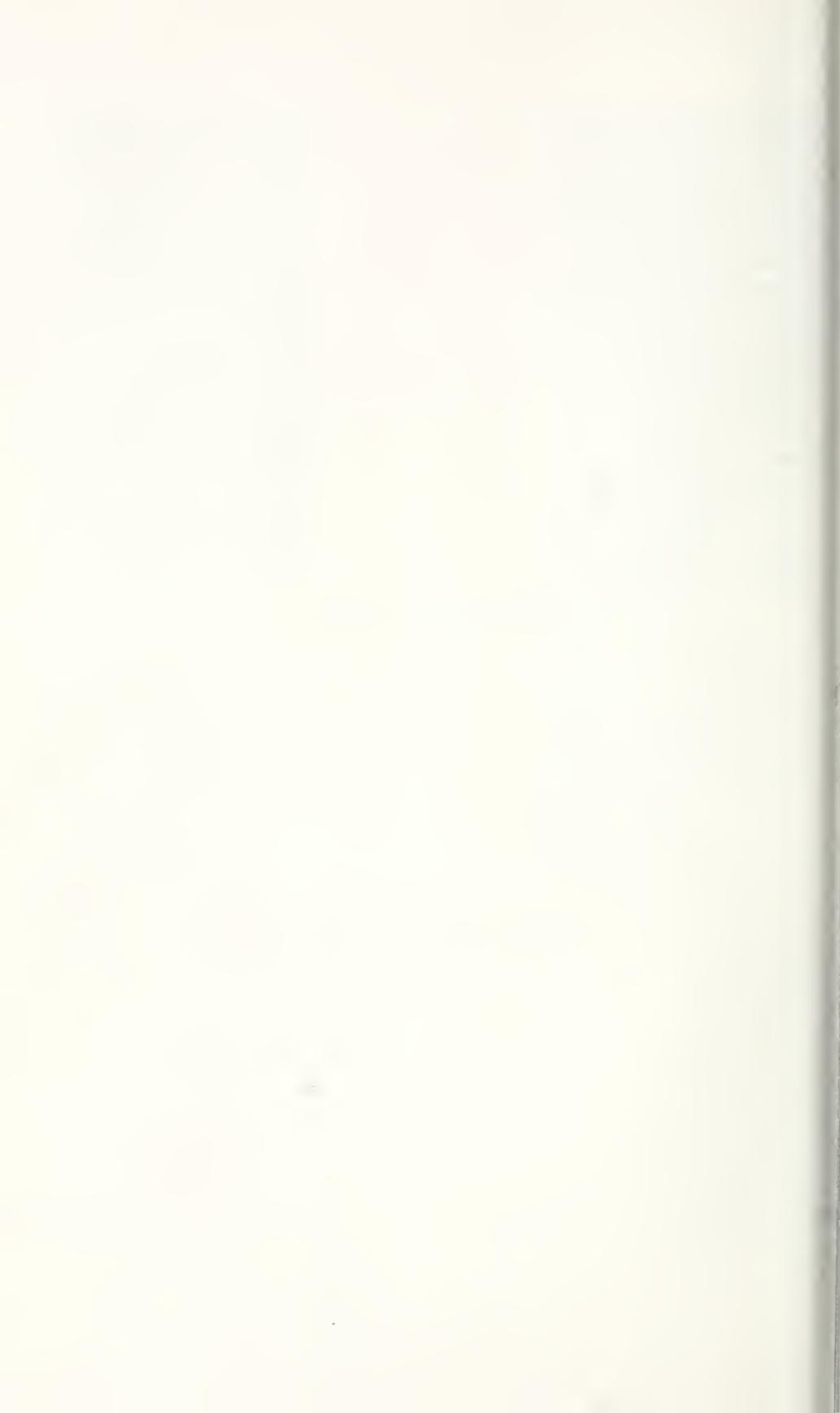
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2 July 1979

Subject: Motor Vehicle; Rules of the Road; Passing
Where There are Solid Center Lines

Requested by: Claire McNaught
Public Safety Attorney
Winston-Salem, N. C.

Question: Are solid center lines considered "markers"
under G.S. 20-150(e)?

Conclusion: Yes. As of July 1, 1979, solid center lines
are "markings" under G.S. 20-150(e)
(Chapter 472, 1979 Session Laws, H.B.
1064).

Chapter 472 of the 1979 Session Laws (H.B. 1064) amended
G.S. 20-150(e) effective July 1, 1979 to read:

"The driver of a vehicle shall not overtake and pass
another on any portion of the highway which is
marked by signs, markers *or markings* placed by the
Department of Transportation stating or clearly
indicating that passing should not be attempted."
(Emphasis added)

The 1979 amendment establishes a mandatory duty to obey highway
markings placed there by the Department of Transportation. The
North Carolina Highway Marking Manual and Supplement (1978)
Section 4A-7 outlines the pavement markings for no passing zones.
Solid yellow center lines shall indicate no passing zones at specified
intersections and on specified grades and curves.

The North Carolina Department of Transportation's Drivers
Handbook under Rules of the Road states:

"There are some places where passing is always unsafe
and usually against the law. Passing should not be
tried: ... 4. Whenever there is a solid yellow line in
your lane."

G.S. 20-150(e), as amended, prohibits passing on solid yellow center lines as they constitute "markings placed by the Department of Transportation stating or clearly indicating that passing should not be attempted."

Rufus L. Edmisten, Attorney General
William W. Melvin
Deputy Attorney General

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31 July 1979

Subject: Social Services; Child Support;
International Reciprocal Enforcement of
Support Obligations

Requested by: Robert H. Ward, Director
Social Services Division
Department of Human Resources

Question: Is the Nation of West Germany a foreign jurisdiction which has a substantially similar support law such that reciprocal enforcement may be effectuated under the North Carolina uniform reciprocal enforcement of support act (N.C. Gen. Stat. 52A-1 to 52A-32)?

Conclusion: Yes.

The Uniform Reciprocal Enforcement of Support Act (hereinafter referred to as URESA) is codified in the North Carolina General Statutes under Chapter 52A. As stated in 52A-2, the purposes of the Chapter "are" to improve and extend by reciprocal legislation the enforcement of duties of support and to make uniform the law with respect thereto."

It is clear that URESA is a uniform law, reciprocal in nature and purpose and should be liberally construed to effectuate its purpose

to accomplish and enforce the duty of a parent to support his children. *Kline v. Kline*, 542 S.W.2d 499 (1976).

The purpose of URESA is to provide a prompt expeditious way of enforcing the duty to support minor children without getting the parties involved in complex collateral issues. *Thompson v. Kite*, 522 P.2d 327 (1974).

URESAs was designed to provide economical and expedient means of enforcing support orders for parties who are located in different states or jurisdictions. *Rainey v. Rainey*, 536 S.W.2d 617 (1976).

From the very onset of its first adoption in the early fifties, it has been clear that URESA has been a success and the various states have adopted it, as well as its amendments, quite readily. The act seeks to apply an equitable and expeditious method of dealing with the complex problems involved. As stated in the *Family Law Reporter*, 4 FLR 4017, May 2, 1978:

"URESAs was a recognition by the states that problems of child and spousal support were no longer a purely local concern. Conventional judicial proceedings were simply unsuitable for effective enforcement of support orders because the absent spouse was normally outside the jurisdiction of the dependent's state courts, because the stay-at-home spouse could rarely afford to track down and sue the absent spouse in another jurisdiction, and because the federal courts have traditionally been closed to domestic relations actions URESAs is an attempt to provide a consistent statutory mechanism for the interstate, and occasionally international, enforcement of support decrees without forcing the person seeking support to bring the action in the absent spouse's jurisdiction Even though the typical URESAs proceeding involves an obligee in one state and an obligor in another state, the act's mechanism may also be used within a state on a county-to-county basis, and is occasionally used in support enforcement cases which cross national boundaries." (P. 4017)

In conference at the September, 1967, meeting of the National Conference on the Uniform Reciprocal Enforcement of Support Act, the central committee decided that it would be far more desirable to have state action on reciprocity with foreign jurisdictions than to seek federal involvement. Basically, this was due to the belief that the federal government would be reluctant to delve into matters relating to family law coupled with the additional problem as to which federal agency could properly and effectively represent the various states. Thus it was left to the individual states to broaden the definition in their statutes to include foreign nations. This was accomplished by a re-examination of the statutory definitions of URESA.

As a result, in 1968 URESA was rewritten such that the definition of "State" in the revised version of URESA (called RURESAs) was expanded to include "any foreign jurisdiction in which this or a substantially similar reciprocal law is an effect."

In 1971, the Council of State Governments on completion of a study of URESA found that nineteen states had provisions in their acts which permitted reciprocity with other nations. North Carolina was not among those enumerated. In this regard, it is noted that North Carolina General Statute 52A-3(8) in 1971 provided that a "State" included "any state, territory, or possession of the United States, and District of Columbia, in which this or a substantially similar reciprocal law has been enacted." Therefore, it is clear that prior to 1975, the North Carolina definition of "State" excluded anything other than a state, territory, or possession of the United States in which a reciprocal law was in effect.

In order to correct the limited scope of the statute and to broaden the definition of "State", in 1975 the statute was amended so that the definition of "State" now includes any "state, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the provinces of Canada in which reciprocity can be effected by administrative action, *and any foreign jurisdiction in which this or a substantially similar reciprocal law is in effect.*" See N.C. Gen. Stat. 52A-3(13).

Obviously, the North Carolina Legislature intended that the statute as amended should include foreign nations which have a substantially

similar reciprocal law within the scope of URESA. Proceeding under the new amendments, North Carolina has recently begun to enforce support laws with Ontario, Canada and thus support duties are now being enforced on behalf of North Carolina residents against residents of Ontario, and *vice versa*. The amendment made in 1975 clearly evidences legislative intent that the same procedure is permissible with other foreign nations.

It should be noted that the objection to reciprocity with a foreign nation on the grounds that international enforcement violates the constitutional prohibition against individual states entering into treaties with foreign governments has been considered and rejected in at least one case. See *Blouin v. Dembitz*, 367 F. Supp. 415, D.N.Y.; *aff'd* 489 F.2d 488 (2d Cir. 1973). In *Blouin, supra*, the Court held that the statute has reciprocal effect and grants to the foreign jurisdiction the same procedural remedies in New York Courts as the foreign state grants to our citizens. The Court further held that it was not a compact with a foreign government, nor did the statute disrupt or embarrass our relations with other countries. Pp. 417-418.

A review of the law of West Germany reveals that the support laws there are substantially similar to those which exist in North Carolina and, in fact, often are broader than our own. For example, the obligation to support includes legitimate and illegitimate children up until age eighteen. There is no statute of limitations for the establishment of paternity. The amount of support is determined by financial need of the child and the ability of the parent to pay. Foreign orders establishing paternity and/or support are recognized and can be enforced in German courts or, if no judgment exists, a standard URESA petition may be sent to the German authorities who will seek to have a suitable order entered in Germany. Enforcement is through contempt proceedings similar to those followed in North Carolina. Thus, it is clear that the law of West Germany is "substantially similar" to our own.

In other states which have considered this problem, notably California and Oklahoma, we find that the term "State" is defined in the same manner as it is in North Carolina. Both Oklahoma and California have determined that West Germany is a reciprocating nation within the ambit of URESA and have granted reciprocity.

Further, the West German Child Support authorities have indicated through correspondence that they are willing to reciprocate in the handling of support matters.

In summary, based on the history of URESA, the legislative intent as evidenced by recent amendments and action by the various states which have considered this problem, it is apparent that our Chapter 52A intends that any foreign nation which has a substantially similar support law should be granted reciprocity and that West Germany falls within the statutory definition.

Rufus L. Edmisten, Attorney General
Henry H. Burgwyn
Associate Attorney

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7 August 1979

Subject: Public Officers and Employees; Conflict of Interest; Remuneration of Area Board Member for Services Rendered to Program Under Contract With Area Authority

Requested by: Sarah T. Morrow, M.D., M.P.H., Secretary Department of Human Resources

Question: Is it allowable under the General Statutes for a member of an Area Mental Health Board to contract his services to a program which is under contract by the Area Authority?

Conclusion: Contract for remuneration for services as described would appear to violate G.S. 14-234.

This question appears to have arisen because of the specific method of operation of group homes under the auspices of area mental health authorities in this state. An area mental health authority is a local governmental entity responsible for the delivery of mental

health, mental retardation, etc. services within its geographic situs, with an area mental health board serving as its governing body. See Article 2F, Chapter 122. In delivering some of these services, an area authority customarily contracts with a group home which is operated by a non-profit corporation. The situation under scrutiny involves remuneration of an attorney who is a member of the area mental health board, but has rendered services to the group home.

G.S. 14-234, in essence, proscribes any public official from making any contract for his own benefit under authority of his office. *Lexington Insulation Company v. Davidson County*, 243 N.C. 252 (1955). Thus, it is very clear that the attorney-board member could not contract with the board for his own services. 40 N.C.A.G. 566 (1969). However, the present situation is somewhat more complicated of resolution.

This Office has previously held to be forbidden contracts between governmental boards and a private business when a member of the board is also a partner of the business or an officer or stockholder in a corporation operating the business. See 44 N.C.A.G. 128 (1974); 42 N.C.A.G. 180 (1973); 42 N.C.A.G. 9 (1972); 40 N.C.A.G. 565 (1970); 40 N.C.A.G. 561 (1969); 41 N.C.A.G. 371 (1971). Conversely, where a board member is merely an employee of the other contracting party with no pecuniary benefit flowing directly to him as a person, the situation falls outside the ambit of G.S. 14-234. *State v. Debnam*, 196 N.C. 740 (1929); 44 N.C.A.G. 293 (1975); 40 N.C.A.G. 565 (1970). (It should be noted that one prior member of the Supreme Court of North Carolina has had occasion to describe even a case involving only an employee of a contracting party as "...not altogether seemly, nor to be commended..." *State v. Weddell*, 153 N.C. 587, at page 590 (1910))

The situation presented does not squarely fall into any of the factual settings dealt with in prior opinions of this Office. However, G.S. 122-35.43 requires the Area Authority (through its board) to review and evaluate the area needs and programs and to develop the annual plan for utilization of facilities and resources; this plan must include the inventory of services to be provided and must set forth an indication of the expenditure of all funds by the Authority. G.S. 122-35.43. Consonant with these responsibilities, the Area Authority must submit a budget report indicating the receipts and

expenditures for the total area mental health program.
G.S. 122-35.44.

This particular situation, which has been characterized as a typical development if the question posed is answered in the affirmative, points up the probability of a conflict with the statute due to normal methods of operation. As described, what would be envisaged here is a transfer of specific funds into a proper line item in order to remunerate the attorney for services rendered, with the area board approving such transfer. Thus, in application, regardless of the absence of any improper motives on the part of any party, this type of transaction would indisputably present the appearance of evil and would appear to amount to a direct violation of G.S. 14-234.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Special Deputy Attorney General

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9 August 1979

Subject: Education; Articles 32A, 32B and §115-166 of the North Carolina General Statutes; Home Instruction of a Child in Lieu of Attending a Public School.

Requested by: Mr. George T. Rogister, Jr.
Attorney for the Wake County Board of Education

Questions: 1. Does home instruction of a child qualify as "a school of religious charter" or as a "nonpublic school" as used in Articles 32A and 32B of Chapter 115 of the North Carolina General Statutes?

2. Is the instruction of a child by a tutor in a private home, instruction in a "private school" as contemplated in the

Compulsory Attendance Law, N.C.G.S.
115-166?

- Conclusions:
1. No.
 2. No.

The 1979 Session of the General Assembly amended Chapter 115 of the General Statutes to add two new articles, Articles 32A and 32B, both of which have the effect of limiting the authority of the State Board of Education to regulate the educational programs of nonpublic schools providing instruction to children of compulsory attendance age. Chapters 505 and 506 of the 1979 Session Laws. The enactment of this legislation has stirred interest in home instruction as an alternative to the education of children in either public or private schools.

This Office has previously ruled that home instruction does not suffice to meet the requirements of the Compulsory Attendance Law, G.S. 115-166, *et seq.*, 40 N.C.A.G. 211 (1969). George P. Rogister, Jr., Attorney for the Wake County Board of Education, has requested a reconsideration of this earlier opinion in light of recently enacted Articles 32A and 32B of Chapter 115. The specific question posed is whether home instruction is encompassed within the meaning of the word "school" as used in those Articles.

Any discussion of the impact of legislation on education in North Carolina is necessarily directed by several provisions of our Constitution. The appropriate role of the State in the education of its citizens is clearly set forth as follows:

"The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.

N.C. Const. Art. 1, §15

Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged.

N.C. Const. Art. IX, §1

The General Assembly shall provide that every child of appropriate age and of sufficient ability shall attend the public schools, unless educated by other means."

N.C. Const. Art. IX, §3

There can be no doubt that the North Carolina Constitution not only requires education to be encouraged, indeed it places on the State the duty to ensure that the people, most particularly the children, are educated. Any legislation which the General Assembly approves in the area of education must be read in the light of this constitutional mandate. "Every statute is to be considered in the light of the Constitution, and with a view to its intent." *State v. Emery*, 224 N.C. 581, 585, 31 S.E. 2d 858 (1944).

Articles 32A and 32B are similar in that they both substantially limit the State's regulatory authority over nonpublic schools. Article 32A deals specifically with "private church schools and schools of religious charter," while article 32B addresses all "qualified nonpublic schools." In substance, the regulatory scheme is the same for schools falling under either Article 32A or 32B.

The word "school" is not defined in either of these Articles. The authors of the legislation set forth in Article 32B, however, did list the types of schools which shall qualify as "nonpublic schools".

"The provisions of this Article shall apply to nonpublic schools which:

- (a) shall be accredited by the State Board of Education; or
- (b) shall be accredited by the Southern Association of Colleges and Schools; or
- (c) shall be an active member of the North Carolina Association of Independent Schools; or
- (d) receives no funding from the State of North Carolina." N.C.G.S. 115-257.8.

It may be inferred from the list set forth that the legislature intended only established educational institutions, whether religious or secular, to fall within this article. All schools which would be included in subsections (a), (b), or (c) are institutions consisting of several teachers, classes of children of varying ages, a recognized and accountable administration, and a regular place for meeting. Subsection (d) is a general term, following a list of specific ones. "In the construction of statutes, the ejusdem generis rule is that where general words *follow* a designation of particular subjects or things, the meaning of the general words will ordinarily be presumed to be and construed as, restricted by the particular designations and as including only things of the same kind, character and nature as those specifically enumerated." *State v. Fenner*, 263 N.C. 694, 697, 140 S.E. 2d 349 (1965). Accordingly, we believe the references to schools in subsection (d) to include only established educational institutions.

It was then apparently the intent of the legislature in enacting these Articles to include only established and identifiable institutions within the operation of these deregulatory Articles. The intent of the legislature is, of course, controlling in the interpretation of a statute. *State v. Hunt*, 287 N.C. 76, 213 S.E. 2d 291 (1975). We are of the opinion that home instruction of a child cannot reasonably be interpreted as instruction in an established and identifiable educational institution as contemplated in Articles 32A and 32B. This opinion is buttressed by the failure of the legislature to specifically include home instruction in these Articles, a failure we deem of particular significance given the constitutional duty of the legislature to "guard and maintain" the right of the people "to the privilege of an education."

In addition to evaluating the impact of Articles 32A and 32B upon our earlier opinion that home instruction did not suffice to meet the requirements of the Compulsory Attendance Law, we have reexamined the statutory and decisional law which formed the basis of that opinion. G.S. 115-166, the statute upon which the earlier opinion was based, has not been amended since 1969 and there has been no court decision in North Carolina or any other jurisdiction which would cause us to change our earlier opinion. Accordingly, it is and remains the opinion of this Office that a parent does not meet the requirements of the Compulsory Attendance Law by providing his child with instruction in the home.

Rufus L. Edmisten, Attorney General
Edwin M. Speas, Jr.
Special Deputy Attorney General

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13 August 1979

Subject: Health; Imposition of Fee for Issuance of
a Permit

Requested by: Thomas R. Dundon
Health Director
Forsyth County

Question: May a local board of health impose a fee
pursuant to G.S. 130-17(e) for the issuance
of a permit pursuant to authority delegated
by the Department of Human Resources?

Conclusion: No.

The Commission for Health Services is created by G.S. 143B-142 and is granted certain powers and duties to promulgate rules concerning the public health. The Commission is authorized to adopt rules governing food and lodging establishments, sewage disposal, public water systems, solid waste management, mass gatherings and numerous other matters affecting the public health. The Department of Human Resources is charged with the responsibility of enforcing the State health laws and rules by G.S. 130-11(1). Additionally, the Department may obtain assistance from local health departments in enforcing the health laws and rules. G.S. 143B-142(4) provides in part that "When directed by the Department of Human Resources, local health departments shall enforce Commission for Health Services' rules and regulations under the supervision of the Department of Human Resources." The Department, pursuant to authority contained in G.S. 130-1(d), has authorized individual sanitarians employed by local health departments to enforce State health laws and rules. The individual sanitarians are issued identification cards pursuant to G.S. 128-14.

Local boards of health are also authorized to make rules and regulations as are necessary to protect the public health. Such rules and regulations may be more stringent than State rules where there is an emergency or "peculiar local condition or circumstance." Otherwise, where there is conflict, the State rules prevail over the local rules and regulations. An exception is provided by G.S. 130-160(b) wherein the local health boards' rules and regulations governing sewage disposal may be approved by the Commission for Health Services and thereafter enforced by the local health departments instead of the State sewage disposal rules.

The question presented herein arises because G.S. 130-17(e) provides a procedure whereby the local health departments may impose fees for services rendered. A fee plan must be recommended by the local health director and then approved by the local health board and the appropriate board or boards of county commissioners. The fee is limited to "services voluntarily rendered and voluntarily received, but shall not apply where the charging of a fee for a particular service is specifically prohibited by statute, regulation or ordinance." An example of a prohibitory statute is G.S. 130-88, as rewritten by Chapter 56, 1979 Session Laws, which provides in part that "The local health department shall administer the required immunizations without charge." Interpretation of the first phrase "voluntarily rendered and voluntarily received" is assisted by examination of Chapter 508, 1973 Session Laws, which substituted the present language "but shall not apply where..." for the prior language "and shall not apply to services required by statute, regulation, or ordinance to be rendered or received." Under the prior language, the local health departments were not authorized to charge a fee for issuance of a permit, for example, for installing a septic tank system because local health regulations required that the site be inspected and permit be issued before the septic tank installed. Under the present language, charging a fee is authorized because, although the permit is still required, charging of a fee is not specifically prohibited. Therefore, in order to give effect to the 1973 amendment, voluntariness cannot be negated merely because inspection and issuance of a permit is required before one undertakes a certain activity. Rather, voluntariness means that one freely applies for a service from the local health department such as the issuance of a permit for a septic tank system.

Although a local health department may impose a fee for services rendered, the question remains whether the department may impose a fee for inspections performed and permits issued at the direction of the Department of Human Resources. Chapter 130 of the General Statutes, which contains most of the public health laws, specifically authorizes the collection of fees by the Department of Human Resources for certain services but is silent concerning the remaining services. For example, G.S. 130-166.55, enacted by Chapter 788, 1979 Session Laws, imposes certain fees for analysis of water samples; G.S. 130-243 requires a one hundred dollar fee to accompany an application for a mass gathering permit; G.S. 130-177 imposes a permit fee on bedding manufacturers; and G.S. 130-166 authorizes the collection of fees for the issuance of certified copies of birth and death certificates. On the other hand, no fee is authorized for solid waste disposal regulation (G.S. 130-166.16 *et seq.*), for sewage disposal regulation (G.S. 130-160) or food and lodging establishment inspections (G.S. 72-46 *et seq.*). Furthermore, there is no general authority equivalent to G.S. 130-17(c) for the Department of Human Resources to impose a fee for services rendered. In fact, Chapter 559, 1979 Session Laws, effective May 1, 1981, states that "the legislative grant of authority to an agency to make and promulgate rules shall not be construed as a grant of authority to the agency to establish by rule a fee or a charge for the rendering of any service or fulfilling of any duty to the public, unless the statute expressly provides for the grant of authority to establish a fee or charge for that specific authority." "Agency" is defined to include every State department, institution or agency but to exclude counties and cities.

Construing the foregoing Laws, it is the opinion of this Office that the authority of the Department of Human Resources to impose fees in matters pertaining to the public health is limited to those matters which are expressly authorized by statute. In enforcing State health laws and rules, the local health departments are acting at the direction of the Department of Human Resources, and the local sanitarians are acting as the authorized agents of the Department. Therefore, when local health departments are enforcing State health laws and rules, they are subject to the same limitations as the Department of Human Resources and may only collect fees specifically authorized by statute. When local health departments enforce local rules and regulations, they may collect fees authorized

by the local board of health pursuant to G.S. 130-17(e).

Rufus L. Edmisten, Attorney General
Robert R. Reilly
Assistant Attorney General

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13 August 1979

Subject: Security Guards; Concealed Weapons

Requested by: Mr. Haywood R. Starling, Director
N. C. State Bureau of Investigations

Question: Is it lawful for a registered security guard to carry a concealed weapon while performing his contractual duties within the confines of a building which is not owned by either the security guard or the contracting security company by which he is employed?

Conclusion: No.

A registered security guard is not permitted to carry a concealed weapon.

"§ 14-269. Carrying concealed weapons. - If anyone, except when on his own premises, shall willfully and intentionally carry concealed about his person any bowie knife, dirk, dagger, sling shot, loaded cane, brass, iron or metallic knuckles, razor, pistol, gun or other deadly weapon of like-kind, he shall be guilty of misdemeanor punishable by a fine not to exceed five hundred dollars (\$500.00), imprisonment for not more than six months, or both. This section shall not apply to the following persons: Officers and enlisted personnel of the armed forces of the United States when in discharge of their official duties as such and acting under orders requiring to carry arms or

weapons, civil officers of the United States while in discharge of their official duties, officers and soldiers of the militia and the State guard when called into actual service, officers of the State, or of any county, city, or town, charged with the execution of the laws of the State, when acting in the discharge of their official duties, provided, however, full-time sworn law enforcement officers may carry a concealed weapon when off-duty in jurisdiction where assigned if so authorized by written regulations of the law enforcement unit, which must be filed with the clerk of court in the county where the law enforcement unit is located, provided further, that no such regulation shall permit the carrying of a concealed weapon while the officer is consuming or under the influence of intoxicating liquor."

The registered security guard is not in a class specifically exempted in G.S. §14-269 from the statutory prohibition against carrying a concealed weapon off ones own premises. The right to carry a concealed weapon off ones own premises is limited to officers of the military and the various governments in the discharge of their official duties and only with special permission and limitations when off duty. G.S. §14-269.

The business of furnishing protection for private premises has expanded rapidly in recent years. Employees of companies contracted to provide security have generally replaced the company night watchman. The security guard on duty often has no direct contact with the owners or possessors of the premises. He simply patrols whichever premises he is directed to by the company. These security guards have no interest nor dominion over the land but are mere employees furnishing security.

The General Assembly in the 1979 Session (Chapter 818) rewrote the 1973 Private Protective Services Act as Chapter 74 C. of the General Statutes. This act requires the licensing of all persons, firms, associations and corporations in any manner working in private protective services. A security guard or night watchman is clearly within the scope of the act. G.S. §74C-3. This act establishes a Private Protective Services Board to set educational and training

requirements for all those in the private protective services business and to administer the licensing of those complying.

The act sets requirements for the registration of all armed security guards which includes the completion of a basic training course on legal limitations on the use of hand guns and on the powers and authority of an armed private security officer. G.S. §74C-13(h)(1)(a). The registration permit authorizes the armed security officer, "while in the performance of his duties or traveling directly to and from work, to carry a standard .38 caliber or .32 caliber revolver or any other firearm approved by the board and not otherwise prohibited by law." G.S. §74C-13(b)(1).

The contention that a man driving in his own car on a public highway is on his own premises as to G.S. §14-269 has been specifically rejected. *State v. Gainey*, 273 N.C. 620 (1968). This section nor any other section in the act allows a private security officer to carry a concealed weapon while on business, traveling to and from business, or at any other time.

In passing the Private Protective Services Act, the legislature puts strict requirements and regulation procedures on the business of private protective services. The act clearly spells out the firearms rights secured through a registration permit. While this statute in no way affects the right of citizens to openly bear arms, it does put restrictions on those furnishing private protective services. The statute does not authorize a security agent to exceed the statutory limitations on the carrying of concealed weapons.

Rufus L. Edmisten, Attorney General
William W. Melvin
Deputy Attorney General

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28 August 1979

Subject: Criminal Law and Procedure; Youthful Offenders; Expungement; Records and Recording Laws.

Requested by: The Honorable Russell G. Walker, Jr.
District Attorney
Nineteenth-B Prosecutorial District

Question: Where a person under the age of 18 years, who has not previously or subsequently been convicted of any offense, is charged with several misdemeanor offenses, the charges are consolidated for trial and judgment, and the sentence imposed is within the statutory limit for conviction of a single offense, may the court order expungement of the record pursuant to G.S. 15-223?

Conclusion: Yes.

The clerks of superior court of the State are required by law to maintain certain records, including records of criminal actions and juvenile actions, G.S. 7A-180. These records are open to public inspection, G.S. 7A-109; 132-1, *et seq.*, and are the property of the people of the State. *State v. West*, 293 N.C. 18, 235 S.E.2d 150 (1977). While courts have the inherent power and duty to take such action as is necessary to make their records speak the truth, *State v. Old*, 271 N.C. 341, 156 S.E.2d 756 (1967); Mallard, "Inherent Power of the Courts of North Carolina," 10 Wake Forest L. Rev. 1, 22 (1974), they are without authority to annul or expunge an accurate record, or the records of another agency of government, absent the authority of statute, *State v. Bellar*, 16 N.C.App. 339, 192 S.E.2d 86 (1972). In this State, a person arrested, though in error, has no right to have the fact of his arrest removed from his criminal record except as authorized by statute, *see* Session Laws 1979, Chapter 61, *compare* Code of South Carolina of 1976 17-1-40, though there may be, in some jurisdictions, a right to restrict access to or use which may be made of such erroneous arrest record, *see generally*, 28 C.F.R., Part 20; *Anno.*, "Right of Exonerated arrestee to Have Fingerprints, Photographs, or Other Criminal Identification or Arrest Records Expunged or Restricted," 46 A.L.R.3d 900 (1972). Court records are protected by law from wrongful disposition or destruction, G.S. 14-76; 132-3, -9. Thus, statutes such as G.S. 15-223, 15-223.1, 90-96 and 90-113.14 are an exception

to the general prohibition of expungement or alteration of records which speak the truth.

G.S. 15-223 provides:

"§15-223. Expunction of records for first offenders under the age of 18 at the time of conviction of misdemeanor.--(a) Whenever any person who has not yet attained the age of 18 years and has not previously been convicted of any felony, or misdemeanor other than a traffic violation, under the laws of the United States, the laws of this State or any other state, pleads guilty to or is guilty of a misdemeanor other than a traffic violation, he may file a petition in the court where he was convicted for expunction of the misdemeanor from his criminal record. The petition cannot be filed earlier than two years after the date of the conviction or any period of probation, whichever occurs later, and the petition shall contain, but not be limited to, the following:

1. An affidavit by the petitioner that he has been of good behavior for the two-year period since the date of conviction of the misdemeanor in question and has not been convicted of any felony, or misdemeanor other than a traffic violation, under the laws of the United States or the laws of this State or any other state.
2. Verified affidavits of two persons who are not related to the petitioner or to each other by blood or marriage, that they know the character and reputation of the petitioner in the community in which he lives and that his character and reputation are good.
3. A statement that the petition is a motion in the cause in the case wherein the petitioner was convicted.

4. Affidavits of the clerk of superior court, chief of police, where appropriate, and sheriff of the county in which the petitioner was convicted and, if different, the county of which the petitioner is a resident, showing that the petitioner has not been convicted of a felony or misdemeanor other than a traffic violation under the laws of this State at any time prior to the conviction for the misdemeanor in question or during the two-year period following that conviction.

The petition shall be served upon the district attorney of the court wherein the case was tried resulting in conviction. The district attorney shall have 10 days thereafter in which to file any objection thereto and shall be duly notified as to the date of the hearing of the petition.

The judge to whom the petition is presented is authorized to call upon a probation officer for any additional investigation or verification of the petitioner's conduct during the two-year period that he deems desirable.

(b) If the court, after hearing, finds that the petitioner had remained of good behavior and been free of conviction of any felony or misdemeanor, other than a traffic violation, for two years from the date of the conviction of the misdemeanor in question, and petitioner was not 18 years old at the time of the conviction in question, it shall order that such person be restored, in the contemplation of the law, to the status he occupied before such arrest or indictment or information. No person as to whom such order has been entered shall be held thereafter under any provision of any laws to be guilty of perjury or otherwise giving a false statement by reason of his failure to recite or acknowledge such arrest, or indictment, information, or trial, or response to any inquiry made of him for any purpose.

(c) The court shall also order that the said misdemeanor conviction be expunged from the records of the court, and direct all law enforcement agencies bearing record of the same to expunge their records of the conviction. The clerk shall forward a certified copy of the order to the sheriff, chief of police, or other arresting agency. The sheriff, chief or head of such other arresting agency shall then transmit the copy of the order with a form supplied by the State Bureau of Investigation to the State Bureau of Investigation, and the State Bureau of Investigation shall forward the order to the Federal Bureau of Investigation. The cost of expunging such records shall be taxed against the petitioner.

(d) The clerk of superior court in each county in North Carolina shall, as soon as practicable after each term of court in his county, file with the Administrative Office of the Courts, the names of those persons granted a discharge under the provisions of this section, and the Administrative Office of the Courts shall maintain a confidential file containing the names of persons granted conditional discharges. The information contained in such file shall be disclosed only to judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense has been previously granted a discharge. (1973, c. 47, s. 2; c. 748; 1975, c. 650, s. 5; 1977, c. 642, s. 1; c. 699, ss. 1, 2; 1979, c. 431, ss. 1, 2.)"

This statute, under *State v. Bellar, supra.*, gives the court the requisite authority to expunge records of the arrest and conviction of persons who meet the requirements thereof. Since the statute operates as an exception to general principles concerning the alteration of accurate judicial records, it would appear, under the ordinary principles of statutory construction, that the statute should be strictly construed, *see generally*, 12 Strong's North Carolina Index and Statutes 5, 5.2 (1978). The statute is phrased throughout in singular terms. If the statute is to be strictly construed, the rule

of G.S. 12-3(1) which allows the singular to import the plural could not be applied.

The intention of the General Assembly as ascertained from the language of the session law, *Wright v. Casualty & Fidelity Company*, 270 N.C. 577, 155 S.E.2d 100 (1967), is controlling, 12 Strong's North Carolina Index 3d, Statutes 5.1 (1978). In Session Laws 1973, Chapter 748, 1, which is the basic act from which current G.S. 15-223 is derived, we find the following aid to interpretation of the section:

"Purpose of Act. The purpose of this act is to protect the future of youthful offenders of the law. Once a criminal record is created by conviction of a person, said criminal record remains a part of his past for so long as he may live. Many youths have only one small encounter with the law. They go on to be excellent citizens, raise good families, but are always hindered by having a criminal conviction on their record. This bill is not intended to excuse those who repeat their wrongdoing, but to somehow pardon a youthful oversight in an isolated occurrence."

The General Assembly's statement of purpose further articulates legislative intent as evident from the section. The statute denies the remedy to a person who has been convicted prior or subsequent to the conviction he desires to have expunged. To that end, we think that G.S. 15-223 would be characterized by our courts as being remedial in character, and thus subject to a rule of liberal rather than strict construction and interpretation, 3 Sutherland Statutory Construction, Chapter 60, (Sands ed., 4th ed. 1974). Furthermore, the statute provides a benefit to a juvenile offender, which some courts have held to be remedial and subject to rules of liberal construction, *In re Aline D.*, 14 Cal.3d 557, 121 Cal. Rptr. 816, 536 P.2d 65 (1975); *Briones v. Juvenile Court for City and County of Denver*, 534 P.2d 624 (Colo. 1975).

Further evidence of the remedial intent of the General Assembly may be inferred from its enactment in the 1979 session of Chapter 61. Chapter 61 of the 1979 Session Laws 1 (effective 20 February 1979) establishes a new section to be codified as G.S. 15-223.1.

Under that section, a person has not yet attained the age of 18 years, and who has not previously been convicted of any offense other than a traffic violation may have expunged the record of his arrest for any felony or misdemeanor offense if the charge is dismissed or if he is acquitted. Unlike G.S. 15-223, there is no limitation on the availability of the remedy under the new statute to a single use. The General Assembly's mercy for the youthful offender is therefore apparent.

The rules governing the disposition of multiple charges in a single sentence are well established, see generally 4 Strong's North Carolina Index 3d, Criminal Law 92, *et seq.* (1976). The joinder of offenses for trial or disposition is addressed to the sound discretion of the court, *State v. Slade*, 291 N.C. 275, 229 S.E.2d 92 (1976); *State v. Anderson*, 281 N.C. 261, 188 S.E.2d 336 (1972). The verdict or plea of guilty to consolidated charges authorizes the imposition of separate sentences on each charge, 4 Strong's North Carolina Index 3d, Criminal Law 137.1 (1976), but the sentence cannot exceed the maximum authorized by statute, *Id.* Where multiple charges are consolidated for sentence, a sentence in excess of the maximum authorized for a single offense will not be sustained on the theory of an intent to impose consecutive sentences, *State v. Austin*, 241 N.C. 548, 85 S.E.2d 924 (1955). Therefore, if multiple misdemeanor charges against a youthful offender are consolidated for judgment and sentence, the sentence imposed cannot exceed the authorized sentence for conviction of a single offense. The sentencing judge, by consolidating the charges for judgment has indicated his intent to treat the charges as a single offense for the purpose of sentencing, even though the judgment may recite pleas of guilty to or conviction of more than a single offense.

Your inquiry is directed to a case in which three charges were consolidated for disposition and the sentence imposed within the statutory limit for a single offense. In those circumstances and in the light of the purposes of G.S. 15-223, we think the convictions should be treated as a single misdemeanor for the purpose of expungement. It would be ironic and unjust that one youthful defendant could plead guilty to a single charge, have two other charges dismissed, receive sentence and be entitled to expungement while a second youthful offender who pleads guilty to three charges and receives an identical sentence would be ineligible for the remedy.

The State Bureau of Investigation's Identification and Records Sections receive many orders to expunge their records, as provided for by the statute. We are, therefore, aware that many judges of the State do order expungement in the circumstances which you describe. In our opinion, the discretionary nature of consolidation and the fact that the remedy of expungement is available only once to a youthful offender neither previously nor subsequently convicted provide adequate safeguards against abuse. We offer this interpretation in the hope that practice may be more uniform throughout the State and that the General Assembly's remedial purpose may be carried out.

Rufus L. Edmisten, Attorney General
David S. Crump
Special Deputy Attorney General
Special Assistant to the Attorney General

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28 August 1979

Subject: Reciprocal Enforcement of Support
Action; Child Support; Registration of
Foreign Support Orders

Requested by: Mr. Larry T. Black
District Court Judge
26 Judicial District

Question: Do the registration provisions of the North
Carolina Uniform Reciprocal Enforcement
of Support Act (G.S. 52A-25 through 30)
apply so as to allow enforcement in North
Carolina of foreign state support orders
entered prior to October 1, 1975?

Conclusion: Yes.

G.S. Chapter 52A, the Uniform Reciprocal Enforcement of Support Act (hereinafter URESA) was first enacted in North Carolina law in 1951. In 1975 the act was rewritten in its entirety to substantially

conform to the 1968 revisions of URESA by the National Conference of Commissioners on Uniform State Laws which include a new procedure for the registration and enforcement of foreign support orders. *Pinner v. Pinner*, 33 N.C. App. 204, 234 S.E.2d 633 (1977). The new registration provisions are codified as G.S. 52A-25 through 30.

The URESA, including the registration procedure established thereunder, creates no new substantive rights between the party seeking support and the party from whom support is being sought. The act merely sets up new procedural mechanisms whereby through substantially uniform legislation establishing reciprocity states have created a new and more efficient way of enforcing support obligations. 2 Lee, *N.C. Family Law* 3d §169 (1963). By enacting substantially similar Uniform Reciprocal Enforcement of Support Acts, all fifty states have sought to avoid support enforcement problems previously experienced because of the inapplicability of the full faith and credit clause of Article IV, Section 1 of the United States Constitution to foreign state support orders deemed to be non-final. Brockelbank and Infausto, *Interstate Enforcement of Family Support*, pp. 77-90 (2d ed. 1971).

The bill (Senate Bill 357) passed in 1975 revising the Uniform Reciprocal Enforcement of Support Act is entitled:

"AN ACT TO REWRITE CHAPTER 52A OF THE GENERAL STATUTES ENTITLED 'UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT'." N.C. Sess. Laws 1975 .c. 656, s.1.

After completely rewriting the text of the Uniform Reciprocal Enforcement of Support Act in Section 1 of the bill, the General Assembly went on in Section 2 of the bill to state as follows:

"This act shall not apply to pending litigation including proceedings which have been initiated in a state other than North Carolina." N.C. Sess. Laws 1975 c. 656 s.2.

The foregoing statement by the General Assembly in Section 2 of the bill relating to the applicability of the rewritten URESA raises

the present issue as to whether the newly established registration provisions may be used to obtain interstate enforcement of a support order of another state predating the effective date (October 1, 1975) of Senate Bill 357.

In an analogous case the North Carolina Supreme Court has addressed the effect of applicability language virtually identical to the language used in Section 2 of Senate Bill 357. *Spencer v. McDowell Motor Company*, 236 N.C. 239, 72 S.E.2d 598 (1952). In the *Spencer* case the defendant Motor Company was contesting the effect of the General Assembly's enactment of an evidentiary statute after the point in time when the plaintiff's cause of action arose. In addressing the defendant's allegation that the statute should not be retroactively applied because of language of non-applicability to "pending litigation", the court in relevant part states:

"While appellant motor company does not contend that the Legislature is without authority to change the rules of evidence ..., it contends that under rules of interpretation the Act should not be given retroactive effect, that is, as to existing causes of act, ... It seems clear, however, from the language of the Act that the Legislature intended that on and after 1 July 1951, the only limitation upon the applicability of the Act is that it shall not apply to pending litigation, that is, litigation then pending. It is so expressly provided.

An action is pending from the time it is commenced until its final determination. And a civil action is commenced by the issuance of a summons. ...

Moreover, the maxim *expressio unius est exclusio alterius*, that is, that the expression of one thing is the exclusion of another applies. From the fact that the Legislature expressly provided that the provisions of the Act shall not apply to pending litigation, it may be implied that it should apply in all other cases.

...(L)aws which change the rules of evidence relate to the remedy only, and are at all times subject to modification and control by the Legislature, and ...

changes thus made may be made applicable to existing causes of action. ... Retrospective laws would certainly be in violation of the spirit of the Constitution if they destroyed or impaired vested right, but ... one can have no vested right in a rule of evidence when he could have no such right in the remedy, and ... there is no such thing as a vested right in any particular remedy." Spencer v. McDowell Motor Company, supra, 236 N.C. at 246. (quotations and citations omitted) (emphasis supplied)

Similarly, the Act in question, N.C. Sess. Laws 1975 c. 656, and specifically the registration provisions codified as G.S. 52A-26 through 30 are purely remedies. Referring to the URESA as a whole G.S. 52A-4 reads:

"These remedies herein are in addition to and not a substitution for any other remedies."

In addition to the foregoing provision concerning remedies, the section of the Act immediately preceding the registration provisions states:

"If the duty of support is based on a foreign support order, the obligee has the *additional remedies* provided in the following sections". G.S. 52A-25. (emphasis supplied)

Accordingly, the URESA as rewritten in 1975 does not affect any vested right of a potential defendant from whom support is sought. A defendant has no vested right in limiting an obligee to pre-URESAs remedies for interstate enforcement of support duties, to wit: following a defendant obligor into a foreign state forum for purposes of lawsuit *de novo* there or after reducing any preexisting initiating state support order to final judgment, pursuing the defendant obligor to a foreign state for suit on the final judgment obtained under the doctrine of full faith and credit.

A plaintiff's cause of action for failure to support, including that under the URESA, is based on attempted enforcement of a duty of support. Under the URESA this term is defined as follows:

"'Duty of Support' means a *duty of support whether imposed or imposable by law or by order, decree, or judgment of any court whether interlocutory or final or whether incidental to an action for divorce, separation, separate maintenance, or otherwise and includes the duty to pay arrearages of support past due and unpaid*". G.S. 52A-3(2). (*emphasis supplied*)

Oftentimes, the obligee in an interstate support case has previously obtained a support order in a state from which an obligor has fled. Under the terminology of the URESA, when the registration remedy (52A-25 through 30) is attempted to be invoked, the state in which the order was initially obtained would be termed the "rendering state". G.S. 52A-3(11).

Whenever a support order is outstanding in the state from which the obligor has fled, the obligee could in the alternative choose to use the traditional URESA remedy. (G.S. 52A-1 through 52A-24). 2 Lee *N.C. Family Law* 3d §169 nn. 264-5(1963); Brockelbank and Infausto, *Interstate Enforcement of Family Support*, p. 80 nn. 189-190 (2nd ed. 1971). When proceeding under the traditional URESA remedy, the state in which a support order was originally obtained is termed the "initiating state". G.S. 52A-3(4).

Whenever there is a preexisting support order in a "rendering state" or "initiating state", it may be argued there exists "pending litigation" or "proceedings which have been initiated in a state other than North Carolina" as the terms are used in N.C. Sess. Laws 1975 c. 656 s.2. In support matters litigation is always pending for the cause of action remains in the continuing jurisdiction of the court and motions may always be made therein. *Barber v. Barber*, 216 N.C. 232, 4 S.E.2d 447 (1939).

Nevertheless, a preexisting order in another state cannot be logically interpreted to be "pending litigation" or "proceedings initiated in another state" so as to bar use of the registration procedures for foreign state support orders obtained prior to October 1, 1975, the effective date of the legislation. Because Section 2 of Senate Bill 357 says "(t)his *act* shall not apply to pending litigation including proceedings which have been instituted in a state other than North

Carolina", such an interpretation would arguably make the totally rewritten URESA mechanism, be it the traditional method or the new registration method, unavailable to any obligee having, as is often the case, a support order outstanding in an "initiating state" or "rendering state" predating October 1, 1975.

A statutory construction of this nature would operate to defeat the objects of the URESA and "must be avoided if that can be reasonably done without violence to the legislative language". 12 N.C. Index 3d, *Statutes* §5.9. The URESA contains two sections relating to the objects of this Legislative Act which state:

"The purposes of this Chapter are to improve and extend by reciprocal legislation the enforcement of duties of support and to make uniform the law with respect thereto."

G.S. 52A-2; and

"This Chapter shall be so interpreted and construed and as to effectuate its general purpose to make uniform the law of those states having a substantially similar act."

G.S. 52A-32.

Consequently, it would be an illogical construction of Section 2 of Senate Bill 357, rewriting the URESA in its entirety, for the words "pending litigation" or "proceedings initiated in another state" to include a preexisting order of another state used as a basis to establish the duty of support under G.S. 52A-3(2) and a concomitant basis for invoking either the traditional or registration remedies of the Act. If the construction was otherwise, all URESA remedies would arguably be barred for all cases involving a pre-October 1, 1975, order entered in a state other than North Carolina while URESA cases for the same time frame but based on the mere existence of a legal relationship like parent/child would be proper. This alternative construction steadfastly holding to a literal interpretation of the statute would lead to an anomalous, absurd result both unintended by the General Assembly and properly avoidable. In general see 12 N.C. Index 3d *Statutes* § 5.9 (1978).

Moreover, there is yet another reason why the language in question was not intended to encompass preexisting orders of other states;

that is, the North Carolina "act" as rewritten obviously could not "apply" to pure orders of foreign states. With the exception of proceedings or pending litigation instituted under a foreign URESA with a view towards obtaining a support order in North Carolina through the procedures established under the North Carolina URESA, pending foreign proceedings or litigation are beyond the jurisdiction of our legislative enactments. Therefore, the words in question must logically refer to "pending URESA litigation" or URESA proceedings which have been initiated in a state other than North Carolina."

For these reasons it is the opinion of this Office that the existence of foreign state orders for support predating October 1, 1975, do not bar the use of the URESA registration procedures (G.S. 52A-26 through 30) for purposes of registering and seeking enforcement of such preexisting orders.

Rufus L. Edmisten, Attorney General
R. James Lore
Associate Attorney

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29 August 1979

Subject: Retirement; Local Disability Retirement Plan; Longevity Pay Considered in Computation.

Requested by: Robert J. Robinson, City Attorney Asheville

Question: Should longevity pay be taken into consideration in computing disability payments to policemen retiring pursuant to provisions of the Asheville Policemen's Pension and Disability Fund?

Conclusion: Yes.

Asheville policemen are members of the Asheville Policemen's Pension and Disability Fund, pursuant to Chapter 188 of the 1977

Session Laws, amended by Chapter 429 of the 1979 Session Laws. The question has arisen whether longevity pay should be taken into account in computing disability payments for policemen suffering disability in the line of duty.

Section 3(a) requires the deduction of "five percent (5%) of the monthly salary of every member of the policemen's fund" as a mandatory contribution to the Asheville Policemen's Pension and Disability Fund. The term "monthly salary" is not defined anywhere in the Act. Service retirement benefits and benefits for disability not incurred in the line of duty are computed according to a formula based upon the member's total earnings in the last twenty years of service for service retirement or since beginning service with the Asheville Police Department for Disability not incurred in the line of duty. A member who is disabled while acting in the line of duty or as a result of the performance of duties as a member of the Asheville Police Department is entitled to "receive monthly a sum equal to seventy percent (70%) of his monthly salary as then paid by the City of Asheville" Section 9(a), Chapter 188, 1977 payments shall be taken into consideration in computing seventy percent (70%) of the monthly salary, or what constitutes the police officer's monthly salary for purposes of computing the seventy percent (70%) for disability retirement benefits.

Employees of the City of Asheville who have completed five or more years of service are eligible for longevity pay bonuses, at a graduated rate according to the number of years of service. Longevity pay bonuses are paid annually, during the second pay period during the month of December. The "Longevity Pay Plan Administration Guidelines for Fiscal Year 1978-79" included a statement that longevity pay bonuses are classified by the Internal Revenue Service as part of an employee's normal income for the current calendar year and that, as such, the bonuses were subject to the normal deductions, including federal and state income tax, social security, and applicable retirement and pension plans. In other words, contributions to the Asheville Policemen's Pension and Disability Fund have been deducted from these annual longevity payments. The Guidelines for administration of the longevity pay plan for the fiscal year 1978-79 include methods for computing the bonus on a pro-rata basis for each month of service for employees on leave without pay during part of the fiscal year and for employees

who retired during the fiscal year. However, it appears that contributions to the Asheville Policemen's Pension and Disability Fund have not been deducted for longevity pay bonuses paid on a pro-rata basis to employees who have retired or applied for disability retirement on the basis of a disability incurred in the line of duty or as a result of the performance of their duties even though these pro-rata longevity pay bonuses have been paid for the period during which these policemen were in active service.

Given all the facts and circumstances, it appears that a portion of the longevity bonuses which represent one month's employment should be included in the member's monthly salary" in order to compute seventy percent (70%) of the monthly salary of a policeman retiring on disability incurred in the line of duty or as a result of performance of duties. Although contributions to the Asheville Policemen's Pension and Disability Fund are not deducted from longevity pay bonuses made after the employee ceases to work because of disability, normally pension fund contributions are deducted from longevity pay bonuses. It does not appear reasonable to conclude that "monthly salary" includes longevity pay bonuses for purposes of determining deductions from one's salary, but not for purposes of computing seventy percent (70%) of the salary for benefits. Barring specific statutory provisions to the contrary, funds from which disability and pension fund contributions are deducted should be included in the basis for computing a disability and pension fund benefit. Therefore, it is our opinion that longevity pay bonuses should be taken into consideration in computing seventy percent (70%) of an Asheville policeman's salary for purposes of determining monthly benefits for a police officer who becomes disabled in the line of duty or as a result of the performance of duties as an Asheville police officer.

The same conclusion would not necessarily hold true for persons retiring from the Asheville Policemen's Pension and Disability Fund on a line of duty disability basis when the provisions as amended in 1979 control. The 1979 amendments, in Chapter 429 of the Session Laws, provide for a line of duty disability in the amount of seventy percent (70%) of the member's "basic monthly salary rate as then paid by the City of Asheville." The change in language for line of duty disability, with no change in the language directing the deduction of five percent (5%) from the member's "monthly

salary," requires the conclusion that the basis upon which the line of duty disability is figured will differ from the compensation from which the mandatory five percent (5%) employee contribution is deducted.

Rufus L. Edmisten, Attorney General
Norma S. Harrell
Assistant Attorney General

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29 August 1979

Subject: Railroad Company; North Carolina Railroad Company; Atlantic and North Carolina Railroad Company; Acquisitions and Dispositions of Real Property; Governor and Council of State.

Requested by: Mr. Joseph W. Grimsley, Secretary
Department of Administration

Question: Do future land acquisitions or dispositions planned by the North Carolina Railroad Company and the Atlantic and North Carolina Railroad Company require the prior approval of the Governor and Council of State?

Conclusion: Future dispositions of real property by these companies must be approved by the Governor and Council of State. Acquisitions of real property by these companies are not subject to the approval of the Governor and Council of State unless the acquisition constitutes an encumbrance on the property of the Railroad.

The North Carolina Railroad Company was incorporated by the General Assembly of North Carolina as a private corporation in

1849. Session Laws of North Carolina, 1849, Chapter 83. The Atlantic and North Carolina Railroad Company was incorporated by the General Assembly of North Carolina as a private corporation in 1852. Session Laws of North Carolina, 1852, Chapter 136. The State of North Carolina is the majority stockholder in each of the corporations. The State owns 75.8 percent of the stock in the North Carolina Railroad Company. It owns 73.5 percent of the stock in the atlantic and North Carolina Railroad Company.

G.S. 124-5 reads as follows:

"no corporation or company in which the State has or owns any stock or any interest shall sell, lease mortgage, or otherwise encumber its franchise, right-of-way, or other property, except by and with the approval and consent of the Governor and Council of State."

This statute, if given its full literal affect, would apply to a disposition of real property by any corporation in which the State owns a single share of stock. Such a construction might give rise to a question of constitutionality. However, it is unnecessary to address that question at this time.

The State of North Carolina is the majority stockholder in each of the Railroad companies. There is a presumption in favor of the constitutionality of a statute. Strong's N. C. Index 3d, *Statutes*, §4.1. We are of the opinion that this statute would be constitutional as applied to the North Carolina Railroad Company and the Atlantic and North Carolina Railroad Company. Therefore, we conclude that future dispositions of real property by these companies require the approval of the Governor and Council of State.

G.S. 124-5 applies only to dispositions of property. It does not apply to acquisitions of property except when the acquisition would constitute an encumbrance on the property of the Railroad. We are unable to find any other statutory provision which requires approval by the Governor and Council of State for acquisition of property by these companies. Since these companies are private corporations, the provisions of Chapter 146 of the General Statutes relating to acquisitions of real property by State agencies would not apply.

Rufus L. Edmisten, Attorney General
Roy A. Giles, Jr.
Assistant Attorney General

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4 September 1979

Subject: Courts; Costs; Witnesses; Worthless Checks;
G.S. 7A-314; G.S. 14-107(5) as Enacted by
Chapter 837, Session Laws of 1979.

Requested by: Honorable John S. Gardner
Chief District Court Judge
704 W. 27th St.
Lumberton, N. C. 28358

Questions: 1. In a worthless check prosecution pursuant to G.S. 14-107 where the defendant pays the worthless check and court costs to the magistrate before the date of trial, and the prosecuting witness is not present before the magistrate, should the prosecuting witness be paid the witness fee under G.S. 14-107(5)? Should the fee be included in the bill of cost?

2. If on the date of trial, the defendant pleads guilty, and the prosecuting witness is not present in court and does not testify, would the prosecuting witness be entitled to the witness fee under G.S. 14-107(5) and should it be taxed as costs?

Conclusion: 1. No.
2. No.

In its strict legal sense, the word "witness" means one who gives evidence in a cause before the court. 97 CJS 350.

The right of a witness to compensation is purely statutory, and the court's power to tax costs is entirely dependent upon statutory authorization. *State v. Johnston*, 282 N.C. 1.

The right to tax costs did not exist at common law. Costs are penal in nature and statutes relating to costs are strictly construed. *City of Charlotte v. McNeely*, 281 N.C. 692.

In *McNeely, supra*, the Court held that a party who testified for himself was not entitled to a witness fee.

The general rule seems to be that a witness must be in actual attendance on the Court to be entitled to compensation, but he need not be called to testify.

Likewise, the rule is that in order to tax the other party for plaintiff's witness fees, the plaintiff's witnesses must be under subpoena, and must be examined or tendered. *Johnson, supra*.

G.S. 7A-314 provides that a witness under subpoena, bound over or recognized to testify shall be entitled to receive \$5.00 per day or fraction thereof, *during his attendance*. (Emphasis added)

Chapter 837, Session Laws of 1979, amended G.S. 14-107 by adding subsection (5) to read:

"(5) In deciding to impose any sentence other than an active prison sentence, the sentencing judge may require, in accordance with the provisions of G.S. 15A-1343, restitution to the victim for the amount of the check or draft and each prosecuting witness (whether or not under subpoena) shall be entitled to a witness fee as provided by G.S. 7A-314, which shall be taxed as part of the cost and assessed to the defendant."

Thus, we conclude that in those cases where the prosecuting witness is entitled to a witness fee, the prosecuting witness must be in attendance upon the Court before the witness fee can be taxed as part of the costs.

G.S. 14-107(5) is an exception to the requirement that the witness must be under subpoena, but actual attendance on the Court is required.

The compensation to a witness is not to pay him for testifying, but simply to provide partial reimbursement for the time and expense incurred from being in attendance upon the Court.

Under the facts presented, the prosecuting witness was not in attendance upon the court and witness fee authorized by G.S. 14-107(5) should not be taxed as costs.

Rufus L. Edmisten, Attorney General
James F. Bullock
Senior Deputy Attorney General

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13 September 1979

Subject: Constitution; U.S. Constitution; First Amendment Right to Association; Municipal Employees; Unions; Supervisory Personnel Membership in Union Representing Employees.

Requested by: E. Murray Tate, Jr., Esquire
City Attorney
Hickory, North Carolina

Question: May a city terminate the employment of a Fire Department Officer with supervisory duties solely on account of his membership in a labor union which counts non-supervisory fire department personnel among its members?

Conclusion: A city has a legitimate interest in maintaining a disciplined and efficient fire department. That interest is significantly compromised by the conflicting loyalties

which unavoidably arise when fire department supervisors join unions which represent fire department employees. Therefore, the city may legally prohibit supervisory personnel from joining unions which include in their membership non-supervisory fire department employees.

It has long since been decided that the freedom of association attendant to and protected by the First and Fourteenth Amendments of the United States Constitution encompasses economic associations such as labor unions, *Thomas v. Collins*, 323 U.S. 516 (1945); *Atkins v. City of Charlotte*, 296 F. Supp. 1078 (W.D.N.C. 1969). Moreover, one may no longer seriously question whether public employees have the same associational rights as their privately employed counterparts, *Elrod v. Burns*, 427 U.S. 347 (1976); *McLaughlin v. Tilendis* 398 F.2d 287 (7 Cir. 1968); *AFSCME v. Woodward*, 406 F.2d 137 (8 Cir. 1969). Nevertheless, a public employee's First Amendment rights are not without limit. See *Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *Elk Grove Fire Fighters Local No. 2340 v. Willis*, 400 F. Supp. 1097 (N.D. Ill. 1975), affirmed, 539 F.2d 714 (7 Cir. 1976); *York County Fire Fighters Association, Local 2498 v. York County*, 589 F.2d 775 (4 Cir. 1978).

Contemporary First Amendment analysis requires that the constitutionality of a state action be determined only after the public interest which the state's action purports to protect is balanced against the individual interests of the person or persons affected by the action. Following this analysis, the United States Supreme Court has held that a state may not limit First Amendment freedoms unless it first establishes: (1) the existence of a substantial, legitimate state interest; (2) a direct relationship between that interest to be served and the proposed state action; and (3) the action is the least drastic restriction of constitutional rights which will accomplish the state's purpose, *Shelton v. Tucker*, 364 U.S. 479 (1960).

Several federal courts have recently had an occasion to apply this three-prong test to state laws which prohibit publicly employed

supervisors from joining unions which include in their membership employees under those supervisors' authority. In three cases dealing specifically with fire department personnel, these courts have upheld a state's right to impose this limit upon their supervisors' union membership.

In *Elk Grove Fire Fighters Local Na 2340 v Willis, supra, Local 2263, International Association of Fire Fighters v City of Tupelo, Mississippi*, 439 F. Supp. 1224 (N.D. Miss., Ed 1977), and *York County Fire Fighters v Yorktown, supra*, federal courts were asked to determine whether a municipality might constitutionally prohibit fire department supervisory personnel from joining unions which counted non-supervisory fire department employees among its members. Following the analysis and guidelines established by the United States Supreme Court, these courts first found that the state has a legitimate and substantial interest in the efficiency of its fire departments.

The courts next found supervisor membership in unions to be inimical to fire department efficiency, *Elk Grove, supra*, at 1100. In reaching this conclusion, the judges relied heavily upon the congressional judgment embodied in Section 14(a) of the Labor Management Relations Act (29 U.S.C. §169 (a)). That section of the Taft-Hartley Amendments freed employers to discharge supervisors who joined unions and reflected a legislative determination that management, like labor, must be assured a contingent of loyal agents, See *Beasley v Food Fair of North Carolina*, 416 U.S. 653 (1974). Though noting that the NLRA is limited to private employers, the courts pointed out the parallels between the private and public sector which make that determination equally applicable to government employers.

Legislation aside, the courts found support for their holding in the adversarial labor-management relation. In times of labor unrest (strikes, picketing, slowdowns) unionized supervisors' loyalties would naturally be divided. Moreover, a more pervasive and potentially more disruptive conflict of interest would necessarily arise out of the cities' use of unionized officers to implement municipal policies which the union might oppose.

"Practically the only circumstance in which a conflict of interest would fail to arise would be if there were no conflict between (city) officials and the firefighters union over any aspect of working conditions, a rather unlikely eventuality." *Elk Grove, supra* at 1103.

Thus the courts found that supervisor membership in unions would retard department efficiency and interfere with a substantial state interest.

Finally, the courts found the regulations in question to be the least restrictive means of accomplishing the state's objectives. They emphasized that the regulations did not prohibit supervisors from joining any union, but only enjoined their membership in unions which counted fire department employees among their members. The courts held such a limitation to be clearly and precisely drawn to achieve the state's legitimate objectives while avoiding undue restriction of the supervisors' rights.

In sum it has been determined that the state's interest in maintaining an effective fire fighting force outweighs the supervisors' limited interest in belonging to a union which represents their subordinates. Therefore, a city may constitutionally prohibit a fire department officer from joining a labor union which includes non-supervisory fire department employees among its members.

Rufus L. Edmisten, Attorney General
Thomas J. Ziko
Associate Attorney

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14 September 1979

Subject: Licenses and Licensing; Occupational
Licensing Board; Travel Expense of
Members; Payment of Actual Travel
Expenses

Requested by: Henry L. Bridges
State Auditor

Question:

Does G.S. 138-7 authorize the payment of actual travel expenses to members of occupational licensing boards, over and above the amounts provided in the schedule in G.S. 138-6(a)(3) for officers and employees of State departments?

Conclusion:

No. G.S. 138-7 does not authorize the reimbursement of excess travel expenses of members of occupational licensing boards, by reason of: (1) the express limitation of G.S. 93B-5(b) restricting reimbursement of occupational licensing board members to amounts "not to exceed that authorized under G.S. 138-6(a) (1)(2) and (3)" for State employees; (2) the express restriction of G.S. 93B-5(d) which provides that "except as provided herein, board members shall not be paid a salary or receive any compensation for services rendered as members of the board"; and (3) the absence of any express exception in G.S. 138-7 to G.S. 93B-5 as was made to G.S. 138-5 and G.S. 138-6.

G.S. 93B-5 provides for compensation exclusively for members of occupational licensing boards. Subsection (b) provides for reimbursement of travel expenses "in an amount *not to exceed* that authorized under G.S. 138-6(a)(1)(2) and (3) for officers and employees of State departments". Subsection (d) provides: "*except as provided herein board members shall not be paid a salary or receive any additional compensation for services rendered as members of the board.*"

G.S. 138-6(a) provides for travel allowances for State officers and employees of State departments, institutions and agencies *which operate from funds deposited with the State Treasurer*. Subsection (3) provides for "in lieu of actual expenses incurred for *subsistence*, payment of \$31.00 per day when traveling in State or \$39.00 per day when traveling out-of-state." It further provides for proration of subsistence payment when travel involves less than a 24 hour

period in accordance with regulations promulgated by the Director of the Budget.

G.S. 138-7 as rewritten by the 1979 General Assembly provides that "expenditures in excess of the maximum amount set forth in G.S. 138-5 and G.S. 138-6 for travel and subsistence may be reimbursed if the prior approval of the department head is obtained." The Budget Director is required to establish and promulgate regulations under which "actual expense in excess of travel and subsistence allowance and convention registration fees as prescribed in G.S. 138-5 and G.S. 138-6 may be authorized by department heads for hotel, meals and registration." (Chapter 838, Section 17, 1979 Session Laws).

G.S. 138-5 provides for compensation for all boards and commissions, (excluding occupational licensing boards), which operate from funds deposited with the State Treasurer. Subsection (2) provides for the payment of subsistence while traveling at the rate of \$15.00 per day or \$35.00 per day when away over-night.

The language of G.S. 93B-5 is clear and does not require interpretation. G.S. 93B-5 deals exclusively with the compensation of occupational licensing board members and controls over any other statutes having general application. The language used expressly limits subsistence of occupational licensing board members to amounts *not to exceed* that authorized by G.S. 138-6(a)(3). *By reference*, an express limitation of \$31.00 per day for in-state travel and \$39.00 per day out-of-state is placed on the amount of subsistence to be reimbursed, subject to proration according to regulation promulgated by the director of the budget for periods of travel less than a twenty-four hour period. G.S. 93B-5 further prohibits the payment of any additional compensation for services *except as provided by G.S. 93B-5*.

G.S. 138-7 expressly provides for exceptions to G.S. 138-5 and G.S. 138-6 and authorizes reimbursement for actual expenses in excess of travel and subsistence as "*prescribed by G.S. 138-5 and G.S. 138-6*." G.S. 138-5 and G.S. 138-6 prescribe compensation for members of State boards and commissions excluding occupational licensing boards and for officers and employees of State agencies, *which operate from funds deposited with the State Treasurer*. G.S.

138-7 does not provide an exception to the statute authorizing compensation to occupational licensing board members (G.S. 93B-5) as it does to other statutes authorizing compensation for members of boards and commissions excluding occupational licensing boards (G.S. 138-5) and to State officers and employees (G.S. 138-6). Where express exceptions are made, the legal presumption is that the Legislature did not intend to save other cases from the operation of the statute. 50 Am. Jur. Statutes §434.

A review of the history of the statutes providing for reimbursement for travel expenses supports the conclusion that G.S. 138-7 has no application to the reimbursement of travel expenses for occupational licensing board members. The statute (G.S. 93B-5) dealing exclusively with occupational licensing boards was passed and codified in 1957. In 1961, the General Assembly enacted and codified G.S. 138-5, G.S. 138-6 and G.S. 138-7 (Chapter 833, Sections 5, 6 and 6.1). The provisions were basically the same as had been previously provided in the 1957 and 1959 Budget Appropriations Acts with two exceptions. G.S. 138-5 and G.S. 138-6 as now codified only apply to boards and commissions and State departments and agencies "which operate from funds deposited with the State Treasurer". The other exception is that previously no excess payments had been authorized and a specific provision was made for reimbursement for excess travel expenses incurred over the amounts in the schedule which was codified as G.S. 138-7.

G.S. 138-7 expressly provides "exceptions to G.S. 138-5 and G.S. 138-6" and requires the Director of the Budget to promulgate regulations under which actual expenses in excess of those "prescribed by G.S. 138-5 and G.S. 138-6 may be reimbursed. We have considered the 1979 amendment. The 1979 amendment to G.S. 138-7: (1) reversed the sequence of the two sentences in that section; (2) eliminated the requirement for approval of the Advisory Budget Commission for the promulgation of the rules and regulations; and (3) provided for prior approval of the department head for reimbursement of travel and subsistence in lieu of the prior approval of the Director of the Budget. We do not find that the rewrite of G.S. 138-7 by the 1979 General Assembly extended the exceptions to the statute providing compensation to occupational licensing board members or to agencies which operate from funds which are not deposited with the State Treasurer.

For the foregoing reasons, this Office is of the opinion that G.S. 138-7 does not authorize the reimbursement of occupational licensing board members for subsistence expenses incurred in connection with travel in excess of the rates specified in G.S. 138-6(a)(3).

Rufus L. Edmisten, Attorney General
Eugene A. Smith
Special Deputy Attorney General

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17 September 1979

Subject: Lotteries; Bingo; Raffles; High School
Booster's Club; Five-Hundred Dollars
(\$500) Limitation; Merchandise

Requested by: Mr. R. Michael Jones
Lucas, Rand, Rose, Meyer, Jones & Orcutt,
P.A.
Counsel for the Wilson County School
System

Questions:

1. May the local high school booster's club legally sponsor a raffle which offers merchandise as a prize or must any prize be in the form of cash?
2. If an exempt organization may offer merchandise as well as cash prizes in the conduct of a raffle, does the five hundred dollars (\$500) limitation apply to prizes in the form of merchandise?

Conclusions:

1. Yes. An exempt organization may legally sponsor a raffle which offers merchandise as a prize; the prize need not be in the form of cash.
2. No. Only a cash prize is limited in the amount of five hundred dollars (\$500).

Subsection (g) of G.S. 14-292.1 deals with the limitations on the amount of cash prizes and the value of merchandise prizes to be offered or paid in bingo games and raffles. Subsection (g) reads as follows:

"(g) The maximum prize *in cash or merchandise* that may be offered or paid for any one game of bingo is five hundred dollars (\$500.00). The maximum aggregate amount of prizes, *in cash and/or merchandise*, that may be offered or paid at any one session of bingo is one thousand five hundred dollars (\$1,500). Provided, however, that if an exempt organization holds only one session of bingo during a calendar week, the maximum aggregate amount of prizes, *in cash and/or merchandise*, that may be offered or paid at any one session is two thousand five hundred dollars (\$2,500). The maximum *cash* prize that may be offered or paid for any one raffle is five hundred dollars (\$500.00)." (Emphasis added)

Each of the above limitations on prizes for both raffles and bingo games are very specific. These specific limitations are limitations on the general exemption from North Carolina lottery laws (Article 37 of Chapter 14 of the General Statutes) for exempt organizations to operate and sponsor bingo games and raffles. The clear and definite use of the terms "cash" and "merchandise" in the three sentences in subsection (g) relating to bingo games and the term "cash" in the last sentence of subsection (g) relating to raffles leads to the conclusion that the legislature clearly intended to make no specific limitation in regards to merchandise prizes for raffles.

Therefore, provided the exempt organization meets all other requirements of G.S. 14-292.1, merchandise may be offered or paid as prizes for a raffle and there is no limitation as to the value of such merchandise prizes.

Rufus L. Edmisten, Attorney General
Acie L. Ward
Assistant Attorney General

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3 October 1979

Subject: Motor Vehicles; Size of Vehicles and Loads

Requested by: Mr. Randy Jones
North Carolina Department of Natural
Resources & Community Development
Division of Environmental Management

Question: Does G.S. 20-116(g) apply to a basically
"unloaded" truck that is depositing
material on the road?

Conclusion: Yes.

G.S. 20-116(g) reads in relevant part:

"(g) No vehicle shall be driven or moved on any highway unless such vehicles is so constructed or loaded as to prevent any of its load from dropping, sifting, leaking, or otherwise escaping therefrom, except that sand may be dropped for the purpose of securing traction, or water or other substance may be sprinkled on a roadway in cleaning or maintaining such roadway. ..."

Any part of a load or what may remain as a prior load dropping, sifting, leaking, or otherwise escaping from a vehicle other than sand being dropped for the purpose of securing traction or water or other substance being sprinkled on the roadway for the purpose of maintaining the roadway would constitute a violation of this section.

The provision appearing in the last unnumbered paragraph of this section relative to the transportation of poultry, livestock, silage or other feed grain should be noted.

Rufus L. Edmisten, Attorney General
William W. Melvin
Deputy Attorney General

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3 October 1979

Subject: Courts; Costs Allowed for Service of Civil Process.

Requested by: Larry J. McGlothlin
Cumberland County Sheriff's Attorney

Question: Does G.S. 7A-311(a)(1) require civil process fees to be assessed, collected and remitted when the law enforcement officer serves or attempts to serve civil process?

Conclusion: Yes.

Chapter 310, Session Laws of 1965, enacted G.S. 7A-311 and provided the fee to be assessed and collected for each item of civil process served or attempted to be served.

Chapter 417, Session Laws of 1973 amended G.S. 7A-311(a)(1) by deleting the phrase "or attempted to be served".

Chapter 1139, Session Laws of 1973 (2d Session) amended G.S. 7A-311 (a)(1) by adding a new sentence: "If the process is served, or attempted to be served by the sheriff, the fee shall be remitted to the city rather than the county."

Chapter 801, Session Laws of 1979 rewrote G.S. 7A-311(a)(1) and divided it into subsections (a) and (b). The first deals with the amount of the fee to be assessed and (b) contains the language that if the process is served, or attempted to be served, the fee shall be paid to the city if by a policeman and to the county if by the sheriff.

It appears clear from the history and language of G.S. 7A-311(a)(1), that the fee is paid when the process is served, or attempted to be served, by the law enforcement officer.

Rufus L. Edmisten, Attorney General
James F. Bullock
Senior Deputy Attorney General

3 October 1979

Subject: Register of Deeds; Mortgages and Deeds of Trust-Cancellation

Requested by: W. W. Speight
Pitt County Attorney

Question: Is the beneficiary of a deed of trust who is also the payee or holder of the note entitled to have the deed of trust cancelled of record?

Conclusion: Yes.

G.S. §45-37(2) provides that a deed of trust may be cancelled of record if the deed of trust and note or other instrument secured thereby are exhibited to the Register of Deeds, with the endorsement of payment and satisfaction by

- (a) The obligee
- (b) The mortgagee
- (c) The trustee
- (d) An assignee of the obligee, mortgagee, or trustee, or
- (e) Any chartered banking institution.

As pointed out in a previous opinion, the beneficiary of a deed of trust, *as such*, is not one of the persons authorized by the statute to obtain cancellation. 48 N.C.A.G. 50 (1978). There was no indication in the question upon which that opinion was based that the beneficiary was an obligee, a bank or assignee thereof. *Id.*, at p. 51.

The question presented here clearly states that the beneficiary of the deed of trust is also the payee or holder of the underlying indebtedness. In this case, the beneficiary is an obligee. *See*, BLACK'S LAW DICT. 1226 (Rev. 4th Ed. 1968). Therefore, the beneficiary, in his capacity as obligee may make the required endorsements and obtain cancellation of record of the deed of trust.

Rufus L. Edmisten, Attorney General
Lucien Capone, III
Associate Attorney General

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4 October 1979

Subject: Weapons; Carrying Concealed Weapons;
Railroad Police

Requested by: Lawton Eure, Training Evaluator
Criminal Justice Training & Standards
Council

Question: Can Railroad police carry concealed
weapons anywhere in the State when in the
performance of their official duties?

Conclusion: Yes.

In relevant part, G.S. 14-269 reads as follows:

§14-269. *Carrying concealed weapons.*—If anyone, except when on his own premises, shall willfully and intentionally carry concealed about his person any bowie knife, dirk, dagger, sling shot, loaded cane, brass, iron or metallic knuckles, razor, pistol, gun or other deadly weapon of like kind, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars (\$500.00), imprisonment for not more than six months, or both. This section shall not apply to the following persons: ... officers of the State, or of any county, city, or town, charged with the execution of the laws of the State when acting in the discharge of their official duties, ..."

G.S. 74A-2, in relevant part, reads as follows:

"§74A-2. *Oath, powers, and bond of company police; exceptions as to railroad police.*—(a) Every policeman

so appointed shall, before entering upon the duties of his office, take and subscribe the usual oath.

(b) Such policemen, while in the performance of the duties of their employment, shall severally possess all the powers of municipal and county police officers to make arrests for both felonies and misdemeanors:

(1) Upon property owned by or in the possession and control of their respective employers; or

(2) Upon property owned by or in the possession and control of any person or persons who shall have contracted with their employer or employers to provide security for protective services for such property; or

(3) Upon any other premises while in hot pursuit of any person or persons for any offense committed upon property vested in subdivisions (1) and (2) above.

. . .

(d) The limitations on the power to make arrests contained in subdivision (1), (2) (and) (3) of subsection (b) shall not be applicable to policemen appointed for any railroad company. Policemen appointed for railroad companies shall be required to post a bond in the sum of five hundred dollars (\$500.00) in lieu of the bond required by subsection (c)."

G.S. 74A-3 reads:

"74A-3. *Company police to wear badges*—Such policemen shall, when on duty, severally wear a shield with the words 'Railway Police' or 'Company Police' and the name of the corporation for which appointed inscribed thereon, and this shield shall always be worn

in plain view except when such police are employed as detectives."

G.S. 74C-3(8)(b)(6) reads:

"Private protective services shall not mean:

....

(6) Company police or railroad police as defined in Chapter 74A of the General Statutes of North Carolina; ..."

In *Tate v. R.R.*, 205 N.C. 51 (1933), the Court held:

"The weight of authority maintains the position that special officers appointed by the State for police duty at the expense of a railway company or other corporation are prima facie public officers, ..."

In *Assoc. of Licensed Detectives v. Morgan, Attorney General*, 17 N.C. App. 701 (1973) the Court said:

"Private or special police are public officers, *Tate v. R.R.*, 205 N.C. 51, 169 S.E. 816 (1933), and therefore, a proper subject of regulation by the State in exercise of its police power."

It would appear that railroad police fall into one of two categories; i.e., those hired for the purpose of security of railroad property, and those who serve in the capacity of detectives. Those who serve in the general capacity of security of property should comply with the provisions of G.S. 74A-3 relative to the wearing of a shield with the words "Railway Police" and the name of the company or corporation for which they are appointed. Therefore, if a weapon is needed, concealment would serve no purpose, however, such does not appear to be prohibited while on the railway's property. Railway police employed as detectives are not required to wear a shield as they are exempt from the requirements of G.S. 74A-3. Further, being a public officer, they are also exempt from the provisions of G.S. 14-269 while on duty. As to whether a railway detective is on duty is simply a question of fact.

Rufus L. Edmisten, Attorney General
William W. Melvin
Deputy Attorney General

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9 October 1979

Subject: Counties, Municipalities, Garnishment,
Child Welfare, Garnishment for
Enforcement of Child Support, N.C.G.S.
110-136.

Requested by: Rufus C. Boutwell, Jr.
Assistant City Attorney
City of Durham

Question: Does a city have immunity from
garnishment proceedings brought for child
support under N.C.G.S. 110-136?

Conclusion: No. The legislative intent of Article 9,
Chapter 110 of the General Statutes is to
provide financial support for dependent
children and to provide an enforcement
procedure against the parent responsible
for providing support to such children.
Thus, limited to the narrow area of child
support under Article 9, it is the opinion
of this Office that the General Assembly
did not intend to provide a remedy of
support for all children except those whose
parents are employed by a governmental
entity. Therefore, the city may be a
garnishee for this limited purpose.

We find no North Carolina case dealing with the specific question
in the area of child support or construing G.S. 110-136 where a
governmental entity was the garnishee. The general rule in this State,
and apparently the majority rule, is that the State, or political
subdivisions and agencies thereof, cannot be summoned as garnishees

in any action without statutory authority. Various reasons have been given by the courts, including the reason that public policy demands the exemption of the government and its agencies from liability as garnishees. In *Swepson v. Turner*, 76 N.C. 115, the North Carolina Supreme Court adopted the public policy view. So far as can be ascertained, however, this case has not been cited or relied upon in this State since the opinion was written in 1877.

We do not depart from the general rule stated above, but we do construe the language of G.S. 110-136, and the purpose set forth in G.S. 110-128 as revealing a legislative intent to provide child support for all dependent children and not to discriminate against those children whose parents happen to be employed by the State or any of its agencies or political subdivisions thereof.

The pertinent statute, G.S. 110-136, providing for garnishment for enforcement of child-support obligation, commences with the words "(n)otwithstanding any other provision of the law". These words generally mean in spite of other provisions and that the statute operates without obstruction from other statutes. This has been held to carry over to decisional law. *Dover v. Dover*, 15 C.A. 3d 675, 93 Cal. Rptr. 384; *Words and Phrases*, Vol. 28A.

Further, the garnishment statute under inquiry provides, in part, that "(t)he garnishee is the person, firm, association, or corporation by whom the responsible parent is employed." G.S. 110-136(a). G.S. 12-3(b) defines the word "person" as extending to and applied to bodies politic and corporate, as well as individuals, unless the context clearly shows otherwise. A body politic is a State, county, or municipal corporation. *Student Bar Asso. v. Byrd*, 293 N.C. at 600. Thus, we construe the word "person" as used in G.S. 110-136 as embracing the State, a county or municipality.

The welfare of children has always been a paramount concern of the courts and the State. The General Assembly, in recent years, has expressed its concern in this area by the enactment of various legislation. It does not seem reasonable to think that it intended to deny a valuable remedy for enforcement of the support obligation to some children simply because the responsible parent is an employee of the State, county, city or other governmental entity.

We hold, therefore, that, by reason of the legislative intent and public policy expressed in G.S. 110-136, the statute is applicable to the State, counties and municipal corporations, and they are not immune from garnishment proceedings brought thereunder.

Rufus L. Edmisten, Attorney General
William F. Briley
Assistant Attorney General

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10 October 1979

Subject: Social Services; Medicaid; Mental Health; Hospitals

Requested by: Dr. Sarah T. Morrow, Secretary
North Carolina Department of Human Resources

Question: Under the 1979 Appropriations Act, may mental and specialty hospitals in North Carolina be reimbursed by the Medicaid program for an unlimited number of administrative days?

Conclusion: Yes.

Under Section 23 of the 1979 Appropriations Act for the State of North Carolina (Chapter 838 of the 1979 Session Laws), the Medicaid program will pay on behalf of its recipients allowable costs for all hospital in-patient care rendered, subject to the exception that payment for administrative days shall be limited to a maximum of three days for any period of hospitalization. It is our understanding that administrative days are days during which alternative placement of a patient is planned and effected and for which there is no medical necessity for hospital in-patient care. In essence, these days constitute a grace period for the orderly placement of a Medicaid patient into a lesser level of care or home setting. The apparent intent of the General Assembly in enacting the provision relating to administrative days was to provide a

financial disincentive to allowing Medicaid patients to linger in hospitals when the medical necessity for hospitalization had expired. By imposing the aforementioned limitation on Medicaid payment for administrative days, it appears that it was the expectation of the General Assembly that hospitals would act in their own best financial interest by providing for the timely and appropriate discharge of Medicaid patients who no longer require hospitalization.

On the other hand, the Medicaid payment basis for mental and specialty hospital services under Section 23 of the 1979 Appropriations Act is not subject to any limitation on allowable costs. Hence, the indisputable answer to the question posed is that under the 1979 Appropriations Act for the State of North Carolina mental and specialty hospitals may be reimbursed by the Medicaid program for an unlimited number of administrative days. The absence of any limitation on Medicaid payment for administrative days with respect to mental and specialty hospitals is probably founded on the rather substantial difficulty in making alternative placement arrangements for mentally and physically handicapped patients.

It should be noted that this Opinion addresses a narrow question relating exclusively to the State Appropriations Act. We have neither been asked for nor offer our opinion on whether the difference in payment basis between regular hospital in-patient care and mental and specialty hospital care may conflict with federal law or regulations or constitutional mandates.

Rufus L. Edmisten, Attorney General
William Woodward Webb
Special Deputy Attorney General

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10 October 1979

Subject: Mental Health, Area Mental Health, Mental Retardation and Substance Abuse Authorities; marking of motor vehicles owned by area authorities.

Requested by: Sarah T. Morrow, M.D., M.P.H.
Secretary
Department of Human Resources

Question: Does G.S. 14-250 requiring certain publicly owned vehicles to be marked apply to vehicles owned by an area mental health, mental retardation and substance abuse authority?

Conclusion: No.

As pertaining to this inquiry, G.S. 14-250 provides as follows:

"It shall be the duty of the executive head of every department of the State government, and of any county, or of any institution or agency of the State, to have painted on every motor vehicle owned by the State, or by any county, or by any institution or agency of the State, a statement that such car belongs to the State or to some county, or institution or agency of the State."

By statutory definition, an area mental health, mental retardation and substance abuse authority is a local political subdivision of the State. (G.S. 122-35.36(1)). Title to the type of personal property described in the present query is held by the area authority. (G.S. 122-35.53).

Prior opinions of the Attorney General have been consonant with these statutory provisions (or their predecessors) and have been based upon the premise that an area authority is a separate entity from the State and from the county. See, 47 N.C.A.G. 8 (1977); 44 N.C.A.G. 185 (1975); 45 N.C.A.G. 120 (1975); 42 N.C.A.G. 120 (1972); 45 N.C.A.G. 70 (1975). As a result, an area mental health, mental retardation and substance abuse authority does not fall within the provisions of G.S. 14-250.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Special Deputy Attorney General

10 October 1979

Subject: Social Services; Mental Health; Conflict of Interest; Payment of Public Assistance to Persons in Rest Homes

Requested by: W. W. Speight
County Attorney for Pitt County

Questions: 1. May payment of public assistance be made for the care of a person in a home for the aged, family care home, or other domiciliary facility which is owned or operated in whole or in part by an employee of a State Alcoholic Rehabilitation Center?

2. May payment of public assistance be made for the care of a person in a home for the aged, family care home, or other domiciliary facility which is owned or operated in whole or in part by a corporation of which an employee of a State Alcoholic Rehabilitation Center is an officer or a shareholder?

3. May payment of public assistance be made for the care of a person in a home for the aged; family care home, or other domiciliary facility which is rented from an employee of an area mental health, mental retardation and substance abuse authority?

Conclusions: 1. No.
2. No.
3. Yes.

G.S. 108-65.2, as amended by 1979 Session Laws, Chapter 702, effective May 30, 1979, provides as follows:

"108-65.2. *Limitations on payments.*—No payment of public assistance under this Part shall be made for the care of any person in a home for the aged, family care home, or other domiciliary facility which is owned or operated in whole or in part by any of the following:

1. a member of the Social Services Commission, of any county board of social services, or of any board of county commissioners;
2. an official or employee of the Department of Human Resources or of any county department of social services;
3. a spouse of a person designated in subdivisions (1) and (2)."

The State Alcoholic Rehabilitation Centers are set up by the Department of Human Resources and are an integral part of that department. See G.S. 122-7.1. Since the clinical director is an employee of the Department of Human Resources, the proscriptions of G.S. 108-65.2 apply to any home of the type described therein which is owned by that employee. Similarly, these prohibitions would also seem to apply to situations wherein an employee of an Alcoholic Rehabilitation Center is an officer or a shareholder of a corporation which owns or operates, in whole or in part, one of these types of homes. That conclusion has been reached with regard to the interpretation of the language of G.S. 14-234 and no distinction can logically be made here. For prior opinions of this Office in comparable situations, see 44 N.C.A.G. 128 (1974), 42 N.C.A.G. 180 (1973); 42 N.C.A.G. 9 (1972); 40 N.C.A.G. 565 (1970); 40 N.C.A.G. 561 (1969).

On the other hand, an area mental health, mental retardation and substance abuse authority is a local political subdivision of the State. See G.S. 122-35.36(1)). As a result an employee of an area mental health, mental retardation and substance abuse authority is not an employee or an official of the State or of any county. See G.S. 122-35.45(b); 47 N.C.A.G. 8 (1977); 45 N.C.A.G. 70 (1975). Thus the provisions of G.S. 180-65.2 would be inapplicable to such an employee.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Special Deputy Attorney General

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12 October 1979

Subject: Mental Health; Mental Hospitals; Requiring
Residents to Participate in Fire Drills

Requested by: Sarah T. Morrow, M.D., M.P.H.
Secretary
Department of Human Resources

Questions:

1. In a fire-drill situation at a State mental hospital is the staff authorized to physically remove a non-consenting patient from his ward?
2. In such a situation would it make any difference if the patient were on voluntary or involuntary status?
3. If the answer to question (1) is yes, what degree of force should be utilized in removing the patient?

Conclusions:

1. Yes.
2. No.
3. Only a reasonable degree of force under existing circumstances should be utilized in removing the patient.

It appears that the Life-Safety Code and accreditation standards vital to the operation and funding of State mental hospitals require that internal disaster, fire and evacuation drills shall be held at least quarterly for each work shift of program personnel in each separate

patient-occupied building. These questions are prompted by the refusal, on occasion, of some patients to get out of bed and leave the ward during such a drill.

The patients involved include some who are involuntarily committed to the hospital by court order, others who are voluntarily admitted upon their own request, and juveniles or other incompetents who are voluntarily admitted with court ordered approval. In all of these situations, the State occupies the position of *parens patriae* regarding these residents; as a result, the State is responsible for the patient's safety, health and welfare. Certainly the evacuation of *all* residents, including those reluctant to participate would be necessary in order to truly evaluate the adequacy of evacuation procedures. Thus, the ability to require participation in the basic drills described is a fundamental necessity in order to enable the fulfillment of the State's responsibilities—for the short range purpose of immediate protection of the residents involved as well as for the long range purpose of insuring the continued operation of the hospitals in order to care for present and future mentally ill persons. No distinction should be made on this score as to the right to refuse to participate by the voluntarily admitted patient or those patients present pursuant to a court order. In other words, the remedy available to a purely voluntary competent patient, should he so desire, would be a request for discharge within the time limitations levied by G.S. 122-56.3, not absolution from compliance with reasonable requirements of the hospital.

In order to secure evacuation, reasonable force may be utilized. As an addendum, though, it would seem that the employees securing compliance should be persons trained in the handling of mentally ill patients who have performed similar functions in insuring compliance with other reasonable hospital directives. On a cautionary note, it should be recognized that any foreseeable injury to the patients which is caused by undue force could well leave the hospital, the State and the individual employee vulnerable to litigation seeking damages.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Special Deputy Attorney General

23 October 1979

Subject: Social Services; Confidentiality of Public Assistance Records; G.S. 108-45

Requested by: Dr. Sarah T. Morrow, Secretary
North Carolina Department of Human Resources

Question: Is it lawful, under applicable State and federal laws and regulations, for a county department of social services to disclose names and other information concerning persons receiving public assistance to the Evaluation Section of the North Carolina Department of Human Resources or its contractual agent in order that an evaluation and report on the expenditure of State funds for the homemaker/chore services program may be done?

Conclusion: Yes.

It is our understanding that the General Assembly of North Carolina specifically requested an evaluation and report by the Department of Human Resources on the expenditure of State funds for the homemaker/chore services program provided under Title XX of the Social Security Act. The responsibility for making this evaluation and report has been assigned to the Evaluation Section of the Department of Human Resources. In order to discharge this responsibility, the Evaluation Section will require access to the records of Title XX public assistance recipients within the county departments of social services.

Pursuant to the provisions set forth in Section 2003(d)(1)(B) of the Social Security Act (42 U.S.C. § 1397b(d)(1)(B)), the federal regulations found at 45 C.F.R. 205.50, and G.S. 108-45(a), public assistance records generally (and Title XX records in particular) are enveloped with confidentiality except for purposes directly connected with the administration of the various programs of public assistance. It is our interpretation of these provisions that county

departments of social services may legally release names and other information concerning persons receiving Title XX public assistance that are contained in the records of the department since the purpose for acquiring this information is without a doubt directly connected with the administration of a program of public assistance (i.e., Title XX). Moreover, in view of our conclusion, there is no need for the county department of social services to obtain the consent of the recipient prior to the release of the information sought.

We reach the same conclusion should the Evaluation Section decide to contract with another agency outside the Department of Human Resources to conduct the actual evaluation provided the contract contains a provision prohibiting disclosure of the information gathered to third parties. The purpose in collecting the information remains the same irrespective of who does the collecting. Additionally, with the contractual prohibition against disclosure, the agency conducting the evaluation is subject to standards of confidentiality comparable to those governing the county departments of social services. Accordingly, under the authority of the federal regulation found at 45 C.F.R. § 205.50(a)(2)(ii), it would be lawful for the county departments of social services to release to the contractor information concerning individuals receiving Title XX public assistance.

Rufus L. Edmisten, Attorney General
William Woodward Webb
Special Deputy Attorney General

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24 October 1979

Subject: Administrative Procedures Act;
Department of Administration; Office of
the Governor; Division of State Budget and
Management; Budget Manual

Requested by: Administrative Rules Review Committee of
the General Assembly

Questions:

1. Is the budget manual of the Division of State Budget and Management required to be filed with the Attorney General?

2. Is the budget manual of the Division of State Budget and Management subject to the adoption and amendment procedural requirements of the Administrative Procedures Act?

Conclusion:

1. Yes, except for those parts already filed or which are not rules.

2. Yes, except for those parts already filed or which are not rules.

1. G.S. 150A-58, in relevant part, reads as follows:

(b) As used in this Article, "rule" means every rule, regulation, ordinance, standard, and amendment thereto adopted by any agency and shall include rules and regulations regarding substantive matters, standards for products, procedural rules for complying with statutory or regulatory authority or requirements and executive orders of the Governor.

G.S. 150A-59, in relevant part, reads as follows:

Rules adopted by any agency on or after February 1, 1976, shall be filed with the Attorney General. All rules shall become effective 30 days after filing, unless the agency shall certify the existence of good cause for, and shall specify, an earlier or later effective date. An earlier effective date shall not precede the date of filing.

1 North Carolina Administrative Code 2A .0103 reads as follows:

The budget manual sets forth policies and procedures to be followed by state agencies in preparing,

monitoring and executing the state's budget. Copies of the budget manual shall be provided to the various departments of state government and are available for public inspection at the division office.

History Note: Statutory Authority G.S. Chapter 143,
Article 1;
Eff. February 1, 1976;
Readopted Eff. February 27, 1979.

G.S. 150A-63, in relevant part, reads as follows:

(c) If the Attorney General determines that publication of any rule would be impracticable, he shall substitute a summary with specific reference to the official rule on file in his office.

Chapter 150A, the Administrative Procedures Act, has two separate and distinct definitions of "rule." The definition in Article 5, Publication of Administrative Rules, is more inclusive than the rule making definition in Article 2, Rule Making, Regulations exempt from the rule making article are not exempt from the publication article unless the regulation is exempted by G.S. 150A-58(b)(1-4). G.S. 150A-59 states no rule, as defined in G.S. 150A-58, may become effective any earlier than the date of filing with the Attorney General.

The budget manual is a compilation of rules and regulations developed by the Division of State Budget and Management which sets forth policies and procedures state agencies must follow in preparing, monitoring and executing the state's budget. An examination of the contents of the manual discloses that it consists of (1) reprints of General Statutes, (2) reprints of other sections of the Administrative Code, and (3) regulations not contained in other sections of the code. This last category includes regulations developed by the Division of State Budget and Management which are necessary to provide more specific procedures for complying with the requirements of the General Statutes and the Executive Orders of the Governor. The last category also contains the portions of the budget manual which have not been filed with the Attorney

General. The rule on file, 1 N.C.A.C. 2A .0103, describes the budget manual and states it may be inspected in the division office. G.S. 150A-63(c) allows for a summary rule if the publication of a rule would be impracticable, but it requires the official rule must be on file in the Attorney General's Office. Those portions of the budget manual which are rules within the the meaning of G.S. 150A-58 and which have not previously been filed with the Attorney General must be filed with the Attorney General to be effective.

(2) In relevant part, G.S. 150A-9, reads as follows:

It is the intent of this Article to establish basic minimum procedural requirements for the adoption, amendment, or repeal of administrative rules ... No rule hereafter adopted is valid unless adopted in substantial compliance with this article.

G.S. 150A-10, in relevant part, reads as follows:

As used in this Article, "rule" means each agency regulation, standard or statement of general applicability that implements or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency.

The term includes the amendment or repeal of a prior rule but does not include the following:

(1) Statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public;

(6) Interpretative rules and general statements of policy of the agency.

G.S. 150A-12, in relevant part, reads as follows:

(f) No rule making hearing is required for the adoption, amendment or repeal of a rule which solely describes the organization of the agency or describes forms or instructions used by an agency.

G.S. 150A-14, in relevant part, reads as follows:

An agency may adopt, by reference in its rules and without publishing the adopted matter in full, all or any part of a code, standard or regulation which has been adopted by any other agency of this State or any agency of the United States or by a generally recognized organization or association.

G.S. 150A-2, in relevant part, reads as follows:

(1) "Agency" means every ... department, division, council, member of Council of State, or officer of the State Government of the State of North Carolina...

Article 2, Rule Making has a definition of "rule" which varies substantially from that of Article 5. The definition in G.S. 150A-10 determines which regulations are subject to the procedural requirements of Article 2, which include notice of hearing and public hearing prior to adoption. The two exemptions cited above, G.S. 150A-10(1) and (6), may include some of the unfiled portions of the budget manual. In applying the definition of "rule," the exemption created by G.S. 150A-10(1) should be limited to those regulations concerning the internal management of the Division of State Budget and Management. Some guidance on the exemption created by G.S. 150A-10(6) is provided by Professor Charles E. Daye in his 1975 article entitled "North Carolina's New Administrative Procedures Act: An Interpretive Analysis," 53 N.C. Law Review 833-923, (1975). At page 853, it states:

"Generally speaking, interpretative rules carry no sanction, and if a sanction is involved, it is seen as emanating from the statute ... It should be emphasized that careful scrutiny of the substance of the rule in question is critical, since the interpretive rule exclusion, if not confined to proper boundaries, could well subsume the rulemaking provisions."

Finally, two separate statutory sections may exempt certain of the regulations of the budget manual from rulemaking or publication in full. G.S. 150A-12(f) exempts any regulations which describe

"forms or instructions used by an agency." G.S. 150A-14 exempts from publication in full any regulations adopted by another agency of the State which are adopted by reference. It should be noted any regulations so adopted must be amended any time the promulgating agency alters a regulation for the adopting agency to maintain the same regulations or the promulgating agency.

Each regulation in the budget manual must be individually examined to determine (1) whether it is a rule within the meaning of G.S. 150A-10; (2) whether, although it is rule, it is exempted from the rule making requirements by G.S. 150A-12(f); and (3) whether it was adopted by reference and thereby exempt from publication.

When the manual was developed, the Division of State Budget and Management was a part of the Department of Administration. By Executive Order 38, that division was transferred to the Office of the Governor on September 10, 1979. Both the Governor's Office and the Department of Administration are agencies within the statutory definitions of "agency" in G.S. 150A-2(1) and G.S. 150A-58(c) and are required to comply with Article 2, Rule Making, and Article 5, Publication of Administrative Rules, to the same extent as are other agencies not specifically exempted.

Rufus L. Edmisten, Attorney General
Daniel F. McLawhorn
Assistant Attorney General

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25 October 1979

Subject: Mental Health, Area Mental Health, Mental Retardation and Substance Abuse Authorities; Use of proxy votes at Area Mental Health, Mental Retardation and substance abuse Board Meetings.

Requested by: Mr. Mansfield Elmore
Area Director
Lee-Harnett Mental Health Center

Question: Is it permissible to use proxy votes at meetings of Area Mental Health, Mental Retardation and Substance Abuse Boards?

Conclusion: No.

As described in G.S. 122-35.36(2), and Area Mental Health, Mental Retardation and Substance Abuse Board is:

"A group of persons appointed by the county commissioners pursuant to the provisions of this Article to serve as the governing body of the area mental health, mental retardation and substance abuse authority."

Such authority is the unit which serves as the comprehensive planning, budgeting, implementing and monitoring group for community based mental health, mental retardation and substance abuse programs. See G.S. 122-35-36(1). The membership of this board can extend up to twenty-five (25) members. See G.S. 122-35.40. As a result of the number of members permitted, together with the nature of the qualifications required for such members, it appears that difficulties are frequently encountered in obtaining a quorum of members present at board meetings so as to enable the transaction of business. This problem has precipitated the question posed.

Article 2F of Chapter 122 contains no provision authorizing the designation of a proxy or the use of a proxy vote at board meetings. The general rule is that, absent specific statutory authorization, a member of a board of this nature may not authorize another person to perform his function.

McQuillin, Municipal Corporations, 3rd Edition Revised, Section 12.126 contains the following informative language on this score:

"In the discharge of their duties the officers cannot go beyond the law nor delegate powers involving the exercise of judgment and discretion."

Further, this point is described at greater length in Mechem, A

Treatise on the Law of Public Offices and Officers, as follows:

"In those cases in which the proper execution of the office requires, on the part of the officer, the exercise of judgment or discretion, the presumption is that he was chosen because he was deemed fit and competent to exercise that judgment and discretion, and, unless power to substitute another in his place has been given to him, he cannot delegate his duties to another...

Wherever these boards and officers are vested with discretion and judgment, to be exercised in behalf of the public, the board or officer must exercise it in person and can not, unless expressly or impliedly authorized to do so, delegate it to others...

The members composing the board have no power to act as a board except when together in session. They then act as a body or unit ... The public for whom they act, have the right to their best judgment after free and full discussion and consultation among themselves of and upon the public matters entrusted to them in the session provided for..." Id., §§567, 577.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Special Deputy Attorney General

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29 October 1979

Subject: Health; Sewage Disposal Rules;
Relationship between State and local rules

Requested by: Stacy Covil
Head, Sanitation Branch
Division of Health Services

Question: What is the relationship between the
sewage disposal rules promulgated by the

Commission for Health Services and those promulgated by local boards of health?

Conclusion: The relationship is described below.

The Commission for Health Services is authorized by G.S. 130-160(a) to adopt rules governing sewage disposal systems with 3000 gallons or less design capacity which do not discharge to the surface waters. Local health boards, pursuant to G.S. 130-17(b), have also adopted rules governing sewage disposal systems. This opinion will discuss the relationship between the sewage disposal rules of the Commission and of the local health boards.

The Ground Absorption Sewage Disposal System Act of 1973, codified as G.S. 130-166.22 *et seq.*, established an enforcement mechanism, based on local health board rules under G.S. 130-17(b), for regulation of ground absorption sewage disposal systems. The heart of the program is the requirement of an improvements permit before construction is commenced and a certificate of completion before the dwelling is occupied. The scope of the Act is limited to permanent structures and mobile homes intended for use as homes and living quarters. See our Opinion, dated May 28, 1974, to Mr. Ben Eaton (43 N.C.A.G. 410). On the other hand, the rules of the Commission for Health Services under G.S. 130-160 apply to any single or multiple-family residence, place of business or place of public assembly.

The relationship of the State and local rules is established by G.S. 130-160(b) and 130-17(b). If the Commission finds that local sewage disposal rules are substantially equivalent to the Commission's rules and are sufficient to safeguard the public health, the local rules may be enforced only as a supplement to the State rules where either the local rules deal with a subject that is not regulated by the State rules or a peculiar local condition or circumstance or an emergency mandates a more stringent local requirement than specified in the State rules.

10 N.C.A.C. 10A.1915 of the State sewage disposal rules requires the issuance of a written permit by the local health department before the installation, repair or renovation of a sewage disposal system. As described in our recent Opinion, dated August 13, 1979,

to Dr. Thomas R. Dundon (49 N.C.A.G. 12), the local health departments enforce the State sewage disposal rules under the direction of the Department of Human Resources. The 1915 permit is required for residences, businesses and places of public assembly. The improvements permit under G.S. 130-166.25, however, is required only for residences. Therefore, where the local health department is enforcing supplemental rules pursuant to G.S. 130-17(b), two permits are required for residences. (The two permits may be printed on the same paper.) Where the local health board rules have been approved under G.S. 130-160(b), only a local permit is required for residences as well as businesses and places of public assembly.

Where the local health department is enforcing the State sewage disposal rules, appeal of any action by the local health department is to a hearing officer of the Department of Human Resources and is governed by the provisions of the Administrative Procedure Act, G.S. 150A-1 *et seq.* Where the local health department is enforcing local rules approved under G.S. 130-160(b) or supplemental rules authorized by G.S. 130-17(b), appeal is to the local health board pursuant to G.S. 130-166.29 for residences or as otherwise provided in the local regulations for businesses and places of public assembly.

Finally, where the local health department is enforcing State sewage disposal rules, the local sanitarians are required to be the authorized representatives of the Department of Human Resources. See our Opinion to Dr. Thomas R. Dundon, *supra*. Conversely, if the local health department is enforcing its own rules, there is no requirement that the sanitarians be authorized representatives of the Department of Human Resources.

Rufus L. Edmisten, Attorney General
Robert R. Reilly
Assistant Attorney General

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2 November 1979

Subject: Counties; Department of Human Resources; Radioactive Material; Radiation

Sources; Licensing; Radiation Protection Act; G.S. 104E-21; G.S. 153A-128

Requested by: Mr. I. O. Wilkerson, Jr.
Director
Division of Facility Services

Question: What is the legal effect upon the licensure activities of the Radiation Protection Section of the Department of Human Resources of current and proposed county ordinances which regulate radiation sources?

Conclusion: The county ordinance attached to your inquiry (purporting to make it unlawful for any person to use, manufacture, produce, process, store, bury, transport, transfer, receive, acquire, own or possess radioactive material except for medical diagnosis or treatment), and substantially similar ordinances, would appear to have no direct legal effect on the licensure activities of the Department in the area of licensure of radioactive material and radiation machines.

The Department of Human Resources derives its powers and duties to license and regulate radiation sources and the possession and use thereof from the North Carolina Radiation Protection Act (G.S. Chapter 104E) and the regulations of the Radiation Protection Commission duly promulgated thereunder. This Act contemplates a single, effective system of regulation of sources of radiation within the State and an orderly regulatory pattern within the State, among the states, and between the federal government and the State to the end that duplication of regulation may be minimized. G.S. 104E-3, G.S. 104E-4. Further, G.S. 104E-21 contains the proviso that local ordinances and regulations dealing with radioactive materials of the kinds regulated by the State be "consistent and compatible" with the provisions of the Radiation Protection Act and the rules and regulations promulgated by the Radiation Protection Commission.

It is recognized that Article 6 of Chapter 153A of the General Statutes, and specifically, G.S. 153A-128, appear to give the counties very broad authority to regulate, restrict or prohibit any possession or dealing with radioactive substances. Further, the Radiation Protection Act itself, by the aforementioned G.S. 104E-21, provides that ordinances or regulations of local governments "...relating to by-product, source and special nuclear materials shall not be superseded by this Chapter." This is immediately followed, however, by the above-mentioned proviso requiring consistency and compatibility. It is an established rule of statutory construction that the latest enactment will control or be regarded as an exemption to or qualification of the prior statute. *State Highway Commission v. Hemphill*, 269 N.C. 535. Since G.S. 153A-128 was enacted in 1973 and the Radiation Protection Act was enacted in 1975, we must conclude that G.S. 153A-128, as it pertains to radioactive substances of the kind licensed by the State, is qualified by the proviso of G.S. 104E-21 to the extent that a county's regulation thereof must be "consistent and compatible" with the provisions of Chapter 104E and the rules and regulations of the Commission duly promulgated thereunder. A county Board of Commissioners has no legislative authority not granted to it expressly or by necessary implication from expressly granted powers. *State v. Tenore*, 280 N.C. 238.

It would appear to be improbable that the county ordinance incorporated in your inquiry purporting to totally prohibit any possession or use of radioactive material in that county (except persons directly involved in the use of radiation machines or radioactive materials for medical diagnosis or treatment) could be construed as being "consistent and compatible" with our Radiation Protection Act by any definition of the quoted words. In view of the above-mentioned single system and orderly pattern of regulation contemplated by the Radiation Protection Act and the requirement of consistency and compatibility, it appears that the permissible area of regulation by a unit of local government of sources of radiation which are regulated by the State might be quite limited. In view of the mandate of this Act, the Department should refrain from action which might be construed as an endorsement of any questionable local ordinance.

Of course, the issuance of a license by the Radiation Protection Section will not exempt the licensee from an action by a county

or unit of local government for the purpose of enforcing its local laws pertaining to the use, possession and handling of sources of radiation. Therefore, if it is deemed desirable, it would be proper to include in all licenses for radiation sources a general admonition to the effect that issuance of the license does not constitute an exemption from such ordinances or regulations of municipalities, counties or boards of health.

This opinion is not to be construed to indicate that the Department should ignore all local ordinances or regulations, of which it may have knowledge, which, directly or indirectly, purport to regulate the use and possession of sources of radiation or the general activities which might be the subject of licensure by the Radiation Protection Division. For instance, a county, by zoning ordinance, might lawfully regulate the location of manufacturing or processing plants or storage warehouses. It is our opinion that the Department should not knowingly license an activity to be conducted in such a location which would obviously be in violation of a zoning ordinance falling within constitutional bounds. Further, it is conceivable that there may be other local ordinances which might be consistent and compatible with the Act. These should be considered on an individual basis.

Rufus L. Edmisten, Attorney General
William F. Briley
Assistant Attorney General

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4 November 1979

Subject: Licenses and Licensing; Occupational
Licensing Board; Travel Expense of
Members; Proration of the Daily
Subsistence

Requested by: Henry L. Bridges
State Auditor

Question: Is the proration of the daily subsistence
allowance as promulgated pursuant to G.S.

138-6(a)(3) by the Division of State Budget, for the reimbursement of State employee for expenses incurred for lodging and meals when travel involves less than a twenty-four hour period, applicable to Occupational Licensing Board Members?

Conclusion:

Yes. G.S. 93B-5, which authorizes reimbursement of travel expense of Occupational Licensing Board Members in an "amount not to exceed that authorized under G.S. 138-6(a)(1)(2) and (3) for officers and employees of State departments", *incorporates by reference* the prorated amounts authorized for reimbursement for expenses incurred for lodging and meals when "travel involves less than a full day (twenty-four hour period)" as promulgated by the Division of State Budget pursuant to G.S. 138-6(a)(3).

An audit of the expenditures of the Electrical Contractors Licensing Board by the State Auditor reveals that in the prior fiscal year, Board Members were paid a flat fee in the amount of \$12.00 for subsistence (meals) when travel involved a period less than twenty-four hours. Regulations promulgated by the State Budget Division contain a schedule for maximum reimbursement of subsistence expense which prorates the daily maximum reimbursement among each meal and lodging. This proration is applicable when travel involves less than a twenty-four hour period. The Board advised the State Auditor that the Budget Regulations promulgated pursuant to G.S. 138-6(a)(3), do not apply to the Board as it does not bank with the State Treasurer. The auditor inquired of this Office as to the applicability of the Budget regulations to the Occupational Licensing Boards.

G.S. 93-5(b) provides that Occupational Licensing Board Members shall be reimbursed for necessary travel expense *in an amount not to exceed* that authorized under G.S. 138-6(a)(1)(2) and (3) for officers and employees of State departments. G.S. 138-6(a)(3) provides for reimbursement for subsistence of a stipulated rate "per

day" and further provides that "when travel involves less than a full day (twenty-four hour period), a *reasonable prorated amount* shall be paid in accordance with regulations and criteria promulgated by the Director of the Budget." Pursuant to G.S. 138-6(a)(3), the Director of the Budget promulgated in Section 5.9 of the Budget Manual a schedule with a proration of the statutory daily rate to be applied "when travel involves less than a full day (twenty-four hour period)". Pursuant to the regulations, State employees, when travel involves less than a twenty-four hour period, are reimbursed expenses for lodging when traveling overnight and for breakfast, lunch and dinner in accordance with the schedule.

In cases where the travel involves a period less than twenty-four hours, G.S. 93B-5, in authorizing reimbursement of travel expense of Occupational Licensing Board Members of an amount NOT TO EXCEED THAT AUTHORIZED BY G.S. 138-6(a)(3) (for subsistence), incorporated by reference the schedule prorating the daily rate, promulgated by the State Budget Division pursuant to the provisions of G.S. 138-6(a)(3). Therefore, this Office is of the opinion that where the travel involves a period of time less than twenty-four hours, the amount of subsistence that Occupational Licensing Board Members are authorized to be reimbursed cannot exceed the amount produced by applying the schedule of the State Budget Division containing the daily subsistence rate prorated, to the lodging and meals involved in the travel of the Board members.

The Executive Budget Act, Article 1 of Chapter 143, provides for the preparation and administration of the State Budget. "State funds" within the definition of the Executive Budget Act" includes those funds collected by Occupational Licensing Boards. G.S. 143-1. However, the General Assembly has not included these Occupational Licensing Boards within the appropriation acts and these boards do not bank with the State Treasurer. Therefore, the Budget Division has no jurisdiction or control over these boards and except as indicated in this opinion the Budget Regulations do not apply to those Occupational Licensing Boards.

Rufus L. Edmisten, Attorney General
Eugene A. Smith
Special Deputy Attorney General

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21 November 1979

Subject: Motor Vehicles; Financial Responsibility,
Minimum Amounts

Requested by: Mr. J. M. Penny
Deputy Commissioner of Motor Vehicles

Question: Chapter 832 of the 1979 Session Laws increases the minimum insurance required under the Motor Vehicle Safety and Financial Responsibility Act. What is the effective date of this act and what affect will it have on policies in effect on the effective date?

Conclusion: The effective date of Chapter 832 of the 1979 Session Laws is January 1, 1980, and it has no affect on policies in effect prior thereto.

Chapter 832 of the 1979 Session Laws of North Carolina, effective January 1, 1980, raises the minimum amounts of financial responsibility for automobile liability insurance required under the Motor Vehicle Safety and Financial Responsibility Act from \$15,000.00 - \$30,000.00 - \$5,000.00 to \$25,000.00 - \$50,000.00 - \$10,000.00. The portions of the act relevant to the question presented read:

"Sec. 12. This act will not affect any policy in effect on the effective date of this act nor will this act affect pending litigation.

Sec. 13. This act shall become effective on January 1, 1980."

Since an insurance policy issued prior to January 1, 1980 would not be affected by the act, the act is prospective and has no retroactive effect. The new limits will apply only to insurance policies issued with an effective date of 12:01 A.M., January 1, 1980, and thereafter. Chapter 832 of the 1979 Session Laws does

not require that the limits of an automobile liability insurance policy in effect prior to January 1, 1980, which met the minimum requirements of the Motor Vehicle Safety and Financial Responsibility Act prior to that date, be raised until the annual renewal period occurring in 1980 or thereafter.

Rufus L. Edmisten, Attorney General
William W. Melvin
Deputy Attorney General

- - -

12 December 1979

Subject: Public Buildings; Plans and Specifications;
Job-Installed Finishes, Color Schedule

Requested by: Edward E. Hollowell
Attorney for Wake County Hospital, Inc.

Question: Does G.S. 133-1.1(g); which requires plans and specifications for the construction or repair of certain public buildings to include a "color schedule" for "job-installed finishes", apply to all finished material incorporated into the construction work at the site, such as paint, wall covering, flooring, tile, laminates and paneling?

Conclusion: Yes. This Office is of the opinion that the term, "job-installed finishes", refers to "the final treatment or coating of a surface" as the word "finish" is defined in Webster's Third New International Dictionary, and includes all of the items described when used as a final finish on the walls, ceilings, floor of the inside of a building as well as when used as a final finish on the outside of a building.

Rufus L. Edmisten, Attorney General
Eugene A. Smith
Special Deputy Attorney General

- - -

12 December 1979

Subject: State Departments, Institutions and Agencies; Department of State Auditor; Audit of Vendors of Hospital Services Receiving Funds from the Department of Human Resources; N.C.G.S. 147-58; N.C.G.S. 108-45.

Requested by: The Honorable Henry L. Bridges
State Auditor

Questions: 1. Does the Department of State Auditor have the authority to examine the documentation and files of vendors of hospital services to determine that payments by the Division of Medical Assistance of the Department of Human Resources were in accordance with State and federal statutes, regulations and policy?

2. May the Department of State Auditor, in the course of such an examination, examine files of vendors of hospital services that contain information which is confidential under the provisions of N.C.G.S. 108-45?

Conclusions: 1. Yes.

2. Yes, when as here, the examination is directly connected with the administration of programs of public assistance.

G.S. 147-58 specifies the duties and authority of the State Auditor.
G.S. 147-58(16) states, in pertinent part:

"The Auditor and his authorized agents are authorized to examine all books and accounts of any individual, firm, or corporation only insofar as it relates to transactions with any department, board, officer, commission, institution, or other agency of the State; provided that such examination shall be limited to those things which might relate to irregularities on the part of any State agency."

The above-quoted statute clearly grants general authority to the State Auditor to examine the records of vendors of hospital services to determine if any irregularities are involved in the payments made by the State agency to the vendors.

A further question of the authority of the State Auditor arises when the records to be examined contain information that is deemed confidential by law.

The confidentiality of records of the Department of Human Resources pertaining to persons applying for or receiving public assistance is established by G.S. 108-45(a), which provides:

"(a) Except as provided in (b) below (which exception is not pertinent here), it shall be unlawful for any persons to obtain, disclose or use, or to authorize, permit, or acquiesce in the use of any list of names or other information concerning persons applying for or receiving public assistance that may be directly or indirectly derived from the records, files or communications of the Department of Human Resources or the county boards of social services or acquired in the course of performing official duties except for purposes directly connected with the administration of the program of public assistance in accordance with the rules and regulations of the Social Services Commission."

The foregoing statute is in conformity with the requirement of 42 U.S.C.A. §1396a(a)(7) that State plans for medical assistance involving federal funds must:

"(7) provide safeguards which restrict the use or disclosure of information concerning applicants and recipients to purposes directly connected with the administration of the plan;"

A Memorandum of Understanding Between the Department of State Auditor and the Department of Human Resources, dated December 3, 1979, and signed by the State Auditor and the Secretary of Human Resources, describes the scope and purpose of audits by the Department of State Auditor as:

"Purpose: Audit effort by the Department of State Auditor is restricted to only such records which are related to the State administration of funds for the purpose of financial and operational review as they relate to State Administered Programs."

With regard to confidentiality of records, the *Memorandum* states:

"Confidentiality of Information: The State Auditor's exposure to confidential information as provided by State and Federal Statute will be subject to the same State and Federal regulations concerning release of Recipient and Provider information as is the Department of Human Resources."

The scope of audits by the Department of State Auditor, as described in the *Memorandum of Understanding*, brings such audits within "... purposes directly connected with the administration of the programs of public assistance..." (G.S. 108-45(a)) and "... purposes directly connected with the administration of the plan;" (42 U.S.C.A. §1396a (a)(7)). Further, the Department of State Auditor specifically acknowledges that it is subject to the same confidentiality provisions of State and Federal Statutes and regulations as is the Department of Human Resources.

Under these circumstances, the State Auditor is authorized by G.S. 147-58 (16) to conduct audits described in the *Memorandum of Understanding* of records of individuals, firms, and corporations relating to transactions with the Department of Human Resources, including vendors of hospital services.

Rufus L. Edmisten, Attorney General
Henry T. Rosser
Assistant Attorney General

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14 December 1979

Subject: Statutory Construction; Clerical Errors

Requested by: Dr. Sarah T. Morrow, M.D., M.P.H.,
Secretary
Department of Human Resources

Question: Can the erroneous reference to G.S. 130-166.52 contained in the penalties section of G.S. 130-166.54 be construed to correctly cite G.S. 130-166.53?

Conclusion: Yes.

G.S. 130-166.54(a) is that section of the North Carolina Drinking Water Act (Chapter 788, Session Laws of 1979) which provides for the assessment of administrative penalties. That section refers to violations of G.S. 130-166.42 as the occasion for assessing a penalty and does not cite G.S. 130-166.53 which defines prohibited acts under the statute.

In *Fortune v. Buncombe County Commissioners*, 140 N.C. 322, 52 S.E. 950 (1905), the Court dealt with the issue of clerical errors and misdescriptions contained in a statute. The opinion enumerated several cardinal rules to be used in statutory interpretation. A statute should be construed with reference to its general scope and the intent of the Legislature in enacting it. Further, in order to ascertain the purpose, the court must give effect to all clauses and provisions.

The court further stated:

"Clerical errors or misprisions, which if not corrected, would render the statute unmeaning or incapable of reasonable construction or would defeat or impair its intended operation, will not necessarily vitiate the act, for they will be corrected, if practicable."

This rule of construction was adopted from *Black on Interpretation of Laws*, §58, and the same principle has been applied in *State v. Woolard*, 119 N.C. 779, 25 S.E. 719 (1896); *Murphy v. Webb*, 156 N.C. 402, 72 S.E. 460 (1911); and *State v. Humphries*, 210 N.C. 406, 183 S.E. 473 (1936).

The North Carolina Drinking Water Act, G.S. 130-166.39 *et seq.*, was adopted with the stated purpose of regulating water systems within the state which supply drinking water to the public, G.S. 130-166.40. The Act provides authority for the adoption of a comprehensive regulatory program. G.S. 130-166.43 states that regulations will be promulgated to establish contaminant levels, and to include monitoring and analysis provisions. The section also provides for regulations to be adopted controlling recordkeeping and inspection, and design and construction criteria. There are other sections dealing with various aspects of public water systems. The statute was enacted to parallel the requirements of the Federal Safe Drinking Water Act of 1974, P.L. 93-523.

G.S. 130-166.54 is that part of the Act which provides authority to enforce the regulatory scheme. Paragraph (a) deals specifically with the assessment of administrative penalties:

"The Department may impose an administrative, civil penalty in accordance with the Drinking Water Regulations, on any person who violates G.S. 130-166.52. Such penalty shall not exceed five thousand dollars (\$5,000) for each day such violation continues."

The cited section, G.S. 130-166.52, deals with the notice required of water suppliers when a supplier fails to comply with particular regulatory requirements. This section is immediately followed by

G.S. 130-166.53 which describes prohibited acts. The "prohibited acts" include, among others, any violations of Drinking Water Regulations and failure to provide notice upon such violations.

Limiting the assessment of administrative penalties to those occasions when a water supplier fails to provide notice pursuant to G.S. 130-166.52, would undermine the regulatory scheme which the Act seeks to establish. The intent to create such a scheme is evident from the overall text of the Act which addresses in detail many aspects of public water systems and their regulation. Construing the citation to G.S. 130-166.52 literally would be contrary to the direction established by the Act as a whole. A literal construction would also effectively invalidate G.S. 130-166.53; the power to prohibit acts is dependent upon a corresponding power to enforce. In this specific context the intent of the Act will also be defeated.

Furthermore, the Act provides its own internal guide for construction. It has been held that the Court must consider this guide in construing statutory language, *In re Watson*, 273 N.C. 629, 161 S.E. 2d 1 (1968). G.S. 130-166.56 provides:

"This Article shall be interpreted as giving the State the authority needed to assume primary enforcement responsibility under the federal act."

The administrative penalties section, as written, will not provide the necessary enforcement authority required by the Federal Safe Drinking Water Act, P.L. 93-523. Also, in *Am Jur*, 2d § 193 STATUTES it is stated:

"In construing the statute of a state the courts have, in determining the intention of the legislature in enacting the Statute, often considered the Acts of Congress upon same and kindred subjects."

The federal act specifically requires a state to adopt adequate enforcement procedures and regulations no less stringent than federal regulations, Sec. 1413, P.L. 93-523. Federal regulation 40 C.F.R. 142.10(b)(vi) requires the state to have authority to assess civil or criminal penalties for violation of the State's Drinking Water Regulations.

On examining both the internal and external evidence, I conclude that the General Assembly intended to enact a program to govern public water systems, with extensive regulations and corresponding enforcement powers. The letter of G.S. 130-166.54(a) conflicts with that intent.

Therefore, I conclude: (1) under North Carolina law, State courts may enforce the intent of the (statutory) law if that intent conflicts with the letter of a particular provision of the law; (2) the legislative intent is for the penalty section to apply to violations of G.S. 130-166.53; and (3) further, a North Carolina court would be likely to enforce this legislative intent in construing G.S. 130-166.54.

Rufus L. Edmisten, Attorney General

- - -

17 December 1979

Subject: Nurse Practice Act; Administration of additional dosage of caudal analgesia by a registered nurse pursuant to direct orders from the attending physician

Requested by: Mr. Bryant D. Paris, Jr., Executive Secretary
North Carolina Board of Medical Examiners

Question: Following the setting in place of the needle for the injection of caudal analgesia and the administration of such analgesia to the patient, is it permissible for a registered nurse to administer additional dosage of the same medication pursuant to direct orders from the attending physician?

Conclusion: Yes.

The question concerns the general practice and procedure at Wake County Hospital System, Inc. and Rex Hospital with respect to the administration of caudals. A caudal catheter is put in place by a physician. The catheter is a teflon tube which is inserted in the

caudal space between the dura, which encloses the spinal cord and fluid, and the epidural space. An initial or charge-up dosage of the analgesic agent (either Marcaine or Nescaine) is administered by the physician by injection with a syringe into the catheter. The physician gauges from the patient's response to the initial dosage the proper amount for a refill dose. The physician instructs the registered nurse to call him or her when the analgesic begins to wear off. The physician then prescribes the refill dosage which the registered nurse administers by injection with a syringe through the caudal catheter which remains continuously in place. All subsequent refill doses are administered by the registered nurse only after the physician has been contacted and issues a new order.

G.S. 90-158(3) a. of the Nurse Practice Act defines "Nursing by a Registered Nurse" as follows:

"The practice of nursing by registered nurse means the performance for compensation of any act in the observation, care, and counsel of persons who are ill, injured, or experiencing alterations in normal health processes; and/or in the supervision and teaching of others who are or will be involved in nursing care; and/or the administration of medications and treatments as prescribed by a licensed physician or dentist. Nursing by registered nurses requires specialized knowledge, judgment, and skill, but does not require nor permit except under supervision of a physician licensed to practice medicine in North Carolina medical diagnosis or medical prescription of therapeutic or corrective measures. The use of skill and judgment is based upon an understanding of principles from the biological, social, and physical sciences. Nursing by registered nurse requires use of skills in modifying methods of nursing care and supervision as the patient's needs change."

The phrase "the administration of medications and treatments as prescribed by a licensed physician or dentist" is the focus of our inquiry. The North Carolina Board of Nursing's "Interpretation of the Legal Definitions of Nursing Practice" (Adopted August, 1977) sets forth the functions of a registered nurse as including:

- "4. *administration of medications and treatments* - the RN is accountable for:
- a. verifying that the medical order is accurate, appropriate, properly authorized and there are no documented reasons to contraindicate administration;
 - b. understanding the purpose of the medications and treatments;
 - c. determining: schedule, observations to be made, actions to be taken;
 - d. assigning of actions to self or other personnel for implementation; and,
 - e. establishing that the nursing staff member to whom action is assigned has the necessary competence and credentials to administer the medications and treatments."

The traditional functions of a physician, as codified in G.S. 90-18, are to diagnose, treat, operate on and prescribe. The insertion of the catheter and the prescription of dosages of an analgesic agent are traditional and accepted functions of a physician. The observation of the patient, the notification of the physician of a change in a patient's condition and the administration of dosages of an analgesic agent pursuant to the direct orders of the attending physician are the traditional and accepted functions of a registered nurse. See G.S. 90-158(3) a. and the "Interpretations" of the Board of Nursing. The administration of dosages by a registered nurse through a caudal catheter by injection with a syringe clearly involves more skill and judgment than the oral administration of medications. However, the degree of skill and judgment involved is not the test for discerning a physician's function from a legitimate function of a registered nurse. (The degree of skill and judgment does distinguish nursing by a registered nurse from nursing by a licensed practical nurse.) Rather, the test is whether the function involves diagnosis,

treatment, surgery or prescription for any human ailment. (See G.S. 90-18.) As noted above, the registered nurse does not perform any of these physician functions.

Therefore, it is the opinion of this Office that the administration of additional dosage of the same medication through a caudal catheter by injection with a syringe pursuant to direct order from the attending physician may be performed by a registered nurse.

Rufus L. Edmisten, Attorney General
Robert R. Reilly
Assistant Attorney General

- - -

19 December 1979

Subject: Social Services; Juveniles and Infants and Incompetents; Juveniles; Waiver of Right to Counsel before and during interrogation.

Requested by: Sgt. James Preston Simmons
Elkin Police Department

Question: Does the G.S. 7A-549 permit a juvenile, less than fourteen years of age, to waive his right to have an attorney present during interrogation?

Conclusion: Yes.

Chapter 815 of the 1979 Session Laws is effective January 1, 1980. Among its provisions is G.S. 7A-549, which says:

"(1) Any juvenile in custody must be advised prior to questioning:

- (a) That he has a right to remain silent; and
- (b) That any statement that he does make can be and may be used against him; and

- (c) That he has a right to have a parent, guardian or custodian present during questioning; and
 - (d) That he has a right to consult an attorney and that one will be appointed for him if he is not represented and wants representation.
- (2) When the juvenile is less than fourteen years of age, no in-custody admission or confession resulting from interrogation may be admitted into evidence unless the confession or admission was made in the presence of the juvenile's parent, guardian, custodian, as well as the juvenile must be advised of the juvenile's rights as set out in subsection (1); however, a parent, guardian, or custodian may not waive any right on behalf of the juvenile.
- (3)
- (4) Before admitting any statement resulting from custodian interrogation into evidence, the judge must find that the juvenile knowingly, willingly and understandingly waived his rights."

This statute sets clear rules for the treatment of juveniles fourteen years of age and older. They have the rights set forth in subsection (1), including the right to have a protective "parent, guardian or custodian present during questioning" and the right "to consult an attorney." They may waive these rights "knowingly, willingly and understandingly". G.S. 7A-549(4).

Juveniles less than fourteen are treated somewhat differently. Subsection (2) speaks specifically to them. Read literally, it gives the juvenile under fourteen the additional right to have some supportive adult, be it "parent, guardian, custodian or attorney" present when the young juvenile makes his in-custody confession or admission. However, the statute undoubtedly means that these persons must be present for the entire interrogation. Only this

meaning comports with the right afforded all juveniles by subsection (1)(c) to have their parents, guardians or custodians present during questioning.

The right given younger juveniles by subsection (2) differs from those in subsection (1) in that it cannot be waived, either by the juvenile or his parent, guardian or custodian. For younger juveniles, "no in-custody admission or confession resulting from interrogation may be admitted into evidence unless the confession or admission was made in the presence of the juvenile's parent, guardian, custodian or attorney." G.S. 7A-549(2) (Emphasis added) Lest there be any doubt of this conclusion, we note that Juvenile Code Revision Committee, drafters of the proposed legislation, wrote:

"The Committee heard from presentees that in many cases...the juvenile under 14 should be permitted to refuse to have any of the persons listed present. Those arguments were rejected." 1979 Report of the Juvenile Code Revision Committee, p. 183.

While the right afforded by subsection (2) cannot be waived, this is not to say that an attorney must be present during questioning of a child less than fourteen. The statute demands the presence of a "parent, guardian, custodian *or* attorney (emphasis added)," and any one of these will do. In fact, the statute explains what must be done whenever an attorney is not present. In that case, the parent, guardian or custodian who is present must be told of the rights available to the juvenile under subsection (1). G.S. 7A-549(2) (This procedure reinforces our earlier statement that the parent, guardian, custodian or attorney must be present during questioning, not merely present for the final confession. It makes no sense after the child's interrogation is complete to advise his parent—in the absence of an attorney—of the child's right to consult counsel or to have his parent present during questioning.)

In short, a juvenile less than fourteen years of age may waive his right to have an attorney present during questioning, but he may not waive his right to have some supporting adult, be it parent, guardian, custodian or attorney present at that time.

Rufus L. Edmisten, Attorney General
Steven Mansfield Shaber
Associate Attorney

I N D E X T O A T T O R N E Y

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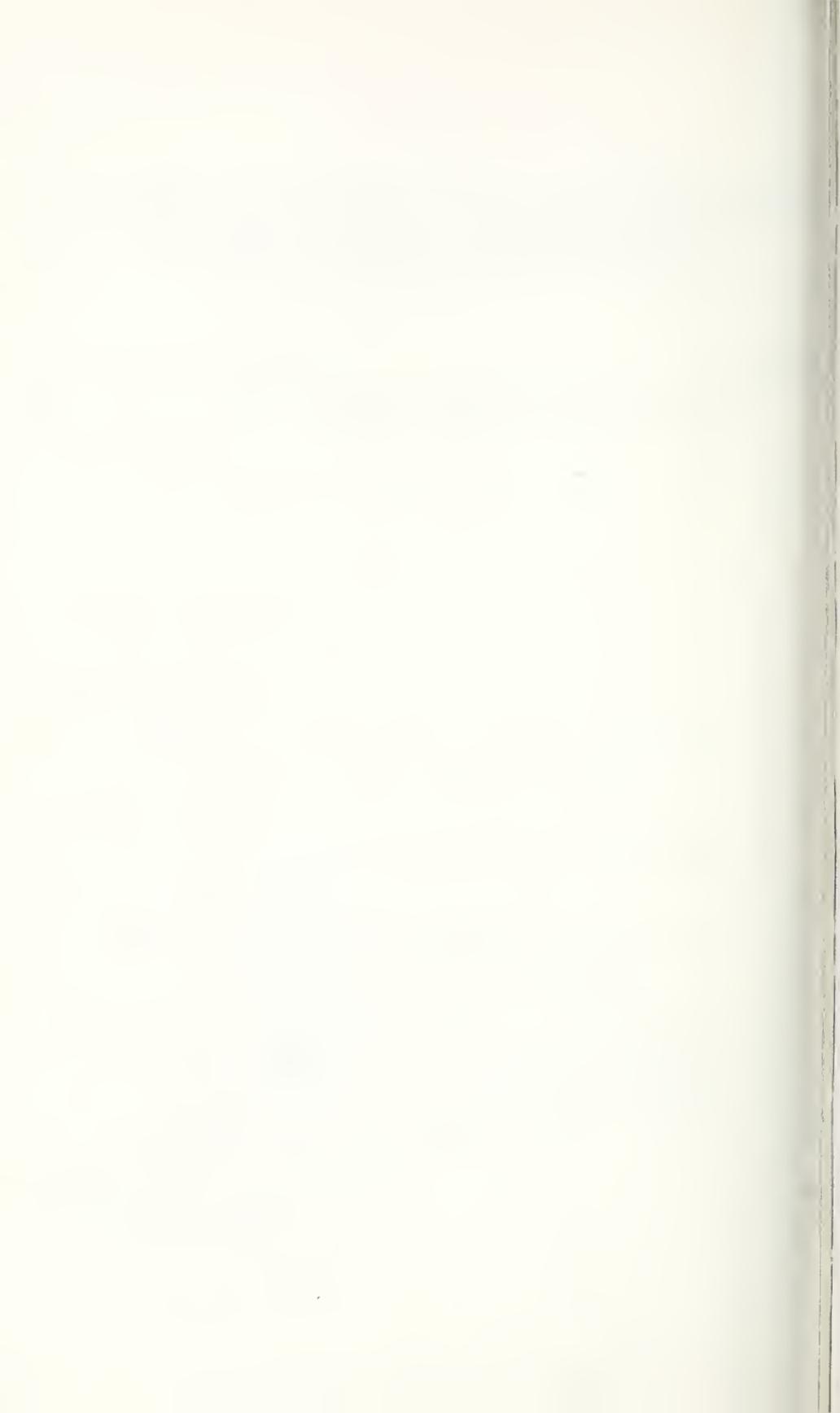
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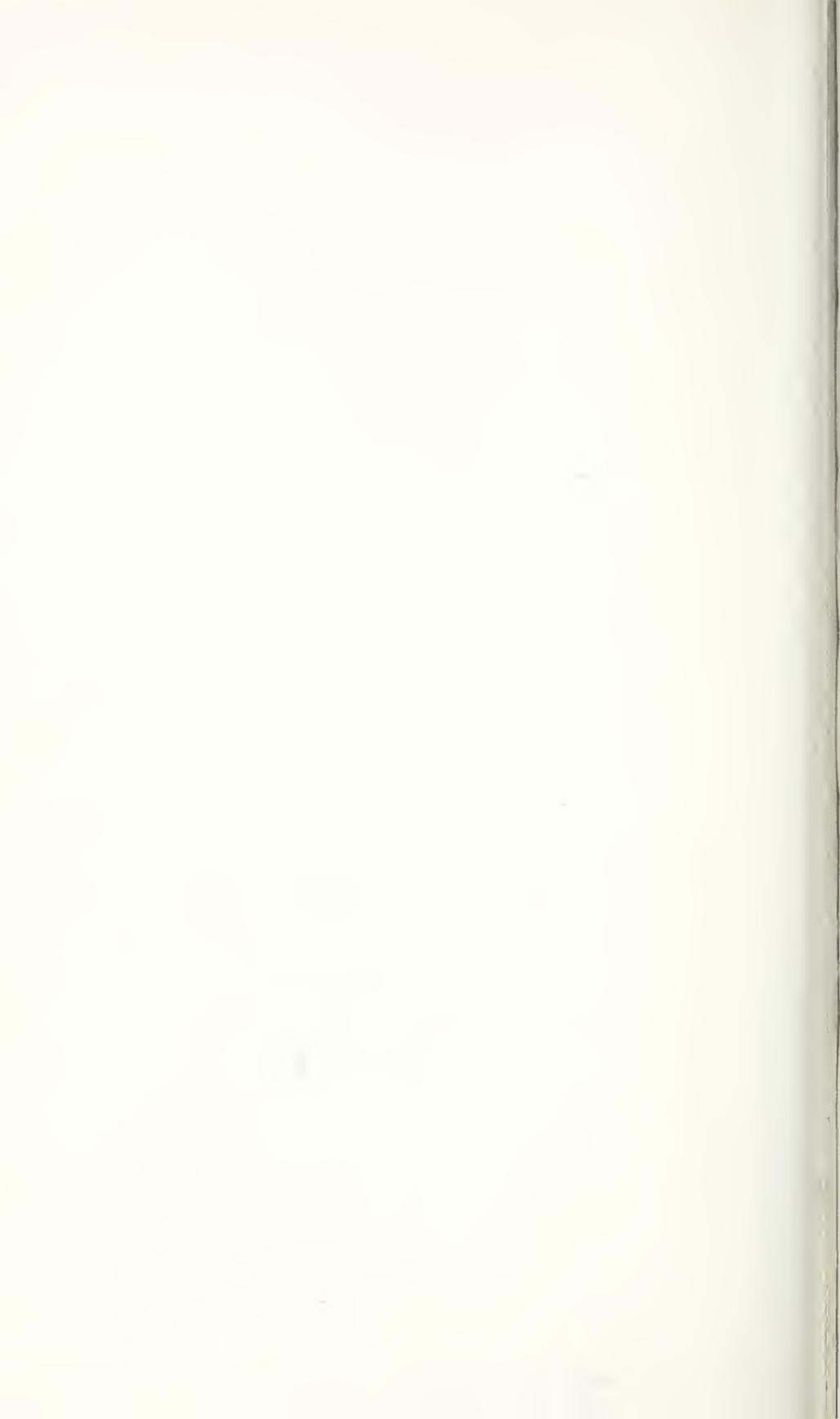
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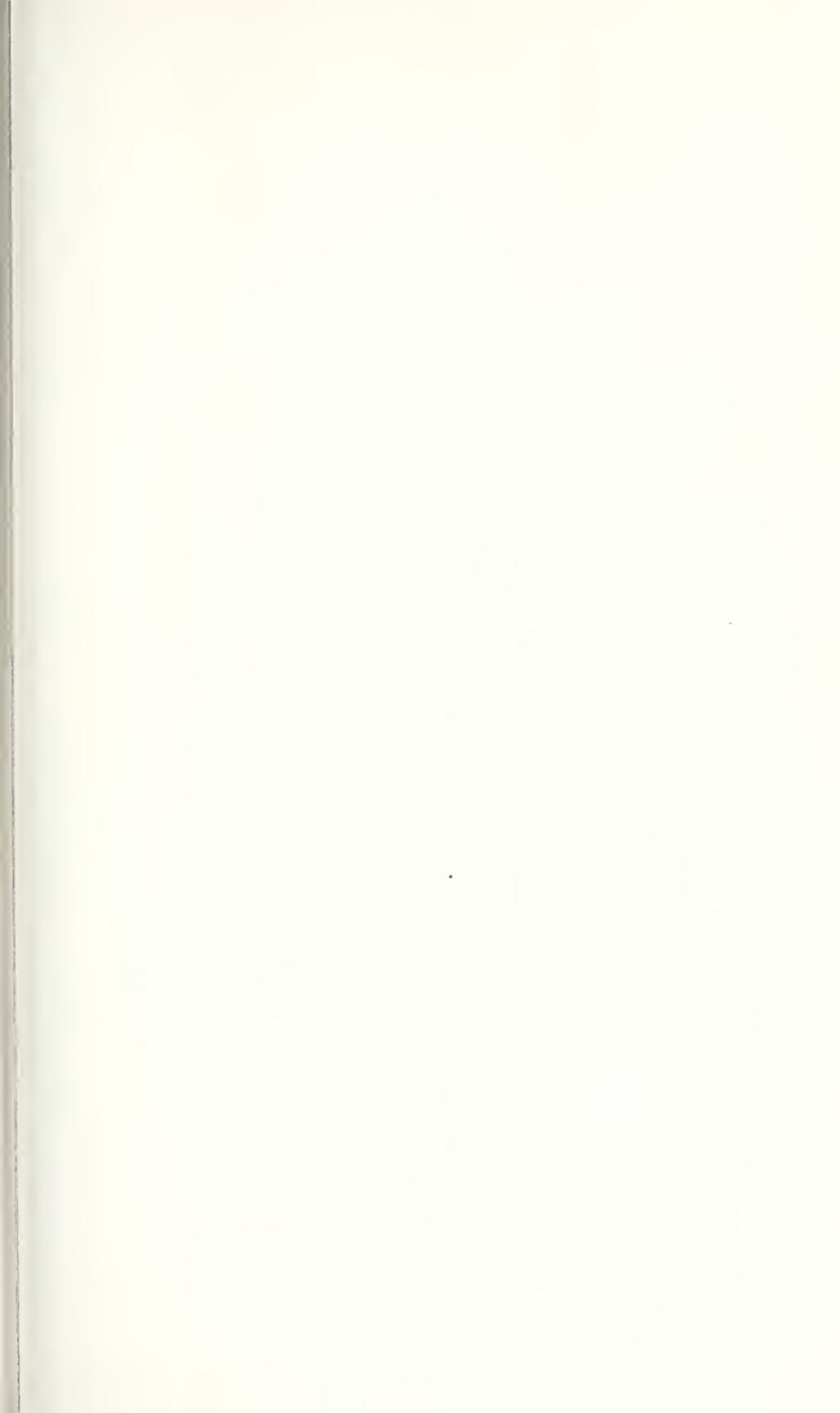
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NORTH CAROLINA
ATTORNEY GENERAL REPORTS

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NUMBER 2

RUFUS L. EDMISTEN
ATTORNEY GENERAL



NORTH CAROLINA
ATTORNEY GENERAL
REPORTS

Opinions of the Attorney General
January 1, 1980 through June 30, 1980

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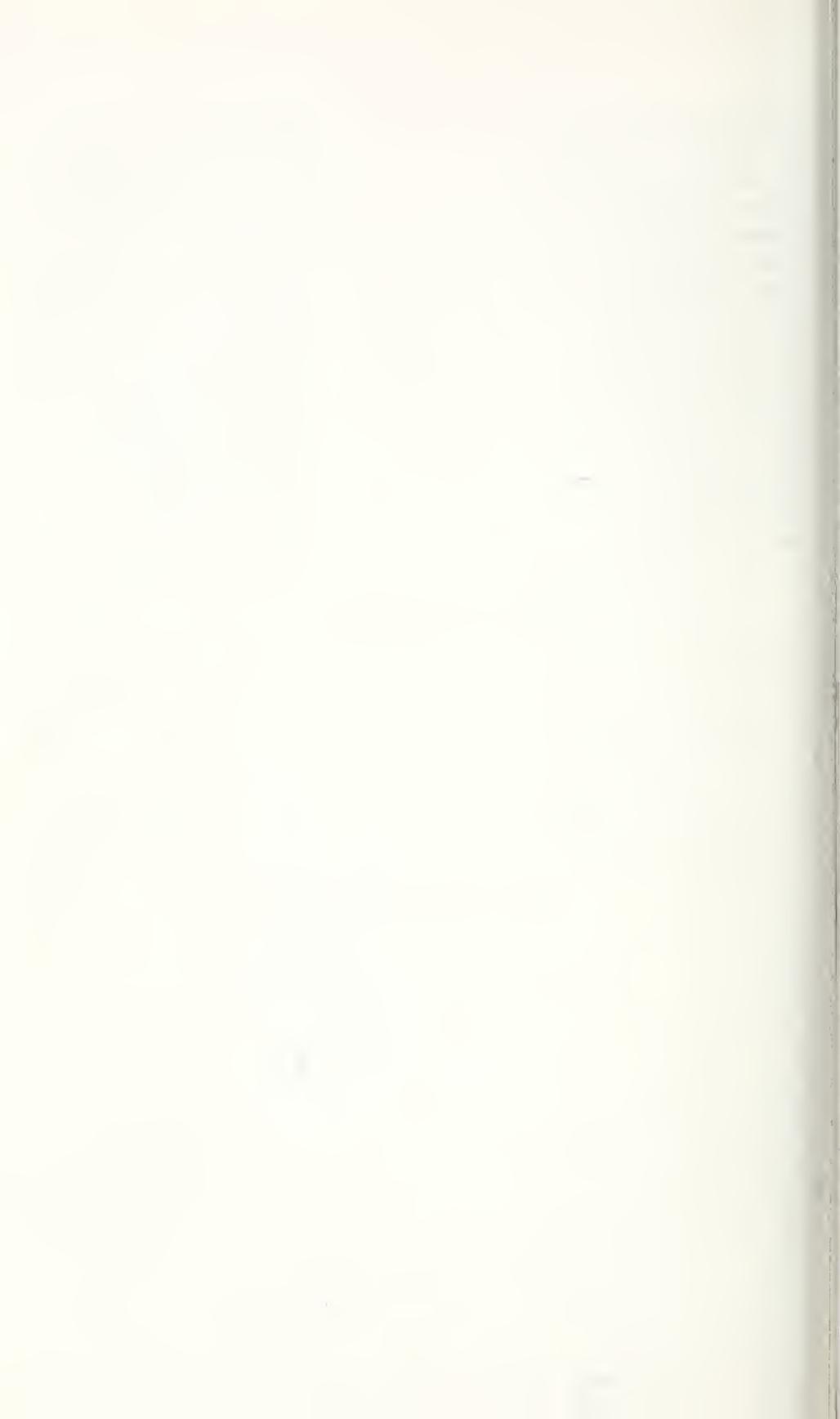
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Bartholomew F. Moore	1848-1851
William Eaton	1851-1852
Matt W. Ransom	1852-1855
Joseph B. Batchelor	1855-1856
William H. Bailey	1856-1856
William A. Jenkins	1856-1862
Sion H. Rogers	1862-1868
William M. Coleman	1868-1869
Lewis P. Olds	1869-1870
William M. Shipp	1870-1872
Tazewell L. Hargrove	1872-1876
Thomas S. Kenan	1876-1884
Theodore F. Davidson	1884-1892
Frank I. Osborne	1892-1896
Zeb V. Walser	1896-1900
Robert D. Douglas	1900-1901
Robert D. Gilmer	1901-1908
T. W. Bickett	1909-1916
James S. Manning	1917-1925
Dennis G. Brummitt	1925-1935

A. A. F. Seawell	1935-1938
Harry McMullan	1938-1955
William B. Rodman, Jr.	1955-1956
George B. Patton	1956-1958
Malcolm B. Seawell	1958-1960
Thomas W. Bruton	1960-1969
Robert Morgan	1969-1974
James H. Carson, Jr.	1974-1974
Rufus Ligh Edmisten	1974-

9 January 1980

Subject: Municipalities, Counties; Disposition of Real and Personal Property Between Units of Government; G.S. 160A-274.

Requested by: Robert C. Cogswell, Jr.
Fayetteville City Attorney

Question: In the sale, lease, exchange of real or personal property by a city or county pursuant to G.S. 160A-274, must the procedural requirements of Article 12, Chapter 160A be followed?

Conclusion: Yes.

G.S. 160A-274 was first enacted as G.S. 160-61.2 by Chapter 806, Session Laws of 1969. Subsection (c) thereof required a public hearing, notice published prior to the public hearing and action by the governing body.

Chapter 160 was rewritten by Chapter 698, Session Laws of 1971 and G.S. 160-61.2 became G.S. 160A-274. In addition, subsection (c) was rewritten by deleting the requirements of published notice and public hearing.

However, we believe it was the intent of the General Assembly for cities and counties to follow the procedures set forth in the sections of Article 12 dealing with a particular method of disposition.

G.S. 160A-266 requires the procedures prescribed in the Article to be followed. Thus when the city or county exercises authority under G.S. 160A-274, it should follow the procedures prescribed for the particular method of disposition.

We do not believe the city or county is restricted by G.S. 160A-272 as to the ten year lease periods therein, but should follow the procedural requirement for leases and rentals of property.

Rufus L. Edmisten, Attorney General
James F. Bullock
Senior Deputy Attorney General

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11 January 1980

Subject: State Departments, Institutions and Agencies; Department of Human Resources; Social Services; Counties; Administrative Procedure Act; N.C.G.S. 108-44; N.C.G.S. 108-109; N.C.G.S. Chapter 150A

Requested by: Honorable Henry L. Stevens, III
Resident Superior Court Judge
Fourth Judicial District

Question: Does a county department of social services have the right under North Carolina law to an appeal for judicial review of a final decision of the Department of Human Resources reversing the determination of the county department on an application for food stamps under Article 5, Chapter 108, North Carolina General Statutes?

Conclusion: No.

An application for food stamps was denied by a county department of social services. As is permitted by N.C.G.S. 108-109, the applicant appealed the denial to the Department of Human Resources. The Division of Social Services, Department of Human Resources, reversed the decision of the county department of social services and determined that the applicant was eligible for food stamps. The county department of social services is seeking to appeal the decision of the Department of Human Resources to the Superior Court for judicial review.

Chapter 108 creates county boards of social services and provides for administration of county social services programs. Among the

programs to be administered by the counties are those of public assistance, set forth in Article 2, which are aid to families with dependent children, State-county special assistance for adults, foster home fund and medical assistance. The respective boards of county commissioners, through the county departments of social services, administer and operate food stamp programs, as provided in Article 5 of Chapter 108.

Applicants for or recipients of public assistance under Article 2 of Chapter 108 may appeal, under N.C.G.S. 108-44, decisions made at the county level to the Secretary of Human Resources. Following an appeal hearing, the Secretary may modify, reverse or affirm a county decision. Under subsection (e) of N.C.G.S. 108-44, the applicant, recipient *or* the county board of social services may petition the Superior Court for judicial review of the order of the Secretary.

Applicants for or recipients of food stamps under Article 5 of Chapter 108 may appeal decisions of the county departments of social services to the Department of Human Resources, as provided in N.C.G.S. 108-109. Adverse final decisions of the Department of Human Resources may be appealed by applicants or recipients to the Superior Court for review, but there is no provision in Article 5 for an appeal by county commissioners or a county department of social services from an adverse final decision of the Department of Human Resources.

Based upon the language of Chapter 108 alone, therefore, it is concluded that neither a board of county commissioners nor a county department of social services has the legal right to petition the Superior Court for review of a final decision of the Department of Human Resources reversing the decision of a county department of social services concerning an application for food stamps.

A further question is whether, if a county department of social services has no right under Article 5 of Chapter 108 to petition for judicial review, it has such right under the provisions of Chapter 150A, the Administrative Procedure Act?

N.C.G.S. 150A-1(a) provides, in pertinent part:

"This Chapter shall apply except to the extent and in the particulars that any statute makes specific provisions to the contrary."

N.C.G.S. 150A-43 provides, in pertinent part:

"Any person who is aggrieved by a final agency decision in a contested case...is entitled to judicial review of such decision under this Article, unless adequate procedure for judicial review is provided by some other statute, in which case the review shall be under such other statute."

N.C.G.S. 108-44 provides the procedure for judicial review of final agency decisions relative to programs of public assistance defined in Article 2 of Chapter 108. It is noted that the statute specifically provides for filing by a county board of social services of petition for review of a final agency decision. N.C.G.S. 108-109 provides the procedure for judicial review of final agency decisions affecting food stamp applicants and recipients. While the statute specifically permits applicants and recipients to file petitions for judicial review, there is no provision permitting counties or county agencies to do so. It is concluded, therefore, that it is the legislative intent that N.C.G.S. 108-109 shall provide the exclusive method of judicial review, and that counties and county agencies shall have no right to judicial review of final agency decisions affecting food stamp matters.

It is also noted that the right to judicial review granted by N.C.G.S. 150A-43 is limited to persons "...aggrieved by a final agency decision..." "Person aggrieved" is defined by N.C.G.S. 150A-2(6) as "...any person, firm, corporation, or group of persons of common interest who are directly or indirectly affected substantially in their person, property, or public office or employment by an agency decision."

This Office is informed by the Department of Human Resources that while substantial county funds are or may be involved in the programs of public assistance provided for in Article 2 of Chapter 108, the food stamps provided for in Article 5 are funded entirely by the federal government. The only county funds are or may be

involved in the programs of public assistance provided for in Article 2 of Chapter 108, the food stamps provided for in Article 5 are funded entirely by the federal government. The only county funds involved may be some portion of the cost of administering the program. Upon these facts, it appears that counties have or may have a substantial financial or property interest in public assistance programs, but have little or no such interest with regard to food stamps. It is concluded, therefore, that a county or county agency is not a "person aggrieved," within the purview of Chapter 150A, by final action of the Department of Human Resources relative to a food stamp applicant or recipient.

Rufus L. Edmisten, Attorney General
Henry T. Rosser
Assistant Attorney General

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16 January 1980

Subject: Criminal Law and Procedure; Domestic
Violence Act; Civil Contempt; Notice;
Arrest

Requested by: Mary Claire McNaught
Public Safety Attorney
City of Winston-Salem

Question: If a protective order is issued pursuant to
the Domestic Violence Act and the officer
finds probable cause to believe the order
is being violated but the offender is
unaware of the order, is the officer
compelled by G.S. 50B-4(b) to take the
offender into custody?

Conclusion: No.

The 1979 General Assembly enacted the Domestic Violence Bill, Chapter 561, 1979 Session Laws. This Act became effective on October 1, 1979 and was reprinted in the Advance Legislative

Service as Chapter 50A. The Act is codified as Chapter 50B.

The purpose of this statute was to provide law enforcement officers with a tool for preventing assaults by family members prior to the crime occurring. See A Crime Control Agenda for North Carolina p. 28 (1978). This Act provides for the Court to issue a protective order or approve a consent agreement to bring about a cessation of acts of domestic violence. The order or agreement may direct a party to refrain from some act, grant possession of a residence of a party and exclude others, require a party to provide alternative housing, or temporary custody of children, order eviction of a party, order either party to make payments for support of minor children, order either party to make payments for support of a spouse, provide for possession of personal property of parties, order a party to refrain from harassing or interfering with the other, and award cost and attorney's fees to either party. G.S. 60B-3(a).

A copy of any order entered and filed under this Article is issued to each party. In addition, a copy of the order is issued to and retained by the police department or the sheriff's department. G.S. 50B-3(c).

Enforcement of this order or agreement is as follows:

"A law enforcement officer *shall arrest* and take a person into custody if the officer has probable cause to believe that the person has violated a court order excluding the person from the residence or household occupied by a victim of domestic violence or directing the person to refrain from harassing or interfering with the victim and if the victim presents the law enforcement officer with a copy of the order or the officer determines that such an order exists through phone, radio, or other communication with appropriate authorities. The person arrested shall be brought before the appropriate district court judge at the earliest time possible to show cause why he or she should not be held in civil contempt for violation of the order...." G.S. 50B-4(b). (Emphasis added).

The General Assembly has created a new tool of enforcement to prevent crime. The remedy, however, is that for civil contempt. There seems to be no reason to distinguish this type of civil contempt from other civil contempt. The statutes relating to civil contempt (formerly G.S. 5-5 - 5-8, now 5A-21) are criminal in nature must be strictly construed. IN RE HEGE, 205 N.C. 625, 630, 172 S.E. 345 (1933). The failure to obey an order must be willful. *Jarrell v. Jarrell*, 241 N.C. 73, 74, 84 S.E. 2d 328 (1954) "A person cannot be punished for contempt in failing to obey an order issued by a court unless his disobedience is willful...One acts willfully when he acts knowingly and of stubborn purpose. *Lamm v. Lamm*, 229 N.C. 248, 249-50, 49 S.E. 2d 403 (1948); *Mauney v. Mauney*, 268 N.C. 254, 286, 150 S.E. 2d 391 (1966). The intent to show disrespect or contempt for the court is not necessary. *Hart Cotton Mills v. Abhrams*, 231 N.C. 431, 439, 57 S.E. 2d 803 (1950). Notice, however, must be proved. Actual notice, as opposed to formal notice, is all that is necessary. *Erwin Mills, Inc. v. Textiles Workers Union*, 234 N.C. 321, 330, 67 S.E. 2d 372 (1951). Knowledge of a person of the substance and meaning of an order is sufficient knowledge for prosecution for contempt and is not required that such person have knowledge of the exact words used in the order. *Id.*

The new civil contempt statute, G.S. 5A-21, does not specifically require a "willful" disobedience to a court order. G.S. 5A-21(a)(3), however, requires a showing that a person is "able to comply with the order or is able to take reasonable measures..." to comply. A person is not "able to comply" with an order of which he lacks knowledge.

It would therefore appear to be reasonable to strictly construe G.S. 50A-4(b) to require probable cause to believe that the person "willfully" violated a court order excluding him from the residence of the household occupied by the victim or directing the person to refrain from harassing or interfering with the victim. The officer, of course, does not have to believe the statement of the person to be arrested. He should examine all the facts and circumstances and if the facts would lead a prudent person to believe, a willful violation occurred, then he has probable cause and should arrest. *State v. Alexander*, 279 N.C. 527, 532, 124 S.E. 2d 274 (1971) (definition of probable cause).

It should be noted that Section 2, Chapter 561, 1979 Session Laws enacted G.S. 14-134.3. This statute provides for domestic criminal trespass. If a person enters after being forbidden to do so or remains after being ordered to leave by the lawful occupant, then he shall be guilty of a misdemeanor. If the person refuses to leave upon being notified of the order, then the officer would have probable cause to arrest for this offense. In addition, if the civil order is presented to the officer, he reads it to the person forbidden to be on the premises and the person then fails to leave, the officer would have probable cause that the arrestee has actual notice of the order. He shall then arrest the person.

Rufus L. Edmisten, Attorney General
Isaac T. Avery, III
Special Deputy Attorney General

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17 January 1980

Subject: Infants and Incompetents; Juveniles; North Carolina Juvenile Code; Criminal Law and Procedures; Show-up.

Requested by: Mary Claire McNaught
Public Safety Attorney
City of Winston-Salem

Questions: 1. If a juvenile under the age of 16 is apprehended operating a motor vehicle while intoxicated, is it permissible to administer a breathalyzer test to the juvenile without a nontestimonial identification order?

2. Is it permissible to have a show-up (one-on-one victim-suspect confrontation) without a nontestimonial identification order when the suspect is a juvenile?

Conclusions: 1. Yes.

2. Yes.

The 1979 General Assembly enacted the North Carolina Juvenile Code. Chapter 815, 1979 Session Laws. This new code became effective on January 1, 1980. Section 5, Chapter 815, 1979 Session Laws. Among the many amendments concerning juveniles is a specific prohibition against nontestimonial identification procedures on any juvenile without a court order issued in accordance with the Code. G.S. 7A-550 (to be codified as G.S. 7A-596).

"Nontestimonial identification" is defined to mean identification:

"...by fingerprints, palm prints, footprints, measurements, blood specimens, urine specimens, saliva samples, hair samples, or other reasonable physical examination, handwriting exemplars, voice samples, photographs, and lineups or other similar identification procedures required in the presence of a juvenile." G.S. 7A-550 (to be codified G.S. 596).

An order for a nontestimonial identification procedure may be issued by any judge of the district or superior courts upon request of a prosecutor. *Id.* The request for the order may be made (1) prior to taking a juvenile into custody, and (2) after custody and prior to adjudicatory hearing, or (3) prior to trial in superior court where a case is transferred to that court. G.S. 7A-551 (to be codified as 7A-597). Any person who willfully violates the provisions of the Code which prohibit conducting nontestimonial identification procedures without an order issued by a judge shall be guilty of a misdemeanor. G.S. 7A-556 (to be codified as G.S. 7A-602).

The Code neither authorizes nor forbids the use of the breathalyzer test on a juvenile. See *In Re Vinson*, ____ NC ____ (Fall Term 1979 No. 30) p. 12 n. 3. Since the statute does not forbid the use of the breathalyzer without a nontestimonial identification order, there appears to be no reason to prohibit it. It must be noted, that there is no authority to force or require a juvenile to submit to a breathalyzer test without an order (Blood specimens are specifically included as a nontestimonial identification procedure and therefore a blood test cannot be substituted in lieu of a breathalyzer test.).

G.S. 20-16.2(a) provides that any person who drives or operates a motor vehicle upon a highway or public vehicular area shall be deemed to have given consent to a chemical test of his breath for the purpose of determining any alcoholic content if arrested for any offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of intoxicating liquor. If this statute applies, assuming that the taking into custody of a juvenile is an arrest within the meaning of this statute, then the juvenile may refuse the test. "If the person arrested willfully refuses to submit to the chemical test designated by the arresting officer, none shall be given." G.S. 20-16.2(c).

It therefore appears that an officer may take a juvenile into custody and request that the juvenile submit to the breathalyzer test. A voluntary submission to the test would appear to be appropriate and the results probably admissible. The test procedures set forth in G.S. 20-16.2 should be followed. Of course, a person under 16 will not lose a license to drive which he does not possess. He may, however, lose a learner's permit or be precluded from obtaining a license for six months if he willfully refuses the test. This is a civil matter within the auspices of the Division of Motor Vehicles. It is independent and separate from any juvenile proceeding. See *Joyner v. Garrett*, 279 N.C. 226 (1971).

The second question presented is whether a nontestimonial identification order is required for a juvenile prior to a "show-up". A show-up is a one-on-one confrontation between a victim and the suspect. "The practice of showing suspects singly to persons for the purpose of identification, and not a part of a lineup has been widely condemned. However, a claimed violation of due process of law in the conduct of the confrontation depends on the totality of the circumstances surrounding it..." *Stovall v. Denno*, 388 U.S. 293, 302 (1967).

The definition of nontestimonial identification found in G.S. 7A-550 (to be codified as G.S. 7A-596) is identical to the definition found in G.S. 15A-271. In fact, the commentary of the Juvenile Code Revision Committee, 1979 Report, p. 185 indicates that the definition was derived from G.S. 15A-271. The Supreme Court has previously held that a show-up is *not* a nontestimonial identification procedure within the meaning of G.S. 15A-271 *et seq.*

"Construing these statutes so as to achieve a logical relationship and to effectuate apparent legislative intent, we hold that Article 14 of Chapter 15A applies only to suspects and accused persons before arrest, persons formerly charged and arrested, who have been released from custody pending trial. The statute does not apply to an in-custody accused." *State v. Irick*, 291 N.C. 480, 490, 231 S.E. 2d 833(1977).

While the statutes in Chapter 7A and those in 15A differ to a certain extent, the statutes are sufficiently similar so as to conclude that a court will construe them the same. That is, a show-up is not a nontestimonial identification procedure requiring an order of the court.

G.S. 7A-551 (codified as G.S. 7A-597) provides for the orders to be issued "prior to taking a juvenile into custody, and prior to adjudicatory hearing, or prior to trial in superior court where a case is transferred to that court." This statute is similar to G.S. 15A-272. Both statutes indicate that the order was intended to apply to suspects who are not in custody or persons who have been arrested, posted bond and were released. See 45 N.C.A.C. 60 (1975). This conclusion is buttressed by G.S. 15A-274 which provides that the person named or prescribed in the affidavit or obtaining the order be required to appear at a designated place and time to submit to the nontestimonial identification. G.S. 7A-553 (codified as G.S. 7A-599) states that the judge may issue an order following the same procedures as in the case of adults under G.S. 15A-274. It would be illogical for the court to issue an order directing a juvenile to appear at a designated time and place when the juvenile is in custody and under the control of a law enforcement officer.

The most compelling reason for this conclusion is that the purpose of the Juvenile Code is to provide for juveniles to be rehabilitated and for the system to be sensitive to them. The most compelling reason for allowing a show-up is to "...guard against charging one whom the victim might exonerate." *State v. Banner*, 279 N.C. 595, 598 (1971). To require a juvenile be retained in custody until an order can be issued as opposed to be immediately taken to the victim and released when no identification is made, would appear contrary to the purpose of the Code. The General Assembly, surely, did not

intend to preclude the police from using very effective investigatory tool by requiring an order prior to a show-up.

It should be noted, however, that all safeguards and procedures for a show-up employed in the adult case should always be employed for juveniles. The same showing in juvenile court prior to admission of identification testimony must be made. See G.S. 7A-573, rules of evidence codified as G.S. 7A-634). The criticism of the show-up and the safeguards required would also apply to a juvenile. See *State v. Baker*, 34 N.C. App. 434 (1977); *Stoval v. Denno*, *Supra*.

Rufus L. Edmisten, Attorney General
Isaac T. Avery, III
Special Deputy Attorney General

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18 January 1980

Subject: State Departments, Institutions and Agencies; Social Services; Department of Human Resources; Department of Natural Resources and Community Development; Conflicts of Interest; N.C.G.S. 108-19; N.C.G.S. 143B-181.1; N.C.G.S. 143B-137; N.C.G.S. 143B-276; N.C.G.S. 143B-277; N.C.G.S. 14-234.

Requested by: Robert H. Ward, Director
Division of Social Services
Department of Human Resources
William W. Ivey, County Attorney for
Randolph County

Questions: 1. Does a conflict of interest arise if a county director of social services serves as a member of the board of directors of a non-profit corporation organized for the purpose of administering federal funds under the Comprehensive Employment and Training Act (29 U.S.C. Ch. 17; Pub. L. 93-203 (1973); Pub. L. 95-524 (1978)), when:

a. The non-profit corporation will administer federal funds through community programs to which the county department of social services may refer social service clients;

b. The county department of social services is a potential recipient, through the non-profit corporation, of federal funds, or services by employees of the non-profit corporation and of training of social service employees;

c. The director, as a member of the board of the non-profit corporation, will approve, or establish policy for entering into, contracts, including contracts with the county department of social services; and

d. Neither the county director of social services nor any member of his immediate family will realize any direct or indirect benefits by reason of any contractual or other relationship between the county department of social services and the non-profit corporation?

2. Does a conflict of interest arise if an individual, who is not a public official, serves as a member of the board of directors of a non-profit corporation organized for the purpose of administering federal funds under CETA and at the same time serves as a member of the board of directors of another non-profit corporation organized for the purpose of administering programs for the aging (Ch. 143B, Art. 3,

Part 14, N.C.G.S.; 42 U.S.C. Ch. 35; Pub. L. 89-73, as amended), when the circumstances and relationships between the corporations will be similar to those described in Question 1 above?

- Conclusions:
1. No.
 2. No.

The questions to which this opinion responds were couched in terms of whether it would be "proper" for persons to serve in the capacities described. It must be noted at the outset that this opinion is not addressed to questions of propriety—which are primarily questions of ethics, public mores or politics—but is addressed solely to questions of legality.

The first question for resolution is whether, under the laws of this State, the duties and responsibilities of a director of a county department of social services, on the one hand, and the duties and responsibilities of a member of the board of directors of a non-profit corporation administering CETA programs in that county, on the other hand, are such that a person serving in both capacities would be unable, *per se*, to fulfill his legal responsibilities to both organizations. The same question applies to a person simultaneously serving as a director of a non-profit corporation administering CETA programs and of a non-profit corporation administering programs for the aging.

In 1965, the Congress enacted Public Law 89-73, providing programs for older Americans to be administered by the U.S. Department of Health, Education and Welfare. The congress defined a number of worthy objectives of the law and stated: "...it is the joint and several duty and responsibility of the governments of the United States and of the several States and their political subdivisions to assist our older people to secure opportunity to the full and free enjoyment..." of the objectives defined by Congress. (42 U.S.C. 3001). In 1973, the Congress added a declaration of additional objectives, which states, inter alia: "It is therefore the purpose of this Act, in support of the objectives of this chapter, to ... (4) insure that the planning and operation of such programs will be undertaken

as a partnership of older citizens, community agencies, and State and local governments, with appropriate assistance from the Federal Government." (42 U.S.C. 3003).

The Comprehensive Employment and Training Act was enacted in 1973 with passage of Public Law 93-203. Among the purposes of the Act, as declared by Congress, are "...to provide job training and employment opportunities for economically disadvantaged, unemployed, or under-employed persons...", enhance self-sufficiency" and "...provide for the maximum feasible coordination of plans, programs, and activities under this chapter with economic development, community development, and related activities, such as vocational education, vocational rehabilitation, public assistance, self-employment training, and social service programs." (29 U.S.C. 801) Administration of the Act is placed in the U.S. Department of Labor.

The scheme of implementation is similar for each act: States qualifying under appropriate federal regulations receive grants of federal funds, which are then allocated by the States, together with State shares, to local agencies or organizations for grass roots administration.

The General Assembly subsequently acted to secure for this State the benefits of the federal programs. G.S. 143B-276 imposed upon the Department of Natural Resources and Community Development the duty: "To provide job training and promote employment for economically disadvantaged persons." G.S. 143B-277 provides that the DNRC shall include all executive functions of the State in the relation to "...the job training of economically disadvantaged persons and the promotion of employment for economically disadvantaged persons..."

A division of Aging was created in the Department of Human Resources by G.S. 143B-181.1, with the duty, among many others ...
(3) To stimulate, inform, educate and assist local organizations, the community at large, and older people themselves about aging, including needs, resources and opportunities for the aging, and about the role they can play in improving conditions for the aging; ...
(5) To provide advice, information and technical assistance to...non-governmental organizations which may be considering the

inauguration of services, programs, or facilities for the aging, or which can be stimulated to take such action..."

The basic goal of the programs of the Department of Human Resources is stated by G.S. 143B-137 to be "...to assist all citizens - as individuals, families, and communities - to achieve and maintain an adequate level of health, social and economic well-being, and dignity."

County directors of social services are directed by G.S. 108-19: "...(3) To administer the programs of public assistance established by this Chapter." Programs of public assistance established by Chapter 108 include aid to families with dependent children, special assistance for adults and medical assistance to the needy.

The objectives of the federal and state laws are totally consistent and harmonious--to provide assistance to those in need, whether the need rises from age, ill health or economic circumstances. The laws require not only that needs be met, but that opportunities be provided to the indigent, the jobless, the aged. All contemplate cooperative efforts, with CETA specifically stating that plans and programs under that act shall be coordinated with "social service programs." (29 U.S.C. 801).

There is no conflict in the means or ends of the respective programs. To a great extent they may be and are, both practically and legislatively, mutually dependent. This Office is informed that county directors of social services have been encouraged to become involved in CETA programs, because they are in a unique position to discern job opportunities in social services programs. Thus through interaction of the directors diverse responsibilities, the unemployed receive training and employment and social service recipients receive needed services. There is no reason that the same will not be true of a person simultaneously serving an organization administering CETA programs and an organization administering programs for the aged.

It is concluded, therefore, that no intrinsic legal conflict exists between the official duties of a county director of social services and his duties as a director of of a non-profit corporation administering CETA programs, which will prevent him from

discharging his legal responsibilities to both. The same conclusion applies to an individual serving simultaneously as a director of two separate non-profit corporations, one of which administers CETA programs and the other of which administer programs for the aging.

The second question for consideration is whether the activities in question would be in violation of G.S. 14-234. That statute provides, in pertinent part: "If any person, appointed or elected a commissioner or director to discharge any trust wherein the State or any county, city or town may be in any manner interested, shall become an undertaker, or make any contract for his own benefit, under such authority, or be in any manner concerned or interested in making such contract, or in the profits thereof, either privately or openly, singly or jointly with another, he shall be guilty of a misdemeanor."

The request for opinion indicates that there are or may be contractual relationships between the corporation administering the CETA programs and the county department of social services, as well as contracts between the corporations administering the CETA programs and programs for the aged. The request for opinion also states that the corporate directors receive no remuneration or other thing of value for their services as such, and, further, that neither the directors nor any member of their immediate families will realize any direct or indirect personal benefit by reason of the contractual or other relationships between the non-profit corporations or between the non-profit corporation and the county department of social services. Upon these facts, there is no violation of G.S. 14-234.

While this opinion is limited to a determination under the laws of this State, investigation and inquiry have not disclosed any federal statute or regulation applicable to the subject matter of the inquiry.

Rufus L. Edmisten, Attorney General
Henry T. Rosser
Assistant Attorney General

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25 January 1980

Subject: Public Officers and Employees; Conflict of Interest; Social Services; Contract of County Social Services Department with Corporation in Which Board Member Has Pecuniary Interest; N.C.G.S. 14-234(a)

Requested by: Mr. Timothy W. Howard
Attorney for Sampson County Department
of Social Services

Question: Does a prohibited conflict of interest occur when a funeral home in which the chairman of the county board of social services holds a pecuniary interest enters into a contract with the county department of social services to provide funeral and burial services for a ward or juvenile under the jurisdiction or custody of the county department of social services?

Conclusion: A conflict of interest may exist, within the purview of N.C.G.S. 14-234(a), if a contract is made under the facts stated.

The acting director of a county department of social services serves as guardian for certain individuals pursuant to N.C.G.S. 35-1.34 and, as guardian, receives and disburses funds, including Social Security payments for his wards' benefit.

In addition, the county department of social services has legal custody of certain juveniles for whom it serves as protective payee and makes disbursements for their benefit. The chairman of the county board of social services is a director of a funeral home and has a financial interest therein. The issue to be determined is whether a conflict of interest will arise under N.C.G.S. 14-234(a) if the acting director or the county department of social services enters into a contract with the funeral home to provide funeral and burial services for wards of the acting director or juveniles under the custody of the county board of social services.

N.C.G.S. 14-234(a) reads, in pertinent part:

"If any person appointed or elected a commissioner or director to discharge any trust wherein the State or any county, city or town may be in any manner interested shall become an undertaker, or make any contract for his own benefit, under such authority, or be in any manner concerned or interested in making such contract, or in the profits thereof, either privately or openly, singly or jointly with another, he shall be guilty of a misdemeanor."

Any contract with the funeral home would be made by the acting director, and presumably, there would be no contract between the funeral home and the board of social services. The director would be acting in his official capacity in making such contracts, however, and the board of social services is in a position to exercise substantial control over the director.

Under N.C.G.S. 108-15(1) and N.C.G.S. 108-17, the county board of social services appoints the director of social services for the county. The salary of the director is determined by the county board of social services pursuant to N.C.G.S. 108-18. The director serves as executive officer of the board and acts as its secretary, as provided in N.C.G.S. 108-19(1). In an Opinion of the Attorney General to the Honorable J. Hayden Wiggs, appearing in 40 N.C.A.G. 561, the question was whether a conflict of interest, within the purview of N.C.G.S. 14-234, would arise if a corporation built and leased houses to a municipal housing authority when the mayor of the municipality was president and owner of the corporation. The facts, reasoning and conclusion of that Opinion are analogous to the situation presented here.

It was stated in that Opinion, copy of which is attached:

"Although the corporation would be contracting directly with the housing authority, it is noted that the housing authority is created by the governing body of the municipality. More importantly, the mayor appoints the members of the authority and has the power to remove them from office. (G.S.

157-4-G.S. 157-8.) Thus, indirectly the contract would be with the municipality....

"In the absence of court decisions more directly in point with the facts presented, a definitive opinion cannot be expressed; however, the language of the cited cases indicate that the court may hold such a contract to be in violation of G.S. 14-234."

N.C.G.S. 14-234 has been amended since the date of the quoted Opinion, but none of the amendments exempt the matter under consideration from the application of the statute. As in the Opinion quoted above, it is concluded that the courts may hold the contract in question here to be in violation of N.C.G.S. 14-234(a).

Inquiry is also made, if a conflict exists, whether the conflict can be avoided by any steps short of resignation of the board member or non-participation of the funeral home in such contracts? In the light of the case law and previous opinions of this Office, no other alternatives come to mind. *State v. Williams*, 153 N.C. 595, quoted at length in the attached Opinion, should prove illuminating on this question.

Rufus L. Edmisten, Attorney General
Henry T. Rosser
Assistant Attorney General

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28 January 1980

Subject: Counties; Department of Human Resources; Aid to the Needy Blind; G.S. 111-13 through G.S. 111-20

Requested by: L. Earl Jennings, Jr.
Director
Division of Services for the Blind
Department of Human Resources

Question: Under the provisions of G.S. 111-13 through G.S. 111-20, what is the

requirement upon the Department of Human Resources and the individual counties with respect to accepting all cases involving applicants for special assistance to the blind, in which the applicants fully satisfy the eligibility requirements, regardless of the amount of funds appropriated for that purpose?

Conclusion:

The requirement upon the Department of Human Resources and the Boards of County Commissioners of the individual counties to accept all duly qualified and otherwise eligible applicants for special assistance to the blind remains the same and is not reduced or limited by the amount of funds appropriated by a county or by the General Assembly for the specific purpose.

The program for Aid to the Needy Blind mandated by G.S. 111-13 through G.S. 111-20 is a State program. The Department of Human Resources is charged with the supervision of its administration (G.S. 111-13) and with making the payments to persons qualifying for awards thereunder (G.S. 111-18). Once a state elects to establish a program for public assistance, it must meet constitutional standards and may not arbitrarily deny to a portion of its citizens the benefits of such program. *Sherbert v. Verner*; 274 U.S. 398, 10 L.Ed. 2d 965. An applicant who is fully qualified and eligible must be granted suitable relief under the applicable laws and regulations. For a board of county commissioners or the Department of Human Resources to deny that relief because of the inadequacy of current county and/or State appropriations would constitute a violation of that applicant's constitutional right to equal protection of law.

We realize of course, that public officials may not be required to do impossible acts such as the payment of awards where the absolute unavailability of funds would make payment of the total of such awards an impossibility. However, the pertinent statutes do not make the payment of these awards contingent upon whether the county of residence of the recipient has made timely payment of the full

amount of its share of such relief granted in that county as required by G.S. 111-17. That section provides that such award shall be paid from county, State and federal funds available. (This Opinion does not attempt to deal with the hypothetical situation where adequate funds for the *full payment* of all awards cannot be made available to the Department of Human Resources.)

Nothing heretofore said implies an opinion by this Office that the several counties are excused from payment of their share of the total amount of relief granted to blind applicants. G.S. 111-17 requires that a county's share of such be transmitted to the State Treasurer in equal monthly installments. It permits counties to borrow, within constitutional limitations, to make up any deficiency in its share caused by insufficiency of its appropriation. We believe that G.S. 111-17 imposes an obligation of the highest priority upon the several counties to use all lawful means to pay their share of the total relief granted in a timely manner. In the event it becomes absolutely impossible for a county to pay its full share of such assistance during a given fiscal year, the resulting deficiency remains a portion of the county's share to be provided for in its next appropriation and tax levy, pursuant to G.S. 111-17. Failure of a county to so provide would subject it to the sanction of that Section including the mandatory withholding of allocation of funds by the Department of Human Resources.

It is recognized that the provisions of G.S. 111-17 permitting a county to borrow to meet its part of the amount required for such aid may currently be rendered ineffective by the statutory limitation upon interest which may be paid.

Rufus L. Edmisten, Attorney General
William F. Briley
Assistant Attorney General

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5 February 1980

Subject: Nurse Practice Act; Emergency Medical Services Act of 1973 (G.S. Chapter 143, Article 56; Unlicensed Practice of Medicine

(G.S. 90-18); Nurse Practitioners (G.S. 90-18.2); Mobile Intensive Care Nurses; 21 N.C.A.C. 32G; Promulgation of Regulations Pertaining to Emergency Medical Services Personnel

Requested by:

I. O. Wilkerson, Jr.
Director
Division of Facility Services
Department of Human Resources

Questions:

1. Who has the ultimate authority to establish regulations pertaining to the functioning and certification of mobile intensive care nurses?

2. Do the statutes require the involvement of a joint subcommittee of the Board of Medical Examiners and the Board of Nursing in the development of regulations pertaining to mobile intensive care nurses and the subsequent adoption of regulations by both Boards?

Conclusions:

1. The ultimate authority and responsibility to establish regulations pertaining to the functioning and certification of emergency medical services personnel, including "mobile intensive care nurses" is, pursuant to G.S. 143-514, in the Board of Medical Examiners.

2. No. Under G.S. 143-514 emergency medical services personnel may, in the course of such duties, perform medical acts for which they are trained "...and as provided in the rules and regulations of such Board (of Medical Examiners), regardless of other provisions of law." Those certified and serving in the position of "mobile intensive care nurse" under the

regulations of that Board are "emergency medical services personnel" within the meaning of that statute. Therefore, involvement of the joint subcommittee of the Board of Medical Examiners and the Board of Nursing is not required in the development of regulations pertaining to their emergency medical services duties.

The Emergency Medical Services Act of 1973 (G.S. Chapter 143, Article 56) establishes a comprehensive emergency medical services program in the Department of Human Resources. G.S. 143-507. The Department is required to establish a program to improve and upgrade emergency medical services and to consolidate all State functions relating thereto, both regulatory and developmental, under auspices of this program. G.S. 143-508. Upon successful completion of training programs established by the Department (and other programs approved by the Board of Medical Examiners) "*...emergency medical services personnel may, in the course of their emergency medical services duties, perform such acts, tasks and functions as they have been trained to perform and as provided in rules and regulations of such Board, regardless of other provisions of law.*" G.S. 143-514. (Emphasis supplied)

The inquiry concerns "mobile intensive care nurses", a term which is not defined in the Act. However, G.S. 143-507(c) defines "emergency medical services" to "*...include all services rendered in responding to the individual's need for immediate medical care in order to prevent loss of life or further aggravation of physiological or psychological illness or injury.*" It is our opinion that personnel serving in the area coming within the definition of "emergency medical services", and certified and functioning as provided for in said Act and the rules and regulations of the Board of Medical Examiners, are "emergency medical services personnel" who may perform medical acts permitted thereunder, *regardless of other provisions of law.*

The regulations of the Board of Medical Examiners pertaining to mobile intensive care promulgated pursuant to the Act give the definition and functions of a "mobile intensive care nurse" and provide for certification by that Board upon recommendation by

the Department. 21 N.C.A.C. 32G. The position is an integral part of a mobile intensive care program as contemplated and provided for in those regulations. The mere fact that the Board's regulations provide that a certain position shall be held by a registered nurse does not take that position out of the scope of the Emergency Medical Services Act and the provision that such personnel may perform such acts that they have been trained to perform and as provided in the rules and regulations of the Board.

Therefore, it is our opinion that "mobile intensive care nurses" are "emergency medical services personnel" within the meaning of the Emergency Medical Services Act. They may perform acts, tasks, and functions in the area of emergency medical services, under the certification and accordance with the rules and regulations of the Board of Medical Examiners, regardless of other provisions of law. The involvement of the joint subcommittee of the Board of Medical Examiners of the Board of Nursing in the development of regulations pertaining to "mobile intensive care nurses", is not required.

Further, we are of the opinion that there is no conflict between the Emergency Medical Services Act and G.S. 90-18(14) and G.S. 90-18.2 as these laws pertain to the requirement for a registered nurse to be certified and function under rules and regulations promulgated by a particular Board or Boards. G.S. 90-18 is a punitive statute making it unlawful to practice medicine without a license but establishing certain exceptions to the definition of the practice of medicine. One of these covers "...the performance of acts otherwise constituting medical practice by registered nurse when performed in accordance with rules and regulations developed by a joint subcommittee of the Board of Medical Examiners and the Board of Nursing and adopted by both boards." There is nothing, however, which would prevent the General Assembly from legislating further exceptions or exemptions which might be codified in this or other sections of the General Statutes. It is our opinion that G.S. 143-514 establishes a further exemption to G.S. 90-18. It seems certain that no person could be successfully prosecuted under G.S. 90-18 for practicing medicine without a license when that person is acting in full compliance with G.S. 143-514 and the rules and regulations of the Board of Medical Examiners lawfully promulgated thereunder.

G.S. 90-18.2 imposes certain conditions upon those nurses (authorized to use the title "nurse practitioner") who are approved to perform medical acts in accordance with regulations jointly adopted by the Board of Medical Examiners and the Board of Nursing. Nothing in this section precludes the General Assembly from making other and different provisions for individuals, including registered nurses, permitting them to lawfully perform medical acts in specialized fields of practice with other certification.

Rufus L. Edmisten, Attorney General
William F. Briley
Assistant Attorney General

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6 February 1980

Subject: Insurance; Financing of travel insurance via credit cards; G.S. 58-61.2, as amended.

Requested by: Joseph E. Johnson, Representative
15th District

Question: Does the 1979 amendment to G.S. 58-61.2 permit insurance premiums to be charged to a credit card facility respecting travel accident insurance as to both public and private modes of transportation?

Conclusion: Yes.

Chapter 58 of the N.C. General Statutes does not define "travel" insurance, but does define many other types of insurance. For instance, respecting the definitions of both life and accident insurance, there is no limitation imposed concerning the use of public or private conveyances. G.S. 58-72. Prior to the 1979 amendment, G.S. 58-61.2, which deals with credit card financing of insurance, did not mention any particular kind of insurance but concerned itself with all kinds without restriction concerning public and private transportation.

As a result of the mentioned failures to limit, generally, the concept of travel insurance, we must conclude that prior to the 1979 amendment there was no statutory restriction as to the use of private or public conveyances concerning travel insurance.

The language of the 1979 amendment to G.S. 58-61.2, which is being here interpreted, is, respecting travel insurance, that:

"...any contract of travel accident insurance upon any life or risk in the State of North Carolina arising from travel, including but limited to airline flight insurance..."

The fact that *airline* flight insurance relates to insurance concerned solely with public transportation does not restrict the entire section so as to deal only with public transportation. The word "including" is not a word of limitation in this context but rather a word of enlargement. *Turnpike Authority v. Pine Island*, 265 N.C. 109, 120, 143 S.E. 2d 319 (1965).

Of primary importance is the fact that the statutory amendment concerns "travel" insurance. Primarily, such insurance would be in the nature of either life or accident insurance. As mentioned, G.S. 58-72(1) & (3), which defines both life and accident insurance, in no manner imposes limitations as to the type of transportation which can be used. More significantly the word "travel" has broad meaning. In 42A. *Words and Phrases*, Travel, among the many cited cases, are those which state:

"'To' 'travel' is to pass or make a journey from place to place, whether on foot, on horseback, or in any conveyance"

"'Travel' has no precise or technical meaning when used without limitation, but its primary and general import is to pass from one place to another, whether for pleasure, instruction, business or health."

For a similar definition, see 87 CJS, Travel, p. 907. Whether an accident suffered while traveling is within the scope of an accident policy depends upon the terms of the policy. 45 CJS, Insurance

§762. We believe that as used in the statute the word "travel" is of broad rather than of limited scope.

We do not believe that the statute uses the word "travel" in some technical sense so as to relate only to travel by public conveyance since "travel insurance" has no technical definition under the North Carolina General Statutes. Accordingly, the word "travel" must be interpreted in a non-technical sense; in this instance, by its popular definition. 82 CJS, Statutes §330.

We conclude that the legislature did not intend to permit financing of travel insurance by way of credit cards where travel is via public systems and to forbid such financing where the travel is via private systems. Both kinds of travel are treated the same and financing of both is allowable under the statute.

Rufus L. Edmisten, Attorney General
Richard L. Griffin
Assistant Attorney General

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12 February 1980

Subject: Real Estate; Antitrust Laws; Real Estate Brokers and Agents.

Requested by: Blanton Little, Secretary-Treasurer
N. C. Real Estate Licensing Board

Question: May a local Board of Realtors, a private trade association, require a licensed real estate agent to become a member of the Board in order to be eligible to apply for membership in or association with a multiple listing service corporation established by the Board?

Conclusion: No, if the multiple listing service is found to be an essential competitive tool in the real estate market it serves. (For clarification see opinion below)

This Office has previously issued an opinion that a local Board of Realtors, a private trade association, may not require a licensed real estate agent to become a member of the Board in order to be eligible for membership in a multiple listing service corporation established by the Board if the multiple listing service corporation is found to be an essential competitive tool in the real estate market it serves. (See 48 N.C.A.G. 38). Confusion has arisen as to whether this practice would be a *per se* violation under G.S. 75-1 and 75-2, and § 1 of the Sherman Act or whether a rule of reason approach should be used.

For clarification purposes, the previous opinion (48 N.C.A.G. 38) assumes that there is no reasonable relationship between membership in the local Board of Realtors and the operation of the multiple listing service. If there were a reasonable relationship, no unreasonable restraint of trade would result by reason of requiring membership in the Board of Realtors as a prerequisite to membership in the multiple listing service.

In analyzing requirements for participation in a multiple listing service, each case must be decided on its own facts. The competitive advantage of multiple listing service participation in the particular real estate market involved must be considered in light of the reasonableness of the requirements for participation and the extent to which such requirements restrict membership in the multiple listing service. Where the multiple listing service is operated as an adjunct of a local Board of Realtors, either as a separate corporation or as a committee of the Board, and where membership in the Board is available on reasonable and non-discriminatory terms, there is no unreasonable restraint of trade.

Rufus L. Edmisten, Attorney General
H. A. Cole, Jr.
Special Deputy Attorney General

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14 February 1980

Subject: Motor Vehicles; Licenses; Issuance of
Limited Driving Privilege; Conviction

Out-of-State, Out of County or in Federal Court

Requested by: James W. Hardison
Assistant District Attorney

Question: Under the provisions of G.S. 20-179(b)(3), must the application for a limited driving privilege by a person convicted in a county other than the county of his residence be made to a court of equivalent jurisdiction?

Conclusion: Yes.

G.S. 30-179(b), in relevant part, reads:

"(3) If a person is convicted in another state or county or in a federal court of an offense that is equivalent to one of the provisions of G.S. 20-138(a), 20-138(b), 20-139(a) or 20-139(b), and if the person's North Carolina driver's license is revoked as a result of that conviction, the person so convicted may apply to the presiding or resident judge of the superior court or a district court judge of the district in which he resides for a limited driving privilege. Upon such application the judge may issue a limited driving privilege in the same manner as if he were the trial judge.

(4) A district court judge may modify a limited driving privilege if:

- a. The holder of the limited privilege petitions the court for a modification of the privilege; and
- b. The privilege was issued by a district court judge; and
- c. The privilege was issued in the county in which the district judge is conducting court.

A superior court judge may modify a limited driving privilege if:

- a. The holder of the limited privilege petitions the court for a modification of the privilege; and
- b. The privilege was issued by a superior court judge; and
- c. The privilege was issued in the county in which the superior court judge is conducting court.

. . . .

(7) This subsection is supplemental and in addition to existing law and shall not be construed so as to repeal any existing provision contained in the General Statutes of North Carolina."

If the conviction is in another state or in the federal courts, application may be made either to the superior or district court in the county of residence of the person convicted as the question of state court jurisdiction would not be at issue.

However, if the provisions of the statute set out above are read in pari materia, it is our opinion that if the conviction occurs within another county of this state, the person convicted must, when applying for a limited driving privilege in the county of his residence, apply to an equivalent court; i.e., to the superior court if convicted in the superior court or the district court if convicted in the district court.

Rufus L. Edmisten, Attorney General
William W. Melvin
Deputy Attorney General

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15 February 1980

Subject: State Departments, Institutions and Agencies; Greater University or Education; THE UNIVERSITY OF NORTH CAROLINA; Licensing of Nonpublic Institutions; Scope of Exemption from Licensure Under N.C.G.S. 116-15(e).

Requested by: Mr. Richard H. Robinson, Jr.
Assistant to the President
General Administration
The University of North Carolina

- Questions:
1. If an institution of higher education which designates itself as and, in fact, is a "seminary, Bible school, Bible college or similar religious institution," undertakes to offer degree programs not intended to prepare students for pursuit of a religious vocation (e.g., bachelor's, master's or doctoral degrees in engineering or business), is such an institution subject to the licensure requirements of N.C.G.S. 116-15 with respect to such secular degree programs, or are all of its degree programs exempt by virtue of N.C.G.S. 116-15(e)?
 2. If an institution of higher education that does not designate itself as a "seminary, Bible school, Bible college or similar religious institution" (and which is largely secular) maintains a religious program, such as a school of theology, as an organizational component of the institution for offering instruction leading to a degree in such a religious program, is the institution subject to the licensure provisions of N.C.G.S. 116-15 with respect to such religious program, or is such program exempt by virtue of the terms of N.C.G.S. 116-15(e)?

3. Is the First Amendment offended by State licensure of the secular degree programs of a religious institution of higher education?

Conclusions:

1. A religious institution of higher education is subject to the licensure requirements of N.C.G.S. 116-15 only with respect to any secular degree programs it offers.

2. The religious degree programs of an institution of higher education are exempt from the licensure requirements of N.C.G.S. 116-15 by virtue of N.C.G.S. 116-15(e).

3. No.

Chapter 116 of the General Statutes deals with higher education. It confers upon the Board of Governors of the University of North Carolina the responsibility for planning and developing a coordinated system of higher education for this State. The General Assembly has vested the Board of Governors with this authority in order to improve the quality of education provided the State's citizens, to extend the benefits of education and to assure economic use of the State's resources. N.C.G.S. 116-1; N.C.G.S. 116-11(1). To accomplish these purposes, the Board of Governors has been granted, among other powers, expansive authority over the conferral of degrees by both public and nonpublic institutions of higher education. N.C.G.S. 116-11(c) and (6); N.C.G.S. 116-15(a) - (c). The Board's authority is complete in regard to the conferral of degrees by public institutions. The Board's authority in regard to nonpublic institutions of higher education, is exercised through the issuance, or denial, of a "license to confer degrees." N.C.G.S. 116-15(b). This authority is not unlimited. It is proscribed by the provisions of N.C.G.S. 116-15(e) which reads as follows:

"The foregoing provisions of this section shall not apply to any seminary, Bible school, Bible college or similar religious institution."

One institution of higher education presently operating within the State designates itself as a "Bible college" but offers bachelor's and graduate degrees in several secular areas such as engineering and business. Conversely, another private institution of higher education which does not designate itself as a "seminary, Bible school, Bible college or similar religious institution" and which offers degree programs principally in secular areas, does maintain within its organizational framework a school of theology and offers degrees in theology. The general question for determination here is whether, and to what extent, the degree programs of either of these institutions are exempt from the licensure requirements of N.C.G.S. 116-15 by virtue of the provisions of N.C.G.S. 116-15(e).

Because the applicability of the exemption in N.C.G.S. 116-15(e) to the degree programs of these two institutions is unclear on the face of the statute, reference must be made to the rules of statutory construction. *Young v. Whitehall Co.*, 229 N.C. 360, 49 S.E. 2d 797 (1948). "The cardinal principle of statutory construction is that the intent of the Legislature is controlling." *State v. Fulcher*, 294 N.C. 503, 520, 243 S.E. 2d 338 (1978). The manifest intent of the General Assembly in vesting the Board of Governors with the authority to license nonpublic institutions of higher education was to assure students enrolled at nonpublic institutions of higher education that the institution had resources sufficient to provide them with an adequate education and to protect the public at large from the fraud of "diploma mills." The intent of the General Assembly in providing an exemption from licensure for a "seminary, Bible school, Bible college or similar religious institution" is likewise manifest, namely, to assure the preservation of the protections of the Free Exercise Clause and the Establishment Clause of the First Amendment to the United States Constitution and the provisions of Article I, Sec. 13 of the North Carolina Constitution.

It may be argued that the literal language of N.C.G.S. 116-15(e) requires exemptions from the licensure requirements on an institutional basis without any regard to the secular or religious basis of the various degree programs of an institution. Such a reading thwarts the dual intent of the Legislature in enacting G.S. 116-15. On the one hand, it frees an institution of higher education ostensibly established solely as a Bible college to offer secular degree programs in areas such as engineering and business without any

regulation, to the potential detriment of its students and the public at large. On the other hand, such a reading places the Board of Governors in the position of licensing the religious degree programs of an institution of higher education which does not designate itself as and, in fact, is not a "seminary, Bible school, Bible college or similar religious institution."

Therefore, N.C.G.S. 116-15(e) should not be read literally. "If a strict literal interpretation of the language of a statute contravenes its manifest purpose, the reason and purpose of the law should control and the strict language thereof should be disregarded." IN RE HARDY, 294 N.C. 90, 95, 240 S.E. 2d 367 (1978). See also IN RE BANKS, 295 N.C. 236, 240, 244 S.E. 2d 386 (1978). By reading N.C.G.S. 116-15(e) to base exemptions from the licensure requirements of that statute upon the secular or religious nature of degree programs, rather than the designation or general nature of the institution itself, the dual manifest purposes of G.S. 116-15 are accomplished. It is the opinion of this Office that N.C.G.S. 116-15(e) should be read in accordance with those manifest purposes.

"Where possible, statutes should be given a construction which, when practically applied, will tend to suppress the evil which the Legislature intended to prevent." IN RE HARDY, *supra*, 294 N.C. at 96. Reading N.C.G.S. 116-15(e) as exempting an institution which is ostensibly merely a "seminary, Bible school, Bible college or similar religious institution" without any regard for the fact that such an institution may offer degree programs of a clearly secular nature is at direct variance with the very purposes of the General Assembly in enacting G.S. 116-15 and in contravention of the basic rules of statutory construction. Similarly, reading G.S. 116-15(e) as requiring the Board of Governors to license the school of theology of a private institution which is not, and does not purport to be, a "seminary, Bible school, Bible college or similar religious institution" is to "license religion." Such a reading would require a violation of the First Amendment to the United States Constitution and Article I, Sec. 13 of the North Carolina Constitution. "It is well settled that if a statute is reasonably susceptible of two constructions, one of which will raise a serious question as to its constitutionality and the other will avoid such question, the courts should construe the statute so as to avoid the constitutional question." *State v. Fulcher, supra*, 294 N.C. at 520. See also, *Lynch v. Overholser*, 369 U.S. 705 (1962).

To summarize to this point, G.S. 116-15(e) should be read to require the Board of Governors to base exemptions from the licensure requirements of N.C.G.S. 116-15 upon either the religious or secular basis of degree programs offered by an institution rather than upon either the manner in which the institution designates itself or the ostensible nature of the institution. Such a reading is consistent with the rules of statutory construction, most particularly the "cardinal principle" of statutory construction that the intent of the General Assembly is controlling.

This conclusion itself raises a constitutional question. Is the First Amendment offended by State licensing of the secular degree programs of a religious institution such as a "seminary, Bible school or Bible College?" The First Amendment to the United States Constitution contains two distinct protections for religion; the Free Exercise Clause which protects the right of the individual to adhere to and practice his own religious beliefs, and the Establishment Clause which requires separation of church and state. Neither of these protections is offended by State regulation of secular degree programs of religious institutions of higher education.

While the protection of the Free Exercise Clause is broad and expansive, that protection is neither absolute nor unlimited. The courts have consistently recognized the State's authority to act pursuant to the police power, even in areas which effect religious practices. *See Reynolds v. United States*, 98 U.S. 145, 25 L.Ed 244 (1878); *Cantwell v. Connecticut*, 310 U.S. 296, 84 L.Ed. 1213, 60 S.Ct. 900 (1940); *Prince v. Massachusetts*, 321 U.S. 158, 88 L.Ed. 645, 64 S.Ct. 438 (1944); and *Gillette v. United*, 401 U.S. 437, 28 L.Ed. 2d 68, 91 S.Ct. 828 (1971). Indeed, particular deference to this authority is found in the area of education. Since *Pierce v. Society of Sisters*, 268 U.S. 510, 69 L.Ed. 1070, 45 S.Ct. 571 (1925), a state may, without offending the Free Exercise Clause, "reasonably...regulate all schools, inspect them and examine their teachers and pupils..." 269 U.S. at 534. *See also, State v. Williams*, 253 N.C. 377, 117 S.E. 2d 444 (1960).

Where this regulatory authority has been discussed in the context of religious education, the United States Supreme Court has emphasized the principle that a state has a proper interest in the manner in which religious schools perform their secular educational

functions. *Board of Education v. Allen*, 392 U.S. 236, 20 L.Ed. 2d 1060, 88 S.Ct. 1923 (1968); *Wisconsin v. Yoder*, 406 U.S. 205, 236, 32 L.Ed. 2d 1526 (1972). As noted in *Wolman v. Walter*, 433 U.S. 229, 53 L.Ed. 2d 714, 97 S.Ct. 2593 (1977):

"There is no question that the State has a substantial and legitimate interest in insuring that its youth receive adequate secular education...." 433 U.S. 15 240.

Whether state licensure of particular degree programs would unconstitutionally infringe upon the religious freedoms of persons associated with a religious school is largely a question of fact. See *United States v. Ballard*, 322 U.S. 78, 88 L.Ed. 2d 1148, 44 S.Ct. 882 (1944); *Brown v. Dade Christina Schools, Inc.*, 557 F. 2d 310 (5th Cir. 1977), *cert. den.* 434 U.S. 1063, 55 L.Ed. 2d 763, 78 S.Ct. 1235 (1977). The touchstone for making such determinations was set forth by the Supreme Court in *Wisconsin v. Yoder, supra*.

"A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claim must be rooted in religious belief. Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which a society as a whole has important interests." 406 U.S. at 215-16.

The existence of a violation of the Establishment Clause of the First Amendment is determined on the basis of a three part test which has evolved over time. The three parts of this test are: whether the statute or regulation at issue has a secular purpose; whether its principal effect is one which either advances or inhibits religion; and whether it fosters an "excessive" government entanglement with religion. *Wolman v. Walter, supra*; *Roemer v. Maryland Public Works Board*, 427 U.S. 736, 49 L. Ed. 2d 179, 96 S.Ct. 2337 (1976); *Lemon v. Kurtzman*, 403 U.S. 602, 29 L.Ed. 2d 745, 91 S.Ct. 2105 (1971). N.C.G.S. 116-15 obviously has a secular purpose and neither

advances nor inhibits religion. Whether state regulations of the secular degree programs of a religious institution causes an "excessive entanglement" between government and religion is a more difficult question. The mere fact, however, that there exists a regulatory relationship between the government and a religious organization does not, of itself, establish an improper entanglement. As the Supreme Court has stated:

"Our prior holdings do not call for a complete separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable.... (citations omitted). Fire inspections, building and zoning regulations and state requirements under compulsory attendance laws are examples of necessary and permissible contacts." *Lemon v. Kurtzman, supra*, 403 U.S. at 614.

If state requirements under compulsory attendance laws are "necessary and permissible contacts" not violative of the Establishment Clause, it seems reasonable to conclude that the same result obtains in State regulation of the quality of secular degree programs at religious institutions of higher education. The underlying purpose of both forms of State regulation is the same, to assure that nonpublic institutions undertaking to provide the citizens of a state with a secular education have available resources sufficient to accomplish that purpose.

In sum, neither the Free Exercise Clause nor the Establishment Clause of the First Amendment of the United States Constitution are violated by our State's licensure of the secular degree programs of a religious institution. It is, of course, possible that the requirements of N.C.G.S. 116-15 could be applied in an unconstitutional manner. To guard against an application of N.C.G.S. 116-15 in violation of the Free Exercise Clause, the Board of Governors should make a case by case determination of whether the degree programs of a religious institution which are apparently secular in nature and purpose do, in fact, have a secular purpose and nature. Similarly, to guard against an application of N.C.G.S. 116-15 in violation of the Free Exercise Clause, the Board of Governors should insure that its contracts with religious institutions

are the minimum necessary to insure compliance with the purposes of that statute.

Rufus L. Edmisten, Attorney General
Eddie Speas
Special Deputy Attorney General

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15 February 1980

Subject: Mental Health; Area Mental Health, Mental Retardation and Substance Abuse Authorities; Replacement of Member of Area Mental Health, Mental Retardation and Substance Abuse Board.

Requested by: Mr. Grady B. Stott
Attorney for Gaston County Board of Commissioners

Question: In a two county area mental health, mental retardation and substance abuse authority, consisting of counties A and B, may the county commissioner who has been appointed to the area board by the Board of County Commissioners of county A unilaterally remove another member of that area board who happens to be from county A, or is it necessary that the removal have the concurrence of the county commissioner who has been appointed to the area board by the county Commissioner of county B?

Conclusion: The concurrence of both county commissioners serving on the area board is required in order to remove the member.

G.S. 122-35.39, *inter-alia*, provides:

"(c) In areas consisting of more than one county, each board of county commissioners within the area shall appoint one commissioner as a member of the area mental health, mental retardation, and substance abuse board. These members shall appoint the other members.

(d) The group of county commissioners authorized to make appointments to the area board shall appoint new members to the area mental health, mental retardation, and substance abuse board to fill vacancies occurring on the board prior to the expiration of the appointed term of office. Such appointments shall be for the remainder of the unexpired term of office. (1977, c. 568, s.1; c. 679, s.7; 1979, c. 358, ss. 5, 23.).

Additionally, G.S. 122-35.40(c) prescribes the term of appointment for members of the area boards but contains the following significant language:

"However, nothing contained herein shall prevent the county commissioners from replacing board members at any time pursuant to G.S. 122-35.39."

It should be noted that the county commissioner from county A who is serving as a member of the area board serves on the area board in an ex-officio capacity to his position as a county commissioner of county A. (G.S. 122-35.40(c)). It should further be noted that the present question does not deal with the replacement of this county commissioner from county A who is so serving as a member of the area board in an ex-officio capacity. Of course, that individual can only be replaced by the Board of County Commissioners who appointed him, i.e., the Board of County Commissioners of county A.

As affecting the question posed, the statutes make it very clear that it would require the concurrence of *both* the county commissioners from counties A and B who are serving ex-officio as area board members in order to validly appoint all of the other members of the area board. The same arithmetical computation relied upon for

appointment would mandate that the concurrence of *both* of the county commissioners from counties A and B serving ex-officio on the area board is required in order to replace any other non-commissioner member of the area board regardless of the county of residence of the member being replaced.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Special Deputy Attorney General

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26 February 1980

Subject: Lotteries; Bingo; Informal Organization
Conducting Games

Requested by: William L. Hill, III
Attorney for New Hanover County School
Board

Question: May an informal organization such as a Parent Teachers Organization (not an affiliate of a national or statewide PTA) or a Band Booster Club, conduct bingo games pursuant to G.S. §14-292.1(1), where the total value of all Prizes in cash or merchandise exceeds ten dollars (\$10.00) and in which the prize per individual bingo game does not exceed a value of ten dollars (\$10.00)?

Conclusion: Yes.

Subsection (1) of G.S. §14-292.1 reads as follows:

"(1) Nothing in this Article except subsection (k) of this section shall apply to bingo games when the only prize given is ten dollars (\$10.00) or less or merchandise that is not redeemable for cash and that has a value of ten dollars (\$10.00) or less. G.S.

18A-30(9) and 18A-35(h) shall apply to such games.
(1979, c. 893, s. 2)"

Subsection (1) defines the kind of bingo games to which G.S. §14-292.1 subsection (a) through (j) and the remainder of Article 37 of Chapter 14 of the General States, do not apply. Therefore, any individual or group, without regard to its tax exempt status, may operate a bingo game in which the prize is ten dollars (\$10.00) or less in value.

It is the opinion of the Attorney General that the North Carolina Legislature intended to limit the prize to ten dollars (\$10.00) or less per each individual bingo game. It is clear that the legislature intended to exempt bingo games with small prize values in comparison with the maximum prize values per individual game allowed by subsection (g) of G.S. §14-292.1. If the legislature intended to limit the aggregate amount of prizes to be given in a single session of several bingo games, it would have done so by specifically stating this in its definition of bingo games to which subsection (1) applies, as was done in subsection (g). Further, the phrase "the only prize given" in subsection (1) applies to an individual bingo game. In a session of bingo usually several individual bingo games are played. It is reasonable to assume that the legislature was aware of this usual characteristic of a session of bingo.

Hence, any organization (formal or informal) without regard to its tax exempt status, or individual, is allowed to conduct bingo games as long as the prize is ten dollars (\$10.00) or less in value for each individual bingo game played during a session.

Rufus L. Edmisten, Attorney General
Acie L. Ward
Assistant Attorney General

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27 February 1980

Subject: Motor Vehicles; Driving Under Influence
Offenses

Requested by: Ed McClearn
Assistant District Attorney
Tenth Prosecutorial District

Question: Under N.C.G.S. 20-179, where there is a prior conviction for driving under the influence, how many years must have elapsed in order that the current conviction may be considered a first conviction?

Conclusion: Three or more years must elapse.

N.C.G.S. 20-179(a), in relevant part, reads:

"Convictions for offenses occurring prior to July 1, 1978, or more than three years prior to the current offense shall not be considered prior offenses for the purpose of subdivisions (2) and (3) above."

As to the criminal penalty, this means that if a person was charged and convicted of DUI in June 1978, and then again in January 1980, the January 1980 conviction would be punishable as a DUI first offense, as no offenses occurring prior to July 1978 can be considered. Under the law prior to amendment, there was no imprisonment upon a conviction of second offense DUI. Thus, there can be no retroactive effect of the new law without violating the *ex post facto* rules.

However, the provisions of G.S. 20-179(b) are applicable only when the question of a limited driving privilege arises. In relevant part, it reads:

"For the purpose of determining whether the conviction is a first conviction, no prior offense occurring more than seven years before the date of the current offense shall be considered. In addition, convictions for violations of any provision of G.S. 20-138(a), 20-138(b), 20-139(a), or 20-139(b) shall be considered previous convictions. Convictions prior to January 1, 1980, shall be considered for purposes of this subsection."

The time limitation involved in G.S. 20-179(b) is seven years. Using the above example, the June 1978 conviction would be a first conviction. Thus, a January 1980 conviction would be a second conviction and a limited driving privilege would not be available. Because no criminal penalties are imposed, there is no *ex post facto* effect, and offenses occurring prior to the effective date of the statute can be considered. By way of further example, if a person was convicted of DUI in June 1962 and again in January 1980, more than seven years have elapsed between the convictions. The January 1980 conviction would then be a first conviction under G.S. 20-179(b), and the offender would be eligible for a limited driving privilege.

Rufus L. Edmisten, Attorney General
Jane P. Gray
Associate Attorney

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28 February 1980

Subject: Elections; Nolo Contendere Plea to Felony Charge; Loss of Right to Vote

Requested by: Bessie J. Cherry
Clerk of Court
Washington, North Carolina

Question: Upon the Court's acceptance of a plea of nolo contendere to a felony charge, does the defendant entering such plea become disenfranchised?

Conclusion: No.

The applicable Constitutional provision, Art. VI, §2(3) Constitution of North Carolina, reads as follows:

"(3) *Disqualification of felon.* No person adjudged guilty of a felony against this State or the United States, or adjudged guilty of a felony if it had been

committed in this State, shall be permitted to vote unless that person shall be first restored to the rights of citizenship in the manner prescribed by law."

This provision has been in effect since July 1, 1971, the effective date of the revised Constitution of North Carolina. Prior to that date the applicable Constitutional provision read as follows:

"§2. *Qualifications of voters.* - Any person who shall have resided in the State of North Carolina for one year, and in the precinct, ward or other election district in which such person offers to vote for thirty days next preceding an election, and possessing the other qualifications set out in this article, shall be entitled to vote at any election held in this State; provided, that the removal from one precinct, ward or other election district to another in this State shall not operate to deprive any person of the right to vote in the precinct, ward or other election district from which such person has removed until thirty days after such removal. *No person who has been convicted, or who has confessed his guilt in open court upon indictment, of any crime the punishment of which now is, or may hereafter be, imprisonment in the State's Prison, shall be permitted to vote, unless the said person shall be first restored to citizenship in the manner prescribed by law.*" (Emphasis added) Art. VI §2.

Responding to inquiries regarding whether the old constitutional provision would result in the loss of a citizen's right to vote by an individual pleading *nolo contendere* to a felony charge, this Office, on at least two occasions, May 29, 1953 and September 14, 1959, issued its opinion that "a person who enters a plea of *nolo contendere* to a felony charge is thereby deprived of his citizenship." Those opinions were based on the theory that "(the) policy of sending to the State's Prison persons entering pleas of *nolo contendere* to felony charges still exists and we can find no authority in the decisions of the North Carolina Supreme Court which would indicate that a plea of *nolo contendere* would protect a defendant from loss of citizenship."

With the enactment of the new Article VI, §2, however, it appears that the result of a *nolo contendere* plea is not the same. Sufficient authority did, and still does, exist to support the earlier rulings that the term "conviction" could be deemed to include the acceptance of a plea of *nolo contendere*, but the altered wording of the new provision, "adjudged guilty of a felony," is much more specific and not nearly so susceptible to differing interpretations. Further, in light of the seriousness of the deprivation of any of an individual's citizenship rights, it appears that we should refrain from continuing to hold that citizenship rights are lost simply because no State Supreme Court case can be found which indicates the contrary. It appears that considerations of fairness would compel an opinion protecting the citizenship rights of an individual in all cases where those rights have not been clearly and unequivocally forfeited.

"...A plea of *nolo contendere* empowers the judge to impose punishment as upon a plea of guilty, *State v. Norman* (276 N.C. 75, 170 S.E. 2nd. 923 (1969)) but it does not authorize or empower the judge to enter a *verdict* of guilty, *State v. Thomas*, 236 N.C. 196, 72 S.E. 2nd. 525 (1952), nor will such an entry support a recital in the judgement that the defendant has been 'found guilty.'" *St. v. Thurgood*, 11 N.C.App. 405, 181 S.E. 2nd. 128 (1971).

Thus, at least under the wording of the current Art. VI, 2§ of the Constitution of North Carolina, it appears that we cannot reasonably hold the plea of *nolo contendere* or "no contest" to a felony charge would result in the forfeiture of any rights of citizenship, including the right to vote.

It should be noted that, due to the variation in wording used before and after July 1, 1971, there is no necessity to overrule the opinions of May 29, 1953, September 14, 1959, or others which may hold similarly.

Rufus L. Edmisten, Attorney General
James Wallace, Jr.
Assistant Attorney General

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27 March 1980

Subject: Lotteries; Bingo; Raffles; Tax Exempt Organization

Requested by: Captain D. G. Jenkins
Greensboro Police Department
Vice/Narcotics Division

Question: May an organization which is exempt from federal income taxation pursuant to 26 U.S.C. 501(c)(7) and exempt from state taxation pursuant to N.C.G.S. §105-130.11(6) qualify as an exempt organization for the purposes of conducting bingo games and raffles pursuant to N.C.G.S. §14-292.1 subsections (a) through (k)?

Conclusion: No.

The type organization which is exempt from federal income taxation pursuant to 26 U.S.C. §501(c)(7) is specifically delineated. 26 U.S.C. §501(c)(7) reads as follows:

"(7) Clubs organized for pleasure, recreation, and other nonprofitable purposes, substantially all of the activities of which are for such purposes and no part of the net earnings of which inures to the benefit of any private shareholder."

The type organization which is exempt from North Carolina income taxation pursuant to N.C.G.S. §105-130.11(6) is also specifically delineated. N.C.G.S. §105-130.11(6) reads as follows:

"(6) Clubs organized and operated exclusively for pleasure, recreation, and other nonprofitable purposes, no part of the net earnings of which inures to the benefit of any private stockholder or member."

The type organization which may qualify as an exempt organization

for purposes of conducting bingo games and raffles pursuant to N.C.G.S. §14-292.1 subsections (a) through (k) is specifically delineated by subsection (b)(1) of N.C.G.S. §14-292.1. Subsection (b)(1) of N.C.G.S. §14-292.1 contains the definition of such exempt organizations for purposes of that statute and it reads as follows:

"(b) For purposes of this section, the term:

(1) "Exempt organization" means an organization that has been in continuous existence in the county of operation of the raffle or bingo game for at least one year and that is exempt from taxation under sections 501(c)(3), 501(c)(4), 501(c)(8)(sic), 501(c)(10), 501(c)(19), or 501(d) of the Internal Revenue Code or is exempt under similar provisions of North Carolina General Statutes as a bona fide nonprofit charitable, civic, religious, fraternal, patriotic or veterans' organization or as a nonprofit volunteer fire department, or as a nonprofit volunteer rescue squad or a bona fide homeowners' or property owners' association. (If the organization has local branches or chapters the term "exempt organization" means the local branch or chapter operating the raffle or bingo game.)"

Internal Revenue Code section 501(c)(7) is not found among those sections listed in subsection (b)(1). Further, N.C.G.S. §105-130.11(6) is not a provision similar to the Internal Revenue Code sections listed in subsection (b)(1) since G.S. §105-130.11(6) is similar to the Internal Revenue Code section 501(c)(7) which is quoted above.

Further, an organization with a tax exempt status defined by Internal Revenue Code section 501(c)(7) is not "a bona fide nonprofit charitable, civic, religious, fraternal, patriotic or veterans organization" as required in the definition of "exempt organization" in subsection (b)(1) of N.C.G.S. §14-292.1. Nor is such organization one of the remaining organizations named in subsection (b)(1).

The definition of exempt organization in subsection (b)(1) of G.S. §14-292.1 is very specific. Unless the exempt organization has one of the tax exempt statuses listed in subsection (b)(1), the

organization does not qualify as an exempt organization for the purpose of conducting a bingo game or raffle pursuant to G.S. §14-292.1 subsections (a) through (k).

Therefore, an organization which is exempt from federal income taxation pursuant to 26 U.S.C. 501(c)(7) (commonly referred to as Internal Revenue Code section 501(c)(7)), may not qualify as an exempt organization as defined in subsection (b)(1) of N.C.G.S. §14-292.1 for purposes of conducting bingo games and raffles pursuant to N.C.G.S. §14-292.1 subsection (a) through (j). N.C.G.S. §105-130.11(6) cannot qualify such an organization for purposes of conducting bingo games and raffles pursuant to N.C.G.S. §14-292.1 subsections (a) through (j). The above conclusions do not prevent such an organization from conducting bingo games pursuant to N.C.G.S. §14-292.1 subsection (1), which permits any organization or person to conduct bingo games when the only prize in cash or merchandise is ten dollars (\$10.00) or less.

Rufus L. Edmisten, Attorney General
Acie L. Ward
Assistant Attorney General

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28 March 1980

Subject: Motor Vehicles; Bicycles; Use of on Streets and Highways

Requested by: Curtis B. Yates
Bicycle Coordinator

Question: Do riders of bicycles have the same rights and responsibilities as operators of other vehicles when using the streets and highways.

Conclusion: Yes, except as to those which by their nature can have no application.

Chapter 20, of the General Statutes of N. C. in applicable parts, reads:

§ 20-4.01. *Definitions.*—Unless the context otherwise requires, the following words and phrases, for the purpose of this Chapter, shall have the following meanings:

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(7) Driver.—The operator of a vehicle.

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(13) Highway or Street.—The entire width between property or right-of-way lines of every way or place of whatever nature, when any part thereof is open to the use of the public as a matter of right for the purposes of vehicular traffic. The terms 'highway' or 'street' or a combination of the two terms shall be used synonymously.

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(25) Operator.—A person in actual physical control of a vehicle which is in motion or which has the engine running.

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(38) Roadway.—That portion of a highway improved, designed, or ordinarily used for vehicular travel, exclusive of the shoulder. In the event a highway includes two or more separate roadways the term 'roadway' as used herein shall refer to any such roadway separately but not to all such roadways collectively.

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(46) Street.—The entire width between property or right-of-way lines of every way or place of whatever nature, when any part thereof is open to the use of the public as a matter of right for the purposes of

vehicular traffic. The terms 'highway' or street' or a combination of the two terms shall be used synonymously.

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(49) Vehicle.--Every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, exempting devices moved by human power or used exclusively upon fixed rails or tracks; provided, that for the purposes of this Chapter bicycles shall be deemed vehicles and every rider of a bicycle upon a highway shall be subject to the provisions of this Chapter applicable to the driver of a vehicle except those which by their nature can have no application.

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§20-171.2. *Bicycle racing.* -(a) Bicycle racing on the highways is prohibited except as authorized in this section.

(b) Bicycle racing on a highway shall not be unlawful when a racing event has been approved by State or local authorities on any highway under their respective jurisdictions. Approval of bicycle highway racing events shall be granted only under conditions which assure reasonable safety for all race participants, spectators and other highway users, and which prevent unreasonable interference with traffic flow which would seriously inconvenience other highway users."

It should be noted that operators of bicycles and mo-peds are exempt from many requirements of the motor vehicle laws including, but not limited to, operators licensing laws, inspection laws and financial responsibility requirements due to the wording of the motor vehicle laws which couple the requirement to motor vehicles rather than just vehicles or to the phrase "registered" or "required to be registered."

Rufus L. Edmisten, Attorney General
William W. Melvin
Deputy Attorney General

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31 March 1980

Subject: Criminal Law and Procedure; Costs; Taxing
Cost Against Prosecuting Witness.

Requested by: Gary B. Tash, Judge
21st Judicial District Court

Questions: 1. Does G.S. 6-49 empower the court
to assess costs against the prosecuting
witness solely because prosecution does not
result in a conviction of the accused?

2. Is the presiding judge, prior to taxing
costs against a prosecuting witness,
required to make specific findings of fact?

Conclusions: 1. No.
2. Yes.

G.S. 6-49 provides, in pertinent part, that a prosecuting witness is potentially liable for the cost of prosecution, including witness' fees, "... if the defendant is acquitted, nolle prosequi entered, or judgment against him is arrested, or if the defendant is discharged from arrest for want of probable cause" The assessment of costs is appropriate where the court is of the opinion "... that there was not reasonable ground for the prosecution, or that it was not required by the public interest"

The fact that a prosecution does not proceed to a full hearing or result in a conviction should not raise a presumption that no reasonable ground existed for it, or that the public interest did not require it. This statute indicates that costs are to be charged against a prosecuting witness only when certain circumstances exist.

Case law requires that the presiding judge make findings of fact to bring the taxing of costs against the prosecuting witness within the requirements of G.S. 6-49.

In *State v. Roberts*, 106 N.C. 602, 10 S.E. 900, 901 (1890), the North Carolina Supreme Court stated:

"But the right of the court below to tax the prosecutor with costs does not arise as a matter of course. It only exists when one of the states of fact above recited is made to appear, by the expressed opinion or judgment of the Court. In the present case, there is no finding of fact by the judge in this regard, but simply a judgment that the prosecutor pay costs. This has no warrant in the law."

State v. Roberts, id., was interpreting Sections 737 and 738 of the Code, the language of which is virtually identical to G.S. 6-49 with respect to the questions under consideration.

Rufus L. Edmisten, Attorney General
Millard R. Rich, Jr.
Deputy Attorney General

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31 March 1980

Subject: Taxation; Trusts; Fiduciaries; Beneficiaries;
Intangibles Tax; Money on Deposit;
Income Tax; Liability for Tax on Trust
Income; Gift Tax; Taxable Gift to trust;
Inheritance Tax; Taxable estate gift to
estate; Payment of Estate liability by a
third person; Pre-need Burial Contract;
G.S. 65-36.1; G.S. 65-36.2; G.S. 65-36.4;
G.S. 105-2; G.S. 105-161(a);
G.S. 105-161(d)(8); G.S. 105-161(e);
G.S. 105-163; G.S. 105-188;
G.S. 105-199; G.S. 105-207;
G.S. 105-212

Requested by:

Honorable James S. Currie
Commissioner of Banks

Questions:

1. Does the creation of a trust fund under a "pre-need burial contract", which generates dividend income, result in any intangibles, income, gift or inheritance tax liability?
2. If so, who is liable for filing returns and paying such tax liability?

Conclusions:

1. Yes, it may.
 - a. The trust fund represented by money on deposit in a bank is subject to intangibles tax. If deposit is in a checking or regular savings account, the bank pays the tax and charges the trust account. If the deposit is represented by a certificate of deposit, the trustee may file the return and pay the tax or remit the tax to the bank, which then pays it. Money on deposit in a North Carolina savings and loan association is not subject to intangibles tax.
 - b. If the trust has dividend income in excess of \$1,000, or has any taxable income, the trustee must file a return and pay any tax due (unlikely under the facts), but since the trustor at all times has access to the entire fund, he must report dividends accessible to him, and pay any tax due thereon.
 - c. If the trustor and the cestui que trust are the same person, there is no gift and no gift tax; if they are different persons, there is a gift when the fund vests in the estate of the cestui at his death, and

the trustor/donor is responsible for any gift tax due.

d. The trust fund used to pay for a decedent's funeral expenses is either an asset of his estate, or is payment of a debt of the estate by a third person such that the payment is not deductible in determining his taxable estate. In either event, the size of his taxable estate is increased by the amount of the trust fund, and taxes due on the estate are the responsibility of the personal representative of the decedent.

The Commissioner of Banks has asked whether, and to what extent, intangibles, income, gift and inheritance tax laws impact upon "pre-need burial contracts" entered into pursuant to the provisions of Article 7A of Chapter 65 of the General Statutes.

A "pre-need burial contract" is a contract "which has for a purpose the furnishing or performance of funeral services, or the furnishing or delivery of personal property, merchandise, or services of any nature in connection with the final disposition of a dead human body to be furnished or delivered at a time determinable by the death of the person whose body is to be disposed of, but does not mean the furnishing of a cemetery lot, crypt, niche, mausoleum, grave marker or monument." G.S. 65-36.1(3). When such a contract is entered into, money paid pursuant to it to any person, partnership, association or corporation for the rendition of such services is "held to be trust funds", and the person or entity (obviously a "funeral home", or "funeral director") is "declared to be a trustee thereof". G.S. 65-36.2(a). The trustee must deposit the funds within 30 days after receipt "in the name of the trustee as trustee", and "shall be held together with the interest, dividends, or accretions thereon, in trust", and the deposit must be with a "financial institution" (by definition, "a bank, trust company or savings and loan association"). G.S. 65-36.1(2); G.S. 65-36.2(a); G.S. 65-36.4. "The trust fund itself shall be solely liable for all taxes on said fund and its interest, dividends, increases and accretions". G.S. 65-36.2(a).

All payments made under the agreement remain "trust funds" until the first of two events occurs: (1) the death of the person for whose service the funds were paid and the full performance of such services by the trustees; or (2) refund to the person who paid the funds, upon his written demand. For convenience, the person referred to in (1) will be called the "beneficiary" and in (2), the "depositor". They are often, but not always, the same person. G.S. 65-36.2(b), G.S. 65-36.4.

If funds remain on deposit when the beneficiary dies, and the contracted services are performed, the financial institution then pays the amount contracted for, and any balance remaining "shall be paid to the estate of the beneficiary". G.S. 65-36.2(c).

A form contract has been prepared and is in general use, and it seems to track the statute. It appears from the statute and the contract that the funeral home or funeral director contracting to provide the service is the trustee, the fund is the corpus, the depositor is the trustor and the beneficiary is the cestui que trust, all in the conventional sense.

With regard to intangibles tax, if the trust fund is deposited in a checking or regular savings account with a bank, it is "money on deposit" subject to G.S. 105-199, in which case the bank files the return, pays the tax and recovers the amount paid by charging the account of the trust. If the deposit is represented by a certificate of deposit, then the trustee may file the return and pay the tax, or may remit the tax to the bank, which then pays it. In either case, the trustee would be entitled to call on the fund as the source of payment. G.S. 105-207; G.S. 65-36.2(a). Finally, if the deposit were with a North Carolina savings and loan association, the deposit would be subject to no tax at all. G.S. 105-212.

With respect to income tax, G.S. 105-161(a) imposes a tax upon "the taxable income of ... trusts, including: (1) ... income accumulated or held for future distribution under the terms of the ... trust ..." Returns are required to be filed by the trustee of each trust where "the gross income ... is in excess of one thousand dollars", or where the trust has "any taxable income". G.S. 105-161(e). However, dividends which are "distributable to a beneficiary" are deductible, and the "depositor" may until the death

of the "beneficiary" always obtain the entire fund, including accretions. The depositor, in that sense, is also a beneficiary even where he and the prospective decedent are different persons. Thus, it seems most unlikely that the trustee will ever have income over \$1,000, or have any taxable income such that he would be required to file a return or pay tax. If he did, the trust fund itself would be liable for the tax. G.S. 65-36.2(a).

However, since the depositor always has access to the fund, before the beneficiary dies, he would be required to report and pay tax on all accretions. G.S. 105-161(d)(8); G.S. 105-163. He, too, would be entitled to look to the fund for payment of his liability. G.S. 65-36.2(a).

With regard to gift taxes, if the depositor and beneficiary are the same person, there is no tax because one cannot make a gift to oneself. If they are different persons, there is no gift until the death of the beneficiary when the fund vests irrevocably in the estate of the beneficiary, or for its benefit. It is rather unlikely, however, that the fund will even then be sufficiently large to incur any significant liability. G.S. 105-188.

With regard to inheritance tax liability, if the beneficiary and the depositor are the same person, the fund is a part of his gross taxable estate. G.S. 105-2. If they are different persons, there seem to be two possible consequences: (a) either there is an instantaneous transfer to and from the decedent at his death, so that the fund is part of his gross taxable estate, or (b) there is a transfer to, but not from his estate, in the sense that a third person paid an estate obligation which is therefore not deductible as an expense of the estate. Both (a) and (b) seem to produce the same, or virtually the same taxable result. G.S. 105-2. Of course, the individual responsible for filing the inheritance tax return, and paying any tax due, is the decedent's personal representative. G.S. 105-23; G.S. 105-28.

Relative to federal income, gift and estate taxes, the results do not seem to be remarkably dissimilar. However, a trustee, depositor or other individual who may incur federal liability should obtain the opinion of the Internal Revenue Service on his specific situation.

Rufus L. Edmisten, Attorney General
Myron C. Banks
Special Deputy Attorney General

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1 April 1980

Subject: Motor Vehicles; G.S. 20-4.18 et seq.;
Reciprocal Provisions as To Arrest of
Nonresidents

Requested by: Colonel John T. Jenkins, Commanding
North Carolina State Highway Patrol

Questions: 1. May a law enforcement officer under
G.S. 20-4.19 arrest and carry before a
magistrate a motorist who resides in a
reciprocating state but who is licensed in
a nonreciprocating state if the offense
committed in North Carolina would not
result in the suspension or revocation of
his license or privilege to drive under the
laws of North Carolina?

2. May a law enforcement officer under
G.S. 20-4.19 arrest and carry before a
magistrate a motorist who resides in a
nonreciprocating state but who is licensed
in a reciprocating state if the offense
committed in North Carolina would not
result in the suspension or revocation of
his license or privilege to drive under the
laws of North Carolina.

Conclusions: 1. No.
2. No.

Article 1B (Reciprocal Provisions as to Arrest of Nonresidents) of
Chapter 20 contains the appropriate statutes. G.S. 20-4.19 reads:

"Issuance of citation to nonresident; officer to report noncompliance.--(a) Notwithstanding other provisions of this Chapter, a law enforcement officer observing a violation of this Chapter or other traffic regulation by a nonresident shall issue a citation as appropriate and shall not, subject to provisions of subsection

(b) of this Section, require such nonresident to post collateral or bond to secure appearance for trial, but shall accept such nonresident's personal recognizance; provided, however, that the nonresident shall have the right upon request to post collateral or bond in a manner provided by law and in such case the provisions of this Article shall not apply.

(c) No nonresident shall be entitled to be released on his personal recognizance if the offense is one which would result in the suspension or revocation of a person's license under the laws of this State."

G.S. 20-4.18(4) defines a nonresident as "a person who is a *resident of or holds a license issued by* a reciprocating state". (Emphasis added) Therefore, a motorist who is a resident of a reciprocating state, regardless of the licensing state, must be permitted to sign the personal recognizance in lieu of posting collateral or bond if the offense would not result in the suspension or revocation of the motorist's license or privilege to drive under the laws of North Carolina. Similarly, a motorist who is a resident of a nonreciprocating state but who is licensed in a reciprocating state must also be permitted to sign the personal recognizance in lieu of posting collateral or bond. A motorist is entitled to the benefits of Chapter 20, Article 1B if he is either licensed by or a resident of a reciprocating state.

The Division of Motor Vehicles has assured us that an effort will be made to process reciprocals signed by residents of reciprocating states who are licensed in nonreciprocating states. We should note that, despite the few problems caused by this particular statutory wording, the nonresident compact avoids long delays in magistrates' offices and permits the violator and the law enforcement officer to resume their individual duties with a minimum of delay and inconvenience.

Rufus L. Edmisten, Attorney General
David Roy Blackwell
Assistant Attorney General

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2 April 1980

Subject: Taxation; Highway Patrol Voluntary Pledge Fund; G.S. 105-154; G.S. 105-258; General Statutes Chapter 126, Article 7.

Requested by: Burley B. Mitchell, Jr., Secretary
Department of Crime Control and
Public Safety

Question: Must the Highway Patrol Voluntary Pledge Fund report to the Department of Revenue information concerning distributions from the fund or is such information confidential under Article 7 of Chapter 126 of the General Statutes?

Conclusion: The information is not confidential and must be reported to the Department of Revenue.

The Highway Patrol Voluntary Pledge Fund is an organization created for the purpose of making a monetary award to each of its members who leave the Highway Patrol by reason of death, retirement, or disability. This purpose is accomplished by collecting a small assessment from each of the remaining members whenever such an award is to be made. Only highway patrolmen are eligible for membership, but not all patrolmen are members, affiliation with the Fund being strictly voluntary and not a condition of employment. The Fund is an association of individual patrolmen and not an official organization of the North Carolina Highway Patrol.

Inasmuch as distributions from the Fund may be taxable to the patrolmen and beneficiaries who receive them, a question arises as

to whether the Fund is subject to the reporting requirements of G.S. 105-154:

"Every individual, partnership, corporation, joint-stock company or association, or insurance company ... having the control, receipt, custody, disposal, or payment of interest (other than interest coupons payable to bearer), rent, salaries, wages, dividends, premiums, annuities, compensations, remunerations, emoluments or other fixed or determinable annual or periodical gains, profits, and incomes paid or payable during any year to any taxpayer, shall make complete return thereof to the Secretary of Revenue."

Clearly, the Fund is an association and its distributions are of the type described in G.S. 105-154. It has been suggested, however, that the Fund is precluded from making the required report to the Secretary of Revenue by G.S. 126-24(5), which provides that personnel file information may not be examined by state government officials or purposes of a tax investigation. G.S. 126-22 defines personnel file information to include "any information gathered by a department, division, bureau, commission, or other agency subject to Article 7 of this Chapter which employs an individual (or) previously employed an individual." Since the Voluntary Pledge Fund is neither an employer nor a department, division, commission, or other agency, it would appear that its records relating to distributions would not constitute confidential personnel file information within the meaning of G.S. 126-22 and, further, that the Fund is required by G.S. 105-154 to report such information to the Secretary of Revenue. Additionally, such records are subject to inspection under G.S. 105-258, which authorizes "(t)he Secretary of Revenue, for the purpose of ascertaining the correctness of any return, making a return where none has been made, or determining the liability of any person for any tax imposed by this Subchapter, or collecting any such tax ... to examine, personally, or by any agent designated by him, any books, paper, records, or other data which may be relevant or material to such inquiry.

Rufus L. Edmisten, Attorney General
Marilyn R. Rich
Assistant Attorney General

3 April 1980

Subject: Sheriffs; Criminal Law and Procedure;
G.S. 15-54

Requested by: H. D. Joyner, Deputy
Cabarrus County
Sheriff's Department

Questions: 1. Is a Sheriff or other law enforcement officer authorized to accept a reward paid by the United States Government for the apprehension of serviceman who is absent without leave?

2. If so, may the County deduct from the reward the costs of keeping the apprehended serviceman pending delivery of the serviceman to the military?

Conclusions: 1. A sheriff or other law enforcement officer is authorized to accept a reward offered by the United States government for the arrest of a serviceman who is absent without leave.

2. The cost of keeping the serviceman in the custody may not be deducted from the reward received by the Sheriff or other law enforcement officer. The appropriate branch of the military should be billed for the costs of keeping the serviceman pending his delivery to the military authorities.

The various branches of the United States Armed Forces have customarily offered a reward for the apprehension of deserters, prisoners, and members absent without leave. The amount of the reward presently may not exceed \$75.00 in any one case. *See e.g.* Public Law 96-154, Title VII, §709, December 21, 1979, 93 Stat. 1153.

G.S. 15-54 provides as follows:

Officer Entitled to Reward. - Any Sheriff or other officer who shall make an arrest of any person charged with a crime for whose apprehension a reward has been offered is entitled to such reward, and may sue for and recover the same in any Court in this State having jurisdiction: Provided, that no reward shall be paid to any Sheriff or other officer for any arrest made for a crime committed within the county of such Sheriff or officer making such arrest.

The statute appears to apply to rewards for crimes against the State of North Carolina. Absence without leave from one of the branches of the United States Armed Forces, a crime under the Uniform Code of Military Justice, 10 U.S.C. §886, is a federal, not a State, offense. However, we believe the General Assembly in enacting the statute intended to establish a State policy allowing law enforcement officers to accept rewards except in the case of State crimes committed within the county where the Sheriff or officer is employed. G.S. 15-54 has been noted and approved by the Supreme Court of this State in the case of BOARD OF COMMISSIONERS OF GRANVILLE COUNTY, 193 N.C. 659, 137 S.E. 711 (1927), in which the Court made the following observation:

Whether or not a sheriff or other police officer whose official duty it is to arrest such person and who receives compensation, by fees or otherwise for the performance of this official duty, shall be entitled to a reward provided for by statute is a matter of policy to be determined by the General Assembly.

If it is a matter of state policy to permit an individual law enforcement officer to collect a reward offered for a crime committed against the State of North Carolina, we would assume by analogy that the Sheriff or law enforcement officer could accept a reward offered by the federal government for the arrest of an AWOL service member. We do not believe that the proviso - that rewards may not be accepted for crimes committed within the county--would be applicable to a reward offered by the federal government. In other words, a law enforcement officer in Cumberland

County could arrest a serviceman who has gone AWOL from Fort Bragg.

The second question concerns whether the costs of maintaining the AWOL prisoner while has was in custody awaiting deliver to the military authorities can be deducted from the reward. It appears that under the federal statute the reward goes to the individual. Along with the provision for the reward though there is a provision for expenses of apprehension and delivery of AWOL personnel. Custodial expenses for military prisoners pending receipt by military authorities is considered an expense of apprehension and delivery. The Army pays \$5.00 per day in accordance with G.S. 7A-313. Reimbursement should be sought by submitting a bill to the Provost Marshal of the military installation to which the prisoner is taken.

Rufus L. Edmisten, Attorney General
James Peeler Smith
Assistant Attorney General

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4 April 1980

Subject: Motor Vehicles; Reciprocity; South Carolina Dealer Tags

Requested by: R. V. Moss
Charlotte Police Legal Officer

Questions:

1. Is it legal for a North Carolina resident who has purchased a vehicle in South Carolina to operate that vehicle in North Carolina while displaying a South Carolina cardboard dealer tag?
2. Is it legal for a South Carolina resident to drive in North Carolina while displaying a cardboard South Carolina dealer tag. (This tag gives only the name of the dealer.)

- Conclusions:
1. Yes.
 2. Yes.

Under authority of Article 1A of Chapter 20 of the General Statutes of North Carolina; i.e. G.S. 20-4.1 through G.S. 20-4.12, and the understanding between the Commissioner of Motor Vehicles for the States of North Carolina and South Carolina pursuant thereto, South Carolina dealer tags should be honored for a period of ten days from the date of purchase as shown by a bill of sale which must accompany the dealer tag.

The fact that such dealer tag is displayed on a vehicle purchased in South Carolina by a North Carolina resident does not alter the ten-day period, provided the North Carolina resident holds a duly executed bill of sale from a South Carolina dealer. Reciprocity extends to the South Carolina dealer as the dealer tag is issued pursuant to South Carolina law.

Rufus L. Edmisten, Attorney General
William W. Melvin
Deputy Attorney General

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4 April 1980

Subject: Prisons and Prisoners; Timing of Parole Revocation Hearings Following Arrest of Parole Violator

Requested by: James Woodard, Chairman
North Carolina Parole Commission

Questions: 1. If a parolee is arrested on unrelated outstanding criminal charges and confined in a local confinement facility and the North Carolina Parole Commission then serves a parole violator warrant based on alleged technical violations of parole, is the Parole Commission required to hold a

preliminary revocation hearing within seven (7) days of service of the warrant?

2. If the first question is answered affirmatively, is the Parole Commission then required to hold its final revocation hearing within forty-five (45) days of the parolee's confinement in the local confinement facility?

3. If the Parole Commission hold its preliminary hearing within seven (7) days but does not hold its final revocation hearing within forty-five (45) days of the parolee's confinement in the local confinement facility, is the parolee entitled to release, release on bond pending a Parole Commission hearing, or any other form of Habeas Corpus relief?

4. If the Parole Commission hold its preliminary hearing within seven (7) days of the parolee's arrest but fails to hold its final revocation hearing within forty-five (45) days of the parolee's reconfinement in the North Carolina Department of Correction, is the parolee entitled to release, release on bond pending a Parole Commission hearing, or any other form of Habeas Corpus relief?

Conclusions:

1. Yes.
2. No.
3. No.
4. No.

The first two questions pose unique factual circumstances. It is clear that when a parolee is charged with and convicted of a crime after

his parole, the Commission may require that the intervening sentence be served prior to executing its parole violator warrant based on the subsequent conviction and taking custody of the parolee pursuant to that warrant. *Moody v. Daggett*, 429 U.S. 78 (1976); *Gaddy v. Michael*, 519 F.2d 669 (4th Cir. 1975) cert. denied, 429 U.S. 988 (1976); Cf. *Jernigan v. State*, 10 N.C.App. 562, 179 S.E.2d 788 (1971), aff'd, 279 N.C. 556, 184 S.E.2d 259 (1971). Occasionally however, the parolee has absconded and remained at large for a long period of time or has committed some other serious technical violation and the new charges upon which the parolee is held are not serious. In such situations, the parolee may be able to post bond on the outstanding charges. To avoid the risk that the parolee might make bond and flee, the Parole Commission executes and serves its warrant on the parolee in the local confinement facility. Even though the parolee is in custody on other charges, he must be given notice and a preliminary hearing within seven (7) days of his confinement. Under N.C.G.S. § 15A-1376(b), a Parole Hearing Officer must hold a preliminary hearing within seven (7) days of the "arrest" of the parolee. By executing and serving its warrant, the Parole Commission in effect "arrests" the parolee. If the hearing is not held as required, the parolee will be entitled to make bail on the other charges and pursuant to G.S. § 15A-1376(b), he will be allowed to continue on parole until a final revocation hearing is held.

If the preliminary hearing is held within seven (7) days of execution and service of the warrant, the final revocation hearing may be delayed until the parolee is released from the custody of the local authorities. Nevertheless, the final revocation hearing must be held within forty-five (45) days of the parolee's "reconfinement" in the North Carolina Department of Correction. G.S. § 15A-1376(e). The Statute mandates a hearing within forty-five (45) days of "reconfinement" without specifying the place of confinement. Although this had led to some confusion, we believe that reconfinement means return to the Department of Correction, not continued confinement on other charges.

The prefix "re" deserves some emphasis. The Parole Commission must act only when it reasonably can act - i.e., when the parolee is reconfinement in the custody of the Department of Correction. The statutory time period within which the revocation hearing must be

held begins to run when the Defendant is returned from the local confinement facility to a state institution. *Whittington v. Commonwealth Board of Probation and Parole*, 402 A.2d 1105 (Pa. 1979); *People ex rel Spinks v. Dillon*, 416 N.Y.S.2d 942 (1979). See also *Inmates Councilmatic Voice v. Rogers*, 541 F.2d 633, 636 (6th Cir. 1976) ("reasonable time" in which final parole revocation hearing must be held begins when the parole authorities take custody and return parolee to the state institution.)

Though the presence of the warrant may make bail on the outstanding criminal charges a futile gesture, that cannot affect this result. *Cooke v. United States Attorney General*, 488 F.2d 667, 671 (5th Cir. 1974). The parolee is still in custody on the other charges and not the parole violation warrant. *Id.*

The seven (7) day and forty-five (45) day time limits set out in G.S. §15A-1376(b) protect the parolee from an unfair and unconstitutional loss of liberty. However, this liberty interest is not triggered until the warrant is executed *and* the parolee is taken into custody pursuant to it. *Moody v. Daggett*, supra 429 U.S. at 86 *Morrissey v. Brewer*, 408 U.S. 471, 488 (1975). For these reasons, we interpret G.S. §15A-1376(b) to mandate a final revocation hearing forty-five (45) days from the time the parolee is returned to the custody of the North Carolina Department of Correction and not forty-five (45) days from his confinement in a local confinement facility on other charges.

From the discussion above, it is clear that the parolee is not entitled to Habeas relief if the Parole Commission does not hold a final revocation hearing within forty-five (45) days of his confinement in a local confinement facility on other charges.

Even if the parole Commission fails to hold a hearing within forty-five (45) days of a parolee's reconfinement in the Department of Correction, the parolee would not be entitled to outright release or release on bail. With his conviction, the parolee loses his presumption of innocence and is not constitutionally entitled to bail. *In re Whitney*, 421 F.2d 337 (1st Cir. 1970); *Lee v. Pennsylvania Board of Probation and Parole*, 467 F.Supp 1043 (E.D. Pa. 1979); *U.S. ex rel Taylor v. Brierton*, 458 F.Supp. 1171 (N.D.Ill. 1978). Although probationers are allowed bail, it is not a violation of the

Equal Protection Clause to deny bail to parolees in similar situations. *People ex rel Tucker v. Kostos*, 68 Ill.2d 88, 368 N.E.2d 903, 906 (1977); *Listro v. Warden*, 365 A.2d 109 (Conn. 1976). In G.S. § 15A-1345(b) the General Assembly specifically provided that probationers would be entitled to bail. Although the procedural safeguards to which parolees are not granted the right to bail. G.S. § 15A-1376 provides for the "arrest" and "reconfinement" of the parole violator but there is no provision concerning bail. The Parole Commission is authorized to hold its hearing without arresting the parolee if it is not necessary to arrest him. G.S. § 15A-1376(a). The Statute is designed to allow the Parole Commission to determine when it can allow a parole violator to remain free pending a revocation hearing. There is no provision for judicial intervention at any point. For all these reasons, a parolee cannot be placed on bail pending his parole revocation hearing.

It is also clear that those not afforded a timely final revocation hearing are not entitled to outright release. Releasing these prisoners is strong medicine to prevent administrative delays. If the legislature had intended to impose such a remedy it would have set it out in the Statute as it did in G.S. § 15A-703 (indictment may be dismissed for failure to provide for a speedy trial). *Smith v. United States*, 577 F.2d 1025, 1028 (5th Cir. 1977).

All of this is not to say that a parolee would be without any remedy if he were not provided a hearing indefinitely. If the Parole Commission fails to act in accordance with the statutory mandate, it could be compelled to hold a hearing by issuance of a Writ of Mandamus. See *Pender v. Joslin*, 262 N.C. 496, 504, 138 S.E.2d 143 (1964). Also, as we have pointed out, the Constitution requires that a parolee be provided a hearing within a reasonable time after he is taken into custody pursuant to a parole violator warrant. A Federal Court could also order a hearing in the event of a delay. Nevertheless, a parolee can never be released from custody as a result of delay in holding his parole revocation hearing unless he can show unreasonable delay (at least several months) and prejudice resulting from that delay. *Beck v. Wilkes*, 589 F.2d 901 (5th Cir. 1978).

Rufus L. Edmisten, Attorney General
Ben G. Irons, II
Assistant Attorney General

10 April 1980

Subject: Counties; Constitutional Debt Limitation; Department of Human Resources; State Public Assistance Contingency Fund; Constitution, Article V, Section 4; N.C.G.S. 108-54.1

Requested by: Dr. Sarah T. Morrow, Secretary
Department of Human Resources

- Questions:
1. May a county, under the circumstances set forth in the opinion, procure a loan from the State Public Assistance Contingency Fund (N.C.G.S. 108-54.1) without securing approval on the qualified voters of the county, as provided in Article V, Section 4 of the North Carolina Constitution?
 2. Is a debt incurred pursuant to Article V, Section 4(2)(a)-(e) subject to the two-thirds limitation imposed by Article V, Section 4(2)(f)?

- Conclusions:
1. A county may procure a loan under such circumstances: (a) if such loan will not violate the provisions of Article V, Section 4(2)(f); or (b) if the Governor determines the existence of an emergency under the provisions of Article V, Section 4(2)(e) of the Constitution.
 2. No.

The letter requesting this opinion states that several counties are unable to pay the county share of Medicaid (Ch. 108, Art. 2, Part 5, N.C.G.S.) because the 1978 Session of the North Carolina General Assembly increased the percentage that counties must pay from fifteen (15%) percent to thirty-five (35%) percent of the non-federal share. Inquiry is made whether, in view of the provisions of Article

V, Section 4 of the North Carolina Constitution, loans can be made to such counties without such loans first being approved by the qualified voters of the respective counties.

The provisions of Subsection (2) of Article V, Section 4 of the Constitution, which are particularly applicable here, read as follows:

"Authorized purposes; two-thirds limitation. The General Assembly shall have no power to authorize any county, city or town, special district, or other unit of local government to contract debts secured by a pledge of its faith and credit unless approved by a majority of the qualified voters of the unit who vote thereon, except for the following purposes:

- a. to fund or refund a valid existing debt;
- b. to supply an unforeseen deficiency in the revenue;
- c. to borrow in anticipation of the collection of taxes due and payable within the current fiscal year to an amount not to exceed 50 per cent of such taxes;
- d. to suppress riots or insurrections;
- e. to meet emergencies immediately threatening the public health or safety, as conclusively determined in writing by the Governor;
- f. for purposes authorized by general laws uniformly applicable throughout the State, to the extent of two-thirds of the amount by which the unit's outstanding indebtedness shall have been reduced during the next preceding fiscal year."

Since the inquiry, as made, does not contemplate a loan within the provisions of Article V, Section 4(2)(f) (which permits authorization of debt without voter approval if the local unit's indebtedness does not exceed two-thirds of the amount by which the unit's outstanding indebtedness was reduced during the next preceding fiscal year), it is assumed that the counties involved would not qualify under such provision. The question, then, is whether the loan could be made

under one or more of the other five exceptions appearing in Section 4(2).

It is our opinion that Section 4(2)(e) is the only exception, if applicable, that meets the circumstances of the inquiry. Section 4(2)(e) is an exception designed "to meet emergencies immediately threatening the public health or safety, as conclusively determined in writing by the Governor."

A further inquiry is whether a loan made pursuant to any exception appearing in Section 4(2)(a)-(e) will be unconstitutional if it exceeds the limitation imposed by Section 4(2)(f). We conclude that the two-thirds limitation set forth in Section 4(2)(f) does not apply to a loan made pursuant to Section 4(2)(a)-(e). Section 4(2)(f) exempts from voter approval debt incurred "for purposes authorized by general laws uniformly applicable throughout the State" so long as such debt does not exceed the two-thirds limitation. As is clear from Article XIV, Section 3 of the Constitution, "general laws uniformly applicable" are laws enacted by the General Assembly, not constitutional provisions. Thus, Section 4(2)(f) applies to debts authorized by laws enacted by the General Assembly, and not to debts specifically authorized by the Constitution.

We conclude, therefore, that upon determination in writing by the Governor, in an appropriate situation, of an emergency immediately threatening the public health or safety, a loan may be made to a county or counties from the State Public Assistance Contingency Fund without approval by the voters of the county or counties and that such loan would not be subject to the two-thirds limitation imposed by Article V, Section 4(2)(f) of the Constitution.

Rufus L. Edmisten, Attorney General
Henry T. Rosser
Assistant Attorney General

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24 April 1980

Subject: Infants and Incompetents; Youth Services;
Limits on Periods of Commitment to
Division of Youth Services

Requested by: Sarah T. Morrow, Secretary
Department of Human Resources

Questions: 1. Does G.S. 7A-652(c) apply to juveniles who were committed to the Division of Youth Services prior to January 1, 1980, and whose cases are not pending on appeal?

2. When the committing judge in a juvenile proceeding predicates a finding of delinquency upon several actions by the juvenile which would be crimes if perpetrated by an adult, in considering the maximum time that the juvenile may be retained at a treatment facility under G.S. 7A-652(c), is the Division of Youth Services automatically bound by the period of confinement that an adult would have received under concurrent sentencing?

Conclusions: 1. No.
2. No.

G.S. 7A-652 which became effective on January 1, 1980, provides in part as follows:

"§7A-652. Commitment of delinquent juvenile to Division of Youth Services. - (a) A delinquent juvenile 10 years of age or more may be committed to the Division of Youth Services for placement in one of the residential facilities operated by the Division if the judge finds that the alternatives to commitment as contained in G.S. 7A-649 have been attempted unsuccessfully or are inappropriate and that the juvenile's behavior constitutes a threat to persons or property in the community.

(b) Commitment shall be for:

(1) An indefinite term not to exceed the eighteenth birthday of the juvenile; or

(2) A definite term not to exceed two years if the judge finds that the juvenile is 14 years of age or older, has been previously adjudicated delinquent for two or more felony offenses, and has been previously committed to a residential facility operated by the Division of Youth Services. The Division may reduce the duration of the definite commitment by an amount not to exceed twenty-five percent (25%) if the juvenile has not committed any major infractions of the regulations of any facility to which he is assigned, and the Division of Youth Services may move for a reduction of more than twenty-five percent (25%) pursuant to G.S. 7A-664.

(c) In no event shall commitment be for a period of time in excess of that period for which an adult could be committed."

Examination of the new North Carolina Juvenile Code, of which these statutory provisions are a part, reveals several significant things:

First, it was the intention of the General Assembly to create a system of dealing with juveniles tailored specifically to their unique needs and situation. See G.S. 7A-516.

Second, under the new provisions, the juvenile court judge is relegated to committing juveniles to the Division of Youth Services for placement in training schools for an indefinite period (not exceeding the 18th birthday) except in very specific instances involving aggravating factors as described in G.S. 7A-652 (b)(2). Only in instances falling within the description of G.S. 7A-652(b)(2) may the judge commit for a specific period of time.

Third, it would seem that the General Assembly desired that a juvenile not be deprived of his freedom for a longer period of time than the period to which an adult could have been sentenced if such adult had committed the same crime or crimes.

With regard to the first question posed, in similar situations involving criminal actions, it has long been held that:

"After a defendant, who did not appeal, has begun serving his sentence, a change or repeal of the law under which he was convicted does not affect his sentence absent a retrospective provision in the statute." *State v. Pardon*, 272 N.C. 72, 76 (1967).

If a criminal case is pending on appeal, of course, an amendment of the statute reducing the permissible punishment therefor inures to the benefit of the defendant. See *State v. Spencer*, 276 N.C. 535, 549 (1976); *State v. Pardon*, supra, at pp. 76-78.

While a juvenile proceeding is designedly different from a criminal action, nonetheless the same principals regarding retrospective application would appear to apply.

The second question posed appears to devolve from the fact that the duration of the sentence to confinement of an adult convicted of multiple offenses runs concurrently, as a matter of law, unless the trial judge directs otherwise. See *State v. Effird*, 271 N.C. 730 (1967); *State v. Duncan*, 208 N.C. 316 (1935). Normally, a statute depriving one of personal liberty (or smacking of criminal application) should be strictly interpreted. However, even a criminal statute must be interpreted so as to effectuate the intent of the General Assembly. Further, "... an interpretation which leads to a strained construction or to a ridiculous result is not required and will not be adopted." *State v. Spencer*, supra, at p. 547 (1976).

It is significant that G.S. 7A-652(c) prohibits exceeding the period for which an adult *could* be committed, as distinguished from the period to which he *would* be committed. The obvious intendment was to look at the nature and separateness of the offenses involved as the criteria controlling the duration of commitment of a juvenile. This conclusion is further buttressed by consideration of the distinctive nature of the dispositional order ordinarily entered by a juvenile court judge (see G.S. 7A-651), as compared to the separate judgments involved in the sentences for individual, separate crimes entered in criminal cases involving adults. The very nature of the

juvenile proceedings and the statutory basis therefor, preclude making the concurrent/consecutive sentencing procedure (which *might* have been used in a criminal case involving an adult) the controlling factor in determining the duration of the commitment of a juvenile.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Special Deputy Attorney General

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28 April 1980

Subject: Mental Health; Voluntary Admissions; Infants and Incompetents; Release of a Minor from a Treatment Facility Pursuant to G.S. 122-56.7(f).

Requested by: Mary B. Chamblee
Assistant Public Defender
Twenty-Sixth Judicial District

Question: Pursuant to the current provisions of G.S. 122-56.7, may parents who have applied for admission of their minor child to a treatment facility later obtain a discharge of the child prior to judicial determination of the need for further treatment at the treatment facility?

Conclusion: No. Only the Court or the treatment facility may release the minor child and only then upon determination that the child does not need further hospitalization.

The 1975 Session of the North Carolina General Assembly ratified the predecessor of G.S. 122-56.7 so as to mandate a judicial hearing within ten (10) days in the cases of voluntary admissions into the treatment facilities of minors and incompetent adults. The original statute did not specifically address the status of the

juvenile/incompetent prior to the date of the hearing. This fact became generally recognized and resulted in considerable difference of opinion as to what the statute actually required and what the statute should require on this subject. It should be noted that in 1975 the Office of the Attorney General issued an opinion interpreting the old statute. See 45 N.C.A.G. 25 (1975).

The 1979 General Assembly rewrote this entire section and, among other changes, added a new sub-section (f) which provides as follows:

"(f) After admission, only the court or the treatment facility may release the minor or person adjudicated *non compos mentis* at any time when either determines that such person does not need further hospitalization."

Apparently, some differences of opinion still have arisen as to whether the parents, etc., may remove a minor child from the treatment facility during the period before the judicial hearing mandated by the statute. These differences of opinion stem from conflicting interpretations of the term "admission" - i.e., whether such means the original entry of the patient into the facility or the later order issued as a result of the judicial hearing. Perhaps the answer to this question is more important now than it was previously due to another new provision included in G.S. 122-56.7(d) permitting the extension of the hiatus before the hearing for a period up to thirty (30) days.

Examination of Article 4, Chapter 122, in its entirety, mandates the conclusion that the word "admission" in G.S. 122-56.7(f) refers to the original placement of the child in the facility. G.S. 122-56.3 sets forth the procedure for voluntary admission by execution of an application. G.S. 122-56.5 provides that, in the case of a child or incompetent, the parent, guardian, etc., shall act for the potential patient in making the application. G.S. 122-56.7(a) provides that the judicial hearing will be held "...within 10 days of the day a minor ...is *admitted* to a treatment facility pursuant to G.S. 122-56.5." (Emphasis applied) On the other hand, significantly, in referring to the judicial hearing, G.S. 122-56.7(b) authorizes the court to "...*concur* with the voluntary *admission* of the minor..." (Emphasis applied) or to order release.

As indicated earlier, very strong feelings apparently exist, pro and con, on the issue of the authority of parents to place minor children in treatment facilities and to secure their release therefrom, versus the authority of the court to determine the need for admission and discharge. Proponents of differing view have been quite vocal on this subject nationwide. Demonstrating the importance of this question, the United States Supreme Court addressed it in 1979 in the landmark decision in the case of *Parham v. J.L., a minor, etc.*, 442 U.S. 584 (1979).

Against this background, it can safely be assumed that the language of our General Assembly was arrived at after serious deliberation and after the balancing of all factors involved in safeguarding the health, welfare and individual rights of the minor children and all other persons involved. The language of the statute is specific in nature and requires the conclusion arrived at here.

In view of the change in the statute described above, this opinion will supersede any conflicting conclusion or language set forth in the prior opinion of the Attorney General promulgated at 45 N.C.A.G. 25 (1975).

Rufus L. Edmisten, Attorney General
William F. O'Connell
Special Deputy Attorney General

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8 May 1980

Subject: Criminal Law and Procedure; Worthless Checks; Prima Facie Evidence of Crime of Issuing a Worthless Check Pursuant to the Provisions of G.S. 14-107.1.

Requested by: Ed McClearn
Assistant District Attorney
Tenth Judicial District

Question: Does G.S. 14-107.1 provide the exclusive method of proving a violation of G.S. 14-107?

Conclusion:

No.

In order for the State to make out a prima facie case of a violation of G.S. 14-107 the State must prove: (1) that the defendant drew and uttered a check; (2) that the defendant did not at the time the check was drawn have sufficient funds on deposit or credit with the banking institution upon which the check was drawn to pay the check upon presentment; (3) that the defendant knew that the check was drawn on insufficient funds. G.S. 14-107.1 has not changed the substantive offense of writing a worthless check. It only provides an alternate method of permitting the State to make out a prima facie case of a violation of G.S. 14-107. Proof of a violation of G.S. 14-107 before the enactment of G.S. 14-107.1 is still sufficient to make out a prima facie case.

"A prima facie case does nothing more than carry the case to the jury for its determination. *Owens v. Kelly*, 240 N.C. 770, 84 S.E. 2d 163. Likewise, prima facie evidence is not more than sufficient evidence to establish the vital facts without further proof, if it satisfies the jury. In a criminal case the jury is at full liberty to acquit the defendant if it is not satisfied from all the evidence - including prima facie evidence - that defendant's guilt has been proven beyond a reasonable doubt. In short, the inference or conclusion which may be drawn from certain facts recited in the statute may justify, but not compel a verdict adverse to the defendant. Ordinarily, the establishment of prima facie evidence does not shift the burden of the issue from the State to the defendant. *State v. Bryant*, 245 N.C. 645, 97 S.E. 2d 264; *State v. Wilkerson*, 164 N.C. 431, 79 S.E. 888." *State v. Riera*, 276 N.C. 361, 367 (1970))

G.S. 14-107 provides that certain evidence is prima facie proof of the two elements of the crime of writing a worthless check. In order to make out a prima facie case of the first element of the crime of writing a worthless check, i.e., that the defendant drew and uttered a check, the State may offer proof of the following: (1) the check was delivered in a face-to-face transaction with a person authorized to take checks; (2) the name and address of the check

passer are on the check; (3) the check taker identifies the check passer at the time of acceptance by a North Carolina driver's license or other serially numbered card containing the person's photo and mailing address; (4) the license or identification card number of the check passer appears on the check; (5) after dishonor, the acceptor sends the check passer a letter by certified mail setting forth the circumstances of dishonor and requesting that any error in connection with the transaction be disposed of in ten days; and (6) the acceptor files an affidavit with a judicial official before issuance of the first criminal process declaring that the other conditions have been satisfied and that 15 days have transpired since he mailed the letter to the check passer and any error has not been remedied. The acceptor must attach to the affidavit a copy of the letter sent to the check passer, a receipt from the U.S. Postal Service certifying the mailing of the letter, and the check or a copy of the check, including the marking by the bank indicating why it was returned.

In order to make out a prima facie case of the second element of the crime of writing a worthless check, i.e., that the defendant did not at the time the check was drawn have sufficient funds or deposit or credit with the banking institution upon which the check was drawn to pay the check upon presentment, the State may offer proof that the bank that dishonored the check returned it in the regular course of business indicating the reasons for dishonor and the acceptor has mailed the certified letter and has filed the affidavit described in preceding paragraph, the check then may be introduced as prima facie evidence of dishonor and as evidence that the defendant had no credit with the bank.

It is the opinion of this Office that G.S. 14-107.1 was enacted by the legislature in order to permit the State to make out a prima facie case of a violation of G.S. 14-107 with fewer witnesses. Rather than sending each clerk who accepted a check, the accepting employer can send one employee to testify in all its cases, and testimony from a bank official about the dishonor of the check is eliminated.

Rufus L. Edmisten, Attorney General
Lester V. Chalmers, Jr.
Special Deputy Attorney General

9 May 1980

Subject: Education; Principals and Supervisors;
Entitlement to Protections of N.C.G.S.
115-142(d)(2)

Requested by: Audrey Wagoner
Division of Personnel Relations
Department of Public Instruction

Question: What requirements must be met by a principal or a supervisor in order to be entitled to the protections of N.C.G.S. 115-142(d)(2)?

Conclusion: A principal must first attain the status of "career teacher" and thereafter serve for three consecutive years as the principal of an elementary school, junior high school or high school in order to be entitled to the protections of N.C.G.S. 115-142(d)(2). A supervisor must first attain the status of a "career teacher" and thereafter serve for three consecutive years as a supervisor performing a particular function in order to be entitled to the protections of N.C.G.S. 115-142(d)(2).

N.C.G.S. 115-142 sets forth the requirements which must be met by a public school teacher in order to attain "career teacher" status (a euphemism for tenure) and prescribes certain benefits and protections which flow from attainment of that status. Although tenure is generally not available to persons occupying administrative positions in educational institutions (see N.C.G.S. 115-142(c)(4) and the Code of the University of North Carolina), the General Assembly has elected to permit persons occupying the administrative positions of public school principal and supervisor to attain that status. The opinion of this Office has been requested as to the requirements which must be met by a principal and a supervisor in order to be entitled to this protected status.

The protection provided principals and supervisors and the requirements which must be satisfied as a precondition to acquiring those protections are set forth in N.C.G.S. 115-142(d)(2) which provides as follows:

"A career teacher who has performed the duties of a principal or supervisor in a particular position in the school system for three consecutive years shall not be transferred from that position to a lower paying non-administrative position without his consent except for the reasons in G.S. 115-142(e) and in accordance with the procedures for the dismissal of a career teacher set out in this section."

On the face of this statute, the requirements which must be met by a principal or a supervisor in order to be entitled to career status in such positions seem relatively clear, viz., that a person attain the status of a career teacher and then serve for three consecutive years as a principal or supervisor in a particular position. However, a close examination of the wording of this subsection, particularly where reference is made to other parts of N.C.G.S. 115-142, raises questions as to the precise meaning and scope of these requirements.

When the language of a statute is unclear or ambiguous, reference must be made to the rules of statutory construction in order to ascertain the legislative will. *Young v. Whitehall Co.*, 229 N.C. 360 49 S.E. 2d 797 (1948). The guiding principle in statutory construction is legislative intent and it is the intent which controls the interpretation of a statute. *State v. Hart*, 287 N.C. 76, 213 S.E. 2d 291 (1975).

N.C.G.S. 115-142(d)(2), reasonable read, requires a principal or supervisor, as a first step in securing the protections afforded by that subsection, to attain the status of a "career teacher". The phrase "career teacher" is defined in N.C.G.S. 115-142(a)(3) as "a teacher who has obtained career status as provided in G.S. 115-142(c)." "Career teacher" status is acquired when "a teacher" is employed by a school system for three consecutive years and then re-employed for a fourth year. N.C.G.S. 115-142(c)(2). "Teacher" is defined by N.C.G.S. 115-142(a)(9) as follows:

"'Teacher' means a person who holds at least a current, not expired, Class A certificate or a regular, not provisional or expired vocational certificate issued by the State Department of Public Instruction; whose major responsibility is to teach or directly supervise teaching or who is classified by the State Board of Education or is paid as a classroom teacher; and who is employed in a full-time permanent position."

This definition would include a supervisor but may not include a principal for it is doubtful that the "major responsibility" of a principal is to "directly supervise teaching" and principals are paid and classified on a different basis than are classroom teachers. See 16 N.C.A.C. 3.0414 and 16 N.C.A.C. 3.0417. If a principal is not a "teacher" as that term is defined in N.C.G.S. 115-142 then a principal who has never taught school or who has not taught a sufficient number of years to acquire "career teacher" status could never enjoy the protections of N.C.G.S. 115-142(d)(2). Such a reading would result in the anomalous situation of supervisors but only some principals being eligible for the protections of N.C.G.S. 115-142(d)(2). We think of no rational reason for distinguishing between principals on the basis of the fortuitous circumstance of opportunity to teach. Any such reading of a statute is disfavored. *State v. Hart, supra; Little v. Stevens*, 267 N.C. 328, 148 S.E. 2d 201.

This undesirable and unfair reading of N.C.G.S. 115-142 may be avoided on either one of two grounds - (1) by interpreting the phrase "career teacher" appearing in N.C.G.S. 115-142(d)(2) as meaningless or (2) by interpreting the term "teacher" as defined in N.C.G.S. 115-142(a)(9), as including principals within its meaning. In the opinion of this Office, it is this latter approach which is most proper. To construe the phrase "career teacher" as meaningless is at variance with established rules of statutory construction. The courts of this state have held that the words of a statute may not be ignored and that the legislature will be presumed to have inserted every part of a statute for a purpose. *State v. Williams*, 286 N.C. 422, 212 S.E. 2d 113 (1975); *Nance v. Southern Railroad*, 149 N.C. 366, 63 S.E. 116 (1908). On the other hand, the rules of the statutory construction do permit N.C.G.S. 115-142(a)(9) to be read to include principals. It was obviously the intent of the General

Assembly in enacting N.C.G.S. 115-142(d)(2) to provide some sort of job security and protection to school principals *and* supervisors. When a literal reading of a statute (here N.C.G.S. 115-142(a)(9)) will contravene the manifest purpose of the legislature as otherwise expressed (here in N.C.G.S. 115-142(d)(2)), the reason and purpose of the law shall control and the strict letter thereof shall be disregarded. *Taylor v. Crisp*, 286 N.C. 488, 212 S.E. 2d 381 (1975).

To summarize to this point, the first requirement imposed upon principals and supervisors by N.C.G.S. 115-142(d)(2) in order to obtain the statutory protections provided therein is to acquire the status of a "career teacher". In order to acquire "career teacher" status, a person must serve in a position which falls within the meaning of the term "teacher" as defined in N.C.G.S. 115-142(a)(9) for a period of three years and be re-employed for a fourth year. Among the positions which fall within the meaning of the term "teacher" are the positions of supervisor and principal.

Once a principal or supervisor has acquired "career teacher" status, the principal or supervisor is required by N.C.G.S. 115-142(d)(2) to thereafter serve as a principal or supervisor "in a particular position in the school system for three consecutive years" in order to be entitled to the protections provided therein. In other words a minimum of six (6) years experience is required for a principal or supervisor to be entitled to the protections of N.C.G.S. 115-142(d)(2).

Once a principal or supervisor has acquired the status of a "career teacher", however, N.C.G.S. 115-142(d)(2) is unclear as to where the next three years service as a principal or supervisor must be performed. The phrase "in a particular position" is ambiguous and susceptible of several interpretations, particularly in regard to principals. It could mean that a principal must serve as a principal of a particular school for three consecutive years; could mean that a principal must serve as a principal at a particular level of the school system (elementary, junior high or high school) for three consecutive years; could mean that a principal must serve at a particular size school (principals are paid on this basis) for three consecutive years or could be considered redundant.

To construe the phrase "in a particular position" as redundant, and thus meaningless, would violate the rules of statutory construction

as set forth in *Nance v. Southern Railroad, supra* and *State v. Williams, supra*. The choice between the other possible constructions of this phrase, however, is not as clear. The cardinal rule of statutory construction is that statutes are to be constructed to effectuate legislative purpose and intent. *State v. Hart, supra*. The implicit but nevertheless manifest purpose of the General Assembly in providing for a probationary period of employment prior to the award of career status (which in most circumstances means, in practical terms, the award of a lifetime contract) is to assure that local boards of education have an adequate and reasonable opportunity to observe and evaluate the performance of individuals in their work in order that only persons with demonstrated abilities to perform their assigned duties are awarded this exceptional status. Because of the exceptional nature of this status and the consequences which flow from its award, statutory requirements for tenure status should be strictly construed. *Marzec v. Fremont School Dist.*, 142 Colo. 83, 349 P. 2d 699 (1960); *Anderson v. Bd. of Education*, 390 Ill. 412, 61 N.E. 2d 562 (1945); *O'Connor v. Emerson*, 188 N.Y.S. 236, *aff'd*. 232 N.Y. 551, 134 N.E. 572 (1911).

We acknowledge that the question of the precise meaning of the phrase "in a particular position" is a close one, particularly in regard to principals. It is the opinion of this Office, however, that the legislative intent in establishing a probationary period for principals and supervisors prior to gaining the protections set forth in N.C.G.S. 115-142(d)(2) is best and most reasonably effectuated by interpreting this phrase to mean that a principal serve at the elementary school level, junior high school level or high school level, and for a supervisor the performance of a particular function (e.g., elementary school curriculum supervisor). The most important duties of a principal are the implementation of the school curriculum, evaluation of teachers and the maintenance of discipline. But schools are not fungible; nor are the skills and abilities necessary to perform these duties in an effective manner. The effectiveness of a principal in performing his duties is dependent in some way on the size of the school to which he is assigned. Likewise, the effectiveness of a person as an elementary school principal may vary to some extent depending upon the type elementary school to which he is assigned. Clearly, however, the skills and abilities necessary to function effectively as a principal of an elementary school as compared with a high school differ markedly. There is substantial variation among

the curricula at an elementary school, junior high school and high school; the skills and abilities necessary for effective teaching, which must be evaluated by principals, vary from one level of the school system to another; and disciplinary problems increase with each progression in grade level.

Interpreting the phrase "in a particular position" to mean for principals service at the elementary school level, the junior high school or the high school level, in our opinion, best reflects the practical and substantial distinctions which exist among the duties and responsibilities of principals at various levels of the public school system and recognizes the differing skills and abilities necessary to function effectively under those circumstances. Thereby, the legislative intent in establishing a probationary period for principals and supervisors in order to provide local boards of education with an adequate and reasonable opportunity to determine the effectiveness of persons as principals and supervisors in the performance of their particular (and different) duties and responsibilities is preserved. "(T)he intention of the Legislature constitutes the law." *State v. Hart, supra*, 287 N.C. at 80.

Rufus L. Edmisten, Attorney General
Edwin M. Speas, Jr.
Special Deputy Attorney General

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14 May 1980

Subject: Courts; Clerks of Court Jurisdiction

Requested by: Honorable R. Max Blackburn
Clerk of Superior Court
Mecklenburg County

Question: Where an appeal is taken to the Superior Court from a Clerk's interim ruling on fees awarded to the Commissioners in a partition proceeding, can the Superior Court retain jurisdiction until final disposition or does the proceeding return to the Clerk of Superior Court ?

Conclusion: The Superior Court may retain jurisdiction and dispose of the full matter under G.S. 1-276.

A proceeding for the partition of real or personal property is a special proceeding over which the clerk has jurisdiction. G.S. 46-1; *Dubose v. Harpe*, 239 N.C. 672, 80 S.E. 2d 454 (1954).

G.S. 1-276 provides that:

Whenever a civil action *or special proceeding* begun before the clerk of a superior court is *for any ground whatever* sent to the superior court before the judge, the judge has jurisdiction; and it is his duty, upon request of either party, to proceed to hear and determine all matters in controversy in such action, unless it appears to him that justice would be more cheaply and speedily administered by sending the action back to be proceeded in before the clerk, in which case he may do so. (Emphasis added).

Thus, when a party appeals from the Clerk's order, the Superior Court is not limited to review the action of the clerk, but is vested with jurisdiction to "hear and determine all matters in controversy in such action," *Allen v. Allen*, 258 N.C. 305, 128 S.E. 2d 385 (1962); *Hudson v. Fox*, 257 N.C. 789, 127 S.E. 2d 556 (1962); *Plemmons v. Cutshall*, 230 N.C. 595, 55 S.E. 2d 74 (1949); *Faison v. Williams*, 121 N.C. 152, 28 S.E. 188 (1897), or the Superior Court may remand it to the clerk, but the decision to do so is fully in the Court's discretion. *Hall v. Artis*, 186 N.C. 105, 118 S.E. 901 (1923).

The jurisdiction of the Superior Court is not derivative in partition proceedings originally before the clerk. Unlike probate matters where the clerk has exclusive original jurisdiction and the Superior Court has only appellate jurisdiction, *In re Estate of Adamee*, 291 N.C. 386, 230 S.E. 2d 541, *reversing*, 28 N.C. App. 229, 221 S.E. 2d 370 (1976), in partition proceedings the clerk is "but part of the same court." *Perry v. Bassenger*, 219 N.C. 838, 15 S.E. 2d 365 (1941). Thus G.S. 1-276 applies. *Compare, Re Hine's Will*, 228 N.C. 405, 45 S.E. 2d 526 (1947) (probate matter).

Rufus L. Edmisten, Attorney General
Lucien Capone, III
Associate Attorney

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14 May 1980

Subject: Health; Solid Waste Management; Chapter 130, Article 13B; Prohibition of Hazardous Waste Facility by Local Ordinance.

Requested by: O. W. Strickland, Head
Solid and Hazardous Waste Management
Branch
Environmental Health Section

Question: Can a city or county enact an ordinance which prohibits the establishment of a hazardous waste facility within its city or county limits?

Conclusion: No.

The United States Congress enacted the Resource Conservation and Recovery Act of 1976 (R.C.R.A.), (42 U.S.C. 6901 et.seq.) to regulate solid waste disposal. Subtitle C of this Act is entitled "Hazardous Waste Management" and it provides for the establishment of standards regulating the treatment, storage, transportation and disposal of hazardous wastes. These federal minimum standards constitute an attempt to provide uniformity among the states in the field of hazardous waste management. Section 6926(b) of R.C.R.A. authorizes individual states to develop their own hazardous waste management programs subject to the approval of the U.S. Environmental Protection Agency. The North Carolina General Assembly responded to this Section in 1979 by amending the Solid Waste Management Act, Article 13B of Chapter 130 of the General Statutes, to provide for the establishment of a comprehensive program concerning the management and disposal of hazardous waste. See G.S. 130-166.18(c) (1979 Cum. Supp.). As a part of this comprehensive program, this legislation provides for

the establishment of extensive rules governing hazardous waste facilities in the following areas: record-keeping and reporting by owners and operators of hazardous waste facilities; treatment, storage and disposal standards of performance and techniques to be used by hazardous waste facilities; location, design, ownership and construction of hazardous waste facilities; proper maintenance and operation of hazardous waste facilities, including requirements for ownership, financial responsibility, training of personnel, continuity of operation and procedures for establishing and maintaining hazardous waste facilities; monitoring by owners and operators of hazardous waste samples from owners and operators of hazardous waste facilities; and a permit system governing the establishment of hazardous waste facilities. In 1979, the North Carolina Commission for Health Services adopted extensive rules and regulations dealing with hazardous waste management, including criteria for the establishment of hazardous waste facilities. See 10 N.C.A.C. 10F.

It is the opinion of this Office that the State of North Carolina has shown a clear legislative intent to provide a complete and integrated regulatory scheme in the area of hazardous waste facilities. G.S. 160A-174(b) provides:

"A city ordinance shall be consistent with the Constitution and laws of North Carolina and of the United States. An ordinance is not consistent with State or Federal law when:

* * *

"(2) The ordinance makes lawful an act, omission, or condition which is expressly made unlawful by State or Federal law;"

* * *

A city ordinance which purports to prohibit hazardous waste facilities within its city limits is not consistent with State law in that it makes unlawful an act which is lawful by State law if appropriate standards are met. It is well established in North Carolina that city ordinances must be in harmony with the general laws of the State and whenever they come in conflict with the general laws the city ordinances must give way. *Washington v. Hammond*, 76

N.C. 33 (1877); *State v. Stevens*, 114 N.C. 873, 19 S.E. 861 (1894); *State v. Williams*, 283 N.C. 550, 196 S.E. 2d 756 (1973); *Smith v. Keator*, 21 N.C. App. 102, 203 S.E. 2d 411 (1974), cert. denied 285 N.C. 235, 204 S.E. 2d 25, affirmed 285 N.C. 530, 206 S.E. 2d 203, appeal dismissed 95 S. Ct. 613, 419 U.S. 1043, 42 L. Ed. 2d 636. As with a city, a county, through its board of commissioners, cannot enact a valid ordinance which prohibits certain conduct if a statewide statute in effect at the time the ordinance in question was adopted deals specifically with the identical conduct. *State v. Tenore*, 280 N.C. 238, 185 S.E. 2d 644 (1972).

A very smimilar situation was present in *Rollins Environmental Services of Louisiana, Inc. v. Iberville Parish Police Jury*, 371 So. 2d 1127 (La. 1979). A suit was instituted by Rollins to enjoin enforcement of a local hazardous waste ordinance which prohibited the storage and disposal of hazardous waste, even if the waste was stored or disposed of properly, within the boundaries of Iberville Parish. The Supreme Court of Louisiana ruled that the federal government, through the enactment of R.C.R.A., and the state governments, through state programs established pursuant to R.C.R.A., had preempted the field of hazardous waste regulation. Therefore, this court ruled, the Iberville Parish ordinance was inconsistent with the general law of Louisiana and thus unconstitutional, null and ineffective.

Current State law makes it lawful to establish a hazardous waste facility if appropriate regulations are met. Therefore it is the opinion of this Office that neither a city nor a county may enact a valid ordinance which prohibits the establishment of a hazardous waste facility within its city or county limits since such an ordinance would be in conflict with the general law of North Carolina.

Rufus L. Edmisten, Attorney General
Thomas G. Meacham, Jr.
Associate Attorney

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21 May 1980

Subject: Health; Counseling Minors for Sickle Cell Disease; Definition of treatment under G.S. 90-21.2

Requested by: Dr. Sarah T. Morrow, M.D., M.P.H., Secretary

Questions: 1. Does counseling minors for sickle cell disease and related genetic disorders constitute "treatment" as defined under G.S. 90-21.2?

2. May minors be counseled for sickle cell disease and related genetic disorders without parental consent?

3. If parental consent is required for counseling minors for sickle cell disease and related genetic disorders, would such consent remain valid for later counseling if obtained at the time of testing?

Conclusions: 1. No.

2. To provide genetic counseling to minors without consent would appear to be a violation of the common law principles governing the parent-child relationship and thus would leave the individual providing these services potentially vulnerable to litigation.

3. Yes.

Generally, the consent of the parent is necessary before his child is medically treated. See *Sharpe v. Pugh*, 270 N.C. 598 (1972). Statutory relief from that duty is provided by G.S. 90-21.1 through 90-21.5. Protection from failure to gain such consent is only

available when: (1) the treatment fits the statutory definition, and (2) the treatment is only given in those particular circumstances outlined by the statute.

G.S. 90-21.2 defines that treatment" which will be protected by the statute; it states:

The word "treatment" as used in G.S. 90-21.1 is hereby defined to mean any medical procedure or treatment, including x-rays, the administration of drugs, blood transfusions, use of anesthetics, and laboratory or other diagnostic procedures employed by or ordered by a physician licensed to practice medicine in the State of North Carolina that is used, employed, or ordered to be used or employed commensurate with the exercise of reasonable care and equal to the standards of medical practice normally employed in the community where said physician administers treatment to said minor.

The purpose of genetic counseling is to provide clear communication of the diagnosis and of all the medical, psychological, social, and genetic factors relating to a particular condition. Genetic counseling encompasses reoccurrence, risk, and prognosis, and alternatives for prevention and/or treatment of a particular condition.

On comparing the statutory definition and the purposes of the counseling, it would appear that genetic counseling is not the type of "treatment" which is encompassed by the statute.

Even if genetic counseling were "treatment", it would not meet the other statutory requirements. G.S. 90-21.1 outlines those situations in which medical treatment may be given without consent; generally it is emergency treatment of minors that is contemplated. Therefore, parental consent is not required when the parents are unavailable, the identity of the child is unknown, immediate treatment is essential, or when the parents' refusal of consent endangers the life of the child.

G.S. 90-21.5 further provides that a minor's consent, alone, is sufficient when medical services are for the prevention, diagnosis,

and treatment of certain conditions, i.e. pregnancy or venereal disease.

Genetic counseling is a follow-up procedure for those adolescents who have been earlier diagnosed as having sickle cell disease. Such procedure would not fall within those exceptions provided by G.S. 90-21.1 or G.S. 90-21.5. To provide genetic counseling to minors without consent would appear to be a violation of the common law principles governing the parent-child relationship and thus would leave the individual providing these services potentially vulnerable to litigation.

Valid parental consent for later counseling may be obtained when the child is tested for sickle cell disease, if parents are sufficiently informed at that time about the proposed counseling and its nature. If "consent" is made without adequate information then there is, in fact, no consent. See *Sharpe v. Pugh*, 270 N.C. 598, (1972) and 136 A.L.R. 1370.

Alternatively, G.S. 90-21.1 et seq. could be amended so that genetic counseling would be included in those medical services which are protected by the statute.

Rufus L. Edmisten, Attorney General
Sarah C. Young
Associate Attorney

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29 May 1980

Subject: Social Services; Juvenile Code; Secure and Nonsecure Custody of Juveniles.

Requested by: The Honorable Willis P. Whichard, Senator North Carolina General Assembly

Questions: 1. May a juvenile alleged to be undisciplined by virtue of being a runaway be held in secure custody for more than 24 hours?

2. May a juvenile alleged to be undisciplined by virtue of being truant or disobedient be held in secure custody?

3. May a juvenile who has been adjudicated delinquent and placed on probation later be placed in secure custody if that juvenile violates the terms of his probation without at the same time committing a new delinquent act?

Conclusions:

1. No, under G.S. 7A-574(b)(9) such a runaway may not be held more than 24 hours in secure custody.

2. No.

3. Yes, a delinquent juvenile who violates probation may be held in secure custody pending further disposition of his case according to G.S. 7A-574(c) & (d).

The three questions posed ask this Office to construe provisions of the new Juvenile Code, G.S. 7A-516, *et seq.* One of the new features of the Code is the secure custody order which is the legal mechanism by which certain delinquent and undisciplined juveniles may be held under lock and key pending hearing and disposition of their cases. The criteria for secure custody orders are set forth in G.S. 7A-574(b). Nine separate criteria for secure custody appear in G.S. 7A-574(b). Only one speaks expressly to the undisciplined juvenile. (Seven speak to delinquent juveniles, and one speaks to self-destructive juveniles.) The section concerning undisciplined juveniles is G.S. 7A-574(b)(9), and it says the following:

"(T)he judge may order secure custody only where he finds there is a reasonable factual basis to believe that the juvenile actually committed the offense as alleged in the petition, and that the juvenile alleged to be undisciplined by virtue of being a runaway should be detained for a period of less than 24 hours to facilitate reunion with parents or to facilitate

evaluation of the juvenile's need for medical or psychiatric treatment."

Three questions arise concerning this provision. First, it is suggested that G.S. 7A-572(a)(3)a implies that other undisciplined juveniles may also be the subject of secure custody orders. Whatever the implication of G.S. 7A-572, the express language of G.S. 7A-574(b) says "only" those undisciplined juveniles who are runaways may be detained under a secure custody order. Second, use of the word "should" in subdivision (9) leads to the suggestion that in some cases runaway juveniles may be detained for more than 24 hours. This is incorrect. The word "should" in subdivision (9) means that the judge must ask if secure custody is necessary for any particular runaway juvenile. Only in cases where secure custody is necessary may it be ordered. But in no case may it extend beyond 24 hours.

Third, it is suggested that subdivision (9) conflicts with the Interstate Compact on Juveniles, G.S. 7A-684, *et seq.* The Compact applies to, among others, runaways from states other than North Carolina which are parties to it. G.S. 7A-688. The Compact provides the following:

"Upon reasonable information that a person is a juvenile who has run away from another state party to the Compact without the consent of a parent, guardian, person or agency entitled to legal custody, such juvenile may be *taken into custody without a requisition and brought forthwith before a judge* of the appropriate court who may appoint counsel or guardian ad litem for such person and *who shall determine after a hearing* whether sufficient cause exists to hold the person, subject to the order of the court, for his own protection and welfare, for such time not exceeding 90 days as will enable his return to another state party to this Compact...."
G.S. 7A-688(a) (Emphasis added)

The Compact procedures and remedies are "in addition to and not in substitution for" other procedures, rights and remedies under State law. G.S. 7A-686. While the juvenile court is the proper court to hold Compact hearings, G.S. 7A-523(1), the procedures of

G.S. 7A-588(a), described above, are markedly different from those in the typical juvenile court abuse, neglect, dependency, delinquency or undisciplined behavior case. The "requisition" is unknown in juvenile court other than under the Compact. Likewise, the hearing which must be held forthwith after the child is taken into custody, differs markedly from the Code hearings on continued secure custody. Among other differences, the Compact hearing need not be repeated every week. Compare G.S. 7A-688 with G.S. 7A-577(g).

The Compact rule defining the maximum age of a juvenile also differs from that set by the other parts of the Juvenile Code. Under the Compact, a juvenile is "any person who is a minor of the state of residence of the parent, guardian, person or agency entitled to legal custody." G.S. 7A-688(c). Compare G.S. 7A-517(20) and (28) which sets the age of juveniles at 18 for most Code purposes but at 16 for undisciplined children. This age difference is crucial. It shows beyond doubt that, for example, a 17 year old runaway Virginian may be subject to the jurisdiction of North Carolina courts through the Compact, whereas a 17 year old runaway North Carolinian is outside the jurisdiction of the State courts because of the Code. The former is a "runaway" under the Compact; the latter is *not* an "undisciplined juvenile" under the Code. The secure custody rules of G.S. 7A-574(b) only apply to undisciplined juveniles. The effect is that runaway North Carolinians alleged to be undisciplined can be held in custody no longer than 24 hours, while out-of-state runaways can be held here up to 90 days. G.S. 7A-574(b)(9) and G.S. 7A-688(a).

The next question asks whether the Juvenile Code permits a truant or disobedient juvenile, alleged to be undisciplined under G.S. 7A-517(28), to be held in secure custody. It does not. Except as unambiguously stated in G.S. 7A-574(b)(8) and (9), concerning, respectively, self-destructive and runaway juveniles, the Code limits secure custody to juveniles alleged to have committed an "offense". G.S. 7A-574(b). Under the Code juveniles who have committed offenses are by definition delinquent. G.S. 7A-517(12). Therefore, it appears that G.S. 7A-574(b), setting criteria for secure custody, is limited to allegedly delinquent juveniles except where the context unmistakably compels a different reading. Only subdivisions (8) and (9) are so compelling.

In saying what has been said, we are not unaware of subdivisions (3) and (5). The former says secure custody is available when the court finds;

"That the juvenile has willfully failed to appear on the pending delinquency charge or has a record of willful failures to appear at court proceedings."

Granted, the second clause of subdivision (3) can be read to stand alone. Read alone, it makes no reference to delinquency. However, it must be read *in pari materia* with the first clause which does confine itself to delinquency cases. More particularly, the first clause speaks of "the pending delinquency charge". Use of the definite article "the" can only mean that the "pending delinquency charge" relates back to the "offense" referred to in subsection (b). This is further textural proof that the word "offense" limits G.S. 7A-675(b) to delinquency cases.

Turning to G.S. 7A-574(b)(5), it says secure custody is available when the court finds;

"That exhaustive efforts to identify the juvenile have been futile or by reason of his being a nonresident of North Carolina there is reasonable cause to believe the juvenile will not appear in court on a pending delinquency case unless he is detained."

Here the first clause does not refer explicitly to delinquent juveniles while the second clause does. However, construing them *in pari materia*, and in light of the word "offense" appearing in the principal clause of subsection (b), and because each of subdivisions (1) through (4) before and (6) and (7) following after are limited to allegations of delinquency, we conclude only allegedly delinquent juveniles can be held in secure custody under either clause subdivision (5).

Finally, it is asked whether the Juvenile Code permits secure custody of a juvenile who has been adjudicated delinquent, placed on probation, violated the probation, but not committed a new delinquent act. The Juvenile Code speaks to probation violations. It says the following:

"If a juvenile violates the condition of his probation, he and his parents, after notice, may be required to appear before the court and the judge may make any disposition of the matter authorized by this act."
G.S. 7A-658.

This section in effect requires a second disposition hearing for a probation violator. Pending this new disposition, the probation violator may be held in secure custody, because according to G.S. 7A-574(c),

"When a juvenile has been adjudicated delinquent, the judge may order secure custody pending the dispositional hearing...."

This subsection authorizes secure custody for an adjudicated delinquent in the discretion of the judge. In exercising his discretion, the judge should consider among other things "the nature and circumstances of the offense" and the "juvenile's family ties, character, mental condition, and school attendance record."
G.S. 7A-574(d).

Rufus L. Edmisten, Attorney General
Steven Mansfield Shaber
Associate Attorney

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2 June 1980

Subject: Streets and Highways; Closing unopened streets offered for dedication in a subdivision; Counties

Requested by: William P. Mayo
County Attorney
Beaufort County

Question: Does N.C.G.S. 153A-241 apply to closing a portion of a street in a subdivision that has been offered for dedication but never

accepted by a public authority nor opened for public use?

Conclusion:

No. Subdivision streets are not open to the public as a matter of right until they have been accepted on behalf of the public in a manner recognized by law. County authorities can only proceed under N.C.G.S. 153A-241 to close a road after an offer of dedication has been accepted and public rights have attached.

N.C.G.S. 153A-241 provides a procedure by which a county can permanently close a public road or easement if a closing is in the public interest and would not deprive anyone of access to their property. The applicability of this statute depends on whether the offer of dedication has ever been accepted so that the public has acquired any rights in the road or easement.

In the situation presented by the Beaufort County Attorney, the adjoining property owners are seeking to close a one block portion of 5th Street in the Pamlico Beach - Lot Subdivision. There are only two adjoining property owners on either side of 5th Street running from Pamlico Drive to the Pamlico River. The map of the subdivision shows the property to have been surveyed in January, 1918, and the corners set and retraced in November, 1930. The Beaufort County Registry did not put the date of recording on older maps, but according to the chronology of the indexing the map would have been recorded in the early 1930's.

In *Steadman v. Pinetops*, 251 N.C. 509, 515 (1960), the court stated the general rule is that when lots are sold and conveyed by reference to a map showing the division of a tract of land into subdivisions of streets and lots, the streets become dedicated to public use and the purchasers of lots acquire the right to have all streets kept open. The court went on to say that the dedication "insofar as the general public is concerned . . . is but a revocable offer and is not complete until accepted, and neither burdens nor benefits with attendant duties may be imposed on the public unless in some proper way it has consented to assume them." *Supra*.

No public authority having jurisdiction has formally or informally accepted the offer of dedication of the one block of 5th Street in the Pamlico Beach - Lot Subdivision. The county has done nothing to open or maintain the street since it was first offered for dedication on the map. The two adjoining property owners agree that the street has never been opened. For a long time a shallow drainage ditch has blocked access to the street from Pamlico Drive. Before an offer of dedication for a street has been accepted, only private rights attach and the county would have no authority under N.C.G.S. 153A-241 to close the street. The parties would have to proceed under N.C.G.S. 136-96 or case law.

Rufus L. Edmisten, Attorney General
Evelyn M. Coman
Associate Attorney

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3 June 1980

Subject: Taxation; Ad Valorem Taxes; Exemptions; Charitable and Scientific Institutions; Electric Power Research Institute, Inc.; G.S. 105-278.7.

Requested by: Mr. Hamlin L. Wade
Mecklenburg County Tax Attorney

Questions:

1. Is Electric Power Research Institute, Inc., a non-profit charitable and scientific institution?
2. Is real and personal property owned by Electric Power Research Institute, Inc., and wholly and exclusively used for non-profit charitable or scientific purposes exempt from ad valorem taxation?

Conclusions:

1. Yes.
2. Yes, subject to statutory limitations herein discussed.

Inquiry has been made as to whether real and personal property of Electric Power Research Institute, Inc. would be exempt from ad valorem taxation under G.S. 105-278.7, assuming proper application therefor were made under G.S. 105-282.1.

Electric Power Research Institute, Inc. is a non-profit corporation incorporated under the laws of the District of Columbia, whose purposes are stated in its charter to be:

"(a) To promote, engage in, conduct and sponsor research and development with respect to electricity production, transmission, distribution and utilization, and all activities directly or indirectly related thereto;

(b) To provide a medium through which investor-owned, government-owned and cooperative-owned power producers and all other persons interested in the production, transmission, distribution or utilization of electricity can sponsor electricity research and development for the public benefit;

(c) To promote, engage in and conduct research in both the pure and applied sciences for the advancement and betterment in the public service of the production, transmission and distribution of electric power;

(d) To sponsor scientific research and development in the electric power field with a view towards providing economical, reliable electric service to the public with minimal adverse environmental effects;

(e) to discover, devise, develop, invent and create through study and research, the methods and means to improve the production, transmission, distribution and utilization of electric power, in order to insure the adequate power supply that is vital to the progress of the nation and the world community;

(f) To seek and ascertain, through scientific research

and development, solutions to environmental problems related to the production, transmission, distribution and utilization of electric power;

(g) To undertake, conduct, engage in or direct research and development activities for the discovery or improvement of new or more efficient forms of electric power production, transmission and distribution and of improved utilization, including new or more efficient uses, of electric power by the public;

(h) To discover and develop, through scientific study, research, ways and means to protect, conserve, and maximize the efficient utilization of finite natural resources used in the production, transmission and distribution of electric power;

(i) To provide a medium for coordination and co-operation and for the exchange of information for all organizations and persons, public or private, concerned with electric power and scientific research and development;

(j) To ascertain, prepare and disseminate information and data with respect to scientific research and development activities in the field of electric power;

(k) To have all those powers conferred upon corporations organized under the Non-profit Corporation Act necessary to effect any or all of the purposes for which the corporation is formed subject to any limitations contained in these Articles of Incorporation or the laws of the District of Columbia."

G.S. 105-278.7 makes the following provisions regarding the exemption of real and personal property used for educational, scientific, literary or charitable purposes:

"(a) Buildings, the land they actually occupy, and additional adjacent land necessary for the convenient use of any such building shall be exempted from

taxation if wholly owned by an agency listed in subsection (c) below, and if: (1) wholly and exclusively used by its owner for nonprofit educational, scientific, literary, or charitable purposes as defined in subsection (e), below...

(b) Personal property shall be exempted from taxation if wholly owned by an agency listed in subsection (c) below and if: (1) wholly and exclusively used by its owner for nonprofit educational, scientific, literary or charitable purposes...

(c) The following agencies, when the other requirements are met, may obtain property tax exemption under this section: (1) A charitable association or institution... (4) A scientific association or institution...

(f) Within the meaning of this section ...

(2) A scientific purpose is one that yields knowledge systematically through research, experimentation, or other work done in one or more of the natural sciences...

(4) A charitable purpose is one that has humane and philanthropic objections; it is an activity that benefits humanity or a significant rather than limited segment of the community without expectation of pecuniary profit or reward..."

Before looking further at the statute, it might be well to consider the following: (a) Section 501(c) (3) of the Internal Revenue Code exempts from federal income tax organizations "organized and operated exclusively for ... charitable, scientific ... or educational purposes, and under that section the Internal Revenue Service has determined this corporation to be exempt (Determination Letter dated 22 September 1972); (b) G.S. 105-125 exempts from corporate franchise tax "charitable ... scientific or educational

corporations, not operating for a profit", and under that section the Department of Revenue has determined the corporation to be exempt (Determination Letter dated 14 December 1979); (c) G.S. 105-130.11(a)(3) exempts from corporate income tax "corporations organized for...charitable, scientific...or educational purposes...no part of the net earnings of which inures to the benefit of any private stockholder or individual", and under that section the Department of Revenue has determined the corporation to be exempt (Determination Letter dated 14 December 1979); and (d) G.S. 105-164.14(b) authorizes refunds of certain sales and use taxes paid by "educational institutions not operated for profit, churches, orphanages and other charitable or religious institutions and organizations not operated for profit," and under that section the Department of Revenue has determined the corporation to be qualified to claim and receive such refunds (Determination Letter dated 11 December 1979).

While we do not believe that any one or more of the foregoing determinations is dispositive of the question (*they might all be wrong, or niceties and nuances of applicable statutes might lead to contrary results*), nonetheless we feel that they form a circumstantial background that ought not be ignored.

Against that background, we note the various conditions of G.S. 105-278.7 that must be met in order that the exemption apply:

(1) Only buildings, land occupied by such buildings, and adjacent land necessary to the convenient use of such buildings shall be exempt, and all personal property shall be exempt, *if wholly owned* by a non-profit charitable or scientific association or institution. By definition, a corporate owner is "charitable" if its activity "benefits humanity or a significant rather than limited segment of the community without expectation of pecuniary profit or reward", and is "scientific" if its activity "yields knowledge systematically through research, experimentation, or other work done in one or more of the natural sciences." G.S. 105-278.7(f). Reference to the purposes set out in the charter impels the conclusion that the corporation is non-profit and that its purposes are both charitable and scientific. This conclusion would of course be refuted and overcome if the corporation were found in actuality to serve other than eleemosynary purposes, but none of the

information provided to us would suggest that such might be the case. We conclude that the corporation is indeed a nonprofit charitable and scientific institution, and for the purposes of this opinion we assume that it wholly owns the property about which it has inquired.

(2) Not only must such property be owned by such a corporation, but it must be *used* wholly and exclusively by the corporation for nonprofit charitable or scientific purposes. G.S. 105-278.7(a) and (b). Since the corporation is simply seeking information as to whether its property would be exempt if it were located in this State, no definitive answer can be given without knowing what the property would be and how it would be used. However, if the real property were limited to buildings, land occupied by buildings and necessary adjacent land, and if all real and personal property were used for the nonprofit scientific and charitable purposes set out in its charter, then such property would in our opinion be exempt from ad valorem taxation, if application therefor were properly made as provided in G.S. 105-282.1.

Rufus L. Edmisten, Attorney General
Myron C. Banks
Special Deputy Attorney General

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6 June 1980

Subject: Extradition; Reimbursement of extradition expenses for the return of a fugitive misdemeanor probationer; N.C.G.S. 15A-744

Requested by: Mr. Jack Cozort
Legal Counsel to the Governor

Question: Shall the State Treasury or the appropriate County Treasury pay the costs and expenses for the return of a fugitive misdemeanor probationer?

Conclusion: The appropriate County Treasury where the misdemeanor allegedly occurred is responsible for the payment of expenses involved in the extradition of a fugitive misdemeanant probationer from an asylum state.

An extradition agent is ordinarily entitled to reimbursement for travel expenses and subsistence costs involved in returning a fugitive to North Carolina from an asylum state. However, the question arises as to who is ultimately responsible for this reimbursement, the State or County wherein the extraditable crime allegedly occurred?

North Carolina is a party to the Uniform Criminal Extradition Act, codified in Article 37 of Chapter 15A of the General Statutes of North Carolina. N.C.G.S. 15A-721 *et seq.* Although the rendition laws are generally uniform, the cost and expense provisions for the reimbursement of extradition agents vary among the different states. The reimbursement provision adopted in North Carolina is a variation of the suggested uniform rule. N.C.G.S. 17A-744 provides in part, the following:

"§15A-744. *Costs and expenses.* - Subject to the requirements, restrictions and conditions hereinafter set forth in this section, *if the crime shall be a felony*, the reimbursements for expenses shall be paid out of the State Treasury on the certificate of the Governor and warrant of the Auditor, as provided by this section. *In all other cases*, such expenses or reimbursements shall be paid out of the County Treasury of the County wherein the crime is alleged to have been committed according to such regulations as the Board of County Commissioners may promulgate. In all cases, the expenses, for which repayment or reimbursement may be claimed, shall consist of the reasonable and necessary travel expense and subsistence costs of the extradition agent or fugitive officer, as well as the fugitive, together with such legal fees as were paid to the officials of the State on whose Governor the requisition is made."

(Emphasis added). Rather than classifying crimes as felonies, the suggested uniform rule provides that when the punishment of the extraditable crime involves confinement in the penitentiary, the extradition expenses will be paid out of the State Treasury. Uniform Criminal Extradition Act, §24.

The language of N.C.G.S. 15A-744 is clear and unambiguous, and must be given its plain and definite meaning. *State v. Camp*, 286 N.C. 148, 209 S.E.2d 754 (1974). The Statute expressly classifies felonies separate and apart from "all other cases." The apparent legislative intent of the distinct class "all other cases" was to encompass crimes which are not felonies, to wit, misdemeanors.

This narrow construction of the Statute is supported by *State v. Patterson*, 224 N.C. 471, 31 S.E.2d 380 (1944), decided under former N.C.G.S. 15-78. In *Patterson*, the North Carolina Supreme Court held that where the return of a fugitive felon from an asylum state is accomplished without formal extradition, the State is not responsible for the expenses involved. N.C.G.S. 15-78 was amended in 1955 to provide that if a fugitive is an alleged *felon* and he is returned to North Carolina without the aid of formal extradition, the State rather than the County must bear the expense of the return. 1955 North Carolina Session Laws, c 289. This provision was carried over and recodified in N.C.G.S. 15A-744. 1973 North Carolina Session Laws, c. 1286, s.16. The use of the word "*felon*" in the subsequent provisions of N.C.G.S. 15A-744 is further indication of the legislative intent to exclude the State from responsibility for reimbursement of extradition expenses involved in the return of criminals other than felons. Therefore, when the extradition involves a fugitive convicted of or charged with a felony, the State Treasury is ultimately responsible for the reimbursement of the extradition agent's expenses. However, in all other cases, to wit, misdemeanors, the County Treasury of the County wherein the crime allegedly occurred must bear the financial burden of reimbursing the extradition agent.

The unequivocal language of N.C.G.S. 15A-744 is controlling on the question raised herein. The appropriate County Treasury where the misdemeanor allegedly occurred is responsible for the payment of extradition expenses involved in the return of a fugitive misdemeanant probationer from an asylum state.

Rufus L. Edmisten, Attorney General
Barry S. McNeill
Associate Attorney

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9 June 1980

Subject: State Departments, Institutions and Agencies; Confidentiality of Records; Social Services; Counties; Juvenile Protective Service Case Records; N.C.G.S. 108-44; N.C.G.S. 7A-675

Requested by: Thomas Russell Odom
Assistant County Attorney
Durham County
Durham, North Carolina

Question: May a volunteer advisory group of local citizens under sanction from the Chief District Court Judge, obtain and review protective service case records of juveniles maintained by the county department of social services for the purpose of advising the Juvenile Court as to the need for review of custody of children being maintained in foster homes under the supervision of the county department of social services?

Conclusion: The protective service case records are not available to such a group unless review of the records is for purposes directly connected with the administration of programs of public assistance and is expressly authorized by the rules and regulations of the Social Services Commission or the Department of Human Resources.

Custody of a juvenile is vested in a county department of social

services ("DSS") either by consent of the parent(s) of the juvenile or by order of a court of competent jurisdiction. Adjudications of custody in such circumstances will normally arise upon a petition alleging that the juvenile is abused, neglected or dependent, as those terms are defined in the Juvenile Code (N.C.G.S. 7A-516 *et seq.*). Placement of the juvenile in a foster home or foster care facility follows vesting of custody in the county department of social services.

Records relating to obtaining custody and to placement in foster care are maintained by the county DSS. This Office has previously rendered an opinion, published in 47 N.C.A.G. 211, at 213, to the effect that the provisions of N.C.G.S. 108-45 apply to "...all records in the several county departments of social services concerning reports of child abuse and neglect..." Under the reasoning in that opinion, the statute clearly extends to records relating to dependency, custody and foster care.

N.C.G.S. 108-45(a) provides:

"(a) Except as provided in (b) below, it shall be unlawful for any person to obtain, disclose or use, or to authorize, permit, or acquiesce in the use of any list of names or other information concerning persons applying for or receiving public assistance that may be directly or indirectly derived from the records, files or communications of the Department of Human Resources or the county boards of social services, or acquired in the course of performing official duties except for purposes directly connected with the administration of the programs of public assistance in accordance with the rules and regulations of the Social Services Commission or the Department of Human Resources."

The exception referred to, appearing in subsection (b) of the statute, is not pertinent here.

Certain aspects of the State's juvenile program are funded in part by the federal government. N.C.G.S. 108-45(a) complies with the federal regulation appearing in 45 C.F.R. 205.50, which requires

in pertinent part, that states receiving such federal funds have statutes limiting use or disclosure of information concerning applicants for or recipients of financial assistance or services to purposes *directly* connected with: (1) administration of the program; (2) investigations, prosecutions or criminal or civil proceedings conducted in connection with administration of the program; and (3) the administration of any other Federal or federally assisted program providing assistance directly to individuals on the basis of need.

It is noted that the regulation specifically forbids "...disclosure to any committee or legislative body (Federal, State or local) of any information that identifies by name and address any such applicant or recipient..." Further, disclosure is restricted to persons subject to standards of confidentiality comparable to those applicable to the county and State social service agencies; and the same policies regarding confidentiality are to be applied to requests for information "...from a governmental authority, the courts, or a law enforcement official as from any other outside source."

N.C.G.S. 7A-675 also speaks to the confidentiality of juvenile records and provides, *inter alia*:

"(c) The Director of the Department of Social Services shall maintain a record of the cases of juveniles under protective custody by his Department or other placement by the court...

"(d) The records maintained pursuant to subdivisions (b) and (c) may be examined only by order of the judge except that the juvenile shall have the right to examine them.

"(g) Disclosure of information concerning any juvenile under investigation or alleged to be within the jurisdiction of the court that would reveal the identity of that juvenile is prohibited except that publication of pictures of runaways is permitted with the permission of the parent.

"(h) Nothing in this section shall preclude the necessary sharing of information among authorized agencies."

The clear intent evinced by N.C.G.S. 108-45(a) and 45 C.F.R. 205.50 is that access to the records in question shall be maintained in strict confidentiality, with the sole exception that they may be made available "...for purposes directly connected with the administration of the programs of public assistance in accordance with the rules and regulations of the Social Services Commission or the Department of Human Resources." We find nothing inconsistent between this intent and the provisions of N.C.G.S. 7A-675, and we are of the opinion that the statutes should be construed *in pari materia*.

From the information supplied, it does not appear that the voluntary advisory group is a part of any federal, State or local agency or that it is authorized by law to perform the functions proposed. We conclude, therefore, that unless the advisory group falls specifically within a rule promulgated by the Social Services Commission or the Department of Human Resources "...for purposes directly connected with the administration of the programs...", the advisory group is not authorized to obtain and review protective service case records of juveniles.

Rufus L. Edmisten, Attorney General
Henry T. Rosser
Assistant Attorney General

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10 June 1980

Subject: Criminal Law and Procedure; Sentences;
Probation; Restitution; Bankruptcy
Proceedings

Requested by: The Honorable Peter W. Hairston
Resident Superior Court Judge
Twenty-second Judicial District

Question:

The defendant-probationer was convicted in Superior Court of assault with a deadly weapon with intent to kill, inflicting serious injury. As a condition of probation, he was ordered to pay restitution, in installments, to the victim. His failure to honor the condition of restitution has caused his probation officer to file a violation of probation report with the Court. May an Order of Arrest be signed, or is the Court precluded from having the defendant-probationer arrested for violation of condition of probation by virtue of the fact that the defendant-probationer is involved in bankruptcy proceedings in Federal Court?

Conclusion:

The defendant-probationer may be jailed.

On June 26, 1978 the defendant-probationer plead guilty to assault with a deadly weapon with intent to kill, inflicting serious injury in the Superior Court of Davidson County. On June 28, 1978, the defendant-probationer was sentenced to not less than five nor more than ten years, sentence suspended upon the performance of conditions referred to below. On June 3, 1980, a violation report against the defendant-probationer was filed. Said report reads, in part, as follows:

"At the time defendant-probationer was placed on probation, he was ordered to pay court indebtedness at the rate of \$125.00 each month until paid in full. As of June 4, 1980, subject is \$657.00 in arrears and has made no payments since December 1979, however, he has filed a claim in United States Bankruptcy Court under Chapter 13. His failure and refusal to pay monies as ordered by the Court is in violation of the condition of probation - 'he shall pay into the Office of the Clerk of Court, P. O. Box 1064, Lexington, North Carolina court costs of \$74.00 and restitution as follows: \$4,000.00 as restitution to Mr. Lester Carroway, 203 Brown Street, Lexington, North

Carolina. Defendant-probationer is to pay \$125.00 per month to the Clerk's office until balance is paid. Payments to begin August 1, 1978, and like sum of \$125.00 due and payable on the first day of each and every month thereafter until paid. Clerk of Superior Court to disburse check to Lester Carroway on a monthly basis. Costs to be paid no later than \$90 days (sic) from this date.' Costs - \$74.00."

On April 1, 1980, subsequent to defendant-probationer's filing for bankruptcy, the United States Bankruptcy Court for the Middle District of North Carolina entered an order confirming a plan under 11 U.S.C., Chapter 13.

Generally speaking, the filing of a proper petition pursuant to the provisions of 11 U.S.C., Chapter 3 results in an automatic stay against the collection efforts of a petitioner's creditors. The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives a debtor a "breathing spell" from his creditors. It normally stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures which have driven him into bankruptcy. However, the present inquiry leads us into the realm of state court criminal proceedings and the matters attendant thereto. The issue presented is whether the filing of bankruptcy proceedings in a federal court precludes further action by a state court against a criminal defendant who has been convicted of a crime and ordered to pay restitution as a condition of probation.

An examination of the provisions of 11 U.S.C. §§523 and 1328, dealing with debts which constitute exceptions to discharge and 11 U.S.C. §362, dealing with exceptions to a provision for automatic stays against certain creditor collection efforts, sheds little light on the issue, except that §362(b)(1) does provide that a filing of a petition under §301, 302, or 303 of the title does not operate as a stay "...of the commencement or continuation of a criminal action or proceeding against the debtor;" No other provisions of the new Bankruptcy Act appear helpful.

Cases from other jurisdictions, however, have addressed the issue presented and have solidly held for the proposition that federal

bankruptcy proceedings in no way operate to stay, or otherwise effect, state court criminal proceedings in which no debtor-creditor relationship between the defendant and his victim can be construed to exist.

"A discharge in bankruptcy has no effect whatsoever upon a condition of restitution of the criminal sentence. A bankruptcy proceeding is civil in nature and is intended to relieve an honest and unfortunate debtor of his debts and to permit him to begin his financial life anew (*In Re Munford*, D.C. 255 F. 108). A condition of restitution in a sentence of probation is a part of the judgment of conviction. It does not create a debt nor a debtor/creditor relationship between the persons making and receiving restitution. As with any other condition of a probationary sentence it is intended as a means to insure the defendant will lead a law-abiding life thereafter. (Penal Law, §65.10).

It would thus be against our statute and public policy to permit a defendant who has received illegal gains and who was ordered to make restitution as a condition of his sentence to vacate such conditions by a discharge in bankruptcy." *People v. Mosesson*, 356 N.Y.S. 2d 483, 484-85, (1974). See also: *People on Inf. of Anerbach v. Topping Bros.*, 359 N.Y.S. 2d 985 (1974).

In *People v. Washburn*, 158 Cal.Rptr. 822 (1979), the California Court of Appeal, citing and following the holding of *Mosesson*, said the following at page 824:

"Defendant principally contended before the appellate department of the superior court, and here, that the law of the United States on bankruptcy is the supreme law of the land on that subject and that it would therefore be contrary to the United States Constitution to impose upon him a condition of probation requiring restitution of a 'debt' which has been lawfully discharged in bankruptcy.

The rationale of the appellate department was that bankruptcy obviously relates to 'provable debts' (see e.g., 11 U.S.C. §1(14)) but that amount ordered to be paid by the municipal court as restitution is not a 'debt' within the meaning of the bankruptcy law. The appellate department concluded that a condition of probation which consisted of restitution to a victim of a criminal act could have no relationship to 'debt' to the victim, since it is part of a judgement of conviction and is for the purpose of punishment, rehabilitation and helping to insure defendant will lead a law-abiding life."

Thus, it would appear that the Superior Court order of June 26, 1978 remains fully enforceable, the pendency of the federal bankruptcy proceedings notwithstanding, and the Superior Court of Davidson County is fully empowered to incarcerate the defendant-probationer for violation of the terms and conditions of probation.

As a caveat we note that the issue presented and the response to said issue concern only a situation in which the court has, for reasons of rehabilitation, ordered the payment of restitution to an injured victim. Neither the issue nor the response thereto are intended to apply to criminal cases in which payments ordered by the court are related to some preexisting debtor/creditor relationship between the defendant-probationer and the victim. In the latter type of case, such as one in which the ordering of repayment is based upon a conviction for the utterance of a worthless check, the law is somewhat less clear.

Rufus L. Edmisten, Attorney General
James Wallace, Jr.
Deputy Attorney General
for Legal Affairs

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25 June 1980

Subject: Physicians; Determination of Death; The Practice of Medicine.

Requested by: Page Hudson, M.D.
Chief Medical Examiner
Medical Examiner Section
Division of Health Services

Question: Is the determination of death regarded as "practicing medicine or surgery" as defined in G.S. 90-18?

Conclusion: Yes.

G.S. 90-18 states in part that "(a)ny person shall be regarded as practicing medicine or surgery within the meaning of this Article who shall diagnose or attempt to diagnose, treat or attempt to treat, operate or attempt to operate on, or prescribe for or administer to, or profess to treat any human ailment, physical or mental, or any physical injury to or deformity of another person." The broad scope of this definition is limited by fourteen exceptions set forth in the statute. For instance, physician assistants and nurse practitioners may perform medical acts when so authorized. See G.S. 90-18.1 and 90-18.2. Determination of whether a person requires treatment and the nature of the treatment is diagnosis of a human ailment and therefore constitutes the practice of medicine. Determination of whether a person is living or dead is a component of diagnosis of a human ailment.

G.S. 90-323, enacted in 1979 as part of the revision of Article 23 of Chapter 90 relating to the right to natural death and brain death, clearly addresses this issue. It states in part that "(t)he determination that a person is dead shall be made by a physician license to practice medicine applying ordinary and accepted standards of medical practice."

The section further states that brain death may be used as a basis for determination of death. The reference to brain death in the section does not limit the requirement of determination of death

by a physician to only occasions where brain death is employed as the determination criterion. Such a construction would be inconsistent with the plain words of the statute and the definition of the practice of medicine or surgery in G.S. 90-18.

Our opinion that determination of death is required to be made by a physician does not necessitate that a physician must be summoned to "pronounce" an obviously deceased body dead as, for example, in the case of the finding of a partially decomposed body in the woods. The law only requires that a death certificate shall be filed for each death which occurs in the State. The medical certificate portion of the certificate must be completed by the attending physician, a hospital physician or the physician who performed an autopsy. G.S. 130-46 only requires that a physician certify the cause of death. It also does not require that a physician must pronounce every individual dead. Finally, G.S. 130-198, which requires medical examiners to be notified of certain deaths, does not mandate that a medical examiner pronounce any person dead. The duties of a medical examiner are to investigate, file a report, complete the death certificate, and, if appropriate, order an autopsy.

Therefore, it is the opinion of this Office that determination or pronounce of death is an integral part of the practice of medicine because it dictates whether life-saving measures will be discontinued or not initiated at all. However, it is necessary only when there is a question of whether an individual is alive or dead.

Rufus L. Edmisten, Attorney General
Robert R. Reilly
Assistant Attorney General

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26 June 1980

Subject: Insurance; Mutual Insurance Company
Guaranty Funds; Dividend Payments

Requested by: Ron Raxter
Staff Attorney
Department of Insurance

Questions:

1. Are cash or stock dividends now paid to guaranty fund shareholders, which dividends jointly exceed 10% annually, in violation of G.S. 58-96?
2. Does the income from guaranty fund investments accrue solely to benefit of the guaranty fund shareholders?

Conclusions:

1. Yes.
2. No.

Charlotte Liberty Mutual Insurance Company (hereafter "insurance company") was chartered in 1926 as a mutual company to issue life, annuity, and accident and health insurance. Until the year 1976, the insurance company had no authorized capital stock including guaranty fund capital stock. During its entire history, no dividend has been paid to its policyholders and on December 31, 1975, there was an earned surplus of approximately \$3 million.

G.S. 58-95 states that in a corporation with guaranty capital, one-half of the directors shall be chosen by and from the stockholders. In 1976, the insurance company's corporate charter was amended to authorize "Guaranty Capital Stock" "for the purpose of providing a Guaranty Fund." Pursuant to the charter amendment, guaranty capital stock was issued. Currently the corporate books reflect the issuance of \$370,900 on guaranty fund stock, some of which has been internally generated in stock dividends.

The insurance company contends that it is entitled to pay to the guaranty fund stockholders a 10% cash dividend under G.S. 58-96 and to segregate the earnings of the guaranty fund assets, with such investment earnings accruing directly to the benefit of the guaranty fund stockholders. Accordingly, since 1977, the company has been paying a G.S. 58-96 cash dividend from general funds as well as a stock dividend credited against the investment income. Together, the dividends exceed 10%.

The statute authorizing guaranty funds, to wit, G.S. 58-96, in part states the following:

"...The stockholders of the guaranty capital of a company or owners of guaranty surplus are entitled to an annual dividend of not more than 10 percentum (10%) on their respect shares, if the net profits or unused premiums left after all expenses, losses, and liabilities then incurred, together with the reserve as provided for, are sufficient to pay the same...."

That this statute limits the total amount of remuneration available to guaranty fund stockholders is clear for several reasons. First for the use of money, an owner or user might receive an interest or contract payment. However, such payments are not customary for stockholders. Common sense speaks loudly to the proposition that an interest, rental, or payment other than a dividend is not to be received by a stockholder in the absence of an expressed statement to that effect. Customarily, a stockholder receives dividends, nothing more. There is no expressed statement authorizing other than a dividend. Second, guaranty fund stock embodies no rights other than those created by statute. 44 C.J.S., Insurance §113. The only right expressly given by the statute is a dividend right with a limit of 10%. Nowhere can it be read into G.S. 58-96 that the stockholders are entitled to more than the annual dividend. Third, when the guaranty fund stock was issued, the insurance company received property of value and issued the stock in payment thereof. The property received now belongs to the insurance company and not to the stockholders. 19 *Fletcher Cyclopedia Corporations* §5231. Accordingly, investment income from the guaranty fund is income for general corporate purposes. 19 *Fletcher*, supra, §9272; 73 C.J.S., Profit or Profits. General corporate income is not to be paid to stockholders in addition to a dividend in the absence of an expressed statement to that effect.

If G.S. 58-96 provided, which it does not, that a separate investment account should be established for the guaranty fund, such provision would not be tantamount to stating that the stockholders are entitled to the investment income as well as to a separate dividend. Of course, the separate investment account would be a good vehicle for determining whether the guaranty stockholders should receive

a dividend. If investment losses occurred, perhaps good judgment would demand that guaranty fund stockholders forego dividends. This technique would be compatible with the provisions of G.S. 58-88, which provides for separate accounts and an 8% dividend at least as to stock companies' guaranty funds established in accordance with G.S. 58-87, since that statute can be interpreted to the effect that the dividend should be paid only from the investment profits.

G.S. 58-69 provides that the general corporate laws are normally applicable to insurance companies. In the current matter, when a stock dividend is issued, the stockholders actually receive stock certificates, and the books of account are modified so as to transfer earned income to paid-in capital. G.S. 55-47(e) requires such an increase in stated capital upon declaration of stock dividend.

With stock having issued to the stockholders, and stated capital having increased, obviously the assets of even a separate account belong to the insurance company. The stockholders cannot have both the stock and ownership of the assets. Accordingly, any income earned by the separate account assets belongs to the insurance company rather than to the stockholders. At most, the stockholders have a right to have their dividend declared from the separate account income.

We are of the opinion that G.S. 58-96 authorizes payment of an annual dividend but imposes a 10% maximum limitation on such dividend. The limitation speaks both toward cash and stock dividends so that the limitation applies to such dividends individually and collectively. The investment income from guaranty fund assets, even if in segregated accounts, is general corporate income and does not belong to the guaranty fund stockholders. However, such income may be used for payment of the guaranty fund stock dividend.

Rufus L. Edmisten, Attorney General
Richard L. Griffin
Assistant Attorney General

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I N D E X T O A T T O R N E Y
G E N E R A L O P I N I O N S

Volume 49, Pamphlet 2

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