political party marked for voting thereon differs from the designation of the political party in the primary election of which such ballot is intended to be voted as marked on said envelope by the county board of elections. Immediately after the canvass is completed, the respective county boards of election shall certify the result of such canvass to the county clerk or the municipal or district clerk or other appropriate officer as the case may be showing the result of the canvass by ward and district, and the votes so counted and canvassed shall be counted in determining the result of said election."

In view of the specific references in the above quoted section of the Absentee Ballot Law to certification by the Board of Elections to various officers therein designated by ward and district it is our opinion that your certification of the results of the Military and Civilian absentee ballots cast should take this form and not that as suggested by the second alternative suggested by your letter.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: JAMES J. McLAUGHLIN
Deputy Attorney General

JJMcL:msg

NOVEMBER 13, 1957

HONORABLE AARON K. NEELD
State Treasurer
State House
Trenton, New Jersey

FORMAL OPINION, 1957—No. 22

DEAR MR. NEELD:

You have requested our opinion concerning the application of the Unfair Cigarette Sales Act of 1952, L. 1952, c. 247, N.J.S.A. 56:7-18 et seq., to situations in which cigarette manufacturers, as part of a program to promote a specified brand of cigarettes, give cigarette lighters or containers of soft drinks with the sale of cartons of such cigarettes. The cigarettes are sold for a price which is no lower than that permitted by law. Although the sales in question are made on the retail level, the manufacturer supplies the cigarette lighters or containers of soft drinks at his own cost. For the reasons hereinafter stated it is our opinion that the aforesaid practices do not violate the Act.

The only sections of the Unfair Cigarette Sales Act of 1952 which may here be applicable are N.J.S.A. 56:7-20a and N.J.S.A. 56:7-23. N.J.S.A. 56:7-20a reads as follows:

"It shall be unlawful and a violation of this act:

a For any retailer or wholesaler *with intent to injure competitors or destroy or substantially lessen competition*—

(1) to advertise, offer to sell, or sell, at retail or wholesale, cigarettes *at less than cost to such a retailer or wholesaler,* as the case may be,

(2) to offer a rebate in price, to give a rebate in price, to offer a concession of any kind, or *to give a concession of any kind or nature* whatsover in connection with the sale of cigarettes . . ."
(emphasis supplied)

It is clear that N.J.S.A. 56:7-20a(1) is inapplicable here since the cigarettes are not sold at less than cost insofar as the retailer or wholesaler is concerned. This conclusion is unavoidable because the lighters and soft drinks are supplied at no cost to the retailer or wholesaler.

There appears to be no violation of N.J.S.A. 56:7-20a(2) since the concession which is given in connection with the sale of cigarettes is a concession on the part of the manufacturer, not of the retailer or wholesaler. However, even if we assume that such concession is attributable to the retailer or wholesaler, the fact that similar concessions are made by other retailers who deal in the brand of cigarettes which are being promoted excludes any "intent to injure competitors or destroy or substantially lessen competition", at least on the retail or wholesale level. In so concluding we are mindful of N.J.S.A. 56:7-20d by which evidence of the giving of a concession of any kind in connection with the sale of cigarettes is made prima facie evidence of intent to injure competitors and to destroy or substantially lessen competition. The prima facie presumption so made out is destroyed by the facts of this case, again assuming that the concession referred to in the statute is that of the retailer or wholesaler.

The only other section of the Act which requires consideration is N.J.S.A. 56:7-23, which states:

"In all advertisements, offers for sale or sales involving two or more items, at least one of which items is cigarettes, at a combined price, and in all advertisements, offers for sale, or sales, involving the giving of any gift or concession of any kind whatsoever (whether it be coupons or otherwise), the *retailer's or wholesaler's* combined selling price shall not be below the 'cost to the retailer' or the 'cost to the wholesaler', respectively, of the total costs of all articles, products, commodities, gifts and concessions included in such transactions." (emphasis supplied)

For the reasons stated above the retailer's or wholesaler's combined selling price cannot be said to be below the cost to such retailer or wholesaler since the items given gratis with sales of cigarettes are supplied by the manufacturer.

The conclusion that the practices in question do not violate the Act, at least insofar as sales below cost are concerned, is further supported by N.J.S.A. 56:7-28b, by which it is provided:

"Merchandise given gratis or payment made to a retailer or wholesaler by the manufacturer thereof for display, or advertising, or *promotion purposes, or* otherwise, shall not be considered in determining the cost of cigarettes to the retailer or wholesaler." (emphasis supplied)

Further, the fact that the concessions above referred to are those of the manu-

facturer and are, so far as appears, made available to the public through many or all retailers which trade in the manufacturer's cigarettes indicates that there is no violation of the spirit of the Act since such practices do not injure competitors or destroy or substantially lessen competition at the retail or wholesale level.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: CHRISTIAN BOLLERMANN
Deputy Attorney General

NOVEMBER 7, 1957

HON. FLOYD R. HOFFMAN, *Director*
Office of Milk Industry
1 West State Street
Trenton, New Jersey

FORMAL OPINION, 1957—No. 23

DEAR DIRECTOR:

We have been asked whether the Office of Milk Industry has power to fix consumer resale prices in Area I. The question presented is answered in the affirmative.

Area I includes the northern twelve counties of the State and part of a thirteenth. Regulations H-2, H-7. The New York-New Jersey Milk Marketing Administrator has authority to fix monthly minimum prices payable by handlers to producers for milk consumed in this area (and for certain other milk not relevant to the present inquiry) whether produced in this State or another. 7 U.S.C.A. §§ 601 to 659 (1952); Order 27, 22 Fed. Reg. 4643, amending 7 C.F.R. § 927.3. The Administrator has adopted a complex formula for redetermining the prices monthly. Order 27, supra, §§ 927.40 to 927.45. These prices may vary widely, even from month to month. For example, from July to August of this year the basic price per hundredweight rose from $4.09 to $4.68, and in September, to $5.03.

The Director has authority to fix "the prices at which milk is to be * * * sold" as part of his power to "regulate * * * the entire milk industry of the State of New Jersey." N.J.S.A. 4:12A-21. He also has authority to fix "the minimum prices to be charged the consumer for milk in the several municipalities or markets of this State * * *". N.J.S.A. 4:12A-22. The legislature has enacted a declaration of its intention to subject milk to regulation by New Jersey at the earliest moment when it can be so regulated, consistent with the commerce clause of the federal constitution. N.J.S.A. 4:12A-49. The Supreme Court of the United States has held that a state may regulate a phase of the milk industry where it is acting to protect an important domestic interest by means which do not discriminate against interstate commerce, although having a substantial effect on such commerce. This was the *ratio decidendi* of *Milk Control Board* v. *Eisenberg Farm Products,* 306 U.S. 346 (1939), in which it was held that Pennsylvania could require licenses and bonds of dealers and regulate the prices they paid Pennsylvania producers even though the milk was resold out of state. On this principle, New Jersey may fix consumer prices in Area I in any manner which does not discriminate against interstate commerce. (There is no preemption problem here as the market administrator has no power to fix consumer prices). *Highland Farms Dairy, Inc.* v. *Agnew,* 300 U.S. 608, 615 (1937).