OCTOBER 30, 1959

DR. ROSCOE P. KANDLE
Commissioner
Department of Health
State House
Trenton, New Jersey

MEMORANDUM OPINION 1959—P-22

DEAR COMMISSIONER KANDLE:

The State Consultant Committee on Community Homemaker Service (an advisory committee to the Division of Chronic Illness Control of the State Department of Health) has asked whether the Community Homemaker Service groups would be immune from tort liability under Chapter 131 of the Laws of 1958, as extended by Chapter 90 of the Laws of 1959 (*N.J.S.A.* 16:1-48 et seq.).

This legislation grants an immunity from certain tort claims arising out of negligence to beneficiaries of non-profit corporations, societies or associations which are "organized exclusively for religious, charitable, or hospital purposes."

The Community Homemaker Service is a locally sponsored agency that places trained women workers in homes where illness or disability might disrupt the normal family routine. They take over household tasks such as marketing, preparing meals, light cleaning and laundry work, and caring for children. Service is part time only, a few hours a day, for as long as needed.

At present there are 13 homemaker services functioning in New Jersey, with others in the process of being established. Seven of these are incorporated, all as non-profit organizations. Funds are raised from donations by the United Fund, Community Chest and similar groups; from private contributions; and by charging a fee of $1.50 per hour ($1.75 by one local group). Of the latter fee, $1.25, plus cost of transportation, goes to the homemaker herself, the rest going to pay for administrative costs (including a five-day training course for each homemaker by the Rutgers Extension Service, and the salary of the Director of the local service). When the family to be served is indigent or cannot afford the fee, no charge is made. Every family in the community, without regard to race, religion or financial status, is eligible to take advantage of this service.

Each group is guided and operated by a volunteer board of directors which sets policy, raises money, helps run the office and does publicity work, the services being rendered without compensation. The State Consultant Committee, which is appointed by the Commissioner of the Department of Health, is responsible for organizing and establishing new local services throughout the State; its members are also volunteer, unpaid people.

In order to qualify as a charitable organization, two requirements must be met: 1. The organization must be non-profit. *Leeds* v. *Harrison*, 7 *N.J. Super.* 558, 569 (*Ch. Div.* 1950); *Rafferzeder* v. *Raleigh, etc. Hospital*, 30 *N.J. Super.* 82 (*App. Div.* 1954) (see also same case in 33 *N.J. Super.* 19, (*App. Div.* 1954)); *The Kimberley School* v. *Town of Montclair*, 2 *N.J.* 28 (1949); *Dana College* v. *State Bd. Tax Appeals*, 14 *N.J. Misc.* 308, 310 (*Sup. Ct.* 1936), *aff'd.* 117 *N.J.L.* 530 (*E. & A.* 1937). 2. The group to be benefited must be an "indefinite class." *Bianchi* v. *South Park*

Presbyterian Church, 123 *N.J.L.* 325 (*E. & A.* 1939); *Mills* v. *Montclair Trust Co.;* 139 *N.J. Eq.* (*Ch. Div.* 1946); *Jones* v. *St. Mary's Roman Catholic Church,* 7 *N.J.* 533 (1951), *cert. denied* 342 *U.S.* 866, 96 *L. Ed.* 644, 72 *S. Ct.* 175 (1951); *Guarantee Trust Co. of New York* v. *New York Community Trust,* 141 *N.J. Eq.* 238 (*Ch.* 1948), *affirmed* 142 *N.J. Eq.* 726 (*E. & A.* 1948); *Leeds* v. *Harrison,* 9 *N.J.* 202, 217 (1952).

Under the first requirement, i.e. that the association be non-profit, the fact that the association charges a fee for its services does not necessarily mean that it is non-profit. *Institute of Holy Angels* v. *Bender,* 79 *N.J.L.* 34 (*Sup. Ct.* 1909); "Liability of a Charitable Institute for the Torts of its Agents," *3 Mercer Beasley Law Review,* 206, 207 (1934).

The converse of this proposition is that the fact that a group or association is *incorporated* as a non-profit organization does not necessarily mean that it is a "charitable institution." *Rafferzeder* v. *Raleigh etc. Hospital, supra,* (30 *N.J. Super.* 82); *Dana College* v. *State Bd. Tax Appeals, supra,* and *Carteret Academy* v. *State Bd. of Taxes and Assessments,* 98 *N.J.L.* 868 (*E. & A.* 1923).

The charitable character of the institution depends on the particular facts of each individual case. *Rafferzeder* v. *Raleigh etc. Hospital, supra,* (30 *N.J. Super.* 82); *The Kimberley School* v. *The Town of Montclair, supra; Carteret Academy* v. *State Bd. of Taxes and Assessments, supra; Montclair* v. *State Bd. of Eq. of Taxes,* 86 *N.J.L.* 497 (*Sup. Ct.* 1914), *aff'd* 88 *N.J.L.* 374 (*E. & A.* 1915); *D'Amato* v. *Orange Memorial Hospital,* 101 *N.J.L.* 61 (*E. & A.* 1925). To determine whether an organization is charitable within the meaning of the statute, as many as possible of the individual facets of its operation must be considered, all with a view of deciding whether the "dominant motive" in the conduct of the organization is or is not to make a profit. *The Kimberley School* v. *The Town of Montclair, supra.*

In addition to the non-profit requirement, another test must be satisfied. This is that the benefits must accrue to an "indefinite class." In *Bianchi* v. *South Park Presbyterian Church, supra,* at page 332, the Court, in holding the Presbyterian Church immune from tort liability because it was an eleemosynary institution, declared:

> "Thus it is that the test of a charity in the legal sense is whether its beneficence falls upon a class sufficiently large and indefinite as to be fairly termed of common and public incidence; and the defendant corporation answers that description."

This definition was substantially followed and approved in *Mills* v. *Montclairs Trust Co., supra, Jones* v. *St. Mary's Roman Catholic Church, supra,* and *Guarantee Trust Co. of New York* v. *New York Community Trust, supra.* The definition was given a slightly different phraseology by the Supreme Court in *Leeds* v. *Harrison,* 9 *N.J.* 202, 217 (1952) (holding that the restriction contained in the bylaws of the Y.W.C.A. limiting membership to members of Protestant Evangelical churches was not invalid), the court announcing that the Y.W.C.A. is "religious, charitable and benevolent in nature. [citing authority] A trust is public or charitable if the subject property is devoted to the accomplishment of purposes which are beneficial or may be supposed to be beneficial to the community."

A review of the facts concerning the Community Homemaker Service groups indicates that they meet both the aforementioned tests and therefore should be considered as falling within the statutory protection. First, the dominant motive is

not to make a profit, but rather to help keep home and family together. There is no indication that any Homemaker Service group has been operating at a profit or that the salaries paid to the Director and office help are higher than that usually paid to people of comparable ability and training. Second, the group benefited is large enough to be termed an "indefinite class;" certainly the services rendered by these groups are "beneficial to the community."

N.J.S.A. 16:1-51 declares the public policy of the statute to be "the protection of non-profit corporations, societies and associations organized for religious, charitable, educational or hospital purposes." This policy would be furthered by holding the local homemaker service groups to be "charitable" within the meaning of the statute. Thus, notwithstanding the fact that the homemaker service groups are not "charitable" in the traditional sense of hospitals, churches, etc., it would seem that they come within the scope of the applicable legislation.

Very truly yours,

DAVID D. FURMAN
Attorney General

NOVEMBER 30, 1959

THOMAS S. DIGNAN, *Acting State Director*
Civil Defense and Disaster Control
Department of Defense
Armory Drive
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MEMORANDUM OPINION—P-23

DEAR MR. DIGNAN:

You have requested our opinion as to whether or not the Division of Civil Defense may print paid advertisements in a State Civil Defense magazine, "The Siren." We are of the opinion that the question must be answered in the negative.

The Office of Civilian Defense Director is a State administrative body within the State Department of Defense. N.J.S.A. App. A:9-37. It is a general rule of statutory construction that only those powers are granted to an administrative agency which are expressly or by necessary implication conferred. *Welsh Farms Inc.* v. *Bergsma,* 16 N.J. Super. 295 (App. Div. 1951); Sutherland, *Statutory Construction,* 3d Edition, §6603. Further, a basic principle accepted in this State is that "an administrative officer is a creature of legislation who must act only within the bounds of authority delegated to him. . . ." *Elizabeth Federal Savings & Loan Association* v. *Howell,* 24 N.J. 488 (1957).

The purpose of the act creating the Office of Civilian Defense is to provide for the health, safety and welfare of the people of this State and to aid in the prevention of damage to and destruction of property during any emergency. N.J.S.A. App. A:9-33. The Legislature, in furthering this purpose has not conferred any express authority to negotiate contracts for the sale of advertisements as it has, for instance, expressly given the power to contract as is necessary and convenient to cooperate with the Federal government in wartime. N.J.S.A. App. A:10-1(e).