AUGUST 9, 1961

HONORABLE KATHARINE E. WHITE
Acting State Treasurer
State House
Trenton, New Jersey

FORMAL OPINION 1961—No. 21

DEAR MRS. WHITE:

You have asked my opinion as to the constitutional validity of a lease-purchase agreement for the acquisition of office space for the Division of Employment Security in the Department of Labor and Industry. You assert that the entire cost of such acquisition would be defrayed by grants from the Federal Government to the State under Title III of the Social Security Act (42 U.S.C.A. 501 *et seq.*) See R.S. 43:21-13(a).

Lease-purchase agreements payable out of funds of the State constitute a violation of the debt limitation clause of the State Constitution, Art. VIII, Sec. 11, para. 3. See *McCutcheon* v. *State Building Authority*, 13 N.J. 46 (1953). That is the holding of Formal Opinion 1957—No. 10, which I am herewith affirming. The numerous judicial decisions that the State or a governmental subdivision may enter into long term leases without violation of the debt limitation clause are not in conflict. A lease-purchase agreement, at the conclusion of which the State is vested with title, is not a long term rental but an installment purchase. *Cf. McMahon* v. *City of Bayonne*, 10 N. J. Misc. 12, 15 (Sup. Ct. 1932); *Viracola* v. *Long Branch*, 1 N.J. Misc. 200 (Sup. Ct. 1923); *DeBow* v. *Lakewood Township*, 131 N.J.L. 291 (Sup. Ct. 1944).

Your inquiry, however, raises another legal issue. The constitutional provision imposing a debt limitation on the State Legislature specifically exempts Federal funds, as follows:

> "This paragraph shall not be construed to refer to any money that has been or may be deposited with this State by the government of the United States."

The procedure for the payment of amounts due under a lease-purchase agreement for the acquisition of Division of Employment Security office space rules out the applicability of the foregoing exception to the constitutional debt limitation. The lessee would be the State, with the responsibility resting on the Director of the Division of Purchase and Property to execute the lease on the State's behalf. Formal Opinion 1954—No. 14; L. 1954, c. 48. The payments would be drawn out of the general treasury in accordance with an appropriation made by law (*State Constitution*, Art. VIII, Sec. 11, para. 1), as provided for in the blanket appropriation of excess Federal funds for the use of the State in Section 2 of the Appropriations Act, L. 1961, c. 38. The pre-audit and warrant functions of the Director of the Division of Budget and Accounting would govern disbursements.

An inquiry may be raised as to the significance of the exemption of Federal funds in the debt limitation clause of the State Constitution, if it is determined not to apply in situations where the State is, in a sense, a conduit and the payments are made to it for a specified purpose and disbursed for that purpose pursuant to a valid appropriation.

Whatever the scope of that exemption, I am satisfied that it is inapplicable here. The State's obligation under a lease-purchase agreement, as lessee, would continue

despite the unavailability of Federal funds in any given year. It is true that the State might resist payment legally by raising the defense of sovereign immunity. *Strobel Steel Construction Co.* v. *Sterner*, 125 N.J.L. 622 (Sup. Ct. 1941). But the State would bear a moral obligation and, properly, the debt limitation clause encompasses debts which are not enforceable by action at law. *McCutcheon* v. *State Building Authority, supra.* This analysis assumes that the lease-purchase agreement would not be subject to termination because of the non-availability of Federal funds.

I, therefore, advise you my opinion that a lease-purchase agreement for the asquisition of Division of Employment Security office space, under the circumstances specified in your letter, would constitute a violation of Art. VIII, Sec. 11, para. 3 of the State Constitution.

Very truly yours,

DAVID D. FURMAN
Attorney General

AUGUST 10, 1961

HONORABLE DWIGHT R. G. PALMER
Commissioner, State Highway Department
1035 Parkway Avenue
Trenton, New Jersey

FORMAL OPINION 1961—No. 22

DEAR COMMISSIONER:

You have asked for my opinion as to whether you have authority pursuant to Chapter 66 of the Laws of 1960 to authorize intrastate railroad passenger fare increases prior to execution and during the term of contracts between the State and a railroad carrier for maintenance of commuter and suburban passenger service.

The statute vests such authority in you. Section 9 provides that the State Highway Commissioner may fix fare tariffs prior to the execution of such a contract to be incorporated therein. The statutory procedure requires a notice and an opportunity for a hearing for the benefit of users of the passenger service. My construction is that Chapter 66 of the Laws of 1960 thus supersedes the general provisions of the Public Utility Laws (R.S. 48:12-1 et seq.).

You are likewise authorized during the term of a commuter subsidy contract to approve intrastate fare increases. Section 5 establishes this authority as follows:

> "During the term of the contract and such further period as the contract may provide, unless otherwise approved in writing by the commissioner, [each contract . . . shall obligate the carrier] not to initiate, take or prosecute, and to actively resist, any proceedings before any State or Federal agency or court for any order, approval, judgment, decree or other action * * * (2) authorizing, directing or permitting the discontinuance or other curtailment of any passenger service operated by the carrier after the effective date of said contract or the increase of any rate of fare charged or collected after such effective date for the use of such suburban passenger service * * *."