

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 acquisition 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 * * *."

This construction of Section 5 of the statute is supported by the provision of Section 9 that the fare tariffs fixed by the Commissioner prior to the execution of the contract "shall remain in effect for the duration of the contract only unless modified by future contracts or determinations." Future contracts or determinations, as referred to in this section, must embrace approvals by the Commissioner, during the term of the contract, for the increase of rates of fare because of hardship or other justification arising subsequent to its execution. Again the procedure by notice and an opportunity for a hearing should be adopted and followed.

The whole thrust of several sections of L. 1960, c. 66 is to avoid rigidity and to provide adaptability to changing circumstances in passenger service subsidy contracts. Section 7 permits waivers in the event of circumstances beyond the control of the carrier as conditions of the contract. Section 8 is specific authority for mutually agreed to amendments during the life of the contract with respect to the manner in which service is to operate. Under Section 10 the Commissioner is directed, within his discretion, to re-evaluate passenger service which was initially determined not to be essential in the public interest and to reach a determination that it is required for the balance of the contract. Finally, Section 14 declares that the entire act is subject to a liberal construction to obtain its objectives of maintaining and preventing discontinuances in commuter and suburban railroad passenger service.

You have asked also as to your authority to authorize the railroad carrier, both prior to and during the term of a commuter subsidy contract, to apply to the Interstate Commerce Commission for interstate railroad passenger fare increases.

Any exercise of authority by the Commissioner over interstate rates would infringe the Interstate Commerce Act. 49 U.S.C.A. § 15(1). The Commissioner, however, retains the statutory authority to withhold subsidy payments upon a breach of an essential provision of the contract. The contract includes in Section 5, as noted *supra*, an undertaking not to charge passenger fares at rates exceeding those incorporated therein. Accordingly, the Commissioner, on behalf of the State, need not enter into a commuter subsidy contract except at interstate fares which are fair and not excessive in his judgment and may upon notice and hearing approve in writing the application for and prosecution of a proceeding for an interstate railroad passenger fare increase before the Interstate Commerce Commission before execution and during the term of the contract.

Sincerely yours,

DAVID D. FURMAN
Attorney General

AUGUST 11, 1961

COLONEL JOSEPH D. RUTTER
Superintendent, Division of State Police
Department of Law and Public Safety
West Trenton, New Jersey

FORMAL OPINION 1961—No. 23

DEAR COLONEL RUTTER:

You have sought my opinion as to whether a member of the State Police who has reached the fourth anniversary of his enlistment may be denied reappointment