tuted a customary and usual work routine requiring skill, discretion and public confidence." 58 N.J. Super. at 236-37.[1]

The remarks of the Appellate Division appear to be particularly applicable to this situation. Although a professor at a State college does not hold an "office", his duties are of sufficient certainty and permanency to make him the holder of a State "position" within the meaning of Article IV, §V, par. 4 of the 1947 Constitution.

For the foregoing reasons, you are advised that a professor at a State college may become a candidate for a seat in the Legislature but, if elected, must resign as a professor at the State college before taking his seat.

Very truly yours,
WILLIAM F. HYLAND
Attorney General of New Jersey
By: MARK I. SIMAN
Deputy Attorney General

1. Other cases which have decided that a particular activity constituted a position include *Freeholders of Hudson Co. v. Brenner*, 25 N.J. Super. 557 (App. Div. 1953), *aff'd* 14 N.J. 348 (1954) (assistant county counsel); *Cavenaugh v. Essex*, 58 N.J.L. 531 (Sup. Ct. 1896) (guard in county jail); *Daily v. Essex*, 58 N.J.L. 319 (Sup. Ct. 1895) (janitor of a court house); *Lewis v. Jersey City*, 51 N.J.L. 240 (Sup. Ct. 1889) (bridge tender).

April 28, 1975

COLONEL EUGENE OLAFF
Superintendent
Division of State Police
Division Headquarters
West Trenton, New Jersey 08625

FORMAL OPINION NO. 11–1975

Dear Colonel Olaff:

In his former capacity as Superintendent, Colonel E. B. Kelly had inquired as to the effect of the decision in *State v. Shack*, 58 *N.J.* 297 (1971), on the prospective enforcement of New Jersey's general trespass statute embodied in *N.J.S.A.* 2A:170-31. Since *Shack* represents the only New Jersey Supreme Court decision construing *N.J.S.A.*2A:170-31, it will undoubtedly serve as a guide for future judicial resolution of controversies emerging from the conflict of interests between farmers and their seasonal migrant help. Accordingly, Colonel Kelly's inquiry warrants discussion of the decision's basis and scope.

It should be noted at the outset that the civil law of trespass is a field separate and distinct from criminal trespass. This dichotomy had its origin in English law

where no trespass to property was criminal unless it was accompanied by or tended to create a breach of the peace. Since civil trespass is a private wrong, penal sanctions against the trespasser must be statutory. Thus, the New Jersey Legislature has imposed penalties for trespass on occupied lands to fish or hunt; for trespass on railroad trains or property; and in general has provided that:

> "Any person who trespasses on any lands, except fresh-meadow land over which the tide has ebbed and flowed continuously for 20 years or more, after being forbidden so to trespass by the owner, occupant, lessee or license thereof, or after public notice on the part of the owner, occupant, lessee or licensee forbidding such trespassing, which notice has been conspicuously posted adjacent to the highway bounding or adjacent to a usual entry way thereto, is a disorderly person and shall be punished by a fine of not more than $50. [*N.J.S.A.* 2A:170-31]."

Although there is little case law applying the foregoing statute, it is clear that there is no single all-purpose test for determining whether the unauthorized conduct complained of is violative of *N.J.S.A.* 2A:170-31. Rather, courts have carefully scrutinized the totality of facts comprising each case in striking a balance between conflicting rights, interests and equities in ascertaining if there was such social harm as to render the trespass criminal. This decisional procedure is consonant with the broad aim of the criminal law in a utilitarian society: to prevent injury to the health, safety, morals and welfare of the public at the occasional expense of the property owner. Accordingly, in some situations, trespassory acts which are nominally criminal do not warrant imposition of penal sanctions because of circumstances justifying their commission. That is, upon balancing all considerations of public policy, the allegedly illicit behavior does not require proscription and punishment but is deemed sufficiently desirable to deserve encouragement and commendation even though some individual may sustain injury as a result. With these concepts in mind, we turn to the facts before the Court in *Shack*.

The complainant, Tedesco, was a farmer employing seasonal migrant workers, who as part of their remuneration, were housed at a camp on his property. Defendants, Tejeras and Shack, were employees of non-profit United States government funded corporations, whose mission, among others, was offering health and legal services to itinerant farm help. Defendants, after making an unauthorized entrance on farm property, confronted Tedesco and requested private employee consultation. When their demands were denied, defendants refused to leave the farm. Tedesco then summoned the State Police, who, upon execution of formal written complaints, arrested Tejeras and Shack for trespassing in contravention of *N.J.S.A.*2A:170-31. Defendants were convicted in the Municipal Court and again on appeal in the County Court in a second trial. The New Jersey Supreme Court then certified defendants' appeal prior to oral argument in the Appellate Division, and held that:

> [U]nder our State law the ownership of real property does not include the right to bar access to governmental services available to migrant workers and hence there was no trespass within the meaning of the penal statute. [*State v. Shack*, 58 *N.J.* at 302].

The result is predicated on the following policy considerations. Property rights are relative and must serve, not disparage, human values. Assuredly, they should not be the basis for exercising oppressive control over the lives of a rootless, isolated and disadvantaged class of citizens who the owner admits to his property to further his own pecuniary gain. Accordingly, the impotent group's fundamental and fragile right of communication can be neither stifled nor emasculated by erecting a trespass statute barrier, founded on minimal intrusions, thereby insulating migrants from services and edification proffered by a solicitous government. Necessarily, a societal accommodation is reached which recognizes that there is

> "[N]o legitimate need for a right in the farmer to deny the worker the opportunity for aid available from federal, State or local services, or from recognized charitable groups seeking to assist him. [*State v. Shack*, 58 *N.J.* at 307]."

Indeed, the Court went well beyond the facts before it to state that:

> "The migrant worker must be allowed to receive visitors there of his choice, as long as there is no behavior hurtful to others, and members of the press may not be denied reasonable access to workers who do not object to seeing them. [*Ibid*]."

The conclusion is the unavoidable realization that itinerant farm help is entitled to the very same opportunity to live with dignity and to enjoy the private associations which are customary among all citizens of our society.*

Thus, *N.J.S.A.*2A:170-31 cannot be invoked by farmers as an instrumentality for barring or removing representatives of government, newsmen and visitors, other than solicitors or peddlers of non-essentials, who reasonably seek out farm workers at their campsite dwellings. Nevertheless, *N.J.S.A.*2A:170-31 must be enforced by the State Police where there has been an unreasonable intrusion upon farm property.

Consequently, employees of state or federal agencies, legislators, representatives of the media, as well as would-be guests are not subject to arrest for trespassing at the behest of the property owner merely because he objects to their unauthorized but reasonable presence at his workers' homes.

Very truly yours,
WILLIAM F. HYLAND
Attorney General of New Jersey
By: GLENN E. KUSHEL
Deputy Attorney General

* The same result has been reached by a number of other courts applying First Amendment arguments in similar or analogous factual contexts. See, *Petersen v. Talisman Sugar Corp.* 478 *F.2d* 73, 80-83 (5th Cir.1973) (First Amendment right of access); *Velez v. Amenta*, 370 *F. Supp.* 1250, 1255-57 (D. Conn. 1974) (First Amendment right of acess); *United Farm Workers Union v. Finerman*, 364 *F.Supp.*, 326, 329 (D.Colorado 1973) (First Amendment right of access); *Franceschina v. Morgan*, 346 *F.Supp.* 833, 838 (S.D.Indiana 1971) (First

Amendment right of access); *Folgueras v. Hassle,* 331 *F.Supp.* 615, 620 (W.D.Michigan 1971) (First Amendment right of access; limitation of owner's property rights; tenant's rights); *People v. Rewald,* 318 *N.Y.S.* 2*d* 40, 45 (1971) (First Amendment right of access).

April 30, 1975

CHAIRMAN MALCOLM BORG
Health Care Administration Board
Department of Health
Health & Agriculture Building
John Fitch Plaza
Trenton, New Jersey 08625

FORMAL OPIONION NO. 12–1975

Dear Chairman Borg:

You have requested an opinion as to whether the Commissioner of Health must submit the "1975 Hospital Rate Review Program, Guidelines" (hereinafter referred to as "guidelines"), dated February 1975, to the Health Care Administration Board (hereinafter referred to as HCAB) as regulations for its approval prior to their adoption under the Health Care Facilities Planning Act, N.J.S.A. 26:2H-1 *et seq.* (hereinafter referred to as HCFPA).

The guidelines, a joint effort by the Departments of Health and Insurance, provide analysts with an accounting mechanism to review proposed hospital budgets for 1975 and assess reasonable payment rates by hospital service corporations. While the guidelines provide an overview of the processes to be followed, schedules A through F in its appendix actually guide the analyst through the necessary computations, comparisons, and reviews required to evaluate a hospital's 1975 budget submission and allowable reimbursement rate. These guidelines have been distributed to all hospitals in the State of New Jersey by the Department of Health.

The underlying issue posed is whether these guidelines are in fact regulations of the Commissioner of Health under the HCFPA and thereby subject to HCAB approval under N.J.S.A. 26:2H-5(b), which provides:

> "The Commissioner, *with the approval of the board,* shall adopt and amend rules and regulations in accordance with the Administrative Procedure Act P.L.1968, c. 410 (C. 52:14B-1 *et seq.*) to effectuate the provisions and purposes of this act. . . ." (Emphasis supplied)

An analysis of the statutory procedure for the review and approval of hospital service corporation rates reveals a requirement for participation by both the Commissioners of Health and Insurance. The statutory mechanism for review and approval provides: