August 5, 1975

HONORABLE RICHARD F. SCHAUB
Commissioner of Banking
36 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 17—1975

Dear Commissioner Schaub:

You have inquired as to the legality of a commercial bank chartered under Pennsylvania law making loans to New Jersey residents secured by second mortgages on New Jersey residential property. More specifically, you have inquired whether a commercial bank chartered under the laws of the Commonwealth of Pennsylvania would be subject to the provisions of the Secondary Mortgage Loan Act, N.J.S.A. 17:11A-34 *et seq*. You have informed us that such a bank has been making loans to New Jersey residents upon the security of second mortgages on the borrower's New Jersey residence. Those loans were finalized at the Pennsylvania offices of the bank, with the documentation evidencing such loans executed and delivered by the borrowers to the bank in Pennsylvania. The terms of the loans comply in all respects with applicable federal and Pennsylvania banking laws.

The Secondary Mortgage Loan Act does not apply to the transactions described *supra*. N.J.S.A. 17:11A-61 provides as follows:

> "Nothing in this act shall be construed as expanding or restricting the powers otherwise conferred by law upon financial institutions, such as State and National banks, State and Federal savings and loan associations, savings banks and insurance companies, to engage in the secondary mortgage business as defined in Section 3 [N.J.S.A. 17:11A-36], and no such financial institution, in exercising any power otherwise so conferred upon it, shall be subject to any provision of this act."

The language of this exemption is quite broad, and on its face, would apply to commerical banks chartered in sister states. moreover, a review of the legislative history of the Secondary Mortgage Loan Act (1970) and its predecessor, the Secondary Mortgage Loan Act (1965), indicates clearly that the legislation was aimed primarily at foreign loan companines, not foreign banks, savings banks or savings and loan associations. *Oxford Consumer Disc. Co. of No. Phila. v. Stefanelli,* 102 N.J. Super 549 (App. Div. 1968), 104 N.J. Super. 512 (App. Div. 1969), mod. 55 N.J. 489 (1970), appeal dism. 400 U.S. 808, 91 S. Ct. 45, 27 L. Ed. 2d 38 (1970), order amended on other grounds 400 U.S. 923, 91 S. Ct. 183, 27 L. Ed. 2d 182 (1970).

It is also important to determine whether, in light of all activities surrounding the mortgage loan, a foreign banking institution is engaged in the prohibited transaction of business in this State in contravention of the Banking Act of 1948, N.J.S.A. 17:9A-316 *et seq*. Such impermissible transaction of business by a foreign bank may be illustrated by solicitation, advertisement or the use of brokers in New Jersey or other activities in this jurisdiction leading to the consummation of the secondary mortgage loan. However, in those cases where all of the activities surrounding the

loan occur exclusively in the foreign jurisdiction, there would appear to be no legal impediment to a foreign bank making loans to New Jersey residents on the security of residential property located in this State. In fact, a foreign bank may enforce a note in this State which was taken in connection with a loan and may also enforce or otherwise dispose of its interest in the New Jersey property which was taken as security for said loan. N.J.S.A. 17:9A-331(3) and (4) provide in pertinent part:

> "Nothing in this article shall prohibit a foreign bank from . . .
> "(3) enforcing in this State obligations heretofore or hereafter acquired by it in the transaction of business outside of this State, . . .;
> "(4) acquiring, holding, leasing, mortgaging, contracting with respect to, or otherwise protecting or conveying property in this State heretofore or hereafter . . . mortgaged . . . to it as security for, or in whole or part satisfaction of a loan or loans made by it or obligations acquired by it in the transaction of business outside of this State. . . ."

However, a foreign bank is not authorized to charge interest at the rates provided in N.J.S.A. 17:11A-44 inasmuch as it is not a secondary loan licensee.

For these reasons, a foreign commercial bank may make secondary mortgage loans to New Jersey residents consistent with the Secondary Mortgage Loan Act of 1970 and the Banking Act of 1948, where there is no transaction of business in whole or in part by such banking institution in the State of New Jersey within the meaning of the Act.

Very truly yours,
WILLIAM F. HYLAND
Attorney General of New Jersey
By: MICHAEL D. GOLDMAN
Deputy Attorney General

July 16, 1975

HONORABLE RALPH A. DUNGAN
Chancellor of Higher Education
Department of Higher Education
225 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 18—1975

Dear Chancellor Dungan:

You have asked for an opinion on several questions dealing with the reduction of the number of faculty at the state colleges as a result of the present state fiscal crisis. Specifically, you have inquired as to whether tenured faculty may be separated

from employment by a state college because of financial exigencies, whether a reduction in tenured faculty must be made on the basis of seniority or whether other factors such as rank, degrees earned, or performance may be used as additional or alternative criteria. You have also asked for our opinion as to the nature of the preferential reemployment rights of faculty separated from a state college due to financial considerations.

Non-tenured faculty are employed pursuant to one-year contracts. The contract between the Council of New Jersey State College Locals, NJSFT-AFT, AFL-CIO and the State provides that "Appointments and reappointments of employees are subject to the availability of funds and proper recording". Article XIII A. Therefore, non-tenured teachers who have received a reappointment for the forthcoming academic year may be released because of a reduction in the College budget necessitating a reduction of staff.

In regard to the rights of tenured faculty, N.J.S.A. 18A:60-3 states in pertinent part:

> "Nothing [in the tenure laws] shall be held to limit the right of the . . . board of trustees of a college . . . to reduce the numbers of professors, associate professors, assistant professors, instructors, supervisors, registrars, teachers, or other persons employed in a teaching capacity in any such institution or institutions *when the reduction is due to a natural diminution of the number of students or pupils in the institution or institutions.* . . ."

This statute further provides that when faculty are released by reason of such reduction, the faculty having the least number of years of service to their credit shall be released in preference to those having longer terms of service. Faculty released because of reduction in the number of students shall be placed on a preferred eligible list in order of the years of service for reemployment and shall be reemployed whenever a vacancy occurs for which they are qualified.

The tenure laws are silent on the matter of reduction of staff for financial reasons. N.J.S.A. 18A:60-3 refers only to reductions as a result of the natural diminution of students. However, in *Nichols v. Board of Education, Jersey City*, 9 N.J. 241 (1952), the court considered an education statute which also had only "natural diminution" as grounds for reducing the number of teachers; yet the court still recognized reductions based on economy as an inherent power of educational authorities. In *Seidel v. Board of Education of Ventnor City*, 110 N.J.L. 31 (Sup. Ct. 1933), the court acknowledged a right of economic reduction even when there was no statute whatsoever. While the Legislature intended the tenure laws to provide job security for teachers after a certain period of satisfactory service, it did not intend to favor private interest as against the public interest. Clearly, when economic pressures at a public institution of higher education are serious enough to warrant the reduction of the work force, the job security of individual persons must yield to the public interest. *See also Levitt v. Board of Trustees of Nebraska State Colleges*, 376 F. Supp. 945 (D. Neb. 1974); *Johnson v. Board of Regents of the University of Wisconsin*, 377 F. Supp. 227 (W.D. Wis. 1974) aff'd 5 F. 2d 975 (1975). Therefore you are advised that tenured faculty may be separated from employment because of financial exigencies.*

N.J.S.A. 18A:60-3 provides that seniority shall be the basis for the determina-