

Gershenfeld Awards is to be construed as an implied repealer of that section of the Retirement Code, it would, of necessity, deal with more than just appropriations and hence, be unconstitutional. For a complete discussion of this principle, see 1961 Opinion of the Attorney General No. 237 and 1957 Opinion of the Attorney General No. 16.

Even though Act 111 purportedly mandates that the Legislature take action within six months following publication of an arbitration award, the Legislature in the case at bar failed to take action. However, the failure of the Legislature to act does not affect the conclusions contained in this opinion.

Since the Gershenfeld Awards concerning nonservice connected survivor benefits conflict with the Retirement Code provisions concerning such benefits, and since the Retirement Code provides that it alone contains the pension rights of all state employees, absent a substantive legislative enactment to the contrary, you are not authorized to make any payment pursuant to the Gershenfeld Awards.

Pursuant to Section 512 of the Administrative Code of 1929, 71 P.S. § 192, we have referred this matter to the Auditor General and State Treasurer for their review and have duly noted that both the Auditor General and State Treasurer disagree with the conclusions expressed in this Opinion.

Very truly yours,

JEFFREY G. COKIN  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

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OFFICIAL OPINION NO. 77-12

*Governor's Energy Council—Solar Heating and Cooling Demonstration Act of 1974—Federal funds—Appropriations—Grants—Pennsylvania Constitution, Article III, § 29—Act No. 117 of 1976—U.S. Constitution, Art. VI, cl. 2 (Supremacy Clause).*

1. The Governor's Energy Council may enter into a contract with the Department of Housing and Urban Development to administer a Federal grant program in Pennsylvania and make grants of \$400.00 to persons installing solar hot water heating systems in their residences.
2. An appropriation by the General Assembly providing for grants of Federal funds to persons who install solar hot water heating systems in their homes would not violate Article III, § 29 of the Pennsylvania Constitution, which prohibits appropriations made for charitable, educational or benevolent purposes.
3. The Pennsylvania Constitution has no control over an act of the United States Congress.

4. The Pennsylvania Constitution cannot have been intended to prohibit the General Assembly from spending Federal funds in accordance with a duly enacted Federal statute.

Harrisburg, Pa. 17120  
July 5, 1977

Honorable William B. Harral  
Executive Director  
Governor's Energy Council  
Harrisburg, Pennsylvania

Dear Mr. Harral:

You have requested our opinion as to the legality of a Federal grant program to be administered by the Governor's Energy Council whereby the Council will be making grants of \$400.00 to persons installing solar hot water heating systems in single family residences. The issue is whether this program is violative of Article III, § 29 of the Pennsylvania Constitution, which prohibits, *inter alia*, appropriations for charitable and benevolent purposes.

Pursuant to the Solar Heating and Cooling Demonstration Act of 1974, 42 U.S.C. § 5501, *et seq.*, the United States Department of Housing and Urban Development has established a grant program which will make Federal funds available to certain selected states, including Pennsylvania, to be used for grants to individuals or families who install solar hot water heating systems in single family residences during 1977. Pursuant to the Federal statute and applicable regulations, the Department of Housing and Urban Development proposes to enter into a grant agreement with the Governor's Energy Council whereby the Federal funds will be turned over to the Council and the Council will make the \$400.00 grants to individuals or families who qualify. It should be emphasized here that the funds involved are 100% Federal funds (including administration costs) and that no matching State or local funds are required. If State matching funds were involved, they could not be paid because of the prohibition against appropriations for charitable or benevolent purposes contained in Article III, § 29 of the Pennsylvania Constitution. However, even though the monies involved are purely Federal, there is nevertheless an issue concerning whether the Governor's Energy Council can legally enter into the grant agreement with HUD in view of the constitutional prohibition.

Article III, § 29, provides, in pertinent part, as follows:

"No appropriation shall be made for charitable, educational or benevolent purposes to any person or community. . ."

Although the payment of Federal grants to individuals by the Governor's Energy Council pursuant to a contract with HUD may not appear at first glance to involve an "appropriation", the General Assembly has

legislated, in Act No. 117 of 1976, that all Federal funds, whether designated as grants, augmentations, credits or otherwise, received from the Federal government in any fiscal year, shall be deposited into the General Fund and that they may not be paid out by the State Treasurer unless pursuant to a specific Appropriation Act of the General Assembly. This Act has been upheld as constitutional by the Commonwealth Court in the case of *Shapp v. Sloan*, 27 Pa. Commonwealth Ct. 312, 367 A.2d 791 (1976)\*. Assuming that the case is affirmed by the Pennsylvania Supreme Court, the question is whether an appropriation providing for grants of Federal funds to persons who install solar hot water heater systems in their homes would violate Article III, § 29, which prohibits appropriations made for charitable, educational or benevolent purposes.

Although, as noted above, an appropriation of State funds for such purpose would violate the constitutional provision, the appropriation of Federal funds in accordance with a Federal statute is a different matter. First of all, the Pennsylvania Constitution has no control over an act of the United States Congress. U.S. Const. Art. VI, cl. 2 (Supremacy Clause). Secondly, even though the Federal funds are required to be appropriated by the General Assembly pursuant to Act No. 117 of 1976, they are still Federal funds and do not become State funds by virtue of the legislative appropriation. The Pennsylvania Constitution cannot have been intended to prohibit the General Assembly from spending Federal funds in accordance with a duly enacted Federal statute. As the Commonwealth Court said in *Shapp v. Sloan*, *supra*.

“Our Pennsylvania forefathers did not frame our Constitution with Federal aid in mind or even dreamed of.” (27 Pa. Commonwealth Ct. at 322, 367 A.2d at 797).

Moreover, the Supreme Court of Pennsylvania, in interpreting the equivalent provision of the Constitution of 1874 (Article III, § 18), said:

“What the Constitution prohibits is the establishment of any such policy which causes an appropriation of *State moneys* for benevolent purposes to a particular class of its citizens. . .”  
*Busser v. Snyder*, 282 Pa. 440, 451, 128 A.80, 84 (1925)  
(emphasis added).

The same Federal grant program could have been designed without involving the State government at all. It could have provided for the grants to be made directly from the Federal agency (HUD) to individuals and families located in Pennsylvania. The involvement of the Governor's Energy Council in this program is as an agent of the Federal government to carry out the Federal program utilizing Federal funds

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\* Editor's note: Affirmed by Pennsylvania Supreme Court; *Shapp v. Sloan*, No. 214 January term 1977; No. 586 January term, 1976; and No. 4 January term, 1977. (Pa. Supreme Ct. filed July 19, 1978) (Appeal to United States Supreme Court filed)

pursuant to Federal law. The fact that the appropriation machinery of the Pennsylvania General Assembly comes into play does not alter the character of the fund. It must be concluded that the Pennsylvania Constitution was not intended to prohibit the General Assembly from making an appropriation in this manner where such is required to implement a Federal program.

For the foregoing reasons, it is our opinion and you are advised, that the Governor's Energy Council may enter into a contract with HUD to administer the Federal grant program in Pennsylvania and make grants of \$400.00 to persons installing solar hot water heating systems in their residences.

Very truly yours,

W. WILLIAM ANDERSON  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

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OFFICIAL OPINION NO. 77-13

*Recent developments concerning the so-called Sunshine Law, Act of July 19, 1974, P.L. 486, No. 175; 65 P.S. §§ 261-269.*

1. The provisions of section 7 of the Sunshine Law are conclusive regarding what functions of the General Assembly are subject to the open meeting requirement.
2. That section of Official Attorney General's Opinion No. 46 of 1974 which concluded that the Sunshine Law does not require disclosure of legal advice by agency counsel concerning pending or impending litigation or other legal proceedings is affirmed.
3. The activities of deliberation, discussion and preliminary decision which lead to formal agency action are not within the statutory definition of formal action and therefore need not be conducted at an open meeting.

Harrisburg, Pa. 17120  
July 5, 1977

Honorable Milton J. Shapp  
Governor  
Harrisburg, Pennsylvania 17120

Dear Governor Shapp:

You have asked our opinion as to the legal consequences of recent developments concerning the so-called Sunshine Law, Act of July 19, 1974, P.L. 486, No. 175, 65 P.S. §§ 261-269. Please be advised as follows:

1. The provisions of section 7 of the Sunshine Law are conclusive re-