

advice on possible alternatives to the demolition, alteration and reconstruction of historic bridges, but the final decision and authority with regard to repair or reconstruction of bridges and other transportation facilities lies with the Department of Transportation. 71 P.S. § 512(a)(15), *Payne v. Kassab*, 468 Pa. 226, 361 A.2d 263 (1976).

The Department of Transportation has the authority to determine the type of rehabilitation, restoration and reconstruction that should be initiated in conformity with the departmental guidelines, rules and regulations. It is my opinion and you are hereby advised that any failure to perform such work when funds are available may expose the Department of Transportation to liability under the Tort Claims Act.

You are further advised that in accordance with the provisions of Section 204(a)(1) of the Commonwealth Attorneys Act, Act No. 1980-164, 71 P.S. § 732-204(a), you will not in any way be liable for following the advice set forth in this opinion.

Very truly yours,

LEROY S. ZIMMERMAN
Attorney General

OFFICIAL OPINION NO. 83-10

Department of State—Constitutionality of the Act of July 12, 1980, P.L. 649, No. 134, § 4, 25 P.S. § 2913(b), (c).

1. The Act of July 12, 1980, P.L. 649, No. 134, § 4, 25 P.S. § 2913(b), (c) which amended the Pennsylvania Election Code to provide for nominating papers to be filed no later than the second Friday subsequent to the primary is valid and binding upon candidates for political office in Pennsylvania until declared otherwise by a court of competent jurisdiction.
2. The decision of the United States Supreme Court in *Anderson v. Celebrezze*, ___U.S.____, 103 S. Ct. 1564 (1983) which declared invalid a provision of the Ohio Election Code requiring independent candidates to file election papers seventy-five (75) days before the primary election is distinguishable from the provisions of Act 134.

September 27, 1983

Honorable William R. Davis
Secretary of the Commonwealth
North Office Building
Harrisburg, PA 17120

Dear Secretary Davis:

Your memorandum of July 25, 1983, requests my advice on the effect of the United States Supreme Court decision in *Anderson v. Celebrezze*, _____ U.S. _____, 103 S. Ct. 1564 (1983) on Section 953 of the Act of June 3, 1937, P.L. 1333, Art. IX, as amended, 25 P.S. § 2913(b). This section reads:

No nomination paper shall be circulated prior to the tenth Wednesday prior to the primary, and no signature shall be counted unless it bears a date affixed not earlier than the tenth Wednesday prior to the primary nor later than the second Friday subsequent to the primary. Act of June 3, 1937, P.L. 1333, Art. IX, § 953, as amended, 25 P.S. § 2913(b).

It is my opinion and you are hereby advised that the Act, as amended by the Act of July 12, 1980, P.L. 649, No. 134, § 4, 25 P.S. § 2913(b), is valid and binding upon candidates for political office in Pennsylvania until declared otherwise by a court of competent jurisdiction.

The previous wording of this section required a candidate to file nomination papers no later than the seventh Wednesday *before* the primary election. This filing deadline for independent candidates was challenged and invalidated in *Salera v. Tucker*, 399 F.Supp. 1258 (E.D. Pa. 1975), *aff'd*, 424 U.S. 959 (1976). The Federal Court in *Salera* fixed the twenty-first of August as the filing deadline for independent candidates for “. . . each successive year in which these candidates seek nomination as independents . . . This August 21st date shall remain in effect until the Pennsylvania legislature shall enact a new filing date for nomination papers.” *Salera, supra*, at pages 1269-1270.

Apparently, in response to the *Salera* decision, the Pennsylvania legislature amended said section in 1980 to establish a new filing date “. . . on or before the second Friday *subsequent* to the primary.” Act of July 12, 1980, P.L. 649, No. 134, § 4, effective January 1, 1981, 25 P.S. § 2913(c).

The 1980 amendment met the condition established by the court in

Salera and the new legislatively enacted filing date replaced the court ordered date of the twenty-first of August.

As your memorandum points out, the next development was that on April 19, 1983, the U.S. Supreme Court, in a five-to-four decision, invalidated a provision of the Ohio Election Code which provided that:

Each person desiring to become an independent candidate for an office for which candidates may be nominated at a primary election . . . shall file no later than 4:00 p.m. of the 75th day before the day of the primary election immediately preceding the general election at which such candidacy is to be voted for by the voters, a statement of candidacy and nominating petition. . . . Ohio Revised Code Annotated, § 3513.257 (Supp. 1982).

The primary election in Ohio for the year in question fell on June 3, 1980, and the filing deadline for independent candidates was March 20, 1980.

On April 24, 1980, Presidential aspirant John B. Anderson announced that he was an independent candidate for President in the State of Ohio and on May 16, 1980, his supporters tendered a nominating petition to the Secretary of State. The Secretary of State refused to accept the documents because they had not been filed within the time required by the Ohio statute. Action was instituted in Federal Court challenging the constitutionality of the Ohio statute.

The Supreme Court held in *Anderson v. Celebrezze, supra*, that Ohio's early filing deadline placed an unconstitutional burden on the voting and associational rights of presidential candidate Anderson's supporters.

Unlike the *Salera* court, the Supreme Court did not establish a new filing deadline other than to implicitly accept a sixteenth of May date as acceptable for the filing of Anderson's papers.

The Ohio statute established a filing deadline 229 days in advance of the general election versus 196 for the Pennsylvania statute and the Ohio statute established a filing deadline *prior* to the primary whereas Pennsylvania's deadline is subsequent to the primary. Therefore, inasmuch as the 1980 amendment to the Pennsylvania statute was not before the United States Supreme Court and is distinguishable from the Ohio statute, I cannot say as a matter of law that Pennsylvania's pres-

ent statute is constitutionally defective. A legislative enactment enjoys a presumption in favor of its constitutionality and all doubts are to be resolved in favor of a finding of constitutionality. *Parker v. Children's Hospital of Philadelphia*, 483 Pa. 106, 394 A.2d 932 (1978); *Com., Pa. Higher Ed. Assistance Agency v. Abington Memorial Hospital*, 24 Pa. Commonwealth Ct. 352, 356 A.2d 837 (1976), *aff'd*, 478 Pa. 514, 387 A.2d 440 (1978).

I note, however, that the court decisions raise some serious constitutional concerns which the Commonwealth should address.

In *Celebrezze*, the state argued that three separate interests were served by the Ohio early filing deadline for independent presidential candidates. They were: voter education, equal treatment for partisan and independent candidates and political stability. The Supreme Court rejected all three.

The *Salera* court, on the other hand, identified three state interests arguably served by holding the nomination paper circulation period so far in advance. The three interests addressed were voter education, a concern that defeated or disaffected primary candidates not use the independent nomination process to thwart the will of the party majority or to wreak vengeance upon the candidate chosen by the party majority and the need for sufficient time to resolve any challenges to the nomination papers and to prepare the ballots in a deliberate and orderly fashion. The only state interest to which the *Salera* court gave any credence was the last, but the court noted that the Commonwealth does not begin to print the ballots until the latter part of September and that a candidate's name can be added to or removed from the ballots in late September without more than minor inconvenience. *Salera, supra*, at page 1267.

My advice is that, based on the *Salera* and *Celebrezze* decisions and with the next primary scheduled to occur in late April of 1984 (a presidential year) you should apprise the Pennsylvania legislature of the *Salera* and *Celebrezze* decisions and what they appear to portend and request that the statute be amended to provide a time period which would serve the only "state interest" recognized by either the *Salera* or *Celebrezze* courts, i.e., the need for sufficient time to resolve any challenges to the nomination papers and to prepare the ballots in a deliberate and orderly fashion. You are in the best position to provide this information to the legislature in the first instance and to defend the ensuing statutory provisions should they become the subject of attack.

You are further advised that in accordance with the provisions of Section 204(a)(1) of the Commonwealth Attorneys Act, Act No. 1980-164, 71 P.S. § 732-204(a), you will not in any way be liable for following the advice set forth in this opinion.

Very truly yours,

LEROY S. ZIMMERMAN
Attorney General

OFFICIAL OPINION NO. 83-11

Public School Employees' Retirement Board—Public School Employees' Retirement Code—Eligibility for Creditable Nonschool Service—Eligibility Credit for an Approved Leave of Absence—Persons Working for Unions—Commonwealth Contributions.

1. Employment with a public school employee labor union is not within the Public School Employees' Retirement Code provisions for creditable nonschool service.
2. An employee otherwise entitled to a one year sabbatical leave can remain an active member of the Public School Employees' Retirement System for that one year under the provisions for an approved leave of absence.
3. Except for a one year sabbatical leave there are no provisions in the Code authorizing payments into the Fund on behalf of an employee of a public school employee union.
4. The Pennsylvania School Employees' Retirement Board should take appropriate steps to refund any contributions made by the Commonwealth, school districts and individuals on behalf of persons who were not eligible to remain active members of the retirement system.

October 19, 1983

Andrew M. Sheffler
Executive Director
Public School Employees' Retirement System
Harrisburg, PA 17108

Dear Mr. Sheffler:

Attorney Herbert C. Goldstein, at the direction and on behalf of the Public School Employees' Retirement Board has by letter of June 9, 1983, requested advice on the specific question of whether or not a person deemed to be "on leave of absence" or "on special assignment" by his local School Board in order to work full-time for a public school employee labor union is entitled to active membership in the Public School Employees' Retirement System.