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COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL
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D. MICHAEL FISHER
ATTORNEY GENERAL

February 27, 1998

The Honorable Robert D. Robbins
Chairman, Local Government Commission
Senate of Pennsylvania
Senate Box 203078
Main Capital Building
Harrisburg, PA 17120-3078

Dear Senator Robbins:

Enclosed herewith are the following:

1. A report prepared by the Attorney General's Office dealing with the OAG's Bureau of Narcotics Investigations and Bureau of Criminal Investigations.
2. A computer disk in Word Perfect format reflecting the aforementioned reports.
3. A letter dated November 3, 1997, addressed to Mike Clark, Legal Intern Office of Attorney General from Mr. Horace A. Johnson.

Please note that during the December 11, 1997 Local Government Commission meeting, the Chairman requested that a copy of the Horace A. Johnson letter be made available for dissemination to Commission members.

If you or members of your staff have any questions concerning the above items, please feel free to contact me at (717) 787-9970.

Sincerely,

David J. Kwait
Chief, Criminal Investigations
Criminal Law Division

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Enclosures

INVESTIGATIVE/ARREST AUTHORITY OF THE BUREAU
OF CRIMINAL INVESTIGATION AND THE BUREAU OF
NARCOTICS INVESTIGATION & DRUG CONTROL OF THE
PENNSYLVANIA OFFICE OF ATTORNEY GENERAL (BCI/BNI)

In general, the jurisdiction of the Pennsylvania Office of Attorney General to investigate and prosecute criminal conduct is derived from the Commonwealth Attorneys Act, 71 P.S. § 732-101 et seq. With respect to investigative authority of its criminal investigators (BCI and BNI), this Act specifically provides that the Attorney General shall have the power to investigate any criminal offense which he has the power to prosecute. The following excerpt of the Act addresses this as follows, in pertinent part:

* * * *

71 P.S. § 732-206. Law enforcement and criminal investigations; investigating grand juries

(a) Law enforcement; criminal investigations. - The Attorney General shall be the chief law enforcement officer of the Commonwealth; the district attorney shall be the chief law enforcement officer for the county in which he is elected. The Attorney General shall have the power to investigate any criminal offense which he has the power to prosecute under section 205; he shall continue the existing programs relating to drug law enforcement. The Pennsylvania State Police shall cooperate with the Attorney General and furnish such services as the Attorney General shall request. (emphasis added)

With regard to the OAG's power to prosecute, the Commonwealth Attorneys Act addresses this as follows, in pertinent part:

* * * *

71 P.S. § 732-205. Criminal prosecutions

(a) Prosecutions.-The Attorney General shall have the power to prosecute in any county criminal court the following cases:

(1) Criminal charges against State officials or employees affecting the performance of

their public duties or the maintenance of the public trust and criminal charges against persons attempting to influence such State officials or employees or benefit from such influence or attempt to influence.

(2) Criminal charges involving corrupt organizations as provided for in 18 Pa.C.S. § 911 (relating to corrupt organizations).

(3) Upon the request of a district attorney who lacks the resources to conduct an adequate investigation or the prosecution of the criminal case or matter or who represents that there is the potential for an actual or apparent conflict of interest on the part of the district attorney or his office.

(4) The Attorney General may petition the court having jurisdiction over any criminal proceeding to permit the Attorney General to supersede the district attorney in order to prosecute a criminal action or to institute criminal proceedings. Upon the filing of the petition, the president judge shall request the Supreme Court to assign a judge to hear the matter. The judge assigned shall hear the matter within 30 days after appointment and make a determination as to whether to allow supersession within 60 days after the hearing. The district attorney shall be given notice of the hearing and may appear and oppose the granting of the petition. Supersession shall be ordered if the Attorney General establishes by a preponderance of the evidence that the district attorney has failed or refused to prosecute and such failure or refusal constitutes abuse of discretion.

(5) When the president judge in the district having jurisdiction of any criminal proceeding has reason to believe that the case is a proper one for the intervention of the Commonwealth, he shall request the Attorney General to represent the Commonwealth in the proceeding and to investigate charges and prosecute the defendant. If the Attorney General agrees that the case is a proper one for intervention, he shall file a petition with

the court and proceed as provided in paragraph (4). If the Attorney General determines that the case is not a proper case for intervention, he shall notify the president judge accordingly.

(6) Criminal charges investigated by and referred to him by a Commonwealth agency arising out of enforcement provisions of the statute charging the agency with a duty to enforce its provision.

(7) Indictments returned by an investigating grand jury obtained by the Attorney General.

(8) Criminal charges arising out of activities of the State Medicaid Fraud Control Unit as authorized by Article XIV (relating to fraud and abuse control) act of June 13, 1967 (P.L. 31, No. 21), known as the "Public Welfare Code," and the Federal law known as the "Medicare-Medicaid Antifraud and Abuse Amendments."

(b) Concurrent jurisdiction to prosecute.-The Attorney General shall have the concurrent prosecutorial jurisdiction with the district attorney for cases arising under subsection (a) (1), (2) and (6) and may refer to the district attorney with his consent any violation or alleged violation of the criminal laws of the Commonwealth which may come to his notice.

(c) Criminal appeals.-In any criminal action in which there is an appeal, the Attorney General may in his discretion, upon the request of the district attorney, prosecute the appeal; he may intervene in such other appeals as provided by law or rules of court.

(d) Powers when prosecuting.-Whenever the Attorney General prosecutes a criminal action, or appeal, he may employ such special deputies as are necessary for that purpose; such deputies shall take the oath of office and be clothed with all the powers, and subject to all the liabilities imposed by law upon district attorneys, including the power to sign informations or indictments. Whenever the Attorney General intervenes in a criminal action, the costs incurred as a result of the intervention shall be paid by the Commonwealth.

The Commonwealth Attorneys Act includes the power to investigate and prosecute criminal matters relating to the public duties of state officials and employees; corrupt organizations; charges referred by a Commonwealth agency pursuant to such agency's enforcement provisions; presentments returned by an investigating grand jury, and matters arising out of the Medicaid Fraud Control Section.

With respect to charges referred by a Commonwealth agency, Section 732-205(a)(6) provides that the Attorney General may prosecute criminal charges investigated by and referred to him by a Commonwealth agency arising out of enforcement provisions of the statute charging the agency with a duty to enforce its provision. Agencies that commonly refer such matters to the Office of Attorney General include, but are not limited to, the following: Pennsylvania Department of Revenue (tax crimes); Department of Public Welfare (Medicaid Fraud); Pennsylvania Department of Environmental Protection (environmental crimes); the State Ethics Commission (public corruption/ethics law violations); the Pennsylvania Securities Commission (fraudulent and prohibited securities practices); and the Pennsylvania Department of Banking (illegal banking operations).

In addition, the Commonwealth Attorneys Act provides that the Attorney General may supersede a district attorney under certain circumstances and may prosecute upon request of a district attorney where a conflict of interest exists or where a district attorney's office lacks adequate resources to properly investigate and prosecute, 71 P.S. § 732-205(a)(3), (4) & (5).

The Attorney General's jurisdiction is not confined solely within the Commonwealth Attorneys Act. Several other Pennsylvania statutes also authorize the Attorney General to prosecute various other criminal sanctions provided for throughout Pennsylvania law. These other statutes are listed below:

1. Dealing in Proceeds of Unlawful Activities (Money Laundering), 18 Pa. C.S. §5111
2. Enforcement (Violations of the Election Code connected with any statement or report and the contents thereof which is to be filed with the Secretary of the Commonwealth), 25 P.S. § 3260b
3. Insurance Fraud Prevention Act, P.S. § 3701-101 et seq.
4. Criminal proceedings (Worker's Compensation Act — Insurance Fraud), 77 P.S. § 1039.9(b)
5. Provider Prohibited Acts, Criminal Penalties and Civil Remedies (Medicaid Fraud Act), 62 P.S. § 1407 (b)(4)

6. Neglect of Care-Dependent Person; Enforcement (Patient Abuse Act), 18 Pa. C.S. § 2713(d)(2)
7. Deceptive or Fraudulent Business Practices (including telemarketing fraud), 18 Pa. C.S. § 4107
8. Antitobacco Act, 73 P.S. § 1611 et seq.
9. Investigating Grand Jury Act, 42 Pa. C.S. § 4541 et seq.

While the foregoing relates to the Office of Attorney General's general criminal law enforcement authority (and primarily BCI), two additional statutes relate specifically to BNI: 1) The Controlled Substance, Drug, Device and Cosmetic Act, 35 P.S. § 780-101 et seq.; and 2) Loss of Property Rights to the Commonwealth (Controlled Substances Forfeitures Act): 42 Pa. C.S. § 6801 et seq.

The Controlled Substance, Drug, Device and Cosmetic Act speaks to a BNI Agent's specific authority to enforce the Act, as well as defining Pennsylvania drug violations. The Act addresses this as follows, in pertinent part:

35 Pa.C.S. § 780-134 Administration of act

(a) Except as may be otherwise provided by law, the provisions of this act shall be administered by the department. The secretary is authorized to employ personnel and to fix their compensation subject to the act of April 9, 1929 (P.L. 177), known as "The Administrative Code of 1929."

(b) The secretary is authorized and directed to establish a Bureau of Drug Control within the department and to employ therein sufficient personnel to perform the duties imposed upon the department by this act.

(c) The secretary may designate specific officers and employees of the Bureau of Drug Control as law enforcement personnel and authorize such personnel to:

(1) Carry firearms in the performance of his official duties;

(2) Execute and serve search warrants, arrest warrants, administrative inspection warrants, subpoenas, and summonses issued under the authority of the Commonwealth;

(3) Make arrests without a warrant for any offense under this act committed in his presence, or if he has probable cause to believe that the person to be arrested has committed or is committing a violation of this act which may constitute a felony;

(4) Make seizures of property pursuant to this act; or

(5) Perform other law enforcement duties as the secretary designates.

(d) Nothing contained herein shall be deemed to limit the authority of the Bureau of Drug Control, the Pennsylvania State Police, the Department of Justice or any other law enforcement agency in dealing with law enforcement matters with respect to persons engaged in the unlawful importation, manufacture, distribution, sale and production of controlled substances, other drugs or devices or cosmetics nor the authority of the council in performing any duties imposed upon it by the "Pennsylvania Drug and Alcohol Abuse Act."

(In interpreting the foregoing portion of the Controlled Substance, Drug, Device and Cosmetic Act, it is important to note that 35 P.S. § 780-134 has been modified inasmuch as the functions, powers and duties of the Department of Health and the Secretary of Health with regard to the establishment and operation of the "Bureau of Drug Control" as set forth in subsections (b), (c) and (d) of 35 P.S. § 780-134 have been transferred to the Department of Justice and the Attorney General (by reorganization plan #6 of 1973, 71 P.S. 755-6.) In addition, all personnel, appropriations, records, equipment, etc. of the Department of Justice were transferred to the Office of Attorney General in 1981 (pursuant to 71 P.S. § 732-501.) The net effect of the foregoing means that the "Bureau of Drug Control", as referenced above, is now the Bureau of Narcotics Investigation and Drug Control (BNI) and the "secretary", as referenced above, is now the Attorney General.)

Likewise, the drug forfeiture law (Loss of Property Rights to Commonwealth) 42 Pa. C.S. § 6801 et seq. confers additional enforcement authority on the OAG (and BNI specifically) because seizures effected by state-wide investigators are to be forfeited to the OAG. When this language is read in conjunction with 35 P.S. § 780-134(c)(4) cited above, BNI's authority with regard to such seizures/forfeitures is clear.

Neither BCI nor BNI Agents are "police officers." Rather, they are "law enforcement officers." The two seminal cases in

this regard are Commonwealth v. Carsia, 512 Pa. 509, 517 A.2d 956 (1986) and Commonwealth v. Galloway, ___ Pa. ___, 574 A.2d 1045 (1990).

In Carsia, the Commonwealth attempted to argue that the Commonwealth Attorneys Act was but one source of the authority of the OAG (to prosecute). However, the Pennsylvania Supreme Court specifically rejected this argument in its opinion. Following its decision in Carsia, the Pennsylvania Supreme Court specifically addressed the issue of the authority of an OAG/BCI agent to arrest in the case of Commonwealth v. Galloway, ___ Pa. ___, 574 A.2d 1045 (1990) as follows, in pertinent part:

[W]e point out first that under Pa.R.Crim.P. 3(1) and (o), a clear distinction is drawn between a "law enforcement officer" and a "police officer":

(1) Law Enforcement Officer is any person who is by law given the power to enforce the law when acting within the scope of that person's employment.

(2) Police Officer is any person who is by law given the power to arrest when acting within the scope of the person's employment.

Second, under the Commonwealth Attorney's Act, Act of October 15, 1980, P.L. 950, No. 164, § 101, et seq., 71 P.S. § 732.101 et seq. (hereinafter referred to as "Act"), the intent of the General Assembly was to limit the authority of that Office to investigate and prosecute **only** those criminal offenses specifically enumerated by the legislature.

* * * *

Our most recent interpretation of that statute held that the Act is the sole grant of authority to the Attorney General, and he "does not possess any inherent additional powers not therein set forth." See, Commonwealth v. Carsia, 512 Pa. 509, 511, 517 A.2d 956, 957 (1986), where we also concluded "that the power of the Attorney General to prosecute criminal matters is prescribed by section 205."

Having determined that this state officer is

governed solely by the Act, we turn next to the Commonwealth's contention that "inherent in the authority to investigate and prosecute is the authority to arrest." (Brief, p. 23). We agree that the Attorney General and his agents are empowered to apply for warrants and to make arrests in those instances where an investigation or prosecution is undertaken pursuant to § 732-205. Obviously, that arrest power is designed to facilitate the investigative and prosecutorial aims of the Attorney General's office. But the power is limited thereby, and we will not read the statute to expand the scope of that power beyond the bounds of the legislative intent underlying it. The specific issue to be decided here is whether those arrest powers, invested in a "law enforcement" officer for purposes of investigating and prosecuting offenses listed in § 732-205, are also of a general nature in the same sense by which municipal police officers and the State Police are authorized by statute to arrest as "police officers." Neither the language of the Act itself, its legislative history, nor case law convinces us that there is any reasonable interpretation of the Act which allows the Attorney General to arrest for offenses outside of those contemplated by the primary purpose behind the statute. The power of arrest under the Act is limited to those actions which fall within the "scope of employment" as defined and circumscribed by the specific offenses in § 732-205. The Attorney General is a "law enforcement officer" and not a "police officer."

* * * *

Commonwealth v. Galloway, ___ Pa. ___ - ___, 574 A.2d 1047-1048.

The clear import of these cases is that criminal investigative agents of the OAG are not "police officers" as defined in the Rules of Criminal Procedure. Rather, they are "law enforcement officers" whose investigative/arrest authority stems from the Commonwealth Attorneys Act and the other statutes referenced herein.

INVESTIGATIVE/ARREST AUTHORITY OF THE
BUREAU OF CRIMINAL INVESTIGATION AND THE
BUREAU OF NARCOTICS INVESTIGATION AND DRUG CONTROL
OF THE PENNSYLVANIA OFFICE OF ATTORNEY GENERAL

Prepared by the Pennsylvania
Office of Attorney General for
the House Resolution 167 Task Force

February 27, 1998

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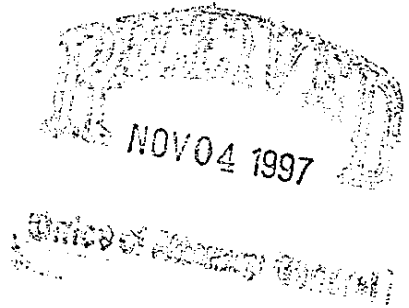
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November 3, 1997



Mike Clark, Legal Intern
Office of Attorney General
Criminal Prosecution Section
16th Floor – Strawberry Square
Harrisburg, PA 17120

Dear Mike:

The Memorandum adequately summarized the police powers of Pennsylvania Sheriffs and Sheriff's Deputies.

On page 7 of said Memorandum, you state the following: "Then, following LEET one must look to statutes looking for any abrogation of that authority. A thorough review of statutory law shows no express abrogation of any common law police power or authority of the Sheriff." The first sentence of the quote indicates that legislation could abrogate the powers of a Sheriff. The second sentence indicates none has done so.

I suggest that the reason no statute has abrogated the power of Sheriffs is because constitutionally it cannot do so. While the legislature may impose additional duties upon the Sheriff, where he is recognized as a constitutional officer, it cannot restrict or reduce his powers as allowed by the Constitution, or as they were recognized when the Constitution was adopted. Anderson, Sheriffs at Section 43 at 37; Sheriffs and Police, Section 56 at 270; Brownstone Township v. County of Wayne, 68 Mich. App. 244, 248, 242 N.W. 2d 538, 539 (1976). "(t. the legislature may vary the duties of a constitutional officer, but it may not change the duties so as to destroy the power to perform the duties of the office"). Sheriffs' arrest powers are derived from the Constitution and the abrogation thereof will require a constitutional amendment.

Very truly yours,

JOHNSON, DUFFIE, STEWART & WEIDNER

Horace A. Johnson

A handwritten signature in black ink, appearing to be 'H.A. Johnson', written over the typed name.

HAI:par:102821
cc: Sheriff Dennis C. Rickard