9. The agreement is not contrary to the provisions of sections 7, 8 and 10 of article IX of the Pennsylvania Constitution; nor do any of the other constitutional objections raised against the General State Authority apply to our case, inasmuch as we are concerned merely with the contract and lease between a municipality, a school district, and a private corporation, the School Association of East Buffalo Township.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.
GEORGE J. BARCO,
Deputy Attorney General.

OPINION No. 376

Conscription—Justices of the Peace—Notaries Public.

1. Conscription for, or voluntary enlistment in, the armed forces of the United States during the present emergency will not affect the status of a person holding a commission as a justice of the peace within this Commonwealth provided, however, such person intends, upon the termination of his service with the United States, to resume the duties of his office in the district for which he was elected.

2. Conscription for, or voluntary enlistment in, the armed forces of the United States during the present emergency will not affect the status of a person holding a commission as a notary public within this Commonwealth provided, however, such person intends, upon the termination of his service with the United States, to resume the duties of his office in the district for which he was commissioned.

Harrisburg, Pa., December 9, 1940.

Honorable J. Paul Pedigo, Secretary to the Governor, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your recent communication requesting our advice upon the following questions, viz:

1. What will be the effect of conscription for, or voluntary enlistment in, the armed forces of the United States on the status of a person duly elected and qualified as a justice of the peace within this Commonwealth?

2. What will be the effect of conscription for, or voluntary enlistment in, the armed forces of the United States on the status of a person duly appointed and qualified as a notary public within this Commonwealth?

We will discuss these questions seriatim and consider them not only from the standpoint of the possible effect of the absence of a

justice of the peace or notary public for a period of one year or more from the district for which he was elected or appointed, but also from the standpoint of the possible incompatibility which might exist between their respective offices and service in the armed forces of the United States.

1. Article V, section 11 of the Constitution of Pennsylvania, which provides for the election of justices of the peace, contains no stipulation with respect to the manner in which the office is to be conducted or the situs thereof. However, this constitutional provision is supplemented by the Act of February 22, 1802, P. L. 75, 42 PS §171, providing that no justice of the peace may act unless he shall reside within the limits of the district for which he was commissioned, and by the Act of June 21, 1839, P. L. 376, 42 PS §172, providing that during the continuance in office justices of the peace are required to keep their offices in the ward, borough or township for which they shall have been elected.

It is obvious, therefore, that the laws of this Commonwealth not only contemplate but require that a justice of the peace reside and keep his office in the district for which he was elected and commissioned. While we do not here decide the question, it would seem to follow logically that if a justice of the peace did not, in fact, maintain his residence and office in the district for which he was elected, such neglect would be sufficient reason for his removal from office. This, it seems to us, would certainly be the case in the event the justice never established an office in the district or, having done so, permanently abandoned the same.

It seems to follow just as logically, however, that if a justice of the peace, having the necessary residence requirements and having established an office within the district, is forced to remove from the district for a limited period of time, and with every intention of returning to it and resuming his duties, such absence would not constitute sufficient reason for his removal from office (see 10 Dauphin County Reporter 98). Being an elected officer, his removal can be accomplished only as provided by article VI, section 4 of the Constitution of Pennsylvania which provides, inter alia, that "* * * All officers elected by the people, * * * shall be removed by the Governor for reasonable cause, after due notice and full hearing, on the address of two-thirds of the Senate."

The case of In Re Bowman, 225 Pa. 364 (1909), was concerned with the Act of May 25, 1907, P. L. 257, which conferred upon the several courts of common pleas of this Commonwealth the power to declare vacant the office of a justice of the peace who failed, for a period of six months, to reside in the district for which he had been elected. Mr. Bowman took a vacation trip to Europe and was

gone for more than the period allowed by the statute. An application to the court of common pleas of the proper county to remove him from office was granted. On appeal to the Supreme Court it was held, without discussing the merits of the case, that the act was repugnant to the provisions of article VI, section 4, supra, and that if the defendant was to be removed from office, such removal could be accomplished only in the manner prescribed thereby. It has been held also in Swanck's case, 16 County Court Reports 318 (1895), and in Huth's case, 4 Dist. Reps. 233 (1895), that the Governor, on his own motion, has no authority to remove an elective officer who, by reason of physical or mental disability, is forced temporarily or permanently to abandon his office.

We are of the opinion, therefore, that the Acts of February 22, 1802 and June 21, 1839, supra, require a justice of the peace to maintain both his residence and office in the district for which he was elected. However, we are just as clearly of the opinion that these acts do not prohibit a temporary absence from such an office after one has been legally established. Certainly it was not the legislative intent that a justice of the peace could not take a vacation, or could not be ill for an extended period of time, without placing his office in jeopardy. More clearly, it could not have been the legislative intent that a justice of the peace who, in a time of national emergency, was conscripted for military service or voluntarily joined the armed forces of the United States, should lose his office because he had temporarily abandoned it in the service of his country. In any event, the only manner in which the question could be raised would be in accordance with the provisions of article VI, section 4, supra; the Governor, on his own motion, has no authority to remove.

The second aspect of the question relating to justices of the peace arises by reason of the following constitutional and statutory provisions, viz:

Article XII, section 2 of the Constitution of Pennsylvania provides as follows:

> No member of Congress from this State, nor any person holding or exercising any office or appointment of trust or profit under the United States, shall at the same time hold or exercise any office in this State to which a salary, fees or perquisites shall be attached. * * *

Section 1 of the Act of May 15, 1874, P. L. 186, 65 PS §1 provides that:

> Every person who shall hold any office, or appointment of profit or trust, under the government of the United States, whether a commissioned officer or otherwise, a sub-

> ordinate officer or agent, who is or shall be employed under the legislative, executive or judiciary departments of the United States, * * * is hereby declared to be incapable of holding or exercising, at the same time, the office or appointment of justice of the peace, notary public, * * * under this commonwealth.

This department, as well as the several courts of this Commonwealth, has beeen repeatedly called upon to decide questions arising under the aforesaid constitutional and statutory provisions relating to the possible incompatibility of offices and employment under the State and Federal Governments. A careful examination of the opinions of this department and of the reported court cases has, however, failed to disclose that the precise question here involved has ever been decided or adjudicated.

One of the controlling cases in this Commonwealth, and the one that in our opinion controls the answer to your inquiry, is that of Commonwealth, ex rel. Bache *v.* Binns, 17 Sergeant & Rawle 219 (1828). In that case the defendant, Binns, who was an alderman in the City of Philadelphia, and who was the editor of a daily newspaper in said city, received authorization to print in his said newspaper the orders, resolutions and laws which were from time to time approved and ratified by the Congress of the United States. Quo warranto proceedings were instituted against him for the purpose of ousting him from his office as alderman on the ground that his appointment from the Federal Government was incompatible with the exercise of his duties as alderman. The rule for the writ of quo warranto was discharged by the Supreme Court and, because the case is decisive of the questions here involved, we quote from the opinions filed, at some length. At page 224 the court said:

> * * * If such shall be decided to be the meaning of the law, every one sees that it may go very far to proscribe some very essential operations of the national government in Pennsylvania. Every justice of the peace or alderman, who is employed, on behalf of the United States, to issue a warrant for felony committed on the seas, robberies, or thefts upon the mail, or any other crime against the United States, will come directly, in the capacity of agent, or as a person employed, under the penalty of the act. Every constable who ventures to execute such warrant will incur the same forfeiture. Every juror who serves in the United States' courts is employed under the judiciary department. Every militiaman who is called into the public service is directly employed under the executive. *Was it ever heard of, that a justice, constable, burgess or alderman, was exempted from the muster roll, because service under the United States was incompatible with his state office?* * * *
>
> But what seems the most inadmissible part of the doc-

trine is yet to be mentioned. By separating the words in the law of office or appointment of trust or profit, from the words relative to agency or employment, we should make it wholly immaterial, whether there is any profit or trust in the case or not, so that, without any contract at all, one of the state officers, named in the law, by volunteering his services under any department of the federal government, or *if he should happen to be detected in time of war, in the ranks,* or at work upon some fortification, under the federal government, though without any pay, yet, being clearly employed, he would as clearly come under this construction of the act. * * * (Italics supplied)

And at page 246 the court said:

> Indeed, to give the act of 1802 the latitude of construction contended for on the part of the relator, would, in my opinion, constitute every one an officer under the United States, who should, in pursuance of an agreement, print and publish a notice, or perform any other service for any of the departments, or their agents. Such could not have been the design of the convention who framed the constitution of Pennsylvania, nor of the legislature who passed the act of 1802; and upon the principle of construction applicable to that act, as a penal statute, we are not authorized to indulge in a latitude of interpretation, for the purpose of embracing a case, which might even appear to be within the reason of its provisions, but which was not within its terms. Whether we regard the term office, as it is defined by local authorities, or as it is employed in the constitution and laws of the United States, or as it is explained by decisions upon other sections of the constitution of Pennsylvania, in which it is used, or finally, according to the common acceptation of the word, it does not appear to me, that the printing and publishing of the orders, resolutions, public laws, treaties, etc., of the United States in the Democratic Press, in pursuance of the letters of the secretary of state, is an office or appointment, within the true intent and meaning of the act of assembly in question; and under all the circumstances shown to the court, it cannot be said, that the respondent, as editor of that paper, holds an office or appointment under the government of the United States. * * *

While it is true that this case was decided before the adoption of our present Constitution or the enactment of the Act of May 15, 1874, supra, yet the provisions of the law under which it was decided were almost identical with those we are now interpreting. While vigorous dissents were filed to the majority opinion, in none of these did the dissenter express the view that employment in the militia or in any other such position would constitute an office or

appointment of profit or trust under the United States Government within the meaning of the constitutional and statutory provisions, then effective.

After careful consideration of Commonwealth, ex rel. Bache *v.* Binns, supra, other reported cases and the opinions of this department, we are clearly of the opinion that voluntary enlistment in the armed forces of the United States would not constitute such employment under the United States as would render the person so enlisted incapable, at the same time, of holding the office of justice of the peace under this Commonwealth. If this be true with respect to persons voluntarily enlisting, it is even more true with respect to those who are conscripted for military service.

2. There is no constitutional provision respecting the office of notary public within this Commonwealth; the appointment, qualifications and tenure of persons appointed to the office are provided for by the Act of March 5, 1791, 3 Sm. L. 6, as variously amended, 57 P. S. §1, et seq.

After carefully considering the various laws pertaining to notaries public, we have been unable to find any provisions pertinent to the present inquiry with the exception of the following, viz:

Section 2 of the Act of March 5, 1791, supra, provides, in part, as follows:

> * * * the governor shall appoint and commission a competent number of persons, of known good character, integrity and abilities, as notaries public, for the commonwealth of Pennsylvania, to reside within such place or places, within this state, as the governor shall in and by the respective commissions direct; * * *

The amendment made by the Act of June 6, 1893, P. L. 323, 57 P. S. §111, provides that:

> It shall be lawful for any person heretofore appointed, or who shall hereafter be appointed, a notary public, and whose commission direct him to reside in any city or borough in any of the counties of this commonwealth in which any said city or borough may be located, to have his domicile in any part of said county or of the adjoining counties: Provided, That he shall keep an office in the said city or borough or county named in his commission.

It is evident, therefore, that the above quoted statutory provisions not only contemplate, but require, a notary public to maintain an office in the district for which he is commissioned and a residence in any part of the county in which he is commissioned or in an adjoining county. Without expressly deciding the point at this time, we believe that if a notary public commissioned for a particular

district failed to establish an office in such district and to maintain permanently a residence in the county in which said district is located, or an adjoining county, such neglect would be sufficient justification for his removal from office. However, as we have heretofore stated with respect to justices of the peace, we are of the opinion that the aforesaid statutory provisions contemplate a permanent failure to establish a legal office and residence and not a situation such as where a notary public were to close his office during a vacation or illness or, as in the instant case, during the period of time he is serving with the United States Army, whether by conscription or voluntary enlistment. In other words, we do not believe that it was the intention of the legislature that a notary public should lose his office merely because, for a temporary period of national emergency of even indeterminate length, he was compelled to close his office and remove from the district, with the consequent inability to perform his official duties.

Notaries public, not being elective officers, are not in the same category as justices of the peace, hereinbefore discussed. Their removal is governed by article VI, section 4 of the Constitution of Pennsylvania, which provides that:

> * * * Appointed officers, other than judges of the courts of record and the Superintendent of Public Instruction, may be removed at the pleasure of the power by which they shall have been appointed. * * * (Commonwealth ex rel. *v.* Likeley, 267 Pa. 310 (1920))

We have frequently advised that notaries public, being appointed by the Governor, may be removed by him at any time and for any reason which, to him, justifies such action. The Governor, therefore, could remove any notary public even for the reason that he had been conscripted for military service or voluntarily enlisted in the armed forces of the United States. Whether the Governor would desire to take such action, of course, is a decision purely personal to him and on it we express no opinion.

However, what we have heretofore said with respect to the possible incompatibility which might exist were a justice of the peace to enlist in, or be conscripted for, military service, applies with equal force to those persons who are holding commissions as notaries public. The provisions of article XII, section 2 of the Constitution of Pennsylvania, supra, and of the Act of May 15, 1874, P. L. 186, supra, are just as applicable to notaries public as they are to justices of the peace; so is the legal theory underlying the opinion of the Supreme Court in Commonwealth ex rel. Bache *v.* Binns, supra. In view of this fact we need only conclude that the office of notary

public is not incompatible with service in the armed forces of the United States, whether that service be voluntary or involuntary.

In view of the foregoing, we are of the opinion that:

1. Conscription for, or voluntary enlistment in, the armed forces of the United States during the present emergency will not affect the status of a person holding a commission as a justice of the peace within this Commonwealth provided, however, such person intends, upon the termination of his service with the United States, to resume the duties of his office in the district for which he was elected.

2. Conscription for, or voluntary enlistment in, the armed forces of the United States during the present emergency will not affect the status of a person holding a commission as a notary public within this Commonwealth provided, however, such person intends, upon the termination of his service with the United States, to resume the duties of his office in the district for which he was commissioned.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.
FRED C. MORGAN,
Deputy Attorney General.

OPINION No. 377

State employes—Effect of National Guard Act and Selective Service and Training Act.

1. An appointive officer or employe regularly employed by the Commonwealth, who is a member of the Pennsylvania National Guard and who is called into Federal military service by the President, under the provisions of the National Guard Act of August 23, 1940, is not entitled to his State pay during the period of such service. He is, however, entitled to the benefits of the Act of June 7, 1917, P. L. 600, provided he has dependents and complied with all of the requirements of this act. This is true in all cases, irrespective of the military rank.

2. An appointive officer or employe of this Commonwealth, who is a member of a reserve component of the Army, Navy, or Marine Corps, and is regularly employed in the service of this Commonwealth at the time he is ordered into the active military service of the Federal Government, is entitled to have paid to his dependents one-half of his salary (but in no event to exceed $2,000 per annum), in accordance with the provisions of the Act of June 7, 1917, P. L. 600, supra. This is true as to all State officers and employes, regardless of the military rank held. The benefits of this act do not accrue until the individual is actually ordered into active duty by the Federal military service, and then only if he meets the other requirements of the act.

3. During the interval that State employes, who are members of the Na-