it deems necessary. Such contracts may be entered into for such period as deemed necessary and practical by the authority but in any event for not to exceed 5 years."

In answer to your first question, the Michigan state fair authority cannot in disregard of state civil service procedures "hire by contract" a director of public relations and advertising, or any other department director for year-round or fair-time employment. Such employment must be in accordance with established civil service rules and regulations through the general manager.

In answer to your second question, if the state fair authority establishes the position of director of public relations and advertising or some similar position, within its organization, then the supervision of employees of the authority, including the director, within any such division would be the responsibility of the general manager pursuant to his duty to hire all necessary personnel, in conformance with the rules and regulations of the civil service commission, as set forth in Section 9 of Act 224, supra. The statutory power to hire employees carries with it the concomitant duty to supervise their activities.

FRANK J. KELLEY,
Attorney General.

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CONSTITUTIONAL LAW: City ordinances imposing income taxes.
TAXATION: Imposition of city income tax.

A city may by ordinance impose an income tax which gives recognition in the tax base to a differential between the amount of income earned or received from sources within the city by city residents and by nonresidents without violating Article IX, Section 7, Constitution of 1963.

A city ordinance designating one class of taxpayers as "resident individuals" and another class of taxpayers as "nonresident individuals" is a valid classification and does not violate the last sentence of Article IX, Section 3, Constitution of 1963.

No. 4295 May 14, 1964.

Hon. Paul M. Chandler
State Representative
The Capitol
Lansing, Michigan
and
Hon. Adam Sumeracki
State Representative
The Capitol
Lansing, Michigan

Representative Chandler has requested the opinion of the Attorney General on the following question:

"Would an income tax levied by a city at a given rate upon the income of city residents; and at one-half that given rate upon the income

of non-residents; conform with Article IX, Section 7 of the 1963 Michigan Constitution which says in part '. . . no income tax graduated as to rate or base shall be imposed . . .'?"

Representative Sumeracki has requested the opinion of the Attorney General on a question stated by him substantially the same as asked by Representative Chandler. In addition, Representative Sumeracki requests the opinion of the Attorney General on a second question which is as follows:

"Is Section 3, Article IX of the present constitution which provides that 'Every tax other than the general ad valorem property tax shall be uniform upon the class or classes on which it operates,' violated by the provisions of House Bill 704, Section 3, which imposes an income tax (being a class tax or excise tax under the bill) of 1% on resident individuals and ½% on non-resident individuals."

In order to answer the first question it is necessary to consider Section 7 of Article IX, Michigan Constitution of 1963, which in its entirety reads as follows:

"No income tax graduated as to rate or base shall be imposed by the state or any of its subdivisions."

A city is a subdivision of the state.[1]

To answer the first inquiry it is necessary to determine the meaning of the clause "graduated as to rate or base" as applied to an income tax. Our Supreme Court held that a tax imposed on income by an ordinance of the city of Detroit was an excise. *Dooley v. City of Detroit,* 370 Mich. 194. In that case the Court approved of the following definition of an excise:

"An excise is a tax imposed upon the performance of an act, the engaging in an occupation, or the enjoyment of a privilege."
(p. 206)

On this phase of the *Dooley case,* the Court came to the conclusion that the income tax imposed by the city of Detroit was an excise tax and was neither a poll tax nor a property tax. Thus, at this point, the question becomes—when is an excise tax "graduated as to rate or base?"

Where different rates are legislatively imposed on varying amounts or quantities of the same tax base there is a "graduated tax."

Turco Paint & Varnish Co. v. Kalodner (1936), 320 Pa. 421, 184 A. 37;

American Stores Co. v. Boardman (1939), 336 Pa. 36, 6 A. 2d 826.

If a tax is graduated, the graduation may be either upward or downward. Graduated taxation may mean that the rate either decreases or increases as the amount of income increases. When the rate increases with the amount of the income, we have progressive taxation. When the rate decreases as the income increases, we have regressive taxation. Graduated taxation therefore

[1] *State, Lydecker et al., Prosecutors v. The Drainage and Water Commissioners of the Township of Englewood,* 41 N.J. Law 154. *Allison v. Corker* (1902), 67 N.J. Law 596, 52 A. 362. *Arkansas State Highway Commission v. Clayton* (1956), 226 Ark. 612, 292 S.W. 2d 77. *Moreton v. Secretary of State,* 240 Mich. 584.

in the wider sense includes both progressive and regressive taxation.[2] These terms have proper application to the rate at which an income tax may be imposed under Article IX, Section 7, Michigan Constitution of 1963.

In the law of taxation the tax base is customarily considered to be the thing or object upon which the tax is imposed. Thus, real and personal property, income, franchises and privileges and various types of business activities may be the base on which a tax is legislatively imposed. In relating the tax base to an income tax the Arizona Supreme Court in the case of *Powel v. Gleason* (1937), 50 Ariz. 542, 74 P. 2d 47, said:

> "Income taxes are precisely what the name signifies; taxes based on income in money, gross or net."

Since the prohibition contained in Section 7, Article IX of the Michigan Constitution of 1963 applies to an income tax, it is obvious that the tax base is income but it is not clear from the phraseology of this section what type of income tax is prohibited because imposed on a graduated tax base. A proportional tax is a tax in which the tax rate remains constant regardless of the amount of the tax base. This is understandable; for example, a flat 2% rate imposed on income. The amount of income will vary between individual taxpayers but this does not produce a graduated tax base.

In Michigan there is no well accepted and commonly understood meaning to the constitutional language "income tax graduated as to * * * base."

For further enlightenment as to the intended meaning, resort may be had to the Address to the People. The explanation there given of Section 7, Article IX, is:

> "This is a new section making it clear that neither the state nor any local unit of government may impose a graduated income tax. The words 'or base' are necessary to prevent 'piggyback' taxation based on the federal tax liability. Without such language, a tax nominally imposed at a flat rate might actually adopt all of the graduation of the federal tax.
>
> "A flat rate income tax is clearly permitted, and could be imposed on a 'piggyback' basis on income computed for federal tax purposes. The legislature could prescribe reasonable exemptions for a flat rate tax."

Going back one step further, resort may be had to the Debates in the Constitutional Convention as an aid in ascertaining the intended meaning.

The language of Section 7, Article IX, supra, was originally a part of Committee Proposal 51 submitted to the Constitutional Convention by the Committee on Finance and Taxation.[3] The statement quoted above from the Address to the People is lifted, with a slight modification, from the text of the remarks made by the chairman of the Committee on Finance and Taxation to the Constitutional Convention of the reasons in support of Committee Proposal 51.[4]

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[2] *Seligman, Progressive Taxation in Theory and Practice, Second Edition, 1908.* printed in *American Economic Association Quarterly, Third Series, Vol. IX, No. 4.*

[3] Official Record. Constitutional Convention 1961, p. 853.

[4] Official Record, p. 854.

During the debate in the Committee of the Whole on Committee Proposal 51 an amendment was offered to strike the words "or base" so that the sentence would then read:

> "No income tax graduated as to rate shall be imposed by the state or any of its subdivisions."[5]

The amendment was defeated and in speaking against it Mr. VanDusen, a delegate in the Convention said:

> "Without the words 'or base' you do not really have any protection against an indirectly graduated state income tax, because a flat rate tax imposed upon the federal tax liability would simply pick up all of the graduation of the federal liability. Without these words 'or base' there is no question but what in my judgment a nominally flat rate tax could be made a graduated income tax."
> (p. 894)

From the foregoing references to the Address to the People and to the Debates in the Constitutional Convention, it becomes apparent that the delegates to the Convention in framing the Constitution and the people in ratifying this document when submitted to them, were informed that the prohibition in Article IX, Section 7 against the imposition of an income tax graduated as to base related to a form of "piggyback" taxation based on federal tax liability. The federal tax *liability* must have been used and understood as meaning the amount of tax owing on a federal income tax return which of course would be computed pursuant to the graduated rates specified in the Internal Revenue Code.

Your first question in no way concerns a type of "piggyback" legislation geared to federal tax liability nor in my opinion does the factual situation you describe result in a graduated tax base. Your stated question indicates a differential in the rate in that residents of the city would be taxed at say 1% of income and nonresidents of the city would be taxed at say ½% of income derived from sources within the city. In my judgment we should look past the hypothetical situation which your question assumes to the actual conditions under which a city is likely to impose an income tax. Under the authority of the *Dooley case,* supra, there can be no doubt that a city may impose an income tax at a uniform rate upon all of the income received by residents of the city from their employment within the city. There is another class, being those workers who receive income from their employment within the city but who reside outside the city. As to this class, it is lawfully permissible to allocate to the city of employment some portion of the income earned therein by nonresidents. The allocation made by the 1962 ordinance involved in the *Dooley case* was accomplished by differentiating between the taxable income of residents and the taxable income of nonresidents. It was described by the Supreme Court in this way:

> "In 1962, by ordinance adopted by its city council and approved by its mayor, Detroit imposed for municipal purposes a net income tax, at the rate of 1%, upon income earned and income received by residents and nonresidents of the city, such taxable income of nonresidents

[5] Official Record, p. 893.

being limited, however, to income earned from work done, services rendered, or other business activities conducted in the city and to income received from sale or rental of real and tangible personal property located in the city."
(p. 199)

The Court in sustaining the allocation differential applied the following reasoning:

"What Detroit has done is to charge part of the cost of municipal government [1] to residents who earn or receive income from whatever source and [2] to those who earn or receive income in Detroit or from real or tangible personal property located in Detroit. Put another way, Detroit imposes its excise upon residents and those who earn or receive such income in or from Detroit for the privilege of enjoying the municipal services it performs for them and the protection it provides to them and their property. Furthermore, it is not unreasonable to assume that a resident's total income and the amount of income earned or received by a nonresident in Detroit or from Detroit property, the basis upon which the amount of tax due is determined, fairly reflects the extent to which municipal services and protection are enjoyed by the taxpayer."
(bracketed material added)
(pp. 206, 207)

By applying the reasoning of the *Dooley case* it would appear to be legally permissible for a city to impose an income tax at a uniform rate, say of 1%, upon all of the income earned by city residents within its borders and upon 50% of the income of nonresidents earned within its borders. I do not mean by use of this example to thereby exclude other methods for determining the amount of taxable income of nonresidents which may be allocated to city sources but I use the example as being readily equated to the rates of 1% on city residents and ½% on nonresidents presupposed from your stated example. What in fact is done in income taxation of this kind if the enabling legislation is properly drafted is to allocate all of the tax base of residents to the city and to allocate one-half of the tax base of nonresidents to the city. In my opinion this does not result in a graduated tax base in violation of Article IX, Section 7 of the Constitution of 1963. Obviously, once the allocation has been made the tax base on which the rate is imposed does not graduate but remains constant subject only to a determination of the components or sources of income going to make up the base itself.

Answering the first stated question, I decline to give a categorical answer for the reason that the specific language of the city ordinance by which the income tax is to be imposed must control in determining the constitutionality of the levy. I am of the opinion however that a city may by ordinance impose an income tax which gives recognition in the tax base to a differential between the amount of income earned or received from sources within the city by city residents and by nonresidents wthout violating the provisions of Article IX, Section 7 of the Constitution of 1963.

I now turn to the second question asked by Representative Sumeracki.

Article IX, Section 3, Constitution of 1963, reads in its entirety as follows:

> "The legislature shall provide for the uniform general ad valorem taxation of real and tangible personal property not exempt by law. The legislature shall provide for the determination of true cash value of such property; the proportion of true cash value at which such property shall be uniformly assessed, which shall not, after January 1, 1966, exceed 50 percent; and for a system of equalization of assessments. The legislature may provide for alternative means of taxation of designated real and tangible personal property in lieu of general ad valorem taxation. Every tax other than the general ad valorem property tax shall be uniform upon the class or classes on which it operates."

Your stated question refers to Section 3 of the Uniform City Income Tax Ordinance which appears at length in Section 6 of House Bill No. 704. Section 3 of the Uniform City Income Tax Ordinance, to the extent here pertinent, is as follows:

> "Sec. 3. Imposition of Tax.
>
> "a. Tax on income: Subject to the exclusions, adjustments, exemptions and deductions herein provided, an annual tax of 1% on corporations and resident individuals and of ½% on nonresident individuals for general revenue purposes is hereby imposed as an excise on income earned and received on and after the effective date of this ordinance.
>
> "b. Resident individuals: The tax shall apply on the following types of income of resident individuals to the same extent and on the same basis that such income is subject to taxation under the federal internal revenue code:
>
> (1) On all salaries, bonuses, wages, commissions and other compensation;
>
> (2) On the distributive shares of the net profits of resident owners of unincorporated businesses, professions, enterprises, undertakings or other activities, as a result of work done, services rendered, and other business activities wherever conducted;
>
> (3) On all dividends, interest, capital gains less capital losses, income from estates and trust, net profits from rentals of real and tangible personal property; and
>
> (4) On other income of resident individuals.
>
> "c. Nonresident individuals. The tax shall apply on the following types of income of nonresident individuals to the same extent and on the same basis that such income is subject to taxation under the federal internal revenue code:
>
> (1) On all salaries, bonuses, wages, commissions and other compensation for services rendered as an employee for work done or services performed in the city, vacation pay, holiday pay, sick pay and bonuses paid by the employer are deemed to have the same tax situs as the work assignment or work location and are taxable on the same

ratio as the normal earnings of the employee for work actually done or services actually performed.

(2) On the distributive shares of the net profits of nonresident owners of unincorporated businesses, professions, enterprises, undertakings, or other activities, as a result of work done, services rendered and other business activities conducted in the city; and

(3) On capital gains less capital losses from sales of, and on the net profits from rentals of, real and tangible personal property, provided such arise from property located in the city."

It was settled by our Supreme Court in the *Dooley case,* supra, that income taxes of the type here involved are excises and not property taxes. The first portion of Section 3, Article IX, Constitution of 1963, relative to the uniform general ad valorem taxation of real and tangible personal property is therefore not involved. This leads to the last sentence of Section 3 which reads:

"Every tax other than the general ad valorem property tax shall be uniform upon the class or classes on which it operates."

Substantially similar language appears in Section 4, Article X of the Constitution of 1908. Our Supreme Court construed the uniformity requirement under the 1908 Constitution to be:

"The only constitutional requirement applicable to specific taxes is that they shall be uniform upon the classes upon which they operate. Constitution 1908, art. 10, § 4."

C. R. Smith Co. v. Fitzgerald, 270 Mich. 659, 673.

To the same effect see:

Jasnowski v. Board of Assessors of the City of Detroit, 191 Mich. 287

and

Shivel v. Kent County Treasurer, 295 Mich. 10.

The slight variance in language between that appearing in the last sentence of Article IX, Section 3, Constitution of 1963, and the corresponding provision appearing in Article X, Section 4, Constitution of 1908, does not render inapplicable the rule of law announced in the foregoing cases.

What the Constitution requires is that the tax be uniform upon the members of a class; therefore, if realistic, fair and reasonable classes can be established, which are not pretended, arbitrary or illegal, the tax is valid. The classification of taxpayers to be subjected to a city income tax into two basic groups, viz: (1) residents of the city, and (2) nonresidents of the city, is in my opinion a reasonable classification and supportable on the ground that it bears some relation to the services, protection and other privileges provided by the taxing authority and enjoyed by the taxpayer.

I answer the question of Representative Sumeracki by stating that in my opinion the designation of one class of taxpayers as "Resident individuals" and another class of taxpayers as "Nonresident individuals" as is done by the language quoted above from Section 3 of the proposed Uniform City Income Tax Ordinance contained in House Bill No. 704 is a valid classifica-

tion and does not violate the last sentence of Article IX, Section 3, Constitution of 1963.

FRANK J. KELLEY,
Attorney General.

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SCHOOLS: District – power to borrow money and construct stadium.
BONDS: Authority to issue, for athletic stadium.

A school district is without authority to borrow money and issue bonds for the purpose of erecting a permanent type seating facility, lighting and storage building, including toilet accommodations, on an athletic field of the school district under Sec. 681 of Act 269, P.A. 1955, as amended by Act 90, P.A. 1963.

No. 4266 May 15, 1964.

Hon. Homer Arnett
State Representative
Lansing, Michigan

You have requested my opinion on the following question:

> May a school district, subject to approval of its school tax electors, borrow money and issue bonds pursuant to authority found in Sec. 681 of Act 269, P.A. 1955, as amended by Act 90, P.A. 1963, for the purpose of installing lighting for night athletic contests, seating for spectators, and a storage building, including toilet facilities?

Your question is based upon a factual situation where a school district proposes to seek the approval of its tax electors to borrow money and issue bonds for the purpose of erecting lighting facilities and permanent type bolted steel bleachers as seating facilities for spectators, including rest rooms and storage facilities, on an athletic field of the school district.

Act 269, P.A. 1955, as amended, being C.L.S. 1961 § 340.1 et seq.; M.S.A. 1959 Rev. Vol. § 15.3001 et seq., is known as the School Code of 1955. Section 681 of said act enumerates the purposes for which the tax electors of a school district may borrow money and issue bonds. Section 681 was amended by Act 90, P.A. 1963, to broaden the purposes to include "for site development and improvement, or for the building or constructing and equipping of athletic fields and playgrounds *but not including athletic stadiums.*" (Emphasis supplied). Act 90, P.A. 1963, began its legislative life as Senate Bill No. 1010 and as originally proposed school tax electors could approve the borrowing of money and the issuance of bonds for the purpose of "building or constructing and equipping of athletic fields, playgrounds and athletic stadiums, or other educational purposes of the school district."

Senate Bill No. 1010 was reported favorably by the Senate Committee on Education with the recommendation that the language "or other educational purposes of the school district" be stricken. Senate Journal 1963, Vol. 1, page 145. The Committee of the Whole recommended to the Senate that