retirement. It should, however, accept employee and employer contributions to the system based on such reported payments plus other compensation in the future, if made currently, and calculate future benefits thereon.

FRANK J. KELLEY,
Attorney General.

641102.1

GOVERNOR: Powers as Commander-in-Chief

NATIONAL GUARD STAFF OFFICERS: Court Martial

The governor's powers as Commander-in-Chief of the National Guard do not include the power to summarily relieve officers of the National Guard from their positions.

Under Act 84 P.A. 1909 as amended the Adjutant General and the Quartermaster General are staff officers. In the absence of resignation or disability, such staff officers can be relieved of their duties by the governor acting as Commander-in-Chief by the finding of cause by a court martial legally convened for that purpose.

No. 4387 November 2, 1964.

Honorable George Romney
The Governor
Capitol
Lansing, Michigan

You have been extensively quoted in the press, on radio and on television to the effect that you are seeking my advice concerning the legality of your action of October 8, 1964 in relieving from state actual duty Major General Ronald D. McDonald, the Adjutant General of Michigan; Brigadier General Carson R. Neifert, the Quartermaster General of Michigan; and Lieutenant Colonel Versel Case, Junior, the Executive Officer of the Office of Quartermaster General. Herewith I am responding to your publicly stated request, and also take note of the fact that you did not see fit to provide me with a formal request for an opinion.

Your action was ostensibly taken under your general powers as Commander-in-Chief.

I find no justification for your action solely on the ground that you are Commander-in-Chief of the armed forces pursuant to Article V, Section 12, Constitution of 1963. Your powers as Commander-in-Chief are statutorily enumerated in Section 19 of the Military Establishment Act being Act 84 P.A. 1909 as amended (C.L. 1948 § 32.1 et seq., M.S.A. 1961 Rev. Vol. § 4.591 et seq.). Nothing appearing in Section 19 authorizes you to relieve officers of the National Guard from their positions nor do I consider you to have any such implied power. A case in point is *People ex rel. Boatright, Atty. Gen., v. Newlon* (1925), 238 P. 44, wherein the Supreme Court of Colorado dealt with a situation somewhat similar to the matter here under consideration. The governor had attempted to remove the acting adjutant

general of Colorado. Under a statute similar to Michigan's the acting adjutant general claimed that his tenure continued until he reached age 64. Section 5, Article 4 of the Colorado Constitution provided: "The Governor shall be commander-in-chief of the military forces of the state. * * *." Passing on the power of the legislature to prescribe by statute for the disciplining of officers in the National Guard the Colorado Supreme Court said:

> "It is difficult to understand how legislative regulation of the tenure of officers of the National Guard contravene section 5, of article 4, of the Constitution. Certainly it does not interfere with the power and duty of the Governor to be commander-in-chief. As such he calls out, directs, and disbands the militia, all, however, under statutory and military regulations which he must obey but cannot create or abolish. He 'commands' the guard which the law creates and commits to his care. That command is no more or less effective because of his inability to discharge an adjutant general than because of his inability to discharge a corporal. While in office all must obey orders and prove efficient. Otherwise they may be temporarily suspended in an emergency, and removed by charges and hearing, not as the whim of the commander-in-chief may dictate, but as the law and military regulations prescribe. Even the President of the United States may not, without such charges and hearing, remove the humblest officer in the federal armies. He is no less commander-in-chief by reason thereof, nor is the Governor any less commander-in-chief of the National Guard for the same reason."
> (p. 45)

In the event you consider your action of October 8, 1964 in relieving these three military officers from state actual duty to have been taken in the exercise of your power as Governor to remove appointed state officers, then I advise you that you did not comply with the requirements of the law applicable to such removals. Article V, Section 10, Constitution of 1963, grants to you as Governor the power of removal in these words:

> "The governor shall have power and it shall be his duty to inquire into the condition and administration of any public office and the acts of any public officer, elective or appointive. He may remove or suspend from office for gross neglect of duty or for corrupt conduct in office, or for any other misfeasance or malfeasance therein, any elective or appointive state officer, except legislative or judicial, and shall report the reasons for such removal or suspension to the legislature."

By Act 4 P.A. 1963, Second Extra Session, Section 83 of the Michigan Election Law was amended to bring its provisions into conformity with Article V, Section 10, quoted above. It is there provided:

> "Such person shall be served with a written notice of the charges against him and be afforded an opportunity for a public hearing conducted personally by the governor."

Not only does the foregoing statute govern the procedure to be followed by you as Governor in undertaking to remove a state officer but, additionally, our Supreme Court has made clear the procedural responsibilities imposed

upon the Governor. In the leading Michigan case of *Dullam v. Willson,* 53 Mich. 392, 407, the Court said:

> "There must be charges specifying the particulars in which the officer is subject to removal. It is not sufficient to follow the language of the Constitution. The officer is entitled to know the particular acts of neglect of duty, or corrupt conduct, or other act relied upon as constituting malfeasance or misfeasance in office, and he is entitled to a reasonable notice of the time and place when and where an opportunity will be given him for a hearing, and he has a right to produce proof upon such hearing."

Since you as Governor did not undertake to hold a public hearing pursuant to notice to the three officers involved specifying the charges made against them with an opportunity to appear and be heard, it is manifest that there has been no proper exercise of your power to remove a state officer embraced within the action you took on October 8, 1964.

In these circumstances it is clear that the action relieving the three officers from state actual duty is a nullity. The officers should be reinstated immediately.

If you determine that disciplinary action is nevertheless required, you may proceed as Commander-in-Chief by convening a court-martial.

The officers involved in your action of October 8, 1964 are staff officers. Section 12 of the Military Establishment Act, supra, reads as follows:

> "Staff officers, including officers of the pay, inspection, subsistence and medical departments, hereafter appointed, shall have had previous military experience and shall hold their positions until they shall have reached the age of 64 years, *unless retired prior to that time by reason of resignation, disability, or for cause to be determined by a court-martial legally convened for that purpose,* and vacancies among said officers shall be filled by appointment from the officers of the militia of Michigan." (Emphasis supplied).

On October 8, 1964 the three officers involved had not resigned their positions nor were they or any one of them suffering under a disability.

In your capacity as Governor you have been empowered by the legislature to convene a court-martial, Act 297 P.A. 1957 is known and may be cited as the Michigan code of military justice. Section 21 of that code prescribes that general court-martials may be convened by the Governor. Section 22 of the code authorizes the Governor to convene special court-martials and Sections 23 authorizes the Governor to convene a summary court-martial.

Section 14 of the Michigan code of military justice contains an itemization of military offenses which may be tried by court-martial. Included in such specifications are loss, damage, destruction or wrongful disposition of military property; frauds against the government connected with military duty or operations and other general acts or omissions to the prejudice of good order and military discipline.

Procedures for conduct of a court-martial are spelled out in detail in the code of military justice. The code sets out all of the necessary information concerning the rights and duties of those involved.

Should you decide to proceed by this method you may be assured that the rights of the officers involved will be protected adequately by the law while at the same time a proper form for the determination of the allegations will have been provided.

FRANK J. KELLEY,
Attorney General.

641103.1

PUBLIC OFFICES AND OFFICERS: Disapproval of appointment.
CONSTITUTIONAL LAW: Session day defined.

The day that the legislature convenes in regular and special session and the day the legislature adjourns the regular or special session without day, and all intervening days, including Sundays, are "session days" within Article V, Section 6 of the Michigan Constitution.

Where an appointment to fill a vacancy in public office requiring advice and consent of the senate is made while the senate is in session, and the legislature adjourns without date before the senate disapproves the appointment or 60 session days have elapsed, an interim appointment can be made and the appointee can assume office upon filing of his oath.

"60 session days" as set forth in Article V, Section 6 of the Michigan Constitution of 1963 includes all regular and special session days but of one legislature only.

No. 4329 November 3, 1964.

Hon. George Romney
Governor
State Capitol
Lansing, Michigan

You have requested my opinion on the following questions:

1. What is the meaning of the words "session day" as they appear in Article V, Section 6 of the Michigan Constitution of 1963?

2. Where the governor makes an appointment while the legislature is in session and the legislature adjourns sine die without taking action on it and 60 session days have not run, can the governor make an interim appointment and does the appointee take office immediately?

3. Does the period "60 session days" found in Article V, Section 6 include special sessions and does it carry over from one session to another and one legislature to another?

1. Under the Michigan Constitution of 1908 the people provided in Article VI, Section 10 as follows:

> "Whenever a vacancy shall occur in any of the state offices, the governor shall fill the same by appointment, by and with the advice and consent of the senate, if in session."

The Attorney General has ruled that when the senate is in session, one nominated to fill a vacancy is not entitled to assume the office to which