

tificate which is valid for the position to which he is assigned, but shall not include nondegree persons holding special certificates as teachers or teacher aides in training in experimental programs." (emphasis added) Administrative Code 1964-1965 AACs, R 390.661

Under the above quoted rule, a person teaching in a public school district in another state would not be a teacher within the meaning of Article II of the teachers' tenure act for the reason that such person would not hold a Michigan teaching certificate valid for the position to which he or she is assigned. Further, Article II of the teachers' tenure act deals with the initial probationary period, the satisfactory completion of which entitles one to continuing tenure under Article III of the statute. Thus, a person who had acquired tenure as a teacher in another state would not be a teacher on continuing tenure within the meaning of MCLA 38.92; MSA 15.1992.

In conclusion, there is no provision in the teachers' tenure act which would reduce the two year probationary period required of all teachers new to Michigan's public schools. It is, therefore, the opinion of the Attorney General that a teacher who has acquired tenure in another state and then comes to Michigan to teach must serve a two year probationary period before acquiring tenure in Michigan's public schools.

FRANK J. KELLEY,
Attorney General.

760518.2

CONSTITUTION OF MICHIGAN: Article 3, section 2

CONSUMERS COUNCIL: Powers, duties and functions

The Michigan Consumers Council is an agency of the legislature and may not exercise executive functions.

Opinion No. 4872

May 18, 1976.

Honorable Dan Angel
State Representative
Capitol Building
Lansing, Michigan 48933

Inasmuch as the Michigan Consumers Council is, by statute, placed under the general control of the legislative council for budgeting, procurement and related management functions,¹ you have asked whether the statute creating the Council is unconstitutional as an attempt to vest the legislative branch of government with powers exercisable only by the executive branch in violation of Const 1963, art 3, § 2. This constitutional provision states:

"The powers of government are divided into three branches; legislative, executive and judicial. No person exercising powers of one

¹ 1966 PA 277, § 8; MCLA 445.828; MSA 2.660(8).

branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."

The Michigan Consumers Council was created by 1966 PA 277, MCLA 445.821, *et seq.*; MSA 2.660(1), *et seq.* 1966 PA 277, § 2 establishes an executive committee on consumer affairs; 1966 PA 277, § 3 establishes a Governor's citizens committee on consumer affairs, and 1966 PA 277, § 4 provides that the two above-mentioned committees, plus a legislative citizens committee on consumer affairs, shall meet regularly and that:

"... The 3 separate committees meeting jointly shall be the special Michigan consumer's council."

1966 PA 277, § 6 provides:

"The council shall:

"(a) Formulate and direct a program for the protection of individual consumers from harmful products and merchandise, false advertising and deceptive sales practices.

"(b) Formulate and conduct a program of research and education to eliminate fraudulent commercial practices.

"(c) Serve as a central coordinating agency and clearing house for activities and information concerning fraudulent commercial practices.

"(d) Advise the governor as to all matters affecting the interests of the people of the state as consumers and recommend to both the governor and the legislature the enactment of legislation necessary to protect and promote the interests of the people as consumers.

"(e) Advise the attorney general of any practice which requires investigation to determine if any law of the state is being violated."

1966 PA 277, § 7 provides:

"The council may:

"(a) Appear before governmental commissions, departments and agencies to represent and be heard on behalf of consumers' interests, except when the legislature has specifically established a regulatory body or commission for the express purpose of regulating rates, charges and conditions of service, or otherwise protecting consumers' interests through the exercise of regulatory power vested in such body or commission.

"(b) Cooperate and contract with agencies, public and private, to obtain statistical surveys, printing, economic information and other necessary information within the range of its budget, or do whatever else is incidental to the proper exercise of its powers.

"(c) Hire a director and whatever additional staff is necessary to carry out its powers and duties, to be paid out of the appropriation to the council."

1966 PA 277, § 8 provides:

"The council shall come under the general control of the legislative

council for purposes of budgeting, procurement and related management functions."

To ascertain whether the legislature is empowered to enact a particular statute, the courts apply these doctrines:

". . . The legislature's power to legislate is unlimited, except as expressly limited by the constitution." *Council 23 v Wayne Co CSC*, 32 Mich App 243, 248; 188 NW 2d 144 (1971)

"The state legislature is the repository of all legislative power subject only to limitations and restrictions imposed by the State or Federal Constitutions as constitutional provisions are to be regarded as limitations on State legislatures and not grants of power to them. *Oakland County Taxpayers League v Board of Supervisors of Oakland County*, 355 Mich 305, 323; 98 NW 2d 599 (1959)

"In passing upon the constitutionality of State legislation, it is necessary to point out in the Constitution of the State the limitation which has been placed by the people through the Constitution upon the power of the legislature to act, before it may be declared unconstitutional." *Huron-Clinton Metropolitan Authority v Boards of Supervisors*, 300 Mich 1; 1 NW 2d 430, (1942)

"If a statute is of such a character that it is subject to differing interpretations one of which would result in the act being held unconstitutional and the other permitting its being upheld as valid, the latter alternative will be accepted." *State Bar of Michigan v Lansing*, 361 Mich 185; 105 NW 2d 131 (1960)

Also, as the consumers council under 1966 PA 277, § 8 is "under the general control of the legislative council for purposes of budgeting, procurement and related management functions," a review will reference to the official record of the 1961 Constitutional Convention of the State of Michigan, to provide insight as to the duties and responsibilities of the legislative council. The following dialogue delineates the legislative council's constitutional role:

MR. DEVRIES:

"Essentially, a legislative council is a bipartisan, permanent, joint committee of the state legislature, assisted by a full time professional research staff, appointed by the council on the basis of merit. Most legislative councils are made up of an equal number of members from each house. The average size of a council is about 18 members. Some councils meet 4 times a year; some meet almost continuously.

"Now, here are some of the functions that I think this council could perform, and it would render a very valuable service to our legislature: 1, it can collect information on state government and on legislative proposals; 2, it can prepare research reports on major issues of state policy; 3, it can recommend legislation; 4, it can draft bills; 5, it can investigate administrative agencies to effect economies in state government; 6, it can cooperate with administrative agencies or special legislative committees; 7, it can study legislative procedures and organizations; 8, it can study the effect of statutory and constitutional pro-

visions; 9, it can study the financial needs of state government; 10, it can study the revision of statutes; 11, it can prepare legislative programs; and 12, it can prepare recommendations to the legislature in advance of the sessions. [P. 2387] (Emphasis has been supplied.)

“One of the most important functions they could perform is to provide basic research on major issues for state policy in between the sessions. Secondly, to investigate administrative agencies, if necessary, to effect economies, or to see if the legislative intent is being carried out. I don’t think that anyone can argue that the legislature now has the staff and the facilities necessary to do this. And there are a good many other functions that I cited in my remarks that could be assigned to this council that are not performed by the service bureau.” [p. 2388-2389] (Emphasis has been supplied.)

The constitutional debates therefore make it quite clear that the legislature through its legislative council may perform many of the same functions and activities that the consumers council is charged with performing, but that in creating the consumers council the legislature has expressly subscribed those functions, duties and responsibilities in the arena of consumer affairs, rather than in the broad spectrum of human problems.

To determine whether the duties, functions and responsibilities of the consumers council, although a legislative agency, appropriately belong to the executive branch of government, an examination of each of the relevant portions of the cited statute is necessary.

1966 PA 277, §§ 6 and 7 set forth the duties, functions and responsibilities of the consumer council and each will be considered in the order set forth in the act.

First, under 1966 PA 277, § 6(a), the council is required to:

“Formulate and direct a program for the protection of individual consumers from harmful products and merchandise, false advertising and deceptive sales practices.”

This mandate states that the council shall develop and implement an enforcement program to protect consumers from harmful products, false advertising and deceptive sales practices, functions that are constitutionally reserved to the executive branch of government. Applying the above-cited constitutional principles, it is evident that 1966 PA 277, § 6(a) seeks to vest executive powers within the legislative branch of government.

The duties required of the consumers council in 1966 PA 277, § 6(a) imply of necessity the receipt of consumer complaints, the handling and mediating thereof, including investigation and some vague form of enforcement activities by the council. The actual rendering of enforcement services to the public upon receipt of consumer grievances which entail violation of many and different laws is a matter exclusively within the province of the executive branch of government, and to the extent therefore that the council may engage in such activities, they are improper and therefore may not be exercised by the legislative branch when they properly belong to the executive branch.

It is therefore my opinion that this subsection is invalid as performance of executive powers by a legislative agency.

Secondly, 1966 PA 277, § 6(b) states that the council shall:

“Formulate and conduct a program of research and education to eliminate fraudulent commercial practices.”

Thirdly, 1966 PA 277, § 6(c) provides:

“. . . Serve as a central coordinating agency and clearing house for activities and information concerning fraudulent commercial practices.”

These duties and responsibilities of coordination do not relate to legislative supervision of executive functions, but more importantly in light of the legislature's continuing interest in the proper expenditure of funds appropriated by it for government's activities, a review of such activities and a report to the legislature of how such executive function activities have been carried out relating to fraudulent commercial practices. In that connection, a review of such activities would necessitate the receipt of information from executive agencies, the public and other sources, a compilation thereof and transmittal to the legislature and others who may be interested. Such functions relate directly to 1966 PA 277, § 6(d).

That subsection provides:

“. . . Advise the governor as to all matters affecting the interests of the people of the state as consumers and recommend to both the governor and the legislature the enactment of legislation necessary to protect and promote the interests of the people as consumers.”

Upon receipt of information directed to the legislature by the council concerning activities and information of the state agencies or others regarding fraudulent commercial practices, the legislature thereby is duly informed of the actual state of affairs within the community of our State and is also better educated as to the needs and interests of its citizens, in order to determine what laws if any may be proposed and enacted to protect the citizens as consumers and promote their interests as consumers. At the same time, since the Governor of the State is responsible for informing the legislature under the Constitution of the state of the State, and is required to prepare a budget for transmittal to the legislature for appropriations for governmental functions, it is not inappropriate for the council to advise and inform the Governor of the research and information it has gathered.

Lastly, 1966 PA 277, § 6(e) states:

“. . . Advise the attorney general of any practice which requires investigation to determine if any law of the state is being violated.”

Since the Attorney General is vested with common-law powers, *Munday v McDonald*, 216 Mich 444, 1921, and in addition has been charged by legislative enactments with a myriad of duties, it is not inappropriate for the consumer council in the course of its duties in gathering appropriate information regarding fraudulent commercial practices, to inform the

Attorney General of such conduct, so that where appropriate the Attorney General may investigate and determine if any law of the state has been violated.

As noted above, 1966 PA 277, § 7 sets forth additional discretionary duties that the council may perform.

1966 PA 277, § 7(a) states that the council may:

“Appear before governmental commissions, departments and agencies to represent and be heard on behalf of consumers’ interests, except when the legislature has specifically established a regulatory body or commission for the express purpose of regulating rates, charges and conditions of service, or otherwise protecting consumers’ interests through the exercise of regulatory power vested in such body or commission.”

Apparently, this subsection was written with the intention that the consumers council appear before executive branch agencies, departments and commissions to advocate the interests of consumers. However, the subsection appears somewhat inconsistent, for when the legislature has created a regulatory body or commission which has as its principal objective the protection of consumer interests or the regulation of rates and charges, the council is expressly forbidden to make such an appearance. Consequently, the council if it is to perform this function in a meaningful manner would most appropriately appear only before those boards, agencies and commissions which are concerned with consumer interests in one manner or another, and if that were the case, they are forbidden from doing so. Thus, they are limited to appearing only before boards, agencies and commissions established within the state where the principal purpose of that board is not regulatory, and not one designed to protect consumers’ interests, but may be one which is regulatory and designed to protect other than consumer interests. For example, there may be a board, agency or commission expressly created in this state whose sole and principal purpose is to protect business interests, and thus the council is purported to be given the authority to appear and advocate the consumers’ interests before that body. For reasons stated later in this opinion, a role of advocate before such a limited number of boards, agencies or commissions is not invalid as the grant of executive power to this council.

1966 PA 277, § 7(b) provides that the council may:

“ . . . Cooperate and contract with agencies, public and private, to obtain statistical surveys, printing, economic information and other necessary information within the range of its budget, or do whatever else is incidental to the proper exercise of its powers.”

A principal legislative function is the gathering of information from all relevant sources, both public and private, to keep the legislature duly and fully informed of material facts and data necessary to make the important legislative decisions. The council is thus charged with discretionary authority to act on behalf of the legislature in gathering information to protect and promote the interests of the consumer public.

Finally, 1966 PA 277, § 7(c) provides that the council may:

"Hire a director and whatever additional staff is necessary to carry out its powers and duties, to be paid out of the appropriation to the council."

It is quite obvious that in the performance of its discretionary duties the council has the ability to hire and appoint a director and additional staff necessary to carry out both its mandated and its discretionary duties and functions.

Thus, apart from the invalidity of 1966 PA 277, § 6(a), I am unable to find any provision of the Consumers Council Act delineating its duties, powers and functions which constitutes the mingling of the executive and legislative power prohibited by the Constitution.

Lastly, it is a general rule of construction that if a portion of an act is invalid and the other portions or provisions of the act are not inoperable, only the invalid portion is excised as invalid. MCLA 8.5; MSA 2.216. See, also, *Coffman v State Board of Examiners in Optometry*, 331 Mich 582 (1951); OAG 1963-1964, No. 4156, p 79 (April 11, 1963); OAG 1947-1948, No. 617, p 486 (February 3, 1948).

Based on the foregoing, it is my opinion that the Michigan Consumers Council Act is, with the exception of section 6(a), a constitutional enactment by the legislature. It is my opinion that the act, again with the exception of 1966 PA 277, § 6(a), does not constitute a mingling of the executive powers with the legislative branch. It is therefore my opinion that, apart from 1966 PA 277, § 6(a), the Michigan Consumers Council Act is valid and enforceable to the extent stated herein.

FRANK J. KELLEY,
Attorney General.

760520.1 _____

UNEMPLOYMENT COMPENSATION LAW:

Retirement Reduction Provisions
Applicability of Restitution Provisions

SCHOOL DISTRICT: Applicability of retirement reduction provisions of the Michigan Employment Security Act.

PUBLIC SCHOOL EMPLOYEES RETIREMENT FUND: Retroactive retirement benefits.

The contributions made by the State into the Public School Employees' Retirement Fund for each school employee may not be treated as contributions of the school districts. As a result, the retirement benefit reduction provisions in MCLA 421.27(f)(1); MSA 17.529(f)(1) may not be applied in computing the weekly amount of unemployment benefits payable to unemployed employees of school districts.

The Michigan Employment Security Commission is required to consider whether the restitution provisions of Section 62(a) of the act are applicable