It is, therefore, my opinion that public employee pension and retirement funds, as authorized by the legislature in Act 314, P.A. 1965, pursuant to Article IX, Sec. 19 of the Michigan Constitution of 1963, may be legally invested in state-chartered and federal-chartered savings and loan associations situated in this state.

FRANK J. KELLEY,
Attorney General.

650809.1

PUBLIC OFFICES AND OFFICERS:
STATE: Civil Service.
COMPENSATION: State officers and employees — Unclassified — Payment of compensation for unused annual and sick leave.

Persons in unclassified positions in state service may receive payment for unused annual and sick leave where so agreed upon.

No. 4355 August 9, 1965.

Mr. Glenn S. Allen
Controller
Dept. of Administration
Lewis Cass Bldg.
Lansing, Michigan

By recent letter you sought my opinion concerning the payment of compensation to unclassified employees for their unused annual and sick leave upon their leaving an unclassified position to become a classified employee covered by the Michigan civil service system.

In your letter you point out "this subject has a spotty and unsatisfactory history." You further point out the far-reaching long-range implications of this problem.

> "Three pending cases bring this issue to a head. However, the three cases are relatively insignificant in comparison with the long-range implications. Governmental reorganization into not more than 20 principal departments will necessarily result in a number of unclassified employees being transferred to classified positions. It is important therefore that a uniform rule be established in advance. Likewise, it may be desirable to treat unclassified employees uniformly."

Because, as you point out, the three cases which presently concern you are undoubtedly only the first of many which will arise, it seems best to consider this matter with regard to the general rules involved rather than with reference to each individual case.

Prior to the passage of Act 346, P.A. 1937, ("AN ACT to provide for a system of civil service in state employment . . ."), and adoption of Section 22, Article VI of the Michigan Constitution of 1908 (the civil service commission amendment) in 1940, all persons employed by the State of Michigan occupied unclassified positions. As our Supreme Court pointed out in *Civil Service Commission v. Auditor General,* 302 Mich. 673, 684:

". . . Prior to the adoption of the amendment, each of the appointing authorities had power to 'fix rates of compensation' for employees in his department and, having done so, he was then required by law to submit his estimated financial needs to the budget director (citing statute) and seek appropriations from the legislature. If he failed in obtaining what he considered to be the necessary amount, the salaries could not be paid in full."

The aforementioned civil service amendment specifically exempted certain positions from its operation. A similar exemption is contained in Section 5, Article XI of the Michigan Constitution of 1963. In Opinion No. 3485, O.A.G. 1959-60, Vol. II, p. 109, then Attorney General Paul L. Adams, with reference to the above case, pointed out:

"The authority of individual departments to employ two unclassified persons is dependent upon legislative appropriation for that purpose. . . ."

Thus, while the constitutional provisions mentioned above exempt the unclassified positions from the operation of the civil service system, the basis for payment by the hiring authority of a person in an unclassified position is the availability of appropriation for the hiring authority provided by the legislature.

Opinion No. 3485 also considered the question under discussion here regarding the status of the unclassified employee. The following excerpts from that opinion are relevant:

". . . The issue here presented is the authority of the respective state departments to provide for payment to unclassified employees of compensation for unused annual and sick leave. No statute expressly authorizes any state official to provide for the payment of such compensation. Nor is such payment expressly prohibited or restricted by any statute.

* * *

"By the same token departments may only provide for the payment for unused annual and sick leave when there is appropriation available for the same.

* * *

". . . under present day standards payment for unused sick leave as well as unused annual leave is generally regarded as being one form of compensation for services rendered.

"Attention is directed to the authority exercised by the heads of state departments with respect to services rendered by unclassified personnel. In the absence of applicable regulation adopted by either the legislature or the state administrative board, such department heads may control the days as well as the hours during which the unclassified employee is required to be in attendance upon his employment. Thus, an appointing authority is free to determine the amount of annual and sick leave to which an unclassified employee is entitled. Authority in the head of the department to determine whether such an employee is entitled to payment for annual and sick leave to the extent of any appropriation

available for the payment thereof is but consistent with the control vested in such officials over unclassified personnel."

Also of concern in the resolution of this problem is the prohibition against extra compensation for public officers contained in Article XI, Section 3 of the Michigan Constitution of 1963 which provides:

"Neither the legislature nor any political subdivision of this state shall grant or authorize extra compensation to any public officer, agent or contractor after the service has been rendered or the contract entered into."

The question of who is a public officer has been before the Michigan Supreme Court in several cases. In *Marxer v. City of Saginaw,* 270 Mich. 256, 261, the Court quoted as follows from *Schmitt v. Dooling,* 145 Ky. 240:

" 'The words "public officer," as used in these opinions, mean one who renders a public service; a service in which the general public is interested . . .' "

The question of whether a probate court stenographer was a public officer was considered in *Meiland v. Wayne Probate Judge,* 359 Mich. 78. The Court laid down the following guidelines (pp. 86 and 87):

"In *People v. Freedland,* 308 Mich. 449, 457, Justice BUTZEL, writing for the Court, quoted from *State, ex rel. Hogan, v. Hunt,* 84 Ohio St. 143, 149 (95 N.E. 666), as follows:

" ' "Manifestly, however, each case should be decided on its peculiar facts, and involves necessarily a consideration of the legislative intent in framing the particular statute by which the position, whatever it may be, is created.' "

"Justice BUTZEL then went on to say (pp. 457, 458):

" ' The rule is accurately stated in *State, ex rel. Barney v. Hawkins,* 79 Mont. 506, 528, 529 (257 P. 411, 53 A.L.R. 583), where the court said:

" ' "After an exhaustive examination of the authorities, we hold that 5 elements are indispensable in any position of public employment, in order to make it a public office of a civil nature: (1) It must be created by the Constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature; (2) it must posses a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power other than the law, unless they be those of an inferior or subordinate office, created or authorized by the legislature, and by it placed under the general control of a superior officer or body; (5) it must have some permanency and continuity, and not be only temporary or occasional." * * *

" 'In *People, ex rel. Throop, v. Langdon,* 40 Mich. 673, 682, Mr. Justice COOLEY said:

" ' "The officer is distinguished from the employee in the greater

importance, dignity, and independence of his position; in being required to take an official oath, and perhaps to give an official bond." ' "

In *Burdick v. Secretary of State,* 373 Mich. 578, the Supreme Court considered the Address to the People, which was issued by the Constitutional Convention, and the Official Record of the Convention itself. Both were found to be appropriate sources for assistance in ascertaining the people's intent in adopting the Michigan Constitution of 1963.

Article XI, Section 3, quoted above, was originally Committee Proposal 62. While some change in the language occurred between its presentation as Committee Proposal 62 and its eventual adoption by the Convention, the essential intent of the proposal remained unchanged. Aside from the statement by the chairman of the committee presenting the proposal, there was no discussion of this proposal.

A statement made by Delegate Erickson, chairman of the committee on miscellaneous provisions and schedule in support of Committee Proposal 62 is found at p. 2493, Official Record, Constitutional Convention 1961, and reads in part as follows:

> "As the provision regards public officers, agents, or contractors, this limitation upon the power of government appears to continue valid. It is in order to point out that what is prohibited is extra compensation. . . What this sentence is aimed to prohibit is the gratuitous grant of further compensation to contractors, agents and *officers* of the government after the fact." (Emphasis supplied)

As Delegate Erickson's remarks indicate, this prohibition is essentially a carry-over from the first sentence of Section 3, Article XVI of the Michigan Constitution of 1908.

The Address to the People states with reference to Article XI, Section 3:

> "No change from the first sentence of Sec. 3, Article XVI, of the present constitution except for deletion of the word 'employee' after 'agent' . . ."
>
> (Official Record, Constitutional Convention 1961, Vol. II, p. 3404.)

The intent of this constitutional restriction is clearly to prohibit the payment of any extra compensation to any public officer (not employee) after his service has been rendered.

From information supplied, it appears that various state agencies have handled the matter of annual and sick leave allowances to unclassified persons in one of the following ways:

(1) The unclassified person is given, by the employing agency, the same amount of annual and sick leave under the same regulations as is provided under civil service regulations for classified employees, or

(2) When the unclassified person is hired, agreement is reached between said employee and the employing agency regarding the question of the amount of annual and sick leave that will be allowed, or

(3) No arrangement was made and no allowance paid.

In addition to an agreement that the unclassified person be compensated

for unused annual and sick leave, it is additionally necessary that there be adequate proof to sustain claims covering both items.

Based on the foregoing, it is my conclusion that whether an unclassified person is to receive compensation for the unused annual and sick leave upon his leaving the unclassified position is, in the absence of controlling legislation, dependent upon the agreement. Such person may receive payment for unused sick and annual leave from the appropriation available to the hiring authority. An agency or commission may not at the time a person leaves an unclassified position decide for the first time that he is to receive compensation for unused annual and sick leave.

FRANK J. KELLEY,
Attorney General.

650809.2

SCHOOLS: Intermediate school districts – special education program – allocation of millage.
TAXATION: Tax allocation – special education.

A county tax allocation board does not have authority to allocate millage for a special education program below that required by the special education budget of an intermediate school district if the budget is within the limitation approved by the voters for such purposes.

No. 4462 August 9, 1965.

Mr. Alexander J. Kloster
Acting Superintendent of Public Instruction
Prudden Building
Lansing, Michigan

In a recent letter you ask substantially the following question:

> Does a county tax allocation board have authority to allocate millage for a special education program below that required by an intermediate district's special education budget if the budget is within the limitation approved by the voters for such purposes at the original or subsequent election authorizing the special education program?

Act 269, P.A. 1955, 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. Sections 307a to 324a of the School Code were added by Act 190, P.A. 1962. These sections provide that an intermediate school district shall establish and maintain a special education program when a majority of the school electors voting at an election authorize such a program.

Section 316a of the School Code, as last amended by Act 246, P.A. 1964, designates the form of ballot for such authorization election. It reads as follows:

> "The ballot to be used in referring the question of the adoption of sections 307a to 324a to the school electors of an intermediate school district shall be set forth in the following form: