March 19, 1973

Nicholas L. Caraganis, Director — Personnel

Jon A. Lund, Attorney General — Attorney General

Maternity Leave - Personnel Rule 11.16

This will respond to your memorandum dated March 1, 1973, regarding the matter referred to above. Because you have indicated that two employees of the Department of Manpower Affairs are entering or have entered the ninth month of pregnancy and there is, therefore, some urgency in the matter, we shall not, at this time, embark upon a lengthy analysis of the difficult legal issues involved. Should you, at some future date, desire a more thorough response to your questions, we would be pleased to further amplify our comments.

It should be noted at the outset that the statutes and regulations cited in Mr. Malloy's memorandum to you dated February 9, 1973, namely: § 1604.10 "Employment policies relating to pregnancy and childbirth" issued under Section 713 (b) of Title VII of the Civil Rights Act of 1964, 78 Stat. 265, 42 U.S.C. § 2000 e - 12, do not apply to the state employees. 42 U.S.C. § 2000 e - (b) (1970), provides that States, as employers, are specifically excluded from these provisions as follows:

> "The term 'employer' .. . does not include . . . a State or political subdivision thereof .. . . "

However, as appears more fully hereafter, the principles underlying these statutes and regulations have, to a considerable extent, been embodied in certain court cases which have arisen under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. If these cases are upheld by the United States Supreme Court, they would be binding upon the State.

The United States Supreme Court has not yet spoken with respect to the extent, if any, to which an employer may lawfully impose mandatory maternity leave upon employees, and the lower federal courts are divided on the question.

Some courts have held that regulations prohibiting women who become pregnant from continuing employment beyond the fourth or sixth months of pregnancy violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution on the

theory that such regulations are inherently discriminatory against women since pregnancy is a condition attendant solely upon female gender. LaFleur v. Cleveland Board of Education, 326 F.Supp. 1208 (N.D. Ohio 1971), rev'd 465 F.2d 1184, 4 FEP 1070 (6th Cir. 1972), petition for certiorari filed November 27, 1972, Docket No. 72-777. Bravo v. Board of Education of City of Chicago, 345 F.Supp. 155, 4 FEP 994 (N.D. Ill. 1972); Heath v. Westerville Board of Education, 345 F.Supp. 501, 4 FEP 1002 (S.D.Ohio 1972); Pocklington v. Duval County School Board, 345 F.Supp. 163, 4 FEP 1040 (S.D. Fla. 1972). These cases, which you will note are the cases cited by Mr. Malloy in his memorandum to you dated February 9, 1973, reason that since no two pregnancies are alike, decisions of when employees (teachers) should discontinue working are matters best left up to the woman and her doctor. According to these cases, deciding when maternity leave shall occur must be made on a case by case determination of inability of the employee to perform her duties by reasons of pregnancy.

Other federal courts of equal stature have ruled that mandatory maternity leave requirements during advanced pregnancy are permissible where there is some rational basis for the requirement. Schattman v. Texas Employment Commission, 459 F. 2d 32 (5th Cir. 1972), cert. denied, 41 U.S.L.W. 3372, January 8, 1973; Cohen v. Chesterfield County School Board, 467 F. 2d 262 (4th Cir. 1972), rev'd on rehearing en banc, ____F. 2d.____, 41 LW 2390, No. 71-707 (4th Cir., Jan. 15, 1973). Schattman permitted the employer to require maternity leave upon the individual's reaching the seventh month of pregnancy and Cohen upheld a requirement that a teacher take a leave of absence at the end of her fifth month of pregnancy.

It should be noted parenthetically that Mr. Malloy refers to the lower court decision in Cohen which has since been reversed by the Fourth Circuit Court sitting en banc with 3 judges dissenting. Schattman was also a split decision.

Due to the disagreement and divergence of opinion among the authorities, and the complexity of the issues involved, it is difficult to predict with any precision what the Supreme Court will decide. However, pending a final resolution of the question, we do not think that it would be unreasonable for you to continue to operate under revised Personnel Rule 11.16.

In view of the foregoing, we would suggest that for the time being you defer the question you raise concerning possible liability by state agencies for injuries sustained by expectant mothers during the period immediately preceding delivery.

We trust that the foregoing satisfactorily answers your immediate questions. If we can be of any further assistance, please let us know.

Jon A. Lund
Attorney General

JAL:H (MLW)