In addition, I am also of the opinion that each individual request for leave must be weighed in light of the benefit that will accrue to the State of Indiana as opposed to personal gain received by the individual concerned. In applying the above principle, the Indiana State Personnel Board has the responsibility to analyze each specific request for an expenditure of public funds in order to safeguard the public interest and to prevent expenditures of public funds wherein the benefit would accrue to an individual rather than to the State of Indiana.

Therefore, with respect to the seven example requests cited in your letter, a granting of each individual request is a matter of policy to be determined by the Indiana State Personnel Board within the scope of the express language of the statute that extended leaves are limited to cases involving injury or illness arising out of their employment.

OFFICIAL OPINION NO. 54

November 21, 1958

Mr. H. Pierre Haflich, Executive Secretary
Indiana Real Estate Commission
145 W. Washington Street, 6th Floor
Indianapolis 4, Indiana

Dear Sir:

This is in reply to your letter in which you request an Official Opinion on the following question:

"Under the Real Estate License Law does the (Indiana Real Estate) Commission have the power to deny the issuance of a license to such applicants whose credit rating is deemed unsatisfactory by the Commission."

The Indiana Real Estate Commission is an administrative board and agency created by statute, and as such it has no common law or inherent powers, but only such power and authority as is conferred upon it by statute.

Chicago & Eastern Illinois R. Co. v. Public Service Comm. *et al.* (1943), 221 Ind. 592, 49 N. E. (2d) 341;


The Real Estate License Law to which your letter refers is Chapter 44 of the Acts of 1949 as found in Burns' (1951 Repl.), Sections 63-2401 through 63-2423, and the powers and authority conferred upon the commission in regard to the issuance of licenses is found in Burns' 63-2415 which reads in part as follows:

"The commission shall have the power to regulate the issuance of licenses and to suspend or revoke licenses * * * ."

This power to "regulate" the issuance of licenses does not include the power to refuse or deny the issuance of any license at all to any class of persons not defined or expressly provided by the statute.

"The words, 'regulation and restriction,' as used in the Constitution, have long had a clear and definite meaning. They do not imply the right to prohibit or forbid." Warren v. Indiana Tel. Co. (1939), 217 Ind. 93, 26 N. E. (2d) 399.

The general rule applying to the granting or refusing of licenses by administrative boards is set out in 53 C. J. S. Licenses § 38, as follows (p. 632):

"As a general rule the power vested in the board or officer to grant licenses on compliance by applicant with the prescribed conditions carries with it, either expressly or impliedly, the power to exercise a reasonable discretion in granting or refusing licenses, but under statutes mandatory in terms no discretion is vested in the licensing board or officer, and every person who possesses the statutory qualifications and who com-
plies with the statutory requirements is entitled to a license. * * *" (Our emphasis)

The general rule in determining whether a statute is mandatory or advisory is as follows:

"'Where the terms of a statute are peremptory and exclusive, where no discretion is reposed or where penalties are provided for its violation, the provisions of the act must be regarded as mandatory.'" Tuthill v. Rendleman (1944), 387 Ill. 321, 56 N. E. (2d) 375, 390.

A careful reading of the Real Estate License Law discloses no grant of discretion, and its terms are exclusive.

This licensing statute further provides as follows:

"The commission shall require all applicants for license to pass a written and oral examination to be taken before the commission on questions pertaining to sale, listing and procedures involved in dealing with real estate, and to obtain thereon a grade previously established as a passing or satisfactory grade. If the applicant is a partnership all members thereof shall pass such examination, and if the applicant is a corporation, all officers or agents thereof seeking to engage on its behalf as a real estate broker or salesman shall pass such examination." (Our emphasis) Acts of 1949, Ch. 44, Sec. 11, as found in Burns' (1951 Repl.), Section 63-2411.

This section sets forth specifically the only statutory qualification for licensing of an applicant under the act, that is, that the applicant pass the written and oral examination on the matters specified.

A careful reading of the other sections of Chapter 44 does not reveal any further statutory qualifications or requirements of residents of Indiana who apply for such a license, although Section 19, as found in Burns' (1951 Repl.), Section 63-2419, does contain a specific qualification of nonresidents, i.e., due proof of good character and real estate brokerage reputation.

In an earlier opinion of this office, 1953 O. A. G., page 364, No. 72, the question concerned the authority of the Indiana
Real Estate Commission to require by rule a one year tenure of an applicant as a salesman as a qualification for eligibility for a broker’s license. My answer thereto was in part as follows:

"Under these sections (Burns' 63-2410 and Burns' 63-2411) the commission has a discretion as to make up of the examination for a real estate broker's license, but the statute does not contemplate an apprenticeship as a real estate salesman before transfer, by examination, to real estate broker. Such a requirement would be in the nature of an additional qualification which is not contemplated by the statute, and would in effect be an amendment to such statute and would be a determination, by the commission, as to the law contrary to the terms of the statute. Such a determination, of course, is solely for the legislature to make."

Just as the proposed rule there amounted to an additional qualification, so here, the requirement of a satisfactory credit report is an additional qualification not contemplated by the statute and therefore a determination, by the commission, as to the law contrary to the terms of the statute.

It is to be noted that the statute in question is perhaps unduly limited in its grant of power to the commission, but the remedy lies with the Legislature.

Accordingly, in answer to your question, it is my opinion that under the existing provisions of the Real Estate License Law, the Indiana Real Estate Commission does not have the power to deny the issuance of a license to applicants on the basis of an unsatisfactory credit rating.