with the violation of the law pertaining to adulterated foods, etc."

The language as set out in section 35-1207, Burns Indiana Statutes Annotated, 1933, to wit: "* * * and shall adopt rules and regulations regulating the minimum standards of food and drugs, * * *" provides a clear and adequate ground upon which to base a rule or regulation pertaining to standards for food and drugs. It is noted in your proposed rule that you fix and establish grades of proficiency as applied to restaurants, that is: a Grade A restaurant is classified as being a restaurant complying with all the sections of your rule, Grade B and Grade C restaurants are those eating establishments that do not reach the degree of proficiency which a Grade A restaurant reaches, but yet do comply with your regulations.

It is noted that the proposed rule provides for the posting, "in a conspicuous place," of a certificate of grade of a restaurant, such as "A," "B" or "C." That portion of the rule which provides for the posting of said certificate is not an unreasonable use of the powers granted to the board by section 35-1207 of Burns Indiana Statutes Annotated, 1933.

It is my opinion that the grading of restaurants is within the power granted the State Board of Health and in the regulation of said restaurant the department does have the right to see that all terms of the rule are complied with, such as keeping posted these grades: that since the failure to comply with the terms of the rule, such as: failure to keep posted in a conspicuous place the certificate of grade, constitutes a violation thereof, that section 8 of said proposed rule pertaining to penalty is applicable and that the same could be enforced under provisions of chapter 104 of the Acts of 1907.

SECRETARY OF STATE: Admission fees of foreign corporations.

December 16, 1937.

Honorable August G. Mueller,
Secretary of State,
Indianapolis, Indiana.

Dear Sir:

I have before me your request for an official opinion growing out of the following statement of facts, viz:

The ..... Company is a foreign corporation incorporated under the laws of Arizona. On January 6, 1931 it was admitted to do business in the State of Indiana. Its one and only manufacturing plant is operated in this state at Fort Wayne, Indiana, at which place is located its main executive office.

The annual corporation report of the corporation filed in the office of the Secretary of State on August 5, 1937 discloses 97.69 per cent of its total outstanding stock represented by business and assets in this state, or 1,916,239 shares. This is an increase in number of shares represented by business and assets in this state over total number of shares so represented in this state at any previous time of 51,910 shares. Computed at one cent per share there is an increase fee due the state in the sum of $519.10.

The corporation objects to the payment of this fee on the basis that the annual report includes as business done "at or from" places of business in this state, business transacted in interstate commerce although done "*from*" places of business in the state on account of which it asks to withdraw its report and correct same in accordance with its theory of the requirement of the statute.

You submit the following questions:

"QUESTION NO. ONE.

"Does a foreign corporation reporting under the General for Profit Corporation Act of 1929 have any legal right to correct a report that has been filed in the office of the Secretary of State, as required by law?

"QUESTION NO. TWO.

"Disregarding the right of a foreign corporation to recall an annual foreign corporation report already filed in the office of the Secretary of State, does section 62, paragraph 7, of the Indiana General Corporation Act of 1929, reading as follows, to wit:

" 'Section 62, paragraph 7. A statement of the amount of business actually transacted by it at or from places of business in this state during its next preceding fiscal year,'

authorize the reporting corporation to deduct all business in interstate commerce?

"QUESTION NO. THREE.

"Conversely, does this language of the statute have any reference to intra or interstate commerce in view of the fact that it is designed to supply the Secretary of State with information necessary for the computation of an admission fee of the reporting corporation to do business in this state?"

This corporation was admitted subsequent to the effective date of the Indiana General Corporation Act of 1929 and the Indiana Corporation Fee Act of the same year. Contrary to the method adopted in some states, the first Act above referred to in providing for the admission of foreign corporations and the second Act in fixing the fee therefor does not base the fee upon the total outstanding or authorized capital stock but authorizes the corporation to make an estimate of the portion of its capital stock to be used in Indiana and to pay an initial fee based upon that estimate determined from a statement to be contained in the application for admission of the following matters, to wit:

"Whenever a foreign corporation desires to be admitted to do business in this state, it shall present to the Secretary of State at his office accompanied by the fees prescribed by law:

* * *

"(2) An application for admission, executed in the manner hereinafter provided, setting forth:

* * *

"(e) The total authorized capital stock of the corporation and the amount thereof issued and outstanding;

"(f) A statement of the total amount of business transacted by it during the fiscal year next preceding the date of such filing, an estimate of the total amount of business to be transacted by it during its then current fiscal year and an estimate of the total amount of business to be transacted by it during its fiscal year next succeeding the date of such filing;

"(g) An estimate of the amount of business to be

transacted by it *at or from places of business in this state* during its fiscal year next succeeding the date of such filing;

"(h) A statement of the total amount of tangible property employed by it during its next preceding fiscal year; an estimate of the total amount of tangible property to be employed by it during its then current fiscal year and an estimate of the total amount of tangible property to be employed by it during its fiscal year next succeeding the date of such filing;

"(i) An estimate of the amount of tangible property to be employed by it in this state during its fiscal year next succeeding the date of such filing;" (Our italics.)

Burns Indiana Statutes Annotated (1933) section 25-304.

Such corporations are required by *law* to make an annual report containing among other things the following:

"(1) The name of the corporation and the location of its principal office in this state;

"(2) The amount of its authorized capital stock and the amount thereof then issued and outstanding;

"(3) A statement of the total amount of business transacted by it everywhere during its next preceding fiscal year;

"(4) A statement of the total amount of tangible property actually employed by it everywhere during its next preceding fiscal year;

"(5) An estimate of the total amount of business to be transacted by it everywhere during its then current fiscal year;

"(6) An estimate of the total amount of tangible property to be employed by it everywhere during its then current fiscal year;

"(7) A statement of the amount of business actually transacted by it *at or from places of business in this state* during its next preceding fiscal year;

"(8) A statement of the amount of property actually employed by it in this state during its next preceding fiscal year;

"(9) An estimate of the amount of business to be

transacted by it *at or from places of business in this state* during its then current fiscal year;

"(10) An estimate of the amount of tangible property to be employed by it in this state during its then current fiscal year;" * * * (Our italics.)

Burns Indiana Statutes Annotated (1933) section 25-307.

The Indiana Corporation Fee Act above referred to in establishing a fee for foreign corporations based upon increase in proportion of capital stock used in this state, provides as follows:

"The Secretary of State shall charge and collect, for the benefit of the state, to be paid into the general fund of the State of Indiana, the following fees, to wit:

* * *

"(d) For increases in proportion of its issued and outstanding capital stock, represented in this state, of one thousand (1,000) shares or less, whether par value or no par value, of foreign corporations for profit, ten dollars ($10.00), to be computed on the basis of annual reports as required by law. For increases in proportion of its issued and outstanding capital stock, represented in this state, where the increase is one thousand (1,000) shares or over, of a foreign corporation for profit, one cent (1c) per share, to be computed on the basis of annual reports as required by law."

Burns Indiana Statutes Annotated (1933) section 25-602.

Increases in such cases are determined from the annual report in the same method as provided for determining the initial fee upon an application for admission. These fees charged and collected for increase in proportion of capital stock used in Indiana are not a tax upon the privilege of continuing the transaction of business but are admission fees permitted to be withheld at the time of admission until a time when and if the future experience of the company shall show that the original estimate was less than the actual proportion of the shares used in the state.

State v. Siosi Oil Corporation, 209 Ind. 394.

Note the language of the court in the above case in referring to such fees, quoting from pages 399-400:

"It is clear that the fees contemplated by statute are not upon an annual or otherwise recurrent basis. A license fee for the privilege of coming into the state to do business is contemplated. The amount of this fee is measured by the amount of capital to be used and business to be transacted in the state, which in turn is measured by the number of shares of capital stock which is proportionate to the amount of capital to be used and business done within the state. The estimate made by the applicant in its application is taken as a tentative basis for determining the fee, but the statute clearly contemplates that the fee so determined is to be afterward adjusted upon the basis of the first and subsequent annual statements and reports of the corporation. It is as though the state had said: 'You may come into this state and do business by the payment of an admission fee proportionate to the amount of your business and capital engaged here. Permission to enter the state is granted now. We will compute the fee when we have definite facts from which to determine the amount of capital engaged and business done within the state.' No reason is suggested, nor can we see a reason, why the state cannot make such an arrangement. See *People, ex rel., Griffith* v. *Loughman, et al.* (1928), 249 N. Y. 369, 164 N. E. 253."

The above case was decided upon a statute providing for the determination of the proportion of the capital stock of a foreign corporation used in Indiana upon a different basis from that of the present statute above quoted. The principle, however, is the same and shows clearly that the fee now demanded in this case is an admission fee permitted to be withheld until an increase determined upon the basis of the provisions of the statute actually occurred.

There should be no question as to the validity of the method employed in Indiana in fixing such admission fee in view of the fact that the Supreme Court of the United States has recently sustained a statute which based the admission fee on total authorized capital stock entirely without reference to the proportion thereof which is to be used in the admitting state.

Atlantic Refining Company v. Virginia, (U. S. Supreme) (October Term, 1937) Law Edition Advance Opinions, Volume 82, No. 3, page 52.

In other words, if Indiana, as is held in the above case as to Virginia, could have demanded an admission fee upon the basis of the entire authorized capital stock of the company seeking admission, much more could the state demand an admission fee or less than the full amount based on the proportion used in Indiana and it would be of no consequence as to how such proportion is established so long as the method used was uniform in its operation. The interstate commerce question, in my opinion, does not enter into the case because, as already shown, the fee charged is not a tax charged for the privilege of continuing to do business in Indiana whether intrastate or interstate but is a part of an admission fee which has now become due and payable upon the basis of the statute pursuant to which the corporation was admitted. The authority last above cited is ample authority for the position here taken. Note the language of the court on page 55. The court said:

> "It is contended that a fee measured solely by the amount of the corporation's authorized capital stock necessarily burdens interstate commerce. In support of that contention it is said that the authorized capital stock represents property located in forty-seven states and several foreign countries used in both interstate and foreign commerce. But this is not true. Authorized capital has no necessary relation to the property actually owned or used by the corporation; furthermore, the fee for which it is the measure represents simply the privilege of doing a local business. Because the entrance fee does not represent either property or business being done, it is immaterial that in fixing its amount no apportionment is made between the property owned or the business done within the state and that owned or done elsewhere.
>
> "The entrance fee is obviously not a charge laid upon interstate commerce; nor a charge furtively directed against interstate commerce; nor a charge measured by such commerce. Its amount does not grow or shrink according to the volume of interstate commerce or the amount of the capital used in it. The size of the fee would be exactly the same if the company did no interstate commerce in Virginia or elsewhere. The entrance fee is comparable to the charter, or incorporation, fee

of a domestic corporation—a fee commonly measured by the amount of the capital authorized. It has never been doubted that such a charge to a domestic corporation whatever the amount is valid, although the company proposes to engage in interstate commerce and to acquire property also in other states. No reason is suggested why a different rule should be applied to the entrance fee charged this foreign corporation."

It follows that the answer to your second question is in the negative, that is, assuming that such business is done *"from"* a place of business in Indiana.

Your third question is also answered in the negative.

As to your first question, I think the Secretary of State, if convinced that an annual report of a corporation is erroneous, would have the right to permit such an error to be corrected. On the other hand, if convinced that there was no error, I think he would be authorized to reject a new and supplemental report which would have the effect of changing the original report.

ACCOUNTS, STATE BOARD OF: Salaries of city engineers, possibility of increase.

December 17, 1937.

Hon. William P. Cosgrove,
State Examiner,
State Board of Accounts,
Indianapolis, Indiana.

Dear Sir:

This will acknowledge receipt of your letter of December 13th in which you submit the following questions:

"1. Can the city civil engineer be legally employed as a building inspector and receive an additional salary or fixed annual remuneration for serving as such building inspector?

"2. If he can not receive a salary or fixed annual remuneration for such services, can he be paid a fee for investigating applications for permits or for making other investigations which would be required of him as such building inspector?"