> organization in accordance with the state civil defense plan and program. Each political subdivision within each county is authorized and directed to organize local civil defense organizations and activities in accordance with the county and state civil defense plan and program and under the direction of the county civil defense organization."

From a reading of the entire "Civil Defense Act of 1951," *supra,* it is apparent that the same does not provide for any type of merit system or civil service to cover employees of county or other local civil defense organizations.

In summary, it is my opinion that because the "Civil Defense Act of 1951," *supra,* does not establish any type of merit system for the employees of county or local civil defense organizations and because the "State Personnel Act," *supra,* specifically excludes county and local civil defense organizations from its provisions, agreements between the Director of the Personnel Division and municipalities or political subdivisions for services in administration of personnel on merit principles cannot be made. It becomes unnecessary, therefore, to answer your second question.

OFFICIAL OPINION NO. 52

October 4, 1961

Mr. William J. Layton, Secretary
Indiana State Board of Barber Examiners
1003 State Office Building
Indianapolis 4, Indiana

Dear Mr. Layton:

This will acknowledge receipt of your letter requesting an opinion as to whether or not the Indiana State Board of Barber Examiners should refuse to issue licenses to persons who are inmates of the state penal institutions in Indiana.

Your letter reads, in part, as follows:

> " 'The Indiana State Board of Barber Examiners has before it a large number of requests for renewal of

> Barber and Apprentice Licenses for the State of Indiana, from persons who are inmates of the State Prison institutions as of the dates of making their applications for renewal of licenses.
>
> " 'This Board desires an opinion from you as to whether or not this Board should issue these renewal licenses or whether the Board should refuse to issue the renewal licenses. Also, the Board would like instructions as to proper procedure if you recommend our refusing to issue these renewal licenses.' "

The Legislature of this state has established certain standards and qualifications for persons desiring to obtain certificates of registration to practice as barbers or apprentice barbers. In addition to these standards, the Legislature has set forth grounds which may under certain circumstances serve to justify the refusal of such certificates of registration. Your question is concerned primarily with these grounds which are contained in Acts of 1933, Ch. 48, Sec. 14, as amended, and as found in Burns' Indiana Statutes (1951 Repl.), Section 63-314. Specifically, the portion of Burns' 63-314, *supra,* which applies to your question, reads as follows:

> "The board shall either refuse to issue or renew or shall suspend or revoke any certificate of registration for any one [1] or combination of the following causes:
>
> "(1) Conviction of a felony shown by a certified copy of the record of the court of conviction."

It is a well established rule of statutory construction that the word "shall" is considered to be a legislative mandate unless a different meaning appears from the context of the whole act. In State *ex rel.* City of Indpls. *et al.* v. Brennan, Judge of Superior Court of Marion County, Room 3 (1952), 231 Ind. 492, 109 N. E. (2d) 409, the Supreme Court of Indiana made the following statement at page 498:

> "The word 'shall' when used in a statute is generally construed mandatory rather than directory, and this rule will control unless it appears clearly from the context or from the manifest purpose of the act as a whole

> that the legislature intended in the particular instance that a different construction should be given to the word. *State ex rel. Simpson et al.* v. *Meeker et al.* (1914), 182 Ind. 240, 243, 105 N. E. 906, 907 and cases cited. *Wysong* v. *Automobile Underwriters, Inc.* (1933), 204 Ind. 493, 504, 184 N. E. 783. *State ex rel. DeArmond* v. *Superior Court of Madison County* (1940), 216 Ind. 641, 643, 25 N. E. 2d 642. *City of Gary* v. *Yaksich* (1950), 120 Ind. App. 121, 126, 90 N. E. 2d 509. 59 C. J. *Statutes* §§ 635, 636. *Bemis* v. *Guirl Drainage Co.* (1914), 182 Ind. 36, 52, 105 N. E. 496."

By following the rule of statutory construction set down by the court in the above case, it is apparent that the Legislature did not intend Burns' 63-314, *supra,* to stand alone and separate from other sections of the law. Specifically, the Legislature has observed constitutional due process by requiring the Board to afford an applicant a hearing prior to any refusal to issue or renew a certificate of registration. With respect to such hearing procedure, Acts of 1933, Ch. 48, Sec. 15, as found in Burns' (1951 Repl.), Section 63-315, reads, in part, as follows:

> *"No action in refusing to issue or renew* or in suspending or revoking *a certificate of registration for any of these causes shall be taken until the accused has been furnished with a statement of the specific charges against him, and notice of the time and place of hearing thereof.* The accused may be present at the hearing in person or by counsel or both. The statement of charges and notice must be served personally upon such person, or mailed to his last-known address at least twenty [20] days prior to the hearing. *If upon such hearing the board finds the charges are true, it may refuse to issue or renew a certificate of registration,* or may revoke or suspend such certificate if the same has been issued." (Our emphasis)

The important feature of Burns' 63-315, *supra* (which is emphasized) shows quite clearly that it was the intent of the Legislature to make the issuance of all certificates of registration, subject to the discretion of the State Board of Barber

Examiners. By reading the barbers' registration law, as a whole, in conformity with the rule of statutory construction set forth above, it is apparent that the word "shall" appearing in Burns' 63-314, *supra,* is not mandatory but must be considered in the light of the discretionary provisions in Burns' 63-315, *supra.* Thus, the conviction of a felony "may" serve as sufficient grounds for the denial of registration or the renewal thereof but the final determination is within the discretion of the Board after examining into all the circumstances surrounding the applicant, and any such denial is subject to judicial review for abuse of discretion.

Another factor which would be available in determining the legislative intent relative to the granting or refusing of certificates of registration to those individuals who have been convicted of a felony can be found in the Indiana Constitution, Art. 1, Sec. 18, and in Acts of 1961, Ch. 343, Sec. 25, as found in Burns' (1961 Supp.), Section 13-1626. The Indiana Constitution, Art. 1, Sec. 18, *supra,* reads as follows:

> "The penal code shall be founded on the principles of reformation, and not of vindictive justice."

In furtherance of the dictates of this constitutional provision, Burns' 13-1626, *supra,* which is the Department of Correction Act of 1961, reads in part as follows:

> "The director of the division of classification and treatment shall supervise in each institution in the department of correction a program of prison education designed in the broadest sense to bring about the rehabilitation of the inmates. *The objective of such programs shall be the return of correctional inmates to society with a more wholesome attitude toward living, with a desire to conduct themselves and their dependents through honest labor. To this end, each inmate shall be given a program of education which is deemed most likely to further the process of rehabilitation.* * * *" (Our emphasis)

Quite clearly the Constitution and the Department of Correction Law of 1961, as above quoted, express a desire by the people of the State of Indiana to rehabilitate the inmates of our penal institutions and to provide them with means to

become useful members of society upon their release. One of the programs adopted with this purpose in mind is the program designed to enable certain inmates to enter the practice of barbering. This is an honorable following and if an inmate could obtain a certificate of registration, there would be a tendency towards a more complete rehabilitation.

When the various standards and qualifications of the barbers' registration law are reduced to a common denominator a rather singular legislative intent is apparent. The common denominator is whether the applicant is a fit and proper person to have, or continue to have, a certificate of registration. This is a standard intended by the Legislature to guide the decisions of the Board.

There have been a number of cases which seem to support this viewpoint. In the case of North v. Barringer (1897), 147 Ind. 224, 46 N. E. 531, the facts suggested that the applicant for a license to sell intoxicating liquors may have violated the law by selling liquor without a valid license. The possible violation was based upon a technical proposition but in upholding the issuance of the license, the court made the following statement at page 228 of the Indiana Reports:

> "* * * Even a conviction of the applicant of a violation of law in the sale of liquors, it has been held by this court, does not necessarily show him to be unfit to receive a license. * * * Such evidence is proper to be considered on the question of his fitness, but it is not conclusive of his unfitness. * * *"

In Corro v. Moss, Commissioner of Licenses (1945), 184 Misc. 1050, 56 N. Y. S. (2d) 652, a person applying for a barber's license did not reveal that he had been convicted of a crime prior to his application. The license was granted, but later revoked when the Board learned of the conviction. In this case, the New York court recognized that the Board had certain control over the issuance of licenses and made the following statement at page 654:

> "The commissioner is entrusted with a certain measure of control over barbers, to the end that they shall be fit, morally as well as professionally, to ply their trade, but his judgment must be responsible to that

> purpose, and he is not authorized to refuse or revoke a license on a moral appraisal which is not relevant to the conduct of the business licensed."

Another case closely in point is Tanner v. DeSapio (1956), 2 Misc. (2d) 130, 150 N. Y. S. (2d) 640. In this case, the applicant applying for a beautician's license had been convicted of grand larceny, and after a time paroled from the Women's Prison. The Board refused to grant a license to the applicant and upon appeal the New York court stated at page 644:

> "There is no question in the mind of the Court but that honesty is an essential element of good moral character and that petitioner was dishonest when she committed grand larceny in the first degree on April 3, 1947. However, this Court refuses to subscribe to any philosophy that assumes that a person once dishonest may not by future conduct acquire good moral character. *If such be the case, the State should alter its programs now in force in correctional institutions whereby reformation of convicts is undertaken.* The duty of the respondent in the instant case was to determine whether or not the applicant was of good moral character at the time she applied for the licenses. It would of course be proper to consider a former conviction, but that would not necessarily prevent the issuance of a license." (Our emphasis)

The statutes which prescribed the qualifications for licenses in the above cases are not identical with Burns' 63-314, *supra,* and Burns' 63-315, *supra,* and for this reason the decisions are not necessarily controlling on the question raised in your letter. However, the language of the courts in each case does afford some guidance and serves as an insight to judicial thinking in such cases. The courts have taken the view that a conviction of a crime should not alone determine conclusively one's fitness and moral character to receive a particular license but the issuance or refusal of a license should depend upon a determination of the facts bearing upon the fitness of the applicant to engage in a given following. In determining whether or not an applicant is a fit person to be licensed, the

Board must look beyond mere adequacy of technical skill and proficiency.

Therefore, in answer to your question, it is my opinion that the issuance of a certificate of registration, or the renewal thereof, to a person convicted of a felony is a matter which is discretionary with the Indiana State Board of Barber Examiners and such conviction is a factor which may be considered in determining the moral character and fitness of any applicant. If the Board feels that the circumstances in any given case may warrant the denial of a license or the renewal thereof, because of a felony conviction, then before such denial, it is necessary for the Board to provide the applicant with a hearing in accordance with the procedure outlined in Burns' 63-315, *supra,* and the provisions of the Administrative Adjudication and Court Review Act of 1947, the same being Acts of 1947, Ch. 365, as found in Burns' (1951 Repl.), Section 63-3002 *et seq.*

OFFICIAL OPINION NO. 53

October 5, 1961

Mr. Vincent H. Knauf, Chairman
Hearing Commission
1330 West Michigan Street
Indianapolis, Indiana

Dear Mr. Knauf:

Your letter of September 18, 1961, has been received and reads as follows:

> "The Hearing Commission requests an official opinion from your office regarding its responsibility and the final disposition of the $1000 paid to school corporations for the conversion, remodeling and/or construction, and the cost of any necessary training equipment after the school corporation officially discontinues the program.
>
> "The payment of state funds was involved originally which is consistent with Acts of 1955, Chapter 166, Act No. 133, Section 4, Paragraph 2.