TAXATION: Collection of Delinquent Property Taxes Attributable to Public Property. Section 446.7, The Code 1979,as amended by 1979 Session, 68th G.A., ch.68, §14. Section 446.7, The Code, as amended, prohibits the tax sale of property of the public entities listed therein for delinquent real property taxes. Upon notice from the county treasurer, such entities should pay the taxes, but if they fail to do so, the board of supervisors must abate them. Griger to Richter, Pottawattamie County Attorney, 1/30/81) #81-1-12(L)

January 30, 1981

David E. Richter
Pottawattamie County Attorney
227 South 6th Street
Council Bluffs, IA 51501

Dear Mr. Richter:

You have requested an opinion of the Attorney General pertaining to the interpretation of 1979 Session, 68th G.A., ch.68,§14. Specifically, you inquire whether §446.7, The Code 1979, as amended, relating to payment of delinquent real property taxes by municipal and political subdivisions, city or county agencies, or the Iowa housing finance authority (hereinafter collectively referred to as governing body) can be enforced and, if so, how. In the event payment of such taxes cannot be enforced, you inquire whether the board of supervisors must abate such taxes or can it decline to do so.

Section 446.7, The Code, authorizes the county treasurer to collect delinquent real property taxes by annual tax sale. In Iowa, the tax sale authorized by chapter 446, The Code, is the only way to enforce payment of delinquent real property taxes where such payment is not voluntarily made, and no taxpayer can be subject to personal liability for such delinquent taxes. In Re Estate of McMahon, 237 Iowa 236, 21 N.W.2d 581 (1946); Lucas v. Purdy, 142 Iowa 359,120 N.W.1063 (1909).

Section 446.7, unnumbered paragraph two (2), The Code 1979, was amended by 1979 Session, 68th G.A., ch.68,§14, to read as follows:

> Property of municipal and political subdivisions of the state of Iowa and property held by a city or county agency or the Iowa housing finance authority for use in an Iowa homesteading project, shall not be offered or sold at tax sale and a tax sale of that property shall be void from its inception. When delinquent taxes are owing against property owned or claimed by any municipal or political subdivision of the state of Iowa, or property held by a city or county agency or the Iowa housing finance authority for use in an Iowa homesteading project, the treasurer shall give notice to the governing body of the agency, subdivision or authority which shall then pay the amount of the due and delinquent taxes from its general fund. If the governing body fails to pay the taxes, the board of supervisors shall abate the taxes as provided in chapters three hundred thirty-two (332), four hundred twenty-seven (427) and four hundred forty-five (445) and section five hundred sixty-nine point eight (569.8) of the Code.

The above quoted statute prohibits the tax sale of a governing body's property for delinquent real property taxes and directs the governing body, upon notice from the county treasurer, to pay the delinquent taxes. However, if the governing body fails to pay the taxes, the statute directs the board of supervisors to abate them.

Prior to amendment, §446.7, The Code 1979, prohibited the tax sale of the governing body's property for delinquent real property taxes and, upon notice by the treasurer, directed the governing body to pay such delinquent taxes. Such provisions were kept, basically, intact by 1979 Session, 68th G.A., ch.68, §14. Section 446.7, The Code 1979, provided that if the governing body failed to pay the taxes after notice from the treasurer, the "collection and enforcement" of the taxes would be suspended until the property was sold to a private purchaser. In addition, if the property was the subject of an absolute conveyance "of the fee to a holder of the conditional

conveyance granted under an Iowa homesteading project," §446.7 provided that the taxes must be cancelled. These provisions in §446.7, The Code, pertaining to suspension of the collection and enforcement of tax payment and to the cancellation of the taxes, were deleted by 1979 Session, 68th G.A., ch.68,§14, and the provision concerned with abatement of the taxes by the board of supervisors was added.

The above quoted provisions in §446.7, as amended in 1979 by §14 of chapter 68, appear to be clear and unambiguous. The tax sale of the governing body's property is prohibited. Upon notice from the county treasurer, the governing body should pay the delinquent real property taxes, but if it fails to do so, payment cannot be enforced since the governing body and its officials do not incur personal liability for the taxes and since the tax collection is no longer provided for after governing body property is sold to a private purchaser. Instead, if the governing body fails to pay the delinquent taxes after notice, the board of supervisors must abate them.

Very truly yours,

Harry M. Griger

Harry M. Griger
Special Assistant Attorney General

COUNTY ENGINEERS: Engaging in practice of land surveying. §§ 111.21, 114.2, 309.17, The Code 1979. A county engineer may not engage in the practice of land surveying unless qualified as a registered land surveyor pursuant to Iowa Code requirements. (Norby to Kane, Chairman, Board of Engineering Examiners, 1/30/81) #81-1-11(L)

January 30, 1981

Harrison Kane, Chairperson
Board of Engineering Examiners
L O C A L

Dear Mr. Kane:

We are in receipt of your request for an Attorney General's opinion regarding two questions concerning county engineers.

First, you have asked whether a county engineer appointed pursuant to § 309.17, The Code, may perform land surveying functions, as defined in § 114.2, The Code. Section 309.17 requires that the county boards of supervisors employ one or more "registered civil engineers" to hold the position of county engineer. Section 309.17 does not, however, require that a county engineer be a registered land surveyor.

A 1931 Attorney General's opinion concluded that a registered engineer may not practice land surveying without separately qualifying as a land surveyor. 1931 Op. Atty. Gen. 58. We continue to agree with this conclusion and see no reason to relieve a county engineer from its application. In other words, a county engineer, just as any other engineer, may not practice land surveying without separately qualifying as a land surveyor.

You have also asked if a county engineer must be registered as a land surveyor to perform the duties described in § 111.21, The Code 1979. This section provides as follows:

> The [conservation] commission may call upon the county engineer of any county to advise relative to the true boundary between the state-owned property and private property in the county, and to furnish plats and surveys showing such true boundary lines, and when directed by the commission, shall mark such boundary lines as herein provided.

We do not believe that this section gives a county engineer any authority beyond that given by their professional certifications. In other words, § 111.21 does not authorize a county engineer who is not a registered land surveyor to engage in the practice of land surveying, as defined in § 114.2. Therefore, if the advice sought by the Conservation Commission requires the county engineer to engage in the practice of land surveying, the county engineer may not personally give such advice unless he/she is a registered land surveyor.

Sincerely,

Steven Norby

STEVEN G. NORBY
Assistant Attorney General

SGN:sh

STATUTES: SOCIAL SECURITY: Medicaid and Supplemental Security Income Eligibility Requirements. 42 U.S.C. § 1381 et seq., 42 U.S.C. § 1396 et. seq., 20 C.F.R. § 416.1240, 42 C.F.R. §§ 431.300-307, 435.4, 435.100, 435.300, 435.401, §§ 3.7, 4.1(36)(a), 217.30, 217.30(4)(b), 249.13, 249A.14 703.3, 714.8, Chapters 249 and 249A, The Code 1979, Acts of the Sixty-Eighth General Assembly, 1980 Session, House File 685. A crime is complete under H.F. 685 where a party, with intent to receive public assistance, transfers property for less than fair consideration. Success or failure in attempting to gain public assistance is immaterial to committing a crime under H.F. 685. Where the Department of Social Services has knowledge that an applicant for public assistance has transferred property one year prior to the making of such application, the department should report such transfer to appropriate law enforcement officials. Department employees are required to ask applicants for public assistance for information that will establish their eligibility or non-eligibility for assistance. The county attorney is responsible for investigating or causing to be investigated suspected fraudulent practices to determine if a criminal prosecution is warranted. The disclosure of information to law enforcement officials directed towards the elimination of fraud in a public assistance benefit program will not violate state or federal nondisclosure laws. The mere passive failure to report suspected fraudulent practices does not constitute a crime. The Department of Social Services may jeopardize federal financial participation in its public assistance programs by failing to report suspected fraudulent practices to law enforcement authorities. H.F. 685 should have prospective effect only. We decline to comment on the enforceability of H.F. 685, but advise that participation in its enforcement may jeopardize federal financial participation in Medicaid and SSI programs. (Mann to Reagen, Commissioner, Department of Social Services, 1/30/81) #81-1-10(L)

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Department of Justice

ADDRESS REPLY TO:

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January 30, 1981

Dr. Michael V. Reagen, Ph.D.
Commissioner
Iowa Department of Social Services
Fifth Floor
Hoover State Office Building
L O C A L

Dear Commissioner Reagen:

You have requested an opinion of the Attorney General on whether the Department of Social Services has any responsibility for the enforcement of an Act of the Sixty-Eighth General Assembly, 1980 Session, House File 685 (hereinafter H.F. 685). Specifically, you ask the following questions:

(1) At what point does the crime take place: at the time of the transfer of property? at the time of application for public assistance? at the time of approval? at the time of receipt of assistance/services?

(2) If an individual disposes of property, applies for assistance, and is determined to be ineligible for a reason unrelated to resources (i.e. no deprivation), has a crime taken place?

(3) What is the Department's responsibility when it has knowledge that a transfer has taken place?

(4) Since divestment of property has no bearing on an applicant's eligibility for public assistance, what responsibility does a local office worker have for investigating the circumstances of suspected transfer? Must the local office worker inquire of the applicant whether such a transfer has taken place within a year of application?

(5) Do federal regulations at 42 C.F.R. 431.300-431.307 dealing with safeguarding information on applicants and recipients prohibit the Department from reporting suspected transfers to law enforcement officials?

(6) What liability does the Department have if it fails to report a transfer of property of which it has knowledge? To whom should such a report be made?

(7) If property has been transferred prior to July 1, 1980 (the effective date of the law) and application for public assistance is made subsequent to July 1, 1980, has a fraudulent practice taken place?

(8) I have attached a response from the Kansas City Regional Office which indicates that for Title XIX purposes we may be out of compliance with Title XIX regulations with the implementation of this law. In light of this, can the Department take any part in the administration of this law?

H.F. 685 amends § 714.8, The Code 1979. Section 714.8 makes anyone who violates the provision thereof guilty of a fraudulent practice. The H.F. 685 amendment to § 714.8 reads as follows:

> Section 1. Section seven hundred fourteen point eight (714.8), Code 1979, is amended by adding the following new subsection:
>
> NEW SUBSECTION. Knowingly transfers or assigns a legal or equitable interest in property, as defined in section seven hundred two point fourteen (702.14) of the Code, for less than fair consideration, with the intent to obtain public assistance under title eleven (XI) of the Code, or accepts a transfer of or an assignment of a legal or equitable interest in property, as defined in section seven hundred two point fourteen (702.14) of the Code, for less than fair consideration, with the intent of enabling the party transferring the property to obtain public assistance under title eleven (XI) of the Code. A transfer or assignment of property for less than fair consideration within one year prior to an application for public assistance benefits shall be evidence of intent to transfer or assign the property in order to obtain public assistance for which a person is not eligible by reason of the amount of the person's assets. If a person is found guilty of a fraudulent practice in the transfer or assignment of property under this subsection the maximum sentence shall be the penalty established for a serious misdemeanor and sections seven hundred fourteen point nine (714.9), seven hundred fourteen point ten (714.10) and seven hundred fourteen point eleven (714.11) of the Code shall not apply.

I. The initial question posed is at what point is a crime committed under H.F. 685. An analysis of the act reveals that there are two alternative bases for establishing

a fraudulent practice under H.F. 685, each of which contain three basic elements. They are as follows: A (1) knowing transfer or assignment of a legal or equitable interest in property, (2) for less then fair consideration, (3) with intent to obtain public assistance, or, in the alternative, it is illegal for anyone to (1) accept a transfer or assignment of a legal or equitable interest in property (2) for less than fair consideration (3) with the intent of enabling the party transferring the property to obtain public assistance.

Once a party has completed all of the three elements referred to above the crime is committed. The corpus delicti or body of the offense is complete. An illegal result has been produced and someone is criminally responsible for the results. State v. Furgison, 217 N.W.2d 613 (Iowa 1974); State v. Dunn, 199 N.W.2d 104 (Iowa 1972). The crime will be complete even though the transferor of the property will have taken no steps to seek or obtain public assistance. In other words, the crime is complete when a party, with intent to obtain public assistance, transfers property for less than fair consideration.

It must be conceded that there is nothing inherently illegal about transferring property for less than fair consideration, nor is there anything inherently illegal about transferring property with intent to defraud. But it is within the power of the legislature to create and define crime, and the only limitation on that power is that the enactment shall not infringe on constitutional rights and privileges. State v. Fuhrmann, 261 N.W.2d 475 (Iowa 1978); State v. Robbins, 257 N.W.2d 63 (Iowa 1977); State v. Watts, 186 N.W.2d 611 (Iowa 1971). Under H.F. 685 the legislature clearly limited the coverage of the act to property transfers for less than fair consideration with the intent to defraud. The gravamen of the crime is the fraudulent intent. In reviewing a similar statute, the United States Supreme Court in Prince v. United States, 352 U.S. 322, 1 L.Ed.2d 370, 77 S.Ct. 403 (1957), stated the following in discussing a statute making it illegal to enter a bank with the intent to commit larceny:

> The gravamen of the offense is not the act of entering, which satisfies the terms of the statute even if it is simply walking through

> an open, public door during normal business hours. Rather the heart of the crime is the intent to steal . . . .

1 L.Ed.2d at 374. Accord, United States v. Lankford, 573 F.2d 1051 (8th Cir. 1978); Rumfelt v. United States, 445 F.2d 134, cert. den. 92 S.Ct. 92, 404 U.S. 853, 30 L.Ed.2d 94 (7th Cir. 1971).

Accordingly, a crime is complete under H.F. 685 where a party, with intent to receive public assistance, transfers property for less than fair consideration.

II. You next ask if a crime has taken place where a party disposes of property, applies for assistance, and is found to be ineligible for assistance for reasons unrelated to the party's resources.

As discussed in division I above, the crime occurs upon the transfer of property for less than fair consideration with intent to receive public assistance. Subsequent acts are immaterial. It is not essential to the crime for the party to seek, apply for, or receive public assistance. The legislature did not include any such additional element in the act, and no additional elements may be read in by construction. Criminal statutes are to be strictly construed. State v. Watts, 186 N.W.2d 611 (Iowa 1971); Knott v. Rawlings, 96 N.W.2d 900, 74 A.L.R.2d 868 (Iowa 1959); Lever Brothers Company v. Erbe, 87 N.W.2d 469 (Iowa 1958).

Accordingly, success or failure in attempting to gain public assistance is immaterial. Although evidence of an attempt to receive public assistance or success in receiving public assistance may be useful in establishing a fraudulent practice under H.F. 685, it is not essential to proving any element of the crime. Cf. Pinkney v. United States, 380 F.2d 882 (5th Cir. 1967), cert. den. 88 S.Ct. 831, 19 L.Ed.2d 876, 390 U.S. 908 (1968). Robinson v. United States Board of Parole, 403 F. Supp. 638 (W.D. N.Y. 1975).

III. In question number three you ask what is the department's responsibility when it has knowledge that a transfer of property by an applicant for assistance has taken place.

As a general proposition, information obtained by the department relative to persons receiving services or assistance from the department is to be held confidential. § 217.30, The Code 1979; 42 C.F.R. § 431.306. However, an exception to the general confidentiality requirements is contained in § 217.30(4)(b), The Code 1979. That section reads as follows:

> b. Confidential information described in subsection 1, paragraphs "a," "b" and "c" shall be disclosed to public officials, for use in connection with their official duties relating to law enforcement, audits and other purposes directly connected with the administration of such programs, upon written application to and with approval of the commissioner or his designee. (emphasis added.)

In § 217.30(4)(b), the legislature mandated that confidential information "shall be disclosed" to law enforcement officials for "purposes directly connected with the administration of such programs" administered by the department. The word "shall" as used by the legislature imposes a duty to disclose confidential information to appropriate law enforcement authorities. § 4.1(36)(a), The Code 1979. The only limitation upon such disclosure is that the disclosure be for law enforcement purposes directly connected with the administration of the programs administered by the department.

The question, then, is whether the disclosure of information relative to the transfer of property by an applicant for public assistance will be for purposes directly connected with the administration of programs provided by the department? We conclude that such a disclosure will be for a proper purpose. Under federal regulations, found at 42 C.F.R. § 450.80(a)(1), (2) and (3), the department is required to pursue the elimination of fraud in its programs. That section reads as follows:

> (a) State plan requirements. A State plan for medical assistance under title XIX of the Social Security Act must:
>
> (1) Provide that the State agency will establish and maintain (i) methods and criteria for identifying situations in which a question of fraud in the program may exist, and (ii) procedures developed in cooperation with State legal authorities for referring to law enforcement officials situations in which there is valid reason to suspect that fraud has been practiced. The definition of fraud for purposes of this section will be determined in accordance with State law.
>
> (2) Provide for methods of investigation of situations in which there is a question of fraud that do not infringe on the legal rights of persons involved and are consistent with principles recognized as affording due process of law.
>
> (3) Provide that the State agency will designate positions that are responsible for referring situations involving suspected fraud to the proper authorities.

It is clear that the department is required to attempt to eliminate fraud from its programs. The disclosure, then, of information to law enforcement officials directed toward the elimination of fraud in the programs of services or assistance offered by the department will be for a purpose directly connected with the administration of such programs and will not violate the confidentiality requirements of §.217.30, The Code 1979. State v. Washington, 83 Wis.2d 808, 266 N.W.2d 597 (1978).

We, therefore, conclude that where the department has knowledge that an applicant for public assistance has transferred property prior to the making of such application the department should report such transfer to appropriate law enforcement officials.

IV. You next raise two questions relative to the responsibility of department employees to seek information from an applicant for public assistance relative to a property transfer. Specifically, you ask what responsibility does a local office worker have for investigating the circumstances of a suspected transfer, and must the local office worker inquire of the applicant as to whether such a transfer has taken place within a year of the application for public assistance?

Under chapters 249 and 249A, The Code 1979, the department of social services is given responsibility for the administration of programs providing for supplemental and medical assistance to eligible persons. A part of that administrative responsibility is to determine the eligibility of applicants for assistance under those programs. Accordingly, departmental employees are required to ask applicants for information that will establish their eligibility or noneligibility for assistance. Applicants for governmental benefits bear the burden of showing their eligibility in all respects. Lavine v. Milne, 424 U.S. 577, 47 L.Ed.2d 249, 96 S.Ct. 1010 (1976).

The criteria for participation in the benefit programs are set out in chapters 249 and 249A of the Code. In addition to the criteria contained in those chapters, it is apparent that the legislature, through H.F. 685, created collateral eligibility requirements for the purpose of conserving state resources for distribution among those who really require assistance. Accordingly, it is the responsibility of the department's employees to determine if applicants for assistance meet those requirements.

The additional requirement for eligibility for public assistance imposed by H.F. 685 are that the applicant has not transferred property for less than fair consideration with the intent to seek public assistance. H.F. 685 creates a presumption that a transfer of property for less than fair consideration within one year prior to the application for public assistance is a transfer with fraudulent intent. It

is, therefore, our conclusion that departmental employees must inquire as to whether the applicant for benefits has transferred property within one year prior to the application for public assistance benefits. This conclusion is supported by 42 C.F.R. § 450.80(a)(2), which requires the department to establish methods for investigating fraud.

We do not, however, mean to suggest that local office workers of the department have sole responsibility for investigating the circumstances of a property transfer. Responsibility for enforcing or causing to be enforced H.F. 685 and similar statutes is enjoined upon the county attorney. 1972 Op.Att'yGen. 374; § 249.13, The Code 1979, § 249A.14, The Code 1979. That office is, therefore, also responsible for investigating or causing to be investigated the circumstances surrounding a suspected illegal transfer of property in violation of H.F. 685. The department's responsibility, then, is to ascertain whether an applicant has transferred property for less than fair consideration within one year prior to the application for public assistance benefits. Since a presumption of a fraudulent purpose is created by such a transfer, the department should, upon discovery of such a transfer advise the county attorney. It shall then be the duty of the county attorney to investigate or cause to be investigated the circumstances surrounding the property transfer to determine if a criminal prosecution is warranted.

V. You next ask whether the confidentiality requirements imposed by federal regulations, found at 42 C.F.R. § 431.300-§ 431.307, prohibit the department from reporting suspected transfers of property to law enforcement officials.

The regulations referred to are based on Title 42 U.S.C. § 1396(a)(7), which reads as follows:

> [A state plan for medical assistance must] provide safeguards which restrict the use or disclosure of information concerning applicants and recipients to purposes directly connected with the administration of the plan . . . .

As concluded in Division III of this opinion, the disclosure of information directed toward the elimination of fraud in a public assistance benfit program will be for a purpose directly connected with the administration of such a program. State v. Washington, 83 Wis.2d 808, 266 N.W.2d 597 (1978). Therefore, such a disclosure will not violate federal or state nondisclosure laws. Washington.

VI. You next ask what the department's liability will be if it fails to report a transfer of property of which it has knowledge, and also inquire as to whom such a report should be made where the department attempts to fulfill its reporting responsibility.

Your second question was answered in division IV of this opinion where we concluded that reports of suspected violations of H.F. 685 should be given to the county attorney.

As to the former question, there is no criminal liability for failure to make a report of a suspected criminal violation. Although § 703.3, The Code 1979, makes a person an accessory after the fact to a criminal violation where the person harbors, aids or conceals an accused person with the intent to prevent apprehension of the accused person, a mere passive failure to disclose the commission or suspected commission of a crime does not make a person an accessory after the fact. State v. Lott, 255 N.W.2d 105 (Iowa 1977); State v. Vesey, 241 N.W.2d 888 (Iowa 1976); State v. Kittelson, 164 N.W.2d 157 (Iowa 1969); State v. Philpott, 222 Iowa 1334, 271 N.W. 617 (1937); State v. Hudson, 50 Iowa 157 (1878); State v. Franks, 377 So.2d 1231 (La. 1979); State v. Atkinson, 298 N.C. 673, 259 S.E.2d 858 (1979); State v. Satterfield, 483 S.W.2d 171 (Ark. 1972); Robinson v. State, 5 Md. App. 723, 249 A.2d 504 (1969). To be an accessory after the fact there must be an overt act to prevent the apprehension of the accused. Id.; 22 C.J.S. Criminal Law §§ 95, 96, and 99 (1961).

On the other hand, the department may jeopardize federal financial participation in its public assistance programs by failing to disclose suspected fraudulent practices to law enforcement authorities. As discussed in Division III of this opinion the department is required by 42 C.F.R. § 450.80(a) to include in its state plan methods and procedures for identifying a situation in which fraud

exists, and for reporting suspected fraud to the proper authorities. The failure of the department to disclose possible fraud situations may violate the requirements of 42 C.F.R. § 450.80(a). Accordingly, the department may jeopardize federal financial participation in its public assistance benefit program for failure to abide by federal requirements for reporting fraud.

VII. Next, you ask if H.F. 685 will apply to property transfers that occurred prior to July 1, 1980. Substantively, you raise a question as to whether the statute will operate prospectively or retrospectively.

Under § 3.7, The Code 1979, statutes are effective on the first day of July following their passage, unless a specified effective date is contained in the Act, or unless approved by the governor on or after the first of July. Statutes approved by the governor on or after the first of July have an effective date on the fifteenth of August.

H.F. 685 does not contain a provision specifying its effective date. It was approved by the governor on May 19, 1980. Therefore, its effective date is July 1, 1980.

Criminal statutes may be applied prospectively only. Retrospective operation is prohibited by both the Iowa and United States Constitutions. This issue was discussed by the Iowa Supreme Court in the case of In Interest of Ponx, 276 N.W.2d 425 (Iowa 1979), where the court stated the following:

> Article 1, section 9 of the United States Constitution, and article 1, section 21 of the Iowa Constitution state that no ex post facto law shall be passed. These clauses prohibit the application of a "new punitive measure to conduct already consummated where it operates to the detriment or material disadvantage of the accused. Accordingly, a punitive measure is ex post facto if it punishes past conduct which was not criminal when it occurred.

Since H.F. 685 is a criminal statute, it cannot apply to acts occurring prior to its effective date. Accordingly, we conclude that H.F. 685 should have prospective effect, and should only apply to fradulent transfers of property that occur after July 1, 1980.

VIII. Finally, you inquire as to whether the Department of Social Services may participate in the enforcement of H.F. 685. You raise this question based on a ruling of the Department of Health and Human Services that H.F. 685 is in conflict with federal regulations governing the Supplemental Security Income and Medicaid programs, Title XVI and Title XIX of the Social Security Act, respectively.

The Medicaid program, authorized by 42 U.S.C. §§ 1396 - 1396K, is a cooperative federal-state effort designed to provide medical assistance to the needy, subject to federal statutory and regulatory guidelines. States that choose to participate in the Medicaid program must adopt a statutory plan setting forth the coverage to be extended to recipients, including the terms upon which individuals will be eligible. Further, they must extend benefits to those who are eligible for federally funded financial assistance, such as recipients of Supplemental Security Income (SSI, 42 U.S.C. § 1381 et. seq.) for the aged, blind and disabled, known as the "categorically needy". In addition thereto, participating states may exercise an option to provide for the payment of medical services to those aged, blind or disabled individuals, known as the "medically needy", whose incomes or resources, while exceeding the financial eligibility requirements for the categorically needy are insufficient to pay for necessary medical care.

Iowa has elected to participate in the above described programs by adopting chs. 249 and 249A, The Code 1979. In doing so, Iowa has agreed to abide by applicable federal statutory and regulatory guidelines.

The issue then, is whether the eligibility requirements for participating in the Iowa Medicaid program conflict with applicable federal law. You provide a copy of a letter from the Deputy Regional Medicaid Director, Department of Health and Human Services, which concludes that a conflict exists. Apparently, the Deputy Director concludes that H.F. 685, which prohibits the transfer of property to obtain eligibility under public assistance programs, conflicts with present federal regulations since it imposes more restrictive eligibility requirements for recipients of Medicaid benefits than are imposed

upon recipients of SSI benefits. The Deputy Director reasons as follows: that there is no current transfer of property prohibition under Title XVI programs; that the transfer prohibition of H.F. 685 will apply to Title XIX programs; that the State of Iowa has elected to use Title XVI eligibility requirements in making Title XIX eligibility determinations; that since H.F. 685 will apply to Title XIX programs it will add a condition of eligibility more restrictive than Title XVI eligibility requirements; that, therefore, the H.F. 685 requirements are not permissable. In light of the Deputy Director's analysis, you ask if the department can legally take any part in the administration of H.F. 685.

It is clear that applicants for Title XVI benefits are subject to resource limitations. Federal law permits a person to dispose of property in order to satisfy the resource limitations imposed under Title XVI (SSI). The applicable statute, 42 U.S.C. § 1382b(b) reads as follows:

> (b) The Secretary shall prescribe the period or periods of time within which, and the manner in which, various kinds of property must be disposed of in order not to be included in determining an individual's eligibility for benefits. Any portion of the individual's benefits paid for any such period shall be conditioned upon such disposal; and any benefits so paid shall (at the time of the disposal) be considered overpayments to the extent they would not have been paid had the disposal occurred at the beginning of the period for which such benefits were paid.

Pursuant to the above statute, the Secretary, Department of Health and Human Services promulgated the following rule at 20 C.F.R. § 416.2140:

> (a) Where the resources of an individual (and spouse, if any) are determined to exceed the limitations prescribed in § 416.1205, such individual (and spouse, if any) shall not be eligible for payment except under the conditions provided

> in this section. Payment will be made to an individual (and spouse, if any) if:
>
> . . . .
>
> (3) The individual agrees in writing to:
>
> (i) Dispose of the nonliquid resources (as defined in § 416.1201) in excess of the limitations prescribed in § 416.1205 within the time period specified in § 416.1242; and
>
> (ii) Repay any overpayments (as defined in § 416.1244) with the proceeds of such disposition.

The Deputy Regional Medicaid Director apparently reasons that the above provisions make it clear that an applicant can transfer property for the specific purpose of attaining eligibility under Title XVI (SSI). Further, that such transfer can be for no consideration as long as it is legally binding. The interpretation of a statute by an agency charged with its enforcement is a substantial factor to be considered in construing the statute. Scarpuzza v. Blum, 426 N.Y.S.2d 505 (1980). We agree with the Director's conclusions. Sinclair v. Department Health and Social Services, 77 Wis. 322, 253 N.W.2d 245 (1977).

The Director, apparently, further reasons that H.F. 685 would apply to the Title XIX benefits, and that H.F. 685 would, because it prohibits a property transfer, add more restrictive requirements for Title XIX (Medicaid) benefits than are presently applied to Title XIX (SSI) recipients. He apparently concludes that this would violate federal law. The regulation applicable to Title XIX is found at 42 C.F.R. § 435.401(c) as follows:

> (c) The agency must not use requirements for determining eligibility for optional coverage groups that are--

> (1) For families and children, more restrictive than those used under the State's AFDC plan; and
>
> (2) for aged, blind, and disabled individuals, more restrictive than those used under SSI, except for individuals receiving an optional State supplement as specified in § 425.230 or individuals in categories specified by the agency under § 435.121.

We agree with the director that a more restrictive eligibility requirement imposed on Title XIX recipients than those which are imposed on Title XVI recipients would violate the federal regulations. We do not agree, however, that H.F. 685 imposes a more restrictive eligibility requirement on Title XIX recipients than those which are imposed on Title XVI recipients. H.F. 685 applies to both Title XVI and Title XIX. There is nothing in the statute which limits its application. In fact, the clear language of the statute makes it applicable to both Title XVI and Title XIX. It applies to "public assistance under title eleven (XI) of the Code". Title XI of the Iowa Code includes chapters 249 and 249A, the statutes adopting State plans for the distribution of Title XVI and Title XIX benefits respectively. Since H.F. 685 applies to both Title XVI and Title XIX, it cannot impose more restrictive requirements on Title XIX recipients than on Title XVI recipients.

Nevertheless, the validity of H.F. 685 must be held to be suspect -- not because it imposes more restrictive eligibility requirements than are imposed by Title XVI, but rather because of the conflict that may exist between the transfer-of-assets prohibition contained in H.F. 685 and the Title XVI regulations which expressly permit such a transfer. As already discussed, under Title XVI, an applicant for benefits is free to dispose of property, and may do so for less than fair consideration, and may do so for the purpose of attaining eligibility under Title XVI programs. These are the precise things that H.F. 685 would prohibit.

On the surface, then, it would appear that the conflict between H.F. 685 and Title XVI regulations is clear. Thus, the Supremacy Clause of the United States Constitution would prohibit

its enforcement. Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 60 L.Ed.2d 508, 99 S.Ct. 1905 (1979); Avonson v. Quick Point Pencil Company, 440 U.S. 257, 59 L.Ed.2d 296, 99 S.Ct. 1096 (1979). However, courts which have addressed similar statutory provisions in other states are divided on the question of the existence of a conflict. In Dawson v. Myers, 622 F.2d 1304 (9th Cir. 1980), cert. granted in Beltran v. Myers, 49 U.S.L.W. 3332 (U.S.Sup.Ct. 1980), the court held that there was no conflict between the California transfer-of-assets rule and the regulations under the Medicaid program on the grounds that federal law did not require the California eligibility standards to be identical with SSI eligibility requirements, but rather that the standards be comparable. In Caldwell v. Blum, 621 F.2d 491 (2d Cir. 1980), the court ruled that New York's transfer-of-assets statute was not comparable with the SSI regulations and was therefore unenforceable. The weight of authority holds that the transfer-of-assets rules are unenforceable. Fabula v. Buck, 598 F.2d 869 (4th Cir. 1979); Udina v. Walsh, 440 F. Supp. 1151 (D.C. Mo. 1977); Buckner v. Maher, 424 F. Supp. 366 (D.C. Conn. 1976), affirmed 434 U.S. 898, 98 S.Ct. 290, 54 L.Ed.2d 184; Owen v. Roberts, 377 F. Supp. 45 (D.C. Fla. 1974); contra, Rhinefeld v. Blum, 66 A.D.2d 351, 412 N.Y.S.2d 526 (1979); Lerner v. Division of Family Services, 70 Wis.2d 670, 235 N.W.2d 478 (Wis. 1975); Although the weight of authority would support a conclusion that H.F. 685 is unenforceable, we decline to offer an opinion on this question as the United States Supreme Court will consider this issue this term in the case of Beltran v. Myers cited above.

We do advise, however, that the more prudent course to follow in the interim may be one of not jeopardizing federal support of the Medicaid and SSI programs. This may be done by not participating in the enforcement of H.F. 685.

SUMMARY

In summary, we conclude that a crime is complete under H.F. 685 where a party, with intent to receive public assistance, transfers property for less than fair consideration. Success or failure in attempting to gain public assistance is immaterial to committing a crime under H.F. 685. Where the Department of Social Services has knowledge that an applicant for public assistance has transferred property one year prior to the making of such application the department should report such transfer to appropriate law enforcement officials. Department employees are required to ask applicants for public assistance for information that will establish their eligibility or non-eligibility for assistance. The county attorney is responsible for investigating or causing to be investigated suspected fraudulent practices to determine if a criminal prosecution is

warranted. The disclosure of information to law enforcement officials directed towards the elimination of fraud in a public assistance benefit program will not violate state or federal nondisclosure laws. The mere passive failure to report suspected fraudulent practices does not constitute a crime. The Department of Social Services may jeopardize federal financial participation in its public assistance programs by failing to report suspected fraudulent practices to law enforcement authorities. H.F. 685 should have prospective effect only. We decline to comment on the enforceability of H.F. 685, but advise that participation in its enforcement may jeopardize federal financial participation in Medicaid and SSI programs.

Sincerely,

Thomas Mann, Jr.

Thomas Mann, Jr.
Assistant Attorney General

TM/jam

THOMAS J. MILLER
ATTORNEY GENERAL
JOHN G. BLACK
SPECIAL ASSISTANT ATTORNEY GENERAL
STEPHEN C. ROBINSON
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ASSISTANT ATTORNEY GENERAL

Department of Justice

ADDRESS REPLY TO:
SOCIAL SERVICES DIVISION
SECOND FLOOR
HOOVER BUILDING
DES MOINES, IOWA 50319
(515) 281-8330

February 9, 1981

Commissioner Michael V. Reagen, Ph.D.
Iowa Department of Social Services
Fifth Floor
Hoover State Office Building
L O C A L

Dear Commissioner Reagen:

We recently issued an opinion on the enforceability of an Act of the Sixty-Eighth General Assembly, 1980 Session, ch. 1189, more commonly known as H.F. 685. In that opinion, Op.Att'yGen. # 81-1-10(L), we declined to comment on the enforceability of H.F. 685, but instead advised that potential conflicts existed between H.F. 685 and the eligibility requirements for the Supplemental Security Income and Medicaid programs adopted by federal law. We also noted that the precise issue involved in that opinion was before the United States Supreme Court for consideration.

Subsequent to the issuance of the above referred to opinion, we have become aware of an amendment to the SSI and Medicaid programs that was signed into law by President Jimmy Carter on December 28, 1980. That amendment, as contained in Public Law 96-611, specifically addressed the eligibility requirements for participation in the SSI and Medicaid programs. In particular, the statute, as it amends 42 U.S.C. § 1382b, adds a new subsection which requires that any resource owned by an applicant for SSI benefits that is disposed of within 24 months preceding the application for benefits, if such resource was given away or sold for less than fair market value and was disposed of for the purpose of attaining eligibility, must be recaptured and included

in the applicant's resources for the purpose of determining the applicant's eligibility for SSI benefits. The amendment further states that any such disposal of resources within the 24 month period preceding the application shall be presumed to be made for the purpose of attaining eligibility for benefits.

The amendment, then, would deny benefits to an applicant who (1) gives away or sells resources or interests (2) for less than fair market value (3) with the intent to obtain SSI benefits. This is comparable to the prohibition contained in H.F. 685. We, therefore, can discern no conflict that would prohibit enforcement of H.F. 685.

This is also true with respect to the Medicaid program. Public Law 96-611 also amends the Medicaid Act, 42 U.S.C. § 1396a, by adding a new subsection which would also deny benefits to an applicant who, although otherwise eligible for benefits, disposes of resources for less than fair market value. The act would also require that a plan be developed and implemented for denying benefits if the State plan requires such a denial. It would further require that the procedures implemented not be more restrictive than procedures utilized for denying SSI benefits. As H.F. 685 applies equally to SSI and Medicaid benefits, we can discern no conflict between H.F. 685 and this new amendment.

In summary, Public Law 96-611, as it amends the Social Security Act, prohibits the disposal of resources for the purpose of attaining eligibility for SSI and Medicaid benefits. This is consistent with the prohibition contained in H.F. 685. Accordingly, we can discern no impediment to the enforcement of H.F. 685.

Sincerely,

Thomas Mann, Jr.

Thomas Mann, Jr.
Assistant Attorney General

TM/jam

Enclosure

COMPATIBILITY: City Councilman, School Board Member. Sections 298.1, 298.2, 384.16, 384.17, The Code 1979. The offices of city councilman and school board member are compatible. 1978 Op.Att'yGen. 875 to the contrary is overruled. (Schantz to Hutchins, State Senator, 1/28/81) #81-1-8(L)

January 28, 1981

The Honorable Bill Hutchins
State Senator
The Senate
State Capitol

LOCAL

Dear Senator Hutchins:

We are writing again in response to your request for an opinion of the Attorney General concerning whether the offices of city councilman and school board director are incompatible. On November 3, 1980, we advised that the previous administration had addressed this question most recently on December 29, 1978, concluding that the positions were incompatible and that, therefore, in accordance with our regular policy, we would not reexamine an opinion which did not appear to be "clearly erroneous." Subsequently, we have been advised of new facts which have caused us to create an exception to our policy.

The December 29, 1978, opinion is only one of several on the question you raised. Indeed, it reversed a November 28, 1977, opinion holding the positions were compatible. When two conflicting opinions are extant, it is possible for citizens to be misled to their detriment and we have been advised of an instance in which this occurred. Moreover, attorneys could be misled as well, because only the 1977 opinion appears in the most recent Iowa Code Annotated. We have concluded that where two recent opinions are in conflict in a context where the public may be misled to their detriment, we should not apply our "clearly erroneous" standard for reexamining prior opinions. After a thorough reexamination here, we have concluded that the offices of city councilman and school board member are compatible.

Analysis of compatibility issues in Iowa usually begins with the decisions in State ex rel. Crawford v. Anderson, 155 Iowa 271, 136 N.W. 128 (1912) and State ex rel. LeBuhn v. White, 257 Iowa 606,

133 N.W.2d at 905:

> The principal difficulty that has confronted the courts in cases of this kind has been to determine what constitutes incompatibility of offices, and the consensus of judicial opinion seems to be that the question must be determined largely from a consideration of the duties of each, having, in so doing, a due regard for the public interest. It is generally said that incompatibility does not depend upon the incidents of the office, as upon physical inability to be engaged in the duties of both at the same time. Bryan v. Cattell, supra. But that the test of incompatibility is whether there is an inconsistency in the functions of the two, as where one is subordinate to the other 'and subject in some degree to its revisory power,' or where the duties of the two offices 'are inherently inconsistent and repugnant.' (Cases omitted)

An examination of the statutes setting forth the powers and duties of city councils and school boards suggests no subject concerning which either body is subordinate to the other. While the bodies clearly will interact on many occasions, no decisions of the one can be appealed to the other for revision. The December 29, 1978, opinion cited only §§ 298.1, 298.8, 384.16 and 384.17, providing that cities and schools must each prepare budgets and certify them to the board of supervisors, the body which actually levies taxes.[1] While one might make a rather strained argument that this creates a conflict of interest, even if it is so regarded, the possibility of an occasional recusal required by a conflict of interest does not create incompatibility of positions. Reilly v. Ozzard, 166 A.2d 360, 368-72 (N.J. 1960).

We should also note that our review of this problem has persuaded us that the common law doctrine of incompatibility should be construed narrowly and applied cautiously, which has not always been the practice in the past. We are so persuaded for at least two types of reasons.

---

1 This opinion should not be understood as suggesting that the office of county supervisor is compatible with service on a school board or a city council.

First, the legislature has indicated it is willing to suspend applications of the doctrine which are perceived to create hardship. See 1979 Session, 68th G.A., ch. 83, § 3. See also § 278.8(2), The Code 1979, overruling 1976 Op.Att'yGen. 89.

Second, certain applications of the incompatibility doctrine, including the present one, approach infringing upon interests of institutional dimension: the interest of a person in seeking public office, see, e.g., Lubin v. Danish, 415 U.S. 709 (1974); Turner v. Fouche, 396 U.S. 346, 362-63 (1970), and the interest of constituents in having their choice of representation respected, see, e.g., Powell v. McCormack, 395 F.2d 577, 597-98 (D.C. Cir. 1968) rev'd on other grounds, 395 U.S. 486 (1969).

For the most part, a person would be likely to serve in both offices only in our smaller communities. In smaller communities, the voters would ordinarily be aware that a candidate was serving in another office and, in any case, an opposing candidate would be free to make an issue of the potential dual office holding so that the voters would be making an informed choice.

For all of these reasons, we now conclude that the positions of city councilman and school board member are not incompatible. The opinion to the contrary issued December 29, 1978, is hereby overruled.

Sincerely,

Mark E. Schantz

Mark E. Schantz
Solicitor General

MES:ab

PREARRANGED FUNERAL PLANS: Section 523A.1, The Code 1979. Chapter 523A would apply to the sale of personal property to be used under a prearranged funeral plan if the personal property is not immediately required. A prearranged funeral plan is any agreement which provides for the purchase of funeral merchandise or a funeral service or both. "Immediately required" as specified in § 523A.1 means when needed because of death of the person for whom the property was purchased. (Graf to Schwengels, State Senator, 1/22/81) #81-1-6(L)

January 22, 1981

Honorable Forrest V. Schwengels
State Senator - 44th District
State Capitol
Des Moines, Iowa 50319

Dear Senator Schwengels:

You have asked three questions about Chapter 523A, 1979 Code of Iowa in order to clarify terms used therein and to determine whether Chapter 523A applies to sales made by cemeteries. Your three questions are:

1. Are there situations in which Chapter 523A would apply to sales made by cemeteries?

2. What is a "prearranged funeral plan" as specified in 523A.1?

3. Under what circumstances would the delivery of personal property be "immediately required" as specified in 523A.1?

The answer to your first question is that Chapter 523A does apply to some sales made by cemeteries. The types of sales covered will be discussed in the answers to your second and third questions. Section 523A.1, The Code 1979 states:

> Whenever an agreement is made by any person, firm or corporation for the final disposition of a dead human body wherein delivery of personal property to be used under a prearranged funeral plan or the furnishing of professional services of a funeral director or embalmer in connection therewith, is not immediately required, eighty percent of all payments made under the agreement, including interest thereon, shall be and remain trust funds until occurrence of the death of the person for whose benefit the funds were paid, unless said funds are sooner released to the person making such payment by mutual consent of the parties.

Chapter 523A applies to the sale of personal property and not real property. Thus, the sale of cemetery lots does not fall within the purview of this chapter. Instead, the chapter applies to the sale of "personal property" which includes vaults, markers, vases, headstones and other items which are not real property or fixtures.

You asked us to define a "prearranged funeral plan" as specified in § 523A.1. A "prearranged funeral plan" is not merely another way of saying a prearranged funeral service or ceremony. A prearranged funeral service can be a part of a prearranged funeral plan. However, a prearranged funeral plan need not include a prearranged funeral service. The legislature recognized that arrangements for the services of a funeral director or embalmer need not be discussed in order to have a prearranged funeral plan. This is evident by the word "or" found in the phrase "prearranged funeral plan or the furnishing of professional services of a funeral director or embalmer...." (Emphasis added)

Clearly, some persons may decide that they do not desire a funeral ceremony and the help of a funeral director or embalmer. If these people, for example, purchase or make arrangements to purchase personal property from a cemetery prior to their deaths, they are making agreements for the final disposition of their bodies and eighty percent of all money paid for the personal property must be put in trust.

Our opinion that prearranged purchases of cemetery merchandise constitute prearranged funeral plans that fall within the scope of Chapter 523A is confirmed by an Iowa Supreme Court case and by a logical interpretation of the Legislature's intent in

enacting Chapter 523A. In the 1970 case of Cedar Memorial Park Cemetery Association v. Personnel Associates, Inc., 178 N.W.2d 343 at 345 (1970), the Iowa Supreme Court states that, "A pre-need funeral contract is simply an agreement made by one during his lifetime by which he arranges for disposition of his body after death." Further, the court stated that Chapter 523A is applicable when "...one enters into a contract to furnish property or services in the future... ." 178 N.W.2d 343 at 353, (1970). It seems obvious that the Iowa Supreme Court recognized that a prearranged funeral plan is any agreement which provides for the purchase of funeral merchandise or a funeral service or both. The words "funeral property or services" clinches our opinion that Chapter 523A would apply to an agreement to purchase funeral property alone. [Emphasis added]

We also note that Chapter 523A does not, on its face, distinguish between cemetery businesses and funeral homes. It thus appears that the legislature intended to protect consumers making certain types of purchases notwithstanding the characteristics of the seller.

We understand that cemetery owners feel that the eighty percent trust requirement is financially prohibitive. While we do not make factual findings in formal opinions, this office is on record supporting legislative changes which would ease the needlessly high requirement of eighty percent. This could be done by lowering the trust requirement from eighty percent to a lesser figure, and by exempting from trust requirements businesses who are able to demonstrate financial responsibility. When asked for a formal opinion, however, the responsibility of the Attorney General is to construe statutes. Whether Chapter 523A should be adjusted to lessen the requirements is a question that the legislature should address.

Finally, you ask us to discuss when the delivery of personal property is "not immediately required." Section 523A.1 says that eighty percent of all payments made for personal property to be used under a prearranged funeral plan must be placed in trust if the personal property is "not immediately required." In short, then, you are asking us to explain when a seller can deliver the personal property because it is "immediately required," thereby avoiding the eighty percent trusting requirement of § 523A.1.

"Immediately required" as contemplated by the Iowa Legislature means when needed because of the death of the person for whom the property was purchased. Again, this is the logical interpretation of this statute, because funeral property is not required until the time of death. Chapter 523A was originally enacted in 1954. At that time, prearranged funeral arrangements were generally made at the consumers' request but the activity of selling funeral property as part of a prearranged funeral plan was minimal compared to what we are experiencing in the industry today.

We recognize that our definition of "immediately required" is contrary to that of the majority opinion of the Kansas Supreme Court in the case of Lakeview Gardens, Inc. v. State of Kansas et al, 557 P.2d 1286 (1976). The Kansas statute discussed is similar to Iowa § 523A.1. Kan. Stat. Ann. § 16-301 provided:

> Any agreement, contract or plan requiring the payment of money in a lump sum or installments which is made or entered into with any person, association, partnership, firm or corporation for the final disposition of a dead human body, or for funeral or burial services, or for the furnishing of personal property or funeral or burial merchandise, wherein the delivery of the personal property or the funeral or burial merchandise or the furnishing of professional services by a funeral director or embalmer is not immediately required, is hereby declared to be against public policy and void, unless all money paid thereunder shall be deposited in a bank or trust company which is authorized to do business in this state and insured by a federal agency, all as herein provided, and subject to the terms of an agreement for the benefit of the purchaser of said agreement, contract or plan. . . .

In the Lakeview Gardens case, the court held that if the personal property is delivered at the request of the buyer either actually or constructively, then the personal property has been "immediately required." The court said that in such cases, the seller need not put any money in trust. Instead, the seller could, for example, tag a casket with the name of the buyer or buyer's name and store the casket for the buyer in the seller's warehouse. Since the buyer had purchased the casket, the buyer could, at any time, pick up the casket and store it or arrange to have it stored elsewhere. In summary, then, the majority opinion held that "immediately required" actually means "immediately desired."

To the contrary, we do not believe that the Iowa Legislature contemplated any consumer desire to take possession of personal property as part of a prearranged funeral plan prior to the time of death. Again, it has only been in recent years that the cemetery industry has been actively involved in selling preneed funeral merchandise, and questions regarding actual and constructive delivery of this merchandise have arisen. It is our opinion that the Legislature, by enacting Chapter 523A, intended that consumers would not take delivery of funeral merchandise until the death of the person for whom the merchandise was intended. Although with the advent of active preneed sales of funeral, personal property today the present requirements may not be best for consumers, such was the intent at the time of its passage.

Support for this view can be found in the explanation accompanying House File 378, later enacted into the present statute. The explanation states that the purpose of the bill is to "safeguard the public when prearranged funeral plans are made and money is paid in advance of the person's decease." Where evidence of the draftsman's intent has been clearly communicated to the legislature, we believe it is entitled to significant weight in statutory interpretation. See Sutherland, Statutory Construction, § 48.12, American Waterways Operators, Inc. v. United States, 386 F. Supp. 799, 804 (D.C. 1974).

In summary, Chapter 523A would apply to sales of personal property made by cemeteries if all the conditions in Section 523A.1, 1979 Code are met. Secondly, a prearranged funeral plan is an agreement made by one during his or her lifetime by which he/she arranges for the disposition of his or her body after death. This type of plan need not but may include a funeral service or ceremony. A funeral plan may be accomplished merely by making arrangements to purchase funeral personal property. Finally, "immediately required" as termed in § 523A.1 means "at the time of death." Thus, the seller of personal property to be used under a prearranged funeral plan or the seller of professional services of a funeral director or embalmer must put 80 percent of the money paid preneed in trust until the time of death of the person for whom the payments were made.

Sincerely,

Kathryn L. Graf

KATHRYN L. GRAF
Assistant Attorney General

KLG/mr

IOWA DEPARTMENT OF TRANSPORTATION: Enforcement Officers; §§324.76, 80.18, 321.477, The Code 1979. The law does not require DOT enforcement officers to be provided with handguns or side arms rather than shotguns. (Goodwin to Connors, 1/19/81) #81-1-3(L)

January 19, 1981

The Honorable John H. Connors
State Representative
Sixty-Eighth General Assembly
Statehouse
Des Moines, IA 50319

Dear Mr. Connors:

You have asked for an Attorney General Opinion on whether the law requires DOT enforcement employees to be provided with handguns or side arms rather than shotguns. You refer to Section 324.76 and Section 80.18 of the Code of Iowa.

Section 324.76 Code of Iowa provides in pertinent part as follows:

> Authority to enforce division III and sections 324.14 and 324.52, is given to the state department of transportation. Employees of the department of transportation designated enforcement employees shall have the power of peace officers in the performance of their duties; however, they shall not be considered members of the Iowa highway safety patrol. The department of transportation shall furnish enforcement employees with necessary equipment and supplies in the same manner as provided in section 80.18, including uniforms which are distinguishable in color and design from those of the Iowa highway safety patrol. Enforcement employees shall be furnished and shall conspicuously display badges of authority. (Emphasis Added)

The referenced division III is commonly known as the Interstate Fuel Use Tax Law. Division III consists of Sections 324.50 through 324.56 of the Code of Iowa. Section 324.14 pertains to the transport of motor fuel in bulk in an unregistered transport. Section 324.52 pertains to bringing motor fuel or special fuel into this state in fuel supply tanks of a commercial vehicle or any other container without paying a fuel tax.

Section 80.18 Code of Iowa provides in pertinent part as you indicated as follows:

> It shall be the duty of the commissioner of public safety to provide for the members of the department when on duty, suitable uniforms, subsistence, arms, equipment, quarters, and other necessary supplies, and also the expense and means of travel and boarding the members of the department. . . (Emphasis Added)

You should also be aware that Section 321.477 authorizes the DOT to designate certain of its employees as peace officers "to control and direct traffic and weigh vehicles, and to make arrests for violations of the motor vehicle laws relating to the operating authority, registration, size, weight, and load of motor vehicles and trailers and registration of a motor carrier's interstate transportation service with the department."

The code section you refer to (Section 324.76) only pertains to enforcement of the Interstate Fuel Use Tax Law. Section 321.477 pertains to the main portion of the DOT enforcement officer's duties. Section 321.477 is silent as to arming the officers with any type of weapon.

Section 324.76 Code of Iowa provides for the DOT supplying "necessary equipment and supplies in the same manner as provided in section 80.18." It is a matter of judgment or administrative discretion on the part of the DOT whether or not a DOT enforcement officer needs to be equipped or supplied with any weapon at all. Section 80.18 provides for providing "suitable arms." Again, it is a matter of judgment or administrative discretion on the part of the DOT as to what arms, if any, are "suitable."

Therefore, it is the opinion of the Attorney General's Office that the law does not require a DOT enforcement officer to be provided with a weapon or arms at all; and if a weapon or arms are provided to DOT enforcement officers, no specific type of weapon or arms is required by law.

Sincerely,

Robert W. Goodwin

ROBERT W. GOODWIN
Special Assistant Attorney General

AGING COMMISSION: Care Review Committees; § 135C.25, The Code, 1979; The Iowa Commission on Aging may appoint members of care review committees for health care facilities within thirty days of notification of a vacancy within a facility's committee. The care review committee is not a governing body and is not subject to the Iowa open meetings law. (Morgan to Bowles, Commission on the Aging, 1/19/81) #81-1-2(L)

Mr. Glenn R. Bowles
Executive Director
Commission on Aging
415 Tenth Street
Des Moines, IA 50309

January 19, 1981

L O C A L

Re: Letter Opinion on Care Review Committees

Dear Mr. Bowles:

Thank you for your letter of October 13, 1980 requesting an Attorney General's opinion on several matters regarding appointments to care review committees.

Health care facilities in Iowa are required to have a properly constituted and functioning care review committee in order to meet licensing standards of the Department of Health. Section 135C.25, The Code 1979, as amended by Laws of the 68th General Assembly, Ch. 1012, § 14, 1980 Session. The Health Department has promulgated rules regarding the function of care review committees. See, e.g., 470 I.A.C. §§ 57.24, 58.27, and 64.35. The Health Department evaluates and monitors the functioning of the committees on an annual basis as part of its licensing review. The purpose of the committee is to review the needs of individual residents regarding health care. The committees do not evaluate medical treatment or financial management of residents.

Chapter 1012, § 14 of the Laws of the Sixty-Eighth General Assembly amends the previous system for the appointment of care review committee members for all health care facilities in Iowa. Presently, the Iowa Commission on Aging is entitled to appoint members of care review committees within thirty days of being notified of a vacancy by a facility administrator. In the event that the Commission on Aging does not make an appointment to the care review committee within thirty days, the administrator is entitled to fill the vacancy.

With this background, we will attempt to answer the specific questions you raise.

1. The health care facility determines the number of people on each care review committee. Whether the committee is correctly constituted will be determined by the Health Department at the time of the licensing inspection survey. The facility is required to keep the Department of Health apprised of the names and addresses of committee members. In addition, the facility would also be able to advise your commission of the names of committee members.

2. If the administrator of a health care facility indicates that a vacancy exists even in a committee of fewer than five members, the Commission may make an appointment to the committee. The Commission cannot change the number of members constituting a committee or make appointments except when notified by the facility administrator that a vacancy exists.

3. We see nothing which would prevent the Commission from recruiting independent committee members if it can do so within thirty days of notification of a vacancy.

4. The Commission appears to have thirty days in which to make an appointment without the administrator's approval. It would seem to us most appropriate that all applicants or interested persons including those suggested by the health care facility administrator be considered by the Commission.

5. As we do not believe the care review committee to be a "govermental body" created by statute within the meaning of § 28A.1(a), The Code 1979, we do not believe that the committees are subject to the open meetings law. Op.Att'yGen. #79-5-4 (Schantz and Haskins to Hanson); Op.Att'yGen. #79-5-17 (Haskins to Thole). We base this assessment on the lack of policymaking or decision-making authority of the committees. A care review committee functions in an advisory capacity to the private facility under § 135C.25, The Code 1979, and in an advisory capacity to the Department of Health pursuant to § 135C.38, The Code 1979. The committees are required to keep patient information confidential under rules of the Health Department.

6. Once the names, addresses and telephone numbers of the care review committee members are provided to the Health Department, they are definitely public information. Anyone seeking to know members of the care review committee for any facility, could contact the Health Department to obtain that information. If a particular facility does not want to release the names of its care review committee members, the person inquiring should be referred to the Health Department for assistance.

We hope this will be of assistance to you. Please do not hesitate to contact us for further information.

Sincerely,

Candy Morgan (ad)

Candy Morgan
Assistant Attorney General

CM/tjb

COUNTIES AND COUNTY OFFICERS: Tax levy to fund solid waste disposal. § § 455B.80, 455B.81 and 384.12(13), The Code 1979. Tax authorized in § 455B.81 may be levied only upon taxable property in the county outside the incorporated limits of any city. (Peterson to Richter, Pottawattamie County Attorney, 2/26/81) #81-2-20(L)

Mr. David E. Richter
Pottawattamie County Attorney
Courthouse
Council Bluffs, Iowa 51501

February 26, 1981

Dear Mr. Richter:

You have requested the opinion of the Attorney General as follows:

> Section 455B.81 of the Iowa Code allows the Board of Supervisors to levy a tax not to exceed 6 3/4 cents per thousand dollars of assessed value of taxable property in the county outside the incorporated limits of any city for the purpose of planning a sanitary disposal project, or of paying the interest and principal of bonds issued pursuant to the provisions of Section 346.23 as they become due. Does this section of the Iowa Code prohibit the Board of Supervisors from levying a tax for the same purposes set out in this section upon the property within the incorporated limits of cities within the counties, or does this section merely establish the maximum levy that may be spread over all the taxable property within the county?

We are of the opinion that the tax authorized by § 455B.81 may be levied only upon taxable property in the county outside the incorporated limits of any city.

Legislation was enacted in 1970 requiring cities, towns and counties to provide sanitary disposal projects for the final disposition of solid wastes by their residents either separately or through cooperative efforts for the joint use of the participating public agencies. Acts of 63rd G.A., 1980 Session, Ch. 1191, effective May 11, 1970.

Section 7 of that Act required the development of plans for such projects by every city, town and county. Financing of this planning effort was separately provided for cities and counties in § § 8 and 9, which, in pertinent part, stated:

> Section 8. Financing of Sanitary Disposal Projects. The board of supervisors of any county may . . . annually levy a tax not to exceed one-fourth mill on all taxable property in the county outside the incorporated limits of any city or town for the purpose of planning a sanitary disposal project or of paying the interest and principal . . . (emphasis supplied)
>
> Section 9. City and Town Financing of Sanitary Disposal Projects. Chapter four hundred four (404), Code 1966, is amended by adding thereto the following new section: "The governing body of any city or town may cause to be levied a tax on all taxable property within its corporate limits . . . for the purpose of planning a sanitary disposal project . . . (emphasis supplied)

This statutory scheme of separately providing for funding the planning efforts of cities and counties with respect to solid waste disposal is preserved in present statutes corresponding to § § 7, 8 and 9 of Ch. 1191 (§ § 455B.80, 455B.81 and 384.12(13), The Code 1979, respectively).

The primary goal of the courts in construing a statute is to ascertain the intent of the legislature in its enactment and, if possible, give it effect. City of Des Moines v. Elliott, 276 N.W.2d 44 (Iowa 1978); Doe v. Ray, 251 N.W.2d 496 (Iowa 1977). See also Slutts v. Dana, 138 Iowa 244, 115 N.W. 1115 (1908) wherein the court, on rehearing, held that a statute which empowered the county board of supervisors to construct bridges and to levy a tax therefor on ". . . all taxable property in the county . . ." did not authorize imposition of the tax on property within the limits of cities of the first class, which cities were authorized by another statute to construct bridges and to levy a tax therefor. A statute clear and unambiguous on its face need not and cannot be interpreted by a court; only those statutes which are of a doubtful meaning are subject to the process of statutory construction. State v. Hocker, 201 N.W.2d 74 (Iowa 1972); Dingman v. Council Bluffs,

249 Iowa 1121, 90 N.W2d 742 (1958). Section 455B.81 clearly limits the tax levy authorized therein both as to the maximum rate (6 3/4 cents per thousand dollars assessed value) and as to the property to which it attaches (all taxable property in the county outside the incorporated limits of any city).

We conclude, therefore, that the tax authorized in § 455B.81 may be levied only upon taxable property in the county outside the incorporated limits of any city.

Sincerely,

Clifford E. Peterson

CLIFFORD E. PETERSON
Assistant Attorney General

CEP:dlt

COURTS, JURY TRIAL COSTS: Sections 606.15(3) and 625.8, The Code 1979. Proper charge for jury trial costs under §§ 606.15(3) and 625.8 is fifteen dollars. (Cleland to Sprinkle, Harrison County Magistrate, Magistrate, Harrison County, 2/17/81) #81-2-17(L)

February 17, 1981

Arlene Sprinkle
Magistrate
Harrison County
Logan, IA 51546

Dear Ms. Sprinkle:

You have requested an Attorney General's Opinion regarding the following question:

> What is the proper charge for jury trial costs under §§ 606.15(3) and 625.8, The Code 1979?

Court authorities should charge ten dollars pursuant to § 625.8, The Code 1979, and five dollars pursuant to § 606.15(3), The Code 1979, as costs for jury trials. Thus, the proper charge for jury trial costs is fifteen dollars.

Section 606.15(3) can be traced to §§ 2527 and 2531, The Code 1851. Sections 2527 and 2531 were part of chapter 136 ("Compensation of Officers"). In general, chapter 136 established compensation for certain officials based on fees for services rendered. However, with regard to the clerk of court, it is not clear whether the fees went to the clerk or to the county treasury. Section 2564, The Code 1851. Sections 2527 and 2531 were apparently repealed nine years later as part of the 1860 code revision. See Sections 4136, 4140, 4187, Revision of 1860. In any event, effective January 1, 1861, the salary for the clerk of court was abolished and the clerk was allowed to collect fees as compensation ($1.50 for jury trials). Section 430(1), Revision of 1860; See Boone County v. Wilson, 38 Iowa 372, 373 (1874).

It is unclear what year the change to the present system took place but by 1897 the law provided that these fees be paid into the county treasury. Section 296, The Code 1897.

Thus, the legislative history of § 606.15(3) indicates that the five dollar fee therein provided for is intended to reimburse the county for services that the clerk of court renders in jury trials and for which the county pays. See Sections 340.1, 340.2, 340A.6, 606.19, The Code 1979.

Section 625.8 can also be traced to chapter 136, The Code 1851. See Section 2545, The Code 1851. Section 2545 set fees for both grand and petit jurors. This provision was repealed under the Revision of 1860, but was reenacted in 1862. 1862 Session, 9th G.A., ch. 15, § 4. In 1874, this provision was amended to provide that the fee taxed as costs for a jury trial would be per diem to the jurors. 1874 Session, 15th G.A., ch. 32, § 1. This amendment, however, was repealed in 1876 and the original section restored. 1876 Session, 16th G.A., ch. 39, §§ 1, 2. It exists today in substantially the same form as restored in 1876. Thus, the legislative history of § 625.8 indicates that the ten dollar fee therein provided for is intended to reimburse the county for services that jurors render in jury trials and for which the county pays. See Section 607.5, The Code 1979.

It is our opinion, therefore, that both the five dollar fee provided for in § 606.15(3) and the ten dollar fee provided for in § 625.8 be taxed as costs in jury trials since each is intended to reimburse the county for separate and distinct services that are provided in jury trials and for which the county must pay.

Sincerely,

Richard L. Cleland
RICHARD L. CLELAND
Assistant Attorney General

RLC/cla

AGRICULTURE: Criminal Law. Recordation of Conveyances of Agricultural Real Property, § 558.44, The Code 1979. An action to enforce the provisions of § 558.44, The Code 1979 is a criminal prosecution. A violation of § 558.44 is a simple misdemeanor and represents only one criminal act regardless of the length of the violation. (Hamilton to Soldat, Kossuth County Attorney, 2/17/81) #81-2-16(L)

February 17, 1981

Mr. Mark S. Soldat
Kossuth County Attorney
714 East State Street
Algona, Iowa 50511

Dear Mr. Soldat:

You have requested an opinion of our office concerning the construction of the enforcement provisions of § 558.44, The Code 1979, which deals with the recordation of conveyances of agricultural land.

Your first question concerns whether or not a violation of § 558.44 constitutes a criminal act or a civil wrong. This question was the subject of a previous opinion of our office, Willits to Frisk, July 19, 1980, a copy of which is enclosed for your benefit. In that opinion we opined that a violation of § 558.44 is criminal in nature and not a civil wrong.

Your second question concerns what type of a crime a violation of § 558.44 is. Section 701.2, The Code 1979, makes an act that is prohibited by statute and punishable by a fine a public offense. Therefore, a violation of § 558.44 is a public offense. Section 701.7 requires that for an offense to be a felony, the statute must declare it to be so and if it doesn't the crime is a misdemeanor. Section 558.44 does not state that a violation is a felony therefore it is a misdemeanor. In addition, § 701.8 operates to make the violation a simple misdemeanor. Therefore, a violation of § 558.44 is a simple misdemeanor.

Your third question concerns whether a violation of § 558.44 that extends over a period of time, as most will, should be considered as one aggragated criminal act, or as a series of separate daily criminal acts. It is our opinion

that any violation of the act, regardless of the duration should be treated as one criminal act. The language of the statute supports this conclusion. The statute does however allow the fine to be increased depending on the duration of the violation. Of course, if more than one transaction is involved, then there may be the possibility of multiple offenses.

The fact that a violation of § 558.44 is a criminal act and not a civil matter makes your questions 4 through 7 moot and they are not addressed.

Sincerely,

NEIL D. HAMILTON
Assistant Attorney General

NDH/ny

Encl.

UNIFORM COMMERCIAL CODE: Transition Continuation Filing Statements: § 554.11105(5)(a), 1979 Code of Iowa. When a financial financing statement has been filed at the county level prior to January 31, 1975, on collateral consisting of equipment used in farming operations, or farm products, or accounts, contracts, rights, or general intangibles arising from or relating to the sale of farm products by a farmer, the transition continuation statement filed pursuant to § 554.11105(5)(a) must be filed within six months prior to the expiration of the five year period or its multiple, from the date of the original county filing as contemplated by § 554.9403(3). (Ormiston to Farrell, Office of Secretary of State, 2/17/81) #81-2-15(L)

February 17, 1981

Mr. Robert E. Farrell, Director
Uniform Commercial Code Division
Secretary of State
Hoover State Office Building
1300 East Walnut
Des Moines, IA 50319

Dear Mr. Farrell:

You have requested an official opinion of the Attorney General on the issue of the proper date on which to file a continuation statement under the transitional filings pursuant to § 554.11105(5)(a).

The issue that is the subject of this opinion arises in a circumstance when collateral consisting of equipment used in farming operations, or farm products, or accounts, contract rights, or general intangibles arising from or relating to the sale of farm products by a farmer in an instance when the original financing statement was filed at the county level prior to January 31, 1975.

The language of the statute states in pertinent part:

> a. Filings in the office of a county recorder which have not lapsed or been terminated prior to January 1, 1975, retain their effectiveness unless subsequently lapsed or terminated until January 1, 1980; however, on or after January 1, 1975, continuation statements are not to be filed in the office of a county recorder, and effectiveness can be continued only through the filing in the

> office of the secretary of state of a financing statement which complies with section 551.9402 or, if filed before January 1, 1980, with subsection 8; the effectiveness of such financing statements is to be continued through continuation statements which comply with section 554.9403, subsection 3; a prior county filing ordinarily may be continued in the office of the secretary of state only in the final six months of its effectiveness at the county level; however, if there were multiple filings in different counties with respect to the same secured transaction, the multiple filings may be consolidated into a single filing in the office of the secretary of state if any one of the multiple county filings is in the final six months of its effectiveness at the county level; ....

§ 554.11105(5)(a), The Code, 1979

The requirements of continuation statements are generally set forth at § 554.9403(3). It states, in part:

> Upon timely filing of the continuation statement, the effectiveness of the original statement is continued for five years after the last date to which the filing was effective whereupon it lapses in the same manner as provided in subsection 2 unless another continuation statement is filed prior to such lapse.

In that same section, the language asserts that a lapse of the financing statement may be avoided by a continuation statement:

> A continuation statement may be filed by the secured party within six months prior to the expiration of the five year period specified in subsection 2.

§ 554.9403(3), The Code, 1979

Subsection 2 of § 554.9403(3) explicity states that:

> ...a filed financing statement is effective for a period of five years from the date of

> filing. The effectiveness of a filed financing statement lapses on the expiration of the five year period unless a continuation statement is filed prior to the lapse.

The controlling date that applied prior to the transition filings was the date of filing with the county recorder. Although the filings are now made exclusively with the Secretary of State, there has been no provision for any date other than the date of the original county filing to be the effective date. It should further be noted that in cases where the original financing statement was filed at the county level, that date is inscribed on the state level continuation statement by the Office of the Secretary of State. Finally, the Office of the Secretary of State has prepared an enclosure to return on improper filings which sets forth the appropriate date of filing.

> A continuation, in order to be timely, must be filed within six months prior to the expiration of the five year period of effectiveness of the original financing statement. Upon timely filing of the continuation statement, the effectiveness of the original statement is continued for five years after the last date to which the filing was effective. When recontinuing a farm filing, use the original county date of filing in determining the final six month period of effectiveness.

In summation, the continuation statement for the transitional filings under § 554.11105(5)(a) must be filed within six months prior to the expiration of the five year period from the date of filing. The date of filing that is contemplated by § 554.9304 (3)(2) is the date of the county filing. Since no provision alters that statutory date, it remains the controlling date even though the filings are now made at a central location with the Secretary of State.

Sincerely yours,

Tam B. Ormiston

TAM B. ORMISTON
Assistant Attorney General

cf

MUNICIPALITIES: Residency Requirements -- §§ 400.6(1), 400.9 and 400.17, The Code 1979. Residency requirements cannot be imposed upon civil service employees, other than police and firefighters and critical employees. (Blumberg to Welsh, State Representative, 2/16/81) #81-2-14(L)

February 16, 1981

The Honorable Joe Welsh
State Representative
House of Representatives
State Capitol

LOCAL

Dear Representative Welsh:

We have your opinion request regarding a residency policy instituted by the City of Dubuque for its employees. Pursuant to the policy, as of September 1, 1980, certain listed employees shall live within the city limits, and all new employees, as of that date, must live within one and one-half miles of the city limits. Employees already hired as of August 30, 1980, do not have to comply. However, the policy provides that in order to receive a promotion an employee must comply with the residency requirement. There is a further exception for employees of the airport and solid waste collection agency. They can live within one and one-half miles of their work sites. You ask whether such a policy is legal.

The City of Dubuque exceeds 15,000 population. Therefore, § 400.6(1), The Code 1979, provides that the majority of its employees must be under civil service. Section 400.17 provides, in pertinent part, for civil service employees:

> Employees shall not be required to be a resident of the city in which they are employed, but they shall become a resident of the state at the time such appointment or employment begins and shall remain a resident of the state during employment. Cities may set reasonable

> maximum distances outside of the corporate limits of the city that policemen, firemen and other critical municipal employees may live.

Under § 400.17, only police, fire, and other critical civil servants can be required to abide by a reasonable residency requirement as a condition of employment.

The policy in question applies to persons hired after August 30, 1980, and to then existing employees who thereafter seek a promotion. The policy is plainly invalid with respect to persons hired after August 30, 1980, in civil service positions.

An argument might be made that § 400.17 is applicable only at the initial hiring stage and that a residency requirement is permissible as a condition of promotion. Upon examination, however, that construction must be rejected.

First, the precise wording of § 400.17 indicates the suggested distinction should be rejected. When referring to the requirement that a civil servant be a resident of the state, the statute distinguishes between becoming and remaining a state resident. With respect to city residence, however, the statute provides flatly that "employees shall not be required to be a resident of the city," terms that suggest they are applicable to all periods of the employment relationship.

Second, we see no reason, and none has been suggested, why the legislature would believe city residency was irrelevant to initial hiring but relevant to promotion. We will not lightly attribute to the legislature a position of questionable rationality.

Finally, we note that although a vacancy in a civil service position generally must be filled by promotion from within, under certain circumstances such a vacancy can be filled by an original entrance examination. See, § 400.9(3). It would doubtless be a source of irritation if one person in a position were subjected to city residency requirement and another in the same position not for no relevant reason. Again, we cannot lightly assume the legislature intended such a result. For all these reasons, we conclude that § 400.17 precludes application of a city residence requirement to civil servants seeking promotion.

In Dubuque, the following employees are not covered by civil service, pursuant to § 400.6(1):

> a. City clerk, deputy city clerk, city solicitor, assistant solicitor, assessor, treasurer, auditor, civil engineer, health physician, chief of police, assistant chief of police in departments numbering more than two hundred fifty members, market master, city manager and administrative assistants to the manager.
>
> b. Laborers whose occupation requires no special skill or fitness.
>
> c. Election officials.
>
> d. Secretary to the mayor or to any commissioner.
>
> e. Commissioners of any kind.
>
> f. Casual employees.

None of these employees would be subject to the statutory prohibition of a city residency requirement for civil servants. Moreover, we have held that a residency requirement which bears a rational relationship to a valid local government purpose is constitutional. Op.Att'yGen. #79-5-28.

However, were a city to impose a residency requirement upon non-civil servants, but not upon civil servants, a serious constitutional question would arise. Unless there were rational grounds for the classification, the non-civil servants would be denied equal protection of the laws. State v. Kyle, 271 N.W.2d 689, 692 (Iowa 1978). Because we assume that the city will wish to reconsider the entire residency policy, however, we need not decide a constitutional question which may well prove to be merely hypothetical. Similarly, it may prove unnecessary to address any equal protection issues that may arise from the special provisions of the policy relating to employees of the airport and the solid waste collection agency.

In summary, residency requirements cannot be imposed upon civil service employees, other than police, firefighters and other critical employees. Imposition of a residency requirement only upon non-civil service employees would raise a significant constitutional question which we need not now decide.

Sincerely,

Larry Blumberg

Larry Blumberg
Assistant Attorney General

LB

OPEN MEETINGS: The Iowa Civil Rights Commission. Sections 28A.1, 28A.2(2), The Code 1981. The Iowa Civil Rights Commission conducts a meeting within the meaning of § 28A.2(2) when a majority of its members gathers at the Iowa State Penitentiary to obtain information on the civil rights concerns of inmates. (Stork to Reis, Executive Director, Iowa Civil Rights Commission, 2/16/81) #81-2-13(L)

February 16, 1981

Artis Reis
Executive Director
Iowa Civil Rights Commission
L O C A L

Dear Ms. Reis:

You have requested an opinion on the following matter:

> The Iowa Civil Rights Commission plans to meet with a group of inmates at the Iowa State Penitentiary. The purpose of this venture is to provide the Commission with an opportunity to listen to the civil rights concerns of the inmates. Does this constitute a meeting under § 28A.2, The Code 1981?

Section 28A.2(2) provides:

> "Meeting" means a gathering in person or by electronic means, formal or informal, of a majority of the members of a governmental body where there is deliberation or action upon any matter within the scope of the governmental body's policy-making duties. Meetings shall not include a gathering of members of a governmental body for purely ministerial or social purposes when there is no discussion of policy or no intent to avoid the purposes of this chapter.

In construing or applying this statute, we must take note of the legislative intent expressed in § 28A.1 that "[a]mbiguity in the construction or application of this chapter should be resolved in favor of openness. Telegraph Herald, Inc. v. City of Dubuque, 297 N.W.2d 529, 532 (Iowa 1980).

The Legislature's definition of "meeting" is confined to the first sentence of § 28A.2(2). Id. Four essential elements are apparent in this sentence. First, there must be "a gathering", which has broad application due to the fact that it may be formal as well as informal and may be by electronic means (e.g. telephone) as well as in person. Second, the gathering must involve a "majority of the members" of the governmental body. Third, the majority of members must gather for the purpose of "deliberation or action". Fourth, such deliberation or action must concern a matter that is "within the scope of the governmental body's policy-making duties".

Assuming that a majority of the Commission gathers at the penitentiary, the first two elements necessary for a meeting are satisfied. You indicate that the purpose of such a gathering is to obtain information on the civil rights concerns of inmates. Accordingly, the gathering clearly falls within the scope of the Commission's policy-making duties under § 601A.5, which generally include the investigation and study of the existence, causes, and extent of discrimination in public institutions. The question of whether the Commission's visit to the penitentiary is a meeting under Chapter 28A therefore hinges on the issue of whether the visit involves "deliberation or action". Neither term is defined in Chapter 28A.

An earlier opinion of this office discussed the meaning of the term "deliberation":

> The term "deliberation" is defined by Webster as "a discussion and consideration by a group of persons of the reasons for and against a measure." In Accardi v. Mayor & Council of City of No. Wildwood, 386 A.2d 416 (N.J. 1976), the New Jersey Court, when called upon to determine the meaning of the term "deliberations" in that state's sunshine law, explained that it "includes the discussion and evaluation" of the facts giving rise to a body's decision. We also note here, that § 28A.1 announces an assurance to the public that the "basis and rationale of governmental decisions" will be subject to public examination . . . [Accordingly], the term "deliberation" includes the discussion and evaluative processes of such bodies in arriving at an eventual decision or policy. In contrast to the exempted "ministerial" duties of a body, the types of duties thus covered by these terms are those involving an exercise of discretion or judgment as to the propriety of an act performed by the body.

Op. Atty. Gen. #79-5-14. The term "action" is defined by Webster as "the bringing about of an alteration by force or through a natural agency" and, in connection with its synonym "deed" has a shared meaning of "something done or effected."

These definitions indicate that the terms "deliberation" and "action" are intended both to have broad application and to include general discussion and/or consideration of matters preliminary to final decision-making. Provisions in Chapter 28A support this observation. Section 28A.2(2) does not require, as a condition for a "meeting", that deliberation or action by a governmental body on a matter within its policy-making duties be either formal or final in any respect. Section 28A.1, however, does declare that the Chapter seeks to assure "that the basis and rationale of governmental decisions, as well as those decisions themselves" are easily accessible to the public. (emphasis added). Moreover, ambiguity in the construction or application of the Chapter is to be resolved in favor of openness. Id.

Pursuant to the expressions of legislative intent contained in Chapter 28A and the definitions of "deliberation" and "action", we conclude that a governmental body charged with a statutory duty of conducting investigations deliberates or acts on a matter within its policy-making duties when a majority of its members meets to obtain information from individuals participating in the investigation. Accordingly, the Iowa Civil Rights Commission conducts a meeting within the meaning of § 28A.2(2) when a majority of its members gathers at the Iowa State Penitentiary to obtain information on the civil rights concerns of inmates.

Very truly yours,

Frank J. Stork

FRANK J. STORK
Assistant Attorney General

FJS:sh

OPEN MEETINGS: The Iowa Civil Rights Commission. Sections 28A.1, 28A.2(2), The Code 1981. The Iowa Civil Rights Commission conducts a meeting within the meaning of § 28A.2(2) when a majority of its members gathers at the Iowa State Penitentiary to obtain information on the civil rights concerns of inmates. (Stork to Reis, Executive Director, Iowa Civil Rights Commission, 2/16/81) #81-2-13(L)

February 16, 1981

Artis Reis
Executive Director
Iowa Civil Rights Commission
L O C A L

Dear Ms. Reis:

You have requested an opinion on the following matter:

> The Iowa Civil Rights Commission plans to meet with a group of inmates at the Iowa State Penitentiary. The purpose of this venture is to provide the Commission with an opportunity to listen to the civil rights concerns of the inmates. Does this constitute a meeting under § 28A.2, The Code 1981?

Section 28A.2(2) provides:

> "Meeting" means a gathering in person or by electronic means, formal or informal, of a majority of the members of a governmental body where there is deliberation or action upon any matter within the scope of the governmental body's policy-making duties. Meetings shall not include a gathering of members of a governmental body for purely ministerial or social purposes when there is no discussion of policy or no intent to avoid the purposes of this chapter.

In construing or applying this statute, we must take note of the legislative intent expressed in § 28A.1 that "[a]mbiguity in the construction or application of this chapter should be resolved in favor of openness. Telegraph Herald, Inc. v. City of Dubuque, 297 N.W.2d 529, 532 (Iowa 1980).

The Legislature's definition of "meeting" is confined to the first sentence of § 28A.2(2). Id. Four essential elements are apparent in this sentence. First, there must be "a gathering", which has broad application due to the fact that it may be formal as well as informal and may be by electronic means (e.g. telephone) as well as in person. Second, the gathering must involve a "majority of the members" of the governmental body. Third, the majority of members must gather for the purpose of "deliberation or action". Fourth, such deliberation or action must concern a matter that is "within the scope of the governmental body's policy-making duties".

Assuming that a majority of the Commission gathers at the penitentiary, the first two elements necessary for a meeting are satisfied. You indicate that the purpose of such a gathering is to obtain information on the civil rights concerns of inmates. Accordingly, the gathering clearly falls within the scope of the Commission's policy-making duties under § 601A.5, which generally include the investigation and study of the existence, causes, and extent of discrimination in public institutions. The question of whether the Commission's visit to the penitentiary is a meeting under Chapter 28A therefore hinges on the issue of whether the visit involves "deliberation or action". Neither term is defined in Chapter 28A.

An earlier opinion of this office discussed the meaning of the term "deliberation":

> The term "deliberation" is defined by Webster as "a discussion and consideration by a group of persons of the reasons for and against a measure." In Accardi v. Mayor & Council of City of No. Wildwood, 386 A.2d 416 (N.J. 1976), the New Jersey Court, when called upon to determine the meaning of the term "deliberations" in that state's sunshine law, explained that it "includes the discussion and evaluation" of the facts giving rise to a body's decision. We also note here, that § 28A.1 announces an assurance to the public that the "basis and rationale of governmental decisions" will be subject to public examination . . . [Accordingly], the term "deliberation" includes the discussion and evaluative processes of such bodies in arriving at an eventual decision or policy. In contrast to the exempted "ministerial" duties of a body, the types of duties thus covered by these terms are those involving an exercise of discretion or judgment as to the propriety of an act performed by the body.

Op. Atty. Gen. #79-5-14. The term "action" is defined by Webster as "the bringing about of an alteration by force or through a natural agency" and, in connection with its synonym "deed" has a shared meaning of "something done or effected."

These definitions indicate that the terms "deliberation" and "action" are intended both to have broad application and to include general discussion and/or consideration of matters preliminary to final decision-making. Provisions in Chapter 28A support this observation. Section 28A.2(2) does not require, as a condition for a "meeting", that deliberation or action by a governmental body on a matter within its policy-making duties be either formal or final in any respect. Section 28A.1, however, does declare that the Chapter seeks to assure "that the basis and rationale of governmental decisions, as well as those decisions themselves" are easily accessible to the public. (emphasis added). Moreover, ambiguity in the construction or application of the Chapter is to be resolved in favor of openness. Id.

Pursuant to the expressions of legislative intent contained in Chapter 28A and the definitions of "deliberation" and "action", we conclude that a governmental body charged with a statutory duty of conducting investigations deliberates or acts on a matter within its policy-making duties when a majority of its members meets to obtain information from individuals participating in the investigation. Accordingly, the Iowa Civil Rights Commission conducts a meeting within the meaning of § 28A.2(2) when a majority of its members gathers at the Iowa State Penitentiary to obtain information on the civil rights concerns of inmates.

Very truly yours,

Frank J. Stork

FRANK J. STORK
Assistant Attorney General

FJS:sh

MUNICIPALITIES: COMPATIBILITY: JUDICIAL MAGISTRATES. § 602.53(2). A part-time magistrate may serve as city attorney if the position does not involve criminal prosecution. (Schantz to Schaefer, 2/11/81) #81-2-12(L)

Magistrate Donavon D. Schaefer
231 West Maple
Cherokee, Iowa

Dear Magistrate Schaefer:

We have your opinion request of October 10, 1980, in which you ask:

> I would appreciate an Opinion from your office regarding the propriety of a part-time Judicial Magistrate also serving as City Attorney for communities within his or her County.
>
> Other than the obvious conflict involving possible criminal charges tried in Magistrate Court, are there any conflicts that would preclude my serving as City Attorney.

This office has previously issued an opinion concerning a magistrate also acting as city attorney. On the assumption that the person would appear as city attorney in Magistrate's Court on criminal matters, it was held that the two positions were incompatible. 1978 Op.Att'yGen. 10. Your question as we understand it is whether the same result would obtain if the duties of the city attorney position did not include any criminal prosecution.

The statutes establishing the magistrate system plainly contemplate that some part-time magistrates will engage in

private practice of law and that they may appear as counsel of record in litigation pending in that district. Section 602.53(2) provides:

> If a judicial magistrate appears as counsel for a client in a matter that is within the jurisdiction of a magistrate, that matter shall be heard only by a district judge, a district associate judge, or a judicial magistrate appointed pursuant to § 602.51. A disqualification under this section shall be had upon motion of the judicial magistrate or of any party, either orally or in writing, and the clerk shall be advised to reassign the matter to a proper judicial officer.

It appears that the legislature foresaw the problem in question and provided its solution. It would follow that the common law compatibility doctrine should not provide a rigid obstacle to the practice in question. A city attorney could have a sufficient volume of litigation before the courts that a practical problem would emerge. It appears, however, that such a problem should be handled administratively by the Chief Judge of the district court rather than by a barrier to service of a magistrate as city attorney.

Sincerely,

Mark E. Schantz
Solicitor General

MES:ab

MUNICIPALITIES: COMPATIBILITY: JUDICIAL MAGISTRATES. § 602.53(2). A part-time magistrate may serve as city attorney if the position does not involve criminal prosecution. (Schantz to Nolte, Judicial Magistrate, 2/11/81) #81-2-11(L)

The Honorable William W. Nolte
Judicial Magistrate
Post Office Box 121
Dumont, Iowa 50625

Dear Magistrate Nolte:

We have your opinion request of September 9, 1980, in which you ask:

> I would like to know what your opinion is on a magistrate acting as a city attorney in matters which do not involve trials in the magistrate's own court. Obviously, there is a conflict of interest for a magistrate to represent a city on criminal matters which would come before the Magistrate Court. However, I was wondering if it is acceptable for a magistrate to be a city attorney in matters such as making up statutes, representation in civil cases, etc., and wanted an opinion from you in relation to same.

This office has previously issued an opinion concerning a magistrate also acting as city attorney. On the assumption that the person would appear as city attorney in Magistrate's Court on criminal matters, it was held that the two positions were incompatible. 1978 Op.Att'yGen. 10. Your question as we understand it is whether the same result would obtain if the duties of the city attorney position did not include any criminal prosecution.

The statutes establishing the magistrate system plainly contemplate that some part-time magistrates will engage in

private practice of law and that they may appear as counsel of record in litigation pending in that district. Section 602.53(2) provides:

> If a judicial magistrate appears as counsel for a client in a matter that is within the jurisdiction of a magistrate, that matter shall be heard only by a district judge, a district associate judge, or a judicial magistrate appointed pursuant to § 602.51. A disqualification under this section shall be had upon motion of the judicial magistrate or of any party, either orally or in writing, and the clerk shall be advised to reassign the matter to a proper judicial officer.

It appears that the legislature foresaw the problem in question and provided its solution. It would follow that the common law compatibility doctrine should not provide a rigid obstacle to the practice in question. A city attorney could have a sufficient volume of litigation before the courts that a practical problem would emerge. It appears, however, that such a problem should be handled administratively by the Chief Judge of the district court rather than by a barrier to service of a magistrate as a city attorney.

You also requested our interpretation of House File 668 concerning the awarding of reasonable attorneys' fees in certain small claims cases. We have had a number of opinion requests from Judicial Magistrates. Some of these, including this question of yours, involve questions that are likely to be raised by parties in the context of an adversary proceeding. For us to issue opinions on such questions raises concerns about this office invading the prerogatives of the judicial branch. For that reason, after consultation with the Chief Justice, we have adopted a policy of asking magistrates to route such questions through the Chief Judge of their district for screening. The court is then informed about the pending question and we have some assurance that our response will not be perceived as usurpation.

Sincerely,

Mark E. Schantz

Mark E. Schantz
Solicitor General

MES:ab

COUNTIES AND COUNTY OFFICERS. Sections 111A.6, 13718, 137.20, 333.2, 333.4, 333.5, 349.18 and 358B.10, The Code 1979. When the board of supervisors denies payment of a bill for which authorization prior to issuance by the auditor is required, the auditor has no authority to issue a warrant, even though the claim is for a legitimate purpose and within budget appropriations. Unless some other Code provision authorizes an auditor to issue warrants without prior supervisor approval, an elected official whose claim was denied must seek a judicial remedy to the denial by the board of payment. (Hagen to Davis, Scott County Attorney, 2/11/81) #81-2-10(L)

Mr. William E. Davis
Scott County Attorney
416 West Fourth Street
Davenport, Iowa 52801

Dear Mr. Davis:

We have received your request for an opinion from our office concerning the responsibilities of the county auditor when issuing warrants pursuant to § 333.2, The Code 1979:

> Except as otherwise provided, the auditor shall not sign or issue any county warrant, unless the board of supervisors by recorded vote or resolution shall have authorized the same, and every such warrant shall be numbered and the date, amount, and the number of the same, and the name of the person to whom issued, shall be entered in a book to be kept in his office for that purpose. [Emphasis added.]

The duties of the county auditor as set out in § 333.2, The Code 1979, require that the board of supervisors authorize warrants before they are issued by the auditor, unless some other Code provision provides an exception. For example, §§ 333.3 and 333.4, The Code 1979, list several bills incurred by the county for which the auditor may issue warrants prior to "audit" or approval by the board of supervisors, including expenses for district court, fixed county expenses such as water, light and telephone charges, and salaries and payrolls.

Other county boards may have autonomous functions, and may be authorized by the Code to order the county auditor to issue warrants on their behalf. For example, the county conservation board certifies to the board of supervisors a tax levy, which when collected, is "paid into a separate and distinct fund to be known as the county conservation fund, to be paid out upon the warrants drawn by the county auditor upon requisition of the county conservation board for the payment of expenses incurred in carrying out the powers and duties of said conservation board." Section 111A.6, The Code 1979. While the board of supervisors have certain fiscal responsibilities concerning the county conservation fund, there is no requirement, that the supervisors approve or authorize warrants to be drawn upon the order of the county conservation board, prior to the time the auditor issues such warrants. Thus, warrants drawn upon the county conservation fund may be issued by the county auditor upon the order of the county conservation board, as an exception to § 333.2, The Code 1979.

Similar exceptions to the requirement of prior board of supervisor approval may be found elsewhere in the Code. The county board of health is empowered to draw upon the local health fund, which may include appropriations from the general fund of the county pursuant to § 137.20, The Code 1979.

> All moneys received by a county or district for local health purposes from federal appropriations, from local taxation, from licenses, from fees for personal services, or from gifts, grants, bequests, or other sources shall be deposited in the local health fund. Expenditures shall be made from the fund on order of the local board for the purpose of carrying out its duties.

Section 137.18, The Code 1979. The board of library trustees for the county library receives tax levies for library maintenance purposes and may draw upon the fund on its own order, pursuant to § 358B.10, The Code, 1979, which provides in part:

> All moneys received and set apart for the maintenance of such library shall be deposited in the treasury of such county to the credit of the library fund, and shall be kept by the treasurer separate and apart from all other moneys, and paid out upon the orders of the board of trustees, signed by its president and secretary.

These various county funds may be deemed to be in the control of the certifying boards or entities empowered by Code provisions to draw upon them. The county board of supervisors is vested with certain fiscal responsibilities which include approval of warrants issued by the county auditor. Thus, any warrant issued by the auditor, as an exception to the requirement of § 333.2, The Code 1979, that the board of supervisors authorize its issuance, must be passed on at a later time by the supervisors, pursuant to § 333.5, The Code 1979:

> Audit by board. All bills paid under the provisions of sections 333.2 to 333.4 shall be passed upon by the board of supervisors at the first meeting following such payment and shall be entered on the minutes as other claims allowed by the board. [Emphasis supplied.]

The approval of the issuance of these warrants by the board of supervisors is a purely ministerial act to keep the supervisors informed of proceedings in each fund. There is no discretion vested in the board of supervisors to allow or disallow a claim. The bill has been submitted and the warrant issued, so that the board of supervisors merely approves the issuance of the warrant and enters it "on the minutes as other claims allowed by the board". When these bills are allowed and entered on the minutes of the board's proceedings, they become subject to the publication requirement of § 349.18, The Code 1979:

> All proceedings of each regular, adjourned, or special meeting of boards of supervisors, including the schedule of bills allowed, shall be published immediately after the adjournment of such meeting of said boards, and the publication of the schedule of the bills allowed shall show the name of each individual to whom the allowance is made and for what such bill is filed and the amount allowed thereon, except that names

> of persons receiving relief from the county poor fund shall not be published. The county auditor shall furnish a copy of such proceedings to be published, within one week following the adjournment of the board. [Emphasis supplied.]

When the board of supervisors denies payment of a bill for which authorization prior to issuance by the auditor is required, the auditor has no authority to issue a warrant, even though the claim is for a legitimate purpose and within budget appropriations. See 1980 Op. Atty. Gen. #80-4-2. (A county board of supervisors cannot refuse to allow payment of a specific claim arising within the approved budget of an elected county officeholder's office, as long as the expenditure is for a legitimate purpose and within budget limits.) Unless some other Code provision authorizes an auditor to issue warrants without prior supervisor approval, an elected official whose claim was denied must seek a judicial remedy to the denial by the board of payment; the auditor may not issue a warrant even upon the firm belief that board approval has been wrongfully withheld.

I hope this information is helpful to you.

Very truly yours,

Howard O. Hagen
Assistant Attorney General

HOH/kap

COUNTIES AND COUNTY OFFICERS: BID LETTING. Article III, § 39A, Constitution of Iowa; Sections 23.2, 332.3(6), and 332.7, The Code 1979. The Board of Supervisors is not required to follow the advertisement and bidletting procedures set forth in § 332.7, The Code 1979, when contracting for services of an architect in connection with a project to construct or repair a county building. (Hagen to Polking, Carroll County Attorney, 2/11/81) #81-2-9(L)

Mr. William G. Polking
Carroll County Attorney
Carroll, Iowa 51401

Dear Mr. Polking:

We have received your request for an opinion from this office concerning the authority of a county board of supervisors to contract with an architect or architectural firm for professional services, without going through the bidding procedures specified in § 332.7, The Code 1979.

The county board of supervisors, as the governing body of the county, is empowered to "represent its county and have the care and management of the property and business" of the county, pursuant to § 332.3(6), The Code 1979. With the adoption of the county home rule amendment to the Iowa Constitution in 1978, Iowa Constitution, Art. III, § 39A, counties need no longer seek specific statutory authority to empower the conduct of its business. So long as the power exercised is not one of taxation, and is not inconsistent with any statutory provision, county home rule brings the power within the purview of the county board of supervisors's authority. See 1979 Op.Atty.Gen. 79-4-7.

When a county undertakes to construct or repair a county building at a cost exceeding $5,000.00, the contract may be entered pursuant to § 332.7, The Code 1979, "only after bid proposals for the construction or repair have been invited by advertisement once each week for three consecutive weeks in all of the official newspapers of the county in which the work is to be done and under express written contract." After receiving bids, "[e]ach contract for the repair or contruction

of a county building shall be awarded to the lowest responsible bidder." [Emphasis supplied]. You have questioned whether a contract for the services of an architect in connection with any construction or repair project must also be entered only after advertisement and bidding procedures pursuant to § 332.7, The Code 1979.

In our opinion, advertisement and bid-letting is not required before the county enters a contract with an architect or architectural firm, even when the estimated payment for architectural services far exceeds $5,000.00. Several reasons for this conclusion can be found in statutory provisions and in the nature of the contract to be entered. First, § 332.7(1), The Code 1979, requires that "[t]he detailed plans and specifications" for "constructing or repairing a court [sic] building", which can be produced only after architectural consultation, "shall be on file and open to public inspection in the office of the auditor of the county in which the work is to be done before advertisement for bids." Clearly any contract for architectural services must be entered long before the contract for the actual construction or repairs is let for bids. See also § 23.2, The Code 1979. The bid-letting procedure would have to be construed twice, if the separate architect's contract was required to be bid under the procedure outlined in § 332.7, and the county would be required to accept the "lowest responsible bidder" for architectural services contract. Since many architects undertake a project on a percentage of cost of project fee basis, it may be difficult to determine who in fact is the lowest bidder. Further, many considerations other than lowest monetary bid enter into a decision to engage the professional services of an architect, and it is doubtful that the term "responsible" was intended to encompass factors including design proposals, professional reputation and aesthetic preferences. The language of § 332.7, The Code 1979, simply does not appear to contemplate that architect's services will be bid.

Finally, it is our understanding that the usual practice when engaging an architect involves a modified "bid-letting" procedure, wherein advertisement concerning the general nature of a project is distributed to architectural firms through the American Institute of Architects, and presentations by prospective architects may be received and considered prior to the final selection of a project architect.

In conclusion, it is our opinion that the county board of supervisors is not required to follow the advertisement and bid-letting procedures set forth in § 332.7, The Code 1979, when contracting for the services of an architect in connection with a project to construct or repair a county building. We hope

this information is helpful to you.

Very truly yours,

HOWARD O. HAGEN
Assistant Attorney General

HOH/ny

COURTS: COURT OF APPEALS JUDGES: SOLEMNIZATION OF MARRIAGES. § 595.10, The Code 1979. A judge of the Court of Appeals may solemnize a marriage. (Bennett to Johnson, State Representative, 2/9/81) #81-2-8(L)

February 9, 1981

The Honorable Robert M.L. Johnson
State Representative
State Capitol

LOCAL

Dear Representative Johnson:

We are in receipt of your recent request for an opinion on the question of whether a Court of Appeals judge may perform a marriage ceremony. We conclude that they may.

Chapter 595, The Code 1979, lists those persons who may solemnize marriages in this state. Specifically, it states that marriages must be solemnized by:

1. A judge of the Supreme or District Court, including a district associate judge, or a judicial magistrate.

2. Some minister of the gospel, ordained and licensed according to the usages of his denomination.

Section 595.10, The Code 1979.

Section 595.10 does not specifically include a reference to a judge of the Court of Appeals. However, we believe it is plain that the legislature has expressed an intent to include all persons functioning in a judicial capacity. A provision similar to § 595.10 has existed in the Code since the Code of 1851, and has been amended to include new categories of judicial functionaries such as the "district associate judge" and the "judicial magistrate."

Second, we note that were we to adopt a construction of the statute that excluded judges of the Court of Appeals a serious constitutional question would be raised. In Redmond v. Carter, 247 N.W.2d 268, 274, the Supreme Court of Iowa held Art. V, § 18 of the Iowa Constitution unconstitutional as a denial of equal protection of the laws under the United States Constitution insofar as it would have prevented a district court judge from being eligible for appointment to the Court of Appeals bench. Similar issues would be raised by a restrictive construction here. It is a well-accepted principle of statutory construction that statutes should be construed to avoid doubts concerning their constitutionality. Iowa Nat. Indus. Loan Co. v. Iowa State Dpt. of Revenue, 224 N.W.2d 436, 442 (Iowa 1974).

Although we are confident this is the better interpretation, it might reassure some if the legislature were to amend § 595.10 expressly to provide that Court of Appeals judges are among those who may solemnize a marriage.

Sincerely,

Barbara Bennett (ab)

Barbara Bennett
Assistant Attorney General

MOTOR VEHICLES: Railroads; Schools; §§ 321.343, 321.252, The Code 1979. Section 321.343 requires a school bus driver to stop, look and listen before crossing any railroad track at a highway grade crossing, even if it appears that the track is not used by rail traffic, unless a police officer or a traffic signal, such as the EXEMPT sign, directs or allows vehicles to proceed. (Mull to Benton, State Superintendent of Public Instruction, 2/6/81) #81-2-6(L)

Mr. Robert D. Benton, Ed.D.
State Superintendent of Public Instruction
Department of Public Instruction
Grimes State Office Building
Des Moines, Iowa 50319

Dear Mr. Benton:

You have requested an opinion of the Attorney General on the following questions:

1. Must a school bus driver stop the school bus as outlined in Section 321.343, The Code, if the railroad is abandoned or unused, but the railroad warning sign and crossbuck sign remain in place?

2. Must a school bus driver stop the school bus as outlined in Section 321.343, The Code, if the tracks remain in place, but the railroad warning sign and crossbuck sign have been removed?

3. Must a school bus driver stop the school bus as outlined in Section 321.343, The Code, if the tracks and railroad warning sign and crossbuck sign remain in place, but the EXEMPT sign is utilized?

In our opinion, the answer to your first two questions is "yes" and the answer to your third question is "no." These answers are based on our opinion that under §321.343 a school bus driver must stop, look and listen before crossing any railroad track at a highway grade crossing, unless a police officer or a traffic signal directs vehicles to proceed, even if it appears that the rail is not utilized by railroad traffic.

Section 321.343, The Code 1979, provides in relevent part as follows:

> The driver of any motor vehicle carrying passengers for hire, or of any school bus or of any vehicle carrying explosive substances or flammable liquids or other hazardous materials . . . before crossing at grade any track of a railroad, shall stop such vehicle within fifty feet but not less than ten feet from the nearest rail of such railroad and while so stopped shall listen and look in both directions along such track for any approaching train, and for signals indicating the approach of a train, except as hereinafter provided, and shall not proceed until he can do so safely.
>
> No stop need be made at any such crossing where a police officer or traffic-control signal directs traffic to proceed.

Section 321.343 is a "law of the road" provision that imposes a greater duty of care on drivers of certain vehicles than required of other drivers. It requires certain drivers to stop, look and listen at railroad crossings. Chicago, B & Q. R. Co. v. Ruan Transp. Corp., 171 F.2d 781, 788 (8th Cir.), cert. denied, 336 U.S. 953 (1949).

A respectable argument can be made that the statute does not contemplate stops at unused tracks because obviously it would be safe to proceed across. This statute, however, must be construed in light of the language used and the purpose of the legislation. State v. One Certain Conveyance, 1971 Honda 350, 211 N.W.2d 297, 299 (Iowa 1973). The language of the statute does not provide for such an exception.

It is the presence of a railroad track under 321.343 that requires a stop and not the posting of a railroad crossbuck or advance warning sign. A railroad track is in itself a warning of danger. It is always considered train time at a railroad crossing and it should be expected that a train may pass at any time. Chicago, B & Q. R. Co. v. Ruan Transp. Corp., 171 F.2d at 785. The duty of a motorist regarding stopping, looking and listening is not changed by the regular or irregular passing of a train. Kinghorn v. Pennsylvania R. Co., 47 F.2d 588, 592 (2nd Cir. 1931).

Section 321.343 was construed in Chicago, B & Q. R. Co., v. Ruan Transp. Corp., 171 F.2d at 788. The court held that a driver of a gasoline transport truck was guilty of contributory negligence for violating §321.343 by colliding with a train at a railroad crossing. The court stated that:

> . . . This statute must be read to mean that the driver of one of the vehicles described shall stop within the distances specified where by looking he can see and by listening he can hear. The command is that the driver shall not proceed until he knows that to proceed is safe. Nothing less than the undivided attention of the driver to looking and listening is compliance with the statute. . . . He had no right to assume what he could not know.

171 F. 2d at 788.

A statute comparable to § 321.343 was considered in Long v. Chicago & N.W. Ry. Co., 256 Wis. 131, 40 N.W. 2d 548, 552 (1949). The court held that noncompliance with the statute is not excused because the road is icy. The court reasoned that:

> On the part of the plaintiff on the oral argument and in the brief there was an attempt to excuse the plaintiff's failure to stop as required by the statute, on the ground the road was icy. To excuse the plaintiff from performing his statutory duty under the circumstances of this case would amount to nothing less than an amendment of the statute. The statute makes no exceptions. A truck driver is required under the statute to come to a full stop, not to stop at his discretion.

40 N.W. 2d at 522. Accord, Miller v. Chicago R.I. & P. Ry. Co., 40 N.W. 2d 324 (S.D. 1949) (failure to stop held not excused by concern for safety of following vehicles).

One solution to the problem of abandoned railroad crossings is provided for in the last paragraph of § 321.343. It provides that "[n]o stop need be made at any such crossing where a police officer or a traffic-control signal directs traffic to proceed." The Iowa Department of Transportation pursuant to § 321.252 and 820 I.A.C. [06,K] § 2.1 has adopted the 1978 National Manual on Uniform Traffic Control Devices for Streets and Highways as the Iowa Manual on Uniform Traffic Control Devices for Strees and Highways [hereinafter cited as Iowa Manual]. A traffice signal contemplated by the Iowa Manual in such situations is the "exempt" crossing sign.

Section 8B-6, Part VIII Traffic Control Systems for Railroad-Highway Grade Crossing of the Iowa Manual provides as follows:

> When authorized by law or regulation a supplemental sign (R15-3) bearing the word EXEMPT may be used below the Crossbuck and

> Track signs at the crossing, and supplemental sign (W10-1a) may be used below the Railroad Advance Warning sign. These supplemental signs are to inform drivers of vehicles carrying passengers for hire, school buses carrying children, or vehicles carrying flammable or hazardous materials that a stop is not required at certain designated grad crossings, except when a train, locomotive, or other railroad equipment is approaching or occupying the crossing or the driver's view of the sign is blocked.

Thus, a visible "exempt" crossing sign eliminates the need for a stop unless a train is approaching.

In summary, it is our opinion that a school bus driver is required under § 321.343 to stop, look and listen before crossing any railroad track at a highway grade crossing, even if it appears tha the track is not used by rail traffic, except when a police officer or a traffic signal, such as the EXEMPT sign, directs or allows vehicles to proceed.

Sincerely,

/s/ Richard E. Mull

RICHARD E. MULL
Assistant Attorney General

STATE OFFICERS AND DEPARTMENTS, Department of Health, Emergency Medical Technicians, Categorization of Advanced Emergency Medical Technicians Pursuant to Rules Adopted by the Board of Medical Examiners. Sections 147A.1, 147A.4, 147A.6, 147A.8, The Code 1981. The Iowa Board of Medical Examiners possesses the statutory authority to adopt rules and regulations providing for the establishment of categories of advanced emergency medical care technicians (EMTs). Pursuant to this statutory authority, the Board may provide by rule for a category designated as EMT-D, allowing for the training of a basic EMT to perform the advanced technique of cardiac defibrillation. (Freeman to Pawlewski, Commissioner of Public Health) 2/5/81 ~~#80-2-15~~ #81-2-3(L)

Norman L. Pawlewski
Commissioner of Public Health
Iowa State Department of Health
Lucas State Office Building
Des Moines, Iowa 50319

Dear Commissioner Pawlewski:

You have sought an opinion from our office regarding a proposal made by the Emergency Medical Services Learning Resources Center, University of Iowa Hospitals and Clinics, involving the training of basic emergency medical technicians (EMTs) in cardiac defibrillation procedures. Pursuant to this proposal, basic EMTs trained to perform cardiac defibrillation procedures would be designated EMT-Ds, a specialized category of advanced emergency medical technicians. Technicians certified as advanced EMT-Ds would be allowed to perform this, and only this, particular advanced procedure in addition to those basic procedures for which they received certification as basic EMTs. Your specific question is whether this proposal, and any future proposals similar to it, might be implemented by modifying the rules and regulations adopted pursuant to authority granted under Chapter 147A or whether the law itself must be amended to provide for such a proposal. An answer to your question requires an examination of the law, especially Chapter 147A, in relation to basic principles of administrative law and procedure.

It is a well-recognized principle of administrative law that agencies may do only that which the law allows them to do. "Administrative bodies have only such power as is specifically conferred or is to be necessarily implied from the statute creating them." Quaker Oats Co. v. Cedar Rapids Human Rights Commission, 268 N.W. 2d 862, 868 (Iowa 1978). Administrative agencies exercise purely statutory powers and, thus, warrant for the exercise of any claimed authority must be found within the appropriate governing statute. Id. Chapter 147A governs advanced emergency medical care, including paramedics.

Another principle of administrative law that must be kept in mind concerns an agency's authority to adopt rules and regulations. Section 147A.4 mandates that the Department of Health and the Board of Medical Examiners promulgate rules pertaining to the operation of ambulance services and rescue squad services and to the certification of advanced EMTs and paramedics. While an agency may have the authority and/or the responsibility to adopt rules and regulations, such rules and regulations, to be valid, must not be inconsistent with either statutory language or legislative intent. Temple v. Vermeer Manufacturing Co., 285 N.W.2d 157, 159 (Iowa 1979). Consequently, a rule providing for a specialized category of advanced EMTs, whereby basic EMTs would be trained to perform one or more advanced techniques, is proper only if it is within the scope or intent of Chapter 147A. A reviewing court will find that a particular rule was within the agency's power to adopt if a rational agency could conclude that the rule was within its delegated authority. Davenport Community School District v. Iowa Civil Rights Commission, 277 N.W. 2d 907, 910 (Iowa 1979).

To answer your particular question, an examination of Chapter 147A definitions is essential. Advanced emergency medical care is defined to include the following medical procedures:

a. Administration of intravenous solutions.
b. Gastric or tracheal suction intubation.
c. Performance of cardiac defibrillation.
d. Administration of parenteral injections of any of the following classes of drugs:
(1) Antiarrhythmic agents;
(2) Vagolytic agents;
(3) Chronotropic agents;
(4) Analgesic agents;
(5) Alkalizing agents;
(6) Vasopressor agents;
(7) Anticonvulsive agents; or
(8) Other drugs which may be deemed necessary by the supervising physician.
e. Any other medical procedure designated by the board, by rule, as appropriate to be performed by advanced EMTs and paramedics who have been trained in the procedure.

§147A.1, The Code (1981). This definition is important because it shows, when read in relation to other definitions, what an advanced EMT may do and what a basic EMT may not do; it also shows, through subsection e, a legislative intent to place discretion in the hands of the Board of Medical Examiners for determining what procedures may be used by trained advanced EMTs and paramedics. As noted briefly above, Chapter 147A has delegated responsibility to the Board, with the advice and assistance of the Advanced Emergency Medical Care Council, for promulgating rules for the certification of advanced EMTs and paramedics. §147A.4(2), The Code.

A basic EMT is defined as follows:

> "Basic EMT" means an individual who has satisfactorily completed the United States department of transportation's prescribed course for basic EMTs, as modified for this state, and adopted by rule by the board, and has complied with any additional requirements established by the board, but who is not certified to perform any of the procedures listed in subsection 1.

§147A.1(3) [Emphasis added]. An advanced EMT is defined as follows:

> "Advanced EMT" means an individual trained to provide advanced emergency medical care, and who has been issued an advanced EMT certificate by the board.

§147A.1(4) [Emphasis added]. A definition is, likewise, given for a paramedic.

> "Paramedic" means an individual trained in all areas of advanced emergency medical care, and who has been issued a paramedic certificate by the board.

§147A.1(5) [Emphasis added]. The underlined portions provide an understanding of legislative intent in relation to your particular question.

A basic EMT is clearly a person who cannot perform any of the advanced procedures defined by the Code or by rules adopted by the Board of Medical Examiners. On the other hand, a paramedic is clearly a person trained in all areas of advanced emergency medical care. In defining an advanced EMT, the legislature chose not to use the same language as it used to define a paramedic; rather, it determined that an advanced EMT is one trained to provide emergency medical care. That definition, unlike the one for paramedics, does not require that an advanced EMT be trained in all areas of advanced emergency medical care.

In ascertaining legislative intent, a statute must be read as a whole and each provision of a statute must be read in relation to all of its other provisions. See City of Des Moines, v. Elliott, 267 N.W. 2d 44, 45 (Iowa 1978). These three above definitions, when read in relation to each other, strongly indicate that the legislature intended an advanced EMT to be a person trained in one or some areas of advanced care, beyond the basic EMT level but not reaching the paramedic level.

Other provisions of Chapter 147A support this conclusion. Section 147A.6(1) provides that the Board of Medical Examiners shall issue certificates to advanced EMTs and paramedics "attesting to the qualifications of any individual who has met all of the requirements for a specific EMT category which are established by the rules promulgated under §147A.4(2)." Providing for categorization adds strong force to the argument that an advanced EMT need not be trained in all areas of advanced emergency care. Furthermore, §147A.8(1) states

that a properly certified advanced EMT or paramedic possesses authority to "[r]ender advanced emergency medical care, rescue, and resuscitation services in those areas for which he or she is certified as defined and approved in accordance with the rules of the board." Again, certification of an advanced EMT to perform only certain advanced functions clearly appears to be intended by the legislature.

Sections 147A.6(1) and 147A.8(1) above, when read in conjunction with 147A.1 (1)(e) and 147A.4(2), further show the intent of the legislature to place authority in the hands of the Board of Medical Examiners to adopt rules and regulations concerning the certification of advanced EMTs in whatever categories are deemed appropriate by the Board. The Board, it should be recalled, promulgates such rules with the advice of the Emergency Medical Care Council. §147A.4(2), The Code.

As a result of the above analysis, it is the opinion of our office that the establishment of an advanced EMT-D category allowing a basic EMT to be trained in the advanced technique of cardiac defibrillation may be done by the Board of Medical Examiners, with the advice of the Emergency Medical Care Council, pursuant to properly promulgated rules. An EMT-D, by virtue of his or her limited certification, would be authorized to practice only one advanced emergency care technique - cardiac defibrillation - unless the Board at a later time broadens the training and certification scope of the EMT-D category. In relation to this latter point, it might be mentioned that §147A.8(2) does not give all advanced EMTs the authority to administer parenteral medications; rather such practice may be performed only by properly certified advanced EMTs and paramedics. §147A.8, The Code.

Similar future proposals might also be adopted pursuant to rule so long as such proposals do not exceed the definitional or rule-making scope of Chapter 147A. Of course, the propriety of future proposals would necessarily have to be examined after these proposals were formalized; our office renders no firm statement of opinion on future proposals beyond the general statement noted above.

Sincerely,

Jeanine Freeman

JEANINE FREEMAN
Assistant Attorney General

JF:djc

REAL PROPERTY/Subdivision Platting/Special Assessment § § 409., 409.9, 384.61, The Code 1979. A tract of land in a city which is subject to a special assessment lien cannot be subdivided into three or more parts until the special assessment is paid. (Ovrom to Kopecky, Linn County Attorney, 2/4/81) #81-2-2(L)

February 4, 1981

Mr. Eugene Kopecky
Linn County Attorney
Linn County Courthouse
Cedar Rapids, Iowa 52401

Dear Mr. Kopecky:

This is in response to your request for an opinion concerning subdivision of land which is subject to a special assessment lien for public improvements. You point out that the subdivision platting law, Chapter 409, Code of Iowa, 1979, seems to prohibit subdivision of land which is encumbered with a special assessment lien, while a provision in the city finance law, § 384.61, seems to authorize it. It is our opinion that land which is subject to special assessment lien cannot be subdivided into three or more parts until the special assessment is paid.

Chapter 409 requires proprietors of urban tracts which are subdivided into three or more parts to file a plat of the subdivision prior to the sale of any lots. Section 409.1, The Code 1979. Section 409.9 requires that the plat be accompanied by an opinion from an attorney that the land platted is "free from encumbrance," a certificate from the county treasurer that it is "free from taxes," and certificates from the clerk of court and the county recorder that it is free from liens and encumbrances as shown by the records on file in their offices. A special assessment for public improvements becomes a lien on the property from the time the plat and assessment schedule are filed with the county auditor. § 384.65(5). The existence of a special assessment lien would preclude the lots from being free from encumbrance as required under § 409.9, which would mean that the plat could not be recorded and the land could not be subdivided.

Section 384.61 states:

> If an owner of property subject to special assessment divides the property into two or more lots, and if the plan of division is approved by the council, he may discharge the lien upon any of the lots by payment of the amount unpaid, calculated as determined by the council.

You ask if the board of supervisors or city council could spread a special assessment among lots established by a subdivision plat, and if the county recorder could accept a subdivision plat which showed the lots subject to special assessment lien. We think that Chapter 409 prohibits these actions. If the legislature had intended to create an exception to § 409.9 for special assessments it would have done so expressly in Chapter 409, as it did in § 409.48 (provision that filing a subdivision plat will not raise the assessed value of the tract for taxation not applicable to special assessments).

The two Code provisions are concerned with different matters. Section 384.61 is in the portion of the Code dealing with city financing of public improvements. It allows the owner of a tract which is subject to special assessment lien to divide the tract and apportion the lien between the lots created which would otherwise be on the entire property. Chapter 409, on the other hand, contains the comprehensive requirements for subdivision and platting of land into three or more parts. One of its major purposes is to ensure that the lots sold by the proprietor are free and clear of all encumbrances. It seems very unlikely that the legislature would have intended to create an exception to the comprehensive subdivision platting law contained in Chapter 409 by a provision in the city financing statute. The effect of this construction is that § 384.61 would be operative only where a city tract is divided into two lots, since subdivision into three or more lots is subject to the provisions of Chapter 409.

It is therefore our opinion that the city council can apportion a special assessment when a lot is divided into two parts, and the owner can remove the lien from one of the lots by payment of the special assessment thereon under § 384.61. However, when a city lot is divided into three or more parts, Chapter 409 requires that the owner pay off the entire special assessment so that the land will be free of encumbrance prior to sale of any lots. Therefore the city

council could not apportion the special assessment on a tract which is divided into three or more parts. The same would be true for a board of supervisors when it considers a rural subdivision. A county recorder cannot accept a subdivision plat which shows the land subject to special assessment because Chapter 409 requires that a plat be accompanied by an attorney's opinion that the land is free of encumbrance which would include a special assessment lien. Accord, Marshal's Iowa Title Opinions, Section 14.1(H-1) (Second Ed. 1978).

Sincerely,

Eliza Ovrom

ELIZA OVROM
Assistant Attorney General
Environmental Protection Division

EO:rcp

MOTOR VEHICLES -- Maximum mechanical operation -- Section 321.225, The Code 1979. City buses are considered commercial vehicles for hire under Section 321.225. Consequently, city bus operators are subject to the maximum operation requirements set out in Section 321.225. (Miller to Rush, State Senator, 2/4/81) #81-2-1(L)

February 4, 1981

Dear Senator Rush:

We have received your request for an attorney general's opinion on whether Section 321.225, The Code 1979, is applicable to city bus operators.

The key question is whether a city bus should be considered a "commercial vehicle for hire" under Section 321.225.[1] Chapter 321, The Code 1979, does not define a commercial vehicle. However, Subsection 321.1(1), The Code 1979, does define vehicle, in that:

> 'Vehicle' means every device in, upon, or by which any person or property is or may be transported or drawn upon a highway.
> 'Vehicle' does not include:
> a. Any device moved by human power
> b. Any device used exclusively upon stationary rails or tracks.
> c. Any steering axle, dolly, or other integral part of another vehicle, except an auxiliary axle as defined in subsection 69, which in and of itself is incapable of commercially transporting any person or property but is used primarily to support another vehicle.

---

[1] Section 321.225 Maximum mechanical operation. No person shall operate a commercial vehicle for hire for more than a period of twelve hours out of any period of twenty-four hours upon the highways of this state without being relieved from duty for ten consecutive hours and where a driver puts in twelve hours of driving out of any period of twenty-four hours, though not consecutive he must be given at least eight hours off duty.

> d. Any integral part of a truck tractor or road tractor which is mounted on the frame of the truck tractor or road tractor immediately behind the cab and which may be used to transport persons and property but which cannot be drawn upon the highway by the truck tractor or another motor vehicle.

Unless a particular city bus would fall within one of the enumerated exclusions, it would be considered a vehicle for purposes of Chapter 321.

Next it must be determined what is encompassed by the term "commercial." Commercial, which is derived from and pertains to commerce, has no established definition. Often it becomes a matter of judicial interpretation or legislative intent in determining the particular scope of the term. It has been stated that:

> [Commerce] is given different meanings under varying circumstances in the interpretation of certain statutes and doctrines. It has been stretched out of all proportion in some instances and contracted in others. In the main, it should be declared to mean that which the legislature had in mind by its use in the particular statute under consideration.

Colorado Contractors Ass'n v. Public U. Com'n., 262 P.2d 266, 269 (Col. 1953).

Generally, commerce has taken on a broad meaning under both federal and state interpretation. This has included various phases of transportation. The United States Supreme Court in Gloucester Ferry Co. v. Pennsylvania, 114 U.S. 196, 29 L.Ed. 158, 5 S.Ct. 826 (1885), stated that "commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and property . . . as well as the purchase, sale and exchange of commodities." In Edwards v. California, 314 U.S. 160, 86 L.Ed 119, 62 S.Ct. 164 (1941), the Court ruled that "it is settled beyond question that the transportation of persons is 'commerce' within the meaning of [Article 1, §8 of the Constitution]."

The Iowa Supreme Court has also taken an expansive interpretation of the term "commerce" which has included the transportation of passengers. In State v. Western Transp. Co., 241 Iowa 896, 43 N.W.2d 739 (1950), the Court ruled that, "'transportation' and 'commerce' are not necessarily

interchangeable. Commerce is the broader term. It means intercourse and is not limited to transportation which is a part of commerce. Commerce includes phases of intercourse other than transportation." This was followed by Bruce Motor Freight v. Lauterbach, 247 Iowa 956, 77 N.W.2d 613 (1956), where it was stated that "transportation covers passengers and personal property." It is well established that vehicles transporting passengers or property would be considered commercial in nature.

As previously stated, however, the actual definition of commerce for purposes of a particular statute can be specifically defined by the governing body. See, Colorado Contractors Ass'n v. Public U Com'n., 262 P.2d at 269. For instance, a governing body could reasonably include or exclude specific types of property for commercial zoning purposes. The same principle would apply if the governing body established special parking zones for commercial vehicles and then proceeded to reasonably define the type of vehicles to be classified as commercial.

The Iowa legislature could have done this by defining precisely what it meant by a commercial vehicle for purposes of Section 321.225. It chose not to, however, and consequently the general interpretation of commercial must be applied. That would include the transportation of passengers or property by city buses falling under the definition of "vehicle" set out in Subsection 321.1(1).

Unless subsequently excluded by statute, the operators of city buses are subject to the maximum operation requirements of Section 321.225.

Sincerely,

James D. Miller

James D. Miller
Assistant Attorney General

MUNICIPALITIES: Utility Boards--§§ 613A.7 and 613A.8, Chapter 388, The Code 1981. A utility board established pursuant to Chapter 388 is an independent or autonomous board of a city. (Blumberg to Poncy, State Representative, LOCAL, 3/31/81)
#81-3-20 "L"

The Honorable Charles N. Poncy
State Representative
L O C A L

Dear Representative Poncy:

We have your opinion request of February 14, 1981. You set forth a situation regarding the legal relationship between a municipality and a municipal board--in this case a board of trustees for the municipal waterworks. It is alleged that employees of the waterworks damaged city streets because of their negligence. The question is whether the insurance carrier for the waterworks board is responsible to reimburse the city for the damage. At issue is the legal relationship between the board and the city.

It should be noted first that the provisions of the insurance policy may control the question of whether the city can recover under the policy. We cannot, therefore, determine whether the insurance company is responsible for the damages.

Chapter 388, The Code 1981, provides for city utilities. A utility board established thereunder may exercise all powers of a city except the certification of taxes, passage of city legislation, and the issuance of bonds. Such a board may be a party to a legal action. The title to all property of the utility must be in the name of the City, although the board has general acquisition, lease, disposal, and management powers with regard to the property. The board shall make annual reports to the city council, and cause minutes of its meetings to be published.

The utility board shall control city tax revenues allocated to the utility and all monies derived from the operation of the utility. All monies for the utility must be held in a separate fund or account.

Generally, a municipal department, when discharging a duty primarily resting on the city, acts as an agent or instrumentality of the city, even though the department may have full power and authority in the matter. 62 C.J.S. Municipal Corporations, § 550 (1949); 3 E. McQuillen, The Law of Municipal Corporations § 12.40 (3rd Ed. 1973). It is also stated therein at § 12.47 that a legislative act creating a board, such as a park board in certain cities, and vesting that board with full power in that particular area is held not be be a new, distinct municipality, but rather an instrument in aid of the municipality. In § 12.48, it is stated:

> Sometimes the water department is a distinct corporate entity, with power to contract, sue and be sued, created and established by the state.
>
> However, the management of waterworks to supply the inhabitants of the local community with water is usually regarded by the courts as a purely local or municipal function, and, therefore, the commissioner or board in control of such service is ordinarily created by the municipal authorities by appointment by the mayor or the governing legislative body, or elected by the qualified electors. Consequently, the water department generally is a mere agency or department of the municipal government, is not a separate corporation, and hence, all its acts, and contracts made by its board or commissioners are the acts and contracts of the municipality.

McQuillen further states, in Volume 18, § 53.71:

> Whether a board, or similar body, provided for by statute or charter, is or is not an agent of the municipality so as to make the latter liable for the torts of the board is a question on which the courts are not in agreement. And various tests have been suggested for determining when an agency relationship exists. Much depends on the wording of the statute, charter or ordinance under which a board is appointed, as fixing the extent of the control, if

> any, of the municipality over the board.
>
> Furthermore, the nature of the duties performed by the board, i.e., whether governmental or corporate, often has been referred to as controlling although it would seem that in this relation the nature of the duties is an entirely separate matter. For example, if a board of water commissioners is not the agent of a municipality because the latter has no control over the board, it would seem, on principle, to be immaterial that the board was engaged in a corporate duty, but the courts have often appeared to take a different view and held the municipality for the negligence of such a board. Thus, in New York, it has been held that, in order to determine whether there is municipal responsibility for the acts of a board, "the inquiry must be whether the department whose misfeasance or nonfeasance is complained of is a part of the machinery for carrying on the municipal government, and whether it was at the time engaged in the discharge of a duty, or charged with a duty primarily resting upon the municipality." However, the legislature may provide for the appointment of sewer, water and street commissioners, make them a body corporate, and provide that all actions for their wrongful conduct shall be brought against them and that no such action shall be brought against the municipality in its corporate name.
>
> Municipalities have been held liable for the torts of such boards as the board of public works, board of water commissioners, board of park commissioners, unless entirely beyond municipal control; sewer commissioners; housing authorities, chambers of commerce, and other like bodies.

It was held in Scott v. Village of Saratoga Spings, 199 N.Y. 178, 92 N.E. 393 (1910), that as a general rule, a city department, in discharging a duty primarily resting upon the city, acts as an agent of the city although the department may have full power and authority in that matter. See also,

St. Germain v. City of Fall River, 177 Mass 550, 59 N.E. 447 (1901) (water board); Rhobidas v. City of Concord, 70 N.H. 90, 47A.82 (1900) (water board); Hourigan v. City of Norwich, 77 Conn. 358, 59A.487 (1904) (water board); State v. Kohnke, 109 La. 838, 33 So. 793 (1903) (water board); State v. Servant, 143 La. 175, 78 So. 437 (1918) (water board); Esberg-Gunst Cigar Co. v. City of Portland, 34 Ore. 282, 55 P. 961 (1896) (water board); City of Seattle v. Dutton, 147 Wash. 224, 265 P. 729 (1928) (park board).

In Fine v. Mayor & Council of Willmington, 47 Del. 539, 94 A.2d 393 (1953), the local water board was established pursuant to State statute. The board members were appointed by the Mayor. It had exclusive rights to employ servants and to make regulations. Its real estate was in the name of the city, and its bills were subject to audit. The surplus revenues were paid over to the city. Based upon these facts, the board was determined to be an agency of the city. The fact that its activities were, for the most part, free of city control, was of no consequence. The defense of the city that it could not be sued for the negligence of the water board was not accepted by the Court. In Jackson v. Hubbard, 256 Ala. 114, 53 So.2d 723 (1951), it was held that because the supplying of water to a city is a municipal function, the water board is, in that sense, an agency of the city.

It has been held that the power of a board to sue or be sued is an essential element in determing whether the municipal board is an autonomous entity. North Miami Beach Water Board v. Gollin, 171 So.2d 584 (Fla. App. 1965). There, the Court found an absence of such authority and declared the Water Board to be a department of the municipality. Section 388.4 provides that a utility board "may be a party to legal action." Although the phrase is different than "sue or be sued" we do not believe that a distinction was intended.

The Supreme Court of Iowa has approached this issue. In Orvis v. Board of Park Com'rs, 88 Iowa 674, 56 N.W. 294 (1893), the issue was whether the issuance of bonds by a park board affected the debt limit of the city. Although this was the issue framed by the parties, the real issue, in fact, was whether the park board was a separate entity from the city. If the board was a separate entity, the debts incurred by issuance of the bonds would not affect the debt limitation of the city. If the board was part of or an agent of the city, the bonds would exceed the city's debt limit. The act whereby the park board was established, provided that the city electors shall elect the commissioners.

The board could certify to the county auditor the percent of taxes necessary for its purposes. It could acquire property by donation, purchase or condemnation. There was specific authority for it to make contracts and sue and be sued, in addition to the authority to issue bonds. In short, the board, by statute, was invested with full control of the city parks. With that statute before it, the Court found that the board was a part of the city, and its issuance of bonds affected the city's debt limit.

In Mitchell v. City of St. Paul, 228 Minn. 64, 36 N.W.2d 132 (1949), the city, through its home rule charter, established a water board. Said charter provided that the board was a department of the city, subject to the charter. The city had the power to fix rates, regulate the distribution of water, and, in general, exercise general control over the board. The Court held (36 N.W.2d at 136):

> We think that there is such identity between the city and the board that, except as otherwise provided, a statute applicable to the city applies to the board. Because of the relationship of the board to the city, there is such identity between them that the board's powers and functions are exercised in subordination to those of, and are governed by law applicable to, the city. This is settled by our decision in Board of Water Com'rs v. Roselawn Cemetery, 138 Minn. 458, 165 N.W. 279, where the question was whether the board's right to exercise the power of eminent domain was under the statutes as an "incorporated place" or under the city charter as a department of the city. We held that it was the latter, and said, 138 Minn. 461, 165 N.W. 280:
>
> "* * * and the board of water commissioners is not an entity separate and independent of the city, but a mere agency or department of the city provided for and governed by the city charter; and its authority to exercise the power of eminent domain rests upon such charter and must be exercised thereunder. In Morton v. Power, 33 Minn. 521, 24 N.W. 194, supra, which arose

> under Sp.L. 1881, c. 188, § 5, before the enactment of Sp.L. 1885, c. 110, § 34, we said, 33 Minn. 523, 24 N.W. 195:
>
> "* * * The contracts which the board is thus authorized to make, though made in the name of the board, are made by it as the representative and agent of the city, and therefore, they are, in substance and effect made with as well as for the city."

See also, Grobbel v. Board of Water Com'rs, 181 Mich. 364, 149 N.W. 675 (1914); Mayor & Alderman of City of Savannah v. Harvey, 87 Ga. App. 122, 73 So.2d 260 (1952).

Finally, City of Spencer v. Hawkeye Security Insurance Co., 216 N.W.2d 406 (Iowa 1974), is a case more factually relevant, at least in some respects. There, two employees of the municipal utility were alleged to be negligent in causing injury to an employee of the city street department (plaintiff). The plaintiff sued the two utility employees and the utility. The utility was dismissed out on a special appearance. It then settled with the plaintiff on behalf of the employees, and demanded that the insurance company pay the settlement. When the company refused, the city filed this action. Hawkeye alleged that all three employees were employees of the city and that the policy excluded coverage for injury to fellow employees.

The Court found the following with respect to the utility: the authority to hire employees and grant them civil service status; the utility's revenues were deposited with the city treasurer, but were kept separate from other funds and were under the sole control of the utility; the defendant employees were paid out of utility funds; the utility had its own employee's identification number and filed its own tax returns; it had its own workers' compensation coverage, and had its own liability insurance policy pursuant to § 613A.7. With respect to the plaintiff, it was determined that: he was hired by the city; he was paid out of city funds; the city had its own employer's identification number and filed its own tax returns; the city had its own workers' compensation and liability insurance program.

The court found that the relationship of the defendant employees to the utility satisfied all the tests for determining an employer-employee relationship but the relationship of the plaintiff to the utility satisfied none of them. It was held that the utility and the city comprised two separate, distinct

employing units. Thus the plaintiff was not a fellow employee of the utility employees.

Section 613A.7 provides, in pertinent part:

> Any independent or autonomous board or commission in the municipality having authority to disburse funds for a particular municipal function without approval of the governing body may similarly procure liability insurance within the field of its operation.

Section 613A.8 has a similar provision:

> Any independent or autonomous board or commission of a municipality having authority to disburse funds for a particular municipal function without approval of the governing body shall similarly defend, save harmless and indemnify its officers and employees against such tort claims or demands.

The second issue in the Spencer case was whether the utility had authority to defend and save harmless its employees. The real issue was the autonomy the utility board had. The Court's discussion of this issue is set forth (216 N.W.2d at 410-411):

> Specifically, Hawkeye argues because Utilities had no statutory power to sue or be sued, it was not an "independent or autonomous board or commission" within the language of § 613A.8, citing several of our decisions, none of which defines the above clause or presents facts analogous to those before us. Board of Park Com'rs v. City of Marshalltown, 244 Iowa 844, 58 N.W.2d 394 (1953); Park Board v. City, 228 Iowa 904, 290 N.W. 680 (1940); Miller Grocery Co. v. City of Des Moines, 195 Iowa 1310, 192 N.W. 306 (1923).
>
> We are not confronted with a controversy between a municipality and one of its boards or commissions as was the court in two of the cases last cited. As a matter of first impression, we must determine what the legislature

> intended by the words it used in these statutes, keeping in view the overall purpose of chapter 613A to abrogate many aspects of governmental immunity and to permit the purchase of liability insurance.
>
> Clearly, it is no answer to say the Utilities is part of the municipality and is therefore not "independent or autonomous." The board or commission authorized to procure insurance under § 613A.7 must be "in the municipality. " The board or commission directed to defend, hold harmless and indemnify its employees in § 613A.8 must be "of the municipality."
>
> Other statutory language, quoted above, specifically bears on legislative intent. The board or commission intended by the legislature must be one "having authority to disburse funds for a particular municipality function without the approval of the governing body." Sections 613A.7, 613A.8, The Code. It is one which has its own "officers and employees." Section 613A.8, The Code. Section 613A.7 indicates such a board or commission would have a "field of * * * operation."
>
> Here the citizens of Spencer, by ballot, placed the management and operation of its utilitis in a board of trustees. . . . That board not only has a statutory "field of * * * operation"; it has its own employees, as we have held in division II. It has "full and absolute control" of utility revenues, without the approval of the city council. . . .
>
> Liability insurance, as well as workmen's compensation insurance, for Utilities' employees is an expense the City and the board could properly determine to be a utility operating

> expense to be procured by the board and paid by utility revenues. Other boards and commissions, not charged with a distinct field of operations nor permitted to disburse funds without city approval would not be "independent and autonomous" as that clause appears in sections 613A.7 and 613A.8 and could not commit city funds for insurance for their activities. . . .
>
> The plain language of § 613A.7 permits either a "governing body" or a "board or commission" to insure the liability of itself or its employees, or both. Assuming Utilities to be immune from suit would not mean it could not or should not insure the liability of its employees, and, in the event of such suit against them, defend them and hold them harmless. If we assume a city council were to compromise the liability of Utilities' employees there is no statutory mechanism by which the council could charge the amounts paid to the field of utility operations. On the other hand, the utility board can adjust its revenues to procure insurance or defend and save harmless its employees.
>
> . . .
>
> We do not intend by anything said here to suggest the City may not be liable for the acts of employees of a board of utility trustees. All such boards and commissions "of a municipality" may well perform municipal functions as agents of the municipality.

Although the Court reserved ruling on whether a city is always responsible for the acts or omissions of utility board employees, it is evident that those employees can be held liable for such acts or omissions to other city employees. It does not seem unreasonable, therefore, that the utility

may be liable, within its field of operation, to the city for the negligence of those employees or at least be responsible for the defense and indemnity of its employees. We cannot pass upon such liability since each case is dependent upon its own set of facts. Nor can we determine if the insurance company must pay the city since its own policy will be one of the determinative factors.

Accordingly, we are of the opinion that the water board, established pursuant to Chapter 388, is an independent or autonomous board of the city.

Very truly yours,

Larry M. Blumberg

LARRY M. BLUMBERG
Assistant Attorney General

LMB/cmc

TAXATION: Taxpayers' Information That May Be Revealed By The Iowa Department of Revenue, §422.72, The Code 1979, as amended by 1979 Session, 68th G.A., ch. 94, §2 (H.F. 421) and §170.5, The Code 1979. H.F. 421 prohibits officers or employees of the Department of Agriculture from examining tax information of food establishments in the hands of the Department of Revenue, obtained as a result of examination or investigation of tax returns, for the purpose of determining the appropriate license fees required of food establishments provided in §170.5. (Kuehn to Lounsberry, Secretary of Agriculture, 3/31/81) #81-3-19 "L"

The Honorable R. H. Lounsberry
Secretary of Agriculture
Henry A. Wallace Building
L O C A L

Dear Mr. Lounsberry:

You have requested an opinion of the Attorney General pertaining to §422.72, The Code 1979 as amended by 1979 Session, 68th G.A., ch. 94, §2 (hereinafter referred to as H.F. 421). Section 422.72 makes it unlawful for the Director of the Iowa Department of Revenue and all Department of Revenue officers or employees to divulge any information obtained as a result of examination or investigation of tax returns except as provided by law.

Section two of H.F. 421 provides, in relevant part:

> The director may, by rules adopted pursuant to chapter seventeen A (17A) of the Code, authorize examination of state information and returns by other officers or employees of this state to the extent required by their official duties and responsibilities. . . . The department shall not authorize the examination of tax information by officers and employees of this state. . . . if the purpose of the examination is other than for tax administration. . . .

In your written request, you state:

> "The Department of Agriculture seeks information from the Department of Revenue for the purpose of determining the appropriate annual license fees required of food establishments, pursuant to Section 170.5, Code of Iowa (1979). That Section provides that the Department of Agriculture shall collect fees for licenses based on the annual gross sales of the establishment.
>
> It is the position of the Department of Agriculture that the fees imposed in Chapter 170, Food Establishments. . . are revenue provisions and a tax administrative function.
>
> * * *
>
> It is the position of the Department of Revenue that the intended usage by the Department of Agriculture of sales tax data is for a 'licensing' function and not a 'tax administrative' function; and that Section 2, Chapter 94, Laws of the 68th General Assembly, 1979 Session, prohibits examination of tax return information by the Department . . . .
>
> The question is, therefore, asked: Does Section 2, Chapter 94, Laws of the 68th General Assembly, 1979 Session, prohibit the Department of Agriculture from the examination of tax information for the purpose of determining appropriate license fees required of food establishments, pursuant to Section 170.5, Code of Iowa?"

In Solberg v. Davenport, 211 Iowa 612, 232 N.W. 477 (1930), the Iowa Supreme Court explained the difference between a license fee and a tax. See Motor Club of Iowa v. Department of Transportation, 265 N.W.2d 151, 513 (Iowa 1978). Solberg v. Davenport, supra, stated at 232 N.W. 480:

> "Among the many powers possessed by the state there are two inherent powers with which we are concerned--one, known as the power of taxation; the other, as the police power. The police power in matters of this kind is usually exercised by way of a license.
>
> Much confusion will be found in the decisions from careless use of language and terms such as 'license fee,' 'license tax,' 'privilege tax,' 'occupation tax,' 'permit,' and 'regulation fees,' which are indiscriminately used;

> yet the word 'license' has a definite and distinct meaning. Bouvier in his Law Dictionary defines it as 'authority to do some act or carry on some trade or business in its nature lawful, but prohibited by statute except with permission of the civil authority, but which would otherwise be unlawful.'
>
> * * *
>
> It is the general rule that, where the charge for the license is imposed in the exercise of the police power, the amount which may be exacted may include and must be limited and measured by the necessary or probable expense of issuing the license and such inspection, regulation, and supervision as may be provided for in the act and may be lawful and necessary.
>
> That there is a very definite distinction existing between a license fee when imposed under the police power and a tax imposed for revenue under the power of taxation. . . .
>
> Where the amount imposed is substantially in excess and out of proportion to the expense incurred, it is generally regarded as a revenue measure. . . . This is particularly so where no provision for inspection or regulation is made by the act." [emphasis supplied]

Sections 170.2, 170.4, 170.46 and 170.47, The Code 1979 state:

> "170.2 License required. No person shall open or operate a food establishment until a license has been obtained from the department of agriculture. Each license shall expire one year from date of issue. A license is renewable. . . .
>
> * * *
>
> 170.4 Operation without inspection or license. No person shall open or operate a food establishment until inspection has been made by the department of agriculture.
>
> * * *
>
> 170.46 Annual inspection. The department shall inspect each food establishment in the state at least once each calendar year. The

> inspector may enter the food establishment at any reasonable hour to make the inspection. The management shall afford free access to every part of the premises and render all aid and assistance necessary to enable the inspector to make a thorough and complete inspection.
>
> 170.47 Inspection upon complaint. Upon receipt of a verified complaint signed by a customer of a food establishment and stating facts indicating the place is in an insanitary condition, the department may conduct an inspection."

According to information you provided at our request, it is clear that the Department of Agriculture's expenses incurred for issuance of the licenses and costs of inspection, regulation and supervision exceed the amount of the license fees collected. Given the aforementioned distinction between a license fee and a tax set forth in Solberg, it is clear that these license fees do not constitute a tax. Therefore, the Department of Revenue, if it divulged information gained from an examination or investigation of tax returns to the Department of Agriculture for use by the latter Department in determining license fees of food establishments, would be transmitting information for use "other than for tax administration" in violation of H.F. 421.

It is therefore, the opinion of the Attorney General that H.F. 421 prohibits officers or employees of the Department of Agriculture from examining tax information of food establishments in the hands of the Department of Revenue, obtained as a result of examination or investigation of tax returns, for the purpose of determining the appropriate license fees required of food establishments provided in §170.5, The Code 1979.

Very truly yours,

Gerald A. Kuehn
Assistant Attorney General

COUNTIES AND COUNTY OFFICERS: Sections 66.1, 332.3, 332.16, The Code 1981. A consistent failure to cast a vote on matters before a board of supervisors constitutes neglect of duty only upon a showing that the failure is willful and is motivated by an evil or corrupt purpose. (Fortney to Cochran, State Representative, 3/31/81) #81-3-18 "L"

Honorable Dale M. Cochran
State Representative
State Capitol
L O C A L

Dear Representative Cochran:

You have requested an opinion of the Attorney General regarding a member of a board of supervisors who consistently refuses to cast a vote on issues brought before the board for action. You indicate that the official in question chooses to cast a vote only when there is a tie-vote among the other board members. You have inquired whether a supervisor has a duty to vote on issues brought before the board. You also inquire whether a consistent failure to cast a vote could constitute neglect of duty such that sanctions can be imposed. It is our opinion that a consistent failure to cast a vote on matters before a board of supervisors constitutes neglect of duty only upon a showing that the failure is willful and is motivated by an evil or corrupt purpose. The remedy for such a situation, if one is needed, lies in the electoral process.

While the Iowa Code does not establish the "duties" of a board of supervisors in express terms, the duties can be inferred from the powers of the board as set forth in § 332.3, The Code 1981. A review of the board's enumerated powers reveals that those powers can be exercised in a number of ways, but most particularly through the casting of votes by the board's members. It is through the casting of such votes that a county's legislative powers are exercised. While a board member may be able to exercise a county's executive powers without voting, this cannot be said of legislative powers.

The Code establishes sanctions which can be brought to bear against an office holder who neglects his duties, including monetary penalties, as well as removal from office. Section 66.1 provides:

> Any appointive or elective officer, except such as may be removed only by impeachment, holding any public office in the state or in any division or municipality thereof, may be removed from office by the district court for any of the following reasons:
> 1. For willful or habitual neglect or refusal to perform the duties of his office.
> 2. For willful misconduct or maladministration in office.
> 3. For corruption.
> 4. For extortion.
> 5. Upon conviction of a felony.
> 6. For intoxication, or upon conviction of being intoxicated.
> 7. Upon conviction of violating the provisions of chapter 56.

Section 332.16 provides:

> If any supervisor shall neglect or refuse to perform any of the duties which are or shall be required of him by law as a member of the board of supervisors, without just cause therefor, he shall, for each offense, forfeit one hundred dollars.

The Iowa Supreme Court has never had occasion to interpret neglect of duty as it applies to § 332.16, however, the Court has addressed this issue on a number of occasions with regard to § 66.1. We note that the courts have been hesitant to impose sanctions on officers in a co-equal branch of government simply for the manner in which they have performed their prescribed duties. It has been consequently held that statutes such as § 66.1 are to be given a strict construction. See Tennant v. Kuhlmeier, 142 Iowa 241, 120 N.W. 689, 19 Ann. Cas. 1026 (1909).

One of the Court's earliest pronouncements regarding § 66.1 would lead one to conclude that the situation you describe would constitute neglect of duty. In State v. Welsh, 109 Iowa 19, 79 N.W. 369 (1899), the Court stated that an officer's neglect of duty must be either habitual or willful in order to justify his removal. The situation you describe arguably could be classified as "habitual" neglect. However, the later decisions of the Iowa Supreme Court place increasing emphasis on the motivation for the officer's actions.

In State v. Manning, 220 Iowa 525, 259 N.W. 213 (1935), a litany of charges was made against city officials. They were accused of "willful and habitual neglect, maladministration, and corruption in office", as well as improper transfer of funds. 259 N.W. 213, 215. The Supreme Court placed the following gloss on the statutory forerunner of § 66.1:

> . . . on the question of alleged misconduct, maladministration, and corruption in office, we are constrained to hold that while there are many acts which were irregular and a number of which are specifically prohibited by statute, substantially as alleged in plaintiff's petition, yet in view of the prior pronouncements of this court . . . (Citations omitted) . . .
>
> . . . requiring that all such acts, whether of omission or commission, in order to constitute grounds for removal must have been done knowingly, willfully, and with an evil or corrupt motive and purpose, we do not believe the cause for removal upon these grounds was proven with that degree of certainty which the law demands. [Emphasis supplied.]

259 N.W. 213, 215.

Accord: State v. Sullivan, 230 Iowa 945, 299 N.W. 411 (1941). The court summarized its earlier holdings in 1974 in State v. Bartz, 224 N.W.2d 632 (Iowa 1974). The following language from Bartz is instructive:

> We have said that in cases where a public official is charged with misconduct, maladministration or corruption under § 66.1, The Code, a showing is required the alleged misconduct was committed willfully and with an evil purpose.
> . . . (Citations omitted) . . .
> We have also said that acts which are simply irregular, even if violative of statutes, are not in themselves grounds for removal from office unless an evil and corrupt motive on the part of the officeholder is shown.
> . . . (Citations omitted) . . .

224 N.W.2d 632, 638.

Based on the interpretations which the Iowa Supreme Court has placed on the concept of neglect of duty as found in § 66.1, it is our opinion that a consistent failure to cast a vote on matters before a board of supervisors constitutes neglect of duty only upon a showing that the failure is willful and is motivated by an evil or corrupt purpose.

Yours truly,

David Fortney

DAVID M. FORTNEY
Assistant Attorney General

DMF:sh

GAMBLING: Roulette wheels - §§ 725.9 and 725.12, The Code 1979; 1980 Session, 68th G.A., ch. 1190. A roulette wheel is a gambling device consisting of a shallow bowl enclosing a rotating disk, that has numbered slots alternately colored red and black, with which players bet on which slot, or which color, a small ball will come to rest in. A paddle wheel, bearing 36 numbers thereon, which when spun and stopped allows a person who has been given a free ticket bearing one such number thereon to purchase an item at a reduced price, is not a roulette wheel. So long as a participant need not provide any consideration, directly or indirectly, for the chance to win the prize, the device is not a gambling device. (Richard to Bisenius, State Senator, 3/26/81) #81-3-17(L)

March 26, 1981

The Honorable Stephen W. Bisenius
State Senator
Capitol Building
L O C A L

Dear Senator Bisenius:

You have requested an opinion of the attorney general's office regarding the legitimacy under Iowa's gambling laws of a certain device which you have described as "a circular wheel with 36 numbers on it. It has rods sticking up from the wheel on the boundaries of each of the 36 numbers and a flexible paddle which bends around the dowels when the wheel is turning and as the wheel slows down and stops, the paddle eventually sticks down between two of the dowels in one of the numbered spaces." You inquire whether simple possession of this device is barred as a roulette wheel under section 725.9, The Code 1979, as amended by 1980 Session, 68th G.A., ch. 1190, § 1. In addition you ask whether the gambling statutes prohibit the device's use in a tavern setting which use you have detailed in your letter as follows: The wheel "is powered by an electric motor and coupled to an electric timer. Every 15 minutes the motor automatically engages, the wheel spins, and continues to spin until it slows down and stops on a given number. All persons over the age of 19 who enter the bar may pick up a ticket with a number on it. If the device stops on their number, they are given the option to buy a drink at a reduced price. There is no obligation on these people to buy anything to get the ticket, nor is there an obligation that they must buy a drink if their number comes up. As such, no customer or patron spends or risks any money in hopes that his or her number will come up on the wheel."

We turn first to examination of the device under section 725.9 to determine whether it would be barred as being a roulette wheel. That provision as amended makes it a serious misdemeanor for a person to have, in any manner or for any purpose, possesion or control of a "gambling device." Section 725.9(4), The Code 1979, as amended by 1980 Session, 68th G.A., ch. 1190, § 1. The terms "gambling device" are defined in section 725.9(3) as "a device used or adapted or designed to be used for gambling and includes, but is not limited to, roulette wheels . . . ." The words "roulette wheels" are not defined in that section nor elsewhere in the gambling provisions of chapters 99B and 725. Hence, we construe them "according to the context and the approved usage of the language." Section 4.1(2), The Code 1981. "Roulette" is generally defined as "[a] gambling game played with a shallow bowl enclosing a rotating disk, that has numbered slots alternately colored red and black, the players betting on which slot, or which color, a small ball will come to rest in." The American Heritage Dictionary of the English Language 1130 (1970). We believe the legislature intended this limited definition to apply to the gambling device of a roulette wheel. See Op.Att'y Gen. #79-12-24 (limiting the gambling device of a slot machine to the "one-armed bandit"). Consequently, it is our opinion that the device as you have described it is not a roulette wheel within the accepted meaning of those terms.

However, our analysis does not end with this pronouncement. The device may nonetheless be prohibited under section 725.9 if it falls within the general definition of "gambling device" quoted above; i.e., simple possession of the device under scrutiny would be proscribed if the device is "used or adapted or designed to be used for gambling." Our review is facilitated by an earlier opinion of this office concerning a somewhat similar device described as a "discount wheel." 1976 Op.Att'y Gen. 371. The wheel contained numbers from 0 to 50 which correspond to a percentage awarded as a discount to a person spinning the wheel after purchasing an item at a retail store. In approaching the question of this device's legality under the gambling laws, this office focused on the prohibition against lotteries then contained in section 726.8, The Code 1975. This prohibition now located in section 725.12, The Code 1979, defines a lottery as "any scheme, arrangement, or plan whereby a prize is awarded by chance or any process involving a substantial element of chance to a participant who has paid or furnished a consideration for such chance." (Emphasis added.) The element of consideration is further defined as existing "only in such cases where as a direct or indirect requirement or condition of obtaining a chance to win a prize, the participants are

required to make an expenditure of money or something of monetary value through a purchase, payment of an entry or admission fee, or other payment . . . ." (Emphasis added.) This office concluded that the discount wheel involved all three elements of a lottery - consideration was a prerequisite "of eligibility for spinning the wheel," "its stopage at a particular number is left purely to chance," and "[t]he winning or benefit or prize to be achieved herein is the discount received." 1976 Op.Att'y Gen. at 372. Thus, this office further concluded that the discount wheel was an illegal gambling device since it would be "used or adapted or designed to be used for gambling."

The wheel here in question is akin to the discount wheel considered in our earlier opinion. Assuming the wheel is functioning as described and is not "gaffed," its stopage at a particular number is left purely to chance. The winning or benefit or prize to be achieved is the discount received. Hence, it is our opinion that the second and third elements - chance and prize - are both present. However, we do not believe that the first element of consideration exists in the use of the device as you have described it. Although it may be argued that a consideration exists in the sense that the winner must pay for a cocktail in order to obtain the discount, such is not the type of consideration contemplated in section 725.12. By its very terms, that provision deals with consideration as a prerequisite of eligibility ("consideration for such chance," "a direct or indirect requirement of obtaining a chance") rather than as a requisite to prize redemption. The fact that there is no obligation to purchase any item to obtain the ticket nor any obligation to redeem the discount prize is crucial. If the wheel were operated whereby a participant was required to purchase any item or pay an entry or admission fee (such as a covercharge) in order to obtain the chance, the wheel would constitute a lottery, unlawful gambling, and its possession would be prohibited under section 725.9 as amended. However, the device as you have described it would not be "used or adapted or designed to be used for gambling" and could, consequently, be possessed legitimately, section 725.9 as amended notwithstanding.

Sincerely,

Richard Lee Richards

RICHARD L. RICHARDS
Assistant Attorney General

bje

STATE OFFICERS AND DEPARTMENTS: Department of Social Services, Judicial District Departments of Correctional Services. Iowa Constitution, article VII, § 1; ch. 905, The Code 1981; §§ 905.2, 905.4, 905.4(5), 905.8. Pursuant to the authority vested in § 905.4, The Code 1981, the district boards of the judicial departments of correctional services may enter into purchase agreements and long-term leases in order to acquire adequate facilities for the community-based correctional program. (Brenneise to Smith, Chairperson, District Board of the First Judicial District Department of Correctional Services, 3/26/81) #81-3-16(L)

Ms. Donna Smith, Chairperson
District Board
First Judicial District
Department of Correctional Services
200 East Fifth
Waterloo, Iowa 50703

March 26, 1981

Dear Ms. Smith:

You have requested an opinion of the Attorney General regarding the authority of the various district boards of the Departments of Correctional Services to enter into long-term leases or purchase agreements for the acquisition of property. Specificially you have requested an opinion on the following questions:

(1) May the district boards enter into long-term leases of as much as ten (10) years in order to encourage the development of facilities which meet their needs when facilities, which are within the financial reach of the district department and are safe and sanitary, do not exist.

(2) May the district boards enter into purchase agreements for the acquisition of property in lieu of acquiring property through lease agreements when it appears that such acquisition would be more economical in the long term than the continuation of said lease agreements.

Chapter 905, The Code 1981, establishes the Iowa community based correctional program. This program is a state-wide correctional plan created to supervise and assist individuals who have been charged with or convicted of a felony, an aggravated misdemeanor or a serious misdemeanor, or who have been placed on probation. Section 905.2 provides for the establishment of a

department of correctional services in each of the eight (8) judicial districts which must furnish or contract for services necessary for the development and maintenance of the community-based corrections program.

Each district department is governed by a board of directors. Section 905.4 grants each board of directors broad powers to meet the needs of the community-based corrections program. Among these powers is the authority to enter into contractual arrangements.

> The district board shall: . . . (5) Arrange for, by contract or on such alternative basis as may be mutually acceptable, and equip suitable quarters at one or more sites in the district as may be necessary for the district departments' community-based correctional program, provided that the board shall to the greatest extent feasible utilize existing facilities and shall keep capital expenditures for acquisition, renovation and repair of facilities to a minimum. § 905.4(5), The Code 1981 (emphasis supplied).

The language of § 905.4(5) grants the district boards the authority to purchase or lease property in order to acquire suitable facilities for its community-based correctional program. In adding the phrase "by contract or on such alternative basis as may be mutually acceptable", the legislature clearly anticipated that leasing arrangements would serve as permissible alternatives to contractual agreements. Therefore, we conclude that the district boards may both purchase, as well as, lease property to assure that adequate facilities are provided for the community-based corrections program.

Although it is apparent that § 905.4(5) authorizes the district boards to enter into leasing arrangements for appropriate facilities, there remains the question of whether that section contemplates long-term leases. We conclude that it does.

The Iowa Department of Social Services (DSS) is responsible for allocating the state funds appropriated for the community-based correctional programs. § 905.8, The Code 1981. Therefore, any action taken by the district boards in procuring appropriate facilities must be dependent upon the fiscal limitations imposed upon DSS.

Article III, § 1 of the Iowa Constitution states that

> The credit of the state shall not, in any manner, be given or loaned to, or in aid to any individual, association, or corporation; and the state shall never assume or become responsible for the debts or liabilities of any individual, association, or corporation, unless incurred in time of war for the benefit of the state.

Our office has previously held that article VII, § 1 does not preclude DSS from entering into a lease which extends beyond the time limit of an appropriation. 1978 Op.Att'y Gen. 598, 599. This is because the obligation to pay rent under a lease does not involve borrowing. Therefore, long-term leasing arrangements do not extend the credit of the state in violation of article VII, § 1.

Moreover, we are satisfied that at the time of the drafting of § 905.4(5), the General Assembly was mindful of the necessity for including flexibility in the management of the community-based correctional program. Certainly the program could not function without a minimal degree of independence in contractual dealings.

In summary then, we conclude that pursuant to the authority vested in § 905.4(5), the district boards may enter into purchase agreements, as well as, long-term leases in order to acquire adequate facilities for the community-based correctional program.

Sincerely,

Craig S. Brenneise

Craig S. Brenneise,
Assistant Attorney General

CSB/kap

Department of Justice

THOMAS J. MILLER
ATTORNEY GENERAL

ADDRESS REPLY TO:
HOOVER BUILDING
DES MOINES, IOWA 50319

March 20, 1981

Dr. Robert D. Benton
Superintendent
Department of Public Instruction
L O C A L

Dear Dr. Benton:

Enclosed is a corrected opinion by Brent Appel concerning abandoned railroad crossings and the use of the "exempt" sign. Mr. Mull's opinion focused on the use of the traffic-control signals in the 1978 National Manual on Uniform Control Devices for Streets and Highways and overlooked the statutory definition of "traffic-control signal."

I will continue to lobby the legislature to secure what I believe to be a technical change in the law allowing school buses to proceed across an abandoned railroad crossing marked with the exempt sign without stopping. If we are successful with the Legislature, I will work with the Department of Transportation to secure their cooperation in attaching the signs.

Sincerely yours,

T. J. Miller

THOMAS J. MILLER
Attorney General

TJM:krf

MOTOR VEHICLES: Railroads; Schools; §§ 321.1(63), 321.343, 321.252, The Code 1979. Section 321.343 requires a school bus driver to stop, look and listen before crossing any railroad track at a highway grade crossing, even if it appears that the track is not used by rail traffic, unless a police officer or a traffic signal directs vehicles to proceed. The EXEMPT sign is not expressly defined as a "traffic-control signal" and therefore its use is not specifically authorized by § 321.343. (Appel to Benton, State Superintendent of Public Instruction, 3-20-81) #81-3-15(L)

Dr. Robert D. Benton, Superintendent
Department of Public Instruction
L O C A L

Dear Dr. Benton:

You have asked our office a number of questions concerning school bus operations and railroad crossings. Specifically, you have asked:

1. Must a school bus driver stop the school bus as outlined in Section 321.343, The Code, if the railroad is abandoned or unused, but the railroad warning sign and crossbuck sign remain in place?

2. Must a school bus driver stop the school bus as outlined in Section 321.343, The Code, if the tracks remain in place, but the railroad warning sign and crossbuck sign have been removed?

3. Must a school bus driver stop the school bus as outlined in Section 321.343, The Code, if the tracks and railroad warning sign and crossbuck sign remain in place, but the EXEMPT sign is utilized?

I have reviewed the relevant provisions of the Code, and conclude that the answer to all three questions is in the affirmative.

Section 321.343, The Code 1981, provides in relevant part as follows:

> The driver of any motor vehicle carrying passengers for hire, or of any school bus or of any vehicle carrying explosive substances or flammable liquids or other hazardous materials . . . before crossing at grade any track of a railroad, shall stop such vehicle within fifty feet but not less than ten feet from the nearest rail of such railroad and while so stopped shall listen and look in both directions along such track for any approaching train, and for signals indicating the approach of a train, except as hereinafter provided, and shall not proceed until he can do so safely.
>
> No stop need be made at any such crossing where a police officer or traffic-control signal directs traffic to proceed.

Section 321.343 was construed in Chicago, B & Q. R. Co., v. Ruan Transp. Corp., 171 F.2d at 788. The Court held that a driver of a gasoline transport truck was guilty of contributory negligence for violating § 321.343 by colliding with a train at a railroad crossing. The Court stated that:

> . . . this statute must be read to mean that the driver of one of the vehicles described shall stop within the distances specified where by looking he can see and by listening he can hear. The command is that the driver shall not proceed until he knows that to proceed is safe. Nothing less than the undivided attention of the driver to looking . . . He had no right to assume what he could not know. [Emphasis added.]

171 F.2d at 788.

Similarly, in Gallagher v. Montpelier & W. River R. Co., 100 Vt. 299, 137 A. 207, 52 A.L.R. 744 (1927), the Court held a driver guilty of contributory negligence for failing to stop, look and listen at a railroad track believed by the driver to be abandoned. The Court noted as follows:

> . . . The conditions that existed at the crossing, aside from the absence of a warning board, were not materially different from those known to exist all over the country. It is a matter of common knowledge

> that some railroads are not used so much as others, and that all roadbeds do not receive like attention, but a traveler has no right to assume that a railroad has been abandoned simply because he never saw a train running over it, or its roadbed is not kept in the most approved condition or there happens to be no warning board at a particular crossing.

52 A.L.R. at 748.

A statute comparable to § 321.343 was also considered in Long v. Chicago & N.W. Ry. Co., 256 Wis. 131, 40 N.W.2d 548, 552 (1949). The Court held that noncompliance with the statute is not excused because the road is icy. The Court reasoned that:

> On the part of plaintiff on the oral argument and in the brief there was an attempt to excuse the plaintiff's failure to stop as required by the statute, on the ground the road was icy. To excuse the plaintiff from performing his statutory duty under the circumstances of this case would amount to nothing less than an amendment of the statute. The statute makes no exceptions. A truck driver is required under the statute to come to a full stop, not to stop at his discretion.

40 N.W.2d at 552. Accord, Miller v. Chicago R.I. & P. Ry. Co., 40 N.W.2d 324 (S.D. 1949) (failure to stop held not excused by concern for safety of following vehicles).

It seems to me that the rationale of the cases of Chicago B. & Q.R. Co., Gallagher and Long would most likely be followed by the Iowa Supreme Court. The language of § 321.343 does not provide an exception for abandoned railroad tracks to the requirement of stopping, looking and listening.

Your letter mentions the use of the EXEMPT crossing sign at abandoned railroad crossings. The Iowa Department of Transportation pursuant to § 321.252 and 820 I.A.C. [06,K]§ 2.1 has adopted the 1978 National Manual on Uniform Traffic Control Devices for Streets and Highways [hereinafter cited as Iowa Manual]. Section 8B-6, Part VIII, Traffic Control Systems for Railroad-Highway Grade Crossings of the Iowa Manual provides as follows:

> When authorized by law or regulation a supplemental sign (R15-3) bearing the word EXEMPT may be used below the Crossbuck and Track signs

> at the crossing, and supplemental sign (W10-1a) may be used below the Railroad Advance Warning sign. These supplemental signs are to inform drivers of vehicles carrying passengers for hire, school busses carrying children, or vehicles carrying flammable or hazardous materials that a stop is not required at certain designated grade crossings, except when a train, locomotive, or other railroad equipment is approaching or occupying the crossing or the driver's view of the sign is blocked.

The last paragraph of § 321.343 provides that "[n]o stop need be made at any such crossing where a police officer or a traffic-control signal directs traffic to proceed." Section 321.1(63), The Code 1981, states that "'Official traffic-control signal' means any device, whether manually, electrically or mechanically operated, by which traffic is alternately directed to stop and to proceed."

As a policy matter, statutory authorization to use the EXEMPT sign would offer one solution to the problem of abandoned railroad crossings. The EXEMPT sign, however, does not alternately direct traffic to stop and proceed and therefore it is not a "traffic-control signal" within the meaning of § 321.343. Accordingly, the use of the EXEMPT signs at abandoned railroad crossings is not specifically authorized by § 321.343. See Rees v. Spillane, 341 Ill. App. 647, 94 N.E.2d 686, 692 (1950) (stop signs held not to be "traffic-control signals"); U.S. Fire Ins. Co. v. Grand Trunk Western R. Co., 344 Mich. 270, 73 N.W.2d 905, 907 (1955) ("The traffic control signal near track 1 did not alternately direct traffic to stop and proceed and, therefore, did not meet the statutory requirements of a traffic control signal which would excuse plaintiff fee from bringing his vehicle to a stop before crossing track 1.") Because it would appear that the use of EXEMPT signs would improve transportation efficiency without sacrificing student safety, the Department of Justice is prepared to support clarifying legislation.

In summary, a school bus driver seems required under § 321.343 to stop, look and listen before crossing any railroad track at a highway grade crossing, even if it appears that the track is not used by rail traffic, except when a police officer or a traffic signal directs vehicles to proceed. The EXEMPT sign is not a "traffic-control signal" and therefore its use is not expressly authorized by § 321.343.

To the extent that our letter of February 2, 1981 to you is inconsistent, it is withdrawn.

Very truly yours,

BRENT R. APPEL
First Assistant Attorney General

BA:s

ESTATES: NONRESIDENT FIDUCIARIES. Sections 633.63, 633.64, 633.502, 61st G.A., Acts 1965, ch. 432 § 7, 63rd G.A., ch. 294 §§ 1 and 2, The Code 1979; Sections 8-158, 8-159, 8-160, Nebraska Law Revised. A Nebraska national bank may qualify and serve, subject to an application to the Court, as a personal representative of an estate where (1) the domiciliary administration of the estate is in Iowa, (2) Nebraska law provides similar reciprocity, and (3) the banking practice is on a sporadic case-by-case basis and not a regular ongoing business activity in Iowa. (Hagen to Connors, State Representative, 3/18/81) #81-3-14(L)

March 18, 1981

Honorable John H. Connors
State Representative
State Capitol
L O C A L

Dear Representative Connors:

We have received a request for an opinion asking:

> Whether a Nebraska national bank and trust company may qualify and serve as a personal representative of an estate where the domiciliary administration of the estate is in Iowa.

Section 633.64, The Code 1979, of the probate code delineates the mechanism for appointing nonresident fiduciaries where the domiciliary administration of the estate is in Iowa. Provisions for appointment of a foreign fiduciary where the domiciliary administration of the estate is outside of Iowa is found at § 633.502, The Code 1979. Section 633.64 states as follows:

> Qualification of fiduciary-nonresident. The court may, upon application, appoint the following nonresidents as fiduciaries:
>
> 1. Natural persons. A natural person who is a nonresident of this state and who is otherwise qualified under the provisions of section 633.63, provided a resident fiduciary is appointed to serve with such nonresident fiduciary; and provided further that the court, for good cause shown, may appoint such nonresident fiduciary to serve along without the appointment of a resident fiduciary.

> 2. Banks and trust companies. Banks and trust companies organized under the laws of the United States or of another state and authorized to act in a fiduciary capacity in another state, if banks and trust companies of this state are permitted to act as fiduciary under similar conditions in the state where such bank or trust company is located.

The second section of the above-quoted provision specifically allows banks and trust companies organized under the laws of the United States or any state to act in a fiduciary capacity if, in fact, there is mutuality or reciprocity for such similar Iowa banks in the State of Nebraska. Sections 633.63-64, The Code 1981, have been amended two times within the past 15 years. Specifically, the 61st General Assembly (Acts 1965, ch. 432, § 7) amended the probate code to include nonresident fiduciary institutions which were authorized to do business in this state, were appointed by the Court, and served with a resident fiduciary except when good cause was shown allowing the entity to serve alone. That amendment appeared as follows:

> SEC. 7. Section sixty-four (64) of chapter three-hundred twenty-six (326), Acts 60th General Assembly is hereby repealed and the following sections are enacted in lieu thereof:
> Sec. 63. Qualification of Fiduciary. Any natural person of full age, and any corporation authorized to do business in this state and to act in a fiduciary capacity, is qualified to serve as a fiduciary in this state except the following:
> 1. One who is a mental retardate, mentally ill, a chronic alcoholic, or a spendthrift.
> 2. Any other person whom the court determines to be unsuitable.
> Sec. 64. Nonresident fiduciaries. A nonresident of this state who is qualified under the provisions of section sixty-three (63) may, upon application, be appointed fiduciary, provided a resident fiduciary is appointed to serve with such nonresident fiduciary; and provided further that the court, for good cause shown, may appoint such nonresident fiduciary to serve alone without the appointment of a resident fiduciary.

After this amendment in 1965, three opinions regarding the relevant provision were issued in 1966 and 1967. The first opinion, Op. Atty. Gen. #66-8-7, held that Iowa law does not:

> . . . prohibit an Illinois state or national bank from qualifying as a fiduciary under § 633.63, 1966 Code of Iowa, provided that such state or national bank procures a certificate of authority as required by Chapter 496A, 1966 Code of Iowa.

The second opinion, Op. Atty. Gen. #67-6-30, held that foreign banks may obtain a certificate to do trust business in this state by complying with Chapter 494 and not Chapter 496A as was held in the prior opinion cited above. It was further noted in that opinion that the transaction of fiduciary business was subject to the supervision and regulation of the Superintendent of Banking under § 524.10, The Code 1966.

The third opinion, Op. Atty. Gen. #67-11-29, held that national banks are authorized to do trust business under § 532.5, The Code 1968, and were not required to obtain a permit under the Business Corporation Act or other chapter of the Code in order to comply with the provisions of §§ 633.63 and 633.64. In this opinion, the prior two opinions were qualified to acknowledge the federal status of national banks. The opinion noted that:

* * *

> It is clear that national banks receive their capacity to act as fiduciaries from the federal government. The authority to act in a fiduciary capacity in a state either where the bank is located or in one other than that in which the bank is located is derived from the laws of that state. See Switzer, Eugene H., Rights of Nonresident Banks and Trust Companies to Serve in Fiduciary Capacities Under the Laws of the Various States, 1962, Library American Bankers Association, 12 East Thirty-Sixth Street, New York 16, New York.
>
> It is well established that in the absence of unmistakably clear language it will not be assumed that a state has attempted to exercise a regulatory power over national agencies established in aid of governmental purposes under the laws of the United States. Jeffries v. The Federal Land Bank of New Orleans, 189 S. 557, 1939. Whatever may be the state law, national banks having the permit specified in Title 12, U.S.C., 92a, may act in a fiduciary capacity if trust companies competing with them have similar powers.

Missouri ex rel Burns National Bank v. Duncan, 265 U. S. 17, 68 L.Ed. 881, 44 S.Ct. 427 (1924).

Further it is well established that even a national bank must be appointed by a state court to be able to serve as an executor. Ex parte Worchester County National Bank, 279 U. S. 347, 73 L. Ed. 733, 49 S. Ct. 368, 61 A.L.R. 987, 1929.

It is my opinion that national banks whether located within the state of Iowa or at some place outside the state are not required to obtain a permit as a foreign corporation to be authorized to do business in this state and to act in a fiduciary capacity.

* * *

We come then to whether or not a national bank wherever located is authorized to act in a fiduciary capacity in this state. It is my opinion that § 532.5 of the Code of Iowa provides sufficient authority for a national bank to comply with the provisions of § 633.63 and § 633.64 in this regard. § 532.5 provides:

> When so authorized by any law of the United States now in force or hereafter enacted, national banks may exercise the same powers and perform the same duties as are by sections 532.1 to 532.4, inclusive, conferred upon trust companies, state and savings banks.

Since this section of the code makes no distinction between national banks located within the state and those located outside of the state there appears to be no need to attempt to classify any such national bank as a foreign corporation.

> We find nothing in the phraseology of the statute . . which indicates an intention to classify national banks created by national law as foreign corporation. . . and in the absence of unmistakably clear language, it will not be found that the state has attempted to exercise regulatory power over national agencies established in aid of governmental purposes. Stewart v. Atlantic National Bank of Boston, 27 Fed. 2d 224, 228 (1928).

With apparent confusion over bank and trust companies' requirements to act as fiduciary in an Iowa domiciled estate and with the national banks' apparent competitive advantage to that of state banks, disclosed by the opinions above, the Iowa Legislature in 1969 amended sections 633.63 and .64, The Code 1968, as follows in the Acts of the 63rd General Assembly, ch. 294, §§ 1 and 2:

> SECTION 1. Section six hundred thirty-three point sixty-three (633.63), Code 1966, is repealed and the following enacted in lieu thereof:
>
> Qualification of fiduciary -- resident.
>
> 1. Any natural person of full age, who is a resident of this state, is qualified to serve as a fiduciary, except the following:
>
> a. One who is a mental retardate, mentally ill, a chronic alcoholic, or a spendthrift.
>
> b. Any other person whom the court determines to be unsuitable.
>
> 2. Banks and trust companies organized under the laws of the United States or of the state of Iowa and authorized to act in a fiduciary capacity in Iowa.
>
> SEC. 2. Section six hundred thirty-three point sixty-four (633.64), Code 1966, is repealed and the following enacted in lieu thereof:
>
> Qualification of fiduciary -- nonresident. The court may, upon application, appoint the following nonresidents as fiduciaries:
>
> 1. Natural persons. A natural person who is a nonresident of this state and who is otherwise qualified under the provisions of section six hundred thirty-three point sixty-three (633.33), provided a resident fiduciary is appointed to serve with such nonresident fiduciary; and provided further that the court, for good cause shown, may appoint such nonresident fiduciary to serve along without the appointment of a resident fiduciary.
>
> 2. Banks and trust companies. Banks and trust companies organized under the laws of the United States or of another state and authorized to act in a fiduciary capacity in another state, if banks and trust companies of this state are permitted to act as fiduciary under similar conditions in the state where such bank or trust company is located.

The 1969 amendments expressly included both state and foreign banks and trust companies subject to certain conditions but the provisions for the necessity of a corporation to be authorized to do business in this state and a resident co-trustee were deleted. In the case of foreign banks and trust companies, the requirements were that they 1) are authorized to act in a fiduciary capacity in another state, 2) be located in states which, under similar conditions, provided reciprocity to Iowa banks in analogous situations, and 3) be granted permission by an Iowa court.

In the case of Nebraska National Bank, we must examine the pertinent federal provisions of the National Bank Act. At 12 U.S.C. § 92a(b), we find:

> Whenever the laws of such State authorize or permit the exercise of any or all of the foregoing powers by State banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of State or local law within the meaning of this section.

The purpose of this provision as summarized in the case of American Trust Co., Inc. v. South Carolina State Board of Bank Control, 381 F.Supp. 313 (D.C.S.C., 1974) was to permit national banks under some circumstances to act as a trustee executor and to create "competitive equality" between the state and national banks located in the same state. Consequently, the question becomes what are the rights of the local Nebraska banks relative to their acting as a fiduciary in an Iowa proceeding. To answer this question, an examination of the Nebraska statutes is necessary.

Sections 8-158, 8-159, and 8-160, Nebraska Law Revised, grant express authority for Nebraska banks to engage in fiduciary activities. These sections state as follows:

> 8-158. Banks; appointment as executor or administrator; authorized. Any bank, chartered to conduct a banking business in this state and so authorized by its corporate articles, shall have power to act, either by itself or jointly with any natural person or persons, as executor of the estate of any deceased person or as administrator of the estate of any person under the appointment of a court of record having jurisdiction of the estate of such deceased person.

Source: Laws 1959, c. 18, § 1, p. 142; Laws 1961, c. 14, § 3, p. 107; Laws 1961, c. 16, § 1, p. 116; R.R.S. 1943, § 8-1,117; Laws 2963, c. 29, § 58, p. 158; Laws 1973, LB 164, § 17.

8-159. Banks; trust department; authorization. Any bank, having adopted or amended its articles of incorporation to authorize the conduct of a trust business as defined in sections 8-201 to 8-226, may be further chartered by the director to transact a trust company business in a trust department in connection with such bank.

Source: Laws 1959, c. 19, § 1, p. 143; Laws 1961, c. 14, § 4, p. 107; R.R.S. 1943, § 18-1,118; Laws 1963, c. 29, § 59, p. 159.

8-160. Banks; trust department; amendment of charter; supervision. The director shall have the power to issue to banks amendments to their charters of authority to transact trust business as defined in sections 8-201 to 8-226, and shall have general supervision and control over such trust department of banks.

Source: Laws 1959, c. 19, § 2, p. 143; Laws 1961, c. 14, § 5, p. 108; R.R.S.1943, § 8-1,119; Laws 1963, c. 29, § 60, p. 159.

Further, § 8-201, Nebraska Law Revised, grants trust companies similar powers. It states as follows:

8-201. Organization; charter required; exception; powers of Department of Banking and Finance. The Director of Banking and Finance shall have the power to issue to trust companies, charters of authority to transact trust company business as defined in sections 8-201 to 8-226. It shall have general supervision and control over such trust companies. Any three or more persons may adopt articles of incorporation and become a body corporate for the purpose of engaging in and conducting the business of a trust company, upon complying with the requirements of sections 8-201 to 8-226 and the general laws of this state relating to the organization of corporations and upon obtaining a charter to transact business as a trust company from the Department of Banking and Finance.

> Every corporation organized for and desiring to transact a trust company business shall, before commencing such business, make under oath and transmit to the Department of Banking and Finance a complete statement including (1) the name of the proposed trust company; (2) a certified copy of the articles of incorporation; (3) the names of the stockholders; (4) the name of the county, city, or village in which said trust company is located; (5) the amount of paid-up capital stock; and (6) a statement, under the oath of the president and secretary, that the capital stock has been paid in as provided for and it shall also pay the fee prescribed by section 8-602 for investigation of such statement. If, upon investigation, the department shall be satisfied that the parties requesting said charter are parties of integrity and responsibility and that the public necessity, convenience and advantage will be promoted by permitting such proposed trust company to engage in business, the department shall issue to said corporation a charter entitling it to transact the business provided for in said sections. Upon payment of the required fees and upon the receipt of the charter, the proposed trust company may begin to transact a trust company business. It shall be unlawful for any corporation, except a foreign corporate trustee to the extent authorized under section 30-2805, to engage in business as a trust company or to act in a fiduciary capacity unless it shall have first obtained from the Department of Banking and Finance a charter of authority to do business.

Of significance is the exception for foreign corporate trustees contained in the last sentence above. Section 30-2805, Nebraska, supra, states as follows:

> 30-2805. Registration, qualification of foreign trustee. A foreign corporate trustee is required to qualify as a foreign corporation doing business in this state if it maintains the principal place of administration of any trust within the state. A foreign cotrustee is not required to qualify in this state solely because its cotrustee maintains the principal place of administration in this state. Unless otherwise doing business in this state, local qualification by a foreign trustee, corporate or individual, is not required in order for the trustee to receive distribution from a local estate or to hold, invest in, manage or acquire property located in this state, or maintain litigation if the laws of the state

> of incorporation or residence of the foreign trustee grant the same authority to a trustee incorporated or resident in this state. Nothing in this section affects a determination of what other acts require qualification as doing business in this state.
>
> Source: Laws 1974, LB 354, § 300, UPC § 7-105.

The above-cited Nebraska statute waives the foreign corporate trustees' necessity of qualification as a foreign corporation doing business in Nebraska when the foreign state grants reciprocity to Nebraska banks, and the foreign corporation is not actively engaged in such business in the state. In other words, as in Iowa, if the foreign bank is not conducting business on a regular basis, but is involved on a sporadic case-by-case basis, no authorization is required. Such conditions appear to be similar and consequently, a Nebraska national bank may, subject to court application, qualify and serve as a personal representative of an estate where the domiciliary administration of the estate is in Iowa.

Very truly yours,

HOWARD O. HAGEN
Assistant Attorney General

HOH:sh

MOTOR VEHICLES: Chauffeur's License for Volunteer Firefighters - §§ 321.1(43) and 321.174, The Code 1979. Volunteer firefighters who operate fire trucks of the type of motor vehicles listed in § 321.1(43) must possess chauffeur's licenses. Volunteer firefighters who operate ambulances need not possess chauffeur's licenses if they receive no more than reimbursement for expenses. (Blumberg to Welsh, State Representative, 3/13/81) #81-3-12(L)

March 13, 1981

The Honorable Joseph Welsh
State Representative
R.R. 2
Box 37
Dubuque, Iowa 52001

Dear Representative Welsh:

We have your opinion request regarding the necessity of a chauffeur's license for the driver of an emergency vehicle for a volunteer fire department. You also ask whether the acceptance of a nominal fee by the volunteer firefighter affects the answer.

Every person who operates a motor vehicle upon the highways of this State, shall, with certain listed exemptions, have a valid operator's or chauffeur's license issued by the Department of Transportation. See, § 321.174, The Code 1979. "Chauffeur" is defined in § 321.1(43) as follows:

> "Chauffeur" means any person who operates a motor vehicle in the transportation of persons, including school buses, for wages, compensation or hire, or any person who operates a truck tractor, road tractor or any motor truck which is required to be registered at a gross weight classification exceeding five tons, or any such motor vehicle exempt from registration which would be within such gross weight classification if not so exempt except when such operation by the owner or operator is occasional and

> merely incidental to his principal business.
>
> Subject to the provisions of section 321.179, a farmer or his hired help shall not be deemed a chauffeur, when operating a truck owned by him, and used exclusively in connection with the transportation of his own products or property.
> [Emphasis added]

Pursuant to § 321.1(43), a person need not operate the vehicle for hire in order to be a chauffeur. Operating the type of truck listed therein with a gross weight classification in excess of five tons, with or without compensation, is sufficient. If, however, the operation of the vehicle is occasional and merely incidental to the owner's or operator's principal business, the person is not a chauffeur.

"Motor truck" is defined in § 321.1(4) as every motor vehicle designed primarily for carrying livestock, merchandise or freight of any kind, or over nine persons as passengers. Section 321.1(6) defines "truck tractor" as every motor vehicle designed and used primarily for drawing other vehicles. It is a motor vehicle not constructed to carry a load other than a part of the weight of the vehicle and load so drawn. Finally, "road tractor" is defined in § 321.1(8) as every motor vehicle designed and used for drawing other vehicles. It is not constructed to carry any load thereon either independently or any part of the weight of a vehicle or load so drawn.

The basis for requiring a chauffeur's license for the operation of certain types of vehicles is one of safety. The importance of safety is most evident when the motor vehicle in question is being used in emergency situations. We cannot lightly assume that the Legislature forgot about fire trucks and other emergency motor vehicles when it enacted § 321.1(43).

In a prior opinion, 1964 Op. Att'y. Gen. 297, we were asked whether operators of fire trucks were required to have chauffeur's licenses. We held there, at page 299:

> It is therefore our opinion that a person hired as a fireman who, as incidental to performing his duties, operates a motor vehicle which does not exceed five tons in gross weight is not required to have a chauffeur's license; however, if a fireman operates a truck tractor, road tractor or motor truck as defined by Section 321.1, which has a gross weight classification exceeding five tons, and that operation is not "occasional or merely incidental", he would be required to have a chauffeur's license.

It is our understanding that the Department of Transportation requires all full-time friefighters who operate fire trucks of the type listed in § 321.1(43) to have chauffeur's licenses, presumably on the basis of the above opinion. However, volunteer firefighters are not required to have chauffeur's licenses because the operation of such vehicles is considered to be merely incidental or occasional. We are not persuaded by the distinction. Volunteer firefighters operate the same type of trucks under similar emergency conditions. The need for safety is just as great for them as for full-time firefighters.

In addition, we have previously discussed what is meant by "occasional and merely incidental". In 1962 Op. Att'y. Gen. 276, we held, at page 277:

> It is not required that a person's exclusive employment be that of operating a truck such as the one in question before the requirement that he have a chauffeur's license becomes applicable. Under § 321.1(43), the exemption from such license is applicable only if the use of occasional and incidental to his principal business. The import of such words is that the exemption will apply only if the operation of such truck is a casual event, fortuitous happening, as if by chance or accident. Moor v. Butz, 156 Pa. Super. 516, 40 A.2d 699, 700 (1944); Liberty Mut. Ins. Co. v. Thompson. 171 F.2d 723, 725 (9th Cir. 1949).

A similar result was reached in 1974 Op. Att'y. Gen. 399. It is therefore readily apparent that the operation of a fire truck by a volunteer firefighter is not "occasional and merely incidental" as those words are used in § 321.1(43).

Section 321.1(43) has not changed since the 1964 opinion. We are not aware of any significant policy changes behind that section since 1964. That opinion is not clearly erroneous, and therefore, we adopt its reasoning and reaffirm it. Accordingly, volunteer firefighters who operate fire trucks of the type listed in § 321.1(43) which are either registered in excess of five tons or if exempt, would otherwise have to be registered if in excess of five tons, must have chauffeur's licenses.

Your second question is whether the acceptance of a nominal fee, such as reimbursement for fuel, would require a chauffeur's license for those operating ambulances.

Our office has previously considered a question regarding reimbursement for fuel in a similar context. In 1938 Op. Att'y. Gen. 508, we were faced with a situation where volunteers drove high school athletic participants to the games. Some of the drivers re-

quested, and were paid, money for gas and oil used on the trip. The issue was whether these payments required the drivers to obtain a chauffeur's license. Referring to a section of the Code similar to § 321.1(43), we held that the payment of such expenses did not constitute compensation for which a chauffeur's license would be required. We find no reason to distinguish that opinion from the facts before us. This does not mean that one who drives an ambulance will never need a chauffeur's license. Rather, if the person in question is truly a volunteer fire-fighter, and if any fees collected are merely reimbursement for fuel, that individual would not be required to possess a chauffeur's license. We make no expression as to other forms of compensation.

Very truly yours,

Larry M. Blumberg

LARRY M. BLUMBERG
Assistant Attorney General

LMB/cmc

SOCIAL SERVICES: Child Care Centers, Licensing: Ch. 237A, §§ 237A.1(7), 237A.1(8), 237A.1(9), 237A.2, 237A.3, The Code, 1981. A child should not be counted for licensing or registration purposes under ch. 237A if the child receives less than two hours care per day.
(Hege to Anderson, State Representative, 3/6/81) #81-3-9(L)

March 6, 1981

The Honorable Robert T. Anderson
State Representative
State House
Des Moines, Iowa 50319

Dear Representative Anderson:

You have requested an opinion concerning the criteria for licensing a child day care center.

Specifically, you have questioned whether:

> A child who receives less than two hours care per day and does not fit into the "child day care" definition should be counted in determining whether a family day care home is required to be licensed as a child day care center?

Chapter 237A, The Code 1981, regulates the licensing or registration of child care centers. Section 237A.1(7), The Code 1981, sets out the basic definition of the service to be regulated by the chapter.

> 7. "Child day care" means the care, supervision or guidance of a child by a person other than the parent, guardian, relative or custodian for periods of two hours or more and less than twenty-four hours per day per child on a regular basis in a place other than the child's home, but does not include:

a. An instructional program administered by a public or nonpublic school system approved by the department of public instruction or the state board of regents.

b. A church-related instructional program of not more than one day per week.

c. Short-term classes held between school terms.

For the State to have authority to regulate the facility or service, four basic criteria must exist:

1. Care, supervision or guidance must be given to a child (§ 237A.1(5), "child" means a person under eighteen years of age);

2. By a person other than the parent, guardian, relative or custodian;

3. For periods of two hours or more and less than twenty-four hours per day per child;

4. On a regular basis in a place other than the child's home.

Specific exemptions from regulations are granted to certain public or private school programs approved by the department of public instruction or the state board of regents, § 237A.1(7)(a), The Code 1981, certain church-related instruction of not more than one day per week, § 237A.1(7)(b), The Code 1981, and certain short-term classes held between school terms, § 237A.1(7)(c), The Code 1981.

The statute defines a facility which may be regulated as a "child day care facility" or facility", which includes both child care centers and family day care homes. Section 237A.1(10).

Finally, a "child care center" is defined as "a facility providing child day care for seven or more children", § 237A.1(8), The Code 1981, while a "family day care home" means "a facility which provides child day care to less than seven children", § 237A.1(9), The Code 1981. It is evident that both types of facilities provide the same care; i.e. child day care, but are distinguishable in the number of

children to which the care is provided. Further, child care centers must be licensed, § 237A.2, The Code 1981, while family day care homes are registered, § 237A.3, The Code 1981.

Under the regulatory scheme set out in ch. 237A, the facility must provide "child day care" before the state has authority to require licensing or regulation. Therefore, at least one child must be provided care in excess of two hours per day, but less than twenty-four hour care. A facility providing the above care would be a "family day care home", § 237A.1(9), The Code 1981, while a facility that provides care in excess of two hours, but less than twenty-four hours, for eight children would be a "child care center" and would be mandated to obtain a license, §§ 237.1(8) and 237A.2, The Code 1981.

On the other hand, a facility providing less than two hours care per child per day for five children is not either a family day care home or a child care center. The State has no authority under ch. 237A to regulate the operation of such a facility.

It should be noted that the threshold requirement of two hours or more of care is applicable to the licensing function as opposed to staffing or programming functions. For staffing and programming purposes, the actual number of children, regardless of length of stay, should be used. This ensures that once the facility may be regulated by the State, that it gives adequate care and supervision to all the children who use its services.

In conclusion, the answer to your question is no. A child receiving less than two hours per day of care is not counted for licensing purposes of child care centers or registration purposes of family day care homes. Sections 237A.1(7), (8), (9), The Code 1981.

Sincerely,

Brent D. Hege

Brent D. Hege
Assistant Attorney General

BDH/kap

ADMINISTRATIVE LAW: CONTESTED CASES: DEMEANOR OF WITNESSES. §§ 17A.11(1), 17A.12(7), 17A.15(2), 17A.15(3), The Code 1981. If an agency member attends a contested case proceeding, conducted by a hearing officer, and observes the demeanor of witnesses, the member may take his/her observations into consideration when later reviewing the hearing officer's proposed decision. (Fortney to Reis, Executive Director, Iowa Civil Rights Commission, 3/6/81) #81-3-8(L)

March 6, 1981

Artis Reis, Executive Director
Iowa Civil Rights Commission
L O C A L

Dear Ms. Reis:

You have requested our opinion as to whether a commissioner who attends, but does not conduct, a contested case hearing may take into account the demeanor of witnesses observed at such hearings when the decision is later reviewed by the full Commission. It is our opinion that the Commissioner may properly take such observations into consideration.

Pursuant to § 601A.15 and § 17A.11(1), The Code 1981, the Civil Rights Commission conducts its contested cases before a hearing officer. See 240 I.A.C. § 1.9(3). Following receipt of the evidence and arguments, the hearing officer makes a recommended decision or a proposed decision to the Commission. See 240 I.A.C. § 1.15(1). The final agency decision is then made by the Commission. See 240 I.A.C. § 1.15(3).

Contested cases before the Commission are open to the public pursuant to § 17A.12(7), The Code 1981. You indicate that on occasion members of the Commission attend these public sessions. While in attendance, it is impossible for such Commissioner to avoid observing the demeanor of witnesses. When reviewing the proposed decision, the Commissioner will retain recollections of the observed demeanor. You inquire as to the appropriateness of relying on these observations.

It is well established that "the primary responsibility for finding facts is that of the agency, not that of the [hearing] examiner." Kenneth Culp Davis, Administrative Law Treatise, 111 (1958). This is true even in circumstances in which issues of fact must be resolved on the basis of the demeanor of the witnesses. Id. In the federal courts, the principle that an agency is not bound by a hearing officer's findings as to the credibility of

witnesses has been articulated for decades. For example, in 1941 the Court of Appeals for the Fifth Circuit used the following instructive language:

> The Board is in no case bound to follow the fact-findings or recommendations of an examiner. Even on a question of the credibility of contradictory witnesses, nothwithstanding the advantage the examiner has of seeing and hearing them testify, the Board may differ from the conclusion of its examiners.

National Labor Relations Board v. Tex-O-Kan Flour Mills Co., 122 F.2d 433 (5th Cir. 1941).

The preceding concepts have been codified in the Iowa Administrative Procedure Act. Section 17A.15(2), The Code 1981, provides in pertinent part: "When the agency did not preside at the reception of the evidence in a contested case, the presiding officer shall make a proposed decision." " . . . On appeal from or review of the proposed decision, the agency has all the power which it would have in initially making the final decision except as it may limit the issues on notice to the parties or by rule . . ." Section 17A.15(3), The Code 1981. Thus, we see that the Iowa Code recognizes that it is the agency, not the hearing officer, which has the ultimate responsibility to make findings of fact. This duty is not altered by the fact that certain issues may turn on demeanor. Once this premise is understood, it follows that a Commissioner who observes witness demeanor and later takes such observations into consideration is acting in an appropriate fashion. If anything, this Commissioner has a more complete and thorough appreciation for the evidence presented than can be gleaned from the cold record.

It may be questioned whether it is appropriate for one or more members of a multimember agency to have directly observed the taking of testimony, while the remaining members base their action on the transcript and record. We believe this concern has been indirectly addressed by prior decisions from a number of sister states. The classic factual situation was presented in Cooper v. State Board of Medical Examiners of Dept. of Professional and Vocational Standards of California, 217 P.2d 630, 35 Cal. 2d 242 (1950). In that case, the state agency was engaged in an enforcement action based on alleged unauthorized practice. A hearing was held before a ten-member panel. Following the hearing, but prior to reaching a decision, five of the ten members were replaced. Seven votes were required for action to be taken. The California Supreme Court determined that it did not violate due process for all

ten current members to participate even though half of the board personally heard the evidence and witnesses, while the remaining half simply read the transcript. Implicit in the facts of Cooper is that only half of the members observed the witnesses' demeanor, the balance dealt only with the cold record. Accord: McGraw Electric Co. v. United States, 120 F.Supp. 354 (E.D. Mo.), aff'd., 348 U.S. 804, 75 S.Ct. 24, 99 L.Ed. 635 (1954); Seabolt v. Moses, 220 Ark. 242, 247 S.W.2d 24 (1952); Peltiford v. South Carolina State Board of Education, 218 S.C. 322, 62 S.E.2d 780 (1950), cert. denied, 341 U.S. 920, 71 S.Ct. 742, 95 L.Ed. 1354 (1951); Knapp v. State Industrial Commission, 195 Okla. 56, 154 P.2d 964 (1945); Florida Dry Cleaning v. Economy Cleaners, 143 Fla. 859, 197 So. 550 (1940). Similar principles apply regarding the substitution of hearing officers. See Kenneth Culp Davis, Administrative Law Treatise, 111-113 (1958). "The key consideration is to prevent the demeanor of witnesses, whenever it may be a substantial element, from getting lost from the case." Id., at 113. This can be accomplished by assuring that those present at the taking of the testimony report to those not present regarding the demeanor of witnesses, if important. Iowa has adopted this view in § 17A.15(2), The Code 1981.

In conclusion, if an agency member attends a contested case proceeding, conducted by a hearing officer, and observes the demeanor of witnesses, the member may take his/her observations into consideration when later reviewing the hearing officer's proposed decision.

Yours truly,

David Fortney

DAVID M. FORTNEY
Assistant Attorney General

DMF:sh

STATE OFFICERS AND DEPARTMENTS - Board of Nursing - Control Over Nurses Practicing in Iowa by Virtue of Employment with the Federal Government but Licensed in a State Other Than Iowa - §§147.12, 147.13, 147.44, 147.55, 152.1, 152.8, 152.10, 258A.3, 258A.4, The Code. In general, unless a specific provision of the Code provides otherwise, the Board of Nursing has no authority to act with respect to those licensees not licensed in Iowa but practicing in this state as employees of the federal government but that the Board does have authority to act with respect to those licensees issued Iowa licenses even though the Iowa licensees are practicing in another state. In particular, the Board of Nursing 1) has no authority or responsibility to investigate a nurse licensed in another state but employed in this state by the federal government for alleged violations of the Iowa Code; 2) has a responsibility to give written notice to another licensing board or hospital licensing agency of evidence of an act or an omission which it reasonably believes is subject to discipline by that other board or agency; 3) has no authority or responsibility to take interim action against a nurse licensed in another state but practicing in Iowa as an employee of the federal government based upon investigative findings while awaiting action by the other state; 4) has no authority or responsibility to require nurses licensed by another state but employed in Iowa with the federal government to meet mandatory continuing education requirements; and 5) has the authority to investigate nurses licensed by Iowa but practicing in another state while employed with the federal government for alleged violations reasonably believed to be cause for licensee discipline. (Freeman to Illes, Executive Director, Iowa Board of Nursing, 3/6/81) #81-3-7(L)

Department of Justice

THOMAS J. MILLER
ATTORNEY GENERAL

ADDRESS REPLY TO:
HOOVER BUILDING
DES MOINES, IOWA 50319

March 6, 1981

Mrs. Lynne M. Illes, R.N.
Executive Director
Iowa Board of Nursing
Executive Hills East
1223 E. Court Avenue
Des Moines, Iowa 50319

Dear Mrs. Illes:

This letter is in response to your request for an attorney general's opinion relating to the authority of the Iowa Board of Nursing over 1) those nurses licensed in another state but employed in Iowa by the federal government and 2) those nurses licensed in Iowa but employed in another state by the federal government. You are concerned specifically with that portion of §152.1, The Code 1981, which exempts from the definition of the "practice of nursing" those nurses licensed in another state and employed in this state by the federal government. §152.1(1)(d), The Code. In particular you have asked the following questions:

1. Does the Iowa Board of Nursing have the authority/responsibility to investigate a nurse licensed in another state and employed in this state by the federal government, who has allegedly violated the Code of Iowa (i.e., drug abuse, practice harmful to the public, etc.) and to inform the state in which currently licensed of said allegations?

2. Does the Iowa Board of Nursing have the authority/responsibility to take any type of interim action against a nurse licensed in another state and employed in this state by the federal government, based on investigative findings, to safeguard the public pending action by the other state, since it may not be realistic to expect expeditious action on the part of said state?

3. Does the Iowa Board Of Nursing have the authority/responsibility to require those nurses licensed in another state and employed in this state by the federal government to meet mandatory continuing

education requirements since they are rendering nursing services to citizens of Iowa?

4. Does the Iowa Board of Nursing have the authority/responsibility to investigate a nurse licensed in Iowa and employed in another state by the federal government, who has allegedly violated either the Code of Iowa or the Code of the state in which she is employed by the federal government?

To answer your questions, various provisions of the Iowa Code, especially those located in Chapters 147, 152 and 258A, must be examined in relation to certain basic principles of administrative law.

It is a well-recognized tenent of administrative law that an agency may exercise only those powers which are specifically conferred or are necessarily implied by the statute creating the agency. Quaker Oats Co. v. Cedar Rapids Human Rights Commission, 268 N.W.2d 862, 868 (Iowa 1978). Agencies exercise purely statutory powers and duties; authority for the exercise of a certain power or duty must be found within the appropriate governing statute or statutes. Id. The Iowa Board of Nursing is an agency within the meaning of the Iowa Administrative Procedures Act. §17A.2(1), The Code.

The Iowa Board of Nursing was created pursuant to §§147.12 and 147.13, The Code, for purposes of giving examinations to applicants for licenses to practice nursing. Various provisions of Chapter 147 further detail the duties and authority of the Board, as do the provisions of Chapter 152 governing the practice of nursing. In addition to these two chapters, Chapter 258A further defines the authority and duties of the various licensing boards, including the Board of Nursing. §258A.(1)(n), The Code.

Section 147.12, The Code, states, in part, that examining boards are to be created and appointed "[f]or the purpose of giving examinations to applicants for licenses to practice the professions for which licenses are required by this title... ." [Emphasis added]. Section 147.13 provides: "The examining boards provided in §147.12 shall be designated as follows: ... for nursing, board of nursing; ... ." These two sections, when read together, indicate that the Board has authority relating to the "practice of nursing."

The "practice of nursing" is defined as "the practice of a registered nurse or a licensed practical nurse." §152.1, The Code. As you have noted though, certain situations have been specifically excluded from this definition, including the following:

> The practice of a nurse licensed in another state and employed in this state by the federal government if the practice is in the discharge of official employment duties.

§152.1(1)(d), The Code. Unless another provision of the Code provides to the contrary, it does appear at the outset that the Board of Nursing has no authority

or responsibility with respect to a nurse who is 1) licensed in another state, 2) employed in Iowa by the federal government and 3) discharging official employment duties. Other Code provisions reinforce this conclusion.

The duties of the Board under Chapter 152 are framed within the terminology of "the practice of nursing" as defined by §152.1(1), that is, the practice of a registered nurse or a licensed practical nurse. For instance, §152.3(1) provides that the duties of the executive director of the Board shall include the receipt of all applications to be licensed for the practice of nursing. Section 152.5(1) provides that "[a]ll programs preparing a person to be a registered nurse or licensed practical nurse shall be approved by the board." [Emphasis added]. Section 152.6 states that "[t]he board may license a natural person to practice as a registered nurse or as a licensed practical nurse." [Emphasis added]. Section 152.7 states that an applicant, to be licensed for the practice of nursing, must meet certain defined criteria. Section 152.10 speaks of the Board's powers to restrict, suspend or revoke a license to practice nursing. Consequently, it does appear that the jurisdiction of the Board, in its exercise of power and authority in relation to the practice of nursing, is limited under Chapter 152 by the definition of the "practice of nursing."

Insofar as your questions involve nurses practicing in Iowa with out-of-state licenses, the reciprocal licensing provisions of the Code should be noted to determine whether these sections confer certain authority to the Board with respect to federally-employed nurses. Sections 147.44 - 147.54, The Code, govern reciprocal licenses as between this state and other states. Furthermore, §152.8 provides as follows:

> Notwithstanding the provisions of sections 147.44 to 147.54, the board shall decide whether to recognize a foreign license to practice nursing under conditions specified which indicate that the licensee meets all the qualifications required under section 152.7. If a foreign license is recognized the board may issue a license by endorsement without an examination being required. Recognition shall be based on whether the foreign licensee is qualified to practice nursing.

Reciprocity is a principle used to recognize licenses that have been issued by other states to practice a particular profession, thus allowing out-of-state licensees to practice in this state. See §147.44, The Code. Once the criteria for reciprocity has been satisfied, an out-of-state licensee may practice in this state as if he or she had been licensed by the State of Iowa. In other words, that licensee is in the same position as one who has been licensed by this state and the Board of Nursing's jurisdiction over that person is the same as its jurisdiction over any other individual directly licensed by the Iowa Board and practicing in this state.

Federally-employed nurses, though, are not practicing in Iowa pursuant to any particular reciprocity agreement. Rather, such nurses are in Iowa by virtue of their federal employment. The language in the reciprocal licensing provisions

of the Code does not expressly grant authority to the Board with respect to federally-employed nurses, nor can such authority be fairly implied. The clearly expressed intent of §152.1(1)(d) is to exclude those nurses practicing in this state as employees of the federal government from the practice of nursing and, without a specific statement to the contrary, these nurses may not be brought under the Board's jurisdiction pursuant to the reciprocal licensing provisions of the Code.

Up to this point, it does appear that the above provisions of the Code do not grant authority to the Iowa Board of Nursing with respect to federally-employed nurses located in Iowa. Rather, jurisdiction would lie with the home state licensing board and with the employing agency of the federal government. To answer your specific questions, however, it is also necessary to examine Chapter 258A, The Code, concerning licensing boards in general.

Section 258A.3 details the authority of licensing boards, notwithstanding any other provisions of the Code. Section 258A.4 provides for the duties of the boards in addition to those other duties specified throughout the Code. Section 258A.1(n) designates the Board of Nursing as a board within the purview of the chapter. In relation to your first question, that is, does the Iowa Board of Nursing have the authority or responsibility to investigate a nurse licensed in another state but employed in this state by the federal government, §258A.3(1)(c) states that the Board has the power to:

> Review or investigate, or both, upon written complaint or upon its own motion pursuant to other evidence received by the board, alleged acts or omissions which the board reasonably believes constitute cause under applicable law or administrative rule for licensee discipline.

This provision limits the Board's reviewing and investigative powers to those situations where evidence of alleged acts or omissions causes the Board to reasonably believe a violation of law or rule has occurred which constitutes cause for licensee discipline. "Licensee discipline" is defined as "any sanction a licensing board may impose upon its licensees for conduct which threatens or denies citizens of this state a high standard of professional or occupational care." §258A.1(5),The Code. [Emphasis added]. This definition clearly indicates that the §258A.3(1)(c), investigative and reviewing powers of the Board are limited to those situations involving suspected violations by Iowa licensees. Consequently, situations of alleged violations by federally-employed nurses not licensed by Iowa may not be investigated by the Board under the powers granted by §258A.3(1)(c), nor do any other provisions of Chapter 258A appear to grant such power or authority.

A second part to your first question asked whether the Iowa Board has the authority or responsibility to inform the state which licensed a federally-employed nurse located in Iowa of suspected violations of the Iowa Code. Section 258A.4(1)(h), The Code, states that one of the duties of the Board is to:

> Give written notice to another licensing board or to a hospital licensing agency if evidence received by the board either alleges or constitutes reasonable cause to believe the existence of an act or omission which is subject to discipline by that other board or agency.

This provision requires the Board to notify other licensing boards of acts or omissions subject to discipline by that board. When the Iowa Board has reasonable cause to believe that a nurse employed with the federal government has committed an act or failed to perform an act which is subject to discipline by an out-of-state board or hospital licensing agency, then evidence of such act is to be reported to the proper board or hospital agency.

Your second question involves the authority or responsibility of the Iowa Board to take interim action against a federally-employed nurse based upon investigative findings. Nothing in either Chapters 147, 152 or 258A appears to grant such authority or to mandate such action. Since the law apparently intends that the Iowa Board of Nursing have jurisdiction over Iowa licensees, any action against an out-of-state licensee located in Iowa pursuant to employment with the federal government would be improper. This conclusion is sensible since the only sanctions the Board of Nursing may enforce (with the exception of civil penalties which may be imposed by rule but only after a licensee is found guilty of a violation) are those relating to a nurse's license, namely, probation, suspension, restriction, revocation, denial or nonrenewal. §152.10, The Code; §258A.3(2), The Code. A licensing board could not, for instance, revoke a license which it had not granted in the first place. The fact that the Iowa Board may have no authority to take interim action, outside of reporting a suspected violation, against a nurse licensed by another state and practicing as an employee of the federal government in Iowa does not mean, however, that the employing institution is necessarily required to allow the alleged violator to continue in a capacity which is likely to pose a serious threat to public health and safety.

Your third question concerns the Board's authority or responsibility to require that nurses not licensed by Iowa but employed in Iowa by the federal government satisfy mandatory continuing education requirements. Section 258A.2(1) states that "[e]ach licensing board shall require and issue rules for continuing education requirements as a condition to license renewal." [Emphasis added]. Because the Iowa Board has no authority to renew an out-of-state license, it seems clear that a federally-employed nurse located in Iowa but licensed by another state cannot be required to obtain continuing education units required of Iowa licensees as a condition for renewal of an Iowa license. This conclusion is indirectly supported by 258A.2(3), which recognizes certain situations whereby an Iowa licensee is not required to obtain continuing education credits while located outside of the state.

> A person licensed to practice an occupation or profession in this state shall be deemed to have complied with the continuing education requirements of this state during periods that the person serves honorably on active duty in the military services, or for periods that the person is a resident of another state or district having a continuing education requirement for the occupation or profession and meets all requirements of that state or district for practice therein, or for periods that the person is a government employee working in his or her licensed specialty and assigned to duty outside of the United States, or for other periods of active practice and absence from the state approved by the appropriate board of examiners.

Clearly the Iowa Code envisages situations where Iowa licensees need not obtain continuing education credits. It certainly, then, is not inconsistent to find that the Iowa Code does not authorize the Iowa Board of Nursing to require that out-of-state federal employees obtain continuing education credits while practicing in Iowa.

Your fourth and final question is whether the Iowa Board of Nursing has the authority or responsibility to investigate a nurse licensed in Iowa but employed in another state by the federal government for alleged violations of either the Iowa Code or provisions of the other state's code. As noted above, the Board does have the authority to review or investigate alleged acts or omissions which the Board reasonably believes constitute cause under applicable law or administrative rule for licensee discipline. §258A.3(1)(c), The Code. "Licensee discipline" is any sanction which may be imposed by a licensing board upon its licensees. §258A.5, The Code. Thus, if an alleged violation is reasonably believed to be a cause for licensee discipline, the Board may investigate the matter even though the Iowa licensee is practicing in another state as an employee of the federal government. An act or omission is deemed cause for licensee discipline if it constitutes grounds as defined by §147.55, §152.10, §258A.3(2), and §258A.10, The Code, or by any other provision of the Code concerned with the discipline of nurses licensed by the Iowa Board. Consequently, it must be kept in mind that not every act or failure to act which might constitute a violation of the Iowa Code or the code of another state will constitute cause for licensee discipline.

In summary, it is the opinion of our office that the Iowa Board of Nursing 1) has no authority or responsibility to investigate a nurse licensed in another state but employed in this state by the federal government for alleged violations of the Iowa Code; 2) has a responsibility to give written notice to another licensing board or hospital licensing agency of evidence of an act or an omission which it reasonably believes is subject to discipline by that other board or agency; 3) has no authority or responsibility to take interim action against a nurse licensed in another state but practicing in Iowa as an employee of the federal government based upon investigative findings while awaiting action by the other state; 4) has no authority or responsibility to require nurses licensed by another state but employed in Iowa with the federal government to meet mandatory continuing education requirements; and 5) has the authority to investigate nurses licensed by Iowa but practicing in another state while employed with the federal government for alleged violations reasonably believed to be cause for licensee discipline. It generally appears, unless a specific provision of the Code provides otherwise, that the Board has the authority to act with respect to those licensees issued Iowa licenses even though the Iowa licensees are practicing in another state but that the Board has no authority to act with respect to those licensees not licensed in Iowa but practicing in this state as employees of the federal government.

Sincerely yours,

Jeanine Freeman

JEANINE FREEMAN
Assistant Attorney General

JF:djc

PUBLIC RECORDS: Support Record Book: §§ 68A.1, 68A.2, 598.22, The Code 1981. The support record book established by § 598.22 should not be open to public inspection, but should only be open to the parties and their attorneys. A child has the status of a party, with attendant access to the support record book, only if an attorney is appointed for that child pursuant to § 598.12. Any list of current addresses of support recipients should be open to public inspection. (Norby to Bordwell, Washington County Attorney, 3/5/81) #81-3-5(L)

March 5, 1981

Richard S. Bordwell
Washington County Attorney
103 1/2 N. Marion Avenue
P. O. Box 308
Washington, Iowa 52353

Dear Mr. Bordwell:

We have received your request for an opinion regarding access to court records concerning support payments made pursuant to orders or judgments in dissolution of marriage proceedings. Section 598.22, The Code 1981, provides for creation of these records and addresses access to them, stating in relevant part as follows:

> All orders or judgments providing for temporary or permanent support payments shall direct the payment of such sums to the clerk of court for the use of the person for whom the payments have been awarded. . .
>
> An order or judgment entered by the court for temporary or permanent support or for an assignment shall be filed with the court clerk. Such orders shall have the same force and effect as judgments when entered in the judgment docket and lien index and shall be a record open to the public. The clerk shall disburse the payments received pursuant to such orders or judgments. All moneys received or disbursed under this section shall be entered in a record book kept by the clerk, which shall be open to inspection by the parties to the action and their attorneys. [Emphasis supplied.]

This statute raises the following concern. Temporary or permanent support orders create a lien upon the real estate of the party the order is entered against. §§ 598.22, 623.23, The Code 1981. Section 598.22, however, may prevent access to the records which would reveal the amount of the lien.

In conjunction with your basic question concerning access to the support payment records, you have asked the following two questions:

2. Since children would not be parties named in an action, should they be allowed access to the record of receipts and disbursements maintained by the Clerk?

3. Since it is necessary for the Clerk of Court to maintain a record of the current address of the party receiving payments, is the address of said party a part of the "record of receipts and disbursements" maintained by the Clerk (which would be available to the parties), or a public record available to the general public, or would it be confidential and not available to anyone?

Your questions require determination of various rights of access to information contained in the support record book. Initially, it should be noted that this book appears to be a "public record", as defined in § 68A.1, The Code 1981. Accordingly, it should be open to public examination pursuant to § 68A.2, unless, as § 68A.2 provides, " . . . some other provision of the Code expressly limits such right or requires such records to be kept secret or confidential."

It should be noted initially that the Iowa Supreme Court has construed ch. 68A in a manner strongly favoring access to public records. See Howard v. Des Moines Register and Tribune, 283 N.W.2d 289 (Iowa 1979). Additionally, the present language of § 598.22 was enacted in 1970, while § 68A.2 was enacted in 1967. 1970 Session, 63rd G.A., ch. 1266, § 23; 1967 Session, 62nd G.A., ch. 106, § 2. Prior to enactment of the present § 598.22, it appears that there was no requirement that support payments be made through the clerks of court and therefore no support record book was maintained. Accordingly, it must be assumed that the Legislature initially enacted § 598.22 with an awareness of § 68A.2. While not expressly stating a limitation on public access, the language of § 598.22 implies that the support record book is a confidential record open only to the parties to the dissolution and their attorneys. In other words, § 598.22 states a limited class of people to whom the support record book is available, but does not, except by inference, state that the book is not open to the public.

Therefore, the essential question presented in this opinion is whether the language of § 598.22 is sufficient to create an exception to the general requirement of access contained in § 68A.2.

Initially, it would appear that in the absence of § 68A.2, the language of § 598.22 requiring disclosure to the limited class would imply confidentiality regarding other persons. See State ex rel. Hutt v. Anthes Force Oiler Co., 237 Iowa 722, 22 N.W.2d 324, 328 (1946). In conjunction with this implication, several other Code sections provide for confidentiality of records concerning dissolution proceedings, which appear to evidence a legislative policy of confidentiality. Initially, §§ 252B.9 and 252B.10, The Code 1981, provide for access to confidential information deemed necessary for use by the child support recovery unit established by § 252B.2, but provide for a criminal penalty for improper disclosure of this information. In addition, § 598.26, The Code 1981, provides for confidentiality and sealing of certain parts of the record in a dissolution proceeding. In addition, if the language of § 598.22 is interpreted to not provide for confidentiality, it would appear to be a superfluous provision. If the public has access to the support record book, there is no purpose in expressly granting the same right of access to the parties and their attorneys. Nor does § 598.22 appear to modify the restrictions on access contained in § 598.26, as the restrictions in § 598.26 do not deny access to any part of the record to the parties and their attorneys. In other words, we can find no purpose for the last clause of the last sentence of § 598.22 unless it is construed as a confidentiality requirement.

An examination of § 598.26 reveals that the confidentiality requirements of this section may not necessarily lend support as a matter of policy to an interpretation of § 598.22 requiring confidentiality. Initially, the confidentiality requirements of § 598.26 extend only until the entry of a decree of dissolution. After this time, the record is sealed only pursuant to motion. In Giltner v. Sark, 219 N.W.2d 700, 706 (Iowa 1974), the Court stated that the limitation of access contained in § 598.26 is primarily designed to facilitate the conciliation process during the pendency of a dissolution action. This policy would not be defeated by public access to the support record book after the entry of a decree of dissolution nor would public access to the support record book during the pendency of a dissolution action appear to present the same potential harm as would access to other parts of the record, such as asnwers to interrogatories or financial statements. Furthermore, even these more sensitive documents become open to public access after entry of the decree unless sealed by motion to the district court. § 598.26(2). In light of the above, there does not appear to be any compelling policy reason for keeping the support record book confidential in all cases.

In conclusion, no clear rationale appears to resolve the conflict between § 68A.2 and § 598.22. There does not appear to be any Iowa Supreme Court decisions regarding what type of language constitutes an express limitation on the public's right to access pursuant to § 68A.2. In contrast to § 598.22, there are many statutes which are certainly more express than § 598.22 in stating an exception to public access. See §§ 2.79, 17A.3, 88.12, 125.33, The Code 1981. [1] Arguably, the inference regarding confidentiality drawn from § 598.22 could be construed to not constitute an express exception to § 68A.2. We believe, however, that the Legislature clearly intended the support record book to be confidential, and accordingly, we believe that the support record book should not be open to public inspection, but should only be open to the parties and their attorneys.

Your second question requires determination of whether the children of the named parties to the action may have access to the support record book. The term "party", in the context of § 598.22, has not been defined by the Iowa Supreme Court, nor is there extensive discussion of the general definition of a party contained in Iowa case law. In Gibbons v. Belt, 239 Iowa 961, 33 N.W.2d 374 (1948), the Court quotes 1 Greenleaf Ev., 16th Ed. § 523, stating as follows:

> * * * Under the term 'parties,' in this connection, the law includes all who are directly interested in the subject matter, and had a right to make defense, or to control the proceedings, and to appeal from the judgment. This right involves, also, the right to adduce testimony, and to cross examine the witnesses adduced on the other side. Persons not having these rights are regarded as strangers to the cause.

A review of various definitions of a party adopted in other jurisdictions reveals that the term has not been restrictively defined to include only named parties, but may include persons having a direct interest in the subject of a proceeding. See Words and Phrases, Permanent Ed. Vol. 31, p. 409. Under the guidance of the quotation from Gibbons v. Belt, set out above, we do not

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[1] In the Report of the Iowa Citizens Privacy Task Force, created pursuant to 1978 Session, 67th G.A., ch. 1191, a compilation is made of Iowa Code sections which require confidentiality. Interestingly, § 598.26 is listed, while § 598.22 is omitted.

believe that all interests in a proceeding compel status as a party, but that status as a party follows from a right to participate in the proceedings. Section 598.12, The Code 1981, provides for appointment of an attorney "to represent the interests of the minor child or children of the parties", including the right to cause witnesses to appear. [Emphasis supplied.] This language not only implies that the spouses are the parties to the dissolution, but appears to present a guide as to when children of the spouses attain the status of a party. We believe that the considerations that mitigate toward appointment of an attorney for a minor child would mitigate toward allowing access to the support record book. Accordingly, a child has the status of a party, with attendant access to the support record book, only if an attorney is appointed for that child pursuant to § 598.12.

Your third question requires determination of the scope of the confidentiality extended to the support record book. As you have pointed out, a clerk must have a record of current addresses of support recipients in order to perform his/her duties pursuant to § 598.22. There does not appear to be any Iowa Supreme Court cases or Attorney General's opinions which directly address the question you have raised. Although a record of addresses would appear essential, neither § 598.22 nor any other statute addresses confidentiality of names. Confidentiality of a particular portion of a public document does not necessarily require confidentiality of the remainder of that document or documents containing closely related material. See 1974 Op. Atty. Gen. 430. Accordingly, we believe that any list of current addresses of support recipients should be open to public inspection. In an appropriate case, an injunction to restrain public examination might be obtained pursuant to § 68A.8, The Code 1981.

Sincerely,

STEVEN G. NORBY
Assistant Attorney General

SGN:sh

MUNICIPALITIES: Home Rule Charter - Terms of Council Members - §§372.10 and 376.2, The Code 1979. A home rule charter may provide for both two year and staggered four year terms for council members. (Blumberg to Fisher, Webster County Attorney, 3/3/81) #81-3-3(L)

March 3, 1981

Mr. Monty L. Fisher
Webster County Attorney
Courthouse
Fort Dodge, IA 50501

Dear Mr. Fisher:

We have your opinion request of January 20, 1981, regarding the form of government in a Home Rule Charter. The proposal adopted by a local commission is for a city council consisting of seven members. Four ward council members would serve two year terms, and three at-large council members would serve staggered four year terms. You ask whether this form of government is permissible.

Section 372.10, The Code 1979, provides that a home rule charter must contain provisions for a council of an odd number, not less than five, a mayor who may be a member of the council, any "[t]wo year or staggered four year terms" of the council members. There is no doubt that if all the council members had two year or staggered four year terms that such would be permissible. The mixture of both is not specifically addressed in the statute. Is the use of the word "or" intended to be disjunctive or conjunctive?

Ordinarily, the word "or" is used primarily as disjunctive. It can, however, be used conjunctively when the context requires such a construction to prevent an absurd or unreasonable result. Note, Avoiding Inadvertent Syntactic Ambiguity in Legal Draftsmanship, 20 Drake L. Rev. 137(1970). If "or," as used in §372.10, is intended to be disjunctive, the section would have to read "two year or four year terms, but not both." If "or" is meant to be conjunctive, that section would read "two year or four year terms or both."

Section 376.2 provides that except as otherwise stated by law or the city charter, terms for elective officers are for two years. The electors may provide for four year staggered terms.

Since a home rule charter may provide for terms other than for the two years found in §376.2, we do not believe that the wording in §372.10 limits the terms to all two years or all four years. A reasonable interpretation is that a home rule charter can provide for both. We do not see any problems of unreasonable classification since all council members elected from wards serve the same term, and all those elected at-large serve the same term.

Very truly yours,

Larry M. Blumberg

Larry M. Blumberg
Assistant Attorney General

LMB/kkh

MUNICIPALITIES: Fire and Police Pension Systems - §§411.1, 411.2, 411.4 and 411.21, The Code 1979; 1980 Session; Ch. 1014, §§31, 34, 35, and 36, Acts of the 68th G.A. When a member of the fire pension system transfers to the police pension system within the same municipality, and legally withdraws the accumulated contributions from the fire pension system during or because of the transfer, such member is entitled to credit for prior service pursuant to §411.4. (Blumberg to Peterson, Muscatine County Attorney, 3/3/81) #81-3-2(L)

March 3, 1981

Mr. Stephen J. Peterson
Muscatine County Attorney
415 Iowa Avenue
Muscatine, IA 52761

Dear Mr. Peterson:

We have your opinion request regarding credit for prior service in a Chapter 411 retirement system. Under your facts, a member of the police department wishes to have credit for his time as a fireman from 1957 to 1966, included with his time as a police officer for retirement purposes. With those facts, you ask:

> Does Chapter 411 of the Code of Iowa provide for two separate retirement systems or is it possible for a member of the Fire Department to transfer both his time served and funds accumulated from the Fire Retirement System to the Police Retirement System?

Pursuant to Chapter 411, there are two separate retirement systems--one for the members of the police department, and one for the members of the fire department. See, §§411.1(1) and 411.2, The Code, 1979. Section 411.4, as amended by 1980 Session, Ch. 1014, §31, Acts of the 68th G.A., provides, in part, that the board of trustees shall credit as service for a member of the system a prior period of service where the member withdrew his or her accumulated contributions as defined in §411.21.

Section 411.21, as amended by 1980 Session, Ch. 1014, §§34, 35, and 36, Acts of the 68th G.A. defines "accumulated contribution, requires the boards to invest the accumulated contributions in the annuity reserve and savings funds, provides for payments from those funds, and provides that members with fifteen or more years of service who were terminated prior to retirement other than by death or disability are still entitled to the accumulated contributions and other retirement benefits.

In a previous opinion, 1974 Op. Att'y Gen. 384, we held that when one transferred from the fire department to the police department within the same municipality, both the employer's and employee's contributions in a 411 system could be transferred from one fund to the other. We know of no statutory changes since that time which would change the result of that opinion. If the transfer from the fire department to the police department was direct, and there was no withdrawal of the accumulated contributions, §411.4, as amended, is not applicable. Pursuant to the previous opinion, everything, including credit for years of service, would transfer automatically. If, however, the member withdrew his accumulated contributions from the fire pension system before the transfer to the police department, §411.4 would apply.

Section 411.4, as amended, refers to "board of trustees" and a member of the "system," in the singular. It could very well have been the intention that the credit within that section only is applicable to one who terminates from one of the systems and withdraws the accumulated contributions, and then, at a later time, rejoins that particular retirement system. Section 4.1(3) provides that the singular normally includes the plural and vice-versa. Thus, §411.4 could be read to mean "boards of trustees" and members of the "systems." We do not believe that such a distinction makes a difference. If a member can transfer directly from one retirement system to another within the municipality without losing prior credit for years of service, it would be unreasonable to say that the legal withdrawal of accumulated contributions between the transfers is a bar to the credit.

Accordingly, we are of the opinion that when a member of the fire pension system becomes a member of the police pension system in the same municipality, and legally withdraws the accumulated contributions from the fire pension system during or because of the transfer, the credit provided for in §411.4, as amended, is not waived or lost.

Very truly yours,

Larry M. Blumberg

Larry M. Blumberg
Assistant Attorney General

LMB/kkh

MUNICIPALITIES: Recomputation of Pensions--§§ 411.1(12), 411.6(12)(a), The Code 1981; 1980 Session, Ch. 1014, § 33, Acts of the 68th G.A. The recomputation of pensions for retired members are based on increases in the earnable compensations of active members occupying the same steps or salary scales as the retired members held. (Blumberg to Holden, State Senator, 4/28/81) #81-4-18(L)

April 28, 1981

The Honorable Edgar H. Holden
State Senator
L O C A L

Dear Senator Holden:

We have your opinion request regarding the recomputation of pensions under Chapter 411, The Code, 1979. Under your facts, the city in question has adopted a cost of living increase for all non-bargaining police officers. The average amount of the increase was five percent. However, the city added an evaluation to determine how much each officer would receive. The amounts varied from 4.18 percent to 5.99 percent. The cost of living increase was added to all non-bargaining officers, and the required percentages were withheld for the pension contributions. No recomputations were made for retired members because of these increases. The reasoning was based upon an opinion of this office, 1978 Op. Att'y Gen. 55, because these cost of living increases were considered to be merit increases. You asked the following questions:

1. Is a general mid-fiscal year cost-of-living adjustment raise to all non-bargaining employees considered a merit raise because of mere fact an evaluation was tacked on to decide the plus or minus adjustment of the 5% basic increase each individual would receive?

2. Does the fact an evaluation was tacked onto a general 5% cost-of-living adjustment to determine the plus or minus 5% each would receive, convert a general raise into a merit raise?

3. Since the mid-fiscal year raise is added to base pay of active officers and increases for pension contribution, state, and federal taxes are taken according to legal requirements, doesn't this make the raise compensation which should be recomputed for retired officers the same as a general raise at beginning of each fiscal year?

4. What figure should be used to recompute non-bargaining retired pensions since the plus or minus 5% was distributed as follows:

12 Lieutenants	.0426 to .0574
5 Captains	.0418 to .0594
3 Majors	.0493 to .0541
1 Lt. Colonel	.0522
1 Chief	.0599

In a subsequent conversation with the city attorney, it was determined that the raises were considered to be merit only and the base pay for the steps were not increased.

In our prior opinion, 1978 Ap. Att'y Gen. 55, the question was whether step increases based upon merit were to be used for pension recomputations. We answered in the negative. Citing to an earlier opinion, 1976 Op. Att'y Gen. 54, we held that the mere fact a member moves up a step within the rank based upon merit does not require a pension recomputation for all those that retired at that step and rank. The reasoning is that merit increases in the form of step increases within a rank apply only to individuals. Pension increases are for general increases in compensation within the step and rank that the retired member held, not for the individual currently holding that position.

For instance, if the retired member held the highest step in the rank of chief at the time of retirement, increases would be based on increases for that step. They would not be based on the increase the current chief received by moving from step one to step two. This reasoning is supported by the language of §411.6(12)(a), as amended by 1980 Session, Ch. 1014, §33, Acts of the 68th G.A. That section provides that the recomputation shall be made based upon the difference between the monthly earnable compensation payable to an active member of the "same rank and position on the salary scale" as held by the retired member at the time of retirement, and the monthly earnable compensation payable to an active member of the "same rank and position on the

salary scale" for July of the year just beginning. Thus, one looks to the rank and step that the retired member held, not the rank and step of the person who replaced the retired member, or any other individual currently within the same rank, but not on the same step or salary scale.

The two previous opinions spoke only to merit increases in the form of upward mobility from one step to another within a rank. They did not concern themselves with cost of living or merit increases within the various steps. We still adhere to the general proposition set forth in those opinions, that merit increases for individuals in the form of step increases should not be used for pension recomputations. Your situation is that although there was a pay increase for all such positions, the amount of the increase was presumably based upon the merit of each individual.

Increases to the monthly earnable compensation of those within the steps occupied by the retired members at the time of retirement should be used as a basis for the recomputation of the pensions. Section 411.6(12)(a), as amended, provides that the recomputation shall be based, in part, on the monthly earnable compensation of a member holding that same step or position on the salary scale within the same rank as the retired member held. "Earnable compensation" is defined in § 411.1(12):

> "Earnable compensation" or "compensation earnable" shall mean the regular compensation which a member would earn during one year on the basis of the stated compensation for the member's rank or position including compensation for longevity and excluding any amount received for overtime compensation or other special additional compensation, meal and travel expenses, and uniform allowances and excluding any amount received upon termination or retirement in payment for accumulated sick leave or vacation. [Emphasis added]

Although clearer language could have been employed, the emphasized portions of § 411.1(12) indicate to us that the term "earnable compensation" was used against an assumption that a city operated with a standard pay plan consisting of ranks and steps for various categories of positions. A standard pay plan reflects the following prototype:

Rank				
	A_1	A_2	A_3	A_4
	B_1	B_2	B_3	B_4
	C_1	C_2	C_3	C_4
	D_1	D_2	D_3	D_4 Step

Under this prototype, one can obtain a raise in three ways: 1)by promotion to a higher step (e.g. A_1 to A_2 or B_1 to B_2); 2)by promotion to a higher rank (e.g. A to B); or, 3)by a general increase for all, or at least several ranks. The first two ways may be regarded as "merit" raises. The third way can be classified as a "cost of living" raise. Under this prototype, a retired member's pension increases in order to reflect all "cost of living" raises.

The scheme you describe does not fit neatly within the legislature's prototype. However, the clear legislative intent to provide retired members with the benefit of raises designated to meet the increasing cost of living indicates that any doubt should be resolved in favor of treating the raise as a "cost of living" raise. In other words, any raise that does not involve a promotion to a higher step or rank in a bona fide pay plan would be treated as a "cost of living" raise and included in "earnable compensation."

Your fourth question presents a difficult problem and we have located no authoritative statutory or case law guidance. In our judgment, however, the only practical approach is to use the <u>average</u> raise for all officers receiving this increase as the basis for recomputing the pensions next July 1.

Accordingly, we are of the opinion that merit increases in the form of upward mobility are not used to adjust pensions. Increases in earnable compensation are used. Your plan contemplates an increase in earnable compensation. Such an increase is used to recompute pensions on July 1 of each year.

Very truly yours,

Larry M. Blumberg

Larry M. Blumberg
Assistant Attorney General

LMB/kh

COUNTIES AND COUNTY OFFICERS: CLAIMS. Article III, § 31, the Iowa Constitution; Chapter 28E, §§ 309.17-21, 332.3(5), 332.3(6), The Code 1981. The county has no authority to pay or settle claims which would be contrary to existing statutory law. Whether recovery of claims paid is pursued in court is a matter within the discretion of the County Attorney. (Hagen to Johnson, State Auditor, 4/27/81) #81-4-16(L)

April 27, 1981

Honorable Richard Johnson, C.P.A.
Auditor of State
State Capitol
L O C A L

Dear Mr. Johnson:

We are in receipt of your opinion request promulgating the following two questions:

1. Generally, does the board of supervisors have the authority to compromise claims, or otherwise direct that payment of claims not be sought by the county, when the claim has arisen from illegal actions by county officials? If so, how is the authority to be distinguished from the power of the Legislature, as provided in Article III, § 31 of the Iowa Constitution?

2. Specifically, under the circumstances previously detailed in this letter, does Kossuth County still have enforceable claim against the county engineer to recover payments in excess of the salary set by the board of supervisors?

In your request, you attach a copy of an opinion, which reviews much of the subject matter of this opinion. 1979 O.A.G. #79-4-17. That opinion held that payments of salary to the county engineer by the board of supervisors in excess of the amount established by the board of supervisors are not permitted by Art. III, § 31 of the Iowa Constitution. The opinion stated that the board of supervisors did not have the power to legalize their action under the set of circumstances that were promulgated herein,

but that such action could be legalized by the Legislature as provided in Art. III, § 31. Iowa Electric Light and Power Company v. Town of Grand Junction, 221 Iowa 441, 264 N.W. 84; 1966 O.A.G. 89; 1936 O.A.G. 116-118. Such a county resolution seeking a legalizing act was issued by the Board of Supervisors on April 2, 1979 without apparent success.

As a result of the 1979 Attorney General's opinion, your letter states that the Kossuth County Board of Supervisors, after consulting with the County Attorney, compromised the claim for excess that the county might have had against the County Engineer under the stated authority of §§ 332.3(5) and 332.3(6) of the Code of Iowa. The question then is whether the Board of Supervisors had the authority to compromise such claims. The County Attorney on February 15th, 1980, issued an opinion which in effect advised the Board of Supervisors that they could compromise any claim the county had against a person and thus avoid a law suit by the County Attorney on behalf of the county.

The County Attorney's opinion relied on Grace v. Hamilton County, 37 Iowa 290 (1873). In that case, the Hamilton County Board of Supervisors had compromised a claim against Hamilton County and was being sued by a taxpayer who claimed that they had no authority to compromise. The Supreme Court in that case held that the Board of Supervisors had the discretion in such matters to act in the best interests of the county. The opinion also cited Collins v. Welch, 12 N.W. 12 Iowa (1882) in which the Court held that a county could in good faith compromise a judgment.

However, in the case of Foster & Foster v. the County of Clinton, 51 Iowa 541, 2 N.W. 20 (1879), the Iowa Supreme Court held that a county attorney cannot render a county liable for compensation of an attorney appointed by him to act in his stead in a criminal prosectuion without statutory authorization. The case further held that the board of supervisors of the county has no power to bind the county by examination, settlement, and allowance of the claim unless the law somewhere requires or authorizes its payment. Such a case involving the express issue of payment of salaries in contravention to Art. II, § 31 would seem to be more persuasive. (1966 O.A.G. 89). In Foster, supra, the Court stated as follows:

> 4. Lastly, it is claimed that the plaintiff should recover under section 303 of the Code, which confers upon the board of supervisors power "to examine, settle and allow all just claims against the county." A claim is not a just claim against the county unless the law somewhere requires or authorizes payment. We have discovered no such requirement or authority to the claim in the question. [Emphasis supplied.]

Foster, supra, was reaffirmed in Mousseau v. City of Sioux City, 84 N.W. 1027, 113 Iowa 247 (1901). The Court once again stated as follows at p. 1027:

> No recovery for services rendered by public officers may be had unless compensation is directed by statute. Guannella v. Pottawattamie County, 84 Iowa 36 N.W. Holland v. Wright County, 82 Iowa 165. The state is not bound to provide for such payment and he who takes employment under its agency excepts, with the honors, the burdens also. Jefferson Co. v. Woolard, lg. Green 432. A claim against a city or county is not just unless the law somewhere requires or authorizes its payment. Foster v. Clinton County, 51 Iowa 1541; Turner v. Woodbury County, 57 Iowa 440. [Emphasis supplied.]

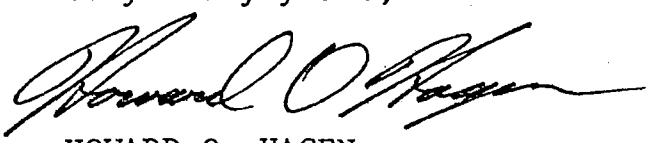
In the recent case of Broadlawns Polk County Hospital v. Estate of Major, 271 N.W.2d 714, the Court once again reasserted the case of Foster & Foster and rejected any theory of implied promise or unjust enrichment on the part of an attorney to the payment of the proportionate share of the estate's attorney fees for services in a wrongful death action where the hospital was not a party to the estate's attorney's contingent fee contract. The Court noted the necessity or contractual and statutory authority, both of which are, based on the evidence before us, absent.

In this case, we had an express contract which states that the reimbursement for services rendered by the County Engineer shall be paid to Kossuth County and not the County Engineer. The contract provides for express payment for personnel of the County Engineer's office but makes clear that the County Engineer is not to be paid under this provision, thereby eliminating any possible confusion as to the interpretation of the 28E agreement. Further, we have an employment arising out of a statutory framework including the exact pay to be received by the county officer, the County Engineer. § 309.17-21, The Code 1981.

Consequently, it is the opinion of this office that, in light of the 28E agreement and of the opinion of April 17, 1979, and the law of the State of Iowa, that the county did not have authority to pay such claims to the county. Further, the second part of your question is thereby moot in that the county did not have authority to do this and, that as stated in our April 17, 1979 opinion, the only remedy in this situation is to have a legalizing Act created by the Iowa Legislature.

However, as stated in our April 17, 1979 opinion, § 336.2(1) does provide for a great deal of discretion on the part of the County Attorney in his determination of whether to pursue a possible claim on behalf of the county. The County Attorney in making that decision could consider the same factors that the Board of Supervisors apparently considered in reaching their decision. Therefore, in answer to your second question, we would state that while Kossuth County may still have a claim against its Engineer, whether that claim should be pursued in Court is a matter within the discretion of the County Attorney.

Very truly yours,



HOWARD O. HAGEN
Assistant Attorney General

HOH:sh

COUNTIES: Tax levies to fund solid waste disposal, §§ 332.32 and 455B.81, The Code 1981. County board of supervisors can levy the stated tax under either § 332.32 or § 455B.81 but not both. (Peterson to Polking, Carroll County Attorney, 4/17/81) #81-4-15(L)

April 17, 1981

Mr. William G. Polking
Carroll County Attorney
Carroll, Iowa 51401

Dear Mr. Polking:

You have requested the opinion of the Attorney General as to whether state law authorizes the levy of a tax under both § 332.32 and § 455B.81, The Code, if used for the purposes stated therein.

We are of the opinion that the county board of supervisors can levy the stated tax under either section but not both.[1] The applicable statutes, in pertinent part, state:

> 332.32 Tax levy. Said boards may within their respective jurisdictions make a determination of which townships of the county will be best served by such disposal ground and levy a tax of not to exceed six and three-fourths cents per thousand dollars of assessed value of all the property in said townships outside the incorporated limits of any city for the purpose of acquiring and maintaining such disposal grounds. Such funds shall be placed in a township dump fund.
>
> 455B.81 Tax levy. The board of supervisors of any county may, in lieu of the levy authorized by section 332.32, annually levy a tax not to exceed six

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[1] The legislature has also authorized the issuance of bonds to finance sanitary disposal projects. §§ 332.44, 332.52. Also, user fees may be imposed in addition to a tax levy. 1976 Op.Att'yGen. 675, copy attached.

> and three-fourths cents per thousand dollars of assessed value of taxable property in the county outside the incorporated limits of any city for the purpose of planning a sanitary disposal project or of paying the interest and principal of bonds issued pursuant to the provisions of section 346.23 as they become due. The levy authorized by this section shall be the only levy that the board of supervisors may authorize for the purposes of this section, notwithstanding the provisions of section 346.11 or any other provision of law. (Emphasis added)

The county home rule amendment contained in Article III, [Sec. 39A] of the Constitution of Iowa, effective November 7, 1978, expressly states that counties ". . . shall not have power to levy any tax unless expressly authorized by the general assembly.. . ." Prior to enactment of the county home rule amendment, the powers of counties were narrowly construed by the Iowa Supreme Court to include only those powers expressly granted or clearly implied by enactment of the legislature.[2]

Thus, both before and after enactment of the home rule amendment, counties could levy only those taxes expressly authorized by the General Assembly.

Section 332.32 was enacted in its present form in 1961 by the 59th General Assembly and was first codified as § 332.32 in the 1962 Code. A statute in substantially the same form as § 455B.81 was first enacted in 1970 (1970 Session, 63rd G.A., ch. 1191, § 8) and codified as § 406.8, The Code 1971. Upon later consolidation of state agency authority and responsibility with respect to the disposal of solid waste, § 406.8 was repealed and the provisions thereof reenacted as § 455B.81, 1972 Session, 64th G.A., ch. 1119, §§ 8 and 112.

Without the emphasized portion of § 455B.81, quoted above, clearly the board of supervisors would be empowered to levy the stated tax under each section. Our inquiry

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[2] This restrictive approach was known as the Dillon rule after the justice who first enunciated the rule in City of Clinton v. Cedar Rapids and Missouri River Railroad, 24 Iowa 455 (1868).

then turns to the meaning intended by use of the emphasized words.

The phrase "in lieu of" is defined in Black's Law Dictionary, Fourth Edition, 1951, as meaning "Instead of; in place of; in substitution of . . ." The Iowa Supreme Court similarly defined the phrase in Wolder v. Rahm, 249 N.W.2d 630 (Iowa 1977), stating further that it does not mean "in addition to." See also Reed v. Albanese, 78 Ill.App.2d 53, 223 N.E.2d 419 (1966); Glassman Const. Co. v. Baltimore Brick Co., 246 Md. 478, 228 A.2d 472 (1967).

In City of Mesa v. Killingsworth, 96 Ariz. 290, 394 P.2d 410 (1964), the Arizona Supreme Court held that a statute saying that use fuel tax was imposed in lieu of motor vehicle fuel tax meant the use fuel tax was "in place of" the motor vehicle tax.

In construing statutes the court ascertains and gives effect to legislative intent. In so doing, the court looks to what the legislature said, rather than what it should or might have said. Davenport Water Company v. Iowa State Commerce Commission, 190 N.W.2d 583 (Iowa 1971). Words are given their ordinary meaning unless defined differently by the legislature or possessed of a peculiar and appropriate meaning in law. Sioux Associates, Inc. v. Iowa Liquor Control Commission, 257 Iowa 308, 132 N.W.2d 421 (1965); § 4.1(2), The Code 1981. See also In the Interest of Clay, 246 N.W.2d 263 (Iowa 1976), and Kelly v. Brewer, 239 N.W.2d 109 (Iowa 1976).

In consideration of the above, we conclude that the legislature authorized counties to impose the stated tax under either § 332.32 or § 455B.81 but not both.

Very truly yours,

Clifford E. Peterson

CLIFFORD E. PETERSON
Assistant Attorney General

CEP:rcp

CRIMINAL LAW: Witness Fees: Prosecuting Attorney's Subpoena Duces Tecum--Sections 815.3, 622.69, and 333.3(2), The Code 1981; Iowa R.Crim.P. 5(6), 13(6)(a), and 14(2); Iowa R.Civ.P. 123 and 155(c). A person who is ordered to produce certain documents or other items pursuant to a prosecuting attorney's subpoena duces tecum under Iowa R.Crim.P. 5(6) is only entitled to receive fees for his attendance and mileage and can not charge or receive fees for other costs incurred in obeying the subpoena. Such person may move the court for an appropriate protective or modifying order upon sufficient showing that compliance would be unreasonable or oppressive. (Richards to Mary E. Richards, Story County Attorney, 4/17/81) #81-4-14(L)

April 17, 1981

Mrs. Mary E. Richards
Story County Attorney
Story County Courthouse
Nevada, Iowa 50201

Dear Mrs. Richards:

You have requested an opinion of the Attorney General regarding the investigative functions of a prosecuting attorney under Iowa Rule of Criminal Procedure 5(6). Particularly, you have asked about responsibility for the payment of costs incurred in the production of documents ordered by subpoena duces tecum. As stated in your letter, this request has arisen because certain financial institutions served with subpoenas duces tecum "have begun sending bills charging a fee to cover their activities required by the subpoena." You have inquired "whether subpoenaed witnesses have a right to [so] charge" and what is "the power or the duty of a government agency to respond to such billings."

Rule 5(6) confers upon a prosecuting attorney investigative powers as sanctioned by the district court. The rule provides in pertinent part:

> The clerk of the district court, on written application of the prosecuting attorney and the approval of the court, shall issue subpoenas including subpoenas duces tecum for such witnesses as the prosecuting attorney may require in investigating an offense, and in such subpoenas shall direct the appearance of said witnesses before the prosecuting attorney at a specified time and place. . . . The rights and responsibilities

> of such witnesses and any penalties for violations thereof shall otherwise be the same as a witness subpoenaed to the grand jury.

(Emphasis added.) Provision for compensation of such witnesses is contained in section 815.3, The Code 1981, which states:

> Witnesses subpoenaed by the county attorney pursuant to R.Cr.P. 5 shall receive the same fees and mileage as are allowed witnesses in the district court, and shall be paid in the same manner in which witnesses before the grand jury are paid except that such fees and mileage shall be certified only by the county attorney.

Section 622.69, The Code 1981, specifies witnesses' fees and mileage at ten dollars for each full day's attendance or five dollars for each attendance less than a full day and fifteen cents per actually travelled mile. Section 333.3(2), The Code 1981, empowers the county auditor to issue warrants without prior approval of the county board of supervisors "(f)or witness fees and mileage for attendance before the grand jury . . . ."

Upon review, we concur with your reading of the Code that it makes no provision for a subpoenaed witness to bill for his services nor does it dictate any response thereto. Sections 815.3 and 622.69 provide fees only for attendance and mileage, not for additional costs incurred in obedience to a subpoena duces tecum. It is a fairly well established principle that "in either a civil or criminal case, a witness is entitled to no further compensation than that which the statutes provide." 81 Am.Jur.2d Witnesses § 23, p. 48 (1976); 97 C.J.S. Witnesses § 41 (1957); see also McNider v. Sirrine, 84 Iowa 745, 747, 51 N.W. 170, 171 (1892) ("It is clear that only such fees can be charged as the statute fixes for the services rendered."); 1920 Op.Att'y Gen. 229 ("The only fee allowed a witness in any tribunal is that fee provided for by statute."). Consequently, it is our opinion that a person who is ordered to produce certain documents or other items under a rule 5(6) subpoena duces tecum is only entitled to receive fees for his attendance and mileage and can not charge or receive fees for other costs incurred in obeying the subpoena. It follows that the prosecuting attorney, county, and state are not obligated to respond to any such billing.

In closing, however, we would also point out that such subpoenaed persons, though not entitled to such compensation, do have some recourse under the rules of criminal procedure. Under Iowa Rule of Criminal Procedure 13(6)(a), the court "upon a sufficient showing" may enter a protective order to deny, restrict or defer any attempted discovery and may "make such other order as is appropriate." This is highly similar to Iowa Rule of Civil Procedure 123 which authorizes the court upon proper motion to make "any order which justice requires to protect a party or person from annoyance, embarassment, oppression, or undue burden or expense." (Emphasis added.) In addition, Iowa Rule of Criminal Procedure 14(2) provides:

> A subpoena may contain a clause directing the witness to bring with him or her any book, writing, or other thing under the witness' control which he or she is bound by law to produce as evidence. The court on motion may dismiss or modify the subpoena if compliance would be unreasonable or oppressive.

(Emphasis added.) This, too, parallels a rule of civil procedure. Rule of Civil Procedure 155(c) states:

> A subpoena may also command the person to whom it is directed to produce the books, papers, documents or tangible things designated therein; but the court, upon motion promptly made by the person to whom the subpoena is directed, or by any other person stating an interest in the documents affected, and in any event at or before the time specified in the subpoena for compliance therewith, may
>
> (1) Quash or modify the subpoena if it is unreasonable and oppressive or
>
> (2) Condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents or tangible things.

It is our view that Rules of Criminal Procedure 13(6)(a) and 14(2) apply to a rule 5(6) subpoena duces tecum and that Rules of Civil Procedure 123 and 155(c) serve as analogy. See Iowa R.Crim.P. 29(2) ("If no procedure is specifically prescribed by these rules or by statute, the court may proceed in any lawful manner not inconsistent with same."). Thus, although a person subpoenaed under rule 5(6) is entitled to no more than the prescribed fees for attendance and mileage, he may nonetheless move the court for an appropriate protective or modifying order upon sufficient showing that compliance would be unreasonable or oppressive.

Sincerely yours,

Richard Lee Richards

RICHARD L. RICHARDS
Assistant Attorney General

bje

STATE OFFICERS AND DEPARTMENTS. Department of Substance Abuse. Child Foster Care Facilities. Licensure. Sections 125.13, 237.1, 237.4, The Code 1981. Residential/intermediate substance abuse treatment facilities which provide treatment to substance abusers who are children, as defined by §237.1(2), The Code, appear to provide "parental nurturing" within the meaning of §237.1(3), The Code, and, thus, are required to be licensed as child foster care facilities unless specifically exempted from licensure by §237.4, The Code. (Freeman to Riedmann, Department of Substance Abuse, 4/10/81) #81-4-10(L)

April 10, 1981

Gary P. Riedmann, Director
Iowa Department of Substance Abuse
Suite 202
Insurance Exchange Building
505 Fifth Avenue
Des Moines, Iowa 50319

Dear Mr. Riedmann:

You recently requested an opinion from our office regarding Senate File 432, as passed by the 68th General Assembly, and its relationship to §125.13, The Code 1981. Essentially you have asked whether residential and intermediate care substance abuse treatment programs required to be licensed by the Iowa Department of Substance Abuse pursuant to §125.13 are also subject to licensing under S.F. 432 when these programs serve children as that term is defined by the Act. An answer to your question requires an examination of S.F. 432 and Chapter 125 and the rules and regulations issued thereunder.

Senate File 432, concerning child foster care facilities, was approved by the Iowa General Assembly on May 23, 1980, and became effective as law on January 1, 1981. Senate File 432 is now Chapter 237, The Code 1981. Section 237.1(2) adopts §234.1(4)'s definition of child, which is as follows:

> [A] person less than eighteen years of age or a person who is at least eighteen years of age but less than twenty-one years of age who is regularly attending an approved school in pursuance of a course of study leading to high school diploma or its equivalent, or regularly attending a course of vocational or technical training either as part of a regular school program or under special arrangements adapted to the individual person's needs.

Chapter 125 is Iowa's Chemical Substance Abuse Law. Section 125.13 provides, in part, that a person may not maintain or conduct a residential program, the primary purpose of which is the treatment and rehabilitation of substance abusers, without first obtaining a written license for the program from the Department of Substance Abuse. Certain exceptions to this licensing requirement are listed in §125.13(2), The Code. Residential treatment programs do serve minors or children as defined by §234.1(4).

Section 237.4, The Code 1981, provides the following in relation to the licensing of child foster care services.

> An individual or an agency, as defined in section 237.1, shall not provide child foster care unless the individual or agency obtains a license issued by the director under this chapter. However, a license is not required of the following:
>
> 1. An individual providing child foster care for a total of not more than twenty days in one calendar year.
> 2. A hospital licensed under chapter 135B.
> 3. A health care facility licensed under chapter 135C.
> 4. A juvenile detention home or juvenile shelter care home approved under section 232.142.
> 5. An institution listed in section 218.1.
> 6. An individual providing child care as a baby-sitter for one or more children, up to a maximum of six children simultaneously, not overnight, at the request of a parent, guardian or relative having lawful custody of the child provided that foster children shall not be counted in determining the maximum number of children allowed.

Pursuant to this section, an individual or agency providing child foster care must receive a license issued by the division director designated by the commissioner of social services. Programs licensed under §125.13, The Code, are not specifically exempted from the licensing requirements of §237.4. Thus the question remains whether residential and immediate care substance abuse treatment programs which also serve children are required to be licensed pursuant to §237.4 after those programs have received a §125.13 license. To answer this question, particular attention must be paid the definitions found in §237.1, The Code.

An "agency" is defined as a person, not meeting the definition of an "individual," which provides child foster care. §237.1(1), The Code. "Person" is defined as follows:

> Unless otherwise provided by law "person" means individual, corporation, government or governmental subdivision or agency, business trust, estate trust, partnership or association, or any other legal entity.

§4.1(13), The Code 1981. On the other hand, an "individual" is basically an individual person or a married couple which does not meet the definition of an agency. §237.1(7), The Code. It appears that substance abuse treatment programs would generally fall within the ambit of the §4.1(13) definition of "person" noted above and would not fall within the §237.1(7) definition of "individual." Consequently, these programs most likely would be "agencies." Whether deemed an "agency" or an "individual," though, a program, to be subject to the licensing requirements of §237.4, The Code, must be providing "child foster care." §§237.1(1), 237.1(7), 237.4, The Code.

As you noted in your opinion request, "child foster care" is defined as follows:

> "Child foster care" means the provision of parental nurturing, including but not limited to the furnishing of food, lodging, training, education, supervision, treatment or other care, to a child on a full-time basis by a person other than a relative or guardian of the child, but does not include:
>
> a. Care furnished by an individual person who receives the child of a personal friend as an occasional and personal guest in the individual person's home, free of charge and not as a business.
>
> b. Care furnished by an individual person with whom a child has been placed for lawful adoption, unless that adoption is not completed within two years after placement.
>
> c. Care furnished by a private boarding school subject to approval by the state board of public instruction pursuant to section 257.25.

237.1(3), The Code. Once, again, treatment programs licensed by the Department of Substance Abuse are not specifically exempted from the general definition. Consequently, one must ask whether residential and intermediate substance abuse treatment programs which serve children provide "parental nurturing," thus subjecting these programs to the licensing requirements of Chapter 237.

Chapter 237 does not specifically define "parental nurturing" except to say that this term includes, but is not limited to, the furnishing of food, lodging, training, education, supervision, treatment or other care, to a child on a full-time basis by a person other than a relative or guardian. The provisions of the Iowa Administrative Code dealing with specific standards for residential and intermediate care substance abuse programs lend a certain measure of assistance in determining whether these particular programs provide "parental nurturing."

805 I.A.C. §3.24 states that "[a] residential/intermediate care program shall be designed to provide comprehensive diagnostic, treatment and rehabilitation services on a scheduled or nonscheduled basis in a residential therapeutic setting." The standards go on to state that "[a] residential/intermediate program shall operate no less than seven days per week, for no less than twenty-four hours a day." 805 I.A.C. §3.24(1). Other standards provide for the preparation and serving of meals, visitations with family and friends, the receipt of mail and the use of telephones. 805 I.A.C. §§3.24(7),(10),(11),(12). In other words, these programs operate on a twenty-four hour basis and provide for the basic, as well as treatment, needs of the patients who are enrolled. Thus, it appears that a child, as defined by Chapt 237, who enters a residential/intermediate treatment program does receive at least food, lodging, supervision and treatment on a full-time basis by a person other than a relative or guardian of the child. In this technical sense, then, it does seem that these treatment programs are subject to the licensing provisions of Chapter 237.

Certainly the ordinary lay-person quite likely would not think of a residential/intermediate substance abuse treatment program which serves children as a child foster care facility. Nonetheless, the stated policy of Chapter 237 indicates that such programs meeting the technical definitions of the chapter are intended by the legislature to be licensed. That policy reads as follows:

> It is the policy of this state to provide appropriate protection for children who are separated from the direct personal care of their parents, relatives, or guardians and, as a result, are subject to difficulty in achieving appropriate physical, mental, emotional, educational, or social development. This chapter shall be construed and administered to further that policy by assuring that child foster care is adequately provided by competently staffed and well-equipped child foster care facilities, including but not limited to <u>residential treatment centers</u>, group homes, and foster family homes.

[Emphasis added]. The residential and intermediate treatment programs licensed by the Department of Substance Abuse are apparently subject to the Chapter 237 licensing provisions unless exempted pursuant to express provisions of §237.4(1-6).

In perusing the licensing exceptions of §237.4, The Code, it does seem that the legislature meant to exempt those institutions already licensed by another licensing authority or otherwise governed by statute or rules and regulations. While one might justifiably wonder why the legislature did not exempt facilities which are licensed by the Department of Substance Abuse from these licensing provisions, without a clearer statement from the legislature indicating the contrary, residential and intermediate treatment programs serving children apparently are subject to Chapter 237 licensing requirements. "[W]here certain exceptions are enumerated, it is presumed the legislature intended no others be created." Iowa Farmers Purchasing Association, Inc. v. Huff, 260 N.W.2d 824, 827 (Iowa 1977).

In conclusion, it is the opinion of our office that residential and intermediate substance abuse treatment facilities which serve children, as that term is defined by §237.1(2), The Code, are agencies which provide "parental nurturing," including the furnishing of food, lodging, supervision and treatment on a full-time basis by a person other than a relative or guardian of the child. Consequently, residential/intermediate treatment centers serving children are providing "child foster care" in the technical, statutory sense of that term. §237.1(3), The Code. Because these substance abuse facilities are not expressly exempted from either the definition of "child foster care," §237.1(3)(a-c), The Code, or from the licensing requirements of §237.4(1-6), they are subject to licensure by the Iowa Department of Social Services, unless the treatment facility itself is one of the institutions exempted by §237.4(1-6)(e.g., a hospital licensed under chapter 135B or a health care facility licensed under chapter 135C).

Yours truly,

Jeanine Freeman

Jeanine Freeman
Assistant Attorney General

JF:djc

CRIMINAL LAW, TRESPASS, CONSERVATION: Sections 716.7 and 716.8, The Code 1979. Trespass as defined in § 716.7(2)(a) requires more than mere entry. Section 716.7(2)(a) and § 716.7(2)(b) are alternative ways to commit trespass and exist independently. A person who enters upon premises accidentally, or who honestly believes that he or she is licensed or privileged to enter, is not guilty of trespass. The legislature should give serious and careful consideration to whether it is desirable to enact a separate statute specifically covering hunting, fishing, and trapping on the property of another without permission. This provision should not be made part of § 716.7. (Cleland to Ramsey, State Senator, 4/8/81) #81-4-9(L)

Honorable Richard R. Ramsey
State Senator
L O C A L

April 8, 1981

Dear Senator Ramsey:

This letter is in response to your request for an Attorney General's opinion with regard to §§ 716.7 and 716.8, The Code 1979. Specifically, you pose the following questions for our consideration:

1. Would a trespass charge lie under § 716.7(2)(a) for the ordinary situation where a person had gone onto the land of another without permission?

2. Does § 716.7(2)(b) negate or affect whether a charge would lie under § 716.7(2)(a)?

3. What does "knowingly" mean as used in § 716.8(1)?

4. How would adding the language of the repealed hunting, fishing, or trapping without permission statute (§ 714.25, The Code 1977) affect the present trespass law?

The answer to your first two questions is no. With regard to your third question, "knowledge" is an element of criminal trespass under both § 716.8(1) and § 716.8(2).

Knowledge, as used here, would mean that mistake of fact would be a defense to a charge of criminal trespass. Finally, a new crime making it per se illegal to hunt, fish, or trap without permission could be added to the criminal code but the desirability of doing so is questionable. However, this provision should not be made part of § 716.7.

I.

Criminal trespass as defined in § 716.7(2)(a), The Code 1979, is a specific intent crime. Entry without permission is not unlawful under § 716.7(2)(a) unless the entry is made "with the intent to commit a public offense or to use, remove therefrom, alter, damage, harass, or place thereon or therein anything animate or inanimate." Section 716.7(2)(a). See Op. Att'y Gen. # 79-8-3. Therefore, the answer to your first question is no. A trespass charge will not lie under § 716.7(2)(a) for the ordinary situation where a person has gone onto the land of another without permission. More is required under the law as written. When a person enters onto the land of another without permission and is charged under § 716.7(2)(a), the accused's intent becomes a fact question, that is, the jury, or the court in the case of a bench trial, must find beyond a reasonable doubt that the accused had the requisite intent specified in § 716.7(2)(a) before the accused can be convicted of criminal trespass.

II.

Section 716.7(2), The Code 1979, defines trespass in alternative ways. Section 716.7(2)(a) and § 716.7(2)(b) define alternative ways to commit trespass. The elements of the definition of trespass under § 716.7(2)(a) are (1) entering upon or in property, (2) without justification or without implied or actual permission, and (3) with the requisite intent. See Division I. The elements of the definition of trespass under § 716.7(2)(b) are (1) entering or remaining upon or in property, (2) without justification, and (3) after being notified or requested to abstain from entering or to remove or vacate.

The essential distinction between the two is that § 716.7(2)(a) requires a specific intent whereas § 716.7(2)(b) requires notification or request not to enter or remain on the property. That is, in a prosecution under the latter section it is not necessary to prove what the accused intended when he or she entered upon or in the property. On the contrary, it is only necessary to prove notification or request not to enter or to leave or vacate. See, Op. Att'y Gen. # 79-8-3. Since § 716.7(2)(a) and § 716.7(2)(b) are alternatives, § 716.7(2)(b) does not negate or affect whether a charge can be filed under § 716.7(2)(a).

It may be that those filing complaints (simple misdemeanors) or informations (serious misdemeanors) are unnecessarily limiting the charge. There should not be a problem as to whether a charge should be filed under § 716.7(2)(a) as opposed to § 716.7(2)(b) because it is not necessary to indicate a particular alternative in the complaint or information. For example, criminal trespass may be charged as "A.B. committed criminal trespass upon the property of (name owner) (thus injuring C.D.) (causing more than $100 in damage)" in violation of § 716.8(2), The Code. See Iowa R.Crim.P. 30, Form 10. When the facts of a particular case would support a conviction under more than one of the alternatives specified in § 716.7(2), the complaint or information should charge the crime in general terms, that is, without indicating a specific alternative.

III.

It is our opinion that "knowledge" is an element of criminal trespass under both § 716.8(1) and § 716.8(2), The Code 1979. In other words, criminal trespass is not a strict liability crime and ignorance or mistake may be a defense. See § 701.6, The Code 1979.

Trespass is defined in § 716.7. Section 716.7, however, does not make trespass a crime. See State v. Kittelson, 164 N.W.2d 157, 165 (Iowa 1969) (section defining "accessory after the fact" did not define a crime where no provision made for how crime would be indicted, tried, or punished). It is only through the operation of § 716.8 that trespass becomes a criminal act and § 716.8 requires more than a mere trespass as defined in § 716.7.

Section 716.8(1) provides that "[a]ny person who knowingly trespasses upon the property of another commits a simple misdemeanor." Under § 716.8(2) the trespass must "result in injury to any person or damage in an amount more than one hundred dollars" and is classified as a serious misdemeanor. Thus, the legislature obviously intended to create two grades of criminal trespass. The problem arises because it is not clear what the legislature intended to be the relationship between the two. Compare § 716.8 with § 711.3, The Code 1979 ("All robbery which is not robbery in the first degree is robbery in the second degree.") and § 713.3 ("All burglary which is not burglary in the first degree is burglary in the second degree.").

Some sources have assumed that § 716.8 operates in the same manner as § 711.3 and § 713.3, that is, all criminal

trespass which does not result in injury to a person or damage in excess of one hundred dollars is simple misdemeanor trespass. The word "knowingly" in § 716.8(1) has been ignored. See IV J. Yeager & R. Carlson, Iowa Practice: Criminal Law and Procedure, §§ 378-386 (1979); II Uniform Jury Instructions: Criminal, Nos. 1609-1612 (1978). Professor Dunahoo has commented as follows:

> There are two grades of Trespass, with the distinguishing characteristic being whether either personal injury or property damage in excess of $100 occurred. This aggravated form of Trespass is a serious misdemeanor, whereas the ordinary form of Trespass is a simple misdemeanor. A similar scheme of grading was included in the pre-revised law, except that the maximum penalty for the aggravated form was imprisonment for six months instead of the one year maximum, as a serious misdemeanor under new Code section 716.8(2).

Dunahoo, The New Iowa Criminal Code, 29 Drake L. Rev. 237, 366 (1980) (footnotes omitted).

The word "knowingly" cannot, however, be ignored or read out of the statute. See In the Interest of Clay, 246 N.W.2d 263, 265 (Iowa 1976) (effect must be given to the entire statute). The problem is one of interpretation. "Knowingly" is an ambiguous word. Among other meanings, it can be interpreted to mean that the accused must have knowledge of the fact that he or she is engaging in a certain act. Or, it can be interpreted to mean that the accused must have knowledge that the act is prohibited by law. See United States v. International Minerals and Chemical Corp., 402 U.S. 558, 91 S.Ct. 1697, 29 L.Ed.2d 178 (1971). In determining which definition the legislature intended, decisions from other jurisdictions are instructive. Section 140.05 N.Y. Criminal Law (McKinney) provides that "a person is guilty of trespass when he knowingly enters or remains unlawfully in or upon premises." The New York Court of Appeals has interpreted this provision to mean that:

> [I]n prosecuting one for trespass in violation of section 140.05, it must be proved that such person "knowingly"

> entered the premises without license or privilege and, therefore, a person who enters upon premises accidentally, or who honestly believes that he is licensed or privileged to enter, is not guilty of any degree of criminal trespass.

People v. Basch, 36 N.Y.2d 154, 365 N.Y.S.2d 836, 840, 325 N.E.2d 156 (N.Y. 1975). The New York provision is substantially the same as § 716.8(1). It is our opinion that the word "knowingly" as used in § 716.8(1) must be given a similar interpretation and effect.

Even though § 716.8(2) does not specifically require knowlege as an element, it is our opinion that knowledge is an element under this section. The question is whether under the principles of statutory construction § 716.8(2) can be read to require knowledge. The following language from State v. Conner, 292 N.W.2d 682, 684-85 (Iowa 1980) (citations omitted) is relevant:

> The polestar of statutory interpretation is legislative intent. To discern that intent, it is necessary to examine the whole act of which the statutory provision in question is part. Particularly relevant are substantively related provisions adopted in the same legislative session. From this examination of related provisions, an overall legislative scheme may become evident. If any single provision, read literally and in isolation, would be repugnant to the overall purpose or scheme, reasonable minds may be uncertain as to its meaning. Statutory construction is then appropriately invoked.
>
> As defendant correctly observes, subsection 707.5(1) is repugnant to the general scheme of sections 707.1-5, which shows a gradation of culpability commensurate with the gradation of punishment . . . .
>
> To read subsection 707.5(1) literally, as requiring no mens rea or fault, but subsection 707.5(2) as requiring recklessness

> would be to impose a stricter sanction for a crime requiring less culpability, in contradiction of the statutory scheme. This contradiction warrants the application of rules of statutory construction because of the uncertainty it creates as to the intended meaning of subsection 707.5(1).
>
> Another justification for statutory construction here is the often-repeated principle first articulated by this court in State v. Dunn: "Whether a criminal intent or guilty knowledge is an essential element of a statutory offense is to be determined as a matter of construction from the language of the act, in conjunction with its manifest purpose and design." Applying this rule, this court has, on a number of occasions, construed a statute to include a criminal intent element absent from its face. This type of statutory construction is not uncommon.

Likewise, to read subsection 716.8(2) literally, as not requiring knowledge, but subsection 716.8(1) as requiring knowledge would be to impose a stricter sanction for a crime requiring less culpability. The ambiguity must be resolved through statutory construction. Moreover, the question of whether § 716.8(2) requires knowledge must, in absence of a specific mens rea requirement, be determined as a matter of statutory construction. Our opinion is not changed by the fact that § 716.8(2) requires injury or damage while § 716.8(1) does not.

Reference to the common law is of little assistance since criminal trespass at common law is substantially different than Iowa's statutory enactment. See 87 C.J.S. § 140 (1954). In addition, the legislative history of § 716.8 is not particularly helpful.

Two principles of statutory construction, however, are particularly relevant in our interpretation of § 716.8. First, statutes must be interpreted so as to avoid absurd results. Hanover Ins. Co. v. Alamo Motel, 264 N.W.2d 774, 778 (Iowa 1978). Second, penal statutes are interpreted strictly with doubts resolved in favor of the accused. State v. Davis, 271 N.W.2d 693, 695 (Iowa 1978).

There is no doubt that failure to read "knowingly" into § 716.8(2) would cause problems. Criminal trespass under § 716.8(1) would include an additional element (knowledge) not required to convict someone of criminal trespass under § 716.8(2). Under this interpretation, simple misdemeanor trespass and serious misdemeanor trespass would be different offenses rather than different degrees of the same offense. See State v. Sangster, 299 N.W.2d 661, 663 (Iowa 1980). This result would be absurd since, for example, under Iowa law a person could not be convicted of violating § 716.8(1) on an information charging a violation of § 716.8(2). See Iowa R.Crim.P. 21(3). The legislature could not have intended such a result.

At the very least, § 716.8(2) is reasonably susceptible of two different interpretations. In the absence of anything which would indicate a contrary legislative intent, § 716.8(2) must be interpreted strictly in favor of the accused which means that "knowledge" must be considered an element of criminal trespass under § 716.8(2).

IV.

Your last question requires a review of the legislative history of § 716.7. Section 716.7 was originally enacted in 1971. 1978 Session, 64th G.A., ch. 274. Sections 744.3 and 746.4, The Code 1971, were repealed. 1978 Session, 64th G.A., ch. 274, § 4. Section 744.3 provided a criminal sanction for persons who willfully entered a building or enclosure where public entertainment was being held without paying admission. Section 746.4 prohibited, inter alia, tramps or vagrants from entering schoolhouses in the nighttime. When § 716.7 was originally enacted, § 714.25, The Code 1971, provided as follows:

> Any person who shall hunt with dog, bow and arrow, or gun upon the cultivated or enclosed lands of another, or who shall fish upon the enclosed or cultivated lands containing or encompassing an artificially constructed pond or ponds of another which have been privately stocked with fish, without first obtaining permission from the owner or occupant thereof, or his agent, or who shall trap upon the cultivated or enclosed lands of another without the permission of the owner or

> occupant thereof, or his agent shall for each offense be fined not more than one hundred dollars and costs of prosecution, and shall stand committed until such fine and costs are paid.

Section 714.25 was not repealed until 1976. 1976 Session, 66th G.A., ch. 1245, § 525.

To the extent relevant here, the criminal trespass provisions were incorporated into the revised criminal code without significant change. 1976 Session, 66th G.A., ch. 1245, § 1607. However, a significant change was made in the 1977 amendments to the criminal code. See 1977 Session, 67th G.A., ch. 147, § 20. Prior to the 1977 amendment, trespass was defined under § 716.7(2)(a) as follows:

> Entering upon or in property without legal justification or without the implied or actual permission of the owner, lessee, or person in lawful possession with the intent to commit a public offense or to use, remove therefrom, alter, damage, harass, or place thereon or therein anything animate or inanimate, without the implied or actual permission of the owner, lessee, or person in lawful possession.

(Emphasis added). This amendment significantly altered the elements of trespass under § 716.7(2)(a). For example, with regard to the intent element, the state was only required to show that the accused had the intent to remove something as compared to that the accused had the intent to remove something without permission as would have been the case prior to the amendment.

It has been proposed that § 716.7 be amended to add the following language:

> It shall be unlawful to hunt with dog, gun, bow and arrow, fish or trap, upon the cultivated, enclosed, or posted lands of another without first obtaining permission from the owner or occupant thereof. Any person violating this section shall be guilty of a simple misdemeanor.

This section is inconsistent with the general scheme of § 716.7. As previously noted, § 716.7 defines trespass but does not make it a criminal act. The proposed provision goes beyond the definitional stage and purports to declare hunting, fishing, and trapping on the property of another without permission a criminal act.

The elements of the proposed statute are (1) hunting, fishing, or trapping, (2) upon the cultivated, enclosed, or posted land of another, and (3) without first obtaining permission from the owner or occupant. This new crime contains elements not required under the present trespass statute. For example, it must be proved that the land is cultivated, enclosed, or posted. Such proof is not a condition precedent for a criminal trespass conviction. Moreover, the terms "cultivated, enclosed, or posted" may be too vague to justify the imposition of criminal sanctions. A criminal statute must "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited so he may act accordingly. A statute must give fair warning of proscribed conduct in order to avoid arbitrary and discriminatory enforcement." State v. Jaeger, 249 N.W.2d 688, 691 (Iowa 1977). The proposed provision leaves many questions unanswered. What does "cultivated" mean? Cultivated as defined in Webster's Third New International Dictionary (1967) as meaning "in crops?" Would hunting on a farm lane between two fields that are "in crops" be prohibited? How soon after the crops were removed would hunting be legal under this provision? Is one no hunting or no trespassing sign in the farm yard of an 800 acre farm sufficient so that all 800 acres would be considered posted? Does the enclosure have to be absolutely complete? What if the gate is open?

As a practical matter, if the evidence is sufficient to show that a person is hunting, fishing, or trapping on the property of another, it is not that much more difficult to prove that the person entered the property with the intent to remove something from the property. Section 716.2(a). II Uniform Jury Instructions, Criminal, No. 215 ("In determining the intent of any person you may, but are not required to, infer that he intended the natural and probable consequences which ordinarily follow his voluntary acts."). Moreover, if game is actually removed from the property without permission, it is unnecessary under § 716.2(d) to prove that the person was even hunting.

Finally, as drafted, this provision purports to create a strict liability crime. If so interpreted, it would not be a defense that the person honestly believed that he or she had permission to hunt on the property. An accused would be guilty under this provision even though it turned out that the hunter had actually sought permission but had mistakenly obtained it from someone not the owner or occupant. Serious consideration should be given to whether it is desirable to enact this provision as a strict liability crime.

Section 714.25, The Code 1971, which is similar to the proposed provision, was not repealed when the criminal trespass was first enacted. The new provision, or § 714.25, could be enacted as a separate crime. However, it is for the legislature to determine whether it would be wise to do so in light of the problems previously discussed and the fact that, for all practical purposes, the subject matter of the new provision is already covered in § 716.7. In other words, the legislature must determine whether it should enact a provision similar to § 714.25 or reenact § 714.25, which was repealed, apparently on the basis that the property rights protected under that provision were sufficiently protected under § 716.7.

CONCLUSION

A lengthy conclusion is not required. Trespass as defined in § 716.7(2)(a) requires more than mere entry. Section 716.7(2)(a) and § 716.7(2)(b) are alternative ways to commit trespass and exist independently. A person who enters upon premises accidentally, or who honestly believes that he or she is licensed or privileged to enter, is not guilty of criminal trespass. With regard to your final question, the legislature should give serious and careful consideration to whether it is desirable to enact a separate statute specifically covering hunting, fishing, and trapping on the property of another without permission. In any event, this provision should not be made part of § 716.7.

Sincerely,

Richard L. Cleland

RICHARD L. CLELAND
Assistant Attorney General

RLC:mlr

COUNTIES: CONFIDENTIAL INFORMATION: Section 68A.7: The county board of health may require those seeking reduced fees for services to make available income information to the supervisors for review. (Morgan to Mahaffey, Poweshiek County Attorney, 4/7/81) #81-4-8(L)

April 7, 1981

Mr. Michael W. Mahaffey
Poweshiek County Attorney
405 East Main
Montezuma, Iowa 50171

Dear Mr. Mahaffey:

We have receivd your request for an opinion regarding the review by the supervisors of names and financial information regarding applicants for a sliding fee scale of payment for county board of health services.

We note that the Code does not provide specific standards regarding the release of information by county boards of health. We assume, therefore, that the general principles of § 68A govern the use and release of information by the board of health.

The Code authorizes confidential treatment of medical information in the possession of a public body including:

> (H)ospital and medical records of the condition, diagnosis, care or treatment of a patient or former patient, including outpatient.

Section 68A.7(2), The Code 1981.

Financial information of applicants for county services is not similarly protected. In fact, as a general rule, the supervisors are required to obtain the financial circumstances of persons for whom they pay for services, including the mentally ill (§ 230.25), the mentally retarded (§ 222.78), substance abusers (§ 125.45(2)) and the poor (§ 252.1 & § 252.13), all references to The Code 1981.

In discussing the similar issue of the public nature of the county auditor's records of name and cost of treatment for mental health payments, the Iowa Supreme Court construes the protection of medical records narrowly:

> Section 68A.7(2), which exempts "hospital records" and "medical records" of a "patient or former patient, including outpatient," does not apply because the documents here were neither compiled for diagnostic or treatment purposes by hospital or medical personnel nor maintained as records of a hospital or physician. They are not hospital or medical records within the meaning of the statute. See Attorney General's Opinion 7572, reprinted in [197576] Iowa Att'y Gen. Biennial Rep. 16062 (holding that auditor's records relating to alcoholic treatment are not within the exemption).

Howard v. Des Moines Register & Tribune Co., 283 N.W.2d 289, 300 (Iowa, 1979), cert. den. 445 U.S. 904; 100 S.Ct. 1081; 63 L.Ed.2d 320 (1980). The Court makes this statement in the context of a statute which specifically excludes any medical mental health records from public view. Sections 229.24 and 229.25, The Code 1981. The law distinguishes clearly between medical records and cost information.

We conclude that the county board of health may require those seeking reduced fees for services to make available income information to the supervisors for review.

We wish to suggest an alternative method for the supervisors to use in determining whether clients are entitled to a sliding fee scale. We recommend that the supervisors, in consultation with the board of health, adopt income standards by which eligibility can be determined. To adopt general income guidelines will permit the supervisors to avoid arbitrary decisions for each applicant for county health services. Such a system of establishing income eligibility guides is used in most public assistance programs. Such an income eligibility system is also used generally in county-funded community mental health centers.

Sincerely,

Candy Morgan

Candy Morgan
Assistant Attorney General

CM/kap

COUNTIES AND COUNTY OFFICERS: TOWNSHIP TRUSTEES: §§ 359.42 and 359.43, The Code 1979. Township trustees can levy a tax to fund township ambulance services without a county referendum. (Fortney to Van Maanen, State Representative, 4/6/81) #81-4-6(L)

April 6, 1981

Honorable Harold Van Maanen
State Representative
State Capitol
L O C A L

Dear Representative Van Maanen:

You have requested an opinion regarding 68th G.A., 1979 Session, Chapter 82, also known as House File 672. You inquired whether a tax can be levied to provide funds for township ambulance services in the absence of a county referendum authorizing same. It is our opinion that no county referendum is needed.

House File 672 amended §§ 359.42 and 359.43, The Code 1979. The amendments authorize township trustees to determine that the township will provide ambulance service. The trustees are also given the authority to levy a tax within the limits set forth in § 359.43 to fund the service. The trustees are authorized to divide the township into districts both for the purpose of providing ambulance service and for the purpose of levying taxes. The amount levied can vary between districts if the trustees so decide. The trustees are authorized to purchase, own, rent or maintain the necessary ambulance equipment. If the trustees determine it is advisable, they may enter into an agreement pursuant to Chapter 28E to provide services.

All of the foregoing powers have been conferred directly on the township trustees. The Legislature did not condition their authority on the submission of these questions to a county referendum.

Yours truly,

David Fortney

DAVID M. FORTNEY
Assistant Attorney General

DMF:sh

COURTS: COUNTIES AND COUNTY OFFICERS: Chapters 19A, 341A and 400, The Code 1981. The position of bailiff of the Iowa district court has civil service status equivalent to that of a deputy sheriff. (Fortney to McCauley, Dubuque County Attorney, 4/6/81) #81-4-5(L)

April 6, 1981

Michael S. McCauley
Dubuque County Attorney
Dubuque, Iowa 52001

Dear Mr. McCauley:

You have requested an opinion of the Attorney General regarding the civil service status of the bailiff of the Iowa district court. It is our opinion that such position has civil service status equivalent to that of a deputy sheriff.

Chapter 341A establishes civil service classifications for deputy county sheriffs. See § 341A.7. The scope of the chapter's applicability is defined by § 341A.7 which provides:

> The classified civil service positions covered by this chapter shall include persons actually serving as deputy sheriffs who are salaried pursuant to section 340.8, but do not include a chief deputy sheriff, two second deputy sheriffs in counties with a population of more than one hundred thousand, and four second deputy sheriffs in counties with a population of more than two hundred thousand. A deputy sheriff serving with permanent rank under this chapter may be designated chief deputy sheriff or second deputy sheriff and retain such rank during the period of his service as chief deputy sheriff or second deputy sheriff and shall, upon termination of his duties as chief deputy sheriff or second deputy sheriff, revert to his permanent rank.

If a bailiff were in fact a "deputy sheriff" who was assigned to perform the functions of a bailiff, the provisions of Chapter 341A would be applicable to the position of bailiff and would confer civil service status.

Section 337.7 provides:

> The sheriff shall attend upon the district court judges, district associate judges, and judicial magistrates of his county, and while they remain in session he shall be allowed the assistance of such number of bailiffs as the judge or magistrate may direct. They shall be appointed by the sheriff and shall be regarded as deputy sheriffs, for whose acts the sheriff shall be responsible. [Emphasis supplied.]

The Code therefore provides that bailiffs are to "be regarded as deputy sheriffs." Consequently, the provisions of Chapter 341A are applicable to the position of bailiff and a bailiff has civil service status equivalent to that of a deputy sheriff.

Yours truly,

David Fortney

DAVID M. FORTNEY
Assistant Attorney General

DMF:sh

STATE OFFICERS AND DEPARTMENTS: COMPTROLLER. Iowa Constitution, Article VII, § 1; § 8.15, The Code 1979. Article VII, § 1 of the Iowa Constitution does not prohibit advance payments of expenses by the State of Iowa. The voucher requesting such advance payment shall comply with § 8.15, The Code 1979. (Norby to Mosher, State Comptroller, 4/2/81) #81-4-3(L)

April 2, 1981

Ronald Mosher
State Comptroller
State Capitol
L O C A L

Dear Mr. Mosher:

We have received your request for an opinion of the Attorney General regarding advance payment of expenses from the state treasury. You have pointed out the established policy of not paying expenses in advance. This policy is supported by prior Attorney General's opinions. 1978 Op. Atty. Gen. 836; 1936 Op. Atty. Gen. 367. Two recent opinions, however, have held that the earlier opinions incorrectly interpreted the Iowa Constitution. Op. Atty. Gen. #80-12-2; Op. Atty. Gen. #79-7-18. We continue to agree with the recent opinions in the conclusion that Iowa Const., art. VII, § 1, does not prohibit advance payment of expenses by the State of Iowa.

You have also brought to our attention § 8.15, The Code 1979, and asked whether this section prohibits advance payments. Section 8.15 provides as follows:

> Before a warrant or equivalent shall be issued for any claim payable from the state treasury, there shall be filed an itemized voucher which shall show in detail the items of service, expense, thing furnished, or contract upon which payment is sought. There shall be attached the claimant's original invoice to a department's approved voucher which shall indicate in detail the items of service, expense, thing furnished, or contract upon which payment is sought.

> Vouchers for postage, stamped envelopes, and postal cards may be audited as soon as an order therefor is entered.

This section does not appear to prohibit advance payment of claims, but rather to require a degree of articulation in the preparation of vouchers. We do not believe that there is anything inherently suspect about warrants issued for advance payments that would prevent the issuance of such warrants in a manner consistent with § 8.15.

Sincerely,

STEVEN G. NORBY
Assistant Attorney General

SGN:sh

Enclosures: Op. Atty. Gen. #80-12-2 (Norby to Wellman)
Op. Atty. Gen. #79-7-18 (Cleland to Holden)

COUNTIES; SPECIAL ELECTIONS: § 345.1 et seq. The provisions of Chapter 345 are only applicable to the construction or remodeling of a "county building or facility" or a "public building." The rights of the electorate to seek a vote to approve or rescind an expenditure pursuant to Chapter 345 is applicable to both §§ 345.1 and 345.4 proposals. Section 345.13 does not establish any time limitations for petitioning for an election. When a § 345.13 petition is signed by 25 percent of those qualified to vote, a petition is valid. A board of supervisors is not required to use the exact language of the petition when the proposal is submitted at a special election. Proposals in addition to those contained in a petition may be included on the ballot. Several distinct public measures may be printed on one ballot and inconsistency between the several propositions is no bar if each is independent of the other so as to enable the voter to indicate his choice on one or all. (Fortney to Lee, Humboldt County Attorney, 4-2-81) #81-4-2 (L)

Robert E. Lee
Humboldt County Attorney
520 Sumner Ave., P. O. Box 672
Humboldt, Iowa 50548

Dear Mr. Lee:

We are in receipt of your opinion request regarding the Humboldt County Opportunity Center. According to the information provided, the Humboldt County Board of Supervisors contributed $50,000.00 in federal revenue sharing funds to a private, nonprofit organization, the Humboldt County Opportunity Center, Inc. The funds were to be used for constructing a new building.[1] The construction has been partially completed.

Recently, the board was presented with a petition for a special election pursuant to § 345.13, The Code 1981. The petition sought to have three plans submitted to the voters. The three proposed plans read as follows:

Plan #1: Continue the present facility in Livermore, Iowa with improvements that are necessary made.

Plan #2: Discontinue the proposed new facility in Humboldt, Iowa.

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1 The organization currently operates a center in Livermore. The new center would be located in Humboldt. It is likely the organization would close the old center when the new one is operable.

Plan #3: Issue $300,000 bonds for the construction of a new opportunity facility.

You have submitted four questions relating to the application of Chapter 345 to the above factual situation. At the outset, it should be noted that the provisions of the chapter are only applicable to the construction or remodeling of a "county building or facility" or a "public building". See §§ 345.1 and 345.4, The Code 1981. In Conrad v. Shearer, 197 Iowa 1078, 198 N.W. 633 (1924), the Iowa Supreme Court construed Ch. 423, The Code 1897. This section was the forerunner of § 345.1. The prior section placed limitations on the amount of money which a county could expend for a "county purpose" absent a vote of the electorate. In holding that an expenditure for improving primary roads was not a "county purpose", the Court stated:

> A "county purpose" is one exercised by the county acting as a municipal corporation. It results in a use or control through the county by its lawfully constituted agents such as the erection of a courthouse or county home, or other project sui generis. Our primary road system is essentially a state system. See chapter 237, Acts 38th G.A., as amended by chapter 84, Acts 40th G.A. In order that it may be carried on most advantageously to the state, improvements are made under plans approved by the state highway commission. [Emphasis supplied.]

198 N.W. 633, 634.

The facts you have presented cast serious doubt on the applicability of Chapter 345 to the Humboldt County Opportunity Center. This facility, though partially funded by public money, is not a county building, nor is it a public building. While the public may be welcome, the building is privately owned and operated by a private corporation. [2] In addition, we note that no bonding

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[2] We draw your attention to 1974 Op. Atty. Gen. 411 which held that while a county can contribute money to fund a legal entity created under Chapter 28E for a governmental purpose, such contribution may be made without holding an election because the limitation of § 345.1 does not apply to a public facility owned by an entity other than the county.

was undertaken to finance the building's construction. Had bonding been involved, the chapter would be applicable. Furthermore, we note that the contribution made by the board was in an amount which § 345.1 allows to be made from federal revenue sharing funds without the need for an election or a public hearing. See 1976 Op. Atty. Gen. 166.

While the present funding of the center and the manner in which it is operated may in fact remove the center from the purview of Chapter 345, we note that the third proposed plan calls for the issuance of bonds to construct a new center. This would appear to call for the erection of a county-owned facility financed by public indebtedness. If so, this would fall within the provisions of Chapter 345. With this background we turn to the specific issues you have posed.

I.

The first inquiry relates to whether the petition in question is "valid and timely" and binding on the board of supervisors. The petition provision is found in § 345.13 which provides:

> The board shall submit the question of the adoption or rescission of such a measure or the allocation of taxes voted to another designated purpose when petitioned by one-fourth of the qualified electors of the county, or by such different number as may be prescribed by law in any special case.

Section 345.13 was part of an original enactment comprised of sections now codified in §§ 345.4 - 345.15. They first appeared as part of the Code of 1851. The forerunner of § 345.1 was not enacted until 1860. However, the Iowa Supreme Court has held that the sections adopted in 1851 are applicable to the later enacted section because all sections were later reenacted as one act. See Windsor v. Polk County, 115 Iowa 738, 87 N.W. 704 (1901). Thus the right of the electorate to seek a vote to approve or rescind an expenditure pursuant to Chapter 345 is applicable to both §§ 345.1 and 345.4 proposals.

We note that § 345.13 does not establish any time limitations for petitioning for an election. The fact that monies have been expended or that contracts have been executed does not prevent the filing of a petition to rescind an underlying expenditure and tax proposal. See § 345.12. The Code does protect third parties, however, by providing that the contracts themselves cannot be rescinded. Id. With third parties thus protected, the Code places no limitation on when the electorate may petition the board of supervisors.

A petition is valid if it meets the criteria established by § 345.13. The only requirement which the petitioners must meet, assuming the proposal in question is one governed by Chapter 345, relates to the number of petitioners. Absent another statute to the contrary, the Code sets the number required at "one-fourth of the qualified electors." Thus, when a petition is signed by 25 percent of those qualified to vote, a petition is valid. When presented with such a petition, the requirements of § 345.13 are mandatory on the board of supervisors. See 1938 Op. Atty. Gen. 841. The board must submit the question to a vote of the electorate.

II.

Your second question, relating to what percentage of the qualified electors of the county is necessary to call an election, has been addressed in Division I.

III.

You have also inquired as to whether a board of supervisors is required to use the exact wording of a petition proposal when the proposal is submitted to the people at a special election. The board is not required to use the exact language of the petition.

The content of a proposal submitted pursuant to Chapter 345 is governed by § 345.6, which reads:

> The mode of submitting questions to the people shall be the following: The whole question, including the sum desired to be raised, or the amount of tax desired to be levied, or the rate per annum, and the whole regulation, including the time of its taking effect or having operation, if it be of a nature to be set forth, and the penalty for its violation if there be one, shall be embraced in a notice of the election. The notice shall, to the extent consistent with this section, be drawn up in accordance with and shall be published as required by section 49.53. A copy of the question to be submitted shall be posted at each polling place during the day of election.

The Iowa Supreme Court has held that all of the information required by § 345.6 is to appear in the proposal submitted to the voters, though the Court recognized that it might be impossible to include information such as the denomination of the bonds and the rate of interest since those matters are dependent on the state of the bond market which cannot be determined in advance.

Wells v. County of Boone, 171 Iowa 377, 153 N.W. 220 (1915).

As applied to the third proposal presented in the petition,[3] the board would need to make a determination regarding the tax aspects of any proposal. It is necessary that a proposal to raise $300,000 through bonding be accompanied by a provision for a tax levy. See § 345.7. The board would consequently need to utilize language for the ballot issue which complied with the requisites of §§ 345.6-7.

IV.

Your final question was whether the board of supervisors may place additional proposals on the ballot when presenting the petition's proposals to the electorate. This question was answered in the affirmative in a previous opinion of this office, 1938 Op. Atty. Gen. 841. In that situation, the Cerro Gordo Board of Supervisors was presented with a petition for issuing bonds to construct a new courthouse. The board wished to include a second proposal which was not included in the petition. The second proposal called for the issuance of bonds to remodel the existing courthouse. We held that the board could include both proposals on the same ballot, allowing for separate votes on each proposal. The following analysis from the 1938 opinion is instructive:

> However, in the instant case we are not confronted with a union of two distinct objects in a single proposition, but rather the submission of two separate and distinct propositions, one, in event of a favorable vote, authorizing the issuance of bonds for the erection and equipping of a new court house, the other if the vote be favorable, authorizing the issuance of bonds for the remodeling of the existing court house, printed upon a single ballot and submitted in the same election. Now, it is apparent upon the face of these two distinct and separate propositions

3 As discussed at the outset of this opinion, the Humboldt County Opportunity Center, Inc. is a private, nonprofit corporation which operates both the Livermore and Humboldt centers. Chapter 345 does not require a vote on plans #1 and #2.

> that there is an inconsistency in the means of accomplishing the objective of providing ample court house facilities for Cerro Gordo County. Nevertheless we submit that if there is not such inconsistency or dissimilarity of object in a single proposition for the "purchase or erection" of a utility, the City of Keokuk case, supra, as would render the submitted proposition dual and, therefore, bad, then a fortiori two separate and distinct propositions on a single ballot, though inconsistent, is not fatal to the validity of an election wherein such propositions are submitted as separate and distinct public measures.
>
> As to either or both propositions, the elector has an absolute, free choice. He may express his vote for or against either or both, and want of that opportunity appears to be the reason why the courts have condemned the incorporation of two distinct objects in a single public measure.

1938 Op. Atty. Gen. 841, 843.

We reiterate and reaffirm the holding of the earlier opinion that (1) several distinct public measures may be printed on one ballot, and, (2) that inconsistency between the several propositions is no bar if each is independent of the other so as to enable the voter to indicate his choice on one or all.

The provisions of Chapter 345 are only applicable to the construction or remodeling of a "county building or facility" or a "public building." The rights of the electorate to seek a vote to approve or rescind an expenditure pursuant to Chapter 345 is applicable to both §§ 345.1 and 345.4 proposals. Section 345.13 does not establish any time limitations for petitioning for an election. When a § 345.13 petition is signed by 25 percent of those qualified to vote, a petition is valid. A board of supervisors is not required to use the exact language of the petition when the proposal is submitted at a special election. Proposals in addition to those contained in a petition may be included on the ballot. Several distinct public measures may be printed on one ballot and inconsistency between the several propositions is no bar if each is independent of the other so as to enable the voter to indicate his choice on one or all.

Very truly yours,

David Fortney

DAVID M. FORTNEY
Assistant Attorney General

DMF:sh

STATE OFFICERS AND DEPARTMENTS: Rulemaking Authority of Medical Licensing Boards. Sections 147.55, 147.76, Chapter 258A, The Code 1981; S.F. 2070, 1980 Session, 68th G.A., ch. 1036, § 33. In light of S.F. 2070, passed by the 1980 Session of the 68th General Assembly, the boards of Medical Examiners, Pharmacy Examiners, Dentistry, Podiatry, Nursing, and Veterinary Medicine do not have authority to promulgate rules concerning the dispensing of prescription drugs, including controlled substances, by practitioners licensed by the boards. Accordingly, these boards do not have authority to promulgate rules regarding the "delegation of nonjudgmental functions in the physical presence of the practitioner" to the extent that such functions involve the dispensing of prescription drugs. (Stork to Kirkenslager, State Representative, 5/27/81) #81-5-19(L)

May 27, 1981

Mr. Larry Kirkenslager
State Representative
State Capitol
L O C A L

Dear Representative Kirkenslager:

You have requested an opinion concerning the following matter:

> On July 5, 1979, [the office of the Attorney General] issued an opinion to the Board of Pharmacy Examiners relative to the question of who, under the Code can disperse prescription drugs. Subsequent to that opinion an Ad Hoc Committee of representatives of the various affected examining boards met and resolved by majority vote that only licensed practitioners should dispense, but that practitioners should be allowed to delegate nonjudgmental functions of delegation in the physical presence of the practitioner.
>
> The question has now come up, and I ask you, can the Board of Medicine [Medical Examiners], Pharmacy, Dentistry, Podiatry, and Veterinary Medicine promulgate rules to allow the delegation of nonjudgmental functions in the physical presence of the practitioner?

By way of explanation, we observe that "the delegation of nonjudgmental functions in the physical presence of the practitioner" includes the dispensing of prescription drugs by an individual who is not a practitioner.

The licensing boards mentioned above, as well as the Board of Nursing, do have general statutory responsibility for the promulgation and enforcement of rules regarding their professions:

> Rules promulgated. The examining boards for the various professions shall promulgate all necessary and proper rules to implement and interpret the provisions of this chapter and chapters 148, 148A, 148C, 149, 150, 150A, 151, 152, 153, 154, 154A, 154B, 155 and 156.

Section 147.76, The Code 1981. This provision applies to the boards of Medical Examiners (Chapter 148), Pharmacy Examiners (Chapter 155), Dentistry (Chapter 153), Podiatry (Chapter 149), as well as Nursing (Chapter 152). The Board of Veterinary Medicine is established under Chapter 169 and must promulgate rules pursuant to § 169.5(9). These licensing boards have additional statutory authority under Chapter 258A of the Code to develop rules for licensee discipline and to administer and enforce laws and rules concerning their respective professions and licensees. See §§ 258A.3(1)(a), 258A.3(3), 258A.4(1)(f). Accordingly, it seems clear that the licensing boards mentioned in your opinion request, as well as the Board of Nursing, have both legal authority and responsibility for promulgating rules to implement and to interpret the statutes that govern the boards. Pursuant to § 258A.4(1)(f), for example, the Board of Medical Examiners has the duty to define by rule acts or omissions which are grounds for license revocation or suspension under the provisions of § 147.55. One of the acts or offenses listed in § 147.55 is engaging in unethical conduct or practice harmful or detrimental to the public. To the extent that the unregulated practice of dispensing prescription drugs and of delegating that function to individuals other than physicians may be harmful or detrimental to the public, the Board appears to have the legal responsibility, under §§ 147.76 and 258A.4, to promulgate rules interpreting the proper scope of such practice. The Board's responsibility in this regard, in addition to that of the other licensing boards mentioned above, is, however, subject to question in

light of Op.Att'yGen. #79-7-10 and the legislation contained in S.F. 2070, adopted by the General Assembly in 1980. 1980 Session, 68th G.A., ch. 1036, § 33.

Op.Att'yGen. #79-7-10 concluded that prescription drugs may be dispensed only by licensed practitioners who are authorized by the Code to prescribe such drugs, i.e. physicians, osteopaths, osteopathic physicians and surgeons, dentists, podiatrists, and veterinarians, and by pharmacists. The conclusion was based upon an interpretation of both the Uniform Controlled Substances Act, contained in Chapter 204 of the Code, and the several statutory provisions governing the scopes of practice of licensed practitioners and pharmacists.

Reacting to Op.Att'yGen. #79-7-10, the 1980 Session of the 68th General Assembly enacted, in S.F. 2070, the following legislation:

> 1. Practitioners licensed under chapters one hundred forty-eight (148), one hundred forty-nine (149), one hundred fifty (150), one hundred fifty A (150A), one hundred fifty-two (152), one hundred fifty-three (153), one hundred fifty-five (155) and one hundred sixty-nine (169) of the Code shall be entitled to continue the practices with respect to dispensing of prescription drugs, including controlled substances, which those practitioners had followed under the laws of this state as amended to July 1, 1979, and as generally interpreted prior to July 5, 1979, notwithstanding the opinion of the attorney general to the secretary of the board of pharmacy examiners rendered on that date, until legislation has been enacted to affirm or modify the attorney general's opinion.
>
> 2. The legislative council is directed to establish a special interim study committee to make a study of prevailing prescription drug dispensing practices, the laws governing those practices, and the opinion of the attorney general to the secretary of the board of pharmacy examiners rendered July 5, 1979, and submit a report to the first session of the Sixty-ninth General Assembly not later than January 12, 1981. The study committee shall include members of the committees on human resources of the senate and house of representatives, and one member each from

> the board of pharmacy examiners, the board of medical examiners, the board of dentistry examiners, the board of nursing examiners, the board of podiatry examiners, and the board of veterinary examiners, each designated by the respective boards to serve on the study committee. The nonlegislator members designated to serve on the study committee pursuant to this subsection shall serve without compensation from the funds of the general assembly.

1980 Session, 68th G.A., ch. 1036, § 33. Paragraph 1 authorizes certain licensed practitioners to continue their practices with respect to the dispensing of prescription drugs, including controlled substances, irrespective of the conclusions of this office in Op.Att'yGen. #79-7-10. In effect, the section places a moratorium on the opinion and thereby suspends any legal impact it may otherwise have. Such practices must, however, have been permitted either by express provisions of state statutes as of July 1, 1979, or by interpretations of the statutes as of July 5, 1979. Paragraph 1 does not, however, provide any explanation as to what types of dispensing practices are to be considered legal or acceptable as of the dates mentioned. By implication, practitioners are permitted to exercise discretion in this regard. The section further indicates that practitioners may continue their dispensing practices "until legislation has been enacted to affirm or modify the attorney general's opinion [Op.Att'yGen. #79-7-10]." This language indicates that the General Assemby does intend to pass further legislation concerning Op.Att'yGen. #79-7-10 and, therefore, on the entire subject of dispensing. This intent is made even more plain by paragraph 2, which establishes a special interim study committee to make a study of dispensing practices and requires the committee to submit a report thereon to the General Assembly not later than January 12, 1981.

The plain provisions of a statute cannot be altered by administrative rule. Schmitt v. Iowa Department of Social Services, 263 N.W.2d 739, 745 (Iowa 1980). Administrative rules must be reasonable and consistent with legislative enactments. Iowa Department of Revenue v. Iowa Merit Employment Commission, 243 N.W.2d 610, 616 (Iowa 1976). Hence, rules may not be adopted that are at variance with statutory provisions, or that amend or nullify legislative intent. Bruce Motor Freight, Inc. v. Lauterbach, 247 Iowa 956, 961, 77 N.W.2d 613, 616 (1956).

The general authority of the boards of medical examiners, pharmacy, dentistry, podiatry, veterinary medicine, and nursing to promulgate rules is modified by the express provisions of S.F. 2070. The practitioners of the professions enumerated in the Act are entitled to continue the practices with respect to dispensing of prescription drugs "which those practitioners had followed under the laws of this state as amended to July 1, 1979, and as generally interpreted prior to July 5, 1979 . . . until legislation has been enacted to affirm or modify the attorney general's opinion [Op.Att'yGen. #79-7-10]." 1980 Session, 68th G.A., ch. 1036, § 33, par. 1. The Act further directs a study by an interim committee, as described above, but does not direct the affected professional licensing boards to adopt rules in accordance with the conclusions of the study.[1] Rather, the Act expresses a legislative intent to preempt the boards' authority insofar as the dispensing of prescription drugs is concerned. This preemption precludes the promulgation of rules which would specifically restrict current dispensing practices, including rules to allow delegation of nonjudgmental functions only in the physical presence of a practitioner. Accordingly, until the General Assembly has enacted legislation on this subject, we conclude that the boards of Medical Examiners, Pharmacy Examiners, Dentistry, Podiatry, Nursing, and Veterinary Medicine do not have authority to develop rules that would be inconsistent with either S.F. 2070 or the dispensing practices generally followed as of the dates mentioned in the statute.

Sincerely,

FRANK J. STORK
Assistant Attorney General

FJS:rcp

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[1] The committee created in paragraph 2, in its report to the General Assembly, made no recommendation for a statutory change in the law concerning dispensing practices. The committee did, however, adopt two resolutions on the subject of dispensing. The first resolution urged the State Board of Medical Examiners to promulgate administrative rules regarding the labeling, packaging, and keeping of records for prescription drugs, including controlled substances, dispensed by physicians and surgeons licensed by

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[1](cont'd) the Board. The second resolution mandated the professional examining board members of the committee to meet separately for the purpose of resolving "the issues of prescription drug and controlled substances dispensing and the delegation of that dispensing function." The resolution further required these members (hereinafter "ad hoc committee") to report to the standing committees on Human Resources in the Senate and House of Representatives regarding a disposition of the dispensing issues. By majority vote, the ad hoc committee adopted its own resolution as follows:

> BE IT RESOLVED, THAT THE AD HOC COMMITTEE ON PRESCRIPTION DRUG DISPENSING PRACTICES REAFFIRMS CURRENT IOWA LAW WHICH LIMITS DISPENSING AUTHORITY TO DENTISTS, PHYSICIANS, PHARMACISTS, PODIATRISTS AND VETERINARIANS; (BOARD OF MEDICAL EXAMINERS ABSTAINED)
>
> BE IT FURTHER RESOLVED, THAT THE COMMITTEE APPROVE THE PROPOSED RULES OF THE IOWA BOARD OF NURSING ON THE ISSUANCE OF A 48-HOUR OR LESS SUPPLY OF PREPACKAGED, PRELABELED MEDICATION BY REGISTERED NURSES UPON THE EXPRESS ORDER OF A PRESCRIBER; (BOARD OF MEDICAL EXAMINERS VOTED NO)
>
> BE IT FURTHER RESOLVED, THAT THE COMMITTEE APPROVE THE PROPOSED RULES OF THE BOARD OF DENTISTRY EXAMINERS AND THE BOARD OF PODIATORY EXAMINERS ON THE ISSUANCE OF A 48-HOUR OR LESS SUPPLY OF PREPACKAGED, PRELABELED MEDICATION BY REGISTERED NURSES UPON THE EXPRESS ORDER OF A PRESCRIBER; (BOARD OF MEDICAL EXAMINERS VOTED YES)
>
> BE IT FURTHER RESOLVED, THAT NONJUDGMENTAL FUNCTIONS RELATED TO THE DISPENSING OF PRESCRIPTION DRUGS MAY BE DELEGATED BY THE PRACTITIONER (THOSE AUTHORIZED TO DISPENSE) BUT ONLY IN THE PHYSICAL PRESENCE OF THE PRACTITIONER; AND, (BOARD OF MEDICAL EXAMINERS VOTED NO)
>
> BE IT FURTHER RESOLVED, THAT THE COMMITTEE APPROVE THE PROPOSED RULES ON PACKAGING, LABELING AND RECORDKEEPING AS PROPOSED BY THE BOARD OF MEDICAL EXAMINERS, THE BOARD OF DENTISTRY EXAMINERS, AND THE BOARD OF PODIATRY EXAMINERS. (BOARD OF MEDICAL EXAMINERS VOTED YES).

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[1](cont'd) Accordingly, the ad hoc committee did reach some agreement, although it was not unanimous, concerning the dispensing issues. The ad hoc committee's recommendations, together with those proposed by its parent committee on prescription drug dispensing practices, were reported to the General Assembly pursuant to S.F. 2070. 1980 Session, 68th G.A., ch. 1036, § 33, par. 2.

COUNTIES: OFFICIAL NEWSPAPERS. Chapter 349, The Code 1981. Absent a joint request pursuant to § 349.15, a county board of supervisors is limited to designating the number of official newspapers specified in § 349.3 and may not pay tax monies to an additional newspaper for purposes of publishing those matters required by § 349.16 and 18. (Fortney to Heitland, Hardin County Attorney, 5/26/81) #81-5-18(L)

May 26, 1981

Jon E. Heitland
Hardin County Attorney
Courthouse
Eldora, Iowa 50627

Dear Mr. Heitland:

You have requested an opinion of the Attorney General regarding designation of official county newspapers pursuant to Chapter 349, The Code 1981. In order to understand the problem you pose, I quote from your letter. You state:

> Hardin County is, by virtue of its population, entitled to three official newspapers, under Iowa Code Section 349.3(4). Presently, there are four newspapers published in Hardin County, all four of which have applied for official newspaper status. The Board of Supervisors, based on submitted subscription lists, has designated three of these newspapers as official newspapers.
>
> Two of the newspapers are clearly entitled to official newspaper status. The third and fourth newspapers have annually competed for the third official newspaper position. An attempt was made at utilizing the provisions of Iowa Code Section 349.15, division of compensation, but this was not agreeable to both the third and fourth newspapers. As a result, no agreement was reached.
>
> The Board of Supervisors, therefore, chose one of the newspapers as the third official newspaper. Subsequently, they passed a resolution authorizing payment to the fourth newspaper for publishing official county proceedings.

We are of the opinion that the resolution of the Board of Supervisors is in conflict with the provisions of Chapter 349. The purpose of designating an official newspaper and publishing those matters required by § 349.16 is to give the taxpayer the same information he could secure by an examination of the records kept by the Board of Supervisors. 1910 Op. Atty. Gen. 223. The objective is to furnish the citizen a convenient method of ascertaining just what business is being transacted by the board and how it is being transacted, as well as to furnish a check upon extravagance and to prevent the presentation and allowance of trumped up or padded claims against the county. Id. These are admittedly concerns of some import. They can, however, be satisfied within the statutory limits of Chapter 349.

Chapter 349 is, at minimum, a comprehensive and detailed scheme to be utilized by all counties in designating official newspapers. The Code specifies when the board is to make the designation, § 349.1, which papers are eligible for designation as official newspapers, § 349.2, the number of official newspapers each county may designate, § 349.3, the method of selection if a larger number of newspapers seeks to be so designated, §§ 349.4-10, the method of appeal to the courts, §§ 349.11-13, as well as those matters which are to be published in the official newspapers, §§ 349.16 and 18. Given the comprehensive nature of Chapter 349, we are unable to say that a county may, pursuant to home rule, make designations beyond the scope of the chapter. See Op. Atty. Gen. #79-4-7 regarding the issue of statutory preemption. The resolution you describe conflicts with the intent of Chapter 349. The statute was intended to impose a limit on the number of newspapers which would be designated as official publications. The practical effect of the resolution is to avoid these statutory limits.

Our position is bolstered by an examination of § 349.15, which provides:

> If in any county the publishers of two or more newspapers, at least one of which by reason of its location and circulation is entitled to be selected as a county official newspaper, have entered into an agreement to publish the official proceedings or have united in a request to have their publication selected for such purposes, and such agreement or request has been filed with the board of supervisors prior to the naming of the official newspapers, the board of supervisors shall designate each of them a county official newspaper, but the combined compensation of the newspapers so requesting or agreeing, added to that

> of the other official newspaper or newspapers, if any, shall not exceed the combined compensation allowed by law to two official newspapers in counties having a population below fifteen thousand or to three official newspapers in counties having a population of fifteen thousand or more.

This section is a clear expression of legislative intent to limit the amount of tax money expended for publishing the official proceedings of the board. Further, it provides the only method by which a number of newspapers greater than that specified in § 349.3 may be designated for publication. We have previously stated that § 349.15 is applicable only if a newspaper which is entitled to official designation in its own right joins with another newspaper in requesting designation. 1938 Op. Atty. Gen. 34. Absent a joint request pursuant to § 349.15, a county board of supervisors is limited to designating the number of official newspapers specified in § 349.3 and may not pay tax monies to an additional newspaper for purposes of publishing those matters required by § 349.16 and 18.[1]

Yours truly,

David Fortney

DAVID M. FORTNEY
Assistant Attorney General

DMF:sh

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1 The scope of this opinion is limited to an interpretation of the requirements of Chapter 349 and those matters which must be published under the requirements of that chapter. We do not address the publication of other official notices, etc. by county officers such as those discussed in Chapter 618.

JUDGES: Retirement Systems--§§ 97B.41, 97B.49, 97B.53, 97B.69 and 605A.3, The Code 1981. Membership in the Judicial Retirement System is not mandatory. A member of the Judicial Retirement System is not entitled to a pension from IPERS. (Blumberg to Longnecker, Administrator, State Retirement Systems, 5/20/81) #81-5-17(L)

May 20, 1981

Mr. Ed R. Longnecker
IPERS
L O C A L

Dear Mr. Longnecker:

We have your opinion request of March 18, 1981, regarding the Judicial Retirement System. You ask whether a judge must give up any IPERS benefits that may be forthcoming in the future upon assuming the office of a judge. Your reference is to § 97B.69, The Code 1981, which provides that when an individual becomes a member of the Judicial Retirement System his or her membership in IPERS is terminated. In your request you assumed that participation in the Judicial Retirement System is mandatory.

Section 605A.3, provides:

> 605A.3 Notice by judge in writing. This chapter shall not apply to any judge of the municipal, superior, or district court including a district associate judge, or a judge of the court of appeals or of the supreme court, until he gives notice in writing, while serving as a judge, to the state comptroller and treasurer of state, of his purpose to come within its purview. Judges of the municipal and superior courts shall at the same time give a copy of such notice to the city treasurer and county auditor within one year after the effective date hereof or within one year after any date on which he takes oath of office as such judge.

The language used in this section is such that it is apparent that membership in this system is not mandatory. A judge becomes a member of the system when notice of his or her intention is given to the state officials. Such notice shall be given within a year of taking the oath as a judge. We have previously stated that this is a voluntary system. See 1968 Op. Att'y. Gen. 423, 424.

Your question, however, is deeper than that. You also ask whether the entry into the judicial system precludes any retirement benefits from IPERS, especially if the individual is vested in IPERS. Section 97B.41(11) defines "vested member" to mean, in general, a member who terminated employment with a certain number of years of service. As a vested member, a pension can be paid under § 97B.49 upon reaching retirement age. In § 97B.53 it is provided that a vested member who is terminated from employment can receive a pension upon reaching retirement age if the member does not receive a refund of the accumulated contributions as provided elsewhere in the chapter. Section 97B.69 provides that one who enters the Judicial Retirement System, in addition to no longer being a member of IPERS, shall be refunded the accumulated contributions. Thus, pursuant to the provisions of that chapter, a person who is terminated from IPERS and receives the accumulated contributions, is not entitled to a pension, even if he or she was otherwise a vested member. We have previously held in relation to this type of system that the legislature has wide discretion with regard to pensions, including a repeal of the system, as long as the affected member is not vested. See 1972 Op. Att'y. Gen. 618. By "vested" we meant, and still mean, the happening of an event that entitles the member to receive the pensions such as reaching retirement age, death or disability.

Thus, a membership in the Judicial Retirement System is voluntary. A judge may elect to stay under IPERS, or become a member of the Judicial Retirement System. However, if a judge elects to be under the Judicial Retirement system, he or she is no longer a member of IPERS.

Very truly yours,

Larry M. Blumberg

LARRY M. BLUMBERG
Assistant Attorney General

LB/cmc

STATE OFFICERS AND DEPARTMENTS: State judicial nominating districts. Section 46.1, The Code 1981. The previous interpretation of § 46.1, that it calls for the appointment of seven judicial nominating commissioners, 1972 Op.Att'yGen. 68, is not clearly erroneous and should be followed until modified by the General Assembly. (Miller to Hultman and Junkins, State Senators, 5/20/81) #81-5-16(L)

May 20, 1981

Honorable Calvin O. Hultman
Senate Majority Leader
State Capitol

Honorable Lowell L. Junkins
Senate Minority Leader
State Capitol

LOCAL

Gentlemen:

We have your recent request for our opinion concerning the proper interpretation of § 46.1, The Code 1981, which provides: "The Governor shall appoint, subject to confirmation by the Senate, one eligible elector of each congressional district to the state judicial nominating commission." When the statute was enacted by the 60th General Assembly in 1963, Iowa was entitled to seven members of Congress and it has been the practice of the Governor to make and of the Senate to approve seven appointments to the Commission since its existence. After the 1970 census, however, Iowa's Congressional delegation was reduced to six. Your question is whether the number of appointed members to the judicial nominating commission should also be reduced from seven to six.

As your request notes, a prior opinion of this office, Turner to Murray, 1972 Op.Att'yGen. 68, concluded that judicial commissioners should continue to be appointed or elected from the seven former congressional districts.

We have indicated on several occasions that, in order to preserve predictability and consistency in the interpretation of statutes, we will overrule prior opinions only if the reasoning therein can be said to be "clearly erroneous." As explained below, we cannot conclude that the prior opinion was clearly erroneous.

The prior opinion was tersely reasoned:

> The manifest purpose of the General Assembly was to provide a geographical distribution of the membership of the commission, and it was found convenient to indicate the congressional districts then existing as judicial commission districts. The latter districts, having been so indicated, continue to exist, there being no relationship whatever between the congress and the judicial commission; there is no reason for a subsequent change in districting for one purpose to carry with it a change for any other purpose.
>
> There is a precise analogy familiar to us all; once the line between the states of Iowa and Nebraska was established by law as the center line of the Missouri river, the state line ran permanently where the river bed was when the compact became law, although the actual course of the river shifted many times.

Put differently, the argument was that the designation of congressional districts was arbitrary but convenient, because there was no connection between the election of members of Congress and the election or appointment of members of the judicial nominating committee. Inasmuch as the new census made the seven old districts no more arbitrary and no less convenient, there should be no change in the size of the commission. We find that reasoning plausible.

Analogies drawn from the reapportionment context, on the other hand, would support a plausible argument that the judicial nominating districts should change with the changes in congressional districts. Because § 46.1 plainly requires geographical distribution of membership on the commission, the argument would run, the legislature may have intended that the geographic districts be equal in population. This argument receives some support from the fact that Baker v. Carr, 369 U.S. 186 (1962), which removed the obstacle of the "political question" doctrine to judicial consideration of malapportionment challenges, was decided shortly before the enactment of § 46.1. However, Wesberry v. Sanders, 376 U.S. 1 (1964), requiring that congressional districts be apportioned equally, and Reynolds v. Sims, 377 U.S. 533 (1964), requiring both houses of a bicameral legislature to reflect the one-man, one-vote principle, had not yet been decided. Of course, there is no constitutional requirement that the judicial commission districts be apportioned according to population. J. Novak, R. Rotunda & J. Young, Constitutional Law, 660 (West 1978). Thus, this line of reasoning, while plausible, is less than irresistible.

The strongest evidence that the prior opinion is not clearly erroneous is the fact that the Governor and the Senate consistently appointed seven members to the commission for a considerable period without seeking clarifying legislation. When a prior interpretation is plainly called to the attention of the General Assembly and it does not act, the courts will treat acquiescence as strong evidence of approval. 2A Sutherland, Statutory Construction, § 49.10 (Sands ed. 1973); General Mortgage Corp. of Iowa v. Campbell, 258 Iowa 143, 138 N.W.2d 416 (1965); Goble v. Mazie Dependent School Dist., 488 P.2d 156 (Okla. 1971). We note that S.F. 276, passed by the Senate on March 4, 1981, would require judicial nominating districts to reflect changes in congressional districts. If a change from prior practice is felt to be desirable, we conclude it should be accomplished by adoption of that or similar legislation, rather than by a change in an interpretation of existing law which is not clearly erroneous and which has been followed for a decade.

Sincerely,

Thomas J. Miller
Attorney General of Iowa

TJM:ab

COUNTIES: Iowa Constitution, Article III, §§ 38A, 39A; §§ 363.2, 384.24, 384.26, 384.82, 388.1, 390.1, The Code 1981; 69th G.A., 1981 Session, S. F. 130, §§ 440.2, 441, 462. A county does not have the authority to establish and operate a utility plant. (Fortney to McCauley, Dubuque County Attorney, 5/14/81) #81-5-12(L)

May 14, 1981

Michael McCauley
Dubuque County Attorney
Courthouse
Dubuque, Iowa 52001

Dear Mr. McCauley:

You have requested an opinion of the Attorney General regarding the authority of a county to establish a county-owned and operated utility plant. You indicated that the Board of Supervisors of Dubuque County are interested in establishing a hydroelectric plant on the Mississippi River in conjunction with the lock and dam system. It is our opinion that a county does not have the authority to establish and operate a utility plant.

We begin our analysis with the County Home Rule Amendment, Iowa Constitution, Article III, § 39A which provides:

> Counties or joint county-municipal corporation governments are granted home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government, except that they shall not have power to levy any tax unless expressly authorized by the general assembly. The general assembly may provide for the creation and dissolution of joint county-municipal corporation governments. The general assembly may provide for the establishment of charters in county or joint county-municipal corporation governments.
>
> If the power or authority of a county conflicts with the power and authority of a municipal corporation, the power and authority exercised by a municipal corporation shall prevail within its jurisdiction.

> The proposition or rule of law that a county or joint county-municipal corporation government possesses and can exercise only these powers granted in express words is not a part of the law of this state.

The authority conferred by the amendment, and the limitations inherent in that grant of authority, were thoroughly examined in an earlier opinion, Op. Atty. Gen. #79-4-7. A copy of that opinion is enclosed. In that opinion we expressed the view that the County Home Rule Amendment contains four basic limitations. We stated these as:

> First, counties have no power to levy any tax unless expressly authorized by the General Assembly. Second, in the event the power or authority of a county conflicts with that of a muncipal corporation, a municipal corporation's power and authority prevails within its jurisdiction. Third, the home rule power exercised by a county cannot be "inconsistent with the laws of the General Assembly". Fourth, home rule power can only be exercised for local or county affairs and not state affairs.

Op. Atty. Gen. #79-4-7, p. 8.

We believe that the Iowa Code prohibits the counties from utilizing tax authority for purposes of establishing a utility. Further, the establishment of such a facility is "inconsistent with the laws of the General Assembly." Finally, we believe that the operation of a utility is not a local affair.

Green v. City of Cascade, 231 N.W.2d 882 (Iowa 1973), addressed the Municipal Home Rule Amendment, Iowa Constitution, Article III, § 38A, which is analogous to the County Home Rule Amendment. The court in Green stated that while municipalities might have the power to authorize revenue bonding under their home rule powers, they could not levy taxes to pay for the bonds without express legislative authority. 231 N.W.2d 882, 885. We believe the Supreme Court would take the same view of county authority.

The Iowa General Assembly has recently enacted a county home rule bill, S. F. 130, 69th G.A., 1981 Session. The bill, which takes effect July 1, 1981, recodifies many of the provisions of the current Code. The bill also adopts many of the provisions of the city code relating to local finances and makes them applicable to counties. A comparison of the authority given to cities to finance a utility with the lack of similar authority for counties indicates a legislative intent to bar counties from such expenditures.

Chapter 388, The Code 1981 expressly authorizes a city to establish and operate a utility. The definition of "city" as used in the city code expressly excludes counties. See § 363.2(1). This exclusion is maintained in Chapter 390 authorizing joint electrical utilities. See § 390.1(1). Following the adoption of Municipal Home Rule, the city code was reorganized and amended similar to the action taken with S. F. 130. Chapter 388 was maintained in the Code. S. F. 130, in contrast, contains no provision authorizing counties to establish utilities. This omission is significant, particularly when viewed in the context of the finance portions of S. F. 130.

Section 384.26 et seq., The Code 1981, sets forth the provisions with which cities must comply to utilize general obligation bonds for any "general corporate purpose." Identical provisions are established for counties in S. F. 130, see § 441, regarding general obligation bonds for any "general county purpose." When we compare the definition of "general corporate purpose" with the definition of "general county purpose" we find a marked distinction. "General corporate purpose" is defined to include "the acquisition, construction, reconstruction, extension, improvement, and equipping of city utilities." See § 384.24(4)(a). In contrast the definition of "general county purpose" contained in S. F. 130 does not include any reference to the operation of a utility. See § 440(2)(c). [1]

When we compare the revenue financing provisions of the city code and the county code, we see again that the Legislature deleted the grant of authority given to cities in the utility area when enacting the county code. Section 384.82, The Code 1981, sets forth the provisions governing a city's use of revenue financing. Nearly identical language was adopted this year in the context of county uses of revenue financing. See S. F. 130, § 462. However, there exists a critical distinction. While § 462 adopts the language of § 384.82 on nearly a verbatim basis, § 384.82 authorizes

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[1] We note that "general county purpose" includes "any other facilities or improvements which are necessary for the operation of the county or the health and welfare of its citizens." See § 440(2)(c)(10). We cannot give this broad provision a construction which encompasses a county utility in face of the fact that § 384.24(4), defining "general corporate purpose" also includes such language in subparagraph (i). The Legislature did not rely on this language to grant cities authority to operate utilities, but rather expressly granted this authority. This express authority was deleted from the county code.

revenue financing for utilities. When adopting § 462, the Legislature deleted this provision.

In addition to the problems posed by the finance provisions of S. F. 130, we feel another impediment exists to a county operating a utility. We do not believe the operation of a hydroelectric plant is a "local affair" within the meaning of Iowa Constitution, Article III, § 39A. In our earlier opinion, we stated that "there are possible proposed county actions which the Code does not expressly forbid or preempt but which may be outside of the scope of county power because they are of state rather than local concern. Historically, the operation of utilities by governmental subdivisions has been limited to cities. When neither cities nor counties had home rule, the Legislature only authorized cities to enter such fields. The economic and environmental impact of operating an electric generating plant on the Mississippi River would reach far beyond the borders of Dubuque County and would affect residents of other counties. These elements lead us to conclude that operation of such a facility is not a local matter. See Scheidler, "Implementation of Constitutional Home Rule in Iowa", 22 Drake L.Rev. 294.

Because of the foregoing concerns, it is our opinion that a county does not have the authority to establish a utility plant.

Yours truly,

David Fortney

DAVID M. FORTNEY
Assistant Attorney General

DMF:sh

CRIMINAL LAW: Uniform Citation and Complaint -- Section 805.6(4), The Code 1981. The authority of designated individuals to administer oaths and certify verifications under section 805.6(4) applies only to scheduled violations charged by uniform citation and complaint. Such designated individual may administer oaths and certify verifications only for other members of his or her particular law enforcement agency. (Richards to Poncy, State Representative, 5/14/81) #81-5-11(L)

May 14, 1981

The Honorable Charles N. Poncy
State Representative
State House
L O C A L

Dear Representative Poncy:

You have requested an opinion of the Attorney General regarding the oath and verification procedures of section 805.6(4), The Code 1981. That section provides:

> The uniform citation and complaint shall contain a place for the verification of the officer issuing the complaint. The complaint may be verified before the chief officer of the law enforcement agency, or his or her designee, and the chief officer of each law enforcement agency of the state is authorized to designate specific individuals to administer oaths and certify verifications.

(Emphasis added.) You have raised the following two questions over this provision: (1) "Does the authority of the designated individuals to administer oaths and certify verifications only apply to uniform citations?" and (2) "(M)ay designated individuals only administer oaths and certify verifications for other members of his or her particular law enforcement agency?"

We believe the answer to your first question is evident. By its very terms, the authority of section 805.6(4) applies only to scheduled violations charged by uniform citation and

complaint. Our conclusion that section 805.6(4) is so limited is also supported by another recent opinion of this office. In Op.Att'yGen. #80-8-3, we opined that Iowa Rule of Criminal Procedure 35 which provides that "(p)rosecutions for simple misdemeanors must be commenced by filing a subscribed and sworn to complaint with a magistrate or district court clerk or the clerk's deputy" does not apply to scheduled violations charged by uniform citation and complaint. Section 805.6(4) contains the special procedure which operates as an exception to the general procedure of Rule 35. Section 4.7, The Code 1981. And this special procedure applies only to uniform citations and complaints.

Upon review of your second question, we conclude that an individual designated according to section 805.6(4) may administer oaths and certify verifications only for other members of his or her particular law enforcement agency. We recognize that this result may cause some inconveniences for the officer issuing the complaint, but the plain language of the section constrains us so to find. The legislature has used the specifying or particularizing article of "the" rather than the indefinite or generalizing articles of "a" or "an" in granting this limited power to administer oaths and certify verifications. Black's Law Dictionary 1647 (4th rev. ed. 1968) ("The" means "(a)n article which particularizes the subject spoken of. 'Grammatical niceties should not be resorted to without necessity; but it would be extending liberality to an unwarrantable length to confound the articles "a" and "the." The most unlettered persons understand that "a" is indefinite, but "the" refers to a certain object.'"). Hence, the use of "the" in "the law enforcement agency" must refer to the specific or particular agency of the issuing officer. Had the legislature intended the opposite, it would have drafted section 805.6(4) to read "the complaint may be verified before the chief officer of a law enforcement agency, or his or her designee."

Sincerely,

Richard Lee Richards

RICHARD L. RICHARDS
Assistant Attorney General

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MUNICIPALITIES: Housing Codes--§ 364.17, The Code 1981. If a city creates a variance in a housing code that affects the habitability of property, an action can be brought to determine whether the variance should be permitted. (Blumberg to Rush, State Senator, 5/14/81) 81-5-10(L)

May 14, 1981

The Honorable Bob Rush
State Senator
L O C A L

Dear Senator Rush:

You have requested an opinion from this office regarding § 364.17, The Code 1981. Pursuant to your facts, a city adopted one of the housing codes listed within § 364.17, but did not include the standard for lead-base paint hazards. You ask whether the omission of that standard would be a reasonable variance.

Section 364.17, effective January 1, 1981, requires cities of at least 15,000 population to adopt one of the housing codes listed therein. Section 364.17(4) provides that a city "may provide reasonable variances for existing structures which cannot practicably meet the standards in the code but are not unsafe for habitation." Thus, a city can have reasonable variances for existing structures that are not unsafe. Without the city housing code before us, it is difficult for us to answer your question. If the city excludes the standard for all structures, it might be working contrary to § 364.17(4). If the variance is just for existing structures, a fact question would develop as to whether the variance was reasonable under the circumstances, and whether such variance results in an unsafe condition. We cannot answer such fact questions.

Your question is deeper than that, however. The underlying question, as indicated by the letter you attached to your request, is if the variance is not in compliance with § 364.17(4), has the city actually adopted that Code, or

does § 364.17(2) apply. That section provides that if a city has not adopted one of the listed codes in subsection (1), it has, by operation of law, adopted the code in subsection (2).

It is reasonable to assume that if the residents believe a variance is not reasonable or otherwise is not in compliance with § 364.17(4), that an action can be brought in the District Court. If the variance is determined to be contrary to § 364.17(4), the Court could order the city to place within the housing code that which it took out. Thus, one would not reach the issue of whether an invalid variance invalidates the entire code. The legislature has not indicated the remedy if a city establishes a variance that is not within the confines of § 364.17(4). We cannot state that the adoption of a variance which would result in properties being unsafe for habitation works the same as if the city had not adopted any housing code. The better reasoned approach would be for the interested parties to insist that the deleted provisions be placed back in the Code, either by action of the city council or by an action filed in the District Court. Since § 364.17(4) applies to all housing codes, including the one in subsection two(2), a city could create a variance in any housing code listed within the section. The only possible means of seeing that such variances comply with subsection four(4) would be through an action in the District Court.

Very truly yours,

Larry M. Blumberg

LARRY M. BLUMBERG
Assistant Attorney General

MUNICIPALITIES: Condominium Conversions--§ 364.1; Chapters 499B and 562A, The Code 1981. Municipalities may require permits for conversions of apartments to condominiums. They may not create causes of action or jurisdiction for private citizens in the District Court. Municipalities may enact ordinances regarding notice to tenants of conversions and a right of first refusal. (Blumberg to Arnould, State Representative, 5/11/81) #81-5-8(L)

May 11, 1981

The Honorable Bob Arnould
State Representative
L O C A L

Dear Representative Arnould:

We have your opinion request regarding a proposed municipal ordinance on the conversion of apartment units to condominiums.[1] The proposed ordinance requires that the developer shall apply for a permit in order to convert the apartments. Notice shall be given to the tenants thirty days prior to the application for the permit. The ordinance further provides that in addition to the Iowa Landlord-Tenant Act, each tenant has the right of first refusal to purchase the apartment. A property report shall be submitted with the application for permit, which shall include evidence of compliance with Chapter 499B, The Code 1979, the expected lifetime of the various parts of the building, an estimated cost of repair, the cost of utilities, propensity to damage by water or floods, and the like. Sufficient parking spaces are also required. Violations of the ordinance will result in legal actions in the name of the city.

Based upon the proposed ordinance, you ask the following questions:

1) Is condominium conversion a "statewide concern" and/or has the field been preempted by virtue of the existence of Code Chapter 499B, and do the proposed amendments conflict with the language of 499B.10.

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[1]A conversion is the sale of individual units in an apartment building by its owner to tenants or outside purchasers. Note, The Regulation of Rental Apartment Conversions. 8 Fordham Urban L. J. 507 (1980).

2) Is condominium conversion a "statewide concern" and/or has the field been preempted by virtue of the Uniform Landlord and Tenants Act.

3) Do these proposed amendments conflict with the last sentence of Section 364.1 of the Iowa Code.

Even though municipalities enjoy Home Rule, there may be certain areas which the State has preempted by a comprehensive statutory scheme. The doctrine of preemption is based upon the principle that a municipality cannot act contrary to the State. Hampshire House Sponsor v. Boro. of Ft. Lee, 172 N. J. Super 426, 412 A. 2d 816 (1979). An ordinance properly enacted and within a municipality's police power will be invalid if it intrudes upon a field preempted by the legislature. When the legislature has preempted a field by comprehensive regulation, a municipal ordinance which regulates the same field is void if it adversely affects the legislative scheme. Plaza Joint Venture v. Atlantic City, 174 N. J. Super. 231, 416 A. 2d 71 (1980). In Garden State Farms, Inc. v. Bay, 77 N. J. 439, 450, 390 A. 2d 1177 (1978) it was held:

> A legislative intent to preempt a field will be found either where the state scheme is so pervasive or comprehensive that it effectively precludes the coexistence of municipal regulation or where the local regulation conflicts with the state statutes or stands as an obstacle to state policy expressed in enactments of the Legislature.

Pertinent questions for consideration in determining whether there is preemption are:

1. Does the ordinance conflict with state law, either because of conflicting policies or operational effect?
2. Was the state law intended, expressly or impliedly, to be exclusive in the field?
3. Does the subject matter reflect a need for uniformity?
4. Is the state scheme so pervasive or comprehensive that it precludes coexistence of municipal regulation?
5. Does the ordinance stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the Legislature?

Plaza Joint Venture v. Atlantic City; Hampshire House Sponsor v. Boro. of Ft. Lee; Overlook Terrace Mgmt. Corp. v. West New York Rent Control Bd., 71 N. J. 451, 366 A. 2d 321 (1976).

In Galvan v. Superior Ct., 70 Cal 2d 851, 859-60, 452 P. 2d 930, 935-36 (1969), the test was similarly stated:

> 1) whether the subject matter has been so fully and completely covered by general law as to indicate that it has become exclusively a matter of state concern; 2) whether the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or 3) whether the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality.

See also, Yuen v. Municipal Ct., 52 Cal. App. 3d 351, 125 Cal. Rptr., 87, 89 (1975).

Chapter 499B, The Code, 1981, is the Horizontal Property Act. Pursuant to that chapter, when the owners or lessees of property wish to construct or convert property to a horizontal regime, as that term is used therein, certain requirements must be met. A declaration containing those things set forth in § 499B.4, in addition to a copy of the floor plans, must be filed with the county auditor. When that filing is made, then the horizontal regime of that chapter is in effect, and the owners and lessees can construct or convert the property pursuant to that chapter. In other words, if the owners or lessees desire to establish a regime which consists of those matters set forth in §§ 499B.5, .7, and .10 through .19, then they must make the requisite filings set forth in §§ 499B.3, .4 and .6.

However, one need not follow Chapter 499B in establishing a condominium, cooperative, or other property regime. If the desire is to establish a property regime which will not include all the matters set forth in Chapter 499B, the requisites of that chapter need not be met. What is apparent is that Chapter 499B must be followed only for those property regimes contained within that chapter.

Chapter 499B was not established to create the right to develop condominiums. Such right was, and is, available by common law. Note, Building on the Horizontal Property Act: Condominiums in Iowa, 59 Iowa L. Rev. 291, 295 (1973). The enactment of the chapter was apparently triggered by § 234 of the Federal Housing Act [12 U.S.C. § 1715y(a)]. The enactment of Chapter 499 was to

ensure marketability of the property. Although the Chapter does authorize development of condominiums, it is not true, as stated above, that all condominiums must be established pursuant to that Chapter. Id. Thus, although it might be desirable to submit a horizontal property regime under the requirements of the chapter to increase the availablity of financing and to prevent the problems that might arise from a common law regime, one is free to choose how to set the regime.

When we apply the criteria for determining preemption to Chapter 499B, keeping in mind the above discussion, we do not find that the Chapter is preemptive. Chapter 499B was not intended to be the exclusive means by which a horizontal property regime is to be established. It is not so pervasive or comprehensive that it precludes coexistence with a municipal ordinance. If the ordinance had provided that in order to enjoy the provisions of §§ 499B. 5, .7, and .10 through .19, one had to obtain a permit from the city, we might have found preemption. But, the ordinance does not concern marketability. Its provisions requiring a permit do not stand as an obstacle to the purpose of the chapter. Therefore, requiring a permit is permissible.

The purpose of the proposed ordinance, as stated therein, is to establish criteria for the conversion of rental housing to condominiums, to reduce the impact on the tenants of the rental units, to assure that the purchasers of the condominiums have been fully informed of the condition of the units, to provide a reasonable balance between rental property and condominiums, and to provide for evaluation of the conversions.

Chapter 499B, although it does involve conversions, makes no mention of tenants of the rental units. We cannot, therefore, state that the proposed ordinance, with regard to tenants' rights, has been preempted by that chapter.

Chapter 499B does not preempt the proposed requirement relating to parking spaces, at least unless it could be shown that the requirement significantly discouraged conversion. It should be noted, however, that it has been held that the conversion from apartment to condominium, insofar as it was merely a change in form of ownership, did not create an occasion for different treatment under a zoning ordinance. City of Miami Beach v. Arlen King Cole Condominium Assoc., Inc., 302 So. 2d 777 (Fla App. 1974). If the parking requirement for condominium conversions differs from that for comparable rental units, the requirement would face a heavy burden of justification under the above decision.

Local ordinances on conversions are generally within the police power of a municipality. Those ordinances would normally be upheld as such, but a danger exists if the ordinances, in fact, prohibit conversions. See, Note, Municipal Regulation of Condominium Conversions in California, 53 S. Cal. L. Rev. 225 (1979). The proposed ordinance in question does not appear on its face to be one that would be declared invalid as an abuse of the police power.

Chapter 562A, The Code 1979, is the Iowa Residential Landlord and Tenant Law. The purposes of the Chapter are set forth in § 562A.2(2):

> 2. Underlying purposes and policies of this chapter are:
> a. To simplify, clarify, modernize and revise the law governing the rental of dwelling units and the rights and obligations of landlord and tenant; and
> b. To encourage landlord and tenant to maintain and improve the quality of housing.
> c. To insure that the right to the receipt of rent is inseparable from the duty to maintain the premises.

The Chapter provides for permissible and impermissible terms and conditions of a rental agreement, the obligations of landlords and tenants, and remedies for both. We have, in a previous opinion, #79-10-5, discussed permissible municipal action with regard to Chapter 562A. There, we found that municipalities had some leeway with regard to that chapter, but pointed out the problems inherent therein. A copy of that opinion is enclosed.

The city attorney expressed concern that the proposed ordinance may be invalid because Chapter 562A is preemptive of the entire area of landlord-tenant relations. This concern was expressed in relation to the rights a landlord has pursuant to Chapter 562A on termination of a lease. It was his belief that the proposed amendment would conflict with Chapter 562A, and would therefore be prohibited by § 364.1, The Code.

The right to terminate a lease is based upon noncompliance with the rental agreement or the non-payment of rent. Section 562A.27. If there is no written lease indicating otherwise, rental terms are either week-to-week or month-to-month. Section 562A.9(4). The right to terminate and the requisite notice is provided for in §562A.34. The proposed ordinance requires that the tenants shall be given written notice of the conversion and shall have the right of first refusal to purchase the apartment. These matters are not specifically contained in Chapter 562A. There is nothing in the proposed ordinance

which prevents a landlord from exercising the rights of termination contained within Chapter 562A. We find no conflict between the proposed ordinance and that Chapter in this area.

The final section of the proposed ordinance provides:

> Section 15. ENFORCEMENT, VIOLATIONS AND PENALTIES
>
> Appropriate actions and proceedings in the name of the City may be taken by law or in equity to prevent any violation of these regulations; to restrain, correct or abate such violation; to prevent illegal occupancy of a building, structure or premises; to recover damages; and these remedies shall be in addition to any penalities described in other sections of the [City Code].

It is apparent from the previously cited opinion, that cities may not compel remedies involving landlord-tenant relations other than what is contained in Chapter 562A. Our office has previously maintained that Home Rule does not create any authority in a city to create causes of actions or jurisdiction in the District Court. See, 1976 Op. Att'y Gen. 681. In addition, the last sentence of § 364.1 provides that Home Rule does not include the power to enact private or civil laws governing civil relationships. If this section of the proposed ordinance merely gives the city the right to enforce its ordinances in the District Court, such would not be contrary to § 364.1. However, § 364.1 would apply if a cause of action is being created for private citizens. We believe the Iowa Supreme Court would place a construction on the subject ordinance which would save it from constitutional infirmity by construing the section to allow only the city to bring an action to enforce the ordinance.

Accordingly, we are of the opinion that Chapter 499B does not prevent a city from requiring a permit for conversion of rental units to condominiums. A city is not preempted by either Chapters 499B or 562A from requiring notice to tenants of a conversion or the right of first refusal. A city shall not create causes of action or jurisdiction for private citizens in the District Court. We do not decide by this opinion whether the proposed ordinance is otherwise constitutional, rational or valid.

Very truly yours,

Larry M. Blumberg

Larry M. Blumberg
Assistant Attorney General

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COUNTIES: Payroll Deductions. §§ 110.12, 333.15, 335.14, 337.11, 509A.1, 509A.3, 509A.12, 514.16, 514B.21, 554.9407, 606.15, The Code 1981. A county may not assess a service charge for processing employee payroll deductions for items such as health insurance and deferred compensation plans. (Fortney to Neighbor, Jasper County Attorney, 5/7/81) #81-5-7 (L)

Charles G. Neighbor
Jasper County Attorney
301 Courthouse Building
Newton, Iowa 50208

Dear Mr. Neighbor:

You have requested an opinion of the Attorney General regarding employee payroll deductions for items such as health insurance and deferred compensation. You have inquired whether a county can assess a service charge against the company or entity receiving the proceeds of the deduction. It is our opinion that a county may not assess such a fee.

The Code 1981 authorizes governmental subdivisions to make various deductions from participating employees' wages. For example, § 509A.1, The Code 1981, authorizes counties to establish plans for group insurance and health insurance for county employees. Section 509A.3 authorizes the county to deduct from the wages of a participating employee an amount equal to that employee's assessment for participation in the plan. Similarly, § 509A.12 mandates counties to establish deferred compensation programs if a single employee makes such a request. Other deductions from wages of county employees are authorized by §§ 514.16 and 514B.21 for hospital and medical service plans, pharmaceutical and optometric service plans, and health maintenance organizations. All of the foregoing provisions place an affirmative duty on the governing body to withhold certain monies from an employee's wages and to pay over the proceeds of the deduction to the provider in question. The Code does not authorize the governing body to assess any fee for the performance of these statutorily defined duties.

In contrast to the provisions regulating deductions from employees' wages, there are numerous provisions of the Code which authorize and prescribe the assessment of fees and charges for the performance of county officers' duties. We take note of

the following representative examples: § 110.12 authorizes the county recorder to assess a fee of twenty-five cents for writing a hunting or fishing license; § 333.15 sets forth the fees which the county auditor may charge for the performance of the duties of that office; similar provisions exist for the county recorder (§ 335.14), the sheriff (§ 337.11) and the clerk of the district court (§ 606.15); § 554.9407 authorizes the county recorder to assess fees in connection with a uniform commercial code search. The foregoing sections represent but a brief sample of the various fees which county officers may assess. No similar provision exists in conjunction with the deduction of employee contributions.

In addition to the total absence of statutory authority, in the context of express authorization for the assessment of other fees, a strong policy consideration exists which militates against implying an authority to assess fees. Your question relates to the performance of statutory duties by public officers. We are hesitant to sanction a policy which would result in a situation wherein the performance of a public duty turns on whether a fee is or is not paid, unless the body establishing the duty has also authorized the collection of a fee. Permitting a public officer to require the payment of a fee before he or she performs a mandatory function established by a higher authority would be detrimental to the effective carrying out of the higher authority's mandate.

In conclusion, a county may not assess a service charge for processing employee payroll deductions for items such as health insurance and deferred compensation plans.

Yours truly,

David Fortney

DAVID M. FORTNEY
Assistant Attorney General

DMF:sh

COUNTIES AND COUNTY OFFICERS: SHERIFF. §§ 337.11(12) and 724.9, The Code 1981. Fees collected by the sheriff and sheriff's deputies pursuant to §§ 337.11(12) and 724.9, The Code 1981, pass to the county and are to be deposited in the county general fund. (Fortney to Kenyon, 5/6/81) #81--5-6 (L)

Mr. Arnold O. Kenyon, III
Union County Attorney
Union County Courthouse
Creston, Iowa 50801

Dear Mr. Kenyon:

You have requested an opinion of the Attorney General regarding the proper disposition of fees collected by the sheriff and sheriff's deputies pursuant to §§ 337.11(12) and 724.9, The Code 1981. It is our opinion that the fees in question are to be deposited in the county general fund.

Section 337.11(12) provides:

> The sheriff shall charge and be entitled to collect the following fees:
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> * * *
>
> (12) For conveying one or more persons to any state, county, or private institution by order of court, or commission, he shall be allowed his necessary expenses, for himself and such person or persons, and in addition thereto, three dollars per hour for the time necessarily employed in going to and from such institution, same to be charged and accounted for as fees. Should the sheriff or deputy sheriff need any assistance in taking any person to any such institution, the same shall be furnished at the expense of the county. (Emphasis supplied.)

You have inquired whether the individual deputy who is involved in transporting a person pursuant to § 337.11(12) is entitled to keep the $3.00 per hour as a personal expense or whether the fee is to be turned over to the county. This particular subsection has not been construed heretofore, however, there have been opinions construing companion sections and these earlier opinions offer guidance in allocating the subject fees.

In 1970 Op.Att'yGen. 390 we opined that because sheriff's deputies and clerks had no statutory duty to be notaries public and notarize documents for the general public, the fees collected for such services belong not to the county but to the individual notaries. In that opinion we pointed out that any analysis of the distribution to be made of any fee must begin with a recognition of the dichotomy between fees earned for services related to official duties and those received for unrelated services.[1] Compare Baldwin v. Stewart, 207 Iowa 1135, 222 N.W. 348 (1928) with Burlingame v. Hardin County, 180 Iowa 919, 164 N.W. 115 (1917). While 1970 Op.Att'yGen. 390 did not concern itself with fees collected pursuant to § 337.11, the opinion's analysis provides an analytical backdrop to understanding earlier opinions which are more directly on point.

In 1938 Op.Att'yGen. 734 we held that the $5.00 per diem charged by the sheriff pursuant to what is now § 337.11(5) for summoning a condemnation jury are payable into the county treasury and may not be retained by the sheriff. We stated that allowing the sheriff to retain the fees would conflict with what is now § 342.1, supra, as well as the forerunner of § 337.14, The Code 1981, which provided: "The amounts allowed by law for mileage and for actual necessary expenses paid by him, and for board, washing, and care of prisoners, may be retained by him in addition to his salary". See § 5192, The Code 1935. The $3.00 paid for transporting a person pursuant to § 337.11(12) is paid for the deputy's time. It is not paid for mileage. Consequently, § 337.14 is not controlling and the fees would pass to the county general fund.

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1. In this regard we draw your attention to § 342.1, The Code 1981, which provides: "Except as otherwise provided, all fees and charges of whatever kind collected for official service by any county auditor, treasurer, recorder, sheriff, clerk of the district court, and their resepctive deputies or clerks, shall belong to the county." (Emphasis supplied.)

Your second inquiry relates to the fees assessed participants in the firearm training program established by § 724.9, The Code 1981. That section provides:

> A training program to qualify persons in the safe use of firearms, shall be provided by the issuing officer of permits, as provided in section 724.11. The commissioner of public safety shall approve the training program, and the county sheriff or the commissioner of public safety conducting the training program within their respective jurisdictions may contract with a private organization or use the services of other agencies, or may use a combination of the two, to provide such training. Any person eligible to be issued a permit to carry weapons may enroll in such course. A fee sufficient to cover the cost of the program may be charged each person attending. Certificates of completion, on a form prescribed and published by the commisioner of public safety, shall be issued to each person who successfully completes the program. No person shall be issued either a professional or nonprofessional permit unless he or she has received a certificate of completion or is a certified peace officer. No peace officer or correctional officer, except a certified peace officer, shall go armed with a pistol or revolver unless he or she has received a certificate of completion provided that this requirement shall not apply to persons who are employed in this state as peace officers on January 1, 1978 until July 1, 1978, or to peace officers of other jurisdictions exercising their legal duties within this state. (Emphasis supplied.)

The analysis utilized to dispose of your § 337.11(12) question is equally applicable to § 724.9. A sheriff, as the issuing officer of weapons permits, has the statutory obligation to provide a firearms training program. Consequently, the sheriff and his deputies are providing a service required

by their official duties. See 1970 Op.Att'yGen. 390. As the fees collected pursuant to § 724.9 do not relate to mileage within § 337.14, the fees would pass to the county pursuant to § 342.1.

We note that you state the sheriff's deputies conducted the training program during off-duty hours and there existed no contract whereby the deputies agreed to conduct the program. The absence of a contract is of no weight. The primary obligation for conducting the program is placed on the sheriff's office by § 724.9. The conducting of the program was a duty. The fact that the program was conducted by the deputies during off-duty hours may be grounds for claiming overtime pay or compensatory time, questions of fact on which we offer no opinion. These issues do not, however, establish a basis on which the deputies may claim the fees as their own.

In summary, fees collected by the sheriff and sheriff's deputies pursuant to §§ 337.11(12) and 724.9, The Code 1981, pass to the county and are to be deposited in the county general fund.

Yours truly,

David Fortney

David Fortney
Assistant Attorney General

DF/jam

COUNTIES: ZONING: Mobile Homes. §§ 135D.1 et seq.; 358A.1 et seq.. Mobile homes and mobile home parks which do not comply with a county zoning ordinance constitute nonconforming uses if they were occupied or established prior to the effective date of the ordinance. Such uses cannot be eliminated in the absence of a showing that they constitute a nuisance or that their removal is necessary to protect the public health, morals, safety or welfare. (Fortney to Gratias, State Senator, 5/6/81) #81-5-4

Honorable Arthur L. Gratias
State Senator
State Capitol
L O C A L

Dear Senator Gratias:

You have requested an opinion of the Attorney General regarding the applicability of a county zoning ordinance to pre-existing structures. According to the information you have provided, Mitchell County adopted a zoning ordinance effective December 18, 1980 which, in relevant portions, regulates the conditions under which mobile homes can be occupied and mobile home parks may be established. You indicated that there are mobile homes and mobile home parks which existed prior to December 18, 1980 and which do not comply with the county ordinance. It is our opinion that such parks and mobile homes constitute nonconforming uses [1] which cannot be eliminated in the absence of a showing that they constitute a nuisance or that their removal is necessary to protect the public health, morals, safety, or welfare. [2]

[1] The term "nonconforming uses", as used in the law of zoning, refers to uses of certain property which are permitted to continue notwithstanding the zoning regulations do not permit similar uses in the area in which the property so used is located. The term is sometimes used in a more general sense as referring to a use of a building or property that does not agree with the regulations of the use district in which it is situated.

[2] The scope of this opinion is restricted by the assumption that the subject mobile homes and mobile home parks are in compliance with all applicable regulations which were in effect at the time the homes or parks were occupied or established.

The purposes of zoning ordinances and the goals such ordinances are thought to effectuate have been recognized in this century by courts, legislatures and urban planners. The Iowa General Assembly demonstrated its recognition of these purposes by enacting a number of laws, including Chapter 358A, The Code 1981, which authorizes zoning at the county level. The objectives of Chapter 358A are set forth in § 358A.5 which provides:

> Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the street or highway; to secure safety from fire, flood, panic, and other dangers; to protect health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements.
>
> Such regulations shall be made with reasonable consideration, among other things, as to the character of the area of the district and the peculiar suitability of such area for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such county.

In order to achieve the foregoing goals, the board of supervisors is given the authority to adopt ordinances regulating various structural aspects. This authority is conferred by § 358A.3 which states, in pertinent part:

> Subject to the provisions of sections 358A.1 and 358A.2, the board of supervisors of any county is hereby empowered to regulate and restrict the height, number of structures, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry,

> residence or other purposes, and to regulate, restrict and prohibit the use for residential purposes of tents, trailers and portable or potentially portable structures; provided that such powers shall be exercised only with reference to land and structures located within the county but lying outside of the corporate limits of any city.

In reliance on the power conferred by Chapter 358A, the Mitchell County Board of Supervisors adopted the referenced zoning ordinance. [3] An examination of the ordinance reveals that Mitchell County has made provision for preexisting nonconforming uses. Article VII, § 3 provides:

> The lawful use of a building or land existing on the effective date of this ordinance may be continued, although such use does not conform to the provisions hereof. If no structural alterations are made, the non-conforming use of a building may be changed to another nonconforming use of the same, or of a less restrictive classification. Whenever a nonconforming use has been changed to a less restrictive use, or to a conforming use, such use shall not thereafter be changed to a more restrictive use. The non-conforming use of a building may be hereafter extended throughout those parts of a building which were manifestly arranged or designed for such use at the time of the enactment of this ordinance.

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[3] We note that mobile homes and mobile home parks are also regulated by the State through the Department of Health. See Chapter 135D, The Code 1981. E.g., no person may establish or operate a mobile home park without obtaining an annual permit from the Department. § 135D.2. Chapter 135D does not contemplate a "preemption" of mobile home regulation to the State. It is assumed that local governing units may enact ordinances, not in conflict with the chapter, which also regulate such structures. E.g., § 135D.7 provides that "Such a permit does not relieve the applicant from securing building permits in municipalities having a building code; or from complying with any other municipal ordinance or ordinances, applicable thereto, and not in conflict with this statute." See also § 135D.5.

Additional protection of nonconforming uses is found in Article VII, § 15, which provides:

> Any person who shall have valid interest in any property at the time of enactment of this ordinance, for which development is planned which may be deemed as a nonconforming use by this ordinance and the Zoning Administrator, may file application with the Zoning Administrator for a special zoning certificate within six months of the enactment of this ordinance. Application for such special zoning certificate shall include all information required for any other zoning certificate application. A special zoning certificate issued under this section shall be valid for five years, but will not be transferable via sale of said property to any person other than the applicant.

If the ordinance is interpreted as being applicable to pre-existing structures, or if the county sought to enforce it against pre-existing structures, serious constitutional problems arise. It is a general rule that zoning ordinances may not be made retroactive, but only prospective. 101 C.J.S. Zoning § 38. Such laws may not operate to restrict or remove existing uses not in conformity with the ordinance unless such uses are nuisances or their removal can be justified as promoting the public health, morals, safety or welfare. 101 C.J.S. Zoning § 63. To deprive an owner of a pre-existing use is generally regarded as an unconstitutional taking of private property without compensation and without due process of law. Id. In this context, a nonconforming use is regarded as a vested right. A corollary to this proposition, however, is that a zoning ordinance may be enforced against a prior nonconforming use where the resulting loss to the owner is insubstantial. Id.

The premise underlying the deference accorded nonconforming uses is the belief that those uses would disappear over time. This has not always occurred. In the words of the Iowa Supreme Court:

> A brief survey of the cases and authorities in this area disclose nonconforming uses have been a problem since the inception of zoning. It was originally thought such uses would be few, and would naturally eliminate themselves through the passage of time, with restrictions on

> their expansion. But during the past two decades it has become increasingly evident pre-existing nonconformities have no natural tendency to fade away. On the contrary it appears they tend to continue and prosper because of the artificial monopoly accorded them by the law. However, it still remains, the basic aim and ultimate purpose of zoning is to confine certain classes of buildings and uses to specified localities. Nonconforming uses are inconsistent with that objective.

Stan Moore Motors, Inc. v. Polk County Board of Adjustment, 209 N.W.2d 50, 52 (Iowa 1973). In order to limit the impact of nonconforming uses, their enlargement or extension are not allowed. Id. See also City of Central City v. Knowlton, 265 N.W.2d 749 (Iowa 1978). However, the power to restrict the enlargement or extension of a nonconforming use does not include the power to require the extinction or cessation of the use.[4]

In Huff v. City of Des Moines, 244 Iowa 89, 56 N.W.2d 54 (1952), the Iowa Supreme Court concluded that regulation and restriction of mobile home parks was a valid exercise of the police power. Later, in Cole v. City of Osceola, 179 N.W.2d 524 (Iowa 1970), the Court authorized regulation of mobile homes themselves. While the Court has authorized regulation of mobile homes, the same deference extended to other types of nonconforming uses has been extended to pre-existing mobile homes and mobile home parks. See Trailer City, Inc. v. Board of Adjustment, 218 N.W. 2d 645 (Iowa 1974). Consequently, a mobile home or mobile home park which qualifies as a nonconforming use would not be subject to termination. However, the Court in Trailer City implied that neither enlargement nor extension of a pre-existing mobile home park would be permitted if such enlargement would contravene a valid ordinance. Trailer City, 218 N.W.2d 645, 648.

To summarize, mobile homes and mobile home parks which do not comply with a county zoning ordinance constitute nonconforming uses if they were occupied or established prior to the effective date of the ordinance. Such uses cannot be eliminated in the

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[4] As discussed above, a governing body can require the termination of a nonconforming use in situations where the use is shown to be a threat to public health, safety or welfare. Likewise, ordinances have been upheld which require amortization of nonconforming uses within a specified period of time. See Board of Supervisors of Cerro Gordo County v. Miller, 170 N.W.2d 358 (Iowa 1969).

absence of a showing that they constitute a nuisance or that their removal is necessary to protect the public health, morals, safety or welfare. The Mitchell County zoning ordinance in question appears to meet these constitutional standards.

Yours truly,

David Fortney

DAVID M. FORTNEY
Assistant Attorney General

DMF:sh

SCHOOLS: Bond Indebtedness: Ch. 296, §§ 296.2, 296.3, 297.7(3), The Code 1981. It is within the discretion of the local school board of eudcation to have two separate referendum questions submitted on a single ballot, or the board may present one bond issue prior to the other and if the first fails they must timely submit the second legally sufficient bond issue or face a potential mandamus action for arbitrary and capricious action. A petition for election may only be eliminated for legally sufficient reasons. (Hagen to Deluhery, State Representative, 5/4/81). #81-5-3 (L)

Honorable Patrick J. Deluhery
State Senator
State Capitol
L O C A L

Dear Senator Deluhery:

We hereby acknowledge receipt of your request for an opinion on three questions raised in an attached letter from Mr. C. W. Schaffert. Mr. Schaffert inquires of you as follows:

1. Is it legal to have affirmation to have two separate referendum questions on a single ballot?

2. Can our petitions be eliminated for nonlegal reasons?

3. If we, namely, the Citizens for Central High School, bring our petitions to the Davenport School Board, through proper channels and in accordance with legal requirements, what is the time frame for the ensuing procedure.

Bonding for school indebtedness arises out of Chapter 296, The Code 1981, and specifically, at issue here are §§ 296.2 and 296.3 which state as follows:

> 296.2 Petition for election. Before such indebtedness can be contracted in excess of one and one-quarter percent of the assessed value of the taxable property, a petition signed by a number equal to twenty-five percent of those voting at the last election of school officials shall be filed with the president of the board of directors, asking that an election be called, stating the amount of bonds proposed to be issued and the purpose for which the indebtedness is to be created, and that the necessary schoolhouse or schoolhouses cannot be built and equipped, or that sufficient land cannot

> be purchased to add to a site already owned, within the limit of one and one-quarter percent of the valuation.
>
> 296.3 Election called. The president of the board of directors on receipt of such petition shall, within ten days after receiving the recommendations of the area education agency board under section 297.7, subsection 3, call a meeting of the board which shall call such election, fixing the time thereof, which may be at the time and place of holding the regular school election. The president shall notify the county commissioner of elections of the time of the election.

The three issues presented above can be merged together through the review of two significant cases in the area of bonding. They are Gibson v. Winterset Community School District, 258 Iowa 440, 138 N.W.2d 112 (Iowa 1965) and Honohan v. United Community School District of the Counties of Boone and Story, 258 Iowa 57, 137 N.W.2d 601 (Iowa 1965). In the case of Gibson v. Winterset, the court reviewed three actions seeking injunctions against submission of an $845,000 bond issue to electors and compelling submission of a $500,000 bond issue by the school board which resulted in judgments for the defendants in the District Court. The plaintiffs appealed and their appeals were consolidated. The Supreme Court held that the refusal of the school board to call an election on the plaintiff's petition for a proposed bond issue after failing numerous times to have the electors adopt the proposed bond issues submitted by the school board, while the plaintiffs contintued to file its petitions for the smaller bond issue, was arbitrary and capricious and subject to relief by mandamus.

The court stated, in part, as follows at 115:

> The existence of two or more petitions before the board at the same time seeking, in different ways, to solve the same problem may well be a factual circumstance which removes the duty of the board from the ministerial category. In view of our ultimate holding, we do not pass upon the mandatory nature of the statute in the present factual situation.

In other words, unfortunately, the court has not directly addressed the necessity of requiring the boards to present the two separate bond issues at the same time. In this particular

case, the board elected to select its particular bond issue in excess of $800,000 four preceding times but never submitted the citizens bond issue for a lesser amount. The issue was whether the other bond issue of the citizens at large should be submitted to the voters prior to another bond issue endorsed by the board.

The court declared that mandamus will issue to correct an abuse of discretion citing Miller v. Hannah, 221 N.W. Iowa 56, 62, 265 N.W. 127, 130, in which the court quoted 18 R.C.L. 126 section 69, which states as follows:

> It is not accurate to say that the writ will not issue to control discretion, for it is well-settled that it may issue to correct an abuse of discretion . . . or such an evasion of positive duty, as to amount to a virtual refusal to perform the duty enjoined and to act at all, in contemplation of the law; and in such case, a mandamus would afford a remedy where there were no other adequate remedies provided by law. See also Pierce v. Green, 229 Iowa 22, 294 N.W., 237, 131 L.R. 1335, where the authorities are extensively corrected.

The court held that "the consistent failure to recognize plaintiffs' right to have an election on the $500,000 bond issue constituted arbitrary and capricious action subject to relief by mandamus." Gibson, supra, 115. The court stated at 115 as follows:

> If the board is assumed to have discretion to choose between the propositions contending for submission to the voters, it follows that the exercise of such discretion should not be disturbed unless a clear abuse is evident. But the discretion is not absolute. The desire of at least 25 percent of the last voting electorate was evidenced by the petitions filed. Record evidence subsequent to the filing of the first petitions shows that the large bond issues have now been submitted six times and defeated six times, while plaintiffs' petitions were being sidetracked. The seventh large bond issue election has been halted by action of this court. It is not necessary to decide at what point the action of the board ceased to become a valid exercise of discretion and became an arbitrary and capricious refusal to submit the alternate proposition. It is sufficient that such point has

> passed. Plaintiffs are entitled to their day before the electorate. Under our bond issue laws it is the voters; not the board of education and not the courts, who must ultimately decide this issue. Plaintiffs' petition in acceptable statutory form could not validly be ignored ad infinitum. [Emphasis supplied.]

The existence of one bond issue filed prior to the other does not in any way void the submission of a second bond issue and the court concluded that the district must submit the $500,000 bond issue to the voters. But most significantly, the court noted at page 116 that of the three citizens' proposals, all three need not be submitted and that it was within the discretion of the board to submit the first proposal initially, and if that issue failed, a second proposal could be submitted from the citizens.

In effect, the court seemed to be saying that there is great discretion that lies within the school board to present the issues in any rational order they so select. The board may, if it wishes, present both bond issues at once or the board may make a rational determination, as this case indicates, to present the first bond issue and if that fails, to present the second. Consequently, it is our opinion that it is legal to have two separate referendum questions submitted on a single ballot, or the board may present one bond issue prior to the other, and if the first fails, they must timely submit the second ballot or face a potential mandamus action for arbitrary and capricious action.

The remaining unanswered question deals with whether petitions can be eliminated for nonlegal reasons. In the case of Honohan, supra, at 601, irregularities relating to the petition for election and the notice of election were reviewed by the court. The taxpayers brought an action against the school district to enjoin the sale of bonds and were appealing an adverse ruling of the local district court to the Supreme Court. The Supreme Court held that the variance between the petition for and notice of the election for the stated purpose of constructing a new schoolhouse and school bond election ballot submitting the question of construction of the senior high school building was a matter of substance fatal to the election and that accordingly no school bonds could lawfully be issued. The court here again initially cited the traditional standard of review in such cases:

> [1,2] I. As a general rule mere irregularities in the conduct of a school election, or minor defects in the form of a ballot do not affect the result of the election, but defects in matters of substance are fatal. Headington v. North Winneshiek Community School District, 254 Iowa 430, 117 N.W.2d 831, and 29 C.J.S. Elections § 173(2) b, page 482. Also, there must be substantial compliance with specific requirements as to form and content of ballots, since they are mandatory. McLaughlin v. City of Newton, 189 Iowa 556, 562-565, 178 N.W. 540, O'Keefe v. Hopp, 210 Iowa 398, 405, 230 N.W. 876, Pennington v. Fairbanks, Morse & Company, 217 Iowa 1117, 253 N.W. 60, State ex rel. Warrington v. Community School District of St. Ansgar, 247 Iowa 1167, 1174, 78 N.W.2d 86, and 29 C.J.S. Elections § 173(2) b page 483.

In the court's analysis, it was noted that §§ 263.3-.4, as established by the Legislature, required that at least the purpose of the petition for the election and notice of the election of such purpose be declared and is mandatory. (See State ex rel. Warrington v. Comm. School Dist. of St. Ansgar, 247 Iowa 1167, 1174, 78 N.W.2d 86 (Iowa 1956) and Hanson v. Henderson, 244 Iowa 650, 665, 56 N.W.2d 59 (Iowa 1952). The court held that the use of the term "schoolhouse" in the petition was unusually vague and that it would not knowingly inform the public as to whether an elementary or secondary schoolhouse were being built and that such notice did not declare with specificity the exact nature of the construction.

Even though the court made this finding, the court was quick to point out that measures not always be set out specifically. At page 604, Honahan, supra, the court stated as follows:

> [5] While the public measure need not always be set forth "in haec verba", there must still be substantial compliance with the relevant statutes. Such compliance with express statutory requirements was totally lacking in the case before us. [Emphasis supplied.]

In conclusion, the courts will look to the substantial compliance with Ch. 262, The Code 1981, cited above and, as long as that is complied with, "nonlegal issues" should not eliminate petitions from ultimate vote. Further, it is within the discretion of the board to conduct a timely election with two legally sufficient proposals being presented, or the board may consider one bond issue per election, but if the first bond issue is rejected, the other qualified issue should be submitted shortly thereafter.

Very truly yours,

HOWARD O. HAGEN
Assistant Attorney General

HOH:sh

CRIMINAL LAW; IMPLIED CONSENT: §§148C.1(6), 148C.4, 321B.1, 321B.4, The Code 1981. A physician's assistant has sufficient training in the withdrawal of blood to be considered a "medical technologist" within the contemplation of §321B.4. Therefore, a physician's assistant is qualified to withdraw a blood sample for the purpose of determining alcoholic content. (Mull to Saur, Fayette County Attorney, 5/1/81) #81-5-2(L)

May 1, 1981

Mr. W. Wayne Saur
Fayette County Attorney
120 East Charles
Oelwein, IA 50662

Dear Mr. Saur:

You have requested an opinion of the Attorney General on "whether a physician's assistant can be used to withdraw a blood specimen for the purpose of determining the alcoholic content of a person's blood." In our opinion, a physician's assistant has sufficient training in the withdrawal of blood to be considered a "medical technologist" within the contemplation of §321B.4. Therefore, a physician's assistant is qualified to withdraw a blood sample for the purpose of determining alcoholic content.

Section 321B.4, The Code 1981, provides in relevant part that:

> Only a licensed physician, or a medical technologist or registered nurse designated by a licensed physician as his representative, acting at the written request of a peace officer may withdraw such body substances for the purpose of determining the alcoholic content of the person's blood.

Only the following three categories of persons are specified to withdraw blood under the implied consent law: licensed physicians, medical technologists, and registered nurses. A respectable argument can be made that a physician's assistant is not within the specified categories of persons authorized to withdraw blood under §321B.4. Statutory construction, however, may be used when a statute is ambiguous and reasonable minds may be uncertain as to its meaning. State v. Schlemme, 301 N.W.2d 721, 723 (Iowa 1981). Reasonable minds could differ as to the meaning of the term "medical technologist."

The statute must be construed in light of the language used and the purpose of the legislation. State v. One Certain Conveyance, 1971 Honda 350, 211 N.W.2d 297, 299 (Iowa 1973). Section 321B.1, The Code 1981, states "that the provisions of this chapter are necessary in order to control alcoholic beverages and aid the enforcement of laws prohibiting operation of a motor vehicle while under the influence of an alcoholic beverage." The general purpose of the implied consent law is 'to reduce the holocaust on our highways part of which is due to the driver who imbibes to freely of intoxicating liquor.'" State v. Schlemme, 301 N.W.2d 721, 723 (Iowa 1981).

In State v. Schlemme, 301 N.W.2d 721 (Iowa 1981), the court held that the implied consent statute does not require the arresting officer to be the officer who invokes the implied consent procedure. The court noted that:

> . . . we have adhered to the general purposes of the chapter and allowed admission of evidence when objections based upon specific lack of foundation requirements did not endanger the defendant's health or did not endanger the accuracy of the test. See, e.g., Schmoldt v. Stokes, 275 N.W.2d at 210 (when original arresting officer did not demand test, subsequent qualified officer who rearrested defendant could request test); State v. Winquist, 247 N.W.2d 256, 259 (Iowa 1976)("medical technologist" as used in statute dependent upon training as microbiologist and experience in withdrawal of blood and not technical requirement of certification by American Society of Clinical Pathologists); Janson v. Fulton, 162 N.W.2d at 441-42 (language in statute requiring physician, medical technologist, or registered nurse designated by licensed physician to withdraw "body substances" does not prevent peace officer from taking urine, breath, or saliva sample as legislature did not intend literal construction); Severson v. Sueppel, 260 Iowa at 1174, 152 N.W.2d at 284 (peace officer who did not see defendant drive may rely on observations of other peace officers for reasonable grounds to believe that he was guilty of offense).

Section 148C.1(6), The Code 1981, states in relevant part that:

> 'Physician's assistant' means a person who has successfully completed an approved program or is otherwise found to be qualified as a physician's assistant and is approved by the board to perform medical services under the supervision of one or more physicians approved by the board to supervise such assistant.

Section 148C.4, The Code 1981, provides in part that "[a] physician's assistant may perform medical service when such services are rendered under the supervision of a licensed physician or physicians approved by the board."

Drawing blood samples is one of the medical services which a physician's assistant is trained to perform. 470 I.A.C. §136.5(1) provides in relevant part as follows:

> . . . The high degree of responsibility an assistant to the primary care physician may assume, requires that [at] the conclusion of his formal education he possess the knowledge, skills and abilities necessary to provide those services appropriate to the primary care setting. These services would include, but need not be limited to, the following:
>
> * * *
>
> (b) Performance or assistance in performance of routine laboratory and related studies as appropriate for a specific practice setting, such as the drawing of blood samples, performance of urinalyses, and the taking of electrocardiographic tracings. [Emphasis added.]

Dorland's Illustrated Medical Dictionary, (25th ed. 1974) at 1543 defines "technologist" as "technician." "Technician" is defined as "a person trained in and expert in the performance of technical procedures." A physician's assistant is trained in the withdrawal of blood and is a "technologist" in that sense.

In both the cases of State v. Snyder, 203 N.W.2d 280 (Iowa 1972) and State v. Winquist, 247 N.W.2d 256 (Iowa 1976), the court held that a medical technologist under §321B.4 does not

need to meet the academic requirements for certification by the American Society of Clinical Pathologists. In Winquist, the court reasoned that:

> . . . we said the purpose of requiring certain qualifications of those authorized to draw blood was to protect the health of the individual, to guard against infection and pain, and to assure the accuracy of the test. We held that a person could possess these qualifications and be a medical technologist within the meaning of Code §321B.4 without having the educational background required for certification by the American Society of Clinical Pathologists. Id. at 285. The question is one of training in withdrawal of blood.
>
> Unlike the situation of physicians and registered nurses, the Code does not provide for state licensing of medical technologists. Nor do statutory educational or training standards exist. The test to determine whether a person holding himself out as a medical technologist is a medical technologist within the meaning of Code §321B.4 is whether a satisfactory showing can be made that he has sufficient training in the withdrawal of blood to accomplish the legislative objectives of protecting the individual's health, guarding against infection and pain, and assuring the accuracy of the test, all in accordance with accepted medical standards. . . . The concern is with the competence of the person withdrawing the blood rather than with an occupational label he may have been awarded by a private association. [Emphasis added.]

247 N.W.2d at 258-259.

We are persuaded by the rationale of Winquist. The physician's assistant has sufficient training in the withdrawal of blood to guard the health of the individual by protecting against infection and pain and to assure the accuracy of the test. In our opinion, a physician's assistant has adequate

training to be considered a "medical technologist" within the meaning of §321B.4. Therefore, a physician's assistant is qualified to withdraw a blood sample for the purpose of determining alcoholic content.

Sincerely,

Richard E. Mull

Richard E. Mull
Assistant Attorney General

INCOMPATIBILITY OF OFFICE; CONFLICT OF INTEREST. Iowa Const. Art. III, § 22. A state legislator is not barred by either Article III, § 22 of the Iowa Constitution or the doctrine of incompatibility of offices from serving as an uncompensated member of a local board of transit trustees. The legislator must exercise discretion to avoid any conflict of interest that could develop in a particular situation. (Stork to O'Kane, State Representative, 6/18/81) #81-6-12(L)

June 18, 1981

Honorable James D. O'Kane
State Representative
1815 Rebecca Street
Sioux City, Iowa 51103

Dear Representative O'Kane:

You have requested an opinion as to whether you, as a state legislator, may be appointed to serve on the Sioux City Board of Transit Trustees. We understand that the members of this Board are appointed by the City Council pursuant to local ordinance, receive no compensation, and have general responsibility for the operation of the municipal transit system. We further understand that the Board has authority over the receipt and expenditure of state funds, which become available to the city through a legislative appropriation administered by the Iowa Department of Transportation.

Article III, § 22 of the Iowa Constitution provides:

> No person holding any lucrative office under the United States, or this State, or any other power, shall be eligible to hold a seat in the General Assembly; but offices in the militia, to which there is attached no annual salary, or the office of justice of the peace, or postmaster whose compensation does not exceed one hundred dollars per annum, or notary public, shall not be deemed lucrative.

Earlier opinions of this office have clearly indicated that this provision bars a legislator only from accepting a "lucrative" office, which involves payment of compensation for services rendered. 1976 Op.Att'yGen. 791; 1975 Op.Att'yGen. 545; 1970 Op.Att'yGen. 763. You have indicated that a member of the Board of Transit Trustees receives no compensation. Accordingly, Article III, § 22, would not bar a legislator from serving on the board.

We have located no statute which bars a legislator from also serving on a local board of transit trustees. Such concurrent service must, however, also be considered in light of common law doctrines concerning incompatibility of office and conflict of interest.

If a person, while occupying one public office, accepts another incompatible with the first, he/she ipso facto vacates the first office, and his/her title is thereby terminated without any other act or proceeding. State ex rel. LeBuhn v. White, 257 Iowa 606, 609, 133 N.W.2d 903, 904 (1965). In order for the incompatibility doctrine to apply, a person must simultaneously hold two public offices. Op.Att'yGen. #79-6-5. The Iowa Supreme Court has held that five essential elements are required to make public employment a public office:

1. The position must be created by the constitution or legislature or through authority conferred by the legislature.

2. A portion of the sovereign power of government must be delegated to that position.

3. The duties and powers must be defined, directly or indirectly, 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.

5. The position must have some permanency and continuity, and not be only temporary and occasional.

State v. Taylor, 260 Iowa 634, 144 N.W.2d 289, 292 (1967). Pursuant to the provisions contained in Article III of the Iowa Constitution, a state representative clearly occupies a public office under the above elements. Likewise, the Sioux City ordinance governing the Board of Transit Trustees indicates that the members of the Board do have sovereign and independent powers and duties as well as continuity in office. Additionally, the Board is created, and its powers and duties are defined, through authority conferred by the legislature. Iowa Const. art. III, § 38A. Since the positions of legislator and transit trustee do involve two public offices, the doctrine of incompatibility does apply. Joint service in the positions may be examined in light of the following standards established by the Iowa Supreme Court:

> The principal difficulty that has confronted the courts in cases of this kind has been to determine what constitutes incompatibility of offices, and the consensus of judicial opinion seems to be that the question must be determined largely from a consideration of the duties of each, having, in so doing, a due regard to the public interest. It is generally said that incompatibility does not depend upon the incidents of the office, as upon physical inability to be engaged in the duties of both at the same time. Bryan v. Catell, supra. But that the test of incompatibility is whether there is an inconsistency in the functions of the two, as where one is subordinate to the other "and subject in some degree to its revisory power," or where the duties of the two offices "are inherently inconsistent and repugnant." State v. Bus, 135 Mo. 338, 36 S.W. 639, 33 L.R.A. 616; Attorney General v. Common Council of Detroit, supra. [112 Mich. 145, 70 N.W. 450, 37 L.R.A. 211]; State v. Goff, 15 R.I. 505, 9 A. 226, 2 Am.St.Rep. 921. A still different definition has been adopted by several courts. It is held that incompatibility of office exists "where the nature and duties of the two offices are such as to render it improper from considerations of public policy, for an incumbent to retain both".

State ex rel. Crawford v. Anderson, 155 Iowa 271, 273, 136 N.W. 128, 129 (1912); see also, State ex rel. LeBuhn v. White, 257 Iowa 606, 133 N.W.2d 903 (1965).

The functions of the Sioux City Board of Transit Trustees are not subordinate to, or dependent upon, legislative authority. Moreover, the duties of a state representative are plainly distinct from those of a transit trustee as set forth in Sioux City Ordinances, ch. 2.30. Legislative funds are appropriated to the State Department of Transportation for distribution, in part, to the Board of Transit Trustees, which then allocates the funds for expenditure. The legislature does not, however, exercise any revisory power over the Board's authority in this regard. Accordingly, we conclude that the duties of a state legislator and transit trustee are not inherently inconsistent and repugnant to establish legal objection based upon incompatibility of offices.

The nature of a conflict of interest must be distinguished from that concerning incompatibility of offices. The former does not affect an individual's ability to serve concurrently in two positions. Rather, it generally voids both the vote of the individual having the conflict on the matter under consideration and the result reached by the public body on the matter, regardless of whether the individual's vote was needed to obtain that result. Wilson v. Iowa City, 165 N.W.2d 813, 820 (Iowa 1969). In order to avoid these consequences, an individual having a potential conflict of interest must at least abstain from a vote on any matter in which the conflict may exist.

A conflict of interest may develop whenever a person serving in public office may gain private advantage, financial or otherwise, from such service. Accordingly, the Iowa Supreme Court has stated as follows:

> We doubt if any rule of law has more longevity than that which condemns conflict between the public and private interests of governmental officials and employees nor any which has been more consistently and rigidly applied.
>
> The high standards which the public requires of its servants were set by common law and adopted later by statute. It is almost

> universally held that such statutes are merely declaratory of the common law. [Citations omitted].
>
> These rules, whether common law or statutory, are based on moral principles and public policy. They demand complete loyalty to the public and seek to avoid subjecting a public servant to the difficult, and often insoluble, task of deciding between public duty and private advantage.
>
> It is not necessary that this advantage be a financial one. Neither is it required that there be a showing the official sought or gained such a result. It is the potential for conflict of interest which the law desires to avoid.
>
> * * *
>
> The employer-employee relationship has always been recognized as one source of possible conflict of interest. It would perhaps be more accurate to describe this, as some writers have done, as a conflict of duties rather than conflict of interest. When one is committed to give loyalty and dedication of effort to both his public office and his private employer, when the interests of those two may conflict, one is faced with pressures and choices to which no public servant should be unnecessarily exposed. James v. City of Hamburg, supra; Town of Hartley v. Floete Lumber Co., 185 Iowa 861, 864, 865, 171 N.W. 183, 185. [Emphasis in original].

Wilson v. Iowa City, 165 N.W.2d 813, 819, 833 (Iowa 1969). In the Wilson case, certain city councilmen were determined to have conflicts of interest under the applicable statute because they had voted to bring a certain area within an urban renewal project when they knew that the area included property in which they had an ownership interest. The conflict of one councilman, however, was based entirely upon his employment by another public body, i.e. the University

of Iowa, which owned property in the urban renewal area and was "vitally interested" in the project. Id. at 821. This councilman had held various positions of trust and responsibility with the University. At the time he became a member of the city council, he was director of the alumni office. Soon after his election, he was made director of community relations for the University. The Court noted that the University was openly in favor of the urban renewal project and would be beneficially affected by it. The Court then concluded that the councilman-employee of the University did have a disqualifying interest under the conflict of interest statute, particularly because of his "position of influence as director of community relations, the very department with which the city would deal in case of matters of mutual interest to the University and the city." Id. at 823.

A later Supreme Court decision applied the Wilson rationale to service by elected local officials on a local public board. Goreham v. Des Moines Metropolitan Area Solid Waste Agency, 279 N.W.2d 449 (Iowa 1970), involved a declaratory action to determine the rights of property owners of a metropolitan area and the status of a solid waste agency created by an intergovernmental agreement pursuant to Chapter 28E, The Code 1981. The agreement provided that the governing body of the solid waste agency would be comprised of elected representatives of the governing body of each participating governmental jurisdiction, or their designated substitutes. One issue on appeal was whether such an agreement violated public policy due to the apparent conflicting interests of the solid waste agency and the individual local governments. The Court concluded:

> Appellants further contend that the agreement creating the Agency is contrary to public policy to the extent that it permits elected officials of the member municipalities to serve on the governing board of the Agency. They argue that the integrity of representative government demands that the administrative officials should be able to exercise their judgment free from the objectionable pressure of conflicting interests. We agree with that proposition, but do not believe it appears here that these members of the Agency board are in such a position. It is conceded that here there is nothing to

> indicate a personal pecuniary interest of those representatives is involved such as appears in Wilson v. Iowa City, Iowa. 165 N.W.2d 813, 820.
>
> Although the members of the board understandably will want to keep the rates their constituents must pay as low as possible, they are well aware that rates must be maintained sufficient to meet the Agency's cost for such services. This is not such a conflict of interest as to be contrary to public policy or fatal to the agreement.
>
> In passing on this question the trial court said, "inasmuch as each representative is on the board primarily to serve as spokesman for the particular municipality or political subdivision he represents, (it could) * * * see no conflict of interest such as would likely affect his individual judgment by virtue of his status as an elected official." It pointed out no compensation is provided for such service and the representative serves at the pleasure of his municipality or political subdivision. We agree with the trial court.
>
> In the recent case of Wilson v. Iowa City, supra, we discussed the issue of conflict of interest and held, where it appeared the official had a personal interest, either actual or implied, he would be disqualified to vote on a municipal project--in that case, urban renewal. No such interest would appear in connection with this project unless some litigation would occur between the municipality he represents and the Agency, in which event the contract itself provides for arbitration procedures. We conclude there is no merit in this assignment.

Id. at 462. The Court in this case appears to place emphasis on the fact that a public official serving on two local public boards, which may have somewhat differing interests or concerns, does not benefit personally from such service, especially absent any possibility for personal financial advantage.

The rationale of Wilson and Goreham may be applied to the situation of a legislator serving on a local appointive board or commission such as the Board of Transit Trustees in Sioux City. We believe that Goreham does limit somewhat the broad language in Wilson when applied to this situation. Accordingly, a legislator does not have a conflict of interest solely because he/she serves on a local appointive board or commission. Nor would a conflict result solely because the legislator may vote on a matter in two different capacities. An objection may arise, however, if the legislator will gain any type of private, personal advantage from rendering a decision in either capacity.

In summary, a legislator may serve as a member of the Sioux City Board of Transit Trustees but should exercise discretion to avoid any conflict of interest that may develop in a particular situation.

Very truly yours,

Frank J. Stork

FRANK J. STORK
Assistant Attorney General

FJS:rcp

LAW ENFORCEMENT, POLICEMEN AND FIREMEN, SHERIFF: Reserve peace officers -- §§ 4.1(18), 80D.1, 80D.8, 80D.9, 337.1, The Code 1981. The requirement that reserve peace officers serve as peace officers only "under the direction of regular peace officers" means that the supervisory regular officers must have knowing control of the subordinate reserve officers. "Under the direction of regular peace officers" does not require that reserve officers be physically accompanied by regular officers at all times. Knowing control of reserve officers by regular officers may be exercised through radio contact. (Richard to Rush, State Senator and Hall, State Representative, 6/16/81) #81-6-9

June 16, 1981

The Honorable Bob Rush
State Senator

The Honorable Hurley Hall
State Representative
Statehouse
L O C A L

Dear Senator Rush and Representative Hall:

You have requested an opinion of the attorney general regarding section 80D.9, The Code 1981. That section provides in pertinent part:

> Reserve peace officers shall be subordinate to regular peace officers, [and] shall not serve as peace officers unless under the direction of regular peace officers . . . . (Emphasis added.)

With respect thereto, you have raised the following specific questions:

> 1. Does the phrase 'under the direction of regular peace officers' mean that the reserve peace officer must literally be accompanied by a regular peace officer at all times when serving as a peace officer for the purpose of section 80D.9?
>
> 2. Would maintenance of radio contact between regular and reserve peace officers constitute 'under the direction of regular peace officers' for purpose of section 80D.9?

We will answer your questions in the order presented.

Chapter 80D is a recent addition to the laws of Iowa. Enacted by the 1980 session of the 68th General Assembly, it constitutes a formalization of the traditional practice of employing persons as adjunct law enforcement officers. This practice has been detailed in several prior opinions of this office. See 1972 Op.Att'yGen. 605; 1978 Op.Att'y Gen. 822; 1978 Op.Att'yGen. 836. In 1978 Op.Att'yGen. 836, we opined that a county sheriff's authority to appoint irregular, special deputies and form posses was derived from section 4.1(18) and 337.1 of The Code. We also identified the duties and powers of such special deputies to include "keeping the peace, preventing crime, arresting persons liable thereto, and executing process of law." This view is in accord now with section 80D.1, The Code 1981, which states in part: "A reserve peace officer . . . has regular police powers while functioning as an agency's representative and participates on a regular basis in the agency's activities including those of crime prevention and control, preservation of the peace and enforcement of the law."

Reserve peace officers are not, however, given a free hand in the exercise of these powers. They are mere subordinates who "act only in a supplementary capacity to the regular force." Section 80D.8, The Code 1981. And under the section here in question they may function only "under the direction of regular peace officers." The scope of this direction has been discussed in a prior letter opinion of this office in which the following was stated:

> The language in section nine . . . should not be construed to limit reserve peace officer activities to situations when they are under the direct supervision of a regular officer.
>
> When construing a statute, the intent of the legislature should be the primary consideration. Hartman v. Merged Area VI Community College, 270 N.W.2d 822, 825 (Iowa 1975). The clear intent of the General Assembly is that reserve peace forces be an option existing for law enforcement agencies to assist them in the performance of their duties. Requiring the physical presence of a regular officer at all times would tend to frustrate that intent.

> Reading such a requirement into the act would also be inconsistent with the generally accepted meaning of 'under the direction of.' That phrase indicates something short of immediate supervision. Ross v. Long, 219 Iowa 471, 258 N.W. 94 (1935). However, it also means more than 'ultimately responsible to.' It infers a requirement of knowing control by a supervisory regular peace officer.

Op.Att'yGen. #80-12-4(L) at page 5. We adhere to this pronouncement in our prior letter opinion. The purpose of chapter 80D is to provide an optional reserve force to assist the regular force in performing its duties. To require the direct, physical supervision of a regular peace officer at all times would add to rather than alleviate the burdens of the regular force. The standard of supervision implied in section 80D.9 is that of knowing control over a reserve officer by a regular officer. Thus, in response to your first question, the phrase "under the direction of regular peace officers" does not mean that the reserve peace officer must literally be accompanied by a regular peace officer at all times.

The answer to your second question follows logically from our answer to the first. The maintenance of radio contact between regular and reserve officers would certainly provide a facile means of knowing control. Hence, such radio contact would place reserve officers "under the direction of regular peace officers" in satisfaction of section 80D.9, The Code 1981.

Sincerely,

Richard Lee Richards

RICHARD L. RICHARDS
Assistant Attorney General

bje

TAXATION: Special Assessments for Public Improvements Against Property Used and Assessed as Agricultural Property - Deferral of Installment Payments, §384.62(4), The Code 1981. Section 384.62 (4) requires that the owner of property subject to a special assessment file a deferral statement six months prior to the date that the assessment installment is due. (Kuehn to Danielson, Assistant Cerro Gordo County Attorney, 6/16/81) #81-6-8(L)

June 16, 1981

Mr. Mark R. Danielson
Assistant Cerro Gordo County Attorney
121 Third Street, NW
Mason City, IA 50401

Dear Mr. Danielson:

You have requested an opinion of the Attorney General concerning the proper interpretation of the language " . . . up to six months before the assessment installment is due . . . " contained in §384.62(4), The Code 1981. Said section states:

> An owner of property subject to an assessment that may be deferred may file a statement at any time up to six months before the assessment installment is due stating that a written request for deferment of such assessments is filed with the city clerk and that the entire lot subject to such assessment has continued to be and is still used and assessed as agricultural property. The collection of that installment and any other unpaid portion of the assessment shall be deferred until the next July 1 and subsequent installments may thereafter be deferred in the same manner for successive years in which a statement is filed. (Emphasis supplied)

More specifically, your question is "whether the language 'up to six months before the assessment installment is due' requires the statement to be filed within the six month period immediately prior to July 1 or whether it requires the statement to be filed at least six months prior to July 1." It is our opinion that the statement must be filed by the latter date.

If the legislature had intended to require that the statement be filed within the six month period immediately prior to the July 1 due date, the legislature would have said "within the six month period before the assessment installment is due." Instead, the legislature said ". . . up to six months before the assessment installment is due . . . ."

Webster's New World Dictionary of the American Language 1559 (2nd C.Ed. 1972), defines the words "up to" to include: "up to [Colloq.] . . . as far as [up to now, up to his hips] . . . ." It is apparent that the legislature wanted to set a point in time whereby all statements had to be filed. Since the legislature choose to use the words "up to" preceding the words "six months before the . . . installment is due", the legislature set the point in time whereby all statements had to be filed at six months prior to the date the installment is due.

To construe that the words "up to" should mean "within" (six months before the installment is due) would violate the proposition that courts search for the legislative intent as shown by what the legislature said rather than what it might or should have said. See Iowa R.App.P. 14(f)(13).

Based upon the foregoing, it is the opinion of this office that §384.62(4) requires that the owner of property subject to a special assessment file a deferral statement six months prior to the date that the assessment installment is due.

Very truly yours,

Gerald A. Kuehn
Assistant Attorney General

COUNTIES: SECONDARY ROADS: Chapters 17A and 306, §§ 306.3, 306.4, 306.10 and 306.19, The Code 1981. A county has authority to control and restrict access to the secondary roads within its jurisdiction. It is not necessary for the board of supervisors to adopt written criteria for approval or denial of road access. (Fortney to Criswell, Warren County Attorney, 6/15/81) #81-6-6(L)

June 15, 1981

John W. Criswell
Warren County Attorney
Warren County Courthouse
Indianola, Iowa 50125

Dear Mr. Criswell:

You have requested an opinion of the Attorney General regarding the authority of a board of supervisors to restrict access to secondary roads. According to the information you have supplied, Warren County has now adopted a resolution which sets forth the criteria to be employed by the board in making determinations relating to establishment of access roads. Prior to the adoption of this resolution, however, the board sought to have an access road vacated due to concern over safety. You inquire whether the county had authority to restrict access to its secondary roads without establishing written criteria for approval or denial of a road access.

Secondary roads, as defined by § 306.3(4), The Code 1981, are placed under the jurisdiction of the county. See § 306.4(2), The Code 1981. The governing body is given broad authority by § 306.10, The Code 1981, to alter, vacate and close portions of the road system within its jurisdiction. While the express language of § 306.10 does not give the governing agency authority over access points, we are of the opinion that such authority can be inferred from Chapter 306. Section 306.19(1) provides, in pertinent part, that the governing agency has "power to purchase or institute and maintain proceedings for the condemnation of land necessary for highway drainage, or land containing gravel or other suitable material for the improvement or maintenance of highways, together with the necessary road access or right of access thereto." Section 306.19(1), when read in conjunction with the broad grant of authority found

in § 306.10, establishes the jurisdiction of the county over points of access on secondary roads. [1]

While we believe that Chapter 306 confers authority on a board of supervisors to restrict access to secondary roads, we hasten to point out that such efforts to regulate should properly distinguish between access roads established in the future and those already in existence. It has been stated that:

> * * * once a right of access vests in the landowner, it is regarded as one of the rights appurtenant to ownership which may not be appropriated * * * without compensation. This is the case where access to a road is cut off, a road is vacated or abandoned, * * * a viaduct is erected, or a bus stop is created, so long as access to the property by means of a road, street, or other publicly owned property is cut off or substantially impaired.

Hoffman, Eminent Domain in Iowa, Revised Ed., (1962), p. 22.

While a landowner who is deprived of an established access may have a compensable interest, the Iowa courts distinguish between denial of all access to the highway itself and an action by the governing body eliminating a specific access route which results merely in inconvenience to the landowner. See Braden v. Board of Supervisors of Pottawattamie Co., 261 Iowa 973, 157 N.W.2d 123 (1968).

We now proceed to the central question you raise: may a governing agency regulate and restrict access to highways without first adopting written criteria? We are of the opinion that it is not necessary for the board of supervisors to adopt written criteria for approval or denial of road access.

The broadest and most pervasive requirement for the adoption of written standards or criteria, sometimes known as "rules", is found in the Iowa Administrative Procedure Act, Chapter 17A, The Code 1981. The term "rule", as defined in § 17A.2(7), is broad enough to encompass the criteria by which a governing agency makes decisions regarding access to highways. The rulemaking requirements of the chapter are not, however,

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[1] Chapter 306 has been held to meet the constitutional requisites of the Fourteenth Amendment to the United States Constitution. Cahill v. Cedar County, 367 F.Supp. 39 (1973), affirmed 95 S.Ct. 21, 419 U.S. 806, 42 L.Ed. 35.

applicable to counties. Sections 17A.3-8 delineate the rulemaking process. These sections impose a variety of requirements on "agencies". An "agency", as defined by § 17A.2(1), expressly excludes "a political subdivision of the state", e.g., a county. Chapter 17A therefore imposes no rulemaking requirement as to controlling access to secondary roads. A review of other chapters of the Code, including Chapter 306 itself, fails to disclose such a requirement as well.

In summary, a county has authority to control and restrict access to the secondary roads within its jurisdiction. It is not necessary for the board of supervisors to adopt written criteria for approval or denial of road access.

Yours truly,

David Fortney

DAVID M. FORTNEY
Assistant Attorney General

DMF:sh

EVIDENCE, JUDICIAL NOTICE, MUNICIPAL ORDINANCES: Section 622.62, The Code 1981. The "properly pleaded" requirement is satisfied when the pleading asserting the municipal ordinance refers to the ordinance by the designation appearing in the appropriate city code or city code supplement. (Cleland to McKean, State Representative, 6/9/81) #81-6-3(L)

June 9, 1981

Honorable Andy McKean
State Representative
Morley, IA 52312

Dear Mr. McKean:

You have requested an Attorney General's opinion on the meaning of that part of § 622.62, The Code 1981, that provides:

> When properly pleaded, the courts of this state shall take judicial notice of ordinances contained in a city code or city code supplement.

To interpret this language it is first necessary to understand that:

> [w]hen a case is presented for trial the court and the jury are presumed to be unaware of the relevant facts, and it is necessary for the parties to prove such facts by the introduction of appropriate evidence. Some facts, however, need not be proved . . .. The process by which a court accepts such facts as true without proof thereof is called "judicial notice."

1 Wharton's Criminal Evidence § 34 (13th Ed. 1972).

Prior to the 1976 amendment of § 622.62, 1976 Session, 66th G.A., ch. 1239, §§ 1, 2, Iowa courts of general jurisdiction could not take judicial notice of municipal ordinances. Worden v. Sioux City, 260 Iowa 1219, 1223, 152 N.W.2d 192, 194 (1967). In other words, it was necessary to prove the existence and content of a municipal ordinance in order to make it part of the record. The 1976 amendment removed this requirement.

In our opinion, the "properly pleaded" requirement is satisfied when the pleading asserting the municipal ordinance refers to the ordinance by the designation appearing in the appropriate city code or city code supplement. Cf. Iowa R.Civ.P. 94 ("A pleading asserting any statute of another state . . . shall refer to such statute by plain designation . . .."). Moreover, when the pleading requirement is satisfied, the court is then under a duty to take judicial notice of the ordinance. Section 4.1(36)(a), The Code 1981 (The word "shall" imposes a duty.).

Sincerely,

Richard L. Cleland

RICHARD L. CLELAND
Assistant Attorney General

RLC/cla

PUBLIC RECORDS: Chapter 68A, The Code 1981. Motor vehicle titles and registration information maintained by a county treasurer are "public records." Such records are available for public inspection. Voluntary associations, such as labor unions, are entitled to inspect public records with rights equivalent to those of their individual members. Reasonable fees may be assessed for the expense of copying public records. The uses to which information may be put does not justify a denial of a citizen's right to inspect public documents. (Fortney to Mahaffey, Poweshiek County Attorney, 6/3/81) #81-6-2(L)

Michael W. Mahaffey
Poweshiek County Attorney
405 E. Main
Montezuma, Iowa 50171

June 3, 1981

Dear Mr. Mahaffey:

You have requested an opinion of the Attorney General regarding the obligations of public officials under Chapter 68A and the question of public access to records. Your inquiries arise from a labor union's request for motor vehicle registration information maintained in the office of the county treasurer.

I.

You have inquired whether motor vehicle titles and registrations are public information. "Public records" are defined by § 68A.1, The Code 1981, as "all records and documents of or belonging to this state or any county, city, township, school corporation, political subdivision, or tax-supported district in this state, or any branch, department, board, bureau, commission, council, or committee of any of the foregoing." Motor vehicle registration and title information are documents or records belonging to the state and its counties. Such records are not included among those records which may be kept confidential pursuant to § 68A.7. Further, we are unaware of any other statutory provision which exempts motor vehicle registration and title information from the scope of Chapter 68A. As these documents are public records, § 68A.2 authorizes their inspection by members of the public.

II.

You have inquired whether a request to inspect public records should be accommodated when the request comes from a labor union. The right to examine public records is conferred on "every citizen of Iowa." § 68A.2. Whether this provision

of the Code applies only to individuals, and not to associations of individual citizens, is a question which has not been directly addressed by the Iowa Supreme Court. We note that previous litigation often involved representatives of the news media. E.g., Howard v. Des Moines Register and Tribune, 283 N.W.2d 289 (Iowa 1979). These cases are not particularly helpful in that the news media is expressly mentioned in Chapter 68A. The intent of the chapter is not effectuated by adopting the position that two or more citizens cannot collectively request to inspect documents which each could individually inspect. An association, such as a labor union, is comprised of and exists through its individual members. Consequently, we believe that voluntary associations are entitled to inspect public records with rights equivalent to those of their individual members. The fact that the association in question is a labor union or an employer association does not serve as a basis for denying access to public documents. To do so would raise serious First and Fourteenth Amendment problems.

III.

You inquire whether a county official can charge a fee for performing a file search pursuant to a Chapter 68A request. We addressed a similar question in Op.Att'y Gen. #81-4-4, copy enclosed. In that earlier opinion, we stated that the cost of copying public records could be assessed to the requestor. We further stated that the fee, which must be reasonable, is not limited to the cost of the actual copying, but may encompass the services of the officer supervising the copying. Such assessment is permissible to avoid the imposition of unnecessary expenses on the public purse, without compensation for such expense and disruption. See 1968 Op.Att'y Gen. 656, 657. We have also opined that:

> Section 68A.3 provides the mechanism by which such copies may be obtained. In general, the statute requires that copying of public records be completed under the supervision of the record's custodian or an authorized deputy in a "suitable place" provided by the custodian. If it is impractical to accomplish the copying at the custodian's office, another place may be employed, at the expense of the individual seeking copies of the records. The individual requesting copies must assume "all expenses" incurred to obtain copies, as well as a "reasonable fee for the services of the lawful custodian or his authorized deputy in supervising the records" during copying. [Emphasis supplied.]

Op.Att'y Gen. #79-4-19, p. 5.

To the extent that a record custodian's time is consumed in copying records or supervising record copying, § 68A.3 allows the imposition of a reasonable charge. However, the Code does not authorize the custodian to impose a fee or charge for performing a search of public records under Chapter 68A.[1]

IV.

Your final inquiry relates to the uses to which a requestor may put the information obtained pursuant to Chapter 68A. You ask whether such information may be utilized to develop mailing lists. You indicate that such lists would be used for organization purposes.

We have repeatedly held that the uses to which information may be put does not justify a denial of a citizen's right to inspect public documents. We have stated that the right to examine and copy voter registration lists is absolute and may not be interfered with on the grounds that the records thereafter may be used illegally. 1976 Op.Att'y Gen. 79. We further have held that the fact that the requestor intends to utilize the records for commercial purposes is not a bar to examination and copying of public records. 1968 Op.Att'y Gen. 518. We see no distinction to be drawn if the requestor intends to develop a mailing list.

In summary, motor vehicle titles and registration information maintained by a county treasurer are "public records." Such records are available for public inspection. Voluntary associations, such as labor unions, are entitled to inspect public records with rights equivalent to those of their individual members. Reasonable fees may be assessed for the expense of copying public records. The uses to which information may be put does not justify a denial of a citizen's right to inspect public documents.

Yours truly,

David Fortney

DAVID M. FORTNEY
Assistant Attorney General

DMF:sh
Enclosure

1 Contrast with various provisions of Chapter 554 which authorizes fees for performing record searches pursuant to the Uniform Commercial Code.

Juvenile Law: Chapter 232. Sections 232.2(10), 232.2(18), 232.11, The Code 1981. Foster parents may not execute a written waiver of the right to counsel for a foster child, absent appointment as guardian or custodian. (Hege to Fisher, County Attorney, 6/3/81) #81-6-1(L)

June 3, 1981

Mr. Monty Fisher
Webster County Attorney
Courthouse
Fort Dodge, Iowa 50501

Dear Mr. Fisher:

You have requested an opinion of the Attorney General relative to the waiver of a juvenile's right to counsel under the juvenile justice act. Specifically, you inquire:

> whether or not a foster parent can sign a waiver of juvenile rights and give law enforcement officials authority to take a statement from a juvenile when the juvenile has been arrested or is a suspect in a criminal proceeding.

Simply, the answer to your question is no, unless the foster parent has been appointed as custodian or guardian.

Section 232.11, The Code 1981, delineates a juvenile's right to counsel in delinquency proceedings, Division II of the Act.

> 232.11 Right to assistance of counsel.
> 1. A child shall have the right to be represented by counsel at the following stages of the proceedings within the jurisdiction of the juvenile court under division II:
> a. From the time the child is taken into custody for any alleged delinquent act that

> constitutes a serious or aggravated misdemeanor or felony under the Iowa criminal code, and during any questioning thereafter by a peace officer or probation officer.
>
> b. A detention or shelter care hearing as required by section 232.44.
>
> c. A waiver hearing as required by section 232.45.
>
> d. An adjudicatory hearing required by section 232.47.
>
> e. A dispositional hearing as required by section 232.50.
>
> f. Hearings to review and modify a dispositional order as required by section 232.54.
>
> 2. The child's right to be represented by counsel under subsection 1, paragraphs "b" to "f" of this section shall not be waived by a child of any age. The child's right to be represented by counsel under subsection 1, paragraph "a" shall not be waived by the child without the written consent of the child's parent, guardian, or custodian.

Subsection two plainly states that written consent for waiver of the right to counsel following the taking into custody may be executed by the "parent, guardian or custodian".

The terms "guardian" and "custodian" are defined in § 232.2, The Code 1981.

> "Custodian" means a step-parent or a relative within the fourth degree of consanguinity to a minor child who has assumed responsibility for that child, a person who has accepted a release of custody pursuant to division IV or a person appointed by a court or juvenile court having jurisdiction over a child. The rights and duties of a custodian with respect to a child shall be as follows:
>
> a. To maintain or transfer to another the physical possession of that child.
>
> b. To protect, train, and discipline that child.
>
> c. To provide food, clothing, housing, and medical care for that child.

d. To consent to emergency medical care, including surgery.

e. To sign a release of medical information to a health professional.

All rights and duties of a custodian shall be subject to any residual rights and duties remaining in a parent or guardian.

Section 232.2(10), The Code 1981.

"Guardian" means a person who is not the parent of a child, but who has been appointed by a court or juvenile court having jurisdiction over the child, to make important decisions which have a permanent effect on the life and development of that child and to promote the general welfare of that child. A guardian may be a court or a juvenile court. Guardian does not mean conservator, as defined in section 633.3, although a person who is appointed to be a guardian may also be appointed to be a conservator.

Unless otherwise enlarged or circumscribed by a court or juvenile court having jurisdiction over the child or by operation of law, the rights and duties of a guardian with respect to a child shall be as follows:

a. To consent to marriage, enlistment in the armed forces of the United States, or medical, psychiatric, or surgical treatment.

b. To serve as guardian ad litem, unless the interests of the guardian conflict with the interests of the child or unless another person has been appointed guardian ad litem.

c. To serve as custodian, unless another person has been appointed custodian.

d. To make periodic visitations if the guardian does not have physical possession or custody of the child.

e. To consent to adoption and to make any other decision that the parents could have made when the parent-child relationship existed.

Section 232.2(18), The Code 1981.

A foster parent absent appointment by the court, does not otherwise fall within either the definition of "guardian" or "custodian". Section 232.2(10), (18), The Code 1981. Indeed, in the most usual situations, the Department of Social Services or a child placing agency will be the custodian of the child, while the foster parents will merely have the physical placement. Section 232.52(2)(d), The Code 1981.

The purpose of § 232.11(2) is to allow the child the opportunity to consult with a parent or supportive adult prior to waiver of the constitutional right to counsel. In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). Adults have a similar right in this state, § 804.20, The Code 1981, and evidence obtained in violation of the right is subject to exclusion in a subsequent criminal proceeding. State v. McAteer, 290 N.W.2d 929 (Iowa 1980).

In summary, a foster parent, absent appointment as guardian or custodian, may not execute a valid written consent to waive a child's right to counsel under § 232.11, The Code 1981.

Sincerely,

Brent D. Hege

Brent D. Hege
Assistant Attorney General

BDH/kap

MUNICIPALITIES: Incompatibility of Offices--§§ 384.16, 441.31, 441.32, 441.35, 441.37, 441.38, The Code, 1981. The positions of city council member and membership on the Board of Review are incompatible. (Blumberg to Maher, Fremont County Attorney, 7/31/81) #81-7-31 (L)

July 31, 1981

Mr. Richard B. Maher
Fremont County Attorney
Fremont County Courthouse
Sidney, Iowa 51652

Dear Mr. Maher:

We have your opinion request regarding whether a conflict exists when a city council member serves on the County Board of Review. Boards of Review are established by § 441.31, The Code 1981. The County Board of Review is established to review all assessments made by the assessor in the county outside of cities which have a city assessor. It is in session each year from May 1 to at least May 31. The Board has the power to equalize assessments and add taxable property to the assessment rolls. § 441.35. Protests to assessments are also heard by the Board. § 441.37. Appeals from decisions of the Board are taken directly to the District Court. § 441.38.

The city council establishes its budget each year. § 384.16. In its proposed budget, the city shall set forth the amount to be raised by property taxes. § 384.16(1)(c). This amount is

determined by multiplying the tax, in dollars per thousand dollars assessed valuation, times the assessed valuations of the property in the city. In order to do this, the council must know what the assessed value of each property is.

It is obvious that any changes in the assessed value of property in the city will affect the city budget. With that in mind, it is clear that a conflict exists with a city council member, who is concerned with the city budget, also sitting on the Board of Review which handles protests to assessments. If there is merely a conflict, the council member would have to abstain from participating in any protest on property within the city. It must be remembered that it is the appearance of and the potential for a conflict that the law desires to avoid. Wilson v. Iowa City, 165 N.W.2d 813 (Iowa 1969).

There also exists a question of incompatibility. The law is that one person cannot occupy simultaneously two offices that are incompatible. Upon accepting the latter office, the first is ipso facto vacated. In State ex rel. Crawford v. Anderson, 155 Iowa 271, 273, 136 N.W. 128, 129 (1912), it was held:

> The principal difficulty that has confronted the courts is cases of this kind has been to determine what constitutes incompatibility of offices, and the consensus of judicial opinion seems to be that the question must be determined largely from a consideration of the duties of each, having, in so doing, a due regard for the public interest. It is generally said that incompatibility does not depend upon the incidents of the office, as upon physical inability to be engaged in the duties of both at the same time. Bryan v. Cattell, supra. But that the test of incompatibility is whether there is an inconsistency in the functions of the two, as where one is subordinate to the other "and subject in some degree to its revisory power," or where the duties of the two offices "are inherently inconsistent and repugnant." State v. Bus, 135 Mo. 338, 36 S.W. 639, 33 L.R.A. 616, Attorney General v. Common Council of Detroit, supra

> [112 Mich. 145, 70 N.W. 450, 37 L.R.A. 211]; State v. Goff, 15 R.I. 505, 9 A. 226, 2 AM. St. Rep. 921. A still different definition has been adopted by several courts. It is held that incompatibility in office exists "where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for an incumbent to retain both."

See also, State ex rel. Le Buhn v. White, 257 Iowa 606, 133 N.W.2d 903 (1965).

There can be no doubt that a position on a city council is a public office. The essential elements required to make a public employment a public office, as listed in State v. Taylor, 260 Iowa 634, 639, 144 N.W.2d 289, 292 (1966), are:

> (1) The position must be created by the constitution or legislature or through authority conferred by the legislature. (2) A portion of the sovereign power of government must be delegated to that position. (3) The duties and powers 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. (5) The position must have some permanency and continuity, and not be only temporary and occasional.

With respect to the Board of Review, it is created by § 441.31, and its duties and powers are defined by § 441.35 through § 441.37. Those duties are performed independently and without control of a superior power other than the law. Sections 441.35 and 441.37 provide for direct appeals to the District Court. A position on the Board of Review has some permanency and continuity since § 441.32 sets the terms for six years. Finally, a portion of the sovereign power of government is delegated to the Board in that it sets assessments on property for tax purposes. We can, therefore, conclude that a member of a Board of Review occupies a public office.

Determining whether an incompatibility exists is more difficult. There is no evidence of a revisory power of one position over the other. If there is an incompatibility, it would be based upon public policy. In Wilson v. Iowa City, 165 N.W.2d 813 (1969), the issue was one of conflict of interest. Although the ruling in that case is solely on conflicts rather than incompatibility, some of the language used by that Court is helpful in determining the public policy involved here. Reference was made to the high standards the public requires of its servants. The rules on conflicts, which derived from these high standards, are based on moral principles and public policy. They demand complete loyalty to the public. Again, it is the potential for conflict which the law desires to avoid.

We can see from the above language from Wilson, and the language of cases cited therein, that public policy demands loyalty and impartiality from its public servants. Allowing a person to occupy two public offices where impartiality is necessary but is jeopardized is contrary to public policy. The assessments on property determine, in part, the amount of taxes for that property. When the Board of Review equalizes assessments and rules on assessment protests it affects the property tax revenue of each governmental unit in the county, including a municipality. When a city council member who passes upon the city budget, composed in part of property tax revenues, sits on a board to review assessments for property tax purposes, the potential for a conflict and an adverse influence is too great. Public policy, for the ultimate benefit of the citizens, demands this type of situation not be permitted to exist.

Accordingly, we are of the opinion that a city council member cannot simultaneously occupy a position on the Board of Review.

Very truly yours,

Larry M. Blumberg

LARRY M. BLUMBERG
Assistant Attorney General

LMB/skb

LIBRARIES: § 303B.9, The Code 1981. The tax receipts levied pursuant to § 303B.9 are to be apportioned equally among all libraries which provide library services to a tax jurisdiction, unless the apportionment is otherwise specified in the contract between the county and the municipal libraries. (Fortney to Richter, Pottawattamie County Attorney, 7/31/81) #81-7-30 (L)

David E. Richter
Pottawattamie County Attorney
Courthouse
Council Bluffs, Iowa 51501

July 31, 1981

Dear Mr. Richter:

You have requested an opinion of the Attorney General regarding § 303B.9, The Code 1981. You have inquired as to the method by which the tax receipts obtained pursuant to said section are to be apportioned among the various libraries. You further inquire whether a library is entitled to share in the apportionment of funds if said library does not establish a rural circulation. From the information you provided, a municipal library in Pottawattamie County has a policy of allowing residents of the county's rural areas to utilize the library, however, due to the municipality's peculiar geographic location, i.e., Carter Lake, no rural residents actually utilize the library.

It is our opinion that the tax receipts levied pursuant to § 303B.9 are to be apportioned equally among all libraries which provide library services to a respective taxing jurisdiction. Section 303B.9 provides:

> A regional board shall have the authority to require as a condition for receiving services under section 303B.6 that a governmental subdivision maintain any tax levy for library maintenance purposes that is in effect on July 1, 1973. Commencing July 1, 1977, each city within its corporate boundaries and each county within the unincorporated area of the county shall levy a tax of at least six and three-fourths cents per thousand dollars of assessed value on the taxable property or at least

> the monetary equivalent thereof when all or a portion of the funds are obtained from a source other than taxation, for the purpose of providing financial support to the library which provides library services within the respective jurisdictions.

A review of our previous opinions leads us to conclude that § 303B.9 provides funding only to those libraries which provide services to a respective tax jurisdiction. We further conclude that such apportionment should be made equally among such libraries. However, we recognize that the arrangement between the county and the municipal libraries is contractual. Consequently, the contracts could specify a different method of apportionment.

In 1976 Op. Att'y Gen. 93, we addressed a question relating to Dickinson County. The county had no county-wide library, rather four municipalities in Dickinson County individually maintained separate libraries to serve their respective residents. The question was raised whether § 303B.9 authorized a county-wide tax levy in Dickinson County. We stated that "since we are dealing here with four or more distinct taxing authorities, we do not see a possibility, under present law and in the absence of a county library system, of a single tax levy spread county-wide to support all the existing libraries in the county." 1976 Op. Att'y Gen. 93, 94. The underlying premise of the opinion is apparent. Unless a subdivision is actually served by a library, that subdivision should not levy a tax for library purposes. We have stated, however, that before a subdivision is deemed to be the recipient of library services it must be served by a local public library. Receipt of services by a regional library [1] is not adequate to initiate the tax levy. 1976 Op. Att'y Gen. 677. The provision of services by a local public library may be on a contract basis. For example, the residents of Municipality A, which has its own library, may contract with Municipality B's residents, who do not have their own library, regarding the provision of library services. Both municipalities would then be served by a local, as opposed to a regional, library and both would be subject to a § 303B.9 levy. See 1978 Op. Att'y Gen. 184 and 1978 Op. Att'y Gen. 319.

The foregoing opinions serve to establish that residents of any municipality which either maintains its own local library or receives library services from another local library are subject to the § 303B.9 tax levy. Similarly, residents of unincorporated areas of a county are subject to the tax if the county has con-

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[1] A regional library is established by Chapter 303B and consists of a central library offering support services to a cluster of counties. The entire state is divided into seven regional library districts.

tracted with a local library to provide services to the residents of those areas. Likewise, residents of such areas would be subject to a tax if the county operated a county-wide library.

Section 303B.9 mandates that the tax receipts generated within a particular tax jurisdiction be paid to the local library serving that jurisdiction. In the event that more than one library serves the residents of a particular tax jurisdiction, we believe that the receipts should be apportioned equally among the libraries in question unless the contractual arrangement specifies otherwise. We base this conclusion on the fact that the relationship between the county and the municipal libraries is purely contractual. The residents of the unincorporated areas are free to decline affiliation with a library. Those residents, through their elected representatives, determine whether or not to avail themselves of library services. As we stated in an earlier opinion:

> The only logical interpretation we can place on § 303B.9 is that if a city wishes to receive or receives library services it will have to help fund them. In other words, a city will have to pay for what it wants and gets. Therefore, if a city wishes to receive such services it will have to levy the tax or appropriate the equivalent in order to contract for them. If a city already is receiving such services it has a duty to help fund them. However, if a city does not want such services (we assume the citizens will have so expressed their views) it need not levy or appropriate any monies, for it should not have to pay for what it will not receive. If the Legislature intended a different result it did not so express it.

1978 Op. Att'y Gen. 184, 186.

In conclusion, the tax receipts levied pursuant to § 303B.9 are to be apportioned equally among all libraries which provide library services to a tax jurisdiction, unless the apportionment is otherwise specified in the contract between the county and the municipal libraries.

Yours truly,

David Fortney

DAVID M. FORTNEY
Assistant Attorney General

DMF:sh

COUNTIES: County Conference Board--§§ 336.2, 441.2, 441.16, 441.31, 613A.1, 613A.2, and 613A.8, The Code 1981. If a County Conference Board and its individual members are sued in tort, the County Attorney shall defend the Board and the members of the Board of Supervisors. The cities and school districts shall provide defense for the mayors and school board directors that sit on the Board. (Blumberg to Folkers, Mitchell County Attorney, 7/31/81) #81-7-29 (L)

Mr. Jerry H. Folkers
Mitchell County Attorney
515 State Street
Osage, IA 50461

July 31, 1981

Dear Mr. Folkers:

You have requested an opinion on the County Conference Board. You wish to know who has the responsibility to represent the Board and its individual members if suit is filed against them.

Chapter 441, The Code 1981, establishes the Conference Board. Pursuant to § 441.2, in each county and each city having an assessor there shall be a conference board. The county board shall consist of the mayors of all cities in the county whose property is assessed by the county, one representative of the board of directors of each high school district of the county, and members of the board of supervisors. The duties of the conference board involve the examination of assessors or deputy assessors and appointment of the assessor. It shall also review the budgets of the assessor, the examining board and the board of review. In that context it shall authorize the number of deputies and other personnel and their salaries and compensation. § 441.16. The board also appoints the board of review. See § 441.31.

With that in mind, you ask who has the responsibility to defend the County Conference Board when it or its individual members are sued. In your instance, you are concerned about the possibility of a civil rights violation case.

There is nothing in Chapter 441 which designates an attorney for the County Conference Board. Section 441.41 provides that the city legal department shall represent the city board of review and the city assessor, and the county attorney shall represent the county board of review and the County Assessor in all litigation involving assessments. That section also provides that the conference board may employ special counsel to assist the city or county attorney.

There is nothing in the Code which speaks to the duties of city or school district attorneys to defend the conference board or its members. Section 336.2 sets forth the duties of the County Attorney. It provides, in part:

> It shall be the duty of the county attorney to:
>
> . . .
>
> 6. Commence, prosecute, and defend all actions and proceedings in which any county officer, in his official capacity, or the county, is interested, or a party.

Since the County Conference Board concerns itself with the County Assessor and his or her assistants, a suit against it would be one in which the county is interested. Thus, the County Attorney would represent the board. The same would be true of the members of the board of supervisors on the County Conference Board.

We cannot say, however that the County Attorney must defend the individual members of the board, other than the supervisors.[1] When the mayors and members of the school boards in the county sit on the conference board they are not made county officials. They are members of the board because of their status as officials for the cities and school districts. It is within their scope of duties as mayors and school board members to be members of the conference board. In other words, when they sit on the conference board they are acting within the scope of their duties.

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[1]This is not to say that the county attorney is prevented from representing the individual members absent a conflict.

Chapter 613A provides for defense of "municipal" officers and employees against a tort action when they are acting within the scope of their duties and employment. § 613A.8. "Municipality" is defined in § 613A.1(1) to include cities and school districts. "Tort" is defined in § 613A.1(3) as every civil wrong resulting in death of or injury to a person or injury to personal or property rights. It includes the denial or impairment of any right under any constitutional provision, statute or rule of law. Thus, an action based upon a violation of civil rights falls with the definition of "tort" in Chapter 613A.

Section 613A.2 provides that a tort shall be deamed to be within the scope of duties or employment if the act or omission reasonably relates to the business or affairs of the municipality. This requirement is also met. Because the Legislature has mandated that mayors and school board directors be on the conference board, there must be some relationship to the business or affairs of a city or school district. In other words, the mayors and directors would not have been placed on the conference board if there was not any relation to the business or affairs of the city or school district. Therefore, with respect to the mayors and school directors, the "municipality" must provide them with legal representation under your facts.

Accordingly, we are of the opinion that the County Attorney shall defend the County Conference Board and the members of the board of supervisors who sit on it. The cities and school districts must provide defense for the mayors and the school board directors who are on the conference board.

Very truly yours,

Larry M. Blumberg

LARRY M. BLUMBERG
Assistant Attorney General

LMB/cmc

MUNICIPALITIES: Incompatibility; Conflict of Duties--The positions of chief of a volunteer fire department and city council member are not incompatible. However, there is a conflict for a person holding both positions taking part in the decision making process and vote as a council member with regard to fire department matters. (Blumberg to Carney, State Senator, 7/31/81) #81-7-28 (L)

The Honorable Clarence S. Carney
State Senator
3412 Cheyenne Blvd.
Sioux City, IA 51104

July 31, 1981

Dear Senator Carney:

You have requested an opinion on whether the chief of a volunteer fire department can similtaneously occupy the position of a member of the city council. Under your facts, the volunteer fire department operates out of a municipal owned station. It is supported by a joint agreement between the city and several townships which it serves. The department is governed by a Board consisting of the mayor, the fire chief and three township trustees. The city, along wiith the townships, gives money each year to the department for its operation. We cannot determine from your facts whether this is a municipal fire department or a private one that contracts with the city. Such a distinction, however, does not make a difference on the main question.

If the fire department is private there would be no prohibition to the chief being on the city council. If the department is municipal, the result would be the same, but for different reasons. In a prior opinion, 1978 Op. Atty. Gen. 325, we held that the position of chief of the volunteer fire department was incompatible with that of city council member. Our result was reached on public policy reasons. The general rule is that one cannot simultaneously occupy two public offices that are

incompatible. See State ex rel. Crawford v. Anderson, 155 Iowa 217, 136 N.W. 128 (1912); State ex rel. Le Buhn v. White, 257 Iowa 606, 133 N.W.2d 903 (1965). The Iowa Court has begun to apply the definition of "public office" from State v. Taylor, 260 Iowa 634, 144 N.W.2d 289 (1966), where there is an issue as to a "public office" or "officer". In applying that definition we find that although the positon of city council member is a public office, that of chief of a volunteer fire department is not. Thus, we find that the two positions are not incompatible. Accordingly, this opinion supersedes our previous one in 1978 Op. Atty. Gen. 325.

This does not mean, however, that a person occupying both positions should vote, as a city council member, on matters involving the fire department. In other words, although a person can occupy both positons, public policy may require abstinence from voting because of a conflict. Conflicts are most often discussed by the courts in terms of a conflict of interest. Such a conflict must be certain, demonstrable, capable of precise proof, pecuniary or propietary, direct and personal. If collateral or remote, proof that the interest influenced the vote is necessary. See Op. Atty. Gen. # 79-7-23.

We do not find that there would be a conflict of interest of a pecuniary or personal nature. We do find what could be termed a conflict of duties which public policy dictates against. In Goreham v. Des Moines Met. Area Solid Waste Agency, 179 N.W.2d 449, 462 (Iowa 1970), the Court agreed that the "integrity of representative government demands that the administrative officials should be able to exercise their judgment free from objectionable pressure of conflicting interests." In Wilson v. Iowa City, 165 N.W.2d 813 (Iowa 1969), the Court made reference to the high standards the public requires of its servants. It stated that the rules on conflicts were derived from these standards and are based upon moral principals and public policy. It is the potential for a conflict which the law desires to avoid. When voting on the expenditure of tax dollars or on the issuance of general obligation bonds public policy requires as much impartiality as possible in the city council members. A fire chief who decides the needs and helps make the requests of the fire department and then votes as a council member on those needs and requests does not exhibit the required impartiality. Again, it is the potential for conflict that the law desires to avoid. Accordingly, a chief of a volunteer fire department who is a city council member should abstain from the decision making process and vote of the council on fire department matters.

Very truly yours,

Larry M. Blumberg

LARRY M. BLUMBERG
Assistant Attorney General

MUNICIPALITIES: Cemeteries--§§ 566.14, 566.15 and 566.16, The Code 1981. Money from donations and bequests and from the sale of lots must be used for the care and maintenance of the lots or property of the donor, unless the terms of the donation, bequest or the sale of lots provides otherwise. Money from the perpetual care fund of a municipal cemetery cannot be used for the purchase and improvement of additional land. (Blumberg to Shimanek, State Representative, 7/30/81) #81-7-27 (L)

The Honorable Nancy J. Shimanek
State Representative
114 South Cedar Street
Monticello, Iowa 52310

July 30, 1981

Dear Representative Shimanek:

We have your opinion request of May 20, 1981. In a conversation with the city attorney, the question has been narrowed to whether perpetual care funds of a municipally run cemetery can be used for the purchase of additional land and the improvements to be made on that land.

Section 566.14 provides:

> [C]ities, irrespective of their form of government, boards of trustees of cities to whom the management of municipal cemeteries has been transferred by ordinance, shall be and they are hereby created trustees in perpetuity, and are required to accept, receive, and expend all moneys and property donated or left to them by bequest, and that portion of cemetery lot sales or permanent charges made against cemetery lots which has been set aside in a perpetual care fund, to be used in caring for the property of the donor, or lot owner who by purchase or otherwise has provided for the perpetual care of a cemetery lot in any cemetery, or in accordance with the terms of such donation, bequest, or agreement for sale and purchase of a cemetery lot, and the money or property thus received shall be used for no other purpose.

In other words, municipalities are required to accept all moneys and property donated or left to them by bequest, and that money plus the money from the sale of lots shall be used in caring for the property of the donor or lot owner or in accordance with the terms of any donation. Any money or property so received shall not be used for any other purpose.

It appears from the language that unless the terms of a specific donation or bequest provide for the acquisition of land or if there is such an agreement with the owners of the lots, the money received by the city through donations or bequests and the money from the sale of lots and any permanent charges on the lots shall be used only for the caring of the lots. The problem, however, concerns the perpetual care fund.

Section 566.14 makes specific mention of a perpetual care fund. Section 566.15 provides that the mayor and council has authority to receive and invest money and property donated, along with that portion of money from lot sales and permanent charges on the lots which have been set aside in a perpetual care fund. It is provided in § 566.16 that before any part of the principal may be invested or used the city shall, by resolution, accept the donation or bequest and that portion of lot sales or permanent charges to be used for perpetual care. The city shall also, by said resolution, provide for the payment of interest thereon to the cemetery general fund to be used in caring for or maintaining the property of the donor or the lots where provision was made in the sale for perpetual care. All this must be done in accordance with the terms of the donations or bequests or the terms of the sale.

It is apparent that lot sales do not have to be made under perpetual care. That is obviously discretionary with the parties to the sale. The above sections of Chapter 566 provide that money from the perpetual care fund can only be used for the care and maintenance of lots sold pursuant to perpetual care. Therefore, said money cannot be used to purchase additional land for the cemetery nor for any improvements on that additional land.

Very truly yours,

Larry M. Blumberg

LARRY M. BLUMBERG
Assistant Attorney General

LMB/cmc

MUNICIPALITIES: Police and Fire Chief's Retirements--§§ 384.6, 411.3 and 411.8(1)(a), The Code 1981. Section 384.6(1) only provides for the normal contribution of § 411.8(1)(a) to be made to the International City Managers Association/Retirement Corporation instead of the pension fund under Chapter 411. Past earned retirement credits and past contributions are not included. (Blumberg to Doderer, State Representative, 7/30/81) #81-7-26 (L)

July 30, 1981

The Honorable Minnette Doderer
State Representative
L O C A L

Dear Representative Doderer:

We have your opinion request regarding Chapter 411, The Code 1981. You ask:

> 1. If a police chief or fire chief chooses to exercise the option to become exempt from the provisions of Chapter 411, Code of Iowa, and become a member of the international city management association/retirement corporation, must the city credit past earned retirement credits and city contribution under Chapter 411, to the account of the respective chief joining the international city management association/retirement corporation; and,
>
> 2. Did the Sixty-eighth General Assembly in House File 2598, Section 29, intend that credits and funds collected under Chapter 411 be transferred to the international city management association/retirement corporation upon exercise of the option permitted under the amendment or did they intend that any police chief or fire chief exercising this option would forfeit past credits and accumulations?

House File 2598, Section 29 can be found in 1980 Session, 68th G.A., Ch. 1014, § 29, and is an amendment to § 384.6(1), The Code. That section now reads, with the pertinent portions emphasized:

> 1. Accounting for pension and related employee benefit funds as provided by the city finance committee. A city may make contributions to a retirement system other than the Iowa public employees' retirement system for its city manager, or city administrator performing the duties of city manager, in an annual amount not to exceed the amount that would have been contributed by the employer under section 97B.11. If a police chief or fire chief has submitted a written request to the board of trustees to be exempt from chapter 411, authorized in section 411.3, subsection 1, a city shall make contributions for the chief, in an amount not to exceed the amount that would have been contributed by the city under section 411.8, subsection 1, paragraph "a", to the international city management association/retirement corporation. A city may certify taxes to be levied for a trust and agency fund in the amount necessary to meet its obligations. [Emphasis added.]

Section 411.3(1) provides, in pertinent part:

> 1. All persons who become police officers or fire fighters after the date the retirement systems are established by this chapter, shall become members thereof as a condition of their employment, except that a police chief or a fire chief who would not complete twenty-two years of service under this chapter by the time the chief attains fifty-five years of age shall, upon written request to the board of trustees, be exempt from this chapter. Notwithstanding section 97B.41, a police chief or fire chief who is exempt from this chapter is exempt from chapter 97B.

Thus, those chiefs who could not possibly serve for twenty-two years by age fifty-five can request in writing that they be exempt from the requirements of chapter 411. Once that is done,

the city shall make contributions to the International City Management Association/Retirement Corporation in the same amount that it would have made to the pension fund pursuant to § 411.8(1)(a). The city must still contribute the same amount of money. However, the contribution is paid to a different organization or fund than that in Chapter 411.

The International City Management Association/Retirement Corporation is not a true pension plan. It is a deferred compensation plan established pursuant to the Internal Revenue Code. To be within the limits of § 457 and related sections of the Internal Revenue Code, the contributions to the Retirement Corporation must fall within the ceilings established by § 457. Thus, if credit for past service were to be paid by the city to the Retirement Corporation, the ceiling would be exceeded, thereby disqualifying the defferred compensation plan. It is also the view of the Retirement Corporation that an employee (the chief) within a § 457 plan must not have any right to the money. The Retirement Corporation believes that in order for its plan to receive the proper status under § 457, the cities' contributions should only include the "normal contribution" as defined in § 411.8(1)(a). That is, it should equal the amount it would have paid into the pension fund. The Retirement Corporation will not accept past credits.

The Legislature, in § 384.6(1) does not speak to past credits. There is nothing therein which give any indication that past credits are to be given. Nor is there any language indicating that there be a transfer of funds already accumulated in the chief's pension fund to the Retirement Corporation. Whether any legislative member intended such to be the case is not relevant since there is an absence of any language so indicating. It is logical to assume that since the Retirement Corporation's plan is one of deferred compensation any language regarding a credit or transfer of funds was intentionally excluded.

In any event, the language of § 384.6(1), only provides for cities to make the "normal contribution" of § 411.8(1)(a) to the Retirement Corporation rather than the pension fund. We find no intent on the part of the Legislature that credits and funds be transferred from the pension funds.

Very truly yours,

Larry M. Blumberg

LARRY M. BLUMBERG
Assistant Attorney General

LMB/cmc

MUNICIPALITIES: Civil Service -- §§ 400.8, 400.9, 400.16, 400.17, 400.18, The Code 1981. A city can refuse to hire or promote a person under civil service to a department where a relative works if it believes that such an action will result in divided loyalties or personnel problems. However, a city cannot deny a qualified individual from applying or being examined for a civil service position, nor from being placed on the certified eligible list. A city cannot remove a person from a civil service position merely on the basis of marriage to a co-worker. (Blumberg to Slater, State Senator, 7/30/81) #81-7-25 (L)

July 30, 1981

The Honorable Tom Slater
State Senator
L O C A L

Dear Senator Slater:

You have requested an opinion regarding a municipality's rules on nepotism in relation to the civil service laws. Specifically, the city in question has a policy where relatives of permanent employees are not to be hired when the relatives would work in the same department; one relative would be in a supervisory position over another; or where one relative would be in a position to have access to confidential information with regard to an administrative or disciplinary matter against another relative. The policy also provides that the marriage of two employees in the same department is a violation of the policy and the termination of one of the employees will be required if a transfer to another department cannot be made. "Relative" is defined as a spouse, anyone within the third degree of consanguinity and affinity, and step-relatives. The Civil Service Commission is to screen out the applicants at the earliest possible stage. The Commission can refuse to accept an application,

refuse to test an applicant, or remove from the eligible list the name of an applicant where violation of the policy could occur. The policy does not affect those currently employed. Its stated purpose is to reduce the possibility of divided loyalties.

Pursuant to Chapter 400, The Code 1981, initial appointments under civil service are made pursuant to original examinations. Promotions are also made pursuant to examination. Section 400.8 provides that as often as necessary the Commission shall hold original entrance examinations. A list of the ten highest qualifiers shall be certified. In cities of at least fifty thousand population, a second list can be established. There is no indication in Chapter 400 of the length of time such certified list for original appointments can be used to fill vacancies or fill newly created positions. Promotions are covered by § 400.9. A similar list of the ten highest qualifiers is established for promotions. Persons on said list shall hold preference for promotion for two years.

Section 400.16 provides that all appointive employees shall be selected with reference to their qualifications, fitness, and for the good of the public service. Section 400.17 provides that those persons appointed and employed pursuant to civil service shall have passed a civil service examination and have been certified as eligible. However, no person shall be appointed or employed in a civil service position unless such person is of good moral character, is able to read and write English, and is not a liquor or drug addict. These two sections give the city and the appointing authority discretion in who is <u>appointed</u> and <u>employed</u>. These two words are emphasized because this discretion appears to exist only in relation to appointment and employment. There is no indication of any applicability to applications for examination. This, as will be discussed below, is significant.

Chapter 400 is a uniform system whereby competent individuals are eligible for employment or promotion to civil service positions. It was established, in part, to remove the spoils and favoritism systems that used to determine city employment. The chapter also assures the applicants that they will be treated fairly, and it assures the appointees and employees that they will not be subject to unfair and arbitrary treatment regarding their job status. It is stated in 3 E. McQuillen, The Law of Municipal Corporations, §12.76, at page 329 (3rd Ed. 1973):

> [C]ivil service laws have been widely adopted. . .for the purpose, among other things, of securing appointments on the ground of fitness, competency and merit so as to benefit the public, and for the purpose of protecting appointees from arbitrary and unjust treatment.

See also, McQuillen, Id at § 12.55; 2A C. J. Antieau, Municipal Corporation Law, § 22.24 (1979); Intern. U. of OP. Eng. v. City of Minneapolis, 305 Minn. 364, 233 N.W.2d 748 (1975); Killingsworth v. Police & Fire Dept. Civil Serv. Com'n, 12 Mich. App. 340, 162 N.W.2d 826 (1968).

It is also stated in McQuillen, Id at § 12.78(b), page 343:

> Restrictions by the commission as to the number who may pass an examination generally are improper. Competitive examinations have been said to require that they be open to all who are able to meet minimum requirements for candidates as distinguished from mere qualifying examinations for one or more picked candidates. However, examinations are sometimes qualifying or noncompetitive, especially in the case of positions not strictly within civil service classifications. Such an examination is one in which successful examinees qualify for an employment or position, the appointment to which may be made from any of those so qualifying without regard to the order in which they are graded. . . .
>
> Necessary qualifications, frequently existent at the time of application to those eligible to take the examinations may be prescribed by the commission which requirements, of course, must be reasonable in order to escape review or modification by the courts. For example, maximum and minimum age limits may be prescribed by the rules for certain employments. The payment of a fee may be a requisite to taking the examination. Experience or training of a specified sort may be required, as well as educational qualifications, such as high school or college graduation or training. Good character and responsible conduct may also need to be established. Extremely important require-

> ments may exist in the nature of United States citizenship and assurance of loyalty. The examination frequently includes a physical examination or a psychiatric examination, as well as examination based on the applicant's knowledge, aptitude and ability.

It was held in Kearns v. City of Buffalo, 202 Misc. 619, 111 NYS2d 778 (1952), that one of the objects of the state civil service laws is that all persons who possess appropriate preliminary qualifications such as residence, age, weight, character and the like "shall be entitled, as a matter of right, to take the examinations. . .subject to minor and reasonable conditions." In Terry v. Civil Service Commission, 108 Cal. App.2d 861, 240 P.2d 691 (1952), it was held that a rule adopted by the Civil Service Commission with respect to requirements for certain positions must be reasonable and not operate to discriminate unreasonably between qualified applicants. Thus, the Court held (240 P.2d at 697):

> It hardly needs citation of authority to establish the principle that the right to work is fundamental and enjoys the personal liberty guarantees of the Fourteenth Amendment. Any unreasonable limitation that deprives qualified persons of the equal opportunity to qualify for work is unconstitutional. . . .The right to work for the government is, of course, not absolute, but it should be safeguarded from legislative or quasi legislative action which discriminates against persons or classes of persons.

Similarly, in Taplick v. City of Madison Personnel Bd., 90 Wisc.2d 500, 280 N.W.2d 301 (1979), the Court found that the refusal to accept an application for civil service involved a property right that required a fair hearing under the Fourteenth Amendment.

The issue thus becomes whether the policy is reasonable. We do not contend that the possibility of divided loyalties and personnel problems is not a proper subject about which a city or civil service commission should be concerned. Nor do we feel that a city or civil service commission lacks the authority to handle and resolve such matters. The desire not to employ two or more relatives in the same department where one has a supervisory power over the other, or where one has access to private personnel files is reasonable. The city or appointing

authority under civil service is not prohibited from denying employment or promotion where such conditions would exist. However, the denial of employment or promotion at a given point in time is distinguishable from denying an application or an examination for civil service positions.

Persons on promotional lists hold preference for promotion for two years. Appointments made from those lists do not have to be in the order that the names are listed. However, any such appointments must be made from the list. Under the policy in question, a person would not be permitted to be examined or, if examined, would not be placed on the certified promotional list if a relative was in the department where there was a vacancy to be filled by promotion. The problem with this policy is that it denies a person, otherwise qualified, the opportunity to be considered for promotion for a two year period. Although a relative may be in a department where there is a vacancy at the time the examination is given, that may not be true at a given point during the next two years. Thus, the policy would unfairly deny a qualified person the right to be examined and placed on the certified list if the score is high enough.

If the hiring or promotion of a person to a department where a relative is already working will likely result in divided loyalties or personnel problems, the solution is not to hire or promote the individual at that point in time.[1] Not permitting a qualified person to apply or be examined for a position is contrary to the concept of civil service.

Another problem exists with the policy on marriage. As stated above, civil service laws are promulgated, in part, to prevent unfair and unjust treatment of appointees and employees. The Legislature has provided for this in § 400.18 and the following sections. That section provides that a person under civil service cannot be removed, demoted or suspended without a hearing and a majority vote of the Commission for neglect of duty, disobedience, misconduct, or failure to properly perform the duties of the position. The right to appeal the decision

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[1] We are not stating here that the policy of not employing two relatives to work in the same department is reasonable under all circumstances. There may be instances where the denial of employment pursuant to the policy could be unreasonable and a denial of rights.

exists. The four reasons for the disciplinary action are listed in § 400.18, and are the only reasons for such an action. We do not find that marriage fits within any of them. Thus, that part of the policy is in direct conflict with Chapter 400. Although a city may require an appropriate transfer under these conditions, it cannot terminate one of the married individuals soley on the basis of marriage.

Accordingly, we are of the opinion that a city can refuse to hire or promote an individual to a department where a relative works if the city believes that it will result in divided loyalties or personnel problems. However, a city cannot deny a qualified individual from applying for or being examined under civil service, nor from being placed on the certified eligible list. A city cannot remove a civil service employee merely on the basis of marriage to a co-worker.

Very truly yours,

Larry M. Blumberg

LARRY M. BLUMBERG
Assistant Attorney General

LMB/skb

COURTS: RETIRED JUDGES: § 605.25, The Code 1981. Section 605.25 does not establish an entitlement to a salary in lieu of continued receipt of an annuity. The section contemplates that a retired judge on temporary assignment make an election between receipt of a salary and continued receipt of an annuity. The section prohibits receipt of both a salary and an annuity. (Fortney to O'Brien, Court Administrator #81-7-24 (L), 7/30/81)

William J. O'Brien
Court Administrator
State Capitol
L O C A L

July 30, 1981

Dear Mr. O'Brien:

You have requested an opinion of the Attorney General regarding construction of § 605.25, The Code 1981. The situation you present is that of a retired Iowa judge who has been serving as a senior judge pursuant to §§ 605A.21-29, The Code 1981. In August 1981, the judge will reach the age of 78, the upper age limit for service as a senior judge. See § 605A.27(1), The Code 1981. As the judge has expressed a desire to continue working in a judicial capacity, the Supreme Court is considering the possibility of assigning him to temporary service pursuant to § 605.25. The question you present is whether a retired judge or retired senior judge serving under temporary assignment may waive the compensation prescribed by § 605.25 and continue annuity benefits under the judicial retirement system. We are of the opinion that waiver is permissible.

Section 605.25 provides:

> Judges of the supreme court, court of appeals and district court who are hereafter retired by reason of age, or who are drawing benefits under section 605A.6, may with their consent be assigned by the supreme court to temporary judicial duties on a court in this state: However, a retired judge shall not be assigned to temporary judicial duties on any court superior to the highest court to which that judge had been appointed prior to retirement, and a judge

> may not be assigned for temporary duties with the supreme court or the court of appeals except in the case of a temporary absence of a member of one of those courts. A retired judge shall not engage in the practice of law unless he shall file with the clerk of the supreme court an election to practice law, in which event he shall thereafter be ineligible for assignment to temporary judicial duties at any time. <u>While serving under temporary assignment as herein provided, a retired judge shall receive the compensation and actual expense provided by law for judges on the court to which he is assigned, but shall not receive any annuity payments to which he may be entitled under the judicial retirement system</u>. He may be authorized in the order of assignment to appoint a temporary reporter, who shall receive the compensation and actual expense provided by law for a regular reporter in the court to which the judge is assigned. The order of assignment shall be filed in the offices of the clerks of court at the places where the judge is to serve. [Emphasis supplied.]

We believe that the purpose of § 605.25 is to ensure that a retired judge serving on temporary assignment does not receive both an annuity and a salary. In other words, the statute is designed to prevent a situation which, in common parlance, might be referred to as "double dipping." We do not believe that the section is designed to mandate the payment of a salary to a justice serving under § 605.25. Likewise, we do not believe that the statute prohibits continued receipt of an annuity. What the statute prohibits is receipt of <u>both</u> a salary and an annuity.

An annuity paid to a retired judge is significantly less than the amount of a current judge's salary. Section 605A.7 provides:

> The annuity of a judge under this system shall be an amount equal to three percent of his average annual basic salary for his last three years as a judge of one or more of the courts included in this chapter, multiplied by his years of service as a judge of one or more of such courts, but no such annuity shall exceed an amount equal to fifty percent of the salary that he is receiving at the time he becomes separated from such service.

The terms of § 605A.7 do not permit an increase in the amount of an annuity as the salaries of current judges are increased. (Contrast with § 605A.24.) Consequently, if a retired judge serving under § 605.25 elects to continue receiving an annuity rather than the current salary of a judge, the retired judge would be electing to serve at a reduced rate of pay. We are unaware of any statute which prevents a public employee to agree to serve for a reduced salary. [1]

In conclusion, § 605.25 does not establish an entitlement to a salary in lieu of continued receipt of an annuity. The section contemplates that a retired judge on temporary assignment make an election between receipt of a salary and continued receipt of an annuity. The section prohibits receipt of both a salary and an annuity.

Yours truly,

David Fortney

DAVID M. FORTNEY
Assistant Attorney General

DMF:sh

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[1] This assumes, of course, that the employee is not an elected public official. See § 722.4, The Code 1981 and Carrothers v. Russell, 53 Iowa 346, 5 N.W. 499 (1880).

CIVIL RIGHTS/CONCILIATION/ADJUDICATING COMMISSIONERS: Sections 601A.15(3)(d), 601A.15(5), 601A.15(6), 17A.12(6), 17A.12(8), 17A.17(1), 17A.17(3), The Code 1981. Civil Rights Commissioner who approves order bypassing further conciliation which thereby places complaint in line for hearing may participate in final adjudication of complaint if the Commissioner (1) does not investigate the complaint, (2) does not prosecute or advocate for the complainant, (3) does not obtain the aid or advice of agency personnel with a personal interest in the complaint or who have prosecuted or advocated for the complainant , and (4) is not exposed, ex parte, to evidence outside the record of the contested case hearing. (Nichols to Reis, Civil Rights Commission, 7/24/81) #81-7-22(L)

July 24, 1981

Ms. Artis I. Reis
Executive Director
Iowa Civil Rights Commission
8th Floor - Colony Bldg.
507 Tenth Street
Des Moines, Iowa 50319
L O C A L

Dear Ms. Reis:

You have requested an opinion from this office inquiring whether the Commissioner who approves an order that a complaint proceed to hearing (hereinafter "approving Commissioner"), as required by §§ 601A.15(3)(d) and 601A.15(5), The Code 1981, may thereafter participate in the Iowa Civil Rights Commission's ("Commission") final decision on the merits of that complaint (hereinafter "adjudicating Commissioner"). It is the opinion of this office that the approving Commissioner may also act as an adjudicating Commissioner if the following conditions are met. First, the Commissioner must not personally investigate the complaint. § 601A.15(6), The Code 1981. Second, the Commissioner cannot personally prosecute or advocate for the complainant. § 17A.17(3), The Code 1981. Third, the Commissioner cannot obtain the aid or advice of agency personnel who have a personal interest in the case (e.g. staff investigators) or who have prosecuted or advocated for the complainant (e.g. staff conciliators). § 17A.17(1), The Code 1981. Fourth, the Commissioner cannot become exposed, ex parte, to evidence which is not contained in the record made at the contested case hearing.

§§ 17A.12(6) and 17A.12(8), The Code 1981.

I. ROLE OF THE APPROVING COMMISSIONER

Complaints filed with the Commission are investigated by the Commission staff. § 601A.15(3)(a), The Code 1981. The investigator presents a recommendation of probable cause vel non to a Commission Hearing Officer who makes a probable cause ruling. Id.; § 601A.15(3)(c), The Code 1981. Complaints credited with probable cause must be conciliated for at least thirty days after the initial conciliation meeting. §§ 601A.15(3)(d) and 601A.15(5), The Code 1981. Once the thirty day period elapses, the director of the Commission, with the approval of a Commissioner, may order further conciliation efforts bypassed and may notify the respondent that the complaint will proceed to hearing. Id. The order bypassing further conciliation is a jurisdictional prerequisite to a hearing. § 601A.15(5), The Code 1981.

Sections 601A.15(3)(d) and 601A.15(5), The Code 1981 do not delineate any specific steps which the approving Commissioner must follow in order to bypass further conciliation. Nor do the Commission's rules provide any specific guidance. In practice, the Commissioner reviews a recommendation from the Commission staff conciliator that the complaint proceed to hearing. The Commissioner also reviews a "case summary" outlining the findings of the Commission's staff investigator and containing the investigator's probable cause recommendation. The Commissioner takes whatever further action, if any, he or she deems necessary to approve or disapprove the staff's recommendation that further conciliation be bypassed and that the complaint proceed to hearing.[1]

II. LIMITATIONS ON APPROVING COMMISSIONERS ACTING AS ADJUDICATING COMMISSIONERS

Section 601A.15(8), The Code 1981 requires the Commission to determine the merits of a complaint after considering the evidence submitted at a contested case hearing governed by Chapter 17A. § 601A.15(7), The Code 1981. Thus, the Iowa Civil Rights Act and the Iowa Administrative Procedure Act must be construed in pari materia to ascertain the limitations on approving Commissioners who also act as adjudicating Commissioners. See

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[1] Sections 601A.15(3)(d) and 601A.15(5), The Code 1981 specifically require that the order bypassing further conciliation emanate from the "director", not a staff conciliator. The Commission's executive director is appointed by the governor with the consent of a two-thirds senate majority. The Commission should revise its current procedure by substituting or supplementing the staff conciliator's recommendation with that of the executive director.

Oliver v. Teleprompter Corp., 299 N.W.2d 683, 686 (Iowa 1980).

At the outset it should be noted that the Iowa Civil Rights Act does not specifically disqualify the approving Commissioner, unlike the "investigating official", from acting as an adjudicator on the same complaint. See § 601A.15(6), The Code 1981. It follows that the approving Commissioner may participate as an adjudicator subject to the general limitations imposed on agency adjudicators by Chapters 17A and 601A.

A. APPROVING COMMISSIONER MAY NOT PERSONALLY INVESTIGATE THE COMPLAINT OR OBTAIN THE AID OR ADVICE OF COMMISSION EMPLOYEES WHO HAVE (1) A PERSONAL INTEREST IN THE CASE OR (2) PROSECUTED OR ADVOCATED FOR THE COMPLAINANT.

Section 601A.15(6), The Code 1981 states that:

> . . . . The investigating official shall not participate in the hearing except as a witness nor shall he participate in the deliberations of the commission in such case.

Chapter 601A specifically defines a "Commissioner" in § 601A.2(9), The Code 1981. "Investigating official" is not similarly defined. Nevertheless, §§ 601A.15(3)(a) and 601A.15(3)(c), The Code 1981 indicate that the "investigating official" is the Commission staff investigator who recommends whether a complaint is supported by probable cause to a Commission Hearing Officer. Section 601A.15(6), The Code evinces a clear legislative intent to insulate the Commission's adjudicative function from its investigative function. Therefore, an approving Commissioner cannot personally investigate any factual issue surrounding a complaint and thereafter participate as an adjudicating Commissioner.

Section 17A.17(1), The Code 1981 imposes further constraints on the approving Commissioner acting as adjudicating Commissioner:

> Unless required for the disposition of ex parte matters specifically authorized by statute, individuals assigned to render a . . . final decision or to make findings of fact and conclusions of law in a contested case, shall not communicate, directly or indirectly, in connection with any issue of fact or law in that contested case, with any person or party,

> except upon notice and opportunity for all parties to participate as shall be provided for by agency rules.
>
> However, without such notice and opportunity for all parties to participate, individuals assigned to render a . . . final decision or to make findings of fact and conclusions of law in a contested case may communicate with members of the agency[2], and may have the aid and advice of persons other than those with a personal interest in, or those engaged in prosecuting or advocating in, either the case under consideration or a pending factually related case involving the same parties.

Sections 601A.15(3)(d) and 601A.15(5), The Code 1981 do not specifically authorize the approving Commissioner to engage in ex parte communications with agency personnel having a personal interest in the complaint.[3]

The Commission's staff investigator and conciliator both have a personal interest in the complaint to which they are assigned. The former has become immersed in determining the factual basis of the complaint to the point where he or she recommends a probable cause, a no probable cause, or some other finding such as administrative closure. The legislature recognized the potential dangers of commingling the investigative role with that of adjudication when it enacted § 601A.15(6), The Code 1981.

Similarly, the conciliator acts as an advocate for the complainant whose complaint has been credited with probable cause. Although the conciliator tries to resolve the complaint in a manner satisfactory to respondent and complainant alike, the conciliator represents the interests of the latter for purposes of negotiation. In order for conciliation to succeed, the respondent must be assured that its offers to resolve the complaint will not be used as a sword if the mediation process fails. The legislature therefore imposed on the Commission staff a duty to maintain the confidentiality of its conciliation efforts. § 601A.15(4), The Code 1981. The Commission by rule further buttressed this duty by providing that:

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[2]That is, other Commissioners. § 17A.2(10), The Code 1981.

[3]Cf. § 601A.15(3)(b), The Code 1981.

> No testimony or evidence shall be offered or received at any hearing concerning offers or counter-offers of adjustment during efforts to conciliate an alleged unlawful discriminatory practice . . . .
> 240 IAC § 1.9(10).

An approving Commissioner may not act as an adjudicating Commissioner on the same complaint if he or she obtains "aid and advice" from agency personnel who have a "personal interest" in the complaint, or who have advocated or prosecuted for the complainant. § 17A.17(1), The Code 1981. A general devotion to the principles of non-discrimination, standing alone, does not constitute a "personal interest" within the meaning of § 17A.17(1), The Code 1981. Op. Att'y Gen. #80-11-8. However, the approving Commissioner who desires to participate as an adjudicating Commissioner must insulate him- or herself from the staff investigator and conciliator assigned to the complaint.

B. APPROVING COMMISSIONER MAY NOT PERSONALLY ADVOCATE OR PROSECUTE FOR A COMPLAINANT.

Section 17A.17(3), The Code 1981, provides that:

> No individual who participates in the making of any . . . final decision in a contested case shall have prosecuted or advocated in connection with that case, the specific controversy underlying that case, or another pending factually related contested case, or pending factually related controversy that may culminate in a contested case, involving the same parties. Nor shall any such individual be subject to the authority, direction, or discretion of any person who has prosecuted or advocated in connection with that contested case, the specific controversy underlying that contested case, or a pending factually related contested case or controversy involving the same parties.

The approving Commissioner cannot act as a prosecutor or advocate for the complainant and thereafter participate as an adjudicating Commissioner. Of course, the prosecutorial function in contested cases before the Commission is discharged by the Attorney General's office. In order to act as an adjudicating Commissioner, the approving Commissioner must also avoid becoming so involved with the merits of the complaint that he or she manifests a "will to win" inconsistent with the role of an

impartial decision maker. Grolier, Inc. v. F.T.C., 615 F.2d 1215, 1220 (9th Cir. 1980).

C. APPROVING COMMISSIONER MUST BE INSULATED FROM EX PARTE EVIDENCE NOT A PART OF THE RECORD MADE AT HEARING.

It is axiomatic that the Commission's final decision must rest solely on evidence which is either submitted at the contested case hearing or is officially noticed. §§ 17A.12(6) and 17A.12(8), The Code 1981. The limitations on ex parte communications involving agency decisionmakers are intended to insure that agency decisions are not based upon matters extraneous to the record made at the hearing. § 17A.17, The Code 1981.

Canon 2 of the Code of Judicial Conduct instructs a judge to avoid impropriety and even the appearance of impropriety in all of his or her activities. The Iowa Supreme Court has admonished agency adjudicators to "be guided by the rationale of that canon." Anstey v. Iowa State Commerce Commission, 292 N.W. 2d 380, 390 (Iowa 1980). Thus, if the approving Commissioner is to act as an adjudicating Commissioner, it is necessary to insulate the former from any evidence which is not subsequently made a part of the record when the controversy embodied by the complaint is presented at a contested case hearing.

Currently, a Commissioner who approves a case for public hearing and, concomitantly, the bypassing of further conciliation may review the staff investigator's case summary and other material deemed necessary to make an intelligent decision. This procedure risks exposing the Commissioner to evidence which is not subsequently made a part of the record at hearing. An approving Commissioner so exposed could not be an adjudicating Commissioner without running afoul of §§ 17A.12(8) and 17A.17(1), The Code 1981.

As a practical matter, the approving Commissioner cannot know whether the case summary and any other materials examined will be made a part of the record when the complaint is presented at hearing. If the approving Commissioner desires to act as an adjudicating Commissioner, the following safeguards should be imposed. First, the approving Commissioner should not review the staff investigator's case summary: § 17A.17(1), The Code 1981 prohibits the adjudicator from obtaining ex parte

aid and advice from persons, such as investigators and conciliators, who have a personal interest in the case.[4] Second, the approving Commissioner must not examine evidence in the Commission's case file generated during the investigation. To do otherwise potentially exposes the Commissioner to evidence which will fall outside the record produced at a subsequent contested case hearing. Third, the Commissioner should review the order of the executive director that further conciliation be bypassed and placing the complaint in line for hearing. Fourth, the director must present a statement to the approving Commissioner explaining why she or he is ordering that further conciliation be bypassed. §§ 601A.15(3)(d) and 601A.15(5), The Code 1981. The statement should focus on the general reasons why further conciliation is futile. It should be silent as to the substantive merits of the complaint and it must not divulge specific offers or counter-offers made by the parties during conciliation. In short, the approving Commissioner should limit his or her review to the director's order bypassing further conciliation and the statement of reasons supporting that order.

III. CONCLUSION

The Commissioner who approves the director's order that further conciliation be bypassed and that the complaint proceed to hearing, §§ 601A.15(3)(d) and 601A.15(5), The Code 1981, may also participate in the final adjudication concerning that complaint if the following conditions are met. First, the Commissioner must not personally investigate the complaint. § 601A.15(6), The Code 1981. Second, the Commissioner cannot personally prosecute or advocate for the complainant. § 17A.17(3), The Code 1981. Third, the Commissioner cannot obtain the aid and advice of agency personnel who have a personal interest in the case (e.g. investigators) or who have prosecuted or advocated for the complainant (e.g. conciliators). § 17A.17(1), The Code 1981. Finally, the Commissioner cannot become exposed, ex parte, to evidence which is not contained in the record made at the contested case hearing. §§ 17A.12(6) and 17A.12(8), The Code 1981.

Sincerely,

Scott H. Nichols

Scott H. Nichols
Assistant Attorney General

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[4] As discussed supra, § 601A.15(6), The Code 1981 prohibits the "investigating official from participating in the adjudication of the investigated complaint. It is apparent that the legislature considers the staff investigator to have a "personal interest" in the case. It would be surprising if the legislature, after banning the investigator from participating in the agency's final deliberations on the complaint, were to allow the investigator to communicate his or her ex parte observations to the adjudicator merely because the complaint had not reached the contested case phase.

MUNICIPALITIES: Conflicts of Interest; Open Meetings §§ 28A.2, 28A.5, 362.5, 362.6 and 380.4, The Code 1981. A conflict of interest of a council member other than those covered by § 362.5, must be certain, demonstrable, capable of precise proof, pecuniary or proprietary, direct and personal. A city cannot declare that one of its boards or committees is not subject to the open meetings law. (Blumberg to Spear, State Representative, 7/24/81) #81-7-21(L)

July 24, 1981

The Honorable Clay Spear
State Representative
L O C A L

Dear Representative Spear:

You have requested an opinion on possible conflicts of interest of city council members. The letter from the mayor, attached to your request is as follows:

> The particular situation involved a contract which gave a local private organization certain free use of facilities when others had to pay for the use. Three members of the five person City Council are members of this organization. Two voted in favor, one abstained, two non-members voted to grant the favorable contract.
>
> The City Attorney by his interpretation of 362.6 stated that as long as a majority of those two non-members voted for the proposal, it made no difference how the ones who might have a conflict voted. I find this contrary to another opinion of the OAG which states that a majority vote (3) of the five member Council is required to pass a measure, in this case a resolution.

I ask you to request an opinion as to whether two members of a five member Council can carry a measure in this manner when all five are present.

The next question is whether a conflict of interest exists when a Council member is a member of an organization and grants the organization, and therefore possibly himself, certain favorable treatment by a contract. Iowa Code 68B, pertaining to state officers, seems to bar such action, but does it also pertain to City Council members? Does Code 362 bar such actions as a conflict?

The specific incident grants the Burlington YMCA Swim Club, a private organization, certain rights to use the publicly provided swimming facilities free of charge, thereby denying the public use during that time.

Another vote granted use of the public tennis courts to a private organization who charges a lesser amount to members of the YM/YWCA than to the general public for tennis lessons. Again, with five members present, four voted in favor, one against. Two of those voting for were members of the YMCA, as was the one voting against. Again, the same rule was applied, and the two non Y members who voted in favor carried the day. I find the reasoning faulty.

Also, an item was passed which grants a Bridge Negotiating Committee of five members, freedom from the Open Meetings Law. The Iowa Code says in effect that all meetings are open except those specifically exempted. Some think they have found a loophole. The group was originally formed by action of the Mayor; then Council authorized it formally by resolution. It seems that because its actions must be finally approved by Council it is exempt, in the opinion of some.

Section 362.6, The Code 1981, provides that where there is a conflict of interest, a measure voted upon is not invalid if the vote of the officer with the conflict was not the decisive vote. Thus, if one member had a conflict and the vote was 4-1, the measure would be valid. If the vote was 3-2, the measure would not be valid. Section 380.4 provides that the passage of a resolution requires an affirmative vote of not less than a majority of the council members. "Quorum" is defined in § 4.1(30) as a majority of the number of members fixed by statute. Section 362.6 also provides that if a specific majority or unanimous vote of the council is required by statute, the vote must be computed on the basis of the number of officers not disqualified by the conflict. However, that provision does not affect your situation since a specific majority other than a normal majority is not required.

We addressed a similar question in an earlier opinion. See 1976 Op. Att'y. Gen. 163. There, the Council consisted of five members. On a specific vote two members abstained because of a conflict with the resulting vote being 2-1. Thereafter, the two council members resigned and another vote was taken. Again, it was 2-1. The issue was whether that vote was sufficient for passage. We held it was not, citing to cases in and outside of Iowa. Thus, if a conflict existed among your council members, the vote would not be sufficient for passage because it did not have a sufficient majority. In the first vote, the conflict would nullify two of the four favorable votes resulting in a 2-0 vote. In the second vote, the result would again be 2-0. Two favorable votes out of five is not a sufficient majority.

The real issue, however, is whether a conflict of interest existed among some of the council members. Specifically, the YMCA came to the Council to request use of some local recreational facilities for their programs. The YMCA wished to use the city pool free of charge for its swim club. It also wanted use of city tennis courts and would charge a lower fee for tennis lessons to members than to others. Three council members are members of the YMCA. You ask whether such consitutes a conflict of interest with those council members when voting on the YMCA's proposals.

Section 362.5 and most case law, at least in Iowa, concerns conflicts of a financial nature--where the officer has a financial dealing with the city. In a prior opinion, Blumberg to Larson, #79-7-23, we discussed conflicts other than those listed in § 362.5. Citing to Moody v. Shuffleton, 257 P. 564, 566

(Cal. 1927), and Appeal of Yenerall, 165 Pa.Super. 144, 67 A.2d 565, 566 (1949), we stated that an interest which disqualifies an officer must be certain, demonstrable, capable of precise proof, pecuniary or proprietary, direct and personal. If collateral, remote, or consequential, proof that the interest influenced the vote is necessary.

The facts before us do not appear to fall within the above statement. That is, mere membership in the YMCA does not automatically create a conflict of interest absent some facts showing that the membership, and any of its benefits, influenced the council member. If such facts do exist, then the vote would be invalid. If such facts do not exist, the vote would be allowed to stand. An inquiry should be made to determine whether sufficient facts exist.

In response to your question on the Open Meetings Law, we must turn to Chapter 28A. Section 28A.2(1), defines "governmental body" as follows:

> a. A board, council, commission or other governing body expressly created by the statutes of this state or by executive order.
> b. A board, council, commission, or other governing body of a political subdivision or tax-supported district in this state.
> c. A multimembered body formally and directly created by one or more boards, councils, commissions, or other governing bodies subject to paragraph "a" and "b" of this subsection.

In a prior opinion, #79-5-4, we were concerned with whether a peer review committee established by a licensing board pursuant to Chapter 258A, The Code, was subject to the Open Meetings Law. We stated there that the central issue was whether the committee was a "governmental body" as that term is defined above. In order for a body to be included within § 28A.2(1)(c) it must be 1) multi-membered, 2) formally created by a board, council, commission or other governing body, 3) directly created by a board, council, commission or other governing body, and 4) must have been delegated some policy-making or decision-making authority. Such bodies must conduct open meetings unless the subject matter of a meeting falls within any of the exceptions in § 28A.5.

The Bridge Negotiating Committee appears to fall within the first three requirements set forth above. From the information supplied to us we cannot determine whether it meets the fourth

requirement. If it is clothed with policy or decision-making authority, it would come within the definition of "governing body" in § 28A.2(1), and be subject to Chapter 28A. If the committee has no such authority, it would not be controlled by Chapter 28A. In any event, a city council does not possess the power to declare, by ordinance or resolution, that one of its boards or committees is exempt from the Open Meetings law. That determination can only be made upon a reading of Chapter 28A and the application of individual facts.

Very truly yours,

Larry M. Blumberg

LARRY M. BLUMBERG
Assistant Attorney General

LMB/cmc

CRIMINAL LAW: PUBLIC RECORDS: PUBLIC SAFETY, DEPARTMENT OF: §§68A.7(9), 80.9(2)(d), 690.2, 692.1, 692.17, 692.18, 901.5, 907.3(1) and 907.9, The Code (1981). §692.17 requires the removal of arrest and disposition data from computer data storage system whenever the charges are dismissed or the defendant acquitted, but does not require the removal of such data from manual data storage systems. Discharge from probation on a deferred judgment or deferred sentence is not a dismissal under §692.17. The master name index in the Bureau of Criminal Identification as currently constituted does not contain criminal history data. (Hayward to Miller, Commissioner of Public Safety, 7/22/81) #81-7-20(L)

Mr. William D. Miller
Commissioner
Department of Public Safety
Third Floor, Wallace Building
LOCAL

July 22, 1981

Dear Commissioner Miller:

You have asked this office for an opinion to assist the Department of Public Safety in the process of computerizing the criminal history records and master name index of the Bureau of Criminal Identification. The master name index contains the following information filed alphabetically as to each name and known alias of persons about whom the Bureau maintains a criminal history record:

Name	Race
Date of Birth	Sex
DCI Number	Height
Control Number	Weight
Contributor Identifier	Eye Color
Contributor Case Number	Hair Color
Social Security Number	Fingerprint Classification

The master name index contains no information regarding any particular arrest, charge, disposition or punishment of an individual. It indicates whether the Bureau has a criminal history record and where to find it. The criminal history records themselves are filed numerically by DCI number.

Your request asks for the opinion of this office on four questions:

1. Does §692.17, The Code (1981), require the removal of all records of arrests in resulting in the acquittal of the accused or dismissal of the charges or does it merely modify the definition of "criminal history data" as indicated by a previous Opinion of the Attorney General, 74 Op. Att'y Gen. 254, 257-258?

2. If §692.17, The Code (1981), requires the expungement of such records from the computer, does that section or any other provision of law preclude the maintenance of such records in a manual file?

3. Does discharge from probation on a deferred judgment or deferred sentence constitute a dismissal under §692.17, The Code (1981)?

4. Does the information in the master name index constitute "criminal history data" for purposes of Ch. 692, The Code (1981).

1. Section 692.17, The Code (1981), Requires the Removal of All Records of Arrests Resulting in the Acquittal of the Accused or the Dismissal of Charges.

Section 692.17, The Code (1981), does indeed require the removal of any criminal history data[1] from a computer whenever the charges are dismissed or the accused is acquitted.

---

[1] "Criminal history data" and its component parts are defined as follows in §692.1, The Code (1981), which states in pertinent part:

> As used in this chapter, unless the context otherwise requires:
>
> * * * * *
>
> 3. "Criminal history data" means any or all of the following information maintained by the department [of public safety] or bureau [of criminal identification or division of criminal investigation] in a manual or automated data storage system and individually identified:
>
> a. Arrest data.
> b. Conviction data.
> c. Disposition data.
> d. Correctional data.
>
> 4. "Arrest data" means information pertaining to an arrest for a public offense and includes the charge, date, time and place. Arrest data includes arrest warrants for all public offenses outstanding and not served and includes the filing of charges, by preliminary information

This finding is contrary to that contained in the September 25, 1973 opinion to your department, 74 Op. Att'yGen. 254, and to the extent that previous opinion conflicts with this opinion, it is rejected. Section 692.17 states:

> Criminal history data in a computer storage system shall not include arrest or disposition data after the person has been acquitted or the charges dismissed.

> when filed by a peace officer or law enforcement officer or indictment, the data and place of alleged commission and county of jurisdiction.
>
> 5. "Conviction data" means information that a person was convicted of or entered a plea of guilty to a public offense and includes the date and location of commission and court of conviction.
>
> 6. "Disposition data" means information pertaining to a recorded court proceeding subsequent and incidental to a public offense arrest and includes dismissal of the charge, suspension or deferral of sentence.
>
> 7. "Correctional data" means information pertaining to the status, location and activities of persons under the supervision of the county sheriff, the division of corrections of the department of social services, board of parole or any other state or local agency performing the same or similar function, but does not include investigative, sociological, psychological, economic or other subjective information maintained by the division of corrections of the department of social services or board of parole.
>
> 8. "Public offense" as used in subsections 4, 5 and 6 does not include nonindictable offenses under either chapter 321 or local traffic ordinances.

The previous opinion of this office based on the premise that statutes are to be construed by looking at what the General Assembly said rather than at what it could or should have said. In doing so, it construed §692.17 to be an exception to the definition of "criminal history data" in §§692.1(3)-692.1(8), The Code (1981). The 1973 opinion acknowledges that this has the absurd result of making it an offense to distribute information concerning the criminal history of guilty persons and no offense to make public the criminal history records of innocent persons.

It was unnecessary to construe §692.17 in that manner. The language can also be construed as a prohibition on the retention of arrest and disposition data in a computer storage system whenever the subject is acquitted or the charges are dismissed. This construction avoids the absurd result contemplated by the previous opinion and does no violence to the text of the statute. It is, therefore, the favored construction of the section. See Hansen v. State, 298 N.W.2d 263, 265-266 (Iowa 1980)

It is also more consistent with the intent of the legislature and the provisions position with Chapter 692. The September 25, 1973 opinion sets forth the concern of the General Assembly, 74 Op. Att'yGen. at 254-255, stating:

> The 65th General Assembly enacted [Ch. 692], however, to protect individuals from misuse of their criminal histories which are now being indexed and centrally stored, sometimes inaccurately, on a large scale basis in many states, including Iowa. By use of the computer, the entire criminal history of any Iowan is, or soon could be, instantly retrievable at one hundred or more police or sheriff's offices throughout Iowa and broadcast over the police radio network to patrol cars and even to criminals and ordinary citizens who monitor law enforcement radio frequencies for their own entertainment. Also, the spector of cousin John and gossiping Gertrude, the relative or good friend of the local deputy, not to mention Big Brother State, having such readily accessible keyholes to the skeletons in many closets, has caused editors, legislators and indeed every privacy loving Iowan some varying degrees of uneasiness.

In order to remedy this concern, the General Assembly enacted several provisions limiting the use of, and access to, computers containing criminal history data. §§692.10 (The Department of Public Safety is to promulgate rules assuring the security of criminal information systems), 692.12 (Criminal history data in a computer must be stored in a manner which will preserve its integrity and must be under the management control of a criminal justice agency), 692.14 (The Department of Public Safety must regulate and limit access to criminal justice agencies to criminal history data and shall insure the security of computer terminals with access to such data) and 692.16 (Arrest data over five years old which have no reported disposition must be removed from all computer storage systems), The Code (1981). The construction of §692.17 set forth in this opinion is consistent with the manifest intent of the General Assembly demonstrated by these other sections.

The General Assembly provided a detailed definition of "criminal history data" and its component parts in §§692.1(3)-692.1(8), The Code (1981). If it had intended that §692.17 be a definitional rather than substantive provision, the legislature would have placed it within the definition section and not among the provisions regulating the use of computers in keeping criminal history records.

For these reasons, §692.17, The Code (1981), prohibits the maintenance of arrest and disposition data, as defined in §§692.1(4) and 692.1(6), The Code (1981), in a computer data storage system whenever the resulting charges are dismissed or the accused is acquitted at trial.

2. Section 692.17, The Code (1981), Does Not Prohibit the Maintenance of Criminal History Data in Manual Data Storage Systems Not Otherwise Prohibited by Statute.

Section 692.17, The Code (1981), only prohibits the maintenance of the specified information in a computer. It does not regulate the maintenance of records in any manual system. In general, the Department of Public Safety has the duty:

> To collect and classify, and keep at all times available, complete information useful in the detection of crime, and the identification and apprehension of criminals. . . .(emphasis added)

§80.9(2), The Code (1981). "[C]omplete information useful in the detection of crime, and the identification and apprehension of criminals" includes fingerprints and arrest records, even where the charges are dismissed. The previous arresting agency may be a valuable source of information about a suspect, even though the particular charges resulted in an acquittal or dismissal. Such an agency may have information concerning a suspects background, associates and activities available which would require much time and effort if another agency needed to collect it independently. However, if the Bureau did not receive fingerprints from another source due to another matter, if the charges are dismissed or the accused acquitted, not only is the Bureau precluded from maintaining the records in a computer, it may not maintain a fingerprint record on the individual. §690.2, The Code (1981), states in pertinent part:

> . . . If the fingerprints of any person are taken under the provisions hereof whose fingerprints are not already on file, and said person is not convicted of any offense, then said fingerprint records shall be destroyed by any officer having them. . . .

The words "not already on file" should be construed to mean at the time of the receipt of a disposition.

Section 690.2 may make it impractical or perhaps impossible, to maintain criminal history records when the fingerprint records are destroyed. This is because it is necessary to have an absolute method of identification. However, this is the only statutory restriction on the maintenance of criminal history data in a manual data storage system. This restriction is based upon a practical rather than legal limitation.

3. A Discharge from Probation Upon a Deferred Sentence or Judgment is not Dismissed Under §692.17, The Code (1981).

The fact that a criminal defendant is discharged from probation after receiving a deferred judgment or deferred sentence does not preclude the Bureau from maintaining arrest and disposition data concerning that particular case in a computer data storage system. A deferred judgment results in the defendant being placed "on probation upon such conditions as [the court] may require." §907.3(1), The Code (1981).

A successful completion of and discharge from, probation from a deferred judgment results in an expungement of the trial court's records with reference to the deferred judgment. §907.9, The Code (1981). A deferred sentence results in the assignment of the defendant to the judicial district department of community corrections for probation supervision §907.3(1), The Code (1981). Section 907.9, The Code (1981), does not provide for the expungement of court records regarding deferred sentences. However, §907.3(1) does provide in regard to both deferred judgments and deferred sentences that "[u]pon fulfillment of the conditions of probation, the defendant shall be discharged without entry of judgment."

This office has previously found that the discharge from probation after a deferred judgment is not a lack of a conviction under §690.1, The Code (1981), requiring the destruction of fingerprint records. 76 Op. Att'yGen. 234, 240-244. The same rationale which that opinion employs to construe the term "convicted" in §690.2 is equally applicable to the term "dismissed" in §692.17. That rationale mandates a narrow construction consistent with the General Assembly's intent to provide complete information to law enforcement agencies manifested in §80.9(2)(d) and Ch. 690, The Code (1981), and to allow certain criminal defendants to keep their criminal history confidential.

Deferred sentences may not create the same question as deferred judgments because they should not result in the expunging of the court's records. Nonetheless, the word "dismissal" in §692.17 is not applicable to either situation. Dismissed is defined as:

> An order or judgment finally disposing of an action, suit, motion, etc., by sending it out of court, though without a trial of the issues involved. (emphasis added.)

H.Black, Black's Law Dictionary, p. 555 (1968). The court must make some finding as to the issues involved in a criminal case. The placement of a person on probation is punishment which cannot be imposed without a finding of guilt beyond a reasonable doubt. The deferral of judgment or sentence are options which a court can exercise at "the time fixed by the court for pronouncement of sentence." §90.15, The Code (1981). They do not constitute a dismissal of the charges. Section 692.17, The Code (1981), therefore, does not come into play in such cases.

4. The Master Name Index in the Bureau of Criminal Identification Does Not Contain Criminal History Data.

Section 692.11, The Code (1981), contains a detailed definition of what constitutes "criminal history data" which is set forth above in footnote number one. The information contained in that definition is that which refers to a particular arrest and the consequences thereof. The information in the Bureau's master name index, as described in your opinion request, does not include any information falling within the term "criminal history data" subject to regulation under Chapter 692, The Code (1981).

It should be noted, however, that the master name index is nonetheless a confidential record. Section 68A.7, The Code (1981), states in pertinent part:

> The following public records shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release information:
>
> ****
>
> 9. Criminal identification files of law enforcement agencies. However, current and prior arrests shall be public records.
>
> ****

The master name index of the Bureau is part of the criminal identification files of the Department of Public Safety. It does not contain any information concerning current or prior arrests.[2] The master name index is, for this reason, not a record available for public inspection.

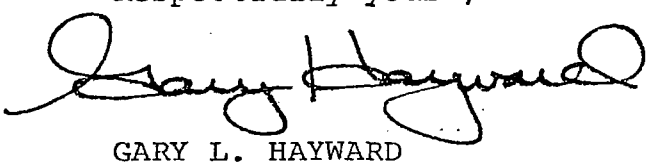
---

[2]If it did contain such information, the master name index would contain "criminal history data" subject to Ch. 692, The Code (1981), and pursuant to §692.18, The Code (1981), such arrest records would be confidential, §68A.7(9) notwithstanding.

5. Conclusion

In summary, §692.17, The Code (1981), requires the removal of any arrest or disposition data, as defined in §§692.1(4) and 692.1(6), The Code (1981) respectively, from any computer data storage system whenever the charges are dismissed or the accused is acquitted. To the extent any previous opinion of this office stated to the contrary, it is expressly overruled. Section 692.17 does not regulate any manual data storage systems. Discharge from probation on a deferred judgment or deferred sentence under §§901.5(1), 901.5(5), 907.3(1) and 907.9, The Code (1981), does not constitute a dismissal of the charges under §692.17 requiring the expungement of information for any computer data storage system. The master name index of the Bureau of Criminal Identification does not constitute or contain "criminal history data" subject to Ch. 692 regulation.

Respectfully yours,



GARY L. HAYWARD
Assistant Attorney General
Public Safety Division

GLH:rlr

COUNTIES: COUNTY HOSPITALS. Chapter 347 and §§ 347.7, 347.13, 347.14, 347.28-29, The Code 1981. The board of trustees of a Chapter 347 facility possess the authority to contract for office space for the purpose of subletting the same to medical practitioners who will utilize the county hospital facilities. If no bonding is contemplated to raise funds to satisfy the lease obligation, the board of hospital trustees may use money generated by the § 347.7 tax levy to satisfy the lease. (Fortney to Olesen, Adair County Attorney, 7/21/81) #81-7-19(L)

July 21, 1981

Willard W. Olesen
Adair County Attorney
Courthouse
Greenfield, Iowa 50849

Dear Mr. Olesen:

You have requested an opinion regarding the authority of the Adair County Hospital Board of Trustees in the matter of constructing a building to house doctors' offices. According to the facts you present, on September 10, 1948, pursuant to Chapter 347 of the Iowa Code, the voters of Adair County approved the construction and equipping of a county public hospital. Because of the shortage of medical practitioners in recent years and the resultant decline in average daily hospital occupancy, the hospital trustees have been required to rely increasingly on their levying authority in order to supplement patient revenues. The trustees believe that it is important to the community to ensure the future viability of the hospital, and they have resolved that affirmative action to procure additional physicians is required. One plan of action contemplates the development of a medical office building on the hospital campus. It is anticipated that the building would house two public health service physicians who have been assigned to Adair County, a surgeon who is yet to be procured, two local dentists, and a local optometrist. An organizational entity separate from the hospital would erect the building and then sell or lease units to the two dentists and the optometrist. The units for the physicians and the surgeon would be leased to the hospital for a term of 25 years. The hospital would in turn sublet these units at fair market rent to the physicians and surgeon.

Based on the foregoing set of facts, you have posed two questions. First, does the board of trustees possess the authority to contract for office space for the purpose of subletting the same to medical practitioners who would utilize the county hospital facilities? Second, if the answer to the first question is affirmative, may revenue from the statutory hospital tax levy be drawn and appropriated to meet the primary lessee's rent obligation in the event other revenues are insufficient or nonexistent? We answer both questions in the affirmative.

Historically, the Iowa Supreme Court has accorded hospital trustees a rather wide range of discretion in the operation of a Chapter 347 facility. In Phinney v. Montgomery, 218 Iowa 1240, 257 N.W. 208 (1934), the Court stated "that it was the intention of the Legislature to place the entire control and management of the County Hospital in the hands of the Hospital Trustees." 257 N.W. 208, 210. We believe that this broad interpretation of the power conferred on the trustees is in keeping with the statutory grant of authority found in §§ 347.13 and 347.14, The Code 1981. We further believe that authority to contract for office space for the purpose of subletting the same to medical practitioners may be particularly found in §§ 347.13(1) and 347.14(10) which provide:

> Said board of hospital trustees shall:
> 1. Purchase, condemn, or lease a site for such public hospital, and provide and equip suitable hospital buildings.
>
> * * *
>
> The board of hospital trustees may:
> 10. Do all things necessary for the management, control and government of said hospital and exercise all the rights and duties pertaining to hospital trustees generally, unless such rights of hospital trustees generally are specifically denied by this chapter, or unless such duties are expressly charged by this chapter.

Whether it is advisable or necessary for a particular county hospital to provide office space for physicians who utilize the hospital facilities is a question within the sound discretion of the hospital trustees. The authority to do so is found in the above-cited sections. The trustees clearly have the authority to lease suitable hospital space rather than construct or purchase existing space. We believe that previous opinions imply a broad definition of what constitutes "suitable hospital buildings".

In 1928 Op. Att'y Gen. 210, we interpreted § 5359(1), The Code 1924, now codified as § 347.13(1), as authorizing the hospital trustees to erect a home for nurses who worked in the hospital. We have also stated that the board may lease equipment to furnish hospital buildings. 1970 Op. Att'y Gen. 542. We believe that if a board may operate a residential facility for nurses, a function which is not directly necessary to the delivery of health care, then a fortiori, a board may operate an office facility for doctors where they can more readily engage in the treatment of patients.

We point out that two previous opinions of this office held that county hospital trustees did not have authority to lease hospital space to private parties. 1974 Op. Att'y Gen. 18; 1962 Op. Att'y Gen. 103. These opinions were issued, however, prior to the adoption of §§ 347.28-30, The Code 1981, and are consequently of little weight today. Sections 347.28 and 29 are particularly pertinent to your inquiry, providing that:

> Any county or city hospital may lease or sell any of its property which is not needed for hospital purposes to any person for use as a physician's office, medical clinic, or any other health-related purpose.
>
> * * *
>
> Any county or city hospital may use property received by gift, devise, bequest or otherwise, or the proceeds from the sale of such property, for the construction of facilities for lease or sale as a medical clinic or a physician's office subject to the approval of the appropriate local health planning agency.

Based on the foregoing statutory authority and previous opinions of this office, we conclude that the board of trustees of a Chapter 347 facility possess the authority to contract for office space for the purpose of subletting the same to medical practitioners who will utilize the county hospital facilities.

Your second inquiry was whether revenue from the statutory hospital tax levy may be drawn and appropriated to meet the trustees' rent obligation on the leased offices in the event other revenues are insufficient or nonexistent. The levy is authorized by § 347.7, The Code 1981. The forerunner of § 347.7 was § 5353, The Code 1924.

In the opinion referred to earlier relating to a residence for nurses, 1928 Op. Att'y Gen. 210, we stated that funds generated by the § 5353 levy could be used to erect the residence building. The construction could be accomplished without a vote of the people if the board has funds available without the issuance of bonds. Similarly, if no bonding is contemplated to raise funds to satisfy the lease obligation, the board of hospital trustees may use money generated by the § 347.7 tax levy to satisfy the lease.

Yours truly,

David Fortney

DAVID M. FORTNEY
Assistant Attorney General

DMF:sh

COUNTIES: COUNTY OFFICERS AND EMPLOYEES; MILEAGE EXPENSE. §§ 79.9 and 79.10, The Code 1981. Local units of government, including municipalities and school districts, may pay a maintenance allowance to a local employee for furnishing a private vehicle to be used by the employee in a public capacity, such allowance being in addition to the mileage expense reimbursement for actual and necessary travel paid under § 79.9. The term "automobile", as used in § 79.9, is intended in a generic sense to connote a motor vehicle without regard to the specific nature of the vehicle in question. Section 79.9 applies solely to reimbursement for miles actually driven in a private vehicle. It does not relate to other incidents of travel. (Fortney to Johnson, Auditor of State, 7/21/81) #81-7-18(L)

Honorable Richard D. Johnson, C.P.A.
Auditor of State
State Capitol
L O C A L

Dear Mr. Johnson:

You have requested an opinion of the Attorney General regarding the scope of § 79.9, The Code 1981. This section provides:

> When a public officer or employee, other than a state officer or employee, is entitled to be paid for expenses in performing a public duty, a charge shall be made, allowed and paid for the use of an automobile of eighteen cents per mile for actual and necessary travel effective July 1, 1979, and twenty cents per mile effective July 1, 1980. A statutory provision stipulating necessary mileage, travel, or actual reimbursement to a local public officer or employee shall be construed to fall within the mileage reimbursement limitation specified in this section unless specifically provided otherwise. Any peace officer, other than a state officer or employee, as defined in section 801.4 who is required to use a private vehicle in the performance of official duties shall receive reimbursement for mileage expense at the rate specified in this section.[1]

[1] We believe that the use of the words "a charge shall be made, allowed and paid" connotes a mandatory obligation. See § 4.1(36), The Code 1981. As such, § 79.9 does not establish a ceiling for reimbursement which would allow an agency or political subdivision to reimburse at a rate less than the statutory rate.

When addressing questions regarding § 79.9, we are limited by the language of § 79.10 providing that "no law shall be construed to give to a public officer or employee both mileage and expenses for the same transaction."

You have first inquired whether a city, county, school district, or other unit of local government may pay a monthly vehicle allowance in lieu of, or in addition to, the statutory mileage rate specified by § 79.9. In Op. Att'y Gen. #80-10-2, we held that a county could contract with a sheriff or deputy whereby the individual would agree to furnish a private vehicle to be used in the performance of official duties. We further held that, pursuant to the contract terms, the county could properly pay a maintenance allowance to the sheriff or deputy for furnishing the vehicle, such allowance being in addition to the mileage expense reimbursement for actual and necessary travel paid under § 79.9. Our opinion was based on the premise that the county was not providing compensation for mileage when the county extended payment for a maintenance allowance. We analogized to the charges or user fees which are assessed for the rental of equipment. Such user fees are separate and distinct from additional fees assessed for the actual use of the equipment according to the amount of usage. User fees or rental fees are assessed for access to the equipment, regardless of the amount of actual use or whether the equipment is used at all. Similarly, a county may reimburse an employee for the furnishing of a private vehicle which the county would otherwise be required to purchase. This "user fee", in the form of a maintenance allowance, is distinct from expenditures for mileage traveled and consequently is not part of the "same transaction" within § 79.10.

As you correctly point out, our earlier opinion related to counties and included an analysis of §§ 332.3(18) and 332.35 which expressly authorize counties to contract with sheriffs and deputies regarding private vehicles used for public purposes. However, our conclusions regarding the limitations of §§ 79.9 and 79.10 were not dependent upon our discussion of §§ 332.3(18) and 332.35. We pointed out that while §§ 332.3(18) and 332.35 authorize the contractual arrangement itself, "neither [section] limits the nature of the terms for payment." Op. Att'y. Gen. #80-10-2 at p. 4. Absent the authorization contained in Chapter 332, we believe that counties independently have authority to enter into such contracts pursuant to their home rule authority. See Op. Att'y Gen. #79-4-7. If a unit of government has the authority to expend public monies for the provision of vehicles to be used for public purposes, such governmental unit may determine it is fiscally sound to contract with public employees for the use of their private vehicles. The terms of such contracts may properly include a provision for maintenance of the vehicle. Such costs of maintenance, being distinct from any reimbursement related to

actual mileage, would not violate §§ 79.9 and 79.10. We do not see that our earlier analysis, Op. Att'y Gen. #80-10-2 can be appropriately limited to counties. We would emphasize, as we did earlier, that we in no manner pass upon the advisability of a governmental unit reaching a decision to implement a policy of maintenance fees.

You have further inquired whether the limitation on mileage reimbursement established by § 79.9 is limited to automobiles only, or if it is to be construed as applicable to other privately-owned vehicles such as motorcycles, trucks and motor homes. If the statutory limitation is not applicable to these other vehicles, you inquire whether local units of government may set various alternate reimbursement schedules for other vehicle types.

We are of the opinion that the term "automobile", as used in § 79.9, is intended in a generic sense to connote a motor vehicle without regard to the specific nature of the vehicle in question. Black's Law Dictionary, (4th Rev. Ed. 1968), p. 169 observes that an automobile is "a vehicle for the transportation of persons or property on the highway, carrying its own motive power and not operated upon fixed tracks . . . a wheeled vehicle propelled by gasoline, steam, or electricity . . . a self-propelled vehicle suitable for use on a street or roadway . . . a vehicle designed mainly for the transportation of persons, equipped with an internal combustion, hydrocarbon vapor engine furnishing the motive power and forming a structural portion thereof . . . generic term, covering both trucks and passenger cars." We concur in this broad definition.

We note that § 321.2, The Code 1981, provides a number of definitions which are relevant to your question, however, there is no separate definition of "automobile." Section 321.1(2) defines "motor vehicle" as "every vehicle which is self-propelled but not including vehicles known as trackless trolleys which are propelled by electric power obtained from overhead trolley wires, but not operated upon rails. "The terms 'car', 'new car', 'used car' or 'automobile' shall be synonymous with the term 'motor vehicle'. [Emphasis supplied.] Section 321.1(2) thus adopts the construction espoused by Black's. We are unable to base our opinion simply on the definition found in § 321.1 in that the section also includes the following limiting language: "The following words and phrases when used in this chapter shall, for the purpose of this chapter, have the meanings respectively ascribed to them." The Iowa Supreme Court has shown a hesitancy in applying the definitions of § 321.1 to other chapters of the Code. See McReynolds v. Municipal Court of City of Ottumwa, 207 N.W.2d 792 (Iowa 1973). However, the Court has stated that: "The definition of a vehicle or motor vehicle in section 321.1 relates only to vehicles moving over or designed and intended to move over the public highways of this state." Id., 792,

795. There are no other decisions in Iowa on this point, but we believe that the broader definition as found in Black's is correct. We believe the legislature intended to regulate the amount of reimbursement when enacting § 79.9. We do not believe they were concerned with the type of vehicle being driven by a public employee. Consequently, we believe § 79.9 uses "automobile" in a generic sense.

Finally, you inquire whether reimbursement of parking expenses are included within the statutory limitations of § 79.9. This question is disposed of by our earlier opinion. Op. Att'y Gen. #80-10-2. The twenty cents per mile limit applies to miles actually driven. It does not apply to other incidents of travel. One certainly would not conclude that the § 79.9 limits applied to such items as meals consumed while traveling. Similarly, the limit is inapplicable to lodging expenses. Section 79.9 is limited in its application. It applies solely to reimbursement for miles actually driven in a private vehicle. It does not relate to other incidents of travel.

In conclusion, local units of government, including municipalities and school districts, may pay a maintenance allowance to a local employee for furnishing a private vehicle to be used by the employee in a public capacity, such allowance being in addition to the mileage expense reimbursement for actual and necessary travel paid under § 79.9. The term "automobile", as used in § 79.9, is intended in a generic sense to connote a motor vehicle without regard to the specific nature of the vehicle in question. Section 79.9 applies solely to reimbursement for miles actually driven in a private vehicle. It does not relate to other incidents of travel.

Yours truly,

David Fortney

DAVID M. FORTNEY
Assistant Attorney General

DMF:sh

RIMINAL LAW, COUNTY ATTORNEYS, SIMPLE MISDEMEANORS: Section 336.3, The Code 1981, Iowa R.Crim.P. 27(1). The county attorney is obligated to inform the magistrate prior to each hearing or trial if he or she cannot attend due to conflicting official business. When the county attorney, after being advised as to the trial or hearing date, fails to appear or advise the magistrate as to the reason for his or her absence, the magistrate may appoint a special prosecutor under § 336.3, The Code 1981. When the county attorney fails to appear, and does not request a continuance, the magistrate, absent a request from the defendant, should not continue a case to another date. When the county attorney fails to appear or advise the magistrate as to the reason for his or her absence, the magistrate may dismiss the case for want of prosecution. The magistrate may not conduct a jury trial in the absence of the county attorney with the arresting officer or complainant acting as the prosecutor. (Cleland to Horn and Kuiken, Judicial Magistrates, Jefferson County, 7/21/81) #81-7-17(L)

July 21, 1981

Ida M. Horn
Tim B. Kuiken
Judicial Magistrates
Jefferson County Courthouse
Fairfield, IA 52556

Dear Ms. Horn and Mr. Kuiken:

In 1977 our office issued an opinion declaring that a county attorney who is engaged in the performance of official duties pursuant to chapter 336 is under no duty to appear and prosecute nonindictable misdemeanors. 1978 Op. Att'y Gen. 52. Twice in that opinion we stated that "trials of nonindictable misdemeanors can be conducted in the absence of the county attorney." 1978 Op. Att'y Gen. at 54-55. As you note, there is no provision in the present Rules of Criminal Procedure as to whether the County Attorney must be present for trials of simple misdemeanors, or whether Magistrates must conduct trials in the absence of the County Attorney. Thus, you pose the following specific questions:

1. Is the County Attorney obligated to inform the Magistrate's Court prior to each hearing if he cannot attend due to conflicting official business?

2. If the County Attorney does not advise the Magistrate's Court that he will not be available, may a special prosecutor be appointed?

3. If the County Attorney does advise the Magistrate's Court of his conflicting official duties and inability to attend the hearing, may the Magistrate continue the matter to another date even if the County Attorney states he does not desire to participate, when, in the Magistrate's opinion, the arresting officer is not capable of

properly prosecuting a simple misdemeanor, especially in a jury trial, and the administration of justice may be thwarted unless a prosecuting attorney is present?

4. If the County Attorney advises that he will not appear to represent the State as prosecuting attorney due to his feeling that the charges are not appropriate for prosecution does the Magistrate have the authority to dismiss for the absence of a prosecutor or appoint a special prosecutor?

5. Is the Magistrate required to conduct a trial, specifically a jury trial, with the arresting officer or complainant acting as prosecutor?

I. In an earlier opinion it was said:

The State of Iowa, through its official representative is entitled to know of all violations in which it may be interested in prosecuting. It is only logical that the chief law enforcement officer of the county be kept fully informed of transgressions of law, which may demand his presence in the prosecution of the same, and so that he may diligently perform his duties in enforcing or causing to be enforced the laws which it is his obligation to uphold. Certainly it does not rest within the discretion of the justices of the peace to determine whether or not the state wishes to appear through its representative, but this necessarily resides within the discretion of the county attorney. Although § 336.2 is considered to be only an outline of the county attorney's duties by this Department, they necessarily constitute the duties which he is obligated to perform. Obviously, performance cannot be achieved if one has no knowledge of the need for the same. It has been said that the mere presence of the county attorney or knowledge that the county attorney is available for prosecution results in numerous defendants' election to plead guilty. An absurdity would result if the county attorney, being clothed with law enforcement obligations were compelled to operate in the obscure shadows, of non-information as to where and when a case is to be docketed. Such a lack of information would lend itself to possibilities of frivolous changes of venue, ultimate dismissal for want of prosecution, and numerous violators escaping the sanctions of the law. We believe that [it] is an obligation of the

> justice of the peace to inform the county attorney having jurisdiction over his court whenever a violator is to be brought before the court, within sufficient time to enable the county attorney to exercise his duties in appearing, rendering advice, directing that his appearance be entered, or appearing and prosecuting if not otherwise engaged in the performance of official duties.

1962 Op. Att'y Gen. 155, 157. See also Iowa R.Crim.P. 45 ("The magistrate shall notify the prosecuting attorney of the trial date . . . ."). Thus, even prior to the adoption of Iowa R.Crim.P. 45, the magistrate had a duty to keep the county attorney advised as to pending trials in simple misdemeanor cases. This duty was based upon the county attorney's need to know this information if he or she was to effectively perform the duties of the county attorney's office. Likewise, the magistrate must perform certain duties, e.g., expeditiously conduct trials in simple misdemeanor cases, which cannot be performed properly if the county attorney does not keep the magistrate advised of when he or she cannot attend a hearing or trial because of conflicting official business. Thus, it is our opinion that the county attorney is obligated to inform the magistrate prior to each hearing if he or she cannot attend due to conflicting official business. If, after the magistrate has informed the county attorney of the hearing or trial, the county attorney does not advise the magistrate as to the reason for his or her absence and fails to attend the hearing or trial, the magistrate may assume that the county attorney's absence is not due to conflicting official business.

II. If the county attorney fails to appear at a hearing or trial after having failed to advise the magistrate whether he or she will attend, the magistrate may appoint a special prosecutor under § 336.3, The Code 1981. The county attorney has a duty to appear and prosecute (which may include moving to dismiss) whenever he or she is not otherwise engaged in official business. Section 336.2(4), The Code 1981. As noted above, when the county attorney, after being advised as to the trial or hearing date, fails to appear or advise the magistrate as to the reason for his or her absence, the magistrate may assume that the county attorney's absence is not due to conflicting official business. In that case, the county attorney is absent within the meaning of § 336.3 and the magistrate may appoint an attorney to act as the county attorney in the pending case.

III. When the county attorney has advised the magistrate that he or she cannot attend a hearing or trial because of conflicting official business, the magistrate cannot appoint a special prosecutor under § 336.3 because, in such cases, the county attorney

has no "duty to appear." Moreover, the court's inherent power to appoint a special prosecutor is severely limited. See 1978 Op. Att'y Gen. at 55. Nevertheless, when the county attorney tells the magistrate that he or she has conflicting official business and that he or she does not desire to participate in the proceedings, the magistrate must do something. The question is whether the magistrate can order a continuance.

Courts have considerable discretion in the granting or denying of a continuance. See State v. Kyle, 271 N.W.2d 689, 691 (Iowa 1978). It is well-recognized, however, that the court should grant a continuance only when substantial justice will be more nearly obtained. State v. Sheffey, 234 N.W.2d 92, 96 (Iowa 1975); State v. Johnson, 219 N.W.2d 690, 697 (Iowa 1974). Moreover, a defendant has a definite interest in the speedy resolution of a charge. Thus, when the county attorney informs the magistrate that he or she will not be able to attend, the county attorney should also inform the magistrate whether he or she wants the matter continued. If the county attorney does not request a continuance, the magistrate, absent a request from the defendant, should not continue the matter to another date.

IV. Assuming that the county attorney does not have conflicting official business, if the county attorney advises the magistrate that he or she will not appear to represent the State as prosecuting attorney due to his or her "feeling" that the charges are not appropriate for prosecution, the magistrate may either dismiss the charge or appoint a special prosecutor. First, we do not approve of the county attorney failing to appear to represent the State merely because he or she "feels" that the charges are not appropriate for prosecution. The county attorney is the chief law enforcement officer in the county. If the county attorney decides that a charge is not appropriate for prosecution, he or she should move to dismiss that charge under Iowa R.Crim.P. 27(1).

As noted above, if the county attorney is absent for reasons other than official business, the magistrate may appoint an attorney to act as county attorney in that case. Section 336.3, The Code 1981. Moreover, if the magistrate decides that it would be in the furtherance of justice, the magistrate may dismiss the case for want of prosecution. Iowa R.Crim.P. 27(1).

V. While there appears to be some authority to the contrary, see 27 C.J.S. District & Pros. Attys. § 29(1)(1959), it is our opinion that it is inappropriate for the magistrate to conduct a jury trial in the absence of the county attorney with the arresting officer or complainant acting as the prosecutor.

First, in our system of justice the role of judge and prosecutor are incompatible. See State v. Willet, ____ N.W.2d ____ (Iowa 5/13/81)(Sup. Ct. No. 64451). Even with a third party non-attorney acting as the prosecutor, "the court becomes vulnerable to a multiplicity of criticism: bias, prejudice or advocacy are some of those." State v. Cuevas, 288 N.W.2d 525, 532-33 (Iowa 1980). If, as is generally assumed, the jury is easily influenced by the actions of the court tending to show a preference for one party, the magistrate's assistance, even on procedural matters, could deny a defendant a fair trial.

Second, having a police officer or complainant act as the prosecutor detracts from the public nature of the crime.

> A crime is a public wrong, that is, a wrong of such a public character that the sovereignty, the authority, and majesty of the entire body politic, prosecutes the offender as one who has committed a wrong against its peace and dignity.

I. W. Burdick, Law of Crime § 2 (1946). Moreover, the county attorney, as an attorney, is subject to certain ethical considerations that would not apply to the police officer or complainant. See Code of Professional Responsibility, EC 7-13, EC 7-14, DR 7-103, The Code 1981. In our opinion, these constraints arise directly from the fact that the county attorney, in prosecuting any level of crime, is serving the public interest rather than private interests. Any person, other than the prosecutor, even a police officer, would not be subject to these constraints, and therefore, could never completely serve the public interest.

Third, allowing non-attorneys to prosecute simple misdemeanors, absent specific legislative authorization, comes perilously close to sanctioning the unauthorized practice of law. See Code of Professional Responsibility, Canon 3, The Code 1981. As noted above, the real party in interest is the State. Prosecution of crime requires the exercise of legal judgment subject to the constraints of the Code of Professional Responsibility. The county attorney or a special prosecutor can satisfy these qualifications but a non-attorney is assumed to lack the necessary legal training and is not subject to the same ethical constraints. Thus, in a case being tried to the jury, no one except the county attorney or a special prosecutor appointed pursuant to § 336.3 should be allowed to act as the prosecutor.

VI. We recognize that the procedures recommended above place the burden on the county attorney to dismiss those cases that in his or her judgment should not be prosecuted. Nevertheless, as chief law enforcement officer for the county, that is one of the county attorney's primary responsibilities.

Sincerely,

Richard L. Cleland

RICHARD L. CLELAND
Assistant Attorney General

RLC/cla

COUNTIES AND COUNTY OFFICERS: COUNTY HOSPITAL TRUSTEE: §§ 8.51, 39.8, 347.9 and 347A.1, The Code 1981. The term of office of a person elected county hospital trustee must commence on the first day of January following the general election which is not a Sunday or legal holiday. (Fortney to Johnston, Polk County Attorney, 7/16/81) #81-7-15(L)

July 16, 1981

Dan Johnston
Polk County Attorney
Courthouse
Des Moines, Iowa 50307

Dear Mr. Johnston:

You have requested an opinion regarding the commencement of terms of office for county hospital trustees. You inquire whether the trustees' terms may commence on July 1 of a particular year so as to be more compatible with the county fiscal year. We are of the opinion that the term of office of a person elected county hospital trustee must commence on the first day of January following the general election which is not a Sunday or legal holiday.

Political subdivisions of this state must conduct their business on a fiscal year beginning July 1. Section 8.51, The Code 1981, provides:

> The fiscal year of cities, counties, and other political subdivisions of the state shall begin July 1 and end the following June 30. For the purpose of this section, the term political subdivision includes school districts.

As you note in your letter, county hospitals organized pursuant to chapters 347 and 347A are subject to § 8.51. Such hospitals are governed by a board of hospital trustees composed of members elected for terms of six years. See §§ 347.9 and 347A.1, The Code 1981. Section 39.8, The Code 1981 provides as follows:

> The term of office of all officers chosen at a general election for a full term shall commence on the first day of January following the election which is not a Sunday or legal holiday, except when otherwise provided by the Constitution or by statute; that of an officer chosen to fill a vacancy shall commence as soon as he has qualified therefor.

Sections 8.51 and 39.8 do create a situation in which the officers of a political subdivision take office when six months of a fiscal year have passed. This, however, is a situation which is applicable to all offices in the state, not merely county hospital trustee. From a policy standpoint, it would be unsound to elect an officer at a November election and delay the taking of office for eight months. The date of the general election is fixed by statute and may not be altered by action of the county. See § 39.1, The Code 1981.

Yours truly,

David Fortney

DAVID M. FORTNEY
Assistant Attorney General

DMF:sh

MOTOR VEHICLES - Livestock Truck Shifting Load Provision - §321.463, The Code 1981; When read in light of its purpose §321.463 requires that there must be a corresponding decrease in weight of one axle including a tandem for a livestock hauler to be within the livestock exemption from the maximum weight limitations. (Goodwin to Kassel, Director, Iowa Department of Transportation, 7/16/81) #81-7-14(L)

July 16, 1981

Mr. Raymond L. Kassel
Director
Iowa Department of Transportation
Ames, IA 50010

Dear Mr. Kassel:

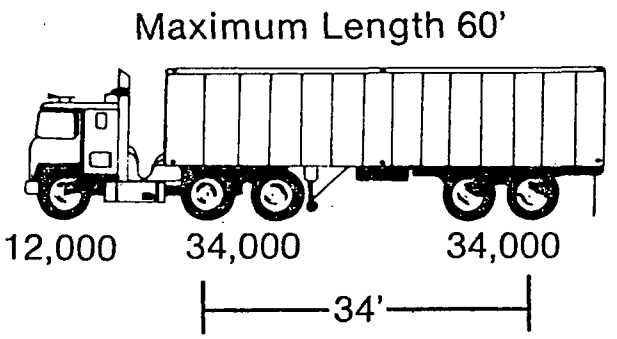
You have asked for an Attorney General's Opinion concerning the portion of §321.463, 1981 Code of Iowa, which is sometimes referred to as the livestock truck shifting load provision. This provision under certain conditions provides an exemption for livestock trucks from the maximum weight limitations found in §321.463.

Section 321.463, 1981 Code of Iowa, establishes four different maximum weight limitations. The maximum weight on a single axle shall not exceed 20,000 pounds. The maximum weight on a tandem axle shall not exceed 34,000 pounds. The maximum weight allowed on a group of axles (which is dependent upon the number of axles and the distance between those axles) is established by the formula:

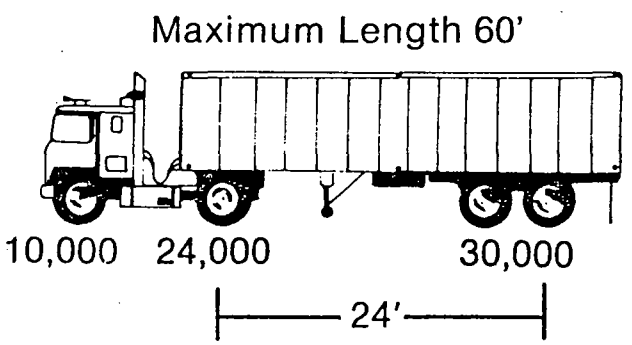
$$W = 500 \left(\frac{LN}{NT} + 12N + 36\right)$$

The case State v. Balsley, 242 Iowa 845, 48 N.W.2d 287 (1951) discusses the term "a group of axles." The attached DOT table contains the computations of that formula for the various numbers of axles and distances. Finally, the maximum gross weight of a vehicle shall not exceed 80,000 pounds. If a vehicle's weight exceeds (1) the single axle limit, (2) the tandem axle limit, (3) the group of axle limit, or (4) the gross weight limit, it is in violation of §321.463. It is important to recognize that a vehicle may comply with one limitation and still be in violation of another limitation.

For example, assume a tractor trailer has a single steering axle, a tandem drive axle and a tandem axle on the trailer as illustrated below. Now assume that the steering axle has 12,000 pounds and the tandem axles have 34,000 pounds on each of them, but that the tandem axles are only 34 feet apart. Although the vehicle does not exceed the gross weight limit of 80,000 pounds, nor the single axle limit of 20,000 pounds, nor the tandem axle limit of 34,000 pounds, it does exceed the group of axle weight limitation. The weight on its group of axles (the two tandem axles) is 68,000 pounds, but the attached table shows that the maximum allowable weight for tandem axles 34 feet apart is 64,500 pounds. In order for that 68,000 pounds to be legal on two tandem axles the table shows that they must be at least 36 feet apart.



By way of further illustration, assume a tractor trailer with a single steering axle (having 10,000 pounds), a single drive axle (having 24,000 pounds) and a tandem axle (having 30,000 pounds) as illustrated below. Also assume the distance between the group of axles is 24 feet. The attached table for group of axles shows that the maximum allowable weight would be 54,000 pounds. Therefore, this illustrated tractor trailer would not be in violation of the gross weight limitations of 80,000 pounds nor the group of axles limitation, nor the tandem axle limitation; but, it would be in violation of the single axle 20,000 pound weight limitation.



However, if the above illustrated tractor trailer were transporting livestock, the livestock load provision would exempt it from the single axle weight limitation.

The livestock truck shifting load provision was enacted in 1949, Chapter 139, §5 in the Laws of the Fifty-Third General Assembly in the following form:

> The weight on any one axle of a vehicle which is transporting livestock may exceed the legal maximum weight given in this chapter providing that the gross weight on any particular group of axles on such vehicle does not exceed the gross weight allowable under this chapter for such group of axles.

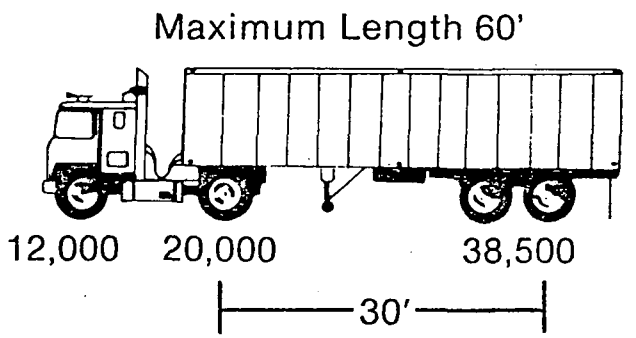
That provision today in the 1981 Code of Iowa reads as follows:

> The weight on any one axle, including a tandem axle, of a vehicle which is transporting livestock on highways not part of the interstate system may exceed the legal maximum weight given in this chapter providing that the gross weight on any particular group of axles on such vehicle does not exceed the gross weight allowable under this chapter for such groups of axles. (Emphasis Added)

The significant question that you actually pose is whether the law requires a compensating decrease in the other axles in the group for the livestock transport to be entitled to the exemption. You state that the Iowa Department of Transportation considers:

> the intent of the law (§321.463) is to allow a truck to continue to be in legal operation if the load shifts. This would presume a configuration which when initially loaded was legal, i.e. legal on all axle weights, group of axles and gross weight. We then interpret the referenced section to allow for extra weight on a single axle or tandem axle with a compensating decrease in the other axles in the group to maintain the overall legal configuration in the event that part of the load moves.

To illustrate the discussion of your question, assume a tractor trailer with a single steering axle (with 12,000 pounds), a single drive axle (with 20,000 pounds), and a tandem axle (with 38,500 pounds) on a trailer having a distance of 30 feet in the group of axles as illustrated below.



The 58,500 pounds on the group of axles is within the maximum weight limit shown on the attached table for a group of axles having a distance of 30 feet. The gross weight of 70,500 pounds is within the 80,000 pound limit, and the weight on the single axles is within the 20,000 pound limit. But, the 38,500 pounds is in excess of the 34,000 pound limit on a tandem axle. If the vehicle is not transporting livestock there is clearly a violation of §321.463, 1981 Code of Iowa on the tandem axle.

If this vehicle is transporting livestock the essential question is whether or not in order to be able to claim the livestock transporting exemption, the vehicle must have a corresponding decrease in weight (from 20,000 pounds to 15,500 pounds) on the single axle in the group of axles.

In this illustration the vehicle is within the maximum weight limitation for a group of axles, and it has only one axle (a tandem axle) which exceeds the maximum weight limitation for that axle. If the livestock load shifts to the extent of having 20,500 pounds on the single axle in that group and the tandem has 38,000 pounds then there are two axles in violation of their respective weight limitations. In that instance with two axles in violation of the weight limitations, the livestock transporting provision would be inapplicable and there would be two weight violations, one on the single axle and one on the tandem axle.

A transporter of any other commodity besides livestock would surely welcome the opportunity to try to overload the tandem axle as shown above, and take the chance of the load not shifting so as to cause two overweight violations (one on the single and one on the tandem). If the statute were construed to allow livestock transporters to overload the tandem as shown above but to deny such an advantage to other transporters, it would be an unfair preference to livestock transporters and would improperly discriminate against transporters of all other commoditites.

There are some rules of statutory construction that give us guidance in answering your question. A statute is to be construed to give it a sensible, practical, workable, interpretation that will avoid absurd results. State v. Monroe, 236 N.W.2d (Iowa 1975), Northern Natural Gas Co. v. Forst, 205 N.W.2d 692 (Iowa 1973). Also, the spirit and purpose of the statute is to be considered. Iowa v. Buckley, 232 N.W.2d 266 (Iowa 1975). State v. Johnson, 216 N.W.2d 335 (Iowa 1974). Also, important to our response to your question, "if there are two possible interpretations of a statute, one of which would raise a question of constitutionality, and another which would not, then the latter will be used." Sutherland Statutory Construction, Vol. 2A, §57.24, p. 456. See also State, ex rel Turner v. Scott, 269 N.W.2d 828 (Iowa 1978) for this same principle of law.

The legislature surely did not intend a stock truck (as in our illustration) to be able to overload an axle including a tandem, and escape a violation if its operator is either fortunate or skillful enough to keep the load overloaded in that precise manner. Instead, knowing that a livestock load does shift, the purpose of the statute is to allow a livestock transporter to load a vehicle up to the maximum weight allowable on each axle, including a tandem axle, and escape a violation of the weight limitations if the load does shift from one axle onto another. To construe the statute otherwise would give livestock transporters an unfair preference over other transporters of any other items. It would, therefore, be discriminatory against a grain hauler, a general commodity hauler, or any other trucker who would certainly welcome the opportunity to try to overload an axle or a tandem axle and take the chance of the load not shifting so as to make two axles in violation of the weight limitations.

In other words, if the group of axles is a single and tandem as illustrated above, the maximum weight allowable on that group of axles would be 54,000 pounds (20,000 pounds on the single and 34,000 pounds on the tandem), providing the distance between the single and tandem axles is 24 feet or more as required by the attached table. If it is a livestock transport the load can shift and overload one axle, including a tandem without being in violation of §321.463, 1981 Code of Iowa. But, if it is not a livestock transport any shift in load causing an overload of one axle, including a tandem, would be a violation of §321.463. If the group of axles is composed of two tandem axles, the maximum weight allowable on that group of axles would be 68,000 pounds, providing the distance between the tandem axles is 36 feet or more as required by the attached table.

The practical, sensible, non-discriminatory interpretation of this statute is that there must be a corresponding decrease in weight of one axle including a tandem for a livestock hauler to be within the livestock transporting exemption from the maximum weight limitation found in §321.465, 1981 Code of Iowa. We agree with your understanding of this statute.

Sincerely,

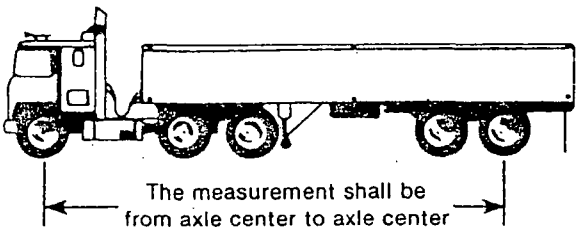
Robert W. Goodwin

Robert W. Goodwin
Special Assistant Attorney General

MAXIMUM GROSS WEIGHT TABLE 1
NON-INTERSTATE HIGHWAYS
(See reverse side for interstate highways)

Axle Weight: No single axle shall carry a gross weight in excess of 20,000 pounds. For axles spaced 40 inches apart but not more than 7 feet apart, 34,000 pounds in total for the two axles, but not more than 20,000 pounds on either individual axle. For axles more than 7 feet apart the maximum weight shall not exceed that shown in the following table. Axles less than 40 inches apart are considered one axle.

The Gross Weight shall be determined by measuring the distance in feet between the first and the last axle in any group under consideration.



Distance* In Feet	2 Axles	3 Axles	4 Axles	5 Axles	6 or More Axles
4	34,000				
5	34,000				
6	34,000				
7	34,000	34,000			
8	38,000	42,000			
9	39,000	42,500			
10	40,000	43,500	45,000		
11		44,000	46,000		
12		45,000	47,000		
13		45,500	48,000	48,500	
14		46,500	49,000	49,500	
15		47,000	50,000	50,500	
16		48,000	51,000	51,500	
17		48,500	52,000	52,500	54,000
18		49,500	53,000	53,500	55,000
19		50,000	54,500	54,500	56,000
20		51,000	55,500	55,500	57,000
21		51,500	56,000	56,500	58,000
22		52,500	56,500	57,500	59,000
23		53,000	57,500	58,500	60,000
24		54,000	58,000	59,500	61,000
25		54,500	58,500	60,500	62,000
26		55,500	59,500	61,500	63,000
27		56,000	60,000	62,500	64,000
28		57,000	60,500	63,500	65,000
29		57,500	61,500	64,500	66,000
30		58,500	62,000	65,500	67,000
31		59,000	62,500	66,500	68,000
32		60,000	63,500	67,500	69,000
33			64,000	68,500	70,000
34			64,500	69,500	71,000
35			65,500	70,000	72,000
36			68,000	70,500	73,000
37			68,000	71,000	74,000
38			68,000	72,000	75,000
39			68,000	72,500	76,000
40			68,500	73,000	77,000
41			69,500	73,500	78,000
42			70,000	74,000	79,000
43			70,500	75,000	80,000
44			71,500	75,500	
45			72,000	76,000	
46			72,500	76,500	
47			73,500	77,500	
48			74,000	78,000	
49			74,500	78,500	
50			75,500	79,000	
51			76,000	80,000	
52			76,500		
53			77,500		
54			78,000		
55			78,500		
56			79,500		
57			80,000		

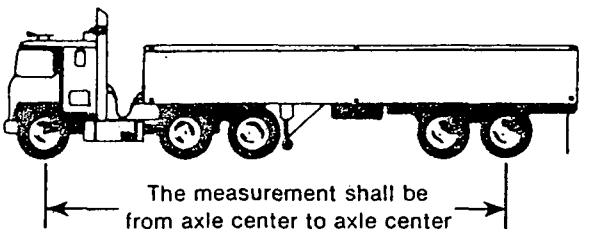
*Measured between the centers of the extreme axles of any group of axles and rounded to the nearest whole foot.

The above maximum gross weight table was calculated in accordance with the current Iowa Code weight formula as modified by Senate File 159, April 1981.

MAXIMUM GROSS WEIGHT TABLE 2
INTERSTATE HIGHWAYS
(See reverse side for non-interstate highways)

Axle Weight: No single axle shall carry a gross weight in excess of 20,000 pounds. For axles spaced 40 inches apart but not more than 7 feet apart, 34,000 pounds in total for the two axles, but not more than 20,000 pounds on either individual axle. For axles more than 7 feet apart the maximum weight shall not exceed that shown in the following table. Axles less than 40 inches apart are considered one axle.

The Gross Weight shall be determined by measuring the distance in feet between the first and the last axle in any group under consideration.



Distance* In Feet	2 Axles	3 Axles	4 Axles	5 Axles	6 Axles	7 Axles
4	34,000					
5	34,000					
6	34,000					
7	34,000	34,000				
8	38,000	42,000				
9	39,000	42,500				
10	40,000	43,500	48,500			
11		44,000	49,500			
12		45,000	50,000			
13		45,500	50,500	56,000		
14		46,500	51,500	57,000		
15		47,000	52,000	57,500		
16		48,000	52,500	58,000		
17		48,500	53,500	58,500	64,000	
18		49,500	54,000	59,000	65,000	
19		50,000	54,500	60,000	65,500	
20		51,000	55,500	60,500	66,000	71,500
21		51,500	56,000	61,000	66,500	72,500
22		52,500	56,500	61,500	67,000	73,000
23		53,000	57,500	62,500	68,000	73,500
24		54,000	58,000	63,000	68,500	74,000
25		54,500	58,500	63,500	69,000	74,500
26		55,500	59,500	64,000	69,500	75,000
27		56,000	60,000	65,000	70,000	76,000
28		57,000	60,500	65,500	71,000	76,500
29		57,500	61,500	66,000	71,500	77,000
30		58,500	62,000	66,500	72,000	77,500
31		59,000	62,500	67,500	72,500	78,000
32		60,000	63,500	68,000	73,000	78,500
33			64,000	68,500	74,000	79,500
34			64,500	69,500	74,500	80,000
35			65,500	70,000	75,000	
36			68,000	70,500	75,500	
37			68,000	71,000	76,000	
38			68,000	72,000	77,000	
39			68,000	72,500	77,500	
40			68,500	73,000	78,000	
41			69,500	73,500	78,500	
42			70,000	74,000	79,000	
43			70,500	75,000	80,000	
44			71,500	75,500		
45			72,000	76,000		
46			72,500	76,500		
47			73,500	77,500		
48			74,000	78,000		
49			74,500	78,500		
50			75,500	79,000		
51			76,000	80,000		
52			76,500			
53			77,500			
54			78,000			
55			78,500			
56			79,500			
57			80,000			

*Measured between the centers of the extreme axles of any group of axles and rounded to the nearest whole foot.

The above maximum gross weight table was calculated in accordance with the current Iowa Code weight formula as modified by Senate File 159, April 1981.

GAMBLING: § 99B.7, The Code 1981. The Elks, Kiwanis, Lions, community clubs and senior citizen groups qualify for § 501(c) status and would be eligible as "qualified organizations" pursuant to § 99B.7, The Code 1981. (Fortney to Mullins, State Representative, 7/16/81) #80-7-13(L)

July 16, 1981

Honorable Sue Mullins
State Representative
Prairie Flat Farms
Corwith, Iowa 50430

Dear Representative Mullins:

You have requested an opinion of the Attorney General regarding eligibility for a license to conduct bingo games. You have inquired whether organizations such as community clubs, both incorporated and unincorporated, service clubs such as the Lions, Elks or Kiwanis, and senior citizens groups organized solely for social purposes would be eligible for a license under § 99B.7, The Code 1981. [1]

Chapter 99B was amended by Senate File 519, 69th G.A., 1981 Session. As amended, Chapter 99B imposes various licensing standards. These standards, found in S. F. 519, Sec. 1 and Sec. 4, are applicable to all licenses under Chapter 99B. These standards relate to such matters as financial standing and the good reputation of the person(s) seeking licensure. Your inquiry relates more directly to the provisions of S. F. 519, Sec. 9, which provides, in pertinent part:

---

[1] There are a variety of licenses available under Chapter 99B. We assume your questions relate to licensure as a "qualified organization" pursuant to § 99B.7. A 99B.7 license is intended for organizations which seek to raise money through legalized gambling and which donate the proceeds to various civic, charitable and educational purposes as defined by § 99B.7(3)(b).

> The person or organization conducting the game can show to the satisfaction of the department that it is eligible for exemption from federal income taxation under either section 501(c)(3), 501(c)(5), 501(c)(6), 501(c)(10), or 501(c)(19) of the Internal Revenue Code, as defined in section 422.4. However, this paragraph does not apply to a political party as defined in section 43.2 or to a nonparty political organization that has qualified to place a candidate as its nominee for statewide office pursuant to chapter 44.

The eligibility for § 501(c) status relates only to "qualified organizations". We understand your question to be whether the organizations referred to earlier are qualified for the requisite § 501(c) status. We believe they generally do qualify.

The sections of the Internal Revenue Code, 26 U.S.C. § 1, et seq., which are incorporated in S. F. 519, authorize qualified organization status for the following organizations:

> 501(c)(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office;
>
> 501(c)(5) Labor, agricultural, or horticultural organizations;

> 501(c)(6) Business leagues, chambers of commerce, real-estate boards, boards of trade, or professional football leagues (whether or not administering a pension fund for football players), not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual;
>
> 501(c)(10) Domestic fraternal societies, orders, or associations, operating under the lodge system--
> (A) the net earnings of which are devoted exclusively to religious, charitable, scientific, literary, educational, and fraternal purposes, and
> (B) which do not provide for the payment of life, sick, accident, or other benefits; and
>
> 501(c)(19) A post or organization of war veterans, or an auxiliary unit or society of, or a trust or foundation for, any such post or organization--
> (A) organized in the United States or any of its possessions,
> (B) at least 75 percent of the members of which are war veterans and substantially all of the other members of which are individuals who are veterans (but not war veterans), or are cadets, or are spouses, widows, or widowers of war veterans or such individuals, and
> (C) no part of the net earnings of which inures to the benefit of any private shareholder or individual.

We are of the opinion that the groups you mention are eligible for qualified organization status as § 501(c)(3) and/or § 501(c)(10) organizations. Clearly, organizations such as the Elks qualify for § 501(c)(10) status. Such fraternal organizations may have "qualified organization" status. Similar organizations would be the Eagles or Moose. The other organizations would likely qualify pursuant to § 501(c)(3).

We note that eligibility for § 501(c)(3) status is controlled by federal regulations and is administered by the Internal Revenue Service. The I.R.S. requires some formal structure before a group or organization is granted § 501(c)(3) status. For example, bylaws which control the use of assets are required, including provision for distribution of assets

upon dissolution of the organization. See I.R.S. Publication 557 (Rev. Feb. 1980) entitled "How to Apply for and Retain Exempt Status for Your Organization."

We believe that the Elks, Kiwanis, Lions, community clubs and senior citizen groups qualify for § 501(c) status and would be eligible as "qualified organizations" pursuant to § 99B.7.

Yours truly,

David Fortney

DAVID M. FORTNEY
Assistant Attorney General

DMF:sh

MENTAL HEALTH: Liability for the Costs of Treating Substance Abusers: Commitment of Substance Abusers to Mental Health Facilities. Laws of the Sixty-Eighth General Assembly, 1980 Session, ch. 1003; Laws of the Sixty-Ninth General Assembly, 1981 Session, House File 821; §§ 3.7, 125.2, 125.13, 125.21, 125.43, 125.44, 204.401, 204.409(2), 229.20, 229.50(3), 229.51, 229.52, 230.1, 230.2, 230.20(5), 321.281, 321.283(3), and 812.3, The Code 1981. As of July 1, 1981, state mental health institutes shall be facilities as defined by § 125.2, The Code 1981, as amended, and therefore facilities within the meaning of § 125.44, The Code 1981. State mental health institutes are not facilities within the meaning of § 204.409(2), The Code 1981. Courts are not authorized to commit violators of § 204.401, The Code 1981, to state mental health institutes as they are not facilities licensed by the Iowa Department of Substance Abuse. Neither the state nor counties will incur any liability for the costs of care and treatment provided to a substance abuser at a state mental health institute in contravention of § 204.409(2), The Code 1981. Persons committed to a state mental health institute in violation of § 204.409(2) may not be considered to be state patients. Chapter 230, The Code 1981, governs the costs of treatment provided to a substance abuser at a state mental health institute, and § 204.409(2), The Code 1981, governs the costs of treatment provided to a substance abuser at a facility licensed by the Iowa Department of Substance Abuse.

A court may order a person committed to a state mental health institute for substance treatment under ch. 812 when it reasonably appears that the defendant is suffering from a mental disorder, which is inclusive of dependency on a chemical substance. Counties must be billed at the rate of eighty percent of the total costs of treatment provided to a person committed to a mental health institute under ch. 812 for a psychiatric evaluation and treatment of a mental disorder, but only at the rate of twenty-five percent of the total costs where the mental disorder results from substance abuse.

A court may commit a violator of § 321.281, The Code 1981, to any institution in Iowa providing treatment for alcoholism or drug dependency, including a state mental health institute. In addition, courts may refer a defendant to a state mental health institute under § 321.283(3), The Code 1981, after the effective date of H.F. 821 on July 1, 1981. The state is responsible for seventy-five percent of the costs of providing treatment to a person committed to a mental health institute under § 321.281, The Code 1981, and the county of legal settlement is responsible for the remaining twenty-five percent of the costs. Persons committed to a mental health institute under § 321.281 may not be considered to be a state patient. (Mann to Reagen, Commissioner, Dept. of Social Services, 7/15/81) #81-7-11(L)

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Department of Justice

July 15, 1981

ADDRESS REPLY TO:
SOCIAL SERVICES DIVISION
SECOND FLOOR
HOOVER BUILDING
DES MOINES, IOWA 50319
(515) 281-8330

Dr. Michael V. Reagen, Ph.D., Commissioner
Iowa Department of Social Services
Fifth Floor
Hoover State Office Building
L O C A L

Dear Commissioner Reagen:

You requested an opinion of the Attorney General on the impact of Chapter 1003, Laws of the Sixth-Eighth General Assembly, 1980 Session (hereinafter H.F. 2584) on the responsibility of counties to pay for treatment provided to substance abuse patients at state mental health facilities. Specifically, you ask the following questions:

1. Are State Mental Health Institutes "facilities" as that term is used in H.F. 2584?

2. Are District Courts free to commit persons guilty of violating Section 204.401 to a mental health institute?

3. What is the financial responsibility of the state for persons committed to a mental health institute for substance abuse under 204.409? The responsibility of the county? Can these persons so committed be considered state cases? Does Section 204.409, supersede Section

125.43, which places financial responsibility with the county of legal settlement?

Under Chapter 812, courts may order a person detained in a mental health institute. Some court orders also specify substance abuse treatment. Section 230.20 requires that we bill for the person's care by program. The billing for all programs except substance abuse is at 80% of cost. The substance abuse program is billed at 25% of the cost.

4. May a Court order substance abuse treatment when a person is ordered detained under Chapter 812? Under what conditions can substance abuse treatment be ordered?

   A District Court may also under Section 321.281 commit a person to a hospital for treatment.

5. When a person is ordered to a mental health institute under Chapter 812, is the county of legal settlement always billed 80%? Are there any circumstances when the billing would be at 25% under the substance abuse program?

6. Are District Courts free to commit persons charged with violating Section 321.281 to a mental health institute? Persons guilty of violating Section 321.281?

7. What is the financial responsibility of the state for persons committed to treatment at a mental health institute pursuant to Section 321.281? May these persons be considered state cases? What is the financial respon-

> sibility of the county of legal settlement? Does Section 321.281 supersede Section 125.43, which places financial responsibility with the county of legal settlement?

House File 2584, in pertinent parts, amends sections of the Iowa Code that provide options for the treatment of substance abusers, including ch. 125, the statute that provides a comprehensive legislative scheme for the treatment and rehabilitation of persons suffering from chemical dependence. Your specific questions about H.F. 2584 are answered as follows in the order presented.

> I. Are State Mental Health Institutes "Facilities" As That Term Is Used In H.F. 2584?

House File 2584 uses the term "facility" in several of its provisions. The relevant provisions are sections four and seven, which reads as follows:

> Sec. 4. Section one hundred twenty-five point forty-four (125.44), unnumbered paragraph one (1), Code 1979, is amended to read as follows:
>
> The director may, consistent with the comprehensive substance abuse program, enter into written agreements with a facility as defined in section 125.2 . . .
>
> . . . .
>
> Sec. 7. Section two hundred four point four hundred nine (204.409), subsection two (2), Code 1979, is amended to read as follows:
>
> 2. Whenever the court finds that a person who is charged with a violation of section 204.401 and who consents thereto, or who has entered a plea of guilty to or been found guilty of a violation of ~~said~~ that section, ~~and~~

> ~~who~~ is addicted to, dependent upon, or a chronic abuser of any controlled substance and that such person will be aided by proper medical treatment and rehabilitative services, it may order that ~~he~~ the person be committed as an in-patient or out-patient to a facility ~~approved~~ licensed by the state department of ~~health~~ substance abuse for ~~such~~ medical treatment and rehabilitative services . . . .

From the above two provisions it is clear that the term "facility" is defined in two different ways under H.F. 2584. Section 4 of H.F. 2584, which is now codified at § 125.44, The Code 1981, refers to a facility as it is defined by § 125.2, The Code 1981. We must therefore turn to § 125.2, The Code.

By an Act of the Sixty-Ninth General Assembly, 1981 Session, House File 821 (hereinafter H.F. 821), section 125.2 was amended as follows:

> Section 1. Section 125.2, subsection 2, Code 1981, is amended to read as follows:
>
> 2. "Facility" means ~~a hospital,~~ an institution, a detoxification center, or an installation providing care, maintenance and treatment for substance abusers ~~and~~ licensed by the department under section 125.13, hospitals licensed under chapter 135B, or the state mental health institutes designated by chapter 226.

It is clear from the new language of § 125.2 that state mental health institutes are to be included in the definition of facilities as contained in § 125.2. We must, therefore, advise that as of the effective date of H.F. 821 state mental health institutes will be facilities as defined by § 125.2, and therefore facilities for the purposes of § 4 of H.F. 2584, now codified as § 125.44, The Code 1981.

Pursuant to § 3.7, The Code 1981, H.F. 821, which was approved by the Governor on May 4, 1981, became effective

as of July 1, 1981. Therefore, state mental health institutes are § 125.2 facilities as of that date.

The same conclusion cannot be reached with respect to § 7 of H.F. 2584. That section, now codified as § 204.409(2), The Code 1981, is a statute that permits a court to place a person convicted of possessing a controlled substance on probation, and further permits the court to commit the person to a facility for treatment where the said person is "addicted to, dependent upon, or a chronic abuser of any controlled substance". The clear language of § 7 authorizes the court to commit the person "to a facility licensed by the state department of substance abuse". Unless a mental health facility has in fact been licensed by the department of substance abuse pursuant to ch. 125, The Code, it does not qualify as a "facility" for purposes of § 7 of H.F. 2584.[1]

II. Are District Courts Free To Commit Persons Guilty Of Violating § 204.401 To A Mental Health Institute?

As discussed in Division I of this opinion, persons convicted of violating § 204.401, The Code 1981, may be placed on probation and committed to a facility licensed by IDSA pursuant to § 204.409 as amended by § 7 of H.F. 2584. Since state mental health institutes (hereinafter MHI's) are not licensed by IDSA, courts are not authorized to commit violators of § 204.401 to such an institution, but instead are limited by the provisions of the statute. Iowa Department of Social Services v. Blair, 294 N.W.2d 567 (Iowa 1980).

III.(A) What Is The Financial Responsibility Of The State For Persons Committed To A Mental Health Institute For Substance Abuse Under § 204.409?

---

1. Although state mental health institutes generally are not licensed by the Iowa Department of Substance Abuse, Cherokee MHI's Substance Abuse Treatment Unit does operate pursuant to an IDSA license. This, however, was not issued to meet state statutory criteria, but rather was issued to permit Cherokee to meet federal statutory substance abuse treatment criteria. Nevertheless, the language of § 7 refers to a facility licensed by IDSA. Thus, Cherokee's Substance Abuse Treatment Unit stands as an exception to the conclusions stated in this opinion.

As discussed in Division II of this Opinion, there is no statutory authority for a court to commit a person to a state mental health institute pursuant to § 204.409, as amended by § 7 of H.F. 2584. Both the courts and mental health institutes are bound by legislative pronouncements in this regard. Iowa Department of Social Services v. Blair, 294 N.W.2d 567 (Iowa 1980). Accordingly, where statutory conditions are not met, the state incurs no liability for the costs of care and treatment of a substance abuser. Op.Att'yGen. # 79-10-12; 1975 Op.Att'yGen. 210, 211.

(B) What Is The County's Financial Responsibility For Persons Committed To A Mental Health Institute Under § 204.409?

Like our conclusion in Division 3(A) above, we reiterate that the district courts cannot impose the solution of committing a person to a MHI in violation of a statute. Blair. Therefore, the county will incur no liability where the statute is ignored. Op.Att'yGen. # 79-10-12; 1975 Op.Att'yGen. 210.

C. Can These Persons So Committed Be Considered State Cases?

Section 7 of H.F. 2584, as it amends § 204.409, reads in pertinent part as follows:

> A person committed under this subsection who is not possessed of sufficient income or estate to enable him or her to make payment of the costs of such treatment in whole or in part shall be considered a state patient and the costs of treatment shall be paid as provided in section one hundred twenty-five point forty-four (125.44) of the Code . . . (emphasis supplied)

State cases or state patients as defined by § 7 refers to those persons committed under § 7 who are incapable of

paying for the costs of their care at a § 7 "facility". As previously discussed in Division I of this Opinion, a § 7 "facility" is a facility licensed by IDSA. Consequently, a person "committed under this subsection" is a person committed to a facility licensed by IDSA. Such a person, if indigent, may be considered to be a state patient thereby imposing financial costs upon the state.

On the other hand, § 7 does not authorize a commitment to a MHI. Accordingly, any person committed to a MHI in contravention of § 7, now codified as § 204.409(2), The Code 1981, cannot be said to be committed under that section. They, therefore, cannot be considered state patients. Op.Att'yGen. # 79-10-12.

D. Does Section 204.409 Supersede Section 125.43, Which Places Financial Responsibility With The County Of A Patient's Legal Settlement?

Section 125.43, The Code 1981, provides that "Chapter 230 shall govern the determination of the costs and payment for treatment provided to a substance abuser in a mental health institute". As previously discussed, § 204.409, as amended by H.F. 2584, relates to the costs of care and treatment provided to a substance abuser at a facility licensed by IDSA. Since these two statues relate to different subjects, neither supplants the other. Where there are no conflicts in statutes and the terms are unambiguous, there is no room for construction. Hartman v. Merged Area VI Community College, 270 N.W.2d 822 (Iowa 1978); Iowa National Industrial Loan Company v. Iowa State Department of Revenue, 224 N.W.2d 437 (Iowa 1974). Accordingly, ch. 230 will continue to govern the costs of treatment provided to substance abusers at MHI's and § 204.409 will apply to facilities licensed by IDSA.

IV. May A Court Order Substance Abuse Treatment When A Person Is Ordered Detained Under Chapter 812, The Code 1981? Under What Conditions Can Substance Abuse Treatment Be Ordered?

Under ch. 812, a person charged with or convicted of a crime may be ordered committed to the custody of the Department of Social Services when in the opinion of the district court "it reasonably appears that the defendant is suffering from a mental disorder which prevents him or her from appreciating the charge, understanding the proceedings, or assisting effectively in the defense". § 812.3, The Code 1981. Such commitment may be for an evaluation and appropriate treatment. Statutory authority for this conclusion is found both in ch. 812 and § 229.20, The Code 1981. Section 229.20(2), as it affects this conclusion, reads as follows:

> When a proceeding under section 229.6 and succeeding sections of this chapter arises under sections 783.5 or 789.8, and the respondent through his attorney waives the hearing otherwise required by section 229.12, the court may immediately order the respondent placed in a hospital for a complete psychiatric evaluation and appropriate treatment, pursuant to section 229.13. . . . (emphasis added).

Clearly the langugage of § 229.20 authorizes the court to commit a person to a MHI for an evaluation and appropriate treatment when proceedings are commenced under §§ 783.5 or 789.8, The Code 1975. Both §§ 783.5 and 789.8 were repealed by the criminal law revision of 1976, ch. 1245, Laws of the Sixty-Sixth General Assembly, 1976 Session, and re-codified as present ch. 812 of the Code. Thus, the reference to §§ 783.5 and 789.8 in § 229.20 is effectively a reference to ch. 812. The result is that under § 229.20 a court is authorized to commit a person to a MHI for an evaluation and appropriate treatment when proceedings are commenced under ch. 812.

Appropriate treatment is dependent upon the nature of the mental incapacity. Mental incapacity may result from dependency on a chemical substance. Section 125.2(8), The Code 1981, defines a person "incapacitated by a chemical substance" as a person, who "as a result of the use of a chemical substance, is unconscious or has his or her judgment otherwise so impaired that he or she is incapable of realizing

and making a rational decision with respect to the need for treatment". A district court could reasonably conclude that such a person could not appreciate a criminal charge, understand court proceedings, or assist in his or her defense. Appropriate treatment, then, for such a person would include treatment for chemical dependency.

Accordingly, under ch. 812 a court may order a person committed to a MHI for substance abuse treatment when it reasonably appears that the defendant is suffering from a mental disorder which is inclusive of dependency on a chemical substance.

V. When A Person Is Ordered To A Mental Health Institute Under Chapter 812, The Code 1981, Is The County Of Legal Settlement Always Billed 80%? Are There Circumstances When The Billing Would Be At 25% Under The Substance Abuse Program?

The county of legal settlement is liable for the costs of a court ordered psychiatric evaluation of a criminal defendant at a state hospital. This conclusion was reached in a prior opinion issued by this office, Op.Att'yGen. # 79-5-24.

Billings are submitted to a county by the superintendent of a state hospital pursuant to § 230.20, The Code 1981. Section 230.20(5) mandates that "the county shall be billed for one hundred percent of the stated charge for each patient, unless otherwise specified in the current appropriation for support of the state hospitals". The current appropriation for MHI's is found in ch. 8, Laws of the Sixty-Eighth General Assembly, 1979 Session. Section Three (3) of that act states that the "state mental health institutes' daily per diem as determined pursuant to section two hundred thirty point twenty (230.20) of the Code shall be billed at eighty percent for each fiscal year". Thus, under § 230.20(5), as amended, counties must be billed for 80 percent of the costs of a psychiatric evaluation of a criminal defendant at a state hospital.

This conclusion, however, is limited to those ch. 812 commitments that are for the purpose of a psychiatric

evalution and diagnosis, and for the treatment of mental disorders not related to substance abuse. Commitments for treatment of mental disorders stemming from substance abuse must be billed at a different rate. The applicable Code provision is § 125.43, The Code 1981. That section reads, in pertinent part, as follows:

> 125.43 Funding at mental health institutes. Chapter 230 shall govern the determination of the costs and payment for treatment provided to substance abusers in a mental health institute under the department of social services, except that the charges shall not constitute a lien on any real estate owned by persons legally liable for support of the substance abusers and the daily per diem shall be billed at twenty-five percent. . . . (emphasis added)

Under § 125.43, treatment provided to a substance abuser in a MHI shall be billed at the rate of twenty-five percent of the total costs. On the surface, § 125.43 appears to conflict with § 230.20(5) as amended. However, related statutes are read in pari materia and the terms of a specific statute control over those of a general statute. Benger v. General United Group, Inc., 268 N.W.2d 630 (Iowa 1978); State ex rel Krupke v. Witowski, 256 N.W.2d 216 (Iowa 1977). Applying this rule of construction to the issue at hand, it becomes clear that § 125.43, a specific statute on the subject of the costs of treating a substance abuser at a MHI, prevails over § 230.20(5), as amended, a statute providing a general scheme for the billing of the costs of treating patients at a mental health institute. Consequently, where a criminal defendants is committed to a MHI under ch. 812 for appropriate treatment stemming from his/her dependence on a chemical substance, costs of the treatment provided must be billed to the counties at the rate of twenty-five percent.

Accordingly, we conclude that when a person is ordered committed to a MHI under ch. 812 for a psychiatric evaluation and/or appropriate treatment resulting from a mental disorder, billings to a county must be made at 80 percent of total

costs. In those isolated cases where the ch. 812 commitment is for appropriate treatment resulting from chemical dependency, billings to the counties must be made at twenty-five percent of the total costs.

VI. Are District Courts Free To Commit Persons Charged With Violating Section 321.281 To A Mental Health Institute? Persons Guilty Of Violating Section 321.283?

A. Section 321.281, The Code 1981, prohibits the operating of a motor vehicle upon the public highways while under the influence of an alcoholic beverage or a drug (OMVUI). The statute permits a court to suspend imposition of sentence on a person convicted of OMVUI and to commit the defendant "for treatment of alcoholism or drug addiction or dependency to any hospital or institution in Iowa providing such treatment".

House File 2584 amends § 321.281, but it does not change the above-quoted language. Thus, it remains clear that a court may commit a violator of § 321.281 to any institution in Iowa providing treatment for alcoholism or drug dependency, including a state mental health institute.

B. In addition to the power to commit a defendant for treatment of alcoholism or drug dependency under § 321.281, a court may refer the defendant for treatment under § 321.283(3), The Code 1981. However, under § 321.283(3), a "court may refer the defendant for treatment at a facility as defined in §§ 125.1 to 125.43 and designated by the division on alcoholism".

There are two significant distinctions between §§ 321.281 and 321.283(3). They are (1) the court's power under § 321.283(3) is limited to the power to refer the defendant for treatment, not commit, and (2) the court is limited to referring the defendant to a facility as defined by § 125.2, The Code 1981.

As discussed earlier, the definition of a facility under § 125.2 was amended to include MHI's by H.F. 821. H.F. 821 became effective July 1, 1981, and as of that date, courts are free to refer defendants to MHI's pursuant to § 321.283(3).

VII(A). What Is The Financial Responsibility Of The State For Persons Committed To Treatment At A Mental Health Institute Pursuant To Section 321.281, The Code 1981?

May These Persons Be Considered State Cases? What Is The Financial Responsibility Of The County Of Legal Settlement? Does § 321.281 Supersede § 125.43?

Section 321.281 was amended by H.F. 2584. Section 9 of H.F. 2584, in pertinent part, reads as follows:

> A person committed under this section who is not possessed of sufficient income or estate to enable him or her to make payment of the costs of such treatment in whole or in part shall be considered a state patient and the costs of treatment shall be paid as provided in section one hundred twenty-five point forty-four (125.44) of the Code. (emphasis supplied)

A clear reading of § 9 reveals that an indigent committed to a facility under § 321.281 shall be considered a state patient. The costs of treating such patient are to be paid pursuant to § 125.44. Section 125.44 was amended by § 4 of H.F. 2584. That section reads as follows:

> Sec. 4. Section one hundred twenty-five point forty-four (125.44), unnumbered paragraph one (1), Code 1979, is amended to read as follows:
>
> The director may, consistent with the comprehensive substance abuse program, enter into written agreements with a facility as defined in section 125.2 to pay for seventy-five percent of the cost of the care, maintenance and treatment of a substance abuser, except that the state's liability shall be one hundred

> percent of the total cost of care, maintenance and treatment when a substance abuser is a state patient. All payments for state patients shall be made in accordance with the limitations of this section. . . . (emphasis supplied)

Other relevant portions § 125.44 includes unnumbered paragraph two (2), which reads as follows:

> The contract may be in such form and contain provisions as agreed upon by the parties. Such contract shall provide that the facility shall admit and treat substance abusers regardless of where they have residence. If one payment for care, maintenance, and treatment is not made by the patient or those legally liable therefor within thirty days after discharge the payment shall be made by the department directly to the facility. Payments shall be made each month and shall be based upon the facility's average daily per patient charge. Provisions of this section shall not pertain to patients treated at the mental health institutes. (emphasis added)

An analysis of § 4 of H.F. 2584, as it amends § 125.44, purports to make clear that the state, through IDSA, is responsible for the total cost of care provided a state patient committed under § 321.281 to a facility as defined by § 125.2. As previously discussed, that definition now includes MHI's.

Although MHI's are facilities for purposes of § 125.2, we cannot conclude that the state is responsible for the total cost of care provided to substance abusers at MHI's. This conclusion is supported by unnumbered paragraph two of § 125.44, which states that the "[p]rovisions of this section shall not pertain to patients treated at the mental health institutes".

Consequently, since § 125.44 does not apply to MHI's, this issue must be resolved through other statutory authority. Said authority is found in § 125.43. As discussed in Division V of this Opinion, under § 125.43 as read in pari materia with § 230.20(5), the costs of treatment provided to a person at a MHI stemming from dependency on a chemical substance must be billed to the counties at the rate of twenty-five percent. We, therefore, conclude that the costs of providing treatment to a person committed to a MHI under § 321.281 must be billed to the counties at the rate of twenty-five percent.

Effectively, this conclusion states that persons committed to a MHI under § 321.281 may not be considered to be state patients. Under §§ 125.43 and 230.20(5), there is no authority for imposing one hundred percent financial liability upon the state. And, as already discussed, § 125.44 does not apply to persons committed to MHI's under § 321.281.

We conclude, then, that the state is liable for seventy-five percent of the costs of providing treatment to a person committed to a MHI under § 321.281, and the county of legal settlement is responsible for the remaining twenty-five percent of the costs.

In summary, we concude that as of July 1, 1981, state mental health institutes are facilities as defined by § 125.2, The Code 1981, as amended, and therefore facilities within the meaning of § 125.44, The Code 1981. State mental health institutes are not facilities within the meaning of § 204.409(2), The Code 1981. Courts are not authorized to commit violators of § 204.401, The Code 1981, to state mental health institutes as they are not facilities licensed by the Iowa Department of Substance Abuse. Neither the state nor counties will incur any liability for the costs of care and treatment provided to a substance abuser at a state mental health institute in contravention of § 204.409(2), The Code 1981. Persons committed to a state mental health institute in violation of § 204.409(2) may not be considered to be state patients. Chapter 230, The Code 1981 governs the costs of treatment provided to a substance abuser at a state mental health institute, and § 204.409(2), The Code 1981, governs the costs of providing treatment to a substance abuser under § 204.409(2) at a facility licensed by the Iowa Department of Substance Abuse.

A court may order a person committed to a state mental health institute for substance treatment under ch. 812 when it reasonably appears that the defendant is suffering from a mental disorder, which is inclusive of dependency on a chemical substance. Counties must be billed at the rate of eighty percent of the total costs of treatment provided to a person committed to a mental health institute under ch. 812 for a psychiatric evaluation and treatment of a mental disorder, but only at the rate of twenty-five percent of the total costs where the mental disorder results from substance abuse.

A court may commit a violator of § 321.281, The Code 1981, to any institution in Iowa providing treatment for alcoholism or drug dependency, including a state mental health institute. In addition, courts may refer a defendant to a state mental health institute under § 321.283(3), The Code 1981. The state is responsible for seventy-five percent of the costs of providing treatment to a person committed to a mental health institute under § 321.281, The Code 1981, and the county of legal settlement is responsible for the remaining twenty-five percent of the costs. Persons committed to a mental health institute under § 321.281 may not be considered to be a state patient.

Sincerely,

Thomas Mann, Jr.
Assistant Attorney General

TM/jam

MUNICIPALITIES: Conflict of Interest--§ 362.5, The Code 1981. In cities of less than ten thousand population, a city officer or employee may enter into a contract with the city if there was competitive bidding in writing, publicly invited and opened. The city does not have to accept the lowest bid. (Blumberg to Coleman, State Senator, 7/10/81) #81-7-9(L)

July 10, 1981

The Honorable Joseph C. Coleman
State Senator
L O C A L

Dear Senator Coleman:

You have requested an opinion regarding a possible conflict of interest in bidding on a city contract. Under your facts, certain city boards sought bids on insurance coverage. The mayor submitted a bid and was awarded it, even though his was not the lowest bid. The question is whether this constitutes a conflict.

Section 362.5, The Code 1981, provides that a city officer or employee shall not have an interest, direct or indirect, in any contract or job of work or the profits thereof or services to be furnished or performed for the city. Such a contract is void. There are ten listed exceptions to this general rule. Subsection four provides an exception for contracts made by a city of less than ten thousand population, upon competitive bid in writing, publicly invited and open. Thus, if the bid in question was based upon public, competitive and written bids, and the city in question is under ten thousand population, the contract would not be void. There would be no conflict of interest. Conversely, if the provisions of § 362.5(4) have not been met, then there is a conflict and the contract is void.

There is nothing in that section which requires that the lowest bid be accepted. However, when the lowest bid is not accepted, there must be a valid public policy reason for rejecting that bid. As an analogy, § 384.99, concerning open bidding on public improvements, merely provides that the governing body must award the contract to the lowest responsible bidder. This does not necessarily mean the lowest bidder. Similar language is used in § 23.18.

Accordingly, we are of the opinion that if the city in question is under ten thousand population, and the bids were publicly invited and opened, competitive and in writing, there is no conflict if a city officer or employee is awarded the bid. The city does not have to accept the lowest bid.

Very truly yours,

Larry M. Blumberg

LARRY M. BLUMBERG
Assistant Attorney General

LMB/kh

REAL PROPERTY; COUNTIES; MUNICIPALITIES: Subdivision platting. Chapter 409, §§ 409.30(3), 114.16, The Code 1981. Professional land surveyor's statement regarding post-recording monumentation binds both surveyor and proprietor. If proprietor prevents timely performance, surveyor may bring action for breach of contract, or may base defense on proprietor's conduct. (Ewald to Hanson, 7/9/81) #81-7-8(L)

July 9, 1981

Mr. Thomas D. Hanson
Counsel for the Iowa State Board of
Engineering Examiners
942 Insurance Exchange Building
Des Moines, Iowa 50309

Dear Mr. Hanson:

You have requested the Attorney General's opinion concerning the legal obligations of registered land surveyors under § 409.30(3), The Code 1981, concerning subdivision plats. You asked the following questions:

> 1. What is the legal obligation of a registered land surveyor under Section 409.30(3), The Code 1981, where the proprietor of subdivided land prevents him from timely establishing additional monuments after the surveyor has signed and recorded a statement that he would do so?
>
> 2. What action, if any, should a surveyor take under such circumstances?

Section 409.30(3) reads as follows:

> Monuments other than the permanent control monuments required in subsection 1 of this section shall not be required to be established before the recording of the plat or the conveyancing of lands by reference to the plat if the

> registered land surveyor includes in the surveyor's statement on the plat that the additional monuments required by this chapter or by any local ordinance shall be established before a date specified in the statement or within one year from the date the plat is signed by the registered land surveyor, whichever is earlier.

A central issue in the interpretation of § 409.30(3) is who the legislature intended to be bound by the statement that monuments would be established. Hartman v. Merged Area VI Community College, 270 N.W.2d 822 (Iowa 1978) (intent of legislature is polestar in construing statutes); Doe v. Ray, 251 N.W.2d 496 (Iowa 1976) (subject matter, effect, consequence, and the reason and spirit of a statute must be considered, as well as the words, in interpreting and construing meaning of statute). The candidates are the surveyor, the proprietor, or both.

To interpret the meaning of § 409.30(3), we should consider other provisions of Chapter 409 and the purposes of that statute. Matter of Blivens Estate, 236 N.W.2d 366 (Iowa 1975); State v. Johnson, 216 N.W.2d 335 (Iowa 1974).

Chapter 409 addresses itself primarily to the proprietor, spelling out his platting obligations attendant to subdividing land. See, e.g., § 409.1 (proprietor shall cause plat to be recorded); § 409.2 (proprietor's duty to record is covenant of warranty); § 409.11 (proprietor shall execute encumbrance bonds); § 409.18 (proprietor may vacate plat before sale). The statute also mentions the surveyor. Section 409.1 requires that the proprietor shall have a plat made by a registered land surveyor. The obvious intent is to compel the proprietor to employ a qualified person to survey and plat the land, so that an accurate plat will be recorded. The primary beneficiary of the § 409.30(3) platting is the proprietor, who, with the aid of the surveyor, is allowed to subdivide and convey land which he owns without prior monumentation. The legislature was also clearly relying on the professional status of the surveyor to protect both governmental and private interests.

The legislative intent of Chapter 409 is, in general, to impose certain statutory duties on proprietors who subdivide their land. The surveyor's primary role is to assist the proprietor in fulfilling certain technical aspects of the platting.

We conclude that in § 409.30(3) the legislature intended that the surveyor, in promising to complete monumentation by a date certain after recording, act as agent for the proprietor, in assisting the proprietor to accelerate the recording process for the primary benefit of the proprietor. Thus, the surveyor's promise would ordinarily bind the proprietor to complete monumentation. See First Joint Stock Land Bank of Chicago v. Diercks, 222 Iowa 524, 267 N.W. 708 (1936). However, we cannot overlook the fact that the legislature specifically named the surveyor in § 409.30(3), and required that he, as opposed to the proprietor, make and sign the monumentation statement. Had the legislature intended to bind only the proprietor to complete the monumentation, it could easily have required the proprietor to make and sign the statement on his own behalf. We thus further conclude that the legislature also intended to bind the surveyor.

In addition to the apparent legislative intent that the surveyor's § 409.30(3) statement bind the proprietor, it appears that in most actual cases the surveyor would have actual or implied authority to do so, based on general agency principles. In Dailey v. Holiday Distributing Corp., 260 Iowa 859, 151 N.W.2d 477 (1967) agency is defined as a fiduciary relationship which results from the manifestation of consent by one person, the principal, that another, the agent, shall act in the former's behalf and subject to his control. When the proprietor employs the surveyor to survey, plat, and set monuments, he manifests his consent that the surveyor act on his behalf, thereby making the surveyor his agent. This agency relationship may be created by express contract or by implication. Walnut Hills Farms, Inc. v. Farmers Coop Co. of Creston, 244 N.W.2d 778, 780-781 (Iowa 1976).

Under the provisions of Chapter 409, the surveyor may also be an independent contractor. See Hassebroch v. Weaver Const. Co., 246 Iowa 622, 67 N.W.2d 549 (1955) (independent contractor is one who possesses, by virtue of his contract, independence in manner and method of performing work contracted for); Tapager v. Birmingham, 75 F.Supp. 375 (D.C. Iowa 1948) (relation of independent contractor contemplates obtaining an agreed end, usually within a stipulated period); Schlotter v. Leudt, 255 Iowa 640, 123 N.W.2d 434 (1963) (factors differentiating independent contractor from employee include whether person is engaged in distinct business, whether work is usually done by specialist, skill required,

furnishing of tools and equipment, time limit of employment, method of payment, whether work is part of regular business of employer, which relationship parties believe they are creating, and whether the principal is or is not in business).

Depending on the circumstances, a person may be an independent contractor in one part of his duties and an agent in another. Birmingham v. Bartels, 157 F.2d 295, 303 (8th Cir. 1946), rev'd on other grounds 67 S.Ct. 1547, 332 U.S. 126, 91 L.Ed. 1947. The surveyor performing work pursuant to Chapter 409 may typically perform the bulk of his surveying activities as an independent contractor. However, when he promises the State to perform certain aspects of this work pursuant to § 409.30(3), he would typically be acting as agent for the proprietor and not as an independent contractor.

Of course, the principal incurs no liability for acts of the agent beyond the agent's authority. Grimsmore v. Consolidated Products Co., 232 Iowa 328, 5 N.W.2d 646, 651 (1942). Such authority includes both express and implied authority. Implied authority is actual authority, circumstantially proved, which the principal intended the agent to possess. Id. The extent of the agent's authority is usually to be ascertained by fair implications, from relations of the parties, the nature of the business or agency, the service to be rendered, the purpose of the transaction to be consummated, and other surrounding circumstances. Id. at 652. It is a question of fact. Mayrath Company v. Helgeson, 258 Iowa 543, 139 N.W.2d 303, 305 (Iowa 1966).

An agent's act falls within the implied authority of his principal when it is done in endeavoring to promote the principal's business and is of such a nature as is usually, reasonably, properly and necessarily incidental to duties and purposes of the agency, even though such acts may not be among those specifically authorized by the agency agreement. Grimsmore v. Consolidated Products Co., 232 Iowa 328, 5 N.W.2d 646, 652 (1942).

Applying these principles here, it would appear that the surveyor has at least implied authority to bind the proprietor by agreeing to complete monumentation after recording. The surveyor's statement is made to promote the proprietor's real estate business; it is usually, reasonably, properly, necessarily, and statutorily incidental to the purpose of the agency, which is to aid the proprietor in

making his real property marketable. Thus, the professional surveyor's statement under 409.30(3) would ordinarily have the effect of legally binding the proprietor to timely complete monumentation.

Our conclusion that the surveyor simultaneously binds himself is based primarily on considerations of legislative intent and statutory construction, discussed above. The fact that the surveyor may be the proprietor's agent does not necessarily preclude this conclusion. See Sultzer v. Lutz, 184 Iowa 1031, 169 N.W. 341 (1918); Emmert v. Jelsma & Holdebrand, 191 Iowa 424, 182 N.W. 652 (1921); Wheeler Lumber Bridge & Supply Co. v. Anderson, 249 Iowa 689, 86 N.W.2d 912 (1958) (although agency is known, principal disclosed, and authority adequate, an agent may, by express promise or undertaking, or by implication from words or conduct, personally obligate himself to a third person with reference to a matter he is handling for his principal).

We also assume that there exists some contractual relationship between the proprietor and the surveyor that the surveyor, for a fee, perform the monumentation required by Chapter 409. Thus, in addition to being obligated to the State by virtue of the § 409.30(3) statement, the surveyor will typically be contractually obligated to the proprietor to complete monumentation. Given this contractual relationship, your letter raises the question as to the surveyor's position when the proprietor "prevents" performance. You mention that such prevention could occur in several forms. For example, the proprietor may direct the surveyor to delay monumentation beyond the time limit, direct him not to complete it at all, or terminate his services prior to completion. Many other types or degrees of prevention or hindrance are conceivable. You also mention that the proprietor's acts of prevention may result from adverse economic conditions.

If the surveyor cannot perform his contractual duties due to the proprietor's obstruction or hindrance, he may seek action against the proprietor for breach of contract. Kaltoff v. Nielsen, 252 Iowa 249, 106 N.W.2d 597, 602 (1960) (in all contracts there is implied term that person for whom work is contracted will not obstruct, hinder, or delay the contractor in his performance); Hardin v. Eska Co., 256 Iowa 371, 127 N.W.2d 595, 598 (1964) (one party to a contract may not hamper the efforts of the other to perform); see also 17A C.J.S. Contracts § 468 at 643 (contractor shall be given

such possession of the premises as will enable him to adequately carry on and complete the work).

Alternatively, the surveyor may opt not to initiate any legal action, but to risk being named as party defendant in an action brought by some party to enforce § 409.30(3). If such an action were brought, the surveyor could implead, counterclaim, or cross-claim against the proprietor, or otherwise base his defense on the conduct of the proprietor, or raise other defenses. If the surveyor elects this more defensive approach, he should, at a minimum, document well both the proprietor's acts of hindrance or prevention and his own readiness, ability, and willingness to timely perform his contractual and statutory obligations.

Depending on the circumstances, the surveyor may raise the defense of legal impossibility. See Salinger v. General Exchange Ins. Corp., 217 Iowa 560, 250 N.W. 13, 15 (1933). In many cases, however, there may be an issue as to whether the acts of the proprietor give rise to a legal impossibility of performance.

In Nora Springs Co-op Co. v. Brandau, 247 N.W.2d 744, 747 (Iowa 1976), the Iowa Supreme Court held:

> The doctrine of impossibility of performance is recognized in Iowa as an excuse for nonperformance generally where that which has been promised becomes objectively impossible to perform due to no fault of the nonperforming party. However, ordinarily a contingency which reasonably may have been anticipated must be provided for by the terms of the contract, or else the impossibility of performance resulting therefrom does not operate as an excuse. [Citations omitted] Where the impossibility is only temporary, the promisor's duty is only suspended while the impossibility continues. [Citations omitted] [Emphasis in original.]

We offer no opinion as to whether the specific acts of prevention which you mention would render performance of monumentation objectively impossible, although we suspect that there are circumstances in which they might. On the other hand, at least some of the forms of prevention which you mention may reasonably have been anticipated and provided

for by terms of the contract between the proprietor and the surveyor, thereby rendering them ineffective to excuse performance. The prudent surveyor will therefore expressly provide for foreseeable contingencies, either in his contract with the proprietor, or as a condition precedent to signing the § 409.30(3) statement. However, it must be kept in mind that the surveyor has not only a contractual duty but also a statutory duty to the public.

Section 114.16 governing professional engineers and land surveyors, provides that "no registrant shall place his signature or seal on any engineering document or land surveying document unless he was in responsible charge of the work, . . ." We do not construe this language to mean that in signing a § 409.30(3) statement the surveyor assumes exclusive responsibility for completing the monumentation, regardless of the nature of his relationship with the proprietor. Rather, the purpose of § 114.16 is clearly to prevent the registered land surveyor from fraudulently delegating work to unlicensed persons.

A long-term solution to the problem which you describe would be, of course, to legislatively amend § 409.30(3) to specifically spell out the respective responsibilities of the parties with respect to post-recording monumentation, with sanctions or penalties for noncompliance. If the provision is subject to undue abuse by those whom it is intended to benefit, then perhaps the legislature should consider repealing the post-recording monumentation privilege altogether.

CONCLUSION

The legislature apparently intended that § 409.30(3) bind both the proprietor and the surveyor to timely complete monumentation. The surveyor will typically also be contractually obligated to the proprietor to do so.

However, if the proprietor prevents the surveyor from timely completing monumentation, the surveyor may sue the proprietor for breach of contract, or may raise the proprietor's acts of prevention as a defense in any action brought to enforce § 409.30(3).

Whether the proprietor's specific acts of prevention are sufficient to excuse the surveyor's performance will depend on the circumstances of each case.

Perhaps § 409.30(3) should be amended or repealed.

Yours truly,

Robert P. Ewald

ROBERT P. EWALD
Assistant Attorney General

RPE:rcp

CONSTITUTIONAL LAW: Comptroller; State Debts; Article VII, Section 2, Constitution of Iowa. Article VII, §2 applies only where the state actually borrows money from a third party in order to meet obligations of government. Debts contracted in violation of the constitutional limitations are generally not enforceable. Appel to Chiodo, State Representative, 7/7/81 #81-7-6(L)

July 7, 1981

Honorable Ned F. Chiodo
State Representative
3410 S. W. 12th Place
Des Moines, Iowa 50315

Dear Representative Chiodo:

We are in receipt of your request for an opinion with respect to the meaning and scope of Article VII, § 2 of the Iowa Constitution. This provision states:

> The State may contract debts to supply casual deficits or failures in revenues, or to meet expenses not otherwise provided for; but the aggregate amount of such debts, direct and contingent, whether contracted by virtue of one or more acts of the General Assembly, or at different periods of time, shall never exceed the sum of two hundred and fifty thousand dollars; and the money arising from the creation of such debts, shall be applied for the purpose for which it was obtained, or to repay the debts so contracted, and to no other purpose whatever. [Emphasis added].

You first ask whether Article VII, § 2 is implicated if the state fails to pay suppliers of goods and services in a timely fashion and, as a result, is charged interest on the outstanding amount owed. No Iowa case has been found addressing this issue. Generally speaking, cases involving

Iowa's constitutional debt limitations have involved the sale of bonds or certificates of indebtedness. Hubbell v. Herring, 249 N.W. 430 (Iowa 1933); Rowley v. Clarke, 114 N.W. 908 (Iowa 1913).

The Supreme Court of the State of Washington, however, has considered the question of whether failure of the state to pay millions of dollars in outstanding warrants violated the state's $400,000 debt limitation. State ex rel. Troy v. Yelle, 217 P.2d 337 (Washington 1950). In Troy, the Court concluded that failure to pay the outstanding warrants did not violate the provision. In essence, the Court held that the constitutional debt limitation applied only to bonded indebtedness where money had actually been borrowed by the state and evidenced by some kind of certificate of indebtedness. The Troy Court rejected the argument that the drawing of a warrant for goods or services rendered was tantamount to contracting a debt under the constitutional provision.

The Iowa Supreme Court, of course, would not be bound to follow a Washington state decision. However, the vast majority of cases construing similar debt provisions in other state constitutions have involved instances where money is actually borrowed from third parties to pay for various projects and where the obligations are memorized in the form of bonds or other legal instruments. Thus, if the Iowa Court applied the debt requirement to unpaid current bills, it would be breaking new ground.

Although the question is not entirely free from doubt, we think it likely that the Iowa Court would interpret our state constitution in a fashion similar to the gloss adopted by the Troy Court. The constitutional provision states that "The State may contract debts to supply casual deficits or failures in revenues . . .". Linguistically, the existence of a casual deficit or a failure in revenue is not a state debt in itself, but the condition precedent that allows the state to contract debts. In other words, if the state is unable to pay for goods and services, it is authorized to borrow money -- contract a debt -- to meet the obligations, but the mere existence of unpaid creditors is not a debt within the terms of the constitutional provision. Such an interpretation is supported by the concluding admonition in Article VII, § 2, which states that "money arising from the creation of such debts" shall be applied for the purpose for which it was obtained. The constitutional framers apparently believed that contracting a debt raises money that the state did not otherwise have that could be applied to a given purpose. The mere inability to pay bills in a timely fashion, however, does not raise or create any money.

Given the existing precedent, though sparase, and the words of the constitutional provision itself, we think it likely that Iowa courts would hold that the failure to pay bills in a timely fashion does not implicate Article VII, § 2.

Your second question is whether debts contracted in violation of the constitutional provision remain valid. As a general rule, it appears that debts are not enforceable to the extent they exceed constitutional limitations. Duff v. Jordan, 311 P.2d 829 (Ariz. 1963). Moreover, the majority rule seems to be that a disappointed vendor cannot generally recover its consideration or the fair market value of the goods and services rendered on a quantum meruit or unjust enrichment theory where limitations on indebtedness are violated. See Perry Water, Light and Ice Co. v. Perry, 120 P. 582 (Okla. 1911). Annotation, 93 A.L.R. 441, 452.

Very truly yours,

BRENT R. APPEL
First Assistant Attorney General

BA:s

CONSTITUTIONAL LAW: Comptroller; State Debts; Article VII, Section 2, Constitution of Iowa. Article VII, §2 applies only where the state actually borrows money from a third party in order to meet obligations of government. Debts contracted in violation of the constitutional limitations are generally not enforceable. Appel to Chiodo, State Representative, 7/7/81 #81-7-6(L)

July 7, 1981

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State Representative
3410 S. W. 12th Place
Des Moines, Iowa 50315

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Very truly yours,

BRENT R. APPEL
First Assistant Attorney General

STATE OFFICERS AND DEPARTMENTS: Commission for the Blind; §601D.3, The Code. The Commission's policy excluding guide dogs from orientation centers does not contravene §601D.3 or §601D.4, The Code. Appel to Hall, State Representative, 7/7/81. #81-7-5(L)

July 7, 1981

Honorable Hurley W. Hall
State Representative
2865 McGowan Blvd.
Marion, Iowa 52302

Dear Representative Hall:

We are in receipt of your opinion request concerning the question of whether the Commission for the Blind's policy of excluding guide dogs from orientation sessions at adjustment centers violates § 601D.4, The Code 1981, which states, in relevant part:

> Every blind person shall have the right to be accompanied by a guide dog, under control and especially trained for the purpose, in any of the places listed in sections 601D.3 . . .

Section 601D.3, The Code 1981, provides that the blind shall "have . . . full and free use" of "public buildings, public facilities, and other public places."

In our view, the Commission's policy does not contravene § 601D.3. That provision is designed to insure that the blind using guide dogs have nondiscriminatory access to all public buildings to conduct business of a nature similar to that transacted by members of the public generally. The Commission's rule does not limit such access; rather, it represents the Commission's policy that students participating in the Commission's training program shall not have the assistance of guide dogs. The policy thus establishes a condition on participation in a benefit program rather than limiting access to a public building.

We, of course, take no view with respect to the wisdom of this policy. That is a question that the Legislature has left in the sound discretion of the Commission, see § 601B.6(9), The Code 1981.

Very truly yours,

BRENT R. APPEL
First Assistant Attorney General

BA:s

OPEN MEETINGS ACT: School Board. Sections 13.2(4), 20.17, 28A.2, 28A.3, 28A.4, 28A.5, 28A.6, 279.15, The Code 1981. A school board must comply with the public notice procedures contained in § 28A.4 of the Open Meetings Act when holding any meeting as defined in § 28A.2(2) of the Act. Generally, such a meeting occurs whenever a majority of the members of a school board gathers to deliberate or act upon any matter within the scope of the board's policymaking duties. The Public Employment Relations Act contained in Chapter 20 of the Code, however, exempts negotiating sessions and strategy meetings of public employers or employee organizations from the provisions of the Open Meetings Act. Accordingly, when conducting a negotiating session or strategy meeting under the Public Employment Relations Act, a school board does not hold a meeting which would necessitate compliance with the procedural requirements, including public notice, of the Open Meetings Act. A school board committee created under § 28A.2(1)(c) must comply with the public notice requirements of the Open Meetings Act except when holding meetings pursuant to § 28A.4(3). Procedures for teacher termination hearings are governed by §§ 279.15 through 279.19 of the Code and do not require prior notification to the media.

In order for a school board to conduct a closed session during a meeting, the requirements of § 28A.5(2) must be followed. These mandate that a specific reason for holding the closed session, as set forth in § 28A.5(1), must be announced publicly in open session and entered in the minutes. Discussion during a closed session of a school board must relate directly to the specific reason announced as justification for the session. (Stork to O'Kane, State Representative, 7/6/81) 81-7-4 (L)

Department of Justice

THOMAS J. MILLER
ATTORNEY GENERAL

ADDRESS REPLY TO:
HOOVER BUILDING
DES MOINES, IOWA 50319

Mr. James D. O'Kane
State Representative
1815 Rebecca Street
Sioux City, Iowa 51103

Sioux City Community School District
c/o Mr. Marvin J. Klass
Attorney for the District
KLASS, WHICHER & MISHNE
830 Frances Building
Sioux City, Iowa 51101

Dear Sirs:

You have both requested an opinion of this office concerning possible violations of Iowa's Open Meetings Act by members of the Sioux City Board of Education with respect to meetings conducted by the Board between September 23, 1980, and March 18, 1981. Representative O'Kane indicates that his request is based upon the concerns of Mr. Milo Colton, a member of the Board who has suggested that the Board has not consistently complied with the Open Meetings Act. Your joint correspondence contains some conflicting versions of the Board's meetings and procedures during the period of time mentioned. We do, however, believe that following recitation of facts sufficiently and accurately reflects the disagreements pursuant to which you desire an opinion:

1. On September 23, 1980, the Sioux City Board of Education met in closed session for the purpose of discussing collective bargaining strategy with the Sioux City Education Association.

During this session, the Board allegedly discussed matters other than the purpose for which the meeting was closed. These other matters included possible school closings.

2. On January 31, 1981, the Sioux City Board of Education met for the purpose of discussing strategy in collective bargaining, particularly concerning fact-finding and mediation held pursuant to bargaining negotiations. At this time, legal counsel did advise the Board that compliance with the procedures of the Open Meetings Act was unnecessary because strategy meetings of public employers were exempted from the Act by another statute. In the course of the Board's discussion of the collective bargaining agreement, some mention was made of reducing staff and closing buildings as a means of financing the agreement. Your correspondence is in conflict regarding the extent of the discussion on these matters as well as whether the public had been notified of the meeting. At this meeting, the Board apparently did authorize counsel for the school district to proceed with the terms of the agreement proposed by the fact finder in the collective bargaining negotiations. Subsequently, the Board approved the collective bargaining agreement pursuant to notice and meeting in open session under the Open Meetings Act.

3. On March 18, 1981, the members of the Board attended a presentation given by a team of the North Central Association of Colleges and Secondary Schools concerning its evaluation of school operations at West High School in Sioux City. Board members participated in a discussion of the results of the team's evaluation. Board members apparently did not consider this presentation to be a meeting and therefore did not comply with the procedural requirements, including notice, of Chapter 28A. Following the presentation, five members of the Board joined with one of

the evaluators in a group. This group engaged in a general discussion regarding the evaluations, possible modifications of the regular form used by the Board in establishing its agenda, and a proposal by one of the Board members of the group to create a committee for the purpose of investigating "lay-offs" of administrative personnel. At this point, one Board member of the group, after indicating that the conversation appeared to involve matters included within the Open Meetings Act, left the group.

4. According to Representative O'Kane's correspondence, the Board has conducted other meetings, including teacher termination hearings in March 1981, without providing public notice of such meetings pursuant to the Open Meetings Act.

In light of the facts described above, Representative O'Kane requests an opinion on the following matters:

1. Do any of the meetings indicated above violate either the letter or the spirit of the Open Meetings Law?

2. Can a majority of the School Board's membership meet together and discuss, deliberate or take action regarding matters affecting the school district without notifying the public or the press about the meetings? (See items 2 and 3 above)

3. Can the School Board hold executive sessions without specifying the parameters of such sessions in a public meeting?

4. If an executive session is held for one purpose (such as to discuss collective bargaining strategy), can other subjects be discussed (such as school closings or teacher lay-offs)? Dr. Colton has expressed a concern that, when in executive session, if the Board

asks "How can we finance the subject under consideration?", the Board has a blank check to discuss virtually any subject related to the school district in executive session, or at least there is the danger that the Board perceives it may have such a blank check.

5. If School Board committee meetings are held, are the public and press entitled to notification of such meetings?

6. In the event of teacher termination hearings, are members of the press entitled to formal notification of such meetings?

On behalf of the Board, Mr. Klass requests an opinion as to whether the Board's meetings on January 31, 1981, and March 18, 1981, involved any violation of the Open Meetings Law.

I.

Whether the meetings of the Sioux City Board of Education on September 23, 1980, January 31, 1981, and March 18, 1981, violated the Iowa Open Meetings Law.

The office of the Attorney General has the statutory duty to give written opinions upon questions of law submitted by either members of the General Assembly or other state officers. § 13.2(4), The Code 1981. No similar duty or authority permits the office to function as an arbiter of factual disputes concerning implementation of state statutes, including the Open Meetings Act. The means of resolving a factual dispute arising under the Act is clearly set forth in § 28A.6 and requires a judicial enforcement proceeding. Such a proceeding must be brought in the district court for the county in which the governmental body in question has its principal place of business. § 28A.6(1).

The issue of whether the Sioux City Board of Education has violated the Iowa Open Meetings Law by act or omission on September 23, 1980, January 31, 1981, or March 18, 1981, essentially involves questions of fact with respect to the Board's implementation of the law on specific occasions. As

noted above, your correspondence indicates basic disagreements with respect to precisely what occurred on these occasions.

In any event, a court, rather than this office, must make the determination as to whether the Board committed violations of the Chapter on the occasions mentioned. § 28A.6. Pursuant to § 13.2(4), however, we will respond to the questions of law raised in your correspondence.

II.

May a majority of the members of a school board meet and discuss, deliberate or act on matters affecting the school district without providing notice to the public or the press.

Section 28A.3 states that "Meetings of governmental bodies shall be preceded by public notice as provided in section 28A.4 and shall be held in open session unless closed sessions are expressly permitted by law." Section 28A.4 provides in relevant part:

> 1. A governmental body, except township trustees, shall give notice of the time, date, and place of each meeting, and its tentative agenda, in a manner reasonably calculated to apprise the public of that information. Reasonable notice shall include advising the news media who have filed a request for notice with the governmental body and posting the notice on a bulletin board or other prominent place which is easily accessible to the public and clearly designated for that purpose at the principal office of the body holding the meeting, or if no such office exists, at the building in which the meeting is to be held.
>
> 2. Notice conforming with all of the requirements of subsection 1 of this section shall be given at least twenty-four hours prior to the commencement of any meeting of a governmental body unless for good cause such notice is impossible or impractical, in which

> case as much notice as is reasonably possible shall be given. Each meeting shall be held at a place reasonably accessible to the public, and at a time reasonably convenient to the public, unless for good cause such a place or time is impossible or impractical. Special access to the meeting may be granted to handicapped or disabled individuals.
>
> When it is necessary to hold a meeting on less than twenty-four hours notice, or at a place that is not reasonably accessible to the public, or at a time that is not reasonably convenient to the public, the nature of the good cause justifying that departure from the oral requirements shall be stated in the minutes.

Subsection (2) above makes clear that the notification procedures of subsection (1) are not mere formalities but, rather, are requirements that must be complied with prior to each meeting of a governmental body. If, for good cause, such compliance is impossible or impractical, the body must give as much notice as is reasonably possible.

A school board is plainly a governmental body under the Act. See § 28A.2(1)(b). The question of when a board conducts a meeting, and thereby necessitates compliance with the notice requirements of § 28A.4, must be examined in light of the definition contained in § 28A.2(2):

> 2. "Meeting" means a gathering in person or by electronic means, formal or informal, of a majority of the members of a governmental body where there is deliberation or action upon any matter within the scope of the governmental body's policy-making duties. Meetings shall not include a gathering of members of a governmental body for purely ministerial or social purposes when there is no discussion of policy or no intent to avoid the purposes of this chapter.

The definition of "meeting" is confined to the first sentence of § 28A.2(2). Four essential elements are apparent in this sentence. First, there must be "a gathering", which

has broad application due to the fact that it may be formal as well as informal and may be by electronic means (e.g. telephone) as well as in person. Accordingly, the occurrence of a meeting does not depend upon any particular formalities that normally would be employed by the members of a governmental body in holding, for example, a regularly-scheduled monthly meeting. Second, the gathering must involve a "majority of the members" of the governmental body. Third, the majority of members must gather for the purpose of "deliberation or action". Neither of these terms is defined in Chapter 28A. Consequently, they should be construed according to their context and approved usage. § 4.1(2), The Code 1981. Prior opinions of this office have made these constructions. Regarding "deliberation", Op.Att'yGen. #79-5-14 stated:

> The term "deliberation" is defined by Webster as "a discussion and consideration by a group of persons of the reasons for and against a measure." In Accardi v. Mayor & Council of City of No. Wildwood, 386 A.2d 416 (N.J. 1976), the New Jersey Court, when called upon to determine the meaning of the term "deliberations" in that state's sunshine law, explained that it "includes the discussion and evaluation" of the facts giving rise to a body's decision. We also note here, that § 28A.1 announces an assurance to the public that the "basis and rationale of governmental decisions" will be subject to public examination . . . [Accordingly], the term "deliberation" includes the discussion and evaluative processes of such bodies in arriving at an eventual decision or policy. In contrast to the exempted "ministerial" duties of a body, the types of duties thus covered by these terms are those involving an exercise of discretion or judgment as to the propriety of an act performed by the body.

The term "action" is defined by Webster's New Collegiate Dictionary as "the bringing about of an alteration by force or through a natural agency" and, in connection with its synonym "deed", has a shared meaning of "something done or affected". See Op.Att'yGen. #81-2-13(L), which also explained the effect of these definitions:

> These definitions indicate that the terms "deliberation" and "action" are intended both to have broad application and to include general discussion and/or consideration of matters preliminary to final decision-making. Provisions in Chapter 28A support this observation. Section 28A.2(2) does not require, as a condition for a "meeting", that deliberation or action by a governmental body on a matter within its policy-making duties be either formal or final in any respect. Section 28A.1, however, does declare that the Chapter seeks to assure "that the basis and rationale of governmental decisions, as well as those decisions themselves" are easily accessible to the public. (emphasis added). Moreover, ambiguity in the construction or application of the Chapter is to be resolved in favor of openness. Id.

The fourth essential element for a "meeting" to occur requires that a governmental body's deliberation or action concern a matter that is "within the scope of the governmental body's policy-making duties." The term "policy" is defined by Webster as follows:

> "2a: a definite course or method of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions; b: a high-level overall plan embracing the general goals and acceptable procedures esp. of a governmental body."

See Op.Att'yGen. #79-5-14. In contrast to the exempted "ministerial" duties of a governmental body as set forth in the second sentence of § 28A.2(2), policymaking duties involve an exercise of discretion or judgment as to the propriety of an act to be performed by the body. Id. Such duties include, for instance, the exercise of discretion by a school board with respect to its statutory responsibilities for hiring and compensating personnel and locating schoolhouse sites. See chs. 279 and 297, The Code 1981.

The second sentence of § 28A.2(2) indicates the limited circumstances in which a meeting does not occur, i.e., when members of a governmental body gather for "purely ministerial or social purposes when there is no discussion of policy or no intent to avoid the purposes of [Chapter 28A]." Purely ministerial purposes refers only to acts performed by a school board which do not involve an exercise of discretion or judgment on the part of its members. Op.Att'yGen. #79-5-14. Social purposes includes those gatherings of a purely non-business nature. Id. In any event, such gatherings may not engage in discussions related to the board's policymaking duties and may not be held for the purpose of avoiding compliance with the procedures of Chapter 28A.

The applicability of the "ministerial exception" in § 28A.2(2) is raised by your inquiry concerning the March 18, 1981, presentation by a team of the North Central Association of Colleges and Secondary Schools with respect to its evaluation of school operations at West High School. See pp. 2-3, supra. We cannot, as indicated previously, render a factual decision as to whether any part of the March 18 proceedings constituted a violation of Chapter 28A. An earlier opinion of this office did, however, provide some explanation regarding the legal significance of the exception contained in § 28A.2(2):

> We are first guided by the definition of "ministerial act" found in Arrow Express Forwarding Co. v. Iowa State Commerce Comm., 256 Iowa 1088, 130 N.W.2d 451 (1964):
>
> > "A ministerial act has been defined as 'one which a person or board performs upon a given state or facts, in a prescribed manner, in observance of the mandate of legal authority and without regard to or the exercise of his own judgment upon the propriety of the act being done.'"
>
> And see, Gibson v. Winterset Community School Dist., 258 Iowa 440, 138 N.W.2d 112 (1966); 27 Words and Phrases, Ministerial Act, p. 374 (1961). It is apparent that the linchpin of the definition is whether the individual must "exercise . . . judgment

> upon the propriety of the act being done." Thus, as applied in the § 28A.2(2) exemption, only those acts performed by a governmental body which do not involve an exercise of discretion or judgment are specifically excluded from coverage of the open meeting laws.

Op.Att'yGen. #79-5-14. Pursuant to this explanation, it appears that gathering for "purely ministerial" purposes may include a situation in which members of a governmental body gather simply to receive information upon a matter within the scope of the body's policymaking duties. During the course of such a gathering, individual members may, by asking questions, elicit clarification about the information presented. We emphasize, however, that the nature of any such gathering may change if either "deliberation" or "action", as defined above, occurs. A "meeting" may develop, for example, if a majority of the members of a body engage in any discussion that focuses at all concretely upon matters over which they may exercise judgment or discretion.

All four of the elements set forth in the first sentence of § 28A.2(2) must be present in a particular situation for a meeting to occur. Hence a gathering of the majority of the members of a school board that results in either action or deliberation upon matters related to policy, as defined above, does constitute a meeting. Accordingly, compliance with the notice provisions of § 28A.4 would be necessary prior to the meeting.

Your correspondence raises the issue of whether negotiating sessions and strategy meetings of a school board are governed by the Open Meetings Act. Such sessions and meetings generally would appear to involve deliberation or action upon matters within the scope of a school board's policymaking duties and, therefore, would require compliance with the procedures, including public notice, of Chapter 28A. See §§ 28A.3, 28A.4. The Public Employment Relations Act contained in Chapter 20 of the Iowa Code, however, provides:

> Negotiating sessions, strategy meetings of public employers or employee organizations, mediation and the deliberative process of arbitrators shall be exempt from the provisions of chapter 28A. However, the employee organi-

> zation shall present its initial bargaining position to the public employer at the first bargaining session. The public employer shall present its initial bargaining position to the employee organization at the second bargaining session, which shall be held no later than two weeks following the first bargaining session. Both sessions shall be open to the public and subject to the provisions of chapter 28A. Hearings conducted by arbitrators shall be open to the public.

§ 20.17(3). Subject to the express exceptions in the last four sentences of this section, the negotiating sessions and strategy meetings of a school board, as a public employer, are completely exempted from the Open Meetings Act.[1] See Burlington Community School District v. P.E.R.B., 268 N.W.2d 517, 524 (Iowa 1978). In effect, this exemption means that a negotiating session or strategy session conducted by a school board according to the first sentence of § 20.17(3) does not constitute a meeting under the definition of § 28A.2(2). Accordingly, a school board is not required to precede such sessions or meetings with public notice as required by § 28A.4. The right of the public to be informed concerning decisions reached in the collective bargaining process is protected by § 20.17(4), which provides that the terms of a collective bargaining agreement must be made public. 268 N.W.2d at 524.

Section 20.17(3) does not delineate the scope of discussion permitted at either a negotiating session or a strategy meeting. As evidenced by the discussion of the Sioux City Board of Education on January 31, 1981, application of the statute may result in some confusion and

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[1] Two observations should be noted with respect to negotiating sessions. First, the exemption in § 20.17(3) applies only to sessions between a public employer, e.g., a school board, and a certified employee organization, since certification is a condition precedent to coverage in the negotiations process under Chapter 20. See §§ 20.13-20.16; Op.Att'yGen. #79-5-19. Second, such negotiating sessions may be opened to the public only if both the employer and employee organization agree to open sessions. Burlington Community School District v. P.E.R.B., 268 N.W.2d 517, 524 (Iowa 1978).

disagreement regarding the matters appropriate for discussion. Nevertheless, § 20.17(3) expresses a legislative recognition of the need for a reasonable amount of flexibility and discretion during a negotiating session or strategy meeting. During a strategy meeting, for example, a school board may need to explore the general fiscal implications and/or consequences of a proposed collective bargaining agreement in order to make a knowledgable decision on whether to approve the agreement. Such matters that are closely related to overall strategy in the collective bargaining process appear to be included within the exemption set forth in § 20.17(3). In our view, however, the exemption does not extend to deliberation or action upon particular policymaking duties, such as the necessity for termination of a specific teacher or closing of a specific school. Such matters are properly discussed within the parameters of Chapter 28A.

III.

May a school board hold an executive (closed) session without specifying, in open session, the parameters of the session.

Section 28A.5 of the Open Meetings Act contains the requirements for holding a closed, or executive, session of a governmental body. Such a session may be held "only to the extent a closed session is necessary" for any of ten specific reasons set forth in § 28A.5(1). Section 28A.5(2) further provides as follows:

> The vote of each member on the question of holding the closed session and the reason for holding the closed session by reference to a specific exemption under this section shall be announced publicly at the open session and entered in the minutes. A governmental body shall not discuss any business during a closed session which does not directly relate to the specific reason announced as justification for the closed session.

Pursuant to the express language of this subsection, a school board clearly must announce, in open session, the precise reason for entering into a closed session. Furthermore, the discussion during the closed session may not extend beyond the parameters of the reason given for holding the session.

IV.

If an executive (closed) session is held for one purpose, may other subjects also be discussed during the course of that session.

The express language of § 28A.5(2), as set forth in Division III above, resolves this question. A school board may not discuss any business during a closed session which does not relate directly to the specific reason announced as justification for the session. Hence if the board is conducting a closed session under subsection (i) with respect to the discharge of a particular teacher, it does not have authority to engage in a general discussion of the qualifications of other teachers or the need for discharge of a school administrator.

V.

If school board committee meetings are held, are the public and press entitled to notification of the meetings.

The question of whether a committee of a school board must comply with the public notice requirements of § 28A.4 in order to hold a meeting depends initially upon whether the committee is a "governmental body" as defined in § 28A.2(1):

> 1. "Governmental body" means:
>
> a. A board, council, commission or other governing body expressly created by the statutes of this state or by executive order.
>
> b. A board, council, commission, or other governing body of a political sub-

division or tax-supported district in this state.

c. A multi-membered body formally and directly created by one or more boards, councils, commissions or other governing bodies subject to paragraphs "a" and "b" of this subsection.

d. Those multi-membered bodies to which the state board of regents or a president of a university has delegated the responsibility for the management and control of the intercollegiate athletic programs at the state universities.

The central issue is whether a school board committee is a governmental body within the meaning of subsection (c), which provides coverage for certain bodies that are delegated authority by the governmental bodies described in subsections (a) and (b). We note, however, that subsection (b) may also apply to such a committee if it consists of a majority of board members who then conduct a meeting as defined in § 28A.2(2).

An earlier opinion of this office has aptly explained the application of subsection (c):

> The central issue is whether a peer review committee is a "governmental body" within the meaning of subsection (c). Subsection (c) provides coverage for bodies delegated authority by boards, councils and commissions covered by subsections (a) and (b). To be covered by subsection (c), a body must be: 1) multi-membered, 2) "formally" created by a board, council, commission or other governing body, 3) "directly" created by a board, council, commission or other governing body, and 4) must itself be a "governing body," in the sense of having been delegated some policy-making or decision-making authority. Further elaboration of these requirements may be helpful.

The requirement that the body be "multi-membered" is self-explanatory. When an agency head makes a decision he or she does not have a meeting subject to being open.

With respect to legal procedure, Webster defines "formal" as "requiring special or stipulated solemnities or formalities to become effective." Thus, the requirement that a subsection (c) body must be "formally" created by the delegating body would be satisfied by a vote upon a resolution or motion or equivalent means.

Webster defines "direct" as "marked by an absence of an intervening agency, instrumentality or influence: IMMEDIATE . . . effected by the votes of the people or the electorate and not by representatives (elected for 7 years by direct suffrage)." Thus, the requirement that a subsection (c) body must be "directly" created by the delegating body means it must be fully constituted and appointed by a body covered by §28A.2(1)(a) or (b) and not by an intermediary or representative such as an executive director or secretary. That this was intended by employing the term "direct" is made clear by the existence of subsection (d), specifically providing coverage for bodies delegated responsibility for intercollegiate athletic programs at the state universities. Those bodies are appointed by the presidents of the universities, who are not covered by subsections (a) or (b). In the absence of the special provision, they would not be covered by subsection (c), because they are not "directly created" by the Board of Regents.

The requirement that a subsection (c) body must itself be a "governing body" in the sense specified is plainly implied. First, we note that the "definition" of "governmental body" does not consist of

> words of explanation. Indeed, subsection (a), for example, refers to a "board, council, commission or other governing body." This language indicates that the essential notion of "governing" or "governmental" is well understood and the function of the definition is to limit the coverage of the chapter to certain of those who clearly do exercise governmental authority. Webster defines "govern" as "to exercise arbitrarily or by established rules continuous sovereign authority over; esp. to control and direct the making and administration of policy in."
>
> * * *
>
> In determining whether a particular body satisfies the requirement that it be a governing body, in the sense of having policy-making or decision-making authority, we note that §28A.1 requires that "ambiguity in the construction or application of this chapter should be resolved in favor of openness." Thus, we do not read §28A.2(1) as requiring that a governmental body have "final authority" in the sense that its decisions could not be overridden by the body which created it. It would be sufficient if the body had authority to make a decision binding upon an affected party or group unless and until it were overridden by superior authority. However, a body whose authority does not extend beyond studying or investigating a problem and/or giving advice or making recommendations, is not a "governmental body" within the meaning of the open meetings law.

Op.Att'yGen. #79-5-4. Upon qualifying as a governmental body as explained above, a school board committee must precede its meetings with public notice as required in § 28A.4. An important exception to this general rule is, however, provided in § 28A.4(3):

> A formally constituted subunit of a parent governmental body may conduct a meeting without notice as required by this section during a lawful meeting of the parent governmental body, a recess in that meeting, or immediately following that meeting, if the meeting of the subunit is publicly announced at the parent meeting and the subject of the meeting reasonably coincides with the subjects discussed or acted upon by the parent governmental body.

Since § 28A.4 applies only to a governmental body, we conclude that a "formally constituted subunit of a parent governmental body" is intended to refer to any governmental body created under § 28A.2(1)(c). Accordingly, in the limited circumstances plainly set forth in § 28A.4(3), a school board committee is exempted from providing the public and the press with public notice of a meeting.

VI.

In the event of teacher termination hearings, are members of the press entitled to formal notification of the hearings.

Section 28A.4(4) states the following:

> If another section of the Code requires a manner of giving specific notice of a meeting, hearing or an intent to take action by a governmental body, compliance with that section shall constitute compliance with the notice requirements of this section.

The hearing procedures for termination of a teacher are set forth in §§ 279.15 through 279.19 of the Iowa Code. Section 279.15 provides in relevant part that a teacher who is notified of the proposed termination of his or her contract may request a private hearing with the school board. The section further provides that the hearing "shall

not be subject to chapter 28A. . . ." Thus, if a teacher makes the request described in § 279.15, the hearing on his or her termination is expressly exempted from the public notice requirements of the Open Meetings Act. The press would therefore not be entitled to formal notification of the hearing.

Within five days after the private hearing, the board must meet, in "executive" session, to make a final decision, which must be in writing and must include findings of fact and conclusions of law. The final vote on termination must, however, be in open session.

In the event a teacher does not timely request a private hearing, however, § 279.16 provides as follows:

> If the teacher fails to timely request a private hearing or does not appear at the private hearing, the board may proceed and make a determination upon the superintendent's recommendation, which determination in that case shall be not later than April 10, or not later than five days after the scheduled date for the private hearing, whichever is applicable. The board shall convene in open session and by roll call vote determine the termination or continuance of the teacher's contract.

Section 279.16 expressly states that only the private hearing on a teacher's termination is exempt from Chapter 28A and requires the board to follow certain procedures in making a decision subsequent to the hearing. The section does not otherwise indicate that Chapter 28A is inapplicable to the board's deliberations; consequently relevant procedures required by the Chapter, including those related to public notice, must be complied with.

In summary, we make the following conclusions concerning the questions raised in your opinion requests:

> 1. A school board must comply with the public notice procedures contained in § 28A.4 of the Open Meetings Act when holding any meeting as defined in § 28A.2(2) of the Act. Generally, such a meeting occurs whenever a

majority of the members of a school board gathers to deliberate or act upon any matter within the scope of the board's policymaking duties.

2. In order for a school board to conduct a closed session during a meeting, the requirements of § 28A.5(2) must be followed. These mandate that a specific reason for holding the closed session, as set forth in § 28A.5(1), must be announced publicly in open session and entered in the minutes.

3. Discussion during a closed session of a school board must relate directly to the specific reason announced as justification for the session.

4. The Public Employment Relations Act contained in Chapter 20 of the Code exempts negotiating sessions and strategy meetings of public employers or employee organizations from the provisions of the Open Meetings Act. Accordingly, when conducting a negotiating session or strategy meeting under the Public Employment Relations Act, a school board does not hold a meeting which would necessitate compliance with the procedural requirements, including public notice, of the Open Meetings Act.

5. A school board committee created under § 28A.2(1)(c) must comply with the public notice requirements of the Open Meetings Act except when holding meetings pursuant to § 28A.4(3).

6. Procedures for teacher termination hearings are governed by §§ 279.15 through 279.19 of the Code and do not require prior notification to the media.

Sincerely,

Frank J. Stork

FRANK J. STORK
Assistant Attorney General

FJS:rcp

OPEN MEETINGS ACT: School Board. Sections 13.2(4), 20.17, 28A.2, 28A.3, 28A.4, 28A.5, 28A.6, 279.15, The Code 1981. A school board must comply with the public notice procedures contained in § 28A.4 of the Open Meetings Act when holding any meeting as defined in § 28A.2(2) of the Act. Generally, such a meeting occurs whenever a majority of the members of a school board gathers to deliberate or act upon any matter within the scope of the board's policymaking duties. The Public Employment Relations Act contained in Chapter 20 of the Code, however, exempts negotiating sessions and strategy meetings of public employers or employee organizations from the provisions of the Open Meetings Act. Accordingly, when conducting a negotiating session or strategy meeting under the Public Employment Relations Act, a school board does not hold a meeting which would necessitate compliance with the procedural requirements, including public notice, of the Open Meetings Act. A school board committee created under § 28A.2(1)(c) must comply with the public notice requirements of the Open Meetings Act except when holding meetings pursuant to § 28A.4(3). Procedures for teacher termination hearings are governed by §§ 279.15 through 279.19 of the Code and do not require prior notification to the media.

In order for a school board to conduct a closed session during a meeting, the requirements of § 28A.5(2) must be followed. These mandate that a specific reason for holding the closed session, as set forth in § 28A.5(1), must be announced publicly in open session and entered in the minutes. Discussion during a closed session of a school board must relate directly to the specific reason announced as justification for the session. (Stork to O'Kane, State Representative, 7/6/81) 81-7-4 (L)

Department of Justice

THOMAS J. MILLER
ATTORNEY GENERAL

ADDRESS REPLY TO:
HOOVER BUILDING
DES MOINES, IOWA 50319

Mr. James D. O'Kane
State Representative
1815 Rebecca Street
Sioux City, Iowa 51103

Sioux City Community School District
c/o Mr. Marvin J. Klass
Attorney for the District
KLASS, WHICHER & MISHNE
830 Frances Building
Sioux City, Iowa 51101

Dear Sirs:

You have both requested an opinion of this office concerning possible violations of Iowa's Open Meetings Act by members of the Sioux City Board of Education with respect to meetings conducted by the Board between September 23, 1980, and March 18, 1981. Representative O'Kane indicates that his request is based upon the concerns of Mr. Milo Colton, a member of the Board who has suggested that the Board has not consistently complied with the Open Meetings Act. Your joint correspondence contains some conflicting versions of the Board's meetings and procedures during the period of time mentioned. We do, however, believe that following recitation of facts sufficiently and accurately reflects the disagreements pursuant to which you desire an opinion:

1. On September 23, 1980, the Sioux City Board of Education met in closed session for the purpose of discussing collective bargaining strategy with the Sioux City Education Association.

During this session, the Board allegedly discussed matters other than the purpose for which the meeting was closed. These other matters included possible school closings.

2. On January 31, 1981, the Sioux City Board of Education met for the purpose of discussing strategy in collective bargaining, particularly concerning fact-finding and mediation held pursuant to bargaining negotiations. At this time, legal counsel did advise the Board that compliance with the procedures of the Open Meetings Act was unnecessary because strategy meetings of public employers were exempted from the Act by another statute. In the course of the Board's discussion of the collective bargaining agreement, some mention was made of reducing staff and closing buildings as a means of financing the agreement. Your correspondence is in conflict regarding the extent of the discussion on these matters as well as whether the public had been notified of the meeting. At this meeting, the Board apparently did authorize counsel for the school district to proceed with the terms of the agreement proposed by the fact finder in the collective bargaining negotiations. Subsequently, the Board approved the collective bargaining agreement pursuant to notice and meeting in open session under the Open Meetings Act.

3. On March 18, 1981, the members of the Board attended a presentation given by a team of the North Central Association of Colleges and Secondary Schools concerning its evaluation of school operations at West High School in Sioux City. Board members participated in a discussion of the results of the team's evaluation. Board members apparently did not consider this presentation to be a meeting and therefore did not comply with the procedural requirements, including notice, of Chapter 28A. Following the presentation, five members of the Board joined with one of

the evaluators in a group. This group engaged in a general discussion regarding the evaluations, possible modifications of the regular form used by the Board in establishing its agenda, and a proposal by one of the Board members of the group to create a committee for the purpose of investigating "lay-offs" of administrative personnel. At this point, one Board member of the group, after indicating that the conversation appeared to involve matters included within the Open Meetings Act, left the group.

4. According to Representative O'Kane's correspondence, the Board has conducted other meetings, including teacher termination hearings in March 1981, without providing public notice of such meetings pursuant to the Open Meetings Act.

In light of the facts described above, Representative O'Kane requests an opinion on the following matters:

1. Do any of the meetings indicated above violate either the letter or the spirit of the Open Meetings Law?

2. Can a majority of the School Board's membership meet together and discuss, deliberate or take action regarding matters affecting the school district without notifying the public or the press about the meetings? (See items 2 and 3 above)

3. Can the School Board hold executive sessions without specifying the parameters of such sessions in a public meeting?

4. If an executive session is held for one purpose (such as to discuss collective bargaining strategy), can other subjects be discussed (such as school closings or teacher lay-offs)? Dr. Colton has expressed a concern that, when in executive session, if the Board

asks "How can we finance the subject under consideration?", the Board has a blank check to discuss virtually any subject related to the school district in executive session, or at least there is the danger that the Board perceives it may have such a blank check.

5. If School Board committee meetings are held, are the public and press entitled to notification of such meetings?

6. In the event of teacher termination hearings, are members of the press entitled to formal notification of such meetings?

On behalf of the Board, Mr. Klass requests an opinion as to whether the Board's meetings on January 31, 1981, and March 18, 1981, involved any violation of the Open Meetings Law.

I.

Whether the meetings of the Sioux City Board of Education on September 23, 1980, January 31, 1981, and March 18, 1981, violated the Iowa Open Meetings Law.

The office of the Attorney General has the statutory duty to give written opinions upon questions of law submitted by either members of the General Assembly or other state officers. § 13.2(4), The Code 1981. No similar duty or authority permits the office to function as an arbiter of factual disputes concerning implementation of state statutes, including the Open Meetings Act. The means of resolving a factual dispute arising under the Act is clearly set forth in § 28A.6 and requires a judicial enforcement proceeding. Such a proceeding must be brought in the district court for the county in which the governmental body in question has its principal place of business. § 28A.6(1).

The issue of whether the Sioux City Board of Education has violated the Iowa Open Meetings Law by act or omission on September 23, 1980, January 31, 1981, or March 18, 1981, essentially involves questions of fact with respect to the Board's implementation of the law on specific occasions. As

noted above, your correspondence indicates basic disagreements with respect to precisely what occurred on these occasions.

In any event, a court, rather than this office, must make the determination as to whether the Board committed violations of the Chapter on the occasions mentioned. § 28A.6. Pursuant to § 13.2(4), however, we will respond to the questions of law raised in your correspondence.

II.

May a majority of the members of a school board meet and discuss, deliberate or act on matters affecting the school district without providing notice to the public or the press.

Section 28A.3 states that "Meetings of governmental bodies shall be preceded by public notice as provided in section 28A.4 and shall be held in open session unless closed sessions are expressly permitted by law." Section 28A.4 provides in relevant part:

> 1. A governmental body, except township trustees, shall give notice of the time, date, and place of each meeting, and its tentative agenda, in a manner reasonably calculated to apprise the public of that information. Reasonable notice shall include advising the news media who have filed a request for notice with the governmental body and posting the notice on a bulletin board or other prominent place which is easily accessible to the public and clearly designated for that purpose at the principal office of the body holding the meeting, or if no such office exists, at the building in which the meeting is to be held.
>
> 2. Notice conforming with all of the requirements of subsection 1 of this section shall be given at least twenty-four hours prior to the commencement of any meeting of a governmental body unless for good cause such notice is impossible or impractical, in which

> case as much notice as is reasonably possible shall be given. Each meeting shall be held at a place reasonably accessible to the public, and at a time reasonably convenient to the public, unless for good cause such a place or time is impossible or impractical. Special access to the meeting may be granted to handicapped or disabled individuals.
>
> When it is necessary to hold a meeting on less than twenty-four hours notice, or at a place that is not reasonably accessible to the public, or at a time that is not reasonably convenient to the public, the nature of the good cause justifying that departure from the oral requirements shall be stated in the minutes.

Subsection (2) above makes clear that the notification procedures of subsection (1) are not mere formalities but, rather, are requirements that must be complied with prior to each meeting of a governmental body. If, for good cause, such compliance is impossible or impractical, the body must give as much notice as is reasonably possible.

A school board is plainly a governmental body under the Act. See § 28A.2(1)(b). The question of when a board conducts a meeting, and thereby necessitates compliance with the notice requirements of § 28A.4, must be examined in light of the definition contained in § 28A.2(2):

> 2. "Meeting" means a gathering in person or by electronic means, formal or informal, of a majority of the members of a governmental body where there is deliberation or action upon any matter within the scope of the governmental body's policy-making duties. Meetings shall not include a gathering of members of a governmental body for purely ministerial or social purposes when there is no discussion of policy or no intent to avoid the purposes of this chapter.

The definition of "meeting" is confined to the first sentence of § 28A.2(2). Four essential elements are apparent in this sentence. First, there must be "a gathering", which

has broad application due to the fact that it may be formal as well as informal and may be by electronic means (e.g. telephone) as well as in person. Accordingly, the occurrence of a meeting does not depend upon any particular formalities that normally would be employed by the members of a governmental body in holding, for example, a regularly-scheduled monthly meeting. Second, the gathering must involve a "majority of the members" of the governmental body. Third, the majority of members must gather for the purpose of "deliberation or action". Neither of these terms is defined in Chapter 28A. Consequently, they should be construed according to their context and approved usage. § 4.1(2), The Code 1981. Prior opinions of this office have made these constructions. Regarding "deliberation", Op.Att'yGen. #79-5-14 stated:

> The term "deliberation" is defined by Webster as "a discussion and consideration by a group of persons of the reasons for and against a measure." In Accardi v. Mayor & Council of City of No. Wildwood, 386 A.2d 416 (N.J. 1976), the New Jersey Court, when called upon to determine the meaning of the term "deliberations" in that state's sunshine law, explained that it "includes the discussion and evaluation" of the facts giving rise to a body's decision. We also note here, that § 28A.1 announces an assurance to the public that the "basis and rationale of governmental decisions" will be subject to public examination . . . [Accordingly], the term "deliberation" includes the discussion and evaluative processes of such bodies in arriving at an eventual decision or policy. In contrast to the exempted "ministerial" duties of a body, the types of duties thus covered by these terms are those involving an exercise of discretion or judgment as to the propriety of an act performed by the body.

The term "action" is defined by Webster's New Collegiate Dictionary as "the bringing about of an alteration by force or through a natural agency" and, in connection with its synonym "deed", has a shared meaning of "something done or affected". See Op.Att'yGen. #81-2-13(L), which also explained the effect of these definitions:

> These definitions indicate that the terms "deliberation" and "action" are intended both to have broad application and to include general discussion and/or consideration of matters preliminary to final decision-making. Provisions in Chapter 28A support this observation. Section 28A.2(2) does not require, as a condition for a "meeting", that deliberation or action by a governmental body on a matter within its policy-making duties be either formal or final in any respect. Section 28A.1, however, does declare that the Chapter seeks to assure "that the basis and rationale of governmental decisions, as well as those decisions themselves" are easily accessible to the public. (emphasis added). Moreover, ambiguity in the construction or application of the Chapter is to be resolved in favor of openness. Id.

The fourth essential element for a "meeting" to occur requires that a governmental body's deliberation or action concern a matter that is "within the scope of the governmental body's policy-making duties." The term "policy" is defined by Webster as follows:

> "2a: a definite course or method of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions; b: a high-level overall plan embracing the general goals and acceptable procedures esp. of a governmental body."

See Op.Att'yGen. #79-5-14. In contrast to the exempted "ministerial" duties of a governmental body as set forth in the second sentence of § 28A.2(2), policymaking duties involve an exercise of discretion or judgment as to the propriety of an act to be performed by the body. Id. Such duties include, for instance, the exercise of discretion by a school board with respect to its statutory responsibilities for hiring and compensating personnel and locating schoolhouse sites. See chs. 279 and 297, The Code 1981.

The second sentence of § 28A.2(2) indicates the limited circumstances in which a meeting does not occur, i.e., when members of a governmental body gather for "purely ministerial or social purposes when there is no discussion of policy or no intent to avoid the purposes of [Chapter 28A]." Purely ministerial purposes refers only to acts performed by a school board which do not involve an exercise of discretion or judgment on the part of its members. Op.Att'yGen. #79-5-14. Social purposes includes those gatherings of a purely non-business nature. Id. In any event, such gatherings may not engage in discussions related to the board's policymaking duties and may not be held for the purpose of avoiding compliance with the procedures of Chapter 28A.

The applicability of the "ministerial exception" in § 28A.2(2) is raised by your inquiry concerning the March 18, 1981, presentation by a team of the North Central Association of Colleges and Secondary Schools with respect to its evaluation of school operations at West High School. See pp. 2-3, supra. We cannot, as indicated previously, render a factual decision as to whether any part of the March 18 proceedings constituted a violation of Chapter 28A. An earlier opinion of this office did, however, provide some explanation regarding the legal significance of the exception contained in § 28A.2(2):

> We are first guided by the definition of "ministerial act" found in Arrow Express Forwarding Co. v. Iowa State Commerce Comm., 256 Iowa 1088, 130 N.W.2d 451 (1964):
>
> > "A ministerial act has been defined as 'one which a person or board performs upon a given state or facts, in a prescribed manner, in observance of the mandate of legal authority and without regard to or the exercise of his own judgment upon the propriety of the act being done.'"
>
> And see, Gibson v. Winterset Community School Dist., 258 Iowa 440, 138 N.W.2d 112 (1966); 27 Words and Phrases, Ministerial Act, p. 374 (1961). It is apparent that the linchpin of the definition is whether the individual must "exercise . . . judgment

> upon the propriety of the act being done." Thus, as applied in the § 28A.2(2) exemption, only those acts performed by a governmental body which do not involve an exercise of discretion or judgment are specifically excluded from coverage of the open meeting laws.

Op.Att'yGen. #79-5-14. Pursuant to this explanation, it appears that gathering for "purely ministerial" purposes may include a situation in which members of a governmental body gather simply to receive information upon a matter within the scope of the body's policymaking duties. During the course of such a gathering, individual members may, by asking questions, elicit clarification about the information presented. We emphasize, however, that the nature of any such gathering may change if either "deliberation" or "action", as defined above, occurs. A "meeting" may develop, for example, if a majority of the members of a body engage in any discussion that focuses at all concretely upon matters over which they may exercise judgment or discretion.

All four of the elements set forth in the first sentence of § 28A.2(2) must be present in a particular situation for a meeting to occur. Hence a gathering of the majority of the members of a school board that results in either action or deliberation upon matters related to policy, as defined above, does constitute a meeting. Accordingly, compliance with the notice provisions of § 28A.4 would be necessary prior to the meeting.

Your correspondence raises the issue of whether negotiating sessions and strategy meetings of a school board are governed by the Open Meetings Act. Such sessions and meetings generally would appear to involve deliberation or action upon matters within the scope of a school board's policymaking duties and, therefore, would require compliance with the procedures, including public notice, of Chapter 28A. See §§ 28A.3, 28A.4. The Public Employment Relations Act contained in Chapter 20 of the Iowa Code, however, provides:

> Negotiating sessions, strategy meetings of public employers or employee organizations, mediation and the deliberative process of arbitrators shall be exempt from the provisions of chapter 28A. However, the employee organi-

> zation shall present its initial bargaining position to the public employer at the first bargaining session. The public employer shall present its initial bargaining position to the employee organization at the second bargaining session, which shall be held no later than two weeks following the first bargaining session. Both sessions shall be open to the public and subject to the provisions of chapter 28A. Hearings conducted by arbitrators shall be open to the public.

§ 20.17(3). Subject to the express exceptions in the last four sentences of this section, the negotiating sessions and strategy meetings of a school board, as a public employer, are completely exempted from the Open Meetings Act.[1] See Burlington Community School District v. P.E.R.B., 268 N.W.2d 517, 524 (Iowa 1978). In effect, this exemption means that a negotiating session or strategy session conducted by a school board according to the first sentence of § 20.17(3) does not constitute a meeting under the definition of § 28A.2(2). Accordingly, a school board is not required to precede such sessions or meetings with public notice as required by § 28A.4. The right of the public to be informed concerning decisions reached in the collective bargaining process is protected by § 20.17(4), which provides that the terms of a collective bargaining agreement must be made public. 268 N.W.2d at 524.

Section 20.17(3) does not delineate the scope of discussion permitted at either a negotiating session or a strategy meeting. As evidenced by the discussion of the Sioux City Board of Education on January 31, 1981, application of the statute may result in some confusion and

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[1] Two observations should be noted with respect to negotiating sessions. First, the exemption in § 20.17(3) applies only to sessions between a public employer, e.g., a school board, and a certified employee organization, since certification is a condition precedent to coverage in the negotiations process under Chapter 20. See §§ 20.13-20.16; Op.Att'yGen. #79-5-19. Second, such negotiating sessions may be opened to the public only if both the employer and employee organization agree to open sessions. Burlington Community School District v. P.E.R.B., 268 N.W.2d 517, 524 (Iowa 1978).

disagreement regarding the matters appropriate for discussion. Nevertheless, § 20.17(3) expresses a legislative recognition of the need for a reasonable amount of flexibility and discretion during a negotiating session or strategy meeting. During a strategy meeting, for example, a school board may need to explore the general fiscal implications and/or consequences of a proposed collective bargaining agreement in order to make a knowledgable decision on whether to approve the agreement. Such matters that are closely related to overall strategy in the collective bargaining process appear to be included within the exemption set forth in § 20.17(3). In our view, however, the exemption does not extend to deliberation or action upon particular policymaking duties, such as the necessity for termination of a specific teacher or closing of a specific school. Such matters are properly discussed within the parameters of Chapter 28A.

III.

May a school board hold an executive (closed) session without specifying, in open session, the parameters of the session.

Section 28A.5 of the Open Meetings Act contains the requirements for holding a closed, or executive, session of a governmental body. Such a session may be held "only to the extent a closed session is necessary" for any of ten specific reasons set forth in § 28A.5(1). Section 28A.5(2) further provides as follows:

> The vote of each member on the question of holding the closed session and the reason for holding the closed session by reference to a specific exemption under this section shall be announced publicly at the open session and entered in the minutes. A governmental body shall not discuss any business during a closed session which does not directly relate to the specific reason announced as justification for the closed session.

Pursuant to the express language of this subsection, a school board clearly must announce, in open session, the precise reason for entering into a closed session. Furthermore, the discussion during the closed session may not extend beyond the parameters of the reason given for holding the session.

IV.

If an executive (closed) session is held for one purpose, may other subjects also be discussed during the course of that session.

The express language of § 28A.5(2), as set forth in Division III above, resolves this question. A school board may not discuss any business during a closed session which does not relate directly to the specific reason announced as justification for the session. Hence if the board is conducting a closed session under subsection (i) with respect to the discharge of a particular teacher, it does not have authority to engage in a general discussion of the qualifications of other teachers or the need for discharge of a school administrator.

V.

If school board committee meetings are held, are the public and press entitled to notification of the meetings.

The question of whether a committee of a school board must comply with the public notice requirements of § 28A.4 in order to hold a meeting depends initially upon whether the committee is a "governmental body" as defined in § 28A.2(1):

1. "Governmental body" means:

a. A board, council, commission or other governing body expressly created by the statutes of this state or by executive order.

b. A board, council, commission, or other governing body of a political sub-

division or tax-supported district in this state.

c. A multi-membered body formally and directly created by one or more boards, councils, commissions or other governing bodies subject to paragraphs "a" and "b" of this subsection.

d. Those multi-membered bodies to which the state board of regents or a president of a university has delegated the responsibility for the management and control of the intercollegiate athletic programs at the state universities.

The central issue is whether a school board committee is a governmental body within the meaning of subsection (c), which provides coverage for certain bodies that are delegated authority by the governmental bodies described in subsections (a) and (b). We note, however, that subsection (b) may also apply to such a committee if it consists of a majority of board members who then conduct a meeting as defined in § 28A.2(2).

An earlier opinion of this office has aptly explained the application of subsection (c):

> The central issue is whether a peer review committee is a "governmental body" within the meaning of subsection (c). Subsection (c) provides coverage for bodies delegated authority by boards, councils and commissions covered by subsections (a) and (b). To be covered by subsection (c), a body must be: 1) multi-membered, 2) "formally" created by a board, council, commission or other governing body, 3) "directly" created by a board, council, commission or other governing body, and 4) must itself be a "governing body," in the sense of having been delegated some policy-making or decision-making authority. Further elaboration of these requirements may be helpful.

The requirement that the body be "multi-membered" is self-explanatory. When an agency head makes a decision he or she does not have a meeting subject to being open.

With respect to legal procedure, Webster defines "formal" as "requiring special or stipulated solemnities or formalities to become effective." Thus, the requirement that a subsection (c) body must be "formally" created by the delegating body would be satisfied by a vote upon a resolution or motion or equivalent means.

Webster defines "direct" as "marked by an absence of an intervening agency, instrumentality or influence: IMMEDIATE . . . effected by the votes of the people or the electorate and not by representatives (elected for 7 years by direct suffrage)." Thus, the requirement that a subsection (c) body must be "directly" created by the delegating body means it must be fully constituted and appointed by a body covered by §28A.2(1)(a) or (b) and not by an intermediary or representative such as an executive director or secretary. That this was intended by employing the term "direct" is made clear by the existence of subsection (d), specifically providing coverage for bodies delegated responsibility for intercollegiate athletic programs at the state universities. Those bodies are appointed by the presidents of the universities, who are not covered by subsections (a) or (b). In the absence of the special provision, they would not be covered by subsection (c), because they are not "directly created" by the Board of Regents.

The requirement that a subsection (c) body must itself be a "governing body" in the sense specified is plainly implied. First, we note that the "definition" of "governmental body" does not consist of

> words of explanation. Indeed, subsection (a), for example, refers to a "board, council, commission or other governing body." This language indicates that the essential notion of "governing" or "governmental" is well understood and the function of the definition is to limit the coverage of the chapter to certain of those who clearly do exercise governmental authority. Webster defines "govern" as "to exercise arbitrarily or by established rules continuous sovereign authority over; esp. to control and direct the making and administration of policy in."
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> * * *
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> In determining whether a particular body satisfies the requirement that it be a governing body, in the sense of having policy-making or decision-making authority, we note that §28A.1 requires that "ambiguity in the construction or application of this chapter should be resolved in favor of openness." Thus, we do not read §28A.2(1) as requiring that a governmental body have "final authority" in the sense that its decisions could not be overridden by the body which created it. It would be sufficient if the body had authority to make a decision binding upon an affected party or group unless and until it were overridden by superior authority. However, a body whose authority does not extend beyond studying or investigating a problem and/or giving advice or making recommendations, is not a "governmental body" within the meaning of the open meetings law.

Op.Att'yGen. #79-5-4. Upon qualifying as a governmental body as explained above, a school board committee must precede its meetings with public notice as required in § 28A.4. An important exception to this general rule is, however, provided in § 28A.4(3):

> A formally constituted subunit of a parent governmental body may conduct a meeting without notice as required by this section during a lawful meeting of the parent governmental body, a recess in that meeting, or immediately following that meeting, if the meeting of the subunit is publicly announced at the parent meeting and the subject of the meeting reasonably coincides with the subjects discussed or acted upon by the parent governmental body.

Since § 28A.4 applies only to a governmental body, we conclude that a "formally constituted subunit of a parent governmental body" is intended to refer to any governmental body created under § 28A.2(1)(c). Accordingly, in the limited circumstances plainly set forth in § 28A.4(3), a school board committee is exempted from providing the public and the press with public notice of a meeting.

VI.

In the event of teacher termination hearings, are members of the press entitled to formal notification of the hearings.

Section 28A.4(4) states the following:

> If another section of the Code requires a manner of giving specific notice of a meeting, hearing or an intent to take action by a governmental body, compliance with that section shall constitute compliance with the notice requirements of this section.

The hearing procedures for termination of a teacher are set forth in §§ 279.15 through 279.19 of the Iowa Code. Section 279.15 provides in relevant part that a teacher who is notified of the proposed termination of his or her contract may request a private hearing with the school board. The section further provides that the hearing "shall

not be subject to chapter 28A. . . ." Thus, if a teacher makes the request described in § 279.15, the hearing on his or her termination is expressly exempted from the public notice requirements of the Open Meetings Act. The press would therefore not be entitled to formal notification of the hearing.

Within five days after the private hearing, the board must meet, in "executive" session, to make a final decision, which must be in writing and must include findings of fact and conclusions of law. The final vote on termination must, however, be in open session.

In the event a teacher does not timely request a private hearing, however, § 279.16 provides as follows:

> If the teacher fails to timely request a private hearing or does not appear at the private hearing, the board may proceed and make a determination upon the superintendent's recommendation, which determination in that case shall be not later than April 10, or not later than five days after the scheduled date for the private hearing, whichever is applicable. The board shall convene in open session and by roll call vote determine the termination or continuance of the teacher's contract.

Section 279.16 expressly states that only the private hearing on a teacher's termination is exempt from Chapter 28A and requires the board to follow certain procedures in making a decision subsequent to the hearing. The section does not otherwise indicate that Chapter 28A is inapplicable to the board's deliberations; consequently relevant procedures required by the Chapter, including those related to public notice, must be complied with.

In summary, we make the following conclusions concerning the questions raised in your opinion requests:

> 1. A school board must comply with the public notice procedures contained in § 28A.4 of the Open Meetings Act when holding any meeting as defined in § 28A.2(2) of the Act. Generally, such a meeting occurs whenever a

majority of the members of a school board gathers to deliberate or act upon any matter within the scope of the board's policymaking duties.

2. In order for a school board to conduct a closed session during a meeting, the requirements of § 28A.5(2) must be followed. These mandate that a specific reason for holding the closed session, as set forth in § 28A.5(1), must be announced publicly in open session and entered in the minutes.

3. Discussion during a closed session of a school board must relate directly to the specific reason announced as justification for the session.

4. The Public Employment Relations Act contained in Chapter 20 of the Code exempts negotiating sessions and strategy meetings of public employers or employee organizations from the provisions of the Open Meetings Act. Accordingly, when conducting a negotiating session or strategy meeting under the Public Employment Relations Act, a school board does not hold a meeting which would necessitate compliance with the procedural requirements, including public notice, of the Open Meetings Act.

5. A school board committee created under § 28A.2(1)(c) must comply with the public notice requirements of the Open Meetings Act except when holding meetings pursuant to § 28A.4(3).

6. Procedures for teacher termination hearings are governed by §§ 279.15 through 279.19 of the Code and do not require prior notification to the media.

Sincerely,

Frank J. Stork

FRANK J. STORK
Assistant Attorney General

FJS:rcp

Substitute for Op. 81-7-3(L)

MENTAL HEALTH: Liability for the Costs of Treating Substance Abusers: Commitment of Substance Abusers to Mental Health Facilities. Laws of the Sixty-Eighth General Assembly, 1980 Session, ch. 1003; Laws of the Sixty-Ninth General Assembly, 1981 Session, House File 821; §§ 3.7, 125.2, 125.13, 125.21, 125.43, 125.44, 204.401, 204.409(2), 229.20, 229.50(3), 229.51, 229.52, 230.1, 230.2, 230.20(5), 321.281, 321.283(3), and 812.3, The Code 1981. As of July 1, 1981, state mental health institutes shall be facilities as defined by § 125.2, The Code 1981, as amended, and therefore facilities within the meaning of § 125.44, The Code 1981. State mental health institutes are not facilities within the meaning of § 204.409(2), The Code 1981. Courts are not authorized to commit violators of § 204.401, The Code 1981, to state mental health institutes as they are not facilities licensed by the Iowa Department of Substance Abuse. Neither the state nor counties will incur any liability for the costs of care and treatment provided to a substance abuser at a state mental health institute in contravention of § 204.409(2), The Code 1981. Persons committed to a state mental health institute in violation of § 204.409(2) may not be considered to be state patients. Chapter 230, The Code 1981, governs the costs of treatment provided to a substance abuser at a state mental health institute, and § 204.409(2), The Code 1981, governs the costs of treatment provided to a substance abuser at a facility licensed by the Iowa Department of Substance Abuse.

A court may order a person committed to a state mental health institute for substance treatment under ch. 812 when it reasonably appears that the defendant is suffering from a mental disorder, which is inclusive of dependency on a chemical substance. Counties must be billed at the rate of eighty percent of the total costs of treatment provided to a person committed to a mental health institute under ch. 812 for a psychiatric evaluation and treatment of a mental disorder, but only at the rate of twenty-five percent of the total costs where the mental disorder results from substance abuse.

A court may commit a violator of § 321.281, The Code 1981, to any institution in Iowa providing treatment for alcoholism or drug dependency, including a state mental health institute. In addition, courts may refer a defendant to a state mental health institute under § 321.283(3), The Code 1981, after the effective date of H.F. 821 on July 1, 1981. The state is responsible for seventy-five percent of the costs of providing treatment to a person committed to a mental health institute under § 321.281, The Code 1981, and the county of legal settlement is responsible for the remaining twenty-five percent of the costs. Persons committed to a mental health institute under § 321.281 may not be considered to be a state patient. (Mann to Reagen, Commissioner, Dept. of Social Services, 7/15/81) #81-7-11(L)

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Department of Justice

July 15, 1981

ADDRESS REPLY TO:
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Dr. Michael V. Reagen, Ph.D., Commissioner
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L O C A L

Dear Commissioner Reagen:

You requested an opinion of the Attorney General on the impact of Chapter 1003, Laws of the Sixth-Eighth General Assembly, 1980 Session (hereinafter H.F. 2584) on the responsibility of counties to pay for treatment provided to substance abuse patients at state mental health facilities. Specifically, you ask the following questions:

1. Are State Mental Health Institutes "facilities" as that term is used in H.F. 2584?

2. Are District Courts free to commit persons guilty of violating Section 204.401 to a mental health institute?

3. What is the financial responsibility of the state for persons committed to a mental health institute for substance abuse under 204.409? The responsibility of the county? Can these persons so committed be considered state cases? Does Section 204.409, supersede Section

125.43, which places financial responsibility with the county of legal settlement?

Under Chapter 812, courts may order a person detained in a mental health institute. Some court orders also specify substance abuse treatment. Section 230.20 requires that we bill for the person's care by program. The billing for all programs except substance abuse is at 80% of cost. The substance abuse program is billed at 25% of the cost.

4. May a Court order substance abuse treatment when a person is ordered detained under Chapter 812? Under what conditions can substance abuse treatment be ordered?

A District Court may also under Section 321.281 commit a person to a hospital for treatment.

5. When a person is ordered to a mental health institute under Chapter 812, is the county of legal settlement always billed 80%? Are there any circumstances when the billing would be at 25% under the substance abuse program?

6. Are District Courts free to commit persons charged with violating Section 321.281 to a mental health institute? Persons guilty of violating Section 321.281?

7. What is the financial responsibility of the state for persons committed to treatment at a mental health institute pursuant to Section 321.281? May these persons be considered state cases? What is the financial respon-

sibility of the county of legal settlement? Does Section 321.281 supersede Section 125.43, which places financial responsibility with the county of legal settlement?

House File 2584, in pertinent parts, amends sections of the Iowa Code that provide options for the treatment of substance abusers, including ch. 125, the statute that provides a comprehensive legislative scheme for the treatment and rehabilitation of persons suffering from chemical dependence. Your specific questions about H.F. 2584 are answered as follows in the order presented.

I. Are State Mental Health Institutes "Facilities" As That Term Is Used In H.F. 2584?

House File 2584 uses the term "facility" in several of its provisions. The relevant provisions are sections four and seven, which reads as follows:

> Sec. 4. Section one hundred twenty-five point forty-four (125.44), unnumbered paragraph one (1), Code 1979, is amended to read as follows:
>
> The director may, consistent with the comprehensive substance abuse program, enter into written agreements with a facility as defined in section 125.2 . . .
>
> . . . .
>
> Sec. 7. Section two hundred four point four hundred nine (204.409), subsection two (2), Code 1979, is amended to read as follows:
>
> 2. Whenever the court finds that a person who is charged with a violation of section 204.401 and who consents thereto, or who has entered a plea of guilty to or been found guilty of a violation of ~~said~~ that section, ~~and~~

> ~~who~~ is addicted to, dependent upon, or a chronic abuser of any controlled substance and that such person will be aided by proper medical treatment and rehabilitative services, it may order that ~~he~~ the person be committed as an in-patient or out-patient to a facility ~~approved~~ licensed by the state department of ~~health~~ substance abuse for ~~such~~ medical treatment and rehabilitative services . . . .

From the above two provisions it is clear that the term "facility" is defined in two different ways under H.F. 2584. Section 4 of H.F. 2584, which is now codified at § 125.44, The Code 1981, refers to a facility as it is defined by § 125.2, The Code 1981. We must therefore turn to § 125.2, The Code.

~~By an Act of the Sixty-Ninth General Assembly, 1981 Session,~~ House File 821 (hereinafter H.F. 821), section 125.2 was amended as follows:

> Section 1. Section 125.2, subsection 2, Code 1981, is amended to read as follows:
>
> 2. "Facility" means ~~a hospital,~~ an institution, a detoxification center, or an installation providing care, maintenance and treatment for substance abusers ~~and~~ licensed by the department under section 125.13, hospitals licensed under chapter 135B, or the state mental health institutes designated by chapter 226.

It is clear from the new language of § 125.2 that state mental health institutes are to be included in the definition of facilities as contained in § 125.2. We must, therefore, advise that as of the effective date of H.F. 821 state mental health institutes will be facilities as defined by § 125.2, and therefore facilities for the purposes of § 4 of H.F. 2584, now codified as § 125.44, The Code 1981.

Pursuant to § 3.7, The Code 1981, H.F. 821, which was approved by the Governor on May 4, 1981, became effective

as of July 1, 1981. Therefore, state mental health institutes are § 125.2 facilities as of that date.

The same conclusion cannot be reached with respect to § 7 of H.F. 2584. That section, now codified as § 204.409(2), The Code 1981, is a statute that permits a court to place a person convicted of possessing a controlled substance on probation, and further permits the court to commit the person to a facility for treatment where the said person is "addicted to, dependent upon, or a chronic abuser of any controlled substance". The clear language of § 7 authorizes the court to commit the person "to a facility licensed by the state department of substance abuse". Unless a mental health facility has in fact been licensed by the department of substance abuse pursuant to ch. 125, The Code, it does not qualify as a "facility" for purposes of § 7 of H.F. 2584.[1]

II. Are District Courts Free To Commit Persons Guilty Of Violating § 204.401 To A Mental Health Institute?

As discussed in Division I of this opinion, persons convicted of violating § 204.401, The Code 1981, may be placed on probation and committed to a facility licensed by IDSA pursuant to § 204.409 as amended by § 7 of H.F. 2584. Since state mental health institutes (hereinafter MHI's) are not licensed by IDSA, courts are not authorized to commit violators of § 204.401 to such an institution, but instead are limited by the provisions of the statute. Iowa Department of Social Services v. Blair, 294 N.W.2d 567 (Iowa 1980).

III.(A) What Is The Financial Responsibility Of The State For Persons Committed To A Mental Health Institute For Substance Abuse Under § 204.409?

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1. Although state mental health institutes generally are not licensed by the Iowa Department of Substance Abuse, Cherokee MHI's Substance Abuse Treatment Unit does operate pursuant to an IDSA license. This, however, was not issued to meet state statutory criteria, but rather was issued to permit Cherokee to meet federal statutory substance abuse treatment criteria. Nevertheless, the language of § 7 refers to a facility licensed by IDSA. Thus, Cherokee's Substance Abuse Treatment Unit stands as an exception to the conclusions stated in this opinion.

As discussed in Division II of this Opinion, there is no statutory authority for a court to commit a person to a state mental health institute pursuant to § 204.409, as amended by § 7 of H.F. 2584. Both the courts and mental health institutes are bound by legislative pronouncements in this regard. Iowa Department of Social Services v. Blair, 294 N.W.2d 567 (Iowa 1980). Accordingly, where statutory conditions are not met, the state incurs no liability for the costs of care and treatment of a substance abuser. Op.Att'yGen. # 79-10-12; 1975 Op.Att'yGen. 210, 211.

(B) What Is The County's Financial Responsibility For Persons Committed To A Mental Health Institute Under § 204.409?

Like our conclusion in Division 3(A) above, we reiterate that the district courts cannot impose the solution of committing a person to a MHI in violation of a statute. Blair. Therefore, the county will incur no liability where the statute is ignored. Op.Att'yGen. # 79-10-12; 1975 Op.Att'yGen. 210.

C. Can These Persons So Committed Be Considered State Cases?

Section 7 of H.F. 2584, as it amends § 204.409, reads in pertinent part as follows:

> A person committed under this subsection who is not possessed of sufficient income or estate to enable him or her to make payment of the costs of such treatment in whole or in part shall be considered a state patient and the costs of treatment shall be paid as provided in section one hundred twenty-five point forty-four (125.44) of the Code . . . (emphasis supplied)

State cases or state patients as defined by § 7 refers to those persons committed under § 7 who are incapable of

paying for the costs of their care at a § 7 "facility". As previously discussed in Division I of this Opinion, a § 7 "facility" is a facility licensed by IDSA. Consequently, a person "committed under this subsection" is a person committed to a facility licensed by IDSA. Such a person, if indigent, may be considered to be a state patient thereby imposing financial costs upon the state.

On the other hand, § 7 does not authorize a commitment to a MHI. Accordingly, any person committed to a MHI in contravention of § 7, now codified as § 204.409(2), The Code 1981, cannot be said to be committed under that section. They, therefore, cannot be considered state patients. Op.Att'yGen. # 79-10-12.

D. Does Section 204.409 Supersede Section 125.43, Which Places Financial Responsibility With The County Of A Patient's Legal Settlement?

Section 125.43, The Code 1981, provides that "Chapter 230 shall govern the determination of the costs and payment for treatment provided to a substance abuser in a mental health institute". As previously discussed, § 204.409, as amended by H.F. 2584, relates to the costs of care and treatment provided to a substance abuser at a facility licensed by IDSA. Since these two statues relate to different subjects, neither supplants the other. Where there are no conflicts in statutes and the terms are unambiguous, there is no room for construction. Hartman v. Merged Area VI Community College, 270 N.W.2d 822 (Iowa 1978); Iowa National Industrial Loan Company v. Iowa State Department of Revenue, 224 N.W.2d 437 (Iowa 1974). Accordingly, ch. 230 will continue to govern the costs of treatment provided to substance abusers at MHI's and § 204.409 will apply to facilities licensed by IDSA.

IV. May A Court Order Substance Abuse Treatment When A Person Is Ordered Detained Under Chapter 812, The Code 1981? Under What Conditions Can Substance Abuse Treatment Be Ordered?

Under ch. 812, a person charged with or convicted of a crime may be ordered committed to the custody of the Department of Social Services when in the opinion of the district court "it reasonably appears that the defendant is suffering from a mental disorder which prevents him or her from appreciating the charge, understanding the proceedings, or assisting effectively in the defense". § 812.3, The Code 1981. Such commitment may be for an evaluation and appropriate treatment. Statutory authority for this conclusion is found both in ch. 812 and § 229.20, The Code 1981. Section 229.20(2), as it affects this conclusion, reads as follows:

> When a proceeding under section 229.6 and succeeding sections of this chapter arises under sections 783.5 or 789.8, and the respondent through his attorney waives the hearing otherwise required by section 229.12, the court may immediately order the respondent placed in a hospital for a complete psychiatric evaluation and appropriate treatment, pursuant to section 229.13. . . . (emphasis added).

Clearly the langugage of § 229.20 authorizes the court to commit a person to a MHI for an evaluation and appropriate treatment when proceedings are commenced under §§ 783.5 or 789.8, The Code 1975. Both §§ 783.5 and 789.8 were repealed by the criminal law revision of 1976, ch. 1245, Laws of the Sixty-Sixth General Assembly, 1976 Session, and re-codified as present ch. 812 of the Code. Thus, the reference to §§ 783.5 and 789.8 in § 229.20 is effectively a reference to ch. 812. The result is that under § 229.20 a court is authorized to commit a person to a MHI for an evaluation and appropriate treatment when proceedings are commenced under ch. 812.

Appropriate treatment is dependent upon the nature of the mental incapacity. Mental incapacity may result from dependency on a chemical substance. Section 125.2(8), The Code 1981, defines a person "incapacitated by a chemical substance" as a person, who "as a result of the use of a chemical substance, is unconscious or has his or her judgment otherwise so impaired that he or she is incapable of realizing

and making a rational decision with respect to the need for treatment". A district court could reasonably conclude that such a person could not appreciate a criminal charge, understand court proceedings, or assist in his or her defense. Appropriate treatment, then, for such a person would include treatment for chemical dependency.

Accordingly, under ch. 812 a court may order a person committed to a MHI for substance abuse treatment when it reasonably appears that the defendant is suffering from a mental disorder which is inclusive of dependency on a chemical substance.

V. When A Person Is Ordered To A Mental Health Institute Under Chapter 812, The Code 1981, Is The County Of Legal Settlement Always Billed 80%? Are There Circumstances When The Billing Would Be At 25% Under The Substance Abuse Program?

The county of legal settlement is liable for the costs of a court ordered psychiatric evaluation of a criminal defendant at a state hospital. This conclusion was reached in a prior opinion issued by this office, Op.Att'yGen. # 79-5-24.

Billings are submitted to a county by the superintendent of a state hospital pursuant to § 230.20, The Code 1981. Section 230.20(5) mandates that "the county shall be billed for one hundred percent of the stated charge for each patient, unless otherwise specified in the current appropriation for support of the state hospitals". The current appropriation for MHI's is found in ch. 8, Laws of the Sixty-Eighth General Assembly, 1979 Session. Section Three (3) of that act states that the "state mental health institutes' daily per diem as determined pursuant to section two hundred thirty point twenty (230.20) of the Code shall be billed at eighty percent for each fiscal year". Thus, under § 230.20(5), as amended, counties must be billed for 80 percent of the costs of a psychiatric evaluation of a criminal defendant at a state hospital.

This conclusion, however, is limited to those ch. 812 commitments that are for the purpose of a psychiatric

evalution and diagnosis, and for the treatment of mental disorders not related to substance abuse. Commitments for treatment of mental disorders stemming from substance abuse must be billed at a different rate. The applicable Code provision is § 125.43, The Code 1981. That section reads, in pertinent part, as follows:

> 125.43 Funding at mental health institutes. Chapter 230 shall govern the determination of the costs and payment for treatment provided to substance abusers in a mental health institute under the department of social services, except that the charges shall not constitute a lien on any real estate owned by persons legally liable for support of the substance abusers and the daily per diem shall be billed at twenty-five percent. . . . (emphasis added)

Under § 125.43, treatment provided to a substance abuser in a MHI shall be billed at the rate of twenty-five percent of the total costs. On the surface, § 125.43 appears to conflict with § 230.20(5) as amended. However, related statutes are read in pari materia and the terms of a specific statute control over those of a general statute. Benger v. General United Group, Inc., 268 N.W.2d 630 (Iowa 1978); State ex rel Krupke v. Witowski, 256 N.W.2d 216 (Iowa 1977). Applying this rule of construction to the issue at hand, it becomes clear that § 125.43, a specific statute on the subject of the costs of treating a substance abuser at a MHI, prevails over § 230.20(5), as amended, a statute providing a general scheme for the billing of the costs of treating patients at a mental health institute. Consequently, where a criminal defendants is committed to a MHI under ch. 812 for appropriate treatment stemming from his/her dependence on a chemical substance, costs of the treatment provided must be billed to the counties at the rate of twenty-five percent.

Accordingly, we conclude that when a person is ordered committed to a MHI under ch. 812 for a psychiatric evaluation and/or appropriate treatment resulting from a mental disorder, billings to a county must be made at 80 percent of total

costs. In those isolated cases where the ch. 812 commitment is for appropriate treatment resulting from chemical dependency, billings to the counties must be made at twenty-five percent of the total costs.

VI. Are District Courts Free To Commit Persons Charged With Violating Section 321.281 To A Mental Health Institute? Persons Guilty Of Violating Section 321.283?

A. Section 321.281, The Code 1981, prohibits the operating of a motor vehicle upon the public highways while under the influence of an alcoholic beverage or a drug (OMVUI). The statute permits a court to suspend imposition of sentence on a person convicted of OMVUI and to commit the defendant "for treatment of alcoholism or drug addiction or dependency to any hospital or institution in Iowa providing such treatment".

House File 2584 amends § 321.281, but it does not change the above-quoted language. Thus, it remains clear that a court may commit a violator of § 321.281 to any institution in Iowa providing treatment for alcoholism or drug dependency, including a state mental health institute.

B. In addition to the power to commit a defendant for treatment of alcoholism or drug dependency under § 321.281, a court may refer the defendant for treatment under § 321.283(3), The Code 1981. However, under § 321.283(3), a "court may refer the defendant for treatment at a facility as defined in §§ 125.1 to 125.43 and designated by the division on alcoholism".

There are two significant distinctions between §§ 321.281 and 321.283(3). They are (1) the court's power under § 321.283(3) is limited to the power to refer the defendant for treatment, not commit, and (2) the court is limited to referring the defendant to a facility as defined by § 125.2, The Code 1981.

As discussed earlier, the definition of a facility under § 125.2 was amended to include MHI's by H.F. 821. H.F. 821 became effective July 1, 1981, and as of that date, courts are free to refer defendants to MHI's pursuant to § 321.283(3).

VII(A). What Is The Financial Responsibility Of The State For Persons Committed To Treatment At A Mental Health Institute Pursuant To Section 321.281, The Code 1981?

May These Persons Be Considered State Cases? What Is The Financial Responsibility Of The County Of Legal Settlement? Does § 321.281 Supersede § 125.43?

Section 321.281 was amended by H.F. 2584. Section 9 of H.F. 2584, in pertinent part, reads as follows:

> A person committed under this section who is not possessed of sufficient income or estate to enable him or her to make payment of the costs of such treatment in whole or in part shall be considered a state patient and the costs of treatment shall be paid as provided in section one hundred twenty-five point forty-four (125.44) of the Code. (emphasis supplied)

A clear reading of § 9 reveals that an indigent committed to a facility under § 321.281 shall be considered a state patient. The costs of treating such patient are to be paid pursuant to § 125.44. Section 125.44 was amended by § 4 of H.F. 2584. That section reads as follows:

> Sec. 4. Section one hundred twenty-five point forty-four (125.44), unnumbered paragraph one (1), Code 1979, is amended to read as follows:
>
> The director may, consistent with the comprehensive substance abuse program, enter into written agreements with a facility as defined in section 125.2 to pay for seventy-five percent of the cost of the care, maintenance and treatment of a substance abuser, except that the state's liability shall be one hundred

> percent of the total cost of care, maintenance and treatment when a substance abuser is a state patient. All payments for state patients shall be made in accordance with the limitations of this section. . . . (emphasis supplied)

Other relevant portions § 125.44 includes unnumbered paragraph two (2), which reads as follows:

> The contract may be in such form and contain provisions as agreed upon by the parties. Such contract shall provide that the facility shall admit and treat substance abusers regardless of where they have residence. If one payment for care, maintenance, and treatment is not made by the patient or those legally liable therefor within thirty days after discharge the payment shall be made by the department directly to the facility. Payments shall be made each month and shall be based upon the facility's average daily per patient charge. Provisions of this section shall not pertain to patients treated at the mental health institutes. (emphasis added)

An analysis of § 4 of H.F. 2584, as it amends § 125.44, purports to make clear that the state, through IDSA, is responsible for the total cost of care provided a state patient committed under § 321.281 to a facility as defined by § 125.2. As previously discussed, that definition now includes MHI's.

Although MHI's are facilities for purposes of § 125.2, we cannot conclude that the state is responsible for the total cost of care provided to substance abusers at MHI's. This conclusion is supported by unnumbered paragraph two of § 125.44, which states that the "[p]rovisions of this section shall not pertain to patients treated at the mental health institutes".

Consequently, since § 125.44 does not apply to MHI's, this issue must be resolved through other statutory authority. Said authority is found in § 125.43. As discussed in Division V of this Opinion, under § 125.43 as read in pari materia with § 230.20(5), the costs of treatment provided to a person at a MHI stemming from dependency on a chemical substance must be billed to the counties at the rate of twenty-five percent. We, therefore, conclude that the costs of providing treatment to a person committed to a MHI under § 321.281 must be billed to the counties at the rate of twenty-five percent.

Effectively, this conclusion states that persons committed to a MHI under § 321.281 may not be considered to be state patients. Under §§ 125.43 and 230.20(5), there is no authority for imposing one hundred percent financial liability upon the state. And, as already discussed, § 125.44 does not apply to persons committed to MHI's under § 321.281.

We conclude, then, that the state is liable for seventy-five percent of the costs of providing treatment to a person committed to a MHI under § 321.281, and the county of legal settlement is responsible for the remaining twenty-five percent of the costs.

In summary, we concude that as of July 1, 1981, state mental health institutes are facilities as defined by § 125.2, The Code 1981, as amended, and therefore facilities within the meaning of § 125.44, The Code 1981. State mental health institutes are not facilities within the meaning of § 204.409(2), The Code 1981. Courts are not authorized to commit violators of § 204.401, The Code 1981, to state mental health institutes as they are not facilities licensed by the Iowa Department of Substance Abuse. Neither the state nor counties will incur any liability for the costs of care and treatment provided to a substance abuser at a state mental health institute in contravention of § 204.409(2), The Code 1981. Persons committed to a state mental health institute in violation of § 204.409(2) may not be considered to be state patients. Chapter 230, The Code 1981 governs the costs of treatment provided to a substance abuser at a state mental health institute, and § 204.409(2), The Code 1981, governs the costs of providing treatment to a substance abuser under § 204.409(2) at a facility licensed by the Iowa Department of Substance Abuse.

A court may order a person committed to a state mental health institute for substance treatment under ch. 812 when it reasonably appears that the defendant is suffering from a mental disorder, which is inclusive of dependency on a chemical substance. Counties must be billed at the rate of eighty percent of the total costs of treatment provided to a person committed to a mental health institute under ch. 812 for a psychiatric evaluation and treatment of a mental disorder, but only at the rate of twenty-five percent of the total costs where the mental disorder results from substance abuse.

A court may commit a violator of § 321.281, The Code 1981, to any institution in Iowa providing treatment for alcoholism or drug dependency, including a state mental health institute. In addition, courts may refer a defendant to a state mental health institute under § 321.283(3), The Code 1981. The state is responsible for seventy-five percent of the costs of providing treatment to a person committed to a mental health institute under § 321.281, The Code 1981, and the county of legal settlement is responsible for the remaining twenty-five percent of the costs. Persons committed to a mental health institute under § 321.281 may not be considered to be a state patient.

Sincerely,

Thomas Mann, Jr.
Assistant Attorney General

TM/jam

MENTAL HEALTH: Liability for the Costs of Treating Substance Abusers: Commitment of Substance Abusers to Mental Health Facilities. §§ 125.2, 125.13, 125.21, 125.43, 125.44, ch. 135B, §§ 240.401, 204.409, 229.20, 229.50(3), 229.51, 229.52, 230.1, 230.2, 230.20(5), 321.281, 321.283(3), and 812.3, The Code 1979. State mental health institutes are not facilities within the meaning of § 125.23, The Code 1979, and within the meaning of H.F. 2584. Court are not authorized to commit violators of § 204.401, The Code 1979, to a mental health institute as they are not facilities licensed by the Iowa Department of Substance Abuse. Neither the state nor the counties will incur any liability for the costs of care and treatment provided to a substance abuser at a state mental health institute in contravention of § 204.409, The Code 1979. Persons committed to a state mental health institute in violation of § 204.409 may not be considered to be state patients. Chapter 230, The Code 1979, governs the costs of treatment provided to a substance abuser at a state mental health institute, and § 204.409, The Code 1979, shall govern the costs of providing treatment to a substance abuser under § 204.409 at a facility licensed by the Iowa Department of Substance Abuse.

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Dr. Michael V. Reagen, Ph.D., Commissioner
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L O C A L

Dear Commissioner Reagen:

You requested an opinion of the Attorney General on the impact of Chapter 1003, Laws of the Sixty-Eighth General Assembly, 1980 Session (hereinafter H.F. 2584), on the responsibility of counties to pay for treatment provided to substance abuse patients at state mental health facilities. Specifically, you ask the following questions:

1. Are State Mental Health Institutes "facilities" as that term is used in H.F. 2584?

2. Are District Courts free to commit persons guilty of violating Section 204.401, the Code 1979, to a mental health institute?

3. What is the financial responsibility of the state for persons committed to a mental health institute for substance abuse under 204.409? The responsibility of the county? Can these persons so committed be considered state cases? Does Section 204.409, supersede Section

125.43, the Code 1979, which places financial responsibility with the county of legal settlement?

Under Chapter 812, the Code 1979, courts may order a person detained in a mental health institute. Some court orders also specify substance abuse treatment. Section 230.20, the Code 1979, requires that we bill for the person's care by program. The billing for all programs except substance abuse is at 80% of cost. The substance abuse program is billed at 25% of the cost.

4. May a Court order substance abuse treatment when a person is ordered detained under Chapter 812, the Code 1979? Under what conditions can substance abuse treatment be ordered?

   A District Court may also under Section 321.281, the Code 1979, commit a person to a hospital for treatment.

5. When a person is ordered to a mental health institute under Chapter 812, the Code 1979, is the county of legal settlement always billed 80%? Are there any circumstances when the billing would be at 25% under the substance abuse program?

6. Are District Courts free to commit persons charged with violating Section 321.281, the Code 1979, to a mental health institute? Persons guilty of violating Section 321.281?

7. What is the financial responsibility of the state for persons committed to treatment at a mental health institute pursuant to Section 321.281, the Code 1979? May these persons be considered state cases? What is the

> financial responsibility of the county of legal settlement? Does Section 321.281 supersede Section 125.43, the Code 1979 which places financial responsibility with the county of legal settlement?

House File 2584, in pertinent parts, amends sections of the Iowa Code that provide options for the treatment of substance abusers, including ch. 125, the statute that provides a comprehensive legislative scheme for the treatment and rehabilitation of persons suffering from chemical dependence. Your specific questions about H.F. 2584 are answered as follows in the order presented.

> I. Are State Mental Health Institutes "Facilities" As That Term Is Used In H.F. 2584?

House File 2584 uses the term "facility" in several of its provisions. The relevant provisions are as follows:

> Sec. 4. Section one hundred twenty-five point forty-four (125.44), unnumbered paragraph one (1), Code 1979, is amended to read as follows:
>
> The director may, consistent with the comprehensive substance abuse program, enter into written agreements with a facility as defined in section 125.2 . . .
>
> . . . .
>
> Sec. 7. Section two hundred four point four hundred nine (204.409), subsection two (2), Code 1979, is amended to read as follows:
>
> 2. Whenever the court finds that a person who is charged with a violation of section 204.401 and who consents thereto, or who has entered a plea of guilty to or been found guilty of a violation of ~~said~~ that section, ~~and~~

> ~~who~~ is addicted to, dependent upon, or a chronic abuser of any controlled substance and that such person will be aided by proper medical treatment and rehabilitative services, it may order that ~~he~~ the person be committed as an in-patient or out-patient to a facility ~~approved~~ licensed by the state department of ~~health~~ substance abuse for ~~such~~ medical treatment and rehabilitative services . . . .

From the above two provisions it is clear that the term "facility" is defined in two different ways under H.F. 2584. Section 4 of H.F. 2584, which amends § 125.44, The Code 1979, refers to a facility as it is defined by § 125.2, The Code 1979. Section 125.2 defines the term "facility" as follows:

> 2. "Facility" means a hospital, institution, detoxification center, or installation providing care, maintenance and treatment for substance abusers and licensed by the department under section 125.13.

Section 125.13 reads as follows:

> 1. Except as provided in subsection 2 of this section, a person may not maintain or conduct any chemical substitutes or antagonists program, residential program or nonresidential outpatient program, the primary purpose of which is the treatment and rehabilitation of substance abusers without having first obtained a written license for the program from the department.

> 2. The licensing requirements of this chapter, except the requirements imposed by section 125.21, shall not apply to any of the following:
>
> a. Hospitals providing any care or treatment to substance abusers required on January 1, 1978, by other provisions of law to be licensed.

The goal in construing a statute is to ascertain the legislative intent and, if possible, give it effect. Doe v. Ray, 251 N.W.2d 496 (Iowa 1977). In doing so, one must look to what the legislature said, rather than what it might have or should have said. Kelly v. Brewer, 239 N.W.2d 109 (Iowa 1976); Steinbeck v. Iowa District Court, 224 N.W.2d 469 (Iowa 1974). In statutory construction, one must seek a meaning which is both reasonable and logical and try to avoid results which are strained, absurd, or extreme. State v. Berry, 247 N.W.2d 263 (Iowa 1976). Statutes relating to the same subject matter must be read in pari materia and read in light of their common purpose and intent. Wonder Life Company v. Liddy, 207 N.W.2d 27 (Iowa 1973).

Applying these principles to the issues at hand, it becomes clear that the "facilities" referred to in § 4 of H.F. 2584 are facilities as defined by § 125.2, The Code 1979. Section 125.2 defines a facility as an institution which provides treatment to substance abusers and is licensed by the Iowa Department of Substance Abuse (hereinafter IDSA). State mental health institutes are not licensed by IDSA, but instead are hospitals that are excepted from the § 125.13 licensing requirements because they were required on January 1, 1978, to be licensed by the Iowa Department of Health pursuant to ch. 135B, The Code 1977. Op.Att'yGen. # 79-5-31. Further, they do not provide chemical substitute or antagonists treatment programs referred to in § 125.21 so as to cause them to fall within the licensing requirement of § 125.13. Id. It follows, then, that since state mental health institutes are not licensed by IDSA pursuant to § 125.13, they are not facilities as defined by § 125.2, and correspondingly, not facilities as referred to in Section 4 of H.F. 2584.

The same conclusion must be reached with respect to § 7 of H.F. 2584. Section 7 amends § 204.409, The Code 1979,

the statute that permits a court to place a person convicted of possessing a controlled substance on probation, and further permits the court to commit the person to a facility for treatment where the said person is "addicted to, dependent upon, or a chronic abuser of any controlled substance". The clear language of § 7 authorizes the court to commit the person "to a facility licensed by the state department of substance abuse". As previously discussed, state mental health institutes are not licensed by IDSA. Accordingly, they are not facilities for purposes of § 7 of H.F. 2584.

Although we have concluded that state mental health institutes are not facilities for purposes of H.F. 2584, the conclusion in no way implies that mental health institutes are statutorily precluded from applying for and receiving a license from IDSA so as to become a facility within the meaning of § 125.2. 1/

II. Are District Courts Free To Commit Persons Guilty Of Violating § 204.401, The Code 1979, To A Mental Health Institute?

As discussed in Division I of this opinion, persons convicted of violating § 204.401, The Code 1979, may be placed on probation and committed to a facility licensed by IDSA pursuant to § 204.409 as amended by § 7 of H.F. 2584. Since state mental health institutes (hereinafter MHI's) are not licensed by IDSA, courts are not authorized to commit violators of § 204.401 to such an institution.

III.(A) What Is The Financial Responsibility Of The State For Persons Committed To A Mental Health Institute For Substance Abuse Under § 204.409?

1/ Note that the definition of the term "facility" under the mental health code, § 229.50(3), The Code 1979, is the same as the definition contained in § 125.2, The Code 1979. Courts, then, cannot commit persons to a mental health institute for substance abuse under §§ 229.51 and 229.52, The Code 1979.

As discussed in Division II of this Opinion, there is no statutory authority for a court to commit a person to a state mental health institute pursuant to § 204.409, as amended by § 7 of H.F. 2584. Both the courts and mental health institutes are bound by legislative pronouncements in this regard. Iowa Department of Social Services v. Blair, 294 N.W.2d 567 (Iowa 1980). Accordingly, where statutory conditions are not met, the state incurs no liability for the costs of care and treatment of a substance abuser. Op.Att'y Gen. # 79-10-12; 1975 Op.Att'yGen. 210, 211.

(B) What Is The County's Financial Responsibility For Persons Committed To A Mental Health Institute Under § 204.409?

Like our conclusion in Division 3(A) above, we reiterate that the district courts cannot impose the remedy of committing a person to a MHI in violation of a statute. Blair. Therefore, the county will incur no liability where the statute is ignored. Op.Att'yGen. # 79-10-12; 1975 Op.Att'yGen. 210.

C. Can These Persons So Committed Be Considered State Cases?

Section 7 of H.F. 2584, as it amends § 204.409, reads in pertinent part as follows:

> A person committed under this subsection who is not possessed of sufficient income or estate to enable him or her to make payment of the costs of such treatment in whole or in part shall be considered a state patient and the costs of treatment shall be paid as provided in section one hundred twenty-five point forty-four (125.44) of the Code . . . (emphasis supplied)

State cases or state patients as defined by § 7 refers to those persons committed under § 7 who are incapable of paying

for the costs of their care at a Section 7 "facility". As previously discussed in Division I of this Opinion, a Section 7 "facility" is a facility licensed by IDSA. Consequently, a person "committed under this subsection" is a person committed to a facility licensed by IDSA. Such a person, if indigent, may be considered to be a state patient thereby imposing financial costs upon the state.

On the other hand, Section 7 does not authorize a commitment to a MHI. Accordingly, any person committed to a MHI in contravention of Section 7 cannot be said to be committed under that section. They, therefore, cannot be considered state patients. Op.Att'yGen. # 79-10-12.

D. Does Section 204.409 Supersede Section 125.43, The Code 1979, Which Places Financial Responsibility With The County Of A Patient's Legal Settlement?

Section 125.43, The Code 1979, provides that "Chapter 230 shall govern the determination of the costs and payment for treatment provided to a substance abuser in a mental health institute". As previously discussed, § 204.409, as amended by H.F. 2584, relates to the costs of care and treatment provided to a substance abuser at a facility licensed by IDSA. Since these two statutes relate to different subjects, neither supplants the other. Where there are no conflicts in statutes and the terms are unambiguous, there is no room for construction. Hartman v. Merged Area VI Community College, 270 N.W.2d 822 (Iowa 1978); Iowa National Industrial Loan Company v. Iowa State Department of Revenue, 224 N.W.2d 437 (Iowa 1974). Accordingly, ch. 230 will continue to govern the costs of treatment provided to substance abusers at MHI's and § 204.409 will apply to facilities licensed by IDSA.

IV. May A Court Order Substance Abuse Treatment When A Person Is Ordered Detained Under Chapter 812, The Code 1979? Under What Conditions Can Substance Abuse Treatment Be Ordered?

Under ch. 812, a person charged with or convicted of a crime may be ordered committed to the custody of the Department of Social Services when in the opinion of the district court "it reasonably appears that the defendant is suffering from a mental disorder which prevents him or her from appreciating the charge, understanding the proceedings, or assisting effectively in the defense". § 812.3, The Code 1979. Such commitment may be for an evaluation and appropriate treatment. Statutory authority for this conclusion is found both in ch. 812 and § 229.20, The Code 1979. Section 229.20(2), as it affects this conclusion, reads as follows:

> 2. When a proceeding under section 229.6 and succeeding sections of this chapter arises under sections 783.5 or 789.8, and the respondent through his attorney waives the hearing otherwise required by section 229.12, the court may immediately order the respondent placed in a hospital for a complete psychiatric evaluation and appropriate treatment, pursuant to section 229.13. . . .(emphasis added).

Clearly the language of § 229.20 authorizes the court to commit a person to a MHI for an evaluation and appropriate treatment when proceedings are commenced under §§ 783.5 or 789.8, The Code 1975. Both §§ 783.5 and 789.8 were repealed by the criminal law revision of 1976, ch. 1245, Laws of the Sixty-Sixth General Assembly, 1976 Session, and re-codified as present ch. 812 of the Code. Thus, the reference to §§ 783.5 and 789.8 in § 229.20 is effectively a reference to ch. 812. The result is that under § 229.20 a court is authorized to commit a person to a MHI for an evaluation and appropriate treatment when proceedings are commenced under ch. 812.

Appropriate treatment is dependent upon the nature of the mental incapacity. Mental incapacity may result from dependency on a chemical substance. Section 125.2(8), The Code 1979, defines a person "incapacitated by a chemical substance" as a person, who "as a result of the use of a chemical substance, is unconscious or has his or her judgment otherwise so impaired that he or she is incapable of realizing and making a rational decision with respect to the need for treatment". A district court could reasonably conclude that

such a person could not appreciate a criminal charge, understand court proceedings, or assist in his or her defense. Appropriate treatment, then, for such a person would include treatment for chemical dependency.

Accordingly, under ch. 812 a court may order a person committed to a MHI for substance abuse treatment when it reasonably appears that the defendant is suffering from a mental disorder which is inclusive of dependency on a chemical substance.

V. When A Person Is Ordered To A Mental Health Institute Under Chapter 812, The Code 1979, Is The County Of Legal Settlement Always Billed 80%? Are There Circumstances When The Billing Would Be At 25% Under The Substance Abuse Program?

The county of legal settlement is liable for the costs of a court ordered psychiatric evaluation of a criminal defendant at a state hospital. This conclusion was reached in an opinion issued by this office, Op.Att'yGen. # 79-5-24,, in which it was reasoned that the import of §§ 230.1 and 230.2, The Code 1979, is that the county of legal settlement is liable for the costs involved in a court-ordered psychiatric evaluation at a state hospital.

Billings are submitted to a county by the superintendent of a state hospital pursuant to § 230.20, The Code 1979. Section 230.20(5) mandates that "the county shall be billed for one hundred percent of the stated charge for each patient, unless otherwise specified in the current appropriation for support of the state hospitals". The current appropriation for MHI's is found in ch. 8, Laws of the Sixty-Eighth General Assembly, 1979 Session. Section Three (3) of that Act states that the "state mental health institutes' daily per diem as determined pursuant to section two hundred thirty point twenty (230.20) of the Code shall be billed at eighty percent for each fiscal year". Thus, under § 230.20(5), as amended, counties must be billed for 80 percent of the costs of a psychiatric evaluation of a criminal defendant at a state hospital.

This conclusion, however, is limited to those ch. 812 commitments that are for the purpose of a psychiatric evaluation and diagnosis, and for the treatment of mental disorders not related to substance abuse. Commitments for treatment of mental disorders stemming from substance abuse must be billed at a different rate. The applicable Code provision is § 125.43, The Code 1979. That section reads, in pertinent part, as follows:

> 125.43 Funding at mental health institutes. Chapter 230 shall govern the determination of the costs and payment for treatment provided to substance abusers in a mental health institute under the department of social services, except that the charges shall not constitute a lien on any real estate owned by persons legally liable for support of the substance abuser and the daily per diem shall be billed twenty-five percent. . . . (emphasis added)

Under § 125.43, treatment provided to a substance abuser in a MHI shall be billed at the rate of twenty-five percent of the total costs. On the surface, § 125.43 appears to conflict with § 230.20(5) as amended. However, related statutes are read in pari materia and the terms of a specific statute control over those of a general statute. Benger v.General United Group, Inc., 268 N.W.2d 630 (Iowa 1978); State ex rel Krupke v. Witowski, 256 N.W.2d 216 (Iowa 1977). Applying this rule of construction to the issue at hand, it becomes clear that § 125.43, a specific statute on the subject of the costs of treating a substance abuser at a MHI, prevails over § 230.20(5), as amended, a statute providing a general scheme for the billing of the costs of treating patients at a mental health institute. Consequently, where a criminal defendant is committed to a MHI under ch. 812 for appropriate treatment stemming from his/her dependency on a chemical substance, costs of the treatment provided must be billed to the counties at the rate of twenty-five percent.

Accordingly, we conclude that when a person is ordered committed to a MHI under ch. 812 for a psychiatric evaluation

and/or appropriate treatment resulting from a mental disorder, billings to a county must be made at 80 percent of total costs. In those isolated cases where the ch. 812 commitment is for appropriate treatment resulting from chemical dependency, billings to the counties must be made at twenty-five percent of the total costs.

VI. Are District Courts Free To Commit Persons Charged With Violating Section 321.281, The Code 1979, To A Mental Health Institute? Persons Guilty Of Violating Section 321.283?

A. Section 321.281, The Code 1979, prohibits the operating of a motor vehicle upon the public highways while under the influence of an alcoholic beverage or a drug (OMVUI). The statute permits a court to suspend imposition of sentence on a person convicted of OMVUI and to commit the defendant "for treatment of alcoholism or drug addiction or dependency to any hospital or institution in Iowa providing such treatment".

House File 2584 amends § 321.281, but it does not change the above quoted language. Thus, it remains clear that a court may commit a violator of § 321.281 to any institution in Iowa providing treatment for alcoholism or drug dependency, including a state mental health institute.

B. In addition to the power to commit a defendant for treatment of alcoholism or drug dependency under § 321.281, a court may refer the defendant for treatment under § 321.283(3), The Code 1979. However, under § 321.283(3), a "court may refer the defendant for treatment at a facility as defined in §§ 125.1 to 125.43 and designated by the division on alcoholism".

There are two significant distinctions between §§ 321.281 and 321.283(3). They are: (1) the court's power under § 321.283(3) is limited to the power to refer the defendant for treatment, not commit, and (2) the court is limited to referring the defendant to a facility licensed and approved by IDSA. Accordingly, we conclude that courts are not free to commit defendants to a MHI under § 321.283(3). Op.Att'yGen. # 79-10-12.

VII.(A) What Is The Financial Responsibility Of The State For Persons Committed To Treatment At A Mental Health Institute Pursuant To Section 321.281, The Code 1979? May These Persons Be considered State Cases? What Is The Financial Responsibility Of The County Of Legal Settlement? Does § 321.281 Supersede § 125.43?

Section 321.281 was amended by H.F. 2584. Section 9 of H.F. 2584, in pertinent part, reads as follows:

> A person committed under this section who is not possessed of sufficient income or estate to enable him or her to make payment of the costs of such treatment in whole or in part shall be considered a state patient and the costs of treatment shall be paid as provided in section one hundred twenty-five point forty-four (125.44) of the Code. (emphasis supplied)

A clear reading of § 9 reveals that an indigent committed to a facility under § 321.281 shall be considered a state patient. The costs of treating such patient are to be paid pursuant to § 125.44. Section 125.44 was amended by § 4 of H.F. 2584. That section reads as follows:

> Sec. 4. Section one hundred twenty-five point forty-four (125.44), unnumbered paragraph one (1), Code 1979, is amended to read as follows:
>
> The director may, consistent with the comprehensive substance abuse program, enter into written agreements with a facility as defined in section 125.2 to pay for seventy-five percent of the cost of the care, maintenance and treatment of a substance abuser, except that the state's liability shall be one hundred

> percent of the total cost of care, maintenance and treatment when a substance abuser is a state patient. All payments for state patients shall be made in accordance with the limitations of this section. . . . (emphasis supplied)

Other relevant portions of § 125.44 includes unnumbered paragraph two (2), which reads as follows:

> The contract may be in such form and contain provisions as agreed upon by the parties. Such contract shall provide that the facility shall admit and treat substance abusers regardless of where they have residence. If one payment for care, maintenance, and treatment is not made by the patient or those legally liable therefor within thirty days after discharge the payment shall be made by the department directly to the facility. Payments shall be made each month and shall be based upon the facility's average daily per patient charge. Provisions of this section shall not pertain to patients treated at the mental health institutes. (emphasis added)

An analysis of § 4 of H.F. 2584 as it amends § 125.44 makes it clear that the state, through IDSA is responsible for the total cost of care provided a state patient committed under § 321.281 to a facility that is licensed by IDSA. This financial liability, however, does not extend to those cases in which the patient is committed to a MHI, for the clear language of § 4 limits it applicability to facilities as defined by § 125.2. As previously discussed, MHI's are not facilities as defined by § 125.2. This conclusion is supported by unnumbered paragraph two of § 125.44, which states that the "[p]rovisions of this section shall not pertain to patients treated at the mental health institutes".

Consequently, this issue must be resolved through other statutory authority. Said authority is found in § 125.43. As discussed in Division V of this Opinion, under § 125.43 as read in pari materia with § 230.20(5), the costs of treatment provided to a person at a MHI stemming from dependency on a chemical substance must be billed to the counties at the rate of twenty-five percent. We, therefore, conclude that the costs of providing treatment to a person committed to a MHI under § 231.281 must be billed to the counties at the rate of twenty-five percent.

Effectively, this conclusion states that persons committed to a MHI under § 321.281 may not be considered to be state patients. Under §§ 125.43 and 230.20(5), there is no authority for imposing one hundred percent financial liability upon the state. And, as already discussed, § 125.44 does not apply to persons committed to MHI's under § 321.281.

We conclude, then, that the state is liable for seventy-five percent of the costs of providing treatment to a person committed to a MHI under § 321.281, and the county of legal settlement is responsible for the remaining twenty-five percent of the costs.

SUMMARY

In summary, we conclude that state mental health institutes are not facilities within the meaning of § 125.23, The Code 1979, and within the meaning of H.F. 2584. Courts are not authorized to commit violators of § 204.401, The Code 1979, to a mental health institute as they are not facilities licensed by the Iowa Department of Substance Abuse. Neither the state nor the counties will incur any liability for the costs of care and treatment provided to a substance abuser at a state mental health institute in contravention of § 204.409, The Code 1979. Persons committed to a state mental health institute in violation of § 204.409 may not be considered to be state patients. Chapter 230, The Code 1979, governs the costs of treatment provided to a substance abuser at a state mental health institute, and § 204.409, The Code 1979, shall govern the costs of providing treatment to a substance abuser under § 204.409 at a facility licensed by the Iowa Department of Substance Abuse.

A court may order a person committed to a state mental health institute for substance treatment under ch. 812 when it reasonably appears that the defendant is suffering from a mental disorder which is inclusive of dependency on a chemical substance. Counties must be billed at the rate of eighty percent of the total costs of treatment provided to a person committed to a mental health institute under ch. 812 for a psychiatric evaluation and treatment of a mental disorder, but only at the rate of twenty-five percent of the total costs where the mental disorder results from substance abuse.

A court may commit a violator of § 321.281, The Code 1979, to any institution in Iowa providing treatment for alcoholism or drug dependency, including a state mental health institute. Courts are not free to commit a person to a mental health institute under § 321.283(3), The Code 1979, but instead must refer patients to a facility licensed and approved by the Iowa Department of Substance Abuse. The state is responsible for seventy-five percent of the costs of providing treatment to a person committed to a mental health institute under § 321.281, The Code 1979, and the county of legal settlement is responsible for the remaining twenty-five percent of the costs. Persons committed to a mental health institute under § 321.281 may not be considered to be a state patient.

Sincerely,

Thomas Mann, Jr.

Thomas Mann, Jr.
Assistant Attorney General

TM/jam

COUNTIES AND COUNTY OFFICERS: SOLID WASTE DISPOSAL COMMISSIONS: §§ 23.1, 23.18, 28E.4, 28E.5, 332.7, 384.95, 453.1, 455B.76, The Code 1981 and Senate File 130, 69th G.A., 1981 Session §§ 340 and 1001. There is no requirement that a contract entered into by a county solid waste commission be let pursuant to public bid procedures. A current contract can be renewed or renegotiated without public bidding. (Fortney to Fisher, Webster County Attorney 7/2/81) 81-7-2 (L)

Monty L. Fisher
Webster County Attorney
Courthouse
Ft. Dodge, Iowa 50501

Dear Mr. Fisher:

You have requested an opinion of the Attorney General regarding the necessity of employing public bidding procedures in the context of a solid waste disposal project contract. Essentially, you are concerned with the propriety of extending or renewing the current contract without the utilization of bid procedures. Your letter set forth in great detail the facts giving rise to your inquiry. We here set forth only those facts we deem pertinent to the discussion which follows.

The Webster County Solid Waste Commission was created by way of a Chapter 28E agreement among Webster County, the City of Fort Dodge and the other towns in the county. The Commission operates a sanitary waste disposal site as required by § 455B.76 which provides that:

> Every city and county of this state shall provide for the establishment and operation of a sanitary disposal project for final disposal of solid waste by its residents not later than July 1, 1975. Sanitary disposal projects may be established either separately or through cooperative efforts for the joint use of the participating public agencies as provided by law.

> Cities and counties may execute with public and private agencies contracts, leases, or other necessary instruments, purchase land and do all things necessary not prohibited by law for the collection of solid waste, establishment and operation of sanitary disposal projects, and general administration of the same. Any agreement executed with a private agency for the operation of a sanitary disposal project shall provide for the posting of a sufficient surety bond by the private agency conditioned upon the faithful performance of the agreement. [Emphasis supplied.]

The Commission has been operating the project by way of a contract with a private party. This party is responsible for regulating dumping and compacting of waste, as well as covering over the waste so that the site may be reclaimed. The current contract, which will shortly expire, was let by way of public bidding procedures. The duration of the contract was premised on the assumption that this would be the last year the site is utilized. As it now appears that the site may be utilized for a number of future years, the Commission is interested in extending the term of the contract and renegotiating certain terms. (We note that both the bid specifications and the contract itself provide for extension of the contract term.) Your inquiry is whether the renewal of the contract may be accomplished without the letting of public bids.

You point out that "the project does not involve the construction of any building or structure on the site. However, the project does involve initial site preparation and the carefully planned construction of lifts to fill a mined out area with alternating layers of waste and cover material. It also involves the construction and maintenance of roads within the boundaries of the site for the use of persons bringing waste to the disposal area on the site and for the use of the contractor to move excavated cover material from soil borrow areas on the site to the disposal area. For a number of years after the site is filled and disposal operations cease, the project will include the finished contouring, seeding and subsequent maintenance of the site in accordance with a final site development plan."

The Commission is desirous of avoiding public bidding if at all possible due to the cost which will be necessitated by such a procedure, as well as the voluminous documents involved.

It is our opinion that there is no requirement that a contract entered into by a county solid waste commission be let pursuant to public bid procedures. Consequently, the current contract can be renewed or renegotiated without public bidding.

We begin our analysis at the pivotal point, Chapter 28E. Section 28E.4 provides:

> Any public agency of this state may enter into an agreement with one or more public or private agencies for joint or co-operative action pursuant to the provisions of this chapter, including the creation of a separate entity to carry out the purpose of the agreement. Appropriate action by ordinance, resolution or otherwise pursuant to law of the governing bodies involved shall be necessary before any such agreement may enter into force. [Emphasis supplied.]

According to the information you have provided, the Webster County Solid Waste Commission was created by way of a Chapter 28E agreement. The Commission is a separate legal entity pursuant to § 28E.4, an entity separate from the county and cities which created it. The Commission's powers are separate and are as defined in the terms of the 28E agreement. See § 28E.5(2). Consequently, any duty to utilize public bidding procedures must be imposed on the 28E entity itself. The fact that there may exist statutory duties which require bid letting by one or more of the public agencies comprising the 28E entity does not impose similar requirements on the entity itself. The 28E entity is separate and distinct from the agencies which create the entity.

In an earlier opinion, Op. Att'y Gen. #79-4-2, we reviewed the impact of § 453.1 on a 28E entity made up of three counties. The 28E entity was, as in your case, a solid waste agency formed by local subdivisions. Section 453.1 regulates the deposit of public funds held by certain units of government, including counties and county officials. We held that § 453.1 was inapplicable to the solid waste agency created under Chapter 28E because § 453.1 did not list 28E agencies among those subject to its provisions. By similar reasoning, a solid waste agency created by Chapter 28E is not subject to public bid requirements simply because its component governmental units are subject to such requirements. The 28E agency is subject to public bid requirements only if there is a statutory duty imposed directly on such agencies.

Section 23.18 imposes public bid requirements on "municipalities" when "the estimated total cost of construction, erection, demolition, alteration or repair of any public improvement exceeds five thousand dollars." "Public improvement" is defined in § 23.1, as amended by Senate File 130, 69th G.A., 1981 Session, § 1001 to mean "a building or other construction work to be paid for in whole or in part by the use of funds of any municipality." The language is thus broad enough to encompass the construction of a waste disposal site, but only if the Solid Waste Commission is a municipality. It is not. A "municipality" is defined by § 23.1, as amended by S. F. 130, § 1001, to mean "township, school corporation, state fair board, state board of regents, and state department of social services." "Municipality" is therefore not a solid waste commission created under Chapter 28E.

Similar to the foregoing comments regarding "municipalities" are our thoughts regarding bid procedures imposed on counties. At present, counties are governed by § 332.7 relating to "constructing or repairing a county building" if the costs will exceed five thousand dollars. This requirement was changed, effective July 1, 1981 by S. F. 130, § 340. Under § 340, the applicable limit is raised to twenty-five thousand dollars. If a county public improvement exceeds this amount, the bid letting procedures of the city code, §§ 384.95 through 384.103 are applicable. For these purposes, a "public improvement" is defined as:

> . . . any building or construction work, either within or outside the corporate limits of a city, to be paid for in whole or in part by the use of funds of the city, regardless of sources, including a building or improvement constructed or operated jointly with any other public or private agency, but excluding urban renewal and low-rent housing projects, industrial aid projects authorized under chapter 419, emergency work or work performed by employees of a city or a city utility.

§ 384.95(1).

The improvements made on the solid waste site are clearly "public improvements" as defined in § 384.95, The Code 1981 and S. F. 130, § 340. However, as indicated earlier, a solid waste commission is a separate entity from its participating members. It is not a municipality. Neither is it a county.

Thus, the public bid requirements of the Code which are applicable to counties are not applicable to a solid waste commission.

We are unable to locate any other sections of the Code which arguably impose public bid letting requirements on a solid waste commission created pursuant to Chapter 28E. Consequently, we are of the opinion that there is no requirement that a contract entered into by a county solid waste commission be let pursuant to public bid procedures. A current contract can be renewed or renegotiated without public bidding.

Yours truly,

David Fortney

DAVID M. FORTNEY
Assistant Attorney General

DMF:sh

MUNICIPALITIES: Fire Safety Codes--§ 364.16, The Code 1981. A city has discretion to adopt a separate fire safety code. (Blumberg to Holien, Marshall County Attorney, 7/2/81) 81-7-1 (L)

Ms. Sandra J. Holien
Marshall County Attorney
Marshall County Courthouse
Marshalltown, IA 50158

Dear Ms. Holien:

You have requested an opinion regarding a city's responsibility to adopt a fire safety code and its liability if it does not.

Section 364.16, The Code 1981, provides:

> Each city shall provide for the protection of life and property against fire and may establish, house, equip, staff, uniform and maintain a fire department. A city may establish fire limits and may, consistent with code standards promulagated by nationally recognized fire prevention agencies regulate the storage, handling, use and transportation of all inflammables, combustibles, and explosives within the corporate limits and inspect for and abate fire hazards. A city may provide conditions upon which the fire department will answer calls outside the corporate limits or the territorial jurisdiction and boundary limits of this state. A city shall have the same governmental immunity outside its corporate limits when providing fire protection as when operating within the corporate

> limits. Firemen operating equipment on calls outside the corporate limits shall be entitled to the benefits of chapter 410 or 411 when otherwise qualified. [Emphasis added.]

Although a city has a duty to provide fire protection, it has discretion whether to promulgate or adopt any fire safety codes. Thus, the decision to repeal such a code is also discretionary.

We know that a city can be held liable for not following such a code it has adopted. See Wilson v. Nepstad, 282 N.W.2d 664 (Iowa 1980). It was also stated therein that a city could be liable for not properly inspecting pursuant to ordinance or statute. See Chapters 103 and 103A, The Code 1981. We cannot state with any certainty the liability of a city for not adopting codes which it has no statutory duty to adopt. Although such cases would have to be determined on each individual set of facts, generally, we do not believe that a city would be liable for not adopting a fire code absent a statutory duty. Chapter 613A provides for liability of a city for the negligent or wrongful acts or omissions of its employees. In addition, it is generally held that courts will not impose a duty upon a legislative body to enact or repeal a law. P. Wagerin, Actions and Remedies Against Government Units and Public Officers for Nonfeasance, 11 Loyla Law Journal 101, 106 (1979). That is where there is no statutory duty the courts are reluctant to impose a common-law duty.

Accordingly, we are of the opinion that the adoption of a fire safety code, other than what may be contained in a housing code pursuant to § 364.17 and any other statute that may impose requirements for fire safety is discretionary with a city.

Very truly yours,

Larry M. Blumberg

LARRY M. BLUMBERG
Assistant Attorney General

LMB/cmc

STATE OFFICERS AND DEPARTMENTS: CONFLICTS OF INTEREST; PUBLIC EMPLOYEES. U. S. Constitution, Fourteenth Amendment; §§ 4.1(3), 68B.2 (last unnumbered paragraph), 68B.2(5), 68B.4, 455B.4(1). Terms "wives" in definition of employee cannot be construed to include husbands for purposes of penal provisions of Chapter 68B. Inclusion of wives but not husbands in prohibitions of § 68B.4 results in an unconstitutional gender-based classification, thus the statute may be enforced against employees and officials but not against their spouses. The United States government and political subdivisions of the State are not individuals, associations, or corporations for purposes of § 68B.4. The language the Legislature used in § 68B.4 bars employees of the Department of Environmental Quality from selling grain to an elevator subject to the department's regulatory authority. Corporations which are owned 10% or more by an employee are subject to all the sales restrictions of § 68B.4 and it does not matter that the goods or services sold may be unrelated to the agency's regulatory function. (Valde to Crane, Executive Director, Department of Environmental Quality, 8/28/81) #81-8-39(L)

Department of Justice

THOMAS J. MILLER
ATTORNEY GENERAL

August 28, 1981

ADDRESS REPLY TO:
HOOVER BUILDING
DES MOINES, IOWA 50319

Mr. Larry E. Crane
Executive Director
Iowa Department of
Environmental Quality
Wallace Building
L O C A L

Dear Mr. Crane:

We have received your request for an opinion of the Attorney General regarding the manner in which § 68B.4, The Code 1981, affects the employees of your department. Section 68B.4 provides as follows:

> No official or employee of any regulatory agency shall sell, either directly or indirectly, any goods or services to individuals, associations, or corporations subject to the regulatory authority of the agency of which he is an official or employee.

You have provided us with six specific hypothetical situations concerning potential application of § 68B.4 which are set out in full in the discussion preceeding analysis of each issue. You specify that in each case the employees are full time, salaried employees of your department as defined in § 68B.2(5).

Several of your questions concern the activities of husbands and/or wives of employees. Since the issue whether wives of male employees are accorded different treatment under the statute than husbands of female employees runs through many of your requests, we will analyze that issue first and then proceed with analysis of specific hypotheticals.

Section 68B.4 bars employees and officials of regulatory agencies from certain activities. "Employee" and "Official" are defined for purposes of Chapter 68B by § 68B.2(5) and § 68B.2(6) respectively. As noted by your request the legislature has recently added the Department of Environmental Quality to the list of agencies considered to be "regulatory agencies" for purposes of Chapter 68B.

The unnumbered paragraph following § 68B.2(12) extends the definition of various terms previously defined in § 68B.2. The last sentence of that unnumbered paragraph provides that "[t]he use of ["employee" or "official"] shall also include wives and unemancipated minor children." (emphasis added). The choice of the term "wives" was apparently deliberately made. We note that the legislature utilized the term "spouse" in defining "Immediate family members" in § 68B.2(12).[1] "Wife" is defined as "a woman united to a man by marriage," Black's Law Dictionary 1771 (4th ed. 1951), "a married woman; specifically, a woman in her relationship to her husband," Webster's New Twentieth Century Dictionary 2091 (Unabridged 2nd Ed. 1971). Thus if the language of that sentence were to be applied literally, the prohibitions of § 68B.4 would apply to wives of male employees and officials of regulatory agencies but not to husbands of female employees and officials.

Violation of § 68B.4 is a serious misdemeanor (§ 68B.8); thus § 68B.4 is a penal statute. Penal statutes must be strictly construed in order to give all persons a "clear and unequivocal warning in language that people generally would understand, as to what actions would expose them to liabilities for penalties." 3 Sutherland, Statutes and Statutory Construction § 59.03, at 7 (4th Ed. 1974). See Knight v. Iowa District Court of Story County, 269 N.W.2d 430 (Iowa 1978). Where a statute is malum prohibitum in nature it is even more imperative that acts made criminal be delineated clearly and unequivocally. Knight, supra, 269 N.W.2d at 438. See 3 Sutherland, Statutes and Statutory Construction § 59.04, at 2 (Supp. 1980). In construing penal statutes the courts will generally not extend such statutes to include anything

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[1]We are aware that the unnumbered last paragraph of § 68B.2 was a part of the statute as originally enacted and at the time of enactment immediately followed § 68B.2(7). 1967 Session, 62nd G.A., Ch. 107. Subsections 68B.2(8-12) were added by subsequent amendment to Chapter 68B. 1980 Session, 68th G.A., Ch. 1015, § 6.

beyond their letter. 3 Sutherland, Statutes and Statutory Construction § 59.04, at 14 (4th Ed. 1974), State v. Coppes, 247 Iowa 1057, 78 N.W.2d 10 (1956). The Iowa Supreme Court has held that it may not under the guise of statutory construction extend, enlarge or otherwise change the terms or meaning of a statute. State v. Vietor, 208 N.W.2d 894 (1973); State v. Wedelstedt, 213 N.W.2d 652 (1973). The Court will not write into a statute words which are not there. State ex rel. Fenton v. Downing, 261 Iowa 965, 155 N.W.2d 517 (1968). The court in determining legislative intent must look to what the legislature said, rather than what it should or might have said. Kelley v. Brewer, 239 N.W.2d 109, 113 (Iowa 1976), Iowa Rules of Appellate Procedure 14(f) (13). "We do not inquire what the legislature meant. We ask only what the statute means." Lever Brothers Co. v. Erbe, 249 Iowa 454, 469, 87 N.W.2d 469, 479 (1958).

We believe that the term "wife" clearly and unequivocally conveys the commonly understood meaning of a female spouse. We do not believe that under the strict construction required of penal statutes a court could extend the meaning of the term to include "husbands".

Because penal statutes must be strictly construed, we do not believe § 4.1(3) can be utilized to extend the meaning of "wives" to include husbands. Section 4.1(3) specifies that "[w]ords of one gender include the other genders." At the time Chapter 68B was enacted, § 4.1(3) provided in pertinent part that "words importing the masculine gender only may be extended to females." § 4.1(3), The Code, 1966. It was amended to its present form by 1971 Session, 64th G.A., Ch. 77, § 12. In Young v. O'Keefe, 246 Iowa 1182, 69 N.W.2d 534 (1955) the Supreme Court held that the term "widow" as used in § 410.10, Iowa Code, 1950, could not be construed to also include widowers. In so holding the Court applied § 4.1(3) as it then existed but concluded "[n]owhere however do we find any statute or authority permitting substitution of the masculine for the feminine." 246 Iowa at 1186, 69 N.W.2d at 537 (emphasis in original by the Court). Thus at the time of enactment of Chapter 68B it is our opinion that the legislature did not intend, nor would the Supreme Court have construed, the term "wives" to include husbands.

To use § 4.1(3) to extend the term "wives" to include husbands by judicial construction would effectively amend and enlarge the statute and would not fairly put persons on unequivocal notice of what activities the legislature has proscribed. Strict construction requires that the term "wives" be given its commonly understood meaning and we conclude that excludes husbands.

We have no doubt that punishment of wives but not husbands would be deemed unconstitutional by the courts as violative of the Fourteenth Amendment to the United States Constitution. To pass constitutional muster under the Equal Protection Clause of the Fourteenth Amendment gender-based distinctions or classifications must serve important governmental objectivies and the discriminatory means employed must be substantially related to the achievement of those objectives. Craig v. Boren, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142, 100 S.Ct. 1540, 64 L.Ed.2d 107 (1980). While Chapter 68B does serve important state interests, it is impossible to conceive that this gender-based distinction is substantially related to the achievement of those objectives. In our opinion, if a ban on certain activities by an employee's spouse is appropriate, it is totally irrelevant whether that spouse is husband or a wife. We believe the courts would declare the prohibition void because it applies only to wives and not to husbands of female employees.

In reaching the above conclusion we have not ignored the principle of statutory construction that the Supreme Court has the power and duty to construe statutes in such a way to preserve them and render them consistent with the State and federal constitutions if possible, State v. Monroe, 236 N.W.2d 24 at 35 (Iowa 1975), and that if a statute is subject to two constructions, one of which will lead to constitutionality and the other unconstitutionality, the Court will generally adopt the interpretation which upholds rather than defeats the law, Iowa Natural Industrial Loan Co. v. Iowa State Department of Revenue, 224 N.W.2d 437 at 442 (Iowa 1974). We do not believe, however, that these principles may be utilized in this instance to extend the reach of a penal statute beyond the clear and commonly understood meaning of the terms of the statute.

However, the issue then becomes whether the statute must fall in its entirety or if the unconstitutional provisions may be stricken and the remainder of the statute

saved. The Supreme Court has stated that this issue is second in importance only to the initial determination of validity. State v. Monroe, supra, 236 N.W.2d 24 at 35, citing 2 Sutherland, Statutes and Statutory Construction § 44.02, at 35 (4th Ed. 1973). Courts will save the good part of a statute if the offensive parts can be removed. It must be determined whether the unconstitutional portion of a statute may be excised and still leave a viable statute expressive of legislative intent. If the paramount intent or chief purpose of a statute will not be destroyed by removing the offensive portion of a statute or the legislative purpose not substantially affected or impaired, the remaining portions of a statute will be saved. See State v. Monroe, 236 N.W.2d 24 at 35-37 (Iowa 1975). Additionally, § 4.12, The Code 1981, provides:

> If any provision of an Act or statute or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act or statute which can be given effect without the invalid provision or application, and to this end the provisions of the Act or statute are severable.

The Court has applied this provision to save statutes if possible. State v. Monroe, supra, 236 N.W.2d at 36.

We believe the primary purpose of the statute can be effectuated by enforcing the prohibitions of § 68B.4 against employees themselves but eliminating the inclusion of "wives" from the definition of employees. Our perception of the primary purpose of § 68B.4 is that it was intended to prevent conflicts of interest and dealing between employees of regulatory agencies and those they regulate. This purpose is not entirely eviscerated by elimination of wives from the prohibition. Thus it is our opinion that the remainder of the statute is enforceable against employees themselves.

A prior opinion of this office stated that for purposes of Chapter 68B "wives" includes "husbands" citing § 4.1(3). 1978 Op.Att'yGen. 373 (Turner to Danker). We note that such issue was not the central focus of that opinion and that there was no analysis of the notice issue. To the extent that opinion is inconsistent with the conclusions herein it is hereby withdrawn. For the reasons set out above we believe that conclusion is clearly erroneous.

We now proceed with our discussion of each of your six hypothetical situations. Your first request is as follows:

> 1. An employee is a member of the United States Army Reserve, and receives compensation from the United States government through the Department of the Army. The Department of the Army operates the Iowa Army Ammunition Plant in Middletown, Iowa. That facility presently disposes of certain wastes by open burning, pursuant to variances granted by the former Air Quality Commission under section 455B.22 of The Code and continued pursuant to section 22, Chapter 1148, Acts of the Sixty-eighth General Assembly. The facility is in the process of designing and installing incinerators, which will require permits under section 455B.13 of The Code, and which will be required to operate in compliance with emission standards specified in Chapter 400-4(455B) Iowa Administrative Code (Is the United States government, or for that matter any unit or government, an "individual, corporation or association" within the meaning of 68B.4?)

Your first request requires a determination whether the United States government is an "individual, association, or corporation" for purposes of § 68B.4. Initially it must be pointed out that, although several key terms included within § 68B.4 are defined for purposes of Chapter 68B, "individual", "association" and "corporation" are not. See e.g. § 68B.2(4) (regulatory agency) § 68B.2(5) (employee) and § 68B.2(6) (official). The legislature is its own lexicographer and where it has chosen to define terms the meaning it gives to words is generally controlling. State v. Steenhock, 182 N.W.2d 377 (Iowa 1970). Absent legislative definition or a peculiar and appropriate meaning in the law, words in a statute are given their ordinary and commonly understood meaning. City of Ft. Dodge v. Iowa Public Employment Relations Board, 275 N.W.2d 393 (1979), State v. Hesford, 242 N.W.2d 256 (Iowa 1976).

"Individual" is defined by Black's Law Dictionary 913 (4th ed. 1951) as follows:

> Individual. As a noun, this term denotes a single person as distinguished from a group or class, and also, very commonly, a private or natural person as distinguished from a partnership,

> corporation, or association; but it is said that this restrictive signification is not necessarily inherent in the word, and that it may, in proper cases, include artificial persons. (emphasis added)

Webster defines "individual" as "a person". Webster's New Twentieth Century Dictionary, 932 (Unabridged 2nd Ed. 1971). We believe that the use of the term "individual" in § 68B.4 was intended to mean a natural person, a human being. This interpretation is strengthened by the inclusion of "associations" and "corporations" which are not natural persons, juxtaposed with "individual" within the language of the statute. Additionally, the legislature also used the word "individual" in defining "member of the general assembly", § 68B.2(3), and in § 68B.10. Those uses of the word within the same Act convince us that for purposes of Chapter 68B the legislature intended the term "individual" to mean a natural person. Because no governmental agency or political subdivision is a natural person, the meaning of "individual" for purposes of § 68B.4 does not include the United States government or other units of government.

The term "association" has been said to be a vague term without fixed meaning. 7 C.J.S. Associations § 2 (1980) states that "the term 'association' . . . is used to indicate a collection of persons who have united or joined together for some special purpose or business and who are called, for convenience, by a common name . . . [A]s the term is commonly used it may be defined to be a body of persons acting together, without a charter, but upon the methods and forms used by incorporated bodies, for the prosecution of some common enterprise".

Webster's defines association as "a society formed for transacting or carrying on some business or pursuit for mutual advantage." Webster's, supra, p. 113. Black's Law Dictionary 156 (4th ed. 1951), defines "association" as:

> An unincorporated society; a body of persons united and acting together without a charter, but upon the methods and forms used by incorporated bodies for the prosecution of some common enterprise.

While finding a precise definition for "association" is a difficult task and unnecessary for purposes of this opinion, we believe it is clear that "association" as commonly understood does not include the United States government or the state or its political subdivisions. It has been held that the state is not an "association" within at least one statute. State v. Taylor, 75 S.D. 533, 64 N.W. 548, 550 (1895). Additionally, the strict construction required of a penal statute does not permit extending the definition of the term "association" beyond its commonly understood meaning.

The problem of defining "corporation" for purposes of Chapter 68B is even more troublesome. The term is wholly undefined by the statute and yet is subject to an exceedingly broad range of definitions. Hence it has been said that "[t]he word 'corporation' in its most extensive signification applies to a nation or state, and thus used, the United States, and the several states, or commonwealths, composing the Union, may be termed 'corporations.' In its generally understood and intended sense they are not corporations. . . ." 1 W. Fletcher, Cyclopedia of the Law of Private Corporations § 67, at 325 (rev. perm. ed. 1974) (emphasis added). See, 1 E McQuillin, The Law of Municipal Corporations § 2.03(c), at 134 (rev. 3rd ed. 1971). Corporations can be variously classified as public or private, quasi-public, quasi-corporations, and profit or non-profit. Entities which may fall into various classification of some form of "corporation" include nations, states, cities, counties, townships, school districts and drainage districts. See 1 W. Fletcher, Cyclopedia of the Law of Private Corporations Ch. 3, §§ 49-80, at 278-384 (rev. perm. ed. 1974).

In our opinion the use of the term "corporation" as commonly understood does not include the United States government. The fact that Chapter 68B creates a penal sanction requires strict construction of its prohibitions. Thus we believe that the term cannot be construed to include the State of Iowa or the United States as a corporation for purposes of applying the prohibitions of § 68B.4.

The term "corporation" standing alone is also sufficiently broad to include municipal corporations. However, it has been said that "generally provisions in state constitutions or statutes using the word 'corporation' standing by itself, are held not to include a municipal corporation." 1 E. McQuillin, The Law of Municipal Corporations § 2.16, at

154 (rev. 3rd ed. 1971) We believe that, even though the above rule is not a hard and fast rule, the generally understood, common meaning of "corporation" would not include municipal corporations. This is especially true when strict construction is applied to the statute.

Your query whether in fact any "unit of government" is a corporation for purposes of § 68B.4 is a very general question and as such difficult to answer. However, we have examined the three various units of government above and concluded that they are not corporations for purposes of § 68B.4. These three entities are often classified as "public corporations" in the broadest sense. A public corporation is said to be "one that is created for political purposes with political powers to be exercised for purposes connected with the public good in the administration of civil government." 1 W. Fletcher, Cyclopedia of the Law of Private Corporations § 58, at 292 (rev. perm. ed. 1974). It is our opinion that when strictly construed the common usage of "corporation" would not include the state government or local governmental subdivisions within the proscriptions of § 68B.4. Hence, it is our opinion that the first hypothetical situation your request presented would not be prohibited by § 68B.4.

The second situation you have presented is as follows:

> 2. An employee lives on a farm and grows grain. The grain is sold to an elevator. The elevator has grain dryers, the installation of which requires permits pursuant to section 455B.13, The Code, and which are required to operate in conformance with emission standards specified in Chapter 400-4(455B) Iowa Administrative Code.

This situation appears to fall squarely within the prohibition of § 68B.4. By the terms of your hypothetical the elevator is subject to the regulatory authority of your department. The statute forbids the sale of "any goods" by an employee to such an entity. The sale may not be made "directly or indirectly." There is no requirement that the goods relate to the functions and duties of the regulatory agency or relate to the employee's duties with that agency. There is also no requirement that an employee's duties be related to the organization subject to the agency's authority. "Employee" is defined as including "all clerical personnel".

§ 68B.2(5). Hence, all employees are subject to the proscription whether they are supervisory or non-supervisory, policy making or non-policy making. The choice of the scope of proscription is for the Legislature to decide.

While many of the prohibitions of this chapter may appear to be unreasonable and overbroad, we are not free to rewrite the statute. In its most extreme applications, however, it may well be that a court would find the statute unconstitutionally overbroad. The argument would be that the statute creates a class so broad that it includes within its scope activities vastly different from hard-core violators. However, we believe that the prohibitions of the statute are facially constitutional and the determination whether an act is constitutional as applied is necessarily dependent upon the specific facts of each case. We cannot attempt to predict the results of determinations which depend so heavily on specific factual situations.

We would strongly advise that the Legislature re-examine Chapter 68B with an eye toward more clearly specifying those activities which are prohibited. In addition to the problems created by the statute being overbroad, many of the key terms of the statute are ambiguous and, therefore, difficult to apply. Among the terms are "individual", "Association", "Corporation", and "subject to the regulatory authority".

We can treat your next three requests together. They are as follows:

> 3. The wife of an employee is employed by a railway transportation company, which is not required to have any permits from the Department. However, diesel powered locomotives, which the company operates, are required to operate in compliance with subparagraph 400-4.3(2)"d"(4), Iowa Administrative Code. Note that other vehicles, including cars and trucks, are required to operate in compliance with subparagraph 400--4.3(2)"d"(2) and (3), Iowa Administrative Code.
>
> 4. The wife of an employee works for a company that disposed of solid waste at a site not holding a permit from this Department, in violation of section 455B.82, The Code. An administrative order was issued under subsection 455B.82(2) to cease use of this site. The company is now disposing of its solid waste at a site holding a permit from the Department. Would the answer be different if the wife was the Department employee rather than the husband?

5. The wife of an employee works at a grocery store, which is a dealer as defined in subsection 455C.1(4), The Code. Note that although the Department has rulemaking authority (section 455C.9), a violation of Chapter 455C or rules promulgated thereunder is punishable as a simple misdemeanor (section 455C.12) in an action brought by the county attorney rather than by the Department.

Each involves the spouse of an employee working for various entities which are in some way "subject to the regulatory authority" of the Department of Environmental Quality. The prohibitions of § 68B.4 have been previously interpreted to include employment by one of the entities subject to the regulatory agency's authority. 1976 Op.Att'yGen. 521 (Nolan to Benton). However, because it is our opinion that the prohibitions placed on employees cannot be extended to those employees' spouses, analysis of your third, fourth, and fifth examples is unnecessary.

Your sixth and last hypothetical is as follows:

6. A female employee and her husband (a non-employee) each own 15% of the stock of a corporation which sells and installs windmills. The corporation sells a windmill to a company that is required to have a pretreatment agreement pursuant to subrule 400-19.3(5) Iowa Administrative Code. No permits are required from this Department for the installation of a windmill.

The corporation in the above hypothetical is included with the definition of "employee" as a result of your employee owning 15% of the corporation's stock. See § 68B.2, unnumbered last paragraph which provides in part, "Whenever the terms . . . 'employee' or 'official' are used in this chapter, the term shall be interpreted to include . . . any corporation of which any of the above holds ten percent or more of the stock either directly or indirectly." The company to which the sales are made is required to have a pretreatment agreement which, among other things, must "limit the monthly average and the daily maximum quantity of compatible and incompatible pollutants discharged . . ." 400--19.3(5)(a)(2), Iowa Administrative Code. Clearly, the company purchasing the windmills is "subject to the regulatory authority of" the Department of Environmental Quality.

The fact that no permits are necessary to install windmills is irrelevant in terms of the statutory prohibition. Section 68B.4 bars the sale of "any goods" to a company which, as in your example, is subject to your department's regulatory authority. As we previously discussed, the prohibition under the statute is not merely for goods and services regulated by or related to the agency function; the ban extends to sales of "any goods and services". § 68B.4. Therefore, we believe that § 68B.4 proscribes the situation in your sixth hypothetical.

Very truly yours,

Michael Paul Valde

MICHAEL PAUL VALDE
Assistant Attorney General

CIVIL RIGHTS / VOLUNTEER WORKERS / CONFIDENTIALITY: Sections 601A.5(1) , 601A.15(4), The Code 1981. The Civil Rights Commission may utilize volunteer workers who sign an agreement to abide by statutory confidentiality requirements. (Fleming to Reis, Civil Rights Division, 8/28/81) #81-8-38(L)

August 28, 1981

Ms. Artis I. Reis
Executive Director
Iowa Civil Rights Commission
8th Floor - Colony Bldg.
507 Tenth Street
Des Moines, Iowa 50319

Dear Ms. Reis:

You indicated that the Iowa Civil Rights Commission may utilize a small number of volunteer workers to assist in evaluation of cases that are pending before the Commission. Therefore, you have presented the following question for our consideration:

> Would Section 601A.15(4), The Code 1981, be violated if volunteer workers were given access to confidential case files upon signing an agreement to abide by the agency's confidentiality mandates?

The answer to your question is no.

We note at the outset that the enabling statute provides that the civil rights chapter "shall be construed broadly to effectuate its purposes." § 601A.18, The Code 1981. Effective use of volunteers would surely assist in effectuating the purposes of the law.

The Commission's power and duties include the following:

> 1. To prescribe the duties of a director and appoint and prescribe the duties of such investigators and other employees and agents as the commission shall deem necessary for the enforcement of this chapter.

§ 601A.5(1) (emphasis supplied). The term "agent" is not defined in the civil rights chapter. According to Black's Law

Dictionary, Revised 4th Ed. (1968 West) an agent is a person authorized by another to act for him, one entrusted with another's business. The relevant dictionary meaning is in accord. See, Webster's Third New International Dictionary, p. 40 (1976) (one that acts for or in the place of another by authority from him). These definitions of agent do not suggest that a wage or salary is required for the agency relationship to exist. Thus, it appears that the Commission could "prescribe the duties" of volunteer "agents" just as it does those who are paid employees.

Nor is there anything in the statutory requirement of confidentiality that would preclude the use of volunteers who are bound by contract to comply with the confidentiality requirement. The duty of non-disclosure is imposed upon the "members of the Commission and its staff." § 601A.15(4), The Code 1981 (emphasis added).

The term staff, like the word agent, does not carry a requirement of wage or salary. The relevant meaning of staff is "the personnel responsible for the functioning of an institution or the establishment or the carrying out of an assigned task under an overall director or head." Webster's, supra, at 2219.

The Commission may wish to adopt a brief rule that the Commission's "staff" may include such volunteers as the Commission selects from time to time if it is concerned that challenges to its use of volunteers might arise.

Respectfully submitted,

Merle Wilna Fleming

Merle Wilna Fleming
Assistant Attorney General

MWF:crn

STATE OFFICERS AND DEPARTMENTS. Department of General Services - Authority for Iowa businesses to donate unneeded equipment and supplies to the State, §§ 18.15, 565.3, 565.4, 565.5, The Code. Any manufacturer or merchandiser may give their unneeded equipment and supplies to the State so long as the object and purpose of such gift is not against public policy or illegal. The State may then distribute such gifts to state agencies and charge such agencies reasonable service charges to cover the costs of distribution. (Swanson to McCausland, Director, Department of General Services, 8/28/81) #81-8-37(L)

Mr. Stanley L. McCausland
Director
Department of General Services
Hoover State Office Building
Des Moines, Iowa 50319

August 28, 1981

Dear Mr. McCausland:

We have received your request for an opinion from this office concerning authority for Iowa businesses to donate unneeded equipment and supplies to the State.

You state that the Federal Surplus Property Division of the Department of General Services receives equipment and supplies no longer needed by the federal government and distributes them to public agencies, schools, hospitals, and other agencies within the State. The program supports itself by charging a small service charge on each item it distributes.

You further state that the generation of federal property is at a low ebb now, and in looking for ways to supplement the decreased federal flow, you have come on the idea of using Iowa manufacturers and merchandisers as a supply source. You have had preliminary contacts which indicate that there is interest in such a project, and request an opinion of the Attorney General on the following questions:

1. Could Iowa businesses donate their unneeded equipment and supplies to the State?

2. Could the State distribute this equipment to the agencies currently served by the federal surplus property program?

3. Could the donating businesses deduct the donations from their income taxes? If so, at what value?

4. Could the State charge the recipients of the donations service charges to cover the costs of transportation, warehousing and other distribution costs?

The authority for the State to receive equipment and supplies no longer needed by the federal government is found in Section 18.15, Code of Iowa, 1981. That section provides as follows:

> Services and commodities accepted. The director of the department of general services is also authorized to accept services, commodities and surplus property and make provision for warehousing and distribution to various departments and subdivisions of the state, and such other agencies, institutions and authorized recipients within the state as may be from time to time designated in federal statutes and rules.

Iowa businesses and others may donate their unneeded equipment and supplies to the State by virtue of Section 565.3, Code of Iowa, 1981. That section states that:

> A gift, devise, or bequest of property, real or personal, may be made to the state, to be held in trust for and applied to any specified purpose within the scope of its authority, but the same shall not become effectual to pass title in such property unless accepted by the executive council in behalf of the state.

Under this statute, any manufacturer or merchandiser may give or donate their unneeded equipment and supplies to the State so long as the object and purpose of such gift is not against public policy or illegal. Eckles v. Lounsberry, 111 N.W.2d 638 (Iowa, 1961). To pass title to the property, the gift must be accepted by the executive council in behalf of the state.

Section 565.4, Code of Iowa, 1981, further provides that:

> If gifts are made to the state in accordance with section 565.3, for the benefit of an institution thereof, if accepted, shall be held and managed in the same way as other property of the state, acquired for or devoted to the use of such institution; and any conditions attached to such gift become binding upon the state, upon the acceptance thereof.

Gifts made directly to a State institution may be accepted by the governing board of such institution, and the board may exercise such powers with reference to the management, sale, disposition, investment, or control of the property as it deems essential to its preservation and the purposes for which the gift was made. Section 565.5, Code of Iowa, 1981.

With property donated to the State under the provisions of Section 565.3, Code of Iowa, 1981, upon acceptance by the executive council, the State may distribute the property or equipment to the state agencies currently served by the federal surplus property program.

With regard to your question pertaining to the deductibility of such donated property, and at what value, we refrain from rendering an opinion thereon because the answer would vary depending upon each specific factual situation involved. Such deductions are generally allowed for contributions to qualified organizations. A "state" is considered by Internal Revenue Service to be a qualified organization for such purposes if the contribution is made for exclusively public purposes. (Internal Revenue Code, Sec. 170(b)(1)(A), Reg. §1.170A-9).

We see no problem in charging the public recipients of the donations reasonable service charges to cover the costs of transportation, warehousing and other distribution costs.

We hope that the above information adequately answers your questions. If we can be of further assistance, please advise.

Yours very truly,

Gary H Swanson

GARY H. SWANSON
Assistant Attorney General

GHS/mel

MOTOR VEHICLES: Probationary Operator's Licenses. Sections 321.178, 321.189, The Code 1981; U. S. Constitution, Amendment XIV, Iowa Constitution, Art. I, § 6. The § 321.178(2) provision for probationary operator's licenses for those drivers between the ages of sixteen and eighteen does not apply to the operation of motorcycles. This provision is valid under the Fourteenth Amendment of the U. S. Constitution and Article I, § 6 of the Iowa Constitution. (Dundis to Jochum, State Representative, 8/28/81) #81-8-36(L)

August 28, 1981

Honorable Thomas J. Jochum
State Representative
2368 Jackson
Dubuque, Iowa 522001

Dear Representative Jochum:

You have requested an Attorney General's opinion on the following questions:

> 1. Since both operators of automobiles and motorcycles must possess operator's licenses, do the provisions of § 321.178 (2)(a) relating to probationary operator's licenses apply to persons between the ages of sixteen and eighteen who operate automobiles and motorcycles?
>
> 2. Since an operator's license is required for the operation of both an automobile and a motorcycle, would the granting of a probationary operator's license only to the operator of an automobile and not to a motorcycle operator, although other circumstances would be identical, be an unlawful discrimination under the Iowa or United States Constitution?

I.

As you have indicated, the standard operator's license issued to drivers in Iowa is authorized by § 321.189(1), The Code 1981. Chauffeurs and operators of motorized bicycles are required to obtain separate licenses. § 321.189(1) and (2), The Code 1981. Although a separate license is not required for

motorcycle operation, the standard operator's license must be specifically marked valid for motorcycle. See I.A.C. 820-07C-13.7(1). As with the chauffeurs and motorized bicycle licenses, a skill test applicable to that vehicle must be passed.

A recent amendment to § 321.189(1) will require the completion of a motorcycle education course for a person under the age of eighteen applying for an operator's license valid for the operation of motorcycles:

> After July 1, 1981, a person under the age of eighteen applying for a [motor vehicle license] valid for the operation of a motorcycle shall be required to successfully complete a motorcycle education course approved and established by the department of public instruction or successfully complete an approved motorcycle education course at a private or commercial driver education school licensed by the department. A public school district may charge a student a fee which shall not exceed the actual cost of instruction. [1]

This course is separate and distinct from the regular driver's education course required under § 321.178(1), The Code 1981.

Section 321.178(2), The Code 1981, has for a number of years provided for the issuance of a probationary operator's license to those between the ages of sixteen and eighteen years of age who have not been able to take the standard driver's education course:

> Youths not attending school - no driver education required.
> a. Any person between sixteen and eighteen years of age who is not in attendance at school or in a public or private school where an approved driver's education course is offered or available, may be issued a one-year probationary operator's license without having completed an approved driver's education course. Such person shall not have a probationary operator's

[1] The 69th General Assembly, 1981 Session, has amended the effective date to January 1, 1982 in House File 872.

> license revoked or suspended upon re-entering school prior to age eighteen provided the student enrolls in and completes the classroom portion of an approved driver's education course as soon as a course is available.

Your question asks whether a probationary license issued pursuant to § 321.178(9)(a) authorizes operation of a motorcycle as well as a conventional vehicle. That question must be answered in the negative.

The exception in § 321.178(2)(a) expressly addresses itself only to noncompletion of the driver's education course, not the motorcycle education course. The fact that the basic operator's license is required for both automobile and motorcycle operation is irrelevant since it must be specifically validated for motorcycle. The Code establishes an additional requirement for motorcycle operation beyond the standard operator's test -- namely successful completion of a motorcycle education course. That additional requirement, unlike the general driver's education requirement, is unqualified.

Even if one were to go beyond the plain language of § 321.178(2)(a) and consider the purpose and intent behind the legislation as enunciated in the December 24th, 1980 Attorney General's opinion you cite (Op.Att'y Gen. #80-12-23, p.5), the same conclusion must be drawn. Although a probationary license marked valid for motorcycle operation could facilitate gainful employment, and even possible attendance at a motorcycle education course farther from home, the potential dangers inherent in operating the motorcycle without benefit of the completed education course for those under eighteen could outweigh that value. Although this rationale has not been spelled out by the Legislature, their call for a separate motorcycle education course under § 321.189(1) indicates they consider motorcycle operation to present distinct problems.

In sum, we are of the view that a § 321.178(2)(a) probationary license is not available for motorcycle operation.

II.

Your second question asks whether such a distinction made between the driver and motorcycle education courses, as far as probationary licenses are concerned, is valid under the United States and/or Iowa Constitutions. The applicable portion of the United States Constitution would be the Fourteenth Amendment equal protection guarantee, and that of the Iowa Constitution, the Article I, § 6 uniform application of laws provision.

The Attorney General opinion cited in Division I contains a general discussion of the above constitutional provisions. The following passage from that opinion is worth repeating:

> The scope of these two constitutional guarantees is not co-extensive. Compare Bierkamp v. Rogers, 293 N.W.2d 577 (Iowa 1980)(holding the Iowa guest statute, § 321.494, The Code 1979, a violation of Iowa Const. Art. I, §6) with Silver v. Silver, 280 U.S. 117, 50 S.Ct. 57, 74 L.Ed. 221 (1929)(holding that the Connecticut guest statute, Conn. Gen. Stat. ch. 308 (1927), does not violate the equal protection clause of the fourteenth amendment) and Hill v. Garner, 434 U.S. 989, 98 S.Ct. 623, 54 L.Ed.2d 486 (1977)(dismissal for want of substantial federal question of an appeal challenging on equal protection grounds the Oregon Guest statute, Ore. Rev. Stat. § 30.115 (1975)).
>
> Absent a suspect class or an infringement of fundamental rights, it is agreed, however, that the test to be applied is the rational basis test. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 312-13, 49 L.Ed.2d 520, 524, 92 S.Ct. 2562 (1976); Rudolph, 293 N.W.2d at 557; Lunday v. Vogelman, 213 N.W.2d 904, 907 (Iowa 1973).

In Rudolph, the Iowa Supreme Court cited with approval a United States Supreme Court statement of the rational basis test:

> The constitutional safeguard [of equal protection] is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

> Rudolph, 293 N.W.2d at 558, quoting McGowan v. Maryland, 366 U.S. 420, 425-26, 81 S.Ct. 1101, 6 L.Ed.2d 393, 399 (1966). When a statute is challenged on the ground that it denies equal protection, the burden is on the challenger to prove the statutory classification 'is wholly irrelevant to the achievement of the state's objective.' Rudolph, 293 N.W.2d at 558.

It is clear we are not dealing with a suspect class, or fundamental rights as defined by present case law, and that accordingly, the rational basis test must be applied in this matter.

We think the Legislature could rationally believe that operating a motorcycle is quite different from operating an automobile or truck. Motorcycles appear to present a number of distinct safety problems - limited visibility to other drivers, less protection for an operator involved in an accident, and various control and handling peculiarities. It is also generally recognized that a younger driver age seems to correlate somewhat with accident and traffic frequency, a fact that when combined with the problems associated with motorcycles would not only require a special safety course before motorcycle operation, but mandate the taking of that course by a youth under the age of eighteen regardless of whether he or she is in attendance at achool or whether the course is even offered at that school.

In our view, the statutory discrimination between automobile and motorcycle operators concerning the issuance of § 321.178(2) probationary licenses can be justified due to the particular concerns with motorcycle operation. As long as all operators of motorcycles are treated identically regarding this matter, the denial of a probationary operator's license does not violate the Fourteenth Amendment of the United States Constitution nor Article I, § 6 of the Iowa Constitution.

Sincerely,

Stephen Dundis (BA)

STEPHEN P. DUNDIS
Assistant Attorney General

SPD:sh

COUNTY AND COUNTY OFFICERS: Board of Supervisors, §§ 252.27, Code of Iowa, 1981, as amended by S.F. 130 of the 69th G.A., 96.19(6)(a)(6)(e), 85.16(2), 97.53, 613A.2, Code of Iowa, 1981. The Board of Supervisors may require persons receiving assistance, pursuant to Ch. 252, The Code, to perform labor for the county as a condition for receipt of such relief. Such persons may be considered employees of the county under these circumstances. (Robinson to Beine, Cedar County Attorney, 8/28/81) #81-8-35(L)

August 28, 1981

Lee W. Beine, Esquire
Cedar County Attorney
419 Cedar Street
Tipton, Iowa 52772

Dear Mr. Beine:

Recently you asked for an opinion of the Attorney General, wherein you stated:

> Our local Board of Supervisors is contemplating a requirement that persons receiving assistance under Chapter 252 of the Code of Iowa perform labor for the County as a condition for receipt of such relief. It is not planned that such labor be part of any work project as set forth by Section 252.42. The question has been raised as to whether Chapter 251, Section 6, of the Code may be read, together with Chapter 252, so that persons receiving relief under Chapter 252 may be put to work on projects other than the streets and highways. Our office would appreciate an opinion from your office on the following: [The first three specific questions are omitted.]

Senate File 130 of the Sixty-Ninth General Assembly is a 257 page Act to Implement the Home Rule Amendment for counties which amended many of the present sections of The Code. Your first two questions pertained to Chapters 251 and 252, The Code, which this Act amends in Sections 1035 to 1041, copies of which are attached. The Governor signed this measure on May 19, 1981, and it became effective July 1, 1981. See, § 3.7, The Code.

The answer you seek is found in § 252.27, The Code, which is amended to read as follows:

> 252.27 FORM OF RELIEF--CONDITION. The Board of supervisors shall determine the form of the relief. However, legal aid shall be only in civil matters and provided only through a legal aid program approved by the board of supervisors. The amount of assistance issued shall be determined by standards of assistance established by the board of supervisors. They may require any able-bodied person to work on public programs or projects at the prevailing local rate per hour in payment for and as a condition of granting relief. The labor shall be performed under the direction of the officers having charge of such public programs for projects. Subject to the provisions of section 142.1, relief may consist of the burial of non-resident indigent transients and the payment of the reasonable cost of burial, not to exceed two hundred fifty dollars.
>
> The board shall record its proceedings relating to the provisions of relief to specific persons under this chapter. A person who is aggrieved by a decision of the board may appeal the decision as if it were a contested case before an agency and as if the person had exhausted administrative remedies in accordance with the procedures and standards in section 17A.19, subsections 2 through 8, and section 17A.20.

Clearly, the Board of Supervisors may require persons receiving assistance under Chapter 252, The Code, to perform labor for the county as a condition for receipt of such relief.

An answer to your third question pertaining to the County Home Rule Amendment to the Iowa Constitution, 1857, is therefore not required.

You next asked:

> 4. In the event that the Board of Supervisors were to require such persons to perform labor for the County, whether or not such labor was limited to the streets and highways, would, or could, such persons be "employables" of the County for purposes of the Workmen's Compensation Law, Chapter 613A of the Code of Iowa, Chapter 96 of the Code of Iowa, and Chapter 97 of the Code of Iowa?

Yes, with the exception of employment for puroses of the Employment Security Act, (See, § 96.19(6)(a)(6)(e), The Code), in our opinion, courts could consider such persons employees of the county under the circumstances related in your question. We recognize that a strong case could be made under the Worker's Compensation Statute (See, § 85.61(2), The Code), The Old-Age and Survivors' Insurance System (See, § 97.53, The Code), and the Tort Claims Act (See, 613A.2, The Code), that persons performing service for the county, as a condition of receiving aid, are not employees but persons performing a required service. That is, they receive welfare under a condition that they participate in a work project. This is not compensation for their services in the employer-employee sense. A case that might support this reasoning is Hicks v. Guilford County, 148 S.E.2d 240 (N.C. 1966) where a juror was held not to be a "public officer", "independent contractor" nor an employee within the Worker's Compensation Act. In our opinion, however, the Iowa courts are likely to follow Scissons v. City of Rapid City, 251 N.W.2d 681 (S.D. 1977), where the court held that a claimant injured on a garbage truck used under a county program of work relief and who was compensated by the county in the form of vouchers which were redeemable for necessaries at various stores was an "employee" of the county and entitled to compensation benefits for the injuries.

At first blush, this result may seem undesirable to the county. Consider, however, McBroom v. State, 226 N.W.2d 41 (Iowa 1975), where a prisoner (not an employee) was able to recover $125,000 from the state for the loss of part of a hand. An employee would be allowed only a fraction of that amount under Worker's Compensation. After this case, § 25A.14(5) and (6), The Code, the State's Tort Claims Act, was amended to its present language which provides that prisoners are covered by Worker's Compensation.

We recognize that City of Rapid City, supra, is not binding on the Iowa courts and our statutes differ. Further, we recognize that § 252.27, The Code, as amended, gives the board of supervisors broader discretion than they have had heretofore to develop standards. However, the phrase "at the prevailing local rate per hour in payment for and as a condition of granting relief" may the Iowa courts to concur with South Dakota's reasoning.

The Michigan Court of Appeals has held that the word "employee" has neither technically nor in general use a restricted meaning, and it may have different meanings in different connections and is not a word of art but takes color from its surroundings and frequently is carefully defined by the statute where it appears. Regents of the University of Michigan v. Michigan Emp. Relations Com., 195 N.W.2d 875, 878 (Mich. App. 1972).

Generally, the employee-employer cases come within the context of whether the person is an employee or an independent contractor. Here the Iowa Supreme Court has laid out the following considerations:

> III. We have repeatedly pointed out the most commonly accepted indicia of the relationship of the employer-employee, frequently in determining whether a person rendering service to another is an employee or independent contractor. Our most recent decision of this kind as this is written is Swain v. Monona County, Iowa, 163 N.W.2d 918, 921, quoting from Nelson v. Cities Service Oil Co., supra, 259 Iowa 1209, 1215, 146 N.W.2d 261, 264-265. The Nelson opinion in turn quotes from several earlier precedents, including Schlotter v. Leudt, supra, 255 Iowa 640, 643, 123 N.W.2d 434, 436-437.
>
> The Schlotter and Nelson cases state: "The most important consideration in determining whether a person giving service is an employee or an independent

> contractor is the right to control the physical conduct of the person giving service. If the right to control, the right to determine, the mode and manner of accomplishing a particular result is vested in the person giving service, he is an independent contractor, if it is vested in the employer, such person is an employee."
>
> It may be well also to repeat from Mallinger v. Webster City Oil Co., 211 Iowa 847, 851, 234 N.W. 254, 256-257 and many later precedents, including Swain v. Monona County and Nelson v. Cities Service Oil Co., both supra, these commonly recognized tests of an independent contractor: "(1) The existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price; (2) independent nature of his business or of his distinct calling; (3) his employment of assistants with the right to supervise their activities; (4) his obligation to furnish necessary tools, supplies, and materials; (5) his right to control the progress of the work, except as to final results; (6) the time for which the workman is employed; (7) the method of payment, whether by time or by job; (8) whether the work is part of the regular business of the employer."
>
> See also 41 Am.Jur.2d, Independent Contractors, sections 5 and 8, pages 743-746, 751-753.

Volkswagen Iowa City, Inc. v. Scott's, Inc., 165 N.W.2d at 792 (Iowa 1969). We assume the county will exercise control.

In summation, the board of supervisors may require persons receiving assistance to perform labor for the county as a condition for the receipt of such relief. Such persons probably would be considered by the courts to be an employee of the county under these circumstances.

Sincerely,

Stephen C. Robinson
Assistant Attorney General

SCR/iam

MENTAL HEALTH: SUBSTANCE ABUSE: Escort of substance abusers to treatment facilities. §§ 125.35 and 125.35(3), The Code 1981. There is no requirement that a Judicial Hospitalization Referee issue an order for the transport of a substance abuser to a substance abuse treatment facility under § 125.35, The Code 1981. Persons other than peace officers may transport or escort a substance abuser to a proper facility under § 125.35. Such person may use such force as is reasonably necessary to detain and transport the substance abuser to a facility. Reasonable force is that which an ordinarily prudent and intelligent person, with the knowledge and in the situation of the person charged with detaining the substance abuser, would have deemed necessary under the circumstances. (Mann to Kumpula, Assistant Dickinson County Attorney, 8/28/81) #81-8-34(L)

Mr. Glenn W. Kumpula
Assistant County Attorney
Dickinson County Attorney's Office
710 Lake Street
Spirit Lake, Iowa 51360

August 28, 1981

Dear Mr. Kumpula:

You requested an opinion of the Attorney General on the following question:

> Is it necessary for the County Judicial Hospitalization Referee to sign an Order authorizing the County Sheriff's Department to pick up and transport to the Mental Health Institute, individuals being committed pursuant to Section 125.35 of the Code?

We have reviewed § 125.35, The Code 1981, and we now conclude that it does not require a referee to issue an order for the escort of a person to a substance abuse treatment facility. We rely on the language of § 125.35(3) for this conclusion, pertinent portions of which read as follows:

> 3. Upon approval of the application by the administrator in charge of the facility, the person shall be brought to the facility by a peace officer, health officer, the applicant for commitment, the patient's spouse, the patient's guardian or any other interested person. The person shall be retained at the facility to which he was admitted, or

> transferred to another facility, until discharged under subsection 5.

The goal in construing a statute is to ascertain the legislative intent and, if possible, give it effect. Doe v. Ray, 251 N.W.2d 496 (Iowa 1977). In doing so, one must look to what the legislature said, rather than what it might have or should have said. Kelly v. Brewer, 239 N.W.2d 109 (Iowa 1976): Steinbeck v. Iowa District Court, 224 N.W.2d 469 (Iowa 1974). In statutory construction, one must seek a meaning which is both reasonable and logical and try to avoid results which are strained, absurd, or extreme. State v. Berry, 247 N.W.2d 263 (Iowa 1976).

It is clear from a review of § 125.35(3) that a person shall be transported to a substance abuse treatment facility after the application for admission has been approved by the administrator in charge of the facility. It is further clear that no order need be issued by a referee authorizing that transportation. In fact, nothing in § 125.35 contemplates any involvement of a referee. Thus, the authority for transporting or escorting a substance abuser to a facility emanates from the approval of the application for admission by the facility's administrator.

It is also clear that persons other than members of a sheriff's office may transport or escort the substance abuser to a facility. Section 125.35(3) authorizes persons other than peace officers to transport substance abusers to a proper facility. Such persons may use such force as is reasonably necessary to detain and transport the substance abuser to a facility. This point was made in a prior opinion of this office, 1975 Op.Att'yGen. 111, where § 125.35's predecessor was discussed as follows:

> . . . [A]s can be seen, § 125.18(3) mandates that upon approval of the application, the intoxicated person shall be brought to the facility. The word "shall" imposes a duty. See § 4.1(36)(a), 1975 Code of Iowa. In some cases, the use of force may be absolutely essential for the authorized person to carry out his duty of bringing the intoxicated person to a facility. The entire purpose of the Alcoholism Act is to provide treatment

> for alcoholics and intoxicated persons. See § 125.1, 1975 Code of Iowa. This purpose would be utterly defeated if force could not be used when necessary. It is recognized that the persons who most need alcoholic treatment are often the ones least likely to submit to it voluntarily. This is particularly true of the class of persons who are subject to emergency commitment under § 125.18(1), namely persons who have threatened, attempted, or inflicted physical harm on themselves or others and are likely to inflict physical harm on themselves or others. Significantly, § 125.18(3) contains no qualification that the intoxicated person shall be brought to the facility only if he consents to be brought.

Cf., Prochaska v. Brinegar, 251 Iowa 834, 102 N.W.2d 870 (Iowa 1960); Maxwell v. Maxwell, 189 Iowa 7, 177 N.W. 541, 10 A.L.R. 482 (1920); Bisgaard v. Duvall, 169 Iowa 711, 151 N.W. 1051 (1915); R. F. Chase, Insanity Proceedings - False Detention, 30 A.L.R.3d 523 (1970); D.A. Cox, Insane Person - Arrest and Dentention, 92 A.L.R.2d 570 (1963).

Although we have concluded that reasonable force may be used to detain and escort a person to a substance abuse facility, the right to use reasonable force is not without qualification. One may not use such force as will take human life or inflict great bodily injury, unless used to prevent the taking of human life or infliction of great bodily injury by the substance abuser. Katko v. Briney, 183 N.W.2d 657 (Iowa 1971); O'Shanghnessy v. Bissell, 430 F.2d 1015 (9th Cir. 1970); 5 Am.Jur.2d Arrest § 80 et. seq. (1962). In other words, reasonable force is that which an ordinarily prudent and intelligent person, with the knowledge and in the situation of the person charged with detaining the substance abuser, would have deemed necessary under the circumstances. Mclusky v. Steinhorst, 45 Wis.2d 350, 173 N.W.2d 148 (1970); Breese v. Newman, 179 Neb. 878, 140 N.W.2d 805 (1966).

In summary, then, we conclude that there is no requirement that a Judicial Hospitalization Referee issue an order for the transport of a substance abuser to a substance abuse treatment facility under § 125.35. Persons other than peace officers may

transport or escort a substance abuser to a proper facility under § 125.35. Such person may use such force as is reasonably necessary to detain and transport the substance abuser to a facility.

Sincerely,

Thomas Mann, Jr.

Thomas Mann, Jr.
Assistant Attorney General

TM/jam

STATE OFFICERS AND DEPARTMENTS: Conflict of Interest, Chapter 68B, The Code. A blind person is not automatically disqualified from serving on the Iowa Commission for the Blind because of conflict of interest. Good judgment should be excercized, however, when a Commissioner is faced with an issue in which the Commissioner has a present, specific, and personal interest in the outcome. Recusal on a specific issue may be the solution on a case by case basis.(Appel to Taylor, Director, Commission for the Blind, 8/27/81) #81-8-32 (L)

John Taylor, Director
Commission for the Blind
L O C A L

August 27, 1981

Dear Mr. Taylor:

We have received your request for an opinion of the Attorney General with respect to the following question:

> Is a conflict of interest created by the appointment of a blind person to the Commission board who receives services from the Commission as either (a) vocational rehabilitation client, (b) blind vending facility operator, (c) recipient of library services, or (d) purchase on credit of aid and appliances?

Preventing a public official from making decisions in his public capacity based on his personal, pecuniary interests has long been recognized by the common law. Wilson v. Iowa City, 165 N.W.2d 813, 822 (Iowa 1981). In order to give effect to this policy, the Iowa Code has several sections dealing with, among other things, the prevention of official misconduct, corruption and bribery of public officials. See Chs. 68B, 721 and 722, The Code 1981. However, no section explicitly deals with the question presented here. Thus, the policies underlying the common law and the various Code sections must be examined in order to answer this question and effectuate the overall legislative objective in preventing conflicts of interest.

Unlike most conflict of interest questions, however, your inquiry does not deal with a specific action by a public official, but rather with whether a person may hold a specific public office at all. In this setting, it is important

to balance the desire to prevent conflicts of interest with the need to appoint capable men and women to such a position. See Dana-Robin Corporation v. Common Council, City of Danbury, 348 A.2d 560, 564 (Conn. 1979). Obviously, a blind person can bring a unique set of experiences to the Commission for the Blind. Since such a person would likely receive some aid from the Commission, that person's experiences would be lost if prevented from being appointed. Also, unlike most "private interests", the aid received by blind persons are granted by government and thus are subject to various requirements and safeguards to insure fairness. Finally, since the Commission duties encompass many more issues than those which might apply to a particular person, § 601B.6, The Code 1981, it would seem unfair to prevent a blind person's appointment to the Commission when less restrictive measures exist.

Therefore, it is our opinion that appointment of a blind person to the Commission who receives services from the Commission for the Blind should not be barred. However, the Commission members should exercise good judgment and not participate in decisions in which they have a present, specific and personal interest in the outcome.

Very truly yours,

BRENT R. APPEL
First Assistant Attorney General

BA:s

COUNTIES: COUNTY CARE FACILITY: Ch. 253, §§ 222.80, 230.15, The Code 1981. The liability of a resident of a county care facility is limited by the statutory authority of the county to charge for care. Any voluntary agreements between an individual and the county specifying terms for continued residence may be enforced by eviction only. (Morgan to Davis, Scott County Attorney, 8/27/81) #81-8-31 (L)

Mr. William E. Davis
Scott County Attorney
Courthouse
416 West Fourth Street
Davenport, Iowa 52801

August 27, 1981

Dear Mr. Davis:

We received your request for an opinion regarding the liability of residents at the Pine Knoll Health Care Facility for payment for care provided. Specifically you request:

1. May a county collect from either voluntary or involuntary residents of a county care facility who have earned or unearned income?

2. May the county require that residents make available resources for payment of care at a county care facility?

3. Are agreements with residents to pay for care enforceable?

4. What is the effect of the Supervisors' resolution establishing a payment schedule of the following?

   a) Residents with jobs inside the facility:
      1. 10% of job assignment income.
      2. 50% of all income sources including social security.

   b) Residents with jobs outside facility:
      1. 25% of job assignment income.
      2. 25% of all income sources including social security.

   c) Residents with no jobs:
      1. 50% of all income sources including social security.

In general, the liability of residents of a county care facility to pay for care depends upon the statutory authority of the county to require payment for care, the statutory liability of the individual to reimburse the county for care, and the source of the individual's income. We offer this opinion in reliance on several assumptions:

1. We understand that the facility about which you inquire is owned by the county, and managed by a county mental health center board organized under Ch. 346A, The Code 1981.

2. The facility is operated as a county care facility pursuant to Ch. 253, The Code 1981.

3. Some residents are either mentally ill within the meaning of Ch. 229 or mentally retarded within the meaning of Ch. 222, The Code 1981.

4. Care is or could be provided to other persons on a voluntary basis as space is available.

5. The sources of income to residents include Federal Social Security (Old Age, Survivors, and Disability Payments under Title II of the Social Security Act), Supplemental Security Income (SSI, paid pursuant to Title XVI of the Social Security Act), Federal Railroad Retirement or Veterans Benefits, earned income (within and without the facility) and other income.

In order to answer your questions, a thorough canvas of relevant statutes is required. At the threshold is § 253.5, The Code, which applies to all residents in a county care facility, which states:

> The board may require of any resident of the county care facility, with the approval of a physician, reasonable and moderate labor suited to the resident's age and bodily strength. Any income realized through the labor of residents shall be appropriated for use by the county care facility as the board of supervisors directs. [Emphasis supplied.] See Acts, 69th G.A., Ch. 117, § 1043.

This statute requires that "any income" realized through the required labor of residents under § 253.5 "shall be appropriated". To the extent the resolution of the Board applies to § 253.5 labor and requires only a fraction of earned income to be appropriated for use by the care facility, it is inconsistent with a law of the General Assembly, § 253.5 and is unlawful.

Mentally retarded individuals are committed or admitted to county care facilities pursuant to § 222.80, The Code. Section 222.80 provides that individuals so committed or admitted:

> . . . shall be liable to the county for the reasonable cost of such support as provided in section 222.78.

Section 222.78 outlines various methods of calculating reasonable costs. In our opinion, any cost recovery formula for mentally retarded in excess of reasonable cost is inconsistent with § 222.80. To the extent that the Board's resolution exceeds this cost limitation in any instance, if any, it is unlawful.

The liability of mentally ill persons is considered in Chapter 230, The Code, which states:

> Mentally ill persons . . . shall remain liable for the support of such mentally ill.

§ 230.15, The Code.

Apparently, this means that mentally ill persons, to the extent they have resources, are liable for the cost of their own care according to the standards outlined in § 230.15. As with the mentally retarded, any application of the Board's formula that leads to collections in excess of the cost of support, would be unlawful.

With respect to voluntary residents, however, the relationship between the resident and the county is contractual in nature. Contracts to provide care in exchange for a specific sum are enforceable to the extent that the voluntary resident may be evicted for non-payment of fees. Eviction is a key remedy of the county for non-payment because a substantial portion of income to most county care facility residents is exempt from attachment under Philpott v. Essex County, 409 U.S. 493, 417, 93 S.Ct. 590, 34 L.Ed.2d 608 (1973):

> (The statute) (42 U.S.C. § 407) imposes a broad bar against the use of any legal process to reach all social security benefits. That is broad enough to include all claimants, including a State.

409 U.S. at 417, 34 L.Ed.2d at 612. Similar statutes protect other Federal transfer payments including Veterans benefits and Railroad Retirement benefits. Other unearned income and any earned income of the voluntary resident may be subject to collection but there is no state statutory authority to collect from voluntary residents.[1]

The resolution adopted by the Scott County Board of Supervisors requires an individual to contribute up to fifty percent of income, including social security, to pay for the cost of care. This requirement is in conflict with the Philpott decision unless it is characterized by the Board as a voluntary contribution and no attempt is made to compel payment. The only remedy for the county in the event of non-payment is eviction. Such a remedy is of little value with involuntary patients and some voluntary patients as the county is obligated to provide care elsewhere.

The information you submit indicates that the Administrator of the facility relied on the practice of many nursing homes in receiving all of the income (including social security) of residents with the exception of a $25 personal needs allowance. We know of no authority for this practice aside from the Medicaid regulations which provide for the Iowa Department of Social Services to reduce its payment to an institution on a specified formula, the typical result of which is to require an individual to pay all of their income to the nursing home except for $25 in personal needs. 42 C.F.R. § 435.725 (1979). This option is available only to the Department of Social Services for care provided in facilities certified for Title XIX (Medicaid).

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[1] We have identified two cases which would tend to permit the supervisors to collect the cost of care from persons whose legal settlement is in Scott County and who are committed to the facility. In these cases, the courts have required a trusteee or guardian to make available veterans benefits to a governmental unit which provided for all costs of care despite the prohibition against attachment of Federal pension funds. Department of Health and Rehabilitation Services, State of Florida v. Davis, 616 F.2d 828 (5th Cir. 1980); Savoid v. District of Columbia, 288 F.2d 851 (D.C. Cir. 1961).

In response to the specific questions you raise, we offer the following:

1. The express statutory provisions for collection are these:

   a. Section 253.5, The Code 1981, which permits the administration to require able-bodied residents to work for the facility.

   b. Chapters 222 and 230 make some persons liable to the county for the cost of care provided.

2. For persons required to reimburse the county for care pursuant to Ch. 222 or 230, The Code 1981, the county may make a reasonable examination of an individual's ability to pay for care up to the ceiling established in these chapters.

3. Agreements with voluntary residents are enforceable only by eviction. We suggest that with committed residents with income who refuse to pay for care that you seek court intervention in obtaining payment. Department of Health and Rehabilitation Services, State of Florida v. Davis, supra.

4. To the extent the resolution conflicts with §§ 253.5, 222.80 and 230.15, it is unlawful.

Sincerely,

Candy Morgan

CANDY MORGAN
Assistant Attorney General

CONSTITUTIONAL LAW; HIGHWAYS; SCHOOLS: Iowa Const. art. III, §30 (1857); H.F. 850, 1981 Session, 69th G.A., §16. The appropriation for the construction of a street on state-owned property from a state primary highway to the sports arena of the University of Iowa pursuant to House File 850, 1981 Session, 69th G.A., §16 will serve public, not special, interests. Therefore, the appropriation does not violate Iowa Const. art. III, §30 (1857) which prohibits "local" or "special" laws regarding the establishment of highways. (Mull to Johnson, State Representative, 8/21/81) #81-8-30(L)

August 21, 1981

The Honorable Robert M. L. Johnson
State Representative
Sixty-Ninth General Assembly
State House
Des Moines, IA 50319

Dear Mr. Johnson:

You have requested an opinion of the Attorney General on the following question: "Is Section 16 of House File 850 in conflict with Article III, Section 30 of the Iowa Constitution? More specifically, is Section 16 in conflict with the following words of Section 30, 'For laying out, opening, and working roads or highways;'?" The appropriation for the construction of a street on state-owned property from a state primary highway to the sports arena of the University of Iowa pursuant to House File 850, 1981 Session, 69th G.A., §16 will serve public, not special, interests. Therefore, the appropriation does not violate Iowa Const. art. III, §30 (1857) which prohibits "local" or "special" laws regarding the establishment of highways.

House File 850, 1981 Session, 69th G.A., §16 provides in part an appropriation for:

> . . . the construction of a new undivided four-lane roadway on state-owned property in Iowa City from the curve of Woolf avenue near the southwest corner of the dental science building and proceeding west and north to the intersection of Rocky Shore drive and U.S. Highways 6 and 218, including the reconstruction of the intersection of Rocky Shore drive

> and U.S. Highways 6 and 218 and the widening from two lanes to four lanes Woolf avenue from the curve of Woolf avenue to the south of the dental science building east to the point where the existing Woolf avenue becomes four lanes. (Emphasis added.)

Iowa Const. art. III, §30 (1857) provides in part as follows:

> The General Assembly shall not pass local or special laws in the following cases:
>
> . . . .
>
> For laying out, opening, and working roads or highways;
>
> . . . .
>
> In all the cases above enumerated, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State . . . .

The establishment of highways is one of six specified categories of special or local laws that are absolutely prohibited. Other special laws are forbidden only "where a general law can be made applicable." It is clear that House File 850, §16 involves an appropriation "[f]or laying out, opening, and working roads or highways" within the meaning of Iowa Const. art. III, §30 (1857). The only question is whether House File 850, §16 is a "local" or "special" law. A "local" law is one which relates to a particular locality. Iowa Motor Vehicle Association v. Board of Railroad Commissioners, 207 Iowa 461, 467, 221 N.W. 364, 367 (1929). A "special" law in the constitutional sense is "one which only operates upon particular persons and private concerns." United States Express Co. v. Ellyson, 28 Iowa 370, 375 (1869).

It may legitimately be contended that House File 850, §16 is a special law because it deals with a particular road at a certain location. See State Board of Regents v. E. F. Lindquist, 188 N.W.2d 320, 324 (Iowa 1971)(law establishing health care facilities at the University of Iowa held to be a constitutional special act). Thus, a respectable argument can be made that House File 850, §16 is prohibited under Iowa Const. art. III, §30 (1857). See Smith v. Baltimore & O.R. Co., 7 Terry 441, 85 A.2d 73, 74 (Del. 1951) (statute invalidated as a special law that

directed a railroad to increase capacity of its bridge on a particular road); Board of County Com. of Lemhi County v. Swensen, 327 P.2d 361, 362 (Idaho 1958) (statute voided as a special law that provided a fund for construction on a particular county road). A statute, however, will be given every presumption of validity and found unconstitutional only upon a clear showing that it infringes on constitutional rights and only if every reasonable basis for support is negated. Woodbury County Soil Conservation Dist. v. Ortner, 279 N.W.2d 276, 277 (Iowa 1979).

The purpose of state constitutional provisions such as Iowa Const. art. III, §30 (1857) is:

> . . . preventing improper legislative log rolling, and such provisions applied to roads have served the useful purpose of forestalling the building at public expense of local private roads for the benefit of individual legislators or their friends. However, the need for building roads suitable for motor vehicles led to considerable change in concepts of what road legislation is actually local as opposed to that which, while local in a geographical sense, is obviously for the benefit of the public at large.

Tusso v. Smith, 38 Del. Ch. 587, 156 A.2d 783, 787, aff'd., 39 Del. Ch. 198, 162 A.2d 185 (Del. 1960).

Mindful of the underlying purpose, the majority of cases have upheld challenged statutes regarding road improvements as not being special laws within the meaning of the constitutional prohibition. See Frost v. State, 172 N.W.2d 575, 580 (Iowa 1969) ("The act [Interstate Bridge Act] is necessarily one of very limited application. It can be called on only when a bridge between Iowa and a sister state is contemplated; but within that selective classification, it operates without distinction or discrimination. The constitution requires nothing more."); Fair v. Buss, 117 Iowa 164, 167, 90 N.W. 527, 529 (1902); Tuttle v. Polk, 92 Iowa 433, 443, 60 N.W. 733, 737 (1894); City of Clinton v. Cedar Rapids & Missouri River R.R. Co., 24 Iowa 455, 468 (1868) (act authorizing construction of a railroad between Clinton and Lyons); Tusso v. Smith, 38 Del. Ch. 587, 156 A.2d 783, aff'd., 39 Del. Ch. 198, 162 A.2d 185, 187 (Del. 1960); Smith v. State Highway Commission, 247 Ky. 816, 57 S.W.2d 1014, 1017 (1933); Application of Oklahoma Turnpike Authorities, 203 Okl. 335, 221 P.2d 795, 800 (1950); State Highway Com'r v. Chambersburg & Bedford Turnpike Road Co., 242 Pa. 171, 88 A. 938

(1913); Henderson v. Delaware River Joint Toll Bridge Comm., 362 Pa. 475, 66 A.2d 843, 850 (1949); 2 Sutherland, Statutory Construction (4th Ed.), §40.14 at 201.

The following test for determining whether certain highway legislation constitutes a special law was articulated in Tusso:

> . . . the need for building turnpikes and freeways to meet the ever-increasing flow of motor vehicle traffic has tended to emphasize the need of a logical approach to what is and what is not a local or special road or bridge law, the test to be applied in such determination being whether public as opposed to special interests are to be served, the geographical location of the structure to be built under the terms of the law being unimportant. . . .

Tusso, 156 A.2d at 787.

We are persuaded by the rationale of Tusso. Although House File 850, §16 provides for a highway improvement at a precise geographical location, we do not feel this factor is controlling. Traffic studies support the need for this connection between the state primary road system and the University of Iowa. In Traffic, Parking and Circulation Study of a Proposed New Arena, University of Iowa (De Leuw, Cather & Company 1979) at 17, it is noted as follows:

> At U.S. 6/218, the volume of traffic to and from the arena would be approximately 1,500 vehicles for a capacity event, or nearly three times the volume using this approach for events at the field house. This volume of traffic could not be accommodated using the existing Newton Road entrance. It is proposed, therefore, that a new four-lane access road be constructed between U.S. 6/218 and Woolf Avenue to serve arena and other West Campus traffic.

With the addition of the new sports arena, the access road of approximately one-half mile in length will be necessary to avoid traffic congestion. The public, not special interests, will be

served by this improvement on state-owned property.

The University of Iowa was created by the Constitution of 1857, is supported in part by tax funds collected throughout the state and provides reduced-cost higher education to students from across Iowa. While the University is located, of necessity, in a particular locality, it is not regarded as "local" by the law or by the people of the state.

Thus, in our opinion, the highway improvement authorization by House File 850, § 16 is not a local or special law within the contemplation of Iowa Const. art III, § 30 (1857).

Sincerely,

Richard E. Mull
(RMJ)

Richard E. Mull
Assistant Attorney General

COUNTIES AND COUNTY OFFICERS: COUNTY COMPENSATION BOARD. Chapter 340A, §§ 340A.1, 340A.6, The Code 1981. A county may adopt a compensation schedule which includes cost of living adjustments. A county compensation schedule need not include cost of living adjustments for all offices. (Fortney to Zenor, Clay County Attorney, 8/19/81) #81-8-28(L)

August 19, 1981

Michael L. Zenor
Clay County Attorney
Courthouse
Spencer, Iowa 51301

Dear Mr. Zenor:

You have requested an opinion of the Attorney General regarding the role of the county compensation board established by § 340A.1, The Code 1981. You inquire whether the compensation board may recommend, and the board of supervisors adopt, a compensation schedule which provides base salaries supplemented by periodic adjustments for cost of living (hereinafter COLA). You further inquire whether COLA may be granted to certain officers' salaries, while not included in others. We are of the opinion that a county may adopt a compensation schedule which includes COLA. We are further of the opinion that a county compensation schedule need not include COLA for all offices.

Chapter 340A sets up a mechanism by which the compensation of county officers is determined. The chapter establishes a local board which makes recommendations to the board of supervisors regarding county officers' compensation. After reviewing the recommendations, the supervisors determine the final compensation schedule, which may not exceed the recommendations. The supervisors may reduce the recommended compensations. In an earlier opinion, 1978 Op. Att'y Gen. 111, we held that the supervisors can only accept the recommendations or reduce them across the board. They may not increase the recommendations.

The entire framework of Chapter 340A is designed to determine the "compensation" of county officers. Regrettably, the statute does not contain a definition of "compensation". If COLA is considered an aspect or a component of "compensation", the county compensation board and the board of supervisors could appropriately include such an element in the salary schedule.

In a recent opinion, Op. Att'y Gen. #81-6-7, we opined that fringe benefits, such as group insurance, are not "compensation" as that term is utilized in Chapter 340A. Our reasoning in that opinion leads us to a different conclusion with regard to COLA. We believe that COLA is an aspect of "compensation". We base this conclusion on our earlier opinion in which we determined that "compensation" encompassed salary or wages. COLA is essentially a scheduled or deferred increase in salary or wages. It is not akin to group insurance or paid vacation. In our earlier opinion, we stated:

> We believe that §§ 340A.6 and 340A.8, taken together, evidence an intent on the part of the General Assembly to give the county compensation board jurisdiction over salary and wages, not fringe benefits. Section 340A.6 permits the board of supervisors to reduce the commission's recommendations. If a reduction occurs, it is directed to the proposed 'annual salary or compensation.' The utilization of the term 'compensation' as an alternative or an adjunct to the term 'salary' is explanable by reference to § 340A.8, authorizing interim increases in officers' compensation. This section recognizes that not all county officials receive compensation in the form of salary. Some are compensated on a per diem basis. The term compensation is thus used generically as a term which encompasses remuneration in the form of salary or per diem.
>
> We note that other sources define 'compensation' as 'remuneration or wages given to an employee or, especially, to an officer. Salary, pay, or emolument.' Black's Law Dictionary (Rev. 4th Ed. 1968, p. 354.)

Op. Att'y Gen. #81-6-7, pp. 2-3.

Having concluded that a county compensation schedule may properly include COLA, we turn to your question as to whether all county salaries must include COLA or whether only the salaries awarded to certain offices may include a COLA component. Section 340A.6 provides, in pertinent part:

> The board of supervisors shall review the recommended compensation schedule and determine the final compensation schedule of the elected county officers which shall not exceed the recommended compensation schedule. In determining the final compensation schedule if the board of supervisors wishes to reduce the amount of the recommended compensation schedule, the annual salary or compensation of each elected county officer shall be reduced an equal percentage.

The above-quoted section is the only portion of Chapter 340A which addresses the question of equality among county officers' salaries. We have interpreted § 340A.6 as providing two options to a board of supervisors, to wit: the board may (1) accept the recommendations of the county compensation board as submitted; or (2) the board may determine that lower salaries or compensation should be fixed, and if it does so, it must reduce the recommended salary or compensation of each officer by an equal percentage. 1978 Op. Att'y Gen. 111.

Other than the obligation to treat all county officers equally should the board of supervisors decide to reduce the recommendations of the county compensation board, there is no requirement in Chapter 340A that equal salaries be maintained among various county offices. Indeed, as you are certainly aware, there are often variations among the salaries which a county pays to its various county officers. Granting COLA to one officer while denying it to another may result in an increased disparity among officers' salaries and may therefore be ill-advised for policy considerations. However, the weighing of such consequences is within the sound discretion of the county compensation board. It is our opinion, therefore, that a county compensation board may recommend, and a board of supervisors may adopt, a compensation schedule which provides COLA for some, but not all, county officers.

Yours truly,

David Fortney

DAVID M. FORTNEY
Assistant Attorney General

DMF:sh

COUNTIES AND COUNTY OFFICERS: PUBLIC RECORDS. Iowa Const., Art. III, § 39A, Chapter 68A, The Code 1981, 69th G.A., 1981 Session, Senate File 130. The charging of a fee by a local official for the performance of a public function is in conflict with the County Home Rule bill if such fee is not among the scheduled fees. The charging of a reasonable fee for a records search is permitted by Chapter 68A if such fee is intended to cover the reasonable expenses of the search. (Fortney to Martens, Emmet County Attorney, 8/19/81) #81-8-27(L)

August 19, 1981

John G. Martens
Emmet County Attorney
Courthouse
Estherville, Iowa 51334

Dear Mr. Martens:

You have requested an opinion of the Attorney General regarding the Home Rule powers of Iowa counties. You inquire whether a county officer, in your case the recorder, may assess a service charge for such matters as record searches performed for businesses. [1] We assume from your letter that the imposition of the charges would have the prior authorization of the board of supervisors. We are of the opinion that county officers may not charge fees for the performance of their official duties and functions unless such fees have statutory authorization.

The County Home Rule Amendment provides:

> Counties or joint county-municipal corporation governments are granted home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government, except that they shall not have power to levy any tax unless expressly authorized by the general assembly. The general assembly may provide for the creation and dissolution of joint county-municipal corporation governments. The general assembly

[1] The record search example does not define the scope of either your request or our opinion. We address all services performed by a county officer within the scope of his or her duties.

> may provide for the establishment of charters in county or joint county-municipal corporation governments.
>
> If the power or authority of a county conflicts with the power and authority of a municipal corporation, the power and authority exercised by a municipal corporation shall prevail within its jurisdiction.
>
> The proposition or rule of law that a county or joint county-municipal corporation government possesses and can exercise only those powers granted in express words is not a part of the law of this state.

Iowa Const., Art. III, § 39A.

In an earlier opinion we stated that "the amendment contains four basic limitations. First, counties have no power whatsoever to levy any tax unless expressly authorized by the General Assembly. Second, in the event the power or authority of a county conflicts with that of a municipal corporation, the municipal corporation's power and authority prevails within its jurisdiction. Third, the home rule power exercised by a county cannot be 'inconsistent with the laws of the General Assembly.' Fourth, home rule power can only be exercised for local or county affairs and not state affairs." Op. Att'y Gen. #81-2-5. See also Op. Att'y Gen. #79-4-7.

We believe that the charging of a fee by a local official for the performance of a public function is in conflict with the comprehensive fee schedule set forth in 69th G.A., 1981 Session, Senate File 130, when such fee is not among the scheduled fees. However, we also believe that charging a reasonable fee for a records search is permitted by Chapter 68A if such fee is intended to cover the reasonable expenses of the search.

We previously stated that the prohibition on acts which are "inconsistent with the laws of the General Assembly" constituted a limitation founded on the concept of "preemption", i.e. "in any given area the state, by broad and comprehensive legislation, has intended to exclusively regulate a subject matter. Where 'preemption' is applicable, any local government regulation regardless of content, is inconsistent with the pervasive state legislation." See Op. Att'y. Gen. #79-4-7, citing Scheidler, Implementation of Constitutional Home Rule in Iowa, 22 Drake L. Rev. 294 (1975). A review of various sections of Division V of S. F. 130 discloses that the Legislature has provided a com-

prehensive list of the fees that county officers may charge for various services. See § 506 relating to fees the auditor is entitled to collect; § 603 and § 604 relating to fees the recorder is entitled to collect; § 654 relating to fees the sheriff is entitled to collect; § 704 relating to fees the clerk of court is entitled to collect. We are unable to find authority for a county to impose additional fees in the face of such a comprehensive compilation of authorized fees.

In an earlier opinion, Op. Att'y Gen. #81-5-7(L), we held that in the absence of statutory authorization a county may not assess a service charge for processing employee payroll deductions for items such as health insurance and deferred compensation plans. Language from that opinion relating to the relevant policy considerations is pertinent here. We quote:

> In addition to the total absence of statutory authority, in the context of express authorization for the assessment of other fees, a strong policy consideration exists which militates against implying an authority to assess fees. Your question relates to the performance of statutory duties by public officers. We are hesitant to sanction a policy which would result in a situation wherein the performance of a public duty turns on whether a fee is or is not paid, unless the body establishing the duty has also authorized the collection of a fee. Permitting a public officer to require the payment of a fee before he or she performs a mandatory function established by a higher authority would be detrimental to the effective carrying out of the higher authority's mandate.

Op. Att'y Gen. #81-5-7(L), p. 2.

While your inquiry is not limited to a search of records in the recorder's office, we do believe a few comments would be pertinent with regard to fees for such services. First, the Code specifically authorizes the recorder to assess fees in connection with a search of uniform commercial code records. See § 554.9407, The Code 1981. Second, a search of any public record by a local official is governed by Chapter 68A, commonly referred to as the Open Records Act.

Section 68A.3 expressly allows the custodian to impose a reasonable fee for the expenses of copying public records. We have opined that the section is calculated to insure that the lawful custodian of public records is, in making such records available for examination and copying, not be be obliged to incur unnecessary expense or to have the work of his office disrupted without being reimbursed for such expense or compensated for such disruption. 1968 Op. Att'y Gen. 656, 657. However, while reasonable fees may be assessed for these services, we have stated that all citizens requesting to examine and copy public records are to be treated alike. Certain individuals or classes of individuals are not to receive preferencial treatment or reduced rates. Op. Att'y Gen. #81-4-4. However, a public body subject to Chapter 68A may not charge an Iowa citizen a fee simply as a precondition to allowing examination of a public record governed by the Chapter. A fee may, however, be charged to cover reasonable expenses incurred by the body in making information that is contained in electronic storage systems, such as magnetic tapes and cards, available to a citizen for examination and/or copying as a public record. This fee must represent only the actual costs involved in satisfying the request for examination and/or copies. An agency that has already translated a public record from an electronic storage system into a printed format must, upon request, make copies of the record in printed form available to a citizen of Iowa but may charge a reasonable fee for copying expenses. Op. Att'y Gen. #81-8-18.

In conclusion, the charging of a fee by a local official for the performance of a public function is in conflict with the County Home Rule bill if such fee is not among the scheduled fees. The charging of a reasonable fee for a records search is permitted by Chapter 68A if such fee is intended to cover the reasonable expenses of the search.

Yours truly,

David Fortney

DAVID M. FORTNEY
Assistant Attorney General

DMF:sh

MUNICIPALITIES: Financing of Industrial Projects. Sections 4.2, 4.4, 4.6, 153.34(10), 419.1(2), and 514B.1, The Code 1981; 320 I.A.C. § 30.4(153)-15; § 1 Senate File 506; 1975 Session, 66th G.A., Ch. 1219. Financing the construction of a dental clinic falls within the ambit of Ch. 419. (Walding to Miller, State Senator, 8/14/81) #81-8-25 (L)

The Honorable Charles P. Miller
State Senator
801 High Street
Burlington, Iowa 52601

August 14, 1981

Dear Mr. Miller:

We have received your opinion request of June 24, 1981, regarding an interpretation of § 419.1, The Code 1981. You ask whether a dental clinic may qualify under that section. In addition, you make inquiry as to any possible effect S.F. 506 may have on the particular project. Chapter 419 provides for municipal support of industrial projects. Municipalities have the powers to acquire, improve, and equip projects; lease projects; sell projects; enter into loan agreements with respect to projects; and issue revenue bonds to defray the costs of projects.

Section 419.1(2), The Code 1981, provides in pertinent part:

> 'Project' means all or any part of, or any interest in, (a) any land, buildings or improvements . . . which shall be suitable for the use of any voluntary nonprofit hospital, clinic or health care facility as defined in section 135C.1, subsection 4, or of one or more physicians for an office building to be used exclusively by professional health care providers, including appropriate ancilliary facilities . . . . [Emphasis added]

The underscored language of the aforementioned section was added by § 1 of S.F. 506. Chapter 1219, Acts of the 66th G.A., 1975 Session, added to § 419.1 the provisions relating to "voluntary nonprofit hospital, clinic or health care facility."

Generally, statutes are to be liberally construed with a view to promote their objects and assist the parties in obtaining justice. See § 4.2, The Code 1981. It is presumed that a just and reasonable result is intended and that public interest is favored over any private interest. See § 4.4, The Code 1981. If a statute is ambiguous, the following may be considered in determining the legislative intent: (1) The object sought to be obtained; (2) The circumstances under which the statute was enacted; (3) The legislative history; (4) The common law or former statutory provisions; (5) The consequences of a particular construction; (6) The administrative construction of the statute; and (7) The preamble or statement of policy. See § 4.6, The Code 1981.

We feel that the word "clinic" is vague and ambiguous and that reasonable minds can disagree or be uncertain as to its scope. See People v. Dobbs Ferry Medical Pavillion, Inc., 40 A.D.2d 324, 327-28, 340 N.Y.S.2d 108, 112 (1973). In a prior opinion, 1975 Op.Att'y.Gen. 258, we found that a medical clinic operated for profit may qualify as a "project" within Ch. 419. The issue here, then, is whether "clinic" includes a dental clinic.

Initially, the common denominator of the terms "hospital", "clinic", and "health care facility" would appear to be health care. The term "health care services" is defined in § 514B.1, The Code 1981, as including the provision of medical or dental care or hospitalization. Thus, the intention of the legislature appears to have been to provide for the general health of the public, both medical and dental.

With respect to the term "clinic", it is defined in Webster's New Twentieth Century Unabridged Dictionary (2d ed. 1969) as "an organization or institution that offers some kind of treatment." Further, in Weeks v. City of Bonnar Springs, 213 Kan. 622, 630, 518 P.2d 427, 434 (1974), the Kansas Supreme Court construed the term "clinic" as "an association of two or more physicians or dentists." [Emphasis added] The applicable ordinance in the case, unlike § 419.1(2), did make reference to "dental treatment" however. Nevertheless, the general definition of the term "clinic" appears to include the dental profession.

In addition, the term "clinic" is not limited by express statutory language to medical clinics. Absent an indication to the contrary, we feel that no legislative preference for the medical profession should be presumed. Accordingly, the unqualified term "clinic" should not be limited merely to medical clinics.

It should be noted that § 153.34(10), The Code 1981, prohibits the use of the name "clinic" by any licensed dentist or any licensed dental hygienist to designate what is in fact an individual or group private practice. Accord 320 I.A.C. § 30.4(153)-15. While dentists can not use the term "clinic" in the operation of their practice, a dental clinic may nevertheless qualify as a "clinic" for purposes of Ch. 419.

Turning to the recent legislative revisions to Ch. 419, you have asked what effect S.F. 506 may have on the proposed dental project. A reading of the aforementioned inclusion leads to one of two interpretations. First, the legislature inserted the language to clarify the term "clinic". Alternatively, the language was inserted to establish another separate classification of eligible "projects". We believe the latter is the correct interpretation. Our rationale is threefold. First, the term "clinic" in the first classification, as mentioned previously, is an "association of two or more physicians or dentist." [Emphasis added] Weeks at 630, 434. Also, recall that Webster's Dictionary defined "clinic" as an "organization or institution . . . . " Both definitions connotate a multi-member association. The cited revision, however, qualifies "one or more physicians" for a Ch. 419 "project". [Emphasis added] While a sole physician could qualify under the second classification for a Ch. 419 "project", he or she could not so qualify under the ~~second~~ first classification. Hence, the two classifications are discordant. Second, although the cited revision speaks to office space for "physicians" exclusively, it does not support a conclusion that the term "clinic" is equally limited. Use of the connective word "or" merely introduces any of the possibilities in a series. Finally, if the legislature had intended to restrict Ch. 419 "projects" to physicians, they simply had to insert the adjective "medical" immediately prior to the term "clinic" in S.F. 506. Of course, no such insertion was in fact made. For the foregoing reasons then, we believe the correct interpretation of the cited legislative revision was to expand the classification of eligible "projects" under Ch. 419.

Accordingly, we are of the opinion that the scope of § 419.1(2) is broad and that financing the construction of a dental clinic falls within the ambit of Ch. 419.

Very truly yours,

Lynn M. Walding

LYNN M. WALDING
Assistant Attorney General

LMW/ny

JUVENILE: Shelter care expenses may be reimbursable by the state under § 234.35 and 234.36 but may not be reimbursable by the state as § 232.141(2) expenses for which no provision is otherwise made by law except that pre-adjudicatory court ordered shelter care under §§ 232.21 and 232.78 are allowable 232.141(2) expenses. Juvenile mental health and treatment costs subject to the terms of § 444.12(3) are not allowable as juvenile justice costs under § 232.141(2). (Black to Royce, Administrative Rules Review Committee, 8/14/81) #81-8-23 (L)

Mr. Joseph A. Royce
Iowa General Assembly
Administrative Rules Review Committee
State Capitol
L O C A L

August 14, 1981

Dear Mr. Royce:

You have requested that we render an opinion on the following questions:

1. Does § 232.141, the Code, preclude the reimbursement to counties of costs for juvenile detention and shelter service above the base cost?

2. May juvenile detention and shelter services be paid out of the foster care provisions of §§ 234.35 and 36?

3. Does § 444.12(3), The Code, preclude reimbursement under § 232.141, for court ordered mental examination or treatment of a minor?

The questions which you raise have not been addressed by the Iowa courts in any reported case. The statutes involved do not specifically answer the questions, either. Their resolution, therefore, depends on reading the statutes involved as a whole and giving them a plain and obvious meaning in a sensible and logical construction. Telegraph Herald v. City of Dubuque, 297

N.W.2d 529 (Iowa 1980). Related statutes must be construed and read in the light of their common purpose and intent in order to create a harmonious system or body of legislation. Rush v. Sioux City, 240 N.W.2d 431 (Iowa 1976). In construing related statutes, specific provisions are held to control over general provisions. Berger v. United Group, Inc., 298 N.W.2d 630 (Iowa 1978).

Your first questions relates to § 232.141, The Code, which is the funding mechanism for the Juvenile Justice Act, ch. 232, The Code. The second question involves §§ 234.35 and 36 which attempt to allocate foster care costs between the county and the state. The third question poses the relationship between the county mental health and institutions fund and the funding mechanism of the Juvenile Justice Act. Clearly, these statutes deal with related matters and are to be construed in pari materia in accordance with the statutory principles summarized in the preceding paragraph.

1 Does § 232.141, the Code, preclude the reimbursement to counties of costs for juvenile detention and shelter service above the base cost?

When the Juvenile Justice Act was passed, the legislature did not know what the costs of implementing it would be, as evidenced by the following language from the appropriations bill for the Department of Social Services for the first year of operation under the new act.

> Six hundred sixty thousand (660,000) dollars of the funds appropriated by section eight (8), subsection six (6) of this Act may be used for reimbursement of county juvenile court expenses pursuant to section two hundred thirty-two point one hundred forty-one (232.141), subsection four (4) of the Code. If it appears at any given time that six hundred sixty thousand (660,000) dollars will be insufficient for reimbursement of county juvenile court costs, the department shall report to the comptroller and the joint appropriations subcommittee on social services relative to the need for additional funds for such costs.

> The department of social services shall also report to the joint appropriations subcommittee on social services and to the legislative council no later than December 1, 1979 on the projected costs to the state for county juvenile court expenses, based upon reports received from the counties for the first quarter of the fiscal year beginning July 1, 1979.

Ch. 8, § 17(2), Laws of the Sixty-Eighth G.A. 1979 Session.

In the light of this appropriation, the statutory scheme, and the express wording of § 232.141(4)(d)[1], we conclude that § 232.141, The Code, was intended to be a maintenance of effort funding system for the Juvenile Justice Act under which counties would continue to pay for specified juvenile expenses at the current level (adjusted for inflation) with the state assuming the additional costs.

The use of the word "shall" in § 232.141(4) specifying what the county and the state "shall" pay imposes a duty to pay. § 4.1(36)(a), The Code. We, therefore, conclude that the county may not pay the state's share of the costs computed under § 232.141 and the state may not pay the county's share.

With regard to whether juvenile detention costs may be paid by the state under § 232.141, we must decline to answer for the reason that we have represented the Department of Social Services against Polk and Linn counties in connection with appeal board claims seeking reimbursement for detention costs under § 232.141. These claims were settled on the basis of the counties paying all costs of their detention facilities and receiving no reimbursement therefore under § 232.141, The Code. Having advocated a position in a judicial process on behalf of a client, we cannot now issue a formal opinion on the same matter.

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1. § 232.141(4)(d). Costs incurred under provisions of this section which are not paid by the county under the provisions of paragraphs "a," "b" and "c" shall be paid by the state. The counties shall apply for reimbursement to the department, which shall promulgate rules and forms to carry out the provisions of this paragraph.

Shelter care costs, may, under appropriate conditions, be considered to be foster care costs payable by the state under §§ 234.35 and 234.36, The Code. Since such expenses are specifically provided for at §§ 234.35 and 234.36, The Code, they cannot be said to be court ordered "care, treatment, or examination" for which "no provision is otherwise made by law". § 232.141(2). Absent such a finding, there is no category under § 232.141 authorizing their reimbursement by the state or inclusion in the county base. We note, however, that §§ 234.35 and 234.36 do not address court ordered, pre-adjudicatory shelter care provided under 232.21 and 232.78 and, therefore, conclude that the expenses incident to such court ordered care are an allowable expense under § 232.141(2) as court ordered care, treatment or examination for which no provision for payment is otherwise made by law.

2. May juvenile detention and shelter services be paid out of the foster care provisions of §§ 234.35 and 36?

As with the preceding question, we must decline to answer that portion of your second question that relates to detention cost. This is because of the Polk and Linn County appeals to which we have previously alluded.

In our answer to your first question on shelter care costs, we have opined that such costs should be considered to be foster care expenses governed by §§ 234.34 and 234.35 and not care, treatment, or examination for which no other provision is made by law and, thus, governed by § 232.141, The Code. With respect to the allowable limits on foster care expenses, please see Op.Att'yGen. # 81-5-13.

3. Does § 444.12(3), The Code, preclude reimbursement under § 232.141, for court ordered mental examination or treatment of a minor?

Consistent with our earlier opinion (Op.Att'yGen. # 81-5-13), we conclude that 232.141(2) must be viewed as a general statute and § 444.12(3), a specific statute in the same manner as §§ 234.35 and 234.36 would be specific and not general provisions. Also, the clear statutory scheme of § 232.141(2) is that it applies only when "no provision is otherwise made by law

for payment for the care, examination, or treatment of the minor."

Under this analysis, if a specific item of expense is governed by § 444.12(3), it cannot be considered to be an allowable § 232.141(2) expense.

While we cannot address in this opinion the broad range of possible factual permutations and combinations, we do note that it would seem possible that not all mental examinations or treatment which a court could order would fit within the scope of § 444.12(3). It is, therefore, a theoretical possibility that some such expenses could be paid under § 232.141. We recognize that this could lead to dispute and confusion between county and state as to which expenses are governed by § 444.12(3). In part, this area of dispute could be reduced through administrative rules but the preferable solution would be legislative. From a purely practical stand point, there seems little reason why some mental examination and treatment expenses should be paid under § 444.12(3) and others under § 232.141, but we believe the current state of the law mandates this result. In interpreting statutes, it is necessary to look at what the legislature said and not what it might have or should have said. Kelly v. Brewer, 239 N.W.2d 109 (Iowa 1976).

Very truly yours,

John G. Black
Special Assistant Attorney General

JGB/jam

COUNTIES: TOWNSHIP TRUSTEES: TOWNSHIP CEMETERIES: § 359.30 and 359.33, The Code 1981; 69th G.A., 1981 Session, Senate File 130, § 401(2)(c). Township trustees have the authority to levy a tax for maintenance of privately-owned cemeteries located within the township if such cemetery is used by the general public. The trustees are not required to levy a tax for such purposes, however, the board of supervisors can require such a levy. (Fortney to Van Gilst, State Senator, 8/13/81) #81-8-21 (L)

Honorable Bass Van Gilst
State Senator
R. R. 4
Oskaloosa, Iowa 52577

August 13, 1981

Dear Senator Van Gilst:

You have requested an opinion of the Attorney General regarding the following question:

> Is a township required to pay for the maintenance of a cemetery which is not owned by the township after a city annexes the land on three sides of the cemetery, thereby significantly decreasing the township's tax base?

We are of the opinion that a township has no obligation to levy a tax for maintenance of a privately-owned cemetery located within the township. [1]

The power and authority to acquire cemeteries is conferred on the township trustees by §§ 359.28-29, The Code 1981. The trustees are also empowered to control and operate the cemetery (§ 359.31), including the power to sell the cemetery, Id., or to sell individual lots (§ 359.32).

The trustees are required to levy a tax for maintenance of township-owned cemeteries, however, they are given discretion whether to levy a tax to maintain privately-owned cemeteries within the township. These levies are respectively authorized by §§ 359.30 and 359.33 which provide:

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1 Because of our conclusion that there is no obligation on the part of the township per se, the annexation problem you raise is not controlling. If, however, the cemetery in question was publicly-owned, the township would be obligated to maintain the cemetery pursuant to § 359.30. The fact that the tax base of the township had been reduced, or that land on three sides of the cemetery had been annexed, would not alter this obligation of the township.

> They shall, at the regular meeting in November, levy a tax sufficient to pay for any lands so condemned or purchased, or for the necessary improvement and maintenance of cemeteries thus established, and for the necessary improvement and the maintenance of public parks acquired by gift, devise, or bequest under section 359.29, or for the maintenance and improvement of cemeteries so established in adjoining townships, in case they deem such action advisable.

§ 359.30.

> They may levy a tax not to exceed six and three-fourths cents per thousand dollars of assessed value of taxable property to improve and maintain any cemetery not owned by the township, provided the same is devoted to general public use.

§ 359.33.

As the cemetery in question is not owned by the township, § 359.30 would be inapplicable and § 359.33 would control. Said section authorizes, but does not require, the trustees to levy a tax for maintenance of a privately-owned cemetery.

While there is no obligation on the part of the trustees to maintain a privately-owned cemetery, the county board of supervisors does have the authority to levy a tax within a township for maintenance of such a cemetery. 69th G.A., 1981 Session, Senate File 130, § 401(2)(c) provides:

> The board may: Levy within a township at a rate not to exceed the rate permitted under sections 359.30 and 359.33 for the care and maintenance of cemeteries, if the township officials fail to levy the tax as needed.

In conclusion, township trustees have the authority to levy a tax for maintenance of privately-owned cemeteries located within the township if such cemetery is used by the general public.

The trustees are not required to levy a tax for such purposes, however, the board of supervisors can require such a levy.

Yours truly,

David Fortney

DAVID M. FORTNEY
Assistant Attorney General

DMF:sh

PUBLIC RECORDS: City addressograph plates. Sections 68A.1, 68A.2, 68A.3, The Code 1981. An Iowa citizen may examine and obtain copies of the information contained on city addressograph plates either in the office of the lawful custodian of the plates or at some other suitable place. In either situation, the lawful custodian or an authorized deputy must maintain supervision of the plates and may charge a reasonable fee both for the supervision and any actual expenses incurred in making copies. The fact that the information on the plates may be used for political purposes does not bar examination and copying of the information under Chapter 68A. (Stork to Cochran, State Representative, 8/13/81) #81-8-20 (L)

Honorable Dale M. Cochran
State Representative
R. 1, Box 109
Eagle Grove, Iowa 50533

August 13, 1981

Dear Representative Cochran:

You have requested an opinion as to whether city addressograph plates may be used by candidates for public office in making campaign mailings. We understand that these plates are metal devices containing the names and addresses of certain city residents. The plates are utilized by the city to address water bills that are sent to these residents and are adaptable for use on printing equipment other than that owned by the city.

Provisions of the "Examination of Public Records Act" contained in Chapter 68A, The Code 1981, are instructive to an analysis of your inquiry. Section 68A.1 defines "public records" as follows:

> Public records defined. Wherever used in this chapter, "public records" includes all records and documents of or belonging to this state or any county, city, township, school corporation, political subdivision, or tax-supported district in this state, or any branch, department, board, bureau, commission, council, or committee of any of the foregoing.

The specific terms "records and documents" are not defined in Chapter 68A and may, therefore, be construed according to their context and approved usage. § 4.1(2), The Code 1981.

As applied to public entities, "records" generally refer to either official documents which record the acts of public entities or official copies of documents deposited with legally designated officers. Webster's New Collegiate Dictionary (1979). "Documents" refers to original or official papers relied upon as the basis, proof, or support of something and, more broadly, to those writings that convey information. Id. In order to constitute a public record, a record or document need only be a convenient, appropriate, or customary method of discharging the duties of office by a public official; it need not be a record or document that is required by law to be kept as a memorial or official action. 66 Am.Jur.2d, Records and Recording Laws, § 19, at 354 (1973), cited with approval in Howard v. Des Moines Register & Tribune Co., 283 N.W.2d 289, 299 (Iowa 1979).

The information contained on city addressograph plates is unquestionably relied upon by city officials as a convenient and appropriate method of discharging one of their official duties. The fact that the information is contained on plates rather than on pieces of paper is not determinative of its status under § 68A.1. The provisions of Chapter 68A are to be liberally interpreted to ensure broad public access to public records. City of Dubuque v. Telegraph Herald, Inc., 297 N.W.2d 523, 526 (Iowa 1980). Accordingly, and in view of the generally-accepted definitions of "records" and "documents", we conclude that the information contained on a city addressograph plate constitutes a public record under § 68A.1.

Section 68A.2 establishes a citizen's right to examine and to copy public records while § 68A.3 provides guidelines by which such examination and/or copying may be accomplished. The former section states:

> Citizen's right to examine. Every citizen of Iowa shall have the right to examine all public records and to copy such records, and the news media may publish such records, unless some other provision of the Code expressly limits such right or requires such records to be kept secret or confidential. The right to copy records shall include the right to make photographs or photographic copies while the records are in the possession of the lawful custodian of the records. All rights under this section are in addition to the right to obtain certified copies of records under section 622.46.

Section 68A.3 provides:

> Supervision. Such examination and copying shall be done under the supervision of the lawful custodian of the records or his authorized deputy. The lawful custodian may adopt and enforce reasonable rules regarding such work and the protection of the records against damage or disorganization. The lawful custodian shall provide a suitable place for such work, but if it is impracticable to do such work in the office of the lawful custodian, the person desiring to examine or copy shall pay any necessary expenses of providing a place for such work. All expenses of such work shall be paid by the person desiring to examine or copy. The lawful custodian may charge a reasonable fee for the services of the lawful custodian or his authorized deputy in supervising the records during such work. If copy equipment is available at the office of the lawful custodian of any public records, the lawful custodian shall provide any person a reasonable number of copies of any public record in the custody of the office upon the payment of a fee. The fee for the copying service as determined by the lawful custodian shall not exceed the cost of providing the service.

Previous opinions of this office have explained the operation of this section:

> Section 68A.3 provides the mechanism by which such copies may be obtained. In general, the statute requires that copying of public records be completed under the supervision of the record's custodian or an authorized deputy in a "suitable place" provided by the custodian. If it is impractical to accomplish the copying at the custodian's office, another place may be employed, at the expense of the individual seeking copies of the records. The individual requesting copies must assume "all expenses" incurred to obtain copies, as well as a "reasonable fee for the services of the lawful custodian or his authorized deputy in supervising the records" during copying.

> The section imposes the duty upon the records custodian to "provide any person a reasonable number of copies . . .upon the payment of a fee", if copy equipment is available at the office of the record's custodian. The fee for such copies "shall not exceed the cost of providing the service." Thus, in those situations where copying is required to be completed by the custodian, the copies may be provided upon payment of those expenses incurred to provide such copies. The cost of postage is clearly such a cost.
>
> Accordingly, it is our opinion that §§ 68A.2 and 68A.3 require a governmental body to provide a copy of the minutes of meetings to members of the public at large who may request copies. Section 68A.3 authorizes the custodian of such minutes to provide copies of the minutes only upon payment of the expenses, including the fees for postage, incurred to provide copies of such minutes.

Op. Att'y Gen. #79-4-19; Op. Atty' Gen. #81-4-4. In light of these opinions, it seems clear that an Iowa citizen may examine and obtain copies of the information on city addressograph plates either in the office of the lawful custodian of the plates or at some other "suitable" place. In either situation, the lawful custodian or an authorized deputy must maintain supervision of the plates and may charge a reasonable fee both for the supervision and any actual expenses incurred in making copies. Op. Att'y Gen. #81-4-4.

We have located neither any provision of the Code that expressly limits the rights of an Iowa citizen to obtain the information on city addressograph plates nor any provision that requires such information to be kept secret or confidential. §§ 68A.2, 68A.7. Chapter 68A does not qualify the right of examination and copying of a public record by the purpose for which the record may be used. Consequently, the fact that the information on city addressograph plates may be used for political

purposes does not bar examination and copying of the information. Op. Att'y Gen. #81-4-4; 1968 Op. Att'y Gen. 518, 520. [1]

In conclusion, we advise that, pursuant to Chapter 68A, candidates for public office may examine and copy the information contained on city addressograph plates. The purpose for which the information will be used does not limit the right of examination and copying of public records under § 68A.2.

Very truly yours,

Frank J. Stork

FRANK J. STORK
Assistant Attorney General

FJS:sh

[1] We note that the information which may be obtained from city addressograph plates appears to be available also from voter registration records maintained in the office of the county auditor pursuant to § 48.5, The Code 1981. Information in the voter registration records may be used only to request a registrant's vote or for any other bona fide political purpose. § 48.5(3).

MENTAL HEALTH: Liability for the costs of care and treatment of disabled persons. 42 U.S.C. §§ 402 et. seq., 1381 et. seq., 1397 et. seq., 1397a(a)(1), 1397b(d)(1)(E), 1397c, 45 C.F.R. §§ 228.25, 228.26, §§ 222.2(5), 222.60, 234.6, 249, 252.1, 252.25 and 252.27, The Code 1981, § 770-131.4, The Iowa Administrative Code. A county of legal settlement is legally responsible for the costs of necessary and legal health care services for a mentally retarded individual, in the absence of state or federal financial support. The term "mental retardation" refers to a condition characterized by three significant features: (1) significantly subaverage general intellectual functioning, (2) resulting in, or associated with, deficits or impairments in adaptive behavior, (3) with onset before the age of 18. The county of legal settlement is liable for the reasonable charges and expenses incurred in the relief and care of a poor person. To qualify for general relief a person must be a poor person within the meaning of § 252.1, The Code 1981. A county board of supervisors has broad discretion in determining the amount of assistance necessary to meet the needs of a poor person. (Mann to Shirley, Dallas County Attorney, 8/13/81) #81-8-19 (L)

Mr. Alan Shirley
Dallas County Attorney
1124 Willis Avenue
P.O. Box 487
Perry, Iowa 50220

August 13, 1981

Dear Mr. Shirley:

You requested an opinion of the Attorney General on the question of whether a county is liable for the costs of care and treatment for an indigent person who has sustained severe and permanent injuries. You relayed the following information and specific questions:

> There is a Dallas County resident who sustained brain damage at the age of 21 as a result of a car accident. She is presently receiving Supplimentary Security Income (SSI) and Social Security Disability. She resides in a residential facility where the state pays the difference between her income and the per diem maintenance costs at the facility. The County pays 25% of the service costs with the federal government paying 75%. As of July 1 there will not be any federal match for the service costs.

> Does the County have a legal responsibility under the Code to assume 100% of these costs? Can the client be defined as a mentally retarded person under the provisions of Chapter 222 of the Code? If not, is there some other provision in the Code or the Departmental Rules which would allow that individual to be classified as a person defined in Chapter 222 of the Code? Alternatively, is the County's only responsibility for the individual under the provisions of Chapter 252 of the Code (the Poor Fund)?

In order to fully understand the questions raised, a review of pertinent federal and state statutory and regulatory provisions is appropriate. Apparently the person involved herein (hereinafter referred to as Ms. X) receives Disability Insurance Benefits and Supplemental Security Income under 42 U.S.C. §§ 402 et. seq. and 1381 et. seq., respectively. In addition, state supplementary assistance is provided to Ms. X under ch. 249, The Code 1981. These monies are used to defray the costs of shelter, food and clothing (maintenance costs) for Ms. X in a residential care facility.

It is also apparent that Ms. X has been the recipient of other services, such as care, training, instruction and habilitation. Financial responsibility for these services (service costs) have been borne by Dallas County and the federal government pursuant to the Title XX program. Title XX is a program established by Congress on January 4, 1975. 42 U.S.C. § 1397 et. seq. The purpose of the program is to provide cash grants to the states for the purchase of specific services for needy individuals. 42 U.S.C. § 1397a(a)(1). Each state is required to develop a plan which delineates the categories of services to be provided in each service delivery area, as well as the eligibility criteria for client participation. 42 U.S.C. § 1397b(d)(1)(E). The Iowa State Plan provided that the county of legal settlement would provide a 25 percent match for the cost of Title XX services provided to individuals having legal settlement in a respective county. The remaining 75 percent of the costs were to be paid with Title XX funds.

Service costs for Ms. X's habilitation has been paid as described in the referred to State Plan. However, as of July 1, 1981, the State Plan has been revised. The provision of the State Plan which permitted Title XX funds to be used for residential care in Dallas County was eliminated pursuant to the applicable statutory and regulatory provisions. 42 U.S.C. § 1397c; 45 C.F.R. §§ 228.25 and 228.26; § 234.6, The Code 1981; § 770-131.4, The Iowa Administrative Code; Governor's Final Plan Under Title XX, Iowa Department of Social Services, July 1981-June 1982.

Your question, then, is whether the county has a legal responsibility to assume 100 percent of the service costs for Ms. X, in the absence of Title XX funds? A similar question was discussed in a prior Opinion of the Attorney General, Op.Att'yGen. # 79-6-27. In that opinion the question was whether the county of legal settlement has final financial responsibility for payment of services, such as sheltered work/work activity services, for the mentally retarded when Title XX or other funds are not available. This office concluded that, with respect to the mentally retarded, § 222.60, The Code 1979, placed responsibility on the county for necessary and legal expenses of mentally retarded patients at approved facilities. The following language from that opinion is helpful:

> From the foregoing, it can be seen that § 222.60 sets three criteria which must be met before the responsibility of bearing costs is imposed on a county, to wit: the costs must be necessary and legal; the costs must be related to admission, commitment or treatment; and, the costs must be for a patient at an authorized facility. If the cost of services for a mentally retarded individual at a sheltered work/work activity center meet these three criteria, the cost would be properly charged to the county of legal settlement.
>
> Dependent upon the particular facts applicable to the individual receiving services, it is possible to answer your question either affirmatively or negatively. Not all mentally retarded persons would be eligible for all types of sheltered work/ work activity services at county expense. The three criteria outlined above must be met.

> It is important to note that not all mentally retarded individuals are covered by the standards of § 222.60. An individual must initially qualify as a patient in an authorized facility. Of course, there is no requirement that such person be an inpatient of a facility. A person who is on a rehabilitative leave from a facility could still be considered a patient at the facility until totally discharged.
>
> Participation in sheltered work/work activity could qualify as treatment, training, habilitation, etc., but whether this is so would have to be determined with regard to the treatment needs of the individual in question. It is presumed that the charges for the services are in fact "necessary" charges.
>
> In summary, if the cost of services for a mentally retarded individual at a sheltered work/work activity center can meet the three criteria contained in § 222.60, the county of legal settlement has final financial responsibility for payment of those services.

Accordingly, it must be concluded that if Ms. X is mentally retarded the county is responsible for the costs of necessary and legal health care services provided to her.

We turn, then, to the question of whether Ms. X may be considered to be mentally retarded within the meaning of the Iowa Code. Section 222.2(5), The Code 1981, defines mental retardation as follows:

> 5. "Mental retardation" or "mentally retarded" means a term or terms to describe children and adults who as a result of <u>inadequately developed</u> intelligence are significantly impaired in ability to learn or to adapt to the demands of society. (emphasis added)

This statutory definition of mental retardation places emphasis upon deficiencies in intellectual growth which manifest themselves at an early age. It is consistent with the nationally accepted definition of mental retardation. That definition, as published by the American Association on Mental Deficiency, reads as follows:

> Mental Retardation refers to significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior, and manifested during the developmental period.
>
> GENERAL INTELLECTUAL FUNCTIONING is defined as the results obtained by assessment with one or more of the individually administered general intelligence tests developed for that purpose.
>
> SIGNIFICANTLY SUBAVERAGE is defined as IQ more than two standard deviations below the mean for the test.
>
> ADAPTIVE BEHAVIOR is defined as the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected for age and cultural group.
>
> DEVELOPMENTAL PERIOD is defined as the period of time between birth and the 18th birthday.

Grossman, Manual On Terminology And Classification In Mental Retardation, American Association on Mental Deficiency (1977).

It appears, then, that mental retardation has three significant features: (1) significantly subaverage general intellectual functioning, (2) resulting in, or associated with, deficits or impairments in adaptive behavior, (3) with onset before the age of 18. See also, Diagnostic and Statistical Manual of Mental Disorders, 3d Edition, DSM-III, American Psychiatric Association (1980).

Applying this definition to the case at hand, it appears that Ms. X may not be considered to be mentally retarded. Her disability did not manifest itself until age 21, and further, it did not result from inadequately developed intelligence. Rather, her disability is the result of the physical destruction of brain cells caused by an auto accident. While this condition certainly constitutes a disability within the meaning of certain state and federal civil rights laws, it does not constitute mental retardation within the meaning of § 222.2(5), The Code 1981. Accordingly, Ms. X may not be considered to be mentally retarded.

Since we have concluded that Ms. X is not mentally retarded, the question of the county's legal responsibility for her care must be based on authority other than § 222.60. At common law the public authorities had no duty to support paupers or other needy persons. Such duty, where it exists, rests entirely on a statute. Michel v. State Board of Social Welfare, 245 Iowa 961, 65 N.W.2d 89 (1954). Iowa has such a statutory scheme. Chapter 252, The Code 1981, dictates that a county provide assistance to persons unable to earn a living by labor due to either a physical or mental disability. 1978 Op.Att'yGen. 766. Specifically, § 252.25, The Code 1981, provides that counties "[s]hall provide for the relief of poor persons in its county who are ineligible for, or are in immediate need and are awaiting approval and receipt of, assistance under programs provided by state or federal law, or whose actual needs cannot be met by the assistance furnished under such programs."[1] The county of legal settlement, then, is liable for the reasonable charges and expenses incurred in the relief and care of a poor person. 1978 Op.Att'yGen. 766.

Thus, even though Ms. X is not a mentally retarded person as defined by Iowa law, she may be entitled to county assistance under ch. 252. Of course, to qualify for such relief, she must be a "poor person" within the meaning of § 252.1, The Code 1981.

---

1. As an SSI recipient, Ms. X would be financially eligible for Title XIX (Medicaid) which provides payment for certain medical services, including care in an Intermediate Care Facility (nursing home) or Intermediate Care Facility/Mentally Retarded (nursing home for the mentally retarded). In order to receive such care under Title XIX a person must not only meet the financial eligibility standards, but also meet the medical eligibility standards as well. There are only a very limited number of ICF/MR facilities in the state of Iowa.

As you have not supplied financial information for us to review that question, we decline to speculate on whether Ms. X is a poor person within the meaning of The Code.

Further, we decline to comment on the extent of the assistance that Ms. X may be entitled to under ch. 252 as that is a matter to be decided by the county board of supervisors. Under § 252.27, The Code 1981, "the amount of assistance to meet the needs" of a poor person "shall be determined by standards of assistance established by the county board of supervisors". Thus, the question of whether Ms. X may continue to receive the same services as presently being provided will have to be answered based upon the standards adopted by the Dallas County Board of Supervisors to implement § 252.27, The Code 1981.

In summary, the county of legal settlement is legally responsible for the costs of necessary and legal health care services for a mentally retarded individual in the absence of state or federal financial support. The term "mental retardation" refers to a condition characterized by three significant features: (1) significantly subaverage general intellectual functioning, (2) resulting in, or associated with, deficits or impairments in adaptive behavior, (3) with onset before the age of 18. The county of legal settlement is liable for the reasonable charges and expenses incurred in the relief and care of a poor person. To qualify for general relief a person must be a poor person within the meaning of § 252.1, The Code 1981. A county board of supervisors has broad discretion in determining the amount of assistance necessary to meet the needs of a poor person.

Sincerely,

Thomas Mann, Jr.

Thomas Mann, Jr.
Assistant Attorney General

TM/jam

INSURANCE: Passenger liability coverage on mopeds. Sections 321.275(2)(a), 321A.1(4), 321A.5(2), 321A.21(2)(b), 505.8, 515.109, 515A.3(1)(a), The Code 1981. In order to comply with the motor vehicle financial responsibility law, a liability insurance policy on a moped must provide coverage to the owner or operator for liability to a passenger thereon, even though it is unlawful to carry a passenger. Providing that coverage does not violate public policy. (Haskins to Comito, State Senator, 8/12/81) #81-8-17 (L)

August 12, 1981

Honorable Richard Comito
State Senator
1320 Ridgeway
Waterloo, Iowa 50701

Dear Senator Comito:

You have asked the opinion of our office on the following questions:

1. Is it lawful for a motor vehicle liability insurance carrier to require an insured owner of a moped (motorized bicycle) to purchase additional insurance coverage against liability for injuries to passengers on the moped?

2. Does the answer to question number one depend upon whether or not the insurer charges a separate premium for the passenger liability coverage?

Your questions arise in the context of Section 321.275(2)(a), The Code 1981, which makes it unlawful for the operator of a motorized bicycle to carry any other person.

In Insurance Department Declaratory Ruling 1981-1, to which you allude, the Commissioner of Insurance (the "commissioner") indicated that his department will not approve motorcycle and moped liability insurance policies which fail to provide coverage for liability of the owner or operator of the motorcycle or moped to a passenger. The basis for the declaratory ruling was the commissioner's determination that the public interest would not, for a variety of reasons, be served by incomplete liability coverage for motorcycle and moped owners or operators. It is

sufficient to note here that the commissioner is clothed with broad powers over the control, supervision, and direction of all insurance business transacted in this state. See Section 505.8, The Code 1981; Huff v. St. Joseph Mercy Hosp., 261 NW 2d 695, 698 (Iowa 1978). Specifically, under Section 515.109, The Code 1981, the commissioner has the power to approve all liability insurance policy forms.

Section 321A.21(2)(b), The Code 1981, part of the motor vehicle financial responsibility law, requires that a liability insurance policy on a "motor vehicle" (of which a moped is one, see Section 321A.1(4), The Code 1981) shall cover "the liability" which the owner or operator has by virtue of the ownership or operation of it.[1] We read this section as requiring that an insurance policy cover all liability. Certainly, part of the liability of a moped owner or operator could be to a passenger. The fact that it is unlawful to carry a passenger on a moped would not negate liability. Indeed, it might enhance it. See generally Koll v. Manatt's Transp. Co., 253 NW 2d 265, 270 (Iowa 1977) (violation of statute as evidence of negligence). Thus, in order to meet the motor vehicle financial responsibility law, coverage must be provided for liability to a passenger on a moped.

The unlawfulness of carrying a passenger on a moped does not mean that providing coverage for liability to a passenger violates public policy. An early challenge to automobile liability insurance was that it violated public policy by protecting the insured from liability for his own negligence or unlawful acts in the form of a violation of traffic laws. See Anderson, Couch Encyclopedia of Insurance Law, 2d Section 45:2, at 105 (1964). However, this contention has been rejected in most jurisdictions.

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[1]Section 321A.21(2)(b) states:

> 1. A "motor vehicle liability policy" as said term is used in this chapter shall mean an owner's or an operator's policy of liability insurance, . . .
>
> 2. Such owner's policy of liability insurance:
>
> . . .
>
> b. Shall insure the person named in the policy and any other person, as insured, using the motor vehicles with the express or implied permission of the named insured, against loss from the liability imposed by law for damages arising out of the ownership, maintenance, or use of the motor vehicles. . . .

See id.; American Fidelity Co. v. Bleakley, 157 Iowa 442, 138 NW 508 (1912). Thus, it is not necessarily a violation of public policy for a liability insurance policy to protect an insurer from the consequences of his or her own unlawful act. In City of Cedar Rapids v. Northwestern Nat'l Ins. Co., 304 NW 2d 228, 230 (Iowa 1981), it was held that public policy is not violated when an insurance policy covers an insured for punitive damages occasioned by his or her own wrongful conduct. There, as here, the argument could be made that insurance coverage of wrongful acts encourages those acts. However, the court in Northwestern Nat'l Ins. Co. apparently felt such a consideration to be insufficient to void coverage on grounds of public policy.

In the present context, it is clear that a certain number of passengers will in fact ride on mopeds despite the existence of a statute prohibiting the operators of mopeds from carrying them and that these passengers or their families, in the event of an accident, could be left without redress from the monetary consequences of death or serious injury if the owner or operator of the moped lacks liability insurance. Hence, providing liability coverage to an injured moped passenger or to his estate under the insurance policy of the owner or operator of the moped is not contrary to public policy. This conclusion does not depend upon an additional charge not being made for the coverage. An insurance company clearly has the right to charge a rate for a particular liability coverage which is commensurate with the risk assumed. At the same time, the rate cannot be excessive. Section 515A.3(1)(a), The Code 1981, provides that liability insurance rates may be neither excessive nor inadequate and is part of a comprehensive scheme for review by the commissioner of those rates. Any additional charge for coverage of liability to a passenger on a moped, whether or not in the form of a separate premium, is subject to the safeguards of that chapter. Allowing a charge for that coverage, it should be noted, does not create "mandatory" insurance. In his declaratory ruling, the commissioner has simply prescribed the form for insurance if that alternative is utilized to satisfy the financial responsibility law. A motor vehicle owner or operator can still post a security bond in the event of a major accident in lieu of insurance. See Section 321A.5(2), The Code 1981.

In sum, in order to comply with the motor vehicle financial responsibility law, a liability insurance policy on a moped must provide coverage to the owner or operator for liability to a passenger thereon, even though it is unlawful to carry a passenger. Providing that coverage does not violate public policy.

Very truly yours,

THOMAS J. MILLER
Attorney General of Iowa

Fred M. Haskins

FRED M. HASKINS
Assistant Attorney General

TJM/FMH/ks

INSURANCE DEPARTMENT OF IOWA
LUCAS STATE OFFICE BUILDING
DES MOINES
50319

ROBERT D. RAY
GOVERNOR

BRUCE W. FOUDREE
COMMISSIONER

DECLARATORY RULING 1981-1

The Insurance Department has received numerous questions and inquiries asking whether motorcycle and moped insurance policies may contain an exclusion for guest passenger liability. This ruling is in response to those inquiries.

Under the Iowa Guest Statute, section 321.494 of the Code, a guest passenger in a motor vehicle could not recover in a personal liability action against the owner or operator of a vehicle unless the injury resulted from the driver being under the influence of alcohol or drugs or from the reckless operation of the vehicle. Thus, motor vehicle operators possessed a form of immunity. However, the Iowa Supreme Court recently declared the guest statute unconstitutional. Bierkamp v. Rogers 293 N.W.2d 577 (Iowa 1980). Because of this decision, motor vehicle operators no longer enjoy their former immunity. This includes operators of motorcycles.

Many motorcyclists may not be aware of their increased exposure to liability and may assume that their current policy covers such liability. In the case of personal automobile policies, coverage for liability to guest passengers is provided within the scope of the bodily injury (BI) coverage. However, traditionally, motorcycle policies have excluded coverage for guest passenger liability. Motorcyclists could always buy such coverage, but because of the guest statute their need for it was not as great due to the immunity which they enjoyed. The Iowa Supreme Court's ruling has changed that.

Motorcycle policyholders, and motorcycle passengers, should be afforded protection in the same manner as insureds and passengers under automobile insurance policies. Motorcycle policies which exclude guest passenger liability coverage have the potential for creating confusion among policyholders about the extent of their coverage and may result in substantial harm to the public. Of particular concern is the considerable risk exposure of the operator of a motorcycle and the corresponding danger to a guest passenger.

In addition, Iowa law requires that owners or operators of motor vehicles must be able to demonstrate proof of financial responsibility in the amounts of $15,000 "because of bodily injury to or death of one person" and $30,000 "because of bodily injury to or death of two or more persons" in any one accident. Iowa Code section 321A.1 (1981). Correspondingly, motor vehicle insurance policies must have these minimum levels of coverage. Iowa Code section 321A.21(2) (1981). Both motorcycles and motorized bicycles (mopeds) are types of motor vehicles. Iowa Code section 321.1 (1981). Consequently, they must conform to the minimum financial requirements of section 321A.21(2) of the Code with respect to bodily injury.

The purpose of the minimum financial responsibility law is to provide a mechanism for the protection of persons injured in motor vehicle accidents. Because of the Bierkamp decision, injury to a passenger riding on a motorcycle is now a form of bodily injury for which a motorcycle owner or operator can be liable. They no longer enjoy the limited statutory immunity they once had. To exclude this particular type of bodily injury liability coverage from the bodily injury coverage regularly afforded under motorcycle policies is therefore contrary to both the intent of Chapter 321A and the public interest. There is now no reason why an individual or an insurance policy should be considered exempt from the minimum financial responsibility laws of this state with respect to bodily injury caused to a guest passenger riding upon a motorcycle or motorized bicycle. A guest passenger exclusion defeats the very purpose of the statute.

For these reasons, the Commissioner is of the opinion motor vehicle policies which exclude guest passenger liability coverage are contrary to law and not in the public interest. Under the authority of sections 505.8 and 515.109 of the Code, 1979, policy form filings which contain such an exclusion will not be approved for use in this state. In addition, all existing filings which exclude guest passenger liability may not be used for policies issued or renewed after June 15, 1981 and must be refiled without the guest passenger exclusion.

Insurers may satisfy the financial responsibility requirements for guest passenger liability coverage by endorsement to policies. However, the limits of coverage under such endorsements must be at least those specified by the financial responsibility law, i.e. $15,000 per person and $30,000 per occurrence. For example, an insurer may sell a motorcycle policy containing regular bodily injury limits of $100,000/$300,000 and an endorsement providing for guest passenger liability limits of $15,000/$30,000.

Dated this 31 day of March, 1981.

Bruce W. Foudree

BRUCE W. FOUDREE
Commissioner of Insurance

COUNTY HOSPITALS: Prescription drugs to employees. § 347A.1, The Code 1981. County hospitals organized under Chapter 347A, The Code, may provide prescription drugs at cost to hospital employees and dependents as an employee fringe benefit. (Brammer to Larson, Winneshiek County Attorney, 8/12/81) #81-8-16 (L)

July 29, 1981

Dennis G. Larson
Winneshiek County Attorney
112 West Main Street
Decorah, Iowa 52101

August 12, 1981

Dear Mr. Larson:

You had requested the opinion of this office on the question of whether a hospital organized under Chapter 347A of the Iowa Code may provide prescription drugs at cost to hospital employees and their dependents as an employee fringe benefit.

The Winneshiek County Memorial Hospital is organized under Chapter 347A of the Iowa Code. The trustees of the hospital have the authority to "employ, fix the compensation and remove at pleasure professional, technical, and other employees skilled or unskilled as it may deem necessary for the operation and maintenance of the hospital..." pursuant to §347A.1, The Code, 1981. Furthermore, that section gives the board of trustees the authority to "make all rules and regulations governing its meetings and the operation of the county hospital and shall fix rates, fees and charges for the services thereby furnished...."

Because the board of trustees is authorized to fix fees for services furnished by the hospital, which would undoubtably include the price of medications dispensed, there would seem to be no prohibition against the board fixing the fees for prescriptions for their employees at a level different than the fee the board decides to charge the public who use the hospital pharmacy services. In addition, the provision of §347A.1 which authorizes the board to "fix the compensation" of the employees as it deems necessary allows the board the option of providing such fringe benefits as the board may determine is necessary to attract staff sufficient in number and quality for the operation and maintenance of the hospital. It is important to note that, if the employees are represented by a certified employee organization, such a decision may be required to be implemented through the collective bargaining process set out in Chapter 20, the Code, 1981.

Hospital pharmacies are not licensed under the general pharmacy licensing provisions of 155 of the Code because they are considered by the Department of

Health to be a service unit of the hospital. Hospitals are licensed pursuant to Chapter 135B and the rules and regulations promulgated pursuant thereto control the operation of the hospital pharmacy. Upon review of Chapter 135B and the rules in 470.1.A.C. §51, there does not appear to be any provision in either which would prohibit the dispensing of prescription drugs from the hospital pharmacy to employees. In addition, Norman Johnson, Executive Secretary of the Iowa Board of Pharmacy Examiners, indicated that as long as the drugs are dispensed in compliance with state and federal regulations the Board of Pharmacy has no objection to any proposal which would provide prescription drugs at cost to hospital employees.

In conclusion, it is the opinion of this office that Chapter 347A.1, The Code 1981, allows the board of trustees of the hospital to set fees for prescription drugs dispensed from the hospital and also to fix the compensation of employees of the hospital. The provision of prescription drugs to employees as a fringe benefit would, therefore, be an acceptable practice for boards of trustees of 347A hospitals. We are unable to find authority in the statutes regulating hospitals or pharmacies which would prohibit such a practice. Therefore, it is the opinion of this office that the Winneshiek County Memorial Hospital may provide prescriptions at cost to its employees and their dependents.

Sincerely,

Susan Barnes Brammer

Susan Barnes Brammer
Assistant Attorney General

SBB/fc

MUNICIPALITIES: Authority of fence viewers--Chapter 679, §§ 113.1, 113.3, 113.23, 359.17, 359.24, and 359.25, The Code 1981. The city council shall act as fence viewer in a partition dispute involving tracts of land wholly within a municipality. Such authority is not diminished by the fact that one of the tracts of land is owned by the city. Nevertheless, the council may prefer to submit the matter to arbitration as provided for in Chapter 679. Also, upon written request a city shall be compelled to share in the cost of erecting and maintaining a partition fence by an adjacent property owner. [Walding to Angrick, Citizens' Aide Ombudsman, 8/12/81] #81-8-15 (L)

Mr. William P. Angrick II, Ombudsman
Citizens' Aide Office
Capital Complex
L O C A L

August 12, 1981

Dear Mr. Angrick:

We have received your opinion request of June 18, 1981, regarding partition fences. Specifically, you have asked:

> 1. To whom does a citizen make a request under Section 113.1, The Code 1981, when the tracts of land involved in the request are wholly within a municipality, not a part of a township?
>
> 2. If it is within the authority of the city council to act as fence viewer under the above-mentioned circumstance, is it appropriate for the council to act as fence viewer when one of the parcels of land in question is owned by the city? If not, to whom would the responsibility fall?
>
> 3. If a request is made to the city by an adjacent property owner to share in the erecting and maintaining of a fence when the property is outside of a township and the city council is acting as fence viewer , must the city share in the costs of the fence?

Two opinions and an Iowa Supreme Court case appear to have an answer to your first question. Upon closer scrutiny, however, they appear to breed confusion. In the first opinion, 1928 Op.Att'y.Gen. 208, the issue was whether township trustees, as fence viewers, had jurisdiction to decide fence disputes in incorporated towns. The opinion holds that township trustees have no such jurisdiction.

The more recent opinion, 1962 Op.Att'y.Gen. 15, expanded upon the holding of the earlier opinion. Not only did we rule that township trustees have no authority within city limits, but that their powers, including that of fence viewers, are transferred to the city council.

The Supreme Court of Iowa has partially abrogated the holdings of the opinions though. In Ryan v. Heller, 232 Iowa 760, 6 N.W.2d 113 (1942), the Court ruled that city and town officers had no jurisdiction as fence viewers in a city whose limits were less than a civil township. Thus, the opinions are in conflict with Ryan.

A closer examination of the Code will resolve the conflict in favor of Ryan. Section 359.17, The Code 1981, authorizes township trustees to act as fence viewers. The trustees' jurisdiction is limited, however, by §§ 359.24 and 359.25, The Code 1981. Section 359.24 provides: "Where a city constitutes one or more civil townships the boundary lines which coincide throughout with the boundary lines of the city, the offices of township clerk and trustee are abolished." In such cities, § 359.25 provides: "The duties required by law . . . of the board of trustees shall be performed by the city council."

Accordingly, the city council shall act as fence viewer in a partition dispute involving tracts of land wholly within a municipality. In response to your first question then, the proper place to make a request under § 113.1, The Code 1981, in this case, is with the city council.

A more difficult question is posed by your second inquiry. In particular, you have asked whether or not it is a conflict of interest for a city council to act as fence viewer when the city is a party to a partition dispute. Generally, a conflict of interest develops whenever a person serving in public office may gain any private advantage, financial or otherwise, from such service. See, e.g., § 314.2 (county officials' or employees' interests in municipal housing projects prohibited) and § 403.22 (public officials' or employees' interests in municipal housing prohibited). Such statutes are merely declaratory of common law rules prohibiting conflicts of interest. See Wilson v.

Iowa City, 165 N.W.2d 813, 819 (Iowa 1969). No statutory provision precluding an interested city council from serving as fence viewer could be located.

Two recent Iowa Supreme Court cases speak to the issue of conflict of interest as it relates to concurrent public service. The landmark case, of course, is Wilson v. Iowa City, 165 N.W.2d 813 (Iowa 1969). In the Wilson case, a member of the city council was determined to have a conflict of interest based entirely upon his employment with the University of Iowa, another public body, which owned property in the urban renewal area and was "vitally interested" in the project. Id at 821. At the time he became a member of the city council, he was director of the alumni office. Soon after his election, he was made director of community relations for the University. The court noted that the University was openly in favor of the urban renewal project and would be beneficially affected by it. The court then concluded that the councilman-employee of the University did have a disqualifying interest under the conflict of interest statute, particularly because of his "position of influence as director of community relations, the very department with which the city would deal in case of matters of mutual interest to the University and the city." Id at 823.

A later Supreme Court decision does appear to limit the broad language of Wilson. Goreham v. Des Moines Metropolitan Area Solid Waste Agency, 179 N.W.2d 449 (Iowa 1970), involved a declaratory action to determine the rights of property owners of a metropolitan area and the status of a solid waste agency created by an intergovernmental agreement pursuant to Ch. 28E, The Code 1981. The agreement provided that the governing body of the solid waste agency would be comprised of elected representatives of the governing body of each participating governmental jurisdiction, or their designated substitutes. One issue on appeal was whether such an agreement violated public policy due to the apparent conflicting interests of the solid waste agency and the individual local governments. The Court concluded:

> [Appellants] argue that the integrity of representative government demands that the administrative officials should be able to exercise their judgment free from the objectionable pressure of conflicting interests. We agree with that proposition, but do not believe it appears here that these members of the agency board are in such a position. It is conceded that here

> there is nothing to indicate a personal pecuniary interest of those representatives is involved such as appears in Wilson v. Iowa City, Iowa. 165 N.W.2d 813, 820.
>
> Although the members of the board understandably will want to keep the rates their constituents must pay as low as possible, they are well aware that rates must be maintained sufficient to meet the Agency's cost for such services. This is not such a conflict of interest as to be contrary to public policy or fatal to the agreement.
>
> In passing on this question the trial court said, "inasmuch as each representative is on the board primarily to serve as spokesman for the particular municipality or political subdivision he represents, (it could). . . see no conflict of interest such as would likely affect his individual judgment by virtue of his status as an elected official." It pointed out no compensation is provided for such service and the representative serves at the pleasure of his municipality or political subdivision. We agree with the trial court.

Id. at 642. The Court in this case appears to place emphasis on the fact that a public official serving on two local public boards, which may have somewhat differing interests or concerns, does not benefit personally from such service, especially absent any possibility for personal financial advantage.

Applying the Wilson and Goreham decisions to our case we find no inherent conflict of interest. The rationale is threefold. First and foremost, the members of the city council have neither a personal nor a financial interest in acting concurrently as council members and as fence viewers. There is nothing to indicate a "personal pecuniary interest" here. In the event that members of the council become interested, however, they must disqualify themselves. Second, although the city council understandably will want to keep the cities share of the cost of the partition fence as low as possible, they also will be well aware that they must treat their constituents fairly. This is not such a conflict

of interest as to be contrary to public policy or fatal to the intent of Ch. 113 to create an impartial tribunal. Similarily, the third reason for our finding is that the members of the city council are accountable to the public. As elected officials, they serve at the will of the people. Accordingly, the authority of the city council to act as fence viewer is not diminished by the fact that one of the tracts of land is owned by the city.

We should note that any person who believes that he or she has not been treated justly is not without recourse. In fact, Ch. 113 provides for appeal to the district court. See § 113.23, The Code 1981. Such appeal is triable at law. See Laughlin v. Franc, 247 Iowa 345, 73 N.W.2d 750 (1955).

Although it is stautorily permissible for an interested city council to act as fence viewer, the council may still want to explore the possibility of submitting the matter to a disinterested third party. One possibility would be submission to arbitration. Chapter 679, The Code 1981, provides the pertinent procedures. Submission to arbitration has the advantage of avoiding even the appearance of partiality.

Finally, in response to your third question, we refer you to § 113.1, The Code 1981. It provides: "The respective owners of adjoining tracts of land shall upon written request of either owner be compelled to erect and maintain partition fences, or contribute thereto, and keep the same in good repair throughout the year." In a prior opinion, 1970 Op. Att'y Gen. 649, citing to Hansen v. Kemmish, 201 Iowa 1008, 208 N.W. 277 (1926), we held that the tracts of land to be partioned need not be farm land. Subsequently, our office has held that cities are not exempt from Ch. 113 of The Code 1981. See 1976 Op. Att'y. Gen. 433. In that opinion we stated, "There is nothing in CH. 113 that specifically exempts cities. Nor can anything so exempting be found in any other Chapter." Id. Hence, upon written request, a city shall be compelled to share in the cost of erecting and maintaining a partition fence by an adjacent property owner.

In summary then, the city coucil shall act as fence viewer in a partition dispute involving tracts of land wholly within a municipality. Such authority is not diminished by the fact that one of the tracts of land is owned by the city. Nevertheless, the council may prefer to submit the matter to arbitration as provided for in Ch. 679. Also, upon written

request a city shall be compelled to share in the cost of erecting and maintaining a partition fence by an adjacent property owner.

Very truly yours,

Lynn M. Walding

LYNN M. WALDING
Assistant Attorney General

LMW/ny

FOSTER CARE:§234.35; §234.36, The Code 1981. Our previous opinion stating that the State of Iowa is responsible for payment of foster care under §§234.35 and.36 was not changed in substance with the revision of the Juvenile Code (Ch. 232, The Code 1981).The Department of Social Services may be liable for payment of court-ordered foster care expenses even when the Department does not have custody or guardianship of a child. (Black to Reagen, Commissioner, Iowa Department of Social Services, 8/11/81) #81-8-12 (L)

Dr. Michael V. Reagen
Commissioner
Iowa Department of Social Services
Hoover State Office Bldg.
Des Moines, Iowa 50319

August 11, 1981

Dear Dr. Reagen:

This office on March 21, 1978, opined that the State of Iowa is responsible for foster care costs specified in §§ 234.35(4) and 234.36, The Code, even though the Department of Social Services does not have guardianship over or custody of the child in question. You now request that we reconsider that portion of the opinion in the light of what you refer to as a reference to a "new statute". In actuality, the change in the statutory reference in § 234.36 from §§ 232.33(3) or (4) and 232.34(3) or (4) to § 232.50 and § 232.99, respectively, has no substantive affect in terms of the responsibility to pay foster care costs.

These changes in the dispositional section of the Juvenile Justice Act still permit juvenile courts wide latitude in the disposition of juvenile delinquency and child in need of assistance cases. Nothing in these sections requires that foster care only be provided if the Department of Social Services has custody or guardianship of the child. We conclude that our former opinion remains correct, wherein it concludes that the State of Iowa may[1] have liability for foster care costs under §§ 232.35 and .36 of The Code even though the Department of Social Services does not have guardianship over or custody of the child to whom the foster care was provided.

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1 Obviously, for the State to have liability all of the conditions specified for imposing that liability under §§ 234.35 and .36 of The Code must be met.

You also inquire as to whether the Department of Social Services rules apply to foster care not provided by the Department. The Department rules on foster care are primarily directed to care provided by the Department or care purchased by the Department under contract. Clearly, however, licensing requirements apply even though the Department does not operate or contract with the foster care facility. We believe the broad range of the Department's rules identify to whom they are intended to apply and that a detailed categorization of them here would serve no useful purpose. If it is thought that a particular departmental rule is ambiguous as to whom it is to apply, we would express an opinion as to its proper interpretation.

We do note, however, that with respect to payment for foster care, The Code at § 234.36 provides that the maximum allowable amounts which a county or the department may pay are those established by the department pursuant to § 234.38, The Code. We have previously opined that these limits apply to foster care payable by the State under §§ 234.35 and 234.36 even though the Department does not have guardianship over or custody of the child in question. Op. Att'y Gen. #81-5-13.

Yours very truly,

John G. Black
Special Assistant Attorney General

MENTAL HEALTH: Liability of counties for patients transferred from state mental health institutes to county care facilities. §§ 227.11, 227.16, 230.1 and 230.15, The Code 1981. Under § 230.15 a county is liable for 100 percent of the costs of care and treatment of a patient at a state mental health institute for 120 days; thereafter, the county's liability is limited to the average minimum cost of the maintenance of a physically and mentally healthy individual residing in his/her own home. The reduced rate of liability for the care and treatment of mental health patients available under § 230.15 is limited to the care and treatment provided at state mental health institutes. A county is entitled to receive five dollars per week in state aid for each patient transferred to a county care facility pursuant to § 227.11. (Mann to Poppen, Wright County Attorney, 8/11/81) #81-8-11 (L)

Mr. Lee E. Poppen
Wright County Attorney
P. O. Box 111
Clarion, Iowa 50525

August 11, 1981

Dear Mr. Poppen:

You requested an opinion of the Attorney General on the question of whether a county is entitled to the reduced rate of liability available under § 230.15, The Code 1981, for mental health patients who are transferred from a state mental health facility to a county care facility pursuant to § 227.11, The Code 1981.

Essentially, you raise a question of statutory construction, and familiar principles of construction apply. The goal in construing a statute is to ascertain the legislative intent and, if possible, give it effect. Iowa State Education Association v. Public Employees Relations Board, 269 N.W.2d 446 (Iowa 1978); City of Des Moines v. Elliott, 267 N.W.2d 44 (Iowa 1978). In doing so, one must look to what the legislature said, rather than what it might have or should have said. Interest of Clay, 246 N.W.2d 263 (Iowa 1976); Kelly v. Brewer, 239 N.W.2d 109 (Iowa 1976). In seeking the meaning of law, the entire act

should be considered and each section construed with the act as a whole and all parts thereof construed together; the subject matter, reason, consequence and spirit of the enactment must be considered, as well as the words used, and the statute should be accorded a sensible, practical, workable and logical construction. Matter of Estate of Bliven, 236 N.W.2d 366 (Iowa 1975). When statutes relate to the same subject matter or to clearly allied subjects they are said to be in pari materia and must be construed, considered and examined in the light of their common purpose and intent so as to produce a harmonious system or body of legislation. Iowa Department of Transportation v. Nebraska-Iowa Supply, 272 N.W.2d 6 (Iowa 1978); Matter of Estate of Bliven, 236 N.W.2d 366 (Iowa 1975).

Relying on the foregoing principles, we now examine applicable statutes. Under § 230.1, The Code 1981, the county of a person's legal settlement is initially liable for the costs of care and treatment of a patient at a state mental health institute. Ultimately, a mental health patient, family members, and insurance contractors or others may have liability for the costs of such care and treatment pursuant to § 230.15, The Code 1981. In addition to imposing liability upon a specified class of persons, § 230.15 places a limitation upon a county's liability for patients who receive care and treamtent at state facilities in excess of 120 days. Pertinent portions of § 230.15 read as follows:

> 230.15 Personal liability. Mentally ill persons and persons legally liable for their support shall remain liable for the support of such mentally ill. Persons legally liable for the support of a mentally ill person shall include the spouse of the mentally ill person, any person, firm, or corporation bound by contract for support of the mentally ill person, and, with respect to mentally ill persons under eighteen years of age only, the father and mother of the mentally ill person. The county auditor, subject to the direction of the board of supervisors, shall enforce the obligation herein created as to all sums advanced by the county. The liability to the county incurred under this section on account of any mentally ill person shall be limited to one hundred percent of the cost of

> care and treatment of the mentally ill person at a state mental health institute for one hundred twenty days of hospitalization, whether occurring subsequent to a single admission or accumulated as a consequence of two or more separate admissions, and thereafter to an amount not in excess of the average minimum cost of the maintenance of a physically and mentally healthy individual residing in his own home, which standard shall be established and may from time to time be revised by the department of social services. No lien imposed by section 230.25 shall exceed the amount of the liability which may be incurred under this section on account of any mentally ill person. (emphasis added.)

Under the above language, the county's liability for the costs of care and treatment of a mentally ill person at a state mental health institute is one hundred percent of the costs for the first 120 days of hospitalization. Thereafter, the county's liability is limited to the average minimum cost of the maintenance of a physically and mentally healthy individual residing in his/her own home, an amount which is less that the actual costs incurred at a mental health institute. It is this reduced rate of liability that you have inquired about.

The question, then, is whether the reduced liability, which is available to the county under § 230.15, would still be available for a person who is originally confined in a state mental health institute and who is subsequently transferred to a county care facility under § 227.11, The Code 1981?

Section 227.11 reads as follows:

> 227.11 Transfers from state hospitals. A county chargeable with the expense of a patient in a state hospital for the mentally ill shall remove such patient to a county or private institution for the mentally ill which has complied with the aforesaid rules when the state director or the director's designee so orders on a finding that said patient is

> suffering from chronic mental illness or from senility and will receive equal benefit by being so transferred. A county shall remove to its county care facility any patient in a state hospital for the mentally ill upon request of the superintendent of the state hospital in which the patient is confined pursuant to the superintendent's authority under section 229.15, subsection 4, and approval by the board of supervisors of the county of the patient's residence. In no case shall a patient be thus transferred except upon compliance with section 229.14, subsection 4, or without the written consent of a relative, friend, or guardian if such relative, friend or guardian pays the expense of the care of such patient in a state hospital. Patients transferred to a public or private facility under this section may subsequently be placed on convalescent or limited leave or transferred to a different facility for continued full-time custody, care and treatment when, in the opinion of the attending physician or the chief medical officer of the hospital from which the patient was so transferred, the best interest of the patient would be served by such leave or transfer. However, if the patient was originally hospitalized involuntarily, the leave or transfer shall be made in compliance with section 229.15, subsection 4.

While it is clear that § 227.11 authorizes the transfer of a patient from a state mental health facility to a county care facility, nothing in § 227.11 addresses the question of the availability of a reduced rate of liability for the costs of care and treatment of the patient at a county care facility. Instead, § 227.11 has as its purpose the inducement of counties to care for the mentally ill at the local level, thus preventing or alleviating overcrowding at state hospitals. 1963 Op. Att'y Gen. 229.

To resolve questions of financial liability, § 230.15 must again be reviewed. Upon analysis, it is clear that the reduced rate of liability available under § 230.15 is not available where a patient receives treatment at a county care facility. The clear language of the statute limits the reduced liability to "the costs of care and treatment of the mentally ill person at a state mental health institute". Nothing in the statutory language extends the reduced rate of liability to care and treatment received by a patient at a county care facility, irrespective of whether the patient was originally admitted to or transferred to the county care facility. Thus, in construing this statute, we are limited to what the legislature said, rather than what it might have or could have said. Accordingly, we must conclude that the reduced rate of liability for the care and treatment of mental health patients available under § 230.15 is limited to the care and treatment provided at a state mental health institute.

We do not mean to suggest, however, that there is no state aid available to the counties for the care and treatment of mental health patients at county care facilities. On the contrary, under § 227.16, The Code 1981, the county is entitled to "receive the amount of five dollars per week for each patient" transferred under the provisions of § 227.11. Op. Att'y Gen. 79-9-24; 1963 Op.Att'yGen. 229; 1955 Op.Att'yGen. 95.

In summary, under § 230.15 a county is liable for 100 percent of the costs of care and treatment of a patient at a state mental health institute for 120 days; thereafter, the county's liability is limtied to the average minimum cost of the maintenance of a physically and mentally healthy individual residing in his/her own home. The reduced rate of liability for the care and treatment of mental health patients available under § 230.15 is limited to the care and treatment provided at a state mental health institute. A county is entitled to receive five dollars per week in state aid for each patient transferred to a county care facility pursuant to § 227.11.

Sincerely,

Thomas Mann, Jr.

Thomas Mann, Jr.
Assistant Attorney General

TM/jam

COUNTIES: UNIFIED LAW ENFORCEMENT: 28E: §§ 28E.21-28, The Code 1981. A tax levy for purposes of a public safety fund is not authorized unless the proposition receives a majority vote in the respective subdivisions participating in a unified law enforcement district. (Fortney to Belson, Ida County Attorney, 8/11/81) #81-8-9 (L)

Robert Belson
Ida County Attorney
500 1/2 Second Street
Ida Grove, Iowa 51445

August 11, 1981

Dear Mr. Belson:

You have requested an opinion of the Attorney General regarding the election procedures to be utilized in establishing a public safety fund pursuant to § 28E.22, The Code 1981. According to the information you provide, Ida County has unitifed law enforcement as contemplated by §§ 28E.21-28, The Code 1981. The system was established via a 28E agreement between the county and five cities within the county. The governing boards of the respective subdivisions are interested in holding an election to seek approval of a tax levy, the proceeds of which would constitute a public safety fund. You inquire whether passage of the levy is premised on obtaining a majority vote in each of the five cities and in the unincorporated area of the county, or whether the proposition may be adopted by simple majority vote of the county as a whole. We are of the opinion that such a levy is not adopted unless it receives a majority vote in each of the respective cities, computed separately, as well as a majority vote in the unincorporated area of the county.

Resolution of your inquiry turns on an interpretation of §§ 28E.21 and 28E.22. These sections provide:

> For the purpose of this division, the term "district" means a unified law enforcement district established by an agreement under the provisions of this chapter by a county, or portions thereof, or cities to provide law enforcement within the boundaries of the member political subdivisions.

28E.21.

The board of supervisors, or the city councils of a district composed only of cities, may, and upon receipt of a petition signed by five percent of the qualified electors residing in the district shall, submit a proposition to the electorate residing in the district at any general election or at a special election held throughout the district. The proposition shall provide for the establishment of a public safety fund and the levy of a tax on taxable property located in the district at rates not exceeding the rates specified in this section for the purpose of providing additional moneys for the operation of the district.

The ballot for the election shall be prepared in substantially the form for submitting special questions at general elections and the form of the proposition shall be substantially as follows:

"Shall an annual levy, the amount of which will not exceed a rate of one dollar and fifty cents per thousand dollars of assessed value of the taxable property in the unified law enforcement district be authorized for providing additional moneys needed for unified law enforcement services in the district for a period of not exceeding five years?"

Yes __ No __

If a majority of the qualified electors in each city and the unincorporated area of the county voting on the proposition approve the proposition, the county board of supervisors for unincorporated areas and city councils for cities are authorized to levy the tax as provided in section 28E.23.

Such moneys collected pursuant to the tax levy shall be expended only for providing additional moneys needed for unified law enforcement services in the district and shall be in addition to the revenues raised in the county and cities in the district from their general funds which are based upon an average of revenues raised for law enforcement purposes by the county or city for the three previous years. The amount of revenues raised for law enforcement purposes by the county for the three previous years

> shall be computed separately for the unincorporated portion of the district and for each city in the district. [Emphasis supplied.]

§ 28E.22.

We are compelled to reach our conclusion because of two separate rationales. First, the explicit language selected by the General Assembly indicates a separate tally of the vote in each participating subdivision. The Legislature has defined the term "district" for purposes of §§ 28E.21-28. Legislative definitions in statutes are binding on a court interpreting the statute. Cedar Memorial Park Cemetery Ass'n. v. Personnel Associates, Inc., 178 N.W.2d 343 (Iowa 1976). If, as you suggest, the relevant paragraph of § 28E.22 was intended to mean a majority vote in the county as a whole, the Legislature would have drafted the section as follows:

> If a majority of the qualified electors in the district voting on the proposition approve the proposition . . .

The failure to use the word "district" at this point is particularly striking when one considers the number of times the word is employed throughout the sub-chapter and particularly in § 28E.22. The use of the words "in each city and the unincorporated area of the county" appears to be a conscious decision on the part of the Legislature. To interpret this language as meaning the county as a whole, or the district as a whole, would defeat legislative intent.

Our second reason for our conclusion is that taxes are levied by the respective cities and the county. See § 28E.24. If we were to interpret the section in question as meaning the district as a whole, it would be possible that a particular city may be forced to levy a tax for the public safety fund despite the fact that a majority of said city's voters disapprove the tax. Such a situation runs afoul of the traditional taxing procedures, as well as the scheme of § 28E.24.

In conclusion, a tax levy for purposes of a public safety fund is not authorized unless the proposition receives a majority vote in each of the respective subdivisions participating in a unified law enforcement district.

Yours truly,

David Fortney

DAVID M. FORTNEY
Assistant Attorney General

DMF:sh

CITIES AND TOWNS: Appointment and Hiring of Officers - §§ 372.4, 372.13(4), and 384.6(2), The Code 1981. A city is generally not bound by contracts made by its officers or agents who lack the requisite authority to so obligate the city. But a city may nevertheless ratify such contracts and bind itself thereto provided the contracts were within the city's general corporate powers and are not otherwise ultra vires. Richards to Tullar, Sac County Attorney, 8/7/81) #81-8-8 (L)

Mr. Lon R. Tullar
Sac County Attorney
110 East State
Sac City, Iowa 50583

August 7, 1981

Dear Mr. Tullar:

You have requested an opinion of the attorney general regarding the liability of a city for persons employed by the mayor without approval of the city council. According to the situation described in your request letter, the mayor on behalf of the city of Sac City, Iowa, hired a Mr. Stanley and Mr. O'Leary as "undercover investigators" without approval of the Sac City City Council. The mayor undertook personal loans for the payment of these persons' salaries. The rental fee for a vehicle used by these "investigators" remains unpaid. You have raised the following specific questions for our consideration:

1. Were Stanley and O'Leary legally employed Sac City Police Officers?

2. If not, has Section 721.2(1), The Code, been violated?

3. If the answer to Question 1 is no, can the unauthorized employment be approved or ratified by the Sac City Council?

4. If the answer to Question 3 is yes, can the Sac City Council pay the bank note and/or rental vehicle fee?

5. Can citizens and Sac County (by the Board of Supervisors) make donations to Sac City to help defray the expenditures referred to in Question 4 above?

A mayor's powers of appointment are prescribed in section 372.4, The Code 1981. That section provides in pertinent part that "(t)he mayor . . . shall appoint the marshal or chief of police . . . . Other officers must be selected as directed by the council." A city council's powers of appointment are prescribed in section 372.13(4), The Code 1981. That section states in relevant part that "(e)xcept as otherwise provided by state or city law, the council may appoint city officers and employees, and prescribe their powers, duties, compensation, and terms." An examination of the pertinent city ordinances of Sac City reveals that the police department is composed of the chief who is appointed by and serves at the pleasure of the mayor and "such other law enforcement officers and personnel, whether full time or part-time, as may be authorized by the council." These other members are appointed by the mayor "subject to the approval of the council." Their compensation is to be determined "by resolution of the council."

Upon review, it is our opinion that Mr. Stanley and Mr. O'Leary were not legally Sac City police officers. Although the mayor could appoint them as officers, their appointment was subject to the city council's approval. In the absence of such approval, their employment was not created by law and they were, thus, not peace officers de jure. We do not reach the question of their status as peace officers de facto. See 1976 Op.Att'yGen. 426.

Upon review of your second question, we have determined that we must decline to answer same. It is the policy of this office not to render opinions on questions of whether or not particular statutes have been violated. An answer to your second question on whether or not section 721.2(1) was violated under these circumstances would certainly contravene that policy.

Your third and fourth questions deal with the municipality's power to ratify the contract made by the mayor and thereby bind the city to its terms of payment. A municipal corporation is not bound by the unauthorized acts of its officers. Dively v. City of Cedar Falls, 21 Iowa 565 (Iowa 1866). However, "(t)he general rule is that municipal corporations may ratify contracts made on their behalf which they have authority to make. Thus, it is competent for a municipal corporation to ratify a contract and thereby to make it a binding obligation . . . if the contract was within its general corporate powers but was invalid . . . because the officer or agent who purported to execute it on behalf of the municipality had not the requisite authority." 56 Am.Jur.2d Municipal Corporations, Counties, and Other Political Subdivisions § 508 at 559 (1971). See Everts v. District Township of Rose Grove, 77 Iowa 37, 41 N.W. 478 (1889). The employment contract here was not ultra vires such as to frustrate its ratification. See

Horrabin Paving Co. v. City of Creston, 221 Iowa 1237, 262 N.W. 480 (1935); Cedar Rapids Water Co. v. City of Cedar Rapids, 118 Iowa 234, 91 N.W. 1081 (1902). It is clear that the city of Sac City has the authority to make such employment contracts and, hence, the city council could ratify this contract made by the mayor and thereby bind the city to its obligations. It follows that if the city becomes bound by the council's ratification it can retire the notes and assume payment of the vehicle rental fee.

Your fifth question has two parts. The first is whether private citizens can donate money to the city to defray these expenses; the second is whether the Sac County Board of Supervisors may donate county funds to the city for said purpose. The Code does make provision for a city's receipt of gifts. According to section 384.6(2), The Code 1981, "(a) city may establish a trust and agency fund for . . . (a)ccounting for gifts received by the city for a particular purpose." If the city of Sac City establishes such a fund, it may unquestionably receive gifts or donations from private citizens for the particular purpose of defraying these expenses. The second part of the question poses some difficulties. Our review of the Code, particularly chapter 332, discloses no authority that would permit a county board of supervisors to make a "gift" or "donation" to anyone. Upon consideration, it is our view that although the Sac County Board of Supervisors cannot make an outright gift to the city, it may wish to consider a more formal arrangement with the city akin to an agreement under chapter 28E, The Code 1981. For example, the board by resolution could determine that this employment resulted in a "county benefit," that the county could have entered the same kind of employment contract with these "investigators," and that the county could, therefore, pay the city for part of these services.

Sincerely,

Richard L. Richards

RICHARD L. RICHARDS
Assistant Attorney General

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STATE OFFICERS AND DEPARTMENTS: Hearing Aid Dealers. Authority to test for hearing loss. §§ 147.151(5), 154A.1(4), 154A.1(5), 154A.20, The Code 1981. The authority of a hearing aid dealer to measure human hearing by any means is limited by the statutory phrase "for the purposes of selections, adaptations, and sales of hearing aids." Chapter 154A does not grant hearing aid dealers the authority to administer tests and interpret the results of said tests for the purpose of determining a hearing loss. (Freeman to Hawes, Chairperson, Board of Speech Pathology and Audiology Examiners, 8/6/81 #81-8-5 (L)

Mr. Kenneth C. Hawes
Chairperson
Iowa State Board of Speech Pathology
and Audiology Examiners
State Department of Health
Lucas State Office Building
L O C A L

August 6, 1981

Dear Mr. Hawes:

You have requested an opinion from our office concerning the scope of a hearing aid dealer's authority to administer and interpret tests performed for the purpose of determining a hearing loss. Specifically, you have asked the following:

> Do the licensure laws pertaining to Audiologists and Hearing Aid Dealers prohibit a hearing aid dealer from administering tests, and interpreting the results of such tests, to determine the presence of a hearing loss?

To answer your question, an examination of Chapter 154A, The Code 1981, governing hearing aid dealers, in relation to certain principles of statutory construction is necessary.

The scope of authority of a hearing aid dealer is defined by statute. Section 154A.1(4), The Code, defines a "hearing aid dealer" as "any person engaged in the fitting, dispensing and the sale of hearing aids and providing hearing aid services or maintenance, by means of procedures stipulated by this chapter or board." [Emphasis added.] Of special importance to this opinion is the authority of a hearing aid

dealer to fit a hearing aid. Section 154A.1(5), The Code, defines "hearing aid fitting" as follows:

> "Hearing aid fitting" means the measurement of human hearing by any means for the purpose of selections, adaptations, and sales of hearing aids, and the instruction and counseling pertaining thereto, and demonstration of techniques in the use of hearing aids, and the making of earmold impressions as part of the fitting of hearing aids.

[Emphasis added.] The emphasized portions of the two sections noted above show two important elements associated with the practice of hearing aid fitting. To begin, hearing aid dealers are not specifically limited in the methods they use to measure human hearing; hearing aid fitting is the measurement of human hearing by any means.[1] While any means may be employed, though, section 154A.1(5) clearly provides that such measurement of human hearing may be done by a hearing aid dealer only for the purpose of selecting, adapting and selling of hearing aids. Section 154A.1(5), on its face, indicates that hearing aid dealers may not use methods to measure human hearing for the purpose of diagnosing a hearing loss.

This conclusion is borne out by a reading of the remainder of chapter 154A. A statute must be construed in its entirety. State v. Broten, 295 N.W.2d 453, 454 (Iowa 1980). Section 154A.1(4) details four primary functions of a hearing aid dealer: 1) to fit hearing aids, 2) to dispense hearing aids, 3) to sell hearing aids and 4) to provide hearing aid services or maintenance. Other sections of chapter 154 reiterate these functions, especially the functions of fitting, dispensing and selling hearing aids. Section 154A.8(2) states that it shall be the duty of the state department of health to register and issue licenses to persons whom the board of examiners deems qualified to engage in the fitting or selection and sale of hearing aids. Section 154A.9 allows the board of hearing aid dealer examiners to consider the past felony record of an applicant for licensure but only if the felony conviction relates directly

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[1] It should be noted, however, that while section 154A.1(5) does not limit the means used by a hearing aid dealer in measuring human hearing, section 154A.1(4) does limit the means used to fit a hearing aid to procedures stipulated by chapter 154A or by the board of hearing aid dealer examiners.

to the practice of fitting or selection or sale of hearing aids. Section 154A.13 allows the issuance of a temporary permit, which permit entitles an applicant for such permit to engage in the fitting or selection and sale of hearing aids. Section 154A.20 requires a hearing aid dealer to maintain as part of his or her records the results of test techniques as they pertain to the fitting of hearing aids.

Section 154A.12 is particularly instructional. That section addresses the scope of examination to be taken by applicants for a hearing aid dealer's license.

> The examination required by this chapter shall be designed to demonstrate the applicant's adequate technical qualifications including, but not limited to, the following:
>
> 1. Written tests of knowledge in areas such as physics of sound, anatomy and physiology of hearing, and the function of hearing aids, as these areas pertain to the fitting or selection and sale of hearing aids.
>
> 2. Practical tests of proficiency in hearing testing techniques as these techniques pertain to the fitting or selection and sale of hearing aids.
>
> 3. Evidence of knowledge of the medical and rehabilitation facilities that are available in the area served, for children and adults who have hearing problems.
>
> 4. Evidence of knowledge of situations in which it is commonly believed that a hearing aid is inappropriate.
>
> 5. The procedures and use of equipment established by the board for the fitting or selection and sale of hearing aids.
>
> 6. Practical tests of proficiency in the taking of earmold impressions.

> The board shall not require the applicant to possess the degree of professional competence normally expected of physicians.

Section 154A.12 [Emphasis added]. This section especially highlights the legislative intent that hearing aid dealers be specifically limited to those acts associated with the fitting or selection and sale of hearing aids. Nothing in sections 154A.1(4) or 154A.1(5) or in chapter 154 when read as a whole indicates that hearing aid dealers are authorized to measure the loss of human hearing per se.

A portion of § 154A.20 might seem, at first glance, to be inconsistent with the above conclusion that hearing aid dealers are limited to the use of measurement techniques for the purpose of fitting a hearing aid only. That section provides in part as follows:

> Whenever any of the following conditions are found to exist either from observations by the licensed hearing aid dealer or person holding a temporary permit or on the basis of information furnished by a prospective hearing aid user, the hearing aid dealer or person holding a temporary permit shall, prior to fitting and selling a hearing aid to any individual, suggest to that individual in writing that his best interests would be served if he would consult a licensed physician specializing in diseases of the ear, or if no such licensed physician is available in the community, then to a duly licensed physician:
>
> 1. Visible congenital or traumatic deformity of the ear.
>
> 2. History of, or active drainage from the ear within the previous ninety days.
>
> 3. History of sudden or rapidly progressive hearing loss within the previous ninety days.
>
> 4. Acute or chronic dizziness.
>
> 5. Unilateral hearing loss of sudden or recent onset within the previous ninety days.

> 6. Significant air-bone gap (greater than or equal to 15dB ANSI 500, 1000 and 2000 Hz. average).
>
> 7. Obstruction of the ear canal, either by structures of undetermined origin, such as foreign bodies, impacted cerumen, redness, swelling or tenderness from localized infections of the otherwise normal ear canal.

[Emphasis added]. The legislature, in this section, has been careful to say that a hearing aid dealer must suggest consultation with a physician whenever one of the detailed conditions is found by the hearing aid dealer to exist either 1) as a result of observation by the hearing aid dealer or 2) on the basis of information provided by the prospective user. This provision does not authorize, either expressly or impliedly, the examination of the ear by a hearing aid dealer for the actual purpose of determining the presence of one of the above conditions. If the hearing aid dealer, however, observes the presence of any said conditions in measuring for a hearing aid, he or she must suggest further medical consultation before actually fitting or selling a hearing aid.

Chapter 154A is clearly concerned with the technical practice of actually fitting a hearing aid, as well as the dispensing and selling of hearing aids. Section 147.151(5), however, is concerned with the nonmedical evaluation, identification, prevention and remediation of hearing disorders and associated communication disorders. That section provides as follows:

> The "practice of audiology" means the application of principles, methods, and procedures for measurement, testing, evaluation, prediction, consultation, counseling, instruction, habilitation, rehabilitation, or remediation related to hearing and disorders of hearing and associated communication disorders for the purpose of nonmedically evaluating, identifying, preventing, ameliorating, modifying, or remediating such disorders and conditions in individuals or groups of individuals, including the determination and use of appropriate amplification.

Pursuant to this section, a person properly trained and licensed to practice audiology has the authority to non-medically evaluate, identify and prevent disorders of hearing. In evaluating and identifying hearing disorders, a licensed audiologist certainly may test for a hearing loss. While the particular question of this opinion is not concerned with the scope of an audiologist's authority with respect to disorders of the ear, the above section is further indication that if the legislature had meant to grant hearing aid dealers the authority to measure human hearing for the purpose of determining a hearing loss, the legislature would have employed broader language rather than the limiting language of "for the purpose of selections, adaptations and sales of hearing aids" found in § 154A.1(5).

In construing statutes, courts are required to examine statutes relating to the same subject matter or closely-allied subjects together in light of their common purposes and intent. State v. Schmitt, 290 N.W.2d 24, 26 (Iowa 1980); Wonder Life Co. v. Liddy, 207 N.W.2d 27, 32 (Iowa 1973). "The court must harmonize statutes relating to the same subject . . . so as to produce a harmonious system or body of legislation if possible. The statutes should be so construed as to give meaning to all of them, if this can be done, and each statute should be afforded a field of operation." Wonder Life, 207 N.W.2d at 32.

Both section 147.151(5) and chapter 154A are concerned with the licensing of persons who are trained in some fashion to work with the human ear. The legislature apparently has established a three-tiered approach to protecting the public with respect to the diagnosis and treatment of hearing disorders. Licensed physicians represent the first tier. Pursuant to section 147.141(5), licensed audiologists may not medically diagnose or treat diseases of the ear; medical diagnosis and treatment, such as an ear infection or blockage requiring surgical attention, must be attended to by a physician. Licensed audiologists represent the second tier. Section 147.151(5) grants extensive, nonmedical authority to audiologists with respect to the identification, prevention and remediation of hearing and communication-associated disorders and conditions. In conjunction with this authority, an audiologist must possess a masters degree or its equivalent, show evidence of the receipt of 275 hours of supervised clinical training as an audiology student, and show evidence of the completion of not less than nine months of clinical experience under the supervision of a licensed audiologist

following the receipt of a masters degree. § 147.153(2), The Code. Hearing aid dealers represent the third tier. A hearing aid dealer is concerned with the technical act of properly fitting a hearing aid as well as selling and dispensing hearing aids and providing hearing aid services or maintenance. A hearing aid dealer need not obtain a specific higher education degree but he or she must pass the qualifying examination required by § 154A.12. Section 154A.9, The Code. That examination requires proficiency in certain subjects, but only insofar as those subjects relate to the fitting or selection or sale of hearing aids.

Clearly all three professional groups--physicians, audiologists, and hearing aid dealers--have important functions under Iowa's statutory scheme. It is, likewise, clear that each group is, in some fashion, limited in its authority with respect to persons with hearing disorders.

In a sense, the legislature has engaged in a certain amount of line-drawing. Thus, it may happen that a hearing aid dealer, in conducting a test for the purpose of fitting a hearing aid, will conclude in his or her own mind that the person being tested has, indeed, suffered a loss of hearing. A hearing aid dealer, nonetheless, is not authorized to diagnose such loss of hearing or to represent to the public an ability to conduct tests for the purposes of determining a hearing loss.

In conclusion, the authority of a hearing aid dealer is limited to the measurement of human hearing by any means for the purpose of selecting, adapting and selling hearing aids. Chapter 154A does not grant hearing aid dealers the authority to administer tests and interpret the results of said tests for the purpose of determining a hearing loss.

Sincerely yours,

Jeanine Freeman

JEANINE FREEMAN
Assistant Attorney General

JF:rcp

Department of Justice

THOMAS J. MILLER
ATTORNEY GENERAL

ADDRESS REPLY TO:
HOOVER BUILDING
DES MOINES, IOWA 50319

Mr. Richard A. Kitch
Attorney at Law
KITCH, SUHRHEINRICH, SMITH, SAUBIER,
& DRUTCHAS, P.C.
2000 Buhl Building
Detroit, Michigan 48226

Dear Mr. Kitch:

This letter is in response to the concerns that have been raised by you and several others with respect to Op.Att'yGen. #81-8-5(L) (Freeman to Hawes), which opinion was issued by the Office of the Attorney General in August of 1981. That opinion concluded that Iowa Code chapter 154A (1981) authorized licensed hearing aid dealers in Iowa to measure human hearing by any means for purposes of selecting, adapting and selling hearing aids but that the provisions of that chapter did not authorize hearing aid dealers to administer tests and interpret the results of said tests for the purpose of determining a hearing loss. You, along with others, including Dr. Lindsay L. Pratt, Chief of the Department of Otolaryngology, Cooper Medical Center, Camden, New Jersey, and Robert S. Klopp, president of the Iowa Hearing Aid Society, expressed your belief that the opinion was given without the benefit of certain material information and that, therefore, the opinion should be reconsidered.

We have reviewed the information provided to us by you, Dr. Cooper, and the Iowa Hearing Aid Society, as well as information presented in response by certain audiologists, including Steven C. White of the American Speech-Language-Hearing Association, Niel Ver Hoef of the Iowa Speech and Hearing Association, and Elaine Szymoniak of the Rehabilitation Education and Services Branch of the Iowa Department of Public Instruction. Pursuant to this review, we have

determined that the basic conclusion of Op.Att'yGen. #81-8-5(L) is correct and should stand. In upholding the conclusion of that opinion and its supporting rationale, however, we hope to clarify certain points so that the full repercussions of the opinion can be better understood.

The original opinion's conclusion derives from a reading and interpretation of the language of Iowa law. The starting point in determining the legal scope of a licensed health care professional's authority to practice his or her profession is the law governing that particular profession. In analyzing that law for purposes of ascertaining its meaning, legislative intent controls and must be given effect. Doe v. Ray, 251 N.W.2d 496, 501 (Iowa 1977). In seeking legislative intent, one must look at what the legislature has said rather than at what it should or might have said. Kelly v. Brewer, 239 N.W.2d 109, 113-114 (Iowa 1976).

In examining Iowa Code Chapter 154A (1981) on its own as well as in relationship to the practice of other health care professions, especially Iowa Code §§ 147.151 to 147.156, we originally concluded that hearing aid dealers do enjoy the statutory authority to measure human hearing by any means but only for the purposes of selecting, adapting and selling of hearing aids. We believe our initial analysis on that point is correct and, thus, that analysis will not be repeated in full here. Following from the conclusion that hearing aid dealers could measure human hearing only for the limited purpose of fitting a hearing aid, we determined that hearing aid dealers could not measure human hearing for the sole purpose of determining or diagnosing a loss of hearing.

This latter conclusion has caused considerable concern for many hearing aid dealers. Hearing aid dealers argue that the inability to test for a hearing loss significantly hampers their efforts to properly fit a hearing aid. Furthermore, hearing aid dealers maintain that in testing for purposes of fitting a hearing aid, they must be able to inform their clients of the results of those tests. They fear, however, that a sharing of those test results would be deemed a diagnosis of a loss of hearing, an action which Op.Att'yGen. #81-8-5(L) states is beyond a hearing aid dealer's scope of practice. The question of advertising by hearing aid dealers has also arisen insofar as the restraints that Op.Att'yGen. #81-8-5(L) may place upon hearing aid dealers who have often publicized the offering of free hearing tests by them. A certain amount of clarification appears to be in order.

While a hearing aid dealer may not test for the sole purpose of determining or diagnosing a loss of hearing, a hearing aid dealer may, however, use any means necessary to fit a hearing aid. "Fitting a hearing aid" includes the "selections, adaptions, and sales" of hearing aids. Iowa Code §§ 154A.1(4) and (5). Any test that is relevant to the selection, adaption and sale of a hearing aid may be performed by a hearing aid dealer. In performing such tests, a hearing aid dealer may also be allowed to inform his or her client of the results of those tests insofar as said tests and results therefrom relate to the proper fitting or selection, adaption and sale of a hearing aid.

In other words, hearing aid dealers are expressly limited in their practice by the language of the Code referring to "the fitting of hearing aids" or "the selection, adaption, and sale of hearing aids." E.g., Iowa Code §§ 154A.1(5), 154A.12(1), 154A.12(2), 154A.12(5), 154A.20 (1981). While hearing aid dealers must be able to provide their clients with certain information learned by them through the course of fitting an aid, that information cannot go beyond the scope of the authorized practice of hearing aid dealers. The greatest difficulty, though, comes in determining the exact parameters of information that may be shared by hearing aid dealers in the course of assisting clients in the selection, adaption and sale of a hearing aid.

Audiologists apparently believe that hearing aid dealers are not authorized to inform clients that tests conducted in the course of fitting an aid reveal that the client has suffered a loss of hearing and that the client needs or would benefit from a hearing aid. Audiologists seem to also believe that statements made by hearing aid dealers in the course of fitting an aid to the effect that a client has a loss of hearing in one or both ears constitutes a diagnosis of a loss of hearing. Hearing aid dealers, on the other hand, believe that they must be allowed to explain to clients that they have suffered a loss of hearing and are in need of an aid. If not, hearing aid dealers feel that they would be placed in the awkward position of responding to clients' questions concerning the results of certain tests with the answer, "I cannot tell you." Dr. Pratt further maintains that informing a client that he or she has suffered a loss of hearing does not, in and of itself, constitute a diagnosis. He states in his October 12, 1981, letter to Mark Schantz, Solicitor General: "Hearing tests do not provide a diagnosis. They only describe the type of hearing loss possessed by the listener being tested."

In some respects, a problem appears to exist with respect to terminology. Information submitted by persons on both sides of this controversy, a reading of regulations issued by the federal Food and Drug Administration, 21 C.F.R. Part 801, and a reading of the district court record and transcript in the case of Iowa Speech and Hearing Association and Academy of Otolaryngology v. Iowa Department of Social Services (Iowa Ct. App. No. 2-63960, filed August 26, 1980), indicate three levels of evaluation that could be performed upon a person experiencing hearing difficulties: 1) a medical evaluation, which can legally be performed by a licensed physician; 2) a hearing evaluation, which can legally be performed by a licensed physician or a licensed audiologist, although audiologists believe that most physicians have not received sufficient training to properly perform a hearing evaluation; and 3) a technical evaluation done solely for the purpose of fitting a hearing aid, an act which can be performed only by a licensed hearing aid dealer. Line-drawing between these three evaluation activities is difficult, to say the least.

Clearly, though, neither audiologists nor hearing aid dealers can render a medical diagnosis with respect to hearing difficulties experienced by a particular person. The definition of audiology, Iowa Code § 147.151(5), supports this conclusion with respect to audiologists and Iowa Code § 154A.20 supports it with respect to hearing aid dealers. Neither audiologists nor hearing aid dealers claim any ability to engage in medical diagnosis.

A dispute between audiologists and hearing aid dealers seemingly exists, however, with respect to hearing evaluations. Audiologists evidently maintain that a hearing test which shows that a person's hearing ability is below the normal range of human hearing constitutes a hearing evaluation and that a statement to a person following such a test to the effect that according to the test, the person has suffered a loss of hearing, constitutes a diagnosis of a loss of hearing. Hearing aid dealers apparently believe, though, that a hearing test, alone, does not constitute a hearing evaluation, and that a statement to a client that the hearing test shows a loss of hearing, without anything more, does not constitute the diagnosis of a hearing loss. Furthermore, audiologists seem to believe that the hearing evaluation is done, in part, to determine a person's need, if any, for a hearing aid, and that a statement as to the need for a hearing aid also constitutes a diagnosis which falls beyond the scope of the practice of a hearing aid dealer; hearing aid dealers believe otherwise.

Recognizing the above arguments, we are of the opinion that in testing for purposes of fitting for hearing aids, hearing aid dealers can state to their clients that the tests done by them show a hearing loss and that such a statement, standing alone, does not constitute a diagnosis of a loss of hearing. However, such a statement can legitimately be made only pursuant to testing done in the course of fitting a hearing aid. Thus, where a person is being fitted for a hearing aid but wonders whether the tests legitimately conducted by the hearing aid dealer indicate a loss of hearing, the hearing aid dealer is authorized to give said test results to his or her client; the hearing aid dealer, though, is not authorized to go beyond a statement of results and to attempt to explain reasons for the loss or to suggest treatment to alleviate the problem of a hearing loss. Such matters, we believe, do fall within the realm of diagnosis and beyond the hearing aid dealer's scope of authority.

To further explain, we view the technical act of measuring human hearing for purposes of fitting a hearing aid, wherein it is discovered that a person's hearing level is below the range of normal hearing, akin to measuring human blood pressure. A trained technician or aide who measures a person's blood pressure and, in reading the results, discovers the person's blood pressure levels exceed the normal range, is not engaged in diagnosis when the technician informs the person of his or her pressure range and notes that such a range is higher than normal. However, if the aide or technician attempts to explain the cause for the high blood pressure or to treat the same, that person may then be engaging in diagnosis.

This conclusion is consistent with the dictionary definition of "diagnosis." That word is variously defined as "the art or act of identifying a disease from its signs and symptoms," or "investigation or analysis of the cause or nature of a condition, situation, or problem," or "a statement or conclusion about the nature or cause of a phenomenon." Webster's Third New International Dictionary Unabridged 622 (1967). When a hearing aid dealer performs tests in the course of fitting an aid and subsequently informs the person being fitted that the tests show that the person's hearing range falls below the normal range of human hearing, the hearing aid dealer is not identifying a disease, or investigating or analyzing the cause or nature of a condition, or arriving at a conclusion about the nature or cause of the hearing loss.

Recognition that hearing aid dealers can lawfully inform clients that tests performed in the course of fitting an aid show a below-normal hearing range is not inconsistent with the legislative intent of chapter 154A. That chapter authorizes hearing aid dealers to conduct any tests for purposes of fitting a hearing aid. In allowing the performance of these tests, it is only reasonable to conclude that hearing aid dealers could inform clients of the results of those tests insofar as those results relate to the fitting of the aid. In analyzing a statute, absurd or impractical results are to be avoided. Telegraph Herald, Inc. v. City of Dubuque, 297 N.W.2d 529, 532 (Iowa 1980). Iowa law allows persons over the age of twelve, see Iowa Code § 154A.20 (1981), to be fitted for a hearing aid by a hearing aid dealer before or without benefit of examination by and consultation with an audiologist or a physician. In legitimately examining for purposes of fitting an aid, it would be impractical to prohibit a hearing aid dealer from informing his or her client that tests performed showed a hearing capacity below the normal range of hearing. Such a communication, we believe, is relevant to the fitting of an aid and does not, in and of itself, constitute a diagnosis.

Section 154A.20, paragraphs one and two, impliedly recognize that certain communications will occur between hearing aid dealers and their clients. Those sections provide that hearing aid dealers shall deliver receipts to persons supplied with hearing aids, which receipts shall include, among other things, the following statement:

> The purchaser has been advised that any examination or representation made by a licensed hearing aid dealer in connection with the fitting or selection or selling of this hearing aid is not an examination, diagnosis, or prescription by a person licensed to practice medicine in this state and therefore, must not be regarded as medical opinion or advice.

In other words, hearing aid dealers will examine clients and provide certain information relevant to the fitting of an aid to those clients but, in doing so, hearing aid dealers must advise their clients that said examinations and representations do not constitute medical opinion or advice. In this respect, the client is made aware of the fact that a medical examination has not taken place. The client then, at his or her option, may seek further advice with respect to his or her hearing problem. Section 154A.20 provides

further protection to clients by requiring hearing aid dealers who recognize or observe certain conditions to inform their clients in writing that their best interests would be served by consulting a licensed physician. Finally, the interests of persons under the age of twelve are protected by § 154.20's requirement that no hearing aid be sold to those persons unless an otolaryngologist or licensed physician has within the preceding six months recommended a hearing aid.

We further note, as we did in the earlier opinion, that in our view that portion of § 154A.20 providing for the discovery of certain conditions by a hearing aid dealer does not authorize the hearing aid dealer to diagnose those conditions or to in any way treat them. The language of that section has been carefully selected to say whenever one of the seven listed conditions is found to exist either from observation or from information received from the prospective user, the hearing aid dealer must suggest in writing that the user's best interests would be served by an examination by a licensed physician. All of the conditions listed appear to be of a nature that could be observed through testing performed by a hearing aid dealer to fit an aid or through information gathered by a hearing aid dealer from a prospective user. A hearing aid dealer is not prohibited from informing a client that he or she has observed one or more of the statutorily listed conditions, but in observing the conditions, the hearing aid dealer is not in a position to explain the causes for the conditions or to suggest treatment thereof.

Thus, it is our opinion that hearing aid dealers may, in the course of fitting or selecting, adapting, or selling of a hearing aid, test or measure human hearing by any means and may inform their clients of the results of said tests insofar as the results are relevant to the fitting of the aid. A hearing aid dealer may not, in the course of testing to fit an aid, diagnose a client's hearing condition. A statement to the client that the tests performed show a hearing range below the normal and, thus, a hearing loss, does not, standing alone, constitute a diagnosis. Nonetheless, the performance of hearing tests and statements that tests show a below-normal hearing range are not proper and are beyond the scope of a hearing aid dealer's license when performed independently and not for the purpose of fitting an aid.

If a hearing aid dealer may not independently test for the sole purpose of diagnosing a hearing loss, the question then arises as to whether hearing aid dealers may offer free

hearing test services by which persons are examined by a hearing aid dealer to determine a loss of hearing, after which persons may be encouraged by hearing aid dealers to purchase a hearing aid to alleviate any loss of hearing which is discovered in the course of the testing. Also the question exists as to whether hearing aid dealers can advertise the giving of free hearing tests by them without stating in the advertisement that such tests are for the purpose of fitting or selection, adaption and sale of a hearing aid.

It is our understanding that hearing tests conducted by hearing aid dealers in their offices, or in hearing test booths at state or county fairs, or in mobile units, or other such sites, are done so for the purpose of eventually selling hearing aids to persons who may have a loss of hearing. In this respect, such hearing tests are done in concert with the intent of § 154A.1(5), stating that a hearing aid dealer may perform any test for the purpose of selection, adaption and sale of a hearing aid. Thus, if a person comes on his or her own initiative to the office of a hearing aid dealer and states that he or she is having trouble hearing and wonders if a hearing aid might help, the hearing aid dealer may test to determine if an aid would be beneficial. In much the same way, hearing aid dealers should be able to advertise the giving of hearing tests, free of charge or for a cost, to encourage people to discover whether their hearing could be improved by the receipt of a hearing aid. An artificial distinction would be created if we were to conclude that a hearing aid dealer can give a hearing test to a person who comes to the hearing aid dealer independently but that a hearing aid dealer cannot advertise an ability to give the very same test to persons who might come to the hearing aid dealer as a result of the advertisement.

Audiologists have expressed sincere concern over potential harm to the public caused by such advertisement by hearing aid dealers. They fear that advertisement of a free hearing test may lead persons to believe that they would be receiving something more than just a reading of their hearing levels and, thus, those persons will not seek further medical or audiological advice with respect to hearing problems they may be experiencing. Furthermore, audiologists fear that persons who come for a free hearing test may then be at an unfair advantage if the hearing aid dealer seeks to sell them a hearing aid.

Advertisement of the ability to perform an activity which falls within the scope of the practice of a limited

health care professional is not, in and of itself, illegal. False or misleading advertisement, or advertising an ability to perform an activity falling outside the scope of one's practice, is illegal. A person engaging in false or misleading advertising is subject to licensee disciplinary action, Iowa Code § 147.55(3), and may be subject to action under Iowa's consumer fraud statute, Iowa Code § 714.16(2)(a), depending on the circumstances surrounding the alleged deception. Furthermore, a person advertising an ability to perform acts falling outside his or her scope of practice is subject to potential injunctive action and/or criminal action for such advertisement. Iowa Code §§ 147.72, 147.83, 147.86, 147.87, 147.92.

Consequently, advertising by a hearing aid dealer, or any other health care professional, is subject to legal strictures. Also, § 154A.20, noted above, provides protection to persons who decide to purchase a hearing aid following a hearing test offered by a hearing aid dealer. In addition, § 154A.24 directly provides for various situations in the course of advertising or selling a hearing aid which could, if engaged in, result in the suspension or revocation of a hearing aid dealer's license to practice. Iowa Code § 154A.24(3)(a), (c), (d), (e), (h), (k), (l), (m), (n), (o), (p), (q), (r). A hearing aid dealer is also subject to criminal action for a violation of any provision of chapter 154A. Iowa Code § 154A.27.

We are unable to conclude that advertising by hearing aid dealers of the offering of free hearing tests in and of itself constitutes an illegal activity. In addition, we feel the public is well-protected from abuse by the various provisions of chapter 154A, chapter 147, and the Consumer Fraud Act. However, we do believe that since the hearing tests advertised by hearing aid dealers must be given for purposes of fitting or selecting, adapting or selling of a hearing aid, the Board of Examiners for Hearing Aid Dealers might be encouraged to adopt a rule requiring licensees who advertise hearing tests to state in the advertisement that such testing is done in connection with the possible fitting or selection, adaption or sale of a hearing aid. In this respect, the public would not be innocently misled to believe that the hearing test offered is for a purpose other than the fitting or sale of a hearing aid.

Before closing, some discussion is necessary with respect to federal Food and Drug Administration law and rules and regulations governing the sale of certain medical devices, including hearing aids. 21 U.S.C. §§ 360c-360k; 21 C.F.R § 801.421(a); 21 C.F.R. Part 808. Concern has been

raised as to whether federal law and regulations preempt Iowa law as that law is interpreted by the Office of the Attorney General. For reasons noted below, we believe that these provisions of the Iowa law which are pertinent to this opinion are not preempted by federal law and regulations.

Chapter 9 of 21 U.S.C. constitutes the Federal Food, Drug and Cosmetic Act. Sections 360c-360k govern the sale of medical devices intended for human use. With respect to federal preemption, section 360k(a) provides:

> Except as provided in subsection (b) of this section, no State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement --
>
> (1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and
>
> (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.

Regulations found at 21 C.F.R. Part 808 address preemption and procedures for receiving exemptions from preemption as authorized by 21 U.S.C. § 360(k)(b). Section 808.1(d) specifically emphasizes the criteria necessary for a finding of preemption while also listing those common situations in which preemption will not be found.

Basically federal law and its supporting regulations establish a two-pronged test for determining preemption, asking 1) whether state or local requirements relate to a matter included in the federal regulations and, if so, 2) whether those requirements are different from or in addition to any requirement found in the federal law or regulations. 21 U.S.C. § 360k(a); 21 C.F.R. § 808.1(d). See also, Smith v. Pingree, 651 F.2d 1021, 1022-1023 (5th Cir. 1981); New Jersey Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 384 A.2d 795, 809 (1978). Furthermore, preemption generally is not found unless it is the clear and manifest intent of Congress, as expressed in federal legislation, that federal law should control. Jones v. Rath Packing Co., 430 U.S. 519, 525, 97 S.Ct. 1305, 51 L.Ed.2d 604, 614 (1977); New Jersey Guild, 75 N.J. 544, 384 A.2d at

808. In determining whether state and federal laws are so inconsistent that state law must give away, the proper criterion to apply is whether state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Jones, 430 U.S. at 526, 97 S.Ct. 1305, 51 L.Ed.2d at 614. See also Iconco v. Jensen Construction Co., 622 F.2d 1291, 1296 (8th Cir. 1980). "Preemption of state law by federal statute or regulation is not favored . . ." Chicago and Northwestern Transportation Company v. Kalo Brick and Tile Company, 450 U.S. 311, 317, 101 S.Ct. 1124, 67 L.Ed.2d 258, 264-265 (1981).

Iowa law, as interpreted by the Office of the Attorney General, does not allow hearing aid dealers to test human hearing for the independent purpose of diagnosing a loss of hearing. On the other hand, Iowa law does not mandate an examination by an audiologist before the receipt of a hearing aid, nor does Iowa law mandate an examination by a physician or otolaryngologist before the receipt of a hearing aid except where the hearing aid recipient is a person under the age of twelve. In this respect, the unreported decision of Commonwealth of Massachusetts v. Hayes (D.C. Mass, No. 81-519-S, Feb. 5, 1982) is distinguishable. That case involved a challenge to a state requirement that, in addition to the medical evaluation demanded by federal regulation, a person must obtain a hearing test evaluation by a physician, audiologist, or otolaryngologist before purchasing a hearing aid. That requirement was deemed different from FDA law and regulations and, thus, preempted. The primary issue before the Federal district court was whether the FDA properly denied the state an exemption from preemption, an issue not relevant to this opinion.

Iowa law, unlike the Massachusetts law, does not mandate a hearing evaluation by a licensed physician, otolaryngologist or audiologist before the fitting of a hearing aid by a hearing aid dealer. Iowa law does, however, address the scope of a licensed hearing aid dealer's authority to practice his or her profession. Pursuant to 21 C.F.R. § 808.1(d)(3), it appears that preemption is not applicable in this situation. That provision provides:

> Section 521(a) [21 U.S.C. § 360k] does not preempt State or local permits, licensing, registration, certification, or other requirements relating to the approval or sanction of the practice of medicine, dentistry, optometry, pharmacy, nursing, podiatry, or any other of the healing arts or

> allied medical sciences or related professions or occupations that administer, dispense or sell devices. However, regulations issued under section 520(e) or (g) [21 U.S.C. 360j(e), (g)] of the act may impose restrictions on the sale, distribution, or use of a device beyond those prescribed in state or local requirements. If there is a conflict between such restrictions and state or local requirements, the Federal regulations shall prevail.

21 U.S.C. 360j(e) concerns restricted devices and 21 U.S.C. 360j(g) concerns exemptions for devices for investigational, scientific uses, neither of which are relevant to the issue of hearing aids and the licensed authority of hearing aid dealers.

Because the two-pronged test of 21 U.S.C. § 360k(a) is not satisfied and because Iowa's licensure law appears to be exempt from preemption pursuant to 21 C.F.R. § 808.1(d)(3), we are of the opinion that the doctrine of federal preemption does not affect the interpretation of Iowa law given by Op.Att'yGen. #81-8-5(L). To verify this conclusion, however, our office sought informal advice from the Bureau of Medical Devices of the Food and Drug Administration. A response received from that office indicated that while licensure provisions are generally not preempted, three provisions of Iowa Code § 154A.20 are preempted. (See attached response). These three areas of alleged preemption do not, in our view, affect the outcome of Op.Att'yGen. #81-8-5(L) or this response.

In closing, we are still of the opinion that Iowa law does not grant to hearing aid dealers the authority to measure human hearing for the sole purposes of diagnosing a loss of hearing. Hearing aid dealers may measure human hearing by any means for purposes of selecting, adapting and selling hearing aids and, in so doing, may advise clients of the results of tests legitimately performed insofar as said results relate to the fitting of the aid. In testing human hearing in the course of fitting an aid, a hearing aid dealer does not diagnose a loss of hearing when he or she merely informs a client that the client's hearing measures below the normal range of human hearing. Hearing aid dealers may advertise free hearing tests when such tests are done for purposes of ultimately fitting or selecting, adapting and selling of a hearing aid. In advertising and in fitting and selling a hearing aid, hearing aid dealers

are subject to various legal strictures which operate to protect the public from the fraudulent or improper activities of a hearing aid dealer. Nonetheless, the Board of Examiners for Hearing Aid Dealers is encouraged to adopt a rule requiring advertisement by hearing aid dealers of free hearing tests to reflect that such tests are done for the purposes of fitting or selecting, adapting and selling of a hearing aid.

Chapter 154A is primarily a licensure law and, thus, provisions of chapter 154A which are relevant to the issues posed here are not preempted by federal law and regulations. However, certain provisions of § 154A.20 are, in the informal opinion of the Food and Drug Administration, so preempted.

Sincerely yours,

Jeanine Freeman

JEANINE FREEMAN
Assistant Attorney General

JF:rcp

Attachments

cc: Robert M. Kreamer, Attorney at Law
Dr. Lindsay L. Pratt, Cooper Medical Center
Kenneth C. Hawes, Iowa Board of Speech Pathology and Audiology Examiners
Elaine J. Szymoniak, Department of Public Instruction
Neil Ver Hoeff, Audiology Associates
Mary Mills, Iowa Board of Examiners for Hearing Aid Dealers
Robert S. Klopp, Iowa Hearing Aid Society
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PIPELINES; COMMERCE COMMISSION; DRAINAGE DISTRICTS. Chapter 455, §§ 455.1, 455.199(1); Chapter 479, §§ 479.1, 479.29(1), The Code 1981. Federal law (Natural Gas Pipeline Safety Act of 1968 and Alaska Natural Gas Transportation Act of 1976) totally preempt state law with respect to regulation of interstate gas pipelines. Sections 455.199(1) and 479.29(1) are constitutionally valid, but subordinate to preemptive federal law. Section 479.29(1) prevails over § 455.199(1). County home rule amendment does not give county authority to enforce ordinance inconsistent with state law. (Ewald to Craft, State Senator, 8/6/81) #81-8-4 (L)

The Honorable Rolf V. Craft
State Senator
R.R. #4
Decorah, Iowa 52101

August 6, 1981

Dear Senator Craft:

You have requested the Attorney General's opinion concerning the authority of counties to adopt standards for the laying of pipeline which are more stringent than those required by the Natural Gas Pipeline Safety Act. You also ask whether this federal law conflicts with certain state laws, and whether those state laws conflict with each other.

Your first question is as follows:

> Is federal legislation (specifically the Natural Gas Pipeline Safety Act) pre-emptive over any additional or more stringent standards that may be adopted by the state or counties?

The Natural Gas Pipeline Safety Act of 1968 (Safety Act) reads, in pertinent part, as follows:

> [T]he Secretary shall, by order, establish minimum Federal safety standards for the transportation of gas and pipeline facilities . . . . Any state agency may adopt such additional or more stringent standards for pipeline facilities and the transportation of gas not subject to the juris-

> diction of the Federal Power Commission under the Natural Gas Act as are not incompatible with the Federal minimum standards, but may not adopt or continue in force . . . any such standards applicable to interstate transmission facilities. 49 U.S.C. § 1672(b) (1968).

The legislative history of the Safety Act makes it clear that Congress intended to avoid dual safety regulation of interstate transmission facilities:

> The relationship of Federal-State regulatory authority created by this bill differs as between local pipelines and interstate transmission lines. In the latter area, the lines of a single transmission company may traverse a number of States and uniformity of regulation is a desirable objective. For this reason, section 3 provides for a Federal preemption in the case of interstate transmission lines.
>
> On the other hand, in the case of local lines exempted from the economic regulatory authority of the Federal Power Commission under the Natural Gas Act, States may establish additional or more stringent standards, provided they are not inconsistent with the Federal minimum standards. The committee has provided for this different treatment because each State authority is uniquely equipped to know best the special aspects of local pipeline safety which are particularly applicable to that community.

3 U.S. Cong.Admin.News, 1968 at page 3241.

The constitutional basis for federal preemption with respect to interstate pipelines is the commerce clause, U.S. Const., art. I, § 8, and the supremacy clause, U.S. Const., art. VI. The validity of the preemption doctrine and the federal law in question is not challenged.

In United Gas Pipeline Company v. Terrebonne Parish Police Jury, 319 F.Supp. 1138 (E.D.La. 1970), aff'd, 445

F.2d 301 (5th Cir. 1971), a parish ordinance regulating the construction, installation and operation of pipelines was challenged. The U.S. District Court held that, "[a]s applied to interstate transmission pipelines, the Safety Act must prevail over and preempt any state or state political subdivision law, ordinance or similar mandate." 319 F.Supp. at 1139. The Court of Appeals affirmed, but implied that the parish could enact a valid ordinance requiring permits with reasonable conditions. 445 F.2d at 302.

In Tenneco, Inc. v. Public Service Commission of West Virginia, 352 F.Supp. 719 (S.D.W.Va. 1973), aff'd, 489 F.2d 334 (4th Cir. 1973), the court recognized Congress' clear attempt in the Safety Act to develop a cooperative program with the states for gas pipeline safety administration. The court upheld a West Virginia statute which assessed fees against interstate lines to help defray the cost of administering the safety program. The statute was not unconstitutional because it did not conflict with the safety provisions of the Safety Act. 352 F.Supp. at 722; 489 F.2d at 335, 337.

More recently and closer to home, in Northern Border Pipeline Company v. Jackson County, Minnesota, 512 F.Supp. 1261 (D.Minn. 1981), the court held that the Safety Act preempts the entire field of gas pipeline safety. Id. at 1264. Its legislative history indicates that Congress unmistakeably ordained that federal law preempt state law. Id. at 1265. Thus, a Minnesota county is without authority to regulate cover requirements for interstate pipelines which are part of the Alaska Natural Gas Transportation System established under the Alaska Natural Gas Transportation Act (ANGTA), 15 U.S.C. § 719 et seq. (1976). 512 F.Supp. at 1266.

Similarly, in Federal Energy Regulatory Commission v. Public Service Commission of North Dakota, 513 F.Supp. 653 (D.N.D. 1981), it was held that North Dakota statutes, insofar as they conflict with routing and construction provisions of ANGTA, must yield to overriding federal law. Id. at 656. The court found that the Act, as a whole, described "a pervasive scheme of federal regulation directed to every aspect of this unique pipeline, . . ." Id.

We agree with the holdings in these two 1981 cases. We conclude that interstate gas pipelines subject to the safety regulations of the Safety Act or ANGTA are exempt from state

and local regulation. With respect to intrastate pipelines, states may adopt additional or more stringent standards only if they are not incompatible with federal minimum standards.

We also call to your attention the Hazardous Liquid Pipeline Safety Act, 49 U.S.C. § 2001 et seq. (1979). This Act establishes minimum federal safety standards for the transportation of hazardous liquids (excluding liquified natural gas) and pipeline facilities. Like the Safety Act, it differentiates between intrastate and interstate pipeline facilities:

> Any State agency may adopt additional or more stringent safety standards for intrastate pipeline facilities and the transportation of hazardous liquids associated with such facilities, if such standards are compatible with the Federal standards issued under this chapter. No State agency may adopt or continue in force any safety standards applicable to interstate pipeline facilities or the transportation of hazardous liquids associated with such facilities.

49 U.S.C. § 2002(d) (1979).

Your second question now reads:

> Given that federal legislation is preemptive, are Sections 455.199(1) and 479.29(1), Code of Iowa 1981, in conflict with federal legislation?

The two statutes are set out, in pertinent part, below:

> When any person proposes to construct a pipeline, electric transmission line, communication line, underground service line, or other similar installations on, over, across, or beneath the right of way of any drainage or levee district, such person shall, before beginning construction, obtain from the drainage or levee district an easement to cross the district's right of way. The governing body of the district

> shall require such person to agree to comply with subsection 3 of this section and may, as a condition of granting such easement, attach thereto such additional conditions as they deem necessary.

§ 455.199(1), The Code 1981.

> The [Commerce Commission] shall, pursuant to chapter 17A, adopt rules establishing standards for the protection of underground improvements during the construction of pipelines, to protect soil conservation and drainage structures from being permanently damaged by pipeline construction and for the restoration of agricultural lands after pipeline construction. * * * Any county board of supervisors may, under the provisions of chapter 17A, and subsequent to the rule-making proceedings, petition under those provisions for additional rule making to establish standards to protect soil conservation practices, structures and drainage structures within that county. * * *

§ 479.29(1), The Code 1981.

Section 455.199(1) authorizes drainage districts to attach necessary conditions before granting an easement for a pipeline to cross the district's right of way. Section 479.29(1) authorizes the Commerce Commission to establish standards for pipeline construction. On the other hand, we have concluded above that federal law is totally preemptive with respect to interstate pipelines, and partially preemptive with respect to intrastate pipelines.

Thus, both state statutes would violate the United States Constitution if they were construed to authorize state or local governing bodies to regulate interstate pipeline safety, an area that has been explicitly preempted by federal legislation. And both would be unconstitutional if construed to permit states to regulate intrastate pipelines in a way incompatible with federal minimum standards.

However, all Iowa statutes are presumed to be in compliance with the United States Constitution. § 4.4(1), The Code 1981. They should, if reasonably possible, be

construed to avoid unconstitutionality. State v. Sullivan, 298 N.W.2d 267 (Iowa 1980); State v. Rassmussen, 213 N.W.2d 661 (Iowa 1973); State v. Lavin, 204 N.W.2d 844 (Iowa 1973).

By construing both §§ 455.199(1) and 479.29(1) to apply to interstate and intrastate pipelines only to the extent that they do not conflict with preemptive federal legislation, we can reasonably avoid a finding of unconstitutionality.

In its rules, the Commerce Commission adopted the federal minimum safety standards as the minimum safety standards of the State of Iowa. 250 I.A.C. § 10.12(479). This is consistent with federal law and not violative of the preemption doctrine.

We conclude, then, that §§ 455.199(1) and 479.29(1) should be construed to be consistent with, yet subordinate to, the Safety Act and ANGTA, with respect to interstate and intrastate pipeline safety. Given this construction, we find no conflict among the state laws, Commerce Commission rules, and federal pipeline legislation.

Your final question reads:

> Is there a conflict between Section 455.199(1) and Section 479.99(1)?

Our conclusions above substantially moot this question with respect to interstate gas pipeline regulation, since both statutes are federally preempted.

However, disregarding federal preemption, several principles of statutory construction appear to be relevant. One is that unless statutes are in direct conflict, they will be read together and, if possible, harmonized. Hardwick v. Bublitz, 253 Iowa 49, 111 N.W.2d 304 (1962). Another states that if the statutes cannot be harmonized, the more specific provision prevails over the more general. § 4.7, The Code 1981. Finally, the more recently enacted of two irreconcilable statutes shall prevail. § 4.8, The Code 1981.

Chapter 455 deals with levee and drainage districts. It authorizes counties to:

> establish . . . drainage districts, and . . . levees, and cause to be constructed . . . any levee, ditch, drain, or water-

> course, or settling basins, . . . or to straighten, widen, deepen, or change any natural watercourse, in such county, whenever the same will be of public utility or conducive to the public health, convenience and welfare.

Section 455.1, The Code 1981.

Subsection 455.199(1) concerns easements through drainage districts, with respect to construction of pipelines, underground service lines, or other similar installations. It was enacted in 1969 and amended in 1970. 1969 Session, 63rd. G.A., ch. 260, § 21; 1970 Session, 63rd G.A., ch. 1219, § 1.

Chapter 479 deals specifically with pipelines and underground gas storage. It confers upon the Commerce Commission:

> the power and authority to supervise the transportation or transmission of any solid, liquid, or gaseous substance, except water, within or through this state by pipeline, whether specifically mentioned herein or not, and the power and authority to supervise the underground storage of gas, so as to protect the safety and welfare of the public in its use of any public or private highways, grounds, waters and streams of any kind in this state.

§ 479.1, The Code 1981. Section 479.29(1) specifically authorizes the Commerce Commission to adopt rules establishing safety standards for pipeline construction. It also provides specific procedures by which counties may participate in rulemaking.

Section 479.29 was enacted in 1979. 1979 Session, 68th G.A., ch. 118, § 4. Chapter 479 was extensively amended by the General Assembly in 1981. See 1981 Session, 69th G.A., Senate File 531. The amendments include numerous provisions relating to damage resulting from pipeline construction. See, e.g., the as yet unnumbered new sections of Chapter 479 relating to arbitration agreements, damage agreements, negotiated fees, particular damage claims, determination of

installation damages, subsequent filing, financial condition of permittee--bond. See also the as yet unnumbered new subsections of § 479.29 relating to inspection and repair of damaged drain tile, and the additions to §§ 479.29(4) and (5) relating to topsoil replacement and inspection.

It appears to us that § 455.199(1) and § 479.29(1) can be harmonized. Looking at those subsections and the sections and chapters of which they are a part, we see that § 455.199(1) was intended primarily as a means to protect certain proprietary interests of drainage districts. Section 479.29(1), on the other hand, is an integral part of a chapter intended by the legislature to govern pipeline construction. Peffers v. City of Des Moines, 299 N.W.2d 675 (Iowa 1980) (all parts of statute should be considered together); State v. Charlson, 261 Iowa 497, 154 N.W.2d 829 (Iowa 1967) (parts of statute should be interpreted in light of relation to whole). We conclude that, with respect to the regulation of gas pipelines, Chapter 479 and § 479.29(1) do not conflict with, but rather prevail over Chapter 455 and § 455.199(1).

Even if we were not able to thus harmonize the statutes by limiting each to its specific area of concern, and again disregarding federal preemption, application of the second and third principles mentioned above would readily reveal that, with respect to regulation of gas pipeline construction and damages resulting therefrom, § 479.29(1) is both more specific and more recently enacted than § 455.199(1); therefore, § 479.29(1) should prevail. See Northern Border Pipeline Company v. Jackson County, Minnesota, 512 F.Supp. 1261, 1264 (D.Minn. 1981) (to extent that conflict exists, latter more specific statute expressly exempting interstate pipelines from state and local regulation regulating cover controls over former, more general county zoning statute).

The County Home Rule Amendment to the Iowa Constitution does not affect this conclusion, inasmuch as it specifically provides that home rule power and authority may not be inconsistent with the laws of the General Assembly. Iowa Const. amend. 37. See Bryan v. City of Des Moines, 261 N.W.2d 685, 687 (Iowa 1978) (state law limitations on city home rule power must be expressly imposed); Chelsea Theater Corporation v. City of Burlington, 258 N.W.2d 372, 373 (Iowa 1977) (state law preempts irreconcilable city home rule ordinance); Green v. City of Cascade, 231 N.W.2d 882, 890 (Iowa 1973) (same); Op.Att'yGen. #79-4-7 (county home rule

power cannot be "inconsistent" with laws of General Assembly, as term is defined in Bryan, Chelsea, Green, supra; intent to vest exclusive subject matter jurisdiction in state may be implied from legislative history). Thus, a county could not enforce any ordinance inconsistent or irreconcilable, in this case, with Chapter 479, § 479.29, or any rules promulgated pursuant thereto. See 250 I.A.C. §§ 10.10 to 10.12 (479).

Yours truly,

Robert P. Ewald

ROBERT P. EWALD
Assistant Attorney General

RPE:rcp

COUNTIES: FINANCES: Transfer of funds. Counties, under H.F. 836 recently enacted by the legislature, may honor warrants drawn on a county fund when there is a temporary shortfall of revenues in that fund if the county has balances otherwise available. Appel to Johnson, State Auditor, 8/6/81) #81-8-3 (L)

Richard Johnson, C.P.A.
State Auditor
State Capitol
L O C A L

August 6, 1981

Dear Mr. Johnson:

You have requested an opinion concerning the ability of county government to honor warrants drawn on a county fund when there is a temporary shortfall of revenues in that fund. This question was addressed by the General Assembly this year. House File 836, which was enacted, states:

> Within the restrictions of this subsection and after consultation with the county auditor, the board of supervisors, and the official charged with the administration of the fund in question, the county treasurer may honor warrants drawn upon a county fund at any time during the fiscal year rather than proceeding under Chapter 74 regardless of the current availability of a cash balance in the fund on which the warrant is drawn, if there are sufficient funds available in the total cash balance of all county funds.

Thus, counties may now honor warrants when there is a temporary shortfall of money in a particular fund without recourse to the State Appeal Board pursuant to § 24.22, The Code, provided that the terms and conditions of H. F. 836 are met.

Given this new express statutory authority, it is not necessary to construe the meaning of the term "transfer" as used in § 24.22, The Code 1981.

Very truly yours,

BRENT R. APPEL
First Assistant Attorney General

BA:s

OPEN MEETINGS ACT: Reasonably accessible place. Section 28A.4(2), The Code 1981. A county board of supervisors must hold its meetings at places that are reasonably accessible to residents of the county. This reasonableness requirement is satisfied when the Board meets at places located within the county. (Stork to Clark, State Representative, 8/4/81) #81-8-2 (L)

Honorable Betty Jean Clark
State Representative
Rockwell, Iowa 50469

August 4, 1981

Dear Representative Clark:

You have requested advice as to the requirements of the Iowa Open Meetings Act concerning public accessibility to meetings conducted by governmental bodies that are subject to the Act. Specifically, you inquire about the place at which a meeting may be conducted and question, for example, whether the Cerro Gordo County Board of Supervisors may hold a meeting at a lake town in Minnesota after giving proper notice as required by the Open Meetings Act.

Section 28A.4(2), The Code 1981, provides in relevant part as follows:

> Each meeting shall be held at a place reasonably accessible to the public, and at a time reasonably convenient to the public, unless for good cause such a place or time is impossible or impractical. Special access to the meeting may be granted to handicapped or disabled individuals.
>
> When it is necessary to hold a meeting on less than twenty-four hours notice, or at a place that is not reasonably accessible to the public, or at a time that is not reasonably convenient to the public, the nature of the good cause justifying that departure from the normal requirements shall be stated in the minutes.

Pursuant to this language, a governmental body has discretion to determine precisely where its meetings will be held. The only qualification upon such flexibility is the requirement that the place of a meeting be "reasonably accessible to the public." The term "reasonable" is relative; accordingly, its meaning is shaped largely by the facts and circumstances existing in a particular situation. The Iowa Supreme Court has, for example, observed that, with respect to the standard of "reasonable doubt" in a criminal prosecution, "reasonable" means "rational, honest, or fair." State v. Hamilton, 247 Iowa 768, 72 N.W.2d 184 (1956). Webster's New Collegiate Dictionary defines "reasonable" in similar fashion to mean both "not extreme or excessive" and "moderate, fair." Other provisions in Chapter 28A further clarify the meaning of the "reasonably accessible" language used in § 28A.4.

Section 28A.3 provides in part that meetings of governmental bodies shall be held in open session unless closed sessions are expressly permitted by law. Section 28A.2(3) defines an open session to mean "a meeting to which all members of the public have access." Section 28A.1 declares the intent and fundamental policy of the Open Meetings Act:

> Intent--declaration of policy. This chapter seeks to assure, through a requirement of open meetings of governmental bodies, that the basis and rationale of governmental decisions, as well as those decisions themselves, are easily accessible to the people. Ambiguity in the construction or application of this chapter should be resolved in favor of openness.

This policy and the express definition of "open session" plainly suggest that a governmental body should facilitate the attendance at its meetings of any interested members of the public. Accordingly, it seems reasonable, or rational and fair, to expect that a governmental body will hold a meeting at a place that is as centrally located as possible to the members of the public served by the body.

Residents of Cerro Gordo County unquestionably have reason to be interested in the deliberations of their Board of Supervisors. Chapter 28A commits the Board to make such deliberations "easily accessible" to the public by meeting at

a reasonably accessible place. In our opinion, this reasonableness requirement is met when the Board meets at places located within the county. County residents are likely to be familiar with such locations and are not required to travel far to reach them. The same considerations do not attach to a meeting held at a lake town in Minnesota. We therefore advise that such a location does not appear to be a place "reasonably accessible" to the residents of Cerro Gordo County and, accordingly, does not comport with the requirements of Chapter 28A.

Very truly yours,

Frank J. Stork

FRANK J. STORK
Assistant Attorney General

FJS:sh

COUNTIES: POOR FUND: PURCHASE OF MEDICAL SERVICE: While some nursing homes in Iowa may voluntarily agree to provide care at the Title XIX (Medicaid) rate to counties, there is no requirement that care paid by counties be provided at the Title XIX rate. (Morgan to Brown, State Senator, 8/4/81) #81-8-1 (L)

August 4, 1981

The Honorable Joe Brown
The Senate
Statehouse
Des Moines, Iowa 50319

Dear Senator Brown:

You have requested that we answer the following question:

> May a county purchase nursing home care for a person who will later receive Title XIX (Medicaid) at the Medicaid rate of $26.05 per day or must the "private pay" rate be paid?

Persons who qualify for Title XIX (Medicaid) of the Social Security Act (found at 42 U.S.C. § 1396 et. seq.) solely on the basis of income must reside in an intermediate care facility for one full calendar month before payment can be made by the State pursuant to the Medicaid program. While most individuals have sufficient resources to pay for their own care during this qualification period, some individuals request the county in which they reside to pay for care until eligibility for Medicaid is established.

We know of no authority in either the statute or cases which would require an intermediate care facility to accept the Medicaid rate (presently $26.05 per day) for care prior to the time an individual qualifies for Title XIX.

We have inquired of knowledgeable persons employed by the Iowa Department of Social Services regarding the present practice among nursing homes when care is paid by counties. We understand that some counties are able to purchase nursing care service at the Medicaid rate by agreement of the particular nursing home providing care.

As nursing homes are generally privately owned businesses, they may provide care at privately established rates. Nursing homes are not required to participate in Medicaid, but may choose to do so at a rate established at the 74th percentile of aggregate costs for all facilities. Undoubtedly some proprietors will accept the offer of county officers to pay for care at the Medicaid rate of $26.05 per day, but we know of no requirement that they do so.

Yours very truly,

Candy Morgan

Candy Morgan
Assistant Attorney General

CM/kap

COUNTIES AND COUNTY OFFICERS: County benefits to the poor and work requirements. Section 1039, S.F. 130, 69th G.A., § 252.27, Code of Iowa; Article III, § 39A, Iowa Constitution; § 96.19(6)(a)(6)(e), Code of Iowa; Chs. 85, 85A, 85B, and 250, Code of Iowa. The County may require the poor to render reasonable labor as a condition of receiving benefits under Ch. 252, Code of Iowa. The County, under the County Home Rule Amendment, may require veterans who are poor to render reasonable labor as a condition for receiving benefits under Ch. 250, Code of Iowa. Such a person would not be an employee under § 96.19(6)(a)(6)(e), The Code, but would be an employee for purposes of Ch. 85, 85A, and 85B, The Code. (Robinson to Casper, Madison County Attorney, 9/29/81) #81-9-16(L)

September 29, 1981

John E. Casper, Esq.
Madison County Attorney
223 East Court Avenue
Winterset, IA 50273

Dear Mr. Casper:

You recently asked for an opinion of the Attorney General as follows:

> Several Iowa Counties have apparently initiated work relief programs for the persons receiving assistance under Iowa Code Chapter 252 (Support of the Poor) and Iowa Code Chapter 250 (Commission of Veteran Affairs) who are able to work. This County has inquired of these programs to determine whether or not they would be suitable for application in Madison County, Iowa. As a result of that inquiry, our County has received conflicting information concerning the lawfulness and propriety of such work relief programs under existing statutes and laws. For example, the State Veteran Affairs Commission advises this County not to get involved in any County workfare type program; yet, several Iowa counties are doing precisely that.
>
> We believe this situation requires a formal opinion as to the lawfulness of mandatory workfare type programs for those recipients of benefits under Iowa Code Chapters 250 and 252 who are able to work. Specifically, our questions are as follows:

> 1. May the poor and needy receiving assistance under Iowa Code Chapter 252 who are otherwise able to work, be required to render reasonable labor to the County as a condition of receiving benefits?

Yes. The County as a condition of receiving benefits under Chapter 252, The Code, as amended, may require the poor and needy (who are able to work) to render reasonable labor. Section 1039 of Senate File 130, 69th G.A., amends § 252.27, The Code, and broadens the nature of the work or labor that may be required. A similar question has previously been answered by this office in Op. Atty. Gen. #81-8-35(L), a copy of which is attached. This opinion details more fully the reasoning behind our answer to this and other questions you raise.

You next asked:

> 2. May claimants receiving benefits under Iowa Code Chapter 250, who are otherwise able to work, be required to render reasonable labor to the County as a condition of receiving benefits under said Chapter?

In our opinion a County may, as a condition of receiving benefits, require veterans (who are able to work) to render reasonable labor to the County. The County Home Rule Amendment to the Iowa Constitution, Article III, § 39A, is the basis for our opinion. The Amendment provides:

> Counties home rule
>
> [Amend. 37] Counties or joint county-municipal corporation governments are granted home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government, except that they shall not have power to levy any tax unless expressly authorized by the general assembly. The general assembly may provide for the creation and dissolution of joint county-municipal corporation governments. The general assembly may provide for the establishment of charters in county or joint county-municipal corporation governments.

> If the power or authority of a county conflicts with the power and authority of a municipal corporation, the power and authority exercised by a municipal corporation shall prevail within its jurisdiction.
>
> The proposition or rule of law that a county or joint county-municipal corporation government possesses and can exercise only those powers granted in express words is not a part of the law of this state. (emphasis added)

We recognize that this is a close question wherein a strong argument can be made that veteran benefits come within the category of "state affairs" which require a unified state policy where counties cannot legislate because the Amendment applies only to "local affairs". See, Scheidler, Implementation of Constitutional Home Rule in Iowa, 22 Drake L. Rev. 294, 304-307, Clark, State Control of Local Government in Kansas: Special Legislation and Home Rule, 20 Kans. L. Rev. 631, 661 [referred to in Green v. City of Cascade, 231 N.W.2d 882, 885, 888 (Iowa 1975)].

There are no Iowa Supreme Court cases interpreting the County Home Rule Amendment so we use the interpretations that the Court has given to the Municipal Home Rule Amendment (Art. III, § 38A) which is identical in wording in all material respects. Both constitutional amendments contain the phrase "if not inconsistent with the laws of the general assembly." This means the county or city may enact measures that are not inconsistent with state law. In Airport Com. for City of Cedar Rapids v. Schade, 257 N.W.2d 500, 505 (Iowa 1977), the Supreme Court cited Green v. City of Cascade, 231 N.W.2d 882, 890 (Iowa 1975) holding that "state statutes should be interpreted, if possible, in a way to render them harmonious with the actions of the [county]." As there is no prohibition in Chapter 250, The Code, preventing a county from requiring a veteran to render reasonable labor to the County as a condition of receiving benefits, it is, therefore, permissible under the County Home Rule Amendment.

Again, we recognize that the legislature when it enacted § 1039 of Senate File 130, specifically extended the power of the county to authorize work or labor as a condition of receiving benefits concerning the general welfare area of Chapter 252; whereas no extension of such a power was made when amending Chapter 250 concerning veteran benefits. A rule of statutory construction would indicate when the legislature failed to extend

the grant of power in veteran affairs as it did in general welfare that this indicates a legislative intent not to extend the power in the area of veteran affairs. Our answer to this is simply that the County Home Rule Amendment is a stronger mandate that takes precedence over the rule of statutory construction. In this regard, it should be noted that Chapter 250, of The Code, established County commissions to use county money and to aid county veterans. The assistance program is county, not state, in nature even though its existence is mandated by The Code.

We, of course, make no comment on the desirability of requiring veterans to work as a condition of receiving benefits as this is a matter left to the respective County boards of supervisors.

You next asked:

> 3. In the event recipients under either Chapter may not be required to work as a condition precedent to obtaining benefits, may the county establish voluntary workfare type programs for either class of recipients assuming their ability to perform the labor?

The affirmative response to questions one and two, above, precludes the need to answer this question.

You next asked:

> 4. In the event such workfare programs are lawful and proper, does this program constitute employment of the person by the County subjecting the County to unemployment claim liability or is this arrangement exempt employment under Iowa Code Chapter 96.19(6)(e)? (sic § 96.19(6)(a)(6)(e), The Code)

In our opinion, § 96.19(6)(a)(6)(e), The Code, defines "employment" in such a way that services performed after December 31, 1977 by an individual to a government entity as part of an unemployment work relief program financed by a political subdivision of the state are not those of an employee.

You next asked:

> 5. In the event these workfare programs are lawful and proper, are the monetary

credits which the recipients receive for their labor subject to Federal and State Employment taxes?

6. In the event these workfare programs are lawful and proper, are the recipients entitled to the rights and remedies provided by Iowa Code Chapters 85, 85A and 85B on account of injuries suffered for which benefits under said Chapters are recoverable?

We answer these questions in the affirmative. For further particulars, see pages 3 and 4 of Op. Atty. Gen. #81-8-35(L), attached and referred to above.

Sincerely,

Stephen C. Robinson
Assistant Attorney General

SCR/sm
Encl.

STATE OFFICERS AND DEPARTMENTS. Department of Health - Confidentiality of Vital Statistics, §§ 144.43, 68A.2, H.F. 413, Laws, 69th G.A., The Code. Repeal by the General Assembly of statutory provisions relating to confidentiality of vital statistics does not constitute breach of contract. (Swanson to Gentleman, State Senator, 9/29/81) #81-9-15(L)

Honorable Julia Gentleman
State Senator
2814 Forest Drive
Des Moines, Iowa 50312

September 29, 1981

Dear Senator Gentleman:

We have received your request for an opinion from this office concerning the effect of House File 413, Laws of the 69th General Assembly, upon Section 144.43, Code, 1981.

Section 144.43 mandated that certain vital statistics in the custody of county or local registrars remain confidential for sixty-five years. H.F. 413, Chapter 10, repeals by implication Section 144.43, and allows such statistics to be inspected and copied as of right under Chapter 68A, Code, 1981, at any time. Said statistics include the following:

1. A record of birth if that birth did not occur out of wedlock;

2. A record of marriage;

3. A record of divorce, dissolution of marriage, or annulment of marriage;

4. A record of death if that death was not a fetal death.

You request an opinion of the Attorney General on whether the repeal of this section represents a breach of contract between the state and the individuals who may have earlier supplied information on the assumption their privacy with regard to these records would be respected for sixty-five years.

Generally, when the government acts in its legislative capacity, it does not create contract rights in the legislation. Legislative power includes the power to repeal existing laws. The rule is that there can, in the nature of things, be no vested right in an existing law which precludes its repeal. Am.Jur.2nd, Statutes, § 378.

In support of the rule are the cases of District of Columbia v. John R. Thompson Co., 346 U.S. 100, 97 L.Ed. 1480, 73 S.Ct. 1007; Western Union Tel. Co. v. Louisville & H. R. Co., 258 U.S. 13, 66 L.Ed. 437, 42 S.Ct. 258.

We conclude, therefore, that the state is not in breach of contract by virtue of passage of H.F. 413.

If we can be of further assistance, please advise.

Yours very truly,

Gary H. Swanson

GARY H. SWANSON
Assistant Attorney General

GHS/mel

COUNTIES: CIVIL DEFENSE: DISASTER SERVICES: §§ 4.1(36) and 29C.9, The Code 1981. A county board of supervisors is required to participate in local civil defense planning. Political subdivisions are each accorded one vote in the joint administration of civil defense. The joint administration does not have the authority to impose a particular level of financial assessment on any of the participating subdivisions. (Fortney to Strittmatter, Jones County Attorney 9/24/81) #81-9-13(L)

Nick Strittmatter
Jones County Attorney
Courthouse
Anamosa, Iowa 52205

September 24, 1981

Dear Mr. Strittmatter:

You have requested an opinion of the Attorney General regarding county civil defense pursuant to Chapter 29C, The Code 1981. You have posed three questions for our consideration:

1. Does a majority vote of the Civil Defense Board bind the county Board of Supervisors absolutely, regardless of whether the county representative to the Defense Board is absent or abstains from such vote?

   Your letter explains that you are concerned with whether the Civil Defense Board can require a particular level of assessment or tax levy from the member subdivisions.

2. Does Iowa Code Chapter 29C permit weighted voting on the Civil Defense Board where warranted?

3. Does a county have the option of not being a party to the emergency planning administration as contemplated by § 29C.9?

We will address your questions in the reverse of the order you present them.

A county does not have the option of nonparticipation in the civil defense structure established by Chapter 29C. Section 29C.9(1) requires that a county board of supervisors participate in local civil defense planning. The section provides, in pertinent part, that "boards of supervisors and city councils shall form a joint county-municipal disaster services and emergency planning administration." [Emphasis supplied.] Participation is a duty of the board. See § 4.1(36)(a), The Code 1981.

Weighted voting, based on the population of each respective subdivision, is not permitted. Section 29C.9(1) provides for equal representation and voting strength for each subdivision. The section provides, in pertinent part, that "such joint administration shall be composed of a member of the county board of supervisors and the mayor or his representative of the city governments within the county and the sheriff of such county." The county already is allocated two votes, i.e., one given to the supervisors and one given to the sheriff. Beyond this, § 29C.9(1) does not contemplate proportional representation.

The joint administration does not have the authority to impose a particular level of assessment on any of the participating subdivisions. While the joint administration has the authority to establish a budget pursuant to § 29C.9(2) and to set the compensation of joint administration employees pursuant to § 29C.9(3), the county and the municipalities retain their inherent power and control over appropriations. This authority is not delegated to the joint administration. We base this conclusion on § 29C.9(1) which provides, in pertinent part:

> Each county and city located within the county may appropriate money from the general fund of the county or city for the purpose of paying expenses relating to disaster services and emergency planning matters of such joint administration and establish a joint county-municipal disaster services fund in the office of the county treasurer. The county and cities located in that county may deposit moneys in such fund, which fund shall be for the purpose of paying expenses relating to disaster services and emergency planning matters of such joint administration. [Emphasis supplied.]

The county and cities have the power to appropriate money to the joint administration, but there is no obligation that they contribute an amount equal to an amount set by the joint administration. See § 4.1(36)(c), The Code 1981.

Yours truly,

David Fortney

DAVID M. FORTNEY
Assistant Attorney General

DMF:sh

MUNICIPALITIES: Mayor's Compensation. §§ 4.2, 4.4, 4.6, and 372.13(8), The Code 1981; § 368A.21, The Code 1973. The word "term," as used in § 372.13(8), The Code 1981, refers to the term of the mayor, not that of the council. A council may not legislate a midterm change in the compensation of a mayor. (Walding to Halvorson, State Representative, 9/21/81) #81-9-10(L)

September 21, 1981

The Honorable Rodney Halvorson
State Representative
1030 North 7th Street, Apt. A
Fort Dodge, Iowa 50501

Dear Mr. Halvorson:

You have requested an opinion of the Attorney General and state:

> May a mayor elected to a four-year term of office, who is not a voting member of the council, have his salary changed by ordinance of the council during the first two years of his term for application the second two years of his term pursuant to Section 372.13(8) of the Code of Iowa?

Section 372.13(8) provides in pertinent part:

> By ordinance, the council shall prescribe the compensation of the mayor, council members, and other elected city officers, but a change in the compensation of the mayor shall not become effective during the term in which the change is adopted . . . . [Emphasis added]

The ambiguity posed by the aforementioned statute concerns the underscored portion of the statute. In particular, the question raised is whether the word "term" refers to the term of the council or to the term of the mayor. Since the mayor is to be elected for a four-year term and the council for a two-year

term in the City of Fort Dodge, different interpretations result in different conclusions. Accordingly, if "term" refers only to the term of the council, an affirmative response to your inquiry follows; conversely, a negative response follows if "term" refers to the term of the mayor.

Generally, statutes are to be liberally construed with a view to promote their objects and assist the parties in obtaining justice. See § 4.2, The Code 1981. It is presumed that a just and reasonable result is intended and that public interest is favored over any private interest. See § 4.4, The Code 1981. If a statute is ambiguous, the following may be considered in determining the legislative intent: (1) The object sought to be obtained; (2) The circumstances under which the statute was enacted; (3) The legislative history; (4) The common law or former statutory provisions; (5) The consequences of a particular construction; (6) The administrative construction of the statute; and (7) The preamble or statement of policy. See § 4.6, The Code 1981.

In our judgment, "term" refers to the term of the mayor. Our analysis is twofold. First, the Code has long addressed the issue of midterm changes in the compensation of city officers. At one time, § 368A.21, The Code 1973, provided in part that " . . . the emoluments of any city or town officer [shall not] be changed during the term for which he has been elected." The clear intent of that section was to prevent midterm changes in the compensation of any city or town officer, including the mayor. Nothing which the legislature has done subsequently indicates an intent to reverse this scheme. Second, policy considerations also favor our interpretation of the word "term". According to Antieau on Municipal Corporate Law, "One of the principal purposes of . . . statutory provisions [against changing the compensation of city officers during their term of office] is to prevent local government officers from using their influence and position to secure salary increases after they have been elected." ANTIEAU, 2A MUNICIPAL CORPORATE LAW § 22.105 (1979). Such influence includes direct, as well as indirect methods. For instance, while a mayor may not be able to legislate a change in compensation, he or she may be able to influence the council to so act with the veto power invested in the executive branch. Consequently, the better interpretation for policy reasons is an interpretation restricting midterm changes in the compensation of city officers, including the mayor.

Accordingly, the word "term", as used in § 372.13(8), The Code 1981, refers to the term of the mayor, not that of the council. As such, the council may not legislate a midterm change

in the compensation of a mayor. A negative response to your inquiry, therefore, follows.

Very truly yours,

LYNN M. WALDING
Assistant Attorney General

LMW/ny

COUNTIES, SHERIFFS: Iowa Constitution, Art. III, §39A; §§344.2 and 693.4, The Code (1981); 1981 Session, 69th G.A., S.F. 130, §§300(4) and 423(3). Radios purchased for a sheriff's department pursuant to §693.4, The Code (1981), may be funded either by a line item in the sheriff's appropriation or as a separate appropriation from the general fund. (Hayward to McKean, State Representative, 9/16/81) #81-9-8(L)

September 16, 1981

The Honorable Andy McKean
State Representative
Morley, Iowa 52312

Dear Representative McKean:

You have asked this office for an opinion concerning the financing of radios purchased for county sheriff departments to be used in conjunction with the Department of Public Safety state radio broadcasting system. Section 593.4, The Code (1981), states in this regard:

> It shall then be the duty of the board of supervisors of each county to install in the office of sheriff, such a radio receiving set and a set in at least one motor vehicle used by the sheriff, for use in connection with said state radio broad casting system. The board of supervisors of any county may install as many additional such radio receiving sets as may be deemed necessary. The cost of such radio receiving sets and the costs of installation thereof shall be paid from the general fund of the county. (emphasis added.)

Your question is whether such radios are to be paid for by the sheriff out of his appropriation or whether a special appropriation must be made to cover the expense of their purchase and installation.

Any discussion of this question must begin with the fact that counties have been granted home rule. Iowa Constitution, Art. III, §39A. The recent session of the General Assembly extensively reworked the provisions of the Code

which control county activities. Applicable provisions are 1981 Session, 69th G.A., S.F. 130, §300(4), which states:

> An exercise of county power is not inconsistent with a state law unless it is irreconcilable with it.

and 1981 Session §69th G.A., S.F. 130, §423(3), which states in pertinent part:

> Except as otherwise provided by state law, amounts expended for county government purposes shall be paid from the general fund, including but not limited to amounts for the following purposes if paid:
>
> * * * * * *
>
> y. For the cost of radio equipment installed under section 693.4.
> z. For salaries and expenses of elected county officers, deputy officers, assistants, clerks, and other employees, unless otherwise provided by law.
>
> * * * * * *

The general budgetary procedures of Ch. 344, The Code (1981), have not been affected by this legislation. The only provision of that chapter apposite to this discussion is §344.2 (last sentence) which requires only as follows:

> The appropriations to each separate county office or department shall be itemized in the same manner that accounts are itemized on the records of the county auditor.

The particular question posed in your request does not seem to be answered directly by either the Code or the Iowa Constitution. In light of this circumstance, the question is whether either method of providing an appropriation is "irreconcilable" with state law. 1981 Session, 69th G.A., §300(4), S.F. 130. Neither a specific appropriation for radios, nor a line item provisions for radios in the sheriff's appropriation would seem to be irreconcilable with the §693.4, The Code (1981), requirement that such radios be paid for

from the county's general fund. The sheriff's expenses are paid from the general fund regardless of how they are itemized for auditing purposes. The county boards of supervisors are free to itemize appropriations as they deem appropriate from the general fund so long as they comply with the provisions of Ch. 344, The Code (1981).

Respectfully yours,

GARY L. HAYWARD
Assistant Attorney General
Public Safety Division

GLH:dkl

MENTAL HEALTH: Entitlement of counties to a reduced rate of liability for mental health care. §§ 227.11, 230.15, 230.20, 230.20(5), The Code 1981; An Act of the Sixty-Ninth General Assembly, 1981 Session, Senate File 572, §§ 39 and 53(4), An Act of the Sixty-Ninth General Assembly, 1981 Session, House File 849, §§ 4 and 5. Section 230.15, The Code 1981, does not establish a reduced rate of liability for counties, but rather establishes a reduced rate of liability for mentally ill persons or others obligated for their support, who may be indebted to the county for monies advanced by the county for mental health care. Under § 230.20(5), as amended, a county is entitled to a 20 percent reduced rate of liability for the costs of mental health care. (Mann to Templeman, Bureau Chief, Institutions/Hospital Schools, Division of Mental Health Resources, Iowa Department of Social Services, 9/11/81) #81-9-6 (L)

Mr. Harold Templeman, Bureau Chief
Institutions/Hospital Schools
Division of Mental Health Resources
Iowa Department of Social Services
First Floor
Hoover State Office Building
L O C A L

September 11, 1981

Dear Mr. Templeman:

You recently requested a clarification of an opinion issued by this office, Op.Att'yGen. # 81-8-11(L), in which we addressed the question of whether a reduced rate of financial liability would be available to a county under § 230.15, The Code 1981, for indigent persons transferred from a mental health institute to a county care facility under § 227.11, The Code 1981. In that opinion, we concluded that the reduced rate of liability for the care and treatment of mental health patients available under § 230.15 is limited to the care and treatment provided at a state mental health institute.

Incidental to reaching the above conclusion, we utilized language which gives rise to your present inquiry. That language is as follows:

> Under the above language, the county's liability for the costs of care and treatment of a mentally ill person at a state mental health institute is one hundred percent of the costs for the first 120 days of hospitalization. Thereafter, the county's liability is limited to the average minimum cost of the maintenance of a physically and mentally healthy individual residing in his/her own home, an amount which is less than the actual costs incurred at a mental health institute. It is this reduced rate of liability that you have inquired about.

Your query, then, is whether this language may be used as authority for the proposition that a county is entitled to a reduced rate of liability under § 230.15, The Code 1981.

We have reviewed our prior opinion and § 230.15. Applying familiar principles of statutory construction, we now opine that § 230.15 does not establish a reduced rate of liability for counties, but rather establishes a reduced rate of liability for mentally ill persons or others obligated for their support, who may be indebted to the county for monies advanced by the county for mental health care. To the extent that we utilized language in our prior opinion which suggests otherwise, we now retract or modify that language consistent with the above conclusion.

We further advise that the extent of a county's liability for mental health care is to be determined pursuant to § 230.20, The Code 1981. We discussed § 230.20 in a prior opinion, Op.Att'yGen. # 81-7-11(L), where we stated the following:

> Billings are submitted to a county by the superintendent of a state hospital pursuant to § 230.20, The Code 1981. Section 230.20(5) mandates that "the county shall be billed for one hundred percent of the stated charge for each patient, unless otherwise specified in the current appropriation for support of the state hospitals". The current appropriation for MHI's is found in ch. 8, Laws of the Sixty-Eighth General Assembly, 1979 Session. Section Three (3) of that act states that the "state mental health institutes' daily

> per diem as determined pursuant to section two hundred thirty point twenty (230.20) of the Code shall be billed at eighty percent for each fiscal year". Thus, under § 230.20(5), as amended, counties must be billed for 80 percent of the costs of a psychiatric evaluation of a criminal defendant at a state hospital.

Thus it appears that a county is entitled to a 20 percent reduced rate of liability if so specified in current appropriations. The current appropriation bill for the mental health institute is an Act of the Sixty-Ninth General Assembly, 1980 Session, House File 849, §§ 4 and 5. This act continues the reduced rate of liability available to the counties by requiring that counties be billed at 80 percent of the daily per diem costs for mental health patients.

In addition to H.F. 849, the legislature adopted an amendment to § 230.20(5), which codifies the 20 percent reduction of liability for counties. That amendment, as found in an Act of the Sixty-Ninth General Assembly, 1981 Session, Senate File 572, § 39, permanently amends § 230.20(5) to require that "the county shall be billed for eighty percent of the stated charge for each patient". Pursuant to § 53(4) of S.F. 572, the amendment takes effect on July 1, 1982.

In summary, we conclude that § 230.15 does not establish a reduced rate of liability for counties, but rather establishes a reduced rate of liability for mentally ill persons or others obligated for their support, who may be indebted to the county for monies advanced by the county for mental health care. Under § 230.20(5), as amended, a county is entitled to a 20 percent reduced rate of liability for costs of mental health care.

Sincerely,

Thomas Mann, Jr.

Thomas Mann, Jr.
Assistant Attorney General

TM/jam

cc: Lee E. Poppen
Wright County Attorney

CRIMINAL LAW: Uniform Citation and Complaint. §805.6, The Code 1981. To "deliver" within the meaning of §805.6(1)(a), The Code ("the officer shall deliver the original and a copy to the court where the defendant is to appear") includes the mailing of the original and copy to the proper court. It is not necessary that the officer swear or affirm with right hand raised that the information contained in the citation and complaint is true and correct. A signature is sufficient to constitute "verification" within the meaning of §805.6(4), The Code 1981. (Martin to Lawton, Magistrate, Cass County, 9/11/81) #81-9-5 (L)

September 11, 1981

The Honorable Shirley J. Lawton
Cass County Judicial Magistrate
Court House
Atlantic, IA 50022

Your Honor:

In your letter of February 20, 1981, you ask for the opinion of the Attorney General on two matters relating to the uniform citation and complaint, § 805.6, The Code 1981: To quote from your letter:

> Question: A trooper mails the citation to the County Clerk's office in which the defendant is to appear, from the county where he lives. His Post headquarters are located in the County where the defendant must appear. The questions arose in Court that the Code indicates the citation must be delivered in person by the Trooper to the County Clerk's office. Is mailing considered a delivery as the Code States?
>
> 805.6-4 - A dismissal of a citation was requested in Court as the officer did not "swear and affirm" with right hand raised that the information contained herein is true and correct. The trooper signed the citation in front of a proper designee (the Clerk of Court) and his signature was verified by the designee. Would this be considered "swearing and affirming" the information is correct, without the raising of the right hand?

A. Delivery by Mail is Sufficient.

It is our opinion that delivery by mail is sufficient to comply with the "shall deliver" language of § 805.6(a), The Code 1981. While there is no case law in Iowa directly construing this language, the following principles are clear. When the Code does not define a term, reference may be made to common and generally accepted meanings of words. See e.g. State v. Moorhead, ___ N.W.2d ___ (Iowa 7/15/81)(Sup. Ct. No. 65330)(Dictionary definition of "equivalent" applied to definition of "equivalent education" within the meaning of § 299.1, The Code). The common meaning of "deliver" is "to hand over: Convey" Webster's New Collegiate Dictionary p. 298 (1979). Delivery has been defined as the voluntary transfer of possession from one person to another. Kintzinger v. Millin, 254 Iowa 173, 117 N.W.2d 68 (1962). "What constitutes delivery depends largely upon the character and situation of the property. Nothing more being required than what is usual, convenient and proper." Cownie v. Local Board of Review In and For City of Des Moines, 235 Iowa 318, 16 N.W.2d 592, 598 (1944). So long as the citation and complaint is received in and filed by the proper court, the method used in perfecting this filing can include the use of the mails. See, section 805.4, The Code 1981 ("the law enforcement officer issuing the citation shall cause to be filed a complaint in the court in which the cited person is required to appear.");

B. It is Not Necessary that the Officer Swear and Affirm With Right Hand Raised.

It is also the opinion of this office that the officer's verification of the citation and complaint need not be accomplished "with right hand raised." To verify means to confirm or substantiate by oath. Francesconi v. Independent School District of Wall Lake, 204 Iowa 307, 214 N.W.2d 882, 885 (1927). The purpose of the oath is to secure the truth. Dalbey Bros. Lumber Co. v. Crispin, 234 Iowa 151, 12 N.W.2d 277 (1943). Some outward act is required by the person taking the oath "calculated to appeal to the conscience of the person to whom it is administered and by which he signifies that his conscious is bound . . .." 12 N.W.2d at 279. Unless the statute so specifies, there is no particular form the outward act must take. 12 N.W.2d at 279. A signature would, therefore, be a sufficient outward act for purposes of verification.

Sincerely,

Thomas N Martin

THOMAS N. MARTIN
Assistant Attorney General

TNM/cla

BEER AND LIQUOR CONTROL: §§ 123.1, 123.3(5), 123.95, The Code 1981. A caterer or other party who does not hold a liquor control license may not purchase liquor at a state liquor store and transport it to a licensed premises for service to members of a bona fide meeting or convention. This conclusion applies even if the nonlicensee does not make a profit on the liquor. (Norby to Gallagher, Director, Beer and Liquor Control Department, 9/4/81) #81-9-4(L)

September 4, 1981

Rolland A. Gallagher, Director
Beer and Liquor Control Department
L O C A L

Dear Mr. Gallagher:

You have requested an opinion of the Attorney General regarding the legality of certain arrangements apparently undertaken by caterers which involve the serving of liquor. You have outlined the arrangement as follows:

> Is it legal for food caterers or other people who do not hold a liquor license to: buy liquor on which the 15% tax [required to be paid by holders of liquor licenses, § 123.96] is not paid at our state liquor stores for bona fide conventions or meetings and transport this liquor to the licensed establishment where the liquor is going to be consumed by the bona fide convention or meeting, transport a portable bar to the licensed establishment to be used by the bona fide convention or meeting, arrange for an independent bartender (not one employed by licensee) to serve the liquor for the bona fide convention or meeting, take ice to the licensed establishment, etc., and charge the bona fide convention or meeting for these services?

The possibility of such an arrangement arises through § 123.95, The Code 1981, which provides as follows:

> Premises must be licensed--exception as to conventions and social gatherings. It is unlawful for any person to allow the dispensing or consumption of intoxicating liquor, except sacramental wines and beer, in any establishment unless such establishment is licensed under this chapter.

> However, bona fide conventions or meetings may bring their own legal liquor onto the licensed premises if the liquor is served to delegates or guests without cost. All other provisions of this chapter shall be applicable to such premises. The provisions of this section shall have no application to private social gatherings of friends or relatives in a private home or a private place which is not of a commercial nature nor where goods or services may be purchased or sold nor any charge or rent or other things of value is exchanged for the use of such premises for any purpose other than for sleeping quarters.

The considerations suggesting opposing results on your question readily spring to mind. On the one hand, since § 123.95 does create a privilege for meetings and conventions to procure liquor and serve it at a licensed premises, delegation of the tasks involved in arranging such service may not appear particularly offensive. On the other hand, if such delegation and payment for services amounts to the caterer being essentially a liquor licensee in all but name, both the regulatory and revenue generating responsibility of the state are compromised.[1] Additionally, we assume that a non-licensee providing services for compensation as described above would be inclined to maintain that the cost of their services does not include a price mark-up on the liquor served. One possible resolution of this question might be that such service for compensation is permissible provided no mark-up in price is made in connection with the actual liquor served. Such a proposition would appear to us to create problems of proof, requiring establishment of the fact that the caterer's profit was derived only from goods and services and not from sale of liquor.

We look to several statutory provisions in reaching our conclusion. Initially, it is important to note that Ch. 123 should be strictly construed to achieve its regulatory purposes. § 123.1, The Code 1981. Review of the language of § 123.95

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[1] For example, an action for damages pursuant to § 123.92, The Code 1981, may be brought against either a licensee or a non-licensee. Only licensees, however, need furnish proof of financial responsibility.

indicates to us that its focus is not toward allowing a non-licensed commercial enterprise to serve liquor to a meeting or convention at a greater profit due to avoiding the 15% tax, but toward allowing the meeting or convention to have liquor on a licensed premises without paying the cost of the licensee tax. In other words, the exception for conventions and meetings should be construed in light of the language of § 123.95 concerning private social gatherings, which is limited to places that are not commercial in nature. Accordingly, we believe any commercial activities involved with service of liquor to a meeting or convention should be closely scrutinized to determine if the spirit of Ch. 123 is compromised. As discussed below, we believe that the system you have described does violate Iowa law.

Initially, § 123.3(25) defines "sale" for purposes of Ch. 123 as follows:

> The prohibited 'sale' of alcoholic liquor or beer under this chapter includes soliciting for sales, taking orders for sales, keeping or exposing for sale, delivery or other trafficking for a valuable consideration promised or obtained, and procuring or allowing procurement for any other person.

Pursuant to this broad definition, it appears that the delivery of liquor by a caterer, as described in your question, does constitute a "sale" of liquor to the meeting or convention delegates.[2] Accordingly, we believe it is illegal for a caterer, or any non-licensee, to purchase liquor at a state store and transport it to the site of service to a meeting or convention. This conclusion applies regardless of any claim that no profit is made on the liquor by the caterer. We do believe, however, that the caterer may charge the sponsor of the meeting or convention for bartending service, mix, and ice, provided this cost is paid by the sponsoring organization and not charged to the delegates for individual drinks.

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2 A prior Attorney General's opinion expresses the view that a service for delivery of liquor from a state liquor store to a liquor licensee is not contrary to Ch. 123. 1972 Op. Att'y Gen. 645. We wish to express no further opinion on that question, but believe that deliveries to a licensee are adequately monitored to ensure that actual delivery is made to the licensee. See 150 I.A.C. 4.22. Additionally, such sales to a licensee do not raise any question regarding payment of the 15% licensee tax.

In conclusion, we note that consumption of liquor is highly regulated, and no inherent right to sell or consume liquor exists. In light of this proposition, persons seeking to avoid the payment of a licensee tax on liquor served at a normally licensed premises should not expect to easily avoid the tax requirement. Accordingly, requiring members of meetings or conventions to literally bring their liquor themselves does not appear an inappropriate burden for avoidance of the tax that would be charged the licensee under normal circumstances.

Sincerely,

STEVEN G. NORBY
Assistant Attorney General

SGN:sh

DISSOLUTION OF MARRIAGE: Confidentiality of support record book. § 598.22, The Code 1981. The support record book is a confidential record. The amount of unpaid support obligations may not be made public if this amount is calculated from data in the support record book. (Norby to Swartz, State Representative, 9/4/81) #81-9-3(L)

Honorable Thomas Swartz
State Representative
1516 W. State
Marshalltown, Iowa 50158

September 4, 1981

Dear Representative Swartz:

You have requested an opinion of the Attorney General on the following question:

> When a lien for temporary or permanent support or for an assignment is created by operation of § 598.22, The Code 1981, is the amount of the unpaid accrued obligation and thus the amount of the lien, a matter of public record?

Your question arises from the confidentiality requirements discussed in a recent opinion, Op. Att'y Gen. #81-3-5(L).

A piece of information itself cannot be directly related to these confidentiality requirements. Documents, not information, are protected. This does not mean, however, that a confidential document may be read by its custodian to avoid the clearly improper act of allowing public access to the document.

Accordingly, the amount of the lien may not be obtained from confidential records. If the same information can be obtained from other public records, the information should be sought in this manner. But the confidentiality requirements of § 598.22 prevent access to the support record book as a means of obtaining this information unless authorized by a party to the dissolution action.

Sincerely,

Steven G. Norby

STEVEN G. NORBY
Assistant Attorney General

SGN:sh

COUNTIES AND COUNTY OFFICERS: COLLECTIVE BARGAINING. §§ 20.28, 344.8-10, The Code 1981. County officers are prohibited from expending funds in excess of their authorized appropriation. Projected deficits in an office's appropriation can be covered by a transfer of funds. The transfer must be pursuant to a properly adopted resolution of the board of supervisors. (Fortney to Kenyon, Union County Attorney, 10/30/81) #81-10-25(L)

October 30, 1981

Arnold O. Kenyon III
Union County Attorney
Courthouse
Creston, Iowa 50801

Dear Mr. Kenyon:

You have requested an opinion of the Attorney General regarding the relationship between various provisions of the Code and the terms of a collective bargaining agreement presently in force between the Union County Board of Supervisors and the Teamsters as the collective bargaining agent for the county's deputy sheriffs. At the outset, we feel compelled to state the appropriate purposes of an Attorney General's opinion. While it is appropriate for this office to express an opinion on legal issues, it is improper for us to engage in judicial fact-finding in the context of an opinion. Interpreting the terms of a contract, which is not of statewide concern, is more appropriately addressed at the local level. This is particularly true in a situation where a formal mechanism has been established for resolving disputes related to the interpretation of a labor contract negotiated pursuant to Chapter 20, The Code 1981.

With the foregoing principles serving as background, we turn to the questions you raise. Essentially, you present the following scenario: Union County has entered into a collective bargaining agreement with its deputy sheriffs. The agreement includes, among other items, a provision relating to overtime pay. The provision is as follows:

ARTICLE XII

OVERTIME COMPENSATION

Overtime pay for all hours worked in excess of forty-four (44) hours in any given work week at the rate of one and one-half (1½)

> the normal hourly rate of pay shall be paid provided such payment does not exceed 250 hours per contract year. After 250 hours has been reached, overtime shall be compensated in compensatory time off at the same rate as overtime pay. There shall be no pyramiding of overtime or any other pay.

The problem faced by Union County results from the fact that the Board of Supervisors has appropriated a sum of money for salaries for deputy sheriffs which the sheriff believes is inadequate to meet the needs of his department. He bases this belief on the fact that while the amount appropriated is enough to pay the base salaries of the sheriff's deputies, it does not include an amount adequate to compensate the deputies for projected overtime hours. The deputies have worked overtime hours during this budget year. The sheriff, properly concerned with his budget limitations, has refused to allow the overtime pay claimed by the deputies. The deputies in turn have filed grievances pursuant to § 20.18, The Code, and the terms of the collective bargaining agreement.

Section 20.28, The Code 1981, provides:

> A provision of the Code which is inconsistent with any term or condition of a collective bargaining agreement which is made final under this chapter shall supersede the term or condition of the collective bargaining agreement unless otherwise provided by the general assembly. A provision of a proposed collective bargaining agreement negotiated according to this chapter which conflicts with the Code shall not become a provision of the final collective bargaining agreement until the general assembly has amended the Code to remove the conflict.

County officers are prohibited from expending funds in excess of their authorized appropriation. See § 344.10, The Code 1981. The Union County sheriff has expressed concerns that it is impossible to comply with both Article XII of the collective bargaining agreement and § 344.10, while at the same time providing adequate law enforcement for the county. We note that there is no inherent conflict between the collective bargaining agreement and the Code. The agreement does not require that the sheriff schedule overtime. It merely provides the mechanism for determining the calculation of overtime if actually scheduled and worked. The practical problem to be faced by Union County is, quite simply, either the sheriff schedules only an amount of law enforcement coverage that is affordable within the base salary, in which case the

appropriation is adequate; or, the sheriff schedules the overtime hours he feels are necessary, thereby resulting in a shortfall in his budget account. The projected deficit could then be covered by a transfer of funds pursuant to §§ 344.8 or 9, The Code 1981. This transfer is a decision to be made by the board of supervisors, however, not by the sheriff. If the supervisors indicate an unwillingness to make a fund transfer, § 344.10 would require the sheriff to adjust his scheduling to remain within his appropriation. Should the supervisors decide to make the transfer of funds, the transfer must be made pursuant to a properly adopted resolution of the board. See §§ 344.8 and 9.

Yours truly,

David Fortney

DAVID M. FORTNEY
Assistant Attorney General

DMF:sh

MENTAL HEALTH: County Liability for Costs of Care of Mental Patients Admitted to Private Hospitals. §§ 229.22, 230.1, 230.11, 230.18, 444.12, 444.12(2), 444.12(3), The Code 1981. County of legal settlement is responsible for the costs of care and treatment of a mental patient treated at a private facility under § 229.22, The Code 1981. The county of admission or commitment is liable for the costs of care and treatment of mental patients treated at a private facility under § 229.22, The Code 1981, where the legal settlement of the patient is in another state or is unknown. Statutory liability for the costs of care and treatment of a mental patient without legal settlement is only imposed upon the state when such persons are treated at state hospitals. (Mann to Davis, Scott County Attorney, 10/28/81) #81-10-24(L)

ASSISTANT ...

October 28, 1981

Mr. William E. Davis
Scott County Attorney
Scott County Courthouse
416 West Fourth Street
Davenport, Iowa 52801

Dear Mr. Davis:

You requested an opinion of the Attorney General on the following question:

> Is a county liable to pay the entire cost of care, treatment and maintenance of patients, specifically those patients having legal residence in another state or unknown county of settlement, who have been admitted and detained in a private hospital pursuant to the emergency procedures under Section 229.22 of the Code?

This issue was addressed in a prior opinion of this office, Op.Att'yGen. # 79-9-23, in which we opined that the state of Iowa has no liability and/or responsibility for the payment or reimbursement for the costs of psychiatric evaluation or treatment in a private hospital for persons not having legal settlement within the state. We further opined that the county of legal settlement has liability and/or responsibility for the payment or reimbursement for the costs of psychiatric evaluation or treatment in a private facility where a person is placed in a private facility in lieu of admission or commitment to a state mental health institute. We relied on § 444.12(3), The Code 1979, for the above conclusion.

Upon review and evaluation, we reaffirm our view that the county of legal settlement is responsible for the costs of care and treatment of a mental patient detained for emergency commitment and treated at a private facility under § 229.22, The Code 1981. In addition, we conclude that the county of admission or commitment of a person to a private facility is liable for the costs of care and treatment for such person where the person's legal settlement is in another state or is unknown. We reach this conclusion because liability is only imposed upon the state for the care of persons without a legal settlement when such persons are treated at state hospitals. Op.Att'yGen. # 79-9-23; §§ 230.1 and 230.11, The Code 1981. Since the legislature did not impose liability upon the state for the care and treatment of a person at a private facility, and since a person without legal settlement may not be denied appropriate care and treatment solely on the basis of residency when residents are provided such care and treatment, Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); Sheard v. Department of Social Welfare, 310 F. Supp. 544 (N.D. Iowa 1969); 1978 Op.Att'yGen. 596; 1972 Op.Att'yGen. 328, liability for such costs must lie elsewhere. It is our view that the legislature imposed such costs upon the county. We rely upon both § 230.18 and § 444.12(2) and (3), The Code 1981, as support for this conclusion. Those sections read as follows:

> 230.18 Expense in county or private hospitals. The estates of mentally ill persons who may be treated or confined in any county hospital or home, or in any private hospital or sanatorium, and the estates of persons legally bound for their support, shall be liable to the county for the reasonable cost of such support.
>
> 444.12 County mental health and institutions fund. The board of supervisors of each county shall establish a county mental health and institutions fund, from which shall be paid:
>
> * * *
>
> 2. Any portion which the board of supervisors may deem advisable of the cost of psychiatric examination and treatment of persons in need thereof

> or of professional evaluation, treatment, training, habilitation, and care of persons who are mentally retarded, autistic children or persons who are afflicted by any other developmental disability, at any suitable public or private facility providing inpatient or outpatient care in such county. As used in this subsection: (emphasis added)
>
> * * *
>
> 3. The cost of care and treatment of persons placed in the county hospital, county care facility, a health care facility as defined in section 135C.1, subsection 8, or any other public or private facility:
>
> a. In lieu of admission or commitment to a state mental health institute, hospital-school, or other facility established pursuant to chapter 222. (emphasis added)

It is our view that § 230.18, by implication, holds a county liable for the costs of care and treatment for a mental patient incurred at a private facility. That section makes mentally ill persons or their estates liable to a county for monies advanced by the county for mental health care. By implication, the county is liable for the initial costs of care and treatment for the mental health patient in a private facility, subject to recoupment from the patient or his/her estate.

Even if § 230.18 did not imply this liability, we think that the language of § 444.12 and subsections is clear in this regard. Liability is imposed upon the county where a person is admitted or committed to a public or private facility in lieu of admission to a state mental health institute, when such person has no legal settlement.

In summary, we conclude that the county of legal settlement is responsible for the costs of care and treatment of a mental patient treated at a private facility under § 229.22, The Code 1981. The county of admission or commitment is liable for the

costs of care and treatment of mental patients treated at a private facility under § 229.22, The Code 1981, where the legal settlement of the patient is in another state or is unknown. Statutory liability for the costs of care and treatment of a mental patient without legal settlement is only imposed upon the state when such persons are treated at state hospitals.

Sincerely,

Thomas Mann, Jr.

Thomas Mann, Jr.
Assistant Attorney General

TM/jam

STATE OFFICES AND DEPARTMENTS. Department of Health. Division of Vital Records and Statistics. Sections 144.13, 144.15, 144.45, The Code 1981. Certified copies of birth certificates issued by the Department of Health must show the date of registration. The Department may not, in lieu of the date of registration, certify that the registration was timely and that the certificate was not a delayed registration. (Freeman to Pawlewski, Commissioner of Public Health, 10/28/81) #81-10-23(L)

October 28, 1981

Mr. Norman L. Pawlewski
Commissioner of Public Health
Iowa State Department of Health
Lucas State Office Building
Des Moines, Iowa 50319

Dear Commissioner Pawlewski:

You have requested an opinion from our office with respect to older, specifically early 1900, birth certificates, many of which do not bear an original filing date. You have asked in particular whether the Department is required to individually stamp these records with the date of filing, which dates may be obtained from the yearly record books in which the records themselves are contained or whether the Department may, in the alternative, send copies of these certificates without said filing dates but with a notice printed at the top or on the back of the certificate copy which states:

> If this birth certificate does not have an original filing [date], the Department verifies the certificate was filed within the appropriate time limits as required unless otherwise indicated as a delayed filing.

You make specific reference to chapter 470-99.2 of the Iowa Administrative Code.

Chapter 144, The Code 1981, governs the maintenance and operation of a vital statistics system throughout the State of Iowa. Section 144.2, The Code. Certain requirements with respect to the registration of various vital statistics records are outlined throughout chapter 144.

Section 144.13 governs birth certificates and states in pertinent part as follows:

> A certificate of birth for each live birth which occurs in this state shall be filed with the local registrar of the district in which the birth occurs within five days after the birth and shall be registered by the registrar if it has been completed and filed in accordance with this chapter.

Section 144.13(1), The Code. This particular provision does not require that the date of filing be noted on the certificate, itself, nor do any of the other provisions of section 144.13 require such a notation. Section 144.15, regarding delayed registrations of birth, does require that the date of registration of a delayed certificate of birth be noted on that certificate. The section states, in part, that "[c]ertificates of birth registered one year or more after the date of occurrence shall be marked "delayed" and shall show on their face the date of the delayed registration."

Your question, though, appears to be concerned with those older certificates of birth which were not registered a year or more after the date of birth. While section 144.13 contains no specific requirement for notation of filing or registration date, section 144.45 must be noted. That section provides in pertinent part as follows:

> Certified copies. The state registrar and the clerk of the district court shall, upon written request from any applicant entitled to such record, issue a certified copy of any certificate or record in his custody or of a part thereof. Each copy issued shall show the date of registration; and copies issued from records marked "delayed", "amended", or "court order" shall be similarly marked and show the effective date.
>
> * * * * * * * * *
>
> No person shall prepare or issue any certificate which purports to be an original, certified copy, or copy of a certificate of birth, death, fetal death, or marriage except as authorized in this chapter.

[Emphasis added.] According to section 144.45, a certified copy of a record of birth must show the date of registration. The legislature uses the word "shall." The word "shall" imposes

a duty. Section 4.1(36)(a), The Code. Furthermore, "[w]hen addressed to a public official the work 'shall' is ordinarily mandatory, excluding the idea of permissiveness or discretion." Schmidt v. Abbott, 26 Iowa 886, 890, 261 Iowa 156 N.W.2d 649, 650 (1968). The below quoted portion of section 144.45 also shows an intent on the part of the legislature that the provisions of that section are mandatory and not permissive or discretionary.

No exception to a showing of the date of registration on a certified copy of records in the custody of the state registrar is made by the statute. Consequently, it appears that the law, itself, requires that the registration date be shown when a certified copy of a record is issued. I.A.C. 470-99.2, which provides in part that "[t]he registration of a birth after the statutory time prescribed for filing but within one year from the date of birth shall be registered on the standard form of a live birth certificate," offers no relief from the clear requirement of section 144.45. Even if I.A.C. 470-99.2 did purport to grant such relief, its validity would then be questionable since agencies may not proscribe rules which are contrary to or in excess of their statutory grants of authority. Iowa Auto Dealers Association v. Iowa Department of Revenue, 301 N.W.2d 760, (Iowa 1981).

In answer to your specific question, though, it must be noted that section 144.45 only refers to certified copies of records issued by the state registrar. Section 144.43 does not refer to the original records maintained by the state registrar. Furthermore, section 144.13 does not mandate that the records, themselves, carry a notation of the date of filing or registration. Thus, the law does not appear to require that the Department of Health go through all of the old records of birth in its custody and note the date of registration where these records are not delayed registrations of birth governed by section 144.14. When a certified copy is released, however, the date of registration must be noted thereon at that time.

In conclusion, certified copies of birth certificates issued by the state registrar upon request shall show the date of registration. It is the opinion of this office that the Department may not issue a certified copy of a certificate of birth without the date of registration but, rather, with a statement certifying that the certificate was filed within the appropriate time limits and was not a delayed registration of birth.

Sincerely yours,

Jeanine Freeman

JEANINE FREEMAN
Assistant Attorney General

JF:djc

MENTAL HEALTH: COUNTIES AND COUNTY OFFICERS: Investigation of mental patient's ability to pay for mental health care. §§ 4.1(36)(a), 230.1, 230.15, 230.25(1), 230.26, The Code 1981. County board of supervisors has an affirmative duty to investigate the ability of a mental health patient to pay, or others liable for the patient's support, to pay for mental health care. The board is not required to direct the county auditor to index a patient's name where the board finds that the patient or others liable for the patient's support is able to pay for mental health care, but is required to direct the auditor not to index a patient's name where the board finds an inability to pay. The county auditor is required to automatically index a patient's name in the county's account book, unless pursuant to § 230.25(1) the board of supervisors directs that the patient's name not be indexed. (Mann to Bloom, Montgomery County Attorney, 10/23/81) #81-10-22(L)

October 23, 1981

Mr. Dennis D. Bloom
Montgomery County Attorney
Montgomery County Courthouse
Red Oak, Iowa 51566

Dear Mr. Bloom:

You requested an opinion of the Attorney General on the question of what procedural steps must be taken by a county in order to preserve its right to collect monies advanced for the care and treatment provided to county residents at mental health facilities. In substance, you ask the following specific questions:

1. Does a county board of supervisors have an affirmative duty to investigate the ability of a mental patient, and others liable for his/her care and treatment to pay for such mental health care?

2. Where the board finds that a mental health patient, or others liable for his/her support, is able to pay for mental health care provided, is the board required to direct the county auditor to index the name of the patient in the county's account book?

3. If the board fails to direct the auditor to index a patient's name, should the auditor automatically index the patient's name if the board does not issue a finding that the patient is unable to pay for mental health care, and does not direct the auditor not to index the patient's name?

In responding to your questions, we restate the well established principle that a county is liable for the costs of care and treatment provided to legal residents of the county at mental health facilities. 1978 Op.Att'yGen. 126; 1976 Op.Att'yGen. 400; § 230.1, The Code 1981. A county may, however, recover monies advanced for mental health care from a mental health patient, or from others legally liable for the patient's support. Op.Att'yGen. # 81-8-11(L); § 230.15, The Code 1981. Thus, a county is required to investigate and determine the ability of a mental health patient, and others liable for the patient's support, to pay for the expenses of the patient's hospitalization. In this regard, § 230.25(1), The Code 1981, requires the following:

> 1. Upon receipt from the county auditor of the list of names furnished pursuant to section 230.21, the board of supervisors shall make an investigation to determine the ability of each person whose name appears on the list, and also the ability of any person liable under section 230.15 for the support of that person, to pay the expenses of that person's hospitalization. If the board finds that neither the hospitalized person nor any person legally liable for his or her support is able to pay those expenses, they shall direct the county auditor not to index the names of any of those persons as would otherwise be required by section 230.26. However the board may review its finding with respect to any person at any subsequent time at which another list is furnished by the auditor upon which that person's name appears. If the board finds upon review that that person or those legally liable for his or her

> support are presently able to pay the expenses of that person's hospitalization, that finding shall apply only to charges stated upon the certificate from which the list was drawn up and any subsequent charges similarly certified, unless and until the board again changes its finding. (emphasis added).

This office has reviewed § 230.25(1) in two prior opinions, Op.Att'yGen. # 79-6-22 and 1978 Op.Att'yGen. 1. Both of those opinions addressed substantive questions about a board of supervisor's duty to determine a person's ability to pay for mental health care. In 1978 Op.Att'yGen. 1, we opined that a board's determination of ability to pay is to be made each time the county is billed for treatment, under any standards and procedures which are necessary, and which directly tend to accomplish its duty to determine ability to pay, and which are not otherwise inconsistent with law. In Op.Att'yGen. # 79-6-22, we opined that the board's assessment of a person's ability to pay should be limited to a person's present ability to pay, based on the person's nonexempt assets and the economic needs of the person and his/her family. Relying on the above opinions and the language of § 230.25(1), we now conclude that a board of supervisors has an affirmative duty to investigate a person's ability to pay for mental health care. The legislature dictated that the board "shall" make an investigation of a person's ability to pay. The word "shall" imposes a duty. § 4.1(36)(a), The Code 1981. Thus a county board of supervisors has an affirmative duty to investigate the ability of a mental health patient to pay, or ability of others liable for the patient's support, to pay for mental health care.

You next inquire as to whether the board is required to direct the county auditor to index a patient's name in the county's account book where the board determines that the patient or others liable for his/her support is able to pay for mental health care. In reviewing § 230.25(1), we find no language which imposes an affirmative duty upon the board to direct the county auditor to index a patient's name where the board finds that the patient, or others liable for the patient's support, are able to pay for mental health services. In fact, the board is only required to give direction to the county auditor where the board finds that a person is unable to pay. In those instances, the board "shall"

direct the auditor not to index the patient's name in the account book. This is the only requirement imposed by the statute.

Concededly, it could be argued that § 230.25(1) requires by negative implication that the board direct the auditor to index a patient's name where the board finds an ability to pay. However, no such language is included in the statute and it should not be read in under the guise of statutory construction. State v. Hesford, 242 N.W.2d 256 (Iowa 1976); Kelly v. Brewer, 239 N.W.2d 109 (Iowa 1976).

Equally as important, this question was addressed in another statutory provision. Section 230.26, The Code 1981, imposes a duty upon the auditor to keep an accurate account of patient costs. It reads as follows:

> 230.26 Auditor to keep record. The auditor of each county shall keep an accurate account of the cost of the maintenance of any patient kept in any institution as provided for in this chapter and keep an index of the names of the persons admitted or committed from such county. The name of the husband or the wife of such person designating such party as the spouse of the person admitted or committed shall also be indexed in the same manner as the names of the persons admitted or committed are indexed. The book shall be designated as an account book or index, and shall have no reference in any place to a lien. (emphasis added).

Under the above provision, the county auditor is duty bound to index the name of persons from the county receiving mental health care in an institution. Again, the legislature used the word "shall", and that word imposes a duty. § 4.1(36)(a), The Code 1981. Consequently, the county auditor is required to automatically index a patient's name in the county's account book, unless pursuant to § 230.25 the board of supervisors directs that the patient's name not be indexed.

In summary, we conclude that a county board of supervisors has an affirmative duty to investigate the ability of a mental health patient to pay, or others liable for the patient's support,

to pay for mental health care. The board is not required to direct the county auditor to index a patient's name where the board finds that the patient or others liable for the patient's support, to pay for mental health care. The board is not required to direct the county auditor to index a patient's name where the board finds that the patient or others liable for the patient's support is able to pay for mental health care, but is required to direct the auditor not to index a patient's name where the board finds an inability to pay. The county auditor is required to automatically index a patient's name in the county's account book, unless pursuant to § 230.25(1) the board of supervisors directs that the patient's name not be indexed.

Sincerely,

Thomas Mann, Jr.
Assistant Attorney General

TM/jam

BANKS: HOLDING COMPANIES CONTROL. Section 524.1803, The Code 1981; 12 U.S.C. §§ 1817 and 1842. No bank holding company shall make any offer to purchase or acquire, directly or indirectly, the voting shares of any state or national bank without extending the same offer to owners of all outstanding shares of the bank not owned or controlled by the holding company. The mechanism of disclosure may vary so long as it reasonably apprises the shareholders of the current price offered except in those instances where federal and state securities law and federal banking law applies. (Hagen to Huston, State Superintendent of Banking, 10/23/81) #81-10-21(L)

October 23, 1981

Thomas H. Huston, Superintendent
Department of Banking
L O C A L

Dear Mr. Huston:

We are in receipt of your opinion request in which you ask whether a bank holding company would be required to make an offer to purchase all of the shares of a bank from the shareholders thereof in the following situations:

1. An existing bank holding company ("Company") which owns 80 percent or more of the issued and outstanding shares of a state or national bank ("Bank") doing business in Iowa, is contacted by one of the minority shareholders of the Bank who offers to sell his shares to the Company.

2. An existing bank holding company ("Company") which owns 80 percent or more of the issued and outstanding shares of a state or national bank ("Bank") learns of the death of one of the minority shareholders of the Bank and makes an offer to purchase the shares of the Bank from the estate of the deceased shareholder.

3. An existing bank holding company ("Company") offers to acquire less than a controlling interest in a company (whether or not a bank holding company under the Act) which owns a controlling interest in a state or national bank doing business in Iowa.

4. An existing bank holding company ("Company") offers to acquire less than a controlling interest in a company (whether or not a bank holding company under the Act) which owns a controlling interest in a state or national bank not doing business in Iowa.

5. An existing bank holding company ("Company") offers to acquire less than a controlling interest in a company (whether or not a bank holding company under the Act) which owns less than a controlling interest in a state or national bank.

The answer to all of the above questions is yes. Section 524.1803, The Code 1981, states as follows:

> Offer to purchase stock. No bank holding company shall make any offer to purchase or acquire, directly or indirectly, the voting shares of any state or national bank without extending the same offer to the owners of all outstanding shares of the bank not owned or controlled by the holding company. The refusal of any shareholder to accept the offer shall not be a bar to purchase or acquisition of the shares of any other shareholder if all other pertinent requirements of this division have been met by the bank holding company. [Emphasis supplied.]

Under this provision, there does not seem to be any alternative other than offering the same price to all individuals. This interpretation is strengthened by the recent cases of Linge v. Ralston Purina Company, 293 N.W.2d 191 (Iowa 1980) and Rowen v. LeMars Mutual Ins. Co. of Iowa, 282 N.W.2d 639 (Iowa 1979). Majority shareholders do owe a fiduciary duty to minority shareholders. Linge, supra, 293 N.W.2d at 194. The underlying factual concern in the Linge case is whether the majority shareholder and the tender offeror had made a disclosure of all material facts both in the context of a tender offer and in the context of a short form merger. But while this June, 1980, Iowa Supreme Court decision established the principle that the majority shareholders owe a fiduciary duty to minority shareholders, it did not further address the specific contours of the fiduciary duty. However, these legal contours have been statutorily established in the context of bank holding company ownership of bank stock. Section 524.1803, as cited above, could not be any clearer and a holding company when making an offer to

any of the parties in any of the transactions listed in paragraphs 1 through 5 above must apprise other shareholders of the current price and make that offer available to any shareholders who wish to sell their stock at that particular price. This does not appear to mean, in the isolated purchase situation described in paragraphs 1 and 2 above, that a bank holding company must send a letter to each and every shareholder but that one must have a system for reasonably apprising shareholders of the current purchase price.

The bank holding company may advise shareholders that the current price offered may be disclosed by any public mechanism or system which they so select, i.e., stock exchange, posting, letter, telephone, etc., as long as it reasonably apprises the shareholders of the current price.

Such a system eliminates the necessity of readvising all of the shareholders for each and every reason no matter how small the purchase. However, in the case of any substantial purchase, i.e., 5% or more, it would seem more prudent to advise the shareholders by letter. Finally, we would note that in each case, the bank holding company should consult both the Iowa and Federal Securities Acts and the Federal Reserve Deposit Act, 12 U.S.C. § 1817 and the Bank Holding Company Act, 12 U.S.C. § 1842, to ensure compliance with the relevant statutory provisions and rules thereunder.

Very truly yours,

HOWARD O. HAGEN
Assistant Attorney General

HOH:sh

LAW ENFORCEMENT, POLICEMEN AND FIREMEN, SHERIFFS, COUNTIES, MUNICIPALITIES: Reserve Peace Officers, Unified Law Enforcement - §§28D.4(2), 28E.1, 28E.21, 80B.2, 80D.1, 80D.6, 80D.8, and 80D.9, The Code (1981). Because a regular peace officer force is a condition precedent to the establishment of a reserve peace officer force, a peace officer who is the sole member of a law enforcement agency must be certified as a regular officer, pursuant to Ch. 80B, The Code (1981), rather than as a reserve officer, pursuant to Ch. 80D, The Code (1981). Local governments including a county, portion of a county, cities, or any combination thereof, may establish a unified law enforcement district pursuant to §§28E.21-28E.28, The Code (1981), for the joint exercise of their law enforcement authority. Law enforcement agencies may exchange officers and employees pursuant to Ch. 80D, The Code (1981), however, if such exchange includes reserve peace officers, the receiving agency must have an existing regular peace officer force. (Hayward to Binneboese, State Representative, 10/23/81) #81-10-19(L)

The Honorable Donald Binneboese
State Representative
Rural Route #2
Hinton, Iowa 51024

October 23, 1981

Dear Representative Binneboese:

You have asked this office for an opinion concerning law enforcement in the smaller communities of Iowa. Specifically, you have asked the following questions.

1. May a peace officer, who works part-time, as the sole peace officer in a community, legally perform the duties of that office if qualified as a reserve officer under Chapter 80D, The Code (1981), rather than certified by the Iowa Law Enforcement Academy under Chapter 80B, The Code (1981), and

2. May cities share the services of a part-time law enforcement officer.

1. A Reserve Peace Officer Force Cannot Exist in the Absence of a Regular Peace Officer Force.

If a community has a one officer police force, the officer must be certified through the Iowa Law Enforcement Academy and not as a reserve peace officer pursuant to Chapter 80D, The Code (1981). This is so because a regular force is a prerequisite, or condition precedent, to the establishment of a reserve force. Also, in a related subject, the distinction between a regular peace officer and a reserve peace officer lies not in the amount of time devoted to a position. Rather it lies in the nature of the authority such officers possess and the relationship between one classification of officers and the other.

At first blush, the distinction between a reserve and regular officer may not seem great. However, a careful

reading of Chapter 80D, The Code (1981), will quickly demonstrate that there are crucial and substantive differences between the two. Section 80D.1, The Code (1981), defines a reserve officer by stating in pertinent part:

> . . .A reserve peace officer is a volunteer, nonregular, sworn member of a law enforcement agency who serves with or without compensation, has regular police powers while functioning as an agency's representative and participates in the agency's activities including those of crime prevention and control, preservation of the peace and enforcement of the law.
>
> * * * * * *
>
> (emphasis added.)

A reserve peace officer has substantially the same authority as a regular peace officer. Section 80D.6, The Code (1981), states in pertinent part:

> * * * * * *
>
> While in the actual performance of official duties, reserve peace officers shall be vested with the same rights, privileges, obligations, and duties as any other peace officers.

Nonetheless, there is a difference between a reserve peace officer and a part-time regular officer. This difference is pointed out in §80D.8, The Code (1981), which states:

> Reserve peace officers shall act only in a supplementary capacity to the regular force and shall not assume full-time duties of regular peace officers without first complying with all requirements for regular peace officers.

and §80D.9, The Code (1981), which states in pertinent part:

> Reserve peace officers shall be subordinate to regular peace officers, [and] shall not serve as peace officers unless under the direction of regular peace officers. . . . Each department for which a reserve force is established shall appoint a regular force peace officer as the reserve force co-ordinating and supervising officer. That regu-

> lar peace officer shall report directly to the chief of police, sheriff or commissioner of public safety or the commissioner's designee, as the case may be.

Obviously, a reserve peace officer cannot serve in a supplementary capacity or be supervised by a nonexistent regular force. Also the chief of police, county sheriff and Commissioner of Public Safety are responsible for the establishment of training standards, §80D.3, certification of training, §80D.4, assignment of duties, §80D.6, and authorization to carry a firearm, §80D.7, The Code (1981), for reserve peace officers engaged by their respective departments. It should be clear from this that a peace officer cannot be a member of, or constitute the whole membership of, a reserve force unless it is established as an adjunct to an existing and staffed regular peace officer force.

The General Assembly stated its intent that law enforcement personnel in this state be capable and professional when it created the Iowa Law Enforcement Academy. Section 80B.2, The Code (1981), states:

> It is the intent of the legislature in creating the [Iowa law enforcement] academy and council to maximize training opportunities for law enforcement officers, to co-ordinate training and to set standards for the law enforcement service, all of which are imperative to upgrading law enforcement to professional status.

The use of reserve forces in a limited capacity under the direction of fully trained regular officers is not in conflict with this intent. The exclusive employment of reserve officers is not only contrary to the provisions of Chapter 80D, cited above, it would also frustrate the legislative intent stated in §80B.2 to upgrade and professionalize law enforcement.

These statutes make a clear distinction between the reserve and regular peace officer. A regular peace officer is expected to be fully trained so that he or she can capably function in all areas of law enforcement. A reserve peace officer, with substantially less training, is expected to perform those specific tasks for which he or she has received training, and to do so under the watchful eye of a regular officer. The direction of reserve officers by regular officers

does not necessarily require immediate physical supervision Op. Atty. Gen. #80-12-4 and #81-6-9. Yet, reserve officers cannot act with the same independence or discretion as regular peace officers.

For these reasons, if a law enforcement agency consists of one officer, that officer must be a regular peace officer in accordance with the standards and regulations of the Iowa Law Enforcement Academy. Such officer's training cannot be limited to that required of a reserve peace officer in Chapter 80D, The Code (1981).

2. Cities and/or Counties May Jointly Exercise Their Law Enforcement Authority.

Local governments may jointly exercise their law enforcement powers for the purpose of doing so in a more efficient manner. Section 28E.1, The Code (1981), states:

> The purpose of this chapter is to permit state and local governments in Iowa to make efficient use of their powers by enabling them to provide joint services and facilities with other agencies and to co-operate in other ways of mutual advantage. This chapter is to be liberally construed to that end.

Thus it is possible for a county, portion of a county, cities or a combination thereof to provide for unified law enforcement within their areas of jurisdiction through the creation of a unified law district and public safety commission under the provisions of §§28E.21-28E.28, The Code (1981). Such a district would be considered a single entity. Therefore, if the district had a regular peace officer force, it could assign a reserve officer on a part time basis to a particular community subject to the supervision requirements of Ch. 80D, The Code (1981).

Chapter 28D, The Code (1981), provides a vehicle for the exchange of law enforcement personnel between local agencies which may be of some assistance in improving the provision of enforcement services in small communities. However, because §28D.4(2), The Code (1981), states that the receiving agency is responsible for the supervision of employees exchanged, a Chapter 28D agreement cannot involve the exchange of reserve officers unless the receiving agency has a regular force to supervise them.

3. Summary

Because a regular peace officer force is a condition precedent to theestablishment of a reserve officer peace force, a peace officer who is the sole member of a law enforcement agency must be certified as a regular peace officer in accordance with the rules and regulations of the Iowa Law Enforcement Academy. Local governments including a county, portion of county and cities, or any combination thereof, can, pursuant to §§28E.21-28E.28, The Code (1981), form a unified law enforcement district for the joint exercise of their law enforcement powers. Law enforcement agencies may exchange personnel under Chapter 28D. Such exchanges may include reserve peace officers if the receiving agency has an existing regular peace officer force.

Respectfully yours,

GARY L. HAYWARD
Assistant Attorney General
Public Safety Division

GLH:dkl

MOTOR VEHICLES: Minors' school licenses. Section 321.194, The Code 1981; DOT Reg. 820-[07,C]13.5(2)b; DPI Reg. 670-6.11(257). School Administrators do not have discretion under §321.194, The Code 1981, to deny the issuance of statements of necessity based on criteria wholly unrelated to those specified in that section, and administrative rules promulgated under it. The Iowa Department of Transportation does not possess statutory authority for accepting minors' school license applications without a statement of necessity. (Dundis to Angrick, Citizens' Aide/Ombudsman, 10/23/81) #81-10-18(L)

October 23, 1981

Mr. William P. Angrick, II
Citizens' Aide/Ombudsman
Capitol Complex
Des Moines, IA 50319

Dear Mr. Angrick:

In a letter dated August 6, 1981 you posed two questions concerning the issuance of minors' school licenses by the Iowa Department of Transportation. Under §321.194, The Code 1981:

> "Upon certification of a special need by the school board or the superintendent of the applicant's school, the department may issue a restricted license to any person between the ages of fourteen and eighteen years. . . for the purposes of attending duly scheduled courses of instruction and extracurricular activities at such school. . ."

You ask:

> "1. Under Section 321.194, does the school administrator have discretion to deny an affidavit of necessity based on criteria wholly unrelated to those specified in the Code and Administrative rules?
> 2. If the affidavit is denied by the local school administrator, does statutory authority exist for the DOT to accept an application for the license without it?"

1. The §321.194 application requirements for a minors' school license are as follows:

> "Each application shall be accompanied by a statement from the school board or superintendent of the applicant's school. The statement shall be upon a form provided by the department. The department of public instruction shall adopt rules pursuant to chapter 17A establishing criteria for issuing a statement of necessity. Upon receipt of a statement of necessity, the department shall issue a resticted license. The fact that the applicant resides at a distance less than one mile from his or her school is prima facie evidence of the nonexistence of necessity for the issuance of such a license". [emphasis added]

In compliance with the statutory directive to adopt rules establishing criteria for the issuance of such a statement, the Iowa Department of Public Instruction did so in DPI Regulation 670-6.11(257):

> "Minor's school license. The local school board or superintendent of the applicant's school shall assure that the following requirements are met prior to certifying a special need exists for the issuance of the minor's school license.
> 6.11(1) The applicant lives one mile or more from his or her school of attendance. Distance to the school of attendance shall in all cases be measured on the public highway only, starting in the roadway opposite the private entrance to the residence of the applicant and ending in the roadway opposite the entrance to the school grounds.
> 6.11(2) The applicant for the minor's school license is enrolled in instructional programs or involved in extracurricular activities at the applicant's school of attendance that occur at such times that make it impossible to take advantage of the school transportation service, or that the school transportation service is not provided.
> This rule is intended to implement the Acts of the Sixty-eighth General Assembly, 1980 Regular Session, Chapter 1094.

Those criteria have been incorporated in a "Statement of Necessity for School License" form provided by the department, also as directed by statute. This is the same form as that attached to your letter. These are the only regulations involving minors' school licenses that have been issued by the Department of Public Instruction.

Although §321.194 does not expressly direct school boards and superintendents to issue statements of necessity once the Department of Public Instruction criteria are met, we feel that is its direct intent. Each application must be accompanied by a statement of necessity, and as we shall see in the answer to your question number two, it is the only possible way of obtaining a minors' school license. Once more, upon receipt of such a statement, the department "shall" issue the license without further discretion in the matter.

The cardinal importance of the statement of necessity in obtaining a minors' school license naturally leads to the further requirement of rules "establishing criteria for issuing a statement of necessity". This statutory directive seems clear in its implication that rules are required to establish criteria so that individual, standardless discretion will be eliminated. To argue that although criteria have lawfully been established, school boards and superintendents may ignore them, substituting others in their place, makes the sentence meaningless.

It is our opinion, therefore, that school administrators do not have discretion under §321.194, The Code 1981 to deny the issuance of statements of necessity based on criteria wholly unrelated to those specified in that section, and administrative rules promulgated under it.

2. Section 321.194 was amended in 1980 by an Act of the Sixty-eighth General Assembly, (1980 Session 68th G.A., ch. 1094, §21). Prior to this amendment the relevant portion of this statute read as follows:

> Whenever the necessity therefor is shown, a restricted license may be issued to any person between the ages of fourteen and eighteen years. . . For the purpose of establishing a need for the license provided for in this section, each application shall be accompanied by an affidavit from the school board or superintendent of the applicant's school

> which affidavit shall be upon a form provided by the department and shall state the acts deemed to justify the issuance of a license to the applicant. Neither such affidavit nor the inability to obtain the same shall be binding on the department but may be considered by the department in its determining of whether or not to grant the application." [emphasis added]

Attention is drawn to several changes not earlier cited. The term "Statements of necessity" replaces "affidavits". More importantly, the underlined sentence was stricken and the requirement that each application be accompanied by a statement of necessity added, along with the direction that the department "shall" issue a minors' school license upon receipt of the statement. Additionally, the unamended statute that had begun, "Wherever the necessity therefore is shown, a restricted license may be issued . . ." was changed to read, "Upon certification of a special need by the school board or the superintendent of the applicant's school, the department may issue a restricted license. . . ."

As you state in your letter, the Iowa Department of Transportation does have an administrative rule, DOT Regulation 820-[07,C]13.5(2)b, which appears to allow an applicant to submit a written statement in lieu of the statment of necessity. However, it is our opinion that §321.194, as amended, removes all authority from the department to accept an application for a minors' school license without a statement of necessity, and the rule is thus presently invalid.

It should be noted that this office has been informed by the Office of Driver License within the Iowa Department of Transportation that, although this rule has not been deleted to reflect the statutory amendment, the department, in practice no longer accepts any statement other than the prescribed statements of necessity.

Sincerely,

Stephen P. Dundis

STEPHEN P. DUNDIS
Assistant Attorney General

COURTS: JUDICIAL MAGISTRATES; Accessibility to and Retention of electronic recordings. §§631.11(3); 631.11(5); Ia. Rules Cr. Proc. 2(4)(g)(1); 2(4)(f), The Code. In civil proceedings electronic recordings may be removed from courthouse for transcription under supervision of magistrate. Electronic recordings in criminal proceedings may not be removed. The clerk of district court is responsible for destruction. (Swanson to Tullar, Sac County Attorney, 10/23/81) #81-10-17(L)

October 23, 1981

Mr. Lon R. Tullar
Sac County Attorney
110 East State
Sac City, Iowa 50583

Dear Mr. Tullar:

We have received your request for an opinion from this office concerning preservation of the "record" in Sac County Magistrate matters.

You state that a tape recorder is used of all testimony and proceedings in Sac County Magistrate Court. In the past, after a hearing, whether civil or criminal, if a party wanted the tape preserved, they made the request to the Magistrate and then checked the tape out to make their own transcript. You request an opinion of the Attorney General on the question of whether this practice is proper.

You further ask how long the tape recordings must be retained before they are destroyed by erasor, re-use, disposal, or otherwise.

In civil matters, Judicial Magistrates have jurisdiction over small claims under Section 631.2, Code, 1981. The record made upon hearing and disposition of electronic recordings are governed by Section 631.11, Code, 1981. Subsection 3 thereof provides:

> ". . . the magistrate, in his discretion, may cause the proceedings upon trial to be reported electronically. If the proceedings are being electronically recorded both parties shall be notified in advance of that recording. If the proceedings have been reported electronically the recording shall be retained under the jurisdiction of the magistrate unless appealed, and upon appeal shall be transcribed only by a person designated by the court under the supervision of the magistrate." (Emphasis supplied)

The terms "supervise" and "supervision" have generally been defined as the act of overseeing with power of direction, inspecting with authority, having general oversight of, and superintendence, but do not necessarily imply actual custody or possession. 83 C.J.S., pp. 899-901.

By the terms of the statute, it can be seen that the Magistrate is allowed some discretion in the manner of transcription of the recorded tapes upon appeal. An application should be made to the Court for an order allowing such transcription. It may then designate an individual to prepare the transcript and may exercise such supervision thereof as it deems appropriate under the circumstances. The language of this section would not preclude the designated individual from removing the recorded tapes from actual custody of the Magistrate for purposes of transcription, so long as actual supervision thereof by the Magistrate is undertaken by court order or otherwise.

The matter of destruction of such electronic recordings in civil cases is discussed in Section 631.11(5), Code, 1981, which is self-explanatory. That subsection states:

> "Unless an appeal is taken, an electronic recording of a proceeding in small claims shall be retained until the time for appeal has expired as specified in section 631.13. Thereafter, the magistrate may direct that the recording tape or other device be erased and used for subsequent recordings. If the proceeding is appealed, the recording may be erased following entry of judgment by the district judge hearing the appeal."

Accessibility to such recorded tapes in criminal proceedings before the Judicial Magistrate is described in Iowa Rule of Criminal Procedure No. 2(4)(g)(1). That rule provides as follows:

> "On timely application to a magistrate, for good cause shown, and subject to the availability of facilities, the attorney for a defendant in a criminal case may be given the opportunity to have the recorded tape of the hearing on preliminary examination replayed for his or her information in connection with any further hearing or in connection with his or her preparation for trial." (Emphasis supplied)

The use of the phrase "subject to the availability of facilities", as used here, contemplates the retention of such recorded tapes in the custody of the Magistrate or within the confines of the courthouse. Should counsel desire to procure a transcript of a recorded tape, he or she may do so, on timely application to the Magistrate for good cause, by making a copy of such tape within courthouse facilities. Counsel may also have a certified court reporter or other person make a transcription upon the courthouse premises.

After conducting the criminal proceedings, the Magistrate is required to transmit forthwith to the clerk of the district court all papers and recordings in the proceeding. Iowa Rule of Criminal Procedure No. 2(4)(f).

The method of destruction of records by the clerk of the district court is set out in Sections 606.21, .22, Code, 1981.

We hope that the above information adequately answers your questions. If we can be of further assistance, please advise.

Yours very truly,

Gary H. Swanson

GARY H. SWANSON
Assistant Attorney General

GHS/mel

MUNICIPALITIES: Civil Service. Sections 4.1(22), 4.1(36)c, 400.6, and 400.11, The Code 1981. The chief of police is not one of the positions which may be temporarily filled according to the provisions of Ch. 400. "Vacancy" as used in Ch. 400 does not include the situation where the person occupying the position in question is on sick leave, regardless of the duration. Also, the twenty-day requirement in Ch. 400 is to be construed in accordance with the terms of § 4.1(22). Finally, the appointive power granted to a person or body to temporarily fill a vacancy is permissive or discretionary, rather than mandatory. [Walding to Junkins, State Senator, 10/23/81] #81-10-16(L)

October 23, 1981

The Honorable Lowell L. Junkins
State Senator
Montrose, Iowa 52639

Dear Mr. Junkins:

This opinion is in response to your request dated August 26, 1981, regarding an interpretation of § 400.11, The Code 1981. Specifically, you have asked:

> 1. Do the provisions of section 400.11 of the Code relating to the salary of one temporarily filling a vacancy apply when the vacancy is in the office of Chief of Police?
>
> 2. In an Attorney General's opinion issued in 1973 (Blumberg to Rhodenburg, Pottawattamie County Attorney, 2/7/73) it was found the term "vacancy" as used in this section does not apply to vacations or temporary leaves of absences. In your opinion, is there a vacancy when the employee is on sick leave? Does the length of the sick leave have an effect on whether a vacancy exists?
>
> 3. When the term "twenty days" is used in section 400.11 does this mean 20 calendar days or 20 working days?
>
> 4. When a vacancy occurs, does section 400.11 require the person having the appointing power to fill the vacancy temporarily or may the position be left vacant?

Section 400.11, The Code 1981, provides in pertinent part:

> When there is no such preferred list or certified eligible list, or when the eligible list shall be exhausted, the person or body having the appointing power may temporarily fill a newly created office or other vacancy only until an examination can be held and the names of qualified persons be certified by the commission, and such temporary appointments are hereby limited to ninety days for any one person in the same vacancy, but such limitation shall not apply to persons temporarily acting in positions regularly held by another. Any person temporarily filling a vacancy in a position of higher grade for twenty days or more, shall receive the salary paid in such higher grade. [Emphasis added]

In response to your first inquiry, it is our judgment that the provisions of § 400.11 relating to the salary of one temporarily filling a vacancy do not apply when the vacancy is in the office of chief of police. Our rationale is twofold. First and foremost, the provisions of Ch. 400 do not apply to the office of chief of police. See § 400.6, The Code 1981. As such, the provisions of § 400.11 are inapplicable to that position. Second, that section refers to a vacancy in a "position of higher grade." The term "grade", as used in relation to civil service, refers to the rank or relative positions occupied by civil service employees. The office of police chief is not a civil service position. Accordingly, the chief of police is not one of the positions which may be temporarily filled according to the provisions of Ch. 400. This is not to say, however, that an acting police chief cannot receive compensation commensurate with the position of chief of police. The city council, which has authority to establish the compensation of the police chief, has equal authority with regard to the compensation of the acting police chief.

In a prior opinion, 1973 Op.Att'y.Gen. 45, we found that "vacancy" as used in § 400.11 does not include those situations where the person occupying the position in question is on vacation or a temporary leave of absence. An answer to your second inquiry can be gleaned from the rationale of that opinion. In particular, it was our contention, when the term "vacancy" is taken in the full context of the paragraph, that the legislature

is referring to permanent vacancies. Sick leave, of course, does not create a permanent vacancy. Accordingly, "vacancy" as used in Ch. 400 does not include the situation when the person occupying the position in question is on sick leave, regardless of the duration.

A response to your third inquiry is found in Ch. 4. In particular, § 4.1(22), The Code 1981, provides:

> Computing time--legal holidays. In computing time, the first day shall be excluded and the last included, unless the last falls on Sunday, in which case the time prescribed shall be extended so as to include the whole of the following Monday, provided that, whenever by the provisions of any statute or rule prescribed under authority of a statute, ~~the last day for the~~ commencement of any action or proceedings, the filing of any pleading or motion in a pending action or proceedings or the perfecting or filing of any appeal from the decision or award of any court, board, commission or official falls on a Saturday, a Sunday, the first day of January, the twelfth day of February, the third Monday in February, the last Monday in May, the fourth day of July, the first Monday in September, the eleventh day of November, the fourth Thursday in November, the twenty-fifth day of December, and the following Monday whenever any of the foregoing named legal holidays may fall on a Sunday, and any day appointed or recommended by the governor of Iowa or the president of the United States as a day of fasting or thanksgiving, the time therefor shall be extended to include the next day which is not a Saturday, Sunday or such day hereinbefore enumerated.

Accordingly, the twenty-day requirement in Ch. 400 is to be construed in accordance with the terms of § 4.1(22). As such, when the term "twenty days" is used in Ch. 400 it refers to twenty calendar days.

As concerns your fourth and final inquiry, the underscored portion of § 400.11 makes it clear that the person or body having appointive power "may" temporarily fill a vacancy. Albeit the

legislature has provided that the term "may" confers a power, § 4.1(36)c, The Code 1981, such provision is inapplicable since Ch. 400 was enacted prior to July 1, 1971. Hence, common law rules of statutory construction apply.

The Iowa Supreme Court has ruled that the term "may", absent a contrary legislative intent, implies permissive or discretionary rather than mandatory action or conduct. See Schultz v. Board of Adjustment of Pottawattamie County, 258 Iowa 804, 139 N.W.2d 448 (1966); John Deere Waterloo Tractor Works of Deer & Co. v. Derifield, 252 Iowa 1389, 110 N.W.2d 560 (1961). Accordingly, the appointive power granted to a person or body to temporarily fill a vacancy is permissive or discretionary, rather than mandatory.

In summary, then, the chief of police is not one of the position which may be temporarily filled according to the provisions of Ch. 400. "Vacancy" as used in Ch. 400 does not include the situation where the person occupying the position in question is on sick leave, regardless of the duration. Also, the twenty-day requirement in Ch. 400 is to be construed in accordance with the terms of § 4.1(22). Finally, the appointive power granted to a person or body to temporarily fill a vacancy is permissive or discretionary, rather than mandatory.

Very truly yours,

LYNN M. WALDING
Assistant Attorney General

LMW/ny

CLERKS: CRIMINAL PROCEDURE: CLERK OF COURT. -- There is no docketing fee for indictable criminal cases; the docketing fee for appeals of simple misdemeanors should be taxed as a part of the costs by the clerk rather than being collected when the notice of appeal is filed. (Williams to O'Brien, Court Administrator, Supreme Court of Iowa, 10/21/81) #81-10-15(L)

October 21, 1981

Williams J. O'Brien
Court Administrator
State Capitol
L O C A L

Dear Mr. O'Brien:

This letter is in answer to your request for an opinion concerning the collection of filing fees in criminal actions. You specifically ask:

> 1. Does the twenty-five dollars "for filing any petition, appeal, or writ or error and docketing the same" apply to criminal cases as well as civil cases? Is an indictment or trial information a "petition, appeal, or writ of error"?
>
> 2. Does the twenty-five dollars "for filing any . . . appeal . . . ." apply to simple misdemeanors as well as small claims appealed to the district court pursuant to R.Cr.P. 54 and section 631.13, The Code, respectively?
>
> 3. If the twenty-five-dollar filing fee does not apply to criminal cases, is there any other statutory authority permitting clerks of the district court to assess any charge for the filing of an indictable criminal case?

In answer to your first paragraph, S.F. 130 § 704 of The Acts of the 69th General Assembly, 1981 Session, as amended by S.F. 571 § 4 provides in relevant portion as follows:

> 1. The clerk shall collect the following fees:

> a. For filing a petition, appeal, or writ of error and docketing them, twenty-five dollars . . . .
>
> * * *
>
> aa. In criminal cases, the same fees for same services as in suits between private parties. When judgment is rendered against the defendant, the fees shall be collected from such defendant.

In answer to your first question, an indictment or information does not constitute a, "petition, appeal, or writ of error" as set out in § 704. The Iowa Supreme Court has held that an indictment is not a "pleading." State v. Luce, 194 Iowa 1307, 191 N.W. 64 (Iowa 1922); by the same logic, an information is neither a "pleading" nor a petition. Clearly, the information or indictment is not an appeal or writ of error and, since it is not a petition either, the fee for docketing cannot be charged.

Your second question asks whether an appeal from a magistrate court of a simple misdemeanor constitutes an appeal triggering the fee provision of § 704. Clearly, the procedure for review of simple misdemeanor convictions set out in Rule of Criminal Procedure 54 constitutes an appeal as that word is commonly used; therefore, the clerk must collect the docketing fee required by § 704. The other question which must be addressed is whether the fee must be paid in order to perfect an appeal or whether the clerk should tax the filing fee as a part of the costs of the action. Rule 54 provides in relevant part that,

> The defendant may take an appeal, by giving notice orally to the magistrate that he or she appeals, or by delivering to the magistrate not later than ten days thereafter, a written notice of the defendant's appeal, and in either case the magistrate must make an entry on its docket of the giving of such notice. . . . When an appeal is taken, the magistrate shall forward to the appropriate district court clerk a copy of the docket entries in the magistrate's court, together with . . . and all other papers in the case.

Because of the method in which an appeal is perfected, not specifically requiring the payment of a filing fee, the clerk should open the appropriate file when the records are received from the magistrate and tax the docketing fee as a part of the costs.

In your third question you have asked whether there is any other statutory authority permitting clerks to assess a charge for the filing of an indictable criminal case. Review of The Code does not indicate any authority for assessing such costs to a defendant.

Yours very truly,

Richard A. Williams

RICHARD A. WILLIAMS
Assistant Attorney General

bje

MUNICIPALITIES: Urban Renewal, Public Bidding; Chapters 384, 403, The Code. Cities may forego public bidding when they undertake agreements designed to further urban renewal projects pursuant to Chapter 403, the Code. (Appel to Chiodo, State Representative, 10/16/81) #81-10-14(L)

The Honorable Ned Chiodo
State Representative
State Capitol
Local

October 16, 1981

Dear Representative Chiodo:

We are in receipt of your opinion request concerning the relationship between urban renewal projects and public bidding requirements of the Code.

We are advised that the City of Des Moines seeks to launch a joint venture with private property owners for the construction of a sky walk system in downtown Des Moines. Our understanding is that this project is part of the urban renewal project currently underway in Des Moines pursuant to Chapter 403, The Code. The city and private property owners would like to jointly build the sky walk and thereafter charge each underlying property owner its pro rata share of the project. If construction crews presently on location are used, overall costs will be significantly reduced. In order to use these crews, which would otherwise remain in the area for only a short period of time, implementation of public bidding procedures is impractical.

Generally speaking, municipalities undertaking public improvements must comply with the contract letting procedure outlined in Chapter 384, The Code. However, the definition of "public improvement" under this Chapter excludes "urban renewal . . . projects", see §384.95, The Code. On its face, then, the contract letting provisions of Chapter 384 do not appear applicable to the sky walk if it is an element of an urban renewal project.

In addition, Chapter 403, The Code, spells out the powers of municipalities in carrying out urban renewal projects. Section 403.12(3) provides, in relevant part, that cities may enter into "Any . . . agreement . . . without appraisal, public notice, advertizement, or public bidding." (emphasis supplied)

Given these clear statutory directives, it is our opinion that the City of Des Moines, under the facts as we understand them, may proceed to enter into agreements for the construction of the sky walk as an element in its urban renewal project without public bidding as described in Chapter 384, The Code.

Very truly yours,

BRENT R. APPEL
First Assistant Attorney General

TAXATION: Accrual and Rate of Inheritance Tax Extension Interest. Section 450.6, The Code 1981, as amended by 1981 Session, 69th G.A., H.F. 734 and S.F. 555. In the event that an extension for payment of inheritance tax is granted by the director of revenue for an estate of a decedent dying before July 1, 1981, interest begins to accrue at the rate set forth in §1(2) of H.F. 734 on January 1, 1982, or at the expiration of twelve months from the date of the decedent's death, whichever occurs the later. In the event that the decedent dies on or after July 1, 1981, such extension interest begins to accrue from the expiration of nine months from the date of the decedent's death. (Griger to Kudart, State Senator, 10/15/81) #81-10-13(L)

October 15, 1981

The Honorable Arthur Kudart
State Senator
602 Dows Building
Cedar Rapids, IA 52401

Dear Senator Kudart:

You have requested an opinion of the Attorney General as follows:

> On June 13, 1981, was approved House File 734, which amended Section 450.6, Code of 1981 to indicate that in the event that there was a delay in filing the Inheritance Tax Return and an extension was obtained from the Director, the interest rate would be at the rate in effect under Section 1 of the act which in effect is two percent lower than the prime interest.
>
> However, on June 20, 1981, was approved Senate File 555, which modified Section 450.6 of the Code and said that in the event an extension is given on the filing of Iowa Inheritance Tax, the tax shall bear six percent interest from the expiration of 9 months from the date of the decedent's death.
>
> The question is: As of January 1, 1982, what will be the interest rate on the tax due because of an extension of the filing of Iowa Inheritance Tax Return?

The legislature, in 1981 Session, 69th G.A., H.F. 734 and 1981 Session, 69th G.A., S.F. 555, amended the provisions of §450.6, The Code 1981. In particular, these amendments changed aspects concerning payment of interest on unpaid inheritance tax in the event that the director of revenue grants an extension to pay the tax. In view of these amendments, you inquire what the rate of interest will be on and after January 1, 1982, where an extension for inheritance tax payment has been or will be granted by the director of revenue.

As will be demonstrated, for estates of decedents dying before July 1, 1981, interest will begin to accrue in an extension situation twelve months from the date of the decedent's death. On January 1, 1982, the interest rate will thereafter constitute the rate set forth in §1 of H.F. 734 in the event that the twelve month period has expired on or before December 31, 1981. In the event that the twelve month period expires on or after January 1, 1982, the interest rate will begin to accrue at the rate set forth in §1 of H.F. 734 upon the expiration of the twelve month period. For estates of decedents dying on or after July 1, 1981, interest will begin to accrue in an extension situation nine months after the date of the decedent's death at the rate set forth in §1 of H.F. 734. By definition, this interest accrual cannot commence prior to March 1, 1982.

House File 734 was enacted to establish a new rate of interest for a number of state taxes. Section 1 of H.F. 734 provides as follows:

> Section 1. Chapter 421, Code 1981, is amended by adding the following new section:
> NEW SECTION. INTEREST RATE.
> 1. Except where a different rate of interest is stated in a provision of this title, the rate of interest on interest-bearing obligations arising under this title shall be the rate of interest in effect under this section.
> 2. The rate of interest that shall be in effect during a calendar year shall be the rate which is two percentage points less than the numerical average, rounded to the nearest one percent, of the respective prime rates for each of the months in the twelve-month period that ends September 30 of the previous calendar year. The rate of interest established by this subsection takes effect January 1, and applies to any amount which is due or becomes payable on or after that date.

3. Nothwithstanding contrary provisions of subsection 2, the rate of interest that is in effect during a calendar year shall also be the rate of interest to be in effect for the following calendar year, unless the rate of interest as calculated under subsection 2 is at least one percentage point higher or lower than the rate then in effect.

4. In the event interest accrues or is calculated on a monthly basis, the rate of interest for each month shall be one-twelfth, rounded to the nearest one-tenth of one percent, of the rate specified in subsection 2.

5. As used in subsection 3, the term "prime rate" means the prime rate charged by banks on short-term business loans, as determined by the board of governors of the federal reserve system and published in the federal reserve bulletin.

6. In October of each year the director shall cause an advisory notice to be published in the Iowa administrative bulletin and in a newspaper of general circulation in this state, stating the rate of interest to be in effect on or after January 1 of the following year, as established by this section. The calculation and publication of the rate of interest by the director is exempt from chapter 17A.

Section 15 of H.F. 734 amended §450.6, The Code 1981, as follows:

Sec. 15. Section 450.6, Code 1981, is amended to read as follows:

450.6 ACCRUAL OF TAX--MATURITY--EXTENSION OF TIME. The tax ~~hereby~~ imposed ~~shall be for the use of the state, shall accrue~~ by this chapter accrues at the death of the decedent owner, and shall be paid to the department of revenue within twelve months after the death of the decedent owner except when otherwise provided in this chapter. When in the opinion of the director of revenue additional time should be granted for payment to avoid hardship, the director may extend the period to a date not exceeding ten years from the date of death of the decedent. In the case of any such extension the tax shall bear ~~six percent~~ interest at the rate in effect under section 1 of this Act from the expiration of twelve months from the date of the decedent's death.

It is clear that H.F. 734 deletes the six percent interest rate heretofore applicable in situations where the director of revenue has granted an extension for payment of Iowa inheritance tax and replaces that rate with one computed with regard to the "prime rate" as defined in the statute. This rate of interest will be the rate set forth in §1(2) of H.F. 734, i.e., two percentage points less than a computed twelve month numerical average of prime rates. In addition, the language quoted above in §1(2) of H.F. 734 states that the new interest rate, effective January 1, 1982, "applies to any amount which is due or becomes payable on or after that date." When read in conjunction with §15 of H.F. 734, it is clear that the legislature intended, on January 1, 1982, to raise the interest already accruing at the rate of six percent to the new rate. In the event that the twelve month period expired on or after January 1, 1982, interest would begin to accrue at the new rate.

Section 2 of S.F. 555 amended §450.6, The Code 1981, in relevant part as follows:

> Sec. 2. Section 450.6, Code 1981, is amended to read as follows:
> 450.6 ACCRUAL OF TAX--MATURITY--EXTENSION OF TIME. The tax ~~hereby~~ imposed ~~shall~~ ~~be~~ is for the use of the state, shall accrue at the death of the decedent owner, and shall be paid to the department of revenue within ~~twelve~~ nine months after the death of the decedent owner except when otherwise provided in this chapter. When in the opinion of the director of revenue additional time should be granted for payment to avoid hardship, the director may extend the period to a date not exceeding ten years from the date of death of the decedent. In the case of any ~~such~~ extension the tax shall bear six percent interest from the expiration of ~~twelve~~ nine months from the date of the decedent's death.

An examination of §2 of S.F. 555 clearly denotes that with respect to the situation involving an extension for payment of inheritance tax, the time period for commencing interest accrual was shortened from twelve months to nine months from the date of the decedent's death. This amendment does not purport to change or amend in any manner the extension interest rate set forth in §450.6, The Code 1981, or in H.F. 734. The provisions of §2 of S.F. 555 became effective for estates of persons dying on or after the "effective date" of this section. See §20 of S.F. 555. Since S.F. 555 was signed by the Governor prior to July 1, 1981, and since this amendment did not contain a publication clause and, for §2, did not list an effective date subsequent to July 1, 1981, then §2 became effective on July 1, 1981, for estates of decedents dying on or after that date.

In summary, there is no conflict between H.F. 734 and S.F. 555. House File 734 sets forth a new rate of interest, commencing on or after January 1, 1982, depending upon the circumstances. Senate File 555 shortens the time period to commence interest accrual in inheritance tax extension situations from twelve months to nine months from the date of decedent's death for estates of decedents dying on or after July 1, 1981. In the event that the decedent died prior to July 1, 1981, interest in an extension situation begins accrual twelve months from the date of decedent's death and, if the twelve month period has expired prior to January 1, 1982, then on January 1, 1982, interest which has previously accrued at six percent will begin to accrue at the new rate fixed by §1(2) of H.F. 734. If the twelve month period expires on or after January 1, 1982, interest will commence accrual at the new rate on such expiration date. In the event that the decedent dies on or after July 1, 1981, interest will begin to accrue at the rate fixed by §1(2) of H.F. 734 at the expiration of nine months after the date of the decedent's death, and as a consequence, could never begin to accrue on January 1, 1982 or prior to March 1, 1982.

Very truly yours,

Harry M. Griger

Harry M. Griger
Special Assistant Attorney General

TAXATION: Real Property Taxation of the Common Areas or Elements of Condominiums, §499B.11, The Code 1981. Real Property taxes for the common elements or areas of a condominium are not levied separately on the common elements or areas but, rather, are levied as a part of each unit or apartment on a fractional share or percentage basis so that each unit or apartment bears a portion of the real property taxes regarding the common elements or areas. (Kuehn to Chiodo, State Representative, 10/15/81) #81-10-12(L)

October 15, 1981

The Honorable Ned F. Chiodo
State Representative
3410 S.W. 12th Place
Des Moines, IA 50315

Dear Representative Chiodo:

You have requested an opinion of the Attorney General pertaining to the property taxation of the common areas or elements of condominiums. In your written request, you state:

> The design and overall scheme of a residential subdivision. . . the typical condominium, often places formal ownership of access roadways and certain common areas in the. . . condominium homeowners' association. . . . The homeowners' association and. . . condominium usually enter into a convenant [sic] limiting use of such property in perpetuity, with the reciprocal right of use and enjoyment existing in favor of all individual homeowners in the . . . condominium.
>
> Based on the above facts it becomes necessary to determine what valuation should be placed on the homeowners' association property for assessment and taxation purposes when the property is, in effect, a servient estate, the value of which has shifted to the individual homeowners'. . . units (dominant estates).

> . . . Specifically, if the assessed valuation of . . . units reflect their fair market value, including the value of appurtenant rights and easements to common arease [sic] . . ., is it correct that the common areas themselves should be nominally assessed for perhaps one dollar in order to avoid inadvertent, double taxation?

The question posed assumes that the common areas or elements of a condominium will inadvertently be taxed twice; on the common areas or elements which are part of the corporation or association (condominium) and, again, as part of the individual homeowners unit or apartment.

The possibility of what you refer to as "double taxation" is avoided because §499B.11, The Code 1981, provides that all real property taxes regarding condominiums shall be levied on each unit or apartment with each unit or apartment sharing its respective fractional share or percentage of taxation regarding the common elements. Therefore, no taxes are levied separately on the common elements. Instead, the taxes regarding the common elements are levied on each unit or apartment on a fractional share or percentage basis.

Sections 499B.7 and 499B.11, The Code 1981, state:

> 499B.7 Interest in common elements--reference to them in instrument.
>
> 1. The fractional or percentage interest in the general common elements and the fractional or percentage interest in the limited common elements where such exist are hereby declared to be appurtenant to each of the separate apartments.
>
> 2. Any conveyance, encumbrance, lien, alienation or devise of an apartment under a horizontal property regime by any instrument which describes the land and apartment as set forth in section 499B.4, shall also convey, encumber, alienate, devise or be a lien upon the fractional or percentage interest appurtenant to each such apartment under section 499B.4, subsection 6, to the general common elements, and the respective share or percentage interest to limited common elements where applicable, whether such general common elements or limited common elements are described as in section 499B.4, subsections 4 and 5, by general reference only, or not at all.

> 499B.11 Real property tax and special assessments--levy on each apartment.
>
> 1. All real property taxes and special assessements shall be levied on each apartment and its respective appurtenant fractional share or percentage of the land, general common elements and limited common elements where applicable as such apartments and appurtenances are separately owned, and not on the entire horizontal property regime. [emphasis supplied]

It is, therefore, the opinion of the Attorney General that there is no double taxation regarding the common areas or elements of a condominium because the real property taxes for such common areas or elements are not levied separately on the common areas and elements, but rather, are levied as a part of each unit or apartment on a fractional share or percentage basis so that each unit or apartment bears a portion of the real property taxes regarding the common areas or elements.

Very truly yours,

Gerald A. Kuehn
Assistant Attorney General

AERONAUTICS: Section 330.17, The Code, 1981. A city, county, or township may not establish an airport commission under Section 330.17 if it does not have a property interest in an airport. (Baty to Kassel, Director of Department of Transportation, 10/15/81) #81-10-11(L)

October 15, 1981

Mr. Raymond L. Kassel
Director
Department of Transportation
800 Lincoln Way
Ames, IA 50010

Dear Mr. Kassel:

You asked, "Is a city, county, or township required to acquire and own an airport before an airport commission can be established?" Section 330.17, The Code 1981, provides "The council of any city, county, or township which owns or otherwise acquires an airport may, . . . submit to the voters the question as to whether the management and control of such airport shall be placed in an airport commission." (emphasis supplied). It is our opinion that ownership is not required, but some interest, such as a lease, is required before the commission may be established.

Section 330.19, The Code 1981, provides that the ballot question is whether the city shall place or continue the management and control of its airport or airports in an Airport Commission. Section 330.21, The Code 1981, provides that funds of the airport commission shall be used to pay indebtedness arising from the acquisition and construction of airports and the maintenance, operation and extension thereof. Section 330.17 by its words applies only to cities, counties, or townships which already own or have an interest in an airport. Sections 330.19 and 330.21 assume ownership or an interest in an airport. Where the statute is clear and unambiguous, the courts will not apply rules of construction. Richardson v. City of Jefferson, 257 Iowa 709, 714, 134 N.W.2d 528, 531 (1965), Courts may not under the guise of construction extend, enlarge, or otherwise change the terms of a statute. Sueppel v. City Council of Iowa City, 257 Iowa 1350, 1354, 136 N.W.2d 523, 525 (1965).

If an airport commission could be established without an airport, the powers granted an airport commission in Chapter 330, The Code 1981, could not be exercised. Such a result would violate the presumption of the enactment stated in Section 4.4, The Code 1981. Paragraphs numbered 2 and 4 presume that the entire statute is intended to be effective and that a result feasible of execution is intended.

This opinion, that an airport commission may not be established pursuant to Chapter 330, The Code 1981, without an airport, does not preclude a city or county from establishing a similar agency, commission or committee under any of their other powers.

Sincerely,

John W Baty

John W. Baty
Assistant Attorney General

COUNTIES AND COUNTY OFFICERS. Iowa Constitution, Art. III, § 39A; §§ 19A.3, 79.1, 332.3(10), 340A.1, The Code 1981, Senate File 130, § 323(1)(o). The board of supervisors has the authority to establish a sick leave policy for elected officials which would permit payment for accrued sick leave. The board may also establish a policy whereby it provides hospitalization and major-medical insurance coverage for elected officials. (Fortney to Tullar, Sac County Attorney, 10/14/81) #81-10-9(L)

October 14, 1981

Lon R. Tullar
Sac County Attorney
110 East State
Sac City, Iowa 50583

Dear Mr. Tullar:

You have requested an opinion of the Attorney General regarding the authority of the board of supervisors to establish a sick leave policy for elected officials which would permit payment for accrued sick leave. You also inquire whether the board may establish a policy whereby it provides hospitalization and major-medical insurance coverage for elected officials. We are of the opinion that the board has authority to establish such policies.

Pursuant to Iowa Constitution, Art. III, § 39A, known as the County Home Rule Amendment, counties may exercise governmental power in the determination of local affairs where such exercise is not inconsistent with state law. Express statutory authorization is no longer necessary to validate a county's acts. See Op. Att'y Gen. #79-4-7.

We believe that the setting of sick leave policy for elected officials and the establishment of fringe benefits such as medical insurance for such officials are matters of local concern. County-elected officials and county employees do not come within the purview of the state merit employment system created by Chapter 19A, The Code 1981, which is limited in its application "to all employees of the state" with certain enumerated exceptions, § 19A.3. Section 79.1, delineating sick leave policy for state employees, is further limited in application to "permanent full-time employees of state departments, boards, agencies, and commissions." See Op. Att'y Gen. #79-8-16.

The fact the state statutes dealing with sick leave policies are inapplicable to the counties disposes of any argument that the state has preempted this area from county legislation. In addition, there is legislation which authorizes the board to act in this area. Recently adopted Senate File 130, § 323(1)(o), effective July 1, 1981 states that "the board shall . . . fix the compensation for services of county and township officers and employees if not otherwise fixed by state law." The forerunner of § 323, § 332.3(10), The Code 1979, was earlier held to authorize the board to establish sick leave policy for county employees. Op. Att'y Gen. #79-8-16. We see no basis for distinguishing this question from our earlier opinion given that the scope of the section includes both officers and employees. Finally, Op. Att'y Gen. #81-6-7 held that a board of supervisors may provide group insurance and similar fringe benefits to county officers even though such benefits are not included in the determination of compensation pursuant to Chapter 340A, The Code 1981.

Yours truly,

David Fortney

DAVID M. FORTNEY
Assistant Attorney General

DMF:sh

AGRICULTURE: Authorized Farm Corporation. Sections 172C.1(8) and 172C.1(9), The Code 1981. An "authorized farm corporation" is not required to receive any specified percentage of its gross revenues from farming. Nor is an "authorized farm corporation" required to be founded solely for the purpose of farming. Finally, a corporation formed for a general purpose, which subsequently becomes engaged in the business of farming, does not qualify as an "authorized farm corporation." (Walding to Rush, State Senator, 10/13/81) #81-10-7(L)

October 13, 1981

The Honorable Bob Rush
State Senator
830 Higley Building
Cedar Rapids, Iowa 52401

Dear Mr. Rush:

We have received your opinion request of July 16, 1981, regarding an interpretation of Ch. 172C. Specifically, you have asked:

> 1. Is an "authorized farm corporation" within the meaning of Section 172C.1(9) required to receive any specified percentage of its gross revenues from farming?
>
> 2. Is an "authorized farm corporation" within the meaning of Section 172C.1(9) defined as a corporation which is formed solely for the purpose of farming or may this definition include a corporation which is formed for a general purpose and which subsequently becomes engaged in the business of farming?

Section 172C.1(9), The Code 1981, provides:

> "Authorized farm corporation" means a corporation other than a family farm corporation <u>founded for the purpose of farming</u> and the ownership of agricultural land in which:

> a. The stockholders do not exceed twenty-five in number; and
>
> b. The stockholders are all natural persons or persons acting in a fiduciary capacity for the benefit of natural persons or nonprofit corporations. [Emphasis added]

A response to your first question necessitates a consideration of the definition of an "authorized farm corporation." As defined by § 172C.1(9), there are two requirements which a corporation must meet to qualify as an "authorized farm corporation." First, the corporation must be founded for the purpose of farming. Second, ownership of the corporation must not exceed twenty-five stockholders, all of whom are natural persons or persons acting in a fiduciary capacity for the benefit of natural persons or nonprofit corporations. While a "family farm corporation" is required to receive a specified percentage of its gross revenues from farming, § 172C.1(8), The Code 1981, no such requirement is provided for an "authorized farm corporation." Accordingly, an "authorized farm corporation" is not required to receive any specified percentage of its gross revenues from farming.

For proper consideration, the second question should be bifurcated. We will first consider whether an "authorized farm corporation" needs to be formed solely for the purpose of farming. Next, we will consider whether a corporation formed for a general purpose, which subsequently becomes engaged in the business of farming, qualifies as an "authorized farm corporation." At issue, in both cases, will be the first requirement of an "authorized farm corporation", that it be "founded for the purpose of farming."

The first part of the second question can be summarily answered. As the underscored portion of the aforementioned statute makes evident, an "authorized farm corporation" must be "founded for the purpose of farming." Nothing in that language mandates that farming be the sole purpose for founding the corporation. Accordingly, an "authorized farm corporation" need not be founded solely for the purpose of farming.

As to the second part of the second question, the same language is applicable. Section 172C.1(9) is quite clear that an "authorized farm corporation" must be "founded for the purpose of farming." [Emphasis added] Therefore, a

corporation formed for a general purpose, which subsequently becomes engaged in the business of farming, does not qualify as an "authorized farm corporation."

In summary then, an "authorized farm corporation" is not required to receive any specified percentage of its gross revenues from farming. Nor is an "authorized farm corporation" required to be founded solely for the purpose of farming. Finally, a corporation formed for a general purpose, which subsequently becomes engaged in the business of farming, does not qualify as an "authorized farm corporation."

Very truly yours,

LYNN M. WALDING
Assistant Attorney General

bje

PUBLIC EMPLOYMENT: CONFLICT OF INTEREST. An apparent conflict of interest generally exists in a situation in which a member of an AEA board of directors makes programming decisions regarding a student if those decisions impact on whether that student will be eligible to continue receiving services purchased from the board member's employer. Such board member should abstain from participation in that particular decision. (Fortney to Clements, State Representative, 10/13/81) #81-10-6(L)

October 13, 1981

Honorable James B. Clements
State Representative
1535 Northlawn Road
Davenport, Iowa 52804

Dear Representative Clements:

You have requested an opinion of the Attorney General regarding the election of the executive director of Handicapped Development Center, located in Davenport, Iowa, to a seat on the board of directors of the Mississippi Bend Area Education Agency. This AEA includes Scott County and the City of Davenport. It is our understanding that Handicapped Development Center is a private agency which contracts to provide services to governmental bodies such as the AEA, school districts and the Department of Social Services. Your question, presented in a broader framework, is whether an employee of a provider agency may be elected to an AEA which contracts with that provider agency. You express concern that the AEA makes programming decisions affecting clients served by the provider agency. You question whether this presents a "conflict of interest."

At the outset, we would point out that the situation you present does not involve the doctrine of incompatibility of offices. When an incompatibility of offices exists, an individual is prohibited from occupying both offices. A position with a private agency does not constitute an office within the doctrine of incompatibility. See State v. Taylor, 260 Iowa 634, 144 N.W. 289 (1966); Op. Att'y Gen. #81-8-26. In contrast, a conflict of interest does not prevent an individual from holding an office. The conflict may, however, prohibit the officeholder from participating in a particular decision or action.

A conflict of interest generally develops whenever a person serving in public office may gain any private advantage, financial or otherwise, from such service. The occurrence of a conflict may be defined either by statute or by common law rules. Op. Att'y Gen. #81-6-12(L). An allegation of conflict of interest can only be decided through a sifting of the various facts surrounding a particular action or set of actions taken by an officeholder.

The leading case on conflict of interest is Wilson v. Iowa City, 165 N.W.2d 813 (Iowa 1969). In the Wilson case, certain city councilmen were determined to have conflicts of interest under the applicable statute because they had voted to bring a certain area within an urban renewal project when they knew that the area included property in which they had an ownership interest. The conflict of one councilman, however, was based entirely upon his employment by another public body, i.e., the University of Iowa, which owned property in the urban renewal area and was "vitally interested" in the project. 165 N.W.2d 813, 821. This councilman had held various positions of trust and responsibility with the University. At the time he became a member of the city council, he was director of the alumni office. Soon after his election, he was made director of community relations for the University. The Court noted that the University was openly in favor of the urban renewal project and would be beneficially affected by it. The Court then concluded that the councilman-employee of the University did have a disqualifying interest under the conflict of interest statute, particularly because of his "position of influence as director of community relations, the very department with which the city would deal in case of matters of mutual interest to the University and the city." Id. at 823.

The Wilson Court did not find it necessary to analyze the statutory duties of the councilman involved with the urban renewal project. Instead, the Court focused on the presence of irreconcilable loyalties, loyalties to the private employer and loyalties to the public he had been elected to serve. Referring to the common law prohibitions against conflict of interest by a public employee, the Court in Wilson observed:

> These rules, whether common law or statutory, are based on moral principles and public policy. They demand complete loyalty to the public and seek to avoid subjecting a public servant to the difficult, and often insoluble, task of deciding between public duty and private advantage.

> It is not necessary that this advantage be a financial one. Neither is it required that there be a showing the official sought or gained such a result. It is the potential for conflict of interest which the law desires to avoid. [Emphasis in original.]

165 N.W.2d 813, 819.

While a question of conflict of interest must be addressed on a case-by-case basis and, of necessity, requires factual determinations which are not appropriately made in the context of an Attorney General's opinion, we are prepared to state that an apparent conflict of interest generally exists in a situation in which a member of an AEA board of directors makes programming decisions regarding a student if those decisions impact on whether that student will be eligible to continue receiving services purchased from the board member's employer. Such board member should abstain from participation in that particular decision.

Yours truly,

David Fortney

DAVID M. FORTNEY
Assistant Attorney General

DMF:sh

COUNTIES AND COUNTY OFFICERS: Veterans Affairs Fund; Legal Residence in the County. Section 250.1, The Code 1981. The county commission in determining whether a veteran has a legal residence in the county should consider matters relating to his true, fixed, and permanent home and place of habitation. That place to which, whenever he is absent, he has an intention of returning. Consideration should also be given to where the year-round residence is, voter registration, place of filing tax returns, property ownership, drivers license, car registration, employment, and marital status. (Robinson to Kauffman, 10/8/81 # 81-10-5(L)

October 8, 1981

Mr. Ray J. Kauffman, Director
Iowa Department of Veterans Affairs
State Capitol
LOCAL

Dear Mr. Kauffman:

You recently asked for an opinion of the Attorney General which I have paraphrased as follows:

> A veteran came to Des Moines from a neighboring county in the last week of December, 1980 for the purpose of attending school. As long as he was a student, he worked as a part time janitor (20 hours per week) at $3.35 per hour for the school.
>
> In May, 1981 the veteran left the school to enter the Veterans Administration Medical Center at Knoxville, Iowa for alcoholic treatment. In July, 1981, he finished his treatment and came back to Des Moines.
>
> In August, 1981 he came to the office of Polk County Commission of Veteran Affairs to seek assistance.
>
> The caseworker informed the Veteran that Polk County would not help as he was in Des Moines for the sole purpose of attending school. The Veteran stated he was now going to attend school at Area XI in Ankeny, Iowa and would need help until September, at which

> time he would start getting paid while attending school.
>
> He was told that he should seek assistance from his home or Marshall County. He was given money to go there but was sent back by the Marshall County Veterans Commission.
>
> We want an opinion as to what County is responsible for assistance to a person going to school? The County that he comes from and lived prior to attending school or the County he lives in while attending school? We do not feel that the taxpayers of Polk County should be responsible for this load.

The applicable Code section with regard to your questions is found in § 250.1, The Code, viz:

> 250.1 Tax. A tax not exceeding twenty seven cents per thousand dollars of assessed value may be levied by the board of supervisors upon all taxable property within the county, to be collected at the same time and in the same manner as other taxes, to create a veteran affairs fund for the benefit of, and to pay the funeral expenses of honorably discharged indigent men and women of the United States who served in the military or naval forces of the United States in any war. . . having a legal residence in the County. (Emphasis added.).

As we understand the statute, the veteran is entitled to the benefit if he has a legal residence within the county. We are asked to determine which of the two counties is responsible. Thus, there is no constitutional question of the denial of benefits based on residency, but simply a determination of which intra-state entity will pay.

"Legal residence" has been defined as distinguished from "actual residence" in that it is more permanent in character and there is no present intent of removing therefrom. The act of residing and the intent to return when absent must concur. Mason v. World War II Service Compensation Board, 243 Iowa 341, 348, 51 N.W.2d 432 (1952), Hinds v. Hinds, 1 Iowa (1 Cole) 37 (1855).

The Iowa Supreme Court in Edmundson v. Miley Trailer Co., 211 N.W.2d 270 (Iowa 1973)(en banc) provides help in defining the terms "residence" and "domicil". The case involved an itinerant horse trainer whose nomadic work required him to travel extensively and continuously throughout the country. The Court stated:

> The trial court did not believe plaintiff established a residence in this state after his sojourn in Michigan. It was therefore not necessary for it to determine whether the term "residence" as used in the statute was synonymous with "domicil". These terms sometimes are and sometimes are not held to be synonymous, depending on the nature of the action in which the question is raised.
>
> [1-4] "Residence" and "domicil" are terms of fixed and familiar meaning. Residence may be temporary, transient or permanent. Domicil is a broader term. Residence coupled with the required intent is necessary to acquire domicil but actual residence is not necessary to preserve an established domicil. Domicil, once established, continues until supplanted by the acquisition of a new one. Every person has one and only one domicil but may have no residence, one residence or several residences. . .
>
> "The requisite element of intent to change one's domicil necessarily includes an intention to abandon the former domicil, and to do so permanently. There must be both an absence of an intent to return and an intent to remain in the place chosen as the new domicil. To effect a change of domicil, there must be the intent to exchange the prior domicil for another. If a person establishes a new dwelling place, but never abandons the intention of returning to the old dwelling place as his only home, the domicil remains at the old dwelling place". (Emphasis added)[by the Court] 25 AmJur.2d, Domicil, section 24, page 19. See also 28 C.J.S. Domicil § 9, page 11.

> [5] We find no showing plaintiff's domicil was ever changed from Iowa, his domicil of origin. His stay in Michigan during the months of his marriage, even if it amounted to residence there at the time, did not rise to a change of domicil. We do not find it established in the record plaintiff ever formed the required intent to change his domicil from Iowa.
>
> The record is replete with evidence of a continuance of plaintiff's ties in Iowa. The checking account, the mailing address, the horses left in Iowa, plaintiff's frequent visits here, the tax return filed in Iowa when none was filed in Michigan, plaintiff's drivers license all negative any intent of becoming domiciled in Michigan. On these facts we find plaintiff was at all times domiciled in Iowa. [211 N.W.2d at 270-271]

This case teaches us also those factors the court today would consider in determining "legal residency". Finally, residency, like domicil, is essentially to be determined on a case by case bases. It is a matter of personal intent based on present facts rather than the happening of some future or contingent event. Julson v. Julson, 255 Iowa 301, 122 N.W.2d 329 (1963).

The county commission in determining whether a veteran has a legal residence in the county should consider matters relating to his true, fixed, and permanent home and place of habitation. That place to which, whenever he is absent, he has an intention of returning. Consideration should also be given to where the year-round residence is, voter registration, place of filing tax returns, property ownership, drivers license, car registration, employment, and marital status. These plus those matters pointed out in the Edmundson, Mason, and Hinds cases, above, all indicate the location of a person's "legal residence".

From the facts we have, our judgment would be that the veteran has his "legal residence" in Marshall County. It is well you sought assistance in defining this legal matter as the the veteran ought not be sent back and forth. Perhaps the legislature should expand the concept of a "legal settlement" as found in § 252.16, The Code, and apply it to veteran benefits as it does to the general welfare area of Chapter 252 and mental

health and retardation. See § 222.60(1), 229.43, The Code. These sections meet the "constitutional muster" because the individual is not shuttled about or deprived. These statutes simply determine which county or whether the state pays and were designed to equalize the load on any one county.

Sincerely,

Stephen C. Robinson
Assistant Attorney General

SCR/sm

COMMERCE COMMISSION: GRAIN WAREHOUSES AND DEALERS' LICENSES: Financial Statements Required on Previous Fiscal Year for New Licenses. §§ 3.7, 542.3, 542.5, Chs. 542 and 543, The Code 1981, and H.F. 841, 1981 Session, 69th G.A. The Commerce Commission's requirement that financial statements received after July 1, 1981, comply with H.F. 841 does not, in effect, force compliance with the Act prior to July 1, 1981. A statute does not operate retroactively merely because part of the requisites of its action is drawn from a time antecedent to its passage. (Willits to Diemer, State Representive, 10/8/81) #81-10-4(L)

October 8, 1981

The Honorable Marvin Diemer
State Representative
806 Westwood Drive
Cedar Falls, Iowa 50613

Dear Representative Diemer:

You have requested the opinion of the Attorney General on whether the Commerce Commission's requirement that financial statements received after July 1, 1981, in conjunction with applications for licenses as grain dealers or grain warehouses, comply with the requirements of H.F. 841, enacted by the 69th General Assembly, 1981 Regular Session, in effect, forces compliance with the act prior to the effective date of the legislation?

House File 841 makes numerous amendments to Chapters 542 (Grain Dealers) and 543 (Bonded Warehouses), The Code 1981. Section 4 of H.F. 841 extensively amends § 542.3, The Code 1979, relating to the requirements to obtain a grain dealer's license, including the maintenance of certain net worth and bond requirements, as shown by financial statements, as required by the Commerce Commission, accompanied by either an unqualified audit, by a certified public accountant, or, at the election of the applicant, a review audit by a certified public accountant. If the latter is elected, the grain dealer must be inspected twice during each twelve-month period, rather than once.

Section 542.5, The Code 1981, as amended by § 6 of H.F. 841, provides that upon the filing of the application and compliance with the terms and conditions of Ch. 542 and the rules of the commission, the commission shall issue a license to the

applicant. All grain dealers' licenses terminate June 30 of each year and may be renewed annually by the filing of a renewal application as prescribed by the commission before June 30.

Section 4 of H.F. 841 amends § 542.3 to create two types of license for grain dealers:

> 2. The type of license required shall be determined as follows:
>
> a. A class 1 license is required if the grain dealer purchases any grain by credit-sale contract, or if the value of grain purchased by the grain dealer from procedures during the grain dealer's previous fiscal year exceeds two hundred fifty thousand dollars. Any other grain dealer may elect to be licensed as a class 1 grain dealer.
>
> b. A class 2 license is required for any grain dealer not holding a class 1 license. A class 2 licensee whose purchases from producers during a fiscal year exceed two hundred fifty thousand dollars in value shall apply immediately for a class 1 license. If a class 1 license is denied, the person immediately shall cease doing business as a grain dealer. [Emphasis supplied].

As the underlined language makes clear, the measure of whether a class 1 license is required of a grain dealer is the amount of business done by that grain dealer in its previous fiscal year. House File 841 became effective July 1, 1981. § 3.7, The Code 1981. Thus, the renewal of all grain dealers' licenses on or after July 1, 1981, is subject to H.F. 841. This would mean that the measure of what type of license is based on the dealer's most recent fiscal year prior to that date, according to the Legislature's enactment.

A statute does not operate retroactively merely because it relates to antecedent events, or because part of the requisites of its action is drawn from time antecedent to its passing. Lewis v. Fidelity & Deposit Co., 292 U.S. 559, 54 S.Ct. 848, 78 L.Ed. 1425 (1934); 82 CJS § 412. We do not believe this statute, nor the commerce commission rules promulgated thereto, operates retroactively. The Iowa Supreme Court has described a retroactive law as one which, "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty or attaches a new disability in respect to transactions or considerations already past." Walker State Bank v. Chipokas, 278 Iowa 49, 51 (Iowa 1975).

In the situation here, no part of H.F. 841 affects the rights of grain dealers or grain warehouses for transactions prior to July 1, 1981, the effective date of the act. Rather, under the provisions of H.F. 841, the dollar value of activity of a grain dealer or warehouse in the previous fiscal year is simply the measure to determine the type of license required the following year. As the Lewis case, cited above, holds, a statute does not operate retroactively merely because part of the requisites of its action is drawn from a time antecedent to its passing.

It is our opinion that the situation here falls into that category. Thus, to answer your question, the Commerce Commission's requirement that financial statements received after July 1, 1981, comply with H.F. 841 does not, in effect, force compliance with the Act prior to July 1, 1981.

Sincerely,

Earl M. Willits

EARL M. WILLITS
Assistant Attorney General

EMW/ny

ELECTIONS; SPECIAL ELECTIONS; NOMINATION OF NONPARTY CANDIDATES. Ch. 43, §§ 43.2, 43.3; Ch. 44, §§ 44.1, 44.4; Ch. 45, §§ 45.1, 45.4; Ch. 49, §§ 49.1, 49.31, 49.32, 49.36; Ch. 69, § 69.14. Procedures for filing nominations for nonparty candidates under Chapters 44 and 45 are applicable to special elections. (Pottorff to Whitcome, Director of Elections, 10/6/81) #81-10-3(L)

October 6, 1981

Louise Whitcome
Director of Elections
Office of the Secretary of State
State Capitol
L O C A L

Dear Ms. Whitcome:

You have requested an opinion concerning the time and method of filing nominations for candidates other than those candidates certified by the Republican and Democratic parties for a special election to be held on November 3, 1981, to fill a vacancy in the 42nd state representative district. Specifically you inquire:

1. If a convention may be held in accordance with § 44.1 by a nonparty political organization for the purpose of nominating a candidate for state representative at a special election to fill a vacancy, when must the certification be filed with the state commissioner?

2. Is it permissible for independent or nonparty candidates to file nomination petitions for a special election to fill a vacancy?

3. If the answer to #2 is "Yes", how is the required number of signatures to be calculated?

4. If the answer to #2 is "Yes", when must the nomination petitions be filed with the state commissioner?

5. If a special election to fill a vacancy in the general assembly is proclaimed to be held while the general assembly is in session or within forty-five days of the convening of any session,

> and the answers to #1 and #2 are "Yes", what would the time limits be for filing convention certifications by nonparty political organizations or nomination petitions by independent or nonparty candidates?

The procedures for filing nominations for candidates are generally addressed in Chapter 43, The Code 1981. This chapter states that candidates of all political parties[1] for all offices which are filled by regular biennial elections must be nominated at a primary election. § 43.3, The Code 1981. The chapter further states that candidates of a political organization which is not a political party may be nominated by proceeding under Chapters 44 and 45. § 43.2, The Code.

Chapters 44 and 45 set out nomination procedures alternative to primary elections by political parties. Chapter 44 provides for nomination by convention or caucus and is expressly limited to use only by nonparty political organizations. § 44.1, The Code. Chapter 45 provides for nomination by petition but is not expressly limited to use only by nonparty political organizations. § 45.1, The Code. Chapter 45, therefore, sets out the appropriate means for nomination of independent or nonparty candidates who are not affiliated with a nonparty political organization.

The Code does not appear to specifically provide that these alternative nomination procedures may be applied to nominate nonparty candidates for special elections. The application of these procedures in special elections, however, is implicit in the statutes which do address special elections.

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[1] The determination of whether a candidate represents a "political party" is governed by § 43.2 which provides in part:

> 43.2 "Political party" defined. The term "political party" shall mean a party which, at the last preceding general election, cast for its candidate for president of the United States or for governor, as the case may be, at least two percent of the total vote cast for all candidates for that office at that election. It shall be the responsibility of the state commissioner to determine whether any organization claiming to be a political party qualifies as such under the foregoing definition.

A special election may be held to fill a vacancy in the General Assembly when the body in which such vacancy exists is in session or will convene prior to the next general election and the Governor orders a special election to be held. § 69.14, The Code. We note that a special election is to be conducted under Chapter 49 in the same manner as all elections unless a specific statutory exemption applies. § 49.1, The Code. Chapter 49, in turn, expressly provides for listing candidates on the ballot in addition to candidates of political parties. §§ 49.31, 49.32, 49.36, The Code.

The language of these statutes plainly anticipates the participation in special elections of candidates other than those candidates nominated by political parties. It must be inferred, therefore, that the procedures for filing nominations for such candidates under Chapters 44 and 45 are applicable to special elections.

Since, in our view, Chapters 44 and 45 are applicable to special elections, we rely on the terms of these chapters to answer your specific inquiries concerning the time and method of filing for nomination:

1. A nonparty political organization may nominate a candidate for special election by convention or caucus under Chapter 44. These nominations must be filed "not less than twenty days prior to the date of an election called upon at least forty days' notice and not less than seven days prior to the date of an election called upon at least ten days' notice." § 44.4, The Code.

2. An independent or nonparty candidate may file a nomination petition for a special election under Chapter 45.

3. If a petition is filed under Chapter 45, the papers must be signed by eligible electors residing in the district equal in number to at least two percent of the total vote received by all candidates for President of the United States or Governor, as the case may be, at the last preceding general election in such district. § 45.1, The Code.

4. If a petition is filed under Chapter 45, the papers must be filed with the state commissioner by the same filing date applicable in the event of nomination by convention or caucus. §§ 44.4, 45.4, The Code.

5. If a special election to fill a vacancy in the General Assembly were proclaimed to be held while the General Assembly was in session or within forty-five days of the convening of any session, the Governor would be required to give at least ten days' notice. § 69.14, The Code. When a special election is called on at least ten days' notice, nominations by convention or caucus or petition must be filed not less than seven days prior to the date of the election. §§ 44.4, 45.4.

Sincerely,

Julie F. Pottorff

JULIE F. POTTORFF
Assistant Attorney General

JFP:sh

GENERAL ASSEMBLY: Legislative Council; Legislative Service Bureau. Section 2.58, The Code 1981. The Legislative Council is afforded statutory authority to allocate the work of the Legislative Service Bureau. The June 29, 1981, reaffirmance of a work priority policy for the Bureau did not infringe upon the obligation of the Council to make reasonable provision for Bureau services to individual legislators. (Schantz to Priebe, State Senator, 10/5/81) #81-10-2(L)

October 5, 1981

Honorable Berl E. Priebe
State Senator
Rural Route 2, Box 145A
Algona, IA 50511

Dear Senator Priebe:

We have your recent request for an opinion of the Attorney General concerning the lawfulness of a directive of the Legislative Council to the Legislative Service Bureau allocating the services of the Bureau in connection with reapportionment legislation.

Section 2.58, The Code 1981, creates a legislative service bureau (LSB) and provides that it shall operate under the direction and control of the Legislative Council. At its meeting of July 8, 1981, the Legislative Council adopted "the recommendations of Mr. Garrison concerning submission of amendments to the third redistricting plan, as stated in correspondence to the Legislative Council, dated June 29, 1981." MINUTES, Legislative Council, July 8, 1981.

In the above-referenced letter of June 29, Mr. Serge Garrison, executive director of the Iowa Legislative Service Bureau, sought the concurrence of the Legislative Council in procedures to be followed for submission of amendments to "a third redistricting plan." Mr. Garrison pointed out that § 2.58 generally limits LSB duties to technical functions, drafting and research, and precludes "recommendations" on matters of policy. The development of particular reapportionment maps from general criteria does involve the exercise of

some judgment and discretion. The procedure for drafting redistricting laws set forth in Chapter 42 is a specific exception to this general rule based upon the exigencies of the particular context. Believing that this exception should be confined by the language generating it, Mr. Garrison advised that if individual legislators wished amendments or other plans for redistricting, they should provide the maps and LSB would perform only its traditional function of translating an individual legislator's policy preferences into technically appropriate language.[1]

Mr. Garrison also noted that the preparation of redistricting legislation was extremely time-consuming and requested the Council to reaffirm Subsection 8 of the Bureau Statement of Policy. Subsection 8 is entitled "Priority of Bill Drafting and Research Requests" and provides as follows:

> In most instances, priority for bill drafting and research shall be as follows:
>
> (1) Bill drafts and research studies for standing committees and subcommittees of standing committees.
>
> (2) Bill drafts and research studies assigned to an interim study committee by the Council.
>
> (3) Bill drafts and research studies requested by a majority or minority floor leader on the basis of a caucus position.
>
> (4) Bill drafts and research studies requested by individual legislators, in the order requested subject to adjustment on the basis of complexity or availability of information.
>
> (5) Prefiled executive department bills.

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1 At your request LSB prepared a bill which contained only a minor alteration of "Plan III." That bill was filed as Amendment No. S-3923.

As we understand the action of the Legislative Council, then, it simply reaffirmed the traditional "technical" (nonpolicy-making) role of LSB and its standing policy concerning prioritization of requests for assistance. The Council did not direct in so many words that individual legislators not be provided service. However, because of the deadline under which the General Assembly was laboring, see Amendment 26, Iowa Const., the practical effect of Council action may have been to preclude the possibility that individual legislators could offer major amendments to "the Third Plan."

In our opinion, the action of the Legislative Council is consistent with § 2.58, which provides:

> There is hereby created a legislative service bureau which shall operate under the direction and control of the legislative council. The administrative head of the legislative service bureau shall co-operate with and serve all members of the general assembly, the legislative council, and committees of the general assembly. It shall upon proper request of members and committees of the general assembly prepare research reports upon any governmental matter. Such research reports and findings therein shall not contain any recommendations. The bureau shall assist and serve any standing or interim committee of the general assembly upon request, approved by the legislative council. The bureau shall draft and prepare bills for committees and individual members of the general assembly. Research and bill drafting requests made between sessions shall be in the manner provided for by the legislative council. The legislative council shall have the sole power and duty to allocate the work load of the bureau but may delegate such duty to the legislative service bureau director. (Emphasis added.)

First, as previously noted, the action of the Council does not, on its face, infringe any "right" to LSB service for individual legislators that may be created by § 2.58.

Second, the Code makes clear that the entirety of a statute is intended to be effective and that a result feasible of execution is intended. Section 4.4, The Code 1981. Section 2.58 provides that the "legislative council shall have the sole power and duty to allocate the workload of the bureau. . . ." This provision could not be reconciled with the direction to LSB to draft and prepare bills for the individual members of the General Assembly if the latter is interpreted to provide an absolute and unlimited "right" to service. Nor would such a reading be "feasible of execution" given the current staffing of LSB. For both reasons we conclude that § 2.58 should be interpreted merely to require the Legislative Council to adopt reasonable policies that make substantial provision for technical services to individual legislators. Moreover, if it were for us to evaluate the reasonableness of the Council action of July 8, 1981, we would not find it wanting.

Finally, however, we would note that the interpretation of § 2.58 involves a matter of the internal management of the legislative branch of government into which we believe the judicial branch would not, and the executive branch should not, significantly intrude. If the General Assembly is displeased with the directions to LSB afforded by the current Legislative Council, it may provide clearer direction by statute or resolution, modify the membership of the Council, or both. Even were we to conclude that the Legislative Council had acted unreasonably, we would be strongly inclined to defer to the interpretation of § 2.58 that is reflected in the customs and usage of the General Assembly.

Sincerely,

Mark E. Schantz

Mark E. Schantz
Solicitor General

MES:ab

HEALTH: Local and county boards. Employment practices. §§135.11(15), 137.6, Chapter 400, The Code 1981. Employment practices of local boards must meet the requirements of the Iowa Merit Employment Department or the civil service provisions outlined in Chapter 400. Unless the local board receives federal funding, the Iowa Merit Employment Department exercises no oversight function over the board's employment practices. The Department of Health may, pursuant to §135.11(15), adopt rules to aid in the enforcement of §137.6. The consequences of a board's failure to comply with §137.6 include loss of federal funding, intervention by the Department of Health pursuant to administrative rules, and lawsuits brought by aggrieved parties. (Brammer to Pawlewski, Commissioner of Public Health, 10/5/81) #81-10-1(L)

October , 1981

Norman L. Pawlewski
Commissioner of Public Health
Lucas State Office Building
Des Moines, Iowa 50319

Dear Commissioner:

You have requested an opinion of the Attorney General regarding the interpretation of §137.6(4), The Code 1981, which concerns the employment practices of local boards of health. Section 137.6(4), The Code, states that local boards of health shall have the power to, "Employ such employees as are necessary for the efficient discharge of its duties. Employment practices shall meet the requirements of the Iowa merit system council or any civil service provision adopted under Chapter 400." You have asked four specific questions regarding this statute, each of which will be considered separately.

I

The first question posed was:

What does 137.6(4) specifically require county boards of health and boards of supervisors to do?

a. Are they required to use the Iowa Merit Employment Department hiring process and compensation plan?

b. May they follow a local personnel system which has been formally approved by Iowa Merit Employment Department?

c. May they follow a local personnel system which has not been formally approved by Iowa Merit Employment Department but is subject to review to determine if it is acceptable?

d. If a county develops a local personnel system under item 'b' or 'c' above, must it include an equitable compensation plan?

e. Other?

A partial answer to this question may be found in an opinion previously issued by this office wherein it was stated that:

> section 137.6(4) goes no further than to require that local boards of health conform either to the rules adopted by the Merit Commission under §19A.9 of the Code, or to rules governing employment practices as outlined in Chapter 365. (That Chapter has been transferred to Chapter 400.) Thus, the hiring, transfer, promotion and removal of employees must be done according to one of these two sets of rules; the local board need not adopt a pay plan, nor establish its own merit commission, nor do any other affirmative acts other than those necessary to bring their employment practices within the parameters of one of the two sets of rules previously mentioned.

1974 Op. Att'yGen. 372.

Under the wording of the statute a local board of health has two options with regard to its employment practices: either follow the requirements of the Iowa Merit Employment Department or follow the Civil Service provision rules outlined in Chapter 400, The Code. If the first option was chosen, the local board could do several things.

It could enter into a contract with the Iowa Merit Employment Department pursuant to §19A.16, The Code. In the alternative, the local board could establish its own merit employment system which would be required to operate in accordance with the rules adopted by the State Merit Employment Department. The local board would not, therefore, be required to use the Iowa Merit Employment Department hiring process and compensation plans, but any hiring process or compensation plan it did use would have to meet the requirements of the Department. In order to meet the requirements of the Department, the board's employment practices would have to follow the rules of the Department codified at Chapter 570 of the Iowa Administrative Code.

Part "b" of your first question asks whether the local boards could follow a "local personnel system" which had been formally approved by the Iowa Merit Employment Department. It is my understanding, after discussing this matter with the Director of the Merit Department and some members of her staff, that the Department has never been requested to approve a local personnel system. If a locality was receiving federal funds, it would be required to comply with the federal standards for a Merit System of Personnel Administration, 5 C.F.R. §900 et seq. In turn, the federal Office of Personnel Management has made the Iowa Merit Employment Department its "agent" to monitor compliance by the locality with merit rules. The Department does not, and has not, formally approved of any local personnel systems. In answer to both parts "b" and "c" of your first question, therefore, it would seem that a local board of health could follow a "local personnel system" as long as that system complied with the rules of the State Merit Employment Department. Part "d" of the question asks whether a local personnel system developed by a county would have to include an equitable compensation plan. If the county was attempting to develop a system that would meet the

federal standards for a Merit System of Personnel Administration, then any such system would be required to provide for equitable and adequate compensation. See 5 C.F.R. §900.604.

II

The second question you presented was: "Who or what body has the responsibility for ensuring that employment practices of the local boards of health conform to '... requirements of the Iowa Merit Employment Department or any civil service provisions adopted under Chapter 400'." There does not appear to be any provision in Chapter 137, The Code, which grants authority to any particular body to ensure that a local board of health complies with §137.6(4), The Code. If, as was suggested above, a local board entered into a contract with the State Merit Employment Department for the purpose of becoming eligible to receive federal funds, the Department would monitor compliance on behalf of the federal Office of Personnel Management. Conceivably, if the local board's employment practices were not in compliance with the rules of the Department and the terms of the contract, the Department would notify the federal authorities, and the local board could suffer the loss of its federal funding. If the receipt of federal funds is not involved, then the State Merit Employment Department would have no oversight function in regard to the local boards.

III

Your third question was, "What, if any, authority can be exercised by the Department of Health in verifying or ensuring conformity of these local employment practices with merit or civil service requirements?" Chapter 137, The Code, which creates the local boards of health, does not specifically grant or deny the State Department of Health the power to regulate the employment practices of local boards. It apppears, however, that the Legislature intended that the Department would exercise some degree of supervision over local boards by virtue of §137.6(5), The Code. That section requires a local board to "provide reports of its operations and activities to the State Department (of Health) as may be required by the Commissioner."

In addition, §135.11(15), The Code, requires the Department of Health to, "Establish, publish, and enforce rules not inconsistent with law for the enforcement of the provisions of this title...." The word "title" refers to Title VII of the Code, "Public Health". Title VII encompasses Chapters 135 through 145A, and therefore, since Chapter 137 is included in Title VII, it would appear that the Department does have the authority to establish, publish, and enforce rules which will in turn enforce the provisions of Chapter 137. It should be noted that the Department has already adopted various rules concerning local boards of health which are codified at 470 I.A.C. §§77.1 - 77.3. It is stated that these rules are intended to implement §135.11(15), The Code.

Section 135.11(15), The Code, constitutes a broad grant of authority to the Department to adopt and enforce rules for the enforcement of the various provisions found in Title VII. This grant of authority is limited by the qualification that said rules shall not be inconsistent with law. As was previously noted, however, there does not appear to be any provision in Chapter 137 which restricts the authority of the Department to oversee the activities of the local boards. Section 137.5, The Code, does state that, "The county board shall have jurisdiction over public health matters within the county,..." and "the city board shall have jurisdiction within the municipal limits." This jurisdiction is not exclusive however. Section 135.33, The Code, provides that:

> If any local board shall fail to enforce the rules of the State Department (of health) or carry out its lawful directions, the Department may enforce the same within the territorial jurisdiction of such local board, and for that purpose it may exercise all of the powers given by statute to the local board, and may employ the necessary assistants to carry out its lawful directions.

In addition, §135.11(5), The Code, requires the Department to inspect the sanitary conditions in any locality of the State on the written petition of at least five citizens from that locality, and it may issue directives for the improvement of those conditions "which shall be executed by the local board".

It appears, therefore, that the Legislature intended the local boards to have primary authority over public health issues within their respective localities. Section 137.6, The Code, enumerates various powers and duties which apply to the boards. A board has the power to employ such persons as are needed to fulfill its responsibilities and the duty to make sure that its employment practices "meet the requirements of the Iowa Merit System Council or any civil service provision adopted under Chapter 400". §137.6(4), The Code. By virtue of §135.11(15), The Code, the Health Department has the authority to establish and enforce rules for the enforcement of the provisions of Chapter 137. The Department could, therefore, adopt rules which would aid in the enforcement of §137.6(4), The Code. The only limitation on the rules is the requirement that they not be "inconsistent with law".

IV

The last question is related to the two previous questions, and it asks, "If the local boards of health do not comply with §137.6(4), what are the consequences of such non-compliance?" As previously noted, a local board which was receiving federal funding and which failed to follow the requisite employment practices could lose said funding. If the Department of Health chose to do so, it could adopt rules for the enforcement of §137.6(4), The Code, and presumably, these rules could include provisions setting out the consequences of a local board's failure to comply with the dictates of that statute. Another possible consequence of a board's failure to comply with §137.6(4) would be a lawsuit brought against the Board by an aggrieved party seeking to force the board to comply with its statutory duty.

In conclusion, §137.6(4) requires the local boards of health to use employment practices which are in accordance with either the rules of the Iowa Merit Employment Department or any civil service provision adopted under Chapter 400, The Code. The boards are not specifically required to use the Merit Employment Department hiring process and compensation plan, but any alternative system must be consistent with the requirements of the Merit Department. No particular person or body has been statutorily charged with ensuring that the employment practices of the local boards comply with §137.6(4), The Code. The Department of Health has the authority pursuant to §135.11(15), The Code, to adopt rules to aid in the enforcement of the provisions of Chapter 137, including the requirements of §137.6(4), The Code. If local boards do not comply with the dictates of that section, they could suffer the loss of federal funding; they could be subject to any consequences which the Department of Health chose to adopt by means of administrative rules; and they could be sued for such noncompliance.

Very truly yours,

Susan Brammer

Susan Brammer
Assistant Attorney General

SB/tw

COUNTIES: Operation of maintenance vehicles. Chapter 321, Section 321.233. Road maintenance workers are exempt from complying with the law of the road as set out in chapter 321 only if the road has been officially closed to traffic. (Gregersen to Renken, State Representative, 11/25/81) #81-11-12(L)

November 25, 1981

The Honorable Bob Renken
House of Representatives
State of Iowa
State House
Des Moines, IA 50319

Dear Representative Renken:

Attorney General Miller has asked me to respond to your letter concerning maintenance practices on county roads. In that letter you raise the following question:

> "Is the practice of operating a maintenance vehicle against the flow of traffic in the left lane a violation of chapter 321 or other motor vehicle law?"

The statute most pertinent to your inquiry is section 321.233, The Code 1981:

> 321.233 Road workers exempted. The provisions of this chapter, except the provisions of section 321.277 and sections 321.280 to 321.282 shall not apply to persons, teams, motor vehicles and other equipment while actually engaged in work upon the surface of a highway officially closed to traffic but shall apply to persons and vehicles when traveling to or from such work. The provisions of this chapter shall not apply to

> maintenance equipment operated by or under lease to any state or local authority while engaged in road maintenance work, including to or from such work.

(Emphasis added.)[1]

Section 321.233, as originally enacted, read as follows:

> The provisions of this chapter shall not apply to persons, teams, motor vehicles, and other equipment while actually engaged in work upon the surface of a highway but shall apply to such persons and vehicles when traveling to or from such work.

In several cases construing the original enactment, the Iowa Supreme Court held that while the statute may have eliminated the need to comply with the provisions of chapter 321 as a matter of law, if the exercise of ordinary care necessitated the taking of an action in accordance with that chapter, the failure to do so would constitute evidence of negligence. See Hartwig v. Olson, 158 N.W. 2d 81, 261 Iowa 1265 (1968), Wamser v. Bostian, 298 N.W. 860, 230 Iowa 792 (1941), Rebmann v. Heesch, 288 N.W.2d 695, 227 Iowa 566 (1939). Hartwig involved two private parties where Wamser and Rebmann both involved injuries to maintenance workers caused by a co-worker.

In 1973 section 321.233 was amended to read as it does presently. 1973 Sess., 65th G.A., ch. 213, §1. That amendment severely limited the application of section 321.233. Road workers are now exempt from complying with the rules of the road only if they are engaged in work on highways which are officially closed to traffic. Section 306.41, The Code, sets forth the method for officially closing roads for construction purposes and provides that there shall be no liability

> for any damages to any vehicle that enters the closed section of highway or the contents of such vehicle or

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[1] Section 321.277 relates to reckless driving. Section 321.280 is concerned with assaults or homicides in the use of a motor vehicle while sections 321.281-283 relate to the operation of a motor vehicle while under the influence of alcohol or drugs. The last sentence of §321.233 has been interpreted by this office to relate only to an exemption from the size, weight, and load limits of chapter 321. Op.Atty.Gen. #79--5-12 (Miller to Allbee).

> for any injuries to any person that enters the closed section of highway, unless the damages are caused by gross negligence of the agency or contractor.
>
> Nothing herein shall be construed to prohibit or deny any person from gaining lawful access to his property or residence, nor shall it change or limit liabiity to such persons.

(Emphasis added.)

The combined effect of section 306.41 and section 321.233, then, is simultaneously to limit the exemption from compliance with the motor vehicle laws, and to relax the duty of care owed to persons and property in most circumstances. Of course, if the highway is not officially closed to traffic, then no exemption exists. Generally, a violation of the law of the road as set forth in chapter 321 is negligence per se unless a legal excuse for the violation is shown. See, e.g., Schmitt v. Clayton County, 284 N.W.2d 186, 188 (Iowa 1979), Kisling v. Thierman, 243 N.W. 552, 554, 214 Iowa 911, 915 (1932). A string of cases dating back to 1893 holds, however, that a violation of section 321.298, which requires vehicles to yield one-half of the traveled way by turning to the right, is evidence of negligence and not negligence per se. See, e.g., Hedges v. Condor, 166 N.W.2d 844 (Iowa 1969); Rippe v. Elting, 56 N.W. 285, 89 Iowa 82 (1893).

Specifically, then, the answer to your question is that maintenance vehicles may be legally operated against the flow of traffic only when the road is officially closed to traffic. If an accident should occur while a maintenance vehicle is operated against the flow of traffic and a lawsuit arises as a result, the standard of liability will vary from negligence to gross negligence, depending upon whether the road is open or closed and whether the injured party is another maintenance worker, lives along the road, or is simply driving on the road.

Sincerely,

Craig Gregesa

CRAIG GREGERSEN
Assistant Attorney General

COUNTIES; HOME RULE; PLATS: Art. III, § 39A, Constitution of Iowa, §§ 409.1, 409.5, 409.14, Chapter 358A. Under Home Rule, a county may redefine subdivision more restrictively than in § 409.1. Before Home Rule, county's power to regulate subdivision was limited to its zoning power. If local government does not require bond for future improvements by developer, it may have no recourse. (Ewald to Stanek, Office for Planning and Programming, (Ewald to Stanek, Office for Planning and Programming, 11/24/81) #81-11-10(L)

Mr. Edward J. Stanek, Ph.D., Director
Office for Planning and Programming
523 East 12th Street
L O C A L

November 24, 1981

Dear Mr. Stanek:

You have requested the opinion of the Attorney General on the following matters:

1. Did counties, prior to the 1978 adoption of County Home Rule, have the power to prepare, adopt and enforce subdivision regulations under Chapter 409, Iowa Code?

2. Does the "three parcel" definition of a subdivision found in § 409.1 apply to counties, or can they, under Home Rule, define a subdivision in a more restrictive fashion of, for example, two parcels?

3. Does a city have any recourse if it does not require a developer to post a performance bond and the developer fails to improve the property according to the provisions of the approved final plat?

Your first question concerns the pre-Home Rule powers of counties. Prior to the enactment of the County Home Rule Amendment, Iowa Const. Art. III, § 39A, the powers of counties were narrowly construed to include only those powers expressly granted or necessarily implied by state law. This restrictive approach to local government was known as the Dillon Rule, after Iowa Supreme Court Chief Justice John F. Dillon's holding in Merriam v. Moody's Executors, 25 Iowa 163 (1868).

While the original rule addressed the relationship between municipalities and the state, it has been generally applied to the county-state relationship as well. See Op.Att'yGen. #79-4-7.

During the one hundred years following Merriam, both the legislature and the courts increasingly emphasized the importance of county government and the breadth of powers expressly or impliedly conferred on it. In 1968 the court finally recognized that county government had policy-making or legislative functions, and was not solely an administrative arm of the state government. Mandicino v. Kelly, 158 N.W.2d 754, 760 (Iowa 1968). See also A. Vestal, Iowa Land Use and Zoning Law, § 2.07 et seq. (1979). Ten years later the Iowa legislature expressly reversed the restrictive Dillon Rule interpretations of delegated county powers by enacting the County Home Rule Amendment. Kasparek v. Johnson County Board of Health, 288 N.W.2d 511 (Iowa 1980).

From this brief historical overview, it would appear that, inasmuch as the power to prepare, adopt, and enforce subdivision regulations was neither expressly granted nor necessarily implied by state law, counties did not possess that power. However, given the judicial erosion of the Dillon Rule prior to the November 7, 1978, effective date of the Home Rule Amendment, counties could argue that they had such de facto power, especially during the period from 1968 to 1978. See Note, Subdivision Regulation in Iowa, 54 Ia.L.Rev. 1121, 1128-29 (1969).

Although counties were not specifically authorized by the Iowa Code to engage in regulation of subdivisions prior to 1978, Chapter 358A, dealing with county zoning commissions, implicitly empowers counties to control subdivisions. See A. Vestal, Iowa Land Use and Zoning Law, §§ 7.01 et seq. (1979). Under Chapter 358A a county could:

> . . . regulate and restrict the height, number of structures, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and location and use of buildings, structures, and land . . . .

Section 358A.3, Iowa Code. See Oakes Construction Co. v. City of Iowa City, 304 N.W.2d 797, 803 (Iowa 1981). However, this traditional county zoning power would not have authorized a county to alter the procedural platting requirements of Chapter 409. See City of Iowa City v. Westinghouse Learning Corp., 264 N.W.2d 771 (Iowa 1978); Op.Att'yGen. #79-4-21; 1970 Op.Att'yGen. 311, 312 ("All subdivision platting in this state must be done in compliance with the provisions of Chapter 409 of the Code. There is no other guideline.")

Your second question asks if a county, under Home Rule, can redefine a subdivision to mean "two parcels." We recently answered this question in the affirmative with respect to cities under their nearly identical Home Rule power. See Op.Att'yGen. #80-2-9, enclosed. We now affirm that opinion and further state that we would draw the same conclusion with respect to counties, namely, that a local ordinance requiring platting of land within

its jurisdiction upon being subdivided into two or more parts is not thereby constitutionally inconsistent with a statute requiring such platting upon division into three or more parts. Any local ordinances must follow the procedures of Chapter 409.

Your third question involves a city's remedies under Chapter 409 where a developer fails to carry out the provisions of an approved final plat with respect to promised improvements.

The statutory remedies are revocation of tentative approval or forfeiture of bond. Sections 409.5, 409.14. One issue is whether these specific statutory remedies were intended to provide the exclusive means by which the city could enforce platting provisions. If so, and if the city granted final approval without requiring a bond, it may indeed have little or no legal recourse against a developer.

A related issue is whether the tentative approval/bonding requirement is mandatory or whether it is merely permissive. Section 409.5 provides that the city "may" tentatively approve a plat, or, "in lieu of" completion before final approval, it "may" accept a bond. The statutory use of the word "may" ordinarily denotes a permissive, nonmandatory course of action. Schultz v. Board of Adjustment of Pottawattamie County, 139 N.W.2d 448 (Iowa 1966). On the other hand, it could be reasonably argued that the formulation "A may do X or, in lieu of X, A may do Y" imposes a mandatory duty on A to do either X or Y. See Wolf v. Lutheran Mutual Life Insurance Co., 236 Iowa 334, 18 N.W.2d 804 (1945) (word "may" can be construed in mandatory sense to effect legislative intent).

Section 409.14 provides that the city "may" require as a condition of approval that all streets be brought to grade, etc., and "may" require a bond. This section, on its face, appears to be more permissive than § 409.5.

We are reluctant to predict how a court might resolve these issues and whether it would allow a municipality to pursue common-law remedies against a developer when it has not exercised its statutory remedies. See Boehck Construction Equipment Corp. v. Voigt, 115 N.W.2d 627 (Wis. 1962) (where statute expressly mandates municipality to require bond, municipality will be held personally liable to suppliers and subcontractors if no bond is provided). In all cases we would advise a city to follow the statutory tentative approval or bonding procedure set forth in §§ 409.5 and 409.14.

In summary, under Home Rule both cities and counties may more restrictively redefine a subdivision. Before Home Rule their power to regulate subdivisions would have been limited to

their zoning powers. If a local government fails to utilize express statutory remedies, particularly its bonding power, it may have no recourse against developers, depending on the Court's construction of Sections 409.5 and 409.14.

Yours truly,

Robert P. Ewald
by Elizabeth M. Osenbaugh

ROBERT P. EWALD
Assistant Attorney General

RPE:rcp

Enclosure

COUNTIES: OFFICIAL NEWSPAPERS: PUBLICATION OF NOTICES. §§ 349.1-2 and 618.3-4, The Code 1981. If a newspaper, once designated as an official county newspaper, changes ownership and changes its name, said newspaper continues as an official newspaper for the balance of the year it was so designated, despite the fact that it ceased publication during a five-month period. However, such paper is not eligible to be designated an official newspaper in future years until it has completed two years of regular publication beginning with the issue following the break in publication. (Fortney to Mahaffey, Poweshiek County Attorney, 11/18/81) #81-11-9(L)

November 18, 1981

Michael W. Mahaffey
Poweshiek County Attorney
Courthouse
Montezuma, Iowa 50171

Dear Mr. Mahaffey:

You have requested an opinion of the Attorney General regarding the designation of official county newspapers pursuant to Chapters 349 and 618, The Code 1981. We are of the opinion that if a newspaper, once designated as an official county newspaper, changes ownership and changes its name, said newspaper continues as an official newspaper for the balance of the year it was so designated, despite the fact that it ceased publication during a five-month period. However, such paper is not eligible to be designated an official newspaper in future years until it has completed two years of regular publication beginning with the issue following the break in publication.

It appears impossible to frame the problem you pose without a recapitulation of the factual background. We therefore provide the following summary. The Board of Supervisors of Poweshiek County designated three newspapers as the county's "official newspapers" for 1981, such designation being made pursuant to §§ 349.1-4, The Code 1981. One of the papers so designated was the Brooklyn Chronicle which, at the time of designation, met the requirements of § 618.3, The Code 1981. During the early part of 1981, publication of official notices appeared in the three designated newspapers. Subsequently, the Brooklyn Chronicle ceased publication due to financial difficulties. This situation continued for a period of five to six months. During this interim period, a new publisher acquired the mailing list and second class postal permit from the publisher of the Brooklyn Chronicle. The new publisher began publishing a paper called the Brooklyn Paper. There is no dispute that the United States Postal Service recognizes the Brooklyn Paper as one and the same as the Brooklyn Chronicle.

You have inquired whether the Brooklyn Paper is qualified pursuant to § 618.3 to continue as an official newspaper of Poweshiek County for 1981, the year of its current designation. You further inquire whether it is qualified to be an official newspaper in future years. There are four sections of the Code which are controlling of the issues you present, §§ 349.1-2 and 618.3-4. These sections provide as follows:

> The board of supervisors shall, at the January session each year, select the newspapers in which the official proceedings shall be published for the ensuing year.

§ 349.1

> Such selection shall be from newspapers published, and having the largest number of bona fide yearly subscribers, within the county. When counties are divided into two divisions for district court purposes, each division shall be regarded as a county.

§ 349.2.

> For the purpose of establishing and giving assured circulation to all notices and reports of proceedings required by statute to be published within the state, where newspapers are required to be used, newspapers of general circulation that have been established, published regularly and mailed through the post office of current entry for more than two years and which have had for more than two years a bona fide paid circulation recognized by the postal laws of the United States shall be designated for the publication of notices and reports of proceedings as required by law.

§ 618.3.

> A change of name or ownership of a newspaper thus designated that does not affect its general circulation as above required shall in no way disqualify such newspaper for selection in making such publication of legal notices.

§ 618.4.

Chapters 349 and 618 must be read in conjunction. 1944 Op. Att'y Gen. 7.

At the outset, it is apparent that the change in name or change in ownership of a newspaper does not, in any way, determine whether the paper continues its eligibility as an official newspaper. § 618.4. The critical element is whether the change impacts upon the paper's publication in such a manner as to change the paper's identity, or to result in a cessation of publication. See 1938 Op. Att'y Gen. 448 to the effect that a newspaper which, sometime after it had been designated as one of the three official newspapers of the county, reduced its publication from daily to weekly and changed its name, had not so changed its identity as to be disqualified under the designation and no further action on the part of the board was necessary except for adoption of a resolution acknowledging the change in name.

As to your first inquiry, the events which transpired after the official designation do not have any bearing on the eligibility of the Brooklyn Paper during 1981. Whether or not a paper qualifies to be an official paper is a question which is resolved once each year and such determination remains in effect for the ensuing year. We base this conclusion on § 349.1 which provides, in pertinent part, that the supervisors are to designate "the newspapers in which the official proceedings shall be published for the ensuing year." (Emphasis supplied.) In addition, 1944 Op. Att'y Gen. 7 held that whether a particular newspaper may qualify as an official newspaper within § 618.3 must be determined as of the time the selection of official newspapers is made.

We recognize that an argument can be developed from § 618.4 to the effect that a change of ownership or name may alter a designation if the change affects the paper's publication. We believe, however, that this section goes to determining, in conjunction with § 618.3, whether a paper has been published for the required two years. If there has been a change of ownership which affects publication, there would be a break in the running of the requisite period of publication. This could impact on future designations. It would not affect a designation once made.

As to designation of the Brooklyn Paper as an official newspaper in years subsequent to 1981, the paper, to be eligible, must have complied with the United States postal laws regarding paid circulation for at least two years. Op. Att'y Gen. #79-4-25. From the facts presented, the Postal Service regards the Brooklyn Paper as having assumed the identity of the Brooklyn Chronicle, so we see no objection to the paper on this point.

The difficulty we have with finding the Brooklyn Paper eligible for designation in 1982 is that § 618.3 requires an official newspaper to be one which has been "published regularly and mailed through the post office of current entry for more than two years." We are unable to say that a newspaper which ceased publication for over five months was "published regularly"

during said period. In 1944 Op. Att'y Gen. 7, we held that the word "published" in § 618.3 meant "to make known publicly or to put in circulation." The Brooklyn Chronicle/ Brooklyn Paper certainly made nothing known publicly during its half-year hiatus.

We are aware that the Iowa Supreme Court in Widmer v. Reitzler, 182 N.W.2d 177 (1970) held that a newspaper qualified as a newspaper of general circulation for official publication of special election notices where it was a weekly newspaper of general circulation, published and mailed for more than two years and so accepted by postal authorities, though it was shown that four instant issues were not regularly published on edition dates. The holding in Widmer is distinguishable on a number of points. Only two need be mentioned. First, the four editions in Widmer, though published late, were in fact published. There was no Brooklyn Chronicle/ Brooklyn Paper published during the period in question. Second, there is a great deal of difference between four weeks and five months when the question is whether a paper was "published regularly."

In conclusion, if a newspaper, once designated as an official county newspaper, changes ownership and changes its name, said newspaper continues as an official newspaper for the balance of the year it was so designated, despite the fact that it ceased publication during a five-month period. However, such paper is not eligible to be designated an official newspaper in future years until it has completed two years of regular publication beginning with the issue following the break in publication.

Yours truly,

David Fortney

DAVID M. FORTNEY
Assistant Attorney General

DMF:sh

SCHOOLS: Employment of spouses of school board members. Sections 277.27, 279.29 and 279.30, The Code 1981. The spouse of a school board member may not be employed by the district as a substitute teacher. (Norby to DeKoster, State Senator, 11/16/81) #81-11-8(L)

November 16, 1981

Honorable Lucas J. DeKoster
State Senator
Hull, Iowa 51239

Dear Senator DeKoster:

You have requested an opinion regarding employment of the spouse of a school board member as a substitute teacher. Section 277.27, The Code 1981, raises a concern with this employment. This section provides, in relevant part, as follows:

> Notwithstanding any contrary provision of the Code, no member of the board of directors of any school district, or his or her spouse, shall receive compensation directly from the school board.

This section has been applied in two prior Attorney General's opinions. First, this section was construed to not prohibit an employee of an area education agency from serving as a school district board member. 1976 Op. Att'y Gen. #89. This construction was made regardless of the assumption that local school districts may contract with an area education agency for progams and support services. The opinion appears to reason that salaried employees of third-party vendors to districts are not compensated directly by the district.

A second opinion considered whether a doctor who is a board member may provide medical examinations to the school's football team. 1976 Op. Att'y Gen. 830. This opinion concludes that such services may not be provided in light of § 277.27.

We believe that payment of a substitute teacher does constitute a "direct" payment for purposes of § 277.27. Initially, the Board must contract with all teachers, including substitutes. § 279.12. Furthermore, the Board must audit and allow claims for salaries, § 279.29, with the exception that the Board may provide by resolution for the secretary to issue warrants for salaries when the Board is not in session. § 279.30.

You have suggested that distinctions may exist for purposes of § 277.27 between "salaries" and other fees which might be received from the board, and between payment by the school district as opposed to the board. Review of §§ 279.29 and 279.30 convinces us that such distinctions cannot be drawn for two reasons. First, § 279.29 refers to all claims, drawing no distinction between salaries and other forms of compensation. Secondly, these sections make it clear that no independent power to authorize expenditures exists in any school official without Board approval.

In conclusion, we believe that § 277.27 prohibits payment of compensation to the spouse of a school board member for serving as a substitute teacher.

Sincerely,

Steven D. Norby

STEVEN G. NORBY
Assistant Attorney General

SGN:sh

STATE OFFICERS AND DEPARTMENTS: Department of Substance Abuse; Licensing and Enforcement Authority. House File 821, Acts of the 69th G.A., 1981 session, §125.13, The Code 1981. Section 12 of House File 821 grants authority to the Department of Substance Abuse to inspect unlicensed facilities and to seek injunctive relief, but only if the facility or program is receiving state dollars. The term "state dollars" appears to refer only to a direct legislative appropriation. The amendments to Chapter 125, The Code, contained in House File 821 do not directly affect the Department's licensure mandate found in §125.13(1), The Code, although as a practical matter, the Department may not be authorized to use its enforcement powers against an unlicensed facility that is not receiving state funds. The Department's monetary liability is contingent on the terms of any contract between the director and the facility. The Department has no implied enforcement power over unlicensed facilities or programs that are not receiving state dollars. (Brammer to Riedmann, Dept. of Substance Abuse, 11/4/81) #81-11-6(L)

Gary P. Riedmann, Director
Iowa Department of Substance Abuse
Suite 202, Insurance Exchange Building
Des Moines, Iowa 50319

November 4, 1981

Dear Mr. Riedmann:

You have requested an Attorney General's opinion regarding an interpretation of House File 821, Acts of the 69th G. A., 1981 Session (hereinafter referred to as "H.F. 821") and its effect on the licensure responsibilities of the Department of Substance Abuse set forth in §125.13(1), The Code 1981. In particular, you have asked for clarification of the term "state dollars" as used in §12 of H.F. 821.[1]

Your first question, in pertinent part, was:

> What would legally be considered to constitute 'state dollars'? For example, would state dollars be limited specifically to only legislative appropriations for substance abuse treatment, or would this be applicable to programs which are assisted by funds supplied by:
>
> a. Any department or agency of Iowa, whether directly, through a grant or contract; or
>
> b. Which is assisted through the allowance of income tax deductions for contributions to the program conducting such functions; or

[1] Section 12 of H.F. 821 gives the Department of Substance Abuse the authority to inspect any "institution, place, building, or agency not licensed as a substance abuse treatment and rehabilitation center" and which is not exempt from licensing under §125.13(2), The Code, to determine if it is in fact a substance abuse treatment and rehabilitation center. The section also gives the state the authority to seek an injunction against a person "establishing, conducting, managing, or operating a substance abuse treatment and rehabilitation facility" without the required license. The last sentence of Section 12 states that "This section does not apply to facilities or programs which are not receiving state dollars."

c. By way of a tax-exempt status for such programs

The term "state dollars" is not defined in H.F. 821 nor were we able to locate a definition of that particular phrase anywhere else in the Code of Iowa. In researching the legislative history of the bill, we discovered a publication entitled "Summary of Legislation Approved by the First Regular Session of the Sixty-Ninth Iowa General Assembly Meeting in the Year 1981" prepared by the Iowa Legislative Service Bureau. Page fourteen of that publication contains a summary of H.F. 821. Part of that summary states that H.F. 821 "allows inspection of a facility receiving state dollars when the Department has probable cause to believe the facility should be licensed. It also provides for injunctive relief and includes penalties for facilities receiving state funds that are operating without a license." (emphasis added). This language indicates that the Legislative Service Bureau considers the term "state funds" to be synonymous with the phrase "state dollars," as that term is used in H.F. 821. One definition of "state funds" can be found in §8.2(2), The Code. That section provides that "'state funds' means any and all moneys appropriated by the Legislature, or money collected by or for the state, or an agency thereof, pursuant to authority granted by any of its laws." Under this analysis, facilities or programs receiving "state dollars" would be limited to those which receive money directly appropriated by the Legislature, unless the operator of the facilities or program is otherwise a "state agency".

You have questioned whether the term "state dollars" may be given a broad interpretation so as to include assistance in the form of tax-exempt status or the allowance of tax deductions for contributions. If the Legislature had intended such a result, it could have used language which would more naturally convey a wider scope of coverage such as "any state or tax assistance." Use of the more specific term "state dollars" suggests a narrower approach and implies that the Legislature intended that only a direct money outlay from the state would constitute state dollars. It appears, after reading the entire text of H.F. 821 and Chapter 125, The Code, that the Legislature intended to proscribe the authority of the Department of Substance Abuse in its dealings with essentially "private" concerns. This is evidenced by §9 of H.F. 821 and §125.21, The Code, wherein it is stated that the Commission shall approve and license a chemical substitutes and antagonists program if the requirements of the rules are met and no state funding is requested. A restricted interpretation of "state dollars", as suggested above, would seem to be more consistent with the Legislative intent expressed in §125.21, The Code.

Your second question asks how H.F. 821 affects the Department's "licensure mendate" of §125.13(1).[2] In reference to this question, your letter states "It appears that the legislature's intent in revising this statute was for the Iowa

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[2]Section 125.13(1), The Code, states that: "Except as provided in subsection 2 of this section, a person may not maintain or conduct any chemical substitutes or antagonists program, residential program or nonresidential outpatient program, the primary purpose of which is the treatment and rehabilitation of substance abusers without first having obtained a written license for the program from the Department."

Department of Substance Abuse (IDSA) to be responsible for licensing only programs receiving funds from the Department; however, 125.13(1) provides IDSA much broader authority for licensure." House file 821 did not change the language of §125.13(1), The Code. That section still requires that a person desiring to conduct one of the enumerated substance abuse programs must obtain a license to do so unless one of the exceptions found in §125.13(2) applies. Section 12 of H.F. 821 does not affect the Department's licensing authority. On the contrary, it grants authority to the Department to inspect an unlicensed institution, place, building, or agency if it has probable cause to believe that the entity is in fact a substance abuse treatment and rehabilitation facility and which is not exempt from licensure. This inspection authority is, however, limited to facilities and programs receiving state dollars.

The answer to your third question, "is there a difference in our liability as it would relate to programs over which we have enforcement powers, and those over which we have no statutory enforcement powers" depends upon what is meant by "liability". If by "liability" you mean the monetary obligation to pay seventy-five percent of the cost of care, maintenance, and treatment of a substance abuser as outlined in §125.44, The Code, then it is necessary to examine how such a monetary liability comes into existence. Under the provisions of §125.44, The Code, the Department becomes liable for funding the above-mentioned costs only if there exists a contract between the facility and the Department. In the absence of such a contract, there is no liability on the part of the Department and the question of whether the Department has any enforcement powers over the facility has no bearing on the liability issue. See Op. Att'y Gen. #79-10-12.

Finally, you have asked, "As an agency of state government responsible for protecting the general health and welfare of the citizenry of Iowa, do we have any enforcement powers over programs for which we have no statutory enforcement powers?" We will assume that by use of the term "enforcement power" you are referring to the Department's authority to "police" unlicensed facilities or programs. The Department of Substance Abuse, like any other administrative body, possesses only such power as is specifically conferred, or necessarily implied, in the statute creating it. See Quaker Oats Co. v. Cedar Rapids Human Rights Commission, 268 N. W. 2d 862 (Iowa 1978). In the absence of any specific statutory enforcement power, therefore, the Department has no such power unless this authority is necessarily to be implied.

As noted above, §12 of House File 821 limits the Department's inspection authority and its power to seek injunctive relief to cases in which an unlicensed facility or program is receiving state funding. There is no language in §12, or anywhere else in Chapter 125, which would "necessarily imply" that the Department has any similar enforcement authority over facilities or programs that are not receiving state funding.

In conclusion, Section 12 of H.F. 821 grants enforcement authority to the Department of Substance Abuse but this authority extends only to facilities or programs that are receiving a direct legislative appropriation. This amendment

does not alter the Department's licensure mandate of §125.13(1), The Code. The practical effect of the amendment, however, is that even though a facility ought to be licensed pursuant to §125.13(1), if it does not receive state funding, the Department has no authority to inspect or enjoin its operation. The Department's monetary liability to a facility is contingent on the terms of the contract entered into between the director and the facility. The Department possesses only such enforcement authority as is specifically conferred or necessarily implied from the provisions of Chapter 125, The Code, as amended.

Very truly yours,

Susan B Brammer

Susan B. Brammer
Assistant Attorney General

MOTOR VEHICLES; DEALERS AND WHOLESALERS: Definition of motor vehicle dealer under §321.238(12) of the Iowa Code. §§321.1(38), 321.238(12), 322.4, 322.5, 322.6, 322.7, 322.28, 322.29, The Code 1981. A person licensed as a wholesaler under chapter 322 of the Iowa Code can be a dealer for the purposes of the §321.238(12) exemption from inspections as long as he or she meets the defintion of "dealer" supplied by §321.1(38). (Dundis to Rush, State Senator, 11/3/81) #81-11-5(L)

The Honorable Robert Rush
830 Higley Bldg.
Cedar Rapids, IA 52401

November 3, 1981

Dear Senator Rush:

In a letter to this office, dated June 4, 1981, you related the following:

> Section 321.238(12) exempts dealers licensed under Chapter 322 from various regulations relating to motor vehicle registrations. Chapter 322 provides for licenses of both wholesalers and individuals who sell motor vehicles at retail. Section 321.1(38) defines dealer as "every person engaged in the business of buying, selling or exchanging vehicles of a type required to be registered hereunder and who has an established place of business for such purpose in this state".

You then request an "opinion as to whether a person licensed as a wholesaler under Chapter 322 is a dealer for the purposes of section 321.238(12)." We believe that question, with certain qualifications, must be answered in the affirmative.

That part of §321.238(12), The Code 1981 relevant to this opinion reads as follows:

> "12. Every motor vehicle subject to registration under the laws of this state, except motor vehicles registered under section 321.115, and motorized bicycles, motor vehicles transferred under the provisions of section 321.51 and 321.52 when first registered in this state, other than a registration to a

> dealer licensed under chapter 322, and each time when transferred for use within this state or when registration is changed from a registration as provided in section 321.115 to a regular registration, other than transfers to a dealer licensed under chapter 322, shall be inspected at an authorized inspection station . . . ." [emphasis added]

It should be noted that §321.238(12) specifically limits its exemption to dealers who are licensed under Chapter 322, The Code 1981. Although it provides no seperate definition for the term "dealer", that chapter does distinguish between motor vehicle retail dealers and wholesalers for licensing purposes. Each must fulfill specific requirements, and each receives a seperate and distinguishable license. §§322.4, 322.5, 322.6, 322.7, 322.28, and 322.29, The Code 1981. However, the fact remains that §321.1(38), the Code 1981 does provide the definition of "dealer" for use in Chapter 321, The Code 1981. The preface to that section specifically states: "The following words and phrases when used in this chapter shall, for the purpose of this chapter, have the meanings respectively ascribed to them." [emphasis added]. The phrase "licensed under chapter 322", therefore, imposes a restriction but cannot be definitional.

A related question at this point is whether the legislature intended the §321.1(38) definition to prevail in this particular case. However, a statute is subject to rules of interpretation only when found to be ambiguous. §4.6, The Code 1981; Iowa National Industrial Loan Co. v. Iowa State Department of Revenue, 224 NW 2d 437 (Ia. 1974). The only time intent will prevail over the literal import of the words used is when that legislative intent is manifest or a literal reading of the statute will lead to absurd consequences. Janson v. Fulton, 162 NW2d 438 (Ia 1968).

First, the statutory wording in question does not appear to be ambiguous. A clear definition of "dealer" is supplied by §321.1(38) and that definition, in turn, is expressly required to be used within Chapter 321. The only other specification is that a dealer must be licensed under Chapter 322 of the Code. That licensing can be accomplished as a retail dealer or a wholesale dealer within that chapter. Of course, no matter which licensing category one

is in, he or she must come within the boundaries of the §321.1(38) definition. For example, a wholesaler is not required under Chapter 322 to have an established place of business, but to be exempted under §321.238(12) he or she must have one, due to the definitional requirement.

A contrary legislative intent to that of the literal import of the words has not been made manifest either from a reading of the statute or from a study of its legislative history. Likewise, there is nothing to indicate that a literal reading of the relevant portion of §321.238(12) would lead to absurd consequences. Allowing both licensed retail dealers and wholesalers to avoid inspection requirements when motor vehicles are transferred to them does not appear illogical since there is no apparent reason why retail dealers should be excepted from inspection procedures, while wholesalers should not. A motor vehicle must always be inspected before being sold to an individual for actual road use. This would seem to be the main concern of this state's inspection law. Indeed, §321.238(12) states motor vehicles are subject to inspection when "first registered in this state . . . and each time when transferred for use within this state . . ."[emphasis added].

It is therefore our opinion that a person licensed as a wholesaler under Chapter 322 can be a dealer for the purposes of the §321.238(12) exemption from inspection as long as he or she meets the definition of "dealer" supplied by §321.1(38), The Code 1981.

Sincerely,

Stephen P. Dundis

STEPHEN P. DUNDIS
Assistant Attorney General

NOTARY PUBLIC: Discretion accorded notaries public in exercising their powers. §§77.1, 77.11, The Code. A notary public may decline the exercise of notarial services. Reasonable discretion is allowed in the exercise of powers and duties of notaries public. (Swanson to Angrick, Citizens' Aid, 11/3/81) #81-11-4(L)

Mr. William P. Angrick II
Citizens' Aid/Ombudsman
Citizens' Aid Office
Capitol Complex
Des Moines, Iowa 50319

November 3, 1981

Re: Your File No. 81-558

Dear Mr. Angrick:

Reference is made to your request for an opinion from this office concerning the discretion accorded to an individual who is invested with the powers and authority of notary public under Chapter 77, Code of Iowa, as revised.

You request an opinion of the Attorney General on the following questions:

1. May an individual decline the exercise of notarial services when presented with appropriate identification and circumstances are otherwise in compliance with the requirements of The Code?

2. May an individual employed by a private institution or establishment condition the exercise of notarial services on the requirement that the person served be a customer or client of the establishment?

The powers and duties of notaries public in Iowa are set out in Chapter 77, Code, 1981. The secretary of state is responsible for appointments and may at any time revoke such appointment. Section 77.1, Code, 1981.

The question of discretion accorded notaries public in exercising their powers when presented with appropriate identification by a person desirous of utilizing their services has not been directly considered by the General Assembly in the enactment of Chapter 77. Neither has it been directly presented to or decided by the Iowa Supreme Court.

Nothing in the language of Chapter 77 would require a notary public to exercise his or her powers in every case where the notary was presented with appropriate identification by a person wishing to utilize the services of such notary.

Only three grounds for removal from office by the secretary of state are set out as constituting improper acts as notary public. These grounds are as follows:

1. exercising the duties of his or her office after the expiration of his or her commission; or

2. when otherwise disqualified; or

3. appending his or her official signature to documents when the parties have not appeared before him or her. Section 77.11, Code, 1981.

Commission of any of the above acts also renders a notary public subject to prosecution for a simple misdemeanor. Id.

Refusal by notaries public in a given situation to exercise the powers conferred upon them by statute does not subject them to removal from office or render them guilty of a misdemeanor.

With respect to civil liability, the Iowa Supreme Court has held that the liability of a notary public is not that of an insurer, and, if he or she is to be held liable, it must be on the ground of negligence, willful misconduct, or corruption, which results proximately in a pecuniary loss of the person claiming injury. Atlas Security Co. v. O'Donnell, 232 N.W. 121 (Iowa 1930).

Based upon the foregoing, we conclude that a notary public is not required to exercise the powers conferred by statute in every situtation in which he or she is requested to do so. Reasonable discretion is allowed.

Therefore, a notary public may decline the exercise of notarial services. The notary may also condition the exercise of notarial services on the requirement that the person served by a customer or client of the establishment by which the notary is employed.

We hope this information will be of assistance to you. Please do not hesitate to contact us for further information.

Yours very truly,

Gary H Swanson

GARY H. SWANSON
Assistant Attorney General

GHS/mel

PUBLIC EMPLOYEES; RETIREMENT AGE. Ch. 70, § 70.2; Ch. 97B, §§ 97B.45, 97B.46. The requirement that peace officers and firefighters cease employment at age sixty-five as provided in § 97B.46(3) prevails over the veterans preference prohibiting disqualification from employment on account of age as provided in § 70.2. (Pottorff to Hansen, State Representative, 11/3/81) #81-11-3(L)

November 3, 1981

Honorable Ingwer Hansen
State Representative
201 South 8th Ave., E.
Hartley, Iowa 51346

Dear Representative Hansen:

You have requested an opinion concerning a possible conflict between statutes affecting the retirement of certain public employees. You point out that Chapter 70, which provides for veterans preference, states:

> 70.2 Physical disability. The persons thus preferred [veterans] shall not be disqualified from holding any position hereinbefore mentioned on account of age or by reason of any physical disability, provided age or physical disability does not render such person incompetent to perform properly the duties of the position applied for. [§70.2, The Code 1981].

Chapter 97B, which addresses employees under the Iowa Public Employees' Retirement System, concurrently states:

> 97B.46 Service after age sixty-five.
>
> * * *
>
> 3. A member shall not be employed as a peace officer or as a fire fighter after attaining the age of sixty-five. [§97B.46(3), The Code 1981].

You specifically inquire which statute prevails when a peace officer or firefighter, who is also a veteran, reaches age sixty-five.

Your question has been answered by the Iowa Supreme Court in Peters v. Iowa Employment Security Commission, 248 N.W.2d 92 (Iowa 1976). In Peters, a veteran asserted that § 70.2 barred forced retirement at age sixty-five under §§ 97B.45 and 97B.46 of the 1973 Code. The Supreme Court ruled, however, that under principles of statutory construction, §§ 97B.45 and 97B.46 prevailed over § 70.2. Id. at 96.

The Court invoked two separate principles. First, when a general statute is in conflict with a specific statute, the latter generally prevails whether enacted before or after the general statute. Second, when two statutes are irreconcilable, the later statute controls. Under either principle, the Court reasoned, the retirement provisions of Chapter 97B prevailed. Id. at 96.

The Peters decision appears to resolve the question you pose. Since Peters, Chapter 97B has been amended several times. Section 97B.46(3), about which you specifically inquire, was added by amendment in 1979. 1979 Session, 68th G.A., ch. 35, § 4. Subsequent amendments, however, would not affect the application of the principles of statutory construction applied by the Court in the Peters case.

Accordingly, we advise that the requirement that peace officers and firefighters cease employment at age sixty-five as provided in § 97B.46(3) prevails over the veterans preference prohibiting disqualification from employment on account of age as provided in § 70.2.

Sincerely,

Julie F. Pottorff

JULIE F. POTTORFF
Assistant Attorney General

JFP:sh

NURSES: Disclosure of information; emergency searches. Sections 125.2, 125.33, 140.3, and 140.4, The Code 1981. If a student approaches a school nurse seeking advice in seeking an abortion, or if a school nurse becomes aware that a student has a venereal disease, is an alcoholic, or is taking a controlled substance, the school nurse is not required by law to inform the student's parents of these circumstances. If a school nurse searches the purse of a student who is unconscious and who appears to have taken an overdose of a controlled substance in an attempt to determine the substance taken, he/she would generally not be liable for the tort of invasion of privacy. (Norby to Illes, Board of Nursing, 11/3/81) #81-11-2(L)

November 3, 1981

Ms. Lynne Illes
Executive Director
Iowa Board of Nursing
L O C A L

Dear Ms. Illes:

You have requested an opinion of the Attorney General on the following questions:

1. If a female student comes to a school nurse seeking help/advice in obtaining an abortion, does Iowa law require the school nurse to inform the student's parents, guardians, etc.?

2. Is a school nurse who is aware that a student has venereal disease, is taking a controlled substance(s) or is an alcoholic, required by Iowa law to inform the student's parents, guardians, etc.?

3. May a school nurse search the purse of a student who has attempted suicide to determine what controlled substance(s) was taken?

Inherent in question no. 3 is the following situation:

A student takes an overdose of a controlled substance(s) in a suicide attempt. The student is brought to the school nurse unconscious. In an attempt to determine what controlled substance(s) was taken, a search of the student's purse was made.

In regard to your first two questions, there does not appear to be any general requirement that a nurse disclose any information to a student's parents.

Regarding a student who seeks help in obtaining an abortion, Iowa has no requirement of disclosure. If disclosure of any type is required, as some states have attempted, this disclosure is generally required by the physician performing the abortion. The U. S. Supreme Court recently upheld a statute requiring that notice be given, if possible, to the parents of an unmarried, unemancipated female by the doctor performing the abortion. H. L. v. Matheson, ___ U.S. ___, 101 S.Ct. ___, 67 L.Ed.2d 388, 49 L.W. 4255 (1981). But regardless of this holding, Iowa has not enacted a requirement of disclosure.

The general lack of a requirement of disclosure also disposes of your second question. We do point out, however, that additional support for nondisclosure is suggested by Ch. 125 and Ch. 140, The Code 1981.

Section 125.33(1) provides that if a minor seeks or receives treatment for alcohol or drug abuse at a licensed facility, § 125.2(2), this fact cannot be disclosed without the minor's consent. Similarly, §§ 140.3 and 140.4 require physicians examining or treating venereal disease to maintain confidentiality, with no exception being applied to minors. Furthermore, § 140.9 provides that a minor has legal capacity to consent to treatment for venereal disease, in contrast to a minor's general incapacity to consent to medical treatment. As noted above, these sections do not pertain to school nurses, but we believe they lend support to the conclusion that a school nurse is not required to make these disclosures.

Your third question raises the possibility of tort liability for invasion of privacy, as it involves a search made without the consent of the student. Individual instances will differ according to the facts, but it appears that generally in an emergency situation liability will not arise. A defense to invasion of privacy arises dispite lack of consent if:

1) an emergency makes it necessary or apparently necessary to act to prevent harm before consent can be obtained; and

2) the actor has no reason to believe that consent would be denied if an opportunity to consent was possible.

Restatement of Torts, Second Edition, § 892D. This principle would appear to protect a nurse conducting a search as you have described.

Sincerely,

STEVEN G. NORBY
Assistant Attorney General

SGN:sh

PUBLIC FUNDS: DEPOSITS: Iowa Const. Art. VIII, § 3; Chs. 453, 454, §§ 4.7, 4.11, 452.10, 453.1, 453.5, 524.103, 534.11(10); Title I of the Housing and Community Development Act of 1974, Public Law 93-383. The Iowa Code requires that public funds must first be proffered to approved banks except where the public funds are to be deposited not more than 14 days. Once the funds are deposited, public funds not needed for currenty operating expenses may be invested pursuant to Section 452.10, The Code 1981, so long as said investment is not in contravention of Article VIII, Section 3, the Iowa Constitution. In certain limited instances, federal legislation providing federal funds may preempt this proffer requirement. (Hagen to Priebe, State Senator, 12/31/81) #81-12-12(L)

December 31, 1981

Honorable Berl E. Priebe
State Senator
R. R. 2, Box 145-A
Algona, Iowa 50511

Dear Senator Priebe:

You have requested that this office issue an Attorney General's opinion concerning the "meaning and application of § 453.5, The Code 1981, in relation to other statutes and Attorney General's opinion interpreting said statute." You also inquire as to whether the language in § 453.5 requires a city to make a proffer to banks designated as depositories by said city and receive a refusal of proffer as is allowed by § 452.10, The Code 1981. This request has been supplemented by an attorney for the same city in which it is inquired whether or not there is a distinction between the depositing of funds as contrasted with the investment of city funds. To begin with Section 453.1 contains certain requirements as to the placement of public "deposits" and was amended by Senate File 292, Sixty-ninth General Assembly (1981) as follows:

> Section 1. Section 453.1, Code 1981, is amended to read as follows:
> 453.1 DEPOSITS IN GENERAL. All funds held in the hands of the following officers or institutions shall be deposited in banks ~~as-are~~ first approved by the appropriate governing body as indicated: For the treasurer of state, by the executive council; for the county treasurer, recorder, auditor, sheriff, ~~township-clerk,~~ clerk of the district court, and judicial magistrate, by the board of supervisors; for the city treasurer, by the city council; for the county public hospital or merged area hospital, by the board of hospital trustees; for a memorial hospital, by the memorial hospital commission; for a school

> corporation, by the board of school directors~~,-provided, however that~~. However, the treasurer of state and the treasurer of each political subdivision shall invest all funds not needed for current operating expenses in time certificates of deposit in banks listed as approved depositories pursuant to this chapter or in investments permitted by section 452.10. The list of public depositories and the amounts severally deposited ~~therein~~ in the depositories shall be a matter of public record. The term "bank" means a bank or a private bank, as defined in section 524.103.

Section 453.5, The Code 1981 then establishes a procedure for the placement of such "deposits." Section 453.5 has recently been amended by the last legislative general session and the adopted amendment reads as follows:

> Section 1. Section 453.5, The Code 1981, is amended to read as follows:
> 453.5 REFUSAL OF DEPOSITS--PROCEDURE. If ~~none of~~ the duly approved banks will not accept ~~said~~ the deposits under the conditions ~~herein~~ prescribed or authorized in this chapter, ~~said~~ the funds may be deposited, on the same or better terms as were offered to the depositories, in any approved bank or banks conveniently located within the state.
> If a governmental unit makes in writing to all qualified, approved depositories a bona fide proffer to deposit public funds either in a savings account, or in a time certificate of deposit, and ~~such~~ the proffer is not then accepted, then and only then may ~~such~~ the governmental unit invest ~~such~~ the funds so declined, on the same or better terms as were offered to the depositories, in bonds or other evidences of indebtedness issued, assumed, or guaranteed by the United States of America or by any agency or instrumentality thereof~~,-but-these-provision-shall-not-affect-the-investment-of-funds-as provided-in-sections-453.9-and-453.10~~. However, public funds that will not be deposited or invested for a term of at least fifteen days may be invested, without prior offer to an approved depository, in notes,

> certificates, bonds or other direct obligations of the United States or any of its agencies.
> ~~Public funds which cannot be deposited for periods of at least ninety days may be invested in notes, certificates, bonds, or other obligations of the United States or any of its agencies, as provided in section 452.10.~~
> In addition to the investments herein authorized, the treasurer of state may invest in any of the investments authorized for the Iowa public employees' retirement system in section 97B.7, subsection 2, paragraph "b" except that investment in common stocks shall not be permitted. This section does not affect the investment of funds as provided in sections 453.9 and 453.10.

On their face, these two provisions promulgate a prior tender concept of public deposits. "All funds held in the hands" of the public officials enumerated in § 453.1, The Code 1981 are to be deposited in "approved" banks. The term "bank" is defined in § 524.103, The Code 1981.

In the event of a refusal of a tender of said deposits by the local governmental entity, Section 453.5, The Code 1981, the funds must be proffered to other conveniently located banks. If they refuse, the governmental unit may deposit the funds in bonds or other evidences issued, assumed or guaranteed by the United States of America or its agencies or instrumentalities. Short term investments of less than 15 days may be placed in notes, certificates, bonds, or other direct obligations of the United States or any of its agencies.

However, there are other statutes which provide for "investment" of public funds as opposed to the "deposit" of said funds. Section 453.1 recognizes this distinction by permitting "investment" of funds not needed for current operating expenses or deposit pursuant to § 452.10, The Code 1981, which states:

> Custody of public funds--investment of deposit. The treasurer of state and the treasurer of each political subdivision shall at all times keep all funds coming into their possession as public money, in a vault or safe, to be provided for that purpose, or in some bank legally designated as a depository for such funds. However, the treasurer of state and the treasurer of each political subdivision shall invest, unless otherwise provided, any of the public funds not

> currently needed for operating expenses in notes, certificates, bonds, or other evidences of indebtedness which are obligations of or guaranteed by the United States of America or any of its agencies; or make time deposits of such funds in banks as provided in chapter 453 and receive time certificates of deposit therefor; or in savings accounts in banks. The treasurer of state may invest any of the funds in his custody in any of the investments authorized for the Iowa public employees' retirement system in section 97B.7, subsection 2, paragraph "b" except that investment in common stocks shall not be permitted.

Section 534.11(10), The Code 1981, refers to investments in savings and loans and states:

> Share accounts as legal investments. Administrators, executors, custodians, guardians, trustees, and other fiduciaries of every kind and nature, insurance companies, business and manufacturing companies, banks, credit unions and all other types of financial institutions, charitable, educational, eleemosynary and public corporations and bodies, and public officials hereby are specifically authorized and empowered to invest funds held by them, without any order of any court in share account of insured savings associations which are under state supervision, and in accounts of federal savings and loan associations organized under the laws of the United States and under federal supervision, and such investment shall be deemed and held to be legal investments for such funds.
>
> The provisions of this section are supplemental to any and all other laws relating to and declaring what shall be legal investments for the persons, corporations, organizations, and officials referred to in this section and the laws relating to the deposit of securities and the making and filing of bonds for any purpose. [Emphasis supplied.]

Section 534.11(10) contemplates investment in "share accounts" in insured state savings and loan associations and accounts in federal savings and loans. This section, however, expressly declares that this provision is supplemental and provides specific authorization for such activity by state saving and loan associations and the city treasurer in the event Ch. 453 is amended or repealed. With the recent amendment of §§ 453.1 and 453.5 being subsequent to and more specific than legislation, such as § 534.11(10), we must conclude that the legislative intent is that the deposits must initially be proffered to the appropriate banks prior to any investment in bonds or other evidences of indebtedness by the United States or its agencies or instrumentalities pursuant to Section 453.5. See §§ 4.7 and 4.11, The Code 1981.

It is important to note that an opinion of this office, 1972 Op. Att'y Gen. 769 concluded that federal savings and loans were instrumentalities and agencies of the United States. While we concur that federal savings and loans may be, in certain instances and activities, be "instrumentalities", this interpretation has been mooted by the various amendments to the relevant statutes deleting the word "instrumentalities", except for § 453.5, The Code 1981 which allows placement of public moneys in United States instrumentalities.

Further, a subsequent 1977 opinion apparently reversed the 1972 opinion raising serious issues yet to be legislatively addressed. See §524.12, The Code 1981 and 1977 Op. Att'y Gen. 152. Such public funds are not covered by the state sinking fund. See Ch. 454, The Code 1981.

In any event, deposit or investment of said public funds in bonds or evidences of indebtedness can only occur after an initial proffer to "banks" has been made and rejected pursuant to Section 453.5, except where the public funds are not to be deposited for more than 14 days. Once the funds are deposited, Section 452.10 may be employed for funds not needed for current operating expenses.

Finally, we would note that this preference may be preempted by federal legislation and regulations in specific instances relating to federal moneys or grants. For example, Title I of the Housing and Community Development Act of 1974, Public Law 93-383 and 24 C.F.R. 570.513 provides that public entities receiving federal moneys may deposit or invest funds in both banks and savings and loan associations institutions via letters of credit to be utilized in rehabilitation projects. Consequently, if there is underlying federal legislation preempting state law allowing public entities to place funds in various institutions, § 453.5 would be of no effect.

Very truly yours,

HOWARD O. HAGEN
Assistant Attorney General

HOH:sh

COUNTIES; REAL PROPERTY; SUBDIVISION PLATTING. §§ 409.9, 409.12, The Code 1981. Chapter 409 of the Code requires that an abstract of title accompanying a subdivision plat be filed with the county recorder, however, the abstract need not be entered of record. (Ovrom to Glaser, Delaware County Attorney, 12/30/81) #81-12-11(L)

December 30, 1981

Mr. Robert J. Glaser
Delaware County Attorney
Manchester, Iowa 52057

Dear Mr. Glaser:

You requested an opinion whether Chapter 409 of the Code of Iowa requires an abstract of title to a subdivision to be filed in the office of the county recorder. It is our opinion that Section 409.9 of the Code requires that the abstract accompanying a subdivision plat be kept on file in the county recorder's office. The abstract does not need to be recorded.

Prior to 1949 Section 409.9 required that subdivision plats "have attached thereto a complete abstract of title", and Section 409.12 required that the abstract of title "be entered of record . . . in the office of the county recorder". See 1949 Session, 53rd G.A., ch. 181, §§ 1, 2. In 1949 the Legislature amended Section 409.9 to require only that the plat "be accompanied by" an abstract of title, and dropped the requirement in Section 409.12 that an abstract be "entered of record" in the county recorder's office. Id. Although it is not explicit, the present requirement that the plat be "accompanied by" an abstract of title appears to require the abstract of title to be kept in the county recorder's office, although they need not be "entered of record", as was required prior to 1949. Accord, Marshall's Iowa Title Opinions and Standards, Section 14.1(D), p. 315 (2nd edit., 1978). Otherwise there would not be much purpose in requiring the abstract of title to accompany the subdivision plat.

Your letter referred to a November 4, 1981, letter from Assistant Attorney General Robert Ewald which stated that Section 409.12 of the Code did not require that an abstract be filed with the county recorder. Mr. Ewald more properly should have used the word "recorded" instead

of the word "filed", and you are in agreement that Section 409.12 does not require the abstract to be recorded. We are sorry if this caused you or the county recorder confusion.

Sincerely,

ELIZA OVROM
Assistant Attorney General

EO:dy

cc: Joan Sheppard
Delaware County Recorder
Manchester, Iowa 52057

Tom Jenk
320 First Avenue East
Dyserville, Iowa 52040

COUNTIES AND COUNTY OFFICERS: CHIEF DEPUTY SHERIFF: TERMINATION. Acts 1981, Senate File 130, §§ 320(4), 651(7), 902(2), §§ 341A.7, 341A.12, The Code 1981. A chief deputy sheriff may be terminated pursuant to §§ 651(7) and 902(2) of 1981 Acts, Senate File 130. Such termination is not made pursuant to § 320(4) of said Act. Constitutional due process does not require notice and an opportunity for a hearing in conjunction with the termination of a chief deputy sheriff unless the termination is based on allegations of dishonesty, immoral, or illegal conduct that call into question the terminated employee's honesty, reputation, or good name. (Fortney to Mullins, State Representative, 12/30/81) #81-12-10(L)

December 30, 1981

Honorable Sue Mullins
State Representative
Prairie Flat Farms
Corwith, Iowa 50430

Dear Representative Mullins:

You have requested an opinion of the Attorney General regarding the appropriate procedure for terminating the appointment of a chief deputy sheriff. [1] We are of the opinion that a chief deputy sheriff may be terminated pursuant to §§ 651(7) and 902(2) of 1981 Acts, Senate File 130. Such termination is not made pursuant to § 320(4) of said Act. Constitutional due process does not require notice and an opportunity for a hearing in conjunction with the termination of a chief deputy sheriff unless the termination is based on allegations of dishonesty, immoral, or illegal conduct that call into question the terminated employee's honesty, reputation, or good name.

I. STATUTORY ANALYSIS

Senate File 130, § 651(7) provides that "subject to the requirements of chapter 341A and section 902 of this Act,

[1] Your inquiry is premised on the assumption that the individual in question was not "serving with permanent rank" within the meaning of § 341A.7, The Code 1981 at the time of his appointment as chief deputy. As such, this person possesses no standing within the "classified civil service" and consequently is accorded no civil service protections within Chapter 341A. We note that this assumption remains constant throughout the opinion. If a chief deputy had been previously "serving with permanent rank," a situation with which we are not presented, the outcome could be significantly altered.

the sheriff may appoint and remove deputies, assistants and clerks." The only limitations which either Chapter 341A or § 902 place on the removal of a chief deputy can, at best, be described as minimal.

Section 341A.12 accords significant procedural protections prior to the removal, demotion or suspension of a deputy, including notice and a hearing. Any adverse action must be based on cause. However, such protections are only accorded to deputies who are in the "classified civil service." A chief deputy is not a member of the "classified civil service." § 341A.7. There is a clear legislative intent to confer procedural protections on deputy sheriffs, but not on chief deputies.

The only requirement which is imposed by Senate File 130, § 902, is that the sheriff revoke the deputy's appointment in writing, such writing to be filed in the auditor's office. Section 902 does not impose requirements of notice of the cause for termination or a hearing to review the merits of the sheriff's action. Such requirements are imposed by § 341A.12, but as discussed above, these requirements are inapplicable to the position of chief deputy.

We are not unmindful that there is an argument that the removal of a chief deputy is governed by Senate File 130, § 320(4) which provides:

> Except as otherwise provided by state law, a person appointed to a county office may be removed by the officer or body making the appointment, but the removal shall be by written order. The order shall give the reasons and be filed in the office of the auditor, and a copy shall be sent by certified mail to the person removed who, upon request filed with the auditor within thirty days of the date of mailing the copy, shall be granted a public hearing before the board on all issues connected with the removal. The hearing shall be held within thirty days of the date the request is filed, unless the person removed requests a later date. [Emphasis supplied.]

We are unable to conclude, however, that § 320(4) is applicable to chief deputies. Initially, state law does make other express provisions for the removal of sheriff's deputies,

i.e., § 341A.12, The Code 1981 and Senate File 130, §§ 651(7) and 902. Second, Senate File 130, § 651(7) which authorizes the sheriff to remove deputies is expressly subject to the terms of Chapter 341A and § 902. It does not subject the sheriff's authority to the provisions of § 320(4). Third, § 320(4) is a general statute which is applicable to all county officers. In contrast, § 902 is applicable only to the deputies and assistants of enumerated elected officials. As such, § 902 would control in the event of a conflict between §§ 320(4) and 902. Indeed, § 341A.12 is an even more specific and narrow statute dealing only with deputies appointed by the sheriff.

For the foregoing reasons, we conclude that the termination of a chief deputy sheriff is governed by the provisions of Senate File 130, §§ 651(7) and 902(2). Such termination is not controlled by § 320(4).

II. CONSTITUTIONAL ANALYSIS

You have also inquired regarding the constitutional due process implications attendant to the removal of a chief deputy sheriff. As we are adverse to engage in any sort of fact-finding with regard to a genuine legal conflict, we cannot appropriately pass upon the reasons precipitating any particular chief deputy's termination. We note that the facts you present indicate that the certificate of revocation filed with the auditor did not contain any specific reasons for the termination. While we are unable to ascertain whether a particular termination did in fact comport with due process, we are able to provide guidelines against which a particular set of facts can be weighed.

The leading Iowa Supreme Court decision in this area is both recent and closely on point. Anderson v. Low Rent Housing Comm'n., etc., 304 N.W.2d 239 (Iowa 1981) involved the firing of a secretary in a municipal department. As in the case of a chief deputy sheriff, Anderson was an employee at will and had no statutory or contractual rights to due process. Id. at 243. As in the case you raise, Anderson was given a written termination, however, unlike the case of the chief deputy, Anderson's notice informed her of the reasons for the discharge. Suffice it to say that the reasons given for Anderson's discharge could in no way be construed as to involve allegations of dishonesty, immoral, or illegal conduct that call into question the terminated employee's honesty, reputation, or good name. Id. at 244-245.

Relying on McDowell v. Texas, 465 F.2d 1342, 1345-46 (5th Cir. 1971), cert. denied, 410 U.S. 943, 93 S.Ct. 1371, 35

L.Ed.2d 610 (1973), the Anderson Court stated that due process does not afford a right to public employment, but it does afford certain constitutional rights in relation to such employment. The Court was unwilling to state that due process considerations attached in all cases of termination of public employment. The range of cases in which such rights attach is limited by the reasons for the termination and the injury resulting from the discharge. Citing a number of cases from various courts, the Iowa Supreme Court held that accusations of incompetence, insubordination, hostility to authority, and unprofessional or unethical conduct do not violate a constitutionally protected liberty interest. Anderson, 304 N.W.2d 239, 244. However, when charges are brought against an employee which might seriously damage standing and association in the community or impose a stigma or other disability that forecloses the freedom of the employee to take advantage of other employment opportunities, a constitutionally protected liberty interest is affected. Board of Regents v. Roth, 408 U.S. 564, 573, 92 S.Ct. 2701, 2707, 33 L.Ed.2d 548, 558-59 (1972). Before an allegation will be deemed to adversely impact on a terminated employee's reputation or to result in stigmatization, the allegations in question must involve dishonesty, immoral or illegal conduct that call into question the terminated employee's honesty, reputation, or good name. Anderson, 304 N.W.2d 239, 244-245. Absent such allegations, constitutional due process concerns do not come to the fore.

In summary, a chief deputy sheriff may be terminated pursuant to §§ 651(7) and 902(2) of 1981 Acts, Senate File 130. Such termination is not made pursuant to § 320(4) of said Act. Constitutional due process does not require notice and an opportunity for a hearing in conjunction with the termination of a chief deputy sheriff unless the termination is based on allegations of dishonesty, immoral, or illegal conduct that call into question the terminated employee's honesty, reputation, or good name.

Yours truly,

David Fortney

DAVID M. FORTNEY
Assistant Attorney General

DMF:sh

BONDING: Municipalities. Sections 24.26-34, 76.1-2, 384.2, 4, 5, 16, 24, 26 and 32 and 403.19. Estimated debt levies may not be certified for those bonds not yet authorized prior to April 1 but may be made for bonds that are issued. Municipalities may calculate estimated debt levies for bonds authorized but not yet issued or sold but no debt service fund may be created until the bonds are in fact issued. All of these calculations are subject to review by taxpayer protest and/or by the Auditor. (Hagen to Rush, State Senator, 12/24/81 #81-12-8(L)

December 24, 1981

Honorable Bob Rush
State Senator
830 Higley Building
Cedar Rapids, Iowa 52401

Dear Senator Rush:

We hereby acknowledge receipt of the following opinion request:

> May a municipality upon certification to the county auditor on March 15th, include in the certification an estimated debt retirement levy for bond issue to be sold during the fiscal year for which the municipality is budgeting?
>
> May this estimate include estimated debt to be retired by general obligation bonds from the city-wide revenue as well as general obligation bonds to be retired from tax increment finance districts?

The first issue inquires as to the submission of an estimated debt retirement levy for bond issues to be sold during the fiscal year for which the municipality is budgeting. This question is necessitated by the recent volatile interest rate fluctuations which have subjected the city to increased interest costs as a result of any delay incurred in the issuance of the bonds subsequent to collection of revenues to fund the payment in question.

Initially, an examination of the relevant statutory framework is required. Chapter 384 outlines in general the structure of city finance and the raising of revenue therefore. The most pertinent provisions of Chapter 384, The Code 1981, are as follows:

> 384.2 Fiscal year and tax year. Except as otherwise provided for special charter cities, a city's fiscal year shall be as provided in section 24.2, subsection 4. All city property taxes must be certified by a city to the county auditor on or before the fifteenth day of March of each year, unless otherwise provided by state law. However, municipal utilities, if not supported by taxation or the proceeds of outstanding indebtedness payable from taxes may, with the council's consent, choose to operate on a fiscal year which is the calendar year. The receipt by the utility of payments from other governmental funds for public fire protection, street lighting or other public use of the utility's services shall not be deemed support by taxation. After notice and hearing in the same manner as required for the city's regular budget under section 384.16, the utility budget must be approved by resolution of the council not later than twenty days prior to the beginning of the calendar year for which the budget applies.
>
> The county auditor shall place city taxes and assessments upon the tax list for the current year, and the county treasurer shall collect city taxes and assessments in the same manner as other taxes. Delinquent city taxes and assessments must be made in the manner provided in chapter 446. The county treasurer shall combine in one tax sale all taxes and assessments due from the same person and collectible by the county.
>
> 384.4 Debt service fund. A city shall establish a debt service fund and shall certify taxes to be levied for the debt service fund in the amount necessary to pay:
>
> 1. Judgments against the city, except those authorized by state law to be paid from other funds.
>
> 2. Interest as it becomes due and the amount necessary to pay, or to create a sinking fund to pay, the principal at maturity of all general obligation bonds issued by the city.

Moneys pledged or available to service general obligation bonds, and received from sources other than property taxes, must be deposited in the debt service fund.

If a final judgment is entered against a city with a population of five hundred or less for an amount in excess of eighty-eight thousand dollars over and above what is covered by liability insurance, such city may spread the budgeting and payment of that portion not covered by insurance over a period of time not to exceed ten years. Interest shall be paid by the city on the unpaid balance. This paragraph shall only apply to final judgments entered but not fully satisfied prior to March 25, 1976.

384.24 Definitions. As used in this division, unless the context otherwise requires:

1. "General obligation bond" means a negotiable bond issued by a city and payable from the levy of unlimited ad valorem taxes on all the taxable property within the city through its debt service fund which is required to be established by section 384.4.

* * *

384.25 General obligation bonds for essential purposes.

1. A city which proposes to carry out any essential corporate purpose within or without its corporate limits, and to contract indebtedness and issue general obligation bonds to provide funds to pay all or any part of the cost of a project must do so in accordance with the provisions of this division.

* * *

384.26 General obligation bonds for general purposes.

1. A city which proposes to carry out any general corporate purpose within or without its corporate limits, and to contract indebtedness and issue general obligation bonds to provide funds to pay all or any part of the costs of a project, must do so in accordance with the provisions of this division.

* * *

> 384.32 Tax to pay. Taxes for the payment of general obligation bonds must be levied in accordance with chapter 76, and the bonds are payable from the levy of unlimited ad valorem taxes on all the taxable property within the city through its debt service fund authorized by section 384.4.

Chapter 76, The Code 1981, provides the levy procedure for payment of general obligation bonds. Specifically, § 76.2, The Code 1981, provides:

> 76.2 Mandatory levy. The governing authority of these political subdivisions before issuing bonds shall, by resolution, provide for the assessment of an annual tax levy upon all the taxable property in such public corporation sufficient to pay the interest and principal of such bonds within a period named not exceeding twenty years. A certified copy of this resolution shall be filed with the county auditor or auditors of the counties, as the case may be, in which such public corporation is located; and the filing thereof shall make it a duty of such officer or officers to enter annually this levy for collection until funds are realized to pay the bonds in full.
>
> If the resolution is so filed prior to April 1, said annual levy shall begin with the tax levy of the year of filing. If the resolution is filed after April 1 in any year, such levy shall begin with the levy of the fiscal year succeeding the year of the filing of such resolution. However, the governing authority of a political subdivision may adjust any levy of taxes made under the provisions of this section, for the purpose of adjusting the annual levies and collections in accordance with the provisions of this Act, subject to the approval of the state comptroller.

We believe that much of the confusion surrounding this inquiry as to whether an estimated debt retirement levy for bond issues may be made for certification results from the failure to distinguish between bonds which are authorized and those not yet authorized. In the law of public finance, rather

sharp distinctions are drawn among the initial state of the process at which the voters, or a designated agency, "authorize" the sale of securities for a specified public purpose, and the ultimate stage at which a public agency "issues" particular securities at a specified rate of interest, in specified denominations and with specified maturities, and third, when the bonds are sold. See Ch. 75, The Code 1981. Compare 64 Am.Jur.2d, Public Securities and Obligations, §§ 124-177 with § 206.217. See also Op. Att'y Gen. #80-7-20.

We do not believe that estimated debt levies may be certified for those bonds not yet authorized prior to April 1. See § 76.1, The Code 1981. That is, if the city council and/or the electorate have not yet approved them pursuant to Iowa law, there is no authorization for levying or estimating any tax assessment for such bond proposals.

However, estimated debt levies for bonds may be calculated for bonds that have been issued. Section 384.4(2), The Code 1981, creates a debt service fund for general obligation bonds issued by the city. The statute refers to issued and not sold. In any budgeting process, the city must make estimates. See § 384.16, The Code 1981. That is, while the budget is to be as precise as possible, budgeting is at best an estimate of the proposed revenue requirements of the particular agencies involved whether they be city patrol, city police, fire department or other services rendered to the public. Within any given year, the certification provided pursuant to § 384.2 is by necessity an estimate of the revenues required for public fire protection, street lighting and public use, etc. In any given year, the budget may be slightly exceeded or slightly deficient due to unforeseen problems which either have to be funded from other sources or in the alternative from which money would be returned to the general funds of the cities. Consequently, § 384.2 and § 76.2 must be interpreted to be a mechanism whereby the county auditor can accurately calculate and fix absolutely the total revenues required by each city with which to fund their revenues.

The more difficult question arises in instances where the bond proposal has been authorized under § 384.24 and .25, The Code 1981, but not yet sold or issued. The issuance and sale are ministerial functions with no express statutory restrictions other than establishing broad guidelines as to terms. Chs. 75 and 76. The bond issuance is governed by market rates and other economic considerations prior to sale. However, no debt service fund may be created for general obligation bonds until the bonds are in fact issued and sold. See § 384.4(2), The Code 1981. Consequently, it would seem that estimated debt levies can be made at any time after the statutory authorization for the bonds has occurred.

Section 384.5, The Code 1981, contemplates some imprecision and strictly confines the proceeds of any excess. It states:

> Excess Tax. A tax levied for the debt service fund is not invalid if it raises moneys in excess of those needed for a specific purpose. Only excess moneys remaining after retirement of all indebtedness payable from the fund may be transferred from the debt service fund to any other city fund, subject to the terms of the original bond issue, and as provided in rules promulgated by the city finance committee created in section 384.13.

The Legislature did not intend to straitjacket cities into only collecting revenues from bonds actually sold. To do so would create tremendous and unnecessary interest costs in today's economy on issues sold after March 15 for which no revenue could be collected for another year. Further, this inpretation gives the city some flexibility in the sale of bonds to avoid unconscionably high interest costs and delay sales for days or weeks if necessary. The City of Cedar Rapids has documented the impact interest costs and the distinction between issued and sold bonds would provide maximum flexibility and yet protect the taxpayer from unnecessary assessments while limiting unnecessary interest costs. The Comptroller concurs in the conclusion by letter dated March 20, 1981, to bond counsel in an unrelated matter. However, no debt service fund may be created for general obligation bonds until the bonds are in fact issued. See § 384.4(2).

We would note that there is a check on these processes available to all citizens to prevent any abuse. The taxpayer may protest the budget and will receive a full hearing pursuant to §§ 24.26-34, The Code 1981. The State Auditor also reviews this process through audits conducted pursuant to § 11.18, The Code 1981.

With respect to the second question, the question itself is more complex. The regular budget estimate may include the amounts required for retirement of bonds from city-wide revenue as well as general obligation bonds to be retired from a tax increment finance district. Section 403.19, The Code 1981. A proper budget should estimate the amount to be expended from both types of bonds and correspondingly should estimate the sources of revenue, including debt services taxes, and including tax increment moneys, which are anticipated to be collected for the purpose.

It should be noted that in addition to the regular budget, a special eligibility certification is required by Chapter 1128 of the Laws of the 68th General Assembly which amended Code section 403.19. This section requires the city to certify annually the amount of loans, advances, indebtedness or bonds which qualify for reimbursement from tax increment or bonds which qualify for reimbursement from tax increment sources and the amount which the city has received in reimbursement of those qualifying expenditures in prior years. This certification applies only to loans, advances, indebtedness or bonds which have previously been issued, however, its only purpose is to show that the city has not yet received full reimbursement for its qualifying expenditures, in order for the auditor to determine that the city is entitled to receive additional tax increment funds in the forthcoming budget year. This certification does not limit the city in its expenditure of those funds upon receipt. This city may elect, under the provisions of § 403.19(3), to pledge the receipt of tax increment funds to bonds or indebtedness as qualified therein, even though the issuance of such bonds may be in the future. It is important to cities to realize that they should have on file, in addition to their regular budget certifications, a certification of tax increment eligibility as called for under Chapter 1128 of the 68th General Assembly. While the statute in question does not appear to call for the certification to be renewed annually, such procedure would certainly be recommended.

Making the same presumptions as were made in the first analysis and dealing only with those districts which have authorized, but not yet issued or sold the bonds, we conclude that such specifically retired general obligation bonds may also be estimated pursuant to the standards and limitations set out above.

Very truly yours,

HOWARD O. HAGEN
Assistant Attorney General

HOH:sh

STATE OFFICERS AND AGENCIES: § 217.3, The Code 1981, 69th G.A., 1981 Session, Senate File 566. Discusses the procedures for reorganizing the Department of Social Services. (Fortney to Reagen, Commissioner, Department of Social Services, 12/24/81) #81-12-7(L)

Michael V. Reagen, Commissioner
Department of Social Services
L O C A L

December 24, 1981

Dear Commissioner Reagen:

You have requested an opinion of the Attorney General regarding the reorganization of the Department of Social Services. 69th G.A., 1981 Session, Senate File 566 requires the department, as a condition of its appropriation, to adopt a reorganization of county and district offices. You inquire as to the procedures by which the plan is to be adopted.[1]

Senate File 566, § 2 provides, in pertinent part, as follows:

> There is appropriated from the general fund of the state for each fiscal year of the biennium beginning July 1, 1981, and ending June 30, 1983, to the department of social services for the division of field operations, including salaries and support, maintenance, and miscellaneous purposes the following amounts, or so much thereof as may be necessary, provided that the department of social services provides a county and district reorganization plan to the joint social services appropriations subcommittee by February 1, 1982.
>
> [A specific plan of reorganization is then detailed.]
>
> The reorganization required by this subsection becomes effective on July 1, 1982, unless the joint social services appropriations subcommittee recommends an alternative plan to the general assembly during the 1982 session of the general

[1] Our opinion is restricted to the reorganization procedures to be employed by D.S.S. We do not discuss constitutional issues.

> assembly. If the department determines that an alternative reorganization plan would best serve its clients, the department shall report the alternative plan to the joint social services appropriations subcommittee by February 1, 1982 . . .

In order to accurately examine Senate File 566, it is necessary to set forth the general administrative powers conferred on the department. Section 217.3, The Code 1981 provides, in pertinent part, as follows:

> The council of social services shall:
>
> 2. Adopt and establish policy for the operation and conduct of the department of social services, subject to any guidelines which may be adopted by the general assembly, and the implementation of all services and programs thereunder.
>
> 7. Approve the establishment of any new division or reorganization, consolidation or abolition of any established division prior to the same becoming effective.[2]

As a result of the adoption of Senate File 566, you have posed the following two questions:

> 1. If before February 1, 1982, the Department recommends an alternative redistricting plan, and if the Joint Social Services Appropriations Subcommittee recommends the alternative plan to the General Assembly during the 1982 session, is any further legislative approval required for the Department to redistrict in accordance with the alternative plan?
>
> 2. Does S.F. 566, Section 2 deprive the Council on Social Services and the Commissioner of their power to redistrict under Chapter 217, The Code, or does it simply mandate a specific reorganization on July 1, 1982, unless before February 1, 1982, the Department submits to the Joint Social

---

[2] We note that the plan of reorganization would constitute a reorganization or consolidation of the division of field operations.

Services Subcommittee an alternative plan and the committee recommends the alternative plan to the General Assembly during the 1982 session?

In answering your questions, we must be guided by legislative intent. The goal in construing a statute is to ascertain legislative intent in order, if possible, to give it effect. State v. Prybil, 211 N.W.2d 308 (Iowa 1973). However, if the language of a statute is plain, unambiguous and consistent with related statutory provisions, no duty of interpretation arises and there is no occasion to probe for legislative intent. State v. Baker, 293 N.W.2d 568 (Iowa 1980). Where a statute is plain and the meaning clear, courts are not permitted to search for its meaning beyond its expressed terms. State v. Hocker, 201 N.W.2d 74 (Iowa 1972). With the foregoing principles in mind, we turn to the issues you present.

We see little question that prior to the adoption of Senate File 566 the department had the authority to reorganize the division of field operations in any manner the department deemed appropriate. § 217.3, The Code 1981. Senate File 566 does not purport to amend or repeal the power conferred on the department by § 217.3. Instead, the bill imposes an affirmative duty on the department to take one of two alternative courses of action. The department must either reorganize in conformity with Senate File 566 or submit an alternate plan of reorganization. If the department elected to institute the plan outlined in Senate File 566, it would report this decision to the legislative subcommittee by February 1, 1982 and the plan would be implemented effective July 1, 1982. Should the department conclude that an alternative plan is more advisable, the department would report this fact to the subcommittee by February 1. If the subcommittee recommends the alternative plan to the general assembly, the department may proceed to implement the alternative plan without further authorization by the general assembly.

The general assembly has devised a format whereby a specified plan is to be implemented unless a subsequent condition occurs, i.e., the department proposes, and the subcommittee recommends, implementation of an alternative plan. If the condition subsequent does in fact occur, the plan outlined in Senate File 566 is suspended and it is never placed in operation.

To directly respond to your questions:

1. No further legislative approval is required for the department to redistrict in accordance with the alternative plan if before February 1, 1982 the department recommends an alternative redistricting plan and the Joint Social Services Appropriations Subcommittee recommends the alternative plan to the general assembly during the 1982 session.

2. Senate File 566 does not deprive the Council on Social Services and the Commissioner of their power to redistrict under Chapter 217. Senate File 566 simply mandates a specific reorganization on July 1, 1982, unless before February 1, 1982, the Department submits to the Joint Social Services Subcommittee an alternative plan and the committee recommends the alternative plan to the general assembly during the 1982 session.

Yours truly,

David Fortney

DAVID M. FORTNEY
Assistant Attorney General

DMF:sh

STATE OFFICERS AND DEPARTMENTS: Medical Care For Indigents. §§ 255.8, 255.16, 255.28 and 255.29, The Code 1981. The formula for determining a county's quota of indigent patients that may be admitted and treated at University Hospitals at state expense under § 255.16 is dependent upon the annual appropriation to the hospital for its implementation. A ceiling of 110 percent of a county's quota exists on the state's financial liability under § 255.16. Section 255.16 does not impose a limit on the number of indigent patients that may be admitted and treated at University Hospitals. Where the number of indigent patients admitted to University Hospitals exceeds 110 percent of a county's quota determined pursuant to § 255.16, the costs for the care and treatment of such patients shift to the county. (Mann to Welsh, State Representative, 12/24/81) #81-12-6(L)

December 24, 1981

The Honorable Joseph J. Welsh
State Representative
Dubuque, Iowa

Dear Representative Welsh:

You requested an opinion of the Attorney General on the proper procedure for determining the quota of patients to be treated by the University Hospitals at Iowa City pursuant to § 255.16, The Code 1981. Specifically you asked the following questions:

1) What is the extent of the University of Iowa and Hospital's obligation to treat indigent patients as a result of Chapter 255, Code of Iowa, 1981.

2) Does the second sentence of 255.16 act in any way as a limit to the State of Iowa's financial obligation which would alter the formula of the first sentence.

In addition to asking the above questions, you supplied correspondence which indicates that University Hospitals interpret § 255.16 as follows:

> Section 255.16 does not establish the number of indigent patients to be referred from a given county to University Hospitals nor does it establish the total number of indigent patients to be referred to University Hospitals from all ninety-nine counties. It does establish the methodology by which the total number will be distributed among the counties. The total number is determined from the level of appropriation granted to the Hospital.

We now turn to § 255.16 for review and evaluation. That section reads as follows:

> 255.16 County quotas. Subject to subsequent qualifications in this section, there shall be treated at the university hospital during each fiscal year a number of committed indigent patients from each county which shall bear the same relation to the total number of committed indigent patients admitted during the year as the population of such county shall bear to the total population of the state according to the last preceding official census. This standard shall apply to indigent patients, the expenses of whose commitment, transportation, care and treatment shall be borne by appropriated funds and shall not govern the admission of either obstetrical or orthopedic patients. If the number of patients admitted from any county shall exceed by more than ten percent the county quota as fixed and ascertained under the first sentence of this section, the charges and expenses of the care and treatment of such patients in excess of ten percent of the quota shall be paid from the funds of such county at actual cost; but if the number of excess patients from any county shall not exceed ten percent, all costs, expenses and charges incurred in their behalf shall be paid from the appropriation for the support of the hospital.

The goal in construing a statute is to ascertain the legislative intent and, if possible, give it effect. Doe v. Ray, 251 N.W.2d 496 (Iowa 1977). In doing so, one must look to what the legislature said, rather than what it might have or should have said. Kelly v. Brewer, 239 N.W.2d 109 (Iowa 1976); Steinbeck v. Iowa District Court, 224 N.W.2d 469 (Iowa 1974). In statutory construction, one must seek a meaning which is both reasonable and logical and try to avoid results which are strained, absurd, or extreme. State v. Berry, 247 N.W.2d 263 (Iowa 1976).

It is clear from the statute that § 255.16 establishes a quota of indigent patients to be admitted and treated at University Hospitals at state expense. The quota is to be determined by applying the formula that the legislature prescribed in § 255.16. Under the formula, a county is entitled to commit a number of indigent patients to University Hospitals for treatment which bears the same relation to the total number of committed indigent patients admitted during the year as the population of such county shall bear to the population of the state. The formula can be diagrammed as follows:

$$\frac{\text{County Population}}{\text{State Population}} = \frac{\text{County Quota}}{\text{Total Indigent Patients Served}}$$

This formula, when filled in with the appropriate statistics, is used to compute the quota for each county. It is not a difficult formula to apply if applied retrospectively at the end of each fiscal year. In such a situation, all pertinent statistical data will be available. For example, assume that County A has a population of 50,000, the state has a population of 3,000,000, and 10,000 indigent patients were actually served at University Hospitals last year. With those facts, the county quota would be determined as follows:

$$\frac{\text{County Population}}{\text{State Population}} = \frac{\text{County quota}}{\text{Total Indigent Patients Served}}$$

$$\frac{50{,}000}{3{,}000{,}000} = \frac{X}{10{,}000}$$

$$\frac{1}{60} = \frac{X}{10{,}000}$$

$$60X = 10{,}000$$

$$6X = 1{,}000$$

$$X = 166.6$$

However, if the formula is applied prospectively at the beginning of each fiscal year so counties may be informed of their quota in advance, problems are encountered. A crucial component of the formula will be missing. The number of patients to be actually admitted to University Hospitals during the forthcoming year will not yet be determined. Consequently, in order to apply the formula, University Hospitals' officials will be forced to either use the statistics from the previous year to compute the county quota, or estimate the number of indigent patients to be admitted during the course of the upcoming year. At the present time, official policy is to estimate the number of indigent patients to be admitted by making the following projections:

1. Project the average cost per patient for the upcoming year.

2. Project the cost for treating obstetrical and orthopedic patients per §§ 255.8 and 255.16, The Code 1981.

3. Project the cost for treating transfer patients and parolees under §§ 255.28 and 255.29, The Code 1981.

4. Deduct from the appropriation for the support of the hospital the costs ascertained pursuant to items 2 and 3 above.

5. Utilize the remaining appropriation to determine the number of patients to be admitted by dividing the costs ascertained pursuant to item 1 above into the remaining appropriation.

6. Decrease the total number of patients from item 5 by a factor that takes into account that counties may send patients totaling 110 percent of their quota.

7. Increase the total number of patients from item 6 by a factor that takes into account the extent to which it is projected that all of the quota will not be used.

§ 720 - 6.1, The Iowa Administrative Code.

The number of persons to be admitted, as determined pursuant to this approach, will vary, depending on the size of the remaining appropriation. This, of course, will have a corresponding impact on the size of the county quotas. It may exceed previous years, be equivalent to previous years, or be less than previous years.

We now come to the central question of this opinion request. Should University Hospitals use data from previous years to project the number of indigent patients to be treated, or should they continue to estimate that number as previously described? We conclude that the present policy may be followed, unless changed by the legislature. Resort to statistical data from previous years will be no more accurate or reliable than the estimated data.

More importantly, the University's present policy has been utilized over a period of several years without legislative modification. We have reviewed the biennial appropriations to the University Hospitals for the years 1973, 1975, 1977, 1979, and 1981. We found no language in those appropriation bills disapproving of the University's approach to implementing ch. 255. Interpretations by an agency charged with implementation of a statute, particularly over a long period of time, and without legislative intervention, is evidence of compatibility of that agency's interpretation with legislative intent. Churchill Truck Lines, Inc. v. Transportation Regulation Board, Etc., 274 N.W.2d 295 (Iowa 1979); First National Bank of Ottumwa v. Bair, 252 N.W.2d 723 (Iowa 1977).

Accordingly, we conclude that the formula created by § 255.16 to be used in determining the quota of a county's indigent patients that may be treated at state expense at University Hospitals is dependent upon the annual appropriation to the hospital for its implementation. While this means that a limit exists on the state's financial liability under § 255.16, it does not mean that a ceiling is imposed on the number of indigent patients that may be admitted and treated at University Hospitals. The language of § 255.16 makes it explicitly clear that the number of patients admitted may exceed the quota established for a county, and where patients are admitted in excess of ten percent of a county's quota, the costs for such patient's care and treatment shifts to the county. The state's liability, then, is 110 percent of the county's quota.

In summary, we conclude that the formula for determining a county's quota of indigent patients that may be admitted and treated at University Hospitals at state expense under § 255.16 is dependent upon the annual appropriation to the hospital for its implementation. A ceiling of 110 percent of a county's quota exists on the state's financial liability under § 255.16. Section 255.16 does not impose a limit on the number of indigent patients that may be admitted and treated at University Hospitals. Where the number of indigent patients admitted to University Hospitals exceed 110 percent of a county's quota determined pursuant to § 255.16, the costs for the care and treatment of such patients shift to the county.

Sincerely,

Thomas Mann, Jr.
Assistant Attorney General

TM/jam

HIGHWAYS: Section 309.22, The Code 1981. For purposes of this section a work project would be classified as "construction" if the work constitutes a significant improvement to the existing facility. The project would be classified as "maintenance" if the work consists of preserving or upkeeping the highway. (J. Miller to Welsh, State Representative, 12/16/81) #81-12-3(L)

The Honorable Joe Welsh
State Representative
Statehouse
Des Moines, IA 50319

December 16, 1981

Dear Mr. Welsh:

We have received your request for an Attorney General's Opinion regarding whether certain activities falling under Section 309.22, The Code, 1981, would constitute "construction" or "maintenance."

As you are aware, Section 309.22 requires the county board of supervisors on or before December 1 of each year to compile a list of proposed construction projects within their county for the succeeding four years. Any project classified as "maintenance" would not have to be included in that list.

The difference between maintenance and construction is rather easy to define. Construction, as used in Section 309.22, would mean to make the roadway better than the original status. Maintenance, on the other hand, would be the preservation or upkeep of the roadway to its original status.

Courts generally have supported this distinction between construction and maintenance. The appellate court in Harding v. Chicago Park District, 339 N.E.2d 779, 34 Ill.App.3d 425 (1975), stated that "maintenance involves preserving the roadway, keeping it up, not permitting it to fall into a state of disrepair." It was also held in Thompson v. Bracken County, 294 S.W.2d 943, 946 (Ky 1956), that "'improve' and 'construct,' mean to make better the original status, while 'maintain' and 'repair' mean to preserve or remedy the original condition."

Other jurisdictions have made similar distinctions. The court in Kitson Bros. v. Comwlth, Dept. of Labor, Etc., 414 A.2d 179 (Pa.Comwlth 1980), interpreted a Pennsylvania statute in defining maintenance work as the "repair of existing facilities when the size, type or extent of such facilities is not thereby changed or increased." It was also held in Natina v. Westchester County Park Comm'n, 268 N.Y.S.2d 414, 49 Misc.2d 573 (1966), that highway redesign, such as providing more lanes and median divisions, was not a matter of maintenance.

In other words, for purposes of Section 309.22, a project would be classified as "construction" if the work to be done constituted a significant improvement in the existing facility. In all probability, the original design and cross-section plans of the highway would be altered as a result of the project. On the other hand, a project would be classified as "maintenance" if the work consisted of preserving or upkeeping a highway in order to meet its original or reconstructed design criteria. In this case, the design and cross-section plans would not be significantly altered.

A more difficult task arises in classifying a particular example of a project as either maintenance or construction. Practically speaking, projects could fall within a gray area when trying to fit them in one of the two definitions. Consequently, it is necessary to consider the length of the project, the thickness of materials to be added to the road surface and the overall purpose of the project.

As a general guide to aid in determining these matters, it is necessary to refer to the AASHTO Maintenance Manual, 1976, lst edition, published by the American Association of State Highway and Transportation Officials. Generally, the AASHTO Maintenance Manual at pp. 4-5 classifies projects that are continuous for 500 feet or more as construction. If the work involves adding materials to the surface of the roadway, then it would be considered construction if it substantially increases the thickness of the surface beyond that originally built. An example of construction would be the resurfacing of a hard surface road with material that is 3/4 inch or more in thickness if it is continuous for 500 feet or more. However, resurfacing with less than 3/4 inch of material would be maintenance regardless of the length of the project. Using less than 3/4 inches of material is merely preserving or restoring the highway to its original design criteria.

In the first example you gave, the project involved the redredging of a ditch to create a new slope angle where the road itself is unaffected. Creating a new slope angle would undoubtedly be classified as construction if the project was continuous for 500 feet or more. The AASHTO Maintenance Manual at pp. 4-5 classifies any substantial slope flattening or landscape treatment as a form of construction. However, the dredging of a ditch where the slopes are reshaped to their approximate original design would be classified as maintenance.

Your second example consists of a project that places new paving material on an existing hard surface road. If the new paving material is less than 3/4 inch in thickness, the project would be classified as maintenance regardless of its length. However, if the material is greater than 3/4 inch in thickness, the project would be classified as construction if it is continuous for 500 feet or more.

Your last example consists of a project of placing treated rock material on gravel roads. It is unclear exactly what treated rock material would consist of. If it consists of a loose material and it substantially increases the thickness of the surface beyond that for which the road was originally built, then the work would amount to construction. It would also be construction if the treated rock material improved the surface of the road from that which was originally built. Both examples would require a continuous project length of 500 feet or more. However, if the treated rock material was to be used for restoring the gravel road to its original design criteria, the work would be maintenance.

Sincerely,

James D. Miller

James D. Miller
Assistant Attorney General

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STATUTES; EFFECTIVE DATE. Ch. 3, §§ 3.1, 3.7. The specification of an alternative effective date in the title of an Act is insufficient to contravene the effective date statutorily provided in § 3.7. (Pottorff to Pope, State Representative, 12/11/81) #81-12-2(L)

Honorable Lawrence Pope
State Representative
3725 University, Apt. 2
Des Moines, Iowa 50311

Dear Representative Pope:

You have requested an opinion concerning the effective date of House File 778, an Act relating to disclaimer of succession to property. This bill was approved by the Governor on May 5, 1981. You point out that the title states the bill provides for an effective date of January 1. The body of the bill, however, does not further provide for the effective date of January 1.

The effective dates for legislation are controlled by Chapter 3, The Code 1981. Section 3.7 specifically provides that "[a]ll Acts and resolutions of a public nature passed at regular sessions of the General Assembly shall take effect on the first day of July following their passage, unless some specified time is provided in the Act, or they have sooner taken effect by publication." Under § 3.7, therefore, "some specified time" must be "provided" in House File 778 in order to contravene the effective date of July 1, 1981.

The specification of an alternative effective date in the title of House File 778 appears to be insufficient to meet the requirements of § 3.7. The title of a bill is required to contain only "a brief statement of the purpose of the bill." § 3.1(4), The Code 1981. "[A]ll detail matters properly connected with the subject so expressed may be omitted from the title." Id. The title, therefore, is intended only to provide a brief summary of the Act. Matters contained in the title would not, ipso facto, have the force and effect of law.

Accordingly, we advise that the specification of an alternative effective date of January 1 in the title of House File 778 is insufficient to contravene the effective date statutorily provided in § 3.7.

Sincerely,

Julie F. Pottorff

JULIE F. POTTORFF
Assistant Attorney General

JFP:sh

MUNICIPALITIES: Police and Fire Pensions. Section 411.6(12)(a) and (c), The Code 1981. Computation of the annual readjustment of pensions is provided for in Ch. 411. In the event the rank or position held by a retired or deceased police or fire official at the time of retirement or death is subsequently abolished, the board of trustees for the police and fire retirement systems are authorized to compute the adjustment of the member's pension. Two possible elements to consider in the adjustment of pensions, in such cases, are suggested. Finally, step increases based upon a reclassification of the salary scale are not to be used in the recomputation of pensions. [Walding to O'Kane, State Representative, 12/11/81] #81-12-1(L

The Honorable James O'Kane
State Representative
1815 Rebecca Street
Sioux City, Iowa 51103

Dear Mr. O'Kane:

You have requested an opinion of the Attorney General regarding the recomputation of pensions under Ch. 411. Specifically, you have asked us to compute the annual readjustment of pensions of several retired chiefs. At the outset, we feel compelled to state the appropriate purposes of an Attorney General's opinion. While it is appropriate for this office to express an opinion on legal issues, it is improper for us to engage in judicial fact-finding in the context of an opinion. Computing the annual readjustment of pensions of retired chiefs, which is not an issue of statewide concern, is more appropriately addressed at the local level.

With the foregoing principles serving as background, we turn to the questions you raise. Essentially, you have presented us with two legal issues. First, you inquire as to the proper method to compute the annual readjustment of pensions when the system used to determine the compensation payable to the retired or deceased members varies from that currently used to determine the active members' compensation. Second, an issue is presented as to whether step increases based upon a reclassification of the salary scale are to be used in the recomputation of pensions.

I. COMPUTATION OF ANNUAL READJUSTMENT OF PENSIONS

Your first inquiry concerns the computation of the annual readjustment of pensions. Section 411.6(12)(a), The Code 1981, provides:

> Effective July 1, 1980, and on each July 1 thereafter, the monthly pensions authorized in this section payable to retired members and to beneficiaries, except children of a deceased member, shall be adjusted as provided in this paragraph. An amount equal to the following percentages of the difference between the monthly earnable compensation payable to an active member of the department, of the same rank and position on the salary scale as was held by the retired or deceased member at the time of the member's retirement or death, for July of the preceding year and the monthly earnable compensation payable to an active member of the department of the same rank and position on the salary scale for July of the year just beginning shall be added to the monthly pension of each retired member and each beneficiary as follows:
>
> (1) Twenty-five percent for members receiving a service retirement allowance and for beneficiaries receiving a pension under subsection 9 of this section.
>
> (2) Twenty percent for members with five or more years of membership service who are receiving an ordinary disability retirement allowance.
>
> (3) Twelve and one-half percent for members with less than five years of membership service who are receiving an ordinary disability retirement allowance, and for beneficiaries receiving a pension under subsection 8 of this section.
>
> (4) Thirty-three and one-third percent for members receiving an accidental disability allowance.

> The adjusted monthly pension shall not be less than the amount which was paid at the time of the member's retirement or death. [Emphasis added]

As can be discerned from the aforementioned statute, the calculation for computing the annual readjustment of pensions would be:

$$\text{Applicable Percentage} \times \left[\begin{array}{l} \text{the monthly earnable compensation payable to an active member of the department, of the same rank and position on the salary scale as was held by the retired or deceased member at the time of the member's retirement for July of the year just beginning.} \\ - \\ \text{the monthly earnable compensation payable to an active member of the department, of the same rank and position on the salary scale for July of the preceding year.} \end{array} \right]$$

To illustrate the calculation, consider the following situation. Assume the monthly earnable compensation payable to an active member of the department, of the same rank and position on the salary scale as was held by a retired member at the time of the member's retirement, for July of the year just beginning is $1,600, an increase of $200 over the preceding year. The annual readjustment to the service retirement allowance of the retired member eligible under section 411.6(12)(a)(1) would be:

$$.25\ (1{,}600 - 1{,}400)$$

$$.25\ (200)$$

$$\$50/\text{Month} = \text{Annual Readjustment of Pension}$$

Accordingly, the retired member would be entitled to an annual readjustment to the member's service retirement allowance of $50 a month.

The underlying presumption of the computation, as evidenced by the underscored portion of the aforementioned statute, is that the applied monthly earnable compensation be of an active member of the department, of the same rank and position on the salary scale as was held by the retired or deceased member at the time of the member's retirement or death. In many instances, as is

the case in Sioux City, a city's system for determining the payable compensation will have undergone several revisions. As a result, the present and the former systems may in fact be incongruent. In such a case, § 411.6(12)(c), The Code 1981, provides:

> The adjustment of pensions required by this subsection shall recognize the retired or deceased member's position on the salary scale within his rank at the time of his retirement or death. In the event that the rank or position held by the retired or deceased member at the time of retirement or death is subsequently abolished, adjustments in the pensions of the member or of the member's spouse or children shall be computed by the board of trustees as though such rank or position had not been abolished and salary increases had been granted to such rank or position on the same basis as increases granted to other ranks and positions in the department.

Thus, a final determination as to the proper adjustment of a pension, in the event that a retired or deceased member's rank or position has been subsequently abolished,[1] rests with the board of trustees for the police and fire retirement systems. In adjusting the pensions of such a member, the boards of trustees are required to proceed as though the rank or position had not been abolished and comparable salary increases had been granted to such rank or position as granted to other ranks or positions in the department. Possible elements to be considered in the adjustment of pensions, in such cases, include the accumulated percentages of salary increases for other ranks and positions in the department, and an ascertainment of a retired or deceased member's relative position in a salary range under the former system and a determination of a comparable position under the current system.

Accordingly, computation of the annual readjustment of pensions is provided for in Ch. 411. In the event the rank or position held by the retired or deceased member at the time of

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[1]Abolishment would include revisions of the system for determining the payable compensation which results in an incongruence between the present and former systems.

retirement or death is subsequently abolished, the board of trustees for the police and fire retirement systems are authorized to compute the adjustment of the member's pension. Two possible approaches to determine the adjustment of pensions, in such cases, have been suggested.

II. STEP INCREASES

Your second inquiry concerns step increases based upon a reclassification of the salary scale. It is our opinion that such step increases are not to be used in the recomputation of pensions. Our rationale is twofold. First and foremost, both §§ 411.6(12)(a) and (c), The Code 1981, make reference to the retired or deceased member's rank and position "at the time of his retirement or death." The clear intent of the section, therefore, is to recompute the pension of a retired or deceased member at the rank and position in which he or she last served, not the rank and position he or she would qualify for under the current system. Second, in prior opinions, 1978 Op.Att'y.Gen. 55 and Op.Att'y.Gen. #81-4-18, we addressed the issue of step increases in the recomputation of pensions. In the latter opinion, we held that the recomputation of pensions are to be based on increases in the earnable compensation of active members occupying the same steps or salary scale as the retired members held. In the former opinion, we held that step increases based upon merit are not to be used in the recomputation of pensions. The rationale of that opinion would appear to be equally applicable to your inquiry. In particular, it was our contention that the inclusion of additional steps within a rank did not warrant pension recomputation for retired or deceased members. Rather, the legislature, in our opinion, intended only to provide for automatic increases within a step.

In summary then, computation of the annual readjustment of pensions is provided for in Ch. 411. In the event the rank or position held by a retired or deceased member at the time of retirement or death is subsequently abolished, the board of trustees for the police and fire retirement systems are authorized to compute the adjustment of the member's pension. Two possible approaches to determine the adjustment of pensions,

in such cases, have been suggested. Finally, step increa based upon a reclassification of the salary scale are not to used in the recomputation of pensions.

Very truly yours,

LYNN M. WALDING
Assistant Attorney General

LMW/nm