STATE OFFICERS AND DEPARTMENTS: Vacancy in Commerce Commission, §474.2, 1962 Code of Iowa. There being no statutory authority for filling a vacancy in the extended term of members of the Commerce Commission, resort is had for the purpose of filling a vacancy in that period, to §474.2 of the Code of 1962, and such appointees are subject to confirmation by the Senate.

January 24, 1963

Mr. Carroll A. Lane
Secretary of the Senate
L O C A L

My dear Carroll:

Reference is herein made to yours of the 22nd, inst., in which you submitted:

> "I have had a request from a member of the Senate for an opinion from your office as to whether or not Mr. Waldo F. Wheeler's appointment as a member of the Iowa Commerce Commission needed to be confirmed by the Senate.

In reply thereto, I advise that in the transition of the Commerce Commission from elective to appointive office, the method for filling a vacancy therein during the extended term is not specifically provided for. On the other hand, there was a repeal of §39.13, Code of 1958, which has provided for the election of such members, and there was also a repeal of §474.2, Code of 1958, and a substitute provided for such section. While §69.8 may be available for the method of filling the vacancy here under consideration, the term of any such appointee under that section cannot be defined or limited under any statute. In that situation, the substitute for §474.2, Code of 1958, enacted by the 58th G.A., Chapter 319, in force July 4, 1959, provides the only method of filling a vacancy occurring after July 4, 1959.

In that situation, we accept such statute as the only statutory method of filling this vacancy. We are of the opinion,

therefore, that an appointment made under the language of such substitute enactment, being now §474.2, both the original and vacancy appointments are subject to confirmation by the Senate.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:le

TOWNSHIPS: Purchase of fire equipment, Chapter 359, 1962 Code of Iowa. There is no authority under the provisions of Chapter 359, Code of 1962, to levy a tax upon the taxable property of the township in order to provide fire equipment for a part of the township.

January 15, 1963

Mr. Henry L. Elwood
Howard County Attorney
Cresco, Iowa

Dear Mr. Elwood:

Reference is herein made to your recent letter in which you submitted the following:

> "We have in Howard County a township divided into two parts. This township is called New Oregon. Each of these two parts of this township are referred to as New Oregon 1 and New Oregon 2. The part consisting of New Oregon 1 consists of 36 sections and New Oregon 2 consists of 18 sections; both of these parts of this one township have one set of Trustees. The part of New Oregon Township referred to as New Oregon 2 desires to purchase and maintain a fire truck and fire fighting equipment in accordance with the procedure as set forth in Sections 359.42 to 359.45 of the 1962 Code of Iowa. These township trustees do not want to follow the procedure as outlined in chapter 357A. The specific question that has arisen is this -- Whether or not under Section 359.42 of the Code the township trustees of New Oregon Township can be permitted to divide New Oregon Township into a separate area for the purpose of submitting to the voters of that area the question 'whether or not the township trustees should levy an annual tax for the purposes of purchasing a fire truck and fire fighting equipment'. Only the voters in the part referred to as New Oregon 2 desire to acquire a fire truck in accordance with Section 359.42 to 359.45 and the voters residing in that part referred to as New Oregon 1 desire not to become involved in this matter.
>
> "I am aware of the fact that under Chapter 357A that a portion of a township can be used as a benefited fire district, however, the township trustees do not wish to follow the procedure as outlined in that chapter. They, instead, would wish to divide a portion of this township as stated and acquire a fire truck and fire equipment in accordance with Sections 359.42 to 359.45."

In reply thereto, I would advise that the statutory power to levy taxes for both the purchase and maintenance of fire equipment is vested in the township trustees by §359.43, 1962 Code of Iowa, which provides the following:

> "Levy. The township trustees may levy an annual tax not exceeding one and one-half mills on the taxable property in the township, without the corporate limits of any city or town which may be wholly or partially within the limits of the township, for the purpose of exercising the powers granted in section 359.42, when so authorized by an affirmative vote equal to at least sixty percent of the total vote cast for and against a proposal therefor at an election held pursuant to section 39.44. However, in any township having a fire protection agreement with a special charter city having a paid fire department, the township trustees may levy an annual tax not exceeding two mills on such taxable property for such purpose, when so authorized by an affirmative vote equal to at least sixty percent of the total vote cast for and against a proposal therefor at an election held pursuant to section 359.44; provided, however, that if the levy of an annual tax not exceeding one and one-half mills has been authorized in such township pursuant to this section prior to January 1, 1959, no new or additional election shall be required in order to authorize the township trustees of such township to levy an annual tax not exceeding two mills pursuant to this section."

By the express terms of the foregoing statute, the power to make such levy by the trustees is limited by levy upon the taxable property of the township outside the limits of a city or town within the limits of a township. The power to levy by the township does not include the power to levy upon the taxable

property of a part of the township. To so conclude would violate fundamental rules of statutory construction:

(1) That courts cannot supply omissions in statutes,

(2) Nor may such statutes be amended by judicial construction.

Both of these rules are here applicable. See Callaghan's Digest Supplement, Volume 5, page 346, title Statutes.

In my opinion, the pertinent sections of Chapter 359, Code of Iowa, 1962, do not authorize a division of townships in order to provide equipment for one of such divisions.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:la

STATE OFFICERS AND DEPARTMENTS: Time of salary payments, §79.1, Code of 1962. Section 79.1, Code of 1962, is concerned with the amount of statutory salary payments to state officers and employees, and not with the time of payment of such salary payments. Salary can be paid in equal monthly or semi-monthly payments, at such time as may be determined by the Comptroller.

January 10, 1963

Mr. Marvin R. Selden
State Comptroller
L O C A L

Dear Mr. Selden:

Reference is herein made to yours of recent date, in which you submitted the following:

> "We call your attention to Section 79.1 of the Code of Iowa, 1962, which states in part:
>
> "'79.1. Salaries specifically provided for in an appropriation Act of the general assembly shall be in lieu of existing statutory salaries, for the positions provided for in any such Act, and all salaries shall be paid in equal monthly or semi-monthly installments and shall be in full compensation of all services, except as otherwise expressly provided ... '
>
> "We note that the Code states, 'equal monthly or semi-monthly installments.' It has been the procedure to pay generally on the 15th and the last day of the month. With the possibility of centralizing the payroll procedures, we raise the following question:
>
> "Would it be possible to pay on dates other than the 15th and the last of the month, such as the 5th and the 20th?"

In reply thereto, I would advise that there is no provision in the Code fixing a time for the payment of salaries of state officials or employees, nor does there appear to be pertinent authority otherwise. The words of the statute, to-wit:

> "salaries shall be paid in equal monthly or semi-monthly installments"

is concerned with the amount of the salary payments and not with the

time of payment. Specifically, the word "semi" is a prefix signifying half -- 38 Words and Phrases 584, permanent edition.

Therefore, the time of payment of such salaries has no statutory direction and may be paid in equal monthly or semi-monthly installments at such time as discretion may dictate.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:le

STATE OFFICERS AND DEPARTMENTS, SCHOOLS, §286A.5, 1963 Code of Iowa, reimbursement by State to School Districts. The reimbursement to school districts provided by §286A, Code of 1962, may not be made piecemeal and the duty of payment thereof by the Comptroller as soon as possible means administratively possible.

February 28, 1963

Mr. Marvin R. Selden, Jr.
Comptroller of the State of Iowa
L O C A L

Dear Mr. Selden:

Reference is herein made to yours of the 1st, inst., in which you submitted the following:

> "Your attention is called to Section 286A.5, Code of Iowa, 1962, which reads as follows:
>
> "'286A.5 Information furnished by school district. At the close of each school year, but not later than July 5, the local district shall supply to the state department of public instruction the information required for calculation of the amount reimbursable to the district. For any day student who has been enrolled on a less than a full school-day basis, the reimbursement shall be calculated proportionately to the portion for which he is enrolled as shall be determined by the state department of public instruction. Forms for this purpose shall be supplied by the state department to each school district not later than June 1. After all claims have been calculated and validated for accuracy, the department of public instruction shall certify the same to the state comptroller for payment as soon as possible. In event that the amount appropriated for reimbursement of the school districts is insufficient to pay in full the amounts to each of the school districts, then the amount of each payment shall be reduced by the state comptroller in the ratio that the total funds appropriated and available bears to the total amount certified for reimbursement. All funds received or to be received under the provisions of this chapter shall be taken into account and considered by each school district when estimating the amount required for the general fund."
>
> "We respectfully request an opinion on the following questions:
>
> "1. Can a certain percent of each claim be paid at one time and the balance at a later date?

"2. If the payment of claims cannot be split, when do the claims have to be paid?

"3. If payments on the claims can be split, when do the payments have to be made?"

(1) In answer to question No. 1, I would advise that these claims cannot be paid in piecemeal.

(2) In answer to your question No. 2, I would advise that in my opinion the words "as soon as possible" in relation to the duty of payment mean administratively possible for payments to be made.

(3) In view of the foregoing answer to your questions, answer to question No. 3 is not required.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:la

STATE OFFICERS AND DEPARTMENTS: Highway Commission-Budget Law, Ch. 8, 1962 Code of Iowa. The Highway Commission, by reason of Chapter 57, 59th G.A., including the Highway Commission within the provisions of Section 8.2, Code of 1962, became subject to the budget law contained in Chapter 8, 1962 Code of Iowa.

February 6, 1963

Mr. Marvin R. Selden, Jr.
Comptroller
L O C A L

Dear Mr. Selden:

Reference is herein made to yours of January 14, 1963, in which you submitted the following:

> "Your attention is called to Section 8.2, subsection 1, Code of Iowa, 1962, which reads as follows:
>
> "'8.2 Definitions. When used in this chapter:
> 1. The terms, "department and establishment" and "department" or "establishment", mean any executive department, commission, board, institution, bureau, office, or other agency of the state government, including the state highway commission, except for funds which are required to match federal aid allotted to the state by the federal government for highway special purposes, and except the courts, by whatever name called, other than the legislature, that uses, expends or receives any state funds.' (Underlining ours)"
>
> "The portion underlined above was the Act passed by the 59th General Assembly, Chapter 57.
>
> "Your attention is also called to Section 313.5, Code of Iowa, 1962, the first paragraph, which reads as follows:
>
> "'313.5. Biennial appropriation--budget. After June 30, 1939, expenditures by the state highway commission under section 313.4 for the support of the commission and for engineering and administration of highway work and maintenance of the primary road system shall be only on authorization by the general assembly.'
>
> "We respectfully request your opinion on the following questions:
>
> "1. With the additional language added by the 59th general assembly to Section 8.2, subsection 1, can departmental expense classifications be now budgeted by the general assembly through its appropriation bills, with the only exceptions being those in which federal matching funds are allotted?

"2. Does the language in section 313.5, relating to 'engineering and administration of highway work' and 'maintenance of the primary road system' in any way limit the budgeting of the departmental expense accounts to these two specific account classifications?

"3. Can the general assembly in enacting the appropriation bills for the 1963-65 biennium, budget such items as (but not limited to) traffic weighing operations, buildings and grounds, property and equipment, inspection service, escort service and legal services including litigation, assuming no federal matching funds?

"Since this is of immediate importance to us in the preparation of the Governor's budget and subsequently the enactment of appropriations by the general assembly, we would appreciate your immediate consideration of this request."

In reply thereto, I advise as follows.

(1) The answer to your question 1 is in the affirmative.

(2) The answer to your question 2 is in the negative. The Section numbered in the question has been impliedly repealed by the action of the 59th General Assembly, Chapter 57.

(3) The answer to your question 3 is in the affirmative.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:ja

STATE OFFICERS AND DEPARTMENTS: §107.1, 1962 Code of Iowa Appointment to Conservation Commission by Governor. The Federal Rural Mail Carrier is a Federal officer and, therefore, ineligible to hold office on the State Conservation Commission.

March 22, 1963

Honorable Reed Casey
State Representative
L O C A L

My dear Mr. Casey:

This will acknowledge receipt of yours of the 11th, Inst., in which you requested an opinion concerning the eligibility of a rural mail carrier being appointed to the Conservation Commission and refer to §107.1, Code of Iowa, 1962.

In reply thereto, I advise as follows:

The section referred to by you, as to the qualifications of membership in the State Conservation Commission, provides among other provisions therein that:

> "...No person appointed to said commission shall during his term hold any other state or federal office."

This has had the consideration of the Supreme Court of North Carolina, 84 S. E. 1042, L.R.A. 1917A 228, Ann. Cases 1917D 316, where action was brought to impose a penalty upon a person who held an office or place of trust contrary to the Constitution of North Carolina, which denied to any person the right to hold any office or place of trust under the United States or any department thereof, or under the State of North Carolina, to hold any other office or place of trust or profit under the authority of North Carolina or be

eligible to a seat in either house of the assembly. In holding that the defendant, a rural mail carrier, was an officer, the Supreme Court of North Carolina, in reversing a contrary holding by the lower court, stated:

> "By reference to the postal laws and regulations of 1913, it will be seen (section 718) that rural carriers are appointed by the postmaster general; that they are required to take an oath to support the Constitution (section 722), and to execute a bond to secure the faithful performance of their duties (section 723); that the oath is referred to as an official oath (section 722), his duties are designated as official duties (section 752), and mention is made of the official character of the carrier (section 740). His term and his duties are fixed by law and not by contract, and the duties are continuing and not intermittent and affect the public generally. They are defined to be:
>
> "It is also provided in section 741 that a rural carrier shall not hold any state, county, municipal, or township office, which is a prohibition usually imposed upon officers and not upon employees.
>
> "***."
>
> The rural mail carrier is, as we have seen, appointed by the Postmaster General, a member of the Cabinet and the head of his department, and therefore comes within the classification of officers outlined in the Constitution, as construed by the Supreme Court of the United States, and this position is not in conflict with State v. Boone, 132 N.C. 1198, 44S.E. 395, in which it was held that a carrier of mails operating upon a star route was not a public officer, because the mail carrier in that case was occupying his position under contract with a contractor of the government, and not by the appointment of the head of any department of government, as is the rural mail carrier.
>
> "It was held in U.S. v. McCrory, 91 Fed. 295, 33 C. C.A. 515, that a letter carrier appointed by the Postmaster General was an officer."

> "We are therefor of opinion that his honor was in error in holding that a rural mail carrier is not an officer."

The laws and regulations referred to the foregoing case in force in 1913 are still substantially in force and effect and applicable to the situation under consideration. Postal laws and regulations a compilation in 1948, appearing to be latest such publication, provides that rural carriers are appointed by the First Assistant Postmaster General (Section 137.13) and are required to take an oath to support the constitution (Section 135.4) and they are also required to execute a bond to insure the performance of their duties. (Section 135.15) . Under the terms of Section 135.27, they are precluded from holding any State, County or Municipal Government office, subject to certain exceptions not applicable here.

Therefore, on the authority of the foregoing, I would advise you that a rural mail carrier is a federal officer and ineligible to hold membership in the State Conservation Commission.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:do

CITIES AND TOWNS: Publication of Town Council proceedings, §368A.3, 1962 Code of Iowa. Where there is a newspaper published in a town, the proceedings of Town Council of that town is required to be published therein pursuant to §368A.3(3), Code of 1962.

March 13, 1963

Mr. James VanGinkel
Cass County Attorney
Atlantic State Bank Building
Atlantic, Iowa

Dear Mr. VanGinkel:

This will acknowledge receipt of yours of the 7th, inst., in which you submitted the following:

"The Town of Wiota has an actual population of 184.

"The newspaper which serves Wiota is actually printed in Anita, Iowa, and has a Wiota News Section. The newspapers which are distributed to residents of Wiota and surrounding area are brought from Anita where they are printed to Wiota and mailed through the Wiota Post Office. The postal fees are paid at the Wiota Post Office for this mailing. This procedure has been followed for over two years.

"The Town Council of Wiota has been of the opinion that since their population is less than 200 they were complying with the law by posting their council proceedings in three public places.

"The statute involved in the second portion of paragraph 3 of Section 368a.3 reads as follows:

"'The provisions of this sub-section shall be fully applicable in towns in which a newspaper is published or in towns of 200 population or over but in all other towns the posting of such statement in three public places shall be sufficient compliance herewith.'

"I have read the opinions dealing with what constitutes publishing a newspaper and you can assume that a newspaper is published in the Town of Wiota.

"The question then remains, is posting of the council proceedings in three public places compliance with the portion of the statute above quoted."

In reply thereto, I advise as follows:

It appearing from the foregoing that Wiota is a town in which a newspaper is published, and thus within the provisions of the foregoing cited statute, the Town Clerk is required to publish the council's proceedings in accordance with the provisions of §368A.3 (3), Code of 1962.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:la

COUNTIES AND COUNTY OFFICERS: §39.18, 1962 Code of Iowa, §43.8 and §69.2, Code of Iowa. A member of the Board of Supervisors may not by way of a leave of absense from the board serve as county engineer and a member of the board who resigns from his office as supervisor is still eligible to fill the office which he was elected beginning one year following his election may resign from the office to which he was elected not within the fact that he has signed an affidavit that he will qualify for the office if elected.

April 9, 1963

Mr. Howard B. Wenger
County Attorney
Fremont County
Hamburg, Iowa

Dear Mr. Wenger:

This will acknowledge receipt of yours of the 22 and the 29 in which you submitted the following:

> "Our county engineer resigned the first part of this month, his resignation effective April 1st. To date the board has been unable to find a replacement for the county engineer, however, one of the members of the Board of Supervisors is a registered engineer and qualified for the job. My first question is: Can this member of the board be granted a leave of absence to work for the county as its engineer until a qualified man can be hired and then return as a member of the board.
>
> A member of our Board of Supervisors was re-elected last November for a term of three years commencing January 1st, 1964. If this member should now resign from his office would he be eligible to qualify and serve for the term for which he was elected commencing January 1st, 1964.
>
> May a present member of the Board of Supervisors resign from his present term and also resign effective immediately from his term for which he was elected and which commences January 2nd, 1964?"

In reply thereto, I advise:

1. I am of the opinion that a member of the Board of Supervisors may not take a leave of absence from the board to accept an appointment and serve as county engineer until the position can be filled permanently. He would be occupying two

incompatible offices at the same time.

2. I am of the opinion that a member of the Board of Supervisors who resigns after election to the office of Supervisor for the term beginning one year after election is still eligible to fill the office to which he was elected. Section 39.18, Code of 1962, makes no distinction between a member of the Board of Supervisors and a non-member thereof in connection with the filling of the office of Supervisor one year after his election and prior to qualifying.

3. In so far as the power of a Supervisor-elect to resign from the term for which he was elected beginning January 2, 1964, I would advise:

The following Iowa Code Provisions should be recognized as pertinent to the problem at hand:

> "Section 43.18 Affidavit by candidate. Every candidate shall make and file an affidavit in substantially the same form:
>
> > ***I furthermore declare that if I am nominated and elected I will qualify as such officer."
>
> "Section 69.2 What constitutes vacancy. Every civil office shall be vacant upon the happening of either of of the following events:
>
> ***
>
> (4) The resignation or death of the incumbent, or of the officer--elect before qualifying."

The obvious problem posed considering these provisions together is that the candidate agrees in the required affidavit

that he will qualify as such officer but at the same time his resignation as an officer-elect before qualifying creates a vacancy. Upon a search of the authorities it appears that this same problem has been previously faced. Thus, in State v. Hamilton, 38 Nev. 418, 111 Par 1026 (1910), where the candidate had agreed to qualify it was held that because of the affidavit he was precluded from resignation. However, it is important to point out that there was no provisions appearing in which resignation would constitute a vacancy. In Elswick v. Ratliff, 166 Ky. 149, 179 SW 11 (1915), where an affidavit to the same affect was given and where a provision was made for the creation of a vacancy by resignation the court held the candidate could withdraw and stated a 179 SW page 12 in regard to the contention that the affidavit prevented withdrawl:

> "But such is not the effect to be given to that statute; it was only for the purpose of requiring men who sought nominations to be in good faith at the time, and to sincerely represent his party as its candidate at the ensuing election. It was not contemplated by the statute that a change in man's situations between August and November should deprive him of the right to decline to represent his party when change of conditions or circumstances in his opinion authorized it."

Thus, based upon these authorities is my conclusion that not withstanding the candidate agrees to qualify if elected any provision existing for creating a vacancy where an elected candidate resigns before qualifying, the right of the elected party to resign prior to qualifying January 2, 1964 is preserved.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:do

CONSTITUTIONAL LAW Ch. 79.1, Code of Iowa, 1960 OAG 189-Amount of vaction per each employee. State Employee is entitled to a vacation with pay at the termination of one year of employment, at the termination of 2 years of employment, and at the termination of 10 years of employment and such right may be exercised prior to the anniversary date as authorized by the head of the Department. Persons working 2 or 3 hours a day are not entitled to a paid vacation.

May 31, 1963

Mr. R. E. Conner
State Personnel Director
L O C A L

Dear Sir:

Reference herein made to youre of the 3 ult. in which you submitted the following:

"Upon request of Mr. Strauss, First Assistant Attorney General, I have resubmitted certain parts of the above mentioned questions, which I respectfully request more specific information.

1. Chapter 79.1, Code of Iowa, stipulates in part as follows: All employees of the state-- are granted one week's vacation after one year's employment and two week's vacation after the second and through the tenth year of employment and three week's after the tenth and all subsequent years of employment, with pay. Said vacations after the first complete year of employment shall be granted, regardless of anniversary date, at the discretion and convenience of the head of the department, agency, or commission.

The questions I raise are two-fold. (A) Does the phrase 'regardless of anniversary date' mean that an employee after completing one year of continuous service and starting into the second year of employment, entitle said employee prior to his anniversary date, for such 2nd year of employment to two week's vacation or, (B) would the above employee be required to wait before taking his vacation till after he had completed his second full year?

It would appear that the phraseology used in this section is somewhat ambiguous. I refer specifically that in each instance where reference is made to vacation period, the word 'after' is used, which would indicate that in each instance the employee is required to complete the specifid

required years before eligible for that particular vacation period. However, on Page 219, report of the Attorney General, 1960, your notation is made as regards vacations for state employees.

'Head of department, commission or agency of the state of Iowa may allow employee vacation prior to the anniversary date, provided employee has completed one full year of employment.' (Gill to O'Connor, State Tax Commission, 3-24-60). #60-3-20.

It would appear that an employee under the above interpretation would be allowed two week's vacation anytime after or anytime prior to his anniversary date.

II. Reference is made to a ruling relative to part-time personnel and their regular entitlement vacation time (Attorney General's Opinion, Pg. 189, 1960).

This reling deals with part-time employees who have worked less than full time as a state employee. There are some departments of the state who have for a number of years, due to insufficient positions on their Table of Organization, employed personnel on a temporary status, who have for all intent and purposes, been employed full time, that is, persons who have worked five days per week for a fifty-two week year, continuously. They are, however, and have for some time, been classified as temporary employees. Would these people be entitled to vacation rights with pay?"

In reply thereto, I advise:

In answer to the problems presented by part I your attention is directed to 1960 OAG 219 which you referred to and which states:

"The last sentence of the statute (§79.1) above set out was added to the law by the 58th General Assembly and clearly establishes authority in the commission or head of department to allow an employee who has completed one year's employment his vacation prior to the occurrence of his anniversary date.

Thus, in answer to your specific question, the commission or head of the department, in its discretion, may allow X his vacation prior to his anniversary date."

More specifically, it appears that an employee is entitled as a matter of right to a vacation after one year of service, after two years of service, and after ten years of service. However, after the first year of employment, this right may be exercised by the employee and a vacation taken prior to the anniversary date of employment in any year if the head of any department or agency of government at his convenience and discretion authorizes a vacation at such time.

In answer to the problem presented by part II in your letter, 1960 OAG 189 should be examined carefully. The situation and question presented by that opinion were as follows:

> "Are regularly employed part time people legally entitled to vacation time? The following two cases illustrate the problem:
>
> > "A person has worked a number of years giving about one-fourth of his time. Another person is working one-half time and has so worked for two years.
> >
> > "Are these two employees entitled to vacation with pay?"

Appling Section 79.1, the question was answered as follows:

> "This statute does not expressly provide a vacation allowance with pay for these services. However, its terms and previous legal interpretations thereof preclude implication thereof. Among these is the assumption that a year is a unit of time conditioning an employee's right to vacation with pay and the amount of the vacation is measured by the year unit of employment. More particularly, the day that measures time under the statute is a 'calendar day and not a working day.' See 1954 Report of the Attorney General, page 28. A calendar day is a day of twenty-four hours. A week under the statute, therefore, plainly consists of seven calendar days. A week is seven consecutive days, ordinarily beginning with Sunday and ending with the following Saturday. See Words and phrases, Volume 45, page 12 et seq. In other words, a vacation day is a calendar day. An employee working two hours or three hours, if entitled to a vacation at all, would under this interpretation be entitled to a calendar day with pay. The anomalous character of this conclusion is

apparent when the foregoing shows such an employee taking a calendar day vacation with pay as the equivalent of a day of two or three hour service with pay. Clearly, this was not the legislative intent. The employees described by you are not therefore entitled to vacation with pay under section 79.1."

Thus, in short it was felt that those employees who worked only a few hours a day were not entitled to a vacation because of the inequality between the day of a few hours and the calendar day as contemplated by Section 79.1. However, in the situation at hand this is not the problem. Instead the employees you mentioned, although classified as temporary, work a full day the year round and therefore should be entitled to a vacation since the inequality contemplated by the previous mentioned opinion is not present.

In 1960 OAG 189 the specific problem raised was whether people who only devote one-fourth or one-half of their time to work are entitled to a paid vacation under Section 79.1. The problem was disposed of in the negative under the rationale that only a 2 or 3 hour work day is not equivalent to a calendar day as contemplated by Section 79.1.

Applying the rationale to the problem at hand where people, although classified as temporary, work 8 hours a day, 52 weeks per year, it would be my opinion the work day and the calendar day would be equivalent and therefore a vacation would be in order.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:do

WELFARE: Soldiers Relief--§§598.23, 595.19 & 595.18, Code of 1962. A child of a veteran born bigamously becomes legitimate and entitled to Soldiers Relief where the first marriage of the veteran is dissolved and he is married by Common Law to the mother of the child. See Sections 595.18 and 598.23, Code of 1962.

June 27, 1963

Mr. F. P. Patterson
Secretary
Soldier's Bonus Board
L O C A L

Dear Mr. Patterson:

This is in answer to your recent question in regard to Soldiers and Sailors Relief in which you asked:

> "John Jones, wife and three children living in Iowa. On January 4, 1963, Jones goes to Montana and marries another woman. On January 17, 1963, the second Mrs. Jones has a baby. On February 28, 1963 Jones and his first wife are divorced. Would the baby born to Jones and his second wife be a legitimate child?"

In response thereto I advise as follows:

The issue of a void marriage are illegitimate in the absence of a statutory provision declaring such issue legitimate. 10 C.J.S., Bastards §2. In Iowa a bigamous marriage is void and unless it was mistakenly believed that the first spouse was dead, the issue of the void marriage are illegitimate. See Iowa Code, 1962, §§598.23 and 595.19.

However, a bastard may be legitimized in Iowa under the authority of Iowa Code, 1962, §595.18 which provides:

"595.18 Issue legitimized. Illegitimate children become legitimate by the marriage of their parents."

Although never decided in Iowa, the marriage contemplated by §595.18 in other states has been held to embrace a common-law marriage as contrasted to the statutory, ceremonial marriage. Todd v. Bowman, 289 Ky. 117, 147 S.W. 2d 71 (1941), and Peirce v. Peirce, 379 Ill. 185, 39 N.E. 2d 990 (1942).

In Iowa a common-law marriage is recognized as a valid marriage could possibly be established where the parties cohabit after the first marriage is dissolved either by death or by divorce. 11 D.L.R. 64. In addition the Iowa legislature has provided in §595.19(4) as follows:

"595.19 Void Marriages. Marriages between the following persons shall be void:

* * *

4. Between persons either of whom has a husband or wife living, but, if the parties live and cohabit together after the death or divorce of the former husband or wife, such marriage shall be valid."

Thus, it is my conclusion that the demand of §595.18 has been satisfied in this case, that the cohabitation of Jones and his second wife following the divorce validated their otherwise bigamous marriage, and therefore the child born to Jones and his second wife is legitimate.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

TOWNSHIPS: Power is limited to cities so far as fire protection is concerned to joint action with other cities, towns or townships. §§368.12, 357A.9, Code of Iowa, 1962. So far as cities to join other agencies of government for fire protection is limited to joint actions with other cities, towns, or townships. Action jointly with fire districts established under the provisions of 357A, Code of 1962 is not authorized.

June 20, 1963

Mr. Walter L. Saur
Fayette County Attorney
22 East Charles
Oelwein, Iowa

ATTENTION: Mr. J. G. Johnson

Dear Mr. Johnson:

Reference herein made to yours of the 22 inst. in which you submitted the following:

> "Several Townships in Fayette and Clayton Counties are contemplating the organization of a fire district under the provisions of Chapter 357A, and several questions have arisen pertaining to the procedure to be followed in organizing this district.
>
> In the first place, it is contemplated that the currently established boundaries of the Valley Community School District will be used to comprise the proposed fire district. Though this district cuts across county and township lines, it would appear that such a district would be proper under the provisions of Sections 357A.1 and 357A.2. The questions here arise from the fact that the proposed fire district will include the incorporated towns of Clermont, Elgin and Wadena.
>
> Section 357A.9 provides that an election shall be called and that 'any legal voter residing within the district at the time of the election shall be entitled to vote.' This election is for the purpose of approving a tax levy, and for the purpose of appointing trustees for the fire district. In order for the tax levy to be

approved, it must carry by a favorable vote of 60%. Section 368.12 provides that cities and towns shall have the power to operate jointly 'with any other city, town or township' for the purpose of maintaining fire protection services. For this authority to be granted, the proposition must receive a majority vote in favor thereof. The questions arising are as follows:

1. Section 368.12 gives cities the power to join facilities with other cities, towns or townships. There is no mention made of joining facilities with a fire district. Can this section be interpreted to allow cities to join facilities also with a fire district, even though this power is not specifically granted in the Code Section? (Would the new 'Home Rule' Statute allow for a more liberal interpretation of this section; and would the fact that Chapter 357A was enacted many years after Chapter 368 affect the interpretation of Section 368.12?)

2. Regarding election procedure in the event that the answer to paragraph 1 is affirmative:

   A. Must separate elections be held in each of the three cities apart from the general election held throughout the proposed fire district?

   B. Must there be two questions submitted to the voters in the incorporated cities - one question proposed under Section 368.12 as to whether or not the city should join with the fire district, and a second question under Section 357A.9 calling for the approval of the proposed tax levy?

3. If the proposition concerning the joining of facilities with the fire district fails to carry by a majority vote in any or all of the above named towns, then are the votes cast

in these towns concerning the proposed tax levy not counted in the tabulation of votes throughout the entire district under section 357A.9 to determine whether or not 60% of the votes cast favored the levying of the tax?

There are several school districts that are planning to form fire districts under a plan similar to this one, and of course, they are encountering these questions with incorporated towns included within the proposed district. Therefore, we would certainly appreciate your immediate attention to this request."

In reply thereto I would advise that Section 368.12, Code of 1962 plainly limits the power of the cities in so far as fire protection is concerned to joint action with other cities, towns, or townships. Insofar as such protection is concerned, this precludes cities from acting jointly with fire districts established under the provisions of Chapter 357A, Code of 1962. This conclusion is consistent with the implications of Chapter 357A that such chapter 357A does not include within its terms cities and towns. See letter opinions of this Department--one issued May 6, 1958 to Mr. Harold G. DeKay, Cass County Attorney, and one issued January 8, 1958 to Mr. Gordon L. Winkel, Kossuth County Attorney. Copies of these opinions are hereto attached. In view of the forgoing, answer to the remaining questions is not required.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:do

COUNTY AND COUNTY OFFICERS: §§4 and 5 , S. F. 402. Where there are less than 5 nominated and the statute requires 5, a vacancy in office will result to be filled by governor. Where only four persons are nominated for the office of District Judicial Commissioner, and the statute requires the nomination of five, there will be a vacancy in office to be filled by the governor.

June 7, 1963

Helen M. Lyman
Clerk of Supreme Court
L O C A L

Dear Madam:

This will acknowledge receipt of yours of the 4th inst in which you submitted the following:

> "Section 4 provides that each judicial district shall elect five electors of the district to the district judicial nominating commission for terms commencing July 1, 1963.
>
> Section 9 gives a sample of the ballot, which states 'Vote for (state number).'
>
> If a ballot is marked, voting for less than five, is it to be counted?
>
> There are several Judicial Districts which have nominated only four.
>
> If you should decide it would not be counted, would we have authority to have a notation printed on the ballot that five must be voted for?"

In reply thereto I would advise you that the 60th General Assembly by Senate File 402 created by Section 4 thereof, the District Judicial Nominating Commission consisting of 10 members who are officers, 5 to be appointed by the Governor and 5 to be elected by the bar of each

Judicial District. Section 5 of Senate File 402 provided for the filling of vacancies in Commission. However, such act failing to define what constitutes a vacancy within its terms, resort must be had to the general statute providing for filling vacancies in an office. This Section is 69.2 Code of 1962, and according to it, the failure to elect at the proper election or to appoint within the time fixed by law creates a vacancy in office. Thus, where there were only 4 nominated for these offices or any number less than 5, the number nominated, whether there be 5 or 4 or other such number, only such number may be elected. A vacancy in one office if only 4 are nominated results.

While there is provision in Section 5 of Senate File 402 for the filling of the vacancy in the Commission, such provision does not include within its terms any method of filling a vacancy created prior to the capacity of the Commissions act as an official body. Thus, resort must be had to Article IV, Section 10 of the Constitution investing the Governor with the power to fill such vacancy.

Thus, in answer to your question where less than 5 candidates are nominated, the vote for 4 should be counted.

A vacancy resulting from the failure to nominate the fifth candidate shall be filled by the Governor.

I am of the opinion that you would have the authority to place upon the printed ballot that 5 are to be elected.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:do

STATE OFFICERS AND DEPARTMENTS: Power of Executive Council with respect to contingent fund -- S.F. 460, 60th G.A., §§19.7, 19.29, 1962 Code. The 60th G.A. in creating the contingent fund of $2,000,000.00 omitted the provision contained in the 59th G.A. Act that allocated from the general contingent fund of the state to be made by the Budget and Financial Control Committee only for contingencies other than for those concerning §19.7, 1958 Code; therefore, powers previously existing in the executive council under §19.7 have been restored. There was preserved and restored to the executive council the power to provide for its use from the general fund of the state.

July 30, 1963

Mr. W. C. Wellman, Secretary
Executive Council of Iowa
L O C A L

Dear Mr. Wellman:

Reference is herein made to yours of July 8th inst., in which you submit the following:

> "In the past, whenever the Executive Council is in need of funds, or when the Executive Council is asked to provide funds for storm or fire damage to various State buildings, a Resolution for these funds is approved by the said Council from the Contingent Fund established by Section 19.7, Code of Iowa, 1962. And the Contingent fund, lacking sufficient money, funds are set aside from the General Revenue Fund of the State and credited to the Executive Council as provided by Section 19.29, Code of Iowa, 1962.
>
> "We would appreciate an opinion as to whether the said Council still has the power to use funds in the above manner."

In reply thereto I would advise that the 59th General Assembly, Chapter 51, provided that allocations from the general Contingent fund of the state would be made by the Budget and Finance Control Committee only for contingencies other than those concerning Chapter 19.7, Code of Iowa, 1958.

This appropriation and its uses is contained in a temporary Act which expired July 1, 1963. The 60th General Assembly made a like appropriation by Senate File 460 in terms as follows:

> "Said contingent fund shall be administered by the budget and financial control committee and allocations therefrom may be made only for contingencies arising during the biennium which are legally payable from the funds of the state."

This appropriation of a two million dollar ($2,000,000.00) Contingent fund is without the provision restricting the area of its authority to those other than contingencies covered by Section 19.7, Code of Iowa, 1962.

As a result of this legislation, I am of the opinion that the powers previously existing in the Executive Council under the provisions of Section 19.7, Code of Iowa, 1962, have been restored.

Therefore, the power of the council with respect to providing funds for its use under the Contingent fund provisions of Section 19.7, may be provided from the General fund in the manner described in your letter.

Yours very truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:jb

STATE OFFICERS AND DEPARTMENTS: Senate Resolution 2 of the 60th G.A. is neither a Senate Concurrent nor a Senate Joint Resolution, but a resolution of the Senate committing the Legislature and its committees to function in respect to legislative matters without the concurrence of the House of Representatives, and, therefore, such resolution does not constitute legislative action.

July 17, 1963

Mr. Allen E. Reyhons, Director
Legislative Research Bureau
L O C A L

Dear Mr. Reyhons:

Reference is herein made to yours of the 18th, inst., concerning Senate Resolution 2, 60th G.A., which provides in part:

> "Be It Resolved by the Senate, that the legislative research committee designated by the General Assembly create a joint advisory committee of legislators under the provisions of chapter 2, Code of 1962, with committee members to be appointed by the President of the Senate.
>
> "The joint advisory committee may with the approval of the President of the Senate and the Speaker of the House request the assistance of five educators or citizens of the state interested in higher education. Such individuals shall be reimbursed for all expenses incurred in providing assistance to the advisory committee."

The Resolution is neither a Senate Concurrent Resolution nor a Senate Joint Resolution, but a Resolution of the Senate committing the Legislature and its committees and appointees to function in respect to legislative matters without the concurrence of the House of Representatives. I am of the opinion that such a Resolution is not a legislative action. Answers to your specific questions, therefore, are not required.

Even though this action expressed the intention of the Legislature, this committee has not been created. In view of the

nonexistence of such committee, answer to your questions would be premature.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:la

STATE OFFICERS AND DEPARTMENTS: Senate File 460, 60th G.A., House File 595, Senate Concurrent Resolution 29. Senate File 460, 60th G.A., amended §2.62, Code of 1962, with the result that both the Legislative Research Committee and the Legislative Research Bureau are financed by appropriation of $60,000 made by the 60th G.A. and not by the funds of the Budget and Financial Control Committee. Section 2.62 as thus amended prevails over Senate Concurrent Resolution 29.

Mr. Allan E. Reyhons, Director
Legislative Research Bureau
L O C A L

Dear Mr. Reyhons:

This will acknowledge receipt of yours of the 17th, ult., and also of the 18th, ult., presenting certain problems arising out of procedures and statutes regulating both the activities of the Legislative Research Committee and the Legislative Research Bureau. In the view that I take of this situation, I find it unnecessary to answer your questions seriatim.

However, it appears that Senate File 460, 60th General Assembly, repealed a portion of §2.62, Code of 1962, in terms as follows:

> "Sec. 2. Section two point sixty-two (2.62), Code 1962, is hereby amended by striking all the sentence beginning with the word 'All' in line five (5)."

and the section as so amended provides now:

> "2.62 Office and supplies--supplies. The office of the research bureau shall be located in the statehouse. Office space, supplies, postage and equipment shall be furnished by the executive council. Expenses of the research committee and research bureau shall be paid upon the approval of the director of the bureau and, if an extraordinary expense, upon the approval of the research committee."

Thus, the result of this legislative act was to remove the Budget and Financial Control Committee as the source of funds with which to operate both the Legislative Research Committee and the Legislative Research Bureau.

In addition, the Legislature, by House File 595, page 42, which is the general appropriation act of the 60th General Assembly, provided with respect to the Legislative Research Bureau, the following:

> "LEGISLATIVE RESEARCH BUREAU
>
> "Sec. 46. For the legislative research bureau there is hereby appropriated from the general fund of the state for each year of the biennium beginning July 1, 1963, and ending June 30, 1965, the sum of sixty thousand dollars ($60,000.00), or so much thereof as may be necessary to be used in the following manner:
>
> "For salaries, support, maintenance and miscellaneous purposes $60,000.00
>
> "Grand total of all appropriations for all purposes for each year of the biennium for the legislative research bureau $60,000.00

Thus, the financing of the Bureau is provided by the above appropriation and not by the Budget and Financial Control Committee.

As a result of these changes, both the Legislative Research Committee and the Legislative Research Bureau are financed by the appropriation of $60,000.00 made by the 60th General Assembly.

Insofar as the Senate Concurrent Resolution 29 is concerned, as related to this situation, it is clear that the

specific provision of §2.62, as amended, providing for the expenses of the Legislative Research Committee, will prevail over the general provisions of Senate Concurrent Resolution 29. The provisions of §2.62, as amended, obviously would prevail as opposed to the terms of Senate Concurrent Resolution 29.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:la

CONSTITUTIONAL LAW: Comstruction of Statute -- Where o the face of the bill there appears a discrepamcy betwee n it and the textual contemts of the bill, it is permissible to go behind the emrolled bill and examine the legislative journal to clarify the discrepancy.

July 16, 1963

Mr. Marvin N. Selden, Jr.
Comptroller,
L O C A L

Dear Mr. Selden:

This is in response to your recent letter in which you stated as follows:

> "The 60th General Assembly passed, and the Governor, the Honorable Harold E. Hughes, signed into law, an appropriation Act known as House File 595, appropriating funds to various state agencies for the biennium 1963-65. On pages 44 and 45 of this enrolled bill, House File 595, 60th General Assembly, Section 49, an appropriation for National Guard and State Guard reads as follows:
>
> > 'Sec. 49. For the national guard and the state guard there is hereby appropriated from the general fund of the state for each year of the biennium beginning July 1, 1963, and ending June 30, 1965, the sum of nine hundred forty-three thousand six hundred dollars ($943,000.00, or so much thereof as may be necessary to be used in the following manner:
> >
> > | | |
> > |---|---|
> > | For salaries | $378,640.00 |
> > | For support, maintenance, armories and miscellaneous purposes (amplified by estimated reimbursements of $220,000.00) | 564,960.00 |
> > | Grand total of all appropriations for all purposes for each year of the biennium for the national guard and state guard | $943,600.00* |

"With reference to the above, we respectfully request an opinion on the following questions:

"1. Should the appropriation be $943,600.00 or $943,000.00?

"2. If the appropriation is $943,000.00, which appropriation should be reduced by $600.00, the appropriation for salaries, or the appropriation for support, maintenance, armories and miscellaneous purposes?"

In reply thereto, I advise as follows:

1. The State of Iowa is loyal to the rule that the enrolled bill, nothing to the contrary appearing on its face, is conclusive evidence of its textual content, and cannot be impeached by the journals or evidence extrinsic to the journals. 60 CAG 184. In this case there is a contrary appearance on the face of the bill. More specifically, the written sum is "nine hundred forty-three thousand six hundred dollars" while the numerical sum immediately preceeding and appearing in parenthesis stipulates "$943,000.00." Thus, it is permissible to go behind the enrolled bill.

As a result thereof, I find that the bill as submitted to the legislature was passed unamended, no amendments having appeared in the journals and therefore I conclude that

a clerical error obviously having been made the true and intended appropriation was "nine hundred forty-three thousand six hundred dollars ($943,600.00)

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:do

HIGHWAYS: Highway Appropriations -- OAG No. 57-7-12. Where these specific items in appropriation act aggregate a sum greater by $80,000.00 than the amount of appropriated, the amount appropriated will control the amount of the appropriation rather than the aggregate of the specific items.

July 16, 1963

Mr. Marvin R. Selden, Jr.
State Comptroller of Iowa
L O C A L

Dear Mr. Selden:

This is in response to your recent letter in which appeared as follows:

> "The 60th General Assembly passed, and the Governor, the Honorable Harold E. Hughes, signed into law, an appropriation Act known as Senate File 488 authorizing expenditures by the State Highway Commission from the Primary Road Fund, Farm-to-Market Road Fund and Urban Road Fund, for the biennium beginning July 1, 1963 and ending June 30, 1965, and relating to salaries of Highway Commission members. The attached copy of the enrolled bill is made a part of this request.
>
> "The total of all the specific individual appropriations in this Act is greater by $80,000.00 than the total of $40,062,510.00, as stated in Section one (1) of the bill.
>
> "With reference to the above, we respectfully request an opinion on the following questions:
>
> "1. Is the total appropriation of $40,062,510.00 in Section one (1) the legal amount that may be expended under this appropriation act, or are the individual amounts appropriated for each specific purpose in this Act the legal amounts which may be expended?

> "2. If the specific individual appropriations are the legal amounts which may be expended under this Act, can the $80,000.00 appropriated for the office of business administration be expended for any other purpose than as set out in this Act?"

In reply thereto, I advise as follows:

1. This situation has arisen before and likewise has been presented to this office. In answer thereto concluded in OAG No. 57-7-12 as follows:

> "...I am of the opinion that the legislative intent is expressed in the language of the legislative act which provides for the appropriation in question aggregates the sum of $613,082.00 annually. The particularizing of use thereof is not the appropriation and while representing an intention of the Legislature as to how the money may be spent, this does not control the amount of the appropriation. The surplus difference between the appropriation and the specific items of use thereof, being an appropriation, its use is subject to the discretion of the Board of Control within the general purposes of the appropriation."

In affirmance of this conclusion, I hereby advise that the aggregate appropriation is $40,062,510.00 to the State Highway Commission to be expended from the Primary Road Fund within the general purposes of the appropriation.

2. The appropriation being in the amount of $40,062,510.00, question two need not be answered.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:do

STATE OFFICERS AND DEPARTMENTS: §8.33, 1962 Code, S.F 460, 60th G.A. Unencumbered balances of allocations made to the Budget and Financial Control Committee from the general contingent fund of the state shall revert to the general fund of the state.

August 23, 1963

Mr. Marvin R. Selden, Jr.
State Comptroller
L O C A L

Dear Mr. Selden:

This will acknowledge receipt of your letter of July 29, 1963, in which you submit the following:

> "The various general assemblies of the State of Iowa have appropriated specific amounts to the general contingent fund of the state. The said contingent fund is administered by the budget and financial control committee and allocations therefrom have been and are made for contingencies arising during a biennium which are legally payable from funds of the State. The unencumbered balance of the contingent fund appropriation has been and is subject to the reversion provisions of section 8.33, Code of Iowa, 1962.
>
> "We respectfully request your opinion on the following question:
>
> "1. Are the unencumbered balances of the allocations made by the budget and financial control committee from the general contingent fund of the state subject to the reversion provisions of section 8.33, Code of Iowa, 1962?"

In reply thereto I would advise as follows. Section 8.33, Code of Iowa, 1962, provides:

> ". . . On September 30, following the close of each biennial fiscal term all unencumbered or unobligated balances of appropriations made for said biennial fiscal term shall revert to the state treasury and to the credit of the fund from which the appropriation or appropriations were made . . ."

The following places the Contingent fund within this statute. Senate File 460, Laws of the 60th G. A., created and appropriated from the general fund of the state for the biennium beginning July 1, 1963, and ending June 30, 1965, two-million dollars ($2,000,000.00) for use as contingent fund. Such Act provides also:

> "Any balance from said contingent fund as of June 30, 1965, shall revert to the general fund of the state."

It is clear, therefore, that this is a sum appropriated from the general fund of the state and any balance reverted to that fund.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:jb

STATE OFFICERS AND DEPARTMENTS: H.F. 588, 60th G.A. -- The language used in H.F. 588, 60th G.A., now Chapter 69 of that Assembly constitutes an appropriation and claims made thereunder may be paid therefrom.

August 22, 1963

Mr. Marvin R. Selden, Jr.
State Comptroller
L O C A L

Dear Mr. Selden:

Reference is herein made to yours of even date in which you submitted the following:

> "The State Appeal Board in session on August 13th approved Thirty-one (31) claims for payment under Chapter Sixty-Nine (69) of the 60th G.A.
>
> "The wording of this chapter on appropriations is not the usual form, but we believe the intent is there.
>
> "Can we proceed to pay claims in accordance with the Chapter?"

In reply thereto I would advise you that the language used in H.F. 588, 60th G.A., now Chapter 69 of its law, reads as follows:

> "Payments authorized by the state appeal board shall be paid from the appropriation or fund of original certification of the claim, except, that if such appropriation or fund has since reverted under section eight point thirty-three (8.33) of the Code, then such payment authorized by the state appeal board shall be out of any money in the state treasury not otherwise appropriated."

This chapter constitutes an appropriation and claims may be paid under the authority of that chapter. (See opinion of Attorney General appearing in the report for 1925-26 page 260, a copy of which is attached.

Yours very truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:jb

ELECTIONS: Constitutional Amendment -- §6.9, 1962 Code. Payment of claims made under §6.9 is authorized from money in the treasury not otherwise appropriated.

August 21, 1963

Mr. Marvin A. Selden, Jr.
State Comptroller
L o c a l

Dear Mr. Selden:

Reference is herein made to your recent letter in which you submit the following:

> "In connection with the special election on the Constitutional amendment to be submitted to the people on December 3, 1963, will you please advise us if the State Comptroller's office can approve claims in accordance with Section 6.9?"

In reply thereto I would advise you that Section 5.9, Code of Iowa, 1962, provides with respect to expenses incurred in elections on Constitutional Amendments, as follows:

> "Expenses incurred under the provisions of this chapter shall be audited and allowed by the state comptroller, and paid out of any money in the state treasury not otherwise appropriated."

Under §6.9, liability of the state for claims thereunder is accepted. Payment of claims made under §6.9 is authorized from money in the treasury not otherwise appropriated. (1916 OAG 165)

Yours very truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:jb

STATE OFFICERS AND DEPARTMENTS: Board of Education. A person acting at the same time as a member of the County Board of Education and as a teacher while occupying incompatible offices, the actions of the County Board of Education, while the person was so acting, were de facto and valid. A person designated to fill a vacancy in the County Board of Education will serve until the school election in the year 1965.

October 30, 1963

Honorable Charles F. Strothman
State Representative
Henry County
New London, Iowa

My dear Mr. Strothman:

This will acknowledge receipt of your recent letter in which you submitted the following:

> "In September, 1962, a member of the Henry County Board of Education became a teacher in a twelve grade school system within the County and continued to teach and serve as a member of the County Board of Education and as President of the Board of Education from October 1, 1961, until he resigned as a member of the County Board of Education on September 13, 1963.
>
> "Are the actions of the County Board of Education and particularly the actions of the ineligible member of the board serving as president valid?
>
> "Nomination papers were filed for a candidate for the unexpired term of the ineligible member of the County Board of Education twenty days prior to the County Board of Education election September 9, 1963.
>
> "This candidate's name was not placed on the ballot by the County Superintendent as he maintained there was no vacancy.
>
> "At a special meeting of the Henry County Board of Education September 13, 1963, the teacher member and president resigned and the existing board appointed a new member in his place.
>
> "In view of the circumstances prior to and after the school election, can this newly appointed member, legally, serve. If not, what corrective action can be taken?"

The effect of the acts of a person occupying incompatible offices is discussed in the case of Metropolitan National Bank v. Commercial State Bank, 104 Iowa 682, where it is said:

> "It is contended that, if the appointment of Bradford as receiver be sustained, his acceptance of that office had the effect to vacate the office of clerk of the district court, because the offices are so incompatible that they cannot be held by the same person at one time; hence that the acts of Bradford as clerk, after his qualification as receiver, were void; that his docketing of this case, the noting of papers filed, and the making of other entries were void; and that, as a result, the district court did not acquire jurisdiction to hear and determine this action. In what Bradford did as clerk after he qualified as receiver he acted as clerk de facto, and third persons dealing with him had the right to rely upon his acts so performed as being legal. It is the well-settled general rule that the acts of officers de facto are as valid and effectual, where they concern the public or the rights of third persons, as though they were officers de jure, and that their authority to act cannot be questioned in collateral proceedings. People v. Nelson, 133 Ill. 565 (27 N.E. Rep. 217); People v. Payment (Mich.), 67 N.W. Rep. 689; Clark v. Town of Easton, 146 Mass. 43 (14 N.E. Rep. 795); Petersilea v. Stone, 119 Mass. 465. See, also, Lufkin v. Preston, 52 Iowa 238; Desmond v. McCarthy, 17 Iowa 526.

On the basis of the foregoing, the actions of this County Board of Education while the same person acted as a member of the board and as a teacher, were de facto and valid and effectual insofar as they concern the rights of third persons or the public.

In answer to your question with respect to resignation and appointment of a new member to fill the vacancy of the re-

signed member, such procedure has the approval of an opinion of this department appearing in 1940 O.A.G. 538. Such vacancy appointees will serve until the school election in the year 1965. See §69.11, 1962 Code.

Yours very truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:jb

STATE OFFICERS AND DEPARTMENTS: Iowa Development Corporation, sale of Oelwein Armory property -- The power of sale of state owned armory property is in the Executive Council upon recommendation of the Armory Board. Such sale to be made when the property is no longer needed for the purpose for which it was acquired. §29.57 of the 1962 Code applies.

October 30, 1963

Donald B. Johnson
Col, AGC, Iowa ARNG
Assistant Adjutant General
P.O. Box 616
Des Moines, Iowa 50303

Dear Sir:

Reference is herein made to yours of the 18th ult. in which you submitted the following:

> "The Oelwein (Iowa) Industrial Development Corporation directed a letter to the Adjutant General of Iowa, dated 17 July 1963, requesting information as to the possibility of conveyance, by the State of Iowa to the City of Oelwein, of the West 80 feet in width of the Oelwein National Guard Armory premises for the purpose of constructing a street in connection with a comprehensive plan for developing an industrial site adjoining the National Guard premises. The Iowa Development Commission of the State is assisting in the planning for this project.
>
> "The Oelwein Armory was constructed in 1953 by authority of 'The National Defense Facilities Act of 1950' (PL 783 - 81st Congress). Pursuant to this authority the Federal Government contributed 75 percent of the actual construction cost of the facility, and the State provided the 25 percent balance of the construction cost and the real estate. Title to the completed facility is held by the State of Iowa.
>
> "National Guard Bureau Pamphlet 74-1 (1 April 1958), prescribing basic policy in implementation of authority in PL 783, in connection with the Army National Guard facilities and Construction Program, provides that the site furnished by the State for the construction of an armory facility should include five (5) acres when located in cities or

congested areas. The present site at Oelwein does include five acres. However, compliance with the request for conveyance will reduce the size of the area by approximately one and one-third acres.

"In connection with the Oelwein Armory construction project the State and Federal Government entered into an agreement, dated 28 May 1952, which agreement included, among others, the following provisions:

ARTICLE I. The State agrees:

9. To maintain and preserve all facilities in a state of good repair at its own expense during the period of this agreement, and at no time during the term of the agreement to permit any disposition or use to be made of such facility which will interfere with its use for the administration and training of units of the Reserve Forces of the United States, or in time of war or national emergency of other units of the Armed Forces of the United States or any other use by the Federal Government.

10. To the extent of its power or authority to take necessary action to prohibit outside interests (such as adjacent land-owners, Public Utility Corporations, etc.) from any utilization of adjacent land that would interfere with the use of any facility for its intended purposes.

ARTICLE III. It is further expressly understood and agreed between the Government and the State:

1. This agreement shall remain in full force and effect for a period of 25 years from date of acceptance by the State and Government of each facility constructed hereunder, which period is agreed to be the approximate life-time of the facility.

"Section 29.57, Code of Iowa, 1962, pertaining to powers and duties of the Armory Board, provides, in part, as follows:

> The Board (Armory Board) shall be empowered to acquire land or real estate * * for the construction of, * * facilities of the Iowa National Guard * *. The title of such property so acquired shall be taken in the name of the State of Iowa and such real estate may be sold by the Executive Council, upon recommendation of the Board, when no longer needed for the purpose for which it was acquired.

"The opinion of the Attorney General of Iowa is required on the following three (3) questions to provide the Adjutant General of Iowa with information upon which to base a reply to the letter request of the Oelwein Industrial Development Corporation. For the purpose of drafting the questions, only, the assumption is made that the Armory Board of the State and the Executive Council of Iowa will favorably consider the requested conveyance in accordance with the provisions of Section 29.57, Code of Iowa, 1962.

1. "Will the proposed project of the Oelwein Industrial Development Corporation constitute justification for conveyance of the requested land in accordance with authority in Section 29.57, Code of Iowa, 1962, as '* * real estate (which) may be sold * * when no longer needed for the purpose for which it was acquired?

2. "Will such conveyance, resulting in reduction of the land area to an amount less than five (5) acres, serve to violate the State Federal agreement?

3. "Will such conveyance violate the agreement if an equivalent amount of land is conveyed back to the State so as to preserve the over-all five (5) acre size of the site?

"The Adjutant General of Iowa respectfully requests the opinion of the Attorney General of Iowa on the above questions."

In reply thereto I would advise that the power of the sale of property of the state insofar as armory properties are concerned, is vested in the Executive Council upon recommendation for sale by the Armory Board. Such sale may be so recommended

for sale and sold when no longer needed for the purpose for which it was acquired.

1. In answer to your question #1, I would advise that there appears to be no relationship between the proposed sale of the Oelwein Armory property and the project of the Iowa Development Corporation outlined in your letter. It seems clear that the reasons for desiring the Oelwein Armory property is not evidence or proof that the property in question is no longer needed for the purpose for which it was acquired. Therefore the answer to your question #1 is in the negative.

2. In answer to your question #2, I am of the opinion that conveyance of the property as proposed to the Oelwein Industrial Development Corporation would be a breach of §9 and §10 of Article I of the contract entered into between the State of Iowa and the Federal Government.

3. In answer to your question #3, I am of the opinion that conveyance to the State of Iowa the amount of land equivalent to the amount in the proposed conveyance would not cure the breach of contract arising out of the first conveyance. Such breach will be avoided by agreement between the State of Iowa and the Federal Government modifying the contract between those two parties in the respect herein proposed.

Yours very truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:jb

COUNTIES AND COUNTY OFFICERS: Members of election board -- §§49.15, 49.19, 49.64, 4967, 1962 Code. The election board at the special election to be held December 3rd, will be composed of the same members as at the last preceding general election as provided by §49.15. §49.64 and §49.67 with respect to the number of ballots to be printed, will be based upon the vote at the precincts as they existed at the time of the general election in 1962.

October 29, 1963

Mr. Edward F. Samore
Woodbury County Attorney
204 Court House
Sioux City, Iowa

Dear Mr. Samore:

This is to acknowledge receipt of your recent letter in which you submitted the following:

> "The City of Sioux City Precincts were changed effective April 4, 1963. The boundaries of some precincts were changed, some of the small precincts were combined into one precinct. The large precincts were divided into two or more precincts. This change affected the number of voters that were registered in the precincts.
>
> Your opinion is respectfully requested on the following:
>
> 1. "How is the Board of Supervisors to choose the members of the election board in the new and combined precincts, under Code Section 49.15?
>
> 2. "How is the Board of Supervisors and Auditor to have the same election board of the last preceding general election, under Code Section 49.19?
>
> 3. "How many ballots shall the auditor have printed for these new and combined precincts under Code Section 49.64?
>
> 4. How many ballots shall the reserve number be under Code Section 49.67?
>
> "We would appreciate your opinion as soon as possible as the ballots must be printed for the coming December 3rd election."

In reply thereto I would advise you that in the view that I take in this situation, it would seem unnecessary to reply seriatim to your questions. When realization exists that the

questions pertain to a special election, the answers of the situation are found in §49.19, 1962 Code, which provides as follows:

> "The election board at any special election shall be the same as at the last preceding general election. In case of vacancies happening therein, the county auditor may make the appointments to fill the same when the board of supervisors is not in session."

The fact that the city has acted under the general powers of the authority of §49.5, 1962 Code, in dividing the city into precincts, has no affect upon the express power conferred by the foregoing Code, §49.19. Nor can the power vested in the board of supervisors by §49.15, 1962 Code, prevail as against the provisions of §49.19. Section 49.15 is operative only in connection with a general election or a primary election. Such statute provides that the board shall act according to the terms thereof, "not more than 45 days and not less than 30 days prior to each general or primary election". Obviously §49.64 and 49.67 are applicable to the precincts which existed at the time of the general election in 1962.

Yours very truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:jb

STATE OFFICERS AND DEPARTMENTS: Executive Council -- §19.7, 1962 Code. Insofar as fire loss at the Woodward State Hospital and School is concerned, the contingent fund provided for by §19.7, 1962 Code, is available for the payment of losses of state owned property. Such fund is not available for payment of property not owned by the state.

October 25, 1963

Mr. W. C. Wellman, Secretary
Executive Council of Iowa
L O C A L

Dear Mr. Wellman:

This is to acknowledge receipt of your recent letter in which you inquired whether the Executive Council was authorized to cover certain fire losses suffered at Woodward State Hospital and School. You referred to a recent letter to you from the Board of Control in which the following appeared:

> "The Board of Control wishes to notify the Executive Council formally that on August 23, 1963, a fire in the Birches Building for male patients occurred, and it destroyed approximately $4,600.00 worth of materials and clothing. This fire was in the clothing room of the building, and therefore much of the loss incurred involved the personal clothing and possessions of the patients which had been purchased by or for patients by parents or by the State of Iowa.
>
> "The itemized loss is attached to this letter for your consideration.
>
> "We ask that the Executive Council authorize the purchase of the materials and clothing as outlined herein, with payment to be made from the contingent fund.
>
> "It should be noted that the actual damage to the building was minimal and that only the cost of the materials has been included in this estimate, since all repairs can be made using Institution personnel at no additional cost to the State."

The mentioned itemization of losses appeared as follows:

"ESTIMATED DAMAGES FOR FIRE IN WARD 3 CLOTHING ROOM AT BIRCHES BUILDING

292	Board feet of lumber @ $170.00 M ft.	$ 49.64
40	Feet of Molding @ .10 per ft.	4.00
	Light Fixtures and Wiring	75.00
	Glass Window Panes	30.80
	Pipe Covering	6.40
	Lime	6.60
	Paint	17.00
	Plaster	3.20
47	Suits (Men's and Boys') @ $40.00 each	1,880.00
50	Three-quarter length coats @ $15.00 each	750.00
30	Raincoats @ $3.00 each	90.00
40	Pairs Overshoes @ $4.50 a pair	180.00
20	Suitcases @ $3.70 each	74.00
100	Pairs Shoes and Oxfords @ $8.00 a pair	800.00
30	Short Jackets (Heavy) @ $14.00 each	420.00
35	Blanket-lined Jackets @ $7.20 each	252.00
	TOTAL	$4,638.64

Section 19.7, 1962 Code of Iowa, provides as follows:

"A contingent fund set apart for the use of the executive council may be expended for the purpose of paying the expenses of suppressing any insurrection or riot, actual or threatened, when state aid has been rendered by order of the governor, and for repairing, rebuilding, or restoring any state property injured, destroyed, or lost by fire, storm, theft, or unavoidable cause, and for no other purpose

> whatever. Any such project for repair, rebuilding or restoration of state property for which no specific appropriation has been made, which when completed will cost more than one hundred thousand dollars, shall, before work is begun thereon, be subject to approval or rejection by the budget and financial control committee."

Thus the contingent fund may be used to replace any state property that has been injured, destroyed or lost by fire. The loss at Woodward having been caused by fire, may be replaced by the contingent fund if that property which was lost was state property.

It is to be noted that the property lost was of three types which were:

(1) Building material purchased by the Board of Control

(2) Clothing of inmates having been bought by the Board of Control

(3) Clothing of inmates bought either by the inmates or their parents for them.

The Board of Control, as agents appointed by the legislature, have power to contract for Woodward. Section 218.1, 1962 Code of Iowa. However, the exercise of this power is for the State of Iowa.

In 49 Am. Jur., States, Territories, and Dependencies, §62, it is provided as follows:

> "It may lay aside its sovereignty and like a private individual or corporation contract either with other public bodies or with private persons, and be bound accordingly as a private person would be bound under a like contract."

Title to property ordinarily posses when the parties to a sale of personal property so intend. In 77 C.J.S., Sales, §255, it is provided:

> "Whether or not title to personal property contracted to be sold passes before or without delivery of the subject matter depends largely on the intention of the parties and the facts of the particular transaction."

However as is provided in 77 C.J.S., §260, it was stated:

> "A delivery to the buyer will, in the absence of anything to indicate an intention to the contrary, transfer the property in the goods as against the seller, his creditors, or subsequent purchasers."

Where intention is not express, rules of construction serve to supply the intention of the parties whereby at least title or property posses upon delivery.

Upon the foregoing it is apparent that title to items of personal property contracted for by the Board of Control vests in the state at least upon delivery since there are no statutory provisions to the contrary. Thus this property can quite well qualify as state property. However, property which the Board of Control did not purchase cannot so qualify.

It is therefore the opinion of this office that the only loss which may be replaced out of the contingent fund is that which the Board of Control has purchased, this being state property. Non-state property cannot be so replaced, and thus, clothing bought by the inmates or their parents cannot be compensated for out of the contingent fund.

Yours very truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:jb

COUNTY AND COUNTY OFFICERS: §§359.42, 357A.11, 1962 Code. Trustees for the benefited fire district do not have the same power as township trustees acting under §359.42. All such benefits of the fire district may enter into an agreement with an adjoining township, or townships, but they may not enter into agreement with other cities, towns or other benefited fire districts.

October 3, 1963

Mr. Keith Mossman
Benton County Attorney
Vinton, Iowa

Dear Mr. Mossman:

This will acknowledge receipt of your letter of August 28, 1963, in which you submit the following questions:

1. "Do the trustees of a benefited fire district have the same powers as township trustees under Section 359.42?

2. "Can the trustees of a benefited fire district enter into an agreement with an adjoining township, or townships, adjoining benefited fire districts, or with a city or town, to jointly purchase, own or maintain fire apparatus and equipment and jointly furnish services in the extinguishing of fires?

3. "Can the trustees of a benefited fire district enter into an agreement with an adjoining benefited fire district that provides for mutual aid in the event of a fire requiring more equipment than is available in the benefited fire district?"

The questions you have submitted are very closely related and for this reason they will be considered together.

Section 357A.11, 1962 Code of Iowa, provides:

"The trustees may purchase, own, rent or maintain fire apparatus or equipment within the state or outside of the territorial jurisdiction and boundary limits of the state of Iowa and provide housing for same and furnish services in the extinguishing of fires within the state or outside of the territorial jurisdiction and boundary limits of the state of Iowa. The trustees shall have the power after approval given by section 357A.9 to levy an annual tax not to exceed one and one-

> half mills outlined in section 357A.9 for the purpose of exercising the powers granted in this section. This levy shall be optional with the trustees. The trustees may purchase material and employ labor to properly maintain and operate the benefited fire district. The trustees shall be allowed necessary expenses in the discharge of the duties, but shall not receive any salary."

Section 359.42, 1962 Code of Iowa provides:

> "The township trustees of any township may purchase, own, rent, or maintain fire apparatus or equipment and provide housing for same and furnish services in the extinguishing of fires within the state or outside of the territorial jurisdiction and boundary limits of the state of Iowa, independently or jointly with any adjoining township or townships, likewise authorized as herein provided, or with any city or town or benefited fire districts, within the state or outside of the territorial jurisdiction and boundary limits of the state of Iowa." (Emphasis supplied).

Since benefited fire districts are "creatures of statute", they are necessarily subject to the often announced rule of the Supreme Court that "creatures of statute" have only those powers conferred by statute or reasonably and necessarily implied as incident to exercise of an expressly conferred power.

In view of this rule it is quite obvious that the trustees of a benefited fire district do not have the same powers as do the township trustees since they were neither expressly granted nor reasonably and necessarily implied.

However, by virtue of §359.42, benefited fire districts may enter into agreements with an adjoining township or townships. See 62 CAG 18 enclosed. Other than this, they are

limited by non-authorization and thus they cannot enter into agreements with either cities, towns or other benefited fire districts. See OAG #63-6-4 and 1960 OAG 72, both of which are enclosed.

Yours very truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:jb

Enclosures